

Covert Action

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In what is now seen as the twilight of the Cold War, James E. Baker and I published a book entitled *Regulating Covert Action: Practices, Contexts, and Policies of Covert Coercion Abroad in International and American Law*.¹ A variety of covert activities were commonly being conducted in international politics in the use of military, economic, diplomatic, and propaganda instruments. Even when certain important phases in the applications of any of these instruments to particular cases were manifestly overt, they were often preceded and followed by covert phases. One general popular response was that all covert activity, as distinct from intelligence collection, is unlawful. Our study attempted to assess, realistically, the extent, if any, to which, or the conditions under which, the international legal process viewed covert actions as lawful.

Lawyers examine how past cases were decided as one indication of how they are likely to be decided in the future. In domestic settings, that investigation involves looking at the work of courts and the legislative process. Because the international legal system has many components that are informal and unorganized, assessing lawfulness in the international context requires an examination of a wider range of responses emerging from many governmental and nongovernmental actors. Further, because many of the communications in this complex chorus are directed at heterogeneous audiences, they are often intentionally designed to be ambiguous and to contain different, inconsistent, or contradictory components or to speak in code. The scholar is obliged to distinguish between statements of aspiration, bluffs, trial balloons, lies and those communications that are indicative of genuine expectations of what is right. By "right" we do not necessarily mean what is moral, but rather what is deemed an appropriate procedure and/or distribution of power in support of specified values by the politically relevant actors in a particular circumstance. In order to test trends in the lawfulness of covert actions, we undertook to examine incidents of the use of covert action in each of the four instruments of policy and to test the reactions of the international community to them.

Our findings indicated a much more complex operational code than formal statements of general prohibition would lead one to anticipate. To be sure, many cases of the use of covert action appeared to be widely condemned. But

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1. Yale University Press, 1992.

we found that the international legal process, while often condemning uses of covert instruments at the verbal level, frequently accepted or accommodated itself to such uses. This accommodation was most likely to occur when the evaluators held that, the covert character of the operation notwithstanding, the application of the instrument was otherwise lawful under international law. Even in circumstances where the lawfulness was doubtful, the use of some covert action was apparently acceptable when it appeared indispensable to achieve some other demanded policy. On the basis of the evidence marshalled, we tried to codify legal expectations in this murky area and, because law in our view is about making decisions, we believed it equally important to propose guidelines for the decisionmakers for whom covert actions might sometimes be feasible options.

Many of the features of international politics have changed in critical and interesting ways since we did our initial study. The Soviet empire has disintegrated, leaving a wide swath of unstable territorial communities stretching through a region not without geopolitical significance for regional and world order. The proliferation of advanced and highly destructive weapons has accelerated among many of the new states as well as among states that had won independence during the Cold War. The most manifest consequence of instability in the modern world, large outflows of refugees, has come to be viewed as an unacceptable cost to the would-be haven states, most of which were suffering economic recession. The ideological clash between totalitarian, market-controlled systems and pluralistic, free-market economies has subsided as communism has fallen into explicit disrepute.

As a consequence of these changes, the struggles in many parts of the underdeveloped world have lost their ideological overlay and come increasingly to be justified in terms of rather classical national interests. In this respect, the end of the Cold War and consequential regional instability seem to have led to an increase in covert activities by states heretofore minor players in the covert struggles of the Cold War. This phenomenon appears principally, or most publicly, in the area of arms transfers and operational support to factional elements embroiled in ethnic or national struggles.

Moreover, a number of interesting changes in intelligence have surfaced in the past few years. First, many of the large national intelligence bureaucracies in major and mid-size states whose existence and substantial budgets were justified by the Cold War have been obliged to redefine their missions and to change many of their prior practices. Public manifestations of this transition suggest that some bureaucracies are adjusting to and perhaps defining new roles and approaches better than others. Compare, for example, the relative experiences in the United Kingdom, where the end of the Cold War has brought cautious disclosure and statutory oversight,² with those in

2. For example, Clause 7 of the Intelligence Services Bill, pertaining to "acts outside the British Isles" provides, *inter alia*, that "If, apart from this section, a person would be liable in the United Kingdom for any act done outside the British Islands, he shall not be so liable if the act is one which is authorised to be done by virtue of an authorisation given by the Secretary of State under this section." "[I]n so far as any acts may be done in reliance on the authorisation, their nature and likely consequences will be reasonable, having regard to the purposes for which they are carried out." Intelligence Services Act 1994, Section 7 (May 26) available in LEXIS, Intlaw Library, Englaw file.

Italy, where the end of the Cold War has brought scandal to the civilian service, SISDE, amid allegations that senior officials embezzled funds earmarked for covert activities. Most dramatic are the efforts in Russia to subordinate the intelligence services to executive control, legislate missions, delimit authorities, and disperse security functions to different agencies. It is too early to tell whether bureaucratic cultures will adapt to or overwhelm institutional change.

Not all prior practices have changed, however. A series of agreements between Russia and former Soviet Republics not to spy on each other appears to have toppled quickly into desuetude.³ Remarks by the Director of Central Intelligence, R. James Woolsey, suggest that the United States has significantly reduced but not eliminated its covert action capability. Specifically, Woolsey has said that

[t]his whole business of taking action politically or economically or with propaganda or with supporting some group with arms transfers such as the moujahedeen in Afghanistan - that whole side of the agency [CIA], covert action, is way, way down compared to what it was back during the 1980s. . . . [O]ver 99 percent of the intelligence community effort these days is in the business of intelligence collection and analysis and not in the business of covert action.⁴

Second, as the more vivid Cold War issues dim, "global issues" like international terrorism, proliferation, and law enforcement have moved to the fore. At least one intelligence agency has publicly quantified this focus, albeit in a rough estimate. Thus, Britain's Security Service (MI5) reported in July 1993 that 26 percent of its resources were allocated to international counter-terrorism and another 25 percent to counter-espionage and counter-proliferation combined.⁵ These global issues involve levels of violence short of "armed attack" as is meant in *Nicaragua*⁶ and therefore, according to a majority of the International Court of Justice, short of the international legal threshold authorizing the lawful coercive response of self-defense. As a result, these global issues present decisionmakers, as we explained, with difficult dilemmas in which proactive and reactive uses of covert action will remain a potential, and in some cases, an ineluctable policy option.

Third, the need for and practice of intelligence gathering and processing by governmental agencies has come "out of the closet" so to speak. The identities of heads of intelligence agencies are no longer concealed, and the work of the intelligence agencies is somewhat more openly discussed by the agencies themselves. In the United States, where this trend towards openness is perhaps most pronounced and authentic, the Intelligence Community is apparently seriously considering the sale of data derived from intelligence collection systems. Openness, and the end of the Cold War, may also lead to

3. See *Moscow Interfax*, 22 November 1993, "Yeltsin Approves Turkmen Military Intelligence Agreement;" *Reuter*, 10 January 1994, quoting remarks of Sergei Stepashin, Deputy Head of the Federal Counter-Intelligence Service ("Stepashin criticized some former Soviet Republics, including the Baltics, for stepping up intelligence operations against Russia despite agreements with Moscow not to spy on one another.")

4. Jim Mann, *Interview*, L.A. TIMES, January 2, 1994, at M3.

5. "The Security Service," Her Majesty's Stationary Office, July 1993, at 12.

6. *Military and Paramilitary Activities*, (Nicar. v. U.S.), 1986 I.C.J. 4.

the increased sharing of national intelligence data with international organizations like the IAEA.⁷ Whether these are essentially superficial changes in style or indicative of more fundamental and permanent trends remains to be seen. In the area of covert action, openness seems to have largely manifested itself in the release of archival material.

Fourth, intelligence oversight appears to be increasing. Many states in the former Soviet bloc are taking a first serious look at intelligence oversight, while Western states, in particular the United Kingdom, are showing renewed interest in the subject.

Coordinately, a number of recent incidents may indicate that covert activities — that is, covert coercion and not exclusively “special activities” as defined under United States law and practice — that are exposed will be subjected to increased legal scrutiny under foreign law. Covert operatives may increasingly find themselves subject to local criminal law for their actions while on sanctioned (or unsanctioned) missions in foreign territories. This is particularly true, and may always have been true, of state-sponsored terrorist incidents, as indicated by the sustained effort to bring to justice the operatives responsible for the destruction of the U.S. plane over Lockerbie. The international reaction to the Supreme Court’s decision in *Alvarez-Machain*⁸ also suggests a decline in tolerance for intrusive covert law enforcement and intelligence activities that become overt. The *Alvarez* decision prompted a near universal reaction; with little focus on the Court’s actual holding, governments across the ideological spectrum condemned the decision for licensing forcible extradition. The reaction is distinct from what we earlier perceived as a more ambiguous reaction to the *Rainbow Warrior* incident.⁹ In this sense, the outcry over *Alvarez* may signal a decline in tolerance for covert coercive activities across sovereign borders generally and not just a particular low point in U.S.-Mexico bilateral relations.

If *Alvarez-Machain* suggests that the gap between operational code and international legal formulas prohibiting abductions may be closing, the formal restraints on efforts to assassinate political leaders may have eroded in the last ten years. The United States did not conceal its interest in Muammar Qaddafi’s death during the 1986 raid on Tripoli. Nor was the prospect of Saddam Hussein’s death in various attacks on Baghdad during the Gulf War viewed with any concern. Indeed, one general suggested that Hussein’s death was an explicit objective of the air war.¹⁰ Some criticized the failure of the United States to support an early, abortive coup against Manuel Noriega that had the potential of resulting in Noriega’s death. So too, under U.N. Security Council authority, U.N. and U.S. forces quite openly pursued efforts to capture Mohammed Farah Aideed in Somalia that might have resulted in Aideed’s

7. See, e.g., *The National Security Agenda*, 15 NAT’L SECURITY L. REP. No. 4, at 6 (April 1993) (reporting on sharing of satellite photographs).

8. *United States v. Alvarez-Machain*, 112 S.Ct. 2188 (1992).

9. See *Rainbow Warrior*, 82 I.L.R. 499 (arbitral decision of Apr. 30, 1990).

10. The general was relieved for his statement — for being either indiscreet or off target. A more recent report in *Newsweek* alleges that a planning cell was established during Operation Desert Shield to consider the possibility of killing Saddam. *The Plan to Kill Saddam Hussein*, NEWSWEEK, January 10, 1994, at 31.

death. Neither the mass media nor other channels of public moral expression condemned the action.

The assassination attempt by Saddam Hussein's covert operatives of ex-President Bush in Kuwait led to a response that was loudly trumpeted though politically and militarily mild. This response was justified at the United Nations and in the press on the basis of self-defense under Article 51 of the U.N. Charter. The United States did not, as it were, plead in the alternative that its action was a lawful countermeasure to state sponsored terrorism or that it was endeavoring to enforce an international norm against assassination and, in particular, the assassination of heads of state. Indeed, *The Washington Post* reports that when "[a]sked to explain why the United States picked that target [Iraqi Intelligence Headquarters] and did not go after Saddam himself, [then Secretary of Defense] Aspin said, 'It's very difficult to target a single individual. It's very difficult to capture a single individual. Dropping bombs on the hope that you're going to get a single individual is a very, very demanding task.'"¹¹ The Secretary did not reference Executive Order 12333, which provides that "No person employed by or acting on behalf of the United States Government shall engage in, or conspire to engage in, assassination."¹²

The assassination abroad of political and religious dissidents regimes elsewhere in Iran appears to continue unabated. The international response has tended towards the tepid even in Western states where legal definitions of murder leave no room for doubt about these actions. Evaluations appear to have been made on the basis of bilateral political context, and accommodations with perpetrators made in the interest of other values. The murder of Shapour Bhaktiar in Paris and the continued death threat against Salman Rushdie have not aroused the sustained international condemnation stirred by incidents such as the sinking of the *Rainbow Warrior* or the abduction of Alvarez-Machain were. The reaction to the apparent abduction of Mansur Kikhiya may signal a change in international tolerance for the transnational assassination and abduction of political opponents.¹³ However, it is too early to tell whether the initial condemnation will be sustained in the long run and supported by concrete political acts.

We suggested earlier that while tyrannicide might present a compelling justification for assassination, assassination in any form, in our view, presents a cascading threat to world order. "International terrorism" is often assassination by adversaries. Does this appraisal change when tyrants have access to weapons of mass destruction? Has the fog of war begun to obscure the distinction between military targets and political murder? Is the norm against assassination eroding? What are its consequences?

11. David Von Drehle & R. Jeffrey Smith, *U.S. Strikes Iraq for Plot To Kill Bush*, WASH. POST, June 27, 1993, at A20.

12. Exec. Order No. 12,333, 46 Fed. Reg. 59,941 (1985).

13. Both the Kikhiya and Rushdie cases have received the attention of senior policy makers in Washington, including the President. *Alarm Being Raised over Fate of Missing Libyan Dissident*, L.A. TIMES, December 17, 1993; *Rushdie Gains Clinton's Support*, WASH. POST, November 25, 1993, at B1. In addition, the United States protested the release of two Iranians in France who were wanted in Switzerland for the 1990 murder of Iranian dissident Kazem Rajavi. *France Rebuffs U.S. Protest over Release of Two Iranians*, WASH. POST, January 13, 1994, at A28.

Terrorism appears to be evolving into the preferred form of covert action of weaker states and, to an extent that cannot yet be gauged, of groups that are not affiliated with any state. By some estimates, 1993 was to have been the most violent year for terrorism since 1970.¹⁴ One way, if not the only way, to prevent terrorist incidents is by covert counter-action. Are we witnessing the birth of a holy war against irregular terrorist forces about the planet? If so, it is likely to be a "dirty" war unless the normative restraints that are appropriate are carefully clarified and applied.

With regard to the actual conduct of intelligence activities, governmental agencies have engaged in a much more overt discussion of industrial espionage by governmental agencies. Whether this focus becomes a major task of agencies, or whether instead the more classic concerns continue, remains to be seen.¹⁵ We may be on the verge of a rather mature appraisal of the need for intelligence in the interactions between competitive units in complex, interdependent and advanced industrial and science-based systems. Each competitive unit tries to get information to advance its special interests, but cumulatively the entire system benefits. Gathering intelligence covertly, which is not considered a covert action under United States law or practice, may come to be viewed as systemically beneficial or eufunctional in ways quite different than in the past. Thus, the gathering of economic information, which has always been a function of intelligence activity, could become more explicit; normative concerns could focus less on the activity itself and more on the question of whether the information is being used for political purposes or is diffused to economic actors and used without regard to the common norms of intellectual property. Those norms are themselves important to an evolving scientific civilization, for they provide the incentives necessary for the investment in new discoveries.

Here we would suggest an additional guideline to those previously offered in our book: in considering what degree of scrutiny to apply to an intelligence activity, and at which level authority to proceed should be granted, policymakers should look beyond the procedural dichotomy between "covert action" and "clandestine collection" to consider the potential aggregate effects of the activity and the intelligence requirements it addresses. New forms of intelligence collection may warrant new forms of decisionmaking, particularly in areas such as industrial espionage where activities could be directed against political allies as well as foes and, if discovered, affect economic and political relations in a manner different than if those same activities were conducted against an avowed enemy. Old forms of intelligence collection in new political contexts may also warrant review.

The so-called New World Order contains much that is old. The special responsibilities of the large industrial democracies in international politics and the democratic nature of decisionmaking within them continue to make covert

14. United States Global Strategy Council, Forum, *Terrorism: The Next Phase?*, August 3, 1993 (excerpting remarks of Yonah Alexander, Senior Fellow, U.S. Global Strategy Council).

15. In an address to the Executive Club of Chicago on November 19, 1993, Director of Central Intelligence R. James Woolsey stated, "The CIA is not going to be in the business that a number of our friends' and allies' intelligence services are in: spying on foreign corporations for the benefit of domestic businesses."

actions of various sorts useful but politically risky instruments for the application of foreign policy. In the brief time available to us, we cannot undertake to examine a wide range of future constructs in order to see what role international politics may hold for covert action. Clearly, however, one possible future involves considerably more elastic restraints on the use of covert action in situations where the world community substantially agrees about the propriety of the objectives. If such a construct is true, clearly prescribed and applied law governing covert action and the institutions for regulating it will be even more urgent than in the past.

