Regulating Covert Action

Practices, Contexts, and Policies of Covert Coercion Abroad in International and American Law

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Chapter 1

The Problem: Its Conceptions and Contexts

Consider the following hypothetical situations:

1. Country X is conducting “low-intensity” operations against its neighbor Y with a view toward replacing the elected government in Y with a leadership sharing its own political views and programs or its tribal composition. The operations involve guerrilla training and support, weapons supplies, and the provision of base camps as well as a large-scale disinformation campaign. X publicly denies that it is involved and claims that even if it were, whatever it may be doing remains below the threshold of “armed attack” and hence precludes Y or states whose assistance it may seek from acting against X. Y and other states are considering responding in kind, but covertly.

2. Intelligence indicates that Country X is developing a substantial chemical warfare production facility. On the basis of intelligence, it appears that the weapons will be used against domestic opponents and against a proximate state with which X is in dispute over an oil-rich tract and may also be sold on the international market to gain needed foreign currency. The matter has been raised in the United Nations Security Council, but X has rejected the charges and appears to be continuing its development. As X has already been subjected to a variety of economic sanctions, no additional feasible measures appear likely to secure a change. Nearby states, with whom the United States is on friendly terms, resist an overt attack on X’s facility, for fear that it will arouse violent anti-American protests within their own countries. But privately they concede that they are deeply disturbed by the plant and its implications. The United States and its allies are considering an aerial attack designed to destroy the plant before it becomes operational. But others in the United States and among its allies are recommending a covert operation in which explosives will be supplied to opponents of the X regime operating within the country, together with instructions on how to go about destroying the plant.

3. The structure of the genome has been mapped and receptor points have been identified. Information from INTERPOL, confirmed by various national intelligence services, indicates that a terrorist group is designing genetic weapons that will target the genotype of particular ethnic groups. The terrorist group is operating in a state whose central authority is ineffective. Hence local authorities can neither be informed nor mobilized for action against the group. Groups within the North Atlantic Treaty Organization (NATO) are urging a covert operation to seize the group’s research and neutralize its capacity.

4. The president of Y, nominally a democracy under an extended state of siege, announces that open presidential elections will be held in three weeks. This will be the first election under Y’s new constitution. Opponents of the regime are disorganized and have limited resources to mount a campaign. This opposition requests financial assistance and technical campaign advice from the clandestine service of State A.

5. Country Z is on the verge of civil war. In response, President B declares martial law and suspends civil liberties consistent with his “constitutional authority.” A group within the military, known as the “Young Reformers,” decides to seize power. The reformers tell contacts that if successful they will restore order and hold free and general elections. They also note that the chief of the general staff will block any military violation of civil authority. Although the reformers have given assurances to the contrary, they will likely kill the chief of staff. Country A is asked to covertly fund the reformers, furnish limited intelligence, and provide arms to the reformers.

6. Through intercepts, confirmed by “soft” information provided by friendly embassies, the United States has come to believe that Country Y is providing haven for a number of terrorists. At the same time, the United States is trying to improve relations with the government of Y. Rather than release this information to the public and create resistance among domestic constituencies to improved relations with Y, the United States decides to present its information in a secret communication, in the hope of persuading Y to change its behavior in desired ways.

We have chosen this unconventional method for commencing discussion of international law and U.S. law and policy with regard to covert actions to make
clear, at the very outset, that this particular modality of international politics is not, in our view, dismissible as an epiphenomenon of the Cold War. Nor can all covert action be taken as the implausible self-justifications of lunatics with irrepressible urges to wreak mayhem, the personality types who are frequently viewed as part and parcel, if not key causes, of the Cold War. Secret unilateral actions or secret phases of unilateral actions are very common. Some of these hypothetical situations, which set key problems in sharp relief, are vintage, some current and familiar, some projections. We believe that every thoughtful reader will find some of the arguments for covert action by the United States or an ally, if not initially persuasive, then at least disturbing in terms of the potential negative consequences of inaction or public action.

The first hypothetical example could be applied mutatis mutandis to Central America or Central Asia. It might also apply in the future to an unstable Eastern Europe. In all, the utility, if not the morality of some hypothetical covert operations seems, at least initially, plausible. Certainly, the prevention of what is commonly called “terrorism” presupposes covert phases of overt action as well as classically covert actions. Many other hypothetical situations might be generated regarding criminal justice investigations, for as crime becomes increasingly transnational, so too does its investigation and apprehension. When such activities cross a border, they frequently become “covert” in the international sense.

**REACTION AND PROACTION**

These hypothetical examples should also make clear that covert action can be both reactive and proactive. In the recent past, the general focus on covert action has concerned itself with the proper reaction to the use by an adversary or its proxy of continuous low-intensity conflict. This sort of covert activity is usually depicted as something “they” (whoever the wicked incumbents of “they” may be at the time) practice against the United States and its friends (whoever they may be at the time). Hence, for the United States, whether its motives are moral or tactical, covert action is essentially viewed as a defensive problem. But the examples show that the international and domestic legal problems and moral quandaries of covert conflict may require both reactive and proactive resolution.

**U.S. POLICY**

It is no secret that the United States has made legal and administrative provision for both modes of covert action and that a number of recent presidents have publicly reserved a national capability to effect them. At a press conference on September 16, 1974, President Ford was asked:

Under what international law do we have a right to attempt to destabilize the constitutionally elected government of another country? And, does the Soviet Union have a similar right to destabilize the government of Canada, for example, or of the United States?

Ford replied:

I'm not going to pass judgment on whether it's permitted or authorized under international law. It's a recognized fact that historically as well as presently, such actions are taken in the best interests of the countries involved.

Seymour J. Rubin, executive director of the American Society of International Law, wrote the president to request clarification of the remark. The president responded:

I am sure you are right in your interpretation of my views about the relevance of international law. It is my intention that the Government of the United States shall observe international law, and endeavor to promote its strengthening in all areas to which it applies.\(^3\)

Other presidents have made comparable statements. President Reagan said, "I do believe in the right of a country, when it believes that its interests are best served, to practice covert activity."\(^4\) Still others, for example Jimmy Carter during the abortive hostage rescue mission, have kept their intentions covert, yet their deeds indicated that their policies were consistent with those expressed by their more open or indirect predecessors or successors. As we will see in chapter 6, the periodic criticisms mounted by Congress with regard to covert actions have never prohibited presidents from engaging in covert actions but have usually culminated in a transfer of more control from the executive branch to Congress in these matters.

Because the internal political systems of many allies and adversaries do not require or match the openness of our own, evidence of comparable legislative oversight is harder to come by, although such oversight probably does exist.\(^5\) Even states that do not provide for legislative oversight and do not contemplate covert action may, if exigency requires it, use alternative procedures to authorize some form of external covert action. In this sense, extent national decisions by the United States and other governments have already made these matters potentially more than hypothetical. As a result, any study of the subject, if it is to be relevant to policy appraisal and formation, must, in our view, examine international and national law and policy questions relating to the contingencies and procedures for reacting to as well as proactive through the range of strategic modalities referred to by the words *covert action.*
DIFFICULTIES OF APPRAISAL

In the popular mind, the term covert warfare evokes images of lonely assassins stalking a particular target or of commando groups of one government infiltrating the territory of another, conducting military operations, and then departing, all without the target government, other governments, or the public in the initiating state knowing their identity and provenance.

To people with very simple notions of law, it seems easy, even inexcusable, to condemn such operations under contemporary international law. In the past, it was not always easy to do so. In part, as we will see in chapter 3, legal clarity was lost in the post-1945 period by the general blurring of the traditional distinction in international law between war and peace. Psychologically and often factually, the Cold War was not quite either. If the Cold War is actually ending, quick condemnations may be easier. But even if the general temperature of international politics warms, particular bilateral relationships may still amount to small-scale Cold Wars with varying regimes approximating the post–World War II ice age.

Quick condemnation may also become more difficult because of changes in the very criteria for appraisal of lawfulness. Even assuming that covert action is nothing more than armed secret agents creeping across borders, appraising the lawfulness of even these limited activities has become more complex because of the multiplicity of versions of contemporary international law, the evolution of a number of neo–just war doctrines, and the emergence of a rather ill-defined doctrine of so-called countermeasures.

Appraisals of lawfulness are also more difficult when the full scope of covert action is taken into account. For example, many of the phases that precede the overt use of military force are properly viewed as part of covert action; some of these phases may be accomplished and some must be accomplished in covert fashion. In this broader conception of the scope of the term, questions of the lawfulness of particular phases become knotty, even if other phases seem easy to judge.

The intergovernmental assumption implicit in the popular notion of covert action ignores the fact that much covert action is now directed against the private armies of national and transnational gangs and other nongovernmental entities that use military force, sometimes with territorial bases, to accomplish their ends. Conceptions of the lawfulness of covert activities that are derived from doctrines prohibiting the use of force against the territorial integrity or political independence of states are essentially inapplicable to these types of covert operations. This does not mean, again, that a legal vacuum exists or that covert operations of this sort are per se lawful, but it does mean that criteria for
appraising lawfulness cannot always be derived from the familiar international texts.

**SCOPE**

It should already be clear that scholars and popular commentators define the scope of the terms *covert action*, *covert warfare*, and *secret warfare* differently. In the popular mind, warfare evokes images of “hot war,” the application of high levels of coercion by specialists in violence, accompanied by large-scale death and destruction. From the perspective of the disengaged scholar, the popular image is only one part of a complex war system in which antagonists and members of various latent war communities routinely take account of the variable of power, which all expect to be a critical factor in decision outcomes. All seek to apply or neutralize it by preparation; weapons development; prepositioning; acquisition, mobilization, and retention of allies; and negotiation with adversaries on the basis of all of these factors. Insofar as there is a common reference to these factors, it is possible for parties to take account of the existing *rapport de force* and to accommodate differences without needing to resort to overt violence.

Every phase preceding the initiation of overt violence is critical to either avoiding the violence or determining the outcomes of the violent phase. Hence each phase is viewed as indispensable, whether the actor’s objective is aggressive or conservative, that is, whether the actor is concerned with extending control over theretofore uncontrolled actors or resources or simply maintaining the arrangements that currently exist.

The application of the term *covert* to any of these phases often shifts, depending upon who is using the term and to which phase it applies. In some cases, neither the target nor third parties may be aware of the activity. For example, penetration of the weapons development or strategic planning processes of the adversary or acquisition of information about the forward location of anti-aircraft defenses is effective only if it is so covert that the adversary remains unaware of it. Such activities may determine the outcome of the phase of explicit violence, should it take place, and, hence, must be considered an element of covert action. Covert activities like these may be accomplished by recruiting ideologically or economically motivated volunteers. They may also be accomplished by imposing relatively high levels of coercion on particular individuals, perhaps by threats of violence against the person or his family or by forms of blackmail.

Coercion is not unique to the military. If it is understood as the purposive attenuation of the options of the target, it becomes a potential property of all

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<td>Hardware salvage and collection</td>
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<td>Industrial espionage; of private parties and government entities, by “friendly” and “unfriendly” actors</td>
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<td><strong>Ideological</strong></td>
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<td>Open broadcast (white propaganda)</td>
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<td>Unattributed (grey) propaganda</td>
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<td>False flag (black) propaganda</td>
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Table 1. Continued

Technical assistance (equipment and expertise)
Electronic countermeasures (jamming)
Disinformation
Subsidization of individual journalists and papers
Mind control
Interest group infiltration/penetration
Direct ownership and operation of foreign press
Diplomatic/Political
Overt intelligence collection
Sensitive intelligence collection
Communications intercept
Technical collection
Break-ins
Indirect action
Election projects
Political advice and technical campaign assistance
Financial subsidy to: press, reporters, parties, candidates, informants, labor unions, students
Coup support
Policy influence
Blackmail and entrapment
Economic and political threat
Assassination
Direct action
Advice
Fund raising on foreign soil
Secret diplomacy
Interest group infiltration
Backchannel policy direction
Assassination

Note: This table presents some of the variety of covert activities engaged in by state and private actors. The perspective taken is that of the scholar and does not necessarily reflect the spectrum of U.S. covert activities past or present. Nor is inclusion in this table intended to suggest that a particular activity is necessarily a "covert" or "special" activity for the purpose of U.S. law. For example, although we have included intelligence collection, it is not per se considered a covert activity under U.S. law. In fact, the line between intelligence collection and covert action can get fuzzy in practice. As a former intelligence officer has pointed out, "If a case officer has recruited a minister in a foreign government, and the minister brings him information but also wants to talk about his ministerial duties, inviting the advice of the case officer, is it 'covert action' to give advice even if the purpose is only to string along the minister and make him a happy spy?"

instruments of policy: the economic, the ideological (mass communication to rank-and-file as a way of undermining elite control), the diplomatic (inter-elite), as well as the military. Coercive action through each of these modalities may be accomplished covertly (see Table 1).

WHEN ARE ACTIVITIES COVERT?

The term covert is used, as we have seen, in many different ways and appears to resist a fixed meaning. It has become "normatively ambiguous" in the sense that it refers simultaneously to facts and, for those for whom the term is generally or totally negative, legal conclusions about facts. The factual property conveyed by the word covert is that the action is accomplished in ways unknown to some parties (not necessarily the targets). The normative conclusion conveyed by the word covert is that the action per se and the way it has been accomplished make it unlawful.

Normative ambiguities are pathological precisely because they short-circuit appraisal. Indeed, some covert usages appear normatively benign, even in structured democratic systems in which openness is a critical component of power sharing. For example, decisions by the Federal Reserve have enormous consequences on the political economy of the United States and other countries. The decisions are accomplished in great secrecy and some can be inferred only from post hoc effects. Comparable decisions may be made on the international level by all or some of the G-7 (United States, Canada, United Kingdom, France, Germany, Italy, and Japan). Decisions in democratic governments to devalue currency are also made in complete secrecy. These essentially "domestic" activities may have significant consequences for foreign governments. At least until the present, the fact that they are accomplished secretly has not appeared to violate international law.

From a scientific standpoint, it would be more precise to use a different term to designate various factual activities and perhaps to reserve the term covert activity for activities deemed to be unlawful. But there are also good reasons for retaining common meanings, if they are used with care. We propose to retain the terms covert action and covert activities but to use them only to designate events and not to determine their lawfulness.

WHO'S FOoling WHom?

Some international activities are accomplished covertly, but they are known to both actor and target. In some cases, secrecy is used to conceal from a constituency plans that, once under way, will be irrevocable. In some instances,
one or both of the governments are concerned to conceal these earlier activities. Hence they become covert by agreement. The provision of intelligence or of political or military advice may be suppressed, because the donor or the recipient (or both) feel that knowledge of its source could undermine its own base of power. The relation between the U.S. and the Saudi governments during the past several decades comes to mind. But the nature of the collaboration need not be defensive. Assume, purely hypothetically, that during the war between Iran and Iraq, the United States determined that its interests would be served by increasing the efficiency of the Iraqi air force. If it were to have sent advisers to Baghdad, where they would have provided target analysis and advice to Iraqi forces, it might well have served the purposes of both governments to make that operation as secret as possible.

THE UTILITY OF SECRECY

It is clear that the property of secrecy is often necessary for the success of an operation or, at least, is a factor that can reduce substantially the costs of an operation, when projected costs become a major factor in a “go” or “no-go” decision. But critics of secrecy frequently note that nothing is really secret and that in most cases the target can get wind of what is being planned. In a sense, this is true, but it overlooks the fact that the major problem decision makers face is often not the unavailability of information but a surplus of information of varying levels of accuracy, whose truth must be evaluated. There will be reports of many “covert” operations under planning. The problem is usually to identify which are real and, moreover, which are likely to result in action. Secrecy and deniability increase the target’s sense of uncertainty and make its ability to prepare for contingencies more difficult and costly. It thus theoretically improves the likelihood of a successful operation. In some circumstances, it also may increase the probability of the adversary’s preemptive moves, if not preemptive strikes. The general expectation of covert action may have the potential of raising the probability of conflict.

THE COSTS OF SECRECY

If secrecy may be viewed as a useful property in many circumstances, it also has disutilities. Wholly aside from the consequence of restricting rather than sharing power in these decisions, shielding certain plans from critical scrutiny may permit inherently defective operations to be set in motion. Sunlight, as Brandeis said, is “the best of disinfectants.” Publicity might have identified defects and either corrected them or led to aborting the project at an early term. In this respect secrecy, whether in democratic or authoritarian systems, has a potential for increasing operational dysfunctions.

In democratic societies, the operational utility of secrecy collides with the demands for power-sharing. Even when secrecy is pursued for socially and legally valid reasons, a necessary consequence is to restrict the participatory options of all those who are denied knowledge of the activity. Despite this aspect of secrecy, democratic societies have adapted themselves to the need for secrecy, but have tried to establish certain normative limits that balance interests in efficiency with interests in power-sharing. United States efforts to find the right mix are considered in chapter 6.

In international politics and law, in which formal institutions still play a reduced role and most decisions are perforce taken unilaterally, the value of power-sharing does not appear to be given as much deference. Nevertheless secrecy may be viewed as unacceptable in circumstances in which, at the very least, law and policy require that advance notice be given to a potential target so that it still can, if it is so disposed, mend its behavior and avoid whatever deprivations have been planned. Considering that the real victims in most punitive actions are civilians who had no role in the offending behavior that precipitated the action, prior notification is particularly humane. With regard to enforcible countermeasures, which we will consider in more detail in chapter 5, it is widely assumed that such measures, if they are to be lawful, must be preceded by an appropriate warning to the putative target. The requirement would plainly undermine the case for an unqualified covert countermeasure.

NONGOVERNMENTAL ACTORS

Changes in the structure of the international arena have greatly enhanced the ability of nongovernmental and nonterritorially based actors to use the military and, in some cases, other instruments of strategy transnationally in order to secure their objectives. Many of these activities are, by their nature, covert: assassination, sabotage, for example. Governmental responses, whether proactive or reactive, to these activities must often be covert. Operations against narcotics producers and traffickers and organized transnational criminal groups, for example, may be largely conducted covertly. Similarly, operations against independent terrorist groups must sometimes be covert. In circumstances where the nongovernmental target is operating within the territory of the state whose own government is ineffective, the success of an operation may preclude cooperation with the host government, if the latter has been infiltrated.
CHANGES IN THE GLOBAL ARENA

Until the present time, the customary version of international law with regard to the use of force, including covert activities, has served the common interests of the major players in the international system. There can be little question that the essential structure of that system, established after the Second World War, is changing. Major international actors whose power had been severely reduced after the Second World War are in the process of reclaiming positions they enjoyed prior to that conflict. The last major empire to have survived the process of decolonization is now under severe stress and may be crumbling. Increasing attention and disposable foreign aid funds are being shifted, in the Western World, from the so-called Third World to Eastern Europe. At the same time, many latent conflicts within and between Eastern and Central European and Central Asian states that had been suppressed by the Soviet Union’s imperial control appear to be reviving. The diversion of Western resources from the Third World to this arena may occasion more adventures in the Third World.

One future construct of the international system in the next several decades would foresee a very high expectation of conventional violence within and between small and mid-sized actors. Insofar as these conflicts threaten to change the power balance between the larger actors, either directly or by shifting control of resources and access to markets, one would expect a variety of political efforts, overt and covert, to influence outcomes in ways that would not discriminate against national interests. In short, the possibility of an emerging consensus between the superpowers about certain types of global arrangements need not preclude an understanding that will tolerate a significant amount of covert activity.

Chapter 2

The Constitutive Process of International Law: Prescription and Application

By law we mean the expectations that politically relevant actors in a system share concerning what is the correct way of apportioning and using power, of producing and distributing particular desired values, and of shaping certain events, in particular circumstances. These expectations are “authoritative” in the sense of being deemed right by the actors and “controlling” because the actors who entertain them are themselves politically effective.

The term law as we use it, does not imply approval of the policies law expresses. The observer, from the critical perspective of the scholar, will often find that particular authoritative arrangements are inconsistent with his own views or those of one or more systems of morality. Indeed, the identification of certain policies as operative law may stimulate programs to change these policies. Some writers assign a high and unvarying positive valence to anything that is characterized as “legal,” but we think it more accurate from a scholarly and jurisprudential perspective and more effective from a policy perspective to resist natural and transempirical notions of law and to conceive of law in terms of authoritative and controlling policies, without regard to whether we approve of those policies.

Law, so understood, does not spring full-blown from some part of the anatomy of some fictitious entity. Law is made and changed by human beings through complex political processes in which power and authority are used by many official and unofficial actors. In national systems marked by stability and institutional differentiation, a key part of the law of the community emerges
from a legislature. Statute books become reliable indicators of what the law is. In contrast, the international political and legal system is marked by much lower stability and relatively little effective institutional differentiation. Identifying the law is a much more difficult problem.

Traditionally international law was said to be made by explicit agreement or by the customary practice of effective actors. This formula had the advantage of preventing those who would codify international law at any moment from straying too far from the expectations of effective elites. Its disadvantages included, first, the automatic assumption that whatever was in treaty form continued to be an expression of law or, at least, an expression of law with the same full intensity as at the time of its conclusion and, second, a certain imprecision in inferring customary expectations from complex and often contradictory flows of practice.

Traditional inquiry assumed that formal international actors would only use the forms and language of agreement when they intended to express policies they deemed to be authoritative and controlling. In the twentieth century, that assumption has continued, though the factual basis for it has ceased. For complex reasons, which we will consider later in this chapter, a large number of states, acting in international parliamentary settings, have routinely expressed aspirational norms or short-term political judgments, in the formal language of agreements. Indeed, a certain debased "legislativistic style" has come to characterize much of international political communication. Nevertheless, many scholars have continued to deploy the traditional methodology to this vast and ever-growing body of communication. Hence they find more and more of what they characterize as "international law," even though significant parts of this international law do not correspond to the expectations of the politically relevant actors in the system. Simultaneously, the always imprecise methods of inferring custom from a flow of practice have become more difficult, and the behavior of more than 160 actors, each composite and incorporating many other actors, and much of the behavior, either unrecorded or inaccessible, must be accounted for.

These complex developments have challenged international legal scholarship. Some scholars have refused to face it and have continued to invoke Article 38 of the Statute of the International Court of Justice as the template for international law. But Article 38 is only a choice of law clause in an arbitration agreement, and its operational authority depends on the agreement of two states to submit a particular dispute to the court. Even if one took Article 38 as a general statement of the "sources" of international law, the question of whether, at the critical moment of decision, items listed in Article 38 are still expressive of the expectations of relevant actors remains.

Various alternative methods have been developed to assess and update current expectations of politically relevant actors in the international system, whether from particular incidents or by inferring expectations through the application of a communications model. Whatever method is used, we would submit that the international law with which we are concerned, as unclear as it may be in certain parts, can be understood, as can the reasons for its obfuscation, only by reference to the political and legal processes that have made it and the context in which it was shaped.

And, as we said earlier, whatever method is used, it is always important to distinguish between what has occurred in the past, the conditions that accounted for it, possible changes of conditions, and the range of possible decisions in the future. One should not assume, especially in periods of rapid change in the overall environment in which decisions are being made, that past decisions will be duplicated in the future.

EFFORTS AT CONSTITUTIVE REVISIONS IN INTERNATIONAL LAWMAKING

In any group, at any level of social organization, one may discern a process of decision making that is concerned less with day-to-day choices and more with establishing and maintaining over time the fundamental institutions for making decisions. Sometimes, this process is expressed in a formal constitution and that document continues to approximate the way these decisions are and are expected to be taken. More often, however, there is no document or, if there is one, the process is more fluid than the text that purports to describe it and it can best be conceived of as an ongoing constitutive process. In the international constitutive process, like processes of decision at all other levels, actors use the authority and the effective control at their disposal to shape institutions to meet their common interests. The constitutive process is neither an abnegation to power nor the transcendence by law over power, but an adaptation of the two.

The installation of the United Nations was accomplished by this constitutive process. Its formal structures confirmed and reinforced the existing power distribution. The Charter was designed to assign critical powers to the Security Council and to require the agreement of all of its permanent members if those critical powers were to be used. But it is no secret that the structural arrangements which the then elite nations had agreed upon and which the Charter sought to install in world politics were frustrated early in the history of the United Nations.

The elite agreement between the Soviet Union and the other permanent
members ended shortly after the ink on the document was dry, if it ever really existed at all. Indeed, only in 1990, in response to the invasion of Kuwait was the Council used as the drafters seem to have intended. Slowly, initially at the initiative of the United States, and then, with the admission of many new states as members, at theirs, the General Assembly tried to assume a different and bolder role than the drafters of the Charter had planned for it. Increasingly, the Assembly got into the lawmakersing business and, increasingly, many members of the Assembly began to take for granted that when a majority of the states of the world convened in a conference forum, what they said was, if not international law, then at least evidence of international law. After 1975, the International Court, for related political and constitutional reasons, tended to support that idea.8

The disintegration during the last forty years of all but the last of the European empires has been accompanied by the establishment of more than one hundred new states, most of which shared the common experience of colonialism and underdevelopment. A large number of the new states in the General Assembly who were relatively weaker than those in the then Soviet and Western blocs, but whose numerical majority, in certain organized structures, permitted them to put their own aspirations into law, sought to use international politics as a way of accelerating their own development and advancing their distinctive political goals.

Nor should it be surprising that this period was marked by greater heterogeneity in perception of the past and aspiration for the future and that this heterogeneity was reflected in almost all lawmakersing activities. Different identifications, different demands for future production and distribution of all the things that people value and different expectations of past and future mean radically different and frequently contradictory appraisals of the lawfulness of contemporary events, particularly those involving conflicts. This has been nowhere more dramatically evident than in appraisals of the Arab-Israeli conflict, but it extends to virtually every one of the major international conflicts of the past decades.

All of these developments accelerated attempts to change, through ambitious international parliamentary programs, almost all the law regarding the techniques by which states influence each other, including ideological methods, the so-called new international information order;7 economic methods, the so-called new international economic order;8 military methods, most comprehensively in the 1977 Protocols Additional to the 1949 Geneva Conventions9 and in a number of other multilateral conventions.10

Many Western states and, most prominently and vigorously, the United States opposed many of these efforts on substantive policy grounds and on the essentially international constitutive ground that international law could not be made in this fashion. As an empirical matter, that was not always the case. Lawmaking, as we have remarked, is a process of communication in which the mobilization of authority and control creates and sustains expectations about what types of behavior in what contingencies shall be deemed lawful or unlawful and what sanctions will be effectively applied. Some policies that Western states opposed did become law through this process.

But this was a period of constitutive transition in which the outcomes were far from certain. Because attitudes about fundamental constitutive decisions on lawmakersing were divided, there was continuing controversy and confusion, adverted to in the previous chapter, concerning what key parts of contemporary international law were. For some important matters, two versions of the law existed, and international decisions resembled a camera taking double-exposures.11 Insofar as this situation continues, it makes the performance of legal tasks task harder, but we submit that the disengaged scholar should be able to identify, though with varying degrees of certainty and sometimes at a rather high level of generality, what, if any, norms are required by effective actors for particular matters.

**CONSTITUTIVE CHANGES CONCERNING THE USE OF FORCE**

Because the bloc of new states has been composed essentially of haves who are seeking to use law to bring about changes, it is not surprising that they have been more open to some uses of force to accelerate the achievement of what they have expressed as legal objectives. Thus, the general restraints on the use of force which have been expressed in constitutive documents since 1945 have often been effectively suspended when matters such as self-determination or decolonization were concerned. Indeed, as we will see in chapter 3, the language in a number of resolutions and conventions opens even broader exceptions.

These various changes have combined with an essentially unresolved innovative feature of the Charter. The Charter is simultaneously statist-oriented and oriented to policies that transcend state claims, such as human rights and, preeminently, self-determination. One consequence is that substantive international law, which was marked in the past largely by static and conserving norms, is now marked by an increasing demand for change. Indeed, it is replete with norms, prescribed within the institutional framework of and drawing authority from the United Nations, retroactively characterizing existing and formally legal situations as unlawful and pathological. Many of these norms are
accompanied by general obligations to behave in ways likely to aid in their realization or they require continuing judgments about situations in terms of an international standard with an accompanying obligation to act to correct the situations if they depart from that standard.

The transformation of the Charter regime, the changing international military environment, the pressure arising from aspirational and appraisal norms, the tension between them and the static statist norms and, of course, the heterogeneity of views of political actors have all contributed to an anomalous situation. The international lawmaker process has responded and adapted to it. Although formal international law, dating from 1945, has established a norm prohibiting “the threat or use of force against the territorial integrity or political independence of any state,” new corollaries have established a regime in which certain uses of force by certain groups for certain purposes have been characterized by some organs as legitimate, even though they involve uses of coercion against the territorial integrity or political independence of the targeted state.

Conversely, the coercive responses by those targeted states that might formerly have been considered lawful means of self-defense, may now be characterized by this particular lawmaker process as themselves unlawful uses of force. First, the aspirational or change norms that have been produced largely in United Nations organs and agencies are used to characterize some situations as unlawful. Second, United Nations organs other than the Security Council, using the Charter paradigm of “aggression—self-defense” as the criterion for lawful uses of force under the Charter, now decide to which contingencies this paradigm will apply. The matter is rendered even more difficult for scholars and practitioners by the fact that key states, which dispose of substantial power in the international system, continue to resist these changes and to insist upon an earlier version of international law that often yields diametrically opposed conclusions concerning the lawfulness of a given case.

The end of the Cold War may signal a revival of more traditional views and the termination of these various exceptions to the unilateral use of force. But, for the moment, the situation remains confused. For the legal scholar operating in this type of complex situation, it is important to distinguish the intellectual tasks being performed. One of them is goal clarification: legal scholars are obliged to clarify what policies they believe will best serve the common interests of the international community. This intellectual task requires the examination of a variety of institutional alternatives in terms of their aggregate consequences for the maintenance of minimum order and the fulfillment of the other goals of the international community.

Scholars must also examine past decisions that conformed or deviated from those goals. Although the performance of the first task necessarily requires a subjective element, the task of trend description cannot be corrupted by the observer’s prejudices. The scholar must also indicate which conditions accounted for past decisions and the likely course of future decisions. Here, again, it is important to suspend one’s personal preferences, lest they distort the scholarly enterprise. The scholar is entitled to express appraisals in terms of his own preferences, but they must be clearly labeled as such, and when the scholar suggests alternatives for achieving a better approximation of certain preferences, he should indicate whether those preferences are his own or those of the larger community.

**MYTH SYSTEM AND OPERATIONAL CODE IN INTERNATIONAL LAW**

Before commencing our examination of decision-making trends regarding the use of force in covert fashion, it is necessary to make two other methodological points. Non-lawyers generally assume that the solution to a legal “problem” is to find a formal provision, for example, Article 2(4) of the United Nations Charter or Article 18 of the Charter of the Organization of American States and simply apply it. That is a grossly over-simplified way of dealing with international law, for it is based on a misapprehension of the character of law and a misunderstanding of the function of the application of norms to concrete cases.

The first misapprehension concerns what constitutes law. In all legal systems, much of what is expressed in legal formulae and is attended by signals of authority is not intended to govern, regulate, or provide effective guidelines for official or private behavior. This part of the “legal system” conveys aspirations and images, not of the way things are, but of the way group members like to believe they are. This is particularly striking in the area of public law:

The picture produced by control institutions does not correspond, point for point, with the actual flow of behavior of those institutions in the performance of their public function: indeed, there may be very great discrepancies between it and the actual way of doing things. The persistent discrepancies do not necessarily mean that there is no “law,” that in those sectors “anything goes,” for some of those discrepancies may conform to a different code. They may indicate an additional set of expectations and demands that are effectively, though often informally, sanctioned and that guide actors when they deal with “the real world.” Hence we encounter two “relevant” normative systems: one that is supposed to apply, which continues to enjoy lip service among elites, and one that is actually applied. Neither should be confused with actual behavior, which may be discrepant from both.
A disengaged observer might call the norm system of the official picture the myth system of the group. Parts of it provide the appropriate code of conduct for most group members, for some, most of it is their normative guide. But there are enough discrepancies between this myth system and the way things are actually done by key official or effective actors to force the observer to apply another name for the unofficial but nonetheless effective guidelines for behavior in those discrepant sectors: the operational code. Bear in mind that the terms myth system and operational code are functional creations of the observer for describing the actual flow of official behavior or the official picture. 

The myth system is readily retrievable through conventional research in the formal repositories of law. The operational code, in contrast, must be sought in elite behavior.

Even if there is little divergence between myth system and operational code, the differing rates of decay of text and context may limit the usefulness of formal sources of law. The proverbial decrees of the Medes and the Persians still exist; the context in which they were created and in which they had legal relevance is gone. Whether a particular exercise of lawmaking seeks to stabilize or change a situation, if it is concerned not with ornamenting myth but with doing what it says it is doing, there must be a minimum congruence between the sociopolitical context prevailing at the time and the sociopolitical presumptions of the legislation. Once legislation is expressed in relatively enduring textual form, however, its rate of decay is minimal; the rate of decay of the encompassing sociopolitical situation will always be greater and may, indeed, be extremely rapid.

With regard to the international law of the use of force, discrepancies between myth and operational code are quite apparent. As in all law, the discrepancy derives from two incompatible drives: an unwillingness on the part of a community to yield key aspirations, however impracticable, that collides with the need to establish guidelines for the actual behavior that is anticipated.

A second misunderstanding concerns how law is applied. Many non-lawyers assume that application simply involves identifying a single norm or rule and applying it to a set of facts. This misapprehends legal methodology. Complex events usually engage many community policies and norms. The responsible decision maker necessarily takes account of all of them within certain limits. The need for the maintenance of minimum order operates as an unstated rider in every decision. The decision maker does not choose an option that is likely to shatter minimum order, a fortiori when the consequence may be nuclear war. Within those parameters, the decision maker seeks to fashion an authoritative response that achieves the best possible approximation of all the norms engaged.

INTERNATIONAL LEGAL APPRAISAL METHODS

Notwithstanding changes in the constitutive process of the United Nations, most instruments of strategy in international law are not, as we will see in chapter 3, deemed to be per se lawful or unlawful. If they were, judgment tasks would be enormously simplified. Because they are not, determining criteria for the appraisal of lawfulness becomes much more complex. To be sure, some General Assembly resolutions, as we will see, do purport to make per se condemnations of particular uses of force. But such resolutions are not always or even often determinative of international law, although they may reflect the aspirations of certain elites and, sometimes, their expectations. International texts, and most importantly, the operational code as evidenced by practice and international incidents must also be consulted. All three may be in conflict.

At the moment of an event and usually on the basis of limited information, intrepid jurists frequently produce a legal "answer" or *responsum*, a type of unsolicited judgment, based on logical derivation from principles, sometimes a single principle, which the jurist determines to be guiding. Consideration of the purpose of the action being appraised and its consequences is deemed inadmissible. The principles on which such opinions are based usually derive from the textual world, whose incompleteness as a guide to the expectations of effective actors we have already commented upon. It is these opinions that often appear in the media as "authoritative" characterizations of the lawfulness or unlawfulness of the event. Would that law were that simple. Would that life were.

We believe that a more appropriate approach is based on what one might call a type of modern natural law in which the purposes, including the aggregate social consequences of the relevant policies expressed in law, are taken fully into account in fashioning a decision. Moreover, the currency of that legal formulation or institutional arrangement for achieving the common interests of the world community are also considered. In our view, this has been the essential character of the international legal process in the past. Accordingly, we submit that lawfulness is, and should continue to be, determined by contextual analysis: who is using a particular strategy, in what context, for what purpose, and in conformity with what international norm, with what authority, decided by what procedures, where and how, with what commensurance to the precipitating event, with what degree of discrimination in targeting, and with what effects as a sanction and what peripheral effects on general political, legal, and economic processes.