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Edited by

Alberto R. Coll, James S. Ord and Stephen A. Rose

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IN MEMORIAM

This book is dedicated by the editors to the memory of Staff Sergeant Jeffrey A. Morrisey, United States Army Special Forces (1960–1994), a faithful soldier, public servant, colleague, and friend.

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FOREWORD

The International Law Studies "Blue Book" series was initiated by the Naval War College in 1901 to publish essays, treatises and articles that contribute to the broader understanding of international law. This, the sixty-seventh volume of that series, is the product of a conference on low-intensity conflict hosted by the Naval War College in April of 1992.

Sponsored by the Office of the Assistant Secretary of Defense for Special Operations and Low-Intensity Conflict, the Symposium on Low-Intensity Conflict brought together scholars, government officials and military officers to address the legal and moral constraints on the ability of the United States to engage in low-intensity conflict operations. Symposium participants included international law scholars, military officers, political scientists and philosophers uniquely well-suited to explore normative constraints, both legal and moral, upon a democratic society's ability to engage in international conflict at the low end of the spectrum of violence. This volume consists principally of papers written for and presented at that symposium, as well as panel discussions and intercessions from the floor. The principal papers focus on low-intensity conflict and the international legal system, just war doctrine, and American morality and legal limits of conflict. The result is a balanced analysis of the philosophical and legal underpinnings of low-intensity conflict. While the opinions expressed in this volume are those of the individual authors and participants, and not necessarily those of the Office of the Secretary of Defense, the United States Navy or the Naval War College, they provide a most valuable contribution to the study of low-intensity conflict. On behalf of the Secretary of the Navy, the Chief of Naval Operations, and the Commandant of the Marine Corps, I extend to the editors, Professor Alberto R. Coll, Major James S. Ord, and Captain Stephen A. Rose, and the contributing authors of this informative and provocative work, our gratitude and thanks.

James R. Stark
Rear Admiral, U.S. Navy
President, Naval War College

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The Editors wish to thank those persons and institutions without whose support this book could not have been published. The Offices of the Under-secretary of Defense for Policy and the Assistant Secretary of Defense for Special Operations and Low-Intensity Conflict generously provided all the necessary funding. Colonel Ron Smith (USA) and Staff Sergeant Jeffrey Morrisey (USA) brought their considerable skills to bear in helping to organize and conduct the initial symposium in 1992 out of which this book grew. The Editors also wish to thank the panel Chairs at the 1992 Symposium, Prof. W. Michael Reisman of Yale University and Rear Admiral Bruce A. Harlow, JAGC, USN (Ret.), and all the authors, commentators, and participants for their substantive contributions to this effort. Finally, without the sustained support and encouragement of RADM Joseph C. Strasser, USN, President of the Naval War College (1990-1995); Dr. Robert S. Wood, Dean of the Center for Naval Warfare Studies; and Professor Richard J. Grunawalt, Director of the Department of Oceans Law and Policy; and their dedicated staff; this book could not have been published.

PREFACE

In a book such as this, it is essential to start out with a definition of "low-intensity conflict." The term is far from precise, and so are any of the numerous replacements offered for it. This should not be surprising. Despite the hankerings of many political scientists to the contrary, the reality of human conflict and war is difficult to categorize into neat, easily distinguishable phenomena. The standard definitions offered by civilian or military planners and their doctrine manuals suffer from being designed often more with an eye to bureaucratic turf preservation than intellectual coherence or clarity. Hence, the best one can do is follow Aristotle's injunction to any would-be political scientist in his *Ethics*, and aim as well as possible, realizing all along that any definition will be less than fully satisfactory by leaving out some dimensions of the problem.

In general, this book uses the term "low-intensity conflict" to describe conflicts other than those in which two or more States use as the preponderant mode of military operations their regular, uniformed armed forces directly against each other. Under this criterion the Vietnam War would be considered a "mixed" conflict in which conventional warfare alternated with "unconventional" or "low-intensity" modes of conflict. In low-intensity conflicts either one of the primary actors is a non-State entity, or the States involved use as the principal means of coercion against each other instruments of violence short of their regular armed forces, such as guerrilla warfare, terrorism, subversion, assassination and coups d'état. Because this type of warfare is different from the "conventional" use of regular armed forces against each other, it makes sense to use the term "low-intensity conflict" interchangeably with "unconventional warfare", even if this usage departs from that in some of the military manuals.

Low-intensity conflict is intensely political. At the strategic, and even tactical level, political considerations guide its logic with greater force and thoroughness than is the case with many conventional conflicts. This also differentiates low-intensity conflict from a resort to violence that is non-political in nature, such as some types of criminal activity or social turmoil that lack an underlying political objective as the chief guiding compass. Beyond these general criteria it is difficult to go much further without either narrowing the definition excessively or else making it so broad as to deprive it of usefulness.

When the low-intensity conflict symposium out of which this book grew was held in April of 1992, Republican control of U.S. foreign policy was in its twelfth year. One result of this long period of dominance by a single party was that the central assumptions of the foreign policy debate and much of its terminology had come to reflect conservative responses to the challenges of the Cold War. The recent history of the expression "low-intensity conflict" provides an interesting demonstration of this trend. Throughout the seventies and into

the mid-eighties it was often employed as a critical label by those who wished to discourage any but the most obviously defensive use of American power abroad. Even as late as 1988, it was used in this way in a widely read volume of essays edited by Michael Klare and Peter Kornbluh that treated the intentions and capabilities of the United States in low-intensity conflict with grim reserve.[1]

The renewed determination evinced by the Reagan Doctrine to counter the sub-conventional challenges of the Soviet Union gave low-intensity conflict a continuing, if controversial, currency. But it was probably the fact that our low-intensity conflict strategies began to succeed, which became increasingly evident throughout the eighties in places as unlike as Afghanistan and El Salvador, that made possible public discourse in which low-intensity conflict could be treated as a legitimate interest of the United States government. The establishment by the 1986 Goldwater-Nichols Act of the Office of Assistant Secretary of Defense for Special Operations and Low-Intensity Conflict gave the term an official solidity and provided a valuable locus for efforts to develop a comprehensive policy to deal with all the activities it had been used to describe.

Though the respectable use of low-intensity conflict had been long established by 1992, the subsidence of the Soviet threat sharpened nagging concerns about its moral and legal ambiguities and added a worrying new dimension of ontological uncertainty to the whole enterprise. If low-intensity conflict had principally been used to describe the various manifestations of Soviet mischief around the globe, to what would it now refer? If it was to be applied to the ancient kinds of nastiness that seem always to reassert themselves at the collapse of empires, then the efforts of Reagan era low-intensity conflict proponents to adapt traditional modes of moral and legal reasoning to meet the insidious challenges of a "new" kind of conflict might began to seem retrospectively fishy. But if the Cold War had actually wrought a temporary deformation in the evolution of international law and morality, those new interpretations of such concepts as sovereignty and legitimate self-defense might well have been justified and could even help to secure wider respect for human rights and democratic institutions in the future. It was in this tentative atmosphere, a reflective pause after a prolonged period of enthusiasm and success, that the low-intensity conflict symposium was convened.

There is abundant literature on the subject of low-intensity conflict, most of it dealing, as one would expect, with the practical difficulties of coping with such thorny military challenges as counter- and pro-insurgency. A subset of the literature is concerned with the political ambiguities of the low-intensity arena and the difficulties it holds for policy makers and diplomats. But very little effort has been devoted to analysing why this kind of conflict is so problematic for a democracy such as the United States and even less to anatomising the exact nature of the normative constraints that seem to hem us in from every side when we confront a foreign challenge short of conventional war.

Although the symposium that occasioned this volume is far from the first large meeting convened to discuss low-intensity conflict, the deliberations of previous conferences have tended to revolve around the practical concerns described above. As an example, of the 68 papers presented at the 1990 American Defense Preparedness Association Special Operations/Low-Intensity Conflict Symposium, only a handful dealt with doctrine and policy, and of those few, none addressed the issue of moral and legal constraints on our ability to engage in low-intensity conflict.

For those concerned to ground U.S. policy on principles that go beyond what is pragmatic, the neglect of these fundamental normative and cultural issues became more obvious as the Cold War order crumbled. The comforting notion that our uneasy instability was but the twilight prelude to a fresh dawn in world affairs was made increasingly implausible by the refusal of a new order to emerge. The suck and eddy of this great tidal flux would inevitably tug painfully at many of our interests abroad in unpredictable ways. The death of the Soviet Union simply multiplied the subconventional challenges facing the United States while removing the grand exigency that had justified past low-intensity conflict strategies.

The end of the Cold War naturally required every aspect of American security policy to be examined in the light of changing conditions abroad and heightened international expectations that we serve as an arbiter of order and justice. But the gravamen of the case for rethinking our approach to low-intensity conflict resided more particularly in the need to understand how a democracy could morally countenance a continued or expanded involvement in warlike activities lacking the appealing moral clarity of the two World Wars, uncertain of legislative sanction and prompted by no obvious, general threat to our security such as had been provided by communism. If the most potent limitation on our conduct of "low-intensity" or "unconventional" operations was the generalized discomfort of the American body politic with them, then surely it made sense to understand precisely the nature of the reservations, how far they were immutable or transient, and what latitude they might reasonably be expected to afford future low-intensity conflict policy makers.

The task of elucidating the questions raised by the new focus of the low-intensity conflict policy directorate was clearly beyond the portfolio of any government department. They involved a complex mix of legal, historical and cultural considerations that could only be addressed by an assortment of experts steeped in these various aspects of the low-intensity conflict conundrum. The perception that the intellectual cartography of all those in the U.S. defense and foreign policy establishments would have to be reoriented to an as yet unclear landscape lent the task a feeling of historic moment and imbued it with philosophical, introspective undertones. The time was ripe to bring together an unusual combination of theoreticians and practitioners to consider in depth the

constraints on America's freedom of maneuver in the low-intensity conflict arena.

A few observations on the rationale behind the organization of the resulting symposium should be of use to the reader who approaches this volume with more than casual interest. To impose a productive structure on the rich and promising mix of diplomats, lawyers, scholars, soldiers and sailors, it was thought best to provide three distinct topics for their deliberations. To this end, a series of analytic papers was commissioned from a select group of thinkers to provide the meat for discussions of sovereignty, just war theory, and the domestic legal and political strictures on low-intensity conflict. To lend coherence to the diversity of view that was expected in the discussion, a complementary series of dissenting or critical essays was also commissioned. Those who feel the need to reacquaint themselves with the nature of sovereignty law and the *jus ad bellum* before plunging into the melee of debate, will find in the articles and essays well written, non-technical and incisive explications of these topics that seldom stray from the overarching concern with low-intensity conflict. If, on the other hand, the reader would like to put his finger on the carotid pulse of the low-intensity conflict debate, all he need do is dip into the symposium proceedings.

The brief account of the changing fortunes of the term "low-intensity conflict" offered at the beginning of this introduction stopped short of describing its current status. Now that the Democratic party has regained the Presidency after a prolonged absence, it is natural to expect that the language used to frame our national aspirations in foreign policy would change, and indeed, a casual observer of these affairs might be forgiven for forgetting that low-intensity conflict was ever a widespread concern in our defense and foreign policy establishments. The expression seems to have reacquired some of its former taint, having retained, perhaps unsurprising, unfavorable associations for those last in office in the seventies. Though its existence has not been actively denied, its popularity as a way of approaching the problems of sub-conventional conflict was for a time eclipsed by high hopes for the possibilities of multilateral security operations conducted under the aegis of a newly sensible, more muscular United Nations. There is now a family of activities, grouped under the heading of "peace operations," which are expected to cope with many of the disturbances formerly collected under the rubric of low-intensity conflict. That enthusiasm for this new approach to security challenges has recently begun to pall is probably as much a reaction to the messy realities of the challenges themselves as it is an indication of a realistic reappraisal of the limitations of the United Nations. In one respect, this is reassuring evidence that low-intensity conflict policy makers and theorists have not been engaged in an extended exercise in reification. Whether one calls them small wars, "unconventional warfare", low-intensity conflicts, peace enforcement operations, or "operations other than war", the

phenomena considered by the low-intensity conflict symposium in April of 1992 are real and persistent.

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Note

1. KLARE & KORNBLUH, LOW-INTENSITY WARFARE (1988).

PART ONE

INTRODUCTION

Chapter I

Unconventional Warfare, Liberal Democracies, and International Order

Alberto R. Coll

The high political, military, and economic risks increasingly associated throughout the course of the twentieth century with open, conventional war have led many States and non-State entities to shift to other forms of violence as instruments of foreign policy. While the attention of liberal democracies and their governments tends to be riveted on the spectacular scenarios of nuclear war or regular conventional conflict, numerous international actors resort to what might be described as strategies of "violent peace" to achieve their objectives. Far from making open war, these actors do their best to persuade their adversaries that they are at peace with them and that relations between them should be "normalized". For these actors, violent peace is a state of affairs in which a wide spectrum of unconventional and highly creative modes of violence, best summed up under the term "unconventional warfare", are used against an opponent, while maintaining the pretense that there is no open war going on. It is a conception of warfare with which ancient strategists and philosophers of war such as Sun Tzu (400 B.C.) and the author of the Arthashastra (300 B.C.) were familiar, but which democratic societies, shaped as they have been by notions of rational liberalism and the feasibility of true peace, have difficulty comprehending.

Unconventional warfare covers a diverse range of activities, many of them associated with the term "low-intensity conflict": support for guerrilla warfare, insurgencies, and non-State actors committed to using violence to achieve their political purposes; undeclared war aimed at overthrowing governments allied with, or friendly to, one's adversaries; aid to terrorist groups through the provision of money, arms, training, false documents and sanctuary; sponsorship of violent coups to install more pliable foreign regimes; sophisticated and intensive disinformation campaigns through the use of broadcasting, other communications media and forged documents to incite violence against the adversary's diplomatic personnel overseas and foreign governments friendly to it; support for acts of assassination and political intimidation against foreign leaders and high-profile defectors and dissidents; and cooperation with entities involved in the wholesale export of narcotic drugs.

Unconventional warfare poses serious problems for democratic, open societies committed to the rule of law in international relations. The covert nature and elusive instrumentalities of unconventional warfare make it difficult for societies under attack to identify the source of the threat and to rally domestic and international opinion to support effective defense and deterrence measures. Unconventional warfare places its victims in the awkward legal, moral and political dilemma of choosing an appropriate response. Sectors of the international community often misperceive responses of a conventional nature, such as the 1986 U.S. bombing raid on Libya, as "disproportionate" or aggressive in themselves. A double standard sometimes prevails, according to which societies under the attack of unconventional warfare are denied the means to defend themselves. The traditional rules of international law and the legal framework of the United Nations Charter, elaborated to deal with outright, open conventional military aggression, are difficult to apply to the highly creative modes of violence characteristic of "violent peace" and unconventional warfare.

Unconventional warfare always has been an inextricable component of international politics, though its salience at a particular time has depended on the character of the State system within which it takes place. In highly anarchical and competitive State systems whose members are bound by few or weak legal and moral ties such as Renaissance Italy, unconventional warfare tends to prevail more than in stable State systems such as 19th century Europe where there is a relatively strong consensus on what constitutes legitimate international behavior. The foundation of unconventional warfare is a particular view of statecraft which sees international relations as inevitably competitive, as providing little space for the long-term accommodation of divergent interests, and as requiring the pursuit of the most devious political instruments to achieve the greatest possible security for one's State. Thus, unconventional warfare, regardless of the military nature of many of its instruments, is essentially political in its guiding logic and its character. Its objective is to confuse, weaken, paralyze and undermine an adversary so as to increase the power and security of one's State or group. Insofar as unconventional warfare resorts to military force, it does so in a carefully calculated fashion and within the context of a broad strategy that includes diplomatic, economic and psychological instruments. To appreciate the true significance of unconventional warfare in the late twentieth century requires that we understand some of the deep, ancient intellectual roots of this particular mode of statecraft. The thought of Kautilya, Sun Tzu, and Machiavelli is especially relevant.

Kautilya's Arthashastra.

Chanakya Kautilya (345-300 B.C.?) was chief advisor and close friend to Chandragupta Maurya, founder of a new empire and dynasty in the heart of

India. Kautilya's reflections on the science of politics, known as the *Arthashastra*, occupy a prominent place in Indian literature and constitute one of the earliest and most articulate expositions of the statecraft of violent peace and unconventional warfare.[1] The counsels with which the *Arthashatra* is filled are based on the assumptions that international politics is anarchical in nature, that rivalry and conflict are inevitable, and that the State's survival requires as much cleverness, dissimulation, deceit, and the employment of covert aggression as raw military and economic power.

From Kautilya's perspective, permanent peace among States was impossible. In fact, one of the most striking aspects of Kautilya's thought was his view that a state of peace can go hand in hand with one of permanent enmity. Whereas in the Western liberal tradition peace and amity are generally seen as logical complements, Kautilya argued that peace and enmity are equally complementary and are as "natural" an expression of power politics as the forced complimentarity of peace and friendship. A State may find it prudent to arrange a truce with an adversary of equal strength, so as to avoid a senseless war in which victory is impossible, but such a truce is temporary in nature and subject to revision according to the fluctuations of the balance of power. Moreover, such "peace" need not imply a corresponding psychological condition of friendship. Underneath the political truce, enmity is to be continuously cultivated in the psychology of one's State and its long-term statecraft, in preparation for the day when it may be possible to pounce on the unsuspecting adversary and destroy him. Similarly, a weak State may submit peacefully to the hegemony of a stronger one, or find itself courted by a stronger State seeking its support for containing a common adversary, but underlying such "peaceful" relationships is an element of convenience which can easily disappear given the ever shifting tides of international relations.

Every State finds itself in one of three conditions: deterioration, stagnation, or progress. One of the statesman's chief tasks is to evaluate correctly the actual condition of his adversaries and respond accordingly. An opponent's stagnation or deterioration is to be exploited without fail, while progress in his power capabilities may require a diplomatic offensive designed to "normalize" relations and arrange a truce so that he will not use his expanding capabilities to gain significant political or strategic advantages.

From his personal involvement in numerous wars, Kautilya was well aware of the high costs and unpredictability of regular "open" warfare. Hence, much of his treatise offers detailed advice on how to carry out what we would call "covert" or unconventional warfare. Of particular importance were intelligence-gathering, acts of destabilization, intensive resort to propaganda and psychological warfare, political deceit and pretense, outright treachery and assassination. Unconventional warfare might be carried out in the context of a political strategy in which the statesman, playing the part of a snake charmer, would lull the

adversary into passivity by means of a nonaggression pact or an agreement defining spheres of influence.[2] As Adda Bozeman has argued, with reference to Kautilya's India,

> What we have . . . on this subcontinent and in hinduized Indo-China and Indonesia are vast fields of interstate relations in which each king, guided by the principles of *artha*, was forever trying to "acquire and maintain the earth," i.e., to outwit and conquer his neighbors. This unabashed philosophical and actual commitment to power and victory, whether rendered through the symbolism of geometry or that of chess - pursuits in which Indians excelled - was obviously incompatible with anything resembling international law or international organization as these terms are understood in the Occident. The only kind of law governing this Oriental state system was the law of the fishes (*matsya nyaya*), in accordance with which the big fish eat the little fish, might is above right, and right is in the hands of the strong. Inequality was postulated as the everlasting condition of political existence, power as the only measure of political worth, war as the normal activity of the state, peace as a lamentable condition of inferiority, and espionage as the most reliable, indispensable shield of royal fortune. Indeed . . . the skills of intrigue, tabulated and annotated under such titles as "Government based on Deceit" and "The Administration of Subversion," were more highly prized than material power. . .[3]

Sun Tzu's The Art of War.

While uncertainty surrounds its origins, Sun Tzu' s *The Art of War* was probably written between 400 and 320 B.C.[4] The treatise's counsels to the ruler can be read at two levels: the tactical one, dealing with particular military stratagems for defeating an adversary, and the strategic and political one, aimed at shaping a long-term statecraft to bring about the enemy's gradual debilitation and eventual surrender. Some of the twentieth century's most outstanding revolutionary leaders, such as Mao Tse-Tung and Che Guevara, indicated that they profited greatly from reading *The Art of War* at both levels.

Sun Tzu shared Kautilya's basic assumptions about the nature of international relations. His intimate acquaintance with the dynamics of the Chinese State system led him to see war and violence as the norm rather than the exception, peace as little more than a truce of convenience, and cunning and deception as essential prerequisites to survival in a dangerous world. In the state of "violent peace" which Sun Tzu perceived as the regular condition of international affairs, unconventional warfare was a vital instrument of State policy.

Like Kautilya, Sun Tzu recognized the high costs and risks of conventional war. Many of the Chinese States of Sun Tzu's time were fairly evenly balanced in their power capabilities. Large armies were difficult to raise, to train, to maintain in operational readiness over long periods of time, and to deploy across long distances over arid or mountainous terrain. Thus, any attempt to defeat an enemy by annihilating its armies in open combat and storming its cities was

fraught with innumerable dangers, not the least of which was the possibility that by the end of the war the enemy State might be so utterly destroyed and the victorious party so exhausted as to call into question the meaning of the entire effort. Hence, for Sun Tzu, the "unconventional approach to warfare", a vital dimension of which was the kinds of activities that today we would call "unconventional warfare", was indispensable. The truly intelligent statesman, argued Sun Tzu, sought to take his adversary's armies and cities intact following a prolonged period of psychological and moral softening up:

> Generally in war the best policy is to take a state intact; to ruin it is inferior to this... Do not put a premium on killing... To capture the enemy's army is better than to destroy it... For to win one hundred victories in one hundred battles is not the acme of skill. To subdue an enemy without fighting is the acme of skill...
>
> The supreme excellence in war is to attack the enemy's plans... Next best is to disrupt his alliances... The next best is to attack his army... The worst policy is to attack cities...[5]

The softening up prior to ultimate victory was to take several forms. The enemy was to be deceived as to one's true intentions, long-term strategic objectives, and actual strength. Sun Tzu ranked the ability to deceive as the greatest of political virtues. The tools of deception were diplomacy, espionage, and the use of "disinformation" and "active measures" to confuse the adversary, sow self-doubt and divisions within him and alienate him from his allies. It was essential to attack the enemy's "mind", his confidence and sense of identity.

Psychological warfare should not refrain from employing the more violent instruments of unconventional warfare. A dissatisfied minority or faction within the enemy State might be encouraged to revolt. An unusually successful enemy general or political leader might be assassinated.

In the kind of adversarial strategy that Sun Tzu saw as proper to most States in an anarchical international system, victory was facilitated by an understanding of "how to use both large and small forces." Sun Tzu's counsels on this point, as with most others throughout his treatise, apply not only at the tactical military level, but also at the much higher level of strategy and policy. "There are circumstances in war when many cannot attack few, and others when the weak can master the strong. One able to manipulate such circumstances will be victorious."[6] Victory required an understanding of the different modes of warfare. In some situations, the use of conventional war ("large forces") might be appropriate, while in others the whole spectrum of unconventional warfare, from special forces and unconventional warfare to guerrilla war, subversion, propaganda, and psychological and political warfare ("small forces") was the most fitting policy instrument.

While *The Art of War* 's premium on unconventional warfare and deception grates liberal sensibilities, there are those who have seen Sun Tzu's doctrine of

war as far more humane and reasonable than traditional Western conceptions of warfare. Sun Tzu's emphasis on "the unconventional approach", his elegant strategy of overcoming an adversary with as little destruction as possible, and his aesthetic disdain for indiscriminate brutality prompted Liddell Hart to speculate, somewhat disingeniously, that if European statesmen and generals around the turn of this century had imbibed Sun Tzu's theories, the course of both World Wars might have been far different.[7]

Machiavelli's The Prince.

Perhaps the most famous expositor of "violent peace" in the Western tradition remains Niccolo Machiavelli (1469-1527). *The Prince* belongs to the same genre as the *Arthashastra* and *The Art of War.*[8] It is a manual for political and military success addressed to the ruler of a State in a highly anarchical system of international relations. While debate continues on the true nature of Machiavelli and his work, many readily agree with Leo Strauss's estimate of Machiavelli as "a teacher of evil".[9] He was also a gifted humanist and patriot.

Although much of *The Prince* deals with how a political adventurer may seize power in a State and keep it against the intrigues of his domestic opponents, there is also an implicit theory of statecraft and warfare. To keep power, a prince not only must eliminate his internal enemies; he also must guard against the perpetual machinations of rival States seeking to conquer his own State. Moreover, success in expanding the size and power of his State may strengthen the prince's domestic position and give him the legitimacy he so badly needs. So, Machiavelli developed a doctrine for success in diplomacy and war. And its core elements were, as in the doctrines of his Oriental counterparts, dissimulation and deception accompanied by various forms of unconventional warfare as a substitute for, or at least a requisite prelude to, direct military assault against foreign rivals.

In diplomacy, as in his dealings with his own subjects, it was important for the prince to disguise his true intentions. In fact, if one had to choose, it was better to appear to be a good man than to be a truly good man. As with Sun Tzu, propaganda, disinformation, and active measures designed to confuse and paralyze the adversary were essential.

The prince also should be prepared to resort to the entire panoply of violent subversion: support for factions within an enemy State seeking to overthrow the existing regime; assassination of selected foreign leaders; the nurture, through money and other means, of civil war in a State to weaken that State and its allies and increase the power of one's own; and any other form of treachery and covert violence available. Unconventional warfare was to be carried out in the context of a diplomacy of "normalcy" and under the cover of the most solemn assurances by the prince concerning his own piety, integrity, and devotion to peace.

Although some of the best contemporary minds looked at Machiavelli with disdain, and the sovereigns of Europe were quick to dissociate themselves publicly from his teachings, the actual course of international politics in the second half of the sixteenth century served as a vast canvas on which the practices counseled by *The Prince* were richly illustrated. The long struggle between England and Spain from 1559 to 1604 remains a classic case study in the dynamics of violent peace and unconventional warfare.[10] While Spain sought hegemony over Europe, England was moved by the desire to stop this hegemonic drive and break open Spain's monopoly over the New World.

During the two decades of violent peace and "cold war" that preceded the outbreak of actual hostilities in 1588, both powers, well aware of the difficulties entailed in attempting open war against one another, resorted to numerous forms of unconventional warfare. Elizabeth I encouraged and helped to finance English expeditions directed against Spanish colonial possessions in the Caribbean and South America. To the protests of the Spanish ambassador, the Queen responded by feigning displeasure over, and disclaiming responsibility for, the acts of pillage and plunder carried out by her unruly subjects. She also looked the other way while an extensive proxy network developed among English, French Huguenot, and Dutch privateers to harass the Spanish lines of communication with the Low Countries across the English Channel. Among the English privateers and their backers were some of her most trusted counselors and financiers. Religious and political passions blended with economic motives and Elizabeth's own larger strategic objectives in tightening the bonds of this proxy network. The Queen also actively intervened in the Dutch revolt against Spain by providing sanctuary for the Dutch rebels, assisting with arms and money (and eventually troops), and intervening in France's budding civil-religious war on behalf of the anti-Spanish faction. Under the leadership of the formidable Francis Walsingham, Elizabeth also developed an espionage network second to none in Europe.

For his part, Philip II of Spain showed a similar grasp of the potentialities of unconventional warfare. His ambassadors in London disbursed large sums of money throughout a wide network of dissatisfied English Catholics willing to assassinate Elizabeth and replace her with either the Catholic Mary Stuart or Philip himself. He sent subsidies to prominent Catholic nobles in Scotland, to encourage them to depose the Protestant James VI and invade England from the north. Eager to isolate England diplomatically in preparation for an invasion, and hoping to turn France into a docile Spanish satellite, Philip fanned the fires of civil and religious discord in France by financing the Catholic League, so that French power would be unable to assist England at her hour of need. Eventually, Spanish troops were involved in the French civil war in support of the League. Meanwhile, on the eve of the Spanish Armada's attempt to invade England in the summer of 1588, Philip's representatives were busy negotiating a possible diplomatic settlement with the English at Borbourg. The king had made it clear

to his Council of State, though not to his diplomats, that the negotiations' chief purpose was to lull England into slackening its own military efforts.

The most fertile soil for unconventional warfare is an international system where the sense of membership in a society of States bound by certain common rules and values has been gravely weakened. That was true of Sun Tzu's China, Kautilya's India, and Europe in the second half of the sixteenth century. The bitter religious antagonisms between Catholics and Protestants, and the rise of new and powerful nation-States eager to assert themselves on the stage of international politics had helped to sunder the fragile sense of community inherited from the Middle Ages. Religious and political differences were perceived as more significant than common values and interests, and remained so until well into the next century when the Peace of Westphalia (1648), acknowledging the exhaustion into which all the great powers had sunk by virtue of the Thirty Years War, put to rest the religious struggle by formalizing the principle of "*cuius regio, eius religio*". The signatories of the Peace also recognized that, despite their differences, they were bound into a society of States by a common Christian culture, a developing system of international law, and the principle of the balance of power.

It is interesting to note that the incidence of unconventional warfare in Europe fell markedly following 1648 and did not return to the high levels of the second half of the sixteenth century until well into our own times. The breakdown of European international society that accompanied the First World War; the subsequent appearance of ideological divisions, rivaling the earlier religious hatreds, in the form of Communism, Fascism, and Nazism; the emergence of powers such as Hitler's Germany and Marxist Russia unwilling to accept the cultural values of the liberal democracies and ready to exploit the principles and rules of international law for the purpose of subverting and overturning the existing balance of power; the evolution of the European-dominated international society of the nineteenth century into a highly diverse multicultural system of States; and the nearly universal recognition of the increased economic costs and politico-military risks of conventional military force; all these factors provided an ideal setting for the recrudescence of unconventional warfare in the twentieth century.

Liberal Democracies and Unconventional Warfare.

The traditions and institutions of liberal democratic societies render them vulnerable to unconventional warfare, and make it difficult for them to understand its nature and develop appropriate counter-strategies. Modern liberal democracies are the product of a set of traditions and ways of looking at the world, spanning several centuries, that in turn were shaped by Christianity, liberalism, and capitalism. From Christianity the modern democratic State has

borrowed notions about the brotherhood of man, the desirability of universal peace and reconciliation, the high value of forgiveness and compassion, and the undesirability of deception as an instrument of politics.[11]

From the broad philosophical universe of liberalism modern democracies have imbibed a view of history as progressive and tending towards greater rationality and harmony. Man and society are seen as capable of undergoing substantial moral improvement. The liberal tradition tends to view war as a retrograde human aberration, an unfortunate holdover from less enlightened days which the enlargement of human understanding gradually will render into oblivion.[12] The intellectual heirs of Sun Tzu and Machiavelli believe that war is a rational instrument of politics, no different from diplomacy or other "peaceful means" in its essential character as a means for the acquisition of power, and whose appropriateness at a particular moment is determined solely by expediency rather than morality. Liberalism, on the other hand, tends to see war as the Christian tradition has done: as a last resort, a basically evil alternative justified only by the necessity of defense against the even greater evil of aggression and conquest. For liberals, war is an abnormal state that periodically punctuates the more natural condition of human peace and harmony.

From its basically optimistic and progressive temperament, liberalism derives the strong hope that modern man will come to see the senselessness and waste of violence and will learn to avoid it. The invention of weapons of mass destruction has only reinforced the earnestness underlying this widely shared liberal hope. The irrationality of nuclear war, the danger of conventional conflict crossing the nuclear threshold, and the exorbitant costliness of conventional conflict itself, suggest to many liberals that since nations need to develop peaceful international mechanisms for settling their differences, they actually will do so.

Capitalism has been another powerful contributor to the general disdain with which liberal democracies tend to view war. In spite of its detractors' arguments, capitalism during the twentieth century has been found more often on the side of those forces supporting diplomatic accommodation and peaceful resolution of conflicts than on the side urging war.[13] This was true of the highest business and financial circles of Great Britain and the United States prior to the outbreak of World War I and during the 1930s.[14] It continues to be true today with regards to the world's large multinational corporations. By the end of the nineteenth century, it was already becoming apparent to some observers that, although a future general war might provide possibilities for great profit to selected industries in certain countries, on the whole its destructiveness would deal a heavy blow to the increasingly sophisticated and fragile network of international trade, investment and industrial production undergirding the world economy. By 1914, most capitalists in Great Britain and France, and even many in Germany, shared this perception and were, therefore, worried about the darkening clouds on the international political horizon. Their fears did not prove to be unfounded. The

legendary tales of capitalists who made large fortunes out of World War I need to be balanced by an account of the many more who were ruined or adversely affected by it.

Today, capitalism is on balance a force for international political restraint and accommodation. Radical critics who point to the connections between large capitalist firms and the world's military establishments tend to downplay other more significant dimensions of the impact of capitalism on international politics. At the height of the Cold War, Gulf Oil happily pumped oil in Angola under the protection of Cuban troops, while its Washington lobbyists pushed for a diplomatic understanding with the Soviet-backed Luanda government and a cutoff of aid to the anti-Marxist rebel Jonas Savimbi. In Sandinista Nicaragua, Exxon maintained its refineries in top working condition for many years, while resisting the Reagan Administration's policy of isolating that country economically and politically. In early 1988, when most of America's large multinationals were engaged in a scramble to secure new economic opportunities in the USSR under the umbrella of *perestroika*, the Chairman of the Board of IBM politely declined to sign an innocuous appeal to President Gorbachev for greater religious freedom, apparently for fear of offending Soviet sensibilities.[15] Throughout the Cold War, American business circles supported a strong defense and large military expenditures for deterrent purposes, but they wanted the competition between the superpowers to remain carefully controlled, so as not to disturb the expansion of international trade, investment, and the processes of wealth-creation. Today, Western multinational corporations are the strongest advocates of expanding trade and investment ties with Iraq and Iran, in spite of the massive evidence that both countries are trying to develop nuclear weapons and Iran remains a major backer of terrorist groups in the Middle East.

There is another significant way in which capitalism indirectly reinforces the liberal democracies' vulnerability to unconventional warfare. The fusion of modern democracy with a capitalist economic system has produced societies whose highest reason for being is the unlimited acquisition and enjoyment of material goods. The Jeffersonian ideal of the pursuit of happiness, hedonistic enough in 1776, has become even more so in the succeeding two centuries. The ultimate standard by which liberal democracies measure themselves, the goal to which all political parties aspire, and the test by which all incumbent politicians are judged, is success in securing ever higher levels of what Hobbes called "commodious living."[16] By fostering consumerism and materialism, and by glorifying individualism to the point of sometimes condoning selfish and antisocial attitudes, modern capitalism provides a less than fertile soil for the nurture of the martial virtues and a poor climate for the acceptance of war as a tragic but unavoidable part of life for which a democracy's citizens must be ever ready.

If the traditions and leading ideas of liberal democracies do not prepare them well for the challenges of unconventional warfare, neither do their predominant

political institutions. Democratic political systems are adversarial by design. They foster pluralism of perspectives and interests, and a political process which prizes combativeness, partisanship, and the pitting of factions against one another. There are always opposition parties thirsting for political blood, and a vigorous free press conscious of its duty to promote public debate and eager for fame and profit. Unless they are faced with an immediate, overwhelming threat, democracies find it difficult to fashion a coherent foreign policy commanding the solid support of their contending domestic factions.

Unconventional warfare is an effective instrument of aggression against democracies and their allies. The subtle, unconventional and generally covert nature of unconventional warfare avoids violence that crosses that threshold above which a democratic populace might be rallied to respond. While conventional aggression might tear a democratic society away from the pursuit of commodious living, unconventional warfare most likely will not. It is also obvious that the highly sophisticated, technological infrastructures underlying the economic systems of many democratic societies are highly vulnerable to forms of unconventional warfare such as terrorism and urban guerrilla warfare.

Moreover, unconventional warfare, as its great theorists and practitioners always have understood it, usually takes place in the context of a process of diplomatic entreaties designed to lull its victim into relaxing its defenses. Within every democratic society there are many individuals of unquestioned integrity and intellectual acuity who will interpret the adversary's diplomatic moves, not as the strategy of Kautilya's "snake charmer", but as good faith efforts towards a reasonable settlement. They will stand up and call for a reciprocal response involving a degree of good faith similar to that which they imagine the adversary to have. When resistance arises to their suggestions, many of these individuals will accuse the government of their own democratic society of being the main obstacle to peace. The ensuing recriminations, divisiveness, and intellectual confusion generated by what inevitably becomes an acrimonious and highly partisan debate further weaken the democratic State's foreign policy and its bargaining position versus its adversaries, most of whom have no similar domestic problems hampering their policies.

While the record of the Western democracies in countering the unconventional warfare waged by the fascist powers in the 1930s is hardly reassuring,[17] it is still an open question whether over the long run democracies are structurally incapable of successfully responding to unconventional warfare. It may be that, in spite of their severe handicaps, democracies can rally the requisite determination, unity of purpose, and political shrewdness necessary for dealing with unconventional warfare. Modern democracies have an impressive array of policy instruments with which to tackle the problem, if they choose to act. Their economic prowess gives them leverage with which to exert costly pressure on their adversaries. Their technological and military capabilities give them conven-

tional military options with which to raise the costs to the enemy of resorting to covert war. And finally, democracies can, and occasionally have been able to, wage unconventional warfare effectively.

No serious study of unconventional warfare can avoid the morally and politically problematical question of whether democracies should "answer fire with fire", that is, engage in selective unconventional warfare of their own as a means of compelling an adversary to desist from its own unconventional warfare efforts. If economic and diplomatic sanctions have proven ineffective, if the mechanisms of international law and organization are unavailable or have failed, if direct war and conventional military options are unadvisable because of their high costs, unconventional warfare may be the appropriate instrument with which a democratic society should defend itself and its allies against an adversary's strategies of violent peace. A resort to unconventional warfare under such circumstances serves the joint purposes of defense against the existing attack and deterrence to future ones. Alexander Hamilton laid the philosophical foundations for the argument that democracies should be prepared to resort to defensive unconventional warfare when he argued in general terms that, as a matter of common sense and practical survival, the United States could not guide its international behavior by the same practices and institutions that govern its domestic life.[18]

The rejoinder to the above argument, as articulated by critics from Thomas Jefferson down to our own day, takes several forms. First, there is the claim that democracies should not stoop to the immorality that unavoidably accompanies unconventional warfare. This particular claim is rooted in the Jeffersonian view that, as Paul Seabury put it, "both the means and ends of American foreign policy... should be always judged against the highest standards of American civic values... the moral character of our civilization should be reflected both in the ways in which we deal with other nations, and in the ultimate purposes to which we aspire in these dealings..."[19] A second kind of claim asserts that in resorting to unconventional warfare democracies corrupt themselves. Supposedly, the practice of Machiavellianism in one's dealings abroad produces Machiavellianism at home; deception, secrecy and treachery in foreign policy lead to the cultivation and spread of similar attitudes and values within the domestic political process.[20] Third, there is the more pragmatically oriented claim that, given their peculiar traditions and institutions, democracies are ill equipped to carry out unconventional warfare, and that their attempt to do so often winds up in failure, in moral and political embarrassment both internationally and domestically, and in loss of the "moral high ground" with all its attendant intangible benefits.[21]

These arguments against the employment of unconventional warfare by democracies need to be taken seriously, but they do not make a foolproof case. At most, they remind us of the pitfalls involved in "fighting fire with fire." Intellectually as well as morally, the most relevant question is not whether

democracies should resort to defensive unconventional warfare, but under what circumstances, and with what kinds of limitations, restraints and provisos such resort should be countenanced.

Unconventional Warfare and International Order.

In theory, the written and unwritten rules and institutions of international society allow democratic States to defend themselves against unconventional warfare. The chief framework of international law, the United Nations Charter, explicitly prohibits the use of force in international relations for aggressive purposes. The Charter was written with a view to the kinds of "open" wars of aggression, such as World War II, in which clear aggressors marshall their conventional military might to conquer their neighbors. In such wars, it is fairly easy not only to determine who the aggressor is, but also to verify the fact that an aggressive attack is taking place. The Charter's framers were, for the most part, hard-headed statesmen; they included men such as Dean Acheson and John Foster Dulles with practical experience in foreign affairs and vivid memories of the 1930s.[22] Had they surmised that the future course of international politics would be marked more by violent peace and unconventional warfare than by invasions of panzer armies, they would have had no trouble seeing that the proscription on aggressive force should embrace the subtle instrumentalities of unconventional warfare as well as the traditional means of direct conventional war.

The Charter also was realistic enough to recognize that the prohibition of force in international relations should not extend to defensive uses of force. This is the meaning of the celebrated Article 51, which states that "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs. . ." It would be wrong to read any convoluted interpretations into the meaning of self-defense, or to argue that "self-defense" is an excessively narrow concept that ties the hands of democratic societies in responding to aggression. Self-defense implies the right to defend oneself, as well as to inflict whatever degree of force is necessary to deter an adversary from future attacks.[23] Article 51 was not intended to serve as a straightjacket for victims of aggression.

In practice, international law and the United Nations Charter have not proven very helpful to democracies facing unconventional warfare. Three problems help to explain why.

The Problem of Inquiry.

By its very nature, unconventional warfare leaves as few trails as possible. Conclusive, incontrovertible evidence of a party's guilt is hard to come by. The

East bloc States that, in the early 1980s, sent arms to Cuba and Nicaragua for transhipment to the Salvadoran guerrillas, made sure that they did not include Soviet-made weapons. The bulk of the arms came from U.S. stockpiles captured by North Vietnam during the Vietnam war, so that the guerrillas could claim that their arms were American-made, and that they had captured them in the course of their own military operations against the U.S.-assisted Salvadoran army. Political assassinations are frequently carried out by individuals having no ideological connections whatsoever to the entity that employs them for their task. If the Bulgarian intelligence services were indeed behind the assassination attempt against the Pope in 1981, one can expect that they would have used, not a disgruntled radical leftist but a right-wing extremist such as Ali Mehmet Agca. The captured Grenada Papers show that the top Grenadian leadership intended to make available to the Soviet Union and Cuba the large "civilian" airport under construction at Point Salines; yet when the Grenadians asked the Soviet Union for direct financial aid to help them complete the airport, Foreign Minister Gromyko told them that this was out of the question and that Grenada should seek a loan from the IMF instead.[24] Fidel Castro, acknowledged by most Latin Americans of the right and the left as an active supporter of violent revolutionary movements in the region for nearly three decades, was superbly skillful in blotting out any evidence of such support. Similarly, during the last three years the Serbian government of Slobodan Milosevic has stoutly denied giving any significant support to the Bosnian Serb armies that have ravaged large sections of Croatia and Bosnia-Herzegovina. Indeed, in a script right out of Machiavelli's *Prince*, Milosevic has even attempted to paint himself as an honest arbiter between the Bosnian Serbs and their Moslem enemies. Whereas conventional military attacks are susceptible to fairly straightforward processes of inquiry, and hence to authoritative determinations that armed aggression has taken place, unconventional warfare is not.

The problem of inquiry has an additional dimension inherent in the institutions of liberal democratic societies. The news media, which might be expected to act as effective ferrets, often wind up focusing on the covert activities of democratic societies and neglecting those of their adversaries. This should not be surprising. Journalists are as full of biases as the rest of us mortals. They are frequently liberal, suspicious of their governments to the point of cynicism, and full of crusading zeal to expose and cleanse the supposed impurities of their own societies. They are skeptical of information or intelligence supporting government claims, and their investigative processes and reporting are affected by the partisan and combative nature of the democratic political process of which they are an integral part. Among the first news item to reach the United States from Grenada following the 1983 intervention was a report of the discovery of a substantial cache of old Springfield rifles at a large warehouse near St. George's. The reporters' subtle inference, explicitly articulated by many editorials ridiculing

the Reagan Administration's supposed alarmism, was that this was the extent of the grave military threat posed by the Grenadian regime against its Caribbean neighbors. Only somewhat later did reports begin to filter back indicating that the total supply of arms found on the island exceeded the wildest estimates of U.S. intelligence both in numbers and in technological sophistication. Enough modern arms of high quality were found for an army of 10,000 (in a country of barely more than 100,000 inhabitants). Many of them were of a clearly offensive nature.[25] Also discovered by U.S. forces, and somewhat downplayed by the media, were unconventional treaties between the Grenadian regime and various Soviet bloc States, providing for the supply of even more weaponry well into 1985.

At a more practical level, unconventional warfare by authoritarian adversaries is much more difficult to investigate because of their adeptness at deception and manipulation of information, which in turn is facilitated by the closed and secretive nature of their societies. Hence, by a combination of default, inertia, and deliberate purpose, inquiry into unconventional warfare against liberal societies receives less emphasis on the evening news or the front page of *The New York Times* than revelations of involvement by democratic governments in covert operations.

The problem of inquiry lends itself to skillful exploitation by the architects of unconventional warfare. The disciples of Sun Tzu know the importance of dissimulation, and they work hard to take advantage of the pluralism and partisanship within democratic societies by sowing skepticism and confusion about their activities. Perhaps no case illustrates this better than Nicaragua's long involvement in the Salvadoran civil war in the 1980s. The first State Department reports in 1981 documenting arms shipments from Nicaragua to El Salvador were received by the U.S. media with wide skepticism bordering on hostility.[26] It did not make much of a difference that shortly thereafter the Democratic-controlled Permanent Select Committee on Intelligence, which had access to the relevant classified information, found in two separate reports in late 1982 and mid-1983 that the evidence of Sandinista and Cuban support for the Salvadoran guerrillas was ample and credible.[27] Nor did it matter that successive defectors in 1983, 1984, and 1987 respectively from Nicaraguan counter-intelligence, the Cuban Ministry of Planning, and Cuba's intelligence services (DGI) confirmed that the involvement was not limited to the supply to weapons, but also included training, command and communication facilities in Nicaragua within driving distance of Managua, and economic assistance.[28] While the evidence of illegal Nicaraguan involvement in the civil war was solid, it was rendered politically irrelevant by the fact that the Sandinistas succeeded in persuading important segments of the media and Congress that what was involved was a set of exaggerations and outright fabrications by a knee-jerk interventionist Administration obsessed with Nicaragua.

The Problems of Impartiality and Politicization.

An effective international legal system capable of providing protection against aggression requires mechanisms for the impartial evaluation of whatever data the processes of inquiry supply.[29] If the inquiry component of this requirement is weak, so is that of impartiality. The institutions of international law, like those of international politics, are hardly impartial. They are affected by the deep political, ideological, cultural and historical differences that divide international society. Agreement and consensus may exist on general principles such as the unacceptability of aggressive force and the legitimacy of defense, but every particular crisis calling for the specific application of these principles to often ambiguous and highly controversial situations brings out the profound differences in interests as well as outlook among the various participants in the international legal process. International law does not exist in a political vacuum. Its principles are cited and argued by governments representing specific national interests, by legal scholars with subjective political sympathies and philosophical predispositions, and by international organizations whose voting majorities reflect a particular set of ideological, political and strategic biases.

Undoubtedly, any future efforts to strengthen the role of international law and the United Nations in curbing aggressive unconventional warfare will have to come face to face with the problems of inquiry, impartiality and politicization. It may be that new and creative policies, approaches and institutions can be developed to reduce the size of these problems and diminish the friction which they presently pose for the authoritative functioning of the norms against aggression. Such hope, however, must coexist side by side with a degree of skepticism. The nature of the international system itself makes it highly resistant to any such innovative approaches.

The existence of a society of States bound by certain general rules and reciprocal expectations (a proposition, incidentally, which is not accepted by all students of international politics) should not confuse us into thinking that there is such a thing as a single international community. At best, there is in today's world a large number of different international communities, each of them wrapped around a particular set of interests and values, some of them more inclusive than others, but none truly universal either in membership or in the scope of its objectives. The lines of membership in these communities are not always mutually exclusive; they often crisscross. But what does not exist and will not exist for a long time, despite the abstract language and fervent desires of world order theorists and many international lawyers, is a single international community that speaks with one voice and represents authoritatively the widely diverse communities of interests and values which make up the real world.

For this reason, although international law and organization deserve the support of liberal democracies, and although it is a morally and politically

worthwhile enterprise to explore the degree to which they may make a better contribution to defense and deterrence against aggressive unconventional warfare, any serious study of unconventional warfare and of the perils it poses to liberal democracies in the late twentieth century will have to go beyond the realm of international law and organization and consider the wider range of policy responses available to democratic States, including some forms of unconventional warfare itself. If one accepts the proposition that effective deterrence contributes to peace and is therefore a friend of peace, then consideration of such a wider range of policy alternatives is a legitimate, indeed unavoidable, subject for discussion.

The question of what constraints and guidelines should shape a democratic State's resort to unconventional warfare will be discussed elsewhere in this book. What has been established here, however, is that unconventional warfare is an old, persistent feature of international politics, present throughout different periods with varying degrees of intensity. To pretend that unconventional warfare does not exist, or that it is not a significant threat to American interests, is illusory. A democratic State's capability and will to resort to unconventional warfare can be a powerful deterrent against its adversaries' resort to it. At a minimum, it can raise the political costs to such an adversary of using unconventional warfare, and it can give the adversary a powerful incentive to explore a more constructive and accommodative relationship. Awareness of the dangers entailed in a democratic State's resort to unconventional warfare is salutary, but it should not be turned into a sweeping theoretical ban against it. Such dangers, too real to be ignored, only remind us of the need for further thinking on how unconventional warfare by democratic States should be carefully circumscribed so as to limit its potential harmful effects, while retaining its usefulness as one of several deterrent mechanisms available to democratic societies in a dangerous and highly unstable world.

Even in the post-Cold War world unconventional warfare remains highly relevant. Shortly after the collapse of Communism in the fall of 1989 it became fashionable for a period of time to argue that whatever problems unconventional warfare or "low-intensity conflict" had posed for international order during the Cold War would become irrelevant in a world in which the Soviet Union no longer would be financing or otherwise supporting such forms of violence. By 1995 such arguments seem less credible. It is true that Marxist-inspired insurgencies are *passé* these days, and that with the exception of Colombia, Peru and Guatemala, unconventional warfare has largely ebbed away in Latin America. Moreover, as the confrontation between the Soviet bloc and the Western alliance has disappeared, so has resort to unconventional warfare among the great powers against each other at present. Yet, various forms of unconventional warfare remain useful instruments of policy for a wide range of groups, nations and States in the Balkans, the Middle East and the Persian Gulf, Central Asia, and large parts

of Africa. These conflicts may not always be of strategic importance to the United States or even of marked significance to the fabric of international order, but in the future they could be. An understanding of the peculiar nature of unconventional warfare, the challenges it poses to liberal democracies, and its persistent recurrence will be as useful in the future as it has been in the past.

Notes

1. KAUTILYA (Shamasastry trans. 4th ed. 1951).
2. BOZEMAN, POLITICS AND CULTURE IN INTERNATIONAL HISTORY 123 (1960).
3. BOZEMAN, THE FUTURE OF LAW IN A MULTICULTURAL WORLD 128 (1971).
4. SUN TZU, THE ART OF WAR 11 (Griffith trans. 1971).
5. *Id.* at 77-78.
6. *Id.* at 82-83.
7. *Id.* at v-vi.
8. MACHIAVELLI, THE PRINCE (1947). Equally important are Machiavelli's Discourses.
9. STRAUSS, THOUGHTS ON MACHIAVELLI 9 (Bergin trans. 1958). For another interesting commentary, see Norton, *Machiavelli and the Modes of Terrorism*, Modern Age 304-313 (1985).
10. See MATTINGLY, THE DEFEAT OF THE SPANISH ARMADA (1959); PADFIELD, ARMADA (1988); MARTIN & PARKER, THE SPANISH ARMADA (1988).
11. The more pessimistic strands within the Christian tradition, such as Augustinianism, have not been as deeply absorbed within the contemporary ethos of liberal democracies as the pacifist, liberal ones that focus on the Beatitudes and downplay the stark political realism implicit in the Pauline epistles.
12. See Kant's essays on "Idea for a Universal History from a Cosmopolitan Point of View", "An Old Question Raised Again: Is the Human Race Constantly Progressing?", and "Perpetual Peace" in KANT, ON HISTORY (Beck ed. 1963). See also the discussions of the liberal tradition in international relations in WALTZ, MAN, THE STATE AND WAR (1954); WOLFERS & MARTIN, THE ANGLO-AMERICAN TRADITION IN FOREIGN AFFAIRS (1956).
13. See Hans Morgenthau's trenchant refutation of the argument that capitalism causes wars in MORGENTHAU, POLITICS AMONG NATIONS 51-57 (5th ed. 1978).
14. *Id.* at 56.
15. The appeal, signed by representatives of all the major religious groups and denominations in the United States, was circulated by the James Madison Foundation (Washington, DC), and President Reagan presented it personally to President Gorbachev at the Moscow summit of May 1988.
16. HOBBES, OF THE NATURAL CONDITION OF MANKIND AS CONCERNING THEIR FELICITY AND MISERY, 102 (Oakeshott ed. 1968). "The passions that incline men to peace, are fear of death; desire of such things as are necessary to commodious living; and a hope by their industry to obtain them."
17. WISKEMANN, EUROPE OF THE DICTATORS 1919-1945 (1966); SHIRER, THE NIGHTMARE YEARS 1930-1940 (1984).
18. On Hamilton's views, see WOLFERS & MARTIN, supra n. 12 at 139-154; LANG, FOREIGN POLICY IN THE EARLY REPUBLIC (1985); and Seabury, *Moral Purpose and American Foreign Policy* (unpublished paper presented at a conference on *Moral Purpose and American Foreign Policy* sponsored by the New York-based Center for Religion and Society at the Smithsonian Institution, Washington, DC, Feb. 20-22, 1987).
19. Seabury, op. cit., 2.
20. BOYLE, WORLD POLITICS AND INTERNATIONAL LAW 293-5 (1985).
21. This is one of the themes in TREVERTON, COVERT ACTION (1987).
22. See AREND, PURSUING A JUST AND DURABLE PEACE: JOHN FOSTER DULLES AND INTERNATIONAL ORGANIZATION (1988).
23. See the extended discussion in Schachter, *International Law in Theory and Practice V*, Collected Courses of the Hague Academy of International Law 150-6 (1985).
24. SEABURY & MCDOUGALL, THE GRENADA PAPERS (1984); VALENTA & ELLISON, GRENADA AND SOVIET-CUBAN POLICY: INTERNAL CRISIS AND U.S.-OECS INTERVENTION (1986).
25. Arthur, *Grenada and East Caribbean Security* 177 Conflict Studies 20 (1985).
26. For a careful study of the State Department's "White Paper" and of the highly politicized and biased reaction to it by much of the media and Congress, see FALCOFF, SMALL COUNTRIES, LARGE ISSUES: STUDIES IN U.S.-LATIN AMERICAN ASYMMETRIES 34-44 (Washington: American Enterprise Institute for Public Policy Research, 1984).

27. HOUSE COMM. ON INTELLIGENCE, SUBCOMMITTEE ON OVERSIGHT AND EVALUATION, STAFF REPORT: U.S. INTELLIGENCE PERFORMANCE ON CENTRAL AMERICA: ACHIEVEMENTS AND SELECTED INSTANCES OF CONCERN, 97th Cong., 2d sess. 3 (22 Sept. 1982), and HOUSE COMM. ON INTELLIGENCE REPORT 98-122, 2 (13 May 1983).

28. The defectors were, in the order given, Miguel Bolanos Hunter, Jose Luis Llovio Menendez, and Maj. Florentino Azpillaga. See the interviews with Bolanos Hunter in Washington Post, June 19, 1983 at A4. For Llovio Menendez, see "Cuban Defector Says Castro Finances Salvadoran Rebels' Arms Purchases", Washington Post, November 19, 1984 at A10. Maj. Azpillaga was a high official in the Cuban DGI who defected to the West in the summer of 1987. From August through November of 1987 Radio Marti (United States Information Agency) conducted extensive interviews with him, the transcripts of which are available. Much of the evidence of Nicaragua's illegal intervention in El Salvador has been gathered in MOORE, THE INDIRECT WAR IN CENTRAL AMERICA (1987), and TURNER, NICARAGUA V. UNITED STATES: A LOOK AT THE FACTS (1987).

29. For a thoughtful exploration of the problem of impartiality in international law, see FRANCK, THE STRUCTURE OF IMPARTIALITY (1968).

PART TWO

LEGAL CONSTRAINTS ON LOW-INTENSITY CONFLICT: INTERNATIONAL LAW AND STATE SOVEREIGNTY

Chapter II

Low-Intensity Conflict and The International Legal System

by
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I. Introduction

One way of thinking about the legality of actions taken in response to "low-intensity" conflict is to inquire about the limits of State sovereignty. That is, to what extent will the limits of State sovereignty be regarded as absolute and to what extent will they yield to pressures to respond to sustained patterns of terrorism, democide† or massive human rights violations, or even uncontrolled narcotics trafficking? Since I believe that conceptual discussion focusing on "sovereignty" is not the most useful way of clarifying the limits of permissible State intervention and use of force under the Charter — nor, indeed, is it even in the mainstream of the international legal approach to these issues over the last decade — this paper does not examine the low-intensity conflict issue in this "sovereignty" framework. The thrust of the legal realist and postlegal realist jurisprudential movements over the last half century has been to analyze by discrete recurring issues or classes and not principally in terms of doctrinal conceptualization, although the latter approach has continued to exert a pull like that of a distant body receding in space. Moreover, for years now international law has ignored "sovereignty" in imposing minimum human rights standards, and issues concerning the use of force have been dealt with not under the rubric of "sovereignty" but in terms of intervention theory, humanitarian intervention, collective defense and other areas of international concern.

The range of relevant issues or claims concerning the limits of external intervention across the borders of third States in relation to "low-intensity conflict" seems to me primarily to relate at present to three categories, although there are others and each of these three can, in turn, be broken down into sub-categories. These three principal categories are:

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†Coined by Professor Rudy Rummel of the University of Hawaii, democide refers to systematic or widespread acts of murder for any purpose. Its meaning is broader than that specified by the U.N. definition of genocide, from which killing for political reasons was excluded at the request of the U.S.S.R.

a. The extent to which force may lawfully be used to respond to sustained and serious low-intensity aggression, such as continuing State sponsored terrorism, which provides external assistance to insurgents or fuels other "secret warfare." Examples would include the Vietnam War in early stages, the secret war in Central America, ongoing Libyan support for terrorism, the bombing of the United States Embassy and the Marine Barracks in Lebanon and the taking of American hostages (and torture death of some) in Lebanon.

b. The extent to which force may lawfully be used to respond to systematic and major human rights violations, including democide and genocide, whether or not associated with crimes against peace. Examples include the slaughter of civilians in Bangladesh prior to the Indian intervention, Pol Pot's largely ignored democide in Cambodia and, more recently, Saddam Hussein's slaughter of the Kurds.

c. The extent to which force may lawfully be used, if at all, to respond to sustained and intense narcotics trafficking. If, of course, a widely recognized government requests such assistance then there is likely to be little issue under international law, provided such assistance meets the requirements of human rights and other relevant constraints under the law of war. If there is no consent, traditional international law would, in most such settings, deny any right of intervention through direct use of force. The ability of the drug trade to overwhelm and corrupt governments of small nations, and the new alliance of narcotics traffickers with insurgents, may require substantial reevaluation of traditional constraints in this category.

This paper will deal primarily with issues in the first category, although it may have some relevance for discussion of categories two and three. There is, for the most part, a rich literature concerning the principles and limits of humanitarian intervention dealing with category b; although, as we learn more about the prevalence of democide, this is a category that may need rethinking and a liberalization of criteria for response in settings of genuine democide or genocide. Moreover, we certainly could benefit from more effective international machinery to deal effectively with these crimes. Category c is more difficult for generalization and may be more context dependent than even Categories a and b. As this paper illustrates, however, I believe that there is a major conceptual problem in the present approach of many, including some international lawyers, to the Category a problem and, accordingly, this paper focuses on that issue.

While I expect that the theme of this paper will be welcomed by many, it may be unwelcome to others. The task of a scholar, however, is not to please the audience but rather to pursue the truth. The truth we are pursuing here is a truth about how to reduce aggression, whether overt or covert. That is, it is a truth about reducing a major category of war and violence. The importance of truth concerning this critical issue places a special burden on all of us, scholars and policymakers alike, not to simply pursue gentle debate, but rather, vigorous

debate in the search for truth. In my judgment, we are urgently in need of "new thinking" in this area and the real control of low-intensity aggression awaits a broader understanding of a new paradigm. I hope that this paper will at least serve to begin the "new thinking" about the role of law in deterring low-intensity (and high-intensity) aggression even as it is certain to raise the decibel level of the debate.

The simple but important message presented in this paper is that widely held models about the origins and control of violent conflict between nations, including the low-intensity conflict spectrum, are themselves part of the problem in the continuation of such violent conflict. These models are a part of the problem in so far as they lead to a focus on policies that in the real world fail to add to deterrence of the aggressive use of force and, conversely, lead to an avoidance of policies that can make a more substantial contribution to peace.

The central symptom of this problem in the international legal system, as it is presently applied, is the system's all too frequent failure to systematically and strongly condemn the aggressive use of force, particularly in the low-intensity conflict spectrum, while simultaneously and perversely condemning and constraining the use of defensive force in response to such aggression. The net effect in such settings is that the international legal system's contribution to the deterrence of aggression, particularly in the low-intensity conflict spectrum, is virtually zero. Thus, as widely applied, the legal system needlessly becomes largely irrelevant in dealing with a central challenge of our age.

Indeed, in some settings, conventional wisdom, with the best of intentions and the worst of consequences, on balance has actually aided aggression, thus turning the legal system upside down. It is as though the international legal system itself were suffering from a severe auto-immune disorder that has turned on its own defenses to aggression. Fortunately, the cure for the auto-immune disorder, if not to the virus of aggression itself, is relatively simple. The remedy requires clear thinking about the nature of aggression and defense in the international system, coupled with a variety of policies intended to deter more effectively the entire spectrum of aggression. Such policies would include, with respect to the international legal system, enhancing the international systemic response *against aggression* and *in support of defense*, particularly regarding the low-intensity conflict portion of the spectrum. It must be understood that a legal system that treats the defensive response to overt or covert aggression the same as, or more severely than, it treats the aggression itself, is either irrelevant in the real world of conflict avoidance, or worse, it assists the aggressive attack. Unfortunately, though the cure may be simple, it will nonetheless be difficult to reeducate against powerful conventional myths that seemingly promote peace and restraint, but actually, add nothing to—or even undermine—the deterrence of aggression.

II. Low-Intensity Conflict in Context: Competing Models of Aggression and Deterrence

Each generation has a favorite panacea for peace. From the turn of the century until World War I, it was the creation of machinery through which third parties could work to settle disputes between nations. From the aftermath of World War I until the present, there has been a major interest in creating effective international organizations for managing the peace. And from the mid-1960s until the recent revolution in the Soviet Union and its subsequent disintegration, the principal focus of efforts to bring peace in our time have focused on nuclear arms control. Although all of these traditional techniques for war avoidance have an important role to play, third-party dispute settlement and arms control, at least as panaceas, seem to be rooted in the belief that wars originate in disputes between nations, accidents, or spiraling arms races. The inadequacy of this etiology of conflict has led us to underestimate the serious theoretical and real-world difficulties in building effective international organizations to manage the peace.

Within this intellectual tradition, the role of the international lawyer has been seen as one of seeking to reduce the lawful uses of force, thus progressively constraining the defensive response and increasingly treating both the aggressive attack and the defensive response as equivalent offenses against rational opportunities for diplomacy and third-party legal settlement.[1] This mind-set is principally responsible for a majority opinion in the *Nicaragua* case before the International Court of Justice that ignores the evidence of the "secret" or low-intensity Sandinista attack against El Salvador and the apparent perjury of Nicaragua's agent before the Court about Nicaragua's involvement in this attack. It reaches out instead to condemn the lesser United States assistance to the Contras, which was provided in response to Nicaragua's program of covert subversion.

There is today, however, a powerful body of evidence that the principal international wars of the Twentieth Century — World Wars I and II, the Korean War, the Indo-China War, the Falklands War, the Iran-Iraq War, the war in Afghanistan, the conflict in Central America, and the recent Gulf conflict, among others — did not arise principally because of unresolved disputes (although they were a factor), accidents, or "arms races," but rather because of a synergy between two critical and necessary sets of conditions. The first set of conditions involves a typically totalitarian or, at least, non-democratic regime bent on the use of aggressive force to alter the contemporary political or territorial dispensation in fundamental violation of the United Nations Charter. The second set of conditions is a system-wide failure of deterrence. Systemic deterrence is here taken to embrace the strength of international organizations against aggression, the balance of power, military capabilities, defensive alliances, clarity about

intentions to respond to aggression, the strength of the international legal system, and the extent of economic interdependence.

Where an aggressor is absent, as in United States-Canadian and Swiss-French relations, there is no risk of major war, even in the absence of deterrence. Where deterrence is present at effective levels, as it was in the North Atlantic Treaty Organization (NATO) against Soviet power, war can be avoided even if there may be aggressive intent. Importantly, we should also note that the overwhelming majority of aggressive regimes in this century have been totalitarian, or at least non-democratic, and that they tend to exhibit what I have elsewhere called "the radical regime syndrome" of a one-party political system with a repressive internal security system. Indeed, one of the most interesting connections in this respect, is that these regimes are not only aggressors in initiating major wars, but they are also engaged in slaughtering their own people. One current researcher believes that these regimes may have killed about four times the total number of people as have been killed in all of the major wars of the twentieth century combined.[2] Hitler's Third Reich, Stalin's Soviet Union, Ho Chi Minh's Vietnam, and Pol Pot's Kampuchea are examples. In contrast, democratic nations almost never attack other democratic nations or commit democide against their own people.

If this model of a synergy between an aggressive regime (typically a radical regime that is also engaged in democide or other massive human rights violations against its own people) and a system-wide deterrence failure is the principal form of major international conflict in our time, then the policies most used in seriously working for peace are quite different than those which flow from the "conventional" legal, arms control, and peace studies models. The most useful policies include overall political engagement strategies (such as the Commission on Security and Cooperation in Europe (CSCE) process) to seek to promote more democratic regimes around the world as a major component of the foreign policy of democratic nations coupled with a variety of means to *strengthen* system-wide deterrence against aggressive threats from radical regimes. It is of critical importance that we retain the military power to effectively deter such regimes (the Korean War partly resulted from a deterrence collapse driven by a precipitate United States demobilization after World War II); we *must* send clear deterrence signals (here see World Wars I and II; the Korean War; the Indo-China conflict, French and U.S. phases, particularly the U.S. post-Paris Accords phase; the Falklands War; and, most recently and dramatically, the Gulf conflict); and we must strengthen the overall international legal system to severely sanction aggression *and*, just as importantly, to strongly support *defense* against *aggression*.

It is largely the *difference* between the treatment of aggression and the treatment of defense that measures the effectiveness of the legal system in deterring aggression-*not* the degree to which the use of force is outlawed. If an aggressor knows that a potential victim State or its allies will be condemned as much as the

aggressor, if not more, for a defensive response against an aggressive attack, then the real-world legal system that sends the signal is simply irrelevant as a factor in war avoidance; or even worse, it may encourage conflict. This point is so important, and so pervasively misunderstood in much of the legal literature, that I will repeat it with emphasis: *It is largely the difference between the treatment of aggression and the treatment of defense that measures the effectiveness of the legal system in contributing to the deterrence of aggression—not the degree to which the use of force is outlawed.* Moreover, this effect may be magnified when—as the model posits—the non-democratic aggressor is little affected by internal criticism of "legal violations," but the responding democratic nation, precisely because it is democratic, may be substantially inhibited or deterred by such a charge of illegality.

Low-intensity conflict, it should be noted, seems also to fit the "new thinking" conflict model of an aggressive regime/deterrence failure synergy. In major part, although not exclusively, low-intensity conflict is simply a range of actions—from sporadic terrorism through sustained insurgency—pursued by insurgent groups or repressive regimes to attain their aggressive aims. Perhaps the major difference between low-intensity conflict and conventional warfare is that the ambiguity and low visibility of low-intensity attack escalate the effect in the "conventional" model of ignoring the attack and largely focusing the systemic response against the defensive response to the aggressive attack. Only when the aggression is as flagrant as the armored invasion of Kuwait in August 1990—the first effort ever made to aggressively swallow a Member state of the United Nations—does the system clearly condemn the attack and support the defense, and even then the action was opposed by many. Suppose that Iraq had sought the same result through support of an insurgency within Kuwait; would the world community have responded as it did? Would it have responded at all? In this connection it might be noted that one of the "lessons" Libyan leader Moammar Qadhafi seems to have learned from the Gulf conflict is that Iraq should have pursued its objective by an indirect warfare or guerilla strategy. In a recent address to the Benghazi Military Academy, he told the graduates: "Had it [Iraq] sent guerrillas there, they would have occupied the whole region."[3]

III. The Role of Law in Aggression and Deterrence: A Case of Auto-Immune Disease as Applied to the Spectrum of Low-Intensity Aggression

This paper should not mistakenly be read as an attack against international law. I believe that, as intended under the United Nations Charter, a system of law that vigorously condemns aggressive attack, whether overt or covert, and mobilizes in important ways that may predictably be known in advance to support the defensive response against aggression, is of the utmost importance in promoting a more peaceful world. Indeed, I would assert that we greatly underestimate

the important role a revitalized legal system could play. That legal system, however, must get back to basics. Aggression, whether overt or covert, *must* be clearly condemned. Defense, whether overt or covert, *must* be clearly supported and assisted. *And* it must be understood that it is the *difference* between the systemic treatment of aggression and defense that will largely determine whether the legal system will play a significant role in war avoidance.

Sadly, however, there are many reasons to believe that, particularly when confronted with low-intensity conflict, the present international legal system suffers from a severe auto-immune disease that compels it to treat the defensive response more severely than the aggressive attack. Typically, many international lawyers will respond to United States assistance and efforts toward collective defense against low-intensity aggression, such as assistance to the Contras or the raid on Libya, by ignoring the aggressive attack which precipitated the U.S. action and by focusing their objections on the U.S. defensive response. By ignoring the long-term pattern of aggressive low- and mid-intensity attack, these "restrictivist" or "minimalist" international lawyers characterize the response as an illegal "reprisal" to a single incident, or they over narrowly condemn the action as non-proportional, even if, in reality, the action is insufficient to end the continuing low-intensity aggressive attack.

The following excerpts from the legal literature, condemning defensive responses to low-intensity attack, with little focus on the precipitating aggression, provide all too recurrent examples of the auto-immune disease.

One of the best known American international lawyers is Professor Louis Henkin of Columbia University. I will pick on him first precisely because he is one of the most able international lawyers and is not a polemicist. In a recent chapter "Use of Force: Law and U.S. Policy" done for the prestigious Council on Foreign Relations, Professor Henkin argues in support of the majority opinion of the International Court of Justice in the *Nicaragua* Case (and against the dissenting opinion of Judge Stephen Schwebel of the United States): "Extravagant claims of right to act in self-defense have been the principal threat to the law of the Charter."[4] Just think about that one! Does Professor Henkin really believe that World War II (remember that the Kellogg-Briand Pact already incorporated the non-aggression proscription of the Charter along with the right of defense), the Korean War, the Vietnam War, the Soviet invasion of Afghanistan or the recent Gulf conflict (occurring as Professor Henkin wrote his chapter), among others, resulted from difficulties in seriously differentiating aggression from defense? Does he really believe that Hitler, Kim Il Sung and Saddam Hussein were actually confused as to the scope of the right of lawful defense? These "principal threats" to the Charter did not result from an expansion of the right of defense but rather because of a willingness by aggressive totalitarian regimes to commit aggression and a system perceived by them as unlikely to provide effective defense. True to form, Professor Henkin then goes on to

condemn out of hand United States actions in Grenada, Libya, and Nicaragua (which presumably he believes were the "principal threats" to world order. Note in this connection that the United States forces that were killed in the single terrorist act of the bombing of the Marine barracks in Lebanon exceeded United States casualties in all three of these criticized actions combined.). Professor Henkin singles out and condemns these three U.S. actions, despite literature supporting the lawfulness of United States actions in all three conflicts, in respectively three sentences, two sentences and four sentences. Good technique, Professor Henkin—one need not address the merits, factually or legally, of positions contradicting one's world view provided it can be said that the "alleged grounds have been widely challenged" or "the legal justification . . . was widely rejected."[5] Certainly no specific factual or legal reasons for one's conclusions should be given. Professor Henkin further goes on to bring this message home to responses against terrorism—without differentiating whether such terrorism constitutes a sporadic act or an ongoing and sustained low-intensity attack:

> Nor is interstate force the solution to the scourge of terrorism, or even a significant deterrent to it. Little of contemporary terrorism is in fact perpetrated by States; too many States condone it, but surely the law does not—ought not—permit the use of military force against any State that does so. Even where a State is satisfied that another State has in fact perpetrated an act of terrorism against its diplomatic personnel, it is undesirable to permit the victim State to respond by military force against the territory of the perpetrator. The exceptions in article 51 were limited to cases of armed attack that are generally beyond doubt; a State's responsibility for acts of terrorism is rarely beyond doubt and difficult to prove to international satisfaction. Article 51 gives a right of self-defense, a right to use necessary and proportional force to defend against an armed attack. This right does not allow retaliation for past attacks. The response in self-defense to an armed attack must be necessary and proportional; an attack on the territory of a State perpetrating terrorism cannot be a "proportional" response and can hardly be the "necessary" response to defend against an act of terrorism already committed or even to deter future terrorist acts. The international community must develop stronger determination and seek other remedies against terrorism. A State that has been the victim of an act of terrorism will have to pursue other remedies against States that it believes responsible and against the States that encourage, promote, condone, or tolerate terrorism or provide a haven to terrorists.[6]

Professor Falk, who had widely condemned as illegal United States actions in defending South Vietnam against North Vietnamese aggression, wrote an article condemning as illegal the United States/Republic of Vietnam incursion into Cambodia during the course of the Vietnam War despite use of Cambodian sanctuaries by 40,000 regular North Vietnamese troops in attacks against American and Republic of Vietnam forces in South Vietnam.[7]

Professor Jordan Paust condemned as illegal President Ford's actions in the *Mayaguez* seizure, arguing: ". . . the American response was wholly disproportionate to the Cambodian action — an action that was, moreover, lawful."[8]

Professor Francis Boyle has written widely condemning most United States and Israeli uses of force in recent years. Barely do his writings focus on the pattern of low-intensity aggressive attack triggering some of these actions. When Israeli troops went into Lebanon to stop persistent and ongoing terrorist attacks against Israel (not just threatened future attacks) Boyle said that "even assuming the contemporary international legal order still recognizes the regressive doctrine of preemptive self-defense, the Israeli invasion of Lebanon fails to meet that test as well."[9] And when the United States sought to deter Libyan terrorism (and extreme oceans claims) by sending ships of the Sixth Fleet into international waters in the Gulf of Sidra where they had every right to be under international law in both peace and war, Boyle declared the U.S. action a breach of the peace under Article 39, and a threat of force in violation of Article 2(4) of the U.N. Charter.[10]

Specific constraints catalogued by the author that have been urged on the customary law right of defense over the past several decades include the following, among others:

- interpretation of Article 51 of the Charter as limiting the customary law right of defense, particularly arguments that it prevents "anticipatory defense" or defense against action other than a brazen assault;
- arguments that the right of defense does not include response against the territory of a State that is providing major assistance to or directing "indirect" aggression or secret warfare;
- arguments that "proportionality" requirements prevent a response against the territory of a State engaged in continuing low-intensity aggression;
- arguments that effective military responses (whether in the *Mayaguez* case, the Gulf conflict or the Central American conflict) are disproportional;
- arguments that the right of defense under Article 51 ceases once an issue has been referred to the Security Council for action;
- arguments that if a collective defense action does not *immediately* respond to an armed attack (for example it delays three months for a necessary military build-up and an effort at peacemaking) that the right is lost;
- arguments that an occupied country has no one that can lawfully request collective defense assistance on their behalf following a successful blitzkrieg attack;
- arguments that the right of defense in settings of civil conflict (even in the face of illegal assistance to insurgents) should not permit direct involvement of foreign nationals in the defensive military effort on behalf of the Government; and
- arguments that the right of defense under Article 51 of the Charter does not include a right to require unconditional surrender and alter the government in a post-war setting (a restriction that would have come as a shock to the Allies in

> World War II and that may have prevented the successful democratic transitions of Germany and Japan after that war).

Most recently, abundant examples may be found relating to the overt Iraqi aggression in the Gulf conflict. Thus, Professor Abram Chayes questioned whether, following early Security Council resolutions on the Gulf conflict, there was any right of collective defense remaining under Article 51 of the Charter.[11] Professor Al Rubin urged the extraordinary position (effectively supporting quick armored invasions) that following the total occupation of Kuwait there was no lawful Kuwait government to request collective assistance against Iraq's aggression.[12] Professor Oscar Schachter, generally one of the most sensible observers of use of force law and who, in fairness, demolished the Chayes argument, opined with virtually no discussion that the coalition force bombing of Iraq was disproportionate and that it would have been illegal under Article 51 of the Charter for the coalition to have gone to Baghdad and replaced the Saddam Hussein government.[13] Professor Burns Weston, while conceding that the coalition action was lawful, condemned it as resulting from impermissible United States and British arm twisting in the Security Council.[14] Even the Secretary General of the United Nations at one point proclaimed the silly proposition that after three months (to permit the necessary military build-up for an effective response and to give peace efforts a chance) the right of collective defense under Article 51 of the Charter had been lost.[15] And, of course, the usual polemicists were actively at work. Former United States Attorney General Ramsey Clark worked with a "National Coalition to Stop U.S. Military Intervention in the Middle East" and toured the world charging the United States with war crimes and crimes against humanity in its conduct of the Gulf hostilities.[16] A statement by Ramsey Clark said:

> The commission accuses the U.S. of preplanning war, blocking negotiations, controlling the media, manipulating the United Nations, deliberate genocide and other crimes against humanity and violations of the U.N. Charter and international law.[17]

Although Clark had previously expressed an intention to present evidence of Iraqi war crimes in Kuwait, the agenda released for his "war crimes tribunal" included no such testimony.[18]

Similarly, William Arkin, Director of Military Research at Greenpeace, and Director of Greenpeace's Nuclear Information Unit, co-authored a report that focused on the environmental issues in the Gulf War. This report goes lightly on condemnation of Saddam Hussein's illegal environmental terrorism in the Gulf and projects an overall impression that the environmental damage in the Gulf conflict is really an inevitable part of "modern warfare." In a classic, and shockingly anti-environmental, example of the auto-immune disease, this "case

study" would seem to charge the United Nations coalition with causing as much damage to the Gulf's environment as the eco-terrorism of Saddam Hussein.[19]

Incredibly, there are even numerous examples of strenuous governmental efforts to exempt terrorists or others engaged in low-intensity aggressive attacks from normal national criminal justice systems. Neil C. Livingston gives the following account of efforts made by elements within the German government first to prevent the conviction of Mohammed Hamadi for the 1985 hijacking of TWA 847 and the torture murder of U.S. sailor Robert Dean Stethem, and then, to have him released in a hostage exchange after the terrorist was convicted despite their best efforts:

> [P]erhaps the greatest focus of attention has been on the Hamadi brothers, Mohammed and Abbas, who are incarcerated in Germany. Mohammed Hamadi was convicted of the 1985 hijacking of TWA flight 847 and the brutal murder, on board the aircraft, of a U.S. Navyman, Robert Dean Stethem, and in 1989 was sentenced by a German court to "life" in prison. In Germany, a life sentence means that Hamadi has to serve a minimum of 15 years before becoming eligible for parole. His brother, Abbas, by contrast, is serving a 13-year sentence for kidnapping two German businessmen (in an unsuccessful plot to trade them for Mohammed).
>
> In the middle of August, reports surfaced that the German government was willing to release the Hamadi brothers as part of any hostage/prisoner exchange. According to the reports, the Hamadis were to be included in a comprehensive hostage/prisoner exchange brokered by United Nations Secretary General Javier Perez de Cuellar. (President Bush subsequently indicated that he probably would be inclined to approve any deal reached by Perez de Cuellar with the kidnappers.)
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> Senior U.S. officials say that the German government has long been attempting to unload the Hamadis in any case, primarily for political and economic reasons. The continued incarceration of the two brothers complicates German trade with the Arab world. That probably is one of the reasons why, earlier, the then West German government attempted in every way possible to prevent the prosecution of Mohammed Hamadi after he had been located on German territory by U.S. intelligence.
>
> Not only were the Germans reluctant to pick up Hamadi in the first place, U.S. officials pointed out, but the Bonn government demanded, *after* the United States officially requested his extradition, that there be an unprecedented extradition hearing and lineup to establish that the man captured really was Mohammed Hamadi. Incredibly, when the U.S. Attorney for the District of Columbia and U.S. Justice Department representatives arrived in Germany, along with a number of passengers who had been aboard the ill-fated plane, they found that the entire lineup was composed of what one of the terrorized passengers later described as "Hamadi clones." All were approximately the same height and were dressed in similar clothing. They even wore wigs and makeup designed to further obliterate their individual physical differences.
>
> Remarkably, though, the passengers had no trouble picking Hamadi out of the lineup, much to the chagrin of the German government, apparently. It was Hamadi's eyes, the passengers said later—"They were like two burning coals."

> Although it had few equities in the case, the distraught German government took the only action remaining to it to prevent the extradition of Hamadi to the United States: it decided to prosecute him in Germany.
>
> But the tale did not end even there. When it became clear that the evidence against Hamadi was overwhelming, the German government suggested to the United States that Hamadi may not have been an adult when he hijacked TWA 847—that is to say, he was not 21 years of age at the time. This is a crucial distinction in German law, because if he was not 21 at the time of the crime he could have been sentenced as either a juvenile or an adult. Once again, to the dismay of the Germans, the United States easily proved that Hamadi was 21—albeit just 21—when he hijacked the plane. That's when the German government, grasping at straws, suggested that he might not have been 21 when "he first thought of hijacking the plane." To make a long story short, Hamadi was convicted of the crime—thanks to a courageous German prosecutor and court composed of three judges and two lay jurors—and sentenced as an adult to the maximum penalty permissible under German law.[20]

In contrast to this typical "old thinking" among many international lawyers—and governments, I believe that, in reality, when faced with an ongoing pattern of aggressive attack, it is certainly within the right of individual and collective defense to take necessary and proportional actions to effectively end the attack, whether those actions are overt or covert.[21] This right of defense *is* classic international law, not the fashionable contemporary inversion of this principle. Indeed, if we are serious about peace in our time, it is as incumbent upon the international system as a whole to *ensure* effective deterrence against the low-intensity spectrum, and, for example, against Libyan terrorism worldwide and a continuing pattern of Iranian-encouraged hostage-taking, as it is to deter Korean War or Gulf conflict style armored invasions.

IV. Recommendations for Strengthening the International Legal System to Deal More Effectively with Low-Intensity Aggression

Recommendations for strengthening the international legal system to deal with low-intensity aggression follow clearly if we have an accurate model of the most serious international conflicts. Thus, all of the following suggestions should be useful, as opposed to approaches that may make us feel virtuous but in the real world have little effect on promoting peace. These recommendations construct, in many respects, a prescription for promoting peace - - in so far as we can - - in our time, and as such, may be thought of as helpful in promoting a "new world order."

A. While seemingly "weak," one of the most powerful foreign policy initiatives for the democracies is to systematically "engage" totalitarian regimes with the fundamental principles of the rule of law and democracy. The recent "rule of law" Charter of the Copenhagen round of the CSCE process points the

way.[22] This observer, for one, believes that the recent democratic revolution in the Soviet Union probably resulted considerably more from influences stemming from the Helsinki human rights engagement process than from the entire history of U.S.—USSR arms control efforts. "Rule of law engagement" seeking to influence governments to move toward democratic principles will *not* be an overnight process. In this respect, a shift is already under way in U.S. foreign policy to encompass rule of law engagement, but requires even greater emphasis.[23]

B. The United States, in coordination with other democratic nations, must seek to *greatly* reinvigorate international condemnation of aggressive attack, whether overt or covert, and simultaneously must work to *greatly* reinvigorate the right of and support for defense against such aggression. These principles, if we make them twin *core* principles of democratic nations' foreign policy, have considerable ability to add to deterrence against aggression.

C. In connection with strengthening the international system *against aggression* and *in support of defense* against aggression, we must apply these principles clearly to the low- and mid-intensity conflict spectrum. We must redouble efforts to condemn terrorism, hostage-taking, and aggressive indirect warfare and to support the full range of proportional defensive responses, overt and covert, against low-intensity and indirect aggression.

D. A few illustrative initiatives that might be taken internationally in support of the above goals include the following:

(1) The United States should consider creating a rule of law caucusing group within the United Nations system, gathering together nations from all regional groups which are prepared to support the above objectives. The purpose of this group would be to serve as a focal point within the United Nations system to move the UN system, and the whole world, toward recognition of the importance of the rule of law nationally and internationally.

(2) The United States should coordinate with its allies to issue a statement repudiating the upside down majority opinion of the International Court of Justice in the *Nicaragua* case, giving reasons as to why that decision, although well-meaning, actually encourages aggression in the real world.

(3) The United States should seek to coordinate common democratic nation "white papers" exposing radical regime campaigns of low-intensity conflict, including attempted governmental takeovers, hostage seizures, and terrorism that is directed against civil aviation and other targets.

(4) The United States should initiate a serious international effort to explore ways to meaningfully encourage deterrence applied at a personal level to regime elites engaged in international aggression, whether low-intensity or high-intensity. An effort at holding war crimes trials for Saddam Hussein is one example of seeking to apply personal-level deterrence. Deterrence of aggression must include deterrence of *regime elites*, particularly in radical regime settings. We have for too long focused on deterrence against a nation as an undifferentiated totality. To the extent

that the radical regime syndrome is a major component of the problem, however, it may even be that radical regime elites should be the primary focus of democratic nation deterrence strategies.

(5) Consistent efforts should be made internationally to foster understanding that the low-intensity conflict spectrum, as with the high-intensity spectrum, requires policies that will ensure effective deterrence. Without strategies of effective deterrence, it can be expected that low-intensity, State-sponsored violence will continue and possibly accelerate. I, for one, believe that the generally weak response of democratic nations to such low-intensity attack over the last three decades is a major part of the synergy contributing to the continuation of such attacks.

E. Finally, there is a series of actions that the United States and all democratic nations must undertake when responding to low-intensity aggression if their actions are to foster broad international understanding:

(1) *Before* any defensive response is undertaken to an ongoing pattern of low-intensity attack, the United States should present evidence of the aggressive attack before the Security Council of the United Nations and notify the Council that if the aggression continues, the United States will take appropriate action in response under Article 51 of the Charter. (Note that, consistent with protecting intelligence sources and methods, notification need not include *all* of the evidence of the attack.) This notification requirement is a legal obligation for a defensive response, and if it is neglected, the United States action will be politically harmed. Whether the action to be undertaken in response to aggression is overt or covert, it is not necessary to identify precisely what it will be or when it will take place. The occasion of Security Council notification should be used as a critical opportunity for generating public awareness of the nature of the continuing aggressive attack. If necessary, the evidence should be repeatedly presented before the Security Council.

(2) In cases of defensive response against low-intensity attack, it is particularly important to indicate that the response is in defense against an ongoing and *sustained pattern of attack, not* merely a response to what may have been the latest bombing or other terrorist attack in a series.

(3) It is very important that United States spokesmen clearly and consistently base responsive defensive actions in Article 51 of the United Nations Charter. Such an action should *not* be called a reprisal or anything other than a defensive response against ongoing armed aggression.

(4) Defensive actions should be carefully planned to be consistent with the laws of war and should be proportional, while employing adequate levels of force to quickly prevail and deter for the future. Too little force does not deter and simply discredits the defensive response. The Gulf defensive effort generally provides a good example of an appropriate response. Similarly, it is essential that governmental spokesmen fully respond in detail to the usual disinformation efforts suggesting that such responses are non-proportional or illegal. The defensive effort, if it is to effectively prevail, must also win the associated political struggle.

V. Conclusion

Secret aggression in the low- and mid-intensity conflict spectrum is one of the most serious world order threats of our age. Because of a drumbeat of propaganda concerning political objectives of the attack, coupled with obscure public perceptions of the origins of the attack, and a pervasive mirror-imaging of aggression simply as a "dispute" requiring third-party resolution, the international system tends to ignore the aggressive attack while condemning the more visible defensive response. If, however, we are to discourage the low-intensity portion of the aggressive attack spectrum, then, as with overt aggression, it is essential that we understand the need for effective defense and deterrence against such attack. The international legal system can contribute to such deterrence in a substantial manner if, but only if, we make a strong *distinction* between the treatment of aggression and defense, whether overt or covert. That is, we must strengthen the international legal system to *strongly condemn* aggressive attack, whether such an attack is in the form of low-intensity terrorism, or hostage-taking, or armies on the march. Just as importantly, the system must be strengthened to *strongly support* the defensive response against such aggression, whether such a response is overt or covert.

Notes

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1. A recent example of the tendency of some international legal scholars to ascribe war to the unavailability of dispute settlement machinery is contained in an article on the World Court by Professor Robert E. Lutz II. Professor Lutz writes, in the immediate aftermath of the Gulf conflict, with the best of intentions and within the prevailing myth system of our profession:

> Despite the commitment of nations to "settle their disputes by peaceful means," the drastic and ultimate dispute-settlement method of war has been used once again to resolve an international dispute—this time in the Middle East. One might hope that the hell of war, and the destruction it inflicts upon innocent populations and humanity generally, would have eliminated it as a viable instrument for resolving international disputes at this advanced stage of world history. Yet even with mankind's vast experience with war's horrors and waste, the world community has been unable to channel all international disputes into peaceful resolution processes. Because of the concept of sovereignty and the role that States play in the international system, States may give or withhold their consent to the jurisdiction of third-party dispute-settlement regimes or the submission of their interstate conflicts to the variety of intermediary dispute-settlement procedures. Thus, when a State resists in giving its consent, a dispute may either with time go away, fester and possibly escalate, or become the subject and justification for the use of coercive measures by the complainant-State, which, in many cases, would be considered violations of international law.

Lutz, *Perspectives on the World Court, the United States, and International Dispute Resolution in a Changing World*, Int'l Law. 657, 675-76 (Fall 1991) (footnotes omitted). Apparently Professor Lutz is unaware that Kuwait had offered to submit any border issues to the International Court of Justice. Moreover, many other third party dispute settlement techniques were available to Iraq, including conciliation or mediation by regional Arab leaders. The Gulf conflict did not arise from an absence of available third party dispute settlement machinery. Nor did it even arise from any reasonably perceived "dispute."

2. *See* RUMMEL, LETHAL POLITICS: SOVIET GENOCIDES AND MASS MURDERS SINCE 1917 (1990).

3. House Republican Research Committee Task Force on Terrorism & Unconventional Warfare, *Libyan Terrorism* 5 (Jan. 7, 1992).

4. Henkin, *Use of Force: Law and U.S. Policy*, in RIGHT V. MIGHT: INTERNATIONAL LAW AND THE USE OF FORCE 37, 50 (1989).

5. *Id.* at 54.

6. *Id.* at 62.

7. Falk, *The Cambodian Operation and International Law*, in *III* THE VIETNAM WAR AND INTERNATIONAL LAW: THE WIDENING CONTEXT 33, 50 (Falk ed. 1972). Compare this view with Moore, *International Law and the United States Role in Vietnam: A Reply to Professor Falk, reprinted in* MOORE, LAW AND THE INDO-CHINA WAR 403-457 (1972).

8. *See* Paust, *The Seizure and Recovery of the Mayaguez*, 83 Yale L. J. 774, 774-81, 795-803 (1976).

9. BOYLE, DEFENDING CIVIL RESISTANCE UNDER INTERNATIONAL LAW 335 (1987).

10. *Id.* at 332.

11. Chayes, *The Use of Force in the Persian Gulf* (paper prepared for the U.S.-Soviet Conference on the Non-Use of Force, October 4-6, 1990, copy in possession of author).

12. Rubin, *Iraq, Kuwait, the United Nations and World Order*, Int'l Practioner's Notebook 18 (Feb. 1991).

13. Schachter, *United Nations Law in the Gulf Conflict*, 85 Am. J. Int'l L. 452 (1991).

14. Weston, *Security Council Resolution 678 and Persian Gulf Decision Making: Precarious Legitimacy*, 85 Am. J. Int'l L. 516 (1991). Compare this view with the recent unpublished paper by Professor Inis Claude entitled *Collective Security after the Gulf War*, prepared for the Army War College Conference April 1992, which concludes that great power pressure may even be a *requirement* for an effective United Nations stand against aggression.

15. *See also* Yoxall, *Iraq and Article 51: A Correct Use of Limited Authority*, The Int'l Law. 967, 985 (1991). "While Article 51 might have supported an offensive counterattack on Iraq in early August, by mid-October that option no longer existed." *Id.*

16. *See Ramsey Clark's Crusade*, Legal Times (Sept. 2,1991) at 3.

17. "Benn blames war on U.S. bid to control Iraqi oil," The Press Association Limited, Press Association Newsfile, December 1, 1991.

18. *Anti-War Tribunal Blasts Bush, U.S. Military for Gulf War*, Reuters News Service, May 11, 1991.

19. Arkin, Durrant, & Cherni, *On Impact: Modern Warfare and the Environment—A Case Study of the Gulf War* (May 1991). (A Greenpeace Study).

20. Livingston, *Straight Talk About National Principles*, Sea Power 21-22 (October 1991).

21. See the authorities collected in MOORE, THE SECRET WAR IN CENTRAL AMERICA (1986) and the dissenting opinion of Judge Schwebel in the Military and Paramilitary Activities Case (Nicar. v. U.S.), 1986 I.C.J. 14, 259, 334, para. 167. *See also*, for one of the best general treatments of this subject, MCDOUGAL & FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER (1961) and Erickson, *Legitimate Use of Military Force Against State-Sponsored International Terrorism*, Air Univ. Press, July 1989.

22. *See Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, June 1990*, U.S. Commission on Security and Cooperation in Europe, Washington, D.C.

23. For the intentional breadth of the concept of "rule of law" here, see Moore, *The Rule of Law: An Overview*, presented to the Seminar on the Rule of Law, Moscow and Leningrad, USSR, March 19-23, 1990. The author presented this paper while serving as Co-Chairman, with the U.S. Deputy Attorney General, of the U.S. Delegation to the Moscow—Leningrad Seminar on the Rule of Law.

The "rule of law," as intended here, explicitly does not mean observing the legal niceties on the way to the Gulag. Rather, the principal fundaments of the rule of law are:

- government of the people, by the people, and for the people; [for the origin of this phrasing, see Abraham Lincoln, Gettysburg Address (Nov. 19,1863.), *See also* the French Constitution]

- separation of powers and checks and balances;

- representative democracy and procedural and substantive limits on governmental action against the individual (the protection of human freedom and dignity);

- limited government and federalism; and review by an independent judiciary as a central mechanism for constitutional enforcement. Moore, *The Rule of Law: An Overview, supra.*

For an example of rule of law engagement incorporated into contemporary U.S. foreign policy, see *National Security Strategy of the United States*, August 1991, at 14, col. 1 (U.S. Government Printing Office, 1991).

Recent history has shown how much ideas count. The Cold War was, in its decisive aspect, a war of ideas. But ideas count only when knowledge spreads. In today's evolving political environment, and in the face of the global explosion of information, we must make clear to our friends and potential adversaries what we stand for.

The need for international understanding among different peoples, cultures, religions and forms of government will only grow. In a world without the clear-cut East-West divisions of the past, the flow of ideas and information will take on larger significance as once-isolated countries seek their way toward the international mainstream. Indeed, information access has already achieved global proportions. A truly global community is being formed, vindicating our democratic values.

Through broadcasts, academic and cultural exchanges, press briefings, publications, speakers and conferences, we engage those abroad in a dialogue about who and what we are, to inform foreign audiences about our policies, democratic traditions, pluralistic society and rich academic and cultural diversity. We will increase our efforts to clarify what America has to contribute to the solution of global problems, and to drive home democracy's place in this process. *Id.*

Chapter III

State Sovereignty, International Law, and the Use of Force in Countering Low-Intensity Aggression in the Modern World

by
Robert F. Turner*

Introduction

The end of the Cold War and the success of Operation Desert Storm have substantially reduced the likelihood of United States forces having to engage in hostilities at the upper end of the conflict spectrum. World War III and an accompanying nuclear holocaust are no longer perceived as serious threats to our security. If the coming years bring an end to Leninist rule in China, Cuba, Vietnam and North Korea, much of the impetus behind modern day low-intensity conflict may also be behind us.

Unfortunately, however, there remain a variety of political and para-military organizations around the world who have either severed their ties to the old Leninist establishment or who developed independently of that tradition. In particular, the growing synergism between terrorist organizations and drug cartels poses a serious threat to the peace of the international community. There are other low-intensity threats as well.

This paper will provide an overview of the modern law of sovereignty, and discuss its implications as a constraint on U.S. Government low-intensity conflict doctrine, and raise a few related issues which might provoke discussion and even encourage some new thinking about how we promote peace in a changing international environment.

The Importance of Reciprocity and Good Faith in International Law

Before turning to an examination of the historic development of the doctrine of sovereignty and its modern content, a few words of caution are in order. As we assess our strategic options, we must resist the temptation to destroy our values in order to save them. We need to remain cognizant that any new principles of

international law we decide to embrace must apply universally across the spectrum of nations in the world community. Before the United States claims a right to enter foreign territory to deal firmly with terrorists or drug lords, we need to consider the consequences of making lawful similar conduct by the governments of Saddam Hussein, Moammar Qadhafi, and other radical regimes who may have a different concept of who is a "terrorist." Above all, while there may well be instances in which the United States concludes it must depart from the rules of international law in defense of its national security, we should keep in mind the tremendous benefits we receive from the existence of a stable world legal order and make every reasonable effort to preserve and nurture this maturing instrument of peace and justice.

Maintaining the Jeffersonian Tradition of Honor and Justice

As Sir Thomas More acknowledged, the temptation to "strike down all the laws of England" to get at "the Devil" is a great one; but we must resist that temptation and recognize that living in a world governed by an effective rule of law is in our long-term national interest.

To be sure, Thomas Jefferson acknowledged that there may be extreme circumstances in which the rule of law must give way to the survival of the nation. In an 1810 letter to J.B. Colvin, Jefferson wrote:

> A strict observance of the written law is doubtless one of the high duties of a good citizen, but is not the highest. The laws of necessity, of self-preservation, of saving our country when in danger, are of higher obligation. To lose our country by a scrupulous adherence to written law, would be to lose the law itself, with life, liberty, property and all those who are enjoying them with us; thus absurdly sacrificing the end to the means.[1]

Professor W.E. Hall went even further, appearing to argue that international law permitted virtually any measure that was necessary for a State's survival.[2] But such situations are extremely rare, and when we are tempted to twist the rules a little to promote what we perceive to be the interests of our nation, we need to carefully comprehend and weigh the costs associated with being regarded as a lawbreaker by other nations in the world community. To this, as well, must be added the risks of inadvertently modifying the accepted rules of international behavior in ways that might benefit radical regimes and other potential aggressors.

A valuable part of the diverse legacy left us by Jefferson was a well thought out philosophy of foreign relations. His foreign policy was premised upon two complementary ideas: (1) peace through justice, and (2) peace through strength. We would do well to emulate his approach to world affairs.

Unlike many of his contemporaries and others even today, Jefferson recognized that abiding by the rule of law was in the long-term self-interest of sovereign states. In a letter to his friend Lafayette, written on 2 April 1790, Jefferson wrote:

> I think . . . that nations are to be governed with regard to their own interests, but I am convinced that it is their interest, in the long run, to be grateful, faithful to their engagements, even in the worst of circumstances, and honorable and generous always.[3]

Similarly, in an 18 April 1793 "Opinion on whether the US had a right to renounce treaties with France following the French Revolution," Secretary of State Jefferson argued:

> Compacts . . . between nation and nation, are obligatory on them by the same moral law which obliges individuals to observe their compacts . . . [I]t is true that nations are to be judges for themselves; since no one nation has a right to sit in judgment over another, but the tribunal of our conscience remains, and that also of the opinion of the world. These will review the sentence we pass in our own case, and as we respect these, we must see that in judging ourselves we have honestly done the part of impartial and rigorous judges.[4]

This emphasis upon morally upright behavior was reflected in much of Jefferson's writing. In a letter to James Madison—who served as Jefferson's Secretary of State and succeeded him as President—Jefferson wrote on 19 April 1809: "[I]t has a great effect on the opinion of our people and the world to have the moral right on our side."[5]

In a 28 July 1791 letter to William Short, who had been his private secretary in Paris and was then American *chargé d'affaires* in Paris, Secretary of State Jefferson said: "If there be one principle more deeply rooted than any other in the mind of every American, it is, that we should have nothing to do with conquest."[6] As we seek legal solutions to the complex challenges we face in the low-intensity conflict environment, it is imperative that we not lose sight of this "peace through justice" compass.

Jefferson's "peace through justice" theory was complemented by a well-reasoned belief in the need for military strength. In a 23 August 1785 letter to John Jay—who served as Secretary of Foreign Affairs in the Continental Congress—Jefferson reasoned:

> Justice . . . on our part, will save us from those wars which would have been produced by a contrary disposition. But how can we prevent those produced by the wrongs of other nations? By putting ourselves in a condition to punish them.

> Weakness provokes insult and injury, while a condition to punish, often prevents them. This reasoning leads to the necessity of some naval force; that being the only weapon by which we can reach an enemy. I think it to our interest to punish the first insult; because an insult unpunished is the parent of many others. We are not, at this moment, in a condition to do it, but we should put ourselves into it, as soon as possible.[7]

How far can the United States go in its efforts to promote justice in the struggle against terrorism, narcotics, and other important threats without unacceptably infringing upon the sovereign rights of other States? As we ponder this important question, we ought to bear in mind that the underlying principle of "non-intervention" currently embodied in Article 2(4) of the U.N. Charter was a key element in early U.S. foreign policy. On October 24, 1823—about a month before the promulgation of the Monroe Doctrine—Jefferson wrote a letter to President Monroe praising the proposed remarks:

> Our first and fundamental maxim should be, never to entangle ourselves in the broils of Europe. Our second, never to suffer Europe to intermeddle with cis-Atlantic affairs. America, North and South, has a set of interests distinct from those of Europe, and peculiarly her own. She should therefore have a system of her own, separate and apart from that of Europe. While the last is laboring to become the domicile of despotism, our endeavors should surely be, to make our hemisphere that of freedom. . . . *Nor is the occasion to be slighted, which this proposition offers, of declaring our protest against the atrocious violations of the rights of nations, by the interference of any one in the internal affairs of another . . . .*[8]

This idea of prohibiting "the interference of any one [State] in the internal affairs of another" was a radical concept when proposed by Jefferson, but it was a sound principle and is now embodied in both customary and conventional international law. On occasion, it may act as an impediment to otherwise attractive measures to address problems of low-intensity aggression. As we seek solutions to these serious threats to our national security, we ought to make every effort to leave intact the fundamental prohibition against interfering in the internal affairs of other States.

The Dual Significance of Reciprocity

Policymakers need to keep in mind the important legal concept of reciprocity. Two aspects of this concept are relevant to the topic before us. The first is the reality that any "loopholes" in existing law we find to exploit and any new principles of customary law we help to forge will be available for the world's radical regimes and other potential adversaries to use in their relations with us. The second draws upon Jefferson's observation that law is a "means" and not the ultimate "end" of policy, and we should keep in mind that the United States

entered into the legal regime established by the U.N. Charter with a clear warning that we expected other States to abide by the same set of rules. If our fundamental national interests are jeopardized because we choose to compete by the "rules" against adversaries who accept no such constraints, the time may come when we need to reassess our own adherence to the "rule of law" with respect to those particular outlaw States.

The first point is an important one. The current regime of international law is premised upon the "sovereign equality" of all States, irrespective of size or power.[9] While in fact there are some exceptions to this fundamental doctrine,[10] as a general proposition any legal right claimed by the United States must also be given to Iraq, Iran, Libya, and every other State in the world—perhaps in a somewhat different or even broader scope than initially envisioned by the United States.

There is an understandable temptation to resort to "long arm" statutes claiming extraterritorial jurisdiction to permit serious punishment of foreign drug kingpins or terrorists, and in some situations this may be warranted. In a related vein, like many other States, the United States accepts what we call the *Ker Frisbie* Doctrine, which permits courts to try properly accused individuals irrespective of the fact that the defendant has been brought before the court by kidnapping or other wrongful use of force from another jurisdiction. Thanks to these rules, Mexican druglord Rene Martin Verdugo-Urquidez has been convicted in a California court for the torture and murder of U.S. Drug Enforcement Agency agent Enrique Camarena.[11] Most Americans undoubtedly approve of this outcome, and the fact that Verdugo was apparently seized unlawfully in Mexico by agents of the U.S. government may seem irrelevant.

But ponder for a moment how the United States would likely view an effort by Iraq to carry out a "long arm" criminal statute which pronounced a penalty of death for any individual who took part in the sinful business of producing or marketing alcoholic beverages if such beverages were smuggled into Iraq in violation of that nation's municipal law. Certainly we may feel that narcotics are a greater threat than alcohol, but subjectively Iraq might reasonably group both drugs together. (After all, many of the early treaties designed to regulate opium smuggling also prohibited commerce in illegal alcoholic beverages). And while the United States may well have sufficient procedural guarantees to safeguard the rights of innocent defendants, international law does not require that Iraq adopt an exclusionary rule or even a trial by jury before a capital sentence may be executed. Unilateral efforts to deal with international criminal conduct have inherent risks. The wise policymaker needs to weigh the potential consequences before embracing creative new unilateral "simple solutions." While getting agreement by other States may be difficult, there are clear advantages to taking a multilateral approach when that is possible. Indeed, there are benefits to exhausting

multilateral options even when it is clear effective action at that level will be blocked.

With respect to the second point, I want to make it clear that I am not urging the United States to become a lawbreaker in order to deal with current low-intensity conflict problems. We receive tremendous benefits as a nation from living in a world governed by the rule of law, and we ought to go to great lengths to uphold the principles which we embraced in San Francisco in 1945. However, if the world community proves unwilling or unable to give teeth to the Charter—particularly in respect to its prohibitions against armed aggression—the time may come when we need to adapt to the rules of our adversaries. Indeed, this was the expectation of Senator Arthur Vandenberg, who co-chaired the U.S. Delegation to the 1945 San Francisco Conference and later helped persuade the Senate to give its advice and consent to ratification of the U.N. Charter. In presenting the treaty to the Senate, Vandenberg said:

> I want a new dignity and a new authority for international law. I think American self-interest requires it. But . . . this also requires whole-hearted reciprocity. In honest candor I think we should tell other nations that this glorious thing we contemplate is not and cannot be one-sided. I think we must say again that un-shared idealism is a menace which we could not undertake to underwrite in the postwar world.[12]

It would be immoral for the law-abiding and peace-loving members of the world community to sit idly by out of respect for the rule of law while lawbreaking States carry out repeated acts of unanswered aggression. We hope that the international peacekeeping system will be strong enough to respond effectively to aggression; but if it fails, at some point it may become necessary for us to tell flagrant aggressors that we have no choice but to play by their rules.[13] This, I believe, is essentially what the United States did during the Reagan Administration in dealing with Soviet and Cuban intervention in Nicaragua, the Soviet invasion of Afghanistan, and other elements of the so-called "Reagan Doctrine."[14] International law is at present still an imperfect means of maintaining international peace, and by informing a particularly notorious lawbreaker State that we have no choice but to play by the rules of behavior it has selected, we may ultimately promote *greater* respect for the rule of law by providing aggressor States with an incentive to obey the established rules of international behavior.

Benefits Of Multilateral Approaches

International law does not favor the use of armed force by individual States, and even when self-defense provides a full legal justification for military measures there is an understandable preference for multinational solutions. Obviously, if the United States or a key ally were to be attacked by a major military force, few

would argue with our taking defensive measures as a means of protecting our interests. But even in that situation, it would be in our interest to raise the matter at once in appropriate international organizations (e.g., U.N. Security Council or OAS).

First of all, this provides evidence of good faith on the part of the United States and signals our preference for multilateral responses to armed aggression. Secondly—particularly if the world community understands that the alternative to collective action will be unilateral U.S. action—there is always a chance that we will gain the support of the world community and they will share in the costs of deterring or defeating the aggression. Each time the U.S. bypasses the machinery of international law it helps to undermine that structure, and in the long-run it is clearly in the United States' interest to have an effective world collective security mechanism.

There are obvious advantages of taking a multilateral approach. Consider, for a moment, the case of Libya and the terrorist attack on Pan Am Flight 103. If the powerful United States sent a naval armada to the Gulf of Sidra to pressure Libya into handing over the accused terrorists, many nations would view this as "power politics" as usual—a superpower bully imposing its will on a relatively weak Third World State. By having the U.N. Security Council take the lead, the case becomes not "United States v. Libya" but "The World Community v. Libya," and a charge by the Security Council that Libya is guilty of State-sponsored terrorism is *far* more persuasive to most neutral observers than would be a unilateral U.S. charge. Even if the United States in the end has to act unilaterally, the fact that the Security Council tried without success to compel Libya to fulfill its international responsibilities will likely strengthen the U.S. hand if force ultimately is necessary.[15]

When the United States is forced to go it alone—for example, in situations in which another permanent member exercises its veto in the Security Council—it is important that we have the maximum possible support from our own people and from the people and governments of the world. The knowledge that the U.S. sought to utilize the established international machinery before resorting to unilateral force should strengthen its hand in the struggle for public support.

If We Must Break the Law—Mitigating Systemic Damage

As Secretary of State Jefferson noted,[16] law is a "means" and not the ultimate "end" of society. It is a tremendously important means, and the United States should do nothing to undermine the continued development of international law if we can avoid it. But—particularly given some of the current shortcomings or weaknesses of the law—there may come a time when we must act contrary to our treaty or other international law obligations. In that event, it is important

that we do as little long-term damage to the legal system as possible. Breaches of the law should not be undertaken lightly—they should be limited to the least possible violation of the law that is consistent with protecting the vital interests of our country. We should not twist the rules to pretend to justify unlawful conduct.

If the United States does at some point find it necessary to step outside the current regime of international law to deal effectively with a particularly heinous lawbreaker, it is imperative that we do everything reasonably possible to explain our actions and reaffirm our strong commitment to the principles of international law. We should at the outset acknowledge openly that "special circumstances" have required us to depart from accepted rules of behavior to safeguard fundamental national security interests that have been endangered by the flagrantly unlawful conduct of another State. Such candor is greatly preferable to the pretense that our actions can be somehow reconciled with established norms of behavior among States, which could pave the way for an undesirable change in the rules of international conduct. The U.S. intervention in Panama in December 1989 may provide an example of how not to handle the "special case" situation. This issue will be discussed below.

Considerations of Equity

Related to this kind of extraordinary situation is the question of *equity*. Among the three primary (and co-equal) sources of international law recognized by Article 38 of the Statute of the International Court of Justice are "the general principles of law recognized by civilized nations," and both Judges on the Court and leading scholars have recognized that—in the words of the late Wolfgang Friedman—"equity is part and parcel of any modern system of administration of justice."[17]

The principles of equity may provide some legal basis for the United States to deal with radical regimes or aggressor nations outside the normal rules of international behavior. When Japan invaded Manchuria in 1931, Secretary of State Henry Stimson announced his "Stimson Doctrine" which was subsequently embraced by the League of Nations and a large number of legal scholars. In essence, it provided that the wrongful territorial gains of illegal aggression would not be recognized by the law-abiding world. I believe that the so-called "Reagan Doctrine" was, in effect, a *corollary* to the Stimson Doctrine, in that the United States refused to give regimes which had recently come to power in flagrant violation of the use of force provisions of the Charter, or which were engaged in flagrant violations of those provisions in an effort to overthrow other governments, the normal protections provided by international law to law-abiding States.

As I will discuss below, I believe the April 1986 air attack on terrorist targets in Libya was consistent with the doctrine of self-defense recognized in Article 51 of the U.N. Charter. But, even were it an arguable breach of the law, a case can be made that Libya should not be allowed by the World Court to raise a claim against defensive measures of self-help by other States so long as the important principles of necessity and proportionality have been satisfied.

At the root of this suggestion is the idea that a State which refuses to constrain its own conduct to the most fundamental rules of international law should not be permitted to further weaken its victims by persuading the world community to punish a defensive violation of the same rules. Why should the world community accept such an approach? First of all, it is fair and equitable. But almost of equal importance, such a rule would also strengthen deterrence and provide additional incentives for radical regimes to comply with the law of the Charter. It is well documented that the government of Libya significantly curtailed its support of international terrorism in the months following the 1986 American attack,[18] and it is difficult to argue that the attack did not ultimately contribute to strengthening compliance with the rule of law. As already noted, Senator Vandenberg emphasized in 1945 that U.S. acceptance of the law of the Charter was premised upon reciprocal compliance by our adversaries;[19] and if other means of dealing with terrorism and other forms of low-intensity aggression prove inadequate and require defensive measures of questionable legality, it might be useful to explore equitable defenses.

The doctrine of "unclean hands" denies equitable relief to a petitioner whose own conduct broke the rules or was unfair. Until more effective means can be developed to compel radical regimes to comply with their international legal obligations not to engage in terrorism or otherwise use aggressive force, it would seem to be a reasonable request to ask that international law not direct its immunity system against a peace-loving State which simply seeks to defend itself (or other victims) against such unlawful aggression. In reality, I believe that most necessary and proportional "defensive" responses to international terrorism or other forms of low-intensity armed aggression will be permissible under the theory of self-defense, but not all lawyers will agree. It therefore might be useful to complement a claim of self-defense with the argument that, even if the defensive response exceeded the limits envisioned by the authors of the Charter, the initial aggressor—who has chosen not to abide by its clear international legal obligations—ought not be able to further weaken the victim(s) of its aggression by using legal measures against their defensive response. The most basic principles of equity recognize the unfairness of such an approach, and the United States should reaffirm the idea that equity is a part of international law.

There is a clear problem with this approach. Fundamental principles of equity might well preclude Libya from bringing a claim against the United States for a "reciprocal breach" of the use of force provisions of the Charter.[20] However,

those provisions are clearly peremptory norms of international law (*jus cogens*). As such, a violation is an offense against not only the target of the use of force but every other State as well. Since there is universal jurisdiction over violations of Article 2(4), even if an equity defense could prevent Libya from prevailing in a claim it would not necessarily guard against a claim by another State that had not violated the Charter. Nevertheless, in terms of public perceptions of fairness, the equitable argument is, in my view, a strong one; and to the extent that arguments of self-defense are questionable it would be useful to accompany them with an appeal to equity.

Importance of Public and Congressional Understanding and Support

Before turning to the issue of sovereignty, one other comment may be in order. No major foreign policy initiatives are likely to succeed in a democracy unless understood and supported by the people. This same principle suggests the utility — irrespective of legal requirements[21] — of keeping Congress informed about such initiatives. Further, we must keep in mind that support in other countries — by governments and the public alike — for U.S. foreign policy initiatives is valuable and fully justifies the investment we should make in public information efforts.

Mr. Jefferson was certainly right when he spoke of the importance of having "the moral right on our side"[22] as we seek to earn the support of our own people and those of other countries. Often our policies are clearly just and little explanation is necessary, but there are frequent situations in which these policies only make sense to people familiar with the factual background. This is especially true when force is used in defense against a low-intensity form of aggression, as often the world community and even our own people will not be aware of an initial covert campaign of aggression.

For example, few Americans knew the details of Nicaraguan efforts to overthrow the governments of El Salvador and other neighboring States, nor was Libyan involvement in State-sponsored terrorism fully appreciated at the time of the April 1986 U.S. military attack. As a result, a large number of patriotic Americans were misled into believing that their government was engaged in unprovoked and illegal aggression in both instances. Even if this opposition does not block the success of the policies which inspired it, public opposition to government programs is cumulative and can undermine subsequent unrelated programs.

This means that psychological/political warfare is critically important to any sound low-intensity conflict strategy, and those charged with such responsibilities must either be educated in the law of nations pertaining to the use of armed force or have ready access to individuals who are highly knowledgeable in this area.

There is already a considerable amount of distrust of the government within the academic international law community, and for the past two decades it has been common for legal scholars to criticize governmental decisions to use force. Sadly, even when the government is clearly justified in its decision to resort to force, if its legal justification for the action is misstated, the critics will not hesitate to attack the justification.[23] Therefore, the task of setting forth the moral and legal justification for any potentially controversial use of force should be entrusted to individuals with sound scholarly training and an appreciation of the fact that credibility depends upon complete accuracy and honesty in setting forth the case.

The Concept of Sovereignty

The concept of sovereignty carries with it the idea of supremacy or independence from external control. In an absolute form, sovereignty would clearly preclude the existence of a meaningful system of international law. It affects not only the permissibility of one State using force against another, but also the right of victims of armed aggression to act within the boundaries of other States in the interest of peace. To understand the modern concept of sovereignty, it is useful to review briefly the intellectual origins of the concept and its development over the years.

Early Views Of Sovereignty

It is speculated that William of Ockham (1270-1347) may have been the first to put forth the concept of "popular sovereignty," a view held almost contemporaneously by Marsilius of Padua, who argued that the people were the source of all power within a society.[24] As early as the end of the Middle Ages, the word *souverain*[25] was used in France to indicate a political or other authority which was "supreme" in the sense that it had no other authority above itself.[26]

The first modern attempt to define "sovereignty" is usually attributed to Jean Bodin (1530-1597). In his *Les Six Livres de la République*, Bodin views sovereigny as "the absolute and perpetual power within a State,"[27] or "that supreme authority within a State whence all laws proceed."[28] Bodin viewed an absolute monarch as the source of sovereign power, and concluded that such an authority was subject to "no human restraints."[29] The Sovereign was, however, governed by the Commandments of God and duties of Natural Law to keep faith with his subjects.[30] Bodin argued that sovereignty was an attribute of the king in a monarchy and of the people in a democracy, and it could not be regulated by positive law. The reason a king was required to abide by the terms of treaties (*pacta sunt servanda*) arose not from positive law but because the Law of Nature commands that contracts are binding.[31]

The concept of absolute sovereignty received strong support with the publication in 1625 of Hugo Grotius' classic study, *De Jure Belli et Pacis*, in which the father of modern international law contended that the sovereignty of each State was absolute, including complete control of its subjects and complete independence from external restraint.[32] When the Stuarts replaced the Tudors in England at the start of the seventeenth century, they brought with them the claim of Divine Right of Kings. By this theory, parliaments existed only as a matter of royal grace; and while the king did have a duty to be just in dealing with his subjects, this duty was owed to God and not to the subjects themselves.[33]

The Revolution of 1688 affirmed the theory that sovereign authority grew from the assent of the people, a view championed by John Locke in his *Two Treatises on Civil Government.* Rejecting the absolute sovereignty of Bodin, Locke argued that the sovereign was bound by rules of Natural Law and could be rightfully removed from power by the people if he/she violated these principles.[34]

A contrary view was championed by Hobbes, whose *Leviathan* argued that all rights are derived from the sovereign, who owes no duty to his subjects. According to Hobbes, there can be no legal limitations on sovereign power, and sovereignty must be vested in a single man and can not be divided.[35] John Austin and Jeremy Bentham were largely influenced by Hobbes on the issue of sovereignty.[36] Austin argued that a society (or State) was composed of a "sovereign" and his "subjects." Because Austin, like nearly all authors of the sixteenth and seventeenth centuries,[37] believed sovereignty could not be divided, he held that in a republican form of government it must reside in the legislative branch. The executive must be subordinate to the legislative, and charged with implementing the will of the latter.

The establishment of the American system of government, with three, co-equal, independent branches of the national government and additional powers reserved to the States (federalism) caused problems for some political theorists. Some, including many followers of John Austin, reasoned that the Constitution was the source of political power, and that the people were the source of the Constitution. Thus, in the United States, sovereign power resided with the people.[38] Others concluded that, contrary to prevailing thinking, sovereignty could be divided.[39] French jurist Adéhar Esmein added another voice for the theory that "the people" were the ultimate source of sovereign power.[40]

Professor Charles G. Fenwick writes: "In the technical usage of the past a sovereign State was one which exercised undivided authority over all persons and property within its borders and was independent of direct control by any other power."[41] He notes that historically there were a number of "marks of sovereignty," such as the right to send and receive diplomatic agents, the right to be immune from foreign judicial process, and the right to make war.[42] A

shrinking world and a desire for peace worked gradually to diminish the scope of this great power.

Early Restrictions on Sovereignty

Gierke argued that, even in the Middle Ages, sovereignty was not unlimited. Kings and parliaments alike were constrained by rules of Natural Law (*jus natur*ae), the law of God (*jus divinum*), and "the common practice of all nations" (*jus commune gentium*).[43] R.A. Eastwood and G.W. Keeton writing in *The Austinian Theories of Law and Sovereignty*, conclude: "It will therefore be evident that the existence of the idea of Natural Law imposed an important limitation upon sovereign power. Even Coke, so late as the seventeenth century, held that an Act of Parliament contrary to the principles of Natural Law would be void, but the idea was waning even then."[44]

An important early restriction on sovereignty came from religion. Augustine and Thomas Aquinas believed in "the absolute supremacy of the Papacy."[45] According to the "doctrine of two swords",[46] God has given the Pope two swords—the spiritual sword for the Pope to wield himself, and the temporal sword for the Pope to entrust to another (the Emperor). By this theory, the Emperor was both inferior to the Pope and constrained in his exercise of "sovereign" authority to abide by the law of God.

The desire for peace led to still further refinements in the definition of sovereignty. Hymen Cohen, of the University of Chicago, wrote in 1937:

> In the international field with its contending autonomous groups, with its newly emergent States, the claims to exclusive possession of absolute, unitary power were hardly reconcilable with the desire and the need for peace. To further peace and cooperation among the rulers and nations which had arisen from the remains of the economically antiquated feudal system, the concept of sovereignty changed from a single unitary supreme power. . . . In this manner, owing to the exigencies of an international situation in which the possession of sovereignty was the index to internal governmental supremacy, sovereignty externally was limited in meaning to the recognition that the government was supreme domestically and that it could enforce what it would on its own domain. Externally, it claimed no supremacy; it claimed only a freedom from external control—independence. It claimed, in other words, the right to make such obligations for itself and its nation as it pleased, of its own free will.[47]

Professor Oppenheim noted that the development of international law raised new questions about the traditional theories of sovereignty:

> The question which is now confronting the science of law and politics is how far sovereignty as it presents itself from the point of view of the internal law of the State, namely, as the highest, underived power and as the exclusive competence to determine its jurisdictional limits, is compatible with the normal functioning

> and development of International Law and organisation. The very notion of International Law as a body of rules of conduct binding upon States irrespective of their Municipal Law and legislation, implies the idea of their subjection to International Law and makes it impossible to accept their claim to absolute sovereignty in the international sphere. Their mutual independence is indeed a fundamental rule of International Law; but it is only by reference to a higher legal order that the mutual independence of States, viewed as a rule of law, is conceivable. On the other hand, owing to the weakness of International Law, its supremacy over the States composing the international community is limited to the duty which it imposes upon them to observe and, within a restricted sphere, to submit to the enforcement of the existing rules created by custom or treaty or flowing from the very existence of the society of States. It does not as yet include a competence on the part of the international community to impose fresh obligations upon an unwilling State. . . . These aspects of sovereignty have been the principal cause of the criticism levelled against it in the two decades after the First World War. It is being increasingly realised that progress in International Law, the maintenance of international peace and, with it, of independent national States, are in the long run conditioned by a partial surrender of their sovereignty so as to render possible, within a limited sphere, the process of international legislation and, within a necessarily unlimited sphere, the securing of the rule of law as ascertained by international tribunals endowed with obligatory jurisdiction.[48]

The basic dilemma of trying to regulate sovereign States by international law was captured well by Brierly, who observed: "[I]f sovereignty means absolute power, and if States are sovereign in that sense, they cannot at the same time be subject to law . . . [and] there is no escape from the conclusion that international law is nothing but a delusion."[49] It was because states recognized the utility of rules of international law that they consented to surrender aspects of the traditional sovereignty doctrine.

Modern Restrictions on Sovereignty

The United Nations Charter has been ratified by 175 States and the obligations it imposes are totally inconsistent with the early doctrine of absolute sovereignty. Professor Charles G. Fenwick, who directed the Department of Legal Affairs of the Pan American Union for fourteen years prior to 1962, has written:

> It is obvious that the term "sovereignty" has now lost the meaning attributed to it at the beginning of the twentieth century. States may still be described as "sovereign States," but their sovereignty is sovereignty under the law to which they have bound themselves by the Charter; or better, perhaps, it is sovereignty in the fields of national or domestic jurisdiction that lie outside the newer areas controlled by international law. . . . The term may continue to be used, but it must be understood in a manner consistent with the maintenance of law and order in the international community. States have now abandoned their former right to be the judges in their own cause and the right to take the law into their own hands; they have now recognized the higher right of the international community, acting

> through its appropriate organs, to protect the peace of the community and to remove the causes of dissent that lead to acts of violence. An individual State may, indeed, defy the law; it may refuse to cooperate in putting the procedures of pacific settlement into effect; but it cannot offer in justification of its conduct any legal claim of "sovereign right."[50]

Indeed, Professor Fenwick notes that "Many jurists have urged that the term 'sovereignty' should be discarded, as being out of harmony with the actual facts of international intercourse."[51]

The International Law Commission devoted part of its first session in 1949 to drafting, at the request of the U.N. General Assembly, a Draft Declaration on Rights and Duties of States. Approved by a vote of 11 to 2, it included these articles:

> Article 2
>
> Every State has the right to exercise jurisdiction over its territory and over all persons and things therein, subject to the immunities recognized by international law.
>
> . . . .
>
> Article 4
>
> Every State has the duty to refrain from fomenting civil strife in the territory of another State, and to prevent the organization within its territory of activities calculated to foment such civil strife.
>
> . . . .
>
> Article 7
>
> Every State has the duty to ensure that conditions prevailing in its territory do not menace international peace and order.
>
> . . . .
>
> Article 12
>
> Every State has the right of individual or collective self-defense against armed attack.
>
> . . . .
>
> Article 14
>
> Every State has the duty to conduct its relations with other States in accordance with international law and with the principle that the sovereignty of each State is subject to the supremacy of international law.[52]

These restrictions on "independence" stem both from customary international law and from treaty, and Oppenheim writes "[t]here is hardly a State in existence which is not in one point or another restricted in its territorial supremacy by

treaties with foreign Powers."[53] While it has on occasion been suggested that a treaty should not be permitted to restrict a State's sovereign authority, the majority view—supported by a series of World Court opinions—has long been that the right to enter into agreements limiting sovereignty is itself an element of the exercise of sovereign power.[54]

From time to time throughout history it has been suggested that sovereignty is inalienable and cannot be limited even by treaty. This view has been soundly rejected in the modern world; and, indeed, the Permanent Court of International Justice held as early as 1923 (*Wimbledon* case) that entering into a treaty commitment which limits sovereignty is itself an exercise of sovereignty. The Court reasoned:

> The Court declines to see in the conclusion of any treaty by which a State undertakes to perform or refrain from performing a particular act an abandonment of its sovereignty. No doubt any convention creating an obligation of this kind places a restriction upon the exercise of the sovereign rights of the State in the sense that it requires them to be exercised in a certain way. But the right of entering into international engagements is an attribute of State sovereignty.[55]

The Concept Of *Jus Cogens*

Another dramatic departure from traditional concepts of sovereignty and international law has been the development of the theory of "peremptory norms" (*jus cogens*) of international law which are binding upon all States irrespective of their consent. This is a very new doctrine, and while there is widespread (but not unanimous) agreement that such rules exist, there is far less accord as to the actual content of this "higher" body of law.

Historically, "consent" was viewed as the basis for all rules of international law. A State might undertake an obligation by ratifying a treaty, or it might become bound by a consistent practice of obeying certain rules in the belief (*opinio juris*) that they were legally binding—the process through which customary international law was formed. But even as a new customary rule is formed, if an existing State registered its clear objection it would not be held bound by the new rule.

As early as 1970, in the *Barcelona Traction* case, the International Court of Justice distinguished between the normal bilateral obligations States make to each other and a higher level of duties owed to "the international community as a whole." The Court explained: "Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, and also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination."[56]

The legal theory of "peremptory norms" was embraced by the International Law Commission in the mid-1960s, and through its efforts, was embodied in the 1969 Vienna Convention on the Law of Treaties.[57] Some commentators trace its origins to municipal legal principles of "public policy,"[58] but I suggest that peremptory norms reflect a return to once discredited principles of Natural Law. Irrespective of their intellectual origins, they have dramatically transformed the content of international law. Whereas historically it was viewed as a wrongful act for a state to publicly criticize the conduct of another sovereign State for its internal policies, today all States are held to owe an obligation to all mankind (*obligatio erga omnes*) not to commit armed aggression, genocide, slavery, and a number of other human rights violations.

Low-Intensity Conflict and the Modern Law of Sovereignty

The concept of sovereignty has changed markedly over the past four centuries. Today it is not only a more limited doctrine, but there is widespread agreement that its contemporary basis is the will of the people. By 1956, more than 70% of the nations of the world, including within their borders about 80% of the world's total population, were governed by constitutions which declared that sovereignty rests ultimately in the people of the state.[59] When one adds to this figure the number of States which view sovereignty as being vested jointly in a monarch or other "sovereign" and the people, "the percentage of the world's total population who consider the people to be a source of sovereign power becomes over 95 percent."[60]

There may be some interesting and largely unexplored aspects of a growing consensus that the people of a State are the ultimate source of its sovereignty, particularly in this era of democratic revolution. Between 1979 and 1986, the number of Latin American countries that chose their leaders by reasonably free and democratic elections increased from approximately one third to over 80 percent. Today the figure is even higher. In the past three to four years a similar democratic revolution has swept through Eastern Europe and the former Soviet Union. Even in Africa, the trend is toward democracy (although much remains to be done). According to the prestigious human rights group, Freedom House, 1991 was the first year in which "both the number of Free countries and their populations outnumbered the Not Free countries and their populations."[61] Indeed, this data indicates that more than 70 percent of the 171 nations examined were either democracies or in some stage of democratic transition.[62]

Given the fact that democracies tend not to attack other democracies, the cause of peace may ultimately be served by restricting the role which non-democratic States are permitted to play in the world community. Certainly they should be protected against external aggression; but if sovereign power is the exclusive province of the people in every State, is it logical to allow totalitarian

or authoritarian regimes to exercise it in the absence of a legitimate expression of the popular will vesting them with such authority? This line of reasoning could ultimately justify placing a great deal of pressure on non-democratic States to permit their people to select a government of choice by majority rule. In so doing, it would enhance justice and the long-term peace.

It is clear that the classical view of absolute State supremacy is no longer an element of the modern doctrine of "sovereignty." States are today limited in many ways by customary and conventional international law; and even non-consenting States are constrained by the peremptory norms of international law often called *jus cogens*. No one would seriously challenge the 1952 observation of former World Court Justice Philip C. Jessup that:

> [T]he regulation of the threat or use of force is not inconsistent with the principle of sovereign equality [of States]. A resort to war can, therefore, no longer be justified by an invocation of the old concept of absolute sovereignty, which in the last analysis left every State the final judge of its own cause.[63]

The Appeal of Low-Intensity Aggression

It should be understood that a major reason for the growth of low-intensity conflict as a weapon of choice by radical regimes and aggressor States in the post-Charter world is that more obvious uses of aggressive force are so clearly outlawed and are usually easily identified. The fact that low-intensity aggression has become so often the weapon of choice for modern aggressors stands as evidence of the success of the basic provisions of the Charter, which has clearly prohibited more obvious forms of aggression.

By calling for a narrow interpretation of the rights of States to defend themselves (and each other) from all levels of aggression below all-out "war," these aggressor States believe they can open the way for the lawful destruction or destablization of peaceful neighbors through low-intensity aggression. As will be shown, neither the purposes set forth in the Charter nor the *travaux* of relevant provisions of the Charter support the proposition that the United Nations was established to make it safe for aggressors to subvert their neighbors gradually through low-intensity conflict, and States which genuinely subscribe to the principles of the Charter must not permit the document to be misinterpreted to permit this wrongful end. Ultimately, the low-intensity conflict scenario is selected because it provides a colorable claim of legitimacy (being less obvious) and because its proponents can cite a range of legal scholars who honestly (but wrongly) believe it is unlawful for nations to assist victims of such aggression. If such tactics are allowed to succeed, aggression can be expected to increase. The men who met in San Francisco may well have been thinking primarily about deterring World War III, but the clear intent of the Charter they produced was to outlaw *any* use of force by States contrary to the purposes of the Charter. It

is therefore imperative that this alleged "loophole" be dealt with firmly in defense of the Charter.

Limitations On Threats And Use Of Armed Force

International law clearly prohibits any State from interfering in the internal affairs or infringing the territorial integrity or political independence of any other State in the absence of a legal right to do so. Indeed, it can be argued that the most fundamental of all substantive rules of contemporary international law is the prohibition found in Article 2(4) of the U.N. Charter prohibiting the "threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations."

Judge Jessup has observed:

> Returning to the terms of the Charter of the United Nations, it may be noted that Article 2, paragraph 4, is not an absolute prohibition of the use of force. If force can be used in a manner which does not threaten the territorial integrity or political independence of a State, it escapes the restriction of the first clause. But it must then be established that it is not "in any other manner inconsistent with the Purposes of the United Nations."[64]

Article 1, paragraph 1, of the U.N. Charter sets forth the organization's "purposes":

The purposes of the United Nations are:

> 1. To maintain international peace and security, and to that end, to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.

It is clear that Article 2(4) was intended to be comprehensive in scope, outlawing not only "war" but any non-defensive use of force inconsistent with the Charter's principles. Consider, for example, the result when the U.N. General Assembly in 1951 asked the International Law Commission to come up with a comprehensive "definition of aggression," and the ILC provided this broad formula:

> Aggression is a threat or use of force by a State or Government against another State, in any manner, whatever the weapons employed and whether openly or otherwise, for any reason or for any purpose other than individual or collective self-defense or in pursuance of a decision or recommendation by a competent organ of the United Nations.

This would seem to be sufficiently all-encompassing to satisfy anyone; but, in the end, this definition was *rejected* by a vote of 7 to 3, because it was considered "dangerously restrictive" and not "comprehensive" enough.[65]

The United States was one of several countries that was very wary of trying to write a definition of "aggression," out of fear that it would inadvertently include some loophole allowing aggressive uses of force. President Truman explained the traditional American view:

> At the San Francisco Conference on International Organization (1945) there was a movement to insert a definition of aggression in the United Nations Charter. The United States opposed this proposal. It took the position that a definition of aggression cannot be so comprehensive as to include all cases of aggression and cannot take into account the various circumstances which might enter into the determination of aggression in a particular case. Any definition of aggression is a trap for the innocent and an invitation to the guilty. The United States position prevailed at San Francisco, and the Charter adopted a system whereby the appropriate U.N. organ, in the first instance the Security Council, would determine on the basis of the facts of a particular case whether aggression has taken place.[66]

In addition to uses of force authorized by the Security Council and certain narrow exceptions (like using force to suppress piracy or the slave-trade), the one remaining area of lawful use of force by individual States is self-defense.

Scope Of The Right To Self-Defense

It is universally recognized that a State may take some actions which would otherwise violate the rights of another State if it must safeguard itself from the latter's wrongful conduct. Depending upon the nature of the initial wrongful act, the response is classified as a retorsion, a reprisal,[67] self-help,[68] self-defense, or by other similar terms. The doctrine of "self-preservation" or "self-defense" dates back to the earliest days of the law of nations,[69] and is recognized as a pre-existing "inherent right" of States by the U.N. Charter.[70]

Indeed, there is no more fundamental right of sovereign States than the right to exist[71]; and this right forms the foundation of the right of States to defend themselves from the wrongful conduct of other states. Initially, of course, the "right" of States to exist was largely predicated upon their ability to exist in a balance-of-power world. Until the twentieth century, States also had a sovereign right to engage in armed aggression, and a State unwilling or unable to defend itself might quickly cease to exist.

When the world community first sought to "outlaw" war through the 1928 Kellogg-Briand Treaty, the right of self-defense was carefully preserved. On 23 June 1928, the United States delivered notes to the principal foreign offices of the world stating:

> It believes that the right of self-defense is inherent in every sovereign State and implicit in every treaty. No specific reference to *that inalienable attribute of sovereignty* is therefore necessary or desirable. It is no less evident that resort to war in violation of the proposed treaty by one of the parties thereto would release the other parties from their obligations under the treaty towards the belligerent State.[72]

Judge Jessup notes that this U.S. declaration "suggests that the right of self-defense by its very nature must escape legal regulation."[73] This is reinforced by another statement made by the United States during the negotiation of the treaty:

> Every nation is free at all times and regardless of treaty provisions to defend its territory from attack or invasion and it alone is competent to decide whether circumstances require recourse to war in self-defense. . . . Express recognition by treaty of this inalienable right, however, gives rise to the same difficulty encountered in any effort to define aggression. It is the identical question approached from the other side. Inasmuch as no treaty provision can add to the natural right of self-defense, it is not in the interest of peace that a treaty should stipulate a juristic conception of self-defense since it is far too easy for the unscrupulous to mold events to accord with an agreed definition.[74]

It is also clear that other States shared the U.S. view that the 1928 treaty did not limit the right to self-defense. Professor Brierly notes: "In forbidding war as an 'instrument of national policy' the Pact did not forbid recourse to war in self-defence, and in the negotiations concerning the Pact several States made express declarations emphasizing that self-defence is a natural right not touched by the Pact."[75]

Ultimately, the "Pact of Paris," as the Kellogg-Briand treaty was also known, proved to be without teeth. When Japan invaded Manchuria in 1931, and Italy entered Ethiopia a few years later, the world community did little but protest—and, in the process, the theory that "law" offered a solution to aggressive war was widely discredited.

Fortunately, as World War II came to a close, men of uncommon wisdom recognized the promise of legal institutions in the struggle against aggression and the United Nations was founded. Its Charter sought both to outlaw aggressive uses of armed force and to provide an effective mechanism to enforce peace if that proved necessary. Properly understood, the United Nations Charter is designed to promote multinational responses to any international use-of-force by States in violation of the Charter. Disputes are supposed to be settled peacefully by the parties to them, but if that proves impossible the Security Council is empowered, under certain conditions, to authorize or initiate the use of defensive armed force on behalf of the world community.

However, it was understood from the start that the Security Council might prove unable to act—such as when a permanent member exercises its veto—and

thus the historic right of States to use necessary and proportional force in their own defense, or in defense of other peaceful States who are victims of armed aggression, was expressly preserved.

Self-Defense and Low-Intensity Conflict

The right of self-defense (and of collective self-defense) clearly exists in the case of massive, open, and direct aggression—such as the August 1990 Iraqi invasion of Kuwait. But the student of low-intensity conflict is likely to be more concerned about the doctrine's scope in connection with small-scale covert aggression, or sporadic incidents of terrorism. Although some writers argue that the inclusion of the words "armed attack" in Article 51 of the U.N. Charter implicitly prohibits States from engaging in measures of self-defense in response to lower-intensity forms of aggression,[76] this position is unpersuasive.

To begin with, the equally authentic French-language text of Article 51 says *agression armée* ("armed aggression"), which is less subject to interpretation as requiring a massive "attack" before defensive measures are permitted. As will be discussed, the *travaux préparatories* of Article 51 also supports the interpretation that it was not intended to limit the pre-existing rights of States to defend themselves against uses of force by other States. Furthermore, a careful reading of Article 2(4) of the Charter—the textual embodiment of the modern prohibition against the use of force in international relations—suggests that traditional measures of self-defense are not barred by the Charter. The article says:

> All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations.

A brief, necessary, and proportional use of force in response to a terrorist attack is not an attack "against the territorial integrity or political independence" of any state.

Reconciling Articles 2(4) and 51 of the Charter

International lawyers are divided on the scope of Article 2(4). As explained by Professor Lung-chu Chen, in his 1989 work, *An Introduction to Contemporary International Law*:

> One view takes the position that self-help, beyond self-defense, is impermissible. The arguments for this view may be summarized as follows: (1) Articles 2(3) and 2(4) of the Charter project the fundamental community policies of promoting peaceful change and of minimizing coercion; (2) Article 2(4), read in conjunction with Article 51, and the rest of the provisions contained in Chapter VII of the Charter, dealing with "action with respect to threats to the

peace, breaches of the peace, and acts of aggression," shows clearly that the U.N. Charter as a whole prohibits the use of military force save for self-defense and collective enforcement action (community police action); (3) the blanket prohibition of the use of force embodied in Article 2(4) suggests that self-help is inconsistent with the purposes of the United Nations and hence impermissible. . . . and (5) in the nuclear age, when humanity lives under the shadow of nuclear holocaust, forcible self-help could readily escalate beyond management. . . .

A contrary view maintains that Article 2(4) is not a blanket prohibition of all uses of military force and expressly prohibits only those threats or uses of force directed "against the territorial integrity or political independence of a State, or in any other manner inconsistent with the Purposes of the United Nations." When it seeks neither a territorial change nor a challenge to the political independence of the State concerned, an act of self-help taken in response to a prior unlawful act, in order to secure compliance with international law is to help secure "justice," as enunciated in Article 2(3) of the Charter, and is not inconsistent with the purposes of the organization. Hence, Article 2(4) is no necessary bar to an otherwise permissible act of self-help. . . .

Accordingly, in the absence of effective collective machinery to protect against lawlessness and deprivation, the remedy of self-help cannot be ruled out. The Charter's general proscription of the use of force was predicated on the establishment within the United Nations of effective centralized decision and enforcement. So long as this projected condition remains unfulfilled, the general community cannot afford a paralysis that invites lawlessness and deprivation by particular States with impunity.[77]

Professor Chen notes that "the remedy of self-help . . . is highly susceptible to abuse and misuse," and policy-makers need to consider carefully the ramifications of seeking an expanded interpretation of this power.

One of the reasons that many scholars seek to define "armed attack" narrowly is that they do not want a minor border crossing or other small incident to become a lawful justification for "self-defense" measures which might lead to a major war. After all, a clear purpose of the United Nations system is to promote peace. Professor Sørensen writes:

Armed attack. In establishing whether a State has committed an armed attack or armed aggression against another State, the following factors must, in varying degrees, be taken into consideration: military character of the action, intention of the attacker or aggressor, amount of force used and the resulting seriousness of the situation, and the 'priority principle,' that is, the principle of the first attacker.

It appears to be beyond doubt that an armed attack has occurred when armed forces of one State, regular, irregular, or armed bands composed of private individuals controlled by, and in fact remaining under the orders of, the State, start using violence in or against the territory of another State, or against its forces on or over the open sea, or its forces that stay in foreign territory either by agreement of the sovereign or by virtue of a lawful military occupation.

But not any and every occurrence that displays these characteristics is automatically an armed attack. . . . The notion of an armed attack conveys the idea of the gravity

> of a situation through the amount of force employed. In frontier incidents these elements are usually absent. Where a State aids and abets with military force internal disorders or revolution in another State, the question whether an armed attack has thereby been committed should be tested in the light of criteria that are identical with those enumerated at the beginning of the preceding paragraph. . . .[78]

One might argue that the "necessity" and "proportionality" requirements of self-defense law would take care of the problem of responding to a small border incident by causing World War III. Before force may be used, non-forcible means of dispute resolution must be exhausted (or be clearly unable to resolve the problem), and even then no more force may be used than is necessary to achieve the permissible objective. While Sørenson's "criteria" are not helpful in deciding how to respond to armed intervention, his second paragraph (above) presents a reasonably good characterization of the scope of the law of self-defense both before and subsequent to the Charter if one accepts the argument that Article 2(4) was not intended to alter this inherent right of States.

By this reasoning, contemporary international law does permit a State to send its agents into the territory of another State and use necessary and proportional force against it in response to such things as an ongoing terrorist campaign involving armed individuals being sent from the second State to the first State and engaging in illegal acts of force (bombings, assassinations, hijackings, etc.). True, a State may not use a single terrorist bombing as an excuse to send its entire army into a neighboring State and conquer its territory. The proportionality doctrine protects against such an excessive response. But so long as the response is proportional to that which is necessary to bring an end to future acts of force against the first State, international law does not preclude it.

Articles 2(4) and 51 of the Charter should be analyzed as companion rules in the regulation of armed force in the modern world. However, the common practice of seeking to define the scope of self-defense primarily by focusing on the term "armed attack" seems to be misplaced. Properly understood, Article 2(4) provides the basic prohibition in the Charter against uses of force by individual States, and Article 51 was clearly added later to clarify that States would not be precluded by the Charter (that is, by Article 2(4) of the Charter) from defending themselves and coming to each other's aid if the Security Council were to prove unable to respond effectively to armed aggression. True, the words "armed attack" were chosen in English to make this point; but the great effort made to avoid such terms as "war" or even "aggression" in Article 2(4)—on the theory that such terms might be construed narrowly—should make it clear that this "example" was given simply because the drafters were writing in the shadow of World War II and envisioned future international aggression to follow a similar pattern.

Professor Louis Henkin, of Columbia Law School, favors a narrow reading of Article 51 and writes: "The fair reading of Article 51 permits unilateral use of force only in a very narrow and clear circumstance, in self-defense if an armed

attack occurs. Nothing in the history of the drafting (the *travaux préparatoires*) suggests that the framers of the Charter intended something broader than the language implies."[79] I disagree, and would note that if these articles were intended to terminate pre-existing rights of customary law otherwise consistent with the Charter, the entire U.N. operation in response to the North Korean invasion of South Korea in June 1950 may[80] have been improper. First of all, article 2(4) specifies expressly that "All *Members* shall refrain . . . from the threat or use of force . . . [emphasis added]." Since North Korea was not even arguably a "Member" of the United Nations, Professor Henkin's literalist interpretation would appear to permit non-members to engage in the prohibited conduct. Furthermore, a similarly strict reading of the text of Article 51 would suggest that it only preserves "the inherent right of individual or collective self-defense if an armed attack occurs against a *Member* of the United Nations." Professor Henkin, *et al.*, contend that, by implication the Charter destroys the remainder of the historic customary law right of self-defense—if he is correct, it would seem to follow with equal clarity that there is no right to self-defense in the event of an armed attack against a *non*-Member of the United Nations. Since South Korea was not a U.N. Member in 1950, by Professor Henkin's rules of interpretation the U.N. and its members acted wrongfully in resisting North Korean aggression.

Rather than relying primarily on the "armed attack" language in Article 51, the scope of the right of self-defense can best be understood by a more detailed examination of Article 2(4)—which established the general prohibition against using armed force. A textual analysis of this provision would certainly not seem to preclude measures taken in self-defense against a prior violation of the provisions of Article 2(4), and when the *travaux préparatoire* is consulted to clarify any ambiguities[81] the case is even stronger. As Professor Brierly notes: "Committee I at San Francisco, which dealt with Article 2(4), said outright that 'the use of arms in legitimate self-defense remains admitted and unimpaired."[82] He argues further that the *travaux* of the San Francisco Conference:

> [S]how that Article 51 was introduced into the Charter in Committee III/4 primarily for the purpose of harmonizing regional organizations for defence with the powers and responsibilities given to the Security Council for maintaining peace; and they do not indicate any conscious intention upon the part of Committee III/4, in including the words 'if an armed attack occurs', to put outside the law forcible self-defence against unlawful acts of force not amounting to an armed attack.[83]

Professor Brierly concludes that a broad interpretation of Article 51 is supported by the fact that the Russian text of the Charter refers to self-defense as an "imprescriptible" rather than an "inherent" right, and the French text calls it a "natural" right—both consistent with the view taken by the United States during the negotiation of the Kellogg-Briand Pact that self-defense was an

"inalienable" right.[84] Furthermore, the French text ("*dans un cas où un Membre des Nations Unies est l'objet d'une agression armée*") is not expressed in the form of a condition and suggests that the English "if" was used to express an hypothesis rather than a condition—which is, of course, one of the natural uses of "if."[85]

A similar view is taken by Professor Derek Bowett, in his 1958 book, *Self-Defence in International Law*:

> It is incontestable that prior to the Charter a right of self-defence was recognized by general international law, so that the question which must be posed is whether the Charter contains a prohibition of action which would normally be legitimate as the exercise of self-defence, a right admitted and recognized by the general law. We must presuppose that rights formerly belonging to member States continue except in so far as obligations inconsistent with those existing rights are assumed under the Charter. . . .
>
> It is, therefore, fallacious to assume that members have only those rights which the Charter accords to them; on the contrary they have those rights which general international law accords to them except and in so far as they have surrendered them under the Charter. . . .
>
> Now the relevant obligation assumed by members is, prima facie, that contained in Art. 2(4):
>
> > "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations."
>
> . . . [T]he view of Committee I at San Francisco was that this prohibition left the right of self-defence unimpaired; in the words of its rapporteur 'the use of arms in legitimate self-defence remains admitted and unimpaired.' Indeed, it is difficult to see what other conclusion could be reached, for if we examine the substantive rights protected by self-defence the absence of any inconsistency with Art. 2(4) is apparent. Action undertaken for the purpose of, and limited to, the defence of a State's political independence, territorial integrity, the lives and property of its nationals (and even to protect its economic independence) cannot by definition involve a threat or use of force 'against the territorial integrity or political independence' of any other State. To the extent that action in self-defence would involve a breach of this obligation it would *ipso facto* cease to be within the requirements of self-defence as permitted by general international law. Nor can it be said that the protection of those same substantive rights by the exercise of self-defence is 'in any manner inconsistent with the Purposes of the United Nations'; those purposes hinge primarily on the maintenance of international peace and security, and it would be a strange conclusion if a State's protection of its own legitimate interests were inconsistent with that end.[86]

Of particular relevance to the field of low-intensity conflict, the right of self-defense permits States to use necessary and proportional force in response to direct and indirect forms of armed aggression. One of the world's leading

authorities on the United Nations, Professor Rosalyn Higgins of the University of London, provides revealing examples:

> This right [of self-defense] is available equally to an indirect use of force as well as a direct use of force. A State may protect itself against irregular forces. Thus the Lebanese delegate, in reserving to his country the right of self-defense against alleged indirect violence by the UAR in 1958, stated that:
>
> > "Article 51 does not speak of a direct armed attack. It speaks of armed attack. It wishes to cover all cases of attack, direct or indirect, so long as it is an armed attack . . . [I]s there any difference from the point of view of the effects between direct armed attack or indirect armed attack if both of them are armed and if both of them are designed to menace the independence of a country?"
>
> The claim of self-defense against indirect military aggression was also raised by France during the Tunisian-French mutual charges of aggression in 1958. Declaring that Sakiet-Sidi-Youssef, which it had bombed, was a rebel garrison for the FLN, training recruits and providing arms, the French Government insisted that its actions were defensive.[87]

Professors Ann and A.J. Thomas have taken a similar view, arguing specifically that the Charter permits a use of defensive armed force against States which initiate terrorist attacks using dissident nationals of the victim State:

> The force which should comprise "armed attack" has been broadly defined as "any elements at the disposal of States which are capable of destroying life and property or inflicting serious damage." This would include not only a direct use of force whereby a State operates through regular military units, but also an indirect use of force whereby a State operates through irregular groups or terrorists who are citizens but political dissidents of the victim nation. The inter-American system has characterized such indirect use of force as internal aggression in that it includes the aiding or influencing by another government of hostile and illegal conduct against the established political order of government in another country. Since it is usually an attack against the internal order through an attempt to overthrow or harass the victim government by promoting civil strife and internal upheaval or, once civil strife has commenced, by an attempt to take over the leadership of those in rebellion, it is a vicarious armed attack. . . .
>
> That such vicarious, indirect armed aggression falls within the term "armed attack" as used in Article 51 of the UN Charter has been asserted on several occasions. In the *Greek Case*, which came before the UN in December 1946, the United States took the position that Yugoslavian, Albanian, and Bulgarian assistance to guerrilla forces fighting against the Greek Government in civil strife in that country amounted to armed attack making Article 51 applicable. . . . Secretary of State Dulles . . . was of the opinion that the words "armed attack" included armed internal revolution which was fomented from abroad and aided and assisted from abroad.[88]

Historic U.S. View

The United States Government has historically taken the view that the right of self-defense was unimpaired by the Charter and remains broad to encompass any form of armed international aggression. Article 51 was drafted by a subcommittee of Committee III in San Francisco under the able leadership of U.S. Senator Arthur Vandenberg. In summarizing the status of the negotiations at the second meeting of Committee III on 13 June 1945, Vandenberg stated: "[W]e have here recognized the inherent right of self-defense, whether individual or collective, which permits any sovereign State among us . . . to ward off attack pending adequate action by the parent body. And we specifically recognize the continuous validity of mutual protection pacts . . . ."[89] This language is hardly consistent with a view that Article 51 was intended to vitiate all but a narrow area ("armed attack") of the aggression spectrum in which defensive force might be used. Indeed, Vandenberg later said that had the conference not agreed to reaffirm the inherent right of collective self-defense, "there would have been no Charter." He argued: "Nothing in the Charter is of greater immediate importance and nothing in the Charter is of equal potential importance."[90]

One month later, when the ink on the Charter was barely dry, John Foster Dulles—who had advised the U.S. delegation to the San Francisco Conference—told the Senate Foreign Relations Committee:

> At San Francisco, one of the things which we stood for most stoutly, and which we achieved with the greatest difficulty, was a recognition of the fact that that doctrine of self-defense, enlarged at Chapultepec to be a doctrine of collective self-defense, could stand unimpaired and could function without the approval of the Security Council.[91]

In May 1947 the U.N. Commission of Investigation Concerning Greek Frontier Incidents reported to the Security Council that Yugoslavia, Albania, and Bulgaria had "supported the guerrilla warfare in Greece."[92] During the Security Council's consideration of the issue (prior to action being blocked by a Soviet veto), a U.S. representative "expressed the view that the failure of the Security Council to act did not preclude individual or collective action by States willing to act, so long as the action taken was in accordance with the general purposes and principles of the United Nations."[93] He added:

> I do not think that we should interpret narrowly the "Great Charter" of the United Nations. In modern times, there are many ways in which force can be used by one State against the territorial integrity of another. Invasion by organized armies is not the only means for delivering an attack against a country's independence. Force is

> effectively used today through devious methods of infiltration, intimidation and subterfuge.
>
> But this does not deceive anyone. No intelligent person in possession of the facts can fail to recognize here the use of force, however devious the subterfuge may be. We must recognize what intelligent and informed citizens already know. Yugoslavia, Bulgaria and Albania, in supporting guerrillas in northern Greece, have been using force against the territorial integrity and political independence of Greece. They have in fact been committing acts of the very kind which the United Nations was designed to prevent, and have violated the most important of the basic principles upon which our Organization was founded.[94]

In 1966 Secretary of State Dean Rusk restated the consistent United States view when he told the Foreign Relations Committee that "Article 51 of the Charter was put in specifically to make it clear there was nothing else in the Charter, nothing else in the Charter or anywhere, that impairs the inherent right of individual or collective self-defense."[95]

Complying With The Charter's Reporting Requirement

On several occasions in recent years the United States has used force in a manner that was probably consistent with the self-defense provisions of the Charter, but has been deemed a lawbreaker because it failed to comply with the reporting provisions of Article 51.[96] While one might have argued that the widespread use of the Soviet veto had made the Security Council impotent and the reporting requirement moot, the active involvement of the Security Council in the recent Gulf conflict reinforces arguments that future defensive uses of force ought to be promptly reported to the Council, accompanied by a detailed report giving full justification for the U.S. action.

Specific Problem Areas: Self-Defense of Nationals Abroad

International law has long recognized a right of States to use necessary and proportional force to protect their nationals from threats on the high seas or on foreign territory, and many scholars contend that this right is not eliminated by the U.N. Charter. Thus, Professor Oppenheim writes: "The right of protection over citizens abroad, which a State holds, may cause an intervention by right to which the other party is legally bound to submit. And it matters not whether protection of the life, security, honour, or property of a citizen abroad is concerned."[97]

In contrast, some scholars argue that the Charter requires States to forego the use of military force to protect endangered citizens abroad, and instead requires them to seek peaceful resolution of such disputes.[98] The proposition is arguable,

but the better view, in my opinion, is that force may only be used when "necessary" (that is, when peaceful means of dispute resolution have been exhausted or when it is evident that such measures would not work and further delays may jeopardize the lives or safety of the individuals involved).

Force will only be lawful as a last resort and under circumstances where there is a genuine and justifiable fear that harm may come to the citizens if prompt action is not taken. This remains an area of great controversy, and questionable uses of force in this area are likely to be denounced not only by much of the world but by a diverse group of Americans as well. Indeed, if this power is abused, a situation might even develop in which foreign governments refuse to allow Americans to enter their territory for fear of providing justification for such intervention. Like all lawful self-defense rights, the power to protect endangered Americans abroad is important and should not be abused.

The Problem of the Innocent or Inattentive Host State

It is not difficult to justify a necessary and proportional defensive response to aggression ordered or encouraged by a foreign State. A more difficult situation exists when the State claims sovereignty over territory that is being used by groups or individuals who are not its agents as a base for terrorist attacks or other acts of force against foreign countries.

This is not a new problem. Indeed, the classic 1837 case of the steamer *Caroline*, which will be discussed below,[99] involved an attack by Canadian militiamen upon a U.S. owned steamer docked on the American side of the Niagara River which was being used to transport men and equipment to support an insurgency in Canada. Professor Brierly notes that the Canadians justified their attack on the steamer on the grounds that "[t]he American Government had shown itself unable or unwilling to prevent this traffic. . . ."[100]

In 1916 the United States sent a column of cavalry across the Rio Grande in hot pursuit of Francisco "Pancho" Villa, who had fled across the border to the safety of Mexico following one of numerous attacks into the United States. Mexico was in a state of civil war and did not take effective steps to prevent the use of Mexican territory to launch armed attacks against the United States. Reasoning that the failure of the Government of Mexico to put an end to the raids from Mexican territory justified a U.S. defensive response, the United States simply notified the Mexican President and made no request for permission.[101]

Half a century later, when hundreds of thousands of U.S. forces had been deployed to help defend South Vietnam, a similar problem arose in connection with North Vietnamese and Viet Cong sanctuaries inside "neutral" Cambodia. The territory in question was largely uninhabited prior to the infiltration of communist forces, and when the United States began secretly to bomb parts of

the area the Cambodian government did not object. Finally, in early 1970, the United States and South Vietnam sent a large combined military force into the area, destroying communist soldiers and arms caches found in their path. Although the new government of Prime Minister Lon Nol appeared at least to acquiesce in the intervention, the operation was justified by lawyers on the theory that Cambodia had a legal duty to prevent its territory from being used for acts of aggression against its neighbor, and South Vietnam had a right to defend itself against such attacks even though they were not ordered or facilitated by the Cambodian government.

The legal reasoning was sound. A fundamental restriction on traditional views of "sovereignty" is contained in the duty imposed by international law upon every State not to permit its subjects or territory to be used to violate the rights of other States. As Professor Oppenheim explains:

> The duty of every State itself to abstain, and to prevent its agents and, in certain cases, subjects, from committing any act which constitutes a violation of another State's independence or territorial or personal supremacy is correlative to the corresponding right possessed by other States. It is impossible to enumerate all such actions as might constitute a violation of this duty. But it is of value to give some illustrative examples. Thus, in the absence of treaty provisions to the contrary, a state is not allowed to interfere in the management of their internal or international affairs, nor to prevent them from doing or to compel them to do certain acts in their domestic relations or international intercourse. Further, in the interest of the territorial supremacy of other States, a State is not allowed to send its troops, its men-of-war, or its police forces into or through foreign territory, or to exercise an act of administration or jurisdiction on foreign territory, without permission. . . .
>
> Independence is not unlimited liberty for a State to do what it likes without any restriction whatever. The mere fact that a State is a member of the Family of Nations restricts its liberty of action with regard to other States, because it is bound not to intervene in the affairs of other States.[102]

Later in the same volume Oppenheim writes:

> The duty of a State to prevent the commission within its territory of acts injurious to foreign States does not imply an obligation to suppress all such conduct on the part of private persons as is inimical to or critical of the régime or policy of a foreign State. Thus there is no duty to suppress revolutionary propaganda on the part of private persons directed against a foreign Government. So long as International Law provides no remedy against abuses of governmental power, international society cannot be regarded as an institution for the mutual insurance of established Governments. On the other hand, States are under a duty to prevent and suppress such subversive activity against foreign Governments as assumes the form of armed hostile expeditions or attempts to commit common crimes against life or property. Moreover, while subversive activities against foreign States on the part of private persons do not in principle engage the international responsibility of a State, such activities when emanating directly from the Government itself or indirectly from

> organisations receiving from it financial or other assistance or closely associated with it by virtue of the constitution of the State concerned, amount to a breach of International Law.[103]

Even Professor Sørensen seems to acknowledge the right of a State to use force on the territory of a non-aggressive neighbor under certain narrow circumstances:

> Forcible measures can exceptionally be taken on foreign territory when forces of nature in that territory cause a natural catastrophe in the neighboring State, for example, floods or fires across the border. Here the affected States can use force only when the action of the local authorities proves inadequate and does not succeed in containing the danger.[104]

Consider his reasoning. It is difficult to see why this "defensive" right would apply when a neighboring State failed to control an "act of God" but would not apply when it acquiesced in a violation of its territorial integrity by a third State which engaged in armed aggression against a neighbor. The harm caused by such armed intruders might even be greater than that posed by a fire, and the host State's legal duty to act would seem much clearer.[105]

Conceptually, one may question why a State has a right to take military action on the territory of another sovereign State that has not itself acted for the purpose of harming the first State. Ultimately, the answer probably lies in *balancing* competing sovereign interests. In the case of the 1970 intervention in Cambodia, for example, it is clear that Cambodia had a sovereign right to prohibit foreigners from conducting military activities in or from bases inside its territory (or in any other way infringing upon its territorial integrity). But the Republic of Vietnam also had a sovereign right not to be subjected to armed attacks emanating from Cambodian territory. When forces from the Democratic Republic of Vietnam and anti-government guerrilla fighters from the Republic of Vietnam set up bases inside Cambodia, the Phnom Penh government had both a legal right to require them to leave and a corresponding legal *duty* to keep its territory from being used to launch armed attacks against its neighbor. Whether one regards Cambodia's failure to prevent its territory from being used as a base for aggression as an act of negligence or as evidence of the reality that the Phnom Penh government no longer was in actual *control* of this portion of its territory,[106] the Government of Cambodia was clearly in breach of its duty to its neighbor and South Vietnam had a right to use necessary and proportional force to defend its sovereignty against the ongoing armed attacks.

Anticipatory Self-Defense

One of the most difficult problems facing modern international law is the extent to which measures of "self-defense" may be taken prior to the actual commencement of armed aggression by a hostile State. Professor Chen argues:

> In a developing process of coercion there may be a culminating point that creates reasonable expectations on the part of a target State that an immediate military response is indispensable (that is, necessary) to the protection of its own existence—to safeguard its important bases of power from destruction. Because of the immediate danger of destruction, the common interest in authorizing self-defense in the form of a proportionate military response has long been recognized. Law cannot reasonably ask and expect a target State to wait like a sitting duck to see its own destruction in the face of such danger.[107]

He continues:

> A focal point of contention in applying Article 51 of the Charter relates to the wording, "an armed attack." Does it mean that self-defense must always wait for an actual armed attack? Or do certain circumstances warrant what is known as "anticipatory" self-defense? The question is not a matter for mere academic exercise but a practical matter of grave concern, one of common interest and human survival in the nuclear age. The U.S. quarantine of Cuba during the missile crisis in October 1962 and Israel's destruction of an Iraqi nuclear reactor in 1981 both raised this vital question.
>
> Two divergent views exist. The first takes a textualist view in stressing that "armed attack" means "only if armed attack," and unless and until there is an actual armed attack or process of attack, the target State cannot respond militarily in self-defense even in the face of "imminent danger." The second view holds that the U.N. Charter is not a suicide pact and that the target State cannot be expected to be a sitting duck awaiting its own destruction in this nuclear age even if a process of attack has not begun. It adds that Article 51 was designed to reaffirm, not to curtail, the customary right of self-defense. Recent State practice would appear to support the latter view, although many disagree.[108]

This problem is particularly apparent when hostilities are likely to involve nuclear, bacteriological, biological, or other so-called "weapons of mass destruction." Must a State wait until an actual attack takes place—an attack which might wipe out in moments a large part of its population and leave it incapable of mounting a meaningful defense of its territory—before it may lawfully come to its own defense?

Admittedly, this is a very troublesome doctrine, for if States are permitted to attack their neighbors pursuant to a subjective belief that they might soon be themselves attacked it is difficult to see how international peace can be sustained. Indeed, modern scholarship on the origins of World War I confirms this risk. It now appears that Germany intentionally sought to provoke Russia to mobilize defensively so that a subsequent German invasion could be "justified" as a defensive response to Russian "aggression"—a strategy designed to persuade Great Britain to remain neutral.[109]

At what point may a State lawfully take "defensive" measures in response to a military buildup on its borders or other evidence of an impending attack? Professor Henkin, a critic of the theory of "anticipatory self-defense" who

believes Article 51 of the Charter to be quite narrow in scope,[110] suggests that "[i]n all probability, then, only an actual take-off by Soviet planes or missiles would cause the United States to strike, and in that case the United States is not 'anticipating' an armed attack, for the attack would have begun."[111] But is this true? After all, for decades during the Cold War nuclear armed bombers would routinely "take-off" from Soviet bases and fly toward the United States, only to be diverted at a point short of U.S. territory. American B-47 and B-52 aircraft flew comparable patterns toward the Soviet Union. Would each such "take-off" constitute "an armed attack" as Professor Henkin seems to suggest? One would hardly think so.

Professor Sørensen denies any right of States to use force in anticipatory self-defense,[112] but a few pages later argues:

> [I]f an aircraft penetrates the airspace of another State and does not obey the orders of the local authorities to land, and either refuses to identify itself, or there are other obstacles to establishing its non-military and peaceful character, force can be employed against the aircraft, and it may even be shot down. For in the circumstances described the State may have reason to fear that the aircraft has an offensive or at least unfriendly purpose, and in view of contemporary developments in the technology of mass destruction, the State cannot be expected to tolerate, apart from treaty obligations, the unauthorized presence of unidentified or foreign military aircraft over its land or sea territory and expose itself to the danger of an attack. . . .[113]

While there is certainly a difference between the two situations—the aircraft in Sørensen's "exception" was in violation of the airspace of the second State—its conduct can hardly by any reasonable definition be characterized as a clear "armed attack" as Sørensen asserts the Charter requires for defensive action. In reality, Professor Sørensen appears to recognize that the nature of modern weapons of mass destruction does justify some type of "anticipatory self-defense."[114] Indeed, he makes the modern case eloquently later in his book when he writes:

> Contemporary developments in the technology of war, in particular, the existence of thermo-nuclear weapons and the speed with which they can be used against an adversary, raise the delicate problem of the rights of States that are in danger of armed attack. Today, when the long-range missiles with nuclear warheads are able to devastate whole regions and countries, the difference between actual and imminent attack becomes negligible.[115]

Whether anticipatory measures of defensive force are justified as a moral matter is a very subjective issue. If a peaceful State obtains reliable information that a neighbor has made a decision to attack, and if that neighbor takes measures to set the stage for an attack, and if the nature of the weapons or the correlation of forces is such that such an attack would likely preclude serious defensive measures,

then *in moral terms* it would be rather easy to justify a pre-emptive or "anticipatory" use of force to protect the target of the planned aggression. The difficulty is that the world community may not be cognizant of the intelligence information which justified the action; and a general rule permitting States to attack their neighbors if they subjectively believe they are about to be attacked would open the door for a wide range of aggressive actions disguised as "anticipatory" self-defense. Saddam Hussein might even signal Kuwait privately that he was contemplating invading his tiny neighbor, and if Kuwait responded by sending more forces toward the border Saddam might present photographs of this "buildup" to justify his measures of "anticipatory self-defense" to the Security Council.

It would not be difficult to establish meaningful constraints upon a doctrine of anticipatory self-defense if all States could be expected to act in good faith; but were that the case Article 2(4) itself would likely solve all use of force problems. If a State has overwhelming evidence that it is about to become the victim of an imminent armed attack—especially if the correlation of forces or the existence of weapons of mass destruction in the potential aggressor's inventory might make meaningful defense impossible if the initial attack succeeded—it is not unreasonable to permit the probable victim to respond preemptively.

The so-called "*Caroline* test"[116] is traditionally associated with the doctrine of self-defense, but a careful examination of the situation suggests that it might arguably more properly be viewed as a test for anticipatory self-defense. The incident arose in 1837, during a rebellion in Canada. A group of insurgents gained control of Navy Island on the Niagara River and they chartered an American vessel, the *Caroline*, to carry arms and supplies from the United States. A Canadian militia force secretly crossed to the American side of the river and seized the American boat, and in the process two American citizens were killed. The Canadian militiamen set the steamer afire and cut it adrift. The currents swept it down river and over the Niagara Falls. The United States objected to this violation of American territory, and ultimately the incident led to an exchange of views between U.S. Secretary of State Daniel Webster and British Foreign Minister Fox. Webster argued that there must be shown "a necessity of self-defence, instant, overwhelming, leaving no choice of means and no moment for deliberation;" and the defensive action must involve "nothing unreasonable or excessive, since the act justified by the necessity of self-defence must be limited by that necessity and kept clearly within it."[117] The *Caroline* test was applied by the Nuremberg tribunal in rejecting a German contention that it was "compelled to attack Norway to forestall an allied invasion, and her action was therefore preventative."[118] This was in reality a pre-Charter argument of a right of anticipatory self-defense.

One point is clear: the proliferation of weapons of mass destruction and effective delivery systems will make the doctrine of anticipatory self-defense even

more important in the coming years. If the United States or one of its allies learns, for example, that a radical regime is planning to launch a nuclear, biological, or bacteriological warfare attack against a major population center, it can hardly be expected to sit quietly back and await such imminent devastation on the theory that an actual "attack" must precede any measures of forceful self-defense.

Humanitarian Intervention

Some scholars contend that it is permissible under international law for one State, or a group of States acting collectively, to intervene in another State for the purpose of preventing or stopping conduct which "shocks the conscience" of mankind, such as widespread murder or torture of innocent people.[119] Oppenheim writes:

> There is general agreement that, by virtue of its personal and territorial supremacy, a State can treat its own nationals according to discretion. But there is a substantial body of opinion and of practice in support of the view that there are limits to that discretion and that when a State renders itself guilty of cruelties against and persecution of its nationals, in such a way as to deny their fundamental human rights and to shock the conscience of mankind, intervention in the interest of humanity is legally permissible. . . . The fact that, when resorted to by individual States, it may be—and has been—abused for selfish purposes tended to weaken its standing as a rule of International Law. That objection does not apply to collective intervention. The Charter of the United Nations, in recognising the promotion of respect for fundamental human rights and freedoms as one of the principal objects of the Organisation, marks a further step in the direction of elevating the principle of humanitarian intervention to a basic rule of organised international society.[120]

Oppenheim concluded that the Charter *strengthened* the case for a legal norm permitting humanitarian intervention.[121] It should be noted that many scholars take a quite different position, arguing that Article 2(4) of the Charter outlawed an established preexisting right of humanitarian intervention. For example, Professor Sørensen concludes: "The prohibition of armed intervention applies equally to humanitarian intervention."[122] Like many writers, he seems somewhat less concerned with multilateral intervention and concludes that the Security Council decisions on the Congo (1960) "give support to the view that there is room for collective intervention on behalf of the United Nations when internal disorders in a State assume the proportions of a threat to international peace and security."[123]

The American Law Institute, in its *Restatement (Third) on Foreign Relations Law*, provides:

> *Humanitarian intervention to rescue victims or suppress human rights violations.* It is increasingly accepted that a State may take steps to rescue victims or potential victims in an action strictly limited to that purpose and not likely to involve

disproportionate destruction of life or property in the State where the rescue takes place. Whether a State may intervene with military force in the territory of another State without its consent, not to rescue the victims but to prevent or terminate human rights violations, is not agreed or authoritatively determined. Such intervention might be acceptable if taken pursuant to resolution of a United Nations body or of a regional organization such as the Organization of American States.[124]

Intervention On The High Seas

International law recognizes universal criminal jurisdiction over certain heinous crimes and expressly gives warships authority to board, inspect, and if warranted, ultimately use force against foreign ships (other than warships) thought to be engaged in the slave trade or piracy. But note carefully that the definition of piracy in applicable treaties, (as vessels engaged in international terrorism on behalf of sovereign States) may well not fall within the definition. There is no general right to board or seize foreign ships on the high seas, but a ship engaged in the use of armed force against foreign States or their citizens may be the object of necessary and proportional defensive measures.

Draft Guidelines for Using Force in Low-Intensity Situations

The prohibition against interfering with the political independence or territorial integrity of other States is a fundamental rule of international law reflecting the modern law of sovereignty. The United States should not engage in such conduct except when essential to defend its legal rights.

As a general principle, it is suggested that military force may be used (or threatened) pursuant to these guidelines:[125]

(1) There must be a breach of State responsibility on the part of the State against whose territory the use of force is being contemplated, e.g.:

a. The terrorist attack or other prior use of armed force was a consequence of the actions of the foreign Government or its agents (e.g., the attack involved members of the State military force or was significantly organized and funded by the State); *or*

b. The State from which the wrongful use of force was mounted must have known, or must have been in a position where it reasonably should have known, that the attack(s) were being planned; and it must have failed to take reasonable steps to prevent the attack(s); *and*

(2) Peaceful means of resolving the dispute must have been exhausted (or it must be clear that they would not succeed); *and*

(3) The level of force used must be limited to that necessary to bring an end to the unlawful threat to the State; *and*

(4) Reasonable efforts must be taken to avoid any unnecessary interference in the internal affairs of other States; *and*

(5) Consistent with (4), all intervention in the second State must be brought to an end at the earliest possible date.

Closing Thoughts: A Critical Era of Challenge and Change

As we move further into the 1990s, it is imperative that policymakers recognize the critical nature of this moment in history. Containment[126] worked, the heart of the Leninist empire has ceased beating, and it is quite possible that the United States will stand alone as a world superpower for the foreseeable future. Indeed, many observers believe it is a *certainty* that the United States will remain the world's only "superpower" for coming years.

Such thinking ignores the possibility of new alliances—most of the modern world is run by individuals raised on balance-of-power strategic thinking—as well as the probable diminution of U.S. strength that a few years of "peacetime" cuts will bring. Whether major challenges arise to "balance" American power will in large part be determined by world perceptions of American ambition and behavior. A benevolent America, cast in the tone of the post World War II gentle giant that rebuilt Europe and Japan while dedicating its nuclear monopoly to preserving peace, is likely to be tolerated far longer than an America determined to have its way across the board.

It is therefore imperative to reaffirm the "peace through justice" strategy of our founders. The more the U.S. is perceived as reckless and anxious to impose unilateral solutions to world problems, the more likely it is to find a growing "anti-United States" alliance of necessity growing across both oceans. The most fundamental principles of morality demand that the powerful giant resort to force with extreme reluctance and only to promote justice and defend essential interests. If the United States' role as world giant is to survive unchallenged, our leaders must by words and conduct assure friends and foes alike of our firm commitment to justice.

I share the view held by many others — a view that dates back at least as far as Immanuel Kant's *Perpetual Peace* — that democratic states tend to be less aggressive in their nature than authoritarian or totalitarian States. I support assistance to Russia and the former Soviet empire not only because it is just and right from a humanitarian point of view, but also because the long-term prospects for world peace will be greatly influenced by the direction these important States take in the coming years.

Much of the democratic progress registered in Eastern Europe in the past few years is premised upon a perception of American fairness and good will. If America chooses to become the world's "Big Brother," promoting its narrow

self-interest with the weight of its nuclear missiles, the predictable reaction in Eastern Europe and other fledgling democracies may well include the discrediting of the system of government for which the United States stands. If we — even for the best of motives — signal to the world that we intend to intimidate our way to success, then we would be wise to stop talking about defense cuts. Just as our free market makes adjustments when demand exceeds supply, we can expect the world political system to seek to compensate for an American-dominated imbalance which is perceived as posing long-term threats to other States.

Our resources are limited, and we could not do for the former Soviet Union what we did for Japan in the late 1940s — even if we wished to attempt such a feat. However, the world's perception of our goals and temperament will be as important as our foreign aid. Now is the time not only to take the moral high ground, but also to make sure that the moral foundations of our policies are carefully understood around the world.

The 1990-91 Gulf crisis provided hope that the essentially stillborn U.N. Security Council might be rejuvenated and permitted to play a central role in world peacekeeping. I believe it is in our interest to promote that end. The dream of the Charter is not "balance of power" politics, but rather the politics of peace. Every potential victim of aggression should be able to expect that the entire world community is prepared to come to its defense in the event of armed aggression. No State, not even the United States of America, will ever be so powerful, or so foolish, that it would commit armed aggression against its neighbors in the face of such odds. If collective security can work, there will be no further need for balance-of-power alliances, and a peaceful United States might be permitted to continue on its way without the need for arms races or new grand alliances.

No nation is likely to pose a direct military threat to U.S. security in the foreseeable future.[127] If we can maintain a reasonable amount of credible power, and couple it with world-wide perceptions that America is just and honorable, our ability to influence world events will be enhanced dramatically. Under such circumstances, international law could expand dramatically—providing in the process not only for multilateral responses to low-intensity aggression and terrorism but even for controlling international narcotics trafficking.

The future, in short, is bright and extremely promising. Opportunities for positive developments in the law abound. But the future is uncertain, and it will be determined by a large degree by how other States view the United States. Policymakers must keep this fact in the forefront of their minds. Even relatively minor departures from the agreed norms of behavior might well be misunderstood at this point. We will not be the only actor shaping the world's new future, but we may well be the most important. Let us not abandon those rules of fairness and honor which once set the United States apart as a beacon for lovers of liberty around the world. And to that end let us redouble our efforts to keep our own people and the world community informed about the rationale behind

our conduct—because there will still be forces around the globe anxious to draw the wrong conclusions and to share their doubts with others. The cause of world freedom and democracy has never been more promising. Its success will depend in part upon how successful we are in living up to our potential as a nation dedicated to peace and justice.

Notes

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1. 12 WRITINGS OF THOMAS JEFFERSON 418 (Mem. ed. 1904) [hereinafter WRITINGS OF THOMAS JEFFERSON]. In 1963, former Secretary of State Dean Acheson told the American Society of International Law in connection with the Cuban Missile Crisis: "In my estimation, however, the quarantine is not a legal issue or an issue of international law as these terms should be understood. . . . [L]aw simply does not deal with such questions of ultimate power. . . . The survival of States is not a matter of law." at the 57th annual meeting of the American Society of Law (April 25-27, 1963) in Proc. Am. Soc'y Int'l L., 1963 at 13-14..

2. "In the last resort almost the whole of duties of States are subordinated to the right of self-preservation." HALL, INTERNATIONAL LAW 322 (8th ed. 1924).

3. 8 WRITINGS OF THOMAS JEFFERSON 12.

4. 8 *id.* at 11.

5. 3 *id.* at 228-29.

6. 8 *id.* at 219.

7. 15 *id.* at 95.

8. 15 *id.* at 478.

9. U.N. CHARTER art. 2, para. 1.

10. For example, the five permanent members of the U.N. Security Council are invested with veto powers not shared with other States. U.N. CHARTER art. 27, para. 3.

11. For a brief statement of the writer's views on this issue, *see* Turner, *Verdugo II Reconsidered: The Law and Policy of Rendition*, 13 (6-8) A.B.A. Law and National Security Intelligence Report 3 (Summer 1991).

12. 91 CONG. REC. 166 (1945).

13. By this I mean that we should not allow an ineffective legal regime to guarantee victory to lawbreakers. Even were we to decide to resort to the "rules of the jungle" in deciding to use force, it would be imperative that we continue to abide by the fundamental rules of civilized moral conduct which regulate the manner in which we use force. Thus, the fact that Iraqi forces murder children and rape civilians would not justify such abuses by American forces.

14. *See* Turner, *International Law, the Reagan Doctrine, and World Peace: Going Back to the Future*, Wash. Q. 119 (Autumn 1988).

15. This approach is not without risks. Some legal scholars will perhaps argue that the United States loses its right to act in self-defense once the Security Council takes up the issue, but the Charter text says self-defense is permissible "until the Security Council has taken measures necessary to maintain international peace and security." I would argue that if the Security Council's measures do not accomplish their stated objective, or if ultimate Security Council action is blocked by a veto, then the Council will have not "taken measures necessary to maintain international peace and security" and the right of self-defense is not vitiated.

16. *See* text accompanying n. 1.

17. FRIEDMAN, THE CHANGING STRUCTURE OF INTERNATIONAL LAW 197 (1964).

18. *See, e.g.*, Department of Defense, *Terrorist Group Profiles* 3 (1988).

19. *See* text accompanying n. 12.

20. Much of this discussion is premised upon the idea that the "armed attack" language of Article 51 of the Charter narrows the traditional right of self-defense and precludes a forceful response to certain types of low-intensity aggression. In reality, I believe that analysis to be inaccurate. If I am correct, it should be unnecessary to even raise the equity argument. However, there is language in the Paramilitary Activities Case (Nicaragua v. U.S.) that supports a more narrow interpretation of Article 51, and it is with that in mind that I raise this alternative approach. The doctrine of *stare decisis* does not apply to the ICJ decisions, and I shall not therefore go into a detailed critique of this case. My views are set forth briefly in Turner, *Peace and the World Court: A Comment on the Paramilitary Activities Case*, 20 Vand. J. Transnat'l L. (1987).

21. The writer has argued elsewhere that some efforts by Congress to mandate a greater legislative role in foreign affairs are of dubious constitutionality. *See, e.g.*, TURNER, REPEALING THE WAR POWERS RESOLUTION: RESTORING THE RULE OF LAW IN U.S. FOREIGN POLICY (1991).

22. *See* text accompanying n. 5.

23. When the United States sought to justify its attack on North Vietnam as a "reprisal" rather than as collective self-defense against ongoing North Vietnamese armed aggression, it played into the hands of its critics within the legal community. Similarly, relatively minor technical errors in a 1981 U.S. White Paper on Nicaraguan aggression against El Salvador were used to discredit the entire document not only within the United States, but ultimately by the majority of the World Court. *See* TURNER, *supra* n. 20, at 53, 75-76.

24. EASTWOOD & KEETON, THE AUSTINIAN THEORIES OF LAW AND SOVEREIGNTY 45 (1929) [hereinafter EASTWOOD & KEETON]. For a detailed discussion of sovereignty, *see* MERRIMAN, HISTORY OF THE THEORY OF SOVEREIGNTY SINCE ROUSSEAU (1900).

25. The French *souverain* ("supreme, paramount; final, without appeal") is derived from the Latin SUPER ANUS. Concise Oxford French Dictionary 778 (1963).

26. 1 OPPENHEIM, INTERNATIONAL LAW: A TREATISE 116 (7th ed. 1948) [hereinafter OPPENHEIM].

27. *Id.*

28. EASTWOOD & KEETON, *supra* n. 24, at 55. *See also* COHEN, RECENT THEORIES OF SOVEREIGNTY 1 (1937) [hereinafter COHEN].

29. EASTWOOD & KEETON, *supra* n. 24, at 55.

30. *Id.*

31. 1 OPPENHEIM, *supra* n. 26, at 116-117.

32. EASTWOOD & KEETON, *supra* n. 24, at 56-57.

33. *Id.* at 57.

34. *Id.* at 58-59.

35. *Id.* at 60.

36. *Id.*

37. OPPENHEIM, *supra* n. 26, at 117.

38. EASTWOOD & KEETON, *supra* n. 24, at 70.

39. OPPENHEIM, *supra* n. 26, at 118.

40. ESMEIN, *ELÉMENTS DE DROIT CONSTITUIONNEL* (6th ed. 1914).

41. FENWICK, INTERNATIONAL LAW 125 (4th ed. 1965).

42. *Id.* at 126.

43. GIERKE, POLITICAL THEORIES OF THE MIDDLE AGES 76 (Maitland trans.), quoted in EASTWOOD & KEETON, *supra* n. 24, at 42.

44. EASTWOOD & KEETON, *supra* n. 24, at 42.

45. *Id.* at 43.

46. *Id.*

47. COHEN, *supra* n. 28, at 1-2.

48. OPPENHEIM, *supra* n. 26, at 118-20.

49. BRIERLY, THE LAW OF NATIONS 16 (6th ed. 1963).

50. FENWICK, *supra* n. 41, at 48-49.

51. *Id.* at 126. Among other sources cited for this view are LAUTERPACHT, THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY (1933); RUSSELL, THEORIES OF INTERNATIONAL RELATIONS (1936); Garner, *Limitations on National Sovereignty in International Relations*, 19 Am. Pol. Science Rev. 1 (1925); and Coker & Borchard in MERRIAM, A HISTORY OF POLITICAL THEORIES (1935).

52. Draft Declaration on Rights and Duties of States prepared by the International Law Commission on 1st Sess. (1949), reprinted in 5 WHITEMAN, DIGEST OF INTERNATIONAL LAW 25-26 (1965) [hereinafter WHITEMAN DIGEST].

53. OPPENHEIM, *supra* n. 26, at 259.

54. *Id.* at 259 n. 5.

55. 1 SCHWARZENBERGER, INTERNATIONAL LAW 58-59 (1949), *quoted in* 1 WHITEMAN DIGEST 261 (1963).

56. Barcelona Traction Case (Second Phase), 1970 I.C.J. Reports 3, 32 (1970).

57. Article 53 of the Vienna Convention on the Law of Treaties, May 23, 1969 [hereinafter Vienna Convention] defines *jus cogens* as "a norm accepted and recognized by the international community of States as a whole as a norm which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." U.N. Doc. A/CONF. 39/27, (1969), 63 Am. J. Int'l L. 875 (1969).

58. *See, e.g.*, LUNG-CHU-CHEN, AN INTRODUCTION TO INTERNATIONAL LAW: A POLICY ORIENTED PERSPECTIVE 214 (1989).

59. 1 PEASLEE, CONSTITUTIONS OF NATIONS 5-7 (2d ed. 1956), *quoted in* 1 WHITEMAN DIGEST 233.

60. 1 WHITEMAN DIGEST, at 234.

61. McColm, *The Comparative Survey of Freedom: 1992*, Freedom Review, Jan.-Feb. 1992, at 5.

62. *Id.*

63. JESSUP, A MODERN LAW OF NATIONS 159 (1952).

64. *Id.* at 162.

65. 5 WHITEMAN DIGEST *746-47.*

66. *Id.* at 740.

67. The distinction between a retorsion and a reprisal is that the action taken in a retorsion would have been lawful even in the absence of the initial wrongful act by the other state (such as denying another state landing rights at an airport in the absence of a treaty establishing such a right, or breaking diplomatic relations), while a reprisal is lawful only because of the prior violation by the other state (such as violating the same or parallel provision of the same treaty). Under the Charter, forceful reprisals are generally regarded as impermissible unless justified by Article 51 of the Charter—in which case they are normally referred to as acts of self-defense.

68. Self-help is a broader term than self-defense and incorporates the latter in addition to retorsion, reprisal and intervention. *See, e.g.*, BRIERLY, *supra* n. 49, at 398. Unlike Brierly, some scholars argue that, under the Charter, the only forceful measures of self-help permitted are those classified as self-defense.

69. OPPENHEIM, *supra* n. 29, at 265.

70. U.N. CHARTER Art. 51.

71. FENWICK, *supra* n. 41, at 271.

72. 1928 I UNITED STATES FOREIGN RELATIONS 91; *see* also FENWICK, *supra* n. 41, at 278; BRIERLY, *supra n. 49*, at *407.*

73. JESSUP, *supra* n. 63, at 163.

74. I UNITED STATES FOREIGN RELATIONS 1928 at 36. This position is supported by the writings of the late Professor Quincy Wright, a former President of the American Society of International Law, who wrote in 1957: "[E]very international obligation not to engage in hostilities carries the qualification, by implication if not by express statement, that it does not impair a state's capacity to use armed force . . . for necessary self-defense, . . . or for assisting, if requested, another state in an armed action permissible to the latter." Wright, *Intervention, 1956*, 51 Am. J. Int'l L. 257, 269 (1957).

75. BRIERLY, *supra* n. 49, at 409-10.

76. FENWICK, for example writes: "It is clear, however, that both of the cases contemplated by the Charter have in mind self-defense of the most restricted character, since self-defense is limited to armed attacks. . . ." *supra* n. 41, at 279. Sørensen presents two reasonable interpretations of the Charter, but sides ultimately with the view "that the CHARTER modified the customary right of self-defense." SØRENSEN, MANUAL OF PUBLIC INTERNATIONAL LAW 765-67 (1968).

77. LUNG-CHU CHEN, *supra* n. 58, at 324-26.

78. SØRENSEN, *supra* n. 76, at 777-78.

79. HENKIN, HOW NATIONS BEHAVE *141* (2d ed. 1979).

80. However, Art. 2, para. 6 of the Charter does provide; "The Organization shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security." This might justify compelling North Korea to comply with the Charter; but if the only aggression prohibited by the Charter is that by a "Member" of the organization one might question whether North Korea had acted wrongfully.

81. The Vienna Convention provides in Art. 31 that "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." Art. 32 allows "[r]ecourse . . . to supplementary means of interpretation, including the preparatory work of the treaty," when the procedures set forth in Art. 31 "leaves the meaning ambiguous or obscure" or "leads to a result which is manifestly absurd or unreasonable."

82. BRIERLY, *supra* n. 49, at 417.

83. *Id.* 417-418.

84. *See* text accompanying n. 72.

85. *Id.* 418-419.

86. BOWETT, SELF-DEFENCE IN INTERNATIONAL LAW 152 (1958).

87. 12 WHITEMAN DIGEST 62-63.

88. *Id.* 737-38.

89. Senator Vandenberg *quoted in id.* at 99.

90. 95 CONG. REC. 8892 (1949).

91. 12 WHITEMAN DIGEST 84-85.

92. 5 *id.* at 281.

93. 12 *id.* at 23.

94. 2 U.N. SCOR (147th and 248th mtg.) at 1120-1121 (1947), *quoted in, Military and Paramilitary Activities* (Nicaragua v. U.S.), 1986 I.C.J. at 335 (Schwebel, J., dissenting).

95. 12 WHITEMAN DIGEST 96.

96. "Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council," U.N. CHARTER Art. 51.

97. OPPENHEIM, *supra* n. 26 at 276.

98. *See, e.g.*, SØRENSEN, *supra* n. 76, at 764.

99. *See infra* n. 117-19 and accompanying text.

100. BRIERLY, *supra* n. 49, at 405.

101. FENWICK, *supra* n. 41, at 275; OPPENHEIM, *supra* n. 26, at 269.

102. OPPENHEIM, *supra* n. 26, at 256-57.

103. *Id.* at 259-62.

104. SØRENSEN, *supra* n. 76, at 775.

105. In the absence of clear negligence, there is no general duty for States to insure that natural catastrophes likes fires and floods which begin in their territory do not spread across frontiers into neighboring States.

106. One of the fundamental elements for establishing statehood is that a government exercise control over the territory it claims to govern.

107. LUNG-CHU CHEN, *supra* n. 58, at 321.

108. *Id.* at 322.

109. "This was the crux of German policy in the final days of the crisis—to delay German war preparations until Russia had announced a general mobilization, and then to blame Russia for starting the war that Germany now sought. The purpose was both to persuade Britain to remain neutral, since it was understood that British policy would never back Russian aggression, and, more crucially, to unify the German People." Glynn, *The Sarajevo Fallacy—The Historical and Intellectual Origins of Arms Control Technology*, The National Interest 23 (Fall 1987).

110. HENKIN, *supra* n. 79, at 141.

111. *Id.* at 142.

112. "[A]ny preventative, anticipatory or pre-emptive use of force prior to the occurrence of an armed attack cannot be regarded as action in self-defense." SØRENSEN, *supra* n. 76, at 767.

113. *Id.* at 773-74. This exception does not apply in the case of easily identifiable commercial aircraft.

114. After all, a mere trespass would not normally justify the use of military force against a foreign national or vessel.

115. SØRENSEN, *supra* n. 76, at 778. Professor Sørensen nevertheless reaffirms his view that the Charter outlaws anticipatory self-defense, and—other than acknowledging a State's right to complain to an international institution that it is about to be destroyed—concludes that the problem may be "insoluble."

116. For a discussion of this case, see OPPENHEIM, *supra* n. 26, at 268-69.

117. BRIERLY, *supra* n. 49, at 406; LUNG-CHU CHEN, *supra* n. 58, at 321.

118. Quoted in BISHOP, INTERNATIONAL LAW *918* (3d ed. 1962).

119. On humanitarian intervention, *see* Lillich, *Humanitarian Intervention*, in MOORE, *LAW AND CIVIL WAR IN THE MODERN WORLD* 229 (1974); FENWICK, *supra* n. 41, at 287-89; BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES at 338-42 (1963).

120. 1 OPPENHEIM, *supra* n. 26, at 280.

121. Prior to the seventh (1948) edition of this work, Oppenheim expressed doubt "whether there is really a rule of the Law of Nations, which admits such intervention. . . ." *Id.* at 279 n. 2.

122. SØRENSEN, *supra* n. 76, at 758.

123. *Id.* at 759.

124. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS OF LAW OF THE UNITED STATES §703, Comment e.

125. This list was quickly drafted as a vehicle for discussion, and is not presented as a finished policy statement.

126. I use the word "containment" here despite the fact that the "roll back" nature of some elements in recent U.S. foreign policy (*i.e.*, the "Reagan Doctrine" as applied to Afghanistan, Cambodia, and arguably even Angola and Nicaragua) differed from the traditional reactive policy of Kennan, NSC-68, and most who came after them. In my view, a critical factor in the collapse of the Soviet Union was the firm foreign and defense policy of the Reagan Administration. There is growing evidence, for example, that the Strategic Defense Initiative was perceived as such a potential threat by Soviet leaders that it left them feeling hopeless in the long-term. The "Reagan Doctrine" served both to divert important Soviet resources from domestic problems and to give Moscow a "stake in the game" of international law.

127. The greatest short-term military danger is likely to be from a radical regime like Iraq, Iran, or Libya, which if armed with weapons of mass destruction could cause a great deal of damage to the United States. Most of the short-term threats to the United States will be likely to come on the economic front.

Chapter IV

Low-Intensity Conflict and State Sovereignty: A Philosophical Analysis

by
Fernando R. Teson*

I. Introduction

Throughout the history of philosophy, the morality of war has been the subject of intense concern and debate.[1] I suspect that the reason for the philosophers' preoccupation with war is that there is something terrible, awesome, final, and conclusive about the physical combat of nation against nation, of army against army. In a very primal way, the frightening reality of war tests the limits of reason, and thus of civilization itself. It is not surprising, therefore, that no less an eminent thinker than Immanuel Kant, the champion of rationalism, called war "the judgment of God," where the outcome determines the side on which justice lies.[2] This seemingly irrational trait of war is, I think, the reason philosophers have bravely tried to analyze and understand it with the tools of rational moral thinking, to domesticate it, as it were. The attempt to set moral limits to violence, and to war in particular, illustrates one of the attributes of enlightened civilization: the recurrent attempt to substitute civilized society based on principled reason for the lawless state of nature, where force and power reign supreme.

In contrast, the vast assortment of operations that have been lumped together under the label "low-intensity conflict" seem to have been excluded from the domain of moral analysis.[3] There are at least two reasons for this omission. First, unlike open war, low-intensity operations usually do not cause as much damage and suffering.[4] Second, and most importantly, there is a substantial difference between the common perception of the morality of each: except for the pacifists, conventional war (rightly or wrongly) has traditionally exhibited an aura of courage, dignity, chivalry, and decency. To many, having fought in a just war (e.g., with the Allies in World War II) is the mark of the virtuous citizen who is ready to defend his country (and other people's countries) against enemies, and (perhaps) to uphold good against evil.[5]

In contrast, low-intensity operations have been thought of as secretive, sleazy, sneaky, and not particularly demonstrative of courage or similar virtues.[6] For one

thing, low-intensity operations are the domain of specialists (spies, commando forces, hit squads, and so on), and therefore it is harder to associate those operations with a general, grass-roots, patriotic effort to defend one's just institutions and defeat the enemy who threatens them.[7] In addition, low-intensity operations are often covert and without warning. And last but not least, they are often aimed at non-military targets.

Some people might refuse to explore the moral justification of low-intensity operations on the grounds that they are a necessary evil—strategically required sometimes, perhaps, yet incapable of being justified with rational moral arguments.[8] Yet, unless one is an extreme pacifist, surely it is not possible to take the position that all low-intensity operations are morally unjustified. (If one is an extreme pacifist, low-intensity operations are always unjustified for the same reasons war is.) The question then becomes: if we accept that sometimes war is justified, are there any additional arguments that bar low-intensity operations in peacetime? Some may argue that such additional arguments are related to State sovereignty. When the reasons that justify war apply, then most bets are off with regard to State sovereignty. But if the reasons to wage open war do not apply, then State sovereignty re-emerges in full power, and low-intensity operations are prohibited out of respect for the sovereignty of the target State. Put differently: if the reasons that justify war obtain, then a government has a right to wage war; if they do not, then no infringement of the sovereignty of another State is justified. On this view, State sovereignty is an all-or-nothing concept, which only collapses when the target State is on the wrong side of a just war.

In this paper I explore the issue of the justification of low-intensity operations in the light of the principle of State sovereignty. I reject the premise that State sovereignty is an intrinsic value, or an all-or-nothing concept. State sovereignty is instead an instrumental value and therefore, moral reasons have to be supplied in its support. It follows that whatever moral reasons are given to justify low-intensity operations, they must compete against the moral reasons that support the respect for State sovereignty.

I argue that a low-intensity operation is morally justified when it meets the following conditions:

1) The ends of the operation are morally justified goals under just war theory. A war has a just aim when it is waged in the defense of persons and, derivatively, of just institutions.

2) The government contemplating the operation is a legitimate government.

3) Either the target State or the target government are illegitimate.

4) The operation does not otherwise violate human rights.

5) The operation is necessary and proportionate.

6) The *modus operandi* is not such that would undermine the flourishing of civic and personal virtues that a liberal democracy must encourage.

The central ideas are embodied in conditions (1) and (3). Whether or not a government should engage in a particular low-intensity operation depends absolutely upon the justice of the cause, and relatively upon the legitimacy of the social contract in the target State. Only legitimate governments have moral standing to conduct these operations (condition (2)); but they may not proceed when the target State is fully legitimate (in the sense explained below.) Even when the target State is not legitimate, those performing the low-intensity operation must make every effort to respect the individual rights of the persons that reside in the State. Condition (5) (necessity and proportionality) is a feature of the conduct of war generally. Finally, even if all the foregoing conditions are met, some *modi operandi* may be so odious that they should be avoided because performing them would undermine the civic and individual virtues that a liberal democracy must cultivate—in other words, those methods may have a highly corrupting effect. Thus, virtue theory provides an important supplement to the liberal theory upon which this paper rests.

II. A Definition of Low-Intensity Conflict

Before tackling our substantive problem, I would like to narrow the kind of low-intensity operations that will be discussed in this paper. Writers have defined low-intensity conflict in a noticeably broad way, as including everything short of "total" war.[9] The first problem with this broad definition is that limited uses of conventional force are best analyzed as part of just war theory.[10] For example, some scholars have treated the 1986 U.S. bombing raid of Libya as an instance of low-intensity conflict because it was a limited operation short of "total" war.[11] Of course, this is a semantic issue. Yet it is best to treat that incident as an instance of the use of conventional force by a State against another State, much in the way international lawyers treat it.[12] The moral justification of limited conventional war is no different from the moral justification of war generally, so no additional moral analysis is needed. I will not, therefore, include instances of limited conventional war (the U.S. operations in Grenada and Panama come also to mind) in my analysis.

The low-intensity operations that pose distinct ethical problems, and those with which I am concerned here, are those that do not amount to overt conventional war, limited or unlimited. However, even after excluding

conventional war, the definition of low-intensity conflict is still too broad. Different kinds of operations are lumped together in the literature under the low-intensity conflict label, yet are very different in ends and means. Examples of these are: counter-narcotics; counter- and pro-insurgency; and the targeting of individuals such as political leaders. A further element of the definition is that all these actions are performed in the territory of another sovereign State, or in a territory assimilated to it; and they do not involve the direct commitment of troops or other personnel openly wearing uniforms or identifying insignia. All these activities have in common that they involve coercive action performed by a government in a foreign State, which by definition is a territory in which the intruding government has no power, in principle, to exercise such coercion.

However, that is all these operations have in common. Many operations that are lumped together under the label of low-intensity conflict (even excluding limited conventional war as I have done) involve substantial material differences of moral relevance. There is a big difference between aiding the Iraqi population to overthrow Saddam Hussein, and training death squads aimed at innocent civilians in El Salvador; between kidnapping a suspected drug trafficker in Mexico without waiting for the Mexican courts to act, and sending a commando force to liberate Western hostages victimized by a fanatic group tolerated by the local government. And the contrasting examples can be multiplied. Given this diversity of possible cases, one cannot have a principle according to which all coercion short of open war exercised in another State's territory is morally impermissible (or permissible.) It will depend on the facts.

III. The Ends of Low-Intensity Conflict

Low-intensity conflict is a form of international coercion. This coercion may involve different degrees of violence.[13] At the very least, low-intensity operations involve violation of the sovereignty of another State, that is, of the monopoly of coercion that is granted only to that government in that territory by the citizens that reside in it, and recognized by international law. And in many other cases, low-intensity operations will involve doing actual violence to persons. What aims can morally justify such actions? Must a government invoke the national interest, or a pressing national interest, or self-defense, or expediency, or the need to punish criminals; or is there something else required in the form of justification? People have differed on the answer to this question.

(a) The Realist Answer

Realists have long maintained that international behavior can be explained by postulating an overriding motivation, which is the same for all international actors, and for nation-States in particular: the national interest. For realists, the

task of the science of international relations is to study and unveil the complex international interactions of different national interests that produce diplomatic confrontation (such as war) and cooperation (including treaties, international organizations, or, to use modern international relations parlance, "international regimes").[14]

Now realism thus defined attempts a descriptive explanation of international behavior. Whatever its merits as a thesis of political science (that is, whether or not realism adequately describes the causes and effects of international behavior), there is *prima facie* nothing in it that logically entails a moral justification of international behavior. The realist can consistently claim that State X performed action A because A advanced X's national interest, but that on independent moral grounds A was unjustified. He need not claim that an appeal to national interest counts as a moral justification for international acts.

However, many descriptive realists have, almost imperceptibly, slid into a normative realist approach, that is, into the view that national interest justifies international behavior. This has been done, in my view, in two different, though not inconsistent ways. Some realists have adopted a state of nature approach to international relations, i.e., the Hobbesian position that nations are always potentially at war with each other.[15] On this view, all is fair in war, the only measure being one of prudential rationality, that is, that the State should do those things that advance its national interest. There is no such thing as transnational justice or morality; thus realists are international moral skeptics.[16] Under this theory, a government makes an international mistake when it does something (e.g., starts a war) believing that the act is in the national interest, when in reality it is not. In these cases, the leaders have failed to perceive the real national interest.

The second path to normative realism is linked to considerations of constitutional philosophy. Under liberal democratic theory, the government is the agent of the people. It is hired by the citizens of the State to serve their interests. A consequence of this agency relationship is that significant deviations from this purpose (e.g., the government seeking its own self-interest) are grounds for criticism and even in extreme situations, for open revolt. These are the terms of the vertical social contract, the contract between people and government.[17] This contract specifies the government's obligation to govern in the interest of the governed. So far so good.

This job description of the government, however, carries implications for international relations. A government does not owe any duty to foreigners, since they do not stand in any contractual relationship with it. A government's paramount international duty, then, is to perform those actions which will maximize the interests of the subjects of the State which it represents. Again, limitations to foreign policy are those that are dictated by prudence. For example, a government behaving too aggressively might cause other States to retaliate in a way that will harm the citizens of the State which it represents. This view is

appealing because it relies on democratic representation to explain the international "state of nature." The world consists of independent nations with governments; these governments are agents that represent their citizens; and each of them attempts, in a competitive world, to serve the interest of its principals. The prudentially correct international action for any State, or group of States, can be determined by an analysis of the interests involved and the options open to the agents, which could be based on models of collective rational choice or game theory. There are no international principles of morality from this philosophical perspective.

From the realist standpoint, for example, the ill-fated, U.S.-supported Bay of Pigs invasion was mistaken, not because it violated the principle of sovereignty, but because the Kennedy administration underestimated the probability of failure and its consequences for the United States. Had the invasion succeeded, there would have been no objections whatsoever against it. Thus, this version of normative realism, based on the agency relationship of government to subjects, reaches the same conclusion as the "state of nature" version of realism: international acts may only be evaluated from the standpoint of national interest.

(b) Extreme and Moderate Realism

Under either version of normative realism, international acts, and hence low-intensity operations, are justified if they serve the national interest. But a further distinction must be made between extreme realism and moderate realism. According to extreme realism, low-intensity operations are justified whenever they advance the national interest. Extreme realists thus regard the net maximization of the national interest as a sufficient reason for conducting low-intensity operations.

For example, if the U.S. government were to determine that abducting a suspected drug trafficker from Mexico serves the national interest and can be accomplished without affecting trade or diplomatic relations, then the operation would be justified.[18] Presumably, this would be so even if some innocent people were killed, or important property damage caused in the course of the abduction, because the U.S. Government does not owe any duty to Mexicans, or to any foreigners. The touchstone of the theory is the national interest. The only admissible reason for moderating our behavior, then, is the perception that otherwise our national interest is likely to be harmed, after computing the benefits reaped by the kidnapping.

Moderate realism, on the other hand, contends that maximizing the national interest is a necessary but not a sufficient reason to justify low-intensity operations. These must be justified by appealing to the national interest, but must also comply with the requirements of necessity and proportionality that apply to the use of force generally.[19] In our previous example, perhaps the kidnapping could be morally justified if (a) all other means to persuade the Mexican Government to render the suspect have failed; and (b) no Mexican lives were lost.

(c) Utilitarian and Communitarian Realism

One preliminary question for the evaluation of realism is what counts as national interest. Realists have two very different answers to this question.

It seems intuitively obvious that there are goals that, if accomplished, would benefit most people in a country. For example, if U.S. industry becomes more competitive, given the American capitalist economic system, most American citizens will benefit. There would be more wealth and jobs in the country. Therefore, diplomatic actions by the U.S. government aimed at this end serve the national interest.

This approach to national interest simply defines it as the aggregate maximization of preferences of the citizens of the State. National interest is explicated by appealing to well-tested empirical laws and theories, and refers to actual preferences of people. It follows that the validity of claims to national interest may be tested by empirical calculations. Some claims are simply empirically false, as for example appeals to the national interest when the only interest being served is that of a minority. There is nothing problematic with this definition of the national interest, because it does not appeal to something above and beyond the actual interest of persons. The national interest is real, concrete, and measurable. This is the utilitarian conception of national interest. In its normative form, this thesis holds that the satisfaction of the net aggregate interests of citizens of the State justifies international acts.

Realists, however, sometimes speak as if there were an interest that is national in the sense of not being reducible to the aggregate actual interests of the citizens of the State. This national interest presumably endures regardless of the change of governments and regardless of the nature of internal sociopolitical arrangements. This is the communitarian definition of the national interest[20] and may be contrasted with utilitarian realism. Claims that an international act (such as an invasion) will enhance national glory preclude the measurement of national interest by empirical means. They rely on a conception of interest that is national in the Hegelian sense; that is, held by the nation as a moral being that endures over time. Communitarians thus reject the utilitarian idea that "counting heads" is the way to determine national interest.

Of course, if the majority of the population feels strongly about national glory or ethnic pride, then their preferences would be maximized by an international act in pursuit of those goals. In this case, utilitarian and communitarian realism will agree on the desirability of a particular outcome. Yet the communitarian approach to national interest is not sensitive to empirical falsification. Communitarians claim that their values are to be found in the "intimations of the tradition" of a given society.[21] If national interest is defined by reference to such notions, it will often be the case that the actual aggregate interests of living citizens do not coincide with what is dictated by the "intimations of the tradition." Although appeals to national glory may be found after analysis to reflect the preferences of citizens of a State, their failure to do so would not invalidate their

justification on communitarian grounds. This version of realism is foundationalist, in that appeal to the foundational principles of the community is thought to outweigh the computation of actual preferences.

Communitarian realism has the virtue of rejecting the pure utilitarian approach to national interest described above. It recognizes that higher principles of morality may not be foremost in the midst of the majority of members of the community at a given historical moment. By refusing to conform foreign policy to transient popular sentiment, this version of communitarianism attempts to instill a principled consistency into the conduct of international relations. And in many situations this approach will be intuitively appealing. For example, an argument against the CIA's involvement in the overthrow of Chilean President Salvador Allende can be made on the grounds that such action was incompatible with the principles embedded in the American tradition of respect for human rights and the popular will.

(d) A Critique of Realism

Normative realism underlies much of the literature on low- intensity conflict. Most of the works on low-intensity conflict are about what strategies better serve the U.S. national interest.[22] But I submit that normative realism is not morally sound. Advancing the national interest is neither a sufficient nor a necessary condition to justify low-intensity operations.

I will start with utilitarian realism. This version of realism, as suggested above, has considerable appeal became it is based on democratic principles. What could be more obvious than that a government that we elect to defend our interests should do those things that advance our interests? In the philosophical literature, the most devastating critique of utilitarianism comes from a foundationalist perspective.[23] Many international acts may serve the national interest in a utilitarian sense, yet be immoral on other grounds. Just as in individual morality we must refrain from immoral acts, even if they maximize our self-interest, so in international relations governments must refrain from immoral acts even if they serve the national interest. Thus the foundationalist critique attacks the often unstated premise of realism that there is no international morality.

This flaw of utilitarian realism is clearly seen in its well-known indifference to human rights. Surely someone committed to liberal principles would not accept the proposition that a government may blatantly violate the rights of persons in other countries provided that in doing so it advances his interests. Put differently, the objection to utilitarian realism is that its premise or point of departure is wrong because it is incomplete. A government's job description should not be "persons we elect to maximize our interests", but "persons we elect to maximize our interests consistently with respect for human rights." A morally justified democracy constrains the will of the majority with respect for human rights. Just as domestically the majority may not oppress minorities, so

internationally the majority may not direct its own government to ignore the rights of individuals in other States.

Although a government's obligation to maximize the preferences of the citizens it represents cannot be a paramount and exclusive international duty, utilitarian realism still has a role to play. When the government carries out a low-intensity operation that harms the national interest (understood in an empirical, not holistic, sense), even if the behavior serves worthy purposes, the citizens have a claim against their government for not doing its job properly. This is much like the claim that a client has against a lawyer who does not do things in the interest of the client, even if the lawyer is moved by noble considerations.

Communitarian realism, in contrast, shares with the human rights approach a foundationalist quality. For communitarian realism, too, there are principles that outweigh the pursuit of actual interest. However, in spite of its anti-utilitarian, foundationalist approach, communitarian realism is untenable for two reasons. The first is common to realism generally, and has already been referred to: the indifference to human rights. In fact, by postulating some national interest over and above the actual preferences of citizens, this version of realism is far more dangerous, and (in spite of its current vogue) even less appealing than utilitarian realism, because it is too close to the spurious and destructive themes of nationalism. The attractiveness of the communitarian critique of the CIA's involvement in overthrowing Allende is that the tradition to which it appeals is morally worthy on other grounds. Yet communitarian theory is hopelessly relativistic. It is committed to justifying appalling regimes of oppression with frightful foreign policies if those practices are embedded in the tradition of the society in question. Communitarians lack the moral tools to come to the defense of dissenters from the tradition. For example, communitarians are bereft of arguments to defend the victims of the Tiananmen Square massacre, since tyranny has traditionally been part of the "intimations" of Chinese tradition. Nor would they have the moral tools to oppose the ambition[25] of Islamic fundamentalists forcibly to convert infidel nations. Communitarians have no room for international human rights or anything close to them, since the very basis of the theory rejects the notion of transnational justice or morality.

The second reason for the moral untenability of communitarianism is that, unlike utilitarianism, it does not even take seriously democratic representation. Communitarians have no reason for preferring a democratically elected government that does not pursue (domestically and internationally) the "intimations of the tradition" to an enlightened undemocratic government. Indeed, this was precisely the view of Plato, the most eminent of communitarians.[26]

A communitarian might reply to this criticism as follows: "Why can't we identify the relevant community as the international community, and say that since that community has agreed to an international law of human rights, international human rights are now part of the intimations of the tradition?" This

position amounts to unconditional surrender, since it makes communitarian realism trivially true. If human rights are universal, then communitarianism, for all purposes, is tantamount to liberalism. The communitarian can no longer identify a relevant community as legitimately denying human rights, because members of that community would be also part of the international community, and as part of that community they are governed by the imperative to honor human rights.

To conclude: Normative realism is unappealing in any of its versions because of its indifference to universal principles of justice—in particular, human rights. Utilitarian realists are right in seeking a liberal democratic foundation of national interest, but consideration for human rights is needed. Communitarian realists, on the other hand, are right in seeking a foundational approach to reject the utilitarian determination of the national interest; they are wrong, however, in the foundational principle (appeal to the intimations of the tradition) that they propose. This principle, like the utilitarian one, is also insensitive to human rights; unlike its utilitarian counterpart, communitarian realism neglects actual interests vindicated by democratic theory (unless the tradition happens, by historical accident, to be the right one on independent moral grounds.)

(e) The Human Rights Approach

The task then is to provide a sound theoretical basis for international morality, one that avoids the pitfalls of realism. Here I contend that an international act is immoral when it violates human rights. If this suggestion is accepted, then we can clearly see why serving the national interest cannot possibly justify low-intensity operations that violate the rights of individuals in the target State. The reason simply is that universal human rights outweigh the pursuit of interest. It follows that a morally acceptable description of the international role of government is this: a government is entrusted by the citizens of the State with the conduct of foreign affairs in such a way so that the interests of the citizens will be served, provided that global human rights are respected. The human rights-based theory of international law is compatible with the pursuit of the national interest (in the utilitarian sense), when respect for human rights constrains it.

The foremost national interest of citizens in a democracy is to defend their just institutions. In a sense, this interest may seem to respond to the description offered by communitarian realists, since the morality of defending just institutions is not contingent on citizens actually wanting to support them at a particular historical time. A government having the wisdom to defend just institutions when they fall from popular favor would be morally justified in opposing the will of the majority. However, as suggested above, the human rights theory of international relations departs from communitarian realism even if the outcome coincides with the liberal view. In the example just given, the communitarian interest is just contingently analogous to the liberal defense of just institutions,

and in any case, the communitarian justification applies only to the domestic defense of just institutions.

Two reasons support the larger duty of democratic governments to uphold human rights and democracy. The first reason is simply that human rights are universal, as indicated above. Therefore a rights-respecting democratic government has a three-fold international duty: to defend its own just institutions; to respect the rights of persons in other countries; and to promote human rights and democracy globally. There is a difference, however, between these three ways of upholding human rights. The first duty of a government is to defend its just institutions: this duty is perhaps the only absolute duty that governments have. The second duty of a democratic government is to respect human rights of persons in other countries, for example, when conducting otherwise permissible low-intensity operations. This duty is very strong, although perhaps not always absolute. The third duty of a democratic government (related to the second) is to defend and promote respect of human rights by foreign governments. This duty is strong, yet constrained by prudential considerations that relate to the capabilities of the State, its resources, and the safety of its citizens.[27]

The second reason governments must uphold human rights and democracy globally is, as Immanuel Kant pointed out, that it is the only way to secure peace.[28] By encouraging the creation and preservation of democratic societies abroad, the democratic government is building the liberal alliance which alone can serve as the basis for a stable international community. If Kant is right, liberal democracies are far less prone to war than illiberal regimes. The coexistence of democratic and undemocratic regimes is the main cause of conflict, because those two radically different political systems cannot easily coexist. The difference in regimes is the cause of international instability.

We see now clearly the consequences for the justification of low-intensity operations of the foregoing considerations: a low-intensity operation will be justified if, and only if, it is consistent with respect for global human rights. Thus, a government may pursue the national interest, either in the utilitarian sense (defined as the satisfaction of the aggregate preferences of the citizens of the State), or in the (putative) communitarian sense of defending just institutions, provided that in doing so it respects the rights of everybody.

The human rights approach helps us dispose of one kind of low-intensity operations: insurgency and counter-insurgency. The human rights approach includes a theory of just war: just war is war waged in defense of human rights.[29] Thus, in almost any war, international or civil, there is a side that is morally right. That side may be waging a war to defend itself from an aggressor, or attempting to overthrow a tyrannical government (at home or abroad), or attempting to justly secede from a parent State (self-determination).[30] Insurgency operations by a democratic State designed to assist the just warriors are justified, provided that the help is welcome. For example, a response to a request for assistance by

Iraqi revolutionaries aimed at overthrowing Saddam Hussein is morally justified. Similarly, counter-insurgency operations to assist legitimate, rights-respecting governments against illiberal uprisings are morally justified, provided, again, that the government welcomes the assistance.[31]

In particular, it is forbidden to assist illegitimate governments (or illiberal groups in civil wars) on the grounds that they are "friends" of the (legitimate) government carrying out the operation. A very important corollary of the human rights theory of international law and relations is that only legitimate governments may be assisted. Kant's liberal alliance is the only plausible foundation of international law; illegitimate governments are excluded from its benefits.[32] This point sharply brings out the contrast between the human rights approach and realism. Many realists have maintained that in foreign policy we should help our "friends," even if they are despicable dictators.[33] Leaving aside for the moment the very plausible claim that such policy is disastrous in the long run, the human rights theory condemns this view as profoundly immoral.[34]

This definition, however, is still very general, and at first blush many will find it unsatisfactory. One possible objection is the one from State sovereignty. A low-intensity operation may be conducted in such a surgical way that no one's rights are violated, yet the sovereignty of the target State would still have been punctured. This objection overlooks the fact that State sovereignty is also grounded on human rights. It follows that whatever arguments are given for respecting State sovereignty (and these can only be human rights arguments) will have to be balanced against the human rights arguments offered to justify the low-intensity operations. This assertion needs to be explained. I turn now, therefore, to the examination of the principles that underlie and justify State sovereignty.

IV. The Justification of State Sovereignty

Low-intensity operations violate the sovereignty of the target State. We saw that in some cases there are moral reasons to make war. The overriding aim of a just war is the protection of human rights. A government's war in defense of the rights of the citizens which are being violated by a foreign aggressor is called self-defense. A government's war in defense of the rights of the citizens of the target State which are being violated by their own government is called humanitarian intervention.

The twin principles of State sovereignty and nonintervention are among the best established precepts of international law. A liberal conception of politics is one in which the just civil society protects and recognizes basic human rights of the type found in modern constitutions or in pertinent international instruments.[35] A liberal conception of State sovereignty has to be consistent with the

justification it offers for the legitimacy of the State generally. I suggest that a State is internationally legitimate when it is internally legitimate.[36]

The best way to approach the question of the legitimacy of the State is to distinguish between the horizontal social contract and the vertical social contract.[37] Citizens of the State are bound to one another by the principles of justice that underlie a just constitution: this is the horizontal social contract. Meaningful social cooperation requires the creation of government, of institutions and offices to which political power is attached. These offices are occupied by persons who are democratically chosen by the citizens of the State. These persons enter, therefore, into an agency relationship with the people who have elected them. This agency relationship is the vertical social contract. In a democracy, the government is accountable to the people and has to remain faithful to the terms of the vertical contract.

From this it follows that illegitimacy may take place in two ways. First, the vertical contract may be breached, in which case the government is illegitimate. This occurs when the government is unrepresentative, or, even if it was originally representative, it engages in serious human rights violations. The government has lost its standing: it does not represent the citizens anymore. Second, the horizontal social contract may break down, so that the State is illegitimate. This state of things may range from a situation of anarchy (Lebanon may be a case in point) to a fragmentation of a parent State into several independent States (much as happened with the Soviet Union).

Thus sovereignty is the flip side of legitimacy. A government is legitimate when it genuinely represents the people and generally respects human rights. Such a government must be respected by foreigners, in particular foreign governments. A State is legitimate and must be respected, when it is the result of a horizontal social contract. In turn, a legitimate social contract (a legitimate constitution) is the one that, at the very least, protects the basic human rights of its citizens. Such a State must likewise be respected by foreigners, in particular foreign governments.

Now a group of people residing in a territory, bound by a legitimate horizontal contract, may rescind the vertical contract as a result of a breach by their government. This may occur in violent revolution or by peaceful means. The government in power becomes illegitimate, that is, the vertical contract has collapsed. In these cases, citizens have not lost their rights. They have not forfeited their human rights nor their civil society which is the result of the social contract that protects such rights. (The horizontal social contract, I emphasize, is derived from individual rights.) They have given up neither their individual rights nor their life in common, their commitment to social cooperation. The illegitimate government, however, is not morally protected. Foreigners, therefore, have a duty to respect human rights and life in common in the State, but do not owe a similar duty to the illegitimate government, because it has lost its standing with its own people. It does not have any moral standing, therefore, with foreigners.[38]

The main reason for this loss of moral legitimacy is practical. If a tyrannical government enjoys the protection of international law it can continue to oppress its people with impunity.[39]

It is possible, however, that even the horizontal contract may collapse, that the civil society may itself disintegrate. Or there may be an illegitimate, spurious social contract, one that does not provide for respect of basic human rights. In these cases, the State is illegitimate. Of course, *a fortiori*, the government will be illegitimate, since the vertical contract exists at the sufferance of the horizontal contract. In this case also, as in the case of the collapse of the vertical contract, individuals, who can no longer be called citizens, have not forfeited their individual rights. Stateless people, persons in the State of nature, hold individual rights. (Imagine that in an unexplored, remote area of the globe we discover individuals who do not have any political or social organization, who just wander in the region. Human rights, I take it, would accrue to them, although I will not attempt to prove this point.) Foreigners, and in particular foreign governments, must respect the human rights of the individuals that reside in that putative State notwithstanding the collapse of the horizontal social contract.

Yet if the horizontal contract collapses, citizens do not have a claim to life in common anymore. Foreigners, therefore, are not under as stringent a duty to respect that "society" as in the case of collapse of the vertical contract. They must respect individual human rights, but there is no more social contract to respect. The individuals, not the State or the society, are all that is left.

To summarize: A State is entitled to the complete protection of State sovereignty afforded by international law when it is founded upon a legitimate horizontal contract and a legitimate vertical contract. A State is entitled to a lesser sovereignty protection when the vertical contract has collapsed. While human rights and the right to a life in common ought to be respected, the illegitimate government and its instrumentalities are not entitled to protection. Finally, when both the horizontal and vertical contract have collapsed, the individuals that reside in the State are entitled to respect for their individual human rights.

We turn now to the application of these principles that support State sovereignty and how they can preclude the pursuit of low-intensity operations by foreign governments. I shall start with the somewhat easier question of the moral standing to undertake a low-intensity operation.

V. Who Can Undertake a Low-Intensity Operation

The first consequence of the foregoing considerations is that only a legitimate government has moral standing to carry out a low-intensity operation acting as a government. Its members may, however, join a just war as private volunteers, like anybody else. Thus dictators may not validly undertake low-intensity operations. The reason is straightforward: the vertical contract is invalid, the

agency relationship spurious, and thus the government cannot validly act on behalf of the citizens of the State. Therefore, its international acts, and in particular its coercive acts (such as war and low-intensity operations) are invalid as acts of the State.

At first blush this seems counter-intuitive. Why can't the illegitimate government of A send a group of people to train and advise the combatants led by the legitimate government of B in its fight against illiberal insurgents? Surely B can use all the help it can get. However, this will not do. The reason is that the government of A cannot validly order citizens of A to fight and perhaps risk their lives in another State, even for a just cause! Because A's is an illegitimate government, it lacks the moral standing to be commander-in-chief. The "subordinates" do not have any duty to obey, and coercing them into fighting is unjustified. Now any person has a right to join in a just war fought in another State, if invited by the just warriors. So if people in A volunteer to join the just counter-insurgency in B, they will be doing so in their private capacity. They may not use the resources of the State, and they will not be representing the State. The illegitimate government may not engage the people and the collective resources of the State in any coercive action, war or low-intensity conflict.

VI. State Sovereignty and Low-Intensity Conflict

The question whether a low-intensity operation violates the target State's sovereignty is answered by applying the principles suggested in the foregoing discussion. Three cases are possible. First, the target State is fully legitimate (both the State and the government are legitimate). Second, the target State rests upon a valid horizontal contract, but the vertical contract is invalid, rendering the government illegitimate. Finally, the target "State" does not rest upon a valid horizontal social contract.

(a) Low-Intensity Operations Against a Fully Legitimate State

Assuming the justice of the cause and the absence of the other moral constraints having to do with proportionality and *modus operandi*, an operation will still violate the sovereignty of a target State if it is fully legitimate, i.e., if both the horizontal and the vertical contracts are intact. There is one exception (more apparent than real) to this principle: when the legitimate government of the target State authorizes the operation, as is often the case in justified counter-insurgency. Thus, for example, whether the U.S. efforts to help the government in El Salvador are barred by sovereignty considerations, other things being equal, depends on the legitimacy of the government. If it is illegitimate, helping it is immoral. If the government is legitimate, the morality of the operation does not depend on sovereignty considerations, because of the authorization. Recall, however, that the other requirements have to be fulfilled; in particular, the cause

has to be just. A legitimate government may not always espouse a just cause, so the operation may be illegitimate on those grounds. In addition, the envisaged operation may be disproportionate, or intrinsically odious, or otherwise in violation of human rights, and be banned for those reasons.

The Eichmann case may illustrate this point.[40] In 1960, Israeli agents located the infamous Adolf Eichmann living in Argentina under a false name. They then kidnapped him out of Argentina. He was taken to Israel, where he was tried, convicted, sentenced to death, and hanged. At the time, both the Israeli and the Argentine Governments were legitimate.[41] Was the operation morally justified? This is a particularly instructive case, because punishing a war criminal is a worthy aim, especially for those (like me) who sympathize with retributive impulses. Yet I believe that the Israeli Government was not justified in kidnapping Eichmann, as was recognized by the United Nations Security Council and implicitly acknowledged in Israel's apology to Argentina.

Let us first look at the aim itself. I have indicated that the main justification of international acts, and international coercion in particular, is the defense of human rights. Punishing a war criminal (even one as evil as Eichmann) is, however, a less compelling aim than a direct defense of human rights. There are two possible justifications that the Israelis had for punishing Eichmann: retributive justice and deterrence. Retributive justice corresponds to an abstract idea of just dessert that is hard to link to the defense of human rights in any obvious sense (even if we otherwise accept a retributionist justification of punishment).[42] Deterrence, in turn, is only indirectly linked to the defense of human rights: Eichmann must be punished because that will be a lesson for potential war criminals and mass murderers, and thus everybody will feel more safe, that is, the probability of rights violations will decrease.

On any account, then, the goals pursued by the Israeli Government, while morally worthy, seemed insufficient to outweigh the moral reasons that support State sovereignty. The Israelis should have requested help from the Argentine Government. Even if that help would have been denied (and there is no evidence that it would) the moral reasons that support sovereignty when the State is fully legitimate supersede, I think, legitimate retributive interests. Of course, given the horrific nature of Eichmann's crimes, the Argentine Government would have acted immorally had it refused to surrender or, in the alternative, prosecute Eichmann. But the remedy lay not in the violation of a legitimate State's sovereignty. Members of the liberal alliance have a duty to keep to rational methods of resolving disputes. Low-intensity operations such as kidnapping have no place within the alliance, no matter how noble the cause or how vile the victim.

(b) Low-Intensity Operations Against an Illegitimate Government

The second situation is more complex: The State is legitimate, but the government is not. The general principle in this circumstance for low-intensity

operations is that, assuming all the other conditions are met, they are legitimate only if they are directed against the government itself and its instrumentalities. This means that the operations may not violate the human rights of the citizens, nor disrupt their life in common.

The example of Iraq may again serve to illustrate this point. I indicated already that a legitimate government's assistance to Iraqi citizens who aim to oust their dictator is morally justified. But let us suppose that the United States contemplates an operation to destroy the arsenal of Iraq, in particular all those facilities and materiel that may increase nuclear capabilities. State sovereignty does not preclude this operation, since it is directed against the government and its instrumentalities, not against the citizens of Iraq. Recall that the other conditions must obtain. In this case, the aim—prevention of aggression by a tyrannical government—is justified.

In these cases, it is important to recall that the citizens have not waived their human rights nor their right to a State, to a life in common. Therefore, the operation must respect these rights. It must be directed as narrowly as possible against the government.

Other situations are relatively unambiguous; for example, help provided to just revolutionaries against an illegitimate government, or protective action on behalf of imminent victims of a tyrant's repression, or rescue missions to protect nationals in danger.

But even in these clear cases, the subjects of the government have not given up their State. Therefore, the operation must respect the local institutions reflective of their life in common. One hypothetical example may help clarify this principle. Let us suppose that the U.S. Government has located in Cuba a notorious drug lord, who we believe has committed very serious crimes in the Unites States. Is the United States morally justified in kidnapping this person from Cuba? The Cuban government, we shall assume, is illegitimate, but the Cuban State is not. In other words, Cubans have a right (against foreigners) that their life in common be respected. This includes institutions such as the judicial system. So the answer to our question will depend on whether the courts in Cuba are independent or, on the contrary, subservient to the Castro regime. If the former, the United States must not act peremptorily and should rely on regular channels (e.g., request for extradition). If the latter, the courts are not an institution to administer justice to the Cuban people, but rather a mere instrumentality of the illegitimate regime. In this case, I suggest that the United States may act, provided that the other requirements are met. The justification is that the United States would be doing no more than capturing a suspected criminal from the shelter offered by a gang of outlaws.

It must not be forgotten that citizens in the target State have not waived their individual rights. Therefore, low-intensity operations must respect human rights. This raises the very difficult issue of people who are killed or injured during an

otherwise justified operation. The most popular doctrine to justify killing people in a just war (and the same considerations apply to justified low-intensity operations) is the doctrine of double effect, which is in part recognized by present international law.[44] According to this doctrine, incidental loss of lives or property is not prohibited if the intent of the just warrior was to obtain a military advantage, not to victimize innocents, even if he could foresee that innocent people would die.[45]

The doctrine of double effect, however, has been recently challenged by Judith J. Thompson.[46] Her critique is skeptical of the moral relevance of the essential distinction between specific intent to kill bystanders and mere foresight that bystanders will die. In her view, if there is any justification for the incidental loss of lives of bystanders in a war, it must depend on the justice of the cause - on the larger purpose of the operation.[47] Professor Thompson, however, bypasses this question as too hard, and, resting on her shoulders, so will I.[48] I offer two observations, however. First, the justification for the incidental loss of innocent lives in a low-intensity operation does not differ from the justification one wants to give for such loss in conventional war. So whether one chooses the doctrine of double effect or the "larger" purpose doctrine to justify incidental loss of innocent lives in a just war, the same rationale is available for justified low-intensity operations. (Recall that the other constraints, such as proportionality and *modus operandi*, still apply.) Second, there is a clear difference in moral culpability between the just warrior (i.e., one fighting for a just cause) who tries as hard as he can to protect innocents, and the just warrior who chooses to terrorize and victimize them in his pursuit of the just end. So at least that difference may be clearly drawn. A low-intensity operation against an illegitimate government, then, may not be aimed at innocent people, even if that is conducive to the demise of the tyrant. Moreover, the agents conducting the low-intensity operations must design it having in mind the protection of the rights of bystanders.

(c) Low-Intensity Operations Against an Illegitimate State

In this case, the social contract has collapsed, and no sovereignty considerations apply. Anarchy reigns, and different groups control different parts of the territory as in Lebanon in the 1980s. Yet even in this case, the aim of the low-intensity operation has to be defensible under just war theory; and the individual human rights of the residents, and in particular innocent people, ought to be respected. Thus the considerations about innocent bystanders discussed in the previous paragraph apply here as well.

VII. Necessity and Proportionality

The main purpose of this paper has been to suggest principles to evaluate low-intensity operations in the light of State sovereignty. Two other conditions,

however, further restrict the legitimacy of these operations. The first is the need to satisfy the customary requirements of necessity and proportionality. Considerations of necessity involve the determination that no less intrusive means are available. Considerations of proportionality involve calculations about costs and benefits of the low-intensity operation in a way that is not solely dependent upon the national interest. The general rule is that the coercion used in the operation, and the consequent harm done by it, has to be proportionate to the importance of the interest that is being served, both in terms of the intrinsic moral weight of the goal, and in terms of the extent to which that goal is served in this particular instance.

VIII. The Requirement that the Operation Comply with Minimal Notions of Decency

The final condition for a morally defensible low-intensity operation is that it must not be so odious in its *modus operandi* as to corrupt the virtues necessary to liberal democratic life.[49] This requirement rests upon an important moral insight: there are things we cannot do to others because of what they are (i.e., they hold rights); and there are things we cannot do to others because of what we are.[50] So what are we? As members of a just civil society we must act in a way such that our civic virtues and best traits of character will be cultivated. This applies, *a fortiori*, to actions by the government, which is supposed to represent the people. In part, the desirability of governmental virtue derives from considerations of self-interest: we cannot expect our government to behave honorably with us if it goes around the globe sending hit squads to assassinate and torture people, even for just causes.

An example may help illustrate this proposition. Is it morally permissible to assassinate Saddam Hussein? I would think not. The proper course of action is to help the Iraqis overthrow him, capture him, and try him in accordance with internationally accepted norms of judicial procedure, by Iraqi courts with international supervision, or better still, by an international criminal court. Assassination is banned, not because Saddam doesn't deserve to die, but rather because agents of a liberal democracy must conduct themselves in a way that honors the civic virtues for which they stand. The same reasoning applies to other intrinsically despicable modes of action, such as torture and terrorism, regardless of sovereignty considerations, just cause, or national interest.[51]

IX. Conclusion

I have argued in this paper that low-intensity operations may be justified only if they further a just cause, they do not infringe the target State's sovereignty (which is itself a function of internal legitimacy), they otherwise respect human

rights, they are necessary and proportionate, and they comply with minimal norms of decency in their mode of implementation. My account of the moral legitimacy of low-intensity operations sets aside the morally false obsession with national interest, and substitutes in its place the defense of human rights and just institutions.

One last word: as the world moves toward the liberal alliance predicted by Immanuel Kant exactly two hundred years ago, low-intensity operations will gradually become less necessary, for the same reasons that overt conflict will decrease.[52] Members of the alliance will rely upon their mutual commitment to democracy, human rights, and the rule of law, and international disputes will gradually be entrusted to international institutions. But there is a crucial proviso: tyrants have no place in this scenario. The international State system will not achieve peace and stability as long as international law continues to protect dictators under the guise of State sovereignty. The main cause of war, and the main source of the sad necessity that democracies have to carry out low-intensity operations, is the existence of the enemies of freedom, in and out of government. Only a truly universal movement toward democracy will render low-intensity operations obsolete.

Notes

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1. For an influential modern reappraisal of the morality of war, see WALZER, JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS (1977).

2. Kant, *To Perpetual Peace: A Philosophical Sketch* (1795), in PERPETUAL PEACE AND OTHER ESSAYS 107, 110 (Humphrey trans. 1983).

3. For a definition of low-intensity conflict, *see infra*, text accompanying nn. 9-12.

4. Of course, the intensity of the conflict is never "low" for those who directly suffer its consequences.

5. Even having fought fairly and with chivalry in conventional war on the wrong side is sometimes regarded as praiseworthy. For example, the German Luftwaffe ace who says "I complied with my duty of fighting bravely for my country." This is, of course, on closer analysis morally dubious.

6. See, for example, Kant's condemnation of certain forms of low-intensity conflict in his Sixth Preliminary Article. Kant, *supra* n. 2, at 109-110.

7. This attitude underlies, I think, the perception by many (which I believe is mistaken) of the intrinsic immorality of the CIA.

8. The literature on the moral justification of low-intensity conflict is surprisingly scarce. The only article on this specific issue is O'Brien, *Counterterror, Law and Morality*, *in* LOW-INTENSITY CONFLICT, at 187 (Thompson ed. 1989). This article, however, does not go beyond very general remarks about international law and just war doctrine.

9. *See, e.g.*, the definition by the U.S. Joint Chiefs of Staff: Low-intensity conflict is a limited politico-military struggle to achieve political, social, economic, or psychological objectives. It is often protracted and ranges from diplomatic, economic, and psycho-social pressures through terrorism and insurgency. Low-intensity conflict is generally confined to a geographic area and is often characterized by constraints on the weaponry, tactics, and level of violence. *A Joint Low-Intensity Conflict Project Final Report, Executive Summary* [U.S. Army Training and Doctrine Command], at 3 (1986). For a summary of criticisms to this definition, *see* Thompson, *supra* n. 8, at 1, 3. *See also* the long list offered by MCMAHON, LOW-INTENSITY CONFLICT: THE PENTAGON'S FOIBLE 34 (1990).

10. In this sense, see the position taken by Col. Harry G. Summers, *A War is a War is a War is a War*, *in* Thompson, *supra* n. 8, at 27.

11. *See, e.g.*, O'Brien, *supra* n. 8, at 188, 199-104.

12. *See, e.g.*, the International Court of Justice in the Military and Paramilitary Activities Case (Nicar.v. U.S.), 1986 ICJ 101-102 (distinguishing between "most grave" and "less grave" prohibited uses of force in customary international law).

13. *See* Sarkesian, *The American Response to Low-Intensity Conflict: The Formative Period*, in ARMIES IN LOW-INTENSITY CONFLICT: A COMPARATIVE ANALYSIS at 19, 21 (Charters and Tugwell eds. 1989), (showing a continuum of coercion in different types of conflict).

14. Seminal works in the realist tradition include MORGENTHAU, POLITICS AMONG NATIONS (1959); WALTZ, MAN, THE STATE, AND WAR (1959); and BULL, THE ANARCHICAL SOCIETY (1977). I realize, of course, that I am oversimplifying realism. The doctrine has many variations, yet I deal in the text with the central and, as far as I know, uniform methodology of national interest analysis.

15. *See* Hobbes, *On Dominion*, Chapter XIII, *cited by* HINSELY, POWER AND THE PURSUIT OF PEACE 51 (1963). *See generally* HOBBES: WAR AMONG NATIONS (Airaksinen and Bertman eds. 1989). For a modern version of this view, *see* NARDIN, LAW, MORALITY, AND THE RELATIONS OF STATES (1983).

16. For a convincing response to the realists' moral skepticism, *see* Cohen, *Moral Skepticism and International Relations*, 13 Phil. & Public Affairs 299 (1984).

17. *See infra* text accompanying nn. 40-48.

18. These facts are not fanciful: *see* U.S. v. Verdugo-Urquidez, 939 F. 2d 1341 (1991).

19. For a discussion of necessity and proportionality, *see infra* Section VII.

20. Communitarians have confined themselves to domestic political philosophy. Representative communitarian views are SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE (1982), and Walzer, *The Communitarian Critique of Liberalism*, 18 Political Theory 6 (1990). To my knowledge, no one has applied communitarian philosophy to international law and relations (Walzer is a curious case: even though he is usually seen as a communitarian philosopher, his views on war are predominately liberal.) For liberal replies to communitarianism, Gutmann, *Communitarian Critics of Liberalism*, 14 Phil. & Public Aff. 308 (1985); and Nino, *The Communitarian Challenge to Liberal Rights*, 8 Law & Phil. 37 (1989).

21. *See* works cited *supra*, n. 20.

22. Any of the essays in Thompson, *supra* n. 8, may serve to illustrate this point.

23. The seminal work in this regard is RAWLS, A THEORY OF JUSTICE (1971).

24. *See* Kant, *supra* n. 2, at 114; *see also* Teson, *The Kantian Theory of International Law*, 92 Colum L. Rev. 53, 60-62 (1992).

25. While community may often be seen as defined by national borders, community may or may not coincide with nations—witness religious communities or the moral community of Europe defined by the European Convention on Human Rights.

26. *See* PLATO, THE REPUBLIC, BOOK VII. Elsewhere Plato writes: "The wise shall lead and rule, and the ignorant should follow," PLATO, THE LAWS, at 609b. As Karl Popper has shown, the "Socrates" of the Republic is the embodiment of unmitigated authoritarianism. POPPER, THE OPEN SOCIETY AND ITS ENEMIES at 131 (2d ed. 1966).

27. Notice that I am talking here about duties, not rights. I take for granted, at this stage of development of international law, that democratic governments have a right to demand human rights compliance from other governments, and, in some extreme cases, even to intervene by force to help victims of serious oppression. *See generally* TESON, HUMANITARIAN INTERVENTION: AN INQUIRY INTO LAW AND MORALITY (1988).

28. *See* Teson, *supra* n. 24, at 74-81.

29. *See* TESON, *supra* n. 27, chapter 6; *see also* Luban, *Just War and Human Rights*, 9 Phil. & Public Aff. 60 (1980).

30. *See generally* BUCHANAN, SECESSION (1991).

31. This requirement derives from considerations of autonomy, which apply to acts in defense of others. This is what complicates defense of others as opposed to self-defense. *See* Thomson, *Self-Defense*, 20 Phil. & Public Aff. 183, 305-306 (1991). But in international law, self-defense of the State is always defense of others. The government assists the citizens who are being victimized by aggression. And we fight in defense of others (our fellow citizens) when we repel the aggressor. It follows that, as I have tried to show elsewhere, the rationale for humanitarian intervention. *See* TESON, *supra* n. 27, at 113-114. *See also* Teson, *International Obligation and the Theory of Hypothetical Consent*, 15 Yale J. Int'l. L. 84, 117 (1990).

32. *See supra* n. 24, at 89-93.

33. Even in the midst of the current global democratic revolution, we can see the endurance of this ruthless approach: Western Governments befriend the Syrian dictator Hafez Assad and the current Chinese leadership, on account of spurious "national interest."

34. We don't even need a very deep theory of morality to condemn the realist's advocacy of "help to friendly dictators." Whether one relies on the universality of human rights (as I do), or on an American or Western communitarian tradition or on pure compassion, the result is the same.

35. *See* Universal Declaration of Human Rights (1948), U.N. Doc. A/811. For the text *see* BROWNLIE, BASIC DOCUMENTS IN INTERNATIONAL LAW 250 (1983).

36. *See* TESON *supra* n. 27, chapters 3, 4, and 112-14. *See also* BEITZ, POLITICAL THEORY AND INTERNATIONAL RELATIONS (1979).

37. The distinction between the two kinds of social contracts was suggested by Arendt, *Civil Disobedience, in* CRISES OF THE REPUBLIC 85-87 (1969). I elaborate the idea here in more detail.

38. I realize that this is not the thrust of international law, which tends to protect any individual who has succeeded in subduing the population. *See* TESON, *supra* n. 27, chapters 3 and 4, and references therein.

39. This does not mean that foreigners may do anything with regard to the illegitimate government. In particular, they may not overthrow it without the consent of the citizens of the State. *See* TESON, *supra* n. 27, at 119-23.

40. *See* HARRIS, CASES AND MATERIALS ON INTERNATIONAL LAW 266-274 (4th ed. 1990).

41. This was one of the brief periods of civilian government in Argentina.

42. *See* Murphy, *Retributivism, Moral Education, and the Liberal State,* Criminal Justice Ethics, (Winter-Spring 1985), at 3. Kant's reason for rejecting deterrence and adopting retribution is unsatisfactory—even creepy. *See* KANT, METAPHYSICAL ELEMENTS OF JUSTICE 99-106 (Ladd trans. 1965) (criminals must be punished because if we don't, we share in their bloodguilt).

43. Of course, the situation changes radically if we change the date. Suppose Eichmann is residing in Buenos Aires in 1978, sheltered by the fascist military regime. The considerations against abducting him do not apply here, and Israel would have had a strong moral case for conducting the operation. The requirement that the operation be as surgical as possible (discussed in the following section) still applies.

44. *See* Protocol Additional to the Geneva Convention, 12 August 1949, art. 51, 16 Int'l Legal Materials 1391 (1977) (Indiscriminate attacks prohibited, but only "disproportionate" loss of incidental lives prohibited). It is interesting to note that for the moral version of the doctrine, just cause is essential, so that every death inflicted by the unjust warriors is unjustified. For international law, however, just cause is irrelevant. The army on the wrong side of a war may also cause incidental loss of lives under the doctrine of double effect.

45. A recent version of the doctrine is offered in Quinn, *Actions, Intentions and Consequences: The Doctrine of Double Effect,* 18 Phil. & Public Aff. 334 (1989).

46. *See* Thomson, *supra* n. 31.

47. *Id.* at 296-298.

48. In TESON, *supra* n. 27, I adopted Daniel Montaldi's suggestion that incidental loss of lives in an otherwise justified operation can sometimes be justified by reference to the nature of the evil that the just warriors are attempting to suppress. I suggested that the suppression of serious human rights violations was an interest compelling enough to outweigh, sometimes, the bystanders' right to life. *See id.*, at 96-102, and references therein. Although I think I was on the right track, this view (which is consistent with Thomson's "larger cause" suggestion) needs to be elaborated further.

49. Virtue theory is usually traced back to Aristotle. *See generally* SHERMAN, THE FABRIC OF CHARACTER: ARISTOTLE'S THEORY OF VIRTUE (1989) For a contemporary account, *see* MCINTYRE, AFTER VIRTUE: A STUDY IN MORAL THEORY (2nd ed. 1984) The effect of adding virtue considerations to rights considerations is that the scope of morality is enlarged. In that sense, virtue theory provides important insights and supplement to liberal rights theory. However, contrary to virtue theorists, I regard civic virtues as parasitic on the values that underlie a liberal democracy, not the other way around.

50. *See* NOZICK, PHILOSOPHICAL EXPLANATIONS 400-402 (1981).

51. Of course, Saddam Hussein may permissibly die at the agents' hands if he chooses to resist the justified attempt to arrest him.

52. *See* Doyle, *Kant, Liberal Legacies, and Foreign Affairs (Part I),* 12 Phil. & Public Aff. 205, 225-232 (1983) and the discussion in Teson, *supra* n. 24, at 74-81.

Reform Intervention and Low-Intensity Conflict

Commentary on Fernando R. Teson's "Low Intensity Conflict and State Sovereignty: A Philosophical Analysis"

by
Terry Nardin*

Fernando Teson argues in his paper for strict moral limits on low-intensity operations, on the grounds that it is just as important to respect human rights in these activities as in conventional warfare. He is right to insist on such limits, but there are problems with the way he goes about making his case.

Specifically, I want to argue that in trying to derive these limits from a philosophical theory of legitimacy, Teson gets bogged down in academic abstractions. A philosophical theory of legitimacy and sovereignty is one thing, moral principles of international conduct another. Furthermore, insofar as it does have policy implications, the legitimacy theory he offers is far too permissive. Instead of relying on an abstract and elastic theory of legitimacy for moral guidance, we should be paying more attention to the traditional constraints of international law, and to making sure that these constraints are reflected in U.S. law and military practice.

International law—not only the law of the Charter, but also customary international law—frowns on armed intervention. Many moralists take a more permissive view of intervention, however. Some pay no attention to international law at all, basing their judgments directly on whatever set of moral ideas seems most compelling, from natural law and human rights to the national interest and American values. Others claim to take international law seriously by agreeing that the sole lawful ground for the unilateral use of armed force by a State is self-defense, but then interpret self-defense so expansively as to effectively undercut the legal constraints. Almost all seem willing to agree that international law should be respected—provided nothing really important is at stake. In Professor Teson's version of the story, international law is morally defensible as a system of rules regulating the relations of legitimate States, but there is no moral basis for paying attention to whatever protection it may offer illegitimate States.

Before considering Professor Teson's argument, I want to express some concern about his handling of the concepts of sovereignty and legitimacy.

For Teson, the concepts are linked: sovereignty is "popular sovereignty," a kind of legitimacy. The version of his paper presented at the Newport symposium defines "sovereignty" as "the monopoly of coercion" granted to a government "by the citizens that reside in it, and recognized by international law." This is not a good definition of sovereignty, however, not only because it loosely combines discrepant factual and normative criteria, but because it attempts to settle by definition what is actually the substantive point at issue in the debate over the moral limits on low-intensity conflict: whether sovereignty (and its corollary, territorial integrity) constitutes a principled obstacle to low-intensity operations.

The core meaning of the word "sovereignty" in the context of international relations is "statehood," a status in international society that is defined by international law. A sovereign State is an independent State, but not necessarily a democratic one. So understood, sovereignty is a presupposition of international society, not a moral principle. "Legitimacy," in contrast, pertains to the moral claim a nation may have to being a State or, alternatively, to the claim a government may have to govern the State. It is plain that, on these definitions, "sovereignty" and "legitimacy" are different concepts, and that the definitions are by no means eccentric ones. We can talk of States whose title to statehood or whose government fails somebody's test of moral legitimacy. If we tie sovereignty to legitimacy, then the concept of sovereignty becomes superfluous.

International law exists because of the uncertainty and disagreement surrounding moral judgments of State conduct. And the concept of sovereignty continues to have a place in international discourse because there is so much uncertainty and disagreement surrounding judgments of legitimacy. By making legitimacy the criterion of sovereignty, as Teson and many other moralists do, we substitute an obscure and contested criterion for a clearer and more objective legal standard. It is true that international law suffers from uncertainty and disagreement, but the remedy for that is to strengthen the consensual basis of international legal norms, not to abandon those norms for an even more uncertain philosophical formula.

Professor Teson presents his views on the moral significance of legitimacy as an alternative to what he calls "realism," the view that the ethical standing of military actions (including low-intensity operations) depends on their consequences for the national interest and that such actions are justified when they advance that interest. Teson's own view is that military and low-intensity operations are justified when they serve to promote democratic government and human rights. I want to suggest that the difference between the realism he rejects and the human rights theory he defends is not as big as he thinks it is.

It may help to sort things out to provide a more elaborate typology of moral views, one that identifies a wider range of moral views than Teson's dichotomy between political realism and the human rights perspective he advocates.

In particular, I want to suggest that it helps to classify moral views along not one but two dimensions. The first allows us to distinguish between consequence-oriented and constraint-oriented viewpoints. A consequence-oriented ethic is one that makes consequences or *outcomes* the criterion of right and wrong, whereas in a constraint-oriented ethic right and wrong are determined on the basis of antecedently-authoritative *principles*. Realism, as Teson understands it, is an example of an outcome-oriented perspective, whereas his own human rights theory is (mostly) a principled or constraint-oriented perspective.

But there is a second dimension of difference in ethical theory that cuts across this outcomes-principles dimension. Ethical theories can also be either universal or particular. That is, the outcomes or constraints they emphasize can be those of mankind as a whole, or they can be those of some particular portion of mankind, a particular community. If we make the simplifying assumption that these two dimensions can be dichotomized, we can generate a simple 2x2 table of possibilities (see Figure 1).

FIGURE 1

	Universal	**Particular**
Consequence-Oriented	Utilitarianism	Political Realism
Constraint-Oriented	Common-sense Morality Natural Law Human Rights	Communal Principles

Although this typology reveals the relationship between two significant dimensions of ethical controversy, it remains a pretty crude interpretive tool. Its categories may seem clear and distinct, but actual moralities are a messy affair. They resemble each other in various, sometimes disturbing ways, and often overlap. In fact, moralities are in some ways best understood as vocabularies for moral judgment and debate, and any given vocabulary can be used to express a wide range of substantive positions.

Consider political realism and common-sense morality, which the typology puts at opposite ends of both dimensions. The picture of realism Teson offers is historically inaccurate and philosophically incomplete. The kind of realism we encounter in foreign affairs, when we get above the level of a vulgar, unthinking "my country right or wrong," is one that does not entirely dismiss principled constraints, whether these come from one's own tradition (for example, the American ethos or the ethic of military honor) or from some putatively more universal source (natural law, human rights, "reason," etc.). The realism of Treitschke, Niebuhr, Butterfield, Morgenthau, and Kennan recognizes not only the prudential considerations of necessity and proportionality, but also the principled constraints of morality and law.

The ethical question, as the realist frames it, is "When should moral and legal constraints be set aside for the sake of the national interest (that is, to preserve national security or the public safety)?" Realist theories can be usefully classified according to whether and under what circumstances they permit prudential considerations to override principled ones. An extreme or pure realist might say "always," but more moderate versions of realism would introduce progressively stricter constraints: "only in foreign affairs," "only in war," or "only in national emergencies." In other words, the kind of sophisticated realism that is rooted in the idea of reason of State, and that has long been prominent in diplomatic thought and practice, is not a purely consequentialist ethic of the national interest. It is an ethic of principles that is willing to override its principles when the stakes are high enough, and only when the stakes are high enough. The strictest version of such an ethic would be one that insisted on fidelity to law or moral principle except in situations of extremity.

Now a constraint-oriented ethic that allows moral principles to be set aside in extremity is not so different from the kind of political realism that is willing to respect moral principles if the costs are not too high. There is not a big difference between a moral theory that says "respect the principles of justice and human rights except in extremity, if violating these principles is necessary to preserve the community and its laws," and a realist theory that says that "in extremity one may (if necessary) override justice and rights." The realist and human rights theories reach this common point of agreement from different directions, but there *is* a point of agreement. The only way to really distinguish common-sense morality from consequentialist realism is to insist that moral or legal principles must be observed regardless of consequences. *Fiat justitia, ruat coelum* (Let justice be done though the heavens fall). But despite all his insistence on human rights, Teson seems not to want to take this last step, and therefore (I would argue) he remains closer to realism than he perhaps realizes.

Now let's take a closer look at Professor Teson's ethic of legitimacy and his application of it to low-intensity conflict. Teson gets himself into needless difficulty by making too much depend on the idea of legitimacy. His basic

principle is, I have already suggested, unacceptable: that a State is internationally legitimate when it is internally legitimate. The concept of "legitimacy" is not one that can be used simply in making moral judgments, much less policy decisions. Not only are there other ways of justifying sovereignty, but it is by no means clear when either a State or a government is or is not legitimate.

The viewpoints we label "realism", "common-sense morality," and the like are little more than names for theories abstracted from far richer and more complex ethical systems—actual, living moralities that are embedded in practice and used (and misused) by those who would probably be unable to give any very coherent account of the principles underlying their own decisions. The philosopher can identify and dissect these moral traditions, and he can articulate the principles that underlie the judgments in which the traditions are used and through which they are continually reconstituted. The worst thing the philosopher can do is to fool himself into thinking that his constructs are an improved version of, and a practical substitute for, the moral traditions they interpret, and to offer these constructs as a guide to practice. But of course this is precisely what philosophers and other moralists are always doing, and I think Teson falls into this trap as well.

In the philosopher's abstract approach to concrete ethical issues, all too often a merely explanatory scheme is used to criticize or defend conduct. But you can't get very far by simply "applying" abstract moral categories and principles. It would be better to rely on our laws and our moral traditions, criticizing them internally on the basis of self-contradiction (holding a tradition to its own principles, so to speak), rather than to make some rational scheme the archimedean point of reference. In considering the propriety of low-intensity operations, we need to pay particular attention to U.S. and international law. Morally defensible military policies must respect non-consequentialist moral and legal constraints, and those responsible for them must be wary of overriding these constraints on grounds of "necessity."

In my judgment, Professor Teson's analysis is conceptually confused but it is not, in the end, entirely unsound. Teson relies on a philosophical argument to rediscover the common-sense moral idea that when the U.S. engages in low-intensity operations, it ought not only to give weight to considerations of necessity and proportionality, but also to respect those principles that protect individual and collective human rights. In other words, ethically speaking, low-intensity operations (like other kinds of military action) are constrained by moral considerations as well as prudential ones.

Professor Teson proposes a theory to guide policy that is less nuanced than common-sense morality and therefore hardly an improvement on it. As often happens when a philosopher turns to moralizing, this theory turns out to be an abstract restatement of a complex moral tradition or traditions. In Professor Teson's theory, the traditions that are restated are those of natural law and Western liberalism. It is, of course, possible to pull a lot of different rabbits out

of this particular hat, and in seeing human rights and justice as constraints on the pursuit of interest, Teson has at least got the right rabbit.

There is, however, a more practical and less dangerous way of seeking to secure respect for the principles of justice and human rights embedded in common-sense morality, and this is to insist that U.S. low-intensity operations respect both U.S. and international law. This does not mean that the relevant laws are uncontroversial, or that they are beyond criticism and the need for reform. But nothing is more important than improving and respecting our public standards for conducting foreign and military policy. And in interpreting the law, one must keep firmly in mind the basic idea of legality or the rule of law, and resolutely reject higher-law and instrumentalist interpretations that seek to get around constraints on the pursuit of moral goals or national interests.

Finally, we must not forget that there is much to be learned from earlier debates about the morality of war and intervention. Because the principles at stake are those that have long shaped international relations, the current debate regarding the scope and limits of permissible low-intensity operations, especially in relation to the norms of sovereignty, is very much a continuation of the old debate about armed intervention.

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Chapter V

Panel Discussion: International Law and State Sovereignty

W. Michael Reisman, Chair

PROF. REISMAN: It is quite clear, particularly in light of events of the last few years, that whatever you may choose to call the new international political order, the phenomenon of persistent use of low-intensity violence has become an influential agent in shaping it. It's quite probable that, owing to a number of developments, this particular use of coercion could become much more aggravated and widespread.

For the great democracies in which, quite properly, political legitimacy comes from the people, the phenomenon of low-intensity conflict is particularly acute. There is no question that a free people has the common sense to be concerned about its security, and will readily mobilize itself in circumstances in which it perceives a great threat. It is commonly the nature of low-intensity conflict not to pass that particular threshold of public awareness, which means that those who are charged with maintenance of security in great democracies may perceive a reality that is quite different from that which is popularly perceived. Low-intensity conflict is frequently conducted in covert fashion and very often the response to it has to be conducted in a covert fashion. The great democracies of the planet are uncomfortable with the notion of covert action. And there is no question that whatever promises of efficiency covert action may have, they must be weighed against their effects on democracy itself, and certain other pathological features.

As Prof. Coll said, the phenomenon you are asked to consider has moral, ethical, technical, and legal implications. Those implications arise both at home in the domestic political system, and at the international level.

In the last seven years, the International Court of Justice has had two opportunities to address this issue. It is generally held that the type of phenomenon which we are considering, low-intensity conflict, does not need to be forcibly addressed and at least, in the view of the Court, does not warrant the unilateral response that is generally characteristic of self-defense, which is authorized in the United Nations Charter.

At the moment, the same issue is in front of the Court again in a different political context, in the *Libya v. United States* and *Libya v. United Kingdom* cases.

In these matters, international law certainly doesn't serve common interests, and probably is counterproductive in the sense that it forces those who are targets of low-intensity strategies to respond in kind. This is a subject that will have to be considered in the course of the next two days. It is one contribution that international lawyers and scholars may make to clarification and improvement in this particular area.

Our discussion this morning involves a presentation by Professor Robert Turner, and comments by Professor Tom Farer; then a second presentation by Professor Fernando Teson with comments by Professor Terry Nardin. [After Professor Turner presented his paper, "State Sovereignty, International Law, and the Use of Force in Countering Low-Intensity Aggression in the Modern World", Professor Reisman introduced Professor Tom Farer.]

PROF. REISMAN: I call on Professor Farer.

PROF. FARER: Thank you Michael and thank you Bob.

I love being a commentator. I much prefer being a commentator to being a main speaker. No one expects you to be definitive. The main speaker has to hang himself out there. He doesn't know from which side you're going to assault him.

Bob's probably wondering what I'm going to say, and I've been thinking about it myself for a while.

There's a lot that Bob and I agree on. We agree that it's very difficult to bring Operation Just Cause within the constraints of international law. And that is so whether you define the relevant restraints on the use of force as those embedded in the text of the U.N. Charter, or in those to be found in general international law and the customary practice of States, which means in the perceptions of scholars and decisionmakers as to what is the substance of that law.

We are both inclined to think that what Bob calls the "long-arm" statutes—that is licenses to reach across national frontiers to kidnap people who have violated U.S. laws but have been wise enough not to come within the jurisdiction of the United States—probably don't contribute to international order, and probably do not contribute, on balance, to the interests of the United States.

We both recognize the importance of reciprocity, the importance of sensitivity to reciprocity. Although Bob may approach the notion of reciprocity a little more formally than I would, Bob's point in his paper and again in his remarks was that any tactic, any justification that we employ, is by the very nature of law, international or domestic, available to other authority structures under similar circumstances. I think he is making more than a purely formal point about the logic of law. It has to do also with the force of mimesis in international relations.

Forget law for a moment. Just think about a community with a relatively small number of actors, which is the international community. Of course, it's larger than it has ever been before. There are far more sovereign States, and we have

additional sorts of participants. There are various intergovernmental actors and even individual citizens have become incorporated as active subjects. Nevertheless, the principal actors remain States and, therefore, it is a relatively small community. In such a community, certain expectations about behavior emerge, and a leading participant in that community, like the United States, strongly influences those expectations, i.e., that sense of what kind of behavior is acceptable in carrying out national objectives and what kind of behavior is unacceptable. The essence of Bob's reciprocity point, then, is the role we inevitably play in shaping other nations' perceptions of what they are entitled to do in pursuit of their goals.

In terms of basic values, a conception of what our national goals ought to be, Bob and I are very close. And yet, I do find his paper disturbing, and not only because of a certain completely unconscious tone of condescension which it often assumes in discussing people who disagree with his views. Its least appealing feature brings to mind Winston Churchill's comment toward the end of a country house dinner of many courses concluding with a pudding. Churchill took a mouthful, put down his spoon, glared at the master of the house and said, "this pudding has no theme." With a good deal of rhetorical exaggeration one might say as much of Bob's paper. While it is short on theme it does have an implied world view and a series of discrete propositions. The view that came through to me could be summarized as follows:

> The U.S. is a gentle giant in a world divided between peace-loving, anti-interventionists, ourselves foremost among them, and the aggressive, radical, lawless scum.

I call your attention in that connection to the very first paragraph of his executive summary when he speaks of "traditional American values such as nonintervention." If you made that statement to any Latin American forum that I've ever been in, you would be laughed off the stage: The United States a non-interventionary power? Bob is a great enthusiast for executive power in the area of foreign affairs. Many of the precedents for the use of executive power arise, of course, from U.S. intervention in Latin America.

I'm not making a normative point here. I'm not saying whether those interventions were good or bad. I simply note that we have employed intervention frequently in this century. We had marines in one or another country in the Caribbean basin virtually for the entire period from 1900 to 1933. We liberated Cuba from the Spaniards and immediately intervened and occupied it, and only left after the Cubans accepted the Platt Amendment, which allowed us to reenter Cuba whenever we chose to. We have used intervention frequently in the postwar period too. We may have used it wisely. We may have used it unwisely. But to suggest that nonintervention is part of the American tradition is simply

to set a historical context for our discussion in a way which grossly distorts history. It is true, however, that the American people, including much of its elite, have been uneasy about the propriety, as well as the wisdom, of armed intervention in the affairs of weaker States; thus we have sought to find benefit to the objects of our foreign excursions as well as ourselves. The United States, unlike the U.K. or France or Russia, has never contemplated the imperial mission with uninhibited relish.

The second point that Bob makes, it seems to me, is that in order to circumvent the U.N. Charter, or to crawl through its loopholes, the bad guys use low-intensity conflict strategies. Now, we have used low-intensity conflict strategies ourselves. Bob would say we've used them defensively. In some cases—possibly in many cases—we arguably have, although the question of what is offensive and what is defensive is often a question of how far do you look back. Do you look to the immediate event or do you try to put that event into a whole stream of interactions between yourself and another country?

The Iranians have used low-intensity acts against the United States over the past few years. The Iranian view, of course, is that if you take U.S.-Iranian relations from the close of the Second World War to the present time, the U.S. has frequently used low-intensity conflict tactics against Iran, for example, in restoring the Shah to power in 1954.

Again, I'm not trying to make a value judgement at this point. I am merely stating a fact, which is that the tactics and strategies which we lump under this heading "low-intensity conflict" have been widely employed, and we ourselves have employed them. It's not a set of means that are uniquely used against the interests of the United States, and that somehow we have not found it possible to employ.

Third, Bob seems to be expressing a world view which suggests that in responding to attacks on the United States using low-intensity warfare methods, we should try to live within the substantive and procedural law, and if we construe that law properly—that is, the way Bob does—normally we can crush the bastards legally. But, if the substance of law gets in the way of our vital interests, and we can't make the U.N. or regional institutions do the right thing, then we must act outside the law to defend our vital interests.

While implying an intimate linkage among threats to vital interests, low-intensity conflict and terrorism, Bob neither defines them nor spells out that linkage. The paper assumes that we still have a lot of vicious opponents out there in the wide world. What is left totally unclear, however, is whether our enemies are enemies because of their methods—and if so, which methods—or because of their ends. I think we need to think about that.

What has struck me over the past several years in which I've participated in discussions about low-intensity conflict—I was part of the two-year, multiple-meeting project on aspects of low-intensity conflict that Alberto Coll organized—was that the sometimes almost frenzied attention to this concept often had

the effect, and sometimes I felt it was designed to have the effect, of preventing us from asking ourselves whether the objectives of our opponents, the substantive ends of presumptive opponents, were wholly unreasonable or incompatible with our interests. We concentrated entirely on the means that presumptive enemies employed.

To give you an example of what I mean: we often talk about the problem of the Middle East in terms of radical Arabs using low-intensity conflict against the United States. Having so defined the problem, we concentrate on devising responsive strategies. Even a very moderate Arab might look at the problem differently. He might well say, "this is the way U.S. policy has worked in the Middle East: (a) it's worked to enable the Israelis to annex operationally part of the occupied territories of the West Bank and to turn the remainder into Bantustans, in the process depriving the Palestinians of the rights of citizenship in the lands of their birth; (b) U.S. policy has operated to maintain the divisions of the Arab world, which were largely laid out by Britain when it was the dominant imperial force in the Middle East." In other words, it has functioned to maximize Arab weakness and to sustain the concentration of the area's natural wealth in the hands of a few greedy and corrupt princes and emirs. Moreover, in deciding how to assess and respond to aggression, the U.S. has been completely arbitrary in normative terms.

In 1980 Iraq committed naked aggression against Iran. We assisted Iraq in avoiding defeat. In 1990, Iraq committed naked aggression against Kuwait, and we responded effectively to thwart naked aggression and to punish the aggressor. The U.S. record in the Middle East, is therefore, not one of the evenhanded application of international norms.

Now, let me sum up these somewhat disjointed remarks. Maybe I can pull them together.

First, we need to rethink the larger ends of American policy in the light of the new international structures of power and interest. In particular, I think we need to address the question: Do we want, and do we think it's in our vital interests, to freeze all existing international frontiers, to freeze, that is, the allocation of all territories and all resources inherited from eras marked by different values, human needs and power structures? It may be desirable to attempt to freeze the inheritance; but I don't think we can simply assume that.

Secondly, I think we should recognize and admit that there's nothing new about low-intensity conflict. It is millennia old, and if we're particularly concerned about it today, we better ask ourselves why? Is there something new about it in terms of a threat to the United States?

Third, I think that we should ask ourselves whether, at least in contemporary circumstances, we should resist the temptation of unipolarity—assuming unipolarity actually exists, given the very many constraints on the application of our

power—and should engage ourselves much more deeply in multilateral decision-making.

My greatest objection to Bob's paper is that when he discusses multilateral decisionmaking, what he seems to be saying is: "Let's go first to regional organizations or to the U.N. If they do the right thing, that is, if they carry out our objectives, then we're happy and we accept that result. If they don't we've exhausted our remedies. We have demonstrated we're not fast on the trigger. So we are then well positioned to act unilaterally." I think that has essentially been our policy over the past twelve years. I think that is why we did not use the relevant regional organizations or the United Nations during the Reagan period to deal with difficulties like the situation in Central America: We knew that the collective judgement of the international community was not sympathetic either to our ends or our means. Therefore, we did not truly engage ourselves in international and multilateral processes of fact-finding and adjudication. And so the question, or at least one of the questions we need to address, is whether it is consistent with our national interests and the changed international system to engage ourselves seriously in these multilateral processes.

Now, I must admit that my dislike of certain tonal aspects of Bob's paper may have led me to exaggerate our differences, which could foster misconstruction of my views. Although low-intensity conflict is not new in world history and is a strategy the United States has itself employed from time to time, it does constitute rather more of a problem for the United States than for many other countries. That is so for three reasons which are at least close to being self-evident. One is the extraordinary diversity and consequentiality of our transnational interests and connections; by affecting the allocation of power and wealth in so many places in so many ways, we are bound to make enemies. Another is the immense military power of our country. The third is the prized openness and pluralism of our society coupled with the democratic temper and morally fastidious self-appreciation of our people.

American power makes it hideously dangerous for another State, or, for that matter, non-State actor, to confront us directly. We are, in other words, almost invulnerable to direct military threats. Low-intensity conflict is not the preferred, it is the only prudent military strategy available to present and prospective antagonists.

The American character and its institutional expression inhibits our use of and aggravates our vulnerability to low-intensity tactics: It would probably be harder for the United States than, for example, France to employ terrorist tactics without exposure. Exposure would have grave domestic and international political consequences. It is presumably easier for agents of antagonistic states or mafias to enter the United States and blend with the population than it would be in a society with a more intrusive security apparatus, or one that was smaller and more homogeneous. However, in light of our freedom from successful terrorist

operations relative to countries like Britain, France, and Germany, this final point needs to be contemplated a bit agnostically.

So while I feel that we have tended in the past decade to exaggerate the low-intensity conflict threat to our interests, and feel as well that on occasion the threat has been invoked to discourage the contemplation of strategies for dealing with difficult States and para-States that combine threats with positive incentives, I join Bob in believing that the topic merits continuing concern and that the U.S. Government needs a strategy which incorporates relevant moral and legal standards.

I am also prepared to concede that cases could conceivably arise where it may be difficult to reconcile the national interest in achieving immediate and decisive results with widely shared normative expectations. I hope Bob shares my view that such cases will be extremely uncommon, only in part because when we do act in ways we would not want others to act and hence cannot justify legally, we, as a satisfied, trading State with a powerful interest in an orderly and predictable world, pay a medium and long-term price that needs to be weighed against predicted, yet invariably speculative, short-term gains.

Under what circumstances is the collision between what some virile Presidential adviser will think it would be immediately useful to do and what States are legally entitled to do most likely to occur? I venture it will be in cases where low-intensity conflict tactics offer a low-cost means of aborting a potential monster problem only if they are employed, as it were, in the first trimester rather than the last. For in such an instance, low-intensity conflict will collide with the principle of necessity which tends to make force precisely the instrument of last recourse.

Every legal system presumably has its euthanasia exception. It is the exception too dangerous to legitimate because it is too susceptible to abuse. So we pretend, for example, that there is no exception to the prohibition of killing, except in self-defense against an apparently deadly attack. But occasionally juries will not convict that horribly battered and terrified wife who kills her battering husband at a time when he is resting from his chronic brutalities. By not writing in the exception, we place a heavy burden of justification on anyone contemplating decisive preventive measures.

PROF. REISMAN: The program laid out by the organizers indicates that I'm to make a few comments, which I'm happy to do, and then I propose to open the floor to discussion and to close it a few minutes before this session concludes, to invite Professor Turner and then Professor Farer to make some final comments.

It's been a very interesting paper and comment. To my surprise, many fundamental assumptions are shared by the speaker and the commentator. I think they both view law as a body of rules that you apply in response to emerging circumstances. You look at a situation, you find out if it is in violation of the

rules and then you're entitled to do something. Some of us, particularly at the New Haven school, tend to view law as a process of making decisions in which there is a constant reference to concerns for minimum order in the larger community that shapes policies in each instance to the appropriate response. But, perhaps, some of you have observed this commonality and may think that there is a different way of approaching the issue.

Professor Turner raises some very interesting and provocative points and Professor Farer definitely has engaged them, I think making them quite explicit. The first is the issue of reciprocity, which Professor Farer said that Bob Turner has presented in a rather formalistic fashion. I actually find their position on this issue quite consistent. I think the first line of inquiry we might take is to consider to what extent the United States actually operates on the basis of reciprocity. Does it have special responsibilities precisely because of its greater strength, and the extent to which it is a leader of allies that are a community of nations sharing a certain vision of public order? Do we have special responsibilities that require or permit us on occasion to initiate changes in law? For example, we refashioned the international securities market by insisting that jurisdiction be respected until a bilateral or multilateral agreement providing some degree of control over this truly international market could be achieved.

The second point that relates to this is the question of our responsibilities as a leader, which Professor Turner drew attention to. This necessarily assumes that our factual view of what is correct is shared by other members of the community that is identified with us, and hopefully, by other substantial parts of the planet. Both speakers address this problem in different contexts. Professor Turner assumed that everyone thinks we are the good guys for insisting that Libya deliver the agents who may have been involved in the destruction of Pan Am Flight 103. I'm not sure that we are perceived that way. Next week the International Court of Justice will respond to Libya's request for interim measures and, as a lawyer, I know you never make predictions about what courts are going to do. I think that there could be some surprises in this.

On the other hand, Professor Farer draws attention to the discrepant views of Arabs as to what United States behavior has precipitated in the Middle East. This raises the question to what extent one can operate unilaterally. Can one effectively test whether one's view is askew or faithful to reality, or whether it simply represents the best interests of the community?

Both Professor Turner and Professor Farer focused on countries and on governments. At the very end of his remarks, Professor Turner, in discussing assassination, I think, disaggregated the general notion of Iraq. Were we at war with the entire country or with the Ba'ath party? Quite different strategic implications flow from that distinction. We may want to consider the extent to which such actions would disaggregate States, and begin to look at structures within them.

Professor Turner drew attention, in a very provocative fashion, to the emergence of certain new substantive natural law principles. I know that several speakers over the next sessions are going to be addressing those issues. They may even want to address them now in the coming discussion.

Professor Turner presented a very interesting historical review of sovereignty in his paper. He described its emergence with Jean Bodin and Thomas Hobbes and the transformations it has undergone through several centuries. His analysis of the radical transformation of sovereignty in this century raised the question whether the notion has changed to the point where it has major implications for the legitimate use of force by one State against another. Bob seemed to suggest that, in some circumstances, the emerging global concerns in favor of democracy would warrant actions on its behalf that would otherwise be precluded by an understanding of sovereignty that had not been altered by the equation of political legitimacy with democratic rule. He discussed the issue of recognition as a tool and suggested that we use it quite vigorously in favor of democratic governments and against undemocratic governments.

Professor Turner reminded us of the argument that democratic States don't tend to engage in aggressive wars. Professor Farer, by implication, casts certain doubts on that proposition. Are there still imperial democracies? Democracies quite intoxicated with their internal democratic processes?

Professor Turner presented a rather textual interpretation of the Charter based on its historical meaning, but did not speak, at least in the presentation this morning, about subsequent illumination by the General Assembly. For example, he neglected to mention the definition of aggression, or the illumination of the Charter by the International Court of Justice in the *Nicaragua* case. To what extent should we address the difference between a textual interpretation of the Charter and its subsequent illumination?

Finally, Professor Turner raised the issue of assassination. Although he was at pains to define assassination, I think that many scholars would not extend it to the targeting of the military and political leadership in the course of war. That seems to me to be something materially different than targeting a political leader in peacetime. But the very forceful arguments that he made, I think, will require us to address whether there have been changes, particularly in the notion of sovereignty, that make assassination a conceivable option for democratic regimes. I confess I have great reservations about it. I'm sure that many would like to discuss it.

Professor Farer's observations, though limited to 15 minutes, managed to cover quite a few points in addition to a very skillful review of Professor Turner's presentation. He insists that our historical record belies the claim that we are not interventionists. He does, however, admit that he uses the word "intervention" to mean any use of force abroad without considering its merits or legality. He advises us in the future to focus not simply on the techniques used by our

adversaries, but, on their objectives and whether those objectives are entitled to some accommodation. He urges in particular, that we rethink certain settled ideas including our commitment to fixed borders and the notion that low-intensity conflict is new. He also encourages us to resist the temptation of unipolarity in favor of multilateral decisionmaking.

This is a very rich range of subjects that have been presented to us for discussion. It's my pleasure now, to open the floor for discussion.

MR. COLLINS: I only have one quick question. Would you please talk a little bit about the pros and cons of the U.S. support for coups which violate the sovereignty of foreign countries? We have done this a number of times in recent years.

PROF. TURNER: This touches on Tom's disagreement with my view that the U.S. has been historically opposed to intervention. I still feel I'm right on that. Early in my paper, I noted that after reviewing a draft of the Monroe Doctrine, Thomas Jefferson wrote to the President that we ought to take advantage of this opportunity to declare our opposition to the practice of intervention by one State in the internal affairs of another. I think that has continued to be a principle held dearly by the American people. Even when the Roosevelt administration gave the Doctrine an interventionist cast, it was in response to British threats to employ military means to compel Latin American debtors to honor their obligations. The role of hemispheric policeman, assumed to forestall transatlantic meddling by the European powers, was repudiated by the Clark Memorandum. My argument is, yes, the United States has intervened, particularly in the post-World War II era, but for the most part, it has intervened in a counterbalancing manner. That is to say, to level the playing field. The classic case is our intervention in Chile against Allende. What is not well known, but is fairly easy to document, is that the Cubans were pouring money and influence into supporting Allende before he came to power. My sense is that what the United States was attempting was to balance the playing field to promote the chances of a democratic opposition with newspapers, and parties and so forth. It's troublesome any time you do it. Certainly, we ought never to overthrow other governments because we don't like their economic philosophy. But during the conflict with the Soviet Union, when the Cominterm or Leninist States were pouring money in on one side, I don't think it was immoral for us to go in on the other side to try to balance things out, just as a general principle.

PROF. REISMAN: So Professor Turner's answer to Mr. Collins' question is that intervention is justified when it is done responsibly to create a level playing field.

PROF. TURNER: Yes, that's right.

PROF. REISMAN: Tom, do you want to respond to that?

PROF. FARER: I think we should not seek to overthrow democratic governments. How is that for a rule of thumb?

PROF. REISMAN: Is there a corollary?

PROF. TURNER: How about non-aggressive democratic governments?

PROF. FARER: The truth is I'm not a reflexive anti-interventionist, and I'm a very typical American. You see something you don't like, you say, let's do something about it. And so, although I support our involvement in international procedures which tend to restrain intervention, I do so always with a certain sense of ambivalence. Did I want to get rid of Idi Amin? Yes. I did want to get rid of Idi Amin. I also wanted to get rid of Pol Pot, and so I, of course, wouldn't have supported Pol Pot's representative at the United Nations as we did for many years.

I think many people here have been or are involved in policy. You know, policy is guided by certain broad directives, and that's why I started off with a rule of thumb. We should not intervene to overthrow democratically elected governments. Unfortunately, this principle is complicated by the fact that popularly elected regimes can go rotten, as recent developments in Peru seem to suggest. But, the view that a past election victory confers legitimacy on a regime implies that support for insurgents opposed to it is illegitimate intervention. So, the connection between the legitimacy of sovereign governments and the legitimacy of foreign intervention is sufficiently ambiguous to complicate the use of an inflexible general principle to arbitrate our foreign policy decisions. Our inability to discern whether the emerging world order will be unipolar or multipolar does nothing to simplify this policy predicament. Nonetheless, I would persist in maintaining that the use of highly coercive forms of intervention to advance interests of moderate importance is probably inconsistent with our larger national interest, which is increasingly dependent on international cooperation.

PROF. REISMAN: If I may make one brief response to that. I think it's wrong to ask the question in terms of military intervention. We're in a very interdependent system, and we're a very large actor, and we are influencing behavior in smaller States all the time. There's no way we can avoid doing it. In this respect, if you talk about it in nonmilitary terms, international politics is constant intervention into the affairs of other States. And the purpose of the intervention

is to force them to change in ways that usually discriminate in favor of the State that's intervening.

I think as a general rule, we should use the power that's available to us in this regular process of interaction to encourage the emergence of democratic governments that honor human rights. This is desirable because there is a fair amount of evidence that these governments are better citizens of the international community and because human rights have a value independent of other considerations.

RADM LEMOYNE: Chuck Lemoyne. I'm with the Special Operations Command.

I would like to follow up on your comment, Professor, about low-intensity conflict. I think from the military perspective, we tend to view it, not as a discreet action, but as an environment in which the military plays only a small part. Ideally, the smallest of all parts. All those other instruments of power are brought to bear on a daily basis in ways that we generally are never publicly conscious of. So, I'm afraid of defining low-intensity conflict as a military campaign. From a military perspective, we're not comfortable with that. We see it as an environment in which the economic and political instruments of power should be given full play.

PROF. REISMAN: I would add also that in the book that I did with James Baker—the one who is sitting in the back of the room, not our Secretary of State—we extended that definition to include diplomacy. All of these factors are instruments of power that can be used coercively at various levels of intensity, and should be examined.

Thank you, Admiral Lemoyne.

PROF. SARKESIAN: Sam Sarkesian. Loyola University, Chicago.

I hope at some point we will consider the operational implications that these rather abstract notions such as just war and sovereignty have for our people on the ground. We need to be clear about these implications because they require us to adhere to moral and legal standards not likely to be shared by our opponents in the grim arena of low-intensity conflict.

I would also hope we can acknowledge that there are different strategic cultures which view the law of war very differently from us. They may even interpret the United Nations Charter in a completely different way. I would venture to say that there are other peoples who perceive nothing morally or legally problematic in low-intensity conflict.

PROF. REISMAN: I think these are very appropriate observations. Perhaps our speakers could address them. Tom, would you like to start?

PROF. FARER: I'm not persuaded that there are different strategic cultures out there because, as I said, I think that we ourselves have employed most of the measures that are on the list of unconventional operations. We have, occasionally, engaged in at least attempted assassinations—Cuba, case in point, and probably a successful hit against Patrice Lamumba in the Congo. There are, however, differences in culture out there which sometimes result in a conflict of interest. The Fatwah, which Khomeini declared against the author Salman Rushdie, who is a resident of the United Kingdom, is totally inconsistent with our notion of human values, with our Constitutional values and, as far as we're concerned, with international law. I'm not sure that an Iranian diplomat would deny that. He would just say, this is a case of a clash of values, and we, in our clashes, are fairly open. For example, when it comes to, let us say, the treatment of women, Saudi Arabia simply says, we reject the western view. That's all. They refused to vote in favor of the universal Declaration of Human Rights back in 1948 because the nondiscrimination provisions were inconsistent with Muslim values as the Saudis construe them.

But when it comes to basic questions of international order such as the use of force across national frontiers, I think there is considerable commonality of views. Now, with respect to democracy, the octogenarian leadership of China is a holdout. They said so very frankly at the General Assembly. They do not accept our conception of the legitimate State. Whether this is a general view in China is another question. I think all of us agree that representative government is more widely esteemed than it has been at any moment in history. Indeed, I would probably put it more strongly than even Bob, and certainly Michael, who is unusually muted for Michael on this point, that there is very good deductive evidence and a reasonable amount, although much less, of empirical evidence that democracies are less aggressive than other regimes. The most important point is that democracies can form secure communities of States that have ceased to think of each other as potential adversaries, which fundamentally transforms their relationships and their ability to allocate resources. So I think there is a very strong national interest in promoting the growth of an authentically pluralistic system. But, democracy is not a universal culture. There are still fascists. They don't call themselves fascists, perhaps quite so frequently, but there's still a fascist culture out there in Latin America certainly, in eastern Europe, in Asia, and other places but I'm not sure that that affects the way in which we fight with each other. It does affect our grand strategic ends.

PROF. REISMAN: Very briefly, I think there are very substantial differences in strategic culture over the use of force, when licit contingencies arise, and I think it poses a major problem.

We have very little time left. I think it would be only fair under the circumstances, to give Professor Turner a chance to make the concluding remarks.

PROF. TURNER: There are a number of issues we didn't discuss like the problem of anticipatory self-defense. For years, there was strong argument that you ought not to allow anticipatory self-defense because it could be used for aggression. In an era of weapons of mass destruction, where you know your neighbor may be getting ready to dump bacteriological contaminants into your water supply, I think we have to recognize that States have to be able to defend themselves before they suffer a million casualties. How you draw that line is very hard. I've talked a little bit about the pros and cons. I don't have an answer to it.

I've thrown out a couple of radical ideas like telling the nondemocratic States, we won't commit aggression against you, but we're not going to give you all the benefits of membership in the world community, until you allow your people to vote and choose their own government. It's an idea that I've been playing around with for a good ten years. I think it looks more attractive today than it did then. I'm not sure it's the right answer.

On the idea of targeting radical elites if they commit aggression, I'm not at all sure I'm right on that. I am sure that it's in our interest to rethink some of our traditional views. We have now made aggressive war a crime, but we don't really deal with it as a crime. We didn't even hold Saddam Hussein accountable for the aggressive war against Kuwait. If there was any time when there should have been a war crimes trial, this was it. I'm not sure that Nuremberg survives as customary law given the way the world community has acted, although the Europeans unanimously called for trials. The House and Senate in this country did. There are problems. That troubles me because I think despite the *ex post facto* problems with Nuremberg, the principles enunciated there were very positive ones and treating aggressive war as a crime is, I think, one way of deterring it. But if we respond to the aggression by slaughtering a bunch of conscriptees and starving a bunch of women and kids, we're not going to deter it, so I would hope that some of you will give this issue some thought. I'm not at all sure I have the answer to it, but I am convinced we need to think it through further than we have, and I throw this out as one way to approach it.

PROF. REISMAN: The second session this morning will begin with a presentation of the paper by Professor Fernando Teson, followed by comments by Professor Terry Nardin. [Professor Teson presented his paper, "Low-Intensity Conflict and State Sovereignty: A Philosophical Analysis."]

PROF. REISMAN: Thank you very much, Professor Teson, for that very systematic presentation of this issue from the perspective of moral theory.

To comment on Professor Teson's paper, I call on Professor Nardin.

PROF. NARDIN: Thank you.

Professor Sarkesian wanted to know when we would get to the operational level. We're not there yet.

I suppose you could say that our debates are on three levels: the operational level, the policy level, and the philosophical, or what we might call the psychedelic level. That may sound hostile to Professor Teson, but as you will soon discover, I'm up there in the clouds with him.

Professor Teson is arguing, as I think is correct, for strict moral limits on low-intensity operations, on the grounds that it's as important to respect human rights in these activities as in conventional warfare, but I think there are problems with the way he goes about making his case.

Specifically, what I want to argue is that you can't make this kind of case by operating at the level of philosophy. You can't develop a philosophical theory of legitimacy and hope to get any kind of policy guidance, not to mention operational guidance out of it. When you try to do that you can get bogged down in philosophical abstractions. In fact, I think that the legitimacy theory that he offers is too elastic and permissive. In its place I would propose the very obvious, plain, probably stupid but nevertheless, in my case, firmly held view, that we simply pay more attention to the traditional constraints of international law and try to make sure these constraints are interpreted properly, and that they are reflected in United States law and military practice.

Let me just state very briefly and bluntly my view about this. This is a complicated view. I tend to see international law itself as an ethic of international relations. I think this ethic is undermined by moral theories that make respect for international law subservient to moral principles. The principles of legality and the rule of law that are embodied in international law, in the American Constitution, in American law, and American military law are most commonly undercut by various kinds of realist arguments that would, too quickly, substitute the pursuit of the national interest for measured respect for our legal traditions. There is another way in which this respect is undercut. And that, I think, is reflected in the kind of liberal idealism which I share as a value, that's represented in Professor Teson's paper. Whether we call this respect for human rights, or natural law or higher law, if we derive from this ethos the argument that our unmediated view of what is right or just can be substituted for judgments that are made on the basis of a consensual body of rules that's come down in the international community through the centuries, then I think we are just as much troubled with liberal idealism as we are with political realism. And this is also true if we prefer, as does Professor Reisman, to call this a consensual body of processes and procedures for generating consensual policy outcomes. That's my main point.

I'd like to now address some more specific points in Professor Teson's paper. First of all, definitional problems. I think he gets off to a bad start by defining "sovereignty" as the monopoly of coercion granted to a government by the

citizens who reside in the State recognized by international law. This is a multidimensional definition, but as you can see, it begs the question because it defines sovereignty in terms of legitimacy. In fact, what Professor Teson is concerned to argue, is that we ought to substitute for sovereignty a concept of legitimacy. In other words, we ought not to be so concerned with State sovereignty, because that protects nasty regimes. We really ought to be concerned with protecting legitimate governments and legitimate States and undermining those that are not legitimate. You certainly can't settle such a controversial proposition by a definition. I don't mean to imply that he does, because he also argues the case, but there really is a problem with the definition of sovereignty. If you link it too closely to legitimacy, you have no argument. What I would want to say is that the plain meaning of "sovereignty" is "Statehood." This has a status in the international system. It's defined by international law. It has nothing to do with moral chains. Sovereignty, I would argue, is absolute in one sense. It's not absolute in the old fashioned sense that a State can do anything or that a leader can do anything. That's simply a misunderstanding. Sovereignty is whatever powers are reserved to the State. They can be duly limited by constitutional constraints. They can be limited by international law. They change all the time. The United States is no less sovereign today because it has given its assent to human rights instruments, than it was before 1945. So the concept of sovereignty doesn't change just because there are limits on State power. When I say that sovereignty is absolute, I mean that it is a premise of the State system. If States aren't sovereign, then there's no State system anymore. There would be a single global State. If we maintain a system of separate, sovereign States, we can talk about various kinds of morally justified limitations on State sovereignty that are real, because they're incorporated in international law. But State sovereignty will persist, and I think we have to be very careful about the terms in which we're going to violate its norms.

Let me then close by making a few points about the main thrust of Professor Teson's argument, which has to do with this notion of legitimacy. I think he gets himself into needless difficulty by making too much depend on the idea of legitimacy. I've already suggested that I believe his basic principle to be unacceptable. Namely, that a State is internationally legitimate if it is internally legitimate. That's another way of saying that sovereign rights can be respected only if a State is internally legitimate.

As I've indicated, there are other ways of justifying sovereignty. But more importantly, the notion of legitimacy is a difficult matter. It's by no means clear to me, anyway, whether a State or a government is or is not legitimate. The concept of legitimacy, in other words, is not one that can simply be used in making moral judgments, much less policy decisions. The problem here, once again, comes from trying to move too rapidly from a philosophical analysis down to some kind of direct guidance over conduct. The theoretical extractions that

we label human rights, realism, and so forth are really, in my view, little more than names for far richer and complex ethical systems, actual living moralities that are embedded in practice, used in making decisions and reconstituted by those decisions. And, moral tradition is an ongoing thing. International law has some stability, but it is not immutable. What the philosopher can do is to identify and dissect these ethical traditions, and try to articulate the principles underlying them. This is a large part of contemporary philosophical practice and can be very helpful. The worst thing a philosopher can do, in my judgment, is to fool himself into thinking that his constructs are an improved version of, and therefore a practical substitute for, the moral traditions they interpret, and to offer those constructs as a guide to practice.

Imagine this room as Plato's cave. You are prisoners in the cave. You are chained to your desks. You are looking at the screen at the front of the room and the staff of the Naval War College is in the back with a projector, playing images on it. You live this way indefinitely, and after a while you become connoisseurs of what's going on the screen. You can correlate movements and so forth. We philosophers are not chained. We can face you. You can't turn around. We see what's really going on. Furthermore, we can go outside this room. We know what's out there in the bright world of truth, illuminated by the sun. When we come back, we can tell you about all of that, and you may be impressed, and you may be amused. But, if we try to give you advice about what you know best, which is how to predict the motions of the shadows on the screen, you will know that we're talking out of turn; that we have nothing to say about that level of practice because the kinds of questions that we're asking, the kinds of things that we're saying, are in a different realm altogether.

Certainly, the philosopher's task is critical , but I would suggest that we need to criticize the ease with which ostensibly moral views are used to undercut the kind of common sense, shadow wisdom if you want, not truth, but shadow wisdom of international diplomatic law and practice. In my opinion, despite all of its deficiencies, this shadow wisdom is nevertheless a far more reliable guide to military conduct, and therefore, by implication, to the conduct of low-intensity operations, than the abstractions of the philosopher. When I said in the beginning that I believe international law is itself an ethic, I did not mean that it can't be criticized from the standpoint of the national interest, or from the standpoint of the noble ideals of justice and human rights that Professor Teson enunciates. I wanted instead to emphasize that those critiques can not do more than provide a basis for the reform of our common traditions, and here I mean not simply our common traditions as officials or citizens of the United States, but also our common traditions as members of what is now a very ancient society that, despite all the talk about a new order, shows promise of persisting into the future.

My final point then would be, I think, one that most of us share, which is that the current debate about the moral limits of low-intensity operations, especially in relation to the norms of sovereignty, is very much a continuation of the absolutely classic debates about the ethic of State power that go back to the Renaissance and beyond. In a more proximate sense, and I think Professor Farer brought this out quite well, we are engaged in more familiar debates about things like the limits of American armed intervention . Since I've revealed myself as a stick-in-the-mud conservative here, I will say that not only do we have to place a lot of reliance on international law, we have to be historians. We have to go back and look at the debates of the preceding couple of decades. There's probably more there to be learned than we realize.

Thank you.

PROF. REISMAN: Thank you very much Professor Nardin.

As you will recall, my function as chairman is to provide a brief summary of the exchanges in the panel before opening the discussion up for questions and comments from the floor.

This has been a particularly interesting and intriguing exchange of views and, like the previous panel, I think an observer would find much more in common between the two speakers than they, themselves, may have appreciated. And, at the same time, there were some very interesting divergences.

Professor Teson undertakes to develop, using the techniques of moral philosophy, a theory for the circumstances under which it is appropriate to conduct a low-intensity operation, which he presents in terms that, I think, are quite congruent with those used by the practitioners of the art. He is careful to say that this is an exercise in moral theory and not an exercise in prudent policy or jurisprudence, that is, an explanation for those who must make decisions as to when and under what circumstances to take action. A moral theory tells you whether something is right, but doesn't necessarily tell you whether it's prudent in some circumstances to do it. He also suggests, since his view is framed in terms of moral theory, that it's not a theory of international lawfulness. But, in fact, I think Professor Teson is caught up here by his own training as a lawyer, and as an excellent jurist. His selection of many of the terms make this theory intersect at critical points with international law, and Professor Nardin may be fair in saying that it tries to do more than philosophy can. Whether the theory is sound or not is something we will have to decide. The word "sovereignty" is not necessary for the theory. It would be enough to say that one could mount a low-intensity conflict if a State lacks legitimacy. Linking that to sovereignty indicates that the Professor is concerned here with a fundamental postulate of classic international law, and that is that one State does not violate the sovereignty of another State. And, the notion of human rights also leads to an intersection between moral philosophy and international law. I don't say this critically, but I think that these

considerations do make it appropriate to consider this theory not only under the rubric of moral philosophy, but also in terms of its adequacy as a praxis, as a guide for those of you who, at some point, may have to make the difficult decision whether to engage in low-intensity operations.

Professor Teson rejects the philosophy of normative realism, which reduces policy to an expression of interests, and proposes a range of conditions that must be met if these operations are to be considered morally justified. He demands that the ends of such actions must be defensible in terms of just war theory. He also argues that they should not be directed against sovereign States. This becomes a point of central importance in the Professor's argument because a distinct theory of internal legitimacy, developed extensively elsewhere in his work, is employed to assess the validity of a nation's claim to sovereign status. The operations should also respect human rights. They should be necessary and proportionate, and comply with minimal forms of decency as to their mode of implementation.

Professor Teson's invocation of proportionality and necessity converges with the recommendation that Professor Nardin makes of a practical guideline since those are the classic criteria of international law for military operations, but they are standards that are very difficult to meet in low-intensity conflicts. I was struck when he was speaking by the fact that so much of conventional military conflict is not massive, simultaneous collisions of two armies, but in fact is a congeries of many small engagements, any one of which might look very much like a low-intensity conflict.

Professor Teson concludes that in the world we want to live in there is no place for tyrants. But, obviously the problem is how we get rid of them, and that's where the methods of low-intensity conflict come in. The Professor's concern that a number of strategies might violate some principle of moral philosophy or virtue may be difficult to reconcile with his desire to see the world rid of tyrants.

Professor Nardin's critique is very interesting and I think, quite fair, though I'm not persuaded by all of it. His view is that this moral theory does not provide a method that is appropriate as a praxis for the lawyer. Instead, he would look to traditional restraints. But, the traditional restraints include the notion of sovereignty, which Professor Teson felt he had to develop a method of explaining away, in certain cases. The traditional approach deals with proportionality and necessity, and I'm not at all certain that international law provides clear guidelines for low-intensity conflict in these areas. If it did, I'm not sure there would be much reason for us to convene for these two days here.

Though Professor Nardin criticizes Professor Teson for his definition of sovereignty as the active recognition of States which are internally legitimate, he has another definition that I think is as selective in its way as Professor Teson's. He is critical of a notion of sovereignty that would encourage States to judge each other in terms of internal practices. He suggests that we adhere to a

traditional interpretation of sovereignty, but if that is the case, one wonders how it is possible to respond to a low-intensity conflict.

Professor Nardin concludes with Plato's extraordinarily powerful image of the prisoners in the cave, whose understanding is limited to the world of surface appearances presented by the ordinary round of mortal existence. He suggests that philosophers can see beyond what we lawyers who are the prisoners in the cave can see. In the Republic, after the description of the prisoners in the cave, Socrates' interlocutor says, "you have given us a strange image," to which the philosopher responds, "even ourselves, even ourselves." These limitations may apply to philosophers as well. I think the more general difficulty here is that we all make decisions, those of us who undertake the responsibility for doing it, on imperfect knowledge. We do the best we can, but that knowledge is quite imperfect.

The alternative that's proposed here is not the systematic approach Professor Teson suggests, but the shadow wisdom of international law and diplomacy. One question you may wish to address in your discussion is whether that provides sufficient guidance for us to bypass some of the larger questions that Professor Teson has raised.

With that brief summary, I would like to throw the floor open. We will have an open discussion. Please feel free to return to issues raised in the previous panel as well. As in the previous panel, we will give the speakers a chance to respond.

PROF. ROBERTSON: Professor Robertson, Naval War College.

I'd like to address Professor Teson about his quest for legitimacy, and bring it down to the operational level. In Peru a duly elected president has now seized power, arbitrarily imprisoned his political opponents and the media reports that he has the support of something like 70 to 80 percent of the population. How do you address legitimacy in that framework?

PROF. TESON: I'm glad that you raised that issue. I am also concerned about what's going on in Peru. It's a very important issue because legitimacy, as I define it, and as I think is defined generally in moral and political theory, requires more than the sanction of the ballot box. A democratically elected government is one requirement, but not the main one. The main requirement is respect for the human rights of the citizens. Therefore, we can have two variations on this theme of compromised legitimacy. An initially undemocratic government may respect the rights of its citizens, as would a benevolent monarchy. But the paradox here is that if the government respects the rights of its citizens, it will also respect the right to vote it out of office. Therefore, the right to elect one's own government is contingent on the respect for human rights.

The converse situation, what I think is happening in Peru today, is that of an initially democratic government, which suspends or cancels individual liberties

and violates human rights. We have to take circumstances into account, but a State that does these things is becoming illegitimate.

I would respond also to your important point about the 70 or 80 percent support that he seems to have. It might be true, but I always distrust those polls. Dictators have always said that they represent the people. I have never met a dictator who doesn't claim to represent his people. But, more important than that, the preservation of human rights is not subject to counting heads.

PROF. REISMAN: Prof. Wakin?

PROF. WAKIN: Mal Wakin, United States Air Force Academy.

I'm a bit uncomfortable with Professor Nardin's use of Plato's metaphor of the cave. It's not a critical point, but it's one that seems to be relevant. I can agree with you that international law is something that we must pay very close attention to and that at the least, serves as a guide for what we do. It seems to me that it always has been influenced by moral philosophy, and sometimes quite directly. When we get the law of warfare, for example, clearly moral philosophy has played an enormous role in determining conduct toward prisoners and non-combatants. It seems to me that the principles underlying these rules of conduct come from philosophical considerations before they are established in international law. So, I'm a little uneasy with the suggestion that the law is only shadow wisdom as distinguished from the knowledge of philosophers who have escaped the cave.

PROF. NARDIN: You know, these are such complicated issues. First of all, a lot of the moral wisdom that we draw on, and that's reflected in international practice and international law, is not necessarily philosophical. There are lots of ways of talking about moral issues, and often when philosophers discuss them they aren't being fully philosophical. They're not simply examining presuppositions and trying to relate morality to other kinds of knowledge. They're not seeking for the foundations of moral beliefs. These are activities that I consider legitimate philosophical pursuits. They are arguing about moral issues, often in a very casuistic way, which is not my ideal of philosophy. They're dealing with particular cases and so on. So, there's no question that part of this larger, ongoing debate isn't a technical matter limited to professional lawyers. So, I don't want to be misunderstood on that point.

I'm concerned about a particular kind of attitude toward moral philosophy that is very prominent in the United States these days, and which I think plays into the kind of interventionism that is also part of our tradition. That is, to be struck by bright ideas and to think that one can substitute one's insight for a process of negotiation and paying attention to the past. I would call this a kind of a rationalistic approach to things, and I think too often when philosophers write about international affairs, they want to short circuit that established process

and get right from principles to results. In fact, the kind of discussion that we have, which has always gone on in international law and in diplomacy, is one that draws on many sources to maintain and debate a never agreed, always controversial, but evolving set of standards. In that kind of discussion, philosophers, of course, do have a contribution to make, if only to say something that's clearer and purer than the more pragmatic discourse that follows on and immediately complicates it.

PROF. REISMAN: Professor O'Brien.

PROF. O'BRIEN: Bill O'Brien, Georgetown University.

I would like to follow up on the question that Admiral Robertson asked. I'm troubled by this business of legitimacy in cases of extreme emergency. Would you say that Abraham Lincoln didn't have any legitimacy? He certainly suspended legal rights, such as habeas corpus, in a peremptory fashion. He said he was compelled to such measures by the gravity of the national situation.

PROF. TESON: Well, we can't stop making principled judgments because there are hard cases. I'm willing to concede to Professor Nardin, that in judging those hard cases, the presumption should be against intervening. If Peru is a hard case, maybe the presumption should be in favor of caution and restraint. I'm willing to concede that. But, it's important that my concession not be taken to mean that the principles do not have great force in very clear cases. Even in the more ambiguous case of Peru, my principles, I think, would provide guidance. Now that we are considering the applicability of general principles to particular cases, I would like to respond to the criticism of my views as excessively abstract and insufficiently concerned with operational problems. I don't think it is warranted. In my paper, I discuss a number of real life examples, ranging from the Israeli abduction of Eichmann to the Bay of Pigs to the possible assassination of Saddam Hussein. I'm willing to analyze any particular operation in terms of these principles. The horizontal contract within the nation, the vertical contract between the regime and the people, the concept of legitimacy that flows from them and the concomitant understanding of international sovereignty all provide guidance for the evaluation of particular operations. I'll be happy to accept the challenge of applying those principles to any case you may suggest.

PROF. REISMAN: Professor Farer.

PROF. FARER: I just want to tease Fernando to amplify a little bit what it is that he's getting at. I suppose that the principles and rules that we've inherited from the continuing history of relations between human communities, which we call international law, incorporate the moral perceptions of these com-

munities at the time. Now, when you propose a separate higher order frame of moral reference as the ultimate arbiter of these relations, it leaves me uncertain as to where the distinction may be found between the results you would achieve by applying your criteria and the results that would be achieved and the things that ought to be done, when applying the perceived legal criteria. When does that distinction arise and what should one do about it? Are you trying to identify the way in which the law should be moving? Do you mean that a discrepancy between the law and your principles should be cause for its modification? Should it be considered grounds for unilateral initiatives, as proposed by Michael Reisman, in order to see whether we can shape a new consensus? If you think that the global consensus represents too low a common denominator, would you be prepared to assert our peculiar moral traditions over others that conflict with it? Or perhaps you mean that philosophy and morality are a frame of reference for extreme cases, such as euthanasia. Let's not pretend it's law, let's recognize the law takes care of the normal case, it doesn't take care of the extreme case. When we're faced with the extreme case, we need some backup, some norms of mitigation, as it were. And so, I'd like to see just which of these possible interpretations you think would be appropriate.

PROF. TESON: Let me say, Tom, that I was vastly relieved when I was commissioned to write this paper, because for the first time in my career, I was freed from the cave and could engage in moral analysis without being concerned with international law. My background is that of an international lawyer, so the fact that I view this process as a philosophical exercise to begin with is not unimportant. Whether or not current international law reflects that is a separate question, and I think it's a very complicated one. I would say that if I had to choose one of your attempts to characterize what I am doing, I would take the second one. My system is admittedly a framework for changing the law if the law doesn't coincide with it.

I have two problems with Terry Nardin's critique, although it was very useful. I have to say in passing, that the defense of the State system in his 1983 book is probably the most lucid that I've come across; it's an excellent work. So, I'm very flattered that he took the time to read my paper and criticize it from the standpoint of a defense of the State system. One problem is that international law may have some objectionable features. That is possible from the standpoint of what's right and wrong, if you believe there's such a thing as right and wrong. I happen to believe, many people will disagree with me, that one problem with the international law is its excessive deference to dictators. The fact that tyrants of all sorts are protected and granted the status of legitimate governments is to me, a moral problem with international law. In that sense, international law is deeply flawed. You cannot just take the view that because a tyrannical regime is there it has to be okay. Would you have said of the ancient regime in France in

1789, "Oh, we've had it for many centuries, let's keep it?" That's what Burke actually argued. It is an ultraconservative view that we should keep whatever we have, and I reject it.

The other conceptual problem with taking international law as a touchstone, is that unfortunately for Professor Nardin's view, there is no such thing as an international law that is chiseled on tablets, waiting to be obeyed. As Professor Reisman and the New Haven school have demonstrated for many years, international law, the practice of States, the language of treaties, need to be interpreted. We need to make sense of it. We just cannot say, "Oh, that's what international law says." We have to make sense of it. On the very issue before us, humanitarian intervention to protect human rights, the practice of States is open to sharply opposed interpretations, each consistent with the facts. You can interpret the practice of States of intervening to remedy human rights violations as carving out a new rule of humanitarian intervention or you can interpret it as criminal aggression. So, I think in order to interpret it you need to rely on principles. Maybe not my theory, someone else's theory, but some theory.

The final remark that I want to make is in response to the last comment you made suggesting that we would want to impose our morality if it clashes with what anyone else thinks. Many people disagree with this position, and certainly I think to some extent Professor Nardin disagrees, but I am simply not a relativist. I do not believe that whatever some community believes is right, must be accepted as right. I think there is objective moral truth. In the international arena, I would make the modest claim that the moral truth is the International Bill of Human Rights. I'll agree with Professor Reisman's remark that my views of philosophy and law intersect there, and I would be happy to accept that as a kind of a working starting point; the International Bill of Human Rights as the touchstone of what is right objectively and universally.

PROF. REISMAN: Jack.

MR. MCNEILL: Yes, Jack McNeill, Defense Department.

I was very pleased in the last few minutes to hear a number of remarks that I think do suggest that there is a great difference between the approach of the philosopher and the approach of those still laboring to understand what international law has to say in this area. Particularly in the arena of low-intensity conflict where the rules, if they be rules, are very difficult to discern. There is a great difference I think, not only in interpretation, but with regard to whether the rules really exist at all. I'm thinking, in particular, of the opinion of the International Court of Justice in the Nicaragua case, where the Court in my view, made up new rules that now purport to limit the right of individual States to engage in self-defense and would also limit their right to come to the aid of each other, in a case where collective self-defense would otherwise be appropriate under Article 51. And so, I think Professor Farer's

earlier question was helpful in that it suggested that we may have to face in this particular realm of inquiry a situation where the rules either do not exist, or have very little validity, perhaps because they emerge from this rather wretched case, which the United States did not handle very well procedurally. Even if that is so, the court, I think, acted in an ultra vires manner, and so there is a cloud, at least on the value and the content of its judgment. Of course the case has never closed because the results have been withdrawn, but a judgment is on the books, a very unhelpful judgment. So what do we do as practitioners and operators in this field where we may have to face the judgment of the Court in a situation where we feel that we have rights under the preexisting law and we have the moral authority to engage in action that we feel must be taken, action which might conform to all of the requirements set out this morning? What is the approach that you would recommend for the policymakers to take into account these conflicting imperatives?

PROF. REISMAN: That's a simple matter. Do the right thing.

PROF. TESON: Well, very briefly, I think that the Nicaragua case was an unmitigated disaster in every respect, not just in the self-defense field, but in the area of human rights.

I think the answer to your question, Professor McNeill, is simply that the Nicaragua case may not represent the law. I think we should take the metaphor of the cave to suggest that Anglo-Saxon notions of precedent may lead us to excessive deference to the Court's judgment. What the interpreter should do is to try to impartially interpret the law in accordance with the background theory that can best explain international relations. I think the Court was out of touch with the process.

PROF. REISMAN: Judge Sofaer.

JUDGE SOFAER: Abe Sofaer.

I am troubled by what Jack says. I find that there are rules, and I had gotten the impression that the trouble with the Nicaragua case was that the Court made up new ones and applied them there, and we battled, and are continuing to battle as I understand it, over what the right rules should be. The interesting thing about Professor Teson's paper is that it seems to imply that there are not any rules, so we are not losing anything by opting for a sort of moral guide to when we can intervene in States and when we can't. I'm not sure of that. I think we, in the Government, always assumed that when you went into another State, irrespective of how moral the government was or the leader was, you were violating the territorial integrity of that State. If it was a State recognized by the U.N., you were violating that State's sovereign rights by going in there without its permission, and there was automatically an obligation upon us to explain what

it was that we felt justified that intervention. So I find the notion that a sovereign State is democratically elected and has a vertical and horizontal legitimacy to be terrifying as a justification to advance, as a practical matter, for any kind of intervention, whether it's an abduction or a rescue or any of those things. I don't see how any of us could do that with a straight face, and I could not, as a matter of conscience. I think it would leave States and political leaders and military leaders without any parameters that were sufficiently reliable to work with. When we look at the Nicaragua decision and say, well, it was wrong because A, B, and C, and we advance something that was right, we are still within the traditional confines of legal argument. I find the paper philosophically very attractive and probably a more accurate guide to what's happening in the world, and what God willing, should happen in the world over the next couple of decades. Maybe it is what we should be pressing for politically, and maybe it should even guide what our political leaders ought to opt for when they decide to use force within traditional legal constraints. But, I don't see it as a legal guide that's final.

PROF. REISMAN: Professor Teson, would you like to comment?

PROF. TESON: Just very briefly.

Well, I'm perfectly pleased with just accepting that you find it attractive philosophically. That's what I tried to do, to write a paper on the philosophy of low-intensity operations compared to State sovereignty and make it attractive. How it's attractive and terrifying at the same time is an interesting proposition.

PROF. REISMAN: Terrifyingly attractive.

PROF. TESON: That's right.

PROF. REISMAN: I would like to interject two comments here starting with Jack McNeill's observation. The international lawmaking process is very complex. It's different than the domestic process where we essentially can consult formal sources; statutes and the judgments that interpret them. A general college of jurists will usually come up with pretty much the same judgment of what the communication of the community's policy is. In the international system you don't have a legislature. You have a lawmaking process that's extremely complex. It involves many different formal organizations like international courts, the Security Council, governments interacting and governments engaging in unilateral action. The determination of what law is at any moment, as a result, requires much more scrutiny, and the responsibility of the international jurist in deciding on the law, is a much graver one than it is for his domestic counterparts. It's one that's usually presented with the qualification that it is valid as of this moment, or in the foreseeable future since we deal with a very fluid situation. In the nature

of the international system, strong actors have the capacity to make changes in law by their behavior. In the post-war period, the United States made a fair amount of international law. Some by itself, some in coordinated behavior with the Soviet Union, and even now, the United States has extraordinary power. A Canadian legal advisor once remarked that in international politics, one hundred minus two sometimes equals zero. There is a blocking capacity and a lawmaking capacity that is associated with this very great power. That means, I think, that there are very special moral responsibilities and here we intersect with Fernando's point. The responsibilities are borne by U.S. officials who have to determine what is appropriate behavior in some circumstances. It's not simply what is right. We're not simply applying law, we're also in the process of making law. While this should proceed with a full sensitivity to the problems of unilateral lawmaking and concern for the genuine interests of others—the international court has talked about this—I still think that it imposes great responsibility.

In regard to the Nicaragua case, I think it quite clear that the Court is simply one of many voices as to what international law is on this matter. It's not the final voice. Even if the Court's jurisdiction were properly founded, which is the contingency in which it may issue authoritative statements, it's not the final statement. So the conclusion as to what law is at a particular moment will involve an ongoing examination of many communications from the context.

One other point. I'm not a moral philosopher, but I would like to respond to Judge Sofaer's observation. I don't think that Teson's being unreasonable. His followup comment was that he believes that wholly aside from what the law is, he has an independent moral responsibility to determine what's right and to recommend to others to do it, and perhaps to do it himself. And so this is, as it were, a criterion for appraisal or evaluation of contemporary law and a guideline for future behavior.

COL SMITH: Ron Smith.

We have dwelt at length on traditional nation-State relationships. I think we need to consider the recent development of extra-national criminal organizations that engage in drug trafficking and terrorism. There's one view, of course, that holds the sovereignty of the nation-State to be inviolable. But perhaps we should be looking at sovereignty with different criteria to address this new problem, particularly where the nation-State involved is either purposely harboring the activity, or is unable to do anything about it.

PROF. NARDIN: I think you can predict my answer to this question. We obviously have a grave global public policy problem and we're here to talk about solutions to it. I don't understand why one moves quickly from the identification of a problem to trying to solve it though the use of force, not to mention covert action. These are measures that might be in violation of not only international

law, but the laws of the United States. I couldn't agree more with the kind of legislative view expressed by other people on this panel today, that we have to be concerned with developing appropriate norms, appropriate modalities for dealing with these problems. I think that the reason we're here is because it's actually the case that there are, from time to time, such challenges that must be answered. The burden, overwhelmingly, is on those who want to act, covertly or forcefully, to deal with those threats. Therefore, I think this whole issue really is about extremity. In other words, what do you do when the threat is so grave that you feel that it's justified to set aside the traditional constraints of law? My position on this is that it's all too easy to succumb to extreme thinking. We've seen again and again that respect for the law is a virtue that helps us resist that kind of temptation. It's not a question of upholding international law or even U.S. law in any simplistic way. Obviously, there are bad treaties, bad decisions. What I'm concerned with is a general attitude toward legality and attitudes which would help to strengthen the rule of law in the international system. Even when dealing with real problems, which may well call for a low-intensity response, we should not act in ways that are going to subvert rather than strengthen the rule of law in international society, which is presumably what we're ultimately concerned with.

PROF. REISMAN: Tom Farer.

PROF. FARER: I think it's necessary to say that there is a very great discrepancy between the view of a rather small number of international legal scholars, most of whom are Americans, and the great majority of European and Latin American legal scholars. Michael and I were at a conference with the cream of the German international legal community only two weeks ago, and the discrepancy was quite clear to them. Most international legal scholars believe there are very significant restraints on the use of force, and that those restraints are identifiable. Despite the unique conjuncture that every case represents, they maintain that it is easy in most cases to identify what the appropriate behavior is as far as law is concerned, and that frequently, the United States has acted without reference to those restraints.

As we talk, I think we should recognize that this discrepancy exists, and I think, often in gatherings like this, one cites one interpretation of the Charter and another and it makes it sound as if there is a balance of views, but the truth is there isn't. Now, that doesn't mean that we should necessarily comply with the majority view. We should at least recognize that this view of the extreme flexibility of the Charter norms, or the customary norms, is not a widely shared view. That ties into the comments that were made about the Nicaragua decision, and the position of the Court in expounding the law. I won't undertake this time to defend the Nicaragua decision, but I think it's

far more defensible and coherent than some of the comments made to this point would suggest. Be that as it may, there is the fact that the Court is composed of jurists from a variety of countries, many of them western or allies of the West. Most of these gentlemen are distinguished and would support the point made earlier, I think, that those American lawyers who think that the norms are unclear represent a distinct minority. In that sense, the Court's view in the case of Libya highlighted this discrepancy with which we must struggle.

PROF. COLL: In response to Professor Farer's point, I think that we need to address also the impact of responsibilities that a great power has, and you, Professor Reisman, alluded to that earlier.

It may be that the United States, because of its global position, faces certain policy choices and obligations which put it into a situation in which the rules, as it perceives them, are not quite clear. It may also be that the rules in a sense do not give the United States enough room for the kind of flexibility that is required, not only strategically but even from the larger viewpoint of political and even moral wisdom. I think that's a point of which we must not lose sight. In the same way that certain small States can behave with a greater disregard for international law than even we do, there are other States without the same degree of international obligation that we have, that will press for what I would call highly restricted interpretations of international law and questions relating to the use of force.

RADM LEMOYNE: For Professor Teson.

You mentioned Saddam Hussein a couple of times in the context of assassination. From an operational standpoint, from the time that the Iraqis moved south to the time that the cease-fire was declared, was there any difficulty in systematically targeting and hunting down Saddam Hussein as the operational commander of Iraqi armed forces? If we could have caught him quickly, I think that may have ended the war earlier.

PROF. TESON: That is a very good question. My answer is there wouldn't have been any difficulty in doing that, which is why I find the failure of the coalition forces to do it inexplicable. I don't know what the facts are. I'm told that the Saudis advised President Bush not to go after Saddam Hussein, against the judgment of the field commanders. I don't know what the facts were, but it's very interesting because it brings out part of what I say about sovereignty. If you're in open war, sovereignty becomes subject to different considerations. So, as you very well put it, I think it would have been justified to go after him as the commander of those forces against which we were fighting. It was easier then than now, when sovereignty considerations, at least in the traditional sense, have reemerged after the cease-fire.

RADM LEMOYNE: And I'd like to follow up by returning to the difficult case of President Fujimori in Peru.

You expressed some reservations about what he's doing, but viewed from another perspective, his country is in mortal danger from drug trafficking and the Sendero Luminoso.

PROF. TESON: Well, let me address that very briefly because it touches closely on my own experience in Argentina. I certainly sympathize with the situation he's in. The fact that the insurgency is being financed by the drug money is admitting an extenuating circumstance. Having said that, I think we in the democratic world should warn, to use the cliche, against trying to save democracy by destroying it. The way to eliminate the cannibals is not to eat them. In Argentina, I witnessed a government for eight years, which in the name of civilization and of democracy, kidnapped, imprisoned, tortured and killed people. So I just don't think that some of the things that he's done are justified, even under the right of an emergency, because they destroy democracy. Having said that, I still believe it's a hard case.

PROF. REISMAN: Ladies and gentlemen, we have reached the end of this morning's session. I thank the speakers in this second panel, and I thank the members of the audience who participated because it's been very useful. We've exposed this as an extraordinarily complex and difficult issue, though a number of speakers put forward guidelines or theories for making choices. None of them suggested for a moment that any of these choices are easy. This is a difficult subject and for that reason, I think we will continue it this afternoon.

Thank you.

PART THREE

MORAL CONSTRAINTS ON LOW-INTENSITY CONFLICT: MORALITY AND THE JUST WAR TRADITION

Chapter VI

Just War Tradition and Low-Intensity Conflict

by
James Turner Johnson*

Introduction

Some readers of this paper may know a great deal about the just war tradition, while others may be less familiar with it. Part I provides an orientation for the latter and, for both sorts of readers, locates my own normative position within just war thought. Working from this base, Part II applies just war tradition to low-intensity conflict.

The just war idea takes many forms in contemporary moral debate, and one must be careful to recognize their variety. After illustrating this diversity with a brief overview of some of the principal contributors to the recent tradition, the paper will go on to discuss their work in greater detail.

For the late Protestant theologian Paul Ramsey, a preeminent figure in the recent debate, just war had to do principally with conduct in war. He understood it to be a moral concept rooted firmly in the Christian ideal of love for one's neighbor and focused on the principle of discrimination. In contrast, Fr. J. Bryan Hehir and the U.S. Roman Catholic bishops view just war as a doctrine of the Catholic faith, rooted in natural law but passed down and developed through theological debate. William V. O'Brien also acknowledges Catholic theological tradition and natural law as sources of the idea of just war, but he accords authoritative status to its formulation by St. Thomas Aquinas and subsequent development in the modern period through international law as well as moral doctrine. For James F. Childress, on the other hand, just war thought is not particularly Christian in nature; it is a set of prima facie ethical duties derived from philosophizing about when the use of violence can be morally justified. A very different philosophical conception of just war is offered by Michael Walzer, for whom it is a body of moral wisdom accumulated from reflection on the struggle against evil throughout history. We might add others to this list, including the "just-war pacifists," persons who typically choose one or another just war criterion (e.g., proportionality or last resort), argue that it

cannot be met under contemporary conditions, and thus conclude that just wars are an impossibility.

Leaving these latter misusers of the idea of just war aside, my own position is that we should speak of just war tradition, not simply one doctrine or another, understanding the tradition to include a number of related streams of thought that are reflected in the diversity of perspectives found in current just war debate. Just war is a historical tradition formed by experience and reflection, including much that is neither specifically theological (or even religious), nor philosophical. It has been strongly influenced by international law, the traditions of chivalry and soldierly practices derived from the experience of many battles.

I like to describe just war tradition as a whole by the metaphor of a river flowing through its delta toward the sea. The common stream forms, separates, and forms again, with the main flow now being carried by this channel, now by that one. When all its parts are understood together, just war tradition represents a cultural consensus on when war is justified and what limits should be observed in fighting justly. This consensus has its deepest roots in classical and biblical antiquity, came together coherently in the high Middle Ages, and has since developed great richness by responding to changing historical conditions. The moral wisdom contained in the tradition has coalesced in certain formal criteria, each of which is informed by a deep and thematically diverse background of historical experience and moral reflection. When seeking to apply this tradition to contemporary issues, I consider the historical weight of meaning present in each of the relevant criteria. Ideally, this becomes a dialogue in which the wisdom of others who faced these problems long ago illuminates the perplexities that surround our deliberations about the use of force in the present.

In the first part of this paper I develop in more detail the view of just war tradition as a historically shaped body of moral wisdom on the justification and limitation of war. In the second part I examine the implications of this tradition for the moral conduct of low-intensity warfare. I conclude the paper by arguing that the moral criteria of just war should be understood as "rules of the game" for the involvement of American forces in low-intensity conflict.

I. What Is Just War Tradition?

A. Main Features and Provisions of Just War Tradition

All major cultures, over the course of their development, have produced normative traditions regulating the use of force. This function is performed in western culture by the just war tradition. It is a moral teaching in the broadest sense, expressing fundamental values relating to the practice of statecraft and the use of force by statesmen. It is important to note, though, that systematic moral reflection has been only one of the major contributors to this broad tradition,

both historically and in the present. When the elements of just war began to cohere in the Middle Ages, they formed a cultural consensus on the justification and limitation of conflict. In addition to theology and philosophy, medieval thinking on just war incorporated chivalric custom and military practice, canon and civil law, and precedent governing relations among princes.

These contributions can still be discerned in the broader just war tradition, where each has its contemporary form. In the military sphere, manuals of warfare prescribe acceptable conduct in battle and stipulate rules of engagement for specific conflicts. In the legal arena, the corpus of international law guides the relations of States. In the theological domain, theorists like Paul Ramsey and the authors of the 1983 pastoral letter of the American Catholic bishops pronounce on war conduct. And in the academy, philosophers like Michael Walzer and Elizabeth Anscombe reflect on the relevance of the tradition to current challenges. In various historical periods, moreover, the tradition as a whole has been carried forward and developed more in one or another of these areas than in the rest. In the eighteenth century, for example, the political and military practice of limited war had a major impact on the entire just war tradition. From the end of World War I until recently, by contrast, the dominant carrier of just war ideas was international law. And from the 1960s to the present, systematic religious and philosophical reflection have regained the primacy of their original influence on the development of the tradition.

In contemporary usage, the term "just war" is sometimes reserved for the religious element in this broader moral tradition.[1] At other times the idea of just war is associated only with the medieval period in which the ideas and practices of the tradition first coalesced.[2] The former usage mistakenly restricts the breadth and diversity of the tradition, however, and the latter fails to take account of its historical continuity and growth. In summary, then, I view just war tradition as a great river of morally informed theory and practical reflection in which many cultural sources mingle. Legal, military, political and philosophical tributaries all enrich the mainstream of Christian just war thought. I also take a comprehensive view of the tradition, keeping in mind its classical origins and complex evolution when applying it to contemporary problems.

Understood in this broad sense, just war tradition has evolved around two distinct questions: when is it justifiable to employ military force and what limits or restrictions should govern the justified use of force. The former question has generated a set of formal criteria for judgment known, in classical terms, as the *jus ad bellum* (literally, that which is right or just in resort to war; contemporary analyst William V. O'Brien calls this part of the tradition the "war-decision law"). The latter question, in turn, has generated other formal considerations grouped under the heading of *jus in bello* (literally, what is right or just within war; O'Brien calls this "war-conduct law").[3] A few comments are needed on the various

criteria that make up the *jus ad bellum* and *jus in bello*, on their interrelationships and on the priorities among them.

The first thing to say is that within the just war tradition the *jus ad bellum* has a certain historical and logical precedence over the *jus in bello*. That is, the question of the right manner of using force does not properly arise until the question whether the use of force is justified has been settled. Some present-day theorists appear to me to have got this logic inverted, arguing that contemporary means of war inevitably violate the *jus in bello* criteria of proportion and discrimination, and therefore that no *jus ad bellum* can exist. This position is sometimes called just-war pacifism; more accurately, it is pacifism pure and simple, because it employs a different logic from that of just war tradition.

The second thing to say is that historically and thematically, the first three *jus ad bellum* categories — just cause, competent authority, and right intention — have a claim to being more fundamental than the others. These had priority in all the medieval sources, including Augustine, the canonist Gratian and his successors, and Thomas Aquinas, who listed only these three criteria as necessary conditions for a just war.[4] For medieval writers, other *jus ad bellum* criteria, while important, had less normative weight. They were either understood as further elaborations of the ideas of just cause and right intention or were seen to be prudential considerations that might count against the justice of a war but could not alone justify the use of armed force.

Similar views were held by the magisterial just war theorists at the dawn of the modern era: the Spanish neo-scholastic Vitoria and his less well known colleagues, Molina and Soto; the later moral theologian Suares; and Grotius, to whose thought is generally traced the theoretical origin of secular international law.

Some present-day just war reasoning, as already noted, seems to invert the logic of the structure established by these great figures. In the debate over the Gulf War, for example, the spokesman for the United States Catholic Conference argued against American use of force against Iraq on the grounds that it would be likely to violate the criteria of proportionality and last resort. Other critics of the war argued that it would not serve the end of peace.[5] These are indeed important concerns to raise, but the weight of just war tradition as a whole calls for looking first at the question of just cause. Its requirements were satisfied, in my view, by Iraq's unwarranted invasion and occupation of Kuwait, violating its sovereignty and international law. The question next in line of consideration, that of competent authority, was more than met by United Nations Resolution 636 and its predecessors, as well as by resolution of the United States Congress. And the desire to restore Kuwaiti sovereignty and prevent Iraq from further aggression was clearly in the spirit of right intention.[6] Only after these considerations have been satisfied do the remaining *jus ad bellum* conditions come into

play. The result is a logic quite different from that obtained by beginning with those criteria and making the entire *jus ad bellum* decision hinge on them.

Equally important, theorists writing in an age of holy war, most notably Vitoria and Grotius, argued for a conception of just war that was universal in scope, not simply an artifact of western culture. They advocated principles based on right reason alone, not religion or other ideological belief. "Difference of religion," Vitoria wrote, "is not a just cause for war." Moreover, he maintained, Indians of the New World and Spaniards alike could understand the requirements of just war, which derive from nature, and both were bound by them.[7]

Following the implications of this reasoning in the present day means rejecting not only justifications for war rooted in religious claims but also, more broadly, those rooted in other sorts of ideologies that make similar claims to absolute truth. With the expiration of Communism as an engine of historical change, the urgency of the latter concern has begun to wane. At the same time, though, the specter of holy war, which had confidently been thought to have disappeared at the start of the modern period, has reemerged. The threat of Islamic militance in the Mideast has been joined by growing Buddhist and Hindu extremism in the subcontinent. Hatred between Protestants and Catholics also continues to fuel strife in Northern Ireland. Faced with such challenges, just war theorists must supply two different sorts of responses. They must first make a special effort to expose the use of spurious religious imperatives to justify aggressive designs. A natural outgrowth of their effort should be the formulation of moral criteria by which this pernicious misuse of religious authority can be condemned and fought—an effort which may at times require the use of military force. On the other hand, just war tradition must not be used so as to undermine its own claims to provide a standard for the use of force that is fair, recognizable through a common human reason, and universally binding. Present-day interpreters of just war tradition should keep both these needs in mind.

B. Just War Tradition and American Legal and Moral Thought on War

There are two ways to think about the presence of just war tradition in American culture, one formal and the other less so. That such a presence exists is of considerable importance for this discussion. It means that the use of just war criteria does not impose alien norms on the American moral consciousness. Part of the task of interpretation, then, is to bring such norms and their implications to light.

Thinking informally about the presence of these just war norms, James F. Childress has argued, as noted above, that they establish "prima facie duties" — obligations to behave in accordance with their requirements unless other norms and other obligations, in a specific case, override them.[8] A less technical way of saying this is that the various categories that make up the *jus ad bellum* and *jus in*

bello of just war tradition are simply objectifications of the way people in our culture normally think when they make moral judgments about war and other uses of force. That is, without prompting from theologians and philosophers, we tend to think in terms requiring just cause, appropriate authorization, right intention, and so on.

Formal signs of the presence of just war tradition are not only useful reference-points in themselves but support the claim that there is a pervasive though informal presence of the just war norms as well. I will identify three major areas in which just war tradition is formally present: international law, military codes of conduct, and the theological and philosophical debate.

1. Just War Tradition and International Law. International law on war has historically been one of the vehicles for development of just war thought within the broader just war tradition. In this relationship, the categories are those of just war tradition in its classic form, while the content of the categories is drawn from specific provisions of the contemporary law of war. That these provisions are not identical with the content of *jus ad bellum* and *jus in bello* summarized earlier simply underscores the fact that international law is one among several major tributaries of the broader tradition, each of which has its own concerns and develops the tradition within its own limits.

What emerges from this comparison is that international law truncates the broader tradition in certain respects. The links are plain, nevertheless. This relationship means, among other things, that to draw out fully the implications of international law in a particular case, interpreters should bear in mind the moral wisdom of the broader tradition. The somewhat embattled notion of defense found in contemporary international law thus can be better understood when it is recognized that "defense" in this context includes not only just cause, but also the classic just war categories of recovering something wrongly taken and punishment of wrongdoing.

2. Just War Tradition and American Military Manuals on War. There is a long tradition, dating back to the early modern era, of manuals of military conduct that render concretely the more abstract content of normative western thought on war. The earliest such manuals in the United States were written chiefly to regulate civil-military relations. A corner was turned, however, with the Civil-War era General Order No. 100 of 1863, prepared at the behest of the General-in-Chief of the Union Army by a commission that included a professor of international law, Francis Lieber. "Lieber's Code," as the manual is sometimes known, differed from earlier regulations in two important ways. It focused on the conduct of war, not the barracks life of the soldier. It also defined the limits of allowable practices in war by reference to the extant body of customary procedure and systematic juristic theory. These customs and theories defined international law on war in a time when it had not yet been formulated in specific treaties and international agreements. General Order No. 100 set the pattern for

a new style of military manual on war, both in the United States and in other western countries. Present-day American military manuals like the Army's FM 100-5 and the Air Force's AFP 110-31 are the latest examples of this approach to summarizing and regularizing the implications of moral norms that ultimately trace to just war tradition.

3. The Theological and Philosophical Debate Over Justified War. Beginning with the groundbreaking work of Paul Ramsey, *War and the Christian Conscience,* published in 1961,[9] sophisticated efforts to explore and spell out the specifically Christian elements in the just war tradition have figured significantly in the American religious debate over ethics and war. Seven years later, Ramsey published *The Just War: Force and Political Responsibility,*[10] a compilation of twenty-four essays focusing both on nuclear deterrence and counter-insurgency in Vietnam. By presenting a reasoned defense for the use of force in Christian practice, Ramsey's essays shifted the perspective of the just war debate. Establishing at the outset that force is a necessary part of politics, he countered utopian arguments calculated to exclude consideration of the use of force from political discourse. Ramsey then employed an extensive analysis of the concept of love for one's neighbor to meet the arguments of Christian pacifists. He maintained that the love of a Christian for his neighbor justifies his participation in war at the same time as it constrains his use of force. Love requires that the Christian defend his neighbor against unjust attack, employing means up to and including military force. But Christian love also requires that the innocent be protected against direct, intentional use of force against them. This latter consideration, which Ramsey termed the principle of discrimination, is otherwise known as the principle of noncombatant immunity. By focusing on it as a requirement of Christian love, Ramsey implicitly made this *jus in bello* principle the centerpiece of his own understanding of the just war idea, minimizing the *jus ad bellum.* This perspective on what is distinctively Christian in just war teaching continues to have a great influence in religious debate over ethics and war.

A bibliography of the many works written over the last thirty years that apply just war tradition to contemporary military issues from a specifically Christian perspective would include authors such as Childress, Fr. Hehir, O'Brien, Potter, Weber, and the American Catholic bishops, whose pastoral letter was the most influential of several official church statements in this genre. Numerous other writers have also used just war reasoning for pacifistic purposes, including Hauerwas, Geyer, Yoder, and the authors of church statements such as the pastoral letter on war of the bishops of the United Methodist Church. In short, just war tradition, albeit in a form tailored to specifically Christian concerns, is a central part of recent religious debate over ethics and war.

In the corresponding philosophical debate, the most prominent figure is Walzer, whose *Just and Unjust Wars,* published in 1977,[11] holds a place of honor

comparable to Ramsey's 1961 work. Walzer's purpose, as expressed in the preface, was to rehabilitate just war reasoning for the contemporary debate. Other philosophers who have explicitly employed just war reasoning in their writings about ethics and war range from Elizabeth Anscombe to Robert W. Phillips. The just war idea is an influential presence in philosophical as well as in theological debate — not, again, as something imposed from outside but as a way of thinking about ethics and war that is integral to theological and philosophical argumentation.

In summary, just war tradition has become deeply rooted in the way Americans think about what justifies war and what restraints should govern it. Public thinking on the use of force has been influenced so strongly by the tradition that policy decisions couched in terms of just war criteria are readily taken up in the to and fro of the ongoing debate.

C. Levels of Application of Just War Tradition in the National Use of Military Force

The just war tradition may be applied to several distinct layers of responsibility, descending from the highest level of political leadership through policy makers to military commanders of all ranks and their enlisted personnel, while not excluding the reflective citizen who takes an active interest in the national policy debate. In other words, just war tradition offers moral guidance, lays down obligations, and establishes a framework for critical moral reflection at all these levels. Let me comment briefly on each.

1. The Head of State. The ideal of the "good ruler" is deeply rooted in western culture. The power of such a political leader is not merely statutory, but is given moral authority by the virtue of his actions. As Ramsey and Walzer have argued, by providing the statesman with a protocol of restraints and justifications to guide his thinking about the use of force, the just war tradition establishes a framework for the realization of this ideal. Such a perspective is a direct challenge to that form of political realism that considers the best politics to be totally value-free. Even if such a value-free state of affairs were achievable in practice, it could not serve the public good in a society characterized by deeply rooted moral values. For the head of state to take into account the moral wisdom contained in just war tradition is, then, nothing less than right politics.

2. The Policy Debate. Essentially the same considerations apply a notch lower, at the level of the policy intellectuals both inside and outside of government. Again, the issue is whether a more adequate understanding of politics is provided by an effort to achieve a value-free "realism" or whether it is to be found in an effort to incorporate into policy formulation and associated decisions moral values deeply held in the political society. In Part II of this paper I will follow this consideration further, examining the translation of just war ideas into

contemporary policy language. At the present, however, my point is simply that just war reflection belongs at the policy level, even as it does at the level of decisions of the head of state.

3. Military Command. The presence of just war criteria in the international law of war and in contemporary military manuals and regulations demonstrates plainly the relation between these basic cultural ideas about the proper use of military force and the responsibility of persons in military command. Obviously, there are differences in degrees of responsibility according to rank and assignment in military service. Commanders at higher levels bear greater burdens of responsibility than subordinates and also have greater ability to influence how military force is employed. They decide on military objectives, prioritize targets, choose weapons and decide what people will be put at risk. The great responsibilities and discretionary powers of the military commander underscore the fundamentally moral nature of command and draw him fully into the circle of reflection on the relation of moral values to combat.

4. The Individual in Military Service. United States military regulations reflect domestic and international law in placing final responsibility upon an individual for his actions. Ignorance of the law does not excuse violation of it; nor does obedience to unlawful orders. Nor does the "law" in question have to be framed as positive law. The Nuremberg precedent makes clear that the fundamental moral notions that have shaped positive law remain binding even when they are not given explicit expression within it. If this were all that needed to be said, the result would be military anarchy, making war more dangerous and destructive for soldiers and civilians alike. The moral requirements of the just war tradition are accordingly condensed and given practical focus in its treatment of military discipline. To avoid worsening violence with chaos, orders and actions in accord with military discipline are given a presumption of rightness that imposes a duty to obey on the private soldier. Yet that duty is never absolute; the moral nature of the individual implicitly imposes a check on it. This means that moral responsibility extends up and down the chain of command. No soldier should be asked to fight in an unjust war or under unjust orders. But at the same time, the soldier owes a presumption of rightness to his commanders, the political leadership and the country as a whole.

5. The Private Citizen. In a democratic society the private citizen is not at the bottom of a chain of command but, in an important sense, at the top, since the representatives he elects give character to the nation and influence its foreign policies. This side of the Kingdom of God on earth or some other utopia, the use of force is an essential part of politics. War does not belong outside the sphere of the moral but, like other human activities, is fundamentally moral in nature. It is the citizen's obligation to ensure that the nation's military policies and its decisions regarding the use of force remain in concert with the moral values that

undergird it. By reflecting on the concerns found in just war tradition, private citizens can make a valuable contribution to the public debate.

My argument has been, then, that just war tradition applies at all the levels of responsibility in the national use of military force. The remainder of this paper examines its application to some illustrative cases of contemporary low-intensity conflict.

II. Applications of Just War Tradition to Low-Intensity Conflict

A. Issues in the Decision To Use Military Force

1. Translation of the *Jus ad Bellum* into Policy Language. How should that part of just war tradition bearing on the decision to employ force be stated in the language of policy for the arena of low-intensity conflict? The question is complicated by the diversity of phenomena that are included under the term "low-intensity conflict" and also by the fact that Congress issues no declaration of war in such cases and a formal state of war as recognized in international law may not exist. The national use of military force within the context of low-intensity conflict takes place in the gray area between a state of war and a state of peace. Within this gray area, Clausewitz's dictum that the use of military force is the continuation of politics by other means applies perhaps even more strongly than in the arena of war proper. Because the policy making process may serve to determine whether the national use of military force is authorized in the absence of the sort of public finding represented by a declaration of war, it is especially important that it be conducted in accordance with just war values.

An example from recent history shows how the just war *jus ad bellum* can be given voice in the language of policy. In the mid-1980s Secretary of State George Shultz and Secretary of Defense Caspar Weinberger became involved in a public debate over the question of committing United States military force. The specific problem at issue was that of international terrorism. In response to the difficulty of fashioning a firm definition of terrorism from which provisions for counter measures might proceed, Secretaries Shultz and Weinberger issued policy statements on the use of force that reflected the concerns of the *jus ad bellum* in the idiom of policy language. The two approaches differed not only in their policy implications regarding the commitment of US forces but also in their employment of just war criteria. Despite their differences, the statements are important instances of the translation of the tradition into the language of contemporary policy.[12] Both policies demonstrate that even when the formal just war criteria are not explicitly invoked, their concerns are still readily identifiable.

It is instructive to note the differences between these two policy positions in tone, in their implications for the commitment of military force and even in the level of argument. Shultz's position makes greater use of moral abstractions and

aims to provide an ideological justification for the use of military force against international terrorists. Secretary Weinberger's position is much more narrowly focused and pragmatically oriented. Shultz appeals to high national values such as freedom, international security and stability, resistance against aggression, human decency and peace. Weinberger concentrates on procedures our government has employed to foster these values: using force only in defense, ensuring the appropriateness of the means to the cause, securing public and congressional support for the use of force, and verifying that all means short of force have no likelihood of success. Both positions fit within the just war tradition despite their differences, but their divergent approaches remind us that the formulation of policy is best pursued as a debate. As an evocation of values fundamental in just war tradition and American society, Shultz's approach has great appeal; yet without the procedural restraints imposed by Weinberger's approach, the result might well be a national bellicosity that would submerge those values. Thus, in practical terms the "Weinberger doctrine," as it has come to be called, is a much better statement of policy for guidance in the commitment of US forces in low-intensity conflict situations.

My final point is that when just war tradition is applied in specific ways to concrete contemporary concerns, one should expect to notice some differences from classical expressions of the content of the just war categories. This follows from the fact that both the contemporary and the classical reflect their own historical contexts. But because the classical meanings attached to the just war criteria reflect a much broader historical context and encompass a wide range of practical moral experience and reflection, they provide a basis for critical assessment of the contemporary expressions. From a classical just war perspective, for example, the Weinberger doctrine could profit from clarification in virtually every category. Should the use of "defense" be taken to include the two additional just causes of classical theory: punishment of wrongdoing and retaking something wrongly taken? Should not "right intention" also be correlated with the goals of producing peace and fighting according to the *jus in bello* limits? On "right intention", Weinberger's position, calling for an assessment of whether non-forceful means are ever likely to work, is a far more adequate reflection of the classic just war tradition than, for example, the position taken by the American Catholic bishops and other religious leaders, who read the last resort condition as requiring that all possible non-forceful means be actually tried and found to fail before resort to force is justified.

In sum, the Weinberger-Shultz debate of the mid-1980s provides an edifying example of the application of just war reasoning in contemporary policy language. These cases provide a model for evaluating the faithfulness of other policy statements and debates to the just war tradition.

2. Choosing to Use Military Force Against a Low-Intensity Conflict Adversary: the Relation of Moral Authority and Sovereignty in Actions

Across National Borders. The idea of sovereignty is treated in classic just war language through the concept of "right authority." Its original purpose was to discourage the spread of lawlessness in medieval society by proscribing the use of force for private purposes. The need to control the many depredations practiced by the strong against the weak had become so acute by the tenth century that it gave rise to the "peace of God" movement, an effort by ecclesiastical authorities to arrest the growth of anarchic violence. The canonists who continued the work of the movement through the fourteenth century succeeded in defining a conception of "right authority" which allowed only those civil authorities with no formal superior to authorize the use of force. This was consonant with prevailing medieval political theory, in which right politics aimed at establishing three goods: order, justice, and peace. Order was conceived as first among these, for without order there would be chaos; without order, just relationships among the members of the political community could not be ensured; and without both order and justice there could be no true peace, for peace meant far more than an absence of violence. This final goal of a good politics envisioned a community in which justice and orderly relations would prevail among men. The use of force for private ends was therefore seen as an attack on the society as a whole. Only the need to preserve order, justice and peace could legitimize force, and only those who had been recognized by society as legitimate authorities could order its use. Thus the just war term "right authority," which goes back to the Romans, translates into the modern concept of sovereignty, though it is broader than the specific legal definition of sovereignty found in positive international law.

Many changes have transpired since the medieval coalescence of the idea of right authority, but the fundamental idea still stands. Nor is this moral criterion for the just use of force tied to any particular concept of sovereignty. Good political communities may take a variety of forms, but they are alike in promoting order, justice and peace.

The application of the authority to employ force is not limited to war proper. This is shown by its medieval beginnings as the authorization for police actions against all forms of lawlessness. We can see this also in the classical grounds for just cause: defense against an unjust attack in progress or preparation, retaking of something wrongly taken and the punishment of wrongdoing. These criteria for just cause do not presuppose that the perpetrator of evil is another sovereign entity. Rather, when (following a favorite proof-text of classical just war theorists, Romans 13:4) the sovereign is given the right to use force, it is to act on behalf of God to punish evildoers. The limits on the sovereign's action are those of practical politics and the extent of his abilities. If another sovereign allows safe haven to cross-border raiders, or is too weak to do anything about them, then just war tradition has historically given those who have been wronged the authority to retaliate.

All this historical reasoning provides strong support for the view that just war tradition allows the use of force on legitimate sovereign authority against the sorts of adversaries encountered in the context of low-intensity conflict: terrorists, drug traffickers and despots. These are the contemporary analogues of those medieval predators cited above. Indeed, there is more than a mere allowance to be found in the historical record: there is unambiguous hostility toward such threats to good political communities.

Nor, in principle, does the "right authority" to use force to combat such threats stop at a nation's borders, so that the wrongdoers in question can take refuge in an international "no man's land" or behind the legal wall of another nation's formal sovereignty. Force may be employed across borders in cases of serious threats that can be dealt with in no other way.

Of course, many restraints hedge in the discretionary powers granted by this view of sovereignty and the use of force. The moral limits encompass all the criteria of just war tradition. Besides right authority and just cause, these include right intention, proportionate means and ends, reasonable prospect of success, last resort, just peace and the *in bello* principles of discrimination and proportionality. These criteria constrain the use of force in low-intensity conflict just as they do in cases of conventional conflicts between States.

While unpacking these restraining criteria, one quickly encounters a variety of concerns peculiar to the contemporary world. In our democracy, government serves as a trust from and for the people. Without public support for military action, it has no "right authority" in the just war sense. The Weinberger doctrine is exactly on target in this regard. This is recognized almost instinctively in American politics, moreover, as the examples of such recent interventions as Grenada, Panama, and the Gulf War show in their particular ways.

Even when just cause exists for a particular use of force that enjoys broad public support, we must address a number of other concerns that are raised by the classic just war categories enumerated above. Will military force solve the problem or exacerbate it? (Proportionality of means to ends). Are we in a position to use force effectively against the threat? (Reasonable hope of success). Might other means have a reasonable chance of success? (Last resort). Is the result likely to enhance security and justice for all concerned, or lessen them? (The end of peace). These questions must be answered anew for every threat that we confront and be justified in terms that reflect the nature of our political community.

Certain recent developments have begun to influence the extent of national sovereignty in the sphere of international law. These are, broadly, of two sorts. On the one hand, the United Nations has been reinvigorated and with it various smaller multinational organizations ceded some measure of sovereignty by their members. And on the other hand, an understanding that human rights are not a matter of national preference has gained international acceptance. Both developments may weigh against unilateral intervention, and both have in fact lent

support to critics of US military action in the three cases mentioned earlier: Grenada, Panama, and the Persian Gulf. But I think the broader thrust of these developments supports intervention when there is a broad international consensus favoring it. Such a consensus was overwhelming in the case of the Gulf War, providing justifications for the use of force against Iraq that went well beyond any interests particular to the United States.

It may be then, that these developments only appear to modify sovereignty by focusing on human rights or alter its conception by reformulating it at the international rather than the national level. I am far from convinced that these developments in fact alter the concept of State sovereignty at all. What they do is more subtle and, in some ways, more far-reaching. They allow interventionary actions despite sovereignty in cases of egregious violations of generally accepted rights, and they do so by giving international sanction to such interventions, even when carried out by a single nation.

Such a state of affairs depends on a large measure of international consensus and, perhaps more importantly, the lack of a significant challenge to that consensus. It could not exist so long as the Cold War lasted, and it may not exist at some future point that is now below the horizon. Nor is such a consensus in any way automatic; it must be achieved anew in each new situation. But when it does exist, it redefines the rules of national and international behavior.

Specifically, I think the result is to open the door to clearly defined police-like activities involving the use of force to resist or remove what are broadly recognized threats to a particular people or to international order as such. Just war tradition as a whole has always been much more open to such interventionary action than positive international law has become in the twentieth century. The latter defines legitimate resort to force as always responsive: it is second use, responding to a prior, aggressive first use. While aimed at dampening resort to force in general, this conception of right use of force has the effect of identifying any employment of military force across national borders as aggressive by definition. The burden of proof is always to show that it is not. I suggest that under certain conditions now — conditions of egregious and unpunished violations of rights or threats to the security of others — the burden of proof has shifted so as to distinguish between aggression and temporary, interventionary use of military force to set right such violations and threats.

3. Violations and Threats Deserving a U.S. National Response. The term "low-intensity conflict," is relatively new and covers a significant variety of types of conflict. According to the 1985 definition of the Joint Chiefs of Staff, low-intensity conflict is a limited politico-military struggle to achieve political, social, economic, or psychological objectives. It is often protracted and ranges from diplomatic, economic, and psycho-social pressures through terrorism and insurgency. Low-intensity conflict is generally confined to a geographic area and is often characterized by constraints on the weaponry, tactics, and level of

violence.[13] Or, as one recent essay put it, this term was developed "to describe a diverse range of politico-military activities less intense than modern conventional warfare."[14] Either definition is sufficiently broad to include the Vietnam war at one extreme and counter-terrorist measures at the other. It would be impracticable to consider here all facets of such a diverse range of conflict. In any case, the policy and decision issues now current have less to do with Vietnam-like wars and more to do with challenges of a different kind posed by terrorism, narcotics trafficking, dictators and rogue States. Still other low-intensity conflict challenges may be expected to arise from ideological zealotry, ethnic hatred, and political instability following the Soviet breakup. This bewildering multiplication of disorder requires that low-intensity conflict policy-making be conducted on a case-by-case basis. In such analysis fundamental rules of prudence should supplement the moral restraints of just war tradition. There is always far more wrong in the world than the most powerful of nations can remedy. The United States should choose first from among the ills it can mitigate those that jeopardize its values and interests or those of its close allies. And military force may not necessarily be the best response for all of these first order threats.

Let me comment briefly on two specific types of challenges in response to which use of military force may be justified: terrorist activity directed against the United States at home or abroad and the narcotics trade.

Terrorism proven to be State-sponsored is clearly an act of war to which a military response is justified. Even when it is legitimate, recourse to arms may not be the most appropriate or practical response to terrorism, but such prudential considerations do not vitiate the right to resort to force. The moral issue here is the same as for other possible uses of force: the need to satisfy the various conditions that define the just war *jus ad bellum*.

Satisfaction of the defining conditions does not, however, support the argument that what may be done must be done. Critics of the 1986 American air strike against Libya have frequently argued that the action was wrong because Iran and Syria were more to blame for the terror bombing in Berlin that occasioned the strike. According to this criticism, it was inconsistent and somehow unfair to target Libya alone; we should also have retaliated against the other States. This is a spurious argument. One is never morally required to do everything one may morally do. One may punish wrongdoing, says just war tradition; one does not have to do so. But not all who advanced the argument from consistency seriously wanted to punish Iran and Syria as well as Libya. In some cases, it thinly veiled an effort to deny any and all use of military force against State-sponsored terrorism; that is, the argument was pacifism in the guise of a push for consistency. When advanced in good faith, the consistency argument ignores the prudential concerns inherent in just war tradition and good statecraft; when used disingenuously, it seeks to deny that force may be used for moral purposes.

Broadly, then, the moral questions involved in deciding whether to use military force to respond to a terrorist act are not different in kind from those bearing on the use of military force in response to an overt act of hostility. Just cause must still be proven to exist, although this is more difficult in the case of terrorist acts in which State sponsorship is suspected. Right authority must still be satisfied in the form of both national command authority and public support for the decision to use force. So also should the other concerns of the *jus ad bellum* be attended to: right intent, proportionality of harm inflicted to damage done and values at stake, reasonable hope of success, last reasonable resort, the goal of a peace resting on justice and good order.

The other particular case I want to treat briefly here is that of using military force to interdict, deter, and punish narcotics traffickers. Unlike State-sponsored terrorism, the organized narcotics trade often operates out of secure enclaves within countries whose governments, like those of Colombia and Peru, are too weak to root them out. The trade may even, as in Peru, be linked with a revolutionary movement at war with the national government. Under these circumstances, the use of military force to break up drug enclaves and open them to more standard means of police action seems highly appropriate. Given the direction of the narcotics traffic from these countries to the United States, I would argue that just cause exists for the use of military force, expressed in the classic language, "to repel injury" and "to punish wrongdoing." But at the same time, the inability of friendly national governments to act by themselves constrains our use of this justification. The prudential requirements of the just war tradition may not be satisfied by unilateral American military intervention. Here is a case in which the scale of possibilities implied by just war tradition matches that of good statecraft. Beginning with efforts to bolster the counter-narcotics capabilities of a host government, the range of justifiable options ascends to an invited military intervention, turning to unilateral intervention only when all other possibilties have been exhausted. Again, we have a case in which a just cause may be present, but other concerns must also be taken into account to determine whether use of military force is justified.

B. Specific Issues in the Choice of Means (the Jus in Bello *of Just War Tradition)*

1. Observing Discrimination and Proportionality in Low-Intensity Conflict. In operational terms, the just war tradition is one of limited war. Within the realm of what it is both justified to do and possible to do, *jus in bello* requires that military plans be subjected to a closer degree of critical scrutiny through the lens of discrimination and proportionality, the two principles that bear on the conduct of justified military activities. The commander who takes these criteria into account before issuing orders will attempt to focus his forces on the particular targets most closely connected with the activity being punished.

That is, if both targets are in the same range of possibility, it is morally preferable to strike at a training camp for terrorists than a barracks complex for uniformed military, and, similarly, an attack against a drug baron's private enclave is preferable to imposing broad sanctions on his country, the burden of which would fall disproportionately on innocent people.

This rule of thumb also guides the targeting of terrorists when State sponsorship cannot be conclusively proven and a counter-State strike is impractical. Israeli air strikes against terrorist sanctuaries in Lebanon demonstrate how this approach can be used, but also reveal its limitations. Principled targeting requires excellent intelligence, but may still fall short of locating the most deserving sites for retaliation. Cross-border air strikes often provoke criticism for violating territorial sovereignty, and may cause harm beyond their intended targets. Yet, in a struggle where terror and counter-terror reciprocate unceasingly, these methods observe more often than not the principles of discrimination and proportionality.

2. The Targeting of Specific Individuals. Pushed to their logical limits, these two principles may be thought to hold some justification for a strategy of decapitation and ultimately, in some cases, the targeting of specific individuals. But, in making moral judgments, logic is not everything, and this is particularly true when they are based in just war tradition. As a body of moral wisdom founded in historical experience and reflection, it is less a logical system of rules than a collection of normative conditions from various sources. There are, in fact, counter-currents within the tradition on the question whether specific individuals may be targeted.

On the positive side, the targeting or assassination of individuals guilty of capital crimes can be argued to be the most discriminate and proportionate action possible because it avoids the collateral deaths and destruction that accompany military strikes. A terrorist known to be responsible for a bombing would seem an appropriate object for discrete retribution. Singling out leaders of terrorist and narcotics trafficking organizations, without whom their groups could not function, seems similarly faithful to the logic of discrimination and proportionality. Capture can be argued to be even more attractive, since it allows targeted individuals to be tried before a court.

But there are serious negative arguments as well. Least problematic is capturing an individual to bring him to trial. Yet such action is not entirely clean, because it may violate both international law and the law of the country where the abduction occurs. Arguments for targeting individuals are less than clear; arguments against depend on the attitudes of the international community and the country involved.

Assassination raises significant additional difficulties, even if we set aside the fact that it is against United States law. As punishment for crimes committed, it is an imperfect form of justice because of the absence of a fair trial. It also violates

our cultural understanding of the nature of war, which has traditionally looked askance at targeting individuals. This is a serious problem that requires to be examined a bit further.

The just war tradition incorporates the western view of war as conflict among organized groups. In keeping with its strong prejudice against singling out individuals, Christian soldiers in the West well into the Middle Ages were required to do penance after battle in case they had fought with wrong intention—including hatred of a specific enemy and fighting with intent to harm him. The chivalric code likewise stressed that combat was a test of valor and prowess, not an effort to kill other persons; a fallen knight was to be taken prisoner. Kings and nobles leading their men in battle were, however, considered fair game for combatants seeking the tactical advantages to be gained by rendering their opponents leaderless, so long as this was not an excuse for the pursuit of a personal vendetta. Moreover, what was permissible on the field of battle was strongly condemned if it happened in the tent. One may see two principles at work here: that war is not about death but about prevailing, and that war is a social and not an individual activity. Assassination satisfies neither principle: it simply does not look like war.

A further negative factor was a general cultural uneasiness about regicide. Kings who had initiated unjust wars or who had been guilty of particular crimes against their own subjects are the closest historical analogy we might find to a modern-day Qadhafi or Saddam Hussein. Both feudal law and religious doctrine allowed for such a king to be removed from power, by force of arms if necessary. But the goal was not to kill him, though this might happen in battle; rather the purpose was to remove him from power and to keep him from resuming power by imprisonment or exile. Why was regicide so suspect? One reason was the ancient belief that an aura of sanctity surrounded a king's person, so that shedding his blood involved much more than shedding the blood of an ordinary mortal. Another reason for the traditional aversion to regicide was the fear that it could shatter the brittle order of feudal society with an uncontrollable chain of reprisals. I suspect that these concerns retain a considerable influence in contemporary thinking. And it is not unreasonable to expect that American complicity in the assasination of a foreign head of State could place the life of our own president at risk.

Our cultural predjudice against assasination also stemmed from a dislike of the means involved. A favorite weapon of regicides, poison has historically been regarded as a means *mala in se* (evil in itself). A use of arms that denied the victim a fair fight was considered dishonorable. Trapping the target or luring him into a vulnerable position was also thought likely to depend on an inadmissible use of deception.

Finally, and by no means least, assassination has simply always looked too much like murder. If it is not war, if it is brought about unfairly, by stealth or by

deception or by means bad in themselves, it has many of the attributes of murder. It may be argued that the two are not in fact the same, but they are enough alike to create a general cultural suspicion of assassination.

For all these reasons, just war tradition has never explicitly taken the logic of discrimination and proportionality to justify or imply assassination. Nor would I. There is no reason to use this moral tradition to argue against the United States legal proscription of assassination.

3. Covert vs. Overt Means: Destabilization vs. Use of Military Force in Low-Intensity Conflict. Just war tradition is about the justification and limits of the use of military force; covert means in the modern sense are largely outside the purview of those who have contributed to its development. The use of means *mala in se* or inadmissible deception, as discussed in the previous section, are among the few cases where the tradition does touch on covert methods. But in general there is no reason to read into just war reasoning any particular preference for overt as opposed to covert forms of action. While covert actions may be harder to judge because their purposes and means are kept secret, the same conditions apply to both: the action in question must be justified by the terms of the traditional *jus ad bellum*, and the means should conform to the terms of the *jus in bello*.

These conditions do not define or justify any specific action; rather, they tend to describe a range of actions ascending to the overt use of force, and then go on to distinguish among the categories and degrees of force. The *jus ad bellum* principles of proportionality and last resort are particularly interesting in this regard, because they imply that it is possible for covert means to accomplish more good while causing less harm than military action.

Destabilization is also morally attractive as an alternative to the use of force. The problem here is not with the *jus ad bellum* conditions but with those that consider the consequences of the means used. As shown by the economic sanctions imposed on Iraq after the invasion of Kuwait, these means may depend for their effect on the harm done to the populace in general, intentionally targeting noncombatants. The use of military force in the case of the Gulf War, as I have argued elsewhere, was morally preferable to slow economic strangulation. Overt or covert support of indigenous insurgent groups raises another set of issues. Moral deliberations are complicated by the fact that the concerns of just war tradition must be judged to be satisfied both for the guerillas and for the nation giving outside support. These concerns may quickly become tangled in non-moral policy or prudential considerations as well. Indeed, the controversy mounts less over fundamental moral questions such as just cause, than over speculation as to whether the indigenous forces can succeed, how much help they need, if it should be overt or covert and whether the policy will actually improve matters. This is well illustrated by the debate in the United States over aid to the Kurdish and Shiite rebellions in Iraq that followed the Gulf War. There

was strong consensus that Saddam Hussein had forfeited any legitimate claim to continue to rule Iraq. It was also widely agreed that the Kurds and the Shiites were right to revolt against him given their long history of oppression and the ferocious campaign his forces were waging against them. Against these facts were prudential judgments about whether these two groups, or either of them, could succeed in toppling the central government, whether they could unite the country or would only end by fragmenting it, and whether they would establish a less problematic new government or only a new one that would be problematic in different ways. These prudential concerns are of course also moral concerns, reflected in the just war criteria of reasonable hope of success, last resort, and the goal of peace. When they are the source of serious doubt, they have the effect of setting restraints on what might be allowed according to the principles of just cause and right intention.

Each case, then, must be judged on its own merits. Destabilization by means covert or overt is prima facie attractive by comparison with resort to military force; yet final judgment depends on weighing the means employed and their consequences.

4. The Permissibility and Limits of Deception. Above I have spoken of "impermissible deception" as a factor in shaping the concrete content of just war tradition. What is permissible and what is not? The answer is far from clear in the historical sources, where the two concepts are used with no manifest agreement as to their content. The lack of clarity continues down to the present, yet there has been gradual development in some areas. Broadly, the identifying mark of impermissible deception is the intentional blurring of conditions imposing moral restraint on the use of force. This convention may be illustrated by a historical example. Through much of the Middle Ages non-knights in arms were slaughtered if captured. While this was in part an effort to restrict the use of arms to the knightly class and thus secure its power, it also reflected a fear of peaceable-looking people who might turn on a soldier when his guard was down. Non-knights were, by the end of the Middle Ages, accepted into armies by being organized under responsible commands, but the fear of the deceptive peasant developed into a general cultural rejection of partisans that continued at least until the 1860s. Then Francis Lieber, charged to give legal guidance to the United States Army in the Civil War[15] set out principles that in time became positive international law. His work is perpetuated in the Hague Convention, which requires that partisans serve under responsible commanders, wear identifying clothing or insignia, carry their arms openly, and fight according to the accepted laws of war.[16] Yet the old fear of the deceptive peasant has hardly been laid to rest. Michael Walzer, in *Just and Unjust Wars*, recalls a case from World War II that could have occurred, given different weapons, at any prior time in history.[17] The Vietnam war brought the problem of the deceptive peasant to center stage

for American troops, who often found it hard to distinguish combatants from noncombatants in guerilla-controlled territory.

With a degree of trepidation, I will draw some cautionary observations from this unclear history. Deception in itself is not a moral problem; yet in some forms it does raise moral questions. In particular, there may be violations of fairness which lead to acts that resemble murder more than war; this is one of the difficulties with assassination, as noted above. It is also the problem Walzer's example presents. There are other forms of deception which erode the possibility of observing noncombatant immunity, as amply demonstrated by our experience in Vietnam, where it was often impossible to distinguish the Viet Cong from civilian noncombatants. Or deception may depend on putting noncombatants at risk. This is the problem posed by Mao's dictum that guerillas should live among the populace like fish in the sea, and it is the problem posed by the PLO's habit of basing itself in the midst of civilian settlements. I believe that all these cases involve impermissible deception and, while there may be other variations of this practice, its distinguishing characteristic remains the obscuring of conditions that impose moral restraints on the use of force. Other forms of deception that do not undermine these restraints are permissible.

III. Conclusion: Conditions for the Moral Use of Force in Low-Intensity Conflict

The burden of my argument in Part II of this paper has been to demonstrate that the precepts of the just war tradition are particularly well suited to clarifying the moral perplexities of low-intensity conflict. To summarize:

1) The terms and conditions defined in the *jus ad bellum* and *jus in bello* of just war tradition should be the basis for deliberation on the morality of particular policies and actions in low-intensity conflict. These terms and conditions may imply the use of force and set limits to it, or they may imply means short of force. The rules drawn from just war tradition apply equally to low-intensity conflict and full-scale war, but they encounter different challenges in each. When the United States has formally declared war, the condition of right authority has been satisfied by the congressional declaration, which ideally follows from an assessment that just cause, right intention, and the other *jus ad bellum* conditions are satisfied. In low-intensity conflict situations, a congressional pronouncement is absent, and the *jus ad bellum* concerns must be addressed differently, but they must be satisfied.

2) In assessing the justification for involvement in low-intensity conflict, what may morally be done does not by itself dictate what must be done. Even where just cause exists, remedying the evil in question may be the

wrong choice for a number of prudential reasons. As I have argued above, there is always far more wrong in the world than one nation, even a very powerful one like the United States, can right. Even among those ills it is in our power to remedy, our first priorities must be those that directly challenge our own values and interests or those of our close allies. Among these first order threats there may be some against which military force offers an effective remedy and is the only likely solution, but there are others for which military force is not the best answer. The full set of moral criteria found in just war tradition provide guidance for making the distinction.

3) Intervention in low-intensity conflict should enjoy a broad measure of support in the international community and seek to establish values broadly recognized in that community. It has often been argued in the recent past that the United States should not try to be the world's policeman. This view is valid insofar as it seeks to discourage unsustainable commitments, imprudent risks to our interests, or reckless reliance on unilateral action. In the post-Cold War world, however, there is a greater possibility of achieving substantial international agreement on the kind of activities that warrant an unconventional response, extending, if necessary, to the use of force across national borders. This suggests that an underlying consensus is also developing in support of the use of collective action to meet moral challenges to the international order. These changes should make it possible for the United States to bring its national power to bear against threats to international comity. We may be able to attack systematic human rights violations, State-sponsored terrorism, regional aggression, and the global traffic in narcotics—not as a lonely paladin—but with the approval and support of the community of nations.

Finally, all the above presumes that the United States will continue to honor its democratic heritage and the whole panoply of values which guided its founding as it confronts the ambiguous challenges of low-intensity conflict.

Notes

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1. Prominent examples are the usage of Paul Ramsey (*see infra* n. 10 and 11) and the National Conference of Catholic Bishops in *The Challenge of Peace* (1983).
2. A prominent example is HOFFMANN, DUTIES BEYOND BORDERS (1981).
3. *See* O'Brien, *The Failure of Deterrence and the Conduct of War*, in THE NUCLEAR DILEMMA AND THE JUST WAR TRADITION 158 (O'Brien and Langan eds. 1986).
4. Thomas Aquinas, Summa Theologica II/II, Q. 40, Art. 1.
5. A sample of such arguments is found in JOHNSON AND WEIGEL, JUST WAR AND THE GULF WAR 91-158 (1991).
6. For fuller development of these arguments, *see id.* at 3-42.
7. VICTORIA, DE JURE BELLI, section 10. See further the discussions of Victoria, Grotius, and other contemporary theorists in JOHNSON, IDEOLOGY. REASON. AND THE LIMITATION OF WAR 208 (1975).

8. CHILDRESS, MORAL RESPONSIBILITY IN CONFLICTS: ESSAYS ON NONVIOLENCE, WAR, AND CONSCIENCE (1982).

9. RAMSEY, WAR AND THE CHRISTIAN CONSCIENCE (1961).

10. RAMSEY, THE JUST WAR: FORCE AND POLITICAL RESPONSIBILITY (1968).

11. WALZER, JUST AND UNJUST WARS (1977).

12. For fuller discussion of these two positions within a just war framework, *see* Johnson, *Just War Thinking and Its Contemporary Application: The Moral Significance of the Weinberger Doctrine*, 81-113 in THE RECOURSE TO WAR: A MORAL APPRAISAL OF THE "WEINBERGER DOCTRINE", (Sabrosky and Sloane eds. 1988) or Vol 1, *Small Wars and Insurgencies*, 146-70 (1990).

13. Thompson, *Low-Intensity Conflict: An Overview*, in LOW-INTENSITY CONFLICT 1-25 (Thompson ed. 1989).

14. *Id.* at 2.

15. LIEBER, GUERILLA PARTIES (1862).

16. 1907 Hague Convention IV, Annex: Regulations Respecting the Laws and Customs of War on Land, Section I, Chapter I.

17. The case is taken from Marcel Ophuls' documentary film *The Sorrow and the Pity*: a platoon of German soldiers is "on a march through the French countryside during the years of the German occupation. They passed a group of young men, French peasants, or so it seemed, digging potatoes. But these were not in fact peasants; they were members of the Resistance. As the Germans marched by, the 'peasants' dropped their shovels, picked up guns hidden in the field, and opened fire. Fourteen of the soldiers were hit." WALZER, JUST AND UNJUST WARS 176 (1977).

Arbiter Mundi?: Commentary on James Turner Johnson's "Just War Tradition and Low-intensity Conflict"

by
Francis X. Winters*

Introduction

Assuming that the responsibility of the appointed commentators at the Conference is merely to initiate discussion by drawing attention to inviting topics for consideration, I have chosen to focus on that section of Professor Johnson's essay which is at once most policy relevant and most theoretically engaging. Perhaps the most illustrative passage in this section of the argument is the claim that:

> Specifically, I think the result is to open the door to clearly defined police-like activities involving the use of force to resist or remove what are broadly recognized threats to particular people or to international order as such. Just war tradition as a whole has always been much more open to such interventionary action than positive international law has become in the twentieth century. . . . I suggest that under certain conditions now — conditions of egregious and unpunished violations of rights or threats to the security of others — the burden of proof has shifted so as to distinguish between aggression and temporary, interventionary use of force to set right such violations and threats.

As a possible stimulus to discussion, let me suggest some historical reservations about the comprehensive accuracy of the claim: "Just war tradition *as a whole* has always been much more open to such interventionary action than positive international law has become in the twentieth century." While it may be true that certain periods in the development of just war tradition have indeed been permissive in regard to State intervention beyond its borders (or the borders of an ally), it does not seem readily apparent that just war tradition *as a whole* "has *always* been much more open to such interventionary action than positive international law has become in the twentieth century." Indeed there seems ample evidence that in two of its most distinguished stages of development, the Paris School of the 13th and early 14th centuries and the closely related Salamanca School of the 16th century, the just war tradition was unequivocally hostile to external intervention by State authorities. It might even be justifiably claimed, I

would suggest, that the characteristic contribution of the authors of these two Schools (St. Thomas Aquinas and his disciple John of Paris, and Vitoria of Salamanca) was precisely to challenge the interventionist claims of the Holy Roman Empire in the 13th and 14th centuries, and of the Spanish Crown (and Roman Emperor) in the 16th centuries. If this historical claim can be established, it might be more accurate to assert that some (but not all) leading thinkers of the just war tradition were more interventionist than contemporary international law would allow. Such a modification of the profile of just war tradition might conceivably have consequences for our larger policy discussions throughout these days.

Contemporary International Law

The teaching of the just war tradition is presented in Professor Johnson's paper as a set of standards more open to intervention in the internal affairs of other sovereign nations than the stance enshrined in contemporary international law.[1] Our analysis, then, must begin with a minuscule summary of the comparatively restrictive standard of the international legal tradition. A familiar summary of that tradition is found in the United Nations Charter (Chapter I, Article 2 (4)):

> All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State. . . .

Since the minimal content of the term "political independence" is the nation's right to the government of its own choice, efforts by other governments to depose extant regimes (even dictatorial or drug trafficking regimes) unequivocally violates the prohibition stated in Article 2 (4).

This international legal restriction of the threat, or use, of force in order to change or coerce other governments is, of course, an annoyance to powerful nations with a strong confidence in the superiority of their own sense of justice and in their own distinctive political institutions. A sense of the recent history of the evolution of the principle of nonintervention, as it is now articulated in the Charter, reveals that it was formulated precisely in reaction to the continuous intervention by the United States against its neighbors to the south in the early 20th century. Robert Klein traces the emergence of the principle to the insistent demand by Latin American government officials for guarantees against threats to their political independence. Specifically, it was U.S. interventions in the staple of U.S. hemispheric policy, namely, Nicaragua, that ignited the Latin American demand for a principle of nonintervention (Seventh International Conference of American States, Montevideo, 1933).[2] The United States voted for the resolution of nonintervention at this Conference. President Roosevelt subsequently refused to intervene to protect the President of Nicaragua, Juan Sacasa,

from removal by U.S.-anointed General Anastasio Somoza, head of the U.S.-designed National Guard.[3]

Klein then traces the origins of the U.N. Charter's fundamental principle of "sovereign equality" directly to the influence at the war-time conference planning the U.N. of Sumner Welles and Cordell Hull, whose own endorsement of the principle of sovereign equality had been nurtured by their decade-long diplomatic dealings with officials of Latin American nations who had experienced, or feared experience, of U.S. intervention.[4] The Charter's prominent support of the principle of sovereign equality, and its corollary of nonintervention, may then be seen as evidence of "the sins of the fathers being visited on their sons." U.S. interventionism thus sowed the seeds of the sovereignty principle now enshrined in the U.N. Charter.

The principle of nonintervention is now under attack, or at least subject to continuous erosion. Alongside the history of recent controversial cases of U.S. interference in Nicaragua (1979-1986),[5] and Panama (1989)[6] one might only refer to two documents on low-intensity conflict which seem to assume the irrelevance of the international legal principle of sovereign immunity from intervention. The first is the Final Report "Joint Low-Intensity Conflict Project" prepared by the Project at the U.S. Army Training and Doctrine Command, Fort Monroe, Virginia (1 August 1986): ". . . the U.S. can provide support for . . . an insurgent force seeking freedom from an adversary government."[7] More explicitly still, a subsequent Initial Draft of "Some Thoughts on Low-Intensity Conflict," originating at the Army-Air Force Center for Low-Intensity Conflict (Langley Air Force Base, Virginia (August, 1989)), seems to endorse assistance to insurgents seeking to overthrow the national government:

> The U.S. may assist a government or insurgent forces against a government. . . . The U.S. supports selective insurgencies opposing oppressive regimes who work against U.S. interests.[8]

Both these documents seem clearly to challenge the present academic understanding of the legal norms concerning intervention. Both John Norton Moore in *Law and Civil War in the Modern World* and, in a more philosophical vein, Michael Walzer in *Just and Unjust Wars*, spell out the principles that allow outside assistance (up to a certain level and moment) to governments facing local insurgencies while condemning assistance to such insurgencies.[9]

The argument presented by Professor Johnson challenges Walzer's interpretation of just war theory with two broad claims: that the tradition allows outside intervention against "petty dictators" and "drug traffickers" *even apparently in the absence* of any indigenous insurgencies challenging such regimes.[10] Professor Johnson's permissive approach to the morality of cross-border reforms appears to represent a certain innovation in just war thinking, although it would be a

familiar argument from the more liberal "cosmopolitan" views of Charles Beitz and many others.[11]

Without entering at this point into the compelling question of whether such a "liberalization" of just war tradition would be politically and morally wise, I will confine myself to analyzing the historical claim that Professor Johnson presents for his more permissive approach to reform intervention in the name of the just war tradition.

In arguing that the just war tradition *as a whole* cannot legitimately be said to favor a permissive approach to cross-border State actions designed to remove from power petty dictators and/or drug traffickers, I propose to draw attention not to the specific teachings about rights in warfare (*jus ad bellum, jus in bello*) but to the overarching and controlling notion of *justice*, which is inextricably intertwined with the analysis of just wars in any era. For just war theory is obviously a corollary of theories about political justice itself. What, then, was the conception of just politics in the eyes of St. Thomas (and John of Paris) and later in the age of St. Thomas' disciple Francisco de Vitoria? From such a foundational inquiry we might come to a different interpretation of just war theory than Professor Johnson has arrived at for the tradition as a whole.

Justice and the School of Paris: St. Thomas Aquinas and John of Paris

The defining struggle of mid-13th and 14th-century Europe was the century-long political and intellectual confrontation between the Holy Roman Empire, on the one hand, and the forces of nationalism (in the Kingdoms of France, Spain and Naples), on the other. Among the many conspicuous political contributions of St. Louis IX of France was his steady defiance of the legal claims made against his authority by the Emperor. As early as 1254, Louis affirmed that his support of imperial legal codes in France was a sovereign choice of the French Crown, anxious to avoid distracting his realm by unnecessary legal innovation required to fashion a new legal code for France alone. King Louis' decree on the law explicitly negates the imperial contention that the legal force of the ancient codes was a symbol of imperial sovereignty in France.[12]

In this political context, St. Thomas lent the weight of his own considerable authority to King Louis' cause by providing a philosophical argument for a culture-bound and historically unique political order for the various ancient realms constituting Europe.[13] St. Thomas' own political, and consequently moral, philosophy was largely particularistic and relativistic. King St. Louis' successful effort to shield his own regal authority from the imperial pretensions of legal uniformity throughout Europe had the good fortune to be able to call upon the theological reasoning of one of the leading figures of the age.

These joint (political and theological) efforts to limit the legal authority of the emperor to "his own region" (Germany) bore fruit finally in the following century when the Emperor of the time had the poor judgement to summon the King of Naples to his court on the grounds of treason (*laesae majestatis*). The King, alongside the King of France, appealed to the Pope to rule on the canonical prerogatives of the Holy Roman Emperor. The Pope ruled that the Emperor enjoyed no legal authority in Naples or France. The claim of sovereignty for the several nations of Europe was thus ratified in canon law and entered into the political consciousness of Europeans. The meaning of sovereignty was precisely, then, the defiance of the universal pretensions of a particular realm, i.e. the Holy Roman Empire. The consequence of this theological and canonical revolution was the vindication of an international system of States.

It appears, then, that the 13th and 14th century notion of justice (and of its corollary the just war) was shaped precisely to condemn interventionism on philosophical and theological grounds. This period cannot then be included in any catalogue of ages when concepts of justice encouraged interventionism.

Justice and the School of Salamanca: Francisco de Vitoria

It is perhaps coincidental that the leading architects of the natural law conception of justice (and its corollary, the just war theory) thought and taught in moments of great cultural crisis. Aquinas happened to be lecturing on theology in Paris at the dawn of the post-imperial age in Europe. In response to the moral challenge arising across the continent to choose between the traditional (and canonical) weight of imperial authority and the emergence of political pluralism within Christendom, Thomas had opted for the supremacy of regal sovereignty (immunity from the customary imperial claim of suzerainty in France). Thus, the new moral and political principle of national sovereignty constituted a declaration of independence for France (and the other kingdoms) from the constraints of empire. This cardinal development in the natural law tradition shaped all subsequent interpretations of justice (and just war thinking).

Two centuries later, another cultural crisis gripped Christendom, namely, the opportunity to navigate the seas and explore "the Indies."

Spain, sailing to the New World, sent with its *conquistadores* their Dominican chaplains, who quickly discovered the moral ambiguity of the unexpected cultural encounter with alien civilizations. The missionaries included Fra Bartolomeo de las Casas, an early colonial landlord himself who became a crusader for Indian rights.[14] By his correspondence with Spain, he engaged the Court, and equally decisively, theologians of Valladolid and Salamanca in the challenge of justifying, or denouncing, the imposition of Spanish rule in America. Among his Dominican colleagues unsettled by the lurid accounts of the tragic circumstances of the newly conquered

peoples was the young Dean of the Faculty at Salamanca, Fra Francisco de Vitoria.[15]

Vitoria was amply prepared to undertake the task, for his own theological studies had been made at Paris, where he benefitted from a renaissance of Thomistic political and moral thought. He was, then, from an early age imbued with the Thomistic insistence on the right of national sovereignty, that is, the conviction that the several disparate European realms were independent of any overlord, including the Emperor. The base line of Vitoria's analysis of the ethics of "the conquest," then, was the primordial principle of sovereignty, the nation's immunity from external intervention.

Vitoria's own decisive contribution to the natural law understanding of justice was to conclude that sovereignty was a two-edged sword: just as Thomas had elevated the principle as a check against German imperial claims against the independence of France, so Vitoria insisted that the still unfamiliar nations and tribes encountered across the seas were sovereign in their own right and immune from coercion by the Spanish Crown. Vitoria's cardinal contribution to the tradition may have owed more to his strength of character and his penchant for intellectual consistency than to any intellectual genius. For it took a man of considerable fortitude to stand up to the pressure of public (and royal and ecclesiastical) zeal for the conquest in his defense of the newly discovered people in the Americas from the claim that, as barbarians, they had no rights. Affirming the Spanish right to travel, to trade, and to preach in the Indies, Vitoria nevertheless challenged the wider claims of political and religious superiority and jurisdiction in the Indies.

Vitoria's explicitly drawn corollaries on the justice of war in the Americas were that wars fought against the native peoples, except in self-defense, were unjust, while Indian defensive wars against the Spanish were justified.[16]

The School of Salamanca, like its inspiration at Paris, contributed to the understanding of the principle of sovereignty by insisting that the right which defies rule from abroad likewise must renounce the aspiration to rule from abroad by coercion. At least these two decisive centers of just war thinking represent a challenge to, rather than a justification of, intervention.

Conclusion

It might be preferable if the ethical question of whether the U.S. should unilaterally depose governments which it perceives as dictatorships and/or drug traffickers were merely an academic matter. For better or worse, this is not the case. In the "low-intensity" intervention dubbed "Operation Just Cause," U.S. citizens saw a classic demonstration of the dynamics of U.S. hemispheric house-cleaning in the post-Cold War era. It was to some a chilling exhibition of the self-righteous application of overwhelming force against a hapless and

despicable despot/drug trafficker. Military victory was swift, yielding a prisoner in the docks at Miami awaiting the judgment of his non-peers.

What were the consequences of this perhaps precedent-setting engagement in low-intensity conflict? At Congressional Hearings in July, 1991, the unanimous judgment of witnesses was dismal. Eva Loser (Fellow, The Americas Program, Center for Strategic and International Studies), captured the spirit of the hearings in her assessment: One-year-after-the-invasion-type articles trumpeted the cynical joke within Panama that General Noriega has been replaced by "General Discontent."[17] Other witnesses concluded that neither the judicial process, the national administration, the legislature, the new Public Defense Force, nor the economy is functioning. To add a dash of irony to this assessment, Dr. Richard Millett of Southern Illinois University adds that a notable consequence (or sequel) to Operation Just Cause has been the emergence of an exacerbated domestic drug problem in Panama.[18] Additionally, the witnesses warned the Subcommittee that Panamanian dependence on the U.S. has been heightened, and the U.S. responsibility for the failings of the new government which it installed during the invasion was cited as a claim for further reform intervention and additional financial support.

Even before these wholly predictable indigenous consequences became evident, the Organization of American States on December 23, 1989 in an unprecedented resolution, condemned the invasion by a vote of 20 to 1.[19] The response of the U.S. State Department was: "We are disappointed that the O.A.S. missed an historic opportunity to get beyond its traditional narrow concern over non-intervention. The resolution is unbalanced. It does not cite the root problem—Noriega—and it fails to recognize the threat to Americans."

I am inclined myself to believe that the condemnation of the invasion by twenty Latin American governments is much closer to the genius of the just war tradition than the U.S. State Department deploring of the OA.S.' "traditional narrow concern over non-intervention."

Afterword

Ethical Considerations Relevant to the Possibility of Low-Intensity Conflict Used to Resolve Problems of State-Sponsored Terrorism or Proliferation of Weapons of Mass Destruction

Much less problematic ethically than the use of force to depose dictators or drug traffickers is the possibility of such limited military response to State-sponsored terrorism or proliferation of nuclear weapons.

(1) State-Sponsored Terrorism: The Government Sponsored or Supported Use of Force Against Civilians of Other Nations. By just war

standards, such acts are acts of war (the employment of force to coerce other governments) which violate the traditional standard of non-combatant immunity. They are therefore immoral and may be resisted and/or punished by military means, observing the traditional limits of proportionality and discrimination. Such conclusions seem relatively uncontroversial corollaries of the just war tradition.

Additional questions about the justice of such means (for example, against Libya in 1986) may be raised on two counts:

(a) Chance of success. Since the exercise of this right in the Libyan case has yielded ambiguous results, judgment must be deferred on the question of feasibility.

(b) Unilateral authorization. It seems reasonable to ask whether some concerted multilateral efforts (e.g. sanctions approved by the Security Council) might be more effective. One might even contemplate the possibility of excluding from the U.N. all members proven to be sponsors of terrorism.

(2) Proliferation of weapons of mass destruction. This newly surfacing question is intellectually daunting. The chance of resolving it by recourse to the just war tradition is slight. For those States most likely to be able to execute low-intensity conflict attacks against such proliferators are almost certainly armed themselves with weapons of mass destruction. This double standard, which is morally intelligible and defensible, represents a novel challenge to the just war tradition for which that tradition may not indeed have any constructive response.

The present urgent case of response to Iraqi refusal to honor its cease-fire treaty is easily resolved. Signing the treaty was a legitimate sovereign choice by Iraq, the execution of which is a matter of legal and moral obligation. Failure to fulfill these treaty obligations would, I believe, be a just *casus belli*.

Notes

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1. Johnson, *supra*, 147 at 160. The same argument is adumbrated earlier in the essay 158-159.

All this historical reasoning argues strongly that just war tradition allows the use of force on legitimate sovereign authority against the sorts of adversaries encountered in low-intensity conflict contexts: terrorists, drug traffickers, petty dictators who use the resources of their countries for their own purposes and against the good of their people. Indeed, historically there is more than a mere *allowance* to be found in the historical record: there is *downright hostility* toward such threats to the order, justice, and peace of good political communities and of the natural rights of innocent people victimized by such activities.

Nor, in principle, does the 'right authority' to use force to combat such threats extend only to a nation's borders, so that the wrongdoers in question can take refuge in an international 'no man's land' or behind the legal wall of another nation's formal sovereignty. Rather, force may be employed across borders in cases of serious threats that can be dealt with in no other way.

2. KLEIN, SOVEREIGN EQUALITY AMONG STATES: THE HISTORY OF AN IDEA 98-99 (1974).
3. *Id.* at 100-01.
4. *Id.* at 109-13.
5. This entire period is narrated in KINZER, BLOOD OF BROTHERS: LIFE AND WAR IN NICARAGUA (1992). The destabilization of Anastasio Somoza Debayle in July, 1979, is narrated in LAKE, SOMOZA FALLING: THE NICARAGUA DILEMMA: A PORTRAIT OF WASHINGTON AT WORK (1989), and in PASTOR, CONDEMNED TO REPETITION: THE UNITED STATES AND NICARAGUA (1987). Pastor's early history (Chapter II, "A Fractured History") reveals the continuum of "reform-intervention" throughout the twentieth century.
6. Cf. *infra*, Conclusion, at 176-177.
7. Final Report, *Joint Low-Intensity Conflict Project*, U.S. Army Training and Doctrine Command, Fort Monroe, Virginia (1 August 1986), at 4.
8. Initial Draft, *Some Thoughts on Low-Intensity Conflict*, Army-Air Force Center for Low-Intensity Conflict, Langley Air Force Base, Virginia (August, 1989), at 2-7, 2-8.
9. MOORE, LAW AND CIVIL WAR IN THE MODERN WORLD (1974). Compare Moore's Chapter I, *Toward an Applied Theory for the Regulation of Intervention*, 26-27 with WALZER, JUST AND UNJUST WARS 86-108 (1977), seeks to interpret the substance of international law on intervention for a layman.
10. Walzer and Johnson agree that the right of sovereignty is not absolute, for it is generally understood in the natural law tradition that sovereignty, like all other human rights, is an instrument of human welfare. Non-intervention is, therefore, a moral and legal prohibition which may, under some circumstances, be overridden by the prior imperative of the common good, or occasionally by the possible threat to the good of neighboring nations. The decisive question, which evokes the specter of casuistry which accompanied the natural law tradition at its best moments, is to define or identify those exceptional circumstances in terms general enough to serve as a standard for decision-making.

Johnson points to at least two such cases in which he seems to argue that the just war tradition lends support to principled abrogations of sovereignty: (1) "egregious violations of generally accepted human rights" (page 29); [cf. 47: "systematic and ongoing violations of human rights"] and 2) "Broadly recognized threats to a particular people or to international order as such" (p. 30); [cf. p. 47: "threats to international order and the security of other States by regional hegemons, and the global traffic in narcotics"]. Elsewhere, Johnson specifically identifies the perpetrators of these violations as "petty dictators who use the resources of their countries for their own purposes and against the good of the people," and "drug traffickers" (pp. 26-27). Against such offenders, one may legitimately appeal to the just war tradition to invoke the use of force (p. 26), according to Johnson.

These two claims seem to me to constitute novel (if perhaps desirable) extensions of the just war tradition, rather than ready corollaries of it. The claim for the use of force against drug traffickers within another country rests on the premise that officials of foreign governments (e.g., the U.S.) should "give and enforce the law" about drug production/distribution in nations such as Colombia and Peru, even without the agreement of the governments, "as a last resort." (p. 35). I regard this claim as possibly unprecedented in the literature on the just war tradition and probably contrary to the views on sovereignty of at least Thomas Aquinas and Vitoria. (cf. footnotes 12-16, *infra*, with accompanying text). (There may indeed be other leading authorities in the tradition who would support such a position, although I am unfamiliar with such sources.)

The associated claim, that military force may be invoked against "petty dictators who use the resources of their countries for their purposes and against the good of the people" (pps. 26-27), seems to me equally unfamiliar as a traditional stance of the just war tradition. For the determination of the fact of "tyranny" in medieval political culture was a judgment reserved strictly to those people themselves who were its victims. The little-understood medieval tradition of a right to revolution was historically understood as an exclusively domestic prerogative and obligation. (Several brief passages representative of a vast literature may be found in: CARLYLE AND CARLYLE, A HISTORY OF MEDIEVAL POLITICAL THEORY IN THE WEST (1928 and after), III, 122-146; V, 36, 92, 105-120, and 460-469; and, VI, 75-78; GIERKE, POLITICAL THEORIES OF THE MIDDLE AGE, at 74-77 (Maitland trans. 1938); and WILKS, THE PROBLEM OF SOVEREIGNTY IN

THE LATTER MIDDLE AGES at 108, 121-24, 211, 222-223 (1963). In these passages, references to judgement by the community are constant.

The extension to non-nationals of the right to make judgements about the presence of tyranny on the part of officials of governments may (or may not) be a sound instinct of the present age. I am aware, however, of no historical grounds to argue that such a trans-border extension can be supported on the authority of the just war tradition.

For these reasons, I would judge that Johnson's appeal to the tradition as an authority to support low-intensity coercive actions against the States guilty of dictatorship or drug trafficking represents an extension, rather than an application, of the tradition itself. Walzer seems closer to the historical tradition when he limits intervention to a response to "massive violations of human rights," identifying such violations as: "the enslavement or massacre of political opponents, national minorities, and religious sects." (JUST AND UNJUST WARS, at 101,) From my reading of the authors, I would judge Walzer's restriction of intervention to quasi-genocidal acts to represent a more traditional instinct than Johnson's proposed use of force against "petty dictators and drug traffickers."

11. BEITZ, POLITICAL THEORY AND INTERNATIONAL RELATIONS (1979).
12. Ullmann, *The Development of the Medieval Idea of Sovereignty*, The English Historical Review 1-33 (1949).
13. The same insistence on the cultural determinants of moral obligation and political systems in St. Thomas' political philosophy' is found in WILKS, THE PROBLEM OF SOVEREIGNTY 140 (1963).
14. For a concise summary of the career and contribution of de las Casas, *see* Collard's Introductory Essay to his translation of de las Casas' *History of the Indies*, ix-xxiv (1971).
15. For the life and teaching of Vitoria, cf. HANKE, THE SPANISH STRUGGLE FOR JUSTICE IN THE CONQUEST OF AMERICA (1949).
16. An interpretation of Vitoria's teaching can be found in Winters, *Freedom to Resist Coercion*, Commonweal, 369-72 (1991).
17. Testimony presented before the Subcommittee on Western Hemisphere Affairs, U.S. House of Representatives, 17 July 1991, page 2.
18. *Id.* at 4-5.
19. *The Washington Post*, 23 December 1989, at A7.
20. *Id.*

Chapter VII

Just War Doctrine's Complementary Role in the International Law of War

by
William V. O'Brien*

Introduction

Revived just war doctrine has increasingly been invoked by the United States government and armed forces in the contemporary era. As the American tradition of respect for international law continues, the moral warrants and limitations of just war doctrine have increasingly been called upon to complement the legal prescriptions of the positive law of war. This is not surprising. Historically, just war doctrine and the international law of war developed concurrently. This was and remains especially true with respect to war-conduct law (*jus in bello*). As legal positivism displaced natural law and other higher law normative approaches in the 19th and early 20th centuries, just war doctrine virtually disappeared except as a chapter in the history of ideas. Collapse of the positive international law of war in the total wars of World Wars I and II, the nuclear balance of terror, the multitude of revolutionary/counterinsurgency wars complicated by multiple interventions and counterinterventions, and the increase in terrorism all contributed to a sense that international law needed reinforcement in some cases and replacement in others.

The most significant evidence of the relevance and importance of just war doctrine to political and military policy decisions has been furnished by the United States government and military. Government and military leaders have understood that there must be persuasive legal and moral arguments justifying decisions to use armed force if Congressional and popular support is to be firm. Terms common to the international law of war and just war doctrine, e. g., proportionate force, discrimination, measured response, have been employed in official statements. This trend was epitomized in key addresses by Secretary of Defense Caspar W. Weinberger and Secretary of State George P. Shultz.[1] Emphasis on U.S. efforts to observe the principles of proportion and discrimination was prominent in the Department of Defense's Interim Report of July 1991 on the Persian Gulf Conflict.[2] Moreover, just war doctrine is studied in the

service academies and at the highest levels of military education in the service colleges.[3]

The emerging functions of just war doctrine as treated in theory and practice within the United States government and the armed forces are:

(1) to provide a framework for moral analysis of security issues;

(2) to complement the positive international law of war as it is applied in security-decision processes as a source of policy guidelines; and

(3) to complement positive international law in official statements justifying U.S. policies and conduct to the American people and the world.

Just War Doctrine as a Complement to International War-Decision Law (*Jus Ad Bellum*)

Contemporary international war-decision law is based on two overlapping bodies of law. The first is the law with regard to recourse to armed force as set forth in the United Nations Charter and interpreted and applied by belligerents. The second is the law emanating from the principle of non-intervention.

UN war-decision law is based on Article 2 (4) which prohibits "the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations." UN war-decision law then provides for two forms of legally permissible recourse to armed force:

(1) enforcement actions ordered by the Security Council in virtue of Article 42 against a State found by the Council to have caused "a threat to the peace, or act of aggression" as provided in Article 39 (including enforcement actions ordered by the Security Council which utilize regional organizations as provided in Article 53); and

(2) individual and collective self-defense, pending Security Council action, as provided under Article 51.[4]

These war-decision provisions have been subject to considerable interpretation. Roughly, these interpretations can be divided between strict, literal versions and more permissive "reasonable" versions. The debate among publicists and among advocates and critics of U.S. and other war policies has centered on individual and collective self-defense as recognized in Article 51. This has been the case since, until Desert Storm, there never was an Article 42 Security Council enforcement action. Absent any enforcement actions, UN war-decision law was limited to some form of individual or collective self-defense.

Strict interpretations of self-defense required that "an armed attack occur." Such interpretations denied any form of preemptive attack even if aggression was

a clear and present danger.[5] Moreover, strict interpretations of self-defense generally refused to consider low-intensity threats like exported revolution and terrorism as "armed attacks."[6]

"Reasonable" self-defense interpretations claimed a right of preemptive or anticipatory self-defense, which was to be judged in the total context of the situation, an example being Israel's preemptive attack in the 1967 June War.[7] "Reasonable" self-defense interpretations also sought to deal with the proliferation of cases of indirect aggression in the form of low-intensity warfare by considering such behavior as "armed attacks" warranting self-defense measures under Article 51. Thus, the Israelis claimed a right to carry out preventive/attrition attacks against PLO bases in Arab countries as a reasonable form of self-defense against terrorist attacks launched from those countries.[8] The Israelis further extended this claim to a self-defense right to respond to attacks on Israeli nationals and interests around the world. The United States adopted this concept in the 1986 Libyan raid.[9]

On the whole, UN Security Council practice has reflected strict, literal interpretations of war-decision law. It has rejected Israeli claims of self-defense against terrorist attacks launched from sanctuary States.[10] The general line of Security Council condemnations of Israeli counter-terror actions has been based on the view that self-defense measures should be limited to passive, on-the-spot "resistance to attack." Discontinuous responses following terrorist attacks have been condemned as "reprisals,"[11] No Security Council action condemning the U.S. 1986 Libyan raid was possible but, with the exception of the United Kingdom, Council members held to the strict version and denied the U.S. claim of self-defense. The U.S. action was condemned by the General Assembly.[12]

I have called the more liberal approach to war-decision law "reasonable." This usage is not intended to beg the question in each debate over the legal permissibility of recourse to armed force. It is intended to encourage an overall evaluation of such recourse in the context of the practical situation rather than a black letter law approach purporting to be based on a correct interpretation of the language of the Charter. "Reasonable" approaches may be justified because they offer practical alternatives to approaches that are unrealistic and unfair.

The strict UN war-decision law is based on a number of unrealistic assumptions. It assumes a highly effective machinery for peaceful settlement of disputes. Our experience since 1945 is that many "disputes" are intractable, based on profound differences that have embittered the parties over the years. The Charter also assumed a practical monopoly of force in the international community sufficient to ensure the peace. The Gulf War, authorized by the Security Council as an enforcement action, was the first in forty-six years to provide a remedy to a victim of aggression. It is quite unclear whether this enforcement action will be the first in a series as a new world order develops or whether it will be the last, a unique case. Lacking the protection of UN enforcement actions, victims

of aggression have been compelled to interpret self-defense broadly and realistically.

UN war-decision law was based on the assumption that war-avoidance was overwhelmingly the highest priority and that defense of justice had to be subordinated to war-avoidance. As concern for human rights increased—together with violations thereof—the UN peace-at-any-cost emphasis was rejected by many States and political movements.

Finally, as demonstrated in the strict interpretations of self-defense, UN war-decision law assumed that most conflicts would be interstate conventional wars. Of course, most of the wars in the UN era have been low-intensity wars of revolution, terrorism, intervention and counterintervention.

Given the gaps between the assumptions and priorities of the UN Charter and the realities of contemporary world politics, it is not surprising that UN war-decision law, particularly as strictly and literally interpreted, does not reflect the practice and expectations of States and political-military movements. What is required is a "reasonable" approach to the understanding of self-defense in a world in which there is little prospect for effective collective security, notwithstanding the success of Desert Storm. Just war doctrine is ideally suited to provide a framework for determining what is "reasonable" in war situations.

In the contemporary era, war frequently takes the form of intervention and counterintervention. From the time when Emerich de Vattell proclaimed the principle of the sovereign equality of States (*droit des gens*), 1758, the principle of non-intervention has been treated as fundamental in international law.[13] Needless to say, it has often been violated. But even as colonialism and imperialism declined in the latter part of this century, there was widespread—if often hypocritical—insistence on the necessity and priority of the principle of non-intervention. The principle basically prohibits interference by one State with the exercise of sovereign powers by another State.[14] In some modern versions, however, the principle is expanded to prohibit an unlimited spectrum of forms of influence.[15]

As with UN war-decision law, interpretations of the principle of non-intervention range from strict and literal to "reasonable." This discussion will be limited to cases of intervention involving armed force. I will therefore eschew the arcane issues of political, economic and social intervention, including Coca-Cola intervention, designer jeans intervention and CNN intervention. Strict opposition to armed intervention is most commonly concerned to prohibit external involvement in civil wars.

Here, in addition to the reliance on the concept of inviolable sovereignty, there is insistence on the right of self-determination—by civil strife if necessary—without outside interference.[16]

The problem with the prohibition of intervention in civil war is that, more often than not, it is manifestly ignored by States and political-military movements. Indeed, throughout the Cold War, one could say that a civil war that was

not the object of multiple, competing interventions must have occurred in a place that was of no serious interest to anyone but the indigenous population. Moreover, as in UN war-decision law, strict interpretations of the principle of non-intervention refused to consider exported revolution and other forms of indirect aggression as intervention. Perhaps the outstanding example of this was provided by the involvement of the United States in Vietnam, where we intervened to counter the indirect revolutionary aggression exported by the North. Our more open intervention was roundly condemned, while the transparently concealed indirect aggression of the North was ignored or condoned. Had North Vietnam invaded South Vietnam conventionally as North Korea invaded South Korea, presumably even strict constructionists of UN war-decision law would have had to accept a U.S. claim of counterintervention as collective self-defense against aggression. The mode of indirect aggression—and its acceptance—denied the U.S. this clear justification.

In keeping with their interpretation of the law regulating recourse to armed force, those who reject the strict principle of non-intervention undertake to judge military intervention in the context of the situation. Here the emphasis is on the dynamics of intervention and counterintervention. Competing intervening powers have often been active in a contested country or area in a number of ways not involving use of armed force, such as economic and technical assistance. When a revolutionary war heats up, it is necessary to see which intervening powers are escalating the conflict. Thus, it is clear that in the period leading to full-scale American involvement in the Vietnam War, 1954–1965, the North Vietnamese and their Viet Cong allies consistently escalated the war and increased the North Vietnamese role in it, even to the point of infiltrating North Vietnamese regular forces into South Vietnam in the fall of 1964.[17]

Historically, exceptions have been claimed to the principle of non-intervention. Admittedly these exceptions have been primarily invoked by advanced Western, sometimes imperialist, States intervening in less-advanced, weaker States. However, these exceptions have also been invoked by Third World States, as India did in Sri Lanka. The exceptions claimed have been:

(1) intervention by treaty right, e.g., U.S. in Panama

(2) intervention by invitation of incumbent government—usually in the form of counterintervention against antecedent intervention in support of insurgents

(3) intervention by a foreign power to protect the lives and property of its nationals and other endangered aliens

(4) humanitarian intervention—intervention to save a people from its own government.[18]

The first three exceptions have been invoked a number of times. They are controversial in areas where interventions have been deemed self-serving and harmful but, in American practice at least, they are considered respectable justifications for intervention. However, such interventions must be justified as "reasonable" in the context of the situation.

A right of humanitarian intervention has been supported by some of the most eminent international law publicists.[19] However, there is little practical evidence that true humanitarian intervention has occurred. Supposed examples such as India's intervention in the Bangladesh War of National Liberation are tainted by the self-serving interests of the intervening power.[20]

Just war doctrine can assist in the search for "reasonable" responses to intervention taking the form of indirect aggression. Beyond that, just war doctrine can help penetrate the veils of "sovereign equality" and "self-determination" to determine what courses of action are most likely to lead to justice and democracy. Unlike the tendency of international law, just war approaches need not always defer to claims of untouchable "sovereignty" and to the primacy of "self-determination" if fundamental human rights have been violated on a large scale.

Just War Doctrine Applied - War-decision Law (*Jus Ad Bellum*)

I will assume that the usual justification for recourse to armed force will be some form of individual or collective self-defense. I will further assume that most cases of American recourse to armed force will involve intervention and that the level of interaction will be some form of low-intensity conflict. The justification will be reasonable counterintervention against antecedent intervention amounting to either direct or indirect aggression. The task is to bring just war resources to the assistance of efforts to frame reasonable claims for self-defense and counterintervention.

Competent Authority. Just war doctrine demands that the commitment of a State's armed forces to war be based on whatever authority is necessary in that State to take such action. Just war doctrine has not yet really reached consensus on the difficult question of establishing competent authority in a revolutionary leadership. Since the majority of wars contemplated in this study are revolutionary/counterinsurgency wars, it will be necessary to discuss the requirements for competent authority in terms of American law, in terms of the law and politics of a counterinsurgent government and in terms of the leadership of a revolutionary force. Of course, the United States may intervene on the side of the insurgents in a revolutionary war, as it did in Nicaragua.

Competent authority for U.S. intervention in revolutionary/counterinsurgency wars has been a controversial subject in modern American history. The

effort to resolve the controversy in the War Powers Resolution[21] has not been very successful. Presidents from Ford to Bush have, in effect, refused in principle to accept the War Powers Resolution as binding but have undertaken to recognize the role of Congress by informing its leaders of actions covered by the Resolution.[22] In the case of Desert Storm, the President, after hesitating and claiming he did not need to have Congressional authorization, moved to obtain it in the Joint Resolution of January 1991.[23] This authority, of course, was sought for a much greater military venture than involvement in the more typical low intensity conflicts. Certainly the failure of President Johnson to obtain a declaration of war in the Vietnam conflict is widely seen as a mistake, not only on legal grounds but in terms of the need to commit the Congress and the nation to support of the conflict.[24]

Just war doctrine would encourage policies of obtaining clear legal and political authority and support for commitment of American forces to war, even wars of very low intensity. The problem, of course, is that U.S. involvement may be very low-profile or even clandestine. It may be awkward or impractical to have a major debate followed by Congressional action in order to carry out a low-profile intervention in confused situations, such as El Salvador and Nicaragua. Nevertheless, ordinary prudence, based on experience with mismanaged interventions, suggests that if competent authority is not assured, low-intensity conflict operations—often risky at best—will not be sustained and successful.

As remarked, just war doctrine has not been sufficiently developed with respect to the issue of competent authority in revolutionary movements. Lacking the kind of constitutional and other legal guidelines applicable to an incumbent government, revolutionary leaders should demonstrate their popular mandate to use armed force against an incumbent regime. This is usually a difficult task. Many revolutionary leaders follow the Leninist tradition of the self-appointed "vanguard of the proletariat" that allows them to decide when and how a revolution should take place and what kind of regime should result if it is successful. This may lead to abuse by the vanguard of the proletariat but it must be acknowledged that sometimes this is the only way that a needed revolution can get off the ground. The populace may be too apathetic or frightened to commit to a revolution. In these circumstances it may be difficult for revolutionary leaders with legitimate causes to demonstrate popular support. On the other hand, there have been many cases in which revolutionary leaders terrorized and intimidated an unsympathetic populace and obtained its support by coercion.

If the intervening power is supporting the insurgents it should require evidence, not only of the essential justice of the revolutionary cause, but of substantial uncoerced popular support for the insurgents. However, if the intervention is on the side of an incumbent regime's counterinsurgency efforts, it would seem that the issue of competent authority in the insurgent forces is not

as important as issues of just cause and comparative justice, to be discussed presently. Coerced popular support revolutionary activity is a reason to support counterinsurgency measures. However, if, as a practical matter, the insurgents have sufficient control of the population to carry out their operations, their authority may be unjust but it is effective.

By far the most usual U.S. low-intensity conflict operations have been in support of counterinsurgency rather than insurgency. Here, the issue of competent authority in the incumbent regime is critical. Intervention by invitation requires a government with the legitimacy to invite external assistance. This was a major issue in the Vietnam War when critics charged that the Saigon regime was illegitimate, corrupt, unrepresentative and an American puppet. Indeed, Michael Walzer argued that the very fact that South Vietnam needed the United States to survive proved that its government lacked competent authority.[25]

In dealing with this issue it is necessary to set a very different standard for judging competent authority than in the case of a well-established State and its government. The typical State that suffers from civil war and external intervention is already precarious. It is often engaged in "nation building." Nation building is difficult enough. Add to it the necessity for a regime in an undeveloped State to fight a civil war, usually one that is supported or even controlled by an external power, and you have a situation wherein maintenance of competent authority is very difficult.

Accordingly, the competent authority issue in counterinsurgency must be analyzed with full recognition of the dilemmas of the incumbent regime. Insistence on democratic reforms and the rule of law must be balanced with acknowledgment of the security requirements of wartime. In the final analysis, judgments must be made, when intervention is contemplated, initiated and continued, whether the incumbent government is potentially capable of emerging from the war willing and able to develop a democratic, just regime.

Additionally, just war doctrine would give weight to other criteria such as the status of the regime in international law and diplomacy. If, as was the case with South Vietnam, the regime governs a State recognized by others, accepted in international conferences and generally treated as an international person, the presumption will usually be that it has competent authority to invite external intervention. This is especially true in cases of counterintervention in response to antecedent intervention on behalf of insurgents.[26]

In considering issues of competent authority it is important to recognize that they are not solely matters of morality or law. They are eminently important in political-military terms. If military intervention is to be carried out in a revolutionary war, the credentials of the party to be assisted are obviously critical in estimating the probability of success and proportionality of the enterprise. Indeed,

all of the just war *jus ad bellum* conditions presuppose that the putative just side, including all parties to it, has adequate competent authority.

Just Cause. The broad category of just cause examines the substance of the cause and the comparative justice of the adversaries. It also weighs the good that is sought against the means required to achieve it and the consequences of using force. This calculation of proportionality must be conducted in the light of the probability of success after reasonable exhaustion of peaceful remedies.

The *substance of the cause* in modern just war doctrine is individual and collective self-defense. There is no present consensus in just war doctrine supporting a right of military intervention for reasons not covered by self-defense. This leaves a gap in the doctrine that needs to be filled. Two kinds of recourses to force can be conceived which do not clearly fall into the category of self-defense: humanitarian intervention and just revolution.[27]

As remarked in the discussion of international war-decision law, an exception to the principle of non-intervention is sometimes made for intervention to protect nationals abroad in clear and present danger. However, there has thus far been little acceptance of an exception of humanitarian intervention in cases where a foreign power would intervene to save a people from its own oppressive or even genocidal government. This remains an open question in international law and just war doctrine could support a trend to recognize humanitarian intervention as a legitimate action—provided that it was clearly humanitarian, aimed at saving an oppressed population, and not self-serving.

The substance of the just cause in just revolution is to remove a government that is intolerable to its subjects and replace it with one representative of or at least acceptable to them. In a broad sense, this just cause is a kind of self-defense of the people. In the kind of situation envisaged by advocates of humanitarian intervention, resistance to a violently oppressive or genocidal incumbent government may literally be justified as self-defense. However, in most cases of revolution the just cause is the removal of a bad, unrepresentative government and its replacement with one acceptable to the people. More attention to the definition of just cause for revolutionary war is needed because self-defense does not really describe the cause in most revolutionary wars. A revolutionary war is usually a war of choice. It is not thrust upon the people except in cases where oppression has taken a particularly violent form. Accordingly, the necessity for violent change must be demonstrated in order to provide a referent for the requirement of proportionality of means to ends. Lacking sufficient warrant in contemporary just war doctrine for a more elaborate concept of just cause other than self-defense, I will simply conclude that there are two categories of just cause: self-defense and just revolution.

Comparative Justice. The concept of comparative justice has already been touched upon in the discussion of competent authority. Recourse to military intervention in collective self-defense should be justified on grounds that the States or regimes defended deserve to be defended. Moreover, it should be clear that failure successfully to defend a State or regime will result in an unacceptable loss of freedom and human rights because the unjust character of the victor ensures that the people it conquers will be oppressed, as were the citizens of the Republic of South Vietnam by the Viet Cong and North Vietnamese after the South fell. As observed above, evaluation of comparative justice is difficult in revolutionary/counterinsurgency wars. Nevertheless, the just cause of self-defense or of just revolution must be validated by a finding that the party supported has the greater comparative justice.

The heart of the just war doctrine is the calculus of *proportion of means and consequences to ends in the light of probability of success.* Many situations cry out for just intervention or successful revolution but, tragically, hold little probability of success. If this is the case, there should be no resort to armed force, no matter how just the cause. This general statement should be qualified. There may be justification for seemingly hopeless resistance by the immediate victims of aggression and oppression, as was the case with Finland in its fight against the Soviet Union in 1940. Many revolutionary wars have culminated in victory over an oppressive regime despite great odds. However, just war doctrine requires a party contemplating what could be called a war of choice to assess the probability of success. In the light of this assessment, the probable bad effects of the war are balanced against the good of achieving the just cause. The bad effects or cost of the war should be proportionate to the good of the just cause. This assessment should be made before initiating a just war or revolution. It should then be repeated at critical stages in the war. What may have seemed proportionate at the outset may come to appear disproportionate, particularly if assessments of the probability of success have proved over-optimistic.

Moreover, the calculation of proportionality is a grand strategic calculation of the overall probable consequences of the war. It goes beyond the war-conduct level of proportionality required by the principle of military necessity. In classical terms, the proportion of war-decision law is at the level of *raison d'etat* as compared with the war-conduct law level of *raison de guerre.*

The complexities of the war-decision calculus of proportion in just war analyses are well illustrated in the case of the conventional high-intensity Persian Gulf War of 1991. U.S. and allied decision-makers had to estimate not only the damage and costs of the fighting, but the political, military, economic, social and environmental consequences of the war.

Although often less obvious and dramatic, the myriad of costs and consequences of low-intensity conflict intervention in civil war may be equally complex. For example, any U.S. military intervention in Latin America

engenders governmental and popular opposition and resentment. Moreover, as in the case of the 1989 U.S. intervention in Panama, the aftermath may be prolonged political, economic and social dislocation that must be justified as proportionate to the just cause of removing a tyrant and his oppressive regime.

Finally, the just cause may not be pursued by recourse to armed force unless there is a *reasonable exhaustion of peaceful remedies*. The more common formulation for this requirement is *last resort*. I find this formulation too extreme. It tends to imply such a reluctance to justify recourse to armed force that last, desperate measures may only be taken when it is virtually too late to defend the just cause. To refer again to the 1991 Gulf War, last resort might require that we still be trying to turn back Saddam Hussein by peaceful means, supplemented by coercive sanctions short of major military action. I find that the five months between Iraq's aggression and the full-fledged U.S./UN response was marked by reasonable exhaustion of peaceful remedies.

Peaceful and coercive remedies short of full-scale war should be exhausted. These remedies have been reasonably exhausted if there is no apparent movement by the other side towards an acceptable resolution of the situation caused by its unjust actions. This is true whether the adversary is an aggressor State, an oppressive regime or a revolutionary movement.

Right Intention. Right intention requires the just belligerent to limit its goals in war to those things necessary for the achievement of the just cause. If the just belligerent goes beyond what is necessary for the success of the just cause it risks losing its moral status.

Right intention also requires that the just belligerent repress sentiments of hatred and vengeance which are all too common in war, particularly in revolutionary/counterinsurgency wars. Right intention requires that the just belligerent always acknowledge that the ultimate goal of a just war is a just and lasting peace. Actions that are likely to frustrate that ultimate goal show a lack of right intention.

Right intention, as a condition of just war, has theological origins. It calls upon individuals, political and military decision-makers and whole nations to fight morally without tainting their cause with hatred and the desire for vengeance. But right intention is also a prudential requirement of international politics. It is not good policy to incur unnecessarily the abiding hatred of others and it is good policy to seek reconciliation with defeated enemies, as did the U.S. with Germany and Japan after World War II.

At this point the war-decision law of just war doctrine may be compared to that of international law. Note that the alternative formulations of the war-decision questions in international law are somewhat limited and rather mechanical. A proposed course of action either fits within a legal category or it does not. This is particularly true if strict versions of the law regulating recourse to armed

force and military intervention are applied. This discussion has undertaken to demonstrate that the just war guidelines for war-decision are much more comprehensive and realistic. They call for a full analysis of the situation and a rigorous decision process in which probable means and consequences are balanced against probable outcomes. After making such an analysis, decision-makers may be in a position to justify recourse to war as "reasonable," not simply as "legal." Or, it may appear that what is "legally permissible" is not "reasonable."

It should be clear that the war-decision law of just war doctrine respects but is not intimidated by the international law hierarchy of values dominated by "sovereignty," "self-determination," "non-intervention" and "war-avoidance." Justice and humanity may in some situations override those values. Injustice and inhumanity may flourish behind the shield of "sovereignty" and "non-intervention." "Self-determination" may mean bloody repression in a Darwinian process. Given the destructiveness of virtually all modern forms of war there is good reason to give high priority to its avoidance, but that priority is not total and perennial. In a world in which established States are breaking up, often with chaotic and bloody consequences, there are good reasons to give proper respect to sovereignty. However, there are some situations that can only be alleviated by some form of armed intervention and coercion and, in such cases, war-avoidance must yield to other priorities such as justice and protection of human rights.

To be sure, challenging the priorities of modern international law may be risky in a heterogeneous world riven by conflict. There are dangers of self-deception and hypocrisy. But, if the just war concept of right intention is taken seriously, those who supplement a primitive international law with the resources of just war doctrine may be better able to deal with the difficult decision to have recourse to armed force.

Just War Doctrine Applied — War Conduct Law (*Jus In Bello*)

Even if the decision-maker has thoroughly considered and satisfied the criteria of the war-decision law of just war doctrine and concluded that recourse to arms is justified, he must still confront the war-conduct law of just war, which consists primarily of the principles of proportion and discrimination. Just war doctrine strongly supports the international law condemnation of genocide, which is a positive law reflection of natural law on which just war is in large measure based.[28] Modern just war doctrine tends not to go much beyond these basic principles, leaving the detailed normative regulation of war to international war-conduct law.

Proportion. The war-conduct principle of proportion is the heart of the principle of military necessity, recognized in all U.S. military manuals. It requires

that military actions be proportionate to a legitimate military purpose. Whereas the war-decision requirement of proportion is at the grand strategic level of *raison d'etat*, the war-conduct requirement of proportion is at the strategic and tactical levels of military necessity or *raison de guerre*.

In positive international law, military necessity is judged entirely in the context of the military situation. The greater political-military issues of the war are not considered. There is a sharp isolation of war-conduct law from war-decision law. In just war doctrine there is a definite relation between the principles of proportion in war-decision and war-conduct law. This means that proportionality is subject to two levels of judgment. First, was the military measure proportionate to the military objective? Second, what was the effect of the military measure on the ultimate objectives of the war? A single decision as to the proportionality of a measure of military necessity may not make much difference to the grand strategic picture, but a pattern of measures, an accumulation of decisions justified by military necessity, may be at odds with the overall achievement of the just cause at proportionate cost.

To be sure, a tactical or even a strategic commander may not be able to judge the implications of his actions for the broader outcome of the war. But higher political-military decision-makers and commanders should control as far as possible the actions of subordinates in the chain-of-command so as to limit decisions of military necessity that are counterproductive from the standpoint of grand strategy and war-decision law. Although American commanders on the ground understandably chafed at the orders that forbade them to go north of the Yalu during the Korean War or cross into Cambodia in the Vietnam conflict, the need to avoid an open war with communist China was perceived by policy makers at the time to be sufficiently important to offset the immediate military disadvantages of allowing our enemies these sanctuaries.

It should be recalled that the normative principle of proportion is closely related to the military principle of economy of force.[29] Its application must be judged primarily on a military concept of "reasonableness," *viz.*, was the action consonant with good military practice?

Discrimination. The just war principle of discrimination, or noncombatant immunity, is understood by the United States to be manifest in the international law of war in the form of the principle of humanity.[30] The principle of discrimination prohibits direct intentional attacks on noncombatants and civilian targets. Most just war analysts consider this principle to be absolute but they are able to reconcile it with the indiscriminate propensities of modern war at all levels by invoking some version of the principle of double effect.[31] I take a different approach. I contend that the principle of discrimination, while extremely important is not absolute. Rather, it is a principle that requires that civilian damage be proportionate to the military advantage gained by a military measure.

In modern security jargon, the counterforce value of the action should be proportionate to the countervalue costs.[32]

The principles of proportion and discrimination are difficult to apply at all levels of the spectrum of military force. This includes low-intensity conflict, particularly in cases of revolutionary/counterinsurgency war. Such wars are often fought in areas where the belligerents and civilians are closely intermixed. It becomes virtually impossible to fight without causing substantial civilian casualties and civilian damage. Indeed, it is well known that a standard tactic of insurgents is deliberately to involve civilians and civilian targets so that damage to them will alienate the population from the counterinsurgent forces and government and taint the reputation of intervening allies.

This fact emphasizes the need to coordinate the strategy and tactics of war-fighting with the greater strategic ends of a war. The purely military results of counterinsurgent operations, in the form of guerillas killed and bases destroyed, must be weighed against what the fighting has done to the attitudes of the civilians caught in the middle of it. Insurgents and their supporters may need to perform the same calculation.

In summary, both the positive international law of war and the war-conduct law of just war doctrine emphasize the principles of proportion and discrimination. The main — and important — difference between them is that the international law of war is interpreted and applied only to military contexts whereas just war evaluates conduct in grand strategic as well as strategic and tactical terms. Just war, then, can complement and supplement the positive international war-conduct law and contribute to policies that are more moral and more prudential.

Two particular issues, frequently debated in discussions of low-intensity conflict, have been raised with respect to the international war-conduct law as interpreted by international law and by just war doctrine. These are the issues of deception and assassination. It must be acknowledged from the outset that neither has, to my knowledge, received much attention in the contemporary just war literature.

There is some relevant positive international war-conduct law with respect to *deception*. In the Hague Rules of 1907, Hague Convention IV, "it is especially forbidden . . . to make improper use of a flag of truce, of the national flag, or of the military insignia and uniform of the enemy, as well as the distinctive badges of the Geneva Convention." (Art. 23 (f)) The Hague Rules also provide: "Ruses of war and the employment of measures necessary for obtaining information about the enemy and the country are considered permissible." (Art. 24)

The meaning of Art. 23 (f) is evident, as indicated by the discussion of its provisions in Army FM 27-10.[33] The Army's interpretation of Art. 24 is more complex. A distinction is made between "good faith" and "treachery or perfidy." It is conceded that the line between the two is "indistinct." FM 27-10 observes

that, "It would be improper practice to secure advantage of the enemy by deliberate lying or misleading conduct which involves a breach of faith, or when there is a moral obligation to speak the truth."[34] Examples given are "to feign surrender so as to secure an advantage over the opposing belligerent thereby" and "to broadcast to the enemy that an armistice had been agreed upon when such is not the case," is a "treacherous" act.[35]

The discussion in FM 27-10 condones all manner of spying and subversion of enemy forces.[36] To the two examples of "perfidy" or "treachery" could be added such possibilities in low-intensity conflict as luring enemies to a parley with assurance of security and then capturing or killing them, or, more broadly, promising amnesty to those who have surrendered their arms and then imprisoning or killing them. I would consider FM 27-10's treatment of deception in war-conduct law to be acceptable to just war doctrine, having noted that the subject has apparently not elicited treatment in the major just war texts.

Assassination. Assassination is a subject which is frequently discussed in connection with low-intensity conflict, but there seems to be little consensus about it. The subject is to a considerable extent treated as moot because of the U.S. executive order prohibiting assassination as an instrument of policy. Nevertheless, debate over the moral permissibility of assassination continues. In classic just war doctrine and Scholastic political thought the subject is mainly addressed with respect to tyrannicide. Much of the treatment of this subject was conditioned by the emotions of the religious wars, international and civil. More modern discussions of tyrannicide tend to be cautious at best and generally negative. Indeed, the whole legacy of Catholic thought with regard to revolution, clearly reacting to the French and Bolshevik revolutions, has been to discourage violent revolution and seek remedies through legal and non-violent means. Heinrich Rommen does not even discuss the possibility of tyrannicide and Johannes Messner rules out almost any form except in cases where persons demonstrating legitimate authority might dispose of a tyrant who held power illegitimately.[37]

Admittedly, this meagre literature gives little basis for discussion of the moral permissibility of assassination, including assassination of political, military and/or revolutionary figures whose status might not be equivalent to that of a ruler deemed by some to be tyrannical. Nor does the literature take up the case of a potential target for assassination based not so much on the claim that he is a tyrant, but on the recognition that he is a key figure in the enemy camp. This would, for example, be the case in assassination of revolutionary and/or terrorist leaders or drug lords. Such a case occurred when Israeli agents assassinated Khalil El Wazir (*nom de guerre* Abu Jihad) in his home on April 16, 1988. Abu Jihad was a top PLO leader who had planned and organized some of the major PLO terrorist attacks against Israel. He was in every sense a military commander, a combatant in the PLO's war with Israel, which was a war fought largely on the PLO side

by means of terrorism.[38] Security Council Resolution 611 of April 25, 1988, which was made possible by a U.S. abstention, condemned the assassination of Abu Jihad, as all previous resolutions had condemned Israeli counterterror attacks, except when vetoed by the United States.[39] Resolution 611 is not an impressive precedent for dealing with the status of assassination in international law.

A just war perspective on the problem would emphasize the ramifications of an assassination in context rather than attempt to establish a universal prescription. Just war doctrine would single out targets of assassination who clearly had a military or combatant status. A militarily active chief executive or a revolutionary or terrorist leader would be distinguished from other high officials who seemed to fall more into the category of civilian or non-combatants. Having said this, my own approach would be prudential rather than grounded in some basic normative principle. It is likely that one assassination would breed a spiral of others. This is demonstrated in the numerous instances of gangster wars, as described in *The Godfather.* Vengeful assassination could lead to endlessly reciprocating attacks which, in the end, might not give either side any decisive advantage, would lead to chaos and would tend to violate right intention. This just war analyst would not encourage assassination as an instrument of policy, always recognizing that an important enemy leader who took risks as a combatant, including residence inside of military targets, might be killed by counterforce military actions.

Just War Doctrine Applied - Counterterror Operations

The preceding discussion has covered a wide variety of situations in which armed force is used in low-intensity conflict. The main focus, however, has been on intervention on one side or another of revolutionary/counterinsurgency war. There is another form of low-intensity conflict which is usually part of revolutionary/counterinsurgency war but which has become so distinctive and threatening that it requires independent treatment. This is terrorism. Terrorism is often just one of the measures used by insurgents and counterinsurgents. It may simply supplement the main efforts of guerrilla and counterguerrilla warfare, as it did in Vietnam. Sometimes, as in the case of the IRA, terror is the sole form of armed coercion. In the case of the PLO, terror is the main form of armed coercion but circumstances sometimes force the PLO to fight in a counterforce mode, as it did in Lebanon in 1978 and 1982.[40]

Whether terrorism is the sole, the principal or a supplemental form of armed coercion, it confronts an adversary with very difficult problems. Terrorism turns the concept of a counterforce warfare on its head. It is usually not directed at military targets. Rather, terrorists deliberately attack non-military targets with the intention of creating fear and insecurity in the target population and

government. All sorts of passive defense measures have been developed to limit the depredations of terrorists. However, it is impossible to guard all possible targets of terrorists. Ultimately, terrorists must be attacked in their bases and the governments and populations that provide those bases must be punished sufficiently severely to discourage them from continuing support of or acquiescence in terrorist operations.

Obviously, the country most plagued by terrorism has been Israel. Israel has developed, in addition to impressive passive defense arrangements, a counterterrorist strategy of deterrence by example. No simple deterrent posture, such as that of a nuclear deterrent, is possible as an answer to terrorism. Rather, by preventive/attrition attacks on the sources of terrorist activity, the Israelis seek to inflict unacceptable damage on the PLO and on the States and populations that provide the sanctuaries and launching pads for terrorist attacks on Israel, on Israelis, other Jews and their interests around the world.[41]

On the whole, this counterterrorist deterrence/defense strategy has been successful. It contributed decisively to the expulsion of the PLO from Jordan in 1970 and to the Syrian decision to bar PLO terrorist operations from being launched from Syria. It was less successful when applied to PLO operations launched from Lebanon because of the weakness and ultimate collapse of the Lebanese government and polity.[42]

However, Israel has paid a heavy price in terms of United Nations practice and world opinion for its counterterror deterrent/defense strategy. The Security Council and most participants in UN debates have consistently condemned Israeli counterterror attacks in Egypt, Jordan, Syria and Lebanon. Israel has claimed that these attacks are absolutely necessary as self-defense measures against a continued pattern of terrorist attacks launched from sanctuary States.[43] But UN practice has consistently held to a strict version of war-decision law that denies Israel anything but immediate, on-the-spot self-defense.[44] Israel's counterterror measures have been condemned as "reprisals" which are distinguished from "self-defense."[45]

There is a complicated debate among publicists about the difference between self-defense and reprisals that need not be revisited here.[46] The question is whether a "reasonable" interpretation of the right of self-defense includes the right to use preventive/attrition attacks against the sources of a continuing pattern of terrorist attacks. In the case of the April 15, 1986 U.S. attack on terrorist bases in Libya, the answer was that such a continuing pattern of terrorism did require a self-defense response in the form of an effective attack on the sources of terrorism aimed at U.S. nationals and their interests as well as other targets.[47]

Note that the American claim of counterterror self-defense is even broader than that of Israel. Israel has sustained thousands of terrorist attacks in its own territory, as well as suffering from attacks on its nationals and on other Jews and their interests worldwide for over forty years. The United States has suffered

from a relatively small number of terrorist attacks, almost entirely outside of its territory, usually in relatively limited forms. Yet the United States claimed a self-defense right to make a major air strike against terrorist bases and military facilities in Libya.

What emerges from the Israeli and American experience is two claims:

(1) a self-defense right to use preventive/deterrence attacks on terrorist bases in sanctuary States;

(2) a self-defense right to protect nationals and their interests abroad by counterterrorist attacks on the sources of continuing terrorist activity.

The Israeli/U.S. stance is definitely a minority position in international law. Moreover, because of the disparity in the level of victimization by terrorists, there may be a difference between the Israeli position which has been held for decades, and the American position which rests almost entirely on the single Libyan case. This is an issue that will require more serious thought both in the realms of security policy and international law.

Contributions from just war doctrine may be helpful. I have not struggled through all of the arguments about the difference between "self-defense" and "reprisals" because they come primarily from publicists writing relatively early in the UN era, and they are based on strict interpretation of the war-decision law of the Charter, interpretations that have long since ceased to reflect the practice and expectations of States and political movements.[48] The threat of terrorism was not contemplated in the United Nations Charter, yet it represents far more of a security threat to many States than conventional international war, which naturally was foremost in the minds of the framers of the Charter. In these circumstances, new thinking about the right of self-defense is necessary. Rather than continue the tortured arguments about the meaning of self-defense under the Charter, policy makers and publicists would profit from putting prominent cases of victimization by terrorism through a just war analysis.

It should be clear from the general discussion of just war conditions already presented that recourse to just war analyses would not necessarily be more or less supportive of counterterror self-defense measures. Each case would present its own problems of weighing costs and consequences against the desirability of attaining the counterterror just cause. This is already reflected in practice. The possibility of preventive/attrition counterterror attacks is usually restricted pretty much to Libya. This is because Libya is a weak country and its leader, Qadhafi, has a reputation for evil and erratic behavior. There is grumbling about terrorist support and even promotion in Syria and Iran but little serious consideration of attacking sources of terrorism in those countries. This is because they are major players in the Middle East and counterterror attacks on their territory probably

could not be justified after a searching calculation of proportionality of probable means and consequences and outcomes.

I conclude that the contemporary international war-decision law purporting to outlaw counterterrorist attacks on terrorist sanctuaries and launching pads is bankrupt. It needs to be replaced by a new understanding of self-defense in a world in which terrorism is a major security problem. Just war doctrine can be useful in developing this more realistic understanding of self-defense.

Just War Doctrine Applied: The International Drug Trade

The international drug trade is a great evil in many ways. It supplies millions of drug addicts around the world, leading to sickness and death, crime, social dislocation and corruption. The international drug trade may very well inflict more human suffering than wars and violent revolution. The question is whether just war doctrine, developed to deal with recourse to and conduct of armed coercion, is relevant to the challenge of suppressing the international drug trade.

This is an entirely new problem for just war doctrine. There are no precedents in the doctrine for taking on a subject of this kind. In approaching it, I suggest that it be broken down into two parts. The first is that part of the international drug trade that operates primarily as a business, albeit a criminal business. The second is that part of the international drug trade that is closely linked to and sometimes an instrument of political movements or even established governments.

The second case seems less difficult to approach through just war doctrine. If, for example, the United States wants to provide military assistance to the government of Peru to subdue the Shining Path movement and, as part of that undertaking, participate in attacks on those who produce and export drugs in order to support the Shining Path insurgents, just war analysis might well justify the anti-drug component in counterinsurgent strategy as part of the overall effort to defeat the insurgents. Without going through that analysis I can see, for example, that the Shining Path insurgents would fail the test of comparative justice.

To be sure, there would be some serious questions about likely measures such as destruction of crops destined for the production of drugs. Consideration would have to be given to the economic and social effects of such destruction in areas controlled by the Shining Path insurgents. A kind of scorched earth policy might not pass the principles of proportion and discrimination. Nevertheless, as long as the war on drugs would be part of an overall just counterinsurgency war, it could very well receive the support of just war analysts.

The first and greater part of the international drug trade is more problematic. As a business it may exchange services with unjust insurgents and governments, but its main function is profit, not the triumph of unjust insurgents and

governments. In this sense, the commercial international drug trade is far more of a threat than is the drug activity employed by particular insurgents or governments in an instrumental fashion. This threat requires unprecedented international cooperation of a number of kinds. Some of this cooperation takes the form of use of the military as well as the police of a number of countries.

From the standpoint of international law, the key questions concern sovereignty and jurisdiction. In principle, any form of military intervention or intervention with police or undercover agents should be on the basis of invitation by the territorial sovereign. Suggestions that uninvited intervention could be justified on theories of extraterritorial jurisdiction have rightly been viewed skeptically. Before a State starts sending uninvited agents to make arrests ("irregular recovery") or perhaps executes drug dealers in another State, it is well to consider the prospect of being visited with similar uninvited agents.

If just war doctrine is to contribute to the formulation of morally acceptable policies for using armed coercion against the international drug trade, it will first have to establish that the evil of the drug trade is equivalent to the evil of aggression and unjust oppression. War is an extreme remedy and should be employed only against the threat of aggressive war or some other comparable evil. What would be needed to respond to the challenge of the international drug trade would be a full scale just war analysis in which the evil of the trade would be established, the relevance and probable utility of military coercion directed against it projected, and the probable costs and consequences of employing military coercion estimated. This analysis would also have to include a just war evaluation of the proportionality of recourse to armed force against the principal regions from which the international drug trade operates, as well as an evaluation of the effects of such a concentrated effort in one area on the trade in others. Thus, it would be necessary to recognize that a massive effort, including use of armed coercion, in Latin America might suppress the drug trade there at enormous cost only to have the trade spring up immediately in Africa or Asia.

This has been an exploratory voyage in uncharted waters. It is now time to try to develop some charts. The best way to go about this would be for specialists to develop case studies of the principal branches of the international drug trade and its relation to corrupt governments and revolutionary movements. The studies should be presented to just war analysts along with plans for the use of force against the trade. The analysts could then evaluate the possible role of armed intervention in specific cases on the basis of the just war criteria.

Conclusions

This paper has undertaken to evaluate the state of contemporary international law regulating recourse to armed force, including armed intervention. It has concluded that this body of law is at present inadequate as a normative guide to

decisions about recourse to armed coercion. While a complete abandonment of international war-decision and war-conduct law is not justified, it is clear that decision-makers require supplementary or even alternative analytical frameworks in order to make good policy decisions. Modern just war doctrine can provide such an alternative analytical framework. Depending on the problem and the relevant international law, just war doctrine can either complement international law or simply replace it as the primary source of normative guidance.

This paper has shown how systematic application of the just war categories can provide a much more comprehensive and realistic basis for decision than contemporary international law in dealing with problems of armed intervention in revolutionary/counterinsurgency wars and deterrence and defense against terrorism. The paper concludes with a preliminary foray into the question of using armed coercion to attack the international drug trade. On first impression, it appears that it is easier to justify the use of force against the international drug trade if the action is part of an overall just intervention in a revolutionary/counterinsurgency war. It is much more difficult, while prescinding the international drug trade from its links to corrupt governments and revolutionary movements, to think through the possibilities of using armed coercion against it. This task may be undertaken in future studies. The best way to approach it would be for experts on the international drug trade to provide basic background information to just war analysts and pose to them scenarios involving the use of armed coercion against specific targets considered critical to the operations of the drug trade. Just war analyses would then undertake to perform the fundamental function of assessing the means and consequences of recourse to armed coercion in context and their proportionality to the good ends sought, in the light of the probability of success.

Notes

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1. See Weinberger's speech to the National Press Club on November 28, 1984, revised in "The Uses of Military Power," and Shultz' speech at Yeshiva University on December 9, 1984, revised in "The Ethics of Power" in ETHICS AND AMERICAN POWER 1-10 (Lefever ed. 1985).

2. Department of Defense, *Conduct of the Persian Gulf Conflict, An Interim Report*, 1-2, 4-4, 12-2-4 (July 1991).

3. Professor Johnson and I, as well as other just war scholars such as Fr. J. Bryan Hehir and Fr. John Langan, S.J., have lectured on just war at the war colleges and service academies. Students at these institutions read contemporary just war books and selected chapters and articles, some of which are reproduced in study materials.

4. Article 51 provides:

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

5. *See, e.g.* BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 275-78, 367 (1963); OPPENHEIM, INTERNATIONAL LAW 154-156 (7th ed. 1952); Wright, *The Cuban Quarantine*, 57 Am. J. Int'l L. 560-65 (1963); *Intervention 1956*, 51 Am. J. Int'l L. 270 (1957); HENKIN, HOW NATIONS BEHAVE 140-46 (2nd ed. 1979).

6. *See, e.g.* BROWNLIE, *supra* n. 5, at 278-9. *See also* the application of the restrictive view of UN war-decision law to Israeli counter-terror operations, summarized in O'BRIEN, LAW AND *MORALITY IN* ISRAEL'S WAR WITH THE PLO 102-12 (1991).

7. MCDOUGAL & FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER 224-244 (1961), BOWETT, SELF-DEFENCE IN INTERNATIONAL LAW 53-4, 270-75 (1958); STONE, LEGAL CONTROLS OF INTERNATIONAL CONFLICT 281 (2nd ed. 1959); STONE, AGGRESSION AND WORLD ORDER 92-103 (1958); Higgins, *The Legal Limits to the Use of Force by Sovereign States: United Nations Practice*, 37 Brit. Y. B. of Int'l L. 299 (1961); Tucker's new section in KELSEN, PRINCIPLES OF INTERNATIONAL LAW (Tucker ed. 2nd ed. 1966); O'Brien, *International Law and the Outbreak of War in the Middle East, 1967*, 11 Orbis, 692-723 (1967).

8. O'BRIEN, n. 6, at 101-7, 112-14.

9. *Id.* at 114-17.

10. *Id.* at 102-12.

11. *Id.* at 102-12.

12. *Id.* at 114-17.

13. *See* BRIERLY, THE LAW OF NATIONS 36-40, 131-3 (Waldock ed. 6th ed. 1963).

14. Rosenau, *The Concept of Intervention*, 22 J. of Int'l Aff. 165-76 (1968); Rosenau, *Intervention as a Scientific Concept and Postscript*, in 2 THE VIETNAM WAR IN INTERNATIONAL LAW 979-1015 (1976); Moore, *Intervention: A Monochromatic Term for a Polychromatic Reality*, in 2 THE VIETNAM WAR IN INTERNATIONAL LAW 1061-88 (Falk ed. 1976); Vincent, *Nonintervention and International Order* (1974).

15. *See*, for example, United Nations General Assembly Resolution 2131 (XX), adopted December 21, 1965:

> 1. No State has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements, are condemned.
>
> 2. No State may use or encourage the use of economic, or any other type of measures to coerce another State in order to obtain from the subordination of the exercise of its sovereign rights or to secure from it advantages of any kind. Also, no State shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another State, or interfere in civil strife in another State.

See similar language in The Charter of the Organization of American States, Articles 15, 16 and 17, T.I.A.S. No. 2361.

16. HENKIN, HOW NATIONS BEHAVE 16, 115, 126, 134, 176-8, 182, 195, 198, 203-6, 232 (1979); Farer, *Harnessing Rogue Elephants: a Short Discourse of Intervention in Civil Strife*, in 2 THE VIETNAM WAR AND INTERNATIONAL LAW 1095-1102 (Falk ed. 1969); Moore, *Intervention* 1067-9 (1969).

17. LEWY, AMERICA IN VIETNAM, 15-41 (1978).

18. On grounds for intervention *see*: Moore, *6 A Digest of International Law*, 2-11 (1906); THOMAS & THOMAS, JR., NON-INTERVENTION: THE LAW AND ITS IMPORT IN THE AMERICAS 74-8, 79-97, 123-41, 215-40 (1956); HENKIN, HOW NATIONS BEHAVE 156-61 (1979).

19. *Pro* humanitarian intervention: Lillich, *Forcible Self-Help by States to Protect Human Rights*, 53 Iowa L. Rev. 325-51 (1967); *Intervention to Protect Human Rights*, *15* McGill Law Journal 205-19 (1969); *Humanitarian Intervention: A Reply to Ian Brownlie and a Plea for Constructive Alternatives*, in LAW AND CIVIL WAR IN THE MODERN WORLD 229-561 (Moore ed. 1974); McDougal & Reisman, *Rhodesia and the United Nations: The Lawfulness of International Concerns*, *69* Am. J. Int'l L. 1-9 (1968).

Contra humanitarian intervention: Brownlie, *Humanitarian Intervention*, in LAW AND CIVIL WAR IN THE MODERN WORLD 218-27 (Moore ed. 1974); Bowett, *The Interrelation of Theories of Intervention and Self-Defense*, in LAW AND CIVIL WAR IN THE MODERN WORLD 38-50 (Moore ed. 1974); Franck & Rodley, *After Bangladesh: The Law of Humanitarian Intervention by Military Force*, 62 Am. J. Int'l L. 275-305 (1973).

20. Compare WALZER, JUST AND UNJUST WARS 101-8 (1977), with KISSINGER, WHITE HOUSE YEARS 842-918 (1979); and FRANCK & RODLEY, AFTER BANGLADESH 275-305.
21. War Powers Resolution Pub. L. No. 93-148, 87 Stat. 555 (1973).
22. On practice concerning the War Powers Resolution see: FISHER, CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT 260-80 (3rd ed. 1991); GLENNON, CONSTITUTIONAL DIPLOMACY 87-122 (1990); TURNER, THE WAR POWERS RESOLUTION: ITS IMPLEMENTATION IN THEORY AND PRACTICE 47-91 (1983).
23. Authorization for Use of Military Force Against Iraq Resolution, Pub. L. No. 102-1, 105 Stat. 3 (1991).
24. SUMMERS, JR., ON STRATEGY 12-13, 17-19 (1982).
25. WALZER, JUST AND UNJUST WARS 98-101 (1977).
26. *Legality of United States Participation in the Defense of Viet-Nam*, Memorandum Of Legal Advisor of Department of State (Leonard Meeker), March 4, 1966, *Department of State Bulletin* 54 (1966) 474.
27. James T. Johnson suggests that there may be warrant for reviving the classical just war justifications for wars to punish wrongdoing and retake something wrongly taken Johnson, *supra*, at 147.

This possibility is seldom even mentioned by contemporary just war analysts. Church documents such as the 1983 American Catholic Bishops Pastoral, *The Challenge of Peace*, restrict just cause to self-defense, clearly implying self-defense against armed aggression.

28. Convention on Genocide, U.N. GAOR 3d Sess. (I), Resolutions at 174; U.N. Doc. No. A/810; (1949).
29. Department of the Air Force, *International Law - The Conduct of Armed Conflict and Air Operations*, AFP 110-31, 1-5-6 (1976).
30. *Id.* 1-6.
31. *See, e.g.* WALZER, JUST AND UNJUST WARS 153, 155 (1977). Walzer's version of the principle of double effect is as follows:

(1) The act is good in itself or at least indifferent, which means for our purposes that it is a legitimate act of war.

(2) The direct effect is morally acceptable—the destruction of military supplies, for example, or the killing of enemy soldiers.

(3) The intention of the actor is good, that is, he aims narrowly at the acceptable effect; the evil effect is not one of his ends, and, aware of the evil involved, he seeks to minimize it, accepting costs to himself.

(4) The good effect is sufficiently good to compensate for allowing the evil effect; it must be justifiable under Sidgwick's proportionality rule.

32. I explain the debate on discrimination and my position in O'BRIEN, THE CONDUCT OF JUST AND LIMITED WAR 42-55 (1981); LAW AND MORALITY IN ISRAEL'S WAR WITH THE PLO 281-4 (1991); The Hague Convention Respecting the Laws and Customs of War on Land (1907).
33. Department of the Army, *The Law of Land Warfare*, FM 27-10 § 52.5, at 23 (1956).
34. *Id.*, at § 49, 50, at 22.
35. *Id*, § 50, at 22.
36. *Id*, § 49, at 22
37. ROMMEN, THE STATE IN CATHOLIC THOUGHT 473 (1945); MESSNER, SOCIAL ETHICS 600 (Doherty trans. 1965).
38. O'BRIEN, LAW AND MORALITY IN ISRAEL'S WAR WITH THE PLO 58, 167-8 (1991).
39. S/RES/611 (1988).
40. O'BRIEN, LAW AND MORALITY IN ISRAEL'S WAR WITH THE PLO 15-18 (1991).
41. *Id.* at 18-26.
42. *Id.* at 37-41.
43. *Id.* at 112-14.
44. *Id.* at 102-112.
45. *Id.*
46. See Bowett, *Reprisals Involving Recourse to Armed Force*, 66 Am. J. Int'l L. 1-36 (1972); Barsotti, *Armed Reprisals*, in THE CURRENT LEGAL REGULATION OF THE USE OF FORCE 79-110 (Cassese ed. 1986); O'BRIEN, LAW AND MORALITY IN ISRAEL'S WAR WITH THE PLO, 99-125 (1991).

47. *See* Parks, *Crossing the Line, 112 Proceedings* 964-80 (1986); O'BRIEN, LAW AND MORALITY IN ISRAEL'S WAR WITH THE PLO 114-17 (1991).

48. *See, e.g.*, Bowett, *supra* note 46, at 29-30; Franck, *Who Killed 2 (4)? or Changing Norms Governing the Use of Force by States*, 64 Am. J. Int'l L. 809-837 (1970); Coll, *The Limits of Global Consciousness and Legal Absolutism: Protecting International Law from Some of its Best Friends*, 27 Harv. Int'l L. J. 599, 606-20 (1986); Arend, *International Law and Recourse to Force: A Shift in Paradigms*, 27 Stan. J. Int'l L., 1-47 (1991).

Commentary on William V. O'Brien's "Just War Doctrine's Complementary Role in the International Law of War"

by
William G. Eckhardt*

When I first read Professor O'Brien's work over ten years ago, I immediately noted an unusual blending of "just war" and "law." Not only were these two disciplines commingled, but Professor O'Brien used unique language of his own creation to continually remind the reader of their strange cohabitation.

In March of 1983 in a symposium on "The Role of Special Operations in US Strategy for the 1980s," Professor O'Brien delivered a paper entitled, "Special Operations in the 1980s: American Moral, Legal, Political, and Cultural Constraints."[1] For many years, Army War College students in their formal critiques have indicated that this paper is the most important article that they read while at the Army War College. Its thesis adds practicality to an appropriate integration of "just war theory" and "law."

The thesis of this 1983 paper is central to our discussion. Professor O'Brien stressed the linkage between political and cultural constraints and moral and legal terminology when he argued: ". . . it is clear that in a free society such as the United States, legal and moral issues, both real and spurious, are central to the successful conduct of war."[2] After discussing in the most practical of terms such matters as the nature of supported regimes, intervention, and war conduct, he went on to conclude: "The best rule simply stated: observe the highest practicable standard of just war and international law irrespective of the legal status of participants in or victims of the conflict. That is good morality and law, good policy and public relations."[3]

Army War College students restate and build upon these themes. To them, the Vietnam War demonstrated that the Clausewitzian center of gravity for a democracy is sustaining political support for the difficult decision to use force. When the government communicates with its people regarding the use of force, it necessarily does so in moral and legal language.[4] Such language and concepts come to us from an ancient just war tradition and from a respect for the wisdom of the rule of law. Not only do military officers in a democratic polity need to

understand and comply with legal, moral, and cultural constraints on the use of force, they must also internalize this moral and legal language so that they will be able to appropriately communicate with the citizens that they serve. Recent events have demonstrated in a powerful way the practicality of Professor O'Brien's theory.

Military operations involve planning, training and execution. More recently, they have begun to require justification. This phenomenon became discernible in the speech by President Reagan following the Libyan raid.[5] In every major operation since, uniformed officers have participated in televised public briefings reporting on current military operations. Indeed, our most talented "operators," because of their expertise and current knowledge, may well be required to become our public spokesmen. This prospect adds direction and urgency in the development of curricula for the education of senior officers. It also further reinforces Professor O'Brien's practical thesis.

The education of senior officers requires a theoretical, interdisciplinary approach. Stressing fundamental truths, underlining principles, and tracing the historic development of ideas are far more important than the teaching of current issues or rules. In this interdisciplinary approach, each discipline has its own unique contribution. Experience has taught me that an analysis of operational problems that combines just war theory, domestic and international law, history and management information insures sound public policy. The best example, in my judgment, of such writing can be found in Guenter Lewy's Book, *America in Vietnam*, in Chapter 7, "American Military Tactics and The Law of War."[6] This chapter is vital reading for military officers who wish to extract professional lessons from the Vietnam War. Such a rigorous, interdisciplinary, historical analysis seems to be at the heart of Professor O'Brien's plea.

In the paper before us, Professor O'Brien goes beyond an interdisciplinary approach to national security problems by advocating that just war theory "complements" international law. He thus seems to be moving beyond comingling to intermarriage. Historically, he notes that legal positivism displaced just war theory in the 19th and early 20th centuries. However, the "collapse of the positive international law of war in the total wars of World War I and II, the nuclear balance of terror, the multitude of revolutionary/counterinsurgency wars complicated by multiple interventions and counterinterventions, and the increase in terrorism"[7] has produced a need to "shore up" legal "weak points" with the disciplined, rigorous analysis required by the just war tradition.

Personally, I am both repulsed, attracted, and intrigued by this approach. The advantage of law is certainty, and many would argue that nebulous just war theory detracts from it. In our secular society, instinct tells us that one should be very careful not to let "religious ideas" intrude into the law. Will we selectively use just war theory only if the law is not on our side and we need to bolster our

argument? Simplistically, self-defense under the UN Charter is our only "just cause," so why talk about just war anymore?

Practical experience attracts me to Professor O'Brien's approach. I am persuaded by his comparison of the strong and weak points of just war tradition and international law. Practically, the integration he advocates of just war theory and law will occur in war-decision law where international law is at its weakest, or, in Professor O'Brien's words—"somewhat limited and rather mechanical."[8] He seeks to deal with the difficult decision to use armed force and to help us conduct ourselves so as to sustain support for that decision. As noted above, this is *the* Clausewitzian center of gravity in our democracy. His plea is to surmount a limited, mechanical, checklist, legalistic approach to decision making with a comprehensive, realistic analysis balancing means and consequences against probable outcomes.[9]

How does one practically achieve a more central role for just war tradition in shaping government policy on the use of force? Professor O'Brien's approach clearly requires more effective communication among the members of the Clausewitzian trinity—the people, the military and the government. The distinguished writer on military affairs, Colonel Harry G. Summers, has also noted that there is a requirement to engage the national will, to gain public support, and to obtain and sustain national and international consensus.[10]

These necessities seem to have been reflected in then-Secretary of Defense Caspar Weinberger's tests for going to war articulated in his November 1984 National Press Club address — "The Uses of Military Power" — which have become known as the Weinberger Doctrine.[11] Articulated at a time when there was a general disenchantment with the relevance of international law to foreign policy, Secretary Weinberger's text does not mention the United Nations, does not mention international law, and does not acknowledge any legal prohibition against the non-defensive use of force. When the law was in danger of fracturing and was not representing a working international consensus, Secretary Weinberger revived the just war tradition in an attempt to place intellectual "bench marks" for public discussion in a search of consensus.[12] Is not this approach similar to that proposed by Professor O'Brien? Our countrymen are not unprepared for such a debate. In the Gulf War debate, as noted recently by George Weigel in his portion of *Just War and the Gulf War*: "there has rarely been such a sustained (and in many respects, impressive) public grappling with the moral criteria and political logic of the just war tradition."[13] In the context of the "revived" respect for the United Nations Charter, is such a discussion not the plea of Professor O'Brien? The practical importance of our discussion cannot be overstated. Professor O'Brien's intermingling of just war tradition and international law is an important step toward a more rigorous, interdisciplinary approach to use of force issues.

Notes

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1. O'Brien, *Special Operations in the 1980s: American Moral, Legal, Political, and Cultural Constraints. Special Operations in US Strategy* 53-84 (Barnett, Tovar, and Shultz, eds. 1984).

2. *Id.* at 55-56.

3. *Id.* at 71.

4. *See* GOLD, EVASIONS: THE AMERICAN WAY OF MILITARY SERVICE 5-6 (1986); Philip Gold provides a succinct articulation of the usefulness of the just war tradition. The just war heritage, then, is far more than some philosophical tinker toy, designed for the amusement of pedants and obscurantists far removed from the battlefield. It is also more than a simple ethical checklist whose mechanical use guarantees either moral decision making or prudent policy. Rather, the just war heritage provides a conceptual framework within which the individual must evaluate his or her responses to armed conflict, and then communicate those responses to the larger society, and to society's agent, the State. And the just war heritage also provides the conceptual framework by which society and State must justify any recourse to arms, and the standard by which that recourse must be judged.

5. President's Address to the Nation, United States Air Strike Against Libya, 1986 Pub. Paper 499 (April 16, 1986); To make a practical teaching point, I often provide my students with a copy of this address and with the just war criteria requesting that they outline President Reagan's remarks from a just war point of view. This exercise underscores immediately the relevance of the just war study that follows.

6. LEWY, AMERICA IN VIETNAM 223-270 (1978).

7. O'Brien, *supra* at 181.

8. *Id.* at 191.

9. Philip Gold articulates the fallacies in thinking that international law is the answer for determining whether a country should go to war.

> . . . reasoning upholds a basic premise of contemporary international law: that nations may resort to arms only in individual or collective self-defense, and then only in response to a prior and clearly defined act of territorial aggression. In effect, this formulation . . . declares that response to physical invasion constitutes the only legitimate *casus belli*, adding to the implicit corollary that if everyone is forbidden to shoot first, no one will shoot at all.
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> On the surface, this seems an eminently logical piece of reductionism, and quite in keeping with allegedly traditional American values. First shot equals aggression; aggression equates to international crime; defense thus automatically acquires both legitimacy and limitation—the limitation of repelling the aggressor, but no more. All in all, a tidy little formulation in which the only relevant question becomes, 'Who started it?'
>
> . . . it ignores the existence of a continuum of conflict, especially the exceedingly complex twentieth century continuum. Few modern conflicts ever exhibit such an unambiguous character. 'Who started it?' is rarely as simple a question as 'Who fired first?' Further, most contemporary conflicts exhibit a 'mixed' character: part civil war, part ideological struggle, part international (or proxy) war. In such cases, the question of who fired first may prove not only irrelevant, but also impossible to determine.

See GOLD, EVASION: THE AMERICAN WAY OF MILITARY SERVICE 15-17 (1986).

10. SUMMERS, JR., ON STRATEGY II: A CRITICAL ANALYSIS OF THE GULF WAR 5-59 (1992); *See also*, SUMMERS, JR., ON STRATEGY: A CRITICAL ANALYSIS OF THE VIETNAM WAR 33-70 (1982).

11. WEINBERGER, FIGHTING FOR PEACE: SEVEN CRITICAL YEARS IN THE PENTAGON 433-445 (1990).

12. ECKHARDT, 'WE THE PEOPLE' GO TO *WAR IN THE RECOURSE TO WAR: AN APPRAISAL OF THE "WEINBERGER DOCTRINE"* 69-74 (Sabrosky and Siaone eds. 1988).

13. JOHNSON AND WEIGEL, JUST WAR AND THE GULF WAR 48-49 (1991).

Chapter VIII

Panel Discussion: The Just War Tradition

Alberto R. Coll, Chair

[After introducing the panelists, Prof. Coll yielded the floor to Prof. James Turner Johnson, who summarized the key points in his paper "Just War Tradition and Low-Intensity Conflict." Prof. Coll then introduced Fr. Francis X. Winters, who presented a critique/commentary on Prof. Johnson's paper.]

FATHER WINTERS: I want to emphasize the critical thrust of my paper, which I now feel more vigorously about because I believe that the themes that Jim defends in his paper represent a wide spectrum of opinion in the group today. In particular, I would like to register a certain vigorous uneasiness with what I took this morning to be the belief that political legitimacy is more or less identical with democracy. I realize this is a very wide spread opinion in America. I believe, although Jim doesn't say this in his paper, that his argument that the United States can use low-intensity conflict to remove dictators in other countries rests precisely on the supposition that we can judge what is dictatorship, tyranny or despotism in another country. That, in turn, rests on the supposition, I believe, that legitimacy and democracy are identical. My own reading of the just war tradition, which is not nearly so professionally profound as Jim's, is that this is certainly not true, at least at the highpoints of the just war tradition. It may be true of 98 percent of the authors who can be considered to be just war theorists.

I am wholly convinced that three of the greatest authors, St. Thomas Aquinas and his disciple, John of Paris in the thirteenth and early fourteenth centuries and Vitoria in the sixteenth century, clearly by the whole weight of their genius, resist the notion that any particular form of government is universally valid. About that I will say one thing. This historical moment, in which St. Thomas Aquinas taught, was the time when King Louis of France was resisting the pretensions of the Holy Roman Emperor to give and enforce the law in France. St. Thomas agreed with the King that virtue is, in fact, a function of culture. As St. Thomas said and later, curiously, Jefferson said in our own culture, what is virtuous in one State may be vicious in another, because politics is of the stuff of culture. If you concede that cultures are irreducible, then politics will, some say, be irreducible. Therefore, at the points in the tradition represented by St. Thomas Aquinas and his disciple John of Paris, and by Vitoria, who opposed the

dominion of Spain over its American colonies, it is clearly the case that just war doctrine insists that political legitimacy be culture specific. There are, of course, some things that would be unjust anywhere, but for the most part, political legitimacy is culture specific and, therefore, it is not possible to claim the existence of a universal standard of legitimacy that must be met before a regime is entitled to international respect for its sovereignty. I believe this is the position of these authors.

I would like to mention just two cases, with one of which I am very familiar. We all know about the other through reading the newspapers. The first is Operation Just Cause, which I think a lot of people here have problems with for one reason or another. I happened to be in Panama lecturing to the Southern Command leadership a little bit before the operation, actually, in 1986, so I have some feel for the area. Naturally, I followed the invasion with a certain amount of interest. Even after the event, I had some students who were Panamanians, so I kept asking them what was going on. They brought me a lot of papers presented in the Congress to the House Subcommittee on Western Hemisphere Affairs and I quote in my paper from a statement by Eva Loser who works for CSIS in Washington. She said that in the Panamanian press, there is general agreement that General Noriega had been replaced by general discontent. Just Cause looked like good conduct and as if it was effective, but now what's going on in Panama? Nothing is going on in Panama. I mention that because it is entirely possible that reform intervention, say intervention against dictators which, from our point of view looks quite sound, may not work out as well as we might expect. I would argue that's wholly explicable philosophically, and wholly predictable historically.

Let me mention the other case, which I am studying currently for a book. This is the case of the Kennedy Administration's removal of the government of South Vietnam in 1963. I have become very interested in this question, and have, in fact, interviewed all the survivors of the Kennedy Administration, with the exception of former Secretary of Defense Robert McNamara who didn't answer his mail and former Special Counsel to the President Theodore Sorensen who said no.

The United States' removal of the President of South Vietnam in 1963, was, and I have this on very good authority, micromanaged by President Kennedy from the beginning to the end. It was a classic case of reform intervention. Ngo Dinh Diem was removed precisely because he was a dictator. The Kennedy Administration was wholly persuaded that if it could only remove Diem, democracy would flourish. We moved, therefore, between August 24th when the first cable went out directing the embassy in Saigon to run a coup, and November 1st when it actually occurred. The United States Government had exceptionally comprehensive information, because Kennedy was himself determined to have the facts. Even in the face of very clear warnings that after Diem there would be chaos, we set out to reform the government of South Vietnam by decapitating it. What happened? Ngo Dinh Diem, as was predicted, was

replaced by a military junta which lasted 89 days. They were then replaced by another military junta that lasted about 18 months, which was replaced by Thieu and Ky. Reform never appeared.

Now, it is entirely possible that because I have been preoccupied with this fateful choice in American and Vietnamese history, I feel overly strong about the principle of sovereignty. I concede that. All I will say is that in this pivotal episode, the connection between the assumption that Americans know what is legitimate in another country and the move to reform the situation by decapitating the government, from which chaos ensued, may not be coincidental. If there is such a connection, then I think we should pause and ask ourselves whether we shouldn't take more seriously this old-fashioned principle of sovereignty, which insists that political legitimacy is culture specific, and therefore should not be judged from the outside by someone who simply happens to be powerful enough to overthrow a government.

PROF. COLL: Thank you, Father Winters.

Let me summarize some of the key points made by both panelists before we open up the floor.

Professor Johnson argues that the just war tradition is best seen as a historically received way of thinking about the problem of war. He views it as a tradition that is very closely connected to what Professor Terry Nardin would call "common morality," in the sense that it draws for its sustenance on attitudes among the general population as well as religion, international law, and military manuals. And, he sees these sources functioning as "carriers" that advance the tradition with varying degrees of vigor during successive stages of its development.

Professor Johnson cites the Shultz-Weinberger debate in the mid-1980s as an example of the liveliness and relevance of just war tradition to current policy deliberations. At this point, I must inject a personal observation, which is that in my years of teaching international law, I have found a degree of reluctance on the part of international lawyers to take seriously just war thinking. This reluctance stems from a sense that the tradition stands for a way of thinking that is no longer relevant or practical, that just war doctrine is caught in the musty cobwebs of medieval theology. But as Jim Johnson very usefully reminds us, the Shultz-Weinberger debate illustrates that just war tradition is alive because the questions raised by its criteria are very similar to the kinds of questions that at least most of us in the West ask whenever we engage in moral reasoning about war. Even when just war criteria are not formally invoked, the questions that are raised, the standards alluded to by both Shultz and Weinberger, correspond to those addressed by the just war tradition itself. It is also understandable that there will be differences between some of the emphases laid down by the tradition in its classical formulations, and some of its contemporary applications. This is a

natural product of the tradition's ability to absorb contemporary moral concerns and modes of argumentation. As an example of this, Professor Johnson cites among others, the question of defense. In his view, the just war tradition includes not only self-defense, but also very importantly, the notion of recovering something wrongly taken, and the principle of punishing the wrongdoer. I find that an important and very interesting observation and on a practical level, I would like to point to its relevance in justifying counter-terrorist policy.

When the United States carried out its military raid against Libya in 1986, it seemed to me that we went through tremendous contortions intellectually to justify it solely as a self-defense operation. And, whenever the question was raised as to whether this was only a self-defense operation, our international lawyers were most insistent that self-defense was a complete account of our motivations for the raid. Meanwhile, if you had asked most Americans what the goals of the operation were, they would have included self-defense and implicitly deterrence, but also they would have referred to punishment of wrongdoing. They would have said, "we bombed Qadhafi not only because we need to defend ourselves against him, and not only because we want to deter him from future acts, but also because it is morally sensible and legally reasonable to punish him for what he has done." The debate, of course, will continue for quite some time to center on the issue of how broadly we define the concept of defense.

Professor Johnson also focused on the question of moral authority and sovereignty. He was careful to define sovereignty in the light of the notion of right authority. Only those civil authorities with no formal superior could authorize the use of force to protect the community from domestic and foreign threats, to defend it from lawlessness and to promote the values of good social order. And the limits on that use of force sanctioned under right authority, were to be, as he puts it, practical politics and the power of others. From that, Professor Johnson deduces that in responding to low-intensity conflict, the authority to use force would extend even across transnational borders, and that in a sense, the same standards that apply to the use of force in general, should apply to resort to low-intensity conflict.

Professor Johnson discussed the traditional criteria for a just war. These requirements include the existence of a just cause, the presence of right intention and a condition of last resort. I think he quite properly avoided defining this latter category as the satisfaction of a formal requirement that all available remedies have in fact been exhausted. He opted instead for an assessment that there is nothing more to be gained from waiting. This was particularly relevant during the Gulf War. Terry Nardin and I have had many debates on this question. He and some of my colleagues on the Carnegie Council have argued that we should have given sanctions more time. My view, and I suspect Jim Johnson's, though if he disagrees, he may correct me on the spot, was that we really were not required by just war tradition or by moral reasoning, or moral reasonableness, to

wait until we had actually exhausted all of the remedies available. All that was necessary was a reasonable assessment of whether we, indeed, were in a situation of last resort; whether if we were to wait, Saddam Hussein would change his mind and withdraw from Kuwait.

Other criteria laid down by the just war tradition included the end of a peace that would promote social order, and the idea that force be used in accordance with the *jus in bello* and the canons of discrimination and proportionality.

There's another very important point to be made here because traditionally, people who hear the words "just war" often equate it with a notion of wars of religious fanaticism. Jim Johnson reminds us that even if a use of force is justified according to the *jus ad bellum*, in order for it to remain justified, the action must still observe the principles of discrimination and proportionality. Otherwise, what initially began as a justified use of force, can become an unjust war.

Professor Johnson raises the question of whether the work of international organizations to which States now give some authority to use force, places some limits on unilateralism. He suggests that indeed it does, but that these organizations also give States considerable discretion for intervention in two situations: when there is a specific security threat to the community or a member of it, and when extreme human rights violations have occurred. Just war tradition, he admits, is broader than international law in its allowance of the use of force. And in his view, international law, as was suggested by some of the earlier papers and comments, has become overly restrictive; a question that we need to debate.

On the practical question of the targeting of individuals, Professor Johnson reminded us that even though decapitation of individual terrorist leaders or heads of State involved in particular crimes of aggression, seems to accord with the logic of discrimination and proportionality, it also carries several important costs. It often involves the violation of international and even domestic law. It deprives the victim of the due process of law. It also runs counter to a strong tradition against regicide which has deep foundations in principles of social order. It looks too much like murder. It often involves means that are *mala in se*, and as he reminds us, war is not murder.

Father Winters, in his commentary, is extremely uneasy with what he sees to be one of the premises of Jim Johnson's paper, which is equating political legitimacy with democracy. But I think at the root of this unease there is an even more radical critique which Father Winters poses for Jim Johnson's thesis and for some of us here in this room. That is, as he puts it in rather blunt language, justice is culture specific. Justice is not a universal norm. There may be some general notions of justice, but at the policy level I hear him arguing that justice is very much circumstance dependent. That poses some very interesting questions across not only policy, but philosophical lines.

Father Winters discusses our interventions in Panama and South Vietnam to argue that United States' efforts to remake other regimes that fall short of our values, are dangerous, often downright counterproductive, and suggest a great degree of arrogance on our part. In some ways along the same lines that Terry Nardin earlier made a plea for international law, Father Winters makes a plea for that now somewhat discredited, old fashioned principle of sovereignty. He suggests that there is a core value to that principle of sovereignty, which is the protection and embodiment of the idea that justice ultimately is culture specific. By recognizing that value, sovereignty provides a link to reality which policymakers badly need. The weight given to sovereignty by international law, in this view, encourages a morally desirable degree of social order that is violated when we attempt to remake the world in accordance with western cultural ideals that we suppose to be universal.

There is a wealth of key issues that we need to raise here and I would like to open the floor now.

PROF. COLL: Professor Sarkesian.

PROF. SARKESIAN: I'm grappling here with the meaning of low-intensity or unconventional conflict. Does it include everything except conventional war? If it does, we need to flesh it out more fully to determine how international law would apply to it. I just wonder if international law is comprehensive enough to cover all aspects of every kind of war. I'm not sure that it is. Although I'm not an expert in international law, I suspect that it is still growing and has many gaps or areas that have been left unclear. I'm just wondering if some of these ill defined areas coincide with the critical elements of uncoventional conflict, that is, revolution, counterrevolution, and terrorism. This raises the possibility that attempts to adjudicate the conduct of low-intensity conflict would involve a legal free-for-all in contrast to the well established law of conventional war.

My second concern is whether just war doctrine is not driven by what we normally consider now as conventional war issues. That is, war between recognized political entities. I just wonder how relevant such a doctrine can be to revolution, counterrevolution and terrorism. It seems to me that's a problem that some of our own military had in looking at unconventional conflict through a conventional lens.

As a final aside, I'd like to observe that democracies tend to evolve chaotically so we need to be careful about looking for any one historical pattern in an attempt to make judgements about political legitimacy. But to recap, the issues I would really like to be addressed are the meaning of low-intensity conflict, whether international law is comprehensive enough to cover all of its manifestations, and the relevance of just war doctrine to unconventional conflict.

PROF. JOHNSON: Let me quote the 1985 definition of low-intensity conflict from my paper:

> Low-intensity conflict is a limited political and military struggle for achieving political, social, economic or psychological objectives. It is often protracted and ranges from diplomatic, economic, and psychosocial pressures through terrorism and insurgency. Low-intensity conflict is generally confined to a geographic area and is often characterized by constraints on the weaponry, tactics and the level of violence.

My position in the paper is that we're not talking about a phenomenon. We're talking about a range of phenomena and it is simply an accident of history that we are now confronted with it. These phenomena don't fit very well in the traditional categories as we have become accustomed to using them. So we have to ask ourselves how to apply those categories, or indeed, what other categories might apply.

On the question of whether international law is well-equipped to deal with low-intensity conflict, I have given a somewhat wooden picture of international law in my paper and, in fact, I personally tend to be much more optimistic about its flexibility, but international lawyers differ on this point.

As for the relevance of just war tradition to low-intensity conflict, by referring back to the "peace of God" movement and the original impetus that gave birth to the idea of right authority, I was trying to show that the genesis of the tradition was not concerned with fighting between sovereigns. The tradition really began to coalesce around the social problems caused by various disorderly elements that threatened medieval society. And so, I do think that there is something to be learned from reflecting on this tradition for low-intensity conflict. I think that the sorts of phenomena that we think of today as involving the potential for low-intensity conflict are, in fact, very much the same sorts of experiences that in the Middles Ages gave rise to what was then a rather inchoate set of traditions, which was crystallized by reflection in a coherent doctrine on just war.

FR. WINTERS: If I could respond to the second of those questions, whether just war tradition is relevant to revolutionary insurgency.

I think it's quite striking actually. I mean, before there was a fully developed theory of sovereignty in the just war tradition with St. Thomas Aquinas, there was a 500 year old tradition about revolution. The tradition about revolution within what then became the just war tradition originates at least as early as the eighth century. Now, that's important to the present discussion because many American debates about reform in other countries assume that we will have to provide the impetus for it. The just war tradition insists that reform is an indigenous capacity and an indigenous obligation. Therefore, the fact that we know there should be reform somewhere doesn't mean that America should

intervene to bring it about. It means that the first burden is on the people in the country to decide what's tyranny and to do something about it.

My own view is that much American discussion of reform intervention has a premise that is slightly condescending to other nations. Namely, they're not bright enough to know they're being tyrannized or if they're bright enough, they're not courageous enough to do something about it. So I think if the just war tradition has a relevance to revolution, it's that revolution is a universal right, and therefore, we shouldn't be inclined to leap into it immediately. We should allow other peoples to deal with tyranny as they see fit.

I just want to say one more thing. I also think that the just war tradition does not preclude us from assisting another government facing a revolution. I don't think it is explicit in the tradition anywhere but I think the tradition is wholly open to it. I think that the idea of being allowed to assist governments against insurrection is more a question of international law, but I think the just war tradition is at least open to it. I think my first point is more important though.

PROF. FARER: Three points. First on the question of whether international law covers low-intensity conflict and its range of phenomena. If law were only a collection of rules, it would make it easier to answer. If you see law as consisting of three kinds of materials (rules, principles and policies), then the situation is different. Even if a specific rule doesn't cover a problem, the broad principles do cover it, and the policies that infuse the rules and principles, certainly cover the issue. This makes it perhaps easier for reasonable people to disagree as to exactly what the appropriate legal result is of a case, but it doesn't leave gaps in the legal structure as such.

The second point has to do with what seems to have become the principal issue with sovereignty, which is low-intensity conflict and democracy. I'm not entirely sure how it relates to the general discussion that we're having. If it is a question of whether we should use low-intensity conflict strategies to overthrow tyrants, we can focus on that issue. Or we can decide if it is a question as to whether we overthrow tyrants by low-intensity tactics or high-intensity tactics, and that's another issue to be considered. I don't think that distinction was made by either speaker.

FR. WINTERS: Could I just answer that one. I meant, my response to Jim is that he does, as far as I can tell from the text, say that we should be allowed to turn to low-intenstiy conflict to remove dictators.

PROF. JOHNSON: Yes, that is my position.

FR. WINTERS: Now, to my mind that supposes, first of all, that you have a just claim for removing a dictator. This talk about doing it by low-intensity

conflict can't be resolved until you decide whether you have a right to do that. My claim is that there is no such right.

PROF. FARER: By low-intensity, meaning—

FR. WINTERS: By any meaning. It's wholly irrelevant unless you have a right to engage in reform intervention and I don't think there's such a right, or, if there is such a right, it's not in the just war tradition. At least, it's not in the parts of the just war tradition with which I'm familiar.

PROF. JOHNSON: What I actually said was this: first, I explicitly did not say that the only good governments are democratic governments. I think that by and large you find more of them that are, but generally I did not say that. What I said was you find good governments that satisfy the proper ends of politics, in a variety of forms, and you have to take that seriously. This means that you can actually conceive of a good government that is run by someone we might consider a very strong monarch. I'm not sure I'd go so far as to say a good government could ever be run by a dictator because the term "dictator" means something different to me.

Secondly, I said that in order for there to be justification of the use of force, there must have occurred an egregious violation or threat to the rights or security of people. That is the criterion I would use in making the decision about whether to move against a particular dictator or not. I do think that there is a right to do that. I don't think that we can use the argument about different conceptions of rights, justice and legitimacy to argue against the fact that there are a lot of things that you can get a very broad international consensus on. So, what I did was to say that where you've got that consensus and where you have some clearly egregious violations then there is justification.

PROF. COLL: But would you apply that to violations against peoples within sovereign boundaries?

PROF. JOHNSON: Yes.

PROF. COLL: Whereas Father Winters keeps insisting that sovereign borders should be inviolate.

FR. WINTERS: Yes, on the whole. I would say I'm very close to the position, I think it's Michael Walzer's, that borders are not absolute in every case. Genocide is certainly a case where sovereignty is being subverted, but I think there is, in the literature, a wide spectrum of views about when borders can legitimately be crossed to arrest human rights violations. I think the word "egregious" is

insufficiently clear and means different things to different people. Since I believe that borders have an extraordinarily important cultural and political significance, a powerful nation like the United States should be very clear in principle about what it means by an egregious violation of human rights. If we don't have such an understanding, our policy can mean anything to anybody. It can mean the fact that if you don't approve of this man who's apparently been dealing in drugs, it permits you to blow him away. I think that lack of clarity presents an enormous temptation for a nation with the power that we have. Intellectual clarity in advance of the crisis is indispensable as a protection for us and for them.

PROF. FARER: Could I just press both Jim and Francis on this one important point? You James, imagine that there could be reasonably attractive regimes that aren't pluralistic. I think you, Francis, say, well, perhaps there can be at least acceptable regimes that aren't pluralistic, they just have another cultural tradition. I would ask you both whether you think that's true today as opposed to for all of human history. Isn't it possible to argue that as a consequence of the penetration of market forces of capitalism into all corners of the globe and the liberal culture that goes with it, but doesn't always produce liberal governments, that the traditional sources of legitimacy which enable rulers to govern without extreme repression, have disintegrated? The traditional institutions which buffered populations against monarchs have also tended to disintegrate and, therefore, is it not probable that human rights, even the core rights plus pluralistic systems, are really the only alternative today for ruling with only moderate degrees of repression?

FR. WINTERS: I wouldn't think that. Take for example the claim that the present Chinese regime is unacceptable to us; that if it were smaller and less powerful, we would do something to change it. I think that's assuming a level of understanding on our part which is arrogant, in Alberto's phrase, because I don't think that it's changed that much.

PROF. JOHNSON: But that's very different from saying that it is a good regime. I should say Tom, you found me out. Because I do think of these possible good regimes mainly in historical terms.

PROF. COLL: George Weigel.

DR. WEIGEL: Frank, could I ask you to sharpen this just a bit. It seems to me you're right to warn us of the limits of American understanding and therefore, enjoin caution in recreating other peoples' societies. If I may say, I think the point would be even more effectively made if you counted the limited examples where we have done a pretty good job of recreation. Mainly post-war Germany and Japan.

FR. WINTERS: That's another story.

JUDGE SOFAER: They are clearly success stories. I think it is obviously true that cultural complexity is written in the descriptive history. Some of us would say by the author of history, beyond the history. But cultural complexity does not absolve us from making some important discriminating judgements at certain points. For example, Saddam Hussein may believe, for a combination of ideological, religious and practical reasons, that he has an obligation to acquire nuclear weapons. This may stem, not from lunacy, but from his own sense of justice and the obligations of leadership. It does not seem to me necessary to maintain that we have any obligation to accept his idiosyncratic view of justice at all. Moreover, I would say that in the case of Saddam Hussein in particular, his signature of the U.N. cease-fire agreement and subsequent violation of it suggest that he has made the decision to play ball on our legal and moral court. The problems of non-proliferation and its relationship to just war tradition is clearly going to be on the agenda sometime in the near future.

FR. WINTERS: About Saddam Hussein, I concede that he has signed, for whatever reason. I must say it's one of the most baffling things about Saddam Hussein, that is why he signed this treaty. But at any rate, he signed the treaty agreeing that these things would be dismantled. I tried to get off the theoretical hook by saying, Saddam Hussein agreed to this. We can do what has to be done militarily to make him live up to that.

What would we have done if we had found out without going to war with him that he was on the brink of acquiring nuclear weapons? I think it's an extraordinarily complex question because to do something about it involves use of a double standard, and I try to maintain in the paper that there's nothing in the just war tradition which would justify using a double standard in that case. Nevertheless, I think it would be wise for us to do something about it. How you would make a moral case for it, I would be the last person to know.

JUDGE SOFAER: The double standard being what, that we have nuclear weapons—

FR. WINTERS: We have nuclear weapons, they do not. I would have to go slowly with that. I mean, Israel has them and we're denying them to Iraq.

JUDGE SOFAER: You would surely admit that no sane person operating through the just war tradition would say that we have any moral justification to do something about the British nuclear submarine force.

FR. WINTER: No. I agree. I agree.

JUDGE SOFAER: Then can the only reason for that be that we also have nuclear weapons? We intuitively, morally—

FR. WINTERS: I understand, but that intuitive, moral sense gets us off the hook. I think if you want to look at this question from the point of view of philosophy, we have to look at the cases of Israel and Iraq. Now, I realize this may be extremely contentious, I'm sure it's contentious, but that's what I get paid for. I have no confidence, none whatsoever, that Israel will never use a nuclear weapon. I would have even less confidence that Saddam Hussein will not use his, but if I were morally certain that I could move against Saddam Hussein, I would feel compelled morally to say the same thing about Israel, which I'm not willing to say, and I don't know how to deal with that theoretically. Happily, it's not my field. But certainly as an intellectual conundrum, it's very substantial.

PROF. COLL: Professor Wakin.

PROF. WAKIN: Could I pursue this business of cultural specific justice just a little bit more? I'm just a little puzzled. When you say justice would demand that we leave Iraq alone if we leave Israel alone, from what culture are you speaking? You see the issue that I see? In order for you to say that, you must have in mind some sense of justice that goes beyond the culturally specific sense of justice. That's number one.

FR. WINTERS: What I'm thinking of is a very primitive sense of justice. That is to say, one thinks it unjust and one is fairly confident. If one tracks my publication record, one can see that this is not a new opinion for me. One will see a consistent and unambiguous expression of the position that any military use of nuclear weapons is wholly unacceptable morally. I was in that position when America was the only nuclear power and I still feel exactly the same way. Perhaps more strongly about Iraq and Israel. So I would say there is no moral justification for a policy that contemplates the use of nuclear weapons in military fashion for any nation and I think that that is one of the very few things that could be acknowledged by any culture.

PROF. WAKIN: That's a universal judgement, that's not culture specific.

FR. WINTERS: Yes. There are some universal judgements.

PROF. WAKIN: I would like to ask about some others.

FR. WINTERS: Okay.

PROF. WAKIN: For example, genocide.

FR. WINTERS: Same.

PROF. WAKIN: Slavery.

FR. WINTERS: It is not possible to say that a political form, as such, is universal. Now, when you talk about slavery, for, example, which is a very hard case, you're not simply talking about a political society. You're talking about the subjugation of one block of people to another. That's not only a question of politics. So when I talk about politics being culturally specific, I'm not talking about economics, which is the fundamental thing at work in slavery, I assume. I'm talking about ways of organizing society, the political interactions among people within boundaries. In that realm, I think that the possibilities of human invention are endless. I guess, I never thought about it this way but I think what I'm protesting against when we insist on this equation between democracy and legitimacy, is that it is fundamentally opposed to the notion of human liberty. I don't think it can be all poured into one form.

PROF. COLL: Professor Reisman.

PROF. REISMAN: This morning Fernando Teson expressed a view, I think, that was acceptable to everyone here. And that was that the notion of the use of force by a strong state like the United States simply to further national interests, this atomistic notion that it's good for us, therefore it's good, was unacceptable. This is known as normative realism. To avoid this stance, you must, in effect, have criteria which you believe transcend your own culture when you make judgements about what goes on in another culture, in another State. You need that. We've all tried to attach ourselves to this notion of universal norms.

Father Winters says that such standards are largely chimerical and that justice is situation specific. I'm quite sure that that was a correct statement when Aristotle said it, and I'm quite sure it was a correct statement when the missionaries came to the New World and undertook to win the souls of its indigenous population. I agree with Tom Farer, that the attempt to postulate universal norms today is not a manifestation of imperial arrogance. I don't think Father Winters is correct in saying that these matters are culture specific. I think the emergence of a global culture involves a vast process of homogenization. A common set of values is being imposed around the globe from the top down, admittedly very often against the will of peoples attached to their own traditions. I think that many of those values are expressed in a few documents, most of which unquestionably were

authored by Westerners. Some work. Some documents very probably were initiated by controlling factions in developing countries who wished to circumvent international pressures of domestic reform.

I submit to you that many of these core values do represent a code that is shared by a large part of the world. I think central among these core values is the notion that the individual is to be valued for himself and that people are equal in this respect. They're to be treated equally, and that they're not to be subjected to coercion in ways that violate due process. These ideas are spelled out with remarkable precision in the small group of documents that make universal moral claims. I'd like to drop a footnote here. There's no question that the application of these documents by various international commissions is subject to variation, but even allowing for various interpretations, the core values are not compromised. Now, I would submit to you that the Chinese people, certainly not the government, but all those who labor under its yoke and those who gathered at Tianamen would agree with us that beliefs about the dignity of the individual and his right to equality under law entail democracy. After all, democracy essentially is a system of government in which limits are placed on the coercive powers of the regime over its citizens in order to secure individual rights.

The consequence of accepting Father Winters' theory, which may be correct, is that we lose all possibility of making judgements other than through an ethnocentric lens and I think most of us know what this leads to. I submit to you that these values have indisputably become common articles of faith among peoples throughout the planet and this obliges us to honor their expectations of liberal treatment by intervening to help those suffering under despotism.

FR. WINTERS: If I can just respond to that. One specific case in which I must say I have to disagree with you is the Gulf War. My position was that it was a classically just war. And, that we had a right to go to the defense of Kuwait even though it was not democratic and had no aspiration ever to become democratic. I believe, moreover, that our government was extremely careful to say that we were defending the sovereignty of Kuwait; we did not claim to be intervening for the cause of democracy.

I believe that if you drift into the position of saying that the only legitimate government is a democratic government, you could not make a case for the Gulf War, and if you could not make a case for the Gulf War, you'd be making a case for the subjugation of an independent people. I think down that road there are some political and military impasses that we should be extremely careful to avoid.

PROF. COLL: Setting aside for a moment the equation of democracy with political legitimacy, would you concede that the Gulf War could still have been justified as a defense of the fundamental principle of respect for human life against the wanton disregard for it implicit in military conquest?

FR. WINTERS: Yes. That's what I'm saying.

PROF. COLL: Still, the invasion of Kuwait was an attack on these core values.

FR. WINTERS: But my point is not that it was the rights of individuals being threatened, it was the right of that people to be independent as a people. I don't want to reduce rights to individual rights, and I think that the fundamental difference in our debate here, is whether sovereignty is a human right.

The whole point of my thesis, and that of Walzer, and I think Terry Nardin, is the fundamental political human right of sovereignty. Some sovereign people will make individual rights their criterion. Other sovereign people won't, and they have a sovereign right to choose one or the other. I don't think we can legislate a particular understanding of the relationship between the individual and the State. Not only philosophically, but historically, this is a wholly utopian enterprise.

PROF. COLL: We have time for one last comment and I will turn to Judge Sofaer for his response.

JUDGE SOFAER: I thought you were claiming more than that in the following sense: even if you would regard us as agreed on basic moral objectives for the world at this point, you think that the act of intervening in order to satisfy our sense of justice can cause more moral damage than standing back just because we don't know what will ensue from that act. I tend to share that concern. I think the basic rules of international law are derived from historical wisdom. Rules about sovereignty and about territorial integrity are barriers that confront us and force us to make allowance for the fact that just because we think we know better, we may not be able to make things better. And even though I believe we do know better, I accept these practical limitations on our reforming spirit.

I greatly admire and appreciate the complex analysis of Professor O'Brien's just war valuations because they highlight the fact that even within an equitable system of law, one must cope with the issue of remedy. The creation of rules, even rules everyone accepts, does not necessarily mean that all violations, even if they are agreed to be violations, would be treated similarly. And I was very distressed when we walked away during the Gulf War from the statements of principle Jeane Kirkpatrick had made in 1981 concerning Israel's preemptive bombing of the Iraqi nuclear reactor at Osirak. You will remember that she condemned it because Israel had not exhausted the diplomatic means available to it prior to making the strike and she actually went on to equate it to the Soviet invasion of Afghanistan. It became impossible socially, politically, legally, morally, to defend any war on the position that everyone in the legal community had

taken for granted as being accurate, not just accurate morally. I mean, no one ever assumed that it was morally wrong for Israel to bomb the reactor. I certainly assumed that Iraq was preparing to manufacture a bomb that they might use against Israel, but I also thought it was a sound legal rule that we had stated in the U.N. And, I couldn't understand why we were walking away from it as though we had suddenly discovered after all, here is this evil man, and we didn't know all along that he would possibly use nuclear weapons against a country. I thought the answer from a technical point of view in Israel's case was that Saddam Hussein never withdrew his declaration of war, a fact that we didn't make much of at the time.

Beyond that issue there was the question of an appropriate remedy for Israel, in light of its surgical strike against that reactor, which was a discrete action clearly driven by concern for its own survival. The experience of handing down perhaps thousands of sentences as a judge in a district court convinced me that different cases involving violations of the same law must be decided according to their respective merits. You will act differently when an Eichmann is seized in Argentina than when someone else is seized there, but you don't necessarily want to change the rule about State sovereignty and territorial integrity because of that. We don't have an international law of remedies yet. I think we're on the way to it. Michael Reisman certainly has the kind of sensitive analysis that forces us to look for a remedy appropriately tailored to all the circumstances. I find myself very comfortable with the traditional rules, but I think that moral neutrality must necessarily accommodate our reactions to different circumstances. We're comfortable with that flexibility, especially with respect to the constraints placed upon the United States by the veto power in the Security Council. But there's no getting away from the fact that flexibility is the rightful prerogative of every State by virtue of the heterogenous nature of human existence.

PROF. COLL: Thank you.

We have had a discussion that has been so rich that I was hesitant to stop it, so we're running a little bit late, but I would like to ask Professor Johnson and Professor Winters if they have any concluding comments, and then we will take a short break before coming back to Bill O'Brien and Bill Eckardt.

PROF. JOHNSON: I'll just say one thing. I have really been delighted by this discussion about democracy which came at me totally unprepared. I had not anticipated that we would get into this. I didn't talk about it in my paper, and I sort of wondered why we were spending so much time on it. But, as I listened to all of you talking about it, a thought came to mind. These principles that I was discussing have developed over time under a great variety of political conditions. But I found myself asking what kind of political conditions in the

contemporary world would provide the necessary framework within which you could examine the relevance of these concerns, in an open and fair, and as far as possible, non-culture specific way. It seems to me that democracy is, in fact, the answer to that, and so maybe you all saw a wisdom in all of this that I, in writing my paper, didn't see.

FR. WINTERS: Just to put in a word, while I may give the impression of being neutral toward democracy, this is not the case, nor am I neutral toward American democracy. Those of you who travel a lot, and I think Tom was struck by this on his visit to Germany, know that what's happening here today is really quite distinctively American. I have spent a certain amount of time in France. What we're doing here could not happen in France. That the military, the clergy, theologians, lawyers, State Department and CIA should all find themselves in one room talking about the ethics of war, is really quite a unique and distinctive American phenomenon and I could not be more at home here.

PROF. COLL: Thank you, Father Winters.

We will take a short break and then come back. After the next paper and discussion, I will try to share with you, from my viewpoint, some of the key themes and questions that we need to continue to wrestle with. Thank you.

PROF. COLL: It's quite appropriate to resume our discussion by turning to William O'Brien's paper on Just War and I will turn the floor over to him now.

PROF. O'BRIEN: Thank you, Alberto.

My assignment was to talk about the relation of the modern just war doctrine to international law. In effect, it serves as kind of a bridge between people primarily acquainted with international law and those primarily focused on just war. It's a relation that's not that difficult to discuss today, but several years ago it would have been. It seems to me that in the last, roughly 10 to 15 years, interest in just war doctrine has increased markedly in the United States Government, and particularly in the military. Several of us, like Jim Johnson, Father Winters and myself have lectured here and at the Army War College. I was gratified to discover when I lectured at West Point several years ago, that every single student in a required ethics course in second year was reading Michael Walzer. So I think it's not surprising that you see over the years an increased use of language both from international law and from just war in the policy justifications that are made by the United States Government. Now, you don't have to agree with the policies, but I think we've made a lot of progress, at least in my lifetime. I don't remember all this concern with proportion and discrimination in World War II. Certainly not. It was more of a holy war attitude that we were right to use

overwhelming force. As Jim Johnson brought out in detail in his paper and then mentioned in his oral presentation, the particularly interesting dialogue between Secretaries Weinberger and Shultz several years ago, showed elements of just war thinking, although it was not expressly acknowledged in their statements. I haven't seen the final version of the report on the Persian Gulf conflict, which I gather is not out yet, but certainly the draft that came out last summer has a lot of language taken from international law terms and just war. So, I think it's an indisputable fact that we have made considerable progress in encouraging sophisticated normative analysis in the statements and justifications for U.S. defense and security policy.

I see the role of just war doctrine to be threefold. First, to provide a framework for moral analysis of security issues. Second, to complement the international law, not to replace it but to complement it, providing guidelines for policy when appropriate. Third, to complement international law in forming justifications for the policies once they are put into effect.

Now, I will probably disappoint some of our international lawyers because I have to give a somewhat pessimistic analysis of the state of international law relative to recourse to force. I am not as pessimistic about the law governing conduct in war. In the post-Vatican II spirit of trying to move from Latin to the vernacular, I tend to use the terms war decision law and war conduct law, rather than use *jus ad bellum* and *jus in bello.*

I think that the war decision law of international law has some problems. In the first place, I don't see any real prospect for a new world order. I think that the Security Council mandated action in the Gulf under Article 42 was unique, maybe the last one we will ever have of its kind. The circumstances that made it possible were extraordinary. Accordingly, everything falls back on Article 51, the interpretations of self-defense. As was already alluded to several times this morning, there are differing views of what constitutes self-defense. Some of them are very strict, amounting to little more than on-the-spot defense against immediate armed attack. That is a view held by a lot of very distinguished international lawyers, including many European and South American practitioners. I think they are very unrealistic. A lot of the texts that I have read, even ones written after 1945, are literal treatments of the Charter, and I think we have had quite a few years of experience since then to appreciate the advantages of the Myres McDougal idea of practice and expectations, and not just look at what the Charter provides. In any event, I would argue for a fairly broad interpretation of "self-defense" to relate to the various challenges that we happen to have experienced around the world since 1945.

Now, where the just war tradition comes in, I think, is as follows. Those who would not favor a narrow, but rather a broader understanding of self-defense, will often use words as McDougal does, such as "reasonable," very much like the concept of reasonableness in domestic tort law. Well, I think a just war

doctrine gives us an analytic format for making judgements about proportionality and reasonableness that can be very useful.

Finally, on the state of war decision law, I would like to repeat an observation that has occurred in a number of journals and books over the last few years, including Alberto Coll's article some years ago in the *Harvard Journal of International Law*. There are many assumptions underlying the uncompromising purity of war decision law in the United Nations Charter. One is that specific settlement of disputes, with so-called better peace machinery, will be much easier and disputants won't need to go to war. Well, if you look around the world, you'd see a lot of intractable conflicts that are not amenable in the near term, to specific settlement.

Secondly, of course, was the assumption that there would be a collective security capability that would greatly remove the need for self-defense. With the rare exception of the recent Gulf action, that hasn't developed at all.

Thirdly, I read into the Charter a priority for war avoidance over everything else, which is very understandable thinking in terms of 1945. But I think you see around the world an awful lot of people for whom war avoidance is not the highest priority. Justice is the highest priority. And justice is defined in terms of whatever ideological or ethnic agenda is at stake. So, there are a lot of people out there who are willing to employ armed coercion in some form or another.

And finally, I want to agree with the point made in the last discussion, that quite naturally, the model for war we have in the United Nations Charter is mainly international conventional war. To answer Sam Sarkesian's question, I don't think that the understanding of the Charter provisions originally had anything much to do with the kind of sub-conventional warfare which is apparently the main problem we have in the present situation.

Now, there's a second component though, to the war decision law. In addition to the law with respect to recourse to armed force, there's a law having to do with intervention. We have been around the circle several times and I'm not going to belabor it too much. I would just say that the principle of nonintervention is universally acclaimed and universally violated. Everybody, but everybody, believes in just intervention, my just intervention. Yours is bad intervention, but mine is good, whether it be pro-democractic, pro-communist, pro-Islamic, pro-this or pro-that. So you have quite a tension it seems to me, between this ironclad principle of non-intervention and once again, the practice and expectation not only of States but of the various other non-State political actors.

In these circumstances then, I think that the war decision component of international law badly needs some kind of reinforcement or supplement in the form of analysis of reasonable interpretations and I think just war can provide that help. Now, I realize that I was subjected to a preemptive first strike this morning by Terry Nardin, who would probably have canceled the whole afternoon on the grounds that this is undercutting respect for international law.

But I do think that international law would benefit from what I'm calling the complementary application of just war doctrine.

Now, in attempting this complementary application I assumed that the United States role in using armed coercion could take two forms. It might be some kind of collective self-defense, with the exception, perhaps, of the complicated debate about the international drug traffic where you could also argue that we would be acting in immediate self-defense. Alternatively, our role might involve some kind of what I would call reasonable intervention. Justifying that role requires that we find some criteria for determining reasonableness. I'll just go quickly then to the just war doctrine categories and comment on their relevance in determining what is acceptable collective self-defense and what is acceptable reasonable intervention.

First of all, there is the problem of competent authority within the United States. I won't go through the whole debate about the Executive versus Congress and the War Powers Act and all the rest of it. You're familiar with that, but it's a continuing issue. There is also the question of the competent authority of regimes that we may be helping in cases of counterinsurgency. I think that problem would take a lot more time than I have this afternoon, because it is very unusual to have to give counterinsurgency interventionary assistance to States like Denmark. Most of the States that you're going to intervene in are a mess, and have been that way for a long time. The addition of an insurgency to their enduring problems means that to expect them to get high marks from Amnesty International and Freedom House is perhaps unrealistic. Was the regime in Saigon competent enough? Well, these are judgment calls and I just flag that as an issue.

Secondly, we need to examine what the substance of a just cause might be. Let's look at what just causes are out there. I think self-defense, individual and collective, is clearly one, but then you'd have to decide what that means. We've had some references to humanitarian intervention in our discussion today, and I'm a pessimist about it because of what some of the best minds, like Michael Reisman, and his predecessor Myres McDougal have written about it. This is the one point I was so excited about that I decided I'd turn out an article too, but then I discovered a nasty fact. I couldn't find any examples of it. You all were talking about whether or not we should intervene to help somebody who's a victim of oppression, but nobody wants to go and help the victims of oppression. There was no intervention in Uganda until finally its neighbors were fed up with the mess and went in for their own reasons. Walzer wants us to believe that Mr. Ghandi liberated Bangladesh because of the goodness of his soul and his desire to help the people in Bangladesh. I don't believe that for a minute. I think it was Indian power politics. But you see, you've got to picture a national leader saying, we're going into Ruritania. Now, we don't have any real interest in Ruritania, but we're going to go in there and save the Ruritanians from their own

government. That's going to be a very hard sell, I think, including in the United States.

And then there's another claimant for the status of just cause and this gets to one of Sam Sarkesian's questions; the status of just revolution. Well, here I have to disagree entirely with Father Winters. I don't think there's a serious book in existence of contemporary just war doctrine on just revolution. If there is, I'd like to see it. There are a lot of reasons for that. One of them is that at least in the Catholic tradition, for a long, long time, revolution meant two things: French Revolution and Russian Revolution. They were bad for the church and bad for the people. So, in Catholic social ethics, for a long time the textbooks all said avoid it, avoid it, find some nonviolent means and the most extreme application of that, I'm sorry to say, was in Ireland where the clergy consistently opposed revolution. So, I think there's a whole new field for a study in two parts. On the one hand about just revolution, which would be relevant to our situation if we were to be assisting revolutionaries as we were with the Contras. Alternatively, in the case of counterinsurgency, how one makes a judgment call as to whether it's just to intervene against somebody else's revolution.

Briefly, the issue of comparative justice, which is part of the just war analysis, presents the same problem that we have with competent authority. We saw this recently in the Gulf. Kuwait is not a Jeffersonian democracy, but it's better than Iraq. That's about the best you can say. You're not going to get a lot of clear cut cases like the comparative justice of the NATO nations and the Warsaw Pact nations. This was an easy one, but most of your potential interventions, I'm afraid, will have to be made in very muddy circumstances.

The core of the just war decision is the calculus of proportion which balances the means required against the probability of success. Here you see, I think that there are resources in just war doctrine that international law simply can't muster because it is mechanical. It says go, no go. The calculus of proportion is an extraordinarily comprehensive, challenging, difficult exercise which requires that one attempt to assess all of the ramifications of what's likely to happen. It requires a great deal of speculation. Think back to the fall of 1990. I don't know about you, but I didn't meet anybody who had a clear understanding of what we should do in the Gulf, because the intangibles were just floating in every direction. How would the balance of power be affected? What was going to be the result in the Islamic world? How would the American people react? It went on and on and on. I have a great respect for the policymakers who survived that period while making very difficult judgements, which I happened to agree with. Whatever position you took, whether with the administration or with somebody like Senator Nunn, the Gulf War demonstrated that the calculus of proportion is an enormously difficult undertaking and I think that just war doctrine can help us to think through it.

Finally, the criteria of right intention particularly involves sticking to the just cause and not trying to add to it and then take advantage of it. That might be a problem in the kind of low-intensity conflict that we're talking about.

Overall then, I would say that the war decision component of international law is rather fair, as you'd expect it could be, but not sufficiently flexible to deal with many different kinds of situations, particularly those that are below the level of conventional international war. I want to emphasize that I'm not suggesting that we should rely on just war doctrine because it allows us more latitude in justifying our policies. I would argue that in many respects, it might be more difficult. There might be situations where we could legally justify recourse to armed force, but after looking at the total calculus of proportion, would decide no, this is not a prudent thing to do.

I won't go into detail on war conduct law with respect to proportionality and discrimination, except to make one point. The war conduct law requirements of just war doctrine are more demanding than international law for this reason. In international law we distinguish sharply between the war decision law and the war conduct law. We say everybody has to behave themselves according to war conduct law, irrespective of the justice of the cause, which is a good policy. Just war doctrine asks that assessments of proportionality be made, not only at the strategic and the tactical level, but also at the grand strategic level. So one would consider military practices such as search and destroy in Vietnam, which might be perfectly justifiable in terms of military operational necessity, and perhaps conclude that they were counterproductive to our larger ends.

Now, I'd like to take a look at a couple of issues that were raised in the mandate I was given, and consider how just war thought might be applied to them. One issue that was raised is that of deception. I regret that I didn't have time to go back as Father Winters did into the classics of just war doctrine, because I think I might have found something there about deception. But, I took an easy way out and I found what I thought was pretty good material from international law which I could use to substitute in this case for just war doctrine. There is some relevant guidance on deception and I have it in my paper. Army Field Manual 27-10 of 1956 cites the Hague Rules of 1907, Convention IV, in Article 23 (f), "It is especially forbidden to make improper use of a flag of truce, of the national flag, or of the military insignia and uniform of the enemy as well as distinctive badges of the Geneva Convention." The Hague Rules in Article 24 also provide, "Ruses of war and the employment of measures necessary for obtaining information about the enemy and the country, are considered permissible." The meaning of Article 23, I think, is clear. But the Army's interpretation of Article 24 is more complex. A distinction is made between good faith and treachery or perfidy. Now, you understand we're talking about war and relations between enemies. In the case of counter-narcotics operations, you would be dealing with criminals. It is conceded that the line between the two is "indistinct." FM 27-10

observes that, "It would be improper practice to secure advantage of the enemy by deliberate lying or misleading conduct which involves a breach of faith, or when there is a moral obligation to speak the truth." Examples given are "to feign surrender so as to secure an advantage over the opposing belligerent" and "to broadcast to the enemy that an armistice had been agreed upon when such is not the case." These are "treacherous" acts.

The discussion in 27-10 condones all manner of spying and subversion of enemy forces. To the two examples of perfidy or treachery could be added such possibilities in low-intensity conflict as luring enemies to parley with assurances of security and then capturing or killing them, or, more broadly, promising amnesty to those who surrendered their arms and then imprisoning them or killing them.

In conclusion, I would consider FM 27-10's treatment of deception in war conduct law to be acceptable to just war doctrine, having noted that the subject has apparently not elicited treatment in the major contemporary just war texts. For all I know, there may be all sorts of things in the older, classic literature.

As for assassination, which was discussed a number of times today, I share many of Jim Johnson's misgivings about it. I would want to limit it to a wartime situation or something equivalent to it and limit its target to people who had a strong military identification. Often, a dictator will in fact be a commander of the armed forces. I think if his titles were only nominal, I would be more worried about it. I think an acceptable example, which is very controversial, would be the Israeli assassination of Abu Jihad in 1988. This man was a principal organizer of terrorist attacks, including mass attacks, in 1978 near Tel Aviv. I think you could in a very real sense say that in the war waged by the PLO against Israel, he was an active military commander and a legitimate military target.

The question of counterterror has also been mentioned a number of times, particularly with respect to the raid on Libya. Now it happens I just have a book out which I would like to plug, called *Law and Morality in Israel's War with the PLO*, the result of ten years of arduous work including the very unpleasant experience of reading all the Security Council debates on Israeli reprisal actions. I come away from that work with some strong feelings on the question of counterterror. I'll outline the essence of my argument very briefly. If one insists on a narrow reading of self-defense, which is what the Security Council did over and over and over again, that means only that a policeman or soldier can be stationed every place where somebody might commit a terrorist attack. That's not very practical. There is no way by passive defense that a State can defend itself against terrorism. So the Israelis very early on got the idea of what I call a preventive attrition approach; after spotting a pattern of terrorism, they would attack its sources. They don't wait for the terrorists to show up because they have no idea when they will strike. So the Israelis attack the terrorists where they live, in Jordan or Lebanon. Of course, this raises the question of sovereignty. I would

argue that both in international law and in just war doctrine, the State that consistently permits itself to be a sanctuary and a launching pad for terrorists, is inviting the kind of retaliatory raids that the Israelis have carried out. I guess I'm practically the only non-Israeli who agrees with the Israeli position that all the "law" is on the other side in the Security Council. It's very interesting the United States, which contributed a great deal of that law earlier on, began to back away from it, and then in 1986, used exactly the same argument that the Israelis had always used when we bombed Qaddafi's terrorist base in Libya. We argued that we could only counter a pattern of continuing terrorism by striking at its source.

This leads me to conclusions that I think are probably fairly controversial. First, as the Israeli and U.S. governments now agree, self-defense against terrorism legitimately includes deterrent attacks. And second, as we concluded after the Libyan raid, self-defense extends to protecting one's nationals abroad against terrorism, which legitimately involves attacking its sources.

I tried to stay away from discussing the drug trade as long as I could, but I was asked to say something about it so I have reluctantly entered the drug battle. First of all, it seems to me there is a problem in equating the international drug trade with armed aggression. I think it's going to take a great deal of thinking through because unless it is really the equivalent of armed aggression, just war doctrine and the international law of war won't have much bearing on it, undesirable and tragic as it is.

Secondly, it struck me when thinking about it, and this is particularly relevant because of recent developments in Peru, these disciplines could come to bear more directly on the drug trade if it was intertwined with some kind of armed activity or coercion. Jim Johnson discussed that in his paper. In other words, if the Shining Path people in Peru are, at one and the same time, insurgents and major sources of the international drug trade, intervention against them, which I don't particularly recommend by the way, might be seen as a legitimate combination of counterinsurgency and counternarcotics operations.

With respect to what I call the commercial drug traffic, deadly as it is, having no particular color, much less relation, to organized conflict, I just don't see that it's appropriate to use military force against it and I have the impression that a lot of people in the military are far from enthusiastic about the idea of getting involved in the drug war.

My conclusions are the following. First of all, it seems to me that a good deal of contemporary positive international law on the recourse to armed force and on intervention is mechanical, incomplete and simply not sufficient to deal with the kinds of conflicts that are out there.

Secondly, I think that the war conduct law is in better shape. It's closely aligned with just war doctrine, and I simply think that just war doctrine can contribute further to the definition of so-called reasonableness in working out the issues of discrimination and proportion.

Thirdly, getting to the issue again that Sam Sarkesian raised, it's quite clear that there isn't a big literature on the relevance of just war doctrine to the kinds of subjects that we've been dealing with. But I do believe, with Jim Johnson, that just war doctrine is a growing, developing thing that has all sorts of potential and, if we put our minds to it, we may find the resources within just war doctrine to take on new problems.

One other point. I think it's important to emphasize that the respect for international law in areas having to do with conflict is mainly generated within the values of a State. It does not depend upon reciprocity. In the old days, we used to try to teach the troops, act as you would want to be acted against. Forget it. Ask the people who were prisoners-of-war in Korea. Ask the people who were prisoners-of-war in Vietnam. We didn't mistreat communist prisoners-of-war because they were torturing and mistreating ours. The reason Americans obey the laws of war is because we're Americans and we have a value system that says we will fight properly. We don't always live up to it, but I think that is our tradition.

Finally, I want to emphasize that the other part of the sanction impelling us to respect these codes is what you might call both individual and social conscience. Of course you can cheat on just war doctrine. You can cheat on any kind of ethical system if you want to, but if you're serious about trying to do the right thing, then the sanction of your own conscience is what keeps you from manipulating and being hypocritical. My belief is that, more often than not in recent times, the United States has been conscientious and I think that we should be happy about the increased influence of just war doctrine in U.S. policy.

Thank you.

PROF. COLL: Thank you, Professor O'Brien.

Now we will hear from Bill Eckardt from the U.S. Army War College.

PROF. ECKARDT: Some ten years ago when I first began to read Professor O'Brien's writings, I scratched my head at his co-mingling of just war and law, and his strange terminology. He gave a paper at a similar conference in 1983 on special operations in which, he discussed the nature of the legal and moral debate we have in our society when we attempt to gain a consensus about going to war. That very practical paper, my students have consistently told me, is the most important article they read while they're at the Army War College. During this same time, there was a great reconsideration of lessons learned from the Vietnam War. The key conclusion of that reevaluation was that in a democracy the task of sustaining support for the decision to use force is an area of vulnerability comparable to a Clausewitzian center of gravity. Those two ideas combined in the minds of my students and I think I will show in just a minute, how practical an effect they had.

The third step in what I perceive to be a rather long trail, is the one that you have in front of you today, in which Professor O'Brien suggests a supplementation of international law with just war tradition.

My students felt quite strongly that they not only had to learn the terminology of these two disciplines, but learn of their traditions and benchmarks, and internalize them because they, in fact, would be called upon to explain and justify what they did, and that is precisely what happened. There began to be another aspect of operations. One not only must plan, train for and execute a military operation; it appears that now one must justify, or perhaps a better verb is explain, what one has done. From the time when President Reagan defended that particular bombing raid on Libya, military officers have stood before the cameras and have had to justify or explain what has transpired.

I think that Professor O'Brien seeks more than the commingling of two disciplines. What he is after is a rigorous interdisciplinary approach to policy-making when it involves the use of force. I would add to just war theory and domestic and international law; history in large doses, especially history of the profession of arms, and certain management information. An example of what I consider to be classic writing of this kind is Gunther Lewy's, *America in Vietnam.* Chapter seven, entitled, "American Military Tactics and the Law of War," is absolutely must reading for any military officer for thinking about Vietnam.

Concerning the paper Professor O'Brien has presented today, I must admit that I am repulsed, attracted and intrigued by his approach. The advantage of the law to me is certainty. Many would argue that nebulous just war theory not only does not add certainty, it detracts from it. In our secularly-trained society, instinct tells us that one should be very careful not to let religious ideas, if you will, intrude into the law. Will we selectively use just war theory only if the law is not on our side and we need to bolster our argument? My memory is that when President Reagan discussed the raid on Libya, the speech was long on just war, and very short on the law. Simplistically, self-defense under the United Nations Charter is our only just cause. So why talk about just war anymore? Well, I think there are some practical reasons we do this. As I intimated at the beginning of my remarks, it is this discussion, this practical reaching of consensus, that is key. I would say that what Professor O'Brien seeks is the linking of the Clausewitzian trinity of the people, the military, and the government in an effective union that can only be done in a democracy through intelligent debate.

In closing, it seemed to me that the Weinberger Doctrine of 1984 reflects this process. That particular doctrine, which purportedly is our public debate on using force and going to war, does not mention the United Nations. If does not mention international law. Does not even acknowledge any legal prohibition against the non-defensive use of force. It came at a period of time when there was a general disenchantment with the relevance of international law to foreign policy; when one side appeared to thumb its nose at the law. It seems to me that

Secretary Weinberger sought out crucial benchmarks in reaching a consensus on taking the American people to war. When he did that, he drew on the just war tradition, and wanted an informed debate to gain consensus. I think that's what Professor O'Brien really seeks.

PROF. COLL: Thank you Professor Eckardt.

Let me try to hit at some of the key points made by the presentations that do not overlap significantly with points made earlier, and I will limit myself so that we can go on to the general discussion.

Bill O'Brien's first thesis is that the war decision component of international law is excessively rigid, and morally and politically inadequate to deal with the difficult issues at hand. And that first proposition is one that I hope Michael Reisman, Tom Farer and Terry Nardin will feel free to challenge rather vigorously.

The second proposition Professor O'Brien offers us is that just war tradition provides a useful and coherent moral analysis of security issues. In the process of doing so, it also complements international law because, in his view, just war tradition helps us to arrive at criteria of reasonableness through which we can then work to define what kinds of intervention and what kinds of use of force are reasonable, given the particular context that we may face. He recognizes, as all of us do in this room, that each peculiar use of force, each peculiar intervention is, as the adjective suggests, fraught with unique circumstances. And, therefore, the problem becomes one of applying the standards to those circumstances, and in that process, the word "reasonableness, " or in the words of the New Haven school, the question of "appropriate contexts and responses" becomes highly relevant. So in his view, the just war tradition provides means by which we can wrestle with standards of reasonableness.

Professor O'Brien is clearly pessimistic about the future of the war decision dimensions of international law, although he is at least mildly hopeful about international war conduct law. He also cites the problem of intervention as a further example of the limitations of international law in helping policymakers to determine when is it appropriate to use force and how. He's pessimistic about the prospects for a new world order. The security mandate against Iraq was a unique phenomenon, he argues, so the prospects for collective security are really no better today than they were three years ago, and he makes that case rather strongly.

Taking his discussion very specifically to the area of low-intensity conflict, Professor O'Brien raises several caveats that I think are useful for us to ponder. First of all, he points out that in any low-intensity conflict, definitions of competent authority will always be highly problematic because, as he said, we don't wage low-intensity conflicts in countries like Denmark. We only need to intervene in situations where legitimacy itself is at stake and is therefore

problematic. Secondly, the question of just revolution to which Father Winters' paper alluded, and to which our earlier discussion brought us, is also highly problematic. In Professor O'Brien's view, low-intensity conflicts that involve claims of just revolution will be exceedingly difficult even for the just war tradition, to analyze coherently. Thirdly, we must beware, at least as I understand Professor O'Brien, of resorting to the humanitarian intervention justification in low-intensity conflicts, because, in his view, there is no genuine humanitarian intervention anywhere in the world. A proposition that some of you may feel free to challenge. Fourthly, he warns us to keep in mind that assessing the relative merits, the comparative justice of regimes involved in low-intensity conflicts, necessarily involves making difficult judgements. A fifth warning Professor O'Brien gives us has to do with the calculus of proportionality. He suggests that just war doctrine can help us, not only in low-intensity conflicts, but also in conventional conflicts, in determining the calculus of proportionality with a greater degree of nuance than international law can do.

In conclusion, as he puts it, international law is highly limited. He provides very specific examples for this view from the area of counterterrorist operations. In his view, international law as reflected in U.N. Security Council resolutions dealing with various Israeli counterterrorist operations, is inadequate to address the moral and policy dilemmas faced by the Israeli State, and he suggests that our reading of the provisions made by the Charter for self-defense needs to be broadened. This harkens back to an earlier point in our discussion. Our interpretation needs to be broadened to include not only deterrence, but also situations in which our nationals are attacked outside of our own territory. I think that one legitimate question that needs to be raised is how broad a definition of self-defense we can really justify.

Professor O'Brien warns us against over-commitment or even significant military commitment in the drug wars. In that sense, he is suggesting that perhaps our involvement in these drug wars should not be properly classified as low-intensity conflict, but more as law enforcement, although he agrees that in some cases in which the drug trade is tied to significant use of armed force by organized groups such as insurgents, it begins to resemble low-intensity conflict.

Professor Eckardt gave a rather strong endorsement of Professor O'Brien's points. He reminded us that one of the important things about the just war tradition is, as Jim Johnson told us earlier, that its thought reflects forms of what Terry Nardin would call common morality. For a democracy, resort to force either in the form of low-intensity conflict or otherwise, has to be rooted in those notions of common morality if it is to yield the kind of public support requisite to success, if it is to be part of that Clausewitzian trinity of the army, the government and the people.

I want to close here by raising some uncomfortable questions for both Professor O'Brien and Professor Eckardt. The first problem alluded to by

Professor O'Brien himself, and also by Professor Eckardt, is the potential for just war doctrine to be used casuistically. To what extent is there a danger of just war doctrine becoming simply an instrument by which we justify that which those in power wish to do? That is, of course, a danger present also for international lawyers. But given Professor Eckardt's recognition that law has the advantage of a greater degree of certainty, that it has certain more easily recognizable signposts, and that just war doctrine is indeed, quite flexible, how do we guard against the danger of just war doctrine simply becoming part of a rather mechanical process for justifying that which our government does?

Secondly, when Professor O'Brien tells us that ultimately respect for international law does not depend on reciprocity, but on our domestic moral values, I do believe he has an important point to make. But is he overstating his case? And so I want to raise the question for you: what is the role of reciprocity? Admittedly much of the reason we behave lawfully is rooted in our own domestic moral and legal values. But is there a place for reciprocity? Bill O'Brien suggests that there isn't. Do we really accept that?

And then thirdly, I would like to hear from our legal practitioners, people such as Admiral Harlow, Admiral Robertson, Jack McNeil, Michael Reisman and Tom Farer, whether Bill O'Brien's case against international law is either fair or gives us a full account. I would in particular also invite the comments of Judge Sofaer from the viewpoint of his experience as Legal Counsel to the Department of State. More generally, to what extent can you, in your various positions of responsibility, see the usefulness or the coherence of just war tradition for the kinds of policy challenges that you face?

PROF. O'BRIEN: Can we start with question number one?

I've already acknowledged that there is a potential for misuse and for hypocrisy in applying just war doctrine. It seems to me though, if it is done seriously, not only as a matter of conscience, but as a matter of prudence, it can be of great value. You could take all the normative elements out of the process altogether. I've always thought just war doctrine would be a good standard format for a policymaker to sit down with and figure out what we are trying to do, what we are doing it with, what are the probable consequences, what are the chances of success and what are their ramifications that we can't entirely foresee? I've always thought it a very common sense sort of thing. So once again, you really can't, in the end, cheat on your own conscience and your own professional judgement. I think in this kind of business there's not very much room for kidding yourself.

One of the things that strikes me very much about just war doctrine is the critical business of the probability of success. I didn't speak at length about that, but one of the aspects I emphasize is that it must be done repeatedly. You review every day, maybe every hour, what's going on, and at some point you may say, well, this seemed like a good idea. It seemed to be possible, but now it's going

wrong and maybe we better figure a way to get out. But if you really take that seriously, I don't think that you're likely to misuse just war doctrine.

PROF. ECKARDT: May I comment on the second question about reciprocity?

It seems to me that the view expressed by my students is a corollary of Professor O'Brien's thesis. We obey the rules because if we don't, we lose the support of our people and we lose the war. If My Lai didn't teach us anything else, it taught us the consequences of indiscipline on the battlefield. One uses this particular concept in going to war to get consensus and also to maintain it, as Professor O'Brien advocated in that '83 article, by following the high standards of just war and international law. That seems to me to be very important.

PROF. COLL: Let me turn to the floor here. Professor Farer.

PROF. FARER: I want to respond to the very question that you pose Alberto, and maybe the way to go about it is to look at the past 10 or 15 years and ask ourselves what sorts of activity would we want to engage in involving the use of force. If we could have done what we wanted to do within the parameters of law as those boundaries are generally seen, or as I earlier pointed our, the way most international lawyers outside of the United States do see the limitations on the use of force, then Professor O'Brien's point about the inadequacies of international law tends to fall. In my judgement the Afghanis weren't insurgents because there was never a legitimate government there. It was a government installed by an act of aggression. Actually, we were providing continuing assistance to the representatives of the sovereignty of the Afghan State, and therefore, our assistance there was well within the indisputable parameters of the existing international legal system. No problem. We don't have to have recourse to just war theory.

Now, Bill's point about the way just war theory can supplement international law was useful. Even if the assistance to the Afghanis was clearly legal, we might still decide to search our consciences more deeply. One of the points I thought you were getting at was that the difference between legal analysis and just war analysis is that just war analysis is historically more generous, it's broader. It requires us to take more kinds of events into account. It requires us to start back earlier in terms of the longer term relationship between two entities, and it asks us to consider future relationships between those entities. Although I think you overstated the case in your presentation, law does tend to say you can go or not go. If you can go, it imposes somewhat fewer restraints, I think, on the decisionmaking process than just war theory.

Let me take my argument to its conclusion by considering in very short order three other recent cases of U.S. intervention abroad. I always felt that a respectable

case could be made that Libya was making a connected series of military probes against the United States, and a proportionate response under the rubric of self-defense was legitimate. I could have argued the other side but I'm saying there's a very respectable legal case to be made there within contemporary restraints.

As a number of us have said, I think it's rather hard to make a case for Panama as a lawyer. Nor can you make the case very effectively in Grenada. That's why even Margaret Thatcher voted to censure us for Grenada, although we had a little better case there than we did in Panama.

Nicaragua was another case where a respectable legal argument could be made and was made by a number of advocates of assistance to the Contras. If we have the time I would make the contrary argument. The bottom line, if we look at these concrete cases and these are perhaps the most celebrated ones, is that international law as generally recognized by international lawyers and a very wide spectrum of opinion among our closest allies would have allowed us to engage in perhaps the most important uses of force that we have seen during the last 15 years.

PROF. COLL: Let me ask again to please identify yourself and your institution before you speak.

MR. CONNELY: Tom Connely, with the Office of the Joint Chiefs of Staff.

I take exception to Professor O'Brien's characterization of international law as being limited. Rather than looking at the example you used, the Security Council resolutions concerning the Israeli attack, a different approach with respect to the use of force might be to look at the practice and expectations, or as Professor Reisman says, incidents, where the Israelis really have created the norm. By responding to terrorist attacks, the United States used that same rationale. The Turks use it when they go after the Kurds in Iraq, and now most recently, Iran has used it. If you examine the practice and expectation of the legitimate component of international law over time, rather than in the light of a Security Council resolution formulated in reaction to a specific incident, how do you determine the legitimacy of the low end of low-intensity conflict — covert operations? How can we expect just war principles realistically to be applied to activities that are so secretive?

PROF. O'BRIEN: I have a problem with covert activity because I don't think there's very much of it. We can't keep secrets in Washington. I would think that a covert operation would be covered, as Jim Johnson said about low-intensity conflict generally, by the same rules of just war doctrine. The fact that the evaluation would be covert wouldn't change the requirement to meet all the various conditions.

PROF. COLL: How about the point about practices and expectations? Aren't you defining international law too narrowly when you look at only the Security Council resolutions?

PROF. O'BRIEN: I have mixed feelings about that because, after reading all these debates, I have a very low opinion, in the first place, for the legal scholarship that goes into them. In 40 years, there has scarcely been half a dozen serious attempts to back up an argument by reference to legal text. In fact, mainly the Israelis are the ones that do that, but the rest of them just pontificate about these things and after a while they begin to agree with each other. They say, well, as we rightly said 14 times already, we're right. That doesn't strike me as very sound legal scholarship.

On Tom's example, I think if all your respected authorities were queried on both Libya and Nicaragua, they would absolutely blast us off the map. You say that a good legal case could be made and I think that is possible on Libya. I myself think it's a little tougher on Nicaragua, but I believe that the U.S. position is a very distinct minority, as suggested, among other things, by the ICJ decision. Now, I'm not saying whether it's good, bad or indifferent, but I'm just saying there is a difference between what gets churned out by the international community or whatever you want to call it, and what some of us might see as reasonable and proper in a particular situation.

PROF. COLL: On this particular point, Judge Sofaer, would you like to jump in?

JUDGE SOFAER: I agree with that. I think that if our military planners and political leaders started to listen to the group of international law scholars that Tom Farer is talking about, this country wouldn't have done virtually any of the things it's done in the last 12 years. They would have been glad, those international legal scholars, irrespective of the consequences. Maybe because of the consequences.

The issue for me, is that you can't equate international legal scholars with the kind of people that Eckardt is talking about who have to sit around a table and plan for wars. When we had the exercise of Protocol 1, there were many European legal advisors, to use his phrase in the way he intended, who were told by their governments that the protocol would be ratified for political reasons, while allowing for certain exceptions. Nonetheless, they sat down with us and carved out huge holes in the intended effects of the protocol with reservations, exceptions and interpretations. It wouldn't have been very difficult really, to design a manual for the NATO forces that the U.S. could agree to. But we determined not to ratify the resulting protocol because the JCS found, in a 100-page study, that it would interfere not just politically with U.S. objectives,

but militarily. I think that there's a big difference between the international lawyers who function as legal advisors throughout the world and the international legal scholars who think about these issues in a different way, and have a different agenda. That's all there is to it.

Bork wrote with some passion that morality had nothing to do with international law and that's why he didn't give a damn about it. He wasn't prepared to support a system of law that doesn't care about justice. He cited prominent international legal scholars who had advanced the proposition that morality doesn't have anything to do with international law. I'd like to know what you are trying to do. Is Eckardt right that you progressed from a position where you were trying to merge the interests of justice with traditional international legal analysis into a single system, or are you talking about two systems that have to be applied in a complementary manner? Functionally, I want to illustrate the difference. We get invited to staff meetings where they're talking about the wisdom of something. They really do, our decisionmakers, even if they're lawyers, they make a distinction between the times when they call upon us to participate in the decisionmaking process as lawyers, and the times when they feel that they're really being asked to exercise their judgment. Are you trying to say that the lawyers in the State Department and the Department of Defense and the CIA, when it undertakes low-intensity operations that are covert, ought to be telling their bosses, "not only should you be hearing from us on whether this is an act of self-defense, but you should be hearing from us on whether you should invoke the doctrine of self defense here, because it won't go down with the people of America, or with the people of the world?"

PROF. O'BRIEN: I'd like to acknowledge a separateness. I'd like to take the second version which maintains that the two are complementary, but very closely related. As I tried to indicate, I think that you can broaden your legal analysis by being informed, if you will, by the perspectives of just war doctrine, particularly on self-defense, which as we said this morning, is an inherent right of natural law. It was there a long time before Article 51.

PROF. ECKARDT: I'd like briefly, if I could, to respond to Judge Sofaer.

As a legal advisor to a combatant commander, I sat in the senior decision cell expected to speak forthrightly, not just when asked about technical, legal things. Not only to give technical legal input, but to do what a lawyer does and listen and to try to insure that in effect, the honor of the United States was protected. Now, one is very careful when one does that and I tried to suggest that there is an interdisciplinary approach that lawyers can bring to the table. I don't see how one separates out the guidelines of international law and just war and the history of the profession of arms. All of those things bump up against each other in time

of crisis when you're sitting around the table and trying so very hard to do the correct thing.

JUDGE SOFAER: Yes. I prefer that view myself, and obviously like to be invited to those meetings, but as you put it, you have to be very careful in those circumstances. What I think you're saying implicitly, is that there is a very circumscribed role for those kinds of factors in terms of what you should feel free to say to your commanders.

PROF. ECKARDT: I would agree. I think it is very unfair for a lawyer to enter into the policy debate and misuse the law as a club when the law isn't the driving force. One must clearly separate one's advice as a lawyer and one's advice as a staff officer, although they may come from the same person.

PROF. COLL: Bob Turner.

PROF. TURNER: Bill, I want to take you back to Nicaragua for a moment just because it strikes me as being a typical case of low-intensity conflict. Let me quickly try to set forth the elements of the argument as I see them, and see where we disagree.

It seemed to me there was an overwhelming body of evidence that the government of Nicaragua was trying to overthrow the government, not only of El Salvador, but of other neighbors. It was training guerrillas, supplying them with equipment, giving them intelligence advice, money, smuggling airplane after airplane and boatload after boatload of arms from Vietnam and Cuba, to El Salvador and so forth. Even the Boland Committee unanimously concluded that the evidence on Nicaraguan aggression against El Salvador was, I've forgotten the word, but it meant unquestioned. The U.S., subsequent to that, began a mirror-image campaign of providing aid, training, intelligence advice, money and so forth, to a group of Nicaraguans to try to put pressure on the Nicaraguan government to stop its aggression. The mirror image campaign seemed to me to be a fairly clear case of self-defense. There's a lot more to it than that, but do you disagree with what I have said so far? Is the difference a factual one or do you not think that it's legal? The government of El Salvador, I think, clearly asked us for help. Is it that this kind of low-intensity aggression does not warrant collective self-defense or do you not believe the aggression took place, or what?

PROF. O'BRIEN: The original theory of the case was plausible. This was an action, rather an unusual one, in which we were in effect exporting revolution as a self-defense measure. That made me nervous from the outset because I spent a good deal of the '60s attacking North Vietnam for exporting revolution to

South Vietnam. I was a little bit nervous now about us exporting revolution, but okay.

PROF. TURNER: But defensively there's a difference.

PROF. O'BRIEN: Yeah. All right.

But time went on. Year after year, and I didn't have the impression that the number of Nicaraguans entering into El Salvador was all that great. In just war terms, this raises questions of proportionality. Secondly, the Contras did precious little. They were kind of a joke. Their operations were rare and apparently didn't amount to very much. Over time it appeared to me that this was a very dubious approach. Then the third piece, I don't know quite how this fits in, but I was very unhappy with the Reagan administration's apparent claim that they didn't intend to overturn the Sandinista regime—which seemed absurd. What else were the Contras doing? I don't think they had in mind a coalition government or something of the kind.

PROF. TURNER: But you're not arguing that it's impermissible to use defensive force against that kind of armed attack?

PROF. O'BRIEN: Not in principle but it's a judgement call.

PROF. COLL: Admiral Harlow.

RADM HARLOW: At your request I do have a couple of comments on the practical application of these rules for the United States in the decisionmaking process.

One thing bothered me and that is the lawyers arguing about what is lawful and what isn't lawful. It's technically sterile for us to argue that certain actions that have been undertaken by significant actors on the international system are illegal. When they occur they have the effect, perhaps difficult for us to admit, of changing the law. As far as the practice of law is concerned, the difficulty arises not so much in the conduct of war. I think that the rules are fairly clear, the manuals are fairly clear, and the wars are fought in accordance with the standards that we believe in. The difficulty arises on this issue of when to resort to armed force. And as was pointed out, these considerations often hinge on points of fact. Particularly in the low-intensity area, we're talking about limited intelligence and a shortage of facts. So it becomes impossible for a lawyer to seize upon factual fragments and say, this is legal or illegal.

Having said that, it's my observation that people in command centers and senior officials carry their own baggage with them, a collection of moral, ethical and religious convictions. There is something in the American gut that acts as a

brake upon certain conduct. It's dangerous to carry that too far because it is, I suppose, an undefined characterization of the American will, if you were to generalize it, but nonetheless I think that it has been a factor in decisionmaking in the United States of America for a long time.

PROF. COLL: Jack McNeill.

MR. MCNEILL: I just wanted to comment on the idea or the thesis that international law is so inflexible, one should look very carefully at an alternate set of complementary rules. I can certainly see the value of the just war analysis in the policy context, but I don't think we should give up on the international legal perspective. Although I certainly agree with Professor Farer's comment earlier, about the body of opinion that seems to prevail among European academicians and others, and their low regard for legal theories the United States has propounded regarding Panama, Grenada, and Libya, I think we have to remember that even though we may stand alone, the practice of States is a very important source of international law. If we have reached our conclusions by applying the law as we understand it in good faith, though with perhaps greater flexibility than is observed elsewhere, having preserved the integrity of our process, then we can say that our actions are legally defensible. We should not be cowed by the collective wisdom of other nations. We have to take it into account, but we have our own responsibilities within the United States to advise decisionmakers as to what the law genuinely is and how to apply it to the best of our ability.

PROF. COLL: We have time for only two more interventions. Michael Reisman and John Collins.

PROF. REISMAN: I'd like to go to the question that Alberto put to us at the beginning of this discussion period. Perhaps I can approach it by going back to some observations that were made from the floor.

I agree with Jack's final comment. First off, I don't think that Tom is correct in saying that European professors who have spent a good deal of time pontificating on the law all criticize us. Many of them, in fact, particularly French lawyers, are quite supportive of much United States action. The jury, if that is the jury, is much more mixed than Tom suggested. The point is that 25 or 30 European professors, some of whom may have cultivated a style that implies they commune with the dead before they issue it, have strongly criticized us. It's absurd to think that 25 or 30 professors, most of whom are out of touch, are part of this extraordinarily rich process that you struggle with every day. The fact of the matter is the lawyers in government are not international lawyers either. This is an extraordinarily rich process that's woven in a very complex international

pattern. It involves States and international organizations and all the people who participate in them.

Judge Sofaer said that high policymakers sometimes don't consult their international lawyers when they make decisions. That doesn't mean that what they're doing is not international law. That is international law. That's the stuff of international law, and the expectations that their deeds create are what it's all about. Bill, in an earlier intervention, said that he had no truck with people who kept quoting and dissecting the language of the United Nations Charter decades after is was concluded. He is interested in practice, what was actually done. But the practice of the Security Council or the General Assembly cannot be excluded from this whole rich process. That's what we have to look at. If we don't, what we're going to do is create a taxidermological creature that has all the vitality of a stuffed owl and you know that's not what international law is about.

Now, what are we looking for? We're looking for the expectations that are shared by politically relevant actors. That's what our decisionmakers come up against when they want to make a choice. The question they ask themselves is, if we do this are others going to characterize it as impermissible, and if they do, what price are they going to impose? The price may be quite small or it may be quite large. This is really the stuff of international law and this is what we should be pointing out. If the decisionmakers who are paying our fees don't call us, then it's obvious that we're not providing them with the right information. I don't think the 25 lawyers that Tom is concerned about are in any position to make judgements, or for that matter to speak about international law unless they can show us that they go through this process, and I don't think they do.

Bill, I think, in presenting what he calls the natural law approach and criticizing the international law approach, is really just using a different perspective on international law. What he calls natural law is very close to the perspective that I think has been taken at New Haven and many other places over the years. There are a number of different ways of looking at the law. It's a very complex creature. Take John Austin's famous statement, "Law is the order of political superior to political inferior, accompanied by the imposition of an evil for deviation." You've got a political superior. You've got a political inferior. You have communication. That's John Austin's classic definition. If your perspective is that of the political inferior and you're the receiver, then you tend to look at law in a certain way. But if your perspective is that of the political superior, and that I submit is the perspective you adopt on behalf of your clients, then you look at things quite differently. Then you ask yourself, what are the larger goals of the system? What are the conditions that I've got to deal with here? What are the past trends? What are the conditions that accounted for them? What are the likely consequences of different future choices and what options can I invent? What's the power process that I'm dealing with? These are the factors that Bill calls a modern natural law. I submit to you that it is the perspective from which

people make decisions, whether they're making decisions domestically or internationally.

I always like to hear Bill. He's so realistic and so refreshing and so common sense. The only question I have is whether or not he's using the wrong terms to describe what he's doing.

PROF. COLL: The last intervention this afternoon is from John Collins from the Library of Congress.

MR. COLLINS: We spent all day listening to fascinating legal, philosophical and theoretical views of sovereignty and just war and the right of self-defense, and I'm sitting here asking myself how do I use this mish-mash of ideas for any practical purpose in my job? How will you synthesize the ideas that we have enjoyed all day and put them to some practical use?

PROF. COLL: I think that the process that we're engaged in here presupposes several things. One is that decisionmakers, as Admiral Harlow reminded us, are human beings, they're moral beings, they're reasoning beings. In Admiral Harlow's words, they carry baggage with them. They have presuppositions, assumptions and notions about reality. These ideas are ultimately moral in character because they affect how those who believe in them act morally. They fix the bearings that their owners take in a world in which all action takes place against the background of a moral structure.

I think that the kinds of discussions that we have had here, first of all, push us into grappling with some of the more awkward, more uncomfortable questions. They push us to look beyond the kinds of operational processes that we're involved in day-to-day, which often degenerate into turf fighting and the pursuit of bureaucratic power for its own sake. They push us toward asking questions about ends and goals. What is it that we should be about and what are the limits as we go about seeking these public policy goals? Anyone in either the State Department or the Defense Department that is involved in the formulation of policy, is involved whether he or she likes it or not, in the process of moral reasoning as well as legal reasoning. We also live in a society in which it's very important for us to understand, by virtue of its strategic culture, by virtue of its domestic moral values, and also by virtue of its role and its responsibilities in the world, what kinds of constraints are placed on our policymaking. And so, I see this as a process that helps us to clarify our assumptions, that broadens our viewpoint and that takes us back to first questions. In that, I think I see a tremendous value. This is not a mechanical world. I will not walk out of here able to decide in a lock-step fashion what particular policies we should support towards Peru, a very good example of a low-intensity dilemma unfolding before our eyes right now. But, I do think that a few points have been made, a few

questions have been raised and a few nagging reminders have been resurrected by our colleagues in this room that will help me perhaps to rethink one or two questions with regard to our policy towards Peru.

Before we conclude, let me just mention a few issues that I think our discussion this afternoon has raised.

At a very broad level, I think that we keep coming back to Terry Nardin's analogy and to Michael Reisman's elaboration on that analogy, regarding Plato's cave and the relationship of moral philosophy to policy and the relationship of policy to operations. The question that we need to grapple with is whether we really believe in this room, that the shadow wisdom of those of us in the cave can be illuminated by the higher world outside it. That ties into the question of what is the role of lawyers as well as of moral philosophers who have an interest in public policy questions relating to national security. All kinds of questions come up regarding the integrity of judgment. What are the standards or safeguards that we need to protect that integrity of judgment so that neither lawyers nor moral philosophers become simple advocates and do manage to retain a sense of objectivity as they engage in that rich process of counseling their clients? The lawyer is hired by the client but he is hired by the client to exercise his judgment. At least I would want to hire a lawyer in order for him to have the freedom and the integrity to tell me when I should not do something that I'm contemplating. That applies more broadly to the question of moral philosophy. So, that relationship of philosophy to policy and to operations is one that we need to keep our eyes on.

Secondly, we need to keep wrestling with the question of the definition of international law, and exactly what we mean by international law. Michael Reisman just offered us a very eloquent and persuasive account of international law, which I would suggest differs from some of the more popular notions about international law as a set of rules or, as a dear friend of mine likes to call it, as a TV set that is either turned on or off. So we need to look closely at whether our definition of the process of international law is flexible enough to incorporate moral and prudential considerations. Michael Reisman would argue that it does and some of us in this room would agree with him.

Thirdly, moving to a different set of issues bearing on low-intensity conflict policy, how do we address the problems raised by Father Winters' position about the cultural context of justice? Father Winters implied that we need to be aware of reformist agendas and suppositions that often drive our support for low-intensity conflict operations in different parts of the world, be they *coup d'etats* to overthrow the nasty dictator, or support for an insurgent group that we think will do some good things for a particular country. I would suggest that Father Winters' warning needs to be tempered by the reality that not all low-intensity conflicts are radically reformist in nature. There are some types of low-intensity conflict environments in which we become engaged for purposes of making a

small difference. I don't think that we always display the kind of reformist zeal that Father Winters described, but it's a very important warning, because there is a strong reformist zeal in the American temperament to begin with. So those of us involved in the low-intensity conflict policy business need to be aware of this temptation.

Beyond that, however, can we agree that there are certain core values which need to be included in the calculus for deciding when a resort to force may be justified? Can we agree on what these core values are? Do they go beyond respect for human dignity and protection of the person? Shouldn't they include treating human beings as ends in themselves and with equality, as Michael Reisman argued? This is definitely part of the core. How much farther beyond this are we prepared to go?

Father Winters maintained that sovereignty is a core human right. How far are we prepared to argue with that position, and how do we address it in the context of some situations around the world in which sovereignty is easily manipulated by elites that clearly do not represent the people over which they claim power? Are we perverting the word "sovereignty?" I think Jim Turner Johnson would suggest that in those cases we are perverting the meaning of sovereignty and we are perverting the meaning of right authority when we allow sovereignty to be used as a shield behind which regimes that really don't represent their peoples can shelter. This, of course, would have to be in the context that we would call egregious. Not necessarily in mild dictatorships where there might be reasonable differences, but in a case which everyone in this room would agree that a particular regime was not representative.

Let me close with one question that we have not wrestled with yet, and I think is important, and that is the following: does low-intensity conflict pose peculiar challenges for the *jus in bello*? That is, for the laws of warfare? If so, what are these? We have spent a great deal of effort here in discussing the *jus ad bellum*, but that is only part of the definition of a just war. Ultimately a war is not justifiable if the means involved in waging it become sufficiently dirty or disproportionate, or indiscriminate, or sufficiently evil in themselves.

I do believe that low-intensity conflict poses some peculiar challenges for the *jus in bello* and I have not thought through the problem with any degree of care or rigor, but I would like to invite you all to join me in exploring that question. Can you fight a clean low-intensity conflict? How far can you do that? Are there things about low-intensity conflicts that make it more difficult to fight them relatively more cleanly than other kinds of conflict? That is an important policy question that we need to deal with.

Thank you for your great patience, for your enthusiasm. I want to thank all of the members of our Just War Panel: Professor Johnson, Father Winters, Professor O'Brien and Professor Eckhardt.

Thank you very much, once again.

PART FOUR

U.S. POLITICAL AND CULTURAL CONSTRAINTS ON LOW-INTENSITY CONFLICT

Chapter IX

Low-Intensity Conflict in the Post-Cold War World: The American Moral-Cultural Environment

by
George Weigel*

I. Introduction: Taking Chesterton Seriously

The public debate on American policy options that took place between the Iraqi invasion of Kuwait on August 2, 1990 and the suspension of Operation Desert Storm on February 28, 1991, was loud, raucous, impassioned, sometimes confused, often insightful — in a word, "democratic." Moreover, that debate was frequently couched in explicitly moral terms drawn from the classic categories of the just war tradition. Cabbies and subway riders, barbers and bartenders, talk show hosts and talk show callers, op-ed pundits and religious leaders, Members of Congress and Executive branch officials all argued in terms of questions like these: Was ours a just cause? What were our intentions—what were we really after? Who was the authority competent to authorize the use of force against Iraq: the President, the President authorized by Congress, the President authorized by the United Nations? Did we have a reasonable chance of success? Could we discriminate between combatants and noncombatants? Was military force a last resort?

Not all of the participants in that six-month long public seminar argued as wisely as they might have done.[1] But let us not dwell here on the irony of a situation in which the Chairman of the House Armed Services Committee had to explain the meaning of certain key just war criteria to the archbishop chairing the U.S. Catholic bishops' international policy committee (and on national television!). Rather, let us focus on the fact that the American people and their political leaders instinctively reached for just war categories — which is to say, for moral categories — in their attempt to sort out the options available to the United States after the Iraqi invasion, occupation, and attempted reduction of Kuwait. Indeed, the instinctive consensus that these were the relevant categories was so widespread that when other rationales were bruited — such as Secretary of State James Baker's defense of the possible use of U.S. military force to eject

Saddam Hussein from Kuwait as a matter of "jobs, jobs and jobs" — the public reaction was swift and negative, and the attempt to appeal to what were deemed baser motives was quietly (and quickly) abandoned.

Indeed, and admittedly without the benefit of careful survey research, I would suggest that the sourness in the national spirit these days, even on the matter of Desert Storm, has at least something to do with an intuition that, in the war's end-game, the United States abandoned its larger moral purpose in the Gulf War and fell back into policymaking according to the seductive (and deceptive) categories of realpolitik — with disastrous consequences for the Kurds and Shi'ites, and with the singularly unsatisfactory result of Saddam Hussein still in power and still busily pursuing a nuclear weapons capability.

Be that as it may, the key point is this: the debate between Desert Shield and Desert Storm demonstrated that foreign and defense policy in the American context does not exist *here*, and moral reasoning somewhere over *there*. Americans understand that there is one human universe of thought and action, in which "morality" and "politics" are inextricably intertwined. That national understanding is more often reflexive than reflective, to be sure. And no doubt there continue to be residual problems caused by the moralism bequeathed to the national political culture by our Puritan and 19th century evangelical forebears, who frequently identified the norms appropriate to social ethics with the norms appropriate to personal and business relationships. But the larger, and more significant point is that America remains, as G.K. Chesterton famously described it, a "nation with the soul of a church."

Put another way, realpolitik is not simply a poor guide to policymaking (and particularly in a revolutionary period such as ours, in which a realist emphasis on "stability" as the overriding norm in the policy calculus can help produce precisely . . . instability). Realpolitik calculations and realpolitik rationales for policy are also a sure prescription for discord and disunity within a body politic than understands (once again, instinctively) that realpolitik is not an escape from moral reasoning, but rather a debased form of moral reasoning.

That is not the way other countries are. Indeed, one cannot imagine the kind of debate that took place here between August 1990 and March 1991 taking place in the French fifth republic prior to one of its occasional African adventures; nor, at the time of the Falklands/Malvinas war, was there anything in Great Britain resembling the public moral argument in America over Desert Shield/ Desert Storm. But that is the way we are. And that is why political and military leaders dare not ignore Chesterton's insight into the American character. The moral argument has to be engaged.

And in terms of the kind of world in which we are likely to be living for the foreseeable future, that means engaging the moral argument lodged within the broader debate about low-intensity conflict.

II. The Necessity of Leadership

Engaging that moral argument is not an exercise in abstraction. The kind of morally reflective statecraft suggested by the logic of the just war tradition requires that we take careful stock of our empirical circumstances. That means, among other things, taking the temperature of the American body politic.

It is not always pleasant to have one's forecasts vindicated. And those of us who were writing, in the late 1980s, that *the* foreign policy debate of the 1990s was likely to be a reprise of the 1930s contest between internationalists and isolationists (or "non-interventionists," or "new nationalists," or whatever) would just have soon have been proven wrong. Alas, we were right.

This debate is, quite obviously, crucial to the future of the debate over low-intensity conflict. If the isolationists win, much of the debate over low-intensity conflict will become moot. There may be residual support for certain anti-terrorist and counter-terrorist activities, and perhaps for a modest U.S. role in such contingency operations as disaster relief and shows of force. But that will be about it.

What would it mean for the new isolationism to "win?" It is difficult to imagine the circumstances in which the American people buy the new isolationism whole hog, and retreat into the kind of demi-hemispheric Fortress America proposed by Patrick J. Buchanan.[2] But it would not require so comprehensive a victory by the new isolationists to push the low-intensity conflict option to the far nether reaches of the policy menu. "Winning," in this political-cultural sense, means simply that the American people decline to take up the burden of leadership in a newly unipolar world and that the United States becomes, in consequence, a reactive, rather than pro-active, power in world politics: content with guarding its interests (rather narrowly construed), and resolutely eschewing any serious attempt to shape a new world security system in the aftermath of the Cold War.

The American people have every reason to want a break at the end of the Cold War. If we think of the Cold War (as I believe we should) as the second stage of the great anti-totalitarian war that began in 1939, the United States was in something resembling a state of war for over fifty years (from the point at which President Roosevelt began the clandestine war against German U-boats in the North Atlantic in 1940, until August 21, 1991, at which point the USSR ceased to exist as an effective political entity). And no doubt there are reasonable arguments for scaling back some of our commitments — political and budgetary — in the aftermath of our victory.

But the end of the Cold War has not seen the sudden outbreak of "multipolarity," as many in the international relations guild seemed to expect. "Europe" does not exist as a meaningful political reality, as the ruins of Dubrovnik mutely attest. Nippobashing aside, Japan is a great power in economic terms alone; and

while that is nothing to be sneered at, it does not translate into the capacity to bend the grand politics of nations to one's will (or, perhaps less brutally, to shape the basic trend lines of world politics). The Soviet Union no longer exists, and the successor Commonwealth of Independent States is in no position to do much of anything beyond trying to dig out from under the economic, ecological, and spiritual rubble of the totalitarian system. China is quite probably headed for a period of internal disarray, after the collapse of the Maoist/Dengist gerontocracy. The United Nations remains what it has been since 1945: a stage on which a script written elsewhere is played out.

In sum, the end of the Cold War has not brought us back to the Europe of the 19th century, i.e., a multipolar world of five or six great powers; nor has it ushered in a new era of internationalism in which international legal and political organizations are the primary actors and the primary political reference points in world politics. Rather, the end of the Cold War has seen the emergence of a unipolar world in which there is but one Great Power — the United States — with the requisite combination of political, ideological, cultural, economic, and military strength to determine, if it chooses, the ground rules for the immediate future of world politics and economics. Moreover, as the Gulf crisis and the debacle in Yugoslavia should have taught us, the alternative to American leadership in the world is not multipolar leadership but chaos.

The key question, of course, is, whether the United States — which is to say, the American people — will choose to exercise the leadership role which history has thrust before us.

I cannot tell you whether we will, in fact, accept the burden of leadership in a unipolar world. But I can say, with some assurance, that we will most certainly not take the lead in shaping the ground rules of international life in the post-Cold War world until we are summoned to do so by our political leaders. Which, to put it briefly, we have most assuredly not been summoned to do.

The failure of U.S. political leadership on these questions in the year since Desert Storm has been comprehensive. The national Democratic Party has never grappled seriously with its leadership's massive misreading of the signs of the times from the early 1970s on. There has been no intellectual and moral reckoning with the pattern of failure exhibited by Congressional Democrats on five of the defining foreign policy issues of the past decade: the nuclear freeze proposal, the question of economic sanctions against South Africa, support for the Nicaraguan democratic resistance, assessing the reform communism of Mikhail Gorbachev, and "giving sanctions a chance" in the Gulf. Until that reckoning takes place — and there has been very little of it evident on the campaign trail these past several months — we need not expect the Democratic Party to call the American people to the leadership role that could be theirs in a unipolar world.

Nor should it be thought that things are in much better shape on the other side of the partisan fence. President Bush's celebration of victory in the Cold

War in his January 1992 State of the Union address was welcome. But it was also at least five and a half months too late; it followed hard on the heels of a sour pattern of administration deprecation of the reformist forces in the Soviet Union; it ill fit with the administration's curious (and, to my mind, unbecoming) nostalgia for the uncomplicated days when all one had to do was deal with Mikhail Gorbachev (to the tune of "Moscow Nights," in the East Room of the White House); and it was incongruent with the administration's singular lack of energy in devising effective support for the processes of democratic and market consolidation in the new democracies of central and eastern Europe. Nor did the President take the occasion of his first public acknowledgment of freedom's victory in the Cold War to lay out a new design for American leadership in the post-Cold War world; rather, reacting to the current political wisdom instead of aggressively shaping the public agenda, the President left the implications of our Cold War victory dangling, so to speak, and spent the rest of his address on (admittedly pressing) domestic issues.

Historians of the future will find much of this simply bizarre. Think about it: at no point between the Revolution of 1989 in central and eastern Europe and the aftermath of the New Russian Revolution of August 1991 did the President of the United States address the American people to define, publicly, the moral and political meaning of the end of the Cold War, or to sketch the contours of an active American engagement in shaping the future course of world politics and economics.[3] Moreover, in an election year, no challenger to the President tried to fill that astonishing gap. The challengers from the opposition party would not do so—or could not, without alienating key parts of their constituency, which had long since found the Cold War distasteful and were thus not in much of a mood to celebrate American victory in it. The challenger from within the President's party chose to look backward rather than forward. And thus the gap remained. And the country, not unpredictably, decided that it was in a malaise.

It is, as they say, passing strange indeed.

There is no way to think seriously about the relationship of American political culture to the problems of low-intensity conflict without confronting this horizon-setting issue of internationalism vs. isolationism. And there is no way to confront that issue without addressing the issue of political leadership. Just as credible and persuasive political leadership is recognized (in all the literature I have reviewed, at least) as an essential condition for a successful low-intensity conflict policy, so is persuasive and aggressive political leadership necessary if America is to take the leadership role of which it is capable in world affairs.

Only when our political leadership has defined our new role in the new post-Cold War world—which, in my judgment, means only when the political leadership has explained to the American people the facts of life about unipolarity—will we be able to defend any broad-scale low-intensity conflict

policy, beyond some very "domestic" issues like narcotics interdiction and anti-terrorism.

III. The New Moral Debate

As Martin Luther instructs us in his Small Catechism, we should always try to put the best construction on things: so let us assume that such political leadership emerges, and that a new consensus on the inescapability of an active American leadership role in world politics and economics becomes the political-cultural baseline for policymaking. Remembering what was said above about Chesterton's adage and the need for the policy-maker to take it seriously, what will be some of the moral issues that the low-intensity conflict planner will have to confront in the 1990s?

Here we return to the classic categories of the just war tradition. The *jus in bello* principle of *discrimination* (and its prohibition of the direct targeting of noncombatants) is, at one and the same time, the just war norm that virtually all reflective people intuitively grasp and one of the more difficult norms to observe in low-intensity conflict situations. This is particularly true in counterinsurgency operations, where the insurgent forces typically hide within the indigenous population (like fish in the sea, in Mao Tse-tung's famous metaphor) and not infrequently use the indigenous civilian population as defensive shields of one sort or another. But similar difficulties present themselves in anti-terrorism and counter-terrorism operations, as the U.S. experience in attacking Libya and the experience of the State of Israel in militarily confronting Palestinian and Hezbollah terrorism readily attest.

The just war panel will doubtless go into the refinement of the principle of discrimination in light of these distinctive circumstances. So let me simply say here that, if our concern in low-intensity conflict operations is both to do the right thing and to have the support of the American people in the doing of that, great care must be taken to resist the temptation to abandon the principle of non-combatant immunity because of the enemy's perfidious use (and abuse) of the civilian population.

Americans understand, as the just war tradition understands, that there are going to be unintentional civilian casualties in war: that is one of the reasons why war inevitably carries with it an element of moral tragedy, no matter how noble the cause. But Americans also want the principle of non-combatant immunity to remain intact. Nor should we think that Americans are incapable of thinking in rather complex terms about these issues. The country is able to understand that the commander on the scene often has to make excruciatingly difficult choices at those points at which scrupulous observance of the principle of non-combatant immunity is in tension with the commander's moral responsibility for the safety of his own forces. But that understanding has to be brought

to the surface by the political and military leadership in its public presentation of the situation in question. [That was done, I would argue, in Desert Storm, both in terms of reporting the rules of engagement during the air war and the consequent (and risky) return of unexpended ordnance when target recognition was below minimum requirements, and in the discussion of the bombing of the Iraqi command center/bunker/shelter in Baghdad.]

At a more fundamental level of the debate, and looking once again to the classic categories of the just war tradition, the most significant public moral argument about possible future low-intensity conflict scenarios and operations is likely to be focused on the orienting *jus ad bellum* norm of *just cause*. The outlines of this debate began to emerge during the argument between August 2, 1990 and January 16, 1991. In a post-Cold War world, what constitutes a morally acceptable *casus belli*? A cross-border invasion in violation of the bedrock principle of sovereignty? Massive and flagrant human rights abuses? The threat posed by Iraq's efforts to obtain weapons of mass destruction and the means to project them far beyond its borders? The threat to the international economy posed by the possibility of Iraqi control of over 40% of the world's proven oil reserves? The instability and danger to world peace that would inevitably follow from an Arab Middle East dominated by Saddam Hussein? All of the above? Some of the above? None of the above?

On this matter of "just cause," the classic tradition taught that one or more of three conditions had to be met for the criterion to have been satisfied: defense against attack, punishment of evil, or the recovery of something wrongly taken. Contemporary just war thinking has tended to reduce these to "defense against attack," although, as Professor Johnson points out, the other two conditions have not simply disappeared but "have been subsumed within a gradually broadened concept of defense that allows retaliation for an attack launched and completed (punishment of evil) and defines wrongful occupation of territory as a state of 'continuing' armed attack."[4] Still, the U.S. Catholic bishops' commentary during the Gulf crisis debate stressed that the only possible *casus belli* in that situation was the cross-border invasion and occupation of Kuwait. Even more comprehensively, and insofar as one can successfully parse the complex signals coming from various parts of the Holy See over the past eighteen months, the Vatican (while insisting that it has not become pacifist in its basic moral reading of war and peace) does seem to have reduced the components of *casus belli* to a narrow construal of "defense against an attack already launched."

Here, on this matter of the substantive components of "just cause," is precisely where a public moral argument needs to be engaged, and with a very careful eye to the empirical evidence on the likely future of international conflict. Consider three hypothetical scenarios for U.S. military action in the 1990s under the low-intensity conflict rubric: nuclear non-proliferation, counter-terrorism, and humanitarian intervention in the case of massive human rights abuse.

1. Perhaps the most serious threat to security in the post-Cold War world arises from the intersection of three distinctively modern phenomena: crazy States (Libya, Iraq, Iran, etc.) + weapons of mass destruction + ballistic missile capability. This lethal equation puts great stress on those who wish to define a just *casus belli* as simply "defense against an attack already launched"—and precisely because of the "crazy State" factor. No morally serious just war analyst would defend a preemptive strike on the French *force de frappe* or on Britain's nuclear submarine pens. Why? Because we have confidence in the regimes that have launch control over those nuclear weapons. We have no such confidence (to put it gently) in the leadership of Libya, Iraq, or Iran. How, precisely, does this effect the moral equation?

I would argue that our knowledge of the intentions of the leaders of such regimes has to be weighed carefully into the moral calculus. Thus the issue is not just one of capabilities. It is capabilities plus intentions, measured against a calculus of relative dangers and consequent American responsibilities. Preemptive action runs certain risks, to be sure. But is there not a grave moral responsibility assumed by those who would risk massive civilian casualties, and massive regional destabilization, by leaving a man like Saddam Hussein with an intact nuclear capability?

2. Similar questions arise when one faces the question of preemptive action against terrorists. There is something inherently implausible about the moral weight of the claim that one can only act militarily against terrorists in "defense against an attack already launched." The tactics of hit-and-run (or hide-the-bomb-in-the-suitcase-and-run) are the essence of terrorism, which has an essentially political goal rather than the goal of territorial occupation that we associate with the classic cross-border attack. Our intuitive sense that this is too narrow a concept of "just cause" should lead us to consider the possibility of a careful expansion of the "just cause" criteria. Were this to be done, I should not think it impossible to refine our concept of "just cause" to include (proportionate and discriminate) pre-emptive action against terrorist capabilities—to prevent the deaths of innocents on a large scale, and to enforce some minimum ground rules of acceptable international behavior in an inescapably interdependent world. But we have to do that refining in public: and in this case the "public" is the international community as well as the American body politic. And we have to do it in such a way as to prevent a general erosion of the moral-cultural boundaries that the just war tradition has laid down for centuries.

3. Perhaps the hardest case under "just cause" in the post-Cold War world has to do with situations in which human rights are being massively and flagrantly abused, and there seems to be no indigenous force capable of ousting the brutal regime committing those abuses.

It should be said here (and the same caution applies to the non-proliferation and counter-terrorism scenarios as well) that one should not lightly erode the

taboos surrounding the principle of sovereignty. The principle evolved at the Peace of Westphalia, after all, in an effort to prevent Europe from degenerating into a continental free-fire zone with ecclesiastical approbation for the sundry combatants. Tampering with that principle should not be done blithely, for in international politics as well as in personal life, there is always the risk of letting loose seven devils worse than the first.

In the just war tradition as I understand it, and in modern Catholic moral theology (in the exegesis of which I may have, as the lawyers say, some "standing"), the principle of sovereignty has never been understood to have absolute value: which is to say that the norm of the inviolability of sovereignty was never understood as an exceptionless norm. But it was understood to be an important norm, and the situations in which it could be overridden had to be grave indeed. All in all, the principle of sovereignty has served the world rather well, and if it is taken perhaps a bit too absolutely in modern international law, then it is probably better to err on the side of caution than to risk the dissolution of the principle altogether.

On the other hand, consider this scenario: One of the new democracies of eastern Europe implodes under economic and social pressures, and a fascist/nationalist dictatorship emerges. The dictatorship attempts to consolidate its power by persecuting minority group X, which had done reasonably well during the economic restructuring that followed the communist crack-up. The persecution includes the whole range of repressive evils: discriminatory laws, penal camps, torture, executions. There is even the possibility of genocide. Are we to say that the international community—or, to sharpen the issue even more directly, the United States, perhaps in conjunction with regional allies—has no recourse other than diplomatic pressure and economic sanctions to stop the killing? On the other hand, how does an American President explain to American parents, at the funeral, that their son had to be put in harm's way for the sake of achieving a humanitarian good in a faraway land which posed no threat to our national security?

There are no simple answers—moral answers or political answers—to these dilemmas. It cannot be the case that the United States is under a moral obligation to intervene militarily in every situation in which human rights are being systematically and brutally abused. On the other hand, and in situations in which there has been no cross-border violation of sovereignty, can the "human rights criterion" ever push the calculus of "just cause" to fulfillment? What obligations do we incur to help stabilize the future of the country in question, having removed the abusive government?

Perhaps here is where the discussion of national low-intensity conflict and special operations capabilities bumps up against the question of international or regional interposition of forces. For it does seem as if there is not so great a breach of the principle of sovereignty if military action is taken by a regional force or

international force (or, as in the case of certain actions in the old French West Africa, by the former colonial power). But whether we are thinking of unilateral or multilateral intervention, we have to think through more carefully, and as a matter of public moral argument, the question of when, if ever, the gross brutalization of innocent and defenseless people constitutes a legitimate *causus belli*: which is to say, when, if ever, are we morally justified in overriding the principle of sovereignty and using military force as a means of humanitarian assistance.

In terms of gauging the public temperature on low-intensity conflict matters, I would guess that there would be considerable public support (much of which would show an impressive level of moral sophistication) for the proportionate and discriminate use of U.S. military force as an "energetic" means of enforcing nuclear non-proliferation: especially if it were clearly understood that other means of redress had been tried and had failed, and that our action had the support of the saner elements in the international community. I should think that the same general approbation would meet the preemptive use of low-intensity conflict and/or special operations capabilities against known terrorists and terrorist facilities. I am less persuaded that the country would support an extensive use of American military force in situations where there is no direct threat to American interests but in which grave human rights abuses are being systematically perpetrated. Would the American public support the use of international forces, possibly including U.S. forces, in such circumstances? Perhaps.

IV. Problems in the High Culture (So To Speak)

If the American people have shown a generally impressive ability to calibrate the moral and political arguments involved in low-intensity conflict (or in conventional wars, such as the Gulf War), the same cannot be said for what are often thought of as the "teaching centers" of our culture: our religious institutions, our institutions of higher education, and the mass media. The continuing intellectual and moral distress in these arenas will doubtless have an effect on the "constraints" under which low-intensity conflict policy is developed and executed.

On the question of the religious institutions: the hard fact is that the just war tradition as a method of moral reasoning is quite probably taken more seriously at the service academies and the war colleges than in our largest seminaries. During the Gulf crisis, the leadership of mainline/oldline Protestantism, as exemplified by the National Council of Churches (NCC-USA), showed itself to be functionally pacifist. This was not the pacifism of high moral principle. Rather it was a political pacifism born of the conviction that American military power can serve no good end in world politics. One need not look for much leadership in sorting out the moral questions sketched above from these quarters.

But since these are dying institutions (demographically speaking), their impact on the public argument is likely to be minimal in any case.

The Gulf crisis was the occasion for the growing part of American Protestantism — the "evangelical" world which is itself a complex amalgam of doctrinally conservative mainline dissidents, fundamentalists, and charismatics — to enter the foreign policy debate on explicitly just war grounds for perhaps the first time. The key group here is what we might call, broadly, the "conservatives": the Southern Baptist Convention, and the evangelical (and doctrinally serious) remnants of the Presbyterian, Methodist, and Episcopal churches. There is considerable agreement among these parties on several points: that the quietism that marked the evangelical churches from the days of the Scopes trial to the mid-1970s is inappropriate for Christians; that the Christian church has public obligations larger than its obligation to help form the consciences of its congregants; and that there is no developed evangelical social ethic capable of sustaining this new public engagement in an intellectually serious way. Thus, during the Gulf crisis, one found the "conservatives" beginning to grapple with the just war tradition as a moral template for thinking about public policy, in active conversation with Catholic and secular just war scholars. This is a development of potentially historic importance for the reinvigoration of just war thinking in American Christianity, given the fact that conservative or evangelical Protestantism has supplanted the traditional mainline/oldline institutions as the center of demographic gravity in the churches of the Reformation in the United States. If followed through, this new evangelical Protestant interest in the just war tradition would certainly play a significant role in shaping the moral-cultural environment in which American policymakers operate.

The future of the Catholic debate is difficult to discern. The Catholic bishops' record during the Gulf crisis was considerably better than that of their NCC-USA conferees. The bishops' congressional testimony was built around the classic just war criteria, and in that respect, the bishops helped deepen the public moral argument. [They most certainly did not, as some of them insisted, introduce the moral element to the wider public debate; the moral argument was alive and (reasonably) well from the outset, as anyone with a car radio and the patience to listen to talk shows could readily attest.] On the other hand, the bishops' testimony was also driven in part by certain readings of the political situation in the Middle East that proved to be sadly mistaken: a pattern of analysis that was sadly reminiscent of the bishops' fundamental misreading of the politics of U.S./Soviet relations in the 1980s.

In the short term, and in the wake of Desert Storm, the future of the American Catholic debate will probably center on two issues, one of which has serious implications for low-intensity conflict planning. There has been much debate in Catholic circles since Desert Storm about the degree to which U.S. military policy in the Gulf observed the principle of proportionality; the focus here tends

to be on the relatively high numbers of Iraqi combat deaths and on the damage done by the allied air campaign to the economic and technical infrastructure of Iraq. Those are grave questions with important implications for the future of conventional war, but they do not bear directly on low-intensity conflict. On the other hand, the post-Gulf Catholic debate about the components of just cause certainly will shape the low-intensity conflict argument in the future. The bishops' tendency seems to be to hold the line, so to speak, at cross-border attacks; there is little evidence that non-proliferation, or anti-terrorism, or humanitarian assistance will be defended by the United States Catholic Conference as legitimate casus belli. That inclination will be reinforced, or so it would seem, by the Vatican's narrowing of the boundaries of just cause. Yet, as I argued above, there really are serious, and in many respects unavoidable, issues to be engaged here. We may thus be heading for a period of some brisk intellectual confrontation in Catholic circles.

As for the American academy, the dreary stories of the impact of "political correctness" on our campuses are too familiar to have to be rehearsed here. That the campuses will provide recruits for any possible movement that seeks to restrict U.S. low-intensity conflict capabilities seems wholly predictable. But whether that movement will have any real political impact seems a more dubious proposition, at least in light of the Desert Shield/Desert Storm experience: for here, as in recent elections, students often proved politically wiser than their presumed (and tenured) betters. Of more immediate concern than these potential agitations, though, is the state of international relations theory in American higher education. Read through the scholarly and technical literature here, and you may well be reminded of Newton Minow's famous description of television as a "vast wasteland." We are living in a revolutionary period, in which the power of ideas and passions to shape events — sometimes in wholly unexpected ways — has been decisively demonstrated in venues ranging from east Asia to Kiev. And yet we find ourselves burdened by a professoriate that stopped taking political ideas and passions seriously two generations ago. Think of the vast amount of energy (and money, and ink) expended in 1990-1991 on the so-called "Grand Bargain" devised by the brahmins at Harvard's Kennedy School of Government: the deal in which the United States and its western allies, in return for major Soviet military cut-backs, would agree to finance the reform communism of Mikhail Gorbachev. Somehow, amidst all the equations, the basic political fact of the situation never got taken seriously: that what the people of the Soviet Union wanted was to get rid of communism, reform or otherwise, and sooner rather than later.

A similar intellectual paralysis pervades much of the establishment foreign policy community. Some months ago, editors at *Foreign Affairs* were lamenting, to the *New York Times* correspondent Thomas Friedman, that no one had yet sent them the post-Cold War equivalent of George Kennan's famous "Mr. X" article, which provided the doctrinal foundation for containment and the Cold

War. The real question, I submit, and given the current, sad, disoriented state of the received wisdom in the foreign policy establishment, is whether the editors would recognize such an article if it came over the transom.

Thus I fear that we are headed for a period of intellectual instability and fragmentation in our foreign policy thinking. The public debate, such as it is, will likely be *ad hoc* and case-by-case, rather than conducted against the horizon of a broadly agreed-upon doctrine. This does not rule out the possibility of a national consensus emerging on an low-intensity conflict policy. It does suggest that any such policy is likely to be rather limited in its vision.

Finally, there is the fourth estate. It had a bad war in the Gulf. When reporters become targets of satire on "Saturday Night Live" ("Tell us, general, if there was one secret you wouldn't want the Iraqis to know, what would it be?"), something of the post-Watergate aura of the media has dimmed. And yet there seems to have been little self-examination in the prestige press after the Gulf War. Rather, the focus has been on challenging the press access rules that were enforced during that conflict. Moreover, in the aftermath of the Soviet crack-up, the overwhelming majority of media attention to the Defense Department has been focused on, yes, the budget — which is to say, on what is going to get cut. I have discerned very little interest to date in the broader questions of post-Cold War strategy, including low-intensity conflict strategy: despite the fact that the resolution of these questions would be necessary for rational force structuring and weapons procurement planning.

This is not, I should say, wholly the media's fault; it surely has something to do with the failures of political leadership noted above. And that fact, combined with what seems to have been widespread public support for the ground rules set for the press by the Department of Defense during Desert Storm, suggests again that there are ways around a potential media "problem" with low-intensity conflict planning and programs: if the political leadership has the wit and will to assert itself.

V. Concluding (and Decidedly Unscientific) Postscript

The collapse of communism brought to an end what can be construed as a two hundred year-old fantasy in the Western world, the attempt to remake (and perfect) the human condition through politics: an enterprise that began with Rousseau's speculations in pre-revolutionary France and that led, along a complex historical path that proved the bitter wisdom of Richard Weaver's observation that "ideas have consequences," to Auschwitz-Birkenau and the Gulag. In the aftermath of this struggle to re-assert the priority of the individual human being, culture, and society over the polity (which, in the West, included the struggle to resist more benign forms of governmentally-sanctioned social engineering), we may well be headed, at least in the developed world, for what we might call a "post-political" era. That shift in the historical templates has been reinforced by our own domestic experience: many of the great questions on our

national social agenda — crime, drugs, welfare reform, the urban underclass, education — are increasingly understood, and by liberals as well as conservatives, to be primarily questions of character, in the addressing of which government is a singularly clumsy and singularly inefficient actor. Thus, the end of the Rousseau-inspired tyranny of the political in grand world politics has intersected with a rediscovery of the crucial importance of the virtues in a democratic republic and with an era of budgetary restraint to produce, as I say, a "post-political" era in American public life.

There is much in this that we should welcome. The danger, as I see it, is that our political leadership, reinforced by the ideological convictions and trendiness of both the press and the academy, will conclude that, under these circumstances, a gentle isolationism really is the way to go. And that would be a mistake.

It would be a mistake because the world is inextricably "interdependent" — or at least inextricably interconnected — and any attempt to withdraw from it will inevitably make the task of tending our own republican garden even more difficult. It would be a mistake because we do have, at the end of this bloodiest of centuries, the opportunity to set a pattern for international relations that is something other than Hobbes's war of all against all. And it would be a mistake because it would be morally demeaning: for nations, as well as for individuals, to set themselves up as islands, entirely unto themselves, is to choose for a crabbed and narrow conception of their responsibilities.

Should we summon the will to assume the leadership in world affairs that could be ours, a careful public moral exploration of the problems and prospects of low-intensity conflict will be essential — for these are precisely the kinds of conflicts that seem likely to dominate the post-Cold War international arena. But that exploration will not take place at the level of seriousness it deserves unless and until the prior question — America First, or America first among the leaders of the world? — is settled, and in favor of the latter understanding of who we are and what we should be. *That*, and nothing less than that, is the key issue of "constraint" that low-intensity conflict planners face in the next period.

Notes

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1. Weigel, *War, Peace, and the Christian Conscience*, in JUST WAR AND THE GULF WAR (Johnson and Weigel eds. 1991).

2. Buchanan, *America First: A Foreign Policy for the Rest of Us*, in FJB FROM THE RIGHT (September 1991).

3. President Bush did, in the main, do an exceptionally fine job of explaining what was at stake in the Gulf crisis, and in defining the nation's short-term interests and goals in resisting Iraqi aggression. But there was little attempt to relate this crisis to the larger scheme of things in the post-Cold War world. Thus the emblematic phrase for the administration's putative grand design and its doctrinal replacement for "containment" — the "new world order" — remained essentially without content.

4. Johnson, *The Just War Tradition and the American Military*, in JUST WAR AND THE GULF WAR at 22 (Johnson and Weigel eds. 1991).

Chapter X

American Strategic Culture in Small Wars

by
Carnes Lord*

That the United States has had great difficulty bringing its military establishment effectively to bear in limited conflict situations is hardly a secret. From Vietnam in the 1960's through Grenada and Lebanon in the early 1980's to El Salvador in very recent years, the track record of U.S. involvement in contingency operations as well as protracted revolutionary warfare in the less developed world is spotty at best, with serious flaws apparent even in victory. In general, the United States has reaped a disappointing return in such conflicts from what have often been major investments of its material, moral and political resources.

Clearly, a number of different factors work together to constrain the performance of the American government in low-intensity or limited warfare environments. At the most general and fundamental level is what one may conveniently call "American political culture". Not only is our nation formally a democracy; Americans are a deeply democratic people. Democratic or egalitarian attitudes, and the manners and morals that flow from them, have a great deal to do with the way Americans view governments in the less developed world and the way they interact with individuals in less developed societies. While in some respects a great strength, this has often acted as a severe limitation. But other aspects of our political culture are also of importance in this connection. Beyond democracy, America is heir to powerful traditions of political liberalism — limited government and the rule of law — and of religious enthusiasm and moralism. Finally, Americans are a pragmatic people, with a tendency to seek technical solutions to isolated problems and a preoccupation with the here and now at the expense both of the past and the future. This means, among other things, that Americans tend to lack the historical memory that is critical for understanding other cultures, as well as the future orientation and holistic thinking that are the preconditions for strategy.

American political culture affects the activities of the U.S. government in a number of ways. In the first place, it is absorbed by government officials from the various institutions of the culture — schools, universities, churches, films, television, and the press. Secondly, it acts on them through the medium of public

opinion, which tends to define the outer boundaries not only of what the government can do but often of what it can consider or discuss. Finally, it acts on them in a more direct and authoritative way through the U.S. Congress and the legislative instruments at its disposal.

The extent to which American involvement in small wars has been constrained by public opinion and congressional fiat in the years since Vietnam scarcely needs to be emphasized. The antiwar movement aroused by the American debacle in Vietnam shaped the political consciousness of a generation of Americans and ultimately dethroned two Presidents. Its effects are still palpable today in our elite cultural institutions, in spite of what would seem to be a growing acceptance in popular opinion throughout the country of the employment of American military power abroad. As for Congress, it mounted in the aftermath of Vietnam what can only be described as a systematic assault on the ability of the President and the national security bureaucracy to engage effectively in low-intensity conflict. The War Powers Act, various legislative constraints on security assistance, and congressional oversight of covert action are perhaps the most egregious results of this effort. While the Executive branch has managed to resist or ignore some of them, it certainly remains seriously encumbered with such legal and quasi-legal baggage. Nor does there seem much prospect for relief, given the continuing partisan divide between Legislative and Executive branches.

Nevertheless, it can be questioned whether these factors by themselves are as decisive as is often assumed in limiting or crippling US Government performance in the low-intensity arena. At least as important, it can be argued, are those constraints imposed by the Executive branch on itself. While they are rooted in and reflect aspects of the wider political culture, these constraints derive largely from the nature of the national security bureaucracy and of national security decision-making as they have evolved in the United States since World War II, and especially over the last three decades. Those constraints — an interrelated nexus of attitudes, habits, traditions, and standard operating procedures — form what can usefully be labelled "strategic culture."

Strategic culture is the product of a number of very disparate influences. Foremost among them may be said to be the following: the geopolitical setting in which a nation finds itself; its international relationships; its political culture and social structure; its military culture — military history, traditions, and education; military and security organizations and their relationship to civilian authority; and weapons and technology. Strategic culture expresses itself in matters as diverse as strategic doctrine, personnel practices, command and control arrangements, and weapons procurement. Offensive orientation, reliance on firepower as distinct from maneuver, reliance on surprise and deception; such characteristics of a military establishment usually reflect its key strategic-cultural themes.

Elusive as the notion of strategic culture may seem to be, the phenomena it tries to capture are real enough, and can prove powerful and persisting in their effects. At the same time, it is important not to overstate the staying power of strategic-cultural attitudes and practices. Traumatic events — particularly military defeat — can reshape a nation's strategic culture very quickly. Organizational reform can also have a radical impact in a reasonably brief period of time. Consider, for example, the apparent impact of the (relatively modest) congressionally-mandated reform of the Organization of the Joint Chiefs of Staff in 1986 on the planning and conduct of America's military campaigns of the last several years. One also needs to be careful to avoid a deterministic view of the operation of strategic culture. Individuals and individual leadership really can play a decisive role in overcoming cultural patterns in organizations and, indeed, entire nations. Strong individuals at middle levels of military organizations can have a powerful influence; on occasion they are able to create identifiable and persisting subcultures (consider, for example, the case of Adm. Hyman Rickover and the nuclear Navy).

How does strategic culture affect American performance in low-intensity conflict or small wars? The fundamental problem is obvious and massive. What distinguishes low-intensity conflict from other forms of conflict is not the scale of violence as such but the fact that violence is embedded in a political context that directly shapes and constrains it. As Clausewitz teaches, all war is the continuation of politics by other means; low-intensity warfare is distinguished from other warfare by the extent to which politics dictates not merely strategy but military operations and even tactics. In low-intensity warfare, non-military instrumentalities of national power may have an equal or even greater role to play than military forces. What this means in practice is either that military forces must perform essentially non-military functions, or that special means must be devised to coordinate and integrate military forces with non-military agencies of government. Either course is apt to be culturally stressing for any military establishment, but all the more so for that of the United States. In addition to its long-standing traditions of military professionalism and civilian control of military activities, the American military (and national security establishment generally) tends to view war and peace as sharply delineated activities rather than as a continuum. The use of force tends to be seen as a last resort, a response to the failure of politics or diplomacy rather than as an instrument of politics or diplomacy.

Additionally, the American national security establishment as a whole is not structured in a way that facilitates coordination between the armed forces and other agencies of government, and moral-cultural attitudes in the civilian agencies tend to be more hostile toward the use of force than is the case in many countries. For a number of reasons relating to its constitutional and political history, the U.S. government lacks a powerful center, at least during periods of

relative peace or in the absence of a major external threat. Key agencies such as the Departments of State, Defense, and Treasury and the Central Intelligence Agency enjoy considerable autonomy. In recent years, Congress' challenge to Presidential discretion and prerogative in national security affairs has led to a further weakening of executive control, particularly of the intelligence community. All of this might be less significant if there existed in the United States a cohesive political class with traditions of service to the nation's military and security forces and an instinctive understanding of the requirements of national strategy, of the sort that ran the British and French Empires in the nineteenth century or the Soviet Empire in the twentieth. As a general rule, however, America's political elite has shown little knowledge of or interest in "imperial policing," as the British used to describe low-intensity warfare.

At senior levels of the U.S. Government, in any event, there has been little effort to develop doctrines or mechanisms that might provide a strategic framework for the conduct of small wars. In a surprising reversal of previous patterns, what interest there has been in this area has come from the Congress. The Low- Intensity Conflict Board, a subcabinet-level coordinating mechanism Congress asked to have established in the White House in its military reform legislation of 1986, remains essentially a dead letter. Although forced by Congress to accept the creation of a unified command for special operations forces and a new bureau in the Department of Defense for special operations and low-intensity conflict, the Executive branch at the highest levels has consistently opposed institutional reform or other fundamental measures to improve either its strategic competence or its operational capabilities in the low-intensity arena. This clearly reflects strong resistance from the relevant bureaucracies, particularly the Department of State, but to some degree also the defense establishment as a whole.

What problems does all this create for the strategic direction of small wars? In the first place, and probably most importantly, military contingency planning remains totally divorced from the civilian national security agencies, and subject only to very restrictive review by civilian officials within the Department of Defense. This has consistently caused difficulties in the area of U.S. dealings with the political leadership of the countries involved (notably the establishment of the Endara government in Panama; but consider also the handling of the Governor General of Grenada during Operation Urgent Fury). It has also led to consistent neglect of civil-military planning issues both during and after combat operations. The U.S. did not adequately anticipate the problem of breakdown of law and order in Panama City during Operation Just Cause, or plan for the reconstitution of Panama's security forces, political system and economy (the same failure occurred in Grenada). In the second place, U.S. intelligence capabilities are not well configured to support low-intensity warfare. This is particularly true of short-notice contingency operations (the absence of adequate maps in Grenada has been widely remarked), but remains a problem even in

protracted conflicts such as El Salvador, due to an overemphasis on sophisticated technical collection assets as opposed to the human intelligence networks that are critical to the successful conduct of revolutionary war. Third, the process of planning for security assistance to friendly governments suffers not only from congressional micromanagement, but from persistent disconnects between diplomatic and military requirements and an excess of bureaucratization.

Because low-intensity conflict (especially in the form of protracted revolutionary war) is neither peace nor war in the ordinary sense of those terms, no one is clearly in charge. Absent strong direction from the national level, there are essentially two ways of coping with such situations. The first is to put the military in charge but force it to perform many nonmilitary or non-combat functions (the French in Algeria). The second is to create *ad hoc*, hybrid civil-military structures under proconsular civilian leadership (the British in Malaya). In spite of some experimentation with the second model (the Civil Operations and Revolutionary Development Support–CORDS–program) in Vietnam, the United States has tended toward the first alternative in practice, although as a matter of policy it has generally understated the military role and overstated the contributions of other agencies to the conduct of low-intensity operations. The first model has the advantage of simplicity and of maintaining a military discipline and spirit in an environment that too easily tolerates bureaucratic business as usual. It has the disadvantage that it asks more from soldiers than they are customarily able to perform, and threatens to distract them from their more properly military missions. Which model is chosen has much to do with the prevailing military culture of a society.

The United States military as it exists today is very largely a product of its decades-long confrontation with the Soviet Union. It is probably fair to say that the Soviet threat as seen by the U.S. military establishment was fundamentally a military threat, one posed either directly to the United States by Soviet strategic nuclear forces, or to America's allies in Europe and Asia by Soviet conventional forces. (Consider by contrast the French military, which in the 1950's came to see "revolutionary war" in the less developed world as the central threat posed by Soviet Communism and revised its military doctrine to reflect this perception.) Accordingly, the basic mission of U.S. military forces has been seen as the deterrence of, or defense against, the Soviet threat so understood; other missions, including the containment of Soviet imperial expansion, have been considered of a strictly secondary order. This may well have been an entirely proper ordering of national priorities, but it has clearly created and reinforced a military culture oriented to major weapons systems, high technology, and large (not to say apocalyptic) wars, to the neglect of the non-military dimensions of international conflict.

If this analysis is correct, it appears to follow that a dominant role for the American military in small wars is to be neither desired nor expected. Several

other factors, however, need to be considered. Contrary to a certain popular (or more accurately, elite) stereotype, today's officer class in the United States is better and more broadly educated than at any time in the past. In terms of general understanding of the international political-military environment, it can by no means be assumed that military officers are less well-equipped than, say, foreign service officers. Moreover, the military culture has unique advantages in terms of the planning and execution of highly complex operations. Habitual attention to the relation between strategy and resources, recognition of the importance of doctrine, discipline in execution, accountability: all of these features sharply distinguish the military from civilian national security organizations and are not easily replicated outside a military organizational context.

It is undoubtedly unrealistic to expect today's military to accept full responsibility for the small wars mission. There is still a powerful current of feeling within the military, deriving principally from the Vietnam experience, which regards low-intensity warfare as a political albatross—a high-risk enterprise that typically lacks genuine national commitment and jeopardizes the institutional standing of the defense establishment as a whole. Without revisiting the historical debate over responsibility for the American defeat in Vietnam, it seems fair to say that while there is certainly justification for the view that the nation's political leadership blundered badly in that conflict, there were also serious military shortcomings that can be traced to a general failure to appreciate the nature of low-intensity warfare (which is not to say that Vietnam was typical of the genre). More recent experience—the ten year conflict in El Salvador—shows that the military has made real progress in correcting those shortcomings, even in the absence of a major national commitment or firm strategic direction from Washington; it is at least arguable that the U.S. could have achieved substantially better results by relatively modest improvements in its military (or security-related) effort on the ground. It is not unreasonable to expect the U.S. military to digest these lessons over time and take a more positive attitude toward the small wars mission. After all, the United States is very unlikely ever again to involve itself directly in a Vietnam-like counterinsurgency situation; at the same time, it is becoming increasingly difficult to justify structuring the U.S. military establishment around exclusively large-war missions. The case of Panama shows how a small war can be not only low cost but high payoff both in a strategic and a political sense. Even a protracted small war need not raise the specter of Vietnam if rules of engagement are reasonable, strategic objectives are understandable and attainable, costs are contained, and the supported government is politically palatable. Improved coordination of the military and non-military instruments of national power will remain the key to improved American performance in small wars. As suggested above, perhaps the most promising approach is simply to expand the military's responsibility in areas usually considered peripheral to its primary war-fighting mission. The most important such areas are intelligence,

information, civil administration or civil affairs, and security assistance. Experience indicates that U.S. civilian organizations are unlikely to provide adequate support for these functions in low-intensity operations; at the same time, though typically neglected by military organizations, they can and have been effectively performed by them. In its recent campaigns in Panama and the Persian Gulf, the American military turned in highly creditable performances in the areas of psychological operations and civil affairs, in spite of some problems in interagency coordination. Notwithstanding a recent failed experiment in the area of military human intelligence (HUMINT) collection, it can be argued that such a capability remains an important desideratum. As regards security assistance, there is at least a respectable case to be made for removing primary responsibility for it from the State Department and giving it to the Department of Defense.

A few remarks need to be made concerning the changing face of low-intensity warfare in the post-Soviet world. The new international situation clearly alters American requirements in this area in fundamental ways. The delinkage of small wars from Soviet global ambitions that has been taking place over the last several years means that the U.S. will be worrying less about deep involvement in protracted revolutionary warfare in the developing world. In general, the military dimensions of U.S. involvement in such conflicts will probably decrease, while other dimensions (notably law-enforcement) will become more prominent. As a consequence of this, the center of gravity of low-intensity warfare, properly speaking, will shift from insurgency/counterinsurgency to contingency operations, both violent and otherwise. This development will provide a welcome opportunity to reformulate a doctrine of low-intensity conflict that more clearly defines the operational spectrum and distinguishes and assigns bureaucratic roles and missions. And it may well favor the approach suggested here of expanding military responsibility for key political-military missions.

The world we are now entering holds many question marks, and is plainly going to force a rethinking of many of the most cherished assumptions underpinning American national security policy. This kind of world is bound to have a corroding effect on our strategic culture — and thereby offers a unique opportunity to free ourselves from some of its shackles.

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Chapter XI

Panel Discussion: Domestic U.S. Constraints on Low-Intensity Conflict

RADM Bruce Harlow, Chair

[Following the presentations by George Weigel and Carnes Lord of their respective papers, Rear Admiral Harlow opened the floor to discussion.]
RADM HARLOW: To allow more opportunity for comment and questions, I will forego a summary and open the proceedings to interventions from the floor.

PROF. SARKESIAN: Is there such a thing as a just revolution, as a just counterrevolution, or a just terrorist operation?

MR. WEIGEL: Can there be a just revolution? Yes. Just counter-revolution? I'm not sure what that would mean. One of the things I should have mentioned, which merits some thought, is the way in which political struggle shaped the end of the Cold War in Central and Eastern Europe. In other words, non-military political action aimed at the "revolutionary overthrow of the existing regime."

Just terrorism? No. That's off the board. Just counter-terrorism? I think counter-terrorism, as Bill O'Brien's new book indicates, puts the most stress of anything we've yet considered on the traditional just war categories because of the nature of the adversaries and the discrimination problem. As long as this is a phenomenon of our times, we're going to have to figure out a way to think about it in something approaching just war terms. In this matter, I'd happily defer to Bill.

MR. COLLINS: The subject of assassination kept cropping up both days, and what I would like to do is give you all a couple of things to think about that might not have occurred to you before.

U.S. policy disapproves of assassination for moral, legal and, as Carnes Lord said, cultural reasons, but the limits of that disapproval are very fuzzy because the term "assassination" has never been effectively defined. It seems to me that it's time to sort out that semantic mess, because, if flexibility is important for low-intensity conflict, we may be passing up a lot of useful opportunities. Strategic assassination has a potential to change the course of events dramatically; it can even change the course of history.

I believe, personally, that the term "assassination" should be differentiated from garden variety homicide and limited to selective attacks on individual civilians for political or social purposes. And according to that definition, killing chiefs of States or other key civilian officials would clearly be taboo. But pseudo-civilians, let's say in their role as military commanders, clearly ought to be legitimate targets. I'm thinking of people like Saddam Hussein. We spent a lot of time trying to blow this guy up with bombs. What's wrong with hitting him with a bullet? I really don't understand the difference. Legitimate targets could include senior military officers, whose deaths I would call justifiable homicide. I love a quote from Field Marshall Slim who used to say that "Nothing is better for the morale of troops than occasionally to see a dead general."

The prime movers for military projects might be considered legitimate targets. I'm thinking, for example, about what would have happened it somebody had hit Oppenheimer or Szilard while they were trying to put the Manhattan Project together. What would have happened if someone had hit Hyman Rickover when he alone was pushing for a nuclear-powered Navy?

If you don't like assassination, what about abduction? It's a lot harder, but it gets you away from the assassination prohibition. The real master of this was Otto Skorczeny. This guy snatched Mussolini off the top of Grand Sasso Mountain, which was supposedly impregnable, and spirited him away to establish a fascist government in exile. In 1944, the Hungarians announced their intention to leave the Axis. Skorczeny kidnapped the regent and Hungary stayed in the war until the bitter end in 1945. During the Battle of the Bulge, General Eisenhower was never allowed out of his quarters because we were afraid that Skorczeny was either going to assassinate or abduct him.

Now, there's a flip side to all of this, obviously. Assassination and abduction are games that anybody can play, but only gifted players can play well. My guess is that if John Wilkes Booth had known it was going to take a hundred years to sort things out after he assassinated Lincoln, he might have thought a second time. So the bottom line in thinking about this particular issue is that you need to take a hard look at the cost-benefit ratios, and weigh them not only with political leaders, but also with some special operations professionals. You only give the word to go then, if the plan looks good from the U.S. policy standpoint. If that is done, it's just possible that these kinds of activities could fit within our moral framework.

MS. HECKLINGER: A question then. How would you apply that to the drug war and what place would the principle of reciprocity have in your plans?

MR. COLLINS: You know, I'm a good Christian but I really wouldn't have any compunction at all about hitting some of these drug lords. I think again that

it's a case of thinking through the risk/gain ratio. But this is also a transnational problem. We can't make these decisions by ourselves in most cases.

FR. WINTERS: Can I ask Carnes to talk a little more at length about the claim that the Panama war was "low-cost but high-payoff"; what does that mean?

MR. LORD: Well, that was really in the context of the argument you often hear, from military people in particular, that in the Vietnam War we wasted an incredible amount of resources and lives for a State that was not at all proportionate to it.

In Panama, clearly, there was a much greater proportion between the investment that we made in the State and its strategic value. I think my point was that we can conduct these kinds of operations in a cost-effective and also a morally acceptable way so that they're politically acceptable in this country and constitute a strategic success, which I think Panama was.

FR.WINTERS: Well, how do you deal with the fact it was condemned immediately by the OAS? In the long-term that's going to bear a cost to the United States.

MR. LORD: Well, I think the regional effects were much less than many people thought they would be at the time. Today, I don't see any really negative fallout in the region. Most Latin governments pretty much, from a fairly early stage, accepted the action as a reasonable one.

FR. WINTERS: Why do you say that?

MR. LORD: That's the way I read it. I'm not a Latin American expert, but I think Panama failed to provoke the kind of outcry that has greeted some of our other Central American involvements.

RADM HARLOW: Any other comment or question?

PROF. FARER: George Weigel's reference to "crazy States" gives me a chance to underline a point I tried to make yesterday. I think the whole discussion of low-intensity conflict is fundamentally skewed when it assumes that States or groups whose positions are initially antagonistic to ours ought to be dealt with as permanent enemies, and that what we should worry about is the techniques needed to remove them as obstacles to the achievement of our objectives. Characterizing our opponents as crazy, which is not to suggest that there are no crazy regimes, is one of the ways of avoiding having to think about the question of whether parties who initially are our adversaries may nevertheless have claims

which we ought to think about accommodating. The nature of our discussions tends to treat our purposes as sacrosanct, and doesn't always take sufficient account of the resources of diplomacy. What is diplomacy other than an effort to seek out an accommodation? You may decide that the costs are not worth the compromise. This is just a caveat and I think it's made about as clearly as it can be.

PROF. WAKIN: I'd like to speak about one of our possible responses to low-intensity conflict. Terrorism is a criminal act, whether it is committed by an individual or a State. Now, we have traditionally dealt with criminal acts by attempting to arrest and try the perpetrator in a court of law. If, in the process of apprehending the criminal, he gets killed, then that is no great loss. The way we deal with certain kinds of low-intensity conflict might profitably be seen as having more in common with criminal law enforcement than with conventional war. That's worth thinking about when we try to envisage the results of developing policies that permit the assassination of heads of State.

MR. McNEILL: I want to get back to the distinction made within the Defense Department between a covert operation carried out by the intelligence community, and a clandestine operation carried out by military assets. I was thinking about the hypothetical case of nuclear weapons winding up in the hands of Iran. Obviously, we have a choice of methods to deal with such an exigency. I was wondering if Mr. Weigel would say that the criteria in the just war tradition would be equally applicable to a covert or a clandestine operation. According to the documentation provided in the book *Mayday*, President Eisenhower decided that pilots of the U-2 planes would not be military. He wanted them to be civilians so that the Soviets could not characterize the overflight program as a military operation, which they might have done to justify a retaliatory response of a military kind. So, do you think that your just war analysis would apply to this intelligence operation or only to a military one? Would all the criteria apply to a single military operation dedicated to a particular limited goal in peacetime?

MR. WEIGEL: If I understand the question, I think the answer is "Yes." The just war tradition is not in any sense a kind of moral cookie cutter in which you can stamp out fairly clear answers to things. The image I've used is that the just war tradition is far more like a conductor interpreting a symphonic score than an engineer reading a blueprint. I mean, the norms are the notes in the composer's instructions, tempo, et cetera, but the beauty of the music, or in this case the wisdom, is a function of the wisdom of the statesman reading the notes on the score, and interpreting it in a morally reflective way.

It does not seem to me at all inappropriate to think about covert operations for the aims of non-proliferation according to these criteria. After all, Paul

Ramsey is the one who insisted that just war criteria are simply the criteria that are involved in any morally reflective use of force. They apply to policework or a military operation or a civilian-run intelligence operation. These criteria have emerged, as Professor Johnson suggested, from a history of disciplined reflection on the human condition. If I'm hearing you correctly, you seem to see a qualitatively different kind of situation in Judge Sofaer's hypothetical case from say, the moral analysis of the Gulf War. Why is that?

MR. McNEILL: Well, because the analysis in your book, which I think is very helpful and instructive on these points, seems to cast the criteria for just war compliance in very broad terms that might be difficult to apply to a limited mission. I'm thinking of the requirements for the realization of peace and estimating the probabilities of success. Now, you may want to undertake a limited mission even if the odds are greatly against you if you think it could be very important. Maybe this is a mechanistic approach to the problem, but I'd like to know if it is warranted.

MR. WEIGEL: Okay, I see what you are saying. The criterion of advancing the cause of peace is obviously not mechanistic. A wholly justifiable operation according to these criteria will not necessarily yield peace at the end of the equation. We know that's just not the way the world works. But, it is not all that difficult to demonstrate that the chances for peace in the world are enhanced by denying Iran or Hezbollah a nuclear weapon. That is not a hard case to make in my mind. I think what is the harder case to make, given the current state of reflection within the theological and philosophical worlds that pay some attention to this stuff, is the question of just cause. As I was saying earlier, we need to figure out how one carefully reverses this trend towards just cause being defined solely as overt, cross-border attack. How do we carefully expand that definition to take account of these new actors and new technologies without making the boundaries so elastic that there is no serious constraint in front of us?

RADM HARLOW: I'll take one last comment.

PROF. JOHNSON: I would like to put in two cents worth on this question and then make a comment that refers to other general issues.

I would say that there is a difference in the applicability of just war reasoning in this particular case, and I would construe it like this. Paul Ramsey used to argue that the just war tradition is a guide to statecraft. I agree with that but I think that it also needs to be said that there are a lot of other guides to statecraft, and just war tradition is only one among them. Just war tradition has specifically to do with the question of the use of force in the service of statecraft. I can easily imagine covert operations in which the use of force is not the issue; intelligence

gathering is the case in point. So the kinds of moral concerns that would bear on that activity are not identical with the moral concerns that would be brought to an operation involving the use of force of any kind.

I think that's one distinction that we ought to keep in mind. We want our politics, I hope, to be as moral as possible, and to me that means that we have to take seriously just war concerns. But I think we also have some other concerns that, in the case of covert operations, may be a good deal more relevant and more important than the several criteria in just war tradition.

The more general comment I wanted to make has to do with the whole question of the institutionalization of policy and its relationship to the American public debate over low-intensity conflict.

I take seriously the comment that lawyers are very seldom consulted, and when they are brought in, are not asked the right questions or given a chance to respond fully. That's certainly true in spades for the people that do moral studies. We are even farther down the list than the lawyers. What needs to be done in the policy process, is more than simply having people of integrity around, whether they be lawyers or moralists or generals or diplomats. You really have to have an institutionalized process by which certain principles get put in place and used. Whether guidelines or checklists are used would depend on the rigidity of the approach, but something needs to be there that requires policy makers to ponder these criteria before they make decisions. That's a way of making sure that everybody isn't caught napping when the press or somebody in Congress gets hold of a new policy. It's a way of making sure that the debate has, in fact, gone on, and decisions have been made in the proper way. But, there's another side to the thing, and that is making sure the debate is public.

George Weigel touched on something that's very sensitive, it seems to me, when he pointed out that what we did yesterday in here on just war tradition is far more than went on in any seminary in the country this semester. I would say that it's probably more like in the last five years. There is not an ongoing public debate over these things. Maybe it's because we, as a culture, don't really like to talk about the projection of force as a policy matter. The trouble with this is that we will get very bad advice and make disastrous *ad hoc* decisions. So, we've got to find a way to get the debate out of this room in Mahan Hall, and into the public sphere.

RADM HARLOW: I hope you will indulge me if I make a few synoptic observations to cap off our proceedings. It seems obvious that low-intensity conflict brings into play a wide range of domestic and international legal principles. At its lower end, this spectrum might include law enforcement principles entirely consistent with traditional peacetime international relations. Ranging up the spectrum, low-intensity conflict operations could be premised on the principle of humanitarian intervention, as is currently the case in Somalia.

At the upper end of the spectrum, when low-intensity conflict operations contemplate the taking of human life or the destruction of property, the principle of self-defense and, indeed, many of the principles of conventional warfare would come into play.

The application of moral principles to low-intensity conflict presents its own challenges. Low-intensity conflict operations could be undertaken in a proactive mode to prevent an evil from occurring. As was observed earlier in the discussion, moral principles *per se* are infrequently considered by U.S. decision makers in the midst of a low-intensity conflict crisis. My experience, however, is that moral principles do play an important, albeit implicit, role in crisis management. Our decision makers instinctively apply principles of just war, proportionality and humanitarianism in the development of policy options. In simple terms, the applicable moral standard is: one can only launch an operation that involves the taking of life if there is an overwhelming and immediate threat to our vital national security interests and no alternative non-violent means of meeting the challenge.

Although a multilateral response to threats is always preferable, the United States must preserve its ability to undertake effective unilateral low-intensity conflict operations. Our effectiveness in conducting operations in this shadowy, nebulous arena will in large measure determine our security for the forseeable future.

[After a short break in the proceedings, Rear Admiral Harlow reconvened the conference participants and introduced the next two discussants, Judge Abraham Sofaer and Mr. Kenneth De Graffenreid.]

JUDGE SOFAER: When Alberto asked me to speak here, I couldn't help but think that Admiral Mahan, whose portrait we see in the next room, would think that this is a good idea. Low-intensity conflict is one of the critically important dimensions of military strategy. To deal effectively with insurgencies aimed at democratic allies and with State-sponsored terrorism, we need the capacity to act militarily, but with flexibility and speed. The concept of low-intensity conflict also includes many of the most challenging threats to our interests. The United States continues to be faced with conventional wars. However, they seem more likely than not to be the product of the perversity of our enemies. Forms of low-intensity conflict provide a far more promising vehicle than conventional war for attacking well-armed Western States. I keep thanking the Lord for the fact that the madmen of the world seem not to have read Bill Casey's excellent book about the effectiveness of low-intensity techniques and have thus far lacked the discipline to master them. But, the increasing use of these techniques is inevitable. I believe that Assad is a classic example of the leader who shows the discipline to utilize covert low-intensity techniques to attack his enemies. Such

leaders will last a lot longer and be much more effective than those who do not employ these methods.

My assignment, Alberto wrote, was to deal with the legal traditions, norms and morals of American society that constrain resort to low-intensity conflict. Of course, Mahan would again approve of this because he strongly resisted legal rules that unreasonably or unequally restricted military options. He took law seriously. He saw clearly the influence over time that legal and moral norms could come to exercise on military operations. So, he firmly opposed rules, both domestic and international, that deprived the United States of any important military advantage without sufficient offsetting value.

This is obviously not the time nor the place for a comprehensive treatment of every existing legal restraint, every moral impulse in American breasts, and every political institution that influences low-intensity conflict. But a brief overview of the principal forms of legal constraints should be useful in appraising the existing and potential effects of law on this important strategic option. For a more detailed explanation of these factors, I recommend you fill out the form you have for Michael Reisman's book on covert operations. It is a superb work; analytical, pithy and full of useful information and wisdom.

In general, our domestic legal traditions and practices exercise constitutional, statutory, and regulatory constraints on conflict. Additional constraints exist based on the U.N. Charter, treaties, practice, and the principle of reciprocity. While each category of these restraints can have a separate, significant impact, the most efficient way to discuss them in the brief time available, is through a functional evaluation that focuses on selected examples of activities involved in low-intensity conflict, and that examines the key issues related to each activity. Typical of these activities are rescue operations, abductions, measures against State-sponsored terrorism, and the support of armed insurgencies.

The basic question that we have to ask ourselves, and that runs throughout my brief presentation, is the one that was asked very pointedly yesterday: Why do these activities deserve special study? What is unique about them? I would submit they merit study for many good reasons. First, with respect to domestic limitations, strong arguments can be made either that the President has inherent authority to use limited force to protect Americans through rescues or anti-terrorist strikes, or that Congress has approved such activities in various statutes authorizing the arrest of terrorists and establishing the special forces intended for such purposes.

Much stronger arguments can be made with respect to low-intensity conflict along those lines than with respect to high-intensity or conventional conflicts. Furthermore, while the War Powers Resolution applies to low-intensity activities involving the use of regular combat forces, these activities generally do not involve such forces. At least, that's the way we interpreted it in the Reagan Administration, and that interpretation has been accepted. Also, many of the activities involved in low-intensity operations take less than 60 days, and so never

require the approval of Congress under the War Powers Resolution. Presidents have, furthermore, taken the view that such actions are quintessentially those concerning which a report is not possible due to the need for secrecy. So, the Resolution tends to create fewer problems even for those low-intensity activities to which it does apply. In general, it seems safe to say that limited uses of force, designed to serve a special purpose, create less concern in Congress than broader uses of force, such as the war to liberate Kuwait.

The dramatic and substantial air strike against Libya created no significant difficulty in Congress, although it was strictly unilateral, not only because the objective was widely supported, which it was, but also because Congress did not view this onetime, single-purpose effort as a threat to its institutional role and constitutional powers. Conversely, when Congress saw that President Bush was about to wage a full-scale war to liberate Kuwait without its approval, it acted to prevent what would have been, I believe, a *de facto* loss of its authority.

Now, there are exceptions to this generally hospitable view of low-intensity devices under domestic law. Those are the special situations in which Congress has sought an ever greater role in regulating certain covert activities and in making sure that they are subject to legislative review. Where a low-intensity operation is a covert operation under the Intelligence Authorization Act, fiscal year 1991, absent a presidentially declared emergency, special reporting, approval, and funding requirements apply. No such action is allowed that would violate the Constitution as expressly provided in the statutes. This leaves in place, however, the President's power to authorize such operations even if they arguably violate international law, the laws of foreign countries or possibly even U.S. statutes.

Finally, Congress is particularly protective of its exclusive power to fund all U.S. Government activities. Now, I'm not advising anyone to violate a U.S. statute with a covert operation. I think, however, if you report a covert operation that contains an arguable violation of the U.S. statute and the committees do not take you to task for it, you will be given the benefit of the doubt as to whether it does, in fact, violate the U.S. statute in that sort of situation. That would not be true of the funding requirements. I think there's nothing Congress feels more strongly about, particularly after Iran-Contra, than the possibility that covertly generated funds could be used to support other covert operations, which would then not be subject to Congressional check through the budgetary process.

The single most significant limit imposed by executive order on low-intensity operations is the prohibition on assassination. While I share the doubts expressed at this conference about the wisdom of targeting foreign leaders, some interpretations of this prohibition have unreasonably restricted the capacity of the U.S. to use a variety of important low-intensity methods, even in self-defense, which might, not intentionally, result in the death of a foreign leader.

The meaning of assassination in the executive order, however, has been limited in several ways during the last few years. Most significantly, it's been

limited to situations in which the homicide involved is properly characterized as a "murder," in other words, a criminal act. So, I think that the legal limitations on "assassination" are in good order, relatively good order. No President can be given, nor would ever need, authority to murder people and so the issue really is not, I believe, as difficult a problem for planners as it used to be.

In that connection, I might say that it's my view that the flak we took over this assassination problem during the early part of the Bush administration, was the product of individuals within it who did not want the authority to support insurgencies. Not just to kill people, but to support insurgencies. A way of doing that was to broadly construe the assassination prohibition, and then leak that construction to the press. This is something we see used in Washington, over and over again, as a way of precluding options that our government planners legitimately have before them. It took months to clean up that problem, but we did it and I think Bill Barr certainly deserves enormous credit for it. I'm pleased to say I played a constructive role. Jack McNeill was also involved in that, I believe.

Low-intensity conflict also has many unusual qualities and poses unique problems under international law that make it a deserving subject for separate analysis. I will touch upon a few problems, by way of illustration, with respect to activities involving the use of force and others involving controversial actions clearly outside the scope of use of force limitations.

Perhaps the most dangerous notion in this area is the view that force may be used in self-defense only in response to an armed attack in which regular forces of a State, in some manner, invade another State's territory. Some who advanced this view no doubt sincerely believe the U.N. Charter should be read so literally. But such a reading of the Charter is not textually required, and is totally inconsistent with the practice of nations throughout human history, including the post-Charter period. Advocates of the notion that self-defense is so limited are forced to make exception after exception to their vision of self-defense under the Charter in order to account for such actions as the rescue at Entebbe, the right to protect nationals abroad, and the right to preempt attacks. These "exceptions," necessitated by such literal interpretations, undermine the integrity of the Charter and leave it vulnerable to unprincipled *ad hoc* exceptions made to suit the convenience of particular States or ideologies.

I must say in this connection, that Lou Henkin demonstrated integrity in a debate with me at the New York City Bar Association over the Panama affair when he defended this narrow interpretation of armed attack. In response to the question whether he believed that the right of self-defense applied to a smaller State on whose borders a larger State was accumulating a force for the apparent purpose of invading it, he maintained that the smaller State had to wait until it was actually attacked before it had the right to exercise self-defense under the Charter. I wish events like this would get more publicity, because when you see

in print these sort of abstract, scholarly and gentle statements by people like Lou Henkin, and he is a wonderful man, they have credibility. But in that room, at that moment, the credibility of this point of view was completely shattered, even among people who were overwhelmingly hostile to my relatively expansive view of the concept of self-defense.

Limiting self-defense to responses to armed attacks by regular forces of one State against the territory of another, would have grave consequences for American interests. On the one hand, the U.S. would be deprived under such a view of the ability to claim it is acting in self-defense when it responds to low-intensity techniques, such as acts of State-sponsored terrorism aimed at Americans outside the U.S. Other States would thereby be free to use low-intensity techniques short of an armed attack against the U.S. with greater freedom than if such actions were understood to trigger the right of self-defense. On the other hand, since the ability to invoke such countermeasures is theoretically available to Professor Coll, as a practical matter we could not, and should not, utilize the full range of such techniques. Our domestic moral and legal traditions and constraints would strongly inhibit aggressive actions, even if they did not amount to overt armed attacks.

Another problem of particular relevance to low-intensity activity, especially when covert, is the legal position of a State that uses persons other than its own armed forces or avowed agents, to implement its aims. This is one of several areas in which the U.S. has shown an unacceptable inconsistency in its application of legal principles. In general, no State should be able to evade any measure of responsibility properly attributable to it, for a given use of force or other action merely because it uses persons who have no other association with it to implement that policy. Of course, one who supplies arms to a nation or to an individual, bears no responsibility for unintended results beyond what could reasonably be expected to occur. But if we supply a bomb to some insurgents for the purpose of causing an illegal act to be performed, or with a reckless disregard for illegal consequences, we are surely responsible for such acts in some appropriate degree. We held Libya responsible for using terrorists for the purpose of killing Americans, and these were the words used by the President: "To the same extent Libya would have been responsible, had it used its own armed forces for that purpose."

Other areas in which the U.S. has had difficulty coming to grips with problems associated with low-intensity conflict include the following: the principle that no illegal act can be treated as lawful, merely because it is done covertly rather than overtly. In other words, covert operations are designed to enhance effectiveness, not to evade accountability. There is no moral, legal, or any other basis for claiming an evasion of accountability through the use of a covert technique. And there are many of our non-lawyer leaders who need to be taught that lesson over and over again.

Another example of acts short of the use of force in which we may engage is the manner in which we treat diplomatic missions or pouches. This conduct is, in my view, reciprocally permitted to the States against whom we take such acts. Also, it has to be said that we undermine the position we have taken in international fora on agreements such as the Vienna Convention when we pursue covert policies so consistently at variance with our official position that the discrepancy becomes common knowledge. Then there really is no longer any credible basis for us to go to other countries and say that they are supposed to operate in a different way, vis-à-vis our own missions.

Another difficult subject which must be addressed is that of acts which violate the domestic laws of foreign States. Here is a very, very sensitive issue which we have been dancing away from for years. Internally, we look at it periodically, but there are very few open discussions on this issue. These acts, I would submit, are inconsistent with the general policies and objectives of international law and should be undertaken only where some overriding legal principle is available as justification, and where we could regard such acts as appropriate, if taken under the same circumstances within the United States. Now, that's a very challenging statement, but if you think about it, we should be able to meet that standard. We have to look at it carefully. I would take into account the fact that the United States should allow a certain degree of investigative activity in this country by foreign countries. We do tolerate it, because we certainly engage in it overseas, and we could permit a certain amount of this kind of thing without harming ourselves. I'm not suggesting violations of the U.S. law by any means. I'm suggesting relatively harmless things. But if we try to create double standards, we simply won't succeed, and we had better be realistic about that fact. At least somewhere in some forum, maybe not here, maybe not in public debate, but at least somewhere, we have to sit down and cope with the real consequences of what people know we're doing overseas. At the time I left the U.S. Government, we had not succeeded in dealing with these and other similar issues in an intellectually satisfying manner.

Beyond the issues concerning low-intensity conflict raised by the familiar mandates of international law, are some potentially constraining and possibly liberating effects of the new international order. The collapse of the Soviet Union has created a situation in the Security Council where widely accepted norms of international conduct may, for the first time since the Charter's adoption, be taken seriously. While the new international order may lack substance in many other areas of international activity, it means something in the area of international law.

In dealing with Iraq's attack on Kuwait, the Council proceeded from measure to measure until it finally authorized the use of force. Using the Council so effectively helped the President to garner widespread support internationally, and may well have been pivotal in securing the approval of Congress. It is already

clear that this process is potentially available to respond to low-intensity conflict. The Council has recently adopted a resolution that will impose economic sanctions against Libya under Article 41 for failing to turn over the two agents indicted for blowing up Pan Am Flight 103. These extraordinary developments have created serious complications and grave risks for national security planners. Having once resorted to the Security Council to deal with Iraq, and now Libya, the U.S. will be under constant pressure to report all acts of aggression to the U.N. The U.S. will not, moreover, always have its way in the Council; four other States have the veto, and clear-cut decisions can be avoided where a large enough number of States want no clear result. Furthermore, in issues concerning national security, timing can be everything. Over six months went by before Iraq was pushed out of Kuwait, by which time that country was raped. Relying on law enforcement to punish Libya for the Pan Am Flight 103 bombing has already taken over three years, and the process of forcing the surrender of the two indicted agents could take months, and might never succeed. Once the Council refuses to accept a measure sought by the U.S., it will be difficult to act unilaterally, irrespective of how many times or how clearly that right is asserted.

Finally, the Security Council is far less predictable than unilateral action. The process that is taking place in the effort to obtain custody of the Libyan agents is ample proof of this. Libya has taken the U.S. and the U.K. to the International Court of Justice to derail their plan, and it may succeed in obtaining from the I.C.J. at least enough to undermine our political leverage in the Security Council.

So, what should be done about the U.N.? In some respects, we have little choice. We have committed ourselves to develop the potential of the U.N. Security Council to perform its intended role in governing international security. My own view is that we should try to succeed, even as we retain at least a fig leaf of the right, the theoretical right, to act unilaterally if the Council fails to protect some fundamental interest. By this, I mean much more than using the Council as a highly visible vehicle to serve U.S. interests. We should take very seriously the creation of a U.N. force, as well as its use in low-intensity conflicts. Some interesting advantages could flow from such expanded use, not the least of which would be the Council's relative freedom from constraint by our own domestic institutions.

In conclusion, let me assure you that I take very seriously the notions discussed yesterday about just wars and morally-driven interventions. I recognize that international law is not, and cannot be, morally neutral. Also, I fully agree that these matters of moral justification should be a part of a sound international lawyer's analytic framework in evaluating low-intensity warfare. Nonetheless, my view of the lawyer's role in such issues requires a high degree of restraint in pushing any point of view other than those that are very widely accepted. Lawyers and law are already too often relegated to subordinate roles in which they are seldom heard, even on the strictly legal issues. Lawyers need to restore their

credibility in this area with steady, realistic, and honest advice, keeping in mind that to say that the law allows a given action, does not mean it should be taken; whereas to say the law proscribes a given action does mean it should not be taken irrespective of the views of duly elected or appointed individuals as to its moral and political wisdom. The law's role in evaluating low-intensity conflict, therefore, should be to force decision makers through rigorous and comprehensive examination of all the relevant circumstances on each of the issues presented.

I hope my brief comments today are of some help in pointing the way.

RADM HARLOW: Thank you. Ken, you have the floor.

MR. deGRAFFENREID: It's a pleasure for me to be here this morning to share this panel with Admiral Harlow and my good friend, Judge Sofaer. I was asked to consider the moral and legal constraints on successful U.S. engagement in low-intensity conflict. So the purpose that I have this morning is on a rather more practical level than, perhaps, some of the discussion that we had yesterday. I will try to speak from the point of view of a policymaker involved in at least one aspect of low-intensity conflict for about ten years.

Professor Coll mentioned that I was on the staff of the Senate Intelligence Committee. I did that for four years in the late '70s when I was intimately involved in covert action issues and was one of the principal drafters of the 1980 Oversight Act, which attempted to provide some ground rules for congressional oversight, particularly in the area of covert action. Following that, I spent six and a half years at the White House as the intelligence policy person on the National Security Council staff, where I was responsible for looking at all of the covert actions coming forward from the CIA and, to a lesser extent, the Department of Defense, for most of the Reagan period.

From that perspective then, I want to say a few things about one aspect of the moral constraints and the moral underpinnings of U.S. engagement in low-intensity conflict. I will specifically address the tradition of American political values that have influenced our foreign policy in general, and particularly, our use of force. Much of this will be familiar to many of you, and I will only make a few important points. Then I want to descend to the mythical White House basement and talk a little about how moral and legal constraints affected the process by which the United States developed and implemented one example of covert action policy in low-intensity conflict.

To begin all this, I really have two propositions to make. The first is that the United States today has a greater capability to engage in low-intensity conflict than perhaps ever in its history. The creation of the Special Operations Command, the Assistant Secretary for Special Operations and Low-Intensity Conflict, and a more sophisticated and mature approach to these issues on the part of the Congress and within the intelligence community, have all enhanced the means

at our disposal to deal with low-intensity conflict. But I submit that we, in fact, lack the will to engage in most forms of low-intensity conflict. We are willing to engage in only the most classic types of special operations applications which have been traditionally part of military activities. I believe this lack of will precedes from the perception that, by and large, the means and ends of low-intensity operations are not in keeping with American political and moral values.

I have a second point which may seem somewhat curious in light of my first proposition. It isn't so much that moral and legal limitations constrain the work of creating and implementing policy. It is rather that the virtual absence of a moral and legal framework for formulating and implementing our engagements at the low end of the conflict spectrum seriously inhibits consideration of effective low-intensity engagement.

Let me say a few things then about that American political tradition and some of the points that I take from it.

I think the conduct of American international relations is inseparably bound up in the moral and legal values that are revealed in our history, traditions, and temperament. These national characteristics, together with the understanding of international political realities peculiar to America, shape our general approach to foreign policy. Throughout our history, American statesmen, and almost certainly the American people as well, have conceived of our place and purpose in the world in a special and largely moral way. From the earliest days of the Republic, American thought has conceived of the nation as a new world apart, distinct from the despotic European order in which foreign policy was driven by base expedience or morally bankrupt constructs such as the balance of power. According to this deeply held myth, our foreign policy goals reflect the idealistic vision of a new type of political community, essentially moral and universal in its principles of personal liberty and democratic government.

As one student of early American political thought has noted of this motivating legend, "America is the land of the future, where innocent men belong to a society of virtuous simplicity, enjoying liberty, equality and happiness; Europe is the bankrupt past, where fallen men wander without hope in a dark labyrinth, degraded by tyranny, injustice and vice."

The United States was to become the model society for the universe and make a profound contribution to mankind's political redemption. The Founding Fathers saw it as the vehicle for the realization throughout the world of what were then called "The Natural Rights of Man." This vision of America's future in world politics cut across almost all of the partisan and ideological divisions of the period. We find Ben Franklin observing that "the cause of America is the cause of all mankind; assigned to us by providence." Thomas Paine found the American Revolution, "the most virtuous and illustrious revolution that ever graced the history of mankind, the harbinger that creates the new world order

in which the spirit of jealousy and ferocity, which had in the past been characteristic of world politics, would give way to the dictates of reason and humanity, so that force would no longer be the prime arbiter of international quarrels."

Even those Founding Fathers with a greater reputation for realism such as Alexander Hamilton, shared this vision, calling the American experience, "The cause of virtue and of mankind." Said Hamilton, "The world has its eye on America. The noble struggle we have made in the cause of liberty has occasion to kindle revolution and human sentiment. The influence of our example has penetrated the gloomy regions of despotism and has pointed the way to inquiries which may shape the deepest foundations of the world." This sounds a little bit like the kind of discussion we were having here about the spread of democracy in the closing decades of the twentieth century. My point is simply that this tradition remains in place 200 years later. I think that any look at foreign policy debates today and during the Cold War period will find that they have been couched in unambiguously moral terms regardless of political orientation. That's one tradition.

The other tradition, not unrelated to the first, has to do with how Americans view war. Our virtually unique understanding of the dichotomous states of war and peace has been well dissected by scholars and practitioners alike. American thinking rejects the Clausewitzian continuum between peace and war. We view peace as the normal state of international relations; war as an aberration. The use of force in international affairs is to be avoided, but when war does come, it is seen as the result of some overwhelming evil. Political considerations are then to be set aside, and military victory obtained as quickly as possible so that the world may return to peaceful normalcy. In sum, the U.S. view of war is ultimately concerned with moral justification. War is considered to be an irrational act of evil leaders or nations. These views combine with the aversion to power politics, evidenced in those few quotes from the Founding Fathers, and probably shared by the vast majority of Americans. You will see quickly, of course, that the world of low-intensity conflict with limited ends and limited means, which nevertheless puts American lives in harm's way, runs counter to the tradition I have just characterized. Even a cursory examination of the types of conflict in which the United States has engaged since the beginning of the Cold War shows that the lower or gray end of the conflict spectrum has given us particular difficulty.

Let me now say a few things about our moral difficulties with low-intensity conflict. First, and this is something Alberto Coll mentioned last evening, is the issue of means. I think the perception is not unfounded that the means of much of what passes for activities in the low-intensity area are, in fact, dirty tricks, not in keeping with the highest American ideals; not in keeping with the kind of virtue that was referred to yesterday. So, I believe "means" is one area in which low-intensity conflict is foreign to the American tradition.

The second concerns the use of force for limited ends. Americans are willing to die, or at least to put themselves in harm's way if the purpose is victory over evil. But if the end is an adjustment to American national interests and is not seen as a higher order moral issue, it is very difficult for most Americans to believe that force is warranted. As I pointed out very briefly, Americans tend to see conflict in black and white terms. So, their tendency is to say well, if we're not going to win that fight, we shouldn't get into it. These thoughts are in the words of the Founding Fathers and they are echoed in the debate about DESERT STORM. I don't think the influence of our founding philosophy in the use of force in foreign affairs has lessened much in the past 200 years.

The point I wish to make is that in most cases, particularly covert action, low-intensity engagement must come early if it is to be effective. Now, this runs counter to the just war checklist that was discussed yesterday. Covert action is seldom effective if it is used as a last resort. Much of American covert action in the post-World War II period may well have been ineffective because it was too little, too late. So, our reliance on just war thought in this case reinforced the constraints on low-intensity conflict that derive from our native philosophical tradition.

The fourth point I'd like to touch on, mentioned earlier by Abe Sofaer, is that much of low-intensity engagement is secret. Those of you who followed the intelligence revelations of the mid-'70s will remember the premise of the Church Committee was that secret operations, intelligence activities and covert actions were, because of their secrecy, a threat to our democratic values. To some extent, a serious case can be made that that's true. This is another aspect of low-intensity conflict that rests uneasily with our tradition.

Let me turn to the topic of covert action. I have been greatly struck by the fact that most of the individuals I've encountered in the process of developing and implementing covert action policy have a personal moral "compass" which is given no opportunity for expression by the process itself. This is a dilemma that must really be considered by the folks in the Office of the Secretary of Defense. The process of looking at covert actions in low-intensity conflict, and designing the policies and measuring the implementation is itself not explicitly influenced by what we could call collective moral reasoning. That is to say, moral issues do not generally make it to the policy table even though these individuals themselves may be struggling with them in their own minds.

I want to go farther and suggest that in the absence of a process which calls forth these moral considerations in advance, it is unlikely that the United States will have the ability to develop the interest in low-intensity engagements that would lead to success. My observation was that this aversion to low-intensity conflict in general extended to the White House, where there was no call from on high to develop covert action. What would happen is that the CIA would send up a covert action, usually as a courtesy copy on its way to the Hill to meet

the congressional oversight provisions. There would be a brief debate about how to limit the knowledge on the Hill, lest it be leaked and the program be done in early on, and beyond that there was very little discussion of the purpose of the covert action or its relation to policy. In that context, certainly, there was little consideration of what we have been talking about for the last two days, of the moral dimensions of the proposed action.

An example I would like to consider briefly is the Afghanistan covert action program. When the Reagan Administration came into office, the Carter Administration had already begun a covert program of supporting the Mujahedin against the Soviets in Afghanistan. This was already a substantial program, but it appears to me that the Reagan Administration took the view, and I'm going to be a bit facetious here, that if the Carter Administration could spend X dollars in Afghanistan, it behooved the Reagan Administration to spend 20 X. That was, at least for the first several years of the Reagan Administration, essentially the extent of the policy debate as to the wisdom, efficacy and morality of the program in Afghanistan. Now, that is not to say that individuals did not believe that American support to the Mujahedin was a key element of what we might call, in retrospect, the Reagan Doctrine. To the best of my knowledge, however, and I had staff responsibility for this, I do not believe there was ever a formal discussion, or for that matter, an organized informal discussion of the issues involved in Afghanistan. We were simply dumping an awful lot of money into supporting the Mujahedin with almost no consideration as to what was happening. Now, if that had been simply a program to give food aid or medical supplies, one could say that there wasn't a lot of additional policy consideration required. But, of course, the effect of American support was very much to result in the loss of lives, both Russian and Afghani. American lives were not involved, but nevertheless, this was lethal aid on a rather grand scale. In fact, it was the largest covert action program in terms of dollars and equipment in American history.

After a number of us attempted over the course of several years to force a policy discussion on Afghanistan, we finally succeeded in convening a meeting at which we could ask basic questions about our purposes in Afghanistan. The result was guidance for the White House staff to develop a checklist to evaluate implications of the covert action program for American policy objectives. Those of you who advocate the use of just war doctrine as a convenient means of appraisal will be pleased to learn that we did just that. Without mentioning just war, we simply incorporated various criteria in a nice bureaucratic sounding checklist and asked CIA for a reply. There was a bitter dispute because no bureaucrat wants to be measured with regard to his or her performance, and so there was a natural reluctance on the part of those engaged in carrying out the covert action to have to answer these questions. Likewise, there was a reluctance on the part of policymakers to have to define exactly what they were doing covertly and what they intended.

The result of this, after about two years of agony, was the development of a serious policy; one in which moral issues were considered. It was decided that simply killing Russians was not the object of the covert action programs, but that American support should be directed to driving the Russians from Afghanistan in the most effective way possible. Whether or not you agree with that covert action and the American presence in Afghanistan, at least through this process we were able to consider the moral and legal implications of what we were doing there in a forthright way.

That drill only partially took in further covert actions, and I suspect may not yet be the standard government approach with regard to other forms of low-intensity conflict. For that reason, I submit that we badly need a process to foster the kind of debate that we forced over Afghanistan. Otherwise, two unfortunate things will happen. First, we are less likely to have a moral American policy in keeping with our traditions, and second, we are less likely to be able to mount any kind of successful engagement at the lower end of the conflict spectrum because our institutions will continue to shy away from serious consideration of the issue. I stress here that we need to develop a sense of the moral purpose of our policies.

I would leave you in closing with one last question about the morality of low-intensity conflict that has not been raised. Is it better to take the measure of a challenge today, which if left unaddressed, is likely to become much more bloody and difficult to resolve? If, in some situations, a moral purpose can be served by taking immediate action to prevent a worse outcome later, can we devise a way to take this into account when weighing the moral implications of engagement in low-intensity conflict?

Thank you.

RADM HARLOW: Thank you gentlemen. Before I open it to questions and comments, let me make a few observations on what I felt were the highlights of these very interesting discussions.

Two points at the outset, I think, were important. Judge Sofaer stressed the fact that the hallmarks of low-intensity operations are flexibility and speed. I couldn't agree more. Flexibility, because we can in no way anticipate what the challenge will be in the next weeks or months. And speed, because we have to shift forces anywhere on the globe where a challenge may arise. Secondly, Ken deGraffenreid made the point that low-intensity warfare offers the opportunity to reduce the level of violence later in the process. One may look at it as an opportunity to limit the damage of a confrontation through early action that is clear and decisive. I believe this is an important feature of low-intensity conflict not shared by conventional warfare.

Judge Sofaer pointed out that we have a whole range of domestic constraints: statutory, regulatory and of course, moral. Additionally, we have international

constraints through the U.N. Charter and through other limiting international agreements and rules. He discussed how these rules provide a special challenge to the conduct of low-intensity operations, but observed that the impact of the U.S. War Powers Resolution may, perhaps, not be as onerous in low-intensity conflict as it would be in the case of the traditional use of regular forces. The Judge made the point that when low-intensity conflict operations are of a shorter duration and do not involve overt combat, they may not trigger the War Powers Resolution.

Judge Sofaer touched on the sensitive issue of congressional oversight of covert operations in the context of a more general discussion of intelligence matters. In my judgement, a critical element of a proper and effective low-intensity program is an ample and credible intelligence program. Most information at this lower level of intensity is far from clear. It is fragmented and often contradictory. In this arena, we are involved in an ambiguous stage of a national security threat and, therefore, good intelligence backup is essential for sound decision-making. As was pointed out, however, intelligence, or "espionage" as some style it, places us on the margin of moral and legal conduct. It is a very sensitive and difficult issue to grapple with, particularly in an unclassified forum, as is the case here today. Nonetheless, one must think in terms of this underlying need if we are to effectively discuss all aspects of the United States policy dealing with low-intensity conflict.

The Judge also observed that the U.S. must come to grips with the fact that we cannot escape responsibility in the intelligence gathering arena by "hiring" informal agents. Such an approach must be carefully controlled in any program that we would envision for the future.

Judge Sofaer and Mr. deGraffenreid talked in terms of a new international order with particular reference to the positive part played by the U.N. Security Council in the DESERT STORM operation. It took on a new and expanded role in a manner that perhaps none of us in the room would have expected in our lifetimes. While supporting such an international approach, we must be careful that the use of the Security Council, or any other international fora, does not restrict our ability to act unilaterally. We must carefully find our way through this thicket so as to not preclude unilateral action should the requirement arise; but neither should we turn our backs on the promise for international cooperation and stability offered by multilateral diplomacy.

Ken deGraffenreid proposed two factors that impede our ability to act in the area of low-intensity warfare. First, he considers that the U.S. may lack the will to back up low-intensity engagements, particularly early in the threat stage when the need for action is less than clear.

Secondly, he points out that American traditions of moral superiority and aloofness from the rest of the world tend to make Americans think in absolute terms of right and wrong. I cringe at this expression of "moral superiority" but

it nonetheless has been a thread that has woven itself through a lot of American thought for many years. An integral part of this thinking is that war is an irrational act and that when it does become inevitable, should be prosecuted vigorously with an insistence on an unconditional peace. He points out correctly that the ambiguity of low-intensity warfare rests uneasily with these principles.

Ken also described some of the moral dilemmas that we face as a nation with regard to low-intensity warfare. He pointed out, among other things, that Americans are suspicious and worried about covert operations. Just as we tend to be leery of things done behind our backs, we also look askance at deceptions practiced upon citizens of other countries.

This is my experience also. It is true that in the context of crisis management, there is little time for moral introspection. Practical considerations—political and military—are given primary, if not exclusive attention. I have found, however, that there has been an implicit moral/ethical/legal underpinning to the politics and programs that were eventually approved and pursued. Hopefully, this conference can characterize and clarify these underlying scruples. To do so will significantly contribute to effective U.S. policy formulation and decision-making in the complex arena of low-intensity conflict.

At this time, I'd ask for comments and discussion from the floor.

MR. MCKEE: Admiral, thank you. Craig McKee of the Bureau of Intelligence and Research, Department of State.

I thought the presentations this morning were practical and good. I have a couple of notes on the intelligence process. We find many times that the enormous "vacuum cleaner" called the U.S. intelligence system actually had the information we need. The problem is whether it gets to a high point in the decision-making process quickly enough to matter. Official recognition of a low-intensity challenge often follows by months or years the time at which an effective policy might have been developed to meet it. A second point is that during the last six years a somewhat improved procedure has been established, as Mr. deGraffenreid mentioned, to handle the findings. The CIA is required to notify the other agencies of a proposal, and there's a time limit under which they can respond with their own policy recommendations. I don't know whether it is that much more efficient, but I think it is an improvement over the earlier procedures for findings.

RADM HARLOW: I agree.

PROF. FARER: I agreed with much that the two speakers said, and said so well. There were perhaps three points I thought worth raising.

One has to do with preemption. You didn't define your concern with preemption very clearly, Abe. I think you would agree we need to draw some

lines there. Going back to the Nuremburg tribunal, when the Nazi war criminals were accused of crimes against peace, they said that every country must be the best judge of its security, its longer strategic needs, and sometimes this requires preemption. That's essentially the defense position which, of course, was rejected by the court. Every time the Soviet Union increased its nuclear capacity, they presented a serious problem to us; the prospect of exterminating us, in fact. We never considered preempting. Isn't it dangerous in a world armed the way our world is, to take too expansive a view of preemption? The usual argument, as we all know, is that because we have weapons of mass destruction, we have to be able to preempt. But, when you think of all of the false alarms that we've had, we realize the problem with preempting is, if you're wrong, you've made a very serious error indeed. The point is made.

Secondly, the reference to problems—both the opportunities and risks—of going to the Security Council. In that connection, Abe, you said, "timing is everything." I have to admit I thought either that's a cliche without content, or it's wrong. Take the two cases you gave; Libya and Kuwait. Does it really make any difference whether we get those two agents out of Libya now, next week or in a year? If we can get them, the system has worked, and I think it would be a tremendously important precedent. I don't think it makes a bit of difference when we get them. So, therefore, in your case, I don't think timing is everything. I don't think it's anything. In the case of Kuwait, of course, the country was ravaged before we got the Iraqis out, but we weren't in any position to get the Iraqis out on day 1 or day 25. So, you have to really make the argument that the time taken to get multilateral support for our operation was much greater than the time that would have been required for us to mount a unilateral operation, which is by no means clear.

Last point. Congress. We tend to see Congress the way German leaders and thinkers of the eighteenth and nineteenth century tended to see civil society; as a burden to the extent it exerts constraints on what you'd like to do internationally, or, as a place where you can find resources. We tend to think of Congress mostly as a place that gives us the money to do what we want to do, but is otherwise a nuisance. In a way you can say the same thing about the Security Council. Maybe these two criticisms overlap, but the point is that sometimes we're wrong. If we had had to submit ourselves to the review of a multilateral agency like the U.N. in the case of Vietnam, where many of us feel that the expenditure of national assets in a wasteful way was a moral issue, we probably would have had to cut the process short.

European countries run by some very fine able men stumbled into the first World War, and virtually destroyed Europe. Even very able and well-intentioned people make serious mistakes, and we haven't always had the ablest men running the United States Government. Our elections process doesn't always yield men of admirable character and ability in the top position. If the President has a bee

in his bonnet and he's determined, he can impose policy on our bureaucracy, as complicated as it is. Congressional oversight and the oversight of the larger international community can sometimes help us to do what we want to do, and provides us at other times with an opportunity to rethink our ambitions.

JUDGE SOFAER: I'm not going to comment, Tom, on the parts of your remarks that I agree with, and there was much of what you said that I do agree with. I didn't try to deal with the preemption problem. I tend to believe that it is more a problem of tactics or judgement than of law, and properly so.

Coming to the key issues that you mentioned at the end, I don't mean to suggest that Congress can't be right. I think it was right in the Packard Commission. I think Congress has been right on many things that have a very important bearing on our military capacity. But Congress does more than just review things or exercise its legal rights. We are aware of repeated extralegal efforts by Congress to influence events and perform tasks that are really Executive Branch responsibilities. There are many areas, particularly in low-intensity conflict, where Congress has approved the kinds of activities in advance that we want to engage in, and yet wants to be involved in reviewing their implementation. We just have to say no to that and go ahead and exercise executive power and take the licks that are associated with the job.

PROF. FARER: Why? Why do we have to say it? You know, Abe, you can't deal with 445 members of Congress, but why can't you deal with five, or ten?

JUDGE SOFAER: Well, you can't because you don't just deal with them. You deal with their staffs and then you deal with the *Washington Post*. Either you're going to be the Executive and exercise your constitutionally mandated power, or you change the nature of our government. The President, the Secretary of State and the Secretary of Defense don't have their jobs in order to go sit down with the Chairman of the Senate Armed Services Committee, however great a guy he is, to implement a rescue operation. Chairman Aspin doesn't oppose rescue operations; Congress has authorized them. They don't oppose the seizure of terrorists who have killed Americans abroad; they've authorized it in a criminal statute. Yet, he has said to me, this is on the record, "Why can't you just let us come down there and talk to you about each of these things when you're planning to do them," precisely in the spirit that you just recommended. I said, "Because I have my job and you have your job and I'm not going to give you my job. That's why." That's what it all amounts to historically, and that is how it is today. Now, Congress wanted to take my job. That's what Hamilton and Madison said would happen. You know, I interpret treaties, that's my job, but I'm not going to give Congress my power to interpret

treaties. That's the way it's supposed to work. You're supposed to stand firm and take your licks in this government, or the President is being ill-served.

Now, turning to the other point you made about the Security Council. I think that's very, very important. Perhaps I overstated my position. I certainly was not trying to suggest that every delay is unacceptable. In fact, overall, I think we have to live with these delays. I do mean to say in national security affairs that time can be everything and is very, very important. You ask, "what difference does it make as long as we get those two guys?" I rejoin, "does it make any difference if we do get the two guys?" If you were concerned about deterring acts of terror such as the destruction of Pan Am Flight 103, you might well conclude that what we are doing has absolutely nothing to do with the deterrence of national security threats. Now, we may be creating a very important precedent in multilateral cooperation and it's one that I support. But the facts of the matter are that Libya may not be the only State involved in this issue, that these two individuals certainly did not act without authorization, and this whole process is focusing us on what we, in the national security community know are expendable soldiers. This is equivalent, in a military context, to going after two guys who were in a commando squad that raided one of your cities and killed hundreds of civilians, instead of going after the political leadership of the country responsible for doing it. In a very real sense, that's what we're doing. When you take the legal option, you have to face the fact that you have largely given up what have traditionally been regarded as appropriate and effective methods for dealing with a national security problem and that's a very, very big price to pay. We have to figure out ways to make these governments pay. Otherwise who cares if these two guys get killed somewhere, or go plead guilty, spend the rest of their lives in jail and have their families taken care of? Every State has the capacity to develop people willing to die for it, or to spend years in prison for it, in exchange for appropriate rewards.

RADM HARLOW: Did you have a comment?

MR. deGRAFFENREID: Yes, I had one comment, perhaps disagreeing a little bit with Abe on the congressional oversight and agreeing more with you, Tom. I happen to think, having been on both sides of it, that Congress should have a more substantial role in the policy dimensions of covert action and other low-intensity conflict issues than the Executive Branch would want them to have. I think the oversight process is a proper one and has produced the accountability that American covert action policy lacked. In practice it has, however, been a very imperfect process. In the area of low-intensity conflict, in covert action, because it's secret, the relative value of one senator or representative goes up enormously. He can kill a program by leaking it. I think that lure has proven very attractive to certain members, and that has corrupted the process.

RADM HARLOW: Mike.

PROF. REISMAN: I also found both presentations extremely useful and provocative.

I have two questions for Abe and one for Ken.

Abe, in your criteria for proceeding with a particular low-intensity program, one of the tests was whether or not the acts would be in violation of foreign law, if I understood you correctly. Bruce mentioned the issue of espionage, which, I presume, is conducted all the time. I would assume that in most cases those activities don't meet the criteria that you established. I wonder if it isn't too high a standard, and the criterion ought to be whether or not the action in question violates international law, rather than the foreign law of the target State.

The second question addresses something you said in a very clear way at the end of your presentation. You suggested that morality acts as a prudential override when law permits something, but morality never acts as an override on law when the law prohibits something. In other words, you don't proceed because it's the right thing to do if the law prohibits it. Let me put it this way. If the law approves and morality prohibits, kill the operation. If the law prohibits but morality permits, kill the operation. Is this what you meant?

JUDGE SOFAER: On the latter, I think that when you turn it around that way, it isn't exactly accurate because there is an emergency power inherent in international law as well as in national law, and you do have to answer. I think that Jefferson was correct in that regard, as well as in others, although I think he ended up with too broad a view of emergency power because of his restricted view of the Constitution. The fact is that when you violate the law you have to admit you violated the law and face the consequences. As long as you're doing that, and you think that you've done something moral and justifiable, I accept it. For example, the nuclear reactor in Iraq. I think that is a violation of international law, except for the problem of Iraq having not withdrawn its declaration of war, which I really haven't yet analyzed.

As to your other point, I think you've just over-read what I said. When I was in the government for five years I found it disturbing that we would violate the laws of foreign countries without giving that an adequate value weight. I'm not saying that when whatever you're doing violates the law of a foreign country, you can't do it. No. I said that it is a value in international law that States should not violate each other's domestic law. Now, maybe that's controversial, but I find myself very comfortable with it. I think that States ought to respect each other's domestic law and take into account the possibility that their actions might violate it. Then, if there is some overriding value that causes you to want to go ahead anyway, I would accept that, and you have to face the results, the consequences.

What troubles me about the way we have handled low-intensity conflict, particularly covert operations of a nonmilitary sort, is that it's not taken seriously into account that we are violating the laws of a foreign State. We are taking foreign law into account more fully than elsewhere when we analyze abduction proposals. When you go into a foreign country intending to grab someone, the ways in which you violate domestic laws are numerous and it's a very risky proposition. You're talking about a kidnapping. You may well kill someone in the process of the abduction. I just think that we ought to be more sensitive about the laws of foreign countries when we design these operations.

PROF. REISMAN: Ken raised a point on which Abe had touched and that is the notion that where action is appropriate, it probably would be most effective if it were earlier rather than later, when it would probably be of no value.

Bruce talked about preemptive actions, which I think is a very extreme example of the observation Ken was making. The question then came up whether there isn't, in a democracy, a preference for economic over military types of actions without regard to their consequences. I was struck by Abe's example of the destruction in 1981 of the Iraqi reactor, which could have posed an irreparable injury to Israel had it not been preempted. This seems characteristic of the nature of the threats that are likely to be posed in the beginning of the next century, the enormity of the damage that some of them can cause and the need for responding to them earlier rather than later. Do you or Abe see methods for adjusting democratic procedures so that without damaging the fabric of our political society, we can respond appropriately at the earlier rather than later stage?

MR. deGRAFFENREID: There's a kind of inversion going on in thinking about the range of things that we loosely call low-intensity. We tend to single out assassinations, coups, the most extreme military examples of low-intensity conflict. Ideally, the use of force is an element in a range of low-intensity instruments that should be integrated. Other than the fact that lives are involved, it should not make a very particular moral difference. As a practical matter it should be integrated. The U.S. Government doesn't do that well. When all the focus is on the use of force, that separates it from the other elements of low-intensity conflict in a way that winds up being very dysfunctional. This works against the measured use of force for a limited end. I'm not talking about the more extreme examples, but the daily stuff of low-intensity conflict, which in many cases only involves a small measure of force, sometimes non-lethal operations that are nonetheless military. The fact that we have such a difficult time with the moral dimensions of lethal force tends to prejudice the integration of these things. Right now, the exclusive focus on extreme uses of force prevents

us from taking the only effective approach to low-intensity conflict, which is an integrated blend of economic, political and psychological elements.

JUDGE SOFAER: I think you raise a very fundamental problem. Here's the way that I would look at it. Let's say we learned that Pakistan had permitted one of its nuclear devices to be moved up across its borders into Iran, where it had fallen into the hands of the Hezbollah through the Revolutionary Guard. Clearly, the United States should take action before someone uses that bomb because the Revolutionary Guard and Hezbollah have utilized whatever armaments and explosives they've managed to get hold of. If you can go to bed at night as a national security planner for the American people, and allow that to continue, you're not doing your job. You are not protecting the American people. Now, you have to suffer the consequences. I'm very uncomfortable with this idea that we're superior to foreigners, that we can cross their borders with impunity. I find myself very uncomfortable with that premise as an institutional matter. I'm not going to change the rules to allow us complete freedom. We're going to have to act, we're going to have to report that act, and we're going to have to protect ourselves the best we can, politically, as a result of having done it. The ideal way to do this, harking back to the Security Council and its potential, is to create a nuclear regime that we can all respect. Now, we're seeing something that we can certainly respect a lot more than anything before with the current U.N. resolutions relating to Iraq. They state specifics. We're seeing some real professionals out there. For bureaucrats, they're performing heroically. If we can get the Security Council to create regular, routinized inspections of nuclear facilities and materials around the world, we might see real results on the ground. And I think the Security Council process is the most promising vehicle that we have ever had.

RADM HARLOW: In response to Michael's question, I would also like to add that I think the April, 1986 air strike on Libya provides an interesting case in point on the application of legal principles underlying low-intensity conflict operations. Up until 1986, the United States had treated international terrorism as a law enforcement matter. The thrust of U.S. policy was the apprehension and bringing to trial of terrorists who had attacked U.S. citizens.

This did not and could not , however, deal with the question of State-sponsored terrorism. During the preceding decade, the effectiveness of terrorist organizations was greatly enhanced by the support given to them by countries such as Libya. There is ample evidence that Libya provided training camps, logistic support, passport documentation and other support to dissident groups who proclaimed an intent to conduct terrorist strikes against innocent Americans and citizens of other countries. Certainly, the air strike against Libya was beyond the scope of a traditional law enforcement action. Rather than view the air strike

as premised on a new and unique law enforcement principle, I think it can be more accurately characterized as a preemptive strike asserting the inherent right of anticipatory self-defense. In other words, based on necessity, the low-intensity conflict operation escalated from the legal arena of law enforcement to the arena of national security/self-defense. Incidentally, it seems to me that the strike did have the desired deterrent effect. Our evidence indicates that Libya's support for international terrorism waned appreciably in the years following the action.

PROF. TESON: I learned a lot from both presentations. Very, very useful. I just wanted to talk about Ken's presentation. I was amused by the Jamesian description of the American sense of our place in the world. In James' novels, American characters are the embodiment of somewhat unsophisticated innocence and moral virtue, whereas Europeans represent a sophisticated deviousness and greed. It's very interesting to see how, not just in the speeches of politicians, but also in the literature, this dichotomy is really constant in American thought and the make-believe place that Americans see for themselves in the world. But, just to focus on one point. You mentioned briefly that the ordinary American citizen has problems with low-intensity operations. It's hard for them to see force as justified other than to defeat evil. When force is used simply to improve the American situation in the world, then the American citizen rebels against it. Well, it seems to me that the average American citizen's sense of morality is right on the mark. If we are going to offer only strategic justifications for low-intensity operations, we will not satisfy the American tradition, nor will we comply with the Clausewitzian requirement that we get the support of our people. So, this Kissingerian idea that the world is a great chess board and we just have to make the right moves without regard to morality is the wrong way to go. Once we have resolved the prior demands of conscience, then we are morally justified in achieving our strategic goals.

RADM LEMOYNE: I'm from Special Operations Command, and I must tell you that those of us in uniform draw a very clear distinction between covert operations, on the one hand, and clandestine operations, which are done to maintain operational security. We have very little capacity to conduct covert operations.

Judge Sofaer was correct in saying that low-intensity conflict operations are of short duration. Essentially, our special operations capability is bipolar. We have a surgical strike capability that doesn't trigger the War Powers Resolution because it is very quick. Hostage rescue, preemption, and those sorts of things are of very short duration. On the other hand, low-intensity conflict can take the form of a very long-term, low-level engagement. It may not involve lethal military force; often it must. In addition to supplying the Mujahedin with a whole array of weaponry, we also taught Afghanis, day in and day out, how to recognize,

neutralize and avoid mines, which were sprinkled all over their country. We did that for several years. But that does take congressional support. The Special Operations Command and Assistant Secretary of Defense of Special Operations and Low Intensity Conflict (ASD-SOLIC) are creatures of Congress. They exist today because Congress passed that legislation. We can't engage in long-term activities without solid congressional support. I don't shy away from it. We had very direct congressional involvement in El Salvador on the military side. We were expressly limited to 55 advisors. We did that year in and year out. But, the result is that now we have a negotiated settlement between the government and the Farabundo Marti National Liberation Front (FMLN). That's not an unhappy outcome and we did it with intense congressional scrutiny.

RADM HARLOW: Well, I thank all the panelists for their excellent presentations.

Chapter XII

Roundtable Discussion

Alberto R. Coll, Chair

PROF. COLL: In wrapping up the conference this afternoon, I think it would be quite appropriate to ask each of my fellow chairmen to highlight some of the problems that they think it would be useful for us to consider further this afternoon. Each of the panel chairmen will have an opportunity to do that and, afterward, we will open up the discussion to the floor.

PROF. REISMAN: I found this a very fascinating and challenging two days. A number of our theologians have said that there has been more talk of just war doctrine and natural law approaches to the use of coercion here in two days than in five years at the seminaries—and I must say, in twenty years of my own work. But I have tried to think our subject matter through. I have read the papers carefully, as everyone has, and attended carefully to the discussion. I have read some of the works that have been cited, but I will say that I see many things in a different light at the end of two days of discussion. In a sense, I see this as an extraordinarily creative opportunity for the United States. In other ways, I view it as extraordinarily dangerous. I would like briefly to explore those alternatives, and then make a number of suggestions as to what might be done to maximize the good possibilities and to minimize those which seem to me to be potentially pathological.

I think we've used the words "just war" here in three different ways. In some cases, the same speakers were using it with a shifting content. In one sense, I think in the most innocuous, the notion of just war was used to describe a prudential method—*infra legem,* the Romans called it. When we know that something is permissible by law but we're not certain whether it's appropriate to do, the method we employ is a consideration of larger goals. We think about the means that are necessary for achieving them, the cost that will be expended and encountered in their achievement, and the returns that we ultimately expect. This strikes me as a form of good thinking and it is a contribution that natural law has made to all law application. I think it applies whether we're talking about the use of coercion, as Professor Johnson said earlier, or whether we're talking about the use of the four instruments of strategy that Admiral Lemoyne mentioned. It applies whether we're talking about using non-coercive means

over a period of time; the military instrument, the economic instrument, the propaganda instrument, or high level diplomacy.

The second meaning, which I think is somewhat more troubling, is the prudential method which is not within the law, not *infra legem*, but *priter legem*, above the law, and in some cases, *contra legem*.

In the discussion this morning, the question was posed to Judge Sofaer as to whether, in some circumstances, the compelling force of certain moral arguments might lead one to do something against the law, and he responded, "Well, we find a way to do it within the law." It struck me that we were, as it were, skirting a serious problem. The problem is that moral discourse does not simply prohibit, but in some cases compels, if it has any force. It does not simply tell you to refrain from doing something. The moral conscience compels with force, greater than that of Caesar, and what it compels can be against the law. Some aspects of the discussions about certain types of covert or low-intensity operations under international law, clearly would come under the second meaning, that of questionable compliance with the expectations of large parts of the international community.

A third, more general use, which I detect in the discussions, is as the justification in the near future for the use of military force by the United States in peacetime. In this respect, the words "just war" are being used to create a vehicle for new ideology which will provide a justification quite distinct from contemporary international law. It is one that will justify or rationalize our decision from time to time to use relatively low levels of force, minor coercions, whether for an extended period or in a single operation.

I think this last meaning is a fairly recent one. Three or four years ago, if a group like this had been convened to discuss low-intensity conflict, it would inevitably have been composed of men intent on using the concept against us and our friends. It was viewed essentially as a pathology. And, we bemoan the fact that the international legal structure, and to some extent the democratic politics of our own country, have tended to restrain our responses to low-intensity conflict. And, now we're talking about low-intensity conflict in a newly ideological sense as a justification for proaction on our part. I'm not saying this critically, and I will discuss in a moment the justifications for this use of low-intensity conflict, some of which I think are quite cogent. But, I think we should appreciate that we have three meanings and certainly the most dramatically innovative is this new ideological meaning.

The doctrine of just wars is an extremely productive method of ratiocination and evaluation of decision options that comes from the natural law tradition. But, to use it for this new ideological purpose, seems to me to be quite dangerous for several reasons. The first is that it's not simply something that corrects the existing law as I've said, but, very often is compulsive. It compels one to do certain things. It may not be consistent with community standards, or as I will explain in a

moment, with the orders one is receiving from above. The second reason why this may not be the best vehicle for the justification for unilateral action by a major power in a unipolar system is the anarchic potential in the just war tradition. Several panel members who are experts in the tradition and have devoted their careers to its study, have pointed out that it is not a science. The use of just war reasoning is an art, it's appreciative, and reasonable people disagree over its results. The weight, the intensity of compulsion of certain factors may vary. The introduction of just war doctrine into a highly disciplined organization like the military could be potentially quite anarchic, unless, I laugh even to say this, we can imagine prohibiting officers of different ranks from using the techniques of just war to appraise whether or not things are right, and supply them with a just war expert who would tell them the correct position. We are introducing something which is, by its nature, democratic and invites every sentient human being to use his intellect and capacity for judgment to determine the justice of using coercion at a particular moment. I ask you whether that is something you want to incorporate into the decision-making apparatus of the military organization. The military, it seems to me, operates best when there is a strict hierarchy in command. As in the language of the Book of Leviticus, one says "This is the law and neither shall you depart to the left nor to the right." It's possible that the introduction of just war doctrine would return us to the chaotic periods of the Book of Genesis, in which, as the scribe explained, each man did that which was right in his own eyes. I cannot imagine an efficient military operating in that fashion.

The third problem, which is explosive, was pointed out by Father Winters in one fashion, Professor Farer in another, and Professor Nardin. It is that we are departing from a set of value judgments that have been made in the largely collaborative process we call international law, which over time has established policies with certain balances attached to them. We are shifting over to the policy or value preferences of one particular country or social stratum and these may not be universal values.

Father Winters talked about the culture specific problem. Carnes Lord, this morning, in talking about strategic cultures, put great stress on the argument that some, including myself, made yesterday, about the universality of norms. They may indeed be universal, but if strategic cultures are quite different, we can assume that culture will dominate in moments of crisis in which those charged with the security of a group will be primarily concerned with the maintenance of its collective integrity. At such times, they will do what is necessary to follow the imperatives of the strategic culture, rather than the larger international norms.

I am, on the other hand, moved by the fact that the United States is in a position in which it has major responsibilities to the rest of the international community. I think that these responsibilities are quite clear and I think that they are the same whether one tries to justify them using a conception of national

interest, or human rights, or international law. We are integrated into a very tight and interdependent international community. If it does not work well, we will suffer precisely because of this inextricable integration. So, we have a major interest in seeing that it works right.

Rhetoric aside, peoples all over the world look toward us in many ways, particularly in moments of crisis, to do something. If you accept that premise, and it is one from which I start, then the question should be: Is just war, as it's developed, the best ideological device for achieving our purpose? Do some of the costs of the just war tradition, which I think would rest very uneasily if it became an official ideology, make it less than the optimum vehicle for achieving this objective? The perspective of just war theory and natural law is that of those committed to making decisions and not those committed to receiving commands. I think it might be useful to generalize a set of intellectual tasks that we ought to follow and spell them out in some detail, rather than tying ourselves to a single tradition. I think that in every decision we ought to be looking at five intellectual tasks, each of which should be performed quite scrupulously. The first is goal clarification. If we are suggesting that in some circumstance we do things differently from what a significant part of the world has prescribed, I think it important that we not think in terms of what we need, which ultimately is a solipsistic justification we would find unacceptable if used by others. We must consider whether what we are inclined to do serves the interest of the international community.

I think we should go through a clear process of goal clarifications which identify common interests. Father Winters' warning about the potential for cultural parochialism in this process of ratiocination, should not be ignored. We should acknowledge it and develop methods for minimizing that particular pathological potential. I think once we've established goals, we should systematically review the extent to which they have been achieved in comparable situations in the past and their costs. I think it behooves us to be extremely responsible in this fashion and to canvass what the past can teach us about the achievement of these particular goals at particular moments.

I think we have to identify the conditions that prevailed then and are likely to prevail in the near future when the strategy is put into place, in order to make sure that the lessons that were learned from the past are still relevant. I think we owe it to ourselves when we are contemplating doing something like this, to consider its likely consequences. I agreed with almost everything Judge Sofaer said this morning but one remark in the discussion troubled me. In response to a comment he asked, "If we don't get these two men, what difference does it make?" I would think that if we can make a projection toward the future and we can find that the cost to our values or to the texture of international politics or world order is minimal, then an individual initiative on our part may not be justified.

Finally, I think we should seriously consider methods for exploring alternative means of achieving our goals that don't necessarily require unilateral action. I, throughout my career, have supported the notion that unilateral action by members of the international community can be justified when it meets international standards and I don't recede from that for a moment. The international community's formal organs of decision are still quite weak and even when they work, it is owing to extraordinary pressure brought on them by one or two major actors. I am not excluding unilateral action, but I am fearful lest we invent an ideological vehicle that makes it easier for us to do things without going through very careful intellectual tasks that assure ourselves, and the world, that our actions are in the best common interest.

Thank you.

PROF. COLL: Thank you, Michael.

That was both a very elegant and provocative challenge to us, and I do hope that we can focus on the kinds of questions that Professor Reisman just raised; they're tremendously important.

Admiral Harlow.

RADM HARLOW: I am mindful of the admonition that Professor Reisman just gave us; we are faced with an extraordinary opportunity, but also a very dangerous arena in which policy may be abused. I would, nevertheless, hope that this conference may serve as a useful basis for United States policy in this very sensitive area.

Let me discuss what might be done in terms of implementing steps. In this arena, perfect is the enemy of good enough. I have a sense that time is of the essence, not only internationally, but domestically. Americans, in my judgment, do have moral fiber. It's not so firm that they can't be led into abusive and corrosive practices, but on the other hand, with wise and prudent leadership, I think we'll find there's a great reservoir of American will to do the prudent and the right thing. So, the key is wise leadership, and with it, we will not lack the will or moral fiber to take on the arduous and complicated task before us.

I would suggest that there is a need for a Presidential statement. I think it tends to be corrosive for Americans not to really know what direction we are going in the long term. It's also damaging internationally. Just think for a moment of the fear that runs through the hearts of our foreign friends and adversaries alike at the prospect of irresponsible use of American power in a unipolar world. I think there's a crying need for a Presidential articulation of national purpose in this ambiguous area of international affairs. This should include the questions of special operations, anti-terrorism, regional strife and drug trafficking. And let me say as an aside, I wrestled with the issue years ago of whether we could translate anti-terrorist acts from the arena of law enforcement into the arena of national

security. As you know, traditionally, the United States has viewed terrorism as a law enforcement issue. The FBI has cognizance of terrorism in the United States, and the State Department internationally. In 1983, '84, '85, people started looking at that issue and wondered whether the new dimension of State-sponsored terrorism would warrant a different view of our appropriate response. In view of the State-sponsorship of these acts and their impact on American citizens, civil aviation, and the world community in general, I believed that it was appropriate to exercise the extraordinary right of self-defense. So I, for one, supported what led up to the Libya raid. I cannot establish in my own mind, based on the evidence, that it did a hell of a lot of good. I suspect it may have deterred terrorism internationally. In any event, I supported that conversion from law enforcement to national security. The same issue may have to be faced in future years with regard to drug enforcement. I'm not proposing that shift be made now, because I see no firm evidence of State sponsorship of drug running. But if that were to arise, I would support the exercise of the extraordinary right of self-defense.

I think one surprising thing during these last two days was the lack of discussion of the North/South issue. I think many nations perceive this as a situation where the rich get richer and the poor get poorer. International law and international relations have yet to come fully to grips with the question of redistribution of wealth; either voluntarily or through some systematic procedure. I'm not suggesting that I have an answer to that, but I am suggesting that it would certainly please me, and I think please many Americans, if the President came to grips with that issue and expressed the willingness to work with the community of nations toward what the Third World calls a new economic order that would address this issue. I think it's in our selfish interest to do so, if for no other reason than conflict avoidance.

In any event, I think that Americans would support a balanced Presidential statement recognizing that we can and should live with diversity, but at the same time need not live with threats to our economic or social well-being, and that we will protect our interests, and those of our allies.

I think that the theme of such a speech could be taken from the transcripts of our meetings. Going a few steps further, a national decision memorandum supporting the speech might require a Department of Defense concept implementation plan for low-intensity conflict. I would suggest that such a plan contain a statement of the unique nature of the challenge posed by low-intensity conflict. I'd also include in the paper a strategy to deal with this challenge. I would develop a catalog of countermeasures. Additionally, I would include a crisis management plan. There's been a lot of useful discussion here about who would be in charge and how the agencies would coordinate and develop such a plan to implement a policy, if the President announced it.

It would deal with issues of command and control. As Carnes Lord suggested, perhaps the military should be in command even over economic and political aspects of low-intensity conflict. That's a tough nut to crack. It will require an imaginative approach so we don't get bogged down in bureaucratic niceties, and avoid doing the right thing.

I would also make provision for intelligence support. Here let me make a point that I think is important. Intelligence support is often viewed as espionage support. It is not, ladies and gentlemen. One tenth of one percent of intelligence support requires espionage. When I speak of intelligence support, I'm talking about something that is fully lawful. It has to do with intelligently analyzing information that is readily available in the economic, political and military arenas, and communicating one's conclusions to the decision-maker. The point was made this morning that information delayed is information denied. Not only does it have to be delivered in a timely manner, but intelligence requirements have to be carefully assessed. Nipping things in the bud at a low level of violence requires robust intelligence support. If we are to develop a meaningful policy for low-intensity warfare, we must decide who is responsible for intelligence support and how those requirements will be identified.

I would include in such a concept plan the question of legal issues. That draws us back to what Judge Sofaer and many others mentioned, the War Powers Resolution. Frankly, if I wrote the legal memorandum, I would not explicitly use the just war terminology, but would try to present the principles in the context of contemporary reasoning understandable to the military.

Finally, there needs to be a policy oversight to attend to the moral dimension of any low-intensity conflict program and monitor its efficacy. The needs change, and the challenge moves so that reassessment must go on continually.

Although we have listened to many different viewpoints during the symposium, I believe that our deliberations have revealed an identifiable core of consensus that could serve to support the approach I have outlined.

Thank you.

PROF. COLL: Thank you, Admiral Harlow, for your very practical counsel's recommendations. As we continue this project, we should strive to maintain the fruitful tension that we have seen here between the world of policy and practice and the world of philosophy and theology; between the values of the cave and the world of the bright, shining sun.

Let me raise a couple of questions that I think we may want to wrestle with now. I think that the first question that we need to consider has to do with a point that Ken DeGraffenreid made. Ken said that one of the things he discovered in the policy process, is that often there seems to be a vacuum at its core. There is some input of legal advice at times, there are plenty of judgments based on purely strategic considerations, but, in his view, there is no process to ensure

consistent, adequate ethical reflection at the heart of the policymaking process. Therefore, we often make decisions on the spur of the moment and on the basis of practical considerations, without the illumination of ethical reflection. I think that we want to ask ourselves whether that's really true. Do we agree with Ken's description of the policy process and, if so, is it a good thing or is it something we need to worry about? I sense from Professor Johnson's intervention earlier today, that we should be worried. I share that concern and I wonder how the problem can be addressed. Admittedly, ethical reflection is not something that is taught mechanically and we need to see how we can institutionalize it with a great deal of rigor. But, there are some measures that could be helpful. I'm very encouraged, for example, by the tremendous work that Jim Barry, at the CIA, is doing. He heads a small think tank, within the CIA, that addresses ethical issues and that takes very seriously the mandate, both at the level of policymaking and at the level of professional conduct, to promote a greater degree of ethical reflection within the Agency. This could be one direction for our efforts, and you may want to offer some insights into that question.

The second point that I wish to raise was put to me very provocatively yesterday by Chris Lamb. He said we need to come to terms with the fact that key decision makers in most crises are much more influenced by their broad national security responsibilities and the great global interests of the United States than they are by the moral issues of a particular emergency. An example of this, with which Chris is very familiar because he has written the best book about it, is the Mayaguez crisis. During the decision-making process in that affair, the American people were somehow led to believe that the real issue at stake was whether we should risk the lives of American soldiers in order to rescue the ship and its crew. But Chris's book very persuasively makes the case that the decision had little to do with the ethical imperative of saving the lives of American servicemen or even asserting our legal rights over an American ship. The decision was driven by Henry Kissinger's and President Ford's consideration that the United States was, at that point, in a very precarious position. The Mayaguez crisis took place in May of 1975. The United States had just suffered the humiliating loss of South Vietnam to the North Vietnamese. There were grave intelligence reports indicating that the North Koreans were contemplating a move against the South. Our adversaries in other parts of the world, including the then mighty Soviet Union, sensed that the United States might be retreating from its international responsibilities. From Kissinger's viewpoint, the seizure of the Mayaguez presented an opportunity to send a message to the North Koreans and other people around the world about our resolve and that's what drove the decision to recapture it. The concerns about the crew and the ship were very secondary.

Now that is one example of the way pragmatic goals can outweigh moral concerns in national security decision-making and I think that we could cite others, including

the invasion of Grenada. I would expect Professor Nardin to have decided views on the ethical and political wisdom of that operation because he just finished a case study of it. In my opinion, at least from the outside at that time, the invasion of Grenada was not driven principally by our concern for the lives of the medical students on the island. In fact, we had trouble figuring out who they were when we landed, and if the Cubans had been really nasty, they could have slaughtered the students before we got to them. In my view, what really drove Operation Urgent Fury was a decision by the Reagan administration that this was an opportunity to send a very strong signal to Cuba, to Nicaragua, to the Soviet Union, and to a few other adversaries around the world about the determination of the United States to defend its global interests. The justification about the safety of the students was in truth, I believe, a much less influential concern.

The problem that these sorts of national security decisions raise for us — and there are many others like the ones I just mentioned — is to determine what weight moral and legal reasoning actually bear in relation to the pragmatic considerations. I will leave this question open for a broader discussion. The case can still be made that even decisions based on pragmatic, strategic considerations can be morally and legally justified. But, we need to acknowledge that rather straightforwardly and think about what that may imply.

Let me raise a third question for you to try to answer. Are there any points of significant consensus among us after a day and a half of deliberations, and if so, what might they be? My sense is that there is a great deal of disagreement; there may also be some points of consensus, and I hope that we can make them clear. I think we're in agreement that, in however indirect a fashion, legal, moral and other constraints related to our strategic political culture do limit the way in which we think about and implement low-intensity conflict policy. And, I think we also share the perception that notions of morality derived from just war thought, as Professor Johnson argued strongly in his paper, actually have a very close relationship to common morality and shape American thinking about what is right and proper to do.

Let me close with a couple of challenges. Have we really wrestled with the relationship of low-intensity conflict in the *jus in bello*? Are we prepared to say that low-intensity conflicts are by their very nature inherently more difficult to conduct in accordance with just war doctrine than other kinds of conflict? Is there something different about them, or are we comfortable with saying that they are no more problematic to subject to just war criteria than conventional conflict? I'm certain we would be able to make that case for nuclear or high-intensity conflict. What are the distinctions here?

Finally, how comfortable are we with the possibilities opened up by the United Nations? How far are we prepared to go in strengthening the United Nations as a means of dealing with these conflicts in a multilateral way? I believe, of course, that the United Nations is not the only vehicle for us to act

multilaterally. In the Gulf War, for example, even if the United Nations Security Council had not given us its approval for the use of force against Iraq, the United States still would have been able to develop a very solid coalition with allies in Europe and the Arab world, North Africa and Japan. Are there any dangers related to our new-found enthusiasm for the United Nations Security Council, or are we comfortable and do we believe, as Judge Sofaer put it, that we have no other choice but to continue along that course? Taking the multilateral route will have tremendous implications for low-intensity conflict because sooner or later, we will probably fail to get United Nations support for a particular policy. Indeed, the dynamics of the Security Council itself are subject to change. We do not know how long, for example, China will be as pliable and as cooperative as it has been over the last two years, and there are still open questions, of course, about the future of Russia and its democratic orientation.

Let me stop at this point and open the floor for questions and discussion. I will exercise my chairman's privilege to ask that we directly address Professor Reisman's point about the danger of just war as an ideology that might be used to justify proactive behavior abroad. I am very curious about how Professors Weigel, Johnson and O'Brien would respond to that concern.

MR. WEIGEL: I think it's a very wise counsel of caution. Put another way, what I hear Professor Reisman suggesting is that we keep intact the border between the just war tradition properly understood, and the crusading or Holy War tradition, which is obviously not what any of us, I think, are talking about here. Part of the problem with getting a grip on this is semantic. If we thought in terms of a justifiable war tradition, that simple semantic shift would make it easier for us to understand that not everything that is morally justifiable is necessarily wise as a matter of State. I think what Professor Johnson said this morning, about the just war tradition as one resource among others for the construction of prudent and wise policy, is very much worth repeating. When we expand the purview of the just war tradition to claim that a morally justifiable action is morally obligatory, or necessarily wise, we cross the border between just war tradition and other forms of reasoning. If we think only in terms of justifiable resort to armed force, we may be able to keep to firmer ground.

PROF. COLL: The expression "just war" often connotes the idea of a war for justice, which is not its key meaning. I think I agree with you that we need to think in terms of justifiable war, but many people read it as a war for justice.

MR. WEIGEL: I think the point is that one can imagine any number of scenarios, even under a low-intensity conflict rubric, in which the result of the moral calculus seems to be positive, and yet, for a host of other reasons, one decides that what is proposed is not prudent.

PROF. COLL: Professor Johnson.

PROF. JOHNSON: I liked Professor Reisman's discussion of the three ways in which the term "just war" is used. I thought he was absolutely right that all three uses have been employed here and they're present in general discussion outside of our deliberations as well. I also agree that the right use of just war, at least from my perspective, is the first. But, I would also suggest that the problem of the ideological use of this set of principles isn't unique to just war thinking. We find that whenever we have a set of principles for practical application. As Professor Coll was talking, I was suddenly struck by the possibility that someone might at some future time take that wonderful category you introduced which we haven't discussed—the use of low-intensity conflict for the purpose of sending signals—cross that with Professor Reisman's third use of just war, and we have low-intensity operations sending ideological signals all over the world for the purpose of keeping people in line or whatever. That's about the worst possible outcome I can imagine.

I also think we should take seriously what Admiral Harlow said about the need to get some fairly concrete policy implications out of our thinking. I don't know how we can accomplish that, but it is one way, it seems to me, to avoid the ideological exploitation of the just war tradition.

I was told that the guy who actually drafted the Weinberger Doctrine had studied at the War College under Donald Davidson, when he was teaching just war. So it was not accidental that the Weinberger Doctrine can be easily translated into just war language. That's one way to get these moral concerns into policies.

The last thing I would say is that just war is a tradition of limitation. That's really what it's all about. It is not principally an effort to invent new justifications for the use of force. It's an effort to look at uses of force that are indicated by political needs, and determine whether they are morally justified.

PROF. COLL: Professor O'Brien.

PROF. O'BRIEN: My response to Professor Reisman would be more or less along the lines of Professor Johnson's. I prefer the first use of just war, the prudential method. The just war doctrine is not substantive. By and large, it's procedural and sets up a series of questions to which you must supply answers. It doesn't tell you what to do. It asks you to justify what you're going to do. And the first use of just war that Professor Reisman sketched out is in harmony with this approach.

Now, cautious as Michael was about the second use, any natural law approach holds out the possibility that the positive law may be found wanting. That's the whole history of natural law, but direct challenges to positive law are rare. So by and large my reaction to your second use is not so much that the just war dotrine

would be against positive law, but that it might be used to interpret the law in ways that would be more reasonable.

I'd absolutely reject the third use. Natural law is non-ideological by its very nature. It's an ethical framework of analysis. To put content in it, or to make it a tool of some particular point of view would violate its character.

PROF. NARDIN: I noticed two tendencies in the discussion where people have divided ideologically over military issues. I would call one group of speakers separators, and the other group integrators. I'm speaking here about how one combines judgments of legality, judgments of morality, and judgments of interest or prudence. I should indicate before I go further with this that I'm a separator, just so you know.

One of the issues that we've been talking about is the nature of law, because if law is going to govern low-intensity conflict operations, theories about it are not just academic. I think we have a range of quite different views of law here, and if you'll permit me to engage in a little parody which is deliberately unfair, I'd like to identify at least four theories that I've noticed.

First, Professor Teson's view is that we should respect the law except when it's unjust. Then, Professor Turner's view is that we should respect the law except when it's inexpedient. Professor Farer thinks that we should respect the law even when it is inexpedient. And Professor Reisman says that we should do what's expedient and call it law.

Let me immediately apologize to Professor Reisman by acknowledging that he does not intend that the United States should pursue its interests without reference to the concerns of other nations. I understand that he means to advocate a policy making process that is expedient for the larger system of international relations because it takes into account the interests of the international community in formulating American objectives.

However, these are views of law that do not identify it with the common interest. Law is seen instead as a set of constraints on the pursuit of the common interest. So I would say that Professor Reisman is a synthesizer or integrator. Some of you have said that in moral oversight we need to assess the need, accuracy and prudence of our efforts. Admiral Harlow agreed when he connected legality and morality with advocacy, expediency, prudence, and interests.

On the one hand you have people who think that law is essentially a matter of interest and prudence; on the other, people who see it as a matter of rules or constraints in contradistinction to prudence. I think Judge Sofaer indicated repeatedly his commitment to that second view.

I think the same divide persists when we pass from legal to moral issues. What is morality? For some people it's a matter of antecedently authoritative principles that constrain collective international interests as well as those of individual States. The moral point of view is one of conscience, of principle, of civility, of restraints.

This contrasts with an entirely different view of the moral or the ethical, which looks to goals, interests, and outcomes. This is a basic divide in moral theory and it can't be settled here. But I will say that the conflation of law and morality with interests leaves them unable to stand as an independent criterion for judging conduct. They lose their critical force and prophetic judgmental basis, which are precisely the qualities needed by policy makers if they are to subject their work to standards that transcend parochial or nationalistic concerns.

This brings to mind a third dimension which I would characterize as a fundamental cultural question. It's the debate about whether these standards are universal or whether they are particular or communal. That's a very hard thing to decide. I think we all recognize that one reason these debates are so complicated is that we're faced with a series of quite separate ethical outlooks, whether that of international law or American law; whether that of our Christian heritage or the rational natural law version of it; whether American military traditions or foreign. All these different viewpoints are not easily reconciled.

To return to my initial distinction between the synthesizers and the separators, I think the weakness of the former is to strive for consistency at the expense of the critical independence of the various standards that we can call on to evaluate our policy goals. The separator who treats law as one thing, the national interest as something else, and his moral judgment as yet another, may find himself in normative gridlock. Nevertheless, his judgments retain real critical force because he can criticize a policy position on the basis of criteria not already subsumed within it.

PROF. COLL: Thank you.

Professor Farer.

PROF. FARER: I wanted to speak to the question of just war as an ideology, prefaced by a brief comment on Professor Nardin's very important point.

I find Terry is pushing me closer to Professor Reisman. I would distinguish the position that Terry has staked out for himself, a position which I always feel Michael tends toward, in the following way. Government international law tends to incorporate a long term sense of what is in the general or collective interest. It can't have authority distinct from national interests, because after all, the international legal system is a consensual one. We're one of the principal makers of those rules, so there shouldn't be a dichotomy between international law and our longer term interests. There can be a dichotomy between the constraints of law in a particular case, and what is seen as a short-term opportunity to seize an advantage. Unfortunately, political considerations often compel us to make short-fused decisions, even if not in a time of what appears to be a terminal crisis. In such exigencies, we don't have a chance to take into account the whole range of possible implications, short, medium and long term, so the law gives us valuable

guidance. There ought to be a powerful presumption, it seems to me, in favor of adherence to the law for that reason. Not because we think we are adhering to the law at the expense of interests, but because the law reflects interests contemplated outside the context of a crisis.

With respect to just war as ideology, I disagree, I think, with Professors Johnson and O'Brien. I think there's no way of excluding it from our use of just war reasoning, the ideology is a world view. The temptation to employ low-intensity conflict strategies will be very powerful when others depart from our view of what is a desirable world order. We haven't focused very much on that. When Admiral Harlow talked about North/South problems, he suggested the difficulties that could follow from a conception of order as the maintenance of the existing distribution of power, prestige and wealth. I would predict that if we set ourselves up in this fashion as the guarantors of the status quo, we will become the targets of all of those who want change. This approach would probably increase the use of terrorism and low-intensity conflict strategies against us because they are the methods of the weak. We resort to these methods because the loopholes of the U.N. Charter permit it, as my friend Professor Turner pointed out. They allow this latitude because the existing distribution of power, wealth and prestige influence the capacity to generate norms. To what extent should we identify the minimum of order that we all agree is necessary for our national interests with the existing international dispensation? And let's not exclude the internal affairs of those countries like Saudi Arabia and others where we have important interests. I haven't thought this all the way through myself and I don't think anyone else has. If we do define the minimum of desirable order in this very conservative way, we can be sure that we will be targets for low-intensity conflict strategies by those who want significant change, and that we will respond to them with low-intensity conflict strategies.

PROF. COLL: That's a very good point.

Professor Teson.

PROF. TESON: I would like to address the conclusions drawn by Professor Nardin from Professor Reisman's remarks. I think the distinction between those that separate law and morality and those who integrate them is just too simplistic. It seems to me, as anyone who has interpreted the law knows, that there are many ways, starting from the language of treaties, that you can factor your theories of morality into law. The very act of legal interpretation lends itself to an integrationist position because of the nature of jurisprudential language, quite apart from any desire to use the law in support of a particular moral position. The precise meaning of Article 2 of the U.N. Charter, which prohibits the use of force, has been debated for years. In this expression of the purpose of the United Nations, there is surely room for interpretation, be it by a court, a legal

advisor, an international lawyer, or a policy maker in low-intensity conflict operations; all of whom may introduce appropriate notions of morality into the process of interpretation. So I think that the distinction between separation and interpretation is just simplistic and doesn't wash. I agree with Professor Nardin that treaty law agreed upon by States may not leave room for interpretation. There might then be a point at which separation does take place and we must acknowledge that the positive law is unjust. A low-intensity conflict operation would then have to be justified on a moral basis.

The second point that I would like to address concerns a comment by Professor O'Brien on just war theory. I would like to say that, although I was intrigued by the procedural framework of just war theory, it seems to me that it cannot be just that. It has to be filled in by some substantive notion of what's right and wrong, and when it is correct to exercise international coercion. In my view, the most desirable supplement to the procedural framework of the just war tradition is a theory of respect for legitimacy and human rights.

I would like to make my final point by asking why democracies need to use low-intensity operations. I suggest that the reason is simply the existence of despotism around the world. As Professor O'Brien said yesterday, we don't conduct any low-intensity operations against Denmark. Democracies do not fight each other. Kant said this in 1795 in his book *Perpetual Peace* and it has now been overwhelmingly confirmed by the statistics collected by Michael Doyle and other political scientists. Therefore, I suggest that the promotion of democracy and human rights should be a principal motivation for the people who are planning these operations.

PROF. COLL: Thank you Professor Teson.

Professor Eckhardt.

PROF. ECKHARDT: I noticed that our title is "Legal and Moral Constraints on Low-Intensity Conflict," and following on Admiral Harlow's suggestion, if I were in your position, I would commence a study of every congressional act and statute that you believe constricts justly, or otherwise, your ability to conduct the type of low-intensity conflict that you think is permissible. I would ascertain which statutes you think are invalid and suggest amending legislation where appropriate. I'm thinking about activities like security assistance and funding. I'm thinking in practical terms because, after all, the constitutionally mandated war-making power of Congress has sometimes been amplified through legislation that was only appropriate to the conflict which occasioned it, yet it remains in force.

PROF. COLL: Thank you.

Of course I heard both Admiral LeMoyne and Ken DeGraffenreid say that those legal constraints really are not that bad; that indeed, it is a good thing for our health as a polity and for the wisdom of these operations, that they have to be reviewed through a careful process of scrutiny which includes all kinds of legislative restraints.

PROF. ECKHARDT: My idea would simply be to ensure that we are not unnecessarily carrying outdated and impractical baggage, not to sweep away all restraints.

PROF. COLL: Professor Turner.

PROF. TURNER: I'd like to make three or four brief points.

Professor Nardin characterized my views in one sentence. I don't think that was simplistic, I take it as humor. If anybody did think that was a representation of my views, I would urge you either to talk to me or re-read my paper. I believe law is extremely important and I was only thinking about an extreme situation in which the safety of the nation might be in jeopardy when I suggested that we might have to argue with the law, and I said even then that we ought to recognize the harm done by so doing.

Also, I'd like to voice my agreement with the way Professor Teson stressed the importance of what John Norton Moore calls rule of law engagement, or promoting democracy in lieu of law. I think it is a tremendously important part of trying to reduce low-intensity conflict.

I think the idea of working on legislation is worthwhile. I thought Abe Sofaer had an A-plus presentation except for his treatment of the War Powers Resolution. He talked about having two months in which to act under the War Powers Resolution. You've got 48 hours to file your report or you're a lawbreaker. When I testified before the Senate Judiciary Committee a little over a year ago, Senator Biden told me that, in his view, the War Powers Resolution was only of academic interest. But I'll promise you that as soon as the President gets us into a situation in which bodies start coming home in bags and the public is unhappy, members of Congress will embrace that law and say "it's not our fault, get the crooks in the White House who concocted this illegal war." That's one of the laws that we ought to attack. You even get people like Senator George Mitchell saying it's unconstitutional, and yet nobody gets rid of it. When there's a Mayaguez operation in violation of the resolution, Congress can praise it, and when Jimmy Carter fails at the Iran rescue, an almost identical operation, they can call him a crook. I think that the resolution does undermine deterrence and may well promote low-intensity conflict.

The last point is a broader one that Admiral Harlow raised earlier. I'm not sure it has gotten as much attention as it warrants, because it will have to be dealt

with by somebody in the government. That's the drug problem. As I understood the Admiral, he argued that the use of force by the United States against narcotics traffickers in foreign countries would constitute a legitimate exercise of self-defense under Article 51 of the U.N. Charter if it could be proven that their operations were State-sponsored.

This position has a drawback that I tried to raise in my paper. Many of the old treaties that outlawed drugs also outlawed alcohol. Smuggling liquor does not involve a use of force as I see it. If it is self-defense for the United States to use force to combat a trade conducted by the agents of a foreign State that extends from their shores into our streets, then it is surely to be expected that the principle of reciprocity would give a foreign power such as Iraq the right under the Charter to fight the liquor trade at its point of origin in the United States. Alcoholic beverages are as offensive to the Islamic faithful as cocaine is to us. In other words, I'm really worried about taking Article 51 into the drug business. If foreign drug traffickers come onto our soil with narcotics or firearms, we can arrest them. But the view that it is a legitimate exercise of self-defense for us to attack residents of other countries who have initiated transactions in which Americans voluntarily engage, seems to me both unsupportable and dangerous. Nevertheless, the drug trade continues to be a considerable threat to our security and we must continue to think of ways to fight it.

PROF. COLL: Thank you.

Father Winters.

FR. WINTERS: I'd just like to raise two questions that I think might be useful as a focus for a part of your book on the symposium and this desire has been sharpened somewhat by Professor Farer's questions.

My first question is this: Do we as a group feel, and does the U.S. Government take the position, that our nation should remain open to the possibility of overturning governments in the name of justice?

Now my own view, which you may already have predicted, is that there are three reasons why we should not remain open to that possibility. We should not be in the business of overturning governments, first of all, because it is contrary to the fundamental value of order, which should be irreplaceable in international affairs. Secondly, it breaks, as Professor Reisman said, a very long tradition of collaborative understanding of the operative principles of international relations, which includes sovereignty. Third, as Michael also observed, the record of success in overturning governments is not all that good.

My second question is whether we should continue to commit ourselves to the possibility of helping governments resist insurgencies. Certainly international law seems to allow that and, perhaps, to encourage it. Just war tradition certainly allows it and is believed by many people to encourage it. I've always felt that it

was a good idea. The question Professor Farer raises is a very good one. Do we expose ourselves too much by coming down on the side of order? I don't know the answer, but I think that it is of fundamental importance to the low-intensity conflict debate.

PROF. COLL: Thank you.

MR. COLLINS: Professor Farer said that low-intensity conflict is the weapon of the weak. I would suggest to the group that it just seems that way because this conference has been devoted almost entirely to the military aspects of low-intensity conflict. Low-intensity conflict methods can be used by the strong to tremendous effect in non-military contexts such as political, economic, psychological and religious warfare. I'll give you one example. Japan is now in a great position to wage economic warfare against the United States. All four of our military services have weapons and equipment that are inoperable without components from Japan. If they turned off the tap now, we would have to ask how our just war principles would apply in such a crisis. Do they permit us to declare war against Japan for conducting non-military operations against the United States?

PROF. COLL: The same question, by the way, was raised back in '73 with the oil embargo.

MR. COLLINS: Yes sir.

PROF. COLL: And I remember Robert Tucker wrote a very famous piece in which he argued that the United States had the right to seize and occupy the oil fields in Saudi Arabia.

PROF. O'BRIEN: I just would like to voice my agreement with Mr. Lord, Professor Eckhardt and Admiral Harlow about the need for serious study of how the United States Government deals with all the problems that come under the heading of civil affairs, whether they be political, economic, social or psychological. We never have come to grips with it. My experience as a former Army civil affairs officer suggests that the military needs help from the people in AID or the State Department or the universities to deal with all these things. There are a lot of compelling reasons why the military has to take the lead, but it can't go it alone in civil affairs.

There are a lot of problems with getting a grip on civil affairs. First of all, to the extent that you take this business seriously, as soon as the *Washington Post* gets wind of your efforts, there will be an article saying "In the Pentagon they are plotting to take over and rule foreign countries." This has happened before.

The second problem, of course, is that competing bureaucrats will all start elbowing each other out of the way to see who can enlarge his turf. But I think this is simply inescapable because the civil affairs requirement, in most aspects of low-intensity conflict, is more important than anything else, including weapons systems, and all the other kinds of hardware. Ultimately, these conflicts are political and social and that's why civil affairs needs to be taken seriously within the United States Government.

PROF. COLL: Thank you.

Let me thank you most warmly for having joined us for this symposium. I have found it very helpful. As I suggested yesterday, these kinds of gatherings cannot be expected to produce either brilliant new insights or clear solutions to future problems, but I think that they perform a valuable service by airing critical issues that are easily overlooked in the policymaking process. I have found in my brief twenty months in Washington that the greatest moral frailty of policymakers is not a particular fondness for aggression or a proclivity for hatching secret assassination plots. Our greatest sin is something far pettier and perhaps deadlier for our own society, and that is bureaucratic selfishness and tunnel vision. These failings induce us to mistake the process for the goal, the means for the end; to believe that those things which we are engaged in have a reason of their own, and to forget the fundamental reason for the existence of the vast, elaborate machinery of government, which, in my view, is to uphold the honor of the United States. I take that word "honor" to have a strong normative content. Honor implies doing what is lawful and also doing what is right. That is what we as a people believe. So it's useful to get together once in a while and undertake a serious enquiry about the nature of the constraints that we face. What is their weight? How do they affect who we are and what we do, and the kinds of goals that we should have in mind, and the kinds of means that we should use?

There is something very attractive about Professor Nardin's reminder that law and ethics do have a prophetic quality about them. In other words, they often call us to do things that are not necessarily easy or that are not necessarily comfortable. It becomes tempting to reject these considerations out of hand and pretend that we are actually free to base our policy on nakedly expedient considerations or tailor it to justify the existence of the bureaucracy. One of our distinguishing human qualities, however, is that we are moral beings and live in a society bound by notions of lawfulness, against which we need to compare the substance of our policy.

Low-intensity conflict is intensely problematic precisely because it is low-intensity, because it is ambiguous, because it is indirect. It does not throw into sharp relief the kinds of antinomies with which we are most comfortable. Instead, it pushes us into gray areas, where we are compelled to balance and weigh competing values, moral commandments and legal norms.

I also, however, consider myself a hopeless integrator, and would like to reply to Professor Nardin's commentary by pointing out one of the dangers of being a separator. The scrupulous separator maintains that the integrity of law and morality must not be compromised by commingling them with the national interest. But his refusal to cultivate any kinds of integrating links or even tentative embraces can sometimes have an untoward result. Morality and law may come to seem irrelevant to the policy process, and a crude understanding of the national interest untempered by normative considerations will be pushed to the fore by bureaucratic interests. This state of affairs is by no means foreign to the halls of our government.

I am not prepared to give up the quest for integration. It is difficult and it has real dangers, including the temptation to equate what is expedient with what is right, or the tendency to equate our own ideology or narrow prejudices with the good of the world. I think that integration is vital to our ethos as a society because it harmonizes with the principles of our founding. The architects of our republican order built according to a vision that was strengthened by allowing for human imperfection. Their genius lay in framing an edifice in which selfish interests, channeled into mutual opposition, would be softened and reconciled with a moral and legal structure of enduring integrity. This is one of the defining features of the American experiment and it is why we are not by inclination separators. Two hundred years after our founding we still believe it is possible to build a society that acknowledges the realities of human sin; our brokenness and lust for power, while preserving the vigor of law and morality.

I do want to close by urging all of you to think further about the influence of these constraints and how we might improve institutional arrangements for conducting this kind of discourse as our policy is formulated. We have been challenged by Chris Lamb and Ken DeGraffenreid to ask ourselves to what extent moral considerations actually play any genuine role in the policy process. As much as I agree with the particular examples given by Chris, I still think that there are many instances in which these considerations manage to push their way in and shape the debate. But this is a question to which there are not yet any clear answers, and one on which I'm open to fresh ideas.

Let me thank you once again for joining us here, for your intellectual friendship, for the books and articles that you have written in the past from which many of us have profited, and for your good, practical counsel at every step of the way. We look forward to staying in touch with you and I hope that this will not be the last of similar efforts that we will undertake in the future as we continue our pilgrimage. And finally, let me thank the Naval War College for hosting this symposium.

Thank you all.

PART FIVE

CONCLUSION

Chapter XIII

Can American Democracy Employ Covert Action as an Instrument of Statecraft?

Alberto R. Coll and Richard H. Shultz, Jr.

The famed Iran-Contra Congressional investigation of the late 1980s focused public attention on the question of whether the United States, as a democratic regime, should engage in covert action. This debate was not new. In many respects it mirrored that which took place during the congressional investigations of the United States intelligence community a decade earlier. A major issue then and more recently is whether, and if so to what extent, a President should employ covert action as an instrument of policy. The purpose of this analysis is to examine different American perspectives on this question and propose a set of guidelines for the use of covert action in the 1990s and beyond. Before turning to these issues, it is necessary to define covert action and briefly describe its constituent parts. Covert action is employed to influence politics and events in another country without revealing one's involvement or at least while maintaining plausible deniability (that is, conducting an operation so that the sponsoring government can credibly argue that it was not involved). Covert action is more controversial than other aspects of United States intelligence policy such as the collection and analysis of information, or counterintelligence. While relatively easy to define, covert action has become increasingly difficult for the United States to employ as an instrument of statecraft.

Covert action involves various kinds of interference in the affairs of another country. It is a generic term that describes a class of activities that can be divided into the following five categories: propaganda, political action, paramilitary assistance, coups d'etat, and secret intelligence support. While each of these variants will be defined separately, it should be noted that they are often employed in conjunction with one another.

- *Propaganda*, conducted covertly, is the dissemination of unattributable communications to alter the conditions under which governments act. The materials circulated may contain true or false information. An example of a major United States covert propaganda program during the 1950s was the

creation of Radio Free Europe and Radio Liberty to reach mass audiences in the Soviet Union and Eastern Europe.

- *Political action* may involve money, advice, and assistance to individuals or groups in a foreign country. Provided through secret channels, the purpose of political action is to encourage those who are either friendly to one's own interests or hostile to one's enemies. Groups receiving assistance might include political parties, trade unions, government institutions, cultural associations, and media organizations. One early example of a major covert political action was the effort to counter widespread political subversion efforts by the Soviet Union in Germany, France, and Italy during the late 1940s by giving clandestine assistance to non-communist political, labor, cultural, and journalist groups. Perhaps the best-known of these programs centered on the Italian election of 1948. Political action programs continued throughout the post-World War II period, and the debate over the merits of some of these programs has been quite contentious. CIA operations in Chile from the early 1960s through the Allende years became extremely controversial, although they were not initially so.
- *Paramilitary assistance* involves furnishing secret military aid and guidance to foreign forces and organizations. Such aid may be given to those who either conduct or defend against a guerrilla insurgency. Until the 1980s, most CIA paramilitary efforts supported defenses against insurgency. For instance, in the early 1950s, assistance and advice helped the Philippine leader, Ramon Magsaysay, launch an effective paramilitary and psychological campaign against the Huk insurgents, who were backed by communists. Another example of paramilitary activity was the CIA's program in Laos in the 1960s and early 1970s. In 1962, President Kennedy decided to provide clandestine support to the the Royal Lao Army and to the Meo, as well as other hill tribes. By the end of the 1960s, the Meo forces, led by Van Pao, numbered almost 30,000. With extensive CIA support, they waged war against not only the pro-communist Pathet Lao forces but also against regular North Vietnamese divisions. The United States assisted some insurgent forces in the 1950s and 1960s, most notably in Tibet against the Chinese Communists and at the Bay of Pigs. However, it was during the Reagan years that the U.S. government used pro-insurgent programs most extensively.
- *Coup d'etat,* in its traditional form, involves secret assistance or financial backing to a faction within a foreign country that carries out a deliberately conceived and swiftly executed seizure of government power through the removal of the current leadership. The CIA operation in Iran in 1953 is a classic example of a successful coup. A less traditional and broader definition might encompass advice and assistance to a leader who, while friendly, is rapidly losing legitimacy and control. In such instances, the goal is to assist

clandestinely in his safe departure from the scene while helping those individuals and groups in the opposition who are most likely to be supportive of one's interests. The Reagan Administration used this approach on two occasions. In 1986 it helped to bring to an end the twenty-year reign of Ferdinand Marcos, a long-time friend of the United States, by persuading him to go into exile, thereby allowing Corazon Aquino to assume the presidency. A second example was the exit in 1986 of Jean-Claude "Baby Doc" Duvalier from Haiti.

- *Secret intelligence support* is another variant of covert action. It includes the provision of security assistance and intelligence training to the leader of a foreign country to protect him and preserve the regime. Frequently, such support is part of the intelligence liaison process carried out between an intelligence service and the leader the service seeks to help. This practice is the least-discussed aspect of covert action, yet the price of the failure of such programs can be quite high. The assassination of Anwar Sadat is a case in point, as was the death of Mohammed Zia.

American Perspectives on the Use of Covert Action

While there may be general agreement over the definition and elements of covert action, no such consensus exists within the American political system as to whether, or to what extent, the U.S. should engage in secret interference in the politics of another country. For several reasons this is not surprising.

First of all, covert actions are concealed from the open public policy debate that generally takes place on most issues in the American political system. The question of secrecy in government is not new but dates back to the founding of the nation itself. From the beginning there was a dispute over the issue of publicity versus secrecy. The men who gathered in Philadelphia in 1787 differed over the extent to which secrecy was necessary. In principle, the Framers were proponents of open government. For example, in 1783, Alexander Hamilton, a conservative, was in the forefront of a movement to pressure the Congress to open its debate on the national debt to the public.[1] However, few of the founders were willing to reject the need for secrecy out of hand.

During the constitutional convention the issue of secrecy was debated in terms of the responsibility of the branches of government to release information and the rationale for withholding it. Witness the controversy over whether or not the Congress should be required, "from time to time," to publish an account of its proceedings. A compromise on the issue was subsequently included in Article 1, section 5, indicating that while Congress is generally required to make public its proceedings it may withhold "such parts thereof as in their judgement require secrecy." However, no such proviso was included with respect to the Congressional reporting of public expenditures in Article 1, section 9.[2]

With respect to international relations, the Framers were of the opinion that secrecy might be necessary. They sought to attend to the need for secrecy in national security by giving the leading role to the executive. The allocation of powers embodied in Article 2, section 2, represents an attempt to respond both to the needs of national security and the structure of checks and balances. Thus, the President can take swift action to respond to a crisis or exercise leadership in the conduct of relations with foreign governments; but the Congress has the power to declare war, regulate the armed forces, approve treaties, and oversee the broad outlines of foreign policy.

A second, and more immediate, reason for American reluctance toward the use of covert action has to do with the Congressional investigations of the intelligence community during the latter half of the 1970s. In an atmosphere engendered by the Vietnam War, publication of the Pentagon Papers and Watergate, Congress created committees to investigate alleged abuses and illegal practices by the U.S. intelligence community.[3] In January 1975 the Senate voted to establish a Select Committee to Study Governmental Activities with Respect to Intelligence Activities, chaired by Senator Frank Church.[4] A month later the House followed suit. Moreover, the Congress took immediate steps to expand its oversight of covert action. In December 1974 it passed the Hughes-Ryan Amendment to the Foreign Assistance Act to accomplish this. Congress also passed the Clark Amendment to block covert assistance to the anti-communist factions in Angola.[5] The atmosphere surrounding these developments was highly charged and was marked by such allegations as those of Senator Church, who described the CIA as a "rogue elephant on the rampage." While this and similar charges proved to be largely unfounded, as the final report of the Church Committee concluded, they contributed to the argument that a democracy should restrict severely, or eschew altogether, covert action.

Finally, the Iran-Contra scandal of the late 1980s focused the public's attention again on whether or not the United States should engage in covert action. In many respects the questions raised and debated were the same as those thrashed out during the Congressional investigations of the 1970s. Major issues then and now included: first, should a democracy utilize covert action in peacetime; second, if so, which elements should be considered and which should be avoided; and third, to what extent does the President have the authority to make use of covert action as an instrument of statecraft.

In spite of these and related objections, covert action has been employed throughout the postwar era. Within the American political system several perspectives exist about the subject. Below we will divide these into four general categories.

Under No Circumstances Use Covert Action, For It Is Inconsistent With American Political Values

The first viewpoint asserts that under no circumstances should the United States be involved in covert action. This perspective can be divided into two sub-categories: one, covert action violates democratic values; two, Presidents who undertake these activities do so without testing their viability in the public policy market place.

The first of these variants has been advanced by such senior American statesmen as George Kennan and George Ball. Kennan is an interesting case, for initially he was a proponent of covert action in the latter half of the 1940s. At that time it was employed as part of a larger policy to rebuild Western Europe and prevent Soviet-backed communist parties from reaching power. Furthermore, far from violating American values, covert action provided assistance to non-communist political parties to compete against their better financed communist competitors and win democratic elections. Nevertheless, to the degree that he grew disillusioned with America's Cold War policies, Kennan also became a critic of covert action. He wrote that "operations of this nature are not in character for this country. They do not accord with its traditions . . . The effort to conduct them involves dilemmas and situations of moral ambiguity in which the American statesman is deprived of principled guidance and loses a sense of what is fitting and what is not."[6] While Kennan has been willing to admit that "there may be rare moments when a secret operation appears indispensable"—the ACHILLE LAURO kidnapping—he concludes that covert actions are "simply not our dish . . . [they] conflict with our traditional standards and compromise our diplomacy in other areas."[7]

George Ball, who served in senior positions in the Kennedy and Johnson Administrations, agrees with Kennan. As he stated a few years ago:

> In principle, I think we ought to discourage the idea of fighting secret wars or even initiating most covert operations. We throw away our considerable advantages over the Russians when we indulge in such things... The United States... has assets that transcend that, the greatest of which is our reputation for upholding certain principles—noninterference in the affairs of other nations, respect for their sovereignty and self-determination, and so on... When the United States violates those principles... we fuzz over the difference between ourselves and the Soviet Union.[8]

Ball went on to argue that U.S. use of covert action equated with the "Brezhnev doctrine . . . [The] Soviet Union will not accept the overthrow of any of [its] satellites." He believed the U.S. has applied a "similar doctrine to Latin America."[9] A handful of former CIA officials agree. For example, Ralph McGhee argued that covert action and democratic values are incompatible and

that the CIA "helped destroy democracy around the world" through covert action. He believed that this, in turn, would result in the destruction of democracy at home.[10]

A second variant of this perspective has been advanced by Morton Halperin, a former senior official of the American Civil Liberties Union and now a member of President Clinton's National Security Council staff. He believes that covert action commits the U. S. to policy initiatives that are not debated publicly and without giving citizens an opportunity to express their views. This is, in his constitutional interpretation, inimical to the democratic process.

> [C]overt operations are simply incompatible with constitutional government and should be abolished. There is no countervailing national security value that makes this a hard choice . . . [T]hey are a threat to constitutional procedures and the First Amendment . . . The conflict between the secrecy of covert operations and the dictates of the First Amendment should be enough to lead Congress to prohibit such operations . . . Covert operations breed disrespect for the truth . . . [and] for the rule of law. Covert operations involve breaking the laws of other nations. Those who conduct them almost inevitably come to believe they can break American law as well.[11]

In fact, Halperin believes that secret operations have such a corrupting effect on the individuals and institutions that engage in them that he recommended "covert action and spies . . . be banned and the CIA's Clandestine Services Branch disbanded."[12] Former CIA analyst, E. Drexel Godfrey, has described this corrupting effect as the "ethos of intelligence." He explained it in the following way:

> Years of hardening in the ugly business of source control and penetration of foreign capitals have surely taken their toll . . . Thus, a picture emerges of a highly compartmented bureaucracy whose direction has been largely controlled by officials with long experience in the seduction of human beings and societies. Not immoral or even without ethical standards themselves, they have lost the habit of questioning where they should set limits on their official conduct . . . What top management lacked was the habit of limit setting, the reflex that warns of dangerous consequences—not of being found out, but of transgressing minimal ethical standards.[13]

Like Halperin, Godfrey recommended that the United States refrain from all clandestine operations and introduce a sense of ethics in the intelligence community.

Use Covert Action As A Last Resort And When There Is A Dire National Security Emergency

A second perspective views covert action as a last resort. It should be employed only when all else fails and there is a dire threat to the national security of the

United States. This is a minimalist argument that views covert action not as a normal but as an extraordinary instrument of statecraft.

The argument appears to have been made first by Walt Rostow in the aftermath of the Bay of Pigs debacle. Based on his review of what went wrong, Rostow proposed a standard for covert action. He noted that the CIA "only gets terminal cases when conventional means have failed. The CIA [is] asked to undo covertly what the policymaker on high had been unable to prevent overtly."[14] Rostow suggested that when a President turns to the covert instrument he should do so only as a last resort. However, Rostow also noted that success in such operations is always doubtful. In his postmortem of the Bay of Pigs he observed that "all in all, it appears to have been an effort beyond the capacities of the CIA to mount successfully."[15]

A similar argument has been made by such distinguished public servants as former Secretary of State Cyrus Vance, former Secretary of Defense Clark Clifford, and the late Senator Frank Church. According to Gregory Treverton:

> For Vance, the language of the 1947 [National Security] act—"affecting the national security"— was too loose a standard for covert action. Instead he recommended covert intervention only when doing so was absolutely essential to the national security of the United States, and when no other means would do.[16]

Vance believed that "such actions should and would be very rare." He also asserted that certain kinds of covert action, such as assassination or interference with the electoral processes in other countries, should be proscribed. Vance's views were embodied in Executive Order 12036 of 1978, a document that served as the Carter Administration's guidelines for the activities of the national intelligence community.[17]

Meanwhile, Clark Clifford has noted that under the "original concept" in the 1947 National Security Act "covert activities . . . were to be carefully limited and controlled."[18] However, as the cold war continued "we greatly increased our covert activities . . . [to] literally hundreds of such operations going on simultaneously."[19] He believed that "these operations have gotten out of hand . . . Our reputation has been damaged and our capacity for ethical and moral world leadership has been impaired."[20] These conclusions led Clifford to a minimalist position: "the guiding criterion should be the test as to whether or not a certain covert project truly affects our national security . . . [This] will assist us . . . in helping restore to our nation its reputation in the world for decency, fair dealing and moral leadership."[21]

Finally, Senator Church argued that covert action should be held in reserve for "dire emergencies." At such times he believed "timely clandestine action on our part might avert a nuclear holocaust and save an entire civilization."[22] However, Senator Church also felt that covert action might be used to promote "our traditional belief in free government." To illustrate this he pointed to the

mid-1970 events in Portugal: "I can also conceive of circumstances, such as those existing in Portugal today, where our discreet help to democratic political parties might avert a forcible take-over by a communist minority."[23]

Conduct Noncontroversial Covert Action Sparingly And Only When It Is Consistent With U.S. Foreign Policy

A third set of views focuses on the following interrelated arguments: one, secret operations rarely achieve anything meaningful; two, they create great political embarrassment when exposed; and three, covert action has frequently been inconsistent with our publicly stated foreign policy.

On the basis of the above, the following guidelines have been proposed: involve the U.S. only in noncontroversial covert actions; use the instrument sparingly; make all secret operations consistent with overt foreign policy; and, if at all possible, carry out all covert actions openly. These arguments have been put forward most notably by the former Director of Central Intelligence in the Carter Administration, Admiral Stansfield Turner, and by several public policy specialists on intelligence matters.

In *Secrecy and Democracy*, Turner observed that "everyone involved [with intelligence matters] should be required to read the history of covert action to be reminded of how little it can actually accomplish."[24] His study of the postwar American experience led to the conclusion that the gap between what covert action promised and what it actually achieved was rather wide. Nevertheless, Turner saw the "quiet option" as very seductive to Presidents and their advisors, especially when a particular situation begins to go sour. He described just such a sequence of events during the Carter Administration:

> [Secretary of State] Vance was unenthusiastic about almost all covert actions and firmly opposed all paramilitary ones. [National Security Advisor] Brzezinski was an advocate and [Defense Secretary] Brown was in between. The wide difference between Vance and Brzezinski reflected the philosophical gap between them. Brzezinski was much more of an activist, but when it came to intelligence operations he had far less experience than Vance, a former Deputy Secretary of Defense. Brzezinski held unrealistic expectations of what could be achieved by covert action . . . Yet not appreciating that, Brzezinski repeatedly called for more quick covert actions . . . In time Brzezinski prevailed, simply because there was frustration in the White House over continuing Soviet aggressions. Well before the end of the Carter administration in early 1981, a wide variety of covert operations were in place.[25]

Turner viewed the seductive nature of covert action as dangerous. While he concluded that it is "something our nation would never forsake entirely," he argued that we must sharply define the boundaries to "be placed around it, [to] determine what should and should not be attempted, and ensure that there is

careful and continual control over it." For the former Director of Central Intelligence, covert action should be held "in readiness until the right conditions exist." In his view, this generally occurs no more "than once or twice during an Administration."[26]

Beyond these issues, Turner also has been concerned about the domestic and international political crises that have plagued postwar presidents when a covert action was exposed. To dramatize this danger he cited several examples, most notably the 1963-1973 CIA interference in Chile. This led Turner to recommend that the United States undertake only noncontroversial covert actions, so as to avoid political embarrassment. In an editorial concerned with the Reagan Administration's secret funding of the Nicaraguan Contras, he asserted:

> There are circumstances, I think, in which covert operations are justified and in which—if they became public knowledge—they would cause little, if any, controversy. The Nicaragua operation, however, is not one of them. It risks substantial damage to both the national interest and to the CIA . . . When the dust settles on this particular incident, we should decide ourselves whether the price of limiting covert action to noncontroversial objectives is worth it. I believe that it is . . . We would do well to proceed only where there is a good chance that there would be a national consensus behind that covert action if it became known to the public.[27]

This issue of public exposure and political embarrassment has also drawn the attention of academic and policy specialists concerned with intelligence matters. For example, Gregory Treverton, who served on the National Security Council staff in the Carter Administration and later on the National Intelligence Council in the Clinton Administration, has expressed similar concerns as did Turner. According to Treverton, before an administration initiates a covert action it should address the question of whether or not it "could contemplate exposure in midstream. If it were disclosed, would it be deemed acceptable, by the American people in particular?"[28] Treverton's standard comes very close to the Turner argument that the United States undertake only those covert actions that will generate little political debate if revealed.

The test of exposure is directly related to a second guideline proposed by Treverton—"does the intervention contradict overt American policy?"[29] He believes that secret operations should be consistent with the stated foreign policy of an administration. "For presidents, prudence suggests careful attention to such warning signals as the review process throws up—the view of Cabinet officers, people in the White House who attend to the president's interest, and the congressional overseers as surrogates for public reaction."[30]

These policy dilemmas have led several academic and policy specialists to recommend that the U.S. severely limit its use of secret operations and, if at all possible, carry them out openly. For example, Loch Johnson has written that the

"U.S. should lessen its reliance on all forms of covert action, so that the quiet option does not again become the tail that wags the foreign policy dog." While he believes that there are situations in which the U.S. might "help [a friend] quietly and honorably . . ., in most cases, the best assistance would be an open encouragement."[31] Treverton concurs with this proposition, at least for large covert actions. He writes that the "imperative of secrecy, so powerful on the minds of decision makers in a crisis atmosphere, may be less than it seems. If covert action is not going to remain secret anyway, why not act openly?" Treverton admits that this may not settle hard cases. Nevertheless, the "bias toward openness [in the American political system] is a strong one," and we should seek to help our friends overtly, if at all possible.[32]

In the aftermath of the Iran-Contra revelations, Allan Goodman proposed that the political fallout from such operations is so great for the Central Intelligence Agency that "covert action should be curtailed and taken away from the CIA."[33] Goodman also has questioned the utility of covert action from the perspective of performance. He does not believe it has been cost-effective, and has argued that Presidents have employed it "when traditional diplomacy seemed unproductive and overt military intervention risked wider conflict."[34] In light of this, he has urged that "Washington . . . no longer conduct secret political influence, propaganda, and disinformation dimensions of covert action." Goodman does see the need for "some paramilitary operations, such as hostage rescue and antiterrorism." However, responsibility for it would be "returned to the Defense Department."[35]

Employ Covert Action as an Instrument of Statecraft within a Realist Context

There are those who assert that covert action should be understood and employed as a normal instrument of statecraft in support of foreign policy objectives. It should not be used as a substitute for policy or as a last resort after all else fails. There is nothing exceptional or magical about covert operations.

Individuals with rather diverse political views have argued along these lines. For example, Leslie Gelb of *The New York Times* has stated that the issue of covert action should be framed within the larger context of whether or not the United States ought to "interfere in the internal politics of other societies." He has written that that this "is exactly what foreign policy is. All foreign policy is the extension of one's internal policies into the internal politics of another nation."[36] This may take place openly or covertly:

> I think the question is not, "should we have covert operations?" The question is, what is your policy? If you have a policy that makes sense, it seems to me that in principle you could conduct covert operations supporting that policy that would make sense . . . As for specific operations . . . sometimes they have been used wisely and sometimes not, but in most cases the real problem has not been with

> the covert action as such or with the paramilitary operation as such. It has been with the policy itself.[37]

Likewise, Angelo Codevilla, who often has criticized the CIA for its inability or unwillingness to function as a "full service" intelligence agency, believes that covert action should be considered as a normal and not an exceptional instrument of statecraft.[38] He writes that "secret means of exerting influence are part and parcel of foreign affairs, intrinsically no more and no less appropriate than other means." For Codevilla, a foreign policy initiative is generally pursued through a combination of open and secret means. Consequently, covert action makes sense only as part of "broader campaigns to achieve foreign policy objectives."[39] It should not be thought of as something distinct from policy or a substitute for it:

> The term covert action does not denote a category of human activity distinct from foreign policy and its execution, nor even a distinct category of means. Rather, the term covers certain means used by governments in a peculiar way, that is, secretly, for political purposes . . . Present-day America is unique in classifying these means under a single label. Although history is full of examples of nations carrying out what contemporary Americans call covert action, none but American statesmen and writers have ever set these actions apart from those of overt political activity. That is because, apart from a greater degree of secrecy, the means of covert action do not appear different from those of overt political activity.[40]

The theoretical basis for the proposition advanced by Gelb and Codevilla—that covert action is not beyond the pale of normal international politics but one of the instruments of power and influence to be employed in carrying out foreign policy objectives—is, in tone and approach, quite Clausewitzian. The German theorist viewed war as "an act of force to compel the enemy to do our will." Armed conflict is only a means to a political end without which war becomes "pointless and devoid of sense." The same is true of covert action for Gelb and Codevilla. Clausewitz frequently stated in *On War* that "war is nothing but the continuation of policy by other means."[41] In other words, the use of force is an instrument of statecraft and not a substitute for it. When war begins, politics does not end:

> [W]ar in itself does not suspend political intercourse or change it into something entirely different. In essentials that intercourse continues, irrespective of the means it employs. The main lines along which military events progress, and to which they are restricted, are political lines that continue throughout the war into the subsequent peace. How could it be otherwise? Do political relations between peoples and their governments stop when diplomatic notes are no longer exchanged? Is not war just another expression of their thoughts?[42]

In sum, Clausewitz saw war not simply as an act of policy but as an instrument to be employed in the pursuit of that policy. War should not be thought of as

an instrument of last resort. War is but one arrow in the quiver of the statesman (covert action is another). Politics and policy saturate all aspects of war. Thus, it makes no sense to talk about military victory without including the achievement of policy objectives. One cannot create war plans without political guidance that details the purpose of the war and the objectives to be accomplished. The theoretical parallels between Clausewitz and the Gelb-Codevilla position on covert action, as described above, are apparent. They also are in the tradition of post-1945 realism.

Students of post-World War II American foreign policy have argued that covert action has been employed by Presidents within the context of realism. From the Truman Administration to the present, proponents of realism have asserted that covert action, as well as overt forms of intervention, were justified so long as these activities were in support of "the national interest" of the United States. The statesman acting on behalf of the national interest was to follow a standard of conduct different from that found within a democratic polity. This is sometimes referred to as a pragmatic argument. According to Michael Joseph Smith:

> [B]y urging an ethic of responsibility and prudence, the realists sought to provide a general answer to the recurrent and perhaps ultimately insoluble moral dilemmas of statecraft . . . Realists have cleared away the easy optimism of the interwar idealists and exposed the illusions of facile liberalism. They have reminded us that we live in a world of states that claim our highest loyalties and provide a context of order . . . From Weber on, realists have insisted on the inescapable responsibility of power and have urged statesmen and citizens to apply an ethic of responsibility to the moral judgment of state behavior.[43]

How does this relate to the post-World War II American use of covert action as an instrument of statecraft? If we look back to the immediate years following the end of that war, the answer lies in the then emerging Soviet challenge. According to Ray Cline, former CIA Deputy Director for Intelligence, several senior officials in the Truman Administration "argued that the United States had to fight back covertly against widespread political subversive efforts sponsored by the Soviet Union in Germany, France and Italy." Thus, the CIA came to be involved in covert action "under pressure from leading U.S. officials of the day to support basic U.S. foreign policy."[44]

Covert Action and the Origins of the Cold War

An examination of the early history of the CIA concurs with Cline's statement. Although President Truman initially rejected the need for a centralized intelligence service in peacetime and signed an executive order on September 20, 1945, dissolving the Office of Strategic Services, he quickly changed his mind as

the Cold War set in. Under the National Security Act of 1947 he established the CIA. Its broad charter authorizing it "to perform such other functions and duties related to intelligence affecting the national interest" has been interpreted to include the use of secret means to influence politics and events in other countries.[45]

Nevertheless, at the time there was disagreement over whether the CIA should be involved in covert action. Many wanted to limit its mission to the collection and analysis of information. As it became evident that the Cold War would draw the United States into protracted conflicts, a new National Security Council directive, NSC 10/2, established in 1948 the Office of Policy Coordination (OPC), with the responsibility to devise and carry out the full range of covert actions. In 1952, this office was merged into the CIA's Directorate of Plans, later renamed the Directorate of Operations.

The language of NSC 10/2 was explicit in stating the need for covert action: "The National Security Council, taking cognizance of the vicious covert activities of the USSR, its satellite countries and Communist groups to discredit and defeat the aims and activities of the United States and other Western powers, has determined that, in the interests of world peace and U.S. national security, the overt foreign activities of the U.S. Government must be supplemented by covert operations."[46] In other words, covert action was an instrument of policy and was to be used in a prudential manner to counter Soviet operations. In the words of one former CIA officer: "the creation of OPC was a pragmatic decision. No question of morality or legality intruded into the Cold War climate of the times."[47]

Both the Truman and Eisenhower Administrations used covert action as a pragmatic instrument of statecraft. Whether they always set aside questions of ethics and morality is open to debate. However, it was at that time that covert action came to be identified with the adage that "if we are to compete . . . we may have to be as nasty as our adversaries." Several recent writers on U.S. covert action, who are also among its most vigorous critics, argue that Presidents consciously adopted this standard in the conduct of secret operations.[48] They point to what they believe to be the acceptance of the so-called "Doolittle standard" as *prima facie* evidence of the decision on the part of Presidents, throughout the Cold War, to separate democratic values from the pursuit of a realist foreign policy based on pragmatism and power politics.

Lt. Gen. James Doolittle was commissioned by President Eisenhower in July, 1954 to report on CIA covert activities and to "make any recommendations calculated to improve the conduct of these operations." His report was tough-minded and action-oriented:

> It is now clear that we are facing an implacable enemy whose avowed objective is world domination by whatever means at whatever cost. There are no rules in

> such a game . . . If the United States is to survive, long-standing American concepts of fair play must be reconsidered. We must . . . learn to subvert, sabotage and destroy our enemies by more clever, more sophisticated and more effective methods than those used against us. It may be necessary that the American people be acquainted with, understand and support this fundamentally repugnant policy.[49]

Although this was the view of one individual, or more accurately one "Special Study Group," several critics have argued that the "Doolittle standard," or an approximation of it, came to serve as the rationale for the use of covert action by American Presidents. For example, the Cold War historian, John Lewis Gaddis, traces this policy back to 1950 and the formulation of NSC-68. He argues that "for roughly the next two decades this doctrine—perhaps we should call it moral relativism—held sway." While noting that "the men who espoused it . . . were, for the most part, men of good will", nevertheless, "in the end all of them came to the view . . . that in periods of mortal peril these standards [democratic values] could not be allowed to stand in the way of whatever seemed required to defend the national interest." Gaddis points to covert action as epitomizing what he believes is the essential message of NSC-68: "moral compromises" had to become "more or less standard procedure" to meet the threat.[50] Treverton refers to this as the "If-They-Can-Do-It-So-Can-We" principle.[51]

Even though during the two decades following NSC 68 there was a consensus in the United States over the need to employ covert action in conjunction with other policy instruments to contain the Soviet Union, an examination of the period raises doubts about the assertion that all U.S. covert operations were based solely on the "Doolittle standard", Gaddis's "moral relativism", or Treverton's "If-They-Can-Do-It-So-Can-We" principle. In fact, several covert actions were in support of policies that arguably sought to promote independence, self-determination, pluralism, and democratic norms.[52] In other words, covert action was neither a substitute for policy nor was it based solely on the principles of realism. In several instances, it was part of a larger policy that sought to blend strategic interests and American norms.

Are Covert Action and Democratic Values Theoretically Reconcilable ?

On what grounds might an American President consider the use of covert action as an instrument of statecraft? Is there a place for it in American statesmanship, or is it inimical to the values that underlie it? To answer this we should first consider the dimensions of this statesmanship. A modern definition of statesmanship holds that it "involves . . . an ability to act competently and confidently in the world without damaging the integrity of a nation's character and principles."[53]

An understanding of the nature and requirements of statesmanship has been the subject of inquiry since ancient times. It was one of the principal concerns of classical political philosophy. For example, Aristotle addressed the issue in the *Ethics*. He observed that the great statesman is the politician who demonstrates the capacity to act *prudently* on behalf of the State. However, for Aristotle, prudence (practical wisdom in politics) is not understood in the same way it has been treated by many postwar realists. Prudence does not override morality, ethics and values in the name of the protection of the national interest. Prudence is not synonymous with successful pragmatism, cunning, or cleverness. Since the political basis for a nation is a set of shared principles, the action of the statesman, for Aristotle, is the prudential application of these principles to actual situations in the real world.[54] According to Jeffrey Poelvoorde: "each significant action of the statesman involves a decision about what is required by the moment, what is permitted or demanded by the country's principles, and finally, what can be explained in the name of those principles to the citizens. This is the widest expanse of statesmanly prudence," as understood by Aristotle.[55]

In other words, the basis for action in the international arena is the defense of the national interest, not to the exclusion of any consideration of the political values of the regime, but *in light* of those very same principles. Prudence and values are not separated but integrated. Thus, as Alberto Coll has noted, those who have advanced the idea of normative prudence insist that "it is possible to bridge the world of morality and that of politics, to pursue and achieve moral objectives in the political world, even if the objectives themselves have to be redefined and adjusted in the process." Within the context of this understanding, "prudence is not value-free; it remains under the guidance, however ambiguous and indirect, of moral principles."56

To develop for the American statesman a set of guidelines for the use of covert action in ways that take into consideration political values and principles, as well as geostrategic interests (and threats to them), we first must construct a normative foundation for those guidelines. To accomplish this we will draw on two moral and political traditions that have influenced American statesmanship: one, the classical view of statesmanship as reflected in the writings of Aristotle and Thucydides; and two, the political principles underlying the founding of the American regime. These two traditions will supply the basis for the tentative policy guidelines presented in the final section of this analysis. What we seek to establish is a "middle ground" for an American statesmanship "that is neither politically impractical nor morally bankrupt."[57]

The Classical View Of Statesmanship

Classical political philosophy was, in part, concerned with questions of statesmanship and the ends it ought to serve. Unlike many modern-day realists,

Aristotle explicitly, and Thucydides implicitly, sought to connect prudence and morality. Prudence was to remain under the guidance of, and be illuminated by, morality. However tenuously, the nexus between politics and universal principles was to be maintained. As noted elsewhere, "for Aristotle, prudence or practical wisdom was the highest form of virtue or excellence in political life. Without a prudent statesman at the helm, the polis was like a ship wildly tossed about by the waves of human passion and misdirected moral energies."[58]

In Book VI of the *Ethics*, Aristotle states that there are five modes of thought by which truth is reached: art, science, prudence, wisdom, and intuition. Prudence or practical wisdom, which is at home in political life, is the ability "to deliberate about what is good and advantageous." Individuals who are "capable of deliberation will be prudent." This is "because they can envisage what is good for themselves and for people in general; we consider that this quality belongs to those who understand the management of households and states."[59] For Aristotle, statesmanship (the management of States) and prudence are closely related. Statesmanlike prudence can take two forms: one has to do with directing or legislating, the other with "practical circumstances." With respect to the latter, Aristotle explains that the prudent statesman has acquired the capacity to deliberate. This is acquired through "knowledge of particular facts, which become known from experience."[60] Prudence is different from either scientific knowledge or intuition.

What is the relationship between prudence and virtue? Politics and the conduct of the statesman are to be directed toward virtuous, good ends. Aristotle writes that "the full performance of man's function depends upon a combination of prudence and moral virtue; virtue ensures the correctness of the end at which we aim and prudence that of the means towards it."[61] Thus, prudence is directly related to virtue and is not to be confused with mere cleverness or cunning.[62] In effect, the concern of prudence is to adjust or apply the universal moral virtues to particular situations. For Aristotle, the good statesman merges moral virtue with practical intelligence, experience, and knowledge of the particular characteristics of his regime and the world around it.

What are the universal moral virtues that the best regime is to reflect and the prudent statesman to illuminate in his actions? They are most notably justice, moderation, courage, liberality, honor, and proper ambition. The nature of the *polis* plays a critical role in determining whether or not the State and the statesman adhere in its internal and external policy to these virtues. For example, Aristotle asserted that the difference in the regime character of Athens and Sparta was reflected in their foreign policies. In commenting on their external policies he observed: "Taking supremacy in the constitution as the prize of victory they proceed to set up a democracy or an oligarchy as the case may be. Also, those who came to exercise leadership among the Greek states installed democracies or oligarchies in them according to the constitution which each had at home."[63]

Commenting on Sparta's glorification of war, Aristotle linked it to the teachings of her statesmen concerning the nature of the good life:

> their whole system of laws is directed to securing only a part of virtue, military prowess, as being valuable for conquering. Hence the Spartans were stable enough while at war but began to decline once they reached a position of supremacy; they did not understand how to be at leisure, and never engaged in any kind of training higher than training for war.[64]

Aristotle suggested that this perspective was not only morally incorrect, but dangerous to the internal well-being of the regime.[65] As Richard Sears notes, "the implications of this seems clear: foreign policy can and ought to be evaluated on the basis of its correspondence or lack of correspondence with the principles of the good life . . . This is desirable both for moral reasons and because there is a close link between morality and political health or stability."[66]

With this in mind we now turn to Thucydides. This may seem, at first, to be inappropriate. After all, Thucydides is frequently presented in the literature on international relations as a forerunner of contemporary realism and is associated with Machiavelli and Hobbes. It is on the basis of the often quoted Melian dialogue that Thucydides is described as a realist. Yet, Thucydides gives no indication that he approved of Athens' cruel treatment of Melos and its inhabitants. He simply described those events with the kind of impassioned objectivity one would expect of a first-rate historian. If there is a hero in Thucydides' *History of the Peloponnesian War*, it is the Athenian statesman Pericles, whom Thucydides clearly admired, and whom Aristotle cited in his *Ethics* as the paragon of a prudent statesman.

Through Pericles' Funeral Oration, Thucydides makes clear the linkage between prudence, virtue, free institutions, the nature of the Athenian regime and her successes at home and abroad. The speech is in honor of the first dead in the war. Pericles praised Athenian nobility, virtue, moderation and superiority in several ways. He asserts that Athens stands as a model for all cities: "Taking everything together then, I declare that our city is an education to Greece."[67] Why was this so? Because of the institutions upon which Athens was based:

> Let me say that our system of government does not copy the institutions of our neighbors. It is more the case of our being the model to others . . . Our constitution is called a democracy because power is in the hands not of a minority but of the whole people. When it is a question of settling private disputes, everyone is equal before the law; when it is a question of putting one person before another in positions of public responsibility, what counts is . . . the actual ability which the man possesses . . . We are free and tolerant in our private lives; but in public affairs we keep to the laws. This is because it commands our deep respect. We give our obedience to those whom we put in positions of authority, and we obey the laws themselves.[68]

Here we see Athenian democracy at its best. This is government based on laws that liberate the talents of Athenians and contribute to making Athens, in Thucydides' view, the best regime. Her institutions and constitution underlie a character based on virtue and moderation. According to Sears, these qualities contribute to "wise collective decisions and to more effective public enterprises since in each man daring and deliberation are united. Athens' energy, daring, and innovativeness have all been encouraged by free political institutions."[69]

Pericles also stated with pride that the Athenians were noble in their treatment of others. "We make friends by doing good to others . . . this makes our friendship all the more reliable, since we want to keep the gratitude of those who are in our debt by showing continued good will to them."[70] Here Thucydides is drawing the distinction between how Athens and Sparta acquired allies. The Athenians are restrained in their use of power over others and they encourage the development of democratic regimes. Pericles states: "We are unique in this. When we do kindness to others, we do not do them out of any calculations of profit or loss: we do them without after thought, relying on our free liberality."[71]

This defense of empire can also be found in the earlier dialogues at the Spartan Congress held just before the outbreak of the war, where the Athenian delegates pointed out that they ruled their empire more justly than their power required or than others in similar circumstances did:

> Those who really deserve praise are the people who, while human enough to enjoy power, nevertheless pay more attention to justice than they are compelled to do by their situation. Certainly we think that if anyone else were in our position it would soon be evident [that] we act with moderation . . . Yet, unreasonable enough, our very consideration for others has brought us more blame than praise . . . No one bothers to inquire why this reproach is not made against other imperial powers, who treat their subjects much more harshly than we do: the fact being, of course, that where force can be used there is no need to bring in the law. Our subjects, on the other hand, are used to being treated as equals; consequently, when they are disappointed in what they think right and suffer even a smallest disadvantage because of a judgment in our courts or because of the power our empire gives us, they cease to feel grateful to us for all the advantages which we have left to them.[72]

In the remainder of his history, Thucydides described how Athens abandoned moderation, justice, and prudence in its statecraft. That awful descent is, in fact, the major theme of Thucydides' *History*. With the death of Pericles power passed to men who were either demagogues, personally corrupt, or fatally timid. They lacked Pericles' prudence, that is, his ability to blend daring and innovativeness with moderation and restraint.

Political Principles and the Origins of the American Regime

The second tradition we shall draw on is that of the American regime and its founding principles as embodied in the Declaration of Independence and the Constitution. These documents were not a break from the classical past. The Founders were familiar with the "political writings of antiquity and accepted much of the classical criticism of democracy." As Martin Diamond has observed, they understood democracy as it derived from its Greek origins. However, he also noted that the "pre-modern preference for a mixed republic . . . was rejected by the Founders in favor of a democratic republic."[73]

The Declaration of Independence claims to base itself on "natural rights" and holds four "truths to be self-evident." The first of these is that "all men are created equal." This is the fundamental principle of the American democratic regime. If all men are created equal, no one has by nature a superior right to take another's liberty or to determine his or her way of life. From this primary proposition a second set of universal truths—"inalienable rights"—evolved. These individual rights include the right to "life, liberty and the pursuit of happiness."

The third principle holds that to "secure these rights, Governments are instituted among Men, deriving their just power from the consent of the governed." This is the right to government by consent. The Declaration did not specify what type of government was best, only that the consent of the people is necessary to establish government. As Diamond has pointed out, "the Declaration was not urging a particular form of government, but was following John Locke's social contract theory which taught the right of the people to establish any form of government they choose."[74] The fourth right was the right to depose an unjust or unrepresentative government.

Are these universal principles relevant to U.S. foreign policy? It would seem unusual if a nation's values were not to influence how it acts in the international arena. Indeed, sooner or later, a nation will attempt to reconcile its foreign policy with what it stands for in its domestic institutions. How did the Founders view this issue? Although they established the nation on the doctrine of universal natural rights, they did not believe that our foreign policy should seek to transform all those nations that did not accept this as the basis of government. While the Declaration of Independence evoked a doctrine of universal natural rights which might claim to serve as a basis for foreign policy, the Founders also believed in the exercise of prudence. According to Nathan Tarcov, "the founders would not accept our dichotomy of idealism and realism: they would offer instead the complementary relation of principle and prudence. From their perspective the relation is not dichotomous but complementary, a relation of application and judgment."[75] In other words, the Framers of the Declaration sought to strike a balance between universal principles and their prudential application in international relations. Prudence is not separated from values but requires values for

guidance or as a foundation for action. Thus, when we decide to use military force or carry out a covert action, our decision should be influenced jointly by our principles and prudential judgment.

By applying this formula the Framers hoped to steer a middle path in foreign affairs between the amorality of the realists and the excessive moralism of the idealists. The Declaration suggests a path to statesmanship based neither on the absolute adherence to, nor the complete avoidance of, our values. It is the responsibility of the statesman to blend principle and prudence and to refrain from the unlimited pursuit of abstract doctrines in whatever form they take.

During the Constitutional Convention, the Founding Fathers turned to the question of which institution was best suited to conduct statesmanship as described above. Although the need for a strong Executive was not articulated initially, by the end of the Convention the foreign policy powers of the President were substantially increased. Activities requiring deliberation were seen as most suitable for the legislative branch, while those calling for action and decisiveness were assigned to the executive. In the case of the latter, the characteristics of action and decision were seen as particularly necessary in the area of foreign policy. For this reason the executive was given the power to deploy troops and to use military force, although he could not declare war. Likewise, the President was assigned the power to conduct negotiations and related diplomatic activities, but treaty ratification was reserved for the Congress. The President also has responsibility for intelligence matters.

While the Constitutional Convention left the exact scope of these powers to be worked in practice, there is little doubt that foreign policy authority was given extensive consideration.[76] This was amplified in *The Federalist Papers*. Both Hamilton and Madison noted that the ability to act in foreign affairs was central to the power of the Presidency. The need for an effective foreign and defense policy required energetic government and this was seen as a central characteristic of the executive branch. As Madison argued in *Federalist* No. 37:

> Among the difficulties encountered by the Convention, a very important one must have lain, in combining the requisite stability and energy in government, with the inviolable attention due to liberty, and the Republican form. Without accomplishing this part of their undertaking, they would have very imperfectly fulfilled the object of their appointment . . . Energy in government is essential to that security against external and internal danger, and to that prompt and salutary execution of the laws, which enter into the very definition of good government.[77]

Hamilton raised this same issue in *Federalist* No. 70: "energy in the executive is a leading character in the definition of good government. It is essential to the protection of the community against foreign attack."[78] He goes on to state that the "ingredients, which constitute energy in the executive, are first unity, second duration, thirdly an adequate provision for its support, fourthly competent

powers." Hamilton saw "decision, activity, secrecy, and dispatch" as key characteristics of the executive.[79]

In sum, for the Framers, the statesman was to blend principle and prudence in the conduct of international relations. In the Constitution this power was centered in the Presidency. Responsibility for defense and foreign policy was assigned to the Executive because it was the branch most suited for it. The *Federalist Papers* underline the fact that the Framers had solid arguments for placing the use of force and diplomatic activities at the center of the foreign policy powers of the President.

Policy Guidelines for the Use of Covert Action

The purpose of the previous discussion was to examine two Western philosophical traditions as potential sources from which to place the use of covert action on a firmer theoretical basis than exists in the four American perspectives described earlier. These two philosophical traditions, which have a number of common links with the just war tradition explored so thoroughly elsewhere in this book, provide a coherent foundation upon which to construct guidelines for the use of covert action as an instrument of statecraft.

From Aristotle we will adopt an approach that seeks to connect prudence and morality in order to maintain a nexus, however tenuous, between politics and principles. Politics and the conduct of the statesman are to be directed toward virtuous ends. Within this context the role of prudence is to adjust and apply moral virtues to particular situations. Statesmanship becomes a form of prudence, and the statesman fulfills his proper role, when prudence and virtue are combined. Among the moral virtues that the best regime is to reflect are justice, moderation, liberality, honor, and proper ambition. These Aristotelian themes complement well Thucydides' warnings against excess, his praise of moderation in statecraft, and his view of prudence as a necessary check on unrestrained ambition.

From the second tradition we noted that the American regime was founded on four universal principles: equality; inalienable rights; government by consent or self-determination; and the right to change government. The question was raised as to whether, and if so to what extent, these universal principles might be reflected in foreign policy. While the Framers evoked a doctrine of universal natural rights that would appear to serve as the basis for foreign policy, they also called for prudence. They saw a complementary relationship between principles and prudence. The Framers sought to strike a balance between the universal principles upon which the American regime was founded and their prudential application in international relations. By applying this standard the Framers hoped to steer a middle path in foreign affairs that, in today's terminology, would place them between idealism and realism.

Can these theoretical principles assist the American statesman to develop a framework for the consideration of covert action as an instrument of statecraft? Will resort to covert action be appropriate in the years ahead, given the dramatic changes of the past decade? There is little doubt that the international security environment and political terrain of the late 1990s will differ in several ways from that which characterized the Cold War years.

On the one hand, while Russia retains a formidable nuclear arsenal and the future character of its domestic regime remains an open question, for the time being the Russian State poses no direct political or military threat to American interests. As long as it remains in its present weakened economic and political state, Russia is unlikely to challenge the United States in the ways it did throughout the four decades of the Cold War. In fact, there is not a threat or even a potential "peer competitor" discernible within the next twenty years, that could place the United States in the kind of bipolar or zero-sum strategic context that marked the Cold War years.

Yet, the world of the 1990s has turned out to be far more disorderly than was originally expected. Iraq's invasion of Kuwait in 1990 demonstrated the serious dangers that can be posed to American interests by ambitious regional powers in command of vast conventional arsenals and with the potential to employ weapons of mass destruction. Similar challenges could be mounted in the future by Iraq again, or by Iran, North Korea, or any other among the growing number of regional powers around the world that are likely to be emboldened as the United States and Western Europe reduce their own military forces and defense budgets.

Meanwhile, an alarmingly large number of conflicts, some of them best characterized as "unconventional" or "low-intensity", have broken out throughout the Balkans, the Caucasus and Central Asia, the Middle East, and large portions of Africa. While American interests are not seriously affected by all of these conflicts, it seems reasonable to expect that in the future some of these "small wars" might develop in ways that could affect American interests in such a way as to require at least a limited American response, either directly or indirectly. A Balkans war that spreads and eventually drags NATO into its vortex; a Russo-Ukrainian conflict that escalates into open war; or civil strife in Mexico or the Caribbean that triggers waves of refugees to the United States are just a few of the hypotheticals that illustrate the tenuous fragility underlying the contemporary international system.

To deal with any of these potential challenges to its security, the United States will need a wide array of policy instruments, including covert action. The following guidelines are offered as a set of tentative suggestions for covert operations that might include: paramilitary support to a government threatened by internal war or to a movement challenging a government; other paramilitary special operations, including counterterrorism and counternarcotics; coups as described earlier in this paper; and a range of larger political actions.

 # 1. Covert action should be undertaken only when it fits within the larger context of American foreign policy objectives and is in consonance with American values and interests.

Covert action should remain as a clandestine instrument or component of policies that aim at achieving the following objectives: assuring the security and interests of the U.S. and its democratic allies; keeping off balance and undermining enemies that threaten our interests, whether directly or indirectly; contributing to international and regional stability; and finally, selectively promoting democratic principles in places where they exist in embryonic form or not at all.

Such policies seek to promote a combination of U.S. interests and values. In each of these instances, to the extent possible, U.S. policy should reflect a consideration of self-interest and democratic principles. Indeed, the coalescing of self-interest and values through prudential statesmanship will produce a more sound theoretical basis for foreign policy activism and intervention. Within this context, covert action becomes one of several instruments of power and influence employed to implement policy.

#2 Covert action should be not viewed as either a "last resort" option or as an "emergency" action that suspends ordinary standards of morality and prudence.

Covert action should be understood as a normal instrument of statecraft that is employed, in conjunction with other instruments, to support the interests and policy objectives of the United States. We can agree with Gelb and Codevilla that covert action is not beyond the pale of normal international relations. It is a political instrument to be utilized in the pursuit of policy. Covert action is but one of the arrows in the quiver of the statesman.

It is not an extraordinary tool or an instrument of last resort to be used only in dire national security emergencies. In fact, the "last resort" position taken by Rostow, Vance, Clifford, and Church appears to be flawed for several reasons. It proposes a standard that is ahistorical. From ancient times to the present, covert action has not been approached in this manner.[80] Even the history of U.S. intelligence does not support the "extraordinary" or "last resort" thesis.[81] Finally, from a practical political point of view, to turn to covert action after all else fails makes little sense. In all likelihood, such "last resort" initiatives will also end in failure.

While our approach is in the tradition of Clausewitz, it is not synonymous with the "Doolittle standard". In the foreseeable international security environment of the 1990s it appears that no threat can be defined in the ominous terms of the Doolittle Report. Its prescription to "learn to subvert, sabotage and destroy our enemies by more clever, more sophisticated and more effective methods than those used against us" is a wartime standard unlikely to be applicable to the more fluid circumstances of the 90s.

In fact, the Doolittle position contributes to the argument that covert action is analogous to involvement in dirty tricks and dirty wars; covert action is seen as lacking any moral purpose or association with American values. This was the argument advanced above by Kennan and Ball. It leads to the assertion by John Lewis Gaddis that if the American statesman is to employ covert action he or she must suspend values and assume a position of moral relativism. This dichotomy is not the only option, and covert action is not synonymous with dirty tricks and dirty wars. While covert action can be used, and often has been used, in the manner described by Doolittle, Kennan, Gaddis and others, it also may be employed in the service of policy objectives that include the promotion of pluralism, human rights, and other worthwhile values. Used in this way, covert action can be carried out within a framework that blends prudence and principles. It serves policies that pay attention to the national interest, but also go beyond it and incorporate principles upon which the American regime was founded. To borrow the language of a former practitioner, covert action's "stock-in-trade [need not be] the seduction and manipulation of innocents, but the sub-rosa support and succor of peoples and institutions legitimately in need of such assistance."[82]

 # 3 Because of domestic sensitivities, covert action should be used on behalf of values and interests that are important.

Covert action should be in support of a policy that is concerned with an important value or interest of the United States. In other words, it should not be undertaken for trivial or inappropriate purposes. Furthermore, if the policy objectives can be accomplished openly, then it is best to do so. Why do covertly what can be undertaken overtly? However, we should recognize that not every policy objective can be undertaken or accomplished in the open.

Whenever policymakers agree on a covert action they should be prepared to explain that action to the public in case the activity in question becomes public knowledge. The American interests at stake should be clear and discernible. Since intervention has such a negative connotation to the American people, the rationale for covert intervention has to be defensible.

#4 Foreign governments and political movements supported through covert action must meet certain standards of legitimacy acceptable to the American public.

If a covert action is in support of a particular government involved in a protracted internal war, then that incumbent must meet certain political standards to justify U.S. support. Often governments threatened by a guerilla insurgency contribute to internal conflict and instability through their own inefficiency, corruption, and repressiveness. In order to qualify for our assistance, such governments must be moving in the direction of political reform and change

that reflect American principles. Presidents will have to decide whether such governments can stand the scrutiny of the American public. For example, is their use of force justifiable and is it employed in self-defense? Is the incumbent government the best presently available and can it be considered by its population to be a competent authority with political legitimacy? Flexibility should exist to assist governments like that of former President Corazon Aquino in the Philippines (1986-1992) which, though far from perfect, may represent the most viable route available to domestic reform and democratization.

If covert support is provided to a resistance movement, such resistance forces must be challenging a government that is seen as politically illegitimate. Additionally, in terms of its tactics the movement cannot be a mirror image of the government it seeks to replace. In other words, it cannot use indiscriminate violence and coercion to extract support from the population. It must have a political agenda that is acceptable and a cause that is seen as just by the population. In their use of military force the insurgents must make a good faith effort to follow principles of proportionality and discrimination that protect the rights of noncombatants.

The same standards are applicable to covert support for coups of either of two varieties: one, the traditional kind where assistance is given to a faction within a country that carries out a swift seizure of power; two, a less traditional form that consists of easing former friends out of power and into exile and assisting those opposition elements who, once in power, will be either friendly to you or unfriendly to your adversaries. If either or both of these options are undertaken in the future the following conditions are necessary. First, a significant American interest must be at stake. Second, the target of the coups must have lost political credibility and legitimacy with its population. Additionally, those elements that the United States assists must stand for the kind of political change that is reflective of self-determination, political rights, and pluralistic government.

All of the above also applies to covert political actions. The elements or factions receiving assistance must have a serious degree of political legitimacy in the eyes of their own population. And they have to be morally and politically acceptable to the American public as well. The 1983 elections in El Salvador can serve as an example of this guideline. Both of the major candidates—Roberto d'-Aubuisson and Jose Napoleon Duarte—asserted they were friends of the United States and opposed Communism. However, from the standpoint of American values only Duarte was acceptable. Reportedly, covert political advice and support made a key contribution to his election against the better financed d'Aubuisson. In this case covert political assistance was part of a larger policy based on strategic interests and promotion of democratic political norms. This might serve as a model for the use of the "political action" variant of covert action in the future.

#5 *Covert counter-terrorist operations must abide by traditional principles of discrimination and proportionality.*

In countering international or state-sponsored terrorism, covert paramilitary operations have a place. However, since this involves the use of force, such operations should be carried out within the standards of discrimination and proportionality applicable to the overt use of force. While the United States has the right of self-defense, this does not justify using the same tactics as the terrorists. Covert paramilitary operations constitute an important counterterrorist measure, but they need to be undertaken within the general boundaries of the law of armed conflict so as to retain their legitimacy in the eyes of the American public.

Notes

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