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CIA COVERT OPERATIONS AND INTERNATIONAL LAW

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In one respect, international law has always been relevant to the conduct of illegal covert activities in foreign societies. The "guilty" government will not question the sovereign prerogatives of the target society to take appropriate punitive measures to apprehend and punish the perpetrators. The U-2 incident illustrates this relevance very vividly. After the U-2 was shot down and Francis Gary Powers captured on May 1, 1960 the United States issued a cover story, not realizing that Powers survived the crash, about a weather plane having accidently strayed from course. When the Soviet Premier Nikita Khrushchev "blew" the cover story, catching the whole Government from Eisenhower on down in a humiliating lie, the United States finally acknowledged that the U-2 was on a spy flight, that Powers was a CIA contract employee, and that the Soviet Government was entitled to apprehend and punish Powers, as well as make an international protest about the violation of its sovereign air space. And, indeed, by the middle of May Eisenhower had promised the Soviet leader that U-2 flights over the Soviet Union had been permanently suspended. (See account by David Wise, The Politics of Lying, pp. 33-36; see also Kirkpatrick, pp. 207-209.) Implicit in the American response was the illegal status of the U-2 flights and its consequent impropriety. Perhaps, more to the point, was the residual willingness to comply with international law, if and only if, the CIA link is discerned by irrefutable evidence and the cover story blown. That is, so long as the secret is kept or the cover story holds, the inhibitions of international law are cast aside.

Perhaps, even an additional set of qualifications are necessary. It should be recalled that the Soviet Union displayed the capacity to shoot the U-2 down and, therefore, the flights would have become operationally untenable in any event. Furthermore, more remote, less territorial, espionage satellites (SAMOS) were on their way toward being made operational in any event. (See RAF chapter.) And, finally, the Soviet Union had geopolitical clout; U-2 overflights of other

adversaries such as Cuba and North Vietnam, countries without shootdown capabilities or geopolitical clout, continued even though their existence was discovered by the target society governments and angry protests formally made. Therefore, we can safely conclude that the residual relevance of international law is both a matter of last resort and of only modest importance. The central question posed by this paper is whether this low status for international law is desirable in relation to the spectrum of CIA covert activities abroad?

What is surprising, I think, is that the international law argument against covert activities is so rarely raised.

Even critics of the impact of secrecy upon the conduct of foreign policy by the United States have refrained from arguing that the CIA should be curtailed because its activities are so flagrantly in violation of international law standards. Rather, the argument for curtailment is made to rest exclusively upon domestic Constitutional considerations of accountability and of the associated claim that dangerous erosions of democratic traditions take place because public officials are encouraged to deceive and lie to their own citizenry so as to maintain "the cover." (Some IC content because need for cover arises from the "illegal" status as well as from its "immoral" and "unpopular" character.) For instance, in an influential article Nicholas deB. Katzenbach recommends that "We should abandon publicly all covert operations designed to influence political results in foreign countries.... We should confine our covert activities overseas to the gathering of intelligence information." (Katzenbach, "Foreign Policy, Public Opinion and Secrecy," Foreign Affairs, 52:1-19, 15 (1973). Katzenbach declares that he is "prepared to take some losses in our foreign policy if by doing so we can restore the fundamentals of representative democracy to our foreign policy." (Id., p. 19) In the background, also, is Katzenbach's more pragmatic concern to "gain that public consensus without which no foreign policy can hope to succeed" (Id., p. 1) which he believes calls for an abandonment by CIA of its covert operations abroad. My point here is that Katzenbach, although a former professor of international law, never saw fit, even en passent, to comment that "another reason" to give up covert operations is that they

violate international law. (Katzenbach not alone in this, even among international lawyers known for their liberal views, e.g. Franck.) Why is this?

There is not much doubt, as we argue in a later section of the paper, that several standard types of CIA covert operation violate international law standards to which the United States Government is formally committed, violations which if committed by rival governments would be denounced by our officials as "illegal." Is it, perhaps, that the illegality of secret operations is not noticed because there is no reason to expect governments to be responsive to international law when they are not even held accountable to domestic legal processes?

Actually, the published literature gives little insight into why the international law dimension of covert operations is never mentioned. Undoubtedly, one reason for the neglect is that until recently when more carefully documented disclosures made their way into the public arena most of those with access to the relevant patterns of conduct were themselves policy-makers. One notices that the prevailing tone among policy-makers, whether of liberal or conservative persuasion, leads them to premise their evaluations of foreign policy initiatives on domestic arguments and on their degree of success rather than on their degree of conformity to moral or legal norms. Even the Bay of Pigs Operation in 1961 was regarded as fiasco not because the United States had taken covert part in an aggression against a foreign government with whom we were at peace, but because the CIA sponsored an invasion by anti-Castro exiles that failed so miserably to accomplish its strategic mission. (RAF chapter; Marks and Marchetti, 122f) (This same indifference to normative issues is evident throughout the Task Force Study analyses of the Indochina War, Pentagon Papers, Gelb introduction, even Stevenson's 'regret' connected only to issue of integrity, see Wise, pp. 37-38.)

Closer to a real explanation for the neglect comes from CIA enthusiasts who do not doubt that covert operations may, on occasion, be "illegal" or involve "immoral" practices, but accept their occurrence as essential to the furtherance of

national purpose in the world or to offset similar initiatives by America's geopolitical rivals. In effect, the pro-CIA position, and I believe the only tenable rationale, is to say for one reason or another engaging in covert operations is more important for the country's well-being than complying with internatinnal law. (See Copeland, p. 12; Kirkpatrick, Braden, Bissell app. to Marks and Marchetti.) Is this true?

I would like to consider whether in addition to Mr. Katzenbach's domestic rationale for giving up covert operations the United States should give them up because their character is violative of international law. In general, I will defend the view that such a ground of renunciation is itself persuasive, although I will consider some of the difficulties with the position and even acknowledge a certain qualification upon it. The remainder of this paper is divided into the following sections:

I. The International Law Case against CIA's Covert Operations;

II. Problems with the International Law Case;

III. A Qualification upon the Rationale for Compliance with International Law;

IV. Toward a National Policy on International Law Standards.

The International Law Case Against CIA Covert Operations

The international law case is in a sense self-evident and is partially conceded by the insistence of CIA upon secrecy and its related practice of defending itself against allegations by cover stories (i.e., lies). Part of the explanation of the secrecy/deception pattern arises because the behavior is inherently objectionable to a segment of domestic and, even more so, world public opinion, but another part

clearly does reflect an implicit awareness that covert activities by CIA in foreign societies violates their fundamental international law rights as sovereign states. Surely, the United States Government claims the legal right to insulate American society against covert activities carried out under the direction of a foreign government, especially if that activity were to cross the line of intelligence-gathering and involve attempted interference and manipulation of domestic political processes.

International law rests on the fundamental proposition that the government of every sovereign state has complete jurisdiction over events taking place within its territory and that, correspondingly, a foreign government has no legal right to act beyond such explicit grants of right as are made in the course of exchanging diplomatic representatives or agreeing to a foreign military presence. It is true that in a wide array of contexts CIA covert activities occur with the consent of foreign governments and are designed to sustain such a government in power against its domestic enemies. As Marks and Marchetti accurately observe, "For the most part, the agency's aim was not to overthrow particular Latin American governments but rather to protect them from local insurgent movements." (p. 123) Is the consent of the constituted government in the target society a sufficient legal answer to allegations that covert activities violate international law? (Note the comparable claim that Sihanouk consented to U.S. bombardment of his territory provided the policy was kept secret; see Hughes report.) In such a situation, then, the secrecy and cover story are maintained not to avoid a U-2 kind of confrontation, but to protect the effectiveness of the operation on behalf of the foreign government.

The international law issue here is complicated and controversial. It is a special instance of the broader question as to whether a foreign government can legitimate intervention in its internal affairs by giving its consent. There are no very clear guidelines available in this class of instances. If there is an on-going civil war, then some international lawyers consider foreign governmental intervention on behalf of either side, even if requested, as illegal (RAF, Legal Order in a Violent World). More broadly,

the argument is made that any secret authorization of foreign military and para-military action violates the principle of national self-determination that inheres in a state (or society) rather than in its government. Finally, if the covert activities to which consent has been given are themselves aspects of conduct that violates international law, then the CIA is an accessory to the illegal behavior of the foreign government. For example, suppose the CIA, at the request of the government in state A, helps recruit and finance an army for an attack on state B, then the entire operation is illegal under international law and the United States and the government of state A are the guilty parties. Another more esoteric situation is created if the CIA, at the request of the government in state A, helps with commission of "crimes against humanity," (Nuremberg status), i.e., provides weaponry or counsels tactics that involve indiscriminate and inhumane destruction of civilians, even if the victims are citizens of the country wherein the action occurs; such a situation existed for more than a decade, on a massive scale, comprising the so-called 'secret war' in Laos (Marchetti, 118-9). The Phoenix Program--with its full panopoly of counter-terror--is the most celebrated instance of CIA involvement in the commission of crimes against humanity on a systematic basis (brief account in Marchetti and Marks, 245-6; other contexts as well). Therefore, our first category of instances involves the CIA role in aiding, abetting, and conspiring with foreign governments which are themselves violating rules of international law. (We are leaving aside--as not clearly enough covered by IC--the role of CIA in helping governments defend themselves against internal and external enemies; the strongest IC case is violation of self-determination, the weakest IC case is where state A is engaged in valid self-defense or where there is foreign participation of a comparable scale on the side of an insurgency.)

A more familiar pattern of CIA conduct involves a spectrum of covert activities carried on without the consent of the constituted government in the foreign society or in direct opposition to its wishes. The spectrum ranges from intelligence-gathering activity to participation in a coup designed to seize political power from the government presently in power. In the middle of the spectrum are efforts to influence the outcome of

elections in a foreign society such as "the green light" reportedly given on September 23, 1970 by the Nixon Administration "to do all possible--short of a Dominican Republic-type action--to keep Allende from taking power" in Chile (Marchetti, p. 350). There are bizarre cross-purposes occasionally manifest, as when the CIA took some part in overthrowing the Diem regime in South Vietnam during 1963 even though the Saigon government was itself our ally whose existence was itself stabilized by earlier CIA interventions; (Cp. Col. Conem's disclosures re role in coup with Marchetti 114) sort of like the famous claim by an American soldier at Bien Tre--"we had to destroy it to save it"--so the U.S. government had come to the view that it had to destroy the Saigon regime in order to save it. The international law argument here is unambiguous--it is clearly violative of non-intervention norms and prohibitions upon the use of force to engage in military or para-military activities in a foreign society for purposes hostile to the well-being of the constituted government. It is also important to appreciate that published reliable sources make it plain that such military and para-military role has been played by CIA in a large number of countries since the formation of the agency in 1947, especially since the Korean War allowed the Cold War mentality to dominate foreign policy goals.

One extreme instance of such a CIA undertaking was the authorization of a para-military operation under the direction of Colonel Edward Lansdale to disrupt the public order of North Vietnam way back in 1954 in the immediate aftermath of the Geneva Accords; here, the interventionary dimension was aggravated by the effort to disrupt an international peace agreement, negotiated after seven years of bloody warfare, adherence to which the United States had given its solemn pledge (see B. Smith separate declaration).

Among other significant instances of para-military intervention by the CIA to overthrow a legal government in a foreign society are the following: the anti-Mossadegh coup of 1953 in Iran; the anti-Arbenz coup of 1954 in Guatamala; the unsuccessful anti-Sukarno coup of 1958 in Indonesia; the unsuccessful anti-Castro invasion of Cuba at the Bay of Pigs in 1961; the unsuccessful harrassment of Chinese administration of Tibet throughout the 1960's; anti-Papandreou coup of

1967 in Greece; and the anti-Sihanouk coup of 1970 in Cambodia.

These are among the most publicized instances, but there are growing indications that CIA covert activities occurred in many additional countries where the United States was eager to encourage a change of government policy and personnel, perhaps less dramatic than a coup, but a substantial interference with the "political independence" of a sovereign state.

Andreas Papandreou, the son of the Greek liberal leader George Papandreou, was asked by Laughlin Campbell, the head of CIA in Greece at the time in 1961, to help persuade his father to accept a constitutional innovation called "the kindred party system" designed to keep a conservative premier, Constantinos Caramanlis, in power. When Andreas told him that his father was "not about to commit political suicide to please you" the CIA operative changed his tone from affability to anger. Andreas Papandreou reports that Laughlin said: "Go tell your father that in Greece we get our way. We can do what we want--and we stop at nothing." (A. Papandreou, Democracy at Gunpoint: The Greek Frontier, Garden City, N.Y., Doubleday, 1970, p. 108; see also N. Sihanouk, My War with the CIA, New York, Pantheon, 1973 for detailed account by a principal victim of sustained CIA intervention culminating in a successful coup, producing foreign invasions, massive destruction, and a bloody, continuing internal war.)

The statement by Laughlin Campbell--not an idle bluff as Papandreou makes clear in his well-evidenced account of subsequent tragic developments in Greece--summarized the ethos of CIA and made a mockery of the contemporaneous public diplomacy of John F. Kennedy and his ideological lieutenants who were writing and talking so glowingly about their commitment to democratic government and their acceptance of pluralism and the dynamics of national self-determination. The CIA revealed the nailed fist beneath the velvet glove, a commitment to a very different kind of world order system, and above all an endorsement to policies designed to deny other countries the enjoyment of their political independence, i.e., a clear violation of the United Nations Charter, Article 2(4), which as a duly ratified treaty is by the U. S. Constitution

made part of "the supreme law of the land." Therefore, a second category of instances involves the international law violations that arise from the spectrum of covert activities carried on in a foreign society without the knowledge and consent of the territorial government and inconsistent with its political independence as a sovereign state.

One of the major areas of development for international law over the past three decades has been the promotion of an international law of human rights. The general aspiration is proclaimed in Articles 55 and 56 of the U.N. Charter, and has been given more specific content in the Universal Declaration of Human Rights. The norms in these documents, supported by an overwhelming consensus of governments including the United States, express a set of agreed limitations as to the limits of coercion a government may rely upon in relation to its own population. Although these legal documents cover a wide range of civil liberties associated with human dignity, the most minimal legal commitment is expressed in Article 5: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." (For convenient text, see Brownlie, el., Basic Doc., pp. 144-186, Art. 5 of Declaration at 146.)

The relevant point here is that the CIA role in both category 1 and category 2 violations has also consistently adopted as a means the deprivation of human rights of individuals that stood in the way of CIA objectives. We have already had occasion to comment on the Phoenix Program, but it is clear beyond doubt that the CIA in a series of countries has opposed regimes that were basically upholding human rights and helped replace them with regimes that relied upon torture as a routine technique of governance. The instances of Guatemala, Greece, and South Vietnam are well known. The Chilean instance is still shrouded in doubt as to detail, but the basic thrust of CIA efforts is clear: first, if possible prevent Allende from coming to power through the elective process; second, if the first line failed, then encourage all developments that would lead to the downfall of Allende as soon and as decisively as possible. The tragic outcome is now familiar to all, graphically expressed by Gabriel Garcia Marquez as follows: "...implanting the hell-dark seeds brought from Brazil, with all of the machines of terror,

torture, and death, until in Chile there would be no trace of the political and social structures which had made Popular Unity (Allende's winning populist coalition) possible." (Marquez, "The Death of Salvador Allende," Harper's, March 1974, pp. 46-53, at 53; see also IDOC-North America, "Chile: The Allende Years, The Coup, Under the Junta," No. 58, Dec. 1973.)

The Chile case illustrates what is a general commitment of CIA policy to the support of right-wing governments that repress, no matter how mercilessly, suppressions of human rights and to illegal forms of covert activity to oppose progressive governments no matter how respectful of human rights. The irony, of course, is that the CIA only succeeds in situations where the left-oriented regime has not moved in a totalitarian direction and, hence, allows political opposition to operate and mobilize its forces. Allende, for instance, was vulnerable to CIA tactics precisely because he upheld the human rights of his opposition.

The international law contention here is relatively simple: in a series of separate country situations, in a wide array of patterns, the CIA has directly and indirectly contributed to the violation of human rights of individuals and groups on a massive scale. Therefore, a third category of instances involves the international law violations of human rights standards which are perpetrated in foreign societies with the knowledge, consent, and participation of the CIA.

A closely related issue has to do with military conduct violative of the rules of war embodied in the Hague and Geneva treaties which form the backbone of the law of war. As Marchetti and Marks document, the Special Operations Division (SOD) of the CIA, carries out its para-military and military roles without any deference to the laws of war: "The para-military operator...is a gangster who deals in force, in terror, in violence. Failure can mean death--if not to the operator himself, then to the agents he has recruited. The SOD man wages war, albeit on a small and secret level, but none of the rules of warfare apply." (p. 109)

A former CIA operative described his training experience this way: "...we received training in tactics which hardly conformed to the Geneva Convention. The array of outlawed

weaponry with which we were familiarized included bullets that explode on impact, silencer-equipped machine guns, home-made explosives and self-made napalm for stickier and hotter Molotov cocktails.... What did a busload of burning people have to do with freedom? What right did I have, in the name of democracy and the CIA to decide that random victims should die?" (Quoted in Marchetti and Marks, 111-112). There is lots of documentation around of the extent to which CIA conducted and counselled para-military and military operations in violation of fundamental laws of war.

The laws of war are designed to protect "enemy" populations from cruel and indiscriminate modes of warfare. The violation of these laws was relied upon by the United States and its World War II Allies to prosecute criminally thousands of Germans and Japanese soldiers and civilians thought to be responsible perpetrators. The trials led to convictions, prison sentences, some executions.

Also made subject to criminal responsibility after World War II were perpetrators of "crimes against humanity," i.e., victims of cruel and indiscriminate treatment regardless of t heir national identity. Thus, for instance, to the extent that the victims of the Phoenix Program in South Vietnam are South Vietnamese, the perpetrators would be guilty of crimes against humanity; to the extent that they were North Vietnamese, the perpetrators would be guilty of war crimes (see definition of the two categories of offense in Nuremberg Principles, VI (b) and (c).

Obviously, CIA is not the only bureaucratic actor responsible for violating the laws of war and responsible for war crimes, but it may be the only part of the government whose policies are consistently, and as a matter of course, so designed. The status of the Nuremberg Principles is in some doubt among international lawyers, but the United States Government took the lead in trying to embody the war crimes experience after World War II as a permanent feature of international law. (See RAF on laws of war.) Therefore, a fourth category of CIA violations of international law involves various breaches of the laws of war and the commission of a wide array of offenses which would seem to qualify as crimes of war.

There are other related undertakings by CIA that seem to have a distinct status under international law. There is evidence, for instance, that the CIA was active in relation both to the Geneva Accords of 1954 and 1962 and in relation to the Paris Agreement of 1973 in obstructing the implementation of a solemn international peace agreement. Roger Hilsman, a Kennedy official, and Peter Dale Scott show in greater detail that CIA efforts in Laos immediately after the 1962 Geneva Agreements actually proceeded in defiance of White House policies to uphold the bargain so painfully negotiated (see Scott, p. 220 in Chomsky & Zinn, PPV). The post-1973 role of the CIA in Indochina is difficult to depict in detail, but there is no doubt, as Fred Branfman and others have convincingly demonstrated, that the CIA has been active on a number of fronts to assure noncompliance with the Paris Agreements. Such efforts to induce noncompliance of peace agreements cut against the most fundamental legal thrust of the U.N. Charter "to save succeeding generations from the scourge of war" and constitute an instance of a crime against the peace that the Nuremberg Tribunal called the supreme crime against mankind that embodies within itself all other crimes. Therefore, a fifth category of CIA covert activities worthy of separate notice is their active contribution in a number of different international settings to the violation of international peace agreements to which the United States was either a negotiating, guaranteeing, or endorsing party.

A separate kind of CIA violation of international law is reported by Marchetti and Marks. Evidently Saipan in Micronesia has been used as a secret military base in relation to CIA activities in Southeast Asia. Micronesia is a Strategic Trust Territory administered by the United States, supposedly for the well-being of the inhabitants, as a trust exercised for the organized international community as embodied in the United Nations. There is an obligation of the U.S. Government to give annual reports of its administration and to allow periodic inspection visits by U.N. representatives. Naturally, the discovery of a CIA base on Micronesia would produce an international incident of major proportions. Hence, evidently, the CIA disassembles the base altogether just prior to scheduled U.N. visits and then reassembles it as soon as they are over (see Marks and Marchetti, p. 110). In addition

to the disception of the United Nations that results, the whole pattern discloses behavior in violation of the Trusteeship Agreement upon which United States administration rests. Therefore, a sixth category of CIA covert activities involves the violation of the Trustee Agreement by which the United States administers Micronesia on behalf of the organized international community.

There are undoubtedly other categories of CIA covert activities that could be isolated as violative of international law standards. Undoubtedly, for instance, the CIA role that Alfred McCoy so fully documented in sustaining the Laotian supply of heroin seems clearly incompatible with international regulatory efforts to which the United States is a party. (McCoy, The Politics of Heroin in Southeast Asia, New York, Harpers, 1972, see especially pp. 297-315) Such other categories of violation should eventually be identified and developed so as to state the international law argument in its most complete form. Nevertheless, I think that our treatment has been sufficiently comprehensive to make out at least a primie facio case of international law violations by the CIA over a wide range of instances, over a long period of time, in flagrant respects, and with serious repercussions for international relations. It moves our discussion to its next stage, namely, to a consideration of some difficulties about asserting an international law argument in the sphere of operation in which the CIA was engaged.

Arguments Against the International Law Case

John McNaughton, a Harvard law professor on leave to the Defense Department and a principal adviser at the time to McNamara on Vietnam policy, wrote a draft memo dated October 13, 1964 entitled "Aims and Options in Southeast Asia" (Document 209, The PP, III, 580-583, at 582) which proposes that the United States conceive of its role in Indochina as that of a 'good doctor.' McNaughton explains that being a good doctor means "We must have kept promises, been tough, gotten bloodied, and hurt the enemy very badly." One of the critical questions that might mar this desired United States performance is posed as follows: "Is the United States hobbled

by restraints which might be relevant in future cases (fear of illegality, of U.N. or neutral reaction, of domestic pressures of U.S. losses, of deploying U.S. ground forces in Asia, of war with China or Russia, of use of nuclear weapons)?" (pp. 582-3) On the basis of our assessment of CIA's covert activities I think we could have replied to McNaughton's (who died some years ago in a civil aviation crash in the United States) question with a resounding 'No.' But the issue of policy is one of judgment: should the United States be "hobbled by restraints" of the sort mentioned by McNaughton in the conduct of its foreign policy?

CIA supporters argue that such constraints as those associated with international law would adversely affect America's national interests if they were to be enforced against the CIA. Miles Copeland, a former CIA official, for instance, insists "that most intelligent citizens would be relieved, not dismayed" to know that the United States Government is not shocked by the reality of "soviet perfidy" but possesses the means by way of American perfidy to counter it; as Copeland expresses it, "When we choose to violate any of our policies, from being truthful in our diplomacy to refraining from interfering in the internal affairs of a sovereign nation; we find means outside the normal machinery of government. Our Government has such means. It is able to define a problem, to release forces which, largely on their own power, can effect a solution, and to disclaim any responsibility." (Copeland, 10, 12) As we have seen, the real meaning of these bland words includes torture, murder, napalm, atrocities, deception, and official lies. Another CIA former official, speaking out against CIA detractors, wrote an article in 1967 under the provocative title "I'm Glad the CIA Is 'Immoral'" (Saturday Evening Post, May 20, 1967, pp. 10-14). Braden's argument, like that of Copeland, is that the United States is engaged in "a game of nations" within which one technique used by the main players is to engage in CIA-type activity in their search for relative advantages. After reviewing some of CIA's more innocuous interferences in foreign societies--funding friendly unions, infiltrating student groups, financing anti-Communist cultural activity--Braden asks 'Was it 'immoral,' 'wrong,' 'disgraceful'? Only in the sense that war itself is immoral, wrong and disgraceful, for the cold war was and is a war

fought with ideas instead of bombs. And our country has had a clear-cut choice: Either we win the war or lose it" (p. 14). Of course, Braden too, poses the question in what appears to be a deliberately misleading way--it is one thing to counter Soviet politicizing and propagandizing activity with comparable means, but quite another to take part in para-military and military violence for a variety of purposes, many remote from any credible claim to be responding to covert interventions of the geopolitical rivals of the United States. Nevertheless, an issue of genuine moment is posed: namely, other major governments active in international relations are not hobbled by restraints, i.e., do not respect international law. In such a situation, then, is it reasonable and desirable to expect the United States alone to be so hobbled? Why should the country penalize itself in playing the game of nations with unscrupulous rivals, in particular, the Soviet Union?

To assess this argument adequately it is necessary to determine the range, frequency, and character of covert activities by other governments, as well as to appraise their degree of effectiveness. There is little doubt that Soviet covert activities cover a range of illegalities comparable to what the CIA has done in Asia and Latin America, but it is precisely in this area of Eastern Europe where CIA activities are least evident. Rather, the CIA seems most active in relation to those spheres of geopolitical influence wherein the United States seeks to acquire and to sustain its paramountcy; that is, the role of these activities seems more closely connected with neo-imperial diplomacy than with any genuine insistence on neutralizing the activities of other governments. Nevertheless, the pro-CIA position is not entirely eroded as it is still possible to maintain that since other governments do not accept the restraints of international law the United States is also not obliged to comply. In effect, the absence of enforcement procedures, the widespread practice of covert activities, and the general quality of the state system means that compliance with international law is a matter for voluntary determination by each government in each context. I will respond to this contention in the next section, but it is, I believe, a fundamental reason why opponents of CIA such as Katzenbach and Franck are so reluctant to couch their arguments even partially in international law terms.

A related, more restrictive, contention of the same general character is that the international legal norms of prohibition invoked in opposition to CIA covert activities are peculiarly "weak" and "soft" instances of law, even with respect to international law as a whole. The principal norms at issue such as the prohibition of aggression, the principle of national self-determination, the doctrine of non-intervention, crimes against the peace, crimes against humanity as so general in their character that it is difficult to achieve agreed definitions, much less agreed interpretation of their application to specific circumstances. (For years international lawyers have been debating about the desirability and nature of a definition of aggression; finally achieved in 1974.)

A government can make a legally coherent defense in most of the characteristic instances of CIA covert activities--for instance, that the government gave its consent or requested the assistance, that the action was undertaken to offset prior intervention by other foreign governments, or that the particular battlefield practices were not as contended or were a departure from prescribed guidelines or were carried out without CIA knowledge and approval or that the specific CIA operative was acting beyond his proper province. In effect, the argument is that, except for technical violations (i.e., tactics and weapons that violate the laws of war, use of Micronesia in violation of Trust Agreement, the area of international law involves "soft" and "weak" norms that are not sufficiently precise to serve as more than commitments of good intention. In effect, the essence of of covert activity by the CIA, i.e., intervening against legally constituted government or intervening in its favor to frustrate dynamics of self-determination, occurs in a virtual "no law" area, where the character of the norms is not of sufficient authority to fill the law vacuum created by notions of state sovereignty. In a way, the argument is directed at the basic normative flaws in the world order system--namely, that there are still no legally significant qualifications on the discretion of a national government to the use of force in international conflicts, even when the force used amounts to the initiation of warfare (see E. Davidson, The Nuremberg Fallacy). Therefore, to complain about

lesser included instances is hypocritical and nonsensical; and CIA's covert activities constitute in general a lesser included instance, perhaps rising on a few occasions to the status of a sub-species of war as in the "secret war" on Laos or the role taken in repressing the insurgency in the eastern region of Peru during the mid-1960's.

A final line of argument concerns the "double standards" used to assess covert activities. In effect, CIA supporters often invoke "the legacy of OSS" to argue, in effect, that the CIA is engaged in the same sort of covert activities that were praised and glorified during World War II (e.g., Kirkpatrick). By extension, then, the CIA is alleged to be similarly carrying out missions to achieve the national purpose in a geopolitical period when outright warfare has been replaced, not by peace in a real sense, but by the sort of intense and hostile competition denoted by the label "Cold War."

Complicated questions are raised here that fall beyond our scope. For instance, it is necessary to determine whether the OSS really was doing the same sort of things, as considered from a legal point of view, as the CIA. Secondly, it is necessary to assess the argument that the justification of a state of war such as existed for the CIA can be extended to various stages of international relations after World War II, including a condition of detente. And finally, it would be important to judge whether what the OSS did was, in fact, compatible with international law standards; the failure of public opinion to object is of little legal consequence and was also descriptive of public responses to indiscriminate aerial bombardment of German and Japanese cities and of the use of the atomic bomb against Hiroshima and Nagasaki. (See Shimoda case and interpretation for a more detached judgment as to legality.)

There is no doubt that differences in national mood determine the <u>moral</u> and <u>political</u> climate in which CIA-type activities take place, and generally shape public attitudes toward foreign policy. Such a climate, however, does not by itself have any bearing on the <u>legal</u> status of behavior. Although this legal status is problematic because most of the rules are "soft" and the structure of their implementation

"weak," the foreign policy option to uphold the claims of international law exists and has potential importance for the future of the country and for the quality of world order in general.

A Rationale for Compliance with International Law

Despite serious objections to the international law position considered in the last section, I find compelling the rationale for compliance. This rationale rests on a series of separate grounds: law-abidingness as a civic virtue; the progressive general character of the international law rules at issue; and the relevance of international law to a system of world order based on peace and justice.

Respect for International Law. Implicit in the domestic arguments against secret foreign operations is the impossibility of insulating a Constitutional order at home from what is done abroad. At issue is a pattern of behavior, a way of dealing with the political process, a suspension of normal procedures of accountability. I believe the same considerations apply to the rule of law. The Constitution gives international legal norms standing as "the supreme law of the land" if they are embodied in treaties; the Supreme Court has decided that customary rules of international law are also entitled to respect.

It seems to me that it is neither possible nor desirable to separate foreign affairs from domestic society when it comes to the rule of law. The attitude of amorality and a-legality that is so often characteristic of CIA operations abroad seeps into the way in which policy-makers act in domestic settings; the Nixon Administration made this inevitable tendency plain by the blatancy of their behavior. But as has by now been frequently observed, lawlessness of the Nixon's practices was "prepared" by earlier patterns of conduct, one of which the covert activities of the CIA exemplifies. Respect for international law represents one element in a framework of accountability. We should want our leaders to accord respect for all categories of valid law. If international law is to be ignored as a constraint, then that policy decision should

itself be made openly, on the basis of debate, and conceivably leading to a Constitutional amendment of the Supremacy Clause. Posing such a possibility suggests a kind of implausibility in advocating openly that our leaders have an unbridled discretion to violate international law so as to advance their view of national interest in world affairs. The status of international law as a necessary, if weak and uneven, system of behavior guidance is so well established that no government advocates its freedom to violate its rules in general (although some refuse to be bound by specific rules). Even the socialist governments have affirmed their respect for international law, have argued their own disputes by reference to rights established by international law (e.g., the Sino-Soviet territorial dispute), and couch their objections to behavior of other states by reference to international law criteria.

In essence, then, part of securing the rule of law in general involves extending its reach to foreign policy. One motivation for the insistence on secrecy of some CIA operations is undoubtedly the degree to which these operations would strike the international community as "illegal," generating pressures for compliance. As we suggested, when these operations have been discovered by powerful adversaries and the cover story blown, as occurred in the U-2 incident, then the American governmental tendency has been to accept its obligation to comply with international law. Thus, no real claim is ever made by the U.S. Government that a right to ignore international law exists, but only that certain secret operations should be carried out without being subject to scrutiny of a normal kind. Mr. Braden could easily have written a sequel to his article under the title "I'm Glad the CIA 'Violates' International Law."

Progressive character of norms. In addition, I believe, that American foreign policy would benefit from an effective application of the norms at issue in the setting of covert activities. In essence, the doctrine of non-intervention and correlative principle of national self-determination encourage progressive social and political developments under most circumstances. The CIA's role has been to keep repressive governments in power and to overthrow or harass more progressive

ones. Such a role seems detrimental to international society. If the United States had complied with international law it seems much more likely that there would be many more progressive, socially responsible governments in power today throughout the Third World. The CIA role has, in general, helped to promote the militarization of government wherever its influence has been strong, which seems undesirable.

The normal rationalization of the CIA role in foreign societies has to do with the need for the United States to play a counter-interventionary role to offset the encroachments of Soviet and Chinese interventions. A great deal of ambiguity often surrounds this kind of claim--is it the appeal of Communist rhetoric, doctrine, and domestic groupings that need to be offset or is it foreign military assistance? As has been argued in many places the energy for social revolution is often primarily an indigenous matter and becomes "internationalized" only after the CIA enters the scene (see Barnet, Intervention and Revolution). In any event, if the American role is a counter-interventionary one in a genuine sense, then it can carry out such a role overtly and within the framework of international law. The doctrine of self-defense, the right of governments to receive aid, and even the notion of counter-intervention provides a sufficient basis for foreign policy initiatives that were designed to prevent "aggression" by geopolitical rivals. International law is not so conceived or so taut in its application as to jeopardize the well-being or security of a large state.

The basic point here is, I think, no persuasive reason for not eliminating illegal CIA covert activities. These activities have been generally reactionary in their social, economic, and political impacts on countries which desperately need social revolutions to bring to power leaders who are committed to policies that will overcome the misery of the general population. Hence, compliance with international law by the United States might help to make the world safe for social revolutions in national societies now governed in an antiquated and repressive manner.

Quality of World Order. I believe there is a final argument for compliance with international law that relates to the

whole quest for a peaceful and just system of world order. I think the argument needs to be made on two levels: how to prevent the breakdown of the existing relations, how to facilitate the emergence of a more acceptable form of world order than is provided by or possible under the state system.

It is not possible to examine these issues in detail, but some assertions can be made to clarify my viewpoint. First of all, the voluntary acceptance by principal governments of a minimal system of restraints on the use of force is closely connected with the capacity of the state system to maintain world peace over time; international law, although far from perfect, provides such a system, and it is one that enjoys widespread acceptance. The quality of that acceptance depends greatly on voluntary patterns of Great Power attitude and behavior; since there are no international sanctions on principal governments other than public opinion and resistance by their rivals, voluntary compliance plays a central role. A country like the United States is especially important; its non-compliance influences the whole climate within international society and undermines any effort to take international law very seriously as a restraint on others. Thus, one cost of non-compliance by the United States is to compromise our national efforts to persuade other governments to comply or to mobilize opposition to illegal policies in the United Nations.

On a more dynamic level, the prospects for meeting the deepening world order crisis arising from population pressure, food shortages, spreading poverty, ecological decay, resource shortages depend on bringing to power more enlightened and progressive national elites. The authority structure of international law, although far from ideal, does at least prohibit the sort of covert activities that the CIA has engaged in over the past several decades. The elimination of these activities might encourage the emergence of a more humanistic climate in world society that would booster a social movement to reorganize and integrate life in "the global village"; the open historical question is not whether "central guidance" or "global integration" will come about, but only how quickly, under whose control, and by what elements of choice ("The Sherrill Hypothesis"). The sooner we organize to achieve a new system of world order, the better the prospects are for

making the adjustment non-violently and non-traumatically. CIA's global role is basically opposed to allowing such a transition and is aligned in effect with the most narrow and destructive conception of the state system. Thus without being over-dramatic I would contend that there is a link between opposition to the illegal activities of the CIA and the growth of survival policies and politics in the world community and that the demand for compliance with international law is a proper way to strengthen that link.

Conclusion. These three sets of considerations overlap with one another. They all contribute to a general proposition--namely, that the United States Government should realign its foreign policy so as to comply with international law and that such a realignment requires that CIA's program of covert activities be abolished.

A Qualification on the Argument for Compliance

Despite the conclusion reached about compliance, it does seem important to formulate a qualification on its apparent claims. There are circumstances under which adherence to the norms at issue may have a regressive impact. The most obvious instance relates to the status of southern African liberation movements. As matters now stand, of course, it is hardly conceivable that CIA would seek to give these movements any help; quite the reverse, the role of CIA is consistently on the other side. But let's suppose there was a political reversal of mood in the United States and that the CIA was acting in a progressive role to overcome structures of entrenched reactionary and repressive power in the power. Would this development alter our stand on compliance which was partly justified by its positive political effects?

The issue is complex and controversial. Obviously an effective legal order can neither bend to every ideological air current nor can it, nor should it, thwart basic historical tendencies. National governments on their own should not suspend the operation of those rules of international law designed to insulate states from foreign intervention, but the organized international community has such authority.

Specifically, with respect to the struggles of southern Africa, the United Nations and the Organization of African Unity have been virtually unanimous in their view that the incumbent governments are illegitimate and their liberation challengers legitimate. Such a determination gives governments a possibility to enter the struggle. The mandate of the international community is a way of reconciling claims of social change with those of social control. It is what I have referred to as an exercise of a legislative or quasi-legislative competence by the United Nations (see Legal Order chapter).

Such a competence is not meant as an endorsement of CIA-type activities on behalf of anti-colonialist and anti-racist regimes, but it is meant to put a qualification of their legal prohibition. For one thing, the argument suggests that there are limits on the obligation of a government to respect international law and that these limits themselves enjoy a legal status of sorts, although a controversial one (see Yesselson book). Secondly, that these qualifications cannot be achieved by unilateral state action, but depend on overt, multilateral procedures of world community institutions. Thirdly, that the tactics relied upon under these settings are still subject to the legal restraints governing international uses of political violence--the laws of war--especially as these restraints relate to the protection of "innocent" civilians and the prohibition of cruelty (e.g., torture). (These issues need more careful analysis.) And fourthly, that the general presumption against intervention and violence be overcome by the overwhelming preponderance of evidence and argument and that even then, considerations of prudence and the existence of peaceful alternatives be considered.

The qualification, then, being placed on the argument for compliance with international law is mainly directed at absolutist pretensions. Law is an aspect of value-realizing processes, and if its authority stands squarely in the way of community-mandated change, then there must be a way to reformulate its restraints on behavior. The role of civil disobedience in domestic society has often been to express a similar kind of point; and in international society, it might be that a peculiarly conscience-stricken African government could have engaged in a symbolic act of civil disobedience so as to hasten the process of action by the world community.

Toward a National Policy in CIA Covert Activities

The basic drift of this paper leads to a position that might be used to shape a national policy on CIA covert activities:

(1) It should be recognized that many of CIA's covert activities consistently and flagrantly violate international law;

(2) It should be further recognized that respect for the rule of law by the U.S. Government should include respect for international law;

(3) It should be understood that the rules of international law relevant to an appraisal of CIA covert activities are generally enlightened in conception and beneficial in social and political impact;

(4) It should be agreed upon that compliance with international law will require the United States to abolish all programs of clandestine operations, including possibly illegal intelligence-gathering abroad;

(5) It should be understood that to make the policy of abolition effective it will be necessary to dismantle or drastically reduce clandestine capabilities;

(6) It should be recognized that respect for international law in this area of behavior is not necessarily inconsistent with giving support to liberation movements, provided the goals and legitimacy of a specific movement receive the formal endorsement of the overwhelming membership in the international community in a formal act of a main organ of the United Nations.