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Suffolk Transnational Law Review
Spring 1994

Book Review

***350** REGULATING COVERT ACTION: PRACTICES, CONTEXTS, AND POLICIES OF COVERT COERCION ABROAD IN INTERNATIONAL AND AMERICAN LAW. W. MICHAEL REISMAN & JAMES E. BAKER. NEW HAVEN: YALE UNIVERSITY PRESS, 1992. Pp. 250. HARDCOVER \$28.50.

The Need to Know: The Report of the Twentieth Century Fund Task Force on Covert Action and American Democracy. Allan E. Goodman & Bruce D. Berkowitz. New York: The Twentieth Century Fund Press, 1992. PP. 148. Paperback \$9.95.

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Introduction

American intelligence operations, particularly covert operations, have an apparent knack for getting out of control and producing unintended consequences. [FN1] To give a very ***351** recent example: last fall it was reported that in 1986, following the fall of Haitian dictator Jean-Claude Duvalier, the Central Intelligence Agency ("CIA") created a Haitian intelligence service aimed at fighting the cocaine trade. [FN2] Instead of producing intelligence on the drug trade, however, the Haitian intelligence service allegedly distributed drugs in Haiti. In addition, the CIA-created service reportedly used its training to accomplish other things in the political arena, such as investigate and torture supporters of Haiti's first democratically-elected leader, Jean Bertrand Aristide, and threaten to kill the local United States Drug Enforcement Administration chief. The report also alleged that, in exchange for political and military information, the CIA paid key members of the junta that overthrew the ostensibly United States-supported Aristide and blocked his return to power. [FN3]

The reports briefly raised suspicions that perhaps the CIA had backed the 1991 coup against Aristide or sent tacit ***352** signals of approval to that effect. Critics charged that, at the very least, reliance on Aristide's military enemies caused the agency to doubt the mental stability and democratic bona fides of an ousted leader whom the White House seemed committed to restore to power. [FN4]

The Haiti episode also points to what would be a controversial, but hardly unimaginable, role for United States covert action in the post-Cold War world -- the purposeful use of political action and support programs to block democratic but unwelcome outcomes abroad. [FN5] Clearly, the bulk of United States intelligence, including covert action, is and will probably remain focused on tracking and thwarting ***353** narcotics traffic, terrorism, and weapons proliferation. [FN6] Even in these areas, however, covert operations are unlikely to be immune from debate. [FN7] Indeed, since the mid-1970s, few tools of United States foreign policy have provoked as much skepticism as covert action. [FN8] Today, with the Iran-contra scandal fading into memory and covert action comprising less than one percent of the CIA's total budget, [FN9] covert action in principle still has its

passionate detractors.

II. The Need To Know

In *The Need to Know: The Report Of The Twentieth Century Fund Task Force On Covert Action And American Democracy* [FN10] *354 (“The Need To Know”), a recent reconsideration of covert action by The Twentieth Century Fund Task Force (“Task Force”), Hodding Carter calls covert action “Frankenstein’s monster,” the “bastard child” of the Cold War, and an “addictive habit” that “promises a quick fix and delivers lasting degeneration.” [FN11] The former State Department spokesman during the Carter administration claims covert action has no justification in the post-Cold War world whatsoever, if it ever did previously. [FN12]

Neither *The Need to Know* as a whole, however, nor another recent, relatively more conservative examination of the subject, *Regulating Covert Action: Practices, Contexts, and Policies of Covert Coercion Abroad In International And American Law* [FN13] (“Regulating Covert Action”), takes such a position. Both works accept a place for covert action against selected threats in the post-Cold War world. Thus, the stormy debate over covert action seems to have subsided, just as the wider partisan struggle over foreign policy has ended with the collapse of communism. Despite this change, both works suggest that significant differences of degree over the legitimacy of covert action, both in domestic and international law, endure within the United States foreign policy elite.

The Twentieth Century Fund Task Force, which began its review of covert action in 1989 and concluded in late 1991, was composed mostly of prominent Democrats from the Kennedy and Carter administrations. [FN14] The Task Force majority*355 report recommends codifying a number of limitations and requirements with respect to covert action. These are intended to bolster the more modest effort at Congressional oversight in the Intelligence Authorization Act of 1991, [FN15] which was crafted in the wake of Iran-contra, but under which the Task Force fears a repeat of Iran-contra could still occur. But the report’s aim is loftier, as its title suggests: to try to reconcile covert action with democracy in general. Whether the report really succeeds in this task - as opposed to simply weakening the executive’s covert action capability and aggrandizing congressional power - is open to serious question.

For example, one of the report’s central, seemingly noncontentious recommendations is that covert action be “exceptional,” based only on “a compelling national interest,” undertaken “only in support of publicly articulated policy” and “only when overt means are unavailable, insufficient, or (even if sufficient) judged too costly in terms of human life.” [FN16] The Task Force authors believe present “guidance” *356 is too vague. [FN17] The rationale for these principles is that covert action, because it is deniable, flies in the face of accountability, “a fundamental principle of constitutional democracy.” Because it is planned in secret, it contradicts citizens’ right to know and to debate matters of national import. [FN18] Only such principles can justify the abridgement of democracy that covert action represents.

One may well wonder whether this argument is oversimple - the latest example, perhaps, of our rights-inflated discourse. [FN19] Covert action is an undeniable oddity within a democracy: Americans expect to hold their elected representatives answerable in the end, but in the case of a covert action, they may be kept in the dark forever. Covert action has, however, accommodated democracy to a degree. Accountability, though at times imperfect, has largely been achieved through congressional and executive oversight committees. The latter also act as surrogates for a wider public debate regarding covert activities. To date, the tension between internal openness and external demands necessitating covert action has posed an acceptable risk. Indeed, Con-

gress itself has generally recognized or acquiesced in the executive's right to initiate covert action, without advance approval. [FN20] However unobjectionable the principles appear on the surface, therefore, they may be an operational intrusion in the executive's authority to decide upon and begin a covert operation. With ample power of *357 the purse to limit and terminate (or threaten to do so) specific covert actions proposed by the executive, [FN21] the propriety and need for more legislative supervision, in the form of guiding principles, appears dubious.

The possible costs of adopting such guidance are not necessarily academic. If "compelling national interest," for example, is one threshold needed to legitimate covert action domestically, many covert operations deemed necessary by the executive might end up inviting undue Congressional resistance or might never get implemented. [FN22] If "exceptional," covert action could fail when employed or prove unavailable when needed, precisely because covert capabilities will only rarely be exercised or rehearsed. The result may be the very damage to the intelligence community's reputation that the Task Force apparently seeks to avoid. Finally, should covert action be ruled out in its potential use as a hedge against prevailing policy, or as a probe where options are unclear and need to be tested? The Reagan administration's botched opening to Iran, in which it initially tried to reach out to Iranian "moderates," discredited this stratagem. Conforming all covert action with "publicly articulated" purposes, however, would preclude this option *358 altogether. [FN23] The report fails to even address these potential consequences.

The Task Force also revisits a longstanding issue, namely the requisite timing of presidential notifications of covert operation to relevant Congressional oversight committees. The Task Force report argues that notice should be provided well in advance of the operation, and in exceptional emergencies, within forty-eight hours of the operation. [FN24] This goes beyond what was ultimately accepted in the 1991 Intelligence Authorization Act and what, ironically, the new Democratic administration has maintained, namely, that the President must provide "timely" notice for those covert actions for which prior notice has not been provided, but that he cannot constitutionally be limited to a forty-eight hour rule. [FN25] The report builds its case once again on *359 its particular conception of democracy and the Constitution:

Whatever authority the president asserts to withhold information must give way to the rights of citizens, or at least their elected representatives -- including the president and Congress too -- to know what their government is doing. For in our constitutional system, he and his congressional colleagues share the representative function, sharing also, at the same time, the traditional prerogative of sovereigns in diplomacy and defense. [FN26]

The Task Force seems perfectly correct to object to what was then a claim of the President's constitutional authority to withhold notice indefinitely. Such claims have to be balanced against Congress's right to be kept informed. [FN27] The eleven months the Reagan administration withheld notice in its Iran initiative, for example, seems egregious. On the other hand, the Carter administration also withheld notice for over three months for various missions relating to the rescue of the American hostages in Iran in 1980 -- a delay vital to secrecy and, in one instance, to allied cooperation. Conceivably, notice could be "too timely" and imperil an operation through leaks. Further, the report's constitutional argument as to shared power cited above fails to acknowledge the framers' Lockean conception of the executive, as well as historical practice and judicial decisions supporting divided and independent executive powers in the foreign policy area. [FN28] Historical conception and subsequent practice implies a broad, if not unlimited, constitutional*360 right to withhold notice when necessary. [FN29] Enacting a forty-eight hour requirement is certainly one way to impose executive discipline; an alternative, one that does not tamper with more settled executive prerogatives or destroy executive flexibility, is simply

to let the executive take the political risk of withholding notice. [FN30]

Other concrete proposals in *The Need to Know* include, for example, an explicit prohibition on using extra-governmental, self-financed covert action entities. The report also calls for the institution of civil and criminal penalties for violations of covert action procedures and restrictions, “including the giving of false or misleading information to Congress.” [FN31] And in a much longer, workmanlike background paper accompanying the Task Force's brief report, former CIA analysts Alan Goodman and Bruce Berkowitz cover broad arguments for and against covert action, the historical evolution of United States covert action after World War II, and basic information on the planning and oversight of covert operations. Not surprisingly, they embrace a minimalist case for covert action similar to that found in the Task Force report itself.

Despite all its recommended constraints on covert action in the name of democracy, *The Need to Know* has an odd Machiavellian streak. However tempting it may be to eliminate covert action, according to the Task Force, that temptation must be resisted. [FN32] Possible targets or concerns for United States covert activity, according to the report, would be the proliferation of nuclear, chemical and biological weapons, and long-range missile systems; terrorist activities; the illicit manufacture and distribution of drugs; and the support of democratically minded individuals living under *361 tyranny. [FN33] The report thus takes on an almost self-contradictory flavor: in such a menacing world, why or how can covert action be “exceptional”? Can the report's homage to democracy really be sincere, or is it just a posture?

It is truly unfortunate, and indeed ironic, that although in their own private discussions the Task Force apparently discussed covert action scenarios involving the targets mentioned above in some detail, the report itself provides almost no public elaboration. [FN34] Likewise, the report says little about the propriety under international law of actual or hypothetical covert actions. That does not mean, however, that certain preconceptions in this regard might not be unconsciously operative. For example, Berkowitz and Goodman, the authors of the background paper, reflexively presume that cross-border coercive covert operations are often unlawful because they violate broad nonintervention provisions in a number of treaties. [FN35] In their summary of standard arguments for and against covert action, they note that United States presidents have justified covert action in the name of counter-intervention and liberty, but they themselves seem agnostic about such claims. The Task Force report does elaborate a bit on covert action to give “aid and comfort to adherents of democracy struggling to survive tyranny”:

We do not exclude the possibility that covert action may be indispensable -- despite increased availability of overt means -- to put help in the hands of democratically minded individuals and groups struggling to survive tyranny. Where regimes are ruthless in curtailing human rights, those who resist and those who are victimized may deserve our help, and it may have to be provided covertly. For example, in countries where rulers deliberately starve their own people, *362 clandestine overflights to drop medical supplies and even food could be a valid U.S. response. [FN36]

One cannot preclude the Task Force's support for more forceful covert action based on this one guarded passage, but such support seems unlikely. Indeed, one impression the reader takes away from the report is that just as covert action is a domestic evil that must be sharply restricted, so is covert action highly questionable internationally and that only the most humanitarian and defensive covert operations abroad would be internationally defensible. More cynical readers will infer traces of an undue moral idealism that afflicted the Carter administration's foreign policy. Nevertheless, the report's nominal openness to select covert action should not simply be dismissed.

III. Regulating Covert Action

Like the members of the Twentieth Century Fund Task Force, eminent Yale law professor Michael Reisman and former student James Baker (now a State Department attorney assigned to the President's Foreign Intelligence Advisory Board), profess to be no champions of covert action. In *Regulating Covert Action*, [FN37] they amply acknowledge covert action's costs: covert action rubs up against democratic ideals; it invites decision-making pathologies; it forfeits the possible educative impact on the international community provided by overt measures; and it receives no international community appraisal, unless it is exposed. [FN38] The rules of thumb for policymakers with which the authors conclude their work -- "eschew secrecy for its own sake," "try to accomplish overtly what subordinates propose to do covertly," and impose more rigorous internal executive review [FN39] -- parallel the restraint called for in *The Need to Know*.

***363** Yet, Reisman and Baker share little, if any, of *The Need to Know's* taste for actually legislating against the past, e.g., Iran-Contra, or for devising fail-proof schemes of domestic oversight. Breaches of faith and the tug of war between the legislative and executive branches regarding covert action will turn, in their minds, as much upon particular personalities as upon legislation. [FN40] Notwithstanding the work's title, *Regulating Covert Action* is really a provocative investigation of the international, and not so much the domestic, law of covert action. The work rejects orthodox noninterventionism and finds considerably wider scope for permissible covert action internationally than that presumed in *The Need to Know*. [FN41]

The authors begin with their particular conception of international law. As those familiar with the work of McDougal, Reisman, and others of the "New Haven school" well know, that conception is sociological. International law consists not in written rules, but rather in the "expectations that politically relevant actors in a system share concerning what is the correct way of apportioning and using power" [FN42] -- or more simply, expectations elites share "about the right way of doing things." [FN43] Many commentators too quickly assert that treaty language and international resolutions stand for law when they are not necessarily prescriptive. Often the "text" may no longer approximate effective expectations about appropriate behavior. This textual "myth system" differs from, if it is not contradicted by, the underlying "operational code," which can be gleaned only from elite behavior. [FN44]

***364** The authors then briefly survey text and code as they apply to economic, diplomatic, ideological, and military covert and overt coercion. Though norms in the nonmilitary area have been largely permissive, according to the authors, they do surmise certain limits on covert action here. Indiscriminate economic strategies affecting innocent third parties -- for example, counterfeiting another state's currency and introducing it into the international market or spreading false information about a country's products -- might be viewed as unlawful. The property of covertness itself, they add, may delegitimize otherwise licit coercive economic measures, inasmuch as it allows the target state no reasonable chance to modify its offending behavior. They also believe the more egregious instances of disinformation have been sufficiently condemned to be unlawful.

On the other hand, other instances of non-forcible covert action may not be condemned. An example: outside funding to a country intended to improve market conditions prior to an election so as to favor a local incumbent. The authors' overview in these areas is admittedly, and perhaps necessarily, speculative. Still, the analysis is surprisingly brief and devoid of context -- the latter normally the hallmark of the authors' methodology. The authors do not discuss the currently controversial topic of economic espionage, [FN45] which they do list as a form of covert action. ***365** Nor do they refer to some of the more formal literature on non-forcible overt and covert measures. [FN46]

Reisman and Baker find that the widest discrepancy between textual promise and empirical reality lies in the law regarding the unilateral resort to force by states, and it is the analysis of the military, or forcible, strategy that takes center stage for the remainder of the book. The authors reiterate the familiar proposition that although the United Nations Charter proscribes the use of force except in self-defense in response to an armed attack, certain exceptions other than self-defense have arguably become accepted practice. Nor is the use of force, like all other strategies, susceptible of evaluation apart from its purposes. [FN47]

What then about the lawfulness of forcible covert operations? Reisman and Baker examine and appraise several “exposed” covert actions in the search for answers. Several of these incidents are heavy-handed political interventions -- externally-backed coups, such as the United States effort against Mossadegh in Iran, United States efforts to thwart Allende in Chile, and the Soviet push for the martial law crackdown in Poland in 1981. They find that the Cold War created a dose of tolerance for such interventions at the time -- a tolerance they predict will erode with the demise of the Cold War. [FN48] Other incidents involve assassination by state agents, extraterritorial kidnapping of fugitives, and extraterritorial sabotage against nongovernmental groups. However sensational, “low-intensity” actions like these may occur more frequently in the future than one cares to admit. *366 These issues and the authors' tentative findings regarding them are worth briefly discussing in turn below.

A. Assassination

The CIA's attempts to assassinate Fidel Castro, along with its involvement with forces responsible for killing other overseas public figures, came under heavy scrutiny in the mid-1970s. [FN49] One result was an executive order banning assassination. [FN50] The assassination issue has resurfaced first with United States efforts to target such notorious leaders as Libya's Col. Quaddafi and, later, Panama's Gen. Noriega and Iraq's Saddam Hussein. [FN51] Also, since 1989 the intelligence community and Congress have clarified, and more liberally construed, the assassination ban, freeing up United States covert action capabilities against some of these same figures. [FN52]

*367 As a matter of United States domestic law, assassination could still prove to be a policy option for future United States presidents and thus some commentators have called for the ban's codification. [FN53] The Need to Know, primarily out of concern for the relative vulnerability of United States leaders themselves to assassination, also calls for converting the United States executive order into law. [FN54] Unfortunately, the Task Force never discusses its understanding of the term assassination. This seems to imply the Task Force finds no distinction between an assassination and a lawful homicide.

Regarding the separate issue of state-sponsored assassination in international law, however, Reisman and Baker reach a different conclusion. They assert that norms against cross-border assassination, as embodied in various multilateral treaties, are taken seriously, and that assassination, whether of expatriate political dissidents or public leaders, has been regularly condemned. [FN55] However, they refer *368 vaguely to “a certain conditional tolerance for assassination by state agents at the elite level, a trend that prevents us from saying it is prohibited as a matter of international law.” [FN56]

Reisman and Baker speculate that the worldwide acquiescence to the 1961 assassination of Dominican dictator Rafael Trujillo, in which the United States had an indirect hand, may stand in support of externally-supported tyrannicide. A number of other tyrants -- Hitler, Bokassa, Amin, Saddam Hussein -- have certainly presented a morally compelling case for externally-assisted tyrannicide. However, the authors are wary of a formula permitting assassination here, believing it will open a Pandora's box of transnational murder. “Applications of

what would be legitimate homicide of a tyrant are difficult. One person's tyrant is another's hero." [FN57] Cases such as Salmon Rushdie's might multiply. The authors finally suggest that any determination of what would amount to a justifiable homicide by state agents of foreign leaders or private persons overseas should be bound strictly by the "traditional doctrines governing the use of force: proportionality, necessity, and discrimination concerning the target." [FN58]

***369** B. Covert Abduction of Fugitives

State agents, according to the traditional international legal view, have no law enforcement authority in another state's territory absent that state's consent. [FN59] That norm is clearly undergoing increasing pressure or modification. Covert abductions by the United States without host state consent have become a more salient method. [FN60] In 1989, then Assistant Attorney General Barr argued that the international norm had no bearing, at least as a matter of domestic law, on the President's authority to carry out extraterritorial seizures. [FN61] More recently, in *Alvarez-Machain*, [FN62] ***370** the Supreme Court held federal courts can assert personal jurisdiction over a defendant abducted from abroad, even in the face of an extradition treaty and formal host country protest. [FN63] In this case, Drug Enforcement Agency ("DEA") agents seized a Mexican doctor indicted for the 1985 torture-murder of United States DEA agent Enrique Camerena in Mexico. The decision in *Alvarez-Machain* and the policy shift generally have aroused disapproval on both law and policy grounds. [FN64] The Court did not, as widely reported, sanction kidnapping as a matter of international law. [FN65] Inasmuch as domestic courts serve to ***371** interpret international law, however, the decision hardly bolstered the traditional view. [FN66]

Reisman and Baker contend that the traditional norm against nonconsensual abduction still holds in the main. However,

contemporary state practice may suggest that forcible extradition, while often protested vociferously on the bilateral level, is tolerated on the international level, provided a minimal or proportionate use of force is involved in the seizure and the norm that the seized person violated is deemed to be one of general concern. [FN67] They focus in particular not on *Alvarez-Machain*, but on the Israeli kidnapping of Adolph Eichmann from Argentina. In their minds, this transgression of sovereignty really met with widespread acquiescence by the international community. [FN68]

The authors thus provide a provocative, but rather loose, answer to an inchoate doctrinal puzzle that came into sharp focus with the United States interception of the Egyptian airplane carrying the Palestinian hijackers of the Achille Lauro. Do international crimes for which states may have universal prescriptive jurisdiction, such as piracy, hijacking, and perhaps other acts of terrorism, give rise to executive ***372** or enforcement jurisdiction? [FN69] More formally, "is a state's judicial and executive jurisdiction more extensive in cases of the exercise of universal legislative jurisdiction? . . . May, in such cases, a state exercise executive jurisdiction on the territory of another state?" [FN70]

The question has split legal scholars, since it pits issues of paramount justice against equally significant norms protecting the peace. Some, for example, would argue that even the capture of a man responsible for genocide like Eichmann was unjustified on the basis of universal jurisdiction, [FN71] while others would not hesitate to have that particular abduction repeated, or to unilaterally apprehend the comparable if not more audacious Saddam Hussein, responsible for waging aggressive war, for taking hostages, and arguably for genocide against the Kurds and Shia population of Iraq. [FN72] Still others would include Slobodan Milosevic in ***373** their list

of permissible targets under a universal jurisdiction theory, while setting lesser figures from the drug world apart. [FN73] As to whether seizing the two Libyan suspects wanted in the bombing of Pan Am flight 103 whom Libya has refused to surrender to United States and British authorities, Schachter, along with Rubin and others, would presumably answer in the negative. [FN74] Some have thought the capture of violators of what at present seem like less egregious crimes, such as drug trafficking, could be rationalized on the basis that the drug trafficker also is, or *374 should be deemed, as much an international menace as the pirate. [FN75] One scholar has concluded, however, that “universal jurisdiction is still an evolving category, the current scope of which might permit too many abductions It creates a category of abductable offense that is relatively short and morally appealing, but is still overbroad and unclear.” [FN76]

Unfortunately, the authors' own normative position on this issue is unclear, since their work reviews only the relatively easy Eichmann case explicitly and never seeks to specify what threshold of international criminality (besides genocide) must be crossed to allow for forcible abduction. Apart from the issue of propriety, could a limited threat or use of covert abduction, as exercised by such powers as the United States, induce greater compliance globally with international obligations to prosecute? [FN77] That is a more empirical question beyond the scope of the book.

C. Actions Against Nongovernmental Actors

The authors suggest the 1985 case of the Rainbow Warrior may be instructive about future cases in which the state actors covertly seek to thwart transnational actors in another state. The Rainbow Warrior, a Greenpeace ship *375 which was slated to protest and interfere with French nuclear weapons testing in the South Pacific, was blown up by French agents while it was docked in Auckland Harbor, New Zealand. Though New Zealand, Australia, and international press reaction was strongly negative, the reaction of major governments was subdued. Indeed, had not a lone Dutch photographer on board the ship been inadvertently killed in the explosion, outcry may well have been still milder. [FN78] Though France paid reparations and apologized to New Zealand, “the incident might also stand for the proposition that the international community is in some instances willing tacitly to tolerate covert action in support of ‘national security,’ or in any event treat such incidents differently from other violent crimes.” [FN79] The implication is that more discrete overseas covert interdiction or sabotage operations carried out against drug traffickers, terrorists, or proliferators of weapons of mass destruction, might also prove internationally acceptable. The sanctity of territorial sovereignty in such instances will not necessarily be firmly upheld. [FN80]

D. Use Of Force In Response To Another State's Prior Illicit Covert Operations

In addition to examining covert operations such as those discussed above, *Regulating Covert Action* also includes commentary on the use of force (whether overt or covert) in response to another state's prior illicit covert operations *376 -- particularly those involving support to insurgencies or terrorist groups. The authors argue that the self-defense standard enunciated by the International Court of Justice in *Nicaragua v. United States* [FN81] is too high. To rule, as the Court did, that provision of arms and logistical support to guerrillas falls below the requisite level of “armed attack” [FN82] needed to trigger self-defense will not discourage escalation; it will simply widen low-intensity violence across the globe. Nor do the authors embrace the Court's view that the Charter's armed attack threshold for self-defense has merged into the customary law, under which states heretofore reserved a wider competence to use force. [FN83]

The authors may be right to treat Nicaragua as simply the “contemporary textual law” on self-defense and not necessarily as authoritative. Clearly, the United States, the world's lone global military power, and perhaps other major powers, are uncomfortable with it. The United States' 1986 raid on Libya, its 1985 diversion of Egyptian aircraft carrying the hijackers of the Achille Lauro, and its very recent bombing of Iraqi intelligence facilities suggest the United States will react forcibly in response to challenges that fall well short of what has been conventionally understood as an “armed attack.” [FN84] In short, it seems apparent that the United States will carry out de facto reprisals which *377 are presumably distinct from self-defense and thus legally questionable. [FN85] At the same time, it will continue to justify them by mouthing the words of self-defense. Whether the evolving and separate doctrine of countermeasures per se is so open-ended as to justify armed reprisals and other low-intensity operations such as covert abduction, as the authors speculate, seems rather doubtful. [FN86]

Regardless of uncertainties about the future scope of self-defense, however, Reisman and Baker espouse an additional exception to the traditional prohibition of Article 2(4): force, either covert or overt, in support of self-determination. In their lexicon, that powerful term now has as much if not more to do with rights to democratic governance as with a culturally defined people's quest for statehood or political identity. [FN87] Self-determination means “the right of peoples to shape their own political community and *378 freely to choose governments that are responsive to their wishes and consistent with overarching international human rights norms.” [FN88] They call this right “the basic postulate of political legitimacy in this century” -- perhaps an indirect way of asserting that it transcends (and trumps) the traditional prohibition on the use of force as a preemptory norm. [FN89]

The exception would have obvious applications to pro-democratic covert operations involving both political and paramilitary support. At one point in discussing the Bay of Pigs episode, for example, the authors state “if there was any basis in international law for the operation it rested on the principle of self-determination In this instance, however, the self-determination argument was a questionable one. As events demonstrated, the exiles had little popular*379 support in Cuba at the time of the invasion” [FN90] They also defend United States covert military, electoral, and press projects in Greece and Italy after World War II not, as might be expected, on the more traditional grounds of counter-intervention, but on the basis of self-determination. [FN91] Though they do not specify any contemporary targets for such covert operations, the strong implication is that externally-abetted or supported coup attempts against tyrannies (particularly coups that avoid assassination), as well as other diplomatic interventions, could prove legitimate. The authors are certainly more forthright on this issue than is The Twentieth Century Fund Task Force.

Regulating Covert Action's scholarship is detailed and nuanced. The book will become a central reference for students of national security law if only because of its breadth, its rich footnoting, and its annotated digest of United States intelligence-related case law. At the same time, its findings may irk a good number of academic and legal commentators. The analytic framework employed in so many other works in the New Haven school is used here yet again. As Reisman and Baker themselves acknowledge, drawing inferences based on only partially exposed evidence of secret operations, as they must do, is problematic. One wonders, however, if their own consequentialist bias at times skews their analysis. Further, do the incidents the authors examine stand for lawful state practice or are they less a matter of right and more a matter of excuse? Would other scholars examining the same single events reach the same relatively permissive conclusions? [FN92] Finally, the authors's *380 more fluid standards -- for example, those regarding force and self-determination -- could be easily abused. It would be good, in general, to have a better sense of what thresholds must be reached to initiate certain controversial covert (or overt) actions and who would decide these issues: How oppressive the regime? How ruthless the ruler? How audacious the international criminal? How threatening the terrorist group?

Reisman and Baker are more cautious than these questions suggest or their critics may allow. It is not true, for example, that they always excuse or endorse what they find; they think the United States is growing too cavalier about assassination and nonconsensual abduction, and they urge United States policymakers, and the Congress, to reconsider the long-term equities of these and other controversial covert operations generally. Nor do they espouse claims to self-determination that have only been unilaterally characterized or disrespect the need to vet nonviolent alternatives prior to resort to overt or covert force. They believe that “covert actions . . . should be tested by international standards as if they were actions to enforce international obligations.” [FN93] They also claim that “no long-term goal is more at risk in the face of national security expediency than international law.” [FN94] Given the dueling strands within the work, *381 one can perhaps understand how the book was endorsed by both Jeane Kirkpatrick and Richard Falk.

In the end, nevertheless, a certain open-endedness to international rules is tolerated, because it is deemed preferable to absolutist alternatives. As the authors state, “A blanket prohibition on the unilateral use of coercion in the ‘right’ circumstances and for the ‘right’ reasons simply immunizes evil from remedy.” [FN95]

IV. Conclusion

Both *Regulating Covert Action* and *The Need to Know* suggest, a good year or two before their time, that the contests and demands of international politics have not ceased. Covert attempts to gain influence and control, though perhaps becoming less frequent or at least less violent, will continue. [FN96] As the Clinton and future United States administrations cope with a growing flow of calls to intervene abroad or to take action against transnational criminal or terrorist enterprises, ideas about covert operations may well surface for discussion. [FN97] The normative divide revealed in these two works provides a preview to the dissension in policy circles that covert options are bound to arouse in fact.

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[FN1]. See generally Gregory F. Treverton, *Covert Action: The Limits of Intervention in the Postwar World* (1987). But for a more favorable view, see William Colby, *Honorable Men: My Life in the CIA* (1978).

Covert operations are related to, yet distinct from three other, often clandestine elements of intelligence -- collection, analysis, and counter-intelligence. See Roy Godson, *Intelligence and National Security*, in *Security Studies for the 1990s*, 212-214 (Richard Shultz, et al. eds., 1993). Covert operations are best understood as influence attempts. Specifically, they refer to deniable (and usually secret) propaganda operations and the use of agents of influence; political action and support; paramilitary support and guidance; support for coups; and, in some cases, security and intelligence assistance to friendly governments. See Abram N. Shulsky, *Silent Warfare: Understanding the World of Intelligence* 73 - 90 (1991).

An Executive Order and now a statute offer more formal definitions of covert action as undertaken by the United States government. Executive Order 12,333 of December 4, 1981 defines “special activities,” or covert action, as activities conducted in support of national foreign policy objectives abroad which are planned and executed so that the role of the United States Government is not apparent or acknowledged publicly, and functions in support of such activities, but which are not intended to influence United States political processes, public opinion, policies, or media and do not include diplomatic activities or the collection and production of intelligence or re-

lated support functions. The statutory definition is found in the Intelligence Authorization Act of 1991. Intelligence Authorization Act of 1991, Pub. L. No. 102-88, 105 Stat. 429 (1991). Here, covert action is defined as “an activity or activities of the United States Government to influence political, economic, or military conditions abroad where it is intended that the role of the United States Government will not be apparent or acknowledged publicly ...” Excluded from this statutory definition are intelligence collection, traditional diplomatic and military activities, traditional law enforcement activities conducted by United States law enforcement agencies, traditional counter-intelligence activities, and routine support for all such activities. National Security Act of 1947 s 503(e), 50 U.S.C.A. s 413(e), as amended by Intelligence Authorization Act, Fiscal Year 1991, Pub. L. 102- 88, 105 Stat. 429 (1991). Thus, a rescue operation like the one mentioned below in which six Aristide supporters were saved, may qualify as a “traditional military activity.” Also, “special military activities” carried out under the United States Special Military Operations Command, which include “contacts with potential informants, reconnaissance of suspected drug or terrorist operations and ... intelligence relating to an ongoing or expected military operation,” also fall outside the formal definition. See John Broder & Melissa Healy, Military Fights for Freer Role in Covert Operations, L.A. Times, Apr. 6, 1990, at A1.

[FN2]. Stephen Engelberg, CIA Funded Haiti Junta Members, N.Y. Times, Nov. 14, 1993, at A3. The intelligence unit, the National Intelligence Service (SIN), received between \$500,000 to \$1 million annually in equipment and training.

[FN3]. *Id.* In 1990, Father Aristide won 67.5% of the vote and was later overthrown in a September 1991 coup. The CIA cut ties with the SIN shortly after the coup. Also, a Navy Seal unit secretly evacuated six Aristide supporters to safety following the coup.

[FN4]. Congressional leaders, such as Rep. Dan Glickman (D-Kan.), chairman of the House Select Committee on Intelligence, and Rep. Robert Torricelli (D-N.J.), chairman of the House Foreign Affairs Sub-Committee on Inter-American Affairs, denied the CIA intentionally sought to preserve military dictatorship in Haiti. Classified agency briefings before Congress had portrayed Aristide as emotionally unstable, as having ordered the murder of a political opponent the night of the coup, and as having advocated the “necklacing” of political foes with burning tires. Some of these allegations had already been part of the public record. See Steven A. Holmes, Administration is Fighting Itself on Haiti Policy, N.Y. Times, Oct. 23, 1993, at A1; Tim Weiner, Key Haiti Leaders Said to Have Been in the C.I.A.'s Pay, N.Y. Times, Nov. 1, 1993, at A1; Thomas Powers, Aristide's File: A Fight in the Hall of Mirrors, L.A. Times, Oct. 31, 1993, at M1. It should be noted that in Haiti's 1987-1988 elections, the CIA did launch an aborted effort to finance certain candidates over the calls of Aristide to boycott the elections. Jim Mann, CIA's AID Plan Would Have Undercut Aristide in '87-'88, L.A. Times, Oct. 31, 1993, at A1.

[FN5]. Of course, many scholars and activists have argued compellingly for promoting democracy as the centerpiece of United States foreign policy. See generally Joshua Muravchik, *Exporting Democracy: Fulfilling America's Destiny* (1991); Stanley Kober, *Idealpolitik*, 79 *Foreign Pol.* 3 (1990). For the most part, however, there have not been detailed studies of cultural barriers to the expansion of democracy nor of the frequent short term trade-offs policy makers face in certain regions between democratic reform and geopolitical stability or results. See Samuel P. Huntington, *Democracy's Third Wave*, 2 *J. Democracy* 12 (1991); Louis J. Cantori, *The Middle East: Political Trends and Their Implications for U.S. Force Structure*, in *National Security: Papers Prepared for GAO Conference on Worldwide Threats*, GAO/NSIAD- 92-104S, at 53 - 66 (1992); Thomas Friedman, *A New U.S. Problem: Freely Elected Tyrants*, N.Y. Times, Jan. 12, 1992, s 4, at 3; William E. Odom, *Picking and Choosing Among Emerging Dictatorships*, Wash. Post, Apr. 12, 1992, at C7. For an excellent study of how the

United States dealt with trade-offs between stability and democracy during the Cold War, with some speculations about future conflicts, see *Friendly Tyrants: An American Dilemma* (Daniel Pipes & Adam Garfinkle, eds., 1991).

[FN6]. See *Larry King Live* (CNN television broadcast, Transcript #979 -1, Nov. 30, 1993) (Interviewing Director of Central Intelligence James Woolsey). It is open information that former President George Bush authorized covert CIA action “to disrupt the supply of dangerous weapons and components.” Bruce W. Nelan, *Fighting Off Doomsday*, *Time*, June 21, 1993, at 39. For a schematic of the intelligence community, at the center of which is the Director of Central Intelligence (“DCI”), see Loch K. Johnson, *America's Secret Power: The CIA in a Democratic Society* 39 (1989).

[FN7]. See *infra* notes 49 -77 and accompanying text (discussing covert abduction and assassination).

[FN8]. Some prominent critiques include Treverton, *supra* note 1; comments of Ernest May in *Consortium for the Study of Intelligence, Covert Action in the 1990's* 63 - 67 (1992) (arguing United States was not politically constituted to carry out covert action); Morton H. Halperin, *American Military Intervention: Is it Ever Justified?*, *The Nation*, June 9, 1979, at 668, 669 - 670 (stating covert operations violate American constitutional process); Senate Select Comm. to Study Governmental Operations with Respect to Intelligence Activities (“Church Committee”), S. Rep. No. 755, 94th Cong., 2d Sess. (1976). For criticism of the better known “overt” covert actions sponsored under the Reagan Doctrine, see Stephen M. Walt, *The Case for Finite Containment: Analyzing U.S. Grand Strategy*, 14 *Int'l Security* 5, 5 - 49 (1989); Michael Hunt, *Ideology and U.S. Foreign Policy* (1987); George F. Kennan, *Morality and Foreign Policy*, 64 *Foreign Affairs* 205, 214 (1985 - 86) (asserting clandestine defensive operations conflict with American tradition and diplomacy); and remarks of George Ball, *Should the CIA Fight Secret Wars?* *Harper's*, Sept. 1984, at 37, 41. A stimulating normative debate on the Reagan Doctrine is found in *Council on Religion and International Affairs, Intervention & the Reagan Doctrine* (1985) (articles by Robert Tucker, Charles Krauthammer, and Kenneth W. Thompson).

[FN9]. The figure is estimated to be \$30 million or less, according to government officials. Douglas Jehl, *Campaign is Begun to Protect Money For Spy Agencies*, *N.Y. Times*, Mar. 14, 1993, at A1.

[FN10]. Allan E. Goodman & Bruce D. Berkowitz, *The Need To Know: The Report Of The Twentieth Century Fund Task Force On Covert Action And American Democracy* (1992) hereinafter *The Need To Know* .

[FN11]. *Id.* at 21-23 (dissent of Hodding Carter).

[FN12]. *Id.*

[FN13]. W. Michael Reisman & James E. Baker, *Regulating Covert Action: Practices, Contexts, and Policies of Covert Coercion Abroad In International And American Law* (1992) hereinafter *Regulating Covert Action* .

[FN14]. The prominent Democrats from the Kennedy and Carter administrations included Richard Neustadt, the task force chairman; Theodore Sorenson, former Special Counsel to Presidents Kennedy and Johnson; Stansfield Turner, former Director of Central Intelligence; David Aaron, a former deputy national security adviser; Lloyd Cutler, former White House Counsel; Gregory Treverton, currently the Vice Chairman of the National Intelligence Council in the Clinton administration; and Hodding Carter, III. Other members included Thomas K. Latimer, Walter F. Murphy, Janne E. Nolan, Victor H. Palmieri, Frederick A. O. Schwarz, Jr., Deanne C. Siemer, General William Y. Smith, and John C. Whitehead.

[FN15]. Intelligence Authorization Act of 1991, Pub. L. No. 102- 88, 105 Stat. 429 (1991). The Intelligence Authorization Act of 1991 (“Act”) repeals the Hughes-Ryan Amendment. Among other things, the Act defines covert action and requires the President's report provide a written “finding” for covert action. It prohibits retrospective findings. It also requires the President to provide notice of significant changes in previously approved findings and requires the President to inform the Congressional intelligence committees in a timely fashion when a finding has not been submitted prior to the initiation of a covert action.

According to one writer, “The Act represents an old-fashioned, common sense, political compromise It does not restrict the President's flexibility in conceiving, initiating, or conducting covert actions.” William E. Conner, *Reforming Oversight of Covert Actions after the Iran-Contra Affair: A Legislative History of the Intelligence Authorization Act of 1991*, 32 Va. J. Int'l L. 871, 925 - 926 (1992). For a more critical view, see Paul Gumina, *Title VI of the Intelligence Authorization Act, Fiscal Year 1991: Effective Covert Action Reform or ‘Business as Usual’?* 20 Hastings Const. L.Q. 149 (1992).

[FN16]. *The Need to Know*, supra note 10, at 8 - 9 (emphasis supplied).

[FN17]. Presumably, the Task Force would have the policy principles articulated here become part of the written finding whereby the President approves a covert action. Currently, a finding requires a determination that the action “is necessary to support identifiable foreign policy objectives” and “is important to the national security of the United States.” National Security Act of 1947 s 503(a), 50 U.S.C.A. s 413(a) (West Supp. 1994).

[FN18]. *The Need to Know*, supra note 10, at 5.

[FN19]. Cf. Mary A. Glendon, *Rights Talk: The Impoverishment of Political Discourse* 31 (1991) (lamenting that “in America, when we want to protect something, we try to get it characterized as a right”).

[FN20]. Congress has disclaimed any right to pre-approval of covert actions. National Security Act of 1947 s 501(a)(3), 50 U.S.C.A. s 403 (West Supp. 1994). For a discussion of the President's constitutional prerogatives in covert action, see Kent A. Jordan, Note, *The Extent of Independent Presidential Authority to Conduct Foreign Intelligence Activities*, 72 Geo. L.J., 1855, 1877- 82 (1984).

[FN21]. See Shulsky, supra note 1, at 144 - 45. For the view that Congress may not use its appropriations power, however, to negate or interfere with executive powers granted through the constitution, see S. Rep. No. 216, 100th Cong., 1st Sess. 476 (1987); H.R. Rep. No. 433, 100th Cong., 1st Sess. 476 (1987) (Minority Report on the Iran-Contra Affair). This still leaves Congress with a good deal of appropriation power regarding covert action. Lori F. Damrosch, *Covert Operations*, 83 Am. J. Int'l L. 795, 803 (1989). Damrosch states: Surely the President's admittedly broad powers over national security do not allow the Executive to fix national policy on export of arms in derogation of Congress's foreign commerce powers, on paramilitary activities in derogation of Congress's war powers, on overthrow of a foreign government in derogation of Congress's power to define whether international law prohibits such an act. Id.

[FN22]. One wonders, for example, whether covert support for Solidarity in Poland, which was useful, would have been considered “compelling.” For an account of the covert U.S. role with Solidarity, see Edwin Meese, III, *With Reagan: The Inside Story* 170 -171 (1992).

[FN23]. This view is admittedly exceptional. Even proponents of covert action argue it should be consistent with declared policy. See, e.g., *Intelligence Requirements for the 1990s* (Roy Godson ed., 1989). But see Abram Shulsky & Gary Schmitt, *The Theory and Practice of Separation of Powers: The Case of Covert Action*, in *The Fettered Presidency: Legal Constraints on the Executive Branch* 75 (L. Gordon Crovitz & Jeremy A. Rabkin

eds., 1989); Gideon Rose, *When Presidents Break the Law*, 9 *Nat'l Interest* 50 (1987) (arguing that in extremis, deceptions like President Roosevelt's prior to World War II in support of Britain and bucking popular sentiment may be justifiable).

[FN24]. In dissent, Theodore Sorenson argues that notification after the fact should never be deemed timely and must be flatly prohibited. "Permitting the CIA in any instance to delay notification to designated leaders of Congress ... undermines the basic democratic concept of accountability." *The Need to Know*, supra note 10, at 20. More conservative or libertarian critics also object to the executive branch's continuing refusal to notify Congress within 48 hours or before. See, e.g., William Safire, *Truth from Shultz*, *N.Y. Times*, Feb. 4, 1993, at A23 (charging "Clinton wants the same freedom from oversight exploited by ... Reagan and Bush.").

[FN25]. National Security Act of 1947, s 503(c)(3), 50 U.S.C.A. s 413(c)(3) (West Supp. 1994); H.R. Conf. Rep. No. 166, 102nd Cong., 1st Sess. 28 -30 (1991). In various correspondence, President Bush had given assurances he would provide prior notice and in exigent circumstances, notice within a few days of an operation already begun. But he also argued that his constitutional authority to withhold notice for a longer period of time could not be precluded by statute. *Id.* at 27 (reprinting Bush's letter of assurance).

Note that new DCI Woolsey has similarly refused to commit to notify Congress before or within 48 hours after a covert operation. Nor is he willing to commit the Agency to refrain from soliciting foreign funding for covert operations. The 48 hour requirement and a prohibition on overseas solicitations were both elements of draft Democratic legislation similarly rejected by President Bush in the 1991 Intelligence Authorization Act. See Jim Mann, *Signs Point to Business As Usual at the New CIA*, *L.A. Times*, Feb. 6, 1993, at A23.

[FN26]. *The Need to Know*, supra note 10, at 12.

[FN27]. Gary Schmitt, *Executive Privilege: Presidential Power to Withhold Information from Congress*, in *The Presidency in the Constitutional Order* 154, 176 -78 (Joseph M. Bessette & Jeffrey Tulis eds., 1981).

[FN28]. See, e.g., Charles C. Thach, *The Creation of the Presidency, 1775 - 1789: A Study in Constitutional History* (2d ed. 1969); Joseph M. Bessette & Jeffrey Tulis, *The Constitution, Politics, and the Presidency in The Presidency in the Constitutional Order* 3, 23 -26 (Joseph M. Bessette & Jeffrey Tulis eds., 1981); Glenn E. Thurow, *Presidential Discretion in Foreign Affairs*, 7 *Vand. J. Transnat'l L.* 71, 76 - 84 (1973); James F. Basile, Note, *Congressional Assertiveness, Executive Authority and the Intelligence Oversight Act: A New Threat to the Separation of Powers*, 64 *Notre Dame L. Rev.* 571 (1989).

[FN29]. Schmitt, supra note 27, at 177.

[FN30]. See James W. Ceasar, *Liberal Democracy and Political Science* (1990), 189 - 90.

[FN31]. *The Need to Know*, supra note 10, at 6 -7.

[FN32]. As the Task Force authors note, "The international environment is not wholly benign. Nations and groups continue to carry out both overt and clandestine acts that menace and challenge us." *Id.* at 14.

[FN33]. *Id.* at 9. For Hodding Carter this list is an attempt to "legitimize the illegitimate by itemizing new rationales to replace the old one. It was and is a task better left to the Cold War bureaucracy" *Id.* at 22.

[FN34]. The Task Force met to debate covert action seven times from 1989 to 1991. *Id.* at 3.

[FN35]. *The Need to Know*, supra note 10, at 49, 76. In fact, this assumption is also made by more conservative students of intelligence. See, e.g., Shulsky, supra note 1, at 92.

[FN36]. *The Need to Know*, supra note 10, at 14 -15.

[FN37]. *Regulating Covert Action*, supra note 13.

[FN38]. *Id.* at 76, 137.

[FN39]. *Id.* at 140 - 43.

[FN40]. *Id.* at 131, 139. Congressional oversight should be clearly separate from Congressional conduct of foreign policy.

[FN41]. One recent embodiment of such orthodoxy might be Daniel Patrick Moynihan, *On the Law of Nations* (1990) (critically reviewed by this author in 21 *Millennium* 125 -127 (1992)).

[FN42]. *Regulating Covert Action*, supra note 13, at 17.

[FN43]. For an earlier treatment of this distinction, see W. Michael Reisman, *Law from the Policy Perspective*, in Myres S. McDougal & W. Michael Reisman, *International Law Essays* 1 (1981).

[FN44]. *Regulating Covert Action*, supra note 34, at 23 -24.

[FN45]. Regarding economic espionage against U.S. firms by allies, see Peter Schweizer, *Friendly Spies* (1993); Ronald Ostrow, *Economic Espionage Poses Major Peril to U.S. Interests*, *L.A. Times*, Sept. 28, 1991, at A1. The prospect of using the CIA as an instrument for economic espionage against rival commercial powers was hinted at by former DCI Adm. Stansfield Turner in Stansfield Turner, *Intelligence for a New World Order*, 70 *Foreign Affairs* 150 (1991); see also Gerald Seib, *Some Urge CIA to Go Further in Gathering Economic Intelligence*, *Wall St. J.*, Aug. 4, 1992, at A1. To date, DCI Woolsey has refused to adopt any pro-active, as opposed to defensive, use of intelligence community assets in favor of American firms. Efforts are to be limited to warning U.S. corporations against specific efforts against them and in some cases, relaying intelligence, e.g., regarding bribery by competing foreign firms, to the Executive in an effort to create a level playing field for American firms. See Larry King Live, supra note 6. For a case by a former State Department official against a pro-active approach, with discussion by mid-level members of the intelligence community, see Consortium for the Study of Intelligence, *Economic Espionage: Problems and Prospects* (1993).

[FN46]. See, e.g., Lori F. Damrosch, *Politics Across Borders: Nonintervention and Nonforcible Influence over Domestic Affairs*, 83 *Am. J. Int'l L.* 1 (1989).

[FN47]. The authors argue, for example, that:

A mechanically equal assessment of U.S. actions in Grenada and Panama and Soviet actions in Hungary, Czechoslovakia, and Afghanistan ignores objective and consequence which is what politics, morals, and law are all about. It is like equating a mugger's knifing of a citizen on the street with a surgeon's removal of a tumor from that ailing citizen, because both actions involve one human being's putting a knife into another. *Regulating Covert Action*, supra note 13, at 75.

[FN48]. *Id.* at 66 - 67.

[FN49]. Other CIA efforts, investigated by the Church Committee, included those against Patrice Lumumba, Rafael Trujillo, and General Rene Schneider of Chile. *Id.* at 58 -59.

[FN50]. Exec. Order No. 12,333, sec. 2.11, 3 C.F.R. 200 (1982). "No person employed by or acting on behalf of the United States Government shall engage in, or conspire to engage in, assassination." *Id.* The executive order was originally signed by President Ford in 1976 and has been reissued by every President since.

[FN51]. Regarding Quaddafi and the 1986 Libya raid, see Seymour Hersh, *Target: Quaddafi*, N.Y. Times, Feb. 22, 1987, (Magazine), at 1. Regarding Noriega, see *infra* note 52. United States covert programs against Saddam Hussein following the 1991 Gulf War included propaganda and political support to Iraqi opposition forces, but it was also rumored that bribes and promises of protection were being offered, via the Saudis, to members of Saddam's entourage in order to kill the Iraqi leader. See Robert Gates in *Mideast to Discuss Removal of Hussein*, Weekend Edition (Nat'l Pub. Radio, Feb. 8, 1992); John M. Broder & Robin Wright, *CIA Authorized to Target Hussein*, L.A. Times, Feb. 8, 1992, at A1; Michael R. Gordon, *Baghdad 'Coup': An Assassination Bid?*, N.Y. Times, July 9, 1992, at A3. At the outset of United States action in the Gulf War in 1991, then Air Force Chief of Staff General Michael Dugan was dismissed, in part, for his statement that Saddam Hussein would be targeted by American bombers. For an analysis of assassination generally and these and other cases in particular, see Michael N. Schmitt, *State-Sponsored Assassination in International and Domestic Law*, 17 *Yale J. Int'l L.* 609 (1992) hereinafter Schmitt, *State-Sponsored Assassination*.

[FN52]. Two classified memoranda drafted during the Bush administration apparently make clear that the term "assassination" applies only to premeditated political murder. The ban would thus not necessarily apply to the death of a foreign leader, drug-lord, or hostage-taker that proved "incidental" either to a United States attempt at irregular rendition, a United States-supported coup effort, or to a hostage rescue effort. The death of such figures could "just be their bad luck," said one administration official at the time. According to one Pentagon official, the new ruling "takes away the excuse for indecision." Subsequent to the memorandum, but prior to the United States invasion of Panama, the CIA launched "Panama-5," a covert operation that sought to recruit Panamanian military officers and other dissidents to mount a coup in which Noriega might be killed. See Robin Wright, *U.S. OKs Covert Operations That May Kill Foreigners*, L.A. Times, Oct. 14, 1989, at A1; Robin Wright, *U.S. in New Bid to Oust Noriega*, L.A. Times, Nov. 16, 1989, at A1; see also Don Oberdorfer, *U.S. Had Covert Plan to Oust Iraq's Saddam*, *Bush Adviser Asserts*, Wash. Post, Jan. 20, 1993, at A4 (National Security Adviser Scowcroft asserting United States coup efforts against Saddam Hussein complied with the assassination ban).

[FN53]. Damrosch, *supra* note 21, at 800 - 801.

[FN54]. *The Need to Know*, *supra* note 10, at 14. In a concurring opinion, Task Force member Walter F. Murphy argues for a policy of "no first use", stating that the United States should reserve the right to target leaders who attempt to assassinate United States leaders. *Id.* at 19.

[FN55]. *Regulating Covert Action*, *supra* note 13, at 69. The cases of *Letelier v. Republic of Chile*, 502 F. Supp. 259 (D.D.C. 1980) and *Liu v. Republic of China*, 892 F.2d 1419 (9th Cir. 1989), are often cited as leading examples of condemnation. See generally Eric H. Singer, *Terrorism, Extradition, and FSIA Relief: The Letelier Case*, 19 *Vand. J. Transnat'l L.* 57 (1986); Fletcher Alford, Note, *When Nations Kill: The Liu Case and the Act of State Doctrine in Wrongful Death Suits*, 12 *Hastings Int'l & Comp. L. Rev.* 465 (1989). But is condemnation peculiarly Western and does the Middle East represent a special exception to the regime? See Schmitt, *State-Sponsored Assassination*, *supra* note 51, at 625 -26 (questioning whether international reaction to 1988 Israeli

killing of PLO leader Abu Jihad in Tunis really stands for condemnation of assassination); see also Samir F. Ghattas, *Standoff Continues, Iraqis Threaten to Barricade Themselves*, Associated Press, Apr. 20, 1994 (Iraqi diplomats suspected of killing Iraqi exile in Lebanon).

[FN56]. *Regulating Covert Action*, *supra* note 13, at 70 -71.

[FN57]. *Id.* at 70.

[FN58]. *Id.* at 71. Other commentators concur that, while such homicide could be justified in self-defense and on combatant grounds, prudence dictates the restriction of targeting. See Loch K. Johnson, *On Drawing a Bright Line for Covert Operations*, 86 *Am. J. Int'l L.* 284, 303, 307 n.68 (1992) (allowing for targeting a military leader during a declared war). In addition, Johnson has suggested unintentional killing of a foreign leader should be acceptable only in two other circumstances: 1) the killing of a genocidal tyrant incidental to efforts to have him arrested and 2) the killing of a renegade state leader during the bombing of that state's biological, chemical, or nuclear weapons facilities in self-defense. *Id.* at 307 n.68; see also Chris A. Anderson, *Assassination, Lawful Homicide, and the Butcher of Baghdad*, 13 *Hamline J. Pub. L. & Pol'y* 291, 316 -18 (1992) (limiting assassination of opposing leaders to war time and then only for a *jus cogens* offense); Abraham Sofaer, *Thinking Past the Moment*, *U.S. News and World Rep.*, Feb. 18, 1991, at 28 (Saddam Hussein a legitimate target by having personally directed Iraq's forces and under self-defense doctrine for having ordered terrorist attacks on noncombatants); Robert F. Turner, *Fair Trial Necessary Regardless of Crime*, *Nat'l. L.J.*, Jan. 28, 1991, at 12 (killing in international war criminal such as Saddam Hussein as means of saving tens of thousands of lives would be justifiable under international law).

[FN59]. *Restatement (Third) of the Foreign Relations Law of the United States* s 432 (2) (1987) hereinafter *Restatement*; 1 Cherif Bassiouni, *International Extradition: U.S. Law and Practice* s 5.4 (2d ed. 1987).

[FN60]. Illustrative are the cases of Fawaz Yunis, Angel John Zabaneh, Edwin Wilson, Verdugo-Urquidez, Omar Mohammed Ali Rezaq, and, of course, Manuel Noriega. Properly speaking, cases such as these, like most cases, range on the spectrum from pure abduction to more licit irregular rendition, in which the delivering party participates or consents to the transfer. See *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990); *United States v. Yunis*, 924 F.2d 1086 (D.C. Cir. 1991); *United States v. Zabaneh*, 837 F.2d 1249 (5th Cir. 1988); *United States v. Rezaq*, 93 - 0284 (D.D.C.); *United States v. Noriega*, 746 F. Supp. 1506 (S.D. Fla. 1990); *United States v. Wilson*, 565 F. Supp. 1416 (S.D.N.Y. 1983). The practice is hardly unique to the United States. In 1986, for example, Israeli intelligence agents abducted Mordechai Vanunu from Europe and brought him to Israel, where he was tried and convicted of espionage. In 1989, Israeli army forces kidnapped Sheik Abdul Karim Obeid, a Shia Moslem leader wanted for planning the kidnapping of United States Marine Col. William Higgins. Also note that inasmuch as most countries accept a variant of male captus, *bene detentus*, they indirectly sanction covert abduction.

[FN61]. Barr's memorandum, still unavailable to the public, reversed a 1980 legal opinion by then Assistant Attn. Gen. John M. Harmon, *Extraterritorial Apprehension by the Federal Bureau of Investigation*, 4B *Op. Off. Legal Counsel* 543 (1980). For background, however, see *Statement of Assistant Attorney General William P. Barr, Office of Legal Counsel, On the Legality as Matter of Domestic Law of Extraterritorial Law Enforcement Activities that Depart from International Law*, Subcomm. on Civil and Constitutional Rights of the Comm. on the Judiciary, U.S. House of Representatives, Nov. 8, 1989; Michael Isikoff & Patrick E. Tyler, *U.S. Military Given Foreign Arrest Powers*, *Wash. Post*, Dec. 16, 1989, at A1.

[FN62]. *United States v. Alvarez-Machain*, 112 S. Ct. 2188 (1992).

[FN63]. *Id.* The controversial decision was purportedly consistent with the traditional rule of *male captus, bene detentus* and the specifically American variant, the *Ker-Frisbie* doctrine, according to which courts will not divest themselves of jurisdiction over persons solely because defendant was improperly seized. *Ker v. Illinois*, 119 U.S. 436 (1886); *Frisbie v. Collins*, 342 U.S. 519 (1952); see generally Restatement, *supra* note 59, s 432 reporter's note 2.

[FN64]. With regard to negative reaction to *Alvarez-Machain*, see generally Inter-American Juridical Committee Legal Opinion, reprinted in 32 I.L.M. 277 (1993); Michael J. Glennon, *State-Sponsored Abduction: A Comment on United States v. Alvarez-Machain*, 86 Am. J. Int'l L. 746 (1992); Hernan de J. Ruiz-Bravo, *Monstrous Decision: Kidnapping is Legal*, 20 Hastings Const. L.Q. 833 (1993); Statement of Ralph G. Steinhardt before the Subcommittee on Civil and Constitutional Rights, House Committee on the Judiciary, reprinted in 4 Cr. L. For. 135 (1993); Anthony Lewis, *Abroad at Home: Whatever the King Wants*, N.Y. Times, June 21, 1992, at A17; William H. Freivogel, *Suspect Court's Ruling on Kidnapping Foreigners Disturbs Some Experts in International Law*, St. Louis Post-Dispatch, June 17, 1992, at 1B; *Foreigners Can be Kidnapped for U.S. Trial* (Nat'l Pub. Radio, June 16, 1992.) (interview with Abraham Sofaer); S. Rep. No. 72, 103rd Cong., 1st Sess. ss 1, 2 (1993) (proposed amendment to the Foreign Assistance Act prohibiting direct arrest and abduction). Regarding abduction generally, see Abraham Abramovsky, *Extraterritorial Abductions: America's 'Catch and Snatch' Policy Run Amok*, 31 Va. J. Int'l L. 151 (1991). But note that according to a Justice Department memorandum, "the *Alvarez-Machain* decision does not constitute a 'green light' for unrestricted efforts to secure custody over persons abroad without regard to international extradition treaties, or the law of foreign states or international law" U.S. Department of Justice Memo on *United States v. Alvarez-Machain*, 32 I.L.M. 277 (1993).

[FN65]. The Court did not address the defense (not raised by the respondents at this level) that *Alvarez's* seizure violated international customary law *per se*, as opposed to the extradition treaty itself, and thus precluded *Alvarez's* trial as a matter of federal law. One can reasonably infer, however, that the court would not have chosen to use its supervisory powers in favor of the respondent on such a basis. *United States v. Alvarez-Machain*, 112 S. Ct. 2188, 2196 (1992).

[FN66]. See Friedrich Kratochwil, *The Role of Domestic Courts as Agencies of the International Order*, in *International Law: A Contemporary Perspective* 236 (Richard Falk et. al. eds., 1985).

[FN67]. *Regulating Covert Action*, *supra* note 13, at 71 (emphasis added). They also generalize even further: "Conclusions of lawfulness seem to be affected by the particular answers to the questions 'who' seizes 'whom,' 'why,' and 'how.'" *Id.* The authors do suggest one concrete limit to international acceptability, namely covert abductions that involve avoidable death or assassination may be independently condemned. To some extent, such a limit would track with the American law "shocks the conscience" jurisdictional bar for particularly brutal abductions. *United States v. Toscanino*, 500 F.2d 267 (2d Cir. 1974). *Toscanino* is the only formal exception to the *Ker-Frisbie* doctrine mentioned above.

[FN68]. The authors note Israel's nominal apology to Argentina and Argentina's waiver of its right to have Eichmann returned or Israeli agents punished. See U.N. Doc S/4349 (1960).

For an account of the Eichmann seizure by the Israeli agent who captured him, see Peter Kerr, *Man Who Seized Eichmann Recalls Secret Role*, N.Y. Times, Apr. 28, 1986, at B2.

[FN69]. Normally, the term universal jurisdiction refers to a state's right to define, prosecute, and punish offend-

ers, irrespective of the nexus between state and offender, for certain crimes that have become of general concern to the global legal order. Such crimes include piracy, slave-trading, war crimes, perhaps terrorism, and certain human rights violations like torture. Restatement, supra note 59, s 404. In prosecuting Eichmann, who committed his crimes prior to Israeli statehood and against persons then not Israeli citizens, the Israeli court relied in part on universal jurisdiction. *Attorney Gen. of Isr. v. Eichmann*, 36 I.L.R. 277, 304 (Isr. Sup. Ct. 1962). A claim of universal jurisdiction also buttressed the notable decision in *Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (2d Cir. 1980) (torture prohibited under customary law and the torturer an enemy of mankind).

Thus, the concept of universal jurisdiction, strictly speaking, has not applied to exercises of enforcement jurisdiction such as extraterritorial apprehension. But given the heinousness of international crimes giving rise to universal jurisdiction, a push toward an enforcement concept has crept into the literature. See Andrew L. Liput, Note, Analysis of the Achille Lauro Affair: Towards an Effective and Legal Method of Bringing International Terrorists to Justice, 9 *Fordham Int'l L.J.* 328, 334 (1986).

[FN70]. Louis Henkin et al., *International Law: Cases and Materials*, 885 n.3 (2d ed. West 1987).

[FN71]. See M. Chefif Bassiouni, Unlawful Seizures and Irregular Rendition Devices as Alternatives to Extradition, 7 *Vand. J. Transnat'l L.* 25, 61 (1973); Kenneth C. Randall, Universal Jurisdiction Under International Law, 66 *Tex. L. Rev.* 785, 812-13 (1988) (stating universality principle could not justify Israel's violation of Argentine sovereignty); see also *United States v. Toscanino*, 500 F.2d 267 (2d Cir. 1974).

[FN72]. Former Legal Adviser Abraham Sofaer had stated, "There might be situations when I would tell my clients, 'Yes, you may be violating a norm of international law in this instance by abduction, but the individual involved is akin to an Eichmann or a Hitler or the man who shot Stethem in cold blood.'" Stephen Engelberg, U.S. Is Said To Weigh Abducting Terrorists Abroad For Trial Here, *N.Y. Times*, Jan. 19, 1986, at A1. Regarding Saddam Hussein,

Where the alleged crimes in question are of a Nuremberg-category and no other means exist whereby to gain custody of the pertinent head of state, the expectations of nullum crimen sine poena (no crime without punishment) may override those of sovereign immunity It would appear, therefore, that the United States has authority under ... international law to gain custody of Saddam Hussein ... by forcible abduction if necessary. Louis R. Beres, *Iraqi Crimes and International Law: The Imperative to Punish*, 21 *Denv. J. Int'l L. & Pol'y* 335, 351-52 n.50 (1993).

[FN73]. Jonathan A. Bush, *How Did We Get Here? Foreign Abduction After Alvarez-Machain*, 45 *Stan. L. Rev.* 939 (1993).

[FN74]. See Oscar Schachter, In Defense of International Rules on the Use of Force, 53 *U. Chi. L. Rev.* 113, 140 -141 (1986) (seizing accused terrorists from within states which fail to bring them to justice violates territorial sovereignty); Christopher C. Joyner & Wayne P. Rothbaum, *Libya and the Aerial Incident at Lockerbie: What Lessons for International Extradition Law?*, 14 *Mich. J. Int'l L.* 222, 254 -56, 260 (1993) (presuming U.N. Security Council countermeasures are an appropriate and sufficient exception to normal exhaustion of extradition in the Lockerbie event); Alfred P. Rubin, *Who Isn't Cooperating on Libyan Terrorists?*, *Christian Sci. Monitor*, Feb. 5, 1992, at 19 (claiming United States and Britain have circumvented customary extradition or judicial procedures to which Libya is entitled).

It is clear that Schachter and others view abduction to be as impermissible as a use of force properly understood. Therefore, a breach of a duty to extradite or prosecute triggers no right to abduction. Many others seem to share this characterization of abduction. See, e.g., *United States v. Caro-Quintero*, 745 F. Supp. 599, 614 - 615 (C.D. Cal. 1990) (capture of Alvarez-Machain would divest court of jurisdiction if U.N. and OAS

Charters were self-executing since abduction would constitute an illegal use of force violative of the treaties); Abraham Abramovsky & Eagle, U.S. Policy in Apprehending Alleged Offenders Abroad: Extradition, Abduction, or Irregular Rendition, 57 Or. L. Rev. 51, 63 (1977) (maintaining traditional view of abduction violative of international law); Bassiouni, *supra* note 59, at 191 (apprehension a disruption of world public order and a violation of sovereignty, though not termed a use of force *per se*).

[FN75]. If the drug trafficker were viewed as the pirate traditionally was -- as *hostis humani generis*, an enemy of all mankind -- the result would be a broad grant of enforcement jurisdiction, including, where appropriate, extraterritorial abduction. See Andrew K. Fletcher, Note, Pirates and Smugglers: An Analysis of the Use of Abduction to Bring Drug Traffickers to Trial, 32 Va. J. Int'l L. 233, 236, 263 (1991) (offering defense of United States' use of abductions to stop foreign drug traffickers). But see Abramovsky, *supra* note 64, at 180 n.148.

Others have proposed apprehension be multilateralized or legitimized by an international court. See, e.g., Michael R. Ponton, Note, Authority of the United States to Extraterritorially Apprehend and Lawfully Prosecute International Drug Traffickers and Other Fugitives, 21 Cal. W. Int'l L.J. 215, 241- 42 (1990 - 91) (proposing drug trafficking be deemed heinous crime worthy of universal jurisdiction and international tribunal established whose members would be allowed to apprehend extraterritorially).

[FN76]. Bush, *supra* note 73, at 981.

[FN77]. Cf. Phillip B. Heymann & Ian H. Gershengorn, Pursuing Justice, Respecting the Law, 3 Crim. L.F. 1 (1991) (claiming that U.S. extraterritorial statutes against terrorism have, ironically, increased the likelihood asylum states will prosecute terrorists under local laws).

[FN78]. Regulating Covert Action, *supra* note 13, at 72.

[FN79]. *Id.* at 67. The French agents who carried out the explosion and were caught, tried, and sentenced by New Zealand were allowed to serve their sentences at a French military garrison in the Pacific and were later repatriated unilaterally by France in 1988. This case of apparent agent immunity may prove to be rather traditional, *contra* the authors. "When states try to protect their acknowledged agents from the application of some foreign municipal law that has been violated during a covert operation, the matter is usually handled on the diplomatic level; damages are paid, and political accommodations are reached." See Alfred P. Rubin, Libya, Lockerbie, and the Law, 4 Dipl. & Statecraft Mar. 1993, at 2 (citation omitted).

[FN80]. For a concurring view, albeit more formalistic, see Christopher C. Joyner, The Rabta Chemical Factory Fire: Rethinking the Lawfulness of Anticipatory Self-Defense, 13 Terrorism 79 (1990).

[FN81]. Military and Paramilitary Activities in and Against Nicaragua (*Nicar. v. U.S.*), 1986 I.C.J. Merits 14.

[FN82]. *Id.* at 103 -104.

[FN83]. *Id.* at 110. But see dissenting opinion of Judge Schwebel, *Id.* at 347- 48; D. Bowett, Self-Defense in International Law 3 - 4 (1958).

[FN84]. On June 26, 1993, United States ships launched cruise missiles that destroyed the headquarters of the Iraqi intelligence service, the Mukhabarat, in downtown Baghdad. The attack was in response to what the United States alleged to be conclusive proof that Iraqi intelligence was responsible for a foiled assassination attempt of former President George Bush on April 14, 1993 in Kuwait City. Explaining the U.S. action before the Security

Council, U.S. Ambassador Madeleine Albright said the strike was taken under Article 51. The attempt on Bush's life was "an attack on the United States of America In our judgment, every member here today would regard an assassination attempt against its former head of state as an attack against itself and would react." Excerpt from U.N. Speech: The Case for Clinton's Strike, N.Y. Times, June 28, 1993, at A7; see also Address to the Nation on the Strike on Iraqi Intelligence Quarters, 29 Weekly Comp. Pres. Doc. 1180 (July 5, 1993).

[FN85]. The United States itself has formally subscribed to the view that reprisals are unlawful. M. Nash, *Digest of United States Practice in International Law 1979*, Dep't. of State, Off. Legal Adviser, 1749 -52 (1983). For the view that reprisals are, in fact, prohibited, see Ian Brownlie, *International Law and the Use of Armed Force by States* (1961); for a view that they are not prohibited, see D. Bowett, *Reprisals Involving Recourse to Armed Force*, 66 *Am. J. Int'l L.* 1 (1972). On the distinction between reprisals and self-defense in view of the 1986 United States' raid on Libya and the 1985 Israeli raid on Tunis, see Eric H. Singer, *Terrorist Attacks on Nationals: The Lawful Use of Force against Terrorist Bases on Foreign Soil*, 1 *Terrorism & Pol. Violence* 435 (1989).

[FN86]. *Regulating Covert Action*, supra note 13, at 114 -115. The Restatement subjects countermeasures to the Charter's prohibition on the use of force. Restatement, supra note 59, s 905 (2) & cmt. g. The International Law Commission's most recent work on the matter bars countermeasures in violation of a peremptory norm. Reisman suggests a mischievous gap is thereby left open for low-intensity covert operations falling short of a "use of force." It is difficult to believe this doctrinal gap is more than an abstraction. Of course, in practice what amount to forcible countermeasures may well be tolerated, as Reisman and Baker suggest. On countermeasures generally, see Elizabeth Zoller, *Peacetime Unilateral Remedies: An Analysis of Countermeasures* (1984).

[FN87]. The classic case of self-determination ... involves the international recognition of the right of inhabitants of a colony to choose freely their independence or association with another state A more radical interpretation of the principle ... holds that it embraces a right to internal democracy for all peoples irrespective of the status of the territory. Under this conception, self-determination goes beyond the rights of distinctive territorial communities to choose their own government and independence Henkin et. al., supra note 70, at 282-83. Reisman originally seems to have followed not the radical "democratic" view, but a modified classical view. See W. Michael Reisman, *The Case of Western Somaliland: An International Legal Perspective*, reprinted in Myres S. McDougal & W. Michael Reisman, *International Law in Contemporary Perspective* 164, 166 (1981) ("The right of self-determination is available to all peoples who are subjugated, i.e., functionally subjected to colonialism A situation of subjugation will be inferred from such objective factors as geographical, ethnical or cultural distinctiveness.").

[FN88]. *Regulating Covert Action*, supra note 13, at 74.

[FN89]. *Id.*; see also W. Michael Reisman, *Coercion and Self-Determination: Construing Charter Article 2(4)*, 78 *Am. J. Int'l L.* 642 (1984) (stating earlier version of argument). For one rebuttal to Reisman, see Oscar Schachter, *The Legality of Pro-Democratic Invasion*, 78 *Am. J. Int'l L.* 645 (1984) (arguing use of force is still governed by rules of self-defense). But see Anthony D'Amato, *The Invasion of Panama Was A Lawful Response To Tyranny*, 84 *Am. J. Int'l L.* 516 (1990) and his caustic book review of *Right vs. Might: International Law and the Use of Force*, 85 *Am. J. Int'l L.* 201-204 (1991).

At any rate, formal Western-style democracy undoubtedly has been considerably legitimized since the collapse of the Berlin Wall. See Conference on Security and Cooperation in Europe: Document of the Copenhagen Meeting of the Conference on the Human Dimension, reprinted in 29 *I.L.M.* 1305 (1990). Also, many multilateral lending institutions, previously neutral in their stance toward political regime, have linked financing

with “good governance,” a considerable step toward pressing for democratic political structures. See Eric Singer, *Democracy Invests New Thinking at the World Bank*, *Miami Herald*, May 4, 1991, at A27. On the Americas, see Francisco Villagran de Leon, *The OAS and Democratic Development* (U.S. Institute of Peace) 1992. For a recent argument for the primacy of political rights, see Amartya Sen, *Freedoms and Needs*, *New Republic*, Jan. 10, 1994, at 31-38.

[FN90]. *Regulating Covert Action*, supra note 13, at 55 -56.

[FN91]. The authors state:

There is ... neither need nor justification for treating in a mechanically equal fashion, United States covert operations in postwar Greece or Italy, which sought to enable the exercise of self-determination, on the one hand, and Soviet covert intervention in Poland or Cuban operations in Central America, which undermine popular movements and impose undesired regimes on coerced populations. *Id.* at 75 (emphasis added).

[FN92]. Perhaps indirectly, Professor Schachter has taken the authors' approach to task. He comments:

Unilateral acts that stretch the meaning of self-defense are treated as “state practice,” although there is no general opinio juris to support their acceptance as law. Hence, conduct that violates text and earlier interpretations can be viewed as new or emerging law basic on the efficacy of accomplished facts in shaping the law. Some of these arguments, if accepted, would extend the concept of self-defense so broadly as to allow almost any unilateral use of force taken in the name of law and order Ad hoc judgments that are purportedly based entirely on the facts and an undefined standard of “reasonableness” tend to be largely determined by crypto-criteria that reflect particular preferences and values. Such judgments are not likely to help clarify the line between permissible and impermissible conduct Oscar Schachter, *Self-Defense and the Rule of Law*, 83 *Am. J. Int'l L.*, 259, 273 -275 (1989) (citations omitted).

[FN93]. *Regulating Covert Action*, supra note 13, at 141.

[FN94]. *Id.* at 135.

[FN95]. *Id.* at 75; see also Thomas J. Jackamo, III, Note, *From the Cold War to the New Multilateral World Order: The Evaluation of Covert Operations and the Customary Law of Nonintervention*, 32 *Va. J. Int'l L.*, 929, 976 (1992) (recommending against bright line rule against intervention since covert operations, though tainted by Cold War, may achieve international human rights goals).

[FN96]. This is to say nothing of transnational covert actions resulting from increased political, religious and ethnic turmoil within countries. See, e.g., Herbert H. Denton, *Canada Investigates Charges of Indian Covert Operations; Newspaper Says Sikhs Were Infiltrated*, *Wash. Post*, Nov. 25, 1985, at A25.

[FN97]. See Richard Cohen, *The Toughest Case of All*, *Wash. Post*, Apr. 27, 1993, at A17 (hinting at use of covert action against Serbia in defense of Bosnia); Stephen Kurkjian, *Panel Proposes Retaliation Against Airline Terrorists*, *Boston Globe*, May 16, 1990, at A1. Following drug kingpin Pablo Escobar's jailbreak in Colombia, Congressman Robert Torricelli reportedly stated, “it's time to consider the option of actually beginning direct covert activities.” He suggested the United States should launch its own manhunt for Escobar if Colombia did not take more effective measures. David Haskel, *Escobar Jailbreak May Lead to U.S. Policy Revision*, *Reuters*, July 26, 1992.

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