THE RESPONSIBILITY GAP: THE CIA, COVERT ACTIONS AND VIOLATIONS OF INTERNATIONAL LAW

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Abstract

Throughout the course of the Central Intelligence Agency (CIA), the United States of America has committed covert actions in virtually every major region in the world, particularly during the Cold War. These actions are not without their repercussions and have often led to massive violations of international law and human rights. Yet the US is not held responsible for its actions due to legal deficiencies that allow it to breach some of the most basic rules of international law without accountability. This paper examines the obligations of international law concerning covert actions before turning to state responsibility and highlighting the legal deficiencies that allow the US’ violations. It concludes by addressing what legal developments are needed to hold states responsible for their activities in covert actions.
The Kurds, a nomadic people without a country, have been in the quest of their freedom for hundreds of years. Being located between four Middle East powers – Iran, Iraq, Syria and Turkey – has left them as pawns in the global war of politics. In 1972, at the height of the Cold War, the United States of America became engaged in this political stalemate.

In 1970, after a twelve year armed campaign between the Kurds and Iraq, a peaceful agreement had seemed almost possible, brought on by the sheer exhaustion and lack of resources of the two parties. Iran, however, feared the end of this Kurdish war would mean an escalation of violence in the Iran and Iraq border dispute. In order to keep the focus off a favourable demarcation, the Shah of Iran offered the Kurds money and weapons to resume their fight. The Kurds, dissatisfied with the most recent ceasefire but still distrustful of the Shah, countered that they would consider it only if the US guaranteed that the Shah would not be allowed to suddenly cut off funds to them. In August 1972, with the approval of President Nixon and NSC Advisor Henry Kissinger, the CIA began administering funds to the Kurds from CIA headquarters in Tehran. The CIA ultimately distributed about USD$16 million, contributing to Israel’s continued assistance and the Shah’s reported several hundred million. Fourteen months later, the Kurds were still fighting, but Iraq had also become involved in the October War with Israel. On the advice of the CIA and Kissinger and against the advice of Israel, the Kurds missed the opportunity to mount a large offensive against Iraq, whilst half the Iraqi forces were occupied with Israel. The October War eventually led to Iraq and Iran bridging some of their differences in March 1975. Realising that the Kurdish freedom fight was no longer in their best interest, the Shah halted all funds to the Kurds, no longer allowed CIA arms shipments to pass through their lands, and closed the borders to all Kurdish soldiers. The following day, Iraq began a massive offensive to push the Kurds back (Prados, 1986).

No longer able to afford the war, the Kurds sent a distressed appeal through the CIA, “Our people’s fate in unprecedented danger. Complete destruction hanging over our head. No explanation for all this. We appeal to you [sic] and US Government intervene according to your promises” (in Prados, 1986, p. 314). Washington did not reply. The CIA station chief concurred, “Iran’s action has not only shattered their political hopes; it also endangers [the] lives of thousands” (in Prados, 1986, p. 315). No response. Years later a senior US official, thought to be Henry Kissinger, retorted, “‘Covert action should not be confused with missionary work’” (Prados, 1986, p. 315).

Because of this abandonment, the Kurds were pushed back; thousands were killed.

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1 Israel had been funding the Kurds since 1965 (Prados, 1986).
I. Introduction

Since the formation of the Central Intelligence Agency (CIA) in 1947, the United States of America (USA) has been involved in covert actions and secret wars on virtually every continent (Prados, 1986). The CIA was legally mandated with five main functions: to advise the National Security Council (NSC) on intelligence matters, make recommendations, produce intelligence estimates and reports, perform services of “common concern,” and perform “such other functions and duties related to intelligence affecting the national security as the National Security Council may from time to time direct” (Pub. L. No. 235, 80 Cong., 61 Stat. 496, 50 U.S.C. ch.15). The last function has since become a euphemism for all secret warfare, including covert actions.

Though there is no straightforward international law governing covert actions, there should be no argument that covert actions must abide by the laws of armed conflict and international human rights laws, standards and principles. Yet, in understanding the CIA’s role in human rights, there are challenging ethical problems. John Stockwell, former Angola CIA station chief, said of the CIA field officers: "They don't meet the death squads on the streets where they're actually chopping up people or laying them down on the street and running trucks over their heads. The CIA people…meet the police chiefs, and the people who run the death squads, and they do liaise with them, they meet them beside the swimming pool of the villas. And it's a sophisticated, civilized kind of relationship. And they talk about their children, who are going to school at UCLA or Harvard and other schools, and they don't talk about the horrors of what's being done. They pretend like it isn't true" (1987, p. 1). As evidenced by the US abandonment of the Kurds in 1975, the repercussions of US involvement can lead to detrimental violations of human rights and international law.

When massacres happen, when militant dictators are put in power, when paramilitary groups torture using arms given to them by the CIA, when human rights violations are ignored for national interests, should not the US be held accountable to its actions? Even further, should the US be held responsible for its actions and be obligated to make reparations for them? This paper will argue that the US should be held accountable to international frameworks and standards but that current international laws make it impossible to place responsibility on the US for human rights violations and breaches of international law that take place because of the CIA’s participation in covert actions. This paper will highlight those legal deficiencies and will recommend that further legal developments are needed to place responsibility where it should rightly be. The definition of covert actions will be identified first, followed by a study of some of the CIA’s more expensive and expansive covert actions. The relevant obligations in international law frameworks will precede an examination of the international standards of responsibility and legal deficiencies relevant to the aforementioned CIA covert actions. This paper will conclude by recommending international legal developments essential to holding the CIA and the US accountable to their activities in covert actions.²

² Note: By investigating the US, the author is by no means detracting from violations of international law that take place in other countries covert actions, nor is she absolving the in-state, national perpetrators of responsibility for their actions. The US’ covert actions during the Cold War were chosen as a case study because of the availability of de-classified information and size of the programs. The author would also like to point out that covert actions have continued since the fall of the Cold War, but because of their covert nature, it will likely be many years before the actions become public.
II. Propaganda, Manipulation and Paramilitary Activities: Covert Action and debacle the CIA

Covert actions have been used in international politics for centuries, in virtually all major wars, as well as at peacetime (Knott, 1996), using the justification that they are taken in the best interest of the country. At the end of World War II, noting the success of the Office of Strategic Services (OSS) and the avid practice of British covert operations, the US Government created the CIA in 1947 as the main US body for intelligence activities. Since then, the CIA, under relatively little supervision from Congress and without the knowledge of the American public, has utilised covert actions to achieve its foreign policy goals instead of expensive military intervention – particularly useful in the Cold War era of political tension, paranoia, economic distress and nuclear terror (Bowman, 1998). However they have not always been viewed in a positive light. President Kennedy received much criticism for the Cuban Bay of Pigs debacle; President Carter found there was a disassociation between covert actions and his human rights campaign; President Reagan conducted ‘overt’ covert actions that led to the US being taken to the International Court of Justice in 1986 (Prados, 1986). In 1974 a ban on all covert operations was proposed in the Senate, with one senator stating “there is no justification in our legal, moral or religious principles for operations of a US agency which result in assassinations, sabotage, political disruptions or other meddling in another country’s internal affairs” (Knott, 1996, p. 165). However, this law only gathered 17 votes from 100 Senators. The CIA’s covert actions continue to this day and take various forms.

But what is a covert action and what activities does it include? This section will define covert actions, discuss tactics used, and will examine a few cases of covert action that the CIA has been involved in.

A. Defining Covert Actions

The CIA officially defines covert actions as “any clandestine operation or activity designed to influence foreign governments, organizations, persons or events in support of United States foreign policy” (S. Rep. No. 755, 94th Cong., 2d Sess., 1976), although the US Congress redefined covert action as “activities of the United States Government to

3 Nutter notes “the primary founders of America – Washington, Jefferson, and Madison – all employed secret means to achieve what they felt to be critical national goals. Congress even went so far as to recognize this necessity by authorizing the ‘contingent fund,’ which was accountable only to the president” (2000, p. 50).
4 As said by President Ford at a news conference in 1974 when he was asked whether the US has the right to attempt to destabilise the constitutionally-elected government of another country (Ohly, 1975).
5 The OSS was created in World War II to conduct intelligence activities against the Axis powers (Prados, 1986).
6 The CIA’s intelligence activities can largely be classified under two types of covert operations: intelligence collection and covert action (Ohly, 1975). Due to the legal issues raised by covert action, this paper will only address this activity.
7 While the President has the ultimate power to authorize covert action, the Director of Central Intelligence should also seek approval from a small congressional committee as well – this may or may not happen for every instance of covert action (Woodward, 1987).
8 Indeed, former Secretary of State Henry Kissinger described them as being “the gray area between formal diplomacy and military intervention” (Bowman, 1998, p. 4).
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” (in Jackamo, 1991-1992, p. 933) in the 1991 Intelligence Authorization Act. The key to covert actions, though, is their ‘plausible deniability.’ For a covert action to qualify as such, it must be completed in a hidden or disguised manner, so that if the action is discovered, there is no evidence to prove the involvement of the intervening state (Eyth, 2002-2003). This attribute is the overarching rule of what defines a covert action, not the level of secrecy involved. Indeed, “activities undertaken in secret but where the role of the United States will be disclosed or acknowledged once such activities take place are not covert actions” (Bowman, 1998, p. 9). 9

The tactics of covert action do not necessarily include any form of armed force and if it does it will often be of a much lower level of force than traditional military intervention. However, covert action by an intervening state can often lead to a substantial increase in violence and instability in the intervened state (Nunn, 1983-1986). Covert action does not include clandestine action, where only the people completing the action know that it is taking place, proxy wars, which are fought openly with the assistance of an outside power, special operations, which are overt, small-scale military actions, or espionage. Instead, covert actions are generally grouped into three categories: political action, propaganda and paramilitary activities10 (Nutter, 2000). Political action activities are designed to directly influence political processes, decisions and institutions. Methods can involve activities such as monetary and logistical support to political parties, intellectual expertise and advice to individuals, corporations or political parties, political training including how to govern and how to oppress, non-enforcement of laws or policies, access to restricted technologies, psychological operations11 and political assassinations.12 Propaganda is always a crucial component of a covert action. Simply put, propaganda is any information used to influence someone to do something. Commonly, it is used to gain support from part of a country’s population, including the military. It comes in three different ‘colours:’ white, gray and black. White propaganda is when someone distributed information openly and publically so that the source is evident. However, the information distributed is not always a true and accurate portrayal of the

9 Though actions are often disclosed at a later date or leaked to the press.
10 This is the general classification of covert action, although Nutter added Asset Development and Economic Warfare to this list (Nutter, 2000) and Richard Bissell provided eight classifications to the Council on Foreign Relations in 1968, stating: The scope of covert action could include: (1) political advice or counsel; (2) subsidies to an individual; (3) financial support and “technical assistance” to political parties; (4) support of private organizations, including labor unions, business firms, cooperatives, etc.; (5) covert propaganda; (6) “private” training of individuals and exchange of persons; (7) economic operations; and (8) paramilitary or political action operations designed to overthrow or to support a regime... (in Ohly, 1975, p. 194)
11 One of the more creative instances of ‘psyops’ involved playing into Filipino superstitions by spreading a rumor that a vampire lived in an area infested by Communist guerrillas. The CIA captured a guerrilla, pricked his neck with two ‘vampire bite marks,’ and hung him up to drain. After he had bled out, they placed the corpse back on the trail. Once he was found by the guerrillas, they quickly fled the area (Nutter, 2000, pp. 83-84).
12 The CIA is surprisingly quite open about their multiple assassination attempts on leaders such as Fidel Castro, Patrice Lumumba, and more. Castro notoriously has had at least twelve assassination attempts on him by the CIA (Prados, 1986). Still, former CIA director William Colby clarified that no foreign leaders have been killed by CIA operatives, although “It wasn’t for want of trying” (Knott, 1996, p. 171).
situation. It just has an overt author. Gray propaganda is information disseminated by a neutral party to increase its credibility, and also comes in light gray, gray gray and dark gray depending on the source. Black propaganda is false information that appears to come from another source, such as fake documents, false video or audio tapes, or radio broadcasts that appear to come from the enemy. It’s generally used to frame the opponent for something they did not do (Nutter, 2000). Lastly, paramilitary activities can include less violent activities such as providing intelligence to an armed leader or group to more violent means such as acts of terrorism and supporting guerrilla wars and using domestic or irregular local troops to forcibly overthrow a government in a coup d’etat (Eyth, 2002-2003).

Despite the sensational and politically risky associations, the CIA commonly utilises a combination of these tactics in its covert actions. Of most concern are paramilitary activities conducted by supporting militias, mercenaries and other armed forces in a conflict or coup attempt, as these are seriously questionable in international law. The following section will investigate three situations of CIA intervention – Chile, Afghanistan, and the Iran-Contra Affair – to highlight the international legality of covert actions.

B. CIA Case Studies

i. Chile 1970-1973

In an interview with Newsweek, printed on 23 September 1974, Secretary of State Henry Kissinger said, “I don’t see why we have to let a country go communist due to irresponsibility of its own people” (Nutter, 2000, p. 107). This quote referred to Nixon’s and the CIA’s intervention in Chile to prevent a “red sandwich” in Latin America – the US “sandwiched” between Communist Cuba and Communist Chile. In September 1970, Salvador Allende was elected into power through a democratic election. He was a Marxist and won fairly, besides the US’ best efforts to assist an opposing candidate financially through private corporations. During the years of 1970 and 1973, the US spent over USD$8 million to make the Chilean economy scream\(^\text{13}\) by attacking on two fronts: economic and political. All economic assistance to Chile was halted, as well as any USAID funds and multilateral loans. In the three years Allende was in power, “total U.S. economic aid dropped by over seventy-seven percent from 1969 levels and aid from international organizations dried up completely” (Nunn, 1983-1986, p. 145). Politically, the CIA was used to disseminate propaganda, manipulate the media, give financial support to various right-wing political parties, and conduct a hidden track to induce a military coup (Church Committee, 1975). The CIA endeavoured to separate the Chilean government and the Chilean military by more than doubling arms sales, increasing aid to the military by a portentous 1800% (Nunn, 1983-1986), and feeding false information to the military about Cuban infiltrations. This led to a coup attempt by the CIA, “receiving directives from the highest executive level…which ended abortively in the abduction and murder of General Rene Schneider (Nunn, 1983-1986, p. 145).

Allende tried to alleviate the impact of these actions. He attempted to nationalise the industries as promised in his election economic program, but because of the economic

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\(^{13}\) As described by President Nixon in 1970 when requesting an operations plan for Chile (Prados, 1986).
cut-offs by the US, the Chilean economy had no chance of recovery. Industries shut down; a year-long strike by the trucker’s union virtually halted all transportation. Even through all this chaos, support for Allende thrived; he was re-elected in March 1973 and his Unidad Popular party gained more seats in Chilean Congress (Prados, 1986).

In August 1973, however, the constitutionalist leader of the military was ousted and succeeded by General Augusto Pinochet. The Pinochet junta led a military coup on 11 September 1973. Pinochet immediately established a state of siege and began a tremendous campaign of repression. Up to 25,000 Chileans were killed in this campaign, as well as two Americans (Prados, 1986). Post-coup, Pinochet quickly banned all political parties, instigated press censorship, disbanded Congress, cancelled elections for his lifetime and the lifetime of his successor, and imprisoned and tortured supporters of Allende and any others deemed opponents of the new regime (Church Committee, 1975). CIA activities in the country continued shortly afterwards, mainly attempting to increase the positive image of the Pinochet regime. The US recognised this regime as a legitimate government on 29 September 1973, refusing to acknowledge the massive human rights violations that took place in the coup and in the entirety of Pinochet’s dictatorship (Prados, 1986).

“Substantial evidence exists that the CIA played a major role in the demise of the Unidad Popular and the establishment of the brutal Pinochet dictatorship,” (Nunn, 1983-1986, p. 145) including placing American military attaches in the field with the Chilean army participating in the coup. Other US armed forces are thought to be involved from neighbouring countries or off the coast (Prados, 1986). However, “there was no evidence that Allende was a Soviet puppet or likely to run the country into an outpost for Soviet expansionism” (Nutter, 2000). Regardless, it is certain that the CIA and the Chilean armed forces forged a close relationship in the years between Allende’s election and Pinochet’s coup. At the very least, the CIA probably “gave the impression it would not look with disfavour on a military coup. And US officials in the years before 1973 may not have always succeeded in walking the thin line between monitoring indigenous coup plotting and actually stimulating it” (Church Committee, 1975, p. 175). The CIA’s involvement in the overthrow of a democratically elected government and in support of a rightist military junta was unjustifiable and was largely governed by American political and corporate interests. It was kept secret from the American people, who likely would have publically protested the US’ involvement. The regime went on to violate humanitarian and human rights principles the US claims to believe in (Wrage, 1980). Many years later, Pinochet was indicted by the Chilean Supreme Court for numerous human rights violations, and other corruption charges. However, he died before he was able to be convicted of any of the crimes (Foley, 2006).

ii. Afghanistan 1980-1990

Former President Jimmy Carter remembers the Soviet invasion of Afghanistan as a “shock ‘to a world which yearned for peace’” (Prados, 1986, p. 357). In December 1979, Soviet troops began deploying to northern Afghanistan. On Christmas day, a coup and

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14 Director of Central Intelligence (DCI) Helms, who was DCI at the start of US involvement in Chile, was later forced to testify to the Church Committee regarding the CIA’s actions in Chile. He denied under sworn testimony that the CIA had tried to overthrow the Chilean government (Church Committee, 1975). Four years later, he was indicted for perjury in this testimony. He pled no contest and was found guilty (Prados, 1986).
invasion officially began. Marxist Afghani president Amin was killed in a shoot-out with Soviet troops and was replaced by another Communist faction, led by Babrak Kamal. In order to keep his new government secure, Kamal reached out to the Soviets, asking for assistance and protection. A few days after the Christmas coup, around 10,000 soviet troops could be found in and around Kabul. The Soviet intervention received condemnation from around the globe, including several UN resolutions. Yet, in international political terms, the Soviet Union was more protecting an ally from its internal tribal resistance movement than actually invading a country to claim it as its own. Both the government put in power and the government deposed of were Communist (Prados, 1986).

This movement infuriated President Carter in particular, who initiated a covert response through the CIA as early as 9 January 1980, which he described as the “best way to punish the Soviets short of ‘going to war, which wasn’t feasible’” (Prados, 1986, p. 357). The CIA approach consisted of providing support and arms to the Afghan mujahedin rebels, a loose, unstructured confederation of six Afghani tribes based in the mountainous region between Afghanistan and Pakistan, with Pakistan as the conduit (Treverton, 1987-1988). The CIA, under the regulation of President Carter who did not want to potentially expose sensitive technology to the black market, distributed only Soviet-type weapons that were purchased from China and Egypt, whom also trained some of the rebels in warfare. Carter and the CIA expected to just increase the capabilities of the rebels to exploit their expert knowledge of the mountainous terrain to push back Soviet power (Prados, 1986). However, President Reagan’s approach to covert action was much stronger, leading to dramatic increases in the level of funds and types and amounts of weapons being distributed to the Afghan rebels. In fact, in April 1985, Reagan stated it was US policy to drive the Soviet Union out of Afghanistan by all means available (Prados, 1986). Afghanistan quickly became the most expensive covert operation initiated by the US and CIA. Covert operations in Afghanistan totalled at least USD$2.5 billion, including matched financial assistance from Saudi Arabia (Prados, 1986). Weapons distributed by the CIA also increased in their sophistication. Congressman Charles Wilson proposed amending the Defence budget to re-route Pentagon money to purchase new heavy anti-aircraft weapons, in partnership with the CIA who distributed the weapons to the Afghan rebels through Pakistan. The rest of the arms distributed have been less exotic, yet substantial in number – amongst them automatic rifles, bazookas, and grenade launchers (Prados, 1986). It is estimated that “at one point over three hundred thousand fundamentalist Afghan warriors carried weapons provided by the CIA; thousands were trained in the art of urban terror” (Crile, 2002, p. ix).

The covert operation led by the CIA was ultimately successful; some viewing it as the only real success the CIA has had in the last thirty years. The CIA enacted a ‘spoil Action,’ where the goal was not necessarily to win the war, but to bleed the Soviet Union dry or to make the cost to the Soviets so high in lives and money that it had no choice but to give up (Nutter, 2000). By late 1988, the Soviet Union were withdrawing the last of their troops from Afghanistan, although the real warfare had ended much earlier. This

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15 A statement of ‘plausible deniability’ – it was the CIA’s practice to never introduce weapons into another country that could be traced back to the US (Crile, 2002).

16 Or “Freedom Fighters” as President Carter coined (Prados, 1986). The Soviets, however, saw a different perspective. The rebels were notoriously vicious and would utilize particularly gruesome methods of combat handed down from generations of Afghani tribal warfare (Crile, 2002).
victory for the CIA and the Afghan rebels played a catalytic role in the demise of the Soviet Union just a few years later (Nutter, 2000).

Yet this victory was not without massive consequences. The effect of the war on the country and people of Afghanistan was catastrophic. The Soviets had not limited their warfare to just land interaction, adding airpower to assist troops on the ground. The country was devastated; infrastructure and social services were demolished. “Villages thought to house rebel bands were bombed so heavily that large numbers of Afghans were obliged to seek refuge in Pakistan to the south” (Prados, 1986, p. 360). By 1982, over 2.8 million Afghans had sought refuge in towns just over the border. Soviets, believing the villages to house rebels as well as refugees, sent air intrusions across the border, often hitting the Afghan refugees, with over 1 million Afghans killed throughout the duration of the intervention (Crile, 2002). The Soviets were correct to distrust the border villages though. Many new recruits into the rebel forces came through these villages; weapons were often bought in the village bazaars and smuggled across the border (Prados, 1986). Lack of accountability in the CIA’s weapons distribution led to a substantial portion of the highly sophisticated arms distributed simply disappearing into the underground network of mujahedin rebels. It is estimated that only one in ten weapons served their purpose in the Afghan covert operation. Financially, it is estimated that anywhere between twenty percent and eighty-five percent of the money given to the mujahedin was ‘skimmed off the top’ (Prados, 1986). By 1990, the Afghan mujahedin rebels had re-emerged as they originally were – a bunch of feuding tribal warlords obsessed with settling generations-old scores. Except then they were armed with millions of dollars worth of weapons and explosives and had been trained in modern insurgency and military techniques (Crile, 2002).

CIA intervention continued for at least three more years, with the US eager to push the Soviet-backed communist regime by supporting the rebel groups to establish a democracy. While some accomplishments were slowly made, the mujahedin mostly bickered over their old tribal feuds and committed unspeakable atrocities and massive human rights violations against the rest of the Afghan population. Prisoners were massacred; aid trucks were hijacked; the civilian population feared for their lives. The US now found itself having to “turn around and send in a humanitarian mission to deal with the refugees created by [their] own investment” as diplomat Jane Bogue described (Crile, 2002, p. 516). The government that eventually came to exist, the Taliban, had been armed and trained by the US, allowed a jihadist militancy to emerge in its rural mountain villages, and restricted the human rights of the entire population in the name of Islam – most notably those of Afghani women.

Worse still, at least by the US perspective, is that the insurgency that was armed by the CIA has now declared a holy war on the US. The CIA had assumed that when the US “packed its bags and cut off the Afghans, the jihad would simply burn itself out” and probably kill each other off in the process (Crile, 2002, p. 521). Instead, the jihad emerged strong, organised and trained, 9/11 happened, and the US has now committed itself to yet another decade of war in Afghanistan to topple the ‘war on terrorism.’

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17 Some scholars consider this victory the first domino in the collapse of the Soviet Union. They postulate that had this victory not happened, it would have taken much longer to defeat the communist Soviets.
The Iran-Contra Affair actually began in the jungles of Central America in 1981, with President Reagan’s finding authorising assistance to the Contras, a guerrilla army opposed to the newly established government in Nicaragua (Banks, 1987-1988). In 1979, a revolution brought the anti-communist, human rights-violating, Somoza dictatorship to the ground, succeeded by the leftist Sandinista government. The Sandinistas’ anti-American views became quickly evident, as well as its Marxist tendencies, Cuban military and intelligence partnership, and support of a growing Communist insurgency in El Salvador. President Reagan was committed to “not lose a country to communism on our watch,” particularly one in its own “backyard” (Kornbluh, 1987, p. 11). The assistance to the Contras was, at first, moderate, providing just arms, clothes, food and supervision through a covert operation intended to “bleed the Sandinista revolution” (Kornbluh, 1987, p. 9) and hopefully instigate another coup d’état. As the intervention grew throughout 1981 and 1982, though, it developed a multi-front assault – covert, economic, and military.

Its covert operations included the usual activities of propaganda, media intervention, and paramilitary action. The paramilitary operation was by far the largest portion of the covert action, and included direct CIA involvement. In 1981, USD$19 million was allocated to train and arm the Contras, which the CIA first had to develop. By early 1982, the Nicaraguan guerrillas had been organised from once factional political diasporas to the Contras – based in Honduras, trained by Argentine militias and using CIA weapons – and US money flowed freely (Prados, 1986). The contra war immediately transformed. The Sandinista government declared a state of emergency in 1982, imposed press censorship, restricted political activities and forcibly removed indigenous tribes from their tribal land (Kornbluh, 1987). These human rights violations gave Reagan even more motive to continue covert action. However, small successes, such as blowing up bridges, were not enough for Congress, adding to the fact that this covert operation was now overt and had media attention in the US. In order to be portrayed as non-interventionist and legal, Congress signed into effect the first Boland amendment which prohibited “the expenditure of funds ‘for the purpose of overthrowing the Government of Nicaragua’” (Woodward, 1987, p. 287), and ceased financial support to the CIA and Contras for fiscal year 1983. However, the CIA was able to augment its budget by persuading the Pentagon to donate USD$12 million in “surplus” arms for the contra operation (Marshall, 1987).

In September 1983, President Reagan, at the behest of CIA director William Casey and other intelligence committees, signed another finding stating that covert action is necessary in Nicaragua to pressure the Sandinista government to end support to Salvadoran rebels. Congress responded by authorising USD$24 million for fiscal year

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18 A finding is a formal intelligence order that must be signed by the President. Depending on the urgency of the covert action, it may or may not take place prior to the actual covert operation, but is necessary to gain presidential approval and supposed accountability (Woodward, 1987).

19 The economic war, conducted by President Reagan and the US Congress, included blocking USAID assistance and access to multilateral loans, and reducing imports from the country, which had a detrimental effect on the Nicaraguan economy. For example, “the U.S. reduced the quota of sugar it buys from Nicaragua by 90%. Since the bulk of the Nicaraguan sugar crop is sold to the US, the Sandinistas stood to lose at least 54 million dollars annually by this action” (Nunn, 1983-1986, p. 164). However, as this is not a covert action, it will not be discussed further here.

20 Due to press leaks.
1984 (Woodward, 1987). In order to show that the funding was needed and to supplant
the inadequacy of the Contras, the CIA began its own activities of sabotage and
destruction. “CIA pilots bombed Nicaraguan communications towers, frogmen raided
port facilities, and commandos planted mines” (Kornbluh, 1987, p. 47) resulting in
multiple Nicaraguan and American casualties (Prados, 1986). The CIA also wrote and
distributed a manual on paramilitary operations, Psychological Operations in Guerrilla
Warfare, which instructed the Contras on how and when to commit armed propaganda,
how to win the hearts and minds of the Nicaraguan population, and how to neutralise
opponents.21 However, what ultimately brought the world’s attention to the CIA’s covert
actions in Nicaragua was the CIA’s seeding of Nicaraguan ports and harbours with mines
in early 1984. As with all their other direct involvements in the paramilitary activities, to
keep up the pretence of plausible deniability, the Contras were ordered to take the credit
for the mines. Within weeks, ten commercial vessels had been struck by the mines,
including six non-Nicaraguan ships (Kornbluh, 1987). The world’s attention was now on
the Nicaraguan situation and the US attempted to place blame on the Contras, until news
and media reports proved otherwise. Diplomatic repercussions sounded – the UN passed
a series of resolutions condemning the US’ actions, and Nicaragua filed a formal
complaint with the International Court of Justice.22 Congress refused to authorise any
more money towards the operation until December 1985 and passed the second Boland
amendment, “prohibiting any administration agency involved in ‘intelligence activities’
from ‘supporting, directly or indirectly, military or paramilitary operation in Nicaragua by
any nation, group, organisation or individual’” (Marshall, 1987, p. 12).

The lack of Congressional funding did not end the contra covert operation. Instead the
CIA, with the approval of President Reagan, pursued funding through other sources.
These included a “shadow CIA” operating through the NSC and foreign governments
such as Brunei, Saudi Arabia, South Africa, and South Korea, who provided money,
weapons and supplies to the Contras. American right-wing groups also provided
‘humanitarian aid’ and US-based paramilitary organisations offered training in-country
(Kornbluh, 1987). This time around, the CIA made certain that all operations provided
plausible deniability. The head of the operations, Oliver North, set up secret Swiss bank
accounts under a false name, which the money could be transferred through; Congress
was no longer informed about each covert action; the Presidential approval didn’t appear
in writing; all accountability disappeared (Banks, 1987-1988). At this point in the
operation, the CIA also began engaging with Iran to fund the Contra war.

US relations with Iran had been notoriously bad since the ousting of the Shah of Iran
and the Khomeini regime taking the American Embassy in Tehran hostage in 1979. The
Carter administration had imposed sanctions to pressure the release of hostages, who
were not released until 444 days later. In the 1980s, the Reagan administration continued
an arms embargo because of the Iran-Iraq war,23 declaring Iran as a sponsor of terrorism.
So when American citizens, including the Lebanon CIA station chief, were taken hostage
and planes hijacked by the Iranian-sponsored terrorist group, Hezbollah, Reagan’s ‘tough

21 When it was leaked to the press, it was the phrase ‘neutralize’ that gathered attention – a
common euphemism in CIA lingo for assassinate – causing the Washington Post to label it ‘The
22 The results of which will be discussed in the Sections III and IV.
23 During the Iran-Iraq war, the US militarily supported the Saddam Hussein regime through
shipping money, equipment and intelligence – an action that would obviously come back to bite
them later (Nutter, 2000).
on terrorism’ standpoint did not allow much room for negotiation. This was until Oliver North, through the ‘shadow CIA’ NSC, suggested the arms-for-hostages programme. With the President’s approval, old Israeli weapons were sent to Iran in two shipments in August and September 1985 in exchange for the hostages held in Lebanon. As a result, only one hostage was released. Direct sales of weapons to Iran began in January 1986, in an attempt to release more hostages, managed by the CIA and kept hidden from Congress. The weapons were marked up exorbitantly to increase the profit,24 which was then funnelled into the secret Swiss bank accounts to fund the contra operation. All that resulted from the arms-for-hostages operation were a few hostages released and more taken in their place. The operation ceased when the information was leaked. The hostages were eventually all released, and the Sandinistas were defeated – and stepped down from power – in the Nicaraguan election of 1990.

The Iran-Contra Affair was highly condemned in the US to near Watergate-like proportions for the CIA’s direct involvement in Nicaragua, lack of accountability, and for the myriad of lies given under oath to Congress and the American public. Yet reproach is not commonly given for what the CIA’s actions led to in Nicaragua. Contra officers committed wide-spread human rights violations; it is estimated that the Contras are responsible for at least 200 human rights violations and terrorist acts (Kornbluh, 1987). Their acts of terrorism included the murder and torture of Nicaraguan civilians, looting, raping women, kidnapping for the purpose of recruitment, and political assassinations (Marshall, 1987). Indeed, the US armed insurgents “were responsible for the deaths of over 600 Nicaraguans, 346 of them civilians” in 1983 alone (Nunn, 1983-1986, p. 161). Nicaraguan infrastructure was left in pieces; the Nicaraguan economy has yet to recover completely. The effects on Nicaragua’s neighbours were no less dramatic. Honduras received a massive influx of refugees and internally displaced persons; Costa Rica was used as a southern front. For a professed goal in the Latin America region to “support democracy, human rights and economic growth while preserving peace,” (Kornbluh, 1987, p. 215), the US’ Iran-Contra Affair accomplished exactly the opposite.

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24 For example, purchasing TOW antitank missiles for USD$3.7 million and selling them for USD$10 million – more than a 200% mark-up (Nutter, 2000).
III. “When the president does it, that means it is not illegal:”25 Obligations in International Law Frameworks

In 1974, then CIA director William Colby was asked “whether covert action conducted by the CIA violated the laws of the countries in which it occurred; he responded, ‘Of course.’ He was then asked if the CIA undertook activities which would violate the laws of the United Stated if performed here; he answered, “Of course,”…and was somewhat amazed that anyone would bother to ask such silly questions” (Ohly, 1975, p. 203). It doesn’t just occasionally violate a law, though; principles and obligations are breached with such regularity that, in the 1970s, CIA officers became frustrated with President Carter’s commitment to human rights and the limitations it imposed on their covert activities.

President Carter was correct in attempting to abide by the US’s obligations in international law. These obligations come from many sources, such as treaties, customary law, jurisprudence, and more.26 Most relevant to covert actions are the obligations found in the UN Charter, international humanitarian law as defined by the 1949 Geneva Conventions and their additional Protocols, and the treaties of international human rights law, as well as customary law.27 It is critical to note, however, that international legal obligations may be different when the action is being targeted towards a country with which the US is at war (Banks, 1987-1988). Some of the relevant laws will only be applicable during peacetime covert actions.

This section will address the international legal principles raised by covert actions, specifically issues of sovereignty and jurisdiction, non-intervention, the right to armed force, and the protection of human rights, and will examine their legality under international law in relation to covert activities.

A. Sovereignty and Jurisdiction

Covert actions by the CIA must only take place on the soil of another country outside of US jurisdiction. In fact, it is written into their mandate that any operations undertaken must not affect the population of the US on US territory (Crile, 2002).28 Obviously, this raises issues of state sovereignty, which is a fundamental principle in international law. It is the concept that equalises states, purports independence and is crucial to the State’s ability to exercise power in their own territory. Sovereignty delineates that every State has the inalienable right to choose its own political, economic, social and cultural systems, independent from the influence of other States. The principle is not just limited

26 Sources of law are defined as what the International Court of Justice can consider when deciding a case (Dixon & McCorquodale, 2003). Article 38 of the Statute of the International Court of Justice lists them as, inter alia, international conventions, international custom, general principles of law, judicial decision, and the writings of “highly-qualified publicists” (1945)
27 Customary law is created by state practice, specifically where a State acts as such because they believe a practice is obligatory rather than habitual. Customary law, once defined, is binding on all states (Dixon & McCorquodale, 2003).
28 Sometimes, covert actions are not approved of by the CIA legal team for fear of repercussions reflecting back onto US territory, even as drastic as not allowing anti-Soviet propaganda to be printed in European newspapers because they could potentially be brought into the U.S (Crile, 2002).
to using power in a territory a State has sovereignty over, however, but also includes the obligation to refrain from using powers in the territory of another State – that is respecting another State’s sovereignty. Given that many covert operations are conducted to affect a country’s political process, the principle of state sovereignty is clearly infringed. More specifically, international law is violated through covert activities. Even though the UN Charter codified the sovereign nature of all states, this concept may also be defined as customary international law (Turner, 1995), which makes its recognition obligatory on all states. Also, in international human rights treaties, the jurisdiction clause obligates a state to respect, protect and fulfil the rights recognised in the treaty for all individuals within its territory and subject to its jurisdiction. Through CIA involvement and the imminent human rights violations, covert actions are intruding on the jurisdiction of a State as defined by their obligations in international law.

Without discussing the more complicated points of jurisdiction, a State has domestic jurisdiction to create its own laws, exercise jurisdiction over its own territory, and prevent attacks on its sovereign territory. With international treaties more and more defining what those laws should be, at the very least a State retains jurisdiction over their socio-political system, their system of government, and political, economic and other forms of cooperation between states (Mitrovic, 1972, pp. 246-247). Indeed, international jurisdiction reiterates the sovereign nature of states and their ability to define and enforce laws over persons in their territory. In this same nature, a State may not exercise its jurisdiction on the territory of another State. This principle is flagrantly violated by covert actions, whose very nature are to affect another State’s system of government or their socio-political system. Unless a State gives consent for these actions, or it is allowed through international treaties, the CIA portrays direct disregard for these two principles of international law, as prohibited by treaty and customary law.

B. Non-Intervention

Directly linked to the legal concepts of sovereignty and jurisdiction is the principle of non-intervention. Intervention can be loosely defined as any interference by a State into the domestic or foreign affairs of another State without the legal justification of international law or the consent of the intervened State. It may include armed force and other non-armed forms such as economic and financial, diplomatic, propagandist and

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29 The UN Charter bases the organisation on the sovereign quality of its members, as declared in Article 2 (1) (1948), which all members of the United Nations are party to.
30 In the ICCPR, art 2(1) (1976), for example.
31 Described by Marko Milanovic as, “the nationality principle (or active personality) principle, according to which a state may regulate the conduct of its nationals, even when they are broad; the passive personality principle, according to which a state may, within certain limits, prohibit conduct which directly harms its nationals, even if the perpetrator of the harm is not its national and the conduct takes place outside its territory; the protective principle, according to which a state may punish person who seek to harm its most vital interests…; the universality principle, according to which the state may criminalize conduct which harms the international community as a whole, such as piracy and crimes against international law” (Milanovic, 2008, p. 421).
other subversive interventions. This principle is relevant to covert actions, due to their level of interference in another state’s domestic or foreign affairs. Indeed, the plausible deniability of covert actions is specifically linked to the fact that States know their actions are wrong and seek to distance themselves from the activity. Clearly, covert actions can take both armed and non-armed forms, as evidenced by the CIA’s operations in Chile, Afghanistan and the Iran-Contra Affair.

Intervention has commonly been condemned in international law because it breaches the customary principle of sovereignty. The United Nations codified this principle in the UN Charter in 1945, Article 2(4), which states:

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

Whilst the UN Charter does not define what “threat or use of force” is, some have advocated that this refers to both armed and non-armed force, including the clandestine activities that are integral to covert action. The General Assembly has passed further resolutions prohibiting covert operations, inter alia Resolution 2131(XX), which states that “direct intervention, subversion and all forms of indirect intervention are contrary” to the principles of the UN and “consequently, constitute a violation of the Charter of the United Nations” (1965); Resolution 2625 (XXV), which confirms the principle of non-intervention, stating “armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic, and cultural elements, are in violation of international law” (1970); and Resolution 31/91, which denounces “any form of interference, overt or covert, direct or indirect, including…any act of military, political, economic or other form of intervention in the internal or external affairs of other States, regardless of the character of their mutual relations or their social or economic systems (United Nations, 1976). Thus, as Nunn points out, “the clandestine, coercive and interventionary characteristics of covert action render it forbidden under the international law of the United Nations” (1983-1986).

Further still, the principle of non-intervention has now been defined as customary law. Given its direct link to the customary rule of sovereignty, scholars have commonly reasoned that “if states are equal and sovereign, then they must be allowed the right to an unhindered exercise of their sovereign powers within the framework of their international jurisdiction” (Mitrovic, 1972, p. 257). This common thought is now confirmed through international jurisprudence - particularly relevant is the Nicaragua case (1986). In this instance, the International Court of Justice was forced to consider whether non-

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34 The concept of intervention has been highly debated by legal scholars for over a century. For an excellent overview of this discussion, see Mitrovic, 1972 and Nunn, 1983-1986.


36 inter alia, the Corfu Channel Case (UK v. Albania) (Merits), 1949 and Haya de la Torre Case (Peru v. Colombia), 1951.
intervention was custom,\textsuperscript{37} in order for Nicaragua to prosecute the United States for their arming, training and encouraging the Contra army, as described in section II.B.iii. The court found that the US had violated customary international law, as established by UN resolutions, ICJ jurisprudence and by legal scholars (Tsagourias, 1996). Some scholars, however, have stated that the custom of non-intervention cannot be proven by the ICJ’s decision in the \textit{Nicaragua} case, due to their backwards way of proving that custom exists: by first finding it written in various treaties and UN resolutions, then stating that state acceptance of these rules supply the \textit{opinio juris} element needed to define it as custom, and finally looking vaguely at state practice, which, as shown by US covert actions, does not necessarily align (D’Amato, 1987). Whilst the US was not held responsible due to their lack of effective control,\textsuperscript{38} the ICJ decision and the principle of non-intervention can now be described as customary law, and therefore applicable to US covert actions.

C. Right to Armed Force

i. Principles of Law

There are occasions, however, where states have the right to intervene, such as with the permission of the state, in instances of collective intervention by the United Nations, humanitarian intervention, or self-defence. (Murphy, 2009, p. 118).\textsuperscript{39} The US has used each of these concepts as justification of their intervention, depending on the covert action. These principles, as laid out in international law, need examination to see if covert action is covered by the right to armed force.

a. Intervention by Invitation

A legitimate government may invite a foreign armed force into its territory for any purpose lawful under international law. This public consent must be valid for a particular scope of action and time period. Any action taken beyond this agreement breaches Article 2(4) of the UN Charter. In situations of civil war, an exercise for self-determination or when an internal insurgency gains effective control of an area within the State’s territory, intervention by invitation may become invalid. In these circumstances, the rights of a population to determine their political system and the composition of their government are infringed (Murphy, 2009). The Institut de Droit International’s non-binding Principles of Non-Intervention state that sending armed forces or military volunteers, training forces, supplying weapons, and making territory available to be used as a base of operation, supplies or transit are impermissible towards either party in a civil war (in Schachter, 1983-1984, p. 1643). Given the ‘plausible deniability’ characteristic of covert actions, that they are intended to influence a political, economic or military conditions and that they are many times used in an internal insurgency, as evidenced by the three cases in section II.B., CIA covert actions may not be justified by the principle of intervention by invitation.

b. Collective Intervention

\textsuperscript{37} Due to the Vandenberg clause, the US did not accept the jurisdiction of the ICJ in cases deriving from multilateral treaties (Czaplinski, 1989, p. 152)

\textsuperscript{38} This case will be expanded on in further sections, including the principle of effective control.

\textsuperscript{39} However, these reasons are contested by legal scholars. For an overview of differing opinions, see Nunn, 1983-1986.
Should actions taken by the CIA not have consent by the state, authorisation may be given by the United Nations if it has been determined that there has been a “threat to the peace, breach of the peace or act of aggression” in accordance with Chapter VII of the UN Charter (1945). This can involve both military and non-military sanctions and require the assistance of all member states, as required, to restore international peace and security. Chapter VII can be invoked in both international and internal armed conflicts (Dixon & McCorquodale, 2003). Again, due to the clandestine nature of covert actions, it is highly unlikely that the CIA has received authorisation from the Security Council under Chapter VII of the UN Charter to intervene in state affairs.40

c. *Humanitarian Intervention*

The CIA has sometimes used humanitarian intervention as an excuse for their covert actions.41 Armed intervention by states based on cases of large-scale atrocities or extreme deprivation has been argued as justifiable in international law (Schachter, 1983-1984). However, opinions differ greatly as to whether this is a valid justification for intervention. There is not sufficient evidence for the existence of a right to use force for humanitarian purposes; it has not been expressly condemned by the UN, yet it does not appear to align with the principles found in the UN Charter (Brownlie & Apperley, 2000). Some see this principle as emerging customary law, yet at this point there is still too much contention for its determination. Included under the responsibility to protect, humanitarian intervention encompasses many different norms with varying degrees of legal support (Stahn, 2007). However, states that have attempted to apply this principle have had no Security Council resolutions to give authority for their action (Dixon & McCorquodale, 2003). It is too soon in the development of the principle of humanitarian intervention and the responsibility to protect for the CIA to legally apply this concept to their covert actions.

d. *Self-Defence*

The right to self-defence is a common justification of armed conflict in international relations, particularly in covert actions. According to Article 51 of the UN Charter, States have the “inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security” (1945). The right to self-defence can also be considered customary law, as established in the *Nicaragua* Case (1986). This action, however, has several stipulations surrounding its exercise. First, an armed attack must have occurred against the State claiming self-defence. This action must have been by offending the State’s regular armed forces across an international border, or by armed bands, groups or irregulars that carry out acts of armed force. An armed attack cannot be “assistance to rebels in the form of the provision of weapons or logistical or other support” (*Nicaragua v. United States*, 1986, para. 103-104), disqualifying many justifications for covert actions. Whether that action must be used against a State or if the

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40 This fact could change depending on the case. Covert actions commonly accompany direct, overt military action. If the overt military action has been authorized by the Security Council, then the covert actions accompanying them would be legal through the principle of collective intervention. This situation, however, is very rare.

41 According to the CIA’s intervention in Nicaragua, the Nicaraguan people were suffering human rights violations that were so heinous that the US was forced to intervene.
right of self-defence can be taken against a non-State actor is unclear (Trapp, 2007). It must also be noted that the use of pre-emptive armed self-defence, a tactic commonly used by the US, may only be valid where an attack is imminent, leaving no room for deliberation. This, of course, will vary case-by-case (Greenwood, 2003). Secondly, the action must be a necessary and proportionate defensive response. There must not exist any other reasonable alternatives and it must only be used to eliminate the threat and means being used. At all times, it must not exceed in manner or aim the action which gave rise to exercise the right to self-defence (Murphy, 2009). The ICJ has defined this principle of proportionality as a rule of customary law (Nicaragua v. United States, 1986). In no such case can a third state participate in countermeasures involving force; to do so violates the customary law of non-intervention (Hargrove, 1987). Clearly, covert actions rarely align with this principle. In the Nicaragua case the ICJ found that “training, arming, equipping, financing and supplying the contra forces or otherwise encouraging, supporting and aiding military and paramilitary activities in and against Nicaragua” (1986) could not be viewed as self-defence, as Nicaragua had not committed an armed attack against the US. While some covert actions may be taken in self-defence, the majority, being designed to influence foreign political, economic and military events, do not qualify under the right to self-defence.

ii. International Humanitarian Law

Regardless of the justification to use armed force, all actions are required to abide by international humanitarian law (IHL), or the law of armed conflict. IHL does not aim to eradicate armed conflict from the face of this planet, rather it aims to “restrain the parties to an armed conflict from wanton cruelty and ruthlessness, and to provide essential protection to those most directly affected by the conflict” (Kalshoven & Zegveld, 2001). International humanitarian law is non-derogable and should be followed by all states party to the conflict in all conflict situations, whether international or non-international (Geneva Convention I, Art. 1, 1949).

The majority of the four Geneva Conventions of 1949 apply only in international armed conflicts, that is armed conflicts that involve two or more states. These laws cover protection for wounded and sick armed forces (Convention I, 1949); wounded, sick and shipwrecked armed forces at sea (Convention II, 1949); the treatment of prisoners at war (Convention III, 1949); and the protection of civilians in time of war (Convention IV, 1949). Additional Protocol I added more definition to the delineation of combatants, prisoners of war, and civilians, as well as to the protection of such persons (1977). The laws found in this convention are relevant to the CIA’s covert actions when those actions are a part of an international armed conflict. In situations of non-international armed conflicts, Article 3 common to the four Geneva Conventions is applicable to all parties to

42 The ICJ has taken different standpoints in Military and Paramilitary Activities In and Against Nicaragua Case (Nicaragua v. United States), 1986, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004, and Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda), 2005.

43 For more discussion around proportionality, see generally Dixon & McCorquodale, 2003; Schachter, 1983-1984; Trapp, 2007; and Turner, 1995.

44 As Murphy found regarding US cross-border covert operations from Afghanistan to Pakistan (2009, p. 124).
the conflict, not just govermental forces.\(^{45}\) It states that all parties to a conflict of a non-international character treat humanely all “persons taking no active part in the hostilities,” including non-combatants and those placed *hors de combat* (1949). Also applicable are the laws found in Additional Protocol II (1977), which relate to the protection of victims of armed conflict.

While these facts might seem confusing as to whether they apply to the CIA’s covert actions, many of its premises can now be considered customary law, which are also binding on non-state actors (Doswald-Beck & Henckaerts, 2005). These rules include the responsibility to distinguish between civilians and civilian objects and combatants and military objects, refraining from acts of terrorism, and taking extra precautionary care to spare the civilian population, etc, applicable in both international and non-international armed conflicts (Doswald-Beck & Henckaerts, 2005).\(^{46}\) As the ICJ found in the *Nicaragua* case, the CIA and the US are also obligated by the customary law to “not encourage violations of international humanitarian law by parties to an armed conflict. [States] must exert their influence, to the degree possible, to stop violations of international humanitarian law” (Doswald-Beck & Henckaerts, 2005, p. 509). Also, as defined in the *Tadić* case (1995), “if, in any given armed conflict, a group of irregulars was found to ‘belong’ to a state other than the one they were fighting, then it [is] a *de jure* or *de facto* organ of a foreign state and the conflict necessarily ought to be characterised as international.” States that contribute irregulars to an armed conflict are automatically obligated to IHL (Provost, 2002). Therefore, by supporting insurgent groups through supplying military officials, arming, training, etc, regardless to the status of the armed conflict, whether it is international, non-international, or if the US is a third player in the conflict, the CIA is obligated to abide by international humanitarian law in its covert operations, as defined in the Geneva Conventions, customary law and further jurisprudence.

**D. Protection of Human Rights**

The CIA is also required to abide by the relevant laws of international human rights in their covert actions, whether the actions take place during armed conflicts or not. Indeed, human rights, being inherent to the human being, “cannot be dependent on the situation” (Droege, 2007, p. 324).

The UN Charter committed both the organisation and member states to the universal respect for and observance of human rights (Articles 55 and 56, 1945), which were officially recognised with the development of the non-binding Universal Declaration of Human Rights (United Nations, 1948). They have further been codified in treaties, such as the International Covenant of Civil and Political Rights (ICCPR, 1966) and the International Covenant of Economic, Social and Cultural Rights (ICESCR, 1966). Human

\(^{45}\) These situations must be between a governmental armed force and a dissident armed group, which is under “responsible command” and exercises control over a territory in the State that allows them to carry out such armed operations. They are not “situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature” (Additional Protocol II, Article 1 (2), 1977). Rodley describes Common Article 3 acts of a non-international character as falling “somewhere above ‘a mere act of banditry or an unorganized and short-lived insurrection’ but below hostilities of civil war dimensions” (Rodley, 1993, p. 313).

\(^{46}\) For an excellent summary of customary international humanitarian law, see Henckaerts, 2005.
rights “mediate the relationship between, on the one hand, governments and, on the other, those who are subject to that power” (Rodley, 1993, p. 300). States are the primary duty-bearers for human rights; it is States that hold the obligations in international law. According to the United Nations (2006), States have the obligation to respect, protect and fulfil the human rights found in these documents. States are legally bound depending on which treaty they have ratified. For instance, the US is legally responsible to respect, protect and fulfil the rights found only in the ICCPR, because they have not ratified the ICESCR. However, there is movement through jurisdiction to no longer treat human rights as exclusive to domestic jurisdiction, rather as a matter of concern to the international community and international legal system (Prosecutor v Tadic (Jurisdictional Phase), 2006). A key principle to focus on is that the State may fail in its duty to human rights by not protecting rights holders “in its territory and subject to its jurisdiction” (ICCPR, Article 2(1), 1966) from human rights violations. The human rights violations would consist in the omission of the state to prevent the actions.

As stated above, states are obligated to respect, protect and fulfil human rights in all situations, as soon as the treaty comes into force. Yet states still commit massive breaches of human rights. Very rarely, however, will a state claim that it is allowed to violate human rights. Instead, it will attempt to justify its actions through reservations to treaties or a legitimate derogations clause. The Nicaragua case found that by doing so though, a state just affirms its obligation to protect human rights.

Human rights obligations are particularly relevant to the CIA’s covert actions. Firstly, by supporting groups that commit human rights violations, the CIA is implicating itself against the US’ humanitarian and human rights principles. Secondly, human rights may be able to be applied extraterritorialy (Droege, 2007). Human rights violations in other countries may be able to be held accountable to states outside of their territory, and indeed any customary human rights laws must be abided by both at home and abroad through the principle of extra-territoriality, which is “any action that has effect outside the defined territory of a State” (Skogly, 2006, p. 5). Skogly found that extraterritorial jurisdiction of human rights is permissible unless it conflicts with international legal principles through jurisprudence by the ICJ (2006). Further, states should take all reasonable and appropriate measures to ensure the observation of international legal obligations by other states, and rather than this being seen as an unfriendly act, it should

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47 To respect human rights, a State should not interfere with their enjoyment; to protect, a State must take steps to ensure that third parties do not interfere with their enjoyment; in order to fulfil human rights, states must take steps to progressively realise the rights, including to provide the means to facilitate and provide for its realisation (Steiner, Alston, & Goodman, 2008).

48 When ratifying a treaty, a state may limit the treaty’s effect as long as it is within the overall object and purpose of the treaty, or they may suppress certain rights in times of public emergencies that threaten the life of the nation (Steiner, Alston, & Goodman, 2008). Some human rights, though, such as the right to life or freedom from torture, may never be derogated from (ICCPR, Article 4, 1966).

49 The ICJ held that if a State “defends its conduct by appealing to exceptions or justifications contained within the [recognized international law] rule itself, then whether or not the State’s conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule” (Nicaragua v. United States, para. 185, 1986).

50 The Security Council has also condemned human rights violations by foreign groups, implying that human rights can be violated by troops abroad (Droege, 2007).

51 Such as the Nicaragua case (1986) and the Wall Advisory Opinion (2004).
“be considered as a reflection of legitimate community interest” (Duffy, 2006). The US should therefore abide by its obligations and protect human rights particularly vulnerable in covert actions, such as the right to life,\textsuperscript{52} freedom against torture,\textsuperscript{53} freedom from arbitrary arrest or detention,\textsuperscript{54} and the freedom of thought\textsuperscript{55} and opinion.\textsuperscript{56}

Specifically relevant to covert action is the right to self-determination. The ICCPR guarantees all peoples the right to “freely determine their political status and freely pursue their economic, social and cultural development” (Art. 1(1), 1966); the ICESCR supports this right as well (Art. 1(1), 1966).\textsuperscript{57} This right has a direct relation to the customary laws of sovereignty and non-intervention; some may consider the right to self-determination as having reached customary status. By this nature, covert actions that intend to influence or sway the political or economic status of another government fully violate this essential human right.

\textsuperscript{52} ICCPR, Article 4, 1966 – non-derogable
\textsuperscript{53} ICCPR, Article 7, 1966 – customary law and non-derogable
\textsuperscript{54} ICCPR, Article 9, 1966
\textsuperscript{55} ICCPR, Article 18, 1966
\textsuperscript{56} ICCPR, Article 19, 1966
\textsuperscript{57} This right is also supported in multiple other treaties, declarations and resolutions, such as the UN Charter (1945), General Assembly Resolution 2625 (XXV): Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, 1970, and international humanitarian law (First Protocols Additional to the Geneva Conventions of 12 August 1949, Art. 1, 1977).
IV. The Responsibility Gap: Accountability and Responsibility

As the analysis above shows, there are many international legal obligations that are relevant to the CIA’s covert actions. From the actions exemplified in section II.B, the CIA regularly commits various violations of international law, from customary to humanitarian to human rights. Given that the actions take place on the territory of another country, the majority of the repercussions of the US’s violations of international law are felt by non-Americans, particularly for human rights that are breached. The ICJ determined in the *Nicaragua* case that in the covert actions committed by the CIA, with the support of the US government, there is “no doubt that the United States had violated international law” (Czaplinski, 1989), including the principles of state sovereignty, non-intervention, use of force, and humanitarian law. However, the ICJ also declared that the US was not able to be held responsible for the violations committed. Why is this? How can states breach international law and yet not be obligated to take responsibility for their actions? This section will address the issues of state responsibility in international law, before examining further the legal deficiencies that allow the US and others to not be held responsible.

A. State Responsibility

According to Provost, “state responsibility is one of the foundations of international law” (2002, p. 103). State responsibility is triggered when a state commits an internationally wrongful act, which can be an action or an omission, that is “attributable to the State under international law and constitutes a breach of an international obligation of the state” (ILC Articles on State Responsibility, Art. 2, 2001). According to the International Law Commission’s (ILC) Articles on State Responsibility, a breach of an international obligation occurs “when an act is not in conformity with what is required of it by that obligation, regardless of its origin and character” (Art 12, 2001). Obligations may originate from, *inter alia*, customary law, treaties or a unilateral act. Violations of the international legal system, once attributed to a State, carry obligations and responsibility. Covert actions clearly violate international legal obligations, but are they attributable to the US? If so, what must the US do to remedy its actions in international law? These issues of state responsibility and covert actions will be discussed below.

iii. Attribution

Articles 4 to 11 of the Articles on State Responsibility describe how conduct is attributable to a state (2002). Primarily, the conduct of any State organ, which can include any person or entity that has that status internally as well, is considered an act of that State no matter what position it holds. An act is also attributable to a state when a person or entity exercises an element of governmental authority. By this fact, the CIA, created by

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58 Specifically, the mining of Nicaraguan ports, which the US failed to tell civilians about to mitigate the damage, and encouraging persons or groups engaged in the conflict to violate humanitarian law though the publication of “Psychological Operations in Guerrilla Warfare” (*Nicaragua v. United States* (Merits), 1986, pgs. 115-130).

59 The ILC’s Articles on State Responsibility were completed in 2001 after more than 40 years of deliberation. They were adopted by the General Assembly shortly after with virtually full consensus. While the principles raised in these articles are not legally binding, there is movement towards creating a convention on state responsibility (Crawford, 2002). For more information on the history and overview of the articles, see (Bodansky & Crook, 2002)
legislature, can be considered an organ of the State. This is also reinforced by the level of authorization given to the CIA by the President and Congress. Any conduct executed by the CIA is attributed to the US by these standards. Additionally, any act that is conducted on the instructions of a State or any acts conducted by a being that exercises elements of governmental authority, whether the act exceeds its capacity or instructions is recognised as an act of the State (ILC, Article 7 and 8, 2001). Therefore, any actions committed by the CIA will be considered acts of the US whether they were conducted with Presidential or Congressional approval or not.

Any entities acting on behalf of a State should consider the legality of any actions taken in conjunction with another State. Any aid or assistance to another State in the execution of an internationally wrongful act could lead to the international responsibility of the former State, if the former State knows what could happen and if the former had committed the act themselves it would be considered an internationally wrongful act (ILC, Art 16). Further, the conduct of State organs placed at the disposal of another State can be attributed to the former, if it is acting with the former’s governmental authority (ILC Art 6, 2001) and without the latter’s consent. Also, through Article 10, when insurgent groups become the legitimate government, or succeed in establishing a new State, the actors in that movement will be held responsible for any violations of international law. This is “without prejudice to the attribution to a State of any conduct, however related to that of the movement concerned, which is to be considered an act of the State by virtue of the former articles” (ILC Art. 10.3, 2001). By this manner, with the authority given by the US government to intervene in the affairs of another state, such as Afghanistan, Chile or Nicaragua, any conduct taken there by the CIA is recognised as the actions of the US, even if the insurgency is successful.

The International Court of Justice has examined issues of state responsibility in its jurisprudence, prior to the publication of the Articles on State Responsibility. In the Nicaragua case, the court examined whether the actions of the Contras, having been recruited, organised and commanded by the CIA, were essentially acts of the United States, with no autonomy of itself. Whilst in this case, the court found that international laws had been breached and could be attributed to the US extraterritorially, they also concluded that the US could not be held responsible towards those violations because it could not be proved that the US “directed or enforced the perpetration of the acts contrary to human rights and humanitarian law” (Nicaragua v. United States, 1986), known as the principle of effective control. This issue is supported in the Articles on State Responsibility (Art. 16-18, 2001). While this principle will be further examined in Section IV.B., it must be noted that in order for a State to be justicably responsible, it

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60 The commentary for the Articles on State Responsibility explain,

*The notion of an organ “placed at the disposal of” the receiving State is a specialized one, implying that the organ is acting with the consent, under the authority of and for the purposes of the receiving State. Not only must the organ be appointed to perform functions appertaining to the State at whose disposal it is placed. In performing the functions entrusted to it by the beneficiary State, the organ must also act in conjunction with the machinery of that State and under its exclusive direction and control, rather than on instructions from the sending State* (Crawford, 2002, p. 103).

When these conditions are fulfilled, the receiving State is attributable for any actions taken.

61 As well as other advisory opinions, such as the *Wall* Advisory Opinion (2004) and *Namibia* Advisory Opinion (1971).
must be found that they had complete of effective control over the organ violating international law.

ii. Remedies

Once a State has been found responsible for violations of international law, two types of legal consequences entail to remedy the situation. This can now also be defined as a right to a remedy, as the ICJ found in the Wall Advisory Opinion (2004). The Security Council has also found that there is a right to a remedy for gross violations of international human rights law and serious violations of international humanitarian law that include: “(a) equal and effective access to justice; (b) adequate, effective and prompt reparation for harm suffered; (c) access to relevant information concerning violations and reparation mechanisms” (Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, 2005, para. 11). According to the Articles on State Responsibility (2001), states gather new obligations in exercising the right to a remedy, namely to cease and not repeat the act, and the duty to make reparations.

After state responsibility for an internationally wrongful act is established, the Articles of State Responsibility place the state under an obligation to cease the act, if it is continuing, and to offer appropriate guarantees for its non-repetition (Art. 30, 2001). The function of cessation is to end the violation of international law, which protects the interests of the injured state as well as the international community as a whole through the preservation of the rule of law. Requests for non-repetition may take many forms, including the adoption of specific measures or acts and other specific conduct to be taken (Crawford, 2002). This, however, is dependent on the situation.

Once the action has been ceased, the responsible state has a further obligation to remedy the violation of international human rights law. Full reparation for the act can include restitution, compensation, and satisfaction, either singularly or in combination (Articles on State Responsibility, Art. 34, 2001). Through taking restitution measures, the state must re-establish the situation that existed prior to their actions, as long as the measure is proportionate and possible (Art. 35, 2001). Alternatively, the state can compensate for the internationally wrongful acts taken by covering any financially assessable damages (Art. 36, 2001). Lastly and often completed in conjunction with another measure, states may satisfy the wrongfulness of the action through an acknowledgement of their responsibility, a formal apology or expressing some other form of regret (Art. 37, 2001). These measures, for which support can also be found by the UN

62 States are also able to instigate a third form of remedy by taking countermeasures. However, these measures “may only be used to induce a state to cease a wrongful act and to make reparations; they must be commensurate with the injury suffered; and they may not affect obligations that benefit the individual or the international community as a whole” (Bodansky & Crook, 2002). Because of their limited scope, countermeasures will not be discussed here.

63 From an individual level, the right a remedy is generally thought to only be found in international human rights law. However, the complementarity of international humanitarian law and international human rights law ensures that victims will not be left without justice. The jurisdiction of international human rights bodies can provide redress to individual victims, but is still subject to the optional acceptance by the state (Provost, 2002). From a state level, jurisdiction is much different, as will be explained in this section.
Security Council (Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, 2005), should be proportionate to the action taken, and once accomplished, the responsible state can be assumed restored for that action.

B. Legal Deficiencies

Regardless of the measures indicated in international law and the ILC’s Articles on State Responsibility, states are often still not held legally responsible. This means that victims of breaches of international legal principles, international humanitarian law and international human rights law do not have the appropriate remedies taken in order to return their state and their lives to normal. This is because many legal deficiencies exist in international law, which enable the non-accountability of states. These deficiencies will be considered here.

i. Jurisdiction

According to the ICJ, there is a “fundamental distinction between the question of the acceptance by a State of the Court’s jurisdiction and the compatibility of particular acts with international law. The former requires consent; the latter question can only be reached when the court deals with the merits after having established its jurisdiction and having heard full legal arguments by both parties” (Legality of the Use of Force (Yugoslavia v USA) Summaries of Judgements and Orders, 1999). In the Legality of the Use of Force cases (1999), the ICJ found that it did not have jurisdiction over the case of Yugoslavia v USA, because the US had not given consent specific to the case and had no intention to do so. Therefore, the ICJ was not able to comment on the legality of US use of force against Yugoslavia in the specific case. Whether the US should have been found responsible in this case will never be known.

This legal deficiency is quite common and is one of the primary reasons why the ICJ is able to consider so few cases. It is the general practice of courts, treaty bodies and other monitoring mechanisms to examine whether they have jurisdiction over the particular case before commenting on its legal merits. Also, often all domestic and regional remedies must have been exhausted prior to the case’s examination; at other times, all a committee can do is comment on a situation, rather than holding a state legally responsible and obligated to remedy its violation. Even if a State consents to a court or other body to settle a case, “generally, that State cannot be compelled to comply with any decision which results” (Dixon & McCorquodale, 2003, p. 572). It is very easy for states to evade their responsibility by simply denying, contesting or ignoring the jurisdiction of a court. This reduces the ability of the ICJ to hold states responsible for violations of

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64 Nor indeed over any of the other cases addressing the legality of the use of force brought before the court by Yugoslavia or Serbia and Montenegro.
65 The United States, when ratifying the Genocide Convention, which this case was examining, stated that the specific consent of the US is required for any case the state is a party to.
66 The USA, inter alia, contests the constant jurisdiction of the ICCPR’s Human Rights Committee, and therefore generally ignores its comments, for example (Droege, 2007).
67 When it became clear that the international dispute between the US and Nicaragua was to be examined before the ICJ, the US made a declaration limiting its Optional Clause Declaration. This would have extended the lack of compulsory jurisdiction of the Court to include any dispute
international law and decreases the possibility that the ICJ may clarify and develop
ternational law further.

**ii. Effective Control**

In the *Nicaragua* case, the ICJ was able to exercise jurisdiction over the case and
settle its legal merits on customary law. Even though the actions committed by the US
with the Contras were found to be illegal and inappropriate, the US was not found
responsible for the violations of international law. This was because the court held that
the US did not have ‘effective control’ over the territory or personnel (1986). The
principle of effective control is another legal deficiency that allows states to violate
international law without being held accountable or responsible.

In the *Nicaragua* case, the ICJ applied two tests to apply responsibility to the US.
They first examined whether the relationship between the US and the Contras was one of
complete control where the relationship is “so much of control on the one side and
dependence on the other” (Milanovic, 2008, p. 439) that the Contras could be considered
a *de facto* organ of the US, that is an organ whose actions are considered acts of the state.
The second test is that of effective control, which is examined only once the former has
not been satisfied. A State has effective control of another organ when the organ’s actions
were indeed conducted by the State, even though the organ could not be considered *de jure* or *de facto* of the State. When a State has complete or effective control over a
population, obligations in international law accompany it. The State that has complete
or effective control can also be held responsible for any violations of international law.

Droege finds that effective control is a reasonable limitation, “since otherwise states
would be held accountable for violations over which they have no command, or there
could be clashes of jurisdiction between several states” (2007, p. 335). Yet Rodley raised
the point that “there may be difficulty in identifying whether a particular armed
opposition group should be considered as falling above or below the threshold” (1993, p.
313). In the *Nicaragua* case, the ICJ found that a number of operations were decided by
and planned for, if not directly by US advisors, then in collaboration with a US team and
on the basis of intelligence and support supplied by the US. However, they could not find
that *all* acts, at every stage of the conflict, were tactically strategized solely by the US.
The Court was looking for total dependence of the Contras to the US. Therefore, the
Court held the view that the Contras alone remained responsible for their violations of
international law, international humanitarian law in particular (1986), even though the
violations were much stronger and prevalent with the weapons, strategy and training

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with any Central American State. However, since this reservation became after it was known that
the case was being brought to court, the ICJ concluded that the limitation had no effect on the
case (Dixon & McCorquodale, 2003).

68 The UN Human Rights Committee stated,

*States Parties are required by article 2, paragraph 1, to respect and to ensure the
Covenant rights to all persons who may be within their territory and to all persons
subject to their jurisdiction. This means that a State party must respect and ensure the
rights laid down in the Covenant to anyone within the power or effective control of that
State Party, even if not situated within the territory of the State Party...This principle also
applies to those within the power of effective control of the forces of a State Party acting
outside its territory* (UN Human Rights Committee, 2004, para. 10)
supplied by the US. The principle of effective control, whilst an established indicator of legal responsibility, can still leave victims of international law without a form of remedy.

iii. Enforcement

The ICJ in the *Nicaragua* case, however, did find the direct military activities of the US, such as mining Nicaraguan ports, as unlawful and triggering responsibility. The Court ordered the US to cease and desist from any action that would limit, endanger or obstruct access to and from Nicaraguan ports. The US was also ordered to remedy the situation caused by their breach of international law. The US, however, did not. International law notoriously lacks the ability to ensure the enforcement of international law. This threatens international peace and security and can hinder the development of international law (Dixon & McCorquodale, 2003). Therefore, even if states are found to be responsible for violations of international law and ordered to remedy the situation, victims do not always achieve restitution, compensation or satisfaction.
V. A Judicial Transformation: Holding the US Accountable

The CIA’s covert actions have led to a lot of repercussions, from replacing a democratically elected government with a military junta dictatorship, to supporting, arming and training insurgent groups who have committed massive violations of human rights with CIA support before and after becoming the legitimate government. Yet, the US has not been found culpable for playing an essential role in this process because international courts have found that they did not have effective control of the violation. But for the actions of the CIA through intervening in the affairs of another state, would there have been massive violations of international law? If the CIA had not funded the Chilean military and spread propaganda to induce a military coup, would the military, led by the brutal Pinochet, have come into power? Would 25,000 people have been killed by Pinochet’s junta and would violations of fundamental human rights have taken place were it not for US intervention? Would 2.8 million Afghans be forced to flee Afghanistan and would the Taliban had come into power to commit massive violations of human rights if the US had not armed and supported the mujahedin? If the CIA had not created a secret war in Nicaragua by supplying the Contras with arms, training and manuals, would US armed forces be responsible for the deaths of civilians? Would the US have been forced to barter with Iran to get money, bringing international condemnation upon itself for its actions? It is argued here that were the CIA’s interventions eliminated, the effects would not have happened or would have been much less severe because of lack of US involvement. So why should the US not be held responsible for it violations of international law?

In the particular situation where a State tried to hold the US responsible for its actions, the Nicaragua case, the US was either found to not have effective control of the insurgent group, or patently ignored any remedies ordered by the court. The ILC’s Articles on State Responsibility add more definition to the international legal framework for holding states responsible to their obligations in international law. The CIA as an organ of the state can implicate the US by its actions taken in other countries without their consent, by aiding and assisting internationally wrongful acts. However, more development is needed in international law to hold the US accountable to its obligations in, and responsibilities for violations of, international law through its covert actions. There is a changing consciousness in the international judicial forum that increasingly subjects international disputes to binding adjudication. Each new precedent transforms the applicability of international law and removes the political control of international decisions from biased states to an independent international judiciary (Dixon & McCorquodale, 2003). This has been advanced further through the creation of the International Criminal Court (ICC), which now holds individuals responsible for gross violations of human rights\(^{69}\) and the ICC’s definition of the crime of aggression\(^{70}\), which

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\(^{69}\) Specifically the international crimes of genocide, crimes against humanity, war crimes, and aggression (Rome Statute of the International Criminal Court, 1998).

\(^{70}\) Aggression is defined as “the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.” The ICC defines an act of aggression as “the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations,” including using armed forces and weapons against the territory of another State, blocking the ports or coasts of another State, attacking another State’s armed forces by land, sea or air, allowing a second
may become applicable to the CIA’s covert actions, should the US become party to the Rome Statute.

The principle of complete or effective control is not a strong enough test to hold the US responsible for actions that were blatantly illegal in international law.\(^7\) The fact that states can limit the jurisdiction of international courts so that their illegal activities can be conducted without ramification is unacceptable, as is their intentional ignorance to remedies for victims of their actions. The international judiciary system, being alterable, needs more development in the areas of jurisdiction and enforcement and of the principle of control over territory and person in order to hold states accountable to their obligations in international law, to maintain a more permanent international peace and security, and to reduce violations of human rights.

In order for the US to be found responsible for its violations of international law, the law needs to be developed to the requisite standards. Courts should consider any violation of international law brought before it, whether the State accepts the jurisdiction of the court or not. It is recognised that this would have massive budgetary implications for the UN, however, to ensure the maintenance of international peace and security, States must be aware that their violations will not be hidden from the public eye. By having each violation be publically known, enforcing responsibility and remedies for violations would become much less problematic. Utilising the Universal Periodic Review\(^72\) to assist in this enforcement would also be an effective way to hold States accountable to their responsibilities. This recent development is proving to be a useful tool; the majority of states that have been examined are attempting to implement the changes recommended by other UN Member States.

Lastly, the effective control threshold must be lowered to a degree necessary to show direct involvement in the breach of international law. In 2004, in the Ilascu and Others v. Moldova and Russia case, the European Court found Russia to be responsible for human rights violations because it had effective authority, or at the very least decisive influence in the territory, due the presence of a small level of troops and continued military, political and economic support. The Court stated that in exceptional circumstances, the acts of a State “performed outside their territory, or which produce effects there, may amount to exercise by them of their jurisdiction” (2004, para. 314). Therefore, jurisprudence exists in regional human rights mechanisms showing a precedence for lowering the threshold of control to hold states responsible, particularly to having decisive influence over a territory. It is also recommended that States should be held complicit in violations of international law. Complicity can be considered a reasonable threshold, as it will oblige both home and foreign states to take responsibility according to their level of involvement in the situation. Skogly finds that direct complicity is

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\(^7\) Or even in domestic US law, although this topic is not addressed here. See Eyth, 2002-2003 for an overview of the illegality of covert actions in domestic US law.

\(^72\) A unique process that is a part of the Human Rights Council, where UN Member States examine the human rights records of each other and recommend improvements. The contributions of civil society non-governmental organisations are also considered in this process. States are examined every four years (Steiner, Alston, & Goodman, 2008).
specifically related to Article 16 of the ILC’s Articles on State Responsibility (2006, p. 42) and can be defined as when a foreign state intentionally participates in conduct with the foreknowledge of its breaches of international law. Direct complicity can include actions such as providing weapons, support or training to groups committing violations of international law, actions actively engaged in by the CIA. Should international jurisprudence be developed to the requisite standard, including the responsibility of States when they have decisive influence or are directly complicit to violations of international law, victims of any breaches would receive the remedy they have a right to.
VI. Conclusion

Former CIA Director William Colby has admitted that the US could end its covert actions without damaging the national security of the US (Ohly, 1975). Yet the US still uses covert actions to further its national policies to this day. This affects not only the US’ legal principles, but can also lead to the “butterfly effect.” So many state affairs are influenced by outside forces, often to a degree that makes it impossible to control them through domestic regulations. Judge Nagendra Singh, President of the ICJ during the Nicaragua case, stated “Force begets force and aggravates conflicts, embitters relations and endangers peaceful resolution of the dispute” (Nicaragua v USA, Summaries of the Opinions Appended to the Judgement of the Court, 1986). This paper has shown some of the effects that the CIA’s covert actions can have on states, people and politics. It has also shown that these actions are substantial breaches of international law, international humanitarian law and international human rights law, including violations of the customary principles of sovereignty and non-intervention. Yet for these violations no state is being held accountable. Therefore, victims are not getting the remedies they deserve.

Based on the ILC’s Articles of State Responsibility, the US may be held accountable to actions taken by the CIA. Even though there is no legal precedent yet that would hold the US’ covert actions accountable to international law, the international judicial system is ever-strengthening and may soon develop jurisprudence that would obligate states to legal remedies for victims of covert actions. The areas of jurisdiction, enforcement and the principle of effective control were raised as issues that need particular development in the international legal system. While regional mechanisms have found that States can have decisive influence in a territory that obliges them to be held responsible for their actions, there is little international precedence that will force all States to be held accountable to the same standard. It should also not be possible for a State to evade complicity in breaches of international law. Offended States should be encouraged to bring cases to international courts to assist in this legal development.

No state would deny that the people of a nation have a right to determine their political, economic, social and cultural status. The US’ covert actions directly contravene this right. Should the US like to remove its reputation as an imperial power that only pursues its national interests, no matter the cost to the sovereignty of another State, it should refrain from applying covert actions in general, as well as taking responsibility for the effects of their intervention. Marshall found that covert action embodies in its purest form the philosophy that ends justify the means. “Where such tools exist, abuses will follow whether the ends are good or not” (1987, p. 224). This is not an appropriate approach to international relations. The US should have higher standards.

73 Recently, Fox News reported that the US ordered an increase in covert military action in the Middle East (Fishel, Emanuel, & the Associated Press, 2010).
74 The concept that small things can have large, widespread, unknown consequences (Dizikes, 2008).
## Appendix: Acronyms

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<tr>
<th>Acronym</th>
<th>Full Form</th>
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<tbody>
<tr>
<td>CIA</td>
<td>Central Intelligence Agency</td>
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<tr>
<td>DCI</td>
<td>Director of Central Intelligence</td>
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<td>ICC</td>
<td>International Criminal Court</td>
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<td>ICCPR</td>
<td>International Covenant of Civil and Political Rights</td>
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<td>ICESCR</td>
<td>International Covenant of Economic, Social and Cultural Rights</td>
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<td>ICJ</td>
<td>International Court of Justice</td>
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<td>IHL</td>
<td>International Humanitarian Law</td>
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<td>ILC</td>
<td>International Law Commission</td>
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<td>NSC</td>
<td>National Security Council</td>
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<td>OHCHR</td>
<td>United Nations Office of the High Commissioner for Human Rights</td>
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<td>OSS</td>
<td>Office of Strategic Services</td>
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<td>UCLA</td>
<td>University of California at Los Angeles</td>
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<td>UN</td>
<td>United Nations</td>
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<td>UPR</td>
<td>Universal Periodic Review</td>
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<td>USAID</td>
<td>United States Agency for International Development</td>
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