Retaliation and Irregular Warfare in Contemporary International Law

The sudden expansion of the state system in mid-twentieth century has produced many unstable governments and quasi-states. These entities possess few of the traditional attributes of statehood and consequently provide both motive and opportunity for foreign intervention through indirect means. In addition, the bi-polarity of military power, the process of decolonization, the undetermined status of many territories, the numerous ideological struggles, the ready availability of weapons through various programs of competitive arms shipments have in combination encouraged revolutionary and guerrilla movements.

Even though the activities involved are often directed toward undermining the legitimacy of a particular political order, they are usually difficult to assimilate to the concept of "armed attack," and thus action against such movements cannot be justified as self-defense, even where a clear and effective link exists between such groups and the government whose territory is used for organization and sanctuary.[1] It is generally agreed that self-defense is the only lawful use of force permitted under the Charter apart from Security Council action authorized under Chapter VII. Consequently, given the paralysis of the Council, states who are targets of irregular attacks may be left with no lawful means of defense.[2]

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[1]*See* Garcia-Mora, *International Responsibility for Hostile Acts of Private Persons Against Foreign States*, 109ff (1962); Brownlie, *International Law and the Activities of Armed Bands*, 7 INT'L & COMP. L. Q. 712-13 (1958). When dealing with situations where irregular forces are operating, characterization of the participants becomes extremely important. This writer prefers irregular forces armed bands, or guerrillas as the most neutral despite Richard Falk's argument that there is no noncumbersome neutral terminology. These terms do find some support in the literature. The use of value-laden terms does tend to indicate prejudgment and so there is no justification for using terms such as terrorist, guerrilla and freedom fighter as legal equivalents if one is concerned with impartial inquiry. *See* Falk, *The Beirut Raid and the International Law of Retaliation* 63 AM. J. OF INT'L L. 415 (1969).

[2]As both Falk and Bowett point out in recent articles, the use of force by way of reprisals is illegal under the Charter. Falk, *supra* note 1; Bowett, *Reprisals Involving Recourse to Armed Force*, 66 AM. J. OF INT'L L. 1 (1972) and sources cited note 2.

The primary concern of this essay is the regulation of guerrilla forces which operate across recognized international boundaries and/or cease fire lines. These guerrilla forces may operate either within, or in the absence of, a formal state of armed conflict. Such movements occupy an intermediate position between the organization of hostile military expeditions and private revolutionary activities. Though guerrilla activities and other indirect means of coercion occupy a separate and distinct position on the influence continuum, difficulties in making appropriate legal judgments arise because no clear boundaries exist either at the lower end of the continuum between permissible and impermissible means of influence, or at the upper end between indirect and direct uses of coercion.

Attempts to define the upper boundary have engendered considerable debate. Given that self defense is the only legitimate use of force, and that "collective security" guarantees have been ineffective in protecting vital interests, states have endeavored to broaden the concepts of "aggression" and "armed attack" to include some forms of indirect coercion. This would enable a state to justify action against indirect coercive activities as measures of self, or collective self-defense. Not unexpectedly, the result has been that the nature of the circumstances in which indirect coercion may justify the resort to force in self-defense has remained largely undefined.

These differences of opinion are particularly evident in the recent debates in the Special Committee on the Question of Defining Aggression. In the three most recent proposals on defining aggression submitted for consideration of the Special Committee, only the proposal sponsored by Canada, Italy, Japan, the United Kingdom and the United States defined the sponsorship of subversion and irregular forces as "armed attack."[3]

The other two proposals included these lesser forms of violence within the general definition of aggression, but differentiated between the response permitted to "direct" aggression and that permitted to "indirect" aggression. Though the exact limit of responses to indirect aggression are not addressed in these other proposals, the general thrust of their provisions indicates that indirect aggression is illegal, but that the use of indirect methods by one state against another should not permit the target state to invoke the right of self-defense under Article 51.[4]

There is substantial evidence which indicates that the sponsorship of indirect aggression is an international delict. This has been a common theme in the deliberations of the Sixth Committee, the various Special

[3] 8 INT'L LEGAL MATERIALS 665 (May 1969).

[4] *Supra* note 3, 661-65 especially at 664 para. 7. *See also* 8 UN MONTHLY CHRONICLE 25 (March 1971) and 8 UN MONTHLY CHRONICLE 44-46 (April 1971) for summaries of the debates over these proposals.

Committees, as well as in General Assembly Resolutions. The proposition that subversion is not to be "tolerated, connived at, or acquiesced in, has received almost unanimous acceptance."[5] Despite general agreement on the principle that the use of indirect methods are illegal, the critical problem of delimiting permissible responses remains.

In the case of coercion short of war the many different forms of coercive influence have remained largely undifferentiated in law. Yet sporadic acts of sabotage and occasional border raids would seem to give rise to different factual situations from those which encompass sustained operations on national territory. The type of activity, its duration, and the burden it places upon the object state would all seem to be relevant to the evaluation of situations where guerrillas are operating.

But most writers and statesmen have focussed upon overt uses of force and have treated indirect coercion as an undifferentiated whole. Hence, the major divergence among contemporary writers relates to differing perspectives on the consequences of permitting lesser forms of coercive force to be used. Bowett and Stone argue that in the absence of effective action by the organs of the United Nations, vital interests of states may be adversely affected if states are not permitted a resort to force against such provocations.

In this view, if force is not permitted as a sanction, unscrupulous states may act with impunity since law-abiding states would have no redress.[6] By contrast, McDougal, Brownlie and Falk argue that the overwhelming interest in order, and the potential cost of the resort to force with modern weapons, counterbalance the occasional lesser wrongs which may go unredressed because of the prohibition on force.[7]

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[5]*See for example:* UNGAOR Twenty-first Session, Annexes, Agenda Item 87, UN Doc.1/6547 (1966); UN GAOR Twenty-second Session, Annexes, Agenda Item 87, UN Doc. 1/6955 (1967); *Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty* U.N. GAOR Res. 2131 (XX), 21 December 1965; *reaffirmed* as Res. 2225 (XXI) 19 December 1966. Of course Richard Falk has argued that "the politics of terror and the use of exile sanctuaries to disrupt 'the enemy' society enjoys an ambiguous status in recent international experience." *supra* note 1 at 424. What Falk fails to do is examine the comparability of his examples. It is highly questionable that any or all of them can or should be regarded as law creating "facts." Surely the status of governments in exile during World War II is qualitatively separable from that of the status of the Bay of Pigs invasion force.

[6]Stone argues that indirect forms of coercion have survived the Charter, and so war is lawful as a response even where a claim of self-defense cannot be justified. LEGAL CONTROLS OF INTERNATIONAL CONFLICT, 92-103 (1959). Bowett's position is similar except that he would permit responses to indirect attack to be labelled self-defense. SELF-DEFENSE IN INTERNATIONAL LAW, 23-25 (1958).

[7]MCDOUGAL and FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER, 207-208 n. 193 (1961); BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES, 279, 373 (1963); FALK, *The Relevance of Political Context to the Nature and Functioning of International Law: An Intermediate View,* 145 in HOFFMAN AND DEUTSCH (eds.), THE RELE-

Both of these positions seem extreme. On the one hand the dangers of nuclear war are obvious, but not every use of force or every conflict set carries with it the potential for escalation. The risk of nuclear holocaust is but one reason for the increased use of indirect methods. At least as important in many cases is the simple fact that guerrilla operations do not normally put a heavy strain on resources, and in unstable situations promise a substantial return for a minimal investment. Secondly, as long as states perceive deterrence to be stable, even major nuclear states will be able to engage in relatively extensive overt military operations in areas which are of peripheral interest to other nuclear powers. And, lastly, "lesser wrongs" have been more than occasional.[8]

On the other hand, not every use of indirect coercion or even every use of irregular forces is of sufficient scope and intensity to permit the target state a resort to force which may involve the crossing of a territorial frontier. To make such an argument comes close to identifying the right of self-defense with the entirety of a state's legally protected interests, and thus to equating self-defense with the right of self-help. Granted that in the absence of effective United Nations action a substitute norm is needed, it still does not follow that such a norm should license the use of force at will.

As Brownlie points out, the problem of guerrilla warfare may be better understood if specific factual situations are enumerated. Thus the following factual relationships may arise:

1. The organisation, with governmental complicity of armed bands of emigrés or other irregular groups on national territory, for incursion into the territory of another state or states;
2. organisation of such bands by governments on non-national territory for use in third states;
3. support for armed bands already operating on the territory of other state;
4. toleration, with full knowledge of the organisation of bands on national territory;
5. negligence in control of armed bands and raiding groups operating from national territory;
6. inability to control such bands on national territory.[9]

VANCE OF INTERNATIONAL LAW, (1968). In practice McDougal's position is much closer to that of Stone than that of Falk. *See* McDougal, *The Soviet-Cuban Quarantine and Self-Defense*, 57 AM. J. OF INT'L L. 597-602 (1963). For an analysis *see* KELSEN, PRINCIPLES OF INTERNATIONAL LAW (2nd ed. revised by ROBERT W. TUCKER), 75-80 and nn. 69-70.

[8]*See* BUCHAN, WAR IN THE MODERN WORLD (1966); GANN, GUERRILLAS IN HISTORY 60-78 (1971); BELL, THE MYTH OF THE GUERRILLA: REVOLUTIONARY THEORY AND MALPRACTICE (1971).

[9]Brownlie, *supra* note 1 at 712-13.

Brownlie's list can be simplified somewhat. There is general agreement that there is no difference in terms of responsibility between toleration and direct sponsorship, so categories one and four may be joined;[10] similarly there is no legal difference between organization and support, so categories two and three may be joined as well.[11] Since negligence in control would also engage responsibility, in effect there are three distinct situations rather than six: (1) responsible—organization, support or toleration; (2) responsible—negligent; and (3) non-responsible—inability to control.[12]

In practice the distinction between responsibility and non-responsibility may be irrelevant. In the absence of effective collective measures of fact determination the three categories present one problem: what response? Given the circumstances surrounding most ongoing guerrilla operations there are often genuine questions as to the degree of knowledge and control possessed by a government. Aid to guerrillas may come from third states, some of which may be extra-regional. Actions of guerrilla bands may involve the territory and property of third states.

The ideology of the guerrilla movement may command wide support among the population. Financial support may come from ostensibly private individuals who are citizens of third states. And, more to the point, even if a government is unable to disassociate itself from the activities of the guerrillas and is found responsible for their activities, as pointed out above, there is still the problem of appropriate responses by the target state.

In effect, the criteria of the traditional law and the Charter favor covert and indirect methods. The activities of irregular forces are seldom visible enough to attract widespread attention outside of a few raids which cause spectacular results, or which involve the interests of third states. If the target state responds with overt force against either the presumed sponsoring government or the guerrilla forces themselves, it runs the risk of being tagged the "aggressor."

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[10]*Supra* pp 3-4 and nn. 4, 5; also Brownlie, *supra* note 9 at 718 and sources cited therein.

[11]Of course this raises the question of what constitutes support. Many advocates, particularly from small states, are willing to label verbal or ideological backing as support. On the whole, though many states pay some lip service to "ideological aggression," the concept does not seem well established in practice. Furthermore, since the establishment of responsibility could lead potentially to a resort to force in retaliation by a target state, a more substantial connection than verbal support of guerrilla operations would seem necessary. The author suggests that proof of material aid would establish the necessary connection.

[12]There are three categories rather than two because of a presumed difference between negligence and toleration. Toleration implies both knowledge and capacity to deal with the guerrillas; negligence, a lack of knowledge (through negligence), but sufficient capacity. It is acknowledged that the distinction between toleration and negligence is a fine one. Nonetheless, where true negligence is the case, it is assumed that some cooperative strategy for redress may be worked out with the target state. If redress is not forthcoming, the negligence becomes tolerance.

The problem is a difficult one: how to permit effective responses to these situations of relatively indirect and limited attack, without expanding the right to use armed force to a point where self-defense can be invoked to justify violent action against provocations that are trivial or non-existent. The difficulty is to avoid major breaches of the peace of wide territorial extent arising from defensive measures based upon vague evidence.

The basic problem can be defined as a situation in which a state which serves as refuge and staging area, is unable or unwilling to undertake remedial action against irregular forces or to permit the target state to do so. Further, it is assumed that insofar as the target state has been able, it has taken measures within its own territory to suppress the guerrilla activity, and has found these to be inadequate. Thirdly, there must be clear evidence of ongoing illegal activity across an international border.

There are a number of approaches here. It could be argued for example that remedial action in such a situation would not be directed against the political independence and territorial integrity of the state of refuge, but rather, specifically against those who have engaged in illegal activity. One could attribute to irregular forces the status of pirates. International law authorizes all states to seize and punish pirates, irrespective of nationality, according to their own criminal procedures. The response of an aggrieved state would then be directly against the individuals involved, not against the state of which the pirate is a resident or citizen.

This formulation is unsatisfactory because it does not directly address the problem of jurisdiction. Both in the traditional law and more recent restatements of state obligations, territorial integrity and political independence are viewed as synonyms for territorial inviolability.[13]

Similarly the analogy of hot pursuit, when applied to the pursuit of guerrilla forces on land, does not consider the limiting jurisdictional condition of the maritime right. Hot pursuit in maritime law ends the moment the pursued ship enters its own territorial waters or those of a third state.[14] On land no such general right exists, unless greated by specific treaty provisions or the consent of the state from which the band operates.[15]

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[13]*For example,* the Declaration of Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, UN Doc. A/C. 6./L. 793. *Also see* Higgins, *The Development of International Law through the Political Organs of the United Nations,* 175-230 and sources cited therein (1963).

[14]Poulantzas, *The Right of Hot Pursuit in International Law,* 3, 345-48; Brownlie, *supra* note 7 at 372 note 3; Bowett, *supra* note 6 at 38-41. For a recent statement defending such a right *see International Law and Military Operations against Insurgents in a Neutral Territory,* 68 COLUM. L. REV. 1127 (1968).

[15]Brownlie, *supra* note 1 at 730; Poulntzas, *supra* note 11-16. As Brownlie points out, from time to time states have asserted such a right. A recent example is the French position

A second and perhaps more fruitful approach is to argue that the loss of effective control over the area of irregular operations implies that the loss of authoritative jurisdiction and thus of territorial integrity. Logically, then, action against these forces would not be action against the territorial integrity and political independence of the offending state, but in support of it. Despite the persuasiveness of logic, there is little evidence of acceptance of this argument in contemporary practice. Neverthrless this is the logic behind the customary law of neutrality, belligerency and insurgency and would seem to be a viable position. If a neutral is unable to prevent the belligerent violation of its territory, then the offended belligerent power may take action on neutral territory to enforce belligerent rights.[16]

This moves us no further toward a solution, but does permit the restatement of the problem in an appropriate framework. If there is a right of action, what it its scope? In the absence of authoritative third party review, what frequency and level of activity against a state would permit a forceful response across a recognized boundary?

The restraints, necessity and proportionality, which presumably govern the right of beligerent retaliation against a prejudicial violation of neutrality are those which govern the use of force in general. John Norton Moore has observed:

> Necessity and proportionality are shorthand for community policies restricting coercion to situations where there is no reasonable alternative to the use of force for protection of fundamental values. . . .[17]

The ambiguous nature and variable character of these restrainsts is acknowledged. Within themselves, necessity and proportionality contain no criteria for judgment, that is, as legal concepts they merely authorize

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during the Algerian war. The French employed both the "right of hot pursuit" and the "right of riposte," (firing into Tunisian territory) in the Algerian War in order to counteract the use of Tunisian territory by the F.L.N. The Tunisian government refused to acknowledge that any such rights existed. Although both governments made numerous complaints to the Security Council neither side moved to have the Council consider them. For a discussion *see* Fraleigh, *The Algerian Revolution as a Case Study in International Law*, 206-207 in FALK, (ed.) THE INTERNATIONAL LAW OF CIVIL WAR (1971). At worst the positive law in this area then may be uncertain, but emphasizing the limiting criterion of territoriality would seem consonant with state practice. *See further*, Pinto, *Les Regles du Droit International Concernant la Guerre Civile*, RECUEIL DES COURS, 451, 544-48 (1965); Falk, *International Law and the United States Role in Vietnam: A Response to Professor Moore*, 474-75, 490-93 in 1 FALK, (ed.), THE VIETNAM WAR AND INTERNATIONAL LAW (1968).

[16]GREENSPAN, THE MODERN LAW OF LAND WELFARE, 538-540 (1960); KELSEN-TUCKER, *supra* note 7 at 160-62; Brownlie, *supra* note 7, 309-316; 2 SCHWARZENBERGER, INTERNATIONAL LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS, 644-46 (1968).

[17]Moore, *Legal Dimensions of the Decision to Intercede in Cambodia*, 65 AM. J. INT'L L., 53 (1971).

consideration of appropriate contextual criteria.[18] Tucker notes in his discussion of necessity in self defense:

> The degree of necessity held to justify measures of self-defense must largely depend upon the immediacy of the danger posed to the state. The immediacy of the danger, however, need not and, it is generally claimed, cannot be gauged simply in terms of over action of an injurious nature. . . This being so, the danger held to justify the taking not only of preventive, but of anticipatory measures of self-defense will depend upon an interpretation of the significance of behavior that falls short of being overt and unambiguous. Moreover, if the uncertainty to be tolerated before resorting to preventive measures must be related to the nature of the danger posed, the nature of the danger will depend not only upon the *animus* thus far manifested by the other party but also upon the means of injury the other party has at its disposal.[19]

Applied to indirect coercion Tucker's argument has two important aspects. The first is that necessity is related to perceptions of immediacy; the second, that immediacy and scope are governed by the means of injury available to the other party. The content of necessity as a meaningful restraint on retaliation against irregular forces depends upon defining "immediacy."

Clearly the "immediacy" involved is not the "immediacy" of self defense. If it were, there would be no need for a discussion of the problems posed by irregular forces apart from general discussions of the requirements of self defense. It is seldom that single and isolated instances of guerrilla activity are of sufficient scope and duration to jeopardize territorial integrity and political integrity. Rather the threat stems from ongoing operations or the accumulation of isolated events.

As Bowett has shown, the Security Council has rejected "accumulation of events," reasoning when used by Israel in justification of raids against the Palestinian irregulars.[20] The Council has instead preferred to deal with each provocation-response as a discrete event. Condemnations of Israeli actions have thus been based upon the disporportionality of means or the inappropriateness of objectives. The question is whether the Council has rejected "accumulation of events" reasoning per se, or only where such reasoning seemingly would broaden the concept of self defense.

[18]Hence Baxter's point that judgments as to proportionality are "more of a political and a military character than of a legal character" is as true as it is irrelevant. The same argument applies to necessity, or any number of concepts in international law. There is nothing unusual in international law about norms which authorize the consideration of political or military criteria. This is not to underplay the difficulties involved in using the concepts. It is generally not noted that while the United Kingdom accepted Webster's statement in the Caroline case as to the requirements for self-defense, no agreement was ever reached on whether or not the facts of the Caroline incident fell within the scope of these requirements. Baxter, *The Legal Consequences of the Unlawful Use of Force Under the Charter*, PROCEEDINGS, AMERICAN SOCIETY OF INTERNATIONAL LAW, 74 (1968).

[19]KELSEN-TUCKER, *supra* note 7 at 81.

[20]Bowett, *supra* note 2 at 6-7.

If the former, then to the extent that Council pronouncements diverge from the necessities of action perceived by states, the authority of the Council will be undermined. If the latter then "accumulation of events" could be used in justification for retaliation by a target state where strict attention has been paid to appropriateness of objectives and proportionality of means.

This still leaves open the question of what appropriate targets and proportionate responses may be. Does proportionality refer to the size and character of the attack or to the total context of action? Or, rather, is proportionality measured by the force necessary to repel an aggression or by that necessary to remove the causes? With respect to self-defense there is no question that the difference in permissible action between the two concepts is significant. It is submitted, however, that the same dilemma is not directly applicable to action in retaliation.

Given the character of indirect operations, the idea of repelling the intended action has little meaning, nor does limited action conceived in punitive or deterrent terms. Proportionality only has meaning if the scope of permissible action is to reduce or remove the danger of ongoing operations. Restraint is then a function of targets and time. Action, insofar as possible, should be directed against those directly involved, specifically military and para-military installations and personnel. It should be regarded as an exceptional action, limited in time, and not as a continuing policy.

In summary and as a guide to evaluating claims for action against guerrilla forces the following points are relevant:

1. there should be a substantial connection between the prior commission of illegal acts and the resultant claim to act in retaliation;
2. the user of retaliatory force should have exhausted all means of resistance available within its own territorial domain;
3. a diligent effort must have been made to obtain redress through peaceful means;
4. the use of force should be directed so that loss of civilian life is minimized;
5. the use of force should be directed primarily against military and para-military targets and personnel.[21]

[21] Falk, *supra* note 1 at 445. Falk's framework seems overly elaborate and repetitive. Those considerations under heads Nos. 8, 10 and 12 would seem to be irrelevant: Nos. 4 and 10 are somewhat repetitious; while, if No. 2 could be realized a strong argument in terms of self-defense could be made; No. 10 is also an unrealistic expectation in the context of most guerrilla conflicts. For a statement of the traditional law of reprisal *see* SCHWARZENBERGER, *supra* note 15, at 48–50.

The question remains whether in these circumstances the action taken should be termed "self-defense" or merely "retaliatory" but permissible. In general this writer prefers the second alternative. This preference stems from a reluctance to broaden the concept of self-defense to include indirect attack. Where territorial integrity and/or political independence are not immediately and severely affected, it is difficult to make an argument for self-defense, and guerrilla violence seldom presents an immediate threat to vital interests.

Even in the Middle East where perspective is easily distorted because of the salience of Palestinian ideology and claims, the Israelis for the most part have been able to control fedayeen violence through intelligence operations, regular patrols and electronic surveillance.[22] While Israeli losses have been painful, they have not been numerous, nor have they resulted in major alterations in Israeli patterns of settlement and administration.

Yet, in the final analysis, if the states which serve as staging area and refuge, fail in their obligation to police ongoing guerrilla campaigns and refuse a cooperative strategy in ending the attacks, then targets states are left with few choices. At present the Security Council determinations with respect to Israeli actions are little more than legal ritualism; and to the detriment of the Council's authority, legal ritualism is not self-enforcing. In this view there is much to be said for the idea that the use of retaliatory force is the ultimate demand for cooperative law enforcement.[23] While violence might breed violence, violence is also the only effective counter to violence. In the absence of effective community action to encourage restraint, self-help remains the only alternative.

[22]Bell, supra note 8 at 202-205.
[23]Falk, supra note 1 at 444.