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ON CLANDESTINE WARFARE*

ROBERT E. RODES, JR.**

On July 12, 1978, William Guillermo Morales was in an apartment in Queens fashioning a bomb with which he hoped to make a contribution to the independence of Puerto Rico. Instead, the bomb exploded prematurely, injuring Morales and engaging the attention of the police. In the ensuing criminal proceedings, counsel for Morales argued in an able brief that he should not be prosecuted because he was entitled to be held as a prisoner of war. The court gave the contention its due consideration, rejected it, and duly fed Morales into the normal processes of criminal justice as they operate in the Eastern District of New York.¹ The court did not address itself to his claim that he had been refused necessary medical treatment as a way of getting information from him.

On March 10, 1965, Osman Haji Mohamed Ali and another dropped off twenty-five pounds of nitroglycerine in a Singapore bank. It blew up, killing three people. Osman and his unnamed companion were tried for murder and for violation of various arms control laws. They claimed to be members of the Indonesian armed forces and therefore entitled to prisoner of war status. The Privy Council, after lengthy discussion of the relevant authorities, rejected their contention and affirmed their convictions.²

On September 18, 1864, John Y. Beall with a party of Confederates took passage on board the steamboat *Philo Parsons* at the Canadian town of Sandwich, near Detroit. They took possession of the boat, intending to use it in liberating Confederate prisoners held on Johnson's Island in Lake Erie. Their plan miscarried. Two months later, Beall attempted to derail a train near Buffalo. He was arrested at the railroad station in Niagara Falls, N.Y., on the way back to Canada. He had a docu-

* This article and the suggested international convention (Appendix I) and federal statute (Appendix II) were developed as part of a colloquium sponsored by the Frances Lewis Law Center of Washington and Lee University School of Law.

Valuable criticisms (some of which I have embodied in the text, others of which I have argued with expressly in the notes or by implication in this article) were made by Professors James E. Bond, John F. Murphy, and Alfred P. Rubin, and Major David R. Dowell, my fellow participants in the colloquium and by Professor Frederic L. Kirgis, Jr., and his colleagues on the law faculty at Washington and Lee. To all of these I am grateful, and to Lieutenant Colonel Henry J. Gordon, a colleague in a war course at Notre Dame, who went over the draft conviction in an earlier stage.

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¹ *United States v. Morales*, 464 F. Supp 325 (E.D.N.Y. 1979). Professor Alfred P. Rubin kindly supplied me with a copy of the brief presented by attorneys Michael E. Deutsch and Jesse Berman on behalf of Mr. Morales.

² *Ali v. Public Prosecutor*, [1969] 1 A.C. 430 (P.C.).

ment signed by Jefferson Davis and Judah P. Benjamin attesting that he was an Acting Master in the Confederate Navy, embarked on a warlike mission. He was tried by a military commission in New York City for being a spy and for violating the laws of war. Despite an eloquent defense by a prominent New York lawyer, he was condemned and hanged.³

These cases illustrate the generally unreceptive attitude of the law toward clandestine warfare. I mean by "clandestine warfare" any form of combat in which the fighters escape detection by mingling with the ostensibly peaceful population. I use this term because others are open to misinterpretation. "Terrorism" is pejorative: one man's terrorist is another man's freedom fighter. "Guerrilla warfare" often involves concealment in the natural, rather than the social environment, hiding in forests and mountains rather than appropriating the immunity of non-combatants. "Underground" or "resistance" movements may be non-violent.

Clandestine warfare, as thus defined, is not new, as can be seen from Captain Beall's case. In recent years, however, it has gained new prominence. It seems to be the only way a dissident group can hope to prevail against the technological superiority of the modern industrial state. Such covert activity is hard to combat within the aspiration to an open society—an aspiration that many states genuinely cherish and most states find it expedient to profess.

It seems that our moral judgements on clandestine warfare are more nuanced and less severe than our legal judgments. We are able to distinguish between blowing up a tank and blowing up a school bus, between machinegunning a police station and machinegunning a barroom. Most of us honor the people on the Continent of Europe who resisted the German occupation troops during the Second World War. The Irish Republican Army (IRA), the Palestine Liberation Organization (PLO), the forces that created the State of Israel in 1948, and those that affected the transformation from Rhodesia to Zimbabwe in 1979 all have both admirers and detractors. Even their detractors, however, see differences between them and the Symbionese Liberation Army. The total insensitivity of the law to these moral perceptions is, it seems to me, an obstacle to any effort to humanize clandestine warfare.

What I intend to do here, therefore, is propose a substantial revision of the laws governing clandestine warfare. First, though, by way of introduction, I want to offer a more detailed typology of clandestine operations and measures to combat them, a few general reflections on the laws of war, and a critique of those laws as they now stand. Following a traditional and wise distinction in the law, I am separating questions of what may be legitimately done in pursuit of a cause (*jus in bello*) from questions of the legitimacy of the cause itself (*jus ad bellum*).⁴ In the

³ 14 American State Trials 683, 683-85 (Military Comm. 1865).

⁴ See L. OPPENHEIM, 2 OPPENHEIM'S INTERNATIONAL LAW 217-18 (7th ed. H. Lauterpacht 1952); G. SCHWARZENBERGER, INTERNATIONAL LAW AND ORDER 5 (1971).

following discussion, the methods of clandestine warfare should be considered from the standpoint of a person who believes in the cause for which the clandestine force is fighting, while the countermeasures should be considered from the standpoint of a person who believes that the clandestine force should be rigorously suppressed.

I. PATTERNS OF CLANDESTINE WARFARE

Clandestine forces, like other forces, are fighting ultimately for some kind of political objective. But the reason their operation is clandestine is that they cannot hope to defeat their enemy in open combat. Therefore, they must have for their immediate objective some other means of accomplishing their political goals. Sometimes this objective is merely to support a conventional force operating somewhere else. The clandestine forces operating in German-occupied territory during the Second World War played such a support role. But where there is no conventional force to support, the clandestine force has to define its objective more subtly.

One possibility is to discredit the government in power, and thereby gain adherents until the clandestine force can either transform itself into a conventional force or directly supersede the government. This was more or less the approach taken by the Irish Republicans of 1918-21, by Castro in Cuba, by the Communists in Vietnam, and by the Sandinistas in Nicaragua. If the strategy is properly executed, as it was in all the cases mentioned, the clandestine force can make the government look cruel and ineffective at the same time. Pursued far enough, this approach gives the clandestine force moral superiority over the government. As Michael Walzer points out, when clandestine fighters achieve a certain measure of public support, they become the legitimate rulers of the country.⁵

Before this point is reached, however, a clandestine force may be able to accomplish its purposes by making the cost of governing the country so high that the government is willing to reach an acceptable political settlement. Britain's decision to withdraw from Palestine in 1948 may be regarded as such a settlement. Other such settlements occurred in places like Algeria, Mozambique, and Zimbabwe, although in each of these cases the clandestine force involved was in the process of shifting over to conventional operations by the time a settlement was reached. The IRA seems to be pursuing a similar strategy today, and the PLO is attempting a variant of it that involves pressuring the international community to pressure Israel, rather than trying to exert direct pressure on Israel.

This kind of pressure shades off into another and far more reprehensible variety where a political settlement is sought through terrorizing the population into pressuring the government. This strategy is terrorism in the strict sense, and seems entirely unacceptable morally. The

⁵ M. WALZER, *JUST AND UNJUST WARS 194-96* (1977) [hereinafter cited as WALZER].

lives of innocent people cannot legitimately be used as counters in any political maneuver, however desirable its purpose.

Whatever they are trying to accomplish, clandestine forces have only a limited range of devices available. These are used so reguarly that they have become fairly familiar by now. In the countryside, the clandestine force will try to disrupt the civil government of its adversary by attacking and intimidating officials or members of the public who cooperate with them. It will attack isolated units of the enemy's army or police, and may try to put economic pressure on the enemy by destruction of the economic infrastructure: factories, highways, trains, buses, and the like. Especially where a clandestine operation is supporting a conventional force, the clandestine force will try to disrupt the enemy's war effort by interfering with his communications and logistical support. This tactic is the mainstay of World War II movies.

Two additional devices are typical of the urban (as distinguished from rural) clandestine force. One is the hostage-and-barricade situation where a building or conveyance is invaded and defended by threats to the lives of those caught inside. Negotiations are then entered into with a view to providing various advantages to the captors, probably including a clean escape, in exchange for a release of the hostages. There is no obvious reason why this device should not work in the country as well as in the city, but on the whole it has been used only in cities or in airplanes. The other peculiarly urban device is the planting of bombs. The bomber can either park a car with a bomb in it and walk away, leave a bomb in a parcel as if by inadvertance, drop it into a trash receptacle, or shut it in a public locker. It is harder to plant bombs in a rural setting: people leaving parcels about—and especially people leaving cars about—are more apt to be noticed. By the same token, in a rural setting there is less need for bombs: it is easier to sneak up on someone, shoot him, and make a getaway.

The urban devices tend to raise more moral problems than the rural ones, because they are more apt to involve indiscriminate slaughter. The hostages in an airline hijacking or building occupation are generally a random group of peaceful citizens as are the people that get blown up when a bomb goes off in a store, an airport, or a bar. To be sure, indiscriminate slaughter is not unique to this kind of warfare. A National Liberation Front (FLN) spokesman in Pontecorvo's film *The Battle of Algiers* argued that leaving bombs around in shopping baskets is no different morally from dropping them out of airplanes as the French were doing in villages occupied by the FLN: "Give us your bombers and you can have our baskets."⁶ The argument is respectable, but not altogether persuasive. In the first place, indiscriminate aerial bombardment is open to moral objections of its own. Also, it seems to me that sitting at a bar and leaving off a bomb to blow up your unsuspecting fellow-drinkers

⁶ GILLO PONTECORVO'S *THE BATTLE OF ALGIERS* 121-22 (Solinas ed. 1973).

represents a different kind of human insensitivity from dropping bombs out of airplanes. A potential victim will recognize an aerial bomber as an enemy as soon as he sees it, whereas the bar bomber gains access to his victim only by abusing the trust which peaceful citizens habitually place in one another. That trust is so important and so fragile that we should be reluctant to condone any abuse of it.

One way in which both rural and urban clandestine forces attempt to gain legitimacy is by undertaking civil and criminal administration in competition with the established authorities. For example, at one point in *The Battle of Algiers* film, we see FLN officials performing a marriage ceremony and congratulating the bride and groom on their patriotism in bypassing the French authorities.⁷ At another point, we see FLN gunmen administering summary punishment to a prominent figure in the prostitution business who laughs at their demand that he find another line of work.⁸

Assuming the functions of government in this way seems to be a legitimate tactic. When it involves shooting people, however, it cannot be considered apart from the more problematical tactic of assassination. It has generally been regarded as immoral to wage war by assassinating one's enemies. A contrary argument is that it is incongruous for people who take up arms in a just cause (again, the legitimacy of the tactics is to be evaluated on the assumption that the cause is just) to kill policemen and soliders who are not to blame for the injustices that give rise to the war, while the leaders, landlords, businessmen, and officials, who really are to blame, enjoy the immunity of noncombatants.

This argument may support assassination as a form of punishment, but it does not support assassination as a military tactic. The justification for killing your enemy in war is that he is actively engaged in using force to prevent your attainment of your military objectives, not that his continued existence is an obstacle to your political goal. Killing a corrupt official or an oppressive landlord is like killing the head of the prostitution ring, not like killing an enemy soldier. Such killing is capital punishment rather than warfare, and the moral questions it raises must be judged accordingly.

Most successful clandestine forces receive substantial support from outside the state in which they are operating. This support includes relatively secure bases, as well as a source of supplies. Sometimes this support is given and received in defiance of the local government. This seems to be the case with the PLO in Lebanon, as it was with them in Jordan until the Jordanian forces expelled them. On the other hand, the governments of Tunisia and Morocco generally acquiesced in the use of their territory and resources by the FLN, as did the governments of Zambia and Mozambique in the case of the Zimbabwean forces. The atti-

⁷ *Id.* at 37-40.

⁸ *Id.* at 28-36.

tude of the Costa Rican government toward the Sandinistas in Nicaragua seems to have been one of benign neutrality, that of the Sihanouk government in Cambodia toward the Vietcong one of looking the other way. Each of these attitudes poses its own problems for international law.

II. COUNTERMEASURES

The first line of defense against a clandestine force is, naturally enough, the criminal law. A person who shoots policemen, robs banks, or blows up airplanes for political reason can be treated in the same way as a person who does the same things for other reasons. This approach has the advantage for the government of stigmatizing the clandestine fighter as a common criminal. The recent hunger strikes in Northern Ireland illustrate the tenacity with which this advantage can be clung to on one side and resisted on the other.

In most democratic or would-be democratic societies, however, the general criminal law is too weighted in favor of the accused to be really effective against an organized and dedicated body of armed political dissidents. The restrictions on investigation and arrest are too severe, the standards of proof too exacting, the sentences too lenient. Jurors may be drawn from a population sympathetic to the defendant's cause, as in the Ku Klux Klan trials of the 1960s, or they may be subject to intimidation.

Accordingly, governments subjected to serious clandestine warfare have tended to adopt enhancements of the criminal law.⁹ They create new offenses such as belonging to illegal organizations (as in Northern Ireland), parading in disguise (the anti-Klan laws adopted in some American states), or violating curfews. They adopt new definitions of old offenses such as sedition or conspiracy. They increase the penalties for offenses such as illegal possession of firearms (the applicable penalty was death in Kenya in the 1950s and Malaya in the 1960s). They adopt procedural modifications such as the elimination of the jury in certain cases in Northern Ireland.

Governments are usually reluctant to treat clandestine forces according to the laws of war because by doing so they abandon the moral and rhetorical position implicit in using the criminal law. They admit that the clandestine force is something more than a gang of robbers or cutthroats. On the practical level, though, there are advantages for a government in using the laws of war. Government authorities can treat a captured enemy as a prisoner of war without any trial, and can detain him until the war is over. Given the tenacity of some clandestine forces, this detention could last longer than the sentence he would receive

⁹ The British refer to enhancements of the criminal law designed to deal with clandestine operations as "emergency" measures.

under the criminal law. Also, under the laws of war, a member of a clandestine force can be held prisoner simply for being such a member, without any showing that he has done anything to further the operations of the force.

In addition, the laws of war themselves denounce certain actions as criminal. Looting, torture, attacking noncombatants, and a number of other activities are "war crimes" for which a combatant can be tried and punished either by his own forces or by the forces that capture him. To be sure, these atrocities are usually civil crimes as well, but the laws of war allow for trial by military commission (similar to a court martial), with a more expeditious and less defendant-oriented procedure than the civil law is apt to afford.

In many cases, the laws of war will place the members of a clandestine force in an ambiguous category of people called "unprivileged belligerents."¹⁰ This category covers people who are not noncombatants because they are participating in the combat, but are not entitled to be prisoners of war because they have not met certain conditions. These conditions relate mainly to fighting openly; thus, the model case of the unprivileged belligerent is that of the spy.

The consensus of modern scholarly opinion on the subject is that unprivileged belligerency is not punishable under the laws of war. That it is not a crime is shown by the rule that a spy who returns to his own forces and later is captured in uniform cannot be punished for his previous acts of espionage. Nor is the traditional execution of a spy caught in the act provided for in the laws of war. Those laws do no more than withhold their protection from the unprivileged belligerent, leaving his captors free to deal with him under their municipal¹¹ criminal laws.

The handful of cases in the American courts dealing with the status of an unprivileged belligerent appear to reject this scholarly consensus. Captain Beall's case, referred to above, Major André's case from the American Revolution,¹² and *Ex parte Quirin*¹³ from the Second World War all indicate that the laws of war furnish sufficient authority for trying an unprivileged belligerent by military commission and condemning him to death without any reference to municipal law.¹⁴

¹⁰ Baxter, *So-called "Unprivileged Belligerency"; Spies, Guerrillas, and Saboteurs*, 28 BRIT. Y.B. INT'L L. 323, 342 (1951).

¹¹ In international law, the term "municipal" is used to designate the law of an individual state; not, as in other branches of the law, to designate the affairs of cities and towns. The Oxford English Dictionary indicates that the term originally applied to internal, as opposed to external, affairs at any level of government. Its special use for local government dates from the nineteenth century, and seems to be based on Roman and Continental usage.

¹² 6 American State Trials 464 (Inquiry of General Officers of the Army 1780).

¹³ *Ex parte Quirin*, 317 U.S. 1, 36 (1942). See also *Colepaugh v. Looney*, 235 F.2d 429 (10th Cir. 1956), *cert. denied*, 352 U.S. 1014 (1957).

¹⁴ See also LIEBER CODE, art. 13 (also known as General Orders No. 100, Instructions for the Government of Armies of the United States in the Field, Apr. 24, 1863), *reprinted in*

What I suspect is that the anomalous treatment of unprivileged belligerents is a survival from a time when the legal obligation to spare captured enemies in general was less clear than it is today. Ancient and medieval people were not as impressed as we are with the rights of an erring conscience. As they perceived themselves to be making war justly, they perceived their enemies to be making war unjustly, and therefore to be liable to just punishment simply for participating in the war. The strict logic of this perception was always mitigated by humanity in the case of generous victors. As between knights, it was also mitigated by the conventions of chivalry. As between professional soldiers, it was mitigated by professional courtesy, and by the desire not to make the common calling more dangerous than it had to be. When these motivations coalesced into a general rule of sparing all captured enemies, the case of the unprivileged belligerent, to whom these motivations did not generally apply, remained as a somewhat inexplicable exception. In the case of clandestine warfare, the exception applies more broadly than the rule.

As clandestine war becomes serious, the government is apt not to content itself with measures against known belligerents. Often persons suspected of being members, or even sympathizers, of the clandestine enemy are subjected to "preventive detention." Within the past decade, the governments of Northern Ireland and Quebec, to name only the two places where there has been the most press coverage, have taken this step. In both of these cases, detention was authorized by statute.¹⁵ It appears, though, that common law principles will authorize it if the danger is imminent enough. This is the meaning of the provision in the Constitution for suspending the writ of habeas corpus, a provision that Lincoln invoked several times during the Civil War. Cases generally have held that the courts may look into the seriousness of the emergency, but not into the propriety of detaining a particular person while the emergency is going on.¹⁶

Where the clandestine force has general support within the population, or where it is drawn from a recognizable minority, the government

THE LAWS OF ARMED CONFLICTS 3-23 (D. Schindler & J. Toman 1981) [hereinafter cited as LIEBER]. Some of these authorities assimilate the unprivileged belligerent to a war criminal. Others, notably the U.S. DEPT. OF ARMY, FIELD MANUAL 27-10, §§ 77, 82 (1956) [hereinafter cited as AFM], indicate that he is not a criminal, but may be punished, even executed, in order to enhance the risks of unprivileged belligerency. See *United States ex rel. Wessels v. McDonald*, 265 F. 754 (E.D.N.Y. 1920). Note in this connection that Washington advisedly ordered Andr9 to be put to death "ignominiously" by hanging instead of honorably by shooting, and that he was criticized for his order.

¹⁵ Northern Ireland (Emergency Provisions) Act, 1973, c. 53, § 10 sched. 1; War Measures Act, CAN. REV. STAT. c. W-2 (1970); Public Order (Temporary Measures) Act, 1970, 19 Eliz. 2, c. 2 (Canada).

¹⁶ C. ROSSITER, THE SUPREME COURT AND THE COMMANDER IN CHIEF 18-26 (expanded ed. 1976) [hereinafter cited as ROSSITER]; R. SHARPE, THE LAW OF HABEAS CORPUS 93-112 (1976) (British law).

will often resort to some form of collective or vicarious punishment. Collective fines, such as the British used in Cyprus in the 1950s, and punitive curfews, such as they used in Malaya, are among the least drastic of such punishments. A government can apply collective punishments to particular villages where clandestine activity is in evidence, and so lead villagers not strongly attached to the clandestine fighters' cause to come forward with information. At the same time, the punishments are not sufficiently severe or sufficiently unfair to make an enemy out of someone who was not one to begin with.

Destruction of property is a more severe measure. Blowing up houses has been a favorite measure of the Israeli forces when they are attacked from Arab villages. Burning of farms was a similar favorite of the British in South Africa in 1900-02.¹⁷ These measures are harsh, but they would seem to be morally acceptable given sufficient provocation.

The same cannot be said for the taking and execution of hostages and reprisal prisoners. A hostage is taken to secure the future behavior of his neighbors; a reprisal prisoner is taken as punishment for something the neighbors have already done.¹⁸ In either case, the misbehavior of the community to which a person belongs is claimed as a warrant for putting him to death regardless of his personal involvement in such misbehavior. Although this reasoning violates fairly clear-cut moral principles,¹⁹ it was recognized through World War II,²⁰ being finally outlawed by the Geneva Conventions of 1949.²¹

Akin to hostage taking, and probably open to the same objections, is placing prisoners of war or civilians in positions of danger in order to discourage attack. The best known example is the British project for placing Boer civilians on trains in the hope that the Boer commandos would not blow them up.²² An earlier and less familiar example is Sherman's coping with a primitive version of the booby trap on the highways of Georgia by marching Confederate prisoners at the head of his columns.²³ The British did a good deal of debating over the morality and legality of their train project, and eventually gave it up. Sherman

¹⁷ See generally S. SPIES, *METHODS OF BARBARISM?* (1976) [hereinafter cited as SPIES].

¹⁸ The distinction between hostages and reprisal prisoners is established in *The Hostages Trial* (United States v. List and others), 8 Law Reports of Trials of War Criminals 34 (1949) (United States Military Tribunal, Nuremburg).

¹⁹ WALZER, *supra* note 5, at 216-22.

²⁰ *The Hostages Trial*, 8 Law Reports of Trials of War Criminals at 61-65.

²¹ Geneva Convention Relative to Protection of Civilians in Time of War, Aug. 12, 1949, arts. 3, 33-34; 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287 [hereinafter cited as Convention IV]; Geneva Convention Relative to Prisoners of War, Aug. 12, 1949, art. 13, 5 U.S.T. 3376, T.I.A.S. No. 3364, 75 U.N.T.S. 135 [hereinafter cited as Convention III] gives the same protection to prisoners of war.

²² SPIES, *supra* note 17, at 103-08, 240-44 & *passim*. The same device was used by the Germans in 1870. SPIES, *supra* note 17, at 104. See also WALZER, *supra* note 5, at 17 (similar English war tactic).

²³ W. SHERMAN, 2 MEMOIRS OF GENERAL WILLIAM T. SHERMAN 194 (1875).

justified his use of prisoners by pointing to the illegality of the device to which he was responding: he characterized the use of booby traps as "not war but murder." As it happened, no Confederate prisoners were injured by his expedient, because their presence stopped the traps from being set. Using prisoners in this way was forbidden by the Geneva Convention of 1929, and the 1949 Conventions extended the prohibition to civilians.²⁴

Some restrictions on the general population are not called punishments because military necessity rather than collective wrongdoing is called on to justify them. The result still may be as harsh as punishment, if not harsher. An example is the system of curfews and free fire zones developed by the American forces in Vietnam. The object of such a system is to limit the movements of innocent people in such a way that anyone found abroad in certain times and places may be presumed without inquiry to be an enemy and so may be shot out of hand.

While the curfew system was heavily used in Vietnam, it was not invented there. The inventor seems to have been the Spanish general Valeriano Weyler (1838-1930), an admirer of Sherman, who set out to suppress a rebellion in Cuba in 1896. He ordered that all inhabitants of rural areas outside the lines of fortified towns be concentrated within the towns occupied by troops at the end of eight days. All individuals who disobeyed, or were found outside the prescribed areas were to be considered rebels and judged as such.²⁵ The other leg of Weyler's program, the concentration of the rural populace in fortified locations, was picked up by the British in the Boer War, and so gave rise to the term "concentration camp."²⁶ Whether rounding up civilians and placing them in such camps is an effective technique has been debated. The policy certainly had something to do with the surrender of the Boers in 1902, but probably more because their families were succumbing to unsanitary conditions than because their troops were more vulnerable without civilian support. It might be added that whatever the concentration camps did for the war effort they became a lasting obstacle to the peace.

Places where scattered civilians can be brought together and watched have not been called concentration camps since the Nazis appropriated the term for other purposes. The practice, however, has survived the terminology. The United States used "relocation centers" during the Second World War to bring together Japanese-Americans and "secure hamlets" during the Vietnam War to bring together Vietnamese peasants. This kind of relocation of civilians has been restricted, but not

²⁴ Geneva Convention Relative to Prisoners of War, Aug. 12, 1929, art. 9, 47 Stat. 2021, T.S. No. 846, 118 L.N.T.S. 343 [hereinafter cited as 1929 Geneva Convention]; Convention III, *supra* note 21, art. 23; Convention IV, *supra* note 21, art. 28.

²⁵ SPIES, *supra* note 17, at 148, 296; WALZER, *supra* note 5, at 102.

²⁶ SPIES, *supra* note 17, *passim*.

entirely forbidden by the 1949 Geneva Conventions and the 1977 Protocols.²⁷

A final measure against clandestine forces—one of complete desperation, it seems to me—is to destroy their environment (as by defoliants) or their food supply (as by burning crops). Needless to say, the victims of such measures are not all enemies; indeed, many of them are not yet born. Large-scale environmental destruction and intentional destruction of supplies needed by the civilian population for survival are both forbidden by the 1977 Protocols.²⁸

III. THE APPLICABLE LAW

Treating these moves and countermoves as a form of warfare invokes upon them a venerable and growing body of legal material known as the laws and customs of war. These laws and customs grew out of ancient and medieval practice—a combination of chivalry, bombast, and *Realpolitik* with a touch of Scholastic theology. They were reworked by Renaissance and Enlightenment scholarship, especially that of Hugo Grotius (1583-1645), whose *De Jure Belli ac Pacis* assembled all manner of classical material and critiqued it in the light of Christianity and natural law. Another reworking resulted from the codification movement of the nineteenth century. In 1863, Abraham Lincoln promulgated for the Union Army a code prepared by the Prussian scholar Francis Lieber, then a professor at Columbia. Lieber's work influenced a number of later compilations, culminating in the one adopted by an international conference at the Hague (1899 and 1907). These Hague Regulations were substantially reworked and expanded at Geneva in 1949 to reflect the liberal humanitarianism of the immediate postwar years, and again in 1977 to reflect the ideological standoffs of contemporary world politics. A handful of cases from different periods, plus the voluminous war crimes trials following the Second World War, complete the list of major sources. The impact of most of this material on clandestine warfare ranges from problematic to irrelevant.

A. *Persons entitled to Combatant Status*

Legitimate belligerency depends on the status of the war and the status of the persons fighting. Grotius and his predecessors taught that

²⁷ Convention IV, *supra* note 21, art. 49; Protocol II Additional to the Geneva Conventions of 12 August 1949, signed June 10, 1977, 16 INTL LEGAL MATERIALS 1442 (1977) [hereinafter cited as Second Protocol].

²⁸ Protocol I Additional to the Geneva Conventions of 12 August 1949, signed June 10, 1977, 16 INTL LEGAL MATERIALS 1391 (1977) [hereinafter cited as First Protocol]; Second Protocol, *supra* note 27, art. 14. For some reason, the Second Protocol does not contain a prohibition of environmental damage as the first does. But both contain an analogous prohibition of releasing dangerous forces by damaging dams, dykes, or nuclear installations. First Protocol, *supra*, art. 56; Second Protocol, *supra* note 27, art. 15.

only a sovereign could lawfully make war except to repel an immediate invasion. War is an exercise of the God-given power to provide for the common good and to punish offenders. Only those on whom God has bestowed that power may exercise it. This principle has generally been modified in practice by bestowing "belligerent status" on insurgents or other groups able to exercise governmental authority over substantial territory. The Confederates in the American Civil War, for instance, were treated this way.

The law is clear that recognition of belligerent status does not imply any recognition of political status for any purpose besides the war. Nevertheless, established governments have been reluctant to attach belligerent status to their enemies. Thus, the French went all through the Algerian war without officially accepting the belligerent status of the FLN.²⁹

The applicable international legislation—the Hague Convention of 1907, the four Geneva Conventions of 1949, and the two Geneva Protocols of 1977—is not much help on this point. The Hague Convention applies only to wars between signatories; the Geneva Conventions apply also to a war between a signatory and another power "if the latter accepts and applies the provisions thereof."³⁰ What constitutes a "power" within the meaning of this language is no clearer than what constitutes a belligerent. The British Privy Council has held, probably correctly, that even if these Conventions apply to a war they cannot oblige a state to give Geneva prisoner of war status to one of its own nationals.³¹ The Conventions contain a provision applicable to "armed conflict not of an international character" but the obligations it imposes are minimal.³²

The first of the two 1977 Protocols applies to any war governed by the 1949 Conventions, and to revolts against racist or colonialist regimes.³³ The latter provision seems a backward step, because it makes what a person may lawfully do in fighting a war (*jus in bello*) depend on the justice of his cause (*jus ad bellum*).³⁴ Any hope for human decency in

²⁹ FRALEIGH, *The Algerian Revolution*, THE INTERNATIONAL LAW OF CIVIL WAR 179, 196 (Falk ed. 1971).

³⁰ Hague IV, Oct. 18, 1907, art. 2, 36 Stat. 2277, T.S. No. 539 [hereinafter cited as Hague]; Geneva Convention Relative to Wounded and Sick, Aug. 12, 1949, art. 2, 6 U.S.T. 3114, T.I.A.S. No. 3362, 75 U.N.T.S. 3 [hereinafter cited as Convention I]; Geneva Convention Relative to the Wounded and Sick in Naval War, Aug. 12, 1949, art. 2, 6 U.S.T. 3217, T.I.A.S. 3663, 75 U.N.T.S. 85 [hereinafter cited as Convention II]; Convention III, *supra* note 21, art. 2; Convention IV, *supra* note 21, art. 2.

³¹ *Koi v. Public Prosecutor*, [1968] A.C. 829 (P.C.).

³² Convention I, *supra* note 30, art. 3; Convention II, *supra* note 30, art. 3; Convention III, *supra* note 21, art. 3; Convention IV, *supra* note 21, art. 3.

³³ First Protocol, *supra* note 28, art. 1, § 4. There is a further requirement that the revolt constitute an exercise of the right of self-determination on the part of the population concerned. Thus, the occasional case where settlers' or expatriates take the field to resist conciliatory moves by the home government would not be covered.

³⁴ See text accompanying note 4 *supra*.

warfare depends on a separation of these two kinds of legitimacy. Everyone is convinced (or claims to be) of the justice of his own cause and the injustice of his enemy's. A right that is available only to an enemy with a just cause will be available to no one at all.

The second 1977 Protocol applies to insurgent forces that control specific territory.³⁵ It seems not to add anything significant to the traditional criteria for belligerent status. It will not apply to the typical clandestine force, which operates in territory controlled by its adversary—otherwise, it would not need to be clandestine.

The legal status of the individual combatant in clandestine warfare is even more problematical than the legal status of the war. Even in a legitimate war, clandestine fighters are apt to be treated as unprivileged belligerents. Lieber's 1863 code provided that intermittent fighters who resume their civilian status between engagements are to be "treated summarily as highway robbers or pirates."³⁶ The Germans in the Franco-Prussian War of 1870 took the same position with regard to *francs-tireurs*, including under that description any fighter who was not officially mustered or commissioned by the fighter's government.³⁷ The only exception they recognized was the *levée en masse*, or spontaneous rising of the populace of an invaded district to resist the invader.

The Hague Convention of 1907 was less restrictive than Lieber or the Germans. It required for legitimate belligerency only that the troops in question be under responsible command, wear a fixed sign recognizable at a distance, carry arms openly, and conduct their operations in accordance with the laws and customs of war.³⁸ These four requirements were repeated in the Geneva Conventions of 1949.³⁹ Note that while the requirements do away with the unprivileged status of the intermittent or self-appointed fighter, they still impose standards of overtness that a typical clandestine force cannot meet. Note also that an individual fighter is unprivileged if the force to which he belongs violates the law of war, even if he is not implicated in the violation. The first 1977 Protocol relaxes the rules still more.⁴⁰ To be eligible for prisoner or war status if captured, it requires only responsible command, open possession of arms while in the presence of the enemy, and the existence of a disciplinary system that will enforce the laws of war:

These criteria for privileged belligerency are inadequate. It is clear

³⁵ Second Protocol, *supra* note 27, art. 1.

³⁶ LIEBER, *supra* note 14, art. 82.

³⁷ M. HOWARD, THE FRANCO-PRUSSIAN WAR 251-56, 377-81 (1962).

³⁸ Hague, *supra* note 30, art. 1. Cf. International Declaration Concerning the Laws and Customs of War, Brussels, Aug. 27, 1874, art. 9, reprinted in THE LAWS OF ARMED CONFLICTS 25, 28 (2d rev. ed. D. Schindler & J. Toman 1981).

³⁹ Convention I, *supra* note 30, art. 13; Convention II, *supra* note 30, art. 13; Convention III, *supra* note 21, art. 4.

⁴⁰ Convention I, *supra* note 30, art. 43-44. The language requiring an internal disciplinary system does not explicitly make it a condition for privileged belligerency. I would read it, however, as implicitly having that effect.

that the rules, even with the latest relaxation, do not recognize the legitimacy of all the people and operations that most of us are willing to respect. Remembering the all-important distinction between *jus ad bellum* and *jus in bello*,⁴¹ we must test the adequacy of the rules by asking if they allow all the conduct we are willing to approve of in a cause we consider just. Leftists can think about the Sandinistas in Nicaragua or the blacks in South Africa, rightists about fighting the Soviets in Afghanistan, Irish nationalists about the IRA, pro-Israelis about the Stern Gang, pro-Arabs about the PLO, and most Americans about the French underground in the Second World War. Most of us in one or another of these cases would be prepared to honor people who chose to go to war even if they could not control territory, wear uniforms, or get at their enemies without concealing their arms.

B. *Persons Subject to Attack*

Until the 1977 Protocols, the immunity of noncombatants from attack was more an assumption than a matter of specific legislation. The Protocols put a few of the governing principles on paper, but there is still a lot left to custom. Putting custom and the Protocols together with a few other pieces of legislation, we find that the following principles presently govern the legality of particular attacks:

- (1) assassination is not a legitimate means of warfare;⁴²
- (2) noncombatants may be put at risk only if necessary to mount an attack on a "military objective;"⁴³
- (3) indiscriminate attacks on groups of people are forbidden;⁴⁴
- (4) attacks for the purpose of terrorizing civilians are forbidden;⁴⁵
- (5) weapons that cannot be limited in their effect (e.g., mass destruction nuclear weapons or clouds of poison gas) are forbidden.⁴⁶

⁴¹ See text accompanying note 4 *supra*.

⁴² *E.g.*, LIEBER, *supra* note 14, art. 148; A.F.M., *supra* note 14, § 31.

⁴³ *E.g.*, First Protocol, *supra* note 28, arts. 48, 52; Hague, *supra* note 30, arts. 24-28; INTERNATIONAL COMMITTEE OF THE RED CROSS, *Draft Rules for the Limitation of the Dangers Incurred by the Civilian Population* (1956), reprinted in THE LAWS OF ARMED CONFLICTS 187-93 (2d rev. ed. D. Schindler & J. Toman 1981) [hereinafter cited as I.C.R.C.]

⁴⁴ *E.g.*, First Protocol, *supra* note 28, art. 51, §§ 4-5; I.C.R.C., *supra* note 43, art. 6; G.A. Res. 2675, 25 U.N. GAOR, Supp. (No. 13) 292, U.N. Doc. A/2675 (1970); G.A. Res. 2444, 23 U.N. GAOR, Supp. (No. 12) 164, U.N. Doc. A/1748 (1968).

⁴⁵ First Protocol, *supra* note 28, art. 51, § 2; Second Protocol, *supra* note 27, art. 13, § 2; I.C.R.C., *supra* note 43, art. 6.

⁴⁶ *E.g.*, First Protocol, *supra* note 28, art. 51, §§ 4(b)-(c); Geneva Protocol Relating to the Prohibition of Poisonous Gases, June 17, 1925, 94 L.N.T.S. 65; G.A. Res. 2603A, 24 U.N. GAOR, Supp. (No. 12) 226, U.N. Doc. A/1836 (1969); G.A. Res. 1653, 16 U.N. GAOR, Supp. (No. 8) 236, U.N. Doc. A/1063 (1961); I.C.R.C., *supra* note 43, arts. 14-15. For an analysis of the 1977 language, see Aldrich, *New Life for the Laws of War*, 75 AM. J. INT'L L. 764, 780-81 (1981).

While these principles are often disregarded, they are hard to disagree with. Unfortunately, they are not always easy to interpret. I suggested above that shooting a person guilty of specific oppressive conduct may be different from using assassination as a means of warfare. The law offers no criterion for applying this distinction. Nor does it offer a way of telling who is a noncombatant. *The Battle of Algiers* film has the FLN begin their campaign by an indiscriminate shooting of policemen. Now, it must be conceded that policemen wear uniforms and play a major part in fighting against clandestine forces, but does that make a policeman a combatant when he is directing traffic of helping old ladies across the street? The law provides no guidance on the point.

Or consider the actual military forces engaged in fighting the clandestine force. Is every member of those forces a combatant twenty-four hours a day, seven days a week? Under Lieber's code, an enemy soldier is a legitimate target only when an actual engagement is taking place.⁴⁷ We have tacitly (though not by express legislation) abandoned this restriction in more recent times. The modern idea is pretty much that an enemy soldier is a legitimate target any time, and a worker engaged in directly supporting the war effort is a legitimate target at least when he is at work.⁴⁸

Even if we assume that this level of targeting is acceptable in conventional warfare, in the peculiar circumstances of clandestine warfare, it seems too harsh. In conventional warfare there is a line of battle. The combat soldier may be subject to attack whenever he is on the line, but he is given a respite from time to time. The civilian behind the lines may be subject to aerial attack, but he generally knows when enemy planes are coming and when they have gone. The prospect of being killed anywhere anytime by anyone is more of a strain than anyone, whether combat soldier or civilian, is under in a conventional war. The laws governing clandestine warfare should provide the equivalent of a place behind the lines.

The definition of military objectives also raises problems for clandestine warfare. A long tradition dictates that hospitals, museums, churches, schools, and the like are not to be attacked except in case of urgent necessity (as when the Germans holed up in the abbey of Monte Cassino). This tradition has been elaborately restated in such documents as the 1949 Geneva Convention on the Wounded and Sick and the 1954 Hague Convention on Cultural Property. Other more general pieces of legislation forbid the bombardment of undefended cities and towns. The relevance of these provisions, however, is pretty well limited to the situation their framers had in mind—that of advancing conventional forces. Not until 1977 did a piece of international legislation purport to give a general definition of military objectives:

⁴⁷ LIEBER, *supra* note 14, art. 69.

⁴⁸ WALZER, *supra* note 5, at 145-46.

Military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.⁴⁹

It does not seem to me that clandestine forces can be expected to abide by such a limitation as this. Their objective is to harass the government: if they do it by wrecking property instead of people, that is probably the most we can ask of them. I would not try to impose any legal restrictions beyond the traditional immunities of hospitals and cultural property and the recently enacted provisions for protecting the environment.

C. Countermeasures

Some of the countermeasures discussed above are forbidden by international agreements in any wars to which such agreements apply. Hostages, collective punishments, reprisals, and the placing of civilians or prisoners of war in such a way as to shield particular objects from attack are all forbidden by the Geneva Conventions of 1949.⁵⁰ The first 1977 Protocol adds a prohibition of environmental damage, and both Protocols forbid destruction of means required by the civilian population for survival (e.g., food, shelter, fuel).⁵¹ The second Protocol forbids wholesale transfers of civilians (i.e., concentration camps) except for their own protection for "imperative military reasons."⁵²

On the whole these prohibitions seem legitimate. I think, though, that vicarious or collective punishment might be allowed to the extent that it is limited to fine or detention, and is not applied except in a community whose members are collectively failing to cooperate in the suppression of the clandestine force. As to the wholesale transfer of civilians, on the other hand, I think the present legislation is too permissive. In the first place, one ought to be wary of the "own protection" excuse; it was used by the British in the Boer War to support their concentration camps.⁵³ It is easy to believe that no greater evil can befall the local populace than to lose the benevolent presence of our military forces and encounter the vicious soldiery of our enemies, but the local populace

⁴⁹ First Protocol, *supra* note 28, art. 52, § 2; I.C.R.C., *supra* note 43, art. 7; Resolution on the Distinction Between Military Objectives and Non-Military Objects in General and Particularly the Problems Associated With Weapons of Mass Destruction, Sept. 9, 1969, Institute of International Law, § 2.

⁵⁰ Convention I, *supra* note 30, art. 3 (hostages); Convention II, *supra* note 30, art. 3 (same); Convention II, *supra* note 21, art. 33 (same); Convention IV, *supra* note 21, arts. 3, 34 (same); Convention III, *supra* note 30, arts. 13, 87 (collective punishments and reprisals); Convention IV, *supra* note 21, art. 33 (same).

⁵¹ See note 28 *supra*.

⁵² Second Protocol, *supra* note 27, art. 17. Convention IV, *supra* note 21, art. 49 mentions the subject of civilian transfer, but is less restrictive.

⁵³ SPIES, *supra* note 17, at 149.

will not always agree. With regard to the "imperative military reasons" language, I think Walzer would say, and be right in saying, that if we have no better way to fight a clandestine force than to round up the whole civilian population and lock it away, the war is over and the clandestine force has won.⁵⁴ With these exceptions, I would favor extending the prohibitions as they now stand to cover the whole range of clandestine warfare.

In our own country, and in other countries with similar legal systems, some of the usual countermeasures are also restricted by municipal law. As a general principle, the limitations on the investigation and trial of crimes apply here as elsewhere, unless they are modified by the legislature or unless a basis is found for departing from them. It appears that in extreme cases departures will be both politically and constitutionally acceptable, but not in all the cases the government would wish. Thus, the suspension of habeas corpus, as provided for in the Constitution, was accepted in Maryland in 1861.⁵⁵ It was gotten away with in Hawaii in the Second World War, but was later declared illegal.⁵⁶ In the Japanese Exclusion Cases, also from the Second World War, the Supreme Court held that measures otherwise unconstitutional might be upheld in cases of emergency.⁵⁷ The principle is hard to argue with, but its application to the loyal and inoffensive Japanese-Americans now seems so outrageous that it is hard to know whether the cases still have any authority. Perhaps the lesson to be drawn from them is that if the emergency is severe enough to support the proposed measure politically, it will support it constitutionally as well. It would follow that the kind of measures taken by the British and Canadian authorities when the need arises⁵⁸ could also be taken in the United States even though we have written constitutional limits and they have not. On the other hand, the view that "national security," as a general matter, authorizes police methods that would otherwise be illegal or unconstitutional has not found favor.

Under American doctrine, as we have seen, civilians or enemy soldiers can be subjected to military courts and military law if they are found spying or in arms. Otherwise, the rule is that if the civil courts are open and able to function, they and their law must be used.⁵⁹ Whether, if we had a serious clandestine force in this country, we would apply the rule or the exception to it remains to be seen. I believe there is much to be said for using the law of war in such a case.

⁵⁴ WALZER, *supra* note 5, at 195-99.

⁵⁵ ROSSITER, *supra* note 16, at 18-26.

⁵⁶ *Id.* at 54-59.

⁵⁷ *Korematsu v. United States*, 323 U.S. 214 (1944); ROSSITER, *supra* note 16, at 40-54.

⁵⁸ See text accompanying note 15 *supra*.

⁵⁹ *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1867).

D. *Neighboring States*

For a state to harbor a clandestine force operating in a neighboring state is regarded as an act of aggression against the neighboring state. On the other hand, for the state in which the clandestine force operates to pursue it into the state where it is being harbored seems to be regarded as an act of aggression against the harboring state. If the first rule is a good one, the second makes no sense. It is possible to argue that the South Africans are right to fight against the South-West Africa People's Organization (SWAPO) and easy to argue that they are wrong to do so. But I cannot see that it is at all possible to argue that they are right to do so in Namibia and wrong to do so in Angola. I cannot see that what wrong they are doing in Namibia, be it great or small, is in any way enhanced by their crossing the Angolan border to reach their enemy where he has gone.

My point is that a state that harbors a clandestine force cannot claim to be neutral in the fight between that force and the opposing government. The duty of a neutral is clearly to intern any belligerent forces that show up within its borders.⁶⁰ Intentional failure to do this is inconsistent with neutrality, and, therefore, inconsistent with the claim to immunity that neutrals have. Angola, for good or ill, cannot claim to be neutral in the fight between South Africa and SWAPO.

There is in international law a doctrine called "humanitarian intervention" by which a state can intervene in a neighboring state if conditions are bad enough.⁶¹ This doctrine was used by India in Bangladesh, and by Tanzania in Uganda. It can also be used to support the so-called wars of national liberation that are being carried on by clandestine forces in various places. It is not clear how far this doctrine goes, and the 1977 Protocols, despite their general support for wars of national liberation, disclaim any intent to expand it. But whatever the doctrine of humanitarian intervention may justify in the way of support for clandestine forces operating in a neighboring state, it does not justify claiming the rights of a neutral while rendering such support.

In some cases, of course, the support of the harboring state for the clandestine force is less clear: the harboring state may be more victim than ally. This was the situation of Cambodia during much of the fighting in Vietnam; it is quite possibly the situation of Lebanon today. The law seems to require that a neutral state take reasonable measures to prevent breaches of its neutrality, but it does not shed much light on what measures are reasonable or what should happen if a state does not take them. The only clear precedent on the subject is an exchange of notes between the British and American governments establishing that the Canadians should not have crossed the Niagara River in 1837 to burn

⁶⁰ Hague V, Oct. 18, 1907, art. 11, 36 Stat. 2310, T.S. No. 540.

⁶¹ WALZER, *supra* note 5, at 101-08.

a boat that was running supplies from the American side to a group of insurgents on a Canadian island.⁶² This incident is a tenuous basis for solving the problems of the PLO in Lebanon, but there is not much else available. It is clear that the American authorities should have stopped the boat, and that the Canadians should have waited a reasonable time for them to do so before taking matters into their own hands. But it is not clear that a neutral state must hazard the lives of its troops and citizens in order to prevent breaches of its neutrality, or that one belligerent must exercise indefinite forbearance if the other one violates the territory of a neutral with impunity but not with permission. In the end, it would seem that a neutral ought to be able to preserve its neutrality despite the use of its territory by a belligerent, but it can hardly complain if the other belligerent takes preventive measures.

E. Occupation Rules

The law regarding the inhabitants of occupied territory takes them entirely out of the fighting. They are supposed to conduct themselves as peaceful citizens, and do nothing to hinder either the war effort of the occupying power or its administration of the occupied territory. Thus, the resistance fighters in German-occupied territory during the Second World War were not only unprivileged belligerents, they were war criminals. The Nuremberg tribunals, while they condemned the scope and ruthlessness of the Germans' countermeasures, accepted the characterization of the resistance movements as unlawful.⁶³ Later legislation has restricted still further the permissible countermeasures, but it has not changed that characterization.

This state of the law seems most unrealistic. It does not conform to what the inhabitants of occupied territories do, to what we expect them to do, or to what we honor them for doing. As long as they have compatriots or allies in the field, we expect them to give what support they can by disrupting the occupying power and distracting its forces. Even if they have no conventional force to support, we expect them to do what they can to make government difficult enough to encourage a favorable political settlement. Presumably, these expectations should be reflected in the law.

IV. PROPOSALS

In proposing changes in the laws of war we need to pay more than passing attention to what those laws are supposed to accomplish. The

⁶² 2 J. MOORE, A DIGEST OF INTERNATIONAL LAW 409-14 (1906).

⁶³ The Hostages Trial (United States v. List and others), 8 Law Reports of Trials of War Criminals 34, 57 (1949) (United States Military Tribunal, Nuremberg); Baxter, *The Duty of Obedience to the Belligerent Occupant*, 27 BRIT. Y.B. INT'L L. 235 (1951) disagrees with this characterization of the law as of the time of the Second World War. He does not quite persuade me.

laws of war differ from municipal laws in the lack of impartial enforcement by courts or police, and the relative insignificance of the unilateral enforcement measures that are sometimes applied. The laws of war differ also from other provisions of international law because of the effort of the intellect and the imagination needed to look at modern warfare and keep thinking of law.

Let us look at the last point first. It reflects, I believe, a mindset peculiar to modern industrial society.⁶⁴ We are accustomed to seeing organized and strenuous activities in technological terms—an effort to accomplish a determined purpose through the discernment and application of the available means. We are prepared to accept without much argument Clausewitz' dictum that war is a way of imposing our will on other people. It seems only common sense—like saying that civil engineering is a way of imposing our will on the landscape. Indeed, we are even comfortable with looking at law in the same way: witness the popularity of Roco Pound's metaphor of "social engineering." But if law and war are both ways of accomplishing things we want accomplished, they are considerably different ways. If we take both Pound and Clausewitz seriously, we will view law and war as an alternative technologies. It will be hard to think of one as governed by the other.

In earlier times, war was regarded not as an alternative technology to law, but as itself a legal transaction. People who went to war thought of themselves as invoking a divine judgment of their causes. Many societies reached the point of formalizing this invocation long before they were able to supersede it with other forms of trial. The ritual combat or "trial by battle" survived in our legal system until relatively recent times⁶⁵ as a witness to the primordial relation between litigation and war.

This juridical understanding of war accounts for Grotius' insistence that the right to make war belongs only to sovereigns.⁶⁶ Paradoxically, it probably accounts also for the privileged position given to wars of national liberation in the 1977 Geneva Protocols.⁶⁷ Where Grotius sees the pursuit of justice as a prerogative of divinely appointed rulers, modern theorists see it as a prerogative of peoples. But in both cases war is seen as the pursuit of justice.

Seeing war in this way sometimes has an unfortunate effect on people's attitudes toward their enemies. If in making war I am acting as an agent of transcendent justice, then my enemy must be acting as an oppo-

⁶⁴ The maxim *inter arma leges silent* is ancient, but its meaning is not that war is subject to no law. Rather, the phrase means that the law is subject to no law except the law of war. LIEBER, *supra* note 14, arts. 40-41.

⁶⁵ Trial by battle was abolished by Act to Abolish Trial by Battle, 59 Geo. III, c. 46 (1819), after being involved in the celebrated case of *Ashford v. Thornton*, 1 B. & Ald. 405, 106 Eng. Rep. 149 (1818).

⁶⁶ H. GROTIUS, *THE RIGHTS OF WAR AND PEACE* bk. 1, ch. 3, bk. 3, chs. 3, 20 (reprinted 1979) [hereinafter cited as GROTIUS]

⁶⁷ First Protocol, *supra* note 28, art. 1, § 4.

nent of transcendent justice. To the extent I cast myself in the role of judge or policeman, I am casting my enemy in the role of criminal. Why then do I have to treat him with respect when I fight him, and with courtesy and consideration when I catch him?⁶⁸

I think the way we have to solve these questions is to adopt a litigation model that conceives of the combatant as a litigant, not a policeman or judge. This model gives scant warrant for anyone engaged in warfare to despise his enemies. Both sides are suitors together before a judge whose purposes are often inscrutable, and who is apt to give both to them more justice than they bargained for. Abraham Lincoln, after four years of civil war, had some inkling of what it means to submit a cause to such a judgment:

Neither party expected for the war the magnitude of the duration which it has already attained. . . . Each looked for an easier triumph and a result less fundamental and astounding. Both read the same Bible and pray to the same God; and each invokes his aid against the other. It may seem strange that any men should dare to ask a just God's assistance in wringing their bread from the sweat of other men's faces, but let us judge not that we be not judged. The prayers of both could not be answered—that of neither has been answered fully.

The Almighty has His own purposes. . . . Yet, if God wills that [the war] continue until all the wealth piled by the bondsmen's two hundred and fifty years of unrequited toil shall be sunk, and until every drop of blood drawn with the lash shall be paid by another drawn with the sword, as was said three thousand years ago, so still it must be said, "The judgments of the Lord are true and righteous altogether."⁶⁹

I would put it that the first purpose of the law of war is to regulate war as a legal transaction—to sustain the relation between two sides that believe in the justice of their respective causes, but await a judgment that may go hard with both of them. To this perception must be attributed much of what is liturgical and ceremonial in the laws and customs of war as well as much of the respect that the law calls on even the deadliest of combatants to have for one another.

The second purpose of the law of war is to embody moral insights into the manner in which war should be waged. The embodiment of moral insights is a function of any set of laws. The absence of enforcement mechanisms, judges, or police does not make that embodiment superfluous. Our laws do not necessarily accord with our personal conceptions of right and wrong, but they are the language of our community

⁶⁸ See text following note 14 *supra*.

⁶⁹ Abraham Lincoln's Second Inaugural Address (Mar. 4, 1865), reprinted in 5 LIFE AND WORKS OF ABRAHAM LINCOLN 223, 224-25 (1907).

conversation on the subject.⁷⁰ They represent our particular collective ways of implementing general moral principles. As the scholastic philosophers put it, positive law makes specific what the natural law (i.e., morality) leaves general. For instance, it is natural law that tells us not to drive dangerously, whereas positive law tells us not to drive more than forty miles per hour on a particular street. The principle that requires me to respect the humanity and good faith of my opponent in war is analogous to the principle that I must not drive dangerously, while the rule that I must not make prisoners of war work in munitions factories is like the speed limit.

Positive law also serves to confront the individual conscience with the moral judgment of the community (civil rights laws are a better analogy here than speed limits), and to make the results of advance moral reflection available to a person with a snap decision to make in a difficult moral situation—such as almost anyone fighting a war.

In short, where there is moral concern in a social context, there is an important role for positive law, whether or not there is an enforcement machinery. The law makes specific what the applicable moral principles leave general. It treats questions in advance where there is hardly time to treat them as they arise. The law brings the collective experience of the community to bear on questions that very few people would want to answer on their own.

The positive law cannot fulfill these functions unless it bears some recognizable relation to people's moral perceptions of the situations it purports to cover. As I have tried to point out, the positive law on the subject of clandestine warfare does not generally bear such a relation. As a result, it offers very little guidance to those who attempt either to carry out or to suppress clandestine military operations, and both sides seem to conduct their enterprise in a moral as well as a legal vacuum.

I am proposing here a reform in the positive law applicable to clandestine warfare. The major part of my proposal is a draft international convention. I use this form because it is the form taken by most of the existing legislation on warfare. The objection naturally arises that warfare between nations is a concern of the international community, whereas war between factions in a single nation is not. This objection is superficially persuasive, but I think in the end specious. Most modern wars, whether national or international, involve ideological conflicts.⁷¹ Only through the international community and its institutions can we

⁷⁰ See my *THE LEGAL ENTERPRISE* 34-35 (1976).

⁷¹ I recall reading a remark of Professor Paul Freund that ideological warfare will one day become as obsolete as religious warfare is now. Until that day comes, one can draw useful analogies between ideological and religious wars. It is worth noting in this context how much the renovation of international law under Grotius and his contemporaries or near contemporaries owes to the need to work out a basis for relations between Catholic and Protestant powers.

provide for relations between peoples and groups with different ideological commitments.

I have said that positive law is the language of moral conversation in society. These proposals are my own attempt to participate in that conversation. I have not taken into account the formidable political obstacles to getting other and more important participants to adopt them.

In developing these proposals, I begin with what seem to me the four basic principles of the laws and the morality of just war:

- (1) the independence of *jus in bello* from the *jus ad bellum*;
- (2) the condemnation of "perfidy," an ill-defined⁷² body of underhanded tactics distinguished from "ruses," which are acceptable;
- (3) the immunity of noncombatants from attack;
- (4) quarter for lawful combatants when captured.

These principles determine the problems of a reformed law of clandestine war.

The first such problem is distinguishing lawful combatants from gangsters or nut groups. Where a force either wears uniforms or controls territory, we have some guarantee of the seriousness of its enterprise. If we abandon these criteria, we must develop others. I have shown why I do not think the criterion of legitimacy used in the first 1977 Protocol is an acceptable way of doing this.⁷³ What is needed is a criterion not of legitimacy but of seriousness. Having a clearly stated objective may be one such criterion.⁷⁴ Having a reasonably broad constituency may be another—this is analogous to the reasonable prospect of success that is a criterion in classical just war theory. The scope of the countermeasures evoked by a clandestine force may also indicate its seriousness. Where a government imposes curfews and preventive detention, and deploys combat troops, it can hardly contend that its adversary is not serious.⁷⁵

The next problem is distinguishing lawful clandestine warfare from perfidy. A clandestine force could hardly keep the field if it abstained from everything regarded as perfidy under present-day law.⁷⁶ We need to redefine perfidy by resorting to the underlying moral insight that bids us keep faith with even our enemy. I suggest that our treatment of our enemy is based on the twofold presupposition that we are right and

⁷² See text accompanying notes 40 & 41 *supra*.

⁷³ I find no definition earlier than First Protocol, *supra* note 28, art. 37, which seems to me too narrow.

⁷⁴ A clearly stated objective is one of the elements of classical "just war" doctrine.

⁷⁵ J. BOND, *THE RULES OF RIOT* 181-82 (1974).

⁷⁶ Note the ambivalence of article 44 of the First Geneva Protocol of 1977 on the subject of perfidy. First Protocol, *supra* note 28, art. 44.

he is in good faith. Since we are right, we are entitled not to be attacked. We therefore have no obligation to make it easier for the enemy to attack us. Hence, disguise, as such, is legitimate. On the other hand, since the enemy is in good faith we may not deal with him in bad faith. We must not abuse a personal encounter with him. We must not effect his destruction by pretending to be his friend.⁷⁷ The distinction I want to draw is pretty vague in practice, but I think legislation can be formulated that will at least call attention to it, and perhaps give a modicum of help in applying it.

A third problem is determining who is subject to attack. War is part of the political process. Under our tradition, there are some human rights that are immune from the political process. Accordingly, they should also be immune from the tactical expediencies of war. That is, no one can be legitimately attacked merely because it is expedient to attack him. Some further justification has always been necessary.

The traditional basis for subjecting enemy civilians to the hazards of war when it is necessary to do so is the solidarity of the enemy's community. Grotius alludes (with misgivings, to be sure)⁷⁸ to the argument that since the sovereign has power over the persons and property of his subjects it is lawful for the sovereign's enemies to appropriate that power as far as is necessary to pursue their legitimate purposes. Lieber makes the same point in a more sophisticated and more democratic form:

It is a law and requisite of civilized existence that men live in political, continuous societies, forming organized units, called states or nations, whose constituents bear, enjoy, suffer, advance and retrograde together, in peace and in war. The citizen or native of a hostile country is thus an enemy, as one of the constituents of the hostile state or nation, and as such is subjected to the hardships of the war.⁷⁹

Whatever force this argument has is missing in the typical clandestine warfare situation, where the legitimacy and authority of the enemy

⁷⁷ I was hard pressed on this point by my fellow participants in the Washington and Lee colloquium. We ended with a standoff. I was not able to reduce this basic intuition about human encounter to a more persuasive form; nor was I persuaded to abandon it. It is perhaps helpful to note that the most difficult hypotheticals we came up with involved gathering information. I sense some moral distinction between pretending to be someone's friend in order to get close enough to kill him. To be sure, one can use the information to kill him later, but there still seems to be a distinction. I find some support for it in AFM, *supra* note 14, § 49: "In general, a belligerent may resort to those measures for mystifying or misleading the enemy against which the enemy ought to take measures to protect himself." One might be expected to protect himself against disclosing information more strictly than against being killed by chance acquaintances or supposed friends.

⁷⁸ GROTIUS, *supra* note 66, bk. 3, ch. 2.

⁷⁹ LIEBER, *supra* note 14, arts. 20-21.

sovereign are in issue and the two sides are drawn from the same community.⁸⁰

It appears, therefore, that the typical clandestine warfare situation provides only two legitimate bases for attacking an enemy. One is that he is actively engaged in preventing the accomplishment of a legitimate military objective. The other is that he has personally done something wrong. These bases should be spelled out in the law.

In addition to specifying and articulating the applicable moral rules, a revised system of laws for clandestine warfare should provide procedures by which cases subject to the laws of war can be distinguished from cases subject to municipal criminal law. It should also provide some way in which clandestine forces may afford rudimentary procedural justice to persons accused of wrongdoing, and some way, such as parole, whereby clandestine forces can take captured enemies out of the war without undertaking the impossible burden of holding them as prisoners.

Realistic guidance should also be provided for states adjoining places where clandestine warfare is going on. A state that intentionally supports and harbors a force engaged in clandestine operations in another state should be explicitly subjected to the responsibilities of a cobelligerent. A state that wishes to retain the position of a neutral in such a situation should not have to put its own forces at risk in someone else's quarrel in order to do so. But if it cannot or will not prevent the use of its territory by one belligerent, it can hardly complain if the other belligerent operates in the same territory.

Finally, the occupation rules should be amended to establish clearly the legitimacy of such actual practices as were considered right during the Second World War.⁸¹

These are the purposes I have tried to accomplish in the following drafts, one of an international convention, the other of a federal statute.

⁸⁰ Engels argues, I do not recall where, that in conditions of class warfare a member of the enemy class may be attacked regardless of his personal responsibility for what his class is doing. I find this argument morally tenuous. A social class does not have the same intrinsic necessity as a state.

⁸¹ See text following note 4 *supra*.

Appendix I

DRAFT CONVENTION ON CLANDESTINE WARFARE

Article 1: Scope of this Convention

1. This Convention applies to clandestine warfare in or affecting the territory of any of the High Contracting Parties. The term "clandestine warfare" as used herein means armed conflict as carried out by or against clandestine forces. A "clandestine force" is any force whose members systematically attempt to gain military advantage or escape hostile action by mingling with or posing as noncombatants. Forces that are not clandestine forces are called "conventional forces."
2. Reference in this Convention to the laws and customs of war, or to rights and obligations thereunder, or to the rights and obligations of governments, of neutrals, or of conventional forces shall be interpreted, as far as the nature of the case admits, as if the Conventions and Protocols enumerated in Section 3 of this Article were applicable, notwithstanding any provision in any of those Conventions and Protocols limiting its application to cases of international conflict, to forces operating in definite territories, or to combatants wearing a fixed sign or carrying arms openly. In cases to which they apply in terms, those Conventions and Protocols are superseded only to the extent they are inconsistent with this Convention. Without prejudice to the generality of the foregoing, anyone entitled to be a prisoner of war under the provisions of those Conventions and Protocols remains so entitled, and anyone entitled to be a prisoner of war under this Convention is entitled to all the rights of a prisoner of war under those Conventions and Protocols.
3. The Conventions and Protocols referred to in Section 2 of this Article are:
 - (a) The Hague Convention of 1907 Respecting the Laws and Customs of War on Land;
 - (b) The Hague Convention of 1907 Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land;
 - (c) The four Geneva Conventions of 1949;
 - (d) The Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict;
 - (e) The two Protocols to the Geneva Conventions adopted in 1977 by the Diplomatic Conference on Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflict.
4. No person, force, or government shall be denied the benefits of this Convention or exonerated from the obligations thereof on the ground that he or it or any person, force, or government that he or it

is opposing is not a party to this Convention, or has or lacks a particular status under international or municipal law.

Article 2: Rights of Clandestine Forces and Their Members

1. Clandestine forces and their members shall be entitled to the benefit of this Article if they fulfill the following conditions:
 - (a) that of being commanded by a person responsible for his subordinates;
 - (b) that of conducting their operations in accordance with this Convention and other applicable provisions of the laws and customs of war;
 - (c) that of maintaining an internal disciplinary system which, *inter alia*, shall enforce compliance with this Convention and other applicable provisions of the laws and customs of war;and at least one of the following conditions:
 - (d) that of operating in support of a conventional force currently in the field, where the primary war effort against the enemy is being mounted by conventional forces;
 - (e) that of having a defined and publicly stated political aim, which aim has substantial (though not necessarily majority) support within the community in which the force operates, and which its proponents could not realistically expect to implement through peaceful political action. A government that opposes a clandestine force with regular combat troops or by means of emergency measures inappropriate in a peaceful society may not deny that the political aim of that force has substantial support within the community.
2. Members of clandestine forces that fulfill the foregoing conditions are entitled to be prisoners of war if they fall into the power of the enemy. They are punishable for offenses against this Convention or other applicable provisions of the laws and customs of war, but they are not punishable under the municipal law of the enemy for anything done in furtherance of the war effort of the force to which they belong. Nor are they punishable for being found in disguise, for failure to wear a distinctive sign, or for failure to carry their arms openly.
3. Persons who belong to a clandestine force which they believe in good faith to fulfill the conditions of Section 1 of this Article are entitled to the benefits of Section 2, except that if the force does not in fact fulfill the conditions of Section 1, its members may be punished for violations of the municipal criminal law.
4. Persons who knowingly become or remain members of a clandestine force that does not fulfill the conditions of Section 1 are not entitled to the benefits of this Article. They may be punished for violation of this Convention, of other applicable provisions of the laws and

customs of war, or of the municipal law. Unless when captured they are wearing a fixed distinctive sign recognizable at a distance and carrying arms openly, they may also be dealt with under the laws and customs of war concerning spies or other persons who penetrate enemy territory in disguise with hostile intent.

5. As used in this Article, the term "municipal criminal law" does not include emergency measures inappropriate in a peaceful society.

Article 3: Conduct of Hostilities by Clandestine Forces

1. Persons are not subject to attack by clandestine forces except as follows:
 - (a) Members of the armed forces of an adversary are subject to attack while on duty, or while in a fort or other military post with a defended perimeter.
 - (b) Other armed persons are subject to attack while actively engaged in hostilities against a clandestine force, or while deploying or standing guard with a view to such hostilities. The term "hostilities" as used in this provisions includes any attempt to kill, injure, or capture the members of a clandestine force, or to hinder them in the accomplishment of a specific military objective.
 - (c) Persons whether or not armed, while they are actively using or threatening to use force to implement measures or policies specifically denounced in a statement issued pursuant to condition (e) of Section 1 of Article 2, are subject to attack as far as is necessary to prevent their carrying out their purpose. Persons participating in judicial proceedings are not actively using or threatening to use force within the meaning of this provision.
 - (d) In the case of a clandestine force which is operating in support of a conventional force, persons are subject to attack while at work in manufacturing, communication, or transportation industries that directly contribute to the war effort of the adversary against the conventional force being supported.
 - (e) Persons sentenced in accordance with Article 5 are subject to attack for the purpose of carrying out the sentence.

The foregoing provisions shall not be construed to authorize attacks on persons engaged in police or administrative functions of a kind usual in peaceful societies.

2. Indiscriminate attacks on groups or crowds are forbidden, and are not justified by the presence of persons subject to attack among the groups or crowds in question. Attacks for the purpose of terrorizing the general public or particular races, classes, or elements within the general public are forbidden. It is forbidden to attempt to destabilize a government or society by singling out for attack those persons and officials who are most honest, decent, and effective in carrying out peaceful governmental or social functions.

3. Members of clandestine forces shall not fraternize with or endeavor to gain the confidence of persons subject or potentially subject to attack in order to facilitate attacks on such persons. Nor shall they attack any person whom they have placed at a disadvantage by fraternizing with him or gaining his confidence.
4. In operations aimed at the capture or destruction of property, clandestine forces shall take reasonable precautions to avoid harm to persons not subject to attack.
5. Clandestine forces have the same obligations as conventional forces toward medical, religious, and relief personnel; toward journalists; toward women and children; toward cultural property; toward property and locations devoted to the care of the wounded, the sick, refugees, and children; toward supplies and services necessary for the health and survival of the civilian population; and toward the environment.

Article 4: Treatment of Prisoners of War by Clandestine Forces

Except as provided in this Article, clandestine forces have the same obligations as conventional forces toward enemies who surrender or otherwise fall into their power. However, a clandestine force that has no facilities for the indefinite detention of prisoners of war may require any prisoner who has been detained for not less than forty-eight hours and not more than a week to accept liberation on parole, and may refuse quarter to any prisoner who will not give his parole as required. The obligations of a prisoner so paroled and of his government or military superiors are the same as if he had given his parole voluntarily and with permission. No government or military superior may forbid any person to give his parole under the circumstances provided for in this Article or punish him for doing so.

Article 5: The Administration of Justice by Clandestine Forces

Clandestine forces shall not undertake to administer civil or criminal justice in territory not under their effective control or over persons not previously detained by them except in accordance with the following provisions:

1. Clandestine forces shall not undertake the punishment of any crimes except in the following categories:
 - (a) offenses against the laws and customs of war, including this Convention;
 - (b) crimes against humanity, as defined by the Charter and jurisprudence of the International Military Tribunal, Nuremberg and other tribunals established pursuant to the same Charter;
 - (c) in the case of a war between sovereign powers, recognized as such by the international community, where the clandestine force is operating in support of conventional forces of one such

power in territory occupied by an enemy power, treason on the part of nationals of the power to which the clandestine force belongs;

- (d) serious crimes denounced as such by general laws in force before the outbreak of hostilities and appropriate for the government of a peaceful society;
- (e) morally responsible discretionary acts involving the use or threat of force to implement policies or measures specifically denounced in a statement issued pursuant to condition (e) of Section 1 of Article 2.

Except as provided in category (c) above, adherence to or support of the enemies of the clandestine force or the conduct of hostilities against the clandestine force shall not, as such, be punished.

2. Clandestine forces shall not undertake the punishment of any crime in category (d) or category (e) above unless they can do so with reasonable consistency and effectiveness, nor until they have published a proclamation describing with reasonable clarity the crimes they intend to punish.
3. Clandestine forces shall not undertake to give civil relief except to the victims of crimes which they have undertaken to punish. They shall not give civil relief affecting personal status or title to property.
4. No person shall be punished for a crime other than one which he has himself committed, nor until some responsible and impartial person has investigated the case and satisfied himself that the one to be punished is the one who actually committed the crime in question.
5. As part of the investigation provided for in Section 4, the accused shall be provided with a written statement of the charges against him or the opportunity to examine and copy such a statement. He shall also be informed of some means by which he may contribute relevant information to the investigation without placing himself in the power of the clandestine force. No decision shall be made concerning his case until such information has been received and impartially considered.
6. After the investigation provided for in Sections 4 and 5, no punishment shall be inflicted until the charges and the sentence have been made public.

Article 6: Conduct of Hostilities Against Clandestine Forces

Except as herein expressly provided, conventional forces conducting operations against clandestine forces are subject to the same obligations as when conducting operations against conventional forces, and governments endeavoring to suppress clandestine forces are subject to the same obligations as governments maintaining a war effort against conventional forces. The enumeration here of certain practices as expressly forbidden shall not be taken to make other practices lawful.

1. It is forbidden to attack or endeavor to suppress clandestine forces by means of:
 - (a) perfidy;
 - (b) obtaining information through drugs or torture;
 - (c) taking hostages, placing prisoners of war or innocent persons in positions of danger in order to discourage attacks, or, except as provided in Section 2 of this Article, inflicting collective punishments or other punishments not based on individual guilt;
 - (d) general destruction of the natural environment in order to deprive clandestine forces of a place of concealment;
 - (e) starvation of the civilian population among whom clandestine forces are concealed, or other measures seriously impairing the health of the population;
 - (f) concentration camps, or other involuntary mass relocation of civilians;
 - (g) indiscriminate bombardment of places and groups on the ground that clandestine forces may be concealed in or among them, *provided* that in cases of urgent necessity it is acceptable to use non-lethal gas to control and sort groups consisting of mingled clandestine forces and civilians;
 - (h) proclamation of "free fire zones" or other places in which anyone found abroad is presumed without investigation to be an enemy.
2. Notwithstanding any prohibition of collective punishment, in a village, community, or neighborhood where a clandestine force is active and appears to have at least the passive support of the majority of the population, the government or other party endeavoring to suppress the clandestine force may impose collective fines, may confiscate or destroy property other than property affording essential food, shelter, and clothing to the population, and may impose temporary restrictions on the movement of the inhabitants.
3. Notwithstanding any prohibition of distinctions based on race, color, religion, language, national or social origin, wealth, birth, or other status, if it appears that a clandestine force and its adherents are generally characterized by one or more of these criteria, the government or other party endeavoring to suppress the clandestine force may impose otherwise lawful conditions or restrictions on persons so characterized without imposing them on others.

Article 7: Administration of Justice by Conventional Forces and Governments

1. Conventional forces and governments in punishing war crimes, crimes against humanity, and other offenses related to the armed conflict, shall be bound by Article 6 of the Second 1977 Protocol to the Geneva Convention of 1949 unless some standard more favorable to the accused is in terms applicable. Clandestine forces, in dealing

with territory under their effective control, or with persons previously detained by them, are subject to the same requirements as conventional forces.

2. No person claiming the benefit of Article 2 shall be denied it without a judicial determination that he is not entitled to it. Procedures for the making of such a determination shall conform to Article 6 of the Second 1977 Protocol to the Geneva Convention of 1949 unless some standard more favorable to the accused is in terms applicable.

Article 8: Punishments and Reprisals

1. Punishments inflicted under Article 5 or Article 7 shall be proportional to the offenses committed, and shall not involve mutilation, disfigurement, sexual abuse, degradation, or irreversible impairment of health. The death penalty shall not be inflicted on any person under the age of eighteen, or who was under that age when the offense was committed, or on any pregnant woman or mother having dependent children. Corporal punishment shall not be inflicted by any force or government that has adequate facilities for punitive detention.
2. The taking of hostages and the infliction of reprisals upon individuals are forbidden. However, if a person is sentenced in accordance with Article 5, Article 7, or the municipal law in a case provided for in Article 2, the sentence may be suspended subject to conditions imposed on the person sentenced, his employer, the force to which he belongs, or the government which he serves.

Article 9: Neutrality

The rights and obligations of neutrals in cases of clandestine warfare are the same as in cases of warfare between conventional forces, except as otherwise provided in this Article or in Article 10.

1. A clandestine force is not entitled to be recognized by neutrals as a belligerent unless it is operating in support of a conventional force that is so entitled. A clandestine force, unless it is recognized as a belligerent, has no right to require that opposing forces be dealt with according to the laws establishing the obligations of neutrals toward belligerent forces. Except as provided in Article 10, a government opposing a clandestine force has the right to require that the clandestine force be dealt with according to those laws whether or not it is recognized as a belligerent.
2. Whether or not a clandestine force is recognized as a belligerent, if it fulfills the conditions of Article 2, its members, on falling into the power of a neutral, are entitled to be interned rather than extradited or prosecuted. If the clandestine force does not fulfill the conditions of Article 2, its members may be extradited to be tried for violations of the municipal criminal law (but not for offenses against the laws of

war or this Convention), may be tried by the neutral in whose power they are, or may be interned, at the option of the neutral.

Article 10: Neighboring States

This Article applies where a clandestine force uses the territory of one state (called the "base state") as a base for operations within the territory of another state (called the "state of operations").

1. If the base state is unable or unwilling forcibly to prevent the use of its territory by the clandestine force, it shall so advise the state of operations, designating, if it so desires, those parts of its territory which the clandestine force will be free to use.
2. The state of operations may send forces into the territory of the base state, or such part thereof as is designated in the notice provided for in Section 1 for the purpose of hostile action against the clandestine force. A force taking advantage of this privilege shall scrupulously respect the inhabitants of the base state and their property.
3. For the base state to negotiate with the clandestine force regarding limitations on the use of its territory or to sell supplies to the clandestine force at reasonable prices shall not be deemed a hostile act against the state of operations if the notice provided for in Section 1 of this Article is given and the privilege provided for in Section 2 is accorded.
4. If the base state fails, after becoming aware of the presence of the clandestine force in its territory, to give the notice provided for in Section 1 of this Article or to accord the privilege provided for in Section 2 of this Article, it may be regarded as a cobelligerent with the clandestine force.

NOTES ON DRAFT CONVENTION

Article 1

1. I owe to Walzer the idea that the morally significant difference between clandestine and other forces is that clandestine forces endeavor to take advantage of the immunity of noncombatants.
- 2- This draft is not intended to cover the whole field; it is meant to fill
3. in gaps in the existing material. Therefore, the applicability of the existing material must be spelled out.
4. At the colloquium, two objections were raised to this provision. First, that it is inappropriate to hold a party to a convention to which it has not adhered. Compare art. 96 of the First 1977 Protocol, *supra* note 28, with its provision for voluntary adherence by a force with no other international status. Second, that international law should not be concerned with wars between groups that have no international status, or wars over the internal affairs of a single state.

I would respond that almost all of the actual wars to which this Convention would apply if adopted will involve social, economic, political, or ideological forces international in scope. It is idle to say either that they do not concern the international community or that the only agencies with power to legislate for the international community cannot deal with them. See note 71 and accompanying text *supra*.

Article 2

1. (a)-(c) These are conditions for combatant status adapted from the existing material.
(d) World War II resistance forces are examples of forces that would meet this condition. The existence of a conventional force in the field is a sufficient guarantee of the seriousness of the war effort to make other guarantees unnecessary.
(e) Having eliminated the requirements in the existing material that the combatant be part of a uniformed force or a force pursuing a particular political goal or a force that controls territory, I need some other basis for distinguishing a combatant from a gangster or a nut. The requirement of a stated aim is derived from classical just war theory. The reference to the scale of countermeasures comes from J. BOND, *THE RULES OF RIOT* 181-82 (1974).
- 2-4. Combatants fall into three categories under international law. First, there are those who are entitled to be prisoners of war. They may be confined for the duration of the war, but are not punishable for anything they do in furtherance of the war effort and not condemned by the laws and customs of war. Second, there are war criminals, who have done something contrary to the laws and customs of war. They may be tried and punished by anyone who catches them, whether on their own side or on the enemy's. Finally, there are the "unprivileged belligerents" who have not necessarily done anything against the laws and customs of war, but who do not fulfill the conditions for being prisoners of war. See notes 10-14 and accompanying text *supra*. The consensus of scholars is that international law neither protects unprivileged belligerents nor provides for their punishment, but simply leaves them to be dealt with under municipal law. However, the American courts seem to hold that an unprivileged belligerent, as such, is subject to trial and execution under the laws of war, either as a punishment or as a way of increasing the risk of this kind of belligerency. These provisions are intended to sort clandestine fighters among the three categories. I do not want to resolve this disagreement between the scholars and the American courts as to unprivileged belligerency; what I have in mind is to leave the law on the subject where it stands. Note that on the scholars' view the last sentence of Paragraph 2 is superfluous, whereas under the American view it is needed.

5. I debated whether to include this. It would apply to such things as capital punishment for being found with a gun, or a year's imprisonment for curfew violation. If I am right in thinking some clandestine forces are worthy of respect, it does not seem that a person who thinks he belongs to such a force should be shot for possessing a gun before he does anything with it. He should be at least as well off as a common bank robber. The words "emergency measures inappropriate in a peaceful society" are intended to refer to measures that a government regards as temporary and justifies on the basis of extraordinary circumstances brought about by war or civil unrest. See, e.g., Northern Ireland (Emergency Provision) Act, 1973.

Article 3

This Article represents my perceptions of the applicable moral principles. Some of the principles on which I have operated are that in wars fought over economic and social conditions the people responsible for the conditions should be at least as vulnerable as the common soldiers and police; that disguise is not inherently objectionable but abuse of human encounter is; that no one should have to feel that anyone he encounters at any time may be going to kill him; that a person's contribution to a peaceful solution should not be a ground for making an enemy of him, etc.

1. (a) and (b) are meant to distinguish between regular armed forces and police. The situation I have in mind with (c) is that of a sheriff about to evict a peasant from his farm, or a construction crew about to bulldoze a house. It is not meant to authorize a massacre of a legislative body about to enact an oppressive law or a board of directors about to pass an oppressive policy. The last sentence is meant to protect participants in a court proceeding where a prisoner is in custody and about to be marched off to jail. It would not be necessary to protect participants in a court proceeding where an eviction order is about to be handed down. They would not be "actively using or threatening to use force." (d) corresponds to the notion of "quasi-combatant work force" that is used in connection with strategic bombing.
3. See note 77 *supra*. The text is intended to embody my intuitive distinction between fraternizing to obtain information and fraternizing to prepare for attack. This is meant for the most part to replace, rather than to supplement, existing material on perfidy, although rules such as that against misusing the red cross marking or the flag of truce would continue to apply. Rather than spell out the relation with the existing material, I am relying on the general provision of Article 1, Section 2 that the existing material applies except where it is superseded.
4. These matters are all covered in the existing material.
- 5.

Article 4

This Article is meant to deal with the fact that clandestine forces generally have no facilities for holding prisoners. Compulsory parole is a serious departure from existing practice, but it seems appropriate here. The forty-eight hours to one week requirement is to keep the use from getting out of hand. At least as recently as our Civil War, the refusal of quarter was considered acceptable where a commander could not encumber himself with prisoners without endangering his own force. LIEBER, *supra* note 14, art. 60. The modern rule is different, AFM, *supra* note 14, § 85, but, given the dilemma of a clandestine force with prisoners, revival of the earlier practice in the case of a prisoner who will not accept the proffered alternative of parole does not seem unduly harsh.

Article 5

Redressing grievances and punishing oppressors is a way, and in my opinion a legitimate way, for a clandestine force to gain adherents in the community. But it should be done with such procedural safeguards as are possible during a clandestine operation.

Article 6

This Article represents my moral judgment on various expedients used in the Boer War, World War II, Algeria, Malaya, Cyprus, Palestine, and Vietnam. Many of these are also covered in the existing material, but it seemed appropriate to mention them specifically here, as they seem to be particularly adapted for use against clandestine forces.

Article 7

The existing material covers procedures at length, so there is no need for elaboration here.

Article 8

The existing material covers punishments in scattered locations, that make it difficult to cite by reference. The restrictions on the death penalty and on the manner of punishment are similar to the existing material, although not verbatim. The provision for corporal punishment seems essential for forces that have no facilities for keeping prisoners. The provision for conditional suspension of sentences gives the government some maneuvering room where the clandestine force attempts to coerce the release of detained members. It would also permit a clandestine force to trade for cash or supplies the lives of enemies justly condemned.

Article 9

I do not feel that a clandestine force that is not supporting a conventional force is entitled to claim recognition as a belligerent from third parties or to insist that third parties treat its enemies as belligerents. The PLO should not be able to demand that all nations stop selling arms to Israel. Still less should the Symbionese Liberation Army be able to demand that American forces in Germany be interned. On the other hand, the force opposing the clandestine force should have the right to demand that third parties not supply the clandestine force or allow it free access to neutral territory.

Article 10

The existing material forbids belligerents to use neutral territory, and forbids neutrals to allow them to do so. The neutral may use force to defend its neutrality, but I do not find that it is obliged to risk the lives of its own troops to prevent violations of its neutrality. It stands to reason, though, that a state that cannot keep one belligerent out has no right to keep the other out.

Appendix II

DRAFT FEDERAL ACT CONCERNING
ARMED ORGANIZATIONS*Section 1: Definitions*

As used in this Act:

- (a) "Armed organization" means an organized body of persons that has used or threatened to use deadly force in the service of a foreign government or in the pursuit of a political objective, and that may be expected to continue doing so.
- (b) "Military authority" means any person now or hereafter empowered to convene a general court martial, subject to such limitations as the President may establish.
- (c) "The laws and customs of war" includes the provisions of any international agreement to which the United States is a party, whether or not the armed organization involved in any case is a party or is acting on behalf of a party. In determining the eligibility of any persons for treatment as a prisoner of war, each such agreement shall be applied as if the armed organization to which that person belongs were acting on behalf of a party to that agreement.

Section 2: Treatment of Members of Armed Organizations

Any member of an armed organization as defined in Section 1 may be dealt with in accordance with this act and with the laws and customs of war. At the option of the military authority detaining him he may be dealt with in any of the following ways:

- (a) He may be held as a prisoner of war until it shall be determined by the President or by a court in accordance with the provisions of this Act that the armed organization to which he belongs has disbanded or no longer fulfills the definition in Section 1.
- (b) If he is found by a military commission to be guilty of a crime against the laws and customs of war, he may be sentenced to death or such lesser punishment as the military commission may determine.
- (c) If he is found by a military commission to be ineligible for prisoner of war status under the laws and customs of war, the military commission may impose on him any sentence authorized by Act of Congress or by the laws and customs of war as understood and applied in the courts of the United States, *provided*, that no one may be sentenced to death under this subsection unless he is proved to have committed an overt act in aid of the use of deadly force by the armed organization to which he belongs.
- (d) If the civil authorities desire to prosecute him for a crime or crimes, he may be turned over to them, subject to the provisions of Section 4.
- (e) He may be released either absolutely or subject to any condition not inconsistent with the laws and customs of war.

Section 3: Arrest and Detention of Members of Armed Organizations

- (a) A military authority may arrest and detain without warrant any person found armed and suspected of being a member of an armed organization. He may arrest and detain any other person so suspected upon a duly issued warrant. With respect to any such person, he shall have the same power as an agent of the Federal Bureau of Investigation to apply for a warrant. Probable cause to believe that a person is a member of an armed organization shall be probable cause for issuance of a warrant for that person's arrest.
- (b) If a person detained pursuant to subsection (a) of this Section admits that he is a member of an armed organization or is otherwise subject to the laws and customs of war, the military authority detaining him shall deal with him in accordance with Section 2. If he does not make such an admission, the military authority detaining him shall forthwith bring him before a court with jurisdiction to issue a writ of habeas corpus, and the court shall proceed in accordance with Section 5. If the court remands the person to the custody of the military authority, the military authority shall then deal with him in accordance with Section 2.

Section 4: Persons Accused of Civil Crimes

- (a) It is a defense to any criminal prosecution in any court, state or federal, other than a military commission or a court martial, that the accused is a member of an armed organization and that the act constituting the alleged crime was carried out in pursuit of the goals of that organization and was not a violation of the laws and customs of war. In any case in which this defense is successfully established, the court, instead of releasing the accused, shall cause him to be turned over to a military authority to be dealt with in accordance with Section 2. Provided, that he shall not be tried under subsection (b) of Section 2 for any act found by the court not to be a violation of the laws and customs of war.
- (b) If in the course of any criminal investigation or proceeding it shall appear that the accused may have been acting as a member of an armed organization, the court or the prosecuting or investigating authority shall promptly notify a military authority. If the investigation or proceeding is for any reason terminated otherwise than by the conviction and sentencing of the accused, the court or the prosecuting or investigating authority shall cause him to be turned over to a military authority to be dealt with in accordance with Section 2 or Section 3.
- (c) If in the course of any criminal investigation or proceeding the accused shall raise the defense provided for in subsection (a) of this Section, or shall claim in any other way that his case should be dealt with in accordance with the laws and customs of war, his claim or defense shall be taken as constituting the admission provided for in subsection (b) of Section 3.

Section 5: Habeas Corpus

- (a) Any court with jurisdiction to issue a writ of habeas corpus to a United States military officer may issue such a writ to test the legality of the detention of any person under this Act. In proceedings on such a writ, if the prisoner is being detained otherwise than under sentence of a military commission under the provisions of subsection (b) of Section 2, he shall be released unless the court is satisfied that at the time of his capture he was a member of an armed organization, and that the armed organization has not disbanded or ceased to fulfill the definition in Section 1. If the prisoner is being detained under sentence of a military commission under the provisions of subsection (b) of Section 2, he shall be released unless the court is satisfied that at the time of his capture he was a member of an armed organization, that the proceedings of the military commission were regular, and that the sentence was justified by the law and the facts.
- (b) In any proceeding under this Section, the burden of proof shall be on

the detaining military authority, except that if the legality of a person's detention has been established in such a proceeding (other than a proceeding before a military commission under subsection (c)) within the previous eighteen months, the burden shall be on the person detained to establish changed circumstance.

- (c) During such time as the writ of habeas corpus is lawfully suspended, a military commission may make the determination provided for in this Section in any case arising under subsection (b) of Section 3. During such time for ninety days thereafter, no sentence of death may be executed under this Act.

Section 6: Release of Prisoners

If the President or a court or military commission in a proceeding under Section 5 shall determine that an armed organization has disbanded or no longer fulfils the definition in Section 1, anyone detained as a member of that armed organization, including persons sentenced under subsection (c) of Section 2, but not including persons sentenced under subsection (b) of Section 2, shall be released.

Section 7: Death Penalty

No sentence of death shall be passed on any person under the age of eighteen, or who was under that age when captured or when the offense was committed, or on any pregnant woman or any mother with dependent children. No sentence of death may be executed without the express individual approval of the President nor until the expiration of ninety days (or such longer time as may be provided in any applicable international agreement) after sentencing.

Section 8: Miscellaneous

- (a) Laws governing the constitution, procedure, and appellate review of general courts martial shall be applied as far as possible to military commissions under this Act.
- (b) Prisoners of war detained pursuant to this Act shall be entitled to the rights provided for such prisoners under the Geneva Convention of 1949 and the 1977 Protocol thereto, except that no Protecting Power shall be admitted except in a case where the United States is obliged under an applicable international agreement to admit one.
- (c) Laws governing appellate review and stay of judgment shall apply in proceedings under Section 5 as in other civil cases.