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John F. Murphy

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## CLANDESTINE WARFARE: MORALITY AND PRACTICAL PROBLEMS CONFOUNDED

JOHN F. MURPHY\*

By coining the term "clandestine warfare,"<sup>1</sup> Professor Rodes has highlighted a mode of violence, increasingly characteristic of today's milieu, that raises the most profound problems of morality and practical politics. Rodes has expressly declined to consider the political obstacles facing those who would need to cope with the moral problems of clandestine warfare. But morality and politics are inextricably intertwined in this area, and conflicting perceptions of both the morality and the politics of clandestine warfare have undermined efforts to create an effective legal framework.

Despite his disclaimer, Rodes has identified one over-arching political problem: states wish to treat clandestine combatants according to their unfettered discretion.<sup>2</sup> The Geneva Protocols of 1977<sup>3</sup> convincingly demonstrate this sentiment. The Second Protocol on noninternational armed conflict, which one might expect to be relevant to clandestine warfare, has such a high threshold of applicability that "it will be a dull and unimaginative government that will be unable to find an excuse not to apply the Protocol to its own internal conflict."<sup>4</sup> To be sure, the First Protocol, at least in theory, might apply to clandestine warfare against an allegedly racist or colonialist regime. The attempt here is to put constraints on the decision of certain governments, particularly those of Israel and South Africa, in dealing with those seeking their overthrow by violence. However, as Rodes points out,<sup>5</sup> this provision is a backward step in terms of the development of humanitarianism norms and surely will prove unworkable in practice.<sup>6</sup>

Lack of consensus regarding moral values in clandestine warfare may be demonstrated by a consideration of Rodes' contention that the abuse of personal relations in clandestine warfare should be regarded as impermissible. Here the issue of "military necessity" versus "un-

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\* Professor of Law, University of Kansas.

<sup>1</sup> Rodes, *On Clandestine Warfare*, 39 WASH. & LEE L. REV. 333, 334 (1982) [hereinafter cited as Rodes].

<sup>2</sup> *Id.* at 338-43.

<sup>3</sup> Protocols I and II Additional to the Geneva Conventions of 12 August 1949, signed June 10, 1977, 16 INTL LEGAL MATERIALS 1391 and 1442 (1977).

<sup>4</sup> Report of the United States Delegation to the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, 4th Session, Sept. 8, 1977, at 33.

<sup>5</sup> Rodes, *supra* note 1, at 344.

<sup>6</sup> See Proceedings and Committee Reports of the American Branch of the International Law Association (1979-1980), at 38-54.

necessary suffering," a difficult enough judgment call in conventional warfare, comes into sharp relief. Rodes finds especially objectionable the FLN tactic, demonstrated in *The Battle of Algiers* of sitting at a bar and dropping off a bomb to blow up unsuspecting fellow-drinkers.<sup>7</sup> But an FLN partisan might argue in response that such sabotage was absolutely necessary to minimize (although hardly eliminate) the risk of being detected. The argument might continue that failure to establish the contact with the people in the bar could draw unwelcome attention to the bomb carrier.

There is also, perhaps, some question why establishing a brief and casual contact with one's victim is especially immoral. Why should it be less immoral merely to march silently into the bar and deposit a bomb? The immorality of the bomb in the bar or the marketplace would seem to be based on the noncombatant or "innocent" status of the victims. Even here, however, some might argue that the French colonialist (or the Israeli and white South African populations) were anything but innocent because of their direct support of an immoral regime. One may reject such arguments and the premises they are based on, but their specious appeal is a major barrier to efforts to humanize clandestine warfare.

The problem of military necessity versus unnecessary suffering also arises with respect to Rodes' suggestion that military forces fighting a clandestine force are entitled to respite and not to be subject to attack anywhere, anytime.<sup>8</sup> By definition, a clandestine force is weak militarily vis-a-vis the forces of its adversary. To attack the adversary's forces while they are on-duty or even when they are in heavily guarded military barracks could be suicidal. Moreover, clandestine attack at anytime on its military forces greatly increases the cost, financial and psychological, to the target government of governing the country—a primary goal of clandestine warfare.

Rodes' comments regarding the harboring of a clandestine force by a neighboring state, and the pursuit by the state in which the clandestine force operates into the state where it is being harbored, raise an issue of *jus ad bellum* rather than *jus in bello*.<sup>9</sup> That is, the overwhelming majority of United Nations members would not contend that South Africa is right to fight SWAPO in Namibia but wrong to do so in Angola. They would argue that South Africa has no right to fight SWAPO anywhere or, for that matter, to be in Namibia at all. Moreover, most of these states would not regard Angola's harboring of SWAPO forces as an act of aggression or use of force in violation of the United Nations' Charter. Angola is not really claiming the rights of a neutral; it is claiming a special privilege to support a "just war."

Rodes' suggestion that "[o]nly through the international community

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<sup>7</sup> Rodes, *supra* note 1, at 336-37.

<sup>8</sup> *Id.* at 347.

<sup>9</sup> *See id.* at 350-51.

and its institutions can we provide for relations between peoples and groups with different ideological commitments"<sup>10</sup> is provocative, to say the least, when states still zealously guard their sovereignty over matters "essentially within their domestic jurisdiction." Equally provocative, indeed revolutionary, is the provision in his draft convention that "[n]o 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."<sup>11</sup> We have not yet progressed so far from the Westphalian system of states.

These brief comments with their skeptical thrust should not be regarded as a sharp criticism of Professor Rodes' fine paper. On the contrary, he has done us a service in raising some transcendently important issues of law and morality. For this we are grateful.

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<sup>10</sup> *Id.* at 354-56.

<sup>11</sup> Draft Convention on Clandestine Warfare, art. 1(4), reprinted in 39 WASH. & LEE L. REV. 358 (1982).

