23. **Reprisals Involving Recourse to Armed Force**

Derek Bennett

Few propositions about international law have enjoyed more support than the proposition that, under the Charter of the United Nations, the use of force by way of reprisals is illegal. Although, indeed, the words “reprisals” and “retaliation” are not to be found in the Charter, this proposition was generally regarded by writers and by the Security Council as the logical and necessary consequence of the prohibition of force in Article 2(4), the injunction to settle disputes peacefully in Article 2(3) and the limiting of permissible force by states to self-defense. The U.N. Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States, adopted by General Assembly Resolution 2625 (XXV) on October 24, 1970, contains the following categorical statement: “States have a duty to refrain from acts of reprisal involving the use of force.”

In recent years, and principally though not exclusively in the Middle East, this norm of international law has acquired its own “credibility gap” by reason of the divergence between the norm and the actual practice of states. So much is this so that Professor Falk, in a recent article entitled “The Beirut Raid and the International Law of Retaliation,” has suggested a framework for claims to use force in retaliation against prior terrorist acts, thereby conceding the impossibility or unreality of any blanket, unqualified proscription of reprisals involving force.

It cannot be doubted that a total outlawry of armed reprisals, such as the drafters of the Charter intended, presupposed a degree of community cohesiveness and, with it, a capacity for collective action to suppress any resort to unlawful force which has simply not been achieved. Not surprisingly, as states have grown increasingly disillusioned about the capacity of the Security Council to afford them protection against what they would regard as illegal and highly injurious conduct directed against them, they have resorted to self-help in the form of reprisals and have acquired the confidence that, in so doing, they will not incur anything more than a formal censure from the Security Council. The law on reprisals is, because of its divorce from actual practice, rapidly degenerating to a stage where its normative character is in question.

To arrest this process of degeneration may require effective sanctioning by the Security Council of reprisals or, alternatively, a policy of restraint by states which will involve the renunciation of armed reprisals: academic studies are not likely to play any major role in this. However, there is room for a study which is an attempt at clarification of the nature of reprisals, as distinct from permissible self-defense; at an examination of state practice and Security Council practice which will elucidate those features of a claim to use reprisals which will either avoid or minimize condemnations by the Council; and at suggested procedures or assistance by the organs of the international community which might arrest the process of degeneration.

**THE DISTINCTION BETWEEN REPRISALS AND SELF-DEFENSE**

Clearly, if self-defense is a permissible use of force and reprisals are not, the distinction between the two is vital. To some, the distinction is elementary and obvious. The Soviet representative in the Security Council, Mr. Morozov, in the course of the debate on the Gulf of Tonkin incidents in August, 1964, said:

The difference between the right of self-defense and the right of retaliation is quite obvious to any first-year student at any law school or any institution of legal studies.

In fact, contemporary international law categorically denies and rejects a right of retaliation. The recognition of the right of self-defense in Article 51 of the United Nations Charter ipso facto precludes the right of retaliation. . . .

The very fact that Mr. Morozov did not explain the “obvious” distinction is sufficient to alert the first-year law student—and even the more sophisticated—to the possibility of latent difficulty.

Reprisals and self-defense are forms of the same generic remedy, self-help. They have, in common, the preconditions that:

1. The target state must be guilty of a prior international delinquency against the claimant state.
2. An attempt by the claimant state to obtain redress or protection by other means must be known to have been made, and failed, or to be inappropriate or impossible in the circumstances.
3. The claimant’s use of force must be limited to the necessities of the case and proportionate to the wrong done by the target state.

The difference between the two forms of self-help lies essentially in their aim or purpose. Self-defense is permissible for the purpose of protecting the security of the state and the essential rights—in particular the rights of territorial integrity and political independence—upon which that security depends. In contrast, reprisals are punitive in character; they seek to impose reparation for the harm done, or to compel a satisfactory settlement of the dispute created by the initial illegal act, or to compel the delinquent state to abide by the law in the future. But, coming after the event and when the harm has already been inflicted, reprisals cannot be characterized as a
means of protection. This distinction would fit neatly into the general theory
that punishment is a matter for society as a whole, whereas self-defense
must still be permitted to the individual member, as an interim measure
of protection and subject to a subsequent evaluation of the correctness of
the individual's judgment as to the necessity for self-defense by the organized
community of states.

This seemingly simple distinction abounds with difficulties. Not only is
the motive or purpose of a state notoriously difficult to elucidate but, even
more important, the dividing line between protection and retribution becomes
more and more obscure as one moves away from the particular incident
and examines the whole context in which the two or more acts of violence
have occurred. Indeed, within the whole context of a continuing state of
antagonism between states, with recurring acts of violence, an act of reprisal
may be regarded as being at the same time both a form of punishment
and the best form of protection for the future, since it may act as a deterrent
against future acts of violence by the other party. To take what is now
perhaps the classic case, let us suppose that guerrilla activity from State
A, directed against State B, eventually leads to a military action within
State A's territory by which State B hopes to destroy the guerrilla bases
from which the previous attacks have come and to discourage further
attacks. Clearly, this military action cannot strictly be regarded as self-
defense in the context of the previous guerrilla activities: they are past;
whatever damage has occurred as a result cannot now be prevented and
no new military action by State B can really be regarded as a defense against
attacks in the past. But if one broadens the context and looks at the whole
situation between these two states, cannot it be said that the destruction
of the guerrilla bases represents a proper, proportionate means of defense—
for the security of the state is involved—against future (and, given the whole
context of past activities) certain attacks? The reply that this constitutes
an argument of "anticipatory" self-defense which is no longer permitted
under the Charter, since Article 51 requires an actual "armed attack," is
scarcely adequate. It was never the intention of the Charter to prohibit
anticipatory self-defense and the traditional right certainly existed in relation
to an "imminent" attack. Moreover, the rejection of an anticipatory right
is, in this day and age, totally unrealistic and inconsistent with general state
practice.

In fact, the records of the Security Council are replete with cases where
states have invoked self-defense in this broader sense but where the majority
of the Council have rejected this classification and regarded their action as
unlawful reprisals. These cases are worth the study, for they illustrate the
importance of this question: Is the legality of the action to be determined
solely by reference to the prior illegal act which brought it about or by
reference to the whole context of the relationship between the two states?

In the discussion of Israel's complaint of Egyptian restrictions on
the passage of ships through the Suez Canal in 1951, the representative of
Israel, Mr. Eban, countered the Egyptian plea of self-defense by the argument
that self-defense presupposed two conditions: first, an armed attack and,
second, the absence of assumption of responsibility by the Security Council.8
No attempt was made by Egypt to justify the action as a reprisal, possibly
because the argument was deemed to be too weak in law, and the Security
Council condemned the Egyptian action on the basis that the permanent
character of the Armistice Agreements precluded any claim to belligerent
rights or to a right of search and seizure of vessels in self-defense.9

After the Qibya raid in 1953, Israel was perforce obliged to shift away
from this restrictive view of self-defense and, for the first time, argued that
its action was justified in the whole context of repeated theft, pillaging,
border raids, sabotage and injury to Israeli property and life.10 This argument
of an "accumulation of events" became a recurring theme in Israeli statements
long before the June, 1967, hostilities: it figured in Security Council debates
over the Gaza incidents in February and September, 1955, the Lake Tiberias
incident of December, 1955, the Sharaf and Qalqilyah incidents of September
and October, 1956, the Suez invasions of October, 1956, the Lake Tiberias
incident of March, 1956, and the Sufi incident of November, 1956.11

However this may be, the Security Council has never accepted this
widening of the context in which it will assess responsibility. On occasion
after occasion, . . . the Security Council formally condemned Israel for
illegal reprisals and rejected this form of plea of self-defense. It cannot be
said that the Security Council, or even its individual members, have ever
been particularly specific in their reasons for characterizing the Israeli actions
as reprisals rather than self-defense. Certainly, occasional references to the
"punitive" character of the actions are to be found.12 More frequently
emphasis is laid upon their disproportionate character,13 although strictly
this is scarcely relevant if reprisals are illegal in any event, whether
proportionate or disproportionate. In some cases the view is expressed that
prior incidents directed against Israel are not sufficient "provocation" to
justify the reprisal,14 although here again this is strictly irrelevant if the
principle is that all reprisals are illegal.15 There is also to be found an
occasional stress on the "premeditated" character of the reprisal,16 as opposed
to the spontaneous reaction of self-defense, possibly a more relevant criterion,
although even here one can envisage carefully pre-planned reactions in
self-defense which would not cease to be self-defense merely because military
prudence had suggested detailed planning for various possible contingencies.
Were this not so, the whole basis of military planning such as one finds
in N.A.T.O. and other military pacts would be suspect. However, the general
conclusion which emerges from a reading of these debates is that the
Council will not look to the whole context of the action so as to derive
from that and accept the plea of self-defense in the face of continuing and
repeated threats which, unless countered, will recur.

In the Security Council discussion of the Gulf of Tonkin incident,17
though no formal resolution was adopted condemning or deploiting
the United States action, the Soviet17 and Czechoslovak18 representatives rejected
the U.S. plea of self-defense, as did the communication from the Democratic
Republic of Viet-Nam. What is of interest is the fact that the United States relied on a series of past incidents, involving attacks on U.S. vessels, and frankly avowed the aim of securing its naval units against "further aggression."

The Security Council's policy of making an assessment on the basis of the action taken and its immediate cause, or, to put it in different terms, of isolating the incident in question from the general context of the relations between the parties, has certain advantages. In the first place, since it is a restrictive view of self-defense, it necessarily limits the situations of permissible force; and, if our premise is that the less permissible force the better, this may be regarded as an advantage. Its other advantage is that it permits the Council to make a relatively easy judgment on the limited facts before it.

The disadvantages of this policy are that it may arouse a feeling of unfairness in the state condemned by the Council and this has certainly been so with Israel, which has repeatedly protested against the Council's refusal to look at the whole context of a situation. It may also place the state claiming self-defense in a very difficult position strategically, especially in the face of continuing guerrilla harassment, even if it is not difficult to maintain an adequate defensive system which relies upon meeting attacks incident by incident. This is so whether one confines the defense to one's own territory or, under a doctrine of "hot pursuit," extends the defense to the territory affording bases to the guerrillas. Even more important, a series of small-scale defensive measures will not have the same deterrent capacity as a large-scale strike and may even be more costly to the defending state.

RECENT PRACTICE ON REPRISALS

Recent practice, particularly in the context of the Arab-Israeli confrontation, suggests that not only have states like Israel, the United States and the United Kingdom not abandoned their wider view of self-defense—based upon the "accumulation of events" theory—despite the Security Council's rejection of the theory, but even more striking, Israel has relied less and less on a self-defense argument and has taken action which is openly admitted to be a reprisal. The Beirut raid of December 29, 1968, is the obvious example of an action not really defended on the basis of self-defense at all. This shift in argument from self-defense to reprisals may in part be due to the realization that the self-defense argument is unlikely to be accepted in any event. It may in larger part be due to a growing feeling that not only do reprisals offer a more effective means of checking military and strategic gains by the other party but also that they will meet with no more than a formal condemnation by the Council, and that effective sanctions under Chapter VII are not to be feared. Obviously, if this trend continues, we shall achieve a position in which, while reprisals remain illegal de jure, they become accepted de facto. Indeed, it may be that the more relevant distinction today is not between self-defense and reprisals but between reprisals which are likely to be condemned and those which, because they satisfy some concept of "reasonableness," are not.

After the Nahalal incident of March 28, 1954, neither the Mixed Armistice Commission nor the Council condemned Israel. Perhaps the most striking feature about the incident is that the equation—or proportionality—of the damage: the guerrilla attack from Jordan on an Israeli bus in the Negev killed eleven, the Israeli attack on the Jordanian village killed 9 and wounded 14. A somewhat similar incident, the Karamieh incident of March, 1968, brought unanimous condemnation of Israel. But there, after an Israeli bus struck a mine in the Negev, killing two adults and injuring several school children, the Israeli reprisal took the form of a large-scale attack on Karamieh with tanks, helicopters and aircraft in support, followed by claims to have killed 150 "terrorists." The debate in the Council emphasized the disproportionate character of the reprisal. Indeed, time and time again (Qibya, 1952, Lake Tiberias, 1955 and 1962, Jordanian complaint of November 13, 1966, Sana Incident, 1966, Es-Salt Raids, 1968 and 1969, Beirut Raid, 1968) condemnations of Israel have followed when the Council has stressed the disproportionate nature of the reprisal.

One suspects that a somewhat similar adherence to the test of proportionality lies concealed in the reasoning that no useful purpose is served by the Council striking a balance sheet of responsibility. Thus, one arrives at a tentative conclusion that, given a situation in which both sides engage in violence or in breaches of a cease-fire, and given that the Council will not accept the "accumulation of incidents theory" but will look to the immediate cause and effect, a proportionate reprisal will not incur condemnation. There are exceptions to this "rule." The Israeli invasion of Gaza and Sinai in October, 1956, the British action in the Yemen in 1964 and the Portuguese attacks on Zambia in July, 1969, and on Senegal in 1969, prompted Security Council reactions which are difficult to reconcile with it. The first involved a disproportionate Israeli reaction which was not condemned, largely because of the Anglo-French involvement, which seemed far more blameworthy to the majority of Council members and which could not be condemned because of the power of veto. The latter two instances probably invoked a good deal of the anti-colonialist sentiment which operated against Britain's position in Southern Arabia and the Portuguese position in Africa and therefore brought a condemnation for actions which were probably not strikingly disproportionate. If a proportionate response is likely to avoid condemnation, it is of equal interest to ascertain what features of a reprisal action, other than disproportionality, are likely to incur condemnation.

There is a good deal of evidence to suggest that reprisals against civilian populations are more likely to be condemned than reprisals against armed forces. It may also be surmised that the Council will be readier to condemn a reprisal against human life than a reprisal against property. Israeli air attacks on the Jordan River development scheme in Syria in July, 1966, ...
and in Jordan on August 10, 1969.\textsuperscript{37} have gone uncensored. However, the Beirut Airport raid of December, 1968, in which Israel took special precautions to avoid any loss of life, was nevertheless condemned\textsuperscript{38} so that it must certainly not be assumed that reprisals against property will inevitably fall within the area of condoned reprisals. The "balance" between life and property is probably more a part of the general notion of proportionality.

The Beirut raid also illustrates the Security Council's tendency to reject any notion of "collective guilt" which might justify a reprisal against an Arab state irrespective of the origin of the injury which is the immediate cause of the reprisal action. In the Beirut case, Israel failed to produce any convincing evidence that Lebanon was responsible for the attack on the El Al Boeing 707 at Athens airport by the two Arabs who apparently belonged to the Popular Front for the Liberation of Palestine and who had flown to Athens from Beirut, but who had otherwise no obvious connection with Lebanon.\textsuperscript{39} The general allegation by Israel that Lebanon was "assisting and abetting acts of warfare, violence, and terror by irregular forces and organizations"\textsuperscript{40} was not accepted as establishing Lebanese responsibility for this incident.\textsuperscript{41} Clearly, even under traditional law, the target of any reprisal had to be shown to have committed a prior delict so that, without proof of delictual conduct by Lebanon, the Council was disinclined to accept Israel's plea of justification, quite apart from the issue of proportionality. It is possible that the condemnation of Israeli action in the Samu incident in November, 1966,\textsuperscript{42} was due not only to its disproportionate character but also to the fact that Israel attacked Jordan rather than Syria, which had been the country alleged by Israel to be responsible for the increase of terrorist activities only a month previously.\textsuperscript{43}

The whole notion of responsibility which was central to the Security Council's concern over the Beirut raid (and which is fundamental to accepted notions of state responsibility) would argue against any reprisals policy which allows the selection of targets irrespective of the origin of the particular cause of the reprisal... A further factor which apparently affects the Security Council's conception of "reasonableness" is the timing of the reprisal action in relation to efforts at peaceful settlement, the argument being that conduct which jeopardizes the chances of a peaceful settlement is more reprehensible. It is obvious enough that conciliation efforts will be hampered by a spate of reprisals between the parties and this has figured in various discussions within the Council, condemning reprisals.\textsuperscript{44} However, while this may be true as a short-term view, it appears to be part of the current Israeli thinking that, in the longer term, the prospects of a peaceful settlement are enhanced by a policy which forces the other party to realize that it has nothing to gain by continued attacks. This thinking certainly runs counter to that of the Security Council, where the theme "violence breeds violence" is a recurring one.\textsuperscript{45} Which is the more correct, at least in the Middle East situation, time alone will tell. However, some two years after the June, 1967, conflict, the evidence suggested that Israeli thinking was a less correct assessment of the situation (or of Arab mentality) than the Security Council's...

The degenerating effect of reprisals is possibly the strongest argument against them. Had the Israeli reprisal policy in the Middle East succeeded in the sense that it discouraged recourse to violence against Israel in breach of the cease-fire, whether by states through their regular armed forces or by guerrilla organizations, it would have been difficult for the Security Council to condemn it. Indeed, whatever the prima facie illegality of reprisals, the fact that they actively assisted in maintaining the cease-fire would have been enormously persuasive. However, in the event that reprisals produce an escalation of tension and violence, a situation diametrically opposite to the policy objectives of the Security Council, the basic antipathy of the Council towards reprisals is understandable.

THE SPECIAL PROBLEM OF REPRISALS AGAINST GUERRILLA ACTIVITY

. . . Even a policy of reprisal which might seek to avoid condemnation because of its "reasonableness" encounters the initial difficulty of demonstrating the illegality of the activities against which it is directed. This is amply illustrated by the Arab-Israeli situation. Apart from using emotive terms such as "terrorists," Israel has sought to have the guerrilla activities condemned as illegal and has done so on a variety of grounds. Initially the main ground was violation of the Armistice Agreements and, clearly, the transgression of the Armistice Demarcation Lines (ADL) or other violations of the truce were breaches of these agreements.\textsuperscript{46}

. . . The situation since the June, 1967, war has changed in the sense that Israel (but not the Security Council) has now rejected the validity of all the 1948 Armistice Agreements. The case for arguing the illegality of the guerrilla attacks has shifted to the general principle of non-intervention\textsuperscript{47} and the Security Council's cease-fire resolutions. . . . In various forms, certain members of the Council have expressed their concern over the continued military occupation of Arab lands\textsuperscript{48} and it seems clear that they are not only reluctant to share Israel's characterization of the "terrorist" activities as illegal but also reject any plea by Israel of justified reprisals against these activities. It may thus emerge that Security Council condemnation is more likely in respect of reprisals taken to protect territory by the state which is the accepted sovereign over that territory. This view is strengthened by the 1964 condemnation of the British action in the Yemen and the 1969 and 1970 condemnations of Portuguese action against Zamb and Senegal. The sentiment emerging in the Council was that guerrilla activities designed to oust a colonialist Power were not illegal since the colonialist Power's title to the territory or control over it was itself illegal.

However, in relation to Israel, the distinction between the territories occupied in June, 1967, and the territories previously held by Israel is not one on which the Arab guerrilla movements place any great emphasis: both territories are, in their view, "illegally" occupied. This is clearly not the
view of the Security Council, and one can reasonably expect a far more
sympathetic reaction to reprisals taken in "defense" of Israel proper.
Contrariwise, one can expect a more sympathetic reaction to guerrilla activities
aimed at challenging the Israeli hold on the newly occupied territories (and
confined to bases, police and army posts, etc., rather than civilian targets
in those territories) than to guerrilla activities aimed at Israeli proper.33

The question of the illegality of guerrilla activities (and, correspondingly,
the reasonableness of reprisals against them) is inevitably linked to that of
the responsibility of the state on whose territory these activities are organized.
As we have seen, the Security Council initially had no doubts about the
general principle of the responsibility of the territorial state. However,
international law has not developed any notion of absolute liability in the
field and the basic assumption has been that the territorial state assumed
responsibility because it had the power to prevent these activities. This
assumption must now be called in question. It is probably unrealistic in
relation to Jordan and Lebanon,40 and partly so in relation to Syria and
Egypt. The lack of realism about this assumption depends in part on factors
such as the size of the territory and the limited military capacity of a state
when compared with the magnitude of the guerrilla activities, and in larger
part on purely political factors.

In these circumstances, the aim of "teaching a lesson" to these governments
may be misplaced. Reprisals are not likely to affect the toleration shown
by a government to guerrilla activities when a show of intolerance would
bring the downfall of the government. For these reasons, within a conflict
like the Middle East situation, it would seem that a test of "reasonableness"
would require a differentiation between the targets of a reprisal action.
Hence, a reprisal aimed at the guerrillas, destroying their camps or bases,
might be regarded as reasonable, whereas a reprisal aimed at the government
or at state installations, such as airports, dams, irrigation systems, ports,
etc., is far less likely to avoid condemnation

A further indication of "reasonableness" would be the extent to which the
state taking reprisals had exhausted all practical measures for the defense
of its territory within its own territory. The bias against military action which
transgresses a frontier or cease-fire line is marked and, in general terms,
right. It is common for reprisals to involve such transgression and,
invariably, the question is posed: "Why could not the state have defended
itself against these guerrilla activities by measures of defense adopted on
its own territory?"44 It may be noted that the 10-power, non-aligned proposal
on the definition of aggression combines a concession that a state is entitled
to take "all reasonable and adequate steps" against "subversive and/or
terrorist" acts with the restriction that these may not take place on another
state's territory.

It may well be that some of the lack of sympathy for the Israeli policy
stems from the belief that, in her reprisals policy, Israel has chosen the
easy way and has not yet tried possible measures of defense against infiltration
within her own territory (or that now militarily occupied by Israel). Or,
even Rhodesia, so that arguments about the proved ineffectiveness of such sanctions are not necessarily convincing. Sanctions in the form of an embargo or calculated restraint on arms supplies to the area ought to be perfectly possible.

INSTITUTIONAL DEVICES FOR FACT-FINDING

The retention of a system of “community review” of any reprisal action is fundamental to any policy of restraint and, normally, the Security Council will be the organ of review. Such review is, of course, essential if sanctions are in contemplation and, even apart from this, the possibility of review constitutes an important psychological deterrent to those contemplating reprisals. However, no system of review can operate satisfactorily without facilities for independent fact-finding. It is rarely satisfactory to rely entirely on the evidence adduced by the parties. Moreover, in situations where mutual distrust arises from the holding of different views about the facts, the production of evidence independently of both parties may help to allay that mistrust. . . .

The desirability of accurate reporting of the facts seems so obvious as to need no stress. In practice, however, even the fairly sophisticated machinery of UNTSO has proved inadequate. Experience would suggest that specific improvements to any fact-finding machinery likely to be concerned with reprisals would be the following:

1. The terms of reference of the fact-finding bodies should stem from the Security Council (or other review organ) and not be dependent upon the agreements of the parties.
2. Decisions on the interpretation and application of those terms of reference to specific situations should rest with the review organ and not the parties.
3. The fact-finding process should ideally be a continuing one, i.e., involving a continuing scrutiny of the compliance with any armistice, truce or cease-fire or inviolability of a border and not limited to investigating a complaint after the event.
4. Observers should have power of investigation of witnesses, though without power of compelling evidence to be given.
5. The observers should be accorded freedom of movement on both sides of any frontier, ADL or cease-fire line.

It may well be that one party will either refuse to accord these optimum conditions for fact-finding or, having initially accorded them, frustrate them in practice; such conduct will inevitably, and rightly, affect the review organ’s judgment on questions of responsibility for reprisals and, if this be regarded as “bias” or judgment contrary to the facts, the aggrieved party will have no one but itself to blame. Thus, obstruction of optimum fact-finding will create a presumption against the reasonableness of a party’s case.

The purely fact-finding or observer function may not, of course, be sufficient in situations when frequent violations of frontiers or cease-fire lines are occurring; and it is this situation which is most likely to give rise to reprisal action. In this situation, while fact-finding remains essential, there are basically two devices which can help: first, the “interposition” force (like UNEF) with power to prevent infiltrations; second, the establishment of a buffer zone or “no man’s land” which may reduce the risk of infiltration and facilitate its detection. Obstruction of these expedients by a party could also provide a presumption against the reasonableness of its case on reprisals.

It may also be the case that, with frequent but small-scale violations or even small-scale reprisals, the Security Council is not an appropriate review organ and a local, lower-powered forum is desirable. This, essentially, was the idea behind the Mixed Armistice Commissions established pursuant to the four Arab-Israeli Armistice Agreements.

Indeed, the Middle East experience rather suggests that the various forms of machinery for observation, fact-finding, limited deterrence and even intermediate review of responsibility operate adequately only in a situation where both parties have an overriding interest in maintaining local peace. They all, therefore, have a vital role to play in reducing the risks of reprisals.

But, at the stage where one or both parties decide that their interest lies in an aggravation of the situation, either by initiating activities likely to cause reprisals or by taking reprisals, none of these devices will operate effectively unless they are backed by the authority of the Security Council and a determination by that body to bring real pressure to bear. Thus, in the final analysis, any approach to the problem of restraining resort to reprisals must involve three elements: (1) the serious consideration of guides to moderation by decision-makers (e.g., the Falk “framework”) so as to avoid reprisals within limits of reasonableness; (2) the establishment of appropriate and effective machinery for fact-finding and intermediate review by impartial agencies, with authority derived from competent international organs rather than the parties; (3) the application of constraint, in the form of sanctions, by the competent organs of final review such as the Security Council or, exceptionally, an appropriate regional body, designed to ensure compliance with authoritative censure of any policy of reprisals or illegal activities likely to give rise to reprisals.

NOTES

This essay was commissioned by the American Society of International Law as the working paper of its study Panel on Reprisals and Retaliation in International Law. The author revised his paper to take account of the Panel’s discussion as well as important developments since the original version was written. Because of its significance, the article was referred to the American Journal of International Law (AJIL) in its revised Panel form and is being run without attempting to update it further.
The paper focuses on the experience in the Middle East, both because of its richness and importance, and because of the extensive consideration given to that experience by the Security Council and other international organs.—ED.

1. The literature on this point, though not very penetrating on account of the assumed authority of the proposition, is very extensive; the following is no more than a sample: Goodrich and Handbro, Charities of the United Nations 95-96, 102 (London: Stevens and Sons, 1949); Brownlie, International Law and the Use of Force by States, Ch. XI (Oxford University Press, 1963); Higgins, The Development of International Law through the Political Organs of the United Nations 202-205, 217-218 (Oxford University Press, 1963). Both Brownlie and Higgins cite additional authorities: Waldock, 81 Academy, Recueil des Courts 479-491 (1952, II); Sorensen, 101 ibid. 219 (1960, III); Skubiszewski, in Sorensen, Manual of Public International Law 754-55 (New York: St. Martin’s Press, 1968). The authors maintaining a contrary view, i.e., accepting a continuing, permissible role for armed reprisals, are Collett, Retaliation in International Law 203 (New York: King’s Crown Press, 1948); and Stone, Aggression and World Order 43, 94-98 (1958).


4. This condition is usually based on the Naulilua arbitration (Germany-Portugal, July 31, 1928, 2 Int. Arb. Awards 10111), but the arbitrators give no authority for this and, indeed, in the earlier textbooks (and some later) there is little mention of this condition as a specific requirement; see Holland, Lectures on International Law, 8th ed. (1834), 340; Westlake, International Law Part II, 8-11 (1913); 2 Hyde, International Law 1660-1667 (1945). The emphasis was more upon the necessity for the act of reprisal in the sense that it had to have a lawful motive. As we shall see later in this article, there is little evidence that the Security Council today regards this condition as an essential prerequisite of reprisals, although it would scarcely pronounce on the issue since it is committed to the proposition that all reprisals involving the use of force are illegal.

5. This is the thesis ably argued by Brownlie, op. cit., Ch. XIII. It has many adherents, of all “persuasions,” but it has also been a thesis consistently adopted by the Communist bloc.

6. The author has developed this reasoning elsewhere: see Bowett, Self-Defense in International Law 187-191 (Manchester University Press, 1958). This reasoning also has many adherents.

7. Pakistan justified the entry of her troops into Kashmir in 1948 on this basis before the Security Council, an argument opposed only by India. Israel’s invasion of Sinai in October, 1956, and June, 1967, rested on the same argument. The O.A.S. has used the same argument in relation to the blockade of Cuba during the 1962 missile crisis. Several states have expressed the same argument in the Sixth Committee in connection with the definition of aggression and the U.N. itself invoked the principle of anticipatory self-defense to justify action by O.N.U.C. in Katanga in December, 1961, and December, 1963. Following the invasion of Czechoslovakia by the U.S.S.R. in 1968, it is permissible to assume that the U.S.S.R. now shares this view, for there certainly existed no “armed attack.”

8. Ibid., Official Records, 6th Year, 551st Meeting, p. 10.


10. Ibid., 8th Year, 637th Meeting, pp. 15-38, statement by Mr. Eban. Note that, in this incident, Israel did not concede that the attack on Qibya was by Israeli regular armed forces but maintained that it was by border villagers, driven beyond endurance by Arab guerrilla attacks.

11. For example, China, ibid., 24th Year, S/PV. 1470, p. 27 (Gos-Salt, 1969); U.K., ibid., 19th Year, 1109th Meeting, p. 4 (Yemen, 1964).

12. For example, China, ibid., 19th Year, 1166th Meeting, p. 6 (Kibbutz Dan, 1964); France, ibid., 21st Year, 1321st Meeting, S/PV. 1521, p. 2 (Samu, 1966); New Zealand, ibid., S/PV. 1322, p. 7; Netherlands, ibid., S/PV. 1323, p. 6; U.S.A., ibid., 23rd Year, S/PV. 1402, pp. 3-5 (Karamah, 1968); U.S.A., ibid., 23rd Year, S/PV. 1260, pp. 28-30 (Beirut airport, 1968).


14. For example, U.S.A., ibid., 10th Year, 695th Meeting, p. 9 (Gaza, 1955); U.K., ibid., 10th Year, 710th Meeting, par. 36 (Lake Tiberias, 1959); Australia, ibid., 712th Meeting, par. 11; U.S.A., ibid., 17th Year, 999th Meeting, pars. 100-101 (Lake Tiberias, 1962).


16. Ibid., 19th Year, 1140th and 1141st Meetings, Aug. 5-7, 1964.

17. Ibid., 1140th Meeting, p. 9, and 1141st Meeting, p. 15.

18. Ibid., 1141st Meeting, p. 4.


22. Although, interestingly enough, in relation to the Israeli incursions into Lebanese territory in May and September of 1970, Israel reverted to the specific claim of self-defense, this was not accepted by the Security Council (S/Res 280 and S/Res 285 (1970)).

23. Ibid., 9th Year, 665th to 671st Meetings; there was no vote on the Lebanese draft resolution condemning Israel for “aggression” (U.N. Doc. S/3209) and no discussion of reprisals.


26. 21st Year, 1286th to 1295th Meetings; draft resolution S/7437 condemning Israeli action was not adopted.

27. The attack on the Ghur Canal is reported in the Times Newspaper, Aug. 11, 1969; the Israeli Army is reported to have claimed this to be a reprisal for guerrilla attacks emanating from Jordanian territory.

28. Security Council Res. 262 (1968), adopted unanimously on Dec. 31, 1968. And note that, prior to its air strike against the Yemen in 1964, the British first dropped warning messages to minimize loss of life. The British action was nevertheless condemned.

The validity of the argument of course depends upon the proof of responsibility, and Schick, "Some Reflections on the Legal Controversies Concerning America's Involvement in Vietnam," 17 Int. and Comp. Law Q. 933 at 981 (1968), says: "No evidence has been produced by the American Government that these attacks were committed by North Vietnamese regulars, or with the knowledge and the approval of the Government of North Vietnam."


31. The U.S. delegate stated: "Nothing that we have heard has convinced us that the Government of the Lebanon is responsible for the occurrence in Athens ..." (U.N. Doc. S/IPV. 1400, pp. 28-30).


36. Especially Arts. III(2) and (3) and IV(3). As early as the debate on the Qibya incident, Mr. Elam (Israel) emphasized the relevance of the agreements to this kind of activity and referred to Art. IV(3) as "the crux of the agreement. Without it Israel's coastal plain becomes an inferno of chaos and lawlessness." (8th Year, 637th Meeting, p. 17).

37. See statement by Ambassador Comay (Israel), U.N. Doc. S/IPV. 1123, Nov. 18, 1966 (although, at that stage, the argument was used as one supplementary to, and not in substitution for, the argument based on the Armistice Agreement). He there cited General Assembly Res. 2131(XV), "No State shall organize, assist, foster, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of ... another State."

38. France has stated: "Nor can we agree that it is possible to speak of necessary measures for the security of the territory and population under the jurisdiction of Israel, because we cannot recognize jurisdiction established by occupation" (U.N. Doc. S/IPV. 1402, p. 22). See also Pakistan (U.N. Docs. S/IPV. 1435, p. 36 and S/IPV. 1468, p. 11) Senegal (U.N. Doc. S/IPV. 1436, pp. 63-65); Zambia (U.N. Doc. S/IPV. 1469, p. 51).

39. However, it cannot be said that the Security Council has reacted with great energy to Israel's complaint of guerrilla attacks and hijacking of Israeli aircraft. Possibly the matter is not regarded as one with which the Council can deal easily and certainly the Secretary General seems to have assumed ICAO was the more competent; see Eban-U Thant exchange of letters, Feb. 20 and 26, 1969 (U.N. Monthly Chronicle, March, 1969, pp. 12-14).

40. For details of clashes between Lebanese forces and Syrian-backed guerrillas within the Lebanon, see Keesing's Contemporary Archives, 1969, 235/20. King Hussein had rejected the suggestion that he is under any duty to halt guerrilla activities and had justified those activities (New York Times, March 24, 1969). In the debate on the Es-Salt raid of March 26, the Israeli representative, Mr. Tischnak, alleged complete complicity between the Jordan Government and the guerrilla organizations, citing an agreement between them of Nov. 16, 1968. In 1970 in the debates on the Israeli incursions into the Lebanon in May and September, Mr. Tischnak alleged that similar agreements had been made between the Lebanese Government and guerrilla organizations. This position in Jordan had changed quite radically by the summer of 1970. On July 19, 1970, the Jordanian Government announced that, at the culmination of a series of clashes between its forces and guerrilla forces, it had destroyed the Palestinian guerrilla organization on Jordanian territory and all its bases. The Times Newspaper, July 20, 1970.

41. This is not a question to which lawyers can give persuasive answers. However, there would be advantage in a strategic study of the effectiveness against guerrilla activities emanating from abroad of measures of self-defense confined to the target state's own territory. Possibly, variations in circumstances (terrain, size of respective forces, length of frontier, etc.) are such as to permit no generalizations. But obviously a comprehensive study which demonstrated that self-defense, narrowly construed, is in general ineffective against guerrilla activities would strengthen the case for reprisals considerably. Apparently Israel had seriously considered scaling off the 50-mile cease-fire line with Jordan by a defensive barrier, a technique once regarded as impractical (James Feron in the Herald Tribune, Dec. 20, 1967).


43. U.N. Doc. S/7498, adopted on Nov. 25, 1966, envisaged "more effective steps as envisaged in the Charter to ensure against the repetition of such acts." S/Res. 270 (1969), following the August, 1969, air attack on South Lebanon, referred specifically to the possibility of "further and more effective steps as envisaged in the Charter to ensure against repetition of such acts." Also S/Res. 268 (1969), condemning Portugal for the attack on the Zambian village of Lote, threatened "to consider further measures" if Portugal continued raids on Zambia. Successive threats of sanctions, once implemented, can do little to enhance the reputation of the Security Council and were best not uttered at all.

44. Apparently the threat by the U.S. to cease economic aid to Israel was the means whereby the Israeli project for diverting the River Jordan in 1953 was stopped. Burns, Between Arab and Israel (New York: Obolensky, 1963).

45. One cannot exclude the possibility that organs of regional arrangements will afford other organs of review in situations arising between members. The El Salvador-Honduras conflict of July, 1969, the "football war," would provide a possible situation of this kind and, in fact, O.A.S. mediation was accepted.

46. For the view that fact-finding cannot be objective and is not necessary to prevent recurrence (and that the allocation of blame is undesirable), see Frantich and Gold, "The Limits of Perceptual Objectivity in International Peace Observation," in The Middle-East Crisis: Test of International Law, 33 Law and Contemporary Problems 193 (1965). This argument appears to rely on the neuro-chemistry of visual perception and, as there stated, is totally unconvincing to this author. No lawyer would claim complete accuracy for any technique of adding evidence. Indeed, legal systems involve rules of evidence and techniques of proof and cross-examination which assume unreliability of witnesses, etc., which equally assume that, by these rules and techniques, it is possible to weigh evidence and arrive at
a reasonably accurate version of the facts. This author does not accept that neurochemistry has demonstrated the falsity of that assumption and even less that the conclusion that it is unproductive to assess blame is justified in situations like the Middle East.

47. For detailed arguments on this point, demonstrating how, with terms of reference dependent solely on the agreement of the parties, it becomes possible for the parties to frustrate the supervision machinery, see Wainhouse, International Peace Observation (Baltimore: The Johns Hopkins Press, 1966), 268-269, 272. This is not to suggest that, as a peacekeeping organ, an observer mission may not need the consent of the host state. The convention advanced above is that, once consent is given and agreement secured to terms of reference, these terms of reference should be contained in a Security Council resolution, and be interpreted by the Security Council.

48. Many disputes of this character arose out of the Arab-Israeli Armistice Agreements. For a useful summary of the dispute over the Israeli project to drain Lake Huleh, which also involved a dispute on the competence of the MAC, see Higgins, United Nations Peacekeeping 1946-1967: Documents and Commentary 86-99 (London: Oxford University Press, 1969).

49. This was the case with the Arab-Israeli MAC’s; see Wainhouse, op. cit., 272.

50. Thus, observers should be accorded the right to question civilians, army officers, government officials, etc. Refusal to testify or to allow such testimony to be taken would be made a matter for review to the review organ which would be free to draw its own conclusions. This extensive power of investigation would also suggest that military officers, such as the UNTSO observers, might usefully be supplemented by civilian international officials with police or legal training.

51. By a note of Oct. 5, 1956, Israel informed the Chief-of-Staff of UNTSO that observers had no permission to investigate incidents occurring within Israel; see Burns, op. cit., 172. Obviously, this restriction is crippling if it is to be applied to guerrilla activities. For Security Council insistence on full freedom of movement, see Res. 8/15575 and 8/3605.

52. For UNEF’s limited power to apprehend infiltrators in a zone 500 meters from the ADL (and only on the Egyptian side) and, after interrogation, to hand them over to local police, see UNEF: Summary Study of the Experience derived from the establishment and operation of the Force, Report of the Secretary General, U.N. Doc. A/3943, Oct. 9, 1958.

53. See ibid., p. 4.

24. Wars of National Liberation and the Laws of War
Georges Abi-Saab

Wars of national liberation constitute a category of conflicts which, though not previously unknown, has gained great importance since the Second World War. These are "conflicts which arise from the struggles of peoples under colonial and foreign rule for liberation and self-determination."1

The frequency and increasing importance of these struggles in contemporary international relations brought to the fore the numerous and complex problems to which they give rise, especially in the legal field. Among the most important are those concerning the status of wars of national liberation in international law and the extent to which they are governed by the existing laws of war.

THE STATUS OF WARS OF NATIONAL LIBERATION IN CONTEMPORARY INTERNATIONAL LAW

The status of wars of national liberation in contemporary international law depends on their legal qualification as international conflicts or as conflicts not of an international character.

The Traditional Approach

The traditional legal view of wars of national liberation is that they constitute a category of internal wars and as such are not subject to international legal regulation. This is because such conflicts fall within the domestic jurisdiction of the "established government" and are therefore exclusively governed by its municipal law; any dealings by third States with the "rebels" constitute an intervention in its domestic affairs.

But this legally radical separation of wars of national liberation from the international level is of a relatively recent origin. One has only to remember the active role played by France in the American war of independence, the acquisition and affirmation by the Latin American republics of their independence behind the double shield of the Monroe doctrine and the British fleet, and—last but not least—the proclamation of Greek independence by Great Britain, Russia and France after the destruction of the Ottoman-Egyptian fleet by the British in the battle of Navarino.1

However, a changing international context and the rise of the positivist doctrines of the State both in municipal and in international law, led, by the end of the 19th century, to the crystallization of the traditional approach described above.

Even according to the traditional approach, the restrictive attitude to internal conflicts can be radically changed, by resorting to the institution of "recognition of belligerency." If such a recognition emanates from the established government, it entails the application of the international jus in bello to its relations with the rebels; if it emanates from third parties, it enables them to apply the rules of neutrality en-vain é-tres both belligerents. But because the recognition of belligerency is purely discretionary for the established government (and, a fortiori, for third parties), it has been of very rare occurrence. Moreover, in the few instances in which it took place, it intervened at an advanced stage of the conflict and usually after the rebels had secured control over a sizeable part of the territory, i.e., when the war in its material aspect became similar to an interstate war.4 For it is only then that reciprocity could come into play and the institution