

WASHINGTON UNIVERSITY
LAW QUARTERLY

Volume 1961

June, 1961

Number 3

INTERNATIONAL LAW AND THE CONTROL
OF REVOLUTIONARY ACTIVITIES
BY POLITICAL REFUGEES UNDER AMERICAN LAW

MANUEL R. GARCÍA-MORA*

INTRODUCTION

The unprecedented exodus of political refugees from countries dominated by tyrannical regimes has posed the interesting and vital problem of controlling their activities in countries of asylum. While the right of a State to grant asylum to those fleeing from persecution and oppression is unquestioned,¹ the further question is immediately presented as to how to prevent these persons from engaging in activities designed to undermine the political institutions of their native land. This is clearly a matter which not only involves the good relations between the State of refuge and that of which the refugees are nationals, but which also seriously endangers the peace and security of mankind. It is therefore a problem that must be treated in the context of such values as peace and security that every government is bound to promote and cultivate within its jurisdiction. Bearing this in mind, this article will explore the principles of international law that regulate the subject and the manner in which they are applied by the United States.

I. THE PRINCIPLES OF INTERNATIONAL LAW

Concurrent with the right of a State to grant asylum to political refugees, international law recognizes the correlative duty to prevent these persons from committing acts destructive of the political

* Professor of Law, University of Detroit.

1. The right to give asylum is not the question here. This right of the State is generally recognized. See, for elaboration, García-Mora, *International Law and Asylum as a Human Right* (1956).

and social order of the State from which they have escaped.² This duty is clear enough both on principle and policy, and has been said to be nothing more than a phase of the general duty of a State to prevent within its jurisdiction the commission of injurious acts against friendly foreign governments.³ But looking comprehensively at the issue, and insofar as it concerns political refugees in places of asylum, the formulation of the duty in this manner is clearly an attempted simplification of a principle which must be explained on deeper grounds. Thus, behind the apparently simple duty of a State to prevent refugees from plotting against the institutions of other nations, lie far-reaching legal and political considerations. It is believed that these are precisely the considerations which are subverting the very foundations of the traditional law. Two considerations can unmistakably be discerned in this connection.

First, it is common learning among international lawyers that the right of jurisdiction which governments exercise within their territory carries with it the obligation to protect the rights of other nations. This is a prescription resulting from the exercise of sovereignty and unquestionably falling within the competence of the territorial State.⁴ Judge Max Huber, the sole arbitrator in the celebrated *Island of Palmas Case* between the United States and the Netherlands, summarized this obligation in the following terms:

Territorial sovereignty . . . involves the exclusive right to display the activities of the State. This right has as a corollary a duty: *the obligation to protect within the territory the rights of other States*, in particular their right to integrity and inviolability in peace and in war, together with the right which each State may claim for its nationals in foreign territory.⁵

The above passage, though written over thirty years ago, has acquired a special significance for the contemporary world, for it not only requires the prevention of injurious acts against foreign States,⁶ but, perhaps more important, the protection of the rights of other nations as well. A careful study of this latter obligation may conceivably reveal serious difficulties on the practical level, for since the

2. 2 Podestá Costa, *Derecho Internacional Público* 245-48 (3d ed. 1955).

3. Apparently Professor Quincy Wright puts all the emphasis upon this principle. See Wright, *Subversive Intervention*, 54 *Am. J. Int'l L.* 521, 528 (1960).

4. 1 Fauchille, *Traité du Droit International Public* 3-10 (8th ed. 1925).

5. *Island of Palmas Case* (United States v. Netherlands). For text see 2 U.N. Rep. Int'l Arb. Awards 829 (1949). (Emphasis added.)

6. Judge John Bassett Moore, in his dissenting opinion in the *Lotus Case* said: "It is well settled that a State is bound to use due diligence to prevent the commission within its dominions of criminal acts against another nation or its people." *Case of the S.S. "Lotus," P.C.I.J., Ser. A, No. 10, at 88* (1927).

rights of other governments must be protected within the internal jurisdiction of all States, it can convincingly be argued that the world community is likely to become a system of mutual assistance, thus helping to perpetuate tyrannical regimes.⁷ It is largely for this reason that Judge Hersch Lauterpacht argued in 1928 that a State does not have the obligation to protect the constitution of a foreign government whose ideology is distasteful to its own citizens.⁸ Indeed, the deep ideological differences between governments would seem to give ample support to this position. In principle, therefore, there would seem to be nothing wrong with allowing the residents of a State to help other peoples to rid themselves of a totalitarian regime.⁹ This argument, however, is highly deceptive, for it ignores the well-established principle that in the presence of a civil strife or other internal disturbances in another country, States must abstain from participating in the conflict either directly by actual governmental interference or indirectly by allowing citizens and aliens to help either side to the conflict.¹⁰ On this view, the toleration of revolutionary activities by refugees would surely amount to an act of intervention in violation of international law.¹¹ The force of this suggestion reveals itself with all its cogency when remembering that under traditional law if a State does not suppress revolutionary activities taking place within its jurisdiction, the customary right of self-defense on the part of the menaced government is readily conceded.¹²

The second important consideration supporting the duty of the State to prevent refugees from engaging in revolutionary activities against their former government has been seen to be indissolubly linked with the right of a State to grant asylum under international law. It is generally accepted that asylum is a right which exclusively belongs to the State, and the latter can exercise it in accordance with the requirements of its laws.¹³ Appealing as this theory is to conceptions of absolute sovereignty, it nevertheless remains true that the right to grant asylum is conferred upon States by international law,

7. Jessup, *A Modern Law of Nations* 184-87 (1948).

8. Lauterpacht, *Revolutionary Activities by Private Persons Against Foreign States*, 22 *Am. J. Int'l L.* 105, 117 (1928).

9. Cf. García-Mora, *International Responsibility for Subversive Activities and Hostile Propaganda by Private Persons Against Foreign States*, 35 *Ind. L.J.* 306 (1960).

10. Lauterpacht, *Recognition in International Law* 229 (1947).

11. Rougier, *Les Guerres Civiles et le Droit des Gens* 415, 417 (1903).

12. Cf. Thomas & Thomas, *Non-Intervention: The Law and Its Import in the Americas* 274 (1956).

13. In *Chandler v. United States*, 171 F.2d 921, 935 (1st Cir. 1948), the Court of Appeals said: ". . . the right [of asylum] is that of the State voluntarily to offer asylum, not that of the fugitive to insist upon it."

and, that, though governments have a broad discretion in the application and interpretation of the pertinent facts, it does not follow that they are not bound by any consideration at all.¹⁴ It should carefully be noted that in granting or denying asylum States are not performing a legally indifferent act of national policy, but rather an international function of the greatest consequence for the world community.¹⁵ If these observations be correct, it will naturally follow that in the fulfillment of this function international law demands that, consistently with the obligations of friendship and solidarity between nations, political refugees should not be permitted to plot against the institutions of their native country.¹⁶ It should thus be apparent that the right to grant asylum is given by international law to be exercised under the implied condition that the State of refuge does not become a base of subversive activities against another nation. It should similarly be clear that the position of political refugees is radically different from that of the nationals of the State of refuge, for while in respect to the latter a State may successfully escape international responsibility on purely internal constitutional grounds,¹⁷ as regards political refugees, however, the mere granting of asylum would implicitly give rise to the presumption that the State has done so under the condition that such refugees be adequately controlled in their political activities.¹⁸ The non-fulfillment of this duty is clearly an abuse of right for which the government involved is internationally liable.¹⁹ This right-duty dichotomy auto-

14. Judge John Bassett Moore said that in granting asylum a State acts "in the light of its own interests, and of its obligations as a representative of social order." 2 Moore, *Digest of International Law* 757 (1906).

15. Morgenstern, *The Right of Asylum*, 26 *Brit. Yb. Int'l L.* 1949, at 327, 354-57 (n.d.).

16. Thus, on March 15, 1960, the United Nations Human Rights Commission adopted a Draft Declaration on the Right of Asylum, which says in Article 4 that "Persons enjoying asylum should not engage in activities contrary to the purposes and principles of the United Nations." For text, see U.N. Eco. Soc. Council Off. Rec. 30th Sess., Supp. No. 8, at 17 (1960).

17. It will be seen (*infra* p. 203 ff.) that the United States has avoided international responsibility by saying that the suppression of these activities might be contrary to the constitutional guarantees of freedom of speech and of the press. The files of the State Department are filled with such communications to foreign governments. See, 2 Hackworth, *Digest of International Law* 141 (1941).

18. In this connection, Article 2 of the Convention Relating to the Status of Refugees, signed at Geneva on July 28, 1951, says that "Every refugee has duties to the country in which he finds himself, which require in particular that he conform to its laws and regulations as well as to measures taken for the maintenance of public order." See U.N. Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Final Act and Convention Relating to the Status of Refugees (A/Conf. 2/108) at 17 (1951).

19. As to the application of the abuse of right doctrine in international law,

matically operates in the international legal order, for it is firmly grounded on the recognition of a community of interests existing in the world community imperatively demanding the suppression within each country's territory of harmful activities directed against foreign States.²⁰ This condition is by far the most satisfactory one, for it frankly recognizes that a right granted by international law cannot be used to violate international law itself.²¹

II. THE DOCTRINE IN HISTORICAL PERSPECTIVE

The foregoing observations are not really new, for they were well-established in the doctrine of those who have been traditionally regarded as the "fathers of international law." It may therefore be beneficial to discuss their doctrines, if only to perceive the historical consistency of the principle here treated.

While Grotius explicitly said that "a permanent residence ought not to be denied to foreigners who, expelled from their homes, are seeking refuge," he immediately added, as a condition of asylum, "provided that they submit to the established government and observe any regulations which are necessary to avoid strifes."²² It can of course be suggested that in imposing this condition Grotius was really thinking in terms of the public order and internal unity of the State of refuge. However, a closer observation of his views patently reveals that to Grotius dissensions were fatal ills of society to be prevented at all costs and, thus, the maintenance of peace and order was the most important value of the law.²³ Coupling these views with his frank denial of the right of revolution,²⁴ one must inevitably

see, Lauterpacht, *The Function of Law in the International Community* ch. 14 (1933). See also, Dissenting Opinion of Judge Alejandro Alvarez in the Advisory Opinion of the International Court of Justice regarding the Competence of the General Assembly for the Admission of a State to the United Nations, [1950] I.C.J. Rep. 4, 14.

20. U.N. Secretariat, *Survey of International Law*, U.N. Doc. No. A/CN.4/1 Rev. 1, at 34-35 (1949).

21. It is for this reason that the Universal Declaration of Human Rights, adopted by the United Nations General Assembly on December 10, 1948, in guaranteeing the right of asylum in Article 14 adds that "This right may not be invoked in the case of prosecutions, genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations." For the text of the Declaration, see 43 *Am. J. Int'l L. Supp.* 127 (1949).

22. Grotius, *De Jure Belli ac Pacis Libri Tres* bk. 2, ch. 2, § 26 (Kelsey's transl. 1925).

23. *Id.* at bk. 1, ch. 4. See also Lauterpacht, *International Law and Human Rights* 116 (1950).

24. He says in respect to the right of revolution:

But as civil society was instituted in order to maintain public tranquility, the State forthwith acquires over us and our possessions a greater

conclude that Grotius regarded revolutionary activities by refugees against their own State as equally reprehensible, simply because they are likely to produce the type of internal disharmony which he vigorously condemned. But Grotius' views on the subject cannot be adequately understood unless it is remembered that to him natural law imposed upon the States the double duty of granting asylum to the persecuted and of acting as agents of the world community in the preservation of peace and order.²⁵ Thus viewed, the toleration of revolutionary activities by refugees is highly inconsistent with the latter obligation. One may safely say that the Grotian contribution has not lost its validity for the contemporary world.

Like his illustrious predecessor, Vattel insisted on limiting the right of asylum by conditions imposed by the State of refuge.²⁶ Unlike Grotius, however, his limitations on asylum were motivated by a firm desire to avoid complications with foreign governments. In this connection he said:

But though this right [the right of asylum] is necessary and perfect in the general view of it, we must not forget that it is but imperfect with respect to each particular country. For, on the other hand, every nation has a right to refuse admitting a foreigner into her territory, when he cannot enter without exposing the nation to evident danger, or doing her a manifest injury.²⁷

In line with the preceding passage, and in the part of his book dealing with the duties of one nation towards the other, he emphatically said that:

even in States which freely admit foreigners it is presumed that the sovereign only grants them access on the implied condition that they will subject to the laws—I mean to the general laws established for the maintenance of good order and not operative only in the case of citizens or subjects.²⁸

As Vattel believed that foreigners were subject to the laws of good order on equal footing with citizens or subjects, the above passage acquires a more useful meaning when viewed against the background of his doctrine regarding the duty of a nation to prevent

right, to the extent necessary to accomplish this end. The State, therefore, in the interest of public peace and order, can limit that common right of resistance. . . . If, in fact, the right of resistance should remain without restraint, there will no longer be a State, but only a non-social horde. . . ." Grotius, *op. cit. supra* note 22, at bk. 1, ch. 4, § 2(1).

25. For a discussion of Grotius' views, see Basdevant, in *Les Fondateurs du Droit International* 125-267 (1904).

26. Vattel, *Le Droit des Gens* bk. 2, ch. 4, § 56 (Fenwick's transl. 1916).

27. *Id.* at bk. 1, ch. 19, § 230.

28. *Id.* at bk. 2, ch. 8, § 101.

its citizens from committing acts injurious to the peace of a foreign nation. Since for present purposes this is particularly relevant, his words must be quoted *in extenso* here. He said:

The Nation, or the sovereign, must not allow its citizens to injure the subjects of another State, much less to offend that State itself; and this not only because no sovereign should permit those under his rule to violate the precepts of the natural law, which forbids such acts, but also because Nations should mutually respect one another and avoid any offense, injury or wrong; in a word, anything which might be hurtful to others. If a sovereign who has the power to see that his subjects act in a just manner permits them to injure a foreign nation, either the State itself or its citizens, he does no less a wrong to that nation than if he injured it himself. Finally, the very safety of the State and of society at large demands this care on the part of every sovereign.²⁹

It can therefore be seen that Vattel considered the obligation to prevent refugees from engaging in revolutionary activities against the institutions of their country as proceeding from a mutual duty to promote justice between nations. Underlying this obligation is the necessity of co-existence of the States in the world community, for only then can the fundamental rights of all States be adequately assured. To permit refugees to injure their own State from foreign territory, in the Vattelian conception, would clearly violate the former's fundamental right of independence, thus seriously impairing the harmonious relations that nations must maintain at all times. This aspect of the Vattelian position has remained unchallenged, for much of the present-day doctrine largely proceeds upon that view.

Such assertions of the "fathers of international law" raise important points of substantive international law. For it seems fairly clear that the peaceful coexistence of nations in the world community, where the rights of sovereignty and equality of States are vital postulates of the law, of necessity implies a mutual obligation to suppress revolutionary acts directed against a friendly foreign nation.³⁰ Today, as when Grotius and Vattel wrote, the requirements of peaceful coexistence constitute the *raison d'être* of the duty of prevention imposed upon the asylum State.³¹ The crucial problem is, therefore, whether a government values the interest of the world community in peaceful co-existence sufficiently to impose upon itself the obliga-

29. *Id.* at bk. 2, ch. 6, § 72.

30. Kuhn, *The Complaint of Yugoslavia Against Hungary with Reference to the Assassination of King Alexander*, 29 *Am. J. Int'l L.* 87, 89 (1935).

31. Wright, *supra* note 3, at 531.

tion to prevent and punish revolutionary activities which endanger good relations between nations.³²

If the above observations be correct, it will at once be seen that the problem of allowing political refugees to engage in revolutionary activities is not exclusively confined to the relations between States. It is similarly a matter in which the world community has interests vitally at stake. One element which might have prevented an adequate approach to this problem is that historically the possibilities that refugees might have engaged in revolutionary activities did not really arise until the late nineteenth and early twentieth centuries. Under eighteenth century conditions political refugees, particularly those accused of an offense against the State, were easily extradited under existing treaties.³³ In fact, early extradition treaties were precisely designed to make their extradition possible, so that the country from which the refugees had fled could inflict punishment according to its own laws.³⁴ This eighteenth century experience proved to be inadequate for twentieth century conditions, for refugees who unsuccessfully rebelled against oppression have been guaranteed asylum since the nineteenth century when the Belgian Parliament enacted a celebrated law exempting political offenders from extradition.³⁵ Moreover, refugees today have acquired an ever-increasing political importance, for States are likely to use them as a means of encouraging subversion in their nation without the resort to open intervention.³⁶ Since for this purpose refugees constitute effective and concealed means of attack, they are invariably assured support by the govern-

32. Lord Jowitt, *The Value of International Law in Establishing Co-operation Among Nations*, 1 *Int'l L.Q.* 295 (1947).

33. This point is well illustrated by the Treaty of July 18, 1829, signed between France and Switzerland. Cited in Billot, *Traité de l'Extradition* 109 (1874). For a history of early practice, see Clarke, *A Treatise Upon the Law of Extradition* ch. 2 (4th ed. 1903).

34. This practice was endorsed by Grotius, who speaking of political offenders, said: "In the present and in recent generations, and in the majority of European countries, this right, which we have discussed, of demanding for punishment those who have fled beyond the frontier, has been exercised only with respect to crimes that affect the public weal or that manifest extraordinary wickedness." Grotius, *op. cit. supra* note 22, at bk. 2, ch. 21, § 5(5).

35. This law was enacted on October 1, 1833. See Beauchet, *Traité de l'Extradition* 180-277 (1899).

36. In discussing the threat to the political independence and territorial integrity of Greece before the First Committee of the General Assembly, the Greek representative called attention to this in the following terms: "At present new strategic conditions [have] widened the scope of the problem; aggression took less and less the form of direct attack, but more and more that of disguised subversive action." See U.N. Gen. Ass. Off. Rec. 3d Sess., 1st Comm., 176th Meeting at 314 (1948).

ment in whose jurisdiction asylum has been given.³⁷ It is precisely at this point that international law immediately becomes operative, for what international law requires is that the government in question refrain from tolerating groups intending to engage in revolutionary plots against another State. There is ample evidence which gives foundation to the assertion that the toleration of revolutionary activities by refugees is an act of aggression for which the asylum State is internationally responsible.³⁸

With these considerations in mind, it becomes quite apparent that because of national policies, this branch of the law is likely to exhibit a high degree of instability. It is interesting but not at all surprising to note that the legal practice of the States in this area is governed by a variety of rules dependent upon a disturbing number of actors. These will be seen in the substantive treatment of the law of the United States and the frustrated attempts of international law at effective regulation.

III. THE LAW AND PRACTICE OF THE UNITED STATES

The law of the United States regarding subversive acts of refugees against their government is exclusively confined to obligations resulting from the laws of neutrality relating to an international or a civil war. It has thus become well-established that political acts of refugees against a foreign government are not punished unless they form part of a military or naval expedition against a State with which the United States is on friendly terms.³⁹ In respect to the punishment of hostile military expeditions, the statute in question says:

Whoever, within the United States, knowingly begins or sets on foot or provides or prepares a means for or furnishes the money for, or takes part in, any military or naval expedition or enterprise to be carried on from thence against the territory or dominion of any foreign prince or state, or of any colony, district, or people with whom the United States is at peace, shall be fined not more than \$3,000 or imprisoned not more than three years, or both.⁴⁰

37. See the recent dispute between Tunis and the United Arab Republic regarding a Tunisian refugee who engaged in revolutionary activities against Tunisia from the Territory of the United Arab Republic. *N.Y. Times*, Feb. 8, 1961, p. 9, col. 1.

38. Sohn, *Cases on United Nations Law* 850-58 (1956).

39. For a discussion of hostile military expeditions, see García-Mora, *International Law and The Law of Hostile Military Expeditions*, 27 *Fordham L.Rev.* 308 (1958).

40. *Foreign Relations Act*, 18 U.S.C. § 960 (1958). For the application of this provision, see 7 *Hackworth*, *op. cit. supra* note 17, at 397-404.

In interpreting the above statute, the courts have uniformly held that a military expedition is characterized by an association or organization of a military character,⁴¹ having a common design of hostile operation against a friendly State.⁴² Since advocating and engaging in revolutionary action against a foreign government lack both of these conditions, they are likely to remain unpunished, for unfortunately no legislation specifically covers such situations. Most of these principles are instructively illustrated by communications of the State Department answering complaints of foreign governments for alleged revolutionary activities taking place within the United States. Thus, on September 5, 1906, the federal government arrested members of a Mexican revolutionary *junta* for attempting to initiate a military expedition against Mexico from the United States.⁴³ The evidence conclusively showed that a large body of armed men were attempting to cross the frontier to overthrow the Government of Mexico.⁴⁴ Subsequently, however, when the Mexican Government brought to the attention of the State Department certain plots originating along the border of the American side, the United States Government declined to act on the grounds that there was not yet any evidence that the persons involved had violated the neutrality of the United States by organizing a military expedition against Mexico.⁴⁵ Similarly, when in 1885 the British Government inquired whether participation in the Irish National League, an organization to promote insurrection in Ireland, was an offense against the sedition statutes of the United States, the State Department succinctly answered that "treason and sedition made punishable under those statutes are treason and sedition against the United States, and they do not make punishable treason and sedition against foreign sovereigns."⁴⁶ It may be pertinent to add that the State Department instructed the British Government that the persons so acting might be amenable to the jurisdiction of the courts of the states.⁴⁷ Also in a communication of July 31, 1885, addressed to the Spanish Minister, relating to revolutionary activities of the supporters of the Cuban insurrection, the State Department expressed similar views in an even more definite form: "It [the United States] does not assume to visit with penalty

41. *United States v. Tauscher*, 233 Fed. 597, 599-600 (S.D.N.Y. 1916).

42. *Wiborg v. United States*, 163 U.S. 632, 653-54 (1896).

43. See Note of the Acting Secretary of State to Ambassador Thompson, Sept. 11, 1906, 2 Hackworth, *op. cit. supra* note 17, at 336-37.

44. *Id.* at 337-38.

45. Note of Ambassador Creel to Secretary of State Root, March 4, 1907. *Id.* at 339.

46. Note to Secretary of the State of Bayard to the British Minister, Mr. Harris, April 2, 1885, 2 Moore, *op. cit. supra* note 14, at 431.

47. *Id.* at 432.

conduct, which if committed within a foreign jurisdiction, might be punished therein."⁴⁸ Finally, President Grover Cleveland's fourth message to Congress, in reference to the revolutionary activities of Cubans in the United States, deplored that "the spirit of our institutions and the tenor of our laws do not permit [revolutionary activities] to be made the subject of criminal prosecution."⁴⁹

The body of evidence thus gathered would seem to make it clear that in American law a revolutionary activity becomes a punishable offense only if it takes the form of a military or naval force.⁵⁰ Confronted with this technical legal position, and insofar as revolutionary activities *stricto sensu* might be involved, the interesting question squarely arises as to how far the United States Government is bound by the international law rules which impose upon States the duty to prevent refugees from engaging in plots against their former government. This question is the more pointed since a substantial part of these rules has been embodied in many treaties, some of which have been subscribed to by the United States. Particularly instructive in this connection is the Pan-American Convention on the Duties and Rights of States in the Event of Civil Strife signed at Havana on February 20, 1928,⁵¹ which binds the parties "to use all means at their disposal to prevent the inhabitants of their territory, nationals or aliens, from participating in, gathering elements, crossing the boundary or sailing from their territory for the purpose of starting or promoting civil strife."⁵² In similar vein, the United Nations Charter⁵³ and the Charter of the Organization of American States⁵⁴ contain provisions of a general nature prohibiting the intervention of a State in the internal affairs of another. There can be no doubt that these provisions impose upon the United States a specific obligation to prevent revolutionary activities by any person, which is clearly at variance with the pronouncements of the State Department above reviewed. Most recently, however, the State Department has acknowledged the binding character of this obligation when clearly incorporated into a treaty to which the United States is a party.⁵⁵ The exis-

48. Note of Secretary of State Bayard to Minister Valera, July 31, 1885, U.S. Foreign Rel. 1885, at 776 (1886).

49. U.S. Foreign Rel. 1896, at xxxi (1897).

50. *United States v. Tauscher*, 233 Fed. 597 (S.D.N.Y. 1916).

51. For text, see Convention with Other American Republics, Feb. 20, 1928, 46 Stat. 2749, T.S. No. 814. Also *The International Conferences of American States 1889-1928*, at 435 (Scott ed. 1931).

52. Convention with Other American Republics, *supra* note 51, art. 1, para. 1.

53. U.N. Charter art. 2, para. 3, 4.

54. Charter of the Organization of American States art. 15.

55. See the Statement of Ambassador Henry Cabot Lodge before the United

tence of a treaty embodying such an obligation is therefore an overriding consideration, for it essentially assumes that the customary freedom of action on the part of the United States has technically come to an end. This drastic change in the American position can roughly be attributed to two factors. The first is the firm conviction that under international law the obligation to prevent revolutionary activities against a foreign government does not exist apart from treaty,⁵⁶ and the second is simply that under American law there is no federal common law of crimes, that federal crimes must be established by statutes,⁵⁷ and that, since treaties made under the authority of the United States are the law of the land,⁵⁸ the President could presumably act under a treaty in much the same manner as he could under a Congressional Act.⁵⁹ This position apparently is not constitutionally tenable under obligations stemming from general international law.⁶⁰ It may be added that in the absence of a treaty, the inability of the United States to prevent revolutionary activities within its territory is really traceable to its reluctance to extend the restrictions placed upon its residents on the ground that to do so might involve unwarranted limitations upon constitutional liberties.

The preceding observation brings into play another aspect of the American practice, namely, that in attempting to prevent refugees from engaging in revolutionary activities, more specially, in revolutionary propaganda, difficulties of a constitutional nature may immediately arise. Specifically, governmental action to prevent revolutionary activities is likely to give rise to difficulties involving the constitutional guarantees of freedom of speech and of the press. Thus, when on November 28, 1910, the Mexican Government complained that two revolutionaries had gone to Texas to stir up trouble against Mexico, the State Department decisively asserted that "since under the American Constitution liberty of speech and of the press is guaranteed, mere propaganda in and of itself would probably not fall within

Nations Security Council regarding the Cuban complaint against the United States, 43 Dep't State Bull. 199, 202 (1960).

56. This is brought out by Professor Julius Stone as regards hostile propaganda on the part of the government, but it is believed that the same observations are applicable to any kind of hostile action by private persons. See, Stone, *Legal Controls of International Conflict* 319 (1954).

57. *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32 (1812). See also Moschzisker, *Common Law and Our Federal Jurisprudence*, 74 U. Pa. L. Rev. 109, 270, 367 (1925-26).

58. U.S. Const. art. VI, § 2.

59. Evans, *Self-Executing Treaties in the United States of America*, 30 *Brit. Yb. Int'l L.* 1953, at 178, 190-94 (1954).

60. Cf. Dickinson, *The Law of Nations as Part of the National Law of the United States*, 101 U. Pa. L. Rev. 26 (1952).

these [neutrality] statutes and would not therefore be punishable thereunder."⁶¹ In another communication, the Department conclusively said:

Regarding the stress which your excellency lays upon the fact that certain of those whom you designated as filibusters are engaging in more or less newspaper propaganda in this country, I have to repeat the statement already made a number of times to your excellency's predecessor, that the carrying on of a mere propaganda either by writing or speaking does not constitute an offense against the law of nations, nor does it constitute an offense against the local law since freedom of speech and of the press is, under the Constitution of the United States, absolutely assured to those dwelling within its jurisdiction.⁶²

Many other instances could be given where similar observations have been most emphatically made.⁶³ The basic difficulty with this fundamental policy is reasonably obvious. It reflects a lack of awareness about such values of peace and security which are pressing for recognition on the world scene, and which States must effectively promote within their internal jurisdiction. To those concerned with the peaceful co-existence of nations as a requirement of world order, such assertions of the State Department can scarcely meet the international obligations of the United States to afford friendly foreign governments adequate protection against revolutionary activities and propaganda.⁶⁴ This merely suggests the advisability of not inferring from the practice of domestic legal systems any general rule of international law permitting States to ignore revolutionary activities of refugees on purely domestic grounds. Even if in practice this problem may be real, it should be remembered that the obligations of a State on the international plane cannot be avoided by invoking difficulties of internal constitutional order.⁶⁵ It may thus be submitted

61. Note of Secretary of State Knox to the Mexican Ambassador, Dec. 1, 1910, 2 Hackworth, *op. cit. supra* note 17, at 141.

62. Note of Secretary of State Knox to the Mexican Ambassador, June 7, 1911, *Id.* at 142.

63. *Id.* at 140-43.

64. Dickinson, *Defamation of Foreign Governments*, 22 *Am. J. Int'l L.* 840 (1928).

65. In this connection, the Permanent Court of International Justice said: "While on the one hand, according to generally accepted principles, a State cannot rely, as against another State, on the provisions of the latter's constitution, but only on international law and international obligations duly accepted, on the other and conversely, a State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force." *Advisory Opinion on Treatment of Polish Nationals in Danzig*, P.C.I.J., ser. A/B, No. 44, at 24 (1932). See also, McDougal,

that the American practice is at variance with the requirements of international law. This suggestion is even more compelling when considering that the federal government has sufficient constitutional power to enact legislation on the subject, for the Constitution gives Congress the power "To define and punish . . . Offenses against the Law of Nations."⁶⁶ That revolutionary activities against a foreign government is an offense against the law of nations can hardly be denied, for it is indissolubly linked with the peace and security of mankind.⁶⁷ The fulfillment of obligations of this kind on the internal level can be strikingly illustrated by a Congressional Act enacted on May 16, 1884, preventing and punishing the counterfeiting within the United States of notes, bonds and other securities of foreign governments.⁶⁸ This Act was upheld in *United States v. Arjona*,⁶⁹ where the Court gave expression to the international obligations of the United States in the following terms:

The law of nations requires every national government to use "due diligence" to prevent a wrong being done within its own dominion to another nation with which it is at peace, or to the people thereof; and because of this the obligation of one nation to punish those who within its own jurisdiction, counterfeit the money of another nation has long been recognized.⁷⁰

It is exceedingly difficult to see why similar considerations do not control situations involving revolutionary activities against foreign governments. It may of course be argued that the most difficult constitutional objection as to the control of speech and association still has to be answered. In an attempt to meet this objection, it should be recalled that federal and state statutes have imposed criminal liability for seditious utterances and publications injurious to public morals and such statutes have been upheld by the courts against attacks grounded upon freedom of speech and of the press.⁷¹ It is to be noted,

The Impact of International Law upon National Law: A Policy-Oriented Perspective, 4 S.D.L. Rev. 25, 47-49, (1959).

66. U.S. Const. art. I, § 8, cl. 10.

67. Article 2, paragraphs (5) and (6) of the Draft Code of Offenses Against the Peace and Security of Mankind, adopted by the United Nations International Law Commission in 1951, not only prohibit the fomenting of civil strife within the territory of a State but also the undertaking or encouragement of terrorist activities in another State. For text, see Report of the International Law Commission Covering the Work of Its Third Session, 16 May-27 July, 1951. U.N. Gen. Ass. Off. Rec. 6th Sess., Supp. No. 9, at 18 (A/1858) (1951).

68. 23 Stat. 22 (1884), 18 U.S.C. § 478 (1958).

69. 120 U.S. 479 (1887).

70. *Id.* at 484.

71. In this connection, see *Schenck v. United States*, 249 U.S. 47 (1919), affirming a conviction under the Federal Espionage Act, 40 Stat. 217 (1917), for

however, that the operation of this type of legislation is carefully circumscribed, for the Supreme Court of the United States has explicitly required that it meet two conditions. These conditions are, that the crime be properly defined so as to come well within the exceptions to freedom of speech and of the press,⁷² and that the utterances thus punished constitute a "clear and present danger" that they will bring about the substantive evil which the legislative body might prevent.⁷³ The "clear and present danger" rule is by far the most important limitation, from the constitutional standpoint, upon freedom of speech and of the press. It essentially means that before an utterance can be penalized by the government it must ordinarily have occurred "in such circumstances" or have been of "such a nature as to create a clear and present danger" that it would bring about "substantive evils" within the power of the government to prevent.⁷⁴ It is therefore submitted that legislation penalizing revolutionary activities on the part of refugees could be applied within the same limits.⁷⁵ Ample support for this conclusion can be found in the recommendations of the President's Committee on Civil Rights of 1947 which, in dealing with legislation punishing subversive propaganda, reached the conclusion that freedom of speech and of the press would not be infringed if the "clear and present danger" rule were applied along with a clear standard of guilt and adequacy in the procedure.⁷⁶ The benefits to be derived from this approach would go a long way towards implanting the rule of law in the world community.⁷⁷ This has become an imperative of international life, for

causing or attempting to cause insubordination in the military forces of the United States by sending to men who had been newly drafted into the army pamphlets denouncing conscription and urging them to assert their rights in opposition to the draft. See also, *Dennis v. United States*, 341 U.S. 494 (1951), affirming a number of convictions for violation of Section 2 of the Smith Act, 54 Stat. 671 (1940), for advocating, advising and teaching the desirability of overthrowing the government by force; and *Gitlow v. New York*, 268 U.S. 652 (1925), dealing with a similar sedition law of New York.

72. Cf. *Yates v. United States*, 354 U.S. 298 (1957); and *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952).

73. *Shenck v. United States*, 249 U.S. 47, 52 (1919).

74. *Ibid.*

75. It should be mentioned that in enacting the Communist Control Act of 1954, 68 Stat. 775, 50 U.S.C.A. 841, Congress concluded that the existence of the Communist Party presents "a clear present and continuing danger to the security of the United States," and that it "should be outlawed." For text, see Barrett, *Bruton & Honnold, Constitutional Law: Cases and Materials* 1014 (1959).

76. As cited by Wright, *The Crime of "War-Mongering,"* 42 *Am. J. Int'l L.* 128, 132 (1948).

77. For a comprehensive discussion of contributions that the United States could make to world order, see McClure, *World Legal Order: Possible Contributions by the People of the United States* (1960).

today over a hundred States of diverse political systems have come to play a vital role in world community processes.⁷⁸ Certainly, the peaceful co-existence of these States in the world community would seem to suggest that their governments be secured against revolutionary activities and hostile propaganda originating in other jurisdictions.

IV. INTERNATIONAL EXPERIENCE OF THE UNITED STATES IN CASES DEALING WITH SUPPORT OF ACTIVITIES OF REFUGEES

The arguments adduced in the preceding pages must now be examined in reference to certain specific cases where the United States Government has been charged before the United Nations with helping refugees to overthrow their native government. The most important of these cases was perhaps the complaint raised by the Iron Curtain Countries before the General Assembly of the United Nations on account of Section 101 (a) of the Mutual Security Act enacted by Congress in 1951.⁷⁹ Section 101 (a) of the Act appropriates up to \$100,000,000:

for any selected persons who are residing in or escapees from the Soviet Union, Poland, Czechoslovakia, Hungary, Rumania, Bulgaria, Albania, Lithuania, Latvia, and Estonia, or the Communist dominated or Communist occupied areas of Germany and Austria, and any other countries absorbed by the Soviet Union either to form such persons into elements of the military forces supporting the North Atlantic Treaty Organization or for other purposes, when it is similarly determined by the President that such assistance will contribute to the defense of the North Atlantic Area and to the security of the United States.⁸⁰

In asking the United Nations General Assembly to condemn this provision, the Soviet representative to the Political Committee strongly maintained that this legislation was "an aggressive act . . . [and] intervention in the internal affairs of other Members of the United Nations which was incompatible with the United Nations Charter and with international law."⁸¹ Following closely Soviet

78. Jenks, *The Common Law of Mankind* ch. 2, at 62 (1958).

79. For text, see 65 Stat. 373 (1951).

80. This provision has been considered of a highly questionable legal character. See, Bowett, *Self-Defense in International Law* 46-47 (1958). Also, Dr. Charles G. Fenwick maintains that this Act is violative of Article 2, paragraph (5) of the Draft Code of Offenses Against the Peace and Security of Mankind in that it undertakes and encourages activities calculated to foment civil strife in another State. See Fenwick, *Draft Code of Offenses Against the Peace and Security of Mankind*, 46 Am. J. Int'l L. 98, 99 (1952).

81. U.N. Gen. Ass. Off. Rec. 6th Sess., 1st Comm. 103 (A/C.1/SR. 472) (1951).

reasoning, the Polish representative made a special reference to the London Convention of 1933 which included, *inter alia*, the support of armed bands invading the territory of another State in the definition of aggression.⁸² Wholly apart from the fact that the majority of the delegates regarded this complaint as groundless and emotionally charged, as seen by the unconditional rejection of the Soviet resolution condemning the Act, the significant observation must be made that the American representative nowhere questioned the statement of the law as given by the complaining nations, but, rather, vigorously dissented from the interpretation attached by those nations to the Mutual Security Act.⁸³ Thus, while the American representative in principle agreed that support of refugees to rebel against their government is an international delinquency, he pointedly brought out that the intention and purpose of the Mutual Security Act was "to assist refugees from political persecution to take part in the defense of the North Atlantic Community, *if they elected to do so.*"⁸⁴ As no one at this time questioned the legality of the North Atlantic Treaty Organization,⁸⁵ the Mutual Security Act was further supported by a number of delegates on the basis of the United Nations Charter, which among the purposes of the United Nations mentions the taking of "effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace. . . ."⁸⁶ Certainly, the position adopted by the United States would seem to fall squarely within this provision.⁸⁷

For present purposes it may perhaps require emphasis that in answering the Soviet complaint the United States Government did not challenge the principle that support of revolutionary activities of refugees by the State of refuge is an act of aggression. This principle had been previously invoked by the American representative to the General Assembly in the earlier case of Greece against Albania, Bulgaria and Yugoslavia, in which the Greek Government maintained

82. Id. 1st Comm. 107 (A/C.1/SR.473) (1951).

83. Id. 1st Comm. 103 (A/C.1/SR.472) 1951).

84. Id. at 104. (Emphasis added.)

85. In fact, the Peruvian representative seemed to have linked the legality of the Mutual Security Act with the legality of the North Atlantic Treaty. See his remarks, Id. 1st Comm. 119 (A/C.1/SR.475) (1951).

86. U.N. Charter art. 1, para. 1.

87. The American representative invoked this provision. See, U.N. Gen. Ass. Off. Rec. 6th Sess., 1st Comm. 103 (A/C.1/SR.472) (1951). The French representative likewise said that the parties to the North Atlantic Treaty "had joined together to maintain peace and international security in accordance with the provisions of the Charter of the United Nations, it followed therefore that the aim of the amendment to Act 165 was also in accordance with the Charter of the United Nations. . . ." Id. 1st Comm. 113 (A/C.1/SR.474) (1951).

that its northern neighbors were aiding Greek refugees to overthrow their government.⁸⁸ Echoing the sentiments of the majority of the members of the Political Committee, he sharply declared that “. . . Albania, Bulgaria and Yugoslavia had violated the principle of international law according to which a State should not assist bands which were in rebellion against the legal Government of their country.”⁸⁹ This American position is even more striking for another reason, namely, that it regards the general principle concerning the duty of a State to protect other States from injurious acts originating within its jurisdiction, which is historically traceable to the *Alabama Claims*,⁹⁰ as being susceptible of wider application. On this view, the traditional distinction between organized hostile expeditions, which are condemned by international law, and revolutionary acts of individuals, which are not, seen in the discussion of American law, has no defensible basis, for in either case the obligation of prevention becomes operative.⁹¹ There is much in contemporary international life that makes that traditional distinction somewhat obsolete.

The problem has become of the most urgent importance under present conditions when thousands of Cuban refugees, fleeing from the alleged persecution of their government, have been given asylum in the United States. The knowledge is common that these refugees are engaged within the United States in revolutionary activities directed at the overthrow of the Cuban regime.⁹² The matter acquired international concern when the Cuban Government brought this question to the attention of the Security Council of the United Nations on July 18, 1960,⁹³ substantially maintaining that by tolerating subversive groups within its jurisdiction, the United States Government was violating its duty of non-intervention, thus presenting a threat to world peace. Upon American denial, and strong support by other nations, the Security Council enacted a resolution on July 19, 1960, noting that the question was under discussion by the Organization of American States and adjourning consideration of the matter until it receives a report from that Organization.⁹⁴ More recently, when an

88. This case first reached the Security Council on Dec. 3, 1946, and was subsequently transferred to the General Assembly on Sept. 15, 1947. See U.N. Gen. Ass. Off. Rec. 2d Sess., 1 Comm. 9 (60th meeting) (1947).

89. *Id.* at 14.

90. *United States v. Great Britain* (1871). For the record of this arbitration, see 7 Moore, *Digest of International Law*, § 1330, 1059-67 (1906).

91. García-Mora, *International Responsibility for Subversive Activities and Hostile Propaganda by Private Persons Against Foreign States*, 35 *Ind. L.J.* 306, 328 (1960).

92. See *N.Y. Times*, April 12, 1961, p. 14, col. 1.

93. For discussion, see 43 *Dep't State Bull.* 199 (1960).

94. *Id.* at 204.

invasion against the Cuban Government was allegedly launched from the United States, the Cuban Government again brought a complaint before the General Assembly on April 17, 1961, charging the United States with "the international crime of aggression."⁹⁵ It is of some interest to note that the Cuban complaint invoked section 960 of the United States Code, which prohibits the beginning or setting on foot of a military or naval expedition within the United States.⁹⁶ Wholly apart from the merits of this controversy, the available evidence strongly indicates that great numbers of Cuban refugees have been trained in the United States and other areas in Central America with the apparent purpose of overthrowing the present Cuban regime.⁹⁷ Even the Justice Department of the United States has been vitally disturbed by these actions, for it apparently believes that these subversive groups are in fact violating the neutrality statutes of the United States in attempting to prepare and set up a military expedition against a foreign government.⁹⁸ This conclusion is powerfully supported by the fact that a federal district court in Miami indicted a leader of these groups precisely for having attempted to set up a military expedition in violation of the law of the United States.⁹⁹ It is intensely relevant to add that when the Cuban refugees recently established a provisional government in the United States, the State Department succinctly warned them that this action "would violate the United States sovereignty and international law," if done without the consent of the United States.¹⁰⁰

These two cases where the United States has been charged before the world organization of helping refugees to rebel against their government are highly instructive from the legal and political standpoints, for they clearly show how difficult it is for a government to remain within the framework of its obligations under international law where the overthrow of a hostile government would clearly be to its advantage. It may be seen that in such situations the application of the law is permeated with political interests of the highest order, and this largely accounts for the reason why it exhibits a high degree of instability.¹⁰¹ In the case of the United States, this over-

95. For the statement of the Cuban position, see N.Y. Times, April 18, 1961, p. 16, col. 1.

96. Foreign Relations Act, 18 U.S.C. § 960 (1958).

97. It is similarly true that many Cuban fliers are presently being trained in Soviet dominated countries. The full story is given in detail in N.Y. Times, April 17, 1961, p. 1, col. 4.

98. N.Y. Times, April 12, 1961, p. 1, col. 5.

99. Ibid.

100. N.Y. Times, March 23, 1961, p. 1, col. 4.

101. Strausz-Hupé & Possony, *International Relations—In the Age of Conflict Between Democracy and Dictatorship* 354-55 (2d ed. 1954).

riding of international law duties is the more dramatic, because of the apparent American policy to avoid involvement in a situation which may not only undermine the American position before the inter-American community, but also supply fresh ammunition to the propaganda warfare in which nations are presently engaged.

However, to justify legally the American policy of permitting refugees to engage in revolutionary activities, the attractive thesis has been advanced that the United States can do so under the rights of self-defense and reprisals, which are allegedly guaranteed by international law.¹⁰² As these two rights are of a singular contemporary significance, they deserve a special treatment here.

The right of self-defense, as applied to the matter under consideration, would seem to assume a violation of the rights of the United States by continuous subversive acts waged both by the Soviet Union and its satellites, and by the present Cuban Government. As the toleration of these activities by the territorial State is generally regarded as an international delinquency,¹⁰³ it can convincingly be argued that the United States can do the same within its jurisdiction to defend herself against the possibility of attack or subversion. To put the matter in different terms, the right of territorial integrity on the part of the United States gives rise to the right of self-defense against attack. Implicit in this assertion is the recognition that the right of territorial sovereignty of the Communist and Cuban Governments is by no means absolute but must be exercised in manner consistent with international law. Self-defense by the United States is thus exercised in an attempt to meet a violation of the United States' sovereignty proceeding from another jurisdiction. These propositions seem unquestioned, but they raise critical issues from the standpoint of the rule of law in the world community, and must therefore be carefully scrutinized. The starting point in this analysis is the duty of States to prevent their sovereignty from being used by individuals to threaten seriously the peace and security of another nation. It has already been seen that to allow such activities to go unpunished under the right of territorial sovereignty would certainly amount to an

102. Whitton, *Subversive Propaganda Reconsidered*, 55 *Am. J. Int'l L.* 120 (1961). See also, Thomas & Thomas, *Non-Intervention: The Law and Its Import in the Americas* 274 (1956). This right of self-defense was also invoked to justify hydrogen bomb tests. See McDougal & Schlei, *The Hydrogen Bomb in Perspective; Lawful Measures for Security*, 64 *Yale L.J.* 648 (1955). It should be added that since the Mutual Security Act was defended on the basis of the North Atlantic Treaty, and the latter is legally supported on Article 51 of the United Nations Charter which regulates the exercise of the right of self-defense, then the Mutual Security Act itself is sustainable on grounds of self-defense. See *supra* note 87.

103. 1 Oppenheim, *International Law* 298 (8th ed., Lauterpacht, 1955).

abuse of right for which the menaced community is entitled to redress.¹⁰⁴ Thus, since the Communist and present Cuban Governments are all engaged in activities highly detrimental to the security of the United States, it follows logically that the right of self-defense on the part of the United States immediately arises. And the United States has exercised this right, not by direct intervention, but by tolerating revolutionary activities against those governments on the part of their own nationals seeking asylum in the United States. When the argument is thus posed, the right of the United States to exercise self-defense appears with breathtaking clarity. The core of the difficulty lies, however, in that resort to measures of self-defense, even in the limited sense here suggested, is an open invitation to the strong to be *judex in causa sua* and, as Professor Julius Stone has well-observed, it is really incongruous to think of such a measure as being functionally related to orderly world community processes.¹⁰⁵ On the other hand, the argument is irresistibly suggested that self-defense is frankly a legal sanction in an international society devoid of a centralized machinery to enforce the law.¹⁰⁶ Surely, as a proposition of power politics based on the questionable assumption that self-defense is a sanction of the law, this suggestion may be quite acceptable. As a proposition of law, however, it could scarcely find any justifiable foundation, for self-defense as an enforcement of the law can only operate in a situation involving a great power *vis-à-vis* a minor State.¹⁰⁷ But on any issue on which two great powers are opposed, it is certain that each will exercise the liberties which self-defense allows and, what is even more perplexing, each will identify its position with the supposed vindication of principles of international law. The resulting situation may be war against each other; but it would certainly be a curious paradox to regard such actions as emanating from the will of the world community.

The preceding observations merely underlie the important fact that measures of self-defense are not primarily questions of law but of the political relations between States,¹⁰⁸ and therefore, a State policy

104. Lauterpacht, *The Function of Law in the International Community* 286, 303-04 (1933). See also *supra* note 19.

105. Stone, *op. cit.* *supra* note 56, at 287.

106. Kelsen, *Principles of International Law* 15-17 (1953).

107. In this context, Professor Edwin D. Dickinson says that "such devices, theoretically available to all, have actually been a remedy of the strong against the weak." See Dickinson, *Law and Peace* 74 (1951). And Professor Josef L. Kunz, speaking of self-defense, says: "Under such a system a weak State can hardly go to war or take reprisals against a more powerful State, whereas the latter may abuse its power." See Kunz, *Sanctions in International Law*, 54 *Am. J. Int'l L.* 324, 325 (1960).

108. Cf. Bowett, *op. cit.* *supra* note 80.

justified on such a theory is highly questionable, to say the least. This conclusion is defensible on the basis of the United Nations Charter, for the Charter has imposed substantial restrictions upon the right of self-defense. Pertinent in this connection is Article 51, which provides for the exercise of the right of self-defense as follows:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such actions as it deems necessary in order to maintain or restore international peace and security.¹⁰⁹

This provision, contradictory as it is, would seem to be clear and simple in purpose, for it not only safeguards the traditional right of self-defense but also restricts it. This article narrows the field for the exercise of self-defense to circumstances involving an armed attack and only until such a time when the Security Council has taken the measures necessary to maintain international peace and security. It should therefore be clear that self-defense is limited both as to the occasion which gives rise to its exercise and as to its duration. Though no authoritative definition of an armed attack has ever been suggested, it is at least generally agreed that an armed attack is a special type of aggression.¹¹⁰ The line between armed attack and other kinds of aggression is in particular cases often difficult to mark; presumably, however, "armed attack" is narrower than the term "aggression."¹¹¹ It probably includes such acts as invasion of a State by the military forces of another State or some other grave breach of international peace. On the basis of this analysis, it is highly questionable that subversive campaigns by the Soviet and Cuban Governments would make Article 51 of the Charter operative, unless subversive groups of some dimensions actually invade the territory of the United States. This analysis of the right of self-defense further shows the shaky foundation it affords to the Mutual Security Act and to the toleration of revolutionary activities of Cuban refugees by the United States Government. This of course does not minimize the problem confronting the United States security in the

109. U.N. Charter art. 51.

110. Kunz, *The Inter-American Treaty of Reciprocal Assistance*, 42 *Am. J. Int'l L.* 111, 115 (1948).

111. Stone, *Legal Controls of International Conflict* 244 n. 8 (1954).

presence of subversive activities originating in Communist dominated regimes. It does show, however, that the use of self-defense in the manner suggested is probably no longer admissible under international law.¹¹² The encouragement of revolutionary activities of refugees is really a political tool that has no conceivable legal basis. The problem is indeed a difficult one that must be solved by the future formulation of the law. It may be added, however, that the long and painful exchanges between the West and the Communists in the Security Council and the General Assembly of the United Nations have increased, instead of removing, the perplexities of the problem.

It is still possible to base the United States' policies on the right to resort to reprisals, as Professor John B. Whitton has strongly suggested. Professor Whitton recently invoked this thesis as regards action of the United States calculated to support the aspirations of the Soviet dominated peoples to rid themselves of the Communist tyranny.¹¹³ However, a closer study of reprisals under international law reveals conclusions similar to those reached in respect to the right of self-defense. The resort to reprisals is a well-known procedure of international law according to which a nation harmed by the illegal acts of persons within another country's jurisdiction has the right to go into the territory of the latter and punish the offending individuals.¹¹⁴ Reprisals thus applied imply the right of the aggrieved community to punish a State for a violation of an international obligation. It can readily be seen, therefore, that the resort to reprisals is nothing more than the application of self-help by the aggrieved community, and it rests upon the theory that the offending

112. It should be mentioned that the right of self-defense was dealt with in the recent Corfu Channel Case, [1949] I.C.J. Rep. 1, 35, decided by the International Court of Justice. Rejecting the United Kingdom's claim that under the right of self-preservation she had the right to send her Navy into Albanian territorial waters for the purpose of effecting a mine-sweeping operation, the Court unmistakably declared that the action of the British Navy constituted a violation of Albanian sovereignty. The Court said: "The Court can only regard the alleged right of intervention as the manifestation of a policy of force, such as has, in the past, given rise to most serious abuses and such as cannot, whatever be the present defects in international organization, find a place in international law. Intervention is perhaps still less admissible in the particular form it would take here; for, from the nature of things it would be reserved for the most powerful States, and might easily lead to perverting the administration of international justice." Judge Hersch Lauterpacht believes, however, that this part of the opinion may be limited to this particular case. See Lauterpacht, *The Development of International Law by the International Court* 317 (1958).

113. Whitton, *supra* note 102, at 120.

114. Fenwick, *International Law* 532-33 (3d ed. 1948). For a comprehensive treatment of reprisals, see Colbert, *Retaliation in International Law* (1948).

State has not been able to exert measures of prevention.¹¹⁵ But reprisals to rectify wrongs, while permissible by customary international law before World War I, have been forbidden by international instruments of the greatest authority. Particularly applicable are the League of Nations Covenant, the Kellogg-Briand Pact, and the United Nations Charter. For present purposes it is pertinent to mention that the United Nations Charter obligates the members of the United Nations "to settle their international disputes by peaceful means in such a manner that international peace, and security, and justice, are not endangered."¹¹⁶ This provision would seem to restrict substantially the use of reprisals as a means of redress. Restricting even more the scope of reprisals is the provision which binds the Members to refrain from the "threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations."¹¹⁷ The combined operation of these provisions shows remarkably well that coercive or punitive measures by a State against another, even to remedy illegal actions, are no longer permissible methods of settling international disputes.¹¹⁸ Professor Whitton, however, has suggested that reprisals are still sanctions of the law and that they are limited only by two rules, namely, the rule of necessity and the rule of proportionality. He says in this regard that:

Under the rule of necessity the State undertaking reprisals must have tried in vain to obtain redress, for instance, protesting to the other party without result. This rule has been respected in the present case [the United States case]. Secondly, the damage inflicted by the reprisals must be reasonably proportional to the injury suffered by the State applying reprisal.¹¹⁹

There can be no doubt that these rules were designed to keep reprisals within measurable bounds. Despite these limitations, the inescapable fact still remains that the resort to reprisals cannot be justified in the light of standards laid down by the United Nations Charter. Referring to the illegal nature of reprisals, Judge Philip C. Jessup has aptly said that "An aggrieved state is now under a duty, if it is a Member of the United Nations, to refer its case to the Security Council and not to take forceful action on its own behalf."¹²⁰ Profes-

115. 1 Hyde, *International Law Chiefly as Interpreted and Applied by the United States* 244 n. 21 (2d ed. 1945).

116. U.N. Charter art. 2, para. 3.

117. U.N. Charter art. 2, para. 4.

118. Professor Julius Stone has reached this conclusion. See Stone, *op. cit. supra* note 111, at 289-90.

119. Whitton, *supra* note 102, at 121.

120. Jessup, *A Modern Law of Nations* 175 (1948).

sor Whitton's valiant effort to treat reprisals in terms of law completely overlooks that resort to them remains a weapon of the strong against the weak, and that it is highly incompatible with the conception of a world community firmly grounded on the rule of law.¹²¹ Just and orderly processes are the essence of the law, and these objectives are not likely to be attained if conceptions such as those of self-help, of which reprisal is a type, continue to dominate the international legal order.

CONCLUSION

The analysis presented in this article may give rise to the contention that it really leaves a government, against which hostile propaganda and subversion are directed, without any legal means of redress. To counteract such hostile acts by the toleration of revolutionary activities by refugees on the basis of alleged rights of self-defense and reprisal has been found to be contrary to existing international law. While this conclusion may not yet be free from doubt, the body of evidence here gathered would seem to make it almost certain that support of revolutionary activities on the part of refugees by the asylum State is tantamount to complicity in the act and, as such, it constitutes a serious breach of the duty of prevention which international law has clearly imposed upon States.¹²² Recent developments conclusively show that the peace and security of mankind are vitally at stake in these situations, for other nations take advantage of the political climate to support the faction more in accordance with their ideology. Moreover, previous experience in major wars gives rise to the suggestion that international conflagrations often have their roots in local conflicts between minor States or in a civil war apparently confined to the territory of one State.¹²³ It is precisely because of the potential danger of revolutionary activities by refugees that the obligation to prevent them from engaging in such activities must remain as a fundamental principle of law. It may further be submitted that the violation of this obligation not only justifies vigorous protests on the part of the aggrieved govern-

121. Professor Percy E. Corbett says in this connection that resort to such measures actually amounts to a negation of society for "the entity claiming the right also claims the exclusive power to determine when it comes into play." See Corbett, *Law and Society in the Relations of States* 44 (1951).

122. This is what Professor Quincy Wright has termed "subversive intervention." See Wright, *Subversive Intervention*, 54 *Am. J. Int'l L.* 521, 528 (1960).

123. E.g., some writers maintain that World War II actually began in Spain in 1936. See Palmer & Perkins, *International Relations: The World Community in Transition* 553 (1953). See also Thompson, *Political Realism and the Crisis of World Politics: An American Approach to Foreign Policy* 190-91 (1960).

ment, but also the application of preventive or enforcement measures on the part of the United Nations. To say this is also to recognize that since coercive measures can only be applied by the United Nations, unilateral resort to such measures has no longer any admissible legal basis. This conclusion certainly goes a long way towards both mitigating the anarchical elements now existing in the world community and helping to implant law and justice as the basis of the relations between States.