

THE STATUS IN INTERNATIONAL LAW OF NATIONAL LIBERATION MOVEMENTS AND THEIR USE OF ARMED FORCE

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I. WHAT INTERNATIONAL LAW AND COMMENTARIES SAY

A. National Liberation Movements and Wars of National Liberation

1. On Different Types of Armed Conflict

The different types of armed conflict² to which the term “wars of national liberation, in terms of humanitarian law, has been applied are (1) those struggles of peoples fighting a foreign invader or occupant; (2) those that have evolved within the United Nations and identified from the practice of States and international organizations, namely colonial and alien domination (or rule or government) and racist regimes which according to Article 1, paragraph 4 of Protocol I, are armed struggles aimed at resisting the forcible imposition or maintenance of such situations to allow people subjected to them to exercise its right of self-determination;³ (3) dissident movements which take up arms to overthrow the government and the social order it stands for. Their members may consider themselves as a “liberation movement” waging a “war of national liberation” against a regime or government which masks or represents “alien domination;” and (4) armed struggle of dissident movements representing a component people within a plural State which aims at seceding and creating a new State on part of the territory of the existing one.

A different perspective states that “parties to an armed conflict, other than states, are legally classified – ‘along a continuum of ascending intensity’ – as (1) rebels, (2) insurgents or (3) belligerents. Rebellion consists of sporadic challenge to the established government but which remains “susceptible to rapid suppression by normal procedures of internal security”; it is within the domestic jurisdiction of the state. Insurgency is a ‘half-way house between essentially ephemeral, spasmodic or unorganized civil disorders and the conduct of an organized war between contending factions within a State. The material conditions for a condition of belligerency are (1) the existence of an armed conflict of a general character; (2) occupation by the insurgents of a substantial portion of the national territory; (3) an internal organization capable and willing to enforce the laws of war; and (4) circumstances which make it necessary for outside states to define their attitude by means of recognition of belligerency.”⁴

It was proposed, however, that “a more flexible interpretation would assess the effectiveness of liberation movements not in isolation, but in relation to that of their adversary.” A more definitive interpretation would also take into consideration not only the elements in which liberation movements succeed in

controlling, but also those which they succeed in extracting from the control of that adversary. Such an interpretation would logically lead to the conclusion that, though not exercising complete or continuous control over part of the territory, liberation movements, by undermining the territorial control of the adversary as well as their own control of the population and their command of its allegiance, muster a degree of effectiveness sufficient for them to be objectively considered as a belligerent community on the international level.⁵

“While belligerents can only speak for themselves, a liberation movement represents not only itself or the territory it controls, but the whole people whose right to self-determination is being denied. It is this representative capacity which makes the status of a national liberation movement inherently independent of a geo-military dimension. The Protocol acknowledges this representative character in Article 96, wherein it refers to a liberation movement as ‘(t)he authority representing a people engaged against a High Contracting Party in an armed conflict of the type referred to in Article 1, paragraph 4.’”⁶

“The term ‘war of national liberation’ is not just a legal construct; it refers to a fact. Long before liberation wars were integrated into international law, they had existed as concrete historical phenomena. The Protocols Additional, therefore, do not invent a new category but merely acknowledge a material situation already existing. There are facts, of course, that are not politically neutral, but that does not make them any less factual. Moreover, this classification of liberation wars as a category of armed conflicts is based not on morality but on law – the legal right to self-determination.”⁷

2. On People

On the concept of people in the context of national liberation movements, it was explained that “in international law there is no definition of what constitutes a people; there are only instruments listing the rights it is recognized all peoples hold.

Neither is there an objective or infallible criterion which makes it possible to recognize a group as a people: apart from a defined territory, other criteria could be taken into account such as that of a common language, common culture or ethnic ties. The territory may not be a single unit geographically or politically, and a people can comprise various linguistic, cultural or ethnic groups. *The essential factor is a common sentiment of forming a people, and a political will to live together as such.* Such a sentiment and will are the result of one or more of the criteria indicated, and are generally highlighted and reinforced by a common history. This means simultaneously that there is a bond between the persons belonging to this people and something that separates them from other peoples; there is a common element and a distinctive element.”⁸

B. Legal Development and Trends on Recognition of the Right to Self-determination, the Use of Armed Force and the Right to Revolution

A survey of international documents through the years concerning the subject helps in understanding the conceptualization, contours and development on these points.

In fact, even from a liberal bourgeoisie legal point of view, resort to revolution has been recognized for the longest time, though more and more as merely rhetoric today in the context of the international situation.

1. Historical Basis of Right to Revolution

This kind of perspective was provided in this way:

“The right of “revolution” refers to the right fundamentally to change a governmental structure or process within a particular nation-state, thus including the right to replace governmental elites or overthrow a particular government. Such a change can occur slowly or quickly, peacefully or with strategies of violence. x x x x x What Abraham Lincoln recognized was the fundamental democratic precept that authority comes ultimately from the people of the United States, and that with this authority there is retained a “revolutionary right to dismember or overthrow” any governmental institution that is unresponsive to the needs and wishes of the people.

The right of revolution recognized by President Lincoln has, of course, an early foundation in our history. Both the Declaration of Independence (1776) and the Declaration of the Causes and Necessity of Taking Up Arms (1775) contain recognitions of this right, and several state constitutions within the United States consistently recognized the right of the people “to reform, alter, or abolish government” at their convenience. x x x x “99

A Justice of the US Supreme Court said that “the American Revolution served as a precursor for numerous others in the Americas, Europe, and elsewhere, even into the twentieth century. Today, it is common to recognize that all peoples have a right to self-determination and, as a necessary concomitant of national self-determination, a right to engage in revolution.”¹⁰

The nature and scope of the right of revolution was further clarified: “With such a focus, one should discover that private individuals and groups can and do engage in numerous forms of permissible violence. It is too simplistic to say, therefore, that authoritative violence can only be engaged in by “the government” or by governmental elites and functionaries. As Professor Reisman stated, the notion that only state institutions can permissibly use high levels of violent coercion

“is a crucial self-perception and deception of state elites.” Thus, the useful question is not whether private violence is permissible, but what forms of private violence are permissible, when, in what social context, and why. [Underscoring supplied.]

“As Professor Reisman further suggests:

“[I]nsistence on non-violence and deference to all established institutions in a global system with many injustices can be tantamount to confirmation and reinforcement of those injustices. In certain circumstances, violence may be the last appeal or the first expression of demand of a group or unorganized stratum for some measure of human dignity. [Underscorings supplied.]

“Early in our history, we appealed to natural law and the “rights of man” to affirm the right of revolution. Two historic declarations provide an inventory of the forms of oppression thought to justify armed revolution. Our Declaration of Independence proclaimed to the world the expectation that all governments are properly constituted in order “to secure” the inalienable rights of man, that governments derive “their just powers from the consent of the governed,” and that “it is the Right of the People to alter or abolish” any form of government which “becomes destructive of these ends.” x x x x ¹¹

“It is important to note two primary aspects of the right of revolution claimed in these two Declarations. First, the claim was made in a situation in which a ruler and a government sought to subject a people to despotism through various forms of political and economic oppression. Second, and most importantly, the Declaration of Independence was proclaimed “in the Name, and by authority of the . . . People.” Thus, although the framers of these Declarations appealed to natural law and inalienable rights, including the right to be free from governmental oppression and to alter or abolish oppressive forms of government, the primary justifying criterion was the proclaimed authority of the people.”¹²

“In view of the above, one can also recognize the propriety of a claim by the government, when representing the authority of the people, to regulate certain forms of revolutionary violence or, when reasonably necessary, “incitement to violence” engaged in by a minority of the people of the United States and without their general approval. Indeed, several Supreme Court cases document the permissibility of such a claim, although a few others seem to go too far. If, however, the right of revolutionary violence is engaged in by the predominant majority of the people, or with their general approval, the government (or a part of thereof) would necessarily lack authority, and governmental controls of such violence or incitements to violence would be impermissible. Thus, for example, it would be constitutionally improper to allege that “incitement to violence” is always a justification for governmental suppression of such conduct even if violence is imminent. Permissibility does not hinge upon violence as such, but ultimately

upon the peremptory criterion of authority — i.e., the will of the people generally shared in the community.”¹³

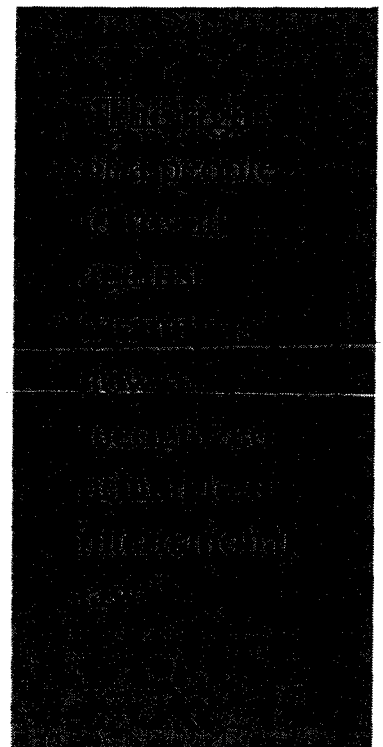
“In summary, numerous cases either affirm or are consistent with a distinction between permissible forms of violence approved by the authority of the people and unlawful violence, especially violence engaged in contrary to the authority of the people. Perhaps in recognition of such a distinction, Justice Black has stated:

“Since the beginning of history there have been governments that have engaged in practices against the people so bad, so cruel, so unjust and so destructive of the individual dignity of men and women that the “right of revolution” was all the people had left to free themselves. . . . I venture the suggestion that there are countless multitudes in this country, and all over the world, who would join [the] belief in the right of the people to resist by force tyrannical governments like those.”¹⁴

“It is doubtful whether Justice Black had in mind specific portions of the Universal Declaration of Human Rights when he recognized the seemingly wide approval of a general right of revolution, but he could have. The preamble to the Universal Declaration declares, for instance, that “it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law.” [*GA. Res. 217A, at 135, U.N. Doc. A/810 (1948).*] As one commentator has noted, the preamble to the Universal Declaration actually supports the right of revolution or rebellion, and it reflects the growth of acceptance of that right at least from the time of the American Declaration of Independence,¹⁵ an acceptance so pervasive as to allow text writers to conclude that “the right of a people to revolt against tyranny is now a recognized principle of international law.” x x x x and that the right of rebellion against tyranny and oppression is an internationally recognized right.¹⁶

“Although some have recognized that armed revolution is a form of “self-defense” for an oppressed people and others seek to limit the right of revolution to cases of a reasonably necessary defense against political oppression, the principles of necessity and proportionality should apply only to the strategies of violence utilized during revolution and are not needed for the justification of a revolution.”¹⁷

It was noted that “allowing for an ‘explicit and authentic act of the whole people,’ apart from the constituent acts of the electorate, gives rise to what



has been referred to as the right to revolution as a recognized principle of international law."¹⁸

The American Declaration of Independence of July 1776 categorically states that:

Whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or abolish it, and to institute new Governments, laying its foundation on such principles and organizing its powers in such forms, as to them shall seem most likely to effect their Safety and Happiness,

Abraham Lincoln in his 1861 Inaugural Address said:

'(t)his country, with its institutions, belongs to the people who inhabit it. Whenever they shall grow weary of the existing government, they can exercise their constitutional right of amending it, or their revolutionary right to dismember or overthrow it.'¹⁹

This right has been juridically expressed as 'direct state action' by constitutionalists:

"A revolution, therefore, may be illegal from the standpoint of the existing constitutional scheme; it is legal, however, —

'from the point of view of the state as a distinct entity not necessarily bound to employ a particular government or administration to carry out its will, it is the direct act of the state itself because it is successful. As such, it is legal, for whatever is attributable to the state is lawful.'²⁰

However, it was conceded that:

"The danger with this formulation is that it is useful only in hindsight. It is premised upon the fact of success thus rendering the whole theory, at best, as an after-the-fact justification. While it is internally self-consistent within its theoretical framework, it is actually useless in practice. Revolution is a right but it remains a crime unless its assertion ripens into victory. The paradox, therefore, is that the process of asserting a right is illegal, but the end-product of that process is legal, at which point the legality retroacts to the inception of the process itself."²¹

Another writer cautioned that "International humanitarian law, as embodied in the 1949 Geneva Conventions, establishes rules of humane conduct for parties engaged in armed conflict. The norms of humanitarian law require that violent acts be consonant with fundamental human rights. Two principles underlie human rights and humanitarian law: first, "all peoples have a right to self-determination and ... a right to engage in revolution"; and second, "international law ... limits the permissibility of armed revolution and participation of individuals in revolutionary social violence."²²

Still another writer wonders whether national liberation movements have a right to use force in international law against established governments and comes

to the conclusion that "the trend over the last four decades and since 1960 in particular has been toward the extension of the authority to use force to national liberation movements"²³

2. Right to Self-Determination in Positive Law

The right to self-determination first appears in positive international law in Articles 1 and 55 of the United Nations Charter, then with General Assembly Resolution 1514 (XV) of 1960 containing the Declaration on the Granting of Independence to Colonial Countries and Peoples, then Articles 1 (1) of both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights both of 1966.²⁴

In 1948, this landmark provision was reached by the international community:

Whereas, it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law. [*Universal Declaration of Human Rights of December 10, 1948*]

In the Declaration Of The Independence Of Colonial Nations And Peoples" (Resolution 1514, XV, December 14, 1960:

2. All peoples have the right of self-determination. They are free to politically determine the force of this right and to freely struggle for economic, social, and cultural development.

4. All armed actions and measures of repression, of any type whatsoever, against dependent peoples are to be halted in order to make it possible for them to peacefully and freely enjoy their right to full independence. The integrity of their national territory will be respected.

In this connection, it was explained that :

"Since 1949, however, the developments which have taken place both in the international community and, consequently in international law, have led progressively and cumulatively to the establishment and consolidation of the international character of wars of national liberation; and this both within and outside the framework of international organizations, as a result of practice and consensus, on the basis of the principle of self-determination."²⁵

"United Nations organs, especially the General Assembly, have confirmed the latter interpretation (the principle of self-determination is a legal principle imposing an obligation on the colonial Powers and establishing a right for all peoples to the exercise of self-determination) in many resolutions, dealing with the subject matter in general or in relation to a specific situation. This trend culminated in general Assembly Resolution 1514 (XV) of 1960 containing the

Declaration on the Granting of Independence to Colonial Countries and Peoples. Self-determination was also recognized as a human right in Article 1 of the International Covenant on Civil and Political Rights and of the International Covenant on Economic, Social and Cultural Rights adopted by the General Assembly in 1966. The most significant achievement in this respect, however, is the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations which was adopted by General Assembly resolution 2625 (XXV) in 1970..... led to the universal recognition of the legally binding nature of the principle of self-determination.”²⁶

In Resolution 2105 (XX) of 20 December 1965, the General Assembly of the UN recognized the legitimacy of the struggle of colonial peoples against colonial domination in the exercise of their right to self-determination and independence, and it invited all States to provide material and moral support to national liberation movements in colonial territories.

In Common Article 1 of the International Covenant on Civil and Political Rights and on Economic, Social and Cultural Rights (Adopted by Resolution 2200 (XXI) of the General Assembly of 16 December 1966), it is provided unequivocally that all peoples have the right of self-determination by virtue of which they freely determine their political status and freely pursue their economic, social and cultural development.

In the same vein, it was said that:

“This development reached a high-water-mark with the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations contained in General Assembly Resolution 2625 (XXV) of October 24, 1970, which proclaimed the ‘progressive development and codification’ of, among seven principles, that of equal rights and self-determination of peoples.”²⁷ It provided, *inter alia*, :

(b) to bring a speedy end to colonialism, having due regard to the freely expressed will of the peoples concerned; and bearing in mind that subjections of peoples to alien subjugation, domination and exploitation constitutes a violation of the principle, as well as a denial of fundamental rights, and is contrary to the Charter of the United Nations.

The establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people.

Every State has the duty to refrain from any forcible action which deprives peoples referred to above in the elaboration of the present principle of their right to self-determination and freedom and independence. In their actions against

resistance to such forcible action in pursuit of their right to self-determination, such peoples are entitled to seek and receive support in accordance with the purposes and principles of the United Nations.

3. Legal Standing of Liberation Movements

The Declaration, it was observed, resolves several intricate and controversial problems posed by cases of violent self-determination, to wit:

(a) It clearly states that the 'forcible action' or force which is prohibited by Article 2, paragraph 4 of the Charter is not that used by peoples struggling for self-determination but that which is resorted to by the colonial or alien governments to deny them self-determination.

(b) Conversely, by armed resistance to forcible denial of self-determination – by imposing or maintaining by force colonial or alien domination – is legitimate under the Charter, according to the Declaration.

(c) The right of liberation movements representing peoples struggling for self-determination to seek and receive support and assistance necessarily implies that they have a *locus standi* in international law and relations.

(d) This right necessarily implies also that third States can treat with liberation movements, assist and even recognize them without this being considered a premature recognition or constituting an intervention in the domestic affairs of the colonial or alien government.”²⁸

But even before the adoption of the said 1970 Declaration, different organs of the United Nations affirmed, on several occasions, the legitimacy of such struggles. For instance, the General Assembly said in resolution 2649 (XXV) (1970) that it

1. Affirms the legitimacy of the struggles of peoples under colonial and alien domination recognized as being entitled to the right of self-determination to restore to themselves that right by any means at their disposal.²⁹

“The Declaration has been construed to have legalized the use of armed means to assert the right to self-determination. The 'forcible action' which is prohibited under Article 2 (4) of the Charter comprehends the use of force by colonial governments to deny a people of their right to self-determination. The wording of the Declaration has been interpreted to exclude the armed means of ascertaining the right to self-determination from the general prohibition on the use of force. In short, the Charter proscribes the forcible denial but permits the forcible assertion on the right to self-determination.”³⁰

“Another significant development based on the 1970 Declaration is the affirmation that liberation movements had *locus standi* in international law and that wars of national liberation were armed conflicts of an international character.

“Under the 1970 Declaration, a movement representing a people ‘in their actions against, and resistance to, such forcible action’ used to deny them their right to self-determination, are entitled to seek and receive outside support. Furthermore, third parties who assist such liberation struggles are not deemed to have breached the duty of non-intervention in the domestic affairs of another state, for such assistance is precisely in accordance with the purposes and principles of the Charter itself. The text of the 1970 Declaration shows that both non-intervention and self-determination are enshrined principles of international law in the same instrument, such that the exercise of one cannot possibly be deemed to be in breach of the other co-equal principle. There is, therefore, a built-in ‘exception’ in favor of self-determination.

“The 1970 Declaration therefore implies that such movement is capable as an international actor to deal directly with outside states. And regardless of whether or not the 1970 Declaration grants international *locus standi* to those movements, at the very least, it expressly and effectively cracks the protective shell of domestic jurisdiction.”³¹

x x x

“The right to self-determination gave rise to a corresponding duty of other states to respect it. And states which use forcible means to deny a people of this right may be legally resisted by armed force as well. Hence, the legal basis of the politico-military means of ascertaining this right to self-determination. The process of this armed assertion is a war of national liberation; the politico-military group which represents a struggling people in that process is a national liberation movement.

“The next logical development was for this war to attain the character of an international armed conflict and for this movement to be deemed an international person.

“A people asserting their right to self-determination are exercising an international right. Other states, in giving them aid in their struggle to assert that right, do not commit an act of intervention; they are simply upholding the Charter of the United Nations and the fundamental principles of international law according to the Charter.

“Furthermore, a state that denies a people this right is liable for an international delict, a breach of duty owed under international law; and if that denial is done by resort to force, it is liable for the illegitimate use of force, contrary to the Charter itself.”³²

4. Various International Instruments on Struggles and Means

Thereafter, General Assembly Resolution 2649 (XXV) on The Importance of the Universal Realization of the Right of Peoples to Self-Determination and of the Speedy Granting of Independence to Colonial Countries and Peoples for the Effective Guarantee and Observance of Human Rights (1970) declared that it:

1. Affirms the legitimacy of the struggle of peoples under colonial and alien domination recognized as being entitled to the right to self-determination to restore to themselves that right by any means at their disposal.

In fact, each year thereafter, the General Assembly had passed a resolution of identical title affirming the right to self-determination. In Resolution 2787 (XXVI) of December 6, 1971, the General Assembly 'confirmed the legality of the people's struggle for self-determination.' In Resolution 3070 (XXVIII) of 30 November 1973, the General Assembly categorically affirmed the right to pursue self-determination 'by all means, including armed struggle.'

In Resolution 2787 (XXVI) (1971), it said that it:

1. Confirms the legality of the people's struggle for self-determination and liberation from colonial and foreign domination and alien subjugation... by all available means consistent with the Charter of the United Nations, 2. Affirms man's basic human right to fight for the self-determination of his people under colonial and foreign domination.

In the same vein, General Assembly Resolution 3103 (XXVIII) on the Basic Principles of the Legal Status of the Combatants struggling against Colonial and Alien domination and Racist regimes (December 12, 1973) proclaimed that:

3. The armed conflicts involving the struggle of peoples against colonial and alien domination and racist regimes are to be regarded as international armed conflicts in the sense of the 1949 Geneva Conventions, and the legal status envisaged to apply to the combatants in the 1949 Geneva Conventions ... is to apply to persons engaged in armed struggle against colonial and alien domination and racist regimes

The said Resolution 3103 stated in its preamble that "the continuation of colonialism in all its forms and manifestations ... is a crime and that all colonial people have the inherent right to struggle by all necessary means at their disposal against colonial powers and alien dominations in the exercise of their right to self-determination.... "

The General Assembly identified and recognized the legal characterization of armed conflicts as wars of national liberation including those in Southern Africa, the peoples of Zimbabwe, Namibia, Angola, Mozambique, Guinea-Bissau and

the Palestinian people (resolution 2787, XXVI, 1971). In fact, several liberation movements have been granted observer status in various organs of the United Nations and regional organizations. In fact, many States have even recognized liberation movements, allowed them to establish official representation in their territory and provided and still provide them with moral and material assistance.³³

In the United Nations Declaration on the Protection of Women and Children in Emergency and Armed Conflict, proclaimed by General Assembly resolution 3318 (XXIX) of 14 December 1974, it was affirmed that:

Deeply concerned by the fact that, despite general and unequivocal condemnation, colonialism, racism and alien and foreign domination continue to subject many peoples under their yoke, cruelly suppressing the national liberation movements and inflicting heavy losses and incalculable sufferings on the populations under their domination, including women and children,

Deploring the fact that grave attacks are still being made on fundamental freedoms and the dignity of the human person and that colonial and racist foreign Powers continue to violate international humanitarian law, x x x x

Even in the Helsinki Accord of 1975, applying the principle of self-determination to internal democracy addressed particularly to European states [*signed by 35 States, 33 European plus Canada and the US*], Principle VIII, Final Act of Conference on Security and Cooperation in Europe, this principle appears:

By virtue of the principle of equal rights and self-determination of peoples, all peoples always have the right, in full freedom, to determine, when and as they wish, their internal and external political status, without external interference, and to pursue as they wish their political, economic, social and cultural development.

Eventually, Article 1 of Protocol I of 8 June 1977 states that:

3. This Protocol, which supplements the Geneva Conventions of 12 August 1949 for the protection of war victims, shall apply in the situations referred to in Article 2 common to those conventions.

4. The situations referred to in the preceding paragraph include armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration of Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.”

Thereafter, General Assembly Resolution 32/147 on measures to prevent international terrorism of 6 December 1977 again:

3. Reaffirms the inalienable right to self-determination and independence of all peoples under colonial and racist regimes and other forms of alien domination,

and upholds the legitimacy of their struggle, in particular the struggle of national liberation movements, in accordance with the purposes and principles of the Charter and the relevant resolutions of the organs of the United Nations.

4. Condemns the continuation of repressive and terrorist acts by colonial, racist and alien regimes in denying peoples their legitimate right to self-determination and independence and other human rights and fundamental freedom;

x x x x

Also, in Resolution 40/61 adopted on December 9, 1985 by the 108th Plenary Meeting, the General Assembly adopted a Resolution on Measures to Prevent International Terrorism³⁴, to wit:

Reaffirming also the inalienable right to self-determination and independence of all peoples under colonial and racist regimes and other forms of alien domination, and Upholding the legitimacy of their struggle, in particular the struggle of national liberation movements, in accordance with the purposes and principles of the Charter and of the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations,

In Economic and Social Council Resolution 1986/43, on the Use of mercenaries as a means to violate human rights and to impede the exercise of the right of peoples to self-determination, the following is again stated:

Reaffirming the legitimacy of the struggle of peoples and their liberation movements for their independence, territorial integrity, national unity and liberation from colonial domination, apartheid, foreign intervention and occupation, x x x

Once again, in G.A. res. 48/94, [48 U.N. GAOR Supp. (No. 49) at 199, U.N. Doc. A/48/49 (1993)], the General Assembly, on its 85th plenary meeting on 20 December 1993 on the Importance of the universal realization of the right of peoples to self-determination and of the speedy granting of independence to colonial countries and peoples for the effective guarantee and observance of human rights, agreed thus: x x x

2. Reaffirms the legitimacy of the struggle of peoples for independence, territorial integrity, national unity and liberation from colonial domination, apartheid and foreign occupation, in all its forms and by all available means;

The International Court of Justice, in advisory opinions, had occasion to affirm that the principle of self-determination as enshrined in the United Nations Charter has through subsequent development of international law been accepted as a "right" of peoples in non-self-governing territories.³⁵

It was concluded that "as concerns the *jus in bello* – i.e. the law governing relations between belligerents and between them and third parties – the most important consequence of the recognition of self-determination as a legal right (a

consequence which inexorably derives also from all the others mentioned above) is to confer an international character on armed conflicts arising from the struggle to achieve this right and against its forcible denial. As such, they are subject to the international *jus in bello* in its entirety.”³⁶

“The right to self-determination, a fundamental principle of human rights law, is an individual and collective right to “freely determine . . . political status and [to] freely pursue . . . economic, social and cultural development.” (ICCPR, Art.1; ICESCR, Art. 1)³⁷

The International Court of Justice refers to the right to self-determination as a right held by people rather than a right held by governments alone.³⁸ Western Sahara Case, 1975 International Court of Justice 12, 31.

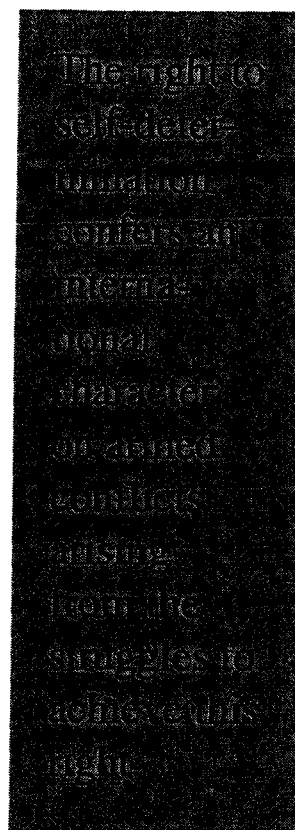
An observer noted again:

“Today, the right of revolution is an important international precept and a part of available strategies for the assurance both of the authority of the people as the lawful basis of any government and of the process of national self-determination. Under international law, the permissibility of armed revolution is necessarily interrelated with legal precepts of authority and self-determination, as well as with more specific sets of human rights.”³⁹

More direct to the point, it was said that:

“(I)t is evident that the people of a given community have the right to alter, abolish, or overthrow any form of government that becomes destructive of the process of self-determination and the right of individual participation. Such a government, of course, would also lack authority and, as a government representing merely some minority of the political participants, it could be overthrown by the majority in an effort to ensure authoritative government, political self-determination, and the human rights of all members of the community equally and freely to participate.

“Thus, as mentioned, the right of revolution supported by the preamble to the Universal Declaration and accepted by text writers as a principle of international law is a concomitant precept and a part of available strategies for the securing of the authority of the people and national self-determination. Importantly also, the international precepts of authority and self-determination provide criteria relevant to our inquiry into the permissibility of individual participation in armed revolution. As in the case of domestic standards, the right of revolution is necessarily a right



of the majority against, for example, an oppressive governmental elite. Furthermore, the authority of the people is the only legitimate standard.”⁴⁰

5. Limitations on Use of Force

As for the concern regarding the limitations on the use of force, it was also pointed out that: “No matter how rationally one may justify revolutionary means in terms of the demonstrable chance of obtaining freedom and happiness for future generations, and thereby justify violating existing rights and liberties and life itself, there are forms of violence and suppression which no revolutionary situation can justify because they negate the very end for which the revolution is a means. Such are arbitrary violence, cruelty, and indiscriminate terror.

“Under international law, including the law of human rights, there are certain forms of violence that are impermissible per se. Included here are strategies and tactics of arbitrary violence, cruelty, and indiscriminate terror. International law also prohibits the use of violence against certain targets, and permissible uses of force are conditioned generally by the principles of necessity and proportionality.

“Thus, with regard to questions of legality concerning targets, tactics, and strategies of social violence, international law already provides normative guidance. A realistic and policy-serving jurisprudence is needed, however, to integrate relevant principles of international law into appropriate analysis and choice about the permissibility of a particular method or means of violence in a given social context.

“Revolution is actually one of the strategies available to a people for the securing of authority, national self-determination and a relatively free and equal enjoyment of the human right of all persons to participate in the political processes of their society.

“With regard to the separate question of the legality of various means of furthering revolution, numerous sets of domestic and international law already proscribe certain forms of social violence. For example, international law, including human rights law, prohibits tactics of arbitrary violence, cruelty, and indiscriminate terror; the targeting of certain persons (such as children) and certain things; and generally any unnecessary death, injury, or suffering.⁴¹

“Thus, in a state in which the basic human rights are disregarded by the authorities and no democratic or peaceful means are available to enforce respect for those human rights, rebellion is a legitimate reaction. This right to rebel against tyranny is an integral part of the Western liberal tradition, and usually is defined as a “right of resistance” to oppressive government.

“The right to rebel against oppression is, therefore, well rooted both at an international and a national level, but the method of its implementation raises

several questions. First, when is armed violence justified, and within what bounds? The answer of the international community is limited to a set of historical forms of rebellion: struggles against oppression by colonial powers, racist regimes, and foreign occupants. The majority of the numerous U.N. General Assembly resolutions on self-determination grant the right to take up arms to achieve self-determination. International practice has evolved along these lines, and was confirmed in 1977 in the first Geneva Protocol on the Humanitarian Law of Armed Conflict (Protocol I). Thus, we can conclude that in those three categories of fighting for self-determination, the rebels can legitimately use armed violence to exercise their right of rebellion."⁴²

C. The Application of Article 1, paragraph 4 and Article 96, paragraph 3 of Protocol I and other pertinent international humanitarian law instruments to National Liberation Movements (NLMs)

1. Recognition of NLMs in the Conventions

Common Article 2, paragraph 3 of the Conventions provides:

“Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall be bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.”

There is the view that that the non-recognition of the declaring party or of the authority representing it, in the context of common Article 2, paragraph 3, of the Conventions, inspired Article 96, paragraph 3 of the Protocol, and as such applies to the latter.⁴³

It was posited that that though the term ‘Power’ usually denotes a State in diplomatic language, it has occasionally been used in a wider sense to include some other entities not having this character and, therefore, in that sense, liberation movements can become parties to the Conventions especially so that a wider interpretation is more compatible with the humanitarian objective and purpose of the conventions which, to be fully realized, commend universal application.⁴⁴

The following views⁴⁵ on whether such an “authority” has to fulfill certain conditions for it to be able to make the declaration are advanced persuasively:

(1) The attempt to impose the condition that there must be recognition of the liberation movement by the regional intergovernmental organization concerned did not succeed and cannot be read into the language of Article 96 as it stands

because such a condition would have led to a restrictive interpretation incompatible with the object and purpose of humanitarian law. While such recognition reduces the margin of possible controversy, "it is not constitutive of the international status or *locus standi* of the liberation movement for the purposes of the Conventions and the Protocol."

(2) As to the question of territorial control by the liberation movement, this is a restrictive line of reasoning to base it on the assumptions of conventional warfare and disregards in the process the special features of guerilla warfare characteristic of wars of national liberation. "Though not exercising complete or continuous control over part of the territory, liberation movements, by undermining the territorial control of the adversary as well as their own control of the population and their command of its allegiance, muster a degree of effectiveness sufficient for them to be objectively considered as a belligerent community on the international level." At any rate, it is significant that neither Article 1, paragraph 4 nor Article 96, paragraph 3, require territorial control.

(3) As to the condition that there must be proof that the liberation movement be truly representative of the people in whose name it is prosecuting the war of national liberation: Abi-Saab says that "In fact, until self-determination can be freely and openly exercised, one has to be content with certain indices of the representative character of liberation movements. Prominent among them is the fact that a liberation movement can hold on and continue the struggle even at a low level of intensity, in spite of the difficult conditions in which, and the uneven position from which, it has to operate; something it could not have done if it did not enjoy wide popular support. In other words, a certain degree of continued effectiveness creates a presumption of representativeness."⁴⁶

(4) As to the condition that the liberation movement should attain a minimum of effectiveness as a belligerent, i.e. it should be a party to a real ongoing armed conflict: it is the whole approach of the Conventions that international armed conflicts are defined not as a function of the degree of intensity of hostilities, but in terms of its parties and the type of relations existing among them. It does not appear as a requirement in either Article 1 or Article 96 nor for that matter common Article 2 of the Conventions.⁴⁷

"The effectiveness of the liberation movement is measured first of all by its organization and internal discipline, as prescribed by Article 43 of Protocol I, It is also revealed by the fact that a liberation movement manages to hold on and continues to operate in spite of the great disparity of means and position between it and its adversary (a fact which can also be considered as a presumption of its representative character."⁴⁸

2. Applicability of ARTICLE 1, PARAGRAPH 4, in

relation to ARTICLE 96, PARAGRAPH 3

ARTICLE 1, PARAGRAPH 4 (On General Principles and Scope of Application) of Protocol I Additional to the Geneva Conventions of 12 August 1949 provides:

The situation referred to in the preceding paragraph [Conventions of 12 August 1949 for the Protection of War Victims, shall apply in the situations referred to in Article 2 Common to those Conventions] include *[which means in statutory construction as non-exclusive and merely illustrative]* armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right to self-determination, as enshrined in the Charter of the United Nations and the Declaration of Principles of International Law concerning Friendly Relations and Co-Operation among States in accordance with the Charter of the United Nations. *[Underscorings supplied]*

ARTICLE 96, PARAGRAPH 3 (On Treaty Relations upon entry into force of this Protocol):

The authority representing a people engaged against a High Contracting Party in an armed conflict of the type referred to in Article 1, paragraph 4, may undertake to apply the Conventions and this Protocol in relation to that conflict by means of a unilateral declaration addressed to the depositary. Such declaration shall, upon its receipt by the depositary, have in relation to that conflict the following effects:

- (a) The Conventions and this Protocol are brought into force for the said authority as a Party to the conflict with immediate effect;
- (b) The said authority assumes the same rights and obligations as those which have been assumed by a [N.B., referring to any High Contracting Party and not a particular entity] High Contracting Party to the Convention and this Protocol; and
- (c) The Conventions and this Protocol are equally binding upon all Parties [N.B.. not necessarily a High Contracting Party] to the conflict.

3. What Colonial Domination, Alien Occupation and Racist Regimes Mean

Are the instances of colonial domination, alien occupation or racist regimes illustrative or exhaustive a listing to qualify whether a struggle of a people in the exercise of its right to self-determination should be considered an international conflict?

The traditional view is that, despite the use of the word “include”, it should be interpreted as introducing an exhaustive list of cases and that the same essentially cover all circumstances in which peoples are struggling for the exercise of their right to self-determination.

There is a legitimate struggle against “colonial domination” when a people have taken up arms to free themselves from the domination of another people, “alien occupation” involves partial or total occupation of a territory which has not yet been fully formed as a State, while “racist regimes” are those founded on racist criteria. “The list is exhaustive and complete: it certainly covers all cases in which a people, in order to exercise its right of self-determination, must resort to the use of armed force against the interference of another people, or against a racist regime. On the other hand, it does not include cases which, without one of these elements, a people take up arms against authorities which it contests, as such a situation is not to be considered international.”⁴⁹

A different view was advanced, to wit:

“(W)henever a state chooses to send its armed forces into combat in a previously non-international armed conflict in another state — whether at the invitation of that state’s government or of the rebel party — the conflict must then be considered an international armed conflict, and the rebel party must be considered to have been given, from the date of such intervention, belligerent status, which, as a matter of customary international law, brings into force all of the laws governing international armed conflicts. If a state other than the state in which a civil war is occurring commits its armed forces to the battle on one side or the other, the nature of the armed conflict changes fundamentally. While one can understand that a government involved in a civil war in its territory might object to its internal enemy’s acquiring belligerent status merely because another state has been induced to join the war, the armed conflict will certainly have become international, and it will be practically impossible to apply both the rules on international armed conflict and those on non-international armed conflict to what, in fact, is a single armed conflict with two warring sides.”⁵⁰

Another insight was provided by the following commentary:

“The next question to be considered is the extent to which the law of Geneva covers acts committed by national liberation movements. From the point of view of international law, until recently national liberation movements could doubtlessly have been regarded as parties to non-international armed conflicts, to which the provisions of Article 3 apply, unless the conditions for their recognition as “belligerents” were met. During the sixties and seventies, however, the non-aligned countries, supported by those of Eastern Europe, launched a massive campaign aiming at the recognition of the armed struggle of national liberation movements as being “international” by definition: i.e., from the first shot, so to speak, without

taking into account the traditional condition of presenting a real and sustained challenge to the government. Thus, General Assembly Resolution 3103 (XXVIII) of December 12, 1973, provides:

“The armed conflicts involving the struggle of peoples against colonial and alien domination and racist regimes are to be regarded as international armed conflicts in the sense of the 1949 Geneva Conventions and the legal status envisaged to apply to the combatants in the 1949 Geneva Conventions and other international instruments are to apply to the persons engaged in armed struggle against colonial and alien domination and racist regimes. x x x⁵¹

In expounding on the application of Article 1, paragraph 4 of Protocol 1, a very progressive view, on the other hand, was posited:

“Article 1, paragraph 4, does refer to the exercise of the right of self-determination; but only in order to qualify the struggles of peoples in the three types of situations mentioned therein, i.e. armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination.

“Does this mean that the provision is limited to these three specific cases of denial of self-determination? The literal interpretation of the text leads to an affirmative answer to this question. But it may be useful in this context to recall the explanation given by the Australian representative in Plenary at the end of the first session, for his renewed support of Article 1 as amended x x x:

‘At that time (of voting in the Committee his delegation had explained that, although it favoured a broadening of the field of application of draft Protocol I, it feared that the terms used . . . might be too restrictive and exclude all conflicts other than those enumerated. After due consideration, his delegation had realized that if paragraphs 1 and 2 (4 in the final version) were taken together and if the word ‘include’ in paragraph 2 was taken literally, the list could be interpreted as not being exhaustive. ‘

“In other words, the Australian representative tried to put forward an interpretation of the provision, which considers the enumeration of the specific types of situations as illustrative and not exhaustive.

“Such an interpretation is more in accord with the spirit of the Protocol and the Conventions: for if we proceed from a humanitarian point of view, we have to favour the application of as much humanitarian law to as many conflicts as possible. This has been the systematic policy of the ICRC; and it is through the practice of the ICRC, of international organizations and of States that such a liberal interpretation can progressively consolidate.”⁵²

This view continued:

“Article 1, paragraph 4, can be plausibly construed in a more liberal way, by interpreting the enumeration of the three categories mentioned therein as illustrative and not exhaustive; an interpretation which brings within its ambit all cases of denial of self-determination, within as well as beyond the colonial context. The absence of the requirement of recognition by the regional organizations either in the definition or for establishing the *locus standi* of liberation movements, facilitates the adoption of this interpretation by the ICRC and by third States in dealing with specific situations. And it is through such subsequent practice that this liberal interpretation - which is much more compatible with the humanitarian object and purpose of the provision and of the whole Protocol - can be anchored in reality and made to prevail.”⁵³

The effect of non-acceptance by an existing government to Protocol I on the applicability of Article 96, paragraph 3 thereof was also clarified:

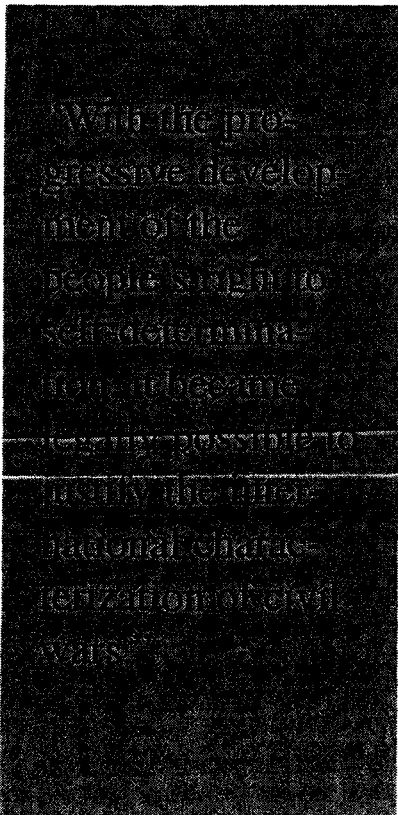
“Even if Protocol I is not accepted as a separate legal instrument by the handful of governments facing a war of national liberation, its provisions assert themselves as the proper interpretation of the Geneva Conventions.

“In this respect, the fact that the *locus standi* of liberation movements was codified in Article 96, paragraph 3, vindicates the earlier interpretation of ‘Power’ in the Conventions to include such movements, at least for the purposes of common Article 2, paragraph 3 of the Conventions, whose formula was more or less borrowed by Article 96 of the Protocol.

“This means that if a liberation movement makes a declaration accepting the provisions of the Conventions, these Conventions, as interpreted in the light of Protocol I, become applicable in the ongoing war of national liberation, regardless of the opposition of the adversary government, as long as it is itself bound by the Conventions.”⁵⁴

In this connection, this view is shared by another scholar:

“Wars of national liberation were hitherto considered as internal armed conflicts and were therefore within the domestic jurisdiction of states. They become international conflicts only when they had crossed a geo-military threshold, beyond which the world community was placed on notice that said revolutionaries qua belligerents were entitled to *locus standi* as international persons.”



“With the progressive development of the people’s right to self-determination, it became legally possible to justify the international characterization of civil wars, without negating the principle of non-interference. First, the right of self-determination is ascribed to a people, such that said possessor of an international right must necessarily be an international person in order to assert and enjoy that right. Second, wars of national liberation were deemed the politico-military assertion of the right to self-determination. A liberation movement, therefore, is asserting an international right against a state, which by denying that right, is in breach of international obligations. Third, the use of armed force to deny a people of their right to self-determination is an act of aggression and entitles the party thus aggrieved to legitimately resort to armed means to resist such forcible denial of their right to self-determination.”⁵⁵

Further:

“Through classical colonialism, erstwhile international matters were legally subordinated to the municipal law of the colonializing power. With neo-colonialism, through the granting of nominal independence, two processes simultaneously transpire. Ostensibly, the relationship between the colonizer and its subject is once again ‘internationalized’, replete with all the trappings of the diplomatic relations between sovereign states. At the same time, however, the client-patron relationship has been so institutionalized, that through sophisticated legal and economic devices, colonial plunder persists. Domestic comprador elements, for instance, shall continue to fight local battles, politically and even militarily, for their patron, a most apt example of a ‘war by proxy’.

“Furthermore, the center-periphery relationship that used to exist only as a relationship between the colonizing power and its colony, later comes to exist as a relationship within the colony itself. The anti-colonial struggle is then fought within the boundaries of the neo-colonial state. The ‘national sovereignty’ of a neo-colony is legal fiction through which the colonizing powers – and the international community in which they are dominant – seek to insulate themselves from the obstinate efforts of peoples to ascertain their right to self-determination. The national liberation framework unmasks that fiction, and in the logic of corporate litigation, pierces the veil of national sovereignty to give aid to those peoples.”⁵⁶

In view of the above discussions, what is meant or contemplated by colonial domination, alien occupation and racist regimes in Article 1, paragraph 4?

There is existing and increasingly progressive legal literature that says the struggle against neo-colonialism may be contemplated in these terms.

Does this provision require that there be both colonial domination and alien occupation as one integral ground for unilateral declaration under Article 96,

paragraph 3 or are the three grounds, i.e. colonial domination, alien occupation and racist regime – three separate and distinct grounds which are independent of one another?

There seems to be divergent opinions on this although there is sufficient existing legal literature that says they can be both distinct and independent and at the same time an integral ground.

It was acknowledged that:

“The main legal problem to be solved was the following: whether members of liberation movements fighting against colonial powers were entitled to combatant status and consequently to treatment as prisoners of war upon capture, or whether their acts of violence could lawfully be subject to the penal law of the established government. This problem is now solved by Article 1, paragraph 4 of Additional Protocol I (1977) to the Geneva Conventions, which has given members of liberation movements combatant and POW status. At the time of its drafting, this provision was the object of an acrimonious debate, and the Diplomatic Conference that adopted the Protocols risked becoming a fiasco. Article 1, paragraph 4 of Protocol I is still an object of contention and its existence is one of the main reasons that the United States refuses to ratify Protocol I.”⁵⁷

In sum then, the following legal conclusions can be reached:

a. The situations referred to in Article 1 (4) of Protocol I need not be exhaustive or exclusive as to definitively foreclose the application of other non-traditionally defined armed conflicts in the exercise of a people of their right of self-determination.

b. The intent of Protocol I is to fully apply the provisions of the Geneva Conventions and Protocol I in all circumstances to all persons who are protected by those instruments, without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflict.

c. The right of self-determination may be exercised if there is a consistent pattern of gross and proven violations of human rights amounting to a denial of the people's right to freely determine its internal and external political and economic status.

d. The principle of effective implementation i.e. a treaty is interpreted in the light of its object and purpose, in the law on treaties favor as far as possible the upholding of the human spirit of the provisions of the Geneva Conventions and Protocol I.

e. The operative condition in the application of the subject provisions is the justifiability of the right of self-determination.

f. The principles and resolutions of the United Nations as well as the history and development of international humanitarian law unanimously show that the intention is to bring in liberation movements within the ambit of IHL.

Notwithstanding this legal question, what is certain is that:

The status recognized to liberation movements indeed gives them, as it gives States, the right to choose whether or not to submit to international humanitarian law, insofar as it goes beyond customary law. In this respect they are in a fundamentally different legal position from insurgents in a non-international armed conflict: if the State in whose territory such a conflict takes place is a Party to the Conventions and to Protocol II, Article 3 common to the Conventions and, as the case may be, Protocol II, will bind all the Parties to that armed conflict straightaway.”⁵⁸

D. Are National Liberation Movements and their Participants Criminals, Terrorists, Freedom Fighters or Revolutionaries?

So how should national liberation movements be considered in international law, particularly with respect to international humanitarian law?

The following observation is illustrative:

“Unfortunately, many of the states involved in attempting to militarily obliterate the peoples with valid self-determination claims try to reduce these conflicts to “terrorism”. So depending on which side of the fence you are on, group A is either a terrorist or a freedom fighter. Some of these regimes’ friends either acquiesce or actively support this erroneous assertion.

“Apart from the mud-slinging, the tragedy is that states are in open violation of their *jus cogens* and *erga omnes* obligations to defend the principle of self-determination. And also, very sadly, not enough people know sufficiently both the law of self-determination and the law of armed conflict to properly redirect the dialogue. The defenders of self-determination are in a very vulnerable position, charged with terrorism. The supporters of the groups fighting for the realization of national liberation may also be labeled or unduly burdened by laws against terrorism at the extremely serious expense of not only human rights but rights under the Geneva Conventions, other treaties and customary laws of armed conflict.”⁵⁹

The peculiarities of wars of national liberation was pointed out in this connection:

“Wars of national liberation are a typical example of what is sometimes called (in ‘peace research’ and ‘strategic studies’) ‘asymmetrical conflicts’. These are

conflicts between radically unequal parties in terms of the resources they command. The one controls the State machinery with all that goes with it, including the administration, the judiciary and the police, as well as modern means of communication and modern army disposing of powerful and sophisticated weapons. The other is composed of irregular combatants whose only asset is their high motivation and strong faith in the justice of their cause, reflecting popular aspirations which cannot be freely and democratically expressed and pursued.

“In these conditions liberation movements have no choice but to carry on a ‘poor man’s war’, by resorting to non-conventional or guerrilla warfare, which calls on man’s ingenuity and cunning to beat the machine and compensate for material inferiority. It is a special kind of warfare which has its own characteristics and internal logic.”⁶⁰

One commentator noted:

“Some of the organizations included in this section represent the internationally recognized opposition movements within countries where there is a civil war (e.g. Iran) or a war of national liberation (e.g. Sri Lanka). Under the U.N. charter and international treaties, the principle of self-determination provides that historically united groups of people (e.g. the Palestinians) have a right to determine their own form of government. In South Africa, for instance, the black majority was denied self-determination under the apartheid system. Today, there are many different ethnic national groups (like the Karenni in Burma, the Kurds in Iraq, the Kashmiris in Kashmir and the Tibetans in Tibet) who are denied self-determination in violation of international law.

“When armed resistance groups meet certain tests and follow the rules set out by the Geneva Conventions and other humanitarian (armed conflict) law, they are not considered terrorist organizations or mercenaries, but legitimate parties to a conflict. Therefore, like the African National Congress in South Africa during apartheid, they have recognized legal status, granting them specific rights, such as to be treated as prisoners of war if apprehended (i.e. not subject to criminal proceedings for shooting a soldier or for treason).⁶¹

On the other hand, a critical view of the traditional concept on national liberation movements was made:

“Revolutionaries, vanquished, are outlaws; victorious, they are the state. The orthodox framework in interpreting the international legal consequences of revolution hinges upon one determinant factor: the extent of effective control by parties to the conflict, as ascertained on a geo-military scale. Upon this factual determination rests the resolution to key juridical issues – the status to be conferred upon the rebels, i.e. whether they are mobs in a leve’e en masse, insurgents, or full-fledged belligerents; the rights and obligations arising therefrom; and the liability of the rebels, and conversely, the extent of state responsibility, for injuries

caused by the conduct of hostilities. Success, in this case, is rebellion's sole justification. Of war, to paraphrase Seneca, the law asks the outcome, not the cause.

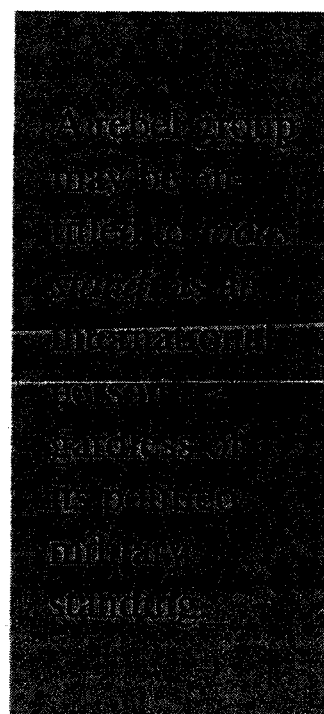
"The chief flaw of this framework is that while the world community has evolved international legal safeguards to minimize the human costs of armed conflict [*referring to international humanitarian law on human rights and on armed conflicts*], international law itself – by its stubborn insistence on the strict categorizing of rebel groups based primarily on their effective strength – has precluded the application of these legal restraints in those cases where they are needed most, i.e. in internal armed conflicts, where there is an appalling asymmetry between the protagonists in terms of men, organization and firepower."

"For unless the rebels have attained the requisite degree of success, international law is deemed inapplicable, deferring to the presumptive primacy of the domestic jurisdiction of the sovereign state. Until then, therefore, the rebels are subject to the impunity of a fevered state whose national security so-called is gravely threatened. Thus, international law comes to the rebel's succor precisely when those rebels are strong enough to demand that it do so. Law, as always, is on the side of the heaviest battalions."⁶²

In seeking to ascertain the legal mode by which international legal protection can be made applicable to erstwhile internal armed conflicts, focus can be made on the development of the concept of the national liberation movement and that they have a privileged status under international law.

"Hence, a rebel group thus classified may be entitled to *locus standi* as an international person regardless of its geo-military standing. That insurrectionary movement is at once placed under an entirely different regime of law. It may enjoy the benefits of international humanitarian protection as a matter of right, and not merely at the forbearance of the established government. It shall furthermore be freed of the handicaps inherent in the application of domestic jurisdiction, under which a liberation movement is presumed to be criminal and subversive, unless it otherwise proves to be ultimately successful."⁶³

"The international status of a national liberation movement, therefore, springs not from a geo-military capacity to assume responsibility for its obligations to the international community; it is based upon a people's inherent eligibility to enjoy an international right, i.e.



self-determination, and to demand of the world community that it respects that right.”

“To the criticism that the national liberation framework is but an ideology in legal garb, suffice it to say –

(T)hat no political system has an a priori absolute and universal validity, that liberal capitalism just as authoritarian capitalism or socialism in all its different forms, may well be detested by some and preferred by others; that the right of peoples to self-determination is not linked to any pre-determined system; that freedom has many meanings, and each people has the exclusive right to decide which meaning they will give it....’⁶⁴

1. Just war vs. Terrorism

The following view was espoused on this point:

“Throughout history, the world has known political violence and war. For centuries political and religious thinkers from many traditions have wrestled with two key questions. When is the use of force acceptable? What principles govern how force that may be used? These two questions are central to something known as “just war” theory.

“These two questions and the concepts of just war theory may also be useful in considering terrorism. In past debates about terrorism, some have suggested that one person’s terrorist is another’s freedom fighter. Are these terms merely labels that have to do with whether one agrees or disagrees with the cause? Or is the distinction based on more concrete and objective grounds?

“Today, just war theory underlies much of accepted international law concerning the use of force by states. International law is explicit about when states may use force. For example, states may use force in self-defense against an armed attack. International law also addresses how force may be used. For example, force may not be used against non-combatants. Despite these laws and norms, there are those who oppose the use of violence under any circumstances. For example, this commitment to non-violence led Mohandas Gandhi to build a movement of national liberation in India organized around the practice of non-violent resistance.

X X X

“After the Second World War, the use of violence in struggles for self-determination and national liberation fueled a new aspect of the debate on legitimate use of force -- the differences between freedom fighters and terrorists. For example, newly independent Third World nations and Soviet bloc nations argued that any

who fought against the colonial powers or the dominance of the West should be considered freedom fighters, while their opponents often labeled them terrorists.”⁶⁵

Indeed, “all liberation movements are described as terrorists by those who have reduced them to slavery. ... [The term] terrorist [can] hardly be held to persons who were denied the most elementary human rights, dignity, freedom and independence, and whose countries objected to foreign occupation.”⁶⁶

“International standards do not provide a clear-cut answer to every possible question, but there are borderline cases that may be open to differing solutions. For example, a faction opposing an indisputedly undemocratic government that denies the most elementary human rights, resorts to forms of terrorism, such as taking hostage members of the army or government to obtain by force, greater respect for human rights. Is this action at odds with the doctrine enshrined in such basic international instruments as the Universal Declaration of Human Rights, the Covenant, and article 3 common to the 1949 Conventions? The contention could be made that the action might be considered legitimate as long as certain strict requirements are fulfilled: the incumbent authorities are unquestionably oppressive and do not leave any room for democratic change; the sole purpose of the “terrorist” action is to achieve some degree of freedom; no innocent civilian is among the victims; and no inhumane or degrading treatment is meted out to the people attacked.

“In summary, international standards of a universal character usually do not allow or condone terrorism, notwithstanding the motivation or ideological matrix of its origin. Rebellion against tyranny and oppression is allowed as a last resort, whether it is a struggle for national liberation or a rebellion against an authoritarian nondemocratic government that allows no form of democratic change. Neither freedom fighters nor rebels, however, are permitted to resort to terrorism.”⁶⁷

On the other hand, instead of endeavoring to define terrorism yet again, a different analytical framework for evaluating both private and public political violence under international law was proposed.

“The proposed framework sets forth a method for determining when, and under what conditions, political violence constitutes impermissible conduct or “terrorism”

Under the analytical framework presented, impermissible political violence consists of acts committed by government or private actors who violate fundamental human rights without justification or excuse. Terrorism, therefore, is committed by use of impermissible methods, reliance on impermissible motivations, or attacks on impermissible targets. This framework, unlike those previously proposed, applies to violence undertaken by states as well as by private actors.”

“For their part, the governments of the democratic capitalist nations, led by the United States, have generally rejected the notion that the political context of anticolonial or revolutionary situations should comprise a factor in determining the contours of terrorism. In addition, these governments have accused Third World and communist states of fomenting terrorism. However, in marked contradiction to their espoused “antiterrorist” rhetoric, a number of democratic capitalist states have provided material aid or moral support to private actors or states that engage in impermissible acts of violence x x x x”⁶⁸

A further clarification was made in this wise:

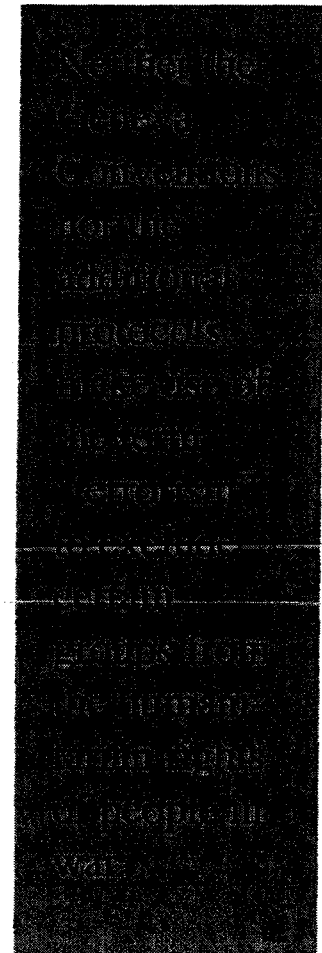
“In short, anti-colonial and anti-racist liberation struggles are legally equivalent to war (read: international armed conflicts), likewise guerrillas are equal to soldiers in such conflicts. It is irrelevant whether or not the (colonial or racist) state accepts this. Declarations of war are equally irrelevant.

“Neither the Geneva Conventions nor the additional Protocols make use of the term “terrorism” to exclude certain groups from the humanitarian rights of people in war. The only preconditions - stated in Art. 4 of the Third Geneva Convention - are a certain degree of regulated means of struggle and compliance with the rules of war (Art. 4A/2d of the Third Convention). It goes without saying that such rules of war include attacks on the enemy’s instruments of war or the killing of enemy combatants x x x x.”

“Criminal law not only has the ability to make members of a party in the civil war “criminals”, it can also punish them on a moral level by not seeing them as opponents in a war but rather as morally inferior criminals. Both of these are means of criminalizing political opponents.⁶⁹

In the “Geneva Declaration On Terrorism” of March 21, 1987 which was issued at the end of the conference of the International Progress Organization (IPO), the following comments are edifying:

Against this background of suffering and struggle, the international debate in the media and elsewhere concerning terrorism is being distorted and manipulated by the ruling powers: The public are misled into thinking that terrorism is solely carried out by victims of the system. We would like to make it clear that terrorism is almost always



an expression of the ruling structures and has little to do with legitimate resistance struggles. The trademark of terrorism is fear and this fear is stimulated in the population through horrifying forms of violence. The worst form of international terrorism is the preparation for nuclear war, in particular the expansion of this arms race into outer space, as well as the development of first-strike weapons. Terrorism includes state-organized holocausts against the people of the world. The terrorism of modern states and their high-technology weapons is far worse than the political violence practiced by groups who want to end oppression and live in freedom.

⁷⁰*[Underscoring supplied.]*

“This definition of terrorism is an accurate one and is fully in line with the criteria of the rights of people in war. The humanitarian rights of people in war forbids the use of violence against uninvolved civilians with the aim of spreading fear. Of course, it is impossible to deny that some political targets are attacked with violence during liberation struggles, thus spreading fear among uninvolved persons - hijacking airliners, for example - but this does not contradict the fact that guerrilla attacks against persons and objects connected to the colonialist war machine carried out in armed independence struggles against colonialism are in full accordance with contemporary rules of war.

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“We shouldn’t confuse the question of the legitimacy of armed operations by guerrillas in an anti-colonial independence struggle under international law with a moral question or with the question of their use of effectiveness. According to the Geneva Declaration On Terrorism:

To say this more clearly: We recommend that non-violent resistance be used whenever possible, and we respect the genuine efforts made by the liberation movements in South Africa and elsewhere to avoid the use of violence as much as possible in their struggle for justice. We condemn all methods of struggle which inflict violence on innocent civilians. We don’t want terrorism, but we must emphasize that the terrorism of nuclear weapons, criminal regimes, state atrocities, attacks with high-technology weapons on Third World peoples, and the systematic violation of human rights are far, far worse. It is a cruel extension of the scourge of terrorism to classify the struggle against terrorism as “terrorism”. We support these struggles and we call for clear political terminology together with the liberation of humanity. *[Underscorings supplied.]*

V. CONCLUSION

From all the foregoing, it is clear that there are strong bases - backed up by existing international instruments, international reality and practice and increasingly progressive views and trends in international law and international humanitarian law - that would support the proposition that national liberation movements have acquired and possess a level of legitimacy.

Necessarily, their use of armed force can also be recognized as a legitimate means in pursuit of their right to self-determination against colonial domination, alien occupation, racist regimes and against all other forms of neo-colonialism, systemic and systematic oppression and repression of peoples.

The dangerous tack after September 11 in different state, bilateral and multilateral laws, agreements and policies and the arbitrariness of putting into various "terrorist" lists what are otherwise legitimate national liberation movements and their alleged leaders run counter to the above doctrines and trends in international law and are therefore legally untenable when measured by the standards, principles, and practice that have gained hitherto universal acceptance.

Admittedly, the available legal materials and commentaries on these points used in this legal opinion did not deal unequivocally with the lawfulness or legitimacy of national liberation movements but only in relation to humanitarian questions.

However, the point worth considering and determining is whether - irrespective of the international or non-international character of national liberation movements - they adhere and conform to international conventions and practice on human rights and international humanitarian law as gauged from an examination of their activities, policies and pronouncements.

It is, therefore submitted, by way of legal opinion and as a logical consequence of all these views that national liberation movements their alleged members and participants cannot be validly regarded as criminals or terrorists insofar as international law and international political and diplomatic perspectives are concerned. #

Footnotes

¹ Abridged version of an 80-page “Legal Opinion on the Status of National Liberation Movements and Their Use of Armed Force in International Law” originally submitted on November 17, 2002 upon request to Messrs. Jan Fermon, Hans Langenberg, and Dundar Gurses, Esqs. It was included as part of the Appendix to the Application for the Removal in the EU “Terrorist List” and for damages filed by Prof. Jose Ma. Sison in the European Court of Justice (First Instance) in Luxembourg on February 6, 2003.

This version was presented to the annual Board Meeting of the IAPL in Antwerp, Belgium on November 26-28, 2004.

² Georges Abi-Saab, *Wars of National Liberation in the Geneva Conventions and Protocols* (165 Recueil Des Cours, 363-436 (1979-IV)).

³ “Colonial domination” originally refers in this context as classical colonialism or colonies of settlement. “Alien occupation” in said Article 1 has the same meaning as “alien domination” in the United Nations resolutions, namely, colonies of settlement. “Racist regime” is more particularly used to denote cases where race is the exclusive criterion for discrimination, although other different origins between two human groups like religion etc. may also qualify as such. This, according to Abi-Saab, is the contemporary concept.

⁴ Raul C. Pangalangan and Elizabeth H. Aguilung, *The Privileged Status of National Liberation Movements Under International Law* (Philippine Law Journal, Vol. 58, pp. 44-65, 1983). Pangalangan is currently the Dean of the University of the Philippines College of Law.

⁵ *Ibid.* citing Abi-Saab.

⁶ *Ibid.*

⁷ *Ibid.*

⁸ Bruno Zimmermann with the collaboration of Jean Pictet, (Yves Sandoz et. al., eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, International Committee of the Red Cross, Martinus Nijhoff Publishers, Geneva 1987); p. 52.

⁹ Jordan J. Paust, *Human Rights and Human Wrongs: Establishing Jurisprudential Foundation for a Right to Violence: The Human Right to Participate in Armed Revolution and Related Forms of Social Violence: Testing the Limits of Permissibility*, Emory University School of Law, Emory Law Journal, Spring 1083, 32 Emory L.J. 545, citing *Corwin*, *The “Higher Law” Background of American Constitutional Law*, 42 *Harv. L. Rev.* 149, 408 (1929.)

¹⁰ *In re Anastaplo*, 366 U.S. 82, 113 (1961) (*Black, J., dissenting.*)

¹¹ Paust, *op.cit.*

¹² *Ibid.*

¹³ Ibid.

¹⁴ *In re Anastaplo*, op. cit.

¹⁵ Paust, *op.cit.*, citing Sumida, *The Right of Revolution: Implications for International Law and Order*, Power and Law 130, 135 (Barker ed. 1971), reprinted in M. McDougal & W. M. Reisman, *International Law Contemporary Perspective – The Public Order of the World Community* 168 (1981).

¹⁶ See for instance, *International Terrorism and Political Crimes* xii, xxi (M. Bassiouni ed. 1975), setting forth the conclusions of a conference of 38 experts from 18 countries. Also, Friedlander, *Terrorism and National Liberation Movements: Can Rights Derive from Wrongs?*, 13 Case W. Res. J. Int'L L. 281, 284-86 (1981); Kittrie, *Patriots and Terrorists: Reconciling Human Rights With World Order*, 13 Case Res. Int'L L. 291, 304-05 (1981); Kutner, *A Philosophical Perspective on Rebellion*, in *International Terrorism and Political Crimes*, 61 (M. Bassiouni ed. 1975).

¹⁷ Paust, *op. cit.*

¹⁸ Pangalangan, op. cit. ,Citing Sumada, op. cit.

¹⁹ Abraham Lincoln, *First Inaugural Address* (March 4, 1861), in *Lincoln's Stories and Speeches* 212 (E. Allen ed. 1900); *American Communic. Ass'n v. Douds*, 339 U.S. 382, 440 n.12 (1950) (also quoting Lincoln's 1848 speech before the House of Representatives).

²⁰ Pangalangan, op. cit. Citing Sinco, *Philippine Political Law*, 7 (1962).

²¹ Ibid.

²² Kevin J. Greene, *Terrorism as Impermissible Political Violence: An International Framework* ; Associate, Cravath, Swaine & Moore, New York City; J.D.1989, Yale Law School; B.A.1986, State University of New York, College at Old Westbury.; Vermont Law Review Winter, 1992

²³ Heather Wilson, *International Law and the Use of Force by National Liberation Movements*, Natalino Ronzitti, University of Pisa, Book Review, *The American Society of International Law; The American Journal International Law*; October, 1990 ; 84 A.J.I.L. 981, Edited by Gerald Blake, at p. 136.

²⁴ Pangalangan, *op. cit.*

²⁵ *Abi-Saab, op. cit.*, at p. 369.

²⁶ *Ibid. at pp. 369-370.*

²⁷ Pangalangan, *op. cit.*

²⁸ *Abi-Saab, op. cit. at pp. 371-372.*

²⁹ Ibid.

³⁰ Pangalangan, *op. cit.*

³¹ Ibid.

³² Ibid.

³³ *Abi-Saab, op. cit. at pp. 373-374.*

³⁴ 1986 American Society of International Law, Washington, D.C. International Legal Materials, Volume 25, Number 1, January, 1986, 25 I.L.M. 239; (1986).

³⁵ *I.C.J. Advisory Opinion on Namibia, (1971) I.C.J. at 31, quoted in Advisory Opinion on Western Sahara (1975), I.C.J. at 31-35.*

³⁶ *Abi-Saab, op. cit.*, at p. 372.

³⁷ Karen Parker, Presentation to the First International Conference on the Right to Self-Determination, United Nations, Geneva (August 2000) entitled *Understanding Self-Determination: The Basics*

³⁸ Western Sahara Case, 1975 International Court of Justice 12, 31.

³⁹ *Paust, op. cit.*

⁴⁰ *Ibid.*

⁴¹ *Ibid.* citing *Marcuse, Ethics and Revolution, in Revolution and the Rule of Law 46 (E. Kent ed. 1971).*

⁴² Antonio Cassese, *Terrorism and Human Rights*; American University Law Review; Summer, 1982; Conference; The American Red Cross—Washington College of Law Conference: International; Humanitarian Law; Human Rights and Humanitarian Law; Washington College of Law of The American University.

⁴³ *Abi-Saab, op. cit.*, at p. 407.

⁴⁴ *Ibid.*, at p. 400, citing *Dictionnaire de la terminologie du droit international, 1960, p. 492, Puissance.*

⁴⁵ *Ab-Saab., op. cit.*

⁴⁶ *Ibid.*, at pp. 412-413

⁴⁷ *Ibid.*, [at pp. 407-414]

⁴⁸ *Ibid.*, at pp. 414. Article 43 of Protocol I provides: 1. The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, *inter alia*, shall enforce compliance with the rules of international law applicable in armed conflict. x x x

⁴⁹ *Zimmermann, op. cit. at p.54-55*

⁵⁰ George H. Aldrich, Symposium: *The Hague Peace Conferences: The Laws of War on Land*, Edited by George H. Aldrich and Christine M. Chinkin, The American Society of International Law; The American Journal International Law; January, 2000; 94 A.J.I.L. 42.

⁵¹ Wil D. Verwey, *The International Hostages Convention and National Liberation Movements*, The American Society of International Law, The American Journal International Law; January, 1981; 75 A.J.I.L. 69.

⁵² *Abi-Saab, op. cit.*, at pp. 397-398

⁵³ *Ibid.* at p. 432.

⁵⁴ *Ibid.*, at pp. 433-434

⁵⁵ Pangalangan, *op. cit.*

⁵⁶ *Ibid.*

⁵⁷ Wilson, *op. cit.*

⁵⁸ Zimmermann, *op. cit.* at pp. 1089-1090)

⁵⁹ Parker, *op. cit.*

⁶⁰ Abi-Saab, *op. cit.*, at p. 416.

⁶¹ Cf. Verwey, *op. cit.*

⁶² Pangalangan, *op. cit.*

⁶³ *Ibid.*

⁶⁴ *Ibid.*, quoting Chaumont, *A Critical Study of American Intervention in Vietnam*, 2 Falk, *The Vietnam War and International Law*, 125-157 (1969) at 149.]

⁶⁵ *Responding to Terrorism: Challenges for Democracy*, August 2002, Choices for the 21st Century Education Program, [Watson Institute for International Studies, Brown University.

⁶⁶ UN Ambassador from Mauritania Moulaye el-Hassan.

⁶⁷ Cassese, *op. cit.*

⁶⁸ Greene, *op. cit.*

⁶⁹ Schubert, *op. cit.* Citing in *Politische Prozesse ohne Verteidigung*, Berlin 1975, p.18.

⁷⁰ Geneva Declaration On Terrorism, 21.3.1987, translated from Janssen and Schubert, *Staatssicherheit*, p.187ff.; the first people to sign this declaration were Nobel Prize winner and former Irish Foreign Minister Sean MacBride, former U.S. Justice Secretary Ramsey Clark, Dr. Johann Galtung, peace researcher at Princeton University, and Dr. Richard Falk, also of Princeton University.

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