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Self-Determination, National Liberation Movements and the Use of Force

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March 2007

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ABSTRACT

The concept of self-determination has with time incrementally evolved from a political principle to an enforceable right at law. The right to self-determination is today considered to be one of the essential principles of contemporary international law. The rapid dissolution of colonialism has not diminished the significance of this right and therefore peoples continue and will continue to make demands to attain self-determination. The need for clarification of the content of the right to self-determination stems essentially from the desire to maintain the, sometimes conflicting, UN principles of peace and justice.

Evidently, there is an absence of a coherent set of rules relating to the interaction of the right to self-determination with other international norms. With the global 'War on Terror' being afforded continuous attention, it is imperative that liberation fighters and liberation conflicts are readily distinguishable from terrorists and terrorism. The legitimate cause of the peoples does not automatically legitimate the means and methods utilised. Therefore, there is a need to examine, in particular, the *jus ad bellum* and the *jus in bello* applicable when peoples actively pursue their right to self-determination.

The purpose of this paper is to observe the interaction between the right to self-determination and other named international law norms. To that end this thesis will examine the use of force and the laws of war provisions that apply in national liberation conflicts. The thesis includes a discussion of the content and scope of the right to self-determination in international law. The recognition of national liberation movements and the consequences of such recognition will also be examined.

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ABBREVIATIONS

| | |
|----------|---|
| ANC | African National Congress |
| Art | Article |
| AJIL | American Journal of International Law |
| BYIL | British Yearbook of International Law |
| EJIL | European Journal of International Law |
| EPLF | Eritrean Peoples' Liberation Front |
| GA | General Assembly |
| ICC | International Criminal Court |
| ICJ | International Court of Justice |
| ICJ Rep. | International Court of Justice Reports |
| ICLQ | International Comparative Law Quarterly |
| ICRC | International Committee of the Red Cross |
| ILC | International Law Commission |
| ILR | International Law Reports |
| NATO | North Atlantic Treaty Organisation |
| NLM | National liberation movements |
| PAC | Panafricanist Congress (South Africa) |
| PLO | Palestine Liberation Organisation |
| OAS | Organisation of American States |
| OAU | Organisation of African Unity |
| SC | Security Council |
| SWAPO | South West African People's Organisation |
| UN | United Nations |
| UNITA | Union national pour l'indépendance totale d'Angola |
| VCLT | Vienna Convention on the Law of Treaties (1969) |

SELF-DETERMINATION and NATIONAL LIBERATION MOVEMENTS

In order to examine which groups may be classed as national liberation movements, engaged in activities in exercise of the right to self-determination, it is necessary to first examine the development and scope of that right in international law. This chapter will include a detailed examination of the history and evolution of the right to self-determination focusing exclusively on the events of the twentieth century and preceding. It will also analyse the current scope of the right, entitlement to the right, implementation and enforcement of the right. The Chapter will conclude by briefly considering the relationship the right to self-determination has with other international law norms, in particular recognizing the various queries that arise when the interaction of these international norms sanction dissimilar and conflicting measures. The questions outlined, in relation to the identified norms, will form the substance of the Chapters that follow.

A Evolution of the Right to Self-determination: the Legal Instruments

The concept of self-determination can be traced back to the American (1775) and French (1789) revolutions. However, the author will not discuss the early foundations of the principle, first due to constraints of space and secondly as there is extensive literature on the topic.¹ In order to outline the development of the right to self-determination it is essential to review the significant international instruments which documented the right and the prominent advocates of the right.

(1) Pre-1945 – The Covenant of the League of Nations

In a message to the US Senate on 22 January, 1917 US President Wilson proclaimed that:

no peace can last, or ought to last, which does not recognise and accept the principle that governments desire all their just powers from the consent of the

¹ See generally Rigo-Sureda, *The Evolution of the Right of Self-Determination: A Study of United Nations Practice*, (Leiden: Sijthoff, 1973) and Pomerance, *Self-Determination in Law and Practice*, (The Hague; Boston: Martinus Nijhoff, 1982).



governed and that no right anywhere exists, to hand people about from sovereignty to sovereignty as if they were property.²

Although the term self-determination is not included within this passage, President Wilson was indirectly asserting such a principle. Despite President Wilson's efforts, self-determination was excluded from the final draft of the Covenant of the League of Nations in 1919. Notably the original draft of the Covenant, as proposed by Wilson, provided in Art 3 that,

The contracting powers unite in guaranteeing to each other political independence and territorial integrity; but it is understood between them that such territorial readjustments, if any, as may in the future become necessary by reason of changes in present racial conditions and aspirations or present social and political relationships pursuant to the principle of self-determination, and also such territorial readjustments as may in the judgement of three fourths of the Delegates be demanded by the welfare and manifest interest of the peoples concerned, may be effected if agreeable to those people ; and that territorial changes may in equity involve material compensation. The contracting powers accept without reservation the principle that the peace of the world is superior in importance to every question of political jurisdiction or boundary'.³

This draft was rejected and the article that was subsequently adopted asserted the 'territorial integrity and existing political independence of all Members of the League'.⁴ Although not expressly endorsed by the League, the principle of self-determination was implicitly espoused through the mandate system and the consideration accorded to the protection of national minorities.⁵

(2) Post-1945

(i) The Charter of the United Nations

² U.S., Congressional Record, LTV, Part 2, 1742.

³ D.H. Miller, *The Drafting of the Covenant*, Volume II (New York: G.P. Putnam's Sons, 1928), pp 12-13.

⁴ Art 10 of the Covenant.

⁵ Art 22 and 23 of the Covenant respectively.

The United Nations introduced, as a result of Soviet demands, the principle of self-determination into the international law arena by incorporating it in the constitutional document of the organization, the Charter of the United Nations (1945). Art 1 (2), which lists the purposes of the United Nations, reads,

To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace.⁶

The principle of self-determination is also explicitly referred to in Art 55, which outlines the promotion of international economic and social cooperation. This section provides direction as to the measures likely to promote conditions of stability and well-being 'based on respect for the principle of equal rights and self-determination'. Although not explicitly inserted within the provisions dealing with non-self governing and trust territories, the principle also underlies Chapter XI and XII of the Charter.⁷

Art 1(2) is, however, simply an acknowledgment of the principle of self-determination and does not impose any legal obligations or duties upon member states. As recognised by Cassese, at the Charter's inception 'self-determination was only taken to mean self-government; ... (and) it was to constitute a goal of the organization and of its member states; in other words, no specific and stringent legal obligations was imposed on states'.⁸ A contrast can be drawn between the principle of self-determination and the subsequent principles endorsed in Art 2 of the Charter. The latter principles which include sovereign equality, peaceful settlement of disputes, prohibition on the threat or use of force and non-intervention in matters essentially within domestic jurisdiction of a state are principles that member states '*shall* act in accordance with'.⁹ The imposition of binding obligations on member states in respect of these principles highlights the obvious significance attached to them. Notably, in both Art 1(2) and 55, the principle of self-determination is mentioned in conjunction with the principle of 'equal rights' of peoples denoting the

⁶ Art 1(2) of the Charter.

⁷ See Bowett, 'Problems of Self-Determination and Political Rights in Developing Countries', (1966) *Proceedings of the American Society of International Law* 134.

⁸ Cassese, *Self-Determination of Peoples: A legal reappraisal*, (Cambridge: Cambridge University Press, 1995), p 65.

⁹ Art 2 of the Charter.

perceived importance, or more importantly, the lack of importance associated with the principle at the inception of the Charter. Regardless of the lack of clarity or force associated with the principle, the mere inclusion in the United Nations Charter indicates the promotion of the right to self-determination. The Charter's very inauguration was based on the need to save succeeding generations from the scourge of war and guarantee the maintenance of international peace and security. Self-determination was therefore not the most important principle at the initiation of the Charter. Yehuda Blum confirms that 'it was regarded as a goal to be attained at some indeterminate date in the future; it was one of the *desiderata* of the Charter rather than a legal right that could be invoked as such'.¹⁰

Self-determination as included in the Charter does not encompass the meaning of the term as understood today. It is essential to realize that the United Nations Charter was drafted to provide for rights and obligations for sovereign states not rights of individuals. Markedly, therefore the Charter did very little apart from mentioning the principle of self-determination in contrast to other principles and the likes of Pomerance cannot be condemned for stating that the principle was referred to 'almost in passing'.¹¹ What is significant is not the meaning of the articles, namely Art 1(2) and 55, as intended at the founding of the Charter but the present interpretation of the provisions which has formed following years of practice. The current interpretation is discussed below.

(ii) Human Rights Instruments

The Universal Declaration of Human Rights (1945) is silent as to a right to self-determination. In 1976 the Human Rights Covenants, namely *the International Covenant on Civil and Political Rights* (ICCPR) and the *International Covenant on Economic, Social and Cultural Rights* (ICESC), entered into force and were binding as between contracting parties. Both Covenants contained a Common Article 1 which referred to the right to self-determination. Art 1 states,

¹⁰ Yehuda Blum, 'Reflections on the Changing Concept of Self-Determination', (1975) 10 Israel LR 511.

¹¹ Pomerance, *Self-Determination in Law and Practice*, (The Hague; Boston: Martinus Nijhoff, 1982), p 9.

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic cooperation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.
3. The States parties to the present Covenant, including those having responsibility for the administration of Non-Self Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

Common Article 1 is evidently phrased in absolute terms, that is, with no express limitations. However, as will be established later, it is subject to the same limitations as incorporated in the Charter provisions. Paragraph two endorsed the right of economic self-determination which enables the sovereignty of natural resources. The Human Rights Covenants also acknowledge the positive duty imposed on all states to promote the realization of the right of self-determination.

In 1984, the Human Rights Committee, responsible for monitoring implementation and compliance with the ICCPR, issued General Comment 12¹² (hereinafter referred to as GC 12), in an attempt to clarify any ambiguities pertaining to the right to self-determination of peoples. GC 12 emphasised the positive obligation on states 'to facilitate realization of and respect for the right of peoples to self-determination' but did not clarify any uncertainties relating to the right and was simply a reiteration of what was already known. Although the Human Rights Committee publishes its interpretation of the content of human rights provisions in General Comments, these documents, including GC 12, are non-binding. Despite the lack of legal status, the General Comments are influential since they are perceived to be an accurate interpretation of human rights provisions.

¹² General Comment No. 12: The right to self-determination of peoples (Art.1)
<www.ohchr.org/english/bodies/hrc/comments.htm>

(iii) Significant General Assembly Resolutions

In 1960 the General Assembly adopted the *Declaration on the Granting of Independence to Colonial Countries and Peoples* (hereinafter Resolution 1514 or the *Declaration on Colonial Countries*). Resolution 1514 (XV) provides the base of what has become known as the 'New UN law of self-determination'.¹³ The relevant provisions of the resolution read,

2. All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
3. Inadequacy of political, economic, social or educational preparedness should never serve as a pretext for delaying independence.
6. Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations.

As indicated by the title of the Declaration, the content of the resolution primarily concentrated on the colonial people's right to self-determination. However the declaration affirms that 'all peoples have an inalienable right to complete freedom'. The right to self-determination, fuelled by Resolution 1514, advocated and provided the basis for the decolonisation policy implemented by the United Nations in the 1960s and 1970s. Resolution 1514, as intended, had a catalytic impact in securing the liberation of colonial peoples. The International Court of Justice claimed that Resolution 1514 was an 'important stage' in the advancement of international law regarding non-self-governing territories and the 'basis for the process of decolonisation'.¹⁴ The General Assembly established a committee, known as the Decolonisation Committee or the Committee of 24, to assist in implementing Resolution 1514.

Three days after the implementation of Resolution 1514, the General Assembly adopted Resolution 1541 (XV) entitled *Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for under Art 73e of the Charter* (hereinafter Resolution 1541).

¹³ Pomerance, *Self-Determination in Law and Practice*, p 12.

¹⁴ The *Western Sahara Case*, (1975) ICJ Rep. pp 12, 31 and 32.

This resolution defines a non self-governing territory as ‘a territory which is geographically separate and distinct ethnically and/or culturally from the country administering it’¹⁵ and identifies the means by which such a territory can attain a ‘full measure of self-government’. These modes of implementation, namely independence, free association and integration, will be discussed shortly.

In 1970 the General Assembly adopted the *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations*¹⁶ (hereinafter the *Declaration on Friendly Relations*) as a means to reiterate the principles of international law fundamental in the relations between states. The Declaration recognised that the right to self-determination was not limited to colonial situations and recognised that exposure of peoples to foreign domination and exploitation amounted to a violation of the peoples’ right to self-determination.

B The Legal Status of the Right to Self-determination

Relying solely on treaty provisions in establishing the legal standing of self-determination is inadequate. Notably at the inception of the Charter the original members of the United Nations accounted for only 51 states. Many states not present at the framing of the Charter have, over time, accepted the obligations and duties imposed by the Charter. As noted above, the Charter-based right to self-determination was conceived as a principle of political morality as opposed to a legal right. The Charter does not use the terms ‘principle’ and ‘right’ synonymously. Acknowledging this, the Australian delegate to the Commission on Human Rights claimed that ‘where the Charter laid down a principle it did not necessarily signify a right, and it must be left to the authority responsible for the administration of a given dependent territory to determine the extent to which a principle of self-determination could be applied to it’.¹⁷ The British delegate also claimed that self-determination was merely a political principle.¹⁸ The intentions of the drafters of the Charter are undoubtedly of immense significance but with the increased membership it seems imperative to move away

¹⁵ Principle IV a.

¹⁶ GA Res. 2625 (XXV).

¹⁷ E/CN.4/SR.505, p 5.

¹⁸ E/CN.4/SR.503, p 7.

from relying solely on 'the preparatory work of the treaty and the circumstances of its conclusion'.¹⁹

Resolution 1514 has been described by some as an innovative attempt to alter the sections of Charter without following the prescribed amending procedure.²⁰ Notably, the Charter contains a Chapter, Chapter XVIII, on the procedure to be followed to bring about amendments to the Charter. However, the Charter is recognised as a 'living instrument' and should be subject to a teleological interpretation which will allow, amongst other things, the incremental development of the rights and obligations of member states. Judge Alvarez noted that a 'treaty... acquires a life of its own. Consequently in interpreting it we must have regard to the exigencies of contemporary life, rather, than the intentions of those who framed it'.²¹ The flexibility and adaptability accorded to the Charter has also been recognised by the likes of Tomuschat who observed the United Nations 'as an entire system which is in constant movement, not unlike a national constitution whose original texture will be unavoidably modified by thick layers of political practice and jurisprudence'.²² Therefore the importance of subsequent practice and the doctrine of implied powers as a means of interpreting, modifying and amending a treaty guaranteeing the evolution of the United Nations system should not be underestimated.²³ Subsequent practice as defined by the *Vienna Convention on the Law of Treaties* 1969 (hereafter VCLT) is 'any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation'.²⁴

The significance of the UN principal organs in clarifying uncertainties pertaining to self-determination should therefore not go unacknowledged. The role of the General Assembly, in particular, in defining self-determination through resolutions immensely contributed towards clarifying the right to self-determination. Examples of the positive action taken by the General Assembly in developing the

¹⁹ Art 32 VCLT

²⁰ See Dugard, 'The Organisation of African Unity and Colonialism: An Inquiry into the Plea of Self-defence as a Justification for the Use of Force in the Eradication of Colonialism', (1967) 16 ICLQ 157, 174.

²¹ *Second Admissions Case*, (1950) ICJ Rep. 4, p 18.

²² Tomuschat, 'Obligations Arising from States Without or Against Their Will', (1993) 241 Hague Recueil 195, 251.

²³ See *Certain Expenses of the United Nations case* (1962) ICJ Rep. 151 and *Legal Consequences for States of the Continued Presence of South Africa in Namibia Notwithstanding Security Council Resolution 276* (1971) ICJ Rep. 16.

²⁴ Art 31(3) VCLT 1969

right to self-determination include the adopting of resolution 545 (1952) which instructed the Human Rights Commission to include the right to self-determination in the Human Rights Covenants. Further examples of when either the General Assembly or the Security Council clarified the scope of the right to self-determination and any ensuing rights will be discussed in the following Chapters. The means by which self-determination metamorphosed into a legal right in the international forum are subsequent Charter interpretation or formation of a customary norm.²⁵ Notably both these methods utilise the same material, namely UN resolutions and declarations, to promote a claim.

Admittedly General Assembly resolutions are recommendatory and therefore not legally binding. This fact does not render them futile. Resolutions are commonly known to codify existing customary norms and are indicators of consensus among the international community. The International Court of Justice noted in the *Legality of the Threat or Use of Nuclear Weapons* Advisory Opinion that,

General Assembly resolutions, even if they are not binding, may sometimes have normative value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*. To establish whether this is true of a General Assembly resolution, it is necessary to look at its content and the conditions of its adoption; it is also necessary to see whether an *opinio juris* exists as to its normative character. Or a series of resolutions may show the gradual evolution of the *opinio juris* required for the establishment of a new rule.²⁶

The resolutions may therefore provide the necessary state practice and *opinio juris* required to establish a new custom. International law is framed by states. They remain the main collaborators of international legislation and norms and thereby the voting statistics of states and statements made by representatives when adopting a resolution constitute states practice and opinion juris. Resolution 1514 was adopted by

²⁵ The sources of law as recognised by the international community are listed in Art 38 of the Statue of the International Court of justice (1945) and include international conventions and international customs.

²⁶ (1996) ICJ Rep. para 70.

89 votes to 0, with 9 abstentions.²⁷ With around thirty non-self governing and trust territories having achieved independence prior to the adoption of the Resolution 1514 it is an inferable conclusion that the resolution was a codification of an existing customary norm relating to the right to self-determination for dependent peoples.²⁸ Resolution 1541 (XV) was adopted by votes 69 to 2, (Portugal and Union of South Africa) with 21 abstentions.²⁹ These figures prove that there is majority consensus that self-determination entails a legally enforceable right. Additionally the Human Rights Covenants have been ratified by most states indicating acceptance that 'all peoples have the right of self-determination'.³⁰ However, certain states did make reservations and declarations upon ratification, accession or succession to the Covenants, relating to the interpretation or application of the right to self-determination. For instance, the representative of Bangladesh made a declaration in respect of Art 1 to the effect that,

It is the understanding of the Government of the People's Republic of Bangladesh that the words "the right of self-determination of Peoples" appearing in this article apply in the historical context of colonial rule, administration, foreign domination, occupation and similar situations.³¹

The Indian representative made a declaration that,

With reference to article 1 of the International Covenant on Economic, Social and Cultural Rights and article 1 of the International Covenant on Civil and Political Rights, the Government of the Republic of India declares that the words the right of self-determination appearing in [this article] apply only to the peoples under foreign domination and that these words do not apply to

²⁷ The abstaining states were Australia, Belgium, Dominican Republic, France, Portugal, South Africa, Spain, the UK and the US.

²⁸ Raic, *Statehood and the Law of Self-Determination*, (The Hague: Kluwer Law International, 2002), p 218.

²⁹ For the list of the abstaining countries, see UN Yearbook 1960, p 509.

³⁰ As of 13 March 2007 the total state parties to the *International Covenant on Civil and Political Rights* were 160 and the *International Covenant on Economic, Social and Cultural Rights* were 155. <www.unhchr.ch/pdf/report.pdf>

³¹ <www.unhchr.ch/html/menu3/b/treaty4_asp.htm>

sovereign independent States or to a section of a people or nation--which is the essence of national integrity.³²

As illustrated from the examples above, these reservations or declarations did not however endorse novel interpretations as to application of the right to self-determination but merely amounted to restatements as to the state's understanding of the right. The various resolutions adopted by the General Assembly and the Security Council reveal the gradual moulding of the right to self-determination and its increased significance in other areas of law. In the light of United Nations practice, in particular the General Assembly, self-determination has evolved into a clearer concept with commendable clarity in relation to certain areas including the right to self-determination as regards a colonial peoples and territory. Although there still are numerous uncertainties and vagaries that require clarification, the scope of the right will inevitably gain certainty progressively.

It is controversial, however, if the right to self-determination constitutes a *jus cogens* norm, a peremptory norm of international law that cannot be derogated from. Established examples of *jus cogens* include the prohibition of crimes against humanity and peace, slavery, piracy and genocide.³³ The legal significance of *jus cogens* has been recognised in the VCLT where Art 53 states that, 'A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law'³⁴. Art 41(2) of the Draft Articles on Responsibility of States for Internationally Wrongful Acts 2001 contends that no state shall recognize as lawful a situation created by a serious breach of a peremptory norm. The commentary to the Draft Articles lists examples of peremptory norms for articles 40 and 41. The commentary does not expressly confirm the peremptory character of the right to self-determination but states that the right to self-determination 'deserves to be mentioned'. In opposition to such a contention Professor Verzijl alleges that self-

³² Ibid.

³³ (1966) Yearbook of the ILC, Vol. II, p 248.

³⁴ Art 53 also states that, 'For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognised by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character'.

determination is 'unworthy of the appellation of a rule of law'.³⁵ The prohibition of the denial of the right to self-determination in a colonial context has possibly attained the status of *jus cogens*. It remains uncertain if the general prohibition of the denial of self-determination is a *jus cogens* norm. The authority available suggests the conclusion that if the right has not attained the status of *jus cogens* it is progressively moving towards such a standing. However, as suggested by Pomerance 'it may also be viewed as a logically meaningless proposition, because the grant of self-determination to one self entails the denial of it to another'.³⁶ It is also noteworthy that the International Court of Justice in the *East Timor* case held that '(t)he principle of self-determination...is one of the essential principles of contemporary international law', which gives rise to an obligation to the international community as a whole to permit and respect its exercise.³⁷

C Entitlement to the Right to Self-determination

Prior to discussing the implementation of the right to self-determination it is necessary to ascertain who may legitimately claim the right. Identifying a certain group as eligible to exercise the right raises further questions pertaining to exclusion and inclusion from the right. As acknowledged by Pomerance,

...recognition of the rights of one 'self' entails a denial of the rights of a competing 'self'. For, in essence, every demand for self-determination involves some countervailing claim or claims.³⁸

Who are the 'selves' that are entitled to self-determination or what constitutes a 'self'? The obvious beneficiaries of the right as recognised by the *Declaration on Colonial Countries* are colonial peoples. In addition, Resolution 1514, even though its primary objective was to bring about an end to decolonization, provides that self-determination is a right evocable by all peoples. Prior to stating that 'all peoples have the right to self-determination' Resolution 1514 (XV) mentions that the 'subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of

³⁵ Verzijil, *International Law in Historical Perspective*, (Leiden: Sijthoff, 1968), 325

³⁶ Pomerance, *Self-Determination in Law and Practice*, p 25.

³⁷ (1995) ICJ Rep. pp 90, 102.

³⁸ Pomerance, *Self-Determination in Law and Practice*, p 2.

fundamental human rights'. It can be inferred, uncontroversially, that this was a depiction of specific scenarios in which people will be entitled to enforce the right to self-determination. It can be concluded that Resolution 1514 established that the right to self-determination was available to dependent peoples; dependent peoples being those subjected to 'alien subjugation, domination and exploitation'. The *ratione personae* of the right are thereby not strictly reserved to colonial peoples, with colonial peoples being merely a category of peoples entitled to claim the right to self-determination.

Excepting Resolution 1514, none of the international instruments enacted thereafter focused the application of the right specifically to colonial peoples. Most of the subsequent enactments recognised that 'all peoples' were entitled to claim the right to self-determination. For example, the Human Rights Covenants and the *Declaration on Friendly Relations* state that the right is available to 'all peoples'. Art 1 of the Human Rights Covenants, whilst expanding the scope of the right, leaves unanswered many questions it raises as to entitlement. Cassese's view is that,

... (the) general spirit and context of article 1 combined with the preparatory work, lead to the conclusion that Article 1 applies to: (1) entire populations living in independent and sovereign states, (2) entire populations of territories that have yet to attain independence, and (3) populations living under foreign military occupation.³⁹

In light of the discussion that follows it appears that this view is widely accepted.

Notably, the recognition of individuals as a 'people' involves a subjective political and legal question. For instance, every claim of self-determination is fostered by a subjective idea that the existing rule is 'alien' or 'foreign'. The criteria as deduced from the international instruments thereby contain contentious subjective overtones. Ascertaining whether a people are legitimately entitled to the right to self-determination will hence involve a case by case inspection on the particular facts in order to come to a conclusion. Hannum, in establishing who constitutes the 'self' entitled to self-determination claimed that, '(it) includes subjective and objective components, in that it is necessary for members of the group concerned to think of

³⁹ Cassese, *Self-Determination of Peoples: A legal reappraisal*, p 59.

themselves as a distinctive group as well as for the group to have certain objectively determinable common characteristics, for example, ethnicity, language, history, or religion.’⁴⁰ Hannum thereafter affirms the difficulty inherent in construing which groups are relevant with regards self-determination for a person can belong to more than one group at the same time.⁴¹

As evidenced by the relevant international instruments there has been a transition from a narrow and restrictive interpretation to a more extensive entitlement to the right. The foremost conclusions that may be drawn from this evaluation is that there is no strict objective criteria for determining eligibility to the right to self-determination and no exhaustive list of beneficiaries of the right to self-determination. The fundamental question, do *all* peoples have the right to self-determination, however, is in light of these documents to be answered affirmatively. In an attempt to clarify the exercise of the right Ofuately-Kodjoe employs viewing the right to self-determination as analogous to the right to self-defence.⁴² In international law, all states by virtue of Art 51 of the Charter have the inalienable right to self-defence. This right can, however, only be legitimately exercised ‘if an armed attack occurs’. Similarly Common Article 1 purports to entitle ‘all peoples’ to the right of self-determination, it is clear upon inspecting the purpose of the right that the actual beneficiaries are peoples of dependent territories and those subject to ‘alien subjugation, domination or exploitation’. For purposes of clarity this thesis will only examine the right to self-determination as may be claimed by colonial peoples, peoples subject to alien occupation or racist regimes.

D Implementing the Right to Self-determination and Mechanisms for Enforcement

Resolution 1514, with regard to colonial people, identifies independence as the most preferred means of implementing the right to self-determination. Resolution 1541 acknowledges that the right to self-determination does not automatically imply independence as the sole and desired means of exercising the right. The resolution further specifies three means of implementing self-determination, with independence

⁴⁰ Hannum, *Autonomy, Sovereignty, and Self-Determination*, (Philadelphia: University Philadelphia Press, 1990), p 31.

⁴¹ *Ibid.*

⁴² Ofuately-Kodjoe, ‘Self-Determination’, in Schachter & Joyner (Eds.) *United Nations Legal Order – Volume 1* (Cambridge: Cambridge University, 1995), p 376.

providing one such route. The modes of implementing self-determination are listed in *Principle VI* of the resolution, which reads,

A Non-Self-Governing Territory can be said to have reached a full measure of self-government by:

- (a) Emergence as a sovereign independent state;
- (b) Free association with an independent state;
- (c) Integration with an independent state.

Although Resolution 1541 does list integration and association as optional means of achieving self-determination, the obvious preference for independence as the end result of self-determination is illustrated by the detail the resolution provides. Markedly, stringent conditions have been laid out if the desired mode of exercising the right to self-determination was either integration or association. Free association 'should be the result of a free and voluntary choice by the peoples of the territory concerned expressed through informed and democratic processes'⁴³ and integration 'should be the result of the freely expressed wishes of the territory's peoples acting with full knowledge of the change in their status, their wishes having been expressed through informed and democratic processes, impartially conducted and based on universal adult suffrage'⁴⁴. Both these caveats confirm that the political status must be freely determined by the people. Furthermore it also proves a clear preference for independence as the means of achieving self-determination as opposed to the other provided. As recognised by Pomerance,

...in innumerable...resolutions of the General Assembly self-determination has been bracketed together with independence – so much that it is popularly (and incorrectly) assumed that the terms are synonymous in theory or, at least, that they are so in United Nations practice.⁴⁵

The *Declaration on Friendly Relations* further extends from this and allows self-determination to be legitimately exercised by the 'establishment of a sovereign and

⁴³ Principle VII.

⁴⁴ Principle IX.

⁴⁵ Pomerance, *Self-Determination in Law and Practice*, p 25.

independent State, the free association or integration with an independent state or *the emergence into any other political status freely determined by a people*'.

As accredited by Anaya the substantive right to self-determination can be differentiated from the remedial right.⁴⁶ Anaya states that,

(W)edding self-determination to entitlements or attributes of statehood is misguided, not only because it obscures the human rights character of the self-determination norm, but also because it fails to distinguish the substance of the norm from the context-specific remedial entitlements that may follow violations of the norm.⁴⁷

The remedial right, which is the right to independence, integration, association or 'any other political status freely determined by a people', only becomes operational in specified circumstances which amount to a violation of the right. Thus the substantive right is available to all as recognised by the Human Rights Covenants, but the remedial right is subject to a restrictive application. Although all peoples have the right to self-determination, the right in itself does not permit change of the status quo. This separation of the substantive right from the remedial right helps to clarify why all peoples are not entitled to enforce the right to self-determination.

As observed by Brownlie 'in the case of the protection of group rights (such as the right of self-determination), precisely because a very delicate balancing of interests is called for, the existence of an efficient and sensitive legal system is immensely important'.⁴⁸ The mere enactment of legal rights is insufficient in ensuring compliance with the right. Enforcement mechanisms and the right to legal redress are factors that influence the competence of the right to achieve its objectives. Several primary and subsidiary organs have been founded by the United Nations in an attempt to warrant effective implementation of the right. The Trusteeship Council was established by the Charter to administer and supervise the trust territories.⁴⁹ The

⁴⁶ Anaya, 'Self-Determination as a Collective Human Right under Contemporary International Law', in Aikio and Scheinin (Eds.), *Operationalizing the right of Indigenous Peoples to Self-Determination*, p 12.

⁴⁷ Ibid.

⁴⁸ I. Brownlie, "The Rights of Peoples in Modern International Law", in J. Crawford (Ed.), *The Rights of Peoples* (1988), p 1 at p 7.

⁴⁹ Chapter XIII of the Charter.

jurisdiction of this principal organ was however limited to trust territories and, hence, today is of no actual relevance. The Fourth Committee and the Committee of 24, instituted by the General Assembly to assist in the implementation of Resolution 1514, had their agenda restricted to decolonization and are not particularly relevant today.

With regards to the right to self-determination granted in Common Article 1, Art 40 of the Human Rights Covenants provide that 'The States Parties to the present Covenant undertake to submit reports on the measures they have adopted which give effect to the rights recognised herein and on the progress made in the enjoyment of those rights'. Although this is not a direct enforcement mechanism it enables the monitoring of state actions which is likely to pressure states to adopt measures to implement the rights concerned. The *(First) Optional Protocol to the International Covenant on Civil and Political Rights (1966)* provides an individual petitions procedure. However, the Human Rights Committee has stated that the procedure cannot be utilised by an individual attempting to assert collective rights, like the right to self-determination as listed in Art 1.⁵⁰

There is evidently an absence of a mandated enforcement mechanism. The difficulties that arise when enforcing the right to self-determination clearly exemplify the disadvantaged position that peoples claiming the right to self-determination face with. As a result, the General Assembly and the Security Council have assumed greater competence to certify compliance with the right to self-determination. This brings into question whether the mandate of the political organs of the United Nations allows the organs to play such a decisive role in the implementation of the right. The International Court of Justice held in the *Reparations case* that:

(u)nder international law the organisation must be deemed to have those powers which, though not expressly provided in the charter, are conferred upon in by necessary implication as being essential to the performance of its duties.⁵¹

⁵⁰ See the *Kitok case*, Report of the Human Rights Commission, A/43/40, pp 221, 228; the *Lubicon Lake Band case*, A/45/40, vol. II, pp1,29.

⁵¹ (1949) ICJ Rep. pp 174, 182. See also Schermers and Blokker, *International Institutional Law: Unity Within Diversity*, 3rd edition (London : Martinus Nijhoff, 1995)

The implied powers doctrine dictates that it is within the powers of the organs to accrue powers necessary for fulfilment of the functions of the United Nations.

As recognised above, the powers of the General Assembly are limited to adopting resolutions concerning self-determination which are of a recommendatory character only. This fact should not detract from the fact that General Assembly resolutions do have considerable influence. For example, Chapter 2 outlines how national liberation movements incrementally achieved status in the international arena. This recognition was initiated by member states acting in organs like the General Assembly.

The role of the Security Council, in contrast, in implementing the right to self-determination may in certain circumstances be of binding force. Chapter VII of the Charter grants the Security Council enforcement powers provided there is a 'threat to the peace, a breach of the peace or an act of aggression'.⁵² The practice of the Council reveals that it is willing to find internal conflicts as posing a threat to the peace with its ability to transcend borders and adversely affect the peace and stability of the international community. A national liberation war being fought to advance the peoples right to self-determination may in such situations come within the realm of the Security Council's activities. Resolutions adopted under enforcement measures will be binding on states.⁵³ These issues will be examined in detail in Chapter 3.

E Self-determination and Other Areas of International Law

Self-determination is not an absolute right unlike, for example, the right of freedom from torture, cruel, inhuman or degrading treatment or punishment and prohibition of genocide. Limitations are imposed to protect competing rights of others and to protect the interests of society, namely the maintenance of peace and security. Although there are no express limitations as provided within the Human Rights Covenants, Art 1(3) states that the right must be exercised 'in conformity with the provisions of the Charter of the United Nations'. With its recognition as a legal right self-determination has invariably seeped into many areas of the law. For example, although the Montevideo Convention on the Rights and Duties of States 1931 codified the criteria necessary to establish statehood, self-determination was viewed as an

⁵² Art 39 of the Charter.

⁵³ Art 25 of the Charter.

additional criterion which may be of relevance.⁵⁴ The areas of law where self-determination is of most relevance include territorial integrity, non-intervention in domestic matters, use of force and terrorism. The norms identified and the questions raised will outline the issues that will be discussed in the following Chapters.

1. Territorial Integrity

Self-determination cannot be utilised as a pretext by which to dismember existing sovereign states. The principle of territorial integrity ensures the preservation of territorial boundaries and in doing so certifies the sovereignty of states. The Canadian Supreme Court in the *Reference Re Secession of Quebec case* affirmed that ‘international law expects that right to self-determination will be exercised by peoples within the framework of existing sovereign states and consistently with the maintenance of the territorial integrity of those states’.⁵⁵ When ratifying the Covenant, India made a reservation which reads,

With reference to article 1 (of both Covenant)..., the Government of the Republic of India declares that the words ‘the right of self-determination’ appearing in those articles apply only to the peoples under foreign domination and that these words do not apply to sovereign independent States or to a section of a people or nation – which is the essence of national integrity.⁵⁶

This reservation, which adopts a narrow interpretation of the right to self-determination, illustrates the importance states attach to national unity and the principle of territorial integrity.

Uti posseditis is the norm used in conjunction with territorial integrity which advocates the retention of colonial boundaries on attaining independence. Thereby the boundary of the newly independent state will be the pre-existing boundary inherited from the colonial administration. Alteration is only permissible by mutual consent. As illustrated in the majority of the resolutions adopted regarding self-determination, including the *Declaration on Colonial Countries*, the potential for conflict between

⁵⁴ The International community refused to recognise Rhodesia as a state due to the denial of the right to self-determination. See GA Res. 2024 (XX), 2151 (XXI) and SC Res. 216 (1965), 217 (1966).

⁵⁵ 115 ILR, p 536.

⁵⁶ UN Sales No. E.87.XIV.2 at 9.

self-determination and territorial integrity is reaffirmed but no solution is offered for when it does. Operative paragraph 6 of Resolution 1514 claims that 'any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations'. Similarly the *Declaration on Friendly Relations* states that self-determination shall not 'be construed as authorising or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent states'. The organs of the United Nations have not supplied any constructive guidance for the reconciling of these potentially conflicting principles. The conventional notion is that self-determination needs to be exercised within accepted political units so as to preserve the sanctity of established frontiers.

In the *Frontier Dispute* case, the International Court of Justice addressed the conflict between the right to self-determination and the principle of *uti possidetis*. The Court held that,

At first sight this principle (of *uti possidetis*) conflicts outright with another one, the right of peoples to self-determination. In fact, however, the maintenance of the territorial status quo in Africa is often seen as the wisest course, to preserve what has been achieved by peoples who have struggled for their independence, and to avoid a disruption which would deprive the continent of the gains achieved by much sacrifice. The essential requirement of stability in order to survive, to develop and gradually consolidate their independence in all fields, has induced African States judiciously to consent to the respecting of colonial frontiers, and to take account of it in the interpretation of the principle of self-determination of peoples.⁵⁷

The Court seemingly implies that subsequent to attaining independence the principles of territorial integrity and sovereignty will prevail over the right to self-determination, where the exercise of the right is likely to disrupt territorial stability. African countries, which were one of the more enthusiastic proponents of self-determination in a colonial context, have embraced a narrow interpretation of the right post decolonization. On account of the multitude of ethnicities within most African states

⁵⁷ Case concerning the *Frontier Dispute* (Burkina Faso v Mali), (1986) ICJ Rep. p 554 at p 567.

the need for a sense of stability for newly independent states is deemed a more important priority than the right to self-determination.

An example where the principle of territorial integrity is not conferred primacy over the right of self-determination is that of Rwandi-Urundi. Through the implementation of Resolution 1746 (XVI) the General Assembly permitted Rwanda and Burundi to 'emerge as two independent and sovereign states'. Further exceptions to the territorial integrity principle include British India, Ruanda-Urundi, Bangladesh, Singapore the Northern Cameroons and the Gilbert Ellice Islands. These examples illustrate that the right to self-determination is not always undermined so as to preserve the territorial integrity of the state and stability of the community. There is seemingly reluctance on the part of the international community to advocate territorial integrity when human rights, such as the right to self-determination, are being grossly infringed.

2. Non-intervention Principle

Higgins eloquently questions if 'the existence of a 'self-determination' element in a situation otherwise internal give that situation the requisite international element to remove it from the domain of questions 'essentially within the domestic jurisdiction'?⁵⁸ The answer to this question is reliant on the status of self-determination, that is, whether self-determination invokes international rights and obligations.⁵⁹

The principle of non-intervention cannot be employed by a colonial power as a mechanism by which to continue control over dependent territory and prevent the advancement of dependent people. The Charter principle of non-intervention, Art 2(7) and the equivalent customary norm will be examined more comprehensively in Chapter 3. In particular, the Chapter will analyse the impact of such provision on the acts of international organisation like the United Nations and third states at times of liberation conflicts. Also in present times, matters which were traditionally perceived as falling exclusively within domestic jurisdiction are being afforded international intervention. For example, civil war scenarios may come within the scope of the Security Council's Chapter VII powers due to recent consensus that it may pose a

⁵⁸ Higgins, *The Development of International Law through the Political Organs of the United Nations*, (London: Oxford University Press, 1969), p 91.

⁵⁹ Ibid.

threat international peace and security. Such situations will also be examined in Chapter 3.

3. Use of Force

The prohibition on recourse to force bars the use of force by a state. The potential scenarios involving the use of armed force by states and liberation movements in liberation conflicts will be discussed in Chapter 3. The *Declaration on Friendly Relations* confirms that,

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

The violation of the people's right to self-determination through the unlawful use of force will seemingly result in two legal repercussions. First, and more obviously, the oppressor of the right will be deemed to have infringed international legal right. Secondly, the illegitimate use of force may make operative the oppressed peoples right to resort to force. Chapter 3 will discuss the right of the national liberation movement to use force to attain self-determination and the use of force by the state in resistance of that right.

4. Terrorism

Peoples fighting the oppression of their right to self-determination are known to be engaged in a war of national liberation. In such a situation a struggle against a colonial, alien or racist regime is deemed to be a legitimate struggle. However, given the topicality of the concept of terrorism, it is necessary to differentiate between terrorists and national liberation movements so as to prevent injustices being inflicted on the latter group's legitimate pursuit of the right to self-determination. Chapter 2 will include an examination of the recognition of liberation movements as participants in the international legal system, an analysis of the terms 'liberation fighter' and

'terrorist' and offer comments on the consequences of the term 'terrorism' being used loosely.

5. Maintenance of International Peace and Security

Resolution 1514 denotes that 'respect for the principles of equal rights and self-determination' will assure the 'creation of conditions of stability and well being and peaceful and friendly relations'. The *Declaration on Colonial Countries* also recognised that 'increasing conflicts resulting from denial of or impediment...constitute a serious threat to world peace'. The Human Rights Committee indicated in GC 12 that,

History has proved that the realization of and respect for the right of self-determination of peoples contributes to the establishment of friendly relations and cooperation between States and to strengthening international peace and understanding.⁶⁰

The relationship between the right to self-determination and the maintenance of international peace and security is complementary. Denial of the right to self-determination is likely to be accompanied by acts which may constitute a threat to the peace or a breach of the peace. Even the draft of article 3 of the Covenant of the League of Nations that failed to be adopted focused on the significance of world peace. Although the maintenance of peace and security will not be examined at length it is necessary to note that these principles have an analogous relationship.

F A Continuing Right in a Post-decolonization Era?

The objectives of the right to self-determination have varied according to times and circumstances. As an anti-colonial concept Resolution 1514 affirmed 'the necessity of bringing to a speedy and unconditional end colonialism in all its forms and manifestation'. Evidently much application of the right to self-determination, where there has been espousal by the United Nations, centres on scenarios involving colonial peoples and territories. Bowett raises the question of whether self-determination has with the end of decolonisation' exhausted its mandate'. Self-

⁶⁰ GC 12, para 8.

determination was primarily utilised as a mechanism by which to end colonialism but apart from the colonial context it is hard to identify situations when the right to self-determination can be asserted.

This author believes that the right to self-determination is not confined to decolonisation. Colonial people are simply a specific category of persons entitled to exercise the right to self-determination. The claim that self-determination only formed positive international law in relation to decolonization is inaccurate. As discussed previously, numerous international conventions and declarations which recognised the right to self-determination were enacted subsequent to the decolonization and do not specially identify colonial peoples or territories.⁶¹ Thereby self-determination is not a concept that will become obsolete when the last remaining colony achieves independence.

It is inevitable that groups will continue to make demands to attain self-determination. The likelihood is that the international community will vehemently deny such rights. It is essential for states to provide a consistent legal basis for resisting such claims. Dismissing claims due to uncertainty as to the scope of the right is likely to lead to a threat to the maintenance of international peace and security. With the unprecedented increase in internal armed conflicts purporting to threaten international stability it is essential to clarify the scope of the present day right to self-determination.

Some academics claim that the definition and scope of the right to self-determination remains as vague and uncertain as when proposed by President Wilson. The legal instruments discussed above disprove this claim. It is true that the right is still submerged in uncertainties but there have been developments which have clarified, even if to a limited extent, the scope of the right. Brownlie asserts that ‘...it is true that it is not easy to give precise definition to the principle of self-determination but it appears to have a core of reasonable certainty.’⁶² A reasoned and consistent set of legal rules must be developed to assist in determining competing claims concerning the right to self-determination. This code of rules must be applicable to varying circumstances and achieve a fine balance of the interests involved.

⁶¹ Examples include the ICCPR, ICESCR and the Declaration on Aggression.

⁶² Brownlie, ‘An Essay in the History of the Principle of Self-Determination’ Grotian society papers 90 (1968) (Published in 1970).

NATIONAL LIBERATION MOVEMENT: FREEDOM FIGHTER or TERRORIST?

A *Introduction*

National liberation movements and related conflicts are not a recent arrival on the international stage but have been thrust to the fore as a result of the rise in national liberation engulfing the third world in the aftermath of the Second World War. This flux was accompanied by quandaries, particularly relating to the legal issues such as the legality of the use of force in pursuit of the right to self-determination and the applicable legal framework in wars in support of national liberation.

Freedom fighters, as the name suggests, are persons who fight for freedom on behalf of people with the right to self-determination. The national liberation movement is the entity possessing the public and representative capacities, a body that will articulate and act for the relevant people in domestic and international affairs. It will be assumed for purposes of simplicity that the term national liberation movement is only used in this paper in respect of the legitimate representative authority of the people. In reality, various mechanisms are used to determine the genuine representative authority of the people to ensure credibility and accountability. How a particular national liberation movement becomes the authentic representative of a people is a broad and composite question outside the scope of this paper. Governments and international organisations, like the United Nations, do accord recognition to liberation movements they believe to be the genuine representative of its people. For example, in numerous resolutions including General Assembly resolution 3111 (XXVIII) the Assembly has noted 'that the national liberation movement of Namibia, the South West African People's Organisation, is the authentic representative of the Namibian people'.¹ Although states and international organisations recognise certain national liberation movements as the legitimate representative of the people, the factors upon which such recognition is ascribed is not made known.² Chapter 1 explored the right to self-determination and from the materials examined it was indisputably clear that certain scenarios, namely, colonial occupation, alien domination and racist regimes, *legitimate* the right to self-

¹ See also GA Res. 3295 (XXIX) in relation to SWAPO.

² For a discussion of the recognition of liberation movement as the legitimate representative of its people See Wilson, *International Law and the Use of Force by National Liberation Movements*, (Oxford: Clarendon Press, 1988), Chapter 6.

determination. The types of national liberation movements that this Chapter will focus on include freedom fighters struggling for liberation and self-determination in territories under colonial domination, similar resistance activities against alien occupation and racist regimes. Liberation movements engaged in conflicts outside the purview of these circumstances, such as secessionist movements and movements fighting oppressive regimes, will not be within the confines of this paper due to their dubious legality.

This Chapter will outline the recognition of liberation groups within the international stage and assess the significance of international legal personality. It will also consider the importance of establishing a clear distinction between terrorists and liberation fighters, in an attempt to identify the extent to which there are objectively distinguishing features, following the present preoccupation with the 'War on Terror' and the urgent need to combat the new challenges and threats that terrorists pose. An examination of the similarities and differences between terrorists and freedom fighters, unsurprisingly, reveals no conclusive dividing line between these fighters but illustrates that they do have parallel traits which massively threatens to jeopardize the legal protection of freedom fighters. Prior to any further discussion it is necessary to establish that this Chapter is principally about national liberation movements and the topic of terrorism will only be discussed in relation to such fractions. It is not intended to be a comprehensive legal analysis of terrorism or terrorist activity.

B Recognition of National Liberation Movements

The question arises as to whether or not national liberation movements constitute subjects of international law? And if so, to what extent? And if not, can liberation movements attain their goals in the absence of international legal personality? Basically, is international legal personality indispensable in the struggle for self-determination? Prior to an examination of whether liberation movements are able to acquire subject status in international law it is necessary to briefly explore the significance of international legal personality.

(1) Recognition in International Law

Subjects of international law are entities regarded as possessing rights and duties enforceable at law. These subjects are recognised as having legal personality due to their ability to have and uphold rights and also to perform specific obligations.

International personality ensures the participation of the entity in international affairs and is also indicative of a sense of acceptance of the entity by the international community, namely those states represented in the United Nations and other international institutions. Professor Lauterpacht remarks that, 'the orthodox positivist doctrine has been explicit in the affirmation that only states are subjects of international law'.³ This view has transformed drastically and entities capable of possessing international personality in contemporary international law include not only states but also international organisations, regional organisations, non-governmental organisations, public companies, private companies and individuals.⁴ Lauterpacht asserts that 'In each particular case the question whether a person or a body is a subject of international law must be answered in a pragmatic manner by reference to actual experience and to the reason of the law as distinguished from a preconceived notion as to who can be subjects of international law'.⁵ In the *Reparation for Injuries Suffered in the Service of the United Nations* advisory opinion the International Court of Justice accepted that

Throughout its history, the development of international law has been influenced by the requirements of international life, and the progressive increase in the collective action of States has already given rise to instances of action upon the international plane by certain entities which are not States.⁶

The International Court of Justice acknowledged that various entities are capable of possessing personality and stressed that concluding that an entity is an international person 'is not the same thing as saying that it is a State, which it certainly is not, or that its legal personality and rights and duties are the same as those of a State'.⁷ Various factors need to be evaluated prior to concluding if an entity has international personality. For example, in relation to states Art 1 of the Montevideo Convention on the Rights and Duties of States 1931 lays down the most widely accepted formulation

³ Lauterpacht (Ed.), *International Law – Collected Papers*, vol. 2 (Cambridge: Cambridge University Press, 1975) p 489.

⁴ See Brownlie, 'Recognition in Theory and Practice', (1982) 53 BYIL 197.

⁵ International Law and Human Rights 12 (1950).

⁶ (1949) ICJ Rep. 174, 178.

⁷ Ibid.

of the criteria of statehood in international law.⁸ Furthermore since personality is a relative concept the rights, obligations and competence attributable to an entity must be determined in light of the circumstances. All entities possessing international legal personality do not have the same rights and duties in international law. The capacities of legal persons will vary from entity to entity. In the *Reparations* advisory opinion in reply to the question of whether the United Nations, as an international organisation, has capacity to bring an international claim, the Court stated that 'The subjects of law in any legal system are not necessarily identical in their rights, and their nature depends upon the needs of the community'.⁹ Rights stemming from personality may include the ability to enter into treaties and to participate in international conferences.

(2) Recognition of National Liberation Movements

The question of whether a national liberation movement constitutes a subject of international law and, if so, to what extent, is inextricably linked with the development of the right to self-determination. Traditionally conflicts of national liberation were perceived as internal conflicts or civil wars and therefore were not subject to regulation by international law, or the jurisdiction of international courts. Such conflicts were exclusively a matter of the territorial state's domestic jurisdiction and were thereby regulated by the municipal law of the state. For national liberation movements involved in such conflicts, the only possible route to international fora was to be recognised as belligerents by the established (adversary) state.¹⁰ However the 'recognition of belligerency' notion was purely discretionary and therefore seldom employed. In fact since World War II the recognition of belligerency has never occurred.

Recognition that a certain liberation group is the chosen representative of their peoples has in relation to some situations been followed by admission as observers or members in international organisations. This acknowledgment of their capacity as actors in the international community may provide an indication of the movement's capacity to possess limited rights and duties in international law. Initially at the

⁸ The criteria include: '(a) a permanent population; (b) a defined territory; (c) government; (d) capacity to enter into relations with other states'.

⁹ (1949) ICJ Rep 174, 178.

¹⁰ See Briggs (Ed.), *The Law of Nations: Cases, Documents and Notes*, 2nd Edition (London: Stevens and Sons, 1953), 1000; Castren, *Civil War*, (Helsinki: Suomalainen Tiedeakatemia, 1966), p 97.

United Nations the peoples of non-self-governing territories were held to be within the jurisdiction of the administering power and were not granted separate status. Shaw characterised the next juncture 'as prototype liberation movements as petitioners within the UN framework'.¹¹ This scheme began as a part of the trusteeship system but consequently was extended to relate to colonial territories in general. The hearing of these petitions was discretionary and the petitioners only become involved as private individuals and not legitimate representative of the movements.¹²

The 1960s and 1970s witnessed the participation of liberation movements as representatives of their people in various subsidiary bodies of the United Nations.¹³ In General Assembly resolution 2918 (XVII), the Assembly in consultation with the Organisation of African Unity championed the participation of liberation movements from Angola, Guinea (Bissau) and Cape Verde and Mozambique 'in an observer capacity in its consideration of those Territories'. Resolution 3247 (XXIX) effectuated the participation of national liberation movements recognised by the OAU or the Arab League by inviting such liberation movements to participate as observers in the United Nations Conference on the Representation of States in Their Relations with International Organizations. The OAU elucidated to a United Nations mission to Africa in 1970 that the recognition of SWAPO was based on three factors: the movement must be representative of the people, it must be engaged in a liberation struggle, and it must be effective.¹⁴ Notably, the OAU failed to further clarify these recognition criteria. The United Nations was restrictive and tactical in requiring that the liberation movements be recognised by the OAU and, in subsequent resolutions the Arab League. The intended purpose of securing regional recognition of the liberation movement was to guarantee a certain level of effectiveness of the group and to exclude secessionist movements from being granted status. In spite of these resolutions, it remains disputable if extensive recognition of the liberation movement

¹¹ Shaw, 'The International Status of National Liberation Movements', (1983) 5 *Liverpool Law Review* 19, 22.

¹² See J. Beaute, *Le Droit de Petitions dans les Territoires Sous Tutelle*, Paris, Librairie Generale de Droit et de Jurisprudence, 1962, and Lazarus, 'Le Statut des Mouvements de Liberation Nationale a l'Organisation des Nations Unies', *Annuaire francais de Droit International* (1974), 173.

¹³ See ECA Res. 194 (IX), GA Res. 2795 (XXVI), GA Res. 2878 (XXVI), GA Res. 2908 (XXVII), GA Res. 3118 (XXVIII).

¹⁴ UN Doc. A/AC. 131/20, para 47, 31 August 1970 .

by international organisations, with states acting through the organisations, is in itself sufficient to grant international personality.

Similarly the Economic and Social Committee reserves the ability to invite national liberation movements recognised by or in accordance with General Assembly resolutions to partake in debates of relevance without vote.¹⁵ By 1973 various subsidiary bodies of the United Nations including the United Nations Educational, Scientific and Cultural Organisation, the International Labour Organisation, the Food and Agriculture Organisation and the Inter-Governmental Maritime Consultative Organisation had granted observer status to national liberation movements. The liberation movement's participation and capacity in these subsidiary bodies was however restricted to only a right to express the views of the peoples concerned.

In 1974, in an unprecedented act of recognition, the General Assembly invited the 'Palestine Liberation Organization, the representative of the Palestinian people, to participate in the deliberations of the General Assembly on the question of Palestine in the plenary meetings'.¹⁶ Under the Charter the General Assembly was mandated to consist only of 'Members of the United Nations',¹⁷ and membership was exclusively available to states.¹⁸ Prior to the unconstitutional grant of observer status to liberation movements in the General Assembly, liberation movements were allowed the opportunity to partake in the work of various subsidiary organs of the United Nations.¹⁹ The powers of the PLO were very soon extended when the Assembly invited the PLO to 'participate in the sessions and the work of the General Assembly in the capacity of observer'.²⁰ Subsequently the Assembly, in a resolution concerning cooperation between the UN and the OAU, decided to

(To) invite as observers, on a regular basis and in accordance with earlier practice, representatives of the national liberation movements recognized by the Organization of African Unity to participate in the relevant work of the Main Committees of the General Assembly and its subsidiary organs

¹⁵ ECOSOC Res. 1949 (LVII), 8 May 1975, rule 73.

¹⁶ Res. 3210 (XXIX).

¹⁷ Art 9 of UN Charter.

¹⁸ Art 4 of UN Charter.

¹⁹ See. Wilson, *International Law and the Use of Force by National Liberation Movements*, p 117-119.

²⁰ Res. 3237 (XXIX).

concerned, as well as in conferences, seminars and other meetings held under the auspices of the United Nations which relate to their countries.²¹

The novelty in respect of the capacity of the PLO was that in addition to participating in the work of the committees and subsidiary organs of the General Assembly, it was also able to participate in plenary sessions. Other liberation movements were not permitted to participate in the plenary sessions and were also restricted in their participation to matters relating to their respective states. In 1976 the Assembly granted SWAPO observer status in plenary sessions.²² The voting statistics reveal that the resolution received no objections and only thirteen abstentions. These figures signify that, regardless of the few abstentions, no state fervently opposed the grant of observer status to approved liberation movements.

The extent of participation allowed to these movements, the PLO and SWAPO, is unconditioned. However practice reveals that these groups actively participate only in sessions concerning matters which are of direct concern to them. Furthermore, liberation movements recognised by the OAU may participate in proceedings of relevance in the main committees and subsidiary organs as observers.²³ This participation does not, however, extend to plenary sessions. The grant of observer status at the United Nations to liberation movements, in light of the recognition by the OAU, 'was certainly a political victory in the drive to internationalize wars of national liberation'.²⁴ The grant of observer status signifies the limited legal personality of the liberation movement in question. Having considered the recognition of liberation movements by the United Nations the author is of the view that it is unnecessary to further consider the recognition by individual states. The author is however not contending that such recognition is inconsequential and does not have influence in conferring legal personality. In fact, it is the collective recognition of individual states, and the states voting through organs like the General Assembly, that assures that recognition is established.

²¹ GA Res. 3280 (XXIX). See GA Res. 3412 (XXX).

²² GA Res. 31/152 .

²³ In addition to SWAPO, the OAU (presently) recognises two liberation movements: the Panafricanist Congress of Azania (PAC) and the African National Congress (ANC).

²⁴ Wilson, *International Law and the Use of Force by National Liberation Movements*, p 120.

While there are legal consequences resulting from recognition, the author is not contending that the legal personality granted to the national liberation movements guarantees all liberation movements the same rights and duties as states. Rather, each movement must gain the requisite recognition as the above mentioned resolutions cannot be interpreted as granting all national liberation movements' international personality. Recognised liberation factions have the ability to possess 'limited' legal personality and will possess certain right and obligations under international law, with violations of these international duties and obligations resulting in legal consequences at the international level. The legal capacity enjoyed by liberation movements will be explored in the next two Chapters in relation to the discussed areas of law: the capacity of national liberation movements to use force and the application of international humanitarian law to national liberation conflicts. The next section of this Chapter considers the important distinction between liberation movements and terrorist organisations.

C Freedom Fighter or Terrorist?

In the wake of September 11 and with the incidence of acts of terrorism rising²⁵, terrorism has been afforded priority in the international arena.²⁶ Until very recently there has not been a near unanimous response by states towards terrorism. Although in general states seemingly condemned it, in relation to particular cases the views of the states fluctuated depending on whether they sympathised with the cause the terrorist acts were committed for.²⁷ Since September 11 there has been unvarying preoccupation with the argument that international law is ill-equipped to combat the threat of terrorism.²⁸ While this may be true on account of the new vagaries of terrorism that have emerged today, this urgent call for adjusted tools to counter

²⁵ Examples include the 7 July 2005 bomb attacks on London's transport network and the 11 March 2004 Madrid train bombings.

²⁶ See SC Res. 1566 (2004) Titled 'Threats to international peace and security caused by terrorist acts'; United Nations Global Counter-Terrorism Strategy (adopted by GA on 8 September 2006).

²⁷ Certain states continue to support or supported in the past organisations that claim to be liberation movements but have not achieved endorsement by the UN. Examples include the IRA, the Quebec separatists and the LTTE.

²⁸ See John Reed's speech, when defence minister (UK), stating that international humanitarian law was inappropriate for dealing with terrorism and needed to be revisited (2006).

terrorism risks overshadowing the general exceptional status afforded to liberation fighters by international law.

(1) Similarities and Differences between Freedom Fighters and Terrorists

Prior to examining the significance of a distinction between freedom fighters and terrorists, it is necessary to list the features these individuals have in common for it enables an understanding as to why this common misconception exists. When attempting to compile such a list one is faced with the reality as to why the distinction between these two groups is blurry. Terrorism is composed of several dichotomies such that compilation of a definite record of similarities and differences between terrorists and liberation fighters appears to be an unfeasible and absurd exercise.²⁹ This evaluation, even given the likelihood of proving unable to draw a definitive line between these groups of fighters, will contribute towards the knowledge necessary to adopt the approach of US Judge Justice Stewart who famously stated, 'I know terrorism when I see it'.³⁰ The question, however, arises if such a stance is sufficient legal basis to impose obligations on states and sanction criminal responsibility for the perpetrators.

(i) Similarities

Terrorist acts can be subject to both domestic and international criminal jurisdiction depending upon the particular circumstances of a case. Jurisdiction may be exercised by the state where the crime is committed, the state of nationality of the perpetrators or suspects and the state of the nationality of the victims. Terrorism on some occasions permits universal jurisdiction, the jurisdiction of a state to prosecute offences irrespective of the link between the offence and the state. Universal jurisdiction is however only available in relation to specific crimes, for example when a terrorist act is a crime against humanity or a violation of a sectoral convention provision, and not terrorism *per se*. The principle *aut dedere aut judicare*, reflected in several counter-terrorism conventions, enforces treaty obligations by dictating that the

²⁹ Seven dichotomies of terrorism or terrorist activity have been recognized by Dinstein in Dinstein Y, 'Terrorism as an International Crime', (1989) 19 Israel Yearbook on Human Rights 55 at 57.

³⁰ As cited in A. Arend and R. Beck, *International Law and the Use of Force*, (New York, 2001) p 140.

state where the suspect is found must prosecute or extradite the suspect.³¹ Also, there has been a recent proposal to establish the first hybrid international tribunal with jurisdiction to prosecute acts of terrorism. The tribunal is to be established by agreement between the United Nations and the Government of Lebanon to try those responsible for the assassination of former Lebanese Prime Minister, Hariri.³²

Although a particular group of terrorists can be focused around a specific territory, terrorism has evolved into a non-territorial, international trend with terrorists operating in trans-national networks. National liberation movements are usually located on the relevant territory of the government it is struggling against although the conflict may be waged across territorial borders. Jurisdiction over liberation movements is therefore mostly based on the territoriality or nationality principle and before domestic courts. A liberation fighter who commits war crimes during an armed conflict may also be prosecuted by the International Criminal Court³³, a judicial organ that exercises treaty based jurisdiction founded on territoriality and nationality. The territorial state or state of nationality must however be a party to the treaty and the situation must have been referred to ICC. Hence national liberation fighters can also be subject to municipal or international jurisdiction depending on the particular facts.

Both terrorism and national liberation struggles can amount to threats to the peace under Chapter VII of the United Nations Charter, authorising collective enforcement measures in retort. For example, Security Council resolution 1373 reaffirmed that the terrorist attacks which took place in New York, Washington, D.C. and Pennsylvania on 11 September 2001 'like any act of international terrorism, constitute a threat to international peace and security'.³⁴ Similarly situations when liberation movements have been struggling against colonial, alien or racist regimes for

³¹ Such clauses are common in several counter-terrorist conventions. For example, Art 7 of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons including Diplomatic Agents (1973) states, The State Party in whose territory the alleged offender is present shall, if it does not extradite him, submit, without exception whatsoever and without undue delay, the case to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that state.

³² See UN Press Releases SC/8579 (13/12/2005), SC/8587 (15/12/2005), SC/8663 (16/03/2006).

³³ Art 8 of the 1998 Rome Statute.

³⁴ See SC Res. 748 (1992), SC Res. 883 (1993), SC Res. 1054 (1996), SC Res. 1267 (1999) SC Res. 1269 (1999) and SC Res. 1333 (2000).

their right to self-determination have constituted 'threat to international peace and security'.³⁵

A terrorist faction in pursuit of autonomy or independence may unfoundedly assert that denial of fundamental freedoms by an alleged racist regime or alien occupier entitled them to the right to self-determination. Although national liberation movements and terrorists may be driven by the same motivation, attaining the right to self-determination, the substantive difference between these groups is that circumstances dictate liberation movements are legally entitled to claim the right to self-determination while terrorists are not. The purposes of terrorism are, nonetheless, not simply restricted to illegitimate autonomous goals resembling the objectives of liberation movements. Grant Wardlaw, senior criminologist with the Australian Institute of Criminology, notes that,

Terrorist activities have many aims. Whilst the primary effect is to create fear and alarm the objectives may be to gain concessions, obtain maximum publicity for a cause, provoke repression, break down social order, build morale in the movement or enforce obedience to it. Several of the objectives may be accomplished simultaneously by a single incident.³⁶

Terrorism may, therefore, be carried out for private motivations or gain which explains, for example, the linking of terrorism with international drug cartels.³⁷

Both categories of fighters are motivated by some cause and the causes are sometimes similar and sometimes identical. The author is not proposing that there is an exhaustive list of root causes for terrorism, an impractical if not immature idea given the diversity of the subject. In light of the fact that a universal definition of terrorism has not been adopted and that the understanding of the concept is subject to fluctuation, an attempt to determine the causes seems futile. However in order to highlight the specific features that national liberation movements and terrorists have in common the relevant and more predominant causes will be listed. The view is

³⁵ See SC Res. 232 (Rhodesia), SC Res. 418 (South Africa), S/RES/713 (Yugoslavia), S/RES/794 (Somalia), S/RES/1160 (Kosovo).

³⁶ Wardlaw G, *Political Terrorism*, 2nd Edition (Cambridge: Cambridge University Press, 1989), p 42.

³⁷ See Blakesley, *Terrorism, drugs, international law, and the protection of human liberty*, (Ardsey-on-Hudson, N.Y : Transnational Publishers, c1992).

expressed that poverty and despair nurture terrorism although the modified and preferred explanation is that inequality consequent upon globalization may cause terrorism.³⁸ An alternate contention asserts that failed or weak states and states infringing human rights cultivate the seeds of terrorism. Misery, frustration, grievance and despair have been recognised by the United Nations as factors that create conditions conducive to international terrorism. In the Report of the Ad Hoc Committee on International Terrorism (General Debate) it was observed 'in particular that the underlying causes of international terrorism were capitalism, neo-colonialism, racism, the policy of aggression, foreign occupation and their consequences. International terrorism, it was further said (the various delegations), was closely connected with, and an ineluctable corollary of, situations that generated and tolerated injustice, inequality, subjugation, oppression, and exploitation'.³⁹ It was subsequently mentioned that 'only the removal of those causes would lead to the eradication of international terrorism'.⁴⁰

(ii) Differences

Terrorism and terrorist activity is condemned as illegitimate in numerous multilateral conventions, UN documents and instruments of other regional organisations. The struggles that national liberation movements pursue in the course of achieving self-determination are legitimate, as substantiated in various international instruments, although the legitimate cause does not automatically legitimate the means and methods utilised in pursuit of the right to self-determination. Art 1(4) of Additional Protocol I provides one such example. This provision ensures that after the initiation of hostilities, the regulation of the ensuing armed conflict between the established government and the liberation fraction will be determined by international humanitarian law. The laws of armed conflict applicable in liberation conflicts will be examined in Chapter 4.

Terrorist acts can be perpetrated by individuals, groups acting privately or can be sponsored by the state and thereby carried out by state agents or private actors. In contrast liberation movements solely consist of persons acting within their personal capacity but on behalf of the national liberation movement.

³⁸ See 2005 World Summit Outcome Document (adopted by the GA).

³⁹ A/34/37 (1979) para. 38.

⁴⁰ Ibid.

The targets of terrorist attacks may include persons or property (including the environment) either public or private. Attacks may in certain instances be unconnected to the cause that the perpetrators are pursuing while in other cases it may be aimed at strategically decided victims like state officials or representatives. Diplomatic agents or personnel are extremely susceptible to terror attacks and as such there are specific conventions pertaining to the protection of such persons from terrorist acts like the 1973 Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents. Terrorist attacks may be directed towards symbolic targets. Terrorists no longer direct their attacks against the targeted party but also involve third party states and citizens. Furthermore terrorist attacks have become notoriously indiscriminate in terms of affecting friend and foe alike although the tragic events of the recent past illustrate that the terrorists do, in fact, discriminate towards the innocent in the hope of inciting international repercussions. September 11 and the Madrid bombings attest to the fact that terrorists deliberately target civilians and civilian infrastructure as a means of achieving their motives. National liberation movements generally target their attacks towards the established government, either government forces or institutions, which is suppressing their right to self-determination. Such attacks are principally carried out in armed conflicts, potentially within the meaning of Art 1(4) of Additional Protocol I, against the forces of the representative government.

The 20th Century has witnessed the evolution of terrorism with terrorists possessing nuclear, chemical and biological weapons signalling the mass destruction capabilities of such organisations. Typical terrorist offences include offences against civil aviation, hostage taking and attacks against internationally protected persons, offences which are not commonly associated with liberation movements. The technological developments in fields of communication, transport and weaponry are not exploited by national liberation movements to the same extent they are by terrorists mainly given the financial costs of accumulating such technologies. Terrorists particularly engage in indiscriminate attacks affecting adversaries and allies alike which liberation movements are expressly prohibited from engaging in under the laws of armed conflict. Irrespective of the idea that one man's terrorist is another man's freedom fighter, a wrongful terrorist act will remain so regardless of the identity of the perpetrator, his motivation or the underlying causes for which he is fighting.

Can acts of terrorism be committed during an armed conflict? The hazy distinction between international terrorism and an armed conflict pursued by liberation fighters will be evaluated in Chapter 4 subsequent to a discussion of the laws of wars applicable in liberation wars. The mere use of violence by a national liberation movement does not label them as a terrorist organisation. As will be discussed in Chapter 3, the right to self-determination does legitimate a certain amount of violence where peaceful means have been exhausted in vain. The activities of national liberation movement are not conducted within a legal vacuum. Abraham Sofaer, the legal advisor for the US State Department, claimed that 'the United States of course also recognises that oppressed people are sometimes justified in resorting to force, but only if properly exercised. For example, such uses of force must be consistent with the laws of war and should not be directed at innocent civilians, include hostage taking, or involve torture'.⁴¹ Numerous Security Council and General Assembly resolutions reiterate that 'all acts of terrorism irrespective of their motivation, whenever and by whomsoever committed' will be condemned.⁴² Such resolutions also clarify that terrorism is 'under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature'.⁴³ National liberation movements that employ terrorist means and methods in pursuing their claim to self-determination will be classified as a terrorist organization albeit the legitimacy of their struggle.

As will be discussed below, terrorist suspects arguably enjoy a diminished protection of their human rights than others. Theoretically although liberation fighters enjoy greater rights, due to misconceived close association of liberation fighters and terrorists the former may be susceptible to human rights derogations. Also, terrorist attacks amount to a direct violation of human rights. Security Council resolution 1566, reinstates as done in copious other resolutions that 'acts of terrorism seriously impair the enjoyment of human rights'.

In respect of terrorism, the wake of September 11 has prompted international treaties and general consensus that all states should cooperate in the 'war against terror'. Former Secretary General Kofi Annan advocating such a stance declared that. 'Terrorism is a global menace. It calls for a united, global response. To defeat it all

⁴¹ Sofaer, 'Terrorism and the Law', (1986) 64 Foreign Affairs 901, 906.

⁴² SC Res. 1566.

⁴³ Ibid.

nations must take counsel together, and act in unison'.⁴⁴ In contrast, in respect of national liberation movement, as will be discussed in the following chapter, third party state is not obliged to support the established government, as was the traditional view, and is able to assist whichever party to the conflict it politically, legally or morally feels obliged to subject to Charter restrictions. National liberation movements may therefore receive the support of other states.

Numerous international documents, predominantly General Assembly and Security Council resolutions, uncompromisingly assert that the underlying causes of terrorism whether political, ideological, philosophical, racial, ethnic or religious cannot be upheld as legal justification for the terrorist act exonerating the individuals of their liability. The annex to General Assembly resolution 49/60 (1994) titled Declaration on Measures to Eliminate International Terrorism confirmed that no justification was tolerable in response to terrorism. Operative paragraph 3 reads:

Criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstance unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them.

Some sectoral conventions also expressly overrule the permissibility of any considerations as justification for terrorist attacks. Art 5 of the International Convention for the Suppression of Terrorist Bombings 1998 and Art 6 of the International Convention for the Suppression of Financing Terrorism 1999 reiterate similar considerations as contained in the General Assembly resolution and state that the terrorist acts are 'under no circumstances justifiable'. The implication of such a stance is that if a terrorist act were to be committed in the name of national liberation it will still constitute a unjustifiable act.

The position in relation to national liberation groups vary slightly. The right to self-determination does justify and thereby legitimize the existence of national liberation movements; however liberation fractions are not without constraints in their activities. A freedom fighter employing a prohibited means of violence, even if it in

⁴⁴ UN Press Release, SG/SM/7962/Rev.1, September 18, 2001

order to achieve the right to self-determination, will face the relevant criminal sanctions. As will be constantly reiterated in this thesis, the legitimacy of the cause will not justify the means and measures adopted in pursuit of that cause. The difference between terrorism and national liberation is that the underlying cause of the former will never prove to be a justification for their actions while the cause of national liberation movements may justify their actions.

International law is a vehicle for combating international terrorism either through advocating means of prevention or prosecuting perpetrators. In contrast, national liberation movements vouch on international law to enable the achievement of the right to self-determination. The relationship that these areas have with international law is inextricably connected to the resulting obligations that states incur in relation to terrorists and national liberation movements. States are obliged to combat and resist terrorism. Various international treaties and United Nations resolutions outline the specific measures that states are compelled to observe in the suppression of terrorism.⁴⁵ In relation to national liberation movements, as will be discussed in the following chapters, international law imposes obligations on states to facilitate the right to self-determination.

Having examined terrorists and liberation fighters it is apparent that there is no clear demarcation as to how one can be distinguished from the other. It is, therefore, necessary to inspect if a definition of terrorism is available and necessary.

(2) A Definition of 'Terrorist'?

Numerous attempts to adopt a single definition of terrorism have concluded unsuccessfully with universal consensus proving to be elusive. For example, in 1972 an Ad Hoc Committee on International Terrorism was set up by the General Assembly⁴⁶ mandated to consider the compilation of a comprehensive convention and provide a definition of terrorism. The Ad Hoc Committee was unable to formulate a definition of terrorism in 1972 and although it has persisted in its effort to do so thereafter, it has not been successful. Inability to secure consensus on whether to include or exclude national liberation movements from within the definition resulted

⁴⁵ SC Res. 1373, and 1566.

⁴⁶ GA Res. 3034 (XXVII).

in the attempts being futile.⁴⁷ Levitt accurately identified this reason and elaborated why it prevents consensus on a definition of terrorism from being reached at the United Nations:

Put simply, governments that have a strong political stake in the promotion of 'national liberation movements' are loath to subscribe to a definition of terrorism that would criminalize broad areas of conduct habitually resorted to by such groups; and on the other end of the spectrum, governments against which these groups' violent activities are directed are obviously reluctant to subscribe to a definition that would criminalize their own use of force in response to such activities or otherwise.⁴⁸

The Government of Senegal suggested that the legal norms against terrorism should include not only 'Acts of violence and other repressive acts by colonial, racist and alien regimes against peoples struggling for liberation, for their legitimate right to self-determination, independence and other human rights and fundamental freedoms' but should expressly provide impunity to those pursuing 'the inalienable right to self-determination and independence of all peoples under colonial and racist regimes, and other forms of alien domination' in recognition of 'the legitimacy of their struggle, in particular the struggle of national liberation movements...'⁴⁹ The Soviet Union demanded exculpation for 'acts committed in resisting an aggressor in territories occupied by the latter, and action by workers to secure their rights against the yoke of exploiters.'⁵⁰ These statements reveal the anxieties facing those states who wished to circumscribe the boundaries of terrorism for the purposes of prosecution. In the Report of the Ad Hoc Committee on International Terrorism, General Debate,

82. ... Many representatives reaffirmed their support for the struggle of all peoples under colonial and racist regimes and other forms of alien domination

⁴⁷ The attempts also failed because of the inability for states to agree on the focal matter of the definition. For example, certain states hope to emphasise the criminal nature of the acts while other states wish to link terrorism with the underlying causes or the conditions conducive to it.

⁴⁸ Levitt G, 'Is "Terrorism" Worth Defining?', (1986) 13 Ohio N. U. L. Review 97, 109.

⁴⁹ UN Doc. A/AC. 160/3/Add. 2, at 3 (20 July 1977).

⁵⁰ UN Doc. A/AC. 160/2 at 7 (22 June 1973).

and in particular the struggle of national liberation movements for self-determination and independence and stressed that they could not endorse any condemnation on international terrorism which would cast doubt on the legitimacy of their struggle.

83. Other delegations said that while respecting the right to self-determination, they did not think there could be any exception implicit, explicit or even apparent to the condemnation of acts which, one representative recalled, it had been proposed to define heinous acts of barbarism.⁵¹

In 1994, a *Declaration on Measures to Eliminate International Terrorism* was adopted by the General Assembly.⁵² Although the resolution condemned ‘all acts, methods and practices of terrorism, as criminal and unjustifiable, wherever and by whomever committed’ it failed to define the operative word ‘terrorism’.

The inability to come to an agreement on a definition was, thereby, largely due to the fact that third world states made a non-negotiable demand that the concept be expressly distinguished from acts committed by freedom fighters, movement of persons fighting for their right of self-determination. Cassese argues that a definition of terrorism does exist but ‘the refusal of developed countries to accept this exception (acts of violence committed by freedom fighters fighting for their right of self-determination) led to a stalemate, which has erroneously been termed a “lack of definition”’.⁵³ In light of this view he affirms that ‘What indeed was lacking as *agreement on the exception*’.⁵⁴ For liberation fighters to be successfully able to pursue their right to self-determination they need to be differentiated from terrorists and being seen as an exception would provide an ideal means of doing so.

At present, practice is such that the sectoral conventions on terrorism define specific acts of terrorism, for example hostage-taking⁵⁵ or terrorist bombings⁵⁶, as opposed to offering a definition of terrorism. Art 1 (2) of the Arab Convention on the Suppression of Terrorism (1998) defines terrorism as,

⁵¹ A/34/37 (1979).

⁵² GA Res. 49/60.

⁵³ Cassese A, *International Criminal Law*, (Oxford: Oxford University Press, 2003), p 121.

⁵⁴ *Ibid.*

⁵⁵ Art 1 of the International Convention against the Taking of Hostages (1979).

⁵⁶ Art 2 of the International Convention for the Suppression of Terrorist Bombings (1998).

Any act or threat of violence, whatever its motives or purposes, that occurs in the advancement of an individual or collective criminal agenda and seeking to sow panic among people, causing fear by harming them, or placing their lives, liberty or security in danger, or seeking to cause damage to the environment or to public or private installations or property or to occupying or seizing them, or seeking to jeopardize a national resources.

Art 2 of the convention provides that,

(a) All cases of struggle by whatever means, including armed struggle, against foreign occupation and aggression for liberation and self-determination, in accordance with the principles of international law, shall not be regarded as an offence. This provision shall not apply to any act prejudicing the territorial integrity of any Arab State.⁵⁷

This convention, therefore, provides an exception in favour of national liberation movements. Although these conventions do provide a definition of terrorism and exclude from its scope the acts of national liberation movements there are regional terrorism treaties and thereby binding only on the relevant contracting state parties. More recent international documents including the 2005 UN Summit Outcome Document and Security Council resolution 1566 on 'Threats to international peace and security caused by terrorist acts' do not contain definitions of the term but condemn terrorism 'in all its forms and manifestations, committed by whomever, wherever and for whatever purposes, as it constitutes one of the most serious threats to international peace and security'.⁵⁸ National anti-terrorist legislation may also include definitions of terrorism although the various definitions are drafted in accordance to the different understandings or priorities relating to international terrorism at a domestic level.

⁵⁷ The Convention of the Islamic Conference Organisation on Combating International Terrorism (1999) also includes a definition of terrorism (Art 1) and provision exempting the acts of national liberation movements (Art 2). Art 2 reads, a. Peoples' struggle including armed struggle against foreign occupation, aggression, colonialism, and hegemony, aimed at liberation and self-determination in accordance with the principles of international law shall not be considered a terrorist crime.

⁵⁸ Para 81 of the 2005 World Summit Outcome Document.

As stated above, the lack of a definition has not barred the general condemnation of international terrorism. Nor has the lacuna prevented the identification of acts of terrorism. Security Council resolutions 1368 and 1373 both refer to the 11 September 2001 events as terrorist acts without providing a definition of the term. This suggests that although a comprehensive definition is unavailable the fundamental elements of terrorism are seemingly known. Helen Duffy questions, 'is the universal condemnation of terrorism matched by a universal understanding of what we mean by the term?'⁵⁹ The question, then, arises if this approach of identifying the basic characteristics of terrorism is advantageous to national liberation movements or not.

(3) Why is the Distinction and Lack of a Definition Important?

Why is it imperative to draw a distinction between national liberation fighters and terrorists? The cliché 'one man's freedom fighter is another man's terrorist' is reflective of the subjectivity the terms 'terrorism' and 'terrorists' are susceptible to. A classic example where consensus is not present is in relation to the reaction of states and international organisations to the Palestine Liberation Organisation. Some states classify the PLO as a terrorist organisation backed by no legitimate foundation and utilising prohibited means and methods of violence to attain an objectionable end. For example, in 2004 the United States Congress declared the PLO to be a terrorist organization under the Anti-Terrorism Act 1987, citing among other justifications the Achille Lauro attack. Other states, such as Jordan view the PLO as a genuine and legitimate representation of an oppressed people using required and legitimate violence to enforce the desired outcome. Professor Baxter accurately remarked that 'We have cause to regret that a legal concept of 'terrorism' was ever inflicted upon us. The term is imprecise; it is ambiguous; and above all, it serves no operative legal purpose'.⁶⁰ An all embracing definition of the term would potentially place national liberation movements within the rubric of terrorists and prevent the movement's ability to further their cause. With the media ensuring that the 'War on Terror' gains tremendous support it is necessary to draw a clear distinction between terrorists and

⁵⁹ Duffy H, *The 'War on Terror' and the Framework of International Law*, (Cambridge: Cambridge University Press, 2005), p 17.

⁶⁰ Baxter R, 'A Sceptical Look at the Concept of Terrorism', (1974) 7 *Akron Law Review* 380.

freedom fighters so as to ensure that the latter category are not indiscriminately subjected to unwarranted treatment.

Most UN instruments, like GA Res. 40/61 (1985), unanimously condemn 'as criminal, all acts, methods and practices of terrorism wherever or whenever committed'. These resolutions relating to terrorism, where terrorism remains undefined, however, invariably contain a provision which reaffirms 'the inalienable right to self-determination and independence of all people under the colonial and racist regimes and other forms of alien domination, and upholding the legitimacy of their struggles, in particular the struggle of national liberation movements'.⁶¹ As will be considered in the following Chapters, such provisions should not be interpreted as absolving national liberation fractions of their obligations under international law when pursuing their rights.⁶² The resolutions go on to clarify that national liberation struggles must be conducted 'in accordance with the purposes and principles of the Charter and the Declaration on the Principles of International Law concerning Friendly Relations and Cooperation among states in accordance with the Charter of the United Nations'. Operative paragraph 9 of the above mentioned declaration urges,

all states, unilaterally and in co-operation with other states, as well as relevant United Nations organs, to contribute to the progressive elimination of the causes underlying international terrorism and to pay special attention to all situations, including colonialism, racism and situations involving mass and flagrant violations of human rights and fundamental freedoms and those involving alien occupation, that may give rise to international terrorism and may endanger international peace and security.⁶³

This section seems to detract from the worth of the previously mentioned provision in relation to the apparent exception afforded to national liberation movement due to the express acknowledgment that colonial, racist and alien administrations may spur acts

⁶¹ See also. GA Res. 34/145 (1979), GA Res. 36/109 (1981), GA Res. 38/130 (1983) GA Res. 40/61 (1985), GA Res. 42/159 (1987), GA Res. 44/29 (1989), GA Res. 46/51 (1991), GA Res. 49/60 (1994), GA Res. 50/53 (1995), GA Res. 51/210 (1996) and GA Res. 52/165 (1997).

⁶² See Chapter 3 and 4.

⁶³ A similar paragraph is present in numerous UN documents including GA Res. 34/145 (1979) operative paragraph 13 and the Report of the *Ad Hoc* Committee on International Terrorism A/34/37/ (1979) Chapter IV, para 118.

of terrorism in retaliation. General Assembly resolution 34/145 (1979) which contains a equivalent provision as quoted above condemns in operative paragraph 4 'the continuation of repressive and terrorists acts by colonial, racist and alien regimes in denying peoples of their legitimate right to self-determination and independence and other human rights and fundamental freedoms'. In effect the resolution 34/145 is claiming that the oppressors of the right to self-determination are engaging in terrorist acts. The resolution thereby seemingly suggests that national liberation struggles maybe likened to terrorist conflicts with both the oppressor and possibly the oppressed resorting to terrorist practices. To draw a parallel between national liberation movements or national liberation conflicts and international terrorism would be affront to the very principles, upheld by the United Nations, which the movement was struggling to achieve.

Many academics have comprehensively considered the advantages and the disadvantages of adopting a universally accepted definition of terrorism and therefore it is unnecessary to discuss such arguments.⁶⁴ This chapter will however discuss the specific advantages and disadvantages to liberation movements stemming from adopting such a definition.

A suspected terrorist is often deprived of his civil liberties, in particular deprivation of his freedom of movement. The absence of a coherent definition on terrorism threatens the position of a freedom fighters who may appear to seem a terrorist. The absence of a definition may also mean that the alleged offender is not made known of the precise nature and elements of his offence. In keeping with the notion of legalism, a legal term should have a universally accepted definition or not be used. Admittedly, many international crimes do not have accepted international definitions. The absence of a definition does have the potential to subject liberation fighters to unwarranted injustices.

The fact that terrorism is left undefined internationally means that states have a wide margin of appreciation when conceptualizing the term under domestic legislation. Notably anti-terrorist security legislation has been implemented in a number of states including the Australia, Canada, Italy, India the Netherlands, New

⁶⁴ See Bassiouni C (Ed.), *International Terrorism and Political Crimes*, (Springfield III: Thomas, c1975); Evans A and Murphy J (Eds.), *Legal Aspects of International Terrorism*, (Lexington, Mass. : Lexington Books, 1978); and Higgins R and Flory M, *Terrorism and International Law*, (London: Routledge, 1997).

Zealand the US and UK.⁶⁵ Security Council resolution 1373 (2001) adopted in immediate response to September 11 imposed obligations on member states to 'Ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice and ensure that, in addition to any other measures against them, such terrorist acts are established as serious criminal offences in domestic laws'. Notably, there were domestic counter-terrorism enactments prior to the September 11⁶⁶ but the event undeniably spurred the implementation of additional stringent anti-terrorist instruments to supplement the pre-existing municipal laws. The noteworthy changes include increased police powers granting the right to detain individuals suspected of being terrorists without charging them with a crime and extension of the right of the state to seize or freeze assets. To assure efficient internal security, such domestic statutes are arguably necessary to counter terrorist threats and thus the author is by no means condemning such acts. While it is blatantly naïve for a state not to seriously consider its vulnerability to terrorist actions and take the necessary precautions, it must resist the urge to over-react to the threat of terrorism and monitor the measures implemented.

The anti-terrorist legislation of the UK will be examined to illustrate the disadvantaged position that liberation fighters will face if they are not to be set apart from terrorists. Sections 41 of the Terrorism Act 2000 provided the police with the power to arrest and detain a person without charge for up to 48 hours if they were suspected of being a terrorist. This period of detention could be extended to up to seven days if the police can persuade a judge that it is necessary for further questioning.⁶⁷ The Anti-Terrorism, Crime and Security Act 2001 extended arrest and detention powers⁶⁸. Notably the legality of these new acts have been debated by human rights lawyers and academics and is likely to be contested at the domestic courts and, possibly, in the European Court of Human Rights. Several cases of

⁶⁵ Australia- Anti-Terrorism Act 2005, Belgium- Anti-Terrorism Act 2003, Canada- Anti-Terrorism 2001, India- Prevention of Terrorist Activities Act, UK- Anti-Terrorism, Crime and Security Act 2001, Prevention of Terrorism Act 2005, Terrorism Act 2006.

⁶⁶ Terrorism Act 2000.

⁶⁷ Schedule 8, Detention, section 29.

⁶⁸ Part 4 of the ATCSA 2001. The current legislative framework also includes the Prevention of Terrorism Act 2005 and Terrorism Act 2006.

violations of the European Convention of Human Rights, mostly concerning the mistreatment of terrorist suspects in custody, have been brought against the UK at the domestic level evidencing that ‘suspects’ are potentially subjected to further breaches of their remaining fundamental rights.⁶⁹ The Government repealed the Part 4 powers under the ATCSA in response to a House of Lords Judicial Committee ruling that Part 4 powers were incompatible with articles of the European Convention on Human Rights relating to the right to liberty, and the right to freedom from discrimination. The need for a freedom fighter to be distinguishable from a terrorist will be detrimental to the liberation fighters. States are faced with the daunting task of balancing the rights of the terrorist suspect and the interests of society which may jeopardize the human rights of national liberation fighters. Professor Warbrick noted ‘that measures justified by reference to terrorism will come to be used against drug-traffickers, organised criminals, ordinary criminals, so that what begin as measures to meet a discrete and confined phenomenon leak out into mainstream law enforcement, putting in jeopardy the human rights of many people’.⁷⁰ Although the absence of a definition resulting in non-specificity ensures the adaptability of the law to deal with rapidly evolving forms of terrorism, it does not secure the protection of liberation fighters.

Another argument towards the adoption of a definition is that the laws, rights and obligations of states are affected if a clear distinction is not established between terrorists and criminal acts carried out by individuals engaged in international or non-international armed conflicts. This is of particular importance to freedom fighters engaged in a legitimate armed conflict against ‘alien occupation, colonial domination or racist regime’⁷¹. In such a circumstance, liberation fighters who satisfy the necessary combatant conditions as provided by the laws of war are entitled to take part in the hostilities. The killing of forces of the adverse party will not make freedom fighters susceptible to criminal prosecution although they may be subjected to such measures if they infringe the laws of war. Terrorists, in contrast, are not provided with any exceptional circumstances when they are entitled to protections afforded by

⁶⁹ See, for example, *R. (on the application of Q) v Secretary of State for the Home Department* [2006] EWHC 2690; *X v Secretary of State for the Home Department* [2005] 3 All E.R. 169.

⁷⁰ Warbrick C, ‘The Principles of the European Convention on Human Rights and the Response of States to Terrorism’, (2002) 3 EHRLR 287, 288.

⁷¹ Art 1(4) of Additional Protocol I.

international humanitarian law. In a majority of circumstances the state engaged in continued sustained hostilities with a liberation movement will claim that the situation is not an armed conflict and instead contend that the group are terrorists. Such a stance permits the state to avoid effectuating the principles of armed conflict and allows captured persons to be regarded as criminals rather than prisoners of war. The importance of distinguishing between terrorists and liberation fighters for purposes of international humanitarian law and the consequences flowing from either classification will be examined in Chapter 4.

There are equally substantive arguments for not adopting a definition of terrorism. Terrorist is an umbrella word subject to constant expansion. As such the term should not be contained given that terrorists are constantly branching out with regards to their means and methods of destruction. The absence of a generic definition of terrorism has not paralysed international efforts to combat offences. Some academics claim that no purpose would be fulfilled in adapting a definition of terrorism because the sectoral conventions, conventions addressing specific terrorist activities, provide sufficient details as to the elements of a crime. A thematic approach, whereby specific terrorist offences are made punishable is evidently the preferred alternative both in respect of national liberation movement and terrorism per se, since it is the sole option capable of securing a certain level of consensus. In light of the various arguments against the adoption of a definition and the inability to secure general, let alone universal, consensus on the issue it is questionable if the adoption of a definition of terrorism will serve a useful purpose.

Judge Sofaer, in an essay⁷², criticizes the seeming special consideration afforded to those fighting 'colonial, racist or alien' occupation. In support of this criticism he remarks that General Assembly resolutions and treaties profess to denounce various terrorist acts also contain provisions reinstating the legitimacy of the struggle against colonial, alien and racist regimes.⁷³ Sofaer concludes that 'international law has been systematically and intentionally fashioned to give special treatment to, or to leave unregulated, those activities which are the source of most acts of international terror.'⁷⁴ Certain sectoral conventions do use caveats which promise

⁷²Sofaer, 'Terrorism and the Law', (1986) 64 Foreign Affairs 901.

⁷³ See GA Res. 40/61 (1986).

⁷⁴ Sofaer, 'Terrorism and the Law', p 922.

exclusion of acts of national liberation movements. For example Art 12 of the 1979 International Convention against the taking of Hostages reads,

In so far as the Geneva Conventions of 1949 for the protection of war victims or the Additional Protocols to those Conventions are applicable to a particular act of hostage-taking, and in so far as States Parties to this Convention are bound under those conventions to prosecute or hand over the hostage-taker, the present Convention shall not apply to an act of hostage-taking committed in the course of armed conflicts as defined in the Geneva Conventions of 1949 and the Protocols thereto, including armed conflicts mentioned in article 1, paragraph 4, of Additional Protocol I of 1977, 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 on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.

Although this provision seems to implement selective enforcement they do not entirely exculpate freedom fighters who have perpetrated a terrorist act as defined in the convention. Such perpetrators will be held accountable under the other international norms and in this particular circumstance under the laws of war. Just as commentators are able to attach the label terrorist to private and state actors they will have to apply the term to groups whose cause is just but who employ terrorist means and methods to achieve that cause.

Thomas Franck in his essay titled 'Profiry's Proposition: The Role of Legitimacy and Exculpation in Combating Terrorism' questions,

What is one to make of those who engage in violence for good causes against pernicious forces? Should one pity the criminal, or should one, by taking whose *why* and *to whom* factors into account cause 'evil' sometimes to be redefined as 'good'?⁷⁵

⁷⁵ Dinstein Y (Ed.), *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne*, (London : Martinus Nijhoff, c1989), p166.

He remarks that 'Legitimacy ... is the quality that attaches to a choice of conduct... when it is justified discursively and its claim of correctness or appropriateness, raised in empirical statements, is generally recognised by the community as a basis for action.'⁷⁶ Genuine national liberation movements and the wars they pursue to attain the right to self-determination are, as examined in the introductory chapter, widely perceived as legitimate.

The lack of an exhaustive, universally accepted definition of terrorism means that freedom fighters and terrorists are sometimes, inaccurately, assumed to be synonymous terms. Even in the absence of such an impression, the lacuna of clear coherent definitions causes both groups of fighters to be closely associated. Due to the lack of a universally recognised definition of terrorism there is uncertainty whether a particular act is a legitimate measure in the name of national liberation or simply an act of terrorism. The surge of recent terrorist acts have prompted many states like the United States and the United Kingdom to enact domestic legislation authorising substantive derogations from a suspected terrorist's civil liberties justified in the sake of national security. The absence of an internationally recognised definition has the effect of unconditionally permitting states to adopt a preferred definition in respect of domestic legislation.

D Conclusions

Professor Schachter accurately asserts that 'Terrorism is defined by actions, not by the cause it is intended to serve'.⁷⁷ With the search for a generally accepted definition of terrorism likened to 'the quest for the Holy Grail',⁷⁸ there is an increased tendency to classify any uprising as terrorism so as to de-legitimise the political demands and grievances of the organisation. 'States fighting various forms of unrest and insurgency are finding it tempting to abandon the sometimes slow process of political negotiation for the deceptively easy option of military action.'⁷⁹ Violations of international law norms, whether in relation to specific acts, *jus ad bellum* or *jus in bello*, will not only harm the credibility of the movement but also deprive it of the rights generally afforded to it under international law. Chapter 3 and 4 will

⁷⁶ Ibid. 167.

⁷⁷ Schachter O, 'The Lawful Use of Force by a State against Terrorists in Another Country', (1989) 19 Israel Yearbook on Human Rights 209, 211.

⁷⁸ Levitt, 'Is "Terrorism" Worth Defining?', 97.

⁷⁹ UN News Centre <www.un.org/apps/news/printnews.asp?nid=5923>

respectively examine the use of force obligations and the laws of war that apply in national liberation conflicts.

NATIONAL LIBERATION MOVEMENTS and the USE OF FORCE

A *The Prohibition on the Use of Force*

Prior to launching into the various arguments for and against states or national liberation movements utilising force in order to achieve particular aims, it is necessary to briefly examine the basic framework on the law on use of force, specifically the actors who have authority to use force and in what circumstances. At the time the United Nations Charter was drawn up in 1945, given that it was in the immediate aftermath of World War II, the major concern for the drafters was peace. The motif of justice was not of parallel significance as the maintenance of international peace and security. Throughout this chapter the interaction between these themes, justice and peace, will become obvious. The aim of the prohibition on force, as initially done by the Kellogg Briand Pact 1928, was to forbid the unilateral recourse to force and renounce war as an instrument of policy.

The current law regulating the use of force primarily stems from the United Nations Charter. Art 2(4) of the Charter reads, 'All Members shall refrain in their international relations 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.' The article is located in Chapter I of the Charter which is titled 'Purposes and Principles' and was perceived by the drafters as having paramount importance in the governance of international relations. However, the prohibition in Art 2(4) is not absolute and the Charter expressly provides two exceptions: the inherent right of self defence¹ and collective security authorised by the Security Council under Chapter VII of the Charter.² Collective security was to replace unilateral recourse to force and could only be pursued under the prerogative of the Security Council.

Under Chapter VII of the Charter, the Security Council is authorised to take enforcement measures on the grounds of collective security 'to maintain or restore international peace and security'. As required by Art 39 for the Security Council to be

¹ Art 51 of the UN Charter.

² Excluding the licence to take action against the enemy states of WWII, Art 53 and 107 of the Charter.

able to take action one of the 'threshold events'³ must be prevalent. On determination of one of these events the Security Council can make recommendations, order provisional measures, or take non-military or military enforcement measures accordingly⁴. Collective security measures have speedily become the preferred course of action when dealing with those states that violate the prohibition on recourse to force. Chapter VII measures will be discussed later in this Chapter in relation to third party (or collective) intervention in times of national liberation conflicts under the Charter regime.

The Charter prohibition on the use of force, although only binding on member states, is as confirmed in the *Nicaragua case* a customary norm of international law applicable to all states.⁵ The parallel customary rule makes the prohibition an obligation binding all states. Although the content of the customary international rule regulating the use of force does not exactly coincide with the Charter based prohibition these sources do not endorse conflicting standards of conduct. The International Law Commission was of the view, during the course of its work on the codification of the law of treaties, that 'the law of the Charter concerning the prohibition of the use of force in itself constitutes a conspicuous example of a rule in international law having the character of a *jus cogens*'.⁶ This view was confirmed in the *Nicaragua Case* where it was stated that the Art 2(4) prohibition 'belongs to the realm of *jus cogens* and is the very cornerstone of the human effort to promote peace in a world torn by strife'.⁷ The consequences of labelling a norm a *jus cogens* norm is considerable and has been acknowledged in the VCLT which was examined in Chapter 1.

The special status afforded to the Charter is substantiated by Art 103, which guarantees the supremacy of Charter law above all other international treaty

³ Threats to the peace, breach of the peace, or an act of aggression are commonly known as the 'threshold events'.

⁴ Art 40, 41 and 42 of the UN Charter respectively.

⁵ *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States)*, Merits, (1986) ICJ Rep. 14, para 99.

⁶ Commentary of the Commission to Art 50 of its draft Articles on the Law of Treaties, *ILC Yearbook*, 1966- II, p.247.

⁷ (1986) ICJ Rep. 14, p.153 (Separate Opinion of President Nagendra Singh). See Christenson, 'The World Court and Jus Cogens', (1987) 81 AJIL 93; Ronzitti, 'Use of Force, Jus Cogens and State Consent', in Cassese A (Ed.), *The Current Legal Regulation of the Use of Force*, (London: Kluwer Academic, 1986), p 147.

obligations.⁸ This feature illustrates the sacrosanct importance the drafters intended the Charter to possess. The supremacy of the Charter could not, however, be guaranteed with changing times unless the Charter possessed certain adaptive powers. The Charter does fortunately have a special character that has enabled its aptitude for adaptation through the interpretation of its principal organs and members.

(2) Development of the Prohibition of Force

Art 2 (4) was adopted as a constraint to the traditional use of direct inter-state force. The drafters did not predict the likelihood of guerrilla warfare, WMD and intra-state conflicts posing an escalating threat to international peace and security. The norms provided by the Charter, Articles 2 (4) and 51, evidently lack comprehensive treatment of such issues. Given the ever changing international conditions and circumstances the prohibition and the limited exceptions have barely withstood the test of time. In light of the changing circumstances in the area of the use of force there is diminished importance of a textual approach and the reduced significance of the 'travaux préparatoires'. The formalist approach of relying solely on the text has been replaced with greater significance being attributed to the subsequent practice of states and the teleological interpretation of the treaty.

Chapter 1 discussed how the 'The Charter itself ... is a living document deliberately designed by founders to have the capacity to meet new threats to peace and security.'⁹ Stromseth affirms that the better response is not to pursue a rigid textual interpretation and declare the Charter dead, but to allow cautious evolution to attain satisfactory treatment to contemporary circumstances.¹⁰ The rules may require refining and revising but Art 2 (4) is still respected by states as authoritative. States would not otherwise comply with the requirement of justifying their actions according to Charter norms. In light of the ability to adapt, the rules must be construed to reflect the realities of the present day or states will be forced, in pursuant of their respective national security interests and foreign policies, to disregard them.

⁸ Art 103 of the Charter reads, 'In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail'.

⁹ Stromseth, 'Law and Force after Iraq: A Transitional Moment', (2003) 97 AJIL 628, 633.

¹⁰ Ibid. 634.

The international law on the use of force has been subject to more speculation than previously with the US lead *Operation Iraqi Freedom* in March 2003 which was justified, at least by the US, through the endorsement of the tenuous doctrine of pre-emptive self-defence.¹¹ It is necessary at this stage to establish the significance of the prohibition because if considered irrelevant or 'dead' today there would be no purpose fulfilled in writing this chapter seeing as actors will be unilaterally able resort to force as they pleased.

Notably, despite the prohibition on the use of force there have been numerous breaches of the rule.¹² Recurring breaches should theoretically result in the formation of new customary norms provided it is accompanied by the necessary *opinio juris*. Many writers deem the death of the law with states using force justified by exceptions not provided in the Charter including the protection of nationals abroad, humanitarian intervention and anticipatory self defence.¹³ The question arises, is Art 2(4) sufficiently uncertain to allow states to manipulate it accordingly? The *Nicaragua case* held that,

It is not to be expected that in the practice of States the application of the rules in question should have been perfect, in the sense that States should be refrained, with complete consistency, from the use of force or from intervention in each other's internal affairs. The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of state conduct inconsistent with the given rule should be treated as breaches of that rule, not as indications of the recognition of a new rule. If a State acts in a way

¹¹ See *US National Security Strategy*, September 2002.

¹² Examples include the North Korean invasion of South Korea (1950); the Arab action in the 1973 Six-Day War; the Soviet invasion of Afghanistan (1979); the Tanzanian invasion of Uganda (1979); the Argentine invasion of the Falklands (1982); the U.S. invasion of Grenada (1983); the Iraqi attack on Kuwait (1990); and the NATO/U.S. actions against Yugoslavia in the Kosovo situation (1999).

¹³ Franck, 'What Happens Now? The UN after Iraq', (2003) 97 AJIL 607, Franck, 'Who Killed Art 2(4)? Or Changing Norms Governing the Use of Force by States', (1970) 64 AJIL 809.

prima facie incompatible with a recognised rule, but defends its conduct by appealing to exceptions or justifications contained in the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule.¹⁴

This passage illustrates the implied assertion by the International Court of Justice that breaches are likely to strengthen Art 2 (4) and not lead to its demise. As emphasized by Dinstein 'in spite of the frequent roar of guns - States involved in armed conflicts uniformly profess their fidelity to article 2(4)'.¹⁵ As recognized in the *Nicaragua case*,

The United States authorities have on some occasions clearly stated grounds for intervening in the affairs of a foreign State for reasons connected with, for example, the domestic policies of that country, its ideology, the level of its armaments, or the direction of its foreign policy. But these were statements of international policy and not an assertion of rules of existing international law.¹⁶

Thereby regardless of the violations of Art 2(4) it is 'premature to pronounce the death of the UN Charter' and the prohibition.¹⁷

It has been established that despite various breaches of Art 2(4), the law on the use of force as prescribed by the Charter is not dead. Therefore the legality of the right of peoples to use force in their struggles to attain self-determination must be assessed in light of the Charter framework and the existing customary international norms. At the outset it is necessary to identify the parties generally involved in national liberation conflicts. Firstly states may use force to suppress national liberation movements claiming the right to self-determination. Liberation movements may use force in the exercise of their right to self-determination. Finally, third states, states not directly party to the conflict, may intervene to support either the state or the liberation movement involved in the liberation conflict. The Chapter will examine the various arguments the parties are likely employ to justify their use of force in conflicts

¹⁴ (1986) ICJ Rep. 14, para 186.

¹⁵ Dinstein, *War, Aggression and Self-Defence*, 3rd edition (Cambridge: Cambridge University Press, 2001), p 89.

¹⁶ (1986) ICJ Rep. 14, para. 207.

¹⁷ Stromseth, 'Law and Force after Iraq: A Transitional Moment', 629.

of national liberation. The applicability of Charter norm as set out in Art 2(4) and customary international law to non-state actors, namely national liberation movements, will be considered below.

B Use of Force by States against National Liberation Movements

(1) Does the Prohibition Apply?

It may be contended that the use of force by an established government to suppress national liberation movements during the course of a national liberation conflict does not come within the scope of the Art 2(4) prohibition and is thereby not unlawful under Art 2(4). The prohibition on the use of force explicitly prohibits the use of force in 'international relations' between member states suggesting that the use of force by a government during an internal civil strife is outside the scope of the article. The use of force by the established government to retain jurisdiction over its own territory does not fall within the ambit 'international relations' as conditioned in Art 2(4) and is thus a matter of state sovereignty. The argument asserts that a lawfully constituted government hereby does not violate international law when using force to repress uprisings, including those in support of a claimed right to self-determination.. National liberation conflicts are, traditionally, categorised as civil wars and therefore a matter of municipal law with no consequence in international law. In such situations the Charter law, namely Art 2(7), dictates that 'Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter...' Art 2(7) is addressed to the United Nations rather than individual states and therefore proscribes the use of force or intervention by the United Nations itself, rather than by individual states. The equivalent customary non-intervention principle similarly prevents third states from intervening in matters of such nature and obligates due respect and observance of the sovereignty, territorial integrity and political independence of states. The *Declaration on Friendly Relations* which reiterated the duty of states to observe the non-intervention principle emphasised that

No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. Consequently, armed intervention and all other forms of interference or

attempted threats against the personality of the State or against its political, economic and cultural elements, are in violation of international law.

Although resolutions 1514 and 1541 were silent on the use of force in relation to peoples entitled to the right to self-determination, the prohibition of the threat or use of force is reinstated in the *Declaration on Friendly Relations*¹⁸ with one notable addition. The resolution expressly acknowledges the prohibition on states to use force against peoples struggling to enforce their right to self-determination. Under the heading, prohibition of force, paragraph 7 states that ‘Every State has a duty to refrain from any forcible action which deprives peoples referred to in the elaboration of the principle of equal rights and self-determination of their right to self-determination and freedom and independence’. Although the term ‘forcible action’ is not defined it may be assumed that this phrase encompasses the use of force, which is possibly the extreme end of the definitional spectrum of that phrase. This provision provides express authority to confirm that states were proscribed from using force to deny peoples of their right to self-determination.

Furthermore the Declaration dictates that the rule is applicable to ‘Every State’ as opposed to the Charter prescribed ‘All Members’ thereby not exempting any state from this obligation. Rosenstock questions if the Declaration ‘represents a mere recommendation or a statement of binding legal rules’.¹⁹ He concludes that the ‘truth would appear to lie somewhere between these two extremes, but closer to the latter’.²⁰ The use of the ‘shall’ in the operative paragraphs of the declaration as an alternative to ‘should’ substantiates this statement. As discussed in Chapter 1 General Assembly resolutions are purely recommendatory although they may be evidence of state practice or *opinio juris*.

As discussed previously, it has been accepted that the United Nations Charter cannot be solely subject to a purely literal interpretation given that the principal purpose for drafting the Charter was to ‘save succeeding generations from the scourge of war’. For the United Nations Charter to retain its authority in the present day it must be subject to a teleological interpretation or run the risk of becoming irrelevant.

¹⁸ GA Res. 2625 (XXV).

¹⁹ Rosenstock, ‘The Declaration of Principles of International Law Concerning Friendly Relations: A Survey’, (1971) 65 AJIL 713, 714.

²⁰ Ibid.

Subsequent changes, modifications and clarification of the UN law, through resolutions, comparable to the *Declaration on Friendly Relations*, will ensure the adaptation of the Charter. These UN documents attest the fact that the prohibition on the use of force has expanded its application to also renounce the use of force against peoples entitled to the right to self-determination.²¹ However the resolutions condemning the use of force against peoples with the right to self-determination have never expressly stated that such a resort to force would amount to a violation of Art 2(4). Nor has there been any acknowledgment that the use of force in contravention of the right to self-determination amounts to a breach of Art 2(4). Instruments condemning the use of force against peoples pursuing self-determination commonly claim that an infringement will amount a breach of the right to self-determination. The significance of such a standpoint is indefinite. The question arises whether there are distinct and separate ramifications resulting from such a classification. The classification as either a breach of the prohibition on the use of force or a breach of the right to self-determination will constitute a violation of a fundamental principle of international law. In light of the fact the non-use of force principle is most often offered as an example of *jus cogens* it is granted that in the hierarchy of norms the use of force principle will prevail over the right to self-determination. This does not necessarily afford separate ramifications although the breach of Art 2(4) is likely to be more vigorously condemned by the international community in comparison to a breach of the right to self-determination.

Another obvious criticism of the argument that Art 2(4) does not prohibit the use of force against peoples claiming the right to self-determination, in the words of Natalino Ronzitto, is that 'to admit the lawfulness of repressive action by the constituted government is therefore tantamount to admitting the lawfulness of action aimed at denying the peoples' right to self-determination'.²² This would amount to an infringement of the state's obligations under numerous UN instruments including the above mentioned resolution 2625. With self-determination being recognised as an international law norm through resolutions like 1514 and 2625, the implication is that such issues are no longer merely a matter of domestic jurisdiction of the state concerned. States can no longer rely on the 'domestic jurisdiction' argument to

²¹ See. GA Res. 3314(XXIV)

²² Ronzitti N, 'Resort to Force in Wars of national Liberation' in Cassese, *Current Problems of International law*, (Milano : A. Giuffrè, 1975) p 320.

repress liberation movements. For the Charter principles and purposes to be in accord and not to sanction conflicting practices it is imperative that Art 2(4) is interpreted as prohibiting the use of force against peoples struggling for their right to self-determination.

An argument that has been put forward to illustrate that the Charter itself prohibited the use of force against peoples claiming their right to self-determination is founded on the basis that Art 2(4) not only restricts the use of force against the 'territorial integrity or political independence' of a state but also 'in any other manner inconsistent with the Purposes of the United Nations'. Art 1(2) of the Charter lists 'respect for the principle of equal rights and self-determination of peoples' as a purpose of the organisation. Therefore the prohibition itself appears to extend its protection to peoples entitled to the right to self-determination. This contention is futile since Art 2(4) is also limited in the sense that it applies only as between the 'international relations' of states. Furthermore, as discussed previously, at the inception of the Charter self-determination was a political concept and not an enforceable international right.

It can be concluded with virtual certainty that the use of force by a state with intent to suppress the peoples' right to self-determination is unlawful and will not be justifiable. Although the applicable law forbids the use of force against peoples claiming their right to self-determination, in practice there is likely to be considerable dispute regarding whether the group of persons are legitimately entitled to the right to self-determination and thereby protected from repressive force by the state. Christine Gray appropriately comments that 'for the vast mass of actual use of force reveals that states almost always agree on the content of the applicable law; it is on the application of the law to the particular facts or on the facts themselves that the states disagree'.²³

(2) Can a State Use Force in Self-defence?

Although the state may not instigate the use of force against peoples struggling to attain self-determination, it may be able to resort to force in the event of the peoples' uprising enabling the right of self-defence in response. Although Art 2(4) seemingly is an absolute prohibition on states' unilateral recourse to force, Art 51

²³ Christine Gray, *International Law and the Use of Force*, 2nd edition (Oxford: Oxford University Press, 2004), p 10.

permits an exception to this principle. Accordingly, the right of self-defence will be briefly examined to establish the scope and application of the right.

(i) The Right of Self-defence in International law

Art 51 provides that:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by members in exercise of this right of self-defence 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 action as it deems necessary in order to maintain or restore international peace and security.

The exercise of the right to self defence is triggered only upon the occurrence of an 'armed attack'. The *travaux preparatoires* reveal nothing as to what constitutes an 'armed attack', most probably because the phrase was apparently unambiguous. Examination of the traditional doctrine of self defence asserts that the right is not available in response to threats or force not amounting to armed aggression within Art 3 of the Definition of Aggression.²⁴ However, Art 2(4) can be breached in a manner that does not amount an armed attack, namely threats of force, and in such instances although there has been a violation of the prohibition of force the victim state is not lawfully able to exercise the right of self defence. The scope of Art 2 (4) is wider than the legitimate exception since unilateral action is only permissible in response to an actual attack. However Art 39 allows the Security Council to take enforcement measures where there is a 'threat to the peace' thereby ensuring that measures may be taken against all violators of the prohibition. The Charter does, technically at least, assure that the prohibition is subject to enforcement.

The schools of thought on the interpretation of Art 51 can roughly be categorised as the narrow and wide interpretation. Those who advocate a wide right

²⁴ GA Res. 3314 (XXIX).

extending beyond the right to respond to an ‘armed attack’ claim that the phrase ‘nothing in the present Charter shall impair the inherent right of ... self defence’ in Art 51 is an explicit acknowledgment of this wider customary norm on self defence. In the *Nicaragua case* the Court established that self defence was an ‘inherent right’ that existed under both treaty and customary law.²⁵ It is indisputably acknowledged that a right to self-defence existed prior to codification in the Charter. This separate customary law right of self-defence was more accommodating than the Charter right. As noted by Judge Schewebel in his dissenting opinion, Art 51 does not state ‘if and only if an armed attack occurs’.²⁶ The Charter does not expressly overrule pre-existing norms on self defence and at the time of drafting there was evidently a customary norm inclusive of a right to anticipatory self defence. The opposing school of thought claims that the exact scope of Art 51 is unambiguous; the right to self defence only exists in response to an ‘armed attack’. Self defence is an exception to the prohibition on the use of force and thereby warrants a narrow construction. ‘The limits imposed on self defence in Article 51 would be meaningless if a wider customary law right to self-defence survives unfettered by these restrictions.’²⁷ If the intention of the drafters was to allow a wider application, Art 51 would be futile, for it asserts the obvious (i.e. that an armed attack gives rise to the right to self defence), while omitting to clarify the conditions of preventive war making the provision susceptible to abuse.

The restrictions of necessity and proportionality have long been associated with the concept of self-defence. It is accepted that the use of force in self-defence must be proportionate to the force or threat towards which it is aimed at averting.²⁸ The US Secretary of State, Webster, in his note to the British government concerning the Caroline incident stated that self-defence must involve ‘nothing unreasonable or excessive; since the act justifies by the necessity of self-defence must be limited by that necessity and kept clearly within it’.²⁹ Under the exception of self-defence the use

²⁵ (1986) ICJ Rep. 14, para 94.

²⁶ Ibid. dissent of Judge Schewebel.

²⁷ Gray, *International Law and the Use of Force*, p 98. See Brownlie, *International Law and the Use of Force by States*, (Oxford : Clarendon Press, 1998).

²⁸ Bowett, *Self-Defence in International Law*, (Manchester: Manchester University Press, 1958) p. 269, Brownlie, *International Law and the Use of Force by States*, (Oxford: Clarendon Press, 1963) p 261.

²⁹ J.B. Moore, 2 Digest of International Law 409-414 (1906).

of force is only permitted to what is necessary and proportionate to the achievement of the desired end result.

The right of self-defence is a conditioned interim measure available 'until the Security Council has taken the measures necessary to maintain international peace and security' and therefore the state invoking self-defence will have to cease the relevant measures when the Security Council acts. This proviso is limited to the Charter based right of self-defence and is not applicable to the customary right to self-defence given that it expressly contained in Art 51. Even though a strict textual interpretation would suggest that the right to individual or collective self-defence would cease once the Security Council practice indicates that states retain the right of self-defence. For example, in respect of the Iraqi invasion of Kuwait Security Council resolution 678 authorised member states to 'use all necessary means' to, amongst other objectives, restore international peace and security in the area but also reaffirmed the previous Council resolution 661 which affirmed Kuwait's right to self-defence. States also have a legal obligation to report to the Security Council if they are exercising their right under Art 51.

The article on self-defence not only permits autonomous recourse to force in self-defence but also explicitly authorises 'collective' self-defence. By including the word collective within the provision it also legitimates not only the victim state defending itself but permitted collective defence agreements.

(ii) Does Self-defence Arise in Response to an Attack by National Liberation Movements?

Having explored the scope of the right of self-defence it is necessary to consider whether self-defence is available in response to an attack by a non-state actor such as a national liberation movement. The key issue is whether attacks by liberation movements amount to an armed attack under Art 51, thus entitling the state to respond with force. Interestingly Art 51 does not specify that the 'armed attack' must emanate from a state. Subsequent to the terrorist attacks on September 11, the US responded vigorously to the attacks upon its territory and asserted the right to self-defence. The US initiated *Operation Enduring Freedom*, an operation led in Afghanistan to find and punish those responsible for the attacks. Security Council resolution 1368 condemned the attacks as terrorism and unambiguously affirmed the right of self-defence in response to terrorist attacks for the first time. Namely, the third

perambulatory paragraph recognised the 'inherent right of individual or collective self-defence in accordance with the Charter'. NATO invoked Art 5 of its treaty and declared its preparedness to act in collective self-defence.³⁰ The OAS also invoked the right of self-defence.³¹ Russia, China and Japan provided support to the military action. There was near unanimous acceptance of the legality of military action with only Iraq challenging legality.³² Therefore, a majority of states accepted the legal basis of *Operation Enduring Freedom* as an exercise in collective self-defence.

This broad acceptance by the international community signals a new willingness to allow states to take measures on the basis of self-defence in response to the threat of terrorist attacks, based on the right of self-defence. However, the exact scope of the right to use force in self-defence against terrorism and whether such a right could be invoked unilaterally is subject to uncertainty. States wishing to do will assert that *Operation Enduring Freedom* is a precedent for the acceptance of such action. Professor Gray asserts that,

It is open to question whether these events have brought about a radical and lasting transformation of the law of self-defence or whether their significance should be narrowly construed in that *Operation Enduring Freedom* was essentially a one-off response to a particular incident based on Security Council affirmation and (almost) universal acceptance by states.³³

Previous practice of the use of force in self-defence against terrorist attacks was controversial. Past examples of the use of force against terrorist attacks include Israel in 1968 against Beirut and in 1985 against Tunis and by the USA against Libya in 1968, Iraq in 1993 and Sudan and Afghanistan in 1998. Notably in all these situations the force was waged against the states unlawfully harbouring the terrorist organisation. The position on the acceptance of the legality of the use of force in response to terrorist attacks may have changed since September 11. The acceptance of the military initiative launched in Afghanistan may be founded on a reinterpretation of Art 51 in light of rapidly changing circumstances and evolving state practice. Security

³⁰ (2001) 40 ILM 1267, 1268.

³¹ (2001) 40 ILM 1270, 1273.

³² Keesings (2001) 4435-6, 44393; *The Guardian*, 8 October 2001.

³³ Gray, *International Law and the Use of Force*, p 160.

Council resolutions 1368 and 1373 asserted in the preamble that the Council was 'determined to combat by all means threats to international peace and security caused by terrorist acts'. The resolutions also affirmed 'the inherent right of individual or collective self-defence in accordance with the Charter'. Given that the right of self-defence is only referred to in the preamble of these resolutions it seems that the resolutions were more concentrated on terrorist attacks constituting a 'threat to international peace and security' rather than an 'armed attack'. However the international consensus at the time certified that states were willing to accept the legality of the use of force in self-defence by the US in reaction to these attacks.

The international response to September 11 signals the possible recognition of a right to self-defence against attacks by non-state actors, such as terrorist organisations. This reconfirms the importance of distinguishing between terrorists and liberation fighters. Despite the tenuous legality of such a right, a state confronted with a liberation conflict may attempt to extend the application of that right to attacks by the liberation movements.

C Use of Force by National Liberation Movements

Traditionally national liberation movements lacked the legal authority to resort to the use of force. However with increased recognition that the right to self-determination is an international law norm entitling victims protection in international law, such conflicts haven catapulted into the international sphere. In light of the legal status of the prohibition of force, outlined above, the use of force by national liberation movements in support of their claimed right to self-determination has aroused considerable opposition. To interpret the law on the use of force so that it is possible to use force to remedy violations of international law, such as a violation of the right to self-determination, would challenge existing legal norms and threaten to extend the recognised legal boundaries. Acceptance of the possibility that unilateral use of force is an available option for victims of international law would make Art 2(4) more susceptible to breaches. It would also be contrary to the Charter principle of settling dispute by peaceful means.³⁴

Evidently, Art 2(4) and 51 are directed to inter-state relations. Such conflicts have today become subsidiary to intra-state conflicts, which are on many occasions far more intense and consequential than traditional inter-state conflicts. National

³⁴ Art 2(3) of the UN Charter.

liberation struggles do not neatly conform to the Charter framework on the use of force. When examining if peoples can use force in their self-determination struggles there are two barriers to surpass. First, national liberation movements must establish that they are capable of possessing the right to resort to force in international law. Secondly, liberation movements must show that they actually have the right to use force in a given circumstance.

(1) The Right to Use Force to Support the Right to Self-determination

The question arises if non-states entities or entities no longer fulfilling the characteristics of a state can resort to the use of force. The use of force by national liberation movements challenges the idea that only sovereign states are able to legitimately resort to force. This question essentially involves recognition of the non-state entity. Professor Crawford affirmed that 'it is well established that belligerent occupation does not affect the continuity of the State: as a result, governments-in-exile have frequently been recognized as governments of an enemy-occupied State *pendante bellico*.'³⁵ Markedly there is a difference *between* acquiescence in matter of fact and acceptance of a principle of law. Recognition of liberation movements has been surveyed in Chapter 2 and it was concluded that liberation movements are capable of possessing certain rights in the international forum although those rights may not always be analogous to those held by sovereign states. The presence of a relationship between states and a national liberation movement does not guarantee that faction all the rights that stem from achieving international legal personality. Recognition as claimed by Hersch Lauterpacht is an aspect of international law.³⁶ It is also a matter inextricably influenced by a state's interests and is hence a matter of policy.

Liberation movements may contend that the Art 2 (4) prohibition is only applicable to states and renounces the use of force in 'international relations', relations between states, thereby not prohibiting the use of force within the territory of a state. Such a contention is in actual fact more damming to the liberation movement than helpful in many respects. First, the lawfully constituted government may in

³⁵ James Crawford, *The Creation of States in International Law*, (Oxford: Clarendon Press, 1979), p 407.

³⁶ H. Lauterpacht, *Recognition in International Law*, (Cambridge: Cambridge University Press, 1947), p. 87.

reliance upon that line of argument use force to repress the liberation movement and claim that such action did not come within the scope of the Art 2(4) prohibition since the state was not acting in its 'international relations'. As outlined above, this factor is no longer a threat on account of the numerous UN resolutions and declarations that recognise the illegality of the use of force to deprive peoples of the right to self-determination. Secondly, and more importantly, it would be extremely disadvantageous for a liberation movement to claim that norms of international law do not apply to its actions given that, as discussed in Chapter 2, it will be endeavouring to establish international legal personality (albeit limited) so as to pursue its aims.

Returning to if liberation movements did in fact have the authority to use force in pursuit of their right to self-determination it is obligatory to examine assorted international instruments. Resolution 1514 is silent on the use of force by either the state or the liberation movement. The US Ambassador Stevenson pointed out during a Security Council debate that, 'Resolution 1514 (XV) does not authorize the use of force for its implementation. It does not and it should not and it cannot, under the Charter...Resolution 1514 (XV) does not and cannot overrule the Charter injunctions against the use of armed force'.³⁷ Similarly Resolution 1541, which is of equal importance in establishing the nature and extent of the right to self-determination, fails to mention the right to use force in support of the right to self-determination.

It is asserted that colonial peoples do not have the right to use force in support of the right to self-determination since that force will represent a rebellion against the lawful authorities and would amount to a violation of territorial integrity³⁸. However, African and Asian states advocated the legitimacy of the use of force in securing the right to self-determination. They argue that a governmental authority which systematically violates basic human rights, like the right to self-determination, and impedes the progression of the peoples it has confined cannot be described as lawful and such conduct will today be an *ipso facto* flagrant violation of international law. In 1964 at a Conference held by the Jurists of Afro-Asian Countries in Conakry, a resolution was adopted stating that 'all struggles undertaken by the peoples for their national independence or for the restitution of the territories or occupies parts thereof, including armed struggle, are entirely legal'.³⁹ Similarly at the 1964 Conference of

³⁷ SCOR, 16th year, 988th meeting, 18 Dec. 1961, para. 93.

³⁸ The principle of territorial integrity has been examined in Chapter 1.

³⁹ *Le Monde*, 25 Oct. 1964.

Non-aligned Countries in Cairo it was asserted that the 'process of liberation is irresistible and irreversible. Colonized peoples may legitimately resort to arms to secure the full exercise of their right to self-determination and independence if the colonial powers persist in opposing their natural aspirations'.⁴⁰

These views progressively emerged in the United Nations and were credited through General Assembly and Security Council resolutions. The first resolution to, seemingly, address the issue of a liberation movement's right to use force was adopted in 1965. Resolution 2105 condemns the 'negative attitude of certain colonial Powers, and in particular the unacceptable attitude of the Governments of Portugal and South Africa, which refuse to recognise the right of colonial peoples to independence' More importantly, in response to the approach of these states, the resolution, in operative paragraph 10, 'recognizes the legitimacy of the struggle by the peoples under colonial rule to exercise their right to self-determination and independence'. However, this resolution cannot be used as authority in establishing an international right of peoples to use force in pursuit of their self-determination claims for several reasons. First, the failure to clarify the word 'struggle', with some states interpreting it to mean armed struggle and others to mean peaceful struggle. This ambiguous term is subsequently repeated in many following resolutions.⁴¹ The communications at the drafting of this and similar resolutions reveal that colonial powers and the US vehemently opposed the inclusion of an express right to use force in support of claims to self-determination. This lack of unanimity between member states led to the ambiguity of the resolutions. The voting statistics of resolution 2105 reveals that a considerable number of states indicated their unwillingness to accept such a right, either by abstaining or casting a negative vote.⁴²

At the 1966 meeting of the Special Committee on the Principles of International Law the Afro-Asian states, headed by Algeria, attempted to gain agreement on the interpretation of the prohibition of force which excluded from that prohibition wars of national liberation. Western states disapproved of this interpretation and affirmed that non-state entities, like peoples pursuing their right to self-determination, are not recognised as being entitled to the right of self-defence. They contended that a right of peoples to self-defence in pursuit of self-determination

⁴⁰ Declaration adopted by the Conference, (1964) 4 *Indian JIL* 603.

⁴¹ See GA Res. 2708; 2652; 3295.

⁴² 74:6:27.

had no foundation in international law or the Charter. The Special Committee failed as a result to come to an agreed conclusion on the matter.

Other principal organs of the United Nations, like the Security Council, have also used the term 'struggles' in relation to peoples fighting to exercise their right to self-determination. In 1966 resolution 232 reaffirmed the 'inalienable right of the people of Southern Rhodesia to freedom and independence in accordance with the Declaration (on Colonialism)...and recogniz(ed) the legitimacy of their struggle to secure enjoyment of their rights'. The 1970 resolution on the *Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples* condemned the actions of colonial powers like Portugal and South Africa and asserted the 'legitimacy of the struggle of the colonial peoples and the peoples under alien domination to exercise their right to self-determination and independence by all the necessary means at their disposal'.⁴³ Similarly, resolution 2652, adopted in relation to the 'deteriorating situation in Southern Rhodesia', reaffirmed 'the inalienable right of the people of Zimbabwe to freedom and independence in conformity with the provision of General Assembly resolution 1514 (XV) and the legitimacy of their struggle to attain that right *by all means at their disposal*'. Interestingly, in Chapter VII resolutions adopted by the Security Council the use of the phrase 'all necessary means' signifies the authorisation of the use of collective armed force. This similarity in terminology may pose a threat to those who oppose the endorsement of the use of force in wars of national liberation. However, the voting figures of these and similar resolutions reveal that western states significantly abstained or voted against the resolution which will prevent the resolutions from being considered as authoritative.⁴⁴ Therefore despite the resolutions legitimizing the 'struggles' of the peoples, there remained strong disagreement on exactly what the term permitted.

The *Declaration on Friendly Relations* while forbidding the use of force by states against peoples entitled to the right to self-determination does not similarly prohibit forcible action by liberation factions. Although the *Declaration on Friendly Relations* does not address the issue of use of force by liberation movements it does continue to state that,

⁴³ GA Res. 2708 (XXV).

⁴⁴ GA Res. 3070, (97-5-28).

In their actions against, and resistance to, such forcible action in pursuit of the exercise of their right to self-determination, such peoples are entitled to seek and to receive support in accordance with the purposes and principles of the Charter.

This declaration was notably passed unanimously due to the fact that the contentious provisions could be subject to varying interpretations. Georges Abi-Saab and Asbjørn Eide recognise this paragraph as an explicit acknowledgment that liberation movements possess the authority to resort to force in international law. Eide remarks that the declaration 'makes it clearer than before that armed struggle for self-determination is legitimate' but acknowledges that the precise extent of this authority remains vague.⁴⁵ Abi-Saab forcefully asserts that,

[A]rmed resistance to forcible denial of self-determination –by imposing or maintaining by force colonial or alien domination—is legitimate according to the Declaration. In other words, liberation movements have a *jus ad bellum* under the Charter.⁴⁶

In contrast, Heather Wilson identifies three objections to a wide interpretation of this paragraph.⁴⁷ First the provision does not explicitly authorise a right to use force when pursuing self-determination claims. It merely asserts that when forcible action is taken to deprive people of their right to self-determination they are entitled to 'seek and receive support' 'in their actions against and resistance' to such forces. The initial use of force against the peoples is a prerequisite to the peoples' right to resort to measures. This is similar to the traditional understanding of self-defence which requires an 'armed attack' prior to the legitimate right to use force in defence. Secondly, the term 'resistance' remains undefined. In the absence of such qualification resistance could involve measures not amounting to the use of force.

⁴⁵ Asbjørn Eide, 'Sovereign Equality Versus the Global Military Structure: Two competing Approaches to World Order', in Cassese (Ed.), *New Humanitarian Law of Armed Conflict*, (Naples: Editoriale Scientifica, 1979), p 25.

⁴⁶ Abi-Saab, 'Wars of National Liberation and the Laws of War', (1972) 3 *Annales d'études internationales*, 100.

⁴⁷ Wilson, *International Law and the Use of Force by National Liberation Movements*, p 99.

Furthermore, the final clause of the relevant paragraph collaborates towards the ambiguity by declaring that 'such peoples are entitled to receive support in accordance with the purposes and principles of the Charter'. Wilson notes that 'the entire controversy revolves around exactly what the purposes and principles of the Charter do and do not allow, the Declaration really does little more than continue the debate'.⁴⁸ Accordingly, the explicit recognition of the prohibition of the use of force by states against peoples claiming their right to self-determination in the *Declaration on Friendly Relations* cannot be interpreted as tacit recognition of the people's right to use force in their fight for self-determination. The change of focus, focusing on the prohibition of the use force as opposed to the right of peoples to use force, was to ensure consensus within the international community.

The trend continued and numerous significant resolutions were drafted including the use of the term 'struggle' in order to secure consensus. For example, Art 7 of the *Definition of Aggression* stated that,

Nothing in this Definition, and in particular article 3, could in any way prejudice the right to self-determination, freedom and independence, as derived from the Charter, of peoples forcibly deprived of that right and referred to in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, particularly peoples under colonial and racist regimes or other forms of alien domination: nor the right of these peoples to *struggle* to that end and to seek and receive support, in accordance with the principles of the Charter and in conformity with the above-mentioned Declaration.

The scope of the term 'struggle' remained undefined but yet for purposes of securing consensus the organs of the UN persisted in using this term.⁴⁹ The use of this term continues the debate as to whether liberation movements can use armed force to

⁴⁸ Ibid.

⁴⁹ For examples of Security Council resolutions using this term, SC Res. 386, 392, 428, 445.

enforce their right, as it is argued ‘what can be the purpose of Art 7 if it does not involve armed resistance?’⁵⁰ According to Bert Roling,

A formulation of the ban on violence-for that is what it comes down to in the definition of aggression- can hardly ‘prejudice the right to self-determination and independence’ if that right would not imply the use of violence.⁵¹

In 1973 the annual resolution on *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*⁵² expressly affirmed in operative paragraph 2 the legitimacy of the peoples struggle for liberation ‘including *armed struggle*’. This phrase was excluded from the 1991 resolution which simply permitted ‘all available means’. This deviation in the usage of terms illustrates the absence of uniform and consistent consensus on the issue.

Art 1(4) of the 1977 Additional Protocol I to the Geneva Convention states,

The situations referred to in the preceding paragraph include armed conflicts 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 on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.

The significance of this article is that it includes armed conflicts undertaken in the exercise of people’s right to self-determination within the realm of international armed conflicts. An argument may be put forward that if the use of force by peoples in pursuit of their self-determination claims was illegitimate, states would have to treat national liberation movements as exclusively a domestic law issue. Hence Art 1(4) of the Additional Protocol by classifying wars of national liberation as

⁵⁰ Cassese (Ed.), *The Current Legal Regulation of the Use of Force*, (London: Kluwer Academic, 1986), 418.

⁵¹ *Ibid.*

⁵² GA Res. 3070 (XXVII).

international armed conflicts implicitly validates the use of force by national liberation movements. This argument is heavily flawed because international humanitarian law makes no comment as to the legality of the initial use of force but intends to regulate how the conflicts are subsequently conducted. As will be discussed in Chapter 4, international humanitarian law concerns the laws regulating the conduct of hostilities and is applicable regardless of aggressor or victim status of the party to the conflict. This equal application of the laws of war cannot be construed as legitimizing the aggressor's initial recourse to force. Further, under international humanitarian law conflicts in pursuit of self-determination are included within the sphere of international conflicts only for the purposes of the said rules.

Although all states do not unanimously advocate the use of force by national liberation movements, it would be incorrect to not take into consideration the incremental progression of the views that have developed. In the *Nicaragua* case the International Court of Justice clarified its understanding on the inter-relationship between the armed intervention, effectively *jus ad bellum*, and state practice. It was noted that,

The significance for the Court of cases of State conduct prima facie inconsistent with the principle of non-intervention lies in the nature of the ground offered as justification. Reliance by a State on a novel right or an unprecedented exception to the principle might, if shared in principle by other states, tend towards modifications of customary international law.⁵³

States may not be willing to pronounce that a general principle permitting the use of force by non-state exists or that wars of national liberation are an exception to the prohibition of force, but in exceptional circumstances may justify such a use of force and in such situations do so tacitly. The use of force by national liberation movements in pursuit of their self-determination presently falls within the list of implicit exceptions to the prohibition of doubtful legitimacy.

(2) The Right to Use Force in Self-defence

⁵³ Nicaragua (Merits) (1986) ICJ Rep. 14, p109 para.207.

Can the use of force by national liberation movements be justified under the exception of self-defence? As current international law prohibits the use of force which will deprive peoples of their right to self-determination; is the implication that a violation of that norm, Art 2(4), would confer on the victim party the right to self-defence under Art 51? A right of self-defence against colonial domination, alien occupation or racist regimes is extremely controversial. Afro-Asian and Socialist countries favoured such a right while Western and Latin American countries continue to oppose it. In order to evidence that such peoples could assert the right of self-defence socialist and Afro-Asian states submitted various arguments. They claimed that the right to self-determination was on the same plane as the Art 2(4) prohibition on the use of force. Admittedly the *Declaration on Friendly Relations* recognises the right to self-determination as a fundamental principle of international law in the friendly relations and cooperation among states categorised with other principles like the prohibition of the threat or use of force and the peaceful settlement of disputes. In the absence of an established hierarchy, it seems plausible that such countries claimed that the denial of one right would allow the prohibition of the other in order to remedy the first. Colonial domination was also claimed to be an example of aggression, thereby permitting the peoples subject to aggression to exercise the right of self-defence. A less specific application of this argument alleges that the repression of the people's right to self-determination is an act of aggression which enables them to resort to self-defence.

In response to these arguments the Western and Latin American states emphasised that peoples and states do not enjoy equal status in international law and that the provisions of the Charter, inclusive of Art 51, are applicable only to states. Although the provisions of the Declaration may seem to confer the right of individual and collective self-defence on non-state entities, it cannot be said to be equivalent to such rights. The exception to the use of force was self-defence against an 'armed attack' and any other use of force would conflict with the principles and purposes of the Charter. The argument of many Western states was that the right of self-defence as prescribed in Art 51 was a right of states and not peoples. This sound contention is supported by the fact that the UN Charter was drafted to regulate relations between member 'states' and in doing so confer rights and duties unto states. Furthermore if Art 51 was to permit non-state entities to resort to force, the Charter would be jeopardising its objective of maintenance of international peace and security. Notably,

however, Art 51 does not explicitly state that 'member states' have the right to self-defence as it generally does in respect of the other duties and obligations of states. In fact the article does not clarify who possessed the Charter based right to self-defence although it may seem likely that given the Charter was drafted purely for sovereign states that it was referring to the rights of states.

(3) Use of Force as a Self-help Remedy

When a right is infringed the victim would naturally turn to the authority granting that right to try and get it enforced. However when such enforcement is not forthcoming there is a belief that the victim should pursue his own means so as to ensure compliance with the right. The lack of effective enforcement mechanisms will force victims of violations to resort to self-help. It is helpful at this stage to examine the basis behind self-help doctrines. In the absence of the necessary constitutional structures to enforce international rights the victims of violations, customarily states, had no alternative but to take measures to their own hands. Evidently at the initiation of the Charter all factors including 'justice' were made subordinate to the 'maintenance of international peace and security' which cemented the demise of the self-help and self-preservation doctrines. 'Self-help may be acknowledged as a remedy of last resort in a situation in which all alternatives for the peaceful vindication of a recognized legal right have been exhausted and the law and the facts indisputably support a plea of extreme necessity'.⁵⁴

How does the holder's of right secure their rights in international law against a violator? In light of Charter law, if the violation amounts to a threat to the peace, breach of the peace or an act of aggression the victim may be able to alert the Security Council and the Council will take the measures as appropriate under Chapter VII. Breaches of the law not amounting to one of the threshold events may only be subject to Chapter VI or the pacific settlement, which does not permit active enforcement. Professor Schacter has accurately acknowledged that the 'the most common complaint about international law is that it lacks effective enforcement. Its obvious deficiencies from this standpoint are the absence of compulsory judicial process and the limited capability of international institutions to impose sanctions on a violator'.⁵⁵

⁵⁴ Franck, *Recourse to Force: State Action Against Threats and Armed Attacks*, (Cambridge: Cambridge University Press, 2002), p 132.

⁵⁵ O. Schachter, *International Law in Theory and Practice* 184 (1991).

He also asserts that the Charter intentionally ‘accords priority to the peaceful resolution of disputes rather than to the enforcement of law...’ Therefore ‘inevitably, the victims of violations have resorted to self-help...’⁵⁶

Self-defence and self-help are similar in the sense that the doctrines only become operative upon the previous illegal act of a state. The respective functions of the two modes of action vary, as self-defence endeavours ‘to preserve or restore the legal status quo’ while self-help aims to ‘take on a remedial or repressive character in order to enforce legal rights’.⁵⁷ The doctrine of self-help and the relevant practice will be briefly explored in order to conclude if national liberation movements may assert this doctrine as justification when securing the right to self-determination through military means. The argument often cited in relation to self-help is that Art 2(4) only prohibits the use or threat of force ‘against the territorial integrity and political independence of any state’ and thereby that action that does not deny any of those rights is permissible. As previously stated this argument is invalid since the prohibition of force also extends to ‘any other manner inconsistent with the Purposes of the United Nations’. Although the law does not presently sanction the use of force in self-help, state practice reveals that the mitigating circumstances that prevail which compel national liberation movements to act may excuse the recourse to force. When the victims of breaches resorted to self-help their effort were met by various responses by the international community ranging from approval, tacit acquiescence and condemnation. States are particularly lenient when after consideration of the specific facts and circumstances it transpires that the entity which eventually resorted to self-help measures was faced with mitigating circumstances.

India claimed as part of its justification for the use of force in the annexation of Goa that it had tried for 14 years to negotiate an amicable and peaceful settlement to the Goan occupation by Portugal but Portugal’s vehement refusal to cooperate in such discussions⁵⁸ left India no choice but to resort to its own means.⁵⁹ At the debates concerning the legality of this self-help measure the India’s Ambassador Jha summarised that,

⁵⁶ *Ibid.*

⁵⁷ Bowett, *Self-Defence in International Law*, p. 11.

⁵⁸ S/5020, 13 December 1961, at 1-2.

⁵⁹ S.C.O.R. (XVI), 987th Meeting, 18 December 1961, at 9-10, paras.41-43.

The use of force, in all circumstances, is regrettable but so far as achievement of freedom is concerned, when nothing else is available, I am afraid that it is a very debatable proposition to say that force cannot be used at all.⁶⁰

The incident illustrated that the international community would tolerate the resort to force as a measure of last resort remedy where international law did not offer any other means of redress. Did India's successful annexation of Goa through the unilateral use of force set a precedent for the doctrine of self-help? Evidently in the examples that followed the United Nations was less willing to overlook the violation of the use of force prohibition.

In 1975, Morocco like India forcefully annexed Western Sahara, a territory it professed to have historic title to. Subsequent to a negative advisory opinion which did not confirm the existence of the alleged legal entitlement to the relevant territory⁶¹ Morocco responded by conducting a 'peaceful' march of 350'000 persons in an attempt to reclaim the territory. Morocco claimed that this measure was one of self-help to rectify a violation of international law suffered. The Security Council 'deplore(d) the holding of the march' and 'call(ed) upon Morocco immediately to withdraw from the Territory of Western Sahara all the participants in the march'.⁶² The undecided fate of Western Sahara continued for a several years but what is paramount is that the UN fiercely condemned the unlawful annexation by force although not completely renouncing achieving decolonization through the use of force. The Argentinean invasion of the British Falklands similarly demonstrated the rejection by the international community at large of a state's right to use force to vindicate a violated right.⁶³

It is necessary to distinguish between the use of force by national liberation movements and the use of force to recover pre-colonial title. The latter scenario is widely accepted as being illegitimate. Unlike in the case of the use of force by national liberation movements, there is consistent and uniform agreement that the use of force to recover pre-colonial title is illegal. The only instance when such a claim has subsequently been accepted is in the case of India's annexation of Goa. All

⁶⁰ S.C.O.R. (XVI), 988th Meeting, 18 December 1961, at 16, para.78.

⁶¹ *Western Sahara* (Advisory Opinion), (1975) ICJ Rep. 12.

⁶² SC Res. 380 (1975).

⁶³ SC Res. 502 (1982).

subsequent attempts to use this argument have been rejected.⁶⁴ These disputes are categorised as territorial and boundary matters and in keeping with Art 2(3) of the Charter must be settled through peaceful means.⁶⁵

Although the Charter has, through Art 2(4), abolished the doctrine of self-help, a limited right to self-help may have survived in customary international law.⁶⁶ However, the circumstances dictating the act in necessity will not be ignored and will be considered to be the relevant extenuating and mitigating factors. Other circumstances precluding wrongfulness include countermeasures being taken in respect of an internationally wrongful. For example, where the state has used force so as to deprive the peoples of their legitimate right to self-determination, the representative national liberation movement may claim that their corresponding use of force is simply a countermeasure taken in respect of the state's unlawful use of force. Such an argument is available to states under the 2001 Articles on the Responsibility of States for Internationally Wrongful Acts (hereafter Draft Articles) adopted by the International Law Commission but it is questionable if such a defence may be claimed by a liberation movement.⁶⁷ If liberation movements are international legal personalities and therefore capable of possessing rights and duties in international law ideally such defences to liability should be applicable in relation to their actions. Notably Part Three, Chapter II of the Draft Articles sets out the various conditions and restrictions that an injured state is subject to when resorting to countermeasures. More importantly Art 50 of the Draft Articles includes under the several obligations not affected by countermeasures 'the obligation to refrain from the threat or use of force as prohibited by the Charter of the United Nations'. Although the Charter does not permit the recourse to counter-measures, it is seemingly an option that is not precluded by state practice. If the circumstances precluding wrongfulness as applicable to states under the Draft Articles are applicable to national liberation it may be possible to claim the

⁶⁴ Examples include the Moroccan claim to Western Sahara, Indonesian claim to East Timor (1976), Argentina's use of force in the Falklands (1982) and Iraqi invasion of Kuwait (1990).

⁶⁵ Art 2(3) reads, 'All members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered'.

⁶⁶ Franck, *Recourse to Force: State Action Against Threats and Armed Attacks*, p. 131. For a discussion into the doctrine of self-help see Chapter 8 of the book.

⁶⁷ Art 22 of the Draft Articles.

defences of distress⁶⁸ and necessity⁶⁹ to liability. Necessity or distress may not itself be accepted as an exculpatory justification and the use of force would thus still amount to a violation of the prohibition on force. UN practice reveals that in some circumstances the use of force as a measure of last resort was tolerated irrespective of the clear violation of international law.⁷⁰

D Third Party Assistance (or Intervention) during National Liberation Wars

At the outset, it is important to clarify the terminology as used in this section. Although many writers use the terms ‘assistance’ and ‘intervention’ interchangeably the author will distinguish between these concepts as they represent two distinct modes of action. Assistance requires the request by a party to the conflict whereas intervention is action taken in the absence of consent although it may not necessarily be undesirable to one or either party. Assistance in relation to wars of national liberation is limited to two potential scenarios: assistance to support the established government in suppressing national liberation movements and assistance to promote national liberation.

(1) Assistance at the Request of the Established Government.

With regards to external assistance there is no Charter provision forbidding or authorising assistance to either party although international law apparently advocated the espousal of the established government in times of internal conflict. As discussed previously the right of self-defence also consists of collective self-defence. A limitation of collective self-defence is that a third party state cannot act in collective self-defence unless the victim of the armed attack has officially claimed that it has been subject to an attack and requested the assistance of its allies in repelling the force. Although it will not be discussed, mutual assistance agreements and regional security arrangements will be of relevance in this type of context. The non-intervention principle would not be applicable in such a situation since an

⁶⁸ Art 24 of the Draft Articles.

⁶⁹ Art 25 of the Draft Articles.

⁷⁰ For example, the rescue by Israel of hostages held by Palestinian and other terrorists in Entebbe following the hijack of an Air France airliner. The relevant Security Council debate was inconclusive.

invitation by the established government to repress a domestic uprising is seen as temporarily suspending the obligation not to intervene. Thereby it was customarily believed that states were permitted to assist the established government confronted with liberation claims. The legal position in relation to assistance in civil conflicts is summarised by Garner,

There is no rule of international law which forbids the government of one state from rendering assistance to the established legitimate government of another state with a view of enabling it to suppress an insurrection against its authority. Whether it shall render such aid is entirely a matter of policy or expediency and raises no question of right or duty under international law. If assistance is rendered to the legitimate government it is not a case of unlawful intervention as is the giving of assistance to rebels who are arrayed against its authority.⁷¹

This assertion is more contentious in scenarios where the government is using force to suppress movements fighting to enforce their right to self-determination in light of the various UN instruments condemning the denial of the right to self-determination.

The Draft Articles endorse that 'a state which aids or assists another state in the commission of an internationally wrongful act by the latter is internationally responsible for doing so'.⁷² Responsibility will only arise if the state rendering aid or assistance 'does so with knowledge of the circumstances of the international wrongful act; and the act would be internationally wrongful if committed by that state'. Articles 41 (2) of the Draft Articles further provides that no state shall recognise as lawful a serious breach by a state of an obligation arising under a peremptory norm 'nor render aid or assistance in maintaining that situation'.⁷³ It is questionable if the right to self-determination is a peremptory norm for the purposes of the Draft Articles. As stated above, the commentary to the Draft Articles does expressly mention the right to self-determination. If self-determination is a peremptory norm, third party states are not at liberty to render assistance to a state in breach of that obligation. States have an obligation not to cooperate or lend assistance to the state in breach of a

⁷¹ (1937) 31 AJIL 68.

⁷² Art 16 of the Draft Articles.

⁷³ See Art 40 of the Draft Articles.

peremptory norm of international law. It is likely that a state or states rendering aid or assistance in apparent breach of Art 41 of the Draft Articles will claim that the peoples asserting the right to self-determination are not legitimately entitled to do so.

(2) Assistance at the Request of the Peoples with the Right to Self-determination

During wars of national liberation states are no longer strictly obliged by international law to support the standing government. With peoples entitled to the right to self-determination being afforded international recognition, states are willing to actively disapprove of the use of force against these peoples even if these states are not as easily persuaded to support the use of force by the peoples.

Many UN documents confirmed the right of the peoples to receive assistance from third party states in Art 7 of the Definition of Aggression resolution affirmed that right of peoples struggling to enforce their right of self-determination 'to seek and receive support'. The 1981 *Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States* recognised the 'The right and duty of States fully to support the right to self-determination, freedom and independence of peoples under colonial domination, foreign occupation or racist regimes, as well as the right of these peoples to wage both political and armed struggle to that end'. The voting statistics, 120-22-6, indicate the lack of consensus on this issue.

There have been several resolutions that have affirmed the right of states to support peoples struggling to attain the right of self-determination without explicitly asserting the right to use force. The Security Council, in resolution 445, commended the 'People's republic of Angola, the People's Republic of Mozambique and the Republic of Zambia and other front-line states for their support of the people of Zimbabwe in their just and legitimate struggle for the attainment of freedom and independence'. Likewise, the Council has commended Angola for 'its continued support of the people of Namibia in their ...struggle'.⁷⁴

Art 41 of the Draft Articles provides that 'states shall cooperate to bring to an end through lawful means' any serious breach by a state of a peremptory norm. Subject to the right to self-determination being such a norm, the peoples denied of their right to self-determination can expect the cooperation of third party states.

⁷⁴ SC Res. 428 (1978)

Unsurprisingly, on most occasions, the government and the movement will claim that the external assistance that the other party is receiving to be unlawful. Questions also remain as to the degree of assistance that is permissible and when such aid ceases to be lawful.

(3) Forcible Intervention.

International law has traditionally been largely apathetic to conflicts, revolutions and rebellions staged within the boundaries of a sovereign state and as a result been unsuccessful in regulating internal wars and external intervention in such wars. The Charter does not mention internal conflicts and upon reflection of the purposes principle in the drafting of the document, did not intend to regulate revolutions or civil wars. The very jurisdiction of the UN in such situations is subject to controversy as states are supposed to refrain from interfering in the 'domestic affairs' of a state and the UN was primarily constituted to regulate inter-state relations. Even where there is international concern the lack of mandate should ideally prevent measures being taken by organs of the UN.

Intervention can be defined as 'dictatorial or coercive interference, by an outside party or parties, in the sphere of jurisdiction of a sovereign state, or more broadly of an independent political community'.⁷⁵ Admittedly this definition is restrictive as intervention can include seemingly non-dictatorial and non-coercive measures, indirect intervention, but is ideal for the purposes of this chapter for the focus will be exclusively concentrated on military intervention. Indirect and clandestine intervention does feature prominently in national liberation wars but it is outside the scope of this chapter.⁷⁶

Objections to the intervention include the principle of non-intervention in the internal affairs of a state in keeping with the principles of sovereignty and independence. In the *Nicaragua* case it was held that,

The principle forbids all states or groups of states to intervene directly or indirectly in internal or external affairs of other states. A prohibited intervention must accordingly be one bearing on matters in which each state is

⁷⁵ Bull (Ed.), *Intervention in World Politics*, (Oxford : Clarendon Press, 1984), 1

⁷⁶ For a general study into all forms of intervention see. Bull (Ed.), *Intervention in World Politics*, (Oxford : Clarendon Press, 1984)

permitted, by the principle of state sovereignty, to decide freely. One of these is the choice of a political, economic, social and cultural system and the formulation of foreign policy. Intervention is wrongful when it uses methods of coercion in regard to such choices, which must remain free ones. The element of coercion, which defines, and indeed forms the very essence of, prohibited intervention, is particularly obvious in the case of an intervention which uses force, whether in the direct form of military action or in the indirect form of support for subversive or terrorist armed activities within another state. General Assembly resolution 2625 (XXV) equates assistance of this kind with the use of force by the assisting state when the acts committed in another state involve a threat or use of force. These forms of action are therefore wrongful in light of both the principle of the non-use of force and that of non-intervention.⁷⁷

This case attests the significant overlap and the complementarities between the principles of non-intervention and the prohibition of the use of force.

The jurisdiction of a state incorporates the state's authority over its territory, citizens, internal affairs and conduct of external relations. The principle of non-intervention guarantees a state's right to independence and sovereignty. As quoted above the *Declaration on Friendly Relations* reinstates this principle and further asserts that 'no State shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another State, or interfere in civil strife in another State'. It is vital to clarify that intervention at the request of the relevant states is not intervention as it is not an infringement of the requesting state's jurisdiction.

As acknowledged by Hedley Bull 'when the rights and wrongs of intervention are being debated we are inclined to argue not as to whether or not they are justified, but rather whether or not they constitute intervention'.⁷⁸ Nations do not readily admit to have interfered in the matters of another. The line between what amounts to an issue of domestic jurisdiction or international law is blurry and subject to variation over time. For example, traditionally the observance of human rights was

⁷⁷ (1984) ICJ Rep. 14, p. 108 para.205

⁷⁸ Bull (Ed.), *Intervention in World Politics*, p 2.

solely a matter for the internal affairs of a state. Today, it may enlist legitimate international interest or concern.

As mentioned above, the UN is also under an obligation, under Art 2(7) of the UN charter, to refrain from 'interve (ning) in matters which are essentially within the domestic jurisdiction of any state' although 'this principle shall not prejudice the application of enforcement measures under Chapter VII'. In spite of the non-intervention clause contained in Art 2(7), intervention in matters within a member's domestic jurisdiction was permitted when the Security Council was acting within the collective security capacity under Chapter VII. In such a situation, provided the matter constituted a threat to the peace, it would cease to be one which was essentially within the domestic jurisdiction of the relevant state.

The involvement of a third state or an international organisation in the conflict makes the conflict a matter of international status. When justifying the deployment of ONUC military force to annihilate the Katangan separatists in Congo the US Deputy Assistant Secretary of State Richard N. Gardner also claimed that 'this was not an internal matter- there was a clear threat to international peace and security because of the actual involvement or potential involvement of outside powers'.⁷⁹ The principal justifications were that the Government of Congo had asked for UN assistance and the Security Council authorised the actions that followed.

Forcible or foreign intervention may be split into two headings: individual intervention and collective intervention. Collective intervention, not at the explicit request of either party to the dispute, may result if the Security Council was to authorise measures under Chapter VII of the Charter. Intervention has become an inevitable facet in international affairs given the interconnectedness of states which increases the likelihood of spill-over effects. Collective intervention will for obvious reasons of superior consensus be preferential to unilateral intervention. Intervention by a single state is likely to be condemned within the international community, most likely at the UN which provides a forum for states to raise such issues. Intervention by a single state generally suggests an act carried out in favour of self-interested motives. Such intervention will not only be a breach of the customary principle of non-intervention but, provided the use of armed force is involved, additionally constitute a breach of the principle of the non-use of force in international relations. Collective

⁷⁹ Department of State Press Release No. 99, February 22, 1963; 48 Department of State Bull. 477 at 478-79 (1963)

intervention, in contrast, is intervention authorised by an international organisation which assures the legitimacy of the measures taken. Even if the collective intervention is not explicitly authorised by an international organisation but constitutes merely of an *ad hoc* coalition, such an intervention is more likely to be received by the international community as being legitimate than an individual intervention for obvious reasons of greater consensus.

Collective security is the most desired means of retort to violators of the prohibition on the use of force, ideally, therefore, the violators of the rule will be met by a unified and overwhelming response authorised by the Security Council. However this idealised order did not always prevail and is most unlikely to do so in the context of the liberation war given the various dynamics (alliances, support and condemnation) History reveals that the collective security system often faces paralysis due to the inability to secure the necessary 'affirmative vote of nine members including the concurring votes of the permanent members'.⁸⁰ Intervention by the international community is hence susceptible to several stringent safeguards ensuring the legitimacy of the armed measures. The veto privilege of the permanent members has the potential to bar collective enforcement where intrinsically necessary. The *Uniting for Peace Resolution* recognised that failure of the Security Council to act 'does not deprive the General Assembly of its rights or relieve it of its responsibilities under the Charter in regard to the maintenance of international peace and security' and resolved that the 'General Assembly shall consider the matter immediately with the view to making appropriate recommendations to Members for collective measures, including in the case of a breach of the peace or act of aggression the use of armed force when necessary, to maintain and restore international peace and security'.⁸¹ Although the General Assembly is only able to make 'recommendations', which are not mandatory, as opposed to the binding obligations imposed by the Security Council⁸², it is able to legitimate the use of force in such circumstances. The General Assembly thereby also possesses the capacity to recommend armed intervention if state representatives are of the belief that a national liberation war is a breach of the peace or an act of aggression.

⁸⁰ Art 27(2) of the Charter

⁸¹ GA Res. 377 (V)

⁸² Art 25 of the Charter.

Racism, colonialism, gross violations of human rights, tactical starvation, genocide, overthrow of a democratically elected government are all instances that have recently been classified as constituting a 'threat to the peace' legitimating a Chapter VII retort. Although the text of the Charter is not on the face of it responsive to developments that have transformed the world, in a desperate attempt to evade obsolescence, the continuity of the Charter principles have been assured by the practice of the UN's principal organs. Thomas Franck reinstates that,

These somewhat artificial "international" dimensions of what, in 1945, would have been seen as lamentable but primarily domestic tragedies or criminal matters subject to domestic police enforcement have not been advanced fraudulently or cynically. Rather, the meaning of "threat to the peace, breach of the peace and act of aggression" is gradually being refined experientially and situationally.⁸³

Civil wars may constitute threats to the peace with international recognition that internal armed conflicts have the potential to transcend territorial boundaries and have repercussions on the international community at large. Internal wars are the wars of the present day with increased recognition of the interdependence of states. The outcome of liberation wars thereby has a likelihood of affecting world politics and thereby becomes a matter of international concern.

If the activities of national liberation movements are causing destabilization in neighbouring states, is there a right to intervene? As mentioned previously, the conflicts within states are capable of having numerous adverse spill-over effects on the international community in particular neighbouring states. If such a conflict was to pass the threshold and amount to 'a threat to the peace, a breach of the peace or an act of aggression' the Security Council may authorise measures under Chapter VII of the Charter.

(4) Humanitarian Intervention

Incremental expansion in what constitutes a threat to the peace, breach of the peace or an act of aggression has resulted in UN military intervention in events arising out of aggression by one state against another but from incidents occurring within one

⁸³ Franck, *Recourse to Force: State Action Against Threats and Armed Attacks*, p. 44

state. 'When a government turns viciously against its own people, what may or should other governments do?'⁸⁴

Although the Charter does not explicitly authorise Chapter VII intervention in instances of gross violations of human rights, as it does not within the traditional prerequisite 'threshold events', in practice the SC has authorised collective measures in times of humanitarian catastrophes. Examples include the use of coercive measures to defy apartheid in South Africa, the revoking Rhodesia's racially enthused Unilateral Declaration of Independence, and the assistance to end the ethnic conflicts in Yugoslavia, Somalia and Kosovo.⁸⁵

Evidently in none of these instances was the humanitarian crisis the sole justification for warranting collective enforcement. Issues including refugee problems and likely involvement of third party states were some of the other reasons quoted. If the action is authorised as a collective measure there is markedly no violation of Art 2(7) since the 'principle shall not prejudice the application of enforcement measures under Chapter VII'. As previously stated, the Charter provisions do not explicitly allow humanitarian intervention although the motive behind the intervention is consistent with the spirit of the Charter. State practice does not concretely condemn or advocate such a right. Criticism or appraisal of intervention in such situations was dependent on the particular circumstances rather than on a strict application of the Charter norms. Thomas Franck endorses that 'this suggests *either* a graduated reinterpretation by the United Nations itself of Article 2(4) or the evolution of a subsidiary adjectival international law of mitigation, one that may formally continue to assert the illegality of state recourse to force but which, in ascertainable circumstances, mitigates the consequence of such wrongful acts by imposing no, on nominal, consequences on states which, by their admittedly wrongful intervention, have demonstrably prevented the occurrence of some greater wrong'.⁸⁶ Therefore, in effect, where the repression of human rights, namely the right of self-determination, constitutes a threat to the peace the international community may intervene on humanitarian grounds.

⁸⁴ Franck, p.135

⁸⁵ SC Res. 232 (Rhodesia), SC Res. 418 (South Africa), S/RES/713 (Yugoslavia), S/RES/794 (Somalia), S/RES/1160 (Kosovo).

⁸⁶ Franck, p 139

E Conclusion

The right to self-determination of peoples now constitutes a significant norm of contemporary international law. The subjection of peoples to alien subjugation, domination and exploitation amounts to a major obstacle to the promotion of international peace and security. The changing world conditions have ensured that the previously subordinated theme of justice has been plummeted to the forum of paramount significance. Nonetheless, since the UN was founded to deal with conflicts through containment and deterrence the effective application of the self-determination right is frequently, at least in relation to the letter of the law, compromised in the preservation of sovereignty and peace. The determination of the peoples to redress their position and achieve their aims has seen considerable adaptation of the interpretation of the law. Although this has caused for the line between violation and adaptation of the law to be blurred, the arguments put forward by liberation movements are, in most instances, compliant with the spirit of law. In view of the conclusions already made pertaining to specific situations it is not possible to conclusively state that as a general rule national liberation movements are legitimately able to use force in pursuit of the right to self-determination. Former Secretary General Kofi Annan fittingly queried in his report to the Millennium Assembly of the United Nations:

Few would disagree that both the defence of humanity and the defence of sovereignty are principles that must be supported. Alas that does not tell us which principle should prevail when in conflict.⁸⁷

In spite of the absence of a clear right to use force, there are national liberation conflicts and therefore it is necessary to consider what rules of international humanitarian law apply in such circumstances.

⁸⁷ We the peoples: the role of the United Nations in the twenty first century, Report of the Secretary-General, A/54/2000, March 27, 2000, p.35, para. 218

LAWS OF WAR

A *Introduction*

Allowing wars of national liberation to benefit from the protection of the humanitarian laws of armed conflict has proved to be less controversial than establishing the legality of the use of force by national liberation movements. Even so, applying the *jus in bello* to national liberation wars has been an extremely contentious issue since the deliberations leading to the adoption of the 1977 Additional Protocols to the Geneva Conventions of 1949. This Chapter will focus solely on the laws of war relevant in wars of national liberation. Although various revisions of the laws of war have theoretically permitted the application of the laws in national liberation struggles, as will be explored in this Chapter, the practical realities dictate that the application of international humanitarian law in such conflicts has been a relatively scarce phenomenon.

B *The Geneva Laws*

(1) *The Hague Laws*

The laws of war codified at the Hague Conferences in 1899 and 1907, (hereafter Hague Law) which amounted to the first substantial effort to collaborate the humanitarian law, remain the foundation of the existing rules of international humanitarian law. The Geneva Conventions I-IV of 1949 (hereafter Geneva Law or Geneva Conventions) were adopted to complement these pre-existing rules¹. While, the Hague Law concentrates on the means and methods of conducting warfare on land and sea, the Geneva Law focuses on protection, namely protection of individual rights and humanitarianism in the treatment of the numerous actors affected by the armed conflict. Although this distinction is superficial to a great extent, the author will use

¹ Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (GC I).

Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (GC II).

Convention (III) relative to the Treatment of Prisoners of War (GC III).

Convention (IV) relative to the Protection of Civilian Persons in Time of War (GC IV).

this feature to limit the discussion of the Hague Conventions. The laws relating to the means and methods of warfare do apply in wars of national liberation. However, the application of the laws is largely uncontroversial and due to constraints of space this area will not be examined. Substantive provisions from the Hague Regulations will be examined, where relevant, to outline and examine the development of the law.

(2) International and Non-international Armed Conflicts

The principles of humanitarian law are applicable in international armed conflicts and are unconcerned with the legality or illegality of the war. Application of these laws of war are guaranteed irrespective of whether the international community or an international organisation like the United Nations condemns the act of war and classifies it as criminal, an act of aggression or any similar negative connotation. Common Art 1 of the Geneva Conventions states that, 'The High Contracting parties undertake to respect and to ensure respect for the present Convention in *all* circumstances'. To place the aggressor and the victim on an equal plane with regards the application of the laws of war is clearly contrary to the general principle of law: that no man shall benefit from his crime, the maxim *ex injuria jus non oritur ex factis jus oritur*. The notion that combatants should benefit from humanitarian law is, however, completely consistent with the fundamental objective of the laws of armed conflict. As identified in the St Petersburg Declaration 1868 and reiterated in numerous humanitarian law instruments, the basic objective of humanitarian law is to 'alleviate as much as possible the calamities of war' and the 'only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy'.²

The Geneva Conventions apply to any international armed conflict regardless of whether a state of war has been declared or not, and even if a party to the conflict disputes the existence of such a state.³ Parties to the conflict often disagree on the issue of applicability of the Conventions. The denial of applicability by one of the parties will result in the treaties being inoperative. This area is where the absence of a mandated body able to decide on such disparities is greatly felt. Common Art 2 assures that the applicability of the Conventions cannot be denied as between

² 1868 Declaration of St Petersburg, Preamble.

³ Art 2 of the Geneva Conventions. This article is common to all four conventions and is therefore commonly referred to as Common Art 2.

Contracting Parties. They notably apply even if the party does not, for whatever reasons, recognise the other party to the conflict.⁴ Although Common Art 2(1) limits the applicability of the Geneva Conventions to contracting parties, Common Art 2(3) recognizes that a High Contracting Party can be bound in its relations with a non contracting party provided the latter accepts and applies the provisions thereof and is thereby a potentially significant article in respect of liberation wars, as discussed below. Art 2(3) reads,

Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain 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.

The preliminary question arises as to the laws applicable in wars of national liberation whether international law, specifically international humanitarian law, or domestic criminal law. Traditionally, international law concerned inter-state relations and thereby the international law of armed conflict existed to regulate the conduct of hostilities during such inter-state conflicts. As discussed in the previous chapter, states traditionally contended that a national liberation conflict is a matter exclusively within domestic jurisdiction of the state concerned. In light of this contention states, legitimately, declared that the applicable law was the existing domestic criminal law. A conflict contained within the boundaries of a state was not governed by international law as international humanitarian law primarily applies to international armed conflicts, an armed conflict between two or more contracting *state* parties. Although, as discussed below, more recent law of war treaties have provided provisions applicable in times of non-international armed conflict such conflicts were previously exclusively a matter of the relevant state's domestic jurisdiction and thereby not covered by international humanitarian law.

⁴ For example, the conflict between Israel and the Arab state since 1948. Although the Arab states refuse to recognize Israel the fact of non-recognition did not foil the application of the Geneva laws. See. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (2004) Advisory Opinion of the ICJ.

The Geneva Conventions have been ratified universally, as of 2006, making irrelevant if the provisions amount to customary international law.

(3) Do the Geneva Conventions apply to National Liberation Movements?

(i) National Liberation Movement's as a 'Power'

The question arises if a liberation movement can come within the scope of the Geneva Conventions. Can a national liberation movement be a 'power' able to make a declaration under Art 2 (3) of the Conventions? Or was this provision limited to application between states? Those critical of such an application of the provision claim that the Geneva Conventions were not drafted to accommodate wars of national liberation and thereby such struggles fall outside the scope of the Conventions. It is accurate to pronounce that the drafters of the Conventions did not consider liberation wars as 'international' armed conflicts; however, when interpreting treaties it is not necessary to solely look at the intention of the drafters. Such an interpretation will adversely affect the temporal application of the treaty and possibly render the document obsolete for inability to adapt to changing circumstances. The VCLT generally advocates interpretation of a treaty 'in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose'.⁵ The provision also states that subsequent agreement between the parties and subsequent practice in the application of the treaty must be taken into account.⁶ The term 'Power' does not necessarily mean a state party and other entities are also able to accede to the Conventions. For instance, an insurgent party can be a 'power' and thereby be legally bound under the laws of war provided the established government recognizes the party as belligerent party to the conflict. Liberation movements should similarly be able to constitute a 'power' given the increased standing and recognition afforded to such organisations with the growing significance attached to the right to self-determination. However, in retrospect, in light of Art 1(4) of Additional Protocol I 1977 and subsequent state practice, although Art 2(3) may have conceptually permitted the inclusion of liberation wars within the realms of international armed conflicts such an interpretation was not acceptable at the time. As discussed in Chapter 2, prior to the 1970s national liberation movements had in fact

⁵ Art 31(1) VCLT 1969.

⁶ Art 31(3) VCLT 1969.

not been granted international recognition and the right to self-determination had not secured the importance that it is afforded in international law at present.

(ii) Recognition of Belligerency/ Statement of Intent

What happens when one of the parties to the conflict is not a high contracting party? It is common practice for the party to issue a statement entailing intention to abide by the provisions of the Conventions. The same practice has evolved in relation to national liberation movements unable to satisfy the requirements imposed by Additional Protocol I. Examples of such practice will be observed subsequent to a discussion of Additional Protocol I.

Although liberation movements did not qualify for humanitarian protection under the Geneva Conventions the 'recognition of belligerency' concept permitted the potential protection of such groups under the laws of armed conflict. This concept operates to ensure that an insurgent group involved in an internal conflict and subject to municipal criminal law is subsequently granted the protection of the laws of armed conflict upon the recognition of belligerency of the group by the established government that the group is in conflict with. While this concept exists in theory, in practice states are unwilling to recognise belligerency of national liberation movements and thus there are no examples to illustrate the effects of such recognition.

(iii) Application of Common Article 3

Although the Geneva Conventions concentrated specifically on armed conflicts of an 'international' nature the 1949 Conventions contained a Common Article, Art 3, which would list the minimum humanitarian protections guaranteed in situations involving in an 'armed conflict not of an international character'. In a conflict of such nature each party to the conflict is, for instance, prohibited from violence to life and person, taking of hostages and outrages upon personal dignity.⁷

⁷ Art 3. In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end the following acts are and shall remain

The Portugal reservation to Common Art 3 made on signature of the Geneva Conventions stated:

As there is no actual definition of what is meant by a conflict not of an international character, and as, in case this term is intended to refer solely to civil war, it is not clearly laid down at what moment an armed rebellion within a country should be considered as having become a civil war, Portugal reserves the right not to apply the provisions of Article 3, in so far as they may be contrary to the provisions of Portuguese law, in all territories subject to her sovereignty in any part of the world.⁸

This reservation illustrates the traditionalist response to the startling norm introduced by Common Art 3 which threatened to impede upon one of the well-established principles of international law, state sovereignty. On signature of the four Geneva Conventions, Argentina made a reservation 'that Article 3, common to all four Conventions, shall be the only Article, to the exclusion of all others, which shall be applicable in the case of armed conflicts not of an international character'.⁹ The significance of state sovereignty is further highlighted by this reservation.

Notably Common Art 3 was one of the first provisions which recognised the fundamental guarantees regulating non-international armed conflict. These guarantees would therefore be applicable in a national liberation conflict and will have to be

prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
 - (b) taking of hostages;
 - (c) outrages upon personal dignity, in particular, humiliating and degrading treatment;
 - (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.
- (2) The wounded and sick shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

⁸Schindler D and Toman J (Eds.), *The Laws of Armed Conflict: A Collection of Conventions, Resolutions and other Documents*, (Dordrecht : Martinus Nijhoff, 1988), p 582.

⁹Ibid. 564.

observed by both the state and the movement fighting in pursuit of the right to self-determination. This article further states that 'the application of the preceding provisions shall not affect the legal status of the Parties' thereby expressly clarifying that the application of these safeguards in conflicts will not alter the status of the conflict to 'international armed conflict' or compromise the established government's official stance on the group.

C The 1977 Additional Protocol I and II to the Geneva Conventions

(1) State Practice Subsequent to the Geneva Convention and the Need for the Additional Protocols

The previously rigid difference between international and internal armed conflicts soon began to collapse with rules of humanitarian law being steadily applied in internal armed conflicts. Clarity as to the type of conflict is imperative to be able to determine the applicable law. A trend has developed prompting the application of the laws of armed conflict in internal conflicts. In the *Tadic* case the International Criminal Tribunal for Yugoslavia elaborated as to why the distinction between international and internal conflicts was steadily becoming indistinct and why international rules pertaining to laws of conflict were being employed to regulate internal conflicts.

First, civil wars have become more frequent ... Secondly, internal armed conflicts have become more and more cruel and protracted, involving the whole population of the State where they occur...Thirdly, the large-scale nature of civil strife, coupled with the increasing interdependence of States in the world community, has made it more and more difficult for third States to remain aloof: the economic, political and ideological interests of third States in this category of conflict, thereby requiring that international law take greater account of their legal regime in order to prevent, as much as possible, adverse spill-over effects. Fourthly, the impetuous development and propagation in the international community of human rights doctrines, particularly after the adoption of the Universal Declaration of Human Rights in 1948, has brought about significant changes in international law, notably in the approach to problems besetting the world community. A State-sovereignty-orientated

approach has been gradually supplanted by a human-being-orientated approach.¹⁰

Including wars of national liberation within the realm of conflicts permitted international humanitarian protection is a notion that gained support incrementally. As discussed in Chapter 2, the lack of rights enjoyed by national liberation movements was due to failure of these liberation movements to be categorised as an *international* issue in many respects. Similarly with national liberation conflicts were perceived as not coming within the traditional scope of ‘international armed conflict’. There are many indicators that illustrate that this inclusion was an incremental, gradual process as opposed to a revolutionary change. One such indicator is UN resolutions, which have linked humanitarian law to wars of national liberation since 1968.¹¹ For example, General Assembly resolution 2652 (XXIII) in relation to the question of Rhodesia, in operative paragraph 13 called ‘upon the United Kingdom, in view of the armed conflict prevailing in the Territory and the in human treatment of prisoners, to ensure the application to that situation of the Geneva Convention relative to the Treatment of Prisoners of was of 12 August 1949’. Notably these resolutions adopted prior to 1973 were addressed to specific states, including Portugal, South Africa and United Kingdom, to apply the Geneva law to the conflicts within their territories.

In 1973, the General Assembly through resolution 3103 (XXVIII) addressed the legal position of combatants engaged in liberation wars and acknowledged that,

The armed conflicts involving the struggle of peoples against colonial and alien domination and racist régimes 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 is to apply to the persons engaged in armed struggle against colonial and alien domination and racist régimes.¹²

¹⁰ *Prosecutor v Tadic*, Case No. IT-94-1-AR72, Para 97.

¹¹ See GA Res. 2383 (XXIII) Rhodesia, GA Res. 2508 (XXIV) Rhodesia, GA Res. 2547A (XXIV) South Africa, GA Res. 2652 (XXV) Rhodesia, GA Res. 2678 (XXV) Namibia, GA Res. 2795 (XXVI) Territories under Portuguese Administration, GA Res. 2796 (XXVI) Rhodesia, GA Res. 2871 (XXVI) Namibia.

¹² GA Res. 3103 (XXVIII).

The voting logistics of the resolution reveals that Western states mostly opposed or abstained from this and similar resolutions.¹³

(2) *The Additional Protocols*

(i) The Diplomatic Conference

In 1974, when the Swiss Government invited representatives of 122 governments to consider the draft proposals prepared by the Red Cross to reaffirm and develop the humanitarian law of armed conflict it notably extended the invitation to representatives of national liberation movements. The participation of liberation movements in international conferences, where the subject matter was understood to concern them, is not an abnormal phenomenon. At the 1977 Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts eleven liberation movements participated in the negotiations.¹⁴ The Diplomatic Conference concluded in 1977 with the adoption of the two Additional Protocols to the Geneva Conventions of 1949. Protocol I concerned international armed conflicts while Protocol II concluded an unprecedented international convention on the application of humanitarian protection aimed at armed conflicts of non-international character. As discussed previously, internal conflicts were only guaranteed the protections afforded in Common Article 3 under Geneva law. Protocol I not only updates the law to ensure in keeping with the present times but also makes certain significant modifications. The substantive provisions of particular relevance to national liberation movements include the extension in the definition of combatant and the resulting entitlement to prisoner of war status. Due to time constraints, this chapter will not explore the drafting history of the relevant articles although it will discuss the criticisms and advantages resulting from these provisions in comparison to the previous law.¹⁵

It is important at this stage to establish that Protocols I and II do not replace the Geneva Conventions but rather 'supplement' them by reiterating and expanding the existing laws.¹⁶ Bothe 'stressed that the provisions of the new protocols cannot be

¹³ 82:13:19.

¹⁴ However, only PLO and SWAPO took part in all four sessions.

¹⁵ For a comprehensive guide to the drafting history of articles See. Bothe, Partsch & Solf, *New Rules for Victims of Armed Conflict*, (The Hague: Martinus Nijhoff Publishers, 1982).

¹⁶ Art 1(3) of API.

read and understood on their own- they must be considered in conjunction with the relevant provisions of the Conventions'.¹⁷ Protocol I is to a certain extent a codification of principles that had crystallised or had potential to crystallise as customary international norms.

Additional Protocol I also ensures the equal application of the laws of armed conflict, irrespective of who is aggressor and who is victim. As discussed above, international humanitarian law has long adhered to the non-discriminatory application of its rules and this is reinstated in the preamble to Additional Protocol I which reaffirms that,

the provisions of the Geneva Conventions of 12 August 1949 and of this Protocol must be fully applied in all circumstances to all persons who are protected by these 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.

Bothe asserts that 'they (the laws of war) are equally valid for both aggressor and aggressed without asking for what reasons or on the basis of what motives one or other is acting'.¹⁸ Even if the liberation movements violate the *jus ad bellum* by instigating liberation wars they are not denied the protections guaranteed the *jus in bello* simply on those grounds. Sir Hersch Lauterpacht confirms that, '...it is impossible to visualize the conduct of hostilities in which one side would be bound by rules of warfare without benefiting from them and the other side would benefit from them without being bound by them'.¹⁹ Since the fundamental purpose of the laws of war is to ensure adherence with the principles of humanitarianism, even the aggressor state, the state waging an illegitimate war, will be safeguarded by and obliged to abide with the law.

¹⁷ Bothe, Partsch & Solf, *New Rules for Victims of Armed Conflict*, p 7.

¹⁸ *Ibid.* 33.

¹⁹ Lauterpacht, (1953) 30 BYIL 206, 212.

Unlike the Geneva Conventions Additional Protocol I has not gained equivalent support and many states including the Afghanistan, India, Iran, Iraq, Israel, Pakistan, Sri Lanka and the United States have not acceded to the Protocol.²⁰

(ii) The Additional Protocols and national liberation movements

Protocol I witnessed the inclusion of a new category of conflicts coming within the scope on international armed conflicts. Art 1(4) of Additional Protocol states,

The situations referred to in the preceding paragraph include armed conflicts 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 on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.

Additional Protocol II certifies beyond doubt that the law relating to internal armed conflicts is distinctly separate from the law pertaining to international armed conflicts. Art 1(4) which extends the aegis of international armed conflict by incorporating wars in pursuit of the right to self-determination has distorted the traditional distinction between international and internal armed conflicts. These conflicts would prior to the 1977 Protocols have been categorised as a non-international armed conflict subject to domestic law and entitled only to the minimum humanitarian protections included in common Art 3 of the Geneva Conventions. Australia claimed that,

The Australian delegation voted in favour of Article 1 because it contains principles which are consistent with the purpose of this Protocol and because it extends international humanitarian law to armed conflicts which can no longer be considered as non-international in character. [...]

²⁰ A comprehensive list of states not party to AP I are Afghanistan, Andorra, Azerbaijan, Bhutan, Eritrea, Fiji, Haiti, India, Indonesia, Iran, Iraq, Israel, Kiribati, Malaysia, Marshall, Morocco, Myanmar, Nepal, Niue, Pakistan, Papua New Guinea, Singapore, Somalia, Sri Lanka, Thailand, Turkey, Tuvalu and the US. Information compiled from the ICRC website, <www.icrc.org>

In applying Protocol I to armed conflicts involving national liberation movement, paragraph 4 is a significant development in international humanitarian law and one which my delegation supported at the first session of the Conference. This development of humanitarian law is the result of various resolutions of the United Nations, particularly resolution 3103 (XXVIII), and echoes the deeply felt view of the international community that international law must take account political realities which have developed since 1949. It is not the first time that the international community has decided to place in a special legal category matters which have a special significance.²¹

The scope of Art 1(4) is often criticised as vague but the provision does not extend applicability to every group that claims to be a national liberation movement or maintains to be struggling for the right of self-determination. This provision restricts the interpretation of wars of liberation to struggles against ‘colonial domination’, ‘alien occupation’ and racist regimes’. Liberation wars not falling within these categories, for example, wars against oppressive regimes and secessionist struggles are excluded. This is further established by the part of the provision which states that, ‘the right of self-determination as enshrined in the Charter of the United Nations and 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 the *Netherlands (Public Prosecutor) v Folkerts*²² case it was confirmed that,

...the Protocol brings members of liberation movements under the protection of the Geneva Conventions to the extent that such movements act in the exercise of their right of self-determination and are fighting against ‘colonial domination and alien occupation and against racist regimes. The Red Army Faction, according to its objectives as set out by Folkerts’ counsel, in no way fulfils these conditions. Nor has it in any way been proved or even been made to appear like that, at the time of his arrest in Utrecht on September 22, 1977,

²¹ VI *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed conflicts (CDDH)* Geneva, 1994-97, Federal Political Department, Bern, Annex, p 59.

²² (1978) 9 *Netherlands Yearbook of International Law* 348.



the accused was involved in a struggle against the Netherlands State within the meaning of the above Protocol.

The accused was not granted the protection of international humanitarian law and was held liable to punishment for the charges brought against him. The inclusion of such a restriction is contrary to one of the fundamental principles governing humanitarian law, the non-discriminatory application of the law. In light of this contradiction, why does the law make such a restriction? The potential answer is a clause reiterated in numerous United Nations instruments on the right to self-determination. For example, the *Declaration on Friendly Relations* affords immense significance to the principles of territorial integrity and independence of sovereign states and as such states, and provides that

Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.

It is noteworthy that specification of the liberation wars falling within Art 1(4) leaves many victims of armed conflict unprotected. Secessionist wars as seen in Nigeria/Biafra (1967-1970) are not liberation wars within the scope of Art 1(4). Such selective humanitarianism is clearly contrary to the non-discriminatory application of law, the elemental objective of humanitarian law. The application of international humanitarian law in classified circumstances of liberation is to avert the dismemberment of pre-existing states. Schindler claims that, 'as long as humanitarian international law distinguishes between international and non-international conflicts, such injustices will be inevitable'.²³

Neither the Protocol nor the *Declaration on Friendly Relations* defines 'peoples' or specifies what amounts to an 'alien occupation' or 'racist regimes'. With none of the instances defined the question of whether certain conflict comes within the ambit of Art 1(4) will involve a purely subjective evaluation. No qualification in either the Protocol or in the *Declaration on Friendly Relations* determining which movements seeking self-determination qualifies as a national liberation movement. As outlined in Chapter 2, it has become accepted practice in the United Nations and

²³ Schindler D and Toman J (Eds.), *The Laws of Armed Conflict*, p 139.

associated institutions to accept national liberation movements recognised by the relevant regional organisations such as the OAU or the League of Arab States.²⁴ Recognition of the national liberation may therefore determine the application of international humanitarian law.

Notably, applicability of Art 1(4) is such that the Geneva Conventions and Protocol I are of no effect as between liberation movements. As in Angola, where there was fighting between more than one liberation movement and the representative government, Art 1(4) dictates that the statutory provisions only applies between the government and each movement. As between the liberation movements the conflict would amount to a non-international conflict and as such the rules and duties relevant would stem from Common Article 3 or Protocol II.

Major Roberts asserted that the provision, Art 1(4), grants national liberation movements' international status and thus legitimates foreign intervention in national liberation wars.²⁵ This contention is completely unfounded with the preamble to Protocol I providing that 'that nothing in this Protocol or in the Geneva Conventions of 12 August 1949 can be construed as legitimizing or authorizing any act of aggression or any other use of force inconsistent with the Charter of the United Nations...'

A criticism of Art 1(4) stems from the fact that the provision specifies that national liberation wars have to be armed conflicts but does not specify the level of intensity the armed conflict resulting from colonial domination, alien occupation or racist regimes should achieve. The relevant provision, Art 1(4), does not necessitate that the armed conflict be of certain intensity. Notably the General Assembly resolutions adopted since 1968 which have called for the application of the Geneva Conventions in liberation wars made no specification as to the intensity the conflict in question attained or had to attain. Schindler recognises that, 'it seems difficult to...

²⁴ See, e.g., Final Act of the Diplomatic Conference on the Reaffirmation and Development of Humanitarian Law in Armed Conflicts which produced the two Protocols: 'National Liberation Movements recognised by the Regional Intergovernmental Organisation concerned and invited by the Conference to participate in its work- Palestine Liberation Organisation, Panafricanist (South Africa) Congress, and South West African People's Organisation. It is understood that the signature by these movements is without prejudice to the position of the participating States on the question of a precedent', Schindler D and Toman J (Eds.), *The Laws of Armed Conflict*, p 619.

²⁵ Roberts, 'The New Rules for waging War: The Case Against Ratification of Additional Protocol I', (1985) 26 Virginia Journal of International law 109, 125.

determine a fixed degree of intensity for wars or national liberation'.²⁶ Furthermore, the term 'armed conflicts' appears in relation to both international and non-international armed conflicts. Art 1(2) of Additional Protocol II stipulates that, 'this Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature...' The use of the common phrase 'armed conflict' prompts the belief that the circumstances as described in Art 1 of Protocol II will similarly be excluded from the scope of Protocol I. This reasoning is relatively frail since the Geneva Conventions utilise the phrase 'armed conflict' with no implications of intensity, as evidenced by the use of the terms in Common Art 3.

In respect of international conflicts a minimum level of intensity of conflicts is not prescribed.²⁷ Non-international conflicts, in contrast, require the hostilities to satisfy a higher threshold of intensity. Which interpretation of armed conflict applies to liberation wars- the one as in international conflicts or the one required in non-international conflicts? At the Geneva Conference Australia declared that, 'In supporting Article 1 as a whole, Australia understands that Protocol I will apply in relation to armed conflicts which have a high level of intensity'.²⁸ The UK attached a declaration when signing Protocol I which stated,

In relation to Article 1, that the term 'armed conflict' of itself and in its context implies a certain level of intensity of military operations which must be present before the Conventions or the Protocol are to apply to any given situation, and that this level of intensity cannot be less than required for the application of Protocol II, by virtue of Article 1 of that Protocol, to internal armed conflicts'.²⁹

²⁶ Schindler D and Toman J (Eds.), *The Laws of Armed Conflict*, p 140.

²⁷ See the ICRC Commentary to Common Article 2 of the Geneva Conventions: 'Any difference ...leading to the intervention of members of the armed forces is an armed conflict...It makes no difference how long the conflict lasts or how much slaughter takes place'.

²⁸ *Official Records of the Diplomatic Conference*, Vol. VI, p 60.

²⁹ Schindler D and Toman J (Eds.), *The Laws of Armed Conflict*, p 717.

Considering the general consensus on the issue it can be concluded that the armed conflict referred to in Art 1(4) must attain the certain high threshold based on intensity, duration and magnitude of the hostilities.

A major criticism of Art 1(4) is that the provision, by extending the scope of application to struggles of self-determination, threatens to reintroduce discrimination into the laws of war. The underlying motive behind humanitarian law is that its application was unbiased by the causes of the conflict but was equally pertinent to all parties. Many states feared that this provision would result in discriminatory observation of the laws of war during wars of national liberation, with the established governments complying with the obligations and the liberation fraction not. Aldrich recognises that,

Most Western States, including the United States, reacted negatively to the inclusion of paragraph 4 in article 1 primarily out of a concern that it imported into humanitarian law the dangerous concept of the just war and might thus lead to other provisions limiting protections of the law to those engaged in “just wars”.³⁰

Art 96 (3) was introduced to curb this angst. The relevant paragraph reads,

3. 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 between (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 High Contracting Party to the Conventions and this Protocol; and

³⁰Aldrich, ‘Progressive Development of the Laws of War: A Reply to Criticisms of the 1977 Geneva Protocol I’, (1986) 26 Virginia Journal of International Law 693, 701.

(c) the Conventions and this Protocol are equally binding upon all Parties to the conflict.

This article recognises the ramifications of applying the law of war to national liberation movements. Art 96(3) states that if a liberation movement is to act in compliance with the conventions and Protocol I, it must do so by issuing a unilateral declaration pronouncing its intention. Prior to issuing such a declaration the Conventions and Protocol I would be inapplicable. In keeping with the principle of reciprocity, High Contracting Parties engaged in such a conflict against a liberation movement are not legally obliged to comply with the Conventions and Protocol I until the liberation movement denotes its intention to accept the laws of war. A declaration is essential for the parties to be bound unlike in inter-state conflicts where a High Contracting Party is bound by the Conventions and the Protocol if the 'enemy accepts and applies the provisions thereof'.³¹ Art 1(4) does not, therefore, in light of Art 96(3), purport to grant armed forces of national liberation movements the protections of the Conventions and the Protocol unless the liberation movement similar to the relevant state accepts the obligations imposed by these instruments. Aldrich thereby asserts that 'members of armed forces of liberation movements are not granted protections simply because they may be deemed to be fighting for a just cause; the Protocol and the Conventions must apply equally to both sides if they are to apply to the conflict at all'.³² When such a declaration is received by the depositary, the Swiss Government, the Protocol will come into immediate effect thereby bestowing on the fraction all the rights and liabilities of a High Contracting Party.

Art 96(3) ensures that national liberation movements do not automatically, due to the very existence of a conflict, enjoy the application of the Conventions and Protocol, although Common Article 3 and Additional Protocol II would still apply. Aldrich believes that the 'emotionally charged terms' as used in the provision will ensure to a great extent that the provision is not utilised. In support of his belief, he contends that the language used in the provision will discourage the key target states, like Israel and South Africa, from ratifying the Protocol. Also if State Party to the Additional Protocol I is confronted with a conflict seemingly within the scope of Art 1(4), it is not likely to accept that it is a 'colonial', or an 'alien' occupier or a 'racist

³¹ Art 96(2) AP I.

³² Aldrich, 'Progressive Development of the Laws of War', 702.

regime'. In such a situation where one of the parties contests the existence of an Art 1(4) conflict, the provision will remain inoperative. Finally he asserts that liberation fraction is unlikely to make a declaration as required by Art 96(3) which will prevent application of the laws of war. These contentions prompted Aldrich to conclude that 'In effect, the provision is a dead letter'.³³

Furthermore, Art 96 specifies that for the humanitarian law of armed conflict to be implemented the people must be 'engaged against a *High Contracting Party*'. In contrast, Art 1(4) makes no similar requirement. This prerequisite diminishes the applicability of Protocol I in national liberation wars with countries like South Africa and Israel, the very states faced with liberation wars and thus the main target states of the provision, not High Contracting Parties and extremely unlikely to become so in the future.

Another criticism of Art 1(4) rises from the apprehension of whether a non-state party would possess the necessary means and attributes to implement and fulfil the obligations under the treaties, given that the Conventions were drafted exclusively for inter-state relations. Evidently, Art 96(3) recognizes 'authority representing a people', which makes it debatable if Protocol I, similar to Protocol II, requires that the liberation movement 'exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol'.³⁴ An argument in favour of such an interpretation is that Art 96(3) has the ability to grant to a representative movement the same rights and obligations as a High Contracting Party. Such a condition is relevant in ensuring non-discriminatory application of the law of armed conflict by entailing that the movement have the necessary capacity to abide by its obligations under the provisions.

The Rhodesian conflict posed a meticulous problem. While the liberation groups fighting against the de facto government were recognised by the regional organisations and the United Nations, the existing government was considered to be illegal. Thereby although the liberation movements could satisfy the necessary conditions as imposed by Additional Protocol 1, Rhodesia was incapable of ratifying the protocols. The liberation movements in such circumstances are not able to issue a declaration under Art 96(3) and the parties to the conflict will solely be bound by the minimum standards of Common Art 3.

³³ Ibid. 703.

³⁴ Art 1(1) of AP II.

Since the adoption of the Protocol I there has not been a single armed conflict that met the requirements of Art 1(4), with the state in question being a High Contracting Party and the representative liberation movement issuing a declaration under Art 96(3). In the absence or prior to an Art 96(3) declaration the fundamental guarantees as provided in common Art 3 of the Geneva Conventions will apply in the relations between the liberation movement and the adverse party.

The likelihood is that in conflicts falling within the scope of Art 1(4) the state involved will not be a High Contracting Party and the liberation movement will not make a unilateral declaration. In such a situation, the ICRC collects declarations of compliance with the Conventions and the Protocol from the parties to the conflict in a procedure called 'triangular agreements'. The advantage of these agreements is that they aid in ensuring compliance with humanitarian law of war in the absence of stirring political consequences like classifying the conflict as 'international' or seeming to grant legitimacy on a liberation movements. Significant practice is available to illustrate such declarations addressed to the ICRC by the relevant group signalling intention to apply the Conventions to the conflict. Examples, of such declarations made by groups, include African National Congress (ANC)³⁵, SWAPO³⁶, the PLO³⁷, the Eritrean Peoples' Liberation Front (EPLF)³⁸, the Union national pour l'indépendance totale d'Angola (UNITA)³⁹, by the Afghan groups ANLF⁴⁰, HESLI ISLAMI⁴¹, and ISA⁴² and by the MORO National Front in the Philippines (MNLF).⁴³ The apparent legal implication of such declarations is that although such declarations do not render the group a party to the Conventions, the intention to abide by the Conventions will be binding on the party. Such declarations should be promoted in the likelihood of the Conventions or the Protocol not being directly applicable since the extensive application of the laws of armed conflict is in keeping with the basic humanitarian cause.

³⁵ Declaration to the ICRC, 29 November 1980.

³⁶ Ibid. 25 August 1981.

³⁷ On numerous occasions, for example, Ibid. 7 June 1982.

³⁸ Ibid. 25 February 1977.

³⁹ Ibid. 25 July 1980.

⁴⁰ Ibid. 24 December 1981.

⁴¹ Ibid. 7 September 1980.

⁴² Ibid. 6 January 1982.

⁴³ Ibid. 18 May 1981.

Thus in circumstances obviously falling within the scope of Art 1(4) the particular views of the state concerned, who invariably claim that the requisite circumstances are absent, prevent the application of the laws of war. The significance of a party to the conflict, usually the established government concerned, claiming that the struggle is not in pursuit of the right of self-determination is that Art 1(4) will remain inoperative. Cassese states that, 'this only proves that although the rule has undisputedly evolved, the lack of any central agency capable of pronouncing on its concrete application greatly weakens its purport'.⁴⁴

As accurately pronounced by Professor Baxter, 'It would be ironic if wars fought for the protection of human rights should lead to the degradation of human rights in war'.⁴⁵ International human right law is also applicable to these conflicts but due to space constraints will not be considered.

As stated above, if the conflict does not reach the threshold as required by Protocol I, Art 1(4), the parties to the conflict would be entitled to the irreducible core of humanitarian norms embodied in Common Art 3 and potentially fall within the scope of Protocol II. Protocol II is evidently only applicable in internal conflicts of relatively high intensity. Furthermore the original provisions from the draft, as prepared by the Red Cross, were deleted at the Diplomatic Conference making the Protocol II a mere minor addition of the protections already assured by common art 3. A government's ability to derogate from fundamental civil and political rights during a public emergency, which could include internal conflicts, has in the past few years heavily endorsed the adoption of a declaration of minimum humanitarian standards. This initiative has been subject to considerable appraisal and objections. If the conflict is such that it does not permit implementation of Protocol II, owing to the inability to satisfy the required standard of intensity, common art 3 is phrased so as to ensure application in any 'armed conflict not of an international ...'

(iii) Customary International Law

Are the provisions most valuable to national liberation movements, namely Art 1(4) and the sections on new combatant status, reflective of customary

⁴⁴ Cassese, *International Law in a Divided World*, (Oxford Clarendon Press, 1986), p 280.

⁴⁵ Baxter R, 'The Geneva Conventions of 1949 and the Wars of National Liberation', in Bassiouni C (Ed.), *International Terrorism and Political Crimes*, (Springfield III: Thomas, c1975) p 120, 132.

international? In respect of Art 1(4), prior to the adoption of Protocol I, the rule embodied herewith received considerable support as evidenced in the UN forum through state practice of member states, although it can safely be said the rule only emerged as a customary norm sometime subsequent the codification of the norm and consequent compliance with it. Art 1(4) resulted in the formation of a rule binding on all states irrespective of ratification. Israel has consistently objected to this inclusion and under the persistent objector rule may not be bound by it. When Art 1(4) was put to vote it secured 87 affirmative votes one opposition (Israel) and 11 abstentions (which were Western countries, except Guatemala). It should be highlighted that not all provisions of Protocol I have crystallised or codified customary norms although with regards to such provisions, the Protocol I may have initiated the development of such norms. These provisions that are not reflective of custom but have contractual force will only apply in national liberation wars if two conditions are contented. The state against which an Art 1(4) type war is being waged must be a party to Protocol I and the national liberation movement concerned must issue a declaration under Art 96(3). Given the extreme unlikelihood of the first condition being met; only customary rules of warfare will apply. Professor Dugard, who provided an expert testimony on international law on behalf of the defence in the *State v Sagarius and Others* case, commented that,

South Africa did not sign the First Protocol nor had it ratified or acceded to the 1977 Protocols. Consequently it was quite clear that South Africa is not bound by Protocol I and therefore, in terms of the treaty, is not obliged to confer prisoner of war status upon members of SWAPO.

Although South Africa is not bound in terms of this treaty, I suggested that there is support for the view that this position has now become part of customary international law, part of the common law of international law. In my judgement this argument is premature, in that Protocol I has not received that support to argue that it is part of international law, binding upon States that have not yet ratified the Convention.⁴⁶

⁴⁶ (1983) South African Law Reports p 833-838.

D Substantive Principles of the Laws of War relevant to National Liberation Movements.

As stated previously, this Chapter will concentrate exclusively on certain principles pertaining to land warfare although the principles of aerial and naval warfare may be applicable in wars of national liberation where appropriate. The principles examined are ones of significance to national liberation movements.

(1) Combatants and Prisoner of War Status

One of the fundamental safeguards provided by humanitarian law is the exemption from punishment under domestic law. This absolvment is offered in respect of acts which amount to criminal acts under municipal law but are not prohibited by international law. Art 43 and 44 of Protocol I records the conditions under which persons shall be combatants and as such, if captured, will be entitled to prisoner of war status and thereby immune from prosecution under domestic law for participation in the hostilities. The impact of Art 43 in clarifying the meaning of combatancy, the requirements and the consequences has been immense. Prior to the Additional Protocol I, the law distinguished between regular and irregular forces. The latter category of forces had to fulfil rigorous criteria to enjoy the privileges of combatants and, if captured, prisoner of war.⁴⁷ Art 4A (2) of the Geneva Convention stipulated that,

- 2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions :
- (a) that of being commanded by a person responsible for his subordinates;
 - (b) that of having a fixed distinctive sign recognizable at a distance;
 - (c) that of carrying arms openly;
 - (d) that of conducting their operations in accordance with the laws and customs of war.⁴⁸

⁴⁷ Art 1, 1907 Hague Convention IV and Art 4A 1949 Geneva Convention III.

⁴⁸ These criteria are identical to the requirements as imposed by the Hague Convention IV.

A reservation made upon accession to the Geneva Conventions by the state of Guinea-Bissau suggests that there was awareness, at the time, that such stringent conditions would be inappropriate.

The Council of State of the Republic of Guinea-Bissau does not recognize the “conditions” laid down in sub-paragraph 2 of this article (Art 4) concerning “members of other militias and members of other volunteer corps, including those organized resistance movements”, because those conditions are unsuited to wars conducted by the people.⁴⁹

The early 20th century witnessed the emergence of a formerly unrecognised class of combatants. The decolonization process introduced the use of guerrillas in the third world. Pressure grew to expand the scope of combatant to grant these forces the protections of international humanitarian law. Liberation fighters, as they may also be known, were excluded from the existing laws mostly due to their inability to satisfy the conditions as required by the treaties. Specifically they failed to satisfy the criteria necessitating that they carry arms openly and wear a distinctive sign recognizable at a distance. The Additional Protocol witnessed a variation in the approach of classifying armed forces with Art 43 drawing no distinction between regular and irregular combatants. The article 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 or 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,

Chapter I, Art 1 reads,

The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions:

1. To be commanded by a person responsible for his subordinates;
2. To have a fixed distinctive emblem recognizable at a distance;
3. To carry arms openly; and
4. To conduct their operations in accordance with the laws and customs of war.

In countries where militia or volunteer corps constitute the army, or form part of it, they are included under the denomination "army."

⁴⁹ Schindler D and Toman J (Eds.), *The Laws of Armed Conflict*, p 574.

inter alia, shall enforce compliance with the rules of international law applicable in armed conflict.

The forces involved in conflicts as described in Art 1(4) are engaged in an international armed conflict and as a result these forces are entitled to combatant rights and obligations, and, if captured will be treated as prisoners of war. Art 43 expressly refers to 'all organized armed forces' of a party to a conflict bringing to an end the strict dichotomy involving regular and irregular forces with the Protocol effectually merging these two notions. Art 43 of the Additional Protocol I treats all members of armed forces, including irregular forces, as combatants and if captured all combatants are entitled to prisoner of war status provided that they are organised under a responsible command and subject to an internal disciplinary system proficient in implementing the laws of war in order to participate in the hostilities and be entitled to prisoner of war status. All members of the forces are therefore combatants and are entitled to participate in the hostilities. Failure to satisfy these requirements will render the group or individual outside the scope of Art 43. The requirements are cumulative and inability to fulfil any of them will effect in loss of status. In such a situation the person will be legitimately disallowed combatant, or if captured, prisoner of war status.

This development is of distinct importance to national liberation movements, with members generally failing to qualify as regular forces. Major Roberts regards these amendments to 'tip the balance of protection in favour of irregular combatants to the detriment of the regular soldier and the civilian'.⁵⁰ There is considerable truth in this statement because the stringent requirements that irregular forces had to satisfy have been considerably relaxed. The realities of warfare dictated however that these severe requirements were frequently unobserved, in particular, with irregular forces finding it impossible to satisfy the criteria of wearing a distinctive emblem and conducting operations in compliance with the laws and customs of war. Aldrich, more accurately, argues that this modification was 'to improve an unsatisfactory situation by providing an incentive for the irregular combatant to comply with the law, thereby increasing the protection of both civilians and regular soldiers.'⁵¹

⁵⁰ Roberts, 'The New Rules for Waging War', p 129.

⁵¹ Aldrich, 'Progressive Development of the Laws of War', p 704.

Art 43 entitles individuals who satisfy the requirements of the provision with combatant status regardless of if the individuals represent a state or fraction not recognised by the adverse party. In contrast to the Geneva Conventions, which provided that the irregular forces and resistance movements had to belong to a state party to the conflict⁵², Art 43 extended the privileges of combatancy to irregular forces even when their authoritative command lack recognition. Art 4 (A) (3) of the 1949 Geneva Convention III provided that regular forces who represented an authority not recognised by their enemy were entitled to protection. This development is of particular significance to liberation fighters who are unlikely to be recognised by the opposing party.

The major concern in including irregular fighters, resistance fighters or liberation fighters, within the ambit of combatant is that it threatened to distort to clear distinction between combatants and the civilian population. Insurance of respect and protection of the civilian population during times of armed conflict is a cardinal rule in humanitarian law. It also raised the question if ‘persons engaged in armed resistance in occupied territory, or in a war of national liberation or other type of guerrilla warfare be expected to survive if they are to distinguish themselves from civilian throughout that period?’⁵³ Detter recognises that ‘the hallmark of any resistance movement is concealment’.⁵⁴ Furthermore, ‘can, conversely, civilians hope to survive if guerrilla fighters in their area never distinguish as such?’⁵⁵ This was dealt with through the inclusion of a provision detailing the obligation to distinguish. Art 44, paragraphs 3 and 4, read,

2. In order to promote the protection of the civilian population from the effects of hostilities, combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack. Recognizing, however, that there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself, he shall

⁵² Art 4 (A) (2), 1949 Geneva Convention III.

⁵³ Kalshoven & Zegveld, *Constraints on the Waging of War*, (Geneva: International Committee of the Red Cross, 2001), p 88.

⁵⁴ Detter, *The Law of War*, 2nd edition (Cambridge: Cambridge University Press, 2000), p 141.

⁵⁵ *Ibid.*

retain his status as a combatant, provided that, in such situations, he carries his arms openly:

- (a) during each military engagement, and
- (b) during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate.

Acts which comply with the requirements of this paragraph shall not be considered as perfidious within the meaning of Article 37, paragraph 1 (c).

4. A combatant who falls into the power of an adverse Party while failing to meet the requirements set forth in the second sentence of paragraph 3 shall forfeit his right to be a prisoner of war, but he shall, nevertheless, be given protections equivalent in all respects to those accorded to prisoners of war by the Third Convention and by this Protocol. This protection includes protections equivalent to those accorded to prisoners of war by the Third Convention in the case where such a person is tried and punished for any offences he has committed.

The above mentioned provisions expressly address the issue of carrying arms openly. The opening sentence of paragraph 3 reinstates the general obligation that requires combatants to distinguish themselves from the civilian population at all times during attacks. The duty to distinguish is intended to promote the protection of the civilian population against the effects of hostilities. This provision is particularly beneficial to irregulars who are not required to distinguish at all times. Experience with resistance movements in conflicts in the 20th century have illustrated that the armed forces of national liberation fractions are most often not qualified soldiers.

The rule embodied in the second sentence of the article is not the generally applicable obligation. A stricter rule is imposed under normal circumstances while the more relaxed standard is applicable solely in 'situations...where owing to the nature of the hostilities' forces are unable to distinguish themselves. Thereby, prior to concluding if a combatant has distinguished himself as required under the Convention, it is necessary to consider the nature of the hostilities so as to ascertain the exact rule on duty to distinguish that is to be imposed. The Belgian Government made a declaration to this effect on ratification of the Protocol which stated 'that the armed conflict situations described in paragraph 3 can arise only in occupied territory

or in the armed conflicts covered by Article 1, paragraph 4, of the Protocol'.⁵⁶ Italy made a similar declaration that 'the situation described in the second sentence of paragraph 3 of Article 44 can exist only in occupied territory.'⁵⁷ This flexible duty has evidently been introduced for the benefit of forces engaged in national liberation wars. 'Inevitably, the regular forces would treat civilians more harshly and with less restraint if they believed that their opponents were free to pose as civilians while retaining their right to act as combatants and their POW status if captured.'⁵⁸ Argentina made a declaration on accession to the Protocols that the duty to distinguish cannot be interpreted 'as weakening respect for the fundamental principle of the international law of war which requires that a distinction be made between combatants and the civilian population, with the prime purpose of protecting the latter'.⁵⁹

Certain phrases in this provision can be subject to varying interpretations. The clauses 'operations preparatory to an attack' and 'during such time as he is visible to the adversary while he is engaged in military deployment preceding the landing of an attack' raise problems resulting from the lack of definite meaning. This lack of certainty caused several states at signature, ratification or accession to the Protocol to include declarations elaborating their interpretation or understanding of the phrases.⁶⁰ Wilson states that 'Art 44 was a confusing if necessary compromise'⁶¹ State practice must elucidate in the absence of a conclusive drafting history since the lack of certainty inevitably permitting abuse. Uniform state practice may never result.

Art 44 (1) instructs that 'Any combatant, as defined in Article 43, who falls into the power of an adverse Party shall be a prisoner of war'. All combatants are entitled to prisoner of war status and, under Conventions, entitled to Geneva Convention III protection. The rules on treatment of prisoners of war are an area of the law that has continued to develop favourably. 'The humane treatment of prisoner so war is rooted in the realization that captures combatants no longer pose any threat

⁵⁶ Schindler D and Toman J (Eds.), *The Laws of Armed Conflict*, p 707. The Republic of Korea and the UK made similar declarations.

⁵⁷ Ibid. 712.

⁵⁸ Sofaer A, 'The Rationale for the United States Decision', (1988) 82 AJIL 784, 786

⁵⁹ Schindler D and Toman J (Eds.), *The Laws of Armed Conflict*, p 704.

⁶⁰ See. Ibid.

⁶¹ Wilson, *International Law and the Use of Force by National Liberation Movements*, p 178

to the lives of the persons who capture them nor their army.’⁶² Fleck further asserts that ‘Prisoners of war shall only be considered as captives detained for reasons of security, not as criminals’.⁶³

Combatants are obliged to comply with the rules of international law applicable in armed conflicts although violation of these rules will not deprive the combatant of his combatant status.⁶⁴ Infringement of the laws of war will result in either party to the conflict, depending on if the combatant is in the hands of his party or of the adverse party, prosecuting for the alleged violations. Under the Geneva Conventions, members of militias and resistance groups had to conduct ‘their operations in accordance with the laws and customs of war’ of which failure to comply with this criterion would result in forfeiture of prisoner of war status.⁶⁵ Art 44(2) states that violations of international law norms on armed conflict ‘shall not deprive a combatant of his right to be a combatant or, if he falls into the power of an adverse Party, of his right to be a prisoner of war...’ This provision will prevent the inhumane treatment of prisoners under falsified pretexts.

Although Art 44(3) is extremely advantageous to forces of liberation movements it does introduce uncertainty in situations where it is debatable if the captured person is indeed a lawful combatant and hence entitled to prisoner of war status. If there was doubt as to whether a person is a combatant or not, the law under the Geneva Conventions states that,

Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.⁶⁶

The present position in Art 45 of Protocol 1 dictates that,

⁶² Fischer H, ‘Protection of Prisoners of War’, in Fleck (Ed.), *The Handbook of Humanitarian Law in Armed Conflicts*, (Oxford: Oxford University Press, 1995), p 321.

⁶³ Ibid.

⁶⁴ Art 44(2) AP I.

⁶⁵ Art 4.

⁶⁶ Art 5 GC III.

1. A person who takes part in hostilities and falls into the power of an adverse Party shall be presumed to be a prisoner of war, and therefore shall be protected by the Third Convention, if he claims the status of prisoner of war, or if he appears to be entitled to such status, or if the Party on which he depends claims such status on his behalf by notification to the detaining Power or to the Protecting Power. Should any doubt arise as to whether any such person is entitled to the status of prisoner of war, he shall continue to have such status and, therefore, to be protected by the Third Convention and this Protocol until such time as his status has been determined by a competent tribunal.

The irregular fighter is the one running the risk of the resulting imprecision since it is the detaining power who decides if the irregular should be persecuted for a violation of the duty to distinguish obligation and if there has in fact been a violation.

Unlawful combatants, persons not entitled to take part in the hostilities, have a legitimate claim to the fundamental guarantees provided in Art 75 of Protocol I. Although this provision encompasses most of the minimum norms provided in common Art 3, it does extend the number of acts prohibited in all circumstances. For example, the notion of torture is explicitly referred to include mental torture in addition to physical torture and there is reference to sexual offences.

Art 43 and 44 of Protocol I have significantly altered the law on armed forces by enlarging of the notion of regular forces and relaxing the provision on the duty to distinguish in order to accommodate liberation movements. Some academics, like Detter, are of the view that 'Protocol I does not really reduce the four conditions in the Geneva Conventions but rephrases them'.⁶⁷ They further assert that the criteria for determining combatant status is vague and involves practical difficulties. Confusion as to whether a person is a combatant or a civilian does result from the new conditions- the conditions that guerrillas need to satisfy during instances of military occupation and wars of national liberation- undermining the protection of the civilian population which is a fundamental objective of international humanitarian law.

(2) Provisions against the Use of Mercenaries

⁶⁷ Detter, *The Law of War*, p 141.

Previous to Protocol I the law did not discriminate members of the forces on the grounds of their exact motives behind partaking in the hostilities. Notably mercenaries have been employed in conflicts against liberation movements particular in third world states. This escalating number of mercenaries enlisted in colonial armies, willing to serve in return for a wage, engaged in conflicts suppressing liberation groups caused uproar amongst third world states which initiated the gradual renunciation of such forces. The Security Council and the General Assembly in an acknowledgment of this practice have adopted resolutions recommending the prohibition of the use of such forces against national liberation movements.⁶⁸

These resolutions were directed at specific anti-colonial conflicts in Africa while there were also a few resolutions condemning mercenaries generally. General Assembly resolutions, however, have no binding effect and are merely recommendations. Security Council resolutions are only binding if adopted under Chapter VII of the Charter and amount to a matter concerning the maintenance of international peace and security. So these resolutions are in effect without any legal force although they are evidence of state practice and *opinio juris*, the elements necessary for establishing a customary rule.

The UN resolutions that have condemned the use of mercenaries in national liberation wars were passed prior to the enactment of the Additional Protocols. For example, General Assembly resolution 3103 (XXVIII)

The use of mercenaries by colonial and racist regimes against the national liberation movements struggling for their freedom and independence from the yoke of colonialism and alien domination is considered to be a criminal act and the mercenaries should accordingly be punished as criminals.

Protocol I introduced a welcome change in the law by prohibiting the use of mercenaries in international armed conflicts, which in light of the aforementioned state practice was already gaining *opinio juris*⁶⁹. For a person to be classified as a mercenary he must satisfy all six criteria as listed in Art 47. Since the requirements

⁶⁸ See, e.g., SC Res. 226 (1966), SC Res. 241 (1967); GA Res. 2395 (XXIII), all relating to Angola and Portugal.

⁶⁹ Art 47 of AP 1.

listed are cumulative they are extremely difficult to prove thereby permitting mercenaries not to be classified as such. Persons classed as mercenaries are not exempt from all protections and are ensured the fundamental safeguards embodied in Art 75 of AP 1.

In 1977 the OAU adopted a Convention for the elimination of mercenarism in Africa. The preamble of the Convention conveys concern 'with the threat which the activities of mercenaries pose to the legitimate exercise of the right of African People under colonial and racist domination to their independence and freedom'. Art 1(2) of the Convention defines the crime of mercenarism as being committed 'by the individual, group or association, representative of a State or the State itself who with the aim of opposing by armed violence a process of self-determination stability or the territorial integrity of another State' and goes on to list the prohibited acts. The Convention also contains an express obligation of states to 'prohibit on its territory any activities by persons or organisations that use mercenaries against any African State member of the Organization of African Unity or the people of Africa in their struggle for liberation'.⁷⁰

In a UN Report submitted by Mr. E.B. Ballestreros, Special Rapporteur on the question of the use of mercenaries, he claimed that,

83. ...no matter how they (mercenaries) are used or what form they take to acquire some semblance of legitimacy, mercenary activities are a threat to the self-determination of peoples and an obstacle to the enjoyment of human rights by peoples who have to endure their presence.⁷¹

He further claimed that,

84. ...The international legal instruments that serve as a framework for the consideration of the question are imperfect and contain gaps, inaccuracies, technical defects and obsolete terms that allow overly broad interpretations to

⁷⁰ Art 6(c) Convention of the OAU for the Elimination of Mercenaries in Africa 1977.

⁷¹ UN Doc. E/CN.4/1997/24, Commission on Human Rights.

be made in order to prevent persons who are in fact nothing but mercenaries from being classed as such.⁷²

(3) Dissemination

In light of the fact that persons acting on behalf of the state are able to commit breaches of the law of international armed conflict it is imperative that combatants and civilians alike are made aware of the relevant norms. Ignorance of the law is not a valid defence and this principle stands in the law of armed conflict. The Conventions and the Protocol accordingly impose an obligation on parties to disseminate the norms contained within these documents to their armed forces and to the civilian population.⁷³ Methods of dissemination are left to the discretion of the state and may range from instruction courses or commentaries on the documents, as done in the United States and Canada or by manuals dedicated to the laws of armed conflict.

The dissemination of knowledge of international humanitarian law must begin in peacetime to ensure that those who are obliged to comply with the obligations are aware of them. Although in the case of regular forces training on the rules of armed conflict in an integral part of military training, the possibility of providing such teaching to liberation fighters who are mostly without regular combat training is questionable.

The challenge of dissemination of humanitarian law to the plethora of participants involved in national liberation wars, namely freedom fighters, is severe considering the various irregular formations acting on behalf of the liberation cause. This inherent difficulty in the dissemination of the laws of armed conflict to freedom fighters will not exempt nor act as a mitigating factor from the attribution of criminal liability such a fighter will be held responsible for if he were to violate humanitarian law.

E International Humanitarian Law, Liberation Movements and the Terrorism Debate

Chapter 2 examined the distinction between terrorists and liberation fighters. At this stage it is important to discuss the effects of such a distinction in

⁷² Ibid.

⁷³ Art 1 Hague IV, Art 47 GCI, art 48 GCII, Art 127 GCIII, Art 144 GCIV, Art 83 AP I

terms of the applicable law in times of conflict. Why is it so important to be classified as a national liberation movement as opposed to a terrorist? Are terrorists under a different legal regime? Helen Duffy questions if 'al-Qaeda and other networks be considered parties to an armed conflict, to be defeated militarily in accordance with IHL (International Humanitarian Law), or should they properly be understood as criminal organisations, requiring effective law enforcement'.⁷⁴ Although there are numerous policy reasons, both, for and against considering Al-Qaeda and like terrorist organisations as being subject to international humanitarian law, this author is of the view that terrorists are governed under domestic criminal law and thus should be prosecuted as such.⁷⁵

The law presently dictates that states and national liberation movements, under the exceptional circumstances contained in Art 1(4) of Additional Protocol I, are the probable parties to an international armed conflict. Although a terrorist organisation may be under the command of a state party to an international armed conflict in which case it may be subject to international humanitarian law as part of the armed forces of the state, the terrorist organisation itself cannot be a party to an international conflict. Terrorists and terrorist organisations do not come within the scope of the law of armed conflict and thereby do not enjoy the protections accorded by international humanitarian law. The conflict that arose in Afghanistan following the military action that commenced on the 7 October 2001 by the United States and coalition forces against the state of Afghanistan represented by the Taliban was an international armed conflict even though the Taliban was espoused by Al-Qaeda forces. At the initiation of *Operation Enduring Freedom* the Taliban was the existing government. With Osama bin Laden's move to Afghanistan from Sudan, the Al-Qaeda organisation apparently formed an alliance with the Taliban and operated from within

⁷⁴ Duffy H, *The 'War on Terror' and the Framework of International Law*, (Cambridge: Cambridge University Press, 2005), 250

⁷⁵ Policy arguments on the modification of the law include: on the one hand, the need to adopt the law to reflect modern realities like the ability of non-state parties to engage in significant armed violence and the need for appropriate regulation. On the other hand, the regulation of activities of organisations like Al-Qaeda through the laws of armed conflict will seemingly confer legitimacy on what basically are criminal organisation and validate their violent actions as legitimate acts of war. The argument continues that international humanitarian law is unnecessary to regulate terrorist activity because it is effectively regulated by national and international criminal law.

Afghanistan.⁷⁶ Following the September 11 attacks the Taliban forces continued to harbour bin Laden and the perpetrators of the attacks claiming them to be innocent. Security Council resolution 1368 called on states to bring to justice the perpetrators, organizers and sponsors of these terrorist attacks and stressed that ‘those responsible for aiding, supporting or harboring the perpetrators, organizers and sponsors of these acts will be held accountable’. The operation was therefore not solely waged to bring to justice the perpetrators of the attacks but also to hold accountable the Taliban government for their support of the perpetrators. If the hostilities were, however, exclusively waged against Al-Qaeda forces the conflict would not amount to an international armed conflict governed by humanitarian law. This stance may be subject to change in the near future with commentators like Rogers endorsing that ‘until now, the law of armed conflict has always been considered to be a matter between states (unless a civil war), but the law has been moving slowly towards recognizing as quasi-states dissident armed faction and authorities representing liberation movements. It might be possible to argue that a state can be involved in an armed conflict against an organization.’⁷⁷

The original official position of the United States Administration with regards to persons detained in Afghanistan during the armed conflict is that they were not entitled to protected person status and afforded the safeguards under the Convention relative to the Treatment of Prisoners of War 1949 (Geneva Convention III).⁷⁸ When the United States began capturing Al Qaeda and Taliban prisoners, US officials consigned the detainees as ‘unlawful combatants’ whom the US regarded as not coming within the protections of GCIII. The detainees were nonetheless to be treated humanely. The legal rationale for denying these detainees prisoner of war status

⁷⁶ After the 1998 U.S. embassy bombings in Africa, Osama bin Laden and several Al Qaeda members were indicted in US criminal court. The Taliban refused requests by the US for the extradition of bin Laden on various grounds. Examples include the Taliban claiming that bin Laden had gone missing in Afghanistan and that the US could provide evidence or proof that bin Laden was involved in terrorist activities. For indictment

see <<http://f11.findlaw.com/news.findlaw.com/hdocs/docs/binladen/usbinladen1.pdf>>

⁷⁷ See comment of A.P.V. Rogers, ‘Terrorism and the Laws of War: September 11 and its Aftermath’, 21 September 2001, available at <http://www.crimesofwar.org/expert/attack-apv.html>

⁷⁸ Following the decision of the Supreme Court of the United States in *Hamdan v Rumsfeld*, *Secretary of Defence*, US Government accepted that Common Article 3 applied to persons detained in the ‘War on Terror’.

offered by the US was imprecise and varied with time. The US government implemented a policy which distinguishes between the groups of forces, the Taliban forces and the Al-Qaeda fighters. The initial justification put forward in denying the Taliban forces of prisoner of war status was that although the Taliban forces as the representative army of the state were technically within the scope of Geneva Convention III, they failed to satisfy the conditions necessary for classification as a combatant. With regards to Al-Qaeda fighters the United States position was that they amounted to non-state actors and therefore were not within the realms of international humanitarian law. In effect the provisions of GCIII were as inapplicable against the Taliban as they were against Al-Qaeda forces. The Taliban forces and Al-Qaeda forces, however, are entitled to the minimum fundamental guarantees provided in the laws of war as set out in Common Article 3 and Article 75 Additional Protocol. Notably, the US was initially reluctant to accept this notion despite acknowledged by other states and the ICRC. Acceptance only followed after the decision in *Hamdan*.

In this particular scenario although the forces of the representative government were only provided equal rights as of the terrorist group also involved in the conflict, had the Taliban forces complied with the conditions necessary to establish combatant status they would have enjoyed prisoner of war status. The fact that the many states and international humanitarian organisations condemned the approach of the US and contended that the US was breaching the fundamental protections afforded by GCIII although of relevance will not be examined here. The purpose of the examination was to establish the effect of national liberation movements not satisfying the necessary criteria for combatant status. The fundamental guarantees that the United States authorities, under international humanitarian law and international human rights law, are obliged to grant these detainees under Geneva Conventions confirm the importance of distinguishing between terrorists and liberation fighters.

The rhetoric 'war on terror' does imply an armed conflict of global proportions making operative the norms of international humanitarian law. Although the interventions in Afghanistan and Iraq initially involved international armed conflicts regulated by the laws of armed conflict the existence of an action pursued on behalf of the 'war on terror' does not guarantee the classification of the conflict as an international armed conflict ensuring the protection of humanitarian law.

States frequently classify their opponents as terrorists in an attempt to preclude application of the laws of armed conflict. National liberation movements are heavily

dependent upon their classification as such to ensure with absolute certainty the applicability of international humanitarian law and to prevent selective implementation of the laws of war by the adversary state.

-Commission of Terrorist Acts in Liberation Wars

In a message from the President of the United States regarding Additional Protocol II, President Reagan commented briefly on the reasons why Protocol I was not to be forwarded to Senate for consent to ratification. It was concluded that,

In key respects Protocol I would undermine humanitarian law and endanger civilians in war. Certain provisions such as Article 1(4), which gives special status to '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', would inject subjective and politically controversial standards into the issue of the applicability of humanitarian law. Protocol I also elevates the international legal status of self-described 'national liberation' groups that make a practice of terrorism. This would undermine the principle that the rights and duties of international law attach principally to entities that have those elements of sovereignty that allow them to be held accountable for their actions, and the resources to fulfil their obligations.⁷⁹

On the amended duty to distinguish obligation the message read, 'As the essence of terrorist criminality is the obliteration of the distinction between combatants and non-combatants, it would be hard to square ratification of this Protocol with the United States announced policy of combating terrorism'. This quotation reveals the US President's rejection of Protocol I on the grounds that the document affords international status to national liberation movements who purportedly resort to terrorist practices. The Reagan Administration's criticism of Protocol I, as a treaty which promotes terrorist activity, is founded on the two articles most useful to

⁷⁹ *Message from the President of the United States*, US Government Printing Office, 100th Congress, 1st session, Treaty doc. 100-2, Washington, 1987. It was concluded that, 'I believe that U.S. ratification of agreement which I am submitting to you for transmission to the senate, Protocol II to the 1949 Geneva Conventions, will advance the development of reasonable standards of international humanitarian law that are consistent with essential military requirements'.

national liberation movements; Art1 (4) and Art 44(3). Application of the laws of war to national liberation wars does not validate the use of terrorist practices by the liberation fraction. Use of terrorist methods by national liberation movements will result in censure of the movement or the relevant fighter for terrorist or international humanitarian law offences and, more generally, affect the credibility of the movement in the eyes of the international community.

Sofaer characterizes Protocol I as a 'significant success' for 'radical groups (seeking) to acquire legal legitimacy'.⁸⁰ The accuracy of this statement is extremely questionable in light of the example of Afghanistan and also given that Protocol I expressly seeks to restrict terrorist tactics. In particular, Art 51(2) prohibits 'Acts or threats of violence the primary purpose of which is to spread terror among the civilians population'. Freedom fighters who comply with the laws of war have no common characteristics with terrorists operating during wartime and Additional Protocol I provides an effort to avoid labelling freedom fighters as terrorists.

Conclusions

Liberation wars have gradually acquired a status separate and distinct from civil wars and other internal conflicts and can no longer be classified purely in terms of its geographical attributes.⁸¹ The rising regularity of liberation conflicts and the brutality involved in such conflicts mean that the atrocities resulting from such struggles are extensive. The suffering, death and destruction that liberation wars entail meant that they were conflicts that could no longer be ignored by the international community. Additional Protocol I was pioneered to allow the application of the laws of armed conflict in national liberation wars in an attempt to introduce the principles of humanity to such conflicts and mitigate the consequences of such conflicts.

⁸⁰ Sofaer, 'The Rationale for the United States Decision', p 912.

⁸¹ Detter, *The Law of War*, p 49.

CONCLUSIONS

As repeatedly asserted in the previous Chapters, the founders of the Charter envisioned and intended for the Charter to be a living instrument, able to dynamically adapt and respond to new challenges and conditions. Having examined the evolution of the principle of self-determination, through mainly the apparatus of the United Nations system, it can be concluded with virtual certainty that the principle of self-determination as contained in the Charter has evolved through years of state practice into a fully fledged legal right. The mere fact that it is arguable whether the right to self-determination has attained the status of *jus cogens* is indicative of the extent to which the principle has developed. Despite the difficulties in defining the precise scope of the right and ensuring its enforcement, it is definite that peoples entitled to such a right possess some status and certain rights under international law. Admittedly the right to self-determination does not operate in a legal vacuum. Various other principles and norms, such as territorial integrity and the prohibition on the use of force, both those beneficial and unfavourable for the enforcement of the right to self-determination, operate in the regulation of the acts of international legal personalities. Given that these principles do not always complement each other there is an essential need for clarification of the content of the right to self-determination.

It is inevitable that groups claiming to be the legitimate representation of a people will continue to make fervent claims to attain self-determination. The probability is that the international community will strongly deny such rights. This thesis has shown that the legitimate right to self-determination makes operative many other ancillary international norms necessary to secure the enforcement of the former right. States, also, have various rights and obligations when responding to a claim to self-determination by national liberation movements. It is essential, therefore, for a state to provide a consistent legal basis for resisting or opposing such claims. Given the extreme interdependence of states in the international community today it is in the interests of all states, and not exclusively the state facing the liberation conflict, to be aware of the legalities resulting from a self-determination claim. The *Declaration on Friendly Relations* confirms that

liberation movements have the right to 'seek and receive support and assistance' in their pursuit of the right to self-determination inferring not only that liberation movements have the capacity to possess rights and thereby have *locus standi* in international law but also that third party states are not always non-actors in these scenarios. Living in an interdependent world means that many of today's threats recognize no national boundaries, are interlinked, and must be tackled at the global, regional and national levels in accordance with the Charter and international law.

Recognition of an entity is inextricably linked with the entry into the arena of legal relations. The recognition of a national liberation movement claiming the right to self-determination is crucial for the pursuit of the right. As discussed in Chapter 2 it is in the interest of the liberation movement to establish international legal personality because it will allow rights and obligations in international law although not entirely akin to the rights and obligations held by states. Recognised national liberation movements therefore have the ability to possess 'limited' legal personality and will possess certain rights and obligations under international law. In addition to equipping the movement with the necessary international rights to pursue the right to self-determination being labelled a legitimate liberation movement guarantees that the movement is distinguished from terrorists. The adverse repercussions following from not being able to make the distinction between a freedom fighter and a terrorist have been discussed in detail. In light of the present fixation with the threat posed by terrorism and the lack of a patent distinction between national liberation movements and terrorists, recognition of the liberation movement as the legitimate representation of a people and the consequential grant of international legal personality will ensure the movement is not deprived of the legal protections provided by international law.

At its initiation, the United Nations Charter adopted a peace-based application of the general principles that was given precedence to the justice-based application. These two applications have, with time, exchanged in priority with the peace-based approach currently subordinate, or perhaps equal, to the justice approach. Therefore, when reconciling the right to self-determination with the prohibition on the use of force there is seemingly the re-emergence of the just war doctrine, a concept which allowed the resort

to war undertaken for a just cause. Resort back to the just war doctrine is not desirable as it is accompanied by problems including having to subjectively determine whose cause is just and whose is not. The question arises if the legitimacy of the peoples cause justifies the means used to achieving that result. There are many United Nations resolutions to suggest that national liberation movements may use force against the unlawful use of force by the constituted government or in hostilities initiated by the movement in instigating a liberation war. Many states uphold the view that national liberation movements may legitimately resort to the use of force to secure the right to self-determination. The consistent conduct of states acting through state practice or the principal organs is a valuable and necessary tool in filling the lacunae or removing any ambiguities of the Charter regime.¹ On inspection of the relevant UN resolutions, particularly resolutions adopted in relation to specific situations, the tendency has been towards the acceptance of the legitimacy of the peoples 'struggle' for their right to self-determination. Despite this widely held acceptance, an influential minority of states have persistently opposed the acceptance of a national liberation movement's right to use force. Such opponents will condemn, in this context, the use of subsequent practice as a means of interpreting, modifying and amending a treaty and claim that 'sole reliance on practice as the test of legality is not acceptable as it will cause an increased unilateralism, with states attempting to alter international rules and norms at will'.² As a result, it cannot be confirmed that a right to use force in pursuit of the right to self-determination exists as a customary norm. In contrast, it is undeniable that the use of force to deny the peoples of the legitimate right to self-determination is prohibited.

The changing status of national liberation movements has affected the rules pertaining to the law of war applicable to such fractions. Art 1(4) reinstates the assertion that self-determination wars are not an internal matter but falls within the realm of international law. Notably the status afforded to national liberation movements has persisted in more recent conventions, for example the 1981 Convention on Prohibitions

¹ Art 31(3) VCLT.

² Rosenne, *Developments in the law of treaties*, (Cambridge: Cambridge University Press, 1989), p 244.

or Restrictions on the Use of Certain Conventional Weapons.³ Thus there is capacity for national liberation movements to benefit from treaties, however restrictive or conditional such benefit may be. Admittedly, in contrast to the universal participation that the Geneva Conventions of 1949 have received, the Protocols, both Additional Protocol I and Additional Protocol II, have not gained similar acceptance.

The inclination should be for the national liberation movement involved in a struggle against colonial domination, alien occupation and racist regimes to adhere to the Geneva Conventions in an attempt to 'internationalize' the conflict. Compliance with these norms of war portrays the liberation movement in a favourable light by demonstrating the movement's endeavour towards decorum and legality. The liberation movement concerned reserves an extremely superior advantageous position by complying with the laws of war. States may be unwilling to accept that their opponents have rights in international law but their fear of appearing inhumane and the likelihood of reciprocal treatment against their own combatants by the liberation movements may in situations compel the observation of the laws and customs of war.

An examination of the *jus ad bellum* and *jus in bello* applicable in liberation conflicts reveal that there has been a progression towards the grant, if not acknowledgment, of rights necessary to the liberation movement to pursue the right to self-determination. Certain issues are still however laced with uncertainty. If the fundamental motifs of the United Nations, peace and justice, are to be delicately balanced there remains a need to resolve these issues further.

³ See Art 7(4) of the Convention.

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