INTERNATIONAL LAW AND WARS OF NATIONAL LIBERATION AGAINST NEO-COLONIALISM*

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ABSTRACT

The evolution of the right to self-determination and the increasing emergence of "non-state-actors" have brought international humanitarian law under scrutiny. This paper questions the state monopoly on violence in the contemporary context of neo-colonialism. Granting that none of the forms of colonialism envisaged in Article 1(4) of Protocol 1 of the Geneva Convention exists today, the paper argues for a normative framework that calls for the internationalization of wars of national liberation against neo-colonialism. Under this framework, it is argued that a liberal construction of Article 1(4) of Protocol I, which would expand its scope from armed struggles against colonialism to wars of national liberation against neo-colonialism, must be accepted. Applying the framework to the Philippine context, this paper examines the Comprehensive Agreement on Respect for Human Rights and International Humanitarian Law, by which both the Philippine Government and the National Democratic Front of the Philippines bound themselves to promote the full scope of human rights and comply with international humanitarian law during the conduct of hostilities.

"A revolution is the handiwork of patience."
—Edel Garcellano[1]

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[1] *For (Monico Atienza), in* VANISHING HISTORY AND OTHER POEMS (2012).

INTRODUCTION

Armed conflict is a complex issue that has entailed a great deal of ruin and affliction, mostly among civilian populations.[2] The world has been its theater, but the actors are no longer the same. Since the Clausewitzian inter-state wars of old, "non-state actors" have emerged all over the globe, dramatically challenging the monopoly of states over the use of force. They have also presented difficult legal questions and engaged the role of international humanitarian law in the regulation of hostilities. As of 2006, there were 26 armed conflicts occurring within the boundaries of states.[3]

During the mid-twentieth century, contemporary armed conflicts called "wars of national liberation" were fought by peoples under colonial domination, alien occupation, and racist regimes. These wars brought the "decolonization" of European colonial empires in the African continent during the 1960s and 1970s.[4] Decolonization gave way to the formal recognition of the right to self-determination by the United Nations and the international community. But after decolonization, wars of national liberation did not abate, most of them recurring in the very states that became newly independent.[5] Some of these "non-international armed conflicts" are impelled by a nuance of the *casus belii* of liberation wars called neo-colonialism, which is the focus of this study.

This study is motivated by the same desire of civilized nations to alleviate human suffering and destruction in situations of conflict. It seeks to offer an alternative view of international humanitarian law, which, in its current typology, fails to accommodate the legitimate assertion of self-determination in the neo-colonial setting and regulate liberation wars against neo-colonialism.

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[2] International Committee of the Red Cross (hereinafter "ICRC"), *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts* (A Report for the 31st International Conference of the Red Cross and the Red Crescent, Nov. 28 – Dec. 1, 2011), 31 IC/11/5.1.2 (October 2011), *available at* http://www.icrc.org/eng/assets/files/red-cross-crescent-movement/31st-international-conference/31-int-conference-ihl-challenges-report-11-5-1-2-en.pdf.

[3] Noelle Higgins, *The Regulation of Armed Non-State Actors: Promoting the Application of the Laws of War to Conflicts Involving National Liberation Movements,* 17 No. 1 HUM. RTS. BRIEF 12-8 (2009), *citing* J. JOSEPH HEWITT, JONATHAN WILKENFIELD & TED ROBERT GURR, PEACE & CONFLICT 12 (2008).

[4] Heather Wilson, *International Law and Use of Force by National Liberation Movements,* 84 AM. J. INT'L L. 981 (1990).

[5] Higgins, *supra* note 3, at 12. These included "conflicts waged by groups representing the Palestinian people, the Corsicans in France, and the Chechens in Russia. Additionally, in 2008 the South Ossetians, with support from Russia, declared independence from Georgia after an armed struggle."

The normative framework in this study argues mainly that wars of national liberation against neo-colonialism are international in character. The fourth paragraph of Article 1, Protocol I, which enumerates the different types of "international armed conflict," should be interpreted to include liberation wars against neo-colonialism. As such, they fall under the ambit of core international instruments covering international armed conflicts: the Geneva Conventions and Protocol I. The normative framework is primarily anchored on the theory (also called the national liberation framework) that national liberation movements enjoy a privileged status in international law.[6] The rest of the analytical approach of the framework is briefly discussed after this introduction.

Part I (BACKGROUND) traces the development of self-determination from the late 17th century to the mid-twentieth century. The section WHO ARE "PEOPLES"? answers the contentious question as to who are the holders of the right to self-determination. This section incidentally discusses the two types of self-determination—internal and external—and the grounds upon which a "minority" may properly exercise them.

Part II (THE DICHOTOMY OF ARMED CONFLICTS IN INTERNATIONAL HUMANITARIAN LAW) probes into the place of wars of national liberation in the dichotomy of international and non-international armed conflict. This part provides how the concept of non-international armed conflict materialized in international humanitarian law, specifically in Common Article 3 of the Geneva Conventions and Protocol II.

Part III (NORMATIVE FRAMEWORK: WARS OF NATIONAL LIBERATION AGAINST NEO-COLONIALISM) consists of three main sections corresponding to the main arguments of the normative framework. It begins by introducing the makings of a neo-colony based on the writings of African scholars.

In the section A LIBERAL CONSTRUCTION, a desirable interpretation of Article 1(4) of Protocol I is made using a simple exercise in statutory construction. In this section, the law is read together with other precepts of international law and jurisprudence.

A LEGAL THEORY OF REVOLUTION is a review of the national liberation framework as the basic premise of this study. It highlights the international character of the right to self-determination alongside generally accepted principles of international law, such as territorial sovereignty and state-centrism. Certain myths about the state's monopoly on violence are dispelled in a sub-

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[6] *See generally* Raul C. Pangalangan & Elizabeth H. Aguiling, *Privileged Status of National Liberation Movements in International Law*, 58 PHIL. L.J. 3, 44-65 (1983).

section, which mainly argues that the right to self-determination in a neo-colonial setting unavoidably gives rise to the concomitant right to revolution or resort to the use of force.

A HUMANITARIAN PERSPECTIVE uses a comparative analysis of the two regimes of international humanitarian law to justify the need for the internationalization of liberation wars. The section also touches on some difficulties that national liberation movements have already experienced in their attempt to apply the Geneva Conventions and Protocol I to their armed conflicts.

Part IV (THE CASE OF THE PHILIPPINES AND THE NDFP) is an application of the normative framework to the Philippines, where an armed conflict has been taking place between the government and a national liberation movement. The sections US COLONIALISM IN THE PHILIPPINES and US NEO-COLONIALISM IN THE PHILIPPINES lay down the historic foundations of the ongoing armed conflict in the country. A brief background is also provided on the National Democratic Front of the Philippines (NDFP). The section REALITIES ON THE GROUND tackles thorny contemporary issues regarding the political and military strategies employed by the Philippine government in crushing the armed conflict. This discussion mainly takes issue with the underhanded "terrorist" tack of the State, which has cost the security and lives of many Filipino civilians. Using concrete realities in the battlefield, some insights are also provided in support of the immense humanitarian significance of internationalizing liberation wars against neo-colonialism.

FINAL WORDS contains a brief survey of this study's thesis and findings, as well as an invitation to a further study and application of the normative framework to other cases.

APPROACH

This study rejects the traditional view that states have always been the sole actors to legitimately wage war, which originated from the new system of political order in Europe based on the Peace of Westphalia in 1648. Since then, sovereign states exercised a monopoly on violence, wielding the same against other sovereign states.[7] This monopoly ended when peoples under oppressive and colonial regimes used armed force during the mid-twentieth century, which

[7] Orla Marie Buckley, *Unregulated Armed Conflict: Non-state Armed Groups, International Humanitarian Law, and Violence in Western Sahara,* 37 N.C. J. INT'L L. & COM. REG. 3 (2012).

exercise in fact crystallized into what is now known as the right to self-determination.

The subject-matter in this study is also approached by rejecting the orthodox geo-military framework of revolution, which "hinges upon one determinant factor: the extent of effective control by parties to the conflict, as ascertained on a geo-military scale."[8] Professors Raul Pangalangan and Elizabeth Aguiling (now Aguiling-Pangalangan) criticized this old framework, thus:

> The chief flaw of this framework is that while the world community has evolved international legal safeguards to minimize the human costs of armed conflict, international law itself—by its stubborn insistence on the *strict* categorizing of rebel groups based primarily on their effective strength—has precluded the application of these legal restraints in those cases where they are needed most, i.e., in internal armed conflicts, where there is an appalling asymmetry between the protagonists in terms of men, organization and firepower.
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> For unless the rebels have attained the requisite degree of success, international law is deemed inapplicable, deferring to the presumptive primacy of the domestic jurisdiction of the sovereign state. Until then, therefore, the rebels are subject to the impunity of a fevered state whose national security so-called is gravely threatened. Thus, international law comes to the rebels' succor precisely when those rebels are strong enough to demand that it do so. Law, as always, is on the side of the heaviest battalions.[9]

In place of this traditional view, Pangalangan and Aguiling advanced the national liberation framework, which is the foundation of the normative framework in this study:

> The national liberation theory of internationalisation is the complete reverse of the basic theory of old. Wars of national liberation are international in character because they express the extent to which contradictions in global relations have been internalized within the boundaries of a nation state. Legally formulated, the new criterion is the international nature of the rights being internally violated within the boundaries of a state. While the old theory measures the extent to which an internal conflict reaches out to the world community and affects outside parties, the new theory examines the extent to which international sources of tension creep into the domestic affairs of a state.[10]

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[8] Pangalangan & Aguiling, *supra* note 6, at 44.

[9] *Id.*

[10] *Id.* at 56.

Finally, this study disavows the use of the three stages of internal armed conflict in classical international law—rebellion, insurgency and belligerency[11]—in the analysis of liberation wars. This categorization was "not much of practical use" to wars of national liberation due mainly to "a lack of clarity, political will, and state practice."[12] The recognition of belligerency, the highest of the three stages, was the only instance where the *jus in bello* could be made to apply to an internal armed conflict, but such state was never recognized in a war of national liberation.[13] Only the state involved in the conflict or a third state could bestow such recognition, and given the unwillingness of states to ascribe the status of "co-belligerent" to their adversaries, such was not always forthcoming. The doctrine seems to be obsolete, moreover, not having been applied since the Boer War in 1902.[14]

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[11] *See* LINDSAY MOIR, THE LAW OF INTERNAL ARMED CONFLICT 4 (2004). Moir discussed these stages thus:

"Rebellion was a modest, sporadic challenge by a section of the population intent on attaining control. Provided the uprising could be dealt with swiftly and effectively in the normal course of internal security, the conflict remained fully domestic. No international restraints on conduct were applicable, and the rebels had no rights or personality in international law, remaining punishable under municipal law.

"Insurgency referred to a more substantial attack against the legitimate order of the State, the rebelling faction being sufficiently organised to mount a credible threat to the government. Insurgency, so far as foreign states are concerned, results, on the one hand, from the determination [...] not to recognise the rebellious party as a belligerent on the ground that there are absent one or more of the requirements of belligerency. On the other hand, recognition of insurgency is the outcome both of the unwillingness of foreign states to treat the rebels as mere law-breakers, and of the desire of those States to put their relations with the insurgents on a regular, although clearly provisional basis [...] It may prove expedient to enter into contact with the insurgent authorities with a view to protecting national interests in the territory occupied by them, to regularising political and commercial intercourse with them, and to interceding with them in order to ensure a measure of humane conduct of hostilities. Recognition of insurgency conferred no formal status on either party, and was certainly not regarded as according belligerent rights, although certain rights and duties were brought into play.

"The final stage was reached when the insurgents were extended recognition as belligerents, which amounted to a declaration by the recognising party that the conflict had attained such a sustained level that both sides were entitled to be treated in the same way as belligerents in an international conflict. Recognition, whether of insurgency or belligerency, was, however, different from recognition of the insurgent party as the government of the afflicted State. It was simply recognition of the fact of the existence of war: It [did] not involve recognition of any government or political regime, nor [...] any expression of approbation or disapprobation or indicate any sympathy for or prejudice against the cause for which either side[.]"

[12] Noelle Higgins, *The Application of International Humanitarian Law to Wars of National Liberation*, J. HUMANITARIAN ASSISTANCE (2004), *at* www.jha.ac/articles/a132.pdf (last accessed Oct. 22, 2012).

[13] *Id.*

[14] DAVID ARMSTRONG, THEO FARRELL & HELENE LAMBERT, INTERNATIONAL LAW AND INTERNATIONAL RELATIONS 199 (1st ed. 2007). *But see* Francois Bugnoin, *Just Wars, Wars of*

I. BACKGROUND

> *"Decolonization never takes place unnoticed, for it influences individuals and modifies them fundamentally. It transforms spectators crushed with their inessentiality into privileged actors, with the grandiose glare of history's floodlights upon them. It brings a natural rhythm into existence, introduced by new men, and with it a new language and a new humanity."*
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> —Frantz Fanon[15]

Championing wars against despotic regimes and colonial subjugations had founded new nation-states and re-ordered the world. The American Revolution against Great Britain (1775 – 1783), the Cuban War of Independence against Spain (1868 – 1878), the Indonesian Revolution against the Netherlands (1945 – 1949), the Algerian War against France (1954 – 1962), and the Bosnian War against Yugoslavia (1992 – 1995) are only a few examples of wars of national liberation.

What then is a war of national liberation? A *war of national liberation* is defined as "the armed struggle waged by a people through its liberation movement against the established government to reach self-determination."[16] Examples are the Colombian guerrilla movements, the Zapatista Army of Liberation, the Palestinian Liberation Organization (PLO), and the Liberation Tigers of Tamil Eelam in Asia.

Self-determination is "the freedom of the people of an entity, with respect to their own government, to participate in the choice of authority structures and institutions and to share in the values of society."[17] Today, international treaty law defines it as the freedom of peoples to determine their political status and freely pursue their economic, social and cultural development.

Aggression and International Humanitarian Law, 847 INT'L REV. RED CROSS 84, 523-54. Bugnoin says that the doctrine of belligerency was also applied in the civil war in Nigeria in the late 1960s.

[15] THE WRETCHED OF THE EARTH (1963).

[16] Natalino Ronzitti, *Resort to Force in Wars of National Liberation*, *in* ANTONIO CASSESE, CURRENT PROBLEMS OF INTERNATIONAL LAW 319-353 (Dott. A. Guiffre, ed., 1975).

[17] *See* YONAH ALEXANDER & ROBERT FRIEDLANDER, SELF-DETERMINATION: NATIONAL, REGIONAL AND GLOBAL DIMENSIONS 314 (1980), *citing* John Norton Moore, *The Control of Foreign Intervention in Internal Conflict,* VA. J. INT'L L. 209, 247 (1969).

A. The Right to Self-Determination and the Process of Decolonization

The history of self-determination can be traced to the dynastic age following the 1648 Peace of Westphalia. In this era, the rule of monarchy in the name of God persisted until the American and French revolutions, but not without enlightened opposition from great thinkers like Jean Jacques Rousseau and John Locke. On July 4, 1776, the 13 independent American states adopted their *Declaration of Independence*, whereby they instituted governments that would "derive their just powers from the consent of the governed" and would secure the "inalienable rights" of men. The French Revolution (1787 – 1799) later deposed monarchic rule and asserted the equality of all peoples. The principle of *Liberte, Egalite, Fraternite* ousted the divine right philosophy, while the *Declaration on the Rights of Man and Citizen* provided for the principles of "respect for their independence and sovereignty, the condemnation of war and aggression, and non-intervention," which principles were to serve as "foundations of the new society." [18] Self-determination then was a "logical consequence" of the recognition of individual human rights and the idea of the nation-state.[19]

In 1815, the Congress of Vienna restored the European balance of power by allowing "previous methods of ceding and partitioning the territories of sovereign states without consulting the populations concerned."[20] But self-determination, then in the form of "nationality principle," prevailed in the Greek and Belgian independence, the series of revolutions in the 1840s, and the Italian plebiscites that led to the unification of Italy.

During the early 20th century, the Bolshevik revolution espoused the historic-economic concept of self-determination, as developed by Vladimir Lenin and Josef Stalin from the earlier works of Karl Marx and Frederick Engels. According to Lenin, the right of nations to self-determination in Clause 9 of the Russian Marxists' Programme means the "political separation of these nations from alien national bodies, and the formation of an independent national state" that do not serve the requirements of modern capitalism.[21] But this principle of

[18] ENVER HASANI, SELF-DETERMINATION, TERRITORIAL INTEGRITY AND INTERNATIONAL STABILITY: THE CASE OF YUGOSLAVIA 90-91 (2nd ed. 2003), *citing* S. Calogeropoulos-Straits, *Les droit des peuples a disposes d'eux memes* (1973).

[19] *Id.*

[20] *Id.* at 60.

[21] VLADIMIR LENIN, THE RIGHT OF NATIONS TO SELF-DETERMINATION (1914.)

self-determination was envisioned not as an end in itself, and was merely a strategic means to further the objectives of world communism.[22]

After World War I, self-determination was conceived as "a guide to the conduct of day-to-day international relations."[23] In 1916, the memorandum prepared by the British Foreign Office declared that national aspirations must be considered as "an essential condition of peace" in the impending territorial settlements. On January 8, 1918, President Woodrow Wilson's *Fourteen Points Address* before the United States Congress affirmed this principle and introduced it into public discourse. In the said speech, Wilson stated that the "consent of the governed was one of the basic conditions for world peace and stability[.]"[24] Wilson's attitude on self-determination did not actually sit well with international practice at the time,[25] but his view reflects self-determination as it is understood today.[26]

The Åland Islands case of 1921[27] is said to be the first self-determination case in international law. After World War I, a Swedish-speaking population inhabited the islands off the Swedish coast in the Baltic Sea. But as the said islands belonged to Finland after the latter's independence from Russia, a territorial dispute ensued between Sweden and Finland. The Council of the

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[22] *See* Daniel Thürer & Thomas Burri, MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, *at* http://www.mpepil.com/sample_article?id=/epil/entries/law-9780199231690-e873&recno=5& (last accessed Oct. 22, 2012).

[23] HASANI, *supra* note 18, at 69.

[24] *See id.* at 80, *citing* William E. Dodd, *Wilsonism,* 38 POL. SCI. Q. 115-132 (1923). Wilson seems to have been convinced that only through the espousing of full self-determination there can be avoided the practice of the balance of power in international system. To avoid this, he declared in his famous Fourteen Points and during the first days of the Paris Conference that the respect for the consent of the governed was one of the basic conditions for world peace and stability. His idea of the League of Nations was to serve this purpose as well. *See* ARTHUR WALWORTH, WOODROW WILSON. BOOK TWO: WORLD PROPHET 176-198 (1978); RUTH CRANSTON, THE STORY OF WOODROW WILSON 280-292 (1945).

[25] Allied and associated powers did not support Wilson's proposal to include self-determination in the Covenant of the League of Nations. The final draft referred "only to the respect for territorial integrity and existing political independence of the Members of the League of Nations." *Id.*

[26] HASANI, *supra* note 18.

[27] "During the union between Sweden and Finland, the Aaland Islands formed part of the administrative division of Finland, but were ceded to Russia by the Treaty of 17 September 1809 (60 C.T.S. 457). By the Convention of March 30, 1856, annexed to the Treaty of Paris between Russia and France and Great Britain (114 C.T.S. 405), Russia was constrained to declare that the islands should not be fortified. Upon the attainment of independence by Finland, the question of their status and future fell to be considered by the Council of the League of Nations." OXFORD ENCYCLOPAEDIC DICTIONARY OF INTERNATIONAL LAW, *available at* http://www.oxfordreference.com/view/10.1093/oi/authority.20110803095342699?rskey=xOCh SW&result=2.

League Nations took cognizance of the case and adopted a resolution recognizing Finland's sovereignty over the Åland Islands, but "recommended autonomy for the territory and guarantees for the local population that would preserve its Swedish language, culture and local traditions." Furthermore, the Council recommended that the islands remain demilitarized, non-fortified and neutral. The case was settled not by granting full independence to the people, but by allowing them to pursue their culture and preserve their identity. Self-determination, hence, was delimited by the principles of sovereign stability and territorial integrity.

During the mid-twentieth century, national liberation movements across the continents spearheaded the break-up of Western colonial empires. The UN provided an adequate forum for the increasing numerical strength of anti-colonial nations to transform the precept of self-determination into a universal right.

The UN Charter adopted in 1945 was the first international instrument to expressly mention the term "self-determination." Article 1(2) thereof states:

> The purposes of the United Nations are:
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> * * *
>
> 2. 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[.] (Emphasis supplied.)

This is affirmed in Article 55 of the Charter, which provides:

> With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations *based on respect for the principle of equal rights and self-determination of peoples*, the United Nations shall promote:
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> a. Higher standards of living, full employment, and conditions of economic and social progress and development;
>
> b. Solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and
>
> c. Universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion. (Emphasis supplied.)

Afro-Asian nations made their first major offensive in the Bandung Conference held in 1955. It was declared therein that "colonialism in all its manifestations is an evil which should speedily be brought to an end."[28]

The landmark *Declaration on the Granting of Independence to Colonial Countries and Peoples* ("Declaration"), embodied in Resolution 1514 (XV) of December 14, 1960 of the UN General Assembly (UN GA), affirmed the right of all peoples to self-determination, including non-self-governing and trust territories.[29] The second preambular paragraph recognized the "need for the creation of conditions of stability and well-being and peaceful and friendly relations based on respect for the principles of equal rights and self-determination of all peoples." The Declaration further stated: "The subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and co-operation." By this time, 17 former colonies had been admitted to the UN as newly independent nations.

Two years later, the UN formed the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence of Colonial Countries and Peoples (also known as Special Committee on Decolonization) to monitor the implementation of the Declaration. Thereafter, several national liberation movements were granted observer status in various UN organs and activities.[30]

On December 20, 1965, the UN GA recognized the struggle of colonial peoples against colonial domination with Resolution 2105 (XX) and exhorted the States to provide material and moral support to national liberation movements in colonial territories. This was reiterated in Resolution 2621 (XXV) of October 12, 1970, "claiming prisoner-of-war treatment under the Third Convention for freedom fighters under detention."[31]

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[28] *Final Communiqué of the Asian-African Conference of Bandung* (1955).

[29] CLAUDE PILLOUD ET AL., COMMENTARY TO THE PROTOCOL ADDITIONAL TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, AND RELATING TO THE PROTECTION OF VICTIMS OF INTERNATIONAL ARMED CONFLICTS (PROTOCOL I) 8 JUNE 1977 (1987), *available at* http://www.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?documentId=D9E6B6264D7723C3C12563C D002D6CE4&action=openDocument (last accessed Oct. 22, 2012). (Hereinafter "ICRC COMMENTARY.")

[30] The Palestinian Liberation Organization (PLO) was granted non-state observer status in 1974, while the South West Africa People's Organization (SWAPO) was granted observer status from 1976. Both the PLO and the SWAPO have been conferred full observer status by the UN GA.

[31] ICRC COMMENTARY, *supra* note 29.

The UN GA on October 24, 1970 adopted the *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States*, which devoted eight paragraphs to "the principle of equal rights and self-determination of peoples." These rights were particularly stated as follows:

> a. All peoples have the *right freely to determine their political status;*
>
> b. Every *State* has *the duty to respect* this right and to *promote its realization*;
>
> c. Every *State* has the *duty to refrain* from any *forcible action which deprives* peoples of this right;
>
> d. In their *actions against, and resistance* to, such forcible action, *peoples are entitled to seek and receive support* in accordance with the purposes and principles of the Charter;
>
> e. Under the Charter, *the territory of a colony or other non-self-governing territory* has a *status separate and distinct from that of the State* administering it.[32] (Emphasis in the original.)

The UN GA Resolution 2200A (XXI), dated December 16, 1966, adopted and opened for signature, ratification and accession by the UN GA the International Covenant on Economic, Social and Cultural Rights (ICESCR), which entered into force on January 3, 1976. Article 1(1) thereof states: "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." Paragraph (3) of the same provision gave the states parties to the Covenant, including those having responsibility for the administration of non-self-governing and trust territories, the positive duty to "promote the realization of the right to self-determination" and "respect that right, in conformity with the provisions of the Charter of the United Nations."

Similarly, UN GA Resolution 2200A (XXI) of December 16, 1966 adopted and opened for signature, ratification and accession by the GA the International Covenant on Civil and Political Rights (ICCPR), which entered into force on March 23, 1976. Article 1 thereof is identical with that of the ICESCR, and affirms that all peoples have the right to self-determination.

In December 1973, the UN GA adopted Resolution 3103 (XXVIII), entitled *Basic Principles of the Legal Status of the Combatants Struggling Against Colonial and Alien Domination and Racist Régimes.* Its preamble stated that the Third and Fourth Geneva Conventions of 1949 should apply to combatants struggling

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[32] *Id.*

against colonial and alien domination and racist regimes, and recommended the drafting of additional instruments that would amplify the protection for these combatants. The Resolution recognized the legitimacy of the struggle against colonial and alien domination and racist regimes in the exercise of the right to self-determination, saying that any attempt to suppress such struggles is not only incompatible with the UN Charter and other relevant international instruments, but also constitutes a threat to international peace and security. Furthermore, such armed struggles are international armed conflicts in the sense of the Geneva Conventions.[33]

More than 80 former colonies (composed of about 750 million people) have been decolonized since the creation of the UN while, as of this writing, 17 non-self-governing territories ("NSGTs") remain to be decolonized.[34]

B. Who are "Peoples"?

In the traditional sense, the exercise of self-determination for the attainment of a new statehood serves to rationalize the state-centric international order. In the revolutionary sense, self-determination is expressed not "in the normal functioning of existing participating processes and in the duty of other States not to interfere but in the existence and free cultivation of an authentic communal feeling, a togetherness, a sense of being 'us' among the relevant group."[35] But who constitutes the "us"? Who are those "peoples" who may exercise the right to self-determination?

Aside from the fact that the word "peoples" denotes groups of people and not individuals, there is no settled definition of the term in international law. The debate surrounding this definition has centered largely on ethnicity, which is problematic because of its fluid nature.[36] Kathleen McVay said that "[i]t may be practically impossible, or undesirable to select peoples who have a right to self-determination on the basis of ethnicity alone."[37] She observed that the practice of the UN and some individual states in recognizing ethnic self-determination has been inconsistent because it does not rest on a single definable principle.[38]

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[33] *Id.*

[34] *The United Nations and Decolonization, at* http://www.un.org/en/decolonization/ (last accessed Apr. 3, 2013).

[35] Martti Koskenniemi, *National Self-Determination Today: Problems of Legal Theory and Practice,* 43 INTL. & COMP. L. Q. 241-269 (1994).

[36] Kathleen McVay, *Self-determination in New Contexts: The Self-determination of Refugees and Forced Migrants in International Law,* 28 UTRECHT J. INT'L & EUROPEAN L. 36, 37 (2012).

[37] *Id.* at 39. (Citations omitted.)

[38] *Id.*

Rosalyn Higgins defined self-determination as a "right of the majority within an accepted political unit to exercise power."[39] Likewise, the concept of "people" in international law has traditionally referred to the "territorial unit of self-determination."[40] This "whole people" approach can be seen in the penultimate paragraph on self-determination in the UN Declaration on Friendly Relations, referring to people as "the whole people belonging to a territory." The ICCPR confirms this by distinguishing between the right to self-determination as belonging to "all peoples" in Article 1, and the rights of minorities in Article 27.[41] Such typical connotation of "people" conforms to the state-system in international law, particularly with the principle of sovereignty and "fundamental corollaries protective of state boundaries and political unity."[42] Under this view, the numerically inferior do not enjoy the right so as not to derogate territorial integrity, among other things.

In 1989, the UNESCO International Meeting Experts for the Elucidation of the Concepts of Rights of Peoples advanced another definition of the holders of the right to self-determination. The "Kirby definition," named after its principal drafter Justice Michael Kirby, identified a "people" as "a group of individual human beings who enjoy some or all of the following common features: a) a common historical tradition; b) racial or ethnic identity; c) cultural homogeneity; d) linguistic unity; e) religious or ideological affinity; f) territorial connection; and g) common economic life."[43]

According to the UNESCO experts, the element common to legal definitions of "peoples" is the "will to be identified as a people or the consciousness of being a people." Contrary to Higgins' definition, the people under the Kirby definition need not be of a large number, "but must be more than 'a mere association of individuals within a state.'"[44] In other words, collectivity need not reside in a majority. This view is supported by the following pronouncement by the Canadian Supreme Court in its judgment with regard to the secession of Quebec:

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[39] Rosalyn Higgins, *The Development of International Law through the Political Organs of the United Nations* (1968).

[40] Gaetano Pentassuglia, *State Sovereignty, Minorities and Self-Determination: A Comprehensive Legal View*, 9 INT'L J. MINORITY & GROUP RTS. 303-324 (2002).

[41] *Id.*

[42] *Id.*

[43] UNESCO Division of Human Rights Democracy and Peace & Centre, *The Implementation of the Right to Self-Determination as a Contribution to Conflict Prevention* (Report of the International Conference of Experts held in Barcelona from November 21 to 27 1998) (1999), *available at* http://www.unescocat.org/pubang.html (last accessed Oct. 22, 2012).

[44] *Id.*

> It is clear that a "people" may include *only a portion of the population* of an existing state. The right to self-determination has developed largely as a human right, and is generally used in documents that simultaneously contain references to "nation" and "state". The juxtaposition of these terms is indicative that the reference to "people" does not necessarily mean the entirety of a state's population.[45] (Emphasis supplied.)

The Court ratiocinated: "To restrict the definition of the term to the population of existing states would render the granting of a right to self-determination largely duplicative, given the parallel emphasis within the majority of the source documents on the need to protect the territorial integrity of the existing states, and would frustrate its remedial purpose." The Court also pronounced that a right of secession exists where "'a people' is subject to alien subjugation, domination or exploitation; and possibly where 'a people' is denied any meaningful exercise of its right to self-determination within the state of which it forms a part." The Court further held that whenever "'a people' is prohibited from exercising its right to self-determination internally, it is entitled, as a last resort, to exercise it by secession."[46]

In the foregoing case, the Court took cognizance of the two forms of self-determination: internal and external. The Ålands case of 1921 was similarly decided when the Council of League of Nations held that the Ålanders had "the right to cultural and ethnic autonomy, but not the right to separate from Finland."[47] Such forms of self-determination came up to contain the potentially explosive nature of self-determination, particularly with regard to separatist minority groups.[48] Mila Sterio distinguished between the two forms as follows:

> The former potentially applies to all peoples, and signifies that all peoples should have a set of respected rights within their central state. Minority groups should have cultural, social, political, linguistic, and religious rights and those rights should be respected by the mother state. As long as those rights are respected by the mother state, the "people" is not oppressed and does not need to challenge the territorial integrity of its mother state. The latter form of self-determination applies to oppressed peoples, whose basic rights are not being respected by the mother state and who are often subject to heinous human rights abuses. Such oppressed peoples, in theory,

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[45] *See In Re* Secession of Quebec, 2 S.C.R. 217 (Can.) (1998).

[46] The Court held that the francophone Quebecois are without the right to secede from Canada since they did not satisfy these threshold tests. *Id.*

[47] *See* Mila Sterio, *On the Right to External Self- Determination: "Selfistans," Secession, and the Great Powers' Rule,* 19 MINN. J. INT'L L. 137, 138 at n.4. (2010).

[48] *Id.*

> have a right to external self-determination, which includes a right to remedial secession and independence.[49]

A minority has a right to "internal self-determination," and only if that right is not respected by the mother state will the right to secede accrue.[50] Internal self-determination refers to inclusion in democratic processes and participation in governance. Indigenous peoples are granted this right through autonomy within the state structure and state guarantees for their cultural, religious and linguistic rights.[51]

On the other hand, secession as a last resort is an exercise of "external self-determination." A minority cannot "challenge the territorial integrity of its mother state," as long as it is not oppressed.[52] External self-determination only pertains to those peoples who have been subjected to routine oppression by their mother-states through gross abuses of human rights and impunity, as in the case of the Kosovars and the Timorese.[53]

Thus, the relevant question is not whether a people constitute the minority or majority of their state in order for them to be entitled to self-determination, but whether they are exercising it on proper grounds. It must be noted, however, that this study refers to liberation wars against neo-colonialism, which seek *not* to create a new nation-state by seceding from the mother-states, but to overthrow them, replace their governments, *and* obliterate their ties with neo-colonizers. This point will be elucidated in the chapter on Neo-Colonialism.

II. THE DICHOTOMY OF ARMED CONFLICTS IN INTERNATIONAL HUMANITARIAN LAW

How wars of national liberation figure in the whole corpus of *jus in bello* is central to the argument of this study. The categorization in international

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[49] *Id.*

[50] *Id.*

[51] Under U.S. law, for instance, Native American tribes are regarded as independent political communities. In 1975, the U.S. Congress enacted the Indian Self-Determination and Education Assistance Act, which declared maximum Indian participation in the direction of educational as well as other federal services to Indian communities as a state policy. *See* Public Law 93-638 § 3, 25 U.S.C.A. § 450a (1975).

[52] Sterio, *supra* note 47, at 147.

[53] However, external self-determination has varied for different minority groups. Sterio observed that "while the Timorese and the Kosovars were able to fully exercise their rights to the most extreme form of self-determination, leading toward remedial secession, the Chechens, the South Ossetians, and the Abkhazians have been denied such rights." *See* Sterio, *supra* note 47 at 169.

humanitarian law of armed conflicts into international or non-international has profound consequences on the rights and duties of the parties regarding the conduct of hostilities and the protection to persons involved in or affected by the armed conflict. The following is a survey of the core sources of international humanitarian law: the Geneva Conventions of 1949,[54] and the Protocols Additional thereto.

A. Geneva Conventions of 1949

1. International Armed Conflicts under the Geneva Conventions

Prior to 1949, international humanitarian law applied only to the classical concept of war, i.e. interstate wars, the exceptions being "situations analogous to international armed conflict [...] only when recognition of belligerency had taken place."[55] The Conventions apply only to states in any of these cases:

> 1. Of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them; and
>
> 2. All cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.[56]

However, there are two provisions regarding accession to or acceptance of the Conventions that could allow their application to national liberation movements.[57] The first is Common Article 60/59/139/155 which provides: "From the date of its coming in force, it shall be open to any Power in whose name the present Convention has not yet been signed, to accede to this Convention."[58] The other provision is Common Article 2(3), which states:

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[54] The four Geneva Conventions adopted on August 12, 1949 are: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; Convention (III) relative to the Treatment of Prisoners of War; and Convention (IV) relative to the Protection of Civilian Persons in Time of War.

[55] Anthony Cullen, *Key Developments Affecting the Scope of Internal Armed Conflict in International Humanitarian Law,* 183 MIL. L. REV. 65-109 (2005).

[56] Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, Chapter I Art. 2, 75 U.N.T.S. 85, 86. Hereinafter, "Geneva Convention II."

[57] Higgins, *supra* note 3, at 7.

[58] Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick Armed Forces in the Field, Aug. 12, 1949, Art. 60, 75 U.N.T.S. 31, 66. Geneva Convention II, *supra* note 56, at 120. Geneva Convention (III) Relative to the Treatment of Prisoners of War,

> Although one of the Powers in the 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.

If the term "power" were to be liberally interpreted, then the provisions could cover national liberation movements, thus bringing the entire Convention of application to wars of national liberation. Of course, this construction was criticized for being contrary to the intention of the drafters. Also, the wave of wars of national liberation did not take place until the 1960s, and were "therefore, obviously, not to the fore of the debate on the application of the conventions in 1949."[59]

Noelle Higgins noted the willingness of national liberation movements to apply the Conventions to its wars in an effort to "legitimize their struggle."[60] There were, in fact, several instances when some national liberation movements actually undertook to apply the Conventions to their armed conflicts. Higgins cited as example the declaration of the National Liberation Front of Algeria (FLN) to apply the Convention on Prisoners of War to French prisoners in 1956 and 1958. Another example was the declaration by the PLO of its intention to accede to the Conventions to the Swiss Federal Council. The latter, however, did not communicate PLO's declaration to the High Contracting Parties, on the belief that the organization could not be a party to the Conventions.[61]

2. Non-International Armed Conflicts under the Geneva Conventions

During the first half of the 20th century, governments engaged in civil wars considered their opponents as "common criminals," thus treating relief given by the Red Cross to the latter as "inadmissible aid to guilty parties."[62] Applications by the International Committee of the Red Cross (ICRC) and Red Cross Societies for permission to engage in relief operations were seen as interference with the domestic affairs of the country. In 1938, the XVIth International Red Cross Conference held in London passed a resolution envisaging for the first time the application of the essential principles of the

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Aug. 12, 1949, Art. 139, 75 U.N.T.S. 135, 240. Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, Art. 155, 75 U.N.T.S. 287, 390.

[59] Higgins, *supra* note 5.

[60] *Id.* at 10.

[61] *Id.* at 11.

[62] ICRC COMMENTARY, *supra* note 29.

Geneva Conventions of 1929 and the Hague Conventions of 1907.[63] During the Preliminary Conference of National Red Cross Societies in 1946, the ICRC proposed the fourth and last paragraph to Article 2 of the draft Conventions of 1949, which was forwarded to the XVIIth International Red Cross Conference at Stockholm. The paragraph reads as follows:

> In all cases of armed conflict which are not of an international character, especially cases of civil war, colonial conflicts, or wars of religion, which may occur in the territory of one or more of the High Contracting Parties, the implementing of the principles of the present Convention shall be obligatory on each of the adversaries. The application of the Convention in these circumstances shall in no wise depend on the legal status of the Parties to the conflict and shall have no effect on that status.[64]

The said proposed Stockholm draft was met with criticism by a number of conservative delegations to the 1949 Geneva Conventions. These critics expressed the view that the unqualified application of the Conventions to intrastate conflicts "would cover all forms of insurrections, rebellion, and the break-up of States, and even plain brigandage," and impair the "equally legitimate protection of the state." The proposal was also seen as a means to according the enemies belligerency status and legal recognition in international law. On the other hand, proponents of the draft considered it an "act of courage":

> Insurgents, said some, are not all brigands. It sometimes happens in a civil war that those who are regarded as rebels are in actual fact patriots struggling for the independence and the dignity of their country. It was argued, moreover, that the behaviour of the insurgents in the field would show whether they were in fact mere felons, or, on the contrary, real combatants who deserved to receive protection under the Conventions.[65]

The controversial text was referred to a Working Party twice. After lengthy debates, the text drawn up by the second Working Party, which contained minimum standards of humane treatment, was finally adopted. This text now reads as Common Article 3 of the four Geneva Conventions of 1949:

> In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each

[63] *Id.*
[64] *Id.*
[65] *Id.*

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 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.

   The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

   The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.[66]

The above provision begs the question of what an armed conflict not of an international character is, as the term "non-international armed conflict" is not defined therein or anywhere else in the Conventions. During the

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[66] Geneva Convention II, *supra* note 56, at 86-88.

deliberations for Common Article 3, the following conditions upon which the Conventions would depend were considered:

> 1. That the Party in revolt against the *de jure* Government possesses an organized military force, an authority responsible for its acts, acting within a determinate territory and having the means of respecting and ensuring respect for the Convention.
>
> 2. That the legal Government is obliged to have recourse to the regular military forces against insurgents organized as military and in possession of a part of the national territory.
>
> 3. a) That the de jure Government has recognized the insurgents as belligerents; or b) That it has claimed for itself the rights of a belligerent; or c) That it has accorded the insurgents recognition as belligerents for the purposes only of the present Convention; or d) That the dispute has been admitted to the agenda of the Security Council or the General Assembly of the United Nations as being a threat to international peace, a breach of the peace, or an act of aggression.
>
> 4) a) That the insurgents have an organization purporting to have the characteristics of a State. b) That the insurgent civil authority exercises de facto authority over the population within a determinate portion of the national territory. c) That the armed forces act under the direction of an organized authority and are prepared to observe the ordinary laws of war. d) That the insurgent civil authority agrees to be bound by the provisions of the Convention.[67]

According to the ICRC Commentary, however, the scope of application of Article 3 shall be "as wide as possible," covering even an armed strife within the confines of a country that does not fulfill the above conditions. Strict observance of the above conditions is not required.

The obligations of parties to a non-international conflict are only those enumerated in Article 3 in relation to persons taking no active part in the hostilities, including persons *hors de combat,* and the wounded and the sick, without more, so that prohibitions on certain means and methods of warfare pertaining to international armed conflicts do not apply. The parties are not compelled to abide by these rules of war for they are merely encouraged to apply

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[67] CLAUDE PILLOUD ET AL., COMMENTARY TO THE CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR (PROTOCOL III), *available at* http://www.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?viewComments=LookUpCOMART&articleUNID=E160550475C4B133C12563CD0051AA66 (last accessed Oct. 22, 2012).

all or part of the Conventions.[68] Therefore, the "Convention in miniature" in Article 3 affords little protection to persons situated in countries of non-international armed conflict, departing from the proposal advanced by the well-meaning ICRC.

Further, Article 3 through its last clause allays the fear that the application of the Conventions "may interfere with the *de jure* government's suppression of the revolt by conferring belligerent status, and consequently increased authority and power, upon the adverse Party."[69] The fact that Article 3 is applied does not mean that the *de jure* government is ascribing any kind of authority to the other party. Neither does it interfere with the government's inherent power to resort to legitimate measures in suppressing its enemies. Thus, Article 3 maintains the status quo, concerned as it is solely with its humanitarian objective.

It may be observed that the threshold provided in Common Article 3 is not as high as that provided in belligerency,[70] so that it was rather easy for national liberation movements to claim the applicability of the said article to its wars. It must be remembered, however, that Article 3 provided very little protection to the classes of persons contemplated in the provision.

B. Additional Protocols of 1977

In 1977, the two Additional Protocols[71] were adopted by states to supplement the Geneva Conventions of 1949 and to make international humanitarian law more responsive to the effects of contemporary armed conflicts. It turned out that despite the "remarkable achievement" of Common Article 3 to accommodate internal conflicts, the same was inadequate, and "for

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[68] Geneva Convention II, *supra* note 56, at 88.

[69] ICRC COMMENTARY, *supra* note 29.

[70] *See* Higgins, *supra* note 12, *citing* Dietrich Schlindler, *The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols*, 163 RECUEIL DES COURS 116 (1979). Higgins said that for a state of belligerency to be recognized, the following attributes of war must be present: 1) the insurgents had occupied a certain part of the territory; 2) they had established a government which exercised the rights inherent in sovereignty on that part of territory; and 3) if they conducted the hostilities by organized troops kept under military discipline and complying with the laws and customs of war.

[71] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol II), June 8, 1977, 1125 U.N.T.S. 610.

political and legal reasons, unsuited to the type of conflict which has characterized recent decades, i.e., wars of national liberation."[72]

1. International Armed Conflicts under Additional Protocol I.

Article 1 of Additional Protocol I provides:

ARTICLE 1. General principles and scope of application.

1. The High Contracting Parties undertake to respect and to ensure respect for this Protocol in all circumstances.

2. In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from dictates of public conscience.

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

4. The situations referred to in the preceding paragraph include armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right to 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.

Article 1(4) of Additional Protocol I brings liberation struggles waged in the peoples' exercise of their right to self-determination into the scope of international armed conflicts. The drafting of this provision was, like the drafting of the groundbreaking Common Article 3, contentious.[73] It was debated whether Article 1(4) contemplates struggles other than colonial domination, alien occupation or a racist regime. One delegation interpreted the word "include" to mean that the following list is not exhaustive while another delegation noted with regret that the paragraph does not cover all situations whereby the right of peoples to self-determination is applied. The ICRC Commentary states otherwise: the word "include" should be interpreted as exhaustive, meaning only

[72] ICRC Commentary, *supra* note 29.
[73] *Id.*

those conflicts against 1) colonial domination; 2) alien occupation, or 3) racist regime come within the ambit of Protocol I.

> However, do the cases listed essentially cover all possible circumstances in which peoples are struggling for the exercise of their right to self-determination? The expression "colonial domination" certainly covers the most frequently occurring case in recent years, where a people has had to take up arms to free itself from the domination of another people; it is not necessary to explain this in greater detail here. The expression "alien occupation" in the sense of this paragraph – as distinct from belligerent occupation in the traditional sense of all or part of the territory of one State being occupied by another State – covers cases of partial or total occupation of a territory which has not yet been fully formed as a State finally, the expression "racist régimes" covers cases of régimes founded on racist criteria. The first two situations imply the existence of distinct peoples. The third implies, if not the existence of two completely distinct peoples, at least a rift within a people which ensures hegemony of one section in accordance with racist ideas. It should be added that a specific situation may correspond simultaneously with two of the situations listed, or even with all three.
>
> In our opinion, it must be concluded that the list is exhaustive and complete: it certainly covers all cases in which a people, in order to exercise its right to self-determination, must resort to the use of armed force against the interference of another people, or against a racist régime. On the other hand, it does not include cases in which, without one of these elements, a people takes up arms against authorities which it contests, as such a situation is not considered to be international.[74]

This study mainly espouses the *contrary* view to this strict interpretation, as discussed at length in Part III.

For Protocol I to be applicable, Article 96(3) provides:

* * *

> 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

[74] *Id.*

> shall, upon its receipt by the depositary, have in relation to that conflict the following effects:
>
> a. The Conventions and this Protocol are brought into force for the said authority as a Party to the conflict with immediate effect;
>
> b. The said authority assumes the same rights and obligations as those which have been assumed by a High Contracting Party to the Conventions and this Protocol; and
>
> c. The Conventions and this Protocol are equally binding upon all Parties to the conflict.

Article 96(3) contemplates two parties: the contracting state, and the authority which made the unilateral declaration. The Conventions and the Protocol immediately apply between these two parties upon the receipt of the depositary of the unilateral declaration. The authority will then have the same rights and obligations as state parties to the Conventions and the Protocol.

The legislation of Article 1(4) in Protocol I was seen as a formal recognition of the legitimate struggles of national liberation movements in international treaty law. But this political victory was more apparent than real because the restrictive construction of this provision has only *ever* been applied to only one armed conflict—that between Peru and Ecuador.[75] Higgins, moreover, noted that national liberation movements have seen little progress in terms of implementation mainly because states are generally disinclined to apply the Conventions to them while an "established predictable practice of application" is lacking.[76]

2. Non-International Armed Conflicts under Additional Protocol II.

Article 1 of Additional Protocol II states:

> ARTICLE 1. Material field of application.
>
> 1. This Protocol, which develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions of application, shall apply to all armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International

[75] Higgins, *supra* note 3 at 23.
[76] *Id.* at 24.

Armed Conflicts (Protocol I) and which *take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, 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.* (Emphasis supplied.)

2. 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, as not being armed conflicts.

As observed by Anthony Cullen, the concept of non-international armed conflict in this provision "sets a much higher threshold of application than Common Article 3."[77] On one hand, Common Article 3 applies to *all* non-international armed conflicts; on the other, Article 1(1) of Additional Protocol II applies *only* to armed conflicts. The latter take place in the territory of a high contracting party, between its armed forces and dissident armed forces or other organized armed groups, which, under responsible command, 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. The standard is further qualified by a "negative definition" in Article 1(2), stating that the 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, as not being armed conflicts. Article 1(2), in effect, "demarcates the lower threshold of non-international armed conflict and thus the application of Common Article 3."[78]

Protocol II established a new threshold that is "considerably higher than mere civil unrest, [but] is lower than state-to-state warfare."[79] Ruled out from its scope are armed conflicts whose intensity falls short of that of a civil war, as well as armed conflicts between armed entities not involving the forces of a *de jure* government. Protocol II, moreover, leaves the problem of discerning the often imperceptible distinction between situations of internal disturbances and non-international armed conflicts. Inescapably, this narrowed scope of internal conflict was seen as a regressive development in the formulation of a cohesive concept of internal armed conflict in international law.

Another problem presented by Protocol II is that protracted guerrilla warfare, by its nature, may easily be dismissed as "sporadic acts of violence." The threshold in Protocol II thus bolstered the "discretionary power of states to

[77] Cullen, *supra* note 55, at 92.

[78] *Id.*

[79] *Id.*

deny the existence of armed conflict," which Medard R. Rwelamira referred to as the individual states' "carte blanche to decide when the Protocol or common Article 3 should be invoked."[80] How then do we account for national liberation movements struggling against neo-colonialism and not against foreign domination, alien occupation or racist regimes, whose armed struggles are not exactly isolated and sporadic acts of violence? Can international humanitarian law not apply to them, just because the governments of their countries relegate them to the status of insurgency or rebellion by virtue, apparently, of the latter's "carte blanche"?

III. NORMATIVE FRAMEWORK: WARS OF NATIONAL LIBERATION AGAINST NEO-COLONIALISM

> *"Sometimes people hold a core belief that is very strong. When they are presented with evidence that works against that belief, the new evidence cannot be accepted. It would create a feeling that is extremely uncomfortable, called cognitive dissonance. And because it is so important to protect the core belief, they will rationalize, ignore and even deny anything that doesn't fit in with the core belief."*
>
> —Frantz Fanon[81]

Neo-colonialism is such an emotive word. It is "one of the great inflammatory terms of international discourse today,"[82] and as such, is perhaps not as attractive a subject matter as colonialism, the appeal of which "lies in the safety of its politics of the past."[83] It eludes definition in any of the sources of international law under Article 38 of the Statute of the International Court of Justice (ICJ).[84] Thus, in this study, the concept of neo-colonialism is understood by looking beyond the legal framework and using sources that are more

[80] *See* M. R. RWELAMIRA, THE SIGNIFICANCE AND CONTRIBUTION OF THE PROTOCOLS ADDITIONAL TO THE GENEVA CONVENTIONS OF AUGUST 1949 (1984).

[81] BLACK SKIN, WHITE MASKS (1967).

[82] Robert P. Barnidge, Jr., *Neocolonialism and International Law, with Specific Reference to Customary Counterterrorism Obligation and the Principle of Self-Defense*, 41 INDIAN J. INT'L L. 21 (2009).

[83] Robert J. C. Young, *Neocolonial Times: An Introduction to Neocolonialism*, 13 OXFORD LITERARY REV. 2 (1991).

[84] Barnidge, *supra* note 82, at 27.

"political." The distinction between the legal and the political, after all, is no longer that distinct, as "there are no more strictly legal issues."[85]

Neo-colonialism is described as the "adjunct" or the continuing effect of colonialism today, rather than its "supersession."[86] In reality, none of the forms of colonialism envisaged in Article 1(4) of Protocol 1 exists today, due to the rapid decline of alien occupation, alien domination and racist regimes after 1977. The last trust territory, Namibia, had achieved its independence in 1990, while the others had exercised self-determination either by independence or free association with independent states.[87] But neo-colonialism has transpired in the wake of colonialism. The supposed "vestiges" of colonialism are "the strong presence of the same forces of alien domination operating under new forms."[88] Long after the process of decolonization, the influence of former colonial powers persists over former colonies by means of new agencies, structures and relationships.

1. Neo-Colonialism

> *[T]he cajolement, the wheedlings, the seductions and the Trojan horses of neo-colonialism must be stoutly resisted, for neo-colonialism is a latter-day harpy, a monster which entices its victims with sweet music.*
>
> —Kwame Nkrumah [89]

i. Internal Forces

In his seminal work *The Wretched of the Earth*, Frantz Fanon[90] warned of the pitfalls of "national consciousness," which was an aftermath of the

[85] *Id.*, *citing* Conditions of Admission of a State to Membership in the United Nations, Advisory Opinion, 1948 I.C.J. 57.

[86] Young, *supra* note 85.

[87] Mustafa Sahin, *The Use of Force in Relation to Self-Determination in International Law*, *at* http://tamilnation.co/armed_conflict/sahin.pdf (last accessed Oct. 22, 2012). Sahin pointed out that there is no longer any significant Non-Self-Governing Territory today. The 16 remaining are: Western Sahara, Anguilla, Bermuda, British Virgin Islands, Cayman Islands, Falk Islands (Malvinas), Montserrat, St. Helena, Turks and Caicos Islands, U.S. Virgin Islands, Gibraltar, American Samoa, Guam, New Caledonia, Pitcairn and Tokelau.

[88] MERLIN M. MAGALLONA, IMPERIALISM AND TRANSNATIONAL CORPORATIONS (ed., 1980).

[89] KWAMEH NKRUMAH, CONSCIENCISM: PHILOSOPHY AND IDEOLOGY FOR DECOLONIZATION (1970).

decolonization process.[91] He argued that in newly independent states, the national middle class takes over, demanding the nationalization of the economy in the process. This they do, however, not to serve the best interests of the nation, but to "transfer into native hands [...] those unfair advantages which are a legacy of the colonial period."[92] The national bourgeoisie can now accumulate capital as they identify with their former oppressors and take on the lucrative role of the "Western bourgeoisie's business agent." Said Fanon, "seen through its eyes, its mission has nothing to do with transforming the nation; it consists, prosaically, of being the transmission line between the nation and capitalism, rampant though camouflaged, which today puts on the mask of neo-colonialism."[93]

Pan-Africanist and Ghana's first post-independence President Kwameh Nkrumah created a model of colonialism that shows the defeat of "positive action" by "negative action." Positive action is the "sum of those forces seeking social justice in terms of the destruction of oligarchic exploitation and oppression," while negative action is the "sum of those forces tending to prolong colonial subjugation and exploitation."[94] Nkrumah explained that after decolonization, the resurgence of overwhelming negative action from the class of sell-outs (Fanon's national middle class), acting in complicity with the former colonial power, brings about neo-colonialism. In this system, the newly independent state becomes subjugated anew under the new regime of the neo-colonial master as the principal and the local ruling elite as its agent.

Paradoxically, decolonization served as an inroad to neo-colonialism. The state subject to it, according to Nkrumah, becomes "an independent [s]tate with all the outward trappings of international sovereignty [...] whose economic system and thus its political policy is directed from outside."[95]

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[90] Foremost African scholar and anti-colonialism activist, Fanon was a key figure in the Algerian struggle for independence against France. His writings are said to have left a profound relevance not only to liberation movements, but also to post-colonial studies and critical theory.

[91] In the opening chapter "Concerning Violence," Fanon described decolonization as simply a substitution of a certain "species" of men by another "species" of men.

[92] *Id.* at 152

[93] *Id.*

[94] Barnidge *supra* note 82, at 28.

[95] *See* KWAME NKRUMAH, NEO-COLONIALISM, THE LAST STAGE OF IMPERIALISM (1965). The book, which reported the vast extent of the United States' "stranglehold" over African economies, offended the U.S. government. Nkrumah said, "[T]he State Department followed up its protest with the rejection of a request from my government for 35 million dollars' worth of surplus food shipments."

ii. External Forces

Neo-colonialism is an assertion of imperialist interests amidst the worsening crisis of international capitalism. After the Great Slump of the 1930s, it was actually World War II that paved the way for the salvage of international capitalism, restoring "production levels, employment, productivity, and profitability in the US, the heartland of the international capitalist economy."[96] The European Recovery Program ("ERP"), more popularly known as the US Marshall Plan, provided suitable conditions for capitalist production.[97] Overproduction and demand for raw materials and new markets were inevitable, and so was the need to militarily secure economic interests in different parts of the world. Because the old-style colonial system, however, would only provoke colonial wars and dissipate anticipated gains, former colonial powers, like the US, instituted neo-colonialism to ensure their continuing geopolitical and economic domination.

After decolonization, the US was threatened by economic nationalism commonly associated with countries exercising their right to self-determination. Thus, it promoted "economic multilateralism" through international institutions like the IMF and the International Bank for Reconstruction and Development (IBRD, later known as the World Bank).[98]

> As the post-war hegemon, the United States, which had the greatest interest in maintaining open doors through the globalization of capital, levered other states to "abandon their economic nationalism and protectionist controls and to accept a world of free trade, free capital flows, and free currency convertibility." The United States frequently intervened directly, using force, in Central America and the Caribbean, but less often in continental Latin America, where either 'covert' operations or financial control sufficed. President Harry S. Truman's claim in 1947 that "the whole world should adopt the American system" to avoid economic autarky in the twenty-first century lay at the heart of the US vision for the post-war institutions: the United Nations and the short-lived International Trade Organization, as well as the IMF and the IBRD.[99]

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[96] ALFREDO SAAD-FILHO & DEBORAH JOHNSTON, NEOLIBERALISM: A CRITICAL READER 35 (eds., 2005).

[97] *Id.*

[98] David Ryan, *Colonialism and Hegemony in Latin America: An Introduction,* 21 INT'L HIST. REV. 287 (1999).

[99] *Id.*

In 1965, Nkrumah noted that the concrete and burgeoning phenomenon of neo-colonialism was no longer an African question as it was also being felt in other parts of the world.[100]

iii. Neo-Colonial Mechanisms

In this "last stage of imperialism,"[101] the neo-colonies' economic systems are intricately intertwined with those of their neo-colonial masters. Nkrumah identified the following as the mechanisms by which it as well as other imperialist powers pervade the neo-colonies' economy:

> On the economic front, a strong factor favouring Western monopolies and acting against the developing world is inter-national capital's control of the world market, as well as of the prices of commodities bought and sold there[.]
>
> Another technique of neo-colonialism is the use of high rates of interest. Figures from the World Bank for 1962 showed that seventy-one Asian, African and Latin American countries owed foreign debts of some $27,000 million, on which they paid in interest and service charges some $5,000 million. Since then, such foreign debts have been estimated as more than £30,000 million in these areas. In 1961, the interest rates on almost three-quarters of the loans offered by the major imperialist powers amounted to more than five per cent, in some cases up to seven or eight per cent, while the call-in periods of such loans have been burdensomely short.
>
> While capital worth $30,000 million was exported to some fifty-six developing countries between 1956 and 1962, it is estimated that interest and profit alone extracted on this sum from the debtor countries amounted to more than £15,000 million. This method of

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[100] *Id.*

[101] *See* VLADIMIR LENIN, IMPERIALISM: THE HIGHEST STAGE OF CAPITALISM (1916). The workings of neo-colonialism cannot be fully understood without dealing with the equally "inflammatory" concept of "imperialism." Consider the following comprehensive definition provided by Lenin of imperialism: "(1) the concentration of production and capital has developed to such a high stage that it has created monopolies which play a decisive role in economic life; (2) the merging of bank capital with industrial capital, and the creation, on the basis of this "finance capital, of a financial oligarchy; (3) the export of capital as distinguished from the export of commodities acquires exceptional importance; (4) the formation of international monopolist capitalist associations which share the world among themselves, and (5) the territorial division of the whole world among the biggest capitalist powers is completed. Imperialism is capitalism at that stage of development at which the dominance of monopolies and finance capital is established; in which the export of capital has acquired pronounced importance; in which the division of the world among the international trusts has begun, in which the division of all territories of the globe among the biggest capitalist powers has been completed."

> penetration by economic aid recently soared into prominence when a number of countries began rejecting it...Such 'aid' is estimated on the annual average to have amounted to $2,600 million between 1951 and 1955; $4,007 million between 1956 and 1959, and $6,000 million between 1960 and 1962. But the average sums taken out of the aided countries by such donors in a sample year, 1961, are estimated to amount to $5,000 million in profits, $1,000 million in interest, and $5,800 million from non-equivalent exchange, or a total of $11,800 million extracted against $6,000 million put in. Thus, 'aid' turns out to be another means of exploitation, a modern method of capital export under a more cosmetic name.
>
> Still another neo-colonialist trap on the economic front has come to be known as 'multilateral aid' through international organisations: the International Monetary Fund, the Inter-national Bank for Reconstruction and Development (known as the World Bank), the International Finance Corporation and the International Development Association are examples, all, significantly, having U.S. capital as their major backing. These agencies have the habit of forcing would-be borrowers to submit to various offensive conditions, such as supplying information about their economies, submitting their policy and plans to review by the World Bank and accepting agency supervision of their use of loans[.][102]

A few years after decolonization, former colonial powers controlled the economies of their former colonies, owning by a great majority the total foreign investments therein. Direct foreign investments, according to Professor Merlin Magallona, constitute the "essence of colonialism in the modern world, involving ownership of industrial assets, occupation of lands or proprietary interests in the national wealth of the developing countries."[103]

Subsequent to decolonization, Third World countries, with the support of socialist states, steered the adoption of a New International Economic Order ("NIEO") in order to "correct inequalities and redress existing injustices" and "eliminate the widening gap between the developed and the developing countries." On May 24, 1970, the UN GA adopted the *Declaration on the Establishment of a New International Economic Order*[104] envisioning an NIEO that will operate on international cooperation and on the basis of "sovereign equality and the removal of the disequilibrium that exists between developing and

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[102] NKRUMAH, *supra* note 89.

[103] MAGALLONA, *supra* note 88, at 41.

[104] General Assembly resolution S-6/3201, *Declaration on the Establishment of a New International Economic Order*, A/RES/S-6/3201 (1 May 1974), available at http://www.un-documents.net/s6r3201.htm.

developed countries." In the Declaration, the world community recognized neo-colonialism as an impediment to the "full emancipation" of developing countries:

* * *

> 1. The greatest and most significant achievement during the last decades has been the independence from colonial and alien domination of a large number of peoples and nations which has enabled them to become members of the community of free peoples. Technological progress has also been made in all spheres of economic activities in the last three decades, thus providing a solid potential for improving the well-being of all peoples. *However, the remaining vestiges of alien and colonial domination, foreign occupation, racial discrimination, apartheid and neo-colonialism in all its forms continue to be among the greatest obstacles to the full emancipation and progress of the developing countries and all the peoples involved.* The benefits of technological progress are not shared equitably by all members of the international community. The developing countries, which constitute 70 per cent of the world's population, account for only 30 per cent of the world's income. It has proved impossible to achieve an even and balanced development of the international community under the existing international economic order. The gap between the developed and the developing countries continues to widen in a system which was established at a time when most of the developing countries did not even exist as independent States and which perpetuates inequality. (Emphasis supplied.)

Magallona explained that political independence, without liberation from alien domination of the economy, is the "essence of new forms of colonialism that have come to be called neo-colonialism." Indeed, control of one's economy is so cogent and imperative to the exercise of national self-determination that in reality, "national independence means economic self-determination."[105]

Transnational corporations ("TNCs") are a powerful tool for the US to advance its economic and political interests in developing countries. Magallona cited instances where the Central Intelligence Agency (CIA) and various American oil companies successfully intervened in otherwise sovereign affairs. In 1958, for instance, they instigated the separatist rebellion in Sumatra against the Sukarno government after the state take-over of foreign oil concessions in the country.[106] The CIA and the Gulf Oil Co. supported separatist movements

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[105] MERLIN M. MAGALLONA, INTERNATIONAL LAW ISSUES IN PERSPECTIVE 136 (1996).
[106] MAGALLONA, *supra* note 88, at 39.

in order to undermine the leadership of the socialist *Movimento Popular de Libertação de Angola* (MPLA) in the newly founded Democratic Republic of Angola.[107] As internal relations increasingly became transnational by the end of the twentieth century, TNCs like these oil companies emerged as new global actors which "can, and often do, act as neocolonialist."[108]

The economic stranglehold of an imperialist power in neo-colonies is only one facet of neo-colonialism. Its influence permeates other fronts using the most inventive of methods. One is "the retention by the departing colonialists of various kinds of privileges which infringe on... sovereignty: that of setting up military bases or stationing troops in former colonies and the supplying of 'advisers' of one sort or another."[109] In exchange for this military presence, the neo-colonist demands concessions and privileges, including the "'right' to provide 'aid.'"[110] Another is the use of mass media in disseminating anti-socialist and anti-liberation propaganda while promoting American heroism.[111] These means were wittingly utilized in the US' "huge ideological plan for invading the so-called Third World" in 1961, to wit:

> During 1962 and 1963 a number of international conferences to this end were held in several places, such as Nicosia in Cyprus, San Jose in Costa Rica, and Lagos in Nigeria. Participants included the CIA, the U.S. Information Agency (USIA), the Pentagon, the International Development Agency, the Peace Corps and others. Programmes were drawn up which included the systematic use of U.S. citizens abroad in virtual intelligence activities and propaganda work. Methods of recruiting political agents and of forcing 'alliances' with the U.S.A. were worked out. At the centre of its programmes lay the demand for an absolute U.S. monopoly in the field of propaganda, as well as for counteracting any independent efforts by developing states in the realm of information.

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[107] *Id.*

[108] Barnidge, *supra* note 82, at 31.

[109] NKRUMAH, *supra* note 89, at 85.

[110] *Id.*

[111] *Id.* Nkrumah said: "Even the cinema stories of fabulous Hollywood are loaded. One has only to listen to the cheers of an African audience as Hollywood's heroes slaughter red Indians or Asiatics to understand the effectiveness of this weapon. For, in the developing continents, where the colonialist heritage has left a vast majority still illiterate, even the smallest child gets the message contained in the blood and thunder stories emanating from California. And along with murder and the Wild West goes an incessant barrage of anti-socialist propaganda, in which the trade union man, the revolutionary, or the man of dark skin is generally cast as the villain, while the policeman, the gum-shoe, the Federal agent—in a word, the CIA—type spy is ever the hero. Here, truly, is the ideological under-belly of those political murders which so often use local people as their instruments."

> The United States sought, and still seeks, with considerable success, to co-ordinate on the basis of its own strategy the propaganda activities of all Western countries. In October 1961, a conference of NATO countries was held in Rome to discuss problems of psychological warfare. It appealed for the organisation of combined ideological operations in Afro-Asian countries by all participants.
>
> In May and June 1962 a seminar was convened by the U.S. in Vienna on ideological warfare. It adopted a secret decision to engage in a propaganda offensive against the developing countries along lines laid down by the U.S.A. It was agreed that NATO propaganda agencies would, in practice if not in the public eye, keep in close contact with U.S. Embassies in their respective countries.
>
> Among instruments of such Western psychological warfare are numbered the intelligence agencies of Western countries headed by those of the United States 'Invisible Government'. But most significant among them all are Moral Re-Armament (MRA), the Peace Corps and the United States Information Agency (USIA).[112]

Nkrumah noted the sharp contradiction between the foregoing catalogue of neo-colonial activities and methods of his time[113] and the growing revolutionary movements by ex-colonial peoples: in Cambodia, Laos, Indonesia, Philippines, Thailand, and Burma; in Colombia, Venezuela and the rest of Latin America; and in Ghana, Tanzania, Uganda, and Kenya in African continent. To Nkrumah, this positive action is "not a sign of imperialism's strength but rather of its last hideous gasp" and a testament to "its inability to rule any longer by old methods."[114]

A. A Liberal Construction of International Humanitarian Law

This study mainly submits that the scope of Article 1(4) of Protocol I must extend to wars of national liberation against neo-colonialism. As earlier pointed out, Article 1(4) of Protocol I is outdated as none of the three categories of armed conflict named therein exists today. The vast import of the law, however, far outweighs the obsolescence of its literal meaning. A liberal construction of the law is therefore necessary.

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[112] *Id.*

[113] *Compare* US neo-colonial methods and activities of today, *infra* Part IV (US Neo-Colonialism in the Philippines).

[114] NKRUMAH, *supra* note 89.

1. Intervention and Sham Independence

Under a regime of neo-colonialism, there are new actors (such as TNCs and the "collaborationist" local ruling elite) as well as cosmetic shifts to indigenous institutions in an attempt to garb the state as independent. The effect of this system is essentially the same as that of colonialism: the interests of the neo-colonized nation are subordinated to those of a foreign power. That neo-colonialism continues to prevent neo-colonized states from fully realizing their independence warrants a broad interpretation of Article 1(4).

To begin, the occurrence of any of the three types of armed conflict in Article 1(4) is at present not forthcoming, if not impossible, given the prohibition on the use of force by states in Article 2(4) of the UN Charter. States are proscribed from threatening or using force against the territorial integrity or political independence of any state, except in the exercise of individual or collective self-defense in response to an armed attack against a member-state.[115] Admittedly, this provision has not deterred states from using force on other states. But as discussed in the preceding section, the relationships and structures in a neo-colonial state have altered the possibilities of impairing the territorial integrity or political independence of a neo-colonial state—by means other than force.

Interference by the colonial power with the acknowledged sovereignty of a former colony bears "broad parallels" with the non-intervention principle in conventional and customary international law.[116] This principle is a "corollary of every state's right to sovereignty, territorial integrity and political independence."[117] The following provisions of the UN Charter set forth the prohibition against intervention:

> ARTICLE 2. The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles.
>
> 1. The Organization is based on the principle of the sovereign equality of all its Members.

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[115] U.N. CHARTER, art. 51.

[116] Barnidge, *supra* note 82, at 31.

[117] Chatham House International, *The Principle of Non-Intervention in Contemporary International Law: Non-Interference in a State's Internal Affairs Used to be a Rule of International Law: Is it Still?* (A Summary of the Discussion Group Meeting, February 28, 2007), *available at* http://www.chathamhouse.org/sites/default/files/public/Research/International%20Law/il280207.pdf (last accessed Oct. 22, 2012), *citing* LASSA F.L. OPPENHEIM, INTERNATIONAL LAW (2nd ed., 1998).

* * *

4. 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.

* * *

7. 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; but this principle shall not prejudice the application of enforcement measures under Chapter VII.[118]

The principle not only involves the prohibition on the use of force in the internal affairs of States but also intervention in ways *not* involving the use of force, like bribing local political parties and other forms of interference in the "internal political processes of the State."[119] In *Nicaragua v. US*,[120] the ICJ stated that prohibited intervention must relate to those "matters in which each State is permitted, by the principle of State sovereignty, to decide freely." Examples of these matters are the choice of a political, economic, social and cultural system and formulation of foreign policy. In neo-colonialism, the neo-colonial power not only intervenes in the affairs of the neo-colonial state; it controls them, thus committing a grave breach of an international legal duty that is quite distinct from its obligation to respect a people's right to self-determination.

Military intervention in an internal conflict in another state between the armed forces of such state and a "non-state actor" may fundamentally change the nature of the armed conflict. The case of *Nicaragua* demonstrated that intervention by another state in a domestic affair in the form of financial and military aid to rebels in the said state makes the internal armed conflict "internationalized." Bruno Zimmerman cited the US intervention in the Vietnam War as another instance:

> My experience with the law in the Vietnam War and my subsequent thoughts about it have convinced me that, whenever a state chooses to send its armed forces into combat in a previously non-international armed conflict in another state—whether at the invitation of that state's government or of the rebel party—the

[118] U.N. CHARTER, art. 4, ¶¶ 1, 4, 7.
[119] *Id.*
[120] 1986 I.C.J. 14.

> conflict must then be considered an international armed conflict, and the rebel party must be considered to have been given, from the date of such intervention, belligerent status, which, as a matter of customary international law, brings into force all of the laws governing international armed conflicts[.][121]

In a neo-colonial state, the people cannot attain the full scope of self-determination while neo-colonial forces are frustrating their efforts at realizing their own independent development. To illustrate, as developing countries capitulate to the capitalist order, they are deprived of their choice to pursue an "alternative non-capitalist or socialist orientation."[122] This drives them to engage anew in a struggle for national liberation. The Third World movement for a New International Economic Order is one such struggle in terms of their economic development.[123] The UN *Declaration on the Establishment of the New International Economic Order* is illuminating:

> The remaining vestiges of alien and colonial domination, foreign occupation, racial discrimination, apartheid and *neo-colonialism in all its forms* continue to be among the greatest obstacles to the full emancipation and progress of the developing countries and all the peoples involved.[124] (Emphasis supplied.)

Neo-colonialism in all its manifestations is a major stumbling block to the genuine emancipation of peoples in former colonies. According to Magallona, developing countries are still being confronted "with powerful impediments to economic independence, which consequently continue to nullify the meaning of their political independence."[125]

2. Statutory Construction

Notwithstanding the above observations, the ICRC Commentary on Additional Protocol I deemed the three categories of wars of national liberation in Article 1(4) as an exhaustive list. But a simple exercise in statutory construction disproves this restrictive view.

The provision must not be read in isolation; it must be interpreted together with other sources of international law. The *Declaration on Friendly*

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[121] ICRC COMMENTARY, *supra* note 29.

[122] Merlin M. Magallona, *The New International Economic Order and the Politics of Multinational Corporations*, 53 PHIL. L.J. 267-286.

[123] MAGALLONA, *supra* note 88, at 129.

[124] Declaration on the Establishment of a New International Economic Order, *supra* note 104.

[125] *Id.*

Relations and Cooperation states that *"all peoples"* possess the right to self-determination *equally and in every respect.*[126] On the other hand, the UN Charter declares that it is the role of the UN to promote and encourage respect for "fundamental freedoms *for all without distinction.*"[127] Protocol I, while abandoning the "just war" doctrine, expressly favors at the same time a broad and plenary application of its provisions regardless of the *raison d'être* of the armed conflict. This is provided in the fifth preambular paragraph of the Protocol:

> Reaffirming further 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 those instruments, *without any adverse distinction* based on the *nature* or *origin* of the armed conflict or on the *causes* espoused by or attributed to the Parties to the conflict.[128] (Emphasis supplied.)

Under the general rules of interpretation of treaties in Article 31(1) of the Vienna Convention on the Law of Treaties, "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and *in the light of its object and purpose.*" In other words, the provision in question must be interpreted in a manner that will give effect to its purpose. The second preambular paragraph of Protocol I provides that the law aims "to reaffirm and develop the provisions protecting the victims of armed conflicts and to supplement measures intended to reinforce their application." The significance of the Protocol, as in the whole corpus of *jus in bello,* lies in the protection that it affords the victims of armed conflict, so that the more people it applies to, the more will it be able to achieve its humanitarian objective. (The subsequent section, *A Humanitarian Perspective*, elaborates on this point.)

The foregoing interpretation finds support in the following pronouncement of the US Supreme Court: "It is a canon of interpretation to so construe a law or a treaty as to give effect to the object designed, and for that purpose all of it provisions must be examined in the light of attendant and surrounding circumstances."[129] In another case, the Court held:

> In choosing between conflicting interpretations of a treaty obligation, *a narrow and restricted construction is to be avoided as not consonant with the principles deemed controlling in the interpretation of international agreements.* Considerations which should govern the diplomatic relations

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[126] *Id.*
[127] ICRC COMMENTARY, *supra* note 29.
[128] *Id.*
[129] *In re* Ross, 140 U.S. 453 (1891).

> between nations, and the good faith of treaties, as well, require that their obligations should be liberally construed so as to effect the apparent intention of the parties to secure equality and reciprocity between them. For that reason if a treaty fairly admits of two constructions, one restricting the rights which may be claimed under it, and the other enlarging it, the more liberal construction it to be preferred.[130] (Emphasis supplied.)

Even a plain reading of the provision yields the same result. Paragraph 4,[131] used the word "include" in referring to colonial domination, alien occupation and racist regimes. The dictionary definition of this word is "to take in or comprise as a part of a whole or to contain between or within."[132] The word is used in the ordinary sense. It can only mean that the three types of armed conflict are only *illustrative* of the armed conflict envisaged in the provision.[133]

Georges Abi-saab proposed an interpretation that brings "all cases of denial to self-determination within as well as beyond the colonial context" within the ambit of the Protocol. According to him, the term "wars of national liberation" in relation to international humanitarian law has been applied to the following types of armed conflict:

1. Those struggles against a foreign invader or occupant;

2. Those that have evolved within the United Nations and identified from the practice of States and international organizations, namely colonial and alien domination and racist regimes are armed struggles aimed at resisting the forcible imposition or maintenance of such situations to allow people subjected to them to exercise its right to self-determination;

3. *Dissident movements in several countries which take up arms with a view to overthrowing the government and the social order it stands for. Their members may consider themselves as a "liberation movement" waging a "war of national liberation" against a regime or government which masks or*

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[130] Factor v. Laubenheimer, 290 US 276 (1933).

[131] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), Jun. 8, 1977, 1125 U.N.T.S. 3. The situations referred to in the preceding paragraph include armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right to self-determination, as enshrined in the UN Charter and the *Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States.*

[132] Merriam-Webster Dictionary, *at* http://www.merriam-webster.com/dictionary/include (last accessed Oct. 19, 2012).

[133] *See* ICRC COMMENTARY, *supra* note 29.

represents "alien domination" but such conflicts do not oppose different "peoples" and the traditional consensus is to consider them as purely internal in the sense of Common Article 3 of the Conventions and possibly Article 1 of Protocol II;

4. Armed struggles of certain dissident movements representing a component people within a plural state which aims at seceding and creating a new State on part of the territory of the existing one.[134] (Emphasis supplied.)

Abi-saab's enumeration takes into account armed conflicts that have emerged more recently (i.e. numbers three and four). By this liberal listing, Abi-saab points out the flaws of the prevailing interpretation of Article 1(4), namely, its disinclination to account for other struggles for self-determination and failure to adapt to current realities. This is problematic, according to Dayana Jadarian, because most contemporary wars of national liberation are "struggles for self-determination against other types of regimes, e.g. authoritarian regimes."[135]

The above interpretation reflects the lack of foresight and reactionary character of international law. The phenomenon of decolonization seems to be consigned to a particular era in the history of international law. This should not be the case, lest the "permanent relevance of the right to self-determination and the trend towards its application beyond classic colonial situations" be effectively discounted. [136]

Senator Jose W. Diokno viewed the lack of terminological precision in international law positively, saying that "often the utility of a concept lies in its very imprecision: for it allows its content to enlarge or contract according to the situation in which it was applied."[137] Out of abstraction comes an opportunity for discourse, which the international legal community must seize with reasonable adaptability:

The policy options, therefore, are between an imprecision unable to cope with that reality, and another imprecision able to cope with it. Phrased differently, the world community must consider that the

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[134] Georges Abi-saab, *Wars of National Liberation in the Geneva Conventions and Protocols*, 165 RECUEIL DES COURS, 363, 393-397 (1979).

[135] Dayana Jadarian, *International Humanitarian Law's Applicability to Armed Non-State Actors* (2007), *available at* http://www.univie.ac.at/elib/index.php?title=International_Humanitarian_Law_Applicability_to_Armed_Non-State_Actors_-_Dayana_Jadarian_-_2007 (last accessed Oct. 22, 2012).

[136] *See* Ronzitti, *supra* note 16.

[137] *See* Pangalangan & Aguiling, *supra* note 6, at n.52, *citing* Jose W. Diokno's Speech in Asian Lawyers, People's Rights and Human Rights (Aug. 27, 1979).

> international regulation of anti-colonial armed conflicts is not an "all-or-nothing" proposition, and that it must reckon with degrees of regulation lest the global order, in its obstinate unwillingness to settle for anything less than a fully effective mode of maintaining humanitarian norms, ultimately end up with what it had sought to alert in the first place—total anarchy. International law, therefore, ignores the phenomenon of wars of national liberation only at great cost to its own values and efficacy.[138]

Abi-saab furthermore said that the absence of a provision in the Protocol requiring the recognition of the armed conflicts by regional organizations actually "facilitates the adoption of an interpretation by the ICRC and by third States in dealing with specific situations." This interpretation, Abi-saab said, will be "anchored in reality,"[139] and thereby subserve the humanitarian purpose of the law.

B. A Legal Theory of Revolution

> *"Although a soldier by profession, I have never felt any sort of fondness for war, and I have never advocated it, except as a means of peace."*
> —Ulysses Grant[140]

1. The National Liberation Framework

Concomitant to the foregoing liberal construction of Article 1(4) is the internationalization of wars of national liberation against neo-colonialism. This normative framework transcends rigid traditional indices based on the geo-military capacity of the conflict and "external participation" of third states. As formulated by Pangalangan and Aguiling, the internationalization of liberation wars lies in the internalization of contradictions in global relations within a state. This new framework contra-poses: "While the old theory measures the extent to which an internal conflict reaches out to the world community and affects outside parties, the 'new theory' examines the extent to which international sources of tension creep into the domestic affairs of a state." Abi-saab explained:

> [D]uring the 17th and 18th centuries, European States established certain legal ties with the political communities of Asia and Africa such as treaties and diplomatic missions which characterize relations between States. In other words, European States acted on the

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[138] *Id.* at 55

[139] Abi-saab, *supra* note 134, at 432.

[140] STEPHEN MERRILL ALLEN, MEMORIAL LIFE OF GEN. ULYSSES S. GRANT (1889).

> understanding, or the assumption, that they were dealing with members of the international community, with subjects of international law.
>
> By the end of the 18th century, however, "[t]he relations which existed between European States and Asian and African entities, and which v ;re more or less egalitarian from a legal point of view, started to become hierarchical. The European states no longer recognized their former partners as independent political entities, and relations with them were no longer considered as governed by international law. And theory followed suit [...] to such an extent that towards the end of the 19th century [...] [these territories] were considered a legal vacancy of sovereignty, a res nullius.
>
> It was through such legal devices that relations between what had become the "centre" of the world and its "periphery," which were formerly recognized in diplomatic and treaty practice as being of an international character, were internalized, in the sense of being taken out of the ambit of international law, as a prelude to direct domination.
>
> The present situation partakes of what one is strongly tempted to call "poetic justice." If the internalization of relations between the "centre" and the "periphery" preceded direct political domination, a very strong tendency has recently shaped up within the international community to consider armed struggles which aim at overthrowing domination as international conflicts, even before this objective is reached.[141]

Abi-saab's "poetic justice" acutely recognizes the growing intensity of tensions in an armed conflict between a former, purportedly, "periphery" and a liberation movement within it. It is in this sense that the pressure group of newly independent Afro-Asian nations in the United Nations insisted on the formal recognition of the right to self-determination in positive international law.[142]

The justification for the international characterization of liberation wars in a manner that is consistent with the non-intervention principle in international law may be summarized thus:

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[141] *See* Abi-saab, *supra* note 134.

[142] Unfortunately, however, international humanitarian law in its present dichotomy fails to accommodate this pursuit for "justice." Pangalangan & Aguiling, *supra* note 6, clarified the "privileged status" of national liberation movements in international law: "The categories in the Protocols are "privileged" only in relation to the traditional laws of war but not in the light of the right to self-determination and of the nature of international humanitarian law."

> First, *the right to self-determination is ascribed to a people*, such that said possessor of an international right must necessarily be *an international person in order to assert* and enjoy that right. Second, wars of national liberation were deemed the politico-military assertion of the right to self-determination. A liberation movement, therefore, is *asserting an international right against a state*, which by *denying that right,* is *in breach of international obligations.* Third, the *use of armed force to deny a people of their right to self-determination* is *an act of aggression* and *entitles the party thus aggrieved to legitimately resort to armed means* to resist such forcible denial of their right to self-determination.[143] (Emphasis supplied.)

That the right being "internally violated within the boundaries of a state" is international in nature makes wars of national liberation international in character. At the core of the framework is the universal right to self-determination.[144] Abi-saab said:

> As concerns the *jus in bello*—i.e. the law governing relations between belligerents and between them and third parties—the most important consequence of the recognition to self-determination as a legal right [...] is to *confer an international character on armed conflicts arising from the struggle to achieve this right and against forcible denial.* As such, they are subject to the internal *jus in bello* in its entirety.[145] (Emphasis supplied.)

Although the question of whether respect for the right to self-determination is *jus cogens* is unsettled, this study is more inclined to consider it so.[146] UN Special Rapporteur Hector Gross Espiell was of the opinion that the

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[143] Pangalangan & Aguiling, *supra* note 6, at 53.

[144] *See* Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970) (Advisory Opinion) (1971 I.C.J. 16) and Western Sahara (Advisory Opinion) (1975 I.C.J. 12). Judge Ammoun in the *Namibia* case called colonialism a "distortion in history." He stated in his impassioned Advisory Opinion: "[t]here (Africa) fell upon it the two greatest plagues in the recorded history of mankind: the slave-trade, which ravaged Africa for centuries on an unprecedented scale; and colonialism, which exploited humanity and natural wealth to a relentless extreme."

[145] Abi-saab, *supra* note 134, at 372.

[146] This question has divided legal scholars. One once observed that based on the *travaux preparatoires*, "self-determination as a norm of *jus cogens* has largely been endorsed by developing and 'socialist' States but not by the majority of western States." UN Special Rapporteur George Espiell pointed out, however, that the acceptance of the self-determination as jus cogens is "not associated with a particular school of legal thought and that writers of differing theoretical tendencies at present accept the existence of peremptory norms of international law." *See, generally,* ANTONIO CASSESE, SELF-DETERMINATION OF PEOPLES 39, 137, *cited in* Kathleen McVay, *Self-determination in New Contexts*, 28 MERKOURIOS 36 (2012) n.56. *See also* Espiell, *infra* note 149.

Declaration is "heterogeneous, and thus not of the nature of *jus cogens* in every one of its propositions, the fundamental principles of the Charter embodied in it—and hence the principle of self-determination of peoples—as enunciated in General Assembly Resolution 2625 (XXV),[147] are nevertheless of the nature of *jus cogens*."[148] Espiell mentioned that in its draft articles on State Responsibility, the International Law Commission in 1976 impliedly conceded to the *jus cogens* nature of the rule. The Commission had then approved a provision categorizing as international crime "a serious breach of an international obligation of essential importance for safeguarding the right of self-determination of peoples, such as that prohibiting the establishment or maintenance by force of colonial domination."[149]

The recognition of the principle of self-determination as *jus cogens* may be a matter of perspective, such that has not yet reached the "summit of legal hierarchy" or gained wide acceptance. Nevertheless, it has been recognized in jurisprudence as an "essential principle of contemporary law." In the *Case Concerning East Timor (Portugal v. Australia)*,[150] the ICJ held:

> [P]ortugal's assertion that the right of peoples to self-determination, as it evolved from the Charter of the United Nations and from United Nations practice, has an *erga omnes* character, is irreproachable. The principle of self-determination of peoples has been recognized by the Charter and in the jurisprudence of the Court; it is one of the essential principles of contemporary international law.

Based on the foregoing, states owe the international community the obligation *erga omnes* to respect the peoples' right to self-determination. The denial of this right is a breach of an international legal duty akin to the intervention principle in international law. Violations of *obligatio erga omnes* in international law have given rise to the right to proceed against the violator (e.g. the criminal prosecution of the perpetrator of an international crime). In the case of neo-colonialism, however, one of the remedies is to countervail forceful impediments to genuine independence with resort to violence, i.e. wars of national liberation, which will be discussed at length in the succeeding section.

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[147] Espiell, *infra* note 148.

[148] Special Rapporteur Hector Gros Espiell, *Implementation of United Nations Resolutions Relating to the Right of Peoples Under Colonial and Alien Domination to Self-Determination*, E/CN.4/Sub.2/405 (1978), *available at* http://unispal.un.org/UNISPAL.NSF/0/BE1DDCB608178D7685256DE100727E8F (last accessed Oct. 22, 2012).

[149] *Id.*

[150] 1995 I.C.J. 90.

Liberation movements represent "not only itself or the territory it controls but the whole people whose right to self-determination is being denied," unlike belligerents whose authority necessarily depends on the extent of their territorial control.[151] This is reinforced by Article 96(4) of the Protocol, which refers to party to the armed conflict other than the state as "(t)he authority representing a people engaged against a High Contracting Party in armed conflict of the type referred to in Article 1, paragraph 4." This representative capacity, according to Pangalangan and Aguiling, makes the status of a national liberation movement inherently independent of a geo-military dimension[152] and stresses the universal prominence of self-determination as a right enjoyed by "all peoples" without any distinction and without need of recognition from any formal authority. Furthermore, the ICJ in the *Western Sahara Case* described this right as "a right held by people rather than a right held by governments alone."[153]

The national liberation framework has been criticized for introducing the "*jus ad bellum* into *jus in bello*, in that it does not only seek to govern the conduct of hostilities but goes into cause of those hostilities." Pangalangan and Aguiling addressed the criticism thus:

> The term "war of national liberation" is not just a legal construct; it refers to a fact. Long before liberation wars were integrated into international law, they had existed as concrete historical phenomena. The Protocols Additional, therefore, do not invent a new category but merely acknowledge a material situation already existing. There are facts, of course, that are not politically neutral, but that does not make them any less factual. Moreover, this classification of liberation wars as a category of armed conflicts is based not on morality but on law—the legal right to self-determination.[154]

The "just war" doctrine actually has no place in this framework because it does not inquire into the "justness" of the *causus bellum* on ethical or moral grounds. In fact, its application is quite analogous with the practice in civil law of identifying the elements of a cause of action: (1) a right in favor of the plaintiff by whatever means and under whatever law it arises or is created, (2) an obligation on the part of the named defendant to respect or not to violate such right, and (3) an act or omission on the part of such defendant in violation of the right of the plaintiff or constituting a breach of the obligation of the defendant to the plaintiff for which the latter may maintain an action for

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[151] *See* Pangalangan & Aguiling, *supra* note 6.

[152] *Id.*

[153] Western Sahara (Advisory Opinion), 1975 ICJ 12, 31.

[154] Pangalangan & Aguiling, *supra* note 6, at 61.

recovery of damages.[155] What is being prosecuted, in a manner of speaking, is not a particular group's political beliefs, but a breach of a legal right in international law.[156]

2. On Fear and Violence

States are averse to applying international regulations to armed conflicts occurring within their boundaries. They either quell the armed conflict or refuse to admit the fact that it passes the standards for the application of certain international humanitarian law. Municipal laws are invoked and emergency powers wielded under the claim that the application of *jus in bello* will "jeopardize their security, immunize captured rebels and lower the cost of revolution."[157] This attitude finds validation in Article 2(7) of the UN Charter, which gives states, in deference to their sovereignty, ample latitude to deal with matters that are within their domestic jurisdiction.[158]

On the other hand, individual members of national liberation movements are indicted under domestic criminal laws both on charges of common crimes and political crimes like rebellion and subversion. This practice is consistent with the "bourgeois-democratic concept of state" known as "constitutionalism," as illustrated by George Washington in the following excerpt from his *Farewell Address*:

> [T]he basis of our political systems is the right of the people to make and to alter their constitutions of government. But the constitution which at any time exists, till changed by an explicit and authentic act of the whole people is sacredly obligatory upon all. The *very idea of the power and the right of the people to establish government presupposes the duty of every individual to obey the established government.* [159] (Emphasis supplied.)

But if the liberation movements succeed in overthrowing the established government and form a new one, their previous acts become the "direct act of the state itself." Revolution is thus a paradox: it is a crime and remains as such unless and until it triumphs. [160]

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[155] Relucio v. Lopez, G.R. No. 138497, 373 SCRA 578, 581-582, Jan. 16, 2002.

[156] *See* Pangalangan & Aguiling, *supra* note 6, at 18, for a discussion on how the national liberation framework dismantles the "double standard" set by traditional international law and the domestic jurisdiction of sovereign states.

[157] *Id.* at 48.

[158] *Id.*

[159] *Id.*

[160] *Id.* Pangalangan & Aguiling criticized this view as dangerous: "useful only in hindsight [...] an after-the-fact justification."

History, however, has abundantly demonstrated that engaging in revolution is a right attendant to the right to self-determination. The right to revolution had been recognized as early as 1775 in the *Declaration of the Causes and Necessity of Taking Up Arms.* In the following year, the US *Declaration of Independence* of 1776 stated:

> When in course of human events, it becomes necessary for one people to dissolve the political bounds which have connected them with another, and to assume among the powers of the earth, the separate and equal station to which the laws of nature God entitles them, a decent respect to the opinion of mankind requires that they should declare the courses which shall impel them to the separation...*whenever any form of government becomes destructive of these ends, it is the right of the people to alter it, or to abolish it, and to institute a new government.* (Emphasis supplied.)[161]

In *Rights of Man,* Thomas Paine said that the authority of the people is the "only authority on which a government has a right to exist in any country."[162] Abraham Lincoln in his *First Inaugural Address* declared that whenever the people "shall grow weary of the existing government, they can exercise their constitutional right of amending it, or their *revolutionary right to dismember or overthrow it.*"[163] But even prior to the American and French Revolutions, the right to revolution had been acknowledged in various societies, as evidenced, among others, by Germanic folk law, the writings of Thomas Aquinas and of the early international law scholars Grotius and Vattel.[164] More recently, the preamble of the Universal Declaration on Human Rights also recognized the right to revolution, albeit implicitly, by stating, "[i]t is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law."

The challenge now is to advance a legal theory of revolution in light of the well-entrenched principles of territorial integrity, political independence, non-use of force, and non-intervention. This task is difficult because the historic concept of revolution as briefly outlined above has been eclipsed by the development of constitutionalism and state-centric international legal principles.

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[161] THE DECLARATION OF INDEPENDENCE (US) (1776).

[162] Jordan Paust, *Democracy and Legitimacy—Is There an Emerging Duty to Ensure a Democratic Government in General and Regional Customary International Law?*, *in* Joint Conference of the American Society of International Law, CONTEMPORARY INTERNATIONAL LAW ISSUES: SHARING PAN-EUROPEAN AND AMERICAN PERSPECTIVES 126-130 (1991).

[163] Abraham Lincoln, *First Inaugural Address* (Mar. 4, 1861). (Emphasis supplied.)

[164] *Id.*

Revolutions of the past seem to be a mere rhetoric device with more sentimental than academic value.

Strangely, however, the widespread vilification of national liberation movements as terrorist organizations lends insight to the concept of revolution. In his mammoth work on the history of guerrilla warfare, Robert Asprey states that mischaracterization of liberation movements is an ancient irony, dating back to the era of Celtiberian slaves working in New Carthage silver mines for Roman legionnaires:

> From time to time, these and other slaves secretly rose to attack the Romans, who, upon seeing a sentry assassinated or a detachment ambushed and annihilated, no doubt spoke feelingly about the use of terrorist tactics. But who had introduced this particular terror to this particular environment? The Romans. Had they options? Certainly: they could have kept their hands off the Iberian Peninsula, or they could have governed it justly and wisely.
>
> Instead, they came as conquerors ruled by greed, and, in turn, they ruled by oppression maintained by terror. What options did the natives hold either to rid themselves of the Roman presence or to convert it to a more salutary form? Only one: force. What kind of force? That which was limited to what their minds could evoke. Lacking arms, training, and organisation, they had to rely on wits, on surprise raids, ambushes, massacres. Was this terror or counter-terror? [165]

Western colonizers perpetrated a self-righteous misinformation using their "double standard," in that the force they used to conquer and oppress became "benevolence" and the "counterforce used by natives became terror."[166] States, including those in the "periphery," seem to have inherited this practice from former metropolitan centers or colonial powers. The denunciation of liberation movements, however, is "almost invariably superficial, hypocritical, judgmental, and unfair, and tends strongly to represent another example of the generalized phenomenon of 'blaming the victim.'" [167] Jeff Sluka observed:

> The violence of the situation, the pre-existing oppression suffered by those who eventually strike back, is conveniently ignored. The

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[165] Jeff Sluka, *National Liberation Movements in Global Context,* Proceedings of the Conference on "Tamils in New Zealand" in Wellington, New Zealand (1996), *at* http://tamilnation.co/conferences/cnfNZ96/jeffsluka.html (last accessed on Oct. 22, 2012), *citing* R. ASPREY, 1-2 WAR IN THE SHADOWS: A HISTORY OF GUERRILLA WARFARE (1994, 2002).

[166] *Id.*

[167] *Id.*

> violence of the oppressed is a form of defensive counterviolence to the violence of conquest and oppression. In no armed national liberation movement I know of in history has this not been the case.[168]

Following Sluka's logic, the colonial power and its agents in a neo-colonial state are actually tempting their fate. Their use of armed force and other neo-colonial mechanisms for denying a people of their right to self-determination is an act of aggression which thus entitles such people to exert "defensive counter-violence." Michael Reisman supports this idea:

> [I]nsistence on non-violence and deference to all established institutions in a global system with many injustices can be tantamount to confirmation and reinforcement of those injustices. In certain circumstances, violence may be the last appeal or the first expression of demand of a group or unorganized stratum for some measure of human dignity.[169]

By criminalizing an otherwise legitimate exercise to self-determination using the duplicitous practice on "terror," states indeed smack of conceit in the international arena. They act as if "the international system should always tilt in their favor when internal forces try to oust them."[170] But behind this arrogance lies the fear of ascribing legitimacy, recognition or respect to national liberation movements which may be a consequence of applying the rules of war to the armed conflicts taking place within their boundaries. States maintain that such legal recognition is prejudicial to their power to crush armed struggles within their jurisdictions. This claim, however, is "typically a façade to mask its true fears of the collateral consequences of recognition." [171] Dawn Steinhoff explained:

> Armed groups challenge many sources of a state's legitimacy. They "often develop (and thrive) in states in which there is a power vacuum or in which states already fail to provide economic and physical security for some portion of the population." As a result, groups often challenge a state's political legitimacy and its monopoly

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[168] *Id.*

[169] W. Michael Reisman, *Private Armies in a Global War System: Prologue to Decision*, 14 VA. J. INT'L L. 1, 32-33 (1973), *cited* in Jan Fermon, Hans Langenberg, Dundar Gurses, *Legal Opinion on Status of National Liberation Movements and Their Use of Armed Force in International Law*, *available at* http://www.josemariasison.org/legalcases/related/legal_status_of_NLMs.pdf (last accessed on Oct. 22, 2012).

[170] American Society of International Law, *Remarks by W. Michael Reisman* in *Application of Humanitarian Law to Noninternational Armed Conflicts,* Proceedings of the Annual Meeting 85-90 (1991).

[171] Dawn Steinhoff, *Talking to the Enemy,* 45 TEX. INT'L L.J. 297 (2009).

> over the use of force within its territory. A state's willingness to engage an armed group is likely bounded by the degree to which it considers the group a threat to its territorial integrity, not the potential impact engagement will have on the group's legal status.[172]

States make it appear that they have the monopoly on legitimate violence. But they do not; they share the power to wield violence with peoples by virtue of the latter's right to self-determination. States, themselves progenies of violence and born of revolutions, perpetuate the myth of this monopoly, constantly fearful of the violence that may end their existence and consign them to oblivion. The modern anti-colonial armed struggles, the French and American Revolutions, and numerous others all have established that the violence of liberation wars is the most potent way to assert the right to self-determination. Marc Weller said:

> International legal rules are made by governments. Governments have an interest in perpetuating the legitimating myth of statehood based on an exercise of the free will of the constituents of the state--their own legitimacy depends on it. But while embracing the rhetoric of free will and self-constituting states, governments have simultaneously ensured that the legal right to self-determination, at least in the sense of secession, is strictly rationed and cannot ever be invoked against the state they represent.[173]

This critique of state-oriented positivism also explains why Protocol I was framed to apply only to "classical and narrowly defined circumstances of salt-water colonialism which practically no longer exists."[174] It must be remembered that it was member-states (with the exception of a liberal minority) that shot down the well-intentioned proposal of the ICRC for the plenary application of the rules of war to both international and non-international armed conflicts. This parallels Steinhoff's observation that states' refusal to engage armed groups in non-violent confrontation, i.e. peace negotiations, is "a statewide campaign to preserve the hegemonic status of states in the international community."[175]

Reisman said that the simplistic notion that only state actors can alone use violence is "a crucial self-perception and deception" of the State, so that the

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[172] *Id.*

[173] Marc Weller, *Settling Self-Determination Conflicts*, 20 E.J.I.L. 111, 112 (2009).

[174] *Id.*

[175] Steinhoff, *supra* note 171, at 154. Steinhoff mentioned this design as a means to prevent the application of the Geneva Conventions, and thus, the internationalization of the character of the ongoing armed conflict. "By refusing to negotiate with these groups so that the Geneva Conventions apply, the treaty system remains a state-only club."

inquiry must *not* be "whether private violence is permissible but what forms of private violence are permissible, when, in what context, and why." Reisman also presented two important questions. The first one is "what forms of violence are permissible?" The answer to this question can be found in the whole corpus of customary laws of warfare, the core sources of international humanitarian law, and other multilateral treaties on the means and methods of warfare. The second is "in what context and why?" which may be tackled simply by asking whether the international legal right to self-determination has been violated.

C. A Humanitarian Perspective

> *"How vile and despicable war seems to me! I would rather be hacked to pieces than take part in such an abominable business."*
>
> —Albert Einstein[176]

As discussed in Part II, liberation wars figure in international humanitarian law in two respects: first, as armed struggles fighting colonialism under Article 1(4) of Protocol I, and second, as non-international armed conflicts within the ambit of either Common Article 3 of the Geneva Conventions or under certain conditions, Protocol II. It has been submitted that the first representation is the correct depiction of wars of national liberation in accordance with the national liberation framework. But the more cogent reason that compels this submission is the vast humanitarian value borne by the internationalization of liberation wars. Indeed, it takes no genius to know how the scourge of war has brought—and continues to bring—untold sorrow to humanity. Present-day armed conflicts, like the wars of old, have seen tragic consequences to combatants and civilians alike.

In terms of the amount of protection they afford victims of armed conflicts, a huge disparity exists between the two types of conflict as presently dichotomized in the Geneva Conventions and their Protocols. A number of scholars[177] have voiced quite a strong opposition to this dichotomy, advocating

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[176] *Mein Weltbild* (1931), originally published in 84 FORUM AND CENTURY 193-194 (1931).

[177] *See, generally,* Higgins, *supra* note 3 and James Stewart, *Toward a Single Definition of Armed Conflict in International Humanitarian Law: A Critique of Internationalized Armed Conflict,* 85 INT'L REV. RED CROSS 313 (2003).

See also Michael Reisman & J. Silk, *Which Law Applies to the Afghan Conflict?,* 82 AM. J. INT'L. L. 465 (1988). Said Reisman and Silk: "The 'distinction' between international wars and internal conflicts is no longer factually tenable or compatible with the thrust of humanitarian law, as the contemporary law of armed conflict has come to be known. One of the consequences of the nuclear stalemate is that most international conflict now takes the guise of internal conflict,

instead for the adoption of a single corpus of *jus in bello* to all types of armed conflicts. Their assertion begins with an absurd question: why does international humanitarian law make a distinction between international and non-international armed conflicts if what it seeks to do is to relieve human suffering and uphold human dignity?

1. Disparities Between the Two Regimes

The four Geneva Conventions address in great detail the humanitarian demands of armed conflicts:

1. Sixty-four (64) articles of the First Convention set out rules for the protection of wounded and sick soldiers; medical personnel, facilities, and equipment; wounded and sick civilian support personnel accompanying the armed forces; military chaplains; and civilians who spontaneously take up arms to repel an invasion. Specifically, the Convention mandates that the wounded and sick shall be respected and protected without discrimination on the basis of sex, race, nationality, religion, political beliefs, or other criteria; not be murdered, exterminated, or subjected to torture or biological experiments; receive adequate care; be protected against pillage and ill-treatment. The parties to a conflict are also required to search for and collect the wounded and the sick, especially after battle.[178]

2. With a total of 63 articles, the Second Convention mandates parties to take all possible measures to search for, collect, and care for the wounded, sick, and shipwrecked. The Convention applies to armed forces members who are wounded, sick, or shipwrecked; hospital ships and medical personnel; and civilians who accompany the armed forces.[179]

3. The Third Convention provides specific rules for the treatment of prisoners of war. One hundred forty-three (143) articles require that these prisoners be treated humanely, adequately housed, and receive sufficient food, clothing, and medical care. Guidelines are also provided regarding the labor, discipline, recreation, and criminal trial of prisoners, who may include

much of it conducted covertly or at a level of low intensity. Paying lip service to the alleged distinction simply frustrates the humanitarian purpose of the law of war in most of the instances in which war no occurs."

[178] American National Red Cross, *Summary of the Geneva Conventions and Additional Protocols* (2011), *at* http://supportgenevaconventions.org/library/geneva_conventions_summary.pdf (last accessed Oct. 22, 2012).

[179] *Id.*

members of the armed forces, volunteer militia, including resistance movements, and civilians accompanying the armed forces.[180]

4. Consisting of 159 articles, the Fourth Convention guarantees the protection of civilians in areas of armed conflict and occupied territories. The Convention specifically provides for the following:

   - If security allows, civilians must be permitted to lead normal lives. They are not to be deported or interned, except for imperative reasons of security. If internment is necessary, conditions should be at least comparable to those set forth for prisoners of war.

   - Pillage, reprisals, indiscriminate destruction of property, and the taking of hostages are prohibited.

   - The safety, honor, family rights, religious practices, manners, and customs of civilians are to be respected.

   - Civilians are to be protected from murder, torture, or brutality, and from discrimination on the basis of race, nationality, religion, or political opinion. They are not to be subjected to collective punishment or deportation.

   - Children who are orphaned or separated from their families must be cared for.

   - Hospital and safety zones may be established for the wounded, sick, and aged, children under 15, expectant mothers, and mothers of children under seven. Civilian hospitals and their staff are to be protected. Medical supplies and objects used for religious worship are to be allowed passage.

   - Civilians cannot be forced to do military-related work for an occupying force. They are to be paid fairly for any assigned work. Public officials will be permitted to continue their duties. Laws of the occupied territory will remain in force unless they present a security threat.

[180] *Id.*

- Occupying powers are to provide food and medical supplies as necessary to the population and maintain medical and public health facilities. When that is not possible, they are to facilitate relief shipments by impartial humanitarian organizations such as the ICRC. Red Cross or other impartial humanitarian relief organizations authorized by the parties to the conflict are to be allowed to continue their activities.

- Internees are to receive adequate food, clothing, and medical care, and be protected from the dangers of war. Information about internees is to be sent to the Central Tracing Agency. Internees have the right to send and receive mail and receive relief shipments. Children, pregnant women, mothers with infants and young children, the wounded and sick, and those who have been interned for a long time are to be released as soon as possible.[181]

Protocol I expands the scope of protection for the civilian population and other protected persons provided by the Conventions. The Protocol specifically prohibits indiscriminate attacks on civilian populations and the destruction of food, water, and other materials needed for survival. It also proscribes the attack on dams, dikes, nuclear generating stations, as well as cultural objects and places of worship. Special protections are provided for women, civilian medical personnel, and children (e.g. those below the age of 15 cannot be recruited to the armed forces). Moreover, the Protocol grants combatant and prisoner-of-war status to "members of dissident forces when under "the command of a central authority." Protocol I also bans the use of weapons that cause superfluous injury or unnecessary suffering as well as other methods of warfare that cause widespread, long-term, and severe damage to the natural environment.[182]

There are also other conventional treaties prohibiting the use of certain methods and means of warfare, but these are applicable only to international armed conflicts. On the other hand, Common Article 3 and Protocol II relating to non-international armed conflicts pale in comparison.

Common Article 3 only provides for three requirements. First, persons taking no active part in hostilities, non-combatants who have laid down their arms and those who have been rendered hors de combat by sickness, wounds,

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[181] *Id.*

[182] *Id.*

detention or any other cause, must be treated humanely without any adverse distinction founded on race, color, religion or faith, sex, birth or wealth or any other similar criteria. Second, the following acts are prohibited with respect to these persons: 1) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; 2) taking of hostages; 3) outrages upon personal dignity, in particular, humiliating and degrading treatment; and 4) 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.[183] Third, the wounded and sick must be collected and cared for.

James Stewart noted the far-reaching failures of Common Article 3. One is its lack of rules elaborating the distinction between military and civilian targets and the principle of proportionality in target selection.[184] Also, while it prevents tortures of combatants, it does not "prevent him or her from being executed for treason."[185]

Protocol II reiterates these fundamental guarantees and provides some additional rules. George Aldrich noted the following as significant:

1. To the acts specifically prohibited by Common Article 3, Protocol II, in its Article 4,[186] adds prohibitions of collective

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[183] American Society of International Law, *Remarks of George Aldrich* in *Application of Humanitarian Law to Noninternational Armed Conflicts,* Proceedings of the Annual Meeting, 93-96 (1991). (Hereinafter "Aldrich")

[184] James Stewart, *Toward a Single Definition of Armed Conflict in International Humanitarian Law: A Critique of Internationalized Armed Conflict,* 85 INT'L REV. RED CROSS 313-349 (2003).

[185] *Id.*

[186] "Fundamental Guarantees.

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2. Without prejudice to the generality of the foregoing, the following acts against the persons referred to in paragraph I are and shall remain prohibited at any time and in any place whatsoever:

a. violence to the life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;

b. collective punishments;

c. taking of hostages;

d. acts of terrorism;

e. outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form or indecent assault;

f. slavery and the slave trade in all their forms;

g. pillage;

h. threats to commit any or the foregoing acts.

punishment, acts of terrorism, slavery, pillage, and threats to commit any of the prohibited acts.

2. Special protection for children are also provided in Article 4, including a ban on the participation in hostilities of children under the age of 15. Curiously, and quite inadvertently, this ban is stated in more absolute terms than the comparable ban in international armed conflicts in Protocol I.

3. Article 5[187] sets minimum standards for the treatment of persons detained or whose liberty has otherwise been restricted for reasons related to the armed conflict.

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3. Children shall be provided with the care and aid they require, and in particular:

a. they shall receive an education, including religious and moral education, in keeping with the wishes of their parents, or in the absence of parents, of those responsible for their care;

b. all appropriate steps shall be taken to facilitate the reunion of families temporarily separated;

c. children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities;

d. the special protection provided by this Article to children who have not attained the age of fifteen years shall remain applicable to them if they take a direct part in hostilities despite the provisions of subparagraph (c) and are captured;

e. measures shall be taken, if necessary, and whenever possible with the consent of their parents or persons who by law or custom are primarily responsible for their care, to remove children temporarily from the area in which hostilities are taking place to a safer area within the country and ensure that they are accompanied by persons responsible for their safety and well-being." PROTOCOL II, art. 4.

[187] "Persons whose liberty has been restricted

1. In addition to the provisions of Article 4 the following provisions shall be respected as a minimum with regard to persons deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained;

a. the wounded and the sick shall be treated in accordance with Article 7;

b. the persons referred to in this paragraph shall, to the same extent as the local civilian population, be provided with food and drinking water and be afforded safeguards as regards health and hygiene and protection against the rigours of the climate and the dangers of the armed conflict;

c. they shall be allowed to receive individual or collective relief;

d. they shall be allowed to practise their religion and, if requested and appropriate, to receive spiritual assistance from persons, such as chaplains, performing religious functions;

e. they shall, if made to work, have the benefit of working conditions and safeguards similar to those enjoyed by the local civilian population.

2. Those who are responsible for the internment or detention of the persons referred to in paragraph 1 shall also, within the limits of their capabilities, respect the following provisions relating to such persons:

4. Article 6 expands considerably the protections to be given to persons accused of criminal offenses related to the armed conflict, in particular in prohibiting the ex post facto imposition of criminality, establishing a presumption of innocence, and establishing the right not to testify against oneself.

5. Articles 7 to 12 provide enhanced protection for the sick and wounded, medical personnel, and medical units and transports. Of particular importance is the prohibition of any punishment of medical personnel for carrying out medical activities compatible with medical ethics, no matter whom they are treating, the prohibition of compelling persons engaged in medical activities either to perform acts contrary to medical ethics or to refrain from acts required by medical ethics, and the requirement that medical units and transports shall not be made the object of attack.

6. Article 13 prohibits making the civilian population or individual civilians the object of attack and further prohibits "acts or threats of violence the primary purpose of which is to spread terror among the civilian population."

7. Article 14 prohibits starvation of civilians as a method of combat.

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a. except when men and women of a family are accommodated together, women shall be held in quarters separated from those of men and shall be under the immediate supervision of women;

b. they shall be allowed to send and receive letters and cards, the number of which may be limited by competent authority if it deems necessary;

c. places of internment and detention shall not be located close to the combat zone. The persons referred to in paragraph 1 shall be evacuated when the places where they are interned or detained become particularly exposed to danger arising out of the armed conflict, if their evacuation can be carried out under adequate conditions of safety;

d. they shall have the benefit of medical examinations;

e. their physical or mental health and integrity shall not be endangered by any unjustified act or omission. Accordingly, it is prohibited to subject the persons described in this Article to any medical procedure which is not indicated by the state of health of the person concerned, and which is not consistent with the generally accepted medical standards applied to free persons under similar medical circumstances.

3. Persons who are not covered by paragraph 1 but whose liberty has been restricted in any way whatsoever for reasons related to the armed conflict shall be treated humanely in accordance with Article 4 and with paragraphs 1 (a), (c) and (d), and 2 (b) of this Article.

4. If it is decided to release persons deprived of their liberty, necessary measures to ensure their safety shall be taken by those so deciding." PROTOCOL II, art 5.

8. Article 15 prohibits attacks against dams, dikes, and nuclear power stations that may cause consequent severe losses among the civilian population as a result of the release of water or radioactivity.

9. Article 17 limits, but does not prohibit, the forced movement of civilians.[188]

Even if these rules are of considerable humanitarian importance, they are merely a "pale shadow" of those rules governing international armed conflicts. Protocol II is silent on the use of certain conventional weapons because restrictions on certain means and methods of warfare are applicable to international armed conflicts.[189] Moreover, neither Article 3 nor Protocol II affords combatants the status of prisoner-of-war and prevents "parties from prosecuting enemy combatants in those circumstances for having taken up arms."[190]

But according to jurisprudence, the distinction between the customary international law governing the "bipartite universe" has been gradually blurred. The Appeals Chamber in the *Tadic* case held that internal armed conflicts are governed by customary rules including "protection of civilians from hostilities, in particular from indiscriminate attacks, protection of civilian objects, in particular cultural property, protection of all those who do not (or no longer) take active part in hostilities, as well as prohibition of means of warfare proscribed in international armed conflicts and ban of certain methods of conducting hostilities."[191] The Appeals Chamber reasoned that the following factors gave rise to the convergence: 1) the increase in the number of civil conflicts; 2) the increase in the level of cruelty of internal conflicts; 3) the increasing interdependence of States; and 4) the influence of universal human rights standards.[192] Abi-saab concurred in this wise:

> A growing practice and *opinio juris* both of States and international organizations has established the principle of personal criminal responsibility for the acts figuring in the grave breaches articles [...] even when they are committed in the course of an internal armed conflict. In fact, the ICRC has chosen to address what it calls the "insufficiency with respect to content and coverage" of treaty law

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[188] Aldrich, *supra* note 183, at 95.

[189] *Id.*

[190] Stewart, *supra* note 184, at 320.

[191] *Id.* at 322, *citing* Prosecutor v. Dusko Tadic (Appeal Judgment), IT-94-1-A, Jul. 15, 1999.

[192] *Id.*

applicable in non-international armed conflicts by analysis of custom and not promulgation of further treaty-based law.

If the application of customary laws of international wars to non-international armed conflicts achieved desirable results for the prosecution of grave breaches of international humanitarian law in *Tadic*, the same must be made to liberation wars against neo-colonialism. The realistic response of the Appeals Chamber to the conflict in the former Yugoslavia is worth emulating. The plenary application of rules on international armed conflict concomitant to the internationalization of liberation wars will be more in accord with the spirit of international humanitarian law. Both civilians—civilians, especially, since parties to an international armed conflict are required to protect them from the dangers and effects of hostilities—and combatants will be immensely benefited. Abi-saab added: "[I]f we proceed from a humanitarian point of view, we have to favor the application of as much humanitarian law to as many conflicts as possible."[193]

2. Difficulties in Application

National liberation movements have encountered difficulties in seeking to apply international humanitarian law to their wars due to the enduring influence of the traditional legal framework of international law.[194] This study has emphasized that recent developments regarding the evolution of the right to self-determination and the increasing emergence of "non-state-actors," such as national liberation movements representing "peoples," have brought international humanitarian law under scrutiny. The state-centrism of international law limits the protection available to both who are taking up arms and those who are "caught up" in the armed conflicts. But liberation movements are active in "various theatres of war," some of them also participating in peace negotiations while forging diplomatic relations with UN organs and other international bodies like the ICRC. Thus, said Higgins, it is important to formulate a "realistic international humanitarian law framework" which will accommodate liberation movements and other non-state actors.[195]

That the Geneva Conventions and Protocol I are only open to states has not stopped liberation movements from declaring their intention to be bound by them "outside of the formal legal framework." Higgins cited the statements of the African National Congress (ANC) in South Africa, the South West Africa People's Organisation (SWAPO), and the Sahrawi Arab Democratic Republic

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[193] Abi-saab, *supra* note 134, at 398.
[194] *See* Higgins, *supra* note 3, at 12.
[195] *Id.*

expressing their willingness to apply the Conventions.[196] Since the proliferation of many liberation wars in the 1970s, many liberation movements "have actively implemented [international humanitarian law ("IHL")] principles, especially in relation to prisoners of war."[197] In 1996, the NDFP made a Declaration of Undertaking to Apply the Geneva Conventions and Protocol I, [198] and accordingly applied the Third Geneva Convention to the handling of its prisoners-of-war.[199] The ICRC has also been invited by some national liberation movements "to visit their prisoner camps and to oversee their implementation of IHL rules."[200] The ICRC has in fact paid visits to the camps of the Popular Front for the Liberation of Saguia el-Hamra and Río de Oro (Polisario Front) at the Western Sahara, the National Front for the Liberation of Chad, and the Sudan People's Liberation Movement (SPLM).[201]

Several national liberation movements like the ANC have made declarations of accession pursuant to Article 96(3), but the Depositary has neither listed any such declarations nor transmitted them to the high contracting parties.[202] In response to the PLO's deposition of its unilateral undertaking, the Swiss Federal Council stated that it was not in a position to decide on the validity of the accession, "due to the uncertainty within the international community as to the existence or non-existence of a State of Palestine." Nonetheless, some of these declarations like the NDFP's were deposited with the ICRC, which, according to Higgins, indicates "that national liberation movements have recognized the difficulties inherent in Article 96(3) and tried to work outside the formal framework." The legal status of such unilateral declarations is still debatable.[203]

A similar mechanism for the accession of national liberation movements is provided in the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects of 1980 (Certain Conventional Weapons or CCW). No such Declarations have yet been made, however. Higgins sees this as a sign that national liberation movements "have become

[196] *Id* at 15.

[197] *Id.*

[198] National Democratic Front of the Philippines Human Rights Monitoring Committee, *Declaration of Undertaking to Apply the Geneva Conventions of 1949 and Protocol I of 1977* (1996), *available at* http://www.ndfpmc.com/gob/sites/default/files/publications/Booklet%206.pdf.

[199] *See* the *Declaration of Undertaking* for details on the captivity and release of prisoners-of-war such as Maj. Noel Buan and Gen. Victor Obillo.

[200] Higgins, *supra* note 3 at 15.

[201] *Id.*

[202] *Id.*

[203] *Id.* at 14. Verhoeven commented that "it is accepted that a declaration without deposition suffices."

disillusioned with the formal IHL framework and the problems associated with accession to other IHL instruments."[204]

The willingness of national liberation movements to apply international humanitarian law to their warfare must be welcomed by the international community. In fact, given the huge disproportion in firepower and military capacity between state armed forces and liberation movements, it is the latter, and not the former who is likely to encounter difficulties in adhering to the rules of war. That states continue to reject the application of the *jus in bello* to liberation wars, notwithstanding its immense humanitarian value, only shows the fear of states in the potential of defensive counter-violence.

IV. THE CASE OF THE PHILIPPINES AND THE NDFP

"The true Filipino is a decolonized Filipino."
—Renato Constantino [205]

A. US Colonialism in the Philippines

Under the Treaty of Paris of 1898, the United States acquired the Philippines from Spain for $20 million[206]. Senator Jovito R. Salonga noted a number of compelling factors that instigated this decision by the imperial power:

> [T]he growth in American industrial and commercial strength which increased the pressures for foreign trade and investment; the race for markets, investments and territories in China among the big powers; including England, France, Russia, Germany and Japan; the overriding thought that the Philippines would serve as the American "gateway to Asiatic markets"; the presence in key positions of prominent figures who saw in the war with Spain a rare opportunity to establish naval bases in the Pacific which would enable the United States to compete with other imperial powers; the widespread belief among Americans in a sense of mission to accomplish great things in the world as part of America's "manifest destiny", and the enthusiasm and pressure that came from the Protestant Churches.[207]

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[204] *Id.* at 15.

[205] THE MISEDUCATION OF THE FILIPINO (1959).

[206] With approximate relative value of $571 million in 2013 based on the percentage increase in comparative prize index from 1898 to 2012. Samuel Williamson, *Seven Ways to Compute the Relative Value of a U.S. Dollar Amount, 1774 to present, available at* http://www.measuringworth.com/uscompare/relativevalue.php (last accessed Feb. 28, 2014.)

[207] Jovito R. Salonga, *A Background Paper on American Military Bases in the Philippines* (1976).

Then US President William McKinley tagged the acquisition of the Philippines as an "altruistic mission," saying that they came to the country "not as invaders or conquerors, but as friends, to protect the natives in their homes, in their employment, and in their personal and religious rights."[208] The US immediately set out to lay the conditions for the "peaceful acceptance of the colonial rule" in order to effect the economic exploitation of its new colony.[209] Along with the military suppression of Filipino resistance in the Philippine-American War, the US resorted to other methods of "subduing the spirit and seducing the mind of the Filipino."[210]

> The re-creation of Philippine society in the image of its conqueror, the conversion of the elite into adjuncts of colonial rule, and the cultural Americanization of the population became integral parts of the process of colonization. A program of virtual de-Filipinization was therefore instituted. This had the effect of gradually dissipating the intense feelings of nationalism that had animated the Revolution and the resistance to American occupation.
>
> A quasi-American society was eventually established which bore the imprint of the institutions, values, and outlook of the colonizing power. The American colonial technique finally earned for the United States the loyalty of millions of Filipinos whose sense of values was distorted, whose children were miseducated, and whose tastes were conditioned to the consumption of American products. It should be noted, however, that generally speaking the degree of loyalty, miseducation and Americanization was in direct proportion to economic and social status.[211]

Colonial policies such as the establishment of the Philippine education system and the perpetration of myths about the US effectively transformed the image of the US as an altruistic benefactor.[212] Historian Renato Constantino said that it was subtly inculcated in Filipinos "a belief that the Philippines is ideally

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[208] William McKinley, *Benevolent Assimilation Proclamation,* Proclamation sent to General Otis (December 21, 1898), *available at* http://www.msc.edu.ph/centennial/benevolent.html. The proclamation was announced in the Philippines on Jan. 4, 1899.

[209] RENATO CONSTANTINO, A HISTORY OF THE PHILIPPINES (1st ed. 1975).

[210] *See id.* at Chapter XVI (Colonial Society and Politics), for an account of Philippine history under American colonial rule.

[211] *Id.*

[212] According to Constantino, these colonial myths were: "that America is the land of opportunity and fair play, that in American society all men are equal, that the Americans came not as conquerors but as friends to give the Filipinos democracy, education, roads, and sanitation, that they trained the Filipinos in self-government to prepare them for independence, and that after granting the country its independence they allowed the Filipinos to enjoy special relations with the United States which were beneficial to the young Republic." *Id.*

suited to be primarily an agricultural country, and that free enterprise capitalism is the only possible economic framework for democracy." This perception provided the US an ideal market for its surplus products, with the Filipinos as "avid consumers of American products" and the Philippines as "a fertile ground for American investment."[213] The use of English as the chief mode of communication and medium of instruction drove a "wedge" between Filipinos and their past and assured the isolation of educated Filipinos from the masses.[214]

The Americans left untouched, and even reinforced, some of the social structures instituted by the Spaniards like the *caciques*. Constantino observed that "[t]he reorganization of local governments which the Americans instituted with the advice of prominent *ilustrados* strengthened the hold of the landed elite on their communities." History repeated itself, particularly that juncture when the Spaniards during colonization made local leaders of chiefs in order to win their loyalty and collaboration. The Americans kept strong control of the central government and restricted the privilege of suffrage "the retention of political power by the elite of each locality."[215]

The Filipino elite and middle class *pensionados* were constituted as new intermediaries who would "interpret American policy to the people and persuade the latter by example to accept American rule."[216] The US secured their goodwill by appointing them to high offices, in the guise of training Filipinos for self-government. The real intent, however, was to "mollify critics in the anti-imperialist movement in the United States." This pacification measure proved to be quite successful so much so that Governor-General James Francis Smith said, "[I]t charmed the rifle out of the hands of the insurgent and made the one-time rebel chief the pacific president of a municipality or the staid governor of a province."[217] Constantino further observed:

> In the beginning, many were still imbued with the nationalism of the people and they may have sincerely thought that the struggle for independence had to be waged within the limits allowed by American colonialism and that the tactics they were employing were the correct ones for the colony. Some of them would achieve a measure of success in widening the frontiers of the struggle within the limitations of colonialism. On the other hand, their claim that the only way to attain freedom was to work for it within the colonial context was also in part, if not wholly so, a rationalization born of

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[213] *Id.* at 265.

[214] *Id.*

[215] *Id.* at 266..

[216] *Id.*

[217] *Id.*

> their own career expectations and the need of propertied classes to safeguard their holdings. We cannot generalize and say that these leaders were all conscious opportunists and hypocrites, and it is likewise difficult to periodize just when a particular leader moved from a position of sincere desire for independence to one of mere sloganeering to cater to public clamor. Neither can we discount, especially in the products of American education, the effects of a carefully nurtured colonial mentality which could make them sincerely equate Philippine interests with American interests. But whether they were conscious opportunists and hypocrites or whether they were sincere but misguided, the fact is that their accommodation within the colonial framework and their efforts to make the people adjust to and accept their colonial status contributed to the erosion of nationalist attitudes and was therefore a disservice.[218]

In the countryside, the *cacique* system preserved the iniquity of feudal relations, frustrating tenants' hopes of acquiring their own lands. Peasants and farmers were dispossessed of their lands through land-grabbing and spurious land-titling.[219] These fomented agrarian unrest beginning in the 1920s. In urban centers, unfair labor relations and low wages led to labor unionism. Class-conscious and militant peasants and rural workers would later unite to advance their material interests.[220]

The Commonwealth was established in 1935 amidst a backdrop of global conflict, namely, "the emergence of totalitarian dictatorships in Europe, the outbreak of the Sino-Japanese war, and the imminence [of World War II]."[221] In 1941, Philippine forces were integrated into the United States Armed Forces in the Far East (USAFFE). War came and ravaged the country. It was in this state when it was "liberated" in 1945. On July 4, 1946, the Republic of the Philippines was declared an independent nation.

B. US Neo-Colonialism in the Philippines

The Philippines, however, did not truly become independent. It only transformed from a colony into a neo-colony, achieving "formal independence without eliminating foreign domination."[222]

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[218] *Id.* at 270.

[219] *Id.* at 297.

[220] *Id.* at 333.

[221] Salonga, *supra* note 207, at 3.

[222] D. B. SCHIRMER & S. R. SHALOM, eds., THE PHILIPPINES READER: A HISTORY OF COLONIALISM, NEOCOLONIALISM, DICTATORSHIP AND RESISTANCE 87 (1st ed. 1999).

After the declaration of Philippine Independence, the Philippine government forged various agreements with the US which ensured the country's dependence on US aid and foreign capital. The Philippine Trade Act of 1946 or the Bell Trade Act tied the Philippine economy to the US economy, providing for preferential tariffs, quotas for Philippine products entering the US and preference for American capital. The Act also restricted the control of the Philippine government over its own economy.[223] To mollify opposition from Filipino nationalists, the "parity" provision of the 1946 agreement provided the reciprocal rights of the US and the Philippines to invest in each other.[224] The parity provision, however, caused our economy to "de-Filipinize," killing infant local industries and reducing economic opportunities for Filipinos in the Philippines.[225] According to the Central Bank Annual Report for 1954, direct foreign investment yielded a profit of PHP 61,100,000, 5.4% or PHP 3,300,000 of which remained with the Philippines, while the remaining 94.6% amounting to PHP 57,800.000 went to foreign investors.[226]

Under the Military Bases Agreement of 1947, the US was given the right to retain its military bases in the Philippines—the Clark Air Base and the Subic Naval Base—over which it would exercise sole control. Contrary to its claim that the bases would be used to protect the Philippines against foreign invasion, the US used them as logistical hubs for military intervention in Asia, particularly the CIA plot to depose Indonesian President Sukarno and the Vietnam War effort.[227] As Salonga later observed, the US government has sponsored client dictatorships in Asia, including the Philippines, "even as it professes to adhere to a policy of non-intervention in local affairs."[228] Salonga ardently condemned the military presence of the US in the country.

> As stated by responsible American officials, the military bases in the Philippines have the function of protecting the business interests of American corporations which have grown tremendously since our independence. In our humble view, they only preserve and advance alien economic domination and help perpetuate our colonial economy.[229]

In exchange for the Military Bases Agreement, the US provided the Filipino elite with military aid, including the advice of the Joint US Military

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[223] *Id* at. 90.
[224] *Id.* at 95.
[225] Augusto San Pedro, *Disparity and Economic Subservience*, 31 PHIL. L.J. 638, 640-1 (1956).
[226] *Id.* at 640-641.
[227] SCHIRMER & SHALOM, *supra* note 222 at 125.
[228] Salonga, *supra* note 207, at 9.
[229] *Id.*

Advisory Group ("JUSMAG"), to quell the HUKBALAHAP insurgency in Central Luzon.[230]

On the political front, the US sponsored candidates in the national elections who would promote its interests. During the presidential elections of 1953, US business interests illegally contributed USD 250,000 to the campaign of "American boy" Ramon Magsaysay whose Nacionalista party was then strapped for money. The US also led smear campaigns to discredit nationalist candidates, often using dirty tricks. In the 1957 presidential elections, for example, nationalist statesman and staunch critic of the military bases Claro M. Recto was labeled a "Chinese Communist stooge." He was defeated by a landslide, scoring a measly 450,000 votes against Carlos P. Garcia's 2,079,000.[231]

By 1970, foreign investment had become very important to the Philippines. Eighty percent of foreign investments was by then owned by Americans.[232] According to a November 1973 Report prepared by the Corporate Information Office of the National Council of Churches of Christ in the US, Americans as of 1970 owned approximately one-third of all the total equity capital of the 900 largest corporations in the Philippines.[233] In the same decade, the policy of privatization of state assets became the order of the day. In 1975, foreign debt ballooned to USD 3 billion.

1. Neoliberalism and Globalization

While Filipino workers have been in exodus to seek employment abroad, the cheapness of Filipino labor has caused the dramatic expansion of business process outsourcing ("BPO") of foreign corporations in the country. TNCs have been stunting local industries and depleting our resources. In other words, "Philippine economic development was tailored to fit the demands of the dominant power and this meant prosperity for foreign investors and their local partners and continuing poverty for the people." Constantino observed:

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[230] *Id.* at 118

[231] *Id.* at 152

[232] *Id.* at 4. From August 1, 1950 to June 30, 1952, the Philippine Air Force "flew 2,600 bombing and strafing sorties, expending over a million rounds of .50 caliber ammunition and a quarter of a million pounds of explosives on *Huk* targets."

[233] Maria Victoria Valenzuela, *Philippine Policy in Housing the Urban Poor: The Economic and Socio-political Contexts of Public Housing Policy* (May 10, 1974) (thesis for Master of City Planning, Massachusetts Institute of Technology *available at* http://dspace.mit.edu/bitstream/handle/1721.1/70649/25985758.pdf?sequence=1).

> Despite a variety of stop-gap measures, the economic situation of the people gradually deteriorated while the colonizers and their local allies steadily appropriated a larger share of the national wealth.
>
> The majority who had always occupied the lower rungs of the economic ladder did not have the authority to plan their lives; the poor were not given the opportunity to develop their capability through correct education based on their aspirations.
>
> Thus a poverty-breeding society was nurtured, and the widening gap between a wealthy few and the impoverished majority became an apparently insoluble problem. State power was manifested in various ways, all leading to the suppression of any move for basic change. A bureaucracy with a vested interest in participation in the exercise of power was established; unproductive expenditure for luxuries was encouraged because the economy provided few incentives for Filipino investors; skills were developed which would have been useful in a different social milieu; export crops predominated over produce to feed a grossly expanding population; and the government was burdened with a type of foreign aid which insured that the debtor would be in constant debt to the creditor.[234]

The national policy framework of the Philippines is biased for foreign capital.[235] The country's economy is export-oriented and merely serves as a production unit of "an internationally integrated production system of global corporations."

The "neoliberal" [236] globalization policy of denationalization, liberalization, privatization and deregulation imposed by the US has caused the underdevelopment of the Philippine economy. The US, through the Philippine government, has prohibited the mobilization of the country's resources for national industrialization and genuine land reform.[237] Under this policy, "puppet leaders" have given premium to "free market" as the state-sanctioned model of

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[234] CONSTANTINO, *supra* note 209, at 337.

[235] MAGALLONA, *supra* note 88, at 141.

[236] Neoliberalism, according to Prof. Jose Maria Sison, is the policy of giving full play to "free market" by providing monopoly bourgeoisie "all the opportunities to raise capital resources, make profits without restrictions and get big tax cuts supposedly to develop the economy, generate jobs and make the working people less 'dependent' on government." Adopted since 1980s under the lead of Reagan and Thatcher, neoliberalism was supposed to solve the problem of "stagflation," "the phenomenon of stagnation and inflation going together and the vicious cycle whereby the attempt to solve either one of them aggravates the other." Sison, *infra* note 237.

[237] Jose Maria Sison, *The Policy of "Neoliberal" Globalization and Worsening Economic Crisis in the Philippines*, Speech on the 30th Founding Anniversary of the League of Filipino Students (Sept. 11, 2008), *at* www.lfs.ph/wp-content/.../neoliberalglobalizationcrisisinphilippines.rtf (last accessed Feb. 15, 2014).

industrial development.[238] Prof. Jose Maria Sison explained how the Philippine government, since the long regime of President Ferdinand Marcos, has catered to neoliberalism, to wit:

> The 1987 constitution of the reactionary state has reduced land reform to a "free market" transaction, with the landlord selling his land voluntarily, demanding current market value or offering the stock distribution option. The principle of state intervention in order to realize social justice, such as the expropriation of landlord estates for affordable redistribution to the tenants, has been laid aside [...].
>
> Under the Ramos regime, the so-called medium term development program did not provide for national industrialization and land reform. But it pushed for the denationalization of the economy to benefit the foreign monopolies and big compradors. It violated the principles of economic sovereignty and conservation of the national patrimony. It removed the restrictions on foreign investors in banking, mining, agriculture, domestic trade and other types of enterprises. It allowed the unrestricted flow of foreign capital in and out of the country and the big comprador exporters of raw materials to stash away foreign exchange abroad. It ran far ahead of the schedule set by the WTO for lowering the tariff on all types of products.
>
> The reactionary government incurred huge local public debt and foreign debt for infrastructure, especially in graft-ridden power generation projects conceded to foreign companies. It went into a privatization spree, selling off state assets and prime public land to foreign investors in order to cover trade and fiscal deficits [...].
>
> The financial crisis of 1997 brought down the Ramos regime's claims to economic success. By the time Estrada became president, the reactionary government had gone bankrupt and foreign credit dried up to the extent that he was compelled to serve his corrupt appetite by taking payoffs from jueteng and using social security funds of government and private employees for the shadiest of deals. He was reduced to begging for infrastructure loans from Japan, which wanted to extract excessive trade and investment privileges.
>
> When the turn of Arroyo came, she renewed the orgy of local and foreign borrowing and the frenzy of implementing the "neoliberal" economic policy which she had strongly pushed as a senator. The imperialists were pushing another wave of easy credit in accordance with the "neoliberal" dictum that economic and financial

[238] *Id.*

problems are solved by scooping money from the central bank into helicopters for these to pour out on the problem.[239]

The Arroyo government entered into onerous and one-sided agreements with other states and multilateral bodies, among them the Japan-Philippines Economic Partnership Agreement ("JPEPA") and the ASEAN Trade in Goods Agreement ("ATIGA"), which favored the economic interests of Japan and other ASEAN countries over Philippine interests.[240] Foreign investors in recent years have imbued capital in key industries such as banking, shipping, telecoms and airlines as well as public utilities. As a result, think-tank IBON noted, the rates of power and water in the Philippines are among the highest in Asia, "while the ordinary Filipino suffers less affordable and accessible basic utilities."[241]

More than three years into his presidency, the administration of President Benigno Aquino III has continued to entrench globalization and neoliberalism deeper into the Philippine economy. As of this writing, the Philippine government is slated to sign the European Union-Republic of the Philippines Free Trade Agreement ("EU-RP FTA"). It has also announced its intention to participate in the US-dominated Trans-Pacific Partnership ("TPP") agreement, under which the Philippines will be bound to "remove the remaining nationalist economic provisions of the Philippine Constitution."[242]

In true neoliberal fashion, the Philippines has lowered its tariff rates to among the lowest in Asia, causing "unabated importation of cheap goods including those which the country can produce"[243] like rice. Pursuant to its commitments under the World Trade Organization (WTO), the Philippines is disabled from protecting its local markets from the inundation of imported products. For instance, WTO was set to lift the quantitative restrictions ("QRs") on the volume of rice that the government imports annually beginning 2012.

Moreover, corporate takeover under Aquino's flagship Public-Private Partnership Program ("PPP") is seen as a "sell-out of social services." While it professes to afford "the private sector a level playing field, reasonable returns and appropriate sharing of risks,"[244] it actually guarantees profit for the private

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[239] *Id.*

[240] *Exclusionary Economics: How Aquino and Arroyo economics are the same*, IBON Features, Jul. 22, 2012, *available at* http://www.ibon.org/ibon_features.php?id=248 (last accessed Apr. 2, 2013).

[241] *Id.*

[242] *Id.*

[243] *Id.*

[244] *Public-Private Partnership Program*, *available at* http://ppp.gov.ph/wp-content/ uploads/ 2s012/05/PPP-Brochure_May2012.pdf (last accessed Apr. 3, 2013).

sector, resulting, ultimately, in the increase in prices of utilities and commodities. Meanwhile, the US launched in January 2013 up to USD 86.5 million in new public-private partnership commitments on a global scale to strengthen the reach and impact of foreign aid.

In harmony with these economic measures, the CIA and big business-backed funding agencies conduct covert operations and clandestine propaganda in the country to dominate the cultural front, manipulate trade unions and deflect the analysis of capitalist exploitation.[245] Prof. Roland Simbulan explained:

> It must be emphasized that the U.S. places high premium on the ideological legitimation of its continuing neo-colonial domination over the Philippines and, as such, depends heavily on the US-financed and US-sponsored institutions, especially on the ideological front. Thus, grants are generously poured in by such agencies as USAID, NED, Asia Foundation and the big business-sponsored Ford Foundation. The objective is to lure and lull the masses into the elite-dominated electoral process, thus legitimizing the neo-liberal economic system and its political apparatus, producing fragile social peace and a "peaceful" mechanism for competition among the Filipino elite and oligarchy.[246]

2. Military and Foreign Policy

The Philippine Senate's rejection of the extension of the Military Bases Agreement in 1991 did not end the US military presence in the country. In 1999, the RP-US Visiting Forces Agreement ("VFA") was entered into, allowing American troops to conduct military exercises and make periodic visits in the Philippines. The VFA has been challenged over issues of sovereignty, although the Philippine Supreme Court has declared it to be constitutional.[247] According to Constantino, the VFA is "the military aspect of US-led globalization which erases national borders," while globalization is "above all the free movement not only of foreign capital but also armed components that will assure the protection of international capital."[248]

The US has entered a new phase in military intervention in the Philippines through the VFA, engaging in annual *Balikatan* Military Exercises

[245] Roland G. Simbulan, *The CIA's Covert Operations in the Philippines*, *in* ROLAND G SIMBULAN, FORGING A NATIONALIST FOREIGN POLICY 52 (2009).

[246] *Id.* at 53.

[247] *See* Bagong Alyansang Makabayan v. Zamora, GR No. 138570, 342 SCRA 449, Oct. 10, 2000. The VFA contains provisions which permit the US government take cognizance of crimes committed by its personnel on Philippine territory, with some exceptions.

[248] CONSTANTINO, *supra* note at 209.

with about 660 US troops in joint military operations for "six months to one year" against the Abu Sayyaf as live targets.[249] Pentagon firms tapped by the USAID served as contractors for infrastructure projects in the south to service the "military access" of American military forces in the country.[250]

Meanwhile, since the defeat of the *Huk* rebellion in the 1950s did not end armed resistance in the Philippines[251], the US has been providing the Philippine government material support for its counter-insurgency efforts. Through the JUSMAG, the US has dictated the Philippines' internal security plans and counter-insurgency programs—from President Marcos' *Oplan Katatagan*[252] to current President Aquino's *Oplan Bayanihan.*

The following, according to Professor Bobby Tuazon, are the other forms of US military interventionism in the Philippines:

1. The Mutual Logistics Support Agreement (MLSA);
2. The retention of the outdated Mutual Defense Pact of 1951;
3. The establishment of the Defense Policy Board (DPB) based in Pentagon;
4. The retention of JUSMAG (Joint US Military Advisory Group);
5. Control of the AFP in the guise of military aid, war exercises, training of senior and junior officers and related;
6. The executive agreement signed by President Macapagal-Arroyo granting immunity rights to US forces in the Philippines in violation of the Philippine Constitution, the Rome-based International Criminal Court (ICC) Treaty and other international humanitarian laws and conventions;
7. Continued intervention in counter-insurgency (now dubbed as "counter-terrorism") operations through the deployment

[249] Roland G. Simbulan, *A New Phase in U.S. Military Intervention, in* ROLAND G. SIMBULAN, FORGING A NATIONALIST FOREIGN POLICY 38 (2009).

[250] *Id.* at 40.

[251] The same economic and social inequalities that have fueled the peasant revolts under the American colonial rule have prompted the liberation movement NFDP and its allied organization New People's Army (NPA) to engage Philippine state forces in armed conflict beginning 1969. In the south, the Philippine government had until recently confronted the Islamist-separatist Moro Islamic Liberation Front (MILF) in armed conflict.

[252] This was followed by *Oplan Lambat Bitag I, II, III, IV* of the Aquino and Ramos administrations, and Estrada's *Oplan Makabayan* in 1998 and *Oplan Balangai* in 2000.

"military advisers," trainers, Special Operation Forces (SOFs) and other forms of "military assistance" (such as intelligence, air support, etc.);

8. Retention of a number of US forces—along with their logistics, war equipment and other facilities—who are participating in so-called war exercises on a temporary or permanent basis;

9. Covert operations by the CIA and other US intelligence arms as well as by the National Endowment for Democracy (NED), US Agency for International Development (AID) such as its clandestine and well-funded AGILE project, and other "non-military" forms;

10. Tagging revolutionary groups, their leaders as well as legal organizations as "terrorist" in order to justify bigger armed interventionism in the guise of the "war on terror" and become "legitimate targets" of military, police and intelligence operations;

11. Covert pressures on the Philippine government, through the DND, to scuttle peace talks with the National Democratic Front of the Philippines (NDFP); [and]

12. [T]he replacement in 2002 of Vice President Teofisto Guingona, who has a record of anti-US bases stance, by the rabidly pro-US and former Marcos henchman, Blas Ople as foreign affairs secretary. In October 2003, the head of the VFA Monitoring Committee, lawyer Amado Valdez, was sacked by Ople for saying in a report that the treaty is onerous and one-sided in favor of the United States.[253]

After the 9/11 attacks, President Macapagal-Arroyo pledged all-out support for the US war on terror, renewing "military ties with Washington" by "once again offering the Philippines as a refueling depot."[254] In 2004, Arroyo branded the Communist Party of the Philippines (CPP), the New People's Army (NPA), and National Democratic Front of the Philippines ("NDFP") Chief Political Consultant and CPP founder Jose Ma. Sison as terrorists, resulting in the latter's inclusion in the terrorist listing of the European Union. Arroyo also used the war on terror to intensify her counter-insurgency program, the

[253] Bobby Tuazon, *Current US Intervention in the Philippines*, Paper Read at the Conference of the College Editors Guild of the Philippines – National Capital Region at San Beda College Auditorium, Manila (Oct. 21, 2003), *available at* http://www.bulatlat.com/news/3-41/3-41 primer.html (last accessed Apr. 2, 2013).

[254] Songok Han Thornton, *People Power and Neocolonial Globalism in the Philippines*, 2 ASIA J. GLOBAL STUD. 20 (2008).

insidious *Oplan Bantay Laya* (OBL), which had the trademark of U.S. counter-terror operations of "intensive military operations, intelligence, and civic action."[255] The OBL resulted in a bloody human rights record—numerous extrajudicial killings, disappearances and other grave human rights abuses of civilians, mostly of activists.[256] The extra-judicial killings under the OBL are also likened to the CIA-sponsored neutralization of suspected Vietcongs in Vietnam in the 1960s known as Operation Phoenix.[257]

The current Internal Peace and Security Plan ("IPSP") called *Oplan Bayanihan* is heavily patterned after the US Counter-Insurgency ("COIN") Guide of 2009 formulated by the US Inter-Agency Counter-Insurgency Initiative (which includes the US Department of Defense, the US State Department, and the USAID). *Oplan Bayanihan* is a testament to the direct involvement of the US in Philippine internal security:

> Recently, the Global War on Terror has resulted in a reinvigorated engagement between the Philippines and US in combating terrorism in the Southern Philippines. Under the ambit of the Visiting Forces Agreement (VFA), US forces provide the AFP technical support, training assistance and support activities such as casualty evacuation in the AFP's efforts against the Abu Sayyaf Group and Jemaah Islamiyah.[258]

The COIN defines counter-insurgency as "the blend of comprehensive civilian and military efforts designed to simultaneously contain insurgency and address its root causes."[259] It regards non-military means of warfare as "often the most effective elements, with military forces playing an enabling role."[260] Similarly, *Oplan Bayanihan*'s integrated approach employs non-combat operations like providing developmental works to communities. But like the OBL, constant military presence in civilian communities sanctioned by the *Oplan* has so far resulted in gross human rights violations. Karapatan reported that from July 2010 to June 2012, there were already 29,465 victims of forced evacuation;

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[255] Benjie Oliveros, *US' Role in Philippine Counter-insurgency Operations, at* http://bulatlat.com/main/2010/09/26/us-role-in-philippine-counterinsurgency-operations/ (last accessed Oct. 22, 2012).

[256] KARAPATAN reported that from January 2001 to June 2010 of the Arroyo administration, there were 2,059 illegal arrests, 1,206 extrajudicial killings, and 206 disappearances. *See* KARAPATAN Alliance for the Advancement of People's Rights, 2010 Year-End Report, *at* http://www.karapatan.org/files/Karapatan%202010%20HR%20Report%20(updated).pdf.

[257] Oliveros, *supra* note 255, at 240.

[258] AFP Internal Peace and Security Plan (IPSP), *at* http://www.army.mil.ph/pdf_files/bayanihan.pdf (last accessed Oct. 22, 2012).

[259] US Government Counter-insurgency Guide (2009) *available at* www.state.gov/t/pm/ppa/pmppt (last accessed Oct. 22, 2012).

[260] *Id* at 7.

19,325 victims of threat/harassment/intimidation; 14, 624 victims of use of schools, religious, medical and other public places for military purposes; and 6,721 victims of indiscriminate gunfire.[261]

The foregoing assertions of US neo-colonial control have purveyed State terrorism, impinged on the Philippines' sovereign, independent and territorial rights and reinforced "the image of the Philippine government in the world community as a puppet of the US"[262]

C. The NDFP

The NDFP, guided by Marxist-Leninist-Maoist thought, characterizes Philippine society as "semi-feudal"[263] and "semi-colonial."[264] Like Fanon, the NDFP views post-decolonization Philippines as one being ruled by imperialist US together with the "local comprador-big bourgeois and landlord agents," and seeks to rid the Philippines of imperialist, feudal and bureaucrat-capitalist forces.[265] Towards this end, its armed organization, the NPA, has been engaging the Philippine government in armed conflict since 1969.

The NDFP describes itself as the "political authority representing the people and organized political forces that are waging an armed revolutionary struggle for national liberation and democracy."[266] It consists of the CPP as its leading political organ, the NPA, and 17 allied revolutionary organizations representing various sectors in the rural and urban areas.

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[261] *See KARAPATAN Monitor* (April-June 2012), *at* http://www.karapatan.org/Karapatan+Monitor+Q2+2012. As of this reporting period, there were also 99 victims of extrajudicial killings, 67 victims of torture, and 11 victims of enforced disappearances.

[262] Tuazon, *supra* note 253.

[263] Professor Jose Maria Sison said Marxist revisionists in the Philippines "concurred with the 'Left opportunists' on the subjectivist notion that the Philippine economy ceased to be semifeudal and had become 'semicapitalist' upon their presumption that a significant increase of industrialization and urbanization had been accomplished under the big comprador-landlord economic policy of the US-directed Marcos fascist regime." *See* Jose Maria Sison, *Development, Current Status and Prospects of Maoist Practice in the Philippines*, *available at* http://www.josemariasison.org/?p=11334 (last accessed Feb. 28, 2014).

[264] *Id.* This study finds agreement with the NDFP on this point. Preceding discussions have adequately established the neo-colonial nature of the Philippines.

[265] The NDFP's view is not politically neutral, but ideology aside, the result is the same. Nowhere does the normative framework in this study qualify its application to any creed: for as long as a post-decolonization nation remains under the rule of its former colonial master, a liberation war raging within falls under Article 1(4) of Protocol I.

[266] *See* National Democratic Front of the Philippines Human Rights Monitoring Committee, *supra* note 198, at 9.

In 1985, the NDFP published its 12-Point Program which outlines its "program of uniting the democratic classes and special sectors of society for the revolutionary struggle against US imperialism, feudalism and bureaucrat capitalism."[267] Its fifth and seventh points are the very antithesis of the current neo-colonial set-up: the termination of all unequal relations with the United States and all other imperialist powers and other foreign entities; the dismantling of the dominance of the US and other imperialists and the big comprador-landlords over the economy; and the implementation of a program of national industrialization while ensuring an independent and self-reliant economy. Moreover, Section 2, Article II (General Revolutionary Principles) of the NDFP Constitution states that the "central task of the Philippine revolution is to overthrow the rule of imperialists and the local reactionary comprador big bourgeois and landlord classes and the establishment of a democratic people's republic."

Since 1992, the NDFP and the Government of the Republic of the Philippines (GPH) have been engaged in peace negotiations, with the governments of the Netherlands, Belgium, and Norway acting either as hosts or third-party facilitators. The Parties have so far adopted ten bilateral agreements. They have also agreed to tackle four substantive agenda in the course of the negotiations, the first being respect for human rights and international humanitarian law; the second, socio-economic reforms; the third constitutional and political reform; and the fourth, cessation of hostilities. As of this writing, the Parties are yet to begin negotiations on the second agenda.

D. The CARHRIHL

Under the first agenda, the Parties adopted the *Comprehensive Agreement on Respect for Human Rights and International Humanitarian Law* ("CARHRIHL") on March 16, 1998.[268] Both Parties to the CARHRIHL bound themselves to promote the full scope of human rights and comply with international humanitarian law during the conduct of hostilities. The CARHRIHL also mandated the creation of certain mechanisms, such as the Joint Monitoring Committee ("JMC") and its Joint Secretariat ("JS"), through which the Parties could monitor the implementation of the Agreement.

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[267] NATIONAL DEMOCRATIC FRONT OF THE PHILIPPINES, CONSTITUTION, art. IV (General Program), *at* http://members.casema.nl/ndf/about/ndf_consti.pdf (last visited Dec 23, 2013).

[268] Comprehensive Agreement for the Respect of Human Rights and International Humanitarian Law (hereinafter "CARHRIHL"), Mar. 16, 1998, Phil.-NDFP, *available at* http://peacebuilderscommunity.org/documents/CARHRIHL.pdf.

In some of the provisions of CARHRIHL, the GPH recognizes that the NDFP "has a separate political authority and organs of political power and has its own principles and organizational structure as embodied in its 12-Point Program, Constitution and Guide for Establishing the People's Democratic Government."[269] Article 3, Part II (Bases, Scope and Applicability) provides that "[t]he Parties shall uphold, protect and promote the full scope of human rights, including civil, political, economic, social and cultural rights. In complying with such obligation due consideration shall be accorded to the respective political principles and circumstances of the Parties."[270] Expressly, the GPH respects the fact that the NDFP has its own political principles and circumstances, and that it will conduct itself in accordance therewith. This point is reiterated in Article 1 of Part VI (Final Provisions) which reads: "[T]he Parties shall continue to assume separate duties and responsibilities for upholding, protecting and promoting human rights and the principles of international humanitarian law in accordance with their respective political principles, organizations and circumstances until they shall have reached final resolution of the armed conflict."[271]

Article 6 of Part I (Declaration of Principles) states that "[t]he Parties are aware that the prolonged armed conflict in the Philippines necessitates the application of the principles of human rights and the principles of international humanitarian law and the faithful compliance therewith by both Parties."[272] The fourth and sixth preambular paragraphs also read:

> ACKNOWLEDGING that the *prolonged armed conflict* in the Philippines necessitates the application of the principles of human rights and the principles of international humanitarian law,
>
> * * *
>
> REALIZING the necessity and significance of assuming *separate duties and responsibilities* for upholding, protecting and promoting the principles of human rights and the principles of international humanitarian law,[273] (Emphasis supplied.)

In these provisions, the GPH expressly acknowledges two things: 1) the present protracted people's war, and 2) the imperative to apply human rights and

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[269] Edre Olalia, *Legal Opinion on Status of National Liberation Movements and Their Use of Armed Force in International Law*, *at* http://www.josemariasison.org/legalcases/related/legal_status_of_NLMs.pdf (last accessed Oct. 22, 2012).

[270] CARHRIHL, *supra* note 268.

[271] *Id.*

[272] *Id.*

[273] *Id.*

international humanitarian law to such conflict.[274] Impliedly, the GPH recognizes that the NDFP is "capable and ready to assume and be bound by such duties and responsibilities."[275] This is affirmed by Article 1, Part III (Respect for Human Rights): "In the exercise of their inherent rights, the Parties shall adhere to and be bound by the principles and standards embodied in international instruments on human rights."

Article 2(1), Part III (Respect for Human Rights) of the CARHRIHL provides an improved definition of the right to self-determination:

> ARTICLE 2. This Agreement seeks to confront, remedy and prevent the most serious human rights violations in terms of civil and political rights, as well as to uphold, protect and promote the full scope of human rights and fundamental freedoms, including:
>
> 1. The right to self-determination of the Filipino nation by virtue of which the people should fully and freely determine their political status, pursue their economic, social and cultural development, and *dispose of their natural wealth and resources for their own welfare and benefit towards genuine national independence, democracy, social justice and development.*[276] (Emphasis supplied.)

The attainment of "genuine national independence, democracy, social justice, and development" is provided herein as the true end of the right to self-determination of the Filipino nation. This provision, according to Edre U. Olalia, should be read in conjunction with Article 4, Part III: "[t]he inherent and inalienable right of the people to establish a just, democratic and peaceful society, to adopt effective safeguards against, and to oppose oppression and tyranny similar to that of the past dictatorial regime." According to Olalia, the phrase "to establish a just, democratic and peaceful society" recognizes the people's collective right to revolt, which, as argued earlier, is concomitant to the right to self-determination.[277]

The following provisions from Part III (Respect for Human Rights) are obligations on the part of the GPH in redressing and preventing the political repression of NDFP members:

> ARTICLE 6. The [GPH] shall abide by its doctrine laid down in People vs. Hernandez (99 Phil. 515, July 18, 1956), as further elaborated in People vs. Geronimo (100 Phil. 90, October 13, 1956),

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[274] Olalia, *supra* note 269, at 59.
[275] *Id.*
[276] CARHRIHL, *supra* note 268.
[277] Olalia. *supra* at 269.

and shall forthwith review the cases of all prisoners or detainees who have been charged, detained, or convicted contrary to this doctrine, and shall immediately release them.

ARTICLE 7. The [GPH] shall work for the immediate repeal of any subsisting repressive laws, decrees, or other executive issuances and for this purpose, shall forthwith review, among others, the following: General Orders 66 and 67 (authorizing checkpoints and warrantless searches); Presidential Decree 1866 as amended (allowing the filing of charges of illegal possession of firearms with respect to political offenses); Presidential Decree 169 as amended (requiring physicians to report cases of patients with gunshot wounds to the police/military); Batas Pambansa 880 (restricting and controlling the right to peaceful assembly); Executive Order 129 (authorizing the demolition of urban poor communities); Executive Order 264 (legalizing the Civilian Armed Forces Geographical Units); Executive Order 272 (lengthening the allowable periods of detention); Memorandum Circular 139 (allowing the imposition of food blockades); and Administrative Order No. 308 (establishing the national identification system).

Upon the effectivity of this Agreement, the [GPH] shall, as far as practicable, not invoke these repressive laws, decrees and orders to circumvent or contravene the provisions of this Agreement.

ARTICLE 8. The [GPH] shall review its jurisprudence on warrantless arrests (Umil v. Ramos), checkpoints (Valmonte v. De Villa), saturation drives (Guazon v. De Villa), warrantless searches (Posadas v. Court of Appeals), criminalization of political offenses (Baylosis v. Chavez), rendering moot and academic the remedy of habeas corpus upon the subsequent filing of charges (Ilagan v. Ponce-Enrile), and other similar cases, and shall immediately move for the adoption of appropriate remedies consistent with the objectives of this and the immediately preceding Article.[278]

As part of its obligation to respect human rights, the GPH shall apply the landmark *Hernandez* doctrine, which states that acts done in furtherance of a political objective should be subsumed under a single political offense. By agreeing to be so obligated under the CARHRIHL, the GPH recognized the status of NPA and NDFP members in the context of criminal law not as common criminals but as political offenders, thus tempering its *carte blanche* over its domestic jurisdiction.[279]

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[278] CARHRIHL, *supra* note 268.

[279] Another agreement, the Joint Agreement on Safety and Immunity Guarantees ("JASIG") signed on Feb. 24, 1995, guarantees "immunity from surveillance, harassment, search,

Article 3, Part VI (Final Provisions) states that "[n]othing in the provisions of this Agreement nor in its application shall affect the political and legal status of the Parties in accordance with the Hague Joint Declaration."[280] Accordingly, the CARHRIHL or its application shall have no effect on the political status of the NDFP as a liberation movement. This is further affirmed by the reference to the Hague Joint Declaration which provides that "the Parties are governed by the principles of mutuality, reciprocity and parity."[281] Sison explained:

> As contracting parties in the CARHRIHL, the [GPH] and NDFP mutually recognize the existence of opposing constitutional frameworks as well as common frames of reference. They mutually reject the imposition of the constitutional and legal processes of either of them upon the other and stipulate common as well as separate duties and responsibilities in accordance with their respective constitutional frameworks and directives of their respective principals.[282]

The last sentence of the above provision reads, "[a]ny reference to the treaties signed by the [GPH] and to its laws and legal processes in this Agreement shall not in any manner prejudice the political and organizational integrity of the NDFP." Based on this, the "revolutionary integrity" of the NDFP as a liberation movement is preserved even as it enters into the peace negotiations and agreements with the GPH.[283] The NDFP therefore has the right *not* to capitulate to the demands of the GPH in accordance with the latter's constitutional and legal structures.

In his study of the CARHRIHL, Olalia found that the Agreement has implications on the status of the NDFP in international law. The CARHRIHL is an expression of the will of the Parties and an outcome of their non-violent confrontation. Wittingly or unwittingly on the part of the GPH, the

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arrest, detention, prosecution and interrogation or any other similar punitive actions due to any involvement or participation in the peace negotiations" to NDFP personnel who are holders of the proper documents of identification.

[280] The Hague Joint Declaration provides that "the holding of peace negotiations must be in accordance with mutually acceptable principles, including national sovereignty, democracy and social justice and no precondition shall be made to negate the inherent character and purpose of the peace negotiations."

[281] Olalia, *supra* note 269.

[282] Introduction to Comprehensive Agreement on Respect for Human Rights and International Humanitarian Law and Related Documents (1992-1998) in the Peace Negotiations between the Government of the Republic of the Philippines and the National Democratic Front of the Philippines (Sep. 26, 1998).

[283] *Id.*

CARHRIHL affirms the international character of the NDFP's liberation war against neo-colonialism. Olalia said:

> Permeating the whole document of the CARHRIHL are several provisions and formulations that validate and impliedly recognize the reality that the NDFP, particularly the CPP, has achieved a status in international law. A study of its provisions shows that it likewise reflects those contained in the NDFP's Guide for Establishing the People's Democratic Government and its Constitution and Program and the [GPH] Constitution as well as the universally accepted principles and standards in international human rights and international humanitarian law instruments. It is a document that endeavoured to put in writing the promotion of the rights of the people and their interests, the protection of the civilian population and the "humanization" of the protracted armed conflict.[284]

E. Unilateral Undertakings

The CARHRIHL is not the only document whereby the NDFP expressed its willingness to assume duties and responsibilities to comply with international humanitarian law. Prior to the signing of the CARHRIHL, the NDFP had already made the same undertaking. On August 15, 1991, the NDFP National Council made a *Declaration of Adherence to International Humanitarian Law*, particularly to Common Article 3 and Protocol II. The NDFP mentioned therein that it had proposed to the GPH "the conclusion of an agreement on human rights and international humanitarian law as an objective even before the talks and agreement on the other substantive issues take place," referring clearly to the CARHRIHL, which would not take form until after almost seven years. The GPH and NDF Negotiating Panels formally met for the first time in 1995.

Years later, the NDFP made a shift in its perception of the armed struggle and began undertaking greater responsibilities as a party to an international armed conflict. On July 5, 1996, pursuant to Article 96 paragraph 3, in relation to Article 1(4) of Protocol I, the NDFP National Council sent its *Declaration of Undertaking to Apply the Geneva Conventions of 1949 and Protocol I of 1977* to the ICRC. The NDFP stated therein that it was cognizant that receipt by the Federal Council of the Swiss Government of the said unilateral Declaration of Undertaking had the following effects:

1. The Geneva Conventions and Protocol I are brought into force for the NDFP as a Party to the conflict with immediate effect;

[284] Olalia, *supra* note 269, at 71.

2. The NDFP assumes the same rights and obligations as those which have been assumed by a High Contracting Party to the Geneva Conventions and Protocol I; and

3. The Geneva Conventions and the Protocol are equally binding upon all Parties to the conflict.

Under the unilateral Declaration, the NDFP accepted the principle of "command responsibility for the system of discipline to ensure respect for the rules of international humanitarian law as having the force of law among its forces and in the areas under its control." It regarded as legitimate targets of military attacks the units, personnel and facilities belonging to the AFP, the Philippine National Police (PNP), paramilitary forces, and the intelligence personnel of the foregoing. It moreover undertook to treat any captured personnel of the military, police and paramilitary forces of the GPH as a prisoner of war, demanding in turn that the GPH do the same to any captured personnel of the NPA and other forces of the NDFP.

Compliance with *jus in bello* governing international armed conflicts entails tremendous effort and strong command of the rules of the war on the part of the NPA. As previously discussed, the protection afforded by these international humanitarian laws do not only extend to persons taking no active part in hostilities, *hors de combat*, and non-combatants who have laid down their arms, but also to prisoners-of-war, civilians and other internationally protected persons. Moreover, the prohibited acts are not limited to (1) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (2) taking of hostages; (3) outrages upon personal dignity, in particular, humiliating and degrading treatment; and (4) 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.

The well-documented cases of prisoners-of-war ("POWs") such as AFP Brig. Gen. Victor Obillo, Capt. Eduardo Montealto, Maj. Noel Buan, PNP Chief Insp. Abelardo Martin, and, more recently, Air Force Maj. Neptune Elequin, demonstrate the insistence of the NDFP to adhere to the Geneva Conventions. These prisoners-of-war (except for Martin[285] who was killed in a "bungled

[285] The NDFP agreed to release Buan and Martin after holding a dialogue with the Humanitarian and Peace Mission. Then-President Estrada refused to meet with the Mission and demanded the capitulation of the NDFP. Even after the ouster of Estrada, the AFP under Gen. Angelo Reyes continued deploying army troops in attempts to rescue Buan and Martin. On April 6, 2001, Buan was released as a "goodwill and confidence-building measure by the NDFP in connection with the resumption of peace talks on [April 27-30,] 2001 in Oslo, Norway, and after

rescue operation" by the AFP) and many others[286] were safely released by the NDFP on moral and humanitarian grounds. In an interview, Elequin said that during his captivity, he was confident he would regain his freedom, believing that they respected human rights.[287] During his turn-over, he testified about how he was treated: "*Maganda ang naging trato sa akin. Hindi man lang nila ako kinurot. Kung ano ang kinakain ng mga kasama ay siya ko ring kinakain* (I was treated well. I did not suffer even a pinch. What the comrades ate I also ate)."[288]

Elequin also recounted that he was "loosely tied only during some nights for security reasons; that he was not handcuffed at all during the day and that he was free to walk around within reasonable limits; that he was given adequate drinking water and allowed to take a bath regularly even at the same time as his custodians; and that he was allowed to communicate with his family."[289]

While negotiating the release of Buan and Abelardo, NDFP Negotiating Panel Chairman Luis F. Jalandoni released an *Updated NDFP Position on the Issue of Prisoners of War and the [GPH]-NDFP Peace Negotiations.* Jalandoni guaranteed the right of POWs to humane treatment, due process, and fair trial,[290] in

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the [GPH] had declared the suspension of military and police operations in the whole of Mindoro Oriental in compliance with the demand of the NPA for the safe and orderly release of Buan." On the other hand, Martin died in a botched rescue operation of the AFP on March 7, 2001. Martin died of gunfire from the army Scout Rangers who were supposed to rescue him. *See* Sandra Nicolas, *Martin Died in Bungled Army Operation, Villagers' Accounts Suggest,* Bulatlat, *available at* http://www.bulatlat.com/archive1/005martin.htm.

[286] *See* Annex to NDFP Human Rights Monitoring Committee, NDFP ADHERENCE TO INTERNATIONAL HUMANITARIAN LAW ON PRISONERS OF WAR (rev. ed., 2009).

[287] Ignacio Alano, *Just and Humane: The Revolutionary Movement's Treatment of POWs* (Oct. 2009), *in* NDFP ADHERENCE TO INTERNATIONAL HUMANITARIAN LAW ON PRISONERS OF WAR (rev. ed., 2009).

[288] *Id* at 111.

[289] *Id.*

[290] In accordance with the CARHRIHL and the norms and standards of international humanitarian law and practice pertaining to the trial of POWs for war crimes, the NDFP respects and accords its POWs their right to a fair trial before a duly-constituted people's tribunal or court martial all the guarantees of due process including:

1.1 a thorough preliminary investigation of the charges and the relevant facts before the formal indictment and trial by the people's tribunal or court martial;

1.2 a detailed written indictment, duly served and explained to the POW specifying the charges, the circumstances of capture, relevant background information about the captured combatant and the evidence gathered and to be adduced by the concerned NPA command;

1.3 right to prepare for trial and be heard with the assistance of competent counsel;

1.4 right to be tried before an impartial tribunal and to appeal its decision to an appellate body; and

accordance with the justice system of the "people's democratic government," and the norms and standards provided in the CARHRIHL and international humanitarian law.[291]

Many years before the NDFP declared its undertaking to apply the Geneva Conventions and Protocol I, the NPA had come up with a memorandum regarding the humane treatment of prisoners-of-war in their custody. The *Memorandum of Melito Glor Command on Policy Towards Prisoners of War,* dated June 18, 1988 states:

> 1. In safeguarding the lives, health and welfare of POWs, they shall be accorded the following to the best of our ability:
>
>   a. regular and proper meals, which shall be the same as those provided to the officers and men of the detention center; POWs may be allowed to purchase additional goods.
>
>   b. availability of a resident medical or paramedical officer, regular medical check-up and whatever medication is required, especially in case of illness;
>
>   c. regular schedule of sunning and outdoor physical exercises;
>
>   d. decent and human living and sleeping quarter within the limits of guerilla conditions;
>
>   e. decent toilet facilities;
>
>   f. communication with, and when security conditions permit, visits by their immediate relatives and loved ones, including conjugal visits;

1.5 the NDFP National Executive Committee retains its power to suspend the judicial proceedings of the people's tribunal or court martial including the execution of the penalty imposed, reverse or modify its findings and decision, grant clemency and order the release of POWs on humanitarian, moral and political grounds, if applicable.

2. The people's democratic government upholds and exercises its political authority in dealing with the question of prisoners of war. It can try and punish prisoners of war when the evidence warrants, take into account mitigating circumstances in order to reduce the punishment or release a prisoner of war on moral and humanitarian grounds or political grounds, if applicable. Jalandoni, *infra* note 286.

[291] Luis Jalandoni, *Updated NDFP Position on the Issue of Prisoners of War and the [GPH]-NDFP Peace Negotiations, in* NDFP Human Rights Committee, NDFP ADHERENCE TO INTERNATIONAL HUMANITARIAN LAW ON PRISONERS OF WAR (rev. ed., 2009).

g. newspapers and other reading materials, whenever available and under supervision; and

h. respect of their personal belongings.

2. In no case shall any act of physical violence or any hostile act against POWs be tolerated.

3. In case of enemy assault upon the detention center, the POWs shall be immediately removed from the area and line of fire and their lives continued to be safeguarded as much as possible.[292]

F. Realities on the Ground

The opposition between the GPH and the NDFP is one Abi-Saab would call an "asymmetrical conflict." The two parties are radically unequal. On the one hand, the GPH has control of the state machinery which it could use to defeat any threat to its stability. It also enjoys the status of legitimacy, long conferred not only by other states but most of its people. The NDFP, on the other hand, suffers a certain stigma, due in part to its errors in the past[293] and, for the most part, to misinformation on its status as a liberation movement. The NDFP and the NPA are often consigned to the category of perennial dissidents, internal security threats, and terrorists.

To state the obvious, the ideology of the NDFP is antithetical to the "world capitalist order" of which the US is the leading player. The merits, however, of capitalism and communism are not in point here, for self-determination has no connection to a pre-determined system.[294] The right may well be exercised by people who wish to transform their social and economic order to *any* system that they desire. But such radical self-transformation is never bloodless and without hostility. In a neo-colonial setting, the state will employ a range of means to preserve its well-entrenched power as well as that of its colonial backer.

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[292] NDFP Human Rights Monitoring Committee, NDFP ADHERENCE TO INTERNATIONAL HUMANITARIAN LAW ON PRISONERS OF WAR (rev. ed., 2009).

[293] The NDFP underwent the Second Great Rectification after making errors of "subjectivism and opportunism" from 1980 to 1991. Thus also began the great schism in the national democratic movement between the reaffirmists (RA) and the rejectionists (RJ) which was marked by a great disunity in the analysis of Philippine society and economy. *See* Alecks Pabico, *The Great Left Divide*, Philippine Center for Investigative Journalism, 1999, *available at* http://pcij.org/imag/SpecialReport/left.html.

[294] Charles Marie Chaumont, A CRITICAL STUDY OF AMERICAN INTERVENTION IN VIETNAM, *in* Richard A. Falk, THE VIETNAM WAR AND INTERNATIONAL LAW 125-157 (1969).

Swaying public opinion is a convenient way of weakening defensive counter-violence. Unlike the state, an underground liberation movement has fewer venues where it can openly and freely address criticism. With the use of the media and its own security forces, state discourse molds the target audience's belief system, resulting in diminished popular support for the liberation movement and its alienation from the masses. In the Philippine setting, this kind of psychological warfare or "psywar" is designed to dovetail the Americanized value system of Filipinos.

The vilification has intensified beginning the declaration of the global war on terror in the wake of the 9/11 World Trade Center attacks. Until March 2011, both the military and police called the NPA as "communist-terrorists" or "CT."[295] They were also indiscriminately branded as "enemies of the state" like the Jemaah Islamiya (JI). The report of the US Office of the Coordinator for Counter-Terrorism Office dated July 31, 2012 listed the CPP/NPA as a "foreign terrorist organization."

The NDFP is not the only target of the terror campaign. Individuals affiliated with leftist mass organizations[296] have been accused, denounced and persecuted as members of the CPP-NPA-NDF.[297] This political strategy is a legacy of "McCarthyism" in the US in the 1950s and a means by which the state ensconces "fear in society—be it fear of communism or of radical Islamist fundamentalism in the 'global war on terrorism.'"[298] In 2006, the AFP came up with a slideshow presentation *Knowing Thy Enemy*, which they have shown in schools and public places as part of military operations. The highlight of this presentation was the "order of battle," which named activists as enemies of the state and leftist organizations as "front organizations" of the NDFP. In 2007, six party-list representatives known as the "Batasan Six" were arrested and falsely charged with rebellion.[299]

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[295] *NPA now called 'CNN,' not 'communist terrorists': AFP*, ABS-CBNnews.com, Mar. 28, 2011, *at* http://www.abs-cbnnews.com/nation/03/28/11/npa-now-called-%E2%80%98cnn%E2%80%99-not-%E2%80%98communist-terrorists%E2%80%99-afp (last accessed Oct. 22, 2012).

[296] Constituting the Bagong Alyansang Makabayan (*Bayan*) or the New Patriotic Alliance, an aboveground national-democratic movement.

[297] *Observer: A Journal on Threatened Human Rights in the Philippines*, 3 INTERNATIONAL PEACE OBSERVERS NETWORK (IPON) (2011).

[298] *Id.* at 29.

[299] *See* Beltran v. People et al., G.R. No. 175013, 523 SCRA 218, Jun. 1, 2007, where the Supreme Court ordered the dismissal of the cases against the party-list representatives and their co-accused for lack of probable cause and due process. The country had then been placed by President Macapagal-Arroyo under a state of national emergency due to the so-called "Oakwood mutiny," a rightist coup attempt by disgruntled AFP officers. The said state of national emergency authorized violent dispersals of various protest actions against the administration.

Red-baiting, meanwhile, has emerged as a form of human rights violation.[300] The association of certain individuals and groups with the NDFP is "not innocuous as it precedes grave attacks on people and their rights."[301] An example is the killing of Dutch activist Willem Geertman in Angeles City, Pampanga after he was identified by the 48th Infantry Battalion of the Philippine Army as a CPP leader in the area. UN Special Rapporteur Phillip Alston, in his 2008 visit to the Philippines, observed that the "public vilification of 'enemies' is accompanied by operational measures," one of which was extrajudicial killings. The Philippine government has been denying responsibility for extrajudicial killings and shifting the blame to the NDFP, saying that the latter commits the said acts in furtherance of its "revolutionary justice." But Alston refuted this "purge theory," saying in his report that evidence for such is strikingly unconvincing.[302] The government submitted virtually no evidence which would substantiate their claims, despite numerous requests.[303] Alston also concluded that the police were reluctant to investigate the military, and that the Ombudsman lacked independence in prosecuting public officials responsible for the human rights violations.[304] According to Human Rights Watch, "the government has largely failed to prosecute military personnel implicated in such killings, even though strong evidence exists in many cases."[305]

Families of NPA members have also been targeted to demoralize them and retaliate against guerrilla forces.[306] In 2009, 20 year-old Rebelyn Pitao, daughter of NPA leader "Commander Parago," was about to ride a tricycle on her way home from work when she was abducted by armed men. The next day, a local farmer saw her dead body in an irrigated ditch—gagged, bound and half-naked. She was raped and repeatedly stabbed at the chest. Her father named the perpetrators as four military elements belonging to the 10th Infantry Division.

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[300] Anne Marxze D. Umil, *Vilification of activists, insidious form of human rights violation*, *at* http://bulatlat.com/main/2012/10/02/vilification-of-activists-insidious-form-of-human-rights-violation/ (last accessed Oct. 19, 2012).

[301] *Id.*

[302] Philip Alston, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions* to the Human Rights Council of the UN (Mission to Philippines), A/HRC/8/3/Add.2 (Apr. 16, 2008).

[303] *Id.* at 14.

[304] Alston was told by his interlocutors that he was being fed propaganda by the witnesses he was interviewing. He noted that "[t]he issue of extrajudicial executions in the Philippines is undeniably politicized and those who have witnessed the killing or steps leading up to the killing of leftist activists are not infrequently themselves sympathetic toward the left." *Id.* However, by applying several tests of credibility, Alston said that the propaganda dimension did not erode the theory that the military was behind the killings.

[305] Human Rights Watch, *World Report Chapter: Philippines 2012* (2012).

[306] Based on complaints filed with the GPH-Monitoring Committee against the GPH.

The Philippine Army initially denied the accusation but later on admitted that two of the perpetrators were military personnel who had been "restricted" to the barracks at the 10th Infantry Division headquarters in Davao del Norte.[307] Other instances involved the arrest, detention, harassment or torture of family members of known NPA members and leaders.

Those who are sympathetic to the cause of the NDFP and supportive of the NPA have also been subjected to human rights abuses.[308] Various human rights organizations have also documented many cases of involuntary servitude, coercion, and torture, which was a means of obtaining information on the identity of NPA members and the location of their camps in the area. Overall, counter-insurgency measures have relentlessly resulted in human rights abuses. In its 2011 year-end report, KARAPATAN stated the following effects of "militarization" in rural and urban areas:

> The deployment of hundreds of uniformed and armed soldiers in rural areas and urban centers including Metro Manila resulted in massive rights violations of ordinary citizens and members of people's organizations. This resulted into cases of torture, illegal arrests and detention, harassment and intimidation, closing of NGO-supported schools and literacy programs, indiscriminate firing resulting in injury and death, and the forced evacuation of 3,010 individuals. The actual number could be much more as many cases have not been reported. Ostensibly for "civic action" and "peace and development programs," military operations continue and have victimized ordinary citizens.[309]

Philippine experience has more than adequately shown a need for the application of the normative framework in this study, i.e. the internationalization of a liberation war against neo-colonialism. The civil integration tack of the government's counter-insurgency program presents a plethora of humanitarian problems. Intensive military occupation exposes civilians to potential danger and disrupts their lives, contrary to the rule in the Geneva Conventions and Protocol I that civilians must be permitted to lead normal lives and that the safety, honor, and family rights of civilians are to be respected. Where military occupation has resulted in violations of economic rights, the prohibition on the destruction of food, water, and other materials needed for survival in Protocol I is also violated. The deliberate targeting of civilians sympathetic to the NPA is yet another

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[307] Keith Bacongco, *"A Killing Too Far: Rebelyn Pitao,"* *at* http://www.abs-cbnnews.com/special-report/03/14/09/killing-too-far-rebelyn-pitao (last accessed October 19, 2012).

[308] Based on complaints filed with the Joint Monitoring Committee.

[309] KARAPATAN, *Sugar-coated Crisis and Terror*, Year-end Report on the Human Rights Situation in the Philippines 68-69.(2012).

violation of the international humanitarian rule that civilians should not be discriminated against on the basis of political opinion. Killings and frustrated killings of civilians through artillery fire such as indiscriminate gunfire and strafing are grave violations of Protocol I.

As of February 2012, the Joint Monitoring Committee has received 5,155 complaint forms, 3,300 or 63.16% of which were filed against the GPH, while the rest or 1,855 or 35.84% were filed against the NDFP. Of the complaints against the NDFP, 1,373 were filed wholesale by the Judge Advocate General's Services ("JAGS") in one day (November 8, 2006). In a study conducted in 2008 by the NDFP-Monitoring Committee ("NDFP-MC"), it was found that 1,349 of these complaints were "defective in form and content and cannot qualify as valid complaints."[310]

> They are not properly documented and most contain no narration of incidents[.] They also lack substantiation for the allegations, except for terse, bare and formulaic statements such as "shot to death/summarily executed" by CTs or communist terrorist[.] One complaint form[ ]has only the signature of the military lawyer from the JAGS Office of the AFP. Since these 1,349 submissions are practically impossible to verify, evaluate or investigate, they are really nuisance complaints meant only to bloat the number of complaints against the NDFP.[311]

Contrary to its commitment in Part III (Respect for Human Rights) of CARHRIHL to apply the *Hernandez* doctrine, the GPH arrests, detains and prosecutes NDFP members for common crimes instead of political offenses. KARAPATAN reported that of the 347 political prisoners in the Philippines as of December 31, 2011, 312 or almost 90% are charged with common crimes while only 15 or 4% are charged with rebellion.[312] Twelve (12) NDFP consultants to the peace negotiations are currently detained despite being JASIG-protected persons. The GPH Negotiating Panel made a commitment to expedite their release during the resumption of the peace talks. However, they remain to be in jail where they are suffering from ill-treatment such as "torture, isolation, harassment, curtailment of visitation rights, overcrowding, ventilation, insufficient and hardly food rations, lack of medical and other facilities, arbitrary and discriminatory regulations, among others."[313]

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[310] NDFP Human Rights Monitoring Committee, *A Look Into the Complaints Submitted to the [GPH]-NDFP Monitoring Committee* (2008).

[311] *Id.*

[312] KARAPATAN, *supra* note 256 at 56.

[313] *Id.*

Moreover, the use of the criminal justice system exacerbates the demeaning effects of the terror campaign to liberation movements, both in terms of their morale and their standing in the community. According to Michael Schubert, "[c]riminal law not only has the ability to make members of a party in the civil war "criminals," but it can also punish them on a moral level by not seeing them as opponents in a war but rather as morally inferior criminals."[314]

Criminal persecution also blurs the fact that membership in the NDFP and its allied organizations is actually legal. [315] The repeal of the Anti-Subversion Law of 1957 in 1992 is a sign of respect to the people's freedom of association, which necessarily attends their right to freely determine their political status and freely pursue their economic, social and cultural development. Under Philippine law, reasonable restraint has been placed to the exercise of this freedom in the Revised Penal Code and other special penal statutes.

With regard to acts committed in furtherance of rebellion and other politically motivated offenses, the "political offense doctrine" has been consistently affirmed in Philippine jurisprudence. In the landmark case of *People v. Hernandez*[316] in 1956, the poet Amado V. Hernandez and other individuals associated with the *Partido Komunista ng Pilipinas* (PKP) and the *Hukbong Mapagpalaya ng Bayan* (HMB) were charged and convicted of "rebellion complexed with murders, arsons and robberies." The Supreme Court held:

> One of the means by which rebellion may be committed, in the words of said Article 135, is by "engaging in war against the forces of the government" and "committing serious violence" in the prosecution of said "war". These expressions imply everything that war connotes, namely; resort to arms, requisition of property and services, collection of taxes and contributions, restraint of liberty, damage to property, physical injuries and loss of life, and the hunger, illness and unhappiness that war leaves in its wake — except that, very often, it is worse than war in the international sense, for it involves internal struggle, a fight between brothers, with a bitterness

[314] Michael Schubert, *Liberation Movements & International Law, Kurdistan Committee of Canada, Theses On Liberation Movements And The Rights Of Peoples*, *at* http://tamilnation.co/humanrights/humanitarian_law/schubert.htm (last accessed Oct. 22, 2012).

[315] The old Communist Party was defined under Rep. Act No. 1700 as an "organized conspiracy to overthrow the Government of the Republic of the Philippines for the purpose of establishing in the Philippines a totalitarian regime and place the Government under the control and domination of an alien power." On July 15, 1987, President Corazon Aquino signed Exec. Order No. 276 which amended the term "Communist Party of the Philippines" to include the NPA and any successors of such organizations.

[316] 99 Phil. 515 (1956).

> and passion or ruthlessness seldom found in a contest between strangers. Being within the purview of "engaging in war" and "committing serious violence", said resort to arms, with the resulting impairment or destruction of life and property, constitutes not two or more offense, but only one crime — that of rebellion plain and simple. Thus, for instance, it has been held that "the crime of treason may be committed 'by executing either a single or similar intentional overt acts, different or similar but distinct, and for that reason, it may be considered one single continuous offense. (*Guinto v. Veluz*, 77 Phil. 801, 44 Off. Gaz. 909.) (*People v. Pacheco*, 93 Phil. 521.)

The Supreme Court has applied the political offense doctrine in a long line of cases involving crimes against national security, treating common crimes like murder, arson and robbery as ingredients of the political offense.[317] However, in manifest disregard of the *Hernandez* doctrine, state prosecutors usually charge common crimes against political offenders and fail to mention the political motivation behind the offenses in the complaints and/or informations that they file with the courts.

The vilification campaign, war on terror and criminal persecution of the NDFP are all violations of the peoples' right to self-determination. Such state practices render self-determination illusory in the neo-colonial Philippine setting, relegating it to the "abstract and metaphysical".[318] Karen Parker said:

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

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[317] *See* People v. Geronimo, 100 Phil. 90 (1956); People v. Aquino, 108 Phil. 814, 820 (1960); People v. Lava, G.R. No. 4974, 28 SCRA 72, May 16, 1969; People v. Manglallan, G.R. 38538160, SCRA 116, April 15, 1988; Enrile v. Salazar, G.R. 92163, 816 SCRA 218, June 5, 1990; People v. Amin, G.R. No. 93335, 189 SCRA 573, Sept. 13, 1990.

[318] Vladimir Lenin addressed this critique of the right to self-determination by Rosa Luxemburg in her Polish article *The National Question and Autonomy (1908-1909)*. He said, "if we want to grasp the meaning of self-determination of nations, not by juggling with legal definitions, or "inventing" abstract definitions, but by examining the historico-economic conditions of the national movements, we must inevitably reach the conclusion that the self-determination of nations means the political separation of these nations from alien national bodies, and the formation of an independent national state." *See* VLADIMIR ILYICH LENIN, *The Right of Nations to Self-Determination* from LENIN'S COLLECTED WORKS (vol. 20, 1972) 393-454, *also available at* https://www.marxists.org/archive/lenin/works/1914/self-det/ch01.htm.

> of not only human rights but rights under the Geneva Conventions, other treaties and customary laws of armed conflict.[319]

The state practices discussed above affirm and exemplify the states' fear of a people's assertion of their right to self-determination and defensive counter-violence. Through the protracted armed struggle, the NDFP has belied the myth of the State's monopoly on the use of force. The NDFP has also engaged the Philippine government in non-violent confrontation through which it has attained recognition and maintained a challenge to the latter's political authority. In turn, the Philippine government and the US have opposed defensive counter-violence with impunity, maximizing the use of state security forces in the battlefield and in civilian communities to bring the legitimacy of the NDFP into broad disrepute.

With the high incidence of extrajudicial killings, political repression and gross human rights abuses in evidence, the contours of such cycle of violence have gone beyond the bounds set by human rights law and international humanitarian law. This is how a neo-colonial state has made its bid for survival and stability at the bloody cost of its people's lives, liberty and security.

FINAL WORDS

> *"Thought is commodified into answers, but we do not learn from answers; we learn from questions. When we forget to ask the questions that motivated our answers, we forget what we really want is, in fact, questions. Answers are passive and questions are active. Without questions, answers lose their importance. Questions encourage thought. Legal questions encourage legal thought."*
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> — Nick Sciullo[320]

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[319] Karen Parker, *Understanding Self-Determination: the Basics*, Presentation to First International Conference on the Right to Self-Determination, Geneva (2000), *at* http://www.guidetoaction.org/parker/selfdet.html (last accessed Oct. 22, 2012); *cited* in Olalia, *supra* note 269.

[320] *Zizek/Questions/Failing*, 47 WILLAMETTE L. REV. 286, 304-305 (2011).

This study has argued that wars of national liberation against neo-colonialism, despite being confined within the territories of states, are international in character. The internal armed conflict between a state and a national liberation movement becomes international by virtue of the international character of the right that is being exercised. Resort to war as a measure of self-determination is a legitimate response to neo-colonialism, which is analogous to intervention by states into the domestic affairs of other states. A war of national liberation is a defensive counter-violence that a people may exert to dismantle neo-colonial forces and to attain genuine independence. Such exercise of the right to self-determination destroys the myth that only states wield the power to legitimate violence.

That anti-colonial wars envisaged in Protocol I no longer exist today warrants a liberal construction of the law. This interpretation is consistent with the spirit and intent of the law. Moreover, the gap between customary law applicable to international and non-international armed conflict has already been blurred, rendering the dichotomy between these two types of armed conflicts of no use. Furthermore, applying the *jus in bello* of international armed conflict to liberation wars will greatly benefit combatants and civilians alike.

Like ex-colonies in the African continent, the Philippines is a laboratory for a multi-disciplinary study of neo-colonialism. With a colonial past and neo-colonial present, and a long history of armed conflict between the government and a national liberation movement, the Philippine experience provides an opportune application of the normative framework. Indeed, the case of the Philippines is linked to a highly politicized battle of ideologies, but such should not daunt us from the task, lest we will be undermining the universality of the right to self-determination.

With the support of the US, the Philippine State has resorted to impunity in order to eliminate threats to its legitimacy and maintain the status *quo*. The challenges presented to it by the NDFP were met with an all-out war on terror, brandishing the word "terrorist" to shame the movement and isolate its mass base. The vilification has likewise targeted civilians who share the national-democratic views of the NDFP, resulting in extrajudicial killings and heightened political repression.

Counter-insurgency programs were designed to integrate the civilian element, thus enabling military occupation of civilian communities. Militarization has endangered the lives and security of civilians, restrained their freedoms and caused hunger. In some areas of conflict, massive displacement has also ensued from sustained military operations. Military occupation has also occasioned torture, illegal arrest, illegal detention and other human rights

violations as well as violations of international law such as killings due to indiscriminate gunfire and the forcible use of civilians in military operations.

Filipino civilians are the ones who stand to benefit the most from the internationalization of armed conflict in the countryside. The application of the Geneva Conventions and Protocol I will compel the state to repeal counter-insurgency measures which have sanctioned the commission of violations of human rights and international humanitarian law. Furthermore, the humane treatment of prisoners-of-war and other protected persons will be an imperative to both parties, as insisted upon by the NDFP in its unilateral Declaration of Undertaking.

Admittedly, taking on the Philippines as a case study has been an ambitious task and the author believes that the present work leaves much to be desired. It is therefore recommended that the Philippine experience be further studied and the premises of the normative framework be further tested.

A. Questions

Neo-colonialism in the current world order provides a fertile yet uncultivated field for legal thought. This study attempted to grapple with the concept of neo-colonialism towards the formulation of a normative framework for wars of national liberation and the right to self-determination. In trying to establish such legal framework, this study has journeyed into abrasive realities, exposing in the process equally abrasive legal problems regarding the assertion of the right to self-determination. So many issues beg to be tackled, like the seeming polar opposition between principle of state sovereignty—upon which the international order is built—and the national liberation framework, and the "hegemonic" tendencies of international law toward anti-capitalist entities, as shown by the practice of vilifying liberation movements as 'terrorist' organizations.

Is there a possibility for leveling the state-centric international field for national liberation movements? Or is it inherently impossible to assert self-determination in the current international system? How do we address the claims of ethnic minorities and secessionist groups who desire to exercise their right to self-determination? Is there such a thing as careful balance between this right and state sovereignty? To what extent does the international system twist in favor of self-determination movements, if it does? What pitfalls are there to the internationalization of liberation wars on the part of national liberation movements?

It is hoped that this study will inspire not answers but more questions and rouse an interest in the more inconvenient and awkward themes of international law like neo-colonialism and wars of national liberation.

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