THE PRIVILEGED STATUS OF NATIONAL LIBERATION MOVEMENTS UNDER INTERNATIONAL LAW

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"WHEREAS it is essential, if man is not to be compelled *to have recourse, as a last resort, to rebellion against tyranny and oppression,* that human rights should be protected by the rule of law ..."
(Underscoring supplied)[1]

"The General Assembly ... *reaffirms* the legitimacy of the people's struggle for liberation from colonial and foreign domination and alien subjugation *by all available means, including armed struggle;*"
(Underscoring supplied)[2]

I
FRAMEWORK

Revolutionaries, vanquished, are outlaws; victorious, they are the state. The orthodox framework in interpreting the international legal consequences of revolution hinges upon one determinant factor: the extent of effective control by parties to the conflict, as ascertained on a geo-military scale. Upon this *factual* determination rests the resolution to key *juridical* issues—the status to be conferred upon the rebels, i.e., whether they are mobs in a *levée en masse,* insurgents, or full-fledged belligerents; the rights and obligations arising therefrom; and the liability of the rebels, and conversely, the extent of state responsibility, for injuries caused by the conduct of hostilities. Success, in this case, is rebellion's sole justification. Of war, to paraphrase Seneca, the law asks the *outcome,* not the *cause.*

The chief flaw of this framework is that while the world community has evolved international legal safeguards to minimize the human costs of armed conflict,[3] international law itself—by its stubborn insistence on the

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[1] Preamble, *Universal Declaration of Human Rights* (1948).

[2] U.N. General Assembly res. 3070 (XXVIII). *Importance of the universal realization of the right of peoples to self-determination and of the speedy granting of independence to colonial countries and peoples for the effective guarantee and observance of human rights* (1973).

[3] International humanitarian law comprehends both human rights and the law on armed conflicts. Our specific concern is the latter. It is in turn sub-divided into the *law of The Hague,* which determines the rights and duties of belligerents in the conduct of operations and limits the choice of means of doing harm, and the *law of Geneva,* or humanitarian law in its restrictive sense, to safeguard military personnel placed *hors de combat* and persons not taking part in the hostilities. PICTET, HUMANITARIAN LAW AND THE PROTECTION OF WAR VICTIMS 13-17 (1975) and Pictet,

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.[4]

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.

The subject-matter of this paper is the legal mode by which international legal protection can be made applicable to erstwhile *internal* armed conflicts. It focuses on the development of the concept of the *national liberation movement* which, this paper contends, is a privileged status under international law. Hence, a rebel group thus classified may be entitled to *locus standi* as an international person regardless of its geo-military standing. That insurrectionary movement is at once placed under an entirely different regime of law. It may enjoy the benefits of international humanitarian protection as a matter of right, and not merely at the forbearance of the established government. It shall furthermore be freed of the handicaps inherent in the application of domestic jurisdiction, under which a liberation movement is presumed to be criminal and subversive, unless it otherwise proves to be ultimately successful.

APPROACH

This paper shall contrapose what are basically the two juristic frameworks of analysis in interpreting internal armed conflicts: the *traditional* school anchored on the sovereign equality of states, and the *national libera-*

The Need to Restore the Laws and Customs Relating to Armed Conflicts, 1 I.C.J. Rev. 22-23 (1969).

4 "Wars of national liberation are a typical example of what is sometimes called (in 'peace research' and 'strategic studies') 'asymmetrical conflicts'. These are conflicts between radically unequal parties in terms of the resources they command. The one controls the State machinery with all that goes with it, including the administration, the judiciary and the police, as well as modern means of communication and modern army disposing of powerful and sophisticated weapons. The other is composed of irregular combatants whose only asset is their high motivation and strong faith in the justice of their cause, reflecting popular aspirations which cannot be freely and democratically expressed and pursued." Abi-Saab, *Wars of National Liberation in the Geneva Conventions and Protocols,* 165 RECUEIL DES COURS 366-436 (1979-IV) at 416.

"Persons imprisoned by the public authorities during (conflicts not of an international character) would run the risk of finding themselves at the mercy of their captors ... internal conflicts ... are frequently more pitiless than... international warfare." THE GENEVA CONVENTIONS HANDBOOK: ESSENTIAL RULES 5 (1975).

"While the government side in principle has the disposal of the established power structure, including the regular armed forces, while it holds the territory and can

tion framework based on the right to self determination. Our particular concern is the juristic foundation for the privileged status of national liberation movements; hence, the specific terms and conditions contained in Protocols I and II, for instance, shall be dealt with only to the extent that they are relevant to the principal subject-matter.

At the outset, the authors wish to emphasize that the two theories, though mutually opposed, do overlap in certain areas, for the new framework was, in fact, born out of the old one; thus, its derivative nature. It builds upon the conceptual scaffolding thus already constructed, but infuses old forms with fascinatingly new content.

That they lead to different conclusions, however, highlights the progressive development of international law: **the evolution of the right to self-determination which is ascribed directly to the *people*, as contrasted to the power of sovereignty, which though ultimately imputed to the people, is putatively reposed in the *state*.**

II

THE LIMITED SCOPE OF THE "OLD" LAW ON INTERNAL WARS

Legal Source of International Protection. The four Geneva Conventions of 1949 have a common Article 3,[5] a miniature convention in itself,[6]

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claim the allegiance of the population, the insurgents have none of these advantages ... Obviously, the protective shell around States which is named 'national sovereignty' is apt to play a far more decisive role in internal armed conflicts ... (thus) a tendency to accept less far-reaching rules for the case of internal armed conflicts than may be considered acceptable for international armed conflicts." KALSHOVEN, THE LAW OF WARFARE 14 (1973).

[5] "ARTICLE 3. In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each party to the conflict shall be bound to apply, as a minimum the following provisions:

(1) Persons taking no active part in the hostilities, including members of the armed forces ... placed *hors de combat* ... shall in all cases be treated humanely, without any adverse distinction...
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 recognised as indispensable by civilised peoples.

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The application of the preceding provisions shall not affect the legal status of the parties to the conflict."

Geneva Convention on the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; Geneva Convention for the Amelioration of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; Geneva Convention Relative to the Treatment of Prisoners of War; Geneva Convention Relative to the Protection of Civilian Persons in Times of War. (August 12, 1949).

[6] James E. Bond, *Internal Conflict and Article Three of the Geneva Conventions,*

which provides minimum standards of protection in armed conflicts not of an international character.

Limitations on its Applicability. The first limitation goes into the substantive provisions of Article 3, which excludes from the ambit of its protection those combatants taking part in the hostilities. Article 3 covers only non-combatants and combatants placed *hors de combat.* Corollarily, combatants belonging to the anti-government faction are not accorded prisoner-of-war status upon capture, and are treated as common criminals.[7]

Furthermore, a textual interpretation of Article 3 precludes its application in cases of *"internal tension without disturbances"*—

> "Consideration must also be given to the fact that the weapons available to the army and the police often, nowadays make armed insurrection impossible, unless part of the army or the police sides with the insurgents. Hence, many situations arise of *serious internal tension without recourse to weapons but the consequences of which (such as arrest without trial) may be very similar to those arising in the event of armed conflicts or internal disorders."* (Underscoring supplied)[8]

The International Committee of the Red Cross (ICRC) has therefore sought to extend the operation of Article 3 to situations characterized by *political dissension* where the military expression of discontent has not yet reached a significant degree, not for lack of mass support but precisely for the efficacy with which the established government has used forceful means to still such expression.

> "Article 3 of the Geneva Conventions can, *stricto jure,* be applied only in cases of armed conflict, *but States refuse to recognize as such the increasing internal disorders or political tension,* leading to *the detention of opponents to the regime....* Hence, citizens are sometimes subjected to emergency laws and arbitrary action in their own country, and in fact treated worse than enemy soldiers captured while armed to the teeth." (Underscoring supplied)[8]

One variant of this kind of internal disorder which does not lend itself subject to Article 3 is *"clandestine warfare"*—

> *"any form of combat in which the fighters escape detection by mingling with the ostensibly peaceful population.* (The author) use(s) this term because others are open to misinterpretation. 'Terrorism' is pejorative: one man's terrorist is another man's freedom fighter. 'Guerilla warfare often involves concealment in the natural, rather than the social

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48 DENVER L.J. 263-283 (1971) at 265; *see also* Pictet, *The Need to Restore the Laws and Customs Relating to Armed Conflicts, supra* note 3 at 34.

7 Bond, *ibid.* at 279.

8 International Committee of the Red Cross, *Protection of Victims of Non-international Conflicts* 5 (May 1969).

9 PICTET, *supra* note 3 at 58. The International Committee of the Red Cross, however, is conscious that in this effort, it may overlap functions with those enforcing the human rights covenants. The suggested resolution is to resort to whichever body of law would be most effective and expeditious for a given situation, i.e., to undertake "parallel and complementary action". (PICTET at 58-61)

> environment, hiding in forests and mountains rather than appropriating the immunity of non-combatants. 'Underground' or 'resistance' movements may be non-violent.
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> ... *It seems to be the only way a dissident group can hope to prevail against the technological superiority of the modern industrial state.* Such covert activity is hard to combat within the aspiration to an open society — an aspiration that many states genuinely cherish and most states find it expedient to profess." (Underscoring supplied)[10]

Some of these combatants, when captured and subjected to the criminal processes of the state, have raised the defense that they were entitled to prisoner-of-war status.[11]

The second limitation to the applicability of Article 3 springs from conditions extrinsic to the law. Governments rocked by civil disorder habitually deny the existence of an armed conflict subject to Article 3. They instead invoke national law and act under emergency or martial law.[12] They claim that Article 3 will jeopardize their security,[13] immunize captured rebels and lower the "cost of revolution.[14]

Legal Impediments. This extrinsic limitation, however, is founded upon a more fundamental legal barrier: the "protective shell of national sovereignty," based on Article 2. (7) of the United Nations Charter, to wit:

> "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;" (Underscoring supplied)

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[10] Robert E. Rodes Jr., *On Clandestine Warfare*, 39 WASH. & LEE L. REV. 333-372 (1982) at 334.

[11] In United States v. Morales, 464 F. Supp. 325, an adherent of Puerto Rican independence, while fashioning a bomb, accidentally defused it. In the ensuing criminal proceedings, Morales argued "that he should not be prosecuted because he was entitled to be held as a prisoner-of-war. The court gave the contention its due consideration (but) rejected it." *See also* Ali v. Public Prosecutor, (1969) 1 A.C. 430 (P.C.) and The Case of Captain John Y. Beall, 14 American State Trials 683 (Military Comm. 1865), in Rodes, *ibid.*

[12] Bond, *supra* note 6 at 272. Article 3, the historical record shows, has been applied only in one instance, during the Algerian conflict. In 1960, the Gouvernement Provisoire de la République Algérienne (GPRA) notified its accession to the Geneva Conventions to the depository, the Swiss Government. France, the colonial Power, objected to this accession. (Abi-Saab, *Wars of National Liberation, supra* note 4 at 401). *See also ICRC, Protection of Victims, supra* note 8 at 3.

[13] PICTET, *supra* note 3 at 56.

[14] Bond, *supra* note 6 at 283. In Bindeschedler-Robert, *A Reconsideration of the Law of Armed Conflicts in* REPORT OF THE CONFERENCE ON CONTEMPORARY PROBLEMS OF THE LAW OF ARMED CONFLICTS 50 (1969), the scope of Article 3 was construed to comprehend armed conflicts where hostile action against the lawful government assumed a collective character and a minimum of organization. Alternatively, from the standpoint of the lawful government, Article 3 came into operation the moment "an armed struggle within a State-like entity assumes such forms that it ceases to be a simple problem of the maintenance of order", i.e., when the government is compelled to call upon its army to intervene, not in an isolated case, but in the course of continued operations."

Inspite of the growing internationalization and economic interdependence of nations, the nation-state remains the basic unit of interaction in the international arena.[15]

In this light, the U.N. General Assembly has declared as a *principle of international law* in accordance with the Charter "the duty not to intervene in matters within the domestic jurisdiction of any State."[16]

In the same instrument, the General Assembly also affirmed as another principle of international law "the sovereign equality of States," more particularly formulated through the following relevant elements:

> "(a) States are *juridically equal;*
> (b) Each State enjoys *the rights inherent in full sovereignty;*
> (c) Each State has the duty to respect the personality of other States;
> (d) The territorial integrity and political independence of the State are inviolable;" (Underscoring supplied)[17]

Based on domestic jurisdiction, the first line of defense of a state is its criminal law on rebellion and subversion.[18] By asserting national law, a state in fact simply affirms the orthodoxy long established in the bourgeois-democratic concept of state, juristically formulated as constitutionalism, that:

> "(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."
> (Underscoring supplied)[19]

Ironically, this same framework, by allowing for "an explicit and authentic act of the *whole* people," apart from the constituent acts of the electorate,[20] gives rise to what has been referred to as the *right to revolution* as a recognized principle of international law.[21] For instance, the *American Declaration of Independence of July 1776* categorically states that—

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[15] *See generally* Tunkin, *International Law in the System,* 147 RECEUIL DES COURS 9-218 (1975-IV) at 28-33.

[16] U.N. General Assemby resolution 2625 (XXV). *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.* (October 24, 1970).

[17] *See also* U.N. General Assembly resolution 2131 (XX). *Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty* (December 21, 1965).

[18] *See* Rodes, *Clandestine Warfare, supra* note 10 at 338. The government may even adopt expanded definitions of old offenses like subversion or rebellion. Governments are usually reluctant to treat clandestine forces according to the laws of war because by doing so they abandon the moral and rhetorical position implicit in using criminal law."

[19] George Washington, *Farewell Address.*

[20] In a democratic political system, the popular organ is the electorate and insofar as it acts to establish constitutional norms, i.e., in the making and amending of the constitution, its power is constituent and it may be referred to as a constituent organ. 1 FERNANDEZ, PHILIPPINE CONSTITUTIONAL LAW 6 (1977).

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

and Abraham Lincoln in his 1861 *Inaugural Address* said—

> "(t)his country, with its institutions, belongs to the people who inhabit it. Whenever they shall grow weary of the existing government, they can exercise their constitutional right of amending it, *or their revolutionary right to dismember or overthrow it.*" (Underscoring suppied)

This right has been juridically expressed as "direct state action" by constitutionalists.

> "The government is only one of the component parts of the state, not the state itself. The government is the agency through which the state expresses and enforces its will.
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> x x x
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> ... The state itself is an ideal person, intangible, invisible, immutable. *The government is an agent, and within the sphere of that agency, a perfect representative.*" (Underscoring supplied)[22]

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

> "from the point of view of the state as a distinct entity not necessarily bound to employ a particular government or administration to carry out its will, *it is the direct act of the state itself because it is successful.* As such it is legal, for whatever is attributable to the state is lawful."
> (Underscoring supplied)[23]

The danger with this formulation is that it is useful only in hindsight. It is premised upon the fact of success thus rendering the whole theory, at best, as an *after-the-fact justification.* While it is internally self-consistent within its theoretical framework, it is actually useless in practice. Revolution is a right but it remains a crime unless its assertion ripens into victory.[24] The paradox, therefore, is that the process of asserting a right is illegal, but the end-product of that process is legal, at which point the legality retroacts to the inception of the process itself.[25] Indeed, —

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[21] Sumada, *The Right to Revolution: Implications for International Law and Order* in MCDOUGAL and REISMAN, INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE: THE PUBLIC ORDER OF THE WORLD COMMUNITY 167-8 (1981).

[22] SINCO, PHILIPPINE POLITICAL LAW 5-9 (1962).

[23] *Ibid.* at 7.

[24] The principle *Ubi jus ibi remedum* (For every right, there is a remedy) is even more relevant with the subsequent development of the right to self-determination and the emergence of the war of national liberation as a politico-military means of ascertaining that right.

[25] Thus, the acts of rebels — should they become successful — are imputed to the newly created state. *See* Art. 15 on the "Attribution to the State of the act of an insurrectional movement which becomes the new government of a State or which

"Treason doth never prosper, what's the reason?
For if it prosper, none dare call it Treason."[26]

Revolutionaries as Belligerents. Parties to an armed conflict, other than states, are legally classified — "along a continuum of ascending intensity"[27]—as (1) rebels, (2) insurgents or (3) belligerents.

Rebellion consists of sporadic challenge to the established government but which remains "susceptible to rapid suppression by normal procedures of internal security"; it is within the domestic jurisdiction of the state.[28]

Insurgency is "a half-way house between essentially ephemeral, spasmodic or unorganized civil disorders and the conduct of an organized war between contending factions within a State."[29] The material conditions for a condition of belligerency are (1) the existence of an armed conflict of a general character; (2) occupation by the insurgents of a substantial portion of the national territory; (3) an internal organization capable and willing to enforce the laws of war; and (4) circumstances which make it necessary for outside states to define their attitude by means of recognition of belligerency.[30]

One distinction, it has been proposed, between the aforementioned categories is that belligerency gives rise to legal rights and obligations, while insurgency amounts to a mere factual recognition of the existence of a limited international personality.[31] Another effect of such distinction is

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results in the formation of a new State", *Draft Articles on State Responsibility* in II-2 YRBK. OF THE INT. L. COM. 92 (1979). A/CN.4/SER.A/1979/Add. 1 (Part 2).

The imputability of the acts of an insurrectional movement *qua* belligerent are contained in Art. 14 of the *Draft.*

"It is important that responsibility should attach as early as possible, even before the group of insurgents has achieved the status of a full-fledged revolution... the particular revolution ... must be successful if responsibility is to arise." *Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens* 158-159 (1961) .

[26] Sir John Harington (1561-1612) as cited in MCNAIR, THE LEGAL EFFECTS OF WAR (1966).

[27] Falk, *Janus Tormented: The International Law of Internal War* in ROSENAU (ed.), INTERNATIONAL ASPECTS OF CIVIL STRIFE 185-248 at 197 (1964).

[28] *Ibid.*

[29] MCNAIR, *supra,* note 25 at 30.

[30] LAUTERPACHT, RECOGNITION IN INTERNATIONAL LAW 176 (1948). International publicists contrapose the *constitutive* and the *declaratory* theories of recognition. The emerging consensus toward the declaratory thesis stresses *the sufficiency of the factual element.* McNair, though, says that "it is a status that (belligerents) possess only insofar as States recognize them to possess it." (MCNAIR, *supra* note 25 at 32). But in LAUTERPACHT, *ibid.*, "(t)he essence of the principle is that recognition is not in the nature of a grant of favor or a matter of unfettered political discretion, *but a duty imposed by the facts* of the situation. Given the requisites of belligerency as laid down by international law, the contesting parties are legally entitled to be treated as if they were engaged in a war waged by two sovereign states."

At the very least, then, once the requisite material elements concur, other states may recognize the belligerent party without incurring any breach of the international legal principle of *non-intervention* in the domestic affairs of a state. *See also* CHEN, THE INTERNATIONAL LAW OF RECOGNITION 175-193 (1948).

[31] *Ibid.* at 270, also as affirmed by Falk, *supra* note 26 at 200.

that an armed conflict characterized as an insurgency is deemed to be governed by Article 3, while those classified under belligerency fall under the more rigorous provisions of Article 2 concerning conflicts of an international character.[32] This interpretation, however, gives rise to a host of complications, as exemplified in the Vietnam experience.[33]

In summary, the "old" framework pivots around the key determinant which is the geo-military standing of the parties, which in turn determines the international legal status of said parties. It does not go into the content of the conflict; it stops at a determination of the *material elements* present. Finally, it operates upon a tacit presumption in favor of domestic jurisdiction.

III

WARS OF NATIONAL LIBERATION AS INTERNATIONAL CONFLICTS: THE LEGAL BASIS

> "It looks to me to be narrow and pedantic to apply the ordinary ideas of criminal justice to this great public contest. I do not know the method of drawing up an indictment against a whole people."[34]

Wars of national liberation were hitherto considered as internal armed conflicts[35] and were therefore within the domestic jurisdiction of states. They became international conflicts only when they had crossed a geo-military threshhold, beyond which the world community was placed on

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[32] MCNAIR, *supra* note 25 at 31-33.

[33] At the height of the Vietnam conflict, the ICRC sought *in vain* to *formally* bind the National Liberation Front (NLF) to observe Article 3. The NLF contended that while they were willing to abide by the minimum standards set thereby, they were not bound by international treaties to which they were not themselves parties-signatories. (Meyrowitz, *The Law of War in the Vietnam Conflict* in 2 FALK (ed.), THE VIETNAM WAR AND INTERNATIONAL LAW 516-571 (1969) at 534-536; hereinafter cited as 2 FALK, VIETNAM WAR).

Legal analysts further pushed for Article 3, this time as part of the *customary rules of war* and *not as a treaty obligation.* (Levie, Maltreatment of Prisoners of War in Vietnam in 2 FALK, VIETNAM WAR 361-397 at 396). But in order to bind the NLF to an international obligation, the condition *sine qua non* was that the NLF be vested with *international legal personality.* For even while the applicability of Article 3, as positive law, is without prejudice to the status of the parties, still it is indispensable that the party upon whom international obligations are being imposed be *first* capacitated to fulfill those obligations and corollarily, to enjoy the corresponding rights. Hence, the need to vest the NLF with, at least, a limited international legal personality.

In the meantime, however, the United States had refused to recognize the NLF. Hence, to burden the NLF with duties under international law *without* having given it the corresponding rights *vis-a-vis* its enemy was to deny legal parity between the protagonists and to further aggravate their factual asymmetry as against each other. *See also The Geneva Conventions and the Treatment of Prisoners-of-War in Vietnam* in 2 FALK, VIETNAM WAR 398-415.

[34] Burke, *Speech on Conciliation with America.*

[35] Note the terminology used. "Wars" are traditionally inter-state conflicts and are *ipso facto* international in character. Intra-state disorders are comprehended by the broader term "armed conflicts". The use, therefore, of the term *wars* of national liberation is *per se* significant. *See* KALSHOVEN, THE LAW OF WARFARE 9-12 (1973).

notice that said revolutionaries *qua* belligerents were entitled to *locus standi* as international persons.

With the progressive development of the people's right to self-determination, it became legally possible to justify the international characterization of civil wars, without negating the principle of non-interference. *First,* the right of self-determination is ascribed to a people, such that said possessor of an international right must necessarily be an international person in order to assert and enjoy that right. *Second,* wars of national liberation were deemed the politico-military assertion of the right to self-determination. A liberation movement, therefore, is asserting an international right against a state, which by denying them 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.

NORMATIVE FRAMEWORKS: ALTERNATIVE SCHEMES

The traditional framework used a geo-military criterion because its primary consideration was the question of *state responsibility* for injuries to third parties, i.e., to other states not parties to the conflict and to their nationals.

Hence, the established state was deemed responsible only insofar as those injuries were caused by its own acts and omissions.[36] Corollarily, to the extent that an insurrectional movement is strong enough to defy the established state—to the extent that the state is impotent in preventing such injurious conduct—*then* to that *same* extent is international responsibility imputable, not to the established state, but to the insurrectional movement. The geo-military criterion is but an index of the capacity of the rebel group to answer for its obligations to the international community.

The geo-military criterion, therefore, as a norm for the characterization of armed conflicts, is international law from the standpoint of the individual claims of outside states. A review of state practice on this score will bear out this conclusion.[37]

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[36] For the present law on state responsibility, please see *Draft Articles on State Responsibility* in II-2 YRBK. OF THE INT. L. C. (1979); DOCUMENT A/34/10. See also *Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens* 157-160 (1961).

[37] Forty-six cases of State Practice in Civil Wars, revolutions, insurrections, riots, mob violence, etc. appear in II-1 YRBK OF THE INT. L. C. 106-124 (1979). DOCUMENT A/CN. 4/315, including the Civil War in the United States, the Paris Commune in France, the Spanish Civil War and the Algerian conflict.

Philippine experience yields an interesting example, The Iloilo Case (United Kingdom v. United States of America) (1925) in *ibid.* at 173.

A progressive ougrowth of this legal schema is that state responsibility was eventually used to bind the rebel movements to observe obligations owed to the world community *as a whole* (as distinct from those obligations to individual states). Hence, a belligerent, exercising effective control over territory and possessed of sufficient internal organization to discipline its personnel, may in all fairness and with equal pragmatism be made internationally responsible, for instance, to observe the laws of armed conflict.

In contrast, the national liberation concept creates a new standard: the international nature of the rights being asserted/violated, such that the world community is taken to task if it allows its norms to be trifled with.

Clashing theoretical constructs are like spectacles with which the viewer, looking at the same world, sees two different pictures. At the sight of a revolution, the geo-military framework sees *what the rebel group owes third parties;* the national liberation concept sees *what the world community owes a struggling people.*

The "Internationalization" of Internal Conflict. Latin American experience in internal wars shows that the *value-orientation* of a conflict is a decisive factor in its "internationalisation." *Structural wars* which aim at a radical overhaul of entire social systems[38] and which question the

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This is a claim in behalf of British businessmen in Iloilo against the American government, for its "culpable neglect" in failing to stop the Filipino "insurgents" from causing damage to British properties.

It is of historical notice that the plantation owners of Western Visayas formed their own "Provisional Government of the Republic of Negros", otherwise known as the Negros junta, as a counter-force against what they perceived to be a sinister plebeian revolution on the threshhold of success. Within days of its formation, the junta sent a delegation to the Captain of a U.S. man-of-war then anchored in Iloilo harbor, to ask for U.S. protection against the forces of revolution. Support was refused on the ground that the Paris Treaty on the final disposition of the Philippines had not yet been signed and that precipitous action by the Americans against the revolutionary forces under General Aguinaldo was not favored for domestic American political reasons. FAST AND RICHARDSON, ROOTS OF DEPENDENCY: POLITICAL AND ECONOMIC REVOLUTION IN 19TH CENTURY PHILIPPINES 103-112 (1982); *see also* TAYLOR, THE PHILIPPINE INSURRECTION AGAINST THE UNITED STATES 138-139 (1971).

The claims in The Iloilo Case arose out of the destruction by Filipino forces of properties belonging to British subjects during the period between the signing of the Treaty of Paris and its ratification. During that period, the Spanish commander evacuated Iloilo and the businessmen of that area requested the American General Otis to occupy the place to preserve peace and property. While General Otis awaited official permission from Washington, Filipino forces had taken over the control of the area. They were eventually driven out, but not before they had burned the town, destroying in the process the properties of the British subjects. The claims were referred to the British/American Claims Arbitral Tribunal, which held that the American forces did not incur any culpable neglect in delaying its intervention, since sovereignty, and thereby responsibility, did not pass to the United States until the exchange of ratifications. In short, it was a matter of discretion whether or not to intervene in Iloilo, and *no duty* to intervene devolved upon the United States until the ratification of the Treaty.

[38] Trebat, *Internal Violence and the International System: The Experience in Latin America,* 46 NOTRE DAME L. 308-348 (1971) at 311-318.

Trebat classifies internal conflicts into three types, according to the objectives of the rebel party: (1) *personnel wars,* in which the object is the *occupancy* of roles

dominant values held by the other actors in the international system, are more prone to become internationalised through the intervention of third parties.

Independent of value-orientation, external participation in the internal war has been put forward as an index for international characterization.

> "Today, however, it is essential that substantial participation in the internal war by private or public groups external to the society experiencing violence serve as a basis for internationalizing civil strife. *The facts of external participation are more important than the extent or character of insurgent aspirations* as the basis for invoking transformation rules designed to swing control from the normative matrix of 'domestic jurisdiction' to the normative matrix of 'international concern'. There is a need, therefore, to develop criteria for the recognition of belligerency that takes account of internal war as the most prevalent and threatening form of international violence, involving both the principal pathway of aggression and a dangerous breeding-ground for a provocative initiation of an escalatory spiral that has a thermo-nuclear catastrophe as its upper limit." (Underscoring supplied)[39]

It is herein submitted that the national liberation framework internationalises a war at an earlier point, compared to the above-proposed standards. While the "value-orientation" and the "external participation" approaches constitute a huge step beyond the rigidity of the old rules, they are still anchored upon the premise of domestic jurisdiction, the exception being those cases where there are *external repercussions* upon third parties.

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.

Prof. Abi-Saab in *Wars of National Liberation in the Geneva Conventions and Protocols*[40] refers to this as "poetic justice."

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in the existing structure of political authority with no aspiration to alter major domestic and foreign policies in society; (2) *authority wars*, involving the *arrangement* of roles in the structure of political authority; and (3) *structural wars*, which aim at an overhaul of entire social structures. Personnel wars involve no value-orientation; authority wars, very little; and structural wars, a generalized conflict of values.

[39] Falk, *Janus Tormented: The International Law of Internal Wars* in ROSENAU (ed.), INTERNATIONAL ASPECTS OF CIVIL STRIFE 185-248 (1964) at 223-224.

[40] 165 RECEUIL DES COURS 366-436 (1979-IV). While the afore-cited text refers to classical cases of colonialism, it is submitted that this "poetic justice" equally applies to *neo-colonialism*.

"(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 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 were more or less *egalitarian* from a legal point of view, stated to become *heirarchical.* 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."* (Underscoring supplied)

SELF-DETERMINATION: A RIGHT IN SEARCH OF A LEGAL REMEDY

The right to self-determination first appears in positive international law in the following articles of the *United Nations Charter:*

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

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

"Article 1. The Purposes of the United Nations are:

x x x

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;"

"Article 55. 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: (international economic and social cooperation)." (Underscoring supplied)

However, it was not until the historic General Assembly resolution 1514 (XV) of 1960 containing the *Declaration on the Granting of Independence to Colonial Countries and Peoples* that affirmative declarations regarding self-determination were made. That *Declaration* categorically stated that self-determination was a right pertaining to peoples.

"The General Assembly,

x x x

Convinced that all peoples have an inalienable right to complete freedom, the exercise of their sovereignty and the integrity of their national territory,

Solemnly proclaims the necessity of bringing to a speedy and unconditional end colonialism in all its forms and manifestitions;

And to this end

Declares that:

x x x

2. All peoples have the right to self-determination; by virtue of that right, they freely determine their political status and freely pursue their economic, social and cultural development."

This exact phraseology was adopted as Article 1(1) of both the *International Covenant on Civil and Political Rights* (1966) and the *International Covenant on Economic, Social and Cultural Rights* (1966).

This development reached a highwater-mark with the *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations* contained in General Assembly resolution 2625 (XXV) of October 24, 1970, which proclaimed the "progressive development and codification" of, among seven principles, that of equal rights and self-determination of peoples.

This 1970 *Declaration* for the first time gave express formulation to the proposition, *first,* that self-determination was a *principle of international law,* and *second,* that it gave rise to a *right* of peoples and a corresponding *duty of every state to respect it.*

"Every State has *the duty to refrain from any forcible action* which deprives peoples ... of their right to self-determination and freedom and

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

The *Declaration* has been construed to have legalized the use of armed means to assert the right to self-determination. The "forcible action" which is prohibited under Article 2(4) of the Charter comprehends the use of force by colonial governments to deny a people of their right to self-determination. The wording of the *Declaration* has been interpreted to exclude the armed means of ascertaining the right to self-determination from the general prohibition on the use of force. In short, the Charter proscribes the forcible denial but permits the forcible assertion of the right to self-determination.[41]

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

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

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

Finally, General Assembly resolution 3103 (XXVIII) on the *Basic Principles of the Legal Status of the Combatants struggling against Colonial and Alien Domination and Racist Regimes* (1973) proclaimed that:

> "3. The armed conflicts involving the struggle of peoples against colonial and alien domination and racist regimes are to be regarded as *international armed conflicts in the sense of the 1949 Geneva Conventions* . . ."

and in consonance with resolution 2621 (XXV) containing the *Programme of Action for the Full Implementation of Declaration on the Granting of Independence to Colonial Countries and Peoples* (1970), affirmed that:

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[41] Until this 1970 *Declaration*, and in the light of the prohibition on the use of force contained in the *Charter*, wars of national liberation were hitherto legally justified as a legitimate resort to force and as a valid exception to the rule (the Soviet thesis); or, they were held to be legitimate acts of self-defense, on the premise that colonialism is permanent aggression (the Afro-Asian theory). Abi-Saab, *Wars of National Liberation* 437 n. 8.

> "(6) (a) All freedom fighters under detention shall be treated in accordance with the relevant provisions of the Geneva Convention relating to the Treatment of Prisoners of War of 12 August 1949."[42]

Another significant development based on the 1970 *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations* is the affirmation that liberation movements had *locus standi* in international law and that wars of national liberation were armed conflicts of an international character.

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

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

This whole chain of development was recognized by the International Court of Justice in its dictum in the 1970 Advisory Opinion on Namibia —

> "The Court must take into consideration the changes which have occurred in the supervening period, and its interpretation cannot remain unaffected by the subsequent development of law, through the Charter of the United Nations and by way of customary law. Moreover, an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of interpretation."[43]

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[42] A note is in order, so that we may avoid confusion as to the legal effect attached to these resolutions.

The *U.N. Charter* is considered a treaty by its party-signatories. The 1970 *Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations* is considered an *authentic* interpretation of the *Charter qua* treaty. More important, it was adopted by the General Assembly through a consensus which included the Western Powers. This was the first time that a consensus was reached "not on a vague general formula, but on a detailed explanation making explicit the different legal implications of the principle." Abi-Saab, *supra* note 40 at 379, 372 and 370.

LIBERATION MOVEMENTS UNDER PROTOCOL I

Under the *Protocols Additional to the 1949 Geneva Conventions,* the scope of armed conflicts of an international character comprehends those "armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination."[44]

We shall now proceed to consider the major juridical difficulties brought about by the upgrading of liberation wars into international conflicts.

The Question of Legal Reciprocity. A criticism which is itself founded upon the traditional framework of the laws of war is that recognition of liberation movements would eliminate the reciprocity between juridically equal states which is one of the primary inducements for obedience to law.[45] This criticism implicitly demands that a liberation movement satisfy a certain measure of the old geo-military standards. Beyond that, it is based on —

> "the assumptions of *conventional* warfare and disregards the special features of *guerilla* warfare characterizing wars of national liberation; all of which leads it to represent effectiveness in very rigid terms. For effectiveness is not merely formal territorial control; it can derive as well from commanding the allegiance of the population. Moreover, even territorial control can no longer be measured by a cut and dry rod ...
>
> x x x
>
> In such fluid situations, territorial control if rigidly conceived, cannot serve as a criterion for determining the effectiveness of either party, because of its relative and ever-changing character. *A more flexible interpretation would assess the effectiveness of liberation movements not in isolation, but in relation to that of their adversary; it would take into consideration not only the elements which they succeeded in controlling, but also those which they succeeded in extracting from the control of that*

The other resolutions are cited as constitutive of state practice. The 1960 resolution, for instance, on the *Granting of Independence to Colonial Countries and Peoples* is a most frequently cited resolution, considered by most African and Asian countries "as a document only slightly less sacred than the Charter". (Rosenstock, *The Declaration of Principles of International Law Concerning Friendly Relations: A Survey,* 65 AM. J. INT'L. L. 713 (1971).

[43] Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. 31.

[44] In Cassese, *The Status of Rebels under the 1977 Geneva Protocol on Non-International Armed Conflicts,* 30 INT'L & COMP. L. Q. 416-439 (1981) at 417, this formulation was considered restrictive of the scope of the term "wars of national liberation". However, in Abi-Saab, *supra* note 40 at 398, the formulation was taken to be merely a specification of three concrete instances of denial of self-determination, an enumeration not necessarily exclusive.

[45] Forsythe, *The 1974 Diplomatic Conference on Humanitarian Law: Some Observations,* 69 AM. J. INT'L. J. 77-91 (1975) at 81.

> *adversary*. Such an interpretation would logically lead to the conclusion that, though not exercising complete or continuous control over part of the territory, liberation movements, by undermining the territorial control of the adversary as well as by their own control of the population and their command of its allegiance, muster a degree of effectiveness sufficient for them to be *objectively* considered as a belligerent community on the international level. (Underscoring supplied)[46]

Following this line of reasoning, therefore, a liberation movement using guerilla warfare may still satisfy geo-military standards; it is a "belligerent" even within the logic of the traditional framework.

But the national liberation concept transcends this framework altogether. Traditionally, belligerency is the legal acknowledgment of the material conditions of an armed conflict and of the *de facto* existence of the belligerent community as a separate entity. "It is an entity whose *de facto* authority is recognized only over the areas it effectively controls.... and whose international legal capacity is conceded only to the extent it is necessary or useful for the prosecution of the armed conflict."[47] Consequently, such international legal status is "rigorously limited both territorially and functionally." On the other hand, a national liberation movement is not subject to such limitations. While belligerents can only speak for themselves, a liberation movement represents not only itself or the territory it controls but *the whole people whose right to self-determination is being denied.* It is this representative capacity which makes the status of a national liberational movement inherently independent of a geo-military dimension. The Protocol acknowledges this representative character in Article 96, wherein it refers to a liberation movement as "(t)he authority representing a people engaged against a High Contracting Party in an armed conflict of the type referred to in Article 1, paragraph 4."

The Issue of Subjectivity (Part One): Jus Ad Bellum and the consequent Double Standard. The national liberation framework has been criticized for introducing *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.[48] Corollarily, this framework results in a *double standard* whereby some wars became international because of the "justness" of their cause without having to meet the material requisites of the geo-military standard.

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

[46] Abi-Saab, *supra* note 40 at 410-411.
[47] *Ibid.*
[48] Forsythe, *supra* note 45 at 80.

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.

The classification does "not purport to establish who has the right to resort to force nor who is right and who is wrong, but merely the applicable (humanitarian) law once an armed conflict of this type broke out."[49] In short, the Protocols Additional do not give preferential treatment to any party to the conflict. To vest a liberation movement with international standing to enjoy the humanitarian protection does not constitute "preferential treatment" for, precisely, it aims to set both parties on equal footing in juridical terms. The categories in the Protocols are "privileged" only in relation to the traditional laws of war but not in the light of the right of self-determination and of the nature of international humanitarian law.

Hence, the new norm does not create a double standard but in fact aims to tear down an old double standard already existing, wherein certain international combatants could be dealt with harshly as common criminals while others were protected as prisoners of war.[50]

The Issue of Subjectivity (Part Two): Politics, Semantics and Liberation Wars. The legal concepts built around the phenomenon of liberation war have been alluded to as "the political rhetoric that passes for legal terminology nowadays." Furthermore, —

> "(T)he danger of such expressions as 'fighting against colonial domination and alien occupation and against racist regimes' is that *they could be applied to a wide range of conflicts going far beyond what was contemplated by those states which have led the campaign for application of the whole of the law of war in wars of national liberation* ... A subjective appraisal of the situation might be expected, each side choosing the characterization of the conflict that would best suit its interests, and claiming that its adversary had completely misconstrued and violated the law. Therein lies legal chaos ..." (Underscoring suppied)[51]

Lack of terminological precision is a valid criticism but it is an unavoidable shortcoming in dealing with international law concepts, for

> "most, if not all, concepts of international law, from the very general such as 'sovereignty' and 'good faith', to even technical ones such as 'the exhaustion of local remedies' have a more or less large *margin of*

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[49] Abi-Saab, *supra* note 40 at 381.

[50] Forsythe, *supra* note 45 at 84. In Abi-Saab, *supra* note 40 at 381: "This line of argument would have been convincing if its proponents were consistent and stood for the elimination of the distinction between international and non-international armed conflicts."

[51] Baxter, *Humanitarian Law or Humanitarian Politics? The 1974 Diplomatic Conference on Humanitarian Law,* 16 HARV. INT'L. L. J. 1-26 (1975) at 15.

> *vagueness* around them. What counts is whether they have a *minimum hard-core allowing for legal determination.*" (Underscoring supplied)[52]

A war of national liberation is an objective situation that rests on the issue of whether self-determination may be invoked or not. It is based on the factual ascertainment of the material conditions elaborated in international documents, which give a clear signification and formulation to the right to self-determination and to the status of national liberation movements. "This criticism reveals a fundamental misunderstanding. *For what is legal in contrast to political? Legal is an adjective describing what is based on a rule of law*... (and) the principle of self-determination is a legal principle."[53]

From a policy perspective, international law has in the past allowed for a certain margin of legal imprecision if only to enable the world community to come to grips with concrete social phenomena not hitherto encompassed by the old rules. Thus even the traditional framework contained an intermediate status between rebellion and full-fledged statehood, i.e., the status of belligerency and of insurgency; ascertainment of this status was decentralized among the outside states and was in itself vague and susceptible of various interpretations.

Wars of national liberation are a concrete worldwide phenomenon. 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 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 avert 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.

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[52] Abi-Saab, *supra* note 40 at 379. In Jose W. Diokno, *Asian Lawyers, Peoples' Rights and Human Rights* (August 27, 1979), this objection is further answered, to wit:

> "That the concept of 'the people' is *imprecise* and that what comprise the rights of people have yet to be spelled out in the Asian context ought not to deter us. *The last is a challenge to face, not a problem to avoid.* As to the first, we lawyers constantly use concepts as imprecise, concepts, for example, like 'public policy' 'public interest', 'good father of a family', and 'reasonable man'. Indeed we are aware 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 is to be applied.*" (Underscoring supplied)

[53] *Ibid.* at 380.

IV

CONCLUSION

The legal status accorded to national liberation movements under the 1977 Protocols Additional is a natural outgrowth of the legal developments preceding it.

Self-determination was declared a principle of international law according to the *Charter of the United Nations.* It was further affirmed as a right *ascribed directly to peoples,* co-equal to other fundamental rights and principles in international law, like the duty of non-aggression and of non-intervention in the domestic jurisdiction of other states. Its assertion, therefore, could not legally be in breach of these other principles.

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

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

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

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

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

From a policy viewpoint, this new theory solves a nagging dilemma inherent in the old geo-military framework. For with the presumptive sovereignty of a state over its domestic affairs, the world community had inhibited itself from regulating a conflict so long as the established state was able to contain that "internal conflict" through military-police action.

But police action, if thorough and effective, only serves to repress *physical violence,* creating an artificial tranquility that outsiders call "peace," and in the meantime sublimating that physical strife into a *structural violence which engenders more inhumanity than war itself.* The world community ironically creates international humanitarian law but permits its application only beyond a threshold of physical hostilities, completely ignoring the fact that violence may be most intense where the expression of discontent is most effectively checked.

To the criticism that the national liberation framework is but ideology in legal garb,[54] suffice it to say —

> "that no political system has an *a priori* absolute and universal validity, that liberal capitalism just as authoritarian capitalism or socialism in all its different forms, *may well be detested by some and preferred by others;* that the right of peoples to self-determination is not linked to any predetermined system; *that freedom has many meanings, and each people has the exclusive right to decide which meaning they will give it* ..."
> (Underscoring supplied)[55]

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[54] Pomerance, *The United States and Self-Determination: Perspectives on the Wilsonian Conception,* 70 AM. J. INT'L. J. 1-27 (1976) at 21. "American intervention in Vietnam was justified in the name of self-determination in all its meanings; communist rule was deemed *ipso facto* alien..."

[55] Chaumont, *A Critical Study of American Intervention in Vietnam* in 2 FALK, THE VIETNAM WAR AND INTERNATIONAL LAW 125-157 (1969) at 149.

On the Vietnam conflict, Chaumont continues, "... that the fact that a people chooses suffering and the risk of annihilation, as in Vietnam, rather than the 'freedom' brought by foreign soldiers and bombers means that the meaning they give to the word 'freedom" equates better with their right to self-determination than the meaning forced on them from without ..." (*Ibid.*)