The Application of International Humanitarian Law to Wars of National Liberation

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Acronyms such as PLO[1], KLA[2] and PKK[3] can strike fear in many. These groups are often associated with indiscriminate death and violent destruction and are viewed in many quarters as dissident rebels or 'terrorists' attempting to undermine legitimate governments. The groups themselves, however, have a diametrically opposing view of the situation. These national liberation movements[4] see themselves as 'freedom fighters'[5], waging a war of national liberation[6] on behalf of their 'people' against an established oppressive government[7] to fulfil their legitimate right of self-determination.

Conflict between a national liberation movement and an established government is a unique form of conflict, involving both guerrilla and regular armed warfare, which engenders much bitterness, injury and death. Conflict of this type also attracts many difficult legal questions and problems which have consequences for the conflicts themselves and for the people involved in them – civilians, members of national liberation movements and government armed forces alike.

Cassese believes that the term 'war of national liberation' was in use as far back as the early nineteenth century[8], and indeed, the use of armed force by peoples under oppressive regimes is certainly not a twentieth century phenomenon. In fact, Sluka points out that:

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[1] Palestine Liberation Organisation.
[2] Kosovo Liberation Army.
[3] *Partia Karkaren Kurdistan* - Kurdish Workers Party.
[4] Regarding the term 'national liberation movement' see Sluka's comment - The use of the term 'national liberation movements' has political implications, particularly when the groups so named are generally referred to by states and the media as 'terrorists'. No one opposed to or critical of these movements calls them 'national liberation movements' because liberation (freedom) has positive value connotations for most people. Nowadays, in the conservative global New Right era we live in, most academics seem to prefer the term 'armed separatist (or secessionist) movements', which they claim is a more objective or neutral description - Sluka 1996.
[5] See ibid - Every nation people will defend its identity and territory from breakup and eradication. Facing absorption and subjugation, many nations have no other choice than to militarily resist the colonizing / conquering states. This is a defensive reaction. To defend their nations from being annihilated, many peoples have taken up arms and engaged in wars of national liberation.
[6] A war of national liberation has been described as: the armed struggle waged by a people through its liberation movement against the established government to reach self-determination - Ronzitti in Cassese 1975, 321.
[7] See Sluka 1996 - National liberation movements are 'peoples' movements seeking freedom, independence, and / or autonomy from what are perceived as oppressive and usually 'alien' regimes. They are popular movements supported by whole communities of subjugated people, and depend on the active support of the population, mobilized by a revolutionary party or organisation.
[8] Cassese in Swinarski 1984, 313.

> There have been national liberation movements since the evolution of the first states. States have proven to be the most efficient of social and military organisations ever devised by human beings for the pursuit of conquest or predatory expansion. The history of states is the history of empire, and from their beginning they spread by conquest and subjugation of neighbouring peoples until today all of the formerly independent nations or peoples have been conquered and included within their boundaries.[9]

The late eighteenth century, for example, saw conflict between American settlers and their British rulers, while in the early nineteenth century, the Latin American countries fought against the rule of Spain and Portugal. However, it was in the mid-twentieth century, during the period of decolonisation, that the main spate of wars of national liberation occurred. It was also during this period that the many inadequacies regarding the application of international humanitarian law to such struggles and wars came to the fore.

It is the aim of this thesis to analyse the international humanitarian law which is applicable to wars of national liberation and to discuss the protection afforded thereby to both civilians and those involved in combat. Because law is ever-evolving and developing this thesis undertakes the study of the laws applicable to wars of national liberation as they developed chronologically. Chapter 1 of this study therefore begins with a discussion of the traditional international law approach to wars of national liberation, focusing on the concept of recognition of belligerency and the protection afforded thereby to those involved in such a conflict.

Chapter 2 concerns the development of international humanitarian law through the adoption of the Geneva Conventions for the Protection of War Victims of 1949[10] and the provisions of these Conventions which could be applicable to wars of national liberation.

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[9] Sluka 1996.

[10] 1949 Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 1949 Geneva Convention II for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 1949 Geneva Convention III Relative to the Treatment of Prisoners of War, 1949 Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War.

Chapter 3 briefly discusses the development of the principle of self-determination and the 'internationalisation' of wars of national liberation by the United Nations (UN) and other regional organizations such as the Organisation of African Unity (OAU). It also focuses on the consequences of this development at the Diplomatic Conference for the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts of 1974 – 1977 and the 'hijacking' of this Conference by national liberation movements.

Chapter 4 will concentrate on one of the results of this Diplomatic Conference i.e., Protocol I[11] regarding international conflicts which was especially tailored and amended to suit wars of national liberation and indeed national liberation movements. The impact of Protocol I on both the political and legal situation of wars of national liberation will also be examined.

The final Chapter will focus on the second result of the Diplomatic Conference - Protocol II[12] regarding non-international conflicts - and the possible application thereof to situations of conflict between a national liberation movement and established government forces.

While the aim of this thesis, as already stated, is to analyse the international humanitarian law provisions which are applicable to wars of national liberation, the main conclusion which will be drawn from this analysis is that despite the various provisions which could, in theory, apply to wars of national liberation, the reality sees only little application of the formal framework of international humanitarian law to this type of conflict. While some States may 'concede' to apply international humanitarian law measures in conflicts which become widespread and sustained, this application is seen as mere concession out of humanitarian concern on behalf of States and not as a legal obligation. Additionally, this concession usually only occurs after various attempts on behalf of governments to quell the insurgency by means of repressive measures, and sometimes, emergency legislation, have failed[13]. National

[11] 1977 Geneva Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts.
[12] 1977 Geneva Protocol II Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts.
[13] See Wilson 1988, 179.

liberation movements seem to be more willing to apply and be to be bound by international humanitarian law than States as it is seen as a means of legitimising and gaining more support for their 'cause' on the world stage. This thesis, would, however, ultimately seek to illustrate the failure of the international community to properly implement the formal framework of international humanitarian law in wars of national liberation.

The aim of this chapter is to identify and to analyse the laws which were applicable to wars of national liberation prior to 1949 when the Geneva Conventions[14] were adopted. While the main wars of national liberation took place in the middle and second half of the twentieth century, many conflicts took place before this time which saw groups uprising against the established government in many states, some which triggered the application of humanitarian law, others which remained within the scope of application of municipal criminal law.

Traditional international law distinguishes between three categories, or indeed, stages, of challenges to established state authority. On an ascending scale of intensity of the challenge to the government, these categories are: 1. rebellion, 2. insurgency and 3. belligerency. An analysis of these categories and the requirements needed to be fulfilled before a conflict can satisfy the threshold of any particular category is of central importance because, as pointed out by Falk[15], the rights and obligations of parties to a conflict are decided firstly by the status ordained on the factions in a conflict. The following section will analyse how wars of national liberation were, and indeed could have been, treated under traditional international law.

Rebellion

The first of these categories, rebellion, involves merely sporadic and isolated challenges to the legitimate authority, conferring neither rights nor duties on the rebels. A rebellion comes within the exclusive remit of the sovereign State, even if a state of rebellion is recognised by a third state. Rebels can legally be treated as criminals under domestic law and, if captured, do not enjoy prisoner of war status. Any assistance from a third State is prohibited by traditional international law as unlawful intervention and interference with State sovereignty, and thus rebels have no protection under international law. As Falk comments:

[14] 1949 Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 1949 Geneva Convention II for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 1949 Geneva Convention III Relative to the Treatment of Prisoners of War, 1949 Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War.
[15] Falk in Rosenau 1964, 197.

> A presumption in favour of stability in the world allows foreign states to intervene on behalf of the incumbent in the situation of mere rebellion. However, if the intrastate conflict is sustained in time and place, it becomes interventionary, according to the traditional theory, to help either faction.[16]

The criteria of rebellion are, however, quite vague and uncertain and the term 'rebellion' can cover many instances of minor conflicts within a State from violent single-issue protests to a 'rapidly suppressed'[17] uprising.[18]

Insurgency

The second of these categories, insurgency, is of a more serious nature than rebellion. Unfortunately, as with rebellion, traditional international law offers no exact definition of insurgency, leaving much confusion surrounding this issue. There are two schools of thought regarding the status of insurgents in international law[19]. Some scholars such as Higgins and Greenspan are of the opinion that the conferring of the status of 'insurgents' on a group brings them out of the remit of municipal law and firmly onto the international law forum, whereas others such as Castren are of the opinion that the status of insurgency does not confer any rights or duties on the group and that they are still subject to municipal criminal law[20]. However, it does seem to be the case that the status of insurgency does bring the group involved out of the exclusive realm of domestic law, giving them quasi-international law status. Falk is of the opinion that insurgency is:

> ...a catch-all designation provided by international law to allow states to determine the quantum of legal relations to be established with the insurgents. It is an international acknowledgement of the existence of an internal war but it leaves each state substantially free to control the consequences of this acknowledgement.[21]

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[16] Ibid, 206.
[17] Ibid, 199. See also ibid, 198.
[18] See ibid, 198 - 9: International law thus purports to give no protection to participants in a rebellion. Rebellion usefully covers minor instances of internal war of a wide variety; violent protest involving a single issue (Indian language riots, Soviet food riots) or an uprising that is so rapidly suppressed as to warrant no acknowledgement of its existence on an extranation level (East European rebellions against Soviet dominion in 1953 and 1956). These norms of identification are, however, vague and seldom serve *expressis verbis* to adjust the relation between the rebellion as a state of affairs and international actors affected in various ways by its existence.
[19] See Wilson 1988, 25.
[20] See Wilson's discussion of these opinions - ibid, 25 – 7.
[21] Falk in Rosenau 1964, 199. See also Menon 1994, 110 and 123.

While the threshold of insurgency is unclear, it seems to be the case that insurgency constitutes a civil disturbance which is usually confined to a limited area of the State's territory and is supported by a minimum degree of organisation[22]. An analysis of the law concerning insurgency leads to the conclusion that certain characteristics must attach to rebels for them to become insurgents[23], i.e. sufficient control over territory and requisite military force to incur interest of foreign States because of the possibility of the actions of the insurgents having an adverse effect on foreign States. Much academic attention has been focused on the rights and obligations of insurgents but as Wilson points out[24], there seems to be general agreement that the rights of insurgents are limited to the territorial boundaries of the State involved. Insurgents are, for example, allowed to enter into general agreements and arrange for humanitarian protection through the International Committee of the Red Cross (ICRC)[25]. However, it is also generally agreed that other rights, e.g. right to blockade, which attach to belligerents, do not, in fact, also attach to insurgents[26]. Menon says of insurgency:

> On the outbreak of insurrection in any country, other States generally maintain an attitude of non-interference in the domestic affairs of that country. However, it may frequently render it not possible for third States to maintain an attitude of indifference for an unduly long period of time and treat the insurrection merely as internecine struggle. Depending upon the geographical situation of the country, the disturbed state of affairs may have deep impact on the trade or commercial relations, in particular maritime interests, of the third States and those States may be forced to declare their attitude towards the rebels. Under the normal circumstances, this gives no cause for any offence to the established government of the country; nor is this declaration a violation of neutrality.[27]

Therefore, insurgency could be seen to partially internationalise a conflict / a rebellion without fully bringing it to the standard of belligerency. As Menon comments,

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[22] See Menon 1994, 110.
[23] See Wilson 1988, 24.
[24] Ibid, 25.
[25] Regarding insurgent rights, see Falk in Rosenau 1964, 200.
[26] See Wilson 1988, 24 - 5.
[27] Menon 1994, 111.

insurgency is a status of potential belligerency.[28] However, as Schlindler points out, recognition of insurgency is, in fact, a very rare occurrence. He says:

> Recognition of insurgents has mainly been substituted by Article 3 of the Geneva Convention and, in some cases, by unilateral declarations of parties to a conflict made upon the request of the ICRC, to the effect that for a specific conflict they would agree to apply certain principles of the humanitarian law. This happened, for example, in Algeria (1955 - 1962), in the Congo (1962 - 1964), in the Yemen (1962 - 1967) and in Nigeria (1967 - 1970).[29]

Belligerency

Belligerency is the final category of a challenge to the established government recognised by traditional international law, and involves a conflict of a more serious nature than either rebellion or insurgency[30]. It is also a more clearly defined concept of international law than either of the other categories of conflict. Recognition of belligerency formalises the rights and duties of all parties to a war. It is...

> ...the acknowledgement of a juridical fact that there exists a state of hostilities between two groups contending for power or authority; it is...the recognition of the existence of war.[31]

In order for a conflict to pass into the category of belligerency however, certain characteristics must attach to it, e.g. Schlindler discusses the criteria laid down by the *Institut de Droit International* in 1900. He says that for a state of belligerency to be recognised is was necessary that:

> (1) the insurgents had occupied a certain part of the State territory; (2) 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[32]. Thus, insurgents could only be recognized if the hostilities had assumed the attributes of war.[33]

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[28] Ibid, 137.
[29] Schlindler 1979, 146.
[30] The distinction between insurgency and belligerency is discussed by Fuller, CJ in *The Three Friends*, 166 (US) 1897, 63.
[31] Menon 1994, 110.
[32] See Resolution on Insurrection adopted by the *Institut de Droit International* in 1900, *Annuaire de l'Institut de droit international*, 1900, 227.
[33] Schlindler 1979, 145.

Higgins describes the criteria as:

> ...first, the existence within a state of a widely spread armed conflict; second, the occupation and administration by rebels of a substantial portion of territory; thirdly, the conduct of hostilities in accordance with the rules of war and through armed forces responsible to an identifiable authority; and fourth, the existence of circumstances which make it necessary for third parties to define their attitude by acknowledging the status of belligerency.[34]

Menon points out that recognition of belligerency as a specific institution as we know it today probably originated in the first quarter of the nineteenth century when text-writers started discussing the status granted by both the British and the United States Governments to the revolting Spanish colonies.[35] While the situation regarding recognition of belligerency is more concretely defined than that regarding either rebellion or insurgency, there is still some vagueness and uncertainty surrounding this subject[36]. The rights and duties of belligerents are, however, clearer, and as Wilson opines:

> Recognition of belligerency gives insurgents rights and duties in international law analogous to those of States.[37]

Once a state of belligerency has been recognised, the belligerent group becomes a subject of international law which incurs some, but not all, of the rights and obligations of States, including the rights and duties of international humanitarian law. Recognition of belligerency can be granted by either the 'parent State' or a third State. Recognising a state of belligerency conferred very little advantage on the third State and therefore was not usually forthcoming. With regard to the motives of recognition of belligerency by third States, Moir states that:

> The most obvious reason could be that the recognising State did in fact support the aims for which the rebels were fighting. Political motives and self-interest are, after all, the foundation upon which much of State practice has historically been built. In this respect, it may also have

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[34] Higgins in Luard 1972, 170-1. See also Moir 1998, 346-7.
[35] Menon 1994, 136.
[36] See *Prize Cases* (1862) 2 Black 635 - US Supreme Court.
[37] Wilson 1988, 26-7. For a discussion of the rights of belligerents on the High Seas see *The Three Friends*, (1896) 166 US 1.

> made good sense since victorious insurgents may well consider the recognition afforded when deciding on future foreign relations.[38]

Recognition of belligerency by the 'parent State' which was taken to be at the discretion of that state, was also very rarely forthcoming as any State would be unwilling to recognise belligerency until they had tried to quell the conflict to the best of their ability. Therefore, recognition of a state of belligerency by the 'parent State', if it came at all, came at an advanced stage of the conflict and only after the 'parent State' believed that their own forces needed to benefit from the principle of reciprocity in the conduct of hostilities[39]. 'Parent States' were often reluctant to recognise belligerency because if a state of belligerency was recognised within its territory, both its own forces and the belligerent forces had the same rights and were under the same obligations, which could in theory prolong the conflict as the government would no longer be able to use all of the power at its disposal. Recognition could also be regarded by the 'parent State' as some sort of concession to the rebels and a sign of weakness on the part of the government[40], even if the State's armed forces would benefit from better treatment during hostilities and in the event of capture if belligerency was recognised.

If belligerency was recognised by either a third State or by the 'parent State', this was analogous to the recognition of a war between two sovereign States under international law, which meant that any intervention by a third State on behalf of either the legitimate government or the insurgent was an act of aggression against the other. Menon discusses the difficulties regarding recognition:

> Once the insurrection acquires sufficient force and permanency, recognition of belligerency thus appears to be justifiable in the eyes of international law. However, recognition given too early may be tantamount to intervention and lead to international friction. Premature recognition is therefore looked upon by the parent State as a gratuitous demonstration of sympathy which may amount to an unfriendly act. Consequently, the authorities are unanimous in emphasizing the necessity for caution on the part of foreign States.[41]

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[38] Moir 1998, 342. Moir also points out that belligerency was most often recognised in maritime situations - often when the legitimate authority placed a blockade on 'insurgent' ports.
[39] See Moir 1998, 343.
[40] See ibid, 343.
[41] Menon, 1994 136 – 7.

The problems regarding recognition of belligerency are therefore, obviously quite numerous. As Moir comments, this led to a reluctance to recognize and an unpredictable practice and pattern of recognition:

> …the laws of war were not automatically applicable to internal armed conflict in the nineteenth and early twentieth centuries. States may have observed them in some cases through the doctrine of recognition of belligerency (either tacit or express), but this was done out of self-interest and for practical purposes, rather than through the belief that they were so bound by international law. Even on the occasions when recognition was afforded, it was a concession to the insurgents, certainly not a legal entitlement. Had State practice been uniform, it might have demonstrated an emerging customary law trend to apply humanitarian law automatically to internal conflicts, but States did not feel legally obliged to recognize belligerency...[42]

As with insurgency, however, belligerency has not, in fact, been recognized in any conflict in many years even though some situations over the years, e.g. the Nigeria-Biafra conflict in 1967, the Algerian conflict and the civil war in Nicaragua[43] would have reached the threshold of belligerency. This leads Higgins to comment that:

> …recognition of this status has lost all practical significance.[44]

Traditional International Law and Wars of National Liberation

What recognition, if any, could wars of national liberation gain under these categories of conflicts of international law? Wars of national liberation take multifarious forms, from sporadic riots to sustained and concerted use of force against the established government. Therefore, the merits of each individual war of national liberation would have to be examined in order to deduce whether the threshold for insurgency or belligerency has been passed, thus triggering the application of international law. Of course, as discussed above, one of the problems with this is the lack of clear and definite criteria for the recognition of insurgency. Indeed, while belligerent status is more easily defined, some uncertainty still persists in this area also. The second major obstacle to the application of the status of belligerency to wars of national

[42] Moir 1998, 350.
[43] See Schlindler 1979, 145 - 6.
[44] Higgins in Luard 1972, 171.

liberation is the reluctance of all States to admit that they have a serious conflict occurring within their State - no State would like to admit that a state of insurgency or belligerency exists within its borders. Firstly, this would show that the situation had gone out of control and that the central government could no longer deal with it. Secondly, an admission of this sort, i.e. that the groups of rebels actually were belligerents recognised by international law, would give a legitimacy to their challenge to the established government. However, recognition of insurgency, or preferably, belligerency, was the only way in which those engaged in a war of national liberation were entitled to *jus in bello* under traditional international law. Recognition of belligerency would especially have been of great importance to such insurgents in order to offer some humanitarian protection to the 'freedom fighter' and to limit casualties of war. Moir points out that:

> An examination of some major internal conflicts of the nineteenth and early twentieth centuries shows that, in those cases where the laws of war were accepted and applied by opposing forces, some form of recognition of belligerency had invariably taken place. In contrast, where recognition of belligerency was not afforded by the government, the laws of war tended not to be applied, leading to barbaric conduct by both sides.[45]

He goes on to state that:

> …recognition of belligerency tended to encourage the observance of the humanitarian rules of warfare, whereas an absence of recognition did the opposite.[46]

Some national liberation movements would have come very close to attaining, if not passing, the threshold required for belligerency by satisfying the necessary criteria as discussed by Schlindler and Higgins above. Yet the fact remains that a state of belligerency has never been recognised in a war of national liberation. Therefore, although interesting, as Wilson comments:

> Discussion of what rights and duties are applicable under traditional international law when belligerency of a national liberation movement

[45] Moir 1998, 345.
[46] Moir 1998, 346.

> is recognised is highly theoretical and devoid of practice in support of theory.[47]

Prior to 1949, 'rebels' / members of national liberation movements were mainly dealt with as criminals under municipal law. This was the common practice of States before international humanitarian law dealt with non-international conflicts in Common Article 3 to the 1949 Geneva Conventions[48]. However, if the conflict / 'rebellion' was in any way protracted, governments often softened or moderated their position in order to afford some protection or benefits to those engaged in combat against the established government. The first attempt to codify this approach is to be found in Francis Lieber's *Instructions for the Government of Armies of the United States in the Field*[49] which was formulated for use in the US civil war - the first war of the 'modern era'[50]. During the course of this non-international conflict, 'combatants' on both sides were generally treated as legitimate combatants and were also treated as prisoners-of-war if captured. The Boer War also saw captured Boers treated as prisoners-of-war by the British until the annexation of the Boer Republics.

This behaviour by established governments was, however, a matter of courtesy, not obligation and was not always afforded, e.g. it was absent in the Greek Civil War (1946 - 9). As Wilson comments:

> The record of State practice when confronting organized resistance movements or secessionist movements is not entirely Draconian. Governments may eventually treat captured persons in an internal armed conflict as prisoners of war, even if they do not recognize them as such. It was generally agreed that according to accepted principles of international law there was no obligation for them to do so, and no government granting analogous treatment to captured prisoners prior to the 1949 Geneva Conventions in an internal armed conflict where the rebels were not recognized as insurgents claimed to do so out of any legal duty. It was a matter of policy and expediency rather than legal obligation.[51]

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[47] Wilson 1988, 37.
[48] This will be discussed in Chapter 2.
[49] D. van Nostrand, New York, 1863.
[50] See Wilson 1988, 38.
[51] Ibid, 41.

Conclusion

This analysis illustrates that prior to 1949 traditional international law was not very well equipped to deal with armed challenges to established government authority. While traditional international law does provide for a categorisation of challenges to state authority, a lack of clarity, political will and State practice means that these categories are not of much practical use. The only means whereby a conflict arising from a challenge to an established government could be dealt with under traditional international law was recognition of belligerency. While provision was made in traditional international law for the application of *jus in bello* to certain challenges which attained this rather illusive status of belligerency, none of these challenges were in the form of a war of national liberation. Wars of national liberation were ignored by traditional international law, with 'freedom fighters' being dealt with under municipal criminal law. The only concession made to 'combatants' in wars of national liberation e.g. treatment analogous to prisoners-of-war in the event of capture, was at the total discretion of the parent State, and was not always forthcoming. By 1949, there was, therefore, an obvious need for a change in international law regarding non-international conflicts and indeed, wars of national liberation.

Traditional international law did not offer adequate protection to victims of non-international armed conflicts and, as discussed in the previous Chapter, wars of national liberation were, to all intents and purposes, ignored by this law. It was not until the adoption of the *Geneva Conventions for the protection of War Victims of 1949*[52] that provisions of international humanitarian law could be seen to be applicable to wars of national liberation. The four Conventions of 1949, focusing on the wounded and sick on land and at sea, prisoners of war and civilians, apply to conflicts of an international character, i.e. conflicts between two High Contracting Parties. There is but one exception among the provisions to this scope of application - Article 3 of the four Conventions, which extends the scope of protection to those involved in conflicts of a non-international character[53]. The classification of a war of national liberation as an international or a non-international conflict is of central importance with regard to the Geneva Conventions and the protection of the wars victims. If a war of national liberation can be regarded as a conflict of an international character, then the whole *jus in bello* of the Conventions - *c.* 400 articles - applies to the conflict. However, if a war of national liberation is considered to be a non-international conflict, it is only the 'rudimentary rules'[54] of Article 3 of the four Conventions which will apply, thus greatly limiting the protection afforded to those involved in such a conflict. The aim of this chapter is to examine the extent to which the provisions of the Geneva Conventions apply to wars of national liberation and to analyse the application, or lack thereof, of these provisions to conflicts of this kind.

The Geneva Conventions of 1949

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[52] 1949 Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 1949 Geneva Convention II for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 1949 Geneva Convention III Relative to the Treatment of Prisoners of War, 1949 Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War.

[53] Regarding the Geneva Conventions and Common Article 2, Rwelamira comments:
The only mitigation to this rigorous provision was mildly provided for in common Article 3, which specified certain minimum standards to be applied in internal conflicts, i.e. wars of non-international character. Common Article 3 required parties to the conflict to be guided by considerations of humanity towards each other - Rwelamira in Swinarski 1984, 230.

[54] Schlindler 1979, 126.

The adoption of the Geneva Conventions dramatically altered the way in which the international community viewed, and dealt with, 'war'. The Geneva Conventions deal with both declared war and all other armed conflicts between States regardless of the intensity of the conflict[55], unlike the traditional international law regime discussed in Chapter 1. Under the Geneva Conventions, there are now just two categories of conflict - international and non-international.

Wars of National Liberation as International Conflicts

The question has been raised whether wars of national liberation could, in any way, be covered by the Geneva Conventions of 1949 and indeed, it has been argued that national liberation movements could benefit and be bound by these Conventions under certain conditions[56]. Even though the Conventions are, in principle, open only to States, they contain two provisions regarding accession to the Conventions or acceptance of the Conventions which could be of use to national liberation movements and allow for the application of the Conventions to wars of national liberation. The first provision is Common Article 60/59/139/155 regarding accession to the Conventions. This states:

> 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.

The second provision is Article 2(3) common to the four Conventions. This provision states:

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

If the terms 'Power' or 'Powers' in these two provisions can be taken to encompass national liberation movements then these movements could accede to, or accept to be bound by, the Geneva Conventions under either Common Article 60/59/139/155 or

[55] See Common Article 2 (1).
[56] See Abi-Saab, 1972, 104.

Common Article 2(3) thus bringing the whole corpus of *jus in bello* into application over wars of national liberation.

This rather liberal interpretation of the above provisions is not without its critics however. It was not the intention of the drafters of the 1949 Conventions to allow for the above interpretation, with the term 'Power' intended to be restricted to mean States only[57]. The main spate of wars of national liberation did not take place until the 1960's and were therefore, obviously, not to the fore of the debate on the application of the Conventions in 1949. As Cassese comments:

> It...seems plausible to argue that in 1949 the States gathered at Geneva neither took wars of national liberation into account nor envisaged the possibility for national liberation movements to become a contracting party to the *Conventions* or at any rate to be allowed to be bound by them.[58]

Schlindler also tackles the problem of the application of the Geneva Conventions to wars of national liberation. He questions whether, despite the fact that it was not the intention of the drafters that the Conventions would apply to wars of national liberation, they could be seen as 'Powers' within the meaning of the above-quoted provisions. He comments:

> The fact that in 1949 the authors of the Conventions considered colonial wars non-international conflicts in the sense of Article 3 cannot be decisive in this respect. For the conception in the minds of the authors of a treaty is not relevant to its later interpretation.[59]

He refers to Article 51 of the *Vienna Convention on the Law of Treaties of 1969*[60] to support this theory. This provision states that a treaty is to be interpreted with regard to the ordinary meaning conferred on its terms in their context and in the light of its object and purpose. He then goes on to comment that:

> If the term 'Power' is interpreted according to the objective and purpose of the Geneva Conventions, it does not seem out of question to regard

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[57] In the opinion of the creators of the Conventions of 1949, wars which today are characterized as wars of liberation were considered as non-international conflicts. The territory of the colonies was looked upon as part of the territory of the mother country - See Pictet 1952, Vol. III, p. 37.
[58] Cassese in Swinarski 1984, 316.
[59] Schlindler 1979, 135.
[60] United Nations Treaty Series, Volume 1155, 331.

> a liberation movement as a 'Power'. ...an insurgent party can become a subject under the laws of war, although only upon recognition. Similarly, it is by no means excluded that a liberation movement which enjoys a large recognition may become a 'Power'.[61]

How would a liberation movement prove that it was, in fact, a 'Power' within the meaning of the Geneva Conventions? If, for example, a liberation movement exerted power over a certain territory which was administered by the 'parent' State as in the case of a colony, a mandate or a trust territory[62], this could serve to 'internationalise' the conflict, bringing it within the scope of the Geneva Conventions. However, for this to be the case, the liberation movement would have to enjoy, as Schlindler points out, 'large recognition' and indeed, the support of the civilian population.

Wars of National Liberation as Non-international Conflicts - Common Article 3

As stated above, in 1949 wars of national liberation were regarded as purely non-international conflicts or indeed, civil wars, thus falling outside the scope of application of all provisions of the Geneva Conventions except for Common Article 3. Prior to World War II, the attention of the laws of war was focused almost exclusively on conflicts between States, i.e. on international conflicts. It was realised, however, that civil wars were becoming more prevalent and that some form of regulation of conflicts of a non-international nature was necessary. This change in attitude brought about an evolution in the laws of war which up to then had placed all the emphasis on State sovereignty - these laws now try to limit state sovereignty in the interests of the individual[63].

This was one of the most controversial of issues to be dealt with at the 1949 Diplomatic Conference whose goal was to revise the Geneva Conventions. While traditional international law had always held that internal conflicts were to be dealt with only under municipal law, one of the aims of the 1949 Conference was to bring non-international conflicts within the jurisdiction of the laws of war. In the year prior to this Diplomatic Conference the ICRC prepared the *Draft Conventions for the Protection of War Victims* and submitted them to the 17th International Red Cross

[61] Schlindler 1979, 135.
[62] See ibid, 136.
[63] See Suter 1984, 15.

Conference at Stockholm. These Draft Conventions saw a 4th paragraph being added to Common Article 2 which stated:

> 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 way depend on the legal status of the Parties to the conflict and shall have no effect on that status.[64]

However, this provision met with resistance both in Stockholm and at the Diplomatic Conference, because as Abi-Saab comments:

> One of the main concerns of its opponents was that in spite of the express formal denial of any effect of such an integral application on the legal status of the parties to the conflict, the possibility such a solution opens to 'rebels' to appoint another State as 'protecting Power' would inexorably internationalize the conflict.[65]

The attempt to extend the laws of war to non-international armed conflicts eventually resulted in the 'daring and paradoxical'[66] Common Article 3, so-called because it is common to all four of the Geneva Conventions of 1949. This article states that:

> 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:
>
> (I)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;

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[64] See Pictet, *Commentary of the Geneva Conventions of 12 August 1949*, Vol. III, Geneva Convention Relative to the Treatment of Prisoners of War, Geneva, ICRC, 1960, 31.
[65] Abi-Saab 1988, 220.
[66] Suter 1984, 15.

(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.

Analysis of Common Article 3

Common Article 3 has been described as a 'milestone in the development of the law of war'[67]. This 'convention in miniature'[68] was the first attempt to legally regulate non-international conflicts in treaty law. It was an attempt to face the reality of the situation of the time with the prevalence of civil conflicts taking place in various parts of the world. This provision seeks to apply the most basic principles enshrined in the Geneva Conventions to non-international conflicts, yet falls far short of the application of the whole corpus of international humanitarian law. While Common Article 3 is similar to the full range of provision contained in the Geneva Conventions in that it extends protection to those caught up in non-international conflicts regardless of the rebels' cause, this protection is much less than that afforded in situations of international conflicts.

There are many criticisms to be made of Common Article 3. As Wilson points out:

> Article 3 does not prevent the established government from punishing the rebels under municipal law, nor does it change their status in law.[69]

This means that the established government can attempt to suppress a rebellion and can still hold the rebels accountable under municipal law. Those 'freedom fighters'

[67] Wilson 1988, 43.
[68] Ibid, 44.
[69] Ibid, 28.

detained as prisoners must, under the provision, be treated 'humanely' but can still be punished and even put to death after a trial under municipal law.

Another weak point of Common Article 3 is that neither the means and methods of war nor the conduct of hostilities are limited with the article being restricted to protection of those persons not taking part in the conflict. Also, while humanitarian aid is expressly allowed under Common Article 3, this aid is quite limited.

One of the biggest failings of Common Article 3 is the uncertainty surrounding its application. Because this provision's application is automatic, no 'recognition' is necessary and therefore, 'target conflicts' are not easily identifiable. Common Article 3 does not provide for a competent authority who can decide if a particular conflict constitutes a 'Common Article 3 conflict'.

Also quite controversial regarding Common Article 3 is the lack of special provisions for guerrilla warfare. Many, if not most, internal conflicts involve this type of warfare yet it is not taken into account by Article 3.

G.I.A.D. Draper describes the difficulties which were faced at the Diplomatic Conference when the drafting of the provision of non-international conflicts came up for discussion[70]. The committee which was charged with the formulation of the non-international conflict provision had to meet on 25 occasions before a consensus was reached. Various drafts were debated and dismissed before a final proposal was agreed upon. Draper states that:

> The limitations and defects of the final Article 3 must be seen in the light of this drafting history. Its conclusion was an achievement and its defects are the price. The anxieties and the caution of states in negotiating this article have been more than borne out by the events which have occurred since the conventions were established. It is probably true to say that Article 3 has been the object of more attention and dispute than any other provision in the conventions. Apart from the intrinsic sensitivity of the subject matter, the political events of the post-1949 period have more often than not manifested themselves in some form of internal armed conflict within a state.[71]

[70] See Draper, 'The Geneva Conventions of 1949' in *Académie de Droit International, Receueil des Cours*, Vol. 1, 1965 - quoted in Suter 1984, 19.
[71] Ibid, 19.

Higgins would conclude regarding Common Article 3 that:

> The Article itself is certainly a step in the right direction - its application is not based on reciprocity by the other party, nor does it depend upon the fulfillment of a technical definition of a civil war.[72]

While, as Higgins comments, Common Article 3 is to be welcomed as an improvement on the traditional international law approach to non-international conflicts, before a proper assessment of the provision can be made the issue of the intensity of conflict required before Common Article 3 will apply, i.e. the issue of threshold, must be addressed.

Threshold of Common Article 3

Probably the most unsatisfactory dimension of this provision is the uncertainty of the threshold of its application, with the term of 'armed conflict not of an international character' not being defined. There is much uncertainty concerning the threshold of violence necessary before a conflict can be regarded as being a non-international conflict under the Geneva Convention for the purposes of Common Article 3. The Diplomatic Conference of 1949 failed to define the scope of the conflict which is covered by Article 3[73], other than stating that it was applicable to 'non-international' conflicts. In order for a war of national liberation to be covered by Article 3, what attributes must it have? The vagueness of Article 3 does allow for interpretation and the possibility of wars of national liberation falling within the scope of this article. Suter is of the opinion that if a group of guerrillas can prove that they represent a threat to the survival of the government by the use of high-level and sustained force then a civil disturbance can take on the character of a non-international conflict[74].

Suter also states that:

> Article 3 of the 1949 Geneva Conventions was not clearly applicable to guerrilla warfare and its provisions were vague enough to permit a variety of interpretations even in a conventional non-international conflict. On the other hand, in a more general sense it was useful in

[72] Higgins in Luard 1972, 183.
[73] See Suter 1984, 16.
[74] See Ibid, 16.

> enabling governments to become accustomed to the principle of non-international conflicts being regulated by international law.[75]

This lack of clarity regarding the concept of an armed conflict not of an international character could be regarded as the 'greatest barrier'[76] to the application of this provision. It can be assumed, however, that the threshold for the application of Common Article 3 is less than that for recognised belligerency discussed in Chapter 1. Recognition of belligerency would bring the whole corpus of humanitarian law, not just the minimum rules of Common Article 3, into application. However, below this threshold, lies a range of conflicts, from unsustained sporadic challenges to state authority to insurgency, which could, conceivably, come within the remit of Common Article 3.[77]

Common Article 3 and Traditional International Law

The approach of Common Article 3 differs in three aspects from the traditional approach of international law to recognition of belligerency, discussed in Chapter 1. Firstly, Common Article 3 is to be applied automatically to conflicts of a non-international character, with no requirement of recognition of belligerency which caused many problems in the traditional international law approach as discussed in the previous chapter. Indeed, there is not even a requirement of reciprocity of the application of the provisions of Common Article 3. Common Article 3 also requires a lower intensity of armed conflict than had been necessary in order for the recognition of belligerents in traditional international law. In conjunction with this, it is not required that the 'combatants' exercise control over any amount of territory or that they have the characteristic of a government. Thirdly, with recognition of belligerency, the whole corpus of *jus in bello* became applicable to the conflict, whereas Common Article 3 contains only the minimum protection.

Wars of National Liberation and Common Article 3

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[75] Ibid, 17.
[76] Wilson 1988, 45.
[77] Ibid, 45.

How does Common Article 3 impact on wars of national liberation? Firstly, because the provision concerns non-international conflicts, there is the presumption that one of the parties to the conflict is not a State and therefore, the question of whether a national liberation movement can come without the remit of this provision is easily answered in the affirmative. Secondly, it is conceivable that this provision could apply to such a conflict, with the threshold for Common Article 3 not even being as high as that for recognition of belligerency. However, it must be reiterated that the protection which would be afforded to those involved in wars of national liberation under Common Article 3 is of the most minimalist in nature. While a High Contracting Party is under an explicit obligation to afford the protection guaranteed by Article 3 to those involved in a non-international conflict against them (possibly a national liberation movement), Common Article 3 also states that:

> 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 Conventions.[78]

This means that if a national liberation movement was deemed to come within the scope of Common Article 3, it and the 'parent State' are also encouraged to apply all the other provisions of the Geneva Conventions relating to international armed conflicts, thus offering a much broader base of protection to those involved in wars of national liberation, including a limit on the means and methods of warfare and on the conduct of hostilities.

Instances of Application of the Geneva Conventions to Wars of National Liberation

Again, as with recognition of liberation movements as belligerents, this discussion regarding the application of the Geneva Conventions to wars of national liberation, is of more theoretical than analytical value as there have been very few situations when the Geneva Conventions were deemed to be applicable to conflicts of this kind. While the case for the application of the provisions of the Geneva Conventions regarding international conflicts may be seen to be quite a liberal approach to the debate as application to wars of national liberation was not foreseen, or even

[78] Common Article 3 (2).

contemplated, when the Conventions were being drafted in 1949, it is still an option which could be considered by both States and national liberation movements. Some conflicts have been of such an intense character that States have felt compelled to apply international humanitarian law, however, this application is seen to be an act of humanitarianism, not a legal obligation on behalf of the State. National liberation movements have been more willing to apply and to declare their intention to apply the Geneva Conventions than 'parent States' in an effort to 'internationalise' and legitimise their struggle and their 'cause'. Of course, national liberation movements would also hope that their adhesion to international humanitarian law would be reciprocated by the State. For example, in both 1956 and 1958, the National Liberation Front of Algeria (FLN) declared its intention to apply the *Geneva Convention on Prisoners of War* to French prisoners and gave orders to its soldiers to comply with international humanitarian law. The *Gouvernement Provisoire de la République Algérienne* (GPRA) notified the depositary of the Geneva Conventions, the Swiss government, of its accession to the Geneva Conventions in 1960. The Swiss then notified the other High Contracting Parties of the Conventions but made a reservation to the accession because it did not recognise the GPRA[79]. The French government, for its part, had actually recognised the applicability of Common Article 3 to the Algerian War in 1956, but, as Wilson comments:

> This was at least partially because the FLN threatened reprisals if executions of captured FLN members continued.[80]

Another situation in which the Geneva Conventions were applied to what could be considered a war of national liberation was the conflict surrounding the secession of Biafra in 1966. Here, however, the government never formally recognised the application of the Geneva Conventions, not even Common Article 3. The Nigerian Federal government had issued a code of conduct to its troops which required them to treat Biafran prisoners as prisoners-of-war. Orders were also given to protect civilians, religious buildings etc. The Red Cross also regularly visited federal government-held prisoners[81].

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[79] See Wilson 1988, 51.
[80] Ibid, 153.
[81] Ibid, 154 - 5.

For many years, Portugal had refused to recognise the applicability of any of the Geneva Conventions, even Common Article 3, to the conflicts in its territories of Guinea-Bissau, Angola and Mozambique and they implemented only municipal criminal law to try to quell the conflicts. However, after 1974, this stance changed and Portugal even invited the ICRC to visit its prisoners-of-war[82].

As seen above, the attempt made by the FLN to accede to the Geneva Conventions was met with a reservation by the Swiss Government. The situation was even more disappointing with regard to the attempted accession of the PLO. In 1969, the PLO communicated to the Swiss Federal Political Department that they were willing to accede to the 1949 Geneva Conventions on condition of reciprocity. However, the Swiss did not even communicate this offer of accession to the High Contracting Parties because they believed that the PLO was not a Party as it did not govern its own territory, and at this stage it had not formed its own provisional government[83]. National liberation movements will be met with obstacles to their accession to the Geneva Conventions[84], however, that does not stop them from declaring their intention to apply and be bound by these Conventions, e.g. the ANC[85] made a statement regarding their willingness to apply the 1949 Conventions to the ICRC[86] in 1980, as did SWAPO[87] in 1981. Another case of declaration of applicability of the Geneva Conventions came from the provisional government established in the Western Sahara by the Polisario - SDAR. The ICRC has even visited Moroccan Prisoners-of-war held by the Polisario Front[88].

Conclusion

The above analysis shows the many difficulties to be faced by national liberation movements in their attempt to apply, and have applied, the Geneva Conventions to wars of national liberation. States had been very unwilling to apply the Conventions and only do so as a concession and if the principle of reciprocity is thought to be

[82] See ibid, 156.
[83] See von Tangen Page 1998, 38.
[84] See Wolf 1984, 40.
[85] African National Congress.
[86] See Wolf 1984, 39 - 40.
[87] South West Africa people's Organisation.
[88] See Wilson 1988, 157.

needed - a legal obligation incumbent on States to apply the Geneva Conventions is not accepted, which makes for a very unpredictable and unsatisfactory pattern of application[89]. The main 'concessions' made by Governments in wars of national liberation of a high intensity is to treat captured 'freedom fighters' like prisoner-of-war and to allow visits by the ICRC - concessions are not made with regard to 'combatants' involved guerrilla warfare[90]. The application of Common Article 3 to wars of national liberation is perhaps easier to accept, with wars of national liberation traditionally being regarded as non-international conflicts. However, even though classification as a Common Article 3 conflict would merely afford the minimum of protection to those involved in a war of national liberation, this too has been only infrequently used as an option. In fact, States have shown much reluctance in the application of Common Article 3 in any non-international conflict of any kind, not only with regard to wars of national liberation. As with a state of insurgency or belligerency, Governments are not willing to admit that they have an armed conflict of any nature occurring within their territory, preferring to deal with it under their own municipal law, perhaps moderating the severity of the municipal law if the conflict is sustained over a period of time. In fact, Higgins comments that Article 3 (1) is ignored in practice and that the second part of Article 3 (2) has never been practiced either, in any case of non-international conflict, much less in a war of national liberation[91]. Therefore, while one might have hoped that the situation regarding adequate protection of individuals involved in wars of national liberation would have been ameliorated by the adoption of the Geneva Conventions, this wish has been only partly fulfilled. However, the Geneva Conventions were adopted in 1949 and it was not until the period of decolonisation in the 1960's and 1970's that the real debate regarding the application of international humanitarian law to wars of national liberation began.

[89] See discussion of case law in Chapter 4.
[90] The issue of the status of 'combatants' involved in guerrilla warfare will be addressed in Chapter 4.
[91] See Higgins in Luard 1972, 182.

Between 1949 and 1974 when the International Committee of the Red Cross convened the Diplomatic Conference for the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, evolution in international community ideas and, consequently in international law, had engendered a development in the recognition and classification of wars of national liberation as wars of an international character. This evolution had at its core, the principle of self-determination. While an in-depth analysis of the concept of self-determination is beyond the scope of this thesis[92], some discussion of this topic is necessary for a full understanding of the evolutionary process undergone by international humanitarian law as it relates to laws of national liberation. To this end, part one of the discussion of this Chapter will focus on the principle of self-determination at a political and legal level prior to 1974, and part two will analyse the impact of this principle on the Diplomatic Conference of 1974 - 1977.

Self-Determination

Both Article 1 and Article 51 of the United Nations Charter[93] refer to the principle of self-determination, a principle which has often been a source of controversy within the organization, with some member States regarding self-determination as 'a mere standard of achievement towards which member States should strive as an ideal'[94], while others view it as a legal obligation. Over the years, however, the principle of self-determination has been the source of many General Assembly resolutions and has gradually taken on the mantle of the second option, i.e. that of a legal right.

During the period of decolonisation, the international community gave much theoretical support to those involved in struggles for national liberation. This support took the guise of multifarious resolutions adopted by the United Nations and other international and regional organisations. Many of these messages of support were

[92] For a comprehensive study of the principle of self-determination see generally Buchheit 1978, Castellino 2000, McCorquodale 2000, Pomerance 1982 and Grahl-Madsen 1979. See also Bassiouni 1971 and Clarke 1980.
[93] Charter of the United Nations (1945), as amended by GA Res. 1991(XVIII), 1963 (557 UNTS 143); 2101, 1965(638 UNTS 308); and 2847 (XXVI) 1971 (892 UNTS 119)
[94] Abi-Saab in Akkerman, Van Krieken and Pannenborg 1977, 369.

founded on the UN *Declaration on the Granting of Independence to Colonial Countries and Peoples*[95]. This declared that:

> 1.The subjugation 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…
>
> 4.All armed action or repressive measures of all kinds directed against dependent peoples shall cease to enable them to exercise peacefully and freely their right to complete independence, and the integrity of their national territory shall be respected.

Another example of such support is a resolution adopted in 1964 by the Conference of Jurists of Afro-Asian Countries in Conakry which states that:

> ...all struggles undertaken by the peoples for the national independence or for the restitution of the territories or occupied parts thereof, including armed struggle, are entirely legal.[96]

Resort to arms by colonised peoples was also recognised by the Conference of Non-aligned States in 1964 in Cairo. It was stated here that:

> ...the process of liberation is irresistible and irreversible. Colonized peoples may legitimately resort to arms to secure the full exercise of their right to self-determination and independence if Colonial Powers persist in opposing their natural aspirations.[97]

The idea that the attainment of liberation was irresistible was echoed in many UN resolutions issued by the General Assembly from 1965 onwards, which reaffirmed the legitimacy of the struggle for self-determination and thus for national liberation, e.g. GA Resolution 2105 (XX) of 1965.[98] Self-determination was also classified as a fundamental right of all peoples in Article 1 of the *International Covenant on Civil and Political Rights*[99] and the *International Covenant on Social, Cultural and*

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[95] Res. 1514 (XV) of 16 Dec. 1960.
[96] Quoted in Verwey 1977, 121.
[97] Ibid, 121.
[98] See also, GA Res. 2107 (XX), GA Res. 2189 (XXI) of 1966, GA Res. 2326 (XXII) of 1967, GA Res. 2465 (XXIII), GA Res. 2383 (XXIII), GA Res. 2396 (XXIII) of 1968, GA Res. 2548 (XXIV), GA Res. 2507 (XXIV), GA Res. 2508 (XXIV), GA Res. 2547 (XXIV) of 1969.
[99] International Covenant on Civil and Political Rights (1966), GA Res. 2200A (XXI), U.N. Doc. A/6316.

Economic Rights[100] of 1966. Following on in this trend in 1970 came the *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations*[101]. This Declaration is significant with regard to the world community's view on self-determination, and indeed on wars of national liberation, because its drafting Committee worked on the basis of consensus and it was also adopted by the General Assembly by consensus. As Abi-Saab comments:

> Thus, for the first time the western Powers as a whole recognized self-determination as a legal right and its denial as a violation of the Charter.[102]

The adoption of this Declaration illustrates that by 1970, the international community had recognised the principle of self-determination as a legal right. This Declaration was important not only because of its most positive contribution to the debate on the status of self-determination but also because of its reference to the use of force regarding self-determination and the legality thereof. As discussed in Chapters 1 and 2, up to this point in history, wars of national liberation - wars of those seeking self-determination - had been regarded, and dealt with almost exclusively, as conflicts of a non-international nature, falling within the remit of municipal law and Common Article 3 only. Therefore, both the use of force by liberation movements to gain self-determination and by 'parent' governments to quell such armed activity was not subject to the prohibition of the use of force in international law[103]. However, once self-determination was recognized as an international legal right, then the issue of the use of force in wars of national liberation was also altered. Firstly, wars of national liberation could no longer be viewed as domestic conflicts. The 1970 Declaration itself states:

> The territory of a colony or other Non-Self-Governing Territory has, under the Charter, a status separate and distinct from the territory of the State administering it; and such separate and distinct status under

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[100] International Covenant on Economic, Social and Cultural Rights (1966), GA Res. 2200A (XXI), U.N. Doc. A/6316.
[101] GA Res. 2625 (XXV).
[102] Abi-Saab in Akkerman, Van Krieken & Pannenborg 1977, 370.
[103] Article 2 (4) of the Charter of the United Nations (1945), as amended by GA Res. 1991 (XVIII), 1963 (557 UNTS 143); 2101 (XX), 1965(638 UNTS 308); and 2847 (XXVI) 1971 (892 UNTS 119).

> the Charter shall exist until the people of the colony or Non-Self-governing Territory have exercised their right of self-determination…

Regarding the use of force, the Declaration states:

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

Abi-Saab comments, regarding this provision, that:

> It clearly states that the 'forcible action' or force which is prohibited by Article 2, paragraph 4 of the Charter is not that used by peoples struggling for self-determination but that which is resorted to by the colonial or alien governments to deny them self-determination.[104]

This implies that force used by national liberation movements or third States to resist a denial of self-determination is, in fact, legitimate under the UN Charter.[105] The 1970 Declaration ultimately leads to the conclusion that the whole corpus of *jus in bello* should apply to wars of national liberation as they are conflicts of an international nature caused by a struggle for self-determination which has been denied by force.[106] Abi-Saab states:

> The 1970 Declaration clearly reveals the legal conviction of the international community as a whole on the different components of the principle of self-determination which make for the international status of wars of national liberation. Legal conviction is one of two elements of international custom; the other is practice. And much practice did take place mainly, but not exclusively, within international organizations.[107]

Examples of this practice are to be found in the many General Assembly resolutions calling for the application of the Geneva Conventions to wars of national liberation, e.g. Resolution 3103 (XXVIII) in 1973. This resolution contained the 'Basic principles on the legal status of the combatants struggling against colonial and alien

[104] Abi-Saab 1979, 371.
[105] See ibid, 371 – 2.
[106] See ibid, 372.
[107] Ibid, 372.

domination and racist regimes'. Point 3 of the Declaration, which was adopted 83:13:19, stated:

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

The General Assembly also adopted resolutions regarding specific instances of struggles for self-determination and national liberation, e.g. Resolution 2787 (XXVI) in 1971 which mentions Zimbabwe, Namibia, Angola, Mozambique, Guinea-Bissau and the 'Palestine people'. Both the General Assembly and the Security Council have also recommended, and in once instance ordered, sanctions against colonial or alien governments and have also recommended for the provision of aid to national liberation movements. Additionally, the UN has set up the *Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples* which maintains links with many national liberation movements. Observer status has also been granted to several national liberation movements in many of the UN's organs and specialised agencies as well as at many UN- sponsored Conferences. Indeed, full observer status has been conferred upon the PLO and SWAPO by the General Assembly.

Other regional organisations such as the Organisation of African Unity (OAU) have also adopted resolutions similar to the UN resolutions regarding liberation movements and have also provided aid to these movements. Indeed, many individual States have recognised liberation movements, some allowing the movements to establish official representations in their jurisdiction.

International Developments Prior to The Diplomatic Conference for the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts 1974 - 1977

Two years prior to the 1970 Declaration regarding self-determination, the UN had shown its interest in International Humanitarian Law at the Teheran International Conference on Human Rights which was concerned with respect for human rights in situations of armed conflict. The ICRC also realised at this point that the law of armed conflicts was not adequately developed to deal with contemporary warfare. They presented a report on the subject of the development of humanitarian law to the 21st International Red Cross Conference in Istanbul in 1969.

Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law 1971 - 1972

Following on from this, the ICRC convened a Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts in Geneva from 24 May to 12 June 1971. This was a very important conference in that it was the first major conference in recent times with the aim of updating the law relating to armed conflicts. Governments elected experts to attend the conference but the delegates did not necessarily act as representatives of their governments. Both the United Nations and the Swiss Federal Council were represented along with 39 other delegations - 16 from WEORG, 6 from Eastern Europe, 10 from Asia/Africa, 4 from the Middle East and 3 from Latin America. In order to update and develop international humanitarian law to more adequately address contemporary conflicts, the Conference decided to reaffirm and supplement the Geneva Conventions of 1949 rather than revise them as they did not want to be seen to be weakening these Conventions and thus, humanitarian law protection.

As a means of supplementing the Geneva Conventions, the ICRC proposed that they would formulate an Additional Protocol on Guerrilla Warfare[108], composed of 5 main principles. The first concerned the status of combatants and POW's following on from Article 4 A(2) of the POW Convention. The second principle dealt with the controversial issue of international versus non-international conflicts. Here the Conference proposed the drafting of standard minimum rules which would apply to all armed conflicts but which would have no bearing on the categorisation of the conflict as international or non-international or on the legal status of the parties to the

[108] See Suter 1984, 110.

conflict. The rules would be the subject of undertakings by both belligerent parties which would then be made known to the ICRC who would in turn notify the 'enemy' party in the conflict and also the other signatories of the Geneva Conventions of 1949[109]. The third principle concerned the civilian population and the protection thereof which emphasised the idea of distinction. The methods and means of warfare were also dealt with as the fourth principle, with the recognition that the right to inflict injury on the enemy is not unlimited, and the reaffirmation of the principles of the 4th Hague Convention. The issue of implementation was the fifth main principle to be dealt with, with the ICRC being allowed to offer certain support to victims and with both parties to the conflict allowing international observers to verify alleged violations of the rules by a means which was yet to be formulated.

However, these proposals proved to be too radical for the Conference of Experts who were not willing to allow for a separate Protocol on guerrilla warfare, even though both the ICRC and the Conference of Experts believed that guerrilla warfare was not a category but a form of conflict which could be either international or non-international[110]. The Conference of experts did not agree however, that there was a need to treat guerrilla warfare in such a specialised manner as to devote a specific protocol to it and believed that the issue of guerrilla warfare would be better dealt with in the context of other forms of armed conflict. They also believed that a distinction should be kept between international and non-international armed conflicts. At the Conference of Experts, the Norwegian delegates who had proposed that only one uniform Additional Protocol be adopted which would be applicable to conflicts of either an international or a non-international character, rather than two, believed that one protocol was the logical approach from the point of view of the victims who suffer equally in international and non-international conflicts. The Norwegian delegation was of the opinion that a distinction in the protection afforded to victims of international and non-international conflicts would result in 'selective humanitarianism'[111]. However, as Schlindler points out:

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[109] See ICRC, *Rules Applicable in Guerrilla Warfare*, Geneva January 1971, 50 - 1, quoted in Suter 1984, 111 - 2.
[110] ICRC, August 1971, 66 - 7 - See Suter 1984, 113 - 4.
[111] Quoted in Schlindler 1979, 154.

> ...such a uniform Protocol would not correspond to the current structure of the world community. International law has to take into account that the world is divided into sovereign States, and that these States keep to their sovereignty. They are not willing to put insurgents within their territory on equal terms with the armed forces of enemy States, or members thereof...Besides, one has to bear in mind that a uniform protocol would inevitably reduce the level of humanitarian law for international conflicts to that of non-international conflicts.[112]

This session of the Conference of Experts did not manage to agree on much else besides the unacceptability of the ICRC's proposals. The ICRC then had to set about drafting two additional draft Protocols to the Geneva Conventions of 1949 to be ready for discussion at the next meeting of the Conference of Experts in 1972. Approximately 400 experts were present at this conference on behalf of 77 governments[113]. The first draft Protocol concerned international armed conflicts and dealt with aspects of both Geneva and Hague law. The second draft Protocol developed and supplemented Article 3 common to the four Geneva Conventions regarding non-international conflicts discussed previously. Following on from this and from the contemporaneous political discussion of self-determination, the ICRC also formulated a draft Declaration on the Application of International Humanitarian Law in Armed Struggles for Self-Determination. This Declaration did not serve to please anyone however. Firstly, the Declaration sought to have the Conference declare that the Geneva Conventions, Protocol I and other rules of armed conflicts should be applied in situations of wars of national liberation. If that was not the case then both Article 3 and Protocol II should be applied or else both parties should apply rules which the ICRC had yet to formulate but would accompany the Declaration. As Suter points out:

> Some experts disapproved of the whole principle of giving any movements special status; others thought that not enough legal protection was given. The stage was set for the collision at Geneva in 1974. [114]

<u>Diplomatic Conference for the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts 1974 - 1977</u>

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[112] Ibid, 154.
[113] See Suter 1984, 117.
[114] Ibid, 123.

The first session of the Diplomatic Conference for the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts took place from February 29 to March 29 1974. One would expect that with the various UN resolutions and the universal acceptance of self-determination as a legal principle in the years just prior to the Conference that the issue of wars of national liberation and their status as international conflicts would have been an important aspect of the draft Protocols. However, these Protocols 'practically ignored the issue'[115]. This was very unsatisfactory in the eyes of many delegations and needed to be remedied. This lack in the draft Protocols coupled with diametrically opposing ideas regarding the application of international humanitarian law to non-international conflicts as well as the status of wars of national liberation manifested itself in a show of bitter disagreement and unpleasantness at the Conference[116]. Suter comments:

> The session was one of the most bitter conferences which many of the people had ever attended, all the more so because no one had foreseen this.[117]

Before the Conference began it was expected that the work of the Conference would not be too difficult because the two draft additional Protocols had been formulated and debated by both medical and legal experts already. All that was left to be accomplished by the Conference was to gain final political approval from the 126 governments represented at the 1974 session. The first major issues to be faced by the Conference were not in fact the substantive issues of the Protocols themselves however, but procedural problems. Among these issues was whether or not to invite national liberation movements recognised by either the OAU or the League of Arab States to the Conference. It was eventually decided that the liberation movements would be invited but they would have no voting power[118]. These liberation movements were: the African National Congress (South Africa) (ANC), the African National Council of Zimbabwe (ANCZ), the Angola National Liberation Front (FNLA), the Mozambique Liberation Front (FRELIMO), the Palestine Liberation Organisation (PLO), Panafricanist Congress (South Africa) (PAC), the People's Movement for the Liberation of Angola (MPLA), the Seychelles People's United

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[115] Abi-Saab 1979, 374.
[116] See Suter 1984, 128.
[117] Ibid, 129.
[118] Conference Resolution 3(1) adopting draft resolution CDDH / 22.

Party (SPUP), the South West Africa People's Organisation (SWAPO), the Zimbabwe African National Union (ZANU) and the Zimbabwe African People's Union (ZAPU).

Once the problem of invitations had been addressed and the liberation movements had been invited, the draft Additional Protocols then came up for consideration. However, the issue of liberation movements once again came to the fore of the debate. The problem was the status of wars of national liberation - were they to be regarded as international conflicts and thus come within the scope of Protocol I or were they to be treated as non-international and be dealt with by Protocol II? The issue of national liberation movements was given to Commission I to be discussed.

The scope of the ICRC's draft Protocol I was addressed in Article 1. This Article stated:

> The present 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 the conventions.

These situations referred to in Common Article 2 are:

> ...all cases 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.

Obviously, the avoidance of the issue of wars of national liberation was unsatisfactory to many delegations. Wars of national liberation had been conferred with the status of an international conflict by the world community through various UN and other resolutions. Here, however, the ICRC had completely ignored these political developments and had taken the traditional international law approach of treating wars of national liberation as falling outside the scope of the law relating to international conflicts. To try to rectify this 'injustice' the Third World Governments proposed an addition to the above-quoted draft paragraph:

> ...the situations referred to in the preceding paragraph include armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning

> Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.

As was expected, an amendment of this sort was not agreeable to Western States, especially ex-Colonial States and various objections were made to it. Firstly, it was submitted that there was not a customary rule of international law which conferred international status on wars of national liberation. However, as discussed above, the international community had already recognised the international character of wars of national liberation with the adoption of the 1970 *UN Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations*[119]. With regard to practice, the various resolutions adopted by the UN and other regional organisations with regard to the application of the laws of war to wars of national liberation are proof of this. Some objections were made which claimed that the amendment was based on purely political and subjective criteria. Also at issue was the fear that the amendment reawoke the 'just war'[120] doctrine and introduced an element of discrimination into humanitarian law.

Alternatives to the amendment were proposed, e.g. CDDH / I / 12 by the UK, Belgium, Federal Republic of Germany, The Netherlands, Argentina and Pakistan which purported to add two paragraphs to draft Article 1 - one reiterating Common Article 1 of the Geneva Conventions and one which restated the Martens clause which was to encompass situations of wars of national liberation. This clause stated:

> In cases not included in this present Protocol or in other instruments of conventional law, civilians and combatants remain under the protection and the authority of the principles of international law, as they result from established custom, from the principles of humanity and the dictates of public conscience.[121]

However, it was believed that the Martens clause did not solve the dilemma of wars of national liberation because

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[119] GA Res. 2625 (XXV).
[120] For an in-depth discussion of the 'just war' concept see generally Graham 1975, Grahl-Madsen 1979, Johnson 1981 and Verwey 1977.
[121] Quoted in Abi-Saab in Akkerman, Van Krieken &Pannenborg 1977, 161.

> ...it simply reserves the application of pre-existing customary law and principles of humanity to victims of armed conflict falling *outside* the scope of the conventional instrument[122].

A different solution was put forward by the Canadian delegate who proposed the idea that the need to apply the Protocol to any given situation should be the subject of a resolution.[123] However, this idea too, was rejected. This rejection was followed by more discussion, more uncertainty and more disagreement[124]. Eventually, the commission was forced to convene a vote on the proposed amendment to Article 1 of the draft Protocol. The delegates voted 70 to 21 in favour of the amendment with 13 abstentions. Suter says of the dispute and debate surrounding Article 1 of the Draft Protocol at the Conference in 1974:

> I believe that the essence of the Article 1 dispute was not, as is so often the case nowadays at conferences concerned with the progressive development of international law, a matter of wanting to change the law for the sake of changing it. Instead, certain governments wished to use the conference as a political tool with which to provide some assistance to the national liberation movements.[125]

As will be discussed in depth in Chapter 4, in addition to the classification of wars of national liberation as international conflicts, the Third World countries also succeeded at the Diplomatic Conference in attaining the status of combatants for 'freedom fighters', fighting a guerrilla-style war, who would be treated as prisoners-of-war if captured. Article 44 sets out new rules regarding combatant status which is broad enough to include 'freedom' or resistance fighters[126]. Also included in Protocol I is Article 96 (3); a means by which national liberation movements could accede to the Protocol. Those involved in fighting wars of national liberation seemed to have gained a very important victory at the Diplomatic Conference of 1974 - 77. *Prima facie*, they had gained recognition of wars of national liberation as international conflicts, a method by which these wars could benefit from international humanitarian law long denied to these conflicts, and special consideration embodied in the Protocol for the unique type of warfare conducted by national liberation movements. To all intents and purposes, the result of the Diplomatic Conference was very positive for

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[122] Abi-Saab in Akkerman, Van Krieken & Pannenborg 1977, 161.
[123] See ibid, 161.
[124] See ibid, 164.
[125] Suter 1984, 145.
[126] Regarding combatant and prisoner-of-war status in wars of national liberation, see Chapter 4.

national liberation movements and for wars of national liberation. It could be said, in fact, that a victory of this magnitude with such political and legal implications was even more than national liberation movements or Third World Countries had hoped for. Suter, in fact, comments that he believes it was not the intention of the Third World delegations who proposed the amendment or of the Eastern European countries who supported it to actually alter the status of national liberation movements in international law[127]. He offers three reasons to support his theory. Firstly, he points out that any government which was engaged in a conflict with a national liberation movement would be unwilling, logically enough, to ratify Protocol 1 in its amended form. Indeed, South Africa, Portugal and Israel were clear on this point in 1974. Therefore, the change in status of wars of national liberation would have been of no practical use to them. The second reason given by Suter is that although the Third World Governments could not have foreseen the bitterness of the dispute of the Conference of 1974, they already knew that the Western Governments would not be in favour of such an amendment and could possibly be willing to see the collapse of the whole Conference rather than see amended Article 1 be adopted. The third reason Suter gives for this theory is that by the time the draft Protocols were adopted, most of the wars of national liberation would have been resolved. Again, the amended Protocol would be of no practical use. Why then, Suter asks, push the amendment? There are many reasons why the amendment was of great importance to its proposers however. Firstly, the amended Protocol gave increased recognition and status to national liberation movements and their wars at international level. Also, the Third World countries had to be seen to be acting on their beliefs. For years before the Conference they had criticised colonialism and apartheid and now they had a chance to bring about a political and legal manifestation of this criticism. Another reason was that the Third World countries were quite wary of Protocol II and wanted their issues of national liberation dealt with in Protocol I. The Third World countries had wanted recognition of the uniqueness of their particular category of wars of national liberation and further, recognition of wars of national liberation as wars of an international character and therefore, these countries wanted no connection between Protocol II and wars of national liberation.

[127] Suter 1984, 145 - 6.

At the end of the first session of the Conference, there was still no compromise regarding Article 1 of the Draft Protocol. Informal meetings convened under the auspices of NGO's after the Conference discussed and tried to formulate a remedy for the problem of Article 1. It was again discussed at a meeting of experts in December 1974 entitled 'The Concept of International Armed Conflict: Further Outlook'[128], but to no avail.

The second session of the Diplomatic Conference took place from 3 February to 18 April 1975 in Geneva, to which the national liberation movements recognised by the OAU and the League of Arab Nations were once again invited. While this session was much more productive than the first with a lot more constructive work taking place, not enough progress was made and it was decided to convene a third session of the Conference in 1976 and a fourth and final session in 1977, during which the Protocols as amended, were adopted. Thus, national liberation movements had gained an important victory in international political and legal terms by finally gaining recognition under international humanitarian law of wars of national liberation as international conflicts.

Conclusion

The absence of a reference to wars of national liberation in the ICRC draft Protocols was very odd in light of all the political discussion regarding this type of conflict in the UN and contemporary international law which directly preceded the Diplomatic Conference. It was therefore quite incongruous that the Diplomatic Conference sought to develop international humanitarian law without any reference to one of the most prevalent types of armed conflicts of the time. As Greenwood comments:

> With hindsight, it was probably naive of the ICRC and the Swiss Government not to anticipate this 'hijacking' of their agenda, one result of which was that the Conference lasted four years instead of the one which had been envisaged.[129]

[128] Ibid, 152.
[129] Greenwood in Durham and McCormack 1999, 7.

It was also necessary to clarify the status of wars of national liberation and where they fitted into the new regime of international humanitarian law - under Protocol I as international conflicts as had been recognised in the 1970 Declaration of the UN[130] by the international community or under Protocol II as non-international conflicts as traditionally viewed by international law. The amendment to Article 1 of Protocol I can therefore be seen as an attempt to avoid future confusion and controversy regarding wars of national liberation by explicitly stating within the context of international humanitarian law what was already accepted by the international community, i.e. that wars of national liberation were conflicts of an international character. While the victory won by national liberation movements and by Third World countries by way of amended Article 1 along with Articles 44 and 96, is to be welcomed, a proper assessment of these provisions is not possible without seeing how this political victory was put into legal practice, i.e. how do wars of national liberation benefit from Protocol I?

[130] Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations - GA Res. 2625 (XXV).

Third World countries had attained a very important political victory at the 1974 - 7 Diplomatic Conference. Article 1 (4), by which certain types of wars of national liberation were given status as international conflicts, was recognition by the international community (by those states that would consequently accede to the Protocol at least) of the legitimacy of struggles for self-determination in the context of international humanitarian law. The armed struggle for self-determination, for freedom from colonial domination, from alien occupation and from racist regimes, which had been developing in political legitimacy over the years through the adoption of various resolutions by the United Nations and by other regional organisations, was finally legally recognised as a conflict of an international nature. It was a victory in political terms for the oppressed over the oppressors. While recognition of legitimacy of one's case is important, more important are the practical legal implications of this recognition. One would expect that recognition as international conflicts would be of great benefit to those fighting in, and affected by, wars of national liberation, with conflicts of an international character triggering the application of the whole corpus of *jus in bello*. One would expect that this was exactly what national liberation movements had hoped for all through the time their 'cause' and their wars had been ignored by both traditional international law and indeed, to a large extent, by the Geneva Conventions of 1949. One would expect that Protocol I of 1977 would forever alter the course of wars of national liberation for the better. This, however, was not to be the case as expectations often fall short of reality. The reality is that Protocol I has not served wars of national liberation well. To fully understand the unfortunate lack of application of Protocol I to wars of national liberation and the benefits denied to national liberation movements thereby, a full understanding of the scope of the Protocol, and the means whereby a national liberation movement can agree to apply and be bound by it, must be attained. To this end, the first section of this chapter will focus on Article 1 (the scope of the Protocol) and Article 96 (accession to the Protocol). The second section will focus on the special provisions of Protocol I regarding combatants - Article 44 - and how these provisions were necessitated by the type of combat employed in wars of national liberation.

Provisions relevant to Wars of National Liberation

The Preamble of Protocol I begins with fine words expressing equally fine sentiments regarding the High Contracting Parties' wish for peace:

> The High Contracting Parties, Proclaiming their earnest wish to see peace prevail among peoples,
> Recalling that every State has the duty, in conformity with the Charter of the United Nations, to refrain in its international relations from the threat or use of force against the sovereignty, territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations.
> Believing it necessary nevertheless to reaffirm and develop the provisions protecting the victims of armed conflicts and to supplement measures intended to reinforce their application.
> Expressing their conviction that nothing in this Protocol or in the Geneva Conventions of 12 August 1949 can be construed as legitimizing or authorizing any act of aggression or any other use of force inconsistent with the Charter of the United Nations...

References to the United Nations Charter and to the use of force inconsistent therewith in the Preamble is significant in light of the various Resolutions from the UN prior to the Diplomatic Conference of 1974 - 77 which recognised and reaffirmed the right to self-determination for all those peoples under colonial domination, alien occupation and racist regimes and also recognised the illegality of the use of force by these oppressors.

Scope

However, it is Article 1 which is of the greatest importance to the present discussion. As already outlined in Chapter 3, this is the provision 'hijacked' by the national liberation movements at the Geneva Diplomatic Conference. Entitled 'General principles and scope of application', this article states:

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

Obviously, the provision that concerns most us here is Article 1 (4) regarding wars of national liberation. A very important aspect of Article 1 (4) is its restrictive scope[131]. In order for Protocol I to apply to a conflict, the conflict must be an armed conflict in which a people is struggling against colonial domination, alien occupation or a racist regime and the struggle of that people must be in order to exercise its right to self-determination against a Contracting Party to the Protocol. An analysis of the drafting history illustrates that it was the intention of the framers to strictly limit the application of the provision to only the three categories of wars of national liberation mentioned in the provision, i.e. a) colonial domination, b) alien occupation and c) racist regimes when the 'peoples' oppressed by these regimes are fighting for self-determination. Another proposal put forward by some developing countries and Australia and Norway which would have left room for the extension of the category of wars of national liberation was rejected[132]. Cassese comments:

> In short, at least the majority of the framers of Article 1 paragraph 4 manifestly intended to 'issue a legal command' having a well-defined and very narrow field of application.[133]

However, there was some confusion at the Diplomatic Conference regarding the scope of application of this provision. The confusion and uncertainty emanates from the word 'include' in paragraph 4. The use of this word could imply that the list is not exhaustive. This view was, in fact, taken by one delegation at the conference - a very important declaration was made by an Australian delegate at the adoption of the Article at the plenary session of the Conference in 1977. He said that Australia took the view that the three categories of wars mentioned in Article 1 (4) were not

[131] See Greenwood 1989, 193 - 4.
[132] CDDH / I / 11. See Cassese in Swinarski 1984, 317.
[133] Cassese in Swinarski 1984, 318.

exhaustive and that other categories of wars of national liberation contemplated by the principle of self-determination by many UN instruments could also be covered by this article[134]. This declaration has been the subject of much academic discussion[135] and might eventually lead to an extension of Article 1 (4). However, another delegation at the Conference believed that Article 1 (4) was too restrictive, as it restricted the application of the Protocol to only the three types of situation listed in Article 1 (4).[136] If one analyses the UN Charter and the Declaration on Friendly Relations, it is clear that the right to self-determination is granted to all peoples equally and in every respect - it is not limited to the situations enumerated in Article 1 (4). The ICRC Commentary on the Additional Protocols states with regard to the meaning of the word 'include':

> We consider that it should be interpreted as introducing an exhaustive list of cases which are considered to form part of the situations covered by the preceding paragraph.[137]

The Commentary goes on to state:

> 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 of self-determination, must resort to the use of armed force against the interference of another people, or against a racist regime.[138]

For the moment therefore, the scope of Article 1 (4) remains restrictive. This has been one of the major criticisms of the Protocol by academics, e.g. Greenwood comments that:

> ...it is important to appreciate the narrow scope of Article 1(4). Despite its emotive language, this provision does not apply to every group which calls itself a 'national liberation movement' or claims to be fighting for self-determination. In the first place, it should be noted that Article 1 (4) applies only in an 'armed conflict'. Although that term is nowhere defined, it implies a certain level of intensity going beyond isolated acts of violence. Thus the Red Brigades, Action

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[134] See CDDH / SR.22, par. 14.
[135] See Cassese in Swinarski 1984, 318, footnote 12.
[136] See CDDH / I / SR. 56, Annex. See also CDDH / I / SR.2 paragraph 34, CDDH I SR. 3 paragraph 21 and CDDH / I SR. 14 paragraph 8.
[137] Sandoz, Swinarski & Zimmerman 1987, 54.
[138] Ibid, 54 - 5.

> Directe, the Baader-Meinhof Gang and groups of that kind fall wholly outside the scope of the provision on this ground alone...[139]

Therefore, while national liberation movements would have sincerely welcomed the adoption of the amended Article 1 at the Diplomatic Conference, its restrictive provisions mean that only some of these movements could benefit from it. Only very few wars of national liberation would fall within the scope of application of the Protocol, leaving some national liberation movements and some civilians involved in wars of national liberation without adequate international humanitarian law protection. While the fact that some wars of national liberation would be covered by Protocol I is to be welcomed, one cannot but question why a wider scope of application was not seen to be viable. As Cassese comments:

> ...from a *strictly humanitarian* standpoint, extending the applicability of *Protocol I* to a larger category of armed conflicts could not but appear positive. Such an extension would involve the application of a greater number of humanitarian rules to these conflicts, and hence would mean greater safeguard of human life. Of course, this also means that combatants are not longer considered common law criminals but lawful combatants, and are exempt from punishment for the mere fact of fighting against the central government. But is this really so bad? Is not what counts the fact that all those who participate in armed conflicts behave in conformity with international law, without committing war crimes or crimes against humanity? By considering wars of national liberation, other than those falling under Article 1, para. 4, as simple internal conflicts one merely places fewer restrictions on violence and thus attenuates to a much lesser extent the bitterness and cruelty of armed conflict. It may seem difficult for a State to treat insurgents fighting for self-determination as lawful combatants rather than as criminals; but it must be borne in mind that the counterpart to such treatment is greater protection for the civilian population, a much more extensive restriction on the methods and means of warfare and thus much greater humanitarian protection for all those embroiled in the armed conflict.[140]

Another major criticism which can be made of Article 1 (4) is that it is quite dated. The drafters of the provision didn't take the political reality of their time into account because it limits the application of the Protocol to the three categories of conflict enumerated in Article 1 (4), three categories of conflict which rapidly declined in

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[139] Greenwood 1989, 193.
[140] Cassese in Swinarski 1984, 319 - 20. See also Rwelamira in Swinarski 1984, 234 and Schlindler 1979, 137.

frequency soon after 1977. When this provision was drafted, much attention was focused on Portugal's African colonies and their struggle for self-determination. However, as Greenwood comments:

> Since the emergence of these colonies as independent States, the practical importance of this part of Article 1 (4) is virtually non-existent.[141]

Other types of wars of national liberation fought for self-determination against other types of regimes, e.g. authoritarian regimes, are not covered at all by the Protocol.

Also, another criticism of this provision is that any State who have a regime which could be considered to fall within the scope of Article 1 (4), e.g. South Africa, would be very unlikely to accede to Protocol I[142]. A national liberation movement in such a State would therefore, find it difficult to accede to the Protocol, and to demand application of the Protocol to its conflict with the State authorities[143].

Accession

As discussed in Chapter 2, there is some doubt regarding the possibility of application of the Geneva Conventions of 1949 to wars of national liberation because national liberation movements are not States. The important provisions regarding wars of national liberation contained in Article 1 (4) of Protocol I would be of no use if this was the case regarding the application of the Protocol. Therefore, Article 96 of Protocol I, i.e. 'Treaty relations upon entry into force of this Protocol', provides that national liberation movements may agree to apply and be bound by the Conventions and the Protocol. This Article states:

> 1. When the Parties to the Conventions are also Parties to this Protocol, the Conventions shall apply as supplemented by this Protocol.
> 2. When one of the Parties to the conflict is not bound by this Protocol, the Parties to the Protocol shall remain bound by it in their mutual relations. They shall furthermore be bound by this Protocol in relation to each of the Parties which are not bound by it, if the latter accepts and applies the provisions thereof.

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[141] Greenwood 1989, 194.
[142] See Wolf 1984, 40.
[143] Those provisions which represent customary international law, could however, still apply – See Wolf 1984, 40.

> 3. The authority representing a people engaged against a High Contracting Party in an armed conflict of the type referred to in Article 1, paragraph 4, may undertake to apply the Conventions and this protocol in relation to that conflict by means of a unilateral declaration addressed to the depositary. Such declaration shall, upon 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.

Both paragraph 1 and 2 of this Article correspond with Article 84 of the draft Protocol which was submitted to the Diplomatic Conference. Paragraph 3 regarding wars of national liberation however, was formulated and proposed at the Conference itself after the adoption of Article 1 paragraph 4 by Committee I, as it was obvious at this stage that if wars of national liberation were now legally international, then a special procedure of acceptance was necessary for national liberation movements, i.e. authorities representing peoples seeking self-determination in an armed conflict against colonial domination, alien occupation and racist regimes.

In order for an authority to accept to apply and be bound by the Protocol under this provision, certain criteria must be met. Firstly, the prerequisites of Article 1 (4) of Protocol I must be satisfied, i.e. there must be an armed conflict where a people are fighting for self-determination against colonial domination, alien occupation and racist regimes. This armed conflict must be between such a people and a Party to Protocol I. This authority must then make a Declaration to the Depositary who will in turn notify the other Parties to the Geneva Conventions[144]. The issue of 'authority' is not without some uncertainty however. Under Protocol I, while the regimes against which wars of national liberation are fought are defined, there is much ambiguity concerning the national liberation movements themselves. Because of the looseness of Article 1 (4), any group which engages in armed conflict against any of the three categories of regimes mentioned in Article 1 (4) could be seen to be a national liberation movement and thus fall within the field of application of the Protocol. This could mean that in some situations of conflicts for self-determination there may be

[144] See Article 100 sub-paragraph (d), Protocol I.

more than one authority claiming to represent the people struggling for self-determination. The ICRC Commentary on the Additional Protocols states:

> In such a case the present paragraph may be applied without difficulty if there is a common declaration or if there are concordant declarations form those authorities; if, on the other hand, one or other of the authorities does not make the declaration, this paragraph applies only between the Contracting Party an the authority or authorities making the declaration.[145]

If a Declaration is made by a competent authority to the depositary this brings into force rights and duties between the national liberation movement and the State involved in the conflict because the State had already become a Party to the Protocol. The Authority then assumes equal rights and obligations with the Contracting Party[146].

No Declaration has ever been made under Article 96 (3) however[147]. The IRA's[148] intention at the Diplomatic Conference of 1974 - 77 to make a declaration under this provision has been noted[149]. Also, on the 28 Of November 1980, Oliver Tambo announced to the ICRC on behalf of the ANC that this liberation movement would both accept and apply the Geneva Conventions of 1949 and Protocol I of 1977. SWAPO did similarly on 25 August 1981 regarding its intention to accept and apply the Geneva Conventions[150]. The ANC made a Declaration to the ICRC on December 3, 1980 which stated that the ANC intended to respect the 'general principles of humanitarian law applicable in armed conflicts'[151]. This Declaration had been annexed to a letter from the Chairman of the UN Special Committee against Apartheid to the Secretary-General[152]. No specific reference was made to article 96 or indeed to Article 1 (4) but the declaration stated that:

> Wherever practically possible, the African National Congress of South Africa will endeavour to respect the rules of the four Geneva

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[145] Sandoz, Swinarski & Zimmerman 1987, 1089.
[146] Article 7 (Meetings) and all of Part VI except Article 96 of protocol are not applicable to the authority.
[147] See Wolf 1984, 40.
[148] Irish Republican Army.
[149] See Green 1989, 150 and Greenwood 1989, 197, footnote 31.
[150] See von Tangen Page 1998, 38.
[151] See Aldrich 1991, 7, footnote 18.
[152] UN Doc. A / 35 / 710 (1980).

> Conventions of 1949 for the victims of armed conflicts and the 1977 Additional protocol I relating to the protection of victims of international armed conflicts.

However, no official declaration under Article 96 (3) has ever been made[153]. Regarding Article 96 (3) Aldrich comments:

> As a result of this provision, in the absence of such a declaration, the Conventions and Protocol have by their terms no application to wars of national liberation. Members of the armed forces of a national liberation movement do not therefore enjoy the protections of those treaties unless the movement formally accepts all the obligations of the Conventions and the Protocol in the same way as the state parties. Few, if any, liberation movements could expect to be in a position to carry out such obligations unless they are about to succeed in becoming the government of the state. In any event, members of the armed forces of liberation movements are not granted protections simply because they may be deemed to be fighting for a just cause; the Protocol and the Conventions must apply equally to both sides if they are to apply to the conflict at all.[154]

Aldrich also goes on to point out that:

> ...in the absence of such a declaration, no colorable claim can be made to prisoner-of-war status or other benefits under the Protocol.[155]

Combatant and Prisoner-of-War status

Along with accession, there was also another issue to be dealt with at the Diplomatic Conference before Protocol I could be seen to be of any practical use in wars of national liberation, i.e. combatant and prisoner-of-war status. Article 1 of the Regulations annexed to the 1907 Hague Convention IV lay down certain criteria which must be met for a combatant to be deemed a lawful combatant who is afforded a special status under international humanitarian law. Article 1 of these Regulations States:

> The laws, rights, and duties of wars apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions:
>
> 1. To be commanded by a person responsible for his subordinates;

[153] Regarding the question of an article 96 (3) Declaration of an 'authority', whose 'parent State' is not a High Contracting Party to the Protocol, e.g. the ANC and South Africa, see Wolf 1984, 40.
[154] Aldrich 1991, 6.
[155] Ibid, 7.

> 2. To have a fixed distinctive emblem recognizable at a distance;
> 3. To carry arms openly; and
> 4. To conduct their operation in accordance with the laws and customs of war.

The 1949 Geneva Convention I, II and II reiterate these criteria and also make express reference to the application of these criteria to members of resistance movements[156]. However, by their very nature, guerrilla movements would find it extremely difficult to fulfil these criteria, especially number 2. Even in 1949, these criteria were seen by many as being unrealistic with regard to contemporary warfare. The ICRC Commentary on the Additional Protocols states:

> It is actually rather strange to note that ...the law of The Hague coped rather well during 1939 - 45, so as to survive virtually intact, even at the end of the Diplomatic Conference of 1949. Hundreds of thousands, if not millions of resistance fighters opposed the occupying armies in Europe and elsewhere, often with nothing more than makeshift equipment at their disposal, but the Hague Regulations were not, on the whole, seriously shaken thereby.[157]

The issue of guerrilla fighters was discussed at the Human Rights Conference in Teheran in 1968. Also discussed were UN General Assembly Resolutions on this issue, e.g. Res. 2852 (XXVI) of 1971 and Res. 3032 (XXVII) of 1972. Also, before the start of the Diplomatic Conference in 1974, some discussion was focused on this issue with suggestions being made that the open carrying of arms during military operations could be sufficient to distinguish guerrilla fighters from civilians[158]. However, the ICRC's Draft Protocol I only provided for a duty on members of organised resistance movements to 'distinguish' themselves without any further elaboration or explanation in its Article 42. When the issue of distinction was coupled with the potential internationalisation of wars of national liberation at the first session of the Diplomatic Conference in 1974 however, various objections were voiced. Some delegations claimed that such a concession to guerrilla fighters...

> ...amounted to abolishing the requirement that the law of armed conflict be respected in military operations conducted by members of

[156] See GC I, Article 13 (2) (a) - (d), GC II, Article 13 (2) (a) - (d) and GC III, Article 4 (2) (a) - (d).
[157] Sandoz, Swinarski & Zimmerman 1987, 383.
[158] Ibid, 384 - 5.

guerrilla movements, while still granting the latter the status of legitimate combatants and of prisoner of war in case of capture[159].

Article 43 of Protocol I defines 'armed forces':

> 1. The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, inter alia, shall enforce compliance with the rules of international law applicable in armed conflict.
> 2. Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities.
> 3. Whenever a Party to a conflict incorporates a paramilitary or armed law of enforcement agency into its armed forces it shall so notify the other Parties to the conflict.

Article 44 then modifies the above-quoted requirements of the Hague IV Regulations of 1979. This Article states:

> 1. Any combatant, as defined in Article 43, who falls into the power of an adverse Party shall be a prisoner of war.
> 2. While all combatants are obliged to comply with the rules of international law applicable in armed conflict, violations of these rules shall not deprive a combatant of his right to be a combatant or, if he falls into the power of an adverse Party, of his right to be a prisoner of war, except as provided in paragraphs 3 and 4.
> 3. In order to promote the protection of the civilian population from the effects of hostilities, combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack. Recognizing, however, that there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself, he shall retain his status as a combatant, provided that, in such situations, he carries his arms openly:
> (a) During each military engagement, and
> (b) During such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate. Acts which comply with the requirements of this paragraph shall not be considered as perfidious within the meaning of Article 37, paragraph 1 (c).
> 4. A combatant who falls into the power if an adverse Party while failing to meet the requirements set forth in the second sentence of

[159] Ibid, 385.

> paragraph 3 shall forfeit his right to be a prisoner if war, but he shall, nevertheless, be given protections equivalent in all respects to those accorded to prisoners of war by the Third Convention and by this Protocol. This protection includes protections equivalent to those accorded to prisoners of war by the Third Convention in the case where such a person is tried and punished for any offences he has committed.
> 5. Any combatant who falls into the power of an adverse Party while not engaged in an attack or in a military operation preparatory to an attack shall not forfeit his rights to be a combatant and a prisoner of war by virtue of his prior activities.
> 6. This Article is without prejudice to the right of any person to be a prisoner of war pursuant to Article 4 of the Third Convention.
> 7. This Article is not intended to change the generally accepted practice of States with respect to the wearing of the uniform by combatants assigned to the regular, uniformed armed units of a Party to the conflict.
> 8. In addition to the categories of persons mentioned in Article 13 of the First and Second Conventions, all members if the armed forces of a Party to the conflict, as defined in Article 43 of this Protocol, shall be entitled to protection under those Conventions if they are wounded or sick or, in the case of the Second Convention, shipwrecked at sea or in other waters.

Therefore, the requirements needed to be met by a 'freedom fighter' in a war of national liberation for him to be deemed to be a combatant and to enable him to benefit from prisoner-of-war status if apprehended, are now much more relaxed. The second sentence of Article 44 (3), a compromise which was proposed by the United States and the Democratic Republic of Vietnam, has been the focus of much attention. The General rule is set out in the first sentence of this provision and is quite strict, and the second sentence is not always applicable. Regarding Article 44 (3) Greenwood comments:

> The first sentence differs from the previous law in two respects. First, it does not specify the manner in which combatants must distinguish themselves from civilians; there is no reference to a fixed, distinctive sign. Secondly, whereas the old law did not make clear when irregulars had to wear their fixed, distinctive sign or carry arms openly, Article 44 (3) specifies that the duty to distinguish oneself from the civilian population applies during 'an attack or...a military operation preparatory to an attack'. This provision should be read together with Article 37 (1) (c), which provides that the war crime of perfidy is committed by 'the feigning of civilian, non-combatant status.'[160]

[160] Greenwood 1989, 202.

The second sentence allows for exceptions and for more relaxed requirements. An important component of the second sentence is the term 'cannot distinguish'. As Greenwood comments:

> In deciding...whether a person who has failed to distinguish himself from the civilian population in the way required by the first sentence of Article 44 (3) but has carried arms openly in the manner specified by the second sentence is entitled to combatant status, it must first be asked whether the nature of the hostilities are such as to bring the second sentence into operation.[161]

Greenwood then goes on to comment on the general understanding of this provision:

> The views expressed by most delegations, and contained in declarations made on signature by the United Kingdom and the United States, that a combatant must carry arms openly throughout the time when he is visible to the enemy while moving to a place from which an attack is to be launched, clearly accords with the text and significantly limits the effects of the exceptional rule.[162]

Conclusion

Protocol I has been the source of much controversy. The provisions of Article 1 (4) and Article 96 (3) were seen in some quarters as introducing 'the highly politicised considerations of *ius ad bellum*'[163] into international humanitarian law and were thus heavily criticised. The Protocol was even christened a 'law in the service of terror'[164]. However, this present analysis has shown that Protocol I, including Articles 1 (4) and 96 (3), is not to be feared. As Greenwood comments:

> ...if one examines the practical aspects of these provisions, they turn out to be very limited.[165]

In a similar vein, Schlindler comments:

> ...these provisions have small chances ever to be applied.[166]

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[161] Ibid, 203.
[162] Ibid, 294.
[163] Greenwood in Durham & McCormack 1999, 15.
[164] See Feith, 1985.
[165] Greenwood in Durham & McCormack 1999, 16.
[166] Schlindler 1979, 144.

It is obvious that the scope of Article 1 (4) is very restrictive, applying as it does to only three categories of struggles for self-determination. The provision is a product of its time and an illustration of the fact that international humanitarian law is ultimately backward looking - a reaction to past events and conflicts, rather then proactive in nature[167]. A clear example of this is the element of self-determination regarding colonial domination, a phenomenon which rapidly declined soon after the adoption of the Protocol.

It has been pointed out that perhaps Article 1 (4) may come to be given a less restrictive interpretation in the future if the principle of self-determination itself undergoes an evolution and comes to be interpreted in a wider fashion[168]. However, as Greenwood points out:

> It is...widely accepted that that has not yet happened and can only occur if the practice of States in this regard undergoes considerable change.[169]

It is not only Article 1 (4) which contains restrictive elements however, Article 96 (3) will also be difficult to satisfy. A declaration made by a national liberation movement / authority under Article 96 (3) will only bring the Geneva Conventions and Protocol I into application over a certain conflict if two elements are satisfied. Firstly, the conditions of Article 1 (4) must be met, i.e., the 'people' on whose behalf the national liberation movements claims to be fighting is actually a 'people' who are struggling against colonial domination and alien occupation and racist regimes in exercising their right of self-determination and the national liberation movement must, in fact, represent this people. Because of the restrictiveness of Article 1 (4), Protocol I has only ever been recognised as formally applicable in one conflict - that between Peru and Ecuador, even though, as Greenwood comments:

> Although Additional Protocol I has been recognised as formally applicable in only one conflict (that between Peru and Ecuador), it should have been treated as applicable to at least some aspects of the fighting in the former Yugoslavia and many of its most important

[167] See Greenwood in Durham and McCormack 1999, 16.
[168] See Abi-Saab 1979, 397 - 8 and Greenwood 1989, 194.
[169] Greenwood 1989, 194 - 5.

> provisions were applied as rules of customary international law in the Kuwait conflict.[170]

The Protocol which was especially amended for and tailored to the needs of wars of national liberation has never actually been applied to such a conflict. What, then was the point of the controversy at the Diplomatic Conference of 1974 - 77 and the amendment of Article 1 (4)? Schlindler accepts that Article 1 (4) and 96 (3) will rarely, if ever, apply to a conflict, yet he goes on to comment that:

> Nevertheless, the provisions of Protocol I on wars of national liberation will probably not remain without effect altogether. They have reinforced the international position of liberation movements. The States which accede to Protocol I thereby implicitly recognize the legitimacy and legality of wars of liberation. This will increase the pressure on the States involved in wars of national liberation to apply the Geneva Conventions.[171]

This comment was made in 1979. Between then and the present day, many conflicts have taken place between national liberation movements and the established government, yet humanitarian law protection has not been afforded to frequently in these situations. Case law regarding members of national liberation movements / 'terrorists' has illustrated the reluctance of States to apply the Geneva Conventions in this type of situation as well as the unpredictability of application[172]. While in some cases, Israeli courts have indicated that in certain instances members of certain organisations, e.g. the Popular Front for the Liberation of Palestine (PFLP) could be considered as prisoners-of-war, especially if wearing a 'uniform' and involved in military activities when captured, other cases have taken a different view. In the case of *Military Prosecutor v Omar Mahmud Kassem and Others*[173] for example, the Israeli court stated:

> No government with which we are in a state of war accepts responsibility for the acts of the Popular Front for the Liberation of Palestine. The Organization itself, so far as we know, is not prepared to take orders from the Jordan government, witness the fact that it is illegal in Jordan and has been repeatedly harassed by the Jordan authorities. the measure that Jordan has (*sic*) adopted against it has

[170] Greenwood in Durham and McCormack 1999, 4 - 5.
[171] Schlindler 1979, 144.
[172] See 'Cases' in Bibliography.
[173] 1969, 1 Is. Yb. on HR, 456, (1971).

> included the use of arms...If these authorities look upon a body such as the Popular Front for the Liberation of Palestine as an illegal organization, why must we have to regard it as a body to which international rules relating to lawful bodies are acceptable?[174]

In the case of *The State v Sagarius and Others*[175], the judge was asked to consider the case of three people - members of SWAPO - who had been found guilty of participating in terrorist activities. Twenty-two members of SWAPO, including the accused, had infiltrated South West African territory from Angola, carrying arms. They then split into smaller groups and all except the accused were killed or expelled from the territory. The judge commented:

> It is common knowledge that the members of the group were clad in a characteristic uniform worn by the armed wing of SWAPO, and that their contacts with the Defence Force occurred in what could be described as a war situation.[176]

They began to retreat but were captured and taken prisoner. The judge continued:

> Considering all the circumstances; they probably regarded their actions as part of a legitimate conflict which enjoyed strong support both at home and abroad.[177]

The judge agreed with evidence given by Professor Dugard which stated that even though there is a tendency in international law to confer prisoner-of-war status on prisoners who have participated in an armed conflict against a colonial, racist or alien regime while wearing a characteristic uniform, governments who do not accept Protocol I are not bound to confer such status, and he went on to question the customary law value of Protocol I. He nevertheless believed that the consensus in international law regarding such conferring of status should be taken into account at sentencing and the death penalty. Two of the accused were given nine year sentences and the third was given an eleven year sentence[178].

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[174] Ibid, 459, quoted in Green 1989, 133.
[175] 1982, May 24 - 28; June 1 - 2; South African Law Reports, vol. 1, 1983, 838 - 8, original in Afrikaans - unofficial translation in Sassoli & Bouvier 1999, 955 - 7.
[176] Sassoli & Bouvier 1999, 955.
[177] Ibid, 956.
[178] See 'Cases' in Bibliography for other judgments regarding the application of international humanitarian law to wars of national liberation.

There is no established predictable practice regarding the application of the principles of international humanitarian law in conflicts involving national liberation movements. Indeed, as pointed out by Green:

> At the time NATO instituted its bombing campaign against Yugoslavia in 1999 there was no suggestion the KLA (Kosovo Liberation Army) was a national liberation movement, even though its avowed aim was self-determination and independence. In fact, only a year earlier western powers were describing the KLA as gangs of terrorists.[179]

Therefore, despite the promising signs of the Diplomatic Conference of 1974 - 77, with the recognition of wars of national liberation as international conflicts and the ensuing insertion of Articles 96 (3) and 44 into Protocol I, little progress has taken place in practical terms of implementation of international humanitarian law in conflicts involving movements of national liberation. While the aforementioned changes to Protocol I are to be welcomed as a long awaited political victory[180], it is the practical legal implications which are needed to ensure adequate protection for those involved in wars of national liberation. If Protocol I is to be of any practical use to those involved in national liberation movements in the future, then...

> ...there is need to look at the *Protocol* as a dynamic instrument not only restricted to the categories of situation named therein, but to other self-determination situations which may not be readily characterisable in terms of the conventional criteria.[181]

However, this analysis of past State practice and the reluctance of States to formally recognise the application of international humanitarian law provisions to conflicts involving national liberation movements, illustrates that a development of this type is doubtful.

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[179] Green 2000, 63.

[180] The political phraseology of that text was chosen because it was understood by its sponsors to be self-limiting to wars against Western powers by oppressed peoples and would not apply to wars within newly independent States. No matter that most liberation movements could not hope to comply with the obligations of the *Protocol* and the *Geneva Conventions* and therefore will probably not ask to have it applied or that the text was written in such insulting terms that no government fighting rebels would ever be prepared to admit that the provision applied to it, for the adoption of the provision was seen, not as an addition to the *Protocol* that would in practice protect any victims of armed conflicts, but as an important *political* victory - Aldrich in Swinarski 1984, 135 - 6.

[181] Rwelamira in Swinarski 1984, 236.

Protocol II of 1977 supplements and develops common Article 3 of the Geneva Conventions of 1949, dealing with non-international conflicts. It may seem quite unusual therefore, after charting the progress made by certain countries and national liberation movements in having wars of national liberation recognised as international conflicts, that this chapter would seek to analyse how Protocol II regarding non-international conflicts could possibly apply to conflicts of this type. Yet, as discussed in the previous Chapter, Protocol I has never been deemed to be applicable to a war of national liberation. As also discussed, there are divergent opinions regarding the scope of the application of Protocol I as laid down in Article 1 (4), especially regarding the word 'include', and the scope of application has been seen to be very restrictive. Therefore, it is necessary to consider all other options open to national liberation movements - one of these options being Protocol II, i.e. could a national liberation movement in conflict with the established government benefit from the application of Protocol II?

Provisions relevant to Wars of National Liberation

Many delegations at the 1974 - 1977 Diplomatic Conference had reservations regarding the idea of a Protocol devoted explicitly to non-international armed conflicts, e.g. China and India along with several Latin American and African countries[182]. These delegations wanted to restrict the scope of application of the Protocol as much as possible. The ICRC draft Protocol II contained 47 articles, but the legislative process saw many discussions, changes and compromises. The end result was a greatly reduced Protocol of 28 Articles. At the last session of the Conference in 1977, the Protocol which emerged from the Committee stage had been actually 'even more elaborate'[183] than the ICRC draft, following the template of Protocol I. It was obvious at this stage that such a Protocol would not be adopted by the requisite two thirds majority at the plenary session. The delegates, fearful of a complete failure, were quite happy to accept a simplified draft Protocol proposed by the Pakistani delegation.

Scope

[182] See Abi-Saab 1988, 227.
[183] Ibid, 230.

Article 1 of Protocol II lays down the 'material field of application' of the Protocol, i.e. the conflicts to which the Protocol would be applicable. Article 1 states:

> 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 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.
> 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.

Regarding this Article the ICRC Commentary on the Additional Protocols states:

> This provision constitutes the keystone of the instrument. It is the result of a delicate compromise, the product of lengthy negotiations, and the fate of the Protocol as a whole depended on it until it was finally adopted in the plenary meetings of the Conference.[184]

A very important aspect to be noted with regard to this Article is the kind of situation not included in the scope - the article does not apply in cases of internal disturbance. The ICRC Commentary elaborates on this by stating:

> ...there are internal disturbances, without being an armed conflict, when the State uses armed force to maintain order; there are internal tensions, without being internal disturbances, when force is used as a preventative measure to maintain respect for law and order.[185]

Situations of this kind are however, covered by regional and universal human rights instruments. According to Article 1 of Protocol II, the Protocol also only applies to situations of conflicts between a dissident group and the central government - not between two or more dissident groups - therefore, this makes the scope of application of Protocol II narrower than that of Common Article 3. However, with regard to a

[184] Sandoz, Swinarski & Zimmerman 1987, 1348.
[185] Ibid, 1355.

conflict between a national liberation movement and an established government, which is of concern to the present study, Protocol II could apply.

Combatant and Prisoner-of-War Status

Unlike Protocol I, Protocol II does not confer either combatant or prisoner-of-war status on a member of any insurgent group. Municipal law still remains in force in situations where Protocol II is applicable. The authorities of the State can still prosecute and sentence anyone who is found guilty of any offence which relates to the conflict e.g. the taking up of arms and the use of force by the insurgent group / national liberation movement. Rwelamira comments that:

> *Protocol II* has in effect restated the general rule of international law relating to the status of belligerency. Before a situation assumes such a status, the conflict is to be considered as a purely domestic affair. The fighters are not regarded as combatants and they are not entitled to the prisoner of wars status if they fall into the hands of the enemy.[186]

Obviously this protection offered by Protocol I regarding combatants and prisoners-of-war, discussed in Chapter 4, is to be much favoured. If a national liberation movement does not, or cannot, make a declaration under Article 96 (3) of Protocol I and engages in a conflict with the forces of the established government which meets the criteria of Article 1 of Protocol II, the national liberation movement's 'combatants' are offered no protection. Yet, the acceptance of a declaration under Article 96 (3) of Protocol I by the depositary from a national liberation movement in a similar conflict situation would confer combatant status on the 'freedom fighters' and prisoner-of-war status in the event of capture.

Threshold

Protocol II applies only to conflicts which have passed a specified threshold of intensity. Once this threshold is passed, the Protocol applies to the conflict in question. The applicability of Protocol II is automatic - no declaration has to be made

[186] Rwelamira in Swinarski 1984, 234 - 5.

by the parties to the conflict as long as the requirements of Article 1 are met. Regarding this aspect of Protocol II Green comments:

> There is no provision on the Protocol enabling a revolutionary authority to accede thereto, but if the governmental authority has already taken this step it is effective for all the inhabitants of the state. In the event of a non-international conflict affecting such a state, the Protocol will apply automatically.[187]

Abi-Saab comments on the same issue:

> ...once the protocol is internationally accepted in the name of the State by its government, it becomes part of the law of the land, and thus binds both individuals and government, including any actual or future government, as well as any counter movement which disputes the representativity or the authority of such government.[188]

As discussed in Chapter 2, Common Article 3 lacks clarity regarding definition of its threshold. This uncertainty has given rise to many interpretations which has often led to a denial of its applicability to a conflict. In order to remedy this situation and to improve the protection of victims of non-international conflicts it was necessary to develop rules and define objective criteria to determine applicability of Protocol II. The discussions and debate surrounding suitable rules and criteria for applicability of Protocol II were long and intense. While it was realised that uncertainty regarding definition often led to the denial of applicability of Article 3, it was also realised that too strict and rigid a definition could mean that states would not apply Protocol II either. Thirteen different proposals, encompassing six varying approaches, regarding the scope of application of the Protocol were discussed at the Conference of Government Experts in Geneva, to be considered by the ICRC. The ICRC's eventual proposal contained a broad definition based on the existence of a confrontation between armed forces or other organised armed groups who were under responsible command, showing a minimum degree of organisation[189], and the established government. The criteria which would be incumbent on the insurgents were finally agreed upon, i.e. responsible command, enough control over part of the territory which enables them to carry out sustained and concerted military operations and the

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[187] Green 2000, 331.
[188] Abi-Saab 1988, 231.
[189] See Sandoz, Swinarski & Zimmerman 1987, 1348 - 9.

ability to implement the Protocol, and were laid down in the above-quoted Article 1. The ICRC commentary on the Additional Protocols states regarding these criteria:

> In practical terms, if the insurgent armed groups are organized in accordance with the requirements of the Protocol, the extent of territory they can claim to control will be that which escapes the control of the government armed forces. However, there must be some degree of stability in the control of even a modest area of land for them to be capable of effectively applying the rules of the Protocol.[190]

To date however, no recognised national liberation movement has been in control of any part of national territory as required by Protocol II[191], with most national liberation movements have their 'base' outside of the 'parent' state.

Obviously, these criteria restrict the scope of application of the Protocol to conflicts of a high intensity only. Therefore, only very few non-international conflicts are covered by Protocol II, unlike Common Article 3. The International Committee of the Red Cross had intended that Additional Protocol II would supplement and develop the rules of Common Article 3 because up to then it had been made obvious by the death and destruction caused by various non-international conflicts that the pre-existing provisions were not effective enough. However, at the Geneva Conference it was decided that the threshold of Protocol II should actually be raised because of a fear of an infringement on State sovereignty[192]. Therefore, the applicability of the Protocol is only possible if the dissidents control some territory and if they have the ability to implement the Protocol. If, in the course of the conflict, the dissidents loose this control or the ability to apply the Protocol, the Protocol is no longer applicable. Therefore, Protocol II provides for the very unsatisfactory position that 'the question of applicability of Protocol II might be answered varyingly, according to the prevailing circumstances.'[193] Despite the efforts made to clarify the issue of the threshold of Protocol II, much ambiguity still surrounds this topic, e.g. Protocol II does not clearly state how much territory must be under the control of the non-government party to the conflict. Also unclear is what actually constitutes

[190] Ibid, 1353.
[191] See Green 2000, 66.
[192] See Schlindler 1979, 148.
[193] Ibid, 148.

'implementation' of the Protocol by the rebel forces. Much is left up to the discretion of the State, which is not a very satisfactory position. As Rwelamira states:

> If States are allowed to characterise a situation and in accordance with the dictates of their individual disposition, then the broader base of humanitarian concerns may be sacrificed in the process.[194]

However, Schlindler points out that:

> Practice has set up the following criteria to delimit non-international armed conflicts from internal disturbances. In the first place, the hostilities have to be conducted by force of arms and exhibit such intensity that, as a rule, the government is compelled to employ its armed forces against the insurgents instead of mere police forces. Secondly, as to the insurgents, the hostilities are meant to be of a collective character, that is, they have to be carried out not only by single groups. In addition, the insurgents have to exhibit a minimum amount of organization. Their armed forces should be under a responsible command and be capable of meeting humanitarian requirements. Accordingly the conflict must show certain similarities to a war without fulfilling all conditions necessary for the recognition of belligerency.[195]

Green concludes that:

> The definition of a non-international armed conflict in protocol II has a threshold that is so high on fact, that it would exclude most revolutions and rebellions, and would probably not operate in a civil war until the rebels were well established and had set up some form of *de facto* government, as had been the case with the nationalist revolution in Spain.[196]

Indeed, Protocol II was not applied to the conflicts which took place in the Soviet Union or Yugoslavia prior to the dissolution of these states, even though recognition of states such as Croatia and Slovenia by some third States implied the existence of an international conflict.

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[194] Rwelamira in Swinarski 1984, 235.
[195] Schlindler 1979, 147.
[196] Green 2000, 66 - 7.

Conclusion

Additional Protocol II was applicable to internal conflicts in El Salvador, the Philippines, Rwanda and to aspects of the fighting in the former Yugoslavia[197], but has never been deemed to be applicable in a situation of conflict between a national liberation movement and the central government. While Protocol II is to be welcomed - as Greenwood comments:

> ...Additional Protocol II goes a long way to putting flesh on the bare bones of common Article 3 of the 1949 Geneva Conventions. In particular, Additional Protocol II contains the first attempt to regulate by treaty the methods and means of warfare in internal conflicts.[198]

- the high level of intensity required for it to be applied has meant that it will very rarely be applied. The above analysis of Protocol II however, illustrates that it could possibly apply to situations of conflict between a national liberation movement and the established government. If a national liberation movement could prove that they had an organised command system and exercised requisite control over territory to carry out sustained and concerted military operations and that they were involved in a conflict with a High Contracting Party, then Protocol II should apply automatically to the conflict. There is little doubt that some national liberation movements would be able to prove they meet these criteria[199], yet, the applicability of Protocol II to any conflict involving a national liberation movement has always been denied. As with the case of Common Article 3, established governments are very reluctant to admit the existence of any type of conflict within their borders, preferring to prize their State sovereignty over humanitarian concerns and apply only municipal criminal law to the 'terrorists'. Yet, if the criteria for the application of Protocol II could be met in a situation of conflict between a national liberation movement and the established government, what benefits are to be gained by the national liberation movement?

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[197] Greenwood in Durham and McCormack 1999, 5.
[198] Ibid, 14. See also Rwelamira in Swinarski 1984, 235.
[199] See Green 1989, 132 - In the case of the IRA...practice shows that the activists tend to be organized in fairly close-knit groups under a commander and with something very akin to military discipline. There have even been instances of IRA units instituting some type of quasi-judicial procedure against some members accused of collaborating with the 'enemy'. Moreover, a large proportion of IRA activities are in fact directed against military installations of governmental institutions, the sort of target that one frequently finds in a civil war. It is sometimes difficult to accept the British Government's contention that such an act is terrorist rather than military in character.

Both Common Article 3 and Protocol can apply simultaneously to a conflict, providing for the minimum amount of protection, but as Abi-Saab comments:

> Where protocol II comes into its own is in the substantive protection, it provides through its much greater, and greatly needed, elaboration of the elliptic declarations of principle of common article 3, and through introducing new fundamental rules concerning the protection of civilians against the effects of hostilities, as well as the protection of medical personnel and transports.[200]

Therefore, while not satisfactory by any means in the light of the existence of an especially-tailored Protocol I, those involved in a conflict between a national liberation movement and the forces of the established government could benefit from the application of Protocol II. The civilians caught up unwittingly in the hostilities would be the benefactors - the 'freedom fighters' however, would still be regarded as 'terrorists' and criminals. However, as Rwelamira comments:

> Individual States are...left with a *carte blanche* to decide when the *Protocol* or common Article 3 should be invoked.[201]

This means that the Protocol will be invoked only rarely. Again, however, Protocol II has ever been deemed applicable to a situation of conflict between a national liberation movement and the established government. While this Chapter has illustrated that the option is there for application in theory, in reality, it has never been seen to be politically expedient to recognise such application.

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[200] Abi-Saab 1988, 236.
[201] Rwelamira in Swinarski 1984, 236.

This discussion has illustrated how inadequately international humanitarian law has dealt with wars of national liberation. Wars of this type, i.e., an 'armed struggle waged by a people through its liberation movement against the established government to reach self-determination'[202] have occupied quite a significant place in the international political forum for many years, yet have failed to have this importance reflected realistically in practical implementation of the formal framework of international humanitarian law. Because of the emotive nature of wars of national liberation they have often led to violence of a savage nature and destruction on a large scale, yet the seriousness of wars of national liberation, and the fate of those involved in these wars, seems to have lost out in the balancing of State sovereignty with humanitarian concerns by the international community.

While most of the conflicts classified as wars of national liberation occurred in the period of decolonisation of the last century, other wars of national liberation took place at various times before this, yet had never properly been provided for by international law. International law had taken the stance that wars of this type were domestic affairs only and that any incursion into such affairs by third States or by international law with regard to this type of conflict would be a violation of State sovereignty. Therefore, international law stayed virtually silent on wars of national liberation and indeed on non-international conflicts in general. The only real effort to break this silence was the aforementioned Lieber Code utilised in the American Civil War. Chapter 1 of this work illustrated that under the traditional international law approach, the only means by which a war of national liberation could have benefited from the application of the whole corpus of *jus in bello* was by the recognition of a state of belligerency by either the 'parent State' or a third State. However, as discussed in this first Chapter, recognition of belligerency in any case of conflict was rarely forthcoming, and if forthcoming at all, was usually as a matter of political expediency with either the parent State requiring the principle of reciprocity or a third State seeing an opportunity to benefit. If recognition of belligerency came at all, it usually came at a late stage of the conflict with much damage, destruction and death already having taken place. Once a state of belligerency was recognised, both sides benefited from the application of the whole regime of international humanitarian law.

[202] Ronzitti in Cassese 1975, 321.

This would have been of benefit in wars of national liberation but no parent or third State ever deemed members of a national liberation movement to be belligerents and thus no war of national liberation was ever deemed to be open to the application of international humanitarian law. Wars of national liberation were traditionally regarded as internal conflicts falling completely outside the remit of international humanitarian law. As in other situations of non-international conflict such as rebellion, these conflicts were dealt with exclusively by municipal law, with 'freedom fighters' being treated and tried as criminals. Some parent States made some slight concessions in cases of non-international conflict where such a conflict was of a prolonged and sustained character by granting treatment analogous to treatment of prisoners-of-war to captured rebels, insurgents or freedom fighters. Cleary, this approach to wars of national liberation and their victims was extremely inadequate. While one may blame the slow evolution of international law regarding non-international conflicts for the neglect of wars of national liberation, the fact that there was a regime in place which, if somewhat underused, saw for the application of *jus in bello* to serious 'non-international conflicts' by the recognition of belligerency, and that this regime was never used with regard to wars of national liberation, proves that the international community did not want to deal with wars of national liberation as international conflicts, even if of a serious nature. The international community placed more importance on maintaining State sovereignty and power over all parts of their State than on humanitarian concerns.

Chapter 2 of this study discussed the need for improvement and development in the laws of armed conflict which led to the adoption of the 1949 Geneva Conventions. Unfortunately, the pre-1949 mindset of the pre-eminence of State sovereignty over humanitarian concerns prevailed at the Geneva Conference of 1949, with only Common Article 3 of the Conventions dealing with non-international conflicts. Wars of national liberation were still categorised as non-international conflicts in 1949, and so this was the only provision open to national liberation movements. Again, this option was unsatisfactory. Chapter 2 highlighted the many criticisms which have been levelled at Common Article 3. The uncertainty surrounding the definition of a conflict not of an international character as well as the confusion regarding threshold and automatic applicability has led to many instances of denial of the applicability of Common Article 3 to a conflict situation. States will always be reluctant to admit that

any sort of conflict exists within their boundaries which would trigger the application of international humanitarian law as it would infringe on their State sovereignty and confer a legitimacy on the rebels or those who contest the state authority. Therefore, Common Article 3 has only rarely been applied to wars of national liberation. Another issue addressed in Chapter 2 was that of the application of the whole of the Geneva Conventions regarding conflicts of an international nature to wars of national liberation. While at the time of drafting, wars of national liberation were considered to be non-international in character, this opinion changed after the adoption of these Conventions. Chapter 3 dealt with the change in opinion of the international community which, by 1977 had conferred international status on wars of national liberation in Protocol I. Therefore, if an authority representing a people fighting a war of national liberation could be seen to be a 'Power' under Article 2 (3) common to the 1949 Geneva Conventions, then the way would be open for the application of the whole body of international humanitarian law to wars of national liberation. This idea could be developed and implemented at some future date. However, up to this point in time, the 1949 Conventions have not been of too much benefit to those involved in wars of national liberation and indeed, when international humanitarian law is applied in a war of national liberation, it is seen as a matter of concession and not a legal obligation.

In the three decades following the adoption of the Geneva Conventions, the instances of conflicts termed wars of national liberation gained in frequency and importance. The period of decolonisation saw various struggles for self-determination giving rise to many complex problems, not least of all in the legal field. The growing importance of wars of national liberation and the legal quandary to which they gave rise was obvious at the Diplomatic Conference of 1974 - 77 discussed in Chapter 3. An analysis of the many statements and resolutions of the UN and other regional organisations in the years preceding the conference illustrates that the belief held at the time of the 1949 Geneva Conference that wars of national liberation were non-international conflicts had changed. Declarations such as the *Declaration on Friendly Relations* showed that change was needed in the legal sphere and that wars of national liberation should be legally recognised as conflicts of an international character. The very emotive issues of self-determination and decolonisation coupled with these resolutions and declarations made for an interesting Conference, it being quite

foreseeable and understandable that there was to be much debate on wars of national liberation, especially on the status of these wars.

Chapters 4 and 5 discussed the outcomes of this Diplomatic Conference. While the Third World Country-proposed Article 1 (4) of Protocol I was a major political victory for national liberation movements and for the 'cause' of wars of national liberation, it has to be said that this political victory has not been transformed into real legal protection for those involved in wars of national liberation. Chapter 4 illustrated the narrow, restrictive scope of Article 1 (4) of Protocol I and the difficulties regarding accession under Article 96 (3) which have resulted in the fact that no war of national liberation has ever benefited from Protocol I. Chapter 5 illustrated that even if a conflict between a national liberation movement and the forces of an established government was treated as a non-international conflict, because of the very high threshold of application laid down in Article 1 of Protocol II, not every conflict of this type could be dealt with by Protocol II either, and as discussed, to date no conflict involving a national liberation movement has been deemed to fall within the remit of Protocol II.

This whole discussion has shown that the practical applicability of international humanitarian law to wars of national liberation has been rendered almost void by political reluctance. While, in theory, recognition of belligerency in a war of national liberation could trigger the application of *jus in bello*, and while in theory Common Article 3 and indeed Protocol II could be applied to wars of national liberation if they meet certain criteria, this very rarely, if ever, happens. Even Protocol I with its own provisions specifically tailored to wars of national liberation has never been invoked with regard to wars of national liberation. As discussed in Chapter 2 the possibility also exists that if a national liberation movement could prove itself to be a 'Power' within the meaning of the Geneva Conventions, that they could apply and agree to be bound by these Conventions. However, this study has been a theoretical exercise - in reality States usually deny the existence of wars of national liberation, preferring to classify such conflicts as internal disturbances or indeed manifestations of terrorism, and deal with them under municipal law, thus preserving their State sovereignty. If they concede to apply international humanitarian law, then it is a manifestation of their humanitarianism, not a matter of a legal obligation

While many groups such as the PLO and the KLA would classify themselves as national liberation movements seeking self-determination, and would believe themselves to be entitled to protection under the Geneva Conventions or Protocol I, they have not succeeded in gaining formal recognition of the application of these legal instruments to their struggles, except in very rare cases. As mentioned in Chapters 2 and 4, some national liberation movements have shown their willingness to apply and to be bound by international humanitarian law in their conflicts against the established government - the IRA had expressed their intention to make an Article 96 (3) Declaration and so be bound by Protocol I at the Diplomatic Conference of 1974 - 77 and the PLO, the ANC, the FLN and SWAPO etc. have also made statements regarding their willingness to be bound by international humanitarian law. Yet, as it stands, no national liberation movement can automatically benefit from international humanitarian law. While in theory there are a number of options open to national liberation movements, in reality, wars of national liberation have only sometimes seen the benefit of the application of international humanitarian law. As illustrated in this thesis, States are very unwilling to recognise that any type of conflict exists within their borders as they do not wish for interference from outside - State sovereignty is all-important. The emphasis and importance placed on State sovereignty has been to the detriment of humanitarian protection of those involved in wars of national liberation. States usually view those actively involved in national liberation movements as 'terrorists' and criminals. This attitude is not to anyone's benefit. By refusing to acknowledge a Common Article 3 or a Protocol II conflict situation, the State's own civilians fail to benefit from the protective measures embodied in these provisions. By failing to acknowledge a Protocol I conflict situation, States are denying legitimacy to national liberation movements as well as the right of these movements to fulfil their wish, and indeed, right of self-determination as accepted by the UN and indeed, by the international community as well as effectively denying many innocent people the right to benefit from the protection of international humanitarian law. If national liberation movements could be allowed to agree to be bound by and apply Protocol I and the Geneva Conventions and benefit from reciprocity, this could only result in less death, damage and destruction. States have realised that wars of national liberation should be covered by international humanitarian law. They have even gone as far as enshrining this political belief in

legal doctrine. However, they have not yet taken the final step of balancing State sovereignty and humanitarian concerns in favour of the latter by applying the formal framework available for situations of wars of national liberation to these conflicts - as long as this remains the case, States could be said to be forcing national liberation movements to live outside the formal framework of international humanitarian law, and this can only be to the detriment of humanity.

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