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INTERNATIONAL LEGAL PROTECTIONS FOR COMBATANTS IN THE SOUTH AFRICAN ARMED CONFLICT

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INTERNATIONAL LEGAL PROTECTIONS FOR COMBATANTS IN THE SOUTH AFRICAN ARMED CONFLICT

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ABSTRACT

The African National Congress (ANC) is engaged in an armed conflict with the South African Government for control of South Africa. ANC combatants are being prosecuted under South African criminal law as rebels, a process which undermines the normative value of the criminal law because it is in conflict with popular support for the ANC. International law provides a humanitarian alternative to the criminal law. This study investigates the international legal protections available to combatants in the conflict.

Lawful combatant status and prisoner of war status would only be available if the South African armed conflict was classified as international. It has been argued that the international status of the ANC, derived from the denial of self-determination to the South African people, internationalises its war against the South African Government. Attempts have been made to enforce this concept. Article 1(4) of Geneva Protocol 1 classifies armed conflicts involving a movement representing a people with a right of self-determination against a "racist regime" as international. But South Africa did not accede to Protocol 1 and the argument that it is custom fails because of insufficient international support. Nevertheless, the developing situation justifies an examination of the personal conditions required to gain protected status. The conditions in Article 4 of Geneva Convention 3 (1949)

are onerous, making it impracticable in South Africa. Protocol 1's updated conditions are more suited to the armed conflict. The Conventions and Protocol 1 also make available procedural and substantive protections to combatants and deal with special issues particular to South Africa.

The South African armed conflict can alternatively be classified as non-international. Common Article 3 of the 1949 Conventions applies because South Africa is party to them. Geneva Protocol 2 is not applicable because South Africa is not a party to it. Unfortunately, Article 3 only applies general humanitarian principles and not protected status.

To conclude, because of the inadequate means for enforcing the classification of the South African armed conflict as international and the inadequacy of the protections available under the law of non-international armed conflict, it is urged that the Government confer ex-gratia lawful status on ANC combatants.

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Unless otherwise indicated in the text, this thesis is entirely my own work.

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LIST OF ABBREVIATIONS

AS	Annual Survey of South African Law
BYIL	British Yearbook of International Law
CDDH	Official Records of the Diplomatic Conference on the Reaffirmation and Development of the Humanitarian Law Applicable in Armed Conflicts (1974-1977)
CILSA	Comparative and International Law Journal of South Africa
ICLQ	International and Comparative Law Quarterly
IRRC	International Review of the Red Cross
NULR	Natal University Law Review
NYIL	Netherlands Yearbook of International Law
RDPMDG	Revue Droit Penal Militaire et Droit la Guerre
SACC	South African Journal of Criminal Law and Criminology
SALJ	South African Law Journal
SAYIL	South African Yearbook of International Law

CHAPTER ONE

INTRODUCTION

1.1 THE LAW OF ARMED CONFLICT

Armed conflict is the most anarchic of human conditions. Societies at war discard many of the mores that restrain human behaviour in peacetime. Man has, however, introduced rules in an attempt to confine this anarchy. International law has been used to curb excessive violence, ease the pain and suffering of those individuals affected by armed conflict, and preserve human life and humanitarian values. This law of armed conflict,[1] or humanitarian law, can be defined as the corpus of international rules, established by treaty or custom, specifically intended to apply in armed conflict.[2] It is split into two divisions. (i) The law established by the Hague Conventions and attached Regulations of 1899 and 1907 (Hague Law) determines the rights and duties of the parties to the conflict in the conduct of operations and limits the choice of doing harm.[3] (ii) The law contained in the various humanitarian Geneva Conventions (Geneva Law) is intended to safeguard military personnel who find themselves at the mercy of the enemy and persons not taking part in hostilities.[4] In

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[1] Historically termed the law of war, or ius in bello.

[2] J S Pictet Humanitarian Law and the Protection of War Victims (1975) 16.

[3] Ibid.

[4] Loc cit.

simple terms then, Hague Law governs how an armed conflict is fought while Geneva Law protects the individual victims of armed conflict.

1.2 THE STATUS OF COMBATANTS IN INTERNATIONAL ARMED CONFLICTS

It is an important principle of the law of armed conflict that in international armed conflicts (i.e. armed conflicts between states) combatants are not subject to the criminal law of the opposing state. The reason why their killing of members of the other side's armed forces is regarded as blameless is rooted in Rousseau's doctrine that the real adversaries are the states the combatants represent and not the individual combatants.[5] States have, therefore, over time, through international treaties and custom, established among themselves the rule that combatants who commit belligerent acts during international armed conflicts cannot be subject to prosecution for those acts provided they personally satisfy certain conditions. In addition, combatants who fall into enemy hands also acquire a special status guaranteeing a certain level of treatment. Thus lawful combatants become prisoners of war (P.O.W's) on capture. Enforcement of these protections depends upon the right of a captured combatant not to be killed immediately, i.e., the right to quarter.

The conditions for lawful combatant status were first set out in

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[5] J J Rousseau Du Contrat Social du Principes du Droit Politique (1762) chp 4.

the Hague law because they were linked to the regulation of methods of warfare, but were later taken up by the law of Geneva as the key conditions for P.O.W. status. These conditions centred on the principle that lawful combatants had to distinguish themselves from the civilian population. This principle of distinction consists of two aspects: (i) The visibility aspect requiring that combatants distinguish themselves visibly from the civilian population and from the opposing side. (ii) The command link aspect requiring that combatants establish their membership of armed forces distinct from the civilian population through a chain of command connecting them to a party to the conflict. It was implicit in the classification of the regular armed forces as lawful combatants that they were already distinct from the civilian population through their uniforms and military organisation.[6] Irregulars, such as volunteer corps, acquired lawful combatant status provided they conformed to the conditions of: Acting under a responsible command, wearing a fixed and distinctive sign, carrying arms openly and obeying the laws and customs of war.[7] If combatants failed to distinguish themselves from the civilian population they lost the right to participate in the armed conflict and P.O.W. status. Common Article 2 of the 1949 Geneva Conventions currently applies the law of armed

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[6] The regular armed forces of states were granted lawful combatant status through a custom which was later formalised in Articles 1 and 2 of the Regulations attached to Hague Convention 4 of 1907.

[7] Article 1 of the Hague Regulations of 1907.

conflict to interstate armed conflicts[8] while Article 4 of the Third Geneva Convention Relative to the Treatment of Prisoners of War sets out the conditions combatants must observe in order to qualify for protected status.[9] The bulk of the Conventions contain additional rules protecting and providing for both combatants and civilians during armed conflict. But what of combatants in conflicts that occur within states?

1.3 THE STATUS OF COMBATANTS IN INTERNAL ARMED CONFLICTS

The international regulation of internal armed conflicts has always been problematic because it is a direct interference in states' internal affairs. Historically, the fate of captured rebels has varied. In small scale rebellions they were usually executed as traitors. In large internal armed conflicts, such as the American Civil War, execution of the rebels became morally repugnant and difficult to implement. The possibility of rebel victory prompted concern about self-preservation. When the rebel threat became impossible to ignore, various customary legal regimes, depending for their application on the nature and size of the engaged forces, were adopted at different historical junctures to regulate the behaviour of the parties to the conflict and their relations with other states. Belligerent recognition, popular in the eighteenth and nineteenth centuries,

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[8] Supplemented by Article 1(3) of the Geneva Protocol 1 of 1977.

[9] This Article is common to the first three Conventions (13/13/4), but we will use Article 4 for the sake of convenience.

regulated the parties' conduct towards each other's combatants according to the accepted practice in international armed conflicts. Combatants were granted lawful combatant status and P.O.W status. By 1949, however, the customary modes had fallen into disuse. They were replaced by common Article 3 of the 1949 Geneva Conventions, which provided general humanitarian guarantees in conflicts "not of an international character", but which gave no protection from the incumbent's criminal law or P.O.W status. Geneva Protocol 2 of 1977 is the most recent legal development in respect of non-international armed conflicts. Intended to supplement Article 3 by increasing the latter's humanitarian protections without conceding any status to the rebel movement, Protocol 2 has not advanced humanitarian law because its application is predicated on the occupation of territory and its protections are insubstantial. Lawful combatant status and P.O.W. status are no longer available in even large scale non-international armed conflicts.

1.4 THE INTERNATIONAL CHARACTER OF WARS OF NATIONAL LIBERATION

After the second world war decolonisation became a major international issue. The implementation of this process transformed the international legal order. Article 1(1) of the United Nations Charter, together with the United Nations (U.N.) Resolutions which developed it, asserted that colonised peoples had a right of self-determination that could only be satisfied by their independence. Most colonial states decolonised peacefully,

but there were instances of protracted colonial intransigence. In these cases national liberation movements were formed in the colonies to fight for independence in what became known as wars of national liberation. The legal problem was classifying these wars of national liberation. The standard classification was that they were internal or non-international armed conflicts because they took place within the colonial state's territory. Thus, at best, Article 3 of the 1949 Geneva Conventions applied and the combatants of the national liberation movement fell under the criminal jurisdiction of the colonial power. But the U.N., swollen with ex-colonial states, sanctioned these wars of national liberation. International support for the legal right of colonised peoples to self-determination lent impetus to the argument that the national liberation movements representing these peoples had a legal right to initiate wars enforcing decolonisation. The majority of U.N. member states regarded these conflicts as taking place between two international subjects, viz.: the colonial state and the colonised people as represented by the national liberation movement. They argued that these conflicts were international, were subject to the law of armed conflict rather than the colonial states' criminal law, and that the combatants of the national liberation movement were entitled to lawful combatant status and P.O.W. status.

The debate on the redefinition of international armed conflicts to include wars of national liberation polarised publicists in

the 1970's. This redefinition was attempted by various means. The international character of wars of national liberation was asserted by the U.N. General Assembly in a number of resolutions, but they have not been accepted as a fons et origo of the law in this regard. Abi-Saab put forward the most sophisticated legal argument for the classification of these wars as international armed conflicts.[10] Paragraph 3 of common Article 2 of the 1949 Geneva Conventions includes as international armed conflicts, inter alia, conflicts between High Contracting Parties (HCP's) and "powers" that are not contracting parties.[11] Abi-Saab interpreted "powers" to include national liberation movements. But this interpretation did not become authoritative. In response, the inclusion of wars of national liberation as a special species of international armed conflict was taken up in the development of a new Protocol additional to the Conventions. This inclusion was the subject of an acrimonious dispute at the 1974-1977 Geneva Diplomatic Conference. Supporters of the national liberation movements contended that these wars were already international armed conflicts under general international law and they intended Article 1 of the new Protocol to simply reinforce this general law. But they added little legal flesh to their highly charged political arguments. On the other hand, the

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[10] G Abi-Saab "Wars of National Liberation and the Laws of War" 3 Annales de Etudes Internationales (1972) 93; "Wars of National Liberation in the Geneva Conventions and Protocols" 165 Recueil des Cours (1979) 353-445.

[11] Article 96(2) of Geneva Protocol 1 of 1977 uses the term "parties" in a similar context.

concept's mainly Western detractors, ranging in opinion from those who regarded the internationalisation of wars of national liberation as a dire threat to the law[12] to those more amenable to the idea but who had difficulty with its various formulations,[13] relied heavily on a legalistic approach. Despite the detractors efforts, Article 1(4) of Geneva Protocol 1 (1977) classifying wars fought for self-determination against colonial, alien, or racist regimes as international armed conflicts was adopted.

This new classification was aimed at attaining lawful combatant status and P.O.W. status for the combatants of national liberation movements. The emancipation of these combatants necessitated the greatest possible relaxation of the requirement that they visibly distinguish themselves from the civilian population. The guerrilla warfare practiced in these wars of national liberation had rendered the visibility aspect of the principle of distinction impractical. Thus, in Articles 43 and 44 of Protocol 1 the personal conditions for lawful combatant status requiring combatants to make themselves visible were substantially reduced from those set out in Article 4 of the 1949 Conventions.

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[12] For example, D E Graham "The 1974 Diplomatic Conference on the Laws of War, a Victory for Political Causes and a Return to the Just War Concept of the Eleventh Century" 32 Washington & Lee LR (1975) 25.

[13] For example, D P Forsythe "The 1974 Diplomatic Conference on Humanitarian Law: Some Observations" 69 American JIL (1975) 77.

Unfortunately, because of the politically loaded wording of Article 1(4), the colonial, alien, and racist states at which it was directed did not become party to the Protocol. Article 1(4)'s exponents have therefore begun to assert that these adversary states are bound by a new rule of customary international law to its effect. The problem of finding a legally binding means for classifying wars of national liberation as international armed conflicts, has, however, yet to be satisfactorily resolved.

1.5 THE SOUTH AFRICAN ARMED CONFLICT IN INTERNATIONAL LAW

South Africa is one of the adversary states targeted in both U.N. General Assembly Resolutions and Article 1(4). Although South Africa has already been decolonised and is an independent state, it was argued in the U.N. that the self-determination of the South African people had not occurred because they have been subject to legislated racial discrimination by the settler government through its internal policy of apartheid.[14] Non-racialism was construed as a right integral to self-determination. It follows that the key nationalist organisation, the African National Congress (ANC), frustrated in its efforts to achieve self-determination peacefully, has legitimately taken up arms against the South African Government in pursuit of this aim. Further, it was argued that the ensuing armed conflict is an international armed conflict and ANC members have a right to

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[14] Abi-Saab op cit 1979 397.

lawful combatant status and P.O.W. status. Article 1(4)'s reference to "racist regimes" is the outcome of these arguments. The South African Government's opposition to this concept is clear. It considers the issue to be domestic and rejects international law. It regards the ANC's combatants, for all practical purposes the members of the its armed wing, Umkhonto we Sizwe,[15] as criminals. It prosecutes them in its criminal courts for statutory offences such as those set out in the Internal Security Act[16] and for common law crimes such as treason. These prosecutions frequently result in the death sentence. Thus we have two competing legal regimes asserting jurisdiction over combatants in the South African armed conflict.

Although the debate on wars of national liberation generated a wealth of general academic comment,[17] little academic attention has been paid to the specific South African problem. The work that has been done is fairly polemical. Asmal has come out strongly in favour of classifying the conflict as international and he considers ANC members to have a legal right to protected status.[18] But his hortatory argument relies heavily on the

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[15] "Spear of the Nation".

[16] No.74 of 1982.

[17] Abi-Saab op cit 1979 provides a useful overview of the issues - most of the work on the subject is cited in my bibliograph

[18] K Asmal "The Status of the Combatants of the liberation Movement of South Africa under the Geneva Conventions of 1949 and Geneva Protocol 1 of 1977" UN Centre Against Apartheid: Notes and Comments (1980); National Liberation Movements: Their Status and

prescriptive nature of General Assembly Resolutions and tends to gloss over the substantive legal problems attendant upon such an approach. Borrowdale has, more circumspectly, investigated both the transformation of Article 1(4) into custom and recent developments in the law affecting South Africa including the ANC's 1980 Declaration that it would observe the general principles of humanitarian law where possible.[18] Booysen, taking a conservative position, has applied the law rigidly to affirm domestic jurisdiction and deny any form of international regulation of the South African armed conflict.[20] These writers worked mainly in response to the adoption of Protocol 1 in 1977. The occurrence of pertinent legal developments and the surge in the level of violence has recently refocussed attention on the application of the law of armed conflict in South Africa. Murray has noted that although a South West African court has accepted the tendency to regard the Namibian armed conflict as international as a mitigating circumstance on sentencing captured SWAPO combatants, the position of ANC combatants is still unclear

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Role in Contemporary International Law Paper delivered to the 11th congress of the International Association of Democratic Lawyers - Malta (13-17/11/1980).

[18] A Borrowdale "The future of the law of War: The Place of the Additional Protocols in Customary International law" 14 CILSA (1981) 79; "The Law of War in South Africa: The Growing Debate" 15 CILSA (1982) 31.

[20] H Booysen "Terrorists, P.O.W's and South Africa" 1 SAYIL (1974/5) 32; Volkereg (1980) 136,392.

in this respect.[21] A South African court has, however, found that the provisions of Protocol 1 internationalising the South African armed conflict have not been accepted into customary international law and that therefore they are not binding in South Africa.[22] These developments are controversial. Further research on the relevance of international law to the South African armed conflict is necessary because of the serious strains placed on South Africa's municipal law by the criminal prosecution of individuals viewed as legitimate combatants by the majority of South Africans and by international society.

1.6 AIM OF STUDY

In response to the need for further investigation, it is the aim of this study to examine the scope and nature of the full range of international legal protections potentially available to combatants in the South African armed conflict. The topic is schismatic. Lawful combatant status and P.O.W. status apply if the armed conflict is classified as international while only general protections apply if the armed conflict is classified as

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[21] C Murray "The Status of the ANC and SWAPO and international humanitarian law" 100 SALJ (1983) 402; "The 1977 Geneva Protocols and South Africa" 33 ICLQ (1984) 462. S v Sagarius 1983(1)SA 833(SWA) establishes the relevance of international law on sentencing in Namibia. S v Mogoerane TPD 6 August 1982 unreported, appears to reject the concept as a moral excuse in South Africa; S v Buthelezi D&CLD 22 Sept unreported, appears to accept the concept as a moral excuse. Both cases were commented on in 1 Lawyers for Human Rights Bulletin (1983) 123 and 129.

[22] S v Petane 1988(3)SA 51(CPD).

non-international. The two legally possible, mutually incompatible classifications, each have two components. As already noted, lawful combatant status is the function of two elements, viz.: (i) The material field of application, involving classifying the armed conflict as international, logically anterior to (ii) the personal field of application, setting out the conditions a combatant must personally meet in order to qualify as lawful. This material - personal taxonomy is also suitable for an analysis of the application of the protections available if the armed conflict is classified as non-international. Therefore, preceded and informed by chapter two's examination of the historical evolution of the basic precepts of lawful combatant status and the international regulation of non-international armed conflicts, the core of my study entails a bi-polar examination.

The first step in Section A - Classification Of The South African Armed Conflict As An International Armed Conflict - entails a discussion, in chapter four, of the material conditions for the classification of the armed conflict as international. The theoretical foundations of the internationalisation of wars of national liberation in general and the South African armed conflict in particular are examined before the actual means of application are investigated. Following this discussion, the argument that "powers" in common Article 2 paragraph 3 of the 1949 Conventions includes organisations such as the ANC is

investigated because classifying the South African armed conflict as an Article 2 conflict would bind South Africa as it is party to the Conventions. Then the development of Article 1(4) of Protocol 1 with its reference to "racist regimes" singling out South Africa as a special kind of international armed conflict is traced. After an inquiry into the reasons why the South African Government rejected Article 1(4) and refused to become a party to Protocol 1, the examination of Article 1(4) devolves into an investigation of its status as a rule of international custom.

The second step in Section A is the analysis, in chapter five, of the personal conditions for lawful combatant status and P.O.W. status beginning with an examination of their theoretical foundations and focussing on their practicability in the South African armed conflict. Although the South African Defence Force (SADF) may generally be characterised as a regular fighting force, members of its reconnaissance battalions, for instance, fight a counter-insurgency war using guerilla tactics. ANC combatants fight as either urban or rural guerrillas. The concern of this study is, therefore, mainly with how irregular guerrillas qualify as lawful combatants in terms of Article 4A(2) of Geneva Convention 3 and Articles 43 and 44 of Protocol 1. Although examination of these Articles occupies the bulk of chapter five, an evaluation is made of problems specific to the South African armed conflict, including the practice of <u>apartheid</u> as a grave breach of international law, unique categories of combatants such

as township combatants, as well as the special position of spies, and mercenaries and how international law deals with terrorism. The chapter concludes with an examination of the procedural and substantive guarantees available to all captured combatants.

The first step in Section B - Classification Of The South African Armed Conflict As A Non-International Armed Conflict - is the discussion, in chapter 6, of the material conditions for the classification of the armed conflict as non-international. Although this alternative classification leads only to general protections for combatants and no immunity from prosecution for taking up arms, it is evaluated because the classification of the conflict is not settled. Because South Africa is party to the 1949 Conventions, the investigation of common Article 3 is concerned only with its criteria of application and the means whereby the parties are bound to apply the Article. The investigation of Protocol 2 focuses on its high threshold[23] and South Africa's non-accession, which together make its application in the South African armed conflict moot at present.

The second step in Section B is the examination, in chapter 7, of the personal field of application of the general humanitarian guarantees available to combatants under the law of non-international armed conflict and the nature of these guarantees.

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[23] Article 1.

The conclusion attempts to sum up the shortcomings of the law and makes some projections as to the possible adaptations of the law that will be necessary for its actual application in the conflict.

1.7 A MOTIVATION FOR THE INTERNATIONAL REGULATION OF THE SOUTH AFRICAN ARMED CONFLICT

Dugard has advocated a cautious approach in dealing with the international regulation of the conflict.[24] The author of this study subscribes to the need for caution. Nevertheless, although it is conceded that the problems of application are formidable, it is submitted from the outset that international regulation of the South African armed conflict will be more beneficial to all parties involved than its continued regulation by South African criminal law and that therefore all means for furthering international regulation should be explored. The rationale behind this submission is related to an appreciation of the interested parties different needs beyond their immediate political advantage.

The ANC has the most apparent need. If its combatants do not attain lawful status they will remain criminals under South African law. Under this law, the taking up of arms, even in a genuine military situation, such as an attack on an SADF unit,

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[24] See C Murray quoting J Dugard in "The Status of the ANC and SWAPO and international humanitarian law" 100 SALJ (1983) 402 at 406.

will be treated as a purely criminal action. The ANC is aware of the advantages of the implementation of humanitarian law. It can only gain in international stature should the conflict come under international jurisdiction and it complies with the law. The organisation has declared that it will adhere to humanitarian law as far as possible. This declaration can be understood to be an attempt to secure lawful combatant status for its guerrillas. Achieving this status will remove the taint of suicide from many of the ANC's activities by removing the threat of prosecution for the taking up of arms and by guaranteeing P.O.W. status on capture. In order to win these protections, however, the law imposes stiff conditions. The ANC will find it difficult to meet these conditions. Nevertheless, the law should be adapted to the situation on the ground and the ANC's willingness to comply should remain the overriding consideration.

The South African Government also has an interest in applying international law in the conflict. Rubin argues, correctly it is submitted, that the classification of politically motivated violence as criminal under the municipal law of a nation serves no purpose.[25] It brings the criminal law into disrepute leading to a legitimacy crisis that profoundly undermines the municipal legal system. In the South African context the undermining of the law is so far advanced by the legal enforcement of racial

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[25] A P Rubin "Terrorism and the Laws of War" 12 Denver Journal of law and Policy (1983) 219 at 231.

domination that it leads one to speculate whether the idea of law itself is not endangered. The international law of armed conflict provides a much more suitable framework for dealing with politically motivated violence in South Africa. It protects civilians because it tends to direct attacks onto military rather than civilian targets by providing legal penalties enforcing the distinction between civilians and the military. It removes combatants from domestic jurisdiction. It provides a better adapted technical legal system for prosecuting individual offenders for any grave breaches of the law that they may commit. Theoretically, criminal law encounters difficulties when dealing with politically motivated crime. It loses its deterrent effect. The sense of retributive justice is not likely to be shared by political dissidents who reject the legitimacy of a society's normal restraints when deciding to perpetrate criminal acts.[28] When the vast majority of the members of a society's population support the aims and ideals of a dissident organisation such as in South Africa, then the sense of retribution alters to a sense of outrage that the dissidents should be treated as criminals for taking up arms to achieve those aims and ideals. Not just the integrity of the criminal law but that of the whole legal system is brought into question. Decriminalising ANC guerrillas will slow the process of debilitation of South African law. The South African Government may continue to buttress its position with the

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[28] A P Rubin "Terrorism, 'Grave Breaches' and the 1977 Protocols" 74 Proceedings of the American Society of International Law (1980) 192.

domestic jurisdiction argument, choosing to weather the consequences of ignoring international opinion rather than show any farsighted flexibility. Eventually, however, its intransigence will be overrun by demographic factors; too many combatants to house in ordinary prisons; too many combatants to keep on sentencing to long terms of imprisonment or death.

The international community also has an interest in seeing the international regulation of armed conflict because it will reinforce international law generally by providing a concrete example of the successful development and application of humanitarian law in an age when such examples are rare. In addition, the operation of the law will help to civilise and restrain what is fast becoming a disastrous and widespread conflagration in the subcontinent.

One should not be blind to the fact that making a classification is a political act. To be rigidly legalistic in this process is to create the illusion of legal integrity where little exists. There is no central authority in international law to give a legally binding judgement on whether the South African armed conflict is international or non-international. The International Committee of the Red Cross (ICRC) has been called on to play international umpire but the organisation has become profoundly reluctant to pass judgement on the classification of any conflict. It prefers to take a pragmatic position urging as much

humanitarian activity as possible. The parties to the South African armed conflict are left to act as both claimant and judge and no party can pass a definitive judgement on the other's claim. The result is a divergence of views as to what law applies. The parties

> ...are more interested in using legal argument in the political-legal process of making and implementing policy than in the academic-legal process of attaching a label to a factual situation.[27]

The value the parties attach to international regulation of the armed conflict depends on whether it is to their direct political advantage. But although the application of humanitarian law has always been tenuous because it requires the participation of all sides to a conflict and not all parties have the political will to apply the law, the law has been successfully applied in extremely difficult situations. Moreover, the object of the law's application is not the political advantage of the participants, but the general increase in the humanitarian conduct of the conflict. This great humanitarian principle provides the best reason for the examination of the legal position of combatants in the South African armed conflict.

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[27] D P Forsythe Humanitarian Politics - The ICRC (1977) 137. He points to the example of Portugal before the 1974 coup where the official position was that the liberation movements in the colonies were rebels and criminals, whilst after the coup they were regarded as legitimate combatants involved in international armed conflicts.

CHAPTER TWO

HISTORICAL BACKGROUND

2.1 INTRODUCTION

This chapter explores the history of two important areas of international law that become enmeshed in the mooted international regulation of the South African armed conflict, viz.: lawful combatant status and the international regulation of internal armed conflict. Lawful combatant status is linked to inter-state armed conflict while the law of intra-state armed conflict, although it provides general protections, does not generally admit of this status. Whether the transfer of lawful combatant status from its traditional jurisdiction to the formally internal South African armed conflict is either a radical new legal departure or fits smoothly into the law's evolution, is important to our concern with South Africa. But it must be noted that the law of lawful combatant status and the law of internal armed conflict grew up independently and therefore in this chapter they are treated in separate sections concentrating on the general themes of their development.

2.2 THE EVOLUTION OF LAWFUL COMBATANT STATUS

2.2.1 GENERAL

The modern law of lawful combatant status evolved through a historical process. This section briefly examines its roots in

order to throw light on how historical practice has influenced the qualifications for lawful combatant status in South Africa today.

2.2.2 THE MIDDLE AGES

Although historically combatants have enjoyed a special status in many different locales, the roots of the modern concept of lawful combatant status can be traced back to the Middle Ages in Europe. In medieval Europe, until the Christian church introduced some restraint in war, a belligerent's entire population was at an enemy's mercy.[1] The church rejected 'private wars' fought for private ends but sanctioned 'public wars' fought for public and just purposes.[2] In the fourteenth and fifteenth centuries a 'just and public war' became an 'open and public war' requiring the sovereign's avowal and open and public signs of war-making.[3] Those who followed the profession of arms were governed by the 'law of arms'. This law strictly limited those who had the right to go to war to the military classes. Ordinary serfs doing battle for their liege lords were unprotected.[4] Acts done outside the 'law of arms' and 'public and open wars' were considered brigandage and murder. The fundamental legal principle

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[1] G Schwarzenberger "Terrorists, Hijackers Guerilleros and Mercenaries" 21 Current Legal Problems (1968) 257 at 271.

[2] G Draper "Combatant Status: An Historical Perspective" 11 RDPMDG (1972) 135 at 136.

[3] Draper op cit 137.

[4] Draper ibid.

established in this period was that the right to bear arms and to participate in acts of warfare was limited to a particular class of men[5] who could be characterised in modern terms as lawful combatants.

2.2.3 THE 'ANCIEN REGIME'

The birth of the ius in bello proper is found in the ancien regime when the burgeoning bourgeoisie began to influence the law but a strong feudalism, although in decline, was still in place. Early publicists such as Hugo De Groot and Emmerich De Vattel, focused their efforts on the ius in bello.[6] Grotius[7] pointed out, as Gentili[8] had done before him, that pirates and brigands do not lawfully wage war. Belli, Grotius, Pufendorf and Vattel all recognised the principle that lawful combatants had a juridical status granting them immunity from criminal prosecution for those warlike acts which did not violate the laws and customs of war but that might otherwise have been crimes under national law. However, the early publicists still held to the idea that war existed between states and between the citizens of states. Every citizen, man, woman or child could be killed or enslaved. The

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[5] E Rosenblad International Humanitarian Law of Armed Conflict (1979) 77.

[6] These early publicists classified the medieval 'law of arms' as part of the ius gentium, a facet of the ius naturale, aligned with and derived from eternal law and, ultimately, from the divine law of revelation.

[7] De Jure Belli ac Paci (1623-1624) Book 1, Chapters 4 & 5.

[8] De Jure Belli (1598).

fate of civilians was absolutely in the hands of the conqueror. Although the formulations of the law made during this period were not always systematic, they served as fertile ground for further development.

2.2.4 THE AGE OF ENLIGHTENMENT AND THE FRENCH REVOLUTION

The eighteenth century climate of rationalism and sensibility was the seed bed of the humanitarian bias of the law of war. In Contrat Social,[9] Rousseau set out two revolutionary ideas. Firstly:

> War is not a relation between man and man, but a relation between state and state in which individuals are enemies only incidentally, not as men or even as citizens but as soldiers.

Secondly:

> The object of war being the destruction of the enemy state, one has the right to kill its defenders only when they have weapons in their hands; but immediately they have put them down and surrender, thus ceasing to be enemies or agents of the enemy, they once more become ordinary men and one no longer has any right to their life. Sometimes one can extinguish a state without killing a single member of it, moreover war confirms no right other than that which is necessary for its purpose.[10]

From this famous doctrine it followed that: (i) military operations ought to be conducted exclusively by combatants in uniform and (ii) the unarmed civilian was to be spared at all

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[9] J J Rousseau Du Contrat Social du Principes du Droit Politique (1762) chp 4.

[10] Quoted by G Draper "The Geneva Conventions of 1949" 114 Recueil des Cours (1965) 59 at 65.

times as much as possible.[11] These two considerations gave birth to the central principle of the law of combatant status, the principle of distinction.[12]

Until the eighteenth century, members of standing armies were usually mercenaries. The French Revolution of 1789 led to the enlargement and democratisation of armies but did not result in any drastic changes in the traditional distinction between combatants and civilians.[13] In 1793 when the French conscription armies entered into battle, the law of war still denied lawful participation in warfare to all but the armed forces. Later additions were seen to owe their status to concession.[14] Irregular armed forces had to be authorised by their sovereign and thus legitimised by their own national law, were assimilated to the regular armed forces. For instance, the volunteers and militia of revolutionary France were normally incorporated into the French armed forces and seem to have worn uniforms or at least a distinctive sign to distinguish themselves from civilians.[15] An eighteenth century innovation included the treatment of captured members of the regular armed forces as

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[11] Rosenblad op cit 10.

[12] The derivation and realisation of this principle did not take place during Rousseau's lifetime so much as in the nineteenth century codification of the law.

[13] G Best Humanity in Warfare (1980) 76-77.

[14] Draper 11 RDPMDG (1972) 139.

[15] A Rosas The Legal Status of Prisoners of War (1976) 294.

prisoners of war. The linking of lawful combatant status and P.O.W status would mature during the codification period. In addition, during the eighteenth century the entire civilian population ceased to be regarded as legitimate objects of attack.

2.2.5 THE EMERGENCE OF GUERILLA WARFARE

The Napoleonic wars were the breeding ground for a new form of warfare, guerilla warfare, which deserves special mention because of its widespread use in twentieth century wars of national liberation. Guerilla warfare originated in the Spanish national resistance to Napoleon's invasion of the Iberian peninsula (1809 to 1813),[16] when small groups of patriots either continued to fight as the remnant of their defeated army or intersected the lines of advance or retreat of the invading French forces. In humanitarian terms the advent of guerilla warfare was a disaster. Draper notes that these guerrillas had little or no military discipline, frequently wore no uniform, disregarded the safety of their prisoners if they took any at all, and their hostile acts could often not be distinguished from brigandage or murder.[17] Anathema to the professional military class, guerrillas were extremely effective in military terms. It was difficult to fight an enemy who disappeared into and reappeared out of the civilian population. The law's treatment of guerrillas was heavily influenced by the major belligerent states of the period, who,

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[16] Best op cit 77.

[17] Draper 11 RDPMDG (1972) 139-140.

unlike countries invaded by Napoleon that saw merit in the 'patriots war', did not welcome new classes of participants. Guerrillas usually received short shrift at the hands of their captors.[18] States confronted with such resistance normally refused to treat captives as P.O.W.s unless they belonged to organised units fighting openly and under direct authorisation. The law left strictly 'amateur' combatants at the mercy of their captors. The contemporary legal consensus was summarised by Wheaton:

> In modern warfare partisans and guerrillas are regarded as outlaws, and may be punished by a belligerent as robbers and marauders.[19]

2.2.6 LEGISLATIVE FOUNDATIONS OF THE CLASSICAL LAW OF WAR

The conventional foundations of the law of war were laid in the second half of the nineteenth century.[20] During this development, the law regulating the right to go to war - the ius ad bellum- was separated from the law regulating the armed conflict - the ius in bello. Henri Dunant's experience of the battle of Solferino (1859)[21] led to his founding the Red Cross in 1863 and ultimately to the adoption of the first Geneva Convention in

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[18] Draper 11 RDPMDG (1972) 139.

[19] Elements of International Law (1836).

[20] Best op cit 129.

[21] Recorded in Souvenirs de Solferino (1862).

1864.[22] This purely humanitarian convention did not attempt to regulate lawful combatant status.

The codification of the customary law of war really began in 1863 with Lieber's Code of Land Warfare,[23] an instruction issued to the Federal armies in the U.S. Civil War. The code recognised the principle of distinction in Article 22. Article 57, reiterating the principle of lawful combatant status, stated:

> So soon as a man is armed by a sovereign government and takes a state's soldier's oath of fidelity, he is a belligerent, his killing wounding or other warlike acts are not individual crimes or offenses.

The code also instituted the protection of P.O.W.s.[24] It regarded partisans as P.O.W.s as long as they wore the uniforms of the army and belonged to the army, being detached solely for the purposes of operating in enemy territory.[25] However, "men, or squads of men, who commit hostilities...without commission, without being part and portion of the organised hostile army, and without sharing continuously in the war" were not "public

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[22] Convention for the Amelioration of the Condition of the Wounded in Armies in the Field. The convention guaranteed the principle of the neutralization of the wounded and of all personnel whose duties were to aid them. Medical equipment was protected by a'distinctive sign.

[23] United States Army General Order No.100 "Instructions for the Government of Armies of the United States in the Field" 24/4/1863.

[24] Article 49.

[25] Article 81 Section 4. Lieber had in the main condemned them in his earlier work Guerilla Parties considered with reference to the Laws and Usages of War (1862).

enemies" and were not entitled to P.O.W. treatment "but [were] treated summarily as highway robbers and pirates."[28] Similarly, "scouts" in disguise,[27] "armed prowlers" who committed acts of sabotage behind enemy lines,[28] and "war rebels" who rose in arms in occupied territory,[29] were not considered as P.O.W.s if caught, and received the death sentence.

In the second half of the nineteenth century, the categories of lawful combatants shrunk under the influence of the great land powers. Warfare was regarded by states such as Prussia as the exclusive privilege of regular armed forces. Irregulars were beyond the pale; they did not obey the customary conditions for qualification as lawful combatants. The Franco-Prussian war (1870-1871) had a strong impact on the legal status of irregulars. The Prussians highlighted the requirement of public authorisation for irregulars when they summarily executed large numbers of Francs-Tireurs, armed French resistance fighters not in uniform and not carrying written authorisation from the French Government.[30] Draper notes that Marx and Engels, who were in active correspondence during the Franco-Prussian war, set out their doctrine of 'peoples war' - fought in self-defence of the

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[28] Article 82.

[27] Article 83.

[28] Article 84.

[29] Article 85.

[30] Rosenblad op cit 34.

homeland without public authorisation - in response to these events. They saw the conduct of guerilla fighters as the essence of these 'peoples' wars'.[31]

The two different viewpoints on the status of irregulars came into conflict at the Brussels Conference on Proposed Rules for Military Warfare held in 1874, which produced an abortive Declaration and draft Code based largely on the Lieber Code.[32] The 'militarist' countries with large standing armies, focusing on levees en masse - large scale spontaneous uprisings against an invader by the population of unoccupied territory - argued that lawful combatant status attached to organised armed forces and urged that mass levees should meet the requirements of regular forces. The 'patriotic' smaller countries, because of their relatively small organised armed forces, were reluctant to limit in any way the right of inhabitants in unoccupied territory to rise up and defend their country.[33] The uneasy compromise contained in the Declaration, recognised as lawful combatants members of the following groups:

(1) The regular army, including militias constituting or forming

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[31] Draper 11 RDPMDG (1972) 141. I P Trainin echoed these ideas before the 1949 Geneva Diplomatic Conference in "Questions of Guerilla Warfare in the Law of War" 46 American JIL (1946) 534.

[32] L Nurick and W.Barret "Legality of Guerilla Forces under the Laws of War" 40 American JIL (1946) 563 at 565.

[33] Draper loc cit.

part of that army.[34]

(2) Militias and volunteer groups fulfilling four conditions:

(a) Commanded by a person responsible for his subordinates.

(b) Having a fixed distinctive emblem recognisable at a distance.

(c) Carrying arms openly.

(d) Conducting their operations in accordance with the laws and customs of war.[35]

(3) The population of an unoccupied territory who, on the approach of the enemy, take up arms to resist the invading troops, without having had time to organise themselves, provided they respect the laws and customs of war (levees en masse).[36]

The compromise did not regulate controversial areas such as abandonment of the necessity of express and written authority for irregular forces[37] or the issue of resistance fighters in occupied territory. But the four conditions for lawful combatant status for irregulars, articulating the principle of visible distinction, were set down for the first time. Coupled with the organisational link to a belligerent state, they remained the standard conditions for lawful status for irregulars until 1977.

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[34] Article 9.

[35] Article 9.

[36] Article 10.

[37] Schwarzenberger op cit 271, notes that retrospective and tacit authorisation was becoming the norm.

Unfortunately, the treaty was never ratified and never became a legally binding instrument, but the Institute of International Law studied it and produced the Oxford Manual of the Law and Customs of War (1880). The Manual set out, without much modification of the Brussels formulation, the qualification of regular army members as lawful combatants, the conditions for lawful combatant status for irregulars, and the requirements for a levee en masse.[38] It made it clear that no protection was afforded to irregulars operating outside the confines set up by these conditions. Together with the Brussels Declaration, the Manual formed the basis of the later Hague Regulations.[39]

2.2.7 THE CODIFICATION OF THE LAW OF WAR

The two Hague peace conferences, convened in 1899 and 1907, produced the first two successful international conventions on the law of war. The first conference simply revised the Brussels Declaration. The rules it agreed upon are contained in the Regulations annexed to the Hague Convention 2 with respect to the Laws and Customs of War on Land. The Regulations indicate that members of the following groups are lawful combatants entitled to P.O.W. status on capture: (1) Regular armies including attached militia and volunteer corps. (2) Militia and volunteer corps whose members fulfill the four conditions of distinction from the

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[38] Article 2.

[39] Schindler and Thoman The Law of Armed Conflicts (1981) 25.

civilian population. (3) Levees en masse in unoccupied territory.[40]

The Regulations recognised militia and volunteer corps on the assumption that they function as auxiliaries of the regular forces and not in detachment from them. Importantly, irregulars admitted to lawful combatant status no longer required the sovereign's command or authorisation. They had instead to meet certain minimal conditions of organisation. In Schwarzenberger's terms, "the test of legitimation" was rejected and "the test of requisite organisation" was adopted.[41] In a modified form this test applies today. Irregulars must, however, still intend to serve a state or other party to a conflict which actually exists.

There was no agreement at the conference on legalising further categories of combatants. The problem of armed resistance in occupied territory went unresolved. The famous De Maartens clause was introduced at the conference to cover all unprotected categories of combatants. It read:

> Until a more complete code of the laws of war is issued, the High Contracting Parties think it is right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilised nations, from the laws of humanity, and the requirements of the public conscience; They declare that it is in this sense

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[40] Groups (1) and (2) in Article 1 and group (3) in Article 2.

[41] Op cit 271. See also Nurick and Barret op cit 567-568.

> especially that Articles 1 and 2 of the Regulations adopted must be understood.

The De Maartens clause played a stop-gap role and has been periodically revived as a catch-all to cover categories of combatants not specifically governed by international law, but it has been insufficient for this purpose.[42]

At the 1907 conference, the one noticeable difference was the increase in the number of participating states, up to 44 from 26 in 1899. The wider geographical distribution of participants is an important trend that would later have a profound effect on the law. However, at the turn of the century the metropolitan nations still took the lead in legal formulation. The only significant change to the 1907 Regulations[43] from the 1899 version was the addition of the condition of carrying arms openly to the condition of respecting the laws and customs of war in the case of levees en masse. The De Maartens clause was again used to shore up the uneasy compromise contained in Articles 1, 2 and 3.

It is clear that through the turn of the century the central theme of the debate about limiting the right to participate in combat was the badgering of the larger states by the smaller ones into granting concessions in respect of irregulars and the

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[42] F Kalshoven "Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts: The Diplomatic Conference 1974-1977 8 NYIL (1977) 107.

[43] Annexed to Hague Convention 4.

consequent slow and uneasy expansion of the categories of lawful combatants. This expansion continues today.

Experiences in World War 1 led to the adoption in 1929 of the Third Geneva Convention Relative to Prisoners of War. Lawful combatant status and P.O.W. status were linked in Article 1 of the Convention, which referred specifically to Articles 1, 2 and 3 of the 1907 Hague Regulations and applied the Convention to all persons mentioned therein and, in addition, to armed forces captured in maritime and aerial warfare.

2.2.8 CIVIL WAR AND TOTAL WAR

In the first half of the twentieth century two developments in warfare occurred that had a strong impact on the law. One was the increase in the number of large scale civil wars such as the Russian (1918-1920) and Spanish (1936-1939) civil wars, which were fought with scant regard for humanitarian law. The other was the movement toward total war first evidenced in World War 1 but reaching its logical conclusion in World War 2.[44] In World War 2 the distinction between civilians and military was ablated by military necessity.[45] This led to an increase in the percentage of civilian deaths in the total mortality rate from 5% in World

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[44] Best op cit 220, notes the war was total in 3 ways: (1) Total killing means. (2) Total population in the armed forces. (3) Superheated collective nationalism on a vast scale.

[45] Nurick and Barret op cit 32.

War 1 to 48% in World War 2.[46] The war also involved a whole range of forces fighting in many different ways.[47] It saw a vast increase in guerilla warfare although no provision had been made in the law for guerrillas who operated in occupied territory. The official German position was that the Hague Regulations did not protect guerrillas in occupied territories even if they adhered to the conditions laid down for militias and volunteer corps in Article 1. The International Military Tribunal (I.M.T.) sitting at Nuremberg, discussed the legality of the resistance in German occupied territory and seems to have assumed that partisans should have been treated as P.O.W.s if they obeyed the four conditions set out in the Hague Regulations. The I.M.T. did decide in 1946 that the Regulations had become declaratory of customary international law by 1939 and thus were binding on states irrespective of treaty obligations.[48]

2.2.9 THE 1949 GENEVA CONVENTIONS

The end of the Second World War ushered in a new international tableau with a steadily increasing number of state participants

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[46] Rosenblad op cit 57.

[47] An unusual problem was the continued fighting of troops after their country had officially capitulated. For example, De Gaulle's Free French were not technically lawful combatants as they were fighting for a state that no longer existed. Germany did confer P.O.W. status on them when they were captured. However, Italians who fought against the Germans from 1943 onward were not accorded such status.

[48] War Crimes Reports vol 15 at 72. The I.M.T. for the Far East expressed an identical view in 1948.

freed from colonialism by the physical and moral exhaustion of Europe. Established in 1945, the U.N. was only later to have an influence on the law of armed conflict. The law was not yet free of the dominant metropolitan bias when the 1949 Geneva Conventions were adopted. They were mainly the result of efforts to put humanitarian law back together again after the debacle of World War 2. The 1949 Geneva Diplomatic Conference adopted four Conventions, viz:

(1) First Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field;

(2) Second Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea;

(3) Third Geneva Convention relative to the Treatment of Prisoners of War;

(4) Fourth Geneva Convention relative to the Protection of Civilian Persons in time of war.

The major problem confronted in Geneva in 1949 was the legal status of guerrillas operating in occupied territory. It was debated whether they should be governed by the new law and, if so, on what conditions. Trainin, with the hindsight of Soviet experience, argued vehemently for the enlargement of the categories of lawful combatants.[49] He asserted that the concept

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[49] I P Trainin "Questions of Guerilla Warfare in International Law" 46 American JIL (1946) 534 at 538 and 541.

that lawful combatants must be authorised by a state, a notion relied upon heavily by states opposing resistance movements, ignored the democratic principle of the people's initiative. He noted that if the legal right to fight flowed only from state authority, when that authority lapsed, for example in occupied territory, so did the right to fight and the people were deprived of their right to protect themselves and their country. The people then had no real international substance, they were merely "participating spectators."[50] This thesis that 'peoples' were subjects of international law with a ius ad bellum and concomitant lawful combatant status was to gain credence later, but the 1949 Conference maintained traditional patterns by accommodating organised resistance in occupied territory within the Hague structures with some modification. Two new categories of lawful combatants were added to regular armed forces, militia and volunteer corps, and levees en masse. They were:

> [a] Members of other militia and members of other volunteer corps including those of organised resistance movements, belonging to a party to the conflict, and operating in or outside their own territory even if that territory is occupied,

provided they complied with the four requirements of the Hague Regulations.[51]

> [b] "Members of regular armed forces who profess allegiance to a government or authority not recognised by a detaining

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[50] Ibid.

[51] Article 4A(2) of Geneva Convention 3.

power."[52]

Reaction to the inclusion of resistance movements as a category of lawful combatants varied. It was argued that the law lent too much protection to resistance fighters and irreparably blurred the distinction between combatants and civilians thus increasing the likelihood of all civilians being treated as potential combatants.[53] But experience since 1949 has shown that obeying the conditions laid down for guerrillas puts a burden on them that is often too heavy to bear leading ultimately to non-adherence to the Conventions.

Up until 1949 the law had concerned itself with international armed conflicts. That the law covered interstate conflicts was a fact implicit in the Brussels and Hague Conventions made explicit in common Article 2 of the 1949 Conventions. The greatest innovation of the 1949 Conventions was the extension by means of common Article 3 of limited protections to victims of non-international armed conflict. Article 3 was a response to the bloody civil conflicts of the previous fifty years and the denial to the ICRC of access to the victims of these conflicts. It is a mini-convention banning certain fundamental inhumanities. Combatants remain criminals under national law for taking up arms and are not given any special treatment upon capture. Yet Article

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[52] Article 4A(3) of Geneva Convention 3, eg. The Free French under De Gaulle.

[53] Best op cit 296.

3 was still a major inroad on state sovereignty and despite its low substantive weight its adherence record has not been good.

Draper sums up the implicit premises of the law as reflected in the 1949 Conventions and Hague Regulations in three propositions:

> (1) The rights of war devolved exclusively upon the armed forces and those who, by analogy and concession, could be assimilated to such armed forces;
> (2) The duties of war debarred military activities against civilians as such;
> (3) One of the rights of war was that members of armed forces and those uplifted by analogy and concession to that status were entitled to P.O.W. status on capture.[54]

I would add a fourth premise not even raised by Draper and not in issue in 1949, viz: The rights of war operated exclusively in international armed conflicts, i.e., interstate conflicts.[55]

2.2.10 DEVELOPMENTS SINCE 1949

It remains briefly to advert to the development of the law since 1949; briefly because this area is the focus of the bulk of this study. The post-1949 departures in the law of armed conflict were the outcome of the vast increase in the number of participating states in the international legal arena. The new states brought with them a whole new set of cultural, religious and ideological

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[54] 11 RDPMDG (1972) 143.

[55] This premise is threatened by the application of the rights of war in belligerencies, but I would argue that belligerency had lapsed into desuetude by 1949 (see below chapter 3). The premise also comes in for criticism by those supporting the right of national liberation movements to the rights of war under the 1949 Conventions, but in 1949 it is clear that such a situation was not yet envisaged.

values. Best points out that

> ...this great legion of newcomers marched almost without exception under the banner of national liberation from out of the ruins of the old empires, bringing with it much feeling to the disadvantage of their imperial former rulers; resentment against racial slights and discrimination, the pride and boldness acquired, often in armed struggle for independence, and a readiness to ascribe the 'backwardness' or 'underdevelopment' of their countries to imperialist/ colonialist exploitation.[56]

Burgeoning third world nationalism, the ideological predilection of Marxism for struggle and the belligerency not only of armies but of whole peoples, all gave impetus to wars of national liberation. The claim of lawful combatant status for national liberation fighters emphasised the inadequacy of common Article 3. The impracticability of the traditional conditions of visibility to the guerilla tactics used in these wars, the blurring of the principle of distinction by the increase in the number of technically civilian participants in combat, the advance of non-discriminatory military technologies which outstripped humanitarian protections, all resulted in increased civilian mortality-rates in post-war conflicts.[57] In consequence, there arose a strong movement to reexamine and develop the law that culminated in the adoption of additional Protocol 1 in 1977. The redefinition in Article 1(4) of international armed conflicts to include wars of national liberation expanded the class of legitimate combatants to include members of national liberation movements and the necessary loosening of the personal obligations

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[56] Op cit 287.

[57] Rosenblad op cit 55.

was made in Articles 43 and 44.

2.2.11 SUMMARY OF TRENDS IN THE LAW OF LAWFUL COMBATANT STATUS

Attention must be drawn to the continuity of the general principles of lawful combatant status. The underlying assumption that extends throughout the history of the law, the assumption that only privileged classes of combatants have a right to make war and not be punished for doing so, has relied for its maintenance on the principle of distinction with its central premise that lawful combatants must distinguish themselves from civilians. The dialectic between these two interrelated ideas and the changing nature of warfare has meant that as the classes of combatants admitted to lawful combatant status have expanded, so the criteria for distinction have contracted. The expansion of the classes of authorised combatants to include those involved in the South African armed conflict and the contraction of the obligations on them to make this authorisation factually possible seems to fit in with the general pattern of the law. But how compatible with the history of the law of internal armed conflict is the transfer of this concept to the formally internal South African armed conflict?

2.3 THE EVOLUTION OF THE INTERNATIONAL REGULATION OF INTERNAL ARMED CONFLICTS

2.3.1 GENERAL

What are internal armed conflicts? Internal armed conflict is used here as a synonym for the old term 'civil war'. Vattel defined a civil war as "every war between members of the same political society."[58] Falk's more recent definition takes into account conflicts that are primarily internal but which have international aspects, viz.:

> A war is usefully classified as internal when violence takes place primarily within a single political entity, regardless of foreign support for the contending factions.[59]

The contention that the conflict must take place within a single territory[60] is unrealistic given the incidence of conflicts where fighting crosses international boundaries because of the insurgent's lack of bases within a country. An armed conflict is internal if it is essentially between members of the same political entity even though it exhibits international tendencies such as border crossings. Two categories encompass all conceivable internal armed conflicts: (a) A conflict between two parties for the ultimate control of the whole territory of a

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[58] E de Vattel The Law of Nations or the Principles of Natural Law Book 3 Chp XVII.

[59] R Falk "International Law and the U.S. Role in the Vietnam War" in R Falk (ed) The Vietnam War and International Law vol 2 (1969) 362.

[60] J C Stassen "Intervention in Internal Wars" 3 SAYIL (1977) 65 at 66.

state; (b) A conflict in which one of the parties tries to secede a part of the existing political entity's territory in order to establish a new state.[61]

How has international law dealt with these conflicts in the past? The eurocentric international legal order, in place since the colonial period, was based on a society of sovereign states with no distinction as to political or social ideology or form of government. Every state was free to institute the government of its choice provided that it was effective and the rights of other states were not impaired. Within its domestic jurisdiction that government had freedom of action. Outside intervention was a negation of national sovereignty. Any attempt to interfere in an internal armed conflict was irreconcilable with this general principle of international law. But other states did intervene and their intervention was regulated by international law. In the eighteenth and nineteenth centuries certain customary modes of classifying internal armed conflicts were developed allowing different levels of humanitarian regulation and varying protections for combatants. My review of these modes in this section is chronological because certain modes were specific to certain historical periods and they were superceded as their usefulness declined.

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[61] Stassen op cit 67.

2.3.2 REBELLION

Customarily, rebellion fell completely outside international jurisdiction and is thus not strictly at point here. But classifying rebellions demarcates the lowest threshold of international jurisdiction in the eighteenth and nineteenth centuries. A rebellion was a sporadic challenge to the legitimate government by a faction within a state intent upon seizing power.[62] It was quickly suppressed by the normal procedures of internal security, for example by the national police.[63] If the rebels were contained by national law then the rebellion remained a purely internal affair.[64] No international protection was accorded to participants in the rebellion. They were treated as ordinary criminals.[65] Other states were expected to maintain normal relations with the incumbent government and could render it assistance, but were forbidden by international law to assist the rebels or to make their territory available for use as bases.

2.3.3 BELLIGERENT RECOGNITION

In internal armed conflicts of a great magnitude of violence and covering extensive territory, belligerent recognition was granted

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[62] R P Dhokalia "Civil Wars and International Law" 11 Indian Journal of International Law (1971) 219 at 224; Stassen op cit 68.

[63] R Falk "Introduction" The International Law of Civil War (1971) 11.

[64] Dhokalia loc cit.

[65] Dhokalia op cit 225; Falk loc cit; Stassen loc cit.

to rebels by the de jure government or by third states. The requisite objective proportions were laid down during the U.S. War of Independence.[66] Oppenheim sets out the standard criteria thus:

> The principles governing recognition of belligerency are essentially the same as those relating to the recognition of states and governments. Certain conditions of fact, not stigmatised as unlawful by international law - the law of Nations does not treat civil war as illegal - create for other states the right and duty to grant recognition of belligerency. These conditions of fact are: the existence of a civil war accompanied by a state of general hostilities; occupation and a measure of orderly administration of a substantial part of the national territory by insurgents; the observance of the rules of warfare on the part of the insurgent forces acting under a responsible authority; the practical necessity for third states to define their attitude to the civil war.[67]

A state of affairs satisfying these criteria involved the full scale use of the army by the incumbents and the raising of an army by the rebels. There was no unanimity as to whether a belligerency had to be recognised if the conditions were satisfied. Oppenheim commented that refusal to recognise belligerent status under these conditions "must be deemed contrary to some principle and precedent",[68] but he acknowledged that many writers considered recognition to be an "act of

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[66] L C Petrowski in R.Falk (ed) The Vietnam War and International Law vol 2 (1969) 477.

[67] International Law 7th ed. Lauterpacht (1952) 249.

[68] Op cit 250.

unfettered political discretion."[68] The correct position was probably that states were not under a duty to recognise but could not recognise when the objective conditions were not satisfied.[70] One of the principle defects of belligerent recognition was that it was subject to political acceptance.

Recognition, once extended, formalised the internal armed conflict in international law. Both parties became pro tanto international subjects.[71] The belligerent was not transformed into a state, but the parties were attributed belligerent rights and duties identical to those existing between sovereign states engaged in an international armed conflict. Prior to recognition, foreign states had a legal right to aid the incumbent government in crushing the revolt and were under a complimentary obligation not to aid the rebels. After recognition, foreign states had to assume the obligations of impartiality and non-participation and the belligerents acquired such rights as blockade against foreign states.[72]

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[68] Ibid note 2. For Oppenheim - Lauterpacht recognition of governments was based on the doctrine of effectiveness. Thus if a belligerent was effective it had to be recognised. The modern trend has been to favour the doctrine of legitimacy - only if belligerents are legitimate are they recognised; and they are recognised even if they are not effective.

[70] M Akehurst A Modern Introduction to International Law 4 ed (1982) 263.

[71] Dhokalia op cit 227.

[72] K E Kilgore "Law of War - Geneva Convention Signatories Clarify the Applicability of Law of War to Internal Armed Conflict" 8 Georgia Journal of International & Comparative Law

Belligerent recognition transformed an internal armed conflict into an international armed conflict for the purposes of the ius in bello. In consequence, lawful combatant status was conferred on members of the belligerent party.[73] It was conferred in an unlimited geographical area. Captured rebels were accorded P.O.W status. Guerrillas were also accorded these protections.[74] In this regard one of the conditions laid down for belligerent recognition was the observance of the law of war. Rebel guerrillas found it hard to meet this condition, but the then current orthodoxy was that the rebels' lack of resources in territory, organisation and control, which debarred them from employing lawful combatants, was the ground for their not being considered belligerents.

The underlying assumptions of the doctrine of belligerency are evident. It was founded on a 'nation's rights' attitude to international law.[75] One of these rights was sovereignty over internal affairs. Only when the rebels had become so objectively

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(1978) 941 at 942.

[73] A Rosas The Legal Status of Prisoners of War (1976) notes, at 281, that the international obligation on the incumbents to refrain from prosecuting rebels for participation, may not have applied to rebel leaders.

[74] G Schwarzenberger "Terrorists, Hijackers, Guerilleros and Mercenaries" 21 Current Legal Problems (1971) 275.

[75] J E Bond The Rules of Riot (1974) 51 points out that belligerency was really based on the doctrine of the sovereign equality of states rather than on the demands of humanity.

strong that third states were forced to deal with them as de facto international subjects did they achieve the status of belligerents.

The doctrine of belligerent recognition could not function effectively in the twentieth century. Oglesby points out that belligerent recognition arose out of and was suited to the balance of power in the early nineteenth century.[76] The emergence of new centres of mercantile capitalism in the eighteenth and nineteenth centuries caused some shift in the locus of political power from the 'old' to the 'new' world, which led to civil conflicts such as the U.S. War of Independence. These conflicts involved the splitting away of colonies from the metropole, but they were located within the ranks of the 'civilised' world and belligerent recognition was not used in the more remote areas of the empire. The balance of power in the late nineteenth and early twentieth centuries was not suitable for belligerent recognition because it granted too much legal status in a period increasingly subjective in its approach to international legal personality. Governments defined their relationships with rebels in accordance with their political preferences and then granted status accordingly.

Is there still a law of belligerent recognition? The evidence is

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[76] R R Oglesby Internal War and the Search for Normative Order (1971) viii.

in the negative. Recognition of belligerency has not been practiced this century.[77] Belligerent recognition lost its last vestiges of relevance with the codification of the law of internal armed conflicts and the setting out of new conditions of application. Oglesby argues convincingly that the customs on which it was founded have fallen into disuse and so the doctrine has fallen into desuetude and is no longer law.[78] Belligerent recognition was historically specific to the early nineteenth century and has little relevance to the late twentieth.

2.3.4 INSURGENCY

Where a rebel group enjoyed only partial success, though there was good reason to believe the conflict would endure, other states granted the forces opposing the government insurgent status.[79] An insurgency was a more sustained and substantial conflict than a rebellion but less intense and extensive than a belligerency. Only police were used in suppressing an insurgency and the conflict, unlike a belligerency, was confined to land. Lauterpacht cautions, however, that

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[77] A Cassese The New Humanitarian Law of Armed Conflict vol 2 (1980) 26. D Schindler "The different types of Armed Conflicts according to the Geneva Conventions and Protocols" 163 Recueil des Cours (1979) 117 at 146 notes that it is arguable that the Algerian and Biafran blockades were implicit instances of belligerent recognition. But the few substantive legal rights granted in these conflicts were probably done in terms of common Article 3 of the Geneva Conventions of 1949, or through a unilateral declaration by one of the parties to the ICRC.

[78] Op cit 110-114.

[79] Stassen op cit 68.

> ...any attempt to lay down the conditions of recognition of insurgency lends itself to misunderstanding. Recognition of insurgency creates a factual relation in the meaning that legal rights and duties as between insurgents and outside states exist only insofar as they are expressly concluded and agreed upon for reasons of convenience, or humanity, or of economic interest.[80]

Foreign states, in order to protect their interests in territory controlled by the insurgents, acknowledged the factual situation arising from the partial success of the insurgents.[81] Insurgency did not confer a formal status but was

> ...essentially a condition of civil revolt in a country in which foreign states while unwilling to treat the rebellious faction as mere lawbreakers, agree(d) to put their relations with the insurgents on a regular, though on an ad hoc basis.[82]

There was no obligation on the recognising state to remain neutral. It could assist the existing government, but if it materially assisted the insurgents, it was guilty of illegally intervening.

With regard to the international legal protection afforded insurgent combatants,

> ...the view has been taken that the recognition of insurgency constitutes an expression of a belief by a foreign power that the insurgents should not be executed as rebels if captured by the legitimate government.[83]

It seems that recognised insurgents, including guerrillas, were

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[80] H Lauterpacht Recognition in International law (1947) 276 -277.

[81] Dhokalia op cit 225.

[82] Lauterpacht op cit 275.

[83] Fenwick International Law (1948) 147.

regarded as lawful combatants and not as common criminals,[84] but only within the territory of the state involved.[85] In practice, however, the rights of lawful participation in combat were specific rights granted by the recognising states. No general rights could be adduced from insurgent status. The insurgents only secured a limited personality vis a vis the recognising state.[86]

Insurgency, like belligerency, was historically specific. Insurgency appeared after the U.S. Civil War and slowly supplanted belligerency because it limited and restricted the legal status of rebelling factions in internal conflicts. At that historical juncture some limitation on international jurisdiction was demanded by the prevailing balance of power. Imperial sovereignty discouraged intervention for any reason in domestic, especially colonial, affairs. Insurgency provided a more discreet regulation of external intervention in internal conflicts because it conferred fewer non-general substantive rights.

> Insurgency and belligerency are therefore not two alternative sets of rules to be applied at will by affected states, but rather two successive norms of law, insurgency succeeding belligerency as a standard more serviceable to the international community.[87]

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[84] Dhokalia op cit 225.

[85] Schwarzenberger op cit 275-276.

[86] R Higgins "Internal War and International Law" in R Falk & G Black (eds) The Future of the International Legal Order vol 3 (1971) 88.

[87] Oglesby loc cit.

Insurgency was at its most useful in the early twentieth century during the height of imperial dominion. Oglesby notes that since then insurgency has declined in importance, but it may still be available as law and unlike belligerency has not fallen into desuetude.[88]

2.3.5 THE CUSTOMARY MODES OF REGULATION OF INTERNAL ARMED CONFLICT ANALYSED

The underlying assumption of the customary norms was the sanctity of the incumbent government's sovereignty. The international system was biased against revolutionary challenge because the governments of member states had a mutual interest in security of tenure.[89] The incumbent's sovereignty was exhibited through territorial control. Thus it was logical that the application of the customary modes to an internal armed conflict should turn on the geo-military scale of the conflict, i.e., an objective assessment of the intensity of military involvement and the extent of territory affected.[90] To acquire international recognition, a rebel group had to achieve a high geo-military profile, usually through the capture and control of territory. Increasing gradations of violence brought into operation increasing international regulation. Thus lawful combatant status and P.O.W. status was only conferred on participants in a

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[88] Op cit 122.

[89] Falk op cit 14.

[90] D P Forsythe Humanitarian Politics - The ICRC (1977) 123.

belligerency when a belligerent's impact on international society could no longer be ignored and, by extension, its attainment of a certain international status was secure. But recognition was also dependent on the political willingness of recognising states, a willingness that varied individually and which changed as the international system changed. While rebellions remained outside international jurisdiction, belligerent recognition developed, then declined, and was succeeded by insurgent recognition in response to the needs of an international society concerned with restricting the international status of rebel groups. Both of these norms declined in the twentieth century because neither was suited to the new system. In an ideologically cleft international society, the concern for correlating status with facts disappeared. Recognition became openly political. Incumbent and challenger were labelled according to the political preference of the third state. International society turned to treaty law in order to straddle the cleavages in modern society and to replace the unsuitable and ineffective customary modes of regulation.

2.3.6 COMMON ARTICLE 3 OF THE 1949 GENEVA CONVENTIONS AND GENEVA PROTOCOL 2 OF 1977

As noted above,[81] common Article 3 of the 1949 Geneva Conventions[82] was the first international treaty provision

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[81] Section 2.2.9 .

[82] It has been claimed that Conventions apply in toto to certain internal armed conflicts objectively indistinguishable from international armed conflicts. At the 1949 Diplomatic

regulating 'armed conflicts not of an international character'. The authors of Article 3 seemed to have believed that they were describing a belligerency.[93] What exactly they intended and how the Article has been interpreted will be dealt with in chapter 6. It is enough to point out here that Article 3 created a new regime of internal armed conflict regulation distinct from the customary modes.

International concern since 1949 with wars of national liberation has resulted in a lack of interest in purely domestic conflicts. The only advance in the regulation of these conflicts was the adoption of Geneva Protocol 2 in 1977. Protocol 2 was intended to boost the regulation of 'non-international armed conflicts'. However, its authors appear have predicated Protocol 2's application at a high a geo-military level and therefore it will probably prove ineffectual.

2.3.7 WARS OF NATIONAL LIBERATION AS A NEW MODE OF INTERNAL ARMED CONFLICT REGULATION

As noted,[94] the term 'war of national liberation' has been used

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Conference the contemplated criteria for this proposition incorporated elements of belligerency such as territorial control. But the criteria went further and were distinctive from belligerency. They were never, however, adopted in treaty form.

[93] Final Record of the 1949 Diplomatic Conference vol 2B (1949) 121ff.

[94] Sections 1.4 and 1.5 above.

to describe, inter alia, a war to accomplish the separation of a colony from governance by a colonial power.[95] The South African armed conflict is regarded as a species of these anti-colonial conflicts. Customarily these wars were treated as internal conflicts because they fell within the domestic jurisdiction of the colonial state. They were governed by that power's municipal law. Any dealings by other states with the rebels constituted an intervention in its domestic affairs.[96] After the Second World War there was increased international concern with wars of decolonisation. This concern culminated in Article 1(4) of Geneva Protocol 1 of 1977. It assumed that "peoples fighting [for self-determination] against colonial domination, alien occupation and against racist regimes" were international subjects and thus having changed the meaning of 'international' in the traditional definition of 'international armed conflict', included wars of national liberation, such as the South African armed conflict, in this definition.

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[95] E B Firmage "The War of National Liberation and the Third World" in J N Moore (ed) Law and Civil War in the Modern World (1974) 304 notes at 309, that it has also been used to describe wars in defence of a homeland, and wars to liberate a people from capitalism.

[96] G Abi-Saab "Wars of National Liberation in the Geneva Conventions and Protocols" 165 Recueil des Cours (1979) 353 at 367 notes the relatively recent origin of this traditional view in the late colonial era. He cites, inter alia, the active role played by France in the American War of Independence prior to establishment of the traditional view. He points out that the growth of positivist doctrines in international and national law, for example the laying down of state sovereignty as the grundnorm of international law, led to this 'traditional' approach.

The internationalisation of wars of national liberation appears to be a major departure from the traditional customary modes of internal conflict regulation. It could be argued that Article 1(4) conflicts fall within the logic of the traditional approach in the sense of an obligatory recognition of belligerency. It is true that wars of national liberation, like belligerencies, are specially sanctioned exceptions to the norm of non-intervention. But as Schindler points out,[87] there are clear differences:

> (1) The laws of war apply automatically in wars of national liberation; no recognition of belligerency by the incumbent government or by third states is necessary.
> (2) The traditional objective conditions of belligerent recognition (particularly the acquisition of a certain part of national territory) are no longer important; the claim to be recognised is exclusively based on the right of self-determination.
> (3) Foreign states are no longer obliged to observe the laws of neutrality; on the contrary, according to General Assembly resolutions and declarations their duty is to promote the realisation of self determination.
> (4) No formal state of war comes into existence in wars of national liberation; unlike formal belligerent status - with rights of blockade etc.

Belligerent recognition's reliance on geo-military factors for classification of an internal armed conflict as international was discarded by the international community in Article 1(4) in favour of a classification based solely on an appreciation of the bearers of rights in international law.[88] Inter-state armed

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[87] D Schindler "State of War, Belligerency, Armed Conflict" in A Cassese (ed) The New Humanitarian law of Armed Conflict vol 1 (1979) 6.

[88] Abi-Saab op cit 411, notes the objective basis of belligerent recognition, and points out that belligerents could only speak for themselves once they had imposed themselves sufficiently to gain international attention. By contrast, national liberation movements represent not only themselves but a

conflicts have always been international without reference to geo-military factors. As the range of international subjects have increased, so the definition of 'international' in international armed conflict has widened. The legal classification of international armed conflict has been enlarged to include conflicts between colonial powers and peoples represented by national liberation movements. Thus to go to international war the parties need no longer be states; to be a 'people', a nascent state, a pro tanto subject of international law is enough. As in all international armed conflicts, "...neither duration nor territorial extent nor the size of the force involved is a decisive factor."[88] The objective proportions of these wars of national liberation play no role in their definition as an international armed conflict. Therefore, geo-military based arguments that the law of international armed conflict does not apply in the South African armed conflict because the armed conflict is of too low an intensity and would not have been governed by belligerent recognition, must fail. Any incident of violence between the incumbent and the national liberation movement, no matter how small, is enough to activate the law of international armed conflict.

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people. Founded on the principle of self-determination, their international status is granted them by the rest of the international community, and extends far beyond what a belligerent could only do for itself.

[88] J S Pictet Humanitarian Law and the Protection of War Victims (1975) 50. Pictet's comment is made in respect of common Article 2 of the 1949 Conventions, but is equally apposite to wars of national liberation.

2.4 GENERAL CONCLUSIONS ON THE HISTORICAL BACKGROUND OF THE LAW

Do the international regulation of internal armed conflicts and the acquisition of lawful combatant status dovetail smoothly in respect of the South African armed conflict? Generally, lawful combatant status has been conferred automatically only in international armed conflicts, i.e., conflicts between states. The only exception to this rule has been recognition of belligerency and the South African armed conflict cannot be equated to a belligerency. Clearly, the law of internal armed conflict cannot be used to apply lawful combatant status in the South African armed conflict. The operation of lawful combatant status in the South African armed conflict can, however, find some precedent in the law of international armed conflict. The expansion of the classes of legitimate combatants in international armed conflicts prior to 1974 had been moving towards the sanctioning of civilian patriots who take up arms to fight for national freedom even though their governments had already been defeated, e.g.: resistance movements. The law had also relaxed the conditions imposed on individual combatants to facilitate this expansion of protection. Thus the argument that the South African armed conflict takes place between two international subjects, viz.: the State and the people, at least partly falls into the developing pattern of the conferral of lawful combatant status on new categories of patriotic combatants even though it takes place within a single state. This thesis

depends for its success, however, on the classification of the ANC as representative of an evolving international legal subject moving toward full international status and not as a legal aberration whose very existence is a negation of, or an exception to, an international society of sovereign states. The theoretical cogency of the recognition of the international status of national liberation movements and the consequences of this recognition for the law of armed conflict are matters to which we now must turn.

SECTION A: CLASSIFICATION OF THE SOUTH AFRICAN ARMED CONFLICT AS AN INTERNATIONAL ARMED CONFLICT

CHAPTER THREE
THE MATERIAL FIELD OF APPLICATION

3.1 INTRODUCTION

The application of the law of international armed conflict in the South African armed conflict can be attempted through paragraph 3 of Article 2 of the 1949 Geneva Conventions or through a norm of customary international law based on Article 1(4) of Protocol 1, but it depends initially on the assertion that the armed conflict takes place between two international subjects. The South African state is firmly established as an international subject. The international status of the ANC is, however, more tenuous. Therefore, before we examine whether the South African armed conflict falls within the material field of application of the law of international armed conflict, we must first examine the theoretical foundations of international status for national liberation movements generally and the ANC specifically.

3.2 THE FOUNDATIONS OF INTERNATIONAL LEGAL STATUS FOR NATIONAL LIBERATION MOVEMENTS

3.2.1 THE INTERNATIONAL LEGAL ORDER AND THE PRINCIPLE OF SELF-DETERMINATION

The claimed international status of national liberation movements must be seen in the context of the historical evolution of the

international legal order. Modern conceptions of the development of the international system through the pre-colonial, colonial, and post-colonial periods, have shaped and directed this claim. Professor Abi-Saab provides a typical analysis of the international legal order's development:[1]

(a) Before colonialism the metropolitan countries regarded African, Asian and South American political entities as part of the international community and as international subjects.[2]

(b) During the colonial period the egalitarian international legal order was transformed into a hierarchical relationship between the metropolitan nations and their new colonies and the colonies lost their international status.[3]

(c) The post-colonial period saw the decolonisation process linked with the reemergence of decolonised communities as new international subjects. These emergent political communities gained international status based on the principle of self-determination often before they had wrested physical control from the colonial state.

In the nineteenth century the law was infused with the sanctity of sovereignty and domestic jurisdiction. Colonies were regarded

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[1] G Abi-Saab "Wars of National Liberation in the Geneva Conventions and Protocols" 165 Recueil des Cours (1979) 353 at 366-7.

[2] Abi-Saab op cit 366; see also his note 1.

[3] Only entities recognised by metropolitan states could be regarded as subjects of international law - hence the popularity of the constitutive theory of recognition during this period.

legally as part of the metropole and colonial affairs were regarded as domestic affairs. Any international interference in the colonies constituted illegal intervention. Decolonisation threatened the existing international legal order in a number of ways. The assistance of Inter Governmental Organisations (IGOs), such as the U.N., in the struggles of colonial peoples for self-determination began to change the international system. The decolonisation process was marked by a sustained attack on colonial sovereignty. Large imperial sovereign states were broken up into new sovereign states. In the colonial context sovereignty was reduced to its foundation, the self-determination of peoples. Hobbes viewed sovereignty as indivisible and unlimited because the people had delegated all their rights and power to the sovereign state.[4] The colonial empires were divided up on the basis that the colonial peoples had not willingly delegated all their rights and power to the colonial sovereign. Popular consent was asserted as the foundation of sovereignty. International society became a non-hierarchical structure of constituent subjects whose outer limit of identity was the state. State sovereignty in a horizontal legal structure implied the sovereign equality of states, a principle that was firmly established as the grundnorm of international law by Article 2(1) of the U.N. Charter.

When the process of decolonisation met with colonial resistance,

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[4] Thomas Hobbes Leviathan (1651) chp 20.

national liberation movements formed to fight the colonial powers on behalf of the colonised people. These wars of national liberation did not fit into the traditional formulation of international armed conflict because one of the parties, the national liberation movement, was not a state, whilst the other party was.[5] Self-determination was the key to international status for national liberation movements. Before it could be shown that they had a legal right to go to war and the wars that they engaged in were international armed conflicts, legal weight had to be achieved for self-determination and its application to a limited number of situations had to be clarified.

3.2.2. SELF-DETERMINATION AS A LEGAL PRINCIPLE

Self-determination consists in Brownlie's terms of the "right of collective national groups (peoples) to choose for themselves a form of political organisation and their relation to other groups."[6] This traditional definition accords with what Cassese calls "external self-determination", or

> ...the ability of a people or a minority to choose freely in the field of international relations, opting for independence or union with other states.[7]

"Internal self-determination", on the other hand, is the idea

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[5] K Asmal National Liberation Movements: Their Status and Role in Contemporary International Law (1980) 21.

[6] I Brownlie Principles of Public International Law (1973) 575.

[7] A Cassese "Political Self-Determination - Old Conceptions and New Developments" in Cassese (ed) UN Law / Fundamental Rights (1977) 137.

that

> ...a people in a sovereign state can elect and keep the government of its choice or that an ethnic, racial, religious or other minority within a sovereign state has the right not to be oppressed by central government.[8]

Self-determination's roots as a political principle lie in the nationalist doctrines of the eighteenth and nineteenth centuries. Woodrow Wilson and Lenin both supported self-determination as a right, Lenin claiming it for "...every liberation movement in the colonies."[9] The principle of "equal rights and self-determination" was enshrined in Articles 1(2) and 55 of the U.N. Charter.

The status of self-determination as a legal principle has long been controversial. To the colonial powers it was only a moral standard. The Third World and Socialist blocs sought to invest it with legal weight and thus establish a legal right of self-determination for all peoples imposing an obligation on colonial powers to grant that right. The latter group understood self-determination largely as being liberation from colonialism, the prototypical example of external self-determination.[10] The Third Worlds monopolisation of the U.N. General Assembly saw the articulation of their conception of self-determination in a

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[8] Cassese ibid.

[9] I V Lenin Selected Works (1943) Vol 5 270; Vol 10 203.

[10] Cassese op cit 141.

wealth of resolutions, the seminal step being the Declaration on the Granting of Independence to Colonial Countries and Peoples.[11] Asmal cites its key features as:

> (a) The acceptance of the right of self-determination for dependent territories seeking independence from colonial powers whilst ignoring fissiparous and secessionist tendencies within states; (b) The acknowledgement that self-determination supplemented the principle of equality and applied to all non-self-governing and mandated territories.[12]

Articles 1 and 3 of the two 1966 Human Rights Covenants[13] recognised self-determination as a human right. Article 1 upheld both the right to external and internal self-determination. But internal self-determination, "the rights of peoples to freely determine their political status" was vague, imprecise and evasive. The most significant development in the genesis of self-determination as a legal principle was the Declaration on Principles of International law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations.[14] Although paragraph 1 of the declaration granted the right of self-determination to all peoples, the right was limited by the identification of external self-determination with decolonisation. The paragraph read:

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[11] G.A. Resolution 1514 (XV) 1960.

[12] Asmal op cit 6.

[13] The International Covenant on Civil and Political Rights; The International Covenant on Economic Social and Cultural Rights; General Assembly 1966.

[14] G.A. Resolution 2625 (XXV), adopted in 1970 by consensus. The Western powers, eg., the UK/USA/France had voted against Resolution 1514.

> The territory of a colony or other non self governing territory has, under the charter, a status separate and distinct from the territory of a state administering it and such separate and distinct status under the charter shall exist until the people of the colony or non self governing territory have exercised their right of self determination in accordance with the charter and particularly its purposes and principles.

By 1970, Abi-Saab argues, it was clear that (external) self-determination was universally accepted as a legal principle.[15]

A number of criticisms have been made of this proposition.

(a) The U.N. Charter defines self-determination as a principle not a right. But, as Abi-Saab recognises, the distinction is irrelevant. What is important is that self-determination is a legal concept carrying rights and obligations.[16]

(b) The General Assembly resolutions that developed self-determination are recommendatory only and thus cannot be binding in themselves or serve as the sole source of evidence of a customary principle like self-determination. Prakash-Sinha notes: i) They are not the only evidence of customary international law; ii) States do not regard the vote in the General Assembly as legally binding; iii) State practice outside the U.N. doesn't support the theory that states see self-determination as legally

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[15] Op cit 370. Among those who agree - R Higgins "International Law and Civil Conflict" in E Luard The International Regulation of Civil Wars (1978) 180; E McWhinney United Nations Law Making (1984) 170; E Rosenblad International Humanitarian Law of Armed Conflict (1979) 33; U O Umozurike Selfdetermination in International Law (1972) 274.

[16] Op cit 378-9.

binding.[17] But General Assembly resolutions are not relied on as the sole evidence of the legal weight of self-determination. The U.N. Charter is the source document.[18] In addition, it is submitted that states do not always regard their vote in the General Assembly as non-binding. Different resolutions, depending on their wording, receive different attention, different measures of support and, consequently, different legal value. Abi-Saab points to the consensus on the 'Friendly Relations' declaration. He argues, after Brownlie, that such resolutions are an authoritative interpretation of the Charter.[19] Finally, Abi-Saab also refers to the general decolonisation by colonial states as evidence of state practice, a fact which runs counter to Prakash-Sinha's last assertion. Decolonisation is, in fact, almost complete.

On this basis it is submitted that although not all the provisions in the various declarations and resolutions are law

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[17] S Prakash-Sinha 14 Indian International Law Journal (1974) 332 at 345; See also H Booysen 1 SAYIL (1975) 20, and J C Stassen 3 SAYIL (1977) 65 at 83.

[18] Asmal op cit 1980 6, goes one step further and asserts that the Charter just gave expression to an already existing ius cogens principle of international law. His conclusion is supported by SWAPO - see J Dugard "SWAPO The ius ad bellum and the ius in bello" 93 SALJ (1976) 144. Self-determination was urged as an example of ius cogens in the travaux preparatoires of the Vienna Convention on the Law of Treaties, but on Portugal's insistence was not included in the draft of what eventually became Article 53 - ius cogens. See H G Espiell "Self-determination and Jus Cogens" in A Cassese (ed) UN Law / Fundamental Rights (1979) 167.

[19] Op cit 379.

because their vagueness and ambiguity does conceal substantial differences in the nature of self-determination, it is difficult to refute the basic premise that external self-determination is a legal principle. Its legal status has gained acceptance in the West and was affirmed by the ICJ in the Western Sahara Case.[20]

The vagueness of the principle causes problems. Higgins asks "what is this 'self' to whom it applies?"[21] It is submitted that U.N. practice, although ad hoc, identifies the recipients of the right of external self-determination. Prakash-Sinha analyses the U.N. position as follows:

> (1) Although almost continuously contended as a right of all peoples, self-determination has in fact only applied to colonial peoples. Trust and non-selfgoverning territories used to be the old basis for self-determination but were replaced under U.N. practice by the territorial identification of colonial areas at the end of World War 2. The territorial division which was made arbitrarily by the colonial powers in the past and which had no regard to the ethnic, cultural, and social factors of the population is taken as the basis of deciding when self-determination should apply.
> (2) In identifying a colonial people reference is made to the majority of the population within a generally accepted political unit and not to minorities, racial, religious or other.
> (3) Self-determination is fulfilled by independence.[22]

He sums up:

> Essentially the realisation of self-determination within the U.N. has meant the decolonisation of peoples and territories

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[20] 1975 ICJ Reports 12.

[21] Loc cit.

[22] G I A D Draper "Humanitarian Law and Human Rights" (1979) Acta Juridica 193 at 203 remarks "Self-determination is by definition a once and for all exercise."

> known to be of the colonial type at the end of World war 2. This has largely been accomplished.[23]

A more universal right of external self-determination and the right of internal self-determination are viewed as dangerous principles by the arbitrarily nationalised third world and socialist blocs. For this reason self-determination as a legal right has not evolved much further than the parameters of external self-determination set out by Sinha.[24] As a legal principle it applies only to 'peoples' who have not achieved independence from colonial powers. With the possible exception of South Africa and Israel, the principle does not apply to the territories of established sovereign and independent states.[25] Newly emerged states, following the practice of the established states, have built walls of sovereignty along their own borders regardless of the demands of internal minorities.[26] But this sovereignty is fully compatible with external self-determination. Sovereignty, an attribute of statehood, is overridden in the

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[23] Op cit 347,360.

[24] This is despite the fact that its logical evolution appears to be in the direction of some sort of legitimacy litmus test for all existing states, i.e., internal self-determination. But if self-determination is based solely on notions of nationalism, the world wide attainment of national self-determination would by definition bring it to an end.

[25] T Fleiner Geister and M A Meyer "New Developments in Humanitarian Law: A Challenge to the Concept of Sovereignty" 34 ICLQ (1985) 267 at 285.

[26] They rely on the 'Friendly Relations' declaration caveat that "nothing in the foregoing paragraphs shall be construed as authorizing any action which would dismember or impair, totally or in part the territorial integrity or political unity of sovereign and independent states."

colonial context by external self-determination, a right pertaining to 'peoples'; or as Eide puts it, "...sovereignty is not complete unless full satisfaction is given to the principle of self-determination."[27] Once that 'people' achieves statehood, sovereignty reasserts itself.

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[27] A Eide "Sovereign Equality versus Global Military Structure - Two Competing Approaches to World Order" in A Cassese (ed) The New Humanitarian Law of Armed Conflict vol.1 (1979) 21 at 26.

3.2.3 SOUTH AFRICA, SELF-DETERMINATION AND THE NORM OF NON-RACISM

Israel and South Africa, two technically sovereign states, are singled out as exceptions to the general rule that self-determination applies only in the colonial context. Why? The issue of Palestinian self-determination is beyond the scope of this study. It is enough to note that many of the arguments applying to South Africa have been transferred to the Israeli context and vice versa.

South Africa has been under a broad legal assault since it instituted its official policy of racial-discrimination in 1948. More U.N. resolutions have been passed on apartheid than on any other international situation. In 1965, interest was first shown in linking the issues of racial equality and decolonisation in the International Convention on the Elimination of all forms of Racial Discrimination.[28] Article 1 of the two 1966 Human Rights Covenants linked self-determination to non-discrimination. A situation of two competing norms of international law emerged, viz.: the sanctity of South African sovereignty versus the most fundamental norm of international morality, non-racism.[29] The 'Friendly Relations' declaration prohibited action against sovereign states, but only in cases where states conducted themselves

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[28] G.A. Resolution 2106B (XX).

[29] R F Taubenfield and H J Taubenfield Race, Peace and Law in Southern Africa (1968) 7.

> ...in compliance with the principle of equal rights and self-determination of peoples... [and have] a government representative of the whole people belonging to a territory without distinction as to race, creed or colour.

Cassese notes that the conditions for the fulfillment of internal self-determination were specified here for the first time.[30] International intervention was, by implication, permissible where those conditions were not met. The declaration did not attempt to impose democracy. In practice, the right of internal self-determination was only available to peoples living under a government not representative of the whole people without distinction as to race. South Africa was the case in point. Only South Africa, international society agreed, was not representative under the limited definition of internal self-determination. International action against South Africa proliferated. 1973 saw the International Convention on the Suppression and Punishment of the Crime of Apartheid;[31] the General Assembly labelled South Africa a threat to international peace and security; the Security Council took Chapter VII Charter action against a member state forbidding the export of arms and military material to South Africa.[32] The action culminated in the

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[30] A Cassese "Political Self-Determination - Old Conceptions and New Developments" in A Cassese (ed) UN Law/ Fundamental Rights (1977) 137 at 264.

[31] G.A. Resolution 3068 (XXVIII). It imposes individual criminal responsibility.

[32] The Security Council, acting in terms of Chapter 7 of the U.N. Charter, entitled "Action with respect to threats to the peace, breaches of the peace and acts of aggression", determined South Africa's internal policies to be a potential threat to international peace and security (i.t.o. Article 39), and then

General Assembly's declaration that "...the racist regime of South Africa is illegitimate and has no right to represent the people of South Africa."[33]

The justification for this conclusion is that although it ostensibly meets the Montevideo criteria for statehood in that it has a permanent population, a defined territory, a government, and the capacity to enter into international relations with other states,[34] South Africa is an example of internal colonialism.[35] The core (White South Africa) has colonised the periphery (Black South Africa, especially the homelands). Coloniser and colonised live in the same territory. The homeland and migrant labour systems support this thesis. The withdrawal of the metropolitan power, the United Kingdom, should have realised South African self-determination, but it did not. Legal authority was transferred to the South African Government, a settler regime that denied the majority of the population a political voice through denial of access to government thus maintaining the

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took non-military enforcement measures to contain this threat (i.t.o. Article 41), by instituting a mandatory ban on arm's sales to South Africa (UN Monthly Chronicle Dec 1977 16).

[33] G.A. Resolution 3411E (XXX) 1975. Subsequent to this the South African Government, anticipating rejection of its credentials at the U.N., did not take its place in the General Assembly.

[34] Article 1 of the Montevideo Convention on the Rights and Duties of States 1933.

[35] K Asmal National Liberation Movements: Their Status and Role in Contemporary International Law (1980) 11.

colonial relationship.[36] Although, from a sociological point of view this analysis may not accord perfectly with reality because the core and periphery exist within a single physical entity and are difficult to distinguish unlike the true colonial situation with the physical separation of the colony from the metropole, it has been used in the South African context to assimilate the norm of racial equality to that of self-determination. South Africa is the first instance where the denial of individual human rights has been recognised as being directly connected to the denial of the collective political rights of peoples. The denial of collective human rights in South Africa is a matter of internal self-determination.[37]

The South African Government has never challenged the principle of self-determination, but it disputes that apartheid violates the principle. The difference between the official South African view and the international view is that the latter sees self-determination in collective terms within extant territorial demarcations, while the former sees it in terms of ethnic 'separate development'. Booysen, in support of the South African Government's policy, argues that self-determination of peoples

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[36] Asmal op cit 12.

[37] Cassese op cit 148ff, notes that although South Africa is the only instance where internal self-determination has achieved the status of a legal right, as a political concept with subsidiary legal weight it has developed through the Helsinki Declaration (1973) and the Algiers Declaration on the Rights of Peoples (1976) to be much more radical, universal, anti-authoritarian and democratic/ libertarian.

means "...that every ethnical and cultural group must be given the opportunity of developing according to their own traditions."[38] Taking this thesis to its logical conclusion, it would seem that only South Africa has fully implemented self-determination.[39] The rebuttal of this argument is that self-determination applies to a nation state as a unit - in South Africa's case that means integration not balkanisation.

South Africa has more durable defences at its disposal than its interpretation of self-determination. These defences are mostly associated with the recognition of the Republic of South Africa as a full, independent, sovereign subject of international law. It relies on Western veto of Security Council resolutions labelling apartheid a threat to international peace and security and it asserts that General Assembly resolutions directed at apartheid are recommendatory only.[40] Nevertheless, South Africa must give the General Assembly's recommendations due consideration in good faith.[41] It has consistently been accused of bad faith at the U.N. for flouting international demands to end apartheid. Its answer is that the recommendations are hit by

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[38] H Booysen 1 SAYIL (1975) 19; See also Volkereg (1980) 392.

[39] As Stassen, op cit 83, argues.

[40] These resolutions find their constitutional basis in Articles 10-14 of the Charter. Their annual repetition lends them no extra weight - see C J R Dugard "The Legal Effect of United nations Resolutions on Apartheid" 88 SALJ (1966) 48.

[41] Laid down as a general principle by Lauterpacht J in the Voting Procedures Case 1955 ICJ Reports 67 & 118-119.

Article 2(7) of the U.N. Charter and fall outside U.N. jurisdiction. Apartheid, it maintains, falls entirely within its 'domain reserve'. However, as Patel notes, Article 2(7) cannot be used in conflict with the basic principles and purposes of the Charter, especially in regard to violations of fundamental human rights.[42] Moreover, domestic jurisdiction is not that fixed. International law has evolved sufficiently to include discriminatory legislation within a state as a matter fit for international concern. U.N. organs have the right as a matter of international practice to determine their own jurisdiction unless specified to the contrary in the Charter and can include apartheid within that jurisdiction.[43] These organisations have found that South Africa has acted in bad faith and sanctions have been, and will continue to be, applied.

Perhaps the greatest penetration of South Africa's domain reserve defence is the assertion that racial non-discrimination is a ius cogens rule. Citing the dissenting judgments of Tanaka J in the SWA Case[44] and Amoun J in the Barcelona Traction Case,[45] where the learned judge gave protection from racial discrimination as

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[42] C N Patel "Legal Aspects of State Expulsion from the UN-South Africa a Case in Point" 3 Natal University LR (1982/3) no's 1&2 197 at 206.

[43] Expenses case 1962 ICJ Reports 168; Dugard op cit 1966 53-4; Patel op cit 207.

[44] (2nd Phase) 1966 ICJ Reports 298.

[45] (2nd Phase) 1970 ICJ Reports 32.

an example of ius cogens, and the fact that the ICJ held South Africa to be in breach of the norm of non-discrimination in the Namibia Opinion,[46] Patel states that "...it would be futile to argue that apartheid falls within the domestic jurisdiction of a state."[47] A peremptory norm of racial non-discrimination would limit South Africa's sovereignty. In fact it would limit all sovereignty. The problem with this thesis is that Article 53 of the Vienna Convention on the Law of Treaties requires that such a norm be "...accepted and recognised by the international community of states as a whole...", an exceedingly difficult test to pass even considering the extensive support for a norm of non-discrimination.[48] Many states are more concerned with the sanctity of their own domain reserves than establishing conclusively the peremptory nature of non-discrimination. Because of the difficulty of achieving this general acceptance, the international community has relied on specific condemnation of apartheid rather than on a universal norm to legitimise its intervention in South Africa's affairs. Nevertheless, because racial non-discrimination has been linked with self-determination in regard to South Africa, the country's internal situation has become of international concern and international law has spawned further rights and obligations in its regard.

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[46] 1971 ICJ Reports 16-17.

[47] Op cit 206.

[48] The test applies expressly to treaty law, but it is probably valid for all purposes.

3.2.4. THE INTERNATIONAL STATUS OF NATIONAL LIBERATION MOVEMENTS AND THE ANC

The ANC has been the recipient of some of these new rights. The ANC, like national liberation movements generally, is a non-state subjects of international law.[48] States have not been the only actors in post-war international society.[50] The right of self-determination has conferred international status on 'peoples'. Through a norm of non-discrimination linked to self-determination the South African people have also had international status conferred on them.[51] These 'peoples' are collective national entities in statu nasciendi - on their way to becoming states. National liberation movements representing these 'peoples' derive their international status from the 'peoples'' international status.[52] However, the bodies remain logically distinct: (a) A people, (b) represented by a national liberation movement, (c) which has an armed wing that actually engages in military action.

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[48] A difficult categorisation to accommodate theoretically- see generally R Higgins The Development of International Law by the Political Organs of the U.N. (1963) 106.

[50] International rights appear to have been conferred on individuals, for instance in the Universal Declaration of Human Rights and in common Article 7 of the 1949 Geneva Conventions.

[51] In this regard, the PAC representative at the 1974 diplomatic conference said Africans of South Africa were "nations" with a "separate and independent national existence recognised by the international community." CDDH/1/SR6 33.

[52] Asmal op cit 8, calls them legally prescribed instruments for the vindication of self-determination.

For a national liberation movement to acquire international status international recognition is essential. In order to receive it, a national liberation movement must be a viable entity with accompanying political institutions. Thus we have an empirical test for legal personality; the movement must meet certain factual criteria. Interim legal personality has been recognised in a number of cases by the U.N. and the O.A.U.. Provisions in General Assembly resolutions that activities involving liberation movements should be undertaken in consultation with the O.A.U. has in practice allowed that organisation to conclusively designate the legitimate liberation movements. It tends to ensure that only anti-colonial and anti-racist national liberation movements are sanctioned and that insurrections against O.A.U. members are not.[53] The recognised national liberation movements initially included FRELIMO, the MPLA, the liberation movement of Guinea Bissau. Later SWAPO, ZANU, ZAPU, and the PLO were recognised.[54] While the U.N. has a

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[53] P J Travers "The Legal Effect of United Nations Action in Support of the PLO and the National Liberation Movements of Africa" 17 Harvard International LJ (1976) 561 at 569.

[54] Through, eg., G.A. Resolution 2787 (XXVI). See also the more moderate Security Council resolutions, eg., Resolution 282 (1970) & 311 (1972). Both the PLO and SWAPO have been granted full observer status by the General Assembly. ECOSOC and other U.N. organs have also recognised and assisted national liberation movements - see Travers op cit 572 to 575.

special committee[55] liaising with liberation movements, the O.A.U. has gone much further and has a liberation committee which aids them directly. These liberation movements have been recognised by many states, These states permit the movements representation in their territory and provide large amounts of aid.

The ANC has participated in debates in various U.N. bodies and has been recognised by the General Assembly.[56] The Assembly affirmed the

> ...legitimacy of the struggle of the oppressed peoples of South Africa and their liberation movements, by all possible means, for the seizure of power by the people and the exercise of their inalienable right of self-determination;

and further recognised the national liberation movement of South Africa as the "...authentic representatives of the overwhelming majority of the South African people." The ANC is regarded as the legitimate representative of an emergent non-racial South African state and as a belligerent entity that has an international right to struggle.

3.2.5. THE ANC'S IUS AD BELLUM

Do national liberation movements have a *ius ad bellum*? The declaration of the 1964 Conference of non-aligned countries

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[55] The Special Committee on the Situation with Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples.

[56] G.A. Resolution 3411 (XXX) 1975. Vote 101/15/16.

stated:

> Colonised people may legitimately resort to arms to secure the full exercise of their right to self-determination and independence if the colonial powers persist in opposing their national aspirations.

The Friendly Relations Declaration, in addition to expressly recognising a duty to refrain from denial of self-determination,[57] also sanctions resistance to the incumbents by stating that support for a 'people' in such a situation of denial is permissible.[58] The General Assembly Definition of Aggression,

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[57] Is there a ius contra bellum on the incumbent regime? Although Article 2(4) of the U.N. Charter forbids the use of force in "international relations", and the term can, on a broad interpretation, be taken to include relations between national liberation movements and states, such an interpretation denies reality. N Ronzitti "Resort to Force in Wars of Liberation" in A Cassese (ed) Current Problems of International Law (1975) 319-347, argues that the ius contra bellum is a corollary of self-determination because a state that is obliged to conform to self-determination must also be debarred from any act, including the use of force, which impinges on that principle. He asserts that this rule is part of custom, based on the consensus in the U.N.. It prohibits South Africa's repressive use of force. Ronzitti notes that South Africa has not unequivocally and steadfastly dissociated itself from self-determination. It just disputes that apartheid flagrantly violates this principle. He therefore argues that South Africa is bound by the ius contra bellum and it is incumbent on other U.N. members to enforce the rule against South Africa. Ronzitti's argument is debatable. South Africa may not object to self-determination, but it definitely objects to Ronzitti's interpretation of it, and to his explanation of the legal basis for a corollary ius contra bellum. South Africa, like all colonial or neo-colonial states, has not been slow to use force in order to combat liberation movements. State practice has rejected any ius contra bellum. The debate will, in any event, remain academic until the war is over.

[58] G.A. Resolution 2629 (XXV). It states:

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

prohibiting aggressive acts between states, provides expressly under Article 7 that nothing in the definition can prejudice the right of self-determination, freedom and independence of peoples under

> ...colonial and racist regimes or other forms of alien domination nor the right of those people to struggle to that end and receive support.[58]

The right to revolt, congruent to non-satisfaction of self-determination, finds its legal basis mainly in these resolutions. Western writers have noted that the Friendly Relations Declaration makes no mention of the use of force to achieve self-determination.[60] The international use of force is permissible only in the instances envisaged in Article 51 of the U.N. Charter - in self-defence or under Security Council authorisation. In all other cases, the blanket prohibition of Article 2(4) applies. A number of theories have been put forward to avoid this prohibition in the case of wars of national liberation:[61]

(a) The use of force to attain self-determination is a case of Article 51 sanctioned self-defence because force is used to deny

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[58] Annexed to G.A. Resolution 3314 1974.

[60] D E Graham "The 1974 Diplomatic Conference on the Laws of War, a Victory for Political Causes and a Return to the Just War Concept of the Eleventh Century" 32 Washington & Lee LR (1975) 25 at 40. See also C J R Dugard "The O.A.U. and Colonialism: An Inquiry into Self-Determination as a Justification for the use of Force for the Eradication of Colonialism" 16 ICLQ (1967) 168-170.

[61] See generally "Wars of National Liberation" in the Encyclopedia of International law vol.4 344.

self-determination. The counter argument is that colonialism or racism does not in itself always involve armed attack or an imminent use of force. The consistent use of force by the incumbent may bring Article 51 into play. But the ius ad bellum of the national liberation movements is clearly not identical to the right to self-defence under Article 51.

(b) Colonialism is itself an aggression ab initio since colonial regimes were installed in the past by force. This argument disregards the legitimacy in the past of territorial acquisition by force and the non-retroactivity of norms of customary international law. Furthermore, Article 51 requires immediate action in self-defence and thus no right of self-defence can exist for an attack that occurred long ago.

(c) A strongly supported argument is that the use of force is a sui generis right emanating from the strong condemnation of colonialism and racism by the international community. The right to revolt in these circumstances is regarded as a valid exception to the Article 2(4) prohibition.[82] Although there is not a complete consensus on the validity of this exception, it does accord with the reality of international support for the national liberation movement's military actions.

(d) Ronzitti argues that because national liberation movements are not, in his opinion, subjects of international law but rather

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[82] K Asmal National Liberation Movements: Their Status and Role in Contemporary International Law (1980) 17; G Abi-Saab "Wars of National Liberation in the Geneva Conventions and Protocol" 165 Recueil des Cours (1979) 371-2.

are only beneficiaries of the right of self-determination, they cannot be hit by Article 2(4).[63] However, such a position undermines the whole concept of wars of national liberation being international, between two distinct subjects of the law, and, for that reason, is untenable.[64]

It is interesting that in non-international armed conflicts international law does not regulate the right to revolt. It is my submission that the right of national liberation movements to revolt finds its roots partly in this non-regulation of revolt in strictly internal situations and partly in the sui generis nature of wars of national liberation. In any event, the debate about the use of force at international level is rendered inappropriate by contradictory state practice. States violate Article 2(4) to the extent where its normative value has become questionable. National liberation movements cannot be condemned for violations that are at best theoretical. The ANC went to war in 1960 and the reality of the situation demands a response from the ius in bello not inextricably linked to the controversy surrounding the legality of the ANC's ius ad bellum.

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[63] Op cit 350-1.

[64] Moreover, if the people that the national liberation movement represents is the true international subject, and the movement is only the beneficiary of the right of self-determination, then logically the people's right to use force would also be hit by Article 2(4)'s prohibition.

3.2.6. THE ANC AND THE IUS IN BELLO

Recognising this fact of war, we are now confronted with the central assertion that wars of national liberation are international armed conflicts and, therefore,

> ...national liberation movements and their members combatting colonialism, racialism and alien rule are entitled to the protection of the Geneva Conventions of 1949, especially those relating to the protection of civilians and P.O.W's....[65]

The war of national liberation's aim - self-determination and the elimination of racialism - distinguishes it from a non-international armed conflict. This purposive criterion defines a narrow field of conflicts. South Africa is singled out as one such conflict. The South African Government, it is argued, must recognise the international nature of the conflict and grant ANC combatants lawful status. But the basis for the application of this thesis as black letter law binding on South Africa is highly problematic. The material application of the law looks in the final analysis to a customary norm for its legal enforcement but, as we shall see, the formation of such a norm is militated against by absence of widespread support for it.[66] We must first, however, turn to the treaty law, which, although more useful as a source of the content of the rules of international armed conflict, can be interpreted to provide the means for the application of the law.

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[65] Asmal op cit 8; See also Abi-Saab op cit 371-2.

[66] C Murray "The 1977 Geneva Protocols and South Africa" 33 ICLQ (1984) 462 at 465.

3.3 THE APPLICATION OF THE LAW OF INTERNATIONAL ARMED CONFLICT IN THE SOUTH AFRICAN ARMED CONFLICT BY MEANS OF COMMON ARTICLE 2 OF THE GENEVA CONVENTIONS OF 1949

3.3.1 INTRODUCTION

With the international status of national liberation movements, including the ANC, established, their supporters looked for ways to turn the application of the law of armed conflict in wars of national liberation, claimed initially in General Assembly resolutions, into a concrete rule binding the incumbent regimes. Resort was first had to the mechanisms available for the application of the law in the four Geneva Conventions of 1949, the most obvious means for applying the law because they have been ratified by more states than any other treaty,[87] including South Africa, which acceded to the Conventions in March 1952.[88] The Convention's material field of application was apparently limited to interstate wars by the criteria laid down in common Article 2. Apart from one small exception, it set out that international armed conflicts exist only between High Contracting Parties (HCPs), i.e., states. The Article has, however, been the subject of a controversial interpretation aimed at the inclusion of wars of national liberation within in its scope.

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[87] 165 in 1986, 256 IRRC (1987).

[88] The Conventions have not yet been legislated into South African law.

3.3.2 PARAGRAPHS 1 AND 2 OF ARTICLE 2

The first paragraph of Article 2 sets out that

> ...the present convention shall apply to 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 recognised by one of them.

An armed conflict is, in these terms, any opposition between two or more High Contracting Parties (HCPs) - generally agreed to include states only - involving the use of armed forces. Two situations are envisaged, viz.: "Cases of declared war", i.e., the classical war situation, and "any other armed conflict which may arise", a catchall phrase for every situation that is a de facto armed conflict without being a declared war.[88] In both situations the laws operation is limited to states only, thus the paragraph does not provide any means for the application of the Conventions in wars of national liberation.

The second paragraph of Article 2 applies the Conventions in

> ...all cases of partial or total occupation of the territory

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[88] The catchalls operation is illustrated in the case Public Prosecutor v Oi Hee Koi [1968] AC 853-4. The major issue in the matter was the applicability of Geneva Convention 3 (P.O.W.) in the 'military confrontation' between Malaysia and Indonesia (1963-66). The Privy Council held:

> ...the trials of the accused were conducted on the assumption which their lordships did not call into question, that there was an armed conflict between Malaysia and Indonesia bringing the Convention into operation. Article 2 applies the Convention not only in cases of declared war but to 'any other armed conflict which may arise between two of more of the High Contracting Parties even if a state of war is not recognised by one of them.' The existence of such a state of armed conflict was something of which the courts in Malaysia could properly take judicial notice of or if in doubt on which they could obtain a statement from the executive

> of an High Contracting Party even if the said occupation meets with no resistance.

A reaction to German occupation of Europe in World War 2, this provision is of no application in wars of national liberation because it envisages occupation of a state by another state party to the convention.

3.3.3 PARAGRAPH 3 OF ARTICLE 2

The third paragraph of Article 2 provides the first possible avenue for the application of the Conventions in wars of national liberation. It reads:

> Although one of the powers in a conflict may not be a party to the present convention, the powers who are parties thereto shall remain bound 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.

Can a national liberation movement be classified as a "power"? More specifically, can the ANC, by accepting and applying the provisions of the Conventions, bind the South African Government to apply the Conventions to the conflict between them? In a controversial article published in 1972, Abi-Saab argues that national liberation movements can be classed as "powers" because of their international status.[70] "Powers" had originally been included in paragraph 3 to cover states that were not HCP's, but which became involved in armed conflicts with HCP's. Abi-Saab seeks to change the acceptance of this "power" - "state" equation

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[70] G Abi-Saab "Wars of National Liberation and the Laws of War" 3 Annales de Etudes Internationales (1972) 93.

as the only valid interpretation of "power". He argues that the international status of national liberation movements has been established, as noted, through their representation of peoples with a right of self-determination. He argues that these national liberation movements have a right to go to war to achieve self-determination and he subscribes to the view that the full ius in bello applies in wars of national liberation. He contends, therefore, that they are "powers" in terms of paragraph 3 and that they can invoke the Geneva Conventions.

Western commentators dispute Abi-Saab's contentions.[71] They adhere to the narrow definition of power, well illustrated in the Israeli case, Military Prosecutor v Omar Muhamed Kassem and Others.[72] One of the issues in the case was whether the Popular Front for the Liberation of Palestine (PFLP), a constituent of the PLO, was such a "power". The court held that it was

> ...clear that the convention applies to relations between states and not between states and bodies which are not states and do not represent states.[73]

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[71] R R Baxter Rivista di dirotti Internazionale (1974) 193 at 195-6; H Booysen "Terrorists, P.O.W's and SA" 1 SAYIL (1974/5) 32; L J Chimango "The relevance of humanitarian international law to the liberation struggles in Southern Africa - the case of Mozambique in retrospect" 8 CILSA (1975) 287 at 304; Draper op cit 16; C J R Dugard 93 SALJ 144 at 153; Graham op cit 47.

[72] [1971] 42 ILR 470.

[73] This interpretation appears to be supported by the wording of paragraph 3, viz.: "parties who are powers thereto", seeming to imply that "powers" are states. But as the procedure for accession also uses "powers", the implication is negated.

Abi-Saab takes issue with the narrow definition of "power".[74] His main arguments are:

(1) It is generally agreed that in the case of recognition of belligerency the whole ius in bello, including the Conventions, applies to the conflict.[75] But such recognition does not transform the belligerent community into a state. Thus if the Conventions were open to states only, the consent of the established government or third party state in the form of recognition of belligerency would not be able to change this situation. He argues that because belligerent recognition entails the application of the Conventions, there is no legal objection to the accession of national liberation movements to the Conventions, but only the political objections of colonial governments and South Africa.

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[74] Op cit 1972 104.

[75] Do the Conventions apply in toto in a belligerency? Oppenheim-Lauterpacht International Law 211-212 answer in the positive. G I A D Draper "Humanitarian Law and International Armed Conflicts" 13 Georgia JIL (1983) 267-268 disagrees. He argues that such an assertion does not fit in with the scheme of international and non-international armed conflicts in the Conventions. With respect to paragraph 3 of Article 2, he asserts that such a belligerent authority does not equal a power, preferring the definition that power only means states, and that belligerencies are governed by Article 3 only. But it is historical fact that belligerencies accorded far more substantive legal rights, including the right to lawful combatant status, than the limited cover provided by the conventional law of non-international armed conflict. However, it is probable that belligerency had already fallen into desuetude before the Conventions were adopted, which makes the whole debate academic.

Cassese attacks Abi-Saab's reasoning.[76] He recognises that the recognition of belligerency did not transform the belligerent entity into a state, but then he notes that the institution of belligerency is obsolete and Abi-Saab's analogy without basis.[77]

(2) In 1960 the Provisional Government of Algeria (GPRA) notified the Swiss Government as depository of its accession to the Conventions. The Swiss Government circulated it to other parties to the Conventions in terms of common Article 59/ 58/ 138/ 156.

But Cassese notes that the GPRA's accession took place at the end of the conflict when France was about to withdraw and, in addition, Switzerland and France objected to the accession.[78] Switzerland's reservation was made, however, as a party to the Conventions and not in its capacity as repository. Abi-Saab disagrees that these reservations can prevent the accession of national liberation movements.[79] As the general rules about

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[76] Abi-Saab introduced this concept at the 1974 Diplomatic Conference as an Egyptian delegate. Cassese, an Italian delegate, criticised Abi-Saab CDDH/1/SR3 at 11. See A Cassese (ed) The New Humanitarian Law of Armed Conflict (1980) vol 2 25.

[77] Op cit 27.

[78] Op cit 26. See also D Bindschedler-Robert "A Reconsideration of the Law of Armed Conflicts" in The Law Of Armed Conflict (1971) 51.

[79] G Abi-Saab "Wars of National Liberation in the Geneva Conventions and Protocol" 165 Recueil des Cours (1979) 400ff.

reservations do not apply,[80] he turns to the Conventions and notes: (a) They are multi-lateral treaties requiring only written notification of accession to the depository;[81] (b) Common Article 13/13/4A deals indirectly with the application of the Conventions to conflicts between parties not recognising each other. Article 4A(3) sanctions "...members of regular armed forces who profess allegiance to a government or authority not recognised by the detaining power." Abi-Saab argues that such an authority can easily include national liberation movements. He notes the ICRC Commentary's position:

> It is not expressly stated that the government or authority must, as a minimum requirement, be recognised by third states, but this condition is consistent with the spirit of the provision...it is also necessary that this authority, which is not recognised by the adversary, shall either consider itself as representing one of the high contracting parties, or declare that it accepts the obligations stipulated in the Convention and wishes to apply them.[82]

General international recognition of a national liberation movement meets the first non-mandatory requirement set out in the Commentary. But to bring about the full application of the Conventions the liberation movement must express its consent to be bound by them. Abi-Saab prefers the less formal procedure in paragraph 3 of Article 2 than actual full accession.[83] Paragraph

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[80] They only apply to reservations made by states at the adoption of a treaty. See Abi-Saab op cit 1979 note 66.

[81] Common Article 59/58/138/156.

[82] Commentary 3 63.

[83] Abi-Saab op cit 1979 403, notes that the provisions in the Conventions for full accession, Articles 60/59/139/155, also use the word "power", and thus national liberation movements can

3 requires acceptance and application of the Conventions in order to bind the other party. Abi-Saab feels that a unilateral declaration of acceptance by the liberation movement would suffice, regardless of the acceptance or opposition of the other parties to the Conventions.[84] He considers the ANC's 1980 Declaration as satisfying the requirements of Article 2 paragraph 3, thus bringing the Conventions into operation in the South African armed conflict.[85] South Africa's rejection of such a view is, he argues, in violation of the Conventions. Although his argument is cogent, ABi-Saab's interpretation of Article 4A(3) conflicts with the intention of the Article's authors to use it as a means of applying the law in situations where the government of a state party to the Conventions has surrendered, but certain elements of its armed forces continue to fight, eg., the position of the De Gaulle's Free French after the Vichy Government signed the armistice with Germany in 1940.

(3) A wider interpretation is more compatible with the humanitarian objects and purpose of the conventions which, if to be fully realised, command universal application.

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also apparently accede to the Conventions. He considers, however, the Article 2 paragraph 3 procedure to be more expedient for practical reasons.

[84] Ibid. The ICRC Commentary points out that no explicit declaration is necessary - Commentary 3 26.

[85] Op cit 1979 404. But it appears the declaration was made in response to Article 96(3) of Geneva Protocol 1. More about the declaration below.

Cassese argues that this key contention is not strong because it ignores the intention of the framers in drawing up the Conventions. He notes that it is evident from the preparatory works that the socialist proposals to extend the Conventions to cover colonial and civil wars were rejected by the majority of states at the 1949 Conference.[86] He concludes that to extend the Conventions to wars of national liberation would run counter to the purpose pursued by the authors of the Conventions.

Schindler's retort is that "...the 1949 conception of colonial wars as Article 3 conflicts cannot be decisive in this respect."[87] Interpreting "power" in terms of Article 31 of the Vienna Convention, Schindler points out that the conception in the minds of the authors of the treaty is not relevant to its later interpretation, the important thing being the ordinary meaning of "power" in the context and light of its object and purpose. This meaning he avers, does not clearly exclude a liberation movement.

Cassese replies that the question of whether such a later interpretation can override an interpretation based on the

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[86] They rejected the ICRC draft Article 2(4) - the end result was common Article 3.

[87] D Schindler "Different Types of Armed Conflicts According to the Geneva Conventions and Protocols" 163 Recueil des Cours (1979) 117 at 135.

travaux preparatoires is a question of construction not settled by the Vienna Convention.[88] However, the ICJ in the Namibia Opinion 1970 advised that changes must be taken into consideration in interpreting a treaty. The concept embodied in "power" in the Convention is not static. The Conventions are large multi-lateral treaties that have acquired their own life, independent of the will of the parties at the moment of their conclusion. They lend themselves to progressive generic interpretations and the concepts they contain cannot be limited to historically fixed, culturally relative interpretations. The 1949 conception of "power" as state is a narrow Western interpretation open to modification over time.

Cassese raises the further point that this narrow Western view also pervades the substantive provisions of the Conventions making it difficult for non-state "powers" to apply them and thus militates against a revised interpretation.[88] He notes that the Conventions, especially Convention 3, are based on two legal concepts, 'nationality' and 'foreign territory', which cannot be applied to wars of national liberation. It follows from these basic notions embodied in the Conventions that the framers did not intend to apply them to wars of national liberation. Cassese asserts that to hold otherwise would be to stretch the

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[88] A Cassese The New Humanitarian Law of Armed Conflict vol. 2 (1980) 27.

[88] Ibid.

Conventions too far.

Schindler's reply to this tack is that the colonial territories' separation from the state administering it meets these elementary requirements of territoriality.[90] On this basis Baxter allows that the process of Portuguese decolonisation could have been an Article 2 paragraph 3 situation because it involved two "power" conflicts.[91] But in his opinion the conflict in South Africa is "...essentially a one power rather than a two power situation",[92] disallowing the laws' application through paragraph 3. This opinion can be analysed by examining certain Articles of the Conventions and gauging the possibilities of ANC compliance with them.[93] Article 19 of Convention 3 reads:

> Prisoners shall be evacuated, as soon as possible after capture, to camps situated in an area far enough from the combat zone for them to be out of danger.

The only feasible ANC method of compliance with this provision would be to transport prisoners over the borders into sanctuaries in the frontline states. Article 19, an important requirement even in the context of guerilla warfare, appears unfunctional in the South African armed conflict at present given that the main

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[90] Op cit 136.

[91] R R Baxter "Humanitarian Law or Humanitarian Politics" 16 Harvard LJ (1975) 1 at 14.

[92] Ibid. He considered the PLO/Israeli situation to fit adequately if not comfortably into paragraph 3.

[93] Obviously an article by article analysis is not possible here.

ANC bases are in Angola. But it may become operable in the future with increased ANC activities in states like Zimbabwe. Another problem is posed by Article 102, which presupposes a national court and legal system for a detaining power - something that the ANC does not possess and therefore will find the procedural safeguards required by the Article difficult to carry out. But that is not to presume that such a system cannot be instituted. Similar problems of application are encountered with Convention 4 (Civilians), where, for example, Article 4 provides that the Convention does not apply to nationals of the detaining power. In the true colonial situation the separate territory of the colony could be used to justify the classification of the coloniser's presence as occupation and the local inhabitants as "protected persons" under the Convention. But in the South African situation lack of territorial separation and the fact that the occupants are also local inhabitants makes such a solution impractical. In total only 14 articles of Convention 4 (Articles 12-36) also protect a state's own population. Faced with these practical difficulties, it can only be urged that problematic provisions should be complied with to the extent possible, recognising that similar difficulties in compliance occur in all wars and that many of the problems arise with the methods of implementation and not with the essence of the rules.[84] But analysis of the

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[84] The sentiment of the authors of "The Geneva Convention and the treatment of P.O.W.s in Vietnam" Note from the Harvard Law Review reprinted in R Falk (ed) The Vietnam War and International Law vol 3 (1969) 398 at 402.

Convention's articles does tend to support Baxter's opinion that Article 2 paragraph 3 does not encompass the South African situation.

Abi-Saab, taking a different approach, attacks the traditional conception of territorial control as the only functional means for implying the degree of effectiveness necessary for the acquisition of legal status.[85] He argues that because it is rooted in the assumptions of conventional warfare it disregards the unconventional guerilla warfare typical of wars of national liberation. He claims that effectiveness can also be based on the control and allegiance of populations. He maintains, moreover, that even formal territorial control is no longer a cut and dried concept. Experience shows that territorial control over the same area can rotate (eg. government by day, rebels by night). He argues that in such situations effectiveness, if rigidly construed, cannot serve as a criterion for determining the legal status of either party because of its relative and ever changing character. He urges the adoption of a more flexible interpretation of effectiveness in the case of national liberation movements taking into consideration not only the elements which they succeed in controlling, but also the elements that they deny control of to the incumbent. He concludes that national liberation movements, whilst not in complete control of

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[85] G Abi-Saab "Wars of National Liberation and the Laws of War" 3 Annales de Etudes Internationales (1972) 97.

territory, by undermining their opponent's control and because of the allegiance of the population

> ...master a degree of effectiveness sufficient for them to be objectively considered as a belligerent community at the international level.[96]

In relation to South Africa, Booysen stated bluntly in 1975 that even this low profile objective situation was not present.[97] Since then the objective military situation has changed, as is clear from Appendix A. Instead of sporadic bombings and sabotage, we are now in a nation wide State of Emergency, brought about not by guerilla warfare, but by large scale urban unrest and the ANC's policy of making the townships ungovernable. Government control of the territory in the townships appears to fluctuate in effectiveness and the allegiance of the population has been lost.[98] But the ANC's control is also debatable. It is unclear whether the ANC can be labelled an effective belligerent even in Abi-Saab's adapted terms. Analysis of the situation is fraught with difficulties, not the least of which is the information blackout.

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[96] Ibid.

[97] H Booysen "Terrorists, P.O.W's and South Africa" 1 SAYIL (1975) 31.

[98] There are even hints of 'liberated zones' - see J Friederickse South Africa: A Different Kind of War (1986) 175.

3.3.4 CONCLUSION[98]

Although supported by the Afro-Asian-Socialist blocs, Abi-Saab's contentions are controversial in the West and Cassese maintains that they are not decisive.[100] The difference is really between a strict and a liberal interpretation of the same provisions. The alternative views are based on different competing policy considerations. Western lawyers value the integrity of a clear, limited definition of international armed conflict in Article 2, without the added controversy that arguments like Abi-Saab's must bring to an already difficult area of law. Advocates of the inclusion of wars of national liberation within the definition of international armed conflict are motivated to play up the international nature of wars of national liberation as well as spur on the application of humanitarian law in these conflicts. Article 2 provides a useful method for doing this because the colonial states and South Africa are parties to the Conventions. Nonetheless, it is plain that consensus has not been achieved. Western state practice does not recognise non-states as "powers".

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[98] I have been careful not to discuss Article 2 paragraph 3 in connection with Article 96(2) of Geneva Protocol 1 of 1977. In essence Article 96(2) reiterates Article 2 paragraph 3 in the context of Protocol 1, but uses the term "party" instead of "power." However, South Africa is not a party to Protocol 1 and no cogent arguments have been put forward that Article 96(2) has a special interpretation relating to wars of national liberation that is a rule of custom, attention having rather been focussed on Article 96(3) as a solution to the problems associated with Article 2 paragraph 3.

[100] A Cassese "A Tentative Appraisel of the Old and the New Humanitarian Law of Armed Conflict" in The New Humanitarian Law of Armed Conflict (1979) 504.

It is submitted that although a liberal interpretation is tenable, its tenuousness makes it an unreliable method for applying the Conventions in the South African situation, something the ANC appears to have recognised by not referring directly to it in its 1980 Declaration. This unreliability is also pointed to by the introduction of Article 1(4) in Protocol 1 of 1977. The effort put into the formulation of Article 1(4) by the backers of the liberal interpretation of Article 2 paragraph 3 tends to indicate a lack of faith in the effectiveness of the liberal interpretation.

However, the controversy surrounding Article 1(4) and the fact that certain parties to the Conventions have not become parties to Protocol 1 has led to the argument that Article 1(4) is the correct and consensual interpretation of Article 2 paragraph 3 of the 1949 Conventions. Article 1(4) does encapsulate the limited material field of application of wars of national liberation. If "powers" is interpreted in the light of Article 1(4), the ANC would definitely be included as such a "power" and South Africa would be bound to apply the full international law of armed conflict because it is a party to the 1949 Conventions. Paragraph 3 does not labour under the burden of Article 1(4)'s wording because there is no reference to pejorative terms like "racist regime", unacceptable to the South African Government. But the fact that Article 1(4)'s wording drove off the target states from becoming party to Protocol 1 must also make it extremely

difficult for them to concede that Article 1(4) is a binding interpretation of paragraph 3. It is therefore not surprising that South Africa gives no credence to that interpretation.

From the perspective of lawful combatant status, the principle defect of using Article 2 as the means for instituting these protections is that it only brings the rules contained in Article 4 of Geneva Convention 3 into operation to define the personal field of application, rules which as we shall see, ANC combatants would find extremely difficult to obey. Article 1(4) must stand alone as a rule of law in order to bring into operation the personal conditions for lawful combatant status contained in Articles 43 and 44 of Protocol 1, which do not set down such rigid conditions of visible distinction from civilians as Article 4 and therefore would be easier for ANC members to obey.

3.4 THE APPLICATION OF THE LAW OF INTERNATIONAL ARMED CONFLICT IN THE SOUTH AFRICAN ARMED CONFLICT BY MEANS OF ARTICLE 1(4) OF GENEVA PROTOCOL 1 OF 1977

3.4.1 INTRODUCTION

In the 1970's, the advocates of the international status of national liberation movements focussed their attention on bringing humanitarian law into line with what they regarded as general international law. The result of their efforts, Article 1(4) of Protocol 1, extends the material field of application of international armed conflicts to include certain wars of national liberation. An examination of the Article's history and criticisms is required to indicate the limitations of this extension and whether it clearly includes the South African armed conflict as an international armed conflict. Examination of the Article's background also points to the crucial issue relative to the application of the law in South Africa by means of Article 1(4), viz.: its political acceptability as a rule of law.

3.4.2 THE GENESIS OF ARTICLE 1(4)

3.4.2.1 DEVELOPMENT IN THE UNITED NATIONS

The development of humanitarian law to include wars of national liberation as international armed conflicts and thus legalise liberation movement combatants began in the U.N. General Assembly. The groups supporting this idea, convinced that it was

legally correct and politically necessary, wanted it expressly stated in treaty form. The initiative was launched at the (U.N.) Teheran Conference on Human Rights held in 1968, which considered that persons struggling against "minority racist or colonial regimes" should, if detained, be treated as P.O.W's or political prisoners under international law.[101] In the same year, the General Assembly declared that it

> ...further confirms the decision of the Teheran Conference to recognise the right of freedom fighters in Southern Africa and in the Colonial Territories, when captured to be treated as P.O.W's under the Geneva Conventions of 1949.[102]

The General Assembly also

> ...expresse(d) its grave concern over the relentless persecution of the opponents of apartheid under the arbitrary laws and the treatment of freedom fighters who were taken prisoner during the legitimate struggle for liberation and, ...(c) declare(d) that such freedom fighters should be treated as prisoners of war under international law, particularly the Geneva Convention relative to the treatment of Prisoners of War of 12 August 1949.[103]

In 1970 the General Assembly requested the Secretary General to give particular attention to these problems.[104] The Secretary General's Reports, published in 1971, highlighted the initiative in the U.N..[105] The key resolution in respect of Article 1(4) is

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[101] Resolution 23 - 'Human Rights in Armed Conflicts'.

[102] Resolution 2446 (XXIII).

[103] Section 8 of Resolution 2396 (XXIII).

[104] Resolution 2597 (XXIV).

[105] Report of the Secretary General on Respect for Human Rights in Armed Conflicts U.N.GA A/7720 20/11/1969; U.N.GA A/8052 18/9/1970; U.N.GA A/8370 2/9/1971.

General Assembly Resolution 3103,[108] which stated that:

> 1. The struggles of people...under racist governments for the implementation of their right to self-determination and independence is legitimate and in full accordance with the principles of international law...
> 3. The armed conflicts involving the struggles 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.
> 4. The combatants struggling against colonial and alien domination and racist regimes captured as prisoners are to be accorded the status of P.O.W. and their treatment should be in accordance with the provisions of the Geneva Convention relative to the treatment of P.O.W's...
> 6. The violation of the legal status of combatants struggling against colonial and alien domination and racist regimes in the course of an armed conflict entails full responsibility in accordance with the norms of international law.

The final product of the 1974-1977 Geneva Diplomatic Conference largely embodied this Resolution.

Rosas notes a few interesting points about this particular set of resolutions:[107]

(a) They were usually adopted 70-100 votes for/ few against/ 10 to 20 abstentions.

(b) Of the mostly Western states that abstained, many expressed reservations to those paragraphs that implied or stated that the Geneva Conventions were applicable in toto to the conflicts in question.

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[108] (XXVIII).

[107] A Rosas <u>The Legal Status of Prisoners of War</u> (1976) 265-6.

(c) The resolutions were ambiguous in that (i) some referred to the principles of the Geneva Convention 3 while others called for the application of the Conventions in toto; (ii) some of the resolutions called for the humane treatment of prisoners as well, a contradictory notion in that it primarily belongs to the context of internal armed conflicts; (iii) most of the resolutions referred only to Convention 3, some to Convention 4, but none to Conventions 1 and 2.

I can add four further points:

(d) The tone of many of the resolutions was peremptory, implying that they carried legal weight. Their legal weight is, however, controversial. The general rule is that they are recommendatory and need only be considered bona fide and seriously. But they may carry weight as subsidiary legal rules depending on the amount of support they engendered.

(e) The resolutions often appear to be based on the conviction that they were interpretations rather than modifications of the 1949 Conventions, which leads back to the discussion of Article 2 paragraph 3.

(f) The resolutions paid considerable attention to lawful combatant status and P.O.W. status. The reason is obvious. The acquisition of these protections meant both added status for national liberation movements and the protection of their fighters - the two key objectives of the whole development of the law in this respect.

(g) A separate sub-set of these resolutions has been aimed specifically at South Africa[108] making the same claims as the general resolutions. Reiterated consistently over the years, the South African Government has, as consistently, ignored them.

3.4.2.2 DEVELOPMENT BY THE ICRC

Parallel to the development in the U.N., but taking a more cautious approach, the ICRC was also intent upon revising the law. The ICRC had unsuccessfully proposed broadening the material field of application of humanitarian law to include wars of national liberation before the 1949 Geneva Conference.[109] In 1965 the Twentieth Conference of the Red Cross requested the ICRC to draft proposals updating the laws of war. The ICRC presented a substantial report on the subject to the Twenty First Red Cross Conference held in Istanbul in 1969. The report assumed that wars of national liberation were non-international armed conflicts and that General Assembly resolutions adopted in 1968 did not express the law as it stood.[110] At the conference, a proposal that national liberation movement combatants should be treated as P.O.W's in accordance with Convention 3 was withdrawn in favour of a resolution asking that combatants in non-international armed

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[108] For example, G.A. Resolution 2396 (XXIII).

[109] The ICRC proposed extending the application of the Conventions to all non-international armed conflicts, citing as examples civil wars, colonial conflicts, religious wars etc.

[110] ICRC Protection of Victims of Non-International Armed Conflicts (1969) 9.

conflict who conformed to Article 4 of Convention 3 receive a treatment similar to that provided in the Convention for P.O.W's. In 1971 the ICRC convened the first of two Conferences of Government Experts (1971/1972) on the development of the law.[111] At these conferences the ICRC/West concentrated on technical changes to the law within traditional assumptions ignoring the political movement in the U.N. to change these assumptions. In its report to the 1971 session the ICRC reiterated its view that wars of national liberation were non-international armed conflicts. This view encountered opposition. Some experts supported the internationalisation of these conflicts,[112] but a draft declaration to that effect was rejected at the 1972 conference.[113] The ICRC's solution was a compromise:

> In cases of armed struggle where people exercise the right to self-determination as guaranteed by the U.N. Charter and the Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in accordance with the Charter of the U.N.; members of organised movements who comply with the aforementioned conditions shall be treated as P.O.W's for as long as they are detained.[114]

A number of comments can be made:-

(a) The issue of the international character of wars of national

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[111] The ICRC sent a general invitation to all parties in the United Nations, and 77 states sent delegations.

[112] ICRC Report on the 1971 Conference of Government Experts 52-56; ICRC Commentary on the Draft Additional Protocols (1973) 6.

[113] ICRC Report on the 1972 Conference of Government Experts vol 2 25.

[114] Footnote to Article 42 of Draft Protocol 1.

liberation was completely avoided.

(b) The proposal was limited to the question of P.O.W's, which is understandable given the content of G.A. resolutions.

(c) P.O.W treatment, not status, was conferred.

(d) The proposal appeared to sanction all wars of national liberation against non-representative governments and not only those fought against colonial and racist regimes.[115]

Western dominance of the two conferences influenced the adoption of a traditional approach to wars of national liberation in the draft Protocol,[116] an approach to the South African Government's advantage because under it the Government did not have to pay attention to the law of international armed conflict. Forsythe maintains that the ICRC's association with the old definition of colonial wars as non-international armed conflicts disadvantaged the ICRC on the global stage.[117] The ICRC/Western position was overly legalistic despite the efforts made by Norway prior to the 1974 Conference to change it. As a result it was bypassed by the political steamroller of third world voting power.

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[115] This option was unsuccessfully proposed at the 1974 diplomatic conference.

[116] D P Forsythe Humanitarian Politics (1977) 124.

[117] Op cit 125. Witness the reluctance of the ICRC to commit itself on the legal issues today. It takes a far more pragmatic approach.

3.4.2.3 THE GENEVA DIPLOMATIC CONFERENCE 1974-1977

3.4.2.3.1 INTRODUCTION

The Conference on the Reaffirmation and Development of International Humanitarian Law was convened in 1974 in Geneva and completed the drafting of two Protocols in 1977 with the ceremonial signing of the Final Act by 102 states and 3 national liberation movements. Both Protocols entered into force on December 7 1978. All in all, 124 states, 50 NGO's and 11 national liberation movements participated in one or all of the four sessions, representing, as was not the case in 1949, most of international society. South Africa attended the first session only. National liberation movements were invited to participate fully because of their involvement in the movement for the internationalisation of wars of national liberation, but were not given voting powers.[118] The ANC attended the first three sessions, the PAC the first, second, and fourth.[118] It is interesting to note that of the 11 national liberation movements invited only four still exist as national liberation movements, viz.: the ANC, PAC, PLO, SWAPO. The rest have been transformed into either the governments or opposition parties of independent states. The intense debate over the participation of the national

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[118] Conference Resolution 3(1). For a detailed look at the controversy surrounding their participation see Abi-Saab op cit 1979 403-405.

[118] F R Ribeiro "International Humanitarian Law: Advancing Steadily Backwards" 97 SALJ (1980) 42 at 43.

liberation movements was a prelude to the bitter wrangle that emerged around the definition of international armed conflict in draft Article 1 of Protocol 1.

3.4.2.3.2 THE EVOLUTION AND ELABORATION OF ARTICLE 1(4)

At the 1974 Conference the U.N. approach to wars of national liberation collided with the ICRC/Western approach. The Third World 'group of 77', supported by the less enthusiastic Socialist bloc,[120] carried over their solidarity and voting strength from the U.N. and took control of the development of Article 1. These two allied groups submitted two alternative proposals with a view to including wars of national liberation as international armed conflicts. CDDH/1/5 initiated by the Socialist bloc purported to add the following paragraph to Article 1:

> The international armed conflicts referred to in Article 2 common to the Conventions also include conflicts where people fight against colonial and alien domination and racist regimes.

CDDH/1/11 proposed by the Third World had a greater impact:

> The situations referred to in the preceding paragraphs include armed struggles waged by peoples in exercise of their right of selfdetermination as enshrined in the Charter of the U.N. and defined by the declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations.

The Western powers took umbrage with these proposals and almost

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[120] D Ciobanu "The Attitude of the Socialist Countries" in A Cassese (ed) The New Humanitarian Law of Armed Conflict (1979) vol 1 399, states at 400-402 that the alignment of forces was not strictly east/west. The third world/socialist blocs failed to act in concert on most issues - Article 1 being an exception. In most instances group policy was overridden by national interest.

left the Conference in 1974. The Western counter proposal CDDH/1/12, stated that wars of national liberation would be covered by the De Maartens clause as applied to Protocol 1. It did not satisfy the proponents of the other two proposals, who, in response, amalgamated their proposals in CDDH/1/41, viz.:

> The situation referred to in preceding paragraphs include armed conflicts where people fight against colonial and alien domination and against racist regimes in the exercise of their right of selfdetermination, as enshrined in the U.N. Charter and defined by the Declaration of Principles of international Law concerning Friendly Relations and Cooperation among states in accordance with the Charter of the United Nations.

The amalgam refers to self-determination as in CDDH/1/11, but restricts it to the situations mentioned specifically in CDDH/1/5. The South American amendment CDDH/1/71, changing "colonial and alien domination" to "colonial domination and alien occupation", was voted on and passed in committee 70/21/13.[121] The Afro/Asian/Socialist countries voted for it, South America split on the issue and the majority of the Western and other group, including South Africa, voted against it. Western supporters of CDDH/1/11 abstained. The ANC supported it. No vote was taken at the 1974 plenary.

At the 1975 session an unofficial working party of active sponsors and major Western detractors examined the modifications to the Protocol necessitated by draft Article 1. Other than the inclusion of a provision for the acceptance by national

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[121] CDDH/1/SR13 at 10.

liberation movements of the Protocols and Conventions,[122] only cosmetic touches were recommended. Matters remained thus until the end of the fourth session in 1977. The West had by this time modified its position to accommodate the majority view. Although the US delegation urged consensus, Israel forced the Article to the vote.[123] The result was 87/1/11 in favour of adoption of the Article.[124] Israel voted against it and the major Western powers abstained while those that had previously abstained voted for it. Article 1 reads:

> 1.[Repeat of Article 1 of the Geneva Conventions]
> 2.[De Maartens clause]
> 3.This Protocol, which supplements the Geneva Conventions of the 12 August 1949 for the protection of War Victims, shall apply in the situations referred to in Article 2 common to these Conventions.
> 4. The situations referred to in the preceding paragraph include armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on the Principles of International law concerning Friendly Relations and Cooperation among states in accordance with the Charter of the United Nations.

Sections 3 and 4 are expressly interrelated by reference in section 4 to the situations covered in section 3. This definition of their relationship does not exclude the types of conflicts covered by section 4 being already covered by section 3. In fact,

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[122] Article 96(3) - see below.

[123] An Israeli motion for a separate vote on paragraph 4 was defeated.

[124] CDDH/1/SR36 at 58.

section 4 is worded as if it were giving an interpretation of Article 2 of the Geneva Conventions.

3.4.2.3.3 ATTITUDES AT THE CONFERENCE SHAPING ARTICLE 1(4)

The legal rationale for Article 1(4) was provided by certain third world delegates after the fact of its coming into being.[125] They placed strong emphasis on general international law derived from U.N. actions.[126] The Western response was to emphasise the political function of the U.N. as opposed to the ICRC's role as the sole initiator of genuine humanitarian law.[127] The pattern, symptomatic of much recent international legal development, was plain; a strong political force faced an entrenched legal position; the result - a lack of fundamental deep rooted consensus. The Western states may have changed tactics by 1977, but they made clear their negative attitude to Article 1(4) on signature and by non-ratification. Socialist states, on the other hand, supported the Third World, but favoured a much stricter

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[125] D P Forsythe "The 1974 Diplomatic Conference on Humanitarian Law: Some Observations" 69 American JIL (1975) 77, notes at 82 that little legal justification was given. He points out that most third world delegates did not realise the full impact of their stand. It appeared some delegates did not know the difference between draft treaties and G.A. resolutions. Abi-Saab tried to give the argument some legal foundations (see CDDH/1/SR4 at 3-4), but his untrained colleagues continued to take a non- legal approach.

[126] CDDH/1/SR2 at 10 - Egyptian delegates reasoning.

[127] CDDH/1/SR2 at 49 - French response. But as Abi-Saab op cit 1979 378 points out, there is no hierarchy in international law - the ICRC does not dominate, nor does the U.N. - rather the law is based on the unity of these organs.

formulation. Cassese argues that they and not the Western group, which had nothing to do with it, were instrumental in narrowing the material field of application of Article 1(4) because they feared its application in their own territories.[128] Many third world states probably had the same attitude.

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[128] A Cassese The New Humanitarian Law of Armed Conflict (1980) vol 2 at 17. But Lysaght at 18 argues that Western states influenced the Third World/ Socialist bloc into a narrow formulation through pointing out the possibility of wars of secession etc., left open by the vague Friendly Relations declaration.

3.4.3 ARTICLE 1(4) - FIELD OF APPLICATION

To illustrate that the South African armed conflict falls within the field of application of Article 1(4), the Article's parameters must be defined. Article 1(4) has been criticised for having a vague field of application because the terms used to define its field are imprecise.[128] But a close examination of its wording in the context of general international law belies its apparent vagueness. Article 1(4) gives specific examples of the kinds of incumbent states opposed by the national liberation movements representing peoples with a right to self-determination, thus establishing a justiciable standard for determining its field of application. Article 1(4) consists of a number of elements, each of which must be dealt with in turn.

What is meant in Article 1(4) by "armed conflicts?" The term is used in a number of contexts.[130] The general definition in the Geneva Conventions is that a single incident involving the armed forces of two or more high contracting parties is an armed conflict, without the necessity of a declaration of war. In Geneva Protocol 2's Article 1, a high threshold is given to the term. Internal disturbances, tensions, riots and sporadic acts of violence are excluded. Protocol 2's Article 1 also requires that the insurgents exercise control over a part of the territory of a

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[128] H Booysen Volkereg (1980) 136.

[130] See M Bothe, K Partsch, W Solf New Rules for Victims of Armed Conflicts (1982) 46.

state in order to enable them to carry out sustained and concerted military operations. Are such lower levels of violence also excluded from the definition in Article 1(4)? Must the national liberation movement control territory? In this regard, Australia stated in explanation of its vote on Article 1(4):

> In supporting Article 1 as a whole, Australia understands that Protocol 1 will apply to armed conflicts which have a high level of intensity.[131]

The United Kingdom declared on signature of the Protocol that it considered that the level of intensity of the conflict "could not be less than that required for the application of Protocol 2 to internal conflicts." The fact that under Article 96(3) the national liberation movement assumes the same rights and obligations as the HCP's, supports this opinion. But Article 1(4) has no explicit threshold. The General Assembly, in its resolutions since 1960, has demanded the application of the 1949 Conventions to wars of national liberation without the condition of a certain intensity or of control of territory. It is the nature of the parties to the conflict and not the geo-military scale of the conflict, which is the objective factor in Article 1(4). Schindler notes that

> ...it seems to depend not so much on the intensity of the armed conflict but rather the quality of the authority representing the liberation movement whether Protocol 1 is applicable.[132]

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[131] CDDH/1/SR6 at 60.

[132] D Schindler "Different Kinds of Armed Conflicts According to the Geneva Conventions and Protocols" 163 Recueil des Cours (1979) 117 at 140.

In spite of the fact that Article 1(4) assumes that any violence between the ANC and Government forces makes the conflict an armed conflict, the attachment to geo-military thresholds in non-international armed conflicts and their similarity to the objective situation in the South African armed conflict, makes the setting up and reaching of a geo-military threshold a major issue. This issue requires investigation. In addition, Articles 43 and 44 make it plain that combatants of national liberation movements must meet requirements of organisation, discipline and adherence to the law beyond the objective capacity of criminals. This implies a fairly sophisticated level of combat. Has this level been reached? South Africa has been labelled a situation of tension rather than an outright armed conflict.[133] Booysen accuses the U.N. of legitimising the attack on South Africa before a full scale attack has taken place.[134] In 1975, applying belligerency criteria, especially territorial control, he concluded that "...no armed conflict, whether of an internal or an international character exists in South Africa."[135] However, hostilities have since escalated to a such a degree that it is now objectively impossible to regard the situation merely as tense. While he was Minister of Police, Louis Le Grange said, "As

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[133] A Rosas The Legal Status of Prisoners of War (1976) 276.

[134] H Booysen Volkereg (1980) 392.

[135] H Booysen "Terrorists, Prisoners of War and South Africa" 1 SAYIL (1975) 45.

far as we are concerned it is war, plain and simple."[136] In Appendix A, I have made a brief survey of statistics that show that Booysen's evaluation of the conflict would be incorrect today. A high increase in the incidence, intensity, tactical and technical sophistication of the violence has given the South African situation the character of a low intensity armed conflict. It does not yet measure up to other wars of national liberation, such as Algeria's (100 000 casualties over 7 years), nor is it congruent with the bush wars in the Portuguese colonies and Zimbabwe. But the conflict has moved into the rural areas of the Northern Transvaal, Natal and the Homelands as well as being fought covertly in Angola, Zambia, Mozambique and Zimbabwe. It has also seen an increasing incidence of urban bombings, sabotage, and the use of terror, coupled with large scale township unrest. The violence has the potential to escalate. It must be remembered that the scale of violence in Zimbabwe only reached a high level in the final four years of the conflict. The situation in South Africa appears to be in a state of transition to such a level. It can therefore be argued that the South African conflict is an armed conflict requiring international legal regulation.

I have already discussed the meaning of "peoples" under self-determination.[137] It is enough to note here that the class of

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[136] 1984 Survey SAIRR 4.

[137] 3.2.2 above.

community authorised to enjoy the Protocol under Article 1(4) is limited by the definition of peoples in general international law and by reference to the rest of the Article. The national liberation movement is the "authority representing a people."[138] It must have a truly representative character.[139] How is this proved? National liberation movements are seldom in a position to do so. In the South African context analysts agonise over the representative nature of the ANC. The incumbent's denial of political process and freedom is largely responsible for this uncertainty.[140] However, certain indices of a national liberation movement's representative character are available. Abi-Saab argues that a degree of continued effectiveness creates a presumption of representativeness.[141] Because the ANC has a 70 year history, 26 years of which have involved armed struggle, it would appear to be effective and therefore representative of the South African people. This presumption is reinforced by the opinion of the international community that the ANC is the legitimate representative of the South African people. But the best reason to so sanction the ANC is its majoritarian support among the South African population, the magnitude of which cannot yet be accurately gauged.

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[138] Article 96(3).

[139] G Abi-Saab "Wars of National Liberation in the Geneva Conventions and Protocols" 165 Recueil des Cours (1979) 412.

[140] Abi-Saab ibid.

[141] Op cit 1979 413.

Article 1(4) recognises only peoples "who have the right of self-determination". The right of self-determination is defined by explicit reference to the U.N. Charter and the 'Friendly Relations' declaration. There was a broad consensus at the Conference that the right of self-determination was of narrow scope and that a broad interpretation was not viable.[142] Subsequent state practice supports this consensus.[143] Ethnic and minority groups that may technically be governed by the principle of self-determination under the Charter do not have the right of self-determination envisaged for certain types of territory by the Declaration. The former can aspire to self-determination within a state but must respect its territorial integrity. The latter have the principle and in addition the right to, in effect, secede from metropolitan states. Generally this right of external self-determination only applies to territorially distinct entities. The exception, as already noted, is the South African situation.

The already limited field of Article 1(4) is narrowed even further by the necessity of the national liberation movement

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[142] Bothe et al. op cit 48 note that no reference is made to the 1966 Covenants which referred to the right of self-determination in Article 1, because the Covenants were not in force, and more importantly, they did not distinguish between different types of self-determination.

[143] For instance a British spokesman pointed out that Article 1(4) did not apply to the IRA - Hansard HC Debates vol 941 col 237 14/12/1977.

being in contest with one of three specified adversaries. On a literal reading of Article 1(4), the denial of self-determination is confined to the three cases mentioned. Some authors argue that the enumeration of specific cases is illustrative not exhaustive.[144] However, it appears that the narrow expression given to self-determination in Article 1(4) was fixed in the eyes of its sponsors. Is Article 1(4) limited to conflicts which exhibit all three conditions at the same time? The text is ambiguous. If all three conditions had to be complied with, Article 1(4) would not apply to South Africa as South Africa does not display all three conditions. The correct interpretation, based on the framers' intentions, is that each condition is separate. General Assembly resolutions singled out racist regimes, i.e., South Africa, as a form of oppression distinct from alien occupation and colonial domination and this conception was carried over to the Conference. The three situations are:

(a) "Colonial domination": The administration of a colonial power is the classic opponent of those who seek self-determination.[145] Salt-water colonialism involving territorially distinct entities is envisaged here.[146]

(b) "Alien occupation": Such occupation implies direct physical

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[144] Abi-Saab op cit 1979 397-8.

[145] Bothe et al. op cit 50.

[146] A review of Third World statements in Committee 1 shows that Article 1(4) was directed largely at Portuguese colonialism. See CDDH/1/SR5; CDDH/1/SR6; CDDH/1/SR13.

presence, but the category does not refer to military occupation in interstate wars.[147] Abi-Saab uses the theory of internal-colonialism to conceptualise alien occupation.[148] He argues that the definition of classic colonial domination was expanded by the U.N. to include other forms of colonisation denying self-determination, designated alien domination and racist regimes. Both are 'colonies of settlement', the telescoping of the colonial power and colony into the same territory. Colonies of settlement are the only cases where internal self-determination has achieved the status of an international legal right. In theory, cases of alien domination are the true colonies of settlement;[148] racist regimes being a special case.

(c)"Racist regimes": These are a species of 'colonies of

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[147] Already covered by Article 2 paragraph 2 of the 1940 Conventions.

[148] Op cit 1979 394-5.

[148] Rosas op cit 272, notes that the drafters had in mind Israel's occupation of the West Bank and South Africa's occupation of Namibia. The Namibian conflict is international given Namibia's international status. It could also be classed as a racial conflict because of the racist policies implemented there. On a broader interpretation it could even involve colonial domination. The Israeli situation is more problematic. It may also be a racial conflict given the 1975 G.A. pronouncement that zionism is racism. But the occupation of the West Bank appears to be full belligerent occupation under Article 2 paragraph 2 of the 1949 Conventions. The position as regards the original territory of Palestine is contentious, but is outside our scope here. Schindler op cit 138, argues that alien occupation is limited only by the cases where occupation in terms of Article 2 paragraph 2 of the Geneva Conventions is not clear cut. Alien occupation would then apply to all other cases of foreign occupation. However, it appears that Article 1(4)'s framers envisaged that only Namibia and Israel were covered by the term. Alien occupation has not been invoked outside these situations.

settlement' where race is the sole criterion of domination. In this case a regime excludes a part of the population from political participation in its electoral laws. What of states where no free elections are held or there is a qualified vote? Neither Article 1(4) nor the 'Friendly Relations' declaration seeks to enforce democracy internationally. Article 1(4) only gives legal weight to internal self-determination in the case where a state is governed by a racially exclusive government. Racist regime was introduced into Article 1(4) in order to cover the struggle for self-determination in South Africa.[150]

In practice, due to the dearth of examples of colonial domination, we are left with alien occupation and racist regimes as the operative terms in Article 1(4), which, because of the framer's restrictive intentions, can really only be applied to South Africa and Israel.[151]

3.4.4 ARTICLE 96(3) - GENESIS

One of the major criticisms of Article 1(4) was that it was discriminatory, giving national liberation movements rights, but

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[150] A close reading of the Conference records reveals that the South African situation was largely glossed over, and few state spokesmen were willing to confront the issue openly.

[151] Bothe et al. op cit 51 point out that the 'Friendly Relations' declaration was not so restrictive as Article 1(4). A Cassese in "A Tentative Appraisal of the Old and New Humanitarian Law of Armed Conflict" in the New Humanitarian Law of Armed conflict vol.1 (1979) 461 at 469 argues that humanitarianism would have been better served by a classification based only on the intensity of the conflict.

not imposing obligations on them. As noted, the unofficial working group that examined the consequences of the proposed Article 1(4), recommended that it be made explicit that national liberation movements would bind themselves, in one form or another, to the Conventions and Protocol. An amendment to this effect, adding an extra paragraph to Article 84, was put forward by bi-partisan sponsors. The amendment, which became the new Article 96(3), was adopted in committee[152] and, forced to the vote in plenary by Israel, was adopted by an even larger majority than Article 1, viz.: 93/1(Israel)/2. Article 96(3) reads:

> 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 depository. Such declaration shall, upon its receipt by the depository have in relation to that conflict the following effects:
> (a) the Convention and the 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 on all Parties to the conflict.

3.4.5 THE ANC'S 1980 DECLARATION AND ARTICLE 96(3)

On the 20th of October 1980, Oliver Tambo, General Secretary of the ANC, handed the President of the ICRC the following declaration, signed by himself:

> The ANC of South Africa hereby declares that it intends to respect and be guided by the general principles of

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[152] Vote 50/0/14.

> international humanitarian law applicable in armed conflicts.
> Wherever practically possible, the ANC of South Africa will endeavour to respect the rules of the four Geneva Conventions of 12 August 1949 for the victims of armed conflicts and the 1977 additional Protocol 1 relating to the protection of victims of international armed conflicts.[153]

Can the ANC make an Article 96(3) declaration? Article 96(3) requires only that it be an "...authority representing a people engaged against a High Contracting Party in an armed conflict of the type referred to in Article 1, paragraph 4". The Article specifies no further conditions for a national liberation movement to qualify to make a declaration. The depositary power need not make a determination of the capacity of the national liberation movement. It may be that national liberation movements should be recognised by the appropriate regional intergovernmental organisation in order to be authorised to issue a declaration. Such a requirement is in accordance with U.N. practice and the practice of the Diplomatic Conference.[154] But IGO approval is politically motivated. Regional organisations such as the OAU will only recognise national liberation movements whose adversaries are not OAU members.[155] Moreover, such a criterion of recognition does not appear explicitly in Article

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[153] 220 IRRC (1982) 20.

[154] A Turkish proposal, CDDH/1/42, that Article 1 explicitly apply to recognised national liberation movements only, was rejected.

[155] Abi-Saab op cit 1979 408 raises the example of the Eritrean Liberation Movement.

96(3), nor can it be read into the language as it stands. The problem is partly resolved by recalling the link between Article 96(3) and Article 1(4) and recognising that only national liberation movements facing the narrow scope of adversaries listed in Article 1(4) can make an Article 96(3) declaration.[158] In the light of the above, it is submitted that it is uncontroversial that the ANC has locus standi in terms of Article 96(3). It has been recognised by the OAU and the U.N., it attended the Conference and is involved in an Article 1(4) conflict.[157]

Is, as Ribeiro argues, a unilateral declaration enough to make the Protocols and Conventions binding on all parties to the

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[158] Paragraph H of the U.K. declaration on signature of the 1977 Protocols states:

> In relation to paragraph 3 of Article 96, that only a declaration made by an authority which genuinely fulfills the criteria of paragraph 4 of Article 1 can have the effects stated in paragraph 3 of Article 96, and that in the light of the negotiating history it is to be regarded as necessary also that the authority concerned be recognised as such by the appropriate regional intergovernmental organisation.

It seems that recognition is partly constitutive of a national liberation movement's locus standi.

[157] Several national liberation movements claiming to fight for the same 'people' creates further problems. They can join umbrella 'front' organisations, or the most representative one may be recognised, or all may be recognised. As long as they struggle for self-determination in terms of Article 1(4) they meet the conditions to make an Article 96(3) declaration. Thus the ANC and PAC both technically qualify as national liberation movements, although the PAC has diminished in substance in recent years. But if national liberation movements fight each other as in Angola, then the conflict is not regulated by Protocol 1.

conflict?[158] Ribeiro is incorrect because, as Murray notes,

> ...the terms of the treaty become binding on the parties to a conflict only when the declaration in terms of Article 96 is either preceded or followed by a ratification of the Protocol by the Party against which the liberation movement is operating.[159]

The adversary state must become a High Contracting Party for the Article 96(3) declaration to bring the law into operation, which partly explains why the ANC's 1980 Declaration is not an Article 96(3) declaration.[160] The ANC's declaration would only constitute an Article 96(3) declaration if South Africa was party to Protocol 1 and it is not. Moreover, the Declaration was not made in terms of Article 96(3) because it was not addressed to, or deposited with, the Swiss Federal Council, the depositary referred to in the Article. In addition, the ANC has not undertaken to apply the Conventions and Protocols unconditionally and in their totality.

What is the effect of the ANC's declaration in the light of the fact that South Africa is not party to the Protocol? Borrowdale submits that such a declaration will bring into being a situation analogous to that envisaged in Article 2 paragraph 3 of the Conventions and Article 96(2) of the Protocol, which provide that parties to the treaties are bound by it in relation to each non-

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[158] Op cit 1980 64.

[159] C Murray "The Status of the ANC and SWAPO and international humanitarian law" 100 SALJ (1983) 402 at 406.

[160] See A Borrowdale "The Law of War in South Africa: The growing debate" 15 CILSA (1982) 31 at 42; Murray op cit 405.

party if the latter accepts and applies the provisions thereof.[181] The onus to adhere then shifts to South Africa. If it does not adhere, then the ANC can simply ignore its declaration or continue to bind itself for humanitarian or propaganda purposes.[182] But as he points out, it is neither realistic nor reasonable to expect one sided adherence. The ANC must have been seeking some form of response from the South African Government when it made its declaration. The Government, however, obviously feels that it is under no legal obligation at present. It has yet to respond to the ANC's declaration, which has had little practical impact.

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[181] Ibid.

[182] Borrowdale op cit (1982) 43.

3.4.6 CRITICISMS OF ARTICLES 1(4) AND 96(3) AS MODES FOR INCLUDING THE SOUTH AFRICAN ARMED CONFLICT WITHIN THE MATERIAL FIELD OF APPLICATION OF INTERNATIONAL ARMED CONFLICTS

3.4.6.1 INTRODUCTION

The formation of humanitarian law has always been a political process. Protocol 1 was no exception. The Western dominance of law making up until 1949, with its emphasis on the technical aspects of conventional warfare, was replaced in 1974 by the preeminence of the Third World, intent upon dealing with its own problems of unconventional warfare and resolving its own political issues. Article 1(4) was simply the solution to one of the more pressing problems of decolonisation. Was it the best solution? The expanding number of players on the international stage made that essential element of effective humanitarian law, consensus, extremely elusive.[183] Article 1(4)'s formation involved the clash of polarised viewpoints. The stepped-up intrusion of *real politick* into the development process in the 1970's, saw the majority using its voting power to weaken the international position of South Africa.[184] Humanitarian law became just another area of struggle against South Africa.[185] The

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[183] Borrowdale op cit 1982 44.

[184] D P Forsythe *Humanitarian Politics* (1979) 127-8.

[185] Forsythe ibid, cites as an example the Indian delegation, which spent most of the 1974 session of the Conference trying to make a law that would burden South Africa and Israel, and thus hamper their efforts in dealing with the national liberation movements struggling against them, and then spent most of the

political compromise that resolved previous disputes in humanitarian law was, in respect of Article 1(4), largely absent between 1974 and 1977. Certainly no common ground was reached between the adversary states, Israel and South Africa, and the national liberation movements and their sponsors. Without that common ground, the law's application became improbable. Article 1(4)'s background, prompts one to ask whether there is a sufficiently broad consensus that it is the law to override the South African Government's objection to the concept?[166] This question should be borne in mind while we examine the specific criticisms of Articles 1(4) and 96(3).

3.4.6.2 THE JUST WAR/ JUS AD BELLUM CRITICISMS

The 'just war' doctrine presupposes that recourse to war is permissible where the cause is just. It originated in early Christian thinking.[167] Revived sporadically over the years,[168] the doctrine was linked to wars of national liberation in the

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1975 session fighting Protocol 2 governing non-international armed conflicts, of possible application to India in the case of internal violence. He emphasizes that this was the prevalent attitude in the Third World.

[166] After Borrowdale op cit 1982 44.

[167] G I A D Draper The Christian and War (1962) 19 notes that it has its origins in the Christian tradition founded by St Augustine and developed in the middle ages. It broke down in the sixteenth century, but was revived by marxists to apply to anti-colonial/ imperial struggles, even though it had proved incompatible with civilized standards of warfare.

[168] Kellog-Briand Pact 1929; 1950's Algerian war.

U.N..[169] Western analysts accuse the Third World of reviving the doctrine in Article 1(4) and of introducing the ius ad bellum into the ius in bello. Some internal wars were to be international because of the target regime, while others, not fought for a just cause, remained non-international. In fact, two different criticisms are made of Article 1(4) under this head:

(a) Article 1(4) justifies a unilateral resort to force in order to achieve self-determination, contrary to the provisions of the U.N. Charter.[170] But there is no provision in Article 1(4) legalising the resort to arms. It may be present by implication from the preparatory work of the Conference, but it is not in the express language.[171] Article 1(4) only refers to the right of self-determination in general international law through reference to extrinsic documents. Graham argues that reference to these documents gives the misleading impression that they sanction a ius ad bellum.[172] He puts the cart before the horse. The argument about the ius ad bellum takes place within general international

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[169] U.N. G.A. Resolutions 2396 (XXIII); 2446 (XXIII); 2806 (XXIV); 2649 (XXV); 2787 (XXVI); 2955 (XXVIII); 3070 (XXVII); 3246 (XXIX); all use the term 'legitimate' i.r.o. wars of national liberation and at times also use 'just'.

[170] D E Graham "The 1974 Diplomatic Conference on the Laws of War, a Victory for Political Causes and a Return to the Just War Doctrine of the Eleventh Century" 32 Washington & Lee LR (1975) 43.

[171] J E Bond "Amended Article 1 of Draft Protocol 1 to the 1949 Geneva conventions: the Coming of Age of the Guerilla" 32 Washington & Lee LR (1975) 65 at 76.

[172] Op cit 40.

law and finds no explicit basis in Article 1(4). To be more specific, with respect to South Africa, Article 1(4) does not confer a ius ad bellum on the ANC.

(b) Article 1(4) implies discrimination against the unjust side and better treatment for the just, thus clashing with the elementary premise of humanitarian law, the equality of the parties. This partiality is believed to occur in a number of ways,[173] viz.: i) Guerrillas fighting for a just cause must not be held to the same standards of conduct expected of states and their uniformed combatants. ii) Therefore, guerillas should be able to use what means are necessary to attain their desired ends unrestricted by the law. iii) The restrictions embodied in traditional legal concepts have been largely formulated by the regimes opposing the national liberation movements and thus may be amended and rejected at will. These points are an expansion of the extreme North Vietnamese position that the opponents of national liberation movements had no legal rights. More moderate proponents of Article 1(4) did not support this claim. They were seeking to increase, not decrease, the number of protected combatants. They conceived the 'just war' doctrine as restricting the right of incumbent regimes to do with national liberation movement combatants as they liked rather than permitting the combatants of national liberation movements to do as they

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[173] Graham op cit 40-41.

pleased.[174] The inclusion of a provision in the preamble to Protocol 1, prohibiting the denial of protections accorded by the Conventions and Protocol, emphasised their commitment. The aim of applying the law in the South African armed conflict was to emancipate ANC combatants from South African criminal jurisdiction, not to free them of all legal fetters or to discriminate against the South African Government forces.

Article 1(4) may encourage the escalation of a war of national liberation because increased protection for combatants may encourage greater participation and because it may promote third party intervention on the "just side". But the latter fear is contradicted by state practice in wars of national liberation not regulated by Article 1(4) - states do not intervene directly, but only provide logistical support,[175] while the former fear has never been confirmed because Article 1(4) has not been applied. Escalation of the conflict in South Africa has more to do with the intransigence of the Government than with Article 1(4).

3.4.6.3 THE TEMPORARY NATURE OF WARS OF NATIONAL LIBERATION AS DEFINED BY ARTICLE 1(4)

Article 1(4) was designed with specific conflicts in mind. Thus

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[174] S D Bailey Prohibitions and Restraints on War (1972) 84.

[175] For example, Mozambique and Zambia did not join the Patriotic Front in its attack on Rhodesia.

it will have a limited effective duration.[176] Cassese criticises the West for allowing Article 1(4) to incorporate a dated formula. He argues that it should have included all wars of self-determination conducted by oppressed peoples.[177] The Australian solution was to interpret the formula as a number of examples and not as a closed list.[178] The majority of states, however, favoured the narrow interpretation because it meant that no vital interest of theirs was effected. Lysaght notes:

> Colonial disengagement almost complete, they were unlikely to be involved in wars of self-determination as ... South Africa and Israel were the last frontiers.[178]

States that had emerged through a process of external self-determination would not let the law be used against them. The many authoritarian regimes among Article 1(4)'s backers would have rejected any incorporation of the right of internal self-determination in situations other than racist regimes. Despite Article 1(4)'s temporary nature, the South African armed conflict

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[176] E Rosenblad International Humanitarian Law of Armed Conflict (1979) 37, points out that Protocol 1 is retrospective, just as the Hague and Geneva Conventions were. It pays no attention to essential new trends, for example frequent use of guerilla warfare in non-international conflicts. He submits that it should have included all armed conflicts of an international character. But most Humanitarian Conventions are an inadequate response to previously experienced problems.

[177] A Cassese "A Tentative Reappraisel of the Old and the New Humanitarian Law of Armed Conflict" in The New Humanitarian Law of Armed Conflict vol.1 (1979) 468.

[178] CDDH/1/SR22.

[178] C Lysaght "The attitude of the Western Countries" in Cassese (ed) The New Humanitarian Law of Armed Conflict (1979) vol 1 349 at 354.

still demands humanitarian attention.

3.4.6.4 ARTICLE 1(4) IGNORES THE TRADITIONAL OBJECTIVE CRITERIA OF DISTINCTION BETWEEN INTERNATIONAL AND NON-INTERNATIONAL ARMED CONFLICTS AND SUBSTITUTES SUBJECTIVE CRITERIA

Three basic criticisms of Article 1(4) have been made under this general head.[180]

(i) Article 1(4) sets no geo-military threshold for application. Kalshoven registers that Article 1(4) fails to provide any indication of the level at which a 'struggle' assumes the character of an armed conflict.[181] As noted, the U.K. used Article 1 of Protocol 2, which sets a high objective threshold for application of Protocol 2, to set a geo-military threshold in Article 1.[182] E.Luard (MP) stated that this "implies a high level

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[180] F Kalshoven "Reaffirmation and Development of International Humanitarian Law applicable in armed Conflicts: The first session of the Diplomatic Conference 20 February - 29 March 1974" 5 NYIL (1974) 3 at 32.

[181] Ibid.

[182] Its declaration on signature of the Final Act of the Conference reads:

> "(a) in relation to Article 1, that the term 'armed conflict' of itself and in its context implies a level of intensity of military operations which must be present before the Conventions and the Protocol are to apply to any given situation, and that this level cannot be less than that required for the application of Protocol 2, by virtue of Article 1 of that Protocol, to internal conflicts."

Annex to the U.K. Declaration on signature of the 1977 Protocols - paragraph (a).

of intensity of military operations."[183] The British interpretation of Article 1(4) has been criticised for attempting to change the proper meaning of the Article because no such level of intensity is actually expressed in Article 1(4). Draper replies that although the Protocol is silent on the point, the effective functioning of the instrument demands a minimum level of intensity and Article 96(3) requires such an intensity by necessary implication.[184] Draper ignores the fact that geo-military capacity as a qualification for application is alien to interstate wars. Even very low intensity conflicts between states are international. Nevertheless, Article 1(4)'s exclusion of any conflict intensity prompts some doubts as to the practicability of Protocol 1. From the discussions at the Diplomatic Conference, it appears that the national liberation movements and their supporters sought to convince sceptics that they did have a high objective war making capacity. In the discussion of the meaning of "armed conflict" in Article 1(4),[185] it was noted that it can be argued that the South African armed conflict has reached an intensity requiring international regulation.

(ii) Article 1(4)'s complete rejection of geo-military criteria makes it uniquely contradictory of international law. This

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[183] Hansard H/C Debates vol 941 col 237 14/12/1977.

[184] G Draper "The Implementation of the Geneva Conventions of 1949 and the Additional Protocols of 1978" 164 Recueil des Cours (1979) 47.

[185] 3.4.3.

criticism contrasts Article 1(4) with the customary distinction between international and non-international armed conflicts made on the basis of geo-military scale. Only when an internal conflict reached a certain intensity did it become international for the purposes of the application of humanitarian law. Thus, a war of national liberation was internal "if viewed objectively".[186] But the desuetude of the customary modes heralded the demise of geo-military considerations in the internationalisation of internal armed conflicts and they were finally abandoned at the 1974 Diplomatic Conference. Article 1(4) is not unique in ignoring these considerations. The law always ignores objective factors when it assumes that all conflicts between states always have the capacity to become large scale. The only criterion for the classification of interstate conflicts as international is that they take place between distinct international subjects.[187] Article 1(4) assumes, like Article 2 of the 1949 Conventions, that any act of violence, no matter how small, between the official armed forces of international subjects, usually states but in this case states and national liberation movements, constitutes international armed conflict.

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[186] CDDH/1/SR3 at 37 - Italian delegate.

[187] A far more radical approach than Article 1(4) was the proposition by certain Western states that the distinction between international and non-international armed conflicts be eliminated entirely and replaced by purely objective criteria related to different standards of protection. Norway urged such an abolition but, failing that, supported Article 1(4) because it constituted the largest possible scope for humanitarian law. It was foiled when the success of Article 1(4) was followed by the emasculation of Protocol 2.

(iii) Article 1(4)'s definition is subjective and arbitrary. Cassese, dividing Article 1(4) into two elements, notes that one of these, the government against which a war of liberation is fought is objectively defined as either a colonial regime, a racist regime or an alien occupying power.[188] Such governments objectively exist,[189] the present South African Government being an example. Cassese argues that the other element of the definition, the national liberation movement representing a 'people', is not clearly identified in Article 1(4). Consequently, it appears that any movement or rebellious group struggling against one of the aforementioned classes of government may claim that it is engaged in an international armed conflict. Abi-Saab, however, argues that the characterisation of the liberation movement in Article 1(4) is not based on subjective criteria.[190] He notes that Article 1(4) does not refer to the intention of liberation movements but to their objective situation and whether or not that situation warrants the application of the principle of self-determination. Both Cassese and Abi-Saab use objective in the sense of the objective nature

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[188] A Cassese 'A tentative reappraisal of the old and the new humanitarian law of armed conflict' in A.Cassese (ed) The New Humanitarian Law of Armed Conflict (1979) vol.1 467.

[189] A point made inter alia by Cassese op cit 467; G Abi-Saab 'Wars of National liberation in the Geneva Conventions and Protocols' 165 Recueil des Cours (1979) 353 at 380; Forsythe op cit 1979 75.

[190] Ibid.

of the parties involved. This accords with the definition of international armed conflict as taking place between distinct, objectively identifiable, subjects of international law. The narrow selection of adversary states and national liberation movements may appear arbitrary, but it is a result of the restrictions placed on self-determination as a legal right because of the slow but politically realistic development of existing legal categories.

3.4.6.5 ARTICLE 1(4) IGNORES RECIPROCAL/ COROLLARY OBLIGATIONS

Draper feels

> ...that the international community is likely to be confronted by entities bound by a body of humanitarian law that they are unable to apply even if they had the will to do so.[191]

Can national liberation movements be regulated by rules adapted to regulate states? The law relies heavily on the municipal law and organisational infrastructure of states, together with the threat or use of reprisals, to ensure compliance.[192] The infrastructural weakness of national liberation movements may lead to non-observance of the law because it undermines reciprocity. South African soldiers instructed to treat ANC

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[191] G I A D Draper "Wars of National Liberation and War Criminality" in M Howard (ed) Restraints on War (1979) 135 at 159.

[192] The traditional point of view is that
> ...the law of armed conflict should not regulate non state parties, for this would eliminate the reciprocity between juridically equal states which is one of the primary inducements for obedience to the law.

D P Forsythe "The 1974 Diplomatic Conference on Humanitarian Law" 69 American JIL (1975) 81; CDDH/1/SR2 at 12-14; CDDH/1/81 at 5.

guerrillas according to the law on capture, will not do so if they cannot expect similar treatment from the ANC. As Draper's statement outlines, it becomes a question of two factors:

(i) The ability of the national liberation movement to implement the Conventions and Protocol.

Draper expresses two specific doubts as to this ability.[183] Firstly, he questions how the complex requirements of penal enforcement of the Conventions and Protocol are to be met by national liberation movements. Do they have the penal law system, judicial apparatus, substantive and procedural law to, for instance, govern a trial of a person charged with a 'grave breach' of the Conventions or Protocol? What law would govern his extradition to a third state for trial? Secondly, Draper asks how the provisions of Geneva Convention 4 relating to occupied territory are to be enforced? Who are 'protected persons' for the purposes of the Convention? Members of national liberation movements are of the same nationality as the incumbent and thus under Article 4 are precluded from protection. Draper's doubts are valid. The Conventions especially, envisage a stable battle zone and sophisticated infrastructural resources in a conflict between states with citizens and territories of their own. As Bond notes,

> ...the very fact that they (national liberation movements)

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[183] G I A D Draper "The implementation of the Geneva Conventions of 1949 and the Additional Protocols of 1978" 164 Recueil des Cours (1979) 1 at 48.

> are guerrillas rather than governors precludes their acting like the latter; and to the degree that the law imposes obligations on governors qua governors, the guerrillas will be unable to comply.[184]

It would be unrealistic to expect an organisation like the ANC to observe the detailed provisions of all four of the 1949 Conventions and Protocol 1. Dinstein cites this as a good reason for rejecting Articles 96(3) and 1(4).[185] Despite these problems, it has been submitted that the common sense solution is to impose the obligations that can be fulfilled.[186] This would disturb the balance of reciprocity, but it would leave some enforceable law, a better situation than no law at all. Protection for lawful combatants would be easily adhered to. The fact that one party is a state is no guarantee of adherence and the fact that the other party is not is no guarantee of non-adherence. Lysaght's solution is to draw an analogy with common Article 3 of the Geneva Conventions, which urges parties to an Article 3 conflict to make special agreements bringing into force "all or part of the other provisions of the Convention." The Conventions and Protocol would be applied in Article 1(4) conflicts in so far as they are capable of application.[187] Bothe et al., Draper and Aldrich, all

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[184] Op cit 1975 76.

[185] Y Dinstein 31 American University LR (1982) 850.

[186] W Mallison and S V Mallison "The Juridical Status of Privileged Combatants under the Geneva Protocol of 1977 concerning international conflicts" 42 (2) Law and Contemporary Problems (1978) 4 at 74.

[187] C Lysaght "The Attitude of the Western Countries" in A Cassese (ed) The New Humanitarian Law of Armed Conflict vol.1 (1979) 352.

take issue with this point of view, insisting that it is not admissable to argue that a party to a conflict does not have at its disposal the material means of organisation to comply with the Protocol because an Article 96(3) declaration cannot be made without the material conditions necessary for fulfillment of all obligations under the Conventions and the Protocol.[198] Aldrich concludes that the Conventions and Protocol do not apply to wars of national liberation because few, if any, national liberation movements would have the ability to carry out such obligations unless they were about to succeed in becoming the government of a state and would therefore be unlikely to file Article 96(3) declarations. At the Conference the national liberation movements asserted that they were fully capable of implementing all the obligations, but the ANC's limited commitment suggests otherwise. Nevertheless, Aldrich's argument avoids the fact that many states will also undertake the obligations of the Conventions and Protocols by becoming party to them without possessing the infrastructure to actually implement them. Yet, unlike national liberation movements, these states will not be required to prove their ability to comply. Their ability will be assumed. Imposing such strict criteria of ability to comply also ignores the similar problems facing organised resistance movements under Article 4A(2) of Geneva Convention 3, which does not prevent the

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[198] Bothe et al. op cit 43-44; Draper 164 Recueil loc cit; G Aldrich "Progressive development of the laws of war: A reply to the criticisms of the 1977 Geneva Protocol 1" 26 Virginia JIL (1986) 694 at 701-2.

corpus of the law being applied to resistance movements. The question of compliance in these situations is a question of the operation of the law once it is applied, not an issue of application. Therefore, it is submitted that the ability to comply with general principles should be regarded as adequate for national liberation movements. Capability of full compliance cannot serve as a condition for preventing or invalidating Article 96(3) declarations by national liberation movements, such as the the ANC. What is more, wars of national liberation go through stages and are not always by definition unconventional.[199] The ANC might regard the basic infrastructural requirements as being met by its organisational structures in the 'safe harbours' of the Frontline States and through its covert structures within South Africa, until such time as it liberates territory and establishes permanent bases in South Africa. The representative of FRELIMO at the Conference claimed that,

> ...it has been shown in practice that, despite disparities in the resources of the parties involved, nothing prevented the national liberation movements from respecting the principles of humanitarian law.[200]

Violations of the letter of the law would occur, but they are just as likely to occur in interstate conflicts. Perhaps, therefore, a more important consideration is:

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[199] Abi-Saab op cit 1979 383.

[200] CDDH/1/SR3.

(ii) The willingness of national liberation movements to comply.

The FRELIMO representative also said:

> The essential requirement indeed [is] not the technical apparatus or the material means, but the will to apply the principles of humanitarian law and the political outlook of the parties.[201]

The ANC's 1980 Declaration indicates an obvious interest in applying the law. Nonetheless, its adherence record is grim.[202] The recurrent practice of making the civilian population the object of attack, despite its professed strategy of avoiding attacking soft targets,[203] is in direct violation of international law. But the low impact of the law is also due to a lack of reciprocity. The South African Government has made little effort in the humanitarian field.[204]

Ultimately, we must recall that the rationale for applying humanitarian law in the South African armed conflict is to restrain anti-humanitarian behaviour rather than apply highly technical obligations. It is submitted that the best course for both sides in the South African armed conflict to follow would be

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[201] CDDH/1/SR14 at 20.

[202] The adherence records of national liberation movements are not good. In the Portuguese colonies their record was dubious. The law failed in Zimbabwe because ZANU denied the applicability of any law.

[203] See Appendix A.

[204] J Bond 32 Washington & Lee LR (1975) notes at 77 that incumbent regimes seldom hamstring themselves when dealing with guerrillas who torment them; contra Graham 32 Washington & Lee LR (1975) 45.

a policy of flexible application of the law, concentrating on its core principles and only applying the more detailed law when it becomes possible. As Lysaght noted, common Article 3 of the Conventions anticipates such an approach by allowing for separate agreements to bring more of the law into operation. Given the nature of the adversaries, such agreements in the South African situation are likely at best to be only tacit understandings based on strict reciprocity. Each party would sanction technical violations by the other, concentrating rather on adherence to the rules that prohibited unnecessary destruction and suffering, torture, terrorism, and violations of lawful combatant status and P.O.W status. These types of rules are easiest to comply with because they do not rely on infrastructure, but on the political will of the opposing sides. Violations of these rules are also more conspicuous from the point of view of international opinion, a potent force for compliance. An even more potent force for compliance is that ugly face of reciprocity, reprisals. As the ZANU spokesman at the conference said:

> It was obvious that in the absence of legally enforceable provisions in the Conventions that would ensure that they were respected in all circumstances, the only thing that would make the parties to the conflict respect the Conventions would be the knowledge that whatever acts were committed by one party would be committed by the others. The liberation movements could take prisoners, they could attack enemy civilians, they could take hostages and they could give no quarter.[205]

Reprisals are a common practice in the South African conflict. ANC bomb attacks are followed by SADF cross border raids,

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[205] CDDH/1/SR6.

township massacres by ANC offensives. In Vietnam, the granting of lawful combatant status to the Vietcong only occurred after United States prisoners were threatened with execution unless such status was accorded. Similar incidents occurred in Algeria. Once a national liberation movement takes prisoners, the complexion of the incumbent's attitude to lawful combatant status and P.O.W status changes. Moreover, as the legal context of the South African armed conflict alters, the conduct of both sides must alter. The law is self-reinforcing.

The ANC's 1980 Declaration points to such a flexible response to the law. It has undertaken to apply the practicable general principles of the law. The declaration appears to be, if not a rejection of Article 1(4) and Article 96(3), at least a tacit admission by the ANC that the machinery in Protocol 1 for applying the law in toto is unlikely to lead to its application. The overture calls for a reciprocal response from the South African Government.

3.4.6.6 ARTICLE 1(4) HAS A BUILT IN NON-APPLICABILITY CLAUSE

Article 1(4) is unlikely to be useful as conventional law because of its wording, especially the labels "colonial," "alien" and "racist" attached to the incumbent regimes. Norms of justice are not alien to international treaty law, but they are non-functional when they not only require relaxation of state sovereignty, but impose what are formally unacceptable labels on

the target government, no matter how correct those labels may be. Such governments, either will not become parties to the Protocol, or if they do, will not agree that they are colonial, alien or racist.[206] The Israeli explanation of its vote against Article 1(4) is symptomatic:

> Draft Article 1, paragraph 4 had within it a built in non-applicability clause since a party to it would have to admit that it was either racist, alien or colonial - definitions which no state would admit to.[207]

The South African Government will never admit to being "racist" and thus will never become party to the Protocol. The problem for the sponsors of Article 1(4) was how to keep its scope so narrow that it would not impinge upon their own sovereignty. The solution of using the three labels, was, in effect, no solution at all. Although the labels were suitable for use in the U.N. where the majority could impose them on the target state, they were of no use in a treaty because they destroyed any possibility of agreement with those nations that were to apply the treaty. In fact, many Western delegations only withdrew their opposition to Article 1(4) when they realised that not only was it unlikely that it would be applied to them, it was unlikely ever to constitute successful treaty law. Article 1(4) became something of a hollow victory. Not one Article 96(3) declaration has yet been made. The ANC appears instead to have moved the application

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[206] Borrowdale 15 CILSA (1982) 48; G Roberts "The New Rules for Waging War: The Case against Ratification of Additional Protocol 1 " 26 Virginia JIL (1985) 109 at 126; Aldrich op cit 1986 202.

[207] CDDH/1/SR36.

of humanitarian law outside the rigid parameters of Articles 1(4) and 96(3).

3.4.6.7 SUMMARY OF CRITICISMS, ATTITUDES AND ALTERNATIVES

Because Article 1(4)'s backers concentrated on its usefulness as an instrument in the general political struggle against colonial, alien, and racist regimes, while its detractors concentrated on its technical deficiencies, consensus was lost. We are left with two competing norms; one supportive of the internationalisation of wars of national liberation, politically strong but legally shaky; the other arguing that those conflicts are non-international, legally stronger but politically weak. In essence, the concept of internationalising certain wars of self-determination can be accommodated within the structure of international law, but the language of Article 1(4) was not the correct means to achieve this accommodation.[208]

In the South African armed conflict, Article 1(4) left the ball in the Government's court, where it will probably remain. The South African Government has not become a party to the Protocol nor is it likely to. Thus as treaty law the Article has not advanced nor will it advance humanitarianism in South Africa. Are

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[208] Lysaght op cit 360 feels that a better solution would have been to apply the corpus of the law in full to conflicts attaining a certain level of violence, disregarding the international/non-international dichotomy, which is the source of most problems of application. But such a solution was, and probably remains, politically unacceptable.

we then left with a humanitarian vacuum in the South African conflict?[208] It is possible that the South African Government would have rejected Article 1(4) even if it had been couched in more acceptable terms. Indeed, the sponsors of Article 1(4), realising the impossibility of the acceptance by South Africa of the concept that wars of national liberation are international armed conflicts in treaty law, may have had its transformation into custom as their long term goal. An examination of the possibility of such a transformation is called for.

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[208] Borrowdale's fear, op cit 1982 56.

3.5 THE INTERNATIONAL CHARACTER OF WARS OF NATIONAL LIBERATION AND CUSTOMARY INTERNATIONAL LAW

3.5.1 INTRODUCTION

The compilers of the Encyclopedia of International Law note:

> Against the target state's/government's objections to entering into formal treaty relations with liberation movements, scholars and state representatives supporting the cause of liberation have argued that wars of liberation are international wars according to customary international law and that the treatment of members of liberation movements as combatants and P.O.W's is a matter of ius cogens derived from the principle of self-determination within the context of decolonisation.[210]

The transformation of the notion of the international character of wars of national liberation into a rule of custom is controversial. It is the aim of this section to ascertain whether or not a new rule of custom to this effect has come into existence at the time of writing. But before we do this, a brief word must be said about the formation of international custom.

3.5.2 FORMATION OF CUSTOMARY INTERNATIONAL LAW[211]

The two essential elements required to establish a custom are state practice and opinio iuris.[212]

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[210] Encyclopedia of International Law Vol 3 (1982) 248.

[211] See generally, I Brownlie Principles of Public International Law (1973) 5ff.

[212] Article 38(b) of the Statute of the International Court of Justice defines "international custom, as evidence of a general practice accepted as law." Although logically incorrect in that it is the practice which provides the evidence of the custom, the Article contains the two essential elements of custom.

Villiger defines state practice as

> ...any act, articulation or other behaviour of a state, as long as the behaviour in question discloses the states conscious attitude with respect to its recognition of a customary rule.[213]

State practice provides evidence of the formation of the customary rule. It includes a state's abstract as well as concrete actions.[214] The state practice must be (i) general. Common and widespread practice, not universality, is required.[215] The state practice must be (ii) uniform and consistent. The practice must be identical under generally uniform circumstances.[216] The practice must be consistently applied in the sense that single parties cannot, and do not, alter it. The (iii) duration of practice varies according to the objective requirements of the establishment of the rule. In general there is no set period,[217] but a practice requiring repeated repetition must last the required duration, while a practice requiring only one act may bring the rule into existence immediately.[218]

Opinio iuris can be defined as an awareness upon the part of a

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[213] M E Villiger Customary International Law and Treaties (1985) 4.

[214] M Akehurst "Custom as a Source of International Law" 45 BYBIL (1974/5) 1 at 3-4.

[215] Brownlie op cit 7.

[216] D P O'Connel International Law (1970) vol 2 15.

[217] Brownlie op cit 6. Cf Asylum Case 1950 ICJ Reports 296ff.

[218] Akehurst op cit 15. Cf North Sea Cases ICJ Reports 1969 42-43.

state that it follows a certain practice because that practice arises from a legal obligation or right.[218] Because of its abstract nature, opinio is normally inferred from practice.[220] The two elements have a dynamic relationship. The less conclusive the state practice, the clearer must be the evolving opinio iuris.[221]

Generally, customary rules bind all states whether they assent thereto or not. But customary rules do not bind states that dissociate themselves, either expressly or by implication, from the formation of such rules. States seeking to dissociate themselves from a rule must unequivocally and steadfastly oppose themselves to the formative process of the rule.[222] Sustained objection to the emergence of a custom by many states may prevent that emergence by negating state practice and a general opinio iuris.

3.5.3 RELEVANT SOURCES OF EVIDENCE FOR THE TRANSFORMATION OF ARTICLE 1(4) INTO CUSTOM

Written observations by states on draft texts to bodies like the ICRC, statements made in the General Assembly or in other U.N. organs, votes on U.N. resolutions, statements at diplomatic

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[218] North Sea Continental Shelf Case 1969 ICJ Reports 28.

[220] North Sea Continental Shelf Cases 1969 ICJ Reports 43ff.

[221] Villiger op cit 28.

[222] Fisheries Case 1951 ICJ Reports 116,131.

conferences, amendments labeled at such debates, explanations of votes, interpretive declarations, reservations made in connection with the adoption of a text, are all instances of state practice.[223] Mere participation in a conference has no connection with a concrete rule and possesses no value as practice. Votes on single draft rules and draft texts as a whole are significant, both vis a vis the individual states and with respect to the state community. Large votes for or against a rule either erode or build a communal opinio. But all these actions are abstract and are not unequivocal, requiring further material practice to circumscribe and apply the contents of the rule in question.[224]

Treaties can incorporate existing customary law. They may in the course of time also come to be regarded as evidence of customary law.[225] The conduct of states in connection with their contractual obligations - signature, ratification or accession - and subsequent application of a treaty, is crucial to gauging its evidential weight. However, the passage of the general principles of a treaty into custom applicable to non-parties to the treaty will not be immediate even if the vast majority of states became a party to it because, as Baxter notes, there is no such thing as

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[223] Villiger op cit 8.

[224] Loc cit.

[225] R R Baxter "Multilateral Treaties as Evidence of Customary International Law" 41 BYBIL (1965/6) 275 at 278.

international legislation.[226] The superficial unanimity of, for instance, the 1949 Conventions, is undermined by a large number of reservations and understandings. Baxter does believe that the number of state parties is "roughly proportionate" to a treaty's evidential weight.[227] Separate proof of an opinio that the treaty is declaratory of custom or contains custom does clarify matters. Such proof can be had from statements made about customary law in the text of a treaty or statements made subsequent to the treaty's conclusion that assert that at the time of adoption it constituted custom or that it had come to reflect the rules of custom since its adoption.[228] The burden of proof lies on he who asserts that a treaty contains custom. He must adduce evidence of state practice and opinio from the time of adoption of the text of the treaty to the date of the issue of application.

3.5.4 ARTICLE 1(4) AND CUSTOMARY INTERNATIONAL LAW

3.5.4.1 INTRODUCTION

The debate has focussed on Protocol 1 as the foundation of a

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[226] Baxter op cit 1965/6 286.

[227] Baxter op cit 1965/6 277. Villiger loc cit argues that something more is required.

[228] A Borrowdale "The Future of the Law of War: The Place of the Additional Protocols in Customary International law" 14 CILSA (1981) 79 at 88.

custom internationalising certain wars of national liberation.[228] What must be proved? Sufficient evidence must be adduced to support a customary rule that the South African armed conflict is, as provided in Article 1(4), international. This evidence must establish the existence of state practice in respect of such a rule and an opinio that it is law. International law provides little assistance as to the level of proof necessary.

3.5.4.2 AT THE 1974-77 CONFERENCE

The Conference records indicate that the proposed Article 1 was greeted with apprehension by some and welcomed by others. Several delegates were of the opinion that Article 1 incorporated existing law as developed in the U.N..[230] The Egyptian delegate said:

> We are just proposing to them to state explicitly in the field of humanitarian law what they have already accepted as existing and binding law within the framework of the U.N. and general international law.[231]

If such sentiments were correct, it would make proving Article 1(4)'s transformation into custom irrelevant because the concept it contains would already be custom. But one would have to accept that U.N. activities before 1974, especially General Assembly

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[228] For a definitive study see: A Borrowdale "The Future of the Law of War: The Place of the Additional Protocols in Customary International law" 14 CILSA (1981) 79ff.

[230] CDDH/1/SR22 at 1 and 15 - Romania.

[231] CDDH/1/SR2 at 20. See also K Asmal The Status of the Combatants of the Liberation Movement of South Africa under the Geneva Conventions of 1949 and Geneva Protocol 1 of 1977 (1980) 7.

resolutions, were a fons et origo of such a rule of custom, an extremely tenuous proposition because of their abstract nature. Although by 1974 the principle of self-determination had become a part of general international law, it is fairly certain that concept of the international nature of wars of national liberation had not. That the concept was viewed as innovative before the 1974 Conference, is evident from the objections raised against Abi-Saab's liberal interpretation of "power" in Article 2 paragraph 3 of the Conventions. Most Western delegates saw Article 1(4) as innovatory and by "no means a formalisation of the law."[232] Socialist states also regarded it as an innovation.[233] The extreme position, taken by Israel, was that Article 1(4) violated accepted legal norms. At the Conference, apparent consensus on Article 1(4) was achieved, despite Western problems with the Article, partly because there was no perceived threat to their interests and partly because of their desire to make concessions in order to keep the Conference going. The problems certain states had with Article 1(4) reemerged on the signing of the Final Act of the Conference - the UK's declaration limiting the Article's operation to high intensity conflicts being a case in point. Many Western nations accepted the principle of Article 1(4), but were opposed to the terminology or

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232 H Mallison and V Mallison "The Juridical Status of Privileged Combatants under the Geneva Protocol of 1977 Concerning International Conflicts" 42(2) Law and Contemporary Problems (1978) 18; C Murray 33 ICLQ 465.

233 See the statements of Yugoslavia, Czechoslovakia, Syria in CDDH/1/SR2 at 6ff.

possible inroads on their sovereignty. The problem of practicability was an added doubt, more deep rooted than cosmetic. It is possible that many nations signed the Final Act in the belief that the Article would never become effective law. Only Israel indicated resolute opposition to the Article at the Conference by consistently voting against it. But the other protagonist, South Africa, had indicated its opposition by leaving the Conference very early on. The signing of the Final Act was an instance of state practice, but it carries little weight because such signature does not bind states. It is evident that at the conclusion of the Conference Article 1(4) had not been transformed into custom. Further evidence of state practice and opinio was necessary.

3.5.4.3 RATIFICATION AND ACCESSION

Ratification or accession, processes by which states legally bind themselves, are of significance when adjudging the evidentiary weight of state practice in respect of Article 1(4). Mallison and Mallison state:

> If Protocol 1 becomes a widely ratified multilateral convention, and the major military powers are included among the state parties, there is strong reason to believe that Article 1(4) will be accepted as prescribing a standard or norm of international law.[234]

The rate of ratification and accession of Protocol 1 began tardily, but has taken off in recent years. In 1979 there were 11

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[234] Op cit 18.

parties.[235] In 1980, there were 17.[236] By the beginning of 1982 there were 21.[237] At the beginning of 1986, 57 states had become party to Protocol 1.[238] By the end of that year, the number had increased to 66, exactly forty percent of the number of states party to the Geneva Conventions.[239] These include a number of Western powers, such as Italy, originally opposed to Article 1. But major military powers such as the United States have not become a party to Protocol 1. 66 states is a substantial number, constituting just under forty percent of the international community, but it is not substantial enough. Only if the whole or a very substantial part of the international community were party to Protocol 1 would Article 1(4)'s transformation into custom be unequivocal. The norm may have been established between the states already party to Protocol 1. But it cannot regulate the nations to which such a norm must apply because it fails the test of generality of practice.

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235 F Ribeiro "Humanitarian Law: Advancing Rapidly Backwards" 97 SALJ (1980) 42.

236 A Roberts & R Guelff (eds) Documents on the Laws of War (1982) 459-460.

237 C Murray "The Status of the ANC and SWAPO in International Humanitarian Law" 100 SALJ (1983) 402 at 404.

238 251 IRRC (1986) 112. Italy was the 57th state to become a party to Protocol 1 - 27 February 1986. It was also the 50th state to become party to Protocol 2 .

239 256 IRRC (1986). Sixty states, including France, are party to Protocol 2.

3.5.4.4 SOUTH AFRICA AND ISRAEL AS SPECIALLY AFFECTED STATES

As noted, Israel opposed the formation of Article 1(4) - voting consistently against it and not becoming party to the Protocol. By leaving the Conference in 1974, not signing the Protocol, and continuing to treat the matter as an internal affair, the South African Government has also dissociated itself from the existence of any customary norm aimed specifically at South Africa.[240] It is, however, more than a question of dissociation. When the only two states who can actually apply such a norm - South Africa and Israel - consistently dissociate themselves from the formative processes of such a norm, the emergence of the norm itself becomes endangered.[241] In the North Sea Cases[242] the ICJ stipulated that

> ...a very widespread and representative participation in the (1958 Continental Shelf) Convention might suffice of itself, provided it included that of states whose interests were specially affected.

Specially affected states were those coastal nations which possessed a continental shelf as opposed to landlocked states that had no special interest. Villiger notes that this implies that "...without the practice of specially affected states, a customary rule could not arise, nor continue to exist."[243] South Africa and Israel may be regarded as specially affected states.

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[240] Israel denies it explicitly - see C J R Dugard 10 SAYIL (1984) 35 at 53.

[241] See Villiger op cit 13.

[242] 1969 ICJ Reports 43.

[243] Ibid.

Without their participation it can, despite widespread international participation, be argued on the basis of the North Sea Cases that no custom internationalising the armed conflicts within the two states can arise.[244] There are historical precedents for binding states against their will, for example, the eradication of the slave trade. The Fisheries Case[245] provides some precedent for establishing a customary rule binding on a state which rejects the rule in question, but only where that rejection is minor. Although there is no doubt that the tide of international opinion has swung strongly against South Africa, we find ourselves in something of a legal twilight zone. The situation calls for a closer look at the target states' municipal practice to gauge whether or not they are as hostile to the formation of such a norm as they appear to be.

3.5.4.5 MUNICIPAL PRACTICE

Municipal practice provides indirect evidence that affected states are beginning to pay attention to humanitarian law. Israel

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244 D Schindler 163 Recueil des Cours (1979) 136 sums it up:
> It must be emphasised that the question whether wars of national liberation can be regarded as international conflicts is ... not a question of whether a new rule of customary law has developed. A rule of customary law may well have come into existence with regard to the principle of self-determination, but not with regard to the application of the Geneva Conventions to wars of national liberation. The requirements for a new rule of customary law in this respect are hardly fulfilled, as the states particularly affected by such a rule as well as other important states have consistently taken up against it.

245 1951 ICJ Reports 116,138.

is, according to the International Commission on its invasion of Lebanon, obliged to give P.O.W. status to captured PLO combatants.[246] The Israeli Government rejects such suggestions and denies that they are customary law, a view confirmed by its courts in Military Prosecutor v Omar Mohamed Kassem[247] and Jab'r v Military Commander of Judea and Samaria Regions.[248] But the Israeli Government has not ignored the new developments in the law entirely. It undertook to extend to PLO combatants in Lebanon the general principles of humanitarian law embodied in Geneva Convention 4 (Civilians), including ICRC and legal access.[249] In 1981 the death penalty was abolished in occupied territory. Dugard notes that as a result PLO combatants are not martyred like their ANC counterparts in South Africa.[250] In Israel itself, the death penalty is a competent penalty, but only two executions have taken place since 1948.[251] Israeli practice does not accord with its stated position. PLO combatants are accorded a de facto special status and special treatment, viz.: special military tribunals and separate detention facilities.

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[246] Dugard op cit 1984 51.

[247] 1971 42 ILR 470.

[248] 13 Israeli Year Book of Human Rights (1983) 339.

[249] Dugard op cit 1984 52.

[250] Ibid.

[251] Dugard loc cit, notes that in December 1983 an Israeli court sentenced two Israeli Arabs to death for murdering a soldier on instructions of Al Fatah. Dugard says that the prosecutor never asked for the death sentence and officials and academics assured him that the sentence would be altered on appeal.

Rubin illustrates that this tendency of labelling 'terrorists' as criminals while in fact treating them as P.O.W's, is common in states denying the applicability of the law of armed conflict.[252] He notes that in Vietnam, the Vietcong were classed as P.O.W's without regard to the technical question of status, where on a strict application of the Geneva Conventions it would have been denied.[253] In Ulster the British Government has granted 'political prisoner' treatment to the IRA, but not political prisoner status. In Italy the Red Brigade also gets special treatment.[254] Towards the end of the Algerian conflict the French courts began to grant P.O.W status to FLN combatants.[255] Rubin sums up the trend:

> Arguably, the behaviour of states and defending governments reflects, as part of the lawmaking process, a series of political evaluations developing parallel to the 1949 Geneva Conventions. These evaluations may be better suited to the realities of modern armed conflict than the legal categories established by the Conventions. The treatment accorded to captured 'terrorists' in practice more closely conforms to the underlying principles of humanitarian law than the Geneva formulation would require and may spring from the same humanitarian roots. The formulation however remains unmodified, possibly reflecting the statesman's desire to reserve to themselves the legal discretion asymmetrically advantageous to defending governments under the present treaty formulation.[256]

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[252] A P Rubin "Terrorism and the Laws of War" 12 Denver Journal of International Law and Policy (1983) 219 at 220.

[253] Op cit 226.

[254] Rubin op cit 227.

[255] E Rosenblad International Law of Armed Conflict (1979) 84.

[256] Loc cit.

Rubin does not mention South Africa, but he may well have. South African municipal law regards ANC guerrillas as criminals guilty of common law crimes, such as treason, and statutory crimes, such as terrorism under the Internal Security Act 74 of 1982.[257] A number of recent cases indicate, however, that the municipal position is not as consistent as the black letter criminal law would have us believe. As in Israel, the South African Government, in the form of its judicial arm, reacts sensitively to international opinion in what is technically occupied territory - Namibia. In S v Sagarius,[258] three SWAPO members were convicted of participating in terrorist activities in terms of the Terrorism Act 83 of 1967. Evidence before the court showed that the accused were part of a group of 22 guerrillas who had infiltrated Namibia from Angola armed with automatic rifles and explosives. They engaged in sabotage and were subsequently captured by the SADF after a skirmish. They were wearing the distinctive blue denim SWAPO uniform. The death sentence was competent but there was no evidence of the accused having caused death. Professor J.Dugard was called as an expert witness for the

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[257] Implicit in this approach is the judgement of the old English case Proceedings against Aeneas Macdonald alias Angus Macdonald (1747) 18 ST TR 858 at 868 (British Int. Law Cases Vol.4 522 at 523). The court held that:

> Because by the laws of all nations subjects taken in arms against their lawful prince, are not considered prisoners of war, but as rebels, and are liable for the punishment ordinarily inflicted on rebels.

[258] 1983 (1) SA 833 (SWA). Commented on extensively by Murray op cit 100 SALJ 402ff.

defence. Noting that South Africa, not having become party to the 1977 Protocols and not bound by them, was not obliged to confer P.O.W. status on SWAPO members, he suggested

> ...that there is support for the view that this position has become part of customary international law, part of the common law of international law. In my judgement this argument is premature, in that Protocol 1 has not yet received that support that it is part of international law, binding upon states that have not ratified the Convention. Yes, I have already expressed the view that in my judgement a South African Court has no option but to exercise criminal jurisdiction over SWAPO; that a court cannot simply direct that members of SWAPO be treated as P.O.W's. Nevertheless, it is my view that having regard to the new developments in international humanitarian law as reflected in Protocol 1 of 1977 and having regard to the special status of a Namibian, that such factors should be taken into account when it comes to the imposition of a sentence, and in particular it is my view that the court may have regard to these developments when it comes to the question of the death penalty because the Convention of P.O.W's of 1949 makes it clear that a P.O.W. may not be executed by the detaining power for military activities prior to his arrest unless they amounted to war crimes.[259]

Dugard argued not for the legal diminishment, but for the moral diminishment of the accused's guilt - extenuating circumstances- because of the trends established in Protocol 1. Although he ruled that South Africa was not bound by Protocol 1 and thus international law served as no legal excuse for the accused's crimes,[260] Bethune J held that the developments were relevant at the sentencing stage.

> In die getuienis is daarop gewys dat daar 'n neiging in die internasionale reg is om gevangene wat openlik in 'n kenmerkende uniform deelgeneem aan 'n wapenstryd teen koloniale, rasistiese of vreemde moonthede, die status van

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[259] At 836. Quoted by Murray op cit 1983 SALJ 406.

[260] At 837G.

> krygsgevangende te gee.[281]...die neiging ..... as 'n faktor beskou moet word by oorweeging van die vraag of die doodsgevonnis opgele moet word.[282]

Van der Schiff has extracted the mitigating factors taken into account in the judgement.[283] Those relevant to the impact of international law on the Namibian armed conflict are:

(1) The ICJ and other U.N. organs have branded the South African presence in Namibia as illegal.[284]

(2) This attitude is shared by a large part of the international community.[285]

(3) The accused regarded their actions as part of a just struggle with strong legal and foreign support.[286]

(4) The skirmishes between SWAPO and the SADF amount to a war situation.[287]

(5) There is a tendency in international law to accord P.O.W. status to combatants captured in a characteristic uniform in an armed conflict against a colonial, alien, or racist regime.[288]

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[281] At 836C-D.

[282]. Further at 836E-F.

[283] C van der Schiff "Consideration of international humanitarian law in the sentencing of members of SWAPO S v Sagarius 1983 (1) SA 833 (SWA)" 1983 7 SAYIL 112 .

[284] 836B.

[285] 836B.

[286] 836C.

[287] 835.

[288] 836C.

(6) Although the South African legislature has qualified the accuseds' offences as a particularly serious misconduct, this did not appear to be the view of the major part of the community of SWA, nor that of the international community, according to the undisputed evidence given in court.[269]

The court did not hand down the death sentence, but sentenced accused no's 1 and 2 to seven years and accused number 3 to eleven years imprisonment.[270] Cowling asserts that the new judicial flexibility could hasten the transformation of the relevant provisions of the Protocols into customary international law and that the judgement is of great relevance to South Africa itself.[271]

The recognition of humanitarian law as a moral excuse is not yet settled in South Africa itself. Evidence that it has been rejected as a moral excuse is provided by the judgement in S v

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[269] 837D.

[270] Van der Schiff op cit 115 criticises the judgement for ignoring the principles of sentencing in South African law. The court did not question whether tendencies of international law could be accepted as mitigating factors in South African courts. But as a general rule the court has a wide discretion in this area, and can probably take into account such tendencies even though they are contrary to South African law.

[271] M G Cowling "The Effect of International law on Municipal Law in times of Armed Conflict - Sagarius 1983 (1) SA 833 (SWA)" 7 SACC (1983) 79 at 83.

Mogoerane and others.[272] Mogoerane, Mosoli and Motaung were three Umkhonto members who had attacked police stations at Moroka, Wonderboomspruit and Orlando, killing four civilians and police and injuring 11 others. One police constable was shot down with his hands in the air. There was no evidence that the accused distinguished themselves in any way from civilians. The accused were charged with treason. The death sentence was competent. Professor Dugard gave similar evidence to that which he had given in Sagarius before Curlewis J in the TPD. Curlewis J held that his evidence "was of no relevance at all"[273] because South Africa is not a signatory to the 1977 Protocols and the concept of giving P.O.W. status to members of groups such as the ANC/PLO had not become part of customary international law. After a vigorous tirade against the PLO, which, as Murray correctly points out, was not germane to the issue,[274] Curlewis J noted that

> ... it may be said that Prof. Dugard's view ... is that there may well be a move among academics to think that this should be regarded as custom, and thus influence the court. I have taken that into account.

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[272] TPD 6 August 1982 unreported - published in 1 Lawyers for Human Rights Bulletin (1983) 118.

[273] Lawyers for Human Rights Bulletin op cit 123.

[274] Op cit 1983 SALJ 408.

Murray points to the factual differences between the cases- unlike Sagarius and his co-accused who wore SWAPO's distinctive uniform and had not killed anyone, Mogoerane's and his co-accused's actions were much more violent and destructive of human life.[275] Because of their use of civilian disguise there is serious doubt whether they would have been protected had Protocol 1 applied unqualifiedly as they would not have met its personal conditions for the application of lawful combatant status. But that is an issue which can be resolved within the jurisdiction of international law. Curlewis J made no response to the political nature of the accused's crimes. Murray notes that his treatment of Dugard's evidence was informed by his categorisation of the ANC "...as an organisation prepared to shed the blood of innocent people and does so..." and one which attacks the police in order to bring about anarchy and chaos.[276] Curlewis sentenced the three accused to death. In December 1982 the Security Council and General Assembly called upon the South African Government not to execute them, with the General Assembly declaring expressly that they should be P.O.W's.[277] This call was repeated in a unanimous Security Council Resolution[278] endorsed by the European Economic

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[275] Ibid.

[276] Loc cit, quoting from 1 LHRB (1983) at 124 and 126 respectively.

[277] C J R Dugard "Traitors or Prisoners of War" 1983 AS 60-source 1983 (20) U.N.Monthly Chronicle no 2 at 14,15,31.

[278] Resolution 533 (7/6/1983).

Community.[279] Despite concerted international and internal appeals, all three were executed in June 1983.[280]

The inconsistency of the South African courts is revealed by S v Buthelezi and Others.[281] In this case the accused were convicted of contravention of section 2(1)(b) of the Terrorism Act 83 of 1967 for undergoing military training and of a contravention of section 2(1)(c) for possession of fire arms, other weapons and ammunition. Didcott J recognised[282] that black people in South Africa have real grievances and he sympathised with their personal circumstances.[283] As Murray notes,[284] however, it was his appreciation of the accused's factual situation that was significant. The accused, he said, "...came under the influence of agents of and recruiters for the Umkhonto wing of the ANC. So they joined up as soldiers."[285]

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[279] Rand Daily Mail 8/6/1983.

[280] The execution revealed deep divisions on the issue in South African society. Many whites said that the executions were correct; blacks were of the opinion that they should have been treated as P.O.W's - The Star 8/9 June 1983. Pamphlets to this effect were circulated in Soweto.

[281] (D&CLD) 22 Sept.1982 Case no. CC/85/82 reported in 1 Lawyers for Human Rights Bulletin (1983) 129.

[282] Op cit LHRB at 129.

[283] Op cit at 131.

[284] Loc cit.

[285] Op cit 132.

Murray points out that the South African and Namibian cases can be distinguished because of Namibia's international status.[286] But the position within South Africa is contradictory. Murray notes that in Buthelezi, Didcott J in effect accorded legitimacy to a movement that is intent upon overthrowing the government of which he is technically a part and in doing so he took cognisance of the opinion of the majority in both South African and international society. On the other hand, Curlewis's approach in Mogoerane bolsters criticism that the South African judiciary is a part of the repressive racist state machinery and that South African law deliberately ignores trends in international law.[287]

Ultimately, however, Sagarius and Buthelezi express judicial sentiments of a relatively isolated nature. Moreover, even should the relevance to sentencing of the developments in international law become widely accepted by the courts, it can never develop into a legal excuse without either of the following developments occurring:[288] (a) The South African Government becoming party to the Protocol[289] or executive directions being issued to the

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[286] Op cit 1983 SALJ 409.

[287] Ibid.

[288] The problem of reception of international humanitarian treaty and customary law into South African law in order to be used in the South African courts, although unrelated to the correct international legal position, is of obvious practical import to captured combatants.

[289] Under South African law, which follows English law in this respect, treaties are not directly operative in the municipal sphere, but require transformation by legislative

effect that the Government recognises that the armed conflict is international and that ANC members are to be accorded lawful combatant status and P.O.W. status.[290] (b) It is proven in the courts that Article 1(4) is a part of custom and that the Article is not in conflict with any act of parliament.

Such a proof was attempted in the Cape Supreme Court in the recent case of S v Petane.[291] Petane was an ANC political commissar indicted for attempted murder and for terrorism under the Internal Security Act 74 of 1982. When asked to plead, he refused to do so, raising the point in initio litis that the Court had no jurisdiction to try him because he was a P.O.W. in terms of Protocol 1 and the procedure for trial of a P.O.W. set out in Article 45 of the Protocol had not been followed. Conradie J chose to construe the accused's defence as asserting a right to

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intervention for their municipal application - Pan American World Airways Incorporated v S.A. Fire and Accident Ins. Co. Ltd 1965 (3) SA 150 (AD). J Dugard 1968 AS 58-60 notes that the four Geneva Conventions of 1949 were gazetted in May 1968 by the Defence Department, apparently for "general information" only (Govt Notice nos R749, R750, R751, R752. GG no. 2064 3/5/1968.). They were not incorporated by legislative process. However, R v Giuseppe 1943 TPD 139 and R v Werner 1947 (2) SA 828 (AD), treated the unincorporated 1929 Convention as part of South African law. The Pan American case conflicts with these early cases and the correct position is unclear.

[290] H Booysen "Treaties, Enemy Aliens and P.O.W's in South African law" 90 SALJ (1973) 386 at 388-391 notes that if an act lies within the power of the executive, the enactment of the treaty is unnecessary. But ' the decision is the executive's not the court's, which cannot question the act and enforce the treaty against the government if it changes its mind.

[291] 1988 (3) SA 51 (CPD).

lawful combatant status.[282] In other words, he viewed the issue as a question of whether international law applied in the South African context and thus could serve as a legal excuse for the accused's crimes. This occasioned a detailed examination of the relevant legal developments. Conradie J seized on the crucial issue of whether Article 1(4) of Protocol 1's extension of the definition of international armed conflict to include wars of national liberation had crystallised into a norm of customary international law binding the court.[283]

Conradie J accepted that, on the authority of Nduli and another v Minister of Justice and Others,[284] customary international law is part of South African law unless it conflicts with an act of parliament. Despite the strict test for proof of customary law set out in Nduli, requiring that such custom be "...either universally recognised or have received the assent of this country," Conradie J conceded that universality was not a requirement for the proof of custom in international law[285] and accepted that where a custom is recognised by international law,

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[282] At 54G.

[283] At 56C.

[284] 1978 (1) SA 853 (AD). See also the more unequivocal statements in Kaffraria Property Co.Pty ltd v Govt. of the Republic of Zambia 1980 (2) SA 709 (E) at 712-715 and Intersciences Research and Development Services Pty ltd v Republica Popular de Mocambique 1980 (2) SA 111 (T) at 124.

[285] Following Margo J in Intersciences Research and Development Services Pty ltd v Republica Popular de Mocambique 1980 (2) SA 111 (T) at 125.

it will also be recognised by South African law.[296] After examining the essential elements of custom, usus (usage or state practice) and opinio iuris,[297] the learned judge emphasised that before a customary international rule would be accepted into South African law it "...would at the very least have to be widely accepted."[298]

Conradie J then attacked the defence's argument that such a near universal state practice in the form of U.N. resolutions directed at South Africa had transformed the provisions of Protocol 1 into custom.[299] He considered U.N. resolutions to be abstract statements constituting opinio iuris rather than usage and went on to hold that without a "...preceding usus, such a declaration cannot give birth to a customary rule...".[300] Only "...the material, concrete and/or specific acts of states... are relevant as usus."[301] On this basis he regarded as irrelevant the general condemnation of South Africa's internal policies in international forums for the transformation of Protocol 1 into custom. The

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[296] At 57A.

[297] At 57C-D.

[298] At 57I.

[299] At 58A et seq.

[300] At 58F.

[301] At 59A.

learned judge appeared to rely on MacGibbon's argument[302] that General Assembly resolutions per se cannot provide evidence of either of the elements of custom because (a) they are abstract actions that cannot constitute evidence of state practice and, (b) when states vote for a General Assembly resolution they know they are voting for a recommendation, thus it cannot convey the sense of legal obligation essential to an opinio iuris.[303] Conradie J backed up MacGibbon's point with Thirlway's statement that the abstract assertion of a rule cannot be construed as state practice, which must be material, but can at best serve only as supplementary evidence of state practice and opinio iuris.[304]

Conradie J based his judgement on the extent to which states had become party to the Protocol. He accepted Thirlway's argument that the ratification or accession of states to a treaty, despite its abstract appearance, is in fact a concrete practice because the state accepts the rules in the treaty as governing it.[305] Conradie J had earlier stated that "...since ratification of Protocol 1 is open to every state, very little short of that

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[302] I MacGibbon "Means for the Identification of International Law - General Assembly Resolutions: Custom Practice and Mistaken Identity" in B Cheng (ed) International Law Teaching and Practice (1982) 10.

[303] At 59C-F; MacGibbon op cit at 23.

[304] H W G Thirlway International Customary Law and Verification (1972) 58.

[305] At 60I-61B.

could be construed as an acceptance of its provisions."[306] After a brief excursus,[307] the learned judge examined the rate at which states had become party to the Protocol since it came into force in 1978.[308] He concluded that the fact that by December 1986 only 66 states were party to the Protocol as opposed to the 165 states party to the Geneva Conventions and that no major world power had acceded to or ratified the Protocol, indicated that the

> ...approach of the world community to Protocol 1 is, on principle, too half-hearted to justify an inference that its principles have been so widely accepted as to qualify as rules of customary international law.[309]

After noting that the defence had been unable to cite any statement in the published literature that Protocol 1 had attained the status of custom[310] - he quoted from articles by Murray,[311] Swinarski,[312] and Asmal,[313] and at length from Borrowdale,[314] all to the effect that they feel the norm has yet

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[306] At 59E.

[307] See below 178 et seq.

[308] At 64C-65B.

[309] At 65B.

[310] At 65C.

[311] SALJ 1983 loc cit.

[312] C Swinarski "Customary International Law and Protocol 1" in Studies and Essays on International Humanitarian Law and Red Cross Principles.

[313] K Asmal The Status of Combatants of the Liberation Movement of South Africa under the Geneva Conventions of 1949 and Protocol 1 of 1977 (1980).

[314] Op cit 1981 89-90.

to crystallise - he disagreed with Dugard's[315] conclusion that there is a growing conviction among writers that the Protocol has spawned such a rule of custom.[316] He then held:

> For the reasons which I have given I have concluded that the provisions of Protocol 1 have not been accepted in customary international law. They accordingly form no part of South African law.[317]

The preliminary point was dismissed and the trial continued.

Although the judgement is a fair reflection of the position de lege lata, it is, perhaps, unadventurous. Conradie J constantly hinted at further stumbling blocks to the transformation of the Protocol into custom beyond the lack of international support.

One such impediment was the ANC's unwillingness to apply the law in the future. In a brief excursus within the judgement, Conradie J postulated a situation where Protocol 1 had become a part of custom and it governed the South African armed conflict. He argued that even if this were the case, neither party has accepted the Protocol. He noted that the ANC's 1980 Declaration was not an Article 96(3) declaration and nor had the ANC agreed in the interim to abide by Protocol 1's terms.[318] The ANC's reluctance to commit itself to humanitarian law, he imagined,

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[315] 1983 AS 66.

[316] At 65-67.

[317] At 67C.

[318] At 62D-63D.

arose from its unwillingness to be bound by the provisions within the Protocol enforcing the distinction between civilians and the military and prohibiting attacks on civilians.[318] He also noted the unlikelihood of the South African Government accepting the Protocol in the future. He concluded that the defence argued that both parties are bound by the Protocol despite the fact that the only thing they agree on is that they don't desire it to apply.[320] The fact that neither party recognises the application of the law or applies the law at present, does undermine the assertion that it is custom binding on them. However, it is submitted, with respect, that the learned judge went to far. He intimated that the ANC's conduct since 1977 indicates a disinclination to the future application of the law. Conradie J ignores the fact that if the application of humanitarian law was settled, the ANC would be able to accept the quid pro quo-application of humanitarian law in exchange for abandoning tactics in violation of that law. In other words, it is impossible to moot a situation where the law applies and then prejudge the attitude of the parties in that situation on the basis of their attitude at present when the law does not apply.

At the end of his judgement, the learned judge went so far as to say that he was "...not sure that the provisions relating to the field of application of Protocol 1 are capable of ever becoming a

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[318] Articles 48, 51 and 52.

[320] At 63I-64A.

rule of customary international law...". He did not decide the point.[321] But it should be seen in the light of a key objection he broached in the course of his judgement to Protocol 1 ever giving rise to custom, viz.: that the two affected states, Israel and South Africa, were the only states who could apply the Protocol in practice and they were too few to establish a general practice in respect of armed conflicts of this kind.[322] The argument was left undeveloped because the lack of adequate international support for the Protocol made its articulation unnecessary at this stage. Indeed, Conradie J's acceptance of large scale international support for the Protocol as the criterion for its transformation into custom, negated the inference that the custom was unviable because it was incapable of sufficient generality of practice. Conradie J also left open the possibility of proof that these two states had dissociated themselves from a rule of custom to Protocol 1's effect. With South Africa clearly in mind, he conceded that multilateral treaties such as the Protocol could bind non-parties as custom, but only if they exhibit an unambiguous opinio iuris that they consider the treaty provision to be a rule of custom binding them.[323] He viewed non-ratification as strong evidence of non-acceptance. The learned judge ignored the possibility that universal adherence to the Protocol, apart from Israel and South

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[321] At 67B.

[322] At 61B.

[323] At 61I-62A.

Africa, accompanied by the constant reiteration of calls for its application, might change the complexion of the situation to such a degree that the law would bind these states against their will.

In the final analysis, the defence's argument that the Protocol has been transformed into custom failed because of lack of evidence of state practice and opinio iuris to confirm it. However, the learned judge took a fairly conservative view of what constitutes the practice of states. Conradie J was correct to condemn U.N. resolutions not aimed at a specific rule internationalising the South African armed conflict as irrelevant to the formation of such a rule.[324] Nevertheless, he ignores the fact that certain General Assembly resolutions have articulated this specific rule. Moreover, his reliance on MacGibbon's dismissal of General Assembly resolutions as evidence of state practice and opinio is not completely sound. It is possible that when states vote for certain types of resolutions, for instance those in the human rights field, they do not regard their votes as just recommendatory, but in fact intend those instruments to have a greater legal weight. Just as treaties entered into on a contractual basis can spawn custom, it is possible that resolutions made with something more than animo commendatio can also spawn custom. In Thirlway's analysis,[325] the apparently abstract nature of the state practice of ratifying a treaty

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[324] At 59E.

[325] Op cit 58.

becomes concrete because of the *opinio* that it is binding, an *opinio* with a contractual basis. Likewise, when states vote for certain General Assembly resolutions, they may have an *opinio* that the resolution is more than just a recommendation - they may feel that it is in fact binding. That *opinio* can transform the ostensibly abstract vote on the resolution into a concrete state practice supporting the growth of a rule of custom. A custom established through resolutions would require supportive evidence that the resolutions were not regarded by the states as purely recommendatory. Such evidence is available in the assertion in the General Assembly that certain resolutions are binding. The fault of MacGibbon's argument is that he assumes that because the U.N. Charter sets out that General Assembly resolutions are recommendatory that is what they always are and always will be. He leaves no room for the development of the legal weight of these resolutions outside the parameters set down originally for them. Nevertheless, it is not settled that General Assembly resolutions asserting the international character of the South African armed conflict lend enough extra weight to confirm the Protocol's transformation into custom and the conviction and execution of ANC combatants continues unabated.

In response, the international community increasingly supports instruments urging

> ...governments to take the appropriate measures to save the lives of all the persons threatened with execution in trials staged by the illegitimate racist regime on charges of high

treason and under the obnoxious terrorism act.[326] The calls for the commuting of Mogoerane's and his co-accused's death sentences are just one instance of the response to this appeal. The Security Council also appealed to South Africa on several occasions in 1982 not to execute ANC members sentenced to death for treason.[327] Such appeals continue to be made. Some are successful, others not.

ICRC activities in South Africa have also increased dramatically in recent years in response to an upsurge in the intensity of the conflict and a concomitant increase in international concern about it. The ICRC plays an extensive role in humanitarian law[328] and also acts on behalf of political prisoners not covered by the law.[329] But the ICRC does not invoke international law to justify

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[326] G.A. Resolution 341/9H (XXXIV) 1979.

[327] C J Dugard "Appeals for Clemency" 1982 AS 58 - source 19 U.N.Monthly Chronicle (1982) June 33. In Resolution 503 (1982) the Security Council unanimously called upon the South African government to commute the death sentences imposed on N Lubisi, N Munera and P Mashingo. Later their sentences were commuted to life imprisonment. In December 1982 the G.A. and Security Council unanimously called on the government to commute the death sentences imposed on A Tsotsobe, I Shabangu and D Moise, whose appeals were dismissed by the South African Appelate Division in September - S v Tsotsobe 1983 (1) SA 856 (AD).

[328] See M Veuthy "The International Red Cross and the Protection of Human Rights" 1979 Acta Juridica 207.

[329] Veuthey op cit 218, notes that the ICRC sees itself as having a general duty to work in situations of internal tension where detention is common. The organisation's approach is informal and secretive, but appears to be successful. It has established a permanent delegation in Pretoria. Its main activities are (i) prison visits to political prisoners including convicted ANC combatants, in prisons throughout South Africa and,

its presence in South Africa.

3.5.4.6 CONCLUSION

We are left with weighty evidence of growing interest in the international regulation of the South African armed conflict. This interest is exhibited in three marked tendencies:

(i) Growing international support for such regulation expressed in many different international fora and not only in the U.N..

(ii) Partial reception of the special status of liberation movement combatants by other states and in respect of sentencing in South African courts.

(iii) Increased humanitarian activity in South Africa.

(iv) An increase in the rate at which states are becoming party to Protocol 1.

But it is still not proven that there is a rule of international custom to Article 1(4)'s effect. Only near universality of consensus on the same concrete rule will confirm it as custom. Such consensus does not yet exist. Although calls in international fora are generally directed to the granting of protected status for ANC members, some appeal only for the commutation of the death sentence. Support for the Protocol in the form of ratification is often accompanied by extensive reservations and is sometimes based on the implicit belief that

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(ii) relief assistance to the civilian population. The frequency of ICRC visits has increased proportionately to the level of violence, and has also responded to distinct forms of violence, especially to recent township unrest where extensive relief work has been carried out.

Article 1(4) is a dead letter. Reception into the specially affected states' domestic law is fragmentary, inconsistent, and most often of an administrative rather than a legal nature. In fact, such reception is arguably part of a growing trend to accord special status to prisoners fighting for political causes in situations which fall totally outside the ambit of Article 1(4). Finally, increased humanitarian intervention in the South African armed conflict is based on a studious avoidance of the legal issues involved, in order to prevent the political logjams that prescriptive statements might occasion.

What must still happen before the norm contained in Article 1(4) conclusively becomes a part of customary international law?
(i) Major military powers must become party to the Protocol on the express undertaking that Article 1(4) is part of positive law and is not a dead letter. Powers such as the US and the UK have been supportive of Security Council resolutions urging the commutation of the death sentences of ANC members. Their opposition to Article 1(4) and the concept it contains appears to be waning. Their ratification could override South Africa's objection to the formation of such a norm. It is interesting to note, however, that Aldrich, arguing for ratification by the United States, attempts to convince those against ratification that Article 1(4) does not present any threat to the established

legal order because it is a dead letter.[330] Ratification under these circumstances would militate against the formation of a norm of custom based on Article 1(4).

(ii) Statements must be made by states party to the Protocol to the effect that they view Article 1(4) as declaratory of customary international law.

(iii) The South African courts must make a pronouncement to the effect that the norm is part of custom. But Petane makes such a pronouncement impossible in the foreseeable future. Moreover, even if such a custom were established, it would still run into the problem of the courts being unable to enforce rules of customary international law which conflict with South African statutory law as the Protocol manifestly appears to do. Further acceptance of the concept as a mitigating circumstance is possible.

(iv) The South African Government must acquiesce. Accession to the Protocols is highly unlikely. An executive direction to the courts admitting the existence of such a norm as custom is only slightly less improbable. Any contradictory administrative practice according ANC members special status, would, however, do much to undermine the official position and contribute to the formation of such a norm.

In light of the fact that Article 1(4) has yet to be transformed

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[330] G Aldrich "Progressive Development of the Laws of War: A Reply to Criticisms of the 1977 Geneva Protocol 1" 26 Virginia JIL (1986) 694.

into custom and the South African armed conflict does not conclusively fall within the material field of application of the law of international armed conflict, why continue with an examination of its personal field of application? A number of justifications exist:

(i) The rule will conceivably coalesce in the future, and prior exploration of its ramifications is useful.

(ii) It is already being used indirectly at the sentencing stage in South African courts.

(iii) It is regarded by the majority of the international community as being a part of international law applying to South Africa and although this opinion is legally precarious, it carries great political weight.

(iv) There is a legally viable case, although not strong, for considering South Africa bound under paragraph 3 of Article 2 of the 1949 Conventions. Thus a violation by South Africa of this interpretation would be a violation of the Geneva Conventions to which it is party.[331] There are, as noted, good arguments against such an option. The framers of the Conventions never envisaged such an interpretation and it stretches the Conventions too much. There is also no unanimity as to such an interpretation, making it difficult to prove as a rule of law, which such an interpretation by definition must be. But it remains a remote possibility.

(v) Alternatively, one can view Article 1(4), if not as a binding

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[331] G Abi-Saab 165 Recueil des Cours (1979) 433.

interpretation of paragraph 3 of Article 2 of the 1949 Conventions, then at least as an authoritative one and one with which the South African Government must be urged to comply. Application of the Geneva Conventions may only bring into play the impractical personal conditions for lawful combatant status contained in Article 4 of Convention 3. But it is arguable that Articles 43 and 44 of Protocol 1, with their more flexible conditions, are in turn an authoritative interpretation of Article 4 of Convention 3.

(vi) Flexible developments, such as the ANC's 1980 Declaration, point to a future for the law.

(vii) South Africa must be urged to apply, if not the Conventions and Protocols in their entirety, then at least those provisions relating to lawful combatant status and P.O.W status because:

(a) South Africa has as much interest in the ANC in ensuring that combatants are regarded as lawful and thus qualify for P.O.W status; (b) South Africa must avoid a situation where the ANC rejects humanitarian law as happened with ZANU in Zimbabwe;

(c) South Africa has a fundamental interest in preserving its domestic law by decriminalising ANC combatants.[332]

For these reasons it is submitted that there is justification for a detailed examination of the personal requirements for lawful combatant status in the South African armed conflict.

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[332] J Dugard "SWAPO: The Jus ad Bellum and the Jus in Bello" 93 SALJ (1976) 156 advanced similar reasons i.r.o. SWAPO.

CHAPTER FOUR

THE PERSONAL FIELD OF APPLICATION

4.1 INTRODUCTION

Rosas notes:

> When claims for P.O.W status are put forward by entities other than states, or entities whose statehood is in doubt, the claimants usually have in mind one overriding implication, which is not expressly mentioned in the third Convention (P.O.W) but which has traditionally been linked to the concept of P.O.W: namely that while P.O.W's may be held in custody for the duration of the war, they may not as lawful combatants be punished for the sole act of having participated in hostilities.[1]

The ANC is such a non-state entity and the claim of P.O.W. status for its combatants undoubtedly has lawful combatant status as its prime objective. This important protection, along with P.O.W status, was traditionally confined to interstate armed conflicts and predicated on the meeting of certain personal conditions. Article 1(4) was a revolt against the concept of international armed conflicts as taking place exclusively between states. Not surprisingly, the campaign for the protection of combatants of national liberation movements also came up against entrenched concepts in the personal field of application. The pre-1970's law focussed on the protection of regular state armies and moderated efforts to enlarge the personal field of protection.[2] Protocol 1's inclusion of irregular guerrillas among the groups of

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[1] A Rosas The Legal Status of Prisoners of War (1976) 222.

[2] M S McDougal & F P Feliciano "International Coercion and World Public Order: The General Principles of the Law of War" 67 Yale Law Journal (1958) 551 at 829.

permissible participants was pivotal to Third World emphasis on the protection of 'freedom fighters' such as ANC combatants. How is this protection to be achieved at an individual level in the South African armed conflict? Whether combatants in the South African armed conflict fall within the personal field of application of the law of international armed conflict is dependant on the answers to a two simple questions, viz.: Who qualifies for lawful combatant status and P.O.W. status? What must they do to qualify? These two questions prompt two further questions, viz.: What happens to them if they do not qualify? What other basic protections are available to combatants? In answering these questions, attention must be focussed on the conditions for protected status for irregular combatants because ANC combatants fight largely as irregulars. Although less controversial, the conditions the South African Government's regular armed forces must meet will also have to be examined.

The conditions for lawful combatant status are weakly and confusingly delineated in the 1949 Conventions. Protocol 1 went some way to clarifying the rules, but created ambiguities of its own. Enormous problems of interpretation occur, largely because of the absence of a consistent and logical basis for categorisation. It is useful to begin to unmesh the law by first considering the theoretical concepts and distinctions of the personal field of application and then examining these concepts in the context of the South African armed conflict, before going

on to examine the personal conditions themselves.

4.2 A THEORETICAL PERSPECTIVE ON COMBATANT STATUS IN THE CONTEXT OF THE SOUTH AFRICAN ARMED CONFLICT

4.2.1 FUNDAMENTAL DISTINCTIONS

Any understanding of the operation of lawful combatant status in the South African armed conflict must be underscored by knowledge of the technical meanings of certain classifications and their distinctions from other classifications because the consequences of these distinctions, all of which are extant in the South African armed conflict, manifest themselves in the personal regulation of combatants. The distinctions are between (1) armed forces and civilians; (2) combatants and non-combatants; (3) lawful combatants and unlawful combatants. While the categories overlap, they are not, as we shall see, identical.[3]

4.2.1.1 THE DISTINCTION BETWEEN ARMED FORCES AND CIVILIANS

The population of a belligerent state or entity is divided into two broad classes, viz.: The armed forces, including regular and irregular combatants as well as non-combatant members, and those who are not members of the armed forces, the civilians.[4]

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[3] See generally G Schwarzenberger International Law as applied by International Courts and Tribunals vol 2 The Laws of armed Conflict (1968) 110.

[4] M Greenspan The Modern Law of Land Warfare (1959) 53; Schwarzenberger ibid.

4.2.1.2 THE DISTINCTION BETWEEN COMBATANTS AND NON-COMBATANTS

This distinction differentiates between combatants who have the right to engage in actual fighting, i.e., to kill, wound or otherwise disable members of opposing forces,[5] and non-combatant members of the armed forces[6] as well as the whole of the civilian population, who do not have this right. Non-combatants who engage in actual combat are guilty of an offence, in certain circumstances punishable by death. The distinction between combatant and non-combatant serves to indicate to the combatant the persons whom he can attack and by whom he can expect to be attacked. Non-combatant members of the armed forces have the

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[5] Greenspan op cit 53.

[6] The more technical meaning of non-combatant is given to non-fighting members of armed forces such as doctors, nurses, chaplains and medical staff. They (a) belong to the armed forces; (b) wear a uniform or some form of fixed and distinctive sign; (c) are not entitled to participate in hostilities unless unlawfully attacked (Article 2(1) of Geneva Convention 1 1949 and Article 35(1) of Geneva Convention 2 1949); (d) are not legitimate objects of attack; (e) must be returned to their own side on capture unless they are retained to look after sick P.O.W's (Article 3 of the Hague Regulations). They are not P.O.W's (Article 3 of Geneva Convention 1). They get their special status from Article 28 of Geneva Convention 1 and Article 35 of Geneva Convention 2. A further class of non-combatants are camp followers. They are civilians who follow an army without belonging to it, eg., "Newspaper correspondents, reporters, sutlers and contractors" - Article 13 of the Hague Regulations as well as "civilian members of aircraft crews,...members of labour units or services responsible for the welfare of the armed forces" - Article 4A(4) Geneva Convention 3. They are entitled to P.O.W status on capture if in possession of a certificate from the military authorities of the army which they are accompanying - Article 13 of the Hague Regulations. The distinction is also used to differentiate between fighting and service troops- Article 3 of the Hague Regulations. However, service troops can be employed in combat, and can be objects of attack.

general right to immunity from attack because of their humanitarian role, identified by their wearing of distinctive badges, eg., the red cross for medics. Civilians receive this immunity solely from their civilian status.

4.2.1.3 THE DISTINCTION BETWEEN LAWFUL AND UNLAWFUL COMBATANTS

Lawful combatants are those members of the armed forces of a party to a conflict who are exclusively entitled to participate in hostilities.[7] Their belligerent actions are not justiciable in an enemy's criminal courts.[8] They are also entitled to P.O.W status under customary international law, the Hague Regulations, Geneva Convention 3 and Protocol 1. Traditionally, to gain protected status combatants had to belong to either the 'regular' armed forces of a party to the conflict, in which case the conditions their status depended on were assumed complied with, or to 'irregular' groups, in which case they had to conform to the conditions originally laid down in the Hague regulations, viz.: Be commanded by a person responsible for his subordinates; wear a fixed and distinctive sign recognisable at a distance; carry their arms openly; conduct their operations in accordance with the laws and customs of war. A number of approaches have been taken to the fate of civilians or irregulars who did not

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[7] E Rosenblad International Humanitarian Law of Armed Conflict (1979) 590.

[8] W A Solf "The Status of Combatants in Non-International Armed Conflicts under Domestic Law and Transnational Practice" 33 American University LR (1983/4) 53 at 58.

meet these conditions, but who took part in combat:

(i) The lawful/unlawful approach was to the effect that civilian participants were not only unprotected by international law,[9] they had in fact violated it and could be treated accordingly on capture.[10] Guerrillas, partisans, war traitors, francs tireurs and other de facto combatants not meeting the requirements for de jure combatant status, were war criminals under international law by the very fact of their participation in combat and were generally subject to the death penalty. The approach appears to be incorrect in that under pre-1977 law the failure of a combatant to distinguish himself from the civilian population - considered essential by pundits of this theory - involved no breach of any positive prohibition of international law, except to the extent that it might have involved a treacherous killing or wounding under Hague regulation Article 23(B).[11] It is probable that the unlawful label comes not from international law, but from the condemnation of such a combatant by the municipal law of the state concerned or the penal law of the occupying power, as the case may be.

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[9] They are not protected as combatants, but would still receive the minimal protections as civilians under Geneva Convention 4 and customary international law.

[10] G I A D Draper "The Status of Combatants and the Question of Guerilla Warfare" 45 BYIL (1971) 173 at 176. Despite a disclaimer he appears to support this theory.

[11] Greenspan op cit 61.

(ii) The privileged/unprivileged approach, advocated by Baxter in a seminal article in 1951, is the reigning orthodoxy.[12] After tracing the history of spies, guerrillas and other forms of hostile activity by non-armed forces members, he concludes that individuals who disregard or deliberately do not comply with the requirements for 'privileged' combatant status are governed by a single legal principle. Their actions are not violative of international law as such,[13] but they are deprived of the protections of international law and are in the power of the enemy.[14] Thus they are 'unprivileged' combatants, not unlawful combatants.[15] Unprivileged combatants are entitled to the substantive and procedural protections of Geneva Convention 4 (Civilians), but only in occupied areas. They are, however, open to drastic sanctions under the municipal law of the detaining power. Baxter bases his theory on the state practice of belligerents' military manuals and the decisions of national tribunals applying the law. The Privy Council, in Mohamed Ali and another v Public Prosecutor,[16] expressly sanctioned his approach.

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[12] R R Baxter "So Called 'Unprivileged Belligerency' Spies, Guerrillas and Saboteurs" 28 BYIL (1951) 321.

[13] Baxter op cit 1951 342.

[14] Baxter op cit 1951 343; J Stone Legal Controls of International Conflict (1954) 549,561,562,563,569.

[15] Baxter op cit 1951 notes at 344 that judicial determination of adherence to the international law requirements is a question of status, not of guilt. Once an unprivileged status is established then a combatant can be guilty at municipal law.

[16] 1968 (3) All E R 488 (PC) at 493.

(iii) The modern tendency is to ignore the conditions for the attribution of lawful or privileged combatant status and to treat all those who take up arms and belong to a party to the conflict as lawful or privileged combatants under international law, with a right to take up arms and to admission to P.O.W. status precluding prosecution at municipal law.[17] This tendency is grounded on a number of points. Firstly, it is contradictory to deprive a combatant of his protected status for failing to adhere to the conditions set out in the law while allowing a protected combatant to retain his protection even if he has violated the law in other respects.[18] Secondly, many states in practice treat combatants who do not fulfill the requirements for protected status as P.O.W's on capture, although denying them that status.[19] Thirdly, the principle of distinction discriminates against weaker parties as it is almost impossible for them to display their status. Cowling takes a new approach, underpinned by the realisation that the principle of distinction is

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[17] The approach in Committee 3 of the 1974-7 Geneva Diplomatic Conference - CDDH/11/SR33-36, CDDH/236 Rev.1 at 24-23.

[18] Rosenblad op cit 88 referring to Article 85 of Geneva Convention 3.

[19] A P Rubin "Panel Discussion on Protocols Additional to the Geneva Conventions on the Laws of War" 74 Proceedings of the American Society of International Law (1980) 191-212. He cites at 194 US practice with regard to the Vietcong in Vietnam, which must set a valuable precedent for all guerrillas, because of the flexible response of the US to the inability of third world guerrillas to conform to the conditions of visibility.

unworkable under modern conditions of warfare.[20] He submits that combatant status attaches to individuals permanently, derived from their membership of a group belonging to a party to the conflict. Civilians not part of a group belonging to such a party, do not have protected combatant status. Their taking up of arms does not alter their non-participant status and is a violation of a state's or detaining power's national law. Cowling argues that violations of the conditions of visible distinction are violations of the manner of participation, not a question of participation itself. He retains the criteria of visibility only to discover whether the combatant is guilty of a violation of the law of armed conflict, i.e., the war crime of not distinguishing himself from the civilian population. Unfortunately, while the 1974-77 Conference did set up violation of the visibility principle as a separate war crime in Article 44 of Protocol 1, it retained the principle in the Article as a condition for participant status in special situations.

4.2.2 LEGAL PROBLEMS FOR THE PERSONAL FIELD OF APPLICATION OF THE LAW OF INTERNATIONAL ARMED CONFLICT IN THE SOUTH AFRICAN ARMED CONFLICT

4.2.2.1 PROBLEMS WITH GUERILLA WARFARE

Guerilla warfare is the main method of fighting in the South

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[20] M G Cowling The Question of Combatant Status in Relation to the Application of the Laws of War (unpublished thesis - 1977) 138ff.

African armed conflict.[21] Umkhonto we Sizwe is weak in numbers and resources. It can only mobilise dispersed groups of men employing tactics such as sabotage. It avoids pitched battles. Guerilla warfare suits the ANC because of the vastly superior conventional military capability of its adversary. The South African armed conflict is an ideological war in which the allegiance of the civilian population is the principle objective and military tactics are less important than political and psychological methods, for without the population's support, ANC guerrillas have no logistical base. The incumbent's conventional troops also use guerilla warfare as a tactic. At the final stages of the armed conflict, conventional warfare may come into its own as the opponents become more equal in strength. At present, however, the use of guerrilla tactics causes immense problems for the application of a system of law derived from experience in conventional wars.

4.2.2.2 THE OBLIGATION TO GIVE QUARTER

Hague Regulations Article 23(c) prohibiting anyone from killing or wounding "...an enemy, who having laid down his arms or having no longer means of defence, has surrendered..." and Article 23(d) stating that it is forbidden "...to declare that no quarter will be given..." are now part of customary international law. All

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[21] Since 1945 guerrilla warfare has played a central role in the conflicts in Algeria, China, Cuba, Eritrea, Indonesia, Malaysia, Vietnam, the middle east, the Portuguese colonies, and in Southern Africa.

combatants in the South African armed conflict fall under an obligation to give quarter to all other combatants, regular or irregular, lawful or not. Quarter is anterior to all other protections afforded combatants. Nevertheless, it must be recognised that in guerilla warfare the obligation to give quarter can become a major logistical problem. It is difficult to take prisoners under fire; it is difficult to transport prisoners away from the combat zone. The situation is exacerbated when your opponents appear to be civilians, a common occurrence in South Africa. But as Kalshoven notes, there is nothing in Article 23 that applies the obligation only to lawful combatants.[22] Kalshoven outlines three situations where irregular guerrillas may be at an armed force's mercy, but quarter still applies:
(i) Guerrillas encountered in battle. The fact that the guerilla does not wear a distinctive sign or uniform does not make any difference. He may be guilty of crimes, but he may not be executed immediately. (ii) Suspected guerrillas caught in search operations among the civilian population. He submits that to finish off suspects on the spot is murder. (iii) Guerrillas caught in a hostile act not amounting to a fight. He submits that killing them in this case is not permissible. These situations occur in the South African armed conflict and under no circumstances can quarter be refused.

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22 F Kalshoven "The Position of Guerilla fighters under the Laws of War" 11 RDPMDG (1972) 55 at 67-69.

4.2.2.3 THE PRINCIPLE OF DISTINCTION AS A FUNCTIONAL CRITERION FOR LAWFUL COMBATANT STATUS IN THE SOUTH AFRICAN ARMED CONFLICT

The modern formulations of Rousseau's distinction between civilians and armed forces plays a key role in the conferring of lawful status on combatants in the South African armed conflict.[23] Is the principle functional in this role?

In its modern forms, the principle has two components:

(i) Although only assumed in Article 4 of Geneva Convention 3, Article 43 of Protocol 1 requires expressly that legitimate participants must belong to the armed forces of a party to the conflict. Legal participation is predicated on individual or group membership of a party to the conflict. Membership is established through a command link to that party. Members are distinguished from non-members, i.e., civilians who do not have a right to participate in combat.

(ii) The Convention and Protocol also require - implicitly for regulars, expressly for irregulars - that lawful combatants visibly distinguish themselves from the civilian population and the opposing side. They do this by the carrying of arms openly and the wearing of a fixed and distinctive sign. In the sense of this visibility principle, the distinction between participants and non-participants is based on what the individuals physically hold themselves out to be. The conditions of acting under

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[23] This distinction was reaffirmed in Articles 48 and 50 of Protocol 1. Article 50 defines "civilians" and the "civilian population" as distinguished from combatants.

responsible command and obeying the laws of war have been traditionally allied to the conditions of visibility. Together, these conditions constituted an effort to regulate the manner of participation. They were attached as criteria for lawful combatant status before it was realised that combat was not going to remain rigidly defined in terms of nineteenth century conventional warfare and that changes in its manner would endanger whole classes of combatants with the loss of the right to participate.

Not surprisingly therefore, the principle of distinction has been under sustained attack in recent years. Historically we have seen the numbers of participants grow and the numbers of civilians decrease. Resistance movements were added to the sanctioned armed forces in 1949, national liberation movements in 1977. The increase in the numbers of lawful participants has been coupled with the narrowing of the scope of the visibility aspect of the principle of distinction. Baxter points to the eventual demise of the law's "clothes philosophy," which he regards as a throwback to nineteenth century warfare. He states:

> As the current tendency of the law of war appears to be to extend the protection of P.O.W status to an ever increasing group, it is possible to envisage a day when the law will be so retailored as to place all belligerents, however garbed, in a protected status.[24]

The post-1949 trend towards wars of national liberation sparked

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[24] R R Baxter "So Called 'Unprivileged Belligerency' Spies, Guerrillas and Saboteurs" 28 BYIL (1951) 321 at 343.

off a debate about the functionality of the four Hague criteria, especially the carrying of arms openly and the displaying of a fixed and distinctive sign. In the context of wars of national liberation, guerilla warfare challenges the principle of visible distinction because guerrillas must mix with civilians. Often civilians serve as their logistical base, often they are civilians. Von Glahn argues that it would be tantamount to suicide for guerrillas who are members of national liberation movements to adhere to these conditions.[25] Paust regards this argument as a myth. He notes that arms need only be carried openly when an attack is on and that few participants attack with their arms hidden.[26] He argues that the drafters of the 1949 Conventions were aware of the problems of guerilla warfare and that the rigorous conditions set out in Article 4A(2) were based on the perception that guerilla irregulars violated a principle of humanity in war by concealing their identity.[27] Nevertheless, the modern perception is that the four conditions do impose unrealistic requirements on irregulars, especially on irregulars in wars of national liberation. Humanitarian law has always assumed the equality of belligerents and that observance of the law neither benefits nor harms any side. The relaxation of the conditions of distinction in the 1970's was a direct result of

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[25] K Von Glahn 1 Israel Year Book of Human Rights (1971) 233.

[26] J C Paust "Law in a Guerrilla Conflict: Myths Norms and Human Rights" 3 Israel Year book of Human Rights (1973) 39 at 73.

[27] Op cit 45-56.

the perception that the law discriminated against national liberation movements because they did not have the infrastructure to comply with it. They tended to ignore the law because it limited them.[28] The law was partially adapted in Protocol 1 to suit combatants in wars of national liberation. At the 1974-77 Diplomatic Conference, Third World states urged the abolishment of the distinction between civilians and combatants. They argued that the distinction was the product of Western concepts of armed conflicts between regular armies composed of clearly defined military personnel confronting each other along clearly defined front lines. These assumptions were not suitable for 'peoples wars' where every patriot was to be classified a soldier.[29] Western states agreed to the enlargement of the categories of sanctioned combatants, but would not do away with the principle of distinction entirely. Because of Western insistence on the principle's retention, the Third World group switched its attention to restricting its requirements as much as possible. The four Hague criteria were narrowed to the carrying of arms openly under certain conditions in Article 44.

Was there a need to retain the principle of distinction? When the

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[28] H Meyrowitz "The Law of War in the Vietnamese Conflict" in R Falk (ed) The Vietnam War and International Law vol 2 (1969) 516 at 541.

[29] The North Vietnamese delegate said that as a national liberation movement consisted of the whole civilian population, the whole population should have the right to participate - CDDH/111/SR33.

law was being formulated in the nineteenth century, the solutions to two problems - the problem of protecting the civilian population from attack by forcing the military to separate themselves from it through some effective sanction - and the problem of deciding who shall have the right to enter into combat - were found by binding the two together. The right to enter into combat was made dependent on meeting the requirements identifying the military as military, the solution of a suitable penalty to enforce the distinction between civilians and military. The principle of distinction's non-physical operation in the law, the membership of armed forces of a party to the conflict or command link, serves as the fundamental point of distinction between civilians and lawful participants. It must be retained to avoid the politically untenable situation of making the whole civilian population lawful combatants and thus legitimately open to attack. In the sense of its physical operation in the law, as a means for ensuring that combatants can be physically distinguished from civilians and from the opposing side, the principle of distinction can also not be abandoned without making the protection of the majority of the civilian population impossible. It should, however, have been abandoned as a criterion for lawful combatant status and rather enforced as a separate war crime. Why, if loss of status has been the penalty for ignoring the visibility condition for so long, should it be discarded now? There is nothing illogical per se in attaching conditions to protected status. But membership of armed forces is

enough to establish lawful participation because this right is really a case of the political acknowledgement of the legitimacy of the opposing group and, by extension, of its combatants. It is not a question of how a war is fought. Therefore, violation of the criterion of visibility should not remain arbitrarily connected with removal of the right to participate.[30] The arbitrary connection of status and visible distinction is unviable in modern guerrilla wars because too many combatants resemble civilians and they stand to lose their status because of this connection. The connection of status and distinction also leaves the assessment of compliance with the visibility conditions in the hands of the detaining power, offending the principle nemo iudex in re sua causa. The detaining power's discretion with regard to the award of status should be strictly limited. In addition, it is discriminatory to insist that a combatant who uses his 'invisibility' as a tactic to compensate for his material disadvantage should lose his status, while the combatant who engages in indiscriminate bombing does not. Both are actually guilty of a violation of the law of war because their manner of participation endangers civilian lives. Prosecution for the war crime of not distinguishing oneself is not only a suitable replacement for the loss of status as the penalty for contravening the visibility principle, it is also more appropriate to enforcement of that principle.

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[30] See M G Cowling The Question of Combatant Status in Relation to the Application of the Laws of War (unpublished thesis - 1977) 138ff.

Unfortunately, despite its update in Protocol 1, because of the retention of the visibility aspect, Rousseau's principle of distinction is not completely functional as a criterion for lawful participation in the South African armed conflict. We have yet to reach the stage that Baxter foresaw when the 'clothes philosophy' is entirely abandoned as a criterion for lawful participation and the legality of this participation rests solely on the combatants link to a party to the conflict. It is likely that ANC guerrillas will find it difficult to meet the less onerous conditions set out in Protocol 1. But the practice of states in conferring such technically unprotected combatants with protected status ex gratia sets a valuable precedent that should not be ignored in the South African situation.[31] In addition, we must recall that the De Maartens clause states clearly that the categories of lawful combatants established by the Hague Regulations and, by extension, in the 1949 Conventions and 1977 Protocol as the clause is now part of custom, are not exclusive.

4.2.2.4 THE RELATIONSHIP BETWEEN LAWFUL COMBATANT STATUS AND P.O.W. STATUS IN THE SOUTH AFRICAN ARMED CONFLICT

Most General Assembly resolutions claim P.O.W. status for

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[31] For instance in Vietnam, all Vietcong members were given at least P.O.W treatment on capture even if they did not qualify for it under international law. Indeed, the US went much further than legally required too, and worked out its own taxonomy of captured combatants in direct response to the different types of combatants it confronted.

national liberation movement members because it implies lawful combatant status. P.O.W. status and lawful combatant status are historically linked. Articles 1 and 2 of the Hague Regulations of 1899/1907 laid down the categories of persons to be regarded as lawful combatants. Article 3 explicitly linked this status to P.O.W. status. Geneva Convention 3 of 1949 added to the categories of combatants being classed as P.O.W's and implicitly assumed they had a right to lawful participation. Article 43 of Protocol 1 spells out the link between P.O.W's and lawful combatants. Nevertheless, although lawful combatants are always granted P.O.W. status on capture, the modern tendency to identify P.O.W. status with lawful combatant status is not sound in law. Not all P.O.W's are lawful combatants before capture, eg., camp followers. Lawful combatant status is a question of a political-military nature, involving an individual's objective connection with a party to the conflict and his compliance with a number of conditions distinguishing him as a soldier from the civilian population. P.O.W status on the other hand, is a question of a humanitarian nature. It is a guarantee of humanitarian treatment granted to captured lawful combatants and other, non-combatant, enemy aliens. It affords certain guarantees even to combatants who have violated the laws of war, but it is denied to those combatants who have not participated lawfully.

4.2.2.5 CONCLUSION

The basic tenets of the personal field of application of the law

of international armed conflict are not always appropriate to the South African armed conflict. The problems with the law are most acute with regard to the personal conditions for lawful combatant status set out in the 1949 Conventions, the area of law that must be examined first. Bearing these problems in mind, it is submitted from the outset that a liberal interpretation of the provisions is the only tenable interpretation.

4.3 PERSONAL CONDITIONS FOR LAWFUL COMBATANT STATUS UNDER THE 1949 GENEVA CONVENTIONS[32]

4.3.1 INTRODUCTION

This section examines the personal conditions for protected status set out in the 1949 Geneva Conventions against the background of the reality of the South African armed conflict. The conditions for members of regular armed forces differ from those set out for 'irregulars'. They are examined in turn.[33]

4.3.2 REGULAR COMBATANTS IN THE SOUTH AFRICAN ARMED CONFLICT

4.3.2.1 REGULARS IN TERMS OF ARTICLE 4A(1)

Article 4A(1) of Convention 3 of 1949 refers to regular forces as

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[32] Respect for lawful combatant status under Geneva Convention 3 is implemented through the simple expedient of Article 87 which provides that P.O.W's, as set out in Article 4, may not be sentenced to any penalties except those provided for members of the detaining powers armed forces who have committed the same act. The right of lawful combatants to participate in combat is universally recognised and is thus not the subject of sanctions in any detaining power's legal system for its own armed forces.

[33] The use of the terms regular and irregular is not explicit in the 1949 Geneva Conventions, but because of their customary use when referring to the pre-1977 distinctions in the categories of permissible combatants, they have been retained when dealing with the 1949 Conventions. According to this usage, regulars are the official armed forces of a party to a conflict; official in the sense that their existence is set out in the internal legislation of the party. Irregulars are members of groups of a voluntary nature who come into existence during wartime. Their connection with the party to the conflict is therefore more tenuous. Regulars tend to fight in a more conventional manner, while irregulars usually embrace unconventional tactics, but this is not necessarily so.

> (1) Members of the armed forces of a party to the conflict, as well as members of militias or volunteer corps not forming part of such armed forces.

Members of the armed forces and of attached militias and volunteer corps are lawful combatants. South Africa's armed forces falls within this category. The precise military elements that constitute its armed forces is a question of its domestic law[34] as set out in the Defence Act of 1957. It is the direct nature of this organisational link that distinguishes regulars from irregulars.

Can the ANC have regular forces? Following Rosas, it can be argued that the ANC can field regular forces.[35] The definition of regular forces in Article 4A(1) does not necessarily imply conventional warfare.[36] Why then, should the unconventional warfare practiced by the ANC imply irregular forces? All that is required is an objective link between the party to the conflict and its regular forces; the forces must be objectively subordinate to the high command through internal legislation. The ANC has set up an administration. There is little reason why it should not, through the usual process, establish regular armed

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[34] H S Levie Prisoners of War in International Armed Conflict (1978) 36.

[35] A Rosas The Legal Status of Prisoners of War (1976) 329-330. He argumes that all national liberation movements can potentially have regular armed forces.

[36] Consider the unconventional nature of the anti-insurgency operations of many units of the SADF.

forces within the meaning of Article 4A(1). These forces may practice unconventional warfare just as the South African Government's armed forces do. They could include full-time uniformed combat troops not tied to any particular region or popular militias organised at village level. Their apparent nature is not the issue; it is the nature of their objective link to high command that is crucial. Units of Umkhonto can arguably be considered to be the regular armed forces of the ANC. Despite this possibility, the unconventional warfare that the ANC engages in has resulted in its armed forces being generally characterised as irregular.

Do members of regular armed forces involved in the South African armed conflict have to observe the criteria of distinction set out for irregulars in Article 4A(2)? Article 4 explicitly regulates only irregular forces because it was traditionally assumed that regular forces meet these conditions anyway.[37] Rosenblad cites a number of relevant judicial decisions that are authority for the general principle that members of regular armed forces, captured while engaging in sabotage or espionage in occupied or enemy territory wearing civilian clothes or the uniforms of the opposing armed forces, would not be protected by international law because they have not conformed to the

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[37] A Rosas The Legal Status of Prisoners of War (1976) 328.

requirements of distinction explicitly set out for irregulars.[38] A typical decision was that made in Mohamed Ali and Another v Public Prosecutor.[39] The accused, members of the Indonesian armed forces, planted a bomb in an office building in Singapore, killing 3 civilians. They were caught escaping in a boat still dressed in civilian clothes. At the trial, their defence was that they were armed forces members. The Federal court held that,

> ...under international law a member of the armed forces of a party to the conflict who, out of uniform or in civilian clothing, sets off explosives in the territory of the other party to the conflict in a non-military building in which civilians are doing work unconnected with any war effort forfeits his right on capture to be treated as a P.O.W.[40]

The Privy Council dismissed their appeal. It held that members of regular armed forces in terms of Article 4A(1) had to comply with the four requirements of Article 4A(2), notably the possession of a "fixed distinctive sign recognisable at a distance". The court relied heavily on the writings of Lauterpacht, Stone, Baxter and Pictet and on the official military manuals of states. The court noted the importance of the distinction between non-combatants

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[38] E Rosenblad International Humanitarian Law of Armed Conflict (1979) 80. The cases include, inter alia, The Trial of General Oberst Von Falkenhorst War Crimes Reports vol 2 18-30; Ex Parte Quirin War Crimes Reports vol 2 28; Colepaugh International Law Reports 1956 79; The Trial of Skorzeny War Crimes Reports vol 9 92-94, appears to contradict this general principle. General Skorzeny's troops wearing US uniforms, infiltrated US lines. Witnesses said that on two occasions they were still dressed in US uniforms when they opened fire. Although Skorzeny was acquitted, it was because of lack of proof, and thus the case can be distinguished.

[39] 1968 (3) All E R 488 (PC).

[40] At 493.

and members of the armed forces and held that:

> Persons who adopt the protective clothing of the peaceful civilian in order to engage more effectively in hostile acts are 'unprivileged belligerents' not entitled to treatment as P.O.W's and in the words of Stone are 'left to the discretion of the belligerent threatened by their activities.' [The court held that] the accused forfeited their rights under the Convention by engaging in sabotage in civilian clothes.

The two accused were hanged.[41]

The conditions of distinction that regulars must adhere to will be fully explored when the problematic of irregulars is dealt with. But if regulars are not engaged in espionage or sabotage in enemy territory then their status is uncertain. What if regulars are attacked while out of uniform? Realistically, they must retain their lawful combatant status. The more controversial situation would involve entering into conventional combat out of uniform. Following the practice of denying irregulars lawful combatant status under these circumstances, regulars should also lose this status. Indisputably, there is security in fighting in uniform.

In South Africa, in order to remove the issue from domestic jurisdiction entirely, it is submitted that it would be better to allow regular combatants to retain their lawful status even

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[41] R R Baxter "The Privy Council and the Qualification of Belligerents" 63 American JIL (1969) 290 notes at 295 that the court could have treated the attack on a civilian building as a war crime under international law, but chose instead to treat it as a crime under municipal law, the general practice of a number of states since World War 2.

though they do not obey the overt conditions of distinction and rather prosecute them under international law for war crimes, including the crime of not distinguishing themselves. West Germany has adopted this approach in its Federal German Republic Manual on the Laws of War.[42]

4.3.2.2 REGULARS IN TERMS OF ARTICLE 4A(3)

Article 4A(3) reads:

> (3) Members of regular armed forces who profess allegiance to a government or authority not recognised by the detaining power.

The subsection is a response to the World War 2 predicament of governments in exile.[43] The meaning of "authority" is uncertain. Levie notes:

> Apparently, it was intended to cover such contingencies as a government which had ceased to exist and has not been replaced even by a government in exile.[44]

What of the ANC? It has been argued that national liberation movements are "authorities" and that thus their regular combatants are lawful. In Military Prosecutor v Omar Mohamed Kassem and Others,[45] the defendants, PFLP members caught in Israel, argued that they were entitled to the protection of

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[42] A Rosas The Legal Status of Prisoners of War (1976) 328 at 336.

[43] For example France, where the Free French government was not recognised by the Germans.

[44] Op cit 60, based on Final Record of the Diplomatic Conference of Geneva 2A (1949) 415.

[45] 1969 Israeli Military Court Ramallah file 9/67, 67 AJIL (1971) 409.

Convention 3. The court held that the Convention applies to relations between states, and not between states and non-states, and that this automatically excluded the defendants from the protection of Article 4A(3). The verdict was based on the traditional conception of international conflicts as interstate conflicts. Arguably, the ANC could insist on the lawful combatant status of its regular armed forces in terms of Article 4A(3) because it represents a people. Such fighters would, by analogy to Article 4A(1), have to prove their command link to the national liberation movement and, by analogy to Article 4A(2), conform to the conditions of distinction.

4.3.3 IRREGULAR COMBATANTS IN THE SOUTH AFRICAN ARMED CONFLICT

4.3.3.1 IRREGULARS IN TERMS OF ARTICLE 4A(2)

4.3.3.1.1 INTRODUCTION

Article 4A(2) of Geneva Convention 3 reads:

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

Article 4A(2) is applicable to "other" militia and volunteer corps, and organised resistance movements, in the sense that these forces are not under national law a part of the regular armed forces of the country.[46] How does the ANC fit in under Article 4A(2)? It is neither a volunteer corps, militia or resistance movement. But these groups are no longer appropriate to modern times and they cannot be taken as a numerus clausus. It appears that members of any irregular group of a voluntary nature, fighting on behalf of a legitimate party to an armed conflict such as the ANC and abiding by Article 4A(2)'s conditions, can qualify under the Article as lawful combatants.

Rosas notes that it has been generally assumed that should the combatants of national liberation movements wish to be classified as lawful under the 1949 Conventions, they must conform to the conditions laid down for irregulars in Article 4A(2).[47] He criticises this assumption because it confuses the supposedly irregular nature of the national liberation movement with its armed forces, which may in fact be regular. It is likely, however, that most, if not all the ANC's forces, will be irregular until very late in the armed conflict when public hierarchical military structures are established.

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[46] H Levie Prisoners of War in International Armed Conflict (1978) 39.

[47] Op cit 332.

Article 4A(2) sets out six conditions for lawful combatant status, viz:

(1) That the movement to which the combatants are attached belongs to a party to the conflict;

(2) That the movement is organised;

(3) That the movement is commanded by a person responsible for his subordinates;

(4) That the combatants have a fixed distinctive sign recognisable at a distance;

(5) That the combatants carry their arms openly;

(6) That the combatants conduct their operations in accordance with the laws and customs of war.

4.3.3.1.2 COLLECTIVE OR INDIVIDUAL COMPLIANCE?

Must these conditions be collectively or individually complied with? A range of feasible interpretations has been made. The most rudimentary is that Article 4A(2) only requires individual compliance. But the text clearly contradicts this interpretation as it refers to groups. Equally as simple is the interpretation requiring collective adherence without exception. But an individual's non-compliance cannot deprive all the members of a group of their status as lawful combatants.[48] A popular approach insists on collective compliance with those conditions that can be fulfilled by a group and individual compliance with the

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[48] R I Miller The Law of War (1975) 30.

conditions that can be complied with by individuals.[49] Individual failure to comply with the collective conditions does not result in an individual losing his lawful combatant status, but renders him liable for his violation of the law of war, a war crime.[50] Collective failure to observe the collective conditions entails collective loss of lawful combatant status and individual compliance is of no avail.

The latter approach is the most functional. It can be expanded as follows: With regard to the conditions of belonging to a party to the conflict, group organisation and responsible command, the obligation is initially individual, in that the individual must first join a group, and then collective, in that the group must be organised, under responsible command and belong to a party to the conflict. If the individual does not join such a group then he never qualifies as a lawful combatant. If the group is not organised, under responsible command and linked to a party to the conflict, then all its members do not qualify as lawful combatants. The conditions of carrying arms openly, having a fixed and distinctive sign and obeying the laws of war are also fulfilled by the individual first and through collective compliance second. But unlike the first three conditions,

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[49] D Bindschedler-Robert "A Reconsideration of the Law of Armed Conflict" in The Law of Armed Conflict (1971) 40,43. G Draper "The Status of Combatants and the Question of Guerrilla Warfare" 45 BYIL (1971) 196.

[50] Draper op cit 1971 197.

collective compliance is a function of individual compliance and is not a separate issue. Compliance need not be universal. Majority compliance within the group is enough to establish collective compliance; all the members of the group qualify as lawful combatants and individual violators do not lose their lawful combatant status. But individual non-compliance should be regarded as a violation of the laws of war and thus as a war crime. This approach goes part of the way to the more logical position of ignoring the latter three conditions entirely for the purpose of lawful combatant status.

The situation becomes complex when there are different groups participating under a single front, as appears to be the case with the ANC. What happens when the ANC does not in the preponderance collectively obey the conditions? Does every member of every group linked to the ANC lose lawful combatant status? It is submitted not. Compliance is adjudged group by group. If combatants of one group collectively meet the conditions, then lawful combatant status is established for that group, even if every other group does not so qualify.

4.3.3.1.3 THE SIX CONDITIONS ANALYSED

(1) The condition that the group belong to a party to the conflict.

This condition explicitly links the material and personal fields of application of lawful combatant status. Can the ANC be a party to the conflict? The traditional viewpoint is that the phrase "party to the conflict" must be read as referring to a signatory state in the sense of Article 2 and not to a rebel party that has not adhered to the Convention.[51] Such an interpretation would require the ANC to belong to a state that is party to a conflict. This traditional approach was taken by the Israeli Military Tribunal in Military Prosecutor v Omar Mahumed Kassem and Others.[52] The defendants were PFLP members, one of the constituent organisations of the PLO, who had crossed into the West Bank from Jordan. They raised the defence that they were P.O.W's and could not be charged as criminals. The court objected that the PLO did not take orders from the Jordanian Government and was an illegal organisation in Jordan, nor at the time did any other state at war with Israel accept responsibility for the acts of the PLO. It held that:

> ...the literature on the subject overlooks the most basic condition of the rights of combatants to be considered upon capture as P.O.W's, namely, the condition that the irregular forces must belong to a belligerent party. If they do not

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[51] J S Pictet Commentary 3 57.

[52] 1969 42 International Law Reports 470. This position was maintained in Israel's invasion of Lebanon - see R Sabel "Problems of the Law of Armed conflict in Lebanon" 77 Proceedings of the American Society of International Law (1983) 240 at 241.

> belong to the government or the state for which they fight it seems to us, that from the outset, they do not possess the right to enjoy the status of P.O.W's on capture.[53]

Nevertheless, the court went on to decide the case on the accused's compliance with conditions (2)-(6).

Abi-Saab challenges the incumbent regimes' avoidance of the law through their refusal to recognise opposing national liberation movements as parties to the conflict.[54] He asserts that in wars of national liberation the party is the people represented by the national liberation movement and therefore the non-recognition of the movement by the adversary government is of no effect. His argument accords with the general principle that unrecognised governments of states can be party to international armed conflict. It is difficult to see why a liberal interpretation of "party" should not include a 'people'. After all, De Gaulle's Free French were fighting for the French people, despite the

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[53] The court appears to have sanctioned the viewpoint that the PLO must be explicitly recognised by a government party to the conflict. G Schwarzenberger "Terrorists, Hijackers Guerilleros and Mercenaries" 21 Current Legal Problems (1971) 257 points out at 270 that such an assumption is incorrect. He argues that Article 4A(2) must, on a liberal interpretation in accordance with the humanitarian objects of the Conventions, be read so that a group can belong to a party to the conflict irrespective of whether it is recognised by a government or whether under the law of a particular state it is legal or illegal. L Nurick and R Barrett "Legality of Guerilla forces under the Laws of War" 40 American JIL (1946) 563 at 568, note that sovereign authorisation was dropped at the end of the nineteenth century as a constituent requirement of lawful combatant status.

[54] G Abi-Saab "Wars of National Liberation in the Geneva Conventions and Protocols" 165 Recueil des Cours (1979) 355 at 417.

armistice agreement signed by the de jure Vichy French Government. In South Africa, ANC combatants belong to the ANC and, by extension, it can be argued that they represent the majority of the South African people in their struggle for self-determination and the elimination of racism. In theory nothing precludes ANC members from belonging to a "party to the conflict" on a liberal interpretation of the Article, except the absence of widespread support for such an interpretation. The disputed material application of the law through Article 2 is of obvious relevance here.

How does a group belong to a "party"? The exact nature of the nexus between them is not defined. Pictet proposes that it be tested by a theory of liaison.[55] In other words a de facto relationship should be established. Possibly even tacit agreement would be sufficient.[56] Draper argues that it is not sufficient to receive logistical support from such a party, but neither is it necessary to be logistically dependent and under the party's operational command and discipline.[57] An explicit declaration by the ANC of its responsibility for the activities of a specified group of combatants would clarify the situation in South Africa. ANC combatants would have to prove their membership of the ANC,

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[55] J S Pictet Humanitarian Law and the Protection of War Victims (1975) 104.

[56] Bindschedler Robert op cit 40.

[57] G Draper "The Status of Combatants and the Question of Guerrilla Warfare" 45 BYIL (1971) 200.

the further link between the people and the ANC being a nebulous concept that can only be inferred from widespread popular support for the ANC. It is evident that ANC combatants do fight under the ANC's de facto authority and that the ANC holds itself responsible for their actions. For example, the ANC claims responsibility for bomb attacks made within South Africa. Each group's claim must be scrutinised separately. Splinter groups such as the Western Cape Suicide Squad and various township 'comrades' groups would probably have difficulty in establishing membership of the ANC.

(2) The condition that the group be organised.

Irregular forces tend by nature to operate in small bands and to act on their own initiative. Nevertheless, to qualify for protection they must have a central organisation and be subject to the discipline and directives of a central command.[58] They may consist of every kind of ex-civilian including women and children, as long as they operate under superior command.[59] Disorderly bands and individual guerrillas acting on their own are excluded from lawful combatant status.[60] The operation of this condition in the context of wars of national liberation is illustrated by three cases cited by Rosenblad.[61] Late in the

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[58] M Greenspan The Modern Law of Armed Conflict (1959) 60.

[59] Draper op cit 1971 199-200.

[60] Greenspan loc cit.

[61] E Rosenblad International Humanitarian Law of Armed Conflict (1979) 84.

Algerian war of national liberation the Supreme Court of France attempted, in 3 judgments, to establish the principle that captured rebels should enjoy the same protection as French soldiers. In the Trial of Zamouche Houre and the Trial of Becetti Hodelkoder in 1961, the court refused to grant the accused lawful combatant status because they had not belonged to organised military units. But in the Trial of Berrais the accused was acquitted because he had acted as a member of an organised rebel unit.[62] In S v Sagarius[63] Bethune J also made reference to the fact that the accused entered Namibia as part of an "...organised military group under SWAPO's authority." ANC members who claim lawful combatant status must prove their membership of an organised military group with a discernible chain of command. Individuals acting on their own responsibility would be precluded from arguing that their participation was lawful.

(3) The condition that the group must be under the command of a person responsible for his subordinates.

As leadership is an essential element for success in military

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[62] Ibid. Rosenblad notes that towards the end of the Algerian conflict French courts often treated FLN members as P.O.W's, provided they belonged to an organised combatant unit and could not be accused of terrorist attacks on civilians. A similar distinction was made in Vietnam where captured irregulars were classified as either guerrillas, self-defence forces, or secret self-defence forces. Members of all 3 groups were regarded as lawful combatants if they were caught engaged in combat or upon proof that they had previously engaged in combat, but were denied lawful combatant status if they had engaged in terrorism, sabotage or espionage; see 62 American JIL (1968) 765-768.

[63] 1983 (1) SA 833 (SWA) at 834.

operations, this condition should be easily satisfied. In interstate armed conflict it was usually met by the command of the resistance movement by an officer of the regular armed forces. Such a situation is unlikely in the South African armed conflict. Nevertheless, all that is necessary is that there be someone in effective authority, either appointed by the ANC or elected or appointed from within the group. Some way of ascertaining rank, for instance badges or identity papers is preferable, but not essential. Authorisation from high command is helpful because it assists in establishing the nexus between the group and the party to the conflict. A commander is responsible for his subordinates' actions to a higher authority, whether it be the high command or his own troops. Because the condition of responsible command is an attempt to guarantee respect for the other conditions, part of the evidence of non-compliance with it will be non-observance of the other conditions.[64] The internal disciplinary regime of the group should also be such that the conditions of lawful combatant status can be met in practice.[65]

A problem that will undoubtedly manifest itself in the South African armed conflict is how a captured ANC member will establish that he is a member of a group under responsible command without naming his commander and setting out the chain of

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[64] Draper op cit 1971 201.

[65] Draper ibid. He submits that one way of doing this is to make the conditions part of the internal disciplinary regime.

command, an action that would spell extinction for the group. In Military Prosecutor v Omar Mahumed Kassem and Others,[66] one of the reasons the court gave for refusing the accused lawful combatant status was because they had failed to show that they acted under responsible command. ANC groups operate under commanders, but for security purposes they are loathe to reveal their identity. It is debatable whether an assertion of command without revealing the commander's identity is enough to establish membership of a responsibly commanded group. Article 17 of the Convention does make provision for identity cards, which would, to some extent, facilitate proof of such membership.

(4) The condition that the members of the group must have a fixed distinctive sign recognisable at a distance.

This condition is the first of the two conditions that require ANC combatants to distinguish themselves visibly from civilians. It also serves to distinguish them from members of the Government forces and from members of other organisations. It has two constitutive parts:

(a) The sign must be fixed and distinctive: The first issue is the measure of permanency required. The ICRC Commentary states that the sign must be worn constantly and it cannot be removed at convenience.[67] Accommodation with the reality of modern warfare

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[66] File no 9/69 Military Court Ramallah April 13 1969 at 56; 65 American JIL (1971) 409.

[67] Commentary 3 59.

has, however, meant that the condition of constantly wearing such a sign has had to be relaxed. The test is that a combatant must distinguish himself from civilians while engaged in all military action.[68] The sign must be 'fixed' in the sense that it is worn when the combatant is in or is about to enter combat, secured in such a way that it cannot be taken off to permit concealment of the individual's combatant nature. On this basis, Levie rejects easily disposable signs such as handkerchiefs, rags and loose armbands. He approves of sewn on armbands and unique types of jackets.[69] A distinctive uniform is best. The second issue is the manner of distinction. The sign should be distinctive in that it should provide a recognisable association with a widely known group and should not be easily confused with the insignia of other groups or the insignia of the opposing side. In other words, it should be unique. What such a fixed and distinctive sign will be in the South African armed conflict is a question of fact.

(b) The sign must be "recognisable at a distance". The distance at which the sign should be recognisable is controversial. No specific distance is laid down. Draper argues that combatants must be distinguishable from ordinary civilians at the distance

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[68] 1971 Government Experts Document vol 6 at 11; Levie op cit 47. D Bindschedler-Robert "A Reconsideration of the Law of Armed Conflict" in The Law of Armed Conflict (1971) 43-44 supports this interpretation as it flows from the travaux preparatoires - a 1949 Danish proposal that the sign be worn only in military operations was not expressly laid down - Final Record 2A 424,444.

[69] Op cit 48.

at which weapons can be brought to bear.[70] The ICRC states that combatants should be recognisable at a distance calculated by analogy with the uniforms of the regular army.[71] This condition harkens back to the days when regular armed forces wore coloured or harmonious uniforms. In the age of automatic and long range weapons and air support, camouflage has become the norm for both regulars and irregulars.[72] An enemy is identified more by his opening fire or his being in a certain territorial area than by the colour of his uniform.

National liberation movements have complied with the condition of wearing a fixed and distinctive sign by wearing uniforms. In Kassem's case the accused had distinguished themselves from civilians in the area by wearing dark green uniforms and mottled green caps.[73] In Sagarius, Bethune J emphasised the fact that the accused were clad in military uniform and were wearing fixed and distinctive SWAPO emblems throughout their encounter with the South African forces.[74] In South Africa, ANC members often wear

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[70] Op cit 1971 272.

[71] 1971 Government Experts Document 3 at 11; Levie op cit 48.

[72] G Schwarzenberger "Terrorists, Hijackers, Guerrillas, and Mercenaries" 24 Current Legal Problems (1971) 273.

[73] Israel claimed that the PLO did not display a fixed and distinctive sign in Lebanon; see R Sabel "Remarks: Problems of the Law of Armed Conflict in Lebanon" 77 Proceedings of the American Society of International Law (1983) 241.

[74] 1983 (3) SA 833 (SWA) at 834.

uniforms when operating in rural terrain, but in the urban context the condition is not adhered to. In the reality of modern guerrilla warfare, this condition is completely unworkable.[75] The carrying of arms openly is usually considered sufficient. But arms, like signs, may be discarded in combat to allow a combatant to assume the camouflage of a crowd of civilians. Solutions involving factual criteria will always lead to controversy. A better solution would be to require that combatants in the South African armed conflict factually distinguish themselves without stipulating exactly how and to judge their methods objectively from the point of view of a reasonable combatant. This is in fact what tribunals are likely to do in terms of the existing criteria.

(5) The condition that the members of the group must carry their arms openly.

This is the second condition requiring ANC combatants to visibly distinguish themselves from civilians. The arms should be carried openly, not obviously, i.e., not more openly than a regular soldier.[76] Customarily arms had to be carried openly constantly[77] and could not be concealed when the combatant was not using them or when he wished to pass himself off as a peaceful civilian. It

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[75] A Rosas The Legal Status of Prisoners of War (1976) 346.

[76] J S Pictet Humanitarian Law and the Protection of War Victims (1975) 105.

[77] Draper loc cit.

is submitted that today arms need only be carried openly in combat situations, i.e., during actual engagements or preparations for engagements. That the condition is difficult to comply with is illustrated by Kassem's case, where one of the grounds for disallowing the accused lawful combatant status was that they had not carried their arms openly.[78] In Sagarius, Bethune J found that the accused had been carrying their arms openly.[79] Whether the condition will be problematic in South Africa again depends on the sphere of operations. In rural areas it will be comparatively easy for ANC guerrillas to carry their arms openly. In the urban context concealment is the prevailing tactic and ANC members would most probably find themselves in violation of this condition. Therefore, it is submitted that an objective test should also be used, based on how a reasonable combatant would have carried his arms in the particular circumstances of the inquiry.

(6) The condition that the members of the group conduct their operations in accordance with the laws and customs of war.
This condition has a constitutive effect in that the majority of the members of a group must comply to secure lawful combatant status for the group's members.[80] Individual breaches entail

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[78] Israel claims that PLO members do not as a rule carry their arms openly - Sabel loc cit.

[79] 1983 (1) SA 833 (SWA) at 834.

[80] D Bindschedler-Robert "A Reconsideration of the Law of Armed Conflicts" in The Law of Armed Conflicts (1971) 41.

personal responsibility, but no loss of lawful combatant status.

An expedient way for the South African Government to deny lawful combatant status to ANC combatants is to insist on compliance with the whole corpus of the laws of war. It is impossible for ANC groups to comply with the four Geneva Conventions and the Hague Regulations in all their details. Rosas argues, correctly it is submitted, that this condition should be seen only in its constitutive sense and not as the basis for the compliance with the law of armed conflict in its entirety. Compliance with the corpus of the law is ensured by the Convention through the group having to belong to a party to the conflict that is itself bound to observe the law. Used in its constitutive sense, the condition should be interpreted as only requiring compliance with the other five conditions and the main principles of humanitarian law.[81] This accords with a realistic appraisal of the capabilities of ANC groups. Miller submits that what must be looked for is substantial compliance, especially in respect of prohibitions on the wounded and dead, improper conduct towards flags of truce, pillage and unnecessary violence and destruction.[82]

Another major issue is whether the failure of the ANC as a whole to observe the law of war can be imputed to all the groups belonging to the ANC, without evidence of the adherence of the

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[81] Rosas op cit 363.

[82] R Miller The Law of War (1975) 30.

group in question. It is submitted that one groups failure to observe the law cannot serve as a reason for denying protected status to all ANC members. In Kassem's case the court held that the numerous acts of violence directed by the PFLP against civilians precluded the argument that the defendants acted in accordance with the laws and customs of war. The court made its judgement without personal evidence of the accused's violations of the law, basing it incorrectly on the general disregard of the PFLP of the law. In contrast, the PC in Mohamed Ali and another v PP,[83] the French Supreme Court in its response to appeals from Algeria and the US in Vietnam, all made their decisions on the basis of the individual's or his group's observance of the law and not on the whole organisation's observance. Even the Israeli court relied on the somewhat tenuous possible future individual breach of the law inferred from the accused's carrying of civilian clothing.

Rosas notes that there is an apparent contradiction between the condition of compliance with the laws of war and Article 85 of Convention 3, which states that persons prosecuted and convicted for war crimes[84] committed before capture, retain the benefits of

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[83] 1968 (3) All E R 488.

[84] Although the Article reads "prosecuted under the laws of the detaining power" and therefore literally does not include prosecution under international law, Draper 45 BYIL (1971) 197 submits that the laws of the detaining power must include international law - war crimes are part of domestic law.

the Convention.[85] At first blush, it appears that Socialist reservations to Article 85 to the effect that P.O.W. status is not retained after conviction, are in line with Article 4A(2).[86] A closer look at Articles 85 and 4A(2), however, reveals that they are compatible. We must recall that observance of the law of war is a collective condition for lawful combatant status. If the group as a whole ignores the law, then all its members fail to qualify as lawful combatants. Article 85 does not apply because they are not and never were lawful combatants and thus cannot "retain" the benefits of the Convention. But if this condition has only been violated by individual it is not constitutive of protected status. The individual remains protected by Article 85, i.e., he does not lose his lawful combatant status or P.O.W. status despite his conviction for war crimes. But this does not mean that an individual offender cannot be charged under the detaining power's (DP) domestic law for a violation of that law or for a war crime, except for the act of participation and penal offences peculiar to that state.[87] P.O.W's are only given certain

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[85] Op cit 367-372.

[86] Reservations made by Albania, Bulgaria, Czechoslovakia, Hungary, Poland, Romania, Ukraine, Byelorussia, USSR, Vietnam(PRG).

[87] Commentary 3 419ff. F Kalshoven "Reaffirmation and Development of International Law Applicable in Armed Conflicts: The 1974 Diplomatic Conference" 2 NYIL (1971) 68 at 70, argues that such prosecution of P.O.W's under Article 85 is unlikely in the course of hostilities because it encounters grave practical problems.

formal safeguards[88] which, it is submitted, should also apply to unlawful combatants not qualifying as P.O.W's charged with war crimes or crimes under the DP's national law. It is a rule of natural justice that a person is entitled to a proper hearing by a properly constituted court before he can be convicted and punished for acts committed during hostilities.

No doubt observation of this condition will be difficult in the South African armed conflict. It is not unlikely that the Government will deny the application of lawful combatant status to ANC combatants because of wholesale non-compliance with the laws of war by the ANC. As was submitted above, however, compliance must be tested group by group. In addition, the ANC has committed itself in its 1980 Declaration to meet the general principles of the law and if this policy is applied by the men on the ground, it will ensure that they meet the condition of observing the laws of war.

The six conditions are onerous. On a strict interpretation, the last three will probably not be met by the ANC, unless some flexibility is introduced. The difficulty that national liberation movements have with these conditions is reflected in the reservation the PRG of Vietnam made when it acceded to the Conventions. It stated that it would not recognise the "...conditions set forth in Article 4A(2)..." as "...these

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[88] Articles 84/100/103/104.

conditions are not appropriate for the cases of peoples wars in the world today."[88] The conditions requiring visible distinction may in fact have fallen into desuetude, although no consensus has been achieved on this point.[90] The strongest argument for the retention of the visibility criteria is the protection of the civilian population. If they are to be retained, they should perhaps be read together as constituting a single condition of visibility that must be evident before and during combat. At a more general level, an approach similar to the US grant of protected status to combatants in Vietnam who did not qualify under the strict language of Article 4, if applied in the South African armed conflict, would do much to accommodate the ANC's problems with the conditions. It is submitted that the emphasis in such an approach should be on the condition of membership of a group linked to a party to the conflict.

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[88] Quoted by H Levie Prisoners of War in International Armed Conflict (1978) 45. The accession of the former Portuguese colony Guinea Bissau contains an almost identical reservation.

[90] G Abi-Saab "Wars of National Liberation in the Geneva Conventions and Protocols" 165 Recueil des Cours (1979) 421.

4.3.3.2 LEVEES EN MASSE

Article 4A(6) reads:

> (6) Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly, and respect the laws and customs of war.

Article 4A(6) preserves the so called levee en masse. It has disappeared as a mode of irregular warfare since 1945, which may seem surprising in view of the advent of 'peoples wars'. But the sophistication of modern guerilla warfare ensures that national liberation movements, due to the time taken in the gradual building of political and military organisation, contest control with an entrenched enemy. Nevertheless, mass levees may have a small role in South Africa, perhaps in a township uprising if one considers the township unoccupied or in the case of right wing civilians forming into a mass levee in order to repel the ANC. In either instance the conditions of Article 4A(6) would have to be interpreted very generously. The conditions are:

(1) The territory must be unoccupied. A territory is considered occupied when it is actually under the authority of the hostile army.[91] The territory may be an unoccupied part of partially occupied territory.[92] In South Africa, all territory is at

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[91] Article 42 of the Hague Regulations.

[92] This possibility is illustrated in Omar Mahumud Kassem and Others v Military Prosecutor File 9/69 Military Court Ramallah 13 April 1969, 65 American JIL (1971) 409. The court held that the captured PFLP members did not qualify as lawful combatants under Article 4A(6) because the area of the West Bank in which they were captured had been occupied by Israel for more than one year prior to the incident.

present occupied by the Government forces and unoccupied by the ANC.

(2) The mass of the population must spontaneously take to arms at the approach of the enemy.

(3) They must not have had time to form themselves into regular armed units. The essence of a mass levee is that it is unorganised. Thus it can only exist for a very short period, i.e., only during the actual invasion period. If resistance continues it must adhere to the other provisions in Article 4A.[93]

(4) They must carry their arms openly.

(5) They must respect the laws and customs of war.

The comments made in respect of these two conditions in Article 4A(2) apply here. Mass levee combatants are exempted from the conditions of having to display a fixed and distinctive sign recognisable at a distance and of having a responsible commander.

4.3.4 LAWFUL COMBATANT STATUS AND THE DETAINING POWER'S OWN NATIONALS UNDER THE 1949 CONVENTIONS

In interstate conflicts, captured combatants who are the DP's own nationals are not entitled to lawful combatant status or P.O.W. status as they owe the DP a duty of allegiance.[94] This rule was not expressed in the 1949 Conventions, but it is implicit in the

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[93] Commentary 3 68.

[94] Oppenheim-Lauterpacht International Law 7 ed (1952) 768.

assumptions made in certain Articles[95] and was given judicial sanction in PP v Oie Hee Koi.[96] The accused were twelve Chinese Malays captured as members of an Indonesian paratroop force during the Malayan - Indonesian confrontation. Convicted in the lower courts, they appealed to the PC. They contended that they were covered by Article 4 of Convention 3 and were lawful combatants entitled to P.O.W. status. But the PC advised that nationals of a DP were not entitled to lawful combatant status and P.O.W. status despite the silence in Article 4. The PC denied that the Conventions had changed customary international law as enunciated in the traditional definition. Allegiance was the governing principle.[97] It brought into action municipal criminal law as opposed to international law.

The duty of allegiance is the basis for all prosecutions of ANC members in South Africa, whether it is explicit as in the crime of treason or implicit as in the various statutory crimes. The international character of the South African armed conflict is founded on the assumption that the representatives of the people engaged in a struggle for self-determination are not bound by any

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[95] For example, Article 87 on penalties for P.O.W's, states that when fixing a penalty the DP should take into consideration the fact "...that the accused, not being a national of the DP, is not bound to it by a duty of allegiance." Article 100 recalls this fact in connection with the death sentence in particular.

[96] 1968 (2) WLR 715 (PC). See R R Baxter op cit 63 American JIL (1969) 290-294.

[97] At 858.

duty of allegiance to the incumbent regime and may thus not be punished as rebels or traitors. It is arguable that the denial of self-determination through non-racism in South Africa cuts through the tie of allegiance between the Government and ANC members. No duty exists because the unrepresentative nature of the Government means that it does not truly represent the state, the embodiment of the political will of the people. Thus the principle of nationality as embodied in the operation of the Conventions and especially with regard to the conferring of lawful combatant status, can be regarded as inoperative in the South African context.

4.3.5 DESERTERS AND DEFECTORS

Levie explains the distinction as follows:[88] A deserter is someone whose is absent from his place of duty without the permission of the proper authorities. His change of status is motivated by his adversity to the military life and not by ideology. A defector on the other hand seeks refuge with the enemy because he disagrees with the policies of his own government and agrees with those of the enemy. His motivation is ideological. A deserter is still technically a lawful combatant of his original side and retains his P.O.W. status. A defector is also a lawful combatant but if the enemy allows him to serve in its forces it violates Articles 4, 5 and 7 of Convention 3.

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[88] H Levie Prisoners of War in International Armed Conflict (1978) 77-78.

Defectors may also run foul of the non-protection of nationals provisions. But those provisions cannot operate in wars of national liberation. Defections are common in the South African armed conflict. Because of the nature of the conflict, it is submitted that provisions penalising defectors must be ignored.

4.3.6 THE PROCEDURE FOR ADJUDICATION OF STATUS

Where a combatant's status is in doubt, Article 5(2) of Convention 3 applies. It reads:

> (2) Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of categories enumerated in Article 4, such persons shall enjoy the protection of the present convention until such time as their status has been determined by a competent tribunal.

Article 5(2) provides that an individual who falls into the hands of the enemy is entitled to the protection of the Convention until his status is established. This provision prohibits the execution of a combatant before his status has been determined. Who must raise the issue of status? In PP v Oie Hee Koi[99] the PC based its judgement on the fact that although it was not proved that the accused owed Malaya allegiance, it was not contended or proved that they did not. Baxter notes that the PC's position seems to be that a member of the enemy armed forces may be denied P.O.W. status, unless the detained person contends that he has such status.[100] The PC was probably incorrect. The better view is

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[99] 1968 2 WLR 715.

[100] Op cit 293.

that the accused should retain their P.O.W. status until an Article 5 tribunal decides on proof from the DP that they are not entitled to P.O.W. status.

What is a competent tribunal? There appear to be many different versions, eg., military tribunals, ordinary national courts etc.. The US in Vietnam issued the first ever directive on the subject.[101] The Article 5 tribunal was to consist of 3 or more officers who should be, and at least one of whom was required to be, military lawyers. The tribunal had to conduct a hearing according to a set procedure at which the combatant had a right to counsel. It had to reach a decision as to the legality of his participation in combat and his consequent entitlement or not to P.O.W. status. A decision of entitlement was fixed, a decision of non-entitlement was subject to review, rehearing or an administrative grant of P.O.W. status by the commanding officer. There is little information on how this system was actually applied. The U.N. Secretary General's report on human rights in armed conflict recommended that an international agency perform the function of competent tribunal in terms of Article 5.[102] A special tribunal of world habeas corpus has also been

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[101] MACV/Directive 20-51 15/3/1966 par 5f cited in Levie op cit 57.

[102] 2nd Report of the Secretary General on Human Rights in Armed Conflict U.N.Doc. A/8052 18/9/1970.

proposed.[103] Although the ANC has international lawyers among its membership and could supply the expertise necessary for an Article 5 tribunal as well as appeal and review procedures, it may prefer an international agency to perform the function of competent tribunal. Such a solution is, however, unlikely to be acceptable to the Government. An in house procedure would probably be most suitable. If so, status should be adjudicated by a special tribunal made up of senior military lawyers and officers so that the whole issue is removed from the municipal legal sphere. Review and appeal procedures should be carried out by a special board made up of Supreme Court judges. Article 5(2) also envisages that the adjudication of status will normally be made by the same court to which a case has been referred for trial of a substantive offence. The special tribunal could adequately fulfill both functions - adjudication of status and trial for violations of the law of armed conflict. The special tribunal should adopt an inquisitorial procedure to ensure that the accused's compliance or non-compliance with the law is fully investigated, bearing in mind that he or she may often be unaware of the technicalities of the law. Article 17 provides for the information that a P.O.W. is bound to give (name, rank and serial number) and sets out the requirements for ID cards to be carried by combatants and notes in paragraph 4 that no physical or mental torture may be used to extract any further involuntary

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[103] L Rider "International due process for P.O.W.: The need for a Special Tribunal of World Habeas Corpus" 21 University of Miami LR (1967) 721.

information. It should be pointed out to combatants that information in regard to their positive compliance with the conditions for lawful combatant status can only be to their advantage. Article 43 assists the adjudication procedure because it requires the communication of ranks of all persons mentioned in Article 4 by the parties to the conflict.

4.3.7 PROTECTIONS FOR UNLAWFUL COMBATANTS

All combatants in the South African armed conflict who do not qualify as lawful under Article 4, can still avail themselves of the minimum protections of Article 5 of the Geneva Civilians Convention 4 of 1949, if they are captured operating in occupied or enemy territory. Paragraph 3 reads:

> Such persons shall nevertheless be treated with humanity and in the case of trial, shall not be deprived of the rights of fair and regular trial prescribed by the present Convention. They shall also be granted the full rights and privileges of a protected person under the present convention at the earliest date consistent with the security of the state or occupying power, as the case may be.

Article 5 is ambiguous in that it only concedes the possibility of a trial - "in case of trial" - when obviously an adjudication of status is an absolute necessity. But it appears that the Article refers to a trial for violation of the penal provisions promulgated by the DP.[104] Article 5 is also deficient in that paragraph 2 denies a prisoner's right of communication under Article 23/30/136 if absolute military necessity so requires.

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[104] Articles 66,71-75 of Geneva Convention 4.

In the South African context the general protections offered by Article 5 are hit by Article 4 of Convention 4, which states that protected persons do not include a state's own nationals. But to be consistent with the argument that the nationality provisions do not apply in the South African armed conflict, Article 4 also cannot apply because there is no tie of allegiance. What is more, Article 5 provides no more than the basic rights recognised under all civilised legal systems. Unlawful combatants will also remain protected by the general requirements of the De Maartens clause for humane and civilised treatment, a general principle of law recognised by all civilised nations. Draper submits that this principle demands a fair trial and conviction before execution.[105]

4.3.8 CONCLUSION

Although members of the South African Government forces will probably find the personal conditions of lawful combatant status in Convention 3 fairly easy to comply with, these stringent conditions will ensure that the application of the 1949 Conventions in South Africa provides little relief for combatant members of the ANC. Moreover, despite the fact that the Conventions procedural protections go some way to ensure that a combatant's entitlement to protected status is fully investigated, should such status be lost, the Conventions provide

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[105] G Draper "The Status of Combatants and the Question of Guerrilla Warfare" 45 BYIL (1971) 198.

little protection for unlawful combatants. It seems, therefore, that the ANC must seek application of Protocol 1's more relaxed personal conditions, even if only as an authoritative interpretation of Article 4 of Convention 3, if the law of armed conflict is to have much real impact on the South African armed conflict.

4.4 PERSONAL CONDITIONS FOR LAWFUL COMBATANT STATUS UNDER GENEVA PROTOCOL 1 OF 1977

4.4.1 INTRODUCTION

This section examines the new, more appropriate, conditions for the regulation of combatants in the South African armed conflict set out in Protocol 1.

4.4.2 NEW CONDITIONS FOR LAWFUL COMBATANT STATUS

The recognition of wars of national liberation as international armed conflicts in terms of Article 1(4) was bound up with the reduction in Protocol 1 of the personal conditions of lawful participation for combatants. Experience had shown that Article 4 of the 1949 Conventions applied far too strict a standard to be functional in wars of national liberation. The result was a general lack of respect for international law. The consensus at the beginning of the 1970s was that Article 4's criteria needed revision. In response, the ICRC to recommended to the 1971 Government Experts Conference that the criteria for irregulars to qualify as lawful combatants be relaxed on the assumption that guerrilla warfare was the principal type of warfare conducted by irregulars.[106] The experts considered military organisation and

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[106] ICRC Materials Jan 1977 Document 6 Rules applicable in Guerilla Warfare 6-23, quoted in W T Mallison and S V Mallison "The Juridical Status of Privileged Combatants under the Geneva Protocol of 1977 Concerning International Conflicts" in 42(2) Law and Contemporary Problems (1978) 10.

observation of the laws of war indispensable for irregulars[107] and although a number felt that the two conditions of visible distinction were inconsistent with guerilla warfare,[108] it was agreed that irregulars had to distinguish themselves in some meaningful way from civilians in order to protect civilians.[109] Because of the impetus behind the movement for reduction of the conditions, the ICRC submitted draft Article 42 entitled "New Category of Prisoners of War" as the basis for discussion at the Diplomatic Conference. It read:

> In addition to the persons mentioned in Article 4 of the third Convention, the members of organised resistance movements who have fallen into the hands of the enemy are prisoners of war provided such movements belong to a party to the conflict, even if that party is represented by a government or an authority not recognised by the detaining power, and provided that such movements fulfill the following conditions:
> (a) that they are under a command responsible to a party to the conflict for its subordinates;
> (b) that they distinguish themselves from the civilian population during military operations,
> (c) that they conduct their military operations in accordance with the conventions and the present protocol...

A footnote provided that members of organised liberation movements would receive P.O.W. treatment if they obeyed the "above mentioned" conditions.[110] The draft Article codified the

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[107] Mallison and Mallison ibid.

[108] ICRC Report on the 1971 G/E Conference 68 col 2, Mallison & Mallison ibid.

[109] Mallison and Mallison op cit 19.

[110] In fact, the only reference to wars of national liberation in the draft Protocol appeared in the footnote to this draft Article. It read:

> In cases of armed struggle where peoples exercise their right to self-determination as guaranteed by the U.N.

liberal interpretation of several aspects of Article 4A(2) of Convention 3. It made it explicit that irregulars could belong to a government or authority not recognised by the DP; it made it clear in condition (c) that compliance with the condition of conducting military operations in accordance with the law is collective and that individual violation does not result in loss of lawful combatant status; it amalgamated the two criteria of visible distinction into condition (b)'s general requirement that combatants distinguish themselves from civilians only during military operations.[111] By not specifying the exact manner of distinction, the draft Article took into account the exigencies of modern warfare.

The relaxation of the personal conditions of lawful combatant status dominated the second, third and fourth sessions of the Conference, just as inclusion of wars of national liberation in the definition of international armed conflicts had dominated the first session. A number of alternative amendments to draft Article 42 were put forward.[112] Finland's[113] and the UK/USA's[114]

Charter and the 'Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in accordance with the Charter of the U.N.' members of organised liberation movements who comply with the above mentioned conditions shall be treated as prisoners of war for as long as they are detained.

[111] Defined by the ICRC as "offensive and defensive moves by the armed forces in action"- ICRC Draft Additional Protocols to the Geneva conventions of 1949 Commentary 51.

[112] E Rosenblad International Humanitarian Law of Armed Conflict (1979) 91-94.

amendments both endorsed the ICRC's approach, demanding the distinction of civilians and combatants and retaining the regular/irregular dichotomy. Norway's amendment[115] legitimised all combatants who were members of organised, responsibly commanded, armed forces of a party to the conflict.[116] There were no other constitutive conditions for protected status - the logically distinct issues of the right to participate and the manner of participation were disconnected - but there was a separate provision obliging combatants to distinguish themselves from civilians during military operations. Ultimately, however, the debate became a question of compromise between those who urged the total abandonment of the conditions of visible distinction and those who wanted to retain the conditions but at a reduced level.

The national liberation movements' supporters desired to see the principle of distinction dispensed with entirely. Illustrative of this desire was the stance of the OAU.[117] It noted that in wars

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[113] CDDH/111/95.

[114] CDDH/111/257.

[115] CDDH/111/259.

[116] A similar approach had been proposed by Norway, Romania, Indonesia and the Philippines at the second Conference of G/E's- G/E Conference 2 Records 15,17,41,49,54.

[117] Summary Record of the OAU Seminar on Humanitarian Law Dar Es Salaam 21-25/1/1974 Annex 4 5,18-19 quoted by A Cassese "A tentative reappraisal of the old and the new humanitarian law of armed conflict" in A Cassese (ed) The New Humanitarian Law of Armed Conflict vol 1 (1979) 473.

of national liberation the distinction between civilians and freedom fighters blurred because they fought side by side. It argued that by accepting the principle of distinction the freedom fighters would have to give up their principle method of combat and they were not prepared to do so because colonial or neo-colonial armies had superior technology and military strength.[118] The Vietnamese delegate took the extreme view that the draft articles should be tailored to bring the parties to a factually equal position.[119] He felt that the condition of visibility should exist for resistance movements but not for national liberation movements because it was only justified in the international armed conflicts envisaged by the Hague Regulations and Geneva Conventions. He argued that these conflicts took place between industrialised European countries at about the same level of development, able to retaliate on each other's territory, and the activities of resistance movements in these conflicts were completely distinct from the lives of the civilian population. But wars of national liberation, he argued, were unequal war situations where national liberation movements would have to wait years before setting up regular units, the colonial aggressors did not fear retaliation on their population and the lives of the

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[118] The ZANU delegate at the Conference put forward a similar argument, grounded on the idea that the national liberation movement was a vanguard party of the people and indistinguishable from the people. He noted that national liberation movements simply could not afford uniforms and emblems and sometimes went to battle in "ragged shorts." - CDDH/111/SR33.

[119] CDDH/111/SR33.

combatants and civilians were inseparable. On this basis he urged the total abandonment of the condition of visibility.

The national liberation movements' supporters' efforts were only partially successful. The condition of visibility was retained largely through the influence of the rapporteur of Committee 3, George Aldrich (US), whose amendment to draft Article 42[120] formed the core of the new Article 44. The compromise solution contained in the report submitted by the working group of Committee 3 to plenary in 1977,[121] made various concessions to those parties who wanted the visibility condition done away with entirely. Firstly, the condition of visibility had only to be fulfilled immediately before an attack and the method of distinction was not specified. Secondly, although the condition of visibility was made crucial to protected status in certain special situations - according to the report, primarily in wars of national liberation - only one condition of visibility was adopted, viz.: the carrying of arms openly.[122]

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[120] CDDH/111/100.

[121] CDDH/236/REV1.

[122] In reaching this compromise solution, efforts by certain states to introduce explicit references to national liberation movements into the Article were halted after it was pointed out that Article 1(4) effectively included national liberation movement members as lawful combatants; for instance the Vietnamese amendment to draft Article 42 - CDDH/111/253. It is interesting to note that Spain, reacting to the new Article 1, tried unsuccessfully to enter an amendment to Article 42 with an extra condition, viz.: "...provided they exercise effective territorial jurisdiction..." - CDDH/111/209 .

On Israeli insistence, Article 44 went to the vote in plenary. The vote was 73/1/12. Israel voted against, while most Western states abstained. The rapprochement between those who valued the principle of distinction and those who sought to reduce the conditions for protected status, appears to have been weighted in the latter group's favour. Hence the new Article gained Third World and Socialist approval, while the Western states felt it conceded too much, hence their abstentions.

The ICRC also introduced to the Conference a draft Article 41 entitled "Organisation and Discipline", requiring armed forces to "...be organised and subject to an appropriate disciplinary system." The majority of states recognised the importance of a disciplinary system for irregulars. The working group of Committee 3 expanded the draft Article to cover not only the conditions of organisation and discipline, but also the definition of armed forces, those who have the right to be combatants and the incorporation of police forces into armed forces.[123] The catch all "...even if the party ... not recognised by ... adverse party..." was introduced. The title was changed to "Armed Forces". Article 43 in its final form was adopted by consensus in plenary.

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[123] Ghana attempted to have national liberation movements expressly mentioned in draft Article 41 as well - CDDH/111/28. With the expansion of the text the specific mention of particular types of armed forces, for example national liberation movements, was abandoned.

Protocol 1 also saw the introduction of new rules on mercenaries, spies, and safeguards for unlawful combatants. The aim of the Protocol was, according to Committee 3's rapporteur, to provide

> ...a single and non-discriminatory set of rules applicable to all combatants regular and irregular alike, and to prescribe the necessary limited exceptions for spies, mercenaries, and those guerrillas in occupied territory who take advantage of their apparent civilian status to conceal their weapons while making into position for attack.[124]

Articles 43 and 44 contain the main complex of rules relating to protected status for combatants in the South African armed conflict. This complex must be analysed first, before we turn to the exceptional legal regimes.

4.4.3 PROTOCOL 1'S CONDITIONS FOR PROTECTED STATUS - ARTICLES 43 AND 44

Article 43 reads:

> ARMED FORCES
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> 1. The armed forces of a Party to a conflict consist of organised 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 recognised 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 Civilians Convention) are combatants, that is to say they have a right to participate directly in hostilities.
> 3. Whenever a Party to a conflict incorporates a paramilitary or armed law enforcement agency into its armed

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[124] G H Aldrich "New Life for the Laws of War" 75 American JIL (1981) 764 at 770.

forces it shall so notify the other Parties to the conflict. Article 43(1) brings under legal control all armed forces, even those belonging to a Party that "...is represented by a government or an authority not recognised by an adverse Party." Thus a party to the conflict must accord lawful combatant status to combatants of an adversary party which is either (i) an HCP; or (ii) a state which accepts and applies the Protocols and Conventions under Common Article 2 of the Conventions or Article 96(2) of Protocol 1, even if the government of such a state is unrecognised; or (iii) an adversary authority even if that authority is unrecognised. "Authority" means national liberation movements as envisaged in Articles 1(4) and 96(3) of Protocol 1 or perhaps under common Article 2 paragraph 3 of the Conventions and thus includes the ANC. Although logically the people seeking self-determination through non-racism is the party to the conflict, it is practically expedient to regard the ANC as the authority and party to the conflict. Thus the ANC's armed forces are the armed forces of a party to the conflict. In respect of both the Government and the ANC, the issue of recognition/non-recognition by adversaries has been quashed.

The first sentence of Article 43(1) establishes the minimum criteria for armed forces and, by extension, lawful combatants in the South African armed conflict. Article 43 applies a single standard to all armed forces, doing away with the traditional dichotomy of regulars and irregulars. Thus, unlike Article 4A(2)

of Convention 3, no special law applies to irregular forces in South Africa. All combatants must meet three conditions to acquire lawful combatant status.

Firstly, and importantly, Article 43 retains the command link between a Party to the conflict and its armed forces as the key criterion of lawful combatant status.[125] The link provides membership of armed forces and the concomitant protections only to individuals who act on behalf of a state - South Africa - or an entity which is a subject of international law - the ANC - and excludes private wars.[126]

Secondly, combatants must belong to "organised" armed forces. Organisation of the armed forces, groups or units to which combatants belong is a collective condition for lawful combatant status. Individuals who are not members of organised groups are not protected by the law. All the members of unorganised groups lose their lawful combatant status. Organisation is an essential characteristic of an effective fighting force. It will probably be inferred from rank structures and hierarchical chains of command. Umkhonto cadres appear to be organised and should collectively fill this obligation. Members of unorganised splinter units may, however, lose the laws protection.

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[125] G H Aldrich "Guerilla Combatants and P.O.W Status" 31 American ULR (1982) 871 at 874.

[126] M Bothe, K Partcsh and W A Solf New Rules for Victims of Armed Conflicts (1982) 237.

The third condition for lawful combatant status is that the armed forces must be under a "...command responsible to that party for the conduct of its subordinates." Responsible command of the armed forces, groups or units to which combatants belong is a collective condition of lawful combatant status. Individuals who do not belong to such a responsibly commanded group lose the law's protection. Collective violation of this condition means the loss of lawful combatant status for all the members of the group. The condition should be easy to comply with in the South African armed conflict as it is integral to the effective functioning of armed forces. Responsible command is one of the conditions of the Hague/Geneva formulation retained in Article 43. But its formulation here is different to the individual command responsibility contained in Article 4A(2). Article 43 recognises that national liberation movements in Article 1(4) conflicts might be under an anonymous collegial command for security purposes. It thus eliminates many of the practical problems with the old formulation. Despite this improvement it appears that Articles 86 and 87 have reinstated individual command responsibility and have detracted from the effort to depersonalise command.[127]

Article 43(1) provides in a separate sentence that armed forces shall be subject to a disciplinary system enforcing compliance

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[127] Bothe et al. op cit 237.

with the laws of armed conflict. There is some dispute as to whether this condition is constitutive of lawful combatant status, despite the fact that it is plainly an adaptation of the Hague/Geneva condition of "...conducting operations in accordance with the laws and customs of war."[128] If we consider the sentence in isolation, its use of the peremptory verb "shall" implies that such enforcement must be in operation and thus appears to be a sine qua non of qualification for lawful combatant status. But the structure of the paragraph, by making lawful combatant status conditional on command link, responsible command, and organisation, militates against this interpretation. So do the negotiating record and the provisions of Article 44(2).[128] Bothe, Partsch and Solf note that Articles 43 and 44 reaffirm Article 85 of Convention 3, which provides that lawful combatants retain their P.O.W. status notwithstanding violations of the law of armed conflict.[130] For these reasons it is submitted that under Article 43 lawful combatant status is not conditional on being subject to a disciplinary system enforcing the law. Nevertheless, armed forces must have a disciplinary system enforcing the law of armed conflict. Discipline is desirable for military efficiency

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[128] F Kalshoven "Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts- the Diplomatic Conference, Geneva 1974-77" 8 NYIL (1977) 107 at 124 argues it is a-condition, contra Mallison and Mallison op cit 20.

[129] Bothe et al. op cit 238.

[130] Ibid.

as well as being essential for observance of the law.[131] Bothe, Partsch and Solf argue that failure on the part of the armed force's command to provide a disciplinary system could constitute a breach of Articles 86, 87 and 43 and may entail the charging of those responsible with dereliction of duty leading to appropriate penalties.[132] Lawful combatants who violate the law of armed conflict remain personally liable for their violations, but retain the procedural protections of Article 86 of Convention 3 as P.O.W's. Roberts reacted to Article 43's removal of the penalty of loss of lawful combatant status for violation of the laws of armed conflict, by noting that individuals could now only be punished for their violations if sufficient evidence to prove individual guilt could be produced in court.[133] Such evidence would, however, also be required for removal of status. The point is that violation of the laws of war is a universally punishable offence. It should not be enforced by deprivation of lawful combatant status; it is an issue of how a war is fought rather than of those qualified to fight it. Observance of the laws of war is a sound principle in abstract, but its application in times of armed conflict has been unsatisfactory. Compliance with

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[131] Statement of the ICRC delegate to the conference CDDH/111/SR30. Such a system imposes an obligation on the command of armed forces to educate their combatants in the law of armed conflict.

[132] Loc cit.

[133] G B Roberts "The new rules for waging war: The case against ratification of Additional Protocol 1" 26 Virginia Journal of International Law (1985) 109 at 129.

the law of armed conflict could easily become another propaganda tool in the South African armed conflict.

Article 43(2) defines the persons who have a right to participate directly in hostilities - lawful combatants - and reaffirms the principle of lawful combatant status, the right to participate directly in combat without violating the law ab initio. All members of armed forces, as defined in paragraph 1, excluding non-combatants, as defined in paragraph 2,[134] are combatants and all combatants are lawful.[135] By necessary implication those who are not members of armed forces under paragraph 1 are not lawful combatants. Hence the importance of the three conditions of armed forces - command link, organisation and responsible command - for lawful combatant status. The provision is an improvement over Article 4 of Convention 3 which, by implication, made the criteria for P.O.W. status the criteria for lawful combatant status.

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[134] The only non-combatant members of armed forces mentioned specifically are medical personnel and chaplains who have special functions under the Conventions and Protocols. Generally speaking they are not allowed to enter into combat and they do not acquire P.O.W. status on capture - See above 4.2.1.2; Geneva Convention 1 Articles 24, 28; Convention 2 Articles 36, 37; Convention 3 Article 33; Protocol 1 Article 8(c)&(d).

[135] Military personnel permanently assigned to civil defence organisations under the provisions of Article 67 of Protocol 1 are the one exception to the general rule that armed forces members are lawful combatants. Once such members are assigned to civil defence organisations and acquire Article 67's protection, they lose the right to participate in hostilities for the duration of the armed conflict.

Combatant status has been defined in such a manner as to avoid controversial terms like 'privileged', 'legitimate' and 'lawful'.[138] Nevertheless, it is submitted that the appellation 'lawful' should be retained for the sake of convenience. Article 44 provides for the forfeiture of combatant status by a guerilla who fails to comply with the minimum rule of distinction in certain situations and Articles 46 and 47 deny status to spies and mercenaries respectively. The individual fighter who has lost 'combatant' status still remains a de facto combatant. How then are we to distinguish him semantically from his legitimate counterpart? In addition, in the South African context the appellation 'lawful' is particularly appropriate as combatants who have lost this status are unlawful under national law.

Article 43(3), an important innovation, sets out the requirements for incorporation of paramilitary or police forces (considered civilians in international law) into a party to the conflict's armed forces and by extension their qualification as lawful combatants. Two conditions must be met: (i) The party to the conflict must notify other parties to the conflict of the incorporation and, by necessary implication, of the identity of the particular paramilitary force being incorporated. Such notification is unlikely in South Africa because the Government does not recognise the ANC. It is submitted that notification may be dispensed with because the large scale para-military

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[138] CDDH/111/361 Add 2.

activities undertaken by the police is a matter of public knowledge. (ii) The paramilitary force or police force must meet the conditions of paragraph 1, i.e., command link, organisation and responsible command. In South Africa the extensive use of the South African Police in a paramilitary role makes this feature of Article 43 of enormous significance.

While Article 43's establishment of the conditions for lawful combatant status is unproblematic, the long and detailed Article 44 complicates the determination of status. Article 44 reads:

COMBATANTS AND PRISONERS OF WAR

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. Recognising, 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 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 perfidious within the meaning of Article 37 para 1(c).
4. A combatant who falls into the power of an adverse Party while failing to meet the requirements set forth in the second sentence of paragraph 3 shall forfeit his right to be a prisoner of war, but he shall, nevertheless, be given protections equivalent in all respects to those accorded to prisoners of war by the Third Convention in the case where such 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 military operations 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 of 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.

Article 44(1) incorporates the conditions of Article 43 for lawful combatant status into the conditions for P.O.W. status. Anyone involved in the South African armed conflict who does not qualify as a lawful combatant will not qualify as a P.O.W. While reaffirming the obligation on combatants to comply with the law of armed conflict contained in Article 43, Article 44(2) reiterates Article 85 of Convention 3's rule that violations of the law of armed conflict shall not deprive combatants of lawful combatant status or P.O.W. status, except through violation of the specific conditions set out in Article 43 and in Article 44(3). It thus makes explicit what is implicit in the structure of Article 43, viz.: that compliance with all the rules is not a constitutive condition of lawful combatant or P.O.W. status. Article 44(2) recognises that criminal responsibility for war crimes is individual, not collectively based on the obligations of group responsibility.[137] In other words, if an ANC member blows up a bar on the Durban beach front, he and all other ANC members should not be deprived of protected status when he can

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[137] G H Aldrich "Progressive development of the laws of war: A reply to criticisms of the 1977 Geneva protocol 1" 26 Virgina Journal of International Law (1986) 694 at 705.

still be tried and punished for his individual offence.[138]

Article 44's most important provisions in respect of lawful combatant status are contained in paragraph 3. Article 44(3) contains the compromise between those Conference delegates favouring the retention of the visibility component of the principle of distinction either as a separate rule of the law or as a condition for lawful combatant status and those favouring its total rejection because of the impossibility of national liberation movements meeting such a condition.[139] Article 44(3) sets out a general rule of visibility and a special rule for exceptional situations.

The first sentence of Article 44(3) provides that in order to promote civilian protection, all combatants must distinguish themselves from the civilian population while they are engaged in an attack or in military operation preparatory to an attack. The

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[138] Article 44(2) confirms the construction that avoids the apparent contradiction between Article 85 and Article 4A(2) of Convention 3. It appears to neutralise Communist bloc reservations to Article 85 which are to the effect that will not extend protected status to individuals convicted under the laws of the DP for war crimes. But Communist bloc representatives stated in the working group that Article 85 only covered the period after conviction of a P.O.W., and Article 44(2) should be understood as only dealing with the situation up to conviction- Bothe et al. op cit 750; CDDH/236/Rev1. Thus they accepted Article 44(2) as having a limited effect, and still apply their reservations to Article 85 of the Convention.

[139] See CDDH/11/SR33-36, and the Report of the Committee CDDH/236/Rev1.

principle of distinction is reaffirmed.[140] An important omission from Article 44(3) was a condition enforcing the distinction between the opposing armed forces. Combatants are only required to distinguish themselves from civilians and not from members of the opposing side. It can only be assumed that the prohibition against activities such as wearing the other sides uniform in combat is part of customary law and applies to the South African armed conflict. Two features of the general obligation of distinction must be examined:-

(i) How, when and where must combatants distinguish themselves? The method of distinction is unspecified, but can be deduced from past practice in the context of the existing law. Traditionally a distinctive sign and the open carrying of arms was sufficient. The mention of carrying arms openly in the second sentence of Article 44(3) suggests that it is the minimum general condition, but because the second sentence is an exceptional situation, it is arguable that under the general rule something more is required. But the special rule in sentence 2 is exceptional more in regard to the 'when' than the 'how' of distinction. Article 44(3) sentence 1 definitely applies a less rigorous standard than Article 4 of Convention 3. In this context we must note Article

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[140] The general principle of distinction is specifically mentioned in Article 48 which provides:

> In order to ensure respect for and protection of the civilian population and objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants.

44(7), which is to the effect that the generally accepted state practice of wearing uniforms remains unchanged under Protocol 1. Article 44(3) first sentence lowers the standard of distinction for what in effect will be mostly regular armed forces. Is its reduced standard overridden in respect of regulars by the specific rule contained in Article 44(7)? It is submitted that Article 44(7) only requires that regular forces should wear uniforms whenever possible.[141] The working group's report noted that regulars are not required to wear uniforms when they are assigned to tasks where they must wear civilian clothes.[142] Does this mean that when they operate clandestinely regular armed forces may discard their uniforms? As long as they meet the conditions in Article 44(3) sentence 1, they will not be in violation of the Protocol. Article 44(7) does not contain a specific sanction for failure of regular armed forces to wear uniforms.[143] It merely encourages a generally accepted practice. It provides a justiciable standard of distinction, in the sense of uniforms being the principle means of distinction for regular armed forces, which is not specifically provided for in paragraph 3 sentence 1. On this basis it is submitted that Article 44(3)

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[141] After A Rosas The Legal Status of Prisoners of War (1976) 333.

[142] CDDH/236/REV2/XV 373 para 84.

[143] Contra M Bothe, K Partsch & W Solf New Rules for Victims of Armed Conflict (1982) 256, who feel that members of regular armed forces lose their lawful combatant and P.O.W. status if they do not adhere to paragraph 7. But such an approach is not borne out by the text. It is submitted that it is unrealistic given the nature of modern warfare.

first sentence requires some functional method of distinction, based on, but not dependent upon, the carrying of arms openly and the wearing of uniforms. What it is will be dependant upon the particular circumstances of a specific armed conflict. Thus the blue denims of SWAPO members appear to meet the obligation in Namibia because their appearance is immediately associated with SWAPO. Although less well known, ANC combatants in uniform wear khaki with black berets.

The occasions when a combatant must distinguish himself from civilians prior to attack have been reduced from all times when on active duty, or at least while engaged in military operations, to only those military operations preparatory to attack. The daytime civilian/night time combatant, common in the South African armed conflict, has been sanctioned by Article 44(3)(1), provided that he properly distinguishes himself as soon as he begins to participate in a military operation preparatory to an attack. It appears that military operations preparatory to an attack should include administrative and logistical activities preparatory to an attack. But the phrase probably does not include recruiting, training, administration, collection of contributions and dissemination of propaganda because these activities are likely to be conducted in a civilian environment.[144]

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[144] Bothe et al. op cit 252.

(ii) The consequence to combatants of failure to distinguish themselves: There has been some debate as to whether non-compliance with the principle of distinction during the times and occasions specified, results in loss of lawful combatant status and P.O.W. status. Protected status is lost in respect of the exceptional situations covered in Article 44(3) second sentence. Non-compliance with the general rule of the first sentence is punishable as a war crime. But do combatants who violate the general rule lose their protected status as well? There is no explicit reference in the first sentence to the loss of protected status as a sanction for a combatant's failure to distinguish himself. However, the provision in the second sentence that in the extreme situations specified there, where compliance is more difficult that "...he shall retain his status as a combatant..." if he complies with the less onerous conditions set out, seems to imply that in the general situation where compliance is easier, he should only retain his status if he has complied with the condition of distinction.[145] This implication is supported by the wording of Article 44(2), which provides that violations of the rules of international law shall not deprive a combatant of his protected status "...except as provided in paragraphs 3 and 4..." and by the traditional legal position of making status dependent on visible distinction. But the proviso in Article 44(2) may only apply to the second sentence of Article 44(3) and the authors of

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[145] Bothe et al. op cit 251 assume that the retention of the sanction of loss of lawful combatant status for failure to distinguish oneself in sentence 2, applies to sentence 1 as well.

Article 44 may have intended to change the general legal position. The travaux preparatoires do conflict with the interpretation that status is conditional on visibility in the general situations set out in sentence 1. The Report of Committee 3 stated that

> ...with one narrow exception, the article makes the sanction for failure by a guerrilla to distinguish himself when required to do so to be merely trial and punishment for violation of the law of war, not loss of combatant or P.O.W. status.[146]

The narrow exception is contained in the second sentence of paragraph 3. It is therefore submitted that, despite the ambiguity, Article 44 shifts the sanction for combatants' failure to distinguish themselves in general combat situations from loss of the right to participate and P.O.W. status to penal and disciplinary sanctions.[147] Failure on the part of those in command to enforce the new norm of international law becomes a breach of Articles 86 and 87.

The special rule of visible distinction contained in Article 44(3)'s second sentence is the Article's most controversial provision. The compromise between those states against a blanket exemption from the condition of visibility for guerilla forces

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[146] CDDH/407/REV 1 para 19. F Kalshoven "Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts: The Diplomatic Conference, Geneva 1974-1977" 8 NYIL (1977) 130 supports this interpretation.

[147] Aldrich 31 American LR (1982) 879 notes that the military law of states will have to be updated in order to make it possible to prosecute the crime of not distinguishing oneself.

fighting for self-determination and those states advocating such an exemption, is contained in this sentence. Under this provision combatants who, finding themselves in the special circumstances outlined, carry arms openly during the periods outlined, remain lawful, but are not relieved of liability for violation of the new offence established under the first sentence.[148] If they fail to comply with the minimum condition of visibility set out they forfeit their right to participate and P.O.W. status.[148] This is the only exception to the general scheme of Article 43-44 which makes retention of lawful combatant status not conditional on visibility.[150]

The special rule applies in "...situations in armed conflicts where, owing to the nature of the hostilities...". The identity of these situations is not made explicit in the text. The decisive element in identifying these situations is not the cause of the conflict, but the nature of the hostilities. The nature of

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[148] Bothe et al. op cit 253; Kalshoven 8 NYIL (1977) 131.

[148] CDDH/111/SR56.

[150] This means that in effect they are worse off than combatants in the general situations covered by sentence 1, who are amenable to prosecution for violation of the principle of distinction, but retain their protected status. G Aldrich "Progressive Development of the Laws of War" 26 Virginia Journal of International Law (1986) 207ff justifies this exceptional treatment on the basis that (a) failure to carry arms openly can in certain circumstances create such risks for the civilian population that the failure must be discouraged by greater sanctions; (b) it is an incentive to make guerrillas in wars of national liberation and occupied territory abide by the law which has been especially adapted to conditions in such conflicts.

the hostilities must be such that they lead to situations where the combatant cannot distinguish himself and retain any chance of success.[151] Because subsequent state practice is almost non existent the meaning of the phrase is best adduced from the travaux preparatoires. In the explanation of votes given after the adoption of the draft Article at the committee and plenary stages, there was a

> ...marked unity of opinion that the situation envisaged in the second sentence of paragraph 3 can arise only in occupied territory and in the cases of wars of national liberation, precisely the two types of situation that is, which inspired the debate from the outset.[152]

The states concerned about the loosening of restrictions on guerrillas in Article 44(3) sentence 2, attempted to limit its application to situations of occupation and wars of national liberation and thus tried to protect their own interests which were mainly in interstate wars. Lysaght notes that

> ...whether the drawing of a cordon sanitaire around situations of occupation and wars of national liberation was strictly justified on the wording of the paragraph was a doubt voiced only by the Canadian delegation who pointed out that it could apply also in guerrilla operations during wars

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[151] Kalshoven op cit 1977 127.

[152] Kalshoven op cit 1977 128 - Statements made by Sweden, Finland, France, Canada, US,-CDDH/111/SR55-56, CDDH/SR40-41. See also the UK Declaration on signature:

> Paragraph c in relation to Article 44, that the situation described in the second sentence of paragraph 3 of the Article can exist only in occupied territory or in armed conflicts covered by paragraph 4 of Article 1.

Paragraph 3 of the Italian statement on ratification states that such situations exist only in "occupied territory" - 251 IRRC March/April (1986) 113. This statement tends to throw doubt on the efficacy of Article 1(4).

conducted by regular armies.[153]

On its face the Article does contradict the narrow interpretation, but this narrow scope, like the narrow scope of Article 1(4), was one of the arguments used to engender widespread acceptance of the provision. For example, the Nigerian delegate said that

> ...once the colonialist, racist and apartheid regimes changed their abhorrent practices and withdrew their forces the fears of certain delegations [about the lack of protection for civilians in draft Article 42] would be allayed, the compromise text would be relegated to the archives.[154]

In any event the South African armed conflict is one of the factual situations falling within the cordon sanitaire. This does not mean that the special rule governs all combatants in the South African armed conflict all of the time. The general rule applies unless the combatant is in a situation where if he distinguished himself he would lose all chance of success.

How, when and where must a combatant distinguish himself in terms of Article 44(3) sentence 2? "Carrying arms openly" is the subminimum of distinction and is a factual question. Arms must be carried openly, not obviously. The hiding of small arms during

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[153] C Lysaght "The attitude of the Western Countries" in A Cassese (ed) The New Humanitarian Law of Armed Conflict vol 1. (1979) 349 at 358. See also the Swiss delegate's statement that a misunderstanding prevailed about draft Article 42 (Article 44). It was not specially conceived in the interests of liberation movements, but was a rule of general scope, applicable to all armed conflicts - CDDH/SR40.

[154] CDDH/111/SR56.

the delimited periods would mean loss of lawful combatant status. This single condition of visibility has been accused of completely undermining the principle of distinction. But it must be seen in context. Article 37 makes the hiding of arms perfidious, enforcing what is a practical adaptation of the law.

Arms must be carried openly "...during each military engagement...". This is a factual question, but includes any military engagement however small. Arms must also be carried openly "...during such time as he is visible while engaged in military deployment preceding the launching of an attack in which he is about to participate." The meaning of this provision is controversial. It must be emphasised that outside of actual engagement, the only time in which a combatant need carry his arms openly in Article 44(3) sentence 2 situations is while he is engaged in deployment for attack. He need not reveal his arms before he himself is attacked. In other words, the provision applies only to guerrillas who have taken the initiative. A guerrilla who is attacked and only then draws and fires is not in violation of this condition. The drawing of the line between attack and defence is justified not only on the basis that it is during attacks that civilians are most likely to be harmed, but also because conditions of warfare in wars of national liberation make it unrealistic to expect guerrillas to carry arms openly

except during engagements and military deployments.[155]

There are two parts to this provision:

(i) "Engaged in military deployment preceding the launching of an attack": At the Conference widely differing meanings were given to deployment. The Western position is well illustrated by the Federal German delegate's opinion that it was "...an uninterrupted tactical movement towards a place from which an attack is to be launched."[156] The Third World's position was summed up by the Egyptian delegate, who said it was "...the last steps in the immediate and direct preparation for an attack, while the combatants were taking up firing positions." The language of the text supports the Western view as the "deployment" precedes the "launching of an attack". But the Western view defeats the object of the section, which is to promote protection for both guerrillas and the civilian population by inducing guerrillas to adhere to the law through the realistic use of the law. The value judgement implicit in paragraph 3 is that the minimum rules can be met even in very difficult combat circumstances.[157] The Swedish delegate said:

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[155] G Aldrich "Guerrilla Combatants and Prisoner of War Status" 31 American ULR (1982) 878; CDDH/111/SR56.

[156] CDDH/SR40 - Annex 2; UK - CDDH/SR40; CDDH/SR41 at 3 Netherlands, at 7 Canada, at 14 USA. See also the Italian statement on ratification op cit para d, and the UK Declaration on Signature para c.

[157] W T Mallison & S V Mallison "The Juridical Status of Priviliged Combatants under the Geneva Protocol of 1977 Concerning International Conflicts" 42(2) Law and Contemporary

> ...attacks from ambush were the most common form of guerilla warfare. That method depended on surprise and could hardly be prohibited. The provisions of paragraph 3 might be interpreted to mean that guerrillas had to shows their arms in an ambush. That rule however, would not be easy to apply and would not in fact change guerilla warfare that much.[158]

It is therefore submitted that the better view is that deployment must be taken to mean when assuming firing positions. But there is a qualification to this submission. Combatants may engage in ambush as long as the camouflage they use is natural, but they will not remain lawful if they engage in ambush using their own apparent civilian status as camouflage. The general principle is that the adversary should not expect to be attacked by civilians.[159] In such a situation arms must be shown. Thus in S v Mogoerane,[160] Mogoerane and his comrades would probably have lost their lawful combatant status as there was no evidence they distinguished themselves in any way before they attacked the police stations.

(ii) "As he is visible to the adversary". The inclusion of this phrase in the Article sparked a technical debate in Committee 3 about the different means and methods by which a combatant may become visible to his adversary. The UK delegate said that they included electronic devices. The PLO delegate interpreted it as

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Problems (1978) 24.

[158] CDDH/111/SR56.

[159] Swedish delegate - CDDH/111/SR56.

[160] Unreported TPD 6 August 1982 - 1 LHRB (1983) 118.

"...visible to the naked eye..." only, since recourse to electronic devices rendered the Article useless.[161] The possibilities raised by for instance, spy satellites, makes such a point of view more realistic. The debate was still unresolved at the plenary and it appears that states that possess advanced scanning devices will give a wider meaning to visible. But as Kalshoven points out, these interpretations treat "visible" out of context; the real issue is whether an individual is visible as a person who does or does not carry his arms openly.[162] His approach narrows the range of possible interpretations. Only devices that identify the carrying of arms are tenable; perhaps only the naked eye and binoculars. But with modern advances in detection, the carrying of arms is likely to be easily identifiable at great range, leaving the interpretation a technical issue open to partisan interests. It is submitted that a combatant should rather be judged on whether he displayed his arms when he could reasonably have expected to be visible to his adversaries or as the working committee stated, when "...the combatant knows, or should know that he is visible."[163] An ANC combatant could not reasonably expect to be visible to the SADF via CIA satellite photographs. But if he walked into a police station he could reasonably expect to be visible.

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[161] CDDH/111/ at 147.

[162] Op cit 1977 129.

[163] CDDH/236/REV1.

The third sentence of Article 44(3) provides that guerilla operations in which combatants comply with the conditions of paragraph 3 cannot be considered perfidious and hence contrary to the laws of war. Thus it appears that an individual's failure to distinguish himself according to the conditions of Article 44(3) first and second sentence will be considered perfidy if those acts result in the death, wounding or capture of an adversary. Article 37 - perfidy - is further explored below.

National liberation movements do not generally conform to the condition of visibility. The PLO still uses apparent civilian status as camouflage for attacks in Israel[164] as does the ANC in South Africa. Obviously, compliance on both sides of the South African armed conflict, but especially on the part of the ANC, is militated against by extreme reluctance to be caught because of the severe consequences. Should lawful combatant status become possible, adherence is bound to improve. Although the retention of the principle of distinction's visibility aspect as a criterion for lawful combatant status in Article 44(3) is questionable, the principle itself is not, and failure to adhere to it whatever the penalty will endanger the civilian population.

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[164] R Sabel "Remarks: Problems of the Law of Armed Conflict in Lebanon" 77 Proceedings of the American Society of International Law (1983) 241.

A combatant's failure to comply with the conditions of Article 44(3) second sentence results in his losing both his right to participate and P.O.W. status. Article 44(4), however, removes much of the sting from this forfeiture. Article 44(4) was used to induce national liberation movement sponsors to accept the minimum condition of visibility in Article 44(3). Indeed, the explicit link between Article 44(4) and Article 44(3) second sentence implies that Article 44(4)'s similar treatment only applies in wars of national liberation or occupied territory because the special rule in Article 44(3) sentence 2 has been interpreted to apply only in wars of national liberation and occupied territory.

The first sentence of Article 44(4) spells out that a combatant who fails to meet the conditions set out in the second sentence of Article 44(3) forfeits his right to P.O.W. status, but only if he falls into enemy hands "...while failing to meet the requirements...". In other words, the sanction of loss of status becomes operative only if he is captured in the act of failing to disclose his combatant's nature in terms of Article 44(3) sentence 2. But Article 44(4) repairs much of the damage done by loss of lawful combatant status and P.O.W. status. The individual prisoner gets equivalent treatment in all respects to that set out for P.O.W's in Convention 3 and the Protocol, including all the judicial and procedural safeguards if he is tried and

punished for any offence he may have committed.[165] Does equivalent treatment include immunity for taking up arms? Such an interpretation would render sentence 2 of Article 44(3)'s removal of lawful combatant status absurd. Moreover, as Bothe, Partsch and Solf note, it is clear that the Conference did not intend such a result.[166] Recalling that under Convention 3 respect for combatant's privilege is maintained through Article 87, which provides that P.O.W's may only be sentenced to the penalties provided for the DP's own armed forces who have committed the same act, Bothe, Partsch and Solf point out that the fact that failure to distinguish oneself is now a breach of the Protocol puts the DP under a duty to suppress such breaches on the part of its own personnel and to include appropriate sanctions in its own disciplinary code. These new sanctions can in terms of Article 87 be applied to captured unlawful combatants. Thus, equivalent protection will not include protection for acts of violence committed by unprotected combatants.[167] Can these unlawful combatants be sentenced to death? Referring directly to the South African armed conflict, Asmal argues that an individual protected by Article 44(4),

> ...could not be sentenced to death because prisoners of war cannot as a general rule and ... the provisions of Article 44, paragraph 4 envisage a higher standard than the minimum

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[165] CDDH/111/361 Add 2 Committee report on Article 44(3).

[166] Op cit 255 - CDDH/236/REV1 para 90; CDDH/407/REV1 para 19; CDDH/SR40 para's 26,48,52,74; CDDH/SR44 para's 22,24.

[167] M Bothe, K Partsch & W Solf <u>New Rules for Victims of Armed Conflict</u> (1982) 255.

> guarantees that may come into force during a non-international conflict or under the fundamental guarantees accessible to persons affected by a struggle against racism and apartheid under Article 75 of the Protocol.[168]

Although Article 75 does not prohibit capital punishment for unlawful participation and it seems that P.O.W's protected by Convention 3 can be sentenced to death, it is submitted that such a practice is unviable during armed conflict, contrary to the humanitarian spirit of the law and wrong on moral grounds. There is also a growing international opinio iuris that such measures are not to be taken during wars of national liberation. The South African Government should be urged to refrain from executing captured ANC combatants on any ground.

What equivalent protections are available? The Article is not explicit and statements in Committee are not helpful either. Are individuals who have lost their status to be housed in P.O.W. camps or in prisons with other criminals? What of working conditions, payment, rights to communicate, ICRC access, complaints to Protecting Powers? The content of the Article's protections remains unclear. Nevertheless, it is submitted that in the South African context, separate detention facilities and certain basic rights of access would go a long way to meeting Article 44(4)'s equivalent protections.

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[168] K Asmal The Status of Combatants of the Liberation Movement of SA under the Geneva Conventions of 1949 and Protocol 1 of 1977 9.

Kalshoven criticises Article 44(4) on the basis that it does not encourage compliance with Article 44(3) second sentence's condition of carrying arms openly during attacks because it has largely negatived the penalty of loss of P.O.W. status.[169] Kalshoven notes there were two main reasons for this sanction of loss of status.[170] Firstly, to encourage guerrillas to distinguish themselves from the civilian population before an attack. Secondly, to enable the DP to prosecute the combatant if he had not so distinguished himself. In fact, a person protected by Article 44(4) can still be punished for the war crime of failing to distinguish himself under Article 44(3) sentence 1, which undoubtedly will encourage guerrillas to distinguish themselves from civilians. Moreover, Article 44(3) does not protect combatants who lose their protected status under sentence 2 from prosecution for engaging in combat. The criticism that Article 44(4) discourages compliance with Article 44(3) is largely unfounded.

The remaining provisions of Article 44 shore up all possible loopholes in the granting of protected status. Article 44(5), an important innovation, ensures that any combatant who is captured while not engaged in an attack or a military operation preparatory to an attack, retains his rights as a combatant and a

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[169] F Kalshoven "Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts: The Diplomatic Conference, Geneva 1974-1977" 8 NYIL (1977) 132.

[170] Ibid.

P.O.W. whether or not he may in the past have violated the rule in the second sentence of paragraph 3. This rule will protect the majority of P.O.W's from fabrications by the DP of their past histories aimed at depriving them of protected status.[171] But it only applies to protected status and does not confer immunity against prosecution for perfidy under Article 37 or for the war crime of failing to distinguish oneself under Article 44(3) sentence 1. Article 44(6) is a savings clause designed to make it clear that Article 44 is not intended to supplant Article 4 of Convention 3 in cases where the latter would entitle a person to lawful combatant and P.O.W. status. Article 44(8) ensures that persons whose entitlement to P.O.W. status arises only from Article 44 are equally as entitled to the protections of the first and second Geneva Conventions as those whose P.O.W. entitlement flows from Article 4 of Convention 3.

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[171] Working Group Report CDDH/236/REV1/XV Para 91.

4.4.4 SPECIAL PROBLEMS FOR THE PROTECTION OF COMBATANTS IN THE SOUTH AFRICAN ARMED CONFLICT

4.4.4.1 INTRODUCTION

Certain types of conduct by combatants and certain categories of combatants have been singled out for special scrutiny because of their relevance to the South African armed conflict. Combatants who have engaged in perfidy, the grave breach of apartheid, and the use of terror, as well as juvenile and female combatants, township combatants, spies, and mercenaries, are all subject to exceptional legal regimes once they fall into enemy hands.

4.4.4.2. PERFIDY

Article 37 of Protocol 1 provides important support for the principle of distinction between combatants and civilians. The first part of Article 37 reads:

> PROHIBITION OF PERFIDY
> (1) It is prohibited to kill injure or capture an adversary by resort to perfidy. Acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence, shall constitute perfidy. The following acts are examples of perfidy:...
> (c) the feigning of civilian, non-combatant status;...

Paragraph (c) of the ICRC's draft Article on Perfidy gave as one of the examples of perfidy "...the disguising of combatants in civilian clothing."[172] The supporters of national liberation movements, intent upon the relaxation of the principle of

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[172] CDDH/1/1,3,12.

distinction, were concerned about the draft Article's wording because it did not take into account the fact that many national liberation movements did not have the infrastructures to provide their combatants with uniforms.[173] Paragraph (c) was changed to the "feigning of civilian and non-combatant status" before Article 37 was adopted. Consensus was achieved through the inclusion of the provision in what became Article 44(3), which provides that acts that comply with Article 44(3) are not perfidious under Article 37(1)(c).[174] Article 37(1)(c) places beyond doubt the right of a DP to punish a combatant who does not distinguish himself in terms of Article 44(3), despite the provisions in Article 44(4) and (5). Although Article 37(2) provides that ruses of war, such as the use of camouflage, are not prohibited, the use of civilian status as camouflage once the enemy has been engaged by a combatant in the South African armed conflict will ensure that in addition to losing his lawful status in terms of Article 44(3) second sentence, he will also be punishable for perfidy under Article 37(1)(c).

4.4.4.3 THE PRACTICE OF APARTHEID AS A GRAVE BREACH AND A WAR CRIME UNDER ARTICLE 85 OF GENEVA PROTOCOL 1[175]

Against the background of the International Convention on the

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[173] See CDDH/111/SR27 XIV 245.

[174] CDDH/111/SR48 XV 101 and CDDH/236/REV1 XV 375 - Report of Committee 3.

[175] See L C Green "The New Law of Armed Conflict" 15 Canadian Year Book of International Law (1977) 3 at 19.

Suppression and Punishment of the Crime of Apartheid,[176] it was not surprising that when the Geneva Diplomatic Conference was deliberating on what new offences to add to the 1949 list of grave breaches, the addition of the crime of apartheid should be insisted upon by the Third World bloc. A number of delegations pointed out that customary law, the 1949 Conventions and the Protocol all forbade discriminatory treatment and that therefore there was no need for a special provision on apartheid. But the amendment went through in spite of the fact that it violated the neutrality of humanitarian law.

Article 85(1) sets out that Articles relating to the repression of grave breaches under the 1949 Conventions also relate to the repression of grave breaches of the Protocol. These Articles provide that all states party to the Conventions have a duty to seek out and punish war criminals of whatever nationality if found within the states domestic jurisdiction.[177] Article 85(4)(c) lists as one of the grave breaches under the Protocol,

> ...practices of apartheid and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination;...

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[176] Adopted in the form of G.A. Resolution 3068 (XXVIII) on the 30/10/1973, as a result of a campaign in the U.N. by the majority of Third World states, the Convention, which came into force in July 1976, incurs individual responsibility for the commission, participation, conspiracy or incitement of the acts of aiding, abetting, encouraging or cooperating in the crime of apartheid.

[177] Common Article 40/50/29/120.

The initial problem is that of definition. What does "apartheid...[etc.]" mean? Apartheid is not explicitly defined and appears vague and open to wide interpretation.[178] But it was pointed out at the Conference that through the International Convention and common knowledge, everyone was aware of the fact that apartheid referred to the policy of separation imposed by whites in Southern Africa.[179] The scope of application is narrowed by Article 85(4)'s requirements that (i) the breach has to be in violation of the Conventions or the Protocol and (ii) that it must be wilful. Requirement (i) ensures that the grave breach is related to the armed conflict. Requirement (ii) provides that the legal basis for guilt is the intention of the party to commit the breach. With reference to this requirement, Ribeiro submits that simply being a member of the SADF would not entail a breach of Article 85.[180] For the vast majority of SADF members, intention is negated by the compulsion of the disciplinary regime and threat of legal sanction under which they operate. It is submitted that only those in command who consciously formulate and impose apartheid within the framework of the South African armed conflict could possibly be held responsible for a grave breach under Article 85.

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[178] F R Ribeiro "Humanitarian Law Advancing Rapidly Backwards" 97 SALJ (1980) 60.

[179] Green op cit 1977 19.

[180] Loc cit.

Article 85(4)(c) was unnecessary. Its criminalisation of a certain form of political behaviour undermines the law's neutrality, the foundation of the law's application. It appears irrational to the author that the backers of the application of the law of international armed conflict in South Africa should negate all their efforts to modify the law to achieve this goal, by including within this effort such a great disincentive to application of the law as the criminalisation of the very people who must apply it. Adequate provisions penalising discrimination against victims of armed conflict were already extant in the law.

Article 85(4)(c) does illustrate the importance of dropping the condition of conformity to the laws of armed conflict as a condition for lawful participation under Articles 43 and 44 of the Protocol. Had this condition been retained, the argument could have been made that all the members of the armed forces of the South African Government would not be lawful combatants because they violate Article 85(4)(c).

4.4.4.4 THE USE OF TERROR IN THE SOUTH AFRICAN ARMED CONFLICT

The words "terrorist" and "terrorism" are highly emotive concepts in South Africa. What is terrorism and how is it regulated by international humanitarian law in the context of an international armed conflict?[181] There is no decided definition of terrorism in

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[181] See generally H P Gasser "Prohibition of Terrorist Acts in International Humanitarian Law" 26 IRRC (1986) 200.

international law,[182] but it can be distinguished from the other forms of warfare practised in the South African armed conflict. The primary distinction is that while other forms of warfare are directed against the armed forces of the enemy, terrorism is directed against unarmed civilians who are not part of military operations.[183] Of course, all forms of warfare may be indiscriminate, but terror is intentionally directed at civilians with the object of instilling fear.

A psychological element is part of national liberation movement strategy in all wars of national liberation. However, the use of terror in this strategy is often magnified for propaganda purposes by the incumbent so as to classify the whole liberation movement as terrorist, thus discrediting it in the public eye, when terrorism is only part of the movement's hearts and minds campaign. Because the ANC has used terror as a tactic, the Government has labelled it a terrorist organisation. In the context of the international law of armed conflict, however, the ANC's tactics must be divorced from its status. The ANC is a representative organisation with quasi-international status, which employs terrorism and other tactics in its armed conflict with the South African Government. However, the U.N. General

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[182] Gasser op cit 201 notes that the various international conventions on terrorism are limited to one aspect of terrorism, and are therefore of no help in the search for a comprehensive definition of terrorism.

[183] G Schwarzenberger "Terrorists, Hijackers, Guerrillas and Mercenaries" 24 Current Legal Problems (1971) 257 at 263.

Assembly went to far when it asserted that the actions of national liberation movements fighting for self-determination are excluded from the definition of terrorism.[184] Terror is part of, or at least incidental to, ANC strategy. Why? Falk argues that

> ...the insurgent faction in an underdeveloped country has at the beginning of its struggle for power, no alternative other than terror to mobilize an effective operation.[185]

Such a situation is evident in the South African context where, although the ANC went to war in 1960, until very recently a large proportion of its activities involved acts of terror, highly symbolic in nature, but ultimately of little military value because of their very low intensity. Indeed, the South African war machine still effectively keeps the ANC at arm's length. But it also resorts to terror in its war against the ANC.[186]

In spite of the fact that the South African armed conflict is at an early stage and terrorism is considered an acceptable tactic, the law of armed conflict condemns its use. International law draws a distinction between 'licit' and 'illicit' violence, implicitly recognising certain methods and means of warfare as licit and prescribing certain others, including terrorism. Terrorism runs counter to the principle of distinction between

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[184] G.A. Resolution 34/145 (1979).

[185] R A Falk "Six legal dimensions of US involvement" in Falk (ed) The Vietnam War and International Law vol 2 (1969) 218 at 240.

[186] Consider the suspected involvement of South African agents in the recent assassination of Dulcie September, the ANC's representative in Paris - Natal Mercury 4/4/1988.

lawful and unlawful objects of attack. In terms of Article 85(3) of Protocol 1, it is a grave breach of the Protocol to make "...the civilian population or individual civilians the object of attack...", while Article 51(2) of Protocol 1 confirms that civilians shall not be objects of attack primarily designed to spread terror and Articles 53 and 56 prohibit the use of certain objects that could terrorise the civilian population. Illicit violence against persons in the hands of the adverse party is also comprehensively prohibited.[187] Violations of these provisions, such as "wilful killing" or the "taking of hostages"[188] are not only war crimes but are also grave breaches. It appears that within certain limits[189] terror is a licit method of violence when used to control the armed forces of an adverse party. Strictly defined, however, terror directed against armed forces is not terrorism.

The law also provides that only lawful combatants are capable of licit violence. Lawful combatants in the South African armed conflict may, however, resort to illicit violence, such as terrorism, with the result that, under both the 1949 Conventions and Protocol 1, they violate the law and their acts are

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[187] Geneva Convention 1 Article 12(2); Geneva Convention 2 Article 12(2); Geneva Convention 3 Articles 13(2),17(4); Geneva Convention 4 Articles 33,37. Convention 4 Article 34 prohibits the taking of hostages. Geneva Protocol 1 Articles 33(2) and 75 fill in the gaps.

[188] Article 147 of Geneva Convention 4.

[189] Article 35 of Protocol 1.

punishable as war crimes or grave breaches. But there is a distinction between Article 4 of Convention 3 and Articles 43 and 44 of Protocol 1 as to the effect of the practice of terror on lawful combatant status. Because Article 4 of Convention 3 makes protected status conditional on observance of the law of armed conflict, violation of the law through the use of terror makes it possible for combatants to lose their right to participate and become amenable to prosecution under municipal law for wrongful participation and the municipal crime of terrorism.[180] By contrast, under Articles 43 and 44 of Protocol 1, while the observation of the law of armed conflict is required, it is no longer conditional for lawful combatant status.[181] The only sanction available against a lawful combatant who practices terror is prosecution for a war crime (grave breach). It is submitted that this is enough. None of the protections offered lawful combatants prevent their prosecution for the grave breach of terrorism under Article 85. Other than the blanket exemption from prosecution under municipal law, the protections lawful combatants acquire through P.O.W.status are mainly procedural.

The internationalisation of the South African armed conflict would in no way legitimise the use of terror. Article 1(4)'s bringing to bear of the full weight of international law would prohibit the use of terror and provide for penalties equally as

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[180] As happened in Mohamed Ali and another v PP 1969 1 AC 430.

[181] Contra Gasser op cit 211.

severe as those under national law.[192] The set of prohibitions of terrorist acts under international law is more legally sound than the vague, contradictory and ill-defined provisions contained in the Internal Security Act's[193] Article 54.

4.4.4.5 JUVENILE AND FEMALE COMBATANTS

Experience in wars of national liberation has shown that national liberation movements frequently recruit juveniles and woman into their ranks. The South African armed conflict will prove no exception. Protocol 1 attempts to stop the recruitment of juveniles. Article 77 forbids the involvement or recruitment of children under 15, but provides that if such children do take part in the conflict they will, in addition to the rights accorded them as lawful combatants and P.O.W's, enjoy the extra rights the Article affords to children. Further, regardless of any violation of the law of armed conflict by a wrongfully enlisted juvenile, even a grave breach, such a juvenile cannot be executed if under the age of 18 when the crime was committed.

Article 76 of Protocol 1 protects captured female combatants against indecencies. The death sentence is a competent sentence for woman in terms of the Article but the DP should endeavour not

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[192] It could be argued that for practical purposes not all the provisions of the Geneva Conventions and Protocols apply to wars of national liberation. But this would not apply to the prohibitions of terrorism, because these prohibitions are negative and require no infrastructure to enforce.

[193] Act 82 of 1981.

to pronounce it. If a death sentence is pronounced and a woman is pregnant she may not be executed.

4.4.4.6 TOWNSHIP COMBATANTS

The insurrection in South African townships in the past few years is a facet of the armed conflict in South Africa not contemplated by international society in its response to wars of national liberation.[184] International law was developed in relation to a preconception that these wars would involve classic guerilla struggles in rural areas. These situations are beginning to emerge in certain rural areas in South Africa,[185] but the armed struggle is still predominantly urban based. Legal regulation adapted to rural struggles is flexible enough to be transferred to urban guerilla warfare. Lawful combatant status is regulated in the same way in both these theatres - by obeying either the rigorous conditions of Article 4 of Geneva Convention 3 or the better adapted, more flexible conditions of Articles 43 and 44 of Protocol 1. In both theatres the major criterion for lawful combatant status is a command link to the ANC as the party to the conflict. But in the context of township violence directed at the South African Government, the command link becomes tenuous. A member of the ANC firing an AK47 from a shack in the middle of a

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[184] On the insurrection see generally J Frederikse South Africa: A Different Kind of War (1986) 168ff.

[185] Frederikse op cit 174-175. ANC members have also clashed with the armed forces of the national states in rural areas, for example in Venda in March 1988 - Citizen 15/4/88.

township riot would retain his right to participate primarily because he can identify himself as a member of the armed forces of a party to the conflict. But many of those rioting around him, for instance youths throwing petrol bombs at Caspars, would probably find it extremely difficult to establish a direct link between themselves and the ANC. They would also probably find it extremely difficult to establish that they belonged to an organised group operating under a responsible command. In many cases, the total anarchy of the situation renders absurd the proposition that they are lawful combatants within the traditional structures of the law. The essence of the problem is that they remain civilians despite their actions and, as we have seen, the law has historically failed to come to grips with the problem of purely civilian combatants. It has almost universally condemned them. Levees en masse are the closest parallel that comes to mind, but even this category imposes the condition of carrying arms openly and obeying the laws of war.[196] The law is not adapted to deal with civilians who engage in combat in the townships and they will remain beyond all but its most basic protections.

Nevertheless, there may well be organised groups in the townships directly affiliated to the ANC, capable of qualification as lawful combatants, even though they are local township combatants

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[196] See above 4.3.3.2.

and not highly trained nationalist guerrillas.[197] Such groups would qualify for protected status if they could prove their conformity with the personal conditions set out either in the Conventions or Protocol 1. It is likely that any tribunal which, faced with a claim of lawful combatant status by members of such a group, applies the conditions rigorously to the evidence, would almost always conclude that the conditions have not been met. For this reason it is submitted that the incumbent authorities should rather apply flexible guidelines along the lines of those used by the US in Vietnam, making the conferring of protection in these cases an administrative decision based solely on the membership of an organised group able to establish a valid link to the ANC. All combatants who do not qualify for protection under these less rigorous criteria, should still be guaranteed the minimum protections afforded by Article 75 of Protocol 1.

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[197] Such a possibility emerged with the training of part-time combatants by the ANC within South Africa, in the townships or in the open veld - Daily News 30/11/1987.

4.4.4.7 SPIES

Article 46(1) provides:

> Notwithstanding any other provision of the Conventions or of this Protocol, any member of the armed forces of a Party to the conflict who falls into the power of an adverse Party while engaging in espionage shall not have the right to the status of prisoner of war and may be treated as a spy.

Combatants in the South African armed conflict who engage in spying lose lawful combatant status and P.O.W. status.[198] There is nothing in Article 46(1) to suggest that espionage as an occupation is prohibited by international law. Spies just lose the law's protection and a DP may punish a spy under its criminal law, subject to the limitations contained in Articles 29-31 of the Hague Regulations (1907). Article 46(1) does not change the definition of a spy contained in Article 29 of the Hague Regulations, which limited it to a person who,

> ...when acting clandestinely or on false pretenses...obtains or endeavours to obtain information in the zone of operations of the belligerent, with the intention of communicating it to the hostile party.

Article 46(2) makes it clear that a combatant who gathers information in territory controlled by the adverse party while in uniform is not a spy. The meaning of "uniform" was deliberately left undefined, but the report of the committee states that "...any customary uniform which clearly distinguishes the member wearing it from a non-member would suffice."[199] Article 46(4) provides that a combatant who engages in spying does not lose his

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[198] G Aldrich "Guerrilla Combatants and Prisoner of War Status" 31 American ULR (1982) 879.

[199] CDDH/236/REV1 para 35.

protected status "...unless he is captured before he has rejoined the armed forces to which he belongs."

Article 46(3) is an innovative provision. It reads:

> A member of the armed forces of a Party to the conflict who is a resident of territory occupied by an adverse Party and who, on behalf of the party on which he depends, gathers or attempts to gather information of a military value within that territory shall not be considered as engaging in espionage unless he does so through an act of false pretences or deliberately in a clandestine manner. Moreover, such a resident shall not lose his right to the status of P.O.W. and may not be treated as a spy unless he is captured while engaging in espionage.

Article 46(3) recognises that members of armed forces resident in occupied territory may be privy to information incidental to their living there and provides that this should not make them spies or lose them their P.O.W. status. Protection is lost if covert methods of information gathering are used.[200] The underlying premise of Article 46(3) is that resident members of armed forces are not practicing deception simply by appearing to be civilians while gathering intelligence. It must be recalled that in terms of Article 44(3) they only need distinguish themselves in military operations preparatory to an attack. Article 46(3) also ensures that even should such a resident actually engage in covert espionage, he only loses his P.O.W. status if he is caught in the act of spying. Does Article 46(3)

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[200] M Bothe, K Partsch & W Solf New Rules for Victims of Armed Conflict (1982) 266 list forged passes, concealed cameras, clandestine radio transmitters etc. as examples of such methods.

apply to the South African armed conflict?[201] Logically "occupation" includes occupation by an incumbent regime of the territory of a people seeking self-determination. Although such an interpretation goes beyond the meaning given to belligerent occupation in Article 42 of the 1907 Hague Regulations and Article 46(3)'s drafters fastidiously included all references to the traditional terms of occupation, it is submitted that, for humanitarian reasons, the provision should apply inside South Africa. It is plain, however, that a single, shared territory poses enormous problems of application for provisions like Article 46(3).

4.4.4.8 MERCENARIES

Although there do not appear to be any mercenaries engaged in the South African armed conflict at present, a discussion of Protocol 1's provisions on mercenaries is useful because the record of other African armed conflicts tends to indicate their probable future use in South Africa.[202] Traditionally, no special rules applied to mercenaries. If they fell into one of the categories in Article 4 of Geneva Convention 3 and complied with the conditions set out for that category, they were considered lawful

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[201] See generally Bothe et al. op cit 226.

[202] See generally, A Cassese "Mercenaries: Lawful Combatants or War Criminals?" 40 Zeitschrift fur Auslandiches Offenliches Recht und Volkerecht (1980) 1; L C Green "The Status of Mercenaries in International Law" 9 Manitoba LJ (1979) 201; A A Yusuf "Mercenaries in the Law of Armed Conflict" in A Cassese (ed) The New Humanitarian Law of Armed Conflict vol 1 (1979) 113.

combatants and P.O.W's on capture. In response, however, to their extensive use in post-1945 conflicts, it has been argued that the private character of mercenaries distinguishes them from the public members of armed forces and that they are therefore unprotected combatants.[203] Against the background of a general international attack on mercenaries,[204] the idea of authorising the denial of lawful combatant status to mercenaries who fight essentially for private gain was introduced at the Geneva Diplomatic Conference. The states that had fought for the legalisation of national liberation movement combatants were quick to exclude mercenaries. After heated debate, Article 47 was finally agreed upon in the fourth session.[205]

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[203] H Mallison and V Mallison "The Juridical Status of Irregular Combatants under the International Humanitarian Law of Armed Conflict" 9 Case Western Reserve University Journal of International Law (1977) 17.

[204] Between 1969 and 1979 seven General Assembly and three Security Council resolutions were passed on mercenaries, stating that mercenarism was a crime against humanity, and condemning states that permitted or tolerated the recruitment of mercenaries or the provision of facilities to mercenaries. G.A. Resolution 2548 (XXVV) 11/12/1969 stated that:

> The practice of using mercenaries against movements of national liberation and independence is punishable as a criminal act and the mercenaries themselves are outlaws...

G.A. Resolution 34/140 (XXVI) 1979, passed by consensus, called on all states to ensure,

> ...by both administrative and legislative measures that their territory and other territory under their control, as well as their nationals, are not used for the planning of subversion and recruitment, assembly, financing, training and transit of mercenaries designed to overthrow the government of any member state and to fight the national liberation movement of peoples....

G.A. Resolution 34/192G 1979 condemned the use of mercenaries in Namibia.

[205] CDDH/407/REV1 para 23; CDDH/111/SR57 para 4.

Article 47 reads:

MERCENARIES

1. A mercenary shall not have the right to be a combatant or a prisoner of war.
2. A mercenary is a person who:
(a) is specially recruited locally or abroad in order to fight in an armed conflict;
(b) does in fact take a direct part in hostilities;
(c) is motivated to take part in hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks or functions in the armed forces of that party;
(d) is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict;
(e) is not a member of the armed forces of a Party to the conflict; and
(f) has not been sent by a state which is not a Party to the conflict on official duty as a member of its armed forces.

Under Article 47(1), mercenaries are not lawful combatants and do not acquire P.O.W. status on capture. They can be tried for their act of participating in the armed conflict under the DP's national law, but their participation in combat is not yet a crime under international law. Article 47(1) has been criticised for offending the basic rule that all those who take active part in hostilities should be treated without discrimination as to their motive for joining the fighting.[206] But the law has always condemned those who fight for private ends. Mercenaries are not lawful combatants because the command link between them and the party to the conflict, in the sense of their fighting for public

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[206] F R Ribeiro "International Humanitarian Law: Advancing Progressively Backwards" 97 SALJ (1980) 42 at 55.

ends, does not exist.[207] Article 47's deprivation of protections is just one step in an international movement to outlaw mercenarism.[208]

Article 47(2)'s strict definition of mercenaries removes much of the inherent danger in Article 47(1). It defines mercenaries using three positive and three negative elements. The three positive elements are:

(a) Recruitment: The person must be especially recruited as a mercenary.

(b) Conduct: The mercenary must participate directly in hostilities. Bothe, Partsch and Solf note that this condition precludes the classification of advisors and instructors as mercenaries, even if they are not on official duty on assignment by a state that is not a party to the conflict.[209]

(c) Motivation: The mercenary must be motivated essentially for private gain, which is expanded to mean that the mercenary must earn substantially more than a regular soldier. Proof of such gain will, in the nature of things, be extremely difficult to obtain. Ideologically motivated mercenaries remain protected. The

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[207] Bothe et al. op cit 268-9 equate mercenaries, because they fight for private ends, with brigands, bandits and Francs-Tireurs. They point out that Article 47 establishes an analogous rule to the end of naval privateering for land warfare.

[208] See generally "Leashing the Dogs of War: Outlawing the recruitment and use of mercenaries" note in Virginia Journal of International Law (1982) 569 at 589 et seq.

[209] Op cit 271.

test is not entirely satisfactory.[210] Schwarzenberger feels that it is risky to establish legal categories by reference to motive, such as economic incentive, because men, on most occasions, appear to act from mixed motives.[211] The Diplock Report on mercenaries (UK) stated that

> ...any definition of mercenaries which required positive proof of motivation would ... either be unworkable, or so haphazard in its application as between comparable individuals as to be unacceptable. Mercenaries, we think can only be defined by reference to what they do and not by reference to why they do it.[212]

Motivation in an armed conflict like the South African conflict, imports a dangerous psychological element into the law. Most mercenaries involved in fighting liberation movements do so for a variety of reasons, not the least of which is ideological.[213]

The three negative elements exclude from the definition of mercenaries:

(d) Nationals or residents of a party to the conflict: Bothe, Partsch and Solf maintain that it does not preclude the DP from denying P.O.W. status to its own nationals serving in the armed

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[210] Green op cit 220.

[211] G Schwarzenberger "Terrorists, Hijackers, Guerrillas and Mercenaries" 24 Current Legal Problems (1971) 281.

[212] H C Burmeister "The Recruitment and Use of Mercenaries in Armed Conflicts " 72 American JIL (1978) 37 quoting from the Report of the Committee of the Privy Council appointed to enquire into the recruitment of mercenaries (1976) para 7 col 6569.

[213] See Green op cit 220 and the examples quoted.

forces of the enemy.[214] However, in the context of wars of national liberation, the concept of nationality and allegiance must be discarded.

(e) Members of armed forces: In South Africa, mercenaries may enlist in the SADF and thereby circumvent Article 47. Theoretically mercenaries could also join the ANC as a party to the conflict, but this is unlikely to occur in practice. If a mercenary joins the armed forces of a party to the conflict he is subject to those armed forces meeting the conditions contained in Articles 43 and 44 in order to qualify for lawful combatant status and P.O.W. status.

(f) Persons on official duty from third states: This provision exempts persons sent by states not party to the conflict on official duty as members of their armed forces from classification as mercenaries. But as it specifies that they must be sent by states, it appears not to shield members of other national liberation movements that assist a national liberation movement or a state in an Article 1(4) conflict, eg., the ANC's assistance of ZANU and ZAPU in Zimbabwe.

Article 47 does not make the guarantees of Article 75 explicitly available to mercenaries.[215] But Article 45(3) provides that

> ...any person who has taken part in hostilities and does not benefit from the more favourable treatment ... shall have

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[214] Op cit 271; contra Cassese op cit 1980 25.

[215] However, at the Conference a Greek delegate said Article 75 did apply to mercenaries and no one dissented - 8 CDDH/243/250.

> the right at all times to the provisions of Article 75 under this Protocol.

In addition, Article 75 affirms itself, and Article 50 of Convention 3 also applies.

4.4.5 PROCEDURAL AND SUBSTANTIVE GUARANTEES UNDER PROTOCOL 1

4.4.5.1 ARTICLE 45 - PROCEDURAL PROTECTIONS

Article 45 of Protocol 1 fleshes out Article 5 of Convention 3, which provides that if their is any doubt as to a combatants status, he retains the law's protections until his status is determined by a competent tribunal. Although the ICRC had felt Article 5 was sufficient, a number of delegates at the Conference because of the final nature of the decision of Article 5's "competent tribunal" - final in the sense of no appeal and because of the possibility of execution - recommended that it be amended.[216] The major perceived deficiency in Article 5 was the absence of any provision expressly authorising a person found by a competent tribunal not to be a lawful combatant and P.O.W., to raise the issue of his status before a judicial tribunal that puts him on trial for his allegedly unauthorised participation or

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[216] CDDH/111/260. National liberation movements were especially suspicious of these competent tribunals. The ZANU spokesman said,

> ...in the racist regimes courts and judicial tribunals have been used and are being used to further the interests of these regimes. Fair trials are a thing unheard of in these regimes. And yet these regimes have always claimed and continue to claim that their courts and tribunals are competent. - CDDH/111/SR36.

for any violation of the law of armed conflict that he may have committed. If he was only being prosecuted for unlawful participation, the conclusive finding of the tribunal that adjudicated his status would be dangerous. In response to these and other problems, Article 45 was included in the Protocol.

The first sentence of Article 45(1) creates a presumption of P.O.W. status if that status is (a) claimed by the person, or (b) claimed by the party to which he belongs, or (c) he appears to be entitled to P.O.W. status. Nevertheless, the failure of a person to claim P.O.W. status cannot be taken as sole justification for denial of such status.[217] The second sentence provides that in a questionable case a prisoner will remain a P.O.W. until his case has gone before a competent tribunal. Article 45(1) makes it clear that the burden of proving that the conditions for protected status contained in Articles 43 and 44 have not been met rests on the DP.

Article 45(2) provides that prisoners charged with offences arising out of the hostilities who have not been awarded P.O.W. status initially, have the right to assert P.O.W. status de novo and to have a judicial tribunal decide the issue. In South Africa, the adjudication of status would have to occur before the trial because the tribunal's jurisdiction may hinge on the issue. Article 45(2) also makes allowance for the Protecting Power to

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[217] CDDH/236/REV 1 para 58.

attend the proceedings or to be advised of them if they are held in camera for the purposes of state security.

Article 45(3) provides that if a prisoner is found not to be entitled to lawful combatant status or P.O.W. status and the prisoner does not benefit from more favourable treatment in terms of Convention 3, the prisoner has the right to the protection afforded by Article 75. Notwithstanding the derogations permitted by Article 5 of Geneva Convention 4, Article 45(3) also makes the protections of Article 75 the minimum humanitarian standard applicable to civilians protected under Geneva Convention 4 who participate directly in hostilities in the territory of a party to the conflict or in any other territory other than occupied territory. It also guarantees the rights of communication of all persons, except spies captured in occupied territory, and thus almost neutralises the derogations permitted under Article 5 of Convention 4. There appears to be an inconsistency between Article 44(4) and Article 45(3). The combatants who fail to carry arms openly during military engagements or deployments for attack in terms of the second sentence of Article 44(3), lose their right to participate and thus their P.O.W. status, but they are entitled by means of Article 44(4) to a higher standard of protections than those prisoners who have lost protected status and are accorded general protections in terms of Article 45(3). Article 44(4) is, however, simply a case of a special class getting more protection than the general class of unprotected

combatants because the special class were the only group to lose their combatant status through failing to distinguish themselves.

4.4.5.2 ARTICLE 75 - SUBSTANTIVE AND PROCEDURAL PROTECTIONS

Article 75 sets out a minimum standard of protection strongly inspired by the International Convention of Civil and Political Rights. It contains an irreducible hard core of rights that cannot suffer derogation.[218] This mini bill of rights is applicable in terms of Article 75(1) to all persons in the power of a party to the conflict who do not benefit from more favourable treatment under some other provision of the Conventions or Protocol. Article 75(1) would extend the Article's protections to all those who oppose apartheid and find themselves in detention in South Africa for reasons related to the South African armed conflict. It is significant in respect of the South African situation that such protections apply without adverse distinction based either on "race" or "colour". The South African Government's internal policies as they affect prisoner's conditions would probably violate Article 75(1).[219]

Article 75(2) prohibits certain acts by civilians or members of the military. Article 75(3) provides that a person must be fully informed of why he is being arrested, interned or detained and

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[218] G Abi-Saab "Wars of National Liberation in the Geneva Conventions and Protocols" 165 Recueil des Cours (1979) 430.

[219] For example separate detention facilities for separate races.

provides for his quick release if the circumstances justifying his detention no longer exist. Article 75(4) provides for the passing of sentence for an offence related to the armed conflict only after conviction handed down by an impartial and regularly constituted court following recognised principles of judicial procedure. These principles include, inter alia: (a) The accused must be informed of the charge against him and of his rights; (b) individual penal responsibility; (c) no retroactive criminality; (d) presumption of innocence; (e) trial in the accused's presence; (f) no compulsion of self-incriminating testimony; (g) right to examination and cross examination of witnesses; (h) autrefois acquit; (i) public pronouncement of judgement; (j) notice of any further rights of appeal and their time limits. Article 75(5) provides special protections for women. Article 75(6) applies Article 75 until final release. Article 75(7) provides for special rules for prisoners accused of war crimes or crimes against humanity. Article 75(8) ensures that if better treatment is available under any other rule of international law Article 75 does not infringe upon or deny it. Violation of Article 75 would of course be a violation of the law of armed conflict and may lead to individual responsibility.

4.4.6 CONCLUSION

From the ANC's point of view Protocol 1's personal conditions for protected status are a vast improvement on the conditions set out in the 1949 Conventions. Adherence becomes possible because the

Protocol pays attention to details that are important in guerilla warfare in general and in wars of national liberation in particular. In peripheral areas of the law, such as the grave breach of apartheid, the Protocol discriminates against the incumbent. But it is submitted that these discriminatory provisions are unlikely to ever constitute effective law. Moreover, in the substantive provisions relating to the protection of combatants, the Protocol does not discriminate against the incumbent. It is positive law, functionally adapted to a factual situation that requires humanitarian regulation.

4.5 GENERAL CONCLUSION

The law of international armed conflict is a suitable tool for the protection of individual combatants in the South African armed conflict. The more onerous personal conditions set out in Geneva Convention 3 and the better adapted conditions of Protocol 1, provide not only the answer to the question of who qualifies for lawful combatant status and P.O.W. status in the South African armed conflict, but also set out what combatants must do in order to so qualify. In addition, the Conventions and Protocol provide procedural protections to ensure the issue of status is properly investigated and they set out basic human rights for those combatants who do not qualify for protected status. They also make provision for suitable penalties for combatants who violate the law of armed conflict. It is submitted that this unique system of law can be combined into a single legal regime

governing the treatment of combatants in the South African armed conflict. Although no derogation from the protections provided should be countenanced, because of the unconventional nature of the South African armed conflict a certain amount of relaxation of the conditions for protected status should be allowed, especially with regard to adherence to the principle of visibility by combatants. The best solution would be some form of administrative categorisation of combatants based on the general principles of the law, which, however, pays special attention to the peculiar circumstances of the conflict. Creative adaptations of the law are possible. They require only the political will to acknowledge the material application of the law.

SECTION B: CLASSIFICATION OF THE SOUTH AFRICAN CONFLICT AS A NON-INTERNATIONAL ARMED CONFLICT

CHAPTER FIVE

THE MATERIAL FIELDS OF APPLICATION OF COMMON ARTICLE 3 OF THE 1949 GENEVA CONVENTIONS AND GENEVA PROTOCOL 2 OF 1977

5.1 INTRODUCTION

The bulk of this study has been devoted to exploring the classification of the South African armed conflict as an international armed conflict. However, for the sake of completeness, the alternative classification of the South African armed conflict as a non-international armed conflict must also be examined. This chapter's specific aim is to investigate whether the South African armed conflict falls within the material field of application of the law of non-international armed conflict, the condition precedent to the personal application of the provisions of the law of non-international armed conflict offering limited protections to combatants.

Before 1949, humanitarian law's impact on non-international armed conflicts was slight. As noted in chapter 2, non-international armed conflict was regulated by customary modes that became ineffective because they were unsuited to the twentieth century. In 1949 the legal regulation of non-international armed conflict changed significantly.

5.2 COMMON ARTICLE 3 OF THE 1949 GENEVA CONVENTIONS

5.2.1 HISTORICAL BACKGROUND[1]

Common Article 3 was, in 1949, both an innovation and an extension of humanitarian law into the realms of non-international armed conflict. It is one of the few concrete examples of the removal of basic human rights from the jurisdiction of states. Its introduction was a clear, if only potential, limitation of the sovereignty of states that became party to the 1949 Conventions. Humanitarian reformers initially wanted to apply the whole corpus of the 1949 Conventions to non-international armed conflicts, including the right of lawful participation for all combatants. This proposal was rejected ad limine at the 1949 Diplomatic Conference in Geneva, on the basis that it would limit the lawful government's efforts to quell rebellion and restore order and open the door to international interference in purely domestic matters. Despite this setback, the reformers, after noting that governments treated rebels worse than ordinary criminals and resented attempts by external bodies like the ICRC to intercede on the rebel's behalf, argued that combatants wounded or captured in a non-international armed conflict had as great a need of care and decent treatment as the soldier wounded or captured in an international armed conflict.

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[1] See generally G Draper The Red Cross Conventions (1958) 13-16.

Nevertheless, the various draft proposals submitted encountered strong opposition.[2] The main objection was that the established government would ostensibly be required to apply the provision even in cases of brigandage or ordinary criminality.[3] Another problem was the content of the provision. The compromise eventually agreed upon has been labelled a "...convention in miniature."[4] It contains, in a short Article, basic humanitarian rules controlling the actions of the parties to a non-international armed conflict from the outset of the conflict. It does not include any right of lawful participation for combatants. The whole Article clearly constitutes a minimalist approach: the idea that very basic rules are more likely to be applied than complex rules.

5.2.2 THE MATERIAL FIELD OF APPLICATION OF ARTICLE 3 - "ARMED CONFLICT NOT OF AN INTERNATIONAL CHARACTER"

As South Africa is a party to the 1949 Conventions, the application of common Article 3 in the South African armed conflict is solely a question of interpretation of Article 3. If the conflict in the country falls within the material field of application of Article 3, then the Article applies.

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[2] Final Record of the Diplomatic Conference at Geneva 1949 vol 2B 9-15; 40-48; 75-79; 82-84; 90; 93-95; 97-102. Article 3 was discussed first as Article 2 and later as Article 2(4).

[3] J Pictet Commentary 3 32.

[4] Draper op cit 15.

Article 3 states that it applies in the case of an "armed conflict not of an international character". It leaves the specific conditions of such a conflict undefined. Although done deliberately to make the application as wide as possible, it offers no assistance in solving our specific problem of application.[5] The reference to conflicts "...occurring in the territory of one of the High Contracting Parties" would seem to exclude conflicts at sea or in neighboring territory;[6] the latter situation being an important consideration in the South African armed conflict. Article 3's use of the term "armed conflict" requires definition. What distinguishes an "armed conflict" from a riot, faction fight or student protest? Pictet submits that "armed conflict" refers only to disturbances akin to war and does not cover ordinary crimes; while the expression "each party" confirms the conflict has reached a certain stage of development.[7] But "armed" does not necessarily mean with fire arms, and the stage of development is undefined. The Article's content provides vague clues to its material scope. Article 3 appears to demand a fairly high degree of organisation,

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[5] Article 3's ambiguity prompted T J Farer "Humanitarian Law and Armed Conflict: Toward the Definition of International Armed Conflict" 71 Columbia LR (1971) 37 at 43, to remark:

> One of the most assured things that might be said about the words 'armed conflict not of an international character' is that no one can say with assurance precisely what meaning they were intended to convey.

[6] A point raised by A P Rubin "The status of rebels under the Geneva Conventions of 1949" 21 ICLQ (1972) 477 at 483.

[7] J S Pictet Humanitarian Law and the Protection of War Victims (1975) 56.

administration, military command, control and discipline for its observance. For instance, subsection 1(d) implies that the rebels must possess a fairly sophisticated judicial procedural structure if they are to provide "...all the judicial guarantees... recognised as indispensable by civilised peoples." Subsection 2 implies a fairly extensive medical service to collect and care for the wounded and sick. The content of Article 3 clearly raises the threshold of the Article, but we must look elsewhere for further clarification.

The Conference debates reveal that there was little unanimity about the precise meaning of "armed conflict not of an international character". Farer notes that Article 3's ambiguity served as a reconciliation of fundamentally opposed views.[8] The ICRC originally wanted civil wars, colonial wars and religious conflicts to be covered by the Conventions in their entirety.[9] But concern about sovereignty led states to reject this option. One thing made clear at the Conference was that an armed conflict must actually be in progress for Article 3 to apply.[10] The Conference records do contain a set of recommended criteria for distinguishing a genuine internal armed conflict from an unorganised and short-lived insurrection. These criteria lay heavy emphasis on the international impact of the conflict, the

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[8] Op cit 48.

[9] Pictet Commentary 3 30.

[10] Final Record 2B 335 - Swiss delegate.

incumbents full scale military involvement, the rebel's organisation, capacity to respect the law and, significantly, possession of territory.[11] But they do not conclusively define Article 3's scope because they were formulated to define those occasions when the Conventions in their entirety would be applicable to non-international armed conflicts.[12] Accordingly, they incorporate the customary mode of belligerency which is no longer functional in the law. Moreover, the recommendations were not adopted. Booysen's argument that the territoriality requirement makes Article 3 inapplicable to South Africa must thus be rejected because Article 3 does not contain this criterion either explicitly or implicitly.[13] The official ICRC Commentary sees the recommendations as indicative and not exhaustive of "conflicts not of an international character". It concludes that the "...Article should be applied as widely as possible."[14] The fact that various amendments reducing Article 3's scope by enumerating specific types of conflicts were rejected, reinforces the Commentary's call for a latitudinarian application of Article 3. According to the Commentary, the Conference delegates, faced with a choice between either applying all the Conventions to a limited range of conflicts or applying a

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[11] The conditions are listed in Final Record 2B at 121.

[12] R R Baxter "The ius in bello interno" in J N Moore (ed) Law and Civil War in the Modern World (1974) 518 at 526.

[13] H Booysen "Terrorists, Prisoners of War and South Africa" 1 SAYIL (1975) 14 at 31.

[14] Commentary 3 49-50.

limited number of principles to an unlimited range of conflicts, chose the latter course.[15] In addition, the Commentary submits that the principles contained in Article 3 are so basic that no government would violate them even if dealing with bandits. But, as Bond notes, governments have violated these principles.[16] He concludes that

> ...no set of criteria for determining the type of internal conflicts to which Article 3 applies is buried in the Conference Committee reports. Reading through them one nevertheless senses that the delegates intended Article 3 to apply to insurgencies (Angola), to belligerencies or civil wars (Biafra), but never to bandits or even to riots (Watts).[17]

The Conference delegates plainly envisaged that the parties to the conflict must have some minimum form of organisation and that a certain level of violence must exist, but these levels were never agreed upon and were left undefined.

The practice of states underscores Article 3's limited range. Although state practice is fairly confused, it does provide a number of tangible pointers to the Article's scope. In the Algerian conflict, the French Government stated that Article 3 applies,

> ...when a state can no longer maintain order through the normal application of its internal common law and is thus

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[15] Commentary 3 47.

[16] J E Bond The Rules of Riot (1974) 56.

[17] Op cit 57. He assumes that the traditional customary modes of internal conflict regulation are still operative.

obliged to adopt a special code beyond its common law.[18] Portugal did not recognise Article 3's application in its colonies. Portugal made a reservation to Article 3, in which because of, inter alia, Article 3's vague material scope, it reserved the right not to apply Article 3 if it conflicted with its national law in the territories under its sovereignty. The reservation appertained to its colonies and was withdrawn on colonial independence. In the Angolan Civil War, UNITA impliedly accepted Article 3 by its embracement of humanitarian general principles in 1980. In 1978 Ian Smith declared that Rhodesia complied with Article 3, but Robert Mugabe refused to endorse the general principles of the Geneva Conventions and refused to accept a code of conduct for ZANLA fighters because of practical considerations. Although these examples tend to indicate a fairly jaundiced attitude toward Article 3, Forsythe notes that far more attention has been paid to the Article's application than is generally realised.[18] He argues that many governments probably did not made declarations acknowledging the application of Article 3 in order to save national face and prevent the rebels claiming international status, despite the fact that the Article contains an express provision to the contrary. It is true that

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[18] Algerian Office, White Paper on the Application of the Geneva Conventions of 1949 to the French Algerian Conflict; quoted in Commentary 3 35.

[18] D P Forsythe "Legal Management of Internal War: The 1977 Protocol on Non-international armed conflicts" 72 American JIL (1978) 272 at 274-276. He lists 3 ad hoc agreements, 9 explicit acceptances and 21 cases where the ICRC visited and Article 3 possibly applied.

the provisions of Article 3 are general principles contained in most national legal systems and a formal invocation of Article 3 may be seen as legally unnecessary and politically risky. Nevertheless, Article 3 has a bad record of compliance. Bond explains that "...states that quell riots, insurrections or even revolts quickly, do not feel bound to respect Article 3."[20] They act under emergency or martial law as long as the conflict ends swiftly and only accept some obligation to treat opposing forces humanely if the conflict drags on beyond several weeks or months. Although not taking the form of explicit acceptance of Article 3, it often manifests itself in acceptance of an ICRC initiative.

It is submitted that a combination of the lessons of state practice, the intention of the framers and the textual evidence, leads to the following rough outline of the material field of application of Article 3.[21] Article 3 conflicts are delimited from lesser forms of conflict involving sporadic outbursts of violence, such as riots resulting in mass arrests. There must be an armed conflict in progress between different armed forces, which is no longer a simple problem of the maintenance of order. The armed conflict must be of a fairly high intensity and long duration, so that the government is compelled to use its armed

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[20] Op cit 60-61.

[21] See generally ICRC Report on the Reaffirmation and Development of the Law Applicable in Armed Conflict presented to the XXIst International Conference of the Red Cross Geneva (1969) 99.

forces and not just its police, although the use of police in a paramilitary role is sufficient. Such a situation is characterised by the imposition of special legal regimes to maintain domestic control. Both parties should be sufficiently organised politically and militarily, to have a responsible command exercising control and discipline and to implement the Article. The insurgent party is, however, not required to exercise control over territory, nor need it embody any of the attributes of a government.

Adjudged on these criteria, the South African armed conflict probably falls within the ambit of Article 3. While the conflict is at a low level and violence is fairly sporadic, it is beginning to change into a long term war of attrition. The level of violence has risen substantially in the 1980's and can be expected to continue to rise.[22] The Government has imposed draconian sets of unique security laws and proclaimed a State of Emergency. The SADF is heavily involved in the military response to Umkhonto, in the townships, along South Africa's northern borders and in the Frontline states. The ANC is a well organised political collectivity making war on the South African Government and although it has no territory of its own, it has an infrastructure adequate enough to both exercise discipline through a chain of command and apply Article 3. The sustained humanitarian intervention of the ICRC appears to confirm that the

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[22] See Appendix A.

South African situation is more than just a simple problem of the maintenance of order. There is a strong case for arguing that the South African Government is bound to apply Article 3 in the South African armed conflict.

5.2.3 THE BINDING FORCE OF ARTICLE 3

Upon the classification of the South African armed conflict as an Article 3 conflict, Article 3 makes it clear that "both parties" are automatically bound to apply the Article. The South African Government is bound through its contractual obligation. Neither recognition of the ANC nor reciprocity is necessary. The Government cannot technically withdraw Article 3's protections because of violations by the ANC.[23] The Article binds the ANC, but it does not indicate how the ANC is bound. The Article's automatic application appears advantageous. It seems to bypass highly politicised issues that usually impede the application of humanitarian law. Because there is no formal mechanism available to the ANC to bind itself to Article 3, the Government's application of the Article does not involve implied recognition of the ANC. Indeed, Article 3 expressly states in Paragraph 4 that the legal status of the parties is not affected by its operation. The Official Commentary notes:

> Consequently the fact of applying Article 3 does not in itself constitute any recognition by the de jure government that the adverse party has any authority of any kind; it does not limit the government's right to suppress the rebellion by any means - including arms - provided by it's

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[23] G I A D Draper The Red Cross Conventions (1958) 16.

> own laws; nor does it in any way effect the government's right to prosecute, try and sentence its adversaries, according to its own laws. In the same way the fact of the adverse party applying the Article does not give it any right to any new international status whatever it may be and whatever title it may give itself.[24]

In doing so, Kilgore argues, it overcame one of the major stumbling blocks of the customary methods of applying humanitarian law to internal conflicts, viz.: the fact that these methods linked humanitarian protections to the achievement of legitimacy by the rebels.[25] He notes that Article 3's failure as an effective legal instrument is because states in their practice imported these criteria into it.[26] This practice points, however, to the necessity for some form of international recognition of the rebel group in order to bring it within the bounds of effective international legal control. The attempt to avoid what is an undeniable fact of the international system was to Article 3's ultimate detriment. The operation of the Article will give the rebels status. The acknowledgement of the insurgent party is essential if it is to be bound to apply the Article.

Why is it important that Article 3 have legal effects for the ANC? The ANC must be able to exercise rights under the Article and conversely the Article must bind the ANC because unilateral

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[24] Commentary 3 43.

[25] K Kilgore "Law of War: Geneva Conventions Signatories Clarify Applicability of Law of War to Internal Armed Conflict" 8 Georgia Journal of International and Comparative Law (1978) 941 at 948.

[26] Ibid.

application by the incumbent is a myth, given the reality of reciprocity as the major motivation for application. The only credible solution is application of the Article by both sides. How Article 3 binds insurgent movements like the ANC is a vexed question. How does one bind an entity which is not a party to the Convention? Little attention was paid to this issue at the 1949 Conference. Since then, a number of theories have been advanced:-

(i) The original ICRC view was that the insurgents are bound because the original adherence of the government to the Convention containing the Article binds all its subjects, including the rebels, as individuals because the treaty is part of domestic law.[27] The flaw in this view is that it regards the rebels as individual subjects of domestic law under a duty to comply with any international law contained in the domestic law. What is really at stake here is their legal status in international law - their status vis a vis the government and the international community. Further, it is difficult to conceive of individuals as international subjects.

(ii) The updated ICRC approach is that the treaties into which a state has entered are binding for all authorities exercising effective power in that state.[28] Through a rule of custom, treaties are also binding on a government assuming power by means

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[27] Final Record 2B 94, Commentary 3 34-37.

[28] D Schindler "The different types of armed conflicts according to the Geneva Conventions and Protocols" 163 Recueil des Cours (1979) 117 at 151.

of a revolution as the legal personality of the state does not alter through a revolution. The ANC can thus be bound as a potential successor government to the South African Government within the South African state. This approach avoids the conceptual problem of obligating insurgents in an international legal system of which they are not a part, because their responsibilities are made to stem from their condition - consent to be treated as a government is found in the claim to be one. But the ANC may not accept the decision of the Government in binding the state in the first place.[29] In addition, its claim to represent the people does not necessarily mean it claims to be a government, i.e., the finding of consent may be a fiction.

(iii) A third viewpoint is that Article 3, an innovation in 1949, has since become part of customary international law.[30] The evidence of state practice and a concomitant opinio iuris to this effect is contradictory. There have been many internal conflicts where Article 3 has been ignored and even when its application has been recognised there has been constant violation of the Article on both sides. Although some authors argue that a customary norm has now formed, others deny it, and its creation remains controversial.[31] It can, alternatively, be argued that

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[29] D P Forsythe Humanitarian Politics (1977) 140.

[30] M Greenspan The Modern Law of Land Warfare (1959) 624.

[31] Among the disbelievers are the Authors of the Article "The Geneva Convention and the Treatment of P.O.W's in Vietnam" in R Falk (ed) The Vietnam War and International Law vol 2 (1969) 398 at 403; M Bothe, K Partsch and W Solf New Rules for Victims of Armed Conflict (1982) 620.

Article 3's basic provisions are in their substance part of custom and part of ius cogens. In the Corfu Channels Case,[32] the ICJ expressed the opinion that there were certain "...elementary considerations of humanity which have a binding force on all states." Schindler argues that the substance of Article 3 forms part of these principles and is thus binding on any movement purporting to act on behalf of a state without its consent.[33] There is merit in this contention and it is supported by the fact that although few states or insurgent movements have invoked Article 3 in internal conflicts, many have tacitly agreed to respect basic humanitarian principles.

The controversy is, however, largely resolved when the insurgent movement has the political will to adhere to Article 3.[34] Articles 34-36 of the Vienna Convention on the Law of Treaties, provide that a treaty can create either obligations or rights for a third party if the contracting parties intended the treaty to grant such rights or impose such obligations on third parties and the third party accepts these rights and obligations. With regard to the intention of the HCP's, an explicit intention to grant

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[32] 1949 ICJ Reports 22.

[33] Op cit 151-152; See also G Schwarzenberger International Law as Applied in Courts and Tribunals vol 2 The Law of Armed Conflict (1968) 718.

[34] This approach was suggested by Cassese's approach to how Protocol 2 can bind insurgents - A Cassese "The Status of Rebels under the 1977 Geneva Protocol on Non-international Armed Conflicts" 30 ICLQ (1981) 416-439.

rights and impose obligations on third parties emerges from the text of Article 3. Its first sentence reads "...each Party to the conflict shall be bound to apply...". The Article also urges special agreements between "...the parties to the conflict..." to apply some or all of the rest of the Conventions and allows the ICRC to offer its services to "...the parties...". It is plain that the intention of the HCP's, as embodied in the text, is that the insurgents benefit and are addressed by Article 3. The third party must also assent to the rights and duties deriving from the treaty. This is question of fact. The answer is derived from the third party's practice. Paragraph 3 of the Article makes provision for the ideal situation - a special agreement between the insurgent movement and the incumbent government. Such agreements are desirable but extremely rare because of political considerations. Unilateral declarations by insurgent movements that they will apply basic humanitarian provisions are more common. These declarations have the same binding effect as bilateral agreements and if both parties issue declarations they are bound as if they had concluded a formal agreement. It is submitted that the ANC's 1980 Declaration, if it is not an Article 96(3) declaration in terms of Protocol 1, can be seen at a minimum as an implicit unilateral commitment to the basic norms of Article 3. It is arguable that the ANC is bound to apply Article 3, if not formally, then at least in substance. It follows that the Government cannot claim that the ANC cannot invoke the Article.

It can thus be argued that Article 3 binds both parties to the South African armed conflict and that neither party can denounce the Article while the conflict is in progress. Theoretically, if either party fails to comply, the other party can go to the ICRC or other HCP's to call on it to comply. Although the Government is probably already bound to apply Article 3, it would be advisable for it to affirm its commitment to Article 3 in the form of a declaration to the effect that it recognises that Article 3 applies in the South African armed conflict. Together with the ANC's declaration, such a commitment would solidly establish a bedrock of basic protections in the conflict.

5.3 GENEVA PROTOCOL 2 OF 1977

5.3.1 INTRODUCTION - THE GENESIS OF PROTOCOL 2[35]

Article 3 of the 1949 Geneva Conventions, although in its own way a triumph for the legal limitation of violence over unfettered state discretion, does not provide extensive protections to combatants in the South African armed conflict. It was far less ambitious than the original recommendations for the regulation of non-international armed conflicts. Article 3's inadequacies led the 21st International Conference of the Red Cross (1969) to recommend that it should be made more specific and supplemented. The recommendations included a more detailed judicial process, the deferment of executions to the end of the conflict, a general amnesty at the end of the conflict, measures ensuring respect for hospitals, greater relief and, importantly, provisions that combatants should not be punished for participation in combat and an analogous status to P.O.W's for captured participants. These recommendations, contained in a new Protocol 2, would have constituted an ideal vehicle for humanitarian regulation of the South African armed conflict. But as we shall see, the new Protocol's development became bound up with the development of Protocol 1, to the ultimate detriment of both instruments.

The ICRC-convened Conference of Government Experts served as the

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[35] See generally S Junod "Additional Protocol 2: History and Scope" 33 American ULR (1983/4) 29ff.

forum for detailing the proposals for supplementing the law of non-international armed conflict. The experts made a variety of suggestions, ranging from a Protocol with the widest possible material application, covering even low intensity conflicts, to a Protocol with the narrowest scope, covering only high intensity conflicts. The ICRC draft's solution was to make the Protocol applicable to most situations of non-international armed conflict.

The first session of the Geneva Diplomatic Conference was completely taken up with the adoption of wars of national liberation as international armed conflicts. In consequence, the discussions on Protocol 2 were only taken up hesitantly in the second session. The initial basis for discussion was the ICRC draft Protocol. It was a miniature Convention with a relatively broad material scope that placed a substantial number of obligations on the parties and gave extensive rights to third parties such as the ICRC. During the next two sessions the humanitarian safeguards of the ICRC's draft were expanded upon, with some watering down of specific obligations. A draft of forty nine Articles was adopted in Committee by consensus, and was passed on to plenary at the start of the 1977 session.[36] But the consensus was a facade covering the profound discontent of a large number of nations with the draft Protocol. The Pakistani and Canadian delegations carried on parallel discussions with

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[36] CDDH/402/Protocol 2 Articles 1-47.

numerous other delegations and

> ...realised that there was considerable dissatisfaction with the length of the text as well as with the fact that it ventured into domains which they considered sancroscant and inappropriate for inclusion in an international instrument.[37]

As a result, the day before the adoption in plenary, the head of the Pakistani delegation, Hussein J, made what was formally an amendment to the Committee's draft Protocol, but which in fact replaced it.[38] The rationale of this new draft was that it should not affect the sovereignty of the states party to it or the right of non-intervention in their domestic affairs.[38] The emasculated draft Protocol received widespread support not only from Third World states opposed to the Committee's version, but also from the Western and Socialist blocs because these states feared that the Committee draft would not survive a plenary vote. The new twenty eight Article Protocol was adopted by consensus. Protocol 2 was a drastic revision of the ICRC and Committee drafts. All apparent recognition of insurgent parties, most of the rules regulating means and methods of warfare, as well as other sophisticated regulations, were removed. Why?

The major reasons for the emasculation of Protocol 2 was its relation to Article 1(4) of Protocol 1 and the strong attachment

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[37] CDDH/SR49 4 para 11.

[38] CDDH/427 of 31 May 1977 and CDDH/427/Corr.1 of 1 June 1977.

[38] CDDH/SR49 at 5.

of most states to national sovereignty.[40] The split between those in favour and those against Article 1(4) carried over to the negotiations on Protocol 2. Indeed, one of the criticisms of Article 1(4), denied in debate, was that the Third World was trying to bury Protocol 2. This denial was not subsequently borne out. With the inclusion of wars of national liberation as international armed conflicts, many Third World countries saw little reason for Protocol 2. For instance, India, which had spent most of the 1974 session of the Conference attempting to force international regulation on South Africa and Israel, spent most of the 1975 session opposing draft Protocol 2, law which it feared would limit its dealing with various violent situations at home.[41] The Indian spokesman stated:

> If national liberation movements were included under Article 1 [of Protocol 1], the application of the draft Protocol [2] to internal disturbances and other such situations would be tantamount to interference with the sovereign rights and duties of states. The definition of non-international armed conflicts was still vague and no convincing arguments had been put forward to justify the need for draft Protocol 2, the provisions of which would not be acceptable to his delegation.[42]

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[40] See generally D P Forsythe "Legal Management of Internal War: The 1977 Protocol on Non-international Armed Conflicts" 72 American JIL (1978) 280-281; and A Cassese "A Tentative Reappraisal of the Old and the New Humanitarian Law of Armed Conflict" in The New Humanitarian Law of Armed Conflict vol 1 (1979) 461 at 494.

[41] CDDH/1/SR28; D P Forsythe Humanitarian Politics (1977) 128. The Indian delegation even challenged the continued validity of Article 3 of the 1949 Conventions, arguing that it was drafted to cover wars of national liberation when these were regarded as internal armed conflicts, and as this was no longer the case there was no need for Article 3 - CDDH/SR49 annex 6-7.

[42] CDDH/1/SR23 at 56.

The Indian position was shared by many Afro-Asian countries.[43] Their fragile governments were not eager to accord rights to and accept obligations in respect of insurgents in non-international armed conflicts. It is ironic that the argument that these insurgents were rebels against lawful authority and should thus be subject to domestic penal laws only, was the same argument used by colonial, alien and racist regimes. Clearly the authority of colonial, alien and racist regimes is questionable, but so is that of many other governments. The application of humanitarian law in both international and non-international armed conflicts should have been based on the need to regulate the barbarity of all armed conflicts. The Norwegian delegation, motivated as they were by such a need and having supported Article 1(4), viewed the attitude of the Third World to Protocol 2 with dismay.[44]

Ultimately, the reality of a state's internal situation conditioned the way it viewed the Protocol.[45] For those states

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[43] Nigeria and Iraq were also vocal in their objections to Protocol 2. Forsythe op cit 1978 281 notes that many Third World states that had reserved their opinions in Committee, showed themselves to be opposed to the Protocol at the plenary session. They argued that the consensus in Committee had been achieved not on substantive law, but because of a procedural desire not to block what others might accept.

[44] CDDH/1/SR29. The Egyptian delegate was also critical of his colleagues. He said:

> Selective humanitarianism could not exist. The principle underlying Draft Protocol 2 was the same as that which had prompted the effort to extend protection in international armed conflicts. - CDDH/1/SR24 at 10.

[45] Cassese op cit 495-6.

that sought extensive regulation of internal armed conflict at the expense of sovereignty, there was no prospect of civil war.[46] More moderate states that favoured a Protocol covering exclusively humanitarian issues, probably took this position because they only faced internal violence on a small scale.[47] The states which were only prepared to accept a bare minimum of humanitarian protections, usually had specific internal problems, such as the UK in Ulster. Those states opposed to any form of regulation in principle, were like India, the states with greatest potential for internal conflict.

Cassese feels that despite the lukewarm approach of the Conference to Protocol 2, it should be judged on its own merits and not solely in relation to previous drafts.[48] How much actually changed in the final version? Forsythe notes that only three rules of relative importance in the Committee draft do not appear in the final text.[49] These were: Article 10(5), the provision deferring execution to the end of the armed conflict; Article 8(4), requiring parties to facilitate visits by humanitarian organisations; and in Article 33(1), the right of

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[46] They included Norway, Sweden, the Holy See, ICRC and sometimes Belgium, Italy and others.

[47] They included most Western states and the USSR, eight other Eastern bloc states, and a few Third World states such as Egypt and Pakistan.

[48] Op cit 496.

[49] Op cit 1978 282.

relief organisations to provide relief was changed from "shall" to "may". The other changes mostly involved the removal of any reference to "the parties to the conflict" in order to deny rebels any international status. But Protocol 2 contains a provision that emphasises its status as a statement of good intentions rather than law. Article 3 provides expressis verbis

> ...that nothing in this Protocol shall be invoked for the purpose of affecting the sovereignty of the state [paragraph 1]..., or as a justification for intervening, directly or indirectly, for any reason whatever in the armed conflict or in the internal or external affairs of the HCP in the territory of which that conflict occurs [paragraph 2].

Kalshoven calls Article 3 a "...categorical refutation of international concern in internal armed conflict."[50]

5.3.2 THE MATERIAL FIELD OF APPLICATION OF PROTOCOL 2

5.3.2.1 THE DEVELOPMENT OF ARTICLE 1

ICRC draft Article 1 had integrated Article 3 of the Conventions and the Protocol by simply applying the former's scope to the latter. But concern amongst Third World states about national sovereignty led to the introduction of new elements at the Diplomatic Conference that raised the threshold of Protocol 2's field of application substantially above Article 3's. The ICRC draft Article, supported by the West and Egypt, had excluded internal disturbances and tensions from its field of application,

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[50] F Kalshoven "Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts: The Diplomatic Conference, Geneva 1974-1977" 8 NYIL (1977) 115.

but had also rejected territorial control by the adverse party as a criterion inappropriate in modern warfare. Nevertheless, the Third World and East Europeans introduced territorial control into the Committee draft. Furthermore, it was a control of a special kind; enough "...to carry out sustained and concerted military operations and to implement the present Protocol."[51] Bothe, Partsch and Solf note that this meant that it was no longer possible to determine Protocol 2's threshold objectively from the definition in Article 1 itself.[52] Whether the adverse party was able to implement the Protocol depended on its content. The detailed obligations in Protocol 2 in effect raised the threshold. This solution found consensus without much enthusiasm. While many Western states resigned themselves to Article 1, the Norwegian delegate said that:

> ...his delegation objected to the assumption in Article 1 that armed forces needed to exercise control of territory in order to implement the provisions of draft Protocol 2. That assumption had been rejected by the committee at the first session in respect of national liberation movements and he could see no objective elements which would make the application of draft Protocol 2 more difficult in some circumstances for dissident forces than the application of the whole of the 1949 Geneva Conventions and draft Protocol 1 by national liberation movements. He was forced to the conclusion that the problem was not lack of material possibilities concerning the dissident armed forces concerned, but lack of political readiness on the part of certain delegates.[53]

The narrow version went to the vote at the plenary and was

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[51] CDDH/1/238.

[52] M Bothe K Partcsh W Solf New Rules for Victims of Armed Conflict (1982) 625.

[53] CDDH/1/SR29 at 18.

adopted 58/5/29. The Article reads:

> ARTICLE 1 - MATERIAL FIELD OF APPLICATION
> 1. This Protocol, which develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions of application, shall apply to all armed conflicts which are not covered by Article 1 of the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of International Armed Conflicts (Protocol 1) and which takes place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organised 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.

5.3.2.2 ARTICLE 1 INTERPRETED AND APPLIED

Article 1(1) makes it clear at the outset that the material fields of application of Article 3 of the Conventions and Protocol 2 are independent. Thus Article 3's probable application to the South African armed conflict is not affected if Protocol 2 does not apply.

Article 1(1) goes on to set out the parameters of a new category of non-international armed conflicts not covered by the general category of international armed conflicts as designated either in common Article 2 of the 1949 Geneva Conventions or Article 1 of Protocol 1. Obviously, if the South African armed conflict falls clearly under Protocol 1 as an Article 1(4) conflict, then Protocol 2 does not apply. As noted in chapter 3, however, there

is not as yet a general acceptance that South Africa is an Article 1(4) situation. It is thus necessary to examine Protocol 2's application to the South African armed conflict, although it is conceded that this issue is a moot point at present as South Africa is not a party to the Protocol and it is generally agreed that Protocol 2 has not become a part of custom. Nevertheless, it remains conceivable that South Africa may become a party to the Protocol because it is an apolitical instrument containing nothing more than a number of general guarantees that should already, for purely humanitarian reasons, be operative in the South African armed conflict. Protocol 2's very general nature and its core of basic human rights also points to the possibility of its transformation into custom, a possibility that is lent further support by the fact that 60 states had become party to the Protocol by August 1986.[54]

The armed conflicts covered by Article 1(1) are those "...which take place within the territory of an HCP...". Both sides may, however, receive support from the territory of a neighbouring country. Any other interpretation would be unrealistic. In South Africa, much of the ANC's infrastructure and equipment comes from or is stored in neighbouring states. The major lacunae in this provision is that it implies that the Protocol would not apply to armed conflict that occurs outside South African territory, for instance in the Frontline States.

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[54] 256 IRRC (1986).

Article 1(1) makes it clear that the armed conflict must take place between the HCP's "armed forces" and "organised armed groups". Although the exact nature of the Government's "armed forces" is undefined, a note in Committee 1's report reads:

> In this Protocol, so far as the armed forces of an HCP are concerned, the expression 'armed forces' means all armed forces - including those which under some national system might not be called regular forces - constituted in accordance with national legislation under some national systems; according to the views stated by a number of delegations the expression would not include other governmental agencies the members of which may be armed, examples of such agencies are the police, customs and other similar organisations.[55]

This note does not clarify the status of paramilitary forces. For instance, would the SAP, acting in a paramilitary role, be included in "armed forces"? It seems they would have to because of the extraordinary military nature of their duties.

As to the nature of "organised armed groups", according to an ICRC statement in committee 1, it does not mean

> ...any armed band acting under a leader. Such armed groups must be structured and possess organs, and must therefore have a system for allocating authority and responsibility: they must also be subject to rules of internal discipline.[56]

The fairly high degree of organisation implicit here is fleshed out in Article 1(1). It sets out four conditions that ANC forces would have to meet to be classified as "organised armed groups". Firstly, the group must be under a responsible command. This

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[55] Bothe et al. op cit 626.

[56] Bothe et al. ibid.

condition can be fulfilled by proof of a chain of command. A collectively structured group does not require a rigid military hierarchy. Rather, as in the case of the ANC, it may just be a de facto authority sufficient to both plan and carry out concerted and sustained military operations and to impose the discipline requirements ensuring the application of the rest of the Protocol. Secondly, the group must exercise effective control over a part of the territory. How much territory would the ANC have to control? It is impossible to stipulate the precise extent. Rather, the extent is determined by its function.[57] The extent of the control must be enough "to enable" the adverse party "to carry out sustained and concerted military operations" and to apply the Protocol. Even if it is the quality of the control and not the quantity of territory that is crucial, this condition makes Protocol 2's application in South Africa even more of a moot point as the ANC does not control any territory within the country or at least no territory enabling sustained and concerted military operations. Thirdly, the group must have "...the capacity for sustained and concerted military operations". Possessing such a capacity serves to ensure effective territorial control. The ANC may be able to carry out such operations from outside South Africa, but it is incapable of doing so at this stage from within South Africa. Fourthly, the

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[57] However, at the Conference various delegations offered opinions as to its extent, eg. Indonesia - "a substantial part"- CDDH/1/32; Vietnam - "a considerable part" - CDDH/56 add 2 at 25; Brazil - "a non-negligible part" - CDDH/1/79.

group must have "...the capacity for implementation of the Protocol". The ANC must be capable of applying the Protocol. That capability can be attested to by its acting under a responsible command, exercising control over a part of the territory and carrying out sustained and concerted military operations. Junod notes:

> As soon as the material criteria are fulfilled, it may be reasonably expected that the parties will apply the rules of protection contained in the Protocol, because the Parties would then have an adequate infrastructure for such application.[58]

Nevertheless, although Article 1(1)'s extensive conditions on the adverse party ensure that its capacity to apply the Protocol is beyond doubt, Article 1(2) also explicitly excludes from the Protocol's application

> ...situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.

Article 1(2) was taken over almost verbatim from the draft Protocol. The ICRC commentary on the 1973 draft Protocol noted:

> The notion of internal disturbances and tensions has been made more explicit by an enumeration, albeit not exhaustive, of situations considered to be consistent with that notion irrespective of whether constitutional guarantees have or have not been suspended:
> - riots, that is to say, all disturbances which from their start are not directed by a leader and have no concerted intent;
> - isolated and sporadic acts of violence, as distinct from military operations and carried out by armed forces or organised armed groups;
> - other acts of a similar nature which cover, in particular,

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[58] S Junod "Additional Protocol 2: History and Scope" 33 American ULR (1983/4) 38.

> mass arrests of persons because of their behaviour or political opinion.[59]

In the South African context these examples may exclude township unrest, but would probably not exclude all ANC military activity.

Who decides when Article 1(1)'s conditions have been met and that the conflict no longer falls into the situations excluded in Article 1(2)?[60] Some states at the Conference argued that the decision was theirs alone.[61] Others argued that the adverse party must first declare its intention to apply the Protocol.[62] These proposals were withdrawn. Bothe, Partsch and Solf note that all the conditions in Article 1 are objective and thus an HCP has no discretion to decide whether the conflict meets the conditions.[63] Application is automatic and the state must comply with the Protocol unconditionally. That implies that only states can apply the Protocol and only third party states can press them to apply the Protocol. How then is the adverse party bound and what rights can it assert under Protocol 2?

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[59] Bothe et al. op cit 628. Most experts feel that these situations also fall outside the scope of common Article 3 of the 1949 Conventions. However, were not explicitly excluded in common Article 3.

[60] F R Ribeiro "International Humanitarian Law Advancing Progressively Backwards" 97 SALJ (1980) 42 at 47.

[61] CDDH/SR49 11ff; CDDH/1/30 - Rumania.

[62] CDDH/1/26 - Pakistan.

[63] Op cit 628.

5.3.3 THE BINDING FORCE OF PROTOCOL 2

Protocol 2 will bind the South African Government only if it becomes party to the treaty in terms of Articles 20-22 of the Protocol. These Articles set out that only states can ratify or accede to the treaty. There is no provision in Protocol 2 similar to Article 96 of Protocol 1. From the text it appears that the adverse party has no de jure authority under the Protocol. It can neither bind itself nor exercise any rights under the Protocol. Thus it has been argued that the Protocol is unconditionally binding on the state alone and, because the rebels are not bound as a separate entity, they need not apply the Protocol. From this point of view, the obligation of the HCP is to the rest of the parties to the Protocol and cannot be modified by the behavior of the insurgents.[64] But Protocol 2 must concede some status to the adverse party because it demands reciprocal obligations from a de facto authority capable of protracted warfare. It must either bind the insurgents or allow them to bind themselves. But how is it bound?

Although the various approaches to how Article 3 of the 1949 Conventions binds the ANC can be applied to Protocol 2, those arguments are equally as contentious and unconvincing when applied to Protocol 2. It is submitted that Cassese's approach to discovering whether the Protocol has legal effects for third

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[64] View expressed in Article 10 of the draft Protocol-deleted - Italy CDDH/SR51 annex 122.

parties, which was adapted in this study to the similar problem of binding the ANC under Article 3 of the 1949 Conventions, is the correct one.[65] He relies on Articles 34-36 of the Vienna Convention, which provide that a treaty can create either obligations or rights for a third party only if the HCP's intended it to grant such rights or impose such obligations on third parties and the third party accepts the rights or obligations. Looking at the intention of the HCP's as embodied in the text, he argues that because of its explicit connection with common Article 3 in Article 1(1), the Protocol, like Article 3, must also give rights to and impose obligations on insurgents. In addition, he notes that conditions in Article 1(1) such as "responsible command" and "organised armed group", require the compliance of the adverse party with the Protocol for it to become applicable. He submits that it would be absurd to suggest that they should comply without acquiring any rights and duties because there is no reason for compliance if they do not benefit. He dismisses the logically flawless argument that once the objective conditions are met, the Protocol is immediately and automatically applicable, the duty being on the state to apply it unilaterally. According to this approach, the interest of the adverse party is to make the Protocol operational so that they can benefit by it. If they breach the Protocol the HCP cannot disregard it, but if the HCP breaches it, the HCP is answerable

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[65] A Cassese "The Status of Rebels under the 1977 Geneva Protocol on Non-international Armed Conflicts" 30 ICLQ (1981) 416-439.

to other HCP's. But, as Cassese notes, this approach simply does not accord with reality. In practice states do not readily concede applicability. In addition, the insurgents do not live up to standards they have not accepted. Cassese states:

> If insurgents are regarded as beneficiaries and addressees of the Protocol, this means that they are authorised to demand from the government in power the full application of the Protocol, once its activating conditions are present. The very men for whose sake the Protocol has been elaborated are the best equipped to prompt the government concerned to respect it.[66]

Cassese cites other provisions in Protocol 2 which assume that the Protocol binds the adverse party and he concludes that the intention of the parties embodied in the text is that insurgents may derive rights and duties from Protocol 2.

The second requirement is assent by the third party to the rights and duties deriving from the treaty. The willingness of the rebels is a factual question ascertained by looking at their practice. If the willingness and ability of the insurgents to apply the Protocol is evident, then Cassese submits that the Protocol is automatically binding on both parties. The government in power cannot claim that the rebels cannot invoke the Protocol and if the rebels meet the objective conditions the government cannot refuse to comply.[67] In sum then, the ANC, if it met Protocol 2's objective conditions and South Africa was a party to

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[66] Op cit 427.

[67] Cassese op cit 433-439 sets out the adverse party's options if the government does not comply.

the Protocol, could, if it so desired, invoke and bind itself to the Protocol.[68]

Cassese's argument is convincing because it acknowledges that an adverse party involved in a conflict of as high a threshold as that set out in Article 1, must attain a distinct de jure as well as de facto international status.[69] He also takes into account the political will of the adverse party. Protocol 2 is only applied if the adverse party wants to apply it. Thus the totally unrealistic expectation of unilateral compliance on the part of the HCP is avoided. The humanitarian obligations of parties to a conflict are never absolute in practice; reciprocity is fundamental to the enforcement of all humanitarian treaties.

5.3.4 PROTOCOL 2'S APPLICATION IN SOUTH AFRICA

It appears that Protocol 2 is of limited application generally. The development of Protocol 2 provided a unique opportunity to develop the broadly applicable common Article 3 of the Conventions, but the opportunity was wasted. Article 1 of Protocol 2 has raised the threshold of the material field of

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[68] Technically it could do so even though the South African Government is not party to the Protocol.

[69] Such status is normally accorded through some form of international recognition from third states and international organisations, for either political reasons or because of the possible threat to the rights of these third parties, eg. Biafra. It is highly probable that the major motivation for the emasculation of Protocol 2 came from the realisation by states that no amount of legal gymnastics would solve the fundamental problem of some form of legitimation of the insurgent party.

application to one commensurate with the notion of a classical civil war, simply omitting the need for belligerent recognition. If Protocol 2 were equivalent to belligerency then it would mean that legal protection had actually diminished at this level of conflict because in a belligerency there was far greater legal regulation. For one thing, the belligerent party's combatants could qualify as lawful participants, a protection not offered by Protocol 2. Article 1's heavy obligations on the rebels makes Protocol 2's application dubious even in cases of high intensity conflicts. Moreover, if the South African Government were to become a Party to the Protocol, when the armed conflict reached such an intense level as to bring the Protocol into operation, the impetus behind regarding the conflict as international under Article 1(4) of Protocol 1 would be so great as to make Protocol 2's application irrelevant. It is probable that Protocol 2 will never operate in South Africa. Nevertheless, it would seem very strange if the incumbent claimed that it could allow derogation of the fundamental protections contained in Protocol 2, either because the South African armed conflict had not yet reached the threshold contained in Article 1, or because it was not party to the Protocol.

5.4 CONCLUSION

At present, the South African armed conflict is probably only governed by the limited provisions of common Article 3 of the 1949 Geneva Conventions. The very narrowly defined Protocol 2

doesn't apply to the South African armed conflict and the prospects for its future application are not good. Obviously, an examination of Article 3's protections is necessary. In addition, it is submitted that an examination of Protocol 2's personal field of application and general protections is also of interest, more because of what was left out, than what was included.

CHAPTER SIX

THE PERSONAL FIELDS OF APPLICATION OF COMMON ARTICLE 3 OF THE 1949 GENEVA CONVENTIONS AND GENEVA PROTOCOL 2 OF 1977

6.1 PROTECTIONS FOR COMBATANTS IN NON-INTERNATIONAL ARMED CONFLICTS GENERALLY

The law of non-international armed conflict will never meet the demands of the international community for international regulation of the South African armed conflict because it does not oblige South Africa to recognise the right of ANC combatants to participate in combat or accord them P.O.W. status.[70] Customary international law imposes no requirements with respect to the treatment of the participants in civil conflicts[71] and neither common Article 3 nor Protocol 2 recognises the legality of the participation of combatants or confers any status on captured combatants. While both members of armed forces and civilians who are detained enjoy some fundamental guarantees under Article 3 and Protocol 2, national criminal law is not

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[70] G I A D Draper "The Status of Combatants and the Question of Guerilla Warfare" 45 BYIL (1971) 173 at 207; W Solf "The Status of Combatants in Non-international Armed Conflicts under Domestic law and International Practice" 33 American ULR (1983/4) 53 at 58.

[71] R I Miller (ed) The Law of War (1975) 21; R R Baxter "Comments" in P Troboff (ed) Law and Responsibility in Warfare (1975) 267. Both these authors contend that no customary law of war whatsoever applies in non-international armed conflicts. F Kalshoven "Applicability of Customary International Law in Non-International Armed Conflicts" in A Cassese (ed) Current Problems of International Law (1975) 267 disputes this, but concedes that the one customary principle that does not apply, is the principle of lawful participation for combatants.

suspended by either of these instruments. Insurgent combatants can be tried and convicted under the criminal law for the taking up of arms. Bond notes:

> Indeed, a country's initial reaction is usually to decree martial rule, expand the reach of the criminal law, and increase the punishment for offenses endangering national security.[72]

South Africa, with its State of Emergency and special security laws, bears out Bond's statement. The reason for such a reaction is obvious. Most governments fear that any international rule establishing lawful combatant status in non-international armed conflict would not only enhance the status of insurgents, it would also encourage participation by reducing the personal risks involved. Given the negative attitude of incumbents to rebel combatants, it is not surprising that in most situations the rebels treat captured members of the incumbent's armed forces in a reciprocal fashion, executing them on capture. O'Brien notes:

> Paralleling the regimes view of rebels as criminals and traitors, the revolutionaries see government troops as enemies of the people who merit revolutionary justice.[73]

Nevertheless, in certain large scale civil wars combatants have been singled out from ordinary criminals.[74] In conflicts governed

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[72] J E Bond The Rules of Riot (1974) 113.

[73] W O'Brien "The ius in bello in Revolutionary War and Counterinsurgency" 18 Virginia Journal of International Law (1978) 193 at 224.

[74] See 3.5.4.5 supra; A P Rubin "Terrorism and the Laws of War" 12 Denver Journal of International Law and Policy (1983) 219 at 220-227.

by the customary mode of belligerency, lawful combatant status was recognised because of the great magnitude of the conflict. Under modern international law, however, protected status is not conferred even in large scale non-international armed conflicts. But modern states do tend to refrain from prosecuting insurgents for participation and they tend to grant a general amnesty once the conflict is over.[75] However, these de facto practices have not as yet been translated into de jure obligations. They remain within the discretion of the incumbent government, which tends to apply such standards only when the conflict is one of great intensity and extended duration. It also remains within the discretion of the rebel group to abide by such practices. If the South African Government were to accord special status to ANC combatants ex gratia, then, coupled with a similar commitment by the ANC, the legal impasse in the South African armed conflict would be at least partly resolved. At present, however, the Government is not legally obliged to grant such status.

The justification for looking at the personal fields of Article 3 and Protocol 2, diminished by the removal of the possibility of lawful participation for combatants, necessitates only a brief examination of the general humanitarian protections afforded combatants.

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[75] Bond op cit 114.

6.2 COMMON ARTICLE 3'S PERSONAL FIELD OF APPLICATION AND THE GENERAL PROTECTIONS CONFERRED

6.2.1 PERSONAL FIELD

Article 3's personal field includes:

> (1) Persons taking no active part in 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...

Once they have ceased to participate in the conflict and have fallen into the hands of the enemy, "members of armed forces" are covered by Article 3 and no further conditions are imposed for its application. Thus the South African Government's armed forces are covered by Article 3. But what about ANC guerrillas? Draper sets out three possible interpretations of this sentence.[76]

(i) Article 3 confers the same protection upon insurgent guerrillas, such as ANC members, as it purports to do for armed forces fighting against the armed forces of the government. "Armed forces" in the text must be taken to include not only rebel members of the armed forces of the government who turn on the government, but also armed forces independently raised by organisations like the ANC, even if these armed forces are irregular guerrillas.

(ii) The alternative view is that the words used in Article 3 do not embrace irregular guerrillas reduced to captivity in that they are neither "persons taking no active part in hostilities"

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[76] Op cit 1971 210-211.

nor are they "members of armed forces who have laid down their arms" within the meaning of Article 3(1). This view is consistent with the concept of organised armed forces participating on both sides. But ANC guerrillas are not per se unorganised and there is no reason why they cannot be classed as armed forces.

(iii) The ambiguity of the text is resolved when one considers that the intention of its drafters was to create a microcosm of the remainder of the 1949 Conventions. The dichotomy of "persons taking no active part in hostilities" and "members of armed forces" is insufficient to expel irregular combatants from Article 3's protection as it is neither firm nor exhaustive. It must be overridden by the intention of the drafters, as evidenced at the Conference, to make Article 3's application as broad as possible. Considering the general nature of Article 3's protections, the alternative interpretation is untenable. Article 3 must cover all combatant members of the ANC, no matter how irregular they are.

6.2.2 THE GENERAL PROTECTIONS OFFERED COMBATANTS BY ARTICLE 3

It must be reemphasised that in spite of Article 3's probable application in the South African armed conflict, the Government can still try ANC members under its domestic criminal law for participation in combat. The Official Commentary on the Geneva Conventions makes it clear that Article 3 does not prohibit prosecution of insurgents even if they have committed no crime

other than the carrying of arms illegally.[77] The Commentary continues:

> In such a case, however, once the fighting reaches a certain magnitude and the insurgent armed forces meet the criteria specified in Article 4A(2) the spirit of Article 3 certainly requires that members of insurgent forces should not be treated as common criminals.[78]

This sentiment is given no further concretisation. The French response to Article 3 in the Algerian conflict is a good example of how states treat rebel combatants in practice in large scale internal armed conflicts. France, although it acknowledged the applicability of Article 3 in the Algerian conflict, legally executed FLN guerrillas until threats of reprisals by the FLN and although the French then set up camps for captured guerrillas, they still insisted that their captives had no formal legal status.[79] Nevertheless, although not strictly required by Article 3, it is submitted that in the South African context the most pragmatic course for the Government to follow would be to grant ANC combatants lawful status ensuring that they are dealt with outside of the jurisdiction of the criminal law.

What protections are offered by Article 3?

> (1) Persons .... 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

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[77] Commentary 3 40.

[78] Ibid.

[79] T J Farer "Humanitarian Law and Armed Conflict: Toward the Definition of International Armed Conflict" 37 Columbia LR (1971) 53-54.

similar criteria.
To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:
(a) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
(b) taking of hostages;
(c) outrages upon personal dignity, in particular, humiliating and degrading treatment;
(d) the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court affording all the judicial guarantees recognised as indispensable by civilised peoples.
(2) The wounded and sick shall be collected and cared for.

A number of points can be made about the application of these rules to the South African armed conflict.

(a) Assuming Article 3 binds the South African Government and the ANC, neither organisation may summarily execute their prisoners. Article 3 forbids the passing and carrying out of sentence without due process. It may be asked what is a "regularly constituted court"? The Government will probably assume that its criminal courts meet the criteria of a regularly constituted court. Although within Article 3's framework, looking at past precedents, the South African courts do appear to meet Article 3's criteria, it is submitted that special military tribunals would be more suitable. Any tribunal which the ANC institutes to try captured Government personnel may be ad hoc, but it will meet Article 3's standards if it is authoritative, i.e., the ANC, acting within its powers, creates the court according to

recognised standards.[80] It may then be asked what "judicial guarantees" are "recognised as indispensable by all civilised peoples"? Bond notes that

> ...there is a consensus today that certain specific rights are fundamental to trial in any such court. Among these are prompt notice of charges, adequate time and facilities to prepare defense, right to counsel, and the assistance of an interpreter.[81]

The right to an open trial and appeal are also important, but are less universally recognised. The ANC will find even these minimum standards very difficult to comply with in its activities within South Africa, but in base areas in the Frontline states compliance should be easy. With regard to sentence Bond notes:

> Article 3 is silent on the scope of permissible punishments, though it implicitly sanctions executions, only conditioning their imposition on a prior judicial determination of guilt.[82]

There is nothing in Article 3 to prevent the execution of ANC guerrillas simply for having taken up arms against the Government. Either deferment of the death sentence for the duration of the conflict or its total abandonment would be preferable. At present, however, the Government, by sentencing ANC members to fixed terms of imprisonment or to execution, does not violate Article 3. Nor would the ANC if it did likewise.

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[80] Bond op cit 119.

[81] Ibid.

[82] Ibid.

(b) Article 3 does not lay down any specific conditions of detention.[83] It does not explicitly require a trial before detention nor does it prohibit solitary confinement, censorship or other similar practices. It just imposes a general requirement of humane treatment amplified by prohibitions on "cruel treatment and torture", outrages upon personal dignity and humiliating and degrading treatment. Article 3 does not forbid "interrogation" for the purpose of gleaning information, but its prohibition of "torture" would include all forcible and many passive methods of interrogation. Bond, using Geneva Convention 3 as a guideline, argues that adequate medical care, housing, food and communications should be available to prisoners. He notes that the Conventions require similar treatment for captives to a DP's own forces in Articles 49/51. But he recognises that:

> Given the often disparate conditions in which guerrillas operate and the poverty that afflicts most third world countries, the similar treatment standard will not ensure anything like ideal treatment. The ideal is seldom a viable alternative however, and so long as the participants feed, house and care for their prisoners no less well than they do for their own forces, they may have conceded as much to the demands of humanity as the necessity of their circumstances permits.[84]

In South Africa, the spectre of racial discrimination overshadows the question of the treatment of prisoners. It is clear that in order to comply with Article 3, the Government would have to

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[83] At the 1949 Diplomatic Conference the Norwegian delegation proposed that treatment similar to P.O.W. status should be applied to combatants in non-international armed conflicts. The reaction to this proposal was negative and it was withdrawn - Final Record 2B 49.

[84] Bond op cit 126.

desegregate its detention facilities so as not to impose an "adverse distinction" based on racial grounds.

(c) Article 3 does not oblige the parties to the South African armed conflict to accept or permit supervision by a third party, although it does permit an impartial humanitarian body such as the ICRC to offer its services to the parties to the conflict. The ICRC has intervened in South Africa with Government permission.

(d) Article 3 establishes the principle of the protection of the civilian population. Article 3 leaves no doubt that acts against persons not taking part in hostilities - such as acts of terror directed at the civilian population - are absolutely prohibited.[85] Article (3)2 prohibits "...violence to life, torture and the taking of hostages...". As Article 3 does not apply to combatants who have not laid down their arms, combatants appear to be legitimate objects of attack. But what of assassination - the practice of killing another combatant when he poses no threat to the killer's life. Are all Government or ANC officials fair game? It depends on how widely the net of members of the armed forces is cast. Plainly assassination of political appointees or civil service members who are civilians is a violation of Article 3. In addition, although the rules against

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[85] H P Gasser "Prohibition of Terrorist Acts in International Law" 36 IRRC (1986) 200 at 207.

assassination of combatants were eroded in World War 2, the practice is inherently foreign to the idea that combatants involved in an armed conflict should be in a position to take each other's lives.[86]

6.2.3 THE ENFORCEMENT OF ARTICLE 3

The question of the enforcement of Article 3 in the South African armed conflict is controversial, not only in itself, but also because South Africa has never acknowledged Article 3's application. In one view, Article 3 is an isolated Article because of the exclusive definition of international armed conflict in Article 2 and thus the general enforcement measures of the Geneva Conventions do not operate to enforce Article 3's application by the South African Government. A literal reading, however, of the provision in common Article 49/30/129/146 of the Conventions that "...each HCP shall take all measures for the supervision of all acts contrary to the provisions of the present conventions...", makes it clear that this provision covers all breaches including breaches of Article 3.[87] Thus, enquiries into alleged violations of Article 3 by the Government can be made under common Article 52/53/132/149 and individual violations can be punished as grave breaches under common Article 49/30/129/146. As far as the ANC is concerned, if it seeks the application of

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[86] Bond op cit 89.

[87] See C Lysaght "The Scope of Protocol 2 and its relation to Common Article 3 of the Geneva Conventions of 1949 and other Human Rights Instruments" 33 American ULR (1983/4) 12.

general humanitarian protections such as those contained in Article 3, it must comply with Article 3's obligations, including the obligations of specific enforcement measures.

6.2.4 CONCLUSION

Article 3 provides only basic humanitarian protections for combatants.[88] Indeed, Article 3's protections are so general that it can be argued that the South African Government already abides by Article 3 in its ordinary domestic law. However, in order to clarify the situation, it is important that the Government should implement Article 3's specific protections explicitly. A response from the ANC affirming its respect for these protections is also desirable.

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[88] R R Baxter "Ius in bello interno: The Present and Future Law" in J N Moore Law and Civil War in the Modern World (1974) 518 at 529 notes its deficiencies.

6.3 GENEVA PROTOCOL 2'S PERSONAL FIELD OF APPLICATION AND GENERAL PROTECTIONS

6.3.1 PERSONAL FIELD

Were Protocol 2 to apply in the South African armed conflict, its personal field of application would be defined by Article 2.

> Article 2 - Personal Field of Application
> 1. This Protocol shall be applied without any adverse distinction founded on race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or any other similar criteria (hereafter referred to as 'adverse distinction') to all persons affected by an armed conflict as defined in Article 1.
> 2. At the end of an armed conflict, all the persons who have been deprived of their liberty or whose liberty has been restricted for reasons related to such conflict, as well as those deprived of their liberty or whose liberty is restricted after the conflict for the same reasons, shall enjoy the protections of Articles 5 and 6 until the end of such deprivation or restriction of liberty.

Article 2(1) consists of two elements. The first defines the personal field of application of Protocol 2 by directing that it applies to all persons affected by an armed conflict as defined in Article 1, wherever they may be, in the combat zone or elsewhere.[88] Thus combatants of both parties who participate in a conflict falling within the material scope of Article 1 are covered by Protocol 2 through Article 2. It follows that combatants in the South African armed conflict would not fall into Protocol 2's personal field of application even if South Africa were a party to the Protocol, unless the conflict fell

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[88] M Bothe K Partsch and W Solf New Rules for Victims of Armed Conflict (1982) 630.

within the parameters defined by Article 1. The second element prohibits any adverse distinction based on certain criteria taken from the prohibition of discrimination in common Article 2 of the two 1966 Human Rights Covenants.[90] Article 2(2) says nothing about when Protocol 2 begins to apply, but stipulates when it ends. It is safe to assume that Protocol 2 applies when the objective conditions of Article 1(1) are met and both parties agree to apply it.

6.3.2 PROTOCOL 2'S GENERAL PROTECTIONS

6.3.2.1 NO LAWFUL COMBATANT STATUS

In 1971, the ICRC proposed a measure that would preclude the punishment of a fighter "...solely for having belonged to armed forces, unless imperative security arrangements made this necessary."[91] In 1972, the ICRC proposed that a treatment similar to P.O.W. status should be applied to combatants in non-international armed conflicts who observed the four Hague conditions of distinction from civilians. These proposals did not meet with much support from the government experts or from the delegates to the Diplomatic Conference. In 1976, Committee 1 took up these ideas in a much less extensive form. It adopted ICRC

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[90] Bothe et al. ibid.

[91] Protection of Victims of Non-International Armed Conflict Document LE/5B (1971). They also proposed the deferment of the death penalty until the termination of hostilities, unless imperative security arrangements made it necessary.

draft Article 10(5),

> ...which instructed a Court, when sentencing a person for no other crime than having taken part in hostilities, to take into consideration, to the greatest possible extent, the fact that the accused respected the provisions of the present Protocol.[92]

The ICRC draft Protocol attempted to establish immunity of combatants from the death penalty in Article 10(3). It read:

> The death penalty pronounced on any person found guilty of an offence in relation to the armed conflict shall not be carried out until the hostilities have ceased.

Both of these provisions were attached in committee to draft Article 10(5). But the Hussein draft, on a majority vote, scotched paragraph 5 from draft Article 10.[93] Thus there is no provision in Protocol 2 for suspension of the death penalty or even for considering compliance with the Protocol as a mitigating circumstance. Committee draft Article 10(6), which provided that anyone sentenced should have the right to seek pardon or commutation of the death sentence, was also deleted in the Hussein draft.[94]

These provisions would in no way have affected the power of the state to punish rebels for their participation in combat. Although, as Kalshoven points out, they could not have been construed as the beginning of the introduction of lawful combatant or P.O.W. status into the law of non-international

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[92] CDDH/1/SR63.

[93] CDDH/SR50 - vote 26/12/49.

[94] On a vote of 16/17/49.

armed conflict,[95] that was not the way they were viewed by the majority of delegates at the Conference. The explanatory comments attached to the Hussein draft demanded that

> ...nothing in this Protocol should suggest that dissidents must be treated legally other than as rebels. To move in the direction of legitimising their military activities as having some degree of legitimacy is to invite the expectation or even demand of P.O.W. status on capture.[96]

Third World states used their sovereignty as a general justification to limit the development of these and other normative restraints in non-international armed conflicts. In reality, the denial of lawful combatant and P.O.W. status was essential because of the unstable fragmentary nature of new states plagued with ideological and ethnic rivalries.[97] These states feared that conferment of protected status would encourage dissidents to revolt by reducing their personal risk because of their immunity from domestic law. In reply to the assertion that protection of combatants was necessary to protect civilians because it was the only incentive for rebels to comply with the rules protecting civilians, Third World delegates argued that protection of civilians tends to have the undesirable consequence

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[95] F Kalshoven "Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts: The Diplomatic Conference 1974-1977" 8 NYIL (1977) 107 at 144.

[96] CDDH/427 and CDDH/427 Corr. 1.

[97] W A Solf "Problems with the Application of Norms Governing Interstate Armed Conflict to Non-international Armed Conflict" 13 Georgia Journal of International and Comparative Law (1983) 291 at 292.

of legitimising attacks on security personnel and objectives.[98] But the blame for removal of protections for combatants cannot be laid entirely at the Third World's door. Many Western nations were also strongly opposed to the introduction of combatant law into the Protocol for very similar reasons.[99]

Unfortunately, Protocol 2 is no improvement on Article 3 of the Conventions in respect of lawful combatant status and other than political motivation and the fear of reprisals, there is little incentive for the ANC to apply the rest of the Protocol, even if the Protocol applied in the South African armed conflict.

6.3.2.2 QUARTER

ICRC draft Article 7, and Committee draft Article 22 bis, both provided that persons hors de combat should not be made the object of attack.[100] Surprisingly, even this provision was eliminated in the Hussein draft. Thus in Protocol 2 there is no specific protection for enemy combatants hors de combat. The protections in Articles 4-6 do not prevent combatants from being the object of attack at the moment of surrender. However, Article 4(1) does prohibit the order that there shall be no survivors.

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[98] Solf ibid.

[99] A Eide "The New Humanitarian Law of Non-International Armed Conflict" in A Cassese (ed) The New Humanitarian Law of Armed Conflict (1979) vol 1 277 at 304.

[100] Eide op cit 288.

6.3.2.3 DISTINCTION BETWEEN COMBATANTS AND CIVILIANS

Committee draft Article 24 was identical to Article 48 of Protocol 1, which enforces the principle of distinction between civilians and combatants. In plenary, however, the two thirds majority required to enact the draft provision was not achieved and the Conference adopted Articles 7 and 14-18 instead. These Articles constitute as a whole an implicit, watered-down version of the original draft Article.[101]

6.3.2.4 ARTICLE 4 - FUNDAMENTAL GUARANTEES

Article 4(1), which is rooted in Article 3 of the Conventions, sets out the fundamental protections of the person, honour, convictions and religious practice for "...all persons who do not take a direct part in hostilities." Combatants only acquire these protections once they cease to fight or when they fall into the hands of the enemy. Article 4(2) prohibits particular acts, for example, murder, torture etc. Article 4(2)(d) prohibits terrorism. Article 4(3) provides special protections for children, including, importantly, in subparagraph (c), the provision that no children under the age of 15 years shall be recruited in the armed force's groups or be allowed to take part in hostilities. Nevertheless, under subparagraph (d), if they are recruited they retain the special protections.

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[101] CDDH/50 Rep of Committee 2.

6.3.2.5 ARTICLE 6 - PENAL PROSECUTION

Article 6(1) provides basic guarantees for persons prosecuted and punished for criminal offenses related to the armed conflict. Article 6(2) allows that no sentence will be passed and no penalty carried out "...except pursuant to a conviction pronounced by a court offering the essential guarantees of independence and judicial impartiality." It sets out certain procedural rights necessary to guarantee this impartiality. It lays down procedures for trial on the basis of individual, rather than group, responsibility. It provides for the accused to be informed of the charge against him without delay and for his right to a defence;[102] individual penal responsibility;[103] no retroactivity of offenses;[104] and that no heavier sentence is imposed than that applicable when the offence was committed, but allows the accused to benefit from a lighter sentence;[105] presumption of innocence;[106] accused's right to be present at his trial;[107] and his right against self-incrimination.[108] Article 6(3) provides that the accused must be notified of his remedies and any time limits thereon. Article 6(4) forbids, as Protocol 1

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[102] Subparagraph (a).

[103] Subparagraph (b).

[104] Subparagraph (c).

[105] Subparagraph (c).

[106] Subparagraph (d).

[107] Subparagraph (c).

[108] Subparagraph (e).

does, execution of juveniles under 18, pregnant women, and mothers of young children. ICRC draft Article 10(6), to the effect that authorities should endeavour to grant amnesty to as many participants in the armed conflict as possible, was adopted at committee level as Article 10(7) and although its deletion was proposed in the Hussein draft, it was retained in Article 6(5).

Were Protocol 2 to apply in the South African armed conflict, Article 6 establishes penal provisions that would conflict with the working of the criminal law in practice in those areas where it no longer meets international standards.

6.3.2.6 ARTICLE 5 - PRISONERS

Protocol 2, in addition to not recognising lawful combatant status, also makes no provision for P.O.W. status. Captured combatants only have the general protections of Article 5. Article 5 sets out minimum conditions for the treatment of all those individuals who have been deprived of their liberty for reasons related to the armed conflict.

Article 5(1)(a) establishes that wounded and sick prisoners will be cared for in terms of Article 7; (1)(b) establishes a similar standard of treatment to the local population for prisoners; (1)(c) establishes a right to relief; (1)(d) a right to religion; (1)(e) establishes a similar working conditions standard to that of the local population for prisoners required to work. Article

5(2) urges the adoption of further provisions in respect of prisoners if they are within their captor's capabilities, viz.: (2)(a) division of the sexes, (2)(b) communication, (2)(c) camps away from the combat zone, (2)(d) medical examinations, (2)(e) no unnecessary medical procedures.

6.3.2.7 THE PROHIBITION OF TERRORISM

Article 4(2)(d) explicitly prohibits acts or threats of terrorism.[108] Article 13(2)[110] rules that

> ...the civilian population shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.

It is unclear exactly what an act or threat of terror is other than an act or threat of violence. Kalshoven, in an exhaustive study, concludes that international humanitarian law makes no real distinction between terrorism and guerilla warfare.[111] Humanitarian law only emphasises that civilians need protection from acts which intensify fear, anxiety or despair. Nevertheless, Protocol 2's use of the term terrorism is informed by the prohibition on the taking of hostages in Article 42(c) and the prohibition on pillage in Article 42(g). Protocol 2 does prohibit acts of violence against the civilian population, but it is unclear whether it protects combatants not directly involved in

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[108] Article 4(2)(h).

[110] Identical to Article 51 of Protocol 1.

[111] F Kalshoven "Guerilla or Terrorism in Internal Armed Conflict" 33 American ULR (1983/4) 67 at 80.

combat situations from acts of violence such as assassination attempts.

6.3.3 THE IMPLEMENTATION AND ENFORCEMENT OF PROTOCOL 2

The Protocol's enforcement measures are inadequate. Although Article 18 allows relief organisations located within the territory of an HCP to offer their services, it does not grant a right of humanitarian intervention to the ICRC. Local relief societies are usually reluctant to offer their services because they are likely to be the object of attack. Other than Article 18, there are no provisions for the supervision or enforcement of Protocol 2 at all! Although it is arguable that the provisions for enforcement in the 1949 Conventions also apply to Protocol 2 because Protocol 2 is intended to supplement Article 3,[112] the lack of explicit enforcement procedures is a major lacuna in the Protocol.[113]

6.3.4 CONCLUSION

The analysis of Protocol 2's protections reveals that even should it apply in the South African armed conflict, it does little more than explain and expand upon the personal protections of common Article 3 of the 1949 Geneva Conventions.

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[112] C Lysaght "The Scope of Protocol 2 and its relation to Common Article 3 of the Geneva Conventions of 1949 and other Human Rights Instruments" 33 American ULR (1983/4) 25.

[113] See generally G I A D Draper "The Implementation of the Geneva Conventions of 1949 and the Additional Protocols of 1978" 164 Recueil des Cours (1979) 1 at 49.

6.4 NEW DIRECTIONS IN THE LAW OF NON-INTERNATIONAL ARMED CONFLICTS

Common Article 3 and Protocol 2 suffer from common defects that makes them unsuitable for the humanitarian regulation of the South African armed conflict, viz.: a paucity of protections coupled to an inappropriate application threshold. Protocol 1's extensive protections, especially the granting of lawful status to combatants, coupled with its rejection of any geo-military threshold for application, obviously provides a far more attractive option to the ANC than either Article 3 or Protocol 2. In contrast to Protocol 1, these instruments do not regulate very low intensity conflicts, a fact that clearly prevents Protocol 2's application in the South African armed conflict and which throws some doubt on Article 3's application. Nevertheless, recent initiatives to develop international regulation at these low levels may make it possible to close this gap in the law of non-international armed conflict. In 1984 the ICRC President stated:

> A major area that falls outside the effective scope of international humanitarian law applicable in armed conflicts is internal strife that falls below the thresholds of applicability of common Article 3 of the Geneva Conventions of 1949 for the Protection of Victims of War and of the Protocol additional to the Geneva Conventions of 1949, and relating to the protections of Victims of Non-International Armed Conflicts (Protocol 2).[114]

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[114] 238 IRRC Jan/Feb (1984) 3,9. See generally T Meron "Towards a Humanitarian Declaration on Internal Strife" 78 American JIL (1984) 859; T Fleiner-Gerster and M A Meyer "New Directions in Humanitarian Law - A Challenge to the Concept of

He said that the ICRC would hold consultations with experts on the elaboration of a new declaration focussing on internal strife. Meron, responding to the ICRC statement, notes: (i) The declaration should apply to internal strife only; (ii) it should cover situations involving collective violence, including low intensity violence, ranging from "...simple internal tensions to more serious internal disturbances"; (iii) it should cover situations not already covered by the law of armed conflict; (iv) it should be non-derogable and not subject to any limitations or restrictions whatsoever.[115]

Such a declaration would fill a dangerous lacuna in the law of non-international armed conflict. It is submitted that it should be made and South Africa should become party to it. All possible gaps in the protections offered by the law of non-international armed conflict to victims of the South African armed conflict would then, at least theoretically, be closed. The conflict in South Africa is taking place in diverse theatres and at varying levels of violence. A low-thresholded declaration of elementary protections could be used in response to specific situations such as the unclassifiable conflicts within the South African townships and could play a positive role in regulating what has become anarchy.

Sovereignty" 34 ICLQ (1985) 207 at 280.

[115] Op cit 360-361.

CHAPTER SEVEN

CONCLUSION

7.1 GENERAL

The division in South African society that resulted in the armed conflict between the ANC and the Government influences the analysis of those who comment on or determine the legal position of the combatants involved in the conflict. Although this study has approached the position of combatants from a legal viewpoint, it is not, and probably could never be, free from political bias. It has, however, tried to avoid becoming inextricably trapped in polemics, by de-emphasising the moral debate about the legitimacy of the present Government's use of violence to maintain its hold on political power in South Africa and the legitimacy of the ANC's use of violence to attempt to break that hold. Nevertheless, the way in which this moral debate results in sharply differing attitudes to the combatants involved in the conflict provides a powerful motivation for the international regulation of the conflict. The criminalisation of those who engage in armed struggle to end apartheid, undermines the normative content of the South African criminal law because of the moral repugnancy of apartheid to the majority of South Africans and the tendency to regard the struggle against the Government as just. The danger to the domestic law is that its use to punish ANC combatants will eventually result in the complete rejection of the normative value of law and the whole

legal system will dissolve in the resulting anarchy. The use of the criminal law to justify the execution of ANC combatants has already brought South African law into disrepute internationally. In addition to this pressing domestic issue, the humanitarian imperative, the need to alleviate the suffering of all the victims of the conflict, also compels lawyers to look for ways to apply humanitarian law in the conflict. To what extent does international law provide a viable means for the humanitarian regulation of the South African armed conflict?

7.2 THE INADEQUACY OF THE APPLICABLE INTERNATIONAL LAW

Arguably, two different international legal regimes are applicable to the South African armed conflict. It can be classed as either an international or a non-international armed conflict. Adjudged on whether they successfully meld together technical and moral considerations into effective law, neither classification is entirely satisfactory.

Although refined theoretically since its introduction more than twenty years ago, the concept of the international nature of the South African armed conflict has yet to be transformed into effective law binding the parties to the South African armed conflict. The internationalisation of the conflict was part of the radical change brought about in international law under the 'new international legal order'. As in other areas of international law, the new majority of mostly Third World states

moved into the humanitarian arena in pursuit of specific political goals and, from the outset, showed a willingness to discard the received legal structures that could not be adapted to achieve these goals. For most partisans of the national liberation movement's cause, the theoretical legal justification for the internationalisation of wars of national liberation was inchoate and its political necessity was the only real issue. Their disregard for strict legalism shocked the concept's Western detractors. In an effort to placate these objectors, the concept has been explained in terms of the existing definition of international armed conflict.

It has been argued that wars of national liberation, like all international armed conflicts, can be characterised as a conflict between different subjects of international law, in this case a state and a people struggling for self-determination.[1] The South African situation is complicated by the fact that South Africa achieved independence before political emancipation took place, unlike other colonies where emancipation was concurrent with independence. But this failure to achieve emancipation means that the South African people retain the right to internal self-determination, which is exactly the same in legal effect as the classical right of external self-determination. Only when self-determination is fully achieved will the sovereign integrity of the South African state be fully established. It follows from

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[1] A Rosas The Legal Status of Prisoners of War (1976) 292.

this analysis that the ANC, deemed the legitimate representative of the South African people by the majority in the international community, has a legal right to go to war against the South African Government and the ensuing armed conflict must be governed by the law of international armed conflict. Because this argument defines the armed conflict in terms of the objective nature of the parties, it conforms to the accepted legal definition of international armed conflict. Nevertheless, the granting of international status to the ANC is informed by the subjective judgement of international society that the ANC has a morally valid reason for attempting to overthrow the South African Government. This judgement also informs the claim of lawful combatant status for ANC combatants. Lawful combatant status was first granted in interstate armed conflicts because it was recognised that a state's combatants cannot be held morally responsible for taking up arms on their Government's behalf. Transferred to the South African armed conflict, the concept means that ANC combatants cannot be held morally responsible for their actions because they take up arms on behalf of the ANC, which has been legitimated by the international community. Norms of justice, such as these, are not foreign to humanitarian law. However, while it is acceptable to imbue the law with such norms, it is an exercise in futility if the terminology in which they are couched completely undermines the only means for enforcing their application as law.

The liberal interpretation of Article 2 paragraph 3 of the Geneva Conventions and Article 1(4) of Protocol 1 were the tools that the 'new order's' proponents used to try to apply the law of international armed conflict in the South African armed conflict, in order to secure lawful status for ANC combatants. The liberal interpretation of Article 2 paragraph 3 stands accused of stretching the Conventions too far. It remains extremely controversial and is not widely supported. The concrete form given to that interpretation in Article 1(4), with its specific reference to the South African Government as a "racist regime", is too polemical. The Third World used its voting power at the 1974-77 Diplomatic Conference to implement valid ideas in too provocative a manner. The problem arose when, to paraphrase Bond, the new majority said that this is the new law, take it or leave it, and many Western states, as well as South Africa, chose to leave it.[2] Despite the weighty arguments in favour of the application of international law, the South African Government continues to view the conflict as a purely internal question beyond international reach. In a system that only regulates those who participate, Article 1(4)'s loaded terminology allowed the Government to avoid Protocol 1's application in South Africa as treaty law. Commenting on the value of Protocol 1, Conradie J in S v Petane[3] concedes that it

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[2] J E Bond "Amended Article 1 of draft Protocol 1 of the 1949 Geneva Conventions: The Coming of Age of the Guerilla" 32 Washington & Lee LR (1975) 65 at 67.

[3] 1988 (3) SA 51 (CPD) at 63.

> ...may be described as an enlightened humanitarian document...[and]... we may one day find it a cause for regret that the ideologically provocative tones of s 1(4) has made it impossible for the Government to accept its terms.

The packaging of Article 1(4) leads one to speculate whether the new majority in the international community really desired the international regulation of the South African armed conflict or whether it was an instrument designed to punish the South African Government by isolating and condemning it in an international treaty, which at the same time conveniently furnished little general precedent for the granting of substantial rights to rebels in other internal armed conflicts. Whatever their true motive, clearly, to enable the majority in the international community to impose its morality on 'rogue' states like South Africa through the medium of international law, the law has to have a prescriptive nature. Third World States may believe that General Assembly resolutions already provide the means to bind recalcitrant states through international law, but while these resolutions do carry some legal weight, they are not a separate source of positive law. International custom is often used to try to bind a state against its will, but it requires almost universal acceptance and even then states can opt out of the formation of the new rule. Article 1(4) was an instrument that required some form of international legislation imposing majority opinion on recalcitrant states to be immediately effective. No such legislation yet exists and, as Protocol 1's case illustrates, without strong international support, international

custom is a poor substitute. The requisite support for Protocol 1 may be forthcoming in the future, but it is not yet available.

The alternative classification of the South African armed conflict as a non-international armed conflict, appears at first blush to provide a more viable option for the application of international law in South Africa. But it also suffers from problems of difficulty of application as well as a paucity of protection for combatants. Common Article 3 of the Conventions is the only provision which from a positivistic point of view is arguably applicable in South Africa. Article 3 also has a number of other advantages. It is free of ideological baggage. The rationale for its application is the recognition of the need for basic humanitarian restraint rather than the legitimacy of the ANC's aims. It leaves intact the Government's right to prosecute its internal opponents for participation in combat. It is part of a treaty to which South Africa is party. Nevertheless, Article 3 is not a solution to the problem of regulating the South African armed conflict. Firstly, its implicit threshold casts some doubt on whether the South African armed conflict falls into its material field of application and thus its application is not entirely unproblematic. More importantly, Article 3 does not provide adequate protections for combatants. The major omission is some form of special status for combatants. Protocol 2, the attempt to beef up Article 3's protections, was a victim of the 1974-77 Diplomatic Conference's obsession with Article 1(4) of

Protocol 1 and the unwillingness of newly independent states to allow any international interference in their domestic affairs. Emptied of its most valuable additions to protections for combatants in non-international armed conflict and predicated at an impossibly high geo-military threshold, Protocol 2 is inapplicable to the South African armed conflict at present because South Africa is not party to it and its future application seems unlikely.

Despite obvious drawbacks, the application of the law of non-international armed conflict in South Africa is more easily reconciled with the traditional legal structures than the internationalisation of the conflict and will probably become more attractive to the South African Government over time because it allows international regulation at little cost to South Africa's sovereignty. But because it takes no account of the special nature of the South African armed conflict it is, and will probably remain, unattractive to the ANC and its supporters as a suitable solution to the problem of regulating the South African armed conflict. Moreover, because the law of non-international armed conflict permits ANC combatants to fall within the jurisdiction of the South African criminal law, it allows the undermining of that law in the eyes of the majority of the population to continue, a process which must be arrested if the South African criminal law is to survive the present crisis. Although the ANC's 1980 Declaration indicated a commitment to

basic humanitarian restraints such as those contained in Article 3, something more is required if humanitarian law is to have any real impact on the South African armed conflict. The situation has progressed too far for the law of non-international armed conflict to provide an adequate solution. The emphasis is now firmly on the award of lawful status to combatants as the quid pro quo for the application of humanitarian law.

In the final analysis, the internationalisation of the South African armed conflict provides too much law at too high a price for the Government, while the non-internationalisation of the conflict provides insufficient law at an inordinate price to the ANC. Neither option satisfies the overriding humanitarian concern for the regulation of the conflict. Before looking for ways to adapt the existing law to solve the humanitarian impasse in the conflict, it is interesting to speculate on the kind of legal instrument that could have been developed in the 1970's to furnish an ideal solution to the problem of providing effective international law in situations like that in South Africa.

7.3 A MORE SUITABLE SOLUTION

If, as has been argued, Protocol 1 failed to provide effective international regulation of the South African armed conflict only because the means used to apply it as effective law - Article 1(4) with its reference to "racist regimes" - was unacceptable to the Government, it seems to follow that had Article 1(4) been

altered to make it more palatable to the Western and target states, Protocol 1 would have been the best solution for the international regulation of the South African armed conflict. However, other valid objections were made to the internationalisation of wars of national liberation in Article 1(4). Firstly, wars of national liberation were too narrowly defined. Secondly, the theory that these conflicts took place between international subjects was regarded as artificial. Thirdly, it was considered impractical to apply the full corpus of the law of international armed conflict in situations where the liberation movement's ability to apply this law was doubtful. The limited capability of the national liberation movements was borne out by the fact that the ANC, in its 1980 Declaration, only agreed to respect international humanitarian law where possible. A Protocol with a wider scope and sounder theory than Protocol 1, taking into account the claim of lawful status for the combatants of national liberation movements, but not bringing into operation the mass of rules dependant for their operation on the existence of sophisticated state bureaucratic structures, would have gained stronger support from Western and affected states than Protocol 1. It is submitted that a Protocol according lawful combatant status in any internal conflict that reached a certain geo-military threshold or where an internationally recognised organisation confronted the incumbent for legitimate political reasons, such as in a war of national liberation, would have combined both political and legal imperatives to provide a

positive development of the law. Such a Protocol could have linked the gradation of protections to the gradation of violence in general cases of internal insurrection, while recognising the legitimacy of wars of national liberation through the recognition of the lawful status of liberation movement combatants, without reference to the geo-military scale of these conflicts.

The arguments made during the 1974-77 Diplomatic Conference in support of the granting of lawful combatant status in wars of national liberation, illustrate the practicability of making the same grant in internal situations. The personal conditions for lawful combatant status could have been adapted to the conditions of internal armed conflict, in much the same way as they were adapted in Article's 43 and 44 of Protocol 1 to wars of national liberation. A Protocol embodying these provisions, but with a more general application in internal situations than Protocol 1, would have generated legal precedents in other jurisdictions that could have been of enormous significance when the issue of combatant status is actually taken up in South African courts. It would also have pointed to a future for the law - the argument for the granting of special status to internal opponents would not have expired with the end of the South African armed conflict.

In retrospect, had Protocol 2 been predicated at a low threshold with a content that amounted to something worthwhile, it could

have been the appropriate vehicle for such a solution. However, it must be conceded that had Protocol 2 contained such an ideal legal solution, it would probably have been politically unacceptable to many states. It would have had as politically high a profile and therefore had as much political appeal to the Third World as Article 1(4) and Protocol 1. Moreover, it would have intruded on the sovereignty of states in other internal conflicts and thus would have required a greater willingness to surrender sovereignty than was evident in the 1970's.

7.4 WHAT CAN BE DONE WITH THE EXISTING LAW?

Despite the fact that we are left floundering in a legal morass, it would be incorrect to regard international law as useless. Humanitarianism compels us to use the existing law as a basis for the international regulation of the South African armed conflict. At present, common Article 3's fundamental rules probably protect all combatants. Protocol 2, Protocol 1 and the corpus of the 1949 Conventions do not apply. Of course, the situation could alter to the extent where their material conditions of application are present and they do apply. But at this juncture they can only serve as a framework for the extension of humanitarian principles in the South African armed conflict. What kind of framework do they provide?

The promise that the corpus of the law of international armed conflict holds out is the applicability of lawful combatant

status to participants and the denial of domestic criminal prosecution for the taking up of arms against the South African Government. The Conventions and Protocol 1 offer lawful combatant status and P.O.W. status to ANC combatants. These or similar protections were the most serious omissions from Protocol 2. Article 3 urges the parties to internal armed conflicts to agree to bring into force all or part of the other provisions of the 1949 Conventions, thus pointing the way to the operation of lawful combatant status and P.O.W. status in the South African Armed conflict by agreement between the Government and ANC. In the current political climate such agreement is unlikely, although paradoxically it may become possible when the situation worsens. The ex gratia award of status by the Government to ANC combatants is the only hope for the operation of humanitarian law in the conflict at present.

It is submitted that in South Africa, distinction should be made between those guerrillas who meet the requirements for lawful combatant status and those who do not. For the purposes of neat classification this study has followed the orthodox taxonomy; viz. international armed conflict - special status and general protections; non-international armed conflict - general protections only. But as we have seen, the recent practice of states tends to contradict this approach. Combatants in many non-international armed conflicts, such as Lebanon, Chad and Northern Ireland, have been granted what could be described as a quasi-

combatant status, based on the pragmatic responses of states faced with burgeoning conflicts. This status is ex gratia and has no normative content. Given the existing legal impasse, such an arrangement in the South African armed conflict is highly desirable. Because of the magnitude of the concession the South African Government would have to make in order to concede such status of its own free will to ANC combatants, it may appear to be wishful thinking that the Government will accord such status on an ad hoc basis when the opportunity to do so through contractual obligation has arisen and has not been taken up. But the highly politicised nature of the South African situation demands increasing flexibility from the Government. Its attitude to the operation of humanitarian law in South Africa is determined by both the international and internal political climates, and against the background of increasing international isolation and internal rejection of the criminal law, the application of humanitarian law, without the loss of face attendant to becoming party to Protocol 1, will steadily become a more attractive option. Other factors influencing such a decision include the increasing geo-military profile of the conflict, the positive attitude of the ANC to humanitarian law and the possibility of reprisals.

It may seem contradictory to expend so much energy looking for legally binding ways in which to apply humanitarian law in the South African armed conflict and then submit that the best chance

for the present application of the law lies within the Government's prerogative. However, we must not allow in Forsythe's words, "...an instrumental view of international law to become a pursuit of international law itself."[4] The corpus of the law is instrumental in nature - it is constructed to achieve humanitarian goals. If it cannot be used rigidly with its integrity complete, then it should be modified, interpreted, and applied in a flexible manner in order to achieve those goals. In the South African context, one of those goals is the legal emancipation of combatants and the resultant beneficial impact on the conduct of the conflict itself. ANC combatants must be emancipated. In the future, convincing arguments may be found to bind the South African Government to grant ANC combatants lawful combatant status, but at this stage it can only be granted voluntarily by the Government. If it is granted, the ANC will be compelled to follow suit.

ANC combatants can be granted lawful status quite comfortably. Chapter four's evaluation of the personal conditions for protected status and general protections for combatants set out in the Conventions and Protocol 1, indicates that international law is well adapted to the kind of warfare prevailing in the South African armed conflict. It provides an integrated legal

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[4] D P Forsythe Humanitarian Politics (1977) 242. He was referring to the ICRC's attachment to strict legalism at the 1974-77 Diplomatic Conference, an attachment that was ultimately to its detriment and which has strongly influenced its present more informal approach to the law.

regime tailored specifically to the reality of unconventional warfare. Its first step is to ensure the granting of quarter. It then sets out the conditions for lawful combatant status and P.O.W. status. In the South African armed conflict these conditions can be lifted directly from Convention 3's Article 4 or Protocol 1's Articles 43 and 44, an option that has the advantage of capitalising on their interpretation and operation in other jurisdictions. Protocol 1's provisions are more viable in South Africa than Article 4 of Convention 3's onerous conditions because they represent the most up-to-date formulation of the personal conditions for protected status and they are well adapted to the type of 'poor mans war' being fought in South Africa. Alternatively, the existing law can be modified and adapted to the specific conditions of the South African armed conflict. This flexible approach would give lawmakers the opportunity to adapt the existing law to deal creatively with the different groups of combatants peculiar to the South African conflict, such as township combatants and fully trained nationalist guerrillas. They could take a lead in the development of the law by enforcing membership of an organised group, under responsible command, with a link to a party to the conflict, as the criteria for qualification for protected status and finally and conclusively divorcing the principle of visible distinction from the combatants' right to participate, enforcing it rather as a separate provision with attached penal sanctions. Whatever system is chosen to delineate the personal conditions for

protected status, combatants who meet the conditions must fall under international jurisdiction, with a right to participate, but also subject to the various prohibitions extant under international law. These prohibitions would do much to restrain excessive behaviour in the conflict, including attacks on civilians. Attention would have to be paid to the procedure for evaluating status provided by international law. The provisions in Convention 3 and Protocol 1 setting out this procedure could provide the guide for the setting up of tribunal system for the evaluation of status, with a suitable appeal/review procedure, offering all the procedural guarantees and enforcing the substantive protections granted combatants under international law. In addition, this system could serve the important function of trial of combatants for violations of the law of war, for instance perfidy and other grave breaches. International law could also serve as the basis for the special legal regimes relating to spies and mercenaries, but the more controversial provisions in Protocol 1 such as the grave breach of apartheid should be ignored. As for the treatment of captured prisoners, special detention facilities removed from the civilian prison system, conforming to the basic standards of the Geneva P.O.W. Convention without paying attention to inappropriate detail, would be sufficient to meet the demands of humanitarian law.

7.5 THE COSTS OF GRANTING ANC COMBATANTS PROTECTED STATUS

What are the potential costs to the Government of granting

protected status to ANC combatants?

(1) It would increase the international status of the ANC. However, the ANC's international status is increasing daily in spite of the legal defences available to the Government because of the Government's intransigence.

(2) It would encourage greater participation and result in an escalation of the armed conflict. But the armed conflict is already escalating, the number of participants is growing and the consequence of a steadily increasing stream of combatants remaining unregulated by the law is potentially disastrous.

(3) It would focus ANC attacks on the military. The military is, however, capable of defending itself and the emphasis on military targets would result in immense benefits to civilians.

(4) There would be an increased possibility of random criminals being protected. But the personal conditions of lawful combatant status - essentially a command link with the ANC - negatives this possibility entirely.

(5) It would apply lawful combatant status to an armed conflict that has not reached the geo-military threshold necessary for its application. But the conferral of protected status requires no great infrastructure. The South African Government is quite capable of doing all that is necessary for captured ANC P.O.W's. As members of the South African Red Cross point out, the Government paradoxically observes the highest humanitarian principles in dealing with Cuban P.O.W.'s, yet denies these

rights to its own nationals engaged in subversion.[5] Although its capacity for implementation is limited, the ANC also has the capability of applying elementary P.O.W. treatment, especially within the Frontline states.

(6) It would increase the domestic status of the ANC. This is a fundamental hurdle for the incumbent and one that only an act of political will can surmount. But the incumbent already acknowledges that it is at war with the ANC and the polarisation of the South African population in relation to the conflict is almost complete. The domestic legitimation of the ANC will not have that great an effect on support for the ANC.

Set off against the obvious advantages that the granting of lawful combatant status would have - the salvaging of the criminal law and the general humanitarian impact on the conduct of the conflict - it is submitted that the disadvantages of such a grant constitute acceptable damage.

7.6 FORCES FOR COMPLIANCE

What forces for compliance are available to enforce international regulation of the South African armed conflict? The spirit of Article 1 of the 1949 Conventions, whereby HCP's are bound to ensure the other parties' respect for the law, points to the role of the international community in enforcing the law in terms of

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[5] "Panel Discussion on Humanitarian Law and Human Rights in and the International Red Cross" 1979 Acta Juridica 200 at 220.

the influence it can exert on the South African Government and the ANC. That the international community is aware of this role is evidenced by its increasing concern with the fate of ANC guerrillas when they fall into the Government's hands. It can only be urged that they do all within their power to modify the South African Government's view on the issue. Third party protection and intervention is a role which the ICRC can play in an unofficial capacity. The instruction of both SADF and Umkhonto members in the personal conditions for lawful combatant status will go a long way to ensure compliance.[6] Both parties can incorporate the main provisions of protected status into their military penal systems. Nevertheless, reciprocity and reprisals will probably constitute the central means for enforcing international protection for combatants in South Africa.

7.7 THE FUTURE OF HUMANITARIAN LAW IN SOUTH AFRICA

The compromise solution proposed above is an attempt to institute at an informal level in the South African armed conflict, the kind of protections that could have been made available at a formal level by a Protocol built on consensus rather than confrontation. That we have to suggest regulation at an informal level is a great pity. Formal regulation by the law would be invaluable. But it is unlikely to come, at least not in the foreseeable future. Of course, international support for

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[6] Geneva Convention Article 47/ 48/ 127/ 144 makes the military instruction in the Conventions mandatory for armed forces and recommends it for the civilian population.

Protocol 1 may one day reach the level necessary for its transformation into custom and it will become legally binding on South Africa. But in the meantime, it can only be urged that those who have it within their power to impose international regulation of the conflict do so, even if only in the form of an 'out of court' settlement. The key to the actual application of the law is the South African Government. The law's application requires an act of good will on the Government's part. If it adopts international regulation of the conflict, especially the granting of protected status for ANC combatants, the ANC is sure to reaffirm its commitment to the law. If the ANC does not, the Government will no longer be in the position of spoiler. Because the ANC will gain a certain amount of legitimacy through the application of international law in the conflict, it is probable that the Government's application of international law will only be forthcoming when the situation within South Africa deteriorates to the extent that it becomes a viable option. At that point, the conflict will definitely require a humanitarian injection. The tacit acknowledgement of the ANC through the application of international law in the conflict may also show the way to the eventual resolution of the conflict. Once the legitimacy of an enemy is acknowledged, the road is open for a negotiated end to the conflict.

Humanitarian law is at the crossroads in South Africa. Bearing in mind the dismal failure of the law in other wars of national

liberation, it is distinctly possible that the law will fail entirely in South Africa as well. If it does fail, there will be no restraint in a situation that is degenerating rapidly and which has the potential for dissolving into a conflagration engulfing the whole sub-continent.

7.8 THE GENERAL FUTURE DEVELOPMENT OF THE LAW

In its future development, humanitarian law will have to confront the spectre of state sovereignty more directly. Sovereignty is the legal basis for the protective cloak preventing international regulation of the many armed conflicts within states that deny social justice to their own nationals. Penetrating this cloak in the attempt to increase the international regulation of internal conflicts, promises to be no easy task. The development of the law to regulate internal conflicts will require the development of mechanisms for the forcing down of the domain reserve barrier. In this regard, the most obvious area for legal innovation is the articulation and expansion of the legal nature of the right to internal self-determination. If this right can be firmly established, it will provide the key to the extensive application of humanitarian law in situations beyond the South African case. The further movement of humanitarian law into internal affairs is the only logical direction for the law to develop in a world where classical interstate conflicts are becoming increasingly rare and where the major international legal concern is for the universal enforcement of basic human rights.

APPENDIX A: A SHORT APPRAISAL OF THE GEO-MILITARY SITUATION IN SOUTH AFRICA

(a) QUANTITATIVE ASPECTS

(i) The Government Forces

The SADF has an operational force of about 200 000,[1] broken down as follows:- Permanent Force 25,52%; National Service Men 42,06%; Voluntary 2,24%; Civilians 27,09%; Auxiliaries 3,09%. The total defence expenditure in the 1984/5 financial year was R3 754 667 000, about 4% of the budget.[2] The SADF is well equipped with standard and advanced weapons and has bases throughout South Africa and Namibia. It has a fixed disciplinary code and an hierarchical command.

The SAP has about 35 000 members stationed throughout South Africa. They either wear the standard blue uniform or camouflage when operating as a paramilitary force. They use light weapons/riot control gear and vehicles.

In addition there are Civil Defence units, metropolitan police forces and the police and armed forces of the national states and the bantustans.

(ii) The ANC's Military Wing - Umkhonto We Sizwe

Reports on the numerical strength of Umkhonto differ widely. The SAP estimates that there are between 1500 and 2000 trained men, mostly in camps in Angola, plus a further 3000 members who have undergone military training but are no longer active. The Police assert that no more than between 10 and 30 were in the country at one time.[3] These figures are dated. At least 31 members were arrested in early October 1987 alone.[4] Oliver Tambo has spoken of 50 guerilla infiltrations a month. Lodge estimates that Umkhonto has about 10000 members, 400 of whom are operational in the country at any one time.[5] The ANC is reported to have allocated

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[1] M Evans "Restructuring the Role of the Military" 1 South African Review 42. General Magnus Malan refuses to give the total strength of the SADF.

[2] 1984 Survey SAIRR 739/745.

[3] 1984 Survey op cit 93.

[4] Natal Witness 5/10/1987.

[5] Talk given at the University of Durban-Westville - Natal Mercury 14/8/1987.

$50 million p.a., about half of its budget, to its military wing.[6] ANC combatants are armed with light weapons and explosives. Uniforms are abandoned at the South African border.

(b) CHRONOLOGY OF VIOLENCE

(i) 1976 - end of 1983
159 incidents of insurgency. 1976-4; 1977-20; 1978-13; 1979-12; 1980-19; 1981-55; 1982-39; 1983-55.[7]
January 1981 SADF raid on Maputo - 12 ANC members killed.[8]
20 August 1982 - 3 SA soldiers killed in Zimbabwe.[9]
20 May 1983 - Pretoria car bomb attack in Church Street; 20 killed and 217 injured; ANC claims responsibility.[10]
SADF raid on Maputo in retaliation 3 days later; 5 die but apparently not ANC members.[11]
Brigadier Herman Stadler (Security Police) said that between 1976 and the end of 1983 the security police captured 516kg of plastic explosives, 2500 blocks of TNT, 50 demolition mines, 9 limpet mines, 172 AK47 rifles, 50 other assault rifles, 150 pistols, 636 hand grenades, 2000 detonators, 50000 rounds of AK47 ammunition and 7000 rounds of other ammunition. Bomb explosions and threats had increased by 70% since 1979. Damage caused by acts of insurgency and sabotage was conservatively estimated at R600 million since 1976.[12]

(ii) 1984
58 incidents of insurgency occured.[13] 32 explosions - targets included state departments, petrol depots, power installations, railway lines, an SADF building. 26 Armed attacks were made on SAP members, Police Stations and members of the public.[14] The Institute of Strategic Studies (UP) said that 42 ANC attacks occurred in 1984 and more than 100 ANC members were either killed

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[6] 1984 Survey op cit 1.

[7] 1984 Survey op cit 92.

[8] J Friederikse South Africa: A Different kind of War (1986) 137.

[9] 8 SAYIL (1982).

[10] 9 SAYIL (1983).

[11] Friederikse op cit 139.

[12] 1984 Survey op cit 92.

[13] 1984 Survey op cit 92.

[14] 1984 Survey ibid.

or captured.[15] SAIRR data indicated that 27 people died in 42 acts of insurgency; 11 civilians in 2 car bombs and an attack on an oil refinery in Durban; 1 policeman in Soweto in an attack on his vehicle and 1 in an assassination; 14 alleged insurgents died; 61 people were injured.
16 March 1984 - Nkomati Accord signed between SA and Mocambique.[16]
3 April 1984 - ANC car bomb in Durban kills 3 and injures five.[17]
3 September 1984 - Major unrest in the Vaal triangle; 31 killed.
23 October 1984 - 7000 troops invade Vaal townships, the beginning of large scale use of the SADF throughout the nation in the putting down of unrest.

(iii) 1985
217 incidents of sabotage/explosives use or armed attack occurred in 1985; 41 on police members, 19 on police homes, 8 on police stations, 26 on private houses.[18] The first six months saw a rise in the frequency of attacks with 40 incidents reported and a shift of targets from black townships to CBD's and industrial areas.[18] Rioting in 1985 killed 16 police and injured 330. 1153 state and private buildings were destroyed or damaged. 562 adults were killed and 2000 wounded by the police.[20] 1966 were arrested - 54 per day. 2,4 died per day; 6,1 were wounded per day.
Early 1985 - Cross border raids into Gaberone, Botswana.
August 1985 - Partial State of Emergency declared.

(iv) 1986
An 800% increase in armed revolutionary violence took place since 1984.[21] Attacks increased from a weekly average in April 1984/April 1985 of 3,71 to April 1985/April 1986's average of 6,25.[22] ANC attacks rose by 322% in two years since April 1984. Attacks on policeman had risen from 11,95% of all 'terrorist'

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[15] 1984 Survey ibid.

[16] 10 SAYIL (1984).

[17] 10 SAYIL (1984).

[18] Natal Mercury 9/12/1986 quoting from UCT's Institute of Criminology's statistics.

[19] T Lodge "Mayihlane: Let us go to War! From Nkomati to Kabwe - The ANC Jan 1984 - June 1985" 3 South African Review (1986) 226 at 228.

[20] Natal Mercury ibid.

[21] Natal Mercury ibid.

[22] Natal Mercury ibid.

attacks to 27,84%. 1986 witnessed a considerable increase in the use of AK47 rifles. More than 55 arms caches were discovered in the 14 months to December 1986, with a value of R793 387. Since 1976 428 alleged 'terrorists' had been killed or captured, but of those 42,28% had been killed/captured since 1984.[23] 191 people were killed by the police in unrest during the first half 1986. 379 people were killed by other persons. 15 police had died. 2223 people died in unrest between February 1984 and June 1986 -879 in 1985 and 969 in the first half of 1986.
June 1986 - 2nd nation wide State of Emergency proclaimed. Over 10000 people were detained, and the level of violence dropped markedly.

(v) 1987-1988
Although information has been restricted since 1986, it appears that 446 ANC members were arrested in 1987 and 44 members were killed.[24] 38 PAC members were arrested and 4 were killed.[25]
The number of ANC attacks abated, but incidents such as the Grenade attack which killed 2 policeman at Mpumulanga Township near Pietermaritzburg, were fairly common.[26] The level of township violence rose slightly at the beginning of 1987, which also saw the reproclamation of the State of Emergency in June. In the first two months of 1988 112 ANC members were either captured or killed, a drop of one third from the number captured or killed during the same period in 1987.[27] Unusual events included the suspected operation of South African death squads in Europe, culminating in the assasination of the ANC representative in Paris, Dulcie September;[28] and the capture of an all white ANC cadre armed with an anti-aircraft missile near Pretoria in May.[29]

(c) TACTICS AND EVALUATION
The SAP/SADF has been remarkably effective in combating the ANC. The ANC resorted to armed struggle in 1960, but has yet to make a major inroad on the Government's military control of South Africa. The Government has relied on the SAP as its first line of defence, using the SADF only when a stronger response has been necessary. The SADF has been heavily involved in punitive cross

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[23] Natal Mercury ibid.

[24] Citizen 15/4/1988.

[25] Citizen 15/4/88.

[26] Citizen 15/4/88.

[27] Citizen 15/4/88.

[28] Natal Mercury 4/4/1988.

[29] Natal Witness 16/5/1988.

border raids mostly in retaliation for or in anticipation of ANC attacks and offensives. The Government's forces have also been in action against the ANC in the Rhodesian Bush War in which both sides participated on a small scale, and on a larger scale in the conflict in Angola. Government responses involve conventional police action, covert penetration of the ANC, assassination, covert military action in neighbouring states and conventional military responses. One result of the ANC's efforts has been the full scale militarisation of South Africa.

ANC targets include military installations, police stations and personnel, courts and administration offices, people working within the system, 'traitors' (i.e. individuals who give evidence for the state), railway installations, electrical substations and oil companies.[30] The police consider ANC activity in South Africa as low compared to the activities of insurgents elsewhere, labelling the ANC the "least successful" insurgency organisation in operation.[31] It asserts that it has thwarted attempts by the ANC to establish bases in the townships, and move from the use of terror to a guerrilla war.[32] Michael Morris of the 'Terrorism Research Unit' in Cape Town said that much of the ANC's violence was the work of a few individuals or small teams rather than large organised groups. He said that the debate about whether the ANC was switching strategy from 'hard' to 'soft' targets was futile. The ANC attacked less guarded targets when and where it could because of the lack of sufficient manpower or funds to attack specific targets on orders from headquarters.[33] But the debate about whether the ANC officially sanctions attacks on soft targets continues. The Pretoria bombing of the SADF's Poynton House HQ in 1981 was a tactical innovation - timed at afternoon rush hour - located in a busy street in a commercial centre - and in the scale of casualties inflicted. The initial ANC response was supportive of the idea that this was the opening phase of a new campaign but later responses expressed regret at the extent of the killing.[34] Sources in Zimbabwe reported that Oliver Tambo was highly critical of the Durban car bombing of 12 July 1984 in which 5 people died and 27 were injured. It was reported that the explosion was generally treated as a serious deviation from ANC policy, which was that casualties among civilians should be as

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[30] 1984 Survey op cit 93.

[31] Ibid.

[32] Citizen 11/3/1987.

[33] 1984 Survey op cit 94.

[34] T Lodge "The ANC" 2 South African Review (1984) 21 at 22.

low as possible.[35] The May 1987 bombing of the Johannesburg Magistrates Court showed increasingly sophisticated techniques and hardware. In August 1988 an ANC spokesman was reported to have said that if cadre members hit soft targets in violation of the offical policy of avoiding these targets, they could be disciplined.[36] ANC policy is to internalise the war - the idea being that the decisive struggle will take place within the country and not in the surrounding states.[37] Tactics of sabotage and limpet mine use with occasional car bombs suggest the methods of ANC operation - the use of part time guerrillas/temporary training bases giving week long courses within the country.[38] In 1985 the ANC appealed to township youths to form small bands armed with home made weapons and to place themselves at the forefront of township struggles. The SAP claims that such localised groups armed and trained by the ANC operate independently so the ANC can dissociate itself from their more controversial activities, eg., the 'Western Cape Suicide Squad's' grenade attacks on coloured MP's.[39] However, guerilla activity has been sparsely associated with township unrest. The military decisions of the ANC's Kabwe Conference (16/6-26/6 1985) were (i) to strike soft or civilian targets (not civilians specifically); (ii) to intensify 'peoples' war (popular insurrection as opposed to secretive sabotage); (iii) to elect a war council; (iv) all ANC members must undergo military training.[40]

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[35] 1984 Survey op cit 95.

[36] Natal Mercury 19/8/1988.

[37] 1984 Survey op cit 3.

[38] Lodge op cit 1986 229-300.

[39] Lodge ibid.

[40] Lodge op cit 1986 239.

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