The Utilization of International Humanitarian Law and, in Particular, the Geneva Convention Treaty Régime, to Deter Acts of International Terrorism, with Special Reference to Armed Struggles by "Peoples" for their Right to Self-Determination

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ABSTRACT

In 1937, the international community preliminarily agreed on a definition of international terrorism. A major World War and Cold War since that time have made impossible any such modern consensus. In particular, the U.N. principles of the equal rights and self-determination of "Peoples" have caused political and juridical confusion in that liberation fighters who utilize terror methods as one tactic in an overall political strategy to achieve self-determination are frequently termed "terrorists", and prosecuted as such.

In order to regulate wars of self-determination under international law, and to control the means and methods of warfare utilized in them, international humanitarian law (IHL) was extended in 1977 to include armed conflicts for the right to self-determination, "as enshrined in ... the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations". Thus, acts of terrorism perpetrated during armed struggles for self-determination are separable from random acts of international violence, and when perpetrated by states or insurgent forces during wars of self-determination, may be prosecuted under IHL as war crimes.

However, although states are obligated to seek out and prosecute the perpetrators of illicit acts of warfare, they rarely do so. Nevertheless, should IHL be fully utilized during wars of self-determination, if only for purposes of guidance, the separability of illicit acts of war would enable the international community to reach consensus more easily regarding a definition of terrorism in general, and a co-ordination of efforts to deter its occurrence.

When the French Revolution broke out, it certainly afforded to Mr. Burke an opportunity of doing some good, had he been disposed to it; instead of which, no sooner did he see the old prejudices wearing away, than he immediately began sowing the seeds of a new inveteracy, as if he were afraid that England and France would cease to be enemies. That there are men in all countries who get their living by war, and by keeping up the quarrels of Nations, is as shocking as it is true; but when those who are concerned in the government of a country, make it their study to sow discord, and cultivate prejudices between Nations, it becomes the more unpardonable.

- Thomas Paine, Rights of Man

C O N T E N T S

A N A L Y T I C T A B L E O F C O N T E N T S

Chapter 7 Political Aspects of the Applicability of IHL to Liberation Struggles

P R E F A C E

A N D

A C K N O W L E D G E M E N T S

All legal research can face the difficulty of having to follow political events, and few issue areas have been more in the news recently than armed struggles for rights of self-determination. With recent peace initiatives in the Middle East and at Downing Street, it appears increasingly likely that, while much progress has been made to achieve system change or transformation through democratic process, the use of terrorism to further group political aims remains topical. Should the recently-convened Yugoslav war crimes trials prove a fraction as successful as those which took place in Nuremburg and Tokyo after World War 2, the future role of international humanitarian law to deter the perpetration of acts of terrorism will, in my opinion, be assured.

Sincere thanks are due to all those who have helped me in any way with this research and especially to my supervisors Hilaire McCoubrey and Michael Bowman, and to my husband Steve Giles. Thanks are also due to my employer Manchester Metropolitan University for the assistance it has given me in printing and binding this thesis.

As a final point, I have adopted American spellings for the most part in this thesis, and the occasional abbreviated format for source materials indicated in the footnotes. In order to avoid any confusion, I have endeavored to give complete titles and references in the Bibliography.

Elizabeth Chadwick

A B B R E V I A T I O N S

Adelaide L. Rev.	Adelaide Law Review
A.J.I.L.	American Journal of International Law
B.U. Int'l. L.J.	Boston University International Law Journal
B.Y.I.L.	British Yearbook of International Law
Col. H.R. L. Rev.	Columbia Human Rights Law Review
Col. J.T.L.	Columbia Journal of Transnational Law
C.W.I.L.J.	California Western International Law Journal
Doc.	Document
For. Aff.	Journal of Foreign Affairs
Ga. J. of Int'l. and Comp. L.	Georgia Journal of International and Comparative Law
G.A.O.R.	General Assembly, Official Reports
G.P.R.A.	Gouvernement Provisoire de la République Algérienne
Harv. Int'l. L.J.	Harvard International Law Journal
Harv. L. Rev.	Harvard Law Review
H.R.Q.	Human Rights Quarterly
I.C.C.	International Criminal Court
I.C.J.	International Court of Justice
I.C.L.Q.	International Comparative Law Quarterly
I.C.R.C.	International Committee of the Red Cross
I.H.L.	International Humanitarian Law
I.L.A.	International Law Association
I.L.M.	International Legal Materials
I.M.O.	International Maritime Organization
I.M.T.	International Military Tribunal
Int'l. J. Law and Psychiatry	International Journal of Law and Psychiatry
Int'l. L. and Pol.	New York University Journal of International Law and Politics
Int'l. Lawyer	International Lawyer
Int'l. Rel.	International Relations
I.R.A.	Irish Republican Army
I.R.R.C.	International Review of the Red Cross
Isr. L. R.	Israeli Law Review
Isr. Y.B.H.R.	Israeli Yearbook of Human Rights
J. of World Trade	Journal of World Trade
Jurid. Rev. (The)	The Juridical Review
L. of N. Off. J.	League of Nations Official Journal
Medico-Legal J.	Medico-Legal Journal
Melb. U. L. Rev.	Melbourne University Law Review
M. L. Rev.	Modern Law Review
M.R.G.	Minorities Rights Group
N.I.L.R.	Netherlands International Law Review
N.L.F.	National Liberation Front
Nouv. Obs.	Le Nouvel Observateur
Osgoode Hall L. J.	Osgoode Hall Law Journal

P.C.I.J.	Permanent Court of International Justice
P.I.R.A.	Provisional Irish Republican Army
P.L.O.	Palestinian Liberation Organization
Rev. Int'l. Comm. of Jurists	The Review of the International Commission of Jurists
Stan. J. Int'l. L. Supp.	Stanford Journal of International Law Supplement
Terrorism: An Int'l. J.	Terrorism: An International Journal
Vir. J. of Int'l. L.	Virginia Journal of Internationnal Law
U.K.	United Kingdom
U.N.	United Nations
U.N.T.S.	United Nations Treaty Service
U.S.	United States
U. Tasmania L. Rev.	University of Tasmania Law Review
Yale J. Int'l. L.	Yale Journal of International Law
Yale L. J.	Yale Law Journal

1. The Utilization of International Humanitarian Law, and, in Particular, the Geneva Convention Treaty Régime, to Deter Acts of International Terrorism:

Introduction and Terms of Reference

In 1937, the international community agreed on a definition of international terrorism. Since that time, however, geopolitical divisions, political considerations, and a lack of definition of the issues involved in international terrorism have made impossible any co-ordinated world community effort to deter effectively the occurrence of the phenomenon of internationnal terrorism. Instead, there are numerous issue-specific codification efforts which deal in piecemeal fashion with particular acts of international violence, in particular circumstances. Within this context, specific categories of acts are made subject to criminal process and inter-state co-operation regarding extradition. Existing arrangements, thus, are between and among varying combinations of states party to each convention.

In the post-1945 era, a satisfactory approach to dealing with acts of terrorism has been made difficult because of the U.N. Charter principle of the equal rights and self-determination of "Peoples". Initially considered a principle applicable only to former colonial territories, the concept of a "People" has gradually been expanded, in large part as a result of the successful use of violent force in armed struggles by auto- or self-determined "Peoples" for the right of self-determination, which use of force has included acts of terrorism. The term is now understood to include politically, ethnically and/or culturally distinct groups living in situations of colonial domination, alien occupation, or racist régimes, which modern delineation is

codified in the 1977 Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, or Protocol 1.

On the basis of the use of violent force in such armed conflicts, the protections and prohibitions contained in international humanitarian law and, in particular, the Geneva Conventions of 1949, were extended in 1977, in Protocols 1 and 2 to the Geneva Conventions. This extension was mandated by the proliferation of largely unregulated "civil" wars for the right of self-determination. In that many wars for self-determination should now be considered "international" for purposes of the application of Geneva law, it is argued that acts of terrorism perpetrated by or on behalf of "Peoples" struggling for their rights to self-determination constitute a separable and "different" phenomenon to individual acts of terrorism having effect in the international arena. Thus, acts of terrorism perpetrated by "Peoples" struggling for the right to self-determination should be prosecuted under the Geneva treaty régime, as breaches of the Geneva Conventions, or as grave breaches or war crimes.

It is intended first in this brief introduction to outline working definitions for the basic terminology used in this argument. The issues involved and the theoretical structure into which they have been placed will then be discussed both singly and in combination, in order then to consider the viability of the Geneva legal régime to deter and prosecute acts of international terrorism.

1.1. Working Definitions

This argument is made complex by the absence of definition in each of the issue areas concerned in the analysis of terrorist acts

perpetrated by or on behalf of a "People" seeking its right to self-determination. For purposes of the discussion to follow, the following working definitions are made.

1.1.1. "Terrorist Offense"

As noted previously, there is no single definition of terrorism adopted by the world community. The expression "terrorist offense" is used in this discussion as follows. "Terrorist offense" includes, but is not limited to, acts of violence or deprivations of freedom directed against persons or their property for any political purpose. Such acts of violence or deprivations of freedom are often perpetrated regardless of the injured party's or parties' association or connection with the terrorist actor's political purpose. Instead, these acts are perpetrated in the main to spread fear or terror, in order to coerce a government in power to alter its policies.

In this discussion, the expression "terrorist offense" is used interchangeably with the expressions "terrorism", "international terrorism", "acts of terror-violence", and "the phenomenon of terrorism". The use of the expressions "terrorist" or "perpetrators of terrorist acts" is intended to mean those persons involved in terrorist offenses.

Acts of terrorism are considered to be one form of terror-violence. While acts of terrorism are frequently those of political or economic actors having little or no connection with an armed conflict as that term is understood, such acts often form a tactic in the overall political strategy of all parties to a liberation struggle for the right of self-determination. Liberation actors engaged in the use of such tactics, however, will be referred to as "freedom fighters", or other

terms in common usage, to that effect.

1.1.2. <u>"Self-Determination"</u>

The self-determination of "Peoples" is an aspirational goal of the U.N. era, the scope of which has been much expanded in its application within the contexts of state sovereignty and equality. The terms of the U.N. Charter pre-suppose a vision of state sovereignty, and the inviolability of territorial boundaries and political independence of states. However, the vision of state sovereignty pre-supposed in U.N. Charter provisions has come into frequent conflict with the U.N. principle of the equal rights and self-determination of "Peoples", in that a "People" frequently has a transboundary or border existence. In particular, this conflict arises when contexts of ethnic and/or cultural "nationality" must operate through traditional mechanisms of sovereign state administration and internal management. Thus, while most States in the world community concede that a "People's" right to self-determination exists, it is felt that it should be achieved through some form of democratic process or representation.

Further, the identification and content of the rights entitlements involved in self-determination has never been made explicit. From its original context of colonialism, the notion of self-determination has expanded to include "Peoples" in post-colonial states, or in those states where human rights abuses by a government afford a justification for the use of force in self-defense. In other words, rights to self-determination may be restricted to some form of participation in an alrady existing governing process, or may include the grant of various issue-specific rights contained in the post-1945 human rights documents.

Alternatively, self-determination may be viewed as a new standard for evaluating a government's right to rule, and to manage system change. Similarly, where claims to territory are asserted by particular groups or "Peoples" desiring to correct historic wrongs, demands for self-determination may take the form of a claim over territory and to the right to secede from the territorial state. Self-determination in commercial contexts becomes a proper allocation of property and management rights or privileges, and thus may concern issues of expropriation and ownership, compensation, investment rights, contract duration, and basic considerations of jurisdiction.

The many issues underlying self-determination and the use of force to achieve it have eroded more traditional jurisdictional confines delimiting the areas between domestic and international concern. The post-1945 era has thus witnessed a steady expansion of the notion of self-determination, as many armed conflicts or liberation struggles have been waged by self- or auto-determined "Peoples" for their right to self-determination, and their rights to a separate nationality and territorial boundaries.

In view of the above possibilities, the use of the expression in this discussion is intended to convey an expansive rather than a restrictive meaning. Such use will imply, unless otherwise indicated, the achievement of system transformation and/or territorial secession through the use of violent force. For purposes of the present discussion, the use of force to achieve self-determination will include the perpetration of terrorist offenses, as one tactic in an otherwise permissible political strategy. The use of the expression "struggles for the right to self-determination" is intended to include the

expression "wars of national liberation".

1.1.3. "Peoples"

The post-1945 problem of defining what "Peoples" are entitled to self-determine has been in large part created by U.N. unwillingness and/or inability to intervene in classification struggles by self- or auto-determined groups. U.N. goals regarding the notion of self-determination are indefinite, and juridically intrusive in areas of traditional state domestic jurisdiction. As is discussed in Chapter 2, U.N. practice regarding the idea of a "People" has largely been restricted by former colonial boundaries, so that their self-determination would not endanger existing territorial units. Such an emphasis thus ignores anything other than an already existing ethnic map.

This fact, in addition to historic grievances or repressive régimes, means that a strict identification of those "Peoples" entitled to self-determination through contexts of colonialism cannot succeed. The result of such a strict approach has been a proliferation of unregulated violence by auto-determined "Peoples" as the preferred method of self-identification and of system change. A series of successful liberation wars has led to alterations in common understandings regarding which "Peoples" are entitled to assert claims for self-determination, and to use force to achieve their rights. As is discussed in Chapter 3, the term "Peoples" has thus evolved to mean those groups which have common political goals, a will to live together, and clear ethnical and/or cultural ties. Such "Peoples" frequently want independence from an administering state, and use force to achieve it. Given the predictable lack of resources available to them, as non-state

entities, armed force frequently utilized to achieve self-determination takes the form of acts of terrorism.

Mention is made in Protocol 1 Article 1(4) of those "Peoples"

> (F)ighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination, as enshrined in ... the 1970 Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.

Thus, while the categories of liberation struggle to which IHL is made applicable appear narrowly confined in Protocol 1, express reference to the 1970 Friendly Relations Declaration implies a much broader approach. Further complicating the ready identification of what "Peoples" are entitled to self-determination is post-1945 ideological pluralism which, in juxtaposition with democratic presuppositions, has not been conducive to standards of congruence when the time arrives to interpret U.N. Charter provisions. As is discussed in Chapter 3, the result has been many successful liberation wars which have expanded the scope of claimed rights entitlements made by "Peoples" struggling for these rights through the use of armed force.

For these reasons, the use of the term "Peoples" in this discussion will be expansive. Among other things, it is argued that "Peoples" may be identified by their successful use of methods of force or coercion. The term is intended, unless otherwise indicated, to mean those "Peoples" which are ethnically and/or culturally distinct, and exhibit a degree of social and/or political cohesion sufficient to organize methods of force or coercion for use against a state, which methods are at least in part designed to give content to their claims to a right of self-determination.

1.1.4. "International Humanitarian Law"

Referred to as "IHL", this area of law will be understood to be divided into two main branches: the law of war and limited aspects of human rights law. The law of war, as referred to in this discussion and as codified subdivides into those provisions contained in the Hague Conventions or law of war proper, and those provisions contained in the Geneva Conventions or humanitarian law. The law of war is intended to regulate states in the choice of means and methods of warfare utilized against each other in an armed conflict. The law of Geneva is intended to protect individuals and mitigate against the effects of an armed conflict. In that this body of law applies to safeguard the victims, and to mitigate the effects of hostilities, a degree of overlap exists between the law of war and the law of Geneva, particularly regarding the choice of means and methods of warfare employed. This overlap is particularly apparent in Protocol 1 to the 1949 Geneva Conventions.

The second main branch of IHL - human rights law - governs relations between a state and its own nationals essentially during times of peace as this body of law allows for derogation of many individual rights during times of armed conflict. However, certain fundamental rights are non-derogable and human rights law remains relevant in the case of a situation of armed conflict making the two main branches of IHL complementary. A degree of overlap implies the usefulness of adopting an integrated approach to IHL, which was expressly done in Protocol 1 of 1977, despite complaints that conceptual or legal confusion would be the result. Yet, while the two main branches are juridically distinct, an integrated approach to IHL provides the necessary framework through which an individual may be protected against

the actions of states in all circumstances. An integrated approach is also of assistance when the time comes to prosecute breaches of the Geneva Conventions, or grave breaches or war crimes. Thus, the expression "IHL", unless indicated otherwise, is intended to denote an integrated form of Hague law, Geneva law, and limited aspects of human rights law.

As is discussed in Chapter 4, an integrated approach is codified in the 1977 Protocols 1 and 2 to the Geneva Conventions of 1949, and would appear to be generally accepted in customary international law. The use of an integrated approach is intended to make relevant its application to armed struggles by "Peoples" for their rights to self-determination. In that states continue to use the threat or use of force in their diplomatic relations, an integrated approach to the term IHL is further intended to emphasize the heightened need for the ready application of this legal régime to all situations of armed conflict. It is further argued that an integrated approach to IHL is supportive of the notion that Geneva law is appropriate for use in prosecuting and detering acts of terrorism perpetrated by "Peoples" during all liberation struggles, and thus, that such acts are a distinct and separable phenomenon to individual acts of international terrorism.

1.2. Discussion

The argument that the IHL legal régime is appropriate to deter and prosecute terrorists acting for or on behalf of "Peoples" struggling to achieve their rights to self-determination is made complex by the absence of definition in the vast literature. In particular, the issues of international terrorism, of the "Peoples" entitled to the right to self-determination, of the "Peoples" entitled to use force to achieve

self-determination, of the "Peoples" who employ acts of terrorism in pursuit of their aims, and of the scope and nature of the rights entitlements contained in the aspirational goal called "the right to self-determination" remain without prospective guidance.

For the sake of clarity, these many issues will be discussed individually, and in combination. It is considered that the extension of IHL in 1977 to liberation struggles reflects the need to regulate the use of violent force in such armed conflicts. As such, it is clear that this extension would be applicable to deter acts of terrorism perpetrated during such struggles. This extension further makes the inability of the international community to distinguish, deter and prosecute terrorist acts difficult to reconcile.

1.2.1. Legality of the Use of Armed Force in Liberation Wars

By way of preliminary discussion and as discussed in Chapters 2 and 3, the legality of the use of armed force in liberation wars is highly political, as the U.N. system only entitles states to use force. Even then, the threat or use of force is "legal" in highly restricted circumstances, e.g., in self-defense. A perceived "right" to use armed force in liberation struggles in the post-1945 era has thus resulted in legal confusion regarding the outbreak of hostilities, and the actual content of the rules regulating the conduct of war. A customary use of terrorism by all parties to such conflicts further risks the normative development of clear exceptions to U.N. prohibitions against the threat of or use of force.

As is discussed in Chapter 4, the IHL legal régime applies between states which are parties to the same treaties. It also applies between states or other belligerent parties which mutually accept the

treaties, and apply the relevant provisions. Whether or not a "People", as an "aspiring" state, can bind itself to the four Geneva Conventions as a "Power" is highly controversial, and is felt to be beyond the scope of this discussion. IHL is applicable nevertheless to domestic liberation conflicts through mutual acceptance of the 1949 Geneva Conventions, Protocol 1, Protocol 2, or, as a minimum, Common Article 3 to the four Geneva Conventions of 1949, which latter Article applies to armed conflicts "not of an international character occurring in the territory of one of the High Contracting Parties, ...".

The twin failures in the U.N. era to define terrorism, and to deter successfully the perpetrators of acts of international violence are discussed in Chapter 5. These failures led to a gradual recognition of the unregulated nature of liberation conflicts, and mandated the extension of the protections of IHL in 1977 to such situations. Nevertheless, the world community has yet to prevent the violent actions either of liberation movements or of states which such movements threaten. As discussed in Chapters 6 and 7, this seems to indicate that the rationale underlying the law of war is not yet considered by many states to be entirely relevant to struggles for self-determination. State refusal to apply IHL to all liberation struggles, it is argued, is political, and constitutes a rejection of the notion that "Peoples" have the "right" to use armed force in liberation struggles.

1.2.2. IHL as a Neutral Forum

One consequence of the 1977 extension of IHL to wars of self-determination is that acts of international violence or terrorism perpetrated by or on behalf of struggling "Peoples" may be regarded as grave breaches of Geneva law, or war crimes. In that IHL prohibitions

focus more on the nature of an illicit act, and less on the identity of the actor, each state party to the Geneva Conventions is required to search for the perpetrators of war crimes, and must either prosecute them or extradite them for trial. As there is no political offense exception to this duty, IHL offers a content-neutral forum in which terrorist actors may be prosecuted. Thus, it is argued in Chapter 5 that issue-specific anti-terrorism codifications cannot ever be truly effective. This is so because most such instruments contain a political offense or humanitarian exception clause applicable to the extradition of an alleged offender. Where extradition is denied, the remaining duty to bring the offender to trial may result in a "friendly" prosecution, and/or in the grant of political asylum. These exception clauses, thus, are a barrier to effective interstate co-operation to deter acts of international terrorism.

As is discussed in Chapter 6, terrorist violence is frequently used by liberation groups as part of a political and ideological strategy. Such violence is therefore a tactic frequently designed to gain international sympathy, to achieve a degree of political interaction with states, and to indicate a legal relationship with a threatened incumbent for purposes of parity in negotiations to end the violence. The continued failure to pursue and prosecute these violent actors is made difficult to reconcile with the existence of a "neutral" forum offered by the IHL legal régime. Further, a characterization of terrorist acts as grave breaches or war crimes implies that acts of terrorism perpetrated during a liberation struggle constitute a phenomenon which can be distinguished from individual acts of international terrorism. Given this delineation, it would appear that

state unwillingness so to characterize terrorist acts perpetrated during armed conflict is one source of the international community's inability to deter violent actors.

1.2.3. State Unwillingness to Invoke IHL

State unwillingness to invoke or implement the IHL régime in liberation struggles represents a legal evasion, and causes normative confusion. This is so for many reasons. The IHL legal régime provides for both individual and state responsibility for breaches of Geneva law. As is discussed in Chapter 5, issue-specific anti-terrorist instruments do not refer to acts of state terrorism. Further, states are unwilling to recognize a liberation struggle as such, as this implicates the implementation of IHL, and may afford liberation fighters their "window of opportunity" to gain a degree of status, to be recognized as combatants, and to act as a protogovernment. Instead, states frequently prefer to regard all acts of terrorism as criminal, and to prosecute them within sovereign, domestic frameworks of criminal law.

As discussed in Chapters 6 and 7, most states are prepared to concede cautiously that the right to self-determination is a principle of the U.N. system and of international customary law. On the other hand, states are often not prepared to accept the practical results of such a concession. Should IHL be implemented from the first acts of violence or hostilities in a liberation struggle, as required, its application carries considerable factual and political significance as an indication of the scope of the conflict. Implementation of IHL implies that an incumbent government is no longer able to protect sectors of the population from acts of unregulated violence. It also implies a "right" to shoot at target state police or military units

empowered to conduct public order missions. Should such a situation occur, concerned third states have a duty, if not a right, to assess the situation, and to proceed in their own interests. Thus, third states may make their own accommodations with both sides to an armed conflict by re-aligning their diplomatic and investment interests in anticipation of a future alteration in target state sovereignty.

Further, the notion of the right to self-determination of "Peoples" has evolved within the opposing frameworks of state sovereignty and state equality. Many "new" states have achieved their independence after successful liberation struggles. Each state in the U.N. General Assembly has one vote, and Western states which oppose the "right" of liberation fighters to use force to achieve self-determination are outnumbered, in voting terms. General Assembly Resolutions may be passed by large majorities, in the context of state equality, yet never be observed by large or influential states when exercising their sovereign authoritative interpretation of the content of particular domestic uprisings to which the Resolutions potentially apply.

Thus, states are unwilling to invoke IHL in wars of self-determination. To do so means that a threatened state should no longer decide within purely domestic confines the means by which to ensure its own survival, or to repress the armed violence. To do so in effect delimits state jurisdictional competence, and constitutes an erosion of the carefully preserved balance of competence in the U.N. system between domestic and international concerns.

1.3. The Use of Violent Force to Define a Liberation War

Various attempts have been made during the U.N. era to identify

what "Peoples" are entitled to assert the right to self-determination, as the terms of the U.N. Charter regarding the peaceful and orderly attainment of independent statehood by dependent territories and/or "Peoples" are uncertain or controversial in content. In this way, the use of force has entered into the discussion. This has led to the transformation of the notion into a political vehicle through which rights assertions having no or little connection with colonial contexts may be made. In that many "Peoples" have settled the controversy for themselves and achieved self-determination through the use of force, the status of liberation wars in contemporary international law has evolved in large part through the use of violent means and methods of warfare, which include acts of terrorism, and the extension of IHL to regulate them. Auto-determined "Peoples" wishing to right historic grievances or effect system transformation thus employ the rhetoric of self-determination, in order to use force.

The proliferation of self-determination armed struggles also implicates a return of the Eighteenth Century right to revolt against repression which initially gave rise to the political offense exception. When coupled with political, ethnical and/or cultural criteria which potentially define nationality in a new way, it is hardly surprising that the right to self-determination has proved to be a transboundary vehicle through which to correct historic wrongs, and reacquire lands and natural resources. The resulting clash between state sovereignty and new notions of nationality has led to a proliferation of violence by auto-determined "Peoples". This is an aspect of the use of violent force going far beyond the original intended scope of U.N. Charter terms regarding self-defense, or the peaceful and orderly attainment of

independence of non-self-governing territories and/or "Peoples".

For these reasons, it is considered in Chapter 2 that the evolution in status of liberation wars in contemporary international law has been achieved through the "justified" use of violence. Some examples of successful and on-going liberation struggles are given in Chapter 3. The extension of IHL to regulate liberation struggles is discussed in Chapter 4, which extension is intended to re-assert the primacy of law in war. As such, IHL provides an additional forum in which to pursue individual and state perpetrators of grave breaches of the Geneva Conventions, and war crimes. IHL thus can be utilized as the legal régime through which to deter and prosecute all parties to a liberation struggle should they utilize acts of terrorism.

1.4. The Issue of Self-Determination and The Content of IHL

As previously indicated, the effect wars of self-determination have had on the development of IHL is discussed in Chapter 4. The international community notably failed in 1949 to develop the content of the laws of armed conflict, other than minimally in the Geneva Conventions. The laws of armed conflict thus retained for the most part their late-Nineteenth Century frameworks. The U.N. Charter prohibited the threat or use of armed force in diplomatic relations, and the law of war was felt in some quarters to be obsolete. Thus, by examining the separate historical development of each branch of IHL in Chapter 4, it is hoped the integrated approach achieved in 1977 will be better understood. Nevertheless, a rule must be relevant for its intended purpose, and it is of concern that in 1977 many Western states opposed an integrated approach in IHL applicable to armed conflicts waged by "Peoples" struggling against alien occupation, racist régimes, and

colonial domination.

1.4.1. Recognition of Conditions of Modern Warfare

Paradoxically, the integration of Hague and Geneva law in 1977 represents the recognition by the international community of the realities of modern warfare. In other words, each of the three subdivisions found in IHL - Hague law, Geneva law, and aspects of human rights law - has a well-defined-but-separate jurisdictional basis. Further, and as previously discussed, these subdivisions would appear, on the face of it, to have little to do with one another. Nevertheless, wars of self-determination by definition impinge on notions of state sovereign authority, and on notions of nationality, territorial integrity, and individual protections. It is clear that the modern integrated approach represents a development in integrated, fundamental notions of justice, applicable in all circumstances.

Chapter 3 discusses the adaptation of an integrated approach in IHL to struggles for self-determination. This adaptation reflects the single-vote context of U.N. state equality, and thus, majoritarian recognition of the realities of operational conditions in modern armed conflicts. The adaptation serves to delimit traditional domestic jurisdictional confines, and erodes a degree of state sovereign authority. The extension thus reflects the need for individual protection against the actions of states, particularly in contexts of matters of domestic concern, national security and military necessity.

1.4.2. Jurisdictional Conflicts

It is further considered in Chapter 4 that the jurisdictional conflicts implicated by the interrelation of the laws regulating armed hostilities, humanitarianism, and limited aspects of human rights law

have been minimized by the adoption of an integrated approach to IHL. Traditionally, Hague law restrained the military actions a state could take. Geneva law governed the factors states were required to consider regarding the victims of an armed conflict, and thus exerted another restraint on the actions states took under Hague law. Both Hague and Geneva law comprise the law of war. Human rights law, as a post-1945 issue area, makes use of many humanitarian guidelines in its provisions regarding a state's treatment of its own nationals during times of peace. Should a time of war occur, fundamental human rights continue to be observed. Thus, IHL contains limited aspects of human rights law.

While frequently resulting in the same or similar result, the mechanisms competent to apply and enforce these three areas are different, and an integrated approach to IHL in 1977 was criticized as juridically confusing. Protocols 1 and 2 of 1977 made massive incursions into notions of state sovereign authority to suppress formerly "domestic" uprisings. Further, the issues underlying self-determination and the right to use force to achieve it are highly political, and erode traditional jurisdictional confines delimiting the areas between domestic and international concern. Many states are not yet party to Protocols 1 and 2. Many states remain unwilling to recognize the legitimacy of armed liberation struggles. Thus, the potential for confusion increases should the point of application of IHL under such circumstances arise. Nevertheless, IHL provides a neutral forum, universally acceptable, to deter and prosecute "terrorists" acting for or on behalf of "Peoples" or threatened states engaged in an armed conflict for the right of self-determination.

1.4.3. Terrorists and Freedom Fighters

Given individual state unwillingness to date to relinquish sovereign authority both to identify terrorist groups, and to suppress domestic uprisings as mere criminal undertakings, regional and international attempts have been made to reconcile the related-but-separate notions of acts of international terrorism, terrorist acts of liberation movements, and the issue of a "People's" right to use force in self-defense against state aggression taking the form of alien domination, racism, or colonial domination. States in the post-1945 era have been reluctant to recognize a state of war, preferring to treat an uprising or insurrection as a matter solely of domestic concern, suppressable as such through use of the police, paramilitary units, or international assistance in public order missions.

In this vein, the largely unsuccessful law enforcement approach through individual penal suppression of acts of terrorism is discussed in Chapter 5 from domestic, bi-lateral and multi-lateral points of view. Given the hesitance of States to recognize a state of war, it is clear that the extension in full of the provisions of IHL to struggles for self-determination confounds in the attitudes adopted by some states the legal and political considerations inherent in the separate treatment of the right to wage war, and the regulation of war. The problem, once again, is of definition, and of individual state authoritative competence to interpret the nature of a particular use of violent force, be it by the police or military in pursuing terrorist groups, or by a liberation group struggling for system transformation.

It is thus considered that the various approaches taken by the world community to deter acts of international terrorism through

criminal co-operation are made unworkable by the states themselves. Domestic criminal schemes are an inherent facet of state sovereignty. Even between politically similar state systems, sovereign function to inquire into the nature of a violent act and the reasons for an extradition request is not conducive to non-interference in sister-state domestic matters. The political offense exception and humanitarian clauses contained in most anti-terrorist conventions and extradition treaties are based on this issue of inquiry. Individual state sympathy for the notion of a legitimate right to use violent force to achieve self-determination may lead to a "friendly" prosecution should an extradition request not be granted. IHL has no political offense exception, focuses on the nature of an illicit act, reflects the recognition of the realities of modern armed conflicts, and thus provides a neutral forum in which to prosecute violent acts perpetrated in wars of self-determination.

1.5 The Proper Legal Placement of Terrorist Offenses

The basic problem in any approach to acts of terror-violence is that of the legal qualification of the act. Where a liberation group employs methods of force to achieve its goals in the face of incumbent government opposition, the sovereign function of state authoritative interpretation regarding such acts allows states to interpret the use of force restrictively, and within frameworks of individualized domestic criminal law. On the other hand, IHL, where made applicable, allows for a legal qualification to be attributed to an act of terrorism through contexts of military necessity, proportionality, indiscriminateness of effect, and responsibility.

Thus, the application of IHL must be made to appear realistic and

relevant to an armed conflict. As is considered in Chapter 6, the use by liberation groups of methods of terror-violence constitutes an attempt to claim attention to group rights assertions. System change or transformation may be contemplated, and achieved through the use of "direct action" which circumvents government regulatory repression, or any stalled democratic processes which may be in place. The use of violence is also employed to create the appearance of a legal relationship with a threatened government, and to force that government to consider the "People" as equals for purposes of negotiating an end to the armed hostilities. As acts of terrorism form one tactic in such a political strategy, they may be distinguished as a separable and "different" phenomenon to international terrorism, and as such, are capable of deterrence under IHL.

It is considered in Chapter 6 that an analysis of the context and motivations underlying terrorist acts is first mandated in order to properly place the alleged terrorist offenses within appropriate juridical frameworks. Should IHL not be implemented after the outbreak of armed hostilities for self-determination, and a pattern of liberation violence be approached as a violation of peacetime behavior, the legal contradictions inherent in situations where political activity is under domestic military control are clear. Further, an ineffective law enforcement approach risks the loss of a degree of psychological commitment to the existing system of public order. Such a result, in turn, has diplomatic and foreign investment consequences.

Where "crimes" of political violence are perpetrated under the aegis of struggles for self-determination, it is considered that the immediate application of IHL to them, if only for purposes of guidance,

is appropriate on two levels. First, the resulting issue structure allows for no political offense exception for acts of politically motivated violence. Second, the separability of acts of terror-violence as grave breaches and/or war crimes preserves, within existing parameters of international law, both the overall political strategy of struggling groups claiming the right to use armed force to achieve system transformation, and potential frameworks for negotiation and inquiry into the relevant goals or contexts of terrorist acts.

1.6. Effects of Assessments of Responsibility for Violence

The qualification given to violations of legal norms affects subsequent assessments of responsibility for such violations. Chapter 7 explores the implications of this issue within the context of the application of IHL to deter the use of methods of terror-violence in liberation wars. Where interests protected by law such as life or property are damaged by terror-violence, sovereign state authoritative assessments of responsibility for such damage act to determine the legal qualifications to be given to violent acts. Complicating assessments of responsibility for damage are the legal qualifications given to violent political acts by affected third states, if only for purposes of insurance coverage. It is considered, therefore, in Chapter 7 that it is primarily for political reasons that threatened governments do not invoke the IHL legal régime in liberation wars.

This is so because struggles for self-determination implicate the potential alteration of the juridical status of a troubled state in the world community, legitimize the use of violent force to achieve self-determination, and risk a normative development in the means or methods of warfare employed, to include terrorism. The right to wage a "just"

war becomes confounded with the rules regulating its conduct. Authoritative state demarcations between states of war and peace to determine levels and legal effects of culpability are eroded.

Conversely, the ready implementation of IHL risks carving a clear exception to U.N. Charter prohibitions against the threat or use of force. Once a state of war is recognized through humanitarian treatment, certain acts committed in peacetime, such as killing, become permissible. More importantly, acts of terror-violence utilized tactically propel affected third states prematurely to put their relations with a challenging group on a regular basis in an attempt to contain potential damage to foreign property and interests. The encouragement of a new definition of nationality risks the erosion of the inviolability of territorial borders, and the existing ethnic map.

Chapter 7 thus considers whether the consequences of assessments of responsibility for political violence mandate a legal qualification of terrorist acts which will not adversely affect existing diplomatic relations. This presumably implies a law enforcement approach, and a non-negotiable stance as regards "terrorists". As such a political consequence is not calculated to strengthen the primacy of law in situations of "internal" armed unrest, it is further queried whether state hesitation to invoke IHL risks the disregard of IHL, even as a framework for reference, in struggles for self-determination.

1.7. Legal Obstacles to the Prosecution of Terrorists under IHL

State unwillingness to utilize the IHL legal régime is in evidence in the context of war crimes trials. In other words, despite the obligation contained in the Geneva Conventions to seek out and prosecute or extradite for trial all persons, whatever their

nationality, committing or ordering to be committed any of the grave breaches defined in the codifications, this obligation has rarely been undertaken by individual states.

The difficulty in establishing a system of humanitarian law involving penal sanctions appears linked mainly to the still widespread ignorance of the role IHL plays in protecting minimum standards of treatment due to human beings in all circumstances. It is considered in Chapter 8 that state unwillingness to characterize acts of terrorism as "grave breaches" or war crimes ignores the ultimate supremacy of the laws of humanity. States are unwilling to assume IHL duties and obligations which restrain state action. Further, ideological pluralism in the post-1945 international community has meant that many self-determination struggles were alternatively characterized as anti-imperialist, and anti-capitalist wars. This politicized such wars, and in turn, politicized the implementation of IHL.

Chapter 8 considers that the neutral forum offered by the IHL legal régime has been disregarded since the Nuremburg Tribunal for political reasons. It is considered that the first war crimes trials at Nuremburg and in the Far East only occurred because of the unconditional surrender of the aggressor nations, and the occupation of defeated territory. The ready identification of war crimes perpetrators since that time has been hampered by the lack of attention paid to up-dating and developing Hague law, the lack of agreement in the international community regarding exceptions to U.N. prohibitions against war, and the absence of political will, generally.

For example, the attrocities perpetrated during the Vietnam war prompted the 1977 Protocols. Prosecutions of Vietnam war criminals were

infrequent, as U.S. domestic legislation does not easily contemplate the liability of civilian war policy makers. Geneva provisions which impose the universal duty to seek out and prosecute or extradite for trial all persons committing or ordering to be committed any of the grave breaches defined in the codifications resulted only in U.S. military prosecutions which were few in number, presumably on the ex post facto basis which proved unsuccessful at Nuremburg. The up-dating of IHL in Protocol 1 also led to the inclusion of wars of self-determination as automatically "international", which inclusion was opposed by the U.S. The U.S. has yet to ratify Protocol 1, and applies only those provisions which it believes form part of customary international law. Such application in fact does not include a recognition of wars of self-determination as "international", nor does it include many of the new prohibitions as to permissible means and methods of warfare. Thus, the application of IHL to a particular conflict remains a matter for sovereign state authoritative interpretation, and not the result of majoritarian decision-making within contexts of state equality.

Thus, states are unwilling to implement IHL generally, and in particular, during wars of self-determination. States which utilize methods of terror-violence to control domestic situations of armed unrest ignore the ultimate supremacy of the laws of humanity, prefering instead to maintain domestic legal frameworks through which the military may control violent political processes. Sovereign or executive power to interpret and legally qualify violent acts of war as terrorism means that the judiciary are politicized, and that the criminal justice system is just another mechanism to protect existing political frameworks of analysis, rather than to assess ultimate responsibility for damage.

Where wars of self-determination are in issue, the existing fact of sovereignty is endangered. In such circumstances, it is clear that the political consequences of rejecting the applicability of IHL outweigh the legal and humanitarian benefits of observing its provisions. Given the interlocking considerations of national security and the safeguarding of vital national interests, state unwillingness to utilize IHL represents a denial of the individual protections afforded by IHL against the power of states, and constitutes rejection in fact of the restraint required under the second most important treaty régime in the international community. The friction created between contexts of state sovereignty and state equality in the U.N. system would appear to produce this conclusion.

Thus, obstacles to prosecuting war crimes perpetrated during liberations wars would appear to arise from the very state volition which initially accepted IHL as one indicia of sovereign state authority. Actual utilization of the opportunity to separate acts of terrorism from war crimes perpetrated during liberation struggles would not appear to be relevant to the rationale underlying state implementation of IHL, or relevant for purposes of state compliance with and enforcement of its provisions. This result would appear to confirm not only the fact of state terrorism, but further, the unwillingness of states themselves to eschew the tactics of fear.

2. The Evolution of the Right to Self-Determination through the Perspective of Resort to Violence

The U.N. Charter begins with the words "(w)e the Peoples of the United Nations", yet membership of the Organization is confined to Member states. (1) While the Charter also makes provision for non-self governing territories to progress "towards self-government or independence", and thus, presumably, to become Member states if appropriate in the circumstances (2), the possibility of graduating into statehood is viewed by some Member states as extended only to former mandate territories and areas detached from the Axis Powers. (3) Other states take a more expansive view, in that Chapter XII of the U.N. Charter allows additional territories to be termed "trust territories", and to be placed under the administration and supervision of the United Nations. (4) More expansively still, the procedures outlined in U.N. Charter Chapter XII are felt perhaps to include such other non-self-governing territories, or "Peoples", as might wish to break from the institutionalization of the "inviolability of territorial boundaries and political independence" of their respective metropolitan authorities. (5)

Unfortunately, the terms of the U.N. Charter regarding the peaceful and orderly attainment of independent statehood by dependant territories and/or "Peoples" are uncertain as to their actual content and practical application, and any perceived flexibility in approach arguably contemplates a degree of self-help. Nevertheless, Article 2(4) of the Charter prohibits the threat or use of force by Member states in their international relations against the "territorial integrity or political independence of any state". U.N. Charter Chapter XII Article

84 imposes a duty on administering authorities to ensure trust territories play their part "in the maintenance of international peace and security".

Despite these provisions, an expansion in the applicability of self-determination has been accomplished in large part, in the post-1945 era through the success of various domestic armed uprisings by auto-determined "Peoples" demanding rights entitlements as against recalcitrant states. These demands at times have included the right to territorial secession which, given the various elements of nationality, are conditioned by the geographic environment. (6) In effect, therefore, the assertion of a right to self-determination often implies the use of force to achieve territorial secession, in potential breach of U.N. Charter Article 2(4).

Strictly speaking, such uses of force as have been in evidence in post-1945 liberation wars are frequently legally suspect. In particular, terrorist tactics utilized as means and methods of warfare remain condemned generally throughout the international community. (7) Nevertheless, given that the use of force to achieve self-determination may be one of many forms of political violence, the world community has gradually come to see liberation struggles as "internationalized", if not strictly international by nature, through their underlying purpose, general duration and intensity. Given, further, the scale of foreign assistance involved in many liberation struggles, it can hardly be argued that such armed conflicts are not international in fact. (8)

The recognition by the world community of the actual nature of liberation armed conflicts has, in turn, resulted in the extension of the prohibitions and protections of IHL to them. This is due in large

part to the numbers of persons, in particular civilian persons, involved. The extension of IHL to these conflicts was further mandated by the perceived need to adapt IHL to reflect existing general international law. While objections have been voiced that the codified recognition of non-interstate wars as "international" for purposes of the extension of IHL grants legitimacy to terrorist organizations and to their use of non-conventional methods of force, such an extension has been strictly confined in IHL to "Peoples" struggling against "colonial domination and alien occupation and against racist régimes". (9) The extension of IHL thus reflects both the need to regulate political violence, including acts of terrorism, and to extend individual international humanitarian protections to a broader group of individuals.

This section describes the evolution of the content and meaning of the modern right of self-determination of "Peoples" as resulting from the use of force by liberation groups. In large part, this evolution has occurred from liberation groups using illegitimate and illegal means of force against the territorial integrity and political independence of Member states in ways not contemplated in the original U.N. Charter system. Of further interest is the evolution of the modern right of self-determination through uses of force by liberation groups in armed struggles which do not fall within the above-indicated strict confines of IHL. (10) It is argued, in particular, that the use of non- or unconventional means and methods of warfare, as terrorist tactics may be described, in liberation struggles has resulted in an expansion of the original intended scope of U.N. Charter provisions regarding the equal rights and self-determination of "Peoples". It is further argued that

the result of such an expansion is that Member states have recognized the need to take account of this evolution within the confines of IHL.

By way of preliminary discussion, the issue of self-determination arose mainly as an Eighteenth Century philosophy which gained influence as an inherent right up to the time of the League of Nations. Brought into actual play to right the historic wrongs of colonialism and thus to restore the original sovereignty and land title of conquered peoples in colonial territories, the concept has been linked this Century to territorial and alliance interests. (11) By 1919, colonialism, with its aspects of territorial and resource allocation, was heading into its twilight, and the ideas underlying the modern notion of self-determination were beginning to re-appear. While the Covenant of the League of Nations did not specifically mention self-determination, the idea of a right of "Peoples" to self-determination during the time of the League attached in mandate arrangements, as provided for by Article 22 of the Covenant.

The needs of the time also were met by interpreting the notion through the mechanism of the mandate system, which re-distributed German and Turkish dependencies among the principle victorious Powers participating at Versailles in 1919. Such re-distribution did not involve any usurpation of original sovereignty, and thus did not equate to conquest (12), nor was the modern notion of self-determination, including potential territorial secession, in issue as regards these mandate territories. Thus, self-determination, as interpreted through the mandate system, was politically and territorially linked. The territories placed under mandate were perceived as originally sovereign, and the mandatory powers technically had only the power of disposition.

As the mandatory powers had no claims of sovereignty, the status of the inhabitants of mandate territories could not be a domestic question for purposes of Article 15(8) of the Covenant of the League of Nations.

This territorial and political confinement of the notion of self-determination was to change in the U.N. era. The Charter, in Article 1(2), made the principles of the equal rights and self-determination of "Peoples" the foundation of the Organization's purpose to "develop friendly relations among nations ...". Article 55 also refers to these principles "(w)ith a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations ...". The U.N. Charter thus made the self-determination of "Peoples" a principle of universal application, while provision for the trusteeship of the former mandated and other non-self-governing territories was made separately.

Rather than utilize League of Nations provisions regarding the disposition of former mandate territories (13), the U.N. Organization preferred to play a referee role. U.N. Charter Chapter XII Article 79 leaves trusteeship terms to the Member states directly concerned, approval of such terms to fall either to the Security Council, or the General Assembly, as provided for in Articles 83 and 85, respectively. (14) This conceivably left the status of the inhabitants of such territories in question, as title to former non-self-governing territories was not assumed by the U.N.. Nevertheless, boundary integrity was expected to continue to and beyond the point of full independence, presumably on the principle that "the territory of a state furnishes the title for the competence of the state". (15) As a result, the issue of self-determination remained a colonial, and hence,

territorial, problem.

Difficulties in the practical operation of self-determination quickly arose. The peaceful and orderly attainment of independence by dependent territories and/or "Peoples" did not always occur, primarily for reasons which involved redefinitions of the concept of nationality. One reason for this was that U.N. Charter terms stretched beyond the League confines of Axis Power colonialism to include any territories a colonial power might wish to bring under the trustee system through individual agreement. This was seen as one method by which to unburden states of the expense of foreign administration. Further, a new breadth of option was presented.

In combination with the subsequent U.N. recognition of the separate, distinct status of the "Peoples" of formerly non-self-governing territories (16), nationality under the Charter, arguably, could now be viewed as having been redefined in an entirely new way, to cover such other territories and/or "Peoples" as might subjectively wish to break from state administrative institutionalization. Should U.N. Charter provisions which were susceptible to different interpretations be relied on, the right to self-determination could be a transboundary vehicle for the assertion of new cultural and political identities. The concept of "self-determination" having evolved through years of substantive interpretation, new emphases were then used to support these arguments for redefinitions of nationality. Where presuppositions regarding the doctrines of democratic choice, economic liberty, the sanctity of property and individual human rights were in issue, the right of self-determination could be the means by which historic wrongs could be righted, and lands and natural resources re-acquired. (17)

The resulting clash between sovereign and national function directly implicated the careful allocation of competences in the U.N. era. Reluctance on the part of administering states to lose the benefits of such territories led to conflict. Rather than the anticipated peaceful and orderly attainment of independence by inhabitants of former non-self-governing territories, the scope of self-determination thus broadened to include auto-determined "Peoples" struggling for basic rights entitlements through the use of force, even though sovereign claims to territory continued to define issues of nationality as domestic matters, beyond the purview of international "concern". (18) A proliferation of violence resulted. This mandated the extension of the IHL régime to liberation wars, to control these asymetric armed conflicts and their use of nonconventional means and methods of warfare such as terror-violence. (19)

In these ways, the right of self-determination has proven to be an explosive issue in the post-1945 era. It is argued in this Chapter that, as a result of the use of force and in particular, terror-violence, the principle of self-determination has divided the world ideologically regarding the true meaning and effect of the notion. The issue has further divided the world into different states supporting competing interpretations of the U.N. Charter principles of equal rights and self-determination of "Peoples".

The structure of this argument is as follows. Twentieth Century treatment of self-determination, and the "Peoples" considered to be entitled to it are reviewed in Part One. Various of the definitional problems are examined in Part Two. In particular, the problems of defining for modern purposes which "Peoples" are entitled to use force

against Member states to achieve the right of self-determination are examined. This latter issue is developed in Part Three, and the growth of the status of liberation groups in the international community through the community's recognition of the legitimacy of using all necessary means, including armed force, in liberation wars to achieve independence and the right to self-determination is discussed. In particular, groups characterized as terrorist organizations may also be viewed as liberation groups employing nonconventional means and methods of warfare.

It is concluded that the world community has come to accept the self-determination of "Peoples" as a rule of customary international law, despite individual state objection to the practical results of such a notion, due in large part to the use of force by liberation groups. (20) In that terrorist tactics are frequently employed in these asymmetric conflicts, the need to control liberation struggles through international law has also been mandated. Thus, these conflicts have come within the ambit of IHL.

2.1. The Self-Determination Issue: the Principle as Opposed to the Right

The evolution of the principle of self-determination in the post-1945 era has occurred within opposing frameworks of sovereign rights and state equality. The evolution of the notion of self-determination has in turn resulted from, and in, alterations to the bases of international relations. The modern notion of the right of self-determination of "Peoples" is, thus, an example of a gradual state jurisdictional delimitation of domestic issues to the international domain. (21)

Delimitations of jurisdiction from various reserved domains of

Member states sovereignty further involve time lags between the interaction of political forces within existing frameworks, and changes in law and custom. A proliferation of alternative models for the applicability of rights of self-determination has resulted in the non-coincidence of normative orders with jurisdictional arrangements which, in the last analysis, define them. (22)

Taking the common thread of the right to self-determination, and tracing its development through various sources of international law, the growth in strength of the notion is apparent. As previously discussed, the right was initially linked this Century to territorial and political alliance structures. Modern opposition to the notion of self-determination centers on the fear that the uncontrolled exercise of the right to self-determination will threaten international peace and security. (23) As a means to delimit domestic jurisdictional confines and broaden the appropriate areas of international "concern", the right of self-determination has provided a mechanism of instrusion into traditional confines of state sovereign authority as diverse as minority rights, individual human rights, the new economic order, and the modern law of war. Conversely, when viewed as a threat to international stability, it is clear that any apprehension as to the scope of self-determination relies on overly-broad interpretations of U.N. Charter provisions which presuppose the existence of Western-style democratic choice, e.g., economic liberty, the sanctity of property and individual human rights.

It is argued that, in what was originally an aspirational goal employed to better demarcate state responsibility and function within the League of Nations and United Nations systems, the right of self-

determination has been transformed into a political, and legal, concept. As such, it forms a principle of international customary law, and is part of individual state supra-national obligation.

2.1.1. Evolving Basis: Post-Colonialism, the "Aaland Islands" Dispute, and the U.N. Charter System

The course of the growth of the concept of self-determination this Century is remarkable. When viewed as clear evidence of the delimitation of the traditional political divisions inherent in autonomous state competence, it is even more so.

2.1.1.1. The League of Nations

Through the re-distribution of former German and Turkish dependencies in the League mandate system, "an unprecedented, albeit mild, form of international accountability for administration" was provided. (24) While the Covenant did not specifically mention self-determination, it met what were considered the needs of the time through provisions for the protection of minorities. New standards to govern the integration of minorities in the new states created after 1919 served a peace-making function, and were intended to prevent transboundary alliances. (25)

In that self-determination was a primary theme of a staunch supporter of the League system, American President Woodrow Wilson, it is perhaps surprising that the League system did not expressly provide for a right of self-determination. Nevertheless, Wilson's conceptual starting point was that of "an undifferentiated mankind" (26), relying on peoplehood rather than on individual personhood. Standards to govern the integration of minorities, as set out in paragraph VI of the Wilson-Miller draft of the League Covenant, reflect this original emphasis:

> The League of Nations shall require all new states to bind themselves, as a condition precedent to their recognition as independent or autonomous states, to accord to all racial or national minorities within their jurisdiction exactly the same treatment and security, both in law and in fact, that is accorded to the racial or national majority of their people. (27)

On the other hand, the rights ideals of the mandate system and of the minorities policies were not made directly applicable to the victor states, which states were, instead, the guarantors of the peace settlement. Yet, although the major powers did not undertake to free their own colonies, they presumably rejected the notion of new colonial acquisition by not annexing these former German and Turkish colonies as their own. (28)

The resulting political inequity was expedient, and considered to be "necessary for the perfection of international organization". (29) The protection of minorities was left to special agreements, the Minorities Treaties, and the League of Nation's guarantee. The common rights concerned such matters as nationality, the free exercise of belief, employment and identity rights. Nevertheless, the limited application of the protected common rights led to a lapse in observance. (30) Self-determination under the Covenant, thus, served as a basic guidaline, and was operational either through the mechanisms for the attainment of statehood or as a matter of self-help. As an evolving concept in international law, self-determination implied that new colonial acquisition was prohibited. The Mandatories were obliged to move "those colonies and territories which as a consequence of the late war (...) ceased to be under the sovereignty of the States which formerly governed them ..." (31) towards independence. To graduate into

statehood, mandate territories had to meet League requirements of stable government, capable administration, and equal application of law.

2.1.1.2. The "Aaland Islands" Dispute

The League system favored security concerns over those of justice, where there was conflict between the two. (32) As such, the notion of self-determination was merely one principle among others to be considered during the formation of states. For instance, one competing factor to be weighed against the notion of self-determination was the preservation "as against external aggression of the territorial integrity and existing political independence of all Members of the League". (33)

A test of the Wilsonian concept of self-determination occurred in 1920, with the Aaland Islands dispute, when the International Commission of Jurists determined that the mere recognition of a principle of self-determination, as made out in a number of treaties, did not create a positive rule of the law of nations. (34) The islands lie between Finland and Sweden. They were ceded by Sweden to Russia in 1809 with the Swedish cesion of Finland. The island's inhabitants were predominately Swedes. When Finland became independent of Russia in 1917, the islanders asked Finland to return the islands to Sweden. Finland had already granted the islanders limited autonomy, when a local referendum resulted in near unanimity in favor of separation. The matter was referred to the League of Nations.

The Committee of Jurists appointed by the League Council to render an opinion found that the islanders had no right to secede from Finland. The Committee noted that the islanders represented less than 10% of the Swedish population of Finland, and could not claim the right

of self-determination, which applied to national groups as a whole. It was further felt that encouragement of secession in international law would result in complete anarchy. Language indicating that the Committee found no normative content regarding self-determination is as follows:

> Although the principle of self-determination plays an important part in modern political thought, especially since the Great War, it must be pointed out that there is no mention of it in the Covenant of the League of Nations. The recognition of this principal in a certain number of international treaties cannot be considered as sufficient to put it upon the same footing as a positive rule of the Law of Nations. (35)

Although this decision is still used to support opposition to modern territorial claims by "Peoples" attempting to exercise their rights of self-determination, the Committee of Jurists confined their decision to people within definitively constituted states. As such, the sovereign authority of a state may properly operate to restrict the self-determination of group factions within that state. The jurists stressed that their negative conclusion would not apply in a situation of unresolved sovereignty, in which situation a population had several options. This restriction of the principle of self-determination was later to support the post-1945 distinction between "internal" and "external" rights of self-determination. (36)

The Committee's conclusion that the Aaland islanders had no right to secede was later modified by a Commission of Inquiry appointed by the League Council to give a second opinion on the issue. The Commission concluded that the islanders did have rights. If Finland, the Commission said, failed to provide the islanders with certain specified guarantees, the islanders would have a right under international law to

a plebiscite, which democratic procedure could result in separation from Finland.

2.1.1.3. The U.N. Charter

The foundation stones of the U.N. system - the peaceful settlement of disputes, the non-use of aggressive force, equitable trade, territorial integrity and political independence of states, and self-government on the basis of equal rights and self-determination of peoples - were first contained in the Atlantic Charter of 14 August 1941. Initially agreed to and signed by U.S. President Franklin Roosevelt and British Prime Minister Winston Churchill in relation to the American Lend-Lease Act (37), the Atlantic Charter was later ascribed to by twenty-six Allied states on 1 January 1942. The Atlantic Charter provided, in pertinent part, as follows:

> ... (T)hey desire to see no territorial changes that do not accord with the freely expressed wishes of the peoples concerned;
>
> ... (T)hey respect the right of all peoples to choose the form of government under which they will live; and they wish to see sovereign rights and self-government restored to those who have been forcibly deprived of them. (38)

The policies of the Allies thus highlighted the dangers to world civilization posed by German military aggression. Freely determined self-government, territorial integrity, equitable access to trade and raw materials, and economic co-operation were emphasized. The eighth point in the Atlantic Charter concerned the absolute need for the nations of the world to abandon the use of force. The "establishment of a wider and permanent system of general security" was envisaged. This included disarmament on the basis of "the crushing burden of armaments" on peace-loving peoples. (39)

In 1944, there was no mention of self-determination during U.N. Charter negotiations at Dumbarton Oaks in Washington, for various reasons. (40) In particular, Thullen notes that the U.S. stance regarding self-determination was viewed by Churchill as interference in the British colonial problem. This attitude was later altered through regional proposals. (41) Subsequent consultations at San Francisco led to a development which was to benefit the notion of self-determination - the substitution of the League unanimity rule for agreement on general multilateral treaties with the requirement of general acceptability. This was to result in alterations to the traditional nature of individual state responsibility. (42) While this development was also to lead in time to "unacceptable", yet binding, interpretations of the U.N. Charter, through majority vote, the development allowed faster growth in the substance of self-determination.

The consultations in San Francisco in 1946 also saw an amendment tabled by the Soviet Union, which was to lead to the insertion of the words "based on respect for the principle of equal rights and self-determination of peoples" in the text of Articles 1(2) and 55 of the Charter. (43) Given the number of nationalities and minorities in the Soviet Union, its support for the notion of self-determination had traditionally been cautious. (44) While Lenin had accepted the notion in principle, such acceptance was qualified by the proviso that nationalities must not be allowed to fragment the ideal of a communized society. This point is of particular interest in view of the final text of the Charter. The Charter contains numerous presuppositions, e.g., of democratic choice, economic liberty, the sanctity of property, and individual human rights, which presuppositions remain capable of

different interpretations. The U.S. suggested the trusteeship system to the Soviet Union in an effort to forestall Soviet territorial claims after World War II. (45) Nevertheless, the ideological role played by Socialist theory in the formation and subsequent development of the U.N. Charter system has helped to erode certain, more traditional notions of sovereign state competence in the post-1945 era. This is so in that, through a number of competing interpretations, the issues of international "concern" have increased, which "concern" is in potential conflict with jealously-guarded confines of domestic control and authority. (46)

Further, the words "(w)e the Peoples of the United Nations ..." have led to assertions of non-state-centric cultural identity, and to demands for redress of historic wrongs. The loss of both territorial unities and nations during Twentieth Century mass resettlements, administrative divisions, and excessive governmental centralizations has threatened the destruction of the linkages of "Peoples" who otherwise might possess strong claims to self-determination. (47) Armed struggles to overthrow the post-1945 *status quo*, to restore historic lands, and to re-acquire natural resources have been the result. Given the democratic presuppositions found in the final text of the Charter, and the ideological role of Socialist theory in the U.N. era, the path was paved for liberation struggles to be characterized as "just wars".

This twist in interpretation made many Western states hostile to the notion of the self-determination of "Peoples". The waging of aggressive war had effectively been outlawed. Any "right" to wage war now presumably included the notion of a "right" of such "Peoples" to wage ideological war in the face of prohibitions against the threat or

use of force in international relations. Given the asymmetry of such conflicts, terrorism, though condemned worldwide, was frequently employed as the tactic of choice.

U.N. Charter provisions which acknowledge the right of the colonial states to continue administering their territories under the trusteeship provisions were thus juxtaposed with the growing debate surrounding the right to self-determination of non-self-governing territories. Despite the institutionalization of colonial administration under U.N. Charter Chapters XII and XIII, the notion of a right to self-determination of "Peoples" in territories other than those contemplated in the early days of the U.N. system was encouraged. Of further note, anti-imperialist and -colonialist rhetoric which utilized the concept of self-determination proved to be a vehicle for Soviet expansionist ambitions. (48)

Although the U.N. Charter did not call for an immediate end to colonialism, the continued existence of colonial occupation or rule came to be considered inconsistent with the prohibition against aggression. As noted by Quigley, "self-determination appeared to evolve into a norm that required immediate divestment of colonies" (49) by the time of the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples (50), and the 1970 Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations. (51) Nevertheless, the votes cast by the numerically superior small and new states forming the anti-colonial group in the U.N. were not felt to be sufficiently indicative, for guidance or normative purposes, of state practice. The force of these Declarations has also been contested as

not indicative of the habitual state deference to the major world powers. Regarding this point, Reisman notes as follows:

> (The) critical factor in the establishment of custom is the relative power balances, corrected by the context of the issue, of the parties concerned and the intensity of the interest they have in certain outcomes. (52)

The first real indications of the potential of self-determination appeared during the "time of resolve" of what Thullen terms "a dynamic group ... determined to convert the U.N. into an instrument for the final and accelerated settlement of colonial problems". (53) Formed by 1955 of sixteen new Member states, and later enlarged by subsequent admissions to the U.N. organization, this group urged that "a study of the trusteeship system merely in terms of its established goals would evade the central thread determining its nature and developments". (54) In particular, Thullen remarks as follows:

> What few dared to dream of in 1945 came about in a short span of twelve years; anti-colonial sentiment which had gained momentum of irresistible force spared no continent in its forward sweep. (55)

Thus, if viewed as the logical extension of democratic ideals, as mixed with Socialist ideology, the principle of "internal" self-determination of "Peoples" should not have proven divisive in the world community. Conversely, if viewed as an "external" force or mechanism through which to better demarcate state powers and functions, the League system through minority rights, and the U.N. system through the principles of equal rights and self-determination of "Peoples", have each attempted to delimit domestic jurisdictional confines and to broaden the areas appropriate for international "concern" and control, for the maintainance of international peace and stability. (56)

It is difficult to reconcile what appears to be the U.N. Charter's original intent - self-determination as an aspirational goal - with subsequent interpretations incorporating the notion of self-determination as a principle or right in areas such as human rights, IHL, the use of armed force, an implied right of secession, and international terrorism. (57) Through a common linkage, the notion of self-determination can be traced in interests as diverse as the right to life and to an identity, the "right" to use force, the rights of contract, and the right to control resource concession agreements in an ever-expanding interpretation of basic U.N. Charter principles. (58) Either way, the right of self-determination has provided a means of intrusion by the international community into traditional confines of state sovereign authority, where such authority previously would have been allowed to decide internally the nature and scope of domestic individual rights entitlements.

2.1.2. The Right of Self-Determination, National Liberation, and Customary International Law

Since 1945, "national liberation" to achieve the right of self-determination has gradually assumed the character of a legal right. Although it is perhaps difficult to reconcile what appears originally to have been an aspirational goal with subsequent interpretations, the incorporation of self-determination in the areas of human rights and IHL, in particular, is now considered to reflect the expression of a customary right. This legal turn is commensurate with the notion's importance and international dimension, and has been mandated by armed conflicts for national liberation calling for the application of rules. (59)

Nevertheless, attempts to create "instant" customary law through law-making codifications omit the evolutionary step of irrebutable evidence of state practice. This becomes problematic in codifications which combine customary law, "soft" law, and what may be termed "new" law. (60) For instance, most armed conflicts since 1945 have been of a non-international character in the sense that two or more Member states hve not confronted each other directly through the use of armed force. Instead, many of these conflicts have been confined through domestic control mechanisms by characterization as "domestic rebellions" or civil war. Thus, many post-1945 armed conflicts have remained largely unregulated by international law in that they arguably fall within state domestic jurisdictional confines.

As briefly discussed previously, codification efforts in 1977 to extend IHL provisions in full to liberation conflicts as "international armed conflicts" met with opposition, in that differences exist in world opinion regarding the appropriate scope of self-determination. This has led in large part to the politically controversial nature of liberation conflicts. (61) On this basis it is arguable that self-determination and the right to use force to attain it are not yet operative principles of existing customary international law. With regard to this point, Penna notes as follows:

> The proof of state practice is not an easy task. It becomes particularly significant with the interpretation of omissions. ... The only clear cases of customary international law are those in which unilateral state conduct, internal and external, and international acts show an unbroken and uniform practice over a longer period of time, and is supported by *opinio juris* ... . (62)

While it has been noted that most states are prepared to

cautiously concede that the right of self-determination is a principle of international customary law, they are not prepared to accept the full consequences of the principle having evolved into a customary right. One practical result of such a concession, for instance, is the controversy surrounding the incorporation of the notion in the law of war. In particular, the upsurge of national independence movements in the 1950s and 1960s made assessments or evaluations of the use of force highly political. The re-appearance of the "just war" had the predictable effect of confounding the right to wage war with the rules regulating war. (63) In addition to the many efforts this Century to deter the use of war as an extension of politics, such a re-appearance runs counter to post-1945 U.N. rules against the use of aggressive force. (64)

The balance of carefully established fields of competences preserved in the U.N. system means that states retain control of all matters of domestic jurisdiction. The elimination of the League's unanimity rule in favor of U.N. majority consensus allows additional discrepancy in state practice, in that the nature of state responsibility has shifted. Nevertheless, the obligatory nature of custom, and the growing body of rules of *jus cogens*, or peremptory norms are evidence both of the existence, and state recognition, of "general principles". Binding in all circumstances, such rules become international standards, whether or not individual states ascribe to them.

As such, the right of states to choose their internal political, economic, social and cultural systems, to suppress a domestic rebellion in opposition to such state choice, and to employ any methods in doing

so are no longer beyond dispute. (65) The U.N. system attempts to establish standards at many levels to control the manner in which states treat their own citizens. In particular, in circumstances where a state may be fighting for its very existence, the growth in number and content of the rules of IHL reflects the delimitation effects of self-determination on the traditional confines of state jurisdiction.

What is clear is that self-determination has become a principle of customary international law. By continuously broadening the potential scope of its rights entitlements, the notion of self-determination has provided a substantial international mechanism of intrusion into domestic state autonomy. As a result, any discrepancy in state practice or attitude regarding the issue of self-determination does not affect the obligatory nature of self-determination as an international standard. To many commentators, this principle has fully evolved into a substantive right.

2.2. Problems in Defining Which "Peoples" are Entitled to Use Force to Achieve Self-Determination

As previously discussed, many of the stated goals and purposes of the U.N. Charter are capable of different interpretations, and many provisions have proven to be indefinite in meaning. Thus, to attempt at any particular point in time to definitively demarcate the organization's powers and functions more expressly, within the various aspirations, would lead to unworkable results. This situation may also be mirrored in Member state domestic affairs. It takes time for political forces and changes in law and custom to interact and evolve within existing frameworks. Where such interaction is successful, further jurisdictional assertions for delimitations of traditional

competences may be made. Where the interaction of such processes fail or become stalled, violence may occur. Thus, resort to violence in liberation struggles may be viewed as a reaction in frustration to failed attempts to achieve rapid system transformation. The previously mentioned "sovereignty explosion" resulted in part from such jurisdictional and functional classification struggles. Acts of violence further give increased publicity to the asserted substance of rights claims by various national groupings. In particular, terrorist tactics utilized by liberation groups have brought publicity to their goal structures.

Modern struggles by "Peoples" for self-determination rarely begin as independence or secession movements. U.N. Charter provisions for the peaceful and orderly graduation of non-self-governing territories into statehood seem to obviate the need for violence to attain a least some measure of autonomy. Nevertheless, the flexibility of U.N. Charter interpretations has at times exacerbated ideological splits in the post-1945 world community. The absence of any international consensus as to the exact degree of political legitimacy to be afforded liberation groups has meant that resort to extremist tactics is often portrayed as provoked by, or in self-defense against, stalled democratic processes. (66) Alternatively, where an auto-determined "People" has never acquiesced in the loss of its territory, international stability cannot settle around "new" state boundaries. Publicity of such claims is often sought through terrorist tactics, thereby giving a prominent role to the use of violent force. (67)

The problems of defining what "Peoples" are entitled to self-determine in an international legal system which is unwilling to

actively intervene in classification struggles waged by auto- or self-determined groups attempting to come within the terms of U.N. Charter Chapter XII are discussed in this Part. By contrast, the League of Nations political and territorial contexts for the implementation of self-determination, through an eventual return of sovereign title to land and the equal operation of law, were clearly delineated. Thus it is argued that U.N. goal structures surrounding self-determination are too indefinite and juridically instrusive to transform in a peaceful manner what was an aspirational goal into a substantive right. In view of this weakness, a proliferation of unregulated violence, as the preferred method of interpretation of indefinite U.N. Charter provisions, has been the result. (68)

2.2.1. The "Peoples" Entitled to Self-Determine

The development of the notion of self-determination in the U.N. era may be seen in the regular incorporation of the phrase in legal instruments. For instance, the right to self-determination is constantly repeated in human rights documents, and in U.N. Resolutions and Declarations. The law of war incorporates provisions to protect individuals against the actions of states during struggles for self-determination. Anti-terrorist codifications frequently distinguish wars of self-determination and liberation struggles from rhetoric surrounding particular acts of international terrorism. This common linkage repeatedly asserts the right of "all Peoples" to self-determine, the illegality of the subjection of "Peoples" to alien domination and exploitation, and the inalienability of their human rights. Further, the 1970 Friendly Relations Declaration indicates that "Peoples" have a separate and distinct status.

Alternatively, the evolution of expectations underlying the right of self-determination may be viewed as having developed through international legal mechanisms which seek to co-ordinate post-1945 political and ideological pluralism despite individual state deference to the world's major power blocks. The development of self-determination may be viewed as having occurred within separate ideological frameworks, through competing semantic analyses regarding the true intent underlying the various instruments incorporating self-determination as a right. Whichever view is preferred, the continued failure of the international community to reach a consensus regarding the exact identity of "Peoples" entitled to assert the various expectations of rights entitlements is of more importance for present purposes. (69) Had such a consensus been reached, it is clear that a more active role in the peaceful attainment of self-determination by "approved causes" might have been taken by the U.N. The self-determination of "Peoples" has instead gained content through a trial-and-error approach, and on the basis of majority voting. In particular, assessments of alterations in state policy and practice, and of jurisdictional assertions, have been required before normative content could be accurately ascribed to the right of self-determination as a rule of international custom, for purposes of identifying those "Peoples" entitled to assert it.

The vision of state sovereignty presupposed in U.N. Charter provisions regarding equal rights and self-determination entails mechanisms of national authority in operation through state administration and internal management, in contexts of democratic process. For normative purposes, the notion of self-determination has

developed through the distinct branches of colonialism, individual rights, and the separatism and/or integration of "Peoples". For example, self-determination for commercial purposes becomes an allocation of property, management rights, and privileges, and thus concerns issues such as ownership, expropriation, compensation, investment rights, contract duration, and basic jurisdiction. Self-determination for political purposes becomes a question of internal organization, whether through an allocation of representation rights, or general rights of self-management linking into those more commercial purposes previously outlined. Self-determination has thus been framed within various legal instruments in alternate and frequently contradictory motifs of the U.N. system, as in now outlined.

2.2.1.1. The Evolving Basis of Self-Determination

The Universal Declaration of Human Rights in 1948 (70) does not repeat the reference to "the principle of equal rights and self-determination of Peoples" found in U.N. Charter Articles 1(2) and 55. The Declaration adopts instead an individualist and universalist style which can be traced back to the American and French Revolutions. Thornberry notes that, by so doing, the Declaration relegated particularized rights of minorities to past history. (71) Wilson notes that a Soviet amendment to the Declaration, that "every people and every nation has the right to national self-determination", was expressly rejected. (72)

The omission in the Universal Declaration of U.N. Charter language is later rectified in Common Article 1 of the Civil and Political Rights Covenant and the Economic, Social and Cultural Rights Covenant, of 1966. (73) Common Article 1 of the Covenants provides, in

pertinent part, as follows:

> 1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
>
> 2. All peoples may, for their own ends, freely dispose of their national wealth and resources ...
>
> 3. The States Parties to the present Covenant ... shall promote the realization of the right of self-determination.

Thornberry notes that the text and travaux of the Covenants support the view that their content reaches beyond the colonial context. (74) The Covenants follow U.N. General Assembly Resolution 1514 (XV) of 1960, which provides that "(t)he subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights". Resolution 1514 further provides that armed action or "repressive measures of all kinds" employed against such "Peoples" must stop in order to allow them to exercise these rights. The rights enumerated are termed "inalienable", and territorial disruption is felt to be incompatible with U.N. Charter purposes. Resolution 1514 was later supplemented in 1961 by Resolution 1654 (XVI), which contained a supervisory mechanism designed to ensure implementation. Of interest, one purpose of the General Assembly in implementing Resolution 1654 was to pressure recalcitrant states to accept the principles contained in Resolution 1514. Nevertheless, the unwillingness of some states to accept Resolution 1514 led to a refusal to accept or co-operate with the Special Committee established by Resolution 1654. (75)

2.2.1.2. Self-Determination and The Law of War

The steady expansion of the concept of the right to self-

determination increased international awareness of a need to provide the protections of IHL to the victims of armed conflicts which flowed from liberation struggles. From the early 1950s there were calls to revise and update the laws of war. A number of U.N. Resolutions were hinting at the legality of the use of force in such conflicts through an interpretation that such a use of force was not aggressive, but was instead employed in self-defense against, e.g., colonialism. Better protection of civilian populations was required. The growing scale of foreign assistance involved in liberation struggles and the sophistication of weaponry used were additional reasons to update the 1949 codifications. (76)

Prior to the opening of the Diplomatic Conference convened in 1974 to revise and update the four 1949 Geneva Conventions, the General Assembly passed a number of Resolutions which indicated that the law of war might be appropriate to regulate armed struggles for self-determination. In 1965, it passed Resolution 2105 (XX) which "recognized the legitimacy of the struggle of colonial peoples against colonial domination in the exercise of their right to self-determination and independence". Resolution 2936 (XXVII), in 1972, "(r)eaffirm(ed) its recognition of the legitimacy of the struggle of colonial peoples for their freedom by all appropriate means at their disposal". In December, 1973, Resolution 3103 (XXVIII) recognized that combatants struggling for freedom and self-determination were entitled to the application of the provisions of the Third and Fourth Geneva Conventions of 1949. This last Resolution also recognized that armed conflicts resulting from such struggles "are international conflicts in the sense of the Geneva Conventions", a conclusion which effectively delimited the

role of state authoritative interpretation in characterizing many "civil" wars.

Attempts to delimit state jurisdictional function are further apparent from the identity of the participants attending the 1974 - 77 Diplomatic Conference. The number of states varied from 107 to 124. Eleven liberation movements and 51 intergovernmental or non-governmental organizations participated as observers. All decisions on substantive matters and the adoption of articles were subject to a two-thirds majority vote whenever there was no consensus. For example, Article 1(4) of Protocol 1 extended the provisions of the Geneva Conventions to well-defined liberation struggles (77) as if they were international armed conflicts. Article 1(4) was accepted with 80 votes in favor, 1 vote opposed (Israel), and 11 abstentions by mostly Western countries. Of interest, the evolution of such conflicts to the status of international conflicts by means of a consensus approach, for purposes of the extension of the provisions of IHL, further served as a recognition that U.N. Resolutions form a potential source of international law.

2.2.1.3. Alternative Analyses of Self-Determination

Although the idea of self-determination raises a number of issues, the notion is generally expressed through the separate frameworks of colonialism and individual rights. Separatism and integration are also presented as alternative, and highly contradictory, motifs in the Charter system. (78) This has resulted in what has been termed a "schizo" approach to self-determination. (79) Such duality is further evident in the conflicting attitudes adopted by Member states, if only through different linguistic analyses of the true intent

underlying the various texts or instruments which incorporate the notion of self-determination as a right. For example, it has been argued that General Assembly Resolution 637A (VII) of 1953 effectively placed the manner states implement self-determination beyond the confines of U.N. Charter Article 2(7). (80) Nevertheless, many states retain the power to interpret authoritatively the content of their own domestic armed struggles, and the view continues that only the Charter is binding in law, as Resolutions are purely political declarations. This latter view is based on the negotiations in San Francisco. (81)

Another contradiction may be seen between U.N. General Assembly Resolution 1514 (XV) in 1960, and the International Covenant on Civil and Political Rights of 1966. Resolution 1514, the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples, contains doctrines of statehood and notions of decolonialization which suggest that the right of self-determination inheres in a "People" as part of the process by which international juridical entities are created. On the other hand, the expression of human rights law and notions of personal liberty and equality in political participation contained in the 1966 Covenant suggests that the right to self-determination inheres in persons as part of the ways in which international juridical entities are restricted in their actions. (82)

These juxtapositions are highlighted and complicated by assertions of a right to use armed force in liberation struggles. Of interest regarding this point is the General Assembly Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, of 1970. The Friendly Relations Declaration builds on the

decolonization process contained in the 1960 Declaration. While exhorting Member states to refrain "from any forcible action which deprives peoples ... of their right to self-determination and freedom and independence", it proceeds to impose on Member states express duties to desist from encouraging armed bands, acts of civil strife or terrorist acts. The 1970 Declaration further states that "(n)o territorial acquisition resulting from the threat or use of force shall be recognized as legal". "Peoples" have the right to "freely determine, without external interference, their political status". Member states have the duty "to respect this right in accordance with the provisions of the Charter". Most importantly, the Friendly Relations Declaration declares as follows:

> The territory of a colony or other non-governing territory has, under the Charter of the United Nations, a status separate and distinct from the territory of the 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. (Emphasis added.)

Given the absence of identification regarding which "Peoples" are entitled to the right of self-determination, it is argued that the use of armed force by auto- or self-determined "Peoples" has revised common understandings regarding the prohibitions contained in U.N. Charter Article 2(4). It is further argued that the extension of IHL duties and protections equally to all parties engaged in such armed struggles impliedly recognizes the right to revolt against, for example, repression. (83) Should this be the case, it is clear that any international political support of self-determination which underpins the use of particular forms of violence provides a most serious obstacle

to dealing squarely with international terrorism. In particular, undefined rights of non-approved "Peoples" have resulted in competing interpretations of claims assertions through the use of armed force. Codified attempts not yet reflected in state practise to delimit notions of state sovereignty appear to confound the justness of a "People's" war with the regulation of war, in that "the use of all appropriate means" does not imply the primacy of law in war. (84) Thus, tension in the U.N. system regarding these many developmental dilemmas has led to opposition to the operation of self-determination in general, even to its operation in the peaceful manner originally envisaged in the U.N. Charter.

In view of such opposition, liberation groups may be characterized as terrorist organizations, and their tactics as terrorism without further inquiry. (85) Alternatively, where political sympathies or ideology underpin and support national liberation, states may disagree as to the existence of an international délit for purposes of enforcing anti-terrorist codifications. The international community has thus to date been unable effectively to deter the proliferation of political violence, much less to agree on a definition of it. Nevertheless, acts of terrorism perpetrated during a liberation struggle may be universally dealt with through mechanisms provided by IHL.

2.2.2. The "Right" to Use Force to Achieve Self-Determination

The repeated use of armed force in particular contexts may work to revise common understandings as to the right to its use, or it may lead to strong state condemnation of such a use of force. However, the broad limits of "permissible revolutionary activity" (86) in the Twentieth Century are indicative of a coercive normative order which

depends in the last analysis on the application of physical force for purposes of authority and control. In this way, liberation wars may be viewed as exceptions to the prohibitions found in U.N. Charter Article 2(4), in that they may be justified through their cause.

A justification to wage war in the face of U.N. prohibitions, however, is one of degree. A "just cause" to wage war, by definition, is the righting of a wrong, perhaps where other efforts have failed, and the many attempts to legitimize a war with reference to a "just cause" which dominated older debates in the classical *bellum justum* cannot yet be said to have been satisfactorily resolved. The righting of a past historic grievance, e.g., the acquisition of territory through conquest, may not fall squarely within U.N. frameworks of colonialism or human righs violations. Nevertheless, the ideological input of the righting of a past grievance would imply that liberation wars, as based on a "just cause", cannot be "just" on each side. Assuming this point for purposes of argument, it is further argued that war waged in the pursuit of a perceived international right is the highest test of the substance of that right. However, war is to be contemplated only as a last resort. Should a liberation group have system transformation as its goal, the "justness" of engaging in an armed conflict must be gauged through the many prohibitions against the aggressive threat or use of force, the exhaustion of other available remedies, and the last resort nature of war. Thus, where auto-determined "Peoples" use force to achieve their right of self-determination, the "justness" of the cause is analyzed within competing legal and political frameworks in order to determine the true legitimacy of the struggle.

As previously discussed, any presupposition of democratic ideals

in the U.N. Charter has not resulted in firm standards of congruence between expectations of control and authority in post-1945 Member state practice. Charter emphasis on "Peoples" as defined through common political goals as well as clear ethnic or cultural ties which do not endanger existing territorial boundaries or the political independence of states thus ignores anything other than existing distributions of cultural or ideological regionalism. (87) In particular, the presence of Socialism and totalitarianism in the U.N. era has paved the way for the use of violence to attain political and ideological ends. Anti-colonialism, as a form of anti-imperialism, has been used as a vehicle for Soviet expansionist ambitions. When these expansionist policies have come into conflict with expansionist Western regional security concerns, the result has been a delayed or prevented compliance with U.N. Charter requirements regarding independence or statehood of the formerly dependent territories.

Further, territorial grievances and ethnicity continue to play important roles in demands for self-determination. The original context of colonialism is far too narrow to contain the developed notion of self-determination. In particular, an increasingly complex human rights régime has kept the issue of the legality of humanitarian intervention a current theme. (88) The steady growth of this régime reflects a growing support for a right to interfere in sister state domestic affairs, if only to provide humanitarian relief and assistance to embattled populations. The repetition of support and respect for liberation struggles asserted in anti-terrorist codifications and U.N. documents reflects the difficulty of identifing terrorist acts outside of politicized contexts. The developments in IHL have reflected an

acceptance of the fact of war between non-state entities, and the need to protect the victims of such struggles. Yet, nowhere are "Peoples" defined sufficiently to make the rights inherent in self-determination concretely operational. There are only instruments which list the rights that "Peoples" hold, and which re-affirm respect for those "Peoples" engaged in struggles to secure them.

As such, the phenomenon of liberation wars presents a danger to international peace and security by carving an exception in U.N. prohibitions regarding the inter-state threat or use of force. In a primitive system of law such as exists in the international community, where enforcement of the rules in existence must depend on individual state observance of them, this is particularly so. Despite the presence of international custom, and the growing body of peremptory norms, or *jus cogens* rules, valid expectations of state practice may be gauged only through individual state observance of a given set of perceived operational rights. In view of this, there is a need to adjust the time parameters of particular incidents before selecting the relevant norms to apply for purposes of future guidance. (89) It is thus argued that the repeated use of armed force in liberation classification struggles has expanded both the right to self-determination, and the understanding of the content of the justifications for the use of force.

As previously discussed, the "right" to use force to attain self-determination as against Member states has been developed after the fact. The right to use force in such struggles has been recognized and repeated in a number of U.N. General Assembly Resolutions which juxtapose the prohibition of the threat or use of force in international relations, the inviolability of territorial boundaries and political

independence, the non-interference of states in sister state internal affairs, the "justness" of the struggle against colonialism, alien occupation and racist régimes, and the right to the self-determination of "Peoples". Of note are Resolution 2936 (XXVII) of 1972, which reaffirmed U.N. recognition "of the legitimacy of the struggle of colonial peoples for their freedom by all appropriate means at their disposal", and U.N. General Assembly Resolution 3103 (XXVIII) of 1973, which recognized the applicability of the Third and Fourth Geneva Conventions of 1949 to liberation wars.

The eventual "graduation" of liberation wars from the status of domestic matters to proper subjects of international concern and jurisdiction thus reflects both the realities of modern ideological and territorial armed conflicts, and the contentious notion that U.N. Resolutions form a potential source of international law. For present purposes, this is of note to illustrate the effect of the self-determination issue on the evolution of perceptions regarding the boundaries of appropriate state power and function within the broader confines of international law. As liberation wars are popularly perceived as having carved an exception in U.N. prohibitions against the threat or use of force, it is felt that the confounding of the right to wage war with the regulation of war has been the result.

2.3. The Use of Nonconventional Means and Methods of Warfare to Achieve Self-Determination

As previously discussed, delimitations of jurisdiction from domestic to international confines should lead to greater harmonization in world organization. Instead, they are a constant source of tension in the international community. This is so for several reasons.

Contexts of state sovereignty are jealously guarded against the inroads implicitly made through formal notions of state equality. For instance, the issue of self-determination has already potentially been removed from the confines of Charter Article 2(7). State Socialism has offered interpretations in competition with Western-style democratic ideals regarding the developing content of international law and the scope of state sovereignty. U.N. majoritarian decision-making has led to a shift in views of absolute Member state responsibility in that agreements tend more to be maximalist rather than minimalist. Further, the presumed inviolability of territorial boundaries ignores the non-correction of historic territorial acquisitions, which grievances are kept alive by occupied or dominated "Peoples".

It is argued in this Part that the gradual recognition of the authority of liberation groups to use violent force to end colonialism and/or territorial domination, and to achieve system transformation, has resulted in a proliferation of asymetric armed conflicts in contemporary international law. In that struggling groups are often characterized as terrorist, employing terrorist methods, it is further argued that the gradual recognition of the authority to wage "just wars" has encouraged the use of cheap and easily available terror weaponry. Nevertheless, the "justness" of struggles for self-determination is not made any less so because of some terror impact. Further, a type of armed struggle, if repeatedly waged to interpret the substance of perceived rights, may work to revise substantive law by changing prospective expectations of state action. A repeated use of "justified" armed force, as distinguished from waging a "just" war, may inject sufficient legal and conceptual confusion into the pertinent issues to become a test of the

substantive meaning of a multitude of asserted rights. In the absence of effective international diplomatic efforts to forestall, or sanctions to prevent, such repeated uses of force, it is further clear that resort to the use of armed force to resolve classification struggles is dangerous because of the anticipated effects on precedent or norm development.

However, in the case of terrorist methods of war, this has not yet occurred. Strong international condemnation of acts of terrorism, whether perpetrated during liberation wars or within purely political or economic contexts, remains the case. However, while individual states frequently engage in acts of terrorism to maintain frameworks of public order, the ready use of terrorism as one tactic in an otherwise legitimate political strategy has not resulted in a conclusion of permissibility when utilized by liberation groups struggling for rights of self-determination. Should IHL be made applicable to an armed liberation struggle, states, too, are prohibited from engaging in such practices.

2.3.1. The Right to Wage War

The ending of colonialism coincided with a proliferation of Marxist theories which were conducive to the pursuit of the goals of self-determination. Anti-imperialist/capitalist rhetoric also worked to encourage the notion of a right to wage war and thus nurtured in particular a number of Asian and African independence movements. Marxist theory injected conceptual content into anti-colonial discussions, which in turn further supported the notion of a right to rebel. By mixing anti-colonial and anti-imperialist arguments with self-determination issues, political and territorial demands could be

constructed in such a way as to compete with Western-style democratic, albeit expansionist, ideals. This injected the requisite political content into competing semantic analyses of U.N. Charter rules and principles. Resulting rebellions could now be characterized as "just", even though in contravention of domestic and/or international prohibitions regarding the use of force to achieve political aims.

The confounding of the right to wage war with the regulation of war, in the context of liberation armed conflicts for rights of self-determination, further confuses the theories of a "just war" to effect system transformation with more traditional theories of "just war", e.g., to right a grievance. Early Twentieth Century efforts to establish tests for the formal legality of waging war were first a search for restrictions on the use of force where employed to conduct international relations. (90) Efforts then sought to encourage peaceful relations among states, and the creation of new law and system transformation through political processes rather than through the use of armed force. Issues of war guilt, beyond the emphasis placed on legal questions alone, nevertheless survived, as was seen at the end of both World Wars, and presumably, such issues of guilt continue to rely both on formal legality, and distinctions between "just" and "unjust" wars. (91) U.N. Charter prohibitions against the use of aggressive force between Member states in their international relations go further than those of the League of Nations, which only had mechanisms to retard the escalation of a particular dispute.

As such, any perceived modern "right" on the part of liberation groups to use armed force for self-determination rests on two main premises. The first is that of self-defense against the aggression of

colonialism, alien occupation, or racism. The second constitutes what could be construed as a gap in the original U.N. Charter system. Charter prohibitions apply between and among Member states. Maintenance of international peace and security in dependent territories is an additional Member state responsibility. The potential gap, which pertains to the use of armed force in non-interstate national liberation struggles, was in part filled by the the 1970 Friendly Relations Declaration, and by Protocol 1 in 1977 which extended the protections of IHL to liberation struggles against colonial domination and alien occupation, and racist régimes.

However, where an auto-determined "People" asserts rights to self-determination on the basis of other, perhaps more historic grounds, there is controversy as to the true content of the right to use force to achieve self-determination. Whether a resulting armed conflict is internal, and falls within U.N. Charter Article 2(7), or whether the issue of self-determination raises the particular dispute to an issue better dealt with under either U.N. Charter Chapters VI or VII, remains primarily a political question in each particular case, the resolution of which in turn affects the potential for the application of IHL to the conflict.

2.3.2. War to Create New Law or System Transformation

War, as a means of creating new law has, as its counterpart in the domestic sphere, revolution, yet the purposes of interstate war go far beyond the traditional and limited purposes of revolution. In particular, revolution occurs to achieve system transformation and/or to end various forms of repression. Thus, revolution has historically been viewed as a domestic matter, and not an appropriate concern for

international jurisdiction until it threatened international peace and security. (92)

A separate and distinct issue is the primacy of law in war. Regulation of the conduct of interstate hostilities occurs after the creation of expectations by states as to the means and methods to be used. These expectations do not constitute a derogation from the modern prohibition against war, nor do they result in a legitimation of aggression. The primacy of law in war simply means the regulation of the means and methods employed to wage war. Regulation of the conduct of a domestic uprising or civil war has generally been left, until recently, in the hands of the parties to the conflict. For modern purposes, whether or not a particular conflict is characterized as a "war" for potential applicability of IHL thus remains primarily a political question. (93)

As previously discussed, the survival of the colonial system under the U.N. Charter system was qualified by Charter provisions which were designed to ensure the peaceful and orderly attainment of independence by dependent territories and/or "Peoples", the full identity of which and whom were uncertain in 1945. The use of anti-colonialism as a vehicle for Soviet ambitions led to the popular view in some quarters that not only former mandates and areas detached from the Axis Powers were intended, but also, such other non-self-governing territories or "Peoples" as might wish to break from dominant state institutionalization. This is seen particularly when a dominated "People" does not fall within clearcut colonial confines, but instead, within frameworks which call into play post-1945 human rights régimes.

The explosive growth of an "individual-focused" human rights

régime in the U.N. Charter system is arguably intended in part to prevent transboundary alliances of dislocated populations. Nevertheless, self-determination is considered a fundamental human right, and one which is potentially more important than the right to life. Human rights law has thus promoted the growth of the notion of self-determination, if only in the direction of democratic process, or "internal" self-determination. Where democratic process proves too slow to effect new law or system transformation, violence frequently results. Confusion then arises regarding the prohibition of acts of international terrorism, in that a right to the self-determination of "Peoples" which is asserted individually through operative human rights frameworks frequently results in the deprivation of the right to life through terrorist violence. Should IHL be made applicable to armed struggles for self-determination, however, the taking of life may be lawful, and where not lawful, prosecuted as a grave breach or war crime. Further, humanitarian intervention in reaction to sister-state rights violations potentially permits interference in the internal affairs of target Member states. (94) Such interference is made doubly offensive in that it calls state sovereignty into question (95), it leads to inquiry into the propriety of a government's mandate to rule, and it may encourage foreign state assistance and/or support to liberation groups fighting in a "just" cause.

The post-colonial power of disposition over acquired territories was intended initially to encourage peaceful system transformation and later, independence of foreign colonial territories. Instead, its actual operation has injected conceptual and legal confusion into the content of wars of self-determination. The ending of colonialism did

not rectify all historic grievances founded on conquest or cession. War waged for territory, for purposes of system transformation, or as a means of creating new law has thus become a tactic of choice when political or constitutional processes have proven too slow to effect the perceived requisite changes required for true autonomy. In particular, many liberation groups otherwise characterized as terrorist organizations seek such system transformation when confronted with repressive state mechanisms. They thus employ legally suspect tactics, such as terrorism, both to publicize the fact of repression, and the fact that they have never acquiesced in the original loss of territory or autonomy.

2.3.3. Nonconventional Means and Methods of Warfare

Revolution, as a means of changing law or of effecting system transformation, is evidence that the power of disposition by states over acquired territories still lies outside the fields of competence reserved to the U.N. Where the U.N. does take an interest in such conflicts, the political questions underpinning them retard the seemingly clear mechanisms contained in Charter provisions for dealing with issues which endanger international peace and security. The fact of revolution further implies the existence of an asymmetric conflict.

The success of particular classification struggles by national groupings in the post-1945 era has occurred largely through the use of nonconventional means and methods of warfare. This success has thus widened the wording of U.N. Charter provisions regarding equal rights and self-determination, and has side-stepped U.N. Charter prohibitions regarding the use of armed force. As a result, pre-existing interpretational language giving substance both to the Organization's

powers and functions, and to the content of self-determination, hasbeen altered dynamically. This is not to suggest that successful classification struggles in the U.N. era imply that the notion of "sovereign state" is no more than a series of linguistic assertions, if only of rights and duties potentially achievable through revolution. This would encourage war. Instead, any power shifts achieved through violence merely delay the reorganization of a new coherent process of government and alliance structure, through which international order is maintained within an enduring scheme.

Conversely, in that the right to revolt against severe repression is not seriously disputed, an entitlement to resort to force is repeated in a number of U.N. Resolutions. Thus, while a notional entitlement to resort to force has been achieved through the actual use of violence in liberation struggles, a perception of an ideological entitlement to use force is now first required. With particular regard to the use of terror-violence in struggles for self-determination, ready access to weapònry ensures revolutionary potential. However, a perception of entitlement must also be communicated. Thus, when functioning within confines of historical grievance and/or patterns of state repression, the terrorist him- or herself must bed transformed into a "national" hero, and thus into a political weapon. (96) This, in addition to access to and use of more traditional arms, makes terror methods of war both highly personified and personal.

As previously mentioned, a terror impact in a "just" cause, and in an otherwise permissible political strategy for achieving the goals of self-determination, need not delegitimize the national grouping any more than it does the threatened state utilizing extreme methods for the

maintenance of public order. Nor does a terror impact need to result in any conclusion of permissibility regarding the means and methods used to achieve particular goals. (97) An entitlement to use force to achieve self-determination is now recognized, and modern weaponry is available. Thus, the control of the use of weaponry through international law was mandated for purposes of all parties to a liberation conflict. Such control was developed in the recent IHL codifications. (98) Given the breadth of Charter provisions regarding the right of "Peoples" to attain independence from state institutionalization, and given the separate and distinct status of such "Peoples", liberation wars thus had to be regulated through international law as if the parties to such asymmetric conflicts were Member states, bound by full U.N. Charter and war law provisions.

The use of force in liberation struggles has expanded the original intended scope of Member state agreement regarding self-determination and has limited the prohibition of the threat or use of force in international relations. The proliferation of the use of cheap and easily available weaponry in liberation struggles has further made interpretation of the content of such struggles increasingly difficult to assess, particularly where the degree of "justness" of a cause is in dispute. Thus, all such armed conflicts must be viewed as capable of regulation and interpretation through international law, despite the nonconventional means and methods of war frequently employed during their course, and despite the tenancity of contexts of state sovereignty to authoritatively interpret the content of particular armed uprisings. Despite individual Member state objection, the use of terror methods by all parties to a liberation armed conflict should fall within the

jurisdictional framework of IHL, if only for purposes of guidance, rather than within sovereign domestic criminal confines.

It is concluded that the expansion of self-determination through the use of force has resulted in the U.N. Charter aspirational principle evolving into a substantive right in international law. It is further clear that the notion of self-determination has been expanded to include groups which auto-determine that a "People", entitled to assert its claims to territory and political independence, is in issue. In this way, self-determination has proven to be a divisive issue in the post-1945 era, and in particular, an issue which has undermined individual state compliance with IHL. The expansion of self-determination has led Member states to recognize that an extension of the laws regulating warfare was mandated in order to regulate such conflicts under international law, to delineate better the confines of the "justness" of waging war, and to emphasize the primacy of law in war. Nevertheless, the political content of wars of self-determination has led many states to observe new IHL provisions only through confines of existing customary law, as the use of nonconventional means and methods of warfare for the sole purpose of injecting terror is prohibited with regard to all parties. To do otherwise would mean that repressive state mechanisms for the maintenance of public order should a liberation war be in issue are also prohibited, as are all those methods which involve a terror impact utilized during liberation struggles.

It is concluded that the use of force has expanded the notion of self-determination far beyond colonial contexts, and the use of force during liberation struggles can thus be clearly distinguished from individual or random acts of international terrorism. Thus, liberation

groups otherwise characterized as "terrorist" may, and should, be prosecuted under the laws of war for acts of terror-violence perpetrated in armed conflicts for self-determination.

Chapter 2 - Footnotes

1. U.N. Charter Articles 3 and 4.

2. U.N. Charter Chapters XI, XII, and XIII.

3. See Chapter 3.

4. U.N. Charter Article 77.

5. See Chapter 3. See also P. Thornberry, "Self-Determination, Minorities, Human Rights: A Review of International Instruments", 38 I.C.L.Q. 867, 873 (1989), who notes that the Belgian Thesis regarding U.N. Charter Article 73 is discussed as a view radicalizing self-determination through insistence that the principle can apply to individual groups, minorities, and/or disenfranchised populations, on the basis of an analogy to colonialism; J.N. Hyde, "Permanent Sovereignty over National Wealth and Resources, 50 A.J.I.L. 854 (1956). Such a premise implies that colonialism is defined by a lack of democratic, or representative, form of government. This further indicates underlying questions regarding the ultimate disposal of the territories, as well as evidence of claims of constructive colonialism as made by displaced populations, or self-defined peoples, on the basis of Twentieth Century boundary and population transfers.

6. See, e.g., L. Brilmayer, "Secession and Self-Determination: A Territorial Interpretation", 16 Yale J. Int'L. L. 177 (1991); R. Torres, "The Rights of Indigenous Populations: The Emerging International Norm", 16 Yale J. Int'l. L. 127 (1991); A. Fraleigh, "The Algerian Revolution as a Case Study in International Law", in The International Law of Civil War (R.A. Falk, ed.) (1971), at 179; General Assembly Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, Resolution 2625 (XXV) of 24 October 1970 (adopted by consensus, and without a vote). Of interest, compare Book Review, Fenwick, 18 A.J.I.L. 653 (1924); P.M. Brown, "Self-Determination in Central Europe", 14 A.J.I.L. 235 (1920).

7. See Chapters 4 and 5.

8. See Chapter 4; Y. Dinstein, "The International Law of Civil Wars and Human Rights", 6 Isr. Y.B.H.R. 62 (1976).

9. Protocol additional to the four Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I), Article 1(4). Geneva, 8 June 1977. See J. Gardam. "Protocol I to the Geneva Conventions: A Victim of Short Sighted Political Considerations?", 17 Melb. U.L. Rev. 107, 122 (1989), who argues that Article 1(4) is broader in potential scope than customary international law, regarding self-determination.

10. Prior to 1977, Common Article 2 of the four Geneva Conventions of 1949 stated the conditions under which the full protections of those Conventions were applicable, as follows:

> In addition to the provisions which shall be implemented in peace time, the present Convention shall apply to all cases of declared war or of any other conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.
>
> The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.
>
> Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.

As a result of these strict provisions, forms of formally cognizable international conflict other than declared war or a sub-war contest between formally recognized belligerents were not recognized as such by the principal Western commentators on traditional international law. As a result, E.D. Fryer notes as follows:

> This gap between traditional theory and operational conditions has permitted the conduct of substantial international armed violence free of the regularizing and humanizing influence of the Geneva Conventions.

E.D. Fryer, "Applicability of International Law to Internal Armed Conflicts: Old Problems, Current Endeavors", 11 Int'l. Lawyer, 567, 569 (1977).

11. The right of self-determination attaches most clearly in trusteeship and mandate situations, as provided for by the U.N. Charter, and by the League of Nations Covenant. In this Century, the notion of self-determination has generally been associated with the right of colonial "Peoples" to establish their independence, in conformity with the relevant mechanisms and concurrent norms of international law, including those relating to the territorial integrity of states.

12. The territories placed under the mandate system were perceived as originally sovereign, in that they had retained "dormant" title to their respective territory. See I. Brownlie, Principles of Public International Law (1979), at 176. who notes that the power of disposition technically adhered in the principle Entente Powers

participating at Versailles, as determined by the prior relinquishment of sovereignty. Nevertheless, sovereignty was not transferred.

13. The League of Nations Covenant, Article 22, provides in pertinent part as follows:

> In every case of mandate, the Mandatory shall render to the Council an annual report in reference to the territory committed to its charge.
>
> The degree of authority, control, or administration to be exercised by the Mandatory shall, if not previously agreed upon by the Members of the League, be explicitly defined in each case by the Council.
>
> A permanent Commission shall be constituted to receive and examine the annual reports of the Mandatories and to advise the Council on all matters relating to the observance of the mandates.

14. U.N. Charter, Article 79, provides in pertinent part as follows:

> The terms of trusteeship for each territory ... , shall be agreed upon by the states directly concerned ... .

15. I. Detter de Lupis, The Law of War (1987), at 5.

16. Resolution 2625, supra, note 6.

17. See L. Brilmayer, supra, note 6. Of interest, the draft M.R.G. Minorities Convention provides in pertinent part as follows:

> Art. 13.
>
> §2. The main kinds of protection on a national level are the following:
>
> a) the right to self-determination ...
>
> §3 The main kinds of protection on an international level are the following:
>
> a) adjudication of a given type of self-determination on application ...
>
> Art. 14.
>
> The modes of implementing the right of self-determination ... consist in the right to
>
> a) freely secede ... , or to associate with or integrate with ...

Draft International Convention on the Protection of National or Ethnic Groups of Minorities, presented by the Minority Rights Group to the U.N. Human Rights Commission, 1979, reprinted in J. Fawcett, "The International Protection of Minorities", Minority Rights Group, Report No. 41 (1979), Appendix C, at 16, 17.

18. A further example of the concept of "Peoples" defined through usage is that of the basis of jurisdiction in The Attorney General of the Government of Israel v. Eichmann, Criminal Case N. 41/61, Dist. Ct. of Jerusalem, 11 December 1961, 36 I.L.R. 5, excerpted in 56 A.J.I.L. 805 (1962), which rested on a "nation's" existence prior to there being a State.

19. See Chapter 4.

20. See, e.g., A. George (ed.), Western State Terrorism (1991); H. Wilson, International Law and the Use of Force by National Liberation Movements (1988); I. Detter de Lupis, supra, note 15; A. Cassesse, Violence and Law in the Modern Age (1986); A.E. Evans and J.F. Murphy (eds.), Legal Aspects of International Terrorism (1978); Y. Alexander (ed.), International Terrorism (1976).

21. D. Ciobanu, Preliminary Objections (Related to the Jurisdiction of the U.N. Political Organs) (1975), at 32 - 42.

22. Id., at 41. See also W.M. Reisman and A.R. Willard (eds.), International Incidents (1988), where, by use of a series of essay case studies, the "incident" is utilized as the preferred method by which to demonstrate that international norms are influenced more by the reactions of international actors to international incidents, than by "international law" as defined by formal institutions, e.g., the International Court of Justice, or statutes; W.M. Reisman, "The Cult of Custom in the Late Twentieth Century", 17 C.W.I.L.J. 133, 144 (1987). This is of interest with regard to Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro) (Request for Interim Measures), I.C.J. Order of 16 April 1993, reprinted in 32 I.L.M. 888 (1993), wherein the Court indicated that Bosnia-Herzegovina requested, inter alia, "the right of self-determination of the People of Bosnia and Herzegovina". Id., at 899, §36(f).

23. In particular, see U.N. Charter Article 2(4) which applies only to States. The role of terrorist as liberationist or freedom fighter thus causes difficulty in matters of extradition, prosecution, and universality of jurisdiction. See also Y. Sandoz, C. Swinarski, B. Zimmerman (eds.), Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949 (Commentary) (1987), at 41, where it is noted that it was not clear in 1945

> (T)hat ultimately guerilla warfare would be the method of warfare par excellence for liberation movements, and that the tide of self-determination would propel these movements forward, without giving thought to the conditions agreed upon in The Hague in another time and for other circumstances.

24. G. Thullen, Problems of the Trusteeship System (1964), at 9.

25. J. Fawcett, supra, note 17, at 6 - 7. See also R. Veatch, "Minorities and the League", in The League of Nations in Retrospect, Proceedings of the Symposium (1983), at 369; J.L. Brierly, "Matters of Domestic Jurisdiction", VI B.Y.I.L. 8 (1925); P.M. Brown, supra, note 6.

26. E.M. Morgan, "The Imagery and Meaning of Self-Determination", 20 Int'l. L. and Pol. 355, 359 (1988).

27. J. Fawcett, supra, note 17, at 7. Fawcett notes further that two features of the treaty arrangements must be noticed: the common provisions, which are to be found in the specific, or Minorities Treaties, and the League of Nations guarantee, which meant that the protection of minorities could not be modified without the assent of a majority of the League Council. A supervision procedure was established by League Council Resolution in June, 1921. Id.

28. Id. See also J. Quigley, "Self-Determination", 7 B.U. Int'l. L.J. 1, 6 (1989).

29. Book Review, Wright, 18 A.J.I.L. 386, 388 (1924). See also J. Fawcett, supra, note 17, at 5; S.W. Armstrong, "The Doctrine of the Equality of Nations in International Law and the Relation of the Doctrine to the Treaty of Versailles", 14 A.J.I.L. 540, 552 (1920).

30. J. Fawcett, id., at 7. Fawcett further notes that such early localized attempts were in any event subsumed by the establishment of general protections of rights and freedoms under the U.N. system. Id.

31. Covenant of the League of Nations Article 22. See also Q. Wright, "The Proposed Termination of the Iraq Mandate", 25 A.J.I.L. 436 (1931).

32. See C.G. Fenwick, "National Security and International Arbitration", 18 A.J.I.L. 777 (1924); Editorial Comment, Eagleton, "Forces Which will Shape the Rebuilding of International Law", 36 A.J.I.L. 640 (1942).

33. League of Nations Covenant Article 10.

34. See H. Wilson, supra, note 20, at 57; D. Ciobanu, supra, note 21, at 40; D.J. Harris, Cases and Materials on International Law (3d ed. 1983), at 197.

35. Report of the Aaland Islands Committee, excerpted in J. Quigley, supra, note 28, at 7 (footnotes omitted).

36. See Chapter 3.

37. See "Message of the President to the Congress" of 2 August 1941, reprinted in 35 A.J.I.L. 193 (Supp. 1941).

38. Text reprinted in 35 A.J.I.L. 191 (Supp. 1941). See C.G. Fenwick, "International Law: The Old and the New", 60 A.J.I.L. 475, 481 (1966) (the Atlantic Charter, together with the U.N. Charter, set up an ideal of social reconstruction by, in large part, aspiring to remove the economic causes of war); Editorial Comment, Woolsey, "A Pattern of World Order", 36 A.J.I.L. 621 (1942) ("(Hitler) ... has proved to the democracies that there is a danger to civilization greater than Communism. He has demanded social justice among nations".); E.A. Laing, "The Norm of Self-Determination, 1941 - 1991", 22 C.W.I.L.J. 209 (1993), who argues that the normative principle of self-determination passed into customary international law through the 1941 Atlantic Charter.

39. See H. Wilson, supra, note 20, at 58 (the British view of the intent of the Atlantic Charter was Euro-centric); G. Thullen, supra, note 24, at 23 (the American view was of universal application; the view of President Roosevelt was that trusteeship was applicable to all sorts of situations, and thus related more to the theme of international peace and security than to self-government contexts), and at 26 (self-government would avoid the "tag" of annexation regarding required strategic points for future aggression).

40. H. Wilson, supra, note 20, at 58.

41. G. Thullen, supra, note 24, at 28.

42. D. Ciobanu, supra, note 21, at 170; J.L. Brierly, "The Covenant and the Charter", XXIII B.Y.I.L. 83 (1946) (with a resulting shift in the nature of individual state responsibility).

43. H. Wilson, supra, note 20, at 59.

44. J. Fawcett, supra, note 17, at 5.

45. G. Thullen, supra, note 24, at 27.

46. See Chapters 6 and 7.

47. See B. Nahaylo and C.J. Peters, "The Ukrainians and Georgians", Minority Rights Group, Report No. 50 (1981), at 10, citing Ivan Dzyuba who, Nahaylo and Peters indicate, wrote a penetrating critique of the Soviet nationalities policy, from a Marxist-Leninist position, entitled "Internationalism or Russification?", and which became the outstanding document of the 1960's revival in the Ukraine. See also R.F. Devlin, "Law's Centaurs: An Inquiry into the Nature and Relations of Law, State and Violence", 27 Osgoode Hall L.J. 219 (1989).

48. G. Thullen, supra, note 24, at 13, who further notes that this point indicates that a pure analysis of self-determination within the U.N. framework of intended goals and purposes misses the mark.

49. J. Quigley, supra, note 28, at 12. Quigley further draws an analogy between the uses of the word "principle" regarding U.N. Charter Article 2(4), and the Charter "principle" of self-determination, both of which uses imply a legal entitlement. Id., at 10.

50. General Assembly Resolution 1514 (XV) of 14 December 1960. See Chapter 3.

51. Supra, note 6.

52. Supra, note 22.

53. G. Thullen, supra, note 24, at 12 and 113. See also H. Wilson, supra, note 20, at 61 (regarding the Bandoeng Conference, 1955), and 122 (this shift, in particular, was caused by Stalin's death in 1953).

54. G. Thullen, id., at 13.

55. Id., at 182.

56. As noted by Ciobanu, the delimitation of jurisdictions from the various reserved domains of Member states, and the allocation of such delimitations among the U.N. organizations, are the means by which to reach these ends. D. Ciobanu, supra, note 21, at 32.

57. See H. Wilson, supra, note 20, at 63 (in particular, referring to U.N. Charter Article 2(7)), but she also notes that Resolution 637-A (VII) of 16 December 1952 effectively placed the manner states implemented self-determination beyond the confines of Article 2(7). See also Report of the Ad Hoc Committee on International Terrorism, 28 U.N.G.A.O.R., Suppl. (No. 28) U.N. Doc. A/9028 (1973); I. Brownlie, supra, note 12, at 291, et seq.. Compare J. Quigley, supra, note 28, at 10.

58. This version of self-determination entails a vision of state sovereignty as based in the authority of the people concerned, and thus, in administrative and management contexts. On this level, the notion in practice perhaps better reflects the realities of political and economic inequality. Nevertheless, a variety of trade mechanisms such as customs unions, standardization of trade norms, and corporate codes of conduct are continuously being developed and utilized to protect domestic economies from exploitation and foreign dominance, as well as to protect investor organizations and states.

59. Commentary, supra, note 23, at 43. In that a number of U.N. Resolutions were hinting at the legality of the use of force as a form of self-defense in such conflicts by liberation groups, the recognition that the waging of liberation struggles "by all appropriate means at their disposal" was legitimate mandated the extension of IHL. See, General Assembly Resolution 2936 (XXVII) of 29 November 1972, adopted by 73 votes to 4, with 46 abstentions. The blurring of distinction between "types" of force has resulted in a tension between principles of international law and state practice, creating what Lobel terms a "Grotian" juncture between the traditional nation-state system and the increasing interdependence of the international community. J. Lobel, "Emergency Power and the Decline of Liberalism", 98 Yale L.J. 1385, 1430 (1989). See also Chapter 4.

60. See C. Bruderlein, "Custom in International Humanitarian Law", International Review of the Red Cross (IRRC), No. 285, November - December 1991, at 579; C.M. Chinkin, "The Challenge of Soft Law: Development and Change in International Law", 38 I.C.L.Q. 850 (1989); G.J.H. van Hoof, Rethinking the Sources of International Law (1983). See also Chapter 7.

61. In particular, recognition of freedom fighters as potential prisoners of war through IHL treatment affords automatic protection in unknown future situations of armed conflict. This observation has also been made regarding Common Article 3 to the four Geneva Conventions of 1949 in that, at that time, an unprecedented inroad into the exclusive competence of state governments was made, i.e., the imposition of a duty to comply with fundamental rules of humanitarian treatment, going beyond ordinary human rights protections.

62. L.R. Penna, "Customary International Law and Protocol I: An Analysis of Some Provisions", in Studies and Essays in Honour of Jean Pictet (Studies and Essays) (1984), at 201, 206.

63. For a good discussion of this issue, see J. Gardam, supra, note 9, at 115 - 21.

64. In particular, Protocol I grants combatant status to some irregular forces, bans direct or indiscriminate attacks on civilian populations, prohibits reprisals, prohibits various means and methods of warfare, and restricts the selection of military objectives. All such prohibitions and restrictions directly intrude into the state jurisdictional confines of Hague law. See R.L. Fruchterman, Jr., "Enforcement: The Difference between the Laws of War and the Geneva Conventions", in Proceedings of the Law Professor Workshop in Honor of Dean Rusk: Coping with Internal Conflicts: Dilemmas in International Law, 13 Ga. J. of Int'l. and Comp. L. (Suppl. 1983), at 303.

65. See Y. Dinstein, supra, note 8.

66. Y. Alexander, supra, note 20, at 51, remarks as follows:

> It (becomes) necessary to turn political crisis into armed conflict by performing violent actions that will force those in power to transform the political situation of the country into a military situation.

In this way, acts of terrorism evolve from controllable civil disobedience, becoming the tool to effect both political change and subsequent military strategy. See also R.A. Falk, "The Beirut Raid and the International Law of Retaliation", 63 A.J.I.L. 415, 423 (1969); Report of the Ad Hoc Committee on International Terrorism, supra, note 57, at 24, Suggestion submitted by Algeria regarding the underlying causes of international terrorism, which states as follows:

A. State Terrorism

1. It takes the form of mass imprisonments, the use of torture, the massacre of whole groups, widespread reprisals, the bombing of a civilian population, the use of defoliants, the destruction of the economic structures of a country, etc.

2. States resort to violence and terrorism:

(a) When they want to break the will of a people in order to impose direct rule, to subject them to a policy or to use their territory and resources for purposes contrary to that people's interests;

...

B. Terrorism directed against States

1. A social group (or a population) resorts to terrorism and violence against a State:

(a) When their rights are flouted;

...

See Chapter 3.

67. L. Brilmayer, supra, note 6, at 200.

68. See E. McWhinney, Aerial Piracy and International Terrorism (1987), at 3; R.A. Falk, supra, note 66, at n. 25.

69. See, e.g., the Commentary, supra, note 23, at 54 - 5, where the editors note that Article 1(4) "certainly covers all cases in which a people, in order to exercise its right of self-determination, must resort to the use of armed force against the interference of another people, or against a racist régime"; and at 53, n. 81, where 103 states and territories involved in self-determination conflicts are listed.

70. General Assembly Resolution 217-A (III) of 20 December 1948, U.N. Doc. A/810, at 71.

71. P. Thornberry, "Minorities and Human Rights Law", Minority Rights Group, Report No. 73 (1987), at 6.

72. H. Wilson, supra, note 20, at 62.

73. U.N. General Assembly Resolution 2200-A (XXI) of 1966, 21 U.N.G.A.O.R. Suppl. (No. 16) at 52, U.N. Doc. A/6316. Texts reprinted in 61 A.J.I.L. 870 (1967), and 6 I.L.M. 360 (1967), respectively.

74. P. Thornberry, supra, note 5, at 878.

75. See Chapter 3.

76. See Chapter 4.

77. Protocol I, Article 1(4), provides in pertinent part as follows:

> The situations referred to ... include armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination, ...

See J. Gardam, supra, note 9, at 122.

78. See Chapter 3.

79. E.M. Morgan, supra, note 26, at 361.

80. See H. Wilson, and I. Brownlie, supra, note 57.

81. See Pollux, "The Interpretation of the Charter", XXIII. B.Y.I.L. 54, 73 (1946).

82. See E.M. Morgan, supra, note 26, at 361.

83. See, e.g., R. Higgins, "The Place of International Law in the Settlement of Disputes by the Security Council", 64 A.J.I.L. 1, 11 (1970), who notes that, as colonial questions require flexibility, "attempts are thus made to revise the common understanding on the use of force to permit not only the existing right of revolution, but the right and indeed the duty of third parties to aid such revolutions"; L.R. Beres, "Terrorism, Insurgency and Geopolitics: the Errors of U.S. Foreign Policy", 17 C.W.I.L.J. 161, 162 (1987), who discusses "approved" forms of insurgency, e.g., against despotism, given existing frameworks of human rights and the inalienable right to self-determination.

84. See H.-P. Gasser, "Agora: the U.S. Decision not to Ratify Protocol I to the Geneva Conventions on the Protection of War Victims", 81 A.J.I.L. 912 (1987); A.D. Sofaer, "Agora: the U.S. Decision not to Ratify (Cont'd.)", 82 A.J.I.L. 784 (1988); G.H. Aldrick, "Prospects for United States Ratification of Additional Protocol I to the 1949 Geneva Conventions", 85 A.J.I.L. 1 (1991). See also J. Gardam, supra, note 9; "Australia ratifies the Protocols", International Review of the Red Cross (I.R.R.C.), No. 284, September - October 1992, at 558; P. Griffiths and H. Gwilliam, "Comment on Australia's Ratification of the 1977 Additional Protocols to the Geneva Conventions of 1949", 11 U. Tasmania L. Rev. 104 (1992).

85. See Chapter 5.

86. R.A. Friedlander, "The Origins of International Terrorism: A Micro Legal-Historical Perspective", 6 Isr. Y.B.H.R. 49, 54 (1976).

87. L. Brilmayer, supra, note 6, at 191.

88. See Chapter 6.

89. See, e.g., W.M. Reisman and A.R. Willard, supra, note 22.

90. See Chapter 4, and the prohibitions contained in the League of Nations Covenant (1919), the General Act for the Pacific Settlement of International Disputes (1928), the General Treaty for the Renunciation of War (1928), the United Nations Charter (1945). See also D.J. Hill, "Permanent Court of International Justice", 14 A.J.I.L. 387 (1920), who notes that, as the Covenant was designed to enforce peace through force, it was primarily a military compact.

91. See J. Garner, "Punishment of Offenders Against the Laws and Customs of War", 14 A.J.I.L. 70 (1920); D.J. Hill, supra, note 90, at 388 (U.S. stance that war waged to assert rights represented only a political adjustment and, thus, aggression should not be framed in terms of "legal" or "illegal"); Charter annexed to the Agreement of 8 August 1945, providing for the setting up of the International Military Tribunal at Nuremberg, and the Charter of the International Military Tribunal at Tokyo of 19 January 1946. See also T.J. Farer, R.G. Gard, Jr., T. Taylor, "Vietnam and The Nuremberg Principles: A Colloquy on War Crimes", in The Vietnam War and International Law, Vol. 4 (R.A. Falk, ed.) (1976), at 363; L.R. Beres, "The United States Should Take the Lead in Preparing International Legal Machinery for Prosecution of Iraqi Crimes", 31 Vir. J. of Int'l. L. 381 (1991).

92. See E.D. Fryer, supra, note 10; Y. Dinstein, supra, note 8; A.P. Rubin, "The Status of Rebels under the Geneva Conventions of 1949", 56 A.J.I.L. 472 (1962).

93. See Chapters 6 and 7.

94. See Chapter 3.

95. See R. Little, Intervention (1975); D.L. Khairallah, Insurrection Under International Law with Emphasis on the Rights and Duties of Insurgents (1973).

96. E. Weisband and D. Roguly, "Palestinian Terrorism: Violence, Verbal Strategy, and Legitimacy", in International Terrorism, supra, note 20, at 258, 279.

97. See Chapters 6 and 7.

98. Thus, while it has been argued that "terrorism pulls violence out of the realm of war and into the world of politics", E. Weisband and D. Roguly, supra, note 96, at 279, the recognition of a liberation struggle potentially "pulls" political violence back into the realm of war.

3. Examples of "Peoples" Achieving the Right to Self-Determination through Resort to Violence

The struggle for more jurisdictional space in which to expand the principle of self-determination in the U.N. Charter system may be seen through assertions of "rights" to use armed force, rights to ownership and control of material resources, and individual rights, generally. On this basis, it is clear that any strict constructionist approach to the meaning of self-determination may miss the mark, forestall the successful interaction required for system change, and provoke an armed conflict. (1)

As previously discussed, the notion of self-determination is frequently expressed through the two separate branches of colonialism and individual rights. Separatism and integration are also presented as alternative, and highly contradictory, motifs underlying self-determination in the U.N. Charter system. Further, despite an international legal system which prohibits the aggressive use of force, national liberation struggles have now been recognized theoretically as international for purposes of the applicability of IHL. (2) It is thus argued in this Chapter that the recent "automatic" extension of IHL to wars of self-determination provides a legal structure within which to view liberation struggles. IHL also provides a structure for the effective prohibition and punishment of many instances of politically-based violence, and in particular, violent acts which otherwise might be characterized as acts of international terrorism. (3) However, such a development first required the occurrence of a number of successful armed liberation conflicts, and some examples of the role of the use of

force in such conflicts, are now discussed.

By way of preliminary discussion, the extension of IHL protections to wars of self-determination means that a neutral forum in which to gauge the legality of the means and methods employed in such armed conflicts is now available. This extension further provides guidelines through which to delineate the parameters for entitlement to self-determination by auto-determined "Peoples", e.g., through the willingness of such groups to comply with applicable provisions of humanitarian law, which delineation in turn would facilitate any differentiation between "terrorists" and "freedom fighters" for purposes of the protections provided by humanitarian law. An additional effect should also be the re-characterization of some "*prima facie*" terrorists as freedom fighters, with a concommitant decrease in the exercise of extra-territorial jurisdiction by states affected by acts of terrorism perpetrated by liberation groups, in that grave breaches or war crimes are punishable by the national courts of each Member state party to IHL. (4).

It is argued generally in this Chapter that the 1977 extension of substantive IHL law provides a legal structure within which to view and prosecute acts of terror-violence perpetrated by recognized national liberation groups. (5) IHL is also applicable, if only for purposes of guidance, to the treatment of unrecognized "Peoples" engaged in the use of armed force. Nevertheless, objection has been made that the codified recognition of wars of national liberation as "international" grants a measure of legitimacy to terrorist organizations. The use of terrorism as a tool for achieving the right to self-determination has thus been both an aid to publicizing a group's rights demands, and a stumbling

block to universal ratification of Protocol 1. (6)

In particular, objection has been voiced that the 1977 extension of IHL unreasonably intrudes into state sovereign authority to interpret the nature of a domestic armed uprising, and that it results in jurisdictional conflicts. (7) The intrusion into state sovereignty in part involves the issue of the legality, or "justness", of the use of armed force by "approved causes". Jurisdictional conflicts arise when states differ regarding the proper characterization to be attributed to particular uses of armed force by aggrieved "Peoples". These objections could, in turn, undermine interstate co-operation in matters such as extradition. Thus, while it has been argued that the codified recognition of "international" wars of national liberation obviates further inquiry as to their true nature, the underlying lack of state consensus demarcating the concepts involved in the "self-determination" of "Peoples", and the use of force in liberation conflicts, does little to discourage their occurrence.

Political rationales for the use of terror-violence in support of self-determination thus provide one of the most worthwhile perspectives with which to explore the substance of the rights claims involved. Such political underpinnings are also the greatest obstacles met with by states when attempting to deal with international terrorism by means of crime-specific codifications. It is therefore argued that the lack of consensus between, in particular, the first and third worlds as to the identity of the "Peoples" entitled to self-determination has encouraged the use of force in the post-1945 era in a succession of "just wars" which are waged as the highest test of the substance of asserted rights entitlements. (8) This, in turn, endangers the U.N. Charter system, in

that the course and results of such wars in practical terms are undemocratic, legally suspect, and dangerous for use as precedent or norm fabrication. (9)

The structure of this argument is as follows. In Part One, the issue of national choice involved in self-determination is discussed. Some examples of "Peoples" emerging as politically and territorially sovereign, and in free association are Algeria, Micronesia and Hong Kong. As regards integration, the cases of Northern Ireland, Goa, and the Occupied Territories are used to illustrate the tension inherent in U.N. conceptual duality. In Part Two, the East-West ideological split, Resolution 2625, and the laws of war are briefly discussed in order to illustrate the tension created by the U.N. system between aspects of external and internal self-determination, which tension leads to high requirements for emancipation.

It is concluded that the international rules regarding armed classification struggles for self-determination require not only agreement as to form and procedure, but also a more harmonized view of the substantive choices available to "Peoples" wishing to exercise their rights to self-determination. In other words, to make the rules in existence effective, Member states must first agree on the meaning and application of self-determination. Once this occurs, state action which is utilized to contain and/or defend against domestic liberation conflicts need no longer plague the international fight against terrorism. In that acts of terrorism have played a major role in achieving the extension of IHL to liberation struggles, it is further concluded that Protocol 1 extends sufficient enforcement mechanisms to all states to enable them to distinguish acts of political or terror

violence perpetrated as one tactic in a liberation struggle from acts of international terrorism. Such a distinction has obvious consequences for the prosecution of alleged offenders.

3.1. The Issue of Choice in Self-Determination

U.N. Resolution 1514 (XV) of 1960 (10), as previously discussed, stresses that "Peoples" are to be left to "exercise peacefully and freely their right to complete independence ...". Resolution 1514 is complimented in the same year by Resolution 1541 (XV), which provides non-self-governing territories with a choice regarding national destiny. This choice is as follows:

(1) Emergence as a sovereign independent state;

(2) Free association with an independent state; or

(3) Integration with an independent state.

According to the International Court of Justice in the Western Sahara Case, Advisory Opinion, 1975 (11), free association must occur through free and voluntary choice, and must be expressed through public and democratic process. This view of free association is based on Western-style democratic presuppositions of free choice, economic liberty, the sanctity of property, and individual human rights, as contained in the U.N. Charter. Nevertheless, the political and ideological roles played by Socialist theory in the post-1945 era have been fundamental in the loss of traditional territorial unities, and in demands for redress of historic wrongs going far beyond the original League of Nations and U.N. Charter confines of colonialism. In order to "re-seize" natural resources, national wealth, and territorial control, for example, a right to rebel has, in particular instances, been based at least in part on Marxist rhetoric. (12)

Conversely, and depending on the history and constitutional arrangements, if any, in territories and/or of "Peoples" making a claim for self-determination, the choices involved in the determination of national destiny need not include full secession or governmental separation from a dominant state at all. According to this view, opting for less drastic solutions perhaps reflects a more practical attitude towards, and aptitude for, the political and economic realities of sovereign state responsibility which underlie particular forms of means-end utility. Further, the processes which actually constitute "public and democratic process" remain uncertain. (13) Current debate also considers " ... whether there can be an universal understanding of specific rights ... contained in an international instrument". (14) As a result, the economic and strategic considerations involved in a choice of national destiny or self-determination have increased in number and become more varied.

For example, the role of choice in the operation of U.N. Charter provisions regarding non-self-governing territories was particularly clear for the Asian and African states which emerged in the post-1945 era, and the double appeals of the rights contained in the International Covenants on Human Rights of 1966 were often placed in these regions in a "hierarchy of need". It is thus argued that traditional freedoms will be taken seriously by a government "when the people's economic and social expectations have been reasonably met". In other words, "(a)ll aspects of human rights need not be given the same status of importance. A new nation should be free to determine its own national values, political, social and economic priorities, uninfluenced by the preference of the West", in a nation-building exercise which imposes

citizen burdens as well as citizen rights. (15)

Given these many political, ideological and practical considerations, it is clear that the issue of choice in the exercise of self-determination has worked to exacerbate some kinds of group division. (16) Nevertheless, by 1978, 60 territories had achieved joint or separate independence, 13 were integrated, 7 were associated states, 17 were still dependent, and East Timor and Western Sahara were still controversial. (17)

3.1.1. Algeria - Emergence as Sovereign

Confusion has resulted from the juxtapositions which have occurred between U.N. Charter provisions regarding self-determination, and post-1945 interpretations of the various levels of territorial self-management originally contemplated in them. When examined within the context of the "justness" of the use of force, successful assertions of a right to use force in liberation struggles have worked to revise common understandings as to the prohibitions against the threat or use of aggressive force contained in the Charter. This point is illustrated by the successful assertion by the Algerians of a right to use force against France, in the Algerian War of Independence.

From November, 1954, to March, 1962, Algeria fought France to achieve independence and statehood. (18) Initially, the conflict was considered to be a domestic, and not an international, armed disturbance. France avoided calling the conflict a war at all. Nevertheless, it was necessary to ascertain the precise normative framework through which to interpret the conflict in order then to characterize the use of armed force for purposes of guidance, and to evaluate the applicability of IHL. (19) Given the uncertain stance of

the international community regarding self-determination at that time, a preliminary question was the purpose of the rebellion. In other words, was the rebellion merely intended to effect political and economic reform? Depending on the answer to this, the conflict could then be characterized either as a struggle to end colonialism, or as a struggle to effect territorial secession. Of further interest to the present discussion, it was argued as the conflict progressed that a continued pattern of rights violations placed the call for territorial secession beyond the strict confines of a sovereignty or decolonialization struggle. This latter interpretation effectively placed the role played by rights infringements outside the original mandate/trusteeship contexts for purposes of normative theory. The U.N. evaluated the conflict for purposes of such a characterization throughout the conflict, and factors found to favor the self-determination of the Algerian "People" involved allegations of colonial oppression, French opposition to territorial and administrative separation, and claims of discrimination and genocide.

Casualties were high on both sides. The war was conducted mainly through guerilla action and sabotage operations. Inhumane practices, summary executions, and the widespread use of torture led increasingly to calls for the application of the 1949 Geneva Conventions. At a minimum, the application of Common Article 3 to the 1949 Geneva Conventions was required, in that this Article requires observance of minimal standards of humanity. Nevertheless, France found this problematic in that the application of Common Article 3 was felt to imply a recognition of the status of the conflict, if not of the insurgent forces, and might constrain the government's handling of

"traitors".

Given these disagreements regarding both the nature and scope of the conflict, both sides ultimately applied relevant provisions of Geneva law without formal agreement. Initially, this was on a limited basis, but towards the end of the conflict, Geneva law was applied in full in the interests primarily of reciprocal treatment. Nevertheless, questions of authority and responsibility persisted throughout the conflict. Of interest, the insurgent forces sought and obtained re-categorization of their own captured as political prisoners about mid-way through the struggle. Such re-categorization, it was felt, would result in greater protection than prisoner of war status within French contexts of penal liability. (20)

The insurgents further sought and obtained a degree of international personality and competence which were directly attributable to the conflict. This, in turn, strengthened publicity of their claims to full independence, and the augmentation of territorial control and authority. The separate notions of colonial and "rights" self-determination, or "external" and "internal" self-determination, in this instance came to be seen as fully interconnected (21), and by thus developing a completely new area of rights entitlement, the Algerian War led to an evolution of the right to self-determination from purely colonialist confines to include claims for representative government, and freedom from outside interference, alien or foreign domination. Irrespective of, yet arising from, colonial contexts, claims to full entitlement to the underlying human rights filled the legal vacuum, retrospectively.

The facts and circumstances behind the use of force by the

Algerians to achieve independence from France thus gave normative support to the idea of a legitimate entitlement to use force to achieve self-determination. Through the successful use of force in this instance, a factual basis of human rights violations, which basis was connected with but independent of the colonial context, was added to support claims for a right to self-determination, and to encourage other such conflicts to occur.

3.1.2. Micronesia, Hong Kong and Free Association

Micronesia is the only strategic trusteeship ever established. (22) The underlying 1947 Trusteeship Agreement with the United States contained no procedures for its termination. Ultimate responsibility for the former Japanese mandate remains in the Security Council. (23) As a strategic trusteeship, Micronesia is also unique in that its sovereignty was reserved in political trust pending the development of the foundations of self-government. Thus in this instance, the use of force was not required in order to attain desired rights entitlements. The result of the area's eventual exercise of self-determination is as three emerging states, and as a new United States commonwealth, in a compact of free association. (24)

Hong Kong is another strategic area in which there could theoretically be a claim for at least a limited degree of self-determination, in terms of association. In contrast with Micronesia, the notion of self-determination seems not to have been seriously considered in the Sino-British Joint Declaration of May, 1985, governing the 1 July 1997 turnover of the island by the United Kingdom to the People's Republic of China. Instead, the sole relevant question for purposes of the turnover appears to be the rights of the P.R.C. as the

successor state of Imperial China. (25)

Hong Kong presently consists of Hong Kong Island, Kowloon and the New Territories. In 1841, British forces occupied Hong Kong Island and a civil administration was established. The Treaty of Nanjing was signed in 1842, and ratified in 1843. Kowloon was ceded by the Convention of Beijing in 1860. The New Territories was leased by the Convention of Beijing in 1898 for a term of 99 years. Thus, Great Britain has "ownership" of two parts of the colony, and a leasehold interest in one. Until enactment by the British Parliament of the Hong Kong Act in 1985, Hong Kong was to remain a British Crown Colony. This was in spite of post-1945 British policy which allowed self-determination to British colonial possessions. Prior to the Joint Declaration, the British had expressed an interest in enforcing their "legal right" to Hong Kong Island and Kowloon, but the idea was abandoned when it became apparent that the economy and stability of the colony could not be maintained were this to be done. China has relied on historic title, and the invalidity of "unequal treaties", i.e., treaties which are not based on mutual sovereign recognition and reciprocity in benefit, as the bases for its claim for the "return" of the colony to the P.R.C..

This re-assertion of sovereignty over Hong Kong, albeit with a degree of autonomy remaining in island administration, highlights several current problems which are sourced in modern notions of sovereignty, and in particular, in the P.R.C.'s eventual power to amend the Basic Law. There is no definition of autonomy in the Sino-British Declaration. Ultimate constitutional jurisdiction will remain with the P.R.C. after the turnover, and in particular, central governmental

control over the selection of judges will ensure that matters of state, international commercial relations, and local court jurisdiction in general will be affected.

While by no means an example of free association, the situation of Hong Kong is instructive to show the compromise aspect of self-determination. Nevertheless, an increasingly penetrative human rights régime, and questions regarding the legal system generally, have kept alive the issue of the self-determination of the "People" of Hong Kong, leaving open the question of humanitarian intervention should the future situation of the colony so require. Further, its prosperous economy is another potential source with which to maintain aspects of autonomy independent of Chinese control. In the transfer of sovereignty and control of a colonial area, and of a culturally and economically distinct "People", however, the wishes of the islanders would not appear to have been taken into serious consideration. Nevertheless, the British Government continues to monitor the situation, and to protest against usurpation of the islanders' legal and human rights, and rights of self-management generally, which rights link internal organization with more commercial purposes in competing models of self-determination.

3.1.3. The Integration of Northern Ireland, Goa and the Occupied Territories

As has been noted, the notion of self-determination is usually expressed through the two separate issue-areas of colonialism and individual rights. Separatism and integration are additional, and frequently contradictory themes of the U.N. Charter system. These juxtapositions are further conplicated by assertions of a right to use armed force to achieve rights of self-determination. In this context,

the example of Northern Ireland is of interest.

In 1920, Britain claimed to be motivated by considerations of self-determination when Ireland was partitioned. (26) Subsequent statements were made that the Northern Six Counties were freely integrated with the Mainland through fair and universal suffrage, and with mechanisms for limited self-rule. Nevertheless, armed sabotage operations and terrorist attacks by Irish groups advocating re-unification with the Irish state, and Loyalist groups demanding continued integration with the Mainland, continue to occur, particularly since 1972. As for the characterization given to I.R.A. activities in particular, it is of interest that this group projects an image of struggle against colonial oppression for its American sympathizers, while the conflict is depicted as a class struggle to British and Irish constituents. (27)

As regards the armed unrest in the Province, Wortley notes that the British Government refuses to accept that the "Troubles" constitute a Common Article 3 situation, for purposes of Geneva law. The Government further refuses to view the unrest as coming within the terms of reference of either Protocol 1 or Protocol 2 (28), preferring to view all Irish acts of terrorism as isolated, criminal occurrences. This point is of interest in that were IHL made applicable to the situation in Northern Ireland, there are clear prohibitions both against the use of terrorist means and methods of warfare, and the wanton targeting of civilians. Nevertheless, the Government denies that this area of international law has any relevance to police and military operations carried out to maintain a degree of public order in the area. For example, the I.R.A. view cabinet members as legitimate military targets,

but I.R.A. efforts to differentiate between the meaning given to official and civilian casualties have failed, as the Government denies there can be any difference in the illegality of I.R.A. "murder" which is dependant on the status of the victim.

The non-applicability of IHL is of further importance. Special prisoner category status, i.e., not grouping Loyalists and Republicans together, was withdrawn as of March, 1976, for fear that such special status appeared to recognize a political status. Occurring at the same time as the on-going Diplomatic Conference to up-date and revise the 1949 Geneva Conventions, the withdrawal of special status led to hunger strikes among the political internees, and local and European election successes for Irish unification sympathizers. (29) Jackson and McHardy note that these subsequent events gave "the lie to the British government's determined assertion that they (the I.R.A. and its sympathizers) were only mindless criminals to be ignored, never negotiated with". They further note a "steady erosion of civil liberties (in Northern Ireland) ...", which is attributable to denial by the British Government of a situation to which IHL is applicable. (30)

Britain signed Protocols 1 and 2 in 1977, and has not expressed its intention to ratify Protocol 1 until Autumn 1993. (31) After signature, the Pope condemned all killing as murder during his visit to the Irish Republic in 1979. In April, 1980, all special category prisoner status was withdrawn. The violence continues, and has disrupted recent initiatives by John Hume, the Social Democratic and Labour Party M.P. for Foyle, and Sinn Fein President Gerry Adams, who urged the British Government to become involved in round-table talks on the future of Norther Ireland, and to recognize the right of the Irish

"People" as a whole to self-determination. Soon after, a Joint Anglo-Irish Peace Declaration incorporated parts of the unpublished Hume-Adams Initiative, and was signed at Downing Street on 15 December 1993. Nevertheless, the Declaration emphasizes that the "democatic wish of a greater number of people in Northern Ireland" will determine the future political shape of the province, subject to a Unionist veto. (32)

It is also to be feared that with the full integration of the European Community, armaments supply routes and transboundary movements of groups utilizing terrorist methods of violence will be facilitated. As the British Government does not view the armed civil unrest in Northern Ireland as related to U.N. Charter principles concerning the self-determination of "Peoples", the lowering of internal E.C. barriers to trade is made more problematic. (33) Further, in that there is no official recognition of a situation in the area which might require analysis through the issue-structure provided by IHL, consensus regarding the evolving content of self-determination is made difficult, even among otherwise similarly-minded Western democracies.

Another example of tension in the U.N. Charter system approach to any self-determination conflict involving the use of armed force is the case of Goa. Wilson regards the Goa incident as a turning point in the evolving norm of self-determination. (34) The latitude afforded in Resolution 1514 (XV) to the use of force by "Peoples" struggling against alien subjugation, domination and exploitation was, in this instance, put to the test.

In December, 1962, India invaded Goa, Damao and Diu, Portuguese enclaves eligible for eventual self-government. India, however, had never accepted Portugal's claim of right by conquest, and justified its

invasion on the grounds of historic title, territorial proximity, and ethnic homogeneity. India's official reason for the invasion was self-defense, in that Portugal had committed aggression in not relinquishing the area under U.N. supervision. (35) Subsequently termed "armed self-help to oust colonialism", India's use of armed force highlighted the East-West split in attitude both to the trusteeship system and aggression. This tactic of ending colonialism through a unilateral use of force was tolerated by third world states, and the merits of the dispute were obscured by the breach of the peace. (36)

Despite strong diplomatic protest, particularly by the U.S., the issue of self-determination served as the vehicle with which the international community could tacitly accept the subsequent annexation by India of Goa, if not the actual use of armed force. The Goa incident is further evidence of the tension inherent in U.N. Charter interpretational duality. In view of the majoritarian decision-making process in the General Assembly, it was clear that where the organs of the system do not enforce U.N. Charter purposes in the face of breach or injustice, individual Member states accept the burden in modes of self-help. (37)

Reliance on state self-help has thus worked to stretch the jurisdictional space set aside for the notion of self-determination. In this way it can be seen that expansionist ambitions use the notion as a vehicle to foster rebellion, to create international instability, and to interfere in sister-state domestic affairs, generally. As action on the basis of the concept of self-determination may clearly go beyond the original U.N. Charter confines of colonialism, the example of the annexation of Goa is illustrative of one manifestation of the use of

armed force in a self-determination situation in which reasons additional to colonial title are put forward. Yet, as regards the original intent underlying the notion, it is clear that the "Peoples" in these Portuguese enclaves had little say in the matter.

In the case of Palestinian self-determination, on the other hand, U.S. interests in reducing British strategic interests in the area have played their part in the turmoil. (38) This factor, in addition to pressure from the American Zionist lobby, has resulted in a failure until recently to recognize the Palestinian right to self-determination. This failure manifested itself in a strict military administration of the Palestinians by the Israeli Government, discriminatory judicial and employment systems, and the "grant" of alien resident status.

The Palestinian "People" constitute approximately 18% of the entire Israeli population. They also inhabit the Occupied Territories of the West Bank and Gaza Strip. Shehadeh (39) writes that the Israeli Government has made daily life intolerable for this group through discriminatory administrative procedures, the requisitioning of Palestinian land for military, then public, use, then subsequent private sale purposes, violations of minimal human rights, and the widespread demolition of house and property interests. The Israeli Government has refused to accept that sovereignty of the West Bank is Jordanian, yet residents of the area carry Jordanian passports. Through a de facto annexation, Israel has attempted to establish legal title to land, and to install settlements in the territory acquired from the "Six Day War" in 1967, despite widespread and continuing international protest. (40)

The United Nations conferred quasi-governmental status upon the P.L.O. in 1974, as representatives of the Palestinian Arabs in their

claim of legal rights to their homeland, a former British mandate. This occurred despite the proliferation of Palestinian terrorist organizations which continue to splinter world opinion regarding the legitimacy of terrorist armed force to achieve the entitlements of self-determination. The conceptual problem for the world community is once again that within the proper confines of the Palestinian right to self-determination, which includes recognition of the legitimate use of armed force if necessary to achieve that right, Palestinian terrorist organizations have worked alongside the "legal representatives" of the Palestinian "People". As such, these legal representatives have purportedly shared in the responsibility for promoting an active, that is, violent, resistance against the Israelis. This implies that the Palestinian terrorist organizations have been empowered so to act in the name of Palestinian national liberation. (41)

Not surprisingly, Israel cast the only vote in opposition to Article 1(4) of Protocol 1. While it is a signatory to the Geneva Conventions of 1949, it has refused to apply actively the provisions consistently. Preferring to "observe" the Fourth Geneva Convention through application, it has consistently refused to accept that the Third Geneva Convention is relevant to acts of Palestinian armed resistance. (42) For example, Shehadeh notes that in June, 1967, Israel announced its intention to apply Geneva law. By October, reference to possible conflicts between Geneva and Israeli law were deleted. By 1970, Israel was making no reference to the 1949 treaties.

In similar fashion, applicable provisions of the Hague Regulations of 1907 were not actively observed, or acknowledged as relevant to the "administered" territories. Israel continued to

imprison and deport Palestinians accused of and/or convicted of terrorist acts, in violation of Article 49 of the Fourth Convention. While acknowledging that Hague law obligated Israel as customary international law, Israeli courts consistently viewed Geneva provisions as having conventional force only, within a historic context, and thus were to be over-ruled in the event of conflict with Israeli domestic law. (43) Thus, even though Israel had, by 1990, acknowledged that it "retain(s) the territory by force of belligerant occupation", a recent Supreme Court decision rationalized the deportation policy by construing Article 49 of the Fourth Geneva Convention in light of the provisions of Article 43 of the Hague Regulations. In other words, it viewed deportation as the sole, viable option available to protect the local populations from terrorists. (44)

With regard to economic aspects of self-determination, it is of interest that in November, 1986, the European Community announced it would accord the Palestinians of the Occupied Territories the same favorable trade conditions enjoyed by Israel and Jordan. McDowell notes, however, that while welcome, "Israel will not tolerate any competition. If, therefore, the E.C. really wishes to provide access, it must also monitor Israeli and Jordanian interference with this intended access". (45) Thus, the economic contrasts between Israel and the Occupied Territories, for example, remain profound as Israel's per capita gross domestic product is seven times the level on the West Bank and fourteen times that of the Gaza Strip, and much prosperity was denied to the Occupied Territories when Israel closed its borders to it in March, 1993. It would also appear that economic aspects underlying the recent peace initiative signed in Washington have proven to be

persuasive, if only with regard to the continued expense of policing the areas soon to be returned to Palestinian self-management. (46)

In this example of the struggle of the Palestinian "People", it is clear that international involvement since early this Century makes the continuing use of force in the area an international responsibility. While the U.N. continues to produce Resolutions condemning the continued occupation, and the denial of the right of self-determination to the Palestinians, the violence continues. This is despite recent developments, as more radical Palestinian groupings are not satisfied with the agreement achieved in Washington on 13 September 1993. Nevertheless, the use of force in the occupation both by the Israeli state, and the Palestinians, helped the P.L.O. to gain observer status at the U.N., and international recognition of a "People", albeit one without control over its territory.

In addition to the colonial context of the situation, the human rights entitlements of the Palestinians have constituted an independent basis for the group's claim to possess a right to self-determination. Even more clear is the conclusion that the use of force to achieve claimed rights entitlements has reworked common understandings regarding many underlying concepts. Nevertheless, the on-going conflict continues to split world opinion regarding a satisfactory approach to the content of self-determination, and to the resolution of the continued violence in the Middle East.

3.2. "External" and "Internal" Self-Determination

In view of the above-indicated examples of the role of the use of force in achieving self-determination, it is clear that the international community is not in agreement regarding the results of the

evolution of self-determination, nor is state practice entirely indicative of the normative theory underlying its exercise. On the one hand, self-determination may be viewed externally, for purposes of evaluating a particular government's right to rule, to require autonomy in certain instances. More critically, self-determination may be used externally as a mechanism of intrusion into sovereign state domestic affairs and human rights records. On the other hand, and if utilized as an instrument for internal administration, self-determination may be viewed as a statement of majority rule, or as a vehicle by which particular groups may be accorded a degree of self-rule through democratic process.

One important cause of international inconsistency in approach to the twin principles of political and territorial independence, and the equal rights and self-determination of "Peoples", has been the East-West political and ideological split indicated previously. The presence of democratic presuppositions and competing Socialist interpretations of U.N. Charter provisions are particularly apparent when it comes time to vote on U.N. Resolutions and/or to ratify treaties which contain any reference to self-determination and the right to use force to attain it. In particular, this split is illustrated by the Western states which abstained in the vote on Article 1(4), of Protocol 1.

3.2.1. The East-West Split

The starting point of an analysis regarding "internal" and "external" self-determination is the duality of U.N. Charter provisions and the presence of competing interpretations of them. Originating in philosophical concepts shaped by Locke or Kant, it is presently accepted that it is in the nature of being human to be endowed with certain basic

rights. This is an individualist focus. The post-1945 human rights régime is based largely on this premise, as is the U.N. principle of equal rights and self-determination of "Peoples". Taking a more functional, U.N. Charter-based point of view, the issue of self-determination can be traced in treaties and U.N. Resolutions which deal in different issue-areas, and which have been agreed to by sovereign states in an effort to establish ascertainable rules of administration and procedure in the post-1945 international community.

Yet, until 1970, Western states consistently abstained on U.N. Resolutions which recognized a right of self-determination, and/or the right to use force to achieve self-determination. (47) Mainly in this way the "rules" regarding self-determination appear to have fallen into incoherence. (48) By way of example one need only note that the former territories and states of Eastern Europe were seemingly frozen into their annexed status, until recently. Although full members of the U.N., it could not be said that such states were sovereign. They possessed, instead, only a tenuous measure of international personality. With the recent disintegration of the U.S.S.R., however, calls for change have frequently employed the rhetoric of self-determination in contexts completely devoid of colonial content. Instead, the demands are for territory, for the righting of historic wrongs, for economic, social, civil, and political rights, and for human rights. (49) This development, and this use of the rhetoric of self-determination, have been approved by the West.

It would thus seem that, despite post-1945 East-West political and ideological differences, and a level of incoherence appearing in state practice regarding the content of the notion of self-

determination, actual demands for rights entitlements appear to rely at least as much on legal as on political considerations, e.g., the legality of the use of force, albeit within highly politicized contexts. The proliferation of the use of force in liberation struggles has thus not only divided world opinion regarding the propriety of the use of force in particular situations but also regarding the prospective direction in which the notion of self-determination is to develop. This is also true with reference to the direction the laws of war are taking.

The absence of guidance regarding these issues has further complicated attempts to deter acts of international terrorism, and has led to the loss of the political offense exception in modern anti-terrorist treaties for purposes of extradition arrangements. (50)

3.2.2. U.N. General Assembly Resolution 2625 (XXV) of 1970

The growing capacity of non-state units to fully participate in international life has helped to create a mutual deterrence model in which legal functions may quickly be taken over in decaying systems, and normative theory developed. (51) Thus, a primary factor in the more legal focus which has arisen from the East-West split and the incoherence in state practice regarding the notion of self-determination is the adoption in 1970 of U.N. General Assembly Resolution 2625 (XXV). This Resolution, the General Assembly Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, marked a first departure from the prior split in world opinion regarding self-determination. (52) It was the first U.N. instrument to reflect unanimous recognition of a right to self-determination. It further recognized that a colony or non-self-governing territory had a status

which was separate and distinct from that of the administering state.

As previously discussed, this development was more in line with League of Nations mechanisms than with the "referee role" taken by the U.N. in supervising compliance with U.N. Charter provisions. Of further interest, the relative strength of U.N. Resolutions generally in shaping state practice was bolstered by Resolution 2625. Through its repetition by reference in subsequent Declarations, Resolutions and in particular, in Article 1(4) of Protocol 1, and its application in determining the criminal responsibility of Member states in international law, the International Court of Justice was led to decide in 1986, in the Nicaragua case, Merits Phase, that the rules stated in Resolution 2625 amounted to a statement of custom. (53)

While Resolution 2625 does not expressly mention any right of secession from a state authority, Member states recognized that governmental duties to comply with the principles of equal rights and self-determination might lead to such a result should a "People's" right to self-manage its political status, and economic, social and cultural development be ignored. The conflicts inherent between states as groups of citizens, and states as élite governing bodies are thus in part mitigated. (54) Of more importance, Resolution 2625 may be viewed as a interpretational tool by which to extend the categories of armed conflicts to which Protocol 1 is applicable.

Resolution 2625 supports the right of the self-determination of "Peoples", supports the notion of the separate and distinct status of the territory of many of such "Peoples", and urges the use of democratic process when the choice of internal administration is made. Yet whether or not self-determination is viewed as a statement of majority rule, as

a vehicle by which to intrude into sovereign state notions of domestic control, or as a form of institutional camouflage used to conceal administrative manipulation, what is clear is that self-determination is an agent of political change, and constitutes a new standard with which to evaluate a government's right to rule and to manage system change. Thus, the duty of governments to adequately represent the "whole people" contained in Resolution 2625 may be translated into the duty to comply with the principle of equal rights and self-determination by combining sufficient levels of rights entitlements so as to interlock the right to life, and the right to self-preservation.

3.2.3. The Right to Use Force and The Laws of War

As discussed previously, the East-West political and ideological split regarding the right to use force to achieve self-determination helped to ensure that the Western states abstained in the vote on Article 1(4), of Protocol 1, in 1977. Though Resolution 2625 of 1970 was adopted without a vote, different semantic interpretations of U.N. Charter prohibitions continue to plague Member states when the use of aggressive force between them in their international relations is not directly in issue. Further, surviving powers of disposition by states over their territories inject conceptual and legal confusion into different views of the use of force in wars of self-determination, and in assessments of the gains made in the content of self-determination achieved through such use of force.

The right to wage war has thus re-appeared as the notion of self-determination has grown in strength. This right to wage war has little to do with the regulation of war, and in fact, until recently, the laws of war rarely seemed to be an issue, as acts of terror-violence were

utilized as the means and methods of choice for more rapidly achieving asserted rights entitlements. In the context of liberation armed conflicts for rights of self-determination, the "justness" of the cause typically seemed to allow such excess. Theories of a "just war" to effect system transformation thus were confounded with more traditional theories of "just war", i.e., to right a grievance (55), and a measure of self-help by means of the use of violence has led to confusion regarding the more traditional separation between the issues involved in waging a "just" war and the regulation of war. Given the steady repetition of the prohibitions against violations of territorial integrity and political unity, this would seem a logical conclusion.

The validation techniques underlying governmental uses of force should depend for their ultimate authority on power-sharing with the citizenry. (56) Governments are exhorted to provide sufficient levels of rights entitlements to a populace to ensure the right to self-determination is satisfied, which duty represents a derogation of state sovereignty in the sense of the use of legal and political power. (57) Governmental resort to violence in a domestic conflict thus may constitute a crime against its own communities, and lead to models of mutual deterrence in the form of organized domestic armed uprisings. (58)

For this, and additional reasons examined later in this discussion, the laws of war were extended in Protocol 1 of 1977 to include, as international wars, various of the liberation struggles occurring in the post-1945 world community. (59) While ready identification of the "Peoples" entitled to use armed force in pursuit of rights to self-determination is made problematic by differing

interpretations of the content of the notion, what is clear is that the traditional reliance on the colonial system to confine the legality of such conflicts is misplaced, in that such a basis has been superceded by subsequent events. As Protocol 1 has extended to irregular forces the protections of international law, the degree of asymmetry in liberation struggles is potentially decreased. Similarly, methods of terror-violence utilized by any party to such an armed conflict are now strictly forbidden. National groupings must be sufficiently united in political purpose to be recognized as representative of a particular "People". If wishing to be recognized as a proto-government, it is not in the interests of such groups to engage in activities which are in breach of international obligations. (60)

Terrorism has played a major role in the extension of the laws of IHL to liberation struggles, and it is clear that Protocol 1 appropriately extends sufficient enforcement mechanisms to all parties engaged in liberation conflicts to deter acts of political or terror violence. Given the examples briefly outlined in this Chapter, it is clear that the classification struggles in the post-1945 world, some of which are on-going, have both afforded and created sufficient jurisdictional space within the wording of the U.N. Charter to dynamically alter meanings of underlying concepts, and in particular, the appropriateness of the use of armed force.

Further, the course of the growth of self-determination from colonial origins to include a "rights" context, while often "incoherent" for normative purposes, has resulted in international scrutiny of the way in which a state manages democratic processes and organizes its society. When viewed through the growth of non-state units having

powers of resource control and transboundary interdependence, the diminution in state power to dictate to non-state units the extent of their powers and functions is a highly visible feature of modern international law.

The diminution in state power to control the processes autonomously of system transformation in evidence in the recent extension of IHL is an additional feature of the strength of the twin external and internal aspects of self-determination. Thus, the tension created by the multiple demands of self-determination leads to high requirements for emancipation. The extension in full of IHL to self-determination armed conflicts requires that liberation groups behave as proto-governments, and eschew terrorism as a tactic in their overall strategies. This extension further mandates that states involved in such conflicts forego the use of overly repressive law enforcement mechanisms in the interests of maintaining public order.

In that a harmonized view of substantive choice is mandated by the modern emphases propelling state practice regarding the right to self-determination, it is concluded that the extension of Protocol 1 to such conflicts reflects an acknowledgement of the Member state duties agreed to in Resolution 2625. (61) Even though the use of force and the use of terror-tactics gave content in earlier days to the right to self-determination, which in turn led to the recognition of liberation struggles as international, the demands of such a graduation in status now mean that acts of terror-violence perpetrated in liberation armed conflicts should be prosecuted as breaches or grave breaches of the Geneva Conventions, or as war crimes. Once this occurs, there is no need to confuse the prohibition of acts of international terrorism with

the respect and recognition afforded to "Peoples" in their struggles to attain their right of self-determination.

Chapter 3 - Footnotes

1. See Chapter 2.

2. Protocol additional to the four Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I), Article 1(4). Geneva, 8 June 1977.

3. See Fourth Interim Report of the I.L.A. Committee on International Terrorism, reprinted in 7 Terrorism: An Int'l. J. 123 (1984).

4. Geneva Convention for the Amelioration of the conditio of the Wounded and Sick in Armed Forces in the Field (First Convention), 12 August 1949, Article 49; Geneva Convention for the Amelioration of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea (Second Convention), 12 August 1949, Article 50; Geneva Convention relative to the Treatment of Prisoners of War (Third Convention), 12 August 1949, Article 129; Geneva Convention relative to the Protection of Civilian Persons in Time of War (Fourth Convention), 12 August 1949, Article 146; Protocol I, Article 85.

5. See H.-P. Gasser, "Prohibition of Terrorist Acts in International Humanitarian Law", International Review of the Red Cross (IRRC), No. 253, July - August 1986, at 200, 212 ("(w)ithin the scope of international humanitarian law, terrorism and terrorist acts are prohibited under all circumstances, unconditionally and without exception".). See also Protocol I, Article 44.

6. See Chapter 4.

7. See, e.g., R.L. Fruchterman, Jr., "Enforcement: The Difference between the Laws of War and the Geneva Conventions", in Proceedings of the Law Professor Workshop in Honor of Dean Rusk: Coping with Internal Conflicts: Dilemmas in International Law, 13 Ga. J. of Int'l. and Comp. L. (Supp. 1983), at 303; A. Eide, "The Laws of War and Human Rights - Differences and Convergences", in Studies and Essays in Honour of Jean Pictet (Studies and Essays) (1984), at 675.

8. Y. Sandoz, C. Swinarski, B. Zimmerman (eds.), Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949 (Commentary) (1987), at 54 - 5 (Article 1(4) of Protocol I "certainly covers all cases in which a people, in order to exercise its right of self-determination, must resort to the use of armed force against the interference of another people, or against a racist régime".). See also H. Wilson, International Law and the Use of Force by National Liberation Movements (1988), at 80 ("(t)he subjectivity of defining 'peoples' who enjoy this right of self-determination is one of the more common criticisms of any legal right to self-determination"); T.M. Franck, "Legitimacy in the International System", 82 A.J.I.L. 705, 745 (1988) (who argues that there is a need for a systematic framework

in which to analyze self-determination. Conversely, it could be argued that as the principle of equal rights and self-determination has been affirmed both in the U.N. Charter, and in subsequent U.N. Resolutions and codifications, the task is one of formulation of the rights inherent in the principle rather than of analysis of the extent to which the principle is established in internationnal law, through opinio juris or customary practice. Such a shift of emphasis would of course assume sufficient jurisdictional space in which to progressively develop the rights so enumerated.); Notes and Comments, McWhinney, "Friendly Relations and Co-operation Among States: Debate at the 20th General Assembly, U.N.", 60 A.J.I.L. 356 (1966) (there are major problems in actually defining self-determination and the principle of equal rights).

9. This is so particularly in view of the post-1945 prohibition against the threat or use of force in interstate relations. U.N. Charter Article 2(4). See also P. Brogan, World Conflicts (1989), Appendices I and II, at 567 - 76 (list of the world's major wars, coups and revolutions since 1945).

10. Declaration on the Granting of Independence to Colonial Territories and Peoples, General Assembly Resolution 1514 (XV) of 14 December 1960, 15 U.N.G.A.O.R., Suppl. (No. 16), p. 66. As for Resolution 1541 (XV), 15 U.N.G.A.O.R., Suppl. (No. 16), p. 29, the complement of Resolution 1514, H. Wilson, supra note 8, at 81 - 3, notes that Resolution 1541 was intended only for those non-self-governing territories (known as "colonies") in evidence at the time of the U.N. Charter, the sole exception perhaps being Southern Rhodesia, on the basis of human rights violations. Thus, the Resolution was applicable to about 100 such territories between 1945 - 78. Resolution 1541, within the confines of U.N. Charter Chapter XII applies prima facie to geographically separate and ethnically/culturally distinct territories.

11. Western Sahara Case, Adv. Op. I.C.J. Reports 1975, p. 12.

12. See G. Thullen, Problems of the Trusteeship System (1964), at 11, who notes that many Asian and African independence movements were fed by Marxist historical determinism. See also J.L. Kunz, "The Chaotic Status of the Laws of War and the Urgent Necessity for their Revision", 45 A.J.I.L. 37 (1951). Of interest, Lambert notes that when the U.N. Secretary-General proposed in September, 1972, that the issue of international terrorism be considered, African, Asian, and representatives of some Communist states expressed disapproval, in part on the basis that it could be used as a pretext for "imperialists, colonialists, neo-colonialists and racists" to suppress all national liberation groups. China also expressed disapproval. J.J. Lambert, Terrorism and Hostages in International Law - A Commentary on the Hostages Convention 1979 (1990), at 34 - 6, and 36, n. 104.

13. See, e.g., the General Assembly Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, Resolution 2625 (XXV) of 24 October 1970, 25 U.N.G.A.O.R., Suppl. (No. 28), p. 121, U.N. Doc. A/8028 (1971), in which it is stated as follows:

...

> Every State has an inalienable right to choose its political, economic, social and cultural systems, without interference in any form by another State. ...
>
> ...
>
> The establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people. ...

Yet, no indication is given as to the process(es) by which a particular state and/or "People" are to make such a choice. In this way, the twin concerns of sovereign economic rights of control, e.g., of resources, and representative government, interconnect, yet mutually compete, within such issue-areas as regional security, defense alliances and international co-operation in matters of extradition, terrorism, and narcotics trafficking. See Chapter 5.

14. R. Higgins, "The United Nations: Still a Force for Peace", 52 M. L. Rev. 1, 2 (1989).

15. A.H. Amankwah, "Constitutions and Bills of Rights in Third World Nations: Issues of Form and Content", 12 Adelaide L. Rev. 1 (1989).

16. See C. Palley, "Constitutional Law and Minorities", Minority Rights Group, Report No. 36 (1987).

17. H. Wilson, supra, note 8, at 82. Franck notes further that U.N. membership rose from 82 members at the beginning of 1960, to 154 by the end of 1980. T.M. Franck, supra, note 8, at 755, n. 172 (citations omitted) (1988).

18. See generally A. Fraleigh, "The Algerian Revolution as a Case Study in International Law", in The International Law of Civil War (R.A. Falk, ed.) (1971), at 179.

19. Id. See also Recent Publications, Meyer, 4 Interights Bulletin 13 (1989) who notes that in 1960, the Gouvernement Provisoire de la République Algérienne (GPRA) acceded to the Geneva Conventions 1949, much to the dismay of the French. The Swiss Government, in circulating notification of the GPRA's accession, made a "reservation" based on its non-recognition of the GPRA; Q. Wright, A Study of War (2d ed. 1965), at 1426, who notes that the typical "status quo" dispute involves one party's desire to change existing legal rights by appeal to non-legal considerations, while the opposing party demands the application of law; V.P. Nanda, "Self-Determination in International

Law", 66 A.J.I.L. 321 (1972) (discussion of East Pakistan, and the tentative set of criteria to resolve claims to self-determination in non-colonial settings).

20. Supra, note 18. See also Notes, Kronmiller, "Procedures for Asserting the Rights of Prisoners of War through the International Court of Justice", 13 Virg. J. of Int'l. L. 226 (1972); Anon., "The Geneva Conventions and the Treatment of Prisoners of War in Vietnam", 80 Harv. L. Rev. 851 (1967); A.P. Rubin, "The Status of Rebels under the Geneva Conventions of 1949", 56 A.J.I.L. 472 (1962).

21. See P. Thornberry, "Minorities and Human Rights Law", The Minority Rights Group, Report No. 73 (1987); P. Thornberry, "Self-Determination, Minorities, Human Rights: A Review of International Instruments", 38 I.C.L.Q. 867 (1989).

22. A.J. Armstrong and H.L. Hills, "The Negotiations for the Future Political Status of Micronesia (1980 - 84)", 78 A.J.I.L. 484 (1984). See also G. Thullen, supra, note 12, at 43, 57 - 60.

23. U.N. Charter Article 83(1).

24. A.J. Armstrong and H.L. Hills, supra, note 22, at 497. See also D.J. Harris, Cases and Materials on International Law (3d ed. 1983), at 102, n. 12.

25. See P. Wesley-Smith, "Settlement of the Question of Hong Kong", 17 C.W.I.L.J. 116 (1987). See also B.Z. Tamanaha, "Post-1997 Hong Kong: A Comparative Study of the Meaning of 'High Degree of Autonomy'", 20 C.W.I.L.J. 41 (1989 - 90), A. Neoh, "Hong Kong's Future: The View of a Hong Kong Lawyer", 22 C.W.I.L.J. 309 (1991 - 92). Of interest, Neoh notes that in 1972 the Chinese Ambassador to the U.N. requested the Special Committee on Colonialism to remove Hong Kong (and Macao) from the list of territories falling within the terms of reference of Resolution 1514 (XV). The request was made on the basis that these territories fell entirely within China's sovereign competence rather than within U.N. competence over the ordinary category of colonial territories. The request was granted.

26. T.M. Franck, supra, note 8, at 744. See also C. Campbell, "Extradition to Northern Ireland: Prospects and Problems", 52 M. L. Rev. 585 (1989); M. Sellers, "Agreement Between the Governments of the United Kingdom and the Republic of Ireland, signed November 15, 1985", 27 Harv. Int'l. L.J. 706 (1986).

27. R.J. Kuerbitz, "The Bombing of Harrods: Norms Against Civilian Targeting", in International Incidents (W.M. Reisman and A.R. Willard, eds) (1988), at 238, 258. See also B. Robertson, "Military Intervention in Civil Disturbance in Great Britain - What is the Legal Basis?", XXIX - 1-2 Revue de Droit Militaire et de Droit de la Guerre 307 (1990); J. Smyth, "Stretching the Boundaries: the Control of Dissent in Northern Ireland", 11 Terrorism: An Int'l. J. 289 (1988); R.

Murray, "Killings of Local Security Forces in Northern Ireland 1969 - 1981", 7 Terrorism: An Int'l. J. 11 (1984); J.B. Bell, "Strategy, Tactics and Terror: An Irish Perspective" in International Terrorism (Y. Alexander, ed.) (1976), at 65.

28. B.A. Wortley, "Observations on the Revision of the 1949 Geneva 'Red Cross' Conventions", LIV. B.Y.I.L. 143, 152 - 3 (1983).

29. H. Jackson and A. McHardy, "The Two Irelands - the Problem of the Double Minority", Minority Rights Group, Report No. 2 (3d ed. 1984), at 11.

30. Id., at 10.

31. Telephone message from the British International Red Cross, London, on 20 December 1993.

32. See, e.g., S. Bates, "Mayhew balks at Sinn Fein IRA link", The Guardian, 23 October 1993, p. 5; J. Joyce and S. Bates, "Bombing 'grievous blow' to peace talks", The Guardian, 25 October 1993, p. 2. Of interest, one of the Hume-Adams principles appears to include a recognition of the self-determination of the Irish people. See also O. Bowcott, "Downing Street declaration lays down gauntlet to 'disappointed' Sinn Fein", The Guardian, 16 December 1993, pp. 2 - 3; "Bomb follows Hurd warning", The Guardian, 28 December 1993, p. 2.

33. See, e.g. W. Finnie, "Old Wine in New Bottles? The Evolution of Anti-Terrorist Legislation", Pt. 1 The Jurid. Rev. 1 (June 1990) (discussion of the Prevention of Terrorism (Temporary Provisions) Act 1989); "Easing frontier regulations 'could tempt terrorist attacks on London'", The Guardian, 27 December 1989, p. 2; Fox, Campbell and Hartley v. United Kingdom, H.R.L.R., The Times L. R., 16 October 1990, Case No. 18/1989/178/234 - 236, (minimum standard for judging reasonableness of arrests not met by the U.K.). Of interest, Jackson and McHardy note that the Anglo-Irish Agreement of 1985 accepts that some form of devolved self-government will someday win widespread acceptance in Northern Ireland. They also feel that the likeliest hope for rapprochement lies with the E.C. "where the economic interests of the two parts of Ireland are the same, and are diametriocally opposed to those of Britain". H. Jackson and A. McHardy, supra, note 29. One positive result of the 1985 Agreement was the accession by the Irish Government to the European Convention on the Suppression of Terrorism, 1977, by which countries agree not to treat alleged terrorist offenses as political for the purposes of extradition. See Chapter 5.

34. H. Wilson, supra, note 8, at 70.

35. Id. See also D.J. Harris, supra, note 24, at 172 - 5; D. Ciobanu, Preliminary Objections (Related to the Jurisdiction of the U.N. Political Organs) (1975), at 178; R.P. Anand, New States and International Law (1972), at 54; Q. Wright, "Goa", 56 A.J.I.L. 617 (1962).

36. See T.M. Franck, supra, note 8.

37. Q. Wright, supra, note 33, at 629. See also W.M. Reisman, "The Cult of Custom in the Late Twentieth Century", 17 C.W.I.L.J. 133, 145 (1987) (discussion of the need for an international legislative system responsive to real power sharing and responsibility); J.F. Murphy, U.N. and Control of International Violence (1983), at 18 - 20 (discussion of humanitarian intervention); R.P. Anand, supra, note 33, at 74 (statement that countries with 2% of the total world population can form a blocking third; countries with 11% of the world population can form a winning two-thirds); R. Roxburgh, "The Sanction of International Law", 14 A.J.I.L. 26, 35 (1920) (statement that in the absence of a central enforcement authority, self-help is an established sanction in international law, thus rendering intervention by third states more probable).

38. D. McDowell, "The Palestinians", Minority Rights Group, Report No. 24 (1987), at 29. See also J. Quigley, "Self-Determination", 7 B. U. Int'l. L.J. 1 (1989) (discussion of the Palestinian Declaration of Independence which claims that the Palestinians' right to self-determination was violated at the time they were displaced from Palestine in 1949); S.D. Bailey, War and Conscience in the Nuclear Age (1987), at 89 (statement that since the June 1967 war, 63 General Assembly Resolutions have been adopted condemning the action).

39. R. Shehadeh, Occupier's Law - Israel and the West Bank (2d ed. 1988). See also "Symposium (on the Report of the Landau Commission of Inquiry into the Methods of Investigation of the General Security Service Regarding Hostile Terrorist Activity)", 23 Isr. L. Rev. (1989); J.M. Wolf, "National Security versus the Rights of the Accused: The Israeli Experience", 20 C.W.I.L.J. 115 (1989).

40. See, e.g., General Assembly Resolution 43/21 of 8 December 1988, U.N. Doc. A/Res/43/21, reprinted in 27 I.L.M. 1682 (1988), adopted by a vote of 130 in favor and 2 opposed (United States, Israel), with 16 abstentions. Resolution 43/21 condemns Israel's persistent policies and practices which violate the human rights of the Palestinian people in the occupied territories, including Jerusalem, and, in particular, detentions; A.A. Pacheco, "Occupying an Uprising: The Geneva Conventions and the Israeli Administrative Detention Policy During the First Year of the Palestinian General Uprising: December 1987 - December 1988", 21 Col. H.R. L. Rev. 515 (1990). Compare B. Levenfeld, "Israeli Counter-Fedayeen Tactics", 21 Col. J.T.L. 1 (1982) (statement that the consequences of legal theories which would deny Israel the right to defend itself are politically and legally unacceptable).

41. See Meyer, supra, note 19, who notes that, prior to its accession to the 1949 Geneva Conventions in 1989, the P.L.O. had already declared its intention to abide by Geneva law (and the two 1977 Protocols) a number of times since 1969. He adds that this latest application by the P.L.O. may be newly based on its alleged status as a state, with a provisional government. Of interest, H. Wilson, supra, note 8, at 73, notes that it was not until 1969 that the U.N. first referred to the Palestinians as a "People", rather than as refugees.

See also E. Weisband and D. Roguly, "Palestinian Terrorism: Violence, Verbal Strategy, and Legitimacy", in International Terrorism, supra, note 27, at 258; R.A. Friedlander, "The Origins of International Terrorism: A Micro Legal-Historical Perspective", 6 Isr. Y.B.H.R. 49 (1976). As for the use of the name "Palestinian Liberation Organization", see "Text changed after last-minute dispute", The Times, 14 September 1993, p. 12.

42. See H. Wilson, supra, note 8, at 157 ("Israel is a classic example of a government which vehemently denies any obligation to treat members of Palestinian groups as prisoners of war, even when captured under arms in a conventional engagement, ...".); Report submitted to the Security Council by the Secretary-General in Accordance with Security Council Resolution 605 (1987), U.N. Doc. S/19443, 21 Jan. 1988, reprinted in 27 I.L.M. 1684, 1693 - 5 (1988), which re-affirms that the Fourth Convention is applicable to the Palestinian and other Arab territories occupied by Israel since 1967, including Jerusalem; S.D. Bailey, supra, note 36, at 131.

43. R. Shehadeh, supra, note 37, at xi - xiv. See also Israeli S.Ct. J'ment. in Cases concerning Deportation Orders (the "Affo" Judgment), 10 April 1988, reprinted in 29 I.L.M. 140 (1990).

44. The "Affo" Judgment, id.; Regulations annexed to the 1907 Hague Convention IV Respecting the Laws and Customs of War on Land. See also the 1987 I.C.R.C. Annual Report (1988), at 83, which notes that 1987 was the twentieth year of I.C.R.C. activity in Israel and the Occupied Territories, in pursuance of the application of the Fourth Convention.

45. D. McDowell, supra, note 36, at 26.

46. See, e.g., B. Laurance, "Will peace bring prosperity to the Palestinians of Gaza and the West Bank?", The Guardian, 25 September 1993, p. 40; A. George, "Jibril: Arafat will pay for betrayal of Palestinians", The Observer, 3 October 1993, p. 18; M. Binyon, "Pledges of cash pour in to pay for peace", The Guardian, 14 September 1993, p. 13; B. Lynfield, "PLO braced for burden of governing", id. See also D. Brown, "Arafat faces open revolt", The Guardian, 28 December 1993, p. 1.

47. H. Wilson, supra, note 36, at 26.

48. T.M. Franck, supra, note 8, at 743 - 49.

49. See Chapter 2.

50. See Chapter 5.

51. Such non-state units thereby come into being within the framework of the (pre-) existing system. See C. Palley, supra, note 16, at 18. See also Note, Lombard, "The Survival of Noriega: Lessons from the U.S. Sanctions Against Panama", 26 Stan. J. Int'l. L. 272 (1989); F.

Kalshoven, Belligerant Reprisals (1971); I. Detter de Lupis, The Law of War (1987), at XVII (statement that reductions of geographical power have, to some extent, been replaced by the increased influence of organizations like the EC. Terrorist groups, e.g., the P.L.O., I.R.A.,, Baader Meinhof, have also caused changes in attitudes about established state units).

52. General Assembly Resolution 2625 (XXV), supra, note 13, was adopted without a voté. H. Wilson, supra, note 8, at 71, notes that Resolution 2625 contributed to the 1970 session by making the continuation of colonialism in any form "a crime" in international law, which pronouncement has effect both in IHL and in the control of terrorism.

53. See Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, I.C.J. Reports 1986, at 14; R. Abi-Saab, "The 'General Principles' of Humanitarian Law according to the International Court of Justice", IRRC, No. 259, July - August 1987, at 367; C.M. Chinkin, "The Challenge of Soft Law: Development and Change in International Law", 38 I.C.L.Q. 850, 858 (1989). Compare A. d'Amato, "Trashing Customary International Law", 81 A.J.I.L. 101, 102 (1987) ("(i)f voting for a U.N. Resolution means investing it with opinio juris, then the latter has no independent content; one may simply apply the U.N. Resolution as it is and mislabel it "customary law".); W. Czaplinski, "Sources of International Law in the Nicaragua Case", 38 I.C.L.Q. 151, 160 (1989) (statement that the premise that the rules stated in Resolution 2625 constitute evidence of acceptance of the existence of the rule reaches too far, due to lack of a clear definition of the underlying principles), and at 159, as follows:

> The Court defined the scope of the principle of the non-use of force by interpreting the U.N. Charter, while relying on both Resolutions (2625 and 3314 (XXIX)) ... as evidence of opinio juris. The Court's arguments would have been more convincing if they had referred to these Resolutions as a means of identification of the law contained in the U.N. Charter. The Court decided, however, not to recognize them as elements of the system created by the Charter.

See also Protocol I, Article 1(4).

54. See I. Detter de Lupis, supra, note 48, at 29 (statement that factionalism is the probable result whenever rights of self-determination are not synonymous with the democratic principle of free choice of government by the people); P. Allott, "State Responsibility and the Unmaking of International Law", 29 Harv. Int'l. L.J. 1, 25 (1988) (statement that the modern shift from government for the state to government for the people potentially shelters the behavior of individuals).

55. See Chapter 2.

56. In this way, classification struggles for a share in "the blessings of modern civilization on an equal footing" have resulted in modifications to the principles and standards governing practical aspects of self-determination. R.P. Anand, "Role of the 'New' Asian-African Countries in the Present International Legal Order", 56 A.J.I.L. 383, 390 (1962).

57. See D.P. Forsythe, Human Rights and World Politics (2d ed. 1989), at 6, who notes that human rights, in an empirical sense, are a subject defined by international law, beginning with civil and political rights, then with economic, social and cultural rights, and evolving into rights to peace, development, environment, common heritages of mankind, and humanitarian assistance. Thus, it would appear that such a hierarchical definition on the international plane itself effects a preliminary derogation of notions of national sovereignty.

58. Q. Wright, supra, note 19, at 1394. Nevertheless, the political and legal structures within which governments characterize their acts often protect the ruling élite from discourse, and international evaluation. Compare S.R. Chowdhury, State of Emergency (1984), at 91 (statement that public disclosure of an emergency situation deters governments from taking rights derogation measures against their own populations).

59. See Chapter 4.

60. A. Cassesse, Violence and Law in the Modern Age (1986), at 74 - 5.

61. For this reason, it could be argued that the proper reach of Resolution 2625 has perhaps less to do with formal notions of territorial integrity or the use of force than with the maintenance of order during transition periods of power and resource re-allocation, during which transition periods new states strive to produce a co-incidence of political organization and nationality. The economic life of a state thus being intimately connected with its power to defend itself against attack, material prosperity is made a condition of national self-determination. See D.P. Forsythe, supra, note 53, at 214, who concludes that human rights, as an agent of political socialization, have become a new standard for evaluating a government's right to rule, and of managing system change. See also L.R. Beres, "Terrorism, Insurgency and Geopolitics: the Errors of U.S. Foreign Policy", 17 C.W.I.L.J. 161, 163 (1987), who feels that classification struggles for self-determination are an international law-enforcement reaction which deters offending state governments. Such a characterization would appear to require examination of the subsidiary struggle between two sets of rules, or law, in order to make effective distinctions in entitlement to protection and rights, as dependent on terrorist or freedom fighter status.

4. The Effects of Wars of Self-Determination on the Evolution of International Humanitarian Law

International humanitarian law (IHL), taken in its broad sense, is potentially applicable in any time or place individual human beings need legal protection against the activities of states. (1) This legal régime becomes relevant whenever a state has jurisdiction over an individual, whether the state exercises it in a time of "peace", or in a situation of "war". The protections provided by IHL, when exercised, restrict state jurisdictional functions and powers which allow that state to deal with the individual concerned. Thus, IHL in its broad sense encompases both the law of war and aspects of human rights law.

The law of war, and its extension in particular on the basis of the right to self-determination, is the general topic of this Chapter. The law of war as codified subdivides between the provisions contained in the Hague Conventions or law of war proper, and the Geneva Conventions, or humanitarian law. (2) Gaps between codifided principles of IHL and IHL principles which form part of customary or general international law have obvious consequences for the content of the law applicable to a particular armed conflict. Nevertheless, codification of the underlying principles does not erase the independent existence of such principles as principles of customary law. The customary principles of IHL remain basic obligations in the context of assessing state and individual responsibility for violations of the relevant conventions. (3) In the context of an armed conflict to which IHL applies, gaps between traditional theory and operational conditions thus require as a minimum the application of IHL as contained in

international customary law. (4)

In order to illustrate the way in which the use of force in struggles for self-determination has affected the development of IHL, the separate historical development of the three branches of IHL is discussed in this Chapter Also discussed is the growing co-operation among these three branches in developing a more integrated approach which emphasizes the international protection of the individual. In this way, the continued adaptation of an integrated IHL to general international law is used to illustrate the effect wars of self-determination have had on the law of war, and that the extension of IHL to such wars in Protocol 1 Article 1(4) was mandated. (5) In particular, this extension of IHL to liberation struggles, it is argued, helps states to delineate between terrorists and freedom fighters for purposes of exercising jurisdiction over perpetrators of terrorist acts. Thus, state action utilized to deal with liberation conflicts need no longer plague the international fight against terrorism. Protocol 1 extends to states sufficient enforcement mechanisms to allow the international community to prosecute organized, tactical acts of violence perpetrated in liberation struggles, and to distinguish such acts from individual acts of political or economic terrorism.

By way of preliminary discussion, an assessment of the co-ordinated value of the three branches of IHL first requires a brief overview of each in isolation. Further, a degree of interdependence and permeability between and among the three branches of IHL is a function of their separate-but-similar emphasis on the protection of the individual against the activities of states. (6) As has been discussed, state jurisdictional over-assertions, and state distortion

through language paradigms regarding "the national interest" (7), have resulted in competing interpretations of U.N. Charter provisions, and of the appropriate allocation of competences in the post-1945 world community. As more matters may be of international concern than of international jurisdiction, the substitution of "concern" for "jurisdiction" through an emphasis on the protection of the individual against the activities of states, as contained in IHL, effectively removes from the domestic sphere matters considered previously to be of domestic interest only. (8)

Further, state recognition of individual interests protected in IHL provisions means in legal terminology the provision of individual rights, and vested rights must have a remedy in the event of breach. Such remedies must be provided domestically by states parties to IHL in compliance with their international legal obligations (9), and the national remedy cannot negate the international right. (10) Thus, an integrated approach to IHL, through co-ordination of the law of war and human rights law, strengthens both legal certainty as to the terminology used, and the true meaning for individuals of IHL provisions.

Nevertheless, permeability and integration may lead to conceptual and legal confusion when the time arrives to apply the content of IHL to a particular dispute. (11) Two rules of the same content may be subject to separate treatment as regards the organs competent to verify their implementation. The procedures underlying implementation of the three branches of IHL may vary widely, even though the same, or identical, outcome is comtemplated. In this vein, Dr. Pictet makes the following distinctions between the law of war and human rights law:

1. The law of armed conflicts comes into operation at the very time the exercise of human rights is prevented or restricted by war;

2. Geneva law is valid only in the case of armed conflict while human rights are essentially applicable in peacetime, containing derogation clauses in case of conflict;

3. Human rights govern relations between the state and its own nationals; the law of war, those between the state and enemy nationals;

4. The Geneva Conventions are universal and of a mandatory nature;

5. The systems of supervision and sanctions differ; and

6. If only for the sake of expediency, the two systems, while complementary, must remain distinct. (12)

With this basic delineation in mind, Dr. Pictet further distinguishes Hague law and Geneva law as follows:

7. The law of the Hague ... determines the rights and duties of belligerants in the conduct of operations and limits the choice of the means of doing harm ... . (T)he purpose is to regulate operations, and which are still partly geared to military necessity; and

8. The law of Geneva ... is intended to safeguard military personnel placed *hors de combat*, and persons not taking part in hostilities ... . The Geneva texts were drawn up solely for the benefit of the individual. Generally speaking, they do not grant states any rights to the individual's detriment ... . In Geneva, an era was opened in which the individual and the principles of humanity come first. The law of Geveva, in fact, applies to the effects of war rather than to the hostilities. (13)

The adoption of an integrated approach to IHL consists of both codified and customary international legal obligations which are designed to protect and ensure protection of the individual in all circumstances. The extension of this legal régime automatically to wars of self-determination in Protocol 1 Article 1(4) incorporates such an integrated approach, and further, reflects the realities of the methods of modern warfare. In particular, it is argued in this Chapter that the

need for protection during non-conventional armed conflicts, many of which utilize methods of terror violence, is recognized by the international community by means of the integrated approach to IHL adopted in 1977.

The structure of this Chapter is as follows. The separate development of the law of war and limited aspects of human rights law are briefly discussed in the First Part in that the two are distinct legal régimes. The law of war is separated into Hague law or law of war proper, and Geneva or humanitarian law. On the basis that an evolving IHL has brought together these separate legal régimes, which development culminates in an integrated approach in Protocol 1 in 1977, IHL is examined by means of the sum of its parts. The necessity to extend integrated IHL protections to wars of self-determination as a function of the realities of modern warfare, which realities include the increased use of terror-tactics and irregular armies, is discussed in the Second Part. This latter point is developed in the Third Part, and the issue that wars of self-determination are international armed conflicts from their inception is examined in light of the separate status of approved "Peoples" in contemporary international law, and in view of the need to control the means and methods of warfare utilized in them.

It is concluded that the separate branches of IHL may seem to have little relation to each other in that armed conflicts by definition impinge on both human rights and humanity. Yet, the evolution of integrated fundamental notions of justice in the IHL legal régime has resulted in codified and customary individual international protections in all circumstances. As such, the extension of IHL to wars of self-

determination, as international armed conflicts, reflects the adaptation of IHL to developments in war technology during the Twentieth Century and, in particular, to that employed in the post-1945 era. Further, while the extension of IHL to wars of self-determination restrains state action during what previously had been "civil" wars, it also means that states may use the provisions of IHL to deter acts of terror-violence perpetrated during struggles for national liberation.

4.1. The Historical Development of International Humanitarian Law

The development of IHL in the two separate branches of the law of war, which includes both Hague and Geneva law, and aspects of human rights law reflects a unity of purpose: the protection of the individual as against the actions of states. The re-interpretation required for an integrated philosophy of the two separate régimes has resulted nevertheless in conceptual and legal confusion, primarily regarding the content of the law to be applied during particular armed conflicts. (14)

The different concerns reflected in the separate evolutions of Hague law, Geneva law, and aspects of the law of human rights are discussed in this Part, which concerns converged in codified form in Protocol 1 of 1977. Although the separate concerns reflected in each branch or subdivision have resulted in juridical conflict through an overlap in norms and jurisdiction, it is concluded that the resulting permeability of the fundamental principle of protection of the individual may better create a symbiotic relationship which is sufficient to ensure the continued development and observance of this area of international law.

4.1.1. Hague Law, and Control of the Means and Methods of Warfare

The 1899 and 1907 versions of the Hague Conventions (15) resulted from previous attempts to codify the law of war, the first of which may be said to have been the Lieber Code, in 1863. (16) Issued by the U.S. War Department as U.S. Army General Order No. 100 to regulate the behavior of the Northern Forces during the American War Between the States, the Lieber Code was nevertheless of a limited nature, and contemplated only the conduct of hostilities during a civil war. (17) Nevertheless, the provisions of the Lieber Code corresponded to and relied upon contemporaneous European practice. The Code provided in turn a format for later codifications to control the *jus in bello*, and it formed the basis of subsequent projects to codify the international laws of war, most notably, the Brussels Conference of 1874 (18), the Oxford Manual of 1880 (19), and the Hague Conventions on land warfare of 1899 and 1907. (20)

The Brussels Conference was called at the initiative of Alexander II of Russia. The resulting Brussels Project was not approved but provided the basis for the Oxford Manual as formulated by the Institute of International Law in Oxford in 1880. Neither the Brussels Project nor the Oxford Manual had any legal force. (21) The 1899 Hague Convention was convened by Czar Nicholas II (22), during which conference all participating states agreed to provide instructions and regulations regarding the proper conduct of war to their land forces. The 1907 Hague Conventions and annexed Regulations differed only slightly from the 1899 version, but fewer states ratified the 1907 instruments.

Of particular interest, both the 1899 and 1907 Hague instruments were prompted by concerns about evolving war technology, and the

preamble of both expressed "the desire to serve, even in this extreme case (of war), the interests of humanity and the ever progressive needs of civilization". (23) The preamble to the Hague Conventions further reflected technological and humanitarian concerns by inclusion of the "Martens Clause", the 1907 version of which reads as follows:

> Until a more complete code of the laws of war can be issued, the High Contracting Parties think it expedient to declare that in cases not included in the Regulations adopted by them, populations and belligerants remain under the protection and the rule of the principles of the law of nations, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience. (24)

Despite the unfortunate placement of the Martens Clause in the preamble, it is considered to be of the same juridical character as the texts of the Conventions, and to provide evidence of intent as regards the guiding standard by which to interpret the treaties. (25)

Subsequent attempts to harness technological development were made in 1922 at the Washington Conference. The resulting Treaty relating to the Use of Submarine and Noxious Gases in Warfare never entered into force. (26) In 1923 at the Hague, the Rules of Air Warfare were drawn up, but never adopted in legally binding form. (27) In 1925, the Geneva Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases and of Bacteriological Methods of Warfare was signed, and entered into force on 8 February 1928. (28) A related development occurred in 1928 with the ratification by sixty-three states of the Pact of Paris, or Briand-Kellogg Pact (29), by which the waging of aggressive war was denounced. When viewed in conjunction with the efforts at disarmament and the arbitration of international disputes characteristic of the League of Nations (30), the elements of the

international crime of waging war were present sufficient to be relied upon as customary law in 1945 - 46 at the Nuremburg International Military Tribunal. (31)

These early attempts to codify the customary international law underlying the rules regulating hostilities were aimed at predictability in state practice during times of armed conflicts. (32) They were also aimed at restraint regarding the means and methods adopted for use within contexts of military necessity. Nevertheless, new developments in war technology outstripped state attempts to restrain the use of force in international relations, and when World War Two began, existing codifications were to a certain extent already obsolete. Thus, despite the many efforts to restrain states in their choice of military means and methods, "(t)otal war as waged during the Second World War saw a continued violation of the laws of war by all belligerents". (33) Kunz, writing in 1951, asserted that war law needed revision urgently, and termed the disregard of continuing efforts to develop war law the "policy of the ostrich". (34) Of interest, Kunz further asserted that "the laws of war pertain rather to the law of peace", as they formed a part of human rights (35). Nevertheless, many legal scholars felt that, war having been outlawed in 1945, the regulation of its conduct was no longer relevant to internationnal law. Revision finally occurred in Protocols 1 and 2, in 1977, as is discussed later in this Chapter.

4.1.2. Geneva Law and Humanitarian Concerns

The development of Geneva law has paralleled that of Hague law in that the two treaty bodies haved proved effectively inter-dependent in their pragmatic effects. Yet, Hague law and Geneva law evolved in juridically distinct forms. (36)

The first Geneva Conference in 1863 resulted from the publication in 1862 of the book Un Souvenir de Solférino, written by Henri Dunant, a citizen of Geneva who had witnessed the battlefield suffering at Solférino in 1859. Dunant's subsequent proposal to organize relief societies for the care of battle wounded sparked interest throughout Europe. Sixteen states were represented at this founding conference of the Red Cross in 1863, during which proposals for the creation of national committees were adopted (37), and this conference gave impetus to subsequent Geneva Conferences in 1864, 1906, 1929, 1949 and 1977.

In 1864, neutrality in medical treatment in particular was agreed, and entered into force on 22 June 1865. (38) Thirty-three articles agreed in 1906 included among other things provisions for the transmission of information and the express recognition of voluntary aid societies. The 1906 Convention remained in force until 1970. (39) The 1929 instrument (40) included a new Convention for the protection of prisoners of war which "complete(d) similar provisions contained in the Hague Regulations of 1899 and 1907". (41) The 1929 Conventions were subsequently replaced in 1949. These early instruments maintained similar divisions into chapters and articles. All provided improved protections for the medical personnel involved in humanitarian relief and assistance, and for the victims of war, generally. New provisions filled gaps exposed in the operation of the instruments during actual armed conflicts. Intermediary draft conventions served as guidance to states regarding the growing potential of humanitarian law. Then, in 1945, the U.N. system, working from the failure of the League of Nations, placed the rights of the individual on an improved footing. The unity of purpose resulting from the Second World War in the

international community made 1949 "a good time to discuss the rights during times of armed conflicts of the individual rather than of states". (42) The result of this heightened interest was a post-war Geneva conference convened to update existing provisions.

The four Geneva Conventions of 1949 apply primarily to conflicts of an international character. The First Convention, for the sick and wounded (43), was the fourth version, previous Conventions having been in 1864, 1906 and 1929. The Second Convention, for the wounded, sick and shipwrecked (44), replaced the 1907 Hague Convention for the Adaptation of Maritime Warfare of the Principles of the Geneva Conventions. The Third Convention, for prisoners of war (45), replaced the 1929 instrument. The Fourth Convention, for the protection of civilian populations (46), was a completely new codification though some provisions concerning the protection of civilian populations were contained in the Regulations annexed to the Hague Conventions of 1899 and 1907. The 1929 Geneva Conference had recommended the drafting of a convention for the protection of civilians, to be discussed at the next scheduled conference in Geneva in 1940. World War Two intervened. While the 1949 revised version of this draft supplements the Hague Regulations on the same subject, it does not deal with the limitation of the use of particular weapons. (47)

Of particular interest to the present discussion is Common Article 3 to the four Geneva Conventions of 1949. The subject matter of Common Article 3 is wars of a non-international, or civil, nature, and it is frequently termed "a treaty within a treaty" in that it provides for minimal humanitarian protections. (48) The standards contained in Common Article 3 have as their source the Martens Clause, and are based

on fundamental considerations of humanity. In so far as the Geneva Conventions of 1949 were applicable in liberation struggles prior to 1977, it was on the basis of Common Article 3. (49) Common Article 3 may be termed aspirational in that domestic law enforcement methods for the control of domestic armed conflicts are often incompatible with rules governing international armed conflicts, if only because there is merely discretionary provision for a Protecting Power regarding non-international armed conflicts. In that Common Article 3 provides for the observance of fundamental, or minimal rules of humanity during domestic armed conflicts, it is perhaps more a human rights document. Its application to a particular situation of domestic armed unrest is thus dependent on "good government", and unfortunately it has not been expressly invoked during the U.N. era, mainly for political reasons. (50)

The 1949 Geneva Conventions managed to mix a sufficient amount of Hague and Geneva law, to be considered ideologically harmonious with Hague law, by emphasizing the proper confines of "military necessity" and "proportionality". (51) Rosenne, in particular, points to the "modernization" of the participation clause in 1949, which alteration evidenced an intent to combine the two branches of law by enhancing state responsibility for the conduct of war. (52) Further, the Nuremburg International Military Tribunal's rejection of the defense of superior orders, wherever moral choice existed (53), resulted in 1949 in the provision of individual international responsibility for "grave breaches" of Geneva provisions. (54)

In conclusion, the preliminary mix of Hague and Geneva law in 1949 was a first step in the transfer of control of the development of

the rules of war from the individual states which might be involved in a conflict to the international community. This step was taken in a post-war atmosphere of heightened concern for the welfare of the individual as against the actions of states. Nevertheless, gaps in practice soon emerged which demanded new revisions to the existing law of war. These revisions were undertaken formally from 1974 to 1977 (55) and resulted in Protocols 1 and 2, as is discussed later in this part.

4.1.3. Human Rights and IHL

International individual interests should be protected in domestic law as forms of vested rights through state implementation of the IHL treaty régime. These interests should thus have available a national remedy in the event of breach. (56) Although individual rights, or human rights are generally applicable in "peacetime", at least four of the fundamental human rights remain non-derogable during emergency situations and thus continue to provide protection to individuals as against the actions of states during times of armed unrest. These four basic rights are contained in IHL, and have continuous applicability: the right to life, the right to a fair trial and due process of law, the right against the application of ex post facto law, and the right to be free from involuntary servitude and from the infliction of torture. (57)

It is beyond the scope of the present discussion to deal in any detail with the post-1945 human rights régime, particularly as the major U.N. documents on human rights - the 1948 Universal Declaration of Human Rights, and the 1966 International Covenants on Civil and Political Rights, and on Economic, Social and Cultural Rights - do not deal in any way with problems of armed conflict. Nevertheless, humanitarian law

contains limited aspects of human rights law. In addition to the minimum standards of humanity provided in Common Article 3, the Fourth Convention of 1949 has been termed "the greatest departure made by the Geneva law of 1949 and ... may be regarded as a manifesto of human rights for civilians during armed conflicts". (58) Protocols 1 and 2, as discussed later in this part, further extend the protections of human rights in armed conflicts.

The London Charter (59) may be viewed as the first codification of the reality of human rights during war, in that not only did it establish the Nuremburg International Military Tribunal, but it led to the condemnation of traditional war practices such as murder, deportation for slave labor, and plunder of property. (60) The complete rejection of the defense of superior orders also occurred at Nuremburg. This development holds particular interest for purposes of military codes and manuals by which armed forces are guided. Given the role of states' interests implicated in particular situations of armed conflict, national variations in implementing IHL and the subjectivity of strategic approaches to the law of war easily become re-inforcing agents of national interpretations of IHL provisions. Thus, domestic military codes continue to exist alongside Hague and Geneva law, reflecting individual state concepts of necessity, proportionality and national security. (61) Battlefield law as contained in some military manuals prior to the Second World War had to be modified subsequent to the Nuremburg Trials in accordance with the Tribunal's firm stand on the rejection of the defense of superior orders. (62)

The role of limited aspects of human rights law in IHL has fundamental importance, as the deployment of the armed forces is rarely,

if ever, considered to be justiciable in the accepted sense of the word (63). In particular, the application of combat law tends to be discretionary. (64) Nevertheless, "(t)he theoreticl difficulty of a soldier challenging his orders on the ground of perceived illegality is answered by the law's insistence that each man is responsible for his own actions". (65) The assertion contained in Hague law that belligerants do not possess unlimited discretion as to the means they may employ for injuring the enemy or for achieving the purpose for which it has been inflicted further mandates a role for human rights in IHL. The significance of this latter assertion is that fundamental guarantees regarding the treatment of persons in the power of a party to the conflict cannot fall below nonderogable human rights.

The inclusion of human rights in IHL is thus the natural result of the rationalization of the concepts underlying each branch of IHL, particularly for purposes of modern interpretation and subsequent implementation of the substance of the standards enunciated. Inherent in this rationalization process is the basic permeability of the protection of the individual as a distinct normative precept within separate modes of intervention in operation to produce system transformation during situations of armed conflict.

4.1.4. Protocols 1 and 2 of 1977 - Convergence of Previously Separate Régimes

The modification of the participation clauses in 1949 (66) led to a drastic lowering of the conceptual threshhold for ready implementation of IHL in situations of armed conflict. Further complicating state observance of humanitarian law in the post-1945 era was the steady incursion into matters of traditional state sovereign competence made by

the U.N. system. In particular, the upsurge of national independence movements in the 1950s and 1960s made assessments or evaluations of the use of force political, with pragmatic effects on prevailing notions of state sovereignty. (67) The modification of the participation clause theoretically made the Geneva Conventions of 1949 easier to apply during times of armed conflict, but states appeared unwilling to characterize post-1945 conflicts as international situations in which IHL should be implemented. While it is beyond the scope of the present discussion to review in detail the forms of armed conflicts and war practices which ultimately mandated the Diplomatic Conference of 1974 - 77 (68), many liberation wars occurring prior to this time revealed codification gaps in the applicable law. In particular, the absence of any provision in Common Article 3 for a Protecting Power allowed sufficient scope to states to supercede their authority regarding the legality of means and methods used in public order exercises. The war in Viet Nam also revealed gaps in the 1949 codifications. Thus, the role played by state authoritative interpretation regarding the characterization of armed unrest for purposes of applying the correct level of IHL in a post-1945 armed conflict proved an important reason to convene the 1974 - 77 Diplomatic Conference to update and supplement the existing laws of war.

A major political victory was achieved by third world states at the Diplomatic Conference when wars of self-determination were automatically "internationalized" in Protocol 1 Article 1(4). (69) This Protocol, which is applicable to international armed conflicts and supplements the 1949 Geneva codifications (70), extends to wars of self-determination the full provisions of IHL on the basis of their underlying cause, rather than as the result of the scale or intensity of

hostilities. (71) This extension is of particular importance in that fundamental juridical, normative and jurisdictional notions implicit in domestic versus international law are implicated. (72)

Further, Protocol 1 contains a larger element of Hague law through stricter provisions regarding new weaponry (73), proportionality (74), military necessity (75), and the identification of combatants. (76) This mix has led to questions whether Hague and Geneva law are so re-inforcing and interdependent that Protocol 1 can make political positionings justiciable without undue conceptual and legal confusion. (77) There is concern, too, that states may oppose the elevation of national liberation conflicts to ones of an international character by making Common Article 3 inapplicable until a declaration to accept and apply the Geneva Conventions is made by a liberation movement, pursuant to Article 96(3) of Protocol 1, to make the Conventions and Protocol 1 equally binding upon all parties to the conflict. (78)

Protocol 2 has a purpose different to that of Protocol 1: it is designed to supplement Common Article 3. It is also more specific. (79) Protocol 2 "internationalizes" domestic or non-international armed conflicts by requiring threatened states to observe international standards of fundamental due process guarantees (80) and safeguards for persons whose liberty has been restricted. (81) Nevertheless, this "internationalization" of domestic armed situations potentially exacerbates international relations as it allows consensual humanitarian intervention, though there is still no provision for a Protecting Power. It is of interest that the preliminary drafts of Protocol 2 were far longer than its appearance in final form, which final version still has its critics. (82) Best remarks that "(a) strong doctrine of sovereignty

stalks through these Protocols like a riot squad" (83), and it must be queried whether incursions into sovereign matters resulted in this shorter, less satisfactory version.

It is concluded that the confines and convergences of IHL are discovered through an examination of its parts. The present complex interlock of Geneva and Hague law, and aspects of human rights law, exhibits different treaty instruments striving for functional overlap and permeability. Variations in the levels of protections afforded could make assessments of responsibility more difficult however when all parties to a conflict consider themselves bound by different instruments. Of particular concern are traditional principles which states may believe allow them to act despite the presence of new codified provisions which purport to prevent states from acting. Thus, many of the political considerations involved in the allocation of competences in the U.N. system imply that any normative or juridical melding of these different philosophies may prove to be more apparent than real. (84) Nevertheless, the extension in 1977 of integrated notions of justice to wars of self-determination reflects international concern about operational conditions in liberation struggles, and the adaptation of IHL to other developments in general international law. (85)

4.2. The Necessity to Extend IHL to Wars of Self-Determination

As previously discussed, the 1977 revisions to Geneva law were mandated by growing gaps between older codified rules governing armed conflicts and the emergence of new "rules" by virtue of technological developments and state utilization of such developments in the absence of express prohibitions. (86) Given the recognized separate status of

"Peoples" struggling for their rights of self-determination in general international law (87), there further seemed little legal contradiction in 1977 between prohibiting war and regulating resort to it through rules applicable to large-scale violence. (88) The unwillingness of states to apply IHL in their wars of self-determination in the post-1945 era made the dividing line between violations of the existing laws of war and the creation of new rules of war, or trends in that direction, a vital issue to address. (89) The use of newly developed means and methods of warfare meant that the law of war by no means belonged to history. Yet, considerations of state sovereignty in the deployment of new war technology often outweighed the primacy of law, particularly in "domestic" armed conflicts. (90)

This Part discusses the adaptation of IHL, in 1977, to liberation wars as a function, in particular, of the increased levels of assistance from foreign states to rebel factions, and of the perceived need to regulate resort to war.

4.2.1. The Failure of Common Article 3, and Foreign State Intervention in Struggles for Self-Determination

The rules of international law apply to war regardless of its cause. (91) In other words, the study and correct application of the laws of war do not require the identification of the source of the right to wage it. (92) The unwillingness of states to apply humanitarian law, and, in particular, Common Article 3, in domestic armed conflicts resulted from the political context of the structured levels of IHL protections. For example, states are restrained from opting for certain means and methods of maintaining public order once a situation of armed unrest is recognized as such through humanitarian treatment. States

experiencing situations of domestic armed unrest prefer to refer to "police action", "pacification operations", or "fraternal assistance". (93) Given the prohibitions against the threat or use of armed force in the U.N. Charter, this hesitation to recognize a war appears prudent. In view of this political context, third states have proved willing to further their own aggressive policies by aiding and assisting liberation groups in strategically placed struggles for self-determination.

Fryer, in his discussion of international armed conflicts in 1977, notes the following:

> Despite the built-in deference of Common Article 3 ... for the primacy of law during internal uprisings against an incumbent government, the applicability of the Article has been skirted in even the most massive internal conflicts since 1949. Governments ... have sought to preserve maximum flexibility, in the national interest, in dealing with internal armed conflicts by avoiding such formal international legal obligations ... (as) might ... attach in favor of a challenging group ... by virtue of their treatment by the incumbent in any manner as a legal personality. (94)

Liberation uprisings were initially the result of the U.N. approach to colonial policy. (95) However, the terms of the U.N. Charter were subsequently interpreted to cover not only former mandates and areas detached from the Axis powers but any territories that might be brought under the system. At its furthest extension, U.N. provisions potentially applied to auto-determined "Peoples" wishing to reverse pre-colonial grievances and reacquire possession and control of national lands and resources.

This new approach to colonial policy was a clear recognition of the "right" of formerly dependent "Peoples" to an independent existence. This development further challenged traditional reliance on delineations between international and internal war, becoming instead

decolonialization and/or secession wars. (96) As such, the danger of recognizing a liberation struggle by virtue of Common Article 3 treatment was clear to states unsure of the survival of their own sovereignty and territorial boundaries. (97) The claims of liberation movements posed additional problems to concepts of state sovereignty when such claims were based on opposition to human rights violations as practised in régimes pursuing policies of apartheid, racism, and genocide. (98)

Considering themselves possessed of international rights on both peremptory and conventional levels, liberation movements asserted that their separate and distinct status permitted requests to foreign states for aid and assistance in their struggles to achieve self-determination through all means at their disposal, which include armed force and methods of nonconventional warfare. (99) Sympathetic states have afforded such assistance, which has led to accusations of premature recognition of liberation groups, and interference in the domestic affairs of sister-states. These developments, and the need to regulate them, thus led to the inclusion of wars of self-determination in Protocol 1 as international armed conflicts.

The subjective, discretionary and interpretive elements inherent in characterizing liberation conflicts have raised questions whether the legitimacy of armed conflict to achieve self-determination is the proper subject of the laws regulating the conduct of war. In other words, is it appropriate to allow the cause of a war to determine the level of international regulation and protection to be made applicable to its participants? Nevertheless, the significance of this "political" extension of humanitarian treatment rests on the deeper

penetration into international law of the separate norms of Hague and Geneva law, and aspects of human rights law in the domestic sphere. This extension thus rests on other developments generally in the international order, and the realities of modern armed conflicts.

4.2.2. Regulation of and Restrictions on Contemporary Scales of Violence

Humanitarian law, as formulated in the late Nineteenth and early Twentieth Centuries, reflected mutual states' interests in regulating and limiting the categories of permissible participants and strategies in the processes of armed violence. This body of law was also intended "to save from extinction the 'human rights' limitations on the exercise of armed co-ercion within the social process". (100) Yet, as noted by Kunz in 1951,

> These codifications presupposed the doctrines of democracy, capitalism, economic liberalism, the principle of the sanctity of property, the strict distinction between private enterprise and economic activities by the states, ... and the strict distinction between armed forces and civilian populations. ... The appearance of state Socialism, even in democracies, and of totalitarian régimes has changed these conditions basically. They paved the way for the modern 'total war', which made its first appearance in the First World War. (101)

Kunz defines "total war" as "the result of the combination of technological progress in arms with a changed manner of waging war, of the combination of unlimited use of highly destructive weapons for unlimited war aims". (102) He adds: "(e)verything depends on the heart of men who use them". (103)

Improved techniques for waging war, from mechanized to automated to economic, have proliferated in the U.N. era. (104) The continued refinement of chemical, biological, and incendiary weapons of warfare

have made prohibitions of weapons used in the First World War obsolete. Ready breach of the prohibitions against the threat or use of force achieved through the practice of liberation struggles have further confused the "right" to wage war with the need to revise and supplement the laws of war. (105) States have been unwilling, for political reasons, to invoke more than traditional frameworks of the laws of war. This has led to the development of "new" rules in practice, and the resulting inadequacy of the codified rules when deploying new weaponry resulted in the "non-regulation" of many post-1945 armed conflicts.

As previously discussed, Protocol 1 supplements and expands the rules regarding new weaponry, the proportionality of its use, and those persons entitled to use it. (106) The inclusion of wars of self-determination in IHL thus effects an immediate alteration in state positive and negative obligations with regard to the liberationist participants in such conflicts. This inclusion further affects fundamental juridical, normative and jurisdictional notions implicit in the characterization of a domestic versus an "international" use of force. For example, the extension of prisoner of war status to irregular troops utilizing nonconventional means and methods of warfare places a heavy duty of care upon governments. Similarly, combatants must ensure that their military actions do not harm civilians unnecessarily, even those civilians who may be surreptitiously aiding the liberation cause. (107)

Further, Hague law and Geneva law have different jurisdictional bases. (108) The former is regulated by notions of state security and military necessity, and allows states to act. The latter does "not grant states any rights to the individual's detriment", and thus aims to

restrict states in their actions. (109) To reinforce the provisions of both bodies of law, individual responsibility is provided, with each person responsible for his or her own actions. However, provision is made in Protocol 1 Article 96(3) for a liberation group to "assume(...) the same rights and obligations as those which have been assumed by a High Contracting Party" only after unilaterally declaring itself prepared to do so. Should it not decide to deposit the discretionary Article 96(3) declaration, asymmetry in responsibility could be the result. Thus, a major problem is the difficulty of a "soldier" who challenges his orders as illegal in view of humanitarian prohibitions. (110)

Further, much "new" law has been incorporated in Protocol 1, particularly regarding state restraint in the development and deployment of new weaponry. Much of this "new" law has proved controversial, and it must be queried whether codified international law can be so quickly transformed into operational practice absent the willing support of concerned states. (111) The absence of several major Western states from the ratification process would imply not. The complexity of IHL, its aspirational content, and its ideological divisiveness thus complicate individual state commitment to its observance and respect in times of actual armed conflict. Nevertheless, the 1977 supplements were a major achievement in bringing the laws of war into conformity with other developments in international law. (112)

4.3. Protocol 1 and the Use of Violent Force to Achieve the Goals of Self-Determination

U.N. principles regarding the equal rights and self-determination of "Peoples" (113), as developed in practice, have led to conflict when

juxtaposed with the specific rules regarding the inviolability of territorial integrity, and the political independence of states. (114) Further, the legal etymologies of the two sets of obligations share little in common. (115) For example, the balance of carefully established fields of competences preserved in the U.N. system means that states retain control of all matters within domestic jurisdiction. (116) A desire to safeguard traditional areas of sovereign control thus often leads to political distortions in the implementation and observation of international obligations. The rights claims of liberation groups may thus be viewed as demands for control, and for system transformation to occur. Where such rights claims conflict with sovereign state notions of political independence and territorial integrity, the use of force by national groupings claiming entitlement to an independent, self-governing existence has been the result. Given this basic competition in perception of the meaning of U.N. Charter provisions, liberation struggles remained largely unregulated by international law, until 1977. (117)

This Part argues that the 1977 supplements to Geneva law, while a remarkable development, confound the "right" to wage war with the laws regulating war through a piecemeal approach to various forms of domestic uprisings, and, in particular, to wars of self-determination. As such, the effect of wars of self-determination on an integrated IHL threatens both the evolution in normative permeability of the three IHL branches, and the non-observance of the laws regulating the conduct of hostilities.

4.3.1. The "New" Approach to Self-Determination

In contrast to Article 22 of the League of Nations Covenant, the

terms of the U.N. Charter regarding the peaceful and orderly attainment of independence by dependent territories and/or "Peoples" are uncertain as to their possible application in fact. (118) Popularly viewed as covering not only former mandates and areas detached from the Axis powers, they arguably covered other territories or "Peoples" as might wish to break from traditional confines of the "inviolability of territorial boundaries and political independence" of states. For example, historic wrongs provide the source for at least two arguments that "current state boundaries are illegitimate". (119) The first is the acquisition of land through conquest by a state from which a national grouping wish to secede. The second is the post-colonial and post-war consolidation of incompatible "Peoples", through the drawing of artificial territorial borders by colonizing nations. As such, it is sometimes argued that self-determination claims must in part be based on reacquisition of historic territory. (120)

The modern version of self-determination does not focus on the history of a particular territory, but instead relies on complex and conceptual political-legal interlocks, which operate to determine a "Peoples" status as "distinct", and which interpret nationality in ways additional to mere ethnicity or race. Criteria mentioned in Protocol 1 Article 1(4) for the use of force in such struggles are strict, and include the existence of colonial domination, of a racist régime and/or of alien occupation. The I.C.R.C. Commentary however makes further mention of "a common sentiment of forming a people, a political will to live together as such", and "apart from a defined territory, ... a common language, common culture or ethnic ties". (121)

The actual contexts of historic grievance characteristic of many

liberation wars do not co-incide with the confines of post-colonialism or the U.N.'s existing ethnic map. The "right" to wage war for self-determination has been unevenly exercised, with a growing incoherance in the identity of "Peoples" auto-defining themselves as such, and in state practice and attitude towards "approved causes". The recognition of particular liberation conflicts as legitimate, while others are termed "terrorist action", is a development which allows political considerations to obscure the many causes of such conflicts, to the ultimate detriment of appropriately assessing their legitimacy and level of subsequent regulation. Thus, differing ideological approaches to interpretations of entitlement to self-determination have resulted in liberation wars becoming a politically sensitive area of international law. (122) The piecemeal approach to domestic armed conflicts taken by the strict criteria contained in the 1977 Protocols thus threatens the integrated IHL régime with non-implementation in fact, as states avoid self-regulation and -imposition of the duties and burdens required by this body of law. (123)

4.3.2. The 1974 - 77 Diplomatic Conference, and Political Compromise

As previously discussed, it is hard to establish exactly how and when the principle of self-determination became a component part of general international law (124), but the growth in strength of the notion through a series of U.N. Resolutions and its incorporation in different areas of international law resulted in increased support at the Diplomatic Conference for the 1977 extension of humanitarian law to liberation conflicts. In particular, it was felt that the protections of IHL must be extended to the participants and victims of the armed liberation struggles which flowed from frustrated claims assertions and

attempts at system transformation, the aims of which could only be achieved through the use of force. (125)

While the legality of the use of force in wars of self-determination is dealt with elsewhere in this discussion (126), it is noteworthy for present purposes that U.N. General Assembly Resolution 3103 (XXVIII) of December, 1973 recognized the extension of the Third and Fourth Geneva Conventions to liberation wars. This development, in addition to the publicity attrocities committed during liberation wars attracted, mandated the modernization of that treaty body. (127)

The explosion in new states during the decades prior to 1977 resulted directly from operation of the U.N. principles of equal rights and self-determination, and meant that the participants at the 1949 Geneva Codification Conference were outnumbered in 1974. (128) There were also divergences in 1974 in politico-ideological terms, in that many of the new participants had been heavily influenced by state Socialism. This meant in real terms that political compromise would be required if the codification revisions were to proceed. (129) Thus, the results of accelerated delimitations in state jurisdiction through the growth of the notion of self-determination were in evidence at the Diplomatic Conference for the revision of the 1949 Geneva Conventions. State participants numbered from 107 to 124, while also present were eleven liberation movements and fifty-one governmental or non-governmental observers. Thus, political compromise was a major victory for those new and aspiring political units present, and served to encourage the furtherance of classification struggles after wars of self-determination were included in Protocol 1 Article 1(4) as international armed conflicts.

Throughout a three-year negotiation process, all views were heard and the underlying process could not be objected to by any participating state. Almost all provisions in the Protocols were adopted by consensus. Where there was no consensus, the adoption of articles was subject to a two-thirds majority vote. Article 1(4) of Protocol 1 was adopted with 80 votes in favor, 1 vote opposed (Israel), and 11 abstentions (mostly Western countries). The number of states abstaining or opposed to the adoption of Article 1(4) resulted in large part from the failure to definitively make clear the type of situations to which that article is addressed.

Objections were voiced to the confounding of the right to wage war with the rules regulating war through the potential lowering of thresholds of hostility intensity in the face of a "just cause". (130) The extension also has obvious implications for the use of nonconventional means and methods of warfare, such as terror-violence and guerilla tactics, but many provisions contained in Protocol 1 are intended to curb the excessess seen, e.g., during the Viet Nam war.

Wars of self-determination were "internationalized" on the basis of their high profile in the U.N. era, and in view of the arguably separate status of some "Peoples" and their cause (131), rather than the scale of hostilities or the identification of their participants. This was felt to endanger the inviolability of state political independence and territorial borders, particularly as liberation struggles define nationhood in a new way and have many transboundary aspects. (132) Nevertheless, heavy abstention rather than opposition was voiced regarding Article 1(4) in order that the Geneva modernization process could continue. (133)

The "graduation" of such conflicts from the status of domestic conflicts to international armed conflicts for purposes of the extension of IHL provisions in full further served to reinforce the contentious notion that U.N. Resolutions form a potential source of international law. As noted by Gardam,

> Although most states probably are cautiously prepared to concede that the right of self-determination is a principle of customary international law, they are not prepared to accept the practical results of this acceptance as enshrined in Protocol 1. These states see as a dangerous outcome of the acceptance of the Protocol that such action may result in or hasten the transformation of these rules into custom. (134)

In other words, evidence exists that self-determination forms an established rule of international custom. Nevertheless, a conclusion that U.N. Resolutions, regarding the separate and distinct status of some "Peoples", their rights to self-determination and their right to use force to achieve it, have alone transformed the principle into custom, regardless of instances of inconsistant state practice, would arguably require a redefinition of the traditional sources of international law. (135) The inclusion of Article 1(4), as the resulting codification of world opinion expressed in a growing number of General Assembly Resolutions, represented a massive political victory for third world states which had themselves exceeded existing limits on the right to use force. Such use of force having oftentimes meant the use of terror-violence, it was feared by certain major powers that third world numerical superiority would continue to undermine the content of U.N. Charter rules prohibiting the use of force in international relations, and in particular, the use of terror-violence. (136) Nevertheless, evidence of the existence of "instant" custom, as embodied

in a treaty body, may be measured from the perspective of subsequent ratification, and the ratification of Protocol 1, while initially disappointing, is improving.

4.3.3. Problems in Ratification

The view that states are not under any obligation to ratify or accede to particular treaties implies that treaty ratification may be declarative of a present intent, only. This stance, while not strictly in line with the duty of states to be bound by treaties to which they are parties, and to perform them in good faith, remains popular despite the obligatory nature of custom and the growing body of rules of *jus cogens*, or peremptory norms. In this way, the unwillingness of states parties to IHL to invoke this body of law in the post-1945 era is made more clear.

For example, the right to suppress a domestic rebellion and the right to choose the methods of doing so were traditionally beyond dispute, and not considered to be the proper subject of international law. (137) With the advent of Common Article 3 in 1949, and the growth of the human rights régime, attempts are now made in the U.N. era to control the manner in which states treat their own citizens. This may be difficult to enforce, however, in circumstances where a government may be fighting for its very existence. (138) Thus, in tandem with evolving international norms and standards, the Geneva Conventions were supplemented and clarified in 1977, in order to extend to individuals international rights and remedies in all circumstances. (139)

Protocols 1 and 2 made massive incursions into notions of state sovereign authority to suppress domestic uprisings. In particular, Protocol 1 provisions many states found unacceptable include the

recognition of combatant status for certain irregular forces (140), the restriction of attacks against traditional objects of military strategy (141), and the elimination of significant remedies in the event of breach by the enemy, for example, reprisal actions. (142) Offensive political provisions include the automatic extension of IHL provisions to wars of self-determination, as previously discussed.

An additional fear, that "modernizing" the status of wars of self-determination and of their participants would substantially increase the risks to civilian populations by making it easier to conduct such conflicts, nevertheless reflects the "civilian" aspect of most liberation wars. In particular, unrestricted warfare rarely observes traditional distinctions between combatant and non-combatant, making all-out war inevitable. Liberation struggles receive much of their support from civilian populaces which may surreptitiously aid and abet the use of terrorist acts against a threatened incumbent government. Recognition of this fact, by mixing provisions regarding the right to wage war with rules regulating its conduct, disorients those states obsessed with security considerations and sovereign notions of control and authority.

Such modernization further acknowledges the transboundary character of such wars. (143) "Peoples" having a separate, distinct status implicate territorial claims and the potential breakdown of existing state boundaries. While historic territorial wrongs are not evenly corrected at present in the U.N. system through the vehicle of self-determination, recent emphasis on the rights of indigenous peoples and particular ethnic national groupings in issue-specific codification efforts would indicate that a new international norm which recognizes

and respects territorial claims within these new contexts is emerging. (144)

The issues underlying self-determination and the right to use force to achieve it have eroded traditional jurisdictional confines delimiting the areas batween domestic and international concern, and it is for this reason, and for those reasons discussed above, that several major world powers have not ratified Protocol 1. (145) Given the special status of these powers in the U.N. system, this non-ratification is a cause for concern for the future of IHL, as a body of law requiring practical observance for continued viability.

The main problem of the continued viability of IHL thus may prove to be the interrelation of the laws of armed hostilities, humanitarianism, and limited aspects of human rights in that each area has its own separate juridical accommodation. Nevertheless, the rationalization of the concepts underlying each branch, for purposes of defining IHL's true content in the future, will depend on the success or failure of the 1977 revisions to IHL, and on each state's willingness to adapt jurisdictionally to overlaps between sovereign state function and international rights régimes. In other words, as the different branches of IHL involve rules of the same or similar content which nevertheless are implemented by different organs or enforcement mechanisms, state willingness to implement IHL is crucial to the viability of recent developments, to the control of future armed conflicts, and to the success of the fight against acts of international terrorism.

The attempt in 1977 to make humanitarian concerns primary in times of "war" and "peace" through the inclusion of additional types of civil war was an attempt to protect the individual in all circumstances

as against the activities of states. The evolution of integrated fundamental notions of justice in the IHL legal régime thus reflects its adaptation to other developments in international law, and to the realities of modern armed conflicts. Given the prohibitions against the use of nonconventional means and methods of warfare frequently employed in liberation struggles, it is further clear that Protocol 1 contains adequate mechanisms and procedures to remove acts of terror-violence from the ambit of efforts to deter international terrorism. (146)

Chapter 4 - Footnotes

1. E.P. Syquia, "Dr. Jean Pictet and International Humanitarian Law", in Studies and Essays in Honour of Jean Pictet (Studies and Essays) (1984), at 551, 552 - 3. A broad approach must nevertheless be treated with caution. A. Eide, for instance, does not agree that the laws of war and human rights are both contained in international humanitarian law, and stresses their different areas of application, and the distinctions implicit between strictly humanitarian concerns and states interests, per se. A. Eide, "The Laws of War and Human Rights - Differences and Convergences", in Studies and Essays, at 675, 676.

2. E.P. Syquia, id., at 552.

3. See, e.g., Military and Paramilitary Activities in and against Nicarague (Nicaragua v. United States of America), Merits, I.C.J. Reports 1986, at 14, para. 218; C. Bruderlein, "Custom in International Humanitarian Law", International Review of the Red Cross (IRRC), No. 285, November - December 1991, at 579; G.J.H. van Hoof, Rethinking the Sources of International Law (1983).

4. In particular, states are obliged to observe the admonitions contained in the "Martens clause". See Y. Sandoz, C. Swinarski, B. Zimmerman (eds.), Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949 (Commentary) (1987), at 38 - 9; Preamble of the Hague Conventions of 29 July 1899 and 18 October 1907; Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Convention), 12 August 1949, Article 63(4); Geneva Convention for the Amelioration of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea (Second Convention), 12 August 1949, Article 62(4); Geneva Convention relative to the Treatment of Prisoners of War (Third Convention), 12 August 1949, Article 142(4); Geneva Convention relative to the Protection of Civilian Persons in Time of War (Fourth Convention), 12 August 1949, Article 158(4); Protocol additional to the Geneva Conventions of 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol 1), 8 June 1977, Article 1(2); Preamble of Protocol additional to the Geneva Conventions of 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol 2), 8 June 1977.

5. An "integrated IHL" is taken to imply both the separate co-ordination of the law of war and human rights law, and a "mixed-type" law comprising both Hague and Geneva provisions, as may be found in the Convention for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, 14 May 1954, and in Protocol 1.

6. See R. Perruchoud, "A Propos d'un Nouvel Ordre Humanitaire International", in Studies and Essays, at 499, 506, who urges closer co-operation among the various divisions, or branches, of IHL, for a more integrated approach to the emphasis on the international protection of the individual.

7. See Notes, "Constructing the State Extraterritorially", 103 Harv. L. Rev. 1273, 1295 (1990).

8. J.S. Watson, "Autointerpretation, Competence, and the Continuing Validity of Article 2(7) of the U.N. Charter", 71 A.J.I.L. 60, 66, 79 (1977).

9. See, e.g., First Convention, Article 49; Second Convention, Article 50; Third Convention, Article 129; Fourth Convention, Article 146; Protocol 1, Article 85(1).

10. See generally L.C. Green, Essays on the Modern Law of War (1985). See also H.-P. Gasser, "Respect for Fundamental Judicial Guarantees in Time of Armed Conflict - The Part Played by I.C.R.C. Delegates", IRRC, No. 287, March - April 1992, at 121.

11. See, e.g., R.L. Fruchterman, Jr., "Enforcement: The Difference between the Laws of War and the Geneva Conventions", in Proceedings of the Law Professor Workshop in Honor of Dean Rusk: Coping with Internal Conflicts: Dilemmas in International Law, 13 Ga. J. of Int'l. and Comp. L. (Supp. 1983), at 303.

12. E.P. Syquia, supra, note 1, at 555.

13. Id., at 553. Of interest, Syquia notes, at 552, that Dr. Pictet formulated the following definition of IHL in 1967:

> IHL, in the wide sense, is constituted by all the international legal provisions, whether written or customary, ensuring respect for the individual and his well-being.

This definition was later modified, in 1975, as follows:

> IHL, in the broad sense, is constituted by all the international legal provisions, whether of statute or common law, ensuring respect for the individual and promoting his development.

14. In particular, international law presently recognizes four types of armed conflict, to which different principles and instruments of international humanitarian law apply. See D. Weissbrodt and B. Andrus, "The Right to Life in Armed Conflict", 29 Harv. Int'l. L. J. 59, 69 - 70 (1988); D. Plattner, "Assistance to the Civilian Population: the Development and Present State of International Humanitarian Law", IRRC, No. 288, May - June 1992, at 249.

15. In particular, the following instruments are refered to: 29 July 1899: Convention for the peaceful adjustment of international differences; Convention regarding the laws and customs of war on land; Convention for the adaptation to maritime warfare of the principles of

the Geneva Convention of 22 August 1864; Three Declarations: (i) to prohibit, for the term of five years, the launching of projectiles and explosives from balloons or by other similar new methods; (ii) to prohibit the use of projectiles, the only object of which is the diffusion of asphyxiating or deleterious gases; (iii) to prohibit the use of bullets which expand or flatten easily in the human body, such as bullets with a hard envelope, of which the envelope does not entirely cover the core or is pierced with incisions; annexed Regulations respecting the laws and customs of war on land. 18 October 1907: Convention for the pacific settlement of international disputes (I); Convention relating to the opening of hostilities (III); Convention respecting the laws and customs of war on land (IV); Convention respecting the rights and duties of neutral powers and persons in case of war on land (V); Convention respecting bombardment by naval forces in time of war (IX); Convention for the adaptation to naval war of the principles of the Geneva Convention (X); Convention concerning the rights and duties of neutral Powers in naval war (XIII); Declaration prohibiting the discharge of projectiles and explosives from balloons (XIV); annexed Regulations respecting the laws and customs of war on land. See the Final Act of the International Peace Conference, signed at The Hague, 29 July 1899, and the Final Act of the Second International Peace Conference, signed at The Hague, 18 October 1907, reprinted in D. Schindler and J. Toman (eds.), The Laws of Armed Conflict (Schindler/Toman) (1973), at 49 and 53, respectively.

16. The Instructions for the Government of Armies of the United States in the Field, prepared by Francis Lieber, are generally considered to be the first attempt to codify the modern laws of war, and were prepared for use at the request of President Lincoln. See E. Nys, "Francis Lieber - His Life and His Work", 5 A.J.I.L. 355, 379 (Pt. 2 1911), who notes that one main premise dominated the Instructions: that useless severity should not be employed. Thus, the essence of the confines of "military necessity" was first expounded. For the full text, see Schindler/Toman, id., at 3. Of interest, see also M.H. Hoffman, "The Customary Law of Non-international Armed Conflict - Evidence from the United States Civil War", IRRC, No. 277, July - August 1990, at 322; M.N. Schmitt, "State-Sponsored Assassination in International and Domestic Law", 17 Yale J. Int'l. L. 609, 628 - 9 (1992).

17. Issued by General Order dated 24 April 1863, and regulating only the behavior of the Northern forces, "they correspond to a great extent to the laws and customs of war existing at the time". Schindler/Toman, id. The following subjects are treated: rights of the captor in occupied countries, public and private property, protection of persons, deserters, prisoners of war, booty on the battlefield, partisans, spies, flags of truce, exchange of prisoners, parole, armistices, capitulation, and insurrection.

18. Schindler/Toman, p. 25. See also E. Nys, supra, note 16, at 392; G. Abi-Saab, "The Specificities of Humanitarian Law", in Studies and Essays, at 265, 274.

19. Schindler/Toman, p. 35. Both the Brussels Project of an International Declaration concerning the Laws and Customs of War (Brussels Project) and The Laws of War on Land. Manual Published by the Institute of International Law (Oxford Manual) were to form the basis of the 1899 and 1907 Hague Conventions on Land Warfare, and annexed Regulations. Id., at 25.

20. Id.

21. Id., at 49. See also E. Nys, supra, at 393.

22. Schindler/Toman, p. 63. The provisions of these instruments are considered to embody rules of customary law and, as such, are binding on states not formally party to them. As such, they were relied upon in 1946 by the Nuremburg International Military Tribunal, and in 1948, by the International Military Tribunal for the Far East. See supra, note 15, and Chapter 8.

23. Abi-Saab notes that both the 1899 and 1907 instruments were prompted by concerns regarding the evolution of war technology, thus prompting awareness of humanitarian concerns, as reflected in the "Martens clause". G. Abi-Saab, supra, note 18, at 276.

24. Schindler/Toman, p. 64. Rowe remarks that "the clause laid the ghost of a popular misconception, that what was not expressly prohibited in warfare was permitted". P. Rowe, Defence: The Legal Implications (1987), at 145. See also S. Miyazaki, "The Martens Clause and International Humanitarian Law", in Studies and Essays, at 433.

25. See H. Meyrowitz, "Réflections sur le Fondement du Droit de la Guerre", in Studies and Essays, at 419, 423. The Commentary notes, at 38, that draft Protocol 1 re-affirmed this clause in the preamble, but the Diplomatic Conference supported a proposal to include it in Article 1(2). The 1981 U.N. Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Idiscriminate Effects, U.N. Doc. A/CONF. 95/15, 27 October 1980, and Corr. 1, 2, 3, 4 and 5, also reaffirms this clause in the preamble, fifth paragraph.

26. Schindler/Toman, p. 107. See C.G. Fenwick, "International Law: The Old and the New", 60 A.J.I.L. 475, 477 (1966), who notes that the Washington Conference further attempted to forestall the race in new armaments.

27. Schindler/Toman, id., p. 139.

28. Earlier treaties prohibiting the use of gases to which the Protocol refers are the 1899 Hague Declaration, the 1919 Treaty of Versailles, Article 171, and the 1922 Washington Treaty, Article 5. Id., at 109. On 22 January 1975, a statement in connection with the United States ratification of the Protocol was made by the President, affirming the understanding that the Protocol did not extend to control agents and chemical herbicides. See A. Roberts and R. Guelff (eds.), Documents on the Laws of War (Roberts and Guelff) (1989), at 137 - 8.

29. General Treaty for the Renunciation of War 1928, U.K.T.S. 29 (1929), Cmnd. 3410; 94 L.N.T.S. 57. Rowe notes that while the General Treaty had a profound effect on thinking at the time, "the most promising justification for the use of armed force, self-defense, was not mentioned ... at all". P. Rowe, supra, note 24, at 96. Nevertheless, Kunz notes that "Mr. Kellogg's circular letter forms an integral part of the Pact: Every state retains the inherent right of self-defense and is itself the only judge to decide whether there is a given case of self-defense". J.L. Kunz, "The Chaotic Status of the Laws of War and the Urgent Necessity for their Revision", 45 A.J.I.L. 37, 46 (1951). The Treaty has never been terminated, but it appears to have been superceded by Article 2(4) of the U.N. Charter, for practical purposes. See D.J. Harris, Cases and Materials on International Law (3d ed. 1983), at 640.

30. Covenant of the League of Nations, Articles 10 - 2, and 23(d), respectively. See B.B. Ferencz, Defining International Aggression, Vol. 1 (1975), at 8 - 11.

31. Supra, note 22. See also, id., at 57. Compare L.C. Green, supra, note 10, at 57 - 65 (discussion of superior orders).

32. McCoubrey notes further that the Hague Rules worked "reasonably well" in the First World War. H. McCoubrey, International Humanitarian Law, The Regulation of Armed Conflicts (1990), at 13.

33. J.L. Kunz, supra, note 29, at 42.

34. Id., at 37.

35. Id., at 60.

36. Abi-Saab characterizes this evolution as a "moving balance between two dynamic forces in society: 'the requirements of humanity' and 'military necessity', a functional approach for determining both context and content ... at any given moment of time". G. Abi-Saab, supra, note 18, at 265.

37. Schindler/Toman, at 199.

38. Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field of 22 August 1864. Id., at 203.

39. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field of 6 July 1906. Id., at 223.

40. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field of 27 July 1929. Id., at 247.

41. Geneva Convention Relative to the Treatment of Prisoners of War of 27 July 1929. The Convention does not replace but only completes

the provisions of the Hague Regulations, in addition to including control by Protecting Powers. Id., at 261. In that Burma is a party, and has not yet adhered to the Third Convention of 1949, the 1929 Convention is still in force in its relations with the other states parties.

42. P. Rowe, supra, note 24, at 139. He further points to the relatively small number of states involved in the drafting of the four Geneva Conventions of 1949 as being thoroughly conducive to their subsequent near-universal acceptance. Id., at 140.

43. P. Rowe, id., at 295. See also Roberts and Guelff, supra, note 15, at 169.

44. P. Rowe, id., at 323. See also Roberts and Guelff, id., at 193.

45. P. Rowe, id., at 345. See also Roberts and Guelff, id., at 215.

46. P. Rowe, id., at 417. See also Roberts and Guelff, id., at 271. Of interest, the I.L.A. had previously adopted a "Draft Convention for the Protection of Civilian Populations Against New Engines of War", in 1938, the main object of which was the establishment of safety zones for certain non-combatant classes of the population. This Draft Convention provided for sanctions for breach, the determination of which was left to the P.C.I.J., and made specific provision for the payment of compensation for damage caused by such breach. Schindler/Toman, id., at 155.

47. Schindler/Toman, id., at 289. Compare H. McCoubrey, supra, note 32, at 3, who notes that expanding humanitarian provisions to specifically include civilians met with state resistance prior to 1949.

48. Common Article 3 of the four Geneva Conventions provides as follows:

> In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:
>
> (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.
> To this end the following acts are and shall remain 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, mutiliation, cruel treatment and torture;

(b) taking of hostages;

(c) outrages upon personal dignity, in particular humiliating and degrading treatment;

(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

(2) The wounded and sick shall be collected and cared for.

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

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

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

49. Common Article 3 was most likely invoked for the first time in a major post-1945 conflict during the Algerian War. See A. Fraleigh, "The Algerian Revolution as a Case Study in International Law", in The International Law of Civil War (R.A. Falk, ed.) (1971), at 179; A.P. Rubin, "The Status of Rebels under the Geneva Conventions of 1949", 56 A.J.I.L. 472, 479 (1962) (the Vietnam War involved two distinct "armed conflicts": one under Common Article 2, and one under Common Article 3); the Commentary, at 41, 1325 - 6.

50. P. Rowe, supra, note 24, at 142, notes that "in practice Article 3 has been of little direct significance, simply because it attempts to control the manner in which a state treats its own citizens in circumstances where the government concerned may be fighting for its very existence". See also Y. Dinstein, "The International Law of Civil Wars and Human Rights", 6 Isr. Y.B.H.R. 62 (1976).

51. See, e.g., J.L. Kunz, supra, note 29, at 59 - 60.

52. S. Rosenne, "Participation in the Geneva Conventions (1864 - 1949) and the Additional Protocols of 1977", in Studies and Essays, at 803, 807.

53. See L.C. Green, supra, note 31, and Chapter 8.

54. First Convention, Article 49; Second Convention, Article 50; Third Convention, Article 129; Fourth Convention, Article 146.

55. See the Commentary, at xxxii - v.

56. See, e.g., H.-P. Gasser, supra, note 10; T.J. Farer, R.G. Gard, Jr., T.Taylor, "Vietnam and the Nuremberg Principles: A Colloquy on War Crimes", in The Vietnam War and International Law, Vol. 4 (R.A. Falk, ed.) (1976), at 363; J.J. Paust, "After My Lai: The Case for War Crimes Jurisdiction Over Civilians in Federal District Courts", id., at 447. Compare C.J. Piernas, "The Protection of Foreign Workers and Volunteers in Situations of Internal Conflict, with Special Reference to the Taking of Hostages", IRRC, No. 287, March - April 1992, at 143.

57. Y. Dinstein, supra, note 50, at 70 - 2. See also A.H. Robertson, "Humanitarian Law and Human Rights", in Studies and Essays, at 793; D. Schindler, "The International Committee of the Red Cross and Human Rights", IRRC, No. 849, January - February 1979, at 3.

58. L.C. Green, supra, note 10, at 94. In particular, and in addition to Common Article 3, the Fourth Convention, Articles 5(3) and 147, attempts to guarantee that an accused receives a fair trial, the law of which is subject to the derogations allowed under the law of human rights in times of emergency. See S.R. Chowdhury, State of Emergency (1984).

59. London Agreement (and Charter) for the Prosecution and Punishment of the Major War Criminals of the European Axis of 8 August 1945, reprinted in Schindler/Toman, at 689. See Chapter 8.

60. L.C. Green, supra, note 10, at 92.

61. See Roberts and Guelff, at 7. See also L.C. Green, supra, note 31; P. Rowe, supra, note 24, at 141.

62. However, the U.K. and U.S. military manuals were both revised in 1944 to incorporate the rule as stated in the text. See H. Lauterpacht, Oppenheim's International Law, Vol. II (7th ed. 1952), at 568 n. 1. Lauerpacht queries whether this was sufficient to express a sound legal principle. Id., at §253.

63. P. Rowe, supra, note 24, at 3. See also Q. Wright, "The Cuban Quarantine", 57 A.J.I.L. 546 (1963); Q. Wright, "Legal Aspects of the Vietnam Situation", 60 A.J.I.L. 750 (1966); J.J. Paust, "After My Lai", supra, note 56; H.H. Almond, "The Nicaraguan Military Activities Case", 17 C.W.I.L.J. 146 (1987). See generally, 81 A.J.I.L. (1987).

64. As noted by de Mulinen, an armed conflict can involve only a police type force engaged in a small area in an internal conflict, a small task force or expeditionary corps. F. de Mulinen, Handbook on the Law of War for Armed Forces (1987), at 32. Schmitt notes that the following factors may indicate whether a situation of armed conflict is found:

a) degree of international involvement or extent of international effect;

b) organized character of the competing sides;

c) extent of violence;

d) similarity of the combat to traditional military operations;

e) systematic (as opposed to sporadic) nature of the violence; and

f) fundamental nature of the grievances.

Schmitt further notes that "(e)ach of these factors moves the conflict away from the internal disturbances category cited in Protocol 2 and towards the law of armed conflict". M.N. Schmitt, supra, note 16, at 643 n. 168. Further, the law of war will be applied according to the national needs, e.g., the strategic situation and environment. Id., at 39. See also F. de Mulinen, "Transformation of Modern Law of War into Documents for Practical Application", in Studies and Essays, at 445.

65. P. Rowe, supra, note 24, at 56. See also L.C. Green, supra, note 10, at 99.

66. Common Article 2(3) of the four Geneva Conventions of 1949.

67. See A. Cassese, "Wars of National Liberation and Humanitarian Law", in Studies and Essays, at 313.

68. See Chapters 2 and 3. See also the Commentary, at 41 - 56; Roberts and Guelff, at 387 - 8.

69. See "President Reagan's Letter of Transmittal", 81 A.J.I.L. 910 (1987); H.-P. Gasser, "Agora: the U.S. Decision not to Ratify Protocol 1 to the Geneva Conventions on the Protection of War Victims", id., at 912; A.D. Sofaer, "Agora: The U.S. Decision not to Ratify Protocol 1 to the Geneva Conventions on the Protection of War Victims (Cont'd)", 82 A.J.I.L. 784 (1988); G.H. Aldrick, "Prospects for United States Ratification of Additional Protocol 1 to the 1949 Geneva Conventions", 85 A.J.I.L. 1 (1991).

70. Protocol 1, Article 1(3).

71. Protocol 1, Article 1(4), provides as follows:

> 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 régimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles

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

72. See supra, note 11. See also H. McCoubrey, supra, note 32, at 15 - 7; G. Best, Humanity in Warfare (1983), at 321, who comments that U.S. opposition to the automatic extension of IHL to wars of national liberation in part resulted from the use of internal armed uprisings as the primary tool of Marxist-Leninist "workers struggles" to overthrow capitalist forms of government; R.A. Falk, A Study of Future Worlds (1975), at 434.

73. Protocol 1, Article 36.

74. Protocol 1, Articles 35(2), 51(5)(b), 56, 57(2)(a)(iii), and 57(2)(b).

75. Protocol 1, Articles 54(5), 62(1), 67(4), and 71(3).

76. Protocol 1, Articles 43, 44, and 45(1) and (2).

77. Supra, note 63.

78. M. Takemoto, "The 1977 Additional Protocols and the Law of Treaties", in Studies and Essays, at 249, 259.

79. Protocol 2, Article 1, provides as follows:

> 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 (Protocol 1) and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.
>
> 2. This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.

80. Protocol 2, Article 6.

81. Protocol 2, Article 5.

82. See the Commentary, at 1325 - 36. See generally H.S. Levie (ed.), The Law of Non-International Armed Conflict (1987); R. Abi-Saab, Droit Humanitaire et Conflits Internes (1986).

83. G. Best, supra, note 72, at 322.

84. See Chapters 6 and 7.

85. The Commentary, at 48.

86. See the Commentary, at 51 - 2; supra, notes 73 - 6, which new provisions reflect modern requirements through an "integrated IHL"; supra, note 5. See also W. Czaplinski, "Sources of International Law in the Nicaragua Case", 38 I.C.L.Q. 151, 161 n. 42 (1989) ("(d)ifferences between treaty and customary rules, in particular in the field of humanitarian law, have been emphasised by Judge R. Ago in his separate opinion in the Nicaragua case (1986) I.C.J. Rep. 184".); E.D. Fryer, "Applicability of International Law to Internal Armed Conflicts: Old Problems, Current Endeavors", 11 Int'l. Lawyer 567, 570 (1977).

87. The Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States, General Assembly Resolution 2625 (XXV) of 24 October 1970, 25 U.N.G.A.O.R., Suppl. (No. 28), p. 121, U.N. Doc. A/8028 (1971), which Resolution is referred to specifically in the text of Protocol 1, Article 1(4).

88. See H.-P. Gasser, "Agora", supra, note 69; J. Gardam, "Protocol 1 to the Geneva Conventions: A Victim of Short-Sighted Political Considerations?", 17 Melbourne U. L. R. 107 (1989); P. Griffiths and H. Gwilliam, "Comment on Australia's Ratification of the 1977 Additional Protocols to the Geneva Conventions of 1949", 11 U. Tasmania L. Rev. 104 (1992).

89. See J.L. Kunz, supra, note 29. Compare C. Greenwood, "The Concept of War in Modern International Law", 36 I.C.L.Q. 283 (1987).

90. See E.D. Fryer, supra, note 86.

91. In other words, an armed conflict commences with the existence of a situation rendering the law of war provisions applicable. F. de Mulinen, Handbook on the Law of War for Armed Forces, supra, note 64, at 30. See also C. Greenwood, supra, note 89.

92. H. Meyrowitz, supra, note 25, at 425. Compare J. von Elbe, "The Evolution of the Concept of the Just War in International Law", 33 A.J.I.L. 665 (1939).

93. E.D. Fryer, supra, note 86, at 567 - 8. See also J. Stone, "Holes and Loopholes in the Definition of Aggression", 71 A.J.I.L. 224, 233 - 5 (1977).

94. E.D. Fryer, id., at 570. See, e.g., A. Fraleigh, supra, note 49; D.W. McNemar, "The Postindependence War in the Congo", in The International Law of Civil War, id., at 244; K. Boals, "The Relevance of International Law to the Internal War in Yemen", id., at 303; P.E. Corbett, "The Vietnam Struggle and International Law", id., at 348; E.B. Firmage, "Summary and Interpretation", id., at 405.

95. See Chapters 2 and 3.

96. See, e.g., L. Brilmayer, "Secession and Self-Determination: A Territorial Interpretation", 16 Yale J. Int'l. L. 177 (1991).

97. See J. Stone, supra, note 93.

98. See S. Miyazaki, supra, note 24, at 437; F.M. Higginbotham, "International Law, the Use of Force in Self-Defense, and the Southern African Conflict", 25 Col. J.T.L. 529 (1986 - 7).

99. See J. Stone, supra, note 93, at 233. See also General Assembly Resolution 3314 (XXIX) of 14 December 1974 on the Definition of Aggression, Article 7, 29 U.N.G.A.O.R., Suppl. (No. 21), reprinted in 69 A.J.I.L. 480 (1975).

100. J.J. Paust, "'Non-Protected' Persons or Things", in Legal Aspects of International Terrorism (A.E. Evans and J.F. Murphy, eds.) (1978), at 341, 354. Further, and as noted by G. Abi-Saab, supra, note 18, at 266, these laws were "formulated as a purely inter-State and contractual (or reciprocal) set of legal rules".

101. J.L. Kunz, supra, note 29, at 40. See Chapter 8.

102. Id.

103. Id., at 41.

104. See F. Kalshoven, Constraints on the Waging of War (1987); M. George, "Chemical and Biological Warfare", Ecoropa Information Sheet No. 10 (1990); S.A. Voitovich, "Normative Acts of the International Economic Organizations in International Law-Making", 24 J. of World Trade 21, 36 - 7 (1990); Note, Lombard, "The Survival of Noriega: Lessons from the U.S. Sanctions Against Panama", 26 Stan. J. of Int'l. L. 272 (1989); S.C. Neff, "Economic Warfare", 26 Stan. J. of Int'l. L. 67 (1989); D.W. Bowett, "Economic Co-ercion", 13 Vir. J. of Int'l. L. 1 (1972); J.L. Kunz, supra, note 29.

105. J.L. Kunz, id., See also Comment, Kunz, "Bellum Justum and Bellum Legale", 45 A.J.I.L. 528 (1951); J.L. Kunz, "Sanctions in International Law", 54 A.J.I.L. 324 (1960).

106. Supra, notes 73 - 76. J. Gardam, supra, note 88, at 108 n. 5, notes that "the negotiation of Protocol 1 would not have aroused the controversy it has if its provisions were restricted to an improvement of humanitarian rules without attempting to interfere with the means and methods of combat".

107. See supra, note 69.

108. See A. Eide, supra, note 1, and R.L. Fruchterman, Jr., supra, note 11.

109. Supra, note 13.

110. P. Rowe, supra, note 24, at 56.

111. See C. Bruderlein, supra, note 3. See also R. Abi-Saab, "The 'General Principles" of Humanitarian Law according to the International Court of Justice", IRRC, No. 259, July - August 1987, at 367; G.J.H. van Hoof, supra, note 3, at 86, who notes that

> (T)wo questions should be carefully kept apart ... . First, whether rules of international law can come into being solely on the basis of an opinio iuris, without there being an accompanying usus. Second, whether the formation of rules of customary international law can take place in isolation of usage.

112. P. Rowe, supra, note 24, at 150.

113. U.N. Charter Preamble, Articles 1(2), 55, 62(2), 73, and 76.

114. U.N. Charter Preamble, Articles 2(1)(4)(7), 4, 9, 93, 108, and 110.

115. See Chapters 2 and 3.

116. U.N. Charter, Article 2(7). See D. Ciobanu, Preliminary Objections (Related to the Jurisdiction of the U.N. Political Organs) (1975), at 32; C. Niyungeko, "The Implementation of International Humanitarian Law and the Principle of State Sovereignty", IRRC, No. 281, March - April 1991, at 105. Compare M. Torrelli, "La Protection du Médecin dans les Conflits Armés", in Studies and Essays, at 581; M. Torrelli, "From Humanitarian Assistance to 'Intervention on Humanitarian Grounds'?", IRRC, No. 288, May - June 1992, at 228.

117. Supra, notes 50 and 94. See also J. Stone, supra, note 93, at 235 - 7.

118. See Chapters 2 and 3.

119. L. Brilmayer, supra, note 96, at 190.

120. Id., at 190 - 1.

121. The Commentary, at 52. See also T.M. Franck, "Legitimacy in the International System", 82 A.J.I.L. 705, 743 - 8 (1988).

122. See G. Best, supra, note 72. See also R.A. Falk, supra, note 72, at 434, who notes that the Viet Nam War was the "crucial laboratory" for the Kennedy and Johnson administrations' support of "a gigantic build-up of counterinsurgency capabilities to enable the defeat of liberation movements", which American policy makers felt were Communist-led insurgencies; J. Toman, "The Socialist Countries and the Laws of Armed Conflict", in Modern Wars - The Humanitarian Challenge (Report for the Independent Commission on International Humanitarian Issues) (1986), at 158, 163; A.D. Sofaer, supra, note 69, at 785 - 6; A. Cassese, supra, note 67, at 314 - 5..

123. See Chapters 2 and 3. See also I. Detter de Lupis, The Law of War (1987), at 161, who notes that the actual ambit of Article 1(4) is arguably applicable only to the peoples of South Africa and Palestine. Nevertheless, this would not appear to be the case. See the Commentary, at 53 n. 81. Instead, many states, when signing both Protocols 1 and 2 in 1977 made declarations regarding the non-applicability of either instrument to insurgency or liberation movements located within their particular spheres of influence, despite the provisions of Protocol 1, Article 96(3). See, e.g., B.A. Wortley, "Observations on the Revision of the 1949 Geneva 'Red Cross' Conventions", LIV B.Y.I.L. 143, 149, 152 (1983). This may be incompatible with the Vienna Convention on the Law of Treaties 1969, Article 19(3). See also M. Takemoto, supra, note 78.

124. D. Ciobanu, supra, note 116, at 40.

125. The Commentary, at 39 - 40, 45 - 9. See also G.H. Aldrich, "Some Reflections on the Origins of the 1977 Geneva Protocols", in Studies and Essays, at 129.

126. See Chapters 6 and 7.

127. General Assembly Resolution 3103 (XXVIII) of 12 December 1973, 28 U.N.G.A.O.R., Suppl. (No. 30), p. 142, U.N. Doc. A/9030 (1974), entitled "Basic principles of the legal status of the combatants struggling against colonial and alien domination and racist régimes", was adopted with 83 votes for, 13 against, and 19 abstentions.

128. See G. Thullen, Problems of the Trusteeship System (1964), at 182; R.P. Anand, New States and International Law (1972), at 75; A. Cassese, supra, note 67, at 313.

129. The Commentary, at xxxiii, states that the "Rules of Procedure reflect the rules of procedure generally accepted in codification conferences. All decisions on matters of substance taken by the plenary Assembly, and particularly the definitive adoption of articles, were subject to a two-thirds majority whenever there was no consensus. In the Committees only a simple majority was required". B.A. Wortley notes that representatives of 104 states and three liberation movements "signed" the Protocols on 10 June 1977. B.A. Wortley, supra, note 123, at 145.

130. This point may be explained on two levels. First, the law of war applies between all belligerent parties accepting the treaties. For liberation movements, this is provided through the mechanisms of Article 96(3). Second, the law of war applies from the first acts of hostilities in a liberation struggle to which Protocol 1, Article 1(4) applies, regardless of whether particular thresholds of violence have been reached.

131. Protocol 1, Article 1(4); General Assembly Resolution 2625 (XXV).

132. The Commentary, at 56. See also L. Brilmayer, supra, note 96; J. Quigley, "Self Determination", 7 B. U. Int'l. L. J. 1 (1989).

133. J. Gardam, supra, note 88, at 115.

134. Id., at 124. See Chapters 2 and 3.

135. See G.J.H. van Hoof, supra, note 3; W. Czaplinski, supra, note 86; S.A. Bleicher, "The Legal Significance of Re-Citation of General Assembly Resolutions", 63 A.J.I.L. 444 (1969); Notes and Comments, Onuf, "Professor Falk on the Quasi-Legislative Competence of the General Assembly", 64 A.J.I.L. 349 (1970).

136. J. Gardam, supra, note 88, at 107, 119 - 20, notes that uncertainty underlying the exact extent of U.N. Charter 2(4) is one of the reasons states no longer declare, or even recognize, a state of war. There are also a number of different arguments which have been used to support the position that wars of self-determination are outside the prohibitions of Articles 2(4) and 2(7). See Chapter 2. These factors have made acceptance of Protocol 1, Article 1(4) more problematic.

137. See Y. Dinstein, supra, note 50.

138. See D. Schindler, supra, note 57; S.R. Chowdhury, supra, note 58.

139. See R. Abi-Saab, "General Principles", supra, note 111.

140. Protocol 1, Articles 43 and 44.

141. Protocol 1, Articles 48, 51, 52, 53, 54, 55, 56, and 59

142. Protocol 1, Articles 20, 51(6), 52(1), 53(c), 54(4), 55(2), and 56(4).

143. See Chapters 2 and 3.

144. See, e.g., L. Brilmayer, supra, note 96; R. Torres, "The Rights of Indigenous Populations: The Emerging International Norm", 16 Yale J. Int'l. L. 127 (1991): Comptes Rendus, Turpel, 69 La Revue du Barreau Canadien 828 (1990); N.L. Wallace-Bruce, "The Acquisition of Australia", 19 Ga. J. of Int'l. and Comp. L. 87 (1989); P. Thornberry, "Self-Determination, Minorities, Human Rights: A Review of International Instruments", 38 I.C.L.Q. 867 (1989); P. Thornberry, "Minorities and Human Rights Law", Minority Rights Group, Report No. 73 (1987).

145. However, Mr. Douglas Hogg has indicated the U.K.'s decision to ratify Protocol 1 "as soon as the necessary legislation can be enacted in domestic laws". "Written Answers", Hansard (Commons), Vol. 230, col. 371, 22 October 1993.

146. See Chapter 5.

5. Terrorists and Freedom Fighters: The Failure of State-Centered Codification Efforts to Deter Acts of International Terrorism

Concurrent with the Twentieth Century development of humanitarian law, states have worked to encourage the prosecution and punishment of terrorists through antiterrorist conventions, treaties on mutual assistance in criminal matters, and extradition treaties. It is thus argued that these concurrent efforts highlight the scope of the problem of international terrorism, and re-inforce the opinion "that many states accept as legitimate a degree of political violence by individuals and groups in a search for justice as defined by each state for itself". (1)

In that acts of international terrorism, or political violence, are frequently perpetrated by small cells, or groups, such acts are rarely viewed by interested states as sufficient in intensity to cross thresholds of armed conflict regulated by the Geneva Conventions of 1949 or the Hague Conventions of 1907. Even though such acts could be considered "armed aggression", or constitute interference in the internal affairs of states (2), state efforts are aimed at criminalizing individually-perpetrated political violence in multi- and bi-lateral agreements, thereby isolating such acts within structural confines of domestic criminal responsibility. (3) This then means that the underlying political contexts through which such forms of violence could be assessed, if only in part, are usually ignored.

Various of the important codification efforts developed concurrently with the IHL treaty régime this Century are discussed in this Chapter, and it is argued that terrorism perpetrated during struggles for the right of self-determination cannot be defined,

ultimately, as pure criminal activity for these purposes. (4) On this basis, it is further argued that generalized extradition arrangements are not effective measures to eradicate terrorism perpetrated in the context of an armed conflict. This is due in large part to elements in extradition arrangements of imperfect legal obligation which involve both political and legal considerations, and a degree of legal system variation, none of which elements lends itself to objectivity in assessment of such forms of violence.

The reasons for this are many. Efforts within the international community to promulgate clear rules and policies to limit the behavior of politically violent actors continue to clash with state and regional traditions of political asylum, and strong national sympathies. (5) There has never been a definition of terrorism mutually acceptable to the world community. (6) Furthermore, the issue of state responsibility for international terrorism is rarely, if ever, dealt with in codified arrangements for purposes of any satisfactory sanctioning mechanism. (7) Finally, for purposes of this discussion, the following has been observed:

> Only if international terrorism is defined as something which will not bring within its orbit wars of national independence and struggles against racialism and colonialism ... can its prohibition be in conformity with international law and the decisions of the United Nations". (8)

By way of preliminary discussion, it is a longstanding principle of international law that states are obliged to prevent the perpetration of acts of international terrorism. (9) Beyond considerations of the standardization of domestic penal codes and treaties on mutual assistance and/or extradition, "a state is legally obliged to exercise

due diligence to prevent the commission of acts of international terrorism within its jurisdiction". (10) As noted by the I.L.A. Committee on International Terrorism, in 1984, "this statement codifies a basic principle of international tort liability" (11), and as such, no state may legally refuse, on the ground of lack of legal interest, to participate in measures to preserve international peace and security and prevent acts of international terrorism. (12)

Nevertheless, where political violence is motivated by an auto-determined group during a self-determination classification struggle (13), the above-mentioned state legal obligations become confounded with competing political considerations inherent in separate juridical treatments. Competing jurisdictional considerations implicate the right to wage war, the right to regulate war, and the right to authoritatively interpret as criminal individual or group acts which fail to cross recognized thresholds of armed conflict.

Thus, it is clear that states are obliged, legally, to participate actively in the prevention and/or restraint of behavior of politically motivated actors engaging in violence. (14) As such, mutual co-operation and the free exchange of information would appear to be mandated. Nevertheless, continuing international efforts to close loopholes in current codifications are clear evidence of the failure by states to deal adequately with these legal obligations in the face of competing political considerations which in particular frequently underly the use of state terrorism for purposes of covert aggression or interference in the internal affairs of other states.

Given the twin failures of the world community to define the phenomenon of international terrorism for purposes of a standardization

of efforts to prevent it, and to create reliable mechanisms through which to enforce prohibitions against individual, group, or state violence, it is argued that the only forum available to deal adequately with the problem of political violence in such contexts as struggles for self-determination is that offered by the IHL treaty régime. (15) The IHL system addresses degrees of the use of armed force, and has no political offense exception to the duty to extradite or prosecute perpetrators of acts which "are so reprehensible that they are of concern to the international community, whether they are perpetrated in times of peace or war, irrespective of the cause which the perpetrators pursue, and regardless of political motivation". (16)

This point is made clear in a discussion of the League of Nation's Convention for the Prevention and Punishment of Terrorism ("Terrorism Convention"), in 1937. (17) The Convention was an early attempt both to define terrorism and to ensure a sufficient standardization of individual state penal codes for the effective prosecution and punishment of international terrorists. This early Convention, which never entered into force, required the High Contracting Parties to ensure that penal offenses for acts defined as "terrorist" existed in their domestic codes. (18) Provision was also made for the inclusion of laws relating to extradition. (19) Perhaps more importantly, a Convention for the Creation of an International Criminal Court ("I.C.C. Convention") was opened for signature on the same day as the Terrorism Convention. (20) Its signature and coming into force were made contingent on the coming into force of the Terrorism Convention (21), and the I.C.C. was to afford an alternative forum for the trial of terrorist offenses when interested states so

requested. (22) Thus, the Court's jurisdiction was optional.

These early attempts to deal with acts of political violence were made, first, to standardize particular offenses of international terrorism, and second, to ensure that domestic law would be available to prosecute them, within a choice of fora. Neither Convention came into force, and it is argued that this early failure to achieve collective co-operation was the result of a perceived threat to the sovereign role generally played by domestic penal systems, including those laws relating to extradition. (23) More importantly, no further provision was made at that time either to deter acts of state terrorism, or to make states responsible for acts of terrorism.

Subsequent offense-specific agreements have been more successful. The major global conventions which are listed as follows, are frequently refered to, as is discussed later in this section.

Convention on Offenses and Certain Other Acts Committed on Board Aircraft (Tokyo Convention), 1963

Convention for the Suppression of Unlawful Seizure of Aircraft (Hague Convention), 1970

Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Montreal Convention), 1971

Convention for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation (Montreal Protocol), 1988

Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents (Convention on Protected Persons), 1973

International Convention Against the Taking of Hostages (Hostages Convention), 1979

Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (I.M.O. Convention), and Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf (I.M.O. Protocol), 1988 (24)

For purposes of the present discussion, a major problem in state-centered legal efforts to deter terrorism is the continuing absence of an agreed definition of the phenomenon. Regarding this point, it has been noted that "the definition of terrorism is itself part of a political labeling process", striven for within what may further be termed "the politics of terror ...". (25) For present purposes, however, it is important to recall that the primary motives characteristic of acts of terrorism are, first, to spread fear (26), and second, to utilize that fear to pressure or co-erce a government or governing body to change its policies.

In the wider sense of the ready use of violence by all participants in typical modern armed conflicts, it is argued that the deployment of the armed forces is a main distinguishing feature between state terrorism and individual/group violence, in that the former adds a rather unlimited nature to violent activities. It has been noted that the use by states of "indiscriminate violence against civilians which was made into a principle of policy in practice of 'collective punishment' and collective deportation of civilians in retaliation for acts of resistance" (27) is also a discrete form of terrorism. Thus, it would appear that acts of international terrorism cannot successfully be detered or prevented simply by defining them as an individual form of criminal activity.

Assuming this point, it is clear that IHL at present constitutes the sole existing legal régime capable of providing the mechanisms to deal with the political use of armed force or violence. In particular, given the ready use of the military by states to control political processes (28), the control of criminal justice systems by governments,

and the asymmetry of forces involved in struggles for self-determination, it is clear that IHL provides the only forum capable of assessing both state and individual responsibility for violence. IHL focuses on the nature of particular acts, and prohibits the tactical perpetration of reprehensible acts of violence. (29)

Acts of political violence may be considered aggression, or may constitute interference in the internal affairs of states. Post-1945 state reluctance to recognize armed struggles as war has required that state-centric codification efforts exist concurrently with the IHL treaty régime in order to have available alternate structures within which to interpret the nature of violent offenses carrying international political significance. It is thus felt necessary to examine various of the terrorist codification efforts which have been developed alongside IHL documents.

The structure of this discussion is as follows. The 1937 Terrorism Convention and I.C.C. Convention are reviewed in Part One. A number of the treaties and agreements currently in existence which are considered relevant to the prosecution of terrorist acts perpetrated within the context of struggles for self-determination are reviewed in Part Two. It is considered in Part Three whether these attempts at interstate co-operation effect a rejection of IHL's blanket condemnation of illegitimate means or methods of warfare. The failure of the world community to deal effectively with the phenomenon of international terrorism as a form of individualized criminal activity via state-centric treaty instruments is also considered.

It is concluded that efforts to criminalize acts of international terrorism have failed because the legal issues of individual and state

responsibility cannot be reconciled with competing political considerations which underly tactical forms of violence. In particular, it is clear that offense-specific codification efforts disregard many of the legal and political issues underlying wars of national liberation, by characterizing such acts through contexts of individual criminal activity. State reluctance to recognize a domestic liberation struggle as an armed conflict to which humanitarian law applies further obscures issues of state responsibility for provoking the use of force in self-defense.

5.1. The League of Nations and International Co-operation with Regard to the Prevention of Terrorism

Two Conventions were opened for signature on 16 November 1937. The first was the Terrorism Convention (30), and the second, the I.C.C. Convention. (31) The Terrorism Convention was promptly signed by the representatives of twenty states, and the I.C.C. Convention, by the representatives of ten European States. (32)

The Terrorism Convention made an early attempt to define terrorism, and to ensure sufficient standardization in individual state domestic penal codes for the effective prosecution and punishment of international terrorists. Only states which ratified or acceded to the Terrorism Convention could ratify or accede to the I.C.C. Convention. The entry into force of the latter treaty was conditional upon the entry into force of the former. The entry into force of the Terrorism Convention was to take place ninety days after the deposit of three ratifications or accessions. (33) As of 1 January 1941, only India had ratified the Terrorism Convention, and no state had ratified the I.C.C. Convention. (34) Neither Convention ever entered into force.

The initiation of both Conventions was prompted by the assassinations of King Alexander I of Yugoslavia and the French Minister for Foreign Affairs at Marseilles, on 9 October 1934. The extradition of certain persons accused of the assassinations was refused by Italy on the ground that the crime was political. After receipt by the Council of the League of Nations of a memorandum from the French Government regarding the bases for an agreement with a view to the suppression of terrorism, and the adoption of "international measures" for the suppression of political crimes, the Council set up a Committee of Experts to draft a Convention "to assure the repression of conspiracies or crimes committed with a political purpose". (35) Neither treaty came into force, however, due to the outbreak of World War Two, which event quickly interrupted international co-operation in the administration of justice for several years. (36) Tension was already apparent by the time the two Conventions were opened for signature.

Underscoring the optimism involved in these early codification efforts, commentary in 1933 indicated that the unification of criminal law was not so much desired in the world community as that certain offenses should be proscribed and punished. (37) This observation was voiced within the context of a desire for international co-operation in the suppression of crime, which co-operation would ensure that domestic legislation would permit states to exercise jurisdiction over criminal acts wherever they might be committed. Of note, though, were two main objections. The first was that the divergence of law and procedure between legal systems would be difficult to reconcile for this purpose. The second was that the full exchange of information in a "logical and just division among the various countries of their sovereign

jurisdiction to punish for crime" might be difficult to achieve, as well as be expensive. (38) It is therefore argued that, while the Terrorism Convention actually defined terrorism, both treaties foundered in large part on the demands required on state sovereignty before the requisite active state co-operation to make effective the prosecution and punishment of terrorist crimes and offenses committed in a foreign country could be achieved.

5.1.1. The 1937 Definition of Terrorism, as Contained in the Terrorism Convention

As previously noted, a state has the duty to prevent the commission of acts of international terrorism within its jurisdiction. This duty is contained in the Terrorism Convention, pertinent provisions of which are now discussed.

5.1.1.1. Pertinent Provisions

The duty of states to prevent the commission of acts of international terrorism is a principle of international law. This duty is phrased in the Terrorism Convention in Article 1(1), as follows:

> The High Contracting Parties, reaffirming the principle of international law in virtue of which it is the duty of every State to refrain from any act designed to encourage terrorist activities directed against another State and to prevent the acts in which such activities take shape, undertake ...

Article 1(2) defines "acts of terrorism" as "criminal acts directed against a State ...". Such acts must be "intended or calculated to create a state of terror in the minds of particular persons, or a group of persons or the general public". Article 2 specifies the acts which will constitute criminal offenses if they constitute acts of terrorism within the meaning of Article 1, and if such acts are "directed against another High Contracting Party". Such specification was to ensure that

the domestic legislation of the High Contracting Parties permitted the exercise of jurisdiction over terrorist acts, wherever committed. These acts are as follows:

(1) Any wilful act causing death or grievous bodily harm or loss of liberty to:

(a) Heads of States, persons exercising the prerogatives of the head of the State, their hereditary or designated successors;

(b) The wives or husbands of the above-mentioned persons;

(c) Persons charged with public functions or holding public positions when the act is directed against them in their public capacity.

(2) Any wilful destruction of, or damage to, public property or property devoted to a public purpose belonging to or subject to the authority of another High Contracting Party.

(3) Any wilful act calculated to endanger the lives of members of the public.

(4) Any attempt to commit an offence falling within the foregoing provisions of the present article.

(5) The manufacture, obtaining, possession, or supplying of arms, ammunition, explosives or harmful substances with a view to the commission in any country whatsoever of an offence falling within the present article.

Article 3 specifies acts preparatory to the offenses contained in Article 2, which preparatory acts are also made criminal offenses, "whatever the country in which the act of terrorism is to be carried out: ... ". These acts are as follows:

(1) Conspiracy to commit any such act;

(2) Any incitement to any such act, if successful;

(3) Direct public incitement to any act mentioned under heads (1), (2) or (3) of Article 2, whether the incitement be successful or not;

(4) Wilful participation in any such act;

(5) Assistance, knowingly given, towards the commission of any such act.

These offenses are supplemented by Articles 13 (provisions for gun control and regulation) and 14 (provisions for the regulation of passorts "or other equivalent documents").

All the created offenses carried individualized criminal liability. There is no mention of state liability or responsibility for either terrorist acts or preparatory acts. (39) Instead, and in view of the state duties outlined in Article 1, Article 12 states as follows:

> Each High Contracting Party shall take on his own territory and within the limits of his own law and administrative organisation the measures which he considers appropriate for the effective prevention of all activities contrary to the purpose of the present Convention.

Articles 4 and 5 ensure the harmonization of domestic law "in order to prevent an offender escaping punishment". (40) To this end, efforts to standardize domestic penal codes were made as follows. Article 5 states that "each High Contracting Party shall provide the same punishment for the acts set out in Articles 2 and 3, whether they be directed against that or another High Contracting Party". Article 8 provides that Articles 2 and 3 offenses are to be extradictable offenses. Article 8(4) allows for a political offense exception, which is phrased as follows:

> The obligation to grant extradition under the present article shall be subject to any conditions and limitations recognised by the law or the practice of the country to which application is made.

Article 9 allows, where applicable, for the non-extradition of nationals, who must nevertheless "be prosecuted and punished in the same manner as if the offence had been committed on that territory, ...".

5.1.1.2. Discussion

As is obvious from these sections of text, the decision to co-operate or not in the prosecution and punishment of political crimes of terrorism turned on domestic interpretations of the nature of the indicated acts. This is indicated in Article 2 as follows: "... if they (terrorist acts) are directed against another High Contracting Party and if they constitute acts of terrorism within the meaning of Article 1" (emphasis added). Article 18 states as follows:

> The participation of a High Contracting Party in the present Convention shall not be interpreted as affecting that Party's attitude on the general question of the limits of criminal jurisdiction as a question of international law.

Further, Article 19 states as follows:

> The present Convention does not affect the principle that, provided the offender is not allowed to escape punishment owing to an omission in the criminal law, the characterization of the various offences dealt with in the present Convention, the imposition of sentences, the methods of prosecution and trial, and the rules as to mitigating circumstances, pardon and amnesty are determined in each country by the provisions of domestic law.

Disputes between states are mainly contemplated in Article 20(1) with regard to "the interpretation or application of the present Convention, ...", or, in Article 20, concerning dispute resolution between High Contracting Parties, in general.

This codification effort was doomed to fail as states retained their full powers of sovereign authoritative interpretation as to the nature and target of particular acts of terrorism for purposes of characterization. It was further noted in 1933, with regard to the political offense exception in the context of criminal jurisdiction, that "(t)he definition of this category tends to become broader in an

era of exacerbated nationalism like the present ...". (41) This is of interest to the present discussion of liberation struggles, in view of state and regional traditions of asylum, and strong national sympathies. Thus; the unsuccessful attempt made in 1937 to standardize different penal codes and thus to delimit state sovereignty was prophetic with regard to more recent efforts to codify extradition arrangements.

Despite express provisions in the Terrorism Convention which defined the phenomenon of acts of terrorism, and which provided for standardization in domestic penal provisions for purposes of prosecution, it is argued that state authoritative interpretations would have interrupted effective co-operation measures in the identification of suspected terrorists, and in the characterization of the elements of particular offenses, as occurs today. It is argued that, had the Terrorism Convention entered into force with a minimal number of ratifications or accessions, modern difficulties with regard to the ready exchange of information, the extradition of alleged offenders, and the effective prosecution and punishment of international terrorists would have been present, even where particular High Contracting Parties shared the same or similar juridical sources. (42) It is also highly relevant to the present discussion that state terrorism, and perceived rights of self-defense against a government, were not yet contemplated as being appropriate subjects for an anti-terrorist Convention. (43)

For these reasons, the modern failure of the world community, *inter-se*, either to define or provide reliable mechanisms for the trial of acts of terrorism is foreshadowed by the 1937 Terrorism Convention, which codification effort was expressly intended to deal with the suppression of acts of political violence.

5.1.2. The I.C.C. Convention of 1937 and Jurisdictional Problems

As previously noted, objections to the international standardization of criminal offenses are in the main based on dissimilar juridical principles, as derived from divergent cultural sources which involve competing labeling processes and procedures. Definitions of terrorism result from state sovereign authority over the labeling process, which process is frequently a political one. Given these twin elements of categorization - legal tradition and political considerations, it is of interest that the Terrorism Convention contemplated a common approach by defining the political actions which were to incur individualized criminal liability in the domestic systems of the High Contracting Parties. In particular, Article 24 of the Terrorism Convention stated as follows:

> Ratification of, or accession to, the present Convention by any High Contracting Party implies an assurance by him that his legislation and his administrative organisation enable him to give effect to the provisions of the present Convention.

Nevertheless, each High Contracting Party was able, first, to interpret what types of offense fell within the ambit of the treaty. (44) Second, each determined what actions were to be taken regarding extradition provisions. (45) Third, each decided what course a particular domestic prosecution should follow. (46)

It is clear that states were to retain domestic control over the prosecution of offenses enumerated in the Terrorism Convention, while the processes were to result in the same, or similar, substantive outcome. The retention of individual state domestic control over the processes of criminal justice meant the standardization, not the unification, of criminal law and procedure.

The coming into force of the I.C.C. Convention was made contingent on the coming into force of the Terrorism Convention. This linking device made the two Conventions supportive of the notion that the propriety of prosecution was to be determined more by its substantive outcome than by its formal conduct (47), which in effect could have been made impracticable by disputes as to procedure. This point is of particular relevance to matters of extradition, state sympathy for political offenses, and asylum requests.

5.1.2.1. Pertinent Provisions

A High Contracting Party to the Terrorism Convention could commit an accused to the I.C.C. for trial. There was, however, no obligation to do so. Article 2 of the I.C.C. Convention provides as follows:

> 1. In the cases referred to in Articles 2, 3, 9 and 10 of the Convention for the Prevention and Punishment of Terrorism, each High Contracting Party to the present Convention shall be entitled, instead of prosecuting before his own courts, to commit the accused for trial to the Court.
>
> 2. A High Contracting Party shall further, in cases where he is able to grant extradition in accordance with Article 8 of the said Convention, be entitled to commit the accused for trial to the Court if the State demanding extradition is also a Party to the present Convention.
>
> 3. The High Contracting Parties recognise that other Parties discharge their obligations towards them under the Convention for the Prevention and Punishment of Terrorism by making use of the right given them by the present article.

As for providing a choice in prosecuting authority, the I.C.C. Convention, in Article 25(3), states as follows:

> The State which committed the accused person to the Court shall conduct the prosecution unless the State against which the offence was directed or, failing that State, the State on whose territory the offence was committed expresses a wish to prosecute.

Should an accused be committed for trial to the I.C.C., the law applicable to such trial was provided for in Article 21, as follows:

> 1. The substantive criminal law to be applied by the Court shall be that which is the least severe. In determining what that law is, the Court shall take into consideration the law of the territory on which the offence was committed and the law of the country which committed the accused to it for trial.
>
> 2. Any dispute as to what substantive criminal law is applicable shall be decided by the Court.

Whether the prosecution was conducted by the committing state or the injured state, the potential existed for a directly injured person to participate as a *partie civile* before the Court (48), which potential is of particular interest in the contexts of terrorist offenses directed against innocent third parties (49), and of the participation of individuals before international tribunals, generally.

Provisions relating to the execution of sentences are contained in Articles 40 and 41, which are as follows:

> 40. 1. Sentences involving loss of liberty shall be executed by a High Contracting Party chosen with his consent by the Court. Such consent may not be refused by the State which committed the convicted person to the Court for trial. The sentence shall always be executed by the State which committed the convicted person to the Court if this State expresses the wish to do so.
>
> 2. The Court shall determine the way in which any fines shall be dealt with.
>
> 41. If sentence of death has been pronounced, the State designated by the Court to execute the sentence shall be entitled to substitute therefore the most severe penalty provided by its national law which involves loss of liberty.

Article 42 permits a High Contracting Party to pardon an accused, which article allows states additional discretion to disregard the agreed standardization of criminal offenses involving acts of political

violence. Article 42 provides as follows: "(t)he right of pardon shall be exercised by the State which has to enforce the penalty. It shall first consult the President of the Court".

States having committed an accused to the Court for trial were prevented from withdrawing the case from the jurisdiction of the Court by Article 56 which provides that "(a) case brought before the Court before the denunciation of the present Convention, or the making of a declaration as provided in Article 52, paragraph 3, shall nevertheless continue to be heard and judgment be given by the Court".

5.1.2.2. Discussion

In view of the choices of prosecuting authority and in provisions regarding the execution of sentences and powers of pardon, the I.C.C. Convention was deemed "innovative" in that it "relieve(d) states of embarressing burdens cast upon them more or less accidentally ...". (50)

Yet, given the discretion provided to states, as outlined, it is of little surprise that the Court, had it ever been established, would have faced difficulties with choice of law issues. Its creation was made contingent upon the standardization of domestic criminal laws of states parties, albeit the minimal number of three states required to bring the Terrorism Convention into force. One ratification or accession of these three was all that was needed to bring the I.C.C. Convention into force. Thus, the modern difficulty with choice of law issues was foreshadowed by the Terrorism Convention. Not only was domestic law the backbone of any prosecutorial discretion, but extradition or prosecution procedures were left to be determined on a case-by-case basis by individual states interpreting for themselves, individually, the nature and content of any alleged offense to be

prosecuted.

The unification - and not the standardization - of international law regarding the enumerated categories of offenses, was at the time felt to be too ambitious a project on the basis of legal system plurality and expense. Unification, nevertheless, would have resulted in a predictability of desired result regarding the procedural aspects of criminal prosecutions for offenses either committed abroad, or having foreign and international effect. If enunciated in terms of a codified agreement, such predictability of result through unified procedures would have given greater credence to interstate efforts to deter the phenomenon of terrorism within state-centric frameworks. In particular, the extradition and/or prosecution of offenders charged with an offense of a terrorist nature were then, and still remain, hampered by sovereign state assessments of both the propriety of sister state criminal justice procedures, and the political considerations involved in characterizing a particular use of violence as politically motivated. Thus, any chance to unify state attitudes towards the phenomenon of terrorism, for purposes of true reciprocity in policy, was lost. Instead, standardization alone was striven for, which standardization sought to emphasize the importance of prosecution through substantive outcome, rather than through formal agreement as to approach and procedure.

Neither Convention came into force. Had they done so, it is speculated that each would have foundered in a fashion similar to modern codifications. These early Conventions would have failed in cases where state authoritative interpretation retained the scope to characterize particular violent offenses differently, and where state responsibility for terrorist acts might be in issue. More importantly, these

Conventions would have failed where sovereign state criminal procedural considerations, albeit delimited through mutual obligation and assistance, could prevent the extradition of a particular offender on the basis of national sympathy and/or political ideology.

The present failure of the world community to define terrorism, and to standardize or unify attitudes regarding the phenomenon of international terrorism through separate, offense-specific codification efforts is foreshadowed by these post-World War I objections to the innovative yet minimal delimitations of state sovereignty contemplated in the 1937 Conventions. With particular relevance to the extradition of nationals, it would appear clear that modern attempts to co-operate actively in detering terrorism are made more difficult by national and ethnic sympathies regarding the post-1945 issue of the self-determination of "Peoples", and the use of armed force, to achieve their rights. (51)

These issues, coupled with colonialism, racism, alien occupation and the self-defense of "Peoples" against state terrorism, cannot be dealt with squarely within the confines of state-centric anti-terrorist codification efforts, which efforts often serve to re-inforce national sympathies, ideological unity, and economic solidarity. It is thus concluded that IHL is the only treaty régime in existence capable of providing the necessary procedures and mechanisms to deter, apprehend, and prosecute perpetrators of political violence during system transformation struggles, whether they are individuals, groups, or states. Reprehensible acts of violence are clearly regulated by humanitarian law from the first outbreak of armed hostilities. (52) Such regulation applies to states in their use of the military to

control political processes. Prohibitions against the use of violent means and methods of warfare apply to all parties involved in classification struggles by auto-determined "Peoples". Thus, it is clear that IHL can be readily utilized to distinguish and prosecute acts of political violence perpetrated in armed struggles for self-determination should the international community wish to do so.

5.2. The Current Legal System, with Particular Regard to Extradition Arrangements

As is common to all domestic legal systems, a criminal offense must be defined by the state in order that the elements which constitute it may then be specified. (53) Procedures of state sanction must be devised and invoked. With regard to the criminal offense of international terrorism, Murphy notes that "109 different definitions of the term were advanced between 1936 and 1981, and more have appeared since". (54) None of these definitions have ever been adopted by the world community. For this reason, there is still no international crime of "terrorism", subject to universal jurisdiction (55). Instead, there are individual criminal offenses which are recognized in state codifications as acts of international terrorism, which fact renders dubious any satisfactory standardization or unification of state attitude towards the exercise of universal jurisdiction over reprehensible acts committed by, in particular, liberation fighters. As a result, none of the major global conventions attempting to create an absolute obligation to extradite or prosecute terrorists has been entirely successful in achieving reliable observance in the post-1945 era. (56)

Modern codification efforts frequently outline, in general terms,

the constitutive elements of acts of political violence and/or list such specific acts. Guidance to the international community for sovereign interpretations regarding acts of terrorism may be found in U.N. Resolutions which alternately condemn particular terrorist acts, and encourage Member states to engage in constructive dialogue with auto-determined "Peoples". (57)

As was noted in the discussion of the 1937 codifications, attempts to criminalize acts of international terrorism founder in the main on variations in legal system classifications of criminal activity. Beyond this issue, another difficulty in the post-1945 era has been the separation of the right to use armed force in struggles for self-determination from the regulation of tactics of terror-violence deployed by liberation fighters utilizing "direct action" as a "just" mode of conflict resolution. (58) In other words, the "mischievous hypothesis that wars of national liberation are essentially acts of terrorism" (59) has served to cloud both the legality of a "just" use of force, and the regulation of violence. When individual state sovereign authority must grapple with what is considered to be mere political violence, the result is the use of the armed forces, and the adoption of the means of state terrorism in the form of direct or surrogate aggression. (60)

The current legal system is inadequate when the twin issues of the prosecution and punishment of acts of international terrorism are raised. In view of this, states refusing to extradite or prosecute individual terrorists must be confronted with the alternative forum presented by the IHL treaty régime, which body of law makes the deliberate targeting of the civilian population by any entity involved in an armed conflict a war crime. (61)

In order to illustrate the inadequacies of the existing state-centered approach to terrorism, pertinent provisions of the International Convention Against the Taking of Hostages (Hostages Convention), 1979 will first be examined in this Part. Pertinent provisions of the Supplementary Treaty Concerning the Extradition Treaty between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland (U.S.-U.K. Supplementary Extradition Treaty), 1985, the European Convention on the Suppression of Terrorism (European Convention), 1977, and the European Agreement Concerning the Application of the European Convention on the Suppression of Terrorism among the Member States (Dublin Agreement), 1979 will then be discussed and compared. (62)

5.2.1. The Hostages Convention, and the Geneva Conventions, as Applicable to a Particular Act of Hostage-Taking

The Hostages Convention provides for the criminal prosecution, or extradition, of persons committing the offense of hostage-taking regardless of motive or the identity of the victim. (63) The obligation to prosecute or extradite offenders, as worded, resulted from a "package deal" between Western and non-aligned states which had to reconcile the position of national liberation movements, and the legitimacy of the struggle for self-determination, with the prohibition against the taking of hostages. (64)

5.2.1.1. Pertinent Provisions

The Preamble to the Hostages Convention states that the taking of hostages "is an offense of grave concern to the international community". Even so, states parties to the Convention re-affirm

> ... (T)he principle of equal rights and self-determination of peoples as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, as well as in other relevant Resolutions of the General Assembly.

A reservation to an absolute approach to the offense of hostage-taking is included and explained in Article 12, which states as follows:

> In so far as the Geneva Conventions of 1949 for the protection of war victims or the Additional Protocols to those Conventions are applicable to a particular act of hostage-taking, and in so far as States Parties to this Convention are bound under those Conventions to prosecute or hand over the hostage-taker, the present Convention shall <u>not</u> apply to an act of hostage-taking committed in the course of armed conflicts as defined in the Geneva Conventions of 1949 and the Protocols thereto, including armed conflicts mentioned in article 1, paragraph 4, of Additional Protocol I of 1977, in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations. (Emphasis added.)

In addition, Article 13 provides as follows:

> This Convention shall not apply where the offence is committed within a single State, the hostage and the alleged offender are nationals of that State and the alleged offender is found in the territory of that State.

Of interest to the present discussion, a dispute as to the applicability of Article 12 or 13 could result. The implementation of the Geneva treaty régime during a domestic national uprising is frequently a political decision, the result of which affects interpretations of the level of due process protections to be afforded to a "domestic" hostage taker. In other words, a decision to invoke either Article 12 or Article 13 may be necessary to determine the treatment of an accused under either an international or domestic standard.

Otherwise, procedures for the prosecution and punishment of hostage-takers follow a similar format to the 1937 Terrorism Convention. Article 2 provides that "(e)ach State Party shall make the offences set forth in Article 1 punishable by appropriate penalties which take into account the grave nature of those offences". Article 5 provides, in pertinent part, as follows:

> 2. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over the offenses set forth in Article 1 in cases where the alleged offender is present in its territory and it does not extradite him ...
>
> 3. This Convention does not exclude any criminal jurisdiction exercised in accordance with internal law.

Article 8 provides, in pertinent part, as follows:

> 1. The State Party in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State. Those authorities shall take their decision in the same manner as in the case of any ordinary offence of a grave nature under the law of that State.

The major compromise article, which arguably reconciles potential interpretational conflicts, is found in Article 9, which Article provides for a political and humanitarian exception to extradition. Article 9, in pertinent part, provides as follows:

> 1. A request for the extradition of an alleged offender, pursuant to this Convention, shall not be granted if the requested State Party has substantial grounds for believing:
>
> a. that the request for extradition for an offence set forth in Article 1 has been made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality, ethnic origin or political opinion; or

b. that the person's position may be prejudiced:

i. for any of the reasons mentioned in subparagraph a. of this paragraph, ...

Finally, the offenses enumerated in Article 1 are preceded by a definition of a hostage-taker: "(a)ny person who seizes or detains and threatens to kill, to injure or to continue to detain another person". Article 1 broadly defines the persons who commit the offense of hostage-taking, as follows:

2. Any person who:

a. attempts to commit an act of hostage-taking, or

b. participates as an accomplice of anyone who commits or attempts to commit an act of hostage-taking ...

Article 1 indicates that the motive underlying the offense of hostage-taking must be committed:

> (I)n order to compel a third party, namely, a State, an international intergovernmental organization, a natural or juridical person, or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage ...

5.2.1.2. Discussion

Given the above-outlined articles concerning potential applicability of the Geneva treaty régime, extradition, and use of domestic penal codes for purposes of prosecution, it is clear that the Hostages Convention attempts to reconcile the prohibition against hostage-taking as an act of international terrorism, with the legitimacy of the struggle for self-determination. In particular, the Convention was intended to apply to all cases of hostage-taking which are not perpetrated in the course of an armed conflict regulated by humanitarian law and/or the effects of which are not confined to a single state.

Thus, in the context of the offense of hostage-taking as an act

of international terrorism, responsibility for such an offense is dealt with at all possible levels. State responsibility is dealt with through Article 12, which article leaves open the possibility that hostage-taking may occur in the separate legal area governing armed conflicts. Domestic-effect hostage-taking, as dealt with in Article 13, is not the subject of the Convention, and presumably is to be dealt with through appropriate domestic penal mechanisms.

Nevertheless, and as noted by the I.L.A. Committee on International Terrorism in 1982, Article 12 "both eliminates an anomaly and reveals one". (65) In other words, doubt remains as to which armed struggles qualify for the protections afforded through Article 1(4) of Protocol 1. If a domestic armed conflict is not considered to qualify for IHL protections, a perpetrator may be stripped of the protections of international law. A state may indulge in hostage-taking as one tactic in an overall strategy of surrogate aggression. States parties to the Hostages Convention are allowed to indulge in national sympathies, to characterize associated struggles as "international", and to afford combatant soldiers' privileges to hostage-takers involved in such conflicts. While such sympathetic states are still obliged either to prosecute or extradite an offender, the possibility of a friendly prosecution exists.

The I.L.A. notes as follows:

> (T)hose states using the legal power of autointerpretation to deny combatant status to the hostage-takers would find it difficult to achieve their extradition except from those states adopting a similar autointerpretation and qualification and permitting extradition of politically motivated offenders. Without Article 12 it would be possible that a politically motivated hostage-taker, violating the municipal law forbidding kidnapping or extortion or assault in the place of his act, would find asylum in a third state and go

unpunished because politically inspired. At the same time, the same actor doing the same thing to a person protected under the Fourth Geneva Convention of 1949 and fleeing to a state which considers him a soldier in an armed conflict to which the 1949 Geneva Conventions or Protocol 1 applied, would, if he were sought by any state concerned making the same autointerpretation, appear to be liable to criminal process, or even possibly extradition. ... .

> The possibility exists that a hostage-taker might be able to escape both trial and extradition because of doubts as to which of two treaty régimes, or even which of two articles in a single treaty, applied when both lead to the same result and are intended to mesh with each other precisely (66).

Verwey notes further that the Hostages Convention attempts to balance different state interests. Such interests involve legal, humanitarian and political considerations involved in a system of priority of jurisdiction, in addition to the role that domestic penal systems play with regard to state sovereignty, as previously discussed. (67) Concerns regarding regional conceptions of fairness of trial were further voiced, reminiscent of the objections to the unification or standardardization voiced prior to the 1937 codifications.

For these reasons, it would appear that the Hostages Convention has come as close as possible on a multi-lateral basis to provide procedures and mechanisms with which to prosecute and punish acts of hostage-taking at all levels of responsibility. Nevertheless, it would seem that the effort to reconcile the political considerations involved in struggles for self-determination with the individualization of hostage-taking as an offense fails to contemplate the phenomenon of state-motivated or instigated terrorism, which species of terrorism is frequently perpetrated for purposes of covert aggression in armed arenas not characterized as regulated by international law. It also fails to take into account the variations in domestic treatment of criminal

offenders, which variations frequently fall far short of protections provided in international law.

In this latter regard, Article 13 is of concern. The potential contradictions inherent in this article can be imagined. This is of particular concern in classification struggles where acts of a terror nature are used to draw media and government attention to the failure of state legal and constitutional processes to adequately provide for system transformation. For instance, should a target government not interpret a domestic national situation of unrest as coming under the coverage of Protocol 1, Protocol 2, or as a minimum, Common Article 3, there is no protection afforded to an accused other than domestic implementation of various human rights provisions. In such a situation, any evidence of political purpose or motivation underlying a particular group use of violence is frequently disregarded, as individualized criminalization takes hold.

In that a particular hostage-taker may be able to escape sanction due to confusion over which treaty régime to apply, it is concluded that the loopholes afforded by the Hostages Convention present a problem which the international community has yet to confront - that of the political assessment of an armed conflict. Further, in that states have yet to target each other's use of terrorist tactics for potential sanction in issue-specific anti-terrorist conventions as the one under discussion, it can be argued that the IHL treaty régime is the sole forum available which can deal comprehensively with such acts of politically motivated violence as hostage-taking.

5.2.2. The U.S.-U.K. Extradition Treaty, European Convention and Dublin Agreement - Attempts at Unification

Current arrangements regarding extradition, jurisdiction and mutual criminal assistance are largely bi-lateral rather than multilateral. Nevertheless, such arrangements are frequently "hindered in their operational effectiveness by the concept of the sovereignty of states and by outmoded concepts of national jurisdiction". (68)

As discussed in the context of the 1937 codification efforts, the plurality of domestic criminal justice systems in the international community, the divergencies of their juridical sources, and the variations in the enumerated elements of particular offenses frequently lead to objections to unifying procedure for the purpose of standardizing substantive outcomes. This point is re-affirmed by Murphy, who notes the following:

> If the prosecuting state's criminal justice system lacks integrity, the risk of political intervention in the prosecution or at trial exists. Such intervention may prevent the trial or conviction of the accused, or act as a mitigating influence at the sentencing stage. (69)

Such objections were noted early, and commented on in 1933 in the context of the dialogue concerning the unification/standardization of criminal law, in order that the I.C.C. could work in tandem with the Permanent Court of International Justice. In particular, the U.K. felt that "the criminal law is rooted too deeply in the history and customs of peoples to submit to unification except among certain nations". (70)

Three modern attempts to come to a common agreement are the U.S.-U.K. Supplementary Extradition Treaty, the European Convention and the Dublin Agreement. These agreements have been selected from a multitude of possible documents on the same or similar subject matter in that a

degree of standardized procedure appears to have been reached regarding state obligations to either extradite or prosecute the suspected perpetrators of particular terrorist offenses. Furthermore, they have been selected as their lowest common denominator appears to be the deterrence of the civil armed unrest occurring in Northern Ireland, a situation which the U.K. prefers not to regard as one to which the Geneva treaty régime applies.

This part will outline provisions of each document which are relevant to this discussion. In particular, arrangements as regards the extradition of offenders, and similarities and differences in approach to the phenomenon of international terrorism, will be discussed.

5.2.2.1. The U.S.-U.K. Supplementary Extradition Treaty

The U.S.-U.K. Supplementary Extradition Treaty of 1985 is a recent initiative by the U.S., and is intended to supplement and amend the Extradition Treaty between the U.S. and the U.K., signed at London on June 8, 1972. As stated in the report of the Department of State, the supplement is intended to "exclude specified crimes of violence, typically committed by terrorists, from the scope of the political offense exception to extradition". (71)

The supplement was prompted by recent U.S. jurisprudence regarding alleged I.R.A. terrorists detained in the U.S., whose extradition was sought by the British Government. In each case, the court of first instance denied extradition on the ground that the offenses charged constituted political offenses. (72) As a result, the U.S. Administration reacted strongly. In this regard, Murphy notes as follows:

Having failed to convince the courts that the current law reserved the decision on the political offense exception to the Executive Branch, the (U.S.) Government sought to accomplish such a reservation by including in newly concluded bilateral extradition treaties specific provisions reserving to the '(e)xecutive authority of the requested party' the power to determine whether an offense for which extradition is requested falls within the political offense exception. (73)

There was substantial opposition in the U.S. to transferring this decision-making authority from the courts to the Secretary of State. (74) Nevertheless, the U.S.-U.K. Extradition Treaty was revised while it was pending before the Senate Committee on Foreign Relations and the Senate gave its advice and consent to the revised form of the treaty. (75)

5.2.2.2. Pertinent Provisions

Article 1 of the 1985 Supplementary Extradition Treaty effectively limits the scope of the political offense exception previously found in Article 5(1)(c)(i) of the 1972 Treaty by listing the crimes which are no longer to be regarded as offenses of a political nature. Article 1 provides as follows:

> For the purposes of the Extradition Treaty, none of the following offenses shall be regarded as an offense of a political character:
>
> a. an offense within the scope of the Convention for the Suppression of Unlawful Seizure of Aircraft, opened for signature at the Hague on 16 December 1970;
>
> b. an offense within the scope of the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, opened for signature at Montreal on 23 September 1971;
>
> c. an offense within the scope of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, opened for signature at New York on 14 December 1973;

d. an offense within the scope of the International Convention against the Taking of Hostages, opened for signature at New York on 18 December 1979;

e. murder;

f. manslaughter;

g. maliciously wounding or inflicting grievous bodily harm;

h. kidnapping, abduction, false imprisonment or unlawful detention, including the taking of a hostage;

i. the following offenses relating to explosives:

1. the causing of an explosion likely to endanger life or cause serious damage to property; or

2. conspiracy to cause such an explosion; or

3. the making or possession of an explosive substance by a person who intends either himself or through another person to endanger life or cause serious damage to property;

j. the following offenses relating to firearms or ammunition:

1. the possession of a firearm or ammunition by a person who intends either himself or through another person to endanger life; or

2. the use of a firearm by a person with intent to resist or prevent the arrest or detention of himself or another person;

k. damaging property with intent to endanger life or with reckless disregard as to whether the life of another would thereby be endangered;

l. an attempt to commit any of the foregoing offenses.

Article 4 provides that its provisions shall apply to any offense committed before or after the entry into force of the 1985 Supplement, unless an offense "was not an offense under the laws of both Contracting Parties at the time of its commission".

5.2.2.3. The European Convention

The European Convention was signed under the auspices of the Council of Europe by seventeen Member States on 27 January 1977, and entered into force in 1978. Of particular interest to the present discussion, the Convention does not provide a definition of terrorism, but instead, provides that certain terrorist acts shall not be regarded as political offenses for the purposes of extradition. Nevertheless, and in common with Article 9 of the Hostages Convention, a requested state may refuse either to extradite or to afford mutual assistance if it believes that an accused is to be prosecuted with regard to his race, religion, nationality or political opinion. Otherwise, the political offense exception is excluded.

5.2.2.4. Pertinent Provisions

The European Convention follows a similar approach to the U.S.-U.K. Supplementary Extradition Treaty with regard to the modification of the political offense exception. Article 1 provides as follows:

> ...(N)one of the following offences shall be regarded as a political offense or as an offence connected with a political offence or as an offence inspired by political motives:
>
> a. an offence within the scope of the Convention for the Suppression of Unlawful Seizure of Aircraft, ... ;
>
> b. an offence within the scope of the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, ... ;
>
> c. a serious offence involving an attack against the life, physical integrity or liberty of internationally protected persons, including diplomatic agents;
>
> d. an offence involving kidnapping, the taking of a hostage or serious unlawful detention;
>
> e. an offence involving the use of a bomb, grenade, rocket, automatic firearm or letter or parcel bomb if this use endangers persons;

f. an attempt to commit any of the foregoing offences or participation as an accomplice of a person who commits or attempts to commit such an offence.

Article 2 provides that the offenses enumerated in Article 1 could be expanded upon for purposes of extradition. Article 3 modifies all extradition treaties and arrangements between Contracting States "to the extent that they are incompatible with this Convention". Article 4 modifies any extradition convention or treaty existing between Contracting States to include "any offence mentioned in Article 1 or 2".

Article 5, like Article 9 of the Hostages Convention, provides as follows:

> Nothing in this Convention shall be interpreted as imposing an obligation to extradite if the requested State has substantial grounds for believing that the request for extradition for an offence mentioned in Article 1 or 2 has been made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality or political opinion, or that that person's position may be prejudiced for any of these reasons.

Article 6 provides for the standardization of jurisdictional arrangements in each of the Contracting States in order to establish jurisdiction over an offense if a state does not extradite the suspected offender. (76) Article 7 makes obligatory the duty to extradite or prosecute, "without exception whatsoever". Domestic procedure is to apply to prosecution, and "authorities shall take their decision in the same manner as in the case of any offence of a serious nature under the law of the State". Wide mutual assistance in criminal matters is provided for in Article 8, of which paragraph 2 narrows this obligation for the reasons given in Article 5. (77) Article 8(3) modifies all treaties and arrangements concerning mutual assistance applicable between Contracting States wherever incompatible with this Convention.

Article 13 allows a Contracting State to declare, at the time of signature or "when depositing its instrument of ratification, acceptance or approval", that it reserves the right to refuse extradition for any Article 1 offense it considers a "political offence, an offence connected with a political offence or an offence inspired by political motives". Contracting States are urged, nevertheless, to take the seriousness of an offense into account when evaluating its nature for such purposes. (78)

5.2.2.5. The Dublin Agreement

The Dublin Agreement, signed by the Ministers of Justice of the nine EC Member States on 4 December 1979, attempts to make applicable the "extradite or prosecute" obligation to terrorist acts. It makes the European Convention applicable in extradition proceedings between Member states even if one or both states have not ratified the latter instrument, and reduces the effects of Article 13. States parties to the Dublin Agreement which are not party to the European Convention must declare their desire to retain the political offense exception in extradition proceedings. The Dublin Agreement is not yet in force.

5.2.2.6. Pertinent Provisions

The Preamble to the Dublin Agreement states that the concern of the Member States is "to strengthen judicial cooperation among these States in the fight against acts of violence; ...". The scope of the Agreement is given in Article 1, which provides that it "shall apply in relations between two Member States of which one at least is not a party to the European Convention or is a party to that Convention, but with a reservation". This was intended to make the extradition arrangements contained in the European Convention applicable to France, which had

failed to ratify the latter instrument. (79)

Article 2 provides that parties making a reservation to the European Convention are to be subject to the provisions of this Agreement. More specifically, Article 2(2) provides that "(i)n the relations between two Member States of which one at least is not a party to the European Convention, Articles 1 to 8 and 13 of that Convention shall apply subject to the provisions of this Agreement".

Article 3 obliges states making a reservation under Article 13 of the European Convention to declare "whether, for the application of this Agreement, it intends to make use of this reservation", and to declare, if not a party, "whether, for the application of this Agreement, it intends to make the reservation permitted". Article 3(3) makes obligatory the prosecution of political offenses, "without exception whatsoever".

Article 6(2) provides for the Agreement to come into force, as follows:

> The Agreement shall enter into force three months after the deposit of the instruments of ratification, acceptance or approval by all States which are members of the European Communities on the day on which this Agreement is opened for signature.

5.2.2.7. Discussion

For present purposes, it is clear that the principle of extradite or prosecute governs these three arrangements. The U.S.-U.K. Supplementary Extradition Treaty and the European Convention each list specific offenses to be excluded from the political offense exception for purposes of extradition and the two lists are similar. In addition, the Dublin Agreement specifically provides in Article 8 as follows:

> This Agreement shall cease to have effect on the date when all Member States become parties without reservation to the European Convention.

Nevertheless, there are variations in approach to the extradition of political offenders, as is now discussed.

5.2.2.7(1). The Scope for Political Offenses

The main difference between the U.S.-U.K. Supplementary Extradition Treaty and the European Convention/Dublin Agreement would appear to be the scope afforded for discretion in determining what may or may not be a political offense. While Section 3a of the first of these prevents extradition if it can be shown the individual would suffer religious, political or racial discrimination upon return, the U.S. requires an accused to carry a heavy burden of proof for such purposes. Recognition is nevertheless given to potential jurisdictional problems which could arise should perpetrators of certain acts, having mixed elements of political and common crimes, assert a political defense.

In what Murphy refers to as "political incidence theory", as developed in British and U.S. case law, certain offenses may occur in the course of a political disturbance, and are "incidental to and part of the political disturbance". (80) Such offenses might contain mixed elements of domestic and international crime. Thus, it would appear that states remain hesitant to waive completely the right to evaluate the political content, if any, of a particular offense.

5.2.2.7(2). The Issue of Inquiry

The principle of extradite or prosecute involves choosing a legal system for the prosecution of an offense. This choice comes into play particularly when an alleged offender asserts the political nature of

his offense. His fears regarding the fairness of trial, possible prejudice and miscarriages of justice are additional concerns. (81) Nevertheless, as was noted previously regarding the U.S.-U.K. Supplementary Extradition Treaty, recent jurisprudence in the U.S. prompted the additional exclusion of specifically terrorist acts from the political offense exception to extradition between those two countries. (82)

A choice of forum for prosecution further involves a requested state assessing the motives for extradition of the requesting forum, and the basic fairness of its judicial processes. The automatic operation of such an assessment implies a rebuttable presumption that injustice will be the result of extradition. Such an evaluation "could be interpreted as an intervention in the internal affairs of the requesting state". (83) Conversely, and as noted by Sofaer, it is felt in many quarters that "(w)ith respect to violent crimes, the political offense exception has no place in extradition treaties between stable democracies". (84)

States continue to retain levels of autointerpretation as to whether a political offense has been committed, for example through mechanisms such as Articles 1 to 8 and 13 of the European Convention. On the other hand, the recent Supplement to the U.S.-U.K. Extradition Treaty was prompted in order to exclude most political considerations from extradition requests for the perpetrators of certain violent crimes, in particular, those with links to Northern Ireland.

5.2.2.7(3). State Mutual Interest

The world community has a legal interest in maintaining international peace and security. This, then, implies that states have

a mutual interest in the suppression of acts of international terrorism. Nevertheless, in that such acts frequently have a mixed "criminal" and "political" character, states retain a degree of discretion when deciding to extradite or prosecute particular alleged offenders.

Should a situation be more complex, and an armed conflict purportedly exist in the territory of a requesting state, questions regarding the appropriate jurisdictional level to invoke can be the result. For example, disagreement exists as to the true political nature of situations like that existing in Northern Ireland. (85) In a manner similar to that discussed in the context of the Hostages Convention, should an actor from a domestic armed arena flee to a state which auto-identifies him as a soldier in an armed conflict to which the Geneva treaty régime applies, he could be afforded the legal defenses of a combatant. Conversely, he might be subject to criminal process, extradition, or asylum considerations.

Mutuality of state interest in the suppression of international terrorism is necessary before assistance and co-operation arrangements can be made workable. The scope afforded to make inquiry into the viability of sister state legal criminal justice systems would appear to undercut this mutuality, particularly where political crimes are in issue. It would further seem that efforts to reconcile the sovereignty considerations involved in mutual assistance in criminal matters fail to contemplate the possibility of state-motivated or -instigated terrorism.

5.2.2.8. Conclusions

The three arrangements previously discussed have come as close as is politically possible to providing reciprocal procedures and mechanisms with which to prosecute and punish acts of international

terrorism. In view of the twin elements of categorization - legal tradition and political considerations, a degree of ideological solidarity has resulted in a standardized approach to agreed offenses.

Whether self-identification as a "stable democracy" or retention of the right of reservation to deny requests for extradition on the basis of the political context of a particular act of terrorism satisfactorily avoids the issue of state terrorism is a separate issue. In other words, the states involved in the above-outlined agreements have come to a high level of political accommodation with regard to the standardization of their respective penal codes, to the detriment of inquiry into many reasons which underly the perpetration of acts of terrorism.

The accommodations reached between and among the indicated states disregard any approach to the enumerated acts other than the individualized criminalization contemplated by these arrangements. (86) The effort to standardize the relevant penal codes succeed, on a preliminary examination, in that the possibility of same or similar substantive outcomes exists regarding prosecution of the listed offenses. Nevertheless, these arrangements only "succeed" in that their underlying formulae omit the factor of potential state responsibility for the incidence of terrorism in concerned jurisdictions. In particular, the lowest common denominator, the situation in Northern Ireland, serves as an example of this point. The frequently violent quest in that area for system transformation and/or the right of self-determination is disregarded for purposes of IHL treatment, presumably on the basis that the U.K. is a stable democracy, already in possession of satisfactory legal and constitutional arrangements. As noted by

Murphy, "application of an automatic presumption of justice to situations like that existing in Northern Ireland ... may itself be an injustice". (87)

It would appear nevertheless that the continued individualization of criminality ascribed to the listed offenses in these arrangements makes the "prosecute or extradite" formula a manifestation of ideological solidarity on the part of some Western states. Armed conflicts regulated by humanitarian law are not contemplated as relevant, nor is any mention of the recognition of the rights of self-determination of "Peoples" made in the texts (88), which latter issue was the point of compromise between Western and non-aligned states in the Preamble to the Hostages Convention. Instead, the sole legal obligation required of states parties is to ensure the prosecution of the listed offenses.

The agreements outlined are examples of the general language used in anti-terrorist codification efforts. It must nevertheless be concluded that states have yet to target themselves for potential sanction on the basis of responsibility for acts of terrorism, whether such acts are state-sponsored, state-supported, or state-conducted. This omission is particularly egregious when viewed in the light of the many state acts which may provoke civil acts of political violence. (89) The disregard of at least one-half of the equation required to solve the problem of political violence makes it highly possible that any so-called answers or solutions arrived at are in error in both approach and effect.

The issue of state terrorism or aggression makes it clear that the IHL treaty régime is the only forum presently available to the world

community to deal comprehensively with the problem of organized acts of armed violence perpetrated by "Peoples" in self-determination struggles, should it truly wish to do so. This is particularly so when organized, group uses of force, to date characterized simply as random, individual and criminal for all purposes, are in issue.

5.3. The Failure of State-Centered Codifications to Comprehensively Address the Extradite or Prosecute Obligation of States

As previously discussed, the effectiveness of state-centered codifications to deter terrorism is questionable. Not only have many agreements failed to come into force but further, the solutions offered are offense-specific and piecemeal. For example, such agreements take a territorial approach and require a state party to extradite an alleged offender apprehended in its territory. By requiring alternatively that a state prosecute such an offender should extradition be refused, these agreements contain an inducement to extradite.

This inducement to extradite is frequently counterbalanced by humanitarian considerations underlying the availability of political considerations for use by an accused. In particular, and as was noted in 1933 in the context of criminal jurisdiction, it is arguable that the confines of the political offense exception "... become broader in an era of exacerbated nationalism like the present ...". (90)

It is further argued that the non-separation of acts of terrorism committed during liberation struggles from regulation by the Geneva treaty régime dooms such state-centered codification efforts to ultimate failure. The difficulties encountered by similarly-minded states participating in anti-terrorist conventions are evidence that the piecemeal solutions on offer do not deal appropriately with the problem

of political violence. To address the "extradite or prosecute" obligation of states, whether with or without regard to reprehensible acts perpetrated in times of armed conflict, all levels of responsibility for the perpetration of such acts must be analysed. It is concluded that only the IHL treaty régime provides for such an exhaustive analysis.

Recent efforts by the I.L.A. Committee on International Terrorism to propose a comprehensive approach to combatting terrorism by reference to the laws of armed conflict will be reviewed first in this Part. The prohibition of terrorist acts in international humanitarian law will then be discussed. It is concluded that only the IHL treaty régime is available to states for purposes of responsibility for terrorism at all levels. In that states in the post-1945 era remain unwilling to invoke IHL and target themselves for assessments of responsibility, it is further concluded that state-centered codification efforts to deal with the phenomenon of international terrorism through the extradite or prosecute formula can never be truly effective.

5.3.1. The I.L.A. Committee on International Terrorism

By way of preliminary discussion, the I.L.A. Committee on International Terrorism worked for a number of years to propose a comprehensive approach to combatting international terrorism. For present purposes, the Fourth Interim Report of the Committee, issued in 1982, is of interest. (91) This Report suggested that "settled norms of the law of armed conflict be adopted as limits on a government's discretion to exclude political offenders from the extradition process". (92) As the customary character of the laws of armed conflict means that such laws are already applicable to all states, its norms should be

adopted for use in situations of political violence. (93) In particular, such laws require without exception that soldiers or combatants be extradited or prosecuted for atrocities committed in the course of armed conflicts.

5.3.1.1. Use of the IHL Treaty Régime

It was the Committee's view that, should a terrorist offense not come clearly within the rules of IHL, this treaty régime ought at least to be used by states by way of analogy to what otherwise might be characterized as private, or random, acts of international terrorism. (94) The settled norms of the laws of armed conflict forbid the perpetration of reprehensible acts, irregardless of the identity of the perpetrator, and thus there is no political defense to prosecution.

Under this approach, the characterization of acts of terrorism is left to the concerned states, as it is under issue-specific codifications. State sovereign authoritative interpretation is not infringed. The legal obligation to extradite or prosecute, then, is sufficiently extensive to cover all such acts, thereby reducing the possibility that persons not granted combatant privileges by participating states receive a greater leeway to use violence than that accorded to combatants. In other words, asylum in the territory of a state sympathetic with the political motives of the terrorist would be foreclosed.

Unfortunately, Committee debate regarding the use of the laws of armed conflict, if only by analogy, to deal with international terrorism, foundered in disagreement regarding struggles for self-determination and the question whether its final conclusions should deal with the issues of state-directed and -supported terrorism. (95)

5.3.1.2. Draft Articles on Extradition

The Committee's work was completed in 1984 with the adoption of its Report at the 61st (Paris) Conference of the International Law Association. The Committee was then reconstituted to report on legal problems of extradition in relation to terrorist offences. In 1988, the new Committee issued Draft Articles on Extradition in Relation to Terrorist Offences. The Report of the Committee was adopted at the working session on 27 August 1988 by a majority of its members, and includes a draft treaty, an explanatory commentary on that treaty, comments, and texts of partial dissents.

The Draft Articles, while often employing language common to the European Convention, contains in the Preamble a reference to "state terrorism", which is phrased as follows:

> The States Parties to this Convention, ...
>
> Recalling that acts of terrorism perpetrated by governments of States are already prohibited by a number of international conventions such as the Genocide Convention; ...

The Committee noted that many members felt such a direct reference to be out of place. Further, some members of the Committee feared that the sole reference to the Genocide Convention was "confusing, and might imply that other conventions did not forbid 'State terrorism'". (96) Nevertheless, the Committee chose not to attempt an inclusive list but left the existing reference as being beyond dispute.

Otherwise, for purposes of the present discussion, it is of interest that the Draft Articles provide that none of the terrorist offences described in Article 3 are to be regarded as a political offense. (97) One comment submitted for formal inclusion in the Report to the American Branch of the Committee's accomplishments noted, in

pertinent part, as follows:

> The most significant contribution to the substance of the law was probably the realization in the Committee that it was not necessary to define 'political offense' in a treaty providing that the 'political offense' exception to extradition arrangements is not applicable. Whatever any party to any treaty interprets it to mean becomes irrelevant if it is not applicable to the extradition obligation. (98)

Article 4(B) provides that "(t)he official position of a person accused or convicted of any of the offences described in Article 3, or the fact that the person acted under superior orders, shall be no bar to extradition".

Nevertheless, Article 5 of the Draft Articles allows a state to refuse extradition. Article 5 provides in pertinent part as follows:

> A. Extradition may be refused when:
>
> 1. The requested State is not satisfied that the requesting State is able and willing to apply, or, in the case of a convicted person, has applied, before, during and after the trial the fair trial standards required by applicable rules of international law, and to refrain from subjecting the accused or convicted person to torture or to cruel, inhuman or degrading treatment or punishment.
>
> 2. The requested State has reasonable and substantial grounds to believe that the requested person, if extradited, would be persecuted on account of his race, religion, nationality, membership of a particular social group or political opinion.

In other words, Article 5 continues to reserve to states the right to refuse extradition of an accused for political reasons, e.g., should there be any doubts regarding fair trial standards, and/or should the requested state feel that overriding humanitarian concerns and considerations of justice discourage the grant of extradition.

5.3.1.3. Discussion

The Committee notes that in general it is expected that states

most directly injured by an offense will prosecute regardless of any international obligation. Further, extradition to a state most directly affected by an offense is the rule, and prosecution by a less affected state, the exception. (99)

Nevertheless, extradition treaties and arrangements frequently provide for a humanitarian or political offense exception. Even when this is not the case, political considerations regarding the content of an offense afford the potential to conduct a "friendly prosecution" as a substitute for refusing extradition. In this way, it remains clear that the lack of clear guidelines for state-centered efforts to deal with the problem of political violence perpetrated in times of "peace", and not "war", fail to deal with issues of responsibility, and politico-ideological sympathies. (100)

There is neither a duty to extradite nor a duty not to extradite imposed absolutely upon states. Thus, extradition is a matter of imperfect obligation. (101) Further, international law may come into conflict with municipal law should a request for the extradition of a national be made under a treaty, but which request cannot be complied with according to the municipal law, in which circumstances the requested state may risk a breach of its international obligations. The rule of double criminality creates an additional difficulty. In that no person is to be extradited whose act is not a crime in the penal system of both the requested and requesting state, problems involving double criminality are presumably removed by the obligation to incorporate Article 3 offenses into municipal law. Nevertheless, the problems inherent in competing interpretations of international obligations for purposes of domestic enactment may mean that the potential for a

"friendly prosecution" survives. (102)

The fact that the I.L.A. Committee on International Terrorism attempted to discuss the issue of state terrorism, only to be reconstituted into a state-centered committee dealing with the extradition of perpetrators of particular acts of a terrorist nature represents another side-step of the basic issues. The original remit of the Committee on Terrorism was to attempt to use established norms of the laws of armed conflict, if only by way of analogy, for purposes of a legal framework within which to punish, in particular, terrorist acts perpetrated in arenas of low-intensity armed conflict. The final outcome was yet another attempt to characterize terrorist acts possessing a transnational character as individual acts of criminal violence, to be dealt with by states, through ordinary laws relating to extradition.

Dissent was expressed by Committee members throughout the I.L.A. initiative, which dissent fully established that the issues of terrorism and extradition remain "problematical for reasons relating more to political judgments than lack of clarity in the legal order ...". (103) As such, it was acknowledged that times of "peace" as opposed to "war", and state characterizations of domestic acts of armed insurgency, remain problematical in the post-1945 era. This situation, of course, is made worse by the issue of the self-determination of "Peoples", which issue has never been dealt with satisfactorily by a state-centered world community for purposes of prospective guidance.

For these reasons, it is clear that the efforts of the I.L.A. Committee on International Terrorism to apply the laws of armed conflict, if only by way of analogy, to organized acts of political

violence rising to the level of terrorism was well-conceived. The set of established IHL norms already available and recognized as custom in the international community deal with responsibility for the use of force at all levels, and thus provide a framework which is adequate to deal with both state and group violence. It is thus to be regretted that the Committee's efforts in this regard proved divisive.

5.3.2. The Prohibition of Terrorist Acts in International Humanitarian Law

As previously discussed, should extradition to an affected state be refused, the continuing obligation to prosecute a terrorist offender is substantially undercut by the possibility of political intervention to prevent conviction at trial, or to mitigate the sentencing stage. The possibility of a "friendly prosecution", or the absence of double criminality for purposes of conducting a prosecution, has particular importance in the present discussion. In other words, where acts of terror-violence are perpetrated by a "People" in pursuit of its rights to self-determination, a violent political actor could escape punishment altogether.

It is clear that the inclusion of Article 1(4) in Protocol 1 is evidence that self-determination forms an established rule of international custom. (104) It is further clear that the use of armed force by liberation movements is recognized in Protocol 1 for purposes of regulation by international law. (105) Nevertheless, state-centric codification efforts to punish terrorist violence frequently ignore the issue of self-determination in order to disregard the motives which often propel the perpetration of terror-violence. In other words, it would appear that states employ issue-specific codification efforts to

undercut the content of classification struggles. This is also evident among so-called stable democracies. (106)

States in the post-1945 era are highly reluctant to recognize levels of domestic armed conflict as having crossed thresholds of intensity sufficient to be regulated under IHL. (107) It is therefore argued that, within the confines of a domestic classification struggle which has "mixed" elements of war and peace, states which do not make applicable the Geneva treaty régime shift responsibility onto themselves for the continued perpetration of violent terrorist tactics. Acts of state-instigated and -provoked terrorism frequently open the door to the use of the armed forces to control political processes. The well-publicized use of various secret services to both train and assist in de-stabilization campaigns makes further mockery of state rhetoric regarding the "war against terrorism", particularly in that such state assistance may constitute aggression and interference in the internal affairs of other states.

These issues are both legal and political, in that any use of a state's armed forces must be analysed to assess what state interests are implicated, the most important of which should be the maintainance of international peace and security. The issue of state responsibility, in efforts to achieve justice through violence, would appear to be preliminary to any discussion of extradition, mutual assistance in criminal matters, humanitarianism, and/or the laws of armed conflicts.

Interpretational confusion between times of "peace" and "war" makes the blanket characterization of terrorist activity as a form of domestic criminal behavior a nonsense. Further, in that the issue of state responsibility for the proliferation of international terrorism is

not sanctionable under bi-lateral, multi-lateral or regional agreements, such inter-state arrangements may be seen to ignore this problem.

The law of armed conflicts provides guidance for a legal approach. For these reasons, and for purposes of the present discussion, the prohibitions of terrorist acts in international humanitarian law are now reviewed.

5.3.2.1. The Law of Armed Conflicts and the Special Status of Wars of National Liberation

The legal status of wars of national liberation is, for those states which have ratified Protocol 1, that of international armed conflicts. As has been already been discussed at length, states are hesitant to recognize as legitimate uses of force no more than a small number of on-going national liberation wars. (108) In other words, although there are numerous auto-defined "Peoples" presently struggling in classification disputes to achieve rights of self-determination, authoritative interpretations as to their true nature remain state-centric. Codification efforts to criminalize terrorism and to standardize extradition arrangements, through the elimination of the political offense exception for political violence, in effect disregard the use of "direct action" by liberation fighters faced with stalled legal and constitutional arrangements.

What is relevant for present purposes are the legal consequences of such conflicts when the issue of terror violence is discussed. In other words, should a "People" be involved in an armed classification struggle to achieve system transformation, the IHL treaty régime becomes relevant. Should such a conflict qualify as an "approved cause" (109), the set of prohibitions of terrorist acts found in IHL is directly

applicable.

Anyone entitled to engage in combat must abide by the laws of armed conflict, including the ban on terrorism. (110) Any recourse to terrorist methods of warfare is absolutely prohibited. While in practice it is not always easy to make a clear distinction between terrorist violence and legitimate acts of war, all combatants are faced with the same consequences should they violate the rules of armed conflict. Therefore, "guerilla fighters committing a terrorist act against civilians also have to face criminal proceedings". (111)

Acts of terrorism committed during recognized hostilities are grave breaches, or war crimes, and suspected war criminals must be prosecuted. What is more important, jurisdiction over war crimes is universal, and the extradite or prosecute formula is absolute. A suspected war criminal may be brought to trial by a party to the conflict or by any state party to the IHL treaty régime.

In that the laws of international armed conflict have been designed to apply between states, and in that the laws have a well-developed set of prohibitions of acts of terrorism, the special status of wars of national liberation makes it clear that, with the adoption of Article 1(4) of Protocol 1, the legal instruments for the fight against terrorism have become stronger. It is only to be regretted that the conclusions in this regard of the I.L.A. Committee on International Terrorism, previously discussed, failed to achieve unanimous support.

5.3.2.2. The Law of Armed Conflicts as Guidance to a Legal Approach to Terrorism in Peacetime

The law of armed conflicts is a well-developed area of international law. As such, should it not be made directly applicable

to an armed insurgency in which methods of terror-violence are employed, it can provide guidance for a legal and political approach to terrorism. IHL is an area of law which specifically deals with the protection of the individual in all circumstances, sufficient for it to be useful in "mixed" periods of peace and war, or in situations characterized by target states as "peacetime".

The true value of the use of IHL as guidance to a legal approach to terrorism is threefold. First, IHL provides mechanisms to assess and sanction state participation in war crimes. Second, IHL contains prohibitions with regard to illegal means and methods of warfare. Third, IHL contains rules for the protection of civilians against arbitrary acts of violence. While these three points have been dealt with elsewhere at length, it is important to recall for present purposes that the subjective element characteristic of acts of terror-violence is to spread fear. The value of IHL as guidance to a legal approach to terrorism is the prohibition of means and methods of warfare which are intended to spread terror.

While terror is a weapon (112), common methods of which involve psychological means, IHL prohibits unlimited methods and means of warfare, and the infliction of superfluous injury or unnecessary suffering. Thus, there are levels of violence beyond which an individual may not legally go, regardless of his status.

Furthermore, modern armed classification struggles make the distinction between civilians and combatants increasingly difficult, particularly in situations where political processes are controlled through use of the armed forces. The IHL treaty régime is useful as guidance in such situations, in that no latitude is afforded to states

to perpetrate terrorist acts against a populace involved in a struggle for self-determination.

While it is true that methods of warfare may be permissible which in peacetime would amount to terrorist acts, legal guidance is provided by humanitarian law to states in that terrorist acts are subject to criminal prosecution by competent state authorities in accordance with customary principles of international law. Furthermore, the Geneva Conventions, and the 1977 Additional Protocols bind states to refrain from resorting to terrorism. This puts a direct obligation on the persons who act on behalf of the State, including members of the armed forces, and/or of the police. (113)

For these reasons, it is clear that state-centered codification efforts to deal with the phenomenon of international terrorism will continue to encounter difficulties in implementation. Until state obligation is both recognized, and made operational through a sanctioning process, too much is omitted from any cause-and-effect equation. It is further clear that IHL offers well-established procedures and mechanisms for use by states as guidance in their efforts to prohibit acts of terrorism, and in particular, acts of terrorism perpetrated during classification struggles by "Peoples" to achieve system transformation and/or their rights of self-determination.

5.4. Conclusions

Given the breadth of Charter provisions regarding the right of "Peoples" to attain independence from state institutionalization, and given the separate and distinct status of such "Peoples" discussed earlier (114), it is clear that all acts perpetrated in liberation wars should be regulated by international law. While isolated acts of

international terrorism or political violence are rarely viewed as sufficiently intensive in scope to cross thresholds of armed conflict regulated by the laws of armed conflict, state efforts to criminalize political violence in multi- and bi-lateral arrangements, and to isolate such acts within structural confines of individual responsibility disregard the political contexts through which such forms of violence must be assessed.

It is clear that terrorism cannot be defined, ultimately, as a distinct form of criminal activity. The world community has yet to come to agreement with regard to a definition of the phenomenon sufficient to satisfactorily implement the "extradite or prosecute" formula. State-centric codifications involving both political and legal labeling processes result in elements of imperfect obligation. Such state-centric efforts rarely, if ever, contemplate the possibility of state-instigated, -supported, or -conducted terrorism, or the possibility of a struggle for self-determination occurring within a stable democracy.

It is concluded that the only forum available to deal with the problem of acts of political violence perpetrated in struggles for self-determination is that offered by IHL. Whether this treaty régime is made directly applicable to situations of international armed conflict, as provided for in Article 1(4) of Protocol 1, or is used as guidance in a state-centric legal approach to terrorism, it is clear that the procedures and mechanisms in IHL have already been accepted by a majority of the world community, and as such, constitute binding legal obligations which require only a good faith implementation by states.

Chapter 5. - Footnotes

1. Fourth Interim Report of the I.L.A. Committee on International Terrorism, reprinted in 7 Terrorism: An International Journal 123, 125 (1984).

2. See the General Treaty for the Renunciation of War ("Briand-Kellogg Pact") of 1928; the Charter of the United Nations of 1945; Agreement for the Prosecution and Punishment of Major War Criminals (London Agreement), and Charter of the International Military Tribunal of 1945; the four Geneva Conventions of 12 August 1949; Protocols 1 and 2 additional to the four Geneva Conventions of 1949; the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty, General Assembly Resolution 2131 (XX) of 21 December 1965; the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States, Resolution 2625 (XXV) of 24 October 1970.

3. See R.F. Devlin, "Law's Centaurs: An Inquiry into the Nature and Relations of Law, State and Violence", 27 Osgoode Hall L. J. 219 (1989), for a discussion of the juridico-political mechanisms which isolate individuals within society.

4. B.L. Smith, "Antiterrorism Legislation in the United States: Problems and Implications", 7 Terrorism: An Int'l. J. 213, at 220 (1984). See also Report of the Ad Hoc Committee on International Terrorism, 34 U.N.G.A.O.R., Suppl. (No. 37), U.N. Doc. A/34/37 (1979); General Assembly Resolution 34/145 of 17 December 1979, 34 U.N.G.A.O.R., Suppl. (No. 46), U.N. Doc. A/3446 (1979)

5. See J.F. Murphy, "The Need for International Cooperation in Combating Terrorism", 13 Terrorism: An Int'l. J. 381 (1990).

6. Of note on this subject is the failure of the League Of Nations Convention for the Prevention and Punishment of Terrorism, opened for signature at Geneva, 16 November 1937, 7 Hudson, International Legislation No. 499, at 862; 62 L. of N. Off. J., Jan. 1938, 23.

7. See M.C. Bassiouni (ed.), Legal Responses to International Terrorism - U.S. Procedural Aspects (1988), at X.

8. Report of the I.L.A.'s 56th Conference (New Delhi): Committee on International Terrorism (Working Session), 31 December 1974, Statement of Shri M. Asif Ansari (India), at 158. See also Report of the Ad Hoc Committee on International Terrorism, supra, note 4, at 5 - 6, para. 16, where the following is noted:

> ...(A)ttention was drawn to the inacceptability of a broad interpretation of the concept of international

terrorism which would include the national liberation struggle, acts of resistance against the aggressor in territories occupied by the later ... . To draw a parallel between (this phenomenon) and international terrorism would be an affront to national and social movements struggling for the implementation of principles upheld by the United Nations.

9. Report of the I.L.A.'s 61st Conference (Paris): Committee on International Terrorism, Article 9 of a Resolution, reprinted in 7 Terrorism: An Int'l. J., No. 2, 199, at 204 (1984); see also Article 1(1) of the Convention for the Prevention and Punishment of Terrorism, supra note 6, which states as follows:

> The High Contracting Parties, reaffirming the principle of international law in virtue of which it is the duty of every State to refrain from any act designed to encourage terrorist activities directed against another State and to prevent the acts in which such activities take shape, undertake as hereinafter provided to prevent and punish activities of this nature and to collaborate for this purpose.

10. Id., Report of the I.L.A.'s 61st Conference (Paris), Article 9 of a Resolution.

11. Id., Explanation of Article 9 of a Resolution. See also A.E. Boyle, "State Responsibility and International Liability for Injurious Consequences of Acts not Prohibited by International Law: A Necessary Distinction?", 39 I.C.L.Q. 1 (1990).

12. See id., Report of the I.L.A.'s 61st Conference (Paris), Articles 10, 11 and 12 of a Resolution, at 204 - 6. Compare South West Africa, 2nd phase, I.C.J. 1966, at 6 (restrictive view of legal interest).

13. See Chapters 2 and 4. Lambert notes, however, that not every insurgent, secessionist or dissident group which calls itself a national liberation movement will be entitled to that status, e.g., there is support for the view that the legitimacy of wars of national liberation would not appear to extend to struggles in post-colonial and independent states. J.J. Lambert, Terrorism and Hostages in International Law - A Commentary on the Hostages Convention 1979 (1990), at 295 - 6, n. 102. The present discussion does not adopt that premise.

14. See, e.g., the Declaration on Friendly Relations, supra, note 2.

15. See Chapter 4.

16. Report of the I.L.A.'s 61st Conference (Paris), Article 1 of a Resolution, supra, note 9, at 200, the Explanation of which notes as follows:

> This statement is derived from Principle 1 of the Principles of International Law Recognized in the Charter and Judgment of the Nuremberg Tribunal, adopted by the United Nations General Assembly in 1950 (citation omitted).

Id.

17. Supra, note 6. See also Editorial Comment, Kuhn, "International Co-operation in the Suppression of Crime", 28 A.J.I.L. 541 (1934); Editorial Comment, Hudson, "The Proposed International Criminal Court", 32 A.J.I.L. 549 (1938).

18. Terrorism Convention, Articles 2 and 3.

19. Id., Articles 8 - 10.

20. 7 Hudson, supra note 6, No. 500, at 878.

21. I.C.C. Convention, Article 53(2).

22. Id., Article 2.

23. See Editorial Comment, Kuhn, supra, note 17, at 543.

24. Tokyo Convention, 14 September 1963, 704 U.N.T.S. 219; Hague Convention, 16 December 1970, 8670 U.N.T.S. 105; Montreal Convention, 23 Sepember 1971, 974 U.N.T.S. 177; Montreal Protocol, 24 February 1988, reprinted in 27 I.L.M. 627 (1988); Convention on Protected Persons, 14 December 1973, 1035 U.N.T.S. 167; Hostages Convention, 34 U.N. G.A.O.R. Supp. (No. 39) at 23; I.M.O. Convention and Protocol, 10 March 1988, reprinted in 27 I.L.M. 672, 685 (1988). Two additional codifications which, while not directed expressly against terrorism, are also relevant. These are the Convention on the Prohibition of the Development, Production, and Stockpiling of Bacteriological (Biological) and Toxic Weapons and on Their Destruction, 10 April 1972, 1015 U.N.T.S. 163, and the Convention on the Physical Protection of Nuclear Materials, opened for signature 3 March 1980, reprinted in 18 I.L.M. 1419 (1979). See also Fourth Interim Report, Appendix 2, supra, note 1, at 136 - 46, "Treaties Relevant to International Terrorism", prepared by Prof. Gilliam White as Special Rapporteur to the I.L.A.'s Committee on International Terrorism.

25. Report of the I.L.A.'s 63rd Conference (Warsaw): Legal Problems of Extradition in Relation to Terrorist Offenses (Working Session), 26 August 1988, reprinted in 11 Terrorism: An Int'l. J. 511, 525 (1988), Statement of Dr. Naf'e Hasan (HQ/Jordan).

26. See Chapter 1. See, e.g., the Terrorism Convention, Article 1(2), which defines "acts of terrorism" as follows:

In the present Convention, the expression 'acts of terrorism' means criminal acts directed against a State and intended or calculated to create a state of terror in the minds of particular persons, or a group of persons or the general public.

27. See Statement of Dr. Naf'e Hasan, supra, note 25, at 526 - 7.

28. See, e.g., P. Rowe, Defence: the Legal Implications (1987), at 36 - 68 (military intervention in civilian affairs); B. Robertson, "Military Intervention in Civil Disturbance in Great Britain - What is the Legal Basis?", XXIX - 1-2 Revue de Droit Militaire et de Droit de la Guerre 307 (1990).

29. See Report of the I.L.A.'s 61st Conference (Paris), Article 1 of a Resolution, supra, note 9, which states that "(a)ll such acts must be suppressed" (emphasis added).

30. Supra, note 6.

31. Supra, note 20.

32. See Editorial Comment, Hudson, supra, note 17, at 552.

33. Terrorist Convention, Article 26(1) and (2).

34. Editor's Notes, 7 Hudson, supra, note 6, at 862, 878.

35. Editorial Comment, Hudson, supra, note 17, at 551 (citations omitted); Editor's Note, 7 Hudson, supra, note 6, at 862. Hudson notes that prior attempts at co-operation in the suppression of international terrorism had included a protocol concerning measures to be taken against the anarchist movement, signed on behalf of nine states at St. Petersburg, March 1 - 14, 1904, an administrative convention for the exchange of information concerning individuals dangerous to society, signed at Buenos Aires, October 20, 1905, and an agreement concerning mutual defense against undesirable foreigners, signed at Quito, August 10, 1935. Several bipartite agreements also relate to the suppression of terrorism, and many extradition treaties contain clauses excluding attempts against heads of state from the list of political offenses, for example, Article 3(e) of the Convention on Extradition, signed at Montevideo, 26 December 1933. Id., Editor's Note.

36. M.C. Bassiouni (ed.), International Criminal Law, Vol. I. Crimes (1986), at 93.

37. Editorial Comment, Kuhn, supra, note 17, at 543.

38. Id.

39. Instead, Article 1(1) of the Terrorist Convention merely refers to the "duty" of each High Contracting party to "refrain" from such acts, and Article 4 refers to "offenders".

40. Article 4.

41. Editorial Comment, Kuhn, supra, note 17, at 544.

42. Id., generally.

43. See Chapter 2.

44. Terrorism Convention, Articles 2 and 19.

45. Id., Articles 8 - 10.

46. Id., Articles 17(8), 18 and 19.

47. The Terrorism Convention, Article 19, provides as follows:

> The present Convention does not affect the principle that, provided the offender is not allowed to escape punishment owing to an omission in the criminal law, the characterisation of the various offences dealt with in the present Convention, the imposition of sentences, the methods of prosecution and trial, and the rules as to mitigating circumstances, pardon and amnesty are determined in each country by the provisions of domestic law.

Article 21(1) of the I.C.C. Convention provides in pertinent part as follows:

> The substantive criminal law to be applied by the Court shall be that which is the least severe. ...

See also M.C. Bassiouni, "Criminological Policy", in Legal Aspects of International Terrorism (A.E. Evans and J.F. Murphy, eds.)(1978), at 523, 531, where he concludes that "(p)rosecution is the means by which criminal sanctions are imposed. Its importance is determined more by its substantive outcome than by its pro forma conduct, hence the importance of the criminal sanction and its effectiveness".

48. The I.C.C. Convention, Article 26(2), provides as follows:

> Any person directly injured by the offence may, if authorised by the Court, and subject to any conditions which it may impose, constitute himself *partie civile* before the Court; such person shall not take part in the oral proceeding except when the Court is dealing with the damages.

See also the Terrorism Convention, Article 7, which provides as follows:

> In so far as *parties civiles* are admitted under the domestic law, foreign *parties civiles*, including, in

> proper cases, a High Contracting Party shall be entitled to all rights allowed to nationals by the law of the country in which the case is tried.

49. I. Detter de Lupis, The Law of War (1987), at 22, notes that a hallmark of terrorism "is that the force or the threat of force applied ... is not normally against the persons who can grant the wishes of the terrorists, but against some other person(s) or authority". See also Fourth Interim Report, Appendix 1, supra, note 1, at 131, 132, Dissenting Statement by Professor L.C. Green and Dr. J. Lador-Lederer, which asserts the following:

> (A) terrorist act occurs when the actor ... applies violent action or threatens to apply such action, against an individual or entity which has no connection with the dispute between the actor and the entity from which the concession is being sought".

50. Editorial Comment, Hudson, supra, note 17, at 553.

51. See Chapters 2, 3 and 4.

52. See Chapter 4.

53. See H. McCoubrey, "The Nature of the Modern Doctrine of Military Necessity", XXX - 1-2-3-4, Revue de Droit Militaire et de Droit de la Guerre 215, 217 (1991).

54. J.F. Murphy, supra, note 5, at 381, quoting W. Laqueuer, "Reflections on Terrorism", 64 For. Aff. 86, 88 (1986). The problem, then, becomes one of distinguishing between acts of violent dissent, e.g., demonstrations, and acts of terrorism. See Report of the Ad Hoc Committee on International Terrorism, supra, note 4. This is particularly difficult when further distinguishing between actions of liberation movements, and terrorism perpetrated for personal gain, or violent acts related to psychological causes.

55. See M.C. Bassiouni, A Draft International Criminal Code and Draft Statute for an International Criminal Tribunal (1987).

56. See generally J.F. Murphy, supra, note 5. Of note, none of the Conventions listed supra, note 24, places state parties under the obligation to extradite an offender. If a state party choses to prosecute rather than extradite, it has fulfilled its obligations under the conventions.

57. See Chapter 2. See also M.C. Bassiouni, supra, note 55.

58. See Chapter 4. See also Report of the Ad Hoc Committee on International Terrorism, supra, note 4, at 19 - 20, para. 67, where three categories of terrorism are listed as follows:

...(F)irst, terrorism manifested itself when a claim could not be expressed through legal channels because the regulations in force made it impossible to state any claim;

(I)t also manifested itself when such a course was chosen on the basis of considerations of effectiveness (publicity, anticipated result);

(L)astly, it could be related to psychological causes when that course was chosen despite the existence of effective means for the legal expression of claims.

59. Supra, note 8, Statement of Prof. Lakshmikanth Rao Penna (India), at 159.

60. See, e.g., A. George (ed.), Western State Terrorism (1991); supra, note 25; Special Report of the I.L.A.'s 61st Conference (Paris): Committee on International Terrorism, reprinted in 10 Terrorism: An Int'l. J. 189, 194 (1987), Statement of Prof. G. Staroushenko (Soviet Union).

61. See Chapter 4.

62. Supplementary Treaty Concerning the Extradition Treaty between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland, signed at London on 8 June 1972, 25 June 1985, reprinted in 24 I.L.M. 1104 (1985); European Convention for the Suppression of Terrorism, opened for signature 27 January 1977, E.T.S. 90, reprinted in 15 I.L.M. 1272 (1976); European Communities Agreement Concerning the Application of the 1977 European Convention on the Suppression of Terrorism Among the Member States, signed in Dublin on 4 December 1979, Misc. 5 (1980), Cmnd. 7823, reprinted in 19 I.L.M. 325 (1980). The Dublin Agreement has not yet entered into force.

63. See J.J. Lambert, supra, note 13; W.D. Verwey, "The International Hostages Convention and National Liberation Movements", 75 A.J.I.L. 69 (1981).

64. Id., W.D. Verwey, at 76, where he lists nine basic points of compromise.

65. Supra, note 1, at 129.

66. Id. Lambert further notes as follows:

If the state against which the national liberation group is fighting is not party to Protocol 1, such a declaration (under Protocol 1 Article 96(3)) will not brng the Protocol into effect as regards that struggle. The declaration will only serve as a unilateral undertaking of obligations.

J.J. Lambert, supra, note 13, at 294, n. 97.

67. W.D. Verwey, supra, note 63, at 90, quoting the Jordanian delegate to the Drafting Committee. See also J.F. Murphy, "The Future of Multilateralism and Efforts to Combat International Terrorism", 25 Col. J.T.L. 35, 47 (1986), who notes that "(t)he early returns on the Hostages Covention are not encouraging", citing the Achille Lauro affair on 7 October 1985

68. Supra, note 5, at 387.

69. J.F. Murphy, supra, note 67, at 43.

70. Editorial Comment, Kuhn, supra, note 17, at 543.

71. Report of the Dept. of State, submitted with the President's Letters of Transmittal to the U.S. Senate, reprinted in 24 I.L.M. 1104 (1985). The political offense exception permits countries to refuse extradition if the offense involved is political by nature or involves political motivations. This exception derives from Eighteenth Century notions of a right to "engage in revolutionary activities in the face of oppressions". M.N. Schmitt, "State-Sponsored Assassination in International and Domestic Law", 17 Yale J. Int'l. L. 609, 622 (1992). See also C.H. Pyle, "The Political Offense Exception", in Legal Responses to International Terrorism - U.S. Procedural Aspects, supra, note 7, at 181 - 2, n. 5, who notes as follows:

> Before the European Convention and the U.S.-U.K. Supplementary Treaty were adopted, the only modern nations to take this view (that ideologically similar nations ought to help suppress each other's revolutions) belonged to the Soviet bloc. In the Nineteenth Century, only the conservative régimes of Prussia, Russia, Austria, and Naples believed that ideologically similar nations should use their laws of extradition to help suppress each other's revolutionaries.

72. J.F. Murphy, supra, note 67, at 65 - 66. See also W.M. Hannay, "The Legislative Approach to the Political Offense Exception", in Legal Responses to International Terrorism - U.S. Procedural Aspects, supra, note 7, at 115, 116, n. 4, who notes that guidance was provided by a century-old English precedent, In re Castioni, (1891) Q.B. 149. Thus, extradition was denied in the following cases: In re McMullen, Mag. No. 3-78-1099 MG (N.D. Cal. 1979); In re Mackin, 80 Cr. Misc. 1 (S.D.N.Y.), app. dis'd., 688 F.2d 122 (2d Cir. 1981); In re Doherty, 599 F.Supp. 270 (S.D.N.Y. 1984), app. dis'd. sub nom., U.S. v. Doherty, (S.D.N.Y. 1985), aff'd. (2d Cir. 1986). In two other cases, extradition was granted but only on very narrow grounds. See Quinn v. Robinson, 783 F.2d 776 (9th Cir. 1986), rev'g., No. C-82-668 (RPA) (N.D. Cal. 1983), cert. den'd., 107 S.Ct.271 (1986); Eain v. Wilkes, 641 F.2d 504 (7th Cir.), cert. den'd., 454 U.S. 894 (1981). With particular regard to In re Doherty, Murphy, id., at 69 - 70, remarks that Fed'l. Dist. Ct.

Judge John E. Sprizzo characterized the P.I.R.A. as having "an organization, discipline, and command struture that distinguishes it ...", and declined to "make the political exception concept turn upon the Court's assessment of the likelihood of a movement's success". Judge Sprizzo added that the facts of that case presented the political offense exception "in its most classic form", but that the Court had not been presented "with facts which establish that ... the principles embodied in the Geneva Conventions have clearly been violated". 599 F. Supp. 270, 275 - 6.

73. Id., J.F. Murphy, at 71.

74. Id.

75. Id., at 65.

76. Thus, Article 6 obliges each state party to amend its rules of criminal jurisdiction to allow it to try such an offender, provided that it recognizes the principle of jurisdiction upon which the requesting state has based a request for extradition. Article 6 reinforces Article 7.

77. The European Convention is thus not an extradition treaty.

78. See Fourth Interim Report, Appendix 2, supra, note 24, at 142 - 3, which gives the reservations of Cyprus, Denmark, Iceland, Norway, Sweden, France and Italy.

79. See J.F. Murphy, supra, note 67, at 61. France has declined to ratify the Dublin Agreement, and as the ratifications of all the member states of the E.C. are required to bring it into force, the Convention is ineffective. The Dublin Agreement attempts to narrow the application of the European Convention's extradite or prosecute formula to terrorist acts alone, as is stated in the Preamble.

80. J.F. Murphy, id., at 72.

81. See W.M. Hannay, supra, note 72, at 116, n. 3, who notes that since the mid-Nineteenth Century, most extradition treaties exempt fugitives accused of "political offenses" or "crimes of a political character" from extradition. Though the principle has been almost universally accepted, the term "political offense" has never been precisely defined. See also Report of the I.L.A.'s 62nd Conference (Seoul): Legal Problems in Relation to Terrorist Offenses, Draft Articles on Extradition in Relation to Terrorist Offences, and (Working Session) of 29 August 1986, at 559; Report of the I.L.A.'s 63rd Conference (Warsaw), supra, note 25; Report of the I.L.A.'s 63rd Conference (Warsaw): International Committee on Legal Problems of Extradition in Relation to Terrorist Offences and Draft Articles in Relation to Terrorist Offences, at 1032 (1987). Lambert notes that an example cited by the the Council of Europe with respect to the

discrimination clause contained in the European Convention is "if the person to be extradited would, in the requesting state, be deprived of the rights of defence as they are guaranteed in the European Convention on Human Rights" (citation omitted). J.J. Lambert, supra, note 13, at 222, n. 57.

82. But see C. Reed, "US laughs at the one about the Irishman and the Englishmen", The Observer, 10 October 1993, p. 20, in which the case of the extradition from the U.S. to Britain of James Joseph Smith, a Sinn Fein member and one of 38 men to escape from Belfast's Maze prison in 1983, is discussed.

83. J.F. Murphy, supra, note 67, at 73. Issues on this point would be humanitarian concerns regarding the fairness of trial, evaluations as to whether the alleged conduct was inherently criminal, and non-neutral assessments of sister-state penal systems.

84. A.D. Sofaer, "The U.S.-U.K. Supplementary Extradition Treaty", 8 Terrorism: An Int'l. J. 327, 336 (1986). Sofaer, asserts the following:

> The conditions for justifying extradition of political rebels who engage in common crimes of violence undeniably exist in both the U.S. and the U.K. The violence (of the P.I.R.A.) is ... not the result of a lack of opportunity to engage in the democratic process. ...
>
> Similarly, no one can seriously challenge the basic fairness of the British system of justice, even under the extraordinary situation that Britain has faced in Northern Ireland. ...
>
> The absence of a jury (in Diplock courts) does not mean the central principles of procedural fairness are not maintained: trials are held in open court; witnesses may be called and cross-examined; the burden remains on the prosecution to prove guilt beyond a reasonable doubt; the accused has a right to legal advice and representation; and the right of appeal is completely unfettered. ...
>
> The principle reflected in Article 1 of the Supplementary Treaty will establish a definite, workable rule for applying the political offense exception to extradition among stable democracies.

Id., at 336 - 8. See also Report of the Ad Hoc Committee on International Terrorism, supra, note 4.

85. See Chapter 3.

86. Compare the Tokyo Summit Meeting, The Seven Industrial Democracies: Statement on International Terrorism, adopted 5 May 1986, reprinted in E. McWhinney, Aerial Piracy and International Terrorism (1987), at 240 - 1, which states in pertinent part as follows:

> 1. We the Heads of State or Government of Seven Major Democracies and the representatives of the European Community, assembled here in Tokyo, strongly reaffirm our condemnation of International Terrorism in all its forms, of its accomplices and of those including governments, who sponsor or support it. We abhor the increase in the level of such terrorism since our last meeting, and in particular its blatant and cynical use as an instrument of Government Policy. ...
>
> 2. ... Therefore, we urge all like-minded nations to collaborate with us, ...
>
> 3. ...
>
> 4. ... We have decided to apply these measures within the framework of international law and in our own jurisdictions in respect of any state which is clearly involved in sponsoring or supporting international terrorism and in particular of Libya, until such time as the state concerned abandons its complicity in, or support for, such terrorism. ...

See also the Hostages Convention, Article 4(a), which requires states to prevent preparations for terrorist acts to be committed both in other states and in their own territories; Report of the I.L.A.'s 61st (Paris) Conference, Articles 8 and 9 of a Resolution, supra, note 9, at 203 - 4, which state as follows:

> 8. No state may afford support to a person or group engaged or preparing to engage in acts of international terrorism.
>
> 9. A state is legally obliged to exercise due diligence to prevent the commission of acts of international terrorism within its jurisdiction.

87. J.F. Murphy, supra, note 67, at 74. See also Chapter 3.

88. See, e.g., B.A. Wortley, "Observations on the Revision of the 1949 Geneva 'Red Cross' Conventions", LIV B.Y.I.L. 143, 152 - 3 (1983), who notes that the British Government refuses to view the unrest in Northern Ireland as a situation to which either Common Article 3, Protocol 1, or Protocol 2 of the Geneva Conventions apply.

89. See R.F. Devlin, supra, note 3.; J.M. Wolf, "National Security versus the Rights of the Accused: The Israeli Experience", 20

C.W.I.L.J. 115 (1989); G. Bettocchi, "Inquisitorial Procedures in Latin America", 42 Rev. Int'l. Comm. of Jurists 57 (1989); D.L. Khairallah, Intervention Under International Law with Emphasis on the Rights and Duties of Insurgents (1973), at 214, who characterizes internal penal law as a weapon of legitimate self-defense.

90. Editorial Comment, Kuhn, supra, note 17, at 544

91. Fourth Interim Report, supra, note 1.

92. See J.F. Murphy, supra, note 67, at 91.

93. Fourth Interim Report, supra, note 1. Although the Committee considered that "(t)he use of terror against their own populations by some governments was considered by the Committee to lie beyond the scope of its enquiry", id., at 124, it concludes as follows:

> ... (A)ny formulation of law dealing with international terrorism should accept as a premise that: 'No person shall be permitted to escape trial or extradition on the ground of his political motivation who, if he performed the same acts as a soldier engaged in an international armed conflict, would be subject to trial or extradition'.

Id., at 131. Compare Y. Dinstein, "Comments on the Fourth Interim Report of the I.L.A. Committee on International Terrorism", 7 Terrorism: An Int'l. J. 163, 166 (1984), who notes as follows:

> Clearly, the central issue here is that many states regard the acts of terrorists in other countries in peacetime as political in nature, thus undermining the possibility of extradition. The only solution to the problem is to prescribe in a general treaty that terrorists are not exempt from extradition notwithstanding their political motives or purposes.

94. The Committee stated as follows:

> The better course would be to develop what might be called the humanitarian law concerned with political violence in step with the humanitarian law applicable to armed conflict. ... .
>
> ... .
>
> The Committee was throughout its deliberations fully conscious of the fact that states frequently differ over the qualification of individuals and groups resorting to violence for political ends.

> The Report, however, makes it clear that contemporary international law imposes legal limits on the actions of such individuals and groups however they are described.

Id., at 130 - 1. See the Committee Report of the I.L.A.'s 61st Conference (Paris): Committee on International Terrorism (Working Session), reprinted in 7 Terrorism: An Int'l. J. 199, 207 (1984), where it is observed that this new approach was adopted after the presentation of a draft Convention with the Third Interim Report in Belgrade in 1980. Thus, the new approach was intended to sidestep the difficulties of formulating a new Convention. Compare id., Y. Dinstein. Nevertheless, in the context of the present discussion, such a new Convention is not required, and in effect, would be redundant.

95. See the Report of the I.L.A.'s 63rd Conference (Warsaw), supra, note 81, at 1035. See also Report of the Ad Hoc Committee on International Terrorism, supra, note 4, where disagreement was encountered regarding whether the issue of state terrorism was within the scope of the Committee's remit to study the underlying causes of terrorism; General Assembly Resolution 3034 (XXVII) of 18 December 1972, 27 U.N.G.A.O.R., Annexes, agenda item 92, U.N. Doc. A/8969; General Assembly Resolution 32/147 of 16 December 1977, 32 U.N.G.A.O.R., Annexes, agenda item 118, U.N. Doc. A/32/453, para.8; General Assembly Resolution 34/145, supra, note 4.

96. Id., Report of the I.L.A.'s 63rd Conference (Warsaw).

97. Draft Article 4(A). Draft Article 3(A) provides as follows:

> A. Offences for the purposes of this Convention include any act or threat of violence, deprivation of freedom or destruction of property, endangering the life of, or directed against, a person engaged in international communication or international intercourse.

98. Report of the I.L.A.'s 63rd Conference (Warsaw), supra, note 25, at 529, Statement of Alfred P. Rubin, Chairman, Committee on International Terrorism.

99. Report of the I.L.A.'s 63rd Conference (Warsaw), supra, note 81, at 1047, Comment to Draft Article 11.

100. Compare Y. Dinstein, supra, note 94; Fourth Interim Report, Appendix 1, supra, note 1, at 131, Dissenting Statement of Prof. L.C. Green and Dr. J. Lador-Lederer; E.D. Fryer, "Applicability of International Law to Internal Armed Conflicts: Old Problems, Current Endeavors", 11 Int'l. Lawyer 567 (1977).

101. Regarding this point, Murphy notes, for example, that the U.S. declines to recognize antiterrorist conventions as being more than a basis for extradition, as they are not, strictly speaking, "extradition treaties". Supra, note 67, at 45 - 6, n. 48.

102. Report of the I.L.A.'s 63rd Conference (Warsaw), supra, note 25, at 524, Statement of Professor Muddada V. Naidu (India).

103. Report of the I.L.A.'s 63rd Conference (Warsaw), supra, note 81, at 1054, Concluding Observations.

104. See Chapter 3; I. Detter de Lupis, supra, note 49, at 24 - 31. Lambert notes, however, that such a conclusion is less than compelling. J.J. Lambert, supra, note 13, at 291.

105. See the Fourth Interim Report, supra, note 1, at 128, where the following is noted:

> ... (I)n the 1977 Protocols to the 1949 Geneva Conventions a new criterion was introduced: under Protocol 1 (...) the 'authority representing a people engaged against a High Contracting Party' in armed conflicts 'against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination' can, by unilateral declaration valid against parties to the Protocol, switch *from* whatever legal régime the autointerpretations of those others would place its struggle *to* the legal régime applicable to international armed conflicts. ... (a) major advantage to those struggling for an approved cause whom a defending government would prefer to classify as 'terrorists' or 'criminals'.

106. See, e.g., B.A. Wortley, supra, note 88.

107. See Chapter 4.

108. I. Detter de Lupis, supra, note 49, at 161, notes that the actual ambit of Protocol 1, Article 1(4), only covers the peoples of South Africa and Palestine. Compare J. Gardam, who notes that arguments supporting the position that wars of self-determination are outside the prohibitions of U.N. Charter Article 2(4) have made acceptance of Protocol 1 more problematic. J. Gardam, "Protocol 1 to the Geneva Conventions: A Victim of Short-Sighted Political Considerations?", 17 Melb. U.L. Rev. 107 (1989).

109. See the Fourth Interim Report, supra, note 1, at 128, where the following is noted:

> Leaders of people engaged in less 'just' struggles would not have that legal power (to unilaterally declare the applicability of the Geneva Conventions) regardless of the claims of humanitarian concern for the victims of the struggle.

J.J. Lambert, supra, note 13, at 297, notes that the great weakness of Protocol 1 is that most of the movements struggling for national liberation are not recognized as such, and several delegates involved in drafting the Hostages Convention expressed dismay that Article 12 allowed a colonial or occupying power to determine which instruments should apply to a particular act. See also Chapters 6 and 7.

110. See Chapter 4.

111. H.-P. Gasser, "Prohibition of Terrorist Acts in International Humanitarian Law", International Review of the Red Cross, No. 253, July - August 1986, at 200.

112. See Y. Alexander, "Introduction", in International Terrorism (Y. Alexander, ed.) (1976), at xi. See also Reports of the Ad Hoc Committee on International Terrorism, 28 U.N.G.A.O.R., Suppl. (No. 28), U.N. Doc. A/9028 (1973), and supra, note 4.

113. See H.-P. Gasser, supra, note 111.

114. See Chapters 2 and 3.

6. Protocol 1, Methods of Terror-Violence, and the Scope of the Potential Applicability of IHL

International law presently recognizes several types of armed conflict, to which different principles and instruments of IHL apply. These are as follows:

1. International armed conflicts between states to which the Hague Conventions, the four Geneva Conventions of 1949, and other legal principles of general international law apply;

2. International armed conflicts between states which have ratified Geneva Protocol 1 additional to the 1949 Geneva Conventions, and to which the Hague Conventions, the four Geneva Conventions of 1949, and other legal principles of general international law also apply;

3. Wars of liberation or self-determination, as defined by and made subject to Geneva Protocol 1, which are recognized as such by the parties to the armed conflict, and by interested third states through ratification of Geneva Protocol 1. The Hague Conventions, the four Geneva Conventions of 1949, and other legal principles of general international law also apply to such conflicts;

4. Non-international armed conflicts which are subject to concerned state self-regulation in compliance with Common Article 3 of the 1949 Conventions, and some customary norms; and

5. Non-international armed conflicts which are narrowly defined and regulated by Geneva Protocol 2, and which are recognized as such through concerned state self-regulation subsequent to ratification of Geneva Protocol 2. (1)

It is generally asserted that the essence of an act of international terrorism is its occurrence during peacetime. Thus, a basic problem in applying IHL to methods of terror-violence is the delineation between states of "war" and "peace". (2) In other words, acts of international terrorism are rarely considered to be acts of

warfare, as committed by a recognized belligerant. This basic problem of legal qualification is particularly evident when terrorist acts are perpetrated by auto-determined liberation movements as part of an overall political strategy. (3) Where such a group employs armed force to achieve its goals in the face of government opposition, the sovereign function of state authoritative interpretation allows states to interpret such uses of force restrictively, prosecuting such actions within the confines of domestic criminal jurisdiction and state penal law. (4)

It is argued in this Chapter that where force is used by a "People" to achieve goals of self-determination, humanitarian law should be made applicable, automatically. (5) As such, the use in war of methods of terror-violence as one tactical option should be prosecuted under humanitarian law, as a separable and "different" phenomenon from ordinary international terrorism. (6) Conversely, should politically motivated acts of terrorism be approached as peacetime behavior equivalent to atrocities under the law of war, an analysis of the context and motivations underlying the separable acts is required in order properly to place the relevant issues within the appropriate juridical frameworks, and to simplify the legal contradictions inherent in situations where political activity is under domestic military control. (7)

By way of preliminary discussion, the inclusion of wars of self-determination in the Geneva treaty régime, in Protocol 1 Article 1(4), reflects the reality of modern armed conflict. (8) A "People" is often a transboundary concept (9), as ethnical and/or cultural groupings can be found sharing state borders, e.g., the Palestinians. Also, the

existence of "salt water" colonialism denotes a territory which is separate geographically, and distinct ethnically and/or culturally from the country administering it, e.g., Algeria. Thus, armed conflicts for rights of self-determination by particular groups are often "international" from the start. (10)

However, wars of self-determination are rarely recognized as such by a threatened state. (11) The class of groups which fall squarely within Protocol 1 Article 1(4) appears at first sight to be rather restricted. Not every auto-determined group which calls itself a liberation movement will be considered "entitled" to that status for purposes of international recognition of the applicability of Protocol 1. Thus, the scope of potential applicability of Protocol 1 to a wider range of "Peoples" than those living under colonial domination, alien occupation or a racist régime is highly controversial. For example, many states consider that the legitimacy of the right to wage a war of national liberation does not extend to struggles in post-colonial, or independent states. Nevertheless, the rhetoric of self-determination is used in many non-colonial situations of armed violence, e.g., the "Peoples" of the former U.S.S.R., and a degree of foreign aid and assistance afforded to independence movements may strengthen the claims of a particular group. Thus, it is argued that Protocol 1 is potentially applicable to a very wide range of "civil war" situations.

Should this not be the case, it must be noted that international law does not forbid civil war (12), and when a situation of domestic armed conflict occurs, the lack of international regulation other than that contained in Common Article 3 or Protocol 2 is not calculated to strengthen the primacy of law. (13) A government may rely on the police

and locally-recruited paramilitary forces to quell a domestic uprising, or may call for outside assistance from third states. Such use of the military signals to the public and to the world community that acts of political violence are to be characterized as criminal in nature, and without legitimacy. (14) Thus, recognition of the applicability of IHL in full, in Protocol 1, to some struggles for self-determination was a political victory for third world states (15), and armed conflicts waged by "Peoples" in support of their right to self-determination remain a politically sensitive area of international relations. (16) States remain unwilling to implement IHL during such conflicts for fear of politically recognizing a liberation group by virtue of humanitarian treatment. (17) U.N. practice to date in encouraging the expansion and development of the undefined rights of self-determination (18), and in supporting the use of force by liberation movements to achieve these rights (19), is not reflective of state practice which remains ambiguous regarding both the claimed rights entitlements and the legitimacy of the use of force to achieve system transformation. (20)

The deployment by threatened governments of military and/or police forces in areas experiencing a pattern of violent acts perpetrated by a liberation movement illustrates the capacity for violence as a means and tool of persuasion by all parties to an ideological or political dispute. The use of government agents for such purposes departs from the traditional role of the armed forces - to meet an external threat. (21) The analogy to confronting an external threat is nevertheless reinforced through third state aid and assistance to rebel groups, often a key element of destabilization campaigns, and a major factor in the ultimate success of a struggling group. (22) The

delineation between "war" and "peace", for purposes of the legal qualification to be attributed to terrorist acts perpetrated during a struggle for self-determination, is therefore false. (23) Given the capacity for violence during the U.N., era for effecting social and political change, it could be said that there has never been any real peace; there has only been war and waiting for war. (24) Further, given the shift to majority vote, the U.N. system is dependent upon consensual reciprocity, which limits the prescriptive range of international law when faced with sovereign power (25).

Whether or not the IHL treaty régime is actively implemented or merely made applicable as a code of conduct remains largely a function of state authoritative interpretation regarding the nature and scope of a particular armed conflict. (26) So long as state legal frameworks remain operative, the effective use of sovereign power within particular issue areas is scarcely restrained. (27) Thus, states prefer to legally characterize terrorist acts as criminal and to ignore the applicability of the IHL régime to situations of domestic violence. A further objection to such applicability is more jurisprudential, in that "(u)ndue conceptual and legal confusion is likely to result if terrorist acts are construed as in any way related to, or to be measured against, the law of armed conflict". (28)

It is nevertheless argued in this Chapter that where terrorism is utilized in the context of a struggle by a "People" for its right to self-determination, as limited by Protocol 1 Article 1(4) (29), the implementation and/or application of IHL gives rise to no conceptual or legal confusion. Instead, responsibility for armed aggression may more easily be apportioned, and grave breaches prosecuted, than if dealt with

across domestic political or legal fictions. Existing enforcement mechanisms contained in the different branches of IHL are sufficiently integrated by means of Protocol 1 to result in the same or similar substantive outcomes as those desired within purely domestic contexts. (30) "Peoples" is in reality a wide term, and the scope of the potential applicability of IHL to liberation wars is as wide. The ready applicability of IHL to a wide range of liberation wars would be calculated to strengthen the rule of law in such conflicts, and to encourage levels of humanitarian restraint.

This argument is structured as follows. Methods of terror-violence are frequently perpetrated by a liberation movement as part of its political and ideological strategy . Thus, the scope of the applicability of the IHL régime to such methods is discussed in Part One. In that there are conditions precedent to the applicability of the law of war, the use of terror-violence to provoke these conditions is discussed in Part Two. It is suggested in the Third Part that where IHL is made applicable to a situation of domestic armed conflict, acts of terrorism may be approached as impermissible, non-proportional, and indiscriminate means or method of warfare. This latter point is developed in the Fourth Part, and it is argued that methods of terror-violence utilized in a struggle for self-determination to which the IHL régime applies constitute "grave breaches" or war crimes, and are prosecutable as such.

Where "crimes" of political violence are perpetrated under the aegis of struggles for self-determination, the application of IHL to them may be viewed as appropriate on two levels. First, the resulting issue structure allows for no political offense exception for acts of

political violence. (31) Second, the separability of acts of terror-violence as grave breaches and/or war crimes preserves within existing parameters of international law both the overall political strategy of struggling "Peoples" claiming the right to use armed force to achieve system transformation, and potential frameworks of continuing negotiation and inquiry into the relevant goal values or contexts of terrorist acts. (32) It is concluded that the problems of domestic legal certainty cannot negate state obligations under international law. Thus, proof of governmental good faith in ratification of the IHL treaty instruments depends upon a consistent broadening of the categories of "Peoples" entitled to struggle for the right to self-determination, and a consistent broadening of the applicability of IHL provisions through recognition of the benefits of humanitarian law in situations of domestic armed conflict. (33) If such proof is forthcoming, IHL may more easily be seen to be applicable if only as a frame of reference to prosecute acts of terror-violence perpetrated during struggles for self-determination. (34)

6.1. Terrorist Violence as a Political and Ideological Strategy

The use of terror-violence to promote a particular political or ideological strategy is perceived by many groups as either a means of last resort (35), or as the most efficient method in terms of time and available resources to create the necessary conditions for effective political interaction with an incumbent government or dominant political group. (36) In particular, liberation movements attempt to locate their actions within some strategic framework. (37) Where acts of terrorism occur in the context of struggles for self-determination, they can be distinguished from criminal acts for mere personal gain through

perspectives of political motive or goals, utilized as one tactic in an overall strategy. (38) Where system transformation is sought through methods of violence designed to result in political discourse, any resulting frameworks which display legal relationships further reflect the presence of competing claims to interpret domestic legal discourse regarding national classifications, assertions of jurisdiction, and sovereign exercises of power. (39)

This Part discusses the use of violence in struggles for self-determination to achieve political and ideological interaction, which use of force may effectively remove a conflict from the confines of domestic jurisdiction. (40) Given that state entities are juridically stronger in the international community than "national" ones (41), normative choice is frequently masked by the ready use of force by states to quell domestic unrest. Thus, military or police control of political activity may transform missions to restore public order into low-intensity warfare more congenial to army doctrine than to civil control. (42) As such, state rejection of the applicability of IHL limitations risks the reversal in direction of humanitarian law, and places in question the primacy of law in situations of domestic armed conflict.

6.1.1. The Use of Violence to Achieve Political Interaction.

The use of violence by a group struggling for its right to self-determination may effectively remove any resulting political dialogue from the domestic sphere. When used to achieve a political impact, as a competing interpretation of domestic political interactions, such a use of force may invoke the law of war and thus result in international ramifications. In other words, where autonomous state competence to

interpret authoritatively the nature of organized domestic violence is in question, the legal expression of the continuing fact of sovereignty is placed in doubt. (43)

Effective power sharing achieved through the use of force or violence in struggles for self-determination reinforces the rationale for the original use of force. If force is used successfully to create political interactions, and the structures of the issues involved in the conflict are thereby conditioned, a degree of power sharing has been achieved (44) and the existence of competing legal relationships is communicated. Such a result anticipates system change or transformation. (45) Assuming this result, the use of methods of violence by groups struggling for rights of self-determination makes the violent acts a highly relevant, if dangerous, issue for interpretation. The process of political change involved in struggles for self-determination frequently places the legal expression of the continuing fact of sovereignty in doubt. (46) Un-defined issues such as self-determination, the nature of the rights contained in the claimed entitlements to it, the "Peoples" entitled to struggle to attain it, and the legitimacy of their use of force against threatened governments must thus be interpreted accurately in order to condition the legal structures surrounding subsequent attempts at power sharing. (47)

The use of force to achieve effective power sharing forms part of the overall political strategy of a struggling group employing terror methods in an armed conflict. The issue structure contained in the IHL régime, through recognition of the fact of the organized use of force (48), provides an ideal framework in which to separate legal from illegal function in the use of violence. (49) In particular, the use of

force in liberation struggles regulated by IHL must only be exercised within humanitarian guidelines of restraint, as affected by military necessity and proportionality. If this does not occur, IHL provisions allow for the prosecution of particular offenses, and IHL procedures for such prosecutions result in the same or similar substantive outcome as might occur in other legal régimes, e.g., under domestic penal codes. (50) It would thus appear that the use of terror-violence in a struggle for self-determination, standing alone, neither de-legitimizes the underlying process of political change involved in such struggles, nor prevents the penal separability of "grave breaches", where individual responsibility is assessed without the benefit of a humanitarian or political offense exception. (51)

In this vein, Paust notes as follows:

> (A) claim that an otherwise permissible process of political change should not itself (as a whole) be banned because of its terror impact is far different from a claim that any means utilized during such a process should be legitimate when they are analyzed as different strategies. It seems quite likely that most states that mention self-determination or national liberation movements wish to claim only that the overall process should not be impermissible because of some terror impact.
>
> ... (T)he mere accumulation of terror-producing strategies that are separately impermissible into a movement should not result in a conclusion of permissibility. ... (S)elf-determination processes ... should not be impermissible *per se* because of some terror impact. (52)

Another motive underlying the use of violence to achieve political interaction is to shift the international allocation of competences between the U.N. structure and individual states for purposes of power sharing with non-state entities. (53) Assuming such a

result, the use of violence can transform the legal expression of domestic jurisdiction - a facit of sovereignty - into a political matter of international "concern". (54) Such "concern" is expressed in terms of the maintainance of international peace and security, for example, and any perceptual distortion and manipulation occurring through state attempts to over-extend authoritative interpretations may be curtailed. (55)

Political violence utilized to promote political interaction and power sharing means that acts of politically-motivated terrorism perpetrated by liberation groups are locatable in contexts which are in competition with those legal contexts preferred by threatened states. (56) Where violence crosses state boundaries, the perpetration of terrorist acts by liberation movements can transform the legal expression of domestic jurisdiction into a matter of international concern. Where IHL is utilized to both condition and interpret the nature and content of such acts, an additional basis of jurisdiction is provided in order to prosecute them, one in which High Contracting Parties may "search for persons alleged to have committed, or to have ordered to be committed, ... grave breaches". (57) As such, it is clear that the issue structure provided by IHL not only permits the construction of the desired political dialogue but further, provides an ideal framework in which to separate illegal from legal function in particular uses of violent force.

6.1.2. Terrorist Verbal Strategy to Indicate a Legal Relationship

The use of terror-violence to create frameworks for political interaction with a threatened government is intended also to create the appearance of a legal relationship. Should any legal relationship

beyond the confines of penal law appear, it is taken as evidence of a degree of power sharing between competing entities. (58) Should a threatened government chose instead to punish freedom fighters as "terrorists", little evidence of political interaction, legal relationship, or power sharing is apparent. Thus, groups struggling for self-determination frequently employ acts of terrorism sparingly, in order not to provoke any overwhelming counter-response. In this way, terrorism as one tactic in an overall political strategy aims preliminarily at the creation of dialogue. Verbal strategies to explain the purpose and function of organized acts of terrorism are thus employed to attribute social meaning to a group's violent acts, and to place such acts in contexts of goal interpretation which compete with those of the threatened state. (59) In order to justify the use of violence for purposes of continuing constituency support, verbal strategies also are effective as a proportional limitation on state interpretation of the allocation of legal competences. In other words, should there be no reference by a "People" to its legal competence or relationship vis-a-vis the state, there is nothing to interpret. Thus, verbal strategies are employed by states to undermine a competing goal structure, and verbal strategies are employed by liberation groups to undercut existing sovereign state language paradigms which adversely interpret a group's political aims, and to offer competing interpretations of existing belief systems in order to restructure social cohesion. (60)

Verbal strategies used by liberation movements employing terror methods as part of their overall political strategies must therefore be aimed not only at justifying such acts within contexts of social

meaning, but also at exposing the legal contradictions inherent in situations where political activity is circumscribed through domestic military activity. In that two rules of the same content may be subject to separate treatment as regards the organs competent to verify their implementation, the additional goal of legally qualifying terror acts perpetrated by liberation movements as acts of war rather than merely criminal forms part of the goal of creating the appearance of a legal relationship with an incumbent government. (61)

State verbal distortions of the legal capacity of a struggling "People" within its territorial borders may delay the loss or transformation of the established goal system. (62) The continued use of terror-violence by liberation movements, and the continued communication of verbal signals regarding the existence of competing goal systems, may even prevent the establishment of the desired dialogue for purposes of creating a legal relationship in which to negotiate effectively. Where successful, the use of terrorism may effectively "obliterate the distinctions" between U.N. Charter Chapters VI and VII situations, particularly where violence has a transboundary aspect. (63) In other words, many more matters may be of international concern than are of international jurisdiction, particularly where the maintainance of international peace and security is concerned. When such "concern" is acted upon, and the issue is tabled for U.N. discussion, the domestic jurisdiction clause contained in Article 2(7) of the U.N. Charter is effectively eroded. The substitution of "concern" for "jurisdiction" may then be merely a step away,

(A)s the complement to domestic jurisdiction effectively removes from the domestic sphere such matters, by means of shifting from a legal analysis of 'international jurisdiction', as opposed to 'domestic jurisdiction', to a political analysis of 'international concern', as opposed to 'domestic concern'. (64)

When a liberation struggle erupts, and the threatened state is seen no longer to be master of its own house, there is a limit to the volume of dissonant information which can officially be rationalized before international intervention in a domestic disorder, if only through expressions and discussions of "concern", is likely to occur. (65) There is a limit to the action a state may legitimately take to restore domestic public order, and in a U.N. system which presupposes a high degree of democratic ideals, the maintenance of domestic order should rest on societal consensus. (66) The receipt of verbal signals indicating the existence of competing legal relationships within single state territorial confines thus implies the potential for a destabilizing conflict. In this context, a political response by the target state is required to preserve sovereignty, to prevent the loss of the previously established goal system, and/or to prevent international friction as a result of such loss. (67)

Assuming that there are no clearcut distinctions between domestic and international politics in such a politically sensitive area as the self-determination of "Peoples", autonomous state approaches to custom which are based on the political fact of sovereignty and which utilize "language of the national interest" (68) distort domestic and international perceptions of both the nature of the armed conflict and the legal relationships involved in the domestic use of force. Concurrent use by target states of language which denies a degree of

political interaction fails to conceal the legal contradictions inherent in situations involving organized uses of force domestically, which uses of force further indicate the true nature of the competing legal relationships contemplated by opposing factions. (69)

Thus, the tactical use of terrorism by liberation movements involved in armed struggles for self-determination is in large part designed to communicate ideological and political strategies. Such strategies are further aimed at indicating a legal relationship with the target government, for purposes of negotiating a degree of power sharing and/or independence. The armed struggle mandates the application of IHL (70) in order to place acts of terrorism properly in context. The treaty régime does not affect the legal status of either party to an armed conflict, but evidence of a minimal relationship between opposing Powers is needed for purposes of regulation of the conflict. Further, given the availability of foreign state aid and assistance to rebel factions (71), if only as evidence of "international concern", a fictional delineation between war and peace for purposes of prosecuting acts of terrorism during such struggles is untenable. Acts of a terrorist nature perpetrated during an armed conflict are separable, as breaches of humanitarian and war law. Conversely, the complete denial that the IHL régime is applicable to situations of domestic armed conflict which claim to be for the right of "self-determination" (72) would appear to be a complete denial of this treaty form, and to indicate a bad faith disregard of the second most important treaty régime in international law. (73) Any allegedly neutral jurisdictional discourse preventing such application is thus false in content, and helps to create a target for terrorist verbal strategy.

6.1.3. The Use of IHL to Deter Political or Ideological Terror-Violence

The domestic legal and political insulation of liberation movements on the basis of their competing political ideals often prevents such groups from full participation in the domestic political process. Similarly, increasing international support for the U.N. principle of equal rights and self-determination may exacerbate the domestic political situation of "Peoples" having a claim to assert their right to self-determination. Thus, freedom fighters are frequently characterized domestically as terrorists, and are prosecuted under individually focused domestic criminal law. A corresponding absence of individual responsibility to which officials or soldiers are made subject for atrocities committed during "peacetime" public order maintainance missions (74) exacerbates inter-state lack of consensus regarding any satisfactory definition of terrorism, or the creation of stable mechanisms for the extradition or prosecution of international terrorists. (75)

As previously discussed, states frequently differ over the legal qualification of "Peoples" struggling for rights of self-determination through the use of force or violence. Those states which utilize their sovereign powers of authoritative interpretation to deny combatant status to participants in such struggles may prosecute acts of terror-violence by turning from a legal to a political analysis, at which point a request for asylum by a perpetrator of violence to a third state becomes a real possibility. (76) Even where combatant status is made applicable, the potential absence of reciprocity in fact of treatment and restraint in method between opposing factions may reduce the law of war to a matter of convenience.

In particular, individual international responsibility for breaches of the provisions of the IHL régime is provided in the 1949 Geneva codifications, which burdens each party involved in an international armed conflict under customary international law whether or not all sides have agreed to apply humanitarian law. (77) However, state ratification of Protocol 1, which "literally internationalizes" some former "domestic" conflicts, implies agreement with the right of liberation movements to accept unilaterally the duties and obligations of humanitarian law (78). This is so whether or not both sides to the conflict are party to the same instruments, and even though there may be a higher standard of care and duty imposed on the party to IHL having access to more sophisticated means of observing the requisite provisions. Thus, state refusal to recognize the legitimacy of an authority representing an auto-determined liberation movement for purposes of the application of IHL in struggles for self-determination implies a shirking of the required standards of care. Such a refusal further constitutes official denial of the movement's right to use force against the target government (79), and denial of a degree of parity for purposes of combatant status or negotiations to settle the underlying disputes. As such, it would appear that political considerations outweigh the legal obligation to invoke the law of war from the first acts of hostilities.

As previously mentioned, the evolving use of the military to quell domestic disorder frequently transforms peace-keeping missions into low-intensity warfare more congenial to army doctrine. (80) Where the military is employed without the safeguards of the IHL régime, the tendency to over-react may lead to greater international awareness of

the civil strife and raise questions as to the propriety of government perspectives. Minimal or non-reaction by a threatened government to the goals of liberation movements delays effective analysis of the potential legitimacy of motivations underlying acts of violence. (81) It further deters implementation of humanitarian law, if only through non-recognition of the minimal right to receive humanitarian relief and medical care. (82) Conversely, such state non-reaction to legitimate liberation goals puts into question a government's fitness to rule.

In that acts of a terrorist nature perpetrated during an armed conflict remain separable as breaches of humanitarian law, sovereign state interpretations of the use of force in liberation conflicts as criminal reflect the political considerations which give rise to legal contradictions inherent in situations of military control over political activity. Viewed as a trap of overly-complicated provisions and prohibitions (83) which force additional responsibilities onto government bodies possessing the more sophisticated means of victory, states remain unwilling to invoke IHL. Denial of the applicability of IHL from the first acts of hostilities further threatens the erosion of state sovereignty through heightened levels of "international interest" in particular liberation struggles, and in the question of which "Peoples" are entitled to assert their right to self-determinaton, generally. Minimal domestic response to civil disturbance through the use of police or para-military units risks the loss of a degree of public and international psychological commitment to the existing legal order, as civilians, foreigners, and their objects are targeted without restraint, and assessments of responsibility for damage are not forthcoming.

Given the capacity for violence in the post-1945 era as a means of social and political control, it is clear that the denial of the applicability of IHL to situations of domestic armed conflict which claim to self-nominate as struggles for self-determination represents denial of the treaty form itself. "Peoples" is a term which is expanding, as non- and post-colonial demands for independence utilize the rhetoric of self-determination. As the term expands, the potential for the use of violence to test the substance of rights assertions also expands, as its corollary. The separability of terrorist acts from the overall political strategies of liberation movements makes the application of IHL tenable, if primarily for purposes of damage containment and assessments of responsibility for the violation of legal norms. Conversely, liberation groups participated in the 1974 - 77 Diplomatic Conference, and several have made the discretionary declaration under Protocol 1 Article 96(3) to show their readiness to accept the duties and obligations which IHL requires. Such expressions of willingness are encouraging but the barrier of state resistance to an expanding notion of "Peoples", and the non-recognition of liberation wars as such, must be overcome before the rule of law during such conflicts can become a reality. States thus throw away a major tool with which to encourage liberation groups not to resort to terrorist tactics. State denial of the treaty régime's applicability and potential contribution to such situations implies that target governments prefer to mask normative choice by controlling political processes with military action, to approach the primacy of law in armed conflict as a matter of convenience, and to avoid what are viewed as inconvenient, overly complicated international legal obligations.

6.2. The Use of Terror-Violence to Provoke the Application of IHL

Minimal or non-recognition of the goals of liberation movements frequently induces continued resort to terrorist tactics. (84) The verbal signals used subsequently (85) by such groups to explain the motives underlying terrorist acts are a means of publicizing their goals regardless of a particular governmental stance, or authoritative interpretation regarding the criminal content inherent in what otherwise appear to be random, indiscriminate acts of violence. Use of terrorist-violence thus may reflect group desires to publicize or dissiminate the anticipated fact of a loss of psychological commitment to governmental goal systems, or to create the appearance of political frameworks sufficient to construct a legal relationship for international consumption. Verbal signals used to inform public perspectives that a serious degree of societal goal displacement is present within a single state may follow acts which are in basic value conflict with domestic and international norms. The use of such tactical options may, through the presence and viability of competing interpretations, result in a degree of public and international support for the struggling group. Thus, acts of terror-violence perpetrated by liberation movements become capable of interpretation in language other than that used domestically to describe law and order. (86)

The use of terror-violence to provoke the requisite conditions for the application of the law of war is now discussed. As public perceptions of the rights claims asserted by a "People" influence continuing support afforded to the status quo, it is concluded that the rules contained in the IHL régime are better suited to stabilize realistic aspects of the continuing fact of sovereignty (87), as limited

by international normative orders, than are strict domestic confines of interpretation.

6.2.1. Group Terrorism as Evidence of Commonly-Shared Grievances

Tension between the state-centered U.N. system, with its inviolability of territorial boundaries and political independence of states, and the principle of equal rights and self-determination of "Peoples" often occurs at points when acts of civil disobedience occur. (88) Where domestic unrest is ignored or repressed, an escalation in the intensity of violence may result, and ultimately lead to the use of the military, and a threat to international peace and security. (89) As a preliminary point, the weakness of domestic schemes in controlling violence, by attempting to treat social relationships without reference to their content has already been discussed, and reflects the non-success of a law enforcement approach to deter terrorism. (90) By preferring to view members of national groupings as individual juridical subjects, who each carry individual responsibility as defined by the concerned state, governments seek to deprive liberation fighters of the benefits of their group membership with its justifications for the use of violence. (91) The erasing of group membership through individual-oriented legal process thus is an attempt by states to insulate against counter-accusations of, e.g., human rights violations, and to undermine the legitimacy of group-based claims to rights entitlements. Such an erasure further obscures much of the rationale underlying the choice of particular methods of violent force.

As a second point, domestic unrest is frequently evidence of commonly-shared grievances, and may present a danger to international peace and security. Armed conflicts for rights of self-determination

are often factually "international" from the start, as "Peoples" is an expanding and frequently transboundary concept. Direct aid and assistance from sympathetic third states to liberation groups both condition and help to define the "self" to be determined, and is a further aspect of the de-stabilizing effect of politically-motivated domestic unrest.

States rarely recognize the "self-determination" potential of "Peoples" living within their own territorial boundaries. (92) Competing interpretations of, and contradictions in, legal content domestically attributed to politically-motivated, and frequently transboundary, violence perpetrated by such groups will thus reflect the fundamental tension between state and human rights in the U.N. system. (93) The weakness of domestic schemes in de-contextualizing the political content of terrorist acts through an individual and judicial isolation of juridical political persons (94) further illustrates the difficulties encountered in international criminal co-operation to outlaw transboundary acts of terrorism, including those terrorist acts perpetrated during armed struggles for self-determination. (95) The heart of the problem would appear to be state intransigence in the face of U.N. and humanitarian normative structures.

States rather than "Peoples" are viewed as political units in the U.N. system. (96) Domestic armed violence perpetrated by national groups claiming international rights entitlements of individual freedoms beyond those allowed by threatened single-state régimes challenges pre-existing societal consensus, as authoritatively interpreted through language of the national interest. In other words, the problem of definition in the international community of particular rights

entitlements, as interpreted through individual-focused jurisdictional language within particular territorial units, is symptomatic of the political contradictions presently underpinning the tension between state sovereignty and assertions of rights of self-determination. (97)

Thus, the use by national groupings of methods of terror-violence to communicate rights grievances publicizes the consolidation of a group's self-awareness, and seeks to achieve an adversarial structure within state boundaries for purposes of making the application of IHL appropriate. Given the weakness of domestic schemes of criminal jurisdiction to interpret organized, group violence appropriately, application of the IHL régime, if only as a code of conduct between opposing parties to an armed confrontation, is mandated to stabilize the situation and prevent the disruption of international peace and security.

6.2.2. The Use of Terrorism to Preserve the Legitimacy of Group Identity

State control over individual life within a society is made possible by the allocation of legal competences in the U.N. system. (98) Through rights of sovereignty and mechanisms of political unity, relevant principles of international rights entitlements are re-interpreted in language of the national interest, allowing scope for group relationships to be de-contextualized from more traditional formats of identification. (99) State powers to censure, to restrict movement or employment, to circumscribe the practice of religion, to control voting rights and to re-locate entire sectors of the population are just a few examples of the techniques used to break the connections by which individual human life within a society is organized. The isolation of the individual through legal process, as previously

discussed, further clouds the issues involved in formats of identification.

The construction of juridico-political relations between a state and its citizens is premised on state sovereign rights to authoritively determine and interpret the given set of U.N. presuppositions. Any masking of normative choice thus becomes a function of law, and a facet of state administration. (100) An individual within society must first accept the state's right to determine the set of presuppositions, and second, must rely on the state's masking of normative choice characteristic of the re-interpretation of international presuppositions in order to challenge state control over his individual life. (101) Such an approach implies successive re-interpretations. An individual confronted with an isolating, individual-focused state administration must rely on state presuppositions in stating a case for change. Attempting to re-interpret, alone, state interpretations of, e.g., international rights entitlements, the individual is faced with the efficiency of state mechanisms of authority. (102)

Whether or not the contemporary emphasis in international human rights law on the individual rather than on minority or ethnic groupings is a mechanism in the post-1945 era to minimize the potential for group disruption in international affairs (103) is beyond the scope of the present discussion. Nevertheless, what is clear is that state power to control individual and group life through authoritative re-interpretations of international rights entitlements often leads to abuse. Such an allocation of competences in the U.N. system does not reflect aspects of sovereignty as realistic aggregations of group-wills, and it is thus particularly in the context of terror-violence

perpetrated by national groupings organized into liberation movements that the neutral rules of the IHL régime could best be employed. (104)

The efficiency of the issue structure employed by states to interpret the content of a violent domestic incident (105) is gauged by state success in appropriately placing the context of both the causes and effects of particular illegal acts, and in deterring future such acts. Where a national group uses methods of terror as one tactic in an overall political strategy to effect system change or transformation, to achieve political dialogue, and to create the impression of a legal relationship, individual isolation within the legal processes of domestic penal jurisdiction is manifestly inappropriate. (106) The use of methods of terror-violence to preserve the political legitimacy of group identity before the law is characteristic of the contradictions inherent between competing interpretations of state and human rights. A "People's" group allegiance, as evidenced through the use of violence, further strengthens the depth of perception within relevant communities of the meaning of international rights entitlements, which perception of normative choice is often directly masked by overly-broad state jurisdictional assertions of competence to control group life through an approach based on the language of the national interest and the isolation of the individual before the law. Such use of force mandates application of the IHL régime in order to reflect the organized aspect of opposing parties to an armed conflict, and to appropriately place tha context of both the causes and effects of particular uses of violence within appropriate frameworks of inquiry and negotiation.

6.3. Threshhold Problems in Prosecuting Acts of Terrorism under IHL

There are no clear guidelines or procedures by which to verify

the appropriateness of an auto-determined "Peoples"' entitlement to rights of self-determination other than out-dated contexts of colonialism. These are out-dated in that additional contexts have been added to the strict confines regarding the right to self-determination delineated after World Wars 1 and 2, e.g., "Peoples" who struggle in post-colonial contexts, "Peoples" who utilize the rhetoric of self-determination to right historic grievances, "Peoples" whose human rights have been seriously infringed by administering states, and "Peoples" who have emerged as free and independent states with the end of the Cold War. Not to be forgotten is the view that the procedures outlined in U.N. Charter Chapter XII are capable of extension to include such other non-self-governing territories, or ethnically and/or culturally distinct "Peoples" as might wish to utilize them.

Nor are there clear guidelines regarding the scope of the rights entitlements which comprise the right to self-determination. (107) Thus, in practice, struggles to achieve the right to self-determination may range from political attempts aimed at system change or transformation, to territorial secession. (108) There is only the consensual exhortation that states have "the duty to promote through joint and separate action universal respect for the observance of human rights and fundamental freedoms in accordance with the Charter" (109) pursuant to which

> (A)ll peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development. (110)

It is argued in this Part that the lack of clear guidelines or procedures with which to identify the "Peoples" entitled to self-

determination leads to threshhold problems in invoking IHL in situations of domestic violence. If viewed in the context of an armed liberation struggle, the use of terrorism as a method of warfare is forbidden, and such acts may be prosecuted as a separate, distinct phenomenon to international terrorism. If not viewed as occurring within a time of "war", a law enforcement approach to deter and prosecute acts of terrorism has been shown to be unsatisfactory, and subject to inconsistent state practice. Given this situation, it is clear that the use of IHL if only as a code of conduct to deter and prosecute acts of terrorism perpetrated by auto-defined "Peoples" struggling by means of the use of force for the right to self-determination causes no legal or conceptual confusion in assessments of responsibility for the violation of legal norms.

6.3.1. Terrorism and Concern for the Victims of Violence

The political fictions devised by states to delineate between times of "war" and "peace", for purposes of legally qualifying acts of violence (111), ignore the fact of the organized use of force characteristic of struggles for self-determination in preference for political considerations of state authority and control. Of particular concern where such fictions are devised is the degree of civilian involvement in modern struggles for the right to self-determination. Liberation groups both gain support from the populace, and intimidate it in order to present themselves to the international community as the authority representing the whole "People". Thus, civilian involvement in liberation struggles is one result of state refusal both to recognize the strength of a liberation group within its particular community, and to prosecute violations of legal norms in other than an individual,

socially-isolated domestic criminal context.

As a consequence of the increasing involvement of civilian populations in contemporary armed conflicts (112), the modern law of war has become a matter of general international concern. (113) The proliferation of liberation groups utilizing the rhetoric of self-determination has led to a diminution in state competence to authoritatively interpret the nature and content of a liberation struggle occurring within territorial borders. Thus, as a minimum, innocent members of a civilian population who are harmed by acts of violence perpetrated in liberation conflicts are increasingly viewed as having a right to receive humanitarian relief and medical care. (114) Further, the weakness of domestic schemes to control the uses of force by auto-determined liberation groups mandate the application of the law of war from the first acts of hostilities. (115)

6.3.1.1. The Application of Common Article 3

Fundamental general principles of humanitarian law are set forth in the rules contained in Common Article 3 to the 1949 Geneva Conventions, which article provides a regulatory approach to domestic armed conflicts. (116) Common Article 3 applies to cases of "armed conflict not of an international character occurring in the territory of one of the High Contracting Parties". It provides for minimum protections to persons taking no active part in such hostilities, including members of armed forces who have been placed *hors de combat* for any reason. Such persons are to be treated humanely, and if prosecuted for any offense connected with the armed conflict, are to be afforded "all the judicial guarantees which are recognized as indispensable by civilized peoples". The difference between the

fundamental, or minimal, rules of Common Article 3 and the other provisions of the four Geneva Conventions of 1949 lies only in the respective degree of specificity, as based on the nature and scale of the hostilities. (117) Therefore, where an armed conflict for self-determination is not recognized as such (118), the organized use of armed force or acts of violence make Common Article 3 applicable. (119)

According to the International Court of Justice, in Nicaragua v. United States of America (Merits) (120), "these rules constitute a minimum, applicable in all circumstances, including international armed conflicts". In other words, the more specific rules and provisions applicable to international armed conflict incorporate and include these minimum rules of Common Article 3. (121) The Court further concluded that fundamental general principles of humanitarian law belong to the body of general international law, whether or not a conflict is international, for the better protection of victims. (122)

6.3.1.2. Difficulties in Applying Common Article 3 to Terrorism

It is perhaps now obvious to see that the issues underlying struggles for self-determination make international agreement regarding correct approaches to terrorism impossible. (123) Thus, it is argued that the suggested separability of acts of terrorism utilized in struggles for self-determination demands an ad hoc examination of the relevant goals pursued, and of the actual context of the violence, in order to nominate the legal qualification defining such acts as prohibited acts of war within the neutral confines of IHL.

. The non-applicability in practice of Common Article 3 by governments threatened by internal disorder may arguably be perceived as part of a general stand regarding the non-applicability of the law of

war to matters of domestic jurisdiction. Such non-applicability is premised on a number of political considerations. Dinstein (124), writing prior to the signing of Protocols 1 and 2, noted the following difficulties of applying Geneva law to a civil war:

1.	psychological	Article 3 fetters the freedom of action of a government in pursuing persons it regards not as plain offenders, but as traitors ... .
2.	practical	Whereas government forces are capable of taking care of the wounded and sick in an orderly fashion, conducting fair judicial proceedings, and so on, rebels ... are not always able to observe the provisions of Article 3 ... .
3.	practical	There is no room here for the operation (as in an inter-State war) of a Protecting Power ... supervising the implementation of the Article ... .
4.	legal	How can an obligation devolve on the rebels? ... . Who is to bear international responsibility if obligations binding the rebels by virtue of Article 3 are violated (individually, or as a group)?
5.	legal	Upon whom are the corresponding rights of Article 3 conferred (individually, or as a group)? (125)

Additional political difficulties are posed in that Common Article 3 does not provide a definition of "armed conflict" (126), leaving this decision to state authoritative interpretation. It does not require that dissident armed forces be under responsible command, nor that these latter exercise control of territory. Conversely, Common Article 3 makes no mention of its non-applicability to "internal disturbances and tensions, such as riots, isolated and sporadic acts of

violence and other acts of a similar nature". (127) It would thus appear that target state non-application of IHL rules "in all circumstances" is in violation of the international legal obligation to respect and ensure respect for IHL. (128) Discussions of advantages or disadvantages to states of invoking IHL are not the concern of that treaty régime. Discussions of a contractual balance in the means and methods of warfare utilized between opposing parties to an armed conflict (129) are not relevant to the application of minimal humanitarian rules in all circumstances, nor is the reciprocity in fact of humanitarian treatment. The appearance of any legal relationship between the parties is not an issue dealt with through humanitarian law, other than in the context of the recognition of the status of each side's combatants. (130)

In short, and as a matter of political if not legal strategy, there seems to be no reason why IHL should not be made applicable to prosecute acts of terror-violence perpetrated within the context of struggles by "Peoples" for rights to self-determination. The prohibitions as to allowable means and methods of warfare would act to restrain the use by liberation groups of readily available terrorist weaponry and tactics, and would offer both sides a better opportunity to negotiate an end to the struggle. Once implemented, if only as a code of conduct, the potential of humanitarian law would perhaps be made more realistic, and allow for better care and protection of the innocent victims of such conflicts.

6.3.2. Terrorism and Fundamental Humanitarian Concern

The use of violence by liberation groups to effect political change or system transformation is not intended to target innocent third

parties solely for the purpose of inflicting injury on them or on their possessions. (131) Instead, the motive behind indiscriminate targeting is usually to publicize a group's aims, or to wreak damage on a threatened government in such a way as to threaten that state's sovereignty in the eyes of the international community. Once this occurs, there is a potential threat to the maintainance of international peace and security, and third states, perhaps prematurely, place themselves in a negotiation stance with the rebels if only to protect their own nationals and investment interests present in the country.

Given the ready use of diplomatic and investment relations both to encourage and restrain liberation groups, it is clear that a law enforcement approach to acts of violence by liberation groups will rarely succeed. This fact in addition to the use of the political offense or humanitarian exception in extradition arrangements readily show the weakness of domestic schemes to deter acts of violence perpetrated during armed struggles for self-determination. Consequently, IHL should be made applicable from the first outbreak of organized hostilities. Humanitarian law is applicable to liberation conflicts through Protocol 1, Protocol 2 or, as a minimum, Common Article 3 to the four Geneva Conventions of 1949. The right to self-determination, and the legitimacy of the struggle to achieve it are fundamental principles of general international law, and form rules of customary international law. The extension of IHL to a wide range of such struggles would thus appear "solidly rooted in the logic and dynamics of international law" (132), as giving expression to these fundamental principles of general international law. The obligation of state parties to observe and respect the minimum standards of humanity,

regardless of the level of their participation in the treaty régime, further allows the conclusion that the implementation of humanitarian law in the context of armed conflicts for self-determination has a customary character.

Such a conclusion not only requires state parties to factor-in such considerations as an integral part of their sovereign interpretive function but also affords better protection for the victims of such conflicts. (133) Abi-Saab (134), in her discussion of humanitarian law as interpreted by the I.C.J. in Nicaragua (Merits), points out that the Court affirmed what experts in the field of humanitarian law have long hesitated to assert: that the Geneva Conventions merely give specific expression to the general principles of humanitarian law, and that as such, and given their virtually universal participation by the world community, the Geneva régime is raised to the status of general international law much as the Nuremburg Tribunal declared the Hague Conventions and Regulations of 1907 to be part of customary law. She further asserts that

> ... (T)he obligation in Article 1, common to the four Geneva Conventions, to 'ensure respect' for humanitarian law ... was held by the Court to be inseparable from the basic obligations and was consequently recognized as a general principle. This is especially important in the context of the responsibilities of third parties and the international community in general in the face of violations of the Conventions. (135)

Thus, the Court's holding in the case implies that, though gaps between general international law and the codification of its principles have obvious consequences for the content of the law applicable to a particular dispute, such codification does not erase the independent

existence of such principles as principles of customary law. In this way, the obligations contained as part of general international law continue to have existence and binding character independent of political and contractual quid-pro-quo considerations. (136)

This latter point refers to fundamental, or minimal, guarantees of humanitarian concern and consideration. As such, minimal observance of humanitarian law will be of use to protect the victims of violence. The Court's stance is of particular interest when analyzed for purposes of the application of IHL to prosecute acts of terrorist-violence perpetrated during liberation conflicts. (137) Given that struggles for self-determination are by lack of definition open to competing interpretations as to their identity, their legitimacy and their legal contexts (138), the mere presence of an armed conflict implies that not only are state juridical assertions of a time of "peace" unsafe, but further, that any non-applicability of IHL to such situations flies in the face of state obligations to ensure respect for the common interest represented in the minimal agreements achieved in IHL. As such, target state refusal to invoke IHL in situations of domestic armed conflict implicates state responsibility for violations of the treaty régime.

6.4. Terrorism as a Grave Breach of Geneva Law, Where Applicable

A consistent pattern of acts of terrorism perpetrated by identifiable, organized national groupings (139) is clearly a situation of armed conflict contemplated by IHL coverage. The parties to such an armed conflict may however disagree regarding the nature and scope of the hostilities, and the legal qualifications attributable to particular acts so as to make appropriate assessments of responsibility for damage caused during it. In that application or implementation of IHL to a

particular conflict in no way affects the legal status of the parties, it is perhaps more useful to focus on the nature of the acts prohibited by humanitarian law than to determine their illegality according to the level of legal relationship in existence between the parties.

It is argued in this part that there are uses of force which are always unlawful. It thus may safely be assumed that international individual rights and duties impose on every subject of international law identical limits on the legitimate use of force. As such, military acts the sole purpose of which is to spread terror are forbidden (140), and are capable of prosecution under IHL as a separate, distinct phenomenon to acts of international terrorism.

6.4.1. Grave Breaches/War Crimes as Greater Statements of Principle

As previously discussed, the provisions of Common Article 3 are intended to shape the international human duties which are directly imposed upon states and individuals alike. They are not contingent on reciprocity, and are binding unconditionally. The more specific provisions of the Geneva treaty régime condemn certain acts of violence directed against certain targets under certain circumstances, however "just" the underlying cause. Assuming further that the obligations of humanitarian law may be reduced to a number of general principles, it is easier to evaluate whether essentials have been violated regardless of legal qualification regarding the nature or scope of the armed conflict. Put another way, fundamental principles of humanitarian law have an existence independent of their codification, and constitute a minimum "in all circumstances". (141) Thus, grave breaches of the Conventions, e.g., serious offenses perpetrated against persons and/or extensive destruction of their property or cultural objects, are completely

prohibited.

The use of terrorism as part of the overall political strategy of a "People" struggling for the right of self-determination clearly mandates the application of IHL, and preferably through mechanisms provided in Protocol 1. Protocol 1 makes acts of terrorism, which rise to the level of grave breaches of the Geneva Conventions, war crimes. Should a "People" not be considered an "approved cause" by the international community for purposes of the applicability of Protocol 1, their armed struggle still mandates the implementation of IHL if only on a minimal Common Article 3 basis. Whether a liberation group can bind itself to the four Geneva Conventions of 1949 as a "Power" is controversial, and is felt to be beyond the scope of the present discussion. However, once IHL is invoked on a Common Article 3 or a Protocol 1 basis, the parties to the conflict are free to come to special agreements regarding the provisions of the treaty body, so long as such agreements increase the levels of humanitarian treatment provided. (142)

The High Contracting Parties are obligated to "undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed" grave breaches or war crimes (143). The codification of prohibited acts such as wilfully causing death or serious injury to persons, often involve broader statements of principle than are contained in domestic or military law. This is in view of factors such as the insulating role of military law, the often non-voluntary nature of military service, and state powers during times of "peace" to maintain public order through mechanisms of human rights derogation, and military control over political activity

during emergency situations. (144) The real parties in interest - the victims - must thus frequently rely on a threatened government's respect of IHL rather than directly upon the actual terms of its provisions. In this way, the legal contradictions and distortions which must be maintained to avoid invoking IHL in a domestic armed conflict may serve to negate the individual interests protected by international law.

The rights and duties contained in Common Article 3, as a minimum, must be provided and protected domestically. In the event of a breach of such rights, the national remedy should not negate the substance of the international right. Domestic problems of legal certainty both as to the terminology used and the national remedy to be provided for breaches of IHL provisions, such as the infliction of death or injury, can thus be gauged through state willingness to invoke and consistently broaden the application of IHL by widely interpreting its potential scope. Conversely, heavy dependence on state authoritative interpretation and administration, low levels of scrutiny of implementation, and piecemeal approaches to remedial measures indicate the degree of variance in state approaches to the applicability of IHL.

In that the broad statements of principle contained throughout the different levels of humanitarian law represent a minimal consensus among states in the world community (145), they should be made applicable in struggles for self-determination regardless of the legal qualification of the conflict, if only as a code of conduct and a means of restraint. To do so makes the prosecution of grave breaches a universal duty, i.e., one which need make no or little reference to state authoritative interpretation regarding the political nature of the act. To make acts of terrorism perpetrated during armed struggles for

self-determination war crimes further imposes a level of international restraint. Acts of terrorism perpetrated during such conflicts would thus be separately identifiable and universally capable of prosecution, and would in no way need to be confused with efforts to deter acts of international terrorism.

6.4.2. Grave Breaches and International Individual Responsibility

Where IHL is made applicable to any situation of armed conflict, grave breaches (or war crimes) may be viewed as exceptions to exceptions. Certain impermissible acts, such as killing in peacetime, are made permissible in wartime. Yet, if such acts are directed against protected persons or objects in an indiscriminate or non-proportional manner, they remain impermissible. They are exceptions to exceptions. This point is of interest in the context of the increasing overlap between states of "war" and "peace". (146) As a result of this overlap, acts of terrorism perpetrated as part of a liberation struggle, and which thus cause legal confusion during "peacetime", could be viewed as such exceptions to exceptions, and could be kept separate from other uses of force. Assuming this point, increased state willingness to invoke IHL would certainly remove the phenomenon of terrorism perpetrated during liberation struggles from the ambit of efforts to deter international terrorism.

The terms "grave breach" and "war crime" are not easily translatable into domestic criminal codes. (147) Where terrorist acts are perpetrated as a means or method of warfare, there is a problem of defining the offense within its context, prior to choosing the legal régime to make operable for assessments of responsibility where damage is caused by such acts. Assuming then that international individual

rights and duties impose on every subject of international law identical limits on the legitimate use of force, it becomes easier to evaluate the violation of essentials. In that application or implementation of IHL in a particular conflict in no way affects the legal status of the parties involved, national group efforts to achieve system transformation and to preserve identity through the use of terrorism in no way diminish the content of individual international obligations. (148) Instead, responsibility is raised. The Geneva régime provides for individual and state responsibility when humanitarian provisions are violated. "Superior orders" are not a defense, military evaluations of military necessity and proportionality must be justifiable, and humanitarian treatment is to be afforded in all circumstances. A claim to combatant status does not immunize indiscriminate or morally outrageous acts. (149)

These international individual rights and duties have little practical meaning unless viewed as superior in content to domestic interpretations of ordinary human rights or of the criminality of particular acts. Further, in that acts of terrorism breach fundamental provisions of IHL which are to be respected in all circumstances, such acts may be viewed as prohibited by general international law. Each party to IHL is burdened with the duty to exercise its jurisdiction and either prosecute or extradite individuals perpetrating grave breaches or war crimes, even its own nationals. (150) It is thus clear that proof of governmental good faith is required, and is dependent upon a system of state self-regulation which seeks a constant broadening of the applicability of the IHL treaty form.

Chapter 6. - Footnotes

1. See D. Weissbrodt and B. Andrus, "The Right to Life in Armed Conflict", 29 Harv. Int'l. L. J. 59, 69 - 70 (1988). See also D. Plattner, "Assistance to the Civilian Population: the Development and Present State of International Humanitarian Law", International Review of the Red Cross (IRRC), No. 288, May - June 1992, at 249.

2. Fourth Interim Report of the I.L.A. Committee on International Terrorism, Appendix 1, reprinted in 7 Terrorism: An Int'l. J. 123, 131 - 5 (1984), Dissenting Statement by Professor L.C. Green and Dr. J. Lador-Lederer ("The essence of an act of international terrorism is that it is committed during a time of peace, ...").

3. See J.J. Paust, "'Non-Protected' Persons or Things", in Legal Aspects of International Terrorism (A.E. Evans and J.F. Murphy, eds.)(1978), at 341, 383 n. 106.

4. H.-P. Gasser, "Respect for Fundamental Judicial Guarantees in Time of Armed Conflict - The Part Played by I.C.R.C. Delegates", IRRC, No. 287, March - April 1992, at 121, 123 ("... (P)enal prosecution for violations of international humanitarian law is essentially a matter for States, ..."); see also H.-P. Gasser. "Prohibition of Terrorist Acts in International Humanitarian Law", IRRC. No. 253, July - August 1986, at 200; J. Verhaegen, "Legal Obstacles to Prosecution of Breaches of Humanitarian Law", IRRC, No. 261, November - December 1987, at 607.

5. F. de Mulinen, Handbook on the Law of War for Armed Forces, (1987), at 7 ("The law of war applies from the first acts of hostilities or unresisted occupation".); see, e.g., Common Article Two of the four Geneva Conventions of 12 August 1949; Geneva Convention relative to the Protection of Civilian Persons in Time of War (Fourth Convention), 12 August 1949, Article 6; Protocol additional to the Geneva Conventions of 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, Article 3; the Convention for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, 14 May 1954, Article 18.

6. See generally Fourth Interim Report, supra note 2; see also H.-P. Gasser, "Prohibition of Terrorist Acts", supra note 4, at 212 ("Within the scope of international humanitarian law, terrorism and terrorist acts are prohibited under all circumstances, unconditionally and without exception".).

7. See, e.g., R. Murray, "Killings of Local Security Forces in Northern Ireland 1969 - 1981", 7 Terrorism: An Int'l. J. 11 (1984).

8. See Chapter 4.

9. See, e.g., L. Brilmayer, "Secession and Self-Determination: A Territorial Interpretation", 16 Yale J. Int'l. L. 177 (1991); D. McDowall, "The Kurds", The Minority Rights Group, Report No. 23 (rev. ed. 1989); I. Detter de Lupis, The Law of War (1987), at 26 - 30.

10. See Chapters 2 and 3. Y. Sandoz, C. Swinarski, B. Zimmerman (eds.), Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949 (Commentary) (1987), at 47 note that while wars of liberation do not take place between States, "they are certainly of an international character, according to the United Nations; ...". The editors conclude that an "armed conflict for self-determination" covers those cases in which

> ... (A) people, in order to exercise its right of self-determination, must resort to the use of armed force against the interference of another people, or against a racist régime.

Without one of these two elements, it would not be considered "international". Id., at 54 - 5. See also D.L. Khairallah, Insurrection Under International Law with Emphasis on the Rights and Duties of Insurgents (1973), at 133, who argues that the distinction between international and internal armed conflicts is probably relevant only for purposes of compliance with humanitarian law. I. Detter de Lupis, supra, note 9, at 41, posits that conflicts which merit being called "internationalized" are those with a sufficient intensity, and degree of outside participation, with ensuing causes and effects of war.

11. See Chapters 2, 3, and 5.

12. Y. Dinstein, "The International Law of Civil Wars and Human Rights", 6 Isr. Y.B.H.R. 62 (1976).

13. Supra, note 7.

14. See, e.g., R.J. Kuerbitz, "The Bombing of Harrods: Norms Against Civilian Targeting", in International Incidents (W.M. Reisman and A.R. Willard, eds.) (1988), at 238, 244 - 5 ("The public characterization of the incident by British authorities denied any legitimacy to the I.R.A. as a nationalist organization or to its use of force".); H.-P. Gasser, "Respect for Fundamental Judicial Guarantees", and J. Verhaegen, supra note 4.

15. See Chapter 4.

16. The Commentary, at 50 - 5.

17. E.D. Fryer, "Applicability of International Law to Internal Armed Conflicts: Old Problems, Current Endeavors", 11 Int'l. Lawyer 567, 570 (1977).

18. See Chapters 2 and 3. See also I. Detter de Lupis, supra, note 9, at 29 ("... (I)t has been claimed that it is precisely theexaggerated views expressed in the United Nations with regard to self-determination which have contributed to the growth of undesirable liberation wars".).

19. With Resolution 2105 (XX) of 20 December 1965, the General Assembly recognized the legitimacy of the struggle of colonial "Peoples" against colonial domination in the exercise of their right to self-determination and independence. In Resolution 2621 (XXV) of 12 October 1970, prisoner-of-war treatment was claimed under the Third Convention for freedom fighters under detention. In Resolution 2936 (XXVII) of 29 November 1972, inter alia, the legitimacy of the struggle of colonial "Peoples" for their freedom by all appropriate means at their disposal was reaffirmed. In Resolution 3103 (XXVIII) of 12 December 1973, the General Assembly recognized that national liberation wars, involving a "struggle against colonial and alien domination, and against racist régimes" were "to be regarded as international armed conflicts in the sense of the 1949 Geneva Conventions". Of interest, I. Detter de Lupis, supra, note 9, at 44, asserts that "(t)he view that liberation wars are international conflicts ...", was not adopted in Protocol I of 1977. She further notes, at 161, that the actual ambit of Article 1(4) is arguably applicable only to the "Peoples" of South Africa and Palestine.

20. T.M. Franck, "Legitimacy in the International System", 82 A.J.I.L. 705, 746 - 7 (1988). See also A. George (ed.), Western State Terrorism (1991). The problem would appear to be one of the legality of third state military intervention to assist in quelling an insurection. See L. Doswald-Beck. "The Legal Validity of Military Intervention by Invitation of the Government", LVI B.Y.I.L. 189, 208 - 9 (1985) (discussion of the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty, General Assembly Resolution 2131 (XX) of 21 December 1965, and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States, Resolution 2625 (XXV) of 24 October 1970). See also I.L.A., Report of the I.L.A.'s 56th Conference (New Delhi): Committee on International Terrorism (Working Session), 31 December 1974, Statement of Shri M. Asif Ansari (India), at 158.

21. See C.J. Piernas, "The Protection of Foreign Workers and Volunteers in Situations of Internal Conflict, with Special Reference to the Taking of Hostages", IRRC, No. 287, March - April 1992, at 143, 144 - 5, who divides so-called internal conflicts into three types: (1) the low-intensity internal conflict (temporary disturbances, unrest, riots and lynchings), (2) banditry (traditional kidnapping, theft and pillage, usually committed by armed groups with some degree of organization), and (3) high-intensity armed conflict (the classic civil war).

22. See I. Detter de Lupis, supra, note 9. See generally Special Report of the I.L.A.'s 61st Conference (Paris): Committee on International Terrorism (discussion of issues of state terrorism, as involving deliberate preparation for acts of aggression), reprinted in 10 Terrorism: An Int'l. J. 189 (1987).

23. See Fourth Interim Report, supra, note 2; E.D. Fryer, supra, note 17. Compare Y. Dinstein, "Comments on the Fourth Interim Report of

the I.L.A. Committee on International Terrorism", 7 Terrorism: An Int'l. J. 163 (1984) ("... (I)n the overwhelming majority of cases the states of war and peace must still be kept apart inasmuch as they are subject to different international legal régimes".).

24. "War in the Gulf", Greenpeace Campaign Report, February 1991. See also Q. Wright, A Study of War (2d ed. 1965).

25. J.S. Watson, "Autointerpretation, Competence, and the continuing Validity of Article 2(7) of the U.N. Charter", 71 A.J.I.L. 60, 71 (1977).

26. See E.D. Fryer, supra, note 17; C. Bruderlein, "Custom in International Humanitarian Law", IRRC, No. 285, November - December 1991, at 579, 581 - 2.

27. See W.M. Reisman, "Introduction to a New Genre in the Study of International Law", in International Incidents, supra, note 14, at 3; Notes, "Constructing the State Extraterritorially", 103 Harv. L. Rev. 1273 (1990).

28. Fourth Interim Report, Appendix 1, supra, note 2, at 132.

29. See Chapter 4.

30. See H.-P. Gasser, "Respect for Fundamental Judicial Guarantees", supra, note 4.

31. See Fourth Interim Report, supra, note 2, at 131.

32. See A. Cassese, Violence and Law in the Modern Age (1986), at 74 - 5, who queries whether the negotiating stance of emerging groups is harmed by the use of terrorist tactics. See also J.J. Paust, supra, note 3.

33. See Chapter 4.

34. Supra, note 5.

35. M.C. Bassiouni, "Criminological Policy", in Legal Aspects of International Terrorism, supra, note 3, at 523, 530 ("Indeed, such acts may be committed as a 'last resort', by reason of 'necessity', or 'self-defense'".).

36. E. McWhinney, Aerial Piracy and International Terrorism (1987), at 3 (statement that 'direct action' is the 'preferred mode of international conflicts-resolution').

37. Supra, note 35. See also Y. Alexander, "Introduction", in International Terrorism (Y. Alexander, ed.) (1976), at xi, xiv, who quotes Yasir Arafat in an address at the United Nations as follows:

"whoever stands by a just cause ... cannot possibly be called a terrorist"; B.H. Miller, "Terrorism and Language: A Text-Based Analysis of the German Case", 9 Terrorism: An Int'l. J. 373 (1984) (analysis of terrorist propaganda through structural linguistics).

38. Supra, note 3.

39. See, e.g., J. Smyth, "Stretching the Boundaries: the Control of Dissent in Northern Ireland", 11 Terrorism: An Int'l. J. 289 (1988) (discussion of the response of the British state in Northern Ireland to dissent, the nature of state power, and the response to dissent in times of social conflict, generally); Notes, supra, note 27.

40. Supra, note 25.

41. Notes, supra, note 27.

42. See, e.g., P. Rowe, Defence: The Legal Implications (1987), at 38 - 68 (discussion of military intervention in civilian affairs).

43. U.N. Charter Article 99 states as follows: "The Secretary-General may bring to the attention of the Security Council any matter which in his opinion may threaten the maintenance of international peace and security". See also E.D. Fryer, supra, note 17, who notes that a recognition of insurgency reflects the desire of third states to place their relations with the insurgents on a more regular, if provisional basis; R. Little, Intervention (1975), at 23, who notes that the more stringent the measures applied against rebels, the more likely it is they will receive some kind of formal recognition in the international system. Compare G. Niyungeko, "The Implementation of International Humanitarian Law and the Principle of State Sovereignty", IRRC, No. 281, March - April 1991, at 105, who argues that the principle of state sovereignty places many obstacles in the way of implementation of international humanitarian law. This is particularly so when the system of outside supervision is to be invoked; M. Torrelli, "From Humanitarian Assistance to 'Intervention on Humanitarian Grounds'?", IRRC, No. 288, May - June 1992, at 228.

44. See Chapter 4. Y. Alexander, supra, note 37, at xi, notes that "... most observers agree that nearly every political and ideological group has, under certain circumstances, resorted to both governmental and nongovernmental terrorism. ... . Thus, governments wishing to secure and maintain a desired degree of obedience and loyalty have frequently directed institutionalized violence against their own citizenry, ...".

45. R. Little, supra, note 43, at 6 - 8 (statement that a system change, or transformation, is to be anticipated should a third power enter into a conflict between two units in a bifurcated situation).

46. Supra, note 43.

47. See Chapters 2 and 3.

48. In particular, Common Article 3 to the Geneva Conventions of 1949 applies to all armed conflicts "not of an international character occurring in the territory of one of the High Contracting Parties, ... ". G. Willemin and R. Heacock, International Committee of the Red Cross Vol. 2 (1984), at 72, note that Common Article 3 was most likely invoked for the first time in a major conflict in the Algerian War. See also A. Fraleigh, "The Algerian Revolution as a Case Study in International Law" in The International Law of Civil War (R. Falk, ed.) (1971), at 179; H. Wilson, International Law and the Use of Force by National Liberation Movements (1988), at 152 - 62.

49. Geneva law provides for individual responsibility. See Geneva Convention for the Amelioration of the Conditon of the Wounded and Sick in Armed Forces in the Field (First Convention), 12 August 1949, Article 49; Geneva Convention for the Amelioration of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea (Second Convention), 12 August 1949, Article 50; Geneva Convention relative to the Treatment of Prisoners of War (Third Convention), 12 August 1949, Article 129; Fourth Convention, Article 146; Protocol 1, Articles 75(4)(b), 85 and 86; Protocol additional to the Geneva Conventions of 1949, and relating to the Protection of Victims of Non-International; Armed Conflicts (Protocol 2), 8 June 1977, Article 6(2)(b). Geneva law further provides for High Contracting Party responsibility. See the First Convention, Article 51; Second Convention, Article 52; Third Convention, Article 131; Fourth Convention, Article 148; Protocol 1, Articles 82, 91, and 96(3); Protocol 2, Article 3.

50. Supra, note 4.

51. Fourth Interim Report, supra, note 2.

52. Supra, note 3.

53. C. Koenig, "Observer Status for the International Committee of the Red Cross at the United Nations - Legal Viewpoint", IRRC, No. 280, January - February 1991, at 37, 44, notes that national liberation movements in Africa and the P.L.O., as states in statu nascendi, are considered to be in a separate new category of subjects of international law. The usual criterion of control of a defined territory is not applied.

54. Supra, note 25, at 78.

55. U.N. Charter Article 99, supra, note 43.

56. See, e.g., Fourth Interim Report, supra, note 2.

57. First Convention, Article 49(2); Second Convention, Article 50(2); Third Convention, Article 129(2); Fourth Convention, Article 146(2); Protocol 1, Article 85(1).

58. See R.J. Kuerbitz, supra, note 14; J.Smyth, supra, note 39; C. Koenig, supra, note 53.

59. Supra, note 35. See also E. Weisband and D. Roguly, "Palestinian Terrorism: Violence, Verbal Strategy, and Legitimacy" in International Terrorism, supra, note 37, at 258; E.M. Morgan, "The Imagery and Meaning of Self-Determination", 20 Int'l. L. and Pol. 355 (1988).

60. Supra, note 27. Compare R.F. Devlin, "Law's Centaurs: An Inquiry into the Nature and Relations of Law, State and Violence", 27 Osgoode Hall L. J. 219 (1989) (discussion of juridico-political mechanisms which isolate individuals, thereby depriving them of both their economic position and class/group membership before the law, while cultivating a sense of the benefit of legal representation).

61. H.-P. Gasser, "Prohibition of Terrorist Acts", supra, note 4, at 6, distinguishes "licit violence" in armed conflicts governed by the laws of war, from "illicit violence" (which includes terrorism), on the basis of the status of the person committing the violence, and the rules on methods and means of warfare in armed conflicts.

62. Supra, note 59. See also R. Little, supra, note 43.

63. Supra, note 25, at 79.

64. Id.

65. R. Little, supra, note 43, at 159.

66. Supra, note 35, at 523.

67. For example, many states, when signing Protocols 1 and 2 in 1977, made declarations regarding their potential applicability to particular insurgency and liberation movements. See, e.g., B.A. Wortley, "Observations on the Revision of the 1949 Geneva 'Red Cross' Conventions", LIV B.Y.I.L. 143 (1983), at 149 (British Government decision in 1977 to reserve the right not to apply the Protocols to Southern Rhodesia), and at 152 (statement in the House of Commons, on 14 December 1977: "Neither in Northern Ireland nor in any other part of the United Kingdom is there a situation which meets the criteria laid down for the application of either Protocol".); C. Greenwood, "The Concept of War in Modern International Law", 36 I.C.L.Q. 283, 304 (1987); I. Detter de Lupis, supra, note 9, at 154 - 62.

68. Notes, supra, note 27, at 1295.

69. C. Greenwood, supra, note 67, at 305 (" ... (T)he assertion by one of the parties to a conflict that it is in a state of war retains considerable factual and political significance as an indication of the scope of the conflict and the intentions of that party".).

70. Id., at 304 ("For the purpose of bringing into operation the rules regulating the conduct of hostilities, it no longer matters whether those hostilities are characterised as a war. It is the factual concept of armed conflict rather than the technical concept of war which makes those rules applicable".).

71. See R. Little, supra, note 43; L. Doswald-Beck, supra, note 20, at 211 (discussion of the Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States, General Assembly Resolution 36/103 of 9 December 1981, which Declaration does not refer specifically to a prohibition on interference in civil strife); M. McClintock, "American Doctrine and Counterinsurgent State Terror", in Western State Terrorism, supra, note 20, at 121; S. Gervasi and S. Wong, "The Reagan Doctrine and the Destabilization of Southern Africa", id., at 212.

72. These would appear to be far more numerous than South Africa and Palestine, supra, note 19. The Commentary, at 53, n. 81, lists 103 states and territories involved in self-determination issues, citing H. Gros Espiell, The Right to Self-Determination - Implementation of United Nations' Resolutions (1979), Chapter III (paras. 251 - 61), entitled "Specific situations concerning the right of peoples under colonial and alien domination to self-determination which have been or are being dealt with by the United Nations". None of the listed states and territories include any in Eastern Europe, or the countries of the former U.S.S.R..

73. Willemin and Heacock, supra, note 48, at 167 (statement that the U.N. Charter is maximalist, and therefore there must be collaboration in every domain. On the other hand, the Geneva treaty régime is qualitatively more universal in that it represents a minimal consensus between opposed States).

74. See, e.g., J. Verhaegen, supra, note 4.

75. See Chapter 5.

76. Fourth Interim Report, supra, note 2, at 129 - 30.

77. See, e.g., Protocol 1, Article 96(3). See also Y. Dinstein, supra, note 12.

78. H. Wilson, supra, note 48, at 151, remarks that state practice was ahead of the 1977 codifications in that while states were reluctant to concede international rights to a liberation movement, or to admit that an armed conflict existed, "they are often equally reluctant to appear to be inhumane or to encourage brutality against their own soldiers who may be held by a national liberation movement."

79. Supra, note 19.

80. Supra, note 42.

81. R.J. Kuerbitz, supra, note 14; E. Weisband and D. Roguly, supra, note 59.

82. Of interest, M. Torrelli, supra, note 43, at 229, mentions General Assembly Resolution 43/131 of 8 December 1988 (humanitarian

assistance to victims of natural disasters and similar emergency situations), General Assembly Resolution 45/100 of 14 December 1990 (calls on States to consider the possibility of establishing "relief corridors" for humanitarian aid), Security Council Resolution 688 of 5 April 1991 (Kurdish relief), and Security Council Resolution 733 of 23 January 1992 (Somalia), as obviating the need to refer to General Assembly Resolution 36/103 of 9 December 1981 in situations involving humanitarian relief and assistance. See also D. Plattner, supra, note 1, at 261 - 2.

83. L.C. Green, Essays on the Modern Law of War (1985), at 81, further points out that "... states are jealous of their sovereignty and regard the training of their armed forces as a matter of domestic jurisdiction ... . Once again, therefore, confusion is likely to ensue owing to varying conceptions of what the law is ... ."

84. This is so primarily to attract heightened media interest. Supra, note 35, at 523.

85. See, e.g., B.H. Miller, supra, note 37.

86. Supra, note 35. See also Y. Alexander, supra, note 37 (statement that strategies of political and ideological violence in the context of internal and transnational revolution and warfare are struggles for fundamental political, economic, and social change).

87. See, e.g., H.-P. Gasser, "Agora: The U.S. Decision not to Ratify Protocol 1 to the Geneva Conventions on the Protection of War Victims", 81 A.J.I.L. 910 (1987); J. Gardam, "Protocol 1 to the Geneva Conventions: A Victim of Short Sighted Political Considerations?", 17 Melb. U.L. Rev. 107 (1989).

88. See A. Boyle, Defending Civil Resistance Under International Law (1987); L. Doswald-Beck, supra, note 20, at 203 ("The right of a people to self-determination is, generally speaking, becoming increasingly the right belonging to people within a unitary State, ..."), and at 202, n. 64 ("... (O)nce decolonization is complete, the rule against secession, coupled with the rule against the acquisition of territory by conquest, would in effect freeze the political map ... ."). Compare L. Brilmayer, supra, note 9.

89. Supra, note 25.

90. See Chapter 5; R.F. Devlin, supra, note 60.

91. Notes, supra, note 27.

92. Supra, note 72.

93. See, e.g., supra, note 20; A.S. Calogeroulos-Stratis, "The Humanitarian Dimension of War - Protection of the Individual, whether Military or Civilian", IRRC, No. 287, March - April 1992, at 183. See generally Studies and Essays in Honour of Jean Pictet (1984).

94. Individual juridial isolation, in turn, politicizes the role of the judiciary, as "objective" determiners of fact and law. R.F. Devlin, supra, note 60, at 269 and 283, identifies this politicization of the judiciary by its use of bail, emergency detention, process, and re-interpretation of public order laws as designed in exercise of the repressive function of law. State arsenals of legal violence, thus, are expansive, the functions of which are underpinned by a sense of political realism and assisted by judicial participation. See also R.J. Kuerbitz, supra, note 14; J. Smyth, supra, note 39; J.M. Wolf, "National Security versus the Rights of the Accused: The Israeli Experience", 20 C.W.I.L.J. 115 (1989).

95. See Chapter 5.

96. U.N. Charter Articles 3 and 4; but see C. Koenig, supra, note 53.

97. See Notes, supra, note 27.

98. Supra, note 25, at 66. See also I. Brownlie, Principles of Public International law (1979), at 559, who notes that the doctrine of effective nationality, as relating to a territory, recognizes political reality and emphasizes the social basis of the individual's legal relations.

99. Minority and ethnic groupings are two such traditional formats of identification. See P. Thornberry, "Minorities and Human Rights Law", The Minority Rights Group, Report No. 73 (1987); P. Thornberry, "Self-Determination, Minorities, Human Rights: A Review of International Instruments", 38 I.C.L.Q. 867 (1989). The Commentary, at 54, distinguishes such identification formats from the "Peoples" entitled to self-determination by stating that "(t)he essential factor is a common sentiment of forming a people, and a political will to live together as such".

100. Notes, supra, note 27.

101. See R.F. Devlin, supra, note 60.

102. For instance, I. Brownlie, supra note 98, at 577, notes that the individual does not normally bear responsibility for breaches of obligations imposed by the customary law of nations, as such obligations usually rest on states, or governments. Nor can the individual usually bring international claims, as there are practical procedural problems involved in giving individuals access to international courts. See, e.g., the Statute of the International Court of Justice, Article 34 (1). Compare note 83, supra, at 248, citing, in part, the I.L.A.'s Principles of International Law recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal:

> Any person who commits ... a crime under international law is responsible therefor and liable to punishment.

> The fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law.

103. See, e.g., S.R. Chowdhury, State of Emergency (1984), at 235, who queries whether United Nations emphasis on individual human rights was designed to reduce the friction caused by the League of Nations minorities policies.

104. See C. Greenwood, supra, note 69.

105. See, e.g., A. George, supra, note 20.

106. See, e.g., General Assembly Resolution 3034 (XXVIII) of 18 December 1972 on Measures to Prevent International Terrorism, which studies "the underlying causes of those forms of terrorism and acts of violence which lie in misery, frustration, grievance and despair and which cause some people to sacrifice human lives, including their own, in an attempt to effect radical changes". Compare General Assembly Resolution 42/159 of 7 December 1987.

107. See Chapter 2; the Commentary, at 54, the editors of which conclude, however, that "(i)n international law there is no definition of what constitutes a people; there are only instruments listing the rights it is recognized all peoples hold".

108. Supra, note 9.

109. Resolution 2625, supra, note 20.

110. Id. See also I. Brownlie, supra, note 98, at 291, et seq., who argues that as self-determination complements state sovereignty, state equality, and the equality of "Peoples" within a state, it can be used in parallel with the principle of non-intervention for purposes of the prohibition of the use of force in international relations. L. Doswald-Beck, supra, note 20, at 208, agrees, stating further that "the principle of self-determination does not really vest the legal right of the representation of a State in the people as that principle protects the State from external interference rather than vesting any right in the people as such". Compare I. Detter de Lupis, supra, note 9, at 24 - 31, who discusses the U.N. era's idea of "compulsory" democracy, which idea has facilitated the development of the notion of self-determination).

111. Supra, notes 12 and 17. Compare Dinstein, supra, note 23.

112. See, e.g., supra, R.J. Kuerbitz, note 14; note 21; J. Smyth, supr, note 39; C.A. Allen, "Civilian Starvation", 19 Ga. J. of Int'l. and Comp. L. 1 (1989).

113. F. de Mulinen, supra, note 5, at xvi.

114. M. Torrelli, supra, notes 43 and 82.

115. Supra, note 5.

116. See Chapter 4. The Commentary, at 1324 - 5, notes further that "Common Article 3 of the Conventions constitutes the keystone of humanitarian law applicable in non-international armed conflicts. ... . (C)ommon Article 3 lays down the fundamental principles of protection ... . Article 3 merely expresses a minimum of basic rules".

117. R. Abi-Saab, "The 'General Principles' of Humanitarian Law according to the International Court of Justice", IRRC, No. 259, July - August 1987, at 367, 372.

118. See Y. Dinstein, supra, note 12. See also, Fourth Interim Report, supra, note 2, at 128 ("It seems clear that a shift to the highly regulated régime of international armed conflict was believed to be a major advantage to those struggling for an approved cause whom a defending government would prefer to classify as 'terrorists' or 'criminals'".).

119. Nevertheless, see, e.g., M. Takemoto, "The 1977 Additional Protocols and the Law of Treaties", in Studies and Essays in Honour of Jean Pictet, supra, note 93, at 249, 259, who notes that

> If the legal status of national liberation wars had been elevated from armed conflicts not of an international character to ones of an international character by Article 1, paragraph 4, of Protocol 1, then there might be fear that Common Article 3 is not applicable to wars of national liberation until a declaration under Article 96 is made. It is certainly desirable from humanitarian considerations that at least Common Article 3 shall be applied to them.

See also Fourth Interim Report, supra, note 2, at 127, where it is noted that

> International law sets the thresholds at which political violence passes from being essentially a domestic matter to being a matter governed by Article 3 ... or to being an international armed conflict within the scope of Common Article 2 ..., or to raise yet another possibility to which scant attention has yet been paid, an armed conflict of whatever character governed by the laws of war under the general international law applied in civil wars.

120. Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, I.C.J. Reports 1986, at 14.

121. Id., paragraph 219:

> Because the minimum rules applicable to international and to non-international conflicts are identical, there

> is no need to address the question whether those actions must be looked at in the context of the rules which operate for the one or for the other category of conflict.

See also H.-P. Gasser, "New Draft Declaration of Minimum Humanitarian Standards", IRRC, No. 282, May - June 1991, at 328; D. Fleck, "Implementing International Humanitarian Law: Problems and Priorities", IRRC, No. 281, March - April 1991, at 140, 141, who notes

> The rules of international humanitarian law are to a great extent peremptory norms (*jus cogens*) ... . Most of the provisions ... are also self-executing. They are unequivocal and complete and hence can be implemented by government agents and individuals without national legislative measures.

(Emphasis in the original.)

122. Supra, note 117, at 375. Compare C. Bruderlein, supra, note 26, at 584 - 5, who notes that the I.C.J. did not hesitate to affirm its jurisdiction over complaints relating to general (or customary) law, even though the content of the latter might be identical to the norms of treaty law. He considers that

> This equating of general principles with custom is extremely unfortunate. ... No doubt they (the judges) wished to refer to the customary content of humanitarian law but, in the absence of principles and jurisprudence to guide their proceedings, they refrained from seeking its constituent elements for fear of entering into political and philosophical matters outside their mandate.

Nevertheless, see supra, note 117, at 373 ("Even so, does not the virtually universal participation in the Geneva Conventions raise them to the status of general international law, whether we call it customary law or something else?").

123. See Chapter 5, and I.L.A. Report of the 56th Conference (New Delhi), supra, note 20.

124. Supra, note 12.

125. Id., at 66 - 9.

126. Common Article 3 states merely that it is applicable "(i)n the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties ... ." Compare Protocol 2, Article 1(1)

> ... (W)hich develops and supplements (Common) Article 3 ... (and) shall apply to all armed conflicts which are not covered by Article 1 (of Protocol 1) ... and which take

> place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.

See Book Review, Gasser, IRRC, No. 285, November - December 1991, at 637, wherein it is noted that "the conflict in El Salvador is the first case ever in which Protocol 2 was applicable in practice".

127. Protocol 2, Article 1(2), states: "(t)his 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".

128. Nicaragua v. United States of America, supra, note 120, paragraph 218.

129. By way of analogy, see Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion of May 28, 1951, I.C.J. Reports, 1951, p. 23 ("In such a convention the contracting States do not have any interests of their own: they merely have, one and all, a common interest ... . Consequently, in a convention of this type one cannot speak of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties").

130. Supra, note 117, at 367 - 8. See Common Article 3 of the four Geneva Conventions; Protocol 1 Articles 4 and 5(5).

131. H.-P. Gasser, "Prohibition of Terrorist Acts", supra, note 4, at 5 (" ... (T)errorist acts are often directed at outsiders who have no direct influence on or connection with what the terrorists seek to achieve; ...".). See also supra, note 35, at 524:

> If the victim is a person who has a symbolic or representative capacity in the system attacked, then the harm caused to such a person is 'justified' ... . (I)f the victim is an innocent person who has been harmed as a result of the randomness of the violence, then the rationalization is 'political necessity' ... .

132. Supra, note 117, at 375.

133. See, e.g., F. Maurice and J. de Courten, "ICRC Activities for Refugees and Displaced Civilians", IRRC, No. 280, January - February 1991, at 9, 10 ("Unlike the 1951 United Nations Convention on Refugees or the 1969 O.A.U. Convention, the instruments of international humanitarian law do not make the protection of refugees conditional upon a legal definition of their status".).

134. Supra, note 117.

135. Id., at 374.

136. Id.

137. See H.-P. Gasser, supra, note 4.

138. Supra, note 72. Such openness to competing interpretations reflects what Franck refers to as the "checkerboard" application of self-determination, i.e., the lack of coherence in distinguishing between "Peoples" entitled or not to the associated rights. T.M. Franck, supra, note 20, at 747. The Fourth Interim Report, supra, note 2, at 128, refers to "Peoples" so entitled as "approved" causes.

139. See supra, note 119.

140. See H.-P. Gasser, "Prohibition of Terrorist Acts", supra, note 4, at 212 ("Within the scope of international humanitarian law, terrorism and terrorist acts are prohibited under all circumstances, unconditionally and without exception".).

141. Supra, note 117, at 375.

142. See, e.g., Articles 6 and 7 of the four Geneva Conventions.

143. First Convention, Article 49; Second Convention, Article 50; Third Convention, Article 129; Fourth Convention, Article 146; Protocol 1, Article 85(1).

144. Supra, note 42, at 39.

145. Willemin and Heacock, supra, note 48.

146. Y. Dinstein, supra, note 23, at 165.

147. See id.

148. See supra, note 87.

149. Supra, note 83, at 60 (referring to the Nuremberg Charter of Establishment). Compare supra, note 102.

150. First Convention, Article 49(2); Second Convention, Article 50(2); Third Convention, Article 129(2); Fourth Convention, Article 146(2); Protocol 1, Article 88.

7. Political Aspects of the Applicability of IHL to Liberation Struggles

As previously discussed, the legal qualification given to violations of legal norms determines subsequent assessments of responsibility for such violations. (1) This is particularly true where domestic legal norms regulate the use of violence in a society. It is also true when domestic political process is hindered by the ready use of force, e.g., when public order is maintained by the police or government-controlled paramilitary units during civil unrest. (2)

Within the context of struggles for self-determination, sovereign authoritative interpretations as to the merits of claimed entitlements by liberation groups employing violent force are conditioned by competing legally protected interests. Assessments of responsibility for damage caused by terrorist acts are determined by the legal qualifications given by both a threatened government, and third states. (3) As such, assessments of responsibility for damage to life or property interests resulting from the use of terrorism by liberation groups have political consequences. (4) Political considerations regarding assessments of responsibility for damage caused during liberation struggles have thus created a climate of ambiguous state practice regarding the applicability of the IHL régime to modern armed conflicts. In turn, the lack of a common understanding of "war" in terms of parties, methods and consequences has been a characteristic of the post-1945 era. (5)

It is argued in this Chapter that the political effects of liberation wars deter states from invoking the IHL legal régime from the

first organized acts of hostilities or unresisted occupation. Political effects of liberation armed conflicts include the potential alteration of the juridical status of a troubled state in the world community, a legitimation of the use of violent force to achieve self-determination, and the normative development of terrorism as a "justifiable" method of warfare. It is clear that such political considerations are not calculated to strengthen the primacy of law in situations of armed conflict, but it is further clear that implementation of IHL legally alters the duties and obligations owed to an opponent during an armed struggle at the same time IHL purports not to affect the legal status of either party to it. (6) Nevertheless, a desire for the legitimizing effects of IHL treatment may be one of the reasons behind the modern proliferation of low-intensity, surrogate armed violence which has led to normative confusion and legal evasion regarding the true nature of such conflicts.

By way of preliminary discussion, the traditional practice of declaring or recognizing a state of war has become too dangerous in an international legal system which outlaws wars of aggression as an instrument of foreign policy. (7) For example, the semantic extension of Common Article 2 to all forms of international armed conflict has been unfounded in state practice (8), and efforts to nominate liberation groups as "Powers" which can bind themselves to the four Geneva Conventions of 1949 are highly controversial. The non-applicability-in-fact of Common Article 3 does not reflect the right to receive humanitarian relief and medical care. State recognition of the legal grounds for intervention without state consent, if only by sending medical teams to make use of the potential of humanitarian law, remains

questionable. (9) Common Article 3 does not define "armed conflict", thereby preserving strong notions of sovereign authoritative interpretation as to the true nature of a given disturbance. As for the 1977 Protocols, the ratification process has been characterized by the hostility of certain influential states to which the new provisions might particularly apply. (10) Thus, political considerations regarding assessments of responsibility and the legitimizing effects of humanitarian treatment render the non-partisan stance of IHL untenable, in practical terms.

Demarcations between states of "war" and "peace" determine the legal qualification of subsequent assessments or levels of culpability. (11) This fact makes states doubly hesitant to recognize an armed conflict. Once a state of war is recognized through humanitarian treatment (12), certain acts committed in peacetime, such as killing, become permissible. A claim of combatant status may remove from a public order police exercise what would otherwise be the protection of the law. (13) "Superior orders" may be used in mitigation, if not in defense, against punishment for grave breaches of the Geneva Conventions, or war crimes, or for acts perpetrated by overzealous armed forces. (14) Acceptance of the applicability of military law provides an insulating factor against particular forms of responsibility. The nature of the command structure in military service (15) is an additional consideration which may work against a liberation group when it claims that an armed struggle against a threatened government is in fact a war to which IHL applies.

More importantly, a recognition of the applicability of the IHL régime to a situation of domestic violence involving issues of self-

determination propels third states to put their relations with a challenging group on a regular basis, if only to increase levels of protection for foreign property and persons situated in the troubled area. (16) Although diplomatic overtures to liberation groups are frequently premature, wider disruptive potential to foreign interests is thereby reduced or at least stabilized. The maintenance of contact between foreign states and liberation groups puts pressure on a threatened government to acknowledge a legal relationship with the rebeling group, if only for purposes of negotiating an end to the conflict, which pressure further burdens the incumbent with now uncertain assessments of responsibility for violations of legal norms regulating the use of violence. (17)

It is thus argued in this Chapter that implementation of IHL in liberation struggles has a legitimizing effect on the legal status of struggling "Peoples". For example, the various levels of humanitarian protections afford liberation movements their "window of opportunity" to demonstrate to the world community the substance of their rights claims, and their self-image as a protogovernment. Further, the application of IHL during a war of self-determination has probable normative effect on the use of terrorist methods as "justifiable" means and methods of warfare. (18)

The structure of this argument is as follows. The political consequences of target government recognition of the applicability of IHL to a situation of domestic civil unrest are discussed in the First Part. In particular, such recognition implies that the juridical status of the target state has been altered or may be altered in the near future, and that the incumbent is no longer able to protect all sectors

of the population from violence, acting alone. As such, invoking IHL indicates the nature and form of the hostilities. The effect of the application of war law on international recognition of the legitimacy of an authority representing a "People" involved in a struggle for self-determination is discussed in the Second Part. As a threatened government can no longer provide protection to foreign persons and property, foreign states have a duty to define their attitudes to the liberation group and to acknowledge the alteration in juridical status of the target state, for purposes of the continuation of effective international relations. A degree of legitimacy is thus derived by the liberation authority. The effect, if any, on world opinion which results from the renunciation of terrorist methods by liberation movements in their struggle to achieve claimed rights entitlements is examined in the Third Part. The normative effect, if any, which results from the use of terrorist methods is discussed in the Fourth Part, as viewed within the context of legitimate means and methods of warfare in struggles for self-determination.

It is concluded that the main political consequence of invoking IHL in wars of self-determination is the recognition of the legal status of a "People", whose legitimacy has been achieved through the use of violent force. As such a political result is not calculated to encourage states to regulate domestic armed conflicts through international law, states will remain unwilling to invoke IHL in modern armed conflicts.

7.1. The Legitimacy of the Authority Representing a "People"

The political consequences of incumbent government recognition of the applicability of IHL to a situation of domestic civil unrest are

many. In particular, such recognition implies the target state's juridical status in inter-national relations has changed or may do so in the near future. (19) The application of the law of war in situations of civil unrest, and the erosion of the traditional system of neutrality, are discussed in this part. Terrorism, characterized as a peacetime phenomenon (20), will then be discussed to illustrate the role restraint plays in the IHL régime. Thus, the application of IHL in struggles for self-determination raises important questions regarding the legitimizing influence of IHL treatment on national liberation groups.

7.1.1. Application of the Law of War and the Legal Status of the Parties to a Conflict

The IHL régime, as codifed, applies between states which are parties to the same treaties. It also applies between states parties to a particular treaty, and states or other belligerant parties which accept that treaty and apply its provisions. (21) While special agreements on particular matters may be concluded, such agreements cannot lower the thresholds of protection contained in the pertinent treaty instruments. (22) The traditional distinction between the Hague and Geneva Conventions has been reduced in Protocol 1, remaining useful in modern times primarily for jurisdictional frameworks of enforcement (23), and for ascertaining what level of obligation is mutually agreeable among the parties to a conflict. IHL as codified merely gives expression to the general principles of humanitarian law, and the fundamental general principles set forth in the rules contained in Common Article 3 to the 1949 Geneva Conventions constitute a minimum, applicable in all circumstances of armed conflict.

The law of war should be utilized from the first acts of hostilities or unresisted occupation. To encourage the widespread use of IHL, it is categorically stated that the legal status of a party to a conflict is not to be affected by either the application of the law of war or the conclusion of special agreements. This latter point is designed to encourage the use of IHL, if only as a code of conduct, in non-international, or domestic armed conflicts. (24)

7.1.1.1. Belligerency and Insurgency

States remain under an international obligation to prevent an armed conflict from breaking out. They are under positive obligations to abstain from provocative actions, and from the threat or use of force in their international relations. (25) States are under an obligation to abstain from interference in the internal affairs of other states. (26) They are thus obligated either to prevent an armed conflict from breaking out, or to remain out of an armed conflict occurring between other states or within a single state. (27)

Traditionally, the neutrality system encouraged the formation of diplomatic and military alliances, if only for purposes of defending against the use of aggressive armed force. To this end, the distinction between domestic situations of belligerancy and insurgency was all important for purposes of guidance regarding the appropriate action to take within existing prohibitions provided by the neutrality system. In the post-1945 era, on the other hand, the balance of carefully established fields of competence preserved in the U.N. system means that states may unilaterally take preparatory actions in view of a possible armed conflict in order to fulfill obligations under the law of war. (28) Such obligations are contemplated in the U.N. Charter in

provisions which deal with regional and international arrangements for the use of force.

Where conflict occurs domestically, such preparatory action may take the form of provisions for emergency decrees and use of the police or military to maintain public order, particularly as civil unrest may range from street mobs to international war. (29) The existence of a civil war or unrest requires not only observance of the law of war, if only as a code of conduct, but also, "the practical necessity for third states to define their attitude" (30) to such domestic disturbance. The traditional recognition of a state of belligerency, either by word or deed, required that sister-states regulate their activities with both sides on the basis of neutrality, in that either side might emerge triumphant. An intermediate stage between civil disorder and all-out civil war was an insurgency, and did not call into play the neutrality system. Thus, alliance states could assist the target state in quelling the domestic unrest. A target state's response to such unrest, through its authoritative characterization of the situation, was indicative of the nature and form of the hostilities.

The neutrality system was seriously eroded prior to World War 2, and has all but disappeared in the post-1945 era (31), primarily for political reasons as is discussed below. Instead, third states may experience a change in relations with a threatened government as a result of domestic civil disorder, if only through sister-state heightened concern that the target government can no longer protect foreign property and foreign persons. As long as there is no clearly established armed conflict, the opposing parties and third states may disagree on the legal qualification of the conflict. (32) Premature

recognition of a state of belligerency by outside states may constitute "illicit interference in the affairs of the state affected by civil disorders". (33) On the other hand, the fact of insurgency has no effect on the juridical status of the state, and the threatened government may call on other states for aid and assistance. (34)

7.1.1.2. International War and Internal War

The fact of belligerency or insurgency had traditional importance in that it changed the obligations third states owed to the state in which civil strife occurred. Today, the fact of belligerancy invokes one of the principle fields of competence preserved in the U.N. system, that of organizing a collective effort to enforce the prohibition against the spread of military operations beyond the confines of a single state. (35) The fact of insurgency remains within the domestic competence of a target state, the government of which may request outside aid and assistance in quelling the disturbance. U.N. hesistance to intervene in matters of domestic jurisdiction (36) has resulted somewhat in limitations to the prescriptive range of international law when faced with sovereign authoritative interpretation as to the nature of a domestic disorder. (37) While the issues underlying self-determination and the right to use force to achieve it have eroded traditional jurisdictional confines delimiting the areas between domestic and international concern, sovereign state interpretation of a domestic armed struggle delays the transition from international "concern" to international "jurisdiction". Ambiguous state practice has been the result of this dubious balance of competences.

Thus, it is perfectly possible for state parties to IHL to follow an approach to struggles for self-determination which is based solely on

the political fact of sovereignty, which approach often precludes an adequate analysis of the issues underlying a conflict. Such an approach further deters serious initiation of the necessary legal frameworks in which to peacefully settle disputes. The pursuit of change through political channels becomes stymied. Further, the fundamental purpose of IHL is that it should be made applicable as soon as possible, yet it is in effect rejected as a treaty form. (38) For example, as a minimum, an individual has the right to receive humanitarian relief and medical care from intervening medical teams making use of the potential of humanitarian law during an armed conflict. This implies a level of protection not afforded to common lawbreakers. On the other hand, IHL treatment implies that a struggling group has a claim to combatant status, and that the incumbent, by virtue of such treatment, agrees in theory that it may be attacked. (39)

The different levels of political interaction contained within IHL are vital considerations when states are faced with civil dissent. (40) Target state recognition of the applicability of IHL to a situation of domestic civil unrest constitutes recognition that the juridical status of a state either has been altered or may be altered in the near future should public order not be restored. The inability of the U.N. system to prevent the spread of military operations within the territorial confines of a single state means that third states are forced to make their own accommodations with both sides to an armed conflict. This may consist of aid and assistance to either side, and thus involve the risk of interference in the domestic affairs of the target state. While fundamental humanitarian guarantees should be afforded to all involved in such conflicts, humanitarian treatment may

imply a "right" to shoot at target state police or military units empowered to conduct public order missions.

These many factors make the application of IHL to internal conflicts so problematic. In particular, the inclusion of wars of self-determination in Protocol 1 met with heavy resistance from Western states and/or those states to which it might particularly apply, as what were previously considered internal disorders were literally taken out of domestic jurisdictional confines and internationalized. (41) An additional problem in invoking IHL is the collateral recognition of a group's legal personality and of the legitimacy of their armed struggle. This collateral effect directly delimits the scope of sovereign authoritative interpretation, and alters pre-existing frameworks for political interaction. Authoritative assessments of responsibility for violations of legal norms (42), and for damage caused, are further affected.

Thus, many favorable considerations attach in favor of a struggling group if viewed as an "approved cause" by the international community. Should an auto-determined "People" claim these same advantages through a wide reading of the scope of the right of self-determination, the "status" of their struggle may be recognized as an "international" war, by virtue of humanitarian treatment. These are clearly the political concerns of a target government which must further anticipate a time when it will be required to treat a national liberation movement as an equal for purposes of negotiations. (43) Thus, threatened states are unwilling to invoke IHL in a situation of domestic violence, and are unlikely to afford humanitarian treatment to a struggling group. On the basis of the political considerations and

effects, the primacy of law during an armed conflict is rejected.

7.1.2. Terrorism as a "Peacetime" Phenomenon

The evolution of an armed conflict relates to the transition from "peace" to "war", with a possible escalation of parties, personnel and combat means employed. As previously discussed, the post-1945 era has experienced numerous examples of acts of terrorism as the means used to provoke the very escalation feared. (44) Terrorism employed during a time of "peace" can cause the conflict to evolve into "war", and thus has become a vital tactic to alter legal assumptions and to mandate the application of the law of war. (45) It has been seen that the law of war should be applicable, if only as a code of conduct, from the first acts of hostilities or unresisted occupation. On the other hand, such applicability is mandated once violence is characterized as an armed conflict rather than as a series of criminal acts, but the necessary alteration in characterization rarely occurs voluntarily.

State parties to the IHL régime frequently follow an approach based solely on the political fact of sovereignty. (46) A change in legal qualification as to the true nature of a particular use of violence may thus be delayed. In particular, terms which cause conceptual and legal difficulty when identifying terrorism accurately include those which describe the participants in nearly the entire spectrum of armed conflicts. The most common difficulty is the delineation between "freedom fighters" and "terrorists". (47) Delay caused by states through fictitious authoritative interpretations of the nature of a domestic disorder and the identity of its participants may lead to unnecessary use of the police, and may add "an unlimited nature to ... criminal activities and (open) the way to the use of armed

forces". (48)

The identification of terrorist organizations is left to governments. (49) The appropriate legal qualification to be attributed to terrorist acts and their perpetrators has led to much debate. In particular, one simplistic delineation between illicit acts of warfare (as in "approved" struggles for self-determination) and prohibited acts of "peacetime" terrorism is whether or not innocent third parties damaged by such acts are the intended victims. (50) This distinction can be easily countered, if only through an examination of the indiscriminate effects of modern weaponry. Kuerbitz, in his discussion of the bombing of Harrods in 1983 by the I.R.A., begins on the following note:

> Recent trends in warfare, including the increased use of terror, ... have raised concerns, at least in the context of unconventional warfare, that the norm against civilian targeting no longer exists. (51)

This statement would imply that the norm against civilian targeting is not an appropriate point of departure in distinguishing between characterizations of particular uses of armed force. Nevertheless, given the codified prohibitions against terror methods of conflict contained in IHL (52) and in particular, the prohibitions against the wanton targeting of civilians and civilian objects (53), it is clear that methods of terrorism which are intended to cause indiscriminate damage, including damage which may seriously harm persons or their objects, have no place in the restraints contemplated by the law of war.

7.1.3. Terrorism as a "Wartime" Phenomenon

National liberation movements are by definition non-state entities, although they may be characterized as "nations" or "Powers".

The very point in their express acceptance of the law of war (54) is the acceptance of international legal obligations which afford an opportunity to show restraint, a level of control over their troops, and to act as a protogovernment for purposes of building diplomatic relations. On this basis, competing interpretations regarding the legal qualification given to the use of force or violence utilized by liberation movements may be resolved through observance of the maxim that "the right of the parties to a conflict to adopt means of injuring the enemy is not unlimited". (55) As such, the exchange of restraint in method for humanitarian treatment in all circumstances means that illicit methods of combat may not be used, even in a conflict "for a good cause". (56) When the time arrives to treat a liberation movement as an equal or valid counterpart to sovereign states for purposes of negotiation or to regulate the conduct of an armed conflict the use of methods of terrorism subverts the rules of the game and shatters acceptable patterns of behavior. (57)

As previously discussed, methods of terror-violence perpetrated during an armed conflict may be characterized as grave breaches of the Geneva Conventions or as war crimes. (58) It should now be clear that so long as such methods are characterized as "terrorism" and prosecuted through domestic penal sanctions, threatened incumbents are neither willing to acknowledge exchanges of restraint, nor to view a struggling group with any degree of parity. Further, the tenacity of the semantic distinction in legal qualification between "war" and "peace" is evidence that terrorism as a method of warfare is not acceptable in the world community. Where it is utilized to provoke the application of the law of war, an incumbent's juridical status is weakened. The application of

IHL under such circumstances is evidence that domestic schemes to control group terrorist activity have proven ineffective in providing protection to all sectors of the population.

Once the legal qualifications underlying assessments of responsibility have been altered by incumbent recognition of the applicability of the IHL régime, the self-image of a liberation movement as a protogovernment requires restraint in method, in which context terrorism, as a "peacetime" phenomenon, does not form a part. (59) Therefore, humanitarian treatment afforded by a target state to a liberation group in a struggle for self-determination may appear as target state acceptance of the legitimacy of the representative authority, and of its "right" to use force against that state to achieve its goals.

7.2. Implementation of IHL Strengthens International Recognition of the Authority Representing a "People"

The issue of restraint in method is particularly important in an age of armed conflicts for self-determination where U.N. General Assembly Resolutions appear to support wars of national liberation as exceptions to Articles 2(3) and 2(4) of the U.N. Charter. (60) Nevertheless, such support cannot alter the limits the legal order places on combatants, even those fighting in a "just cause". The post-1945 international legal system has thus failed to distinguish between different legitimate uses of force, and to differentiate between those "Peoples" entitled to pursue claims for self-determination through the use of force, and acts of international terrorism which need to be detered. These failures have led to confusion regarding the use of force, generally. Given these omissions, third states auto-interpret

the factual and political significance of acceptance by a target government of the applicability of IHL to an armed struggle for self-determination. Proceeding under the duty to protect their own interests, such third states may prematurely re-align their diplomatic relations in anticipation of potential alterations to target state assessments of responsibility which result from the application of the law of war to a liberation conflict. (61)

The effect of the application of the law of war in a struggle for self-determination on international opinion is discussed in this Part. In particular, the practical advantages to third states of recognizing the parties to such an armed conflict may affect the legal status of liberation fighters, and the normative development of terrorism as a justifiable means of waging a war of self-determination.

7.2.1. Application of the Law of War and the Legal Status of Parties to a Conflict

As previously noted, IHL categorically provides that the legal status of a party to a conflict is not affected by either the application of the law of war or the conclusion of special agreements. In particular, the status of a party to an armed conflict is not altered by the application of the law of war to it. Nevertheless, this position appears untenable in practice, as a degree of heightened status may be gained by means of humanitarian treatment. This is so particularly during a civil war, which occurrence is not treated as illegal in the international order.

While certain conditions of fact may create a duty to recognize diplomatically that the juridical status of a state involved in a civil war has altered, or may soon alter, there is certainly no international

legal obligation to do so. For example, third states may experience a change in relations with a target government if only because that government can no longer protect foreign property and foreign persons. The continuation of effective international relations may require negotiations with a liberation group. Nevertheless, recognition of a "factual" situation may be premature, and thus constitute interference in the affairs of states affected by internal disorder. (62) Although it is the responsibility of the U.N. Security Council to organize collective efforts to prevent the spread of military operations beyond the confines of a single state (63), its frequent failure to do so has resulted in abuse of the state obligation to abstain from interference in the internal affairs of disrupted states. In the absence of effective Security Council measures, aid and assistance may be rendered to rebel factions fighting in a "just cause", as third states regularize their relations in anticipation of the success of a liberation movement such third states may in fact have helped.

The legal contradictions between the U.N. principle of the equal rights and self-determination of "Peoples", and the rules providing for the inviolability of territorial integrity and political independence of states are brought into contact when the application of the law of war becomes an issue in a struggle by "Peoples" fighting for the right to self-determination. Where aid and assistance are rendered to a rebel faction (64), if only through the establishment of diplomatic links or the provision of humanitarian aid, the application of IHL carries considerable significance as an additional indication of both the underlying rationale and potential scope of the conflict.

As previously discussed, a target government's inability to

protect sectors of its population, including foreign persons and property, is signaled through humanitarian treatment afforded a rebel group. (65) The existence of a factual situation is thus notified, and the factual situation, in turn, impliedly legitimizes the decision to invoke the law of war. Third states are under a duty to proceed in their own national interests, and to define their attitudes to the armed conflict. (66) Observance by all parties to the conflict of international legal wartime obligations will, in turn, determine the degree of protection of their interests third states may expect. (67) Jurisdictionally, assessments of responsibility for damage will be gauged by compliance with "wartime", rather than "peacetime", obligations, with obvious effects, e.g., on insurance cover. (68) On this basis, it is in the interests of third states to encourage liberation groups to show restraint, to seize the opportunity to act as protogovernments, and to show themselves willing to enter into negotiations with the target state to end the conflict. Thus, diplomatic relations with liberation groups may be contemplated prematurely, and humanitarian or military assistance may be afforded to them. In this way, the legal status of liberation groups may be established, and legitimated through the use of force.

It is clear that implementation of IHL in a struggle for self-determination affects international behavior towards the conflict. This in turn affects international recognition of the legitimacy of the authority representing a "People". Such recognition implies the acquisition of a legal status, and places the parties to a conflict in a position of parity. As compliance with the rules of IHL mandates restraint in method, evidence of such restraint on the part of a

liberation group will further legitimize their use of force in struggles to achieve self-determination. On the other hand, whether or not legitimated uses of force reinforce the traditional confines of IHL restraint is another question, as is now discussed.

7.2.2. International Recognition of Terrorism as a Method of Warfare

The international community in practice has yet to reach the point of prohibiting terrorism as either an instrument of foreign policy (69) or as a favored method of conflict resolution. (70) The capacity for violence as a tool of persuasion has been maintained in the U.N. era as a primary means of effecting political and social change. On this basis, it is clear that the use of terrorism as an instrument of policy or as a means of warfare opens the way to the use of the armed forces, whether those of a recognized "authority" or those of a state. (71)

An international armed conflict, of which some struggles for self-determination now form a part pursuant to Protocol 1 Article 1(4), has no minimum requirements regarding intensity of violence, military organization, or control of territory. (72) The use of terrorism to open the way to the use of the armed forces is very likely the shortest method to aggression. As such, terrorism has been termed "... often ... a deliberate preparation for an act of aggression". (73)

The law of war is applicable from the first acts of hostilities or unresisted occupation, of which acts of terror-violence perpetrated for political purposes may form a part. This means that the legal qualification given to such acts must be influenced by political considerations of the legal consequences of recognition of an armed conflict. (74) As noted previously, the definition of a terrorist organization is left to a government. Thus, the generalized rhetoric

about terrorism and extradition strengthens state positions in refusing to recognize the underlying reasons for the first use of violence in the cause of self-determination. Such rhetoric permits an incumbent government to legitimate subsequent acts of state repression, and to prevent the appearance of a legal relationship with the struggling group for purposes of conflict resolution through political channels in an atmosphere of parity. (75)

State unwillingness to invoke the IHL régime in struggles for self-determination, as that term is increasingly used (76), has led to a level of normative confusion and legal evasion which implies the rejection of the treaty régime in practice. (77) A primary loss resulting from such rejection is the exchange of restraint in method for humanitarian treatment in all circumstances. Rubin focuses on this latter point when noting as follows:

> As to U.N. General Assembly Resolutions supporting wars of national liberation, there seems to be some confusion between the Resolutions supporting the justice of a particular fight as such, the *jus ad bellum* as an exception to Articles 2(3) and 2(4) of the Charter, and 'terrorism', which ... reflects either only the law of peace or, in the case of violence that some might want to regard as within the law of war, then the *jus in bello*, the limits the legal order places on soldiers even when fighting in a just cause. Surely it is not proposed that ... 'war crimes' in a just cause are not 'war crimes'. (78)

Despite the fact that the law of war is applicable early in a conflict, Rubin further appears to agree with strict interpretations of the scope of domestic jurisdiction by asserting that although, perhaps, "the law of war should in fact apply to all political violence at all stages", the legal régime could be brought into play perhaps prematurely, through outside aid and assistance which constitutes

interference in the internal affairs of an affected state. Within the particular confines of struggles for self-determination, a conservative approach to the applicability of IHL is thus required. This appears to be the intent underlying the provision made in Protocol 1 for the authority in control of a liberation movement unilaterally to bring the law of war into play when it feels prepared to adequately carry out humanitarian provisions. (79) Such a conservative approach to the applicability of IHL in struggles for self-determination would appear to strengthen the role of sovereign authoritative interpretation in the U.N. era in that target states need not accept the validity of the liberation group's declaration, which non-acceptance weakens the importance of a show of restraint by liberation fighters. In view of the lack of concrete criteria regarding the "Peoples" entitled to self-determine, and procedures short of the use of force to achieve their auto-interpreted political goals, this appears to be a logical conclusion. Further, given the fact that the international community is largely unwilling to distinguish acts of terrorism perpetrated within the context of wars of self-determination as a separate phenomenon to that of international terrorism (80), it is perhaps clear that acts of terrorism, as opening the way to the use of the armed forces, will remain the most practical option to pressure an incumbent to implement IHL (81).

Third states may be presumed to interpret correctly the factual and political significance of the implementation of IHL, and incumbent intent regarding the nature and scope of the hostilities. Terrorism as a method to provoke recognition of a state of war therefore is increasingly evident. (82) International and domestic recognition of a

liberation struggle will be affected by virtue of the use of violent force. It is thus to be wondered whether the outer boundaries of agreed limits on the use of force are being stretched beyond traditional confines of IHL restraint, to include an acceptance of terrorism as a legitimate or at least justifiable method of warfare against states which are unwilling to comply with their international legal obligations until forced to do so. If this should be the case, then acts of terrorism are to be anticipated during an armed conflict, and respect for IHL during armed conflict is made more problematic.

7.3. Effects of Renouncing Terrorist Methods in Compliance with IHL Provisions

Given U.N. inability to agree on the rules of self-determination, competing political interests frequently afford liberation movements sufficient media attention to attract outside support, and to encourage a positivie view of their struggle. A movement may thus gain international encouragement in its evolution as a viable proto-government for purposes of diplomatic relations. Further, practical advantages may pursuade many third states to recognize prematurely a liberation authority. Thus, restraint in an armed struggle for self-determination, as required by the provisions of IHL, is evidence of the rebeling group's intent to be responsible for the behavior of its subordinates and to exhibit internal discipline at all stages of its operations. (83) Nevertheless, such restraint is not positively encouraged by concerned states.

The clear advantages to liberation movements of the renunciation of certain tactical options such as the use of terrorism are discussed in this Part. In particular, while a show of responsibility and

restraint by liberation movements helps to legitimize the group's claims in world opinion (84), a further advantage of the renunciation of terrorism is the opportunity to gain sufficient outside support to influence the course of future such struggles by similarly situated groups. (85) Notwithstanding the foregoing, however, it is further argued that the continued use of methods of terror-violence by liberation groups does not make a movement or its aims less legitimate (86), particularly when terror methods by liberation movements form a pattern of self-defense against state terrorism. (87) Similarly, group use of terrorism in liberation wars has yet to be met with any unified condemnation by the international community.

7.3.1. Application of the Law of War and the Credibility of Group Claims

The law of war, by definition, aims at limiting and alleviating the effects of war. It thus makes distinctions between what is and what is not permitted, or legal. For example, in order to ensure the observance of such distinctions, armed forces must have a command responsible for the behavior of all subordinates. (88) Basic distinctions are clear-cut. Protected persons may not participate directly in hostilities, and may not be attacked. Protected objects should not become military objectives, be used for military purposes, or be attacked. (89) Combatants and military objectives may be attacked. (90) Persons and objects are granted protection due to their "function, value, danger factor or importance". (91) Protected status is lost through direct participation in hostilities (92), or as the result of extreme military necessity. (93)

Civilian persons participating directly in hostilities lose their protection and may be attacked. Civilian objects which have become

military objectives may be attacked. Otherwise, the law of war grants fundamental protection to such persons and objects, among others, as are in the power of a belligerant party, neutral state, or own nationals. (94) Each party to an armed conflict is responsible for the treatment given to foreign persons under its control by its agents, in addition to any individual responsibility which may be incurred. (95) It is thus in the interests of foreign states that IHL provisions be made applicable, and be enforced within a state experiencing armed civil unrest. Once invoked, IHL mandates that humane treatment be given in all circumstances. (96)

As such, military acts, the primary purpose of which is to spread terror, are prohibited. (97) Restraint in method is the trade-off for humanitarian treatment in all circumstances. Thus, a liberation movement's self-image as a protogovernment mandates that it refrain from perpetrating random acts of wanton violence while pursuing its political and military goals. In order to maintain a measure of legitimacy, behavior taken on behalf of the group must have a claim of legality. Nevertheless, and as previously discussed, terrorism as a method of conflict resolution or warfare has yet to be prohibited specifically, and in practice, in the international community. The U.N. has been a forum in which unsuccessful efforts have been made to distinguish terrorist tactics in the case of national liberation armed conflicts (98) from acts of international terrorism, per se. U.N. Resolutions and Declarations create exceptions to the prohibitions against the threat or use of force in the conduct of foreign policy, where such force is deemed "necessary" for the termination of colonialism, racist régimes, and gross oppression. (99)

As previously noted, the advantages of a show of restraint by a party involved in an armed conflict are many. Compliance with IHL prohibitions not only maintains sufficient credibility to prevent an overwhelming counter-response, or reprisals during armed conflict, but also forms the basis of demands for humane treatment in all circumstances. A show of responsibility, internal discipline, and restraint in method by a liberation group are indicative of its intentions and willingness to settle the dispute(s) provoking its use of force. (100) It also lends credibility to group claims that it is a viable protogovernment for purposes of diplomatic interaction, and the restoration of international peace and security. (101)

7.3.2. The Use of Terrorism as "Justifiable" in Liberation Struggles

As previously discussed, many members of the international community employ acts of terror-violence as an instrument of foreign policy, and/or as preparatory to otherwise prohibited acts of aggression. Of great concern to the maintenance of international peace and security is the utilization of state-instigated, -directed, or -conducted terrorist acts which "legitimate acts of repression and aggression as preventive counterterror measures". (102) Thus, pluralist and competing ideologies "which allow little room for ... common understanding" (103) exacerbate the lack of clear delineation between states of "war" and "peace". With particular regard to the targeting of civilians, Kuerbitz notes as follows:

> Concurrent changes in modes of armed conflict have blurred the combatant/noncombatant distinction and further reduced the viability of the norm against civilian targeting.
>
> ... (C)ivilians are alleged to be viable targets because every element of an opposing system shares

> the guilt of that system. This characterization, above all, seems to justify and demand total warfare in ideological conflicts ... . (104)

In similar vein, Bassouini remarks that

> (I)f the victim is an innocent person who has been harmed as a result of the randomness of the violence, then the rationalization is 'political necessity' and the system is blamed for provoking the occurrence. On the other hand, where the victim has some representational capacity in the system under attack, the harm is 'justifiable' as 'punishment' or 'self-defense'. (105)

Kuerbitz takes this latter point a step further, noting that I.R.A. attacks on the British Cabinet, or other politicians, are characterized as military or political targeting, thus adding "a new dimension to the limitation of targets". (106) Ascertainable standards for use as guidelines to states are increasingly lacking, and the legal contradictions between sets of U.N. obligations have led to different national approaches to the law of war. (107) In particular, domestic armed violence provoked by state repression of rights entitlements has led to the characterization of acts of terrorism as "justifiable". State provocation has also resulted in the increasing involvement of civilian populations in armed conflicts, and the erosion of norms prohibiting their indiscriminate targeting. (108)

Generalized rhetoric about terrorism and extradition (109) by particular Western states, which contains broad levels of democratic presuppositions, at times forms a smoke screen obscuring equally viable arguments upon "rights" entitlements. "Peoples" struggling for self-determination often do so initially through political channels and too often, subsequently, through means which include armed force. (110) State authoritative interpretation as to the identification of a

"terrorist" group and the legal qualifications to be attributed to its acts too often ignore the rights claims being made, and may thus add an unlimited nature to domestic penal codes circumscribing criminal activities. (111) This may open the way to the use of the armed forces without the minimal, mutual benefits of humanitarian law. Terrorist acts perpetrated in "self-defense" against repression can thus be justified.

Modern liberation groups involved in armed conflicts also have access to technological developments in weaponry and sophisticated communications equipment, tools which may require the mobilization of noncombatants for the "war" effort. (112) Although unconventional armies are constrained in their use of weaponry and in their tactical options by their resources and by the need to maintain sufficient political legitimacy to prevent an overwhelming counter-response, their strategy, tactics, and access to weaponry reflect support by their constituency. (113) This is particularly so when the use of violence is in "self-defense". The ready proliferation of terrorism in struggles for self-determination thus tends further "to justify efficiency-based claims for the targeting of civilians". (114)

For these reasons, foreign state diplomatic or financial recognition of the viability of a liberation movement's struggle for self-determination, even where premature in a strictly legal sense (115), may be practical both to help stabilize a domestic situation, and to ensure the protection of foreign persons and objects caught in the conflict. Foreign state pressure on a target government can help to motivate the requisite political will to negotiate an end to the hostilities. In that the international community is hesitant to

intervene in a domestic uprising, the use of terrorism by a liberation movement may well be the most important means of pressure upon an incumbent government to implement IHL provisions (116), and to approach the liberation group with a degree of parity for purposes of negotiations. Either way, while the eschewing of terrorist methods by liberation groups reinforces a self-image as a protogovernment for purposes of responsible international behavior and diplomatic interaction, the continued use of terror-violence remains viable in a post-1945 era which makes illegal the threat or use of force as an instrument of "foreign" policy. The continued use of terrorist methods by liberation groups to counter measures or mechanisms of state repression or counterterrorist activity also clouds the issues involved in the conflict, and prevents any real progress towards the point of negotiation between equals. (117)

It has been noted that liberation movements which have had the opportunity to mature in terms of organization, and which are subject to internal discipline such as to ensure levels of acceptable behavior on the part of all subordinates, have renounced the use of terror-violence as a part of an overall political strategy. (118) Where terror tactics in support of a struggle continue after such a renunciation, the responsibility tends to be that of more extremist elements within the organization, a circumstance also suffered in state military hierarchies.

The renunciation of terrorist methods means restraint in method, and care in the targeting of military objectives. It is in the interests of both parties to a conflict to invoke and observe IHL provisions. It is also in the interests of foreign states that IHL

govern the conduct of a "domestic" armed conflict and that the spread of military activites be confined to the target state's territorial boundaries. (119) The renunciation of methods of terror-violence by either party to an armed conflict provides the opportunity to gain foreign state support. Nevertheless, where continued in a sporadic fashion, the separability of such methods from the overall political strategies of either party to a conflict does not make less legitimate either's political objectives. In view of the widespread use of terrorism in the international community at large, what is clear is that its use is emerging as a "justifiable" method of control, as well as the most "efficient" means to counter acts of gross repression. (120)

7.4. Normative Effects of the Use of Violent Force to Achieve the Goals of Self-Determination

In view of state use of terrorism as an instrument of foreign and domestic policy, or as preparatory to otherwise prohibited acts of aggression, it is clear that a terror impact does not, alone, de-legitimize any political strategy in which it forms a tactic. Existing normative expectations which result from state practice reflect the degree of tolerance for certain levels of forcible action, if only of those levels characterized as "necessary" for the continued maintenance of international peace and security. (121) In that political inferences and normative expectations may be drawn by foreign policy decision makers from what states in fact do rather than from what states ought to do, evidence of state practice implies that "one ought to orient oneself in the international legal system by reference to ... incidents rather than primarily by reference to statutes, treaties, venerable custom and judicial and arbitral opinions". (122)

This Part will discuss normative expectations regarding the use of terrorism in the context of armed struggles by "Peoples" for their rights to self-determination. In particular, it is argued that ambiguous state practice in the enforcement of IHL limitations on military strategies and activities means that the pursuit of change through methods of terrorism rather than through political channels has resulted in the rejection in practice of the IHL treaty form, and in many examples of non-regulated low-intensity, surrogate armed conflicts. It is concluded that, while it is premature to attempt to distinguish what normative effect terrorism may have on the authority to use force to achieve self-determination (123), the use of terrorism as a method of conflict resolution in struggles for self-determination is a characteristic of the rejection in practice of the restraint mandated by the law of war.

7.4.1. Application of the Law of War and Considerations of Efficiency

While states may take preparatory actions in view of a possible armed conflict in order to fulfil their obligations under the law of war, they remain under an obligation to refrain from actions or behavior which might provoke an armed conflict to occur. (124) Further, matters within single state jurisdictional competence should remain so, unless "internationalized" sufficiently to require discussion and/or intervention by the world community. (125) Given the weakness of the U.N. collective security system, however, interference in the internal affairs of other states falling short of the direct use or threat of the use of force is increasingly the pattern of state practice. (126)

Methods of terror-violence, as previously discussed, remain an efficient tactic to open the way to the use of the military, and to the

dangers of the spread of military operations beyond the territorial confines of a single state. The "internationalization" potential of many contemporary domestic rebellions is clear. (127) Thus, it has been observed that "(a)ny act of international terrorism practically results from a direct or indirect involvement of any state or an unlawful connivance therein". (128) Assuming that foreign state aid and assistance to liberation factions may be the shortest route to full-scale inter-state aggression, or may constitute deliberate preparation for such aggression, the problem of stopping the use of methods of terrorism is one of states meeting the international committments outlined in formal sources of law. (129)

Nevertheless, acts of terrorism perpetrated by auto-determined "Peoples" struggling for their right to self-determination indicate that hostilities have begun, and that the law of war should attach to the situation. This is so in view of the widespread use of violence as a mode of international behavior, generally. Despite the political dangers to threatened governments of reclassifying the legal qualifications attributed to the domestic use of force, implementation of IHL should naturally result once hostilities begin on the basis of the common interests of all parties involved, including those of foreign states. (130)

Given modern levels of violence, the eschewing of terrorist methods appears almost a self-imposed limitation of tactical options. Where public order and investment interests are threatened, tactics of counter-coercion are required. Expectations of authority and control frequently result in state terrorism and a general erosion of human rights. Terrorist acts in response to repression are indicative of

available resources. Subsequent terror methods of domestic control in response prevent real progress in the pursuit of a restoration of the peace and/or of system transformation through political channels. (131) For both parties to a liberation conflict, acts of terrorism are quick, efficient, and often highly effective. For either side to limit its tactical options in such a conflict, and no longer to use available means of violent action, would be to chance failure. It would thus be difficult to attempt to draw firm conclusions regarding the role restraint plays on the viability of IHL, when successful wars of self-determination have utilized acts of terrorism through necessity or in self-defense.

7.4.2. Terrorism and Its Normative Development as a Method of Warfare

As previously discussed, there is insufficient international consensus regarding acts of terrorism to result in common understandings of definitively prohibited acts. (132) On the other hand, it is commonly agreed that an invasion cannot be justified when made "under the pretext of combating terrorism or for giving up the fight against terrorism". (133) Acts of violence generally included under the aegis of "terrorism" are condemned on the basis of formal sources of law which prohibit the use of violent force, such as the U.N. Charter, the IHL treaty régime, the human rights treaty régime and the Convention on the Prevention and Punishment of the Crime of Genocide, among others. Issue-specific treaties such as the Hostages Convention, those applicable to civil aviation and those concerning the safety of internationally protected persons such as diplomatic agents prohibit specific violent acts. Unfortunately, political power considerations affect the practice of states in their observance of the rules, and thus

should be taken into account when assessing the development of emerging norms in international law. (134) In particular, new uses of transboundary force and interference in the affairs of other states, e.g., humanitarian aid, or collective self-defense (135), illustrate the tension created in modern politics between a rule arising from the process of international custom, and one arising by virtue of its incorporation into a treaty form. (136)

Terrorism as an emerging method of conflict resolution would thus appear to be a use of force readily apparent in state practice, and thus a symptom of the reality of modern power structures. A further complicating factor in accepting the "permissibility" of the use of terrorism in practice is the prohibition against the threat or use of force by states in their international relations against the territorial integrity or political independence of any other state. While the threat or use of force by states constitutes a violation of international law, and a war of aggression constitutes a crime against international peace (137), the incidence of state-directed, -controlled, or -instigated acts of terrorism is increasingly viewed as a fact of life in the international community.

Any determination of international custom "as evidence of a general practice accepted as law" (138) must take into consideration compliance with and enforcement of the rules. The underlying rationale for the rules in existence must also remain relevant to support the perceived need for their continued existence, and to support state compliance with and enforcement of them. Given that state action designed to comply with and enforce multilateral treaty rules for the arrest, punishment and extradition of terrorist perpetrators has proven

inadequate, it must be wondered whether the rationale for the rules in place is entirely relevant to explain the continued use of terrorism. (139)

One result of sovereignty is that the interests of all parties to an armed conflict will differ according to their respective needs when it comes time to implement IHL provisions, and to observe and enforce IHL rules. (140) Actual expectations of and committment to these rules can then be tested through consistency of approach. Even where there is consistency in practice, however, there is a need to establish whether action taken in compliance with the law of war is believed to be legally binding, or merely voluntary, in order to provide criteria by which to test future expectations, gauge normative content, and develop existing provisions. (141)

It is doubtful whether mere acceptance of the IHL régime is indicative of state approval of the provisions, or established state practice in the use of force during an armed conflict. Given the efficiency considerations involved in such asymmetric conflicts as struggles for self-determination, normative developments in this category of armed conflict appear to be emerging which support the violent use of force. The ready adoption of such methods of warfare effectively implies a rejection in practice of much of the treaty form, and is characteristic of the rejection of the prohibition against wars of aggression in modern politics. It thus must be wondered whether the rationale for the rules in place remains relevant to states involved in aggression, and whether further development of IHL must be considered in order to face the modern reality of the ready use of indiscriminate violence.

Widespread reliance is placed on the law of war by states in word, if not in practice. This fact, when coupled with contradictory claims regarding the propriety of war law during liberation conflicts has led to a blurring of state consensus and normativity regarding the permissibility of terror methods. Further, traditional rules are inadequate to politically prohibit some methods of modern warfare, e.g., nuclear weaponry. (142) A situation of normative blurring may lead to flexible standards of military necessity, but does nothing to control their evolution. Developments which involve permissibility in the use of terror methods of warfare appear, thus, to encourage the pre-eminance of state political considerations, to the detriment of state willingness to observe IHL obligations.

A rule emerges when states are in compliance with it, and are willing to enforce it. In that states politically reject the applicability of IHL in struggles for self-determination to which IHL is relevant, it is clear that the rationale underlying the law of war is not yet entirely considered relevant to struggles for self-determination. It is further clear that a customary use of terrorism by all parties to such conflicts risks the normative development of clear exceptions to U.N. prohibitions against the use or threat of aggressive armed force. State inability to distinguish between terrorist war tactics and acts of international terrorism is a factor in this development, and is not calculated to strengthen the observance of the second most important operable legal régime in the international community.

Chapter 7 - Footnotes

1. In other words, responsibility for failure to observe obligations imposed by the rules of a particular legal system is determined by such legal qualifications as will lead to assessments of liability for such failure.

2. See P. Rowe, Defence: the Legal Implications (1987), at 36 - 68 (discussion of aspects of military intervention in civilian affairs); B. Robertson, "Military Intervention in Civil Disturbance in Great Britain - What is the Legal Basis?", XXIX - 1-2 Revue de Droit Militaire et de Droit de la Guerre 307 (1990); T. Meron, "Notes and Comments on the Inadequate Reach of Humanitarian and Human Rights Law and the Need for a New Instrument", 77 A.J.I.L. 589 (1983).

3. See, e.g., A.E. Boyle, "State Responsibility and International Liability for Injurious Consequences of Acts not Prohibited by International Law: A Necessary Distinction?", 39 I.C.L.Q. 1 (1990).

4. Id., at 20 - 1 (statement that attribution to the state, or to persons not acting on its behalf, of injurious acts may indicate a failure by the State to adequately perform its own obligations of regulation, protection or control).

5. E.D. Fryer, "Applicability of International Law to Internal Armed Conflicts: Old Problems, Current Endeavors", 11 Int'l. Lawyer 567, 567 - 8 (1977) ("Parties to the many substantial interstate armed conflicts since World War 2 have been disinclined for various generally political reasons to characterize those transactions as 'war' ... Instead, conflicts over time have been euphemized as 'police actions' or 'pacification' or 'fraternal assistance' and so forth ...".).

6. See Chapter 6.

7. A declaration or ultimatum of war is required though seldom resorted to under Article 1 of the Hague Convention No. III Relative to the Opening of Hostilities, of 18 October 1907. Today, states generally rely on the prohibitions contained in U.N. Charter Article 2(4). See C. Greenwood, "The Concept of War in Modern International Law", 36 I.C.L.Q. 283, 302 (1987) ("Since a declaration of war implies a threat of force, it will generally be a violation of the prohibition in Article 2(4) even if unaccompanied by any actual violence".). Compare J.L. Kunz, "Sanctions in International Law", 54 A.J.I.L. 324, 325 (1960) ("Where collective security is absent, the states, for their individual security, follow the policy of armaments, alliances and the balance of power".); J.L. Kunz, "The Chaotic Status of the Laws of War and the Urgent Necessity for their Revision", 45 A.J.I.L. 37, 53 - 4 (1951), who notes as follows:

> Does Article 2(4) 'abolish' wars? It certainly does not. ...(T)he Charter gives the Members a right to use

force under Article 107 (against World War 2 enemy states), Article 53 (enforcement action) and Article 51 (individual and collective self-defense, ... (and there is) the right of self-defense under general international law which is broader than the right granted under Article 51. ... . (F)inally, there must be considered large-scale fighting in the case of civil wars which are not illegal either under general international law or under the U. N. Charter. Compare also R.H. Hull and J.C. Novogrod, Law and Vietnam (1968), at 190 ("(S)ince the use of force by the United States is not directed against the territorial integrity or political independence of either North or South Vietnam, it cannot be characterized as unlawful".).

8. Supra, note 5, at 569. See also T. Meron, supra, note 2.

9. See L. Doswald-Beck, "The Legal Validity of Military Intervention by Invitation of the Government", LVI B.Y.I.L. 189 (1985); R. Little, Intervention (1975); Y. Sandoz, "'Droit' or 'Devoir d'Ingérence' and the Right to Assistance: the Issues Involved", IRRC, No. 288, May - June 1992, at 215; M. Torrelli, "From Humanitarian Assistance to 'Intervention on Humanitarian Grounds'?", International Review of the Red Cross (IRRC), No. 288, May - June 1992, at 228; Book Review, Perret, IRRC, No. 288, May - June 1992, at 316; D. Plattner, "Assistance to the Civilian Population: the Development and Present State of International Humanitarian Law", IRRC, No. 288, May - June 1992, at 249; Report Submitted to the Security Council by the Secretary-General in Accordance with Security Council Resolution 605 (1987), U.N. Doc. S/19443, 21 January 1988, reprinted in 27 I.L.M. 1684, 1693 - 5 (1988) (re-affirms that the Fourth Convention is applicable to the Palestinian and other Arab territories occupied by Israel since 1967, including Jerusalem).

10. South Africa did not particpate in the Diplomatic Conference which drafted the Protocols after the first session, and Israel voted against Article 1(4). Neither state has become party to the Protocol. J.J. Lambert, Terrorism and Hostages in International Law - A Commentary on the Hostages Convention 1979 (1990), at 292. See also H.-P. Gasser, "Agora: the U.S. Decision not to Ratify Protocol 1 to the Geneva Conventions on the Protection of War Victims", 81 A.J.I.L. 910 (1987); J. Gardam, "Protocol 1 to the Geneva Conventions: A Victim of Short Sighted Political Considerations?", 17 Melb. U.L. Rev. 107 (1989); G.H. Aldrick, "Prospects for United States Ratification of Additional Protocol 1 to the 1949 Geneva Conventions", 85 A.J.I.L. 1 (1991); P. Griffiths and H. Gwilliam, "Comment on Australia's Ratification of the 1977 Additional Protocols to the Geneva Conventions of 1949", 11 U. Tasmania L. Rev. 104 (1992). As of 17 September 1993, 184 states are party to the four Geneva Conventions of 12 August 1949, 129 states are party to the Protocol additional to the Geneva Conventions of 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol 1) of 8 June 1977, and 119 to the Protocol additional to the Geneva Conventions of 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol 2) of 8 June 1977.

11. See Y. Dinstein, "Comments on the Fourth Interim Report of the I.L.A. Committee on International Terrorism (1982)", 7 Terrorism: An Int'l. J. 163 (1984).

12. Supra, note 5, at 570.

13. Y. Dinstein, supra, note 11, at 164 ("Protected persons alone are immune from the carnage of war ...".).

14. L.C. Green, Essays on the Modern Law of War (1985), at 62 notes that, in the Hostages Trial (In re List), (1948) Ann. Dig. 632, the Court stated as follows: "if the illegality of the order was not known to the inferior and he could not reasonably have been expected to know of its illegality, no wrongful intent necessary to the commission of a crime exists and the inferior will be protected". See also A. Roberts and R. Guelff (eds.), Documents on the Laws of War (1989), at 7; T.J. Farer, R.G. Gard, Jr., T. Taylor, "Vietnam and The Nuremberg Principles: A Colloquy on War Crimes," in The Vietnam War and International Law, Vol. 4 (R.A. Falk, ed.) (1976), at 363; W.A. Solf, "A Response to Telford Taylor's 'Nuremberg and Vietnam: An American Tragedy", id., at 421; J.J. Paust, "After My Lai: The Case for War Crimes Jurisdiction Over Civilians in Federal District Courts", id., at 447.

15. P. Rowe, supra, note 2.

16. Supra, note 5, at n. 12.

17. See Chapter 6.

18. See, e.g., A. d'Amato, "Israel's Air Strike upon the Iraqi Nuclear Reactor", 77 A.J.I.L. 584 (1983); J. Stone, "Holes and Loopholes in the 1974 Definition of Aggression", 71 A.J.I.L. 224 (1977); R.A. Falk, "The Beirut Raid and the International Law of Retaliation", 63 A.J.I.L. 415 (1969).

19. Supra, note 5.

20. Fourth Interim Report of the I.L.A. Committee on International Terrorism, Appendix 1, reprinted in 7 Terrorism: An Int'l. J. 123, 131 (1984), Dissenting Statement by Professor L.C. Green and Dr. J. Lador-Lederer.

21. F. de Mulinen, Handbook on the Law of War for Armed Forces (1987), at 6; Common Article 2 of the four Geneva Conventions of 12 August 1949; Protocol 1, Article 1; the Convention for the Protection of Cultural Property in the Event of Armed Conflict (Hague Convention on Cultural Property), The Hague, 14 May 1954, Article 18.

22. Article 6 of the 1949 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Convention), the 1949 Geneva Convention for the Amelioration of

the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea (Second Convention), and the 1949 Geneva convention relative to the Treatment of Prisoners of War (Third Convention); the 1949 Geneva Convention relative to the Protection of Civilian Pesons in Time of War (Fourth Convention), Article 7; Hague Convention on Cultural Property, Article 24.

23. See Chapter 4. See also F. de Mulinen, supra, note 21, at 4 ("A mixed-type law" comprising both Hague and Geneva provisions is found in The Hague Convention on Cultural Property, and in Protocol 1).

24. See Chapter 4.

25. Supra, note 7.

26. See, e.g., the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty, General Assembly Resolution 2131 (XX) of 21 December 1965; the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States, Resolution 2625 (XXV) of 24 October 1970; General Assembly Resolution 3314 (XXIX) of 14 December 1974 on the Definition of Aggression; and the Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States, General Assembly Resolution 36/103 of December 1981.

27. See, e.g., C. Greenwood, supra, note 7, at 305 who notes that while war as a legal institution may be incompatible with the U.N. Charter, preserving various bodies of rules (such as the law of neutrality) remains desirable.

28. F. de Mulinen, supra, note 21, at 34; First Convention, Articles 45 and 47; Second Convention, Articles 46 and 48; Third Convention, Article 127; Fourth Convention, Article 144; Protocol 1, Article 80; Hague Convention on Cultural Property, Article 25.

29. See, e.g., S.R. Chowdhury, State of Emergency (1984). Nevertheless, in the absence of specific applicability requirements, Common Article 3 of the four Geneva Conventions, and Article 4 of The Hague Convention on Cultural Property apply to a wider range of actual non-international armed conflicts than does Protocol 2. F. de Mulinen, supra, note 21, at 9. See also H.S. Levie (ed.), The Law of Non-International Armed Conflict (1987); T. Meron, supra, note 2, at 603.

30. Supra, note 5, at n. 2, citing H. Lauterpacht, Oppenheim's International Law, Vol. II (7th ed. 1952), at 249, 250.

31. Yet, and as noted by Schindler, in certain cases, governments still refer to it. D. Schindler, "Transformations in the Law of Neutrality since 1945", in Humanitarian Law of Armed Conflict Challenges Ahead, at 367, 370.

32. F. de Mulinen, supra, note 21, at 40.

33. Supra, note 30.

34. See, e.g., R.H. Hull and J.C. Novogrod, supra, note 7; L. Doswald-Beck. supra, note 9.

35. U.N. Charter Chapters VI., VII. and VIII.

36. U.N. Charter Article 2(7); but see Article 99.

37. As noted by J.L. Kunz, in "Sanctions in International Law", supra, note 7, at 325, "(t)he tremendous disadvantages of such a system are clear. Each state ... has a right of auto-interpretation of international law, ...". See also T. Meron, supra, note 2 at 603 (" ... (T)he fact that the applicability of certain norms may depend on the characterization of the conflict make(s) this gap particularly dangerous.").

38. See Chapter 6.

39. See F. de Mulinen, supra, note 21, at 43 ("The law of war grants a fundamental protection to persons and objects other than combatants and military objectives".). See also supra, note 5, at 568 n. 7 ("The United States in 1974 indicated that it had voluntarily observed the Geneva Conventions ... The South Vietnamese government followed this line while the ... (Viet Cong) maintained silence."); A.P. Rubin, "The Status of Rebels under the Geneva Conventions of 1949", 56 A.J.I.L. 472, 479 (1962) (discussion of the Vietnam War as involving two "armed conflicts": one under Common Article 2 and one under Common Article 3); Report by the Secretary General, supra, note 9, at 1691 ("Israel has consistently taken the position that it does not accept formally the de jure applicability of the Fourth Geneva Convention but that it has decided since 1967 to act in de facto accordance with 'the humanitarian provisions' of that Convention".).

40. See, e.g., D. Weissbrodt and B. Andrus, "The Right to Life in Armed Conflict", 29 Harv. Int'l. L. J. 59 (1988); D. Plattner, supra, note 9, at 249; Report by the Secretary General, supra, note 9 at 1691.

41. Y. Sandoz, C. Swinarski, B. Zimmerman (eds.), Commentary on the Additional Protocols of 8 June 1977 to the Geneve Conventions of 12 August 1949 (Commentary) (1987), at 54 - 5 (statement that Article 1(4) of Protocol 1 "certainly covers all cases in which a people, in order to exercise its right of self-determination, must resort to the use of armed force against the interference of another people, or against a racist régime".).

42. Supra, note 4.

43. See A. Cassesse, Violence and Law in the Modern Age (1986), at 74 - 5.

44. Within the context of armed struggles for self-determination, see the Commentary, at 53 n. 81.

45. See, e.g., General Assembly Resolution 2621 (XXV) of 12 October 1970 (prisoner-of-war treatment claimed under the Third Convention for freedom fighters under detention); H. Wilson, International Law and the Use of Force by National Liberation Movements (1988), at 157 ("Israel is a classic example of a government which vehemently denies any obligation to treat members of Palestinian groups as prisoners of war, even when captured under arms in a conventional engagement, ..."."); General Assembly Resolution 43/21 of 8 December 1988 (condemns Israel's persistent policies and practices violating the human rights of the Palestinian people in the Occupied Territories, including Jerusalem, and, in particular, detentions); Report by the Secretary-General, supra, note 9, at 1692 (" ... (E)ven though Israel does not accept the *de jure* applicability of the Fourth Geneva Convention, the *opinio juris* of the world community is that it must be applied".); Israeli S.Ct. J'ment in Cases concerning Deportation Orders, 10 April 1988, reprinted in 29 I.L.M. 140 (1990) (the Fourth Convention, Article 49, does not reflect customary international law, but instead, being conventional, does not become part of Israeli law unless adopted by legislation); M. Rudman and M. Qupty, "The Emergency Powers Detention Law: Israel's Courts Have a Mission - Should They Choose to Accept It?", 21 Col. H.R. L. Rev. 469 (1990); A.A. Pacheco, "Occupying an Uprising: The Geneva Conventions and the Israeli Administrative Detention Policy During the First Year of the Palestinian General Uprising: December 1987 - December 1988", 21 Col. H.R. L. Rev. 515 (1990).

46. U.N. Charter Articles 2(4) and 2(7); compare Protocol 1, Article 1(4).

47. See Report of the I.L.A.'s 63rd Conference (Warsaw): Legal Problems of Extradition in Relation to Terrorist Offenses (Working Session), 26 August 1988, reprinted in 11 Terrorism: An Int'l. J. 511, 519 (1988), Statement of Prof. E. McWhinney, Q.C.. See also Report of the Secretary General, supra, note 9, at 1688 (statement that the tendency of the Israeli authorities to classify any expression of Palestinian nationalist sentiment as "terrorist" activity, with consequent intervention of the security forces, is a source of Palestinian complaint in the occupied territories).

48. Report of the I.L.A's 63rd Conference Warsaw), id., at 526, Statement of Dr. Naf'e Hasan.

49. Id.

50. Supra, note 20, at 132. See also H.-P. Gasser, "Prohibition of Terrorist Acts in International Humanitarian Law", IRRC, No. 253, July - August 1986, at 200.

51. R.J. Kuerbitz, "The Bombing of Harrods: Norms Against Civilian Targeting", in International Incidents (W.M. Reisman and A.R. Willard, eds.) (1988), at 238, 239.

52. See, e.g., Common Article 3 to the four Geneva Conventions; First and Second Conventions, Article 12(2); Third Convention, Articles 13(2) and 17(4); Fourth Convention, Articles 27, 33, and 34; Protocol 1, Articles 33, 37, 40, 43, 44, 51, 53, 56, 75 and 85; Protocol 2, Articles 4(2)(d) and 13(2).

53. Protocol 1, Articles 51(2) and 52(1); Protocol 2, Article 13(2).

54. Protocol 1, Article 96(3).

55. See Chapter 4. See also the Commentary, at 38 - 9; Preamble of the Hague Conventions of 1899 and 1907; First Convention, Article 63(4); Second Convention, Article 62(4); Third Convention, Article 142(4); Fourth Convention, Article 158(4); Protocol 1, Article 1(2); Preamble of Protocol 2.

56. See, e.g., M. Howard, "Temperamenta Belli: Can War be Controlled?", in Just War Theory (J.B. Elshtain, ed.) (1992), at 23, 33.

57. Supra, note 43. See also Special Report of the I.L.A.'s 61st Conference (Paris), Committee on International Terrorism Conference, reprinted in 10 Terrorism: An Int'l. J. 189, 194 (1987), Statement of Prof. G. Staroushenko ("Acts of international terrorism committed by extremist elements do liberation movements more harm than good."); R.J. Kuerbitz, supra, note 51, at 258.

58. Supra, note 52. See also First Convention, Article 50; Second Convention, Article 51; Third Convention, Article 130; Fourth Convention, Article 147; Protocol 1, Articles 11(4) and 85(2) -(5).

59. See, e.g., E. Weisband and D. Roguly, "Palestinian Terrorism: Violence, Verbal Strategy, and Legitimacy", in International Terrorism (Y. Alexander, ed.) (1976), at 258; D. McDowell, "The Palestinians", Minority Rights Group, No. 24 (1987); H. Wilson, supra, note 45, at 160.

60. Special Report, Reply of Prof. A.P. Rubin, supra, note 57, at 195. See, inter alia, General Assembly Resolution 2105 (XX) of 20 December 1965; Resolution 2621, supra, note 45; Resolution 2936 (XXVII) of 29 November 1972; Resolution 3101 (XXVIII) of 12 December 1973. See also Draft Convention for the Prevention and Punishment of Certain Acts of International Terrorism, U.N. Doc. A/C.6/L.850 (1972); General Assembly Resolution 3034 (XXVIII) of 18 December 1972; Resolution 31/102 of 15 December 1976; Resolution 32/147 of 16 December 1977; Resolution 34/145 of 17 December 1979; Resolution 36/109 of 10 December 1981; Resolution 38/130 of 19 December 1983; Resolution 40/61 of 9 December 1985; Resolution 42/159 of 7 December 1987.

61. Such third-state auto-interpretation more often reflects the premature recognition of a provisional government, rather than an acceptance of the authority of a liberation movement to use force. See H. Wilson, supra, note 45, at 110 - 11.

62. Id. See also L. Doswald-Beck, supra, note 9, at 211 (statement that the Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States, General Assembly Resolution 36/103 of 9 December 1981 does not refer specifically to a prohibition on interference in civil strife).

63. Supra, note 35.

64. In particular, there is growing support in the international community for the position that a right to medical and humanitarian aid and assistance side-steps the prohibitions contained in U.N. Charter, Article 2(7). See Chapter 6.

65. See, e.g., C.J. Piernas, "The Protection of Foreign Workers and Volunteers in Situations of Internal Conflict, with Special Reference to the Taking of Hostages", IRRC, No. 287, March - April 1992, at 143; D. Plattner, supra, note 9..

66. T. Meron, supra, note 2, at 603 (statement that the need to address these problems has also been recognized in the area of political risk insurance; "(t)his particular coverage will thus be available in a situation of civil strife, i.e., a conflict falling short of revolution or insurrection".). See also C.J. Mann, "Personnel and Property of Transnational Business Operations", in Legal Aspects of International Terrorism (A.E. Evans and J.F. Murphy, eds.) (1978), at 399, 422 (statement that private sector responses to the threat of terrorism against transnational business operations has led to, in particular, the provision of hostage insurance).

67. In particular, alien civilians on the territory of an adverse party are protected by the Fourth Convention, Article 38. See "Outline of Legal Aspects of the Conflict in the Middle East", IRRC, No. 280, January - February 1991, at 28; A.S. Calogeropoulos-Stratis, "The Humanitarian Dimension of War - Protection of the Individual, whether Military or Civilian", IRRC, No. 287, March - April 1992, at 183. Compare C.J. Mann, supra note 66, at 449 ("... (W)here injury to aliens is accompanied by a partial or general breakdown in the domestic order, a state may attempt to disclaim responsibility on the basis that any injury to aliens was caused by violent actions of insurgents beyond its reasonable control".).

68. In particular, this issue is the subject of valuations for destruction caused through "military necessity". See, e.g., J.J. Paust, "Suing Saddam: Private Remedies for War Crimes and Hostage-Taking", 31 Vir. J. of Int'l. L. 351 (1991); L.R. Beres, "The United States Should Take the Lead in Preparing International Legal Machinery for Prosecution of Iraqi Crimes", id., at 381; J.N. Moore, "War Crimes and the Rule of Law in the Gulf Crisis", id., at 403. Of interest, see also M.H. Hoffman, "The Customary Law of Non-International Armed Conflict: Evidence from the United States Civil War", IRRC, No. 277, July - August 1990, at 322 (discussion of judicial valuations of confiscation practices and the taking of property).

69. See Special Report, supra, note 57.

70. Yet, as noted by Paust, "... (t)here is respected authority for the position that the customary law of war and practice has prohibited terrorism as an intentional strategy". J.J. Paust, "'Non-Protected' Persons or Things", in Legal Aspects of International Terrorism, supra, note 66, at 341, 352. See also supra, note 52; H.S. Levie, supra, note 29, at 458, Statement of Mr. Pasche (suggestion that the ICRC proposal for draft Protocol 2, Article 26(1), be improved by prohibiting terrorism as a method of conflict). Compare E. McWhinney, Aerial Piracy and International Terrorism (1987), at 3 (statement that "direct action" is the "preferred mode of international conflicts-resolution").

71. Supra, note 48.

72. But see, e.g., I. Detter de Lupis, The Law of War (1987), at 157 (discussion of the declaration made upon signature of the two Protocols by the United Kingdom regarding the government's understanding of the term "armed conflict" as implying "a certain level of intensity of military operations ..."); B.A. Wortley, "Observations on the Revision of the 1949 Geneva 'Red Cross' Conventions", LIV B.Y.I.L. 143 (1983), at 152.

73. See Special Report, supra, note 57, at 195 ("State terrorism is the shortest way to aggression, and very often it is a deliberate preparation for an act of aggression".).

74. See T. Meron, supra, note 2, at 603.

75. See Chapter 6.

76. See, e.g., Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro) (Interim Order concerning Applicication of the Convention on the Prevention and Punishment of the Crime of Genocide), I.C.J., 8 April 1993, reprinted in 32 I.L.M. 888 (1993); O. Bowcott, "Downing Street declaration lays down gauntlet to 'disappointed' Sinn Fein", The Guardian, 16 December 1993, pp. 2 - 3, in which it is noted that one of many points in contention is the Hume-Adams principle of the self-determination of the Irish "People" as a whole.

77. See, e.g., J.L.F. Flores, "Repression of Breaches of the Law of War Committed by Individuals", IRRC, No. 282, May - June 1991, at 247.

78. Special Report, supra, note 60.

79. Protocol 1, Article 96(3).

80. See, e.g., H. Wilson, supra, note 45, at 110 - 11.

81. This is, in fact, what occurred during the Algerian War of Independence, when Common Article 3 was most likely invoked for the

first time in a major post-World War 2 conflict. See G. Willemin and R. Heacock, International Committee of the Red Cross Vol. 2 (1984), at 72; H. Wilson, supra, note 45, at 152 - 62; A. Fraleigh, "The Algerian Revolution as a Case Study in International Law", in The International Law of Civil War (R.A. Falk, ed.) (1971), at 179.

82. See, e.g., P. Brogan, World Conflicts (1989), Appendices I and II, at 567 - 76 (list of the world's major wars, coups and revolutions since 1945).

83. See Chapter 4.

84. This is in large part because the concept of the legitimate struggle, or "just war", is particularly ambiguous in a post-1945 international community which condemns aggressive war. For example, and as queried by Hauerwas, "... is the just war position developed from a paradigm of self-defense or from one of defense of the innocent"? S. Hauerwas, "On Surviving Justly: Ethics and Nuclear Disarmament", in Just War Theory, supra, note 56, at 299, 303. Compare J. von Elbe, "The Evolution of the Concept of the Just War in International Law", 33 A.J.I.L. 665 (1939).

85. See the Commentary, at 41 - 56.

86. J.J. Paust, supra, note 70, at 383, n. 106.

87. See M.C. Bassiouni, "Criminological Policy", in Legal Aspects of International Terrorism, supra, note 66, at 523, 530; supra, note 47. See generally Special Report, supra, note 57 (discussion of state terrorism).

88. F. de Mulinen, supra, note 21, at 9; Hague Convention No. IV Respecting the Laws and Customs of War on Land of 18 October 1907, with annexed Regulations respecting the laws and customs of war on land, Article 1; Protocol 1, Article 43(1); Protocol 2, Article 1(1).

89. F. de Mulinen, id., at 14 - 5, and 48; First Convention, Articles 19, 24, 35, and 36; Second Convention, Articles 22, 27, 36, and 37; Fourth Convention, Articles 18, 20, 21, and 22; The Hague Convention on Cultural Property, Articles 4, 8, and 15; Protocol 1, Articles 8, 12, 15, and 62; Protocol 2, Article 4.

90. F. de Mulinen, id., at 48; Protocol 1, Articles 43 and 52.

91. F. de Mulinen, id., at 1.

92. Id., at 48; Protocol 1, Article 51.

93. F. de Mulinen, id., at 51; The Hague Convention on Cultural Property, Articles 4 and 11.

94. F. de Mulinen, id., at 43; Protocol 1, Articles 72 and 75.

95. F. de Mulinen, id., at 44; Hague Convention No. V Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land of 18 October 1907, Articles 11 - 15; Third Convention, Articles 4 and 12; Fourth Convention, Article 29. See also "Outline of Legal Aspects of the Conflict in the Middle East", supra, note 67.

96. F. de Mulinen, id.; First Convention, Articles 12, 28, and 29; Second Convention, Articles 12, 36, and 37; Third Convention, Article 13; Fourth Convention, Article 27; Protocol 1, Article 75.

97. Supra, note 52.

98. Supra, note 60. See also Report of the I.L.A.'s 56th Conference (New Delhi): Committee on Interational Terrorism (Working Session), 31 December 1974; T.M. Franck, "Legitimacy in the International System", 82 A.J.I.L. 705, 746 - 7 (1989).

99. Supra, note 85.

100. See, e.g., E. Weisband and D. Roguly, supra, note 59; J. Smyth, "Stretching the Boundaries: the Control of Dissent in Northern Ireland", 11 Terrorism: An Int'l. J. 289 (1988); R.J. Kuerbitz, supra, note 51.

101. Supra, note 48.

102. Id. See also M. McClintock, "American Doctrine and Counterinsurgent State Terror", in Western State Terrorism (A. George, ed.) (1991), at 121.

103. R.J. Kuerbitz, supra, note 51, at 261.

104. Id., at 260. See Chapter 8.

105. M.C. Bassiouni, supra, note 87, at 524.

106. R.J. Kuerbitz, supra, note 103.

107. See F. de Mulinen, supra, note 21, at xvi - xvii; Chapter 8.

108. See, e.g., C.A. Allen, "Civilian Starvation", 19 Ga. J. of Int'l. and Comp. L. 1 (1989); D. Plattner, supra, note 9; C.J. Piernas, supra, note 65.

109. See, e.g., Report of the I.L.A.'s 62nd Conference (Seoul): Legal Problems of Extradition in Relation to Terrorist Offences, Draft Articles on Extradition in Relation to Terrorist Offences, at 559 (1986); Report of the I.L.A.'s 63rd Conference (Warsaw): International Committee on Legal Problems of Extradition in Relation to Terrorist Offences and Draft Articles in Relation to Terrorist Offences, at 1032 (1987).

110. See, inter alia, General Assembly Resolution 2936 (XXVII) of 29 November 1972, which reaffirms "its recognition of the legitimacy of the struggle of colonial peoples for their freedom by all appropriate means at their disposal", and Resolution 3314 (XXIX), supra, note 26.

111. Supra, note 48.

112. See Y. Alexander, "Introduction", in International Terrorism, supra, note 59, at i, xv.

113. See, e.g., J.B. Bell, "Strategy, Tactics, and Terror: An Irish Perspective", in International Terrorism, supra, note 59, at 65.

114. R.J. Kuerbitz, supra, note 103.

115. Supra, note 61.

116. Supra, note 81. See also supra, note 39; Book Review, Gasser, IRRC, No. 285, November - December 1991, at 637.

117. See supra, note 100.

118. Supra, note 48.

119. In particular, the confinement of an armed conflict within territorial boundaries will slow the escalation of a domestic conflict to an international one.

120. See R.J. Kuerbitz, supra, note 103; E. McWhinney, supra, note 70.

121. See, e.g., A. d'Amato, "Trashing Customary International Law", 81 A.J.I.L. 101, 105 (1987), who argues that "... state practice since 1945 ... has drastically altered the meaning and content of Article 2(4)"; J. Toman, "The Socialist Countries and the Laws of Armed Conflict", in Modern Wars - The Humanitarian Challenge (Report for the Independent Commission on International Humanitarian Issues) (1986), at 158; Comment, Bilder, "Judicial Procedures Relating to the Use of Force", 31 Vir. J. of Int'l. L. 249 (1991).

122. W.M. Reisman, "Introduction to a New Genre in the Study of International Law", in International Incidents, supra, note 51, at 3, 5.

123. See generally, R.J. Kuerbitz, supra, note 51.

124. F. de Mulinen, supra, note 21, at 34.

125. U.N. Charter Articles 2(7) and 99.

126. It is the direct use of force against another state which remains a breach of international obligations. See Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, I.C.J. Reports 1986, at 14.

127. Supra, note 76.

128. Special Report, supra, note 57.

129. See, e.g., the Statute of the International Court of Justice, Article 38.

130. See generally H.S. Levie, supra, note 29. Compare J. Toman, supra, note 121.

131. See Chapter 6.

132. See Chapter 5.

133. Supra, note 128.

134. See A. d'Amato, supra, note 121. See generally International Incidents, supra, note 51.

135. U.N. Charter Chapter VIII. Of interest, see S.T. Possony, Aggression and Self-Defense: The Legality of United States Action in South Vietnam (FPRI Research Monograph No. 6, 1966), at 68 - 9, who argues that the involvement of the United States in the Vietnam War was as a member of a regional collective system which resulted from a number of direct and indirect defense and other arrangements, with powers that carried responsibilities in Southeast Asia.

136. See C.M. Chinkin, "The Challenge of Soft Law: Development and Change in International Law", 38 I.C.L.Q. 850 (1989). Compare G.J.H. van Hoof, Rethinking the Sources of International Law (1983).

137. General Assembly Resolution 3314 (XXIX), supra, note 26, Article 5(2). See Chapter 8.

138. See C. Bruderlein, "Custom in International Humanitarian Law", IRRC, No. 285, November - December 1991, at 579, 588, who further divides the search for evidence of state practice into normative and systematic approaches. See also G.J.H. van Hoof, supra, note 136.

139. See Chapter 5.

140. F. de Mulinen, supra, note 21, at 39.

141. Supra, note 138.

142. See, e.g., S. Hauerwas, supra, note 84.

8. Legal Obstacles to Prosecution of Breaches of IHL

The suppression and prevention of war crimes, and the securing of humane treatment, are primary purposes of IHL. Instruments which attempt to fulfill these purposes include the St. Petersburg Declaration of 1868, the Hague Conventions of 1907, the Geneva Conventions of 1929 and 1949 and the supplementary Protocols of 1977. (1) Nevertheless, "grave breaches" and not "war crimes" are all that are described in the 429 articles of the four Geneva Conventions of 1949 (2), and High Contracting Parties are obligated to enact legislation to punish "grave breaches" of the Conventions. Such legislation should implement the obligation contained in the Geneva Conventions to seek out and prosecute or extradite for trial all persons, whatever their nationality, who commit or order to be committed any of the grave breaches defined in the codifications. (3) This system establishes the principle of universality of jurisdiction with respect to grave breaches. (4)

In 1977 the term "war crime" was expressly adopted in Article 85(5) of Protocol 1, which states that "(w)ithout prejudice to the application of the Conventions and of this Protocol, grave breaches of these instruments shall be regarded as war crimes". This provision, read together with Article 75(7) of Protocol 1, suggests that High Contracting Parties should incorporate "grave breaches" into their domestic legislation as "war crimes", thereby reinforcing the universality of jurisdiction to suppress illicit acts of violence. (5) The suppression of acts of terrorist violence perpetrated during armed struggles for self-determination would come within such measures.

Notwithstanding the foregoing, the hesitance of states to extend

the scope of their jurisdiction to pursue and prosecute "war criminals", either substantively or procedurally, is discussed in this Chapter, and it is argued that there are intrinsic obstacles to the full utilization of IHL quite apart from the diversity of individual state criminal systems. In this regard, it would appear that states are unwilling to recognize the primacy of law over, or in, politics. Sovereign or executive authoritative power is used to interpret and qualify violent acts of war as "terrorism". This, then, implies that the judiciary are politicized, as states show themselves unwilling to apply penal law to state affairs. As a result, judicial restraint is required when such matters as foreign policy, state security, and national defense are involved.

By way of preliminary discussion, it is argued that state unwillingness to utilize IHL as the framework within which to prosecute war crimes represents a denial of the individual protections afforded by IHL against the power of states. The norm of individual international responsibility for war crimes and the punishment of persons convicted of their perpetration are main principles of IHL. However, the punishment of persons found guilty of war crimes does not absolve the state from responsibility. On the contrary, state responsibility for war crimes is even more serious, particularly where such acts assume a state-organized character. (6) This point was made apparent at Nuremburg in 1945. States may also bear subsidiary responsibility for failure to suppress such acts, as was seen during the War in Viet Nam.

As previously discussed, many obstacles to prosecuting war crimes perpetrated during liberation wars appear to arise from the friction created between contexts of state sovereignty and state equality in the

U.N. system. Notions of military and police necessity have expanded in the face of the non-development of obsolete Hague rules, and the availability of human rights derogations during times of national emergency. States prefer to characterize non-state acts of violence as terrorism through politicized contexts of domestic criminal law, rather than to utilize IHL for purposes of guidance or analysis. States do not appear thus to consider a humanitarian issue structure sufficiently relevant to many wars of national liberation to distinguish and separate acts of international terrorism from illicit acts of war. (7)

Of interest, while the criminality of certain acts is established in IHL (8), devising concrete sanctions for their perpetration is left to internal law. (9) In other words, the establishment of the principle of universality of suppression of war crimes in IHL still leaves the actual exercise of criminal jurisdiction to individual states. (10) Thus, in that the categorization of certain acts as criminal contemplates the possibility of punishment, two juridical categories emerge as equal: recognition of certain acts as criminal in international law, and provision for the exercise of criminal jurisdiction and punishment under internal law. These two categories arguably incur the same juridical consequences on the basis of responsibility for criminal acts.

Nevertheless, this system would appear to involve some intrusion into individual state domestic penal and military codes - the very indicia of state sovereignty. In practical terms, states utilize executive or sovereign power to restrict control by the legal authorities over disputes which may involve sensitive political issues such as service-related offenses committed on behalf of the state, or

acts which may require the judiciary to pronounce on the very legality of a war. (11) There is also the desire to prevent disclosure of the origin of a war crime at too high a level.

Further, the qualification of a grave breach is totally independent of municipal law, even where a state has no "war crime" offense in its national legislation. A grave breach is thus not dependent upon its characterization as a lawful or unlawful act under the law of the country where the act is done. The universality principle of the suppression of war crimes stretches beyond the territoriality principle of jurisdiction applicable in domestic criminal codes, to apply theoretically to the exercise of jurisdiction over aliens for acts committed abroad against other aliens which may not have affected the state required to exercise that jurisdiction. This universality of war crimes jurisdiction is exercised according to a two-pronged test: (a) the presence of an international rule which obligates the state to exercise jurisdiction over the person of any alleged war criminal, so as to establish *in personam* jurisdiction, and (b) the recognition that the act complained of is a crime under international law, which yields subject matter jursdiction.

It is argued that the IHL system cannot but rest on an assumption of the supremacy of its principles and rules over municipal law, especially with regard to grave breaches of its provisions, or war crimes. In the absence of a permanent international war crimes tribunal, established along the *ad hoc* lines of Nuremburg, it would appear appropriate to regard domestic courts as agents of the international system. Yet, considerations of state power and authority often prevail over the legislative implementation and prosecution of war

crimes, if only through a recharacterization of grossly illicit acts perpetrated during an actual armed conflict as offences subject to military disciplinary procedures. The ready identification of war crimes perpetrators has thus been hampered by the lack of attention paid to up-dating and developing Hague law (12), the hesitance in the international community regarding the recognition of a state of war (13), and the presence of state procedural and substantive obstacles. In particular, many states are unwilling to call for the implementation of IHL in wars of self-determination.

The structure of this Chapter is as follows. Procedural and substantive difficulties encountered in the organization of the first major war crimes trials held at Nuremburg (IMT) in 1945 - 6 are briefly outlined in the First Part. In particular, it has been posited that these trials took place only because the aggressor nations unconditionally surrendered, and were militarily occupied. This position is of particular interest in view of recent U.N. initiatives to establish an *ad hoc* war crimes tribunal to prosecute persons responsible for serious violations of IHL since 1991 in the territory of former Yugoslavia. (14)

The atrocities perpetrated during the Viet Nam War are discussed in the Second Part, along with some of the difficulties encountered regarding the prosecution of their perpetrators. These difficulties were due in large part to the obsolescence of Hague law (15), and to the domestic confinement of IHL within U.S. military law. (16) In that the War in Viet Nam has been characterized as both a Geneva Conventions Common Article 2 and Common Article 3 situation (17), it is of particular interest that that war helped to prompt the 1977 Protocols to

the 1949 Geneva Conventions.

Many general political and legal obstacles to the prosecution of breaches of IHL are discussed in the Third Part, not the least of which arises from modern notions of state sovereignty. The relevance of these obstacles to the issue of the separability of terrorist acts perpetrated in wars of self-determination is reviewed in the Fourth Part.

It is concluded that state unwillingness to recognize situations of armed conflict and/or to characterize terrorist acts perpetrated during them as war crimes risks the viability of IHL as an area of international law, particularly as much of this legal régime relies heavily on state self-regulation. In particular, the lack of ready state adherence to IHL prohibitions and obligations implies that any international co-operative effort to deter and prosecute violent actors will not succeed. Thus, rather than the realities of modern wars for self-determination mandating an expansive approach to the development of an international penal law of armed conflicts, a restrictive approach may instead be the result.

8.1. The Nuremburg International Military Tribunal and the Development of the Notion of War Crimes Jurisdiction

As previously discussed, IHL was formulated in the late Nineteenth and early Twentieth Centuries by states with mutual interests in limiting the strategic tactics employed in the event of an armed conflict. (18) In particular, the essential feature of the system established in the Hague Conventions of 1899 and 1907 on the Laws and Customs of War on Land required that High Contracting Parties undertook to instruct their armed forces in accordance with the Regulations annexed to the Convention, and to enforce the Regulations through their

own internal penal systems. (19) This use of domestic jurisdiction reinforced the notion that while international duties and liabilities could be imposed on individuals, their duty of allegiance was to the state. Thus, war crimes jurisdiction rested within the exclusive domestic province of each High Contracting Party, and the individual was not directly in contact with international law.

This situation was to change after 1945, when the Nuremburg and Tokyo Tribunals (20) were convened to try individuals for the first time in accordance with international rules. A similar post-war prosecution had been attempted unsuccessfully after World War 1 (21), and the factors which combined after World War 2 to bring the Tribunals about are of interest. Thus, the role played by the unconditional surrender of Germany on the historic events in Nuremburg, Germany, is now discussed, in addition to the jurisdictional bases on which Nuremburg depended for its ultimate contribution to the development of an international penal law of armed conflicts.

8.1.1. The Assumption of Supreme Authority, over Germany, by the Allies

By means of the Berlin Declaration of the unconditional surrender of Germany, issued on 5 June 1945, the Governments of the U.S., the U.K., the U.S.S.R., and the Provisional Government of the French Republic assumed supreme authority with respect to a German Government which had ceased to exist. The exercise of authority was devolved upon the Commanders-in-Chief severally, each in his zone, and jointly in the chief matters affecting Germany as a whole. This assumption of supreme authority over the German state was not intended to effect its annexation, but was founded in a form of completed conquest or subjugation. In other words, the Allied Control Commission was to act

as the agency through which the Government of Germany was carried on. The Commission's acts in law were to be attributable not to the Allied states but to the deliberately maintained state of Germany, in continued being as a legal entity.

The Allied occupation of Germany was intended to be of a purely temporary nature which allowed for the continued existence of an old state, while a mechanism through which the Government of Germany could be carried on pending a final settlement was provided. (22) The Government of Germany was to be carried on in the name of the U.N. and, it was hoped, the ultimate responsibility of the Occupying Powers would also inhere in the U.N. In this way, control of a defeated Germany by four states was established. Through the assumption of supreme authority, including the authority of the central and local organs of government, military rule was imposed pending a peace settlement, de-Nazification programs, and a period of re-education in democratic responsibilities. (23)

Under these circumstances, there could be no other courts in Germany than the investigatory and prosecutorial organs of the four Powers. Further, the joint intention to detain and surrender war criminals was indicated in the Berlin Declaration, which detention and surrender were to be effected at any time. On 8 August 1945, the London Agreement between the Governments of the designated states was signed "(f)or the prosecution and punishment of the major war criminals of the European Axis", by which the IMT was instituted to try those criminals "whose offenses have no particular geographical location". (24) The Charter of the Tribunal was ratified simultaneously, the Preamble of which declared that the Allies were acting "in the interests of all the

United Nations". (25) Every participating government was invited to adhere to the Charter. The Charter represented the law by which the Tribunal judges were governed in their actions, even though the rules of procedure were decided by the judges themselves. Counsel were supplied to the defendants, but allegations of a *de facto* inequality between prosecution and defense plagued the entire proceedings.

Widespread knowledge of German atrocities and the assumption of supreme authority over a defeated Germany created the conditions necessary for an international war crimes trial to occur. In that war criminals were traditionally tried either by national courts or by capturing forces, Nuremburg was a major departure. Prisoners of war detained by the four Allied Powers were surrendered for purposes of transport to Nuremburg, and trial and punishment by an international judicial body convened in accordance with international rules. The indictment which expressed the common position of the four Powers was intended as a precedent for future use. Offenses against the law of war were carried over in 1949 into codified form in the four Geneva Conventions. "Grave breaches" thus may be considered paraphrases of the war crimes and crimes against humanity detailed in the Nuremburg Charter, albeit amended and expanded to include additional activities committed during World War 2. (26)

The function of the assumption and exercise of sovereignty over German territory to provide a jurisdictional basis for the Charter and Tribunal however leaves at least one issue unresolved. The Nuremburg principles were applied to crimes committed on the territory of sovereign states occupied by Germany during the war, and which never unconditionally surrendered to the allied Powers in 1945. The extension

of jurisdiction to "major war criminals of the European Axis countries" (27) is thus difficult to reconcile with the assertion of jurisdiction as a function of the assumption of control over Germany, unless it is argued that territorial occupation allowed sufficient control to impose this extension in the jurisdictional basis of the Tribunal. (28)

Unfortunately, Nuremburg and Tokyo have proved to be a unique experience in the post-1945 era. This would appear to indicate that states are unwilling since 1945 to extend the scope of their jurisdiction or international co-operation to pursue and prosecute war criminals. This is despite recent U.N. initiatives to establish an international tribunal to prosecute atrocities perpetrated since 1991 in the territory of the former Yugoslavia. (29) Thus, in that states retain a discretionary power in the enforcement of international obligations which bear upon individuals, it would also appear that state unwillingness to utilize IHL could represent a denial of the individual protections afforded, and a preference to recognize the primacy of politics over law.

8.1.2. The Jurisdictional Bases for the Trial and Punishment of the Major War Criminals of the European Axis Countries

Throughout World War 2, various statements were made by the leaders of the United Nations regarding the fate of the Nazi war criminals. While it is beyond the scope of the present discussion to detail the source and content of the many ideas voiced, a brief review of the jurisdictional bases leading to the Nuremburg Judgment is of interest.

8.1.2.1. Crimes of No Geographical Location

As previously discussed, the Nuremburg trial was generally based

on the universality principle of jurisdiction. Nevertheless, the Moscow Declaration of 1 November 1943 (30), reiterated in the London Agreement of 8 August 1945, noted that only the major war criminals whose offenses were of no geographical location were to be tried. Other war criminals were "(to) be sent back to the countries in which their abominable deeds were done in order that they may be judged and punished according to the laws of these liberated countries and of the free Governments that will be created therein".

Once agreement had been reached regarding the fact of a trial of the major war criminals (31), the jurisdictional basis of the IMT was indicated as follows:

> The making of the Charter was the exercise of the sovereign legislative power by the countries to which the German Reich unconditionally surrendered; and the undoubted right of these countries to legislate for the occupied territories had been recognized by the civilized world. The Charter is not an arbitrary exercise of power on the part of the victorious nations, ... , it is the expression of international law existing at the time of its creation; and to that extent is itself a contribution to international law.
>
> The Signatory Powers created this Tribunal, defined the law it was to administer, and made regulations for the proper conduct of the Trial. In doing so, they have done together <u>what any one of them might have done singly</u>; for it is not to be doubted that any nation has the right thus to set up special courts to administer law. (Emphasis added.) (32)

It would appear that the primary concern in the quoted passage is jurisdiction. As previously discussed, traditional concepts of jurisdiction over perpetrators of war crimes were linked to territory, in that the character of an illicit act was determined by the law of the country where the act was done. Given the *locus* of many atrocities, a complete alteration of this principle was required in order to proceed with the war crimes trials. Thus, the remit of the Nuremburg Tribunal

to try war criminals of the European Axis nations whose crimes had no geographical location is of particular interest.

The Nuremburg principles were applied to crimes committed after the actual outbreak of war in 1939. It was in relation to such crimes only that the principle of universality was fully implemeted. Crimes with a particular geographical location were to be tried and punished in accordance with the principle of territoriality. (33)

8.1.2.2. Diversity of Legal Systems

Similar to the problems encountered in 1937 with the Terrorist Convention (34), agreement among the four Powers regarding the procedure and substantive law with which to prosecute Nazi war criminals proved problematic. The U.S. and the U.K. both have common law systems. France has a civil code system, and the U.S.S.R., a socialist one, which at the time was considered close in many ways to the civil law. Despite the diversity of legal systems involved, consensus had to be reached for purposes of the London Charter, and the drafting of an indictment. Thus, there were problems involved both with the content of the crimes involved, and the rules of procedures with which to prosecute them.

Nevertheless, agreement was reached, and Section 2, Article 6 contained the three charges to be alleged. (35) The text of Article 6, as finally approved, contained no explicit charge of conspiracy to commit war crimes or other atrocities. Charge One regarded crimes against peace, Charge Two regarded war crimes, and Charge Three concerned crimes against humanity. However, at the end of Article 6, the following phrase appears:

> Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy

> to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.

This phrase implies that the major war criminals were personally responsible for a common plan or conspiracy to commit all the horrors and atrocities which had occurred, and not just those contained in Count One. This implication would effectively reach pre-1939 atrocities against Germans - particularly Jews - which could not be independently treated as war crimes. This implication would further support a change in the notion of territoriality, in favor of universality of jurisdiction over perpetrators whose acts had no fixed geographical location, i.e., whose orders were executed within the states occupied by the Nazis. In part this assumption of universality allowed the trial of one defendant *in absentia*. However, Count One of the indictment, entitled "The Common Plan or Conspiracy", gave rise to the opinion that the three offenses were to be handled differently (36), and the Tribunal declined to support the contention that the conspiracy charge also related to war crimes or crimes against humanity. (37) This meant that Counts Three and Four, which accused the defendants of conspiracies, were effectively beyond the jurisdiction conferred on the Tribunal by the Charter.

Additional difficulties arose over U.S. pressure to prosecute criminal organizations. (38) Not only did such organizations need to be designated, but further, protest was voiced that the consequences of a finding of organizational guilt would lead to a presumption of individual guilt on the mere basis of membership, and thus to a flood of defendants. Further, substantial procedural problems arose, not the least of which were the adversarial common law practices of cross-

examination and judicial neutrality.

Compromise regarding procedure was reached far more easily. Rules for the content of the indictment, the role to be played by the judges, prosecutors, and defense attorneys, the admissibility of evidence, and voting procedures for the judges were agreed, but remained malleable in view of the uncertainties which were likely to arise during the course of the trial.

8.1.2.3. Legal Objections to the Jurisdiction of Nuremburg

In addition to jurisdictional difficulties, it is of interest that basic legal principles of fairness were allegedly sidestepped. The primary problem encountered was the allegation of ex post facto law regarding crimes against peace, and the demise of the defense of superior orders.

Efforts after World War 1 to deter states from the ready use of armed force in their international relations were many. (39) When Charge One regarding crimes against peace was first formulated, however, sharp disagreement existed whether there was in fact such a crime under international law. Article 6 states in pertinent part as follows:

> The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:
>
> (a) Crimes Against Peace: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing; ...

Taylor notes that, in part, the charge met the prevailing wish for retribution. (40) Beyond this, though, many theories were aired which sought to justify recognition of an existing prohibition in international law against aggression. One commentator (41) urged that

the individual crime of aggression and the international delinquency of aggressive war were to be distinguished, in that a state was guilty should it allow hostilities to be conducted from its territory. This would remove the element of intent from the crime, even though it would be necessary to consider the intent of an accused by examining the significance and extent of his authority over the use of such force. Another objection relied on the Kellogg-Briand Pact of 1928 (42), which did not forbid the acts of private persons, nor had any state implemented its provisions domestically by 1939. A third argument was that pre-World War 2 inter-state agreements not having the status of customary law could not be relied on.

Dissent was heard from the Russians and the French regarding the inclusion of aggressive war as an international crime. (43) After much discussion, however, the scope of the charge was confined by Article 1 of the Charter, which provided "for the just and prompt trial and punishment of the major war criminals of the European Axis". This was then repeated in the introductory paragraph of Article 6, which put the crime of aggressive war on the same plane of generality with the other defined crimes. In this way, crimes against peace gained a limited acceptance as international crimes.

As for the defense of superior orders, Article 8 of the Charter provides as follows:

> The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires.

One basis for this shift was that the act in question ought not be deprived of its character as a war crime simply because it was

perpetrated under orders. Similarly, the perpetrator should not be immune from punishment. (44) While such a conclusion would appear logical, the removal of the defense represented to some yet another example of ex post facto law, particularly where a defendant might not know and/or have any basis for knowing that an order was unlawful. Nevertheless, Article 8 fully supported the imposition of individual, as well as state, responsibility for the perpetration of war crimes. (45)

Thus, Nuremburg helped to establish the universality of war crimes jurisdiction, subsquently incorporated in the 1949 Geneva Conventions and extended in Protocol 1. It also recognized that responsibility for war crimes allowed the punishment of members of the armed forces for illicit acts perpetrated under orders, and that commanders and/or civilian policy makers who issue unlawful orders present the individual member of the forces with a choice in action. Thus, while commanders traditionally effected a shield against widespread liability for war crimes, the reverse has perhaps now become the case, in that individual responsibility frequently prevents disclosure of the origin of a war crime at too high a level.

8.2. The Prosecution of Viet Nam Atrocities

As previously discussed, international law leaves the exercise of criminal jurisdiction to states, which then apply national law to war criminals. Nevertheless, state procedural and substantive obstacles result in hesitation to recognize a situation of armed conflict occurring within domestic territorial borders. Frequently, states do not have an offense of "war crime" implemented into domestic legislation. The ready identification of war crimes perpetrators has thus been hampered, the preference being either to prosecute violent

actors under penal codes, or to confine breaches of discipline to military law. Where this is the case, the accurate characterization of illicit acts is highly constricted.

In that there is no permanent international war crimes tribunal, it would appear appropriate to regard domestic courts as agents of the international system. (46) Nevertheless, U.S. case law arising from the Viet Nam War illustrates two problems with this agency argument. The first is that breaches of the existing military code were dealt with under military law. This meant that many atrocities were either not punished, or were handled leniently, particularly in view of the obsolescence of Hague law. Of interest, the Viet Nam War prompted the up-dating of the 1949 Geneva Conventions, by up-dating Hague and Geneva law in Protocol 1, in 1977. The second problem is that the prosecution of civilian policy makers for aggression was made impossible by the doctrine of judicial restraint, and the absence of express U.S. legislation for this purpose.

The factors surrounding the non-development of Hague law after 1945, and the effects of this on military attitudes during the Viet Nam confrontation are now outlined, after which U.S. domestic jurisdictional obstacles to prosecuting war crimes are discussed.

8.2.1. The Obsolescence of Hague Law

Hague law could not regulate methods of warfare unknown in 1899 and 1907. Thus, a basic guideline propelling war law is the Martens Clause, contained in the Preamble of the 1899 and 1907 Conventions, and subsequently incorporated in Article 1 of Protocol 1. (47) The implication from the Martens Clause is that what is not expressly prohibited in warfare is not necessarily permitted. Instead,

technological and humanitarian concerns are to provide the standard by which to interpret the main text of the treaties and annexed Regulations.

World War 1 showed the insufficiency of this premise and subsequent efforts to curb the use of force in international relations resulted in the neglect of war law. Instead, the only codification of note at the time was the 1925 Geneva Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases and of Bacteriological Methods of Warfare, which entered into force on 8 February 1928. Other areas which needed attention were rules concerning hostages, reprisals, civilians, military necessity, air and sea warfare, and the participation clause. (48)

The result of this neglect was the manner in which World War 2 was fought. Mechanized weaponry, long-range artillery, submarines, aerial warfare, chemical warfare, and tanks made an organized appearance as part of the new doctrine of global or total war. This doctrine first appeared during World War 1, and asserts that the source of military conflicts and violations of the laws and customs of war lies in technological development. Economic competition for new markets and resources among capitalist states becomes thus a prime source of hostility. Nevertheless, so long as Western nations were at war with each other, efforts to humanize war were made.

The result of such technological progress was a change in the manner of waging war. It no longer appeared to make sense to distinguish in practice between military and non-military objectives, to use measures of military constraint, or to avoid collateral damage to civilian areas. This led to alterations in understanding regarding the

content of the doctrine of military necessity (49) and war aims generally, as the weaker of two asymmetric forces uses any means to eliminate the danger. Such means include terrorist acts, in the form, e.g., of murder, collective reprisals, and psychological threats. The principle of *tu quoque* leads to escalation, and provided some justification for the many defendants at Nuremburg. (50)

Unlimited war aims include economic targets. Factories become a prime source of hostilities as war munitions are produced next to civilian population centers. The consequence of this is that an entire population may be "mobilized", making the worker a participant, and thus, a legitimate target of attack. Nevertheless, so long as Western nations were at war with each other, it was only exceptionally that the civilian population was expressly made a target. The industrial balance between them further ensured against the possibility of any real extermination. (51)

With the development of new strategies and types of weaponry, the norms regarding restraint assume a higher profile. Yet, the Hague instruments were not developed until 1977. Further, the U.S. has either not ratified recent instruments which require special or particular restraint, or prefers to confine its view of the relevant norms to traditional frameworks of obsolete Hague and 1949 Geneva rules. (52) For this reason, it is clear that many activities engaged in by the U.S. during the Viet Nam War constituted war crimes. Yet, they were rarely officially identified and prosecuted, as such.

8.2.2. Obstacles to the Prosecution of Viet Nam War Crimes

At Geneva in 1954, North and South Vietnam became a Cold War divided country, with two zones created by a line drawn at the 17th

Parallel. The military demarcation line was intended to be provisional, and the basis for a cease-fire. The Geneva agreement further provided for nationwide elections to be held in 1956, with which the South Viet Namese refused to proceed. Subsequently, the two zones took on the attributes of independent states, with South Viet Nam supported by the U.S. (53) As a result, the Viet Nam War was characterized as both a Common Article 2 and a Common Article 3 situation for purposes of Geneva law, as the U.S. was viewed as aiding the Saigon Government in controlling civil strife and/or as engaging in collective self-defense with South Viet Nam.

Briefly, three propositions justified U.S. involvement in the Viet Nam conflict: (a) North Viet Nam attacked South Viet Nam in violation of Article 2 of the U.N. Charter, (b) South Viet Nam was entitled to use force to repel the unlawful attack, and (c) the U.S. was justified in assisting South Vietnam under Article 51 of the U.N. Charter. (54) The ground fighting took place in South Viet Nam, as the North Viet Namese joined the Southern Vietcong to subvert the Government of South Viet Nam. The U.S. bombed North Viet Nam from the air.

Taylor notes that "(a)n American court undertaking to pass judgment on the legality of our Vietnam actions would have to review these and numerous other questions ... with little guidance from the Nuremburg and Tokyo Judgments". (55) Nevertheless, for those courts which found themselves in such a position, the normal course taken was to decline jurisdiction on the basis of the non-justiciability of political or foreign policy questions. Further, in 1971, the U.S. declared that it would not prosecute ex-servicemen who had violated the international law of war in Viet Nam. (56)

8.2.2.1. The Legal Issues

U.S. violations of the law of war involved *inter alia* the mistreatment of civilians, the bombing of nonmilitary targets, the use of prohibited weapons, and the destruction of Viet Namese villages. This led to accusations that the U.S. was engaged in massive and systematic violation of the most elementary humanitarian rules, by conducting the war in violation of minimal standards. Allegations of genocide were also made, flowing out of a barbaric U.S. counter-guerilla strategy. (57) The war appeared popularly-based in Viet Nam, and the N.L.F. engaged in widespread terrorist tactics. The isolated incumbent government found itself waging war against its own population, and it seemed that a total-war, scorched-earth atmosphere to forestall guerilla efforts was required in order to win.

8.2.2.2. The Nuremburg Arguments

As previously discussed, the Nuremburg and Tokyo Tribunals were held to try government leaders of Germany and Japan. This gave rise to an international law of individual responsibility for waging aggressive war, which responsibility highlighted serious problems involving the "web of connection" joining individual responsibility, national citizenship, and responsibility regarding restraint on the use of force. (58)

A general defense was heard that the use of force by the U.S. in Viet Nam was not directed against the territorial integrity or political independence of either the North or the South, and therefore was not unlawful. Three Nuremburg arguments though were posed. First, crimes against the peace involved the commission of aggression against North Viet Nam. Second, war crimes involved battlefield tactics, and in

particular, a pattern of unrestrained battlefield behavior which was attributable to both military and civilian leaders. Third, crimes against humanity perpetrated by the U.S. and South Viet Nam Governments involved the contention that the cumulative impact of specific violations of the law of war amounted to genocide. (59)

Individuals whose consciences dictated they oppose the war on the above-indicated bases led to questions being raised in domestic U.S. courts regarding the legality of that country's role in the war. Nevertheless, there was a consistent judicial abstention from adjudication of the substantive issues posed by arguments of international law, as the legality of the war and its conduct were felt to be matters within the preserve of the executive branch.

8.2.2.3. Judicial Restraint

It has been argued that the reassertion of an active judiciary in the area of IHL would be a healthy development in the U.S. doctrine of the separation of powers. (60) The question remains, however, whether an active judicial role in such matters is possible. Massacres such as Son My and My Lai were investigated under military authority. Ex-servicemen civilians cannot be tried in military courts-martial for violations of war law, as this would have U.S. Constitutional dimensions. Civilians may be tried before military tribunals for purely military offenses. Conversely, civilians are not afforded a trial before a federal court, even though Article III courts have jurisdiction to hear all cases and controversies arising under the laws of the U.S., as well as original jurisdiction over all offenses against American law.

Under Article 1, Section 8 of the U.S. Constitution, Congress has the power to define and punish offenses against the law of nations, even

though treaties are the supreme law of the land. Military law derives its Constitutional source from the enumerated power of Congress to make rules for the regulation of the armed forces. The President, too, may hold a related power to punish violations of the law of war under the separate war power. Thus, the exercise of Congressional power may be coupled with Presidential power to execute this area of international law. (61) For example, the cases of Ex Parte Quirin (62) and In re Yamashita (63) appeared to create a domestic criminal law for the prosecution of violations of war law, in addition to rules enacted under the power to regulate the armed forces. This would imply a level of concurrent jurisdiction.

Nevertheless, a long exercise of power by courts-martial has seemingly carved out an exclusive jurisdiction, even though the rule is that military fora possess no judicial power. Courts-martial do not have exclusive jurisdiction in cases also triable in the state or federal courts. The issue is thus of priority of jurisdiction, the preference being in favor of military jurisdiction. On this basis, it has been argued that an express legislative enactment providing for war crimes jurisdiction, as distinct from breaches of military law, is required in order to prosecute non-military personnel authorizing or instigating war crimes. This jurisdictional gap in practical terms thus goes to the heart of the Geneva enforcement system. (64) In the absence of such an enactment and of an activist judiciary willing to involve itself in the enforcement of international law, the pre-eminence of the executive and/or legislative branches is maintained.

For these reasons, the judiciary is restrained, and restrains itself from adjudicating Constitutional issues which involve war,

foreign affairs, and the separation of powers for such purposes, as political questions. Thus, foreign relations and powers to wage war have long been regarded as non-justiciable. In particular, under the limitations of the supremacy clause contained in Article VI of the U.S. Constitution, the Supreme Court was not authorized to render judgment on the validity of U.S. participation in the Viet Nam War under the Nuremburg principles or international law in general. (65) The ripeness of the issues for adjudication was an additional obstacle. It was generally felt that the factual and/or legal basis for a challenge of alleged harm was not sufficiently developed to support an actual case or controversy. Thus, the sufficiency of the Constitutional authorization for American military activity in Viet Nam was not, or could not be reviewed. (66) Instead, the non-justiciability of such cases was assessed through policies of abstention as gauged by standing, ripeness, adversariness, and the political question doctrine. Other obstacles included procedural and evidentiary problems, the implementation of decisions such as an injunction against the U.S. Government, and the adequacy of remedies, generally.

In this way it is clear that the exercise of power was insulated during the Viet Nam confrontation, and responsibility for war crimes never attributed accurately. The non-availability in fact of procedures to test the legality of governmental and military conduct thus flew in the face of the Geneva enforcement régime, and the Nuremburg principles.

8.3. Obstacles to Prosecution Generally, and the Primacy of Politics

As previously discussed, the existence of diverse legal systems should form a routine part of any inquiry into the reasonableness of a claim of jurisdiction. (67) An assertion of jurisdiction specifies the

limits of legal competence claimed by the asserting state. Thus, jurisdiction becomes a fundamental aspect of state sovereignty and control. A second factor for consideration is categorization of the issues. For example, the four Allied Powers claimed jurisdiction over the major Nazi war criminals in 1945, the success of which claim rested in large part on Germany's unconditional surrender and subsequent occupation. Yet the diversity of their legal systems created many problems in the formulation of the three charges in the Nuremburg Charter, and the four counts in the Indictment which required high levels of negotiation and co-operation. Another jurisdictional assertion is also seen - that of seeking to impose a particular system of public order. However, the primacy of law in politics seen at Nuremburg has rarely been repeated. This is not encouraging to the development of an international penal law of armed conflicts.

8.3.1. International Norms and State Legislative Discretion

There is a general respect for the diversity of legal systems and notions of jurisdiction so long as international norms are observed. The way in which national law is applied to war criminals is generally beyond the scope of inquiry, particularly between similar systems of public order, so long as the perpetrators of such crimes do not escape prosecution and punishment. Nevertheless, the U.S. failed to prosecute most of its own Viet Nam war criminals, and no other Power stepped in to do so.

When a subject matter is important to the national interest, as was the manner in which the Viet Nam War was fought, a state may press its way of doing things so as to shape the event in a manner favorable to it. Policy co-ordination is the result, and may require that factors

favoring the non-assertion of legal control be taken into account. (68) Hence, it may be argued that the U.S. Government limited war crimes claims by refusing to legislate regarding them, and by pressing for an administraton of American courts that was subject to a strict constructionist approach to the criterion of "due process", despite the many legal theories which urged a more activist judicial role.

Legislative self-restraint exists whenever a law-making body declines to use all its potential competence to assert legal control over people, property and events. Executive self-restraint is more difficult to assess. Further, the accepted prohibitive norms of international law are frequently subordinated to a general mutual respect for legal system diversity. Thus, a domestic authority is able to authoritatively characterize an event in order to bring any assertion of jurisdiction into harmony with the jurisdictional principle invoked. The reverse is also true.

With the advent of a total war era, the traditional state-centered system is highly compromised. War as a means of dispute resolution has become too dangerous. The U.N. has eroded the boundaries of domestic autonomy. Those matters that threaten international peace are quickly drawn within the scope of supranational competence. As noted by Falk, dominant non-revolutionary states and their domestic courts, in particular, thus have a responsibility to establish exemplary modes of behavior. (69) All states have a legal interest in the prosecution of war criminals. Thus, where an effective state consensus favors the implementation of a prohibitive rule of international law, and existing legislation allows prosecution for breach of that rule, substantive legal standards must be applied by the judiciary.

8.3.2. The Primacy of Political Considerations

The four 1949 Geneva Conventions provide that all persons who commit grave breaches, or give orders that they be committed, be sought out and prosecuted, whatever their nationality. Yet, it must be queried whether states regard this as mandatory. Do they intend to put this duty into effect, and to make it thoroughly understood and accepted by politicians, the armed forces, and the legal authorities? In particular, is provision made to search for the origins of a war crime at high levels? Conversely, does the attribution of responsibility for atrocities rest with the soldier, thereby effecting a shield for more senior policy makers?

The issue of individual international responsibility for war crimes is only half the problem. It may be true that individual police or military personnel use excessive force, with no knowledge of wrongdoing. There is a hesitation to prosecute such persons, who presumably act in the public interest and out of misguided notions of loyalty. (70) However, it is wondered whether a hesitation to prosecute them might derive from a multitude of sources, not the least of which is the potential for governmental embarassment. Policy makers effectively may be immune from suit. When the survival of a state is in issue, diclinature may be pleaded.

Verhaegen notes that service-related crimes and offenses are frequently followed by internal inquiry procedures which generally keep such cases away from the courts capable of trying them. Should an injured party wish to prosecute an offender, a right to do so does not normally exist in front of a court-martial, the body usually considered more competent to deal with breaches of the military. Military

tribunals may decline jurisdiction in favor of disciplinary procedures if the offenses are not considered to be sufficiently serious to warrant the use of state resources. (71) The reasons for such a decision need not be given publicly.

Another difficulty encountered is procedural. Evidence may be surpressed, national security may be asserted, and/or jurisdiction may be inadequately invoked through an erroneous classification of the challenged act. In that criminal justice systems rarely prosecute an intent to commit an act, without that act subsequently occurring, the offense of "ordering to be committed" might never be entertained. Thus, the giving of orders to prepare a crime, without the orders subsequently being carried out, would most likely never constitute a prosecuted offense. Similarly, the legal classification of an act of the executive is rarely questioned. An executive amnesty may be declared, as occurred after the Viet Nam War. Procedural and substantive law may come into conflict with, and be superceded by, policy considerations underlying the maintenance of public order. (72) Thus, it would appear that the expansionist approach taken to penal law at Nuremburg is more likely attributable to post World War 2 consensus in the face of mass destruction and Germany's unconditional surrender than it is to international consensus regarding the need for humanity in warfare generally. It was hoped that Nuremburg would be a precedent for future state behavior, as it may yet prove to be regarding the conflict in the territory of former Yugoslavia. (73) On the other hand, the restrictive approach characteristic of modern times is likely to be a function of state resistance to increasing U.N. delimitations of sovereign authoritative competence.

The perceived need to safeguard vital national interests and to justify indiscriminate acts further disregards the minimal consensus reached in 1949, which consensus struck a balance between differing concepts of the requirements of military necessity and the demands of humanity in warfare. Subsequently, the Cold War ideological split, and the division of the international community into client states by the superpowers, undercut the 1949 consensus by encouraging competing interpretations regarding the scope and content of the applicable norms. (74) The dominance exerted in the 1949 balance was then overcome in 1974 - 7 by an increased number of new states in a post-Viet Nam War atmosphere, many of which had sympathies with the struggle against colonial domination, alien occupation, and racist régimes. At that time, not only were some wars of self-determination included in Protocol 1 as international armed conflicts but further, Article 85(5) was adopted, which Article specifically construed the legal term "war crime".

With the end of the Cold War, a new pattern is emerging, that of one superpower hostile to overly-expansive notions of U.N. delimitations of sovereign authoritative competence, and in conflict with the pre-eminence of international law over domestic policies. U.S. readiness to engage in counterinsurgency is not in question (75), and its law and order approach to terrorism is relevant to this point. For this reason, it is doubtful whether any exemplary mode of behavior is presented by its government or its courts which is capable of recognizing the primacy of law in or over politics, and which is ready to apply penal law to issues involving state security or national policy sufficient to invoke IHL readily in armed struggles, other than along the traditional and

outmoded confines of Hague and 1949 Geneva law. Given this apparent unwillingness, it is to be questioned whether any rule regarding the prosecution of war criminals has emerged such that states are in compliance with it. Should the rejection of such rules be the case, it is clear that the rationale once underlying them may no longer be considered sufficiently relevant for purposes of universal application when faced with competing political considerations.

8.4. Obstacles to Prosecuting Terrorist War Crimes

An insurgent faction at the beginning of its struggle for power invariably utilizes terrorist acts. In an era of total war, both sides to an asymmetric armed struggle may be guilty of using any means to fight the opposition. During the Viet Nam War, the cumulative effect of U.S. counter-guerilla strategies led to accusations of genocide, giving the conflict "an entirely new legal magnitude". (76) On the other hand, domination of the conflict by the U.S. helped to unify dissimilar Viet Namese factions, changing for many the character of the war into one of national defense. Were that conflict to occur today, it is to be wondered whether it might be characterized as a war of self-determination on these grounds alone.

A major counter-guerilla strategy may become increasingly indiscriminate when faced with a discriminating insurgent terror. Depending on the extent of the organization on both sides to such a conflict, minimal rules of legal and moral restraint may be violated. Should these minimal rules not be recognized as applicable, a brutalizing impact on the participants is predictable, as all members of the society become victims. Group terrorist retaliation may then be perceived as evidence of commonly-shared grievances, and preserve the

legitimacy of group identity in the face of "alien" domination. Such has unfortunately been the case in the former territory of Yugoslavia. (77)

8.4.1. Fundamental Humanitarian Concern

The targeting by liberation fighters of innocent civilians may involve a relatively small number of victims. Nevertheless, a group's aims may thus be publicized, or a government's inability to maintain public order may be signaled. Conversely, a government prefers to suppress information regarding counter-terrorist strategies, or to redefine the nature of such strategies into acceptable issue structures for purposes of consumption by domestic and international communities. Either way, fundamental humanitarian concerns are ignored.

As previously discussed, it is clear that a law and order approach to terrorist acts perpetrated during a liberation struggle cannot succeed. (78) Where the armed struggle is confined within territorial borders, the violence can only escalate. Should the participants in the struggle be in receipt of foreign aid and assistance, the weaknesses of both sides may be concealed, with little hope of negotiating the conflict's end. International sympathy for a liberation struggle may destroy what consensus there may otherwise have been regarding the availability of or permission for humanitarian intervention. While IHL should, of course, be made applicable from the first outbreak of organized hostilities, its use in conflicts such as Viet Nam is frequently the subject of debate. Common Article 3 is the minimum level of applicability. Should Common Article 2 be deemed appropriate, the four 1949 Geneva Conventions are brought into play. For those states which have ratified Protocol 1, the protections are

raised even higher. Conversely, the participants in a liberation struggle may not even see the point in observing humanitarian guidelines.

The targeting of civilians goes to the heart of national liberation struggles. Liberation groups which do not qualify for Geneva ratification status may also refuse to comply with rules formulated by and between colonial states. Rebels are rarely in control of the resources required to comply with Geneva provisions, making the applicability of much of the treaties a matter of convenience. The notion of parity between equals is not relevant.

Such difficulties however do not excuse the rest of the international community from its Common Article 1 duty to "ensure respect" for humanitarian law. This would presumably include the search for and prosecution of perpetrators of grave breaches or war crimes. This duty would also include observance of the rules regarding proportionality, and the non-infliction of unnecessary suffering. Observance of these many duties would result in better protection of innocent civilians, and a containment of the hostilities.

Nevertheless, the obstacles to fulfilling the paramount duty of ensuring respect for humanitarian law are evident. No longer is it the case that industrialized nations attempt to target and destroy militarily each other's industrial base. The encouragement of low-intensity warfare by industrialized nations seeking new markets thus means that civilians in non-industrial nations are increasingly the victims of the developed world, generally. Low-intensity warfare is further designed to destabilize areas considered to be of strategic value. .The profit motive in the armaments industry which kept the U.S.

out of the League of Nations enables third world armed struggles to occur and contine. Regional arrangements for collective security stretch beyond territorial confines in order to embrace areas of strategic interest. Such arrangements thus may foster interference in the internal affairs of sister states.

Such policy considerations outweigh the force of IHL rules, and there seems little political logic in altering the modern emphases on surrogate warfare in the face of existing societal and economic infrastructures. For these reasons, the obstacles to prosecuting war crimes and in particular, terrorist war crimes, are many, and frequently have nothing to do with law. Fundamental humanitarian concerns, as a bare minimum, require world support and diligence, but a willingness to make applicable the necessary norms of conduct appears to be lacking.

States are thus hesitant to prosecute war criminals, whether or not legislation exists under which to do so. As for terrorist war criminals engaged in a struggle for self-determination, preliminary obstacles to the recognition of a war must first be overcome. Should that occur, the level of IHL applicability must then be assessed. Should this be accomplished, criteria for crimes of war may then be defined, after which the elements which constitute such crimes may be specified. Procedures of sanction must be devised and invoked to the satisfaction of the participants, in order to avoid reprisal actions. The legal process thus rests on an entirely different plane - mutuality - to the process involved in quelling an armed struggle for self-determination within confines of a public order exercise. The parity between quasi-equals which is required for such legal arrangements unfortunately implies a legal relationship with "rebels" which states

politically endeavor to avoid.

8.4.2. The Emergence of a Terrorist Norm

In view of state use of terrorism as an instrument of foreign and domestic policy, the obstacles to prosecuting terrorist war crimes are clear, particularly should the doctrine of *tu quoque* be pleaded in defense. The degree of tolerance for certain levels of forcible action in the face of Article 2(4) of the U.N. Charter further underlines this point. Methods of terror-violence are an efficient means to open the way to the use of the military. The use of terrorism as preparatory to aggression, or as a method of conflict resolution in struggles for self-determination, is characteristic of the non-observance in practice of IHL.

Policy considerations compete with law when states decide whether to observe the rules, and these policy considerations need to be taken into account in any analysis of the development of an emerging norm. As previously discussed, political inferences and normative expectations may be drawn by foreign policy decision makers from what states do rather than from what states ought to do. (79) An increasing gap between codified law and state practice would appear to be emerging. Thus, where the military is called upon to control political processes or to maintain public order, an indication has been made that there is an armed conflict. Hesitation to prosecute members of the armed forces for over-zealous performance of their duties indicates that such practices are not really serious. Considerations of efficiency further support the use of draconian measures during a struggle for national liberation. In this way, increasing levels of violence have altered the meaning of the many prohibitions against the use of force in

international relations, and would imply that terrorism is emerging as an international norm of actual wartime behavior.

State compliance with and enforcement of bi- and multi-lateral treaty rules for the arrest, punishment and extradition of terrorist offenders have proven inadequate to deter the use of international violence. States target themselves for such purposes in IHL, yet actual expectations regarding war crimes do not arise from any post-Nuremburg consistency in approach. Should IHL rules regarding the prosecution of war criminals be viewed restrictively, as mainly applicable by the victor during an enemy's disarmament, much of their potential force is lost. Should these rules be rejected because of the highly political considerations involved in official policy making or in liberation struggles, the rationale underlying IHL becomes irrelevant to the total war strategies of "just" conflicts. This leads to normative blurring, and to the disregard of minimal warfare guidelines. Such a development further leads to notions of the permissibility of the use of terrorism in particular types of armed conflicts, and promotes support for the pre-eminence of policy considerations over legal ones.

Should this be the case, it is then clear that the customary use of terrorist tactics is carving clear exceptions to the prohibition against the use or threat of aggressive force in international relations. Continued state insistence on not differentiating between terrorist war practices, and acts of international terrorism is a major factor in the emergence of increasingly higher levels of violence in the international community. This in turn works to absolve the policy makers, and implies that states may use terrorism unopposed, and without inquiry into individual responsibility, or legal guilt. War crimes

trials do not result for offenses universally recognized as such, except rarely, and when they do, the decision to prosecute is highly political. This in turn politicizes rather than deters a dangerous development in international behavior.

Chapter 8 - Footnotes

1. See Chapter 4.

2. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed forces in the Field (First Convention), 12 August 1949, Article 50; Geneva Convention for the Amelioration of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea (Second Convention), 12 August 1949, Article 51; Geneva Convention relative to the Treatment of Prisoners of War (Third Convention), 12 August 1949, Article 130; Geneva Convention relative to the Protection of Civilian Persons in Time of War (Fourth Convention), 12 August 1949, Article 147.

3. First Convention, Article 49; Second Convention, Article 50; Third Convention, Article 129; Fourth Convention, Article 146.

4. Grave breaches are specifically defined in the Geneva régime. Common war crimes are potentially a broader category, and can consist of excesses or criminal activity as such. Military persons guilty of war crimes may be prosecuted by either the enemy side in case of capture, or by the state in whose forces s/he serves. See Iu. A. Reshetov, "International Law and Crimes Against the Laws and Customs of War", in The Nuremburg Trial and International Law (G. Ginsburgs and V. N. Kudriavtsev, eds.) (1990), at 167. Aggression, colonial domination, genocide and apartheid constitute international crimes.

5. Protocol additional to the Geneva Conventions of 1949, and relating to the Protection of Victims of International Armed Conflict (Protocol 1), 8 June 1977, Article 75(7) states as follows:

> In order to avoid any doubt concerning the prosecution and trial of persons accused of war crimes or crimes against humanity, the following principles shall apply:
>
> > (a) persons who are accused of such crimes should be submitted for the purpose of prosecution and trial in accordance with the applicable rules of international law; and
> >
> > (b) any such persons who do not benefit from more favourable treatment under the Conventions or this Protocol shall be accorded the treatment provided by this Article, whether or not the crimes of which they are accused constitute grave breaches of the Conventions or of this Protocol.

6. First Convention, Article 51; Second Convention, Article 52; Third Convention, Article 131; Fourth Convention, Article 148; Protocol 1, Articles 82 and 91; Protocol additional to the Geneva Conventions of 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol 2), 8 June 1977, Article 3.

7. See Chapter 7.

8. The international characterization of an act as criminal may still result in state variation regarding the act's constituant elements. For countries which require a mental element (*mens rea*) in addition to an act, lack of proof of intent may absolve an accused. See L.C. Green, Essays on the Modern Law of War (1985), at 62, citing the Hostages Trial (In re List), (1948) Ann. Dig. 632.

9. First Convention, Article 49; Second Convention, Article 50; Third Convention, Article 129; Fourth Convention, Article 146; Protocol 1, Article 85(1).

10. Compare Protocol 1, Article 75(7), supra, note 5, which makes reference to "the applicable rules of international law".

11. See, e.g., T.J. Farer, R.G. Gard, Jr., T. Taylor, "Vietnam and the Nuremburg Principles: A Colloquy on War Crimes", in The Vietnam War and International Law, Vol. 4 (R.A. Falk, ed.) (1976), at 363; W.A. Solf, "A Response to Telford Taylor's 'Nuremburg and Vietnam: An American Tragedy'", id., at 421; J.J. Paust, "After My Lai: The Case for War Crimes Jurisdiction Over Civilians in Federal District Courts", id., at 447.

12. While the four Geneva Conventions of 1949 did much to correct wartime deficiencies in the 1907 Hague Conventions, they did not fully cover provisions relevant to means and methods of warfare, and the protection of civilians against the effects of hostilities as contained in Section II of the annexed Regulations respecting the laws and customs of war on land, and the 1907 Hague Convention (No. IX) concerning bombardment by naval forces in time of war. Given the post-1945 development of modern weaponry and air power, the modernization of these rules was urgently needed by the time of the Diplomatic Conference, 1974 - 7. See J.L. Kunz, "The Chaotic Status of the Laws of War and the Urgent Necessity for their Revision", 45 A.J.I.L. 37 (1951).

13. See Chapter 5.

14. See R.Y. Jennings, "Government in Commission", XXIII B.Y.I.L. 112 (1946); G. Ginsbergs and V.N. Kudriavtsev (eds.), supra, note 4. With regard to recent U.N. initiatives concerning the former Yugoslavia, see Report of the Secretary-General of 3 May 1993, U.N. Doc. S/25704, reprinted in 32 I.L.M. 1159 (1993); Security Council Resolution 827 of 25 May 1993, reprinted in 32 I.L.M. 1203 (1993); I. Traynor, "Yugoslav war crimes court takes first faltering steps", The Guardian, 17 November 1993, p. 8..

15. See supra, note 12.

16. See supra, note 11.

17. See Chapter 7, n. 39.

18. See Chapter 4.

19. See the Hague Convention (No. IV), 1907, Article 3, which states as follows:

> A belligerant party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.

Thus, there is no provision for personal liability or for punishment of the soldier who actually commits a violation. The only basis on which such individuals can be tried is either under their own municipal law, or as civilian war criminals, through customary international law. L.C. Green, supra, note 8, at 29. See also annexed Regulations, Article 46; Hague Convention (No. X), 1907, for the adaptation to naval war of the principles of the Geneva Convention, Article 21.

20. See International Military Tribunal (Nuremburg), Judgment and Sentences, 1 October 1946, reprinted in 51 A.J.I.L. 172 - 333 (1947). The trial began at Nuremburg on 20 November 1945. The Judgment was rendered on 30 September and 1 October 1946. The International Military Tribunal for the Far East was based on the same principles as the Nuremburg trial. It was convened in Tokyo on 3 May 1946, and Judgment was rendered on 4 - 12 November 1948. On 11 December 1946, the U.N. General Assembly unanimously adopted Resolution 95(1), which affirmed the principles of international law recognized by the Nuremburg Tribunal, and its Judgment.

21. The Treaty of Versailles, Article 228 - 30, provided for the prosecution of war criminals. A number of trials subsequently took place before the Supreme Court in Leipzig, the results of which were felt to be unsatisfactory. However, there had been no real unity of purpose among the three major Powers at the Paris Peace Conference in 1919, regarding war crimes trials. Taylor notes that public outrage focused on Kaiser Wilhelm, and Article 227 provided for the Kaiser to be tried before a tribunal for "a supreme offence against international morality and the sanctity of treaties". The Kaiser had fled to Holland, a known haven for political refugees, after the Armistice in November 1918. The Allied request for his extradition was refused on the legal ground that the offense charged against the Kaiser was unknown to Dutch law, was not mentioned in any treaties to which Holland was a party, and appeared to be of a political rather than a criminal character. T. Taylor, The Anatomy of the Nuremburg Trials, 1993, at 16 - 7. See also L.C. Green, supra, note 8.

22. See R.Y. Jennings, supra, note 14, at 140; A.M. Larin, "The Verdict of the International Military Tribunal", in G. Ginsbergs and V.N. Kudriavtsev (eds.), supra, note 4, at 88, 96.

23. Such a program was provided for in the Potsdam Declaration of 2 August 1945.

24. Article 1, 5 U.N.T.S. 251, reprinted in 39 A.J.I.L., Suppl. 257 (1945). Zoller notes that grounds for the complete reversal of the territoriality principle were contained in the Act of Military Surrender of 8 May 1945. E. Zoller, "Territorial Effect of the Norm on Responsibility", in G. Ginsbergs and V.N. Kudriavtsev (eds.), supra, note 4, at 106, 108.

25. The Charter was annexed to the London Agreement. See T. Taylor, supra, note 21.

26. L.C. Green, supra, note 8, at 249.

27. Jennings notes by analogy that rights suspended by force alone are revivable should that force subsequently be overcome. It would thus appear that universality of jurisdiction over the alleged offenses was required. R.Y. Jennings, supra, note 14, at 123, n. 1 (citations omitted).

28. W.B. Simons, "The Jurisdictional Bases of the International Military Tribunal at Nuremburg", in G. Ginsbergs and V.N. Kudriavtsev (eds.), supra, note 4, at 39, 51 - 2.

29. See, e.g., Report and Resolution, supra, note 14; Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro) (Interim Order concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide), I.C.J., 8 April 1993, reprinted in 32 I.L.M. 888 (1993); H. McCoubrey, "The Armed Conflict in Bosnia and Proposed War Crimes Trials", XI Int'l. Rel. 411 (1993). The bases of jurisdiction with which the court will operate are subject matter, personal and territorial. See Secretary-General's Report, supra, note 14; I. Traynor, id.

30. 9 Department of State Bulletin (6 November 1943), p. 311.

31. See J.F. Murphy, "Norms of Criminal Procedure at the International Military Tribunal - The Historical Backdrop", in G. Ginsbergs and V.N. Kudriavtsev (eds.), supra, note 4, at 62; T. Taylor, supra, note 21, at 21 - 77.

32. Judgment of the International Military Tribunal, supra, note 20, at 216.

33. E. Zoller, supra, note 24.

34. See Chapter 5.

35. The three charges contained in Article 6 are as follows:

(a) Crimes against peace: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;

(b) War crimes: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian populations of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;

(c) Crimes against humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

36. On the other hand the Indictment, signed in Berlin on 6 October 1945, contained four counts. Count One was entitled "The Common Plan or Conspiracy"; Count Two "Crimes against Peace"; Count Three "War Crimes"; and Count Four "Crimes against Humanity". The counts, so titled, were legally dependent as follows:

Count One, on the third clause of Article 6(a) of the Charter;

Count Two, on the first two clauses of Article 6(a) of the Charter;

Count Three, on Article 6(b) of the Charter; and

Count Four, on Article 6(c) of the Charter.

The result was that pre-war atrocities - particularly against the Jews - were not treated as crimes covered by the Charter, as it was difficult to argue that such were a necessary preparation for aggressive war. T. Taylor, supra, note 21, at 116, and 654. See also J.F. Murphy, supra, note 30, at 68 - 9, citing B. Smith (citations omitted).

37. J.F. Murphy, id.

38. See T. Taylor, supra, note 21, at 78 - 115.

39. See, e.g., the Covenant of the League of Nations; the 1923 League of Nations Draft Model Treaty on Mutual Aid; the 1924 Geneva Protocol on the Peaceful Settlement of Disputes; the 1927 Declaration on Aggressive Wars; the 1928 Kellogg-Briand Pact. See also the 1899 and 1907 Hague Conventions (No. I) on the peaceful settlement of disputes.

40. T. Taylor, supra, note 21, at 626.

41. Q. Wright, "The Law of the Nuremburg Trial", 41 A.J.I.L. 38, 66 (1947).

42. W.B. Simons, supra, note 28, at 49 - 50, citing H. Kelsen (citations omitted).

43. T. Taylor, supra, note 21, at 65 - 6.

44. L. Oppenheim, International Law (6th rev'd. ed. 1944), §253, at 432 - 3.

45. See H. McCoubrey, "The Nature of the Modern Doctrine of Military Necessity", XXX - 1-2-3-4 Revue de Droit Militaire et de Droit de la Guerre 215 (1991). Similar provisions regarding superior orders are provided for the Yugoslav war crimes court. See Secretary General's Report, supra, note 14, at 1175.

46. See, e.g., R.A. Falk, The Role of Domestic Courts in the International Legal Order (1964).

47. See Chapter 4. On the other hand, O'Brien notes that "(r)espected authorities have held that everything is permitted in combat which is not clearly prohibited". W.V. O'Brien, "The Nuremburg Principles", in The Vietnam War and International Law (Vol. 3) (R.A. Falk, ed.) (1972), at 193, 219, citing H. Lauterpacht, "The Problem of the Revision of the Law of War", XXIX B.Y.I.L. 361 (1952).

48. J.L. Kunz, supra, note 12, at 39, indicates, e.g., that the Committee of Jurists for the elaboration of a plan for the P.C.I.J. adopted a *voeu* on 23 July 1920 recommending the revision of the laws of war and a new Hague Conference, but the League did nothing about it. Subsequent such efforts were also made in 1923, 1927 and 1928.

49. Iu. A. Reshetov, supra, note 4, at 169 - 70.

50. Admirals Erich Raeder and Karl Doenitz successfully escaped a guilty verdict in effect on the principle of *tu quoque* with regard to breaches of the international law of submarine warfare. An attempt at a defense of *tu quoque* may be seen in Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro) (Interim Order), supra, note 29.

51. J.-P. Sartre, On Genocide (1968), at 58 - 61.

52. Or, such states prefer to regard the norms on the prohibition or limitation of weapons of mass destruction as belonging primarily to the law of disarmament. Iu. A. Reshetov, supra, note 4, at 172.

53. T. Taylor, Nuremburg and Vietnam - An American Tragedy (1970), at 101 - 2. See also S.T. Possony, Aggression and Self-Defense: The Legality of United States Action in South Vietnam (FPRI Research Monograph No. 6, 1966).

54. T. Taylor, id., at 96.

55. Id., at 102 - 3.

56. J.J. Paust, supra, note 11, at 445.

57. R.A. Falk, The Six Legal Dimensions of the Vietnam War (Center of International Studies, Princeton University, Research Monograph No. 34, 1968), at 29 - 30. See also J.-P. Sartre, supra, note 50.

58. R.A. Falk, id., at 42.

59. Id., at 42 - 3.

60. Id., at 47; T. Taylor, supra, note 52, at 100; R.A. Falk, supra, note 45.

61. J.J. Paust, supra, note 11, at 448 - 451.

62. 317 U.S. 1 (1942).

63. 327 U.S. 1 (1946).

64. See A.P. Rubin, "Legal Aspects of the My Lai Incident", in R.A. Falk (ed.), supra, note 46, at 346.

65. The supremacy clause is as follows:

> This Constitution and the law of the United States which shall be made in Pursuance thereof, and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

66. See, e.g., Holtzman v. Schlesinger, No. 73-C-537 (E.D.N.Y. 1973), discussed in S.J. Wenner, "The Indochina War Cases in the United States Court of Appeals for the Second Circuit", in R.A. Falk (ed.), supra, note 11, at 720, 731.

67. See Chapter 5.

68. See R.A. Falk (ed.), supra, note 45, at 41.

69. Id., at 12.

70. See, e.g., J. Smyth, "Stretching the Boundaries: the Control of Dissent in Northern Ireland", 11 Terrorism: An Int'l. J. 289 (1988); B. Robertson, "Military Intervention in Civil Disturbance in Great Britain - What is the Legal Basis?", XXIX - 1-2 Revue de Droit Militaire et de Droit de la Guerre 307 (1990); R. Murray, "Killings of Local Security Forces in Northern Ireland 1969 - 1981", 7 Terrorism: An Int'l. J. 11 (1984); R. Shehadeh, Occupier's Law - Israel and the West Bank (2d ed. 1988); "Symposium (on the Report of the Landau Commission

of Inquiry into the Methods of Investigation of the General Security Service Regarding Hostile Terrorist Activity)", 23 Isr. L. Rev. (1989); J.M. Wolf, "National Security versus the Rights of the Accused: The Israeli Experience", 20 C.W.I.L.J. 115 (1989).

71. J. Verhaegen, "Legal Obstacles to Prosecution of Breaches of Humanitarian Law", International Review of the Red Cross (IRRC), November - December 1987, at 607, 610 - 11.

72. Id., at 614 - 5.

73. See supra, note 29.

74. For instance, in the case of Viet Nam, Taylor notes that with the exception of the N.L.F., all participants in the conflict were parties to the four 1949 Geneva Conventions. North Viet Nam and the N.L.F. refused to acknowledge that they were bound. Whether that war was an Article 2 or Article 3 situation was another point in dispute. T. Taylor, supra, note 52, at 130 - 1.

75. See, e.g., A. George (ed.), Western State Terrorism (1991).

76. R.A. Falk, supra, note 56, at 30.

77. See, e.g., H. McCoubrey, supra, note 29, at 411 - 413.

78. See Chapter 5.

79. See Chapter 7.

9. Conclusion

The issue of the separability under IHL of terrorist acts during liberation struggles has been the prime focus of this research. Were terrorist war crimes separated from sporadic acts of international terrorism, it is argued that the world community would reach consensus more easily regarding a definition of terrorism, and ways in which to deter its occurrence.

Terrorist acts, if perpetrated by states or insurgent forces during wars of self-determination, constitute grave breaches or war crimes of Geneva provisions. All states are obligated to seek out, and prosecute or extradite for trial, the perpetrators of such acts. There is no political offense or humanitarian exception to this duty. Terrorist acts which are not perpetrated during a liberation struggle must fall within the confines of issue-specific anti-terrorist codifications, and/or multi- and bi-lateral extradition arrangements. These instruments frequently contain a political offense or humanitarian exception clause to extradition, making the prosecution of terrorism highly dependent on the integrity of legal system diversity. The issues involved in the separability of terrorist war crimes perpetrated during a liberation group's resort to violence, thus, are briefly summarized in this Chapter.

The IHL legal régime is highly self-regulatory. Nevertheless, states are unwilling to invoke IHL, and the non-recognition of the separability of terrorist war crimes is the result. A breakdown in world consensus regarding enforcement of its provisions thus implies that the rationale for its rules is no longer considered relevant to

state decision-making.

9.1. Resort to Violence

While the principle of self-determination was originally placed in colonial contexts it has grown to embrace human rights, economic rights, and rights to territory. Such growth is a function in particular of the delimitations of legal competence provided for in the U.N. Charter system, which delimitations have allowed sufficient jurisdictional space in which to redefine notions of nationality.

The issues involved in the right to self-determination have evolved in many respects as a result of resort to violence by liberation groups. In particular, terrorism has been a means and method of choice in liberation struggles. Further, state Socialism has offered different interpretations of substantive international law, in competition with Western democratic ideals. War to create new law or system transformation quickly has become a tactic of choice when political or constitutional processes have stalled, or progressed too slowly to redress grievances adequately.

Many "Peoples" auto-define themselves as entitled to the right to self-determination, and everything that that term implies. Should a "People" be an approved cause, the group may demand its independence, it may struggle for independence, and use force against a governing state to achieve autonomy. With every successful war of self-determination, the growth of the notion in general international law is strengthened. Numerous U.N. Resolutions support the right, support the "justness" of the struggle, and support the use of force to achieve the desired ends.

Given this use of force, wars of self-determination were recognized as international in Protocol 1 of 1977, for purposes of the

extension of humanitarian law to them. This development recognized the need to develop the law of war, to reflect changes in the manner in which armed struggles were being fought. Grave breaches of Geneva law were now termed war crimes, and the rules clarified with regard to military necessity, proportionality, the prohibition against the infliction of unnecessary suffering, and the use of terror means and methods of warfare.

Given the development of IHL in 1977 in particular, it is now possible to prosecute acts of terrorism perpetrated during an armed conflict for self-determination as terrorist war crimes. Many liberation struggles are now viewed as international, rather than civil wars. Therefore, the full provisions of Geneva law should apply to them in full, rather than on the minimal level of Common Article 3. In that IHL is so extended, the international rules for behavior during war should restrain a threatened government, if only through the office of the Protecting Power, where previously there had been little or no such restraint. Thus, acts of terrorism which characterize liberation wars can now be prosecuted under general international law, in trials which should reflect civilized notions of justice. This separability in content of violent acts should enable the world community to arrive at a consensus regarding random terrorist acts, without undercutting the content of the right of "Peoples" to a free existence should they wish to press for one through the use of force.

9.2. Political Considerations

The problematic issue running throughout this study has been the use of force, which is in large part attributable to the U.N. Charter system, and to the way in which it has operated until recently. The

erosion of the boundaries of domestic jurisdiction contemplated in Charter provisions corresponded to a new balance of power which has challenged traditional notions of state sovereignty. Yet, the new balance of power contained an inherent contradiction: the force of capitalism and the force of state Socialism. This meant that, in matters of economic and social organization, the world was divided in its orientation to a particular set of substantive standards. This in turn led to competing interpretations of what effectively is within and what is beyond the reach of substantive rules of international law.

9.2.1. The Presentation of a Legal Claim

Traditional formal requirements which governed the presentation of an international claim presupposed a basic deference to the state as the center of authority. Recourse to an international standard is now possible. The presentation of an international claim rests most securely upon a substantive and a political consensus, however, and the successful presentation of a claim for the right to self-determination requires such a consensus. Provincial tendencies, expansionist ambitions, and opposing views of private property in particular, frequently mean that claims of a right to self-determination are met with conflicting responses from the world community.

Self-determination has thus divided the world, as has the use of force to achieve it. The notion of self-determination is viewed as an outside force which imposes against the will of individual states a particular kind of public order. Further, the inviolability of territorial integrity and political independence are hard to reconcile with rights to an autonomous national existence.

As a legal issue, the use of force in liberation struggles has

re-written many of the rules in international relations. The use of force has proved to be a vehicle by which the major world powers could pursue their quest for resources, engage in covert aggression, and achieve overseas domination. As a political issue, wars of self-determination have enabled the major post-1945 world powers to define their attitudes to aggression, to human rights, and for purposes of the present study, to IHL. After a review of the different attitudes to wars of self-determination, consensus is difficult to discern, which in turn raises questions about the existence of any consensus regarding the constituent rights entitlements which comprise self-determination.

9.2.2. Consensus with Regard to IHL

As part of the substantive and political consensus already existing in the international community, states have come to a minimal agreement in the four Geneva Conventions of 1949. As part of this agreement, states have a duty to enact the necessary legislation to implement the obligation to seek out and prosecute or extradite for trial all persons, whatever their nationality, committing or ordering to be committed any of the grave breaches defined in the codifications. This system establishes a system of universality of jurisdiction regarding war crimes.

Geneva law, as previously discussed, applies in full to international wars, or minimally to civil wars through the customary rules codified in Common Article 3. It provides for state responsibility for grave breaches, as did the Hague Conventions of 1907. In addition, it provides for individual responsibility, as a result of the Nuremburg trials held 1945 - 6. It provides for state diligence in ensuring respect for all of its provisions, and in their implementation.

Armed struggles for self-determination and the development of modern weaponry mandated the further development of IHL in 1977. Armed struggles for self-determination were viewed as a right by a majority in the U.N., and thus served to delimit the confines of matters previously considered reserved to states under Article 2(7) of the U.N. Charter in that such armed conflicts frequently endangered international peace and security. Thus, international substantive and political consensus was achieved with regard to claims for an extenson of international law to many such wars in 1977, and to the pressure to be put on a threatened state to observe the demands of humanitarian law. This consensus approach however did not reflect world unanimity.

9.2.3. The Breakdown of Consensus

The need to develop and supplement IHL was highlighted in large part because of the atrocities perpetrated during the Viet Nam War. The U.S. engaged in counter-guerilla strategy, and a lack of applicable rules led to an attitude of the permissibility of what was not expressly prohibited. The U.S. participated in the 1974 - 7 Diplomatic Conference, and made many contributions to the process. However, it objected strenously to the inclusion of wars of self-determination as international wars, and abstained at the vote on Article 1(4) of Protocol 1 which codified this inclusion. Israel, a country to which Article 1(4) might particularly apply, voted its objection. South Africa, another such country, did not participate after the Conference's first session.

The U.S. voiced its concern at the automatic regulation of such "civil" wars as if they were international conflicts. Such a regulation would unduly interfere in matters of domestic competence, and risk the

interference by third states in threatened state domestic affairs. The U.S. objected to a recognition of irregular armed forces, terrorists and rebels, as combatants for purposes of prisoner of war treatment. Further objection was made to an automatic legitimacy of the use of force in a "just" cause. Otherwise, the U.S. did not want to hamper its own military with new standards of restraint when interpreting the demands of military necessity, and selecting what it felt were legitimate objects for attack. It did not wish the restraint of the new prohibitions against reprisals. Such objections were voiced publicly, after classified discussions took place between U.S. military personnel and U.S. heads of state. As a result, the U.S. has failed to ratify Protocol 1, and refuses to recognize many of its provisions as binding upon it. Conversely, the U.S. has agreed to utilize the provisions it considers reflect international norms of customary law.

This breakdown in consensus with regard to the growth and development of IHL would appear to be a logical outcome of Cold War ideological divisions. The U.S. as a leading proponent of a law and order approach to international law thus appears to have fallen prey to its own shortcomings in this respect. In particular, U.S. refusal to interpret liberation acts of violence through the IHL issue area has stymied international co-operation to achieve consensus on policies to deal with random acts of international terrorism. This hardline stance has thus alienated those states which otherwise might lend their active support to such co-operative efforts and which, instead, offer sympathy, aid and assistance regarding liberation tactics which the U.S. prefers to term terrorism.

9.3. Obstacles to Prosecuting Terrorist War Criminals

Given the lack of substantive and political international consensus underlying attitudes to the use of force, it is perhaps not surprising that states hesitate individually to extend the scope of their jurisdictional competence to pursue and prosecute alleged war criminals. This hesitation is particularly clear should criminal charges for grave breaches be legally dependent on bases provided in new provisions of Protocol 1.

Conversely, state unwillingness individually to implement and apply IHL represents a denial of the protections afforded to individuals against the power of states. States identify an offense in order to then specify its elements for purposes of proof. Thus, should no, or inadequate, provision be made to bring perpetrators of grave breaches to trial, the self-regulatory approach provided in IHL fails. Should no other state undertake to comply with the duty to prosecute alleged war criminals by use of the universality of jurisdiction, it would appear that the rationale underlying the applicable rules is no longer sufficiently relevant to states faced with competing policy considerations which raise the threshold beyond which violent force is not tolerated.

The prosecution and sanction of certain acts deemed criminal in IHL is established in self-regulatory state frameworks. The exercise of jurisdiction is left to states. Thus, state authoritative interpretation regarding responsibility for alleged criminal acts resurrects the traditional hierarchy between two juridical categories which, strictly speaking, should be viewed as equal: the recognition of certain acts as criminal for purposes of international law, and the

extension by states of jurisdiction over such acts for purposes of their prosecution and punishment. This is the result of attempts simply to achieve substantive and political consensus.

Theoretically, problems arise when a state exercises jurisdiction over an alien who may not have harmed that state or its nationals. This remains the case even with regard to recent U.N. initiatives to create an *ad hoc* tribunal through which to exercise jurisdiction over persons alleged to have committed war crimes in the former territory of Yugoslavia, in that trials *in absentia* will not be permitted. In the absence of a permanent international criminal court in which to try war criminals readily, domestic courts should appear as agents in the international order for such purposes. Nevertheless, the lack of consensus regarding the right to use force and the groups which hold this right, and the lack of rules to restrain certain Powers in their efforts to secure regional and strategic security agreements, simply imply that a self-regulatory approach to IHL transforms itself into just another facet of sovereignty, as is the case in criminal co-operation and extradition arrangements.

Assuming this point, what then become eminently clear is that any resulting mutual respect for diversity in legal systems depends on international opinion with regard to the integrity of each one. On this basis, the conclusion must follow that substantive and political consensus is required before a claim of an international right can be asserted successfully. While such consensus would appear to have been achieved regarding the Yuglosav war crimes court, it remains the only instance of such international consensus since Nuremburg. Thus, given the level of self-regulation required by IHL, and the existing balance

of power in the international arena, the continued hostility of the U.S. to wars of self-determination in general does not bode well for the separability of terrorist acts perpetrated in liberation armed struggles, and for the prosecution of war criminals in general.

9.4. Terrorism as a Separable Phenomenon

It has been repeatedly asserted throughout this study that terrorist acts committed during liberation struggles can and should be prosecuted under IHL rules. Numerous committee reports on international terrorism and U.N. efforts to study the phenomenon have been discussed. The issue of inquiry thus regards whether or not the separability of terrorist war crimes perpetrated in liberation struggles is feasible.

As previously indicated, the 1977 extension of IHL to wars of self-determination would indicate that terrorism perpetrated during an armed conflict is separable in law from random acts of international terrorism, similar to the way in which manslaughter is distinguished from death caused by dangerous driving. All parties to an armed conflict must proceed with restraint for the prohibitions against the spread of terror to appear even-handed, as the rules apply to both sides of a liberation struggle. Further, the eschewing of terrorist tactics in liberation struggles reinforces a liberation authority's self-image as a protogovernment for purposes of international consumption. On this basis, the new provisions in Protocol 1 were welcomed by the a majority in the international community, as the forces of war were thus to be constrained.

As has also been noted, the manner of conducting a war changes with new technology. A changed manner of waging war will alter the structure of war as a function of societal infrastructure. In 1899 and

1907, jurists and governments alike attempted to humanize war law at the threshold of two catastrophic world confrontations, and in view of new war technologies. In 1949, the four Geneva Conventions sought to fill many gaps in prior codifications, in time for the Cold War. In 1977, Protocols 1 and 2 filled gaps revealed particularly during the Vietnam War.

As in more traditional times, modern war technology emphasizes strategies of stealth and secrecy. These are the tactics of the jungle, presumably learned well in Viet Nam. Terrorism depends on these two characteristics, and the survival of some states depends on their ability to predict and forestall the occurrence of terrorist war tactics. The learning of a technique becomes the ability to also use it. In a continuing era of total war strategy, designed for the aggrandizement of political power and access to global resources, domestic stability is first required, and it is to be expected that states will use force to maintain public order, and will control political processes through use of the military. Acts of terrorism are thus employed against domestic populations, as well on behalf of target state populations.

A politically divided approach to law and politics in the post-1945 total war era has thus been a prime factor in the resort to armed violence to achieve self-determination. The re-birth of the "just" war flies in the face of concurrent legal prohibitions against the use or threat of armed force by states in their international relations. However, doctrines of total war advocate the use of any means to counter a greater force. What is now clear is that states possessing the superior means and resources with which to maintain their survival

utilize the terror tactics of liberation groups, coupled with the force of law to deter those groups. Thus, the judiciary is politicized, and becomes yet another means of maintaining the *status quo* in the face of international and domestic demands for system transformation.

For these many reasons, domestic judicial interpreters can be of little or no service in the development of international law and, in particular, in the development of IHL. Self-regulating states, which have accepted the duty to apply IHL's many provisions, fail to do so. Too much is at stake in a U.N. system which seeks to exercise control over large Powers through a numbers consensus. It would thus appear that, while IHL is the appropriate medium through which to simplify efforts to deter international acts of random political violence, state unwillingness to inquire into the motives underlying these acts, and unwillingness to utilize this legal régime, will make any consructive movement in this direction highly problematic.

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