LEGAL OPINION ON STATUS OF NATIONAL LIBERATION MOVEMENTS AND THEIR USE OF ARMED FORCE IN INTERNATIONAL LAW

For : Jan Fermon, Hans Langenberg, Dundar Gurses, Esqs.
Re : Legal Opinion on Legitimacy of National Liberation Movements and their Use of Armed Force in International Law
Date : 17 November 2002
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GENERAL QUERIES:

- What is the legitimacy under international law of national liberation movements and their use of armed force?
- How should the legal status of the present Philippine liberation movement be viewed?
- How do the peace negotiations between the GRP and the NDFP and the pertinent documents relate to this legitimacy and the status of the CPP-NPA-NDFP?

The status of national liberation movements in international law has been the subject of much scholarly work through the years. The increasingly progressive trend and view in international law and diplomatic circles is that such liberation movements are considered to have a *locus standi* in international law in the context of the struggle of peoples against colonial domination, alien occupation or racist regimes in the exercise of their right to self-determination.

Now, what are national liberation movements? What are wars of national liberation?

What is meant by the exercise of one's right to self-determination?
What is meant by peoples?
What is meant by struggles against colonial domination, alien occupation and against racist regimes?
Do these include struggles against other forms like the modern day neo-colonialism or imperialism?

And assuming such struggles against neo-colonialism are included, how can and how do these liberation movements adhere or abide to the norms of international law, particularly in the sphere of international humanitarian law?
Regardless of whether these national liberation movements are engaged in armed conflicts of an international or non-international character or both, how does international law view them?

And if so, are they to be regarded as criminals, terrorists, freedom fighters or revolutionaries?

These are some of the necessary questions that arise in order to fully address the main legal query on the legitimacy of national liberation movements and their use of armed force in international law.

I. WHAT INTERNATIONAL LAW AND COMMENTARIES SAY

A. National Liberation Movements and Wars of National Liberation

In **International Law and the Use of Force by National Liberation Movements, Heather A. Wilson** (*The American Society of International Law, The American Journal International Law, October, 1990, 84 A.J.I.L. 981, Edited by Gerald Blake*, *book review by Natalino Ronzitti of University of Pisa),* noted that:

> "The subject of wars of national liberation attracted much scholarly attention at the end of the sixties and during the seventies, when decolonization was at its peak. While the United Kingdom and France (the latter after the bitter experience of the Algerian revolution) chose the wise path of liquidating their colonial empires and giving independence to territories for which they were responsible, the fight to gain freedom was particularly intense in the colonies under Portuguese rule (Angola, Mozambique, Guinea) and in white Rhodesia, where the settlers seceded from the country because they were unwilling to be ruled by a black majority. Armed struggle also took place in Namibia and in South Africa, if less intense in the latter case. The Palestinian conflict added -- and it is still adding -- more color to this picture. "

In **Wars of National Liberation in the Geneva Conventions and Protocols** (165 Recueil Des Cours, 363-436 (1979-IV)), **Georges Abi-Saab** outlined the different types of armed conflict to which the term "wars of national liberation" has been applied, in terms of humanitarian law.

[Abi-Saab, an Egyptian scholar in humanitarian law, finished Graduate studies in Law, Economics and Political Science at the Universities of Cairo, Paris, Michigan, Harvard, Cambridge and Geneva and is a Professor of International Law and Organization at the Graduate Institute of International Studies in Geneva. He was a Consultant to the United Nations Division of Human Rights for the preparation of the first two Secretary-General's reports on "Respect of Human Rights in Armed Conflicts".]

According to him, these wars may be classified as follows:

(1) Historically, those struggles of peoples fighting a foreign invader or occupant;

(2) Those that have evolved within the United Nations and identified from the practice of States and international organizations, namely colonial and alien domination (or rule or government) and racist regimes which according to Article 1, paragraph 4 of Protocol 1, are armed struggles aimed at resisting the forcible imposition or maintenance of such situations to allow people subjected to them to exercise its right of self-determination.

"Colonial domination" originally refers in this context as classical colonialism or colonies of settlement. "Alien occupation" in said Article 1 has the same meaning as "alien domination" in the United Nations resolutions, namely, colonies of settlement. "Racist regime" is more particularly used to denote cases where race is the exclusive criterion for discrimination, although other different origins

between two human groups like religion etc. may also qualify as such. This he says is the contemporary concept.

(3) Dissident movements in several countries which take up arms with a view to overthrowing the government and the social order it stands for. Their members may consider themselves as a "liberation movement" waging a "war of national liberation" against a regime or government which masks or represents "alien domination" but such conflicts do not oppose different "peoples" and the traditional consensus is to consider them as purely internal in the sense of Common Article 3 of the Conventions and possibly Article 1 of Protocol II.

(4) Armed struggle of certain dissident movements representing a component people within a plural State which aims at seceding and creating a new State on part of the territory of the existing one which, according to Abi-Saab, was not directly contemplated in the *[at pp. 393-397]*

In **The Privileged Status of National Liberation Movements Under International Law** (Philippine Law Journal, Vol. 58, pp. 44-65, 1983) **Raul C. Pangalangan,** currently the Dean of the University of the Philippines College of Law, and **Elizabeth H. Aguiling**, presented the following elaboration from a different perspective:

"Parties to an armed conflict, other than states, are legally classified – 'along a continuum of ascending intensity' – as (1) rebels, (2) insurgents or (3) belligerents.

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

"Insurgency is a 'half-way house between essentially ephemeral, spasmodic or unorganized civil disorders and the conduct of an organized war between contending factions within a State. The material conditions for a condition of belligerency are (1) the existence of an armed conflict of a general character; (2) occupation by the insurgents of a substantial portion of the national territory; (3) an internal organization capable and willing to enforce the laws of war; and (4) circumstances which make it necessary for outside states to define their attitude by means of recognition of belligerency." *[citing Lauterpacht, Recognition in International Law 176 (1948).]*

They noted that:

"International publicists contrapose the constitutive and the declaratory theories of recognition. The emerging consensus toward the declaratory thesis stresses the sufficiency of the factual element. Mc Nair, though, says that 'it is a status that (belligerents) possess only insofar as States recognize them to possess it.' But in Lauterpacht, 'the essence of the principle of recognition is not in the nature of a grant of favor or a matter of unfettered political discretion, but a duty imposed by the facts of the situation. Given the requisites of belligerency as laid down by international law, the contesting parties are legally entitled to be treated as if they were engaged in a war waged by two sovereign states.' At the very least, then, once the requisite material elements concur, other states may recognize the belligerent party without incurring any breach of the international legal principle of non-intervention in the domestic affairs of a state." *[Underscorings supplied; footnote No. 30]*

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

of such distinction is that an armed conflict characterized as an insurgency is deemed to be governed by Article 3, while those classified under belligerency fall under the more rigorous provisions of Article 2 concerning conflicts of an international character." *[referring to the 1949 Geneva Conventions.]*

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

Pangalangan et. al., however, agreed with Abi-Saab when they proposed:

> A more flexible interpretation would assess the effectiveness of liberation movements not in isolation, but in relation to that of their adversary; it would take into consideration not only the elements which they succeeded in controlling, but also those which they succeeded in extracting from the control of that adversary. Such an interpretation would logically lead to the conclusion that, <u>though not exercising complete or continuous control over part of the territory, liberation movements, by undermining the territorial control of the adversary as well as their own control of the population and their command of its allegiance, muster a degree of effectiveness sufficient for them to be objectively considered as a belligerent community on the international level</u>. *[citing Abi-Saab; Underscorings supplied.]*

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

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

On the issue of subjectivity because the national liberation framework does not seek only to govern the conduct of hostilities but also goes into the justness of the cause of the hostilities, Pangalangan et. al. contraposed:

"The term 'war of national liberation' is not just a legal construct; it refers to a fact. Long before liberation wars were integrated into international law, they had existed as concrete historical phenomena. The Protocols Additional, therefore, do not invent a new category but merely acknowledge a material situation already existing. There are facts, of course, that are not politically neutral, but that does not make them any less

factual. Moreover, this classification of liberation wars as a category of armed conflicts is based not on morality but on law – the legal right to self-determination."

In support thereof, Pangalangan et. al. maintained that:

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

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

In the **Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, Bruno Zimmermann** with the collaboration of Jean Pictet, (Yves Sandoz et. al., eds., International Committee of the Red Cross, Martinus Nijhoff Publishers, Geneva 1987) gave his views on this subject matter.

[The Commentary is supposed to explain the provisions of the Protocols primarily on the basis of the work of the Diplomatic Conference and other preparatory work where the authors were guided by existing international humanitarian law, general international law and legal literature. However, the editors caution that "if the interpretation of the texts gives rise to some uncertainty, the opinions put forward are legal opinions, and not opinions of principle."]

Zimmermann explains the concept of people in the context of national liberation movements thus:

"In international law there is no definition of what constitutes a people; there are only instruments listing the rights it is recognized all peoples hold. Nor is there an objective or infallible criterion which makes it possible to recognize a group as a people: apart from a defined territory, other criteria could be taken into account such as that of a common language, common culture or ethnic ties. The territory may not be a single unit geographically or politically, and a people can comprise various linguistic, cultural or ethnic groups. <u>The essential factor is a common sentiment of forming a people, and a political will to live together as such.</u> Such a sentiment and will are the result of one or more of the criteria indicated, and are generally highlighted and reinforced by a common history. This means simultaneously that there is a bond between the persons belonging to this people and something that's separates them from other peoples; there is a common element and a distinctive element*." [at p. 52; Underscoring supplied.]*

On this score, **Article 96, paragraph 3 of Protocol I** defines liberation movements as:

> The authority representing a people engaged against a High Contracting Party in an armed conflict of the type referred to in Article 1, paragraph 4.

B. Legal Development and Trends on Recognition of the Right to Self-determination, the Use of Armed Force and the Right to Revolution

A survey of international documents through the years concerning the subject helps in understanding the conceptualization, contours and development on these points.

Even from a liberal bourgeoisie legal point of view, resort to revolution has been recognized for the longest time, though much more as merely rhetoric today in the context of the international situation.

Paust provides this kind of perspective (**Human Rights and Human Wrongs: Establishing Jurisprudential Foundation for a Right to Violence: The Human Right to Participate in Armed Revolution and Related Forms of Social Violence: Testing the Limits of Permissibility,** Jordan J. Paust, Emory University School of Law, Emory Law Journal, Spring 1083, 32 Emory L.J. 545).

[Mr. Paust is a Professor of Law, University of Houston. A.B., 1965, J.D., 1968, University of California, Los Angeles; LL.M. University of Virginia, 1972; J.S.D. Candidate, Yale University.]

"The right of "revolution" refers to the right fundamentally to change a governmental structure or process within a particular nation-state, thus including the right to replace governmental elites or overthrow a particular government. Such a change can occur slowly or quickly, peacefully or with strategies of violence. Thus defined, one might distinguish "revolution" from claims for minority protection, claims to be free from external oppression, and claims to secession.

"x x x What Abraham Lincoln recognized was the fundamental democratic precept that authority comes ultimately from the people of the United States, and that with this authority there is retained a "revolutionary right to dismember or overthrow" any governmental institution that is unresponsive to the needs and wishes of the people.

"The right of revolution recognized by President Lincoln has, of course, an early foundation in our history. Both the Declaration of Independence (1776) and the Declaration of the Causes and Necessity of Taking Up Arms (1775) contain recognitions of this right, and several state constitutions within the United States consistently recognized the right of the people "to reform, alter, or abolish government" at their convenience. Representative of these expectations and even the later recognition of President Lincoln, were the words of one Benjamin Hichborn of Boston in 1777: "I define civil liberty to be . . . a power existing in the people at large, at any time, for any cause, or for no cause, but their own sovereign pleasure, to alter or annihilate both the mode and essence of any former government, and adopt a new one in its stead." *(Corwin,* The "Higher Law" Background of American Constitutional Law, *42 Harv. L. Rev.. 149, 408 (1929.)*

"Indeed, our Republic was founded on revolution. As Justice Black has recognized:

"Thomas Jefferson was not disclaiming a belief in the "right of revolution" when he wrote the Declaration of Independence. And Patrick Henry was certainly not disclaiming such a belief when he declared in impassioned words that have come on down through the years: 'Give me liberty or give me death.' This country's freedom was won by men who, whether they believed in it or not, certainly practiced revolution in the Revolutionary War." (In re *Anastaplo, 366 U.S. 82, 113 (1961) (Black, J., dissenting)*

"The American Revolution served as a precursor for numerous others in the Americas, Europe, and elsewhere, even into the twentieth century. Today, it is common to recognize that all peoples have a right to self-determination and, as a necessary

concomitant of national self-determination, a right to engage in revolution. x x x" *[Underscoring supplied.]*

Paust tried to clarify the nature and scope of the right of revolution.

"In doing so, it will be necessary to identify the relationship between the right of revolution and the international legal precepts of authority, self-determination, and more general norms of human rights. With these interrelations in mind, one can also identify and clarify relevant legal constraints on armed revolution and the participation of individuals in such a process."

"Such a focus should inform choice with regard to permissibility, but a realistic and policy-serving decision about the legality of any particular strategy of armed revolution (or of social violence in general) must also hinge upon adequate inquiry into the actualities of circumstance or, as Professor Reisman has stated, a contextual analysis of:

"who is using the strategy, for what purpose and in conformity with what international norm, with what authority, decided by what procedures, where and how, with what commensurance to the precipitating event, with what degree of discrimination in targeting, [with what outcomes,] . . . and what peripheral effects on general political and economic processes (or the social process more generally).

"Thus, realistic and policy-serving choice concerning the permissibility or impermissibility of a particular coercive process engaged in by private individuals or groups must be guided by an awareness of community expectations about the process of authority as well as an awareness of all relevant domestic and international legal policies at stake, actual trends in authoritative decision, relevant features of past and present context, and probable future effects that might condition the serving or thwarting of legal policies in the future.

"With such a focus, one should discover that private individuals and groups can and do engage in numerous forms of permissible violence. It is too simplistic to say, therefore, that authoritative violence can only be engaged in by "the government" or by governmental elites and functionaries. As Professor Reisman stated, the notion that only state institutions can permissibly use high levels of violent coercion "is a crucial self-perception and deception of state elites." Thus, the useful question is not whether private violence is permissible, but what forms of private violence are permissible, when, in what social context, and why. *[Underscoring supplied.]*

"As Professor Reisman further suggests:

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

"Early in our history, we appealed to natural law and the "rights of man" to affirm the right of revolution. Two historic declarations provide an inventory of the forms of oppression thought to justify armed revolution. Our Declaration of Independence proclaimed to the world the expectation that all governments are properly constituted in order "to secure" the inalienable rights of man, that governments derive "their just powers from the consent of the governed," and that "it

is the Right of the People to alter or abolish" any form of government which "becomes destructive of these ends." x x x x

In The United States Declaration of Independence, the following appears:

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

"The Declaration of the Causes and Necessity of Taking Up Arms had also denounced Parliament's "cruel and impolitic purpose of enslaving [the colonial Americans] . . . by violence . . .," the British government's "intemperate rage for unlimited domination," acts of "cruel aggression," and numerous "oppressive measures" that had reduced our ancestors "to the alternative of choosing an unconditional submission to the tyranny of irritated ministers, or resistance by force."

"It is important to note two primary aspects of the right of revolution claimed in these two Declarations. First, the claim was made in a situation in which a ruler and a government sought to subject a people to despotism through various forms of political and economic oppression. Second, and most importantly, the Declaration of Independence was proclaimed "in the Name, and by authority of the . . . People." Thus, although the framers of these Declarations appealed to natural law and inalienable rights, including the right to be free from governmental oppression and to alter or abolish oppressive forms of government, the primary justifying criterion was the proclaimed authority of the people.

"As Thomas Paine wrote in a widely circulated book, The Rights of Man, the "authority of the people" is "the only authority on which government has a right to exist in any country." *(T.Paine, The Rights of Man 8 (1794))*

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"For this reason, the right of revolution is in the nation as a whole and is not a right of some minority of an identifiable people. ("Jefferson did not defend the right of a minority to seize the government and use it to suppress . . . the majority."); (cf. *American Communic. Ass'n v. Douds, 339 U.S. at 440 n.12; Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176 (1803)]* (right to establish government conducive to happiness is the "exercise of an original right of the people"); But see R. POUND, x x x stated that "minority may as justifiably rebel as a majority").In Locke's view, the right of revolution was a right of the majority of a community. x x x (Lincoln also recognized that if "a majority should deprive a minority of any clearly-written Constitutional right, it might, in a moral point of view, justify revolution." He spoke, however, of a "moral" point of view. Moreover, as conceived here, the use of violence in such a circumstance might best be considered as a claim to self-defense or a defense of right as opposed to a claim to engage in revolutionary violence. Factually, one can recognize the difference between minority claims to secede or to defend against majority-backed depredations and claims to rebel against tyrants of the whole community.) *[Underscorings supplied.]*

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"In view of the above, one can also recognize the propriety of a claim by the government, when representing the authority of the people, to regulate certain forms of revolutionary violence or, when reasonably necessary, "incitement to violence" engaged in by a minority of the people of the United States and without their general approval. Indeed, several Supreme Court cases document the permissibility of such a claim, although a few others seem to go too far. If, however, the right of revolutionary violence is engaged in by the predominant majority of the people, or with their general approval, the government (or a part of thereof) would necessarily lack authority, and governmental controls of such violence or incitements to violence would be impermissible. Thus, for example, it would be constitutionally improper to allege that "incitement to violence" is always a justification for governmental suppression of such conduct even if violence is imminent. Permissibility does not hinge upon violence as such, but ultimately upon the peremptory criterion of authority -- i.e., the will of the people generally shared in the community."

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In a different context, Paust clarified that:

"Indeed, Justice Jackson, while condemning the "lawless" effort of the Communist Party to overthrow our democratic system of government, recognized that "our own Government originated in revolution and is legitimate only if overthrow by force may sometimes be justified." *[American Communic. Ass'n v. Douds, 339 U.S. 382, 435, 439-40, 443 (1950)]* (Jackson, J., concurring in part & dissenting in part; He added, "That circumstances sometimes justify [revolution] is . . . an old American belief." (See also Communist Party v. Whitcomb, 414 U.S. at 450 (rejecting notion that advocating violent overthrow is necessarily equivalent to advocating unlawful action). These same points were recognized by James Madison in 1793." *[Underscorings supplied.]*

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"In summary, numerous cases either affirm or are consistent with a distinction between permissible forms of violence approved by the authority of the people and unlawful violence, especially violence engaged in contrary to the authority of the people. Perhaps in recognition of such a distinction, Justice Black has stated:

"Since the beginning of history there have been governments that have engaged in practices against the people so bad, so cruel, so unjust and so destructive of the individual dignity of men and women that the "right of revolution" was all the people had left to free themselves. . . . I venture the suggestion that there are countless multitudes in this country, and all over the world, who would join [the] belief in the right of the people to resist by force tyrannical governments like those. (*In re* Anastaplo, 366 U.S. 82, 113 (Black, J., dissenting)). *[Underscorings supplied.]*

"It is doubtful whether Justice Black had in mind specific portions of the Universal Declaration of Human Rights when he recognized the seemingly wide approval of a general right of revolution, but he could have. The preamble to the Universal Declaration declares, for instance, that "it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law." *[G.A. Res. 217A, at 135, U.N. Doc. A/810 (1948).]* As one commentator has noted, the preamble to the Universal Declaration actually supports the right of revolution or rebellion, and it reflects the growth of acceptance of that right at least from the time of the American Declaration of Independence, *[Sumida,* The Right of Revolution: Implications for International Law and Order, *in Power and Law 130, 135 (Barker ed. 1971),* reprinted in *M. McDougal & W. M. Reisman, International Law Contemporary Perspective –*

The Public Order of the World Community 168 (1981).] an acceptance so pervasive as to allow text writers to conclude that "the right of a people to revolt against tyranny is now a recognized principle of international law." X x x x (See also International Terrorism and Political Crimes xii, xxi (M. Bassiouni ed. 1975) (setting forth conclusions of a conference of 38 experts from 18 countries that the right of rebellion against tyranny and oppression is an internationally recognized right); x x x *(Friedlander,* Terrorism and *National Liberation Movements:* Can Rights Derive from Wrongs?, *13 Case W. Res. J. Int'L L.281, 284-86 (1981); Kittrie,* Patriots and Terrorists: Reconciling Human Rights With World Order, *13 Case Res. Int'L L.. 291, 304-05 (1981); Kutner,* A Philosophical Perspective on Rebellion, *in International Terrorism and Political Crimes, 61 (M. Bassiouni ed. 1975)* x x x x [*Underscorings supplied.]*

"Indeed, prior to the American and French Revolutions of the eighteenth century, the right of revolution had been accepted in several human societies. Scholars have identified related expectations, for example, among the early Greeks and Romans; in Germanic folk law; among naturalist theorists such as Thomas Aquinas in medieval Western Europe; and in the writings of early international scholars such as Grotius and Vattel. As noted above, the American colonials inherited many of these expectations as well as those of early English writers of transnational fame. Significantly also, early Americans proclaimed the right of revolution for every nation. Fairly obviously, not all persons agreed that armed revolution engaged in by a people against their governmental elites was permissible either in the eighteenth or nineteenth centuries; but as Abraham Lincoln declared, it is "a right, which we hope and believe, is to liberate the world."

Paust continued:

"Although some have recognized that armed revolution is a form of "self-defense" for an oppressed people and others seek to limit the right of revolution to cases of a reasonably necessary defense against political oppression, the principles of necessity and proportionality should apply only to the strategies of violence utilized during revolution and are not needed for the justification of a revolution. Indeed, according to Lincoln, Jefferson, and so many of the founders, revolution is justified whenever the people generally so desire. Furthermore, no limitation on the right of the people to engage in revolution is consistent with the precepts of authority and self-determination x x x" *[Underscorings supplied.]*

"The "necessity" test endorsed by some writers might actually relate to another question, the question of when a defense of right arises because of oppression of an individual's right to participate in the political process. It might be argued that an individual or group has a right to use strategies of violence when reasonably necessary and proportionate to the effectuation of a human right to participate. If so, such a use of violence is not to be engaged in to deny participation by others or to oppress others politically, and such a use of violence might not have as its aim the achievement of an authoritative revolution by the people as a whole. Nevertheless, permissible revolution might be stimulated by such a strategy, and governmental elites that deny a relatively full and free sharing of power might themselves be denied some form of participation temporarily in order to effectuate the fuller and freer sharing and shaping of power by all participants."

On these points, Pangalangan et. al. said:

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

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

"Ironically, this same framework , by allowing for an 'explicit and authentic act of the whole people,' apart from the constituent acts of the electorate, gives rise to what has been referred to as the right to revolution as a recognized principle of international law. *[Citing Sumada, The Right to Revolution: Implication for International Law and Order in McDougal and Reisman, International Law in Contemporary Perspective: The Public Order of the World Community 167-8 (1981); also in Power and Law 130, 135 (Barker ed. 1971); Underscoring supplied.]* For instance, the American Declaration of Independence of July 1776 categorically states that –

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

"and Abraham Lincoln in his 1861 Inaugural Address said –

> '(t)his country, with its institutions, belongs to the people who inhabit it. Whenever they shall grow weary of the existing government, they can exercise their constitutional right of amending it, **or their revolutionary right to dismember or overthrow i**t.' *(A. LINCOLN, First Inaugural Address (March 4, 1861), in LINCOLN'S STORIES AND SPEECHES 212 (E. Allen ed. 1900); American Communic. Ass'n v. Douds, 339 U.S. 382, 440 n.12 (1950) (also quoting Lincoln's 1848 speech before the House of Representatives). [Underscoring supplied.]"*

This right has been juridically expressed as 'direct state action' by constitutionalists, averred Pangalangan et. al.

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

> 'from the point of view of the state as a distinct entity not necessarily bound to employ a particular government or administration to carry out its will, it is the direct act of the state itself because it is successful. As such, it is legal, for whatever is attributable to the state is lawful.' *[citing Sinco, Philippine Political Law, 7 (1962)]*

However, Pangalangan et. al., concede that:

"The danger with this formulation is that it is useful only in hindsight. It is premised upon the fact of success thus rendering the whole theory, at best, as an after-the-fact justification. While it is internally self-consistent within its theoretical framework, it is actually useless in practice. Revolution is a right but it remains a crime unless its assertion ripens into victory. The paradox, therefore, is that the process of asserting a

right is illegal, but the end-product of that process is legal, at which point the legality retroacts to the inception of the process itself."

In **Terrorism as Impermissible Political Violence: An International Framework, Greene** (*Kevin J. Greene, Associate, Cravath, Swaine & Moore, New York City; J.D.1989, Yale Law School; B.A.1986, State University of New York, College at Old Westbury.; Vermont Law Review Winter, 1992*), had this to say:

"Since the founding of the United Nations, the international community has developed an extensive body of human rights law. The United Nations Charter, the Universal Declaration of Human Rights, and the Covenants on Political, Social and Economic Rights embody this area of law. These international documents define basic and inalienable human rights. They also provide standards to determine those human rights deprivations which justify recourse to violence.

"International humanitarian law, as embodied in the 1949 Geneva Conventions, establishes rules of humane conduct for parties engaged in armed conflict. The norms of humanitarian law require that violent acts be consonant with fundamental human rights. Two principles underlie human rights and humanitarian law: first, "all peoples have a right to self-determination and ... a right to engage in revolution"; and second, "international law ... limits the permissibility of armed revolution and participation of individuals in revolutionary social violence."

Heather Wilson, (Natalino Ronzitti, University of Pisa, Book Review: **International Law and the Use of Force by** National Liberation Movements, The American Society of International Law; The American Journal International Law; October, 1990 ; 84 A.J.I.L. 981, Edited by Gerald Blake), for her part, after a review of UN practice, comes to the conclusion that self-determination is a legal right enjoyed by peoples under colonial rule (trust, mandate and non-self-governing territories). She states that self-determination does not mean "a right of secession from a self-governing State unless a part of that State has become effectively non-self-governing with respect to the whole" *[p. 87]*. In the latter case, a right of self-determination is given, even though it is still a moot point in international law. The trend, however, is in that direction, as proven by the UN resolution on friendly relations.

She wonders whether national liberation movements have a right to use force in international law against established governments and comes to the conclusion that "the trend over the last four decades and since 1960 in particular has been toward the extension of the authority to use force to national liberation movements" *[p. 136]*, even though East and West share opposite views on this matter.

Wilson sees the right to use force by liberation movements as instrumental to the application of *jus in bello* to them. "Probably, a parallel of this kind was in existence when the first codifications of the law of war were made. States had the right to wage war *(*jus ad bellum). *Jus in bello*, particularly rules on immunity of combatants for acts of war they committed, was consequential to the lawfulness of the exercise of jus ad bellum. At present, immunity of combatants -- at least for those categories of persons who did not enjoy such status before -- is more rooted in reasons of humanity than in the parallel between jus ad bellum and *jus in bello*, since the right to wage war was abolished by the UN Charter and force is prohibited except in self-defense."

Therefore, the problem according to her is that of the lawfulness of resort to force by liberation movements need not be evaluated for its influence on *jus in bello*. Neither is there a real problem of the lawfulness of resorting to force by liberation movements insofar as they limit themselves to fighting against established governments. The real questions are whether

third states can help liberation movements in their war against established governments and what, if any, the content and form of such aid should be.

Pangalangan et. al said that the right to self-determination first appears in positive international law in Articles 1 and 55 of the United Nations Charter, then with General Assembly Resolution 1514 (XV) of 1960 containing the Declaration on the Granting of Independence to Colonial Countries and Peoples, then Articles 1 (1) of both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights both of 1966.

Article 1 of the UN Charter provides, *inter alia*:

> The purposes of the United Nations are:
>
> x x x
>
> 2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take appropriate measures to strengthen universal peace.

In 1948, this landmark provision was reached by the international community:

> Whereas, it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law. *[Universal Declaration of Human Rights of December 10, 1948]*

In the Declaration Of The Independence Of Colonial Nations And Peoples" (Resolution 1514, XV, December 14, 1960:

> 2. All peoples have the right of self-determination. They are free to politically determine the force of this right and to freely struggle for economic, social, and cultural development.
>
> 4. All armed actions and measures of repression, of any type whatsoever, against dependent peoples are to be halted in order to make it possible for them to peacefully and freely enjoy their right to full independence. The integrity of their national territory will be respected.

In this connection, Abi-Saab explained:

"Since 1949, however, the developments which have taken place both in the international community and, consequently in international law, have led progressively and cumulatively to the establishment and consolidation of the international character of wars of national liberation; and this both within and outside the framework of international organizations, as a result of practice and consensus, on the basis of the principle of self-determination." *[at p. 369]*

"United Nations organs, especially the General Assembly, have confirmed the latter interpretation (the principle of self-determination is a legal principle imposing an obligation on the colonial Powers and establishing a right for all peoples to the exercise of self-determination) in many resolutions, dealing with the subject matter in general or in relation to a specific situation. This trend culminated in general Assembly Resolution 1514 (XV) of 1960 containing the Declaration on the Granting of Independence to Colonial Countries and Peoples. Self-determination was also recognized as a human right in Article 1 of the

International Covenant on Civil and Political rights and of the International Covenant on Economic, Social and Cultural Rights adopted by the General Assembly in 1966. The most significant achievement in this respect, however, is the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations which was adopted by General Assembly resolution 2625 (XXV) in 1970….. led to the universal recognition of the legally binding nature of the principle of self-determination." *[at pp. 369-370]*

In 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, and it invited all States to provide material and moral support to national liberation movements in colonial territories.

In Common Article 1 of the International Covenant on Civil and Political Rights and on Economic, Social and Cultural Rights (Adopted by Resolution 2200 (XXI) of the General Assembly of 16 December 1966), it is provide unequivocally:

> 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….

Pangalangan et. al said that:

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

> Every State has the duty to promote, through joint and separate action, the realization of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter, and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of the principle in order:
>
> (a) to promote friendly relations and co-operation among States; and
>
> (b) to bring a speedy end to colonialism, <u>having due regard to the freely expressed will of the peoples concerned; and bearing in mind that subjections of peoples to alien subjugation, domination and exploitation constitutes a violation of the principle, as well as a denial of fundamental rights, and is contrary to the Charter of the United Nations</u>.
>
> The establishment of a sovereign and independent State, the free association or integration with an independent State <u>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</u>.
>
> Every State has the duty to refrain from any forcible action which deprives peoples referred to above in the elaboration of the present principle of their right to self-determination and freedom and independence. In their actions against resistance to such forcible action in pursuit of their right to self-

> determination, such peoples are entitled to seek and receive support in accordance with the purposes and principles of the United Nations.
>
> The territory of a colony or other non-self-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 to self-determination in accordance with the Charter, and particularly its purposes and principles.' *[Underscorings supplied.]*

With respect to the use of force in the context of self-determination, the 1970 Declaration states:

> Every State has the duty to refrain from any forcible action which deprives peoples … of their right to self-determination and freedom and independence. In their action against, and resistance to, such forcible action in pursuit of their right to self-determination, such peoples are entitled to seek and receive support in accordance with the purposes and principles of the Charter.

The Declaration , according to Abi-Saab, resolves several intricate and controversial problems posed by cases of violent self-determination, to wit:

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

[Article 2, paragraph 4 states:

> *"All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations.]*

(b) Conversely, by armed resistance to forcible denial of self-determination – by imposing or maintaining by force colonial or alien domination – is legitimate under the Charter, according to the Declaration.

© <u>The right of liberation movements representing peoples struggling for self-determination to seek and receive support and assistance necessarily implies that they have a *locus standi* in international law and relations</u>.

(d)This right necessarily implies also that third States can treat with liberation movements, assist and even recognize them without this being considered a premature recognition or constituting an intervention in the domestic affairs of the colonial or alien government." *[at pp. 371-372; Underscorings supplied.]*

Before the adoption of the said 1970 Declaration, Abi-Saab pointed out that different organs of the United Nations affirmed, on several occasions, the legitimacy of such struggles. For instance, the General Assembly said in resolution 2649 (XXV) (1970) that it

> 1. <u>Affirms the legitimacy</u> of the struggles of peoples under colonial and alien domination recognized as being entitled to the right of self-determination to restore to themselves that right <u>by any means at their disposal</u>.

Pangalangan et. al. again pointed out that:

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

> Every State has the duty to refrain from any forcible action which deprive peoples … of their right to self-determination and freedom and independence. In their actions against, and resistance to, such forcible action in pursuit of their right to self-determination, such peoples are entitled to seek relief and to receive support in accordance with the purposes and principles of the Charter.

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

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

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

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

x x x

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

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

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

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

Even **David E. Graham**, a captain in the US Army and Associate Professor of International Law at the Judge Advocate General's School of the Army, in commenting on the impending approval of amended Article 1 of the then Draft Protocol I to the 1949 Geneva Conventions, grudgingly acknowledges that:

> "Although the Declaration on Friendly relations is a resolution of the General Assembly and thus not a binding international agreement, it is nevertheless generally considered to reflect recognized international law concepts. However, the Declaration is relatively innocuous and does not recognize any right to achieve self-determination by force of arms. Consequently, reference to the Charter and the Declaration on Friendly relations in a multilateral convention which defines the scope of international armed conflict as including wars of self-determination against colonialist and racist regimes results in a misleading impression, i.e. that it is the intent of these documents to sanction the use of force by certain 'peoples' seeking to achieve an inherent right. Such an impression is extremely dangerous as well as legally unfounded. However, it has recently attained significant credibility as a result of several developments in the international community." *[See **"The 1974 Diplomatic Conference on the Laws of War: A victory for Political Causes and a return to the 'Just War' Concept of the Eleventh Century**," 32 Washington and Lee Review 24-63; 1975; Underscorings supplied.]*

Pangalangan et. al., on the other hand, maintains that the UN Charter is considered a treaty by its party-signatories. The 1970 Declaration is considered an authentic interpretation of the Charter qua treaty. More important, he says, it was adopted by the General Assembly through a consensus which included the Western Powers. This was the first time that a consensus was reached "not on a vague general formula, but on a detailed explanation making explicit the different legal implications of the principle," *[citing Abi-Saab, Receuil Des Cours 366-436]*

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

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

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

In resolution 2787 (XXVI) (1971), it said that it:

> 1. Confirms the legality of the people's struggle for self-determination and liberation from colonial and foreign domination and alien subjugation… by all available means consistent with the Charter of the United Nations, 2. Affirms man's basic human right to fight for the self-determination of his people under colonial and foreign domination. *[Footnote No. 8; Underscorings supplied.]*

After the adoption of the said declaration, the General Assembly reiterated the same principle more explicitly and forcefully, according to Abi-Saab, citing the said Res. 2787 where it further "called upon all States dedicated to the ideas of freedom and peace to give all their political, moral and material assistance to people's struggling for liberation, self-determination and independence against colonial and alien domination." *[footnote No. 8]*

In the same vein, General Assembly Resolution 3103 (XXVIII) on the Basic Principles of the Legal Status of the Combatants struggling against Colonial and Alien domination and Racist regimes (December 12, 1973) proclaimed that:

> 1. The struggle of the people under colonial or foreign rule or under a racist regime to gain their rights to self-determination and independence is legitimate and in full agreement with the Principles of the Rights of Peoples.
>
> 2. All attempts to suppress the struggle against colonial or foreign rule or against a racist regime are incompatible with the Charter of the United Nations, the Principles of the Rights of Peoples, the declaration concerning friendly relations and cooperation between states in accordance with the Charter of the United Nations, the Universal Declaration of Human Rights, and the declaration guaranteeing independence to colonized nations and peoples, and such attempts pose a threat to international peace and security.
>
> 3. The armed conflicts involving the struggle of peoples against colonial and alien domination and racist regimes are to be regarded as international armed conflicts in the sense of the 1949 Geneva Conventions, and the legal status envisaged to apply to the combatants in the 1949 Geneva Conventions … is to apply to persons engaged in armed struggle against colonial and alien domination and racist regimes

The said Resolution 3103 stated in its preamble that "the continuation of colonialism in all its forms and manifestations …is a crime and that all colonial people have the inherent right to struggle by all necessary means at their disposal against colonial powers and alien dominations in the exercise of their right to self-determination…. " *[Underscoring supplied.]*

Abi-Saab also pointed out specific situations in which the General Assembly identified and recognized the legal characterization of armed conflicts as wars of national liberation including those in Southern Africa, the peoples of Zimbabwe, Namibia, Angola, Mozambique, Guinea-Bissau and the Palestinian people (resolution 2787, XXVI, 1971). *[at p. 373]*. He then noted that several liberation movements have

been granted observer status in various organs of the United Nations and regional organizations. In fact, many States have even recognized liberation movements, allowed them to establish official representation in their territory and provided and still provide them with moral and material assistance. *[at pp. 373-374; Underscoring supplied.]*

[In this connection, the role of the Dutch, Belgian and Norwegian government in various capacities at various junctures of the peace negotiations between the GRP and NDFP must be appreciated properly.]

In the United Nations Declaration on the Protection of Women and Children in Emergency and Armed Conflict, proclaimed by General Assembly resolution 3318 (XXIX) of 14 December 1974, a similar affirmation appears:

> Expressing its deep concern over the sufferings of women and children belonging to the civilian population who in periods of emergency and armed conflict in the struggle for peace, self-determination, national liberation and independence are too often the victims of inhuman acts and consequently suffer serious harm,
>
> Aware of the suffering of women and children in many areas of the world, especially in those areas subject to suppression, aggression, colonialism, racism, alien domination and foreign subjugation,
>
> Deeply concerned by the fact that, despite general and unequivocal condemnation, colonialism, racism and alien and foreign domination continue to subject many peoples under their yoke, cruelly suppressing the national liberation movements and inflicting heavy losses and incalculable sufferings on the populations under their domination, including women and children,
>
> Deploring the fact that grave attacks are still being made on fundamental freedoms and the dignity of the human person and that colonial and racist foreign domination Powers continue to violate international humanitarian law, x x x x [Underscorings supplied.]

Also, the UDRP (Universal Declaration of Peoples' Rights), Article 4, provides that:

> A people have the right to self-determination. Any norm contradicting the right to self-determination is illegal, including the principle of territorial integrity of states.

Even in the Helsinki Accord of 1975, applying the principle of self-determination to internal democracy addressed particularly to European states *[signed by 35 States, 33 European plus Canada and the US]*, Principle VIII, Final Act of Conference on Security and Cooperation in Europe, this principle appears:

> By virtue of the principle of equal rights and self-determination of peoples, all peoples always have the right, in full freedom, to determine, when and as they wish, their internal and external political status, without external interference, and to pursue as they wish their political, economic, social and cultural development.

According to some authors, the phrase "full freedom" in the above quoted Helsinki Accord, was intended to preclude coercion by a government in respect of the choice by the peoples of their internal regime or policies. Notably, this was made explicit by the sponsor, The

Netherlands. [Louis Henkin, Richard Pugh, Oscar Schachter and Hans Smith, eds., International Law: Cases and Materials, 2ed., 1987, West Publishing Co., Minn., USA; "International Status of "Peoples" and their Right of Self-Determination," at p. 284; citing Cassesse, The Helsinki Declaration and Self-Determination, in Human Rights, International Law and the Helsinki Accords 83, 95-103, Buergenthal ed. 1977]

Eventually, Article 1 of Protocol I of 8 June 1977 states that:

> 3. This Protocol, which supplements the Geneva Conventions of 12 August 1949 for the protection of war victims, shall apply in the situations referred to in Article 2 common to those conventions.
>
> 4. The situations referred to in the preceding paragraph include armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration of Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations."

A very reactionary view was advanced on the other hand by Aldrich on the application of these articles to national liberation movements. (***Symposium: The Hague Peace Conferences: The Laws of War on Land , George H. Aldrich*** *, Edited by George H. Aldrich and Christine M. Chinkin, The American Society of International Law ; The American Journal International Law ; January, 2000; 94 A.J.I.L. 42)*

"In the years since the Geneva Conventions were concluded in 1949, the world has clearly changed greatly. A majority of the present states did not exist as states in 1949, and many of them gained their independence only after armed struggles against colonial powers, which made them naturally sympathetic to clandestine resistance movements. Some of these colonial powers may also have found that it was unhelpful to treat as criminals all those who were members of the armed groups seeking independence. In any event, the changes in the composition of nation-states and in their views were sufficient by the 1970s to produce radical changes in the law."

[Sixty-three states were represented at the Geneva Conference in 1949, whereas 124 states were represented at the Geneva Conference that produced the 1977 Additional Protocols when it convened in 1974. Nonvoting participants in the latter conference included 11 national liberation movements.]

x x x

"Acceptance of this compromise text *[on liberation war provisions in Article 1, paragraph 4 of Protocol I]* permitted the Geneva Conference to adopt Protocol I in 1977. It represented an effort to satisfy the demands of many states that resistance fighters in occupied territory should be given a better opportunity than they had had under the Hague law to operate as legitimate combatants and to be entitled to be prisoners of war if captured, at the same time preserving the distinction between civilians and combatants in the situations where civilians would otherwise be at the most risk. It was apparent to many of us at the Geneva Conference that the Hague rules had not had the intended effect of protecting the civilian population because resistance groups in occupied territory generally could not comply with those rules and consequently were forced to operate illegally under civilian cover. The new rules of Protocol I are designed to give these resistance groups an incentive to comply with the law, and thus to reduce the risks to the civilian population that are inevitably posed if the experience of occupation troops gives them reason to fear that they

may be attacked by apparently unarmed civilians. *[Underscorings supplied.]*

x x x

"When the four Geneva Conventions were adopted in 1949, among the many hundreds of articles codifying and developing the laws applicable to the conduct of international armed conflict, only a single one, Article 3, common to all four Conventions, set forth rules applicable to an "armed conflict not of an international character occurring in the territory of one of the High Contracting Parties." While of modest scope, this article was a revolutionary development. Article 3 requires humane treatment of all persons not taking an active part in hostilities, including those who are prisoners and the sick or wounded, and prohibits various illegal acts, including murder, torture, the taking of hostages, and nonjudicial punishments.

"Unfortunately, since 1949 there have been many noninternational armed conflicts, but only very rarely has the state where the conflict occurred acknowledged the applicability of Article 3. Usually, the state concerned has denied that its internal problems have risen to the level of an "armed conflict," which term Article 3 does not attempt to define, and has asserted that the rebels are criminals who respect no laws. In some instances, the governmental authorities may have wanted to be free to murder, torture, and impose arbitrary punishments, but certainly in most instances, the government would have hesitated to accept the applicability of Article 3 largely because it imposes its obligations upon "each Party to the conflict." Governments inevitably see such treaty language as enhancing the status of any rebels to whom it applies by indicating that they, like the state, have rights and duties under international law. *[Underscorings supplied.]*

"During the 1970s, the negotiations in Geneva created an opportunity to expand the law applicable in noninternational armed conflicts by adopting a protocol dealing with such conflicts and to make its implementation more likely by avoiding any use of terms that would appear to enhance the status of rebels or rebel groups. Considerable success was achieved, and the resulting agreement, Protocol II to the Geneva Conventions of 1949, avoids any reference to "Parties to the conflict," largely by resorting to the passive voice, for example, by requiring that "all persons . . . are entitled" and that "all the wounded, sick and shipwrecked . . . shall be respected and protected." The Protocol also substantially expands the protections provided by common Article 3 x x x x"

Thereafter, General Assembly Resolution 32/147 on measures to prevent international terrorism, adopted by 91 in favour, 9 against with 28 abstentions, of 6 December 1977 again:

> 3. Reaffirms the inalienable right to self-determination and independence of all peoples under colonial and racist regimes and other forms of alien domination, and upholds the legitimacy of their struggle, in particular the struggle of national liberation movements, in accordance with the purposes and principles of the Charter and the relevant resolutions of the organs of the United Nations.
>
> 4. Condemns the continuation of repressive and terrorist acts by colonial, racist and alien regimes in denying peoples their legitimate right to self-determination and independence and other human rights and fundamental freedom; x x x x *[Underscoring supplied.]*

Also, in Resolution 40/61 adopted on December 9, 1985 by the 108th Plenary Meeting, the General Assembly adopted a Resolution on Measures to Prevent International Terrorism

[1986 American Society of International Law, Washington, D.C. International Legal Materials, Volume 25, Number 1 , January, 1986 , 25 I.L.M. 239; (1986)], to wit:

> Reaffirming also the inalienable right to self-determination and independence of all peoples under colonial and racist regimes and other forms of alien domination, and Upholding the legitimacy of their struggle, in particular the struggle of national liberation movements, in accordance with the purposes and principles of the Charter and of the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, *[Underscorings supplied.]*

In Economic and Social Council Resolution 1986/43, on the Use of mercenaries as a means to violate human rights and to impede the exercise of the right of peoples to self-determination, it is again stated:

> Reaffirming the legitimacy of the struggle of peoples and their liberation movements for their independence, territorial integrity, national unity and liberation from colonial domination, apartheid, foreign intervention and occupation,
>
> x x x
>
> 3. Calls upon all States to exercise the utmost vigilance against the menace posed by the activities of mercenaries and to ensure, by both administrative and legislative measures, that their territory and other territories under their control, as well as their nationals, are not used for the recruitment, assembly, financing, training and transit of mercenaries, or the planning of such activities designed to destabilize or overthrow the Government of any State and to fight the national liberation movements struggling against racism, apartheid, colonial domination, foreign intervention and occupation for their independence, territorial integrity and national unity; x x x x *[Underscorings supplied.]*

Once again, in G.A. res. 48/94, [48 U.N. GAOR Supp. (No. 49) at 199, U.N. Doc. A/48/49 (1993)], the General Assembly, at its 85th plenary meeting on 20 December 1993 on the Importance of the universal realization of the right of peoples to self-determination and of the speedy granting of independence to colonial countries and peoples for the effective guarantee and observance of human rights, agreed in:

> Reaffirming also the importance of the universal realization of the right of peoples to self-determination, national sovereignty and territorial integrity and of the speedy granting of independence to colonial countries and peoples as imperatives for the full enjoyment of all human rights,
>
> Reaffirming further the obligation of all Member States to comply with the principles of the Charter of the United Nations and the resolutions of the United Nations regarding the exercise of the right to self-determination by peoples under colonial and foreign domination,
>
> Recalling the Vienna Declaration and Programme of Action adopted at the World Conference on Human Rights,
>
> x x x

> 1. Calls upon all States to implement fully and faithfully all the relevant resolutions of the United Nations regarding the exercise of the right to self-determination and independence by peoples under colonial and foreign domination;
>
> 2. Reaffirms the legitimacy of the struggle of peoples for independence, territorial integrity, national unity and liberation from colonial domination, apartheid and foreign occupation, in all its forms and by all available means;
>
> x x x
>
> 11. Strongly condemns the establishment and use of armed groups with a view to pitting them against the national liberation movements;
>
> x x x
>
> 27. Urges all States, the specialized agencies and other competent organizations of the United Nations system to do their utmost to ensure the full implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples and to intensify their efforts to support peoples under colonial, foreign and racist domination in their just struggle for self-determination and independence; x x x x *[Underscorings supplied.]*

The International Court of Justice, in advisory opinions, had occasion to affirm that the principle of self-determination as enshrined in the United Nations Charter has through subsequent development of international law been accepted as a "right" of peoples in non-self-governing territories. *[I.C.J. Advisory Opinion on Namibia, (1971) I.C.J. at 31, quoted in Advisory Opinion on Western Sahara (1975), I.C.J. at 31-35.]*

In **Liberation Movements & International Law, Michael Schubert** (Kurdistan Committee of Canada, Theses On Liberation Movements And The Rights Of Peoples, Translated by the Kurdistan Committee of Canada) advance the view that:

> "The partisan form of struggle, namely the guerrilla, becomes the most significant form of struggle for oppressed peoples; the entire picture of conventional war, with its limited character of scope and means, is completely lost."
>
> x x x
>
> "Of considerable importance to the contemporary development of the humanitarian rights of people in war and its expansion to include armed liberation struggles is the support of the vast majority of UN member states for the last 50 years ever since the founding of the United Nations Charter on June 26, 1945 *[in Germany: BGBI 1973 II p.431; 1974 II p.770; 1980 II p.1252; cf Berber, Volkerrechtliche Vertraege, 1983, p.17ff.],* in particular the non-aggression clause in Art. 2 of the Charter, a position which developed despite the negative votes or abstentions of the NATO states. This position was expanded upon in several UN General Assembly resolutions and shows the importance which independence movements have in international developments.
>
> "These resolutions clearly show that oppressed peoples who take up arms are not aggressors, but rather the colonial and occupying powers are, since they are using police and military force to suppress the right to self-determination x x x x(cf. Lombardi, p.189ff. and p.332ff., as well as UN Resolution 3314 XXIX, 14.12.1974*). [Underscoring supplied.]*

"Therefore, the notion of aggression under the rights of peoples is more than just an actual armed attack, it also indicates the aggressive and inhumane structure of a system of which the utilization of police and military repressive machinery is just the external appearance."

While Abi-Saab admits that the questions of the legal basis of the *jus ad bellum* of liberation movements and that the *locus standi* of liberation movements in general international law lie beyond the scope of his present disquisition *[footnotes nos. 8 and 9]*, "as concerns the *jus in bello* – i.e. the law governing relations between belligerents and between them and third parties – the most important consequence of the recognition of self-determination as a legal right (a consequence which inexorably derives also from all the others mentioned above) is to confer an international character on armed conflicts arising from the struggle to achieve this right and against its forcible denial. As such, they are subject to the international *jus in bello* in its entirety." *[at p. 372; Underscorings supplied.]*

Karen Parker, in her **Presentation to the First International Conference on the Right to Self-Determination United Nations,** Geneva (August 2000) entitled **Understanding Self-Determination: The Basics**, said that:

"The right to self-determination, a fundamental principle of human rights law, *(The Universal Declaration of Human Rights provides that "the will of the people shall be the basis of the authority of government." Universal Declaration of Human Rights, G.A. Res. 217A (III)(1948), Art. 21; The International Covenant of Civil and Political Rights (ICCPR), in force Mar. 23. 1976, 999 U.N.T.S. 171, Art. 1; The International Covenant on Economic, Social and Cultural Rights (ICESCR), in force Jan. 3, 1976, 999 U.N.T.S. 3, Art. 1.)* is an individual and collective right to "freely determine . . . political status and [to] freely pursue . . . economic, social and cultural development." (ICCPR, Art.1; ICESCR, Art. 1)The principle of self-determination is generally linked to the de-colonization process that took place after the promulgation of the United Nations Charter of 1945. Of course, the obligation to respect the principle of self-determination is a prominent feature of the Charter, appearing, *inter alia*, in both Preamble to the Charter and in Article 1.

"The International Court of Justice refers to the right to self-determination as a right held by people rather than a right held by governments alone. (Western Sahara Case, 1975 International Court of Justice 12, 31.) The two important United Nations studies on the right to self-determination set out factors of a people that give rise to possession of right to self-determination: a history of independence or self-rule in an identifiable territory, a distinct culture, and a will and capability to regain self-governance.

"The right to self-determination is indisputably a norm of *jus cogens*. (H. Gros Espiell: "[N]o one can challenge the fact that, in light of contemporary international realities, the principle of self-determination necessarily possesses the character of *jus cogens*." Gros Espiell cites numerous references in United Nations documents referring to the right to self-determination as jus cogens. [*Id., at pp. 11-13. See also Legal Consequences for States of the Continued Presence of South Africa in Namibia (S.W.Africa) 1971 International Court of Justice 16, 89-90 (Ammoun, J., separate opinion)(recognizes* jus cogens *nature of self-determination); I. Brownlie, Principles of Public International Law 83, (3d ed. 1979)(argues that combatants fighting for realization of self-determination should be granted a higher status under armed conflict law due to application* of jus cogens *to the principle of self-determination) [Underscorings supplied.] Jus cogens* norms are the highest rules of international law and they must be strictly obeyed at all times. Both the International Court of Justice and the Inter-American Commission on Human Rights of the Organization of American States have ruled on cases in a way that supports the view that the principle of self-determination also has the legal status of *erga omnes*. The term "*erga omnes*" means

"flowing to all." Accordingly, *ergas omnes* obligations of a State are owed to the international community as a whole: when a principle achieves the status of erga omnes the rest of the international community is under a mandatory duty to respect it in all circumstances in their relations with each other."

Paust again gave his views on these points:

> "Today, the right of revolution is an important international precept and a part of available strategies for the assurance both of the authority of the people as the lawful basis of any government and of the process of national self-determination. Under international law, the permissibility of armed revolution is necessarily interrelated with legal precepts of authority and self-determination, as well as with more specific sets of human rights. For example, the right to change a governmental structure is necessarily interrelated with the question of the legitimacy of that structure in terms of the accepted standard of authority in international law and with the precept of self-determination, both of which are interrelated and are also interconnected with the human rights of individuals to participate in the political processes of their society.
>
> "As recognized in numerous international instruments and by the International Court of Justice, all peoples have the right to self-determination and, by virtue of that right, to freely determine their political status. Similarly it is recognized "that the application of the right of self-determination requires a free and genuine expression of the will of the peoples concerned." *[Western Sahara Advisory Opinion, 1975 I.C.J. 12, 31-33, 36 (citing several international instruments including the authoritative Declaration on Principles of International Law, G.A. Res. 2625, 25 U.N. GAOR Supp. (No. 28) at 121, U.N. Doc. A/8028 (1970)]*. As noted elsewhere, a state that complies with the principle of self-determination is one possessed of a government representing each and every person -- the whole people -- belonging to its territory. Political self-determination, in fact, is a dynamic process involving the genuine, full and freely expressed will of a given people, that is, a dynamic aggregate will of individuals. The "will of the people" is actually the dynamic outcome of such a process and reflects an equal and aggregate participation by individuals and groups in a process of authority.
>
> "Furthermore, there is a significant consistency among the precept of self-determination, the human right to individual participation in the political process, and the only standard of authority recognized in international law. That consistency is evident in documented expectations of the international community concerning the sharing and shaping of political power through a process involving a relatively full, free, and equal participation by individuals who are the members of a given nation-state. x x x x"

x x x

Paust also advanced that:

> "(I)t is evident that the people of a given community have the right to alter, abolish, or overthrow any form of government that becomes destructive of the process of self-determination and the right of individual participation. Such a government, of course, would also lack authority and, as a government representing merely some minority of the political participants, it could be overthrown by the majority in an effort to ensure authoritative government, political self-determination, and the human rights of all members of the community equally and freely to participate. *[Underscorings supplied.]*

"Thus, as mentioned, the right of revolution supported by the preamble to the Universal Declaration and accepted by text writers as a principle of international law is a concomitant precept and a part of available strategies for the securing of the authority of the people and

national self-determination. Importantly also, the international precepts of authority and self-determination provide criteria relevant to our inquiry into the permissibility of individual participation in armed revolution. As in the case of domestic standards, the right of revolution is necessarily a right of the majority against, for example, an oppressive governmental elite. Furthermore, the authority of the people is the only legitimate standard."

x x x

"No matter how rationally one may justify revolutionary means in terms of the demonstrable chance of obtaining freedom and happiness for future generations, and thereby justify violating existing rights and liberties and life itself, there are forms of violence and suppression which no revolutionary situation can justify because they negate the very end for which the revolution is a means. Such are arbitrary violence, cruelty, and indiscriminate terror. *[See Marcuse,* Ethics and Revolution, *in REVOLUTION AND THE RULE OF LAW 46 (E. Kent ed. 1971).]*

">From a legal perspective, Marcuse's statement about the means of violence is equally relevant. Under international law, including the law of human rights, there are certain forms of violence that are impermissible per se. Included here are strategies and tactics of arbitrary violence, cruelty, and indiscriminate terror. International law also prohibits the use of violence against certain targets, and permissible uses of force are conditioned generally by the principles of necessity and proportionality.

"Thus, with regard to questions of legality concerning targets, tactics, and strategies of social violence, international law already provides normative guidance. A realistic and policy-serving jurisprudence is needed, however, to integrate relevant principles of international law into appropriate analysis and choice about the permissibility of a particular method or means of violence in a given social context. x x x x"

x x x

"Revolution is actually one of the strategies available to a people for the securing of authority, national self-determination and a relatively free and equal enjoyment of the human right of all persons to participate in the political processes of their society. *[Underscorings supplied.]*

"With regard to the separate question of the legality of various means of furthering revolution, numerous sets of domestic and international law already proscribe certain forms of social violence. For example, international law, including human rights law, prohibits tactics of arbitrary violence, cruelty, and indiscriminate terror; the targeting of certain persons (such as children) and certain things; and generally any unnecessary death, injury, or suffering.

x x x

"Finally, those who are rightly concerned about the evils of any form of violence and the threat that domestic violence can pose to human dignity and international peace might also consider the warning of former President John F. Kennedy: "[T]hose who make peaceful evolution impossible make violent revolution inevitable." *[Address by John F. Kennedy at Punta del Este,* quoted in *The Law of Dissent and Riots vii (M. Bassiouni ed. 1971). Underscorings supplied.]*

Pangalangan et. al. had this to say:

"That they *[referring to two juristic frameworks or theories, namely, the traditional school anchored on the sovereignty of states, and the national liberation framework based*

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

x x x

"The four Geneva Conventions of 1949 have a common Article 3 x x x which provides minimum standards of protection in armed conflicts not of an international character." *[refers to humane treatment of non-combatants and* hors de combat*, prohibition against murder, mutilation, torture, taking of hostages, passing of sentences and carrying out executions without judicial guarantees, among others]*

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

x x x

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

"Article 3, the historical record shows, has been applied only in one instance – at the time of this paper – during the Algerian conflict. "In 1960, the Gouvernement Provisoire de la Re'publique Alge'rienne (GPRA) notified its accession to the Geneva Conventions to the depository, the Swiss Government. France, the colonial Power, objected to its accession." *[citing James E. Bond, Internal Conflict and Article 3 of the Geneva Conventions, Denver Law Journal, 1971]*

Antonio Cassese , Professor of Political Science, University of Florence, Italy, elaborated on this point: [**Terrorism and Human Rights**; American University Law Review; Summer, 1982; Conference; The American Red Cross--Washington College of Law Conference: International; Humanitarian Law; HUMAN RIGHTS AND HUMANITARIAN LAW; Washington College of Law of The American University].

" Only with regard to a limited category of insurrections, such as wars of national liberation, does humanitarian law grant a right of rebellion. In contrast, human rights standards proclaim a general right of rebellion. This right, however, is implicit and subject to stringent requirements. Provided these requirements are met, the right of rebellion can be exercised by any group, irrespective of the kind of government against which it rebels and of the intensity and scope of the struggle.

"To determine how international human rights standards recognize the right of rebellion, a reading of the Universal Declaration of Human Rights is helpful. The third paragraph of the preamble states that "it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law." (Universal Declaration of Human Rights preamble, para. 3, G.A.Res. 217, U.N.Doc. A/810, at 71 (1948).) Thus, in a state in which the basic human rights are disregarded by the authorities and no democratic or peaceful means are available to enforce respect for those human rights, rebellion is a legitimate reaction. This right to rebel against tyranny is an integral part of the Western liberal

tradition, and usually is defined as a "right of resistance" to oppressive government. The American theologian and liberal political thinker Jonathan Mayhew noted in 1750 that "when [the King] ... turns tyrant, and makes his subjects his prey to devour and destroy, instead of his charge to defend and cherish, we are bound to throw off our allegiance to him, and to resist."

"The same concept is addressed in some modern constitutions, such as that of the Federal Republic of Germany, which provides that everyone has the right to resist, absent any other possible remedy, those persons who seek to abolish the constitutional order.

"The right to rebel against oppression is, therefore, well rooted both at an international and a national level, but the method of its implementation raises several questions. First, when is armed violence justified, and within what bounds? The answer of the international community is limited to a set of historical forms of rebellion: struggles against oppression by colonial powers, racist regimes, and foreign occupants. The majority of the numerous U.N. General Assembly resolutions on self-determination grant the right to take up arms to achieve self-determination. International practice has evolved along these lines, and was confirmed in 1977 in the first Geneva Protocol on the Humanitarian Law of Armed Conflict (Protocol I). Thus, we can conclude <u>that in those three categories of fighting for self-determination, the rebels can legitimately use armed violence to exercise their right of rebellion.</u>"

x x x

"I have been speaking of the reaction of the international community to one particular category of rebellion against oppression--that of liberation movements. It is not clear whether the international community sets permissible limits on other forms of rebellion against tyranny. International standards do not determine whether internal rebellion can legitimately take the form of armed violence. Because this is a sensitive issue, the states have not developed international legislation to address it, each individual state preferring instead to pass regulations unique to its needs. Despite this practice, the international norm indicates that terrorism is strongly condemned. x x x x"

<u>C. The Application of Article 1, paragraph 4 and Article 96, paragraph 3 of Protocol I and other pertinent international humanitarian law instruments to National Liberation Movements</u>

To start with, International Humanitarian Law (IHL) in this opinion is meant the body of principles, standards, norms and rules in armed conflicts principally embodied, contained and expressed in:

(a) The Four Geneva Conventions of 12 August 1949:

I. For the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field;

II. For the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea;

III. Relative to the Treatment of Prisoners of War; and

IV. Relative to the Protection of Civilian Persons in Time of War;

(b) Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the

Protection of Victims of International Armed Conflicts (Protocol I) of 8 June 1977; and

(c) Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) of 8 June 1977.

Of course, the pertinent "principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience," otherwise known as the "Martens clause," complete the whole universe of international humanitarian law (IHL) relevant to the Agreement. (Protocol 1, Article 1(2))

By legal contemplation, the Geneva Conventions and Protocol 1 are applicable to:

a. all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties to the said Conventions and Protocol, even if the state of war is not recognized by one of them;

b. all cases of partial or total occupation of the territory of a High Contracting Party, even if said occupation meets with no armed resistance; and

c. armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right to self-determination. (Geneva Conventions, Common Article 2; Protocol 1, Article 1 (3) (4))

Protocol 2, on the other hand, (which develops and supplements Common Article 3 of the Geneva Conventions) applies by legal contemplation to:

a. all armed conflicts which are not covered by Article 1 of Protocol 1 and which takes place in the territory of a High Contracting Party between its armed forces and

I. dissident armed forces or other organized armed groups which

ii. under the leadership of a responsible command,

iii. exercise such control over a part of the territory

iv. as to enable them to carry out sustained and concerted military operations and to implement Protocol 2. (Protocol 2, Article 1)

In contrast, Common Article 3 of the Geneva Conventions applies in legal contemplation, to all armed conflicts not of an international character occurring in the territory of one of the High Contracting Parties to the said Convention and which do not meet all the requirements for the application of Protocol 2. (Geneva Conventions, Common Article 3). For purposes of easy reference and to determine, by way of elimination, which are the rules, principles and standards of IHL that are <u>not</u> contained or embodied in Common Article 3, the same is hereunder reproduced *in toto*:

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

criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(b) taking of hostages;

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

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

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

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

The Parties to the conflict should further 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." *[Underscoring supplied.]*

Thus, in case of intensive fighting, and in the absence of the acknowledgment of a state of war involving the application of the entire law of war, the provisions of Common Article 3 still apply. Additionally, the rest of the rules of Protocol 2 must be observed. Otherwise, at the very minimum, only the provisions of Common Article 3 apply provided that there are clear and unmistakable hostilities between the armed forces and other organized armed groups. *[Basic Rules of the Geneva Conventions and their Additional Protocols, ICRC, 1987, pp. 52-53]*

It is instructive to note that there are caveats in Protocol 1 and Common Article 3 of the Geneva Conventions, to wit:

a. The application of the Conventions and of this Protocol, as well as the conclusion of the agreements provided for therein, hall not affect the legal status of the Parties to the conflict. Neither the occupation of a territory nor the application of the Conventions and this Protocol shall affect the legal status of the territory in question. (Protocol 1, Article 4); and

b. The application of the preceding provisions shall not affect the legal status of the Parties to the conflict." (Common Article 3, par. 2, Geneva Conventions)

No such counterpart caveat expressly appears in Protocol 2. However, considering that Common Article 3 is suppletory thereto, the same is read into it.

On the other hand, the 3RD Geneva Convention, Article 2 includes an expanded definition of war which includes international conflicts which are not declared wars and armed conflicts between peoples. In other words, there could be a war situation "even if one of the parties refused to acknowledge the crisis"

Common Article 2, paragraph 3 of the Conventions provides:

> "Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall be 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."

Abi-Saab maintains that the non-recognition of the declaring party or of the authority representing it, in the context of common Article 2, paragraph 3, of the Conventions, inspired Article 96, paragraph 3 of the Protocol, and as such applies to the latter. *[at p. 407]*

He posits that though the term 'Power' usually denotes a State in diplomatic language, it has occasionally been used in a wider sense to include some other entities not having this character *[at p. 400, citing Dictionnaire de la terminologie du droit international, 1960, p. 492, Puissance]* , and, therefore, in that sense, liberation movements can become parties to the Conventions especially so that a wider interpretation is more compatible with the humanitarian objective and purpose of the conventions which, to be fully realized, commend universal application. *[at p. 400]*

Abi-Saab advances persuasively the following views on whether such an "authority" has to fulfill certain conditions for it to be able to make the declaration:

(1)The attempt to impose the condition that there must be recognition of the liberation movement by the regional intergovernmental organization concerned did not succeed and cannot be read into the language of Article 96 as it stands because such a condition would have led to a restrictive interpretation incompatible with the object and purpose of humanitarian law. While such recognition reduces the margin of possible controversy, "it is not constitutive of the international status or *locus standi* of the liberation movement for the purposes of the Conventions and the Protocol."

(2) As to the question of territorial control by the liberation movement, Abi-Saab maintains that it is a restrictive line of reasoning to base it on the assumptions of conventional warfare and disregards in the process the special features of guerilla warfare characteristic of wars of national liberation. "Though not exercising complete or continuous control over part of the territory, liberation movements, by undermining the territorial control of the adversary as well as their own control of the population and their command of its allegiance, muster a degree of effectiveness sufficient for them to be objectively considered as a belligerent community on the international level." <u>At any rate, it is significant that neither Article 1, paragraph 4 nor Article 96, paragraph 3, require territorial control. *[Underscoring supplied.]*</u>

(3) As to the condition that there must be proof that the liberation movement be truly representative of the people in whose name it is prosecuting the war of national liberation: Abi-Saab says that "In fact, until self-determination can be freely and openly exercised, one has to be content with certain indices of the representative character of liberation movements. Prominent among them is the fact <u>that a liberation movement can hold on and continue the struggle even at a low level of intensity, in spite of the difficult conditions in which, and the uneven position from which, it has to</u>

operate; something it could not have done if it did not enjoy wide popular support. In other words, a certain degree of continued effectiveness creates a presumption of representativeness. " *[Underscorings supplied, at pp. 412-413]*

(4) As to the condition that the liberation movement should attain a minimum of effectiveness as a belligerent, i.e. it should be a party to a real ongoing armed conflict: it is the whole approach of the Conventions that international armed conflicts are defined not as a function of the degree of intensity of hostilities, but in terms of its parties and the type of relations existing among them. It does not appear as a requirement in either Article 1 or Article 96 nor for that matter common Article 2 of the Conventions. *[at pp. 407-414]*

"The effectiveness of the liberation movement is measured first of all by its organization and internal discipline, as prescribed by Article 43 of Protocol I, It is also revealed by the fact that a liberation movement manages to hold on and continues to operate in spite of the great disparity of means and position between it and its adversary (a fact which can also be considered as a presumption of its representative character*).[at pp. 414]*

For reference, Article 43 of Protocol I provides:

> 1. The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, *inter alia*, shall enforce compliance with the rules of international law applicable in armed conflict. x x x x

Now, the most pertinent and key provisions to be examined are ARTICLE 1, PARAGRAPH 4, in relation to ARTICLE 96, PARAGRAPH 3 of PROTOCOL 1 ADDITIONAL to the GENEVA CONVENTIONS of 12 August 1949:

ARTICLE 1, PARAGRAPH 4 (On General Principles and Scope of Application):

> The situation referred to in the preceding paragraph [Conventions of 12 August 1949 for the Protection of War Victims, shall apply in the situations referred to in Article 2 Common to those Conventions] include *[which means in statutory construction as non-exclusive and merely illustrative]* armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right to self-determination, as enshrined in the Charter of the United Nations and the Declaration of Principles of International Law concerning Friendly Relations and Co-Operation among States in accordance with the Charter of the United Nations. *[Underscorings supplied]*

ARTICLE 96, PARAGRAPH 3 (On Treaty Relations upon entry into force of this Protocol):

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

> (a) The Conventions and this Protocol are brought into force for the said authority as a Party to the conflict with immediate effect;
>
> (b) The said authority assumes the same rights and obligations as those which have been assumed by a [N.B., referring to any High Contracting Party and not a particular entity] High Contracting Party to the Convention and this Protocol; and
>
> © The Conventions and this Protocol are equally binding upon all Parties *[N.B.. not necessarily a High Contracting Party]* to the conflict.

Are the instance of colonial domination, alien occupation or racist regimes illustrative or exhaustive a listing to qualify whether a struggle of a people in the exercise of its right to self-determination should be considered an international conflict?

Zimmermann notes:

> "One delegation considered that in interpreting the word 'include' literally, the list following is not exhaustive. In contrast, another delegation expressed regret that the paragraph remained selective and does not cover all situations entering the concept of the right of peoples to self-determination."

He noted, though, that the Charter of the United Nations and the Friendly Relations Declaration grant the right to self-determination "to all peoples equally and in every respect."

However, he concludes - without further reasoning - that, despite the use of the word "include", it should be interpreted as introducing an exhaustive list of cases and that the same essentially cover all circumstances in which peoples are struggling for the exercise of their right to self-determination. He explained that "colonial domination" is where a people has had to take up arms to free itself from the domination of another people, "alien occupation" involves partial or total occupation of a territory which has not yet been fully formed as a State, while "racist regimes" are those founded on racist criteria.

Zimmermann then maintains:

> "In our opinion, it must be concluded that the list is exhaustive and complete: it certainly covers all cases in which a people, in order to exercise its right of self-determination, must resort to the use of armed force against the interference of another people, or against a racist regime. On the other hand, it does not include cases which, without one of these elements, a people take up arms against authorities which it contests, as such a situation is not to be considered international." *[at p.54-55; Underscorings supplied.]*

Having said these, however, Zimmermann concedes:

> "As regards the crucial question of the inevitable disputes regarding the qualification of a specific conflict, one must assume that the Parties concerned will carry out their obligations in good faith, and count on the positive influence of all the High Contracting Parties. " *[at p. 56, underscorings supplied.]*

Aldrich explained in this connection that:

> "Reality can be messy, and armed conflicts in the real world do not always fit neatly into the two categories -- international and noninternational -- into which international humanitarian law is divided. Sometimes a state will intervene militarily in the territory of

another state where a civil war is in progress, perhaps at the invitation of the government of that state or perhaps in support of another party to the civil war. Sometimes several states will intervene. For purposes of analyzing the rights and duties under international humanitarian law of each of the parties to such mixed conflicts, to what do we turn? Intervening states are likely to see themselves as involved in an international armed conflict, if only to claim prisoner-of-war status for any of their troops that may be captured by an enemy, but such a claim is weak analytically if they are assisting the government at its request against a rebellious party, at least unless a third state is assisting the rebels.

x x x

"My experience with the law in the Vietnam War and my subsequent thoughts about it have convinced me that, whenever a state chooses to send its armed forces into combat in a previously noninternational armed conflict in another state -- whether at the invitation of that state's government or of the rebel party -- the conflict must then be considered an international armed conflict, and the rebel party must be considered to have been given, from the date of such intervention, belligerent status, which, as a matter of customary international law, brings into force all of the laws governing international armed conflicts. If a state other than the state in which a civil war is occurring commits its armed forces to the battle on one side or the other, the nature of the armed conflict changes fundamentally. While one can understand that a government involved in a civil war in its territory might object to its internal enemy's acquiring belligerent status merely because another state has been induced to join the war, the armed conflict will certainly have become international, and it will be practically impossible to apply both the rules on international armed conflict and those on noninternational armed conflict to what, in fact, is a single armed conflict with two warring sides." *[Underscorings supplied.]*

Zimmermann clarifies that the armed conflict must be between a people fighting for self-determination and a Party to Protocol I for this article to apply. If on the other hand the State in whose territory such a conflict takes place is a Party to the Conventions and to Protocol II [and not Protocol I], Article 3 common to the Conventions and Protocol II will bind all the Parties to that armed conflict "straightaway." *[at pp. 1088-1089]*

Zimmermann further examines the situation if an armed conflict within the meaning of Article 1, paragraph 4, is conducted against a Party not bound by the Protocol I:

a) If the State is a Party to the Geneva Conventions:

"The gradual recognition in international law of the right of self-determination and of the international nature of armed conflicts conducted in the exercise of this right had led to the view, even before the Protocol, that common Article 2, paragraph 3, of the Conventions opened also to national liberation movements a possibility to accept the Conventions. x x x

" In fact the same majority of States had insisted on the international character of armed conflicts in the exercise of self-determination already before the adoption of the Protocol, and had then proposed, defended and obtained the inclusion of paragraph 4 of Article 1 and paragraph 3 of the present Article 96 of the Protocol.

"These States did not for one moment think of taking away from national liberation movements a right which they had recognized on many occasions as due to these movements and which will now be regulated and clarified in this article once the Protocol is in force for the State concerned. Consequently, for a very large majority of States the route of acceptance of the Conventions in accordance with their common Article 2, paragraph 3, remains open to authorities representing peoples fighting for self-determination against a State which is a Party only to the Conventions. In the same case a declaration of acceptance

of the Protocol would only count as a unilateral undertaking of obligations in matters which are not covered by customary law."

b) If the State is not a Party to the Geneva Conventions:

"In this situation, which is highly exceptional nowadays, any declaration by a liberation movement could only have the effect of a unilateral commitment in matters not covered by customary law." *[at pp. 1091-1092; Underscorings supplied.]*

Another insight can be had in **The International Hostages Convention and National Liberation Movements**, **Wil D. Verwey** [The American Society of International Law, The American Journal International Law; January, 1981 ; 75 A.J.I.L. 69]:

[Mr. Verwey is a Professor of International Law, the University of Groningen, the Netherlands. He took part, as the Netherlands representative to the Sixth Committee of the General Assembly during its 34th session, in the final rounds of negotiations on the International Convention against the Taking of Hostages.]

"The next question to be considered is the extent to which the law of Geneva covers acts committed by national liberation movements. From the point of view of international law, until recently national liberation movements could doubtlessly have been regarded as parties to noninternational armed conflicts, to which the provisions of Article 3 apply, unless the conditions for their recognition as "belligerents" were met. During the sixties and seventies, however, the nonaligned countries, supported by those of Eastern Europe, launched a massive campaign aiming at the recognition of the armed struggle of national liberation movements as being "international" by definition: i.e., from the first shot, so to speak, without taking into account the traditional condition of presenting a real and sustained challenge to the government. Thus, General Assembly Resolution 3103 (XXVIII) of December 12, 1973, provides:

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

x x x

"At best, one could agree with the delegate of Mexico who said that "the current trend in international law was to regard wars of national liberation as armed conflicts of an international character." Thus, it is uncertain whether the provisions of Article 3 or the rules of Geneva with respect to international armed conflict should be considered applicable to national liberation movements, assuming in the latter case that these rules are now generally binding customary law and are no longer subject to the conventional inter se clause, which excluded parties other than states from being covered.

"In 1977, the effort to solve this legal dispute resulted in the insertion into Article 1, paragraph 4 of Additional Protocol I of the provision that "international armed conflicts" in the sense of Article 2 of the four Geneva Conventions, include armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination x x x x"

Furthermore, Verwey presented a conservative view on the application of the provisions of Article 96, paragraph 3 of Protocol I to national liberation movements:

"It is clear from this latter quotation that national liberation movements have acquired only a conditional treaty-making capacity. The legal validity of any such unilateral declaration depends on the prior ratification of Protocol I by the government against which the liberation movement is directed. Moreover, the fact that so far only 11 countries have ratified Protocol I, and that no potential adversary of any national liberation movement is among them, entirely precludes the possibility of concluding that the rule formulated in Article 1 had developed into a rule of customary international law. (Ten out of eleven contracting parties are nonaligned countries (Botswana, Cyprus, Ecuador, Ghana, Jordan, the Libyan Arab Jamahiriya, Niger, El Salvador, Tunisia, and Yugoslavia); the eleventh country is Sweden. The call made by the Sixth Committee in draft Res. A/C.6/34/L.9, adopted by consensus on November 14, 1979, "that all States consider without delay the matter of ratifying or acceding to the two Protocols," affirms that we are dealing here with conventional, not customary, rules of law.)

"Thus, it would be incorrect to suggest at present that national liberation movements could become a party to the Geneva Conventions. Accordingly, their enemies normally will consider their struggle as covered by the provisions of Article 3, which prohibit hostage taking by national liberation movements, if only with respect to persons protected under the terms of that article, under the conditions indicated above."

Abi-Saab, for his part pointed out that one of the objections to the inclusion of the subject amendment to Article 1 of protocol 1 is the argument of discrimination, i.e. that humanitarian protection should extend to all war victims without distinction and not only to those of wars of national liberation. He contended, however, that:

"This line of argument would have been convincing if its proponents were consistent and stood for the elimination of the distinction between international and non-international armed conflicts. But that was not their case. By contrast, Norway, for example (one of the initiators of the 15-Power amendment), adopted a consistent attitude aiming at maximum extension of protection, by advocating the abolition of the above-mentioned distinction; but short of reaching such a result, it defended the largest possible definition of international conflicts to extend as far as practically feasible the scope of humanitarian protection*."[at p.381; Underscoring supplied]*

In expounding on the application of Article 1, paragraph 4 of Protocol 1, Abi-Saab posits a very progressive view:

"Article 1, paragraph 4, does refer to the exercise of the right of self-determination; but only in order to qualify the struggles of peoples in the three types of situations mentioned therein, i.e. armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination.

"Does this mean that the provision is limited to these three specific cases of denial of self-determination? The literal interpretation of the text leads to an affirmative answer to this question. But it may be useful in this context to recall the explanation given by the Australian representative in Plenary at the end of the first session, for his renewed support of Article 1 as amended x x x:

> 'At that time (of voting in the Committee his delegation had explained that, although it favoured a broadening of the field of application of draft Protocol 1, it feared that the terms used . . . might be too restrictive and exclude all conflicts other than those enumerated. After due consideration, his delegation had realized that if paragraphs 1 and 2 (4 in the final version) were

taken together and if the word 'include' in paragraph 2 was taken literally, the list could be interpreted as not being exhaustive. ' [Underscorings supplied.]

"In other words, the Australian representative tried to put forward an interpretation of the provision, which considers the enumeration of the specific types of situations as illustrative and not exhaustive.

"Such an interpretation is more in accord with the spirit of the Protocol and the Conventions: for if we proceed from a humanitarian point of view, we have to favour the application of as much humanitarian law to as many conflicts as possible. This has been the systematic policy of the ICRC; and it is through the practice of the ICRC, of international organizations and of States that such a liberal interpretation can progressively consolidate." *[at pp. 397-398; Underscorings supplied.]*

He continued:

"Article 1, paragraph 4, can be plausibly construed in a more liberal way, by interpreting the enumeration of the three categories mentioned therein as illustrative and not exhaustive; an interpretation which brings within its ambit all cases of denial of self-determination, within as well as beyond the colonial context. The absence of the requirement of recognition by the regional organizations either in the definition or for establishing the *locus standi* of liberation movements, facilitates the adoption of this interpretation by the ICRC and by third States in dealing with specific situations. And it is through such subsequent practice that this liberal interpretation - which is much more compatible with the humanitarian object and purpose of the provision and of the whole Protocol – can be anchored in reality and made to prevail." *[at p. 432]*

Abi-Saab also clarified on the effect of non-acceptance by an existing government to Protocol 1 on the applicability of Article 96, paragraph 3 thereof:

"Even if Protocol 1 is not accepted as a separate legal instrument by the handful of governments facing a war of national liberation, its provisions assert themselves as the proper interpretation of the Geneva Conventions.

"In this respect, the fact that the *locus standi* of liberation movements was codified in Article 96, paragraph 3, vindicates the earlier interpretation of 'Power' in the Conventions to include such movements, at least for the purposes of common Article 2, paragraph 3 of the Conventions, whose formula was more or less borrowed by Article 96 of the Protocol.

"This means that if a liberation movement makes a declaration accepting the provisions of the Conventions, these Conventions, as interpreted in the light of Protocol I, become applicable in the ongoing war of national liberation, regardless of the opposition of the adversary government, as long as it is itself bound by the Conventions.

"A very strong case can thus be made for considering the 'declarations of intention' made recently by certain liberation movements *[e.g. that of the African National Congress or ANC in Revue Internationale de la Croix Rouge, Vol. 63, No. 727, Jan.-Feb. 1981, p. 21]* to respect the rules of the Conventions and of Protocol 1, as satisfying the requirements of common Article 2, paragraph 3, and thus bringing the Conventions, as interpreted by the Protocol, into operation in the ongoing conflict." *[at pp. 433-434; Underscorings supplied.]*

In this connection, Pangalangan et. al. shared this view:

"Wars of national liberation were hitherto considered as internal armed conflicts and were therefore within the domestic jurisdiction of states. They become international conflicts

only when they had crossed a geo-military threshold, beyond which the world community was placed on notice that said revolutionaries qua belligerents were entitled to *locus standi* as international persons."

"With the progressive development of the people's right to self-determination, it became legally possible to justify the international characterization of civil wars, without negating the principle of non-interference. First, the right of self-determination is ascribed to a people, such that said possessor of an international right must necessarily be an international person in order to assert and enjoy that right. Second, wars of national liberation were deemed the politico-military assertion of the right to self-determination. A liberation movement, therefore, is asserting an international right against a state, which by denying that right, is in breach of international obligations. Third, the use of armed force to deny a people of their right to self-determination is an act of aggression and entitles the party thus aggrieved to legitimately resort to armed means to resist such forcible denial of their right to self-determination." *[Underscorings supplied.]*

x x x

"The geo-military criterion, therefore, as a norm for the characterization of armed conflicts, is international law from the standpoint of the individual claims of outside states. x x x x"

x x x

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

"The national liberation theory of internationalization is the complete reverse of the basic theory of old. Wars of national liberation are international in character because they express the extent to which contradictions in global relations have been internalized within the boundaries of a nation-state. Legally formulated, the new criterion is the international nature of the rights being internally violated within the boundaries of a state. "

x x x

"While the old theory measures the extent to which an internal conflict reaches out to the world community and affects outside parties, the new theory examines the extent to which international sources of tension creep into the domestic affairs of a state."

"Prof. Abi-Saab in Wars of National Liberation in the Geneva Conventions and Protocols refers to this as 'poetic justice'":

> "x x x The present situation partakes of what one is strongly tempted to call 'poetic justice'. If the internalization of relations between the 'centre' and the 'periphery' preceded direct political domination, a very strong tendency has recently shaped up within the international community to consider armed struggles which aim at overthrowing domination as international conflicts, even before this objective is reached."

Pangalangan et. al. asserts that while the aforecited text refers to classic cases of colonialism, "it is submitted that this 'poetic justice' equally applies to **neo-colonialism**." *[footnote No. 40]* Thus:

"Through classical colonialism, erstwhile international matters were legally subordinated to the municipal law of the colonializing power. With neo-colonialism, through

the granting of nominal independence, two processes simultaneously transpire. Oftensibly, the relationship between the colonizer and its subject is once again 'internationalized', replete with all the trappings of the diplomatic relations between sovereign states. At the same time, however, the client-patron relationship has been so institutionalized, that through sophisticated legal and economic devices, colonial plunder persists. Domestic comprador elements, for instance, shall continue to fight local battles, politically and even militarily, for their patron, a most apt example of a 'war by proxy'.

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

They noted furthermore:

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

"In Cassese, The Status of Rebels under the 1977 Geneva Protocol on Non-International Armed Conflicts *[at p. 398]*, this formulation was considered restrictive of the scope of the term 'wars of national liberation'. However, in Abi-Saab, the formulation was taken to be merely a specification of three concrete instances of denial of self-determination, an enumeration not necessarily exclusive." *[Footnote No. 44; Underscorings supplied.]*

In view of the above discussions, what is meant or contemplated by colonial domination, alien occupation and racist regimes in Article 1, paragraph 4?

There is existing and increasingly progressive legal literature that says the struggle against neo-colonialism may be contemplated in theses terms.

Does this provision require that there be both colonial domination and alien occupation as one integral ground for unilateral declaration under Article 96, paragraph 3 or are the three grounds, i.e. colonial domination, alien occupation and racist regime – three separate and distinct grounds which are independent of one another?

There seems to be divergent opinions on this although there is sufficient existing legal literature that says they can be both distinct and independent and at the same time an integral ground.

On another point, Pangalangan et. al. addressed the issue of subjectivity that the national liberation framework uses "political rhetoric that passes for legal terminology", Pangalangan et. al took note of Baxter's view *[Baxter, Humanitarian Law or Humanitarian Politics? The 1974 Diplomatic Conference on Humanitarian Law, 16 Harv. Int'l. L.J. 1-26 (1975) at 15]*:

> (T)he danger of such expressions as 'fighting against colonial domination and alien occupation and against racist regimes' is that they could be applied to a

> wide range of conflicts going far beyond what was contemplated by those states which have led the campaign for application of the whole of the law of war in wars of national liberation… A subjective appraisal of the situation might be expected, each side choosing the characterization of the conflict that would best suit its interests, and claiming that its adversary had completely misconstrued and violated the law. Therein lies legal chaos x x x x

But Pangalangan et. al. argued:

"Lack of terminological precision is a valid criticism but it is an unavoidable shortcoming in dealing with international law concepts, for 'most, if not all, concepts of international law, from the very general such as 'sovereignty' and 'good faith', x x x have a more or less large margin of vagueness around them. What counts is whether they have a minimum hard-core allowing for legal determination. *[citing Abi-Saab; in an extended footnote No. 52, the authors also quoted Jose Diokno in Asian Lawyers, People's Rights and Human Rights, August 27, 1979, thus "Indeed, we are aware that often the utility of a concept lies in its very imprecision: for it allows its content to enlarge or contract according to the situation I which it is to be applied".]*

Wilson acknowledged that:

"The main legal problem to be solved was the following: whether members of liberation movements fighting against colonial powers were entitled to combatant status and consequently to treatment as prisoners of war upon capture, or whether their acts of violence could lawfully be subject to the penal law of the established government. This problem is now solved by Article 1, paragraph 4 of Additional Protocol I (1977) to the Geneva Conventions, which has given members of liberation movements combatant and POW status. At the time of its drafting, this provision was the object of an acrimonious debate, and the Diplomatic Conference that adopted the Protocols risked becoming a fiasco. Article 1, paragraph 4 of Protocol I is still an object of contention and its existence is one of the main reasons that the United States refuses to ratify Protocol I."

On the provisions of Protocol I relevant to liberation movements, i.e., Article 1, paragraph 4, Articles 43 and 44, and Article 96, paragraph 3, these provisions are thoroughly commented on by Wilson and such views are generally correct according to Ronzitti.

Ronzitti further asked:

"Two points, in particular, merit examination. The first is the relevance of Article 1, paragraph 4 in the post-decolonization period. Is this provision to be confined to the history of international law or is it possible to foresee situations in which it will again be invoked? The second is the reconciliation of provisions that have given international status to wars of national liberation, with customary rules of the law of war and conventional humanitarian law in force before the adoption of Protocol I."

"The phenomenon of wars of national liberation does not mark the end of the era of decolonization. Because of the permanent relevance of the right to self-determination and the trend toward its application beyond classic colonial situations, it is foreseeable that conflicts falling under the definition of Article 1, paragraph 4 of Protocol I will recur in the future. Hence the need to consider every possible implication of the fact that wars of national liberation have gained the status of international armed conflict."

D. Are National Liberation Movements and their Participants Criminals, Terrorists, Freedom Fighters or Revolutionaries?

So how should national liberation movements be considered in international law, particularly with respect to international humanitarian law?

Parker further observed:

"Most of you are aware of the facts set out in the above-outlines situations where people have the right to self-determination but have not yet realized it. In these countries there are conflicts -- I do not just mean verbal ones but armed ones. Unfortunately, many of the states involved in attempting to militarily obliterate the peoples with valid self-determination claims try to reduce these conflicts to "terrorism". So depending on which side of the fence you are on, group A is either a terrorist or a freedom fighter. Some of these regimes' friends either acquiesce or actively support this erroneous assertion.

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

Parenthetically, Abi-Saab also had occasion to point out the peculiarities of wars of national liberation:

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

"In these conditions liberation movements have no choice but to carry on a 'poor man's war', by resorting to non-conventional or guerrilla warfare, which calls on man's ingenuity and cunning to beat the machine and compensate for material inferiority. It is a special kind of warfare which has its own characteristics and internal logic." *[at p. 416]*

Verwey, pertinent to this point, on the other hand, said that:

"The pivot of the compromise was the agreement that Article 10 (Article 12 in the final draft) on the scope of the Convention would refer to the law of armed conflict embodied in the Geneva Red Cross Conventions and the Additional Protocols thereto in such a way as to preclude the conclusion that the Hostages Convention would supersede the law of Geneva. x x x x"

Verwey pointed out the building consensus during the negotiations on the International Convention against the Taking of Hostages:

"Statements made during the final debate in the Sixth Committee that Article 12 represented the "key" or "pivot" of the package deal, or that Article 12 will prevent the

Convention from "being used against the struggle for self-determination," could not be taken to mean, therefore, that acts committed by national liberation movements were beyond its scope. They should rather be taken as expressions of the sincere desire to emphasize that the struggle for national self-determination is legitimate and that acts committed by national liberation movements are not to be identified with the performance of ordinary criminal (including terrorist) acts." *[Underscorings supplied.]*

One commentator noted:

"Some of the organizations included in this section represent the internationally recognized opposition movements within countries where there is a civil war (e.g. Iran) or a war of national liberation (e.g. Sri Lanka). Under the U.N. charter and international treaties, the principle of self-determination provides that historically united groups of people (e.g. the Palestinians) have a right to determine their own form of government. In South Africa, for instance, the black majority was denied self-determination under the apartheid system. Today, there are many different ethnic national groups (like the Karenni in Burma, the Kurds in Iraq, the Kashmiris in Kashmir and the Tibetans in Tibet) who are denied self-determination in violation of international law.

"When armed resistance groups meet certain tests and follow the rules set out by the Geneva Conventions and other humanitarian (armed conflict) law, they are not considered terrorist organizations or mercenaries, but legitimate parties to a conflict. Therefore, like the African National Congress in South Africa during apartheid, they have recognized legal status, granting them specific rights, such as to be treated as prisoners of war if apprehended (i.e. not subject to criminal proceedings for shooting a soldier or for treason). *[Underscorings supplied.]*

Pangalangan et. al. , on the other hand, expounded on their critical view of the traditional concept on national liberation movements:

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

"The chief flaw of this framework is that while the world community has evolved international legal safeguards to minimize the human costs of armed conflict *[referring to international humanitarian law on human rights and on armed conflicts]*, international law itself – by its stubborn insistence on the strict categorizing of rebel groups based primarily on their effective strength – has precluded the application of these legal restraints in those cases where they are needed most, i.e. in internal armed conflicts, where there is an appalling asymmetry between the protagonists in terms of men, organization and firepower."

"For unless the rebels have attained the requisite degree of success, international law is deemed inapplicable, deferring to the presumptive primacy of the domestic jurisdiction of the sovereign state. Until then, therefore, the rebels are subject to the impunity of a fevered state whose national security so-called is gravely threatened. Thus, international law comes to the rebel's succor precisely when those rebels are strong enough to demand that it do so. Law, as always, is on the side of the heaviest battalions."

Pangalangan et. al. sought to ascertain the legal mode by which international legal protection can be made applicable to erstwhile internal armed conflicts. They focused on the development of the concept of the national liberation movement and contended that they have a privileged status under international law.

"Hence, a rebel group thus classified may be entitled to *locus standi* as an international person regardless of its geo-military standing. That insurrectionary movement is at once placed under an entirely different regime of law. It may enjoy the benefits of international humanitarian protection as a matter of right, and not merely at the forbearance of the established government. It shall furthermore be freed of the handicaps inherent in the application of domestic jurisdiction, under which a liberation movement is presumed to be criminal and subversive, unless it otherwise proves to be ultimately successful. " *[Underscorings supplied.]*

x x x

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

"To the criticism that the national liberation framework is but an ideology in legal garb, suffice it to say –

> (T)hat no political system has an a priori absolute and universal validity, that liberal capitalism just as authoritarian capitalism or socialism in all its different forms, may well be detested by some and preferred by others; that the right of peoples to self-determination is not linked to any pre-determined system; that freedom has many meanings, and each people has the exclusive right to decide which meaning they will give it….' *[quoting Chaumont, A critical Study of American Intervention in Vietnam in 2 Falk, The Vietnam War and International Law, 125-157 (1969) at 149.]*

In an excerpt from **Responding to Terrorism: Challenges for Democracy** (August 2002, Choices for the 21st Century Education Program, [Watson Institute for International Studies, Brown University], the following view was espoused:

"Throughout history, the world has known political violence and war. For centuries political and religious thinkers from many traditions have wrestled with two key questions. When is the use of force acceptable? What principles govern how force that may be used? These two questions are central to something known as "just war" theory.

"These two questions and the concepts of just war theory may also be useful in considering terrorism. In past debates about terrorism, some have suggested that one person's terrorist is another's freedom fighter. Are these terms merely labels that have to do with whether one agrees or disagrees with the cause? Or is the distinction based on more concrete and objective grounds?

"Today, just war theory underlies much of accepted international law concerning the use of force by states. International law is explicit about when states may use force. For example, states may use force in self-defense against an armed attack. International law also addresses how force may be used. For example, force may not be used against non-

combatants. Despite these laws and norms, there are those who oppose the use of violence under any circumstances. For example, this commitment to non-violence led Mohandas Gandhi to build a movement of national liberation in India organized around the practice of non-violent resistance.

x x x

“After the Second World War, the use of violence in struggles for self-determination and national liberation fueled a new aspect of the debate on legitimate use of force-the differences between freedom fighters and terrorists. For example, newly independent Third World nations and Soviet bloc nations argued that any who fought against the colonial powers or the dominance of the West should be considered freedom fighters, while their opponents often labeled them terrorists.

x x x

"…all liberation movements are described as terrorists by those who have reduced them to slavery. …[The term] terrorist [can] hardly be held to persons who were denied the most elementary human rights, dignity, freedom and independence, and whose countries objected to foreign occupation." (UN Ambassador from Mauritania Moulaye el-Hassan)

“Critics countered that this argument was misleading because it failed to consider the issue in its entirety. What mattered was not the justness of the cause (something that would always be subject to debate) but the legitimacy of the methods used. The ends, they argued, could not be used to justify the means.

“By the late 1970s, significant portions of the international community (though not the United States) had decided to extend the protection of the Geneva Convention to include groups participating in armed struggle against colonial domination, alien occupation, or racist regimes; and to those exercising their right of self-determination. The significance of this change is that it seemed to extend legitimacy to the use of force by groups other than states.

“During the UN debates on terrorism, some argued that the methods of violence used by states can be morally reprehensible and a form a terrorism.

"…the methods of combat used by national liberation movements could not be declared illegal while the policy of terrorism unleashed against certain peoples [by the armed forces of established states] was declared legitimate." (Cuban Representative to the UN)

Cassesse explained that:

“International standards do not provide a clear-cut answer to every possible question, but there are borderline cases that may be open to differing solutions. For example, a faction opposing an indisputedly undemocratic government that denies the most elementary human rights, resorts to forms of terrorism, such as taking hostage members of the army or government to obtain by force, greater respect for human rights. Is this action at odds with the doctrine enshrined in such basic international instruments as the Universal Declaration of Human Rights, the Covenant, and article 3 common to the 1949 Conventions? The contention could be made that the action might be considered legitimate as long as certain strict requirements are fulfilled: the incumbent authorities are unquestionably oppressive and do not leave any room for democratic change; the sole purpose of the "terrorist" action is to achieve some degree of freedom; no innocent civilian is among the victims; and no inhumane or degrading treatment is meted out to the people attacked.

"In summary, international standards of a universal character usually do not allow or condone terrorism, notwithstanding the motivation or ideological matrix of its origin. Rebellion against tyranny and oppression is allowed as a last resort, whether it is a struggle for national liberation or a rebellion against an authoritarian nondemocratic government that allows no form of democratic change. Neither freedom fighters nor rebels, however, are permitted to resort to terrorism." *[Underscoring supplied.]*

x x x

"In conclusion, I present three basic propositions. First, international standards on human rights permit rebellion on two conditions: the target of the rebellious acts must be an authoritarian government that is denying basic human rights, and no democratic and peaceful means of change are available. International standards on human rights, as well as humanitarian law, do not allow rebels to deprive innocent people of their human rights. Even in cases where the goal of the political and military struggle is expressly regarded as legitimate by the international community, such as in wars of national liberation, resorting to terrorist methods is not permitted. x x x x"

Greene had this to say:

"Instead of endeavoring to define terrorism yet again, however, this article proposes an analytical framework for evaluating both private and public political violence under international law. The proposed framework sets forth a method for determining when, and under what conditions, political violence constitutes impermissible conduct or "terrorism" Under the analytical framework presented, impermissible political violence consists of acts committed by government or private actors who violate fundamental human rights without justification or excuse. Terrorism, therefore, is committed by use of impermissible methods, reliance on impermissible motivations, or attacks on impermissible targets. This framework, unlike those previously proposed, applies to violence undertaken by states as well as by private actors." *[Underscorings supplied.]*

x x x

"For their part, the governments of the democratic capitalist nations, led by the United States, have generally rejected the notion that the political context of anticolonial or revolutionary situations should comprise a factor in determining the contours of terrorism. In addition, these governments have accused Third World and communist states of fomenting terrorism. However, in marked contradiction to their espoused "antiterrorist" rhetoric, a number of democratic capitalist states have provided material aid or moral support to private actors or states that engage in impermissible acts of violence x x x x" [Underscoring supplied.]

x x x

"The proposed framework that determines the permissibility of political violence has three components. First, the framework identifies methods, motives, and targets of violence which are inherently violative of human rights. "Inherently violative" in this context means that which all humane and principled parties to a conflict agree comprises crimes against humanity that even political objectives linked to fundamental human rights can never justify.

"Second, the proposed framework outlines the circumstances in which actors can justifiably resort to violence in the first instance. International norms restrict states in their first use of violence as a means to resolve grievances; no less should be required of private actors.

“Third, the framework provides standards that identify compelling reasons that justify recourse to political violence. The standards outlined in the framework limit initial recourse to violence, provide viable standards of conduct once violent conflict begins, and require an examination of underlying political grievances.
However, before establishing procedural and substantive requirements for justifiable recourse to violence, the international community must first establish categories of *per se* impermissible conduct and provide harsh and certain criminal penalties for these violations. This category of *per se* impermissible conduct would preclude certain acts regardless of the political motivation of the actor, the political context of the violence, or the actor's state or private status. Violators of *per se* impermissible acts would, by definition, receive international approbation as unprincipled and inhumane. x x x x”
International law identifies three acts or methods about which humane and principled regimes and private actors agree deserve universal condemnation and criminal sanctions.

Schubert clarified:

“In short, anti-colonial and anti-racist liberation struggles are legally equivalent to war (read: international armed conflicts), likewise guerrillas are equal to soldiers in such conflicts. It is irrelevant whether or not the (colonial or racist) state accepts this. Declarations of war are equally irrelevant.

“Neither the Geneva Conventions nor the additional Protocols make use of the term "terrorism" to exclude certain groups from the humanitarian rights of people in war. The only preconditions - stated in Art. 4 of the Third Geneva Convention - are a certain degree of regulated means of struggle and compliance with the rules of war (Art. 4A/2d of the Third Convention). It goes without saying that such rules of war include attacks on the enemy's instruments of war or the killing of enemy combatants x x x x”

x x x

“Criminal law not only has the ability to make members of a party in the civil war "criminals", it can also punish them on a moral level by not seeing them as opponents in a war but rather as morally inferior criminals. Both of these are means of criminalizing political opponents. (in: Politische Prozesse ohne Verteidigung, Berlin 1975, p.18)”

x x x

In **the "Geneva Declaration On Terrorism" of March 21, 1987** which was issued at the end of the conference of the International Progress Organization (IPO), the following comments are edifying:

> The peoples of the world find themselves in countless struggles for a just and peaceful world, based on fundamental rights, which must be seen in the context of a whole series of broadly supported international conventions.

As for present-day confrontations:

> Against this background of suffering and struggle, the international debate in the media and elsewhere concerning terrorism is being distorted and manipulated by the ruling powers: The public are mislead into thinking that terrorism is solely carried out by victims of the system. We would like to make it clear that terrorism is almost always an expression of the ruling structures and has little to do with legitimate

> resistance struggles. The trademark of terrorism is fear and this fear is stimulated in the population through horrifying forms of violence. The worst form of international terrorism is the preparation for nuclear war, in particular the expansion of this arms race into outer space, as well as the development of first-strike weapons. Terrorism includes state-organized holocausts against the people of the world. The terrorism of modern states and their high-technology weapons is far worse than the political violence practiced by groups who want to end oppression and live in freedom. (*From the "Geneva Declaration On Terrorism", 21.3.1987, translated from Janssen and Schubert, Staatssicherheit, p.187ff.; the first people to sign this declaration were Nobel Prize winner and former Irish Foreign Minister Sean MacBride, former U.S. Justice Secretary Ramsey Clark, Dr. Johann Galtung, peace researcher at Princeton University, and Dr. Richard Falk, also of Princeton University)" [Underscoring supplied.]*

"This definition of terrorism is an accurate one and is fully in line with the criteria of the rights of people in war. The humanitarian rights of people in war forbids the use of violence against uninvolved civilians with the aim of spreading fear. Of course, it is impossible to deny that some political targets are attacked with violence during liberation struggles, thus spreading fear among uninvolved persons - hijacking airliners, for example - but this does not contradict the fact that guerrilla attacks against persons and objects connected to the colonialist war machine carried out in armed independence struggles against colonialism are in full accordance with contemporary rules of war.

x x x

"We shouldn't confuse the question of the legitimacy of armed operations by guerrillas in an anti-colonial independence struggle under international law with a moral question or with the question of their use of effectiveness. According to the Geneva Declaration On Terrorism:

> To say this more clearly: We recommend that non-violent resistance be used whenever possible, and we respect the genuine efforts made by the liberation movements in South Africa and elsewhere to avoid the use of violence as much as possible in their struggle for justice. We condemn all methods of struggle which inflict violence on innocent civilians. We don't want terrorism, but we must emphasize that the terrorism of nuclear weapons, criminal regimes, state atrocities, attacks with high-technology weapons on Third World peoples, and the systematic violation of human rights are far, far worse. **It is a cruel extension of the scourge of terrorism to classify the struggle against terrorism as "terrorism". We support these struggles and we call for clear political terminology together with the liberation of humanity.** *[Underscorings supplied.]*

Lastly, as applied to the concrete situation of the National Democratic Front, the Communist Party of the Philippines, the New People's Army and its alleged members and leaders, it will be significant to take note at this juncture what the International Association of People's Lawyers (IAPL) - an international formation of human rights lawyers, law students, paralegals and legal workers from India, Turkey, the Philippines, Colombia, the Netherlands, Belgium, Afghanistan, Nepal, Greece, Mexico established in December 2000, with observers from Germany, United Kingdom, Spain and Cuba - had taken on the subject of this instant

legal query on 13 October 2002 in its Resolution On the Designation by the US and Dutch Governments of CPP/NPA and Prof. Jose Maria Sison as Terrorists:

> To our knowledge and information, the CPP and NPA are highly responsible and principled political organizations fighting for national liberation and democracy in the Philippines.
>
> They recognize, adhere and conform to international instruments and standards of human rights and international humanitarian law. The CPP and NPA together with 15 other organizations are represented by the National Democratic Front of the Philippines (NDFP) in peace negotiation with the Government of the Republic of the Philippines (GRP) since 1992
>
> These negotiations have been facilitated by the Netherlands, Belgium and Norway and endorsed by the European Parliament. These negotiations have so far produced ten agreements the most important of which is the Comprehensive Agreement on Respect for Human Rights and International Humanitarian Law. These peace negotiations are now placed in jeopardy as a result of the designation of the CPP and NPA and Prof. Jose Maria Sison (who is the Chief Political Consultant of the NDFP panel in the peace negotiations) as "terrorists".
>
> x x x
>
> Furthermore, the IAPL commits itself to expose and oppose the ideological and political offensive of reactionary governments all over the world to denigrate as "terrorists" liberation movements and political organizations with valid and legitimate causes.

II. THE NDFP DECLARATION OF JULY 1996 AND ITS POSITION ON ITS STATUS IN INTERNATIONAL LAW

From all the foregoing thus far, a proper appreciation on the status of the national liberation movement in the Philippines can be undertaken.

On 6 July 1996, the NDFP issued its Declaration of Undertaking to Apply the Geneva Conventions and Protocol 1. According to its text, said Undertaking was made on the following premises:

> a. "The NDFP is the political authority representing the Filipino people and organized political forces that are waging an armed revolutionary struggle for national liberation and democracy, in the exercise of the right of self-determination x x x against the persistent factors and elements of colonial domination and against national oppression, including chauvinism and racism, victimizing the entire Filipino nation and particular minorities in the Philippines."
>
> b. "The persistent foreign domination and national oppression are carried through the GRP as a puppet government in the service of the United States government, which controls and uses it x x x perpetuating in essence the factors of US colonial domination over the Philippine economy, politics, security and culture."
>
> c. "Since the beginning of the civil war, the GRP has in one essential respect maintained the character of the armed conflict as an internationalized internal conflict through subservience to US domination and GRP dependence on US military and other forms of intervention and assistance in the armed conflict. x x x x "

d. The revolutionary forces of the Filipino people consist of:

I. The allied revolutionary organizations of the NDFP which are the consolidation of the revolutionary mass base running into millions in rural and urban areas;

ii. The organs of political power duly constituted under a basic law and established in a significant portion of territory in the Philippines;

iii. The CPP as the ruling party in said organs of political power and the leading party in the NDFP; and

iv. The NPA as main armed force and which is under an effective and responsible command and exercises such control over a significant portion of territory in the Philippines as to be able to carry out sustained and concerted military operations and to implement the Geneva Conventions and its Protocols.

e. The abovementioned revolutionary forces have been engaged in a civil war for a protracted period of time against the GRP, a High Contracting Party to the Geneva Conventions and Protocol II.

f. "The consistent pattern of gross and systematic violation of the Filipino people's civil, political, economic, social and cultural human rights is tantamount to a denial of their sovereign right to freely determine and realize their just aspirations. x x x x "

g. "The aforesaid people and forces have established and developed a political organization that has sufficient governmental character. This political organization has sufficient control over a substantial area, population and resources in the Philippine archipelago. If said political organization were left to itself, it has the capability of reasonably and effectively discharging the duties of a state. x x x x"

h. "It has deployed the New People's Army in accordance with the civilized rules of warfare and has informed and trained it accordingly. Even before this declaration, it has complied with the rules of war under international law. It has consciously followed international humanitarian law x x x and is now resolved to assume in good faith rights and responsibilities under the Geneva Conventions and Protocol I. x x x x" *[Underscorings supplied.]*

Consequently, the NDFP had declared:

"The NDFP undertakes to respect the provisions of the four Geneva Conventions of 1949 and Protocol I of 1977, regarding the conduct of hostilities and the protection of the civilian population and the combatants hors de combat in the armed conflict with the GRP and to regard its obligations under the aforesaid instruments of international humanitarian law as having the force of law among its forces and in the areas under its control." *[page 6; Underscorings supplied.]*

It even went further to publicly announce that:

"The NDFP and the forces it herein represents accept the principle of command responsibility for the system of discipline to ensure respect for the rules of international humanitarian law and punish those who break them*." [Underscorings supplied.]*

The aforequoted statements more than speak for themselves. Suffice it to say here that they are consistent with the NDFP's public stand that it is ready, willing and able to abide, as it is already been abiding, by the rules and standards of international humanitarian law in the conduct of its just war.

The point of contention that must be addressed is whether the NDFP has any legal justification to avail of the subject provisions of Protocol 1, i.e. Article 96 (3) in relation to Article 1 (4).

In the "Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949" published in 1987 by the International Committee of the Red Cross (ICRC), the following relevant observations by Bruno Zimmermann, legal adviser to the ICRC, appear:

a. The right of peoples to self-determination is the right to "freely determine their political status and freely pursue their economic, social and cultural development." (International Covenants on Human Rights)

b. The idea that a national liberation movement must be recognized by the regional intergovernmental organization concerned for paragraph 4, Article 1 to apply was advanced but was not adopted. (p. 53)

c. There are two requirements for paragraph 4 to apply:

i. there must be an armed conflict in which a people is struggling against colonial domination, alien occupation or a racist regime; and

ii. the struggle of that people must be in order to exercise its right to self-determination. (pp. 54-55)

d. The word "include" in Article 1 (4) prefacing the phrase "armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination" <u>should be interpreted as introducing an exhaustive list of cases</u> which are considered to be part of the situations covered. "It our opinion, it must be concluded that <u>the list is exhaustive and complete</u> ; it certainly covers all cases in which a people, in order to exercise its right of self-determination, must resort to the use of armed force against the interference of another people, or against a racist regime. On the other hand, <u>it does not include cases in which, without one of these elements, a people takes up arms against authorities which it contests, as such a situation is not considered to be international</u>." (p.54-55)

e. "Colonial domination" contemplates a situation where a people has had to take up arms to free itself from the domination of another people. "Alien occupation", as distinct from belligerent occupation in the traditional sense of all or part of the territory of one State being occupied by another State, covers cases of partial or total occupation of a territory which has not yet been fully formed as a State. "Racist regimes" covers cases of regimes founded on racist criteria. (p. 54)

f. According to the Conventions and Protocol 1, the only real requirements for the correct application of the law when persons in such an armed conflict are protected persons within the meaning of these instruments are:

i. an authority representing the people engaged in the struggle; and

ii. an organized structure of its armed forces, including a responsible command, in accordance with the requirements of Article 43 (Armed forces). (p.55)

g. Article 96 of Protocol 1 contains an "ad hoc mechanism" by which an authority representing a people engaged in a struggle may make an undertaking. (p. 55)

h. "One thing is certain: the characteristics of a conflict, especially its intensity or its length, may justify the application of the Conventions and of the Protocol [1] as a whole, or part of these instruments, but this is merely a question of common sense, which also applies to any conflict between States. x x x As regards the crucial question of the inevitable disputes regarding the qualification of a specific conflict, one must assume that the Parties concerned will carry out their obligations in good faith, and count on the positive influence of all the High Contracting Parties." (p. 56)

i. Armed conflicts for self-determination are conflicts of an international character. (p. 1088)

j. the following conditions must be present for Article 96 (3) of Protocol 1 to apply:

i. there must be an armed conflict involving the enumerated situations in Article 1 (4);

ii the armed conflict must be between a people fighting for self-determination and a Party to the Protocol [1];

iii. there must be a declaration addressed to the depositary; and

iv. the declaration must come from an authority representing the people engaged in the conflict concerned. (pp. 1088-1089)

k. The subject declaration is unilateral since it produces its effects irrespective of the conduct of the Contracting Party. On the other hand, it does not create merely unilateral obligations, it brings into force rights and duties between the two Parties to the conflict which flow from the Conventions and the Protocol [1] and it does so because of the fact that the Contracting Party against which the fight is directed had previously become a Party to the Protocol [1]. (p. 1089)

l. The declaration is a condition for the effects of Article 96 to apply: "the status recognized to liberation movements indeed gives them, as it gives States, the right to choose whether or not to submit to international humanitarian law, insofar as it goes beyond customary law. In this respect they are in a fundamentally different legal position from insurgents in a non-international armed conflict: if the State in whose territory such a conflict takes place is a Party to the Conventions and to Protocol II, Article 3 common to the Conventions and, as the case may be, Protocol II, will bind all the Parties to that armed conflict straightaway." (pp. 1089-1090)

m. The declaration laid down in Article 96 (3) "is only possible if an armed conflict is conducted against a Party to the Protocol [1]. (p. 1091)

[Zimmermann's analysis on the possibilities in case of an armed conflict within the meaning of Article 1 (4) is conducted against a Party not bound by the Protocol 1 had been discussed above.]

Measured against these views, is there any legal basis or justification for the subject NDFP Declaration? There seems to be no dispute that the present armed conflict is in the exercise of the right of self-determination even as conventionally defined.

The question is whether it is directed among the types of struggles contemplated by the subject provisions of Protocol 1(4). The conservative view espoused by the commissioned writer of the ICRC takes the position that "armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination" is an exhaustive and complete listing. The opinion proffered that "it does not include cases in which, without one of these elements, a people takes up arms against authorities which it contests, as such a situation is not considered to be international" apparently militates against the NDFP's Declaration. Worse, the three types of struggles are restrictively and conservatively construed. However, the NDFP, has rightfully construed it more expansively in keeping with the progressive trend among liberation movements and a substantial number of States in the international community.

Having said all these, the opinion of the ICRC writer provides positive justifications for the NDFP Declaration, when the former categorically admitted that "the characteristics of a conflict, especially its intensity or its length, may justify the application of the Conventions and of the Protocol [1] as a whole, or part of these instruments, but this is merely a question of common sense." Further, " as regards the crucial question of the inevitable disputes regarding the qualification of a specific conflict, one must assume that the Parties concerned will carry out their obligations in <u>good faith</u>."

It should be remembered that the GRP is a signatory and has ratified the Geneva Conventions on 6 October 1952 and has acceded to Protocol 2 on 11 December 1986, both without any reservations. It has yet to accede to Protocol 1.

> Incidentally, "a treaty is generally open for signature for a certain time following the conference which has adopted it. However, a signature is not binding on a State unless it has been endorsed by ratification. The time limits having elapsed, the Conventions and the Protocols are no longer open for signature. The States which have not signed them may at any time accede, or in the appropriate circumstances, succeed to them. Thus, instead of signing and ratifying a treaty, a State may become party to it by the single act called accession." (ICRC, March-April 1996, p. 248)

Consequently, the final remaining issue is whether the subject NDFP Declaration can be invoked against the GRP who has yet to accede to Protocol 1 at the time the said Declaration was made. The categorical interpretation of Zimmermann is that the armed conflict must be between a people fighting for self-determination and a Party to the Protocol 1. He advances the observation that the majority view is that "the route of acceptance of the Conventions in accordance with their common Article 2, paragraph 3, remains open to authorities representing peoples fighting for self-determination against a State which is a Party to only the Conventions. In the same case <u>a declaration of acceptance of the Protocol [1] would only count as a unilateral undertaking of obligations in matters which are not covered by customary law</u>."

At any rate then, even if the GRP is not yet a Party to Protocol 1, the NDFP Declaration arguably has legal justification inspire of the restrictive and legal interpretation by the aforequoted commissioned writer of the ICRC. In short, the ICRC writer's opinions would validate the moral, legal and political soundness of the NDFP Declaration even if the applicability of all the effects of the subject provisions of Protocol 1 are not beyond question by virtue of the fact that the GRP is not a signatory to Protocol 1.

One way or the other, it must be borne in mind, however, that this Commentary, although published and sanctioned by the ICRC, is not a document representing an official interpretation by the ICRC of IHL. In fact, the ICRC is merely a guardian of IHL. Nonetheless, it has a very strong, though not binding and final, persuasive value. Thus, Alexandre Hay, then President of the ICRC, admitted in his Foreword to the said Commentary so much:

> However, the ICRC also allowed the authors their academic freedom, considering the Commentary above all as a scholarly work, and not as a work intended to disseminate the views of the ICRC." *[Underscoring supplied.]*

On the other hand, the records of the deliberations of the proceedings indicate the following relevant points:

a. The overwhelming vast majority of States, mostly "third world countries," agreed in Article 1 of Protocol 1 that wars of national liberation are of an international character and has been accepted in United Nations resolutions as such because of their right to self-determination.

b. The debates show, however, that "colonial domination," "alien occupation," and "racist regimes" originally referred to situations involving a foreign power or racist regimes in the process of decolonization.

c. There is a view (espoused by Australia) that the three categories of armed conflicts are not exhaustive and the subject provisions are applicable to other struggles for as long as they are in the exercise of the right to self-determination, including for instance a struggle against exploitation. (p.63)

d. There seems to be a general understanding that the subject three categories of armed conflicts are both treated separately and independently.

e. There are views that national liberation movements should have a high level of intensity to qualify as an international armed conflict.

f. Most of the States which abstained in the vote on the subject Article 1(4) of Protocol 1 expressed concern that the said three categories of armed conflicts are not susceptible to objective, legal criteria and can lend themselves to "arbitrary, subjective and politically-motivated interpretation and application."

g. A few of the States (e.g. Turkey, Indonesia) qualified their assent to Article 1 (4) by the requirement that there must be a recognition by the respective regional intergovernmental organizations e.g. Organization of African Unity and the League of Arab States. (Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 1974-77.)

Furthermore, the views of the authorities on international humanitarian law are divergent. A general survey of the landscape would reveal the following relevant and differing interpretations on the subject provisions of Protocol 1.

a. Wars of national liberation are mainly in the framework of the decolonization process. The subject three categories of armed conflict are limited in scope to the same. Article 96 (3) will apply only if the State against which the war is being waged is itself a Party to Protocol 1 and the Geneva Conventions.

(Kalshoven)

b. The subject three categories of armed conflict are only three subtypes of such conflicts. However, "colonial domination" contemplates a situation where a colonial power denies the people of a dependent territory of their right of self-determination through colonization. Protocol 1 and the Geneva Conventions may be brought into force only if the "State" which is the adversary in a war of national liberation is a Party to Protocol 1. If the said State is a Party only to the Geneva Conventions, then there is no conventional obligation to apply the latter to national liberation movements. (Richard B. Baxter, RDI, 1974, Vol. 57, pp. 193-203)

c. Emphasis should be made on the 5th preambular paragraph of Protocol 1 which states that:

"Reaffirming further that the provisions of the Geneva Conventions of 12 August 1949 and of this Protocol must be fully applied in all circumstances to all persons who are protected by those instruments, without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflict."

Moreover, the subject three categories of armed conflict contemplate those similar to Portuguese rule, Israeli occupation and the South African apartheid state, respectively. However, current events may force a rethinking of the types of groups entitled to self-determination e.g. secession wars replace anti-colonial wars of the 1950s to '70s as national liberation struggles of the 1990s. (Kennedy)

d. The use of the conjunctive word "and" to preface the subject three types of armed conflict is only the result of poor drafting. (Guy B. Roberts, "The New Rules for Waging War: The Case Against Ratification of the Additional Protocol I, VJIL, 1985, vol. 26, pp. 109-170)

e. The subject provisions of Protocol 1 must include wars of self-determination by peoples gravely and systematically oppressed by authoritarian regimes even if said wars are not akin to the Portuguese, Israeli and South African models or experience. There is a possible objective criteria for their application. Also, from a strictly humanitarian standpoint, humanitarian rules must be extended as safeguards to human life.

Furthermore, the right to self-determination could include as qualifying criteria the existence of a consistent pattern of gross and reliably attested violations of human rights, amounting to a denial of the people's right to freely determine its internal and external political and economic status.

Finally, the basic nature of the Protocols is precisely the aim to protect combatants and war victims as far as possible from the scourge of war, i.e. to place as many restraints as possible on the power of the belligerents to inflict devastation. Whenever the contrary intention is not fully apparent from the origin of the provisions of the Protocols, a construction upholding the human spirit of these provisions should be preferred. This is in accord with Article 31 of the Vienna Convention of the Law of Treaties whereby a treaty is interpreted in the light of its object and purpose, otherwise known as the "principle of effective implementation." (Antonio Cassese, Tentative Appraisal)

It would be seen that despite the lack of unanimity, there are enough progressive interpretations of the subject provisions that would support the decision of the NDFP to

invoke and assume the rights and obligations of Protocol 1 and the Geneva Conventions through this novel approach.

Finally, significant inputs were informally provided by Dr. Francois Rigaux of the Faculty of International Law of the University of Louvaine de la Neuve in Belgium on 2 July 1996. While Dr. Rigaux expressed initially the reservation that the present armed struggle being waged by the NDFP and the revolutionary forces cannot legally be considered as a movement against colonial domination in its traditional meaning purportedly because there are other pervasive US influence in other countries anyway, he categorically stated that the NDFP Declaration will raise its moral and political standing. He said that if may enhance the NDFP's claim to a status of belligerency but legally, it does not change anything. He furthermore concluded that at any rate, the Swiss Federal Council as official depositary has ministerial duties in respect to such Declaration and can neither refuse receipt or acknowledgment of the receipt therefor nor entertain objections and make a ruling thereon.

[Pls. refer also to the opinion of Prof. Eric David of the Institute of Sociology of the Free University of Brussels on or about 27 August 1996.]

In sum then, there are enough legal justifications for the NDFP Declaration, namely:

a. The situations referred to in Article 1 (4) of Protocol 1 need not be exhaustive or exclusive as to definitively foreclose the application of other non-traditionally defined armed conflicts in the exercise of a people of their right of self-determination.

b. The intent of Protocol 1 is to fully apply the provisions of the Geneva Conventions and Protocol 1 in all circumstances to all persons who are protected by those instruments, without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflict.

c. The right of self-determination may be exercised if there is a consistent pattern of gross and proven violations of human rights amounting to a denial of the people's right to freely determine its internal and external political and economic status.

d. The principle of effective implementation i.e. a treaty is interpreted in the light of its object and purpose, in the law on treaties favor as far as possible the upholding of the human spirit of the provisions of the Geneva Conventions and Protocol 1.

e. The operative condition in the application of the subject provisions is the justifiability of the right of self-determination.

f. The principles and resolutions of the United Nations as well as the history and development of international humanitarian law unanimously show that the intention is to bring in liberation movements within the ambit of IHL.

Notwithstanding this legal question, what is certain is that:

> The status recognized to liberation movements indeed gives them, as it gives States, the right to choose whether or not to submit to international humanitarian law, insofar as it goes beyond customary law. In this respect they are in a fundamentally different legal position from insurgents in a non-international armed conflict: if the State in whose territory such a conflict takes place is a Party to the Conventions and to Protocol II, Article 3 common to the Conventions and, as the case may be, Protocol II, will bind all the Parties to that armed conflict straightaway." (Commentary, pp. 1089-1090) *[Underscorings supplied.]*

In sum, reliance can be also taken from the firm and categorical public pronouncement of the NDFP Negotiating Panel through its Chairperson, Luis G. Jalandoni, on the issue of its standing in international law: (Press Release, 3 September 2002**:** Why the CPP and NPA are Not terrorist Organizations, Utrecht, Netherlands):

> We, the panel of the National Democratic Front of the Philippines (NDFP) negotiating with the Government of the Republic of the Philippines (GRP), wish to inform the public in the Netherlands and the whole of Europe that the Communist Party of the Philippines (CPP) and the New People's Army (NPA) are not terrorist organizations, contrary to the claims of the US government.
>
> The CPP and NPA are highly responsible political organizations. They are major allied organizations within the NDFP, which so far the US government has not designated as "terrorist" organization. They are revolutionary organizations fighting for national liberation and democracy against US imperialism and the local exploiting classes in the Philippines. In extensive areas of the country, they undertake programs of mass mobilization, public education and literacy, health and sanitation, land reform, raising production, self-defense, cultural activities and so on.
>
> The CPP has been guided by the Program for a People's Democratic Revolution since 1968. And the NPA is bound clearly by the Rules of the New People's Army, including strict rules of discipline. All the revolutionary forces represented by the NDFP, including the CPP and NPA, are bound by the Bill of Rights in the Guide for Establishing the People's Democratic Government, which serves as the constitution of the provisional revolutionary government.
>
> Under international law, the NDFP and all the organizations within its fold have assumed responsibilities for upholding human rights and humanitarian law by depositing with the Swiss Federal Council on 5 July 1996 the NDFP National Council Declaration of Undertaking to Apply the Geneva Conventions of 1949 and Protocol I of l977.
>
> The NDFP, including the CPP and NPA, has been engaged in peace negotiations with the GRP in Europe since 1992, with the governments of The Netherlands, Belgium and Norway acting at various times as facilitators. These peace negotiations are still in progress under the facilitation of the Norwegian government but are now threatened and assailed by the US in trying to carry out a witch-hunt for "terrorists" within the ranks of the NDFP.
>
> In 1997 and 1999, the European Parliament approved resolutions dealing fairly and even-handedly with the GRP and NDFP as political entities in order to endorse, encourage and support their peace negotiations. Attached hereto are said resolutions, EP Resolution No. B4-0601, 0645 and 0686/97 dated 17 July 1997 and EP Resolution no. B-4, 1096, 1106, 1147, 1158 and 1160/98 dated 14 January 1999.
>
> In the course of the GRP-NDFP peace negotiations, the principals of the GRP and NDFP negotiating panels have mutually approved a series of ten agreements, including the GRP-NDFP Comprehensive Agreement on Respect for Human Rights and International Humanitarian Law (CARHRIHL) in 1998. The GRP and the NDFP have thereby bound themselves to comply with the principles and standards of respect for human rights and

humanitarian conduct in the civil war in the Philippines. Both sides in the armed conflict are required to prevent, avoid and combat acts of terrorism against the civilian population and the hors de combat.

Since their respective founding days in 1968 and 1969, the CPP and NPA have been dedicated to uphold, defend and advance the national and democratic rights and interests of the people. In this connection, as a matter of revolutionary principle and practice, they are necessarily against terrorism. It is of decisive importance that they maintain and develop the participation and support of the people in the revolution and that they use their limited weapons judiciously and precisely against the enemies of the people.

In stark contrast to the CPP, NPA and other revolutionary forces, the GRP and all its armed forces like the AFP, PNP, CAFGU, deputized private armies and death squads commit gross human rights violations on a wide scale against the people, especially the workers and peasants. The records of Amnesty International and other human rights organizations show such rampant human rights violations under the auspices of state terrorism, overshadowing the claims of the GRP against the CPP and NPA.

The aforementioned armed forces use bombs from airplanes, artillery fire, flame-throwers and strafing by rifle fire to attack communities and force them to evacuate. They kill upon sight the leaders and active members of legal mass organizations. They torture and murder suspected revolutionaries and those they capture from the battlefield. In contrast, the NPA applies a lenient policy towards its captives, sharing food with them, giving medical care to the sick and wounded and voluntarily releasing ordinary enemy soldiers in good condition.

After negotiations with the GRP, the NDFP has caused the release of ranking prisoners of war from the custody of the NPA to the representatives of the International Committee of the Red Cross (ICRC) who in turn pass on the released prisoners to responsible GRP officials and families. The whole world knows how the NPA has been able to capture enemy officers, from the rank of general to sergeants, and released them, with no other consideration but the reciprocal release of political prisoners held by the GRP.

In the GRP-NDFP peace negotiations, the NDFP has been the more resolute and vigorous side in demanding the forging and implementation of CARHRIHL. To this day, the NDFP insists that the Joint Monitoring Committee be formed immediately under CARHRIHL in order to have a channel for complaints on alleged violations of CARHRIHL by any side so that the separate and joint implementation of CARHRIHL can become more effective. The Joint Monitoring Committee is provided for by the CARHRIHL as the instrument for preventing, investigating and taking action against human rights violations and acts of terrorism.

If they were to follow subserviently the US government in designating the CPP and NPA as “terrorist” organizations, criminalizing them and taking punitive actions against those suspected of being connected to such organizations, the European Union and particular European governments are liable to run counter to the above-cited 1997 and 1999 resolutions of the European parliament, destroy the GRP-NDFP peace negotiations, prejudice all the ten agreements already forged in these negotiations and extend the witch-hunt for “terrorists” beyond the CPP and NPA.

In fact, our chief political consultant Prof. Jose Maria Sison, who is a recognized political refugee under the protection of the Refugee Convention and the European Convention for the Protection of Human Rights and Fundamental Freedoms (EVRM), is already being condemned and assailed as a "terrorist" and is being subjected to punitive actions, including the freezing of his small personal bank account.

The hysterical "anti-terrorist" official pronouncements and actions of US and European governments as well as the mass media campaign against the CPP, NPA and Prof. Sison are destroying the GRP-NDFP peace negotiations and inflaming the civil war in the Philippines. In fact and in effect, the US is already misrepresenting the NDFP and all the panelists, consultants and staffers of the NDFP negotiating panel as "terrorists".

The vile propaganda in the so-called conservative mass media is that there are thirty "terrorists" in Utrecht, Netherlands. Such demonization of so many Filipinos is a preparation for further attacks. It is only a matter of time that the US will malign the NDFP as a "terrorist" organization.

Under the pretext of anti-terrorism, the US is whipping up the repressive and fascist principles of preemptive punishment, guilt by association, executive action in lieu of judicial process and the like. The GRP-NDFP peace negotiations are doomed if the European governments follow the state terrorism and fascism that the U.S. is spreading globally.

We, the undersigned NDFP negotiating panel, urge the broad masses of the people and all just and reasonable forces to appeal to the European Union and particular European governments to respect the democratic rights of the overseas Filipinos, especially the Filipino progressives who are desirous of national liberation and democracy for the Filipino people, and to cease and desist from witch-hunting our panelists, consultants, staffers and supporters and from intimidating entire Filipino communities.

III. IMPLICATIONS OF THE PEACE NEGOTIATIONS BETWEEN THE GRP AND THE NDFP

In addition to all the above, it will be instructive to refer to the other official pronouncements of the National Democratic Front in regard to its adherence to international humanitarian law, its own rules of discipline, and the implications of the peace negotiations with the Government of the Republic of the Philippines (GRP) and the documents so far reached with it.

A revisit of an analysis of the latter, particularly on the pertinent provisions of the Comprehensive Agreement on Respect for Human Rights and International Humanitarian Law (CARHRIHL) of 16 March 1998 on the recognition and application of international humanitarian law and the attributes of the GRP and the NDFP may be instructive.

Initially, pertinent excerpts from the "Comparative Analysis of 5 August 1997 Common Tentative Draft and 16 March 1998 Comprehensive Agreement on Respect for HR & IHL - A Proposed basis for a Basic Study Guide on the CARHRIHL (31 March 1998; Legal Consultant for HR & IHL, NDFP Negotiating Panel) may be considered:

> THE GOVERNMENT OF THE REPUBLIC OF THE PHILIPPINES, including the executive department and its agencies,

> hereinafter referred to as the GRP AND THE NATIONAL DEMOCRATIC FRONT OF THE PHILIPPINES, including the Communist Party of the Philippines (CPP) and the New People's Army (NPA), hereinafter referred to as the NDFP Hereinafter referred to as "the Parties",

The present formulation emphasizes the continuing force and binding effect of the Agreement between the successors of the Parties. It is also an express recognition in writing of the existence of a separate and distinct responsible political authority or command and a separate armed force other than those of the GRP's.

As used in the Agreement, the term "the Parties" therefore not only collectively refers to the present GRP and the NDFP but also to its rightful successors. More significantly, the use of the term "the Parties" in any part of the Agreement implies that, as far as the NDFP is concerned, it necessarily includes the CPP as a separate and distinct political authority and the NPA as its separate army.

PREAMBLE

> ACKNOWLEDGING that the prolonged armed conflict in the Philippines necessitates the application of the principles of human rights and the principles of international humanitarian law,

It expresses in no uncertain terms of the acknowledgment of: (a) the present protracted people's war ("prolonged armed conflict') and (b) the imperative to apply HR&IHL to such conflict.

> REALIZING the necessity and significance of assuming separate duties and responsibilities for upholding, protecting and promoting the principles of human rights and the principles of international humanitarian law,

It acknowledges the fact that the Parties are assuming separate duties and responsibilities with respect to the application, promotion and protection of HR&IHL. For the NDFP, it may be argued that this is an implicit recognition on paper by the GRP that the former has a separate political authority and organs of political power and has its own principles and organizational structure as embodied in its 12-Point Program, Constitution and Guide for Establishing the People's Democratic Government (hereinafter, "NDFP Guide"). It also implies that it has its own constituency and that it is capable and ready to assume and be bound by such duties and responsibilities through its responsible political command and authority.

DECLARATION OF PRINCIPLES

> Article 2
> The Parties uphold the principles of mutuality and reciprocity in the conduct of the peace negotiations in accordance with The Hague Joint Declaration. The Parties likewise affirm the need to assume separate duties and responsibilities in accordance with the letter and intent of this Agreement.

The present provision is a reiteration of paragraph 6 of the Preamble (Assumption of separate duties and responsibilities. The letter and intent of this Agreement reveal that the

NDFP in particular has its own political and organizational principles and circumstances. In fact, if we correlate this with other provisions of the Agreement, there are enough expressions of recognition of these circumstances, to wit:

a. paragraph 6, Preamble (Assumption of separate duties and responsibilities);

b. Article 6, Part I (Application of and faithful compliance with HR&IHL to armed conflict);

c. Article 3, Part II (Full scope of HR and consideration to respective principles and circumstances), particularly: “In complying with such obligation due consideration shall be accorded to the respective political principles and circumstances of the Parties.”; and

d. Article 1, Part VI (Assumption of separate duties according to respective political principles etc.), particularly: “The Parties shall continue to assume separate duties and responsibilities . . . in accordance with their respective political principles, organizations and circumstances . . . . “

> Article 6
> The Parties are aware that the prolonged armed conflict in the Philippines necessitates the application of the principles of human rights and the principles of international humanitarian law and the faithful compliance therewith by both Parties.

This is a reiteration of paragraph 4 of the Preamble (Necessity of application of HR&IHL to armed conflict). It further stresses not only the imperative to apply HR&IHL to the protracted people’s war but also holding in writing the Parties (in particular the GRP) for their faithful compliance thereto. This is but consistent with the assumption of the NDFP of separate duties and responsibilities with respect to HR&IHL. At the same time, the use of the term “faithful” (i.e. substantial and not strict) gives enough latitude for the recognition of the distinct political principles and circumstances of the NDFP and the peculiarities of the nature and demands of its just war in respect to such compliance

> Article 7
> The Parties hereby forge this Agreement in order to affirm their constant and continuing mutual commitment to respect human rights and the principles of international humanitarian law and hereby recognize either Party's acts of good intention to be bound by and to comply with the principles of international humanitarian law.

This expresses in categorical terms not only the inherent right of the Parties (particularly the NDFP) to adhere, be bound and to comply with IHL but also recognizes such acts to do so for as long as the same are “acts of good intention.”

In sum, this gives further legal and moral validity specifically to the NDFP’s Adherence to Protocol II Additional to the 1949 Geneva Conventions made on 15 August 1991(hereinafter, “Adherence to Protocol II”) and its Declaration of Undertaking to Apply the Geneva Conventions of 1949 and Protocol I of 1977 made on 5 July 1996 (hereinafter, “Undertaking to Apply the Geneva Conventions and Protocol I) as well as other similar diplomatic, legal and international undertakings. In relation to the latter Undertaking, the NDFP in fact stated in paragraph 2, page 5 therein:

> Being a party to the armed conflict, civil war or war of national liberation and authorized by the revolutionary people and forces to represent them in diplomatic and other international relations and in the ongoing peace negotiations with the GRP, we the National Democratic front of the Philippines hereby solemnly declare in good faith to undertake to apply the Geneva Conventions and Protocol I to the armed conflict in accordance with Article 96, paragraph 3 in relation to Article 1, paragraph 4 of Protocol I.

Therefore, the effects of the Undertaking to Apply the Geneva Conventions and Protocol I have been implicitly sanctioned in this Agreement, notwithstanding the arguments of the GRP to the contrary and notwithstanding its reliance on the unpublished "opinion" of the International Committee of the Red Cross.

> PART II
> BASES, SCOPE AND APPLICABILITY
>
> Article 2
> The objectives of this Agreement are: (a) to guarantee the protection of human rights to all Filipinos under all circumstances, especially the workers, peasants and other poor people; (b) to affirm and apply the principles of international humanitarian law in order to protect the civilian population and individual civilians, as well as persons who do not take direct part or who have ceased to take part in the armed hostilities, including persons deprived of their liberty for reasons related to the armed conflict; © to establish effective mechanisms and measures for realizing, monitoring, verifying and ensuring compliance with the provisions of this Agreement; and, (d) to pave the way for comprehensive agreements on economic, social and political reforms that will ensure the attainment of a just and lasting peace.

This affirmed the application of IHL "in order to protect the civilian population and individual civilians, as well as persons who do not take direct part or who have ceased to take part in the armed hostilities" which is after all, the essence and substance of applying IHL to the present armed conflict (aside of course from its implication to the status of the NDFP) and this is the very same essence, intent and language in international humanitarian law.

The term "persons deprived of their liberty for reasons related to the armed conflict" is the same terminology used in the 8 June 1977 Protocol II Additional to the Geneva Conventions of 12 August 1949 (hereinafter "Protocol II") relating to the protection of victims of non-international armed conflicts. At the very minimum, the nature of the present armed conflict is characterized as something involving more than a "dissident force" that should be governed by Article 3 Common to the Four Conventions and Additional Protocol II. It can be advanced then that the NDFP and the CPP and NPA cannot be deemed as mere insurgents or "dissident forces."

> Article 3
> The Parties shall uphold, protect and promote the full scope of human rights, including civil, political, economic, social and cultural rights. In complying with such obligation due consideration shall be accorded to the respective political principles and circumstances of

> the Parties.

This provision connotes a recognition that the NDFP has its own Constitution, Program, Guide and distinct rules and processes.

> Article 4
> It is understood that the universally applicable principles and standards of human rights and of international humanitarian law contemplated in this Agreement include those embodied in the instruments signed by the Philippines and deemed to be mutually applicable to and acceptable by both Parties.

It may be argued positively for the NDFP that not all universally accepted principles and standards of HR&IHL are universally applicable. With the present formulation, these principles and standards are universally applicable and, specifically, this would include its application to the present protracted armed conflict. The use of the term "include those embodied" immediately means that it is non-exclusive i.e. it was not intended to exclude any other relevant instruments like the Geneva Conventions and the Protocols Thereto.

The use of the term "instruments signed by the Philippines" may arguably mean not only those signed by the GRP but also those signed or adhered to by the NDFP independently and in the exercise of its inherent rights. Parenthetically, the conscious use of the word "by the Philippines" and not the customary "by the GRP" supports this reading. In fact, this is the only instance where reference is to the Philippines as a generic term and not to the GRP. Hence, even if the GRP has yet to sign Protocol I, by this interpretation, Protocol I, to which the NDFP has already made an Undertaking to Apply, is included as one of the instruments signed by the Philippines and thereby contemplated as included in this Agreement.

Note should be taken that the seemingly restrictive terms - "mutually applicable to and acceptable by both Parties" to qualify those instruments signed by the Philippines is qualified in the first place by the phrase "deemed to be." Thus, if the GRP argues that a specific instrument, say Protocol I or the Geneva Conventions, is not contemplated in this Agreement because it does not consider it as applicable to the NDFP and/or its applicability is not acceptable to the GRP, then it may be countered that by virtue of the NDFP's Undertaking to Apply Geneva Conventions and Protocol I, any question as to whether it is deemed or considered to be mutually applicable to and acceptable to both the GRP and NDFP is rendered moot and academic -notwithstanding the "opinion" of the ICRC alluded to by the GRP - in the light of the following *ipso facto* (i.e. immediately upon and by the mere fact of receipt by the depositary) effects of said Undertaking:

> W]e the National Democratic Front of the Philippines hereby solemnly declare in good faith to undertake to apply the Geneva Conventions and Protocol I to the armed conflict in accordance with Article 96, paragraph 3 in relation to Article 1, paragraph 4 of Protocol I.
>
> The NDFP is rightfully and dutifully cognizant that this declaration, upon receipt by the Federal Council of the Swiss Government, shall have in relation to the armed conflict with the GRP the following effects:
>
> a. the Geneva Conventions and Protocol I are brought into force for the NDFP as a Party to the conflict with immediate effect;
>
> b. the NDFP assumes the same rights and obligations as those which have been assumed by a High Contracting Party to the Geneva Conventions and Protocol I;

and

c. the Geneva Conventions and this Protocol are equally binding upon all Parties to the conflict.

By virtue of this unilateral declaration of the NDFP, duly deposited with the Swiss Federal Council, the GRP is bound as before by the Geneva Conventions and henceforth by Protocol I in accordance with Article 96, paragraph 3(c) of Protocol I." (at page 5) *[Underscorings supplied.]*

If this Article is correlated with: a. Article 7, Part I (Commitment to HR&IHL and recognition of acts of good intention regarding IHL); b. Article 1, Part III (Inherent right to adhere to international instruments on HR); and c. Article 1, Part IV (Inherent right of Parties to adhere to principles and standards of IHL), then any doubt as to its interpretation will be resolved in favor of the consistent position of the NDFP that HR&IHL as embodied in international instruments is applicable to the present armed conflict and human rights situation.

Besides, the Agreement contains a plethora of principles, rules, standards, objectives, premises, imperatives and directives derived, inspired or culled from or substantially similar to these international instruments on HR&IHL.

Parenthetically, the following quotation from a landmark and hitherto unreversed decision of the GRP Supreme Court, is instructive to all these discussions on "principles and standards" of IHL:

"[It] can not be denied that the rules and regulations of the Hague and Geneva Conventions form part of and are wholly based on the generally accepted principles of international law. x x x Such rules and principles, therefore, form part of the law of our nation even if the Philippines was not a signatory to the conventions embodying them, for our Constitution has been deliberately general and extensive in its scope, and is not confined to the recognition of rules and principles of international law as contained in treaties to which our government may have been or shall be a signatory." (Kuroda vs. Jalandoni, 83 Phil 171 (1949)) *[Underscoring supplied]*

Article 5
This Agreement shall be applicable in all cases involving violations of human rights and the principles of international humanitarian law committed against persons, families and groups affiliated with either Party and all civilians and persons not directly taking part in the hostilities, including persons deprived of their liberty for reasons related to the armed conflict. It shall likewise be applicable to all persons affected by the armed conflict, without distinction of any kind based on sex, race, language, religion or conviction, political or other opinion, national, ethnic or social origin, age, economic position, property, marital status, birth or any other similar condition or status.

Note, the use of the crucial words "affiliated with either Party", implying the recognition that the NDFP itself has its own separate and distinct constituency and territory.

PART III - RESPECT FOR HUMAN RIGHTS

> Article 1
> In the exercise of their inherent rights, the Parties shall adhere to and be bound by the principles and standards embodied in international instruments on human rights.

It expressly recognizes that even the NDFP, being a Party to this Agreement, despite its being a non-state for the moment, has nevertheless the inherent right and capacity to adhere and be bound by international instruments on HR. It is but consistent with the NDFP position that it is willing, ready and able to assume separate duties and responsibilities in protecting and promoting HR (and IHL). Together with other pertinent provisions, this Article elevates and respects the political, organizational, even legal integrity and status of the NDFP.

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

The right to self-determination of course is the right of the Filipino people as a nation. The import of this provision cannot be overstated as it is consistent with the NDFP's Program and the people's struggle towards national democracy and liberation.

This provision must be read in conjunction with: a. Article 4, Part I (Realization of rights under conditions of national and social freedoms); b. paragraph 2, Article 2, Part III (Right to establish a democratic society and oppose oppression); and c. paragraph 25, Article 2, Part III (Right of minority communities to autonomy, ancestral lands, etc.).

> 2. The inherent and inalienable right of the people to establish a just, democratic and peaceful society, to adopt effective safeguards against, and to oppose oppression and tyranny similar to that of the past dictatorial regime.

The provision emphasizes the right as something essentially inherent and inalienable, something which can not be granted or denied a people in struggle.

The phrase "to establish a just, democratic and peaceful society" amounts substantially to the right to revolt against tyranny, exploitation and oppression. In fact, to establish a just, democratic and peaceful society is equivalent fundamentally with the right to revolution in order to install, in its revolutionary sense, a truly just, democratic and peaceful society.

The reference to the Marcos dictatorship suffices to imply the kinds of regime the right to revolt is directed against.

Incidentally, this provision should be read in conjunction with Paragraph 12, Article 2, Part III (Right to free speech, association and redress of grievances) where the formulation of such Article is meaningful enough to include the right to revolt.

> Article 3
> The Parties decry all violations and abuses of human rights. They commend the complainants or plaintiffs in all successful human rights proceedings. They encourage all victims of violations and abuses of human rights or their surviving families to come forward with their complaints and evidence.
>
> Article 4
> The persons liable for violations and abuses of human rights shall be subject to investigation and, if evidence warrants, to prosecution and trial. The victims or their survivors shall be indemnified. All necessary measures shall be undertaken to remove the conditions for violations and abuses of human rights and to render justice to and indemnify the victims.

The provision was also "mutualized" so as to refer to "the Parties" and not to the GRP alone. The collective use of "abuses and violations" to refer to the Parties unwittingly vests on the NDFP the qualities of a state and its ability to exercise political authority and assume responsibility.

> Article 6
> The GRP shall abide by its doctrine laid down in People vs. Hernandez (99 Phil. 515, July 18, 1956), as further elaborated in People vs. Geronimo (100 Phil. 90, October 13, 1956), and shall forthwith review the cases of all prisoners or detainees who have been charged, detained, or convicted contrary to this doctrine, and shall immediately release them.

First of all, the landmark "Hernandez doctrine," and as validated and affirmed as a legal precedent in the *Geronimo* case, extensively discussed further below, in essence follows the almost universally accepted principle that all acts in pursuit of a political objective are absorbed or subsumed under one political offense.

In other words, if in the pursuance of the armed struggle, a revolutionary incites the people, exposes the irregularities and opposes the policies of the existing government, takes up arms, kills or wounds the enemy armed combatant, and is a member of an outlawed underground organization, then he should be tried only for one political offense of rebellion and all other acts are absorbed and deemed as necessary for the rebellious act in pursuance of a political objective. Hence, he should not be charged, detained, tried or convicted for separate offenses of sedition, inciting to sedition, illegal possession of firearms, serious physical injuries, murder, homicide, arson, kidnapping or subversion. He should be treated as a "prisoner of conscience" and not as a common criminal.

> PART IV
> RESPECT FOR INTERNATIONAL HUMANITARIAN LAW

At the outset, basic premises should be spelled out to put in context the following provisions on IHL. Based on available documents and its own history and pronouncements, it mat be

culled that the NDFP is in the main guided by the following basic principles and premises in the negotiations with GRP on IHL:

(a) the NDFP is a revolutionary organization that is not subject or subsumed within the legal and constitutional system and processes of the GRP;

(b) the NDFP and its patriotic and progressive organizations, primarily through the Communist Party of the Philippines (CPP) and the New People's Army (NPA) , are principally engaged in protracted, concerted and sustained armed struggle against the GRP and the imperialist forces;

(c) the NDFP has a responsible political command in all levels and possesses organs of political power that enforce its own legal and judicial system and rules in accordance with its political principles and circumstances;

(d) the NDFP has a separate and distinct armed force that is guided by the appropriate political authority and which is governed by a set of rules of conduct and discipline;

(e) the NDFP through its collective organs of leadership, and in the exercise of its inherent rights, is willing, ready and able to assume and is undertaking its own distinct duties and responsibilities in adhering, respecting and being bound by international humanitarian law;

(f) the NDFP has its own constituency and exercises control in a significant portion of the territory of the Philippines with its own organs of political power;

(g) the NDFP has maintained and is conducting bilateral and multilateral diplomatic and political relations with fraternal organizations and international institutions and even foreign governments as a separate entity from the GRP; and

(h) there is a complementary relationship between the application of the rules, standards and principles of human rights and of international humanitarian law in the context of the present armed conflict; and

(I) the people's war being waged by the NDFP and its revolutionary government and army is characterized both as an armed conflict which is of a non-international character in terms of its occurrence within the Philippines but is at the same time an internationalized internal conflict as it involves the exercise of self-determination against colonial domination and national oppression.

> Article 1
> In the exercise of their inherent rights, the Parties to the armed conflict shall adhere to and be bound by the generally accepted principles and standards of international humanitarian law.

The express recognition of the inherent right of and the exercise of such right by the Parties to the armed conflict to adhere and be bound to such principles and standards of IHL is of positive and far-reaching implication to the status of the NDFP.

> Article 3
> The following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the persons enumerated in the preceding Article 2:

It should be noted that the so-called “acts” in the present Article as well as the “cases or situations” in the immediately succeeding Article 4 (Persons, entities or objects to which IHL apply in certain cases or situations) are all principles, rules, norms and standards of IHL. Read in relation to the in paragraph 4, Preamble (Necessity of application of HR&IHL to armed conflict) and Article 6, Part I (Application of and faithful compliance with HR&IHL to armed conflict), there could be no doubt that the application of the principles and standards of IHL has been recognized in this bilateral document to apply to the present civil war.

The prohibition of all these acts underscore not only the respect for human rights of the subject persons and their protection but are equally intended to “humanize” the present armed conflict in accordance with the civilized and respected rules of warfare contained in international humanitarian law.

> 5. failure to report the identity, personal condition and circumstances of a person deprived of his/her liberty for reasons related to the armed conflict to the Parties to enable them to perform their duties and responsibilities under this Agreement and under international humanitarian law;

A significant reference to such duties and responsibilities not only “under this Agreement” but also “under international humanitarian law” must be noted. While the duties and responsibilities under this Agreement include those specifically stipulated as well as those contemplated under IHL, the expression of the additional reference strengthens its binding force. In addition, it highlights the mutual assumption of separate duties and responsibilities consistent with the political and legal standing claimed by the NDFP.

Specifically, these duties and responsibilities with respect to persons deprived of their liberty for reasons related to the armed conflict would include those contained and contemplated in Articles 3 (1), (2), (3), (4), (5), (6), ; Article 4 (3), (6), (7), (9); and Article 11 of Part IV of the Agreement as well as those in other applicable provisions of the Geneva Conventions and the Protocols.

> 6. denial of the right of relatives and duly authorized representatives of a person deprived of liberty for reasons related to the armed conflict to inquire whether a person is in custody or under detention, the reasons for the detention, under what circumstances the person in custody is being detained, and to request directly or through mutually acceptable intermediaries for his/her orderly and expeditious release;

The reference to “the relatives and duly authorized representatives of a person deprived of liberty for reasons related to the armed conflict” implies the assumption of separate duties and responsibilities of the Parties to the armed conflict, and its consequent implication on their parity and their mutual and reciprocal relations. This additional formulation provides much latitude to mean that it may include either one of the Parties, as would logically follow in the context of the armed conflict, as such “duly authorized representatives.” This is strengthened by the subsequent reference to “mutually acceptable intermediaries” in respect to the request for release of such persons. Of course, aside from the Parties, the duly authorized representatives and the mutually acceptable intermediaries may be the ICRC, a foreign government or entity or other humanitarian institutions. Consequently, these are

additional points for the continuing recognition of the status of the NDFP because it is being regarded as a separate entity from the GRP.

The inquiry or a negotiation or request for release of a person deprived of liberty for reasons related to the armed conflict is a logical consequence that said acts are ultimately addressed to the Party under whose power such person is being held in custody or detention. The denial of this right of inquiry or to act on the request for the release of the subject persons can only be done by the Party under whose power they are being held. The phrase "in custody or under detention" implies the existence of a legal and judicial system for both Parties and stresses their separate capabilities in relation to the present armed conflict.

It should further be noted that this present formulation actually provides the groundwork or mode for the mutual exchange of prisoners of war between the Parties to the armed conflict. As such, it is another affirmation of the implicit recognition of the existence of prisoners of war in the armed conflict and the capability of the Parties to exercise power over the armed forces of the other.

> 1. Persons hors de combat and those who do not take a direct part in hostilities are entitled to respect for their lives, dignity, human rights, political convictions and their moral and physical integrity and shall be protected in all circumstances and treated humanely without any adverse distinction founded on race, color, faith, sex, birth, social standing or any other similar criteria.
>
> 2. The wounded and the sick shall be collected and cared for by the party to the armed conflict which has them in its custody or responsibility.

As one of the protected persons subject of IHL in the present armed conflict, the wounded and the sick deserve and are entitled to humanitarian treatment. This responsibility of collection and care devolves upon the party to the armed conflict which has them in its custody or responsibility. This obviously implies that the Parties have separate political powers in existence.

> 5. Civilians shall have the right to demand appropriate disciplinary actions against abuses arising from the failure of the Parties to the armed conflict to observe the principles and standards of international humanitarian law.

This again implies the existence of a set of rules of conduct and discipline of the Parties. To recognize the right of civilians to demand disciplinary actions against abuses arising from the failure of the Parties to observe such principles and standards is a recognition of such rules of conduct and discipline. And basically, it is the respective armed forces of the Parties to the conflict that can fail to observe the principles and standards of IHL. Thus, it can read also as a recognition of the existence of the Basic Rules of the NPA

Moreover, the recognition that the Parties to the armed conflict are susceptible to the right of civilians to demand appropriate disciplinary actions against abuses from their failure to observe the principles and standards of IHL imply their common and separate duties and responsibilities in respect thereto.

> 7. The ICRC and other humanitarian and/or medical entities shall be granted facilitation and assistance to enable them to care for the sick and the wounded and to undertake their humanitarian missions and activities.

First off, the function of the ICRC not only as the official guardian of international humanitarian law and its continuing significant role in the present civil war is given expression in this Agreement. Specifically, the intensity and level of the armed conflict has reached the point that the beneficial intercession and facilitation through the ICRC of the release of the prisoners of war of the NPA have been accepted by both Parties. Aside from this, of course, the active and prominent role of the ICRC in the release of POWs has enhanced and stressed the status of the NDFP as a distinct political force from the GRP. Its having acted as witness and "intermediary" to the release of the POWs of the NPA was furthermore an opportunity to document and prove that the NDFP and its revolutionary army have been and continue to respect and uphold the basic rules in the conduct of war as mandated by IHL and in accordance with its own rules . In fact, the ICRC has seen and verified for itself how the POWs of the NPA have been treated humanely and with leniency and how their physical and mental conditions were ensured.

The phrase "shall be granted facilitation and assistance" in the Final Agreement implies the existence of territories which the NDFP controls distinct from those of the GRP's, because of the operative term "grant". This necessarily means that it is something given by a Party who has effective control over a particular territory. It also means that the Party is capable of providing such facilitation and assistance independent of the other.

> Article 5
> The Parties decry all violations of the principles of international humanitarian law. They encourage all victims of such violations or their surviving families to come forward with their complaints and evidence.
>
> Article 6
> The persons liable for violations of the principles of international humanitarian law shall be subject to investigation and, if evidence warrants, to prosecution and trial. The victims or their survivors shall be indemnified. All necessary measures shall be undertaken to remove the conditions for such violations and to render justice to and indemnify the victims.

Considering that these two present provisions are parallel to Articles 3 (Condemnation of violations and abuses of HR) and 4 (Liability of violators; indemnification of victims; removal of conditions for HRVs) of Part III of the Final Agreement, all the applicable commentaries thereon are hereby adopted and reproduced by way of reference.

> Article 14
> The Parties shall promote and carry out campaigns of education on international humanitarian law, especially among the people involved in the armed conflict and in areas affected by such conflict.

What is significant about the present provision is these education campaigns will be carried out "<u>especially among the people involved in the armed conflict and in areas affected by such conflict</u>." The idea being conveyed is not only to ensure compliance with the Agreement particularly on the principles and standards of IHL and the basis rules of conduct

in armed conflicts but also the implication of the existence of separate and distinct armed forces of the Parties. The wording “the people involved in the armed conflict” necessarily pertains to the respective armed forces of the Parties.

Moreover, the additional reference to “areas affected by such conflict” implies not only the existence of an ongoing civil war but the existence of separate territories. Thus, it would follow that the NDFP, in the exercise of its rights, is mandated to assume its separate duty and responsibility to carry out campaigns of education on IHL with its army, militia, masses, and revolutionary organizations in its own controlled territories. This is again indicative of its position that it is ready and willing and able to assume the application of IHL in the course of its people’s war.

> PART VI
> FINAL PROVISIONS
>
> Article 1
> The Parties shall continue to assume separate duties and responsibilities for upholding, protecting and promoting human rights and the principles of international humanitarian law in accordance with their respective political principles, organizations and circumstances until they shall have reached final resolution of the armed conflict.

This conveys the idea that such duties and responsibilities are of course subject to the Parties’ respective capabilities and should conform to their respective laws and constitutions. What is additionally peculiar with the present provision is the phrase “until they shall have reached final resolution of the armed conflict.” This expresses the basic fact that this Agreement does not by of itself resolve the armed conflict. It means that pending the ultimate resolution of the armed conflict and the attainment of a truly just and lasting peace, the Parties are in the meanwhile expected and are bound to uphold, protect and promote human rights and international humanitarian law in the course of the civil war.

> Article 2
> The Parties recognize the applicability of the principles of human rights and principles of international humanitarian law and the continuing force of obligations arising from these principles.
>
> Article 3
> Nothing in the provisions of this Agreement nor in its application shall affect the political and legal status of the Parties in accordance with the Hague Joint Declaration. Subsequently, this Agreement shall be subject to the Comprehensive Agreements on Political and Constitutional Reforms and on End of Hostilities and Disposition of Forces. Any reference to the treaties signed by the GRP and to its laws and legal processes in this Agreement shall not in any manner prejudice the political and organizational integrity of the NDFP.

As worded, then, neither the Agreement nor its application will affect the legal status of the GRP (and of the NDFP) nor the political status of the NDFP as a revolutionary organization. The reference to the Hague Declaration enforces this meaning as the principle that “no precondition that negates the character and purpose of peace negotiations” shall be

imposed has been affirmed in conformity with the underlying fact that the Parties are governed furthermore by the principles of mutuality, reciprocity and parity.

Finally, of transcendental importance, the last sentence indicates the revolutionary integrity of the NDFP even as it enters into peace negotiations with the GRP. In addition, the caveat contained in this last sentence has foreclosed any unfounded interpretation that there is only one set of laws and legal processes in the Philippines, contrary to the fact professed by the NDFP that is has its own system of rules, laws and judicial processes.

By way of concluding this part on the implications of this particular bilateral landmark document then, note should be taken of the deliberate attempts in the provisions of the Agreement to "mutualize" the formulation i.e. the constant usage of the term "the Parties" whenever applicable to both, thereby emphasizing and indicating the principles of mutuality and reciprocity in terms of duties, rights and responsibilities. At the same time, there are provisions that pertain to the GRP alone given its present legal status. But because of the crucial caveat contained in the Final Provisions, there is no basis for the fear that the same is prejudicial to the integrity of the NDFP.

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

It signifies the willingness and ability of the NDFP to assume separate duties and responsibilities to respect HR&IHL in accordance with its distinct political principles, organization and circumstances. It may be said, that its political and organizational integrity and standing have been enhanced by entering into the peace negotiations and in entering into this Agreement.

In sum, the words of the NDFP Chief Political Consultant Jose Ma. Sison, (Introduction to "Comprehensive Agreement on Respect for Human Rights and International Humanitarian Law and Related Documents (1992-1998) in the Peace Negotiations between the Government of the Republic of the Philippines and the National Democratic Front of the Philippines, 26 September 1998) are very clear on these points:

> As contracting parties in the CARHRIHL, the GRP and the NDFP mutually recognize the existence of opposing constitutional frameworks as well as common frames of reference. They mutually reject the imposition of the constitutional and legal processes of either of them upon the other and stipulate common as well as separate duties and responsibilities in accordance with their respective constitutional frameworks and directives of their respective principals. These underlying principles of equality, mutuality and reciprocity are clearly expressed in such provisions of the CARHRIHL as the following:
>
> Preamble, paragraph 6: The Parties uphold the principles of mutuality and reciprocity in the conduct of the peace negotiations in accordance with the Hague Joint Declaration. The Parties likewise affirm the need to assume separate duties and responsibilities in accordance with the letter and intent of this Agreement.

> Article 3, Part II; Article 1, Part III; Article I, Part IV; Articles 1 and 3, Part VI: *[supra]*
>
> In negotiating with the GRP, the NDFP has always stood for its revolutionary integrity and the status of belligerency under international law. x x x x
>
> As co-belligerents in the civil war, the GRP and the NDFP override the existence of their conflicting constitutional frameworks by adopting the International Bill of Rights (Universal Declaration of Human Rights and the UN covenants on human rights) and International Humanitarian Law (the Geneva Conventions and its protocols) as their common frame of reference. While then GRP and the NDFP are bound by these international instruments, they can also perform common and separate duties in accordance with their respective constitutions.
>
> x x x
>
> The status of belligerency of the totality of revolutionary forces in the Philippines has been acquired through revolutionary struggle. By revolutionary forces, we mean the revolutionary organs of democratic political power, the Communist Party of the Philippines (CPP) as the ruling party, the New People's Army (NPA) as main component of state power, the organized masses of people in the territory of the people's democratic government. All these forces are represented by the NDFP in the GRP-NDFP peace negotiations and in diplomatic work. x x x x

IV. LIBERATION MOVEMENTS IN PHILIPPINE LAW AND JURISPRUDENCE

In the domestic or municipal front, what then is the status of the present Philippine liberation movement embodied by the struggle of the Filipino people represented by the NDFP?

It must be remembered that Republic Act No. 1700, as amended – An Act to Outlaw the Communist Party of the Philippines and Similar Associations, Penalizing Membership therein and for Other purposes – of June 20, 1957 (as revived by Executive Order No. 167 on 5 May 1987) had been repealed in 1995 by the Philippine Congress.

Said Act categorically defined the "Communist Party of the Philippines" as to mean and include the organizations known as the Communist Party of the Philippines (CPP), its military arm, the New People's Army (NPA), and its political arm, and "any successors of such organization" (Section 3).

Hence, in the formal legal sense, then, the CP, NPA, NDFP and its member revolutionary organizations, are not illegal. Of course, the reality on the ground is different in terms of policy and practice. Not only are the alleged or suspected members of these organizations openly demonized and criminalized by the Philippine government but they are arrested, charged, prosecuted, convicted and sentenced with common crimes including illegal possession of firearms, murder, arson, robbery, kidnapping and the like instead of rebellion. Worst, they get disappeared, tortured or are even summarily executed.

At any rate, at least juridically, Philippine jurisprudence had been consistent in upholding and affirming the "political offense doctrine" with respect to acts committed by alleged rebels or insurgents.

This was first laid down in the landmark Hernandez [*People vs. Hernandez (99 Phil 515 /52 OG 5506; 1956])* doctrine where the accused therein who was identified with the old "Hukbong Mapagpalaya ng Bayan" (People's Liberating Army) and the "Partido Komunista ng Pilipinas" (Communist Party of the Philippines) was charged with the crime of rebellion with multiple murder, arsons, and robberies. The Philippine Supreme Court laid down the following doctrine, which we quote here extensively:

> One of the means by which rebellion may be committed, in the words of Article 135, is by "engaging in war against the forces of government" and "committing serious violence" in the prosecution of said "war". <u>These expressions imply that war connotes, namely: resort to arms, requisition of property and services, collection of taxes and contributions, restraint of liberty, damage to property, physical injuries and loss of life, and the hunger, illness and unhappiness that war leaves in its wake</u> x x x x. Being within the purview of "engaging in war" and "committing serious violence", said resort to arms, with the resulting impairment or destruction of life and property, constitutes not two or more offense, but only one crime - that of rebellion plain and simple*. (at p. 521; Citing Guinto v. Veluz, 77 Phil 801/44 OG 909 and People v. Pacheco, 93 Phil 521) [Underscorings supplied.]*

Using the same reasoning, *Hernandez* cited the earlier ruling in *People v. Labra* (81 Phil 377) where the lower court found the accused guilty not only of treason but also of murder:

> The essential elements of a given crime cannot be disintegrated in different parts, each one stand as a separate ground to convict the accused of a different crime or criminal offense. The elements constituting a given crime are integral and inseparable parts of a whole. In the contemplation of the law, they cannot be used for double or multiple purposes. They can only be used for the sole purpose of showing the commission of the crime of which they form part. The factual complexity of the crime of treason does not endow it with the functional ability of worm multiplication or amoeba reproduction. Otherwise, the accused will have to face as many prosecutions and convictions as there are elements of treason, in open violation of the constitutional prohibition against double jeopardy. (at p. 523)
>
> In short, <u>political crimes are those directly aimed against the political order, as well as such common crimes as may be committed to achieve a political purpose. The decisive factor is the intent or motive. If a crime usually regarded as common, like homicide, is perpetrated for the purpose of removing from the allegiance "to the Government the territory of the Philippine Islands or any part thereof" then said offense becomes stripped of its "common" complexion, inasmuch as, being part and parcel of the crime of rebellion, the former acquires the political character of the latter</u>. (at pp. 535-536.) *[Underscorings supplied.]*

The Supreme Court ruled that the common crimes of murders, arsons and robberies are mere ingredients of the crime of rebellion. In its own words:

> Thus<u>, national, as well as international, laws and jurisprudence overwhelmingly favor the proposition that common crimes, perpetrated in furtherance of a political offense, are divested of their character as "common" offenses and assume the political complexion of the main crime of which they are mere ingredients, and, consequently, cannot be punished separately from</u>

> the principal offense, or complexed with the same, to justify the imposition of a graver penalty. (at p. 541.) *[Underscorings supplied.]*
>
> x x x x
>
> It is evident to us that the policy of our statutes on rebellion is to consider all acts committed in furtherance thereof - as specified in Articles 134 and 135 of the Revised Penal Code – as constituting only one crime, punishable with one single penalty – namely, that prescribed in Article 135. (at p. 547.)

The foregoing doctrine was applied consistently and without interruption in a long line of subsequent cases. Thus:

In *People v. Geronimo (*100 Phil 90/ 53 OG 68; [1956]), the said ruling was affirmed. In this case involving the accused alleged to be ranking officers and members of the "Hukbong Mapagpalaya ng Bayan" and the "Partido Komunista ng Pilipinas" were charged with the complex crime of rebellion with murders, robberies and kidnapping, the Supreme Court again ruled:

> As in treason, where both intent and overt act are necessary, the crime of rebellion is integrated by the coexistence of both the armed uprising for the purposes expressed in Article 134 of the revised penal Code, and the overt acts of violence described in the first paragraph of Article 135. That both purpose and overt acts are essential components of one crime, and that without either of them the crime of rebellion legally does not exist, is shown by the absence of any penalty attached to Article 134. It follows, therefore that any or all acts described in Article 135, when committed as a means to or in furtherance of the subversive ends described in Article 134, become absorbed in the crime of rebellion, and cannot be regarded or penalized as distinct crimes in themselves. In law they are part and parcel of the rebellion itself, and cannot be considered as giving rise to a separate crime that, under Article 48 of the Code, would constitute a complex one with that of rebellion. (at p. 95.)

In *People v. Aquino* (108 Phil 814, 820 [1960]), the accused were charged and convicted with murder. On appeal, the Supreme Court ruled, citing *Hernandez,* that "since it appears that the killing was committed not because of any personal motive on the part of the accused but merely in pursuance of the huk movement to overthrow the duly constituted authorities, the proper charge against them would be rebellion and not murder."

Hernandez was again affirmed in *People v. Lava* (28 SCRA 72; at pp. 96-101; [1969]), where the accused alleged to be high ranking officers of the Partido Komunista ng Pilipinas (PKP) and its military arm the Hukbong Mapagpalaya ng Pilipinas (HMB) were charged and convicted by the lower court of the complex crime of rebellion with murders and arsons for acts committed during eight instances for a period staring from 1946 to 1950.

In *People v. Manglallan* (160 SCRA 116; 121 [1988]), involving an admitted member of the New People's Army, the Supreme Court likewise sustained the contention that the crime committed was not murder but the crime of rebellion as the killing was politically motivated in that it was committed as a means to or in furtherance of the ends of the NPA as the military arm of the Communist Party of the Philippines and cited favorably the earlier aforecited rulings in *Hernandez, Aquino and People v. Agarin* (109 Phil 430).

Hernandez was tested anew and reexamined in *Enrile v. Salazar* (186 SCRA 218 [1990]), a case involving a charge for rebellion with murder and multiple frustrated murder committed

during a failed *coup d' etat* attempt. In an *en banc* decision, the Supreme Court affirmed the doctrine of *Hernandez* that the proper charge is simple rebellion and emphatically ruled:

> The rejection of both options [abandon *Hernandez* altogether or hold it applicable only to offenses committed in furtherance, or as a necessary means for the commission, of rebellion, but not to acts committed in the course of a rebellion which also constitutes "common crimes of grave or less grave character] shapes and determines the primary ruling of the Court, which is that Hernandez remains binding doctrine operating to prohibit the complexing of rebellion with any other offense committed on the occasion thereof, either as a means necessary to its commission or as an unintended effect of an activity that constitutes rebellion. (at p. 228.)

The parameters of the ruling in *Enrile v. Salazar* were further defined and amplified in the subsequent case of *Enrile v. Amin* (189 SCRA 573 [1990]) which quashed a charge for violation of PD No. 1829 "for harboring or concealing, or facilitating the escape of any person he knows, or has reasonable ground to believe or suspect, has committed any offense in order to prevent his arrest, prosecution and conviction) in addition to an earlier charge for rebellion for the same act. Again, on *en banc*, the Supreme Court affirmed *Hernandez* and ruled:

> The *Enrile* case gave this Court the occasion to reiterate the long standing proscription against splitting the component offenses of rebellion and subjecting them to separate prosecutions, a procedure reprobated in the Hernandez case. x x x If a person can not be charged with the complex crime of rebellion for the greater penalty to be applied, neither can he be charged separately for two (2) different offenses where one is constitutive or component element or committed in furtherance of rebellion. (at pp. 577-578.)

In amplifying *Hernandez*, the Court ruled:

> All crimes, whether punishable under a special law or general law, which are mere components or ingredients, or committed in furtherance thereof, become absorbed in the crime of rebellion and can not be isolated and charged as separate crimes in themselves. x x x The Hernandez and other related cases mention common crimes as absorbed in the crime of rebellion. These common crimes refer to all acts of violence such as murder, arson, robbery and kidnapping etc. as provided in the Revised penal Code. The attendant circumstances in the instant case, however, constrain us to rule that the theory of absorption in rebellion cases must not confine itself to common crimes but also to offenses under special laws which are perpetrated in furtherance of the political offense. (at pp. 580-581)

Citing *Manglallan, People v. Avila* (207 SCRA 168; at 173-174; [1992]) also found the conviction of the accused for murder to be erroneous. The Court found that the killing of a governor by the accused who were admittedly and indisputably members of the new People's Army were politically motivated and hence, the crime committed was simple rebellion and not murder.

In *People v. Dasig* (221 SCRA 549 [1993]), involving a conviction for murder with assault upon a person in authority, the Court, citing *Manglallan* and quoting the favorable position of the Solicitor General and ruled in this wise:

> In this case, appellant not only confessed voluntarily his membership with the sparrow unit but also his participation and that of his group in the killing x x x x

> It is of judicial notice that the sparrow unit is the liquidation squad of the New People's Army with the objective of overthrowing the duly constituted government. It is therefore not hard to comprehend that the killing x x x was committed as a means to or in furtherance of the subversive ends of the NPA. Consequently, appellant is liable for the crime of rebellion, not murder with direct assault upon a person in authority. (at pp. 557-558.)
>
> The crime of rebellion consists of many acts. It is a vast movement of men and a complex net of intrigues and plots. Acts committed in furtherance of rebellion though crimes in themselves are deemed absorbed in one single crime of rebellion. The act of killing a police officer, knowing too well that the victim is a person in authority is a mere component or ingredient of rebellion or an act done in furtherance of the rebellion. It cannot be made a basis of a separate charge. (Ibid; Citing *Enrile v. Amin*, 189 SCRA 573*) [Underscorings supplied.]*

Hernandez, handed down in 1956 remain undisturbed up to this day.

[The pertinent provisions of the Revised Penal Code, as amended in 1990 by Republic Act No. 6938 (otherwise known as the Coup D' Etat Law) provides:

> *Article 134. Rebellion or insurrection. How committed. – The crime of rebellion or insurrection is committed by rising publicly and taking arms against the Government for the purpose of removing from the allegiance to said Government or its laws, the territory of the Republic of the Philippines or any part thereof, of any body of land, naval or other armed forces, or of depriving the Chief Executive or the legislature, wholly or partially, of any of their powers or prerogatives.]*

In the most recent case of *People v. Lovedioro* (250 SCRA 389; 394-395 [1995]), it was acknowledged that:

> The gravamen of the crime of rebellion is an armed uprising against the government. By its very nature, rebellion is essentially a crime of masses or multitudes involving crowd action, which cannot be confined *a priori* within predetermined bounds. One aspect noteworthy in the commission of rebellion is that other acts committed in its pursuance are, by law, absorbed in the crime itself because they require a political character. x x x Divested of its common complexion therefore, any ordinary act, however grave, assumes a different color by being absorbed in the crime of rebellion x x x x .(Citing *People v. Hernandez*, 99 Phil 515 and *People v. Geronimo*, 100 Phil 90) *[Underscorings supplied.]*

More graphically, *Hernandez* had this to say:

> In the revolutions, as we conduct them in our countries, the common offenses are necessarily mixed up with the political in many cases. x x x A revolutuionists needs horses for moving, beef to feed his troops, etc.; and since he does not go into the public markets to purchase these horses and that beef, nor the arms and saddles to mount and equip his forces, he takes them from the first pasture or shop he find at hand. This is called robbery everywhere, and is a common offense in time of peace, but in time of war it is a circumstance closely allied to the manner of waging it. (at pp. 539-540;

> citing *In re Ezeta (62 Fed. Rep. 972), citing International American Conference, Vol. 2, p. 615) [Underscorings supplied.]*

The simple point being made in the survey of this court doctrine is that all acts of alleged members of the CPP-NPA-NDFP in pursuit of their political beliefs must, insofar as municipal law is concerned, be absorbed or subsumed in one political crime of rebellion. Their alleged members cannot be charged, prosecuted, tried, convicted and punished with any other offense or crime. This must be appreciated vis-avis the discussions in the sphere of international law on the status of national liberation movements.

[At the moment, there is yet no anti-terrorism law in the Philippines that would legally penalize even national liberation movements. But there are various proposed bills being considered now in the Philippine Congress including Senate Bills 1458 and 1980, House Bills 3802, 4980, 4987 and 5025.

Most of these proposed bills have odious provisions that run counter, among others, to the aforesaid principles and trends in international law regarding national liberation movement.

Significantly, though, two of the major bills - House Bill 3802 by the principal sponsor Rep. Imee Marcos and the Inter-Agency Draft prepared by different government agencies contain the following identical respective caveats in their application:

> *"an act of violence or threat thereof intended or calculated to provoke a state of terror*
> *in the general public, a particular person or a group of persons for political purposes"*
>
> *"an act or omission committed or threatened in or outside the Philippines*
>
> *"(i) that is committed in whole or in part for a political or ideological purpose, objective or cause, and in whole or in part with the intention of intimidating the public, or a segment of the public, with regard to its security, including its economic security,*
> *or compelling a person, a government or a domestic or international organization*
> *to do or refrain from doing any act, whether the person, government or organization is inside or outside of the Philippines, and*
>
> *"(ii) that is intended by means of any of the unlawful activity as defined (killing, hijacking, kidnapping, arson, assassination, cyberterrorism, etc.)*
>
> *(A) to cause death or serious bodily harm to a person by the use of violence,*
> *(B) to endanger a person's life,*
> *(C) to cause a serious risk to the health or safety of the public or any segment of the public,*
> *(D) to cause substantial property damage, whether to public or private property, if causing such damage is likely to result in the conduct or harm related to (A) to (C) and (E) or*
> *(E) to cause serious interference with or serious disruption of an essential service, facility or system, whether public or private,*
> *other than as a result of lawful advocacy, protest, dissent or stoppage of work that does not involve an activity that is intended to result in the conduct or harm referred to in clauses (A) to (C),*

and includes a conspiracy, attempt or threat to commit any such act or omission, or being an accessory after the fact or counseling in relation to any such act or omission, but for greater certainty, does not include an act or omission that is committed during an armed conflict and that, at the time and in the place of its commission, is in accordance with customary international law applicable to the conflict, or the activities undertaken by military forces of a state in the performance of their official duties, to the extent that those activities are governed by the rules of international law." [Senate Bill 3802; Underscorings supplied]

but does not include an action that is committed during an armed conflict and that, at the time and in the place of its commission, is in accordance with customary international law or conventional international law applicable to the conflict, or the activities undertaken by military forces of a state in the exercise of their official duties, to the extent that those activities are governed by the rules of international law." [Inter-Agency Draft; Underscorings supplied.]

[See Public Interest Law Center (PILC), Initial Comparative Matrix of Pending "Anti-Terrorism Bills" in the 12th Philippine Congress, Legal Reference, 27 Aug 2002;

[See also: Public Interest Law Center (PILC), Terrorizing the People Further Through a Legal Monstrosity, A Preliminary Position Paper on the Proposed Anti-Terrorism Act of 2002, Presented before the House Committee on Justice, 15 May 2002, where it was noted that:

Concretely, it poses as a further intrusion and serious threat to rights of the people and of legitimate, open, legal formations to assembly, redress of grievances, speech and expression. It also fails to distinguish the legitimate acts of groups involved in an armed conflict under the standards of international humanitarian law. Lastly, we oppose a proposed law that cannot address the atrocious terrorist acts of agents of the State and of foreign governments.]

V. CONCLUSIONS

>From all the foregoing, it is clear that there are strong bases - backed up by existing international instruments, international reality and practice and increasingly progressive views and trends in international law and international humanitarian law - that would support the proposition that national liberation movements have acquired and posses a level of legitimacy.

Necessarily, their use of armed force can also be recognized as a legitimate means in pursuit of their right to self-determination against colonial domination, alien occupation, racist regimes and against all other forms of neo-colonialism, systemic and systematic oppression and repression of peoples.

The dangerous tack after September 11 in different state, bilateral and multilateral laws, agreements and policies and the arbitrariness of putting into various "terrorist" lists what are otherwise legitimate national liberation movements and their alleged leaders run counter to the above doctrines and trends in international law and are therefore legally untenable when measured by the standards, principles, and practice that have gained hitherto universal acceptance.

Admittedly, the available legal materials and commentaries on these points used in this legal opinion did not deal unequivocally with the lawfulness or legitimacy of national liberation movements but only in relation to humanitarian questions.

However, the point worth considering and determining is whether - irrespective of the international or non-international character of national liberation movements - they adhere and conform to international conventions and practice on human rights and international humanitarian law as gauged from an examination of their activities, policies and pronouncements.

In view of all the above considerations and discussions, it can be validly and cogently argued that the present Philippine liberation movement of the broad masses and different forces of the Filipino people as represented by the National Democratic Front of the Philippines, the Communist Party of the Philippines, the New People's Army and the other revolutionary organizations in the Philippines qualify as a legitimate national liberation movement from the point of view of international law, particularly international humanitarian law.

In addition to its own pronouncements and consistent and firm representations, these organizations, when they entered into peace negotiations with the Government of the Republic of the Philippines, have enhanced their status. Such negotiations have both expressly and impliedly recognized this status as a co-belligerent with a responsible command and with readiness and willingness to assume their responsibilities in accordance with international human rights and humanitarian law.

It is, therefore submitted, by way of legal opinion and as a logical consequence of all these views that the national liberation movement in the Philippines and its alleged members and participants cannot be validly regarded as criminals or terrorists insofar as international law and international political and diplomatic perspectives are concerned. #

REFERENCES:

Georges Abi-Saab, Wars of National Liberation in the Geneva Conventions and Protocols, 165 Recueil Des Cours, 363-436 (1979-IV)

George H. Aldrich, Symposium: The Hague Peace Conferences: The Laws of War on Land, Edited by George H. Aldrich and Christine M. Chinkin, The American Society of International Law ; The American Journal International Law ; January, 2000; 94 A.J.I.L. 42

Antonio Cassese ,Terrorism and Human Rights; American University Law Review; Summer, 1982; Conference; The American Red Cross--Washington College of Law Conference: International; Humanitarian Law; Human Rights and Humanitarian Law; Washington College of Law of The American University

David E. Graham, The 1974 Diplomatic Conference on the Laws of War: A victory for Political Causes and a return to the 'Just War' Concept of the Eleventh Century, 32 Washington and Lee Review 24-63; 1975

Kevin J. Greene, Terrorism as Impermissible Political Violence: An International Law Framework; Vermont Law Review Winter, 1992

ICRC, Basic Rules of the Geneva Conventions and their Additional Protocols, 1987

Legal Consultant for HR & IHL, NDFP Negotiating Panel, Comparative Analysis of 5 August 1997 Common Tentative Draft and 16 March 1998 Comprehensive Agreement on

Respect for HR & IHL - A Proposed basis for a Basic Study Guide on the CARHRIHL, 31 March 1998

National Democratic Front of the Philippines, Negotiating Panel, Luis G. Jalandoni, Press Release: Why the CPP and NPA are Not Terrorist Organizations, Statement of the NDFP Negotiating Panel, Utrecht, Netherlands; 3 September 2002

Raul C. Pangalangan and Elizabeth H. Aguiling, The Privileged Status of National Liberation Movements Under International Law, , Philippine Law Journal, Vol. 58, pp. 44-65, 1983

Karen Parker, Presentation to the First International Conference on the Right to Self-Determination United Nations, Geneva (August 2000, Understanding Self-Determination: The Basics

Jordan J. Paust, Human Rights and Human Wrongs: Establishing Jurisprudential Foundation for a Right to Violence: The Human Right to Participate in Armed Revolution and Related Forms of Social Violence: Testing the Limits of Permissibility, Emory University School of Law, Emory Law Journal, Spring 1083, 32 Emory L.J. 545

Natalino Ronzitti, University of Pisa, Book Review: International Law and the Use of Force by National Liberation Movements, The American Society of International Law by Heather A. Wilson ; The American Journal International Law; October, 1990 ; 84 A.J.I.L. 981, Edited by Gerald Blake

Yves Sandoz et. al., eds., Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949; Bruno Zimmermann with the collaboration of Jean Pictet; International Committee of the Red Cross, Martinus Nijhoff Publishers, Geneva 1987

Jose Ma. Sison, NDFP Chief Political Consultant, Introduction to “Comprehensive Agreement on Respect for Human Rights and International Humanitarian Law and Related Documents (1992-1998) in the Peace Negotiations between the Government of the Republic of the Philippines and the National Democratic Front of the Philippines, 26 September 1998

Michael Schubert, Liberation Movements & International Law, Kurdistan Committee of Canada, Theses On Liberation Movements And The Rights Of Peoples, Translated by the Kurdistan Committee of Canada

Watson Institute for International Studies, Responding to Terrorism: Challenges for Democracy (August 2002, Choices for the 21st Century Education Program, Brown University

Wil D. Verwey, The International Hostages Convention and National Liberation Movements, The American Society of International Law, The American Journal International Law; January, 1981 ; 75 A.J.I.L. 69

[N.B. This legal opinion is without prejudice to further refinements and reformatting and to SUPPLEMENTAL opinion/s as other possible materials come in.]

81

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