ARMED STRUGGLE FOR NATIONAL LIBERATION AND INTERNATIONAL LAW

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International relations of post-World War II have become characterised by armed struggle of an internal character aimed at the overthrow of various systems of domination such as colonialism in Algeria, Guinea Bissau, Mozambique and Angola; imperialism as in Vietnam and Angola; apartheid policy as in Azania (South Africa) and minority rule as in Zimbabwe. The phenomena of the use of force in these ways have attracted analyses and responses by concerned scholars from various disciplines and ideological camps. Some imbued by genuine desire for world peace, others as agents of various other causes. An examination of the literature on national liberation struggle in Africa reveals a staggering confusion of ideas emerging from the analyses of the same facts. A sceptic could rightly say that the combatants in the field have their academic counterparts in ideas.

In the sphere of international law, however, attempts made to apply rules of law to liberation struggles have also not produced consensus. The difficulty here lies in the changing structure of international relations with the emergence of socialist states and developing countries. The slow recognition of the change and in most cases, its blatant denial by respecters of international status quo has also added to doctrinal problems. It is possible to argue that the law relating to liberation struggle is politically charged (as compared for instance to International Economic Law) and, therefore, to enter into a discourse of the law of armed conflict of this type is in essence to play politics. The logic of this thinking must recognize, however, that the very rules of this law must themselves have been the product of the political character of armed conflict.

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This is not to deny the genuine dilemma of some international lawyers who believe that laws are silent in the heat of battle and are revived in the wake of peace. This, however, has not dissuaded analyses of the law applicable durante in bello and indeed most of the literature on the subject is concentrated here. This is so partly because of the nature of liberation struggles and partly because of the historically determined rules of international law. Thus for instance one of the basic rules of the law enunciates that prima facie, armed struggles by the nationals of a state in the territory of that state falls within the sanctuary of that state's jurisdiction into which it is forbidden to probe.

International law does not concern itself with the nature of the political system operated by its subject. This system is free to be exploitative, dictatorial, oppressive etc., so that when the nationals of an oppressive system resort to arms to resolve their fundamental contradiction with that system, international law consistently keeps away. Given the nature of every legal system, armed struggle as a means of effecting changes is essentially treasonable, punishable by the municipal law of that state. The situation, however, assumes an international complexion where (a) the lives and property of aliens are affected; (b) the conflict is of such a magnitude as to disrupt international peace and security; (c) there is intervention by any other state or institution on behalf of or in support of the liberators. Once this happens, the rules of international law come into play. Given, however, modern international relations, it can be maintained that national liberation struggle (which is an extreme form of a civil disturbance) has an international dimension ab initio. Analysis of its legal character requires a three-stage examination which corresponds to the three phases of what national liberation struggle really means. This will involve an examination of (a) the legality of national liberation struggle - jus ad bellum; (b) the law applicable in the conduct of operations - jus in bello and the law applicable after victory jus post bellum. The purpose of this particular paper is to attempt an analysis of the first category. The exercise of necessity compels clarity as to the meaning of 'armed struggle for national liberation'

CONCEPT OF NATIONAL LIBERATION

The concept of armed struggle for national liberation is unknown to inter-

national law which is concerned with 'War' as a contest between subjects of international law. Hugo Grotius, as far back as the seventeenth century, posed the question #what is war?". For him "war is a condition of those contending by force, viewed simply as such".[1] He distinguished between just and unjust war in the context essentially of war between states. Since Grotius, however, 'war' in fact and 'war' in law has been a source of confusion essentially becaus for a legal war to exist, there must be a declaration of war which need not be accepted by the party. It seems, however, agreed that declaration is no longer a requirement nor is legal war synonymous with actual combat. War, as Grotius asserts, is a condition not a contest. War generally implies armed conflict or struggle but is not synonymous with it.[2] War is normally waged by the military apparatuses of and between states.

On a national level, the phenomenon of armed struggle assumes a different dimension. "When a party is formed within the state which ceases to obey the sovereign", says Vattel, "and is strong enough to make a stand against him or when a Republic is divided into two opposite factions and both sides take up arms, there exists a civil war".[3] In this are implied varieties of the internal use of armed force which fall under the label of civil war. The motives for the use of force can be secession, change of government i.e. coup d'etat, ethnic disputes, revolution etc.[4] The common denominator is the employment of force against the established authority of state to attain a certain goal.

Neither Grotius nor Vattel was interested in the political character of war of which the law is a mere manifestation. Clausewitz, however, saw it through and declared, "war is continuation of politics by other (i.e. violent) means".[5] Mao Tse-tung drew the logical conclusion from this and thus asserted that "when politics develop to a certain stage beyond which it cannot proceed by the usual means, war breaks out to sweep the obstacles... It can, therefore, be said that politics is war without bloodshed while war is politics with bloodshed"[6] Armed struggle is, therefore, a misleading appearance for the intense political contradiction existing in a society and which has developed to a point where peaceful solutions can no longer resolve it and so the use of force is resorted to. Armed struggle is, therefore, an instrument for the settlement of disputes.

It is necessary, however, to distinguish liberation struggles which is a

form of internal conflict from the other types of conflicts such as coup d'état. A coup is normally a violent overthrow of a government by a section of the military organ of the state. It can be achieved with or without bloodshed and often is a swift operation. It has a potential to lead to a wider and long drawn-out struggle. Its primary aim is essentially seizure of power. All illegal (from a municipal law standpoint) use of force against the authority of the state constitutes rebellion and as such rebellion is a form not a manifestation of civil war.[7] A revolution is also a change brought about often by the use of force but challenging the socio-economic foundation of society as such and carried out with that aim in view. It often embraces a large section of the community who supports it either by participation or by positive acquiescence. A revolution can be the ultimate aim of a coup d'etat or liberation struggle. "Of all the things we have done", declared Samora Machel, the President of Mozambique, "the most important - the one that history will record as the principal contribution of our generation - is that we understand how to turn the armed struggle into a revolution; that we realised that it was essential to create a new mentality to build a new society".[8]

As for national liberation movement, it is essentially a politically organized group of indigenes of a state who have resorted to the use of armed force to resolve their differences with the established authority of the state. It is composed of persons trained often in foreign countries by the military organs of those states with their consent or acquiescence. The movement's bases of operation are sometimes in the territory of other states and in their own. Their theatre of war is normally concentrated in their own territory but sometimes, it may assume extra-territorial dimensions. The movement often has a clearly defined aim such as, in Zimbabwe, 'majority rule'. There may be multiple aims of the movement reflected in the varying ideological composition but there is always a dominant declared aim.

From both its internal ideology (i.e. the cohesive commonly shared idea which defines their goal, strategy and tactics) and external aim are derived the support of and condemnation by other states whose relations with the warring state become subject of legal determination. A national liberation movement may be composed of Marxists of Peking and Moscow leanings, nationalists, racists, comprador bourgeoisies etc. The movement

is 'national' because it holds together indigenes of differing and contradictory ideas on the nature of the new society. The common denominator, however, lies in an understanding of the immediate 'enemy' and an agreement that its idea is 'wrong' because it is oppressive and often exploitative. From the internal contradiction of the movement, however, is derived the rationale for its foreign support and aid and so also is the case with regard to the state itself. Thus a movement with a leadership of Marxist leanings would draw support from the socialist world and by the same token alienate support from the imperialist world. Yet general international law does not recognize a commonly shared ideology as a legitimate basis for interfering in what it seriously regards as intervention in the internal affairs of a state.

The movement also has normally the support of the people from whom it recruits its combatants and from whom these get food and shelter. Its tactic is to operate in small bands, often elusive, avoiding frontal confrontation with the military forces of the state. Generally, its combatants carry arms openly and wear a distinctive uniform both of which they shed whenever occasion demands. The liberators in the field are answerable to the leadership of the movement who undertake general responsibility for the movement and who constitute its vanguard.

National liberation movement further distinguishes itself from other types of civil war in broadly three respects. First, unlike an uprising, it is highly organized often with a hierarchy of authority to which corresponds responsibility. Its operation is elusive and mobile. Secondly, unlike a coup d'état, the movement derives its recruits from the civilian population from whom it derives political and moral support. Thirdly, the movement carries on a deliberate policy of systematic long drawn-out conflict (protracted struggle) the idea being to drain the economic resistance of the state and weaken the morale of the state combatants. The aim of the movement is liberation from a definite form of oppression. It is liberation because there is oppression. It is a struggle because there is resistance. The struggle is protracted because being militarily weak in terms of weaponry (normally a monopoly of the state), the movement has, of necessity, to operate clandestinely and in small numbers. It is a 'movement' because its internal ideology has taken grip of a sizeable portion of the population who wish it success. Success involves not only the seizure of political power -

the fountain of oppression - but also the suppression of the overthrown idea and the persons who cherish, support and worked for it. The struggle, it must be noted, is not against persons who uphold a given idea. In fine, a national liberation movement is an organized group of indigenes of a state constituted to wage armed struggle against institutionalized oppression in their state and having clearly defined purposes to be achieved by wrenching political power from the administrators of the state apparatuses in order to instal and subsequently institutionalize their own idea. The process is a struggle for a fundamental change which could not be resolved by peaceful means. The use of armed forces is, therefore, a mere manifestation of the struggle of ideas. Armed struggle for national liberation is the military expression of ideas in collision.[9] The struggle, however, is between a state and a movement within a state. The one is clearly a subject of international law, the other apparently not. Yet to discuss the international legal problems relating to the legal character of the struggle, it seems inevitable that the status of the movement should be ascertained and thereafter the 'just' and 'unjust' character of the struggle determined.

STATUS OF NATIONAL LIBERATION MOVEMENTS

Every legal order defines who are its subjects and by implication its objects. It does so either by laying its own clearly defined rules for so determining or by endowing the already existing subjects the power to do so, giving them in some instance certain guidelines to avoid arbitrariness. In international law, states (its subjects) decide when a new subject is born and they do so through recognition. It seems that in the case of new states the criteria laid down in the Montivideo Convention (1933)[10] have been generally accepted as guidelines for states in the exercise of their sovereign rights to determine the existence of a new subject. In the absence of universal recognition, rules of international law come into being only between subjects that have recognized each other. In this lies the relativity of recognition.

As regards the status of national liberation movements, it is clear that, on the application of the Montivideo criteria, they could not be regarded as ripe for recognition and, therefore, the legality or otherwise of their armed struggle automatically vanished from the purview of international law and is relegated to occurrences in the territory of a state over which that

state has exclusive jurisdiction. However, certain rules of international law apply to their combat operations with the state military forces. If the argument is carried a little forward this simplistic view assumes cyclic complexity. The foundation and realisation of recognition are themselves the creation of states exercising their sovereign rights. By the same token, therefore, these states could, if they so desired, change the bases for the creation of new entrants upon whom they could confer international rights and who would assume international obligation, albeit, in their mutual relations. The change of this basis, however, would according to normal rules require the recognition by other states who otherwise would treat recognition of national liberation struggles in their territory as intervention in their domestic affairs.

Recognition of national liberation movements as a subject of international law must be distinguished from their recognition as a belligerent force or as insurgents. The one concerns the legality of armed struggle for national liberation and the other the application and observance of legal rules durante bello. If the national liberation movement is a subject of international law, the discussion as to who is the aggressor, the movement or the state, will fall into focus. This will also determine the legal basis of the trial of any of the combatants post bellum.

Doctrinal support for the view that national liberation movements at a certain stage in the development of their struggle acquire the status of a state has come mainly from Soviet literature.[11] This doctrine, from a Western or Western-oriented point of view would seem untenable unless the socio-philosophical basis from which it was developed is understood. The doctrine starts from the premise that in pre-colonial times nations existed as distinct groups of people bound together by a common culture, occupying a definite portion of land with a developed system of government, laws, machinery for their implementation and as a social cohesive unit with ability to repel aggression from without and maintain law and order within. This constitutes national sovereignty which is inalienable: "Once possessed of national sovereignty", explained Ginsburg, "a national can be deprived of it only if the community itself is totally destroyed... Thus a community reduced to subject stature, though not politically sovereign, on the plans of 'national sovereignty' remains the equal of its independent counterparts,

notwithstanding the loss of its facilities for self-government".[12] In contemporary political history of nations, however, this doctrine must face the task of explaining the status of various nations forcibly united by a colonial power but the struggle for national liberation is the struggle not to return to pre-colonial nation but rather to retain the multinational entity.[13] It would, of course, be argued that the entity is a consensual association of subjects of international law each having an inalienable right to secede and if need be using armed struggle for its liberation. The end product of this thinking creates a practical difficulty which relates to the stability of the international system.

The Soviet doctrine seems, however, to oscillate between saying that national liberation movements are ipso facto subjects of international law once they have acquired certain traits of a state and that they ought to be recognised as such.[14] The first cannot be seriously argued not because nations are not subjects of international law but because national liberation movements are not representative of their nations individually. They rather collectively accept the definition of their territory as made by their colonial master. Whether they are subject for recognition, is, in the final analysis, a question of legitimate exercise of a state's sovereignty within the fragile rules of recognition. It certainly serves no useful purpose to denounce the theory that national liberation movements which at certain stages of their struggle must call for recognition as a subject of international law simply by arguing at what stage this can be done. The very rules of recognition are themselves vague. Thus, for example, a similar question could be posed as to what stage in its struggle a secessionist movement can be recognized. Recognition, it must be borne in mind, is a political act which produces legal consequences. There being no duty to recognize, questions of national interests become decisive factors that dictate recognition.

If state practice were to be resorted to as evidence of the exact status of national liberation movement, their position, it is here argued, has since the 1970s been that of quasi-international persons. States and organizations that share a common ideology with the liberation movement treat the latter as if it were a state. National liberation movements are thus present in the deliberations of the Organization of African Unity

(O.A.U.), they enter into agreements with states, and in their own right. It is clear, however, that the states did not clearly indicate the legal bases of their transaction with the movements.[15]

The fact of entering into political relationship with national liberation movements without the consent of, and sometimes in opposition to the home state, removes the movement from the status of objects of international law, thus internationalizing their relations not only with the states treating them as such, but with their home state as well. The home state could no longer (and indeed evidence does not seem to exist that they did) rely on the domestic nature of the conflict. It has become a struggle of an international character within the bounds of international law. Vattel says:

> Civil war breaks the bonds of society and of government, or at least suspends the force and effect of them; it gives rise, within the Nation, to two independent parties, who regard each other as enemies and acknowledge no common judge. Of necessity, therefore, these two parties must be regarded as forming thenceforth, for a time at least, two separate bodies politic, two distinct Nations. Although one of the two parties may have been wrong in breaking up the unity of the State and in resisting the lawful authority, still they are none the less divided in fact. Moreover, who is to judge them and to decide which side is in the wrong and which is in the right? They have no common superior upon earth. They are therefore in the situation of two Nations which enter into dispute and, being unable to agree, have recourse to arms.[16]

Thus, it would seem absurd to treat armed struggle for national liberation as an event occurring and therefore being within the exclusive jurisdiction of the state. Once it is clear that a state has resorted to the use of its military forces to combat a clearly defined politically motivated group of indigenes themselves using armed force in negation of the authority of that state, relying and getting the support of sizeable members of that state, the situation described by Vattel comes into being. The fact immediately calls for the reaction of other states from which the struggle got its international character.

The temptation of treating national liberation movements as states is derived also from the modern inter-relationships among states. Given the growing interdependence and intercourse, the foreign element in any given state has become big such that any serious disturbance in that state

provokes interference to protect the interest. This is apart from imperialist trends of demarcating spheres of influence which often correspond to spheres of interest, so that an armed challenge to a state has from the beginning, in international complexion which generally often polarizes between interests that desire a structural change in the international system to reflect the wider interests, and those who would accept the apparent just cause but on policy ground oppose it because of the negative effect such a change would bring. What appears to be a national struggle is therefore international and the agents of such struggle are of necessity international. The combined factors of the loss of authority of the state over the movement and the entering into relations by other states with the movement in its own rights gives the movement its quasi-international character. The question that arises now is whether the struggle is lawful not by national standard but by international law.

JUST AND UNJUST WAR

In its evolution, the idea of just and unjust wars had a strong religious connotation.[17] Whose war was just was not easily determined and it was possible for the contending parties to be waging a just war. This arose from the inherent difficulties in determining exactly what was objectively 'just'. This difficulty led to a shift in emphasis to aggressive and defensive war, the one being illegal, the other legal. One thing was however clear. In customary international law, war is a legitimate means for settling disputes.

Grotius was at pains to categorize occasions of 'just' and 'unjust' war. Unlike Vattel, Grotius was of the strong impression that armed revolt against the sovereign authority cannot be 'just' and in any case it is for him private war. Modern thinking on the subject has become divided. Although it may be conceded that those who challenge the authority of a state may have a 'just' cause, it is generally regarded as the internal affairs of that state unless foreign vital interests are at stake.

Socialist jurisprudence has revived the theory of 'just' and 'unjust' war and applied it not only to inter-state wars but to wars of national liberation movements.[18] For its typical formulation it is thus asserted, "the national liberation war of a dependent people against the colonial

power will always be a just, defensive war from the political as well as the legal standpoint, independent of who initiated the military action... This means that the national liberation war begun by a dependent disenfranchized people will represent but a lawful act on its part in response to acts of aggression committed earlier by an imperialist state which led to the forcible enslavement of the said people and the territory which it occupies".[19]

In this, the legal character of armed struggle for national liberation is constituted and derived from the illegal character of the occupation of the colonies. No examination was made as regards title to colonial lands and the treaties from which this was purported to be derived. In one assertion three important legal principles were juxtaposed in a sweeping stroke. These call for consideration.

Colonial titles were factually derived from conquest but legally from treaties entered into between the chiefs and the various trading companies mandated by their various states. The terms of these treaties were simple and contained mainly conditions for state trading and unilateral obligations undertaken by the chiefs to see to it that the letter of the treaty was effectively carried out. It is not surprising that international law evolved the rule of equal and unequal treaties, the latter being denounced as of no legal force. The problems that beset the notion of equal and unequal treaties were of the type that confronted 'just' and 'unjust' war. That is, the criterion for determining equality and as to what subject-matter should 'equality' refer to: the status of the signatories or to the subject-matter of the treaty stipulation. In traditional international law, the validity of treaties rests mainly on the free consent of the parties freely given. This makes the legality of treaties of annexation of colonies on whether the consent of the chiefs (assuming authority to conclude treaties on their part) was freely obtained. The notion of conquest, annexation and colonialism negates the concept of a 'free consent' and cannot by modern international law, confer legitimate title to a territorium nullius. However, the rules of international law as it then obtained regarded the territories of the Afro-Asian people as 'territorium nullies', which title was obtained not so much by conquest but by a continuous display of sovereignty. This implied in some instances the so-called discovery and in most cases the continuous exclusion

of other colonialists. The juridical relationship between the indigenous peoples and the colonialists was outside the purview of strict international law. The implication still remains that rebellion by the indigenous population, even if it were to be continuous, did not affect the title of the colonialist, the indigenous people and their territories being objects not subjects of international law. This development led to the absurd result that a state in international law is not only the physical geographical location of a given people but the sum total of all such places over which a government exercises exclusive sovereignty.

Modern international law has begun to yield to the dynamic changes in the system of international relations. The problem with the legal character of armed struggle for national liberation is also that of what has become known as 'inter-temporal law'. Assuming the legality of a colonial conquest, acquisition and occupation at the time can, in modern general particular practice of states negate this legitimate acquisition. To argue, as socialist jurisprudence attempted to do, that colonial conquest was an act of aggression which was illegal ab initio and therefore cannot be legitimized, is to gloss over established rules at the epoch of colonialism. It seems clear enough that the acquisition, no matter how morally reprehensible it appears today, was legal but it is now a new argument to consider if it continues to be so.

Marx Huber in the Island of Palmas Case made the point, "that a juridical fact must be appreciated in the light of the law contemporary with it, and not the law in force at the time when a dispute in regard to it arises or falls to be settled".[20] Following hard on this, the learned judge rejected the notion of title to territory put forward by the United States and accepted the Netherlands submission that, "a title to a territory is not a legal relation in international law whose existence and elements are a matter of one single moment... the changed conditions of law developing in later times cannot be ignored in judging the continued legal value of relations which, instead of being consummated and terminated at one single moment, are of a permanent character".[21] Evidence of the challenge to the legality of colonial acquisition has so far rested on the legality of the national liberation movements themselves, their international support by international institutions such as the Organization of African Unity and the United Nations and

individual states such as the entire socialist states, and most Afro-Asian states. In the case of individual states, practice has been fragmentary although consistent with the socialist and some African states. In the United Nations, however, the practice has become organized. The argument centres on two main points: (i) that colonialism has become illegal and (ii) colonial peoples have a right of self-determination. The second implies but is not necessarily coterminous with the fact that the continued administration of colonial lands is ipso facto illegal.

COLONIALISM AND THE LAW

In traditional international law, colonialism and its practice was outside the pale of the law. In modern international relations, however, colonialism has acquired a terminus technicus and its practice extra-territorial effect. This arises from the emergence of political consciousness and nationalism evident in the so-called proliferation of the world community by new subjects of international law. The ruling classes and the masses of the independent states often share a common bond of culture, language, race, historical and colonial experience with those in colonial bondage. This means that when one is free it endeavours to assist the other towards freedom. Besides, the very legal structure of colonialism which defines a colonial territory as constituting part of the metropole hampers and limits the sovereignty of the newly emergent states existing in the same geographical milieu. Co-ordination of foreign policies in Africa or the Caribbean for instance, must of necessity exclude the colonies in the region and this exclusion quite often makes a sham of these policies. Yet the foreign policies of the metropole can be applied in the colonies even when this offends the movement towards regional security system.

The approach of the newly emergent states and the socialist community (the challenging agents to the traditional norms of international relations) have bordered on three main factors sometimes inclusive, at other times exclusive. Is colonialism against human rights and therefore illegal? Or is colonialism against the principle of self-determination which is itself a legal right and therefore illegal? Has the development of contemporary international law made title to the colonial territory illegal and therefore its continued occupation illegal?

As regards the first question, it must be pointed out that the 'right' appertains to 'humans' in their individual or associated selves. It is a legal not a social right and the duties are bestowed on the state and its apparatus to ensure its protection and enjoyment. Human rights assume the political structure of society within which the rights are contained. In this way it became possible to make colonialism compatible with human rights and the rights belong to all nationals who are human.

Colonialism as an antithesis to national self-determination is welded to the legitimacy of titles to colonial territory. The synthesis of independence means a permanent abandonment of the territory by the colonialist. When this is achieved by armed struggle for national liberation, it (the struggle) implies a fight not necessarily for this or that human right for this can be granted without loss of territory, but for relinquishing and occupying the definite territorial boundary the administration of which is a sine qua non to enjoying self-determination.[22] When colonialism assumes a racial form like apartheid, the liberation struggle assumes a territorial and racial character. In this particular instance the system of apartheid is fundamentally related and indeed derived from the historical character of title to territory.

Since the sixties, the enlarged United Nations has been at pains to declare that colonialism is contrary to the principles of general international law and the law of the Charter and that, therefore, armed struggle for national liberation is legitimate because it is defensive. Intervention on behalf of the 'liberators' has also been regarded consistent with rules of law. Two main resolutions of the General Assembly call for examination. They are Resolution 1514(XV) and Resolution 2908 (XXVIII).[23] The first is on the granting of independence to colonial countries and peoples (1960) and the other is on the implementation of this resolution (1972).

In Resolution 1514, the negative aspects of colonialism were recounted and linked with the principles of fundamental human rights, but at the same time made separate from them. Colonialism contradicts the notion of human rights[24] but its elimination is a task which transcends that of human rights as such. Colonialism is incompatible with the notion of international peace and security which are the fundamental principles of the United Nations Charter. The Resolution further declares, "that the process of liberation

is irresistible and irreversible and that, in order to avoid serious crisis, an end must be put to colonialism and all practices of segregation and discrimination associated with it". No date was fixed for terminating colonialism but it seems clear enough that the majority of the states of the world desire the end to the practices of colonialism in "a speedy and unconditional way".

Liberation struggle is a dominant feature of the late twentieth century and hence the Resolution declares, "that all peoples have an inalienable right to complete freedom, the exercise of their sovereignty and the integrity of their national territory". The concept of inalienable rights can be found in very many constitutions of nations but here the members of the UN having borrowed it posed it against colonialism.

Having forcefully denounced colonialism, the Resolution now addresses itself to its resistance. "All armed action or repressive measures of all kinds directed against dependent peoples shall cease in order to enable them to exercise peacefully and freely their rights to complete independence, and the integrity of their national territory shall be respected".[25] It may be asked, however, how the colonial power is expected to react when confronted with armed attack against its military forces fighting to retain colonialism. The Resolution gave no clue. It contented itself by announcing the right of the dependent to liberate themselves from colonialism. The Resolution is also silent as to whether it is legitimate for national liberation movements to use arms for the purposes of decolonization. A strained interpretation of the provisions of the Resolution seems to imply the validity of armed attack for national liberation. Having denounced use of armed force against colonized peoples, the Resolution declares that "all peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development". The implication of this statement together with others already cited is that the continuation of colonialism constitutes an infringement of the 'rights' of the dependent peoples and, therefore, a breach of the duty arising from the Declaration. Armed struggle for national liberation is thus an assertion of the inherent right for self-determination and its resistance a breach of duty, not only to desist from the use of force in such situations but also to discontinue colonialism speedily and unconditionally. This inter-

pretation is reinforced by the Resolution of 1972 (twelve years later). In it, the General Assembly reaffirmed that, "the continuation of colonialism in all its forms, including... the waging of colonial wars to suppress the national liberation movements of the colonial Territories in Africa... is incompatible with the Charter of the United Nations".[26] This provision removes armed struggle and its resistance against decolonization from the sphere of domestic jurisdiction, but the question of the legality of armed struggles remains unsettled. Although the 1972 Resolution said much about giving "material assistance" to the liberation movements, practice has translated this to mean the supply of weaponry and, therefore, a recognition of the legality of armed struggle for liberation. In the Resolution on terrorism, however, the General Assembly no longer minced words for it "upholds the legitimacy of... their struggle, in particular the struggle of national liberation movements, in accordance with the purpose and principles of the Charter and the relevant resolutions of the organs of the United Nations."[27]

It seems clear enough that the majority of states and in this case, the majority of mankind denounce colonialism making it incompatible with the United Nations Charter. The Resolutions, however, raised a lot of theoretical problems. To whom for instance, does the colonial power owe the duty to decolonize?

The Resolutions anchored the rights on the dependent people who are objects and not subjects of international law and although beneficiaries of the United Nations are not parties to it. It seems that a colonial power is answerable to the General Assembly of the United Nations and to the international community at large. Although the national liberation movements are not signatories to the Charter, they are the agents of the international community to which they are also a part, to which they are also answerable and from which they derive their material and moral support. Primarily, armed struggle for decolonization is dictated by local circumstances as read and interpreted by the leadership of the movement. The primary responsibility for the struggle attaches to the people engaged in the struggle and for whom the struggle is carried out, but the ultimate responsibility is to the international community at large.[28] This community, however, is not a harmonious or homogeneous whole being replete with ideological,

political, racial and economic contradictions. These reflect themselves in the voting pattern of the General Assembly which produces these Resolutions. The duty of the colonial power to decolonize is, concretely speaking, owed to the majority of states and mankind. Whether principles of law flow from democratic processes shall be examined soon.

The language of the Resolution is such that it fails to distinguish between decolonization and self-determination. The Resolution attempted to equate the two whereas it is clear that the concept self-determination is broader than that of colonialism. Wars of secession for instance come under self-determination and it cannot be seriously argued that this is what the Resolutions were about. By linking decolonization with self-determination, however, the Resolutions attempted to emphasize rights of peoples under colonialism to liberate themselves. The Resolutions thus treat colonialism as incompatible with norms of modern international relations; as incompatible with human rights and finally as incompatible with the principle of self-determination. It seems that the legal consequences that would flow from illegal colonialism would primarily rest on the first which, it has already been said, is linked with the last. The negation of human rights does not necessarily attack the basic political structure of a given society.

Although the Resolutions of the General Assembly are articulated in their denunciation of colonialism, can this be taken to mean that colonialism is illegal because rules of international law can generate from the Resolutions of the General Assembly? The law-creating potential of the General Assembly has been a subject of much debate. The real problem is whether the Resolutions fall into the established pattern of making law itself established by custom as pronounced for instance in the Asylum Case.[29] If, however, the question is posed as to whether modern trends in international relations have affected the very modes of law-making, a circle is created. The practice to change the mode must itself conform to the established rules. If on the other hand resort is had to the more concrete provision of the Statute of the World Court, matters would become easier and clearer. It is an unfruitful exercise to go into endless discussion as to whether the practice of states within the UN constitutes a practice carrying opinone juris and therefore law-creating. It is as clear as noon-day that the Resolutions of the General Assembly cannot constitute custom in the sense of the Asylum

Case.[30] Their legal value must, therefore, be sought either in quasi-consensual agreements or in the general principles of law recognized by subjects of international law. It will be difficult for a jurist to throw overboard a unanimous or majority Resolution of a world body like the United Nations and particularly if such Resolutions confirm the practice of the majority outside the United Nations simply because such practices have not crystallized into the hard liniments of customary international law. It is also absurd to argue that for a general principle to emerge, it must contain the practice of the major Western legal systems for not even in national democratic systems is such a condition a requirement.[31]

There is yet a very serious problem inherent in the law-creating processes of international law. Do the Resolutions create a law only for the parties that voted for it or for the world at large? It is interesting to note that for the colonial powers that voted against the two main Resolutions, colonialism is legal and following therefrom armed struggle for national liberation has no international legal status. Being matters falling within the competence of the colonial power, that power reserves the right "to employ appropriate measures of police protection in order to maintain law and order in territories".[32] It must be recalled that in the Asylum Case, the World Court distinguished general and particular custom thus giving vein to the view that a practice that is attendant with opinione juris creates laws only for the parties thereto. In the absence of recognition or acquiescence by the other parties, contradicting rules of international law would exist within the world system. This very rule reveals the political base of international law and points to the fact also that two rights can validly contest with each other for recognition or superiority. This results from the absence of an authoritative legislative body. The General Assembly is the nearest to such a body but, has it displaced 'Consent' as the foundation of law creation in international law? In the Reparation Case, the World Court paved the way towards democratic law-creating when it declared that the United Nations has an 'Objective personality'; that is to say, it exists in spite of and irrespective of its recognition by non-members and its actions with non-members are governed by rules of international law.[33] But the General Assembly has been endowed with specific powers which over the years it has extended with the acquiescence of the members of the Security Council. Its Resolutions regard-

ing colonialism carry more than two thirds positive vote and the charter specifically charged it with matters concerning colonial peoples. The bulk of its membership have themselves emerged from colonial domination. In these circumstances, it will be difficult to resist the conclusion that once it is accepted that the Resolutions create law, such a law has objective existence.

The Resolutions derive their legal character from the conscious practice of the bulk of the members of the General Assembly within and outside the United Nations both of which reveal an affirmation of the general trend towards decolonization since the sixties. Evidence of the outside practice can be seen in the actions and reactions of states in, for instance, the Goa incident,[34] the Vietnam War[35] and the practice of the OAU.[36]

LIBERATION STRUGGLE UNDER THE UN CHARTER

Having declared colonialism illegal and recognized the legitimacy of armed struggle for national liberation, the question arises as to the compatibility of this with the relevant provisions of the Charter denouncing the use of force. First national liberation movements are not members of the United Nations and it would therefore seem that its provisions prohibiting the use of force do not apply to them. But the United Nations has an objective personality and its General Assembly and Security Council are charged with the function of maintaining world peace and security. If war for the maintenance of colonialism is dubbed an 'aggressive war', then the legality of armed struggle for national liberation would securely rest on self-defence recognized in Article 51 of the Charter. It is, however, one thing to say that colonialism and its practice is illegal, and it is another thing to say its armed support constitutes aggression. In any event self-defence as contained in the Charter and in traditional law is a right appertaining to states and not to quasi-international persons. Perhaps the illegality of colonialism would provide a legal cover for states that openly support liberation movements for then, they could argue that their actions no longer constitute intervention since the practice of colonialism has been outlawed. But what is aggression?

The problem of defining aggression has weakened the interpretation and application of certain provisions of the Charter, especially Articles 2(4) and 51. The socialist practice considers all imperialist and colonialist wars

to constitute aggression but not inter-socialist wars for these are domestic quarrels in the province of proletarian internationalism. Attempts to answer the question whether wars for colonialism constitute aggression reached its climax in 1974, when a Special Committee on the Question of Defining Aggression adopted a definition which pertinently said:

> Nothing in this definition... could in any way prejudice the right to self-determination, freedom and independence, as derived from the Charter, of peoples forcibly deprived of that right and referred to in the Declaration on Principles of International law ... in accordance with the Charter ... particularly peoples under colonial and racist regimes or other forms of alien domination; for the right of these people to struggle to that end and to seek and receive support, in accordance with the principles of the Charter and in conformity with the above mentioned declaration.[37]

In this, armed struggle for national liberation is removed from aggression but it does not say that colonial war constitutes aggression. Moreover, it does not say anything about armed clashes but it refers to the "right to struggle". This type of right can be exercised by constitutional means, say, by violent demonstration. However, it seems, reading the exception clause as a whole, that what was intended was to treat all types of struggles, armed struggle in particular, from being characterized as aggression. Self-defence in traditional international law is not restricted to reaction against aggression so that armed struggle for national liberation and its international support can still provoke armed self-defence permitted in the Charter. This could be, in so far as the colonial power could show, that its use of force is not to continue colonialism but, for instance, to protect the lives and property of aliens. The weakness of this argument will lie in the inseparable link between 'colonialism', itself alien, and alien property. Indeed this type of matter would fall to be settled on applicable rules of law durante bello.

The institution of colonialism is itself by definition violent involving not only the forcible acquisition of alien land, displacement of persons and so forth, but also a continuous use of force to maintain the colonial status quo.[38] By modern international law, title does not attach where force is used[39] and since colonialism has been generally declared an illegal practice, it becomes difficult to justify the legal basis of colonial titles.[40]

Colonial titles were legally acquired under the primitive rules of law in operation between the fifteenth and seventeenth centuries, but modern practice has nullified this title thus generating a new legal principle. Armed struggle for national liberation is in a way an assertion of the right to territorial title. The use of force for the general settlement of disputes has been outlawed except for self-defence. If colonialism is violence in continuum, then it seems clear that armed struggle for national liberation constitutes self-preservation in order to practice self-determination.

CONCLUSION

World disorder in international relations is deeply rooted in the system of oppression and exploitation of which colonialism is an open manifestation. Armed struggle for national liberation is a response. Responsibility for the maintenance of world peace and security is primarily the business of the United Nations but in reality the business of the oppressed peoples. Inroads have been laid into the traditional rules of international law which rules fell short of coping with international regime of oppression that has become the dominant feature of international relations. This development arose from the decisive impact on the international system resulting from the emergence of socialism in the larger areas of mankind and the development of certain rules of law in conformity with its practice. This new phenomenon constitutes in the main both a challenge and a change to orthodox rules of international law. Added to this is the re-emergence of developing nations and their general unity in approaching serious problems of world peace and whose practice has also subverted traditional rules of international law. Both these developments have legitimized armed struggle for national liberation.

It is a hopeless exercise to look into existing rules of international law to find an answer to the legality of liberation struggles. Such an exercise would definitely lead to a negative conclusion. This, however, is an exercise the essence of which has already been altered by the dynamic changes in international relations. It is also just as hopeless an exercise to seek for the rules of law in the writings of publicists unless these make effort to interpret modern general state practice. A thorough analysis of modern practice clearly shows that the legal will of the bulk of

mankind has developed as a negation of hitherto established rules. This, however, has been made possible because of the inherent weakness of the system of international law itself in that it has no legislative organ or judiciary to declare certain law-making exercises illegal. Rather, subjects of international law are the exclusive law-making organ in international relations. Although at the time this phenomenon acquired its legitimacy, subjects of international law as defined by that law excluded the developing countries and the socialist states, the 'old' states now feel embarrassed at the logical application of the rules developed in the main by them. Serious consequences for future development of international law in general and its application to armed struggle for national liberation is the tendency towards bipolarity (West on the one hand and East on the other with the developing nations generally gravitating towards the East).

If colonialism is illegal and armed struggle for national liberation legal, what are the legal consequences of illegal acts in international law and how are they to be implemented? Underlining the answer to this question is the veritable fact characteristic of the power struggle in international relations, that international law assumes high subjectivity where fundamental interests are at stake. What is 'right' for one becomes 'wrong' for the other. This situation is reminiscent of that described by Karl Marx: "There is here, therefore, an antimony, right against right both bearing the seal of law of exchanges. Between equal rights force decides."[41]

NOTES

1 J.B. Scott (ed.), Classics of International law De Jure Paci et Bello Tres 111, p. 33.

2 Brownlie, International law and the Use of Force by States, London, Oxford University Press, 1963, pp. 399-400.

3 The Law of Nations or the Principles of Natural Law Book 111 1758, pp. 337. See also R.P. Dhokalia, "Civil Wars and International Law" 11, Indian Journal of International Law 1971, p. 219.

4 Chalmer Johnson has suggested six types of civil war ranging from (a) Jacquerie; (b) Millenarian rebellion; (c) Anarchistic rebellion; (d) Jacobin Communist revolution; (e) Conspiratorial Coup d etat and (f) Militarised mass insurrection. Mazlish et al, Revolution: A Reader, 1971.

5 Quoted in Lenin on War and Peace, Peking, Foreign Languages Press, 1966, p. 11.

6 Mao Tse-Tung, Selected Military Writings, Peking, Foreign Languages Press, p. 78.

7 Cf. Dhokalia who relies on Lauterpacht's Recognition in International Law (1949) to distinguish between rebellion, insurgency and belligerency. It seems that from the point of view of international law, insurgency and belligerency are just labels to indicate when and how other states are free to define their stand in a civil war. See also Moore, Digest of International Law, Vol. 1, p. 242. Moore equates 'insurrection' with 'revolt' and defines the former as a state intermediate between peace and recognized civil war.

8 Quoted by J. Dodson, in "Dynamics of Insurgency in Mozambique" Africa Report, 12, 1967, p. 53. See also V.I. Lenin who says, "The transfer of state power from one class to another class is first, the principal, the basic sign of a revolution both in the strictly scientific and in practical political meaning of the term." Letters of Tactics, April 1917.

9 Cf. the definition contained in the History of the Communist Party of Soviet Union (Bolshevist's) Short Course, Moscow, Progress Publishers, pp. 167. Contrast this with the heavily loaded concept of national liberation contained under the title "The War of National Liberation and the World" in J.N. Moore and John Hopkins (eds.), Law and Civil War in Modern World, 1974, p. 304.

10 In Article 1 it is provided that, "The State as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government and (d) capacity to enter into relations with the other state". Hudson's International Legislation VI, p. 620.

11 See G. Ginsburg "Wars of National Liberation and the Modern Law of Nations - The Soviet Thesis", Law and Contemporary Problems, 29, 1964, pp. 910. Ginsburg cites extensive Soviet literature written within the framework of Marxism-Leninism.

12 G. Ginsburg, ibid., p. 913.

13 I.M. Lewis, "The Tribal Factor in Contemporary Africa" in C. Legum and J. Drysdale (eds.), Africa Contemporary Record (Annual Survey and Documents), 1969-70, A.12.

14 See Okeke, Controversial Subjects of Contemporary International Law, Rotterdam Press, 1974, pp. 121. Okeke cites Tunkin: "nations fighting for independence and the formation of their own governments should be counted as subjects of international law" (Emphasis added).

15 The practice of the OAU and its members support this view. Note the recently so-called Geneva Conference 1976 for the 'settlement' of the Zimbabwe's crisis of legal independence where the Zimbabwe Peoples' Army (ZIPA) was represented on an equal status with the rebel leader, Ian Smith.

16 Vattel, op, cit., p. 337.

17 The literature on 'just' and 'unjust' wars abounds. See specifically R.W. Tucker, The Just War, 1960, Mahmassani asserts that in the Islamic doctrine, just war was represented as jihad which "is defined as the struggle for the cause of God by all means including speech, life and property". See "The Principles of International Law in the Light of Islamic Doctrine", Hague Recueil des Cours, 117, 1966, p. 280.

18 Thus, Chia Kuan-Lua at the 27th U.N. General Assembly Session, stated the Chinese position as follows "... we are soberly aware that war is inevitable so long as society divided into classes and exploitation of man by man still exists. There are two categories of war, just and unjust. We support just wars and oppose unjust wars". See also Mao Tse-tung, Selected Military Writings, Peking, Foreign Languages Press, pp. 81. There Mao declared, "History knows only two kinds of war, just and unjust. We support just wars and oppose unjust wars. All counter-revolutionary wars are unjust, all revolutionary wars are just".

19 Sharmanazashvili, Colonial War - A Serious Violation of International Law, 1957, p. 60. Referred to also by Ginsburg, op. cit., p. 920.

20 The report of the case is reproduced in the appendix of R.Y. Jennings, The Acquisition of Territory in International Law, Manchester University Press, 1963.

21 Cited by Jessup in American Journal of International Law, 22, p. 735.

22 In the case of Zimbabwe for instance, the underlining fear of the white minority regime in agreeing to a majority rule is the probable loss of territory to the Africans although the rebel leader Ian Smith couches his protest in a racial garb of protecting the so-called western civilization.

23 For a thorough discussion on the first Resolution, see J.A.C. Gutteridge, The United Nations in Changing World. Manchester University Press, 1969. The text of the Resolution is also published at Appendix 5.

24 It is thus asserted in paragraph 1 of the Declaration that, "The objection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and co-operation."

25 See also the General Assembly Declaration on Friendly Relations unanimously adopted at the 25th session. It reads, "Every State has the duty to refrain from any forceable action which deprives peoples ... of their right to self-determination and freedom and independence. In their actions against, and resistance, to, such forceable action in pursuit of their exercise of their right to self-determination, such peoples are entitled to seek and receive support in accordance with the purposes and principles of the (United Nations) Charter". (Emphasis added).

26 See Resolution 2918 (XXVII).

27 General Assembly Resolution 3034 (XXVII). The force of this Resolution is very weak in that 35 states voted against it. It is, however, not clear whether the negative vote is directed at 'legalizing' the decolonizing processes of national liberation movements or against a possible interpretation of legalizing "acts of terrorism".

28 Cf. Ginsburg, op. cit. "In this case, evidence strongly favours the conclusion that the right/duty relationship applies in toto only as between the individual members of United Nations and between each of them and the Organization as a distinct personality, while the colonies enjoy, for the purposes of this arrangement, the status of objects, passive recipients of privileges which others voluntarily choose to extend to them." (p. 930).

29 International Court of Justice Reports, 1950. The law-creating process under discussion was codified in Art. 38 (2) of the Statute of the International Court of Justice. The provision was articulated by the Court in the Asylum Case. The Court said, "The Colombian Government must prove that the rule invoked by it is in accordance with a constant and uniform usage practised by the States in question, and that this usage is the expression of a right appertaining to the State granting asylum, and a duty incumbent on the territorial State." Cf. North Sea Continental Shelf Case, International Court of Justice Reports, 1969, p. 3.

30 It may be what Professor Cheng dubbed "spontaneous international law". This concept has, however, no room in the traditional process of law-creating. Indian Journal of International Law, 5, p. 45.

31 See G. Schwarxenberger, International Law, Vol. 1, 1957.

32 S.M. Schwebel "Wars of National Liberation in U.N." in J.N. Moore (ed.) op. cit., p. 452, quoting from the General Assembly Resolution 2625 (XXV). According to Schwebel, "It was also made clear by the United States, the United Kingdom and other Powers."

33 Advisory Opinion on Reparation for Injuries Suffered in the Service of the United Nations, International Court of Justice Report, 1949, p. 174.

34 See Mr. Jha of India, speech in the Security Council debate ... Cf. Mr. Stevenson of United States. See further Q. Wright in American Journal of International Law, 56, p. 617.

35 The issue in Vietnam is more complicated given the status accorded to the Thieu's regime and the territory he governed. See Falk (ed.), The Vietnam War and International Law, Vols. I and II.

36 Thus in Article 11 of the OAU Charter, it is provided in paragraph (d) that one of the purposes of the Organization is, "To eradicate all forms of colonialism from Africa". The Organization actually constituted a Liberation Committee through which it channels funds to the liberation movements in Africa. The legality of this practice has been doubted. See for instance Dugard, "The OAU and Colonization" in I.C.L.Q., 16, 1967.

37 Quoted in Schwebel, op. cit., p. 456.

38 F. Fanon, The Wretched of the Earth, Harmondsworth, Penguin Books, 1968.

39 R.Y. Jennings, The Acquisition of Territory in International Law, Manchester University Press, 1961, p. 67.

40 Jennings regards the General Assembly Resolutions as political documents and manifests skepticism as to their legal impact on title to territory pointing out that, "possession is still the main catalyst for building a legal title". Ibid, p. 86.

41 K. Marx, Capital, Vol. 1, Moscow, Progress Publishers, 1961, p. 235.