

## **National Liberation Movements: Still a Valid Concept (with Special Reference to International Humanitarian Law)?**

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### **INTRODUCTION**

National liberation movements constitute a category of armed non-state actors that appeared predominantly in the decolonization period and relate to peoples' self-determination. Decolonization concerned territories that are "geographically separate and distinct ethnically and/or culturally from the state administering it"<sup>1</sup> as well as the groups living in them. In several cases these groups gained self-determination without any, or with little, violence (e.g., Uganda, Nigeria). In other situations, however, independence was achieved through armed

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<sup>1</sup> G.A. Res. 1541 (XV) (Dec. 15, 1960). *See also* Natalino Ronzitti, *Resort to Force in Wars of National Liberation*, in *CURRENT PROBLEMS OF INTERNATIONAL LAW: ESSAYS ON U.N. LAW AND ON THE LAW OF ARMED CONFLICT* 319, 338 (Antonio Cassese ed., 1975) (Beforehand, Chapter XI of the UN Charter "virtually legitimised colonialism.").

struggle (e.g., Angola, Mozambique). The latter situations boosted the appearance of liberation movements.

## I

### LIBERATION MOVEMENTS, SELF-DETERMINATION, AND PEOPLES: THREE INTERRELATED NOTIONS

National liberation movements correspond to a category of armed non-state actors who are defined by their objective (self-determination), the quality of their constituency (peoples) and the conduct and/or quality of the opposing government.<sup>2</sup> In essence, national liberation movements constitute the self-help vehicle of peoples to achieve self-determination. In order, however, to substantiate this definition, it is necessary to explore the interrelated notions of self-determination and peoples.

The UN Charter mentions self-determination in articles 1.2 and 55 as a principle, but it is probable that this principle was viewed only as political.<sup>3</sup> Certainly, it was not intended to apply outside the existing pattern of states.<sup>4</sup> Subsequent developments, though, lead to a gradual legalisation of self-determination, initially with regard to colonial, foreign-dominated and racially submitted peoples.<sup>5</sup> For its part, the

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<sup>2</sup> See Julio A. Barberis, *Nouvelles Questions Concernant la Personnalité Juridique Internationale*, 179 RECUEIL DES COURS 145, 245 (1983).

<sup>3</sup> See George Ginsburgs, “Wars of National Liberation” and the Modern Law of Nations: *The Soviet Thesis*, 29 LAW & CONTEMP. PROBS. 910, 930 (1964) (describing it as “anything but a legal prescript”); Antonio Cassese, *Le Droit International et la Question de l’Assistance aux Mouvements de Libération Nationale*, 19 R.B.D.I. 307, 313 (1986); Gebre Hiwet Tesfagiorgis, *Self-determination: Its Evolution and Practice by the United Nations and its Application to the Case of Eritrea*, 6 WIS. INT’L L.J. 75, 83, 85 (1987).

<sup>4</sup> See JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 114 (2d ed. 2006) (These terms “can refer to the sovereign equality of existing States, and in particular the right of the people of a State to choose its own form of government without external intervention. It can also mean the right of a specific territory (or more correctly its people) to choose their own form of government irrespective of the wishes of the rest of the State of which that territory is a part.”). See also Richard Falk, *Problems and Prospects for the Kurdish Struggle for Self-Determination after the End of the Gulf and Cold Wars*, 15 MICH. J. INT’L L. 591, 597 (1993–1994) (supporting the first interpretation).

<sup>5</sup> See *Western Sahara, Advisory Opinion*, 1975 I.C.J. 12, 121 (Oct. 16) (separate opinion by Dillard) (assessing that “a norm of international law has emerged applicable to the decolonization of those non-self-governing territories which are under the aegis of the United Nations”). See also Ronzitti, *supra* note 1, at 343–44 (considering at that time self-determination as a legal principle only within the scope of colonialism and apartheid, although he noted that the International Covenants would change the situation).

General Assembly was more ready to refer to the *right*<sup>6</sup> of self-determination in several resolutions (such as 545 (VI),<sup>7</sup> 1514 (XV),<sup>8</sup> and 2625 (XXV)<sup>9</sup>) dealing with self-determination of peoples, particularly those under colonial rule, and friendly relations between states. The International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights recognized a human right of peoples under common article 1,<sup>10</sup> which is not confined to colonial situations.<sup>11</sup> The International Court of

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<sup>6</sup> See BRAD ROTH, GOVERNMENTAL ILLEGITIMACY IN INTERNATIONAL LAW 204 (2000) (decolonization playing a significant role in this elevation).

<sup>7</sup> G.A. Res. 545 (VI) (Feb. 5, 1952); see also G.A. Res. 637 (VII) (Dec. 16, 1952); G.A. Res. 421 (V) (Dec. 4, 1950).

<sup>8</sup> G.A. Res. 1514 (XV) (Dec. 14, 1960). See also S.C. Res. 183 ¶ 4 (Dec. 11, 1963) (reproducing the same resolution of the General Assembly).

<sup>9</sup> G.A. Res. 2625 (XXV) (Oct. 24, 1970). See Robert Rosenstock, *The Declaration of Principles of International Law Concerning Friendly Relations: A Survey* 65 AM. J. INT'L L. 713, 731 (1971) ("This represents a significant step in the progressive development of international law. . . . Many states had never before accepted self-determination as a right."). See also Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 1.4, June 8, 1977, 1125 U.N.T.S. 3 (referring to a *right* of self-determination, while mentioning, as its bases, the abovementioned resolution and, somewhat excessively, the Charter of the United Nations).

<sup>10</sup> International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171; International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3. See also African Charter on Human and Peoples' Rights, art. 20.1, June 27, 1981, 1520 U.N.T.S. 217.

<sup>11</sup> See Written Statement of the People's Republic of China to the International Court of Justice on the Issue of Kosovo (Apr. 16, 2009) at 4, <http://www.icj-cij.org/docket/files/141/15611.pdf> (limiting the right to self-determination only to colonial and foreign occupation situations); declaration of India to art. 1 of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights (Apr. 10, 1979) at 5, <https://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-3.en.pdf>, ("[T]he words 'the right of self-determination' appearing in [this article] apply only to the peoples under foreign domination"); declaration of Bangladesh, *id.* at 3 (Sept. 6, 2000) ("[T]he right of self-determination of Peoples' appearing in this article apply in the historical context of colonial rule, administration, foreign domination, occupation and similar situations"); and objection of Pakistan, *id.* at 13 (June 23, 2010) ("The right of Self-determination as enshrined in the Charter of the United Nations and as embodied in the Covenants applies to all peoples under foreign occupation and alien domination."). *But see* objection by France, *id.* at 10 (Nov. 4, 1980) ("[T]his reservation attaches conditions not provided for by the Charter of the United Nations to the exercise of the right of self-determination"); Germany, *id.* (Aug. 15, 1980) ("The right of self-determination as enshrined in the Charter of the United Nations and as embodied in the Covenants applies to all peoples and not only to those under foreign domination. . . ."); and the Netherlands, *id.* at 12 (Jan. 12, 1981) ("[T]he right of self determination as embodied in the Covenants is conferred upon all peoples."). See also objections of Sweden, *id.* at 14 (Dec. 14, 1999) and France, *id.* at 10 (Sept. 30, 1999).

Justice was more reluctant to refer to a right.<sup>12</sup> More recently it confirmed the *erga omnes* character of the self-determination right<sup>13</sup> and increasingly, it is considered as a norm of a peremptory character.<sup>14</sup> Yet it is not entirely certain what self-determination means or entails to<sup>15</sup> the holders of the right<sup>16</sup> as well as its means of enforcement.

The right of self-determination in common article 1 to the 1966 Covenants includes the free<sup>17</sup> determination of people's political status,

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<sup>12</sup> See Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16, 31 (June 21). *But see* Western Sahara, Advisory Opinion, 1975 I.C.J. 12, 31 and 35 (Oct. 16) (referring to “the principle of self-determination as a right of peoples” and “[t]he right of that population to self-determination” respectively).

<sup>13</sup> Case Concerning East Timor (Portugal v. Australia), Judgement, 1995 I.C.J. 90, 102 (June 30); Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 199 (July 9). See also Jochen A. Frowein, *Self-Determination as a Limit to Obligations Under International Law*, in MODERN LAW OF SELF-DETERMINATION 211, 215 (Christian Tomuschat ed., 1993).

<sup>14</sup> See United Nations Conference on the Law of Treaties, Official Records, First Session, 300 (1969) (Sierra Leone); Western Sahara, Advisory Opinion, 1975 I.C.J. Pleadings, Vol. I, 207 (Spain); Western Sahara, Advisory Opinion, 1975 I.C.J. Pleadings, Vol. V, 319–20 (Algeria); the Written Statement Submitted by the Government of the Republic of South Africa in the Legal Consequences on the Construction of a Wall in the Occupied Palestinian Territory (Jan. 30, 2004) at 11, <http://www.icj-cij.org/docket/files/131/1597.pdf>. See also Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility, 2006 I.C.J. 6, 89 (Feb. 03) (separate opinion by Dugard); Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, *The Right to Self-Determination: Implementation of United States Resolutions*, ¶ 50 U.N. Doc. E/CN.4/Sub.2/405/Rev.1 (Jan. 1979); Int'l Law Comm'n, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries *in f*, U.N. GAOR, 56th Sess., Supp. No. 10, at 85, U.N. Doc. A/56/10 (Sept. 6, 2001); PETER MALANCZUK, AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW 327 (7th ed. 1997); IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 77 (7th ed. 2008). *But see* Matthew Saul, *The Normative Status of Self-Determination in International Law: A Formula for Uncertainty in the Scope and Content of the Right?*, 11 HUM. RTS. L. REV. 609, 637–39 (2011) (regarding the little evidence on the specific aspects of self-determination that possess the quality of *jus cogens*).

<sup>15</sup> See Saul, *supra* note 14, at 612 (“if the norm is kept ill-defined, states will retain a leeway to resist claims that they are not fulfilling obligations to peoples under their authority”).

<sup>16</sup> See China's statement and declaration by Bangladesh, *supra* note 11 (on colonized peoples). See also declaration of Indonesia (Feb. 23, 2006), *id.* at 5 (“[T]he words ‘the right of self-determination’ appearing in this article do not apply to a section of people within a sovereign independent state. . . .”); and declaration of India, *id.* at 5 (“[T]he words ‘the right of self-determination’ appearing in [this article] . . . do not apply to sovereign independent States or to a section of a people or nation”). *But see* objection by Germany, *id.* at 10 (“The right of self-determination as enshrined in the Charter of the United Nations and as embodied in the Covenants applies to all peoples.”).

<sup>17</sup> Predominantly, this meant without external interference in line with the principle of non-intervention in the internal affairs of a state. See also Committee on the Elimination of

free pursuance of their economic, social and cultural development<sup>18</sup> and free disposition of their natural wealth and resources.<sup>19</sup> To the extent that its effects are confined within the borders of a pre-existing state, we can refer to “internal self-determination.” External self-determination, on the other hand, has a substantial effect on the geography of states, as it could lead to the emergence of an independent state and/or association or integration with a third state. Consequently, external self-determination would clash with the territorial integrity of the “parent” state, whether colonial or not. The General Assembly<sup>20</sup> addressed this point, and in the context of decolonization this clash was solved in favour of self-determination. The territory of colonies and non-self-governing territories has a distinct and separate status from the territory of the administering state,<sup>21</sup> and therefore territorial integrity was irrelevant, while the peoples in the colonial territories differed substantially from the peoples in the metropolitan territory. It would appear, though, that outside this context,<sup>22</sup> the attitude of the international community is mostly hostile<sup>23</sup> or at best indifferent.

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Racial Discrimination, *General Recommendation 21, The Right to Self-Determination*, 48th Sess., 1996, ¶ 4, U.N. Doc. A/51/18, Annex VIII at 125 (linking determination of people’s political status predominantly with the external aspect of self-determination).

<sup>18</sup> See also G.A. Res. 1514, *supra* note 8, ¶ 2.

<sup>19</sup> See also African Charter on Human and Peoples’ Rights, *supra* note 10, at arts. 20–21 (providing for more extensive rights of peoples in relation to self-determination). See also CHRISTINE BELL, *PEACE AGREEMENTS AND HUMAN RIGHTS* 167 (2000) (Increasingly, self-determination is believed to include participatory governance.).

<sup>20</sup> See G.A. Res. 2625, *supra* note 9 (“Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States. . . .”); G.A. Res. 1514, *supra* note 8 (“[A]ny attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations.”). See also Charter of the Organization of African Unity, art. III.3, May 25, 1963, 479 U.N.T.S. 39. The human rights covenants do not include any such limitation.

<sup>21</sup> G.A. Res. 1541, *supra* note 1, Principle IV; G.A. Res. 2625, *supra* note 9.

<sup>22</sup> See Minasse Haile, *Legality of Secessions: The Case of Eritrea*, 8 EMORY INT’L L. REV. 479, 503–04 (1994). Article 1.3 of the ICCPR could lend an argument that external self-determination is confined to peoples in trust and dependent territories.

<sup>23</sup> See Written Statement of The Islamic Republic of Iran in the Case Concerning Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo Before the International Court of Justice (Apr. 17, 2009) at 7, <http://www.icj-cij.org/docket/files/141/15646.pdf> (pronouncing its opposition to external self-determination, as “the right of self determination is not a principle of exclusion or separation but a principle of inclusion”); Written Statement of the Republic of Azerbaijan (Apr. 17, 2009) at 5, <http://www.icj-cij.org/docket/files/141/15668.pdf> (“international law is unambiguous in not providing for a

The meaning of peoples proved an equally difficult task. For a UN Special Rapporteur<sup>24</sup> the following elements were suggested in order to identify peoples entitled to self-determination: “(a) The term ‘people’ denotes a social entity possessing a clear identity and its own characteristics; (b) It implies a relationship with a territory, even if the people in question has been wrongfully expelled from it and artificially replaced by another population.” It is not immaterial to support that actually self-determination during decolonisation applied to territories rather than peoples,<sup>25</sup> a method which ran “against the idea of self-determination,”<sup>26</sup> because “[i]t is for the people to determine the destiny of the territory and not the territory the destiny of the people.”<sup>27</sup> However, among the two criteria for designating non-self governing territories (geographical separation and ethnic/cultural distinction), the former was easier to ascertain and this fact might have had an impact on the weight given to territory as an element for the advancement of self-determination. Furthermore, the creation of a new state, as the usual outcome of decolonization, required the existence of a certain of territory and, therefore, it makes sense to link colonized peoples with a certain territory.

The territorial link is less obvious in other definitions. Instead, they seem to contain a combination of objective and subjective elements. M.G. Kaladharan Nayar<sup>28</sup> refers to the common characteristics of historical tradition, racial or ethnic identity, cultural homogeneity,

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right of secession from independent states”); Statement by the Slovak Republic for the International Court of Justice on the request made by the United Nations General Assembly (resolution A/RES/63/3 of 8 October 2008) for an advisory opinion on the question “Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?” (Apr. 16, 2009) ¶ 6, <http://www.icj-cij.org/docket/files/141/15626.pdf>.

<sup>24</sup> Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, *The Right to Self-determination: Historical and Current Development on the Basis of United Nations Instruments*, ¶¶ 270–279 U.N. Doc. E/CN.4/Sub.2/404/Rev. 1 (Sept. 1978). *But see* Richard N. Kiwanuka, *The Meaning of “People” in the African Charter on Human and People’s Rights*, 82 AM. J. INT’L L. 80, 87 (1988) (considering this definition as limited).

<sup>25</sup> Hurst Hannum, *The Right of Self-Determination in the Twenty-First Century*, 55 WASH. & LEE L. REV. 773, 775 (1998).

<sup>26</sup> Christian Tomuschat, *Secession and Self-determination*, in SECESSION: INTERNATIONAL LAW PERSPECTIVES 1, 25 (Marcelo G. Kohen ed., 2006).

<sup>27</sup> Western Sahara, *supra* note 5, at 122; *see also* Lea Brilmayer, *Secession and Self-Determination: A Territorial Interpretation*, 16 YALE J. INT’L L. 177, 195 (1991) (making a similar argument with regard to peoples seeking secession).

<sup>28</sup> M.G. Kaladharan Nayar, *Self-Determination Beyond the Colonial Context: Biafra in Retrospect*, 10 TEX. INT’L L.J. 321, 340 (1975).

linguistic unity, religious or ideological affinity, geographical continuity, common economic interests, and the qualitative factor of the number of people in the group, further adding “the subjective consciousness that lies at the roots of nationhood.”<sup>29</sup> Obviously, such elements are adequate for distinguishing between colonial peoples from the peoples in the metropolitan territory, but they show a degree of indeterminacy outside this context.<sup>30</sup> The definitions of minorities do not distinguish persuasively from peoples,<sup>31</sup> although minorities are not considered as holders of this right,<sup>32</sup> along with individuals.<sup>33</sup> This could be seriously doubted, though, to the extent that “the term “peoples” is coming to be seen as more inclusive, and it is not limited to the people of the State as a whole.”<sup>34</sup>

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<sup>29</sup> See also Sudan Human Rights Org. v. Sudan; Ctr. for Housing Rights & Evictions v. Sudan ¶ 220 (Afr. Comm’n On H. & Peoples’ R. July 25, 2010) 49 I.L.M. 1573, 1594 (2010) (“An important aspect of this process of defining ‘a people’ is the characteristics, which a particular people may use to identify themselves, through the principle of self identification, or be used by other people to identify them. These characteristics, include the language, religion, culture, the territory they occupy in a state, common history, ethno – anthropological factors, to mention but a few.”). See also Written Comments of the Kingdom of the Netherlands (July 17, 2009) at 5, <http://www.icj-cij.org/docket/files/141/15692.pdf>; ELIZABETH CHADWICK, SELF-DETERMINATION, TERRORISM AND THE INTERNATIONAL HUMANITARIAN LAW OF ARMED CONFLICT 4–5 (1996); Haile, *supra* note 22, at 524.

<sup>30</sup> James Crawford, *State Practice and International Law in Relation to Secession*, 69 BRIT. Y.B. INT’L L. 85, 91 (1999) (“[T]he identification of sub-groups within a given territory as separate ‘peoples’ has been discouraged and colonial territories have acceded to independence . . . as a whole”).

<sup>31</sup> Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Possible Ways and Means of Facilitating the Peaceful and Constructive Solution of Problems Involving Minorities*, ¶ 29, U.N. Doc. E/CN.4/Sub.2/1993/34 (Aug. 10, 1993).

<sup>32</sup> Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, *supra* note 14, at ¶ 56; Hannum, *supra* note 25, at 774; Statement by the Slovak Republic, *supra* note 23, at ¶ 15; Written Statement of The Islamic Republic of Iran, *supra* note 23, at 9. *But see* Kiwanuka, *supra* note 24, at 92–94 (with further references); the Written Comments of the Kingdom of the Netherlands, *supra* note 29, at 5.

<sup>33</sup> U.N. GAOR, 43rd Sess., at 66, U.N. Doc. A/43/PV.75 (Dec. 8, 1988) (with Mexico referring to self-determination as a collective right); Kiwanuka, *supra* note 24, at 80. *But see* Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, *supra* note 14, at ¶ 57; Conference on Yugoslavia, Arbitration Commission, Opinion No 2, 31 I.L.M. 1497, 1498 (1992) (the consequence of the right of self-determination at the internal level is that “every individual may choose to belong to whatever ethnic, religious or language community he or she wishes.”); Hannum, *supra* note 25, at 774.

<sup>34</sup> Crawford, *supra* note 30, at 114; BELL, *supra* note 19, at 162–63. See also Sudan Human Rights Org. v. Sudan, *supra* note 29 at ¶ 222 (“There is a school of thought, however,

From the indispensable link between peoples and national liberation movements, it appears that representativeness is a key aspect of these actors. This representativeness conferred legitimacy on their goal, although a certain process of collective recognition through international organizations proved significant for national liberation movements.

## II THE ROLE OF RECOGNITION AND ITS EFFECT FOR NATIONAL LIBERATION MOVEMENTS

Although the United Nations, as the only general global international organization, took the lead with regard to decolonization processes, recognition was decided by regional organizations,<sup>35</sup> notably the Organization of African Unity<sup>36</sup> and the League of Arab States. In other regions, especially Latin America, “[s]tates . . . were not willing to grant such competence to their regional organizations.”<sup>37</sup>

Reasons of expediency<sup>38</sup> and proximity to local affairs were probably significant for this undertaking by regional organizations. More importantly, “the regional recognition requirement was intended both to require a minimum level of effectiveness with regard to the

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which believes that the “right of a people” in Africa can be asserted only vis-à-vis external aggression, oppression or colonization. The Commission holds a different view, that the African Charter was enacted by African States to protect human and peoples’ rights of the African peoples against both external and internal abuse.”). The view of the Commission appears different from the original conception of the Banjul Charter. See Richard Gittleman, *The African Charter on Human and Peoples’ Rights: A Legal Analysis*, 22 VA. J. INT’L L. 667, 680 (1982); Ebow Bondzie-Simpson, *A Critique of the African Charter on Human and Peoples’ Rights*, 31 HOW. L.J. 643, 656–57 (1988).

<sup>35</sup> HEATHER A. WILSON, *INTERNATIONAL LAW AND THE USE OF FORCE BY NATIONAL LIBERATION MOVEMENTS* 139–42 (1988).

<sup>36</sup> See *id.* at 142–43 (on the practice of the organization). From 1963 the OAU formed the African Liberation Committee in order to channel financial support to liberation movements. The Committee was dissolved in 1994. On the other hand, when the OAU did not face a colonial-era problem, it was very much in favour of the existing *status quo*, as in the cases of Katanga, Biafra, and Somaliland. See also *Katangese Peoples’ Congress v. Zaire*, Afr. Comm’n On H. & Peoples’ R. (1995) (where the Katangese Peoples’ Congress requested recognition by the Commission as a “a liberation movement,” a claim that went unnoticed by the Commission).

<sup>37</sup> Eric Suy, *The Status of Observers in International Organizations*, 160 RECUEIL DES COURS 75, 101 (1978). See also Malcolm N. Shaw, *The International Status of National Liberation Movements*, 5 LIVERPOOL L. REV. 19, 32 (1983). In Asia, granting FREITLIN (East Timor) an observer status was barred because of the lack of a regional organization, although its voice was heard in various General Assembly committees.

<sup>38</sup> Helmut Freudenschuss, *Legal and Political Aspects of the Recognition of National Liberation Movements*, 11 MILLENIUM J. INT’L STUD. n.2, 115, 117 (1982).

organisation concerned<sup>39</sup> before UN acceptance and to exclude in practice secessionist movements,<sup>40</sup> while ascertaining their representativeness.<sup>41</sup> However, the practices of the OAU<sup>42</sup> show high levels of subjectivity within the criteria for recognition, notably the representativeness of the liberation movement and the degree of its effectiveness with regard to the existence of armed violence.<sup>43</sup> In fact some of the recognised movements were not engaged in any armed conflict.<sup>44</sup> Most of these recognitions were readily and incontestably accepted by the General Assembly; in resolution 3111 (XXVIII),<sup>45</sup> SWAPO was recognized as the authentic representative of the peoples of Namibia,<sup>46</sup> while in resolution 2918 (XXVII)<sup>47</sup> the General Assembly affirmed that the national liberation movements of Angola, Guinea, Cape Verde, and Mozambique “are the authentic representatives . . . of the peoples of those Territories.”<sup>48</sup>

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<sup>39</sup> Also Fatsah Ouguergouz, *Guerres de Liberation Nationale en Droit Humanitaire: Quelques Clarifications*, in IMPLEMENTATION OF INTERNATIONAL HUMANITARIAN LAW 333, 344–46 (Frits Kalshoven & Yves Sandoz eds., 1989); Freudenschuss, *supra* note 38; Tomuschat, *supra* note 26, at 25.

<sup>40</sup> MALCOLM N. SHAW, INTERNATIONAL LAW 220–21 (5th ed. 2003). See also WILSON, *supra* note 35, at 145 (only those movements which were claiming representation of the whole peoples in the colonial territory would be recognized).

<sup>41</sup> Claude Lazarus, *Le Statut des Mouvements de Libération Nationale à l'Organisation des Nations Unies*, 20 A.F.D.I. 173, 180 (1974); Julio Faundez, *International Law and Wars of National Liberation: Use of Force and Intervention*, 1 AFR. J. INT'L COMP. L. 85, 94 (1989); Fatsah Ouguergouz, *La Palestine et les Conventions de Genève du 12 Août 1949 ou l'Histoire d'une Adhésion Avortée*, in THE INTERNATIONAL LEGAL SYSTEM IN QUEST OF EQUITY AND UNIVERSALITY: LIBER AMICORUM GEORGES ABI-SAAB 507, 521 (Laurence Boisson de Chazournes et al. eds., 2001).

<sup>42</sup> WILSON, *supra* note 35, at 144–46.

<sup>43</sup> See Shaw, *supra* note 37, at 23 (for an example of recognition that was later withdrawn). Effectiveness in the sense of control over territory or a civilian population did not seem to matter much, if at all, since several liberation movements were not in control of any. See L.C. GREEN, THE CONTEMPORARY LAW OF ARMED CONFLICT 66 (2000). But see L.J. Chimango, *The Relevance of Humanitarian International Law to the Liberation Struggles in Southern Africa—the Case of Mozambique in Retrospect*, VIII COMP. & INT'L L.J. S. AFR. 287, 289–90 (1975) (on Angola); G.A. Res. 2918 (XXVII) (Nov. 14, 1972) (referring in the preamble to liberated areas of Guinea-Bissau).

<sup>44</sup> Lazarus, *supra* note 41, at 181.

<sup>45</sup> G.A. Res. 3111 (XXVIII), ¶ 2 (Dec. 12, 1973).

<sup>46</sup> Note though that the legal authority over the territory was the UN Council for Namibia.

<sup>47</sup> G.A. Res. 2918, *supra* note 43, ¶ 2.

<sup>48</sup> See also G.A. Res. 3294 (XXIX), ¶ 6 (Dec. 13, 1974) (where the national liberation movements are mentioned by name); G.A. Res. 3115 (XXVIII), ¶ 2 (Dec. 12, 1973) (making a reference on the national liberation *movements* in S. Rhodesia as the “sole and authentic representatives of the true aspirations of the people of Zimbabwe”); G.A. Res. 3396 (XXX),

Recognition of national liberation movements differs substantially from classic forms of recognition in international law, although it resembled<sup>49</sup> recognition of government in line with its legitimacy<sup>50</sup> or a government-in-exile,<sup>51</sup> in the event of total lack of territorial control.<sup>52</sup> The effect of recognition was significant for the national liberation movement's legal standing, at least in the United Nations. Observer status was granted to national liberation movements by the General Assembly.<sup>53</sup> In practice, recognized liberation movements were given much greater access in the United Nations than some intergovernmental organisations.<sup>54</sup> Liberation movements were able to participate in Security Council<sup>55</sup> and Economic and Social Council<sup>56</sup> deliberations. Other specialized agencies have also adopted the General

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¶ 2 (Nov. 21, 1975) (mentioning the ANC by name); G.A. Res. 31/6I, ¶ 2 (Nov. 9, 1976) (where the Assembly reaffirms that the ANC and PAC are the "authentic representatives of the overwhelming majority of the South African people"). *But see* U.N. GAOR, 35th Sess., 98th mtg. at 1729, U.N. Doc. A/35/PV.98 (Dec. 16, 1980) (with Austria commenting that "those movements cannot claim to represent all the people of South Africa").

<sup>49</sup> However, this resemblance is to be doubted when there are multiple movements and all of them are accorded recognition.

<sup>50</sup> *See* Suy, *supra* note 37, at 100 (Liberation movements were "perceived as future authoritative governments . . . responsible for the social and economic well-being of their people.").

<sup>51</sup> Georges Abi-Saab, *Wars of National Liberation in the Geneva Conventions and Protocols* 165 RECUEIL DES COURS 353, 412 (1979). *Contra* Freudenschuss, *supra* note 38, at 119.

<sup>52</sup> Some liberation movements formed governments. *See, e.g.*, Thomas H. Henriksen, *People's War in Angola, Mozambique, and Guinea-Bissau*, 14 J. MOD. AFR. STUD. 377, 379 (1976) (on the National Liberation Front of Angola).

<sup>53</sup> *See* G.A. Res. 3237 (XXIX) (Nov. 22 1974); G.A. Res. 31/152 (Dec. 20, 1976). *See generally* G.A. Res. 2621 (XXV), ¶ 6c (Oct. 12, 1970) ("[R]epresentatives of liberation movements shall be invited . . . to participate . . . in the proceedings of those [UN] organs relating to their countries"); G.A. Res. 3280 (XXIX) (Dec. 10, 1974) (according to which liberation movements were granted a permanent observer status in the work of the Main Committees of the General Assembly and its subsidiary organs as well as conferences and seminars under the auspices of the UN).

<sup>54</sup> Suy, *supra* note 37, at 112 and 130; *see also* Shaw, *supra* note 37, at 24 ("the difference between the PLO and the African liberation movements relates to participation in areas not relating to their respective countries"); Lazarus, *supra* note 41, at 194 (PLO had a status identical to a non member state to the UN).

<sup>55</sup> *See* U.N. SCOR, 34th Sess., 2153rd mtg. at 5, U.N. Doc. S/PV. 2153 (June 22, 1979); U.N. SCOR, 36th Sess., 2285th mtg. at 4, U.N. Doc. S/PV. 2285 (June 16, 1981); U.N. SCOR, 31st Sess., 1945th mtg. at 17, U.N. Doc. S/PV. 1945 (July 28, 1976) (with the participation of Polisario, PLO and SWAPO, respectively).

<sup>56</sup> Rules of Procedure of the Economic and Social Council, U.N. Doc. E/5715/Rev. 2, Rule 73.

Assembly's policies,<sup>57</sup> while a number of international conferences included liberation movements as participants.<sup>58</sup> Such participatory rights implied even the possibility of the immunities that are necessary for the performance of their functions.<sup>59</sup> In light of the above, it appears that recognition of national liberation movements, although declaratory with regard to its *raison d' être*, was constitutive with regard to its outcome.<sup>60</sup>

Alternatively, the effects of recognition outside the UN context are not entirely clear. Wilson argues that the responsibility of liberation movements "does not include conduct of their international relations beyond expressing views" of the people.<sup>61</sup> This, however, would not be consistent with the substantial content of self-determination. Certainly the entity which is in control of the colonized territory is responsible for the well-being of the residents, but the legitimate authority shares also a degree of responsibility, at least to the extent of its presence. This division is not unknown in international law, as, for example, in the case of a military occupation. Furthermore the confinement of liberation movement's responsibility in such a manner would strip much of the General Assembly's practice<sup>62</sup> from any substantial meaning.

This practice was of interest both for the *ius ad bellum* and the *ius in bello* (law on the use of force and international humanitarian law respectively). With regard to the first, the General Assembly has

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<sup>57</sup> Suy, *supra* note 37, at 114.

<sup>58</sup> See Lazarus, *supra* note 41, at 195 (for the UN context). The conference that led to the adoption of the Additional Protocols of 1977 also took place with the participation of national liberation movements, although it was not organized under the auspices of the UN.

<sup>59</sup> See G.A. Res. 39/76 (Dec. 13, 1984); G.A. Res. 42/210B (Dec. 17, 1987) (regarding the obligation of the USA not to "prevent the discharge of the official functions of the Permanent Observer Mission of the Palestine Liberation Organization to the United Nations").

<sup>60</sup> Lazarus, *supra* note 41, at 200; Freudenschuss, *supra* note 38, at 122.

<sup>61</sup> WILSON, *supra* note 35, at 122–23 (using as an argument the division between the Council for Namibia (as the administering authority) and SWAPO (as the representative of peoples)).

<sup>62</sup> See CRAWFORD, *supra* note 4, at 113; Haile, *supra* note 22, at 514 (on the initial value of the General Assembly resolutions as mere recommendations). *But see* Committee on Formation of Customary (General) International Law, *Statement of Principles Applicable to the Formation of General Customary International Law*, INT'L L. ASS'N 712, 766 (2000) (General Assembly resolutions could "constitute evidence of the existence of customary international law; help to crystallize emerging customary law; or contribute to the formation of new customary law.").

initially recognized the legitimacy of the struggle.<sup>63</sup> In sequence, the language evolved so that the right of self-determination through struggle would be realised “by all the necessary means at their disposal.”<sup>64</sup> This expression could easily imply the use of armed force,<sup>65</sup> irrespective of the interpretation of the term “struggle.” Despite several opposite reactions and interpretations from other states,<sup>66</sup> the resolutions of the Assembly adopted the language of an “inherent right<sup>67</sup> to struggle by all necessary means at their disposal,”<sup>68</sup> coming finally to an express reference to “armed struggle.”<sup>69</sup> However, the consensual resolutions of the General Assembly are less clear. The Friendly Relations Declaration can be read as implicitly endorsing the response of peoples against forcible action by the colonial/foreign dominating state (in pursuit of the exercise of their right to self-

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<sup>63</sup> See, e.g., G.A. Res. 2105 (XX), ¶ 10 (Dec. 20, 1965); G.A. Res. 2189 (XXI), ¶ 7 (Dec. 13, 1966); G.A. Res. 2326 (XXII), ¶ 6 (Dec. 16, 1967); G.A. Res. 2465 (XXIII), ¶ 5 (Dec. 20, 1968); G.A. Res. 2548 (XXIV), ¶ 5 (Dec. 11, 1969).

<sup>64</sup> G.A. Res. 2649 (XXV), ¶ 1 (Nov. 30, 1970); G.A. Res. 2708 (XXV), ¶ 5 (Dec. 14, 1970); G.A. Res. 2878 (XXVI), ¶ 5 (Dec. 20, 1971); G.A. Res. 2908 (XXVII), ¶ 6 (Nov. 2, 1972); G.A. Res. 3163 (XXVIII), ¶ 5 (Dec. 14, 1973); G.A. Res. 3328 (XXIX), ¶ 5 (Dec. 16, 1974); G.A. Res. 31/143 ¶ 4 (Dec. 17, 1976), G.A. Res. 32/42, ¶ 4 (Dec. 7, 1977); G.A. Res. 34/94, ¶ 4 (Dec. 13, 1979).

<sup>65</sup> See U.N. SCOR, 31st Sess., 1944th mtg. at 5, U.N. Doc. S/PV. 1944 (July 27, 1976) (Zambia); see also WILSON, *supra* note 35, at 97.

<sup>66</sup> See U.N. GAOR, 25th Sess., 1915th mtg. at 4 and 7, U.N. Doc. A/PV.1915 (Nov. 30, 1970) (“Swaziland does not support violence as a means for achieving independence or settling disputes. It appeared to my delegation that the words at the end of operative paragraph 1, ‘any means at their disposal’, are open to any interpretation and could be easily replaced by ‘force or violence’” and Costa Rica “[having] objections” to operative paragraph 1, which contains the phrase, “by any means at their disposal.”). See also U.N. SCOR, 31st Sess., 1948th mtg. at 16, U.N. Doc. S/PV. 1948 (July 30, 1976) (where the UK interpreted the term “struggle” as not implying armed force).

<sup>67</sup> Such a reference was hardly made subsequently.

<sup>68</sup> G.A. Res. 2621, *supra* note 53, ¶ 2; G.A. Res. 35/118, ¶ 4 (Dec. 11, 1980). See also G.A. Res. 2787 (XXVI), ¶ 1 (Dec. 6, 1971) (“by all available means consistent with the Charter of the United Nations”); G.A. Res. 2955 (XXVII), ¶ 1 (Dec. 12, 1972) (“by all available means consistent with the Charter and the resolutions of the United Nations”); G.A. Res. 31/61, *supra* note 48, ¶ 4 (struggle by “all possible means”). This last formulation is more expansive as to the means to be utilized.

<sup>69</sup> G.A. Res. 3070 (XXVIII), ¶ 2 (Nov. 30, 1973); G.A. Res. 3246 (XXIX) (Nov. 29, 1974); G.A. Res. 3382 (XXX) (Nov. 10, 1975); G.A. Res. 31/34 (Nov. 30, 1976); G.A. Res. 32/14 (Nov. 7, 1977); G.A. Res. 33/24 (Nov. 29, 1978); G.A. Res. 34/44 (Nov. 23, 1979); G.A. Res. 35/35 (Nov. 14, 1980), G.A. Res. 36/9 (Oct. 28, 1981); G.A. Res. 37/43 (Dec. 3, 1982); G.A. Res. 38/17 (Nov. 22, 1983); G.A. Res. 39/17 (Nov. 23, 1984); G.A. Res. 40/25 (Nov. 29, 1985); G.A. Res. 41/101 (Dec. 4, 1986); G.A. Res. 42/95 (Dec. 7, 1987); G.A. Res. 43/106 (Dec. 8, 1988); G.A. Res. 44/79 (Dec. 8, 1989); G.A. Res. 45/130 (Dec. 14, 1990). Since 1991, the reference to “armed struggle” has disappeared.

determination),<sup>70</sup> although the means of struggle were left vague. The then Czechoslovakia proposed that the prohibition on the use of force would not include self-defense of nations against colonial domination. Despite the warm support of the Soviet Union and some other UN members, the proposal was opposed by the United States and defeated in the Committee.<sup>71</sup> The resolution on the definition of aggression<sup>72</sup> has implied, in article 7, that peoples under colonial and racist regimes (or other forms of alien domination) could struggle to achieve self-determination, without this form of struggle being considered as aggression. This saving clause does not, however, clearly serve as an acceptance of a legal right to use force.<sup>73</sup>

On the other hand, the nonconsensual resolutions reveal the *opinio iuris* of a large number of states on the permissibility to use force against the colonial regime. However, it is difficult to extract a customary rule in this regard.<sup>74</sup> For a start, it is difficult to assess what

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<sup>70</sup> See [1974–1977] Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Vol. 3, 179 (1978) (hereinafter Negotiation Records for the Additional Protocols) (and the relevant interpretation from Madagascar and SWAPO). *But see* Richard Tyner, *Wars of National Liberation in Africa and Palestine: Self-Determination for Peoples or for Territories?*, 5 YALE STUD. WORLD PUB. ORD. 234, 281 (1978–1979) (arguing that any purported authorization to use armed force would be *ultra vires*).

<sup>71</sup> Marjorie M. Whiteman, 12 DIG. INT'L L. (1963) 281. *See also* John Dugard, *The Organisation of African Unity and Colonialism: An Inquiry into the Plea of Self-Defence as a Justification for the Use of Force for the Eradication of Colonialism*, 16 INT'L & COMP. L.Q. 157, 170–72 (1967); WILSON, *supra* note 35, at 95–96.

<sup>72</sup> G.A. Res. 3314 (XXIX) (Dec. 14, 1974).

<sup>73</sup> *See* Noelle Higgins & Kieran O'Reilly, *The Use of Force, Wars of National Liberation and the Right to Self-determination in the South Ossetian Conflict*, 9 INT'L CRIM. L.R. 567, 577 (2009) (coming to the same conclusion). *See also* Albrecht Randelzhofer, *Article 2(4)*, in THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 112, 128 (2002) (the preparatory works make clear that the meaning of struggle is to fight peacefully). *But see* U.N. SCOR, 34th Sess., 2153rd mtg., *supra* note 55, at 3 (and the statement of the representative of Madagascar with regard to the attacks of Polisario to Morocco); Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, *supra* note 14, at ¶ 93.

<sup>74</sup> *See* Freudenschuss, *supra* note 38, at 121; Barberis, *supra* note 2, at 251; WILSON, *supra* note 35, at 127 (all being negative on the existence of a customary norm). *But see* Patrick Travers, *The Legal Effect of United Nations Action in Support of the Palestine Liberation Organisation and the National Liberation Movements of Africa*, 17 HARV. INT'L L.J. 561, 577–78 (1976) (the customary norm was affirmed because it was “enunciated in substantially the same terms scores of times for more than a decade and [has] consistently formed a central element in the United Nations position against colonialism and racism. [It has] been repeatedly endorsed by overwhelming majorities of an ever more universal United Nations membership and open opposition . . . has almost completely dissolved. . . . [T]he great majority of those voting for United Nations measures . . . probably believed that in

practices can qualify as the second element for the formation of a customary norm, as, obviously, state practice cannot exist. Certainly the national liberation movements' practice is not sufficient as such. We should probably resort to the positive inclination of a large majority of states, as evidenced by the General Assembly votes, as well as such secondary state *practice* that is generated either from the use of force by colonial states (e.g., non recognition or condemnations) or the use of force by the liberation movement (e.g., material support). Furthermore, even if the language of the General Assembly suggests the existence of a norm, it is difficult to accept that the concerned majorities are representative of all systems of law, especially since the western states were usually voting against or abstaining. The following chart shows exactly the fluctuation of positive and negative votes on the series of resolutions, entitled "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," that made an express reference to armed struggle, since 1973:

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doing so they were either helping to create or reaffirm rules of international law."'). *See also* CRAWFORD, *supra* note 4, at 136 (for whom international law is neutral).

Resolution	Date	Yes	No	Abstentions	Nonvoting	Total membership	Recorded
2649 (XXV)	30-11-1970	71	12	28	16	127	N
2787 (XXVI)	06-12-1971	76	10	33	13	132	Y
2955 (XXVII)	12-12-1972	89	08	18	20	135	Y
3070 (XXVIII)	30-11-1973	97	05	28	05	135	N
3246 (XXIX)	29-11-1974	107	01	20	10	138	Y
3382 (XXX)	10-11-1975	99	01	18	26	144	N
31/34	30-11-1976	109	04	24	10	147	Y
32/14	07-11-1977	113	03	18	15	149	Y
33/24	29-11-1978	92	19	20	20	151	Y
34/44	23-11-1979	105	20	16	11	152	Y
35/35	14-11-1980	119	18	07	10	154	N
36/9	28-10-1981	120	17	09	11	157	N
37/43	03-12-1982	120	17	06	14	157	Y
38/17	22-12-1983	104	17	06	31	158	Y
39/17	23-11-1984	121	17	07	14	159	Y
40/25	29-11-1985	118	17	09	15	159	Y
41/101	04-12-1986	126	18	12	03	159	Y
42/95	07-12-1987	126	17	10	06	159	Y
43/106	08-12-1988	124	15	15	05	159	Y
44/79	08-12-1989	123	15	16	05	159	Y
45/130	14-12-1990	113	15	23	08	159	Y

Positive voting in the General Assembly fluctuates between 55 and 79%, including Portugal<sup>75</sup> and Morocco, with the exception of 1979.<sup>76</sup> The opposition to this formula grew after 1977, but it never overcame a 14% of the total membership to the General Assembly, coming almost exclusively from specific western states.<sup>77</sup> However, even states

<sup>75</sup> In the years 1974, 1976, and 1977.

<sup>76</sup> The reasons on Portugal's and Morocco's positive voting can be explained if Portugal was not considering those resolutions as nothing more than recommendations, and if Morocco considered that they applied only in the strict colonial context. Nevertheless, in view of the relatively clear language on the issues of use of force and the overwhelming state support, these states might be breaching a legal rule or estopped from using force against national liberation movements. *But see* Haile, *supra* note 22, at 494 (on a different view regarding the effect of resolutions voted in favour by states).

<sup>77</sup> *See* U.N. GAOR, 35th Sess., 98th Plen. mtg., *supra* note 48, at 1716 (Luxembourg, speaking on behalf of the European Community, and its rejection of "any implicit or explicit

that voted positively, expressed occasional reservations.<sup>78</sup> Abstentions were more usual in the early and late years (ranging altogether from 25% to 4%), while nonvoting states also fluctuated between 2% minimum and 18% maximum of total membership.

Apart from voting in General Assembly resolutions and verbal state support, there is hardly any reference in international courts or tribunals,<sup>79</sup> that could imply the customization of the legality of using force. Furthermore, even if we accepted that a relevant norm of customary law might have crystallized at some point, this materialized after the end of the bulk of decolonization cases. It is certain, though, that even if the use of force is not legalized, it is not, in the least, illegitimate or prohibited.<sup>80</sup> On the contrary, the moral and material support of national liberation movements by other states<sup>81</sup> was also accompanied by positive state practice<sup>82</sup> and the prospects of

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approval of armed struggle in General Assembly resolutions”). *See also id.* at 1717 (New Zealand, “[W]e cannot endorse the concept of armed struggle”); *id.* at 1718 (Portugal, “We do not believe the use of force to be the only way of correcting unjust situations”); *id.* at 1719 (“Canada does not support violence as a means of promoting or preventing change in South Africa”); *id.* at 1728 (Austria, “[O]ur objection to wording . . . applies equally to our objections regarding armed struggle”); *id.* at 1731 (Japan, “[A]s a matter of principle, we refuse to endorse the notion of the United Nations encouraging armed struggle, no matter what the context.”); *id.* at 1732 (Australia, “[W]e have made clear our particular difficulties with texts which endorse the concept of the legitimacy of armed struggle and violent solutions.”).

<sup>78</sup> *See id.*, at 1720 (with Argentina commenting that “we have reservations concerning the reference to armed struggle”). *See also id.* at 1733 (Chile, “[W]e should like to express our disagreement with the General Assembly’s endorsement of armed struggle.”); *id.* at 1733 (“Uruguay cannot support initiatives presented in the Assembly which seek to legitimize armed struggle.”).

<sup>79</sup> *See* Committee on Formation of Customary (General) International Law, *Statement of Principles Applicable to the Formation of General Customary International Law*, 69 INT’L L. ASS’N REP. CONF. 712, 751 (2000) (“it appears that, in the conduct of States and international courts and tribunals, a substantial manifestation of acceptance (consent or belief) by States that a customary rule exists may compensate for a relative lack of practice, and vice versa”).

<sup>80</sup> *See* Cassese, *supra* note 3, at 321.

<sup>81</sup> *See, e.g.*, G.A. Res. 2105, *supra* note 63, ¶ 10; G.A. Res. 2326, *supra* note 63, ¶ 6; G.A. Res. 2649, *supra* note 64, ¶ 2; G.A. Res. 2189, *supra* note 63, ¶ 7. This support was not considered as intervention in the internal affairs of a state or otherwise incompatible with the UN Charter.

<sup>82</sup> *See* Negotiation Records for the Additional Protocols, Vol. 6, *supra* note 70, at 56 (and the relevant reference of Sudan); U.N. GAOR, 35th Sess., 98th Plen. mtg. *supra* note 48, at 1718 (Portugal referring to the moral and material assistance of Angola, Zambia and Mozambique to S. African liberation movements). *See also* Cassese, *supra* note 3, at 325 (Several states have provided refuge to national liberation movements, and this was not condemned even implicitly by the Security Council, when confronted with similar issues).

customization<sup>83</sup> are better in this regard. Yet there is, again, a question mark on the scope of this assistance<sup>84</sup> and it could be claimed that military support did not become customary, at least because the abovementioned resolutions did not spell out such form of assistance explicitly.

The effect of recognition appeared also, indirectly, in the creation of bilateral relations between states and national liberation movements. Besides engaging in diplomatic relations,<sup>85</sup> the PLO signed various multilateral treaties in the context of the Organization of Islamic States. Furthermore, the then European Economic Community accorded preferential treatment in trade relations to the same entity.<sup>86</sup> At times, liberation movements were admitted as states in regional organizations. Apart from the example of Western Sahara, PLO was admitted (as Palestine) to the Organization of Islamic States in 1969<sup>87</sup> and Palestinian representatives participated in the work of the League of

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<sup>83</sup> See ROTH, *supra* note 6, at 214 (“foreign assistance to anti-colonial armed resistance became established custom”).

<sup>84</sup> See Cassese, *supra* note 3, at 323–25 (making a persuasive argument that humanitarian aid to national liberation movements was an obligation of all states, political and financial assistance was a right of third states and military assistance was permissible, without being condemned or blessed by international law (with the exception of sending troops)). Cf. Maurice Flory, *Algérie et Droit International*, 5 A.F.D.I. 817, 829 (1959) (describing an incident of humanitarian aid to Algeria through the Red Cross, which sparked protests from France); Dapo Akande, *Self Determination and the Syrian Conflict—Recognition of Syrian Opposition as Sole Legitimate Representative of the Syrian People: What Does it Mean and What Implications Does it Have?*, EJIL: TALK (Dec. 6, 2012), <http://www.ejiltalk.org/self-determination-and-the-syrian-conflict-recognition-of-syrian-opposition-as-sole-legitimate-representative-of-the-syrian-people-what-does-this-mean-and-what-implications-does-it-have/> (claiming that military support was included in the scope of the General Assembly resolutions).

<sup>85</sup> See Barberis, *supra* note 2, at 264–66 (1983).

<sup>86</sup> CHADWICK, *supra* note 29, at 56. See also Barberis, *supra* note 2, at 259–64; Ouguergouz, *supra* note 41, at 522. See also Shabtai Rosenne, *The Perplexities of Modern International Law*, 291 RECUEIL DES COURS 9, 265 (2001) (seemingly accepting the character of written agreements signed by national liberation movements as treaties). But see Negotiation Records for the Additional Protocols, Vol. 6, *supra* note 70, at 365 (with Canada rejecting the corresponding competence of liberation movements); ANTHONY AUST, *MODERN TREATY LAW AND PRACTICE* 62 (2007).

<sup>87</sup> See Charter of the Organization of Islamic Conference, art 1.8 (one of the explicit objectives and principles of the organization is “to support and empower the Palestinian people to exercise their right to self determination and establish their sovereign State with Al-Quds Al-Sharif as its capital. . .”).

Arab States from its very beginning,<sup>88</sup> before becoming a member since 1976.<sup>89</sup>

In light of the above, the limited international legal personality of national liberation movements, directly deriving from the peoples they represent<sup>90</sup> (and/or the separate status of the colonial territory), has been acknowledged widely.<sup>91</sup> The most important effect of the rise of national liberation movements was probably their inclusion in the international humanitarian law system.

### III NATIONAL LIBERATION MOVEMENTS IN INTERNATIONAL HUMANITARIAN LAW

The possibility that armed force by national liberation movements was somehow blessed by a part of the international community could not but have some effect in the *ius in bello*. Despite the irrelevance of the legality of the use of force on the conduct during hostilities and

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<sup>88</sup> See Annex Regarding Palestine to the Pact of the League of Arab States in HOUSSEIN HASSOUNA, *THE LEAGUE OF ARAB STATES AND REGIONAL DISPUTES* 409–10 (1975). See also *id.* at 264–69 (on the participation of Palestine in the whole agenda of the Council and not only those items which were relevant to itself, which was problematic since there were conflicting views between the members of the League).

<sup>89</sup> Barberis, *supra* note 2, at 265.

<sup>90</sup> Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16, 92 (June 21) (separate opinion by Ammoun); I.P. Blishchenko, *The National Liberation Movement and International Humanitarian Law*, 12 MIL. L. & L. WAR REV. 308, 308 (1973); Lazarus, *supra* note 41, at 175; Shaw, *supra* note 37, at 22.

<sup>91</sup> See U.N. Working Group Report, *Draft Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*, ¶ 28, U.N. Doc. E/CN.4/1986/40 (Mar. 13, 1986) (statement of the German Democratic Republic). See also Ginsburgs, *supra* note 3, at 911–13; Stefan Tolin, *Palestinian People and Their Political, Military and Legal Status in the World Community*, 5 N.C. CENT. L.J. 326, 344 (1973); Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, *supra* note 14, ¶ 64; Barberis, *supra* note 2, at 241; Cassese, *supra* note 3, at 322; Peter H. Kooijmans, *In the Shadowland between Civil War and Civil Strife: Some Reflections on the Standard-Setting Process*, in *HUMANITARIAN LAW OF ARMED CONFLICT CHALLENGES AHEAD: ESSAYS IN HONOUR OF FRITS KALSHOVEN* 225, 230 (Astrid J.M. Delissen & Gerard J. Tanja eds., 1991); Djamchid Momtaz, *Le Droit International Humanitaire Applicable aux Conflits Armes Non Internationaux*, 292 RECUEIL DES COURS 9, 57 (2001); Rosenne, *supra* note 86, at 261–65; IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 62–63 (7th ed. 2008). *But see* Lazarus, *supra* note 41, at 199; Shaw, *supra* note 37, at 32–33 (both being more reluctant).

accountability through humanitarian law,<sup>92</sup> once force is used, certain provisions of humanitarian law will become applicable. The General Assembly has consistently<sup>93</sup> asked for the applicability of the Geneva Conventions (especially Convention III) in conflicts where national liberation movements participated. This implied the internationalization of the conflict, with the arguments resting on the special status of peoples not being possible to consider them as participants in an internal conflict, the advent of decolonization and the usual involvement of third states interests.<sup>94</sup> The pattern of voting is evident in the following chart<sup>95</sup>:

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<sup>92</sup> Yves Sandoz, *International Humanitarian Law in the Twenty-First Century*, 6 Y.B. INT'L HUMANITARIAN L. 3, 8–9 (2003). See also MARCO SASSOLI & ANTOINE A. BOUVIER, HOW DOES LAW PROTECT IN WAR, VOL. I 102–04 (2nd ed. 2006).

<sup>93</sup> G.A. Res. 2383(XXIII), ¶ 13 (Nov. 7, 1968); G.A. Res. 2395 (XXIII), ¶ 12 (Nov. 29, 1968); G.A. Res. 2396 (XXIII), ¶ 8c (Dec. 02, 1968); G.A. Res. 2446 (XXIII), ¶ 5 (Dec. 19, 1968); G.A. Res. 2506 (XXIV), ¶ 4 (Nov. 21, 1969); G.A. Res. 2508 (XXIV), ¶ 11 (Nov. 21, 1969); G.A. Res. 2547 (XXIV), ¶¶ 7–8 (Dec. 11, 1969); G.A. Res. 2621, *supra* note 53, ¶ 3(6); G.A. Res. 2652 (XXV), ¶ 11 (Dec. 3, 1970); G.A. Res. 2674 (XXV), ¶ 4 (Dec. 9, 1970); G.A. Res. 2678 (XXV), ¶ 11 (Dec. 9, 1970); G.A. Res. 2707 (XXV), ¶ 6 (Dec. 14, 1970); G.A. Res. 2714 (XXV), ¶ 13 (Dec. 15, 1970); G.A. Res. 2795 (XXVI), ¶ 7 (Dec. 10, 1971); G.A. Res. 2796 (XXVI), ¶ 10 (Dec. 10, 1971); G.A. Res. 2871(XXVI), ¶ 8 (Dec. 20, 1971); G.A. Res. 2852 (XXVI), ¶ 2 (Dec. 20, 1971); G.A. Res. 2918, *supra* note 43, ¶ 3b; G.A. Res. 3113 (XXVIII), ¶ 5 (Dec. 12, 1973). See, particularly, G.A. Res. 3103 (XXVIII) (Dec. 12, 1973). See also G.A. Res. 2795, *id* ¶ 6 (where the Assembly has also condemned the use of chemicals, as contrary to the (1925) Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, a treaty destined to apply initially in international wars only).

<sup>94</sup> Andrew Borrowdale, *The Law of War in Southern Africa: the Growing Debate*, XV COMP. & INT'L L.J. S. AFR. 41, 47 (1982).

<sup>95</sup> These resolutions do not have a single title, some of them being thematic and some country/ situation-specific. Therefore the differences in state voting could, occasionally, be explained on the theme of each resolution.

Resolution	Date	Yes	No	Abstentions	Nonvoting	Total membership	Recorded
2383 (XXIII)	07-11-1968	86	09	19	11	125	Y
2395 (XXIII)	29-11-1968	85	03	15	23	126	Y
2396 (XXIII)	02-12-1968	85	02	14	25	126	N
2446 (XXIII)	19-12-1968	83	05	28	10	126	N
2506 (XXIV)	21-11-1969	101	02	06	17	126	N
2508 (XXIV)	21-11-1969	83	07	20	16	126	Y
2547 (XXIV)	11-12-1969	86	02	21	17	126	N
2621 (XXV)	12-10-1970	86	05	15	20	126	Y
2652 (XXV)	03-12-1970	79	10	14	24	127	Y
2674 (XXV)	09-12-1970	77	02	36	12	127	Y
2678 (XXV)	09-12-1970	95	05	14	13	127	Y
2707 (XXV)	14-12-1970	94	06	16	11	127	Y
2714 (XXV)	15-12-1970	79	01	34	13	127	Y
2795 (XXVI)	10-12-1971	105	08	05	14	132	Y
2796 (XXVI)	10-12-1971	91	09	12	20	132	Y
2852 (XXVI)	20-12-1971	110	01	05	16	132	N
2871 (XXVI)	20-12-1971	111	02	10	09	132	Y
2918 (XXVII)	14-11-1972	98	06	08	20	132	Y
3103 (XXVIII)	12-12-1973	83	13	19	20	135	Y
3113 (XXVIII)	12-12-1973	105	08	16	06	135	Y

Positive voting in the General Assembly fluctuates between 60% and 80%. The opposition to this formula reached a maximum of 9.5% of the total membership to the General Assembly. Abstentions ranged from 4% to 28.5%, while the percentages from non-voting states also fluctuated between 4.5% minimum and 20% maximum of total membership.

These appeals,<sup>96</sup> which were occasionally considered as creating legal standards,<sup>97</sup> could only be implemented in accordance with the

<sup>96</sup> *But see* G.A. Res. 3113, *supra* note 93 (where the General Assembly “demanded”).

<sup>97</sup> *See* Negotiation Records for the Additional Protocols, Vol. 6, *supra* note 70, at 44 (Egypt); Bert V.A. Röling, *The Legal Status of Rebels and Rebellion*, 13 J. PEACE RES. 149, 153–54 (1976). *Contra* Barberis, *supra* note 2, at 251. *See also* Chimango, *supra* note 43, at

basic principle of equality of belligerents, so that the liberation movements would also apply the Geneva Conventions.<sup>98</sup> In the end, the aspiration of the General Assembly was transposed in positive law in 1977<sup>99</sup> and, at that time, it was considered to be a major victory of the Non-Aligned Movement.<sup>100</sup> Liberation movements, which represent “people . . . fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self determination” were acknowledged as actors of an international armed conflict, “although they may lack several characteristics of the usual participants in such conflicts, states, namely territory and self-government.”<sup>101</sup> Article 4 of the same Protocol stipulates that its application “shall not affect the legal status of the Parties to the conflict.”<sup>102</sup> This clause, being almost identical to common article 3.4 to the Geneva Conventions, has in essence the following outcome: whatever the status of a liberation movement may be in general international law, it cannot be evidenced by the applicability of the laws of international conflict to its activities. Or conversely, there is no basis

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295 (commenting on the “lack the psychological and physical conditions which must be satisfied before a custom develops”); *Cape Provincial Division, S v Petane* in HOW DOES LAW PROTECT IN WAR, VOL. II: CASES AND DOCUMENTS 1515 (Marco Sassòli & Antoine A. Bouvier eds., 2nd ed. 2006) (casting doubt on whether “resolutions passed by the . . . General Assembly qualify as State practice at all”).

<sup>98</sup> Ginsburgs, *supra* note 3, at 917; Chimango, *supra* note 43, at 295. Significantly, though, there is hardly any similar reference, since the aim of the Assembly was different. It is possible, though, to construe the reference in G.A. Res. 2955, *supra* note 68, “by all available means consistent with the Charter and the resolutions of the United Nations”, as implying that the violent means utilized by the liberation movements should abide by the abovementioned resolutions, at least implicitly. See also CHADWICK, *supra* note 29, at 20 (suggesting that the inclusion of national liberation movements to the IHL system was also motivated by the need to control the national liberation movement’s means of violence).

<sup>99</sup> See John Dugard, *SWAPO: the Jus Ad Bellum and the Jus In Bello*, 93 S. AFR. L.J. 144, 156–57 (1976) (for an alternative way to make the Geneva Conventions applicable before that date).

<sup>100</sup> On the other hand, this article has not only attracted a wide criticism from western states and writers (as a typical example of mixing *ius ad bellum* with *ius in bello*), but it has also contributed in downgrading the importance and scope of the Additional Protocol II, relevant to non-international armed conflicts.

<sup>101</sup> Konstantinos Mastorodimos, *The Character of the Conflict in Gaza: Another Argument Towards Abolishing the Distinction Between International and Non-International Armed Conflicts*, 12 INT’L COMMUNITY L. REV. 437, 451 (2010).

<sup>102</sup> See also the declaration of understanding of the Philippines to the (Additional) Protocol I (Mar. 30, 2012), <http://www.icrc.org/applic/ihl/ihl.nsf/Notification.xsp?action=openDocument&documentId=0D57FC180608B232C1256402003FB5A6> (“The application of Protocol I, particularly Articles 1(4), 4 and 96(3) shall not affect the legal status of the Parties to the conflict”).

to claim that “a Party to the conflict . . . by applying humanitarian law . . . could imply, or seem to imply recognition of the very quality it is contesting with regard to the adverse Party.”<sup>103</sup>

The Additional Protocol I did not define liberation movements. Territorial control by a liberation movement was not necessary for the applicability of the Protocol.<sup>104</sup> Nonetheless, the attributes of the armed forces of liberation movements are spelled out in article 43: organization, command responsible to the party to the conflict<sup>105</sup> and subjection to an internal disciplinary system, “which, inter alia, shall enforce compliance with the rules of international law applicable in armed conflict.”<sup>106</sup> In essence, a state army is organized accordingly and the Protocol demands national liberation movements to resemble it.

The applicability of this treaty could only be possible through the mechanism of article 96.3.<sup>107</sup> The representing authority would be able,

<sup>103</sup> Bruno Zimmermann, *Protocol I Article 4*, in COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 71, 73 (Yves Sandoz, Christophe Swinarski & Bruno Zimmermann eds., 1987).

<sup>104</sup> See also Barberis, *supra* note 2, at 268; Ouguergouz, *supra* note 39, at 344–45; RENÉ PROVOST, INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW 259 (2002); L.C. Green, *Low-Intensity Conflict and the Law*, 3 INT’L L. STUDENTS ASS’N J. INT’L L. 493, 506 (1997). See also Negotiation Records for the Additional Protocols, Vol. 8, *supra* note 70, at 293 (a corroboration from Norway).

<sup>105</sup> This element did not feature in the first ICRC Draft of the Protocol. See Negotiation Records for the Additional Protocols, Vol. 1, *supra* note 70, at 143. See also Negotiation Records for the Additional Protocols, Vol. 3, *supra* note 70, at 177–82 (the various proposed amendments during the negotiations by Norway, Madagascar and SWAPO, Poland, Finland, Spain and others make it clear that the “responsible command” was mainly designating the fact of belonging and being answerable to a party to the conflict).

<sup>106</sup> See Jean de Preux, *Protocol I Article 43*, in COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 505, 512 (Yves Sandoz, Christophe Swinarski & Bruno Zimmermann eds., 1987) (therefore “a “responsible” command cannot be conceived of without the persons who make up the command structure being familiar with the law applicable in armed conflict”).

<sup>107</sup> See *Abi-Saab*, *supra* note 51, at 400–03; Dugard, *supra* note 99, at 155–57 (for an attempt to explain in juridical terms the option of national liberation movements to accede to the Geneva Conventions prior to the conclusion of Additional Protocol I). See also Bruno Zimmermann, *Protocol I Article 96*, in COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 1083, 1091 (Yves Sandoz, Christophe Swinarski & Bruno Zimmermann eds., 1987); Barberis, *supra* note 2, at 255; Ouguergouz, *supra* note 39, at 388. See also Negotiation Records for the Additional Protocols, Vol. 5, *supra* note 70, at 137 (with Madagascar commenting that “[w]ith regard to the term “Power” used in the Conventions he wished to point out that it had been accepted in international practice that it could be used to describe entities other than States. There could, therefore be no objection to accession to the Conventions”). The argument is not unsubstantiated, since if states wanted to confine the use of the term “Power,” they could use the term “State.” See also Ouguergouz, *supra* note 41, at 517 (noting the (unique)

by a unilateral declaration addressed to the depositary, to enter into treaty relations with state-parties to the Protocol. However, and despite its name, its effects seem to resemble accession.<sup>108</sup> For Daboné,<sup>109</sup> it is hard to classify such declarations among unilateral acts, but it is also not appropriate to refer to accession.

This technique was duplicated (and expanded) in the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which May Be Deemed to be Excessively Injurious or to have Indiscriminate Effects (art. 7.4).<sup>110</sup> Such possibility was significantly novel, since it gave a non-state entity the right to participate in the system of a multilateral convention. However these provisions have

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examples of Algeria and Guinea-Bissau). *But see* Denise Plattner, *La Portée Juridique des Déclarations de Respect du Droit International Humanitaire qui Emanent de Mouvements en Lutte dans un Conflit Armé*, 18 R.B.D.I. 298, 301 (1984–1985) (rightly noticing that such interpretation would leave unfettered discretion to governments to recognise the effects of the Power's declaration (and, I would add, application of the Geneva Conventions)). *See also* Antonio Cassese, *Wars of National Liberation and Humanitarian Law*, in *ÉTUDES ET ESSAIS SUR LE DROIT INTERNATIONAL HUMANITAIRE ET SUR LES PRINCIPES DE LA CROIX-ROUGE EN L'HONNEUR DE JEAN PICTET* 313, 316 (Jean Simon Pictet & Christophe Swinarski eds., 1984); Neil Boister, *The ius in bello in South Africa: a Postscript?*, XXIV COMP. & INT'L. L.J. S. AFR. 72, 73 (1991) (noting that the interpretation on accession of non-states to the Geneva Conventions did not become authoritative).

<sup>108</sup> *But see* U.K. MINISTRY OF DEF., THE JOINT SERVICE MANUAL OF THE LAW OF ARMED CONFLICT, ¶ 3.4.2b (2004) (where it is claimed that these authorities do not become parties to the Protocol). *See also* Konstantinos D. Magliveras, *Devising New Rules for Regulating International Terrorism Warfare and Engaging Non-State Actors in the Negotiations*, in *INTERNATIONAL LAW AND ARMED CONFLICT* 338, 349 (Noëlle Quenivet & Shilan Shah-Davis eds., 2010) (claiming that the liberation movement's declaration is non-revocable; in that case there is a substantial difference with accession).

<sup>109</sup> Zakaria Daboné, *International Law: Armed Groups in a State-Centric System*, 93 INT'L REV. RED CROSS 395, 411–12 (2011) (further confining the effect of this declaration among the national liberation movement and the high contracting party concerned, coming to the conclusion that it appears to be a new type of special agreement).

<sup>110</sup> Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which May Be Deemed to be Excessively Injurious or to have Indiscriminate Effects (with Protocols I, II, and III), Oct. 10, 1980, 1342 U.N.T.S. 137. *See* W.J. Fenrick, *New Developments in the Law Concerning the Use of Conventional Weapons in Armed Conflict*, 19 CAN. Y.B. INT'L L. 229, 241 (1981) (noting that Israel struggled to avoid an express reference to a unilateral declaration, although admitting that “it is difficult to see how anything other than a unilateral declaration can be utilized if [a national liberation movement] is to indicate that it accepts the obligations”). *See also* declaration of Israel, Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects (with Protocols I, II, and III) (Mar. 22, 1995), [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XXVI-2&chapter=26&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVI-2&chapter=26&lang=en) (“Article 7, paragraph 4 of the convention will have no effect”); *id.* at reservation of Turkey (Mar. 02, 1995) (“[P]aragraph 4 of article 7 of this Convention shall not apply with respect to Turkey.”).

created a considerable burden for the depositary, because several modalities for its application are, at least, debatable.

The (potential) indispensability of recognition is a first issue. The relevant resolutions of the General Assembly do not generally refer explicitly to recognized peoples (or liberation movements).<sup>111</sup> It is the practice exercised by the regional organizations and, in sequence, by the General Assembly that hints to the need for prior recognition. The Additional Protocol I allows only “the authority representing a people” to participate in the system of the treaty,<sup>112</sup> but it does not explain how this representative character is ascertained.

Nonetheless, we have to note the serious reservations on the necessity of recognition. Firstly, Turkey<sup>113</sup> proposed an amendment to art. 1.4 that would render recognition by a regional organization indispensable. That proposal never made it to the final text. In sequence, relevant or comparable reservations/declarations have been made by some, mainly western, states. The UK<sup>114</sup> and France<sup>115</sup> do not consider themselves bound by article 96.3 declarations, unless they ultimately recognized the representative character of the authority. The

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<sup>111</sup> See, though, G.A. Res. 2649, *supra* note 64, ¶ 1.

<sup>112</sup> Additional Protocol, *supra* note 9, art 96.3.

<sup>113</sup> Negotiation Records for the Additional Protocols, Vol. 3, *supra* note 70 Amendments to Draft Additional Protocol I and Annex, 8. See also *id.* at 178 (and the similar suggestion by Pakistan, although there was no reference in regional organizations).

<sup>114</sup> Reservation of the United Kingdom to the Additional Protocol I, ¶ d (Jan. 28, 1998), [http://www.icrc.org/applic/ihl/ihl.nsf/Notification.xsp?action=openDocument &documentId=0A9E03F0F2EE757CC1256402003FB6D2](http://www.icrc.org/applic/ihl/ihl.nsf/Notification.xsp?action=openDocument&documentId=0A9E03F0F2EE757CC1256402003FB6D2); see also the identical reservation to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects, ¶ a(ii) (Feb. 13, 1995). See also U.K. MINISTRY OF DEF., *supra* note 108 (“A substantial degree of international recognition of the legitimacy of the ‘liberation movement’ is necessary, as a minimum recognition by the appropriate regional inter-governmental organization.”).

<sup>115</sup> Declaration/ Reservation of France to the Additional Protocol I, ¶ 18 (Apr. 11, 2001), <http://www.icrc.org/applic/ihl/ihl.nsf/Notification.xsp?action=openDocument&documentId=D8041036B40EBC44C1256A34004897B2>. Note that France did not make any comparable declaration (date of accession: Mar. 4, 1988) on the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects.

Republic of Korea<sup>116</sup> and Belgium<sup>117</sup> have declared that recognition through an international organization is indispensable.<sup>118</sup> Canada<sup>119</sup> and Ireland<sup>120</sup> adopted a middle approach, since recognition by a regional organization is an element for their own determination on whether the “makers of such declaration constitute an authority referred to in article 96.” In essence these views<sup>121</sup> could be deemed as an exception to the rule of nonrecognition, especially since they are not widespread. However, they could also be reflecting the true meaning of the provision.

Secondly, even if the necessity of recognition is implicit, not every region of the world has a relevant and/or competent international organization.<sup>122</sup> More importantly, any sort of recognition would

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<sup>116</sup> Declaration of the Republic of Korea to the Additional Protocol I, ¶ 4 (Jan. 15, 1982), <http://www.icrc.org/applic/ihl/ihl.nsf/Notification.xsp?action=openDocument&documentId=CD8F2DF28F824B75C1256402003FB477>. Note that the Republic of Korea did not make any comparable declaration (date of accession: May 9, 2001) on the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects.

<sup>117</sup> Interpretative Declaration of Belgium to the Additional Protocol I, ¶7a (May 20, 1986), <https://www.icrc.org/applic/ihl/ihl.nsf/Notification.xsp?action=openDocument&documentId=EA2560B9B790488EC1256402003FB2BC>. Note that Belgium did not make any comparable declaration (date of accession: Feb. 7, 1995) on the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects.

<sup>118</sup> See also Negotiation Records for the Additional Protocols, Vol. 6, *supra* note 70, at 55, 63 (on the explanation of vote by Turkey and Indonesia). Similarly *see id* at 190, 196 (1974–1977) (Mauritania and Oman, respectively); Negotiation Records for the Additional Protocols, Vol. 5, *supra* note 70, at 282 (with the Republic of Viet-Nam commenting that “the so-called Provisional Revolutionary Government was not a liberation movement . . . and, so far, no regional organization of South-East Asia had recognized it as such”).

<sup>119</sup> Declaration of Understanding of Canada to the Additional Protocol I (Nov. 20, 1990), <http://www.icrc.org/applic/ihl/ihl.nsf/Notification.xsp?action=openDocument&documentId=172FFEC04ADC80F2C1256402003FB314>. Note that Canada did not make any comparable declaration (date of accession: June 24, 1994) on the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects.

<sup>120</sup> Declaration of Ireland to the Additional Protocol I, ¶ 15 (May 19, 1999), <http://www.icrc.org/applic/ihl/ihl.nsf/Notification.xsp?action=openDocument&documentId=27BB3CD34A4918BFBC1256402003FB43A>. It’s worth noting that Ireland referred also to recognition by the United Nations. Note also that Ireland did not make any comparable declaration (date of accession: Mar. 13, 1995) on the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects.

<sup>121</sup> See also the insistence of Turkey on recognition, in a related context, U.N. GAOR, 35th Sess., 98th mtg., *supra* note 48, at 1721.

<sup>122</sup> PROVOST, *supra* note 104, at 259.

predicate the applicability of humanitarian law upon the will of an international actor, despite the fact that the drafters of the Geneva Conventions (and the Protocols) took pains to reform the law in a way that it would apply automatically, regardless of the wishes of any state.<sup>123</sup>

Scholarly opinion<sup>124</sup> seems to be fairly divided in this regard. Practice after the conclusion of the Additional Protocol, or actually its lack thereof, leans towards the need for recognition. Any discussion upon the declarations of national liberation movements concerned exclusively those that have already been recognized beforehand. Furthermore, self-proclaimed liberation movements, such as the Tamil Tigers<sup>125</sup> and the Chechen rebels, whose representativeness with regard to the ruling government was more or less uncontested,<sup>126</sup> failed to attract the benefits and obligations of Additional Protocol I.<sup>127</sup> But apart

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<sup>123</sup> See also *Abi-Saab*, *supra* note 51, at 408–09; *Ouguergouz*, *supra* note 39, at 343 (claiming also that individual state recognitions would be sufficient).

<sup>124</sup> See A.P.V. Rogers, *Armed Forces and the Development of the Law of War*, 21 MIL. L. & L. WAR REV. 201, 203 (1982); Joële Nguyễn Duy-Tân, *The Law Applicable to Non-International Armed Conflicts*, in INTERNATIONAL LAW: ACHIEVEMENTS AND PROSPECTS 793, 799 (Mohammed Bedjaoui ed., 1991); Green, *supra* note 104, at 503; MOHAMED ABDELSALAM BABIKER, APPLICATION OF INTERNATIONAL HUMANITARIAN AND HUMAN RIGHTS LAW TO THE ARMED CONFLICTS OF THE SUDAN: COMPLEMENTARY OR MUTUALLY EXCLUSIVE REGIMES? 51 (2007) (being positive on the existence of recognition). *But see* *Abi-Saab*, *supra* note 51, at 408; Barberis, *supra* note 2, at 267; *Ouguergouz*, *supra* note 41, at 521; SANDESH SIVAKUMARAN, THE LAW OF NON-INTERNATIONAL ARMED CONFLICT 221 (2012).

<sup>125</sup> Special Rapporteur, *Question of the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, 31, U.N. Doc. E/CN.4/1991/14 (Dec. 27, 1990) (where the Special Rapporteur did not exclude wholly the possibility that the Tigers could be recognized as “an insurrectional or national liberation organization”).

<sup>126</sup> See Crawford, *supra* note 30, at 111; Tomuschat, *supra* note 26, at 31 (both acknowledging that Chechen constituted a people).

<sup>127</sup> The Moro Liberation Fronts in the Philippines have also claimed a similar status, as well as the Kurds in Turkey. See Sadi Cayci, *Countering Terrorism and the Law of Armed Conflict: the Turkish Experience*, 8 INT’L PEACEKEEPING, 333, 338–39 (2002) (about the Kurds). See also the National Democratic Front of the Philippines, Declaration of Undertaking to Apply the Geneva Conventions of 1949 and Protocol I of 1977 (Aug. 9, 1996), [http://ndfp.net/joomla/index.php?option=com\\_content&task=view&id=72&Itemid=83](http://ndfp.net/joomla/index.php?option=com_content&task=view&id=72&Itemid=83), and Letter of the NDFP-NEC to UN Secretary General Ban Ki-moon (Nov. 24, 2008), <http://www.philippinerevolution.net/statements/letter-of-the-ndfp-nec-to-un-secretary-general-ban-ki-moon>. Interestingly the National Democratic Front of the Philippines is a political rather than ethnic group. Furthermore, the Philippines have abstained, until recently, from acceding to the Protocol. See also the declaration of understanding of the Philippines to the Additional Protocol I (Mar. 30, 2012), <http://www.icrc.org/applic/ihl/ihl.nsf/Notification.xsp?action=openDocument&documentId=0D57FC180608B232C1256402003FB5A6> (excluding any possibility for the Protocol’s applicability in conflicts

from the lack of recognition, which in any case would have been difficult in practice if regional organizations were the only competent authorities, the justification could simply be that such conflicts did not fit in the context of struggles against colonial states, alien domination, or racist regimes.

At times, recognition was granted to more than one liberation movements, as in Angola, even though “[t]he language of the article seems to exclude multiple national liberation actors from becoming parties.”<sup>128</sup> However, the subsequent effect of recognitions remained largely a matter of theoretical concern. National liberation movements avoided addressing the depositary.<sup>129</sup> Abi-Saab<sup>130</sup> supported that the “declarations of intention” by these movements were sufficient for the applicability of international humanitarian law; addressing it to the depositary was only a formality without much substance. Yet this “formality” is necessary for states and there is no apparent reason to differentiate the procedure for national liberation movements, in defiance of the express wording of the article.<sup>131</sup> More importantly, the declaration by SWAPO envisaged accession to the Protocol in the future. It is possible that SWAPO’s reluctance to address the depositary related to the legal authority of the United Nations Council for

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within its borders). See also SIVAKUMARAN, *supra* note 124, at 218–19 (for other similar cases).

<sup>128</sup> INGRID DETTER, *THE LAW OF WAR* 191 (2nd ed. 2000). But see Zimmermann, *supra* note 107, at 1089; Abi-Saab, *supra* note 51, at 409.

<sup>129</sup> See *Declaration of Intent by the African National Congress* 63 INT’L REV. RED CROSS 20 (1981); and the South West African People’s Organization (SWAPO) declaration, in Churchill Ewumbue-Monono, *Respect for International Humanitarian Law by Armed Non-State Actors in Africa*, 88 INT’L REV. RED CROSS 905, 909 (2006). The latter’s competence to do so might be doubted in light of the existence of the United Nations Council for Namibia. The Council deposited an instrument of accession to the Geneva Conventions and their additional Protocols on October 18, 1983. See NOELLE HIGGINS, *REGULATING THE USE OF FORCE IN WARS OF NATIONAL LIBERATION, THE NEED FOR A NEW REGIME: A STUDY OF THE SOUTH MOLUCCAS AND ACEH* 95 (2010) (on this accession). See also *Declaration de UNITA*, 62 INT’L REV. RED CROSS 328 (1980) (posing the additional problem of how to treat the declaration in light of the fact that UNITA’s struggle was not against the colonial power, since Angola gained its independence in 1975). Furthermore see the declaration of the Zimbabwean People’s Union (ZAPU), in Churchill Ewumbue-Monono, *Respect for International Humanitarian Law by Armed Non-State Actors in Africa*, 88 INT’L REV. RED CROSS 905, 907–08 (2006) (which preceded even the Protocol’s coming into force).

<sup>130</sup> Abi-Saab, *supra* note 51, at 434, 444. See also SIVAKUMARAN, *supra* note 124, at 221 (claiming that the public nature of the declaration and knowledge by the opposing government should be sufficient).

<sup>131</sup> But see HIGGINS, *supra* note 129, at 120.

Namibia. At the very least, it casts doubt on the intended legal consequence of the declaration. In addition, the ANC's declaration<sup>132</sup> seems to exclude application of the Protocol *in toto* and it resembles an attempt to apply art. 96.2, regarding *ad hoc* acceptance and application<sup>133</sup> of the Protocol (or parts of it) by a party to the conflict.<sup>134</sup> Therefore it is not immaterial to support<sup>135</sup> that liberation movements might have refrained from depositing the unilateral declaration because they considered themselves largely unable to respect the Protocol;<sup>136</sup> several comments in the negotiations table also suggested this problem.<sup>137</sup>

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<sup>132</sup> See also Borrowdale, *supra* note 94, at 42.

<sup>133</sup> See PROVOST, *supra* note 104, at 178–79 (who seems to reject the need to apply the treaty, in line with art. 60.5 of the Vienna Convention on the Law of Treaties).

<sup>134</sup> But see MICHAEL BOTHE, KARL JOSEF PARTSCH & WALDEMAR A. SOLF EDS. NEW RULES FOR VICTIMS OF ARMED CONFLICTS: COMMENTARY ON THE TWO 1977 PROTOCOLS ADDITIONAL TO THE GENEVA CONVENTIONS OF 1949 556 (1982) (rejecting this possibility, since paragraph 3 is *lex specialis* compared to paragraph 2). See also art. 7.4 (b) of the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which May Be Deemed to be Excessively Injurious or to have Indiscriminate Effects (expressly giving the option to national liberation movements to accept and apply the rules, without the need for any formality, in the event that the (opposing) state is not a party to the Additional Protocol I).

<sup>135</sup> See George Aldrich, *New Life for the Laws of War*, 75 AM. J. INT'L L. 764, 771 (1981) (with regard to the ANC). See also Chimango, *supra* note 43, at 307 (To adhere to the Conventions would not really assist their ends. This is why they are not generally keen to express interest in the Conventions.).

<sup>136</sup> But see Negotiation Records for the Additional Protocols, Vol. 8, *supra* note 70, at 35 (with Ukraine wondering “how could it be said that the Conventions and Protocols entailed obligations which were too onerous for the national liberation movements, when the latter themselves declared that they were ready to assume those obligations”).

<sup>137</sup> Negotiation Records for the Additional Protocols, Vol. 5, *supra* note 70, at 116 (Burundi); Negotiation Records for the Additional Protocols, Vol. 6, *supra* note 70, at 42 (Israel); Negotiation Records for the Additional Protocols, Vol. 8, *supra* note 70, at 31 (the Netherlands). See also Abraham D. Sofaer, *The Position of the United States on Current Law of War Agreements: Remarks*, 2 AM. U. J. INT'L L. & POL'Y 460, 465 (1987); BOTHE, PARTSCH & SOLF, *supra* note 134, at 40–41; Borrowdale, *supra* note 94, at 53. But see Abi-Saab, *supra* note 51, at 383–84 and 432 (persuasively rejecting such difficulties for national liberation movements. He referred, among others, to micro-states which are parties to the treaties, to the similarity of the situation to belligerent occupation and the initial inclusion of colonial conflicts to the draft Geneva Conventions, which was not adopted in the end for reasons unrelated with feasibility. Interestingly, though, he refers to “an equivalent modality of implementation, feasible in the conditions of liberation movements . . . can always be found”). See also Negotiation Records for the Additional Protocols, Vol. 8, *supra* note 70, at 32 (with FRELIMO stating that “[I]t had been shown in practice that, despite disparities in the resources of the parties involved, nothing prevented the national liberation movements from respecting the principles of humanitarian law”).

A further counter-argument in this regard comes from the International Court of Justice. The latter has pronounced that “it is not lightly to be presumed that a State which has not carried out these formalities [ratification, accession] though at all times fully able and entitled to do so, has nevertheless somehow become bound in another way.”<sup>138</sup> If this quote is applicable by analogy to national liberation movements, then it is not at all evident that these movements (i.e., SWAPO and ANC) became bound through the abovementioned means.

In the alternative, the reluctance of the specific liberation movements could imply their dissatisfaction with the content of the rules, to the extent that they only participated in their formulation indirectly. Yet it would be immaterial to grant more privileges to national liberation movements at that point, without jeopardizing the outcome on the 1970’s conferences for the advancement of humanitarian law. A simple explanation turns to the fact that since it was general knowledge that their opponents would not become parties to the Protocol, they refrained themselves from adherence to the Protocol.<sup>139</sup>

The negligent effect of this provision could have been predicted in 1977, since the decolonization process was largely over.<sup>140</sup> The state parties avoided its incorporation into their military manuals,<sup>141</sup> while the Rome Statute and other contemporary international humanitarian law treaties do not refer to national liberation wars. More importantly, the affected target states have refrained from becoming parties.<sup>142</sup> It can

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<sup>138</sup> North Sea Continental Shelf Cases (Federal Republic of Germany v. Netherlands/Federal Republic of Germany v. Denmark), Judgment, 1969 I.C.J. 3, 27–28 (Feb. 20) (mentioning specifically rights rather than obligations).

<sup>139</sup> Barberis, *supra* note 2, at 256.

<sup>140</sup> See Negotiation Records for the Additional Protocols, Vol. 6, *supra* note 70, at 61 (with the Federal Republic of Germany commenting that “they have been chosen rather with a view to short-term political problems and objectives, and thus do not fit well into a legal instrument intended to be of long term value”); Borrowdale, *supra* note 94, at 54.

<sup>141</sup> Edward Kwakwa, *Review Essay: The Use of Force by National Liberation Movements: Trends Toward a Developing Norm?*, 14 YALE J. INT’L L. 199, 210 (1989).

<sup>142</sup> The situation in Rhodesia created another problem, since it was an unrecognized *de facto* regime that could not accede to the Geneva Conventions. Britain has excluded applicability of the Conventions to this particular territory (so that automatic succession was not necessarily an option). See Dietrich Schindler, *The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols*, 163 RECUEIL DES COURS 117, 141 (1979) (for more details).

be argued that the provision has largely run its course<sup>143</sup> and only the examples of Western Sahara and Palestine<sup>144</sup> (with Israel not being party to the Protocol, while Morocco acceded only in 2011)<sup>145</sup> can be considered, arguably, as the sole remnants of national liberation movements, if at all.

The Polisario Front constitutes a peculiar situation. It was not recognized as a national liberation movement by the OAU, yet the General Assembly acknowledged the self-determination right of Saharawis.<sup>146</sup> Furthermore the whole situation was considered a case of decolonization, even after the exit of the colonial power.<sup>147</sup> However, the General Assembly avoided using the same terms as with other national liberation movements.<sup>148</sup> In the context of the OAU the Polisario Front was accepted as a member state in 1984.<sup>149</sup> This would suggest that Western Sahara is a state, with the majority of its territory under occupation from Morocco. However, it is actually the latter fact (of belligerent occupation) rather than the status of Polisario that internationalizes the (nowadays) frozen conflict.<sup>150</sup> The reference of

<sup>143</sup> Rüdiger Wolfrum & Christiane E. Philipp, *The Status of the Taliban: Their Obligations and Rights Under International Law*, 6 MAX PLANCK Y.B.U.N.L. 559, 578 (2002); Robert Kolb & Richard Hyde, AN INTRODUCTION TO THE INTERNATIONAL LAW OF ARMED CONFLICTS 77 (2008).

<sup>144</sup> Eric David, *IHL and Non-State Actors: Synopsis of the Issue*, COLLEGIUM No 27 27, 30 (2003). It should be reminded that several countries have recognized the respective liberation movements as states properly.

<sup>145</sup> Both states are parties to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which May Be Deemed to be Excessively Injurious or to have Indiscriminate Effects, containing a mechanism of ‘accession’ of national liberation movements. Only Israel declared the non-effect of this mechanism.

<sup>146</sup> See, e.g., G.A. Res. 2229 (XXI), ¶ 1 (Dec. 20, 1966); G.A. Res. 2354 (XXII), ¶ 1 (Dec. 19, 1967); G.A. Res. 2428 (XXIII), ¶ 1 (Dec. 18, 1968); G.A. Res. 2983 (XXVII), ¶ 1 (Dec. 14, 1972); G.A. Res. 3458A (XXX), ¶ 1 (Dec. 10, 1975).

<sup>147</sup> G.A. Res. 40/50, ¶ 1 (Dec. 2, 1985); G.A. Res. 41/16, ¶ 1 (Oct. 31, 1986); Comm’n on Human Rights Res 1990/4, ¶ 2, U.N. Doc. E/CN.4/RES/1990/4 (Feb. 16, 1990).

<sup>148</sup> See G.A. Res. 34/37, ¶ 6 (Nov. 21, 1979) (recommending that Polisario “. . . the representative of the people of Western Sahara, should participate fully in any search for a just, lasting and definitive political solution.”). See also G.A. Res. 35/19, ¶ 10 (Nov. 11, 1980).

<sup>149</sup> See GINO J. NALDI, THE ORGANIZATION OF AFRICAN UNITY: AN ANALYSIS OF ITS ROLE 34–6 (2nd ed. 1999). See also U.N. SCOR, 34th Sess., 2153rd mtg. *supra* note 55, at 8 (and the statement of the representative of Polisario, that the movement at that time was recognized as state by 23 states and as the representatives of people by 100 states). *But see* Gino Naldi, *Western Sahara: Suspended Statehood or Frustrated Self-Determination?*, 13 AFR.Y.B. INT’L L. 11, 33 (2007) (the current situation seems to lend less support to the statehood claim, as the SADR was even de-recognized by some African states).

<sup>150</sup> See Schindler, *supra* note 142, at 138 (for whom it is a matter of alien occupation). This conclusion is supported by Western Sahara, *supra* note 12, at 39, 68 (assessing that the

S.C. Res. 1429<sup>151</sup> on Moroccan prisoners of war cannot but infer that the conflict was international. Significantly, the entity has not tried to accede to the Geneva Conventions either as a national liberation movement or as a state.<sup>152</sup> Therefore, the applicability of the Additional Protocol I is doubtful, at least with regard to the Front itself.<sup>153</sup>

Palestine appeared to be an equally bewildering situation. It did give “a unilateral undertaking, by declaration in 7 June 1982, to apply the . . . Geneva Convention[s] [which] Switzerland, as depositary State, considered . . . valid.”<sup>154</sup> Subsequently, the same entity tried to access the Convention<sup>155</sup> as a state,<sup>156</sup> after its declaration of independence in 1988. The Swiss Federal Council, though, “informed the States that it was not in a position to decide whether the letter constituted an instrument of accession, “due to the uncertainty within the international community as to the existence or non-existence of a State of Palestine”.”<sup>157</sup> The ICJ in the *Palestinian Wall* avoided giving any clue

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territory was not *terra nullius* in the time of colonization by Spain and that no ties of territorial sovereignty existed between the territory and its people with Morocco or Mauritania). See also Hans-Peter Gasser, *The conflict in Western Sahara- an Unresolved Issue from the Decolonization Period*, 5 Y.B. INT’L HUMANITARIAN L. 375, 379 (2002) (considering Morocco a foreign occupant, but denying that the conflict is international).

<sup>151</sup> S.C. Res. 1429, ¶ 5 (July 30, 2002). *Accord*, S.C. Res. 1495, ¶ 4 (July 31, 2003).

<sup>152</sup> See WILSON, *supra* note 35, at 157; Ewumbue-Monono, *supra* note 129, at 909.

<sup>153</sup> See Gauthier de Beco, *Compliance with International Humanitarian Law by Non-State Actors*, 18 HUMANITÄRES VÖLKERRECHT 190, 190 (2005) (indirectly rejecting the situation as a national liberation war).

<sup>154</sup> Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 173 (July 9).

<sup>155</sup> See *Application to Accede to the Geneva Conventions*, 5 PALESTINE Y.B. INT’L L. 319–20 (1989).

<sup>156</sup> See John Quigley, *Palestine is a State: A Horse with Black and White Stripes is a Zebra*, 32 MICH. J. INT’L L. 749, 753–54 (2011) (for several, mainly subsequent, indications of Palestinian statehood). More recently, see G.A. Res. 67/19 (Dec. 4, 2012) preamble (“Recognizing also that, to date, 132 States Members of the United Nations have accorded recognition to the State of Palestine”). But see also U.N. SCOR, 64th Sess., 6061st mtg. at 29 and 33 (Jan. 06, 2009) (with the representatives of Egypt and Qatar referring to a struggle to achieve and establish (independent) statehood). Furthermore, see *Knox v. Palestine Liberation Organization*, 306 F.Supp.2d 437 (S.D.N.Y. 2004) (“[I]t would be anomalous indeed to hold that a state may *achieve* sufficient independence and statehood in the first instance while subject to and laboring under the hostile military occupation of a separate sovereign.”).

<sup>157</sup> See *Geneva Conventions for the protection of war victims of 12 August 1949 and Additional Protocols of 8 June 1977: Ratifications, accessions and successions as at 31 December 1996*, 37 INT’L REV. RED CROSS 211, 217 (1997). See Ouguergouz, *supra* note 41, at 523–42 (arguing in length that Switzerland exceeded its powers as depositary). See also Comm’n on Human Rights Res 1990/2 ¶ 2, U.N. Doc. E/CN.4/RES/1990/2 (Feb. 16,

on which of the abovementioned acts constituted the means of creating obligations for Palestine; instead it referred to them cumulatively, mentioning also customary law and therefore leaving the whole case unresolved.

The purported recent change in the status of Palestine within the United Nations gives an additional argument for the irrelevance of the national liberation movements' paradigm. The General Assembly has accorded Palestine<sup>158</sup> a “non-member observer State status in the United Nations, without prejudice to the acquired rights, privileges and role of the Palestine Liberation Organization in the United Nations as the representative of the Palestinian people.” More importantly, from 2012 onwards, Palestine acceded to all major treaties relating to the subject matter of international humanitarian law. Specifically, it acceded to the Additional Protocol I from April 2, 2014. The “without prejudice” reference of the General Assembly to the PLO could imply that it retains its status as a national liberation movement. However, it would not make sense to insist on such privileges, at least for IHL purposes, since the accession of Palestine and Israel to the same international treaties demands their mutual application during their interactions, regardless of recognition or not. The same holds true with regard to the customary international law applicable to international armed conflicts, especially as it is reflected in Additional Protocol I.

In consequence it can be doubted whether Western Sahara was ever and Palestine can still be included to the paradigm of articles 1.4 and 96.3 of the Additional Protocol I. Consequently, this brings into question not only the current but also the future relevance of national liberation movements.

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1990) (“Welcom[ing] . . . the accession of Palestine to the four Geneva Conventions of 1949”); and Paul J.I.M. De Waart, *Subscribing to the “Law of Geneva” as Manifestation of Self-determination: the Case of Palestine*, in HUMANITARIAN LAW OF ARMED CONFLICT CHALLENGES AHEAD: ESSAYS IN HONOUR OF FRITS KALSHOVEN 465, 490 (Astrid J.M. Delissen & Gerard J. Tanja eds., 1991).

<sup>158</sup> G.A. Res. 67/19, ¶ 2 (Dec. 4, 2012). One hundred thirty-eight states voted positively, nine voted negatively, forty-one abstained, and five did not vote. *See also* Charles F. Whitman, *Palestine’s Statehood and the Ability to Litigate in the International Court of Justice*, 44 CAL. W. INT’L L.J. 73, 76 (2013–2014) (the argument for Palestinian Statehood has never been stronger). *But see* Jure Vidmar, *Palestine and the Conceptual Problem of Implicit Statehood*, 12 CHINESE J. INT’L L. 19, 24 (2013) (“[T]he status of a ‘non-member State’ does not bring implicit confirmation of the legal status of a State.”).

#### IV IS THERE ANY FUTURE FOR NATIONAL LIBERATION MOVEMENTS?

Besides the abovementioned failed attempts of self-proclaimed national liberation movements to invoke the paradigm and attract the benefits of the entities in subject, it has been argued that the formulation of article 1.4, which *includes* fights against colonial domination, alien occupation etc., does not intend “to be exhaustive”.<sup>159</sup> A (rejected) proposal by a large group of states, which did not limit the conflicts to the classical formulation,<sup>160</sup> would have made this point clearer. In defense of it, the representative of Egypt acknowledged that it would function in states where there was systematic discrimination.<sup>161</sup> At the end of the day, the formulation of article 1.4 could give an argument both for and against a restrictive interpretation. Significantly, various General Assembly resolutions on exercising all available means for the realization of self-determination, including armed struggle, did not seem to limit their scope to Namibia and Palestine,<sup>162</sup> which were arguably the most significant contemporary paradigms in the 1980s. It

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<sup>159</sup> See Negotiation Records for the Additional Protocols, Vol. 5, *supra* note 70, at 228 (Austl.); Abi-Saab, *supra* note 51, at 398; CHRISTOPHER O. QUAYE, LIBERATION STRUGGLES IN INTERNATIONAL LAW 8 (1991). *Contra* Cassese, *supra* note 107, at 317 (making an argument out of the drafting history); Ougergouz, *supra* note 39, at 339–40; Bruno Zimmermann, *Protocol I Article 1*, in COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 33, 54 (Yves Sandoz, Christophe Swinarski & Bruno Zimmermann eds., 1987); Medard R. Rwelamira, *The Role of International Humanitarian Law in Internal Disturbances and Tension Situations: Some Reflections*, XX CILSA 175, 176 (1987); John Baloro, *International Humanitarian Law and Situations of Internal Armed Conflict in Africa*, 4 AFR. J. INT’L & COMP. L. 449, 458 (1992); PROVOST, *supra* note 104, at 255; HIGGINS, *supra* note 129, at 114; SIVAKUMARAN, *supra* note 124, at 221.

<sup>160</sup> Negotiation Records for the Additional Protocols, Vol. 3, *supra* note 70, at 5. See also Negotiation Records for the Additional Protocols, Vol. 6, *supra* note 70, at 354 (Netherlands); Negotiation Records for the Additional Protocols, Vol. 5, *supra* note 70, at 282 (Republic of Viet-Nam). See also Interpretative Declaration of Belgium, *supra* note 117, at ¶ 7b (limiting the scope of the article to “people engaged in an armed conflict the characteristics of which strictly and exactly conform to the definition given by Article 1, paragraph 4”); Declaration of the Republic of Korea to the Additional Protocol I, *supra* note 116, at ¶ 4.

<sup>161</sup> Negotiation Records for the Additional Protocols, Vol. 8, *supra* note 70, at 34. *But see* Negotiation Records for the Additional Protocols, Vol. 5, *supra* note 70, at 107–08.

<sup>162</sup> See, e.g., G.A. Res. 38/17, *supra* note 69, ¶ 3; G.A. Res. 39/17, *supra* note 69, ¶ 3; G.A. Res. 42/95, *supra* note 69, ¶ 3; G.A. Res. 44/79, *supra* note 69, ¶ 3; G.A. Res. 45/130, *supra* note 69, ¶ 4. See also G.A. Res. 42/95, *supra* note 69, ¶ 30 (containing a reference to W. Sahara).

is the lack of practice, though, that suggests the limited reach of the article.

A second argument on its current relevance would stand, if the provision of article 1.4 is considered as customary. In such case, the Western Sahara dispute could, arguably, be included in the aforementioned paradigm.

Customary law is a combination of *opinio iuris* and state practice. When the Additional Protocol I was drafted, the overwhelming majority of states were in favor of the internationalization of the conflict while a strong (and influential) minority was opposed. Thus it can be argued that, in the absence of relevant state practice, in the material sense, and the differing opinions of states, the inclusion of article 1.4 to the Protocol did not reflect existing customary law,<sup>163</sup> although the negative reactions were stronger in the beginning of negotiations.<sup>164</sup> The passage of time has brought a rise in the number of parties (at present being 174<sup>165</sup>) and “[n]ear universal ratification or accession to the Protocol would arguably be enough to transform the Protocol into custom.”<sup>166</sup> Participation in the convention is certainly widespread and representative, and a considerable time has passed since the article’s existence.<sup>167</sup> However, the opposition to the article (in the form of persistent objection) was never eliminated altogether.<sup>168</sup> Some target states are still not parties, while others acceded after becoming unaffected. Interestingly, even potential target states refrained from accession, such as Indonesia or Ethiopia (who acceded

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<sup>163</sup> See Negotiation Records for the Additional Protocols, Vol. 6, *supra* note 70, at 372, 379 (Germany and Japan, respectively).

<sup>164</sup> See Edward Kwakwa, *The Namibian Conflict: a Discussion of the Jus Ad Bellum and the Jus In Bello*, 9 N.Y.SCH. J. INT’L. & COMP. L. 195, 225 (1988) (“The shift could be explained on humanitarian grounds, lack of vital interests for western states or due to the common understanding that the scope of the article would remain limited.”).

<sup>165</sup> At 7 January 2016.

<sup>166</sup> Boister, *supra* note 107, at 86.

<sup>167</sup> See North Sea Continental Shelf Cases *supra* note 138, at 42 (“even without the passage of any considerable period of time, a very widespread and representative participation in the convention might suffice of itself, provided it included that of States whose interests were specially affected”).

<sup>168</sup> See John Dugard, *Human Rights, Humanitarian Law and the South African Conflict*, 2 HARV. HUM. RTS. J. 101, 106 (1989) (discussing the persistent objection of South Africa); Sassòli & Bouvier, *supra* note 97, at 1507–20 (on the treatment of arguments regarding the customary status of these rules in South African courts); Kwakwa, *supra* note 141, at 211 (discussing a positive reaction from South African courts). The persistent objection by Israel could have been deemed as an additional obstacle in the applicability of the Protocol to its conflict with Palestine.

only after Eritrea became independent).<sup>169</sup> The USA opposed the Protocol on this particular ground.<sup>170</sup> The abovementioned differentiations on the recognition element also suggest the difficulty of ascertaining the true meaning of the article as a candidate for customization. The contemporary relevance of national liberation wars trends to the minimum, as implied by their lack of reference in more recent international humanitarian law treaties, while the opinion of academics offers only some further support to this view.<sup>171</sup>

The most serious possibility to resurrect national liberation wars stems from a detachment from historical antecedents, either in those cases that decolonization has not brought about self-rule to all peoples or other similar situations to those described in the article.<sup>172</sup> The historical context under which article 1.4 of the Protocol was concluded is well known (South Africa, Namibia, Rhodesia, and so on) and since these conflicts were largely settled, one could believe that the article is obsolete. However, it is doubtful whether decolonization brought about self-determination of peoples. In many cases, especially in the African

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<sup>169</sup> Morocco became a party in 2011. From states where self-proclaimed liberation movements were or are operating, the Philippines became a party in 2012, while Sri Lanka and Turkey are still outside the treaty system.

<sup>170</sup> Michael J. Matheson, *Remarks*, 2 AM. U. J. INT'L L. & POL'Y 419, 425 (1987).

<sup>171</sup> Schindler, *supra* note 142, at 136; Kwakwa, *supra* note 164, at 197; Christopher Greenwood, *Customary Law Status of the 1977 Geneva Protocols*, in HUMANITARIAN LAW OF ARMED CONFLICT CHALLENGES AHEAD: ESSAYS IN HONOUR OF FRITS KALSHOVEN 93, 112 (Astrid J.M. Delissen & Gerard J. Tanja eds., 1991); Boister, *supra* note 107, at 84; Yair M. Looftstein, *The Concept of Belligerency in International Law*, 166 MIL. L. REV. 109, 132 (2000); YORAM DINSTEIN, THE INTERNATIONAL LAW OF BELLIGERENT OCCUPATION 34 (2009); ANTHONY CULLEN, THE CONCEPT OF NON-INTERNATIONAL ARMED CONFLICT IN INTERNATIONAL HUMANITARIAN LAW 82 (2010); NOAM LUBELL, EXTRATERRITORIAL USE OF FORCE AGAINST NON-STATE ACTORS 97 (2010); SIVAKUMARAN, *supra* note 124, at 216. The opposing view from Antonio Cassese, *The Geneva Protocols of 1977 on the Humanitarian Law of Armed Conflict and Customary International Law*, 3 UCLA PAC. BASIN L.J. 55, 70 (1984) (confining it to states participating to the conference, while excluding Israel in base of its persistent objection); John Dugard, *The Treatment of Rebels in Conflicts of a Disputed Character: the Anglo-Boer War and the 'ANC-Boer War' Compared*, in HUMANITARIAN LAW OF ARMED CONFLICT CHALLENGES AHEAD: ESSAYS IN HONOUR OF FRITS KALSHOVEN 445, 454 (Astrid J.M. Delissen & Gerard J. Tanja eds., 1991); Noelle Higgins, *The Application of International Humanitarian Law to Wars of National Liberation*, J. HUMANITARIAN ASSISTANCE 1, 39 (2004), [www.jha.ac/articles/a132.pdf](http://www.jha.ac/articles/a132.pdf); Ouguergouz, *supra* note 41, at 514; BABIKER, *supra* note 124, at 48. See also Comm'n on Human Rights Res 1989/3, ¶ 13, U.N. Doc. E/CN.4/RES/1989/3 (Feb. 23, 1989) (on Namibia).

<sup>172</sup> See Thomas D. Grant, *Extending Decolonization: How the United Nations Might Have Addressed Kosovo*, 28 GA. J. INT'L & COMP. L. 9, 33–39 (1999–2000). But see Cayci, *supra* note 127, at 339 (rejecting such possibility indirectly).

continent, multiethnic states were created, where the wills of several groups (for self-rule) were largely ignored.<sup>173</sup> Already in the 1960s the head of states in Africa have decided that the old colonial borders would remain unchanged (*uti possidetis* principle<sup>174</sup>) and, consequently, they opposed any claim of self-determination outside the existing pattern of states. However, at least in two, relevantly recent, cases the self-determination of peoples was the driving force behind the creation of new states and the correction of historical wrongs.<sup>175</sup> In East Timor when the colonial Portuguese administration collapsed, the vacuum of power was filled by Indonesia, in disregard of the self-determination right, despite its acknowledgement by the General Assembly.<sup>176</sup> Eritrea was also annexed by Ethiopia, after the two entities functioned as a federation for a number of years and the case was described as “denied decolonization.”<sup>177</sup> Southern Sudan was also considered dominated<sup>178</sup> and, in the end, it has emerged as a state. Such situations could have been included in a broad definition of national liberation movements. At least it should be accepted that even before the actual emergence of the state (but subsequent to the referendums in Eritrea and S. Sudan), if Ethiopia and Sudan decided to use violent force, the conflict could have been labeled as international.

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<sup>173</sup> See HIGGINS, *supra* note 160, at 151–52 (discussing Indonesia).

<sup>174</sup> See Case Concerning the Frontier Dispute (Burkina Faso v. Republic of Mali), Judgment, 1986, I.C.J. 554, 565 (Dec. 22) (“[T]he principle of *uti possidetis juris*, the application of which gives rise to this respect for intangibility of frontiers. . . . It is a general principle, which is logically connected with the phenomenon of the obtaining of independence, wherever it occurs. Its obvious purpose is to prevent the independence and stability of new States being endangered by fratricidal struggles provoked by the challenging of frontiers following the withdrawal of the administering power.”). See also, more generally, SHAW, *supra* note 40, at 446–49. However, it is to be questioned whether it should also preclude dismemberment of a state, since the old colonial borders would not change.

<sup>175</sup> See Brilmayer, *supra* note 27, at 190, 199 (usually such arguments are made by secessionist entities, noting also, the problems that they might give rise).

<sup>176</sup> See, e.g., G.A. Res. 3485 (XXX), ¶ 1 (Dec. 12, 1975); G.A. Res. 33/39, ¶ 1 (Dec. 13, 1978). See also S.C. Res. 384, ¶ 1 (Dec. 22, 1975). See also Robert T. Vance Jr., *Recognition as an Affirmative Step in the Decolonization Process: The Case of Western Sahara*, 7 YALE J. WORLD PUB. ORD. 45, 82–83 (1980–1981) (discussing West Irian, although, in the end, the transfer of sovereignty was blessed by the international community).

<sup>177</sup> Bereket Habte Selassie, *Self-determination in Principle and Practice: the Ethiopian-Eritrean Experience*, 29 COLUMBIA HUM. RTS. L. REV. 91, 119 (1997). See also Tesfagiorgis, *supra* note 3, at 110–11; Angela M. Lloyd, *The Southern Sudan: A Compelling Case for Secession*, 32 COLUMBIA J. TRANSNAT’L L. 419, 438 (1994–1995) (seemingly focusing more on the fact of suppression by Ethiopia). But see Haile, *supra* note 22, at 479–537; Schindler, *supra* note 142, at 137–38 (rejecting the possibility that the conflict between Eritrea and Ethiopia could be international).

<sup>178</sup> See also Lloyd, *supra* note 177, at 440 ff.

Additionally, the applicability of this stipulation has been supported in other cases. Reisman<sup>179</sup> pitched the idea that the resistance in Afghanistan during the 1980s was acting as a national liberation group. Nevertheless, it might not be necessary to argue much in this regard, since it would suffice to acknowledge that Afghanistan was occupied by the then USSR.<sup>180</sup> Obviously, this proposal sought to overcome the dispute on the legal validity of the invitation to intervene. It was nevertheless a deviation from the orthodox reading of article 1.4, which covered “alien occupation,” meaning the occupation of territory, which has never belonged to a sovereign. For Dugard, the language of Article 1(4) is

broad and geographically unlimited. Consequently, there is no reason why it should not be applied, for instance, to conflicts arising out of China’s occupation of Tibet, Indonesia’s occupation of East Timor or the struggle of ethnic Albanians against Serbian domination in Kosovo.<sup>181</sup> Article 1(4) therefore has the potential to effect a substantial change in the distinction made between international and non-international conflicts . . . provided that the concepts of colonial

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<sup>179</sup> Michael Reisman, *The Resistance in Afghanistan Is Engaged in a War of National Liberation*, 81 AM. J. INT’L L. 906–09 (1987).

<sup>180</sup> See Special Rapporteur, *Situation of Human Rights in Afghanistan*, 4, U.N. Doc. E/CN.4/1992/33 (Feb. 17, 1992) (The acknowledgement that Soviet detainees were prisoners of war in a joint statement by Russia and the Afghan Mujahidin constitutes a sort of recognition that the conflict was international); see also *id.* at 12–13 (“[T]he so-called political prisoners held in Afghan prisons who belonged to the armed forces of the opposition may also be . . . considered as captured combatants within the meaning of the Geneva Conventions and Additional Protocol I.”); G.A. Res. 48/152, ¶¶ 8, 10 (Feb. 07, 1994). But see Hans-Peter Gasser, *Internationalized Non-International Armed Conflicts: Case Studies of Afghanistan, Kampuchea, and Lebanon*, 31 AM. U. L. REV. 911, 916 (1981–1982) (the conflict was treated, at least partially, as non-international by the ICRC).

<sup>181</sup> See Negotiation Records for the Additional Protocols, Vol. 6, *supra* note 70, at 154 (with Mozambique indirectly considering the conflict in Vietnam as a national liberation war); Cassese, *supra* note 107, at 324 (referring to East Timor and Vietnam/Kampuchea); Frits Kalshoven, *International Armed Conflict: Legal Qualification and International Humanitarian Law as “Lex Specialis,”* in INTERNATIONAL HUMANITARIAN LAW AND OTHER LEGAL REGIMES: INTERPLAY IN SITUATIONS OF VIOLENCE 62, 63 (Guido Ravasi & Gian Luca Beruto eds., 2005) (referring to Chechnya); HIGGINS, *supra* note 129, at 190 (referring to South Moluccas). See also Ouguergouz, *supra* note 39, at 341 (referring, more generally, to an interpretation of “racist” in accordance with article 1 of the Convention for the Elimination of Racial Discrimination); BABIKER, *supra* note 124, at 54 (expressing his conviction that the provision “will no doubt be resurrected to apply to some future conflicts involving wars of self-determination”).

domination, alien occupation and racist regime are freed from their historical origins.<sup>182</sup>

In two of the three examples referred by the writer a new entity was created, but there are no indications that the respective armed non-state actors were ever treated as a national liberation movement, at least for international humanitarian law purposes.<sup>183</sup>

There is also another significant problem. Even if the attitudes of states changed with regard to auto-determined national liberation movements and we disregarded the need of recognition, itself an arguable claim, such entities, including recognized liberation movements, have only very occasionally followed the procedure that is envisaged in article 96.3. A public unilateral declaration differs from a unilateral declaration addressed to the depositary. And if armed non-state actors do not adopt this approach with all its associated formalities, the whole procedure is destined to remain dead letter.

A last possibility could come from the recent situations in Libya and Syria,<sup>184</sup> which generated a sort of armed non-state actors' recognition as the legitimate representative of a people. This type of recognition can be described as political and could bring about the provision of non-lethal (e.g., material or moral) assistance.<sup>185</sup> Talmon<sup>186</sup> identified the criteria for recognition among the government's lost legitimacy and that "the opposition group must be representative, broad, and enjoy a reasonable prospect of permanence." In such cases it could be claimed, especially in multi-ethnic states, that a self-determination claim is resurrected due to the discrimination by the ruling government and the existence of an alternate prospective governmental entity. In essence the criteria for such type of recognition are not substantially different from national liberation movements' recognition. However, and in light of the current situation in Syria, it would appear that these

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<sup>182</sup> John Dugard, *Bridging the Gap between Human Rights and Humanitarian Law: The Punishment of Offenders*, 38 INT'L REV. RED CROSS 445, 448 (1998).

<sup>183</sup> See, e.g., Sascha Rolf Luder & Gregor Schotten, *Correspondent's Report: Germany*, 2 Y.B. INT'L HUMANITARIAN L. 364, 364 (1999) (discussing the characterisation of the conflict in Kosovo as non-international).

<sup>184</sup> See Akande, *supra* note 84 (making the link with past practice on liberation movements, while being equally cautious about endorsing it).

<sup>185</sup> While, certainly, the provision of military assistance is illegal *per se*, it can be questioned whether financial assistance can also be channeled, see Stefan Talmon, *Recognition of Opposition Groups as the Legitimate Representative of a People*, 12 CHINESE J. INT'L L. 219, 243 (2013), without being able to check where it is directed. *But see* Akande, *supra* note 84.

<sup>186</sup> Talmon, *supra* note 185, at 236–38.

paradigms might be unique and will not be copied in the near future, so that it is not obvious that they could generate a steady practice and, much less, a relevant legal principle in international law.

In light of the above, it is at least difficult to envision any kind of future for the category of national liberation movements, particularly in international humanitarian law, where the stakes are lower, and by implication to other areas of international law. The majority of the international community nowadays continues to be very skeptical (if not hostile) to any furthering of self-determination outside the existing pattern of the community of states. The emergence of Kosovo, which received a large acceptance by states, was occasionally labeled a “*sui generis*” situation,<sup>187</sup> a term which is “often used to describe situations not readily categorized, [and]...to end discussion, not to advance it.”<sup>188</sup> Unless there is a shift in attitudes, both from states and armed non-state actors, it might be time to declare liberation movements as a legal term dead.

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<sup>187</sup> See, e.g., Written Statement of the Grand Duchy of Luxembourg (Mar. 30, 2009) at 1, <http://www.icj-cij.org/docket/files/141/15634.pdf>; Written Statement of the Government of Japan (Apr. 17, 2009) at 6, <http://www.icj-cij.org/docket/files/141/15658.pdf>.

<sup>188</sup> CRAWFORD, *supra* note 4, at 197.

