

WARS OF NATIONAL LIBERATION IN AFRICA
AND PALESTINE: SELF-DETERMINATION FOR
PEOPLES OR FOR TERRITORIES?

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I. *Introduction*

The ironies of international relations often cast states in seemingly uncharacteristic roles. The regime of Fidel Castro was established in Cuba in 1959 after a prolonged revolutionary war of national liberation against the Batista regime and "Yankee neo-imperialism."¹ Once secure in Cuba, the regime sent its militant messiah Che Guevara to ignite further wars of national liberation throughout Latin America. Despite Che's death in Bolivia in 1965,² the Cuban regime continued to train guerrillas for a host of liberation movements and to export the doctrine of revolutionary military action.

Yet by the spring of 1978, 37,000 of Castro's Cubans³ were engaged in combat against three African national liberation movements--that of Savimbi in southern Angola, the Somalian efforts in the Ogaden province of Ethiopia, and the Eritrean Liberation Front, which controlled large stretches of the Eritrean homeland after years of struggle against Ethiopia.⁴ Nor was Cuban intervention confined to supporting one view of the complex set of issues raised by wars of national liberation. The intervention in Angola had been initiated on behalf of another movement of national liberation--the Popular Movement for the Liberation of Angola. Further, press reports suggested the possibility of Cuban intervention in Rhodesia on behalf of movements fighting against the transition government.⁵

1. *See generally* Che Guevara, *Reminiscences of the Cuban Revolutionary War* (1968); and H. Matthews, *Castro* (1969).

2. *See generally* R. Gott, *Guerrilla Movements in Latin America* (1970); L. Vega, *Guerrillas in Latin America: The Technique of the Counter-State* (1969).

3. *Soviet Said to Weigh Cuba Role in Rhodesia*, N.Y. Times, Apr. 14, 1978, at 43, col. 1.

4. *Two Eritrean Independence Groups to Merge*, N.Y. Times, Apr. 29, 1978, at 3, col. 2.

5. N.Y. Times, *supra* note 3. Now that Britain has regained "control" of her rebellious colony, such an event seems unlikely.

Is Cuba for or against wars of national liberation? Does she support or oppose the international principle of the self-determination of peoples? How can intervention in support of some central governments be squared with overt aid given to national liberation movements on other occasions? The dilemma posed by these questions is not Cuba's alone. The General Assembly majorities which have authored Resolutions 2625 (Friendly Relations among States)⁶ and 3314 (Definition of Aggression)⁷ have shown an equally schizophrenic approach to the problem of attempting to define the proper bounds for states' conduct with regard to wars of national liberation. The states of the majority view have championed movements against regimes they abhor. But they have shown little hesitancy in suppressing movements for self-determination within their own borders. The war against the secessionist Ibos in Nigeria should, for example, have constituted the epitaph to wars of national liberation on the African continent. Instead, encouraged by liberation movement victories in Guinea-Bissau, Mozambique and Angola, the majority has seemingly renewed its commitment to the struggles taking shape in southern Africa.⁸

Domestic political considerations, an ever-present element in international policy rationalizations, undeniably explain a large part of the dilemma. The states of the majority may strongly wish to support liberation movements against odious regimes that in their view suppress the legitimate rights of self-determination of peoples. At the same time they may find the principle far too explosive to be applied to their own territories, where ethnic/tribal groupings are scattered across state boundaries drawn more for colonial convenience than in response to concepts of "nationhood." Political considerations become even more

6. G.A. Res. 2625, 25 U.N. GAOR, Supp. (No. 28)121, U.N. Doc. A/8028 (1970), *reprinted in* 65 Am. J. Int'l L. 243 (1971)

7. G.A. Res. 3314, 29 U.N. GAOR, Supp. (No. 31) 142, U.N. Doc. A/9631 (1974), *reprinted in* 69 Am. J. Int'l L. 480 (1975).

8. This attitude is clearly evidenced by the numerous General Assembly resolutions dealing with the questions posed by white minority regimes in southern Africa. Even the Security Council showed a certain militancy in dealing with Rhodesia.

important when states contemplate aid to, or overt intervention on behalf of, one side or another in a national liberation conflict. As long as Haile Selassie's pro-Western regime was in power in Ethiopia, the Russians and Cubans supported Somalian and Eritrean guerrillas. After the overthrow of the empire by Marxist military commanders, the Russians and Cubans switched sides with alacrity.

Political considerations, whether rooted in domestic or foreign policy, do not by themselves fully explain the debate on the international principle of self-determination and the inconsistencies posed by international aid to certain national liberation movements. The Third World states are not reacting in terms of such traditional political constructs as left versus right or communist versus non-communist. Rather, they seek to develop a special subset of self-determination struggles involving wars of national liberation against vestiges of League Mandates and colonial frameworks--those where it is argued that the legitimate aspirations of peoples are thwarted by Zionism or racism.⁹ While the creation of a special category of "justified" wars of national liberation would be no small task in terms of international law, the approach has the advantage of narrowing the focus of debate to a few select test cases: Palestine and Namibia, which have emerged from League of Nations Mandate disputes; the Portuguese African territories, which have achieved liberation since the emergence of the special category; and Rhodesia-South Africa, formerly--and arguably still--colonialist regimes, where white minority populations either rule or retain powers far beyond their numerical strength, and thereby negate the aspirations of black majorities confined within their borders.

The special subset of justified wars of national liberation involves the liberation of *territories* rather than *nations*. Action against the vestiges of League Mandates and colonial frameworks will not threaten the extant state structure. Rather, popular

9. G.A. Res. 2787, 26 U.N. GAOR, Supp. (No. 29) 82, U.N. Doc. A/8429 (1971), reprinted in H. Cattau, Palestine and International Law 215-16 (1973). See section V. *infra*.

self-determination is to be achieved by liberating non-self-governing peoples within the listed territories from colonial, minority or Zionist rule.

Whether international law can possibly accept such a novel distinction depends ultimately on the international legal implications such a distinction entails for each territory. Those implications in turn depend upon the responses to the following questions, which provide a framework for discussion of the problems posed by wars of national liberation in international law: (1) What is a war of national liberation? (2) What types of wars of national liberation can be identified? (3) Can wars of national liberation in general be legitimated by international law? (4) If a special category of legitimate wars of national liberation could be created, would aid to those wars of national liberation be justified?

This article first defines wars of national liberation and describes different types of liberation movements. Next, it discusses the positions states and publicists have taken regarding both legitimation of wars of national liberation and justifications for intervention in such wars. Finally, it concludes that, although the special category exists as a subset of wars of national liberation, intervention is neither more nor less justified there than in other wars of national liberation. The same principles of international law are necessarily applicable to all wars of national liberation. No matter how desirable aid to movements within the special subset may seem to some or even a majority of states, the norms of international law do not and cannot countenance the use of armed intervention to achieve those aims.

II. *Defining Wars of National Liberation*

The analysis of so controversial a concept as wars of national liberation invariably gives rise to definitional problems, for definitions here must in turn rest on other concepts or distinctions which are themselves controversial. Any acceptable definition of wars of national liberation would seem to depend, first, on the distinction between "state" and "nation"; second, on an understanding of the various tactics which nations might employ in their struggles against states; and third, on differentiations of similar terms such

as revolution and revolutionary war, which abound in the field of international relations. Once these distinctions have been made, a description of the component parts of wars of national liberation can be attempted, leading ultimately to a compact definition of the concept.

A. *The Distinction between "State" and "Nation"*

The 1933 Montevideo Convention on the Rights and Duties of States contains a generally accepted definition of statehood: "The State as a person of international law should possess the following qualifications: a) a permanent population; b) a defined territory; c) government; and d) capacity to enter into relations with the other States."¹⁰ States so defined form the very core of the international system. Each state is sovereign and possesses numerous rights, two of the most important of which are the inherent right of self-defense and freedom from outside intervention in matters essentially within its domestic jurisdiction. These rights have been codified respectively as Articles 51 and 2(7) of the United Nations Charter. Membership in the United Nations serves as an imperfect, but not unuseful, index of statehood.

Nations do not possess the requisites of statehood. Although a nation seeking to liberate itself from the shackles of the unwanted state may perceive a population and a territory as its own, may institute a national government, and may even enter into limited relations with supportive states, it nevertheless does not possess sovereignty in international law until it is able to wrest independence from the dominant state. Whereas "[t]he political existence of the state is independent of recognition by the other states,"¹¹ the nation depends entirely on its own perception and on aid from supportive states for the limited status it enjoys. A "nation" cannot deal with states on an equal footing or acquire membership in the United Nations. Rather, the term connotes a grouping of people, along tribal, ethnic or cultural lines who, however visible or distinct, are relegated to second-class status in

10. Convention on Rights and Duties of States, December 26, 1933, art. 1, 49 Stat. 3097, T.S. No. 881.

11. *Id.* art. 3.

international relations and international law.

It is the tension between the concepts of state and nation that gives rise to conflicts such as wars of national liberation. The international system is dominated by sovereign states whose boundaries do not necessarily coincide with national groupings. In a few states, such as France, the terms state and nation are virtually synonymous. A more common situation is the mismatch of nation and state. For example, the Ewe nation straddles the border between Ghana and Togoland and thus has little political power in either state. Similarly, the Kurds are divided among Turkey, Iran and Iraq. Some nations control more than one state, yet remain divided: Germany and Korea are the most prominent examples. Further, an entire nation may be part of a larger state: the English, Scottish, and Welsh nations are all part of the state of the United Kingdom. Finally, a nation may be an official part of no state: the dispossessed Jews after the holocaust of World War II, and Arab Palestinian refugees from 1949 to present, are striking examples.

Inherent in the state-nation tension is the problem that states are objective constructs, whereas nations are by nature subjective. A well-versed high school student could draw state boundaries on a world map, but not even a philosopher-king could sketch in the lines of nationhood.

B. *The Tactics a Nation Chooses to Confront a State*

In order to gain entrance into the magic circle of states and thereby acquire the attendant international privileges of statehood, the nation must convince or force the state or states of which it is part to grant it independence. Two categories of tactics are available to the nation seeking to confront a state with its demands: legitimate political activity within the state structure, and extra-legal activity outside the political structure of the state.

A nation choosing the first category of action would seek to utilize the existing political structure either to capture the state and thereby enshrine its nationhood, or to seek dissolution of the state. Dissolution might mean national autonomy within the extant

state structure, as devolution for the Scots and the Welsh might ultimately entail.¹² Or it might mean full statehood, as separatism for the Quebecois would seem to imply.¹³ "Nationhood" poses such severe challenges to "statehood," however, that more often than not democratic means will be unavailable. Or, if the nation is a minority within the state, democratic means might always be insufficient to accomplish national goals. Therefore, most nations select the second category of extra-legal action as the proper vehicle for anti-state activity.

There exist three extra-legal means by which the nation can challenge the state. First, the nation might employ massive civil disobedience to prove to the state that it no longer has effective control. The nonviolent tactics employed by Gandhi and his followers in India may well have been instrumental in convincing the British to grant independence to the nationalists in 1947.¹⁴ But most movements gravitate toward one of the two violent methods of struggle: the coup d'état or guerrilla warfare.

In a coup d'état, a relatively small group of people aim a lightning blow at the heart of state power. Once the old government is deposed through the occupation of critical or symbolic points in the state's capital, a new regime composed of representatives of the nation is proclaimed.¹⁵ Ironically, like

12. Recent referenda show that devolution may not in fact occur. The Scots voted narrowly in favor of devolution, 52%-48%, and the Welsh flatly rejected the proposal, voting 4-1 against. See *Home-Rule Plan Suffers Setback in British Votes*, N.Y. Times, Mar. 3, 1979, at 1, col. 5.

13. Recent events seem to suggest that Rene Levesque's Parti Quebecois is no longer committed to the "statehood" concept of separatism. Rather, it seeks "independence" in the form of sovereignty-association, whereby economic linkage is maintained. See Hamilton, *On the Contrary, Quebec Independence Isn't Certain*, N.Y. Times, Feb. 23, 1979, at A27, col. 2.

14. See R. Iyer, *The Moral and Political Thought of Mahatma Gandhi* (1973), which convincingly shows the strength of nonviolent tactics in political movements.

15. See generally E. Luttwak, *Coup d'Etat: A Practical Handbook* (1969).

democratic means this tactic risks failure unless the nation is a majority, or a substantial minority where there is no majority, for resistance to the new regime and countercoups by other groups hostile to the nation would serve to jeopardize the nation's dominance. It is not surprising, therefore, that nations most frequently resort to the third extra-legal tactical weapon: guerrilla warfare. Rather than capture the state structure intact by democratic means or by a coup, guerrilla warfare enables a nation to conduct a prolonged, armed insurgency against a state. As long as the guerrillas have the support of their national population, they can seek to bleed the state through endless terrorism, raids or ambushes. The central government, if sufficiently weakened, will eventually be forced to recognize national autonomy in areas controlled by the guerrillas. Finally, as larger military conflicts are staged, the efforts of the central regime will collapse and independence will be granted to the national guerrillas.¹⁶ Guerrilla warfare is by far the most common tactical weapon employed by national liberation movements.

C. *Differentiation of Revolution and Revolutionary War*

The plethora of terms used to describe conduct which is similar to wars of national liberation necessitates the drawing of further distinctions. Because *guerrilla warfare* is the tactic most often employed by liberation movements, wars of national liberation may be considered to be guerrilla wars with the special aim of liberating a nation from a state.

Revolution, or the overthrow of one socio-economic class by another, may or may not occur simultaneously with wars of national liberation, and it may or may not follow in their wake. For example, to Mao, the war of national liberation against the Japanese was only a part of a larger revolutionary struggle of the Chinese

16. The literature on guerrilla theory is extensive. For the theories of former practitioners, see V.N. Giap, *People's War, People's Army* (1962); Che Guevara, *Guerrilla Warfare* (1961); and Mao Tse-tung, *Selected Military Writings* (2d ed. 1966).

people; the two occurred simultaneously.¹⁷ Yet other national liberation movements shun revolution; for example, the Kurdish regime which might emerge at the end of a victorious war against Iran or Iraq would be traditionalist or conservative.¹⁸ Finally, the campaign waged by Castro and Che in Cuba, if it can be classified as a war of national liberation, initially seemed to have no specific revolutionary content. The communist revolution commenced only after the consolidation of power.¹⁹

Revolutionary warfare is the type of warfare used by revolutionary regimes to defeat foreign invaders, as at Valmy in 1792, or to spread the ideals of the revolution beyond the boundaries of the revolutionary state, as in the French revolutionary campaigns in Europe following the victory of Valmy.²⁰ In essence, a war of national liberation remains rooted in the nation and seldom crosses the perceived borders of the nation. However, when the new regime seeks by example and overt aid to inspire new wars of national liberation, as in Che's Bolivian campaign, such conduct verges on revolutionary war.

The variety of instances discussed above illustrates the fact that wars of national liberation have no necessary ideological complexion. There can be right-wing as well as left-wing, non-communist as well as communist, traditional as well as revolutionary,

17. Mao Tse-Tung, *On Protracted War*, in Selected Military Writings 187 (2d ed. 1966).

18. E. O'Ballance, *The Kurdish Revolt: 1961-1970* (1973).

19. Such at least was the perception of the United States government, which initially welcomed Castro. Only after Castro was perceived as a "communist" did the Eisenhower and Kennedy administrations actively seek to oppose him.

20. J. Ellis, *Armies in Revolution* (1974).

wars of national liberation.²¹

D. *Components of Wars of National Liberation*

It is apparent that the concept of wars of national liberation covers a variety of situations. Four components may generally be observed in all of those movements which take the most familiar form--that of a nation using a guerrilla war to challenge a state:

- (1) a nation which feels itself to be culturally or ethnically distinct from the occupiers, colonizers, puppet regime or other nationality that dominates the state structure(s) in which the nation resides;
- (2) the impossibility of access to, or the unwillingness to utilize, democratic/political means to redress grievances which flow from the perception of national separation;
- (3) the willingness to resort to guerrilla warfare to achieve separate nationhood--a willingness which presupposes the availability of arms, the organization of guerrilla forces, and support among the people of the nation to be liberated;²² and

21. It is possible to argue that, because of the nature of communist military/political thought and organization, communist movements are more likely to resort to wars of national liberation than are movements imbued with other ideologies. See M. Elliott-Bateman, *Defeat in the East: The Mark of Mao Tse-Tung on War* (1967); R. Thompson, *Revolutionary Warfare in World Strategy, 1945-1969* (1970). See also, Firmage, *The "War of National Liberation" and the Third World*, in *Law and Civil War in the Modern World* 304 (J.N. Moore, ed. 1974).

22. It is generally agreed in the literature that if counterinsurgency forces outnumber the guerrillas and their supporters by more than 10 to 1, the movement for revolution or liberation will be unable to achieve victory. See J.N. Moore, *Law and the Indo-China War* 141 (1972). Unless the liberation movement has support among the people, the counterinsurgents will threaten to overwhelm the nascent movement by superior force.

- (4) some degree of external support--whether the support be manifested by international propaganda, the training of cadres abroad, money and arms received from friendly states and organizations, or neighboring states which (through design or impotence) provide sanctuaries.²³

These components in turn can be summarized into the following definition: a war of national liberation is a prolonged, extra-legal, armed, popular-based struggle waged by a nation which perceives itself to be distinct from the state or states which dominate the nation and its territory; the campaign is conducted against the extant structure(s) of the state or states in which the nation is incorporated or upon whose territory it lays claim.

III. *Types of Wars of National Liberation*

The components and definition advanced above serve to delineate the concept of wars of national liberation and to distinguish these wars from other similar types of conflict. Nevertheless, wars of national liberation do not fit easily into the international taxonomist's notebook, for this category resists further subdivision into types. Various typologies have been attempted by scholars, some of

23. The fourth component in particular raises the problem of outside intervention on behalf of a war of national liberation. Although it is theoretically possible that a war of national liberation might succeed without international support of any kind, the nature of the current international system renders such an occurrence unlikely. No national liberation movement is so remote from the ideological, strategic, and cultural concerns of the day that it will fail to have some kind of international support, whether such support comes from a great power engaged in *Realpolitik* (Soviet aid to the PLO, CIA aid to the Kurds), a regional organization seeking to help a national self-determination movement which shares a cultural affinity (Arab aid to the PLO, OAU aid to African movements), an ideologically-motivated international party (Communist Party support of the Viet Minh-Viet Cong), church groups (the World Council of Churches' aid to Rhodesian, South African and Namibian movements) or even corporations (Union Minière's aid to the Katangan secessionists in 1964, Gulf Oil's aid to the MPLA in 1975).

which are listed by Moore²⁴ under the general rubric of discussions on intervention in "internal conflicts." These discussions "include both external sponsorship of conflict and external participation in indigenous conflict."²⁵ Although these typologies touch on a critical concern in the evaluation of wars of national liberation--the degree and character of external support or participation--they fall short as analytical tools for categorizing different types of national liberation conflicts.

The first typology, by Linda Miller, has divided internal conflict into "colonial wars, internal conflicts involving a breakdown of law and order, and proxy wars and internal conflicts involving charges of external aggression or subversion."²⁶ Moore criticizes this typology for failing to "subsume the full range of interventions in internal conflict [and to] . . . achieve a clear focus on the different claims presented within each category."²⁷ Nor is the typology readily adaptable to the study of wars of national liberation. While these wars may be colonial conflicts, proxy wars or anarchic struggles following the breakdown of a central regime, national liberation movements may also arise in other situations not contemplated by Miller's typology.

A second approach, by Richard Falk, develops four categories of internal conflict: "civil strife without significant foreign intervention, civil strife with intervention by states other than great powers or their surrogates, civil strife with foreign intervention by the great powers or their surrogates, and civil strife in which the foreign intervention is alleged to take the form of an 'armed attack.'"²⁸ Moore believes that this classification, "although

24. J.N. Moore, *supra* note 22, at 173-75.

25. *Id.* at 129-30.

26. L. Miller, *World Order and Local Disorder: The United Nations and Internal Conflicts* 4-7 (1967).

27. J.N. Moore, *supra* note 22, at 174.

28. Falk, *The New States and International Legal Order*, 118 *Recueil des Cours* 1, 67-68 (1966).

useful in describing world order consequences, begs the question for normative classification about when external involvement is permissible."²⁹ Further, Falk's categories, though adequately designed to describe the situations in which intervention might occur, are too broad to be used for analyzing wars of national liberation. Not only could liberation movements be found in all four categories, but further, a movement whose goal was national liberation would not be differentiated from movements by socio-economic groups, political parties or even rebellious military units motivated by other goals.

A third typology, by Rosenau, groups internal strife incidents into personnel wars, authority wars, and structural wars.³⁰ Moore again criticizes this approach for its lack of "normative clarification."³¹ Wars of national liberation could be found in all three categories, though they would be more heavily concentrated in the two latter ones. The range of activities labeled as wars of national liberation is scarcely subsumed by Rosenau's three categories; nor is the descriptive power of his categories particularly useful as an analytical tool for the study of national liberation movements.

The typology Moore produces, with six main categories and twenty-one subcategories, is clearly the most comprehensive classification system for internal strife and intervention yet devised. The six main headings are as follows:

- (1) non-authority-oriented intervention;
- (2) anti-colonial wars;
- (3) wars of secession;
- (4) indigenous conflict for control of internal authority structures;
- (5) external imposition of authority structures; and

29. J.N. Moore, *supra* note 22, at 174.

30. Rosenau, *Internal War as an International Event*, in *International Aspects of Civil Strife* 45, 63-64 (J. Rosenau ed. 1964).

31. J.N. Moore, *supra* note 22, at 175.

(6) cold-war-divided nation conflicts.³²

While this typology was developed as an attempt to categorize intervention, it might also be used to categorize most of the national liberation movements which have been launched since World War II. Categories two through five offer a particularly valid description of the situations in which wars of national liberation are likely to occur or which national liberation movements are likely to attempt to exploit.

The difficulties with Moore's typology lie not in its analytical depth nor in the descriptive power of the categories, but rather in its essentially normative character. Moore's ground for criticizing the approaches of Miller, Falk and Rosenau--their normative emphasis--applies as well to his own analysis.³³ While these normative problems can and probably should be addressed at some point in discussions concerning wars of national liberation, it seems more useful to adopt a mode of analysis that is initially neutral and descriptive. A descriptive typology focused on the motivational impetus giving rise to liberation movements can provide a sound basis for subsequent normative analysis.

There appear to be six categories, by motivation, of wars of national liberation. The first three involve a struggle against foreign dominance of the nation, whether by occupation forces, colonial powers or imperial regimes. The next two categories involve a struggle against boundaries improperly or unjustly drawn. The final category involves wars perceived as the last refuge for the dispossessed. These categories are as follows:

(1) *Anti-occupation*. A war of national liberation fought against the troops of another state which has militarily occupied the territory of the nation (the Francstireurs against the Prussians, 1870-71; the Maquis against the Germans, 1944; the Yugoslavian Partisans under Tito against the Germans, 1942-45).

32. *Id.* at 175-77.

33. Moore's own normative approach to intervention represents a departure from the established norms of the United Nations Charter and customary international law. This approach has been heavily criticized. See E.V. Rostow, Book Review, 82 Yale L.J. 829 (1973).

(2) *Anti-colonial*. A war of national liberation fought against a regime and troops of a metropolitan power which denies statehood to a "nation" (the Viet Minh and the Algerian FLN against the French; the American colonists against the British).

(3) *Anti-imperial*. A war of national liberation used by people against a state structure that is controlled by a puppet regime or is dominated primarily by foreign political or economic interests (the Hungarian Freedom Fighters against the Communist elite and Soviet "imperial" troops; Castro against the Batista regime and Western economic interests).

(4) *Secessionist*. A liberation movement used by a nation which is incorporated against its will into a larger state's political structure and thus denied statehood of its own (the Kurds in Iraq; the Anya Nyas in Southern Sudan; the Ibos in Nigeria).

(5) *Revisionist*. A national liberation movement which cannot be confined within the boundaries of a single extant state, but rather seeks to redraw boundaries of two or more states (Greater Somaliland).

(6) *Irredentist*. A war of national liberation waged by a nation which is part of no state, and is faced with the ultimate choice of victory or expiration of its national claims (the Jewish Palestinians, especially the Irgun and the Stern gang, pre-1949; the Arab Palestinians, especially the PLO, post-1949).

The various categories present different challenges to the international system. Hence, they involve different issues to be resolved by international law. Chief among both the challenges and the issues are the questions of the legitimation of national liberation struggles and the justification for intervention in wars of national liberation.

IV. *The Legitimation of Wars of National Liberation in International Law*

The question of legitimation of wars of national liberation is perhaps misleading. In one sense, national liberation movements need not seek the blessings of international law until victory is near and

statehood becomes imminent. For wars of national liberation, like revolutions, imply action beyond the international legal framework. As Professor Rostow notes:

The battle cry, "Down with the status quo," is both erroneous and irrelevant: erroneous, because most revolutions occur without international assistance; and irrelevant because it ignores the distinction between matters primarily of international and of domestic concern which is fundamental to world politics and to international law. International law is not against revolutions or social change. It is against the international use of force, whether for conquest or pillage, or to advance a cause deemed sacred.³⁴

Thus, when a war of national liberation receives no overt aid from outside powers, and when no depredations across international boundaries occur, international use of force is not at issue. A wholly domestic conflict ensues, and domestic, rather than international, law would apply.

However, because the component of external support tends to thrust most wars of national liberation into the international arena, international legitimation is frequently sought. It is apparent that not all wars of national liberation need invoke the same justifications for international aid. Further, the possibility that aid to some wars of national liberation is more justified than aid to others must be explored. Finally, it is conceivable that international law does not countenance aid to any national liberation movement, and hence that a justification for aid even to a special category of legitimate wars of national liberation cannot be found.

Of the six categories of wars of national liberation advanced in the preceding section, the first has a ready legitimation in international law. Anti-occupation conflicts in an on-going belligerency, such

34. *Id.* at 843.

as the war waged by Gambetta and the Government of National Defense in France 1870-71,³⁵ and that waged by Tito's partisans in Yugoslavia³⁶ during the Second World War, fall under the rubric of the inherent right of self-defense. Even if a capitulationist regime such as the Vichy Government in France in 1940 has signed a peace treaty, the citizens are not bound to acquiesce. Especially when the fortunes of war may soon turn against the aggressor/occupier, maquis-style movements may fight on as representatives of the state.³⁷ However, this category is limited to on-going belligerencies. After years of general peace, a nation incorporated against its will into a greater state structure cannot suddenly invoke its right of self-defense and thereby claim a right of international aid. The right of self-defense, now codified as Article 51 of the U.N. Charter, belongs to states, not nations.

The other five categories of wars of national liberation cannot present so clear a claim to international aid. However, the General Assembly majority has attempted to create such a claim by establishing a special subset comprising categories two and six: the anti-colonial wars and the irredentist war of the Arab Palestinians. The states of the majority have been quite careful, however, to condemn categories four and five--those wars which most directly threaten their own existence. And though the majority would perhaps find it politically desirable to extend the special subset so as to include "anti-imperial" category three, the complexity of dealing with the economic issues of neo-imperialism has thus far precluded such an extension.

The General Assembly majority has correctly identified a special subset of wars of national liberation. Categories two and six, all currently involving situations extracted from colonial or mandate settings, do seem to constitute a separate, and

35. See M. Howard, *The Franco-Prussian War* (1961).

36. See F. Deakin, *The Embattled Mountain* (1971).

37. See H. Michel, *The Shadow War: Resistance in Europe, 1939-45* (1972).

clearly identifiable, problem in international law from those arising through conflicts which abound in other categories. However, even if national liberation movements in this special subset are legitimate, it does not follow that international aid to them is justified.

V. *The Justification for Intervention on Behalf of or for Aid to National Liberation Movements in International Law*

The critical question of the justification for aid to national liberation movements has generated more than one answer. Five positions on the issue can be identified in scholarly writing in international law:

(1) *Conservative*. Wars of national liberation are outlawed as a threat to the maintenance of international peace and security. Not only is aid to liberation movements forbidden, but all states are to undertake an affirmative burden of aid to the beleaguered governments of target states. This position, reminiscent of the approach of the Congress of Vienna,³⁸ supports the international status quo. But Metternich, the Austrian leader who was the principal architect of the arrangement which came to be known as the Concert of Europe, was unable to prevent the outbreak of rebellions and revolutions, notably in Greece in 1824, and throughout Europe in the 1830's and again in 1848.

It is doubtful whether states today would accept an affirmative duty to aid governments of which they disapprove, for intervention is a costly affair. Moreover, it is possible to argue that the perpetuation of status quo territorial claims "may actually maximize instability and increase the probability of

38. Professor E.V. Rostow has noted that "[t]he relative success of the Concert of Europe as a principle of diplomacy between 1815 and 1914 provided the Western world with an environment of comparative stability and security" E. Rostow, *Peace in the Balance* 299 (1972).

wars."³⁹ Thus, the conservative position is seldom advocated and is often sharply criticized. Although the aspirations for universal peace which lay at the center of the Concert's approach "remain the only coherent and conceivable theory of peace for international society,"⁴⁰ these aspirations gain more ready acceptance when they are incorporated into schemes less subservient to the status quo.

(2) *Traditional.* Wars of national liberation, like revolutions, cannot be outlawed, but outside aid to national liberation movements is completely proscribed. All states owe at least a duty of neutrality to the threatened government, and any state, if invited, may come to its aid. Intervention on behalf of a national liberation movement would constitute a clear threat to the maintenance of international peace and security. This position is widely held in international law, closely reflects the norms of the U.N. Charter, and is consistent with most sections of General Assembly Resolutions 2625 and 3314.

The most articulate spokesman for this view is Professor E.V. Rostow. After analyzing the principles of customary international law and the uniform pattern of state practice, he concludes that "[t]he rule that other nations may assist a state in putting down a rebellion, but not the rebels themselves, seems to correspond to the imperative necessities of international society viewed as a society of states."⁴¹ Moreover, the traditional approach corresponds closely to the international legal distinctions maintained concerning obligations of states to governments beset by rebellions, insurgencies and belligerencies.⁴² Even critics of the traditional approach note that if "incumbency" were ousted as the sole criterion for receiving aid, and "legitimacy" or similar notions substituted, "the international community is still not

39. Reisman, *Private Armies in a Global War System: Prologue to Decision*, in *Law and Civil War in the Modern World*, *supra* note 21, at 252, 256 n. 5.

40. E. Rostow, *supra* note 38, at 299.

41. E. Rostow, *The Ideal in Law* 280 (1978).

42. R. Higgins, *Internal War and International Law*, in 3 *The Future of the International Legal Order* 81, 86-88 (C. Black & R. Falk eds. 1971).

assured that order would result."⁴³ This is particularly true "[a]s long as each state possesses unilateral power to determine legitimacy."⁴⁴ The traditional approach, though criticized by publicists and challenged by many states of the Third World, remains the dominant view in international law.

(3) *Neutralist*. Wars of national liberation are not outlawed, but state aid to either side is forbidden. The conflict is internal; hence, any outside intervention is a threat to the maintenance of international peace and security. This position would prevent wars of national liberation from turning into proxy conflicts of the great powers. But it has nevertheless been heavily criticized for abrogating the right of a state under Article 51 of the U.N. Charter to request aid from other states for the suppression of internal disorders.⁴⁵

Some scholars have found comfort in the idea that neither side receives support:

The traditional view has been that it is lawful to aid a widely recognized government but not insurgents. More recently, some scholars have urged a "neutral non-intervention rule" to the effect that a foreign power may not aid either side engaged in purely civil strife once some threshold of indigenous conflict is exceeded.⁴⁶

This idea was endorsed in 1880 by William Hall,⁴⁷ and most recently by Louis Sohn.⁴⁸

43. Firmage, *supra* note 21, at 346.

44. *Id.*

45. Rostow, *supra* note 33, at 851-52.

46. J. Moore, *supra* note 22, at 87-88.

47. W. Hall, *International Law* § 94, at 249-50 (1st ed. 1880).

Hall's statement of the law regarding intervention was left substantially unchanged by the editors of subsequent editions of his treatise. *See, e.g.*, W. Hall, *A Treatise on International Law* § 94, at 346-47 (8th ed. 1924).

48. Sohn, *Civil Wars: Guidelines for States and the United Nations*, in *Law and Civil War in the Modern World*, *supra* note 21, at 582.

Moreover, the non-intervention rule, as Moore notes, prevents the traditional rule from serving as a "Maginot line for vested privileges."⁴⁹ Further, this approach would enable wars of liberation, like internal revolutions, to constitute, within the international system, a method for change without threatening the overall structure of peace. However, the international component present in almost every movement for national liberation militates against the suggestion that wars of national liberation can be kept free of intervention. While the neutralist position is an academically viable system for maintaining international peace, it would seem to fail the test of practicality. The behavior of states seems to assure that this position will remain a minority view in international law.

(4) *Balance of Power.* Wars of national liberation are not outlawed, nor is aid to either the government or the liberation movement proscribed. Rather, unbalanced intervention is viewed as a threat to the maintenance of international peace and security. This position, the polar opposite of position three, accepts the situation which most often obtains in the international environment. External support of wars of national liberation is matched by international aid to beleaguered central governments in many cases. Variants of this position have been set forth by Farer⁵⁰ and Luard;⁵¹ the basic thesis is that aid short of tactical support would be freely given to governments and insurgents.

The balance of power position has been criticized by Professor Firmage, who has suggested that the existence of a few dissidents might be used as a pretext for massive aid to insurgents who have little indigenous support in the target state's territory.⁵²

49. J.N. Moore, *supra* note 22, at 88.

50. Farer, *Intervention in Civil Wars: A Modest Proposal*, 67 Colum. L. Rev. 266 (1967); Farer, *Harnessing Rogue Elephants; A Short Discourse on Foreign Intervention in Civil Strife*, 82 Harv. L. Rev. 511 (1969).

51. Luard, *Civil Conflicts in Modern International Relations*, in *The International Regulation of Civil Wars* (E. Luard ed. 1972).

52. Firmage, *International Law and the Response of the United States to "Internal War"*, 1967 Utah L. Rev. 517 (1967).

A more salient defect is that intervention might not stop short of "tactical support." A government which had invested billions of dollars in terms of military equipment and logistical supplies, and which had trained insurgents and even lost "advisors" in combat operations, might not acquiesce in the destruction of its surrogate in the target state. In short, if this *de facto* position were accepted as *de jure* in international law, the dangers of war by proxy would be greatly increased. The norms of the U.N. Charter would be severely weakened, for international peace would be relegated to the sidelines by rampant military intervention.

(5) *Radical*. Wars of national liberation are legitimate exercises of the right of self-determination if their motives are the achievement of human rights or anti-colonial, anti-racist or anti-Zionist objectives. Aid to liberation movements, if authorized by Security Council decisions or General Assembly resolutions, is encouraged; aid to the governments of the target states is prohibited. Intervention on behalf of the government is a threat to the maintenance of international peace and security. This position, championed by the General Assembly majority,⁵³ accords fully with the self-determination sections of Resolutions 2625 and 3314. It represents an attempt to provide the special subset of wars of national liberation with an international law justification for intervention on behalf of the liberation movements.

Several publicists of international law have adopted the "radical" position--radical, in that it departs from the traditional interpretations of customary international law concerning intervention on behalf of or aid to insurgents. One of the clearest discussions of the proposal is conducted by Rosalyn Higgins, who notes:

It used to be generally accepted that a state may aid a government threatened with riots and insurgency until such time as it has recognized . . . the belligerent status of the insurgents.

53. T. Farer has also noted the General Assembly's "national liberation majority" in *The Regulation of Foreign Intervention in Civil Armed Conflict*, 142 *Recueil des Cours* 291, 371 (1974).

This statement of the traditional rule is now to be qualified by concern for the principle of self-determination: to what extent is such help an intervention preventing the self-determination of the population of the territory concerned, notwithstanding the limited status of the rebels?⁵⁴

Professor Higgins further notes that Communist nations and new states of the Third World already "regard themselves as free to assist in what they term wars of national liberation."⁵⁵ Despite this assault on the traditional approach, she hesitates to endorse wholeheartedly the positions advocated by Falk and Moore that United Nations approval legitimizes aid to insurgents.⁵⁶

The elaborate normative schemes developed by Moore and Reisman,⁵⁷ while governed by some of the same perceptions as those of the General Assembly majority which authored Resolutions 2625 and 3314, are scarcely immune from normative criticism based more carefully on the United Nations Charter. As Rostow notes, "However much weight one gives to certain General Assembly Resolutions, no such resolution can strip a state of its legal right to defend itself, and to receive military assistance from others who recognize its government."⁵⁸ General adoption of Moore's normative scheme would supplant the established norms of customary international law as well as those of the U.N. Charter. Given the diversity of views on the problem of intervention and the international use of force, such an occurrence is unlikely.

Farer also flirts with the perceptions of the radical position. He suggests that because the doctrine of wars of national liberation is "nominally susceptible to wide application," it has the least "potential for abus

54. Higgins, *supra* note 42, at 97.

55. *Id.* at 105.

56. She questions Falk's position, *id.* at 116-18, and Moore's *id.* at 121. Moore later amended his own stand; see Moore, *Toward an Applied Theory for the Regulation of Intervention*, in *Law and Civil War in the Modern World*, *supra* note 21, at 3, 27-30.

57. Reisman, *supra* note 39.

58. Rostow, *supra* note 33, at 851.

as a normative force in the real world."⁵⁹ Further, even if the national liberation concept were abused, Farer argues that it is "not the only conception relating to the use of force which is susceptible to the above. Two others which leap readily to mind are self-defense and so-called 'peace keeping' by regional organizations."⁶⁰ Though Farer appears willing to accept the perceptions governing the radical position vis-à-vis international intervention on behalf of wars of national liberation, he nevertheless remains suspicious of the human rights argument put forward somewhat disingenuously by the states of the majority. In particular, Farer rejects the international cynicism which permits passage of resolutions criticizing the lack of human rights in southern Africa while events such as the slaughter of the Hutusi in Burundi are virtually ignored:

When the community of nations is unwilling to intervene to end selective genocide in a country as vulnerable as Burundi, it is sending us a message. And that message is that in order to find human rights in the hierarchy of elite values we must keep our eyes on the ground.⁶¹

Of the five positions, the "conservative," the "neutralist" and the "balance of power" are likely to remain minority approaches in international law. However, the "traditional" and "radical" views are widely held by states attempting to justify their actions in the international system. These positions provide conflicting answers to the question posed by the General Assembly majority whether intervention on behalf of the liberation movements in the special subset "colonial and Mandate conflicts" can be justified in terms of international law. The clash of views between the traditional and the radical positions will be pursued through discussions of the following documents: the United Nations Charter, and General Assembly Resolutions 1514, 2625, 3314, 2787 and 3379.

59. Farer, *supra* note 53, at 374. Farer explains the potentially wide application of the radical doctrine by noting that in more than a few states there are national minorities with some factual basis for claiming to be victims of "alien domination." *Id.*

60. *Id.* at 372.

61. *Id.* at 402.

A. *The View of the U.N. Charter*

The debate between the traditional and the radical approaches to intervention centers on the Charter. Unlike General Assembly Resolutions, which carry no necessary force in terms of international law, the Charter is an international compact creating rights and obligations for states. The Charter does not, of course, address directly the special issues raised by wars of national liberation. Nevertheless, both the traditional and the radical approaches seek to anchor their arguments with normative inferences from the Charter's articles.

To a traditionalist, the Charter fully supports the view that aid to national liberation movements is prohibited as a breach of international peace, but that aid to, or intervention on behalf of, a beleaguered government is fully justified if given pursuant to a request. One of the cornerstones of this view is Article 1(1), which lists the following as the primary purpose of the United Nations:

To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.⁶²

In pursuit of these purposes, Article 2(3) requires that "[a]ll Members shall settle their international disputes by peaceful means,"⁶³ and Article 2(4) further requires members to "refrain . . . from the threat or use of force against the territorial integrity or political independence of any state."⁶⁴ Next, Article 2(7) reminds the Members that "[n]othing contained in the present Charter shall authorize the

62. U.N. Charter art. 1, para. 1.

63. *Id.* art. 2, para. 3.

64. *Id.* art. 2, para. 4.

United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state."⁶⁵

This nexus of articles suggests the conclusion that peace is given priority over other U.N. purposes, including those associated with issues of human rights.⁶⁶ Should any dispute assume an international dimension, that dispute must be settled by peaceful means; all Members are required to renounce the threat or use of force against other states.⁶⁷ Finally, however strongly states may feel about human rights or other issues, they are not permitted to intervene in matters which are essentially within the domestic jurisdiction of another state. No exception has been granted for the self-determination of peoples within the boundaries of a sovereign state.

A second cornerstone of the traditionalist view consists of the granting of U.N. membership to states, not peoples or nations. Articles 3 and 4 of the Charter appear to codify the settled practice of international law conferring sovereignty exclusively on states.⁶⁸

A third cornerstone concerns the allocation of decision-making authority among the United Nations organs. Article 11(3) gives the General Assembly the power to bring matters to the attention of the

65. *Id.* art. 2, para. 7.

66. *See* H. Kelsen, *The Law of the United Nations* 19 (1950): "The purpose of the United Nations is world peace." Kelsen further notes that the human rights provisions of the Charter are not legally binding, "since the Charter does not impose upon the Members a strict obligation to grant to their subjects the rights and freedoms mentioned in the Preamble or in the text of the Charter." *Id.* at 29.

67. Rostow, *supra* note 33, at 847: "The use or the threat of force is forbidden to states, save in exercising their inherent right of self-defense and their equally inherent right to aid other states exercising their right of self-defense."

68. *See* H. Kelsen, *supra* note 66, at 59: "According to the wording of Articles 3 and 4 only 'states' can be or become Members of the United Nations." Kelsen further notes, *id.* at 59-61, that this rule was adopted despite the fact that certain "signatories," such as India, the Philippines, Byelorussia and the Ukraine were not then "states" in the sense of international law.

Security Council. But Article 18 carefully limits the General Assembly power to make United Nations' decisions to a few relatively procedural matters such as the budget, the admission of new Members and the elections of states to fill positions in various U.N. organs. On "important questions," such as those which deal with the maintenance of international peace and security, the General Assembly may, even with a two-thirds majority, only "decide" to make recommendations. These recommendations do not, however, constitute United Nations decisions, and if the Security Council is seized of the question, the General Assembly's power even to recommend is impaired.⁶⁹

The Security Council, on the other hand, has the primary responsibility for the maintenance of international peace and security under Article 24.⁷⁰ Further, Article 39 gives the Security Council full decision-making power to "determine the existence of any threat to the peace, breach of the peace, or act of aggression"⁷¹ and to "decide what measures shall be taken . . . to maintain or restore international peace and security."⁷² If the Security Council were to determine that an international crisis caused by a war of national liberation represented a breach of the peace, it could decide to take action under Article 41 or Article 42. Though such action could conceivably include intervention on behalf of the liberation movement instead of the target state, it would be susceptible to a veto by any of the permanent members of the Security Council. A General Assembly resolution cannot accomplish actions which are reserved for the Security Council and which must have the concurring

69. Kelsen, *id.* at 208, notes that "if action is necessary, the General Assembly is not authorized to make recommendations but is bound to 'refer' the question to the Security Council."

70. Kelsen, *id.* at 283, notes that "[t]he maintenance of international peace and security . . . is not only a responsibility of the Security Council but also of the General Assembly. But only the Security Council is authorized by the Charter to maintain international peace and security by enforcement actions."

71. U.N. Charter art. 39.

72. *Id.*

votes of the five permanent members.⁷³

The fourth cornerstone is Article 51, which states that "[n]othing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations."⁷⁴ The contention is sometimes made by traditionalists that this Article is poorly drafted⁷⁵ and that the inherent right of self-defense in international law is more complete than the language of Article 51 suggests.⁷⁶ Even if Article 51 were confined to a narrow interpretation, it would nevertheless retain sufficient vigor to repel the notion that a state could, with impunity, arm guerrillas and send them across international borders. For such acts would constitute an armed attack and would fully justify armed action by the target state as a response.⁷⁷

The traditionalist edifice, while secured by seemingly indestructible cornerstones, has nevertheless been rocked by a spirited onslaught. The radical approach commences with a novel interpretation of the Preamble to the Charter, which contains the phrase "We the peoples of the United Nations." It may be contended that this phrase means either that peoples, not states, are the ultimate sovereigns in the United Nations; or, that peoples (especially those deprived of statehood or self-government by colonialism or racism) have rights under the Charter which are co-extensive with those of states.⁷⁸

73. However, an abstention is not a veto. A resolution may be passed without the concurrence of all five permanent members, so long as none of the five votes is in the negative.

74. U.N. Charter art. 51.

75. See Rostow, *supra* note 41, at 280.

76. See D. Bowett, *Self-Defence in International Law* 184-93 (1958); J. Stone, *Aggression and World Order* 92-101 (1958).

77. An early example of the inherent rights of self-defense against this type of incursion is the celebrated *Caroline* incident in 2 J. Moore, *A Digest of International Law* 409-14 (1906).

78. See R. Higgins, *The Development of International Law Through the Political Organs of the United Nations* 57 (1963). She argues that the belief that all peoples have a right to self-determination, as a policy goal, would allow for an expansion of admission to the United Nations and its subordinate organs.

Gunnar Myrdal, among others, has categorically rejected this view, noting that "[t]he name of the system of intergovernmental organizations is logically fallacious. Indeed, the very first words of its Charter . . . [represent] a pious falsehood."⁷⁹ It must be noted that nowhere else in the Charter are peoples referred to in place of states. Further, only states may become members of the United Nations. It is unlikely that the phrase "We the peoples" was intended to negate centuries of international custom and practice by conferring sovereignty, or even special international rights, on peoples.

Second, the radical position generally contends that the maintenance of peace called for in Article 1(1) is but one purpose of the United Nations. As such, it ranks no higher than the other purposes, among which may be found the self-determination of peoples (Article 1(2)) and the promotion of human rights (Article 1(3)). Indeed, it can be argued that the United Nations' goal of peace is meaningless unless self-determination and human rights ends are also achieved, for peace is not a higher goal, but rather an inseparable part of the totality of Charter norms. Cattani, in disputing the traditionalist view concerning the primacy of peace and the role of the Security Council in assuring the maintenance of that peace, argues as follows:

Article 24 of the Charter provides that in discharging its duties for the maintenance of international peace and security "the Security Council shall act in accordance with the Purposes and Principles of the United Nations." The Purposes and Principles of the U.N. are set forth in Articles 1 and 2 of the Charter. They include, *inter alia*, the duty of the U.N. to act "in conformity with the principles of justice and international law," to develop friendly relations among nations based on "respect for the principle of equal rights

79. G. Myrdal, *Towards a Critical Appraisal of the United Nations* 25 (unpublished manuscript), *quoted in* Rostow, *supra* note 33, at 848.

and self-determination of peoples," to promote and encourage "respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion."⁸⁰

To an extent, this criticism is unanswerable; for meaningful peace would seem to be indivisible from the norms of the Charter. However, the traditionalists maintain that human rights and self-determination objectives are to be achieved only through peaceful means.⁸¹ Nothing in the Charter gives states the right to use force in pursuit of these objectives. Force may be used only for the "suppression of acts of aggression or other breaches of the peace."⁸² A structural interpretation of the Charter, relying particularly on the role of the Security Council expounded in Chapters V and VII, seems to support the traditionalist position. The pursuit of human rights objectives cannot be permitted to destroy international stability, no matter how vital their accomplishment is deemed by some, or even by a majority of, members of the General Assembly.

Third, the radicals dispute the limitations placed on the effect of General Assembly resolutions by the traditionalists' interpretation of the Charter. While Articles 39 and 18 clearly delineate for the General Assembly a status secondary to that of the Security Council on questions of the maintenance of international peace and security, it can nevertheless be argued that the General Assembly may act in the absence of action by the Security Council. One model for this position is the Uniting for Peace Resolution,⁸³ under whose authority some members of the United Nations contributed to the aid of South Korea in 1950. However, since the historical circumstances⁸⁴

80. H. Cattau, *Palestine and International Law* 152 (1973).

81. See Rostow, *supra* note 33, at 847; E.V. Rostow, *supra* note 41, at 283-84.

82. U.N. Charter art. 1, para. 1.

83. G.A. Res. 377, 5 U.N. GAOR, Supp. (No. 20) 10, U.N. Doc. A/1775 (1950).

84. The absence of the Russian representative precluded use of the Soviet veto on this occasion, and the Security Council was able to refer the matter to the General Assembly for action.

which gave rise to this action have not existed in the intervening three decades of United Nations experience, it is unlikely that a new "Uniting for Peace" resolution designed to provide tactical support for a war of national liberation could be achieved.

A more likely model for General Assembly action is furnished by Article 14 of the Charter, whereby "the General Assembly may recommend measures for the peaceful adjustment of any situation . . . which it deems likely to impair the general welfare or friendly relations among nations."⁸⁵ Cattan believes that this article, tied to the purposes of the United Nations as expressed in Article 1, can create an international obligation for U.N. action.⁸⁶ However, Article 14 cannot be invoked "[w]hile the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter."⁸⁷ Further, Article 14 stresses *peaceful* adjustment; the use of armed force is not contemplated. Finally, Article 14 speaks of the power to *recommend*; the power to make a United Nations *decision* with respect to the use of force is vested only in the Security Council.

Fourth, because the special subset of wars of national liberation deals with conflicts arising from mandate or formerly colonial frameworks, it may be argued that the Charter delegates to the General Assembly, rather than the Security Council, the decision-making authority in this area. Article 18(2) places "questions relating to the operation of the trusteeship system"⁸⁸ alongside budgetary and other procedural questions for which the General Assembly has full responsibility. This power is reinforced by Article 85(1): "The functions of the United Nations with regard to trusteeship agreements for all areas not designated as strategic, including the approval of their alteration or amendment, shall be exercised by the General Assembly".⁸⁹

85. U.N. Charter art. 14.

86. H. Cattan, *supra* note 80, at 167-68.

87. U.N. Charter art. 12.

88. *Id.* art. 18, para. 2.

89. *Id.* art. 85, para. 1.

Under this Article, the General Assembly seemingly could articulate a United Nations decision for Namibia. It could arguably also "decide" the problem of Palestine, though the existence of the sovereign states of Israel and Jordan complicates renewed action on issues arising from the original Palestinian Mandate. It is less clear what authority the General Assembly would have with regard to non-self-governing territories under Chapter XI,⁹⁰ a category which could conceivably have been designed to include the former Portuguese territories and Rhodesia.

Higgins has chronicled the rise of the human rights/self-determination claims in the international arena. She discusses extensively whether "the United Nations may always act where a question of self-determination is involved,"⁹¹ and concludes that "self-determination has developed into an international legal right, and is not an essentially domestic matter."⁹² Further, in response to the claim "[t]hat the General Assembly has jurisdiction over situations involving a breach of the specific Charter provisions dealing with human rights,"⁹³ she concludes that the Assembly exercises such power, noting further that some states have expressed the view "[t]hat human-rights questions cannot be essentially within [the] domestic jurisdiction [of the state]."⁹⁴ The erosion of Article 2(7) rights is attributed to the changes and development of international law.⁹⁵

Fifth, the radical position rejects the role assigned to Article 51 by the traditionalists. Zorngibe argues that "the conception of Article 51 is therefore incontestably stricter than that which was sketched in

90. *Id.* arts. 73, 74.

91. R. Higgins, *supra* note 78, at 90-106.

92. *Id.* at 103.

93. *Id.* at 118.

94. *Id.* at 128.

95. *Id.* at 130. But one may question whether customary international law has "progressed" this far. If *The Antelope*, 23 U.S. (10 Wheat.) 66 (1825), is still good authority, and current state practice any guide, one might hesitate to conclude that Higgins is correct in her analysis of the attenuation of Article 2(7).

general international law."⁹⁶ In particular, he concludes that Article 51 addressed classical-style armed attacks against the territory of a state, and he notes that it does not apply to a civil war situation.⁹⁷ In this view, Article 51 rights would come into play if a foreign government armed bands and sent them across international boundaries, but it would not apply to a genuinely internal conflict. As a consequence, states would not have the right under Article 51 to invite other governments to come to their aid for the suppression of internal liberation movements.⁹⁸ Further, a more severe limitation on Article 51 rights could come through Security Council action. If, as in the Rhodesian situation, the Security Council has commended front-line states for their support of the liberation movements and has demanded "that all states refrain from providing any support--overt or covert--to the illegal regime in Southern Rhodesia,"⁹⁹ seemingly little remains of the traditionalist view that under Article 51 Rhodesia has the right to repel armed attacks or to invite governments to come to its aid.¹⁰⁰

The radical position further seeks to establish the right to humanitarian intervention for the protection of the human rights interests placed in issue by wars of national liberation belonging to the special subset. J.N. Moore champions this view: "[T]he importance of the protection of fundamental human rights, the lack of adequate institutional protection for human rights, and the small threat to community policies of most such interventions suggest that if carefully safeguarded such interventions should be per-

96. C. Zorgbibe, *La Guerre Civile* 125 (1975).

The original French text is the following: "La conception de l'article 51 est donc incontestablement plus stricte que celle qui s'était esquissée dans le droit international general"

97. *Id.* at 124-25.

98. *Id.* at 124.

99. *Id.* paras. 6 and 8 of S.C. Res. 411, 32 U.N. SCOR, Resolutions and Decisions 10, U.N. Doc. S/INF/33 (1977).

100. The invocation of Article 51 rights was complicated by the fact that Rhodesia is not a Member of the U.N., and that it may not have been a "state" in international law. This problem appears to be en route to resolution, now that Britain has regained control. After the 1980 Rhodesian general elections, most states will probably recognize Rhodesia/Zimbabwe as a state, whatever the regime that emerges with a plurality or majority.

missible."¹⁰¹ This would seem to be a direct negation of Article 51 rights, as intervention would be on behalf of the national liberation movements. Rostow criticizes this position, noting that it goes far beyond the limits placed upon humanitarian intervention by customary international law:

The customary international law right of humanitarian intervention in situations of chaos and massacre survives under the Charter, presumably as a form of limited self-help under Article 51 to remedy catastrophic breaches of international law which could not otherwise be cured A genuinely humanitarian intervention should not threaten the territorial integrity or political independence of a state...¹⁰²

A broad right to intervene whenever the concept of self-determination is invoked or whenever human rights standards are alleged to have been violated could scarcely be consistent with state practice. Nor, for the same reason, could one allow such intervention for violations found in the special subset.

Sixth, the creation of the special subset has the singular virtue of negating the issue of "territorial integrity" raised by traditionalists under the rubric of Article 2(4). While all wars of national liberation which are secessionist or revisionist threaten the fragmentation of one or more states, the anti-colonial wars launched against the Portuguese Territories, South Africa, Rhodesia and Namibia, and the irredentist war of the Arab Palestinians launched against Israel, do not. Rather, they envisage the liberation of a territory in its entirety. Such liberation, accomplished by indigenous forces without any alteration of borders, would not disrupt the

101. J.N. Moore, *supra* note 22, at 279. See also M. McDougal and Wm. Reisman, *Response by Professors McDougal and Reisman*, 3 *Int'l Lawyer* 438, 444 (1969); R. Lillich, *Forceful Self-Help by States to Protect Human Rights*, 53 *Iowa L. Rev.* 325 (1967).

102. Rostow, *supra* note 33, at 848-49.

territorial integrity of any state. Further, it could be argued that no member of the special subset is a state, thus avoiding Article 2(4)'s proscription of the use of force against a state. Namibia and Palestine are mandate territories; the Portuguese territories (pre-1975) and Rhodesia were non-self-governing territories--similarly, it may even be argued that South Africa is, like Rhodesia and the Portuguese territories, another essentially colonial remnant rather than a true state.¹⁰³

These arguments advanced on behalf of the radical position are formidable. Not only are the cornerstones of Articles 2(4) and 2(7) weakened, but also the applicability of Article 51 is threatened. Even the Security Council is denied primary responsibility if actions are taken by the General Assembly pursuant to Chapter XI and Article 85. Thus, the subset of wars of national liberation where aid to liberation movements is ostensibly justified in international law is firmly set forth.

While the radical approach makes strong arguments, it nevertheless must contend with three powerful traditionalist responses. First, under Article 12, action by the General Assembly cannot be taken once the Security Council is seized of the issue, unless the Security Council expressly requests a General Assembly opinion.¹⁰⁴ The Security Council has taken ongoing action with regard to every one of the territories in the subset and has not requested the recommendations of the General Assembly. Second, only the Security Council can determine that a threat to the peace exists (Article 39) and decide to authorize the use of force to maintain or restore international peace (Article 42). Third, the nexus created by the interplay of Articles 1(1), 2(4), and 51 cannot be overturned by General Assembly resolutions, no matter how large a majority they may represent and no matter how fervently that majority may

103. However, such an argument must overcome the obvious difficulties created by South Africa's status as a founding member of the United Nations.

104. See generally H. Kelsen, *supra* note 66, at 266-69.

believe in human rights and self-determination. The stability which emanated from fear of the scourge of war remains the first concern of the traditionalists, and the Charter clearly reflects that view. Though the debate is scarcely closed, it is apparent that the traditionalists have the sounder interpretation of the United Nations Charter.

B. *General Assembly Resolution 1514 (XV): Declaration on the Granting of Independence to Colonial Countries and Peoples*

Perhaps the perception of Charter "conservatism" forced Third World states to turn increasingly to the General Assembly as a forum for their views. At any rate, the admission of many new members to the United Nations resulted in a series of resolutions that deal fundamentally with the problems inherent in wars of national liberation. While all of these resolutions have been passed by wide margins, the status to be accorded them by international law has been the subject of considerable debate.

One of the most important of the early resolutions was Resolution 1514,¹⁰⁵ adopted by the General Assembly on December 20, 1960 by a vote of 89-0, with nine abstentions. The Resolution was passed in the midst of tremendous international pressure for the granting of independence to colonial peoples--a process that began with the independence of India in 1947 and which accelerated dramatically once Nkrumah's Ghana gained independence in 1957. Britain, the world's premier colonial power, was clearly liquidating its vast empire. And France, already vanquished in Indo-China, was en route to an even more crushing defeat in Algeria, a territory France considered integral to its own.¹⁰⁶

105. G.A. Res. 1514, 15 U.N. GAOR, Supp. (No. 16) 66, U.N. Doc. A/4684 (1960), reprinted in [1960] U.N.Y.B. at 49-50.

106. See generally A. Horne, *A Savage War of Peace: Algeria 1954-1962* (1977).

Thus, Resolution 1514 came at the crest of the wave of independence; the process proved itself irreversible and by the mid-sixties had added many new members to the U.N. roster. Nevertheless, the abstentions in some cases indicated the development of a new problem for international relations--the quiet backwaters of colonialism that were seemingly immune from the crash and thunder of the wave. Britain abstained, for it had yet to deal effectively with the problem of the white minority in Rhodesia. So did South Africa, already a target for self-determination movements both within its territory and in the Mandated Territory of South West Africa. Portugal, following suit, had earlier declared that its African territories were not possessions but rather integral provinces of the *métropole*.¹⁰⁷ The French abstained for similar reasons vis-a-vis Algeria. Finally the United States joined those who abstained, even though it did not have any colonies.¹⁰⁸

Undaunted by the absence of support of three of the five permanent members of the Security Council, the majority produced a document with stirring language. The Preamble invoked the U.N. Charter's "faith in fundamental human rights" and its "respect for the principles of equal rights and self-determination of all peoples."¹⁰⁹ Further, it called for an awareness that conflicts arise from the denial of freedom to dependent peoples and announced belief in the irreversibility of the process of decolonization.¹¹⁰

The substantive sections for the most part followed the lead of the Preamble. Article 1 declared that: "The subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and co-operation."¹¹¹ Article 2

107. See R. First, Portugal's Wars in Africa 11 (1971).

108. The United States insists that Puerto Rico is not a colony and that Resolution 1514 therefore does not apply. Nor does the resolution affect strategic trusts, which fall outside General Assembly authority according to Article 85 of the Charter.

109. G.A. Res. 1514, *supra* note 105.

110. *Id.*

111. *Id.* art. 1.

declared that "[a]ll peoples have the right to self-determination,"¹¹² and Article 4 stated that "[a]ll armed action or repressive measures of all kinds directed against dependent peoples shall cease."¹¹³ If the above position were adopted as a norm of international law, it would require that governments stop repression of, or armed action against, the dependent peoples within their borders, for any such action would violate the principle of self-determination and would thereby constitute an "impediment" or even a threat to international peace.

Article 5 extends the reach of the Resolution to "Trust and Non-Self-Governing Territories or all other territories which have not yet attained independence."¹¹⁴ This extension is almost certainly *ultra vires*. The General Assembly under Article 16 of the U.N. Charter has jurisdiction only over those Trust territories which fall under the definition contained in Article 77. This definition establishes only three categories--"territories now held under mandate; territories which may be detached from enemy states as a result of the Second World War; and territories voluntarily placed under the system by states responsible for their administration."¹¹⁵ Two of the territories in the special subset are mandate territories (Namibia and Palestine). But the others clearly are not mandate territories. Nor have they been detached from enemy states. Certainly they have not been voluntarily placed under the trusteeship system. Nor can the General Assembly seek to base its authority on Chapter XI--the "Declaration Regarding Non-Self-Governing Territories." While the General Assembly may have the power to specify which territories are non-self-governing, that specification itself has the status only of a recommendation, rather than a United Nations decision. As Kelsen notes:

If the General Assembly is competent to make recommendations on matters regulated by Chapter XI, and that means to apply its provisions, the Assembly may--in form

112. *Id.* art. 2.

113. *Id.* art. 4.

114. *Id.* art. 5.

115. U.N. Charter art. 77, para. 1a-1c.

of a recommendation--specify these territories. But a recommendation of the Assembly has no binding force; hence it depends finally on the Member states to decide which are the territories to which their obligations under Chapter XI refer.¹¹⁶

None of the territories in the subset has been voluntarily placed under the aegis of the General Assembly. Even if these territories had been defined as non-self-governing by the Member states which control them, the obligations owed to the United Nations under Chapter XI would be minimal.¹¹⁷ Although "the interests of the inhabitants of these territories are paramount,"¹¹⁸ the only affirmative actions which states are to undertake regularly on their behalf are routine reporting requirements contained in Article 73(e). Beyond that, no timetable for self-government is expressly contemplated. Because Article 73(b) permits the administering state to delay independence "according to the particular circumstances of each territory and its peoples and their varying stages of advancement,"¹¹⁹ it seemingly contradicts Resolution 1514's call for "immediate steps" toward independence.

Article 6 of Resolution 1514 contains the stricture that "[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 Charter of the United Nations."¹²⁰ This statement conflicts with the declaration, contained in Article 2 of the Resolution, that "all peoples have the right to self-determination." Finally, Article 7 muddles the goals of Resolution 1514 by mentioning the principle of "noninterference in the internal affairs of all States" in the same breath with the "sovereign rights of all peoples and their territorial integrity."¹²¹ Territorial integrity and noninterference in domestic affairs are principles that apply to states, not peoples. The tension between the principles of self-determination on the one hand, and

116. H. Kelsen, *supra* note 66, at 556.

117. They are also "vague." *See id.* at 557.

118. U.N. Charter art. 73.

119. U.N. Charter art. 73, para. b.

120. G.A. Res. 1514, *supra* note 105, art. 6.

121. *Id.*, art. 7.

territorial integrity and noninterference in domestic affairs on the other, remains unresolved.

The Members of the General Assembly passed Resolution 1514 with relative ease. But it is far more difficult to gauge its effect. The traditionalist position that General Assembly resolutions are merely recommendations would relegate Resolution 1514 to the realm of the merely hortatory. Further, no traditionalist would accept the abrogation of the Article 2(7) rights of states to suppress internal disorders without interference from abroad, or the denial of the Article 51 rights of states engaged against national liberation movements to receive aid from other states.

To the more radical publicists of international law, Resolution 1514 ranks as a document of major importance. Moore describes it as evidence of "a strong community consensus against colonialism."¹²² Schwelb claims it is an assertion about the present state of international law.¹²³ Higgins believes it is illustrative of "a trend towards acknowledging self-determination as a legal right."¹²⁴

The debate over the international significance of Resolution 1514 has not abated. Rather, it has been intensified by the passing of subsequent resolutions which go even further in the attempt to define a special subset of wars of national liberation where aid to the liberationists is justified. Two of the most important of these are Resolutions 2625 and 3314.

C. *General Assembly Resolution 2625: Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations*

General Assembly Resolution 2625¹²⁵ ranks as one of the most complex documents in international law.

122. J.N. Moore, *supra* note 22, at 187.

123. E. Schwelb, *Human Rights and the International Community* (Chicago, 1964), *discussed in* J. N. Moore, *supra* note 22, at 187.

124. R. Higgins, *supra* note 78, at 100.

125. G.A. Res. 2625, 25 U.N. GAOR, Supp. (No. 28) 121, U.N. Doc. A/8028 (1970), *reprinted in* 65 Am. J. Int'l L. 243 (1971).

The perplexing issue of self-determination for dependent peoples, partially addressed in 1960 by Resolution 1514, was by 1970 further complicated by the internal conflicts in most of the Third World states which constituted the General Assembly's perennial majority. These newly independent states of Asia and Africa proved to be powder kegs. Sparks thrown off by self-determination struggles threatened to explode not only the stability of these nascent states, but also the prevailing pattern of international peace. Nevertheless, anti-colonialism, anti-racism, anti-apartheid and human rights movements had heightened the levels of political consciousness among Third World nations. To them, the backwaters of colonialism stood out as symbols of an international system that continued to frustrate the legitimate self-determination aspirations of dependent peoples.

Resolution 2625, a hotly-debated and seemingly contradictory compromise, attempted to reconcile two fundamental sets of concepts of international law--the principles of territorial integrity and noninterference in domestic affairs versus the principles of human rights and the self-determination of peoples. The battlelines drawn on these sets of principles extend to the problem of intervention in wars of national liberation. Those who emphasize the former set of principles believe that aid to governments only is permissible, whereas those who emphasize the latter set of principles believe that overt intervention on behalf of liberation movements in the special subset is fully justified.

The tensions between these sets of principles are apparent even in the Preamble to Resolution 2625. While the General Assembly majority reaffirms the importance of the maintenance of international peace and security, it believes that peace must be "founded upon freedom, equality, justice and respect for fundamental human rights."¹²⁶ While it recalls "the duty of states to refrain in their international relations from military, political, economic or any other form of coercion aimed against the political independence or territorial integrity of any state"¹²⁷ and considers it "essential that all states shall refrain in

126. *Id.*, 65 Am. J. Int'l L. at 244.

127. *Id.*, 65 Am. J. Int'l L. at 244-45,

their international relations from the threat or use of force,"¹²⁸ it nevertheless is convinced that "the subjection of peoples to alien subjugation, domination and exploitation constitutes a major obstacle to the promotion of international peace and security."¹²⁹ Finally, while it remains "convinced that the principle of equal rights and self-determination of peoples constitutes a significant contribution to contemporary international law,"¹³⁰ it concedes that "any attempt aimed at the partial or total disruption of the national unity and territorial integrity of a state or country . . . is incompatible with the . . . Charter."¹³¹

The tensions already evidenced in the Preamble are heightened by the substantive sections. Listed underneath the principle "that states shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state," the following duties appear:

Every state has the duty to refrain from the threat or use of force to violate the existing international boundaries of another state or as a means of solving international disputes, including territorial disputes and problems concerning frontiers of states.

* * *

Every state has the duty to refrain from organizing or encouraging the organization of irregular forces or armed bands, including mercenaries, for incursion into the territory of another state.

* * *

Every state has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another state or acquiescing in organized activities within its territory directed towards the commission of such acts . . .¹³²

128. *Id.*, 65 Am. J. Int'l L. at 245.

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*, 65 Am. J. Int'l L. at 246.

Despite these restrictions, under the same section one finds the duty "to refrain from any forcible action which deprives peoples referred to in the elaboration of the principle of equal rights and self-determination of their right to self-determination and freedom and independence."¹³³

Second, under the principle "concerning the duty not to intervene in matters within the domestic jurisdiction of any state," three express restrictions against interventionist activities appear:

No state or group of states has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other state. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the state or against its political, economic and cultural elements, are in violation of international law.

No state may use or encourage the use of economic, political or any other type of measures to coerce another state in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind. Also, no state shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another state, or interfere in civil strife in another state.

* * *

Every state has an inalienable right to choose its political, economic, social and cultural systems, without interference in any form by another state.¹³⁴

Nevertheless, this section also declares that "[t]he use of force to deprive peoples of their national identity constitutes a violation of their inalienable

133. *Id.*

134. *Id.*, 65 Am. J. Int'l L. at 218.

rights and of the principle of non-intervention."¹³⁵

Finally, in discussing the "principle of equal rights and self-determination of peoples," the tables are turned. Unlike the two preceding sections, the affirmative duties seem to favor international support for national liberation movements.

Every state has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter, and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of the principle, in order:

- (a) To promote friendly relations and co-operation among states; and
- (b) To bring a speedy end to colonialism, having due regard to the freely expressed will of the peoples concerned;

and bearing in mind that subjection of peoples to alien subjugation, domination and exploitation constitutes a violation of the principle, as well as a denial of fundamental human rights, and is contrary to the Charter.¹³⁶

Yet the warning contained at the end of the section seemingly negates the duty described above:

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 conducting themselves in compliance with the principle of equal

135. *Id.*

136. *Id.*, 65 Am. J. Int'l L. at 249.

137. *Id.*, 65 Am. J. Int'l L. at 250.

rights and self-determination of peoples . . . without distinction as to race, creed or color.

Every state shall refrain from any action aimed at the partial or total disruption of the national unity and territorial integrity of any other state or country.¹³⁷

These contradictions are not unique to the General Assembly. The Charter of the Organization of African Unity (OAU) strongly favors the principles of "non-interference in the internal affairs of States [and] respect for the sovereignty and territorial integrity of each State."¹³⁸ The endorsement of these principles has not, however, prevented the OAU from giving overt aid to liberation movements engaged in combat against the regimes of southern Africa.

It is possible that the creation of a special subset of national liberation movements helps to resolve the conflicts between these sets of principles. If the Trust Territories are the preserve solely of the General Assembly, then Namibia and Palestine come under the jurisdiction of that body. The self-determination of peoples, at least in Namibia, could be accomplished without doing violence to the concepts of territorial integrity and noninterference in domestic affairs. Namibia, whose peoples have internationally recognized rights pursuant to the Mandate Agreement, could be liberated in its entirety. Its independence is not an internal affair of South Africa. And if the unallocated portions of the former Palestinian Mandate (Gaza and the West Bank) were allocated by the General Assembly to the Arab Palestinians, subject to an overall peace agreement pursuant to Security Council Resolution 242,¹³⁹ again the concepts of non-interference in domestic affairs and territorial integrity would not be violated.

This position would have been less clear with respect to the former Portuguese colonies, though

138. See Farer, *supra* note 53, at 349.

139. S.C. Res. 242, 22 U.N. SCOR, Resolutions and Decisions 8, U.N. Doc. S/INF/22/Rev. 2 (1967).

their liberation subsequent to the collapse of the metropolitan regime has mooted that issue in international law. The compromise probably would not affect South Africa, which--although arguably only a colonial remnant like the Portuguese colonies or Rhodesia--is almost certainly a state, is a member of the United Nations, and could therefore invoke the protections of Article 2(7) and, if attacked, those of Article 51. However, the limiting case of the subset is Rhodesia. As Schachter notes,

Within the United Nations, *self-determination* has been regarded pre-eminently as the right of the peoples in the overseas colonies to become independent or to achieve self-government. It has also been expressed as a goal in respect of claims by a majority of indigenous inhabitants against rule by a minority of another race, as, for example, in Rhodesia.¹⁴⁰

With respect to Rhodesia, territorial integrity would not be affected. Nevertheless, a claim of domestic interference could now be raised by Britain, since after fourteen years of successful rebellion, it has regained control of its former colony. Rhodesia itself is not yet a Member of the United Nations and can assert no independent rights under the Charter. Further, by the express provision of the Security Council,¹⁴¹ Rhodesia may not be recognized as a state by any state and therefore has no access to the Article 2(4)/Article 51 nexus concerning non-use of force and self-defense.

Two problems remain, however, for those who would accept Resolution 2625 as the harbinger of intervention on behalf of liberation movements rather than governments. First, the General Assembly cannot act on matters "while the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter."¹⁴² The

140. Schachter, *The United Nations and Internal Conflict*, in *Law and Civil War in the Modern World*, *supra* note 21, at 401, 406-07.

141. S.C. Res. 277, 25 U.N. SCOR, Resolutions and Decisions, U.N. Doc. S/Res/277 (1970), para. 2.

142. U.N. Charter art. 12, para. 1.

Security Council has acted, and continues to act, with respect to every situation contained in the special subset. Second, Resolution 2625 does not expressly authorize the use of force¹⁴³ by states or liberation movements against the territories or states in question. Even if it purported to authorize armed action, that authorization would be *ultra vires*. The Security Council alone has such powers under Article 42.

The document nevertheless is of some significance in international law. The principles it espouses, which are repeated in Resolution 3314¹⁴⁴, the Definition of Aggression, represent what Farer (referring to Resolution 3314) has termed a "global consensus."¹⁴⁴ That consensus may extend to a condemnation of colonialism, apartheid, and racism; it may further extend to the qualified support of movements for self-determination within the special subset. However, the consensus does not extend to the use of force against the regimes which currently dominate the territories within the subset, for use of force by a state, whether acting on its own or under the auspices of a General Assembly resolution, would constitute an act of aggression. International action on behalf of national liberation movements, absent a Security Council resolution, must be confined to the peaceful means set forth by the U.N. Charter.

D. *General Assembly Resolution 3314 (XXIX): Definition of Aggression*

The problem of intervention lies at the very center of discussions on the principle of self-determination. General Assembly Resolution 3314¹⁴⁵ attempts to deal with this central concern by defining what constitutes aggression under international law. The compromise position which the General Assembly finally

143. Stephen M. Schwebel makes a similar point in *Wars of Liberation--as Fought in U.N. Organs*, Law and Civil War in the Modern World, *supra* note 21, at 446, 453.

144. Farer, *supra* note 53, at 367. Farer also believes that Resolution 2625 would be of some use in limiting reprisals against supporters of liberation movements, as supplements to Security Council Resolutions: *id.* at 372 & n. 122.

145. G.A. Res. 3314, *supra* note 7.

accepted has been aptly described by one author as a "remarkable package of ambiguities, concealed conflicts, confusions and frustrations of definition."¹⁴⁶

By 1974 the intrinsically difficult problem of defining aggression had become insuperable. The traditionally favored definition, with its "criterion of the armed crossing of a State's frontiers without its consent,"¹⁴⁷ appeared incapable of dealing with two prevailing problems in international relations. First, "in a very typical kind of dispute about territory a definition of the word 'aggression' in terms of crossing the frontier will not do, because the very question over which the trouble arises is as to *where the frontier is* according to the existing rules of law."¹⁴⁸ And second:

The difficulties with the simplistic crossing of frontiers test went . . . even deeper. It was increasingly confronted by doctrines about "wars of liberation" and "struggles for self-determination," which clamoured for the licence to use armed force against putatively "oppressive" sovereign States. They demanded that the use of armed force by third States in support of such struggles be exempted from the definition of aggression; and this necessarily implied that the test of armed crossing of frontiers was to be no longer valid for such cases.¹⁴⁹

The Third World majority attempted to depart from the traditional definition of aggression by designing a definition that would (1) be applicable to border disputes without (2) jeopardizing their borders, and (3) allow the use of armed force on behalf of liberation movements fighting "oppressive" regimes without (4) yielding similar rights to self-determination movements within their (the members of the Third World majority's) own borders. This attempt at redefinition accounts for a great deal of the confusion surrounding Resolution 3314.

¹⁴⁶. J. Stone, *Conflict Through Consensus* 164 (1977).

¹⁴⁷. *Id.* at 10.

¹⁴⁸. *Id.*

¹⁴⁹. *Id.* at 11.

This confusion begins in the Preamble which, appropriately enough, reaffirms Resolution 2625 and renews the internal contradictions of that document. It "[r]eaffirm[s] the duty of States not to use armed force to deprive peoples of their right to self-determination, freedom and independence, or to disrupt territorial integrity."¹⁵⁰ But in the same breath, it seeks to uphold the principles of states' territorial integrity, the peaceful settlement of disputes, and the suppression of acts of aggression.

Of the substantive sections, Articles 1 through 6 define and describe aggressive activity fairly carefully and seem by implication to outlaw all intervention on behalf of national liberation movements. Article 1 defines aggression as "the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State."¹⁵¹ Article 2 states that the "first use of armed force by a State in contravention of the Charter shall constitute *prima facie* evidence of an act of aggression."¹⁵² And Article 3 declares:

Any of the following acts, regardless of a declaration of war, shall . . . qualify as an act of aggression:

- (a) The invasion or attack by the armed forces of a State of the territory of another State . . . ;
- * * *
- (f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;
 - (g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which

150. G.A. Res. 3314, 29 U.N. GAOR, Supp. (No. 31) 142, U.N. Doc. A/9631 (1974), reprinted in 69 Am. J. Int'l L. 480 (1975).

151. *Id.*, art. 1, 69 Am. J. Int'l L. at 481.

152. *Id.*, art. 2, 69 Am. J. Int'l L. at 482.

carry out acts of armed force
against another State . . ., or its
substantial involvement therein.¹⁵³

The three subsections just cited would, for example, condemn foreign troops for attacking Rhodesia, condemn Zambia for allowing its territory to be used by foreign troops for such an attack, and condemn Mozambique, Zambia and Tanzania for their substantial involvement in the raids into Rhodesia conducted by Nkomo's and Mugabe's Patriotic Front guerrillas.¹⁵⁴

Article 4 provides that the list in Article 3 is not exhaustive. Article 5 states that "[n]o consideration of whatever nature, whether political, economic, military or otherwise, may serve as a justification for aggression."¹⁵⁵ Article 6 invokes the U.N. Charter's own provisions with respect to the lawful use of force. Taking these sections as a whole, whatever violates the Charter violates Resolution 3314; aggressions not specifically enumerated in Article 3 are nevertheless proscribed; and no consideration--arguably even the self-determination of peoples--may be permitted to serve as a justification for armed intervention.

The Definition of Aggression, had it stopped there, would have bolstered the norms of the Charter, and remained a tightly constructed condemnation of armed interference in the affairs of any state. However, Article 7 goes on to declare that:

Nothing in this Definition, and in particular Article 3, could in any way prejudice the right to self-determination, freedom and independence, as derived from the Charter, of peoples forcibly deprived of that right and referred to [in Resolution 2625], particularly peoples under colonial and racist regimes or other forms of alien domination; nor the right of these peoples to struggle to that end and to seek and receive support . . .¹⁵⁶

¹⁵³ *Id.*, art. 3, 69 Am. J. Int'l L. at 482.

¹⁵⁴ These subsections apply to Rhodesia, however, only if it were deemed to be a state, a debatable proposition prior to the 1980 elections and subsequent independence.

¹⁵⁵ G.A. Res. 3314, 29 U.N. GAOR, Supp. (No. 31) 142, U.N. Doc. A/9631 (1974), *reprinted in* 69 Am. J. Int'l L. 480 (1975).

¹⁵⁶ *Id.*, art. 7, 69 Am. J. Int'l L. at 483.

And Article 8 provides that "each provision should be construed in the context of the other provisions,"¹⁵⁷ thereby making the special category of liberation movements combatting colonial or racist regimes exempt from the strictures of Articles 1 through 7. Had Article 7 simply addressed the right of peoples under alien domination to revolt, the Definition could have been salvaged. However, by stating that the struggling peoples had the right to seek and receive support, Article 7 undercut the "substantial involvement" position of Article 3(g) and seemed to imply, although the word "force" is not expressly used, that even overt intervention on behalf of liberation movements would not necessarily constitute aggression. It was, as Stone points out, "a strong bid by many non-aligned States to establish the 'inherent right of self-determination' alongside that of self-defence under Article 51 of the Charter."¹⁵⁸ Once aggression occurred against a nation, that nation would be permitted to use self-defense and invite states to come to its aid, just as under Article 51 a state has the right to invite other states to come to its aid. Such a position, if it were accepted by the international community, would justify almost any intervention against almost any state for nearly every violation of human rights committed against a people or even a tiny minority of that people.

Resolution 3314, adopted by acclamation in 1974, has, if nothing else, demonstrated that there is no international consensus concerning the definition of "aggression," especially when an attempt is made to incorporate elements of "justice" into that definition.¹⁵⁹ It is not surprising that the traditionalists generally argue that the document is of little significance. Stone notes that the resolution could not "add to or vary obligations already imposed by the United Nations Charter."¹⁶⁰ He further states

157. *Id.*, art. 8, 69 Am. J. Int'l L. at 483.

158. J. Stone, *supra* note 146, at 35.

159. As J. I. Garvey notes, "Absent a juridical body with compulsory jurisdiction to impose a single view, 'justice' must remain an illusory objective among sovereign States with different perspectives on what constitutes 'justice.'" Garvey, *The U.N. Definition of "Aggression": Law and Illusion in the Context of Collective Security*, 17 Va. J. Int'l L. 177, 196 (1977).

160. J. Stone, *supra* note 146, at 23.

that "[t]he Security Council has exclusive power under Article 39 of the Charter to determine aggression, which includes its discretion to refrain from determining it."¹⁶¹ The fact that the Security Council has in no way endorsed Resolution 331⁴ means that the resolution carries no necessary effect in international law. The Resolution may also be *ultra vires*, beyond the scope of the General Assembly's powers.

The question is raised whether peoples have a right of self-defense which parallels that of states. If so, a people subjected to colonial domination might automatically be termed the victim of an aggression. The traditionalists respond in the negative, noting that "[e]ven those publicists sympathetic to wars of liberation have doubted whether self-defence in the international legal sense is involved."¹⁶² Historically, the inherent right of self-defense belongs to states, not peoples. But the radicals seek to utilize other grounds for their justification. First, they invoke General Assembly resolutions such as 151⁴ and 2625.¹⁶³ However, these resolutions do not constitute U.N. decisions, are not binding in international law, and can scarcely be said to represent customary international law, given the conflicts in Resolution 331⁴'s attempt to define aggression. Second, the radicals cite the political right of revolution, which is grounded on "human rights" concerns rather than the "use of force" doctrine.¹⁶⁴ However, revolution is not at issue; rather, it is the right to aid, or to intervene on behalf of, liberation movements which the radicals must establish. Since human rights objectives under the Charter are to be achieved through peaceful means, this construction cannot lead to the creation of a right of intervention. Finally, it is conceivable

161. *Id.* at 150.

162. *Id.* at 66.

163. *See id.* at 66-86 for a more detailed discussion of the view that the cumulative effect of various General Assembly resolutions is to render wars of national liberation legitimate. In addition to Resolutions 151⁴ and 2625, Stone adverts to the Declaration on the Inadmissibility of Intervention, G.A. Res. 2131, 20 U.N. GAOR, Supp. (No. 14) 11, U.N. Doc. A/6014 (1965), reprinted in 5 Int'l Legal Materials 374-76 (1966).

164. A distillation of this view is set forth by K. Skubiszewski in *Use of Force by States*, in *Manual of Public International Law* 740, 771-72 (Max Sorensen ed. 1968).

that Article 51 rights would apply if the people to be freed were deemed a "former sovereign state."¹⁶⁵ This construction assumes "that the State's authority over the particular people must at some past time have been imposed by armed force, in suppression of that people's Sovereign Statehood, and must now be deemed to be a standing armed attack against that people's former Sovereign State."¹⁶⁶ In the alternative, the argument is made that the initial suppression was unlawful; hence, the people never lost their right of self-defense.¹⁶⁷ However, the "standing armed attack" or unlawful suppression" theories would also be welcomed by the Québécois, the Basques, and more than a few of the Soviet Union's Republics. The principle of self-defense, if extended to peoples, could scarcely be limited to those few cases characterized by "colonial domination" as opposed to all other forms of past suppression.

E. *General Assembly Resolutions 2787 and 3379*

Despite the problems of acceptability encountered by Resolutions 1514, 2625, and 3314, the General Assembly has passed other resolutions which attempt to set forth the majority position with respect to the special subset of wars of national liberation. One of the most radical of these is Resolution 2787, Concerning the Inalienable Rights of the Palestinians and Other Peoples.¹⁶⁸ In Articles 1 through 3 the General Assembly does the following:

165. See Alexandrowicz, *New and Original States: The Issue of Reversion to Sovereignty*, 45 Int'l Affairs 465 (1969). Alexandrowicz does not touch on Article 51 rights, but rather discusses the reversion to sovereignty of ancient peoples.

166. J. Stone, *supra* note 145, at 67.

167. Alexandrowicz, *supra* note 165, at 478, states that "the reverting state can rely on a presumption of revision to the same quantum and measure of sovereignty as that which it had to abandon at the moment of elimination from the Family of Nations in the past."

168. G.A. Res. 2787, *supra* note 9, reprinted in H. Cattani, *supra* note 9, at 215-16.

1. *Confirms* the legality of the peoples' struggle for self-determination and liberation from colonial and foreign domination and alien subjugation, notably in southern Africa and in particular that of the peoples of Zimbabwe, Namibia, Angola, Mozambique, and Guinea (Bissau), as well as the Palestinian people, by all available means consistent with the Charter of the United Nations;

2. *Affirms* man's basic human right to fight for the self-determination of his people under colonial and foreign domination;

3. *Calls upon* all States dedicated to the ideals of freedom and peace to give all their political, moral and material assistance to peoples struggling for liberation, self-determination and independence against colonial and alien domination169

The General Assembly majority did not limit the justification for their arguments to the principle of self-determination. Rather, increasingly strident resolutions struck at the "racist" basis of the oppressor regimes; and one of these, Resolution 3379, went so far as to determine "that Zionism is a form of racism and racial discrimination."¹⁷⁰

It is possible that the definition of the subset contained in Resolution 2787, and its purported focus of anti-racism contained in Resolution 3379, represent some sort of international consensus. Certainly Cattán places great reliance on Resolution 2787, citing it as evidence of the right of Palestinians to recover their homeland.¹⁷¹

169. G.A. Res. 2787, *supra* note 9, at arts. 1-3.

170. G.A. Res. 3379, 30 U.N. GAOR, Supp. (No. 34) U.N. Doc. A/10034 (1975), *reprinted in* 14 Int'l Legal Materials 1520-21 (1975).

171. H. Cattán, *supra* note 80, at 156.

The traditionalist would never admit that a General Assembly resolution has the power to create legally recognized rights, to authorize the use of force, or to legitimate movements struggling for self-determination. As noted earlier, the fact that the Security Council has acted, or continues to act, on the situations defined by Resolutions 2787 and 3379 would seem to negate pretensions of General Assembly competence on the critical questions raised by any contemplated use of force.

VI. *Conclusion*

Although the special subset of wars of national liberation exists as a particular definitional construct in international relations, it does not follow that special rules of international law are applicable to the subset. The traditionalist position, that aid to governments is allowed while aid to liberation movements is proscribed, is solidly anchored in the U.N. Charter. While General Assembly Resolutions 1514, 2625, 3314, 2787 and 3379 may reflect the views of Third World states, they cannot, as the General Assembly majority hoped, amend the applicable articles of the U.N. Charter. Nor are the resolutions themselves unambiguous.

The creation of the special subset does, however, remove at least one weapon from the traditionalist's arsenal--that of territorial integrity. The changes in regimes contemplated by the liberation movements and their supporters, with the possible exception of Palestine, do not infringe territorial integrity as such. The subset possibly removes a second weapon as well: non-interference in the domestic affairs of states, under Article 2(7). Certainly Namibia and, prior to 1975, the Portuguese Territories were not states. Arguably, neither is Rhodesia.¹⁷² Article 2(7) would probably still apply, however, to the Israeli portions of the Palestine Mandate and to the whole of South Africa. Further, the creation of the subset attenuates a third weapon: Article 51. Portugal could only with great difficulty have argued that its Article 51 rights

¹⁷² Now that Britain has regained "control" of her former colony after fifteen years of rebellion, Rhodesia/Zimbabwe is progressing toward statehood, which will follow elections in 1980. After Rhodesia gains statehood, under majority rule, it will cease to be a member of the subset for analytical purposes.

extended to its African provinces. South Africa could not pretend its rights covered Namibia. Rhodesia, though, is not a state and is now under the control of Great Britain; until statehood it would have no independent rights to self-defense under the Charter. Only South Africa and Israel might successfully invoke the protection of Article 51.

The traditionalists are not so easily disarmed. Intervention on behalf of the liberation movements still envisages an international use of force inconsistent with the purposes of the United Nations Charter under Article 2(4). And it still constitutes an impermissible challenge to the maintenance of international peace and security under Article 1(1). If action were to be taken pursuant to a General Assembly resolution, moreover, such action would circumvent the procedures established under Articles 12(1), 39 and 42, which give the Security Council alone the power to consider, determine, and decide the great issues that attend the international use of force.

Finally, the position of the General Assembly majority has not succeeded in articulating, even for the special subset, a clear basis for international action. As Stone has asked with regard to Palestine:

Is the critical date of the Middle East Crisis 1973 or 1967, or the first Arab States' attack on Israel in 1948, or is it at the Balfour Declaration in 1917, or at the Arab invasions and conquest of the 7th century, or even perhaps at the initial Israelite conquest of the thirteenth century B.C.?¹⁷³

For African nations, which peoples do enjoy self-determination? Do the Boers count as a people? Is their oppression of South African blacks different from that of the Nigerian government vis-a-vis the Ibos or that of the Burundi regime vis-à-vis the Hutusi? Such questions could be generated for decades, and answers in terms of international law might never be clear.

173. J. Stone, *supra* note 146, at 136.

Intervention on behalf of national liberation movements--even those few in the subset colonial/Mandate--is too risky a gamble for international peace to justify the dismantling of vital protections contained in the United Nations Charter. The norms of the Charter, while not ideal, are more in keeping with genuine concerns for human rights than the ill-defined concept of "self-determination."