

1988

## THE NAMIBIAN CONFLICT: A DISCUSSION OF THE Jus ad Bellum AND THE Jus in Bello

Edward Kwakwa

Follow this and additional works at: [https://digitalcommons.nyls.edu/journal\\_of\\_international\\_and\\_comparative\\_law](https://digitalcommons.nyls.edu/journal_of_international_and_comparative_law)



Part of the [Law Commons](#)

---

### Recommended Citation

Kwakwa, Edward (1988) "THE NAMIBIAN CONFLICT: A DISCUSSION OF THE Jus ad Bellum AND THE Jus in Bello," *NYLS Journal of International and Comparative Law*. Vol. 9 : No. 2 , Article 3.

Available at: [https://digitalcommons.nyls.edu/journal\\_of\\_international\\_and\\_comparative\\_law/vol9/iss2/3](https://digitalcommons.nyls.edu/journal_of_international_and_comparative_law/vol9/iss2/3)

This Article is brought to you for free and open access by DigitalCommons@NYLS. It has been accepted for inclusion in NYLS Journal of International and Comparative Law by an authorized editor of DigitalCommons@NYLS.

# THE NAMIBIAN CONFLICT: A DISCUSSION OF THE *JUS AD BELLUM* AND THE *JUS IN BELLO*\*

EDWARD KWAKWA\*\*

## I. INTRODUCTION

Despite the United Nations' termination of South Africa's mandate over Namibia,<sup>1</sup> the South African army maintains a significant presence in the territory.<sup>2</sup> In turn, the South West African People's Organization ("SWAPO") has been engaged in a struggle against South African occupation of Namibia. Recent reports indicate that fervent attempts are being made to end this ongoing struggle,<sup>3</sup> but there still remain serious doubts about the prospect for peace in the region.<sup>4</sup> The

---

\* Several significant developments pertaining to the Namibian conflict have taken place within the past few months. In the most important of these, South Africa, Angola and Cuba signed an agreement under which, *inter alia*, South Africa agreed to a troop pull-out of Namibia. For a discussion of some of the problems envisaged in this troop pull-out, see N.Y. Times, March 1, 1989, at A3, col. 4. For the most recent developments pertaining to the conflict, see generally Documents on Peace in Southwestern Africa and Transition for Namibian Independence, July 20, 1988 - May 19, 1989, 28 I.L.M. 944-1017. Nevertheless, this Article remains relevant for several reasons. It is not unlikely that the South African withdrawal will be completed in the very near future. The law of armed conflict will continue to be applicable to the conduct of the parties even during the withdrawal and the implementation phase of Namibia's independence. This Article's discussion of the applicable law in the Namibian conflict also has direct relevance and applicability to similar ongoing situations of armed conflict. It is the author's fervent hope, however, that Namibia will have gained full independence by the time this Article is published.

\*\* LL.B. (Honors) 1984, University of Ghana; LL.M. 1986, Queen's University, Canada; LL.M. 1987, J.S.D. Candidate, Yale Law School. The author wishes to thank Professors Michael Reisman and Paul Kahn for their comments on an earlier draft of this Article.

1. See *infra* note 20 and accompanying text.

2. Theoretically, there is a Military Council in Namibia that is independent of South Africa. In practice, however, this Military Council operates under the effective control of the Southern African Defence Force (the "SADF"). See 14 AFR. CONTEMP. REC. B668 (1981-82). South Africa currently maintains approximately 100,000 armed men in Namibia. By conservative estimate, this works out to one armed man for every thirteen or fourteen civilians in Namibia. See Russell, *Fire Next Door in AFRICA*, Oct. 1986, at 29.

3. See, e.g., Cody, "Peace Steps" Agreed for Angola, Washington Post, Aug. 6, 1988, at A13, col. 4; Thurow, *Governments Agree on Wide Principles in Southern Africa*, Wall St. J., July 21, 1988, at 12, col. 4; Ottaway, *Cautious Optimism on Southern Africa*, Washington Post, July 15, 1988, at A16, col. 3.

4. See, e.g., Uogh, *Southern Africa: Challenges and Choices*, reprinted in 6 FOREIGN

conflict in Namibia is not likely to come to an end even within the next year. In the interim, however, it is imperative that discussion should not be diverted from the conduct of the war itself. Until such time as the Namibian conflict is brought to an end, it is important to focus on the law and policy issues involved in the conflict. Characterization of the governing norms is necessary in determining the treatment which should be accorded to captured SWAPO guerrillas and South African forces. It is also important in assessing the entitlement of all parties to the conflict, on the field of battle as well as upon capture.

This Article analyzes the governing norms of international law relating to the *jus ad bellum* and the *jus in bello*<sup>5</sup> in the Namibian conflict. The first part of this analysis sets forth the Namibian conflict in historical perspective, followed by a discussion of claims relating to the *jus ad bellum*. The argument presented, *inter alia*, is that SWAPO is engaged in a legitimate war of national liberation because: 1) South Africa is illegally occupying Namibia; 2) South Africa's rule by apartheid in Namibia constitutes a violation of international norms; 3) SWAPO is regarded by the international community as the legitimate representative of the Namibian people; 4) present trends in world social process indicate a high degree of tolerance by the international community for the activities of liberation groups such as SWAPO which are engaged in a struggle for self-determination; and 5) the present state of international relations suggests the legitimacy of the use of force in pursuit of basic human dignity. This author takes the position that in the peculiar context of the Namibian conflict, the right of self-determination has become preeminent because it is not at variance with the norms of international law.

The second part of this Article discusses the law that should be applied in the Namibian conflict. It argues that the conflict in Namibia is an international, rather than an internal, armed conflict, because: 1) South Africa's presence in Namibia amounts to a foreign occupation; 2) "Liberation" groups such as SWAPO engaged in resisting the suppression of their right to self-determination are engaged in an international

---

Aff. 1067, 1089 (1988) (arguing that the South Africans are unlikely to implement UN Resolution 435 to bring about Namibian independence because, "Namibia is far more important militarily to Pretoria now than it was in 1980-1981"); Battersby, *Amid Namibia's White Opulence, Majority Rule Isn't So Scary Now*, N.Y. Times, Dec. 26, 1988, at A1, col. 1 (Militant black trade unionists criticized some guerilla leaders for cooperating with the peace plan and preparing for a new battle on the question of sovereignty over Walvis Bay, a South African enclave that was never a part of Namibia).

5. "*Jus ad bellum*" is used here to refer to the law that determines the existence of a right to wage war, whereas "*Jus in bello*" refers to the law governing actual conduct of the war.

conflict, having regard to the nature and degree of third-party involvement and assistance from the international community; and 3) United Nations prescriptions overwhelmingly establish the international nature of the conflict. It is suggested that although Namibia is not an independent state *stricto sensu*, international recognition has conferred a kind of quasi-statehood, thus granting it the status of a "Power" in conflict within the purview of Common Article 2 of the Geneva Conventions of 1949.<sup>6</sup>

This Article also analyzes the Namibian conflict in the context of Article 1(4) of Additional Protocol I,<sup>7</sup> and concludes that although Article 1(4) was specifically created to address situations such as that of Namibia, its limited practice by the international community is insufficient to infer that it has attained the status of custom. Consequently, Article 1(4) is not directly applicable in the Namibian conflict. The conduct of the parties to the conflict is therefore governed by the 1949 Geneva Conventions in their entirety, as well as those provisions of Additional Protocol I which are declaratory of custom and the general principles and customs of the law of war. The Article argues that, consistent with the Geneva Conventions and provisions of Additional Protocol I, SWAPO guerrillas are entitled to combatant and prisoner of war ("POW") status upon capture by the South African government. SWAPO is similarly under a corresponding obligation to observe the laws of war in their entirety.

This Article is premised on the assumption that a result-oriented approach should be taken in construing international humanitarian law instruments. Such a methodology accords with the Vienna Convention on the Law of Treaties,<sup>8</sup> and best advances the interests of international humanitarian law.

---

6. Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, T.I.A.S. No. 3362; 75 U.N.T.S. 31; Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, T.I.A.S. No. 3363, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135; Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287 [hereinafter Geneva Conventions of 1949].

7. Protocol Relating to the Protection of Victims of International Armed Conflicts (Protocol I), *opened for signature* Dec. 12, 1977, 16 I. L. M. 1391 (1977) [hereinafter Protocol I].

8. See Vienna Convention on the Law of Treaties, adopted May 22, 1969, art. 31, U.N. Doc. A/CONF./39/27 (1969), *reprinted in* 63 AM. J. INT'L L. 875 (1969) [hereinafter Vienna Convention] ("A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.").

## II. HISTORICAL BACKGROUND

Namibia is a huge region of land covering a quarter of a million square miles.<sup>9</sup> Its population was estimated at about 1.2 million in 1986.<sup>10</sup> Namibia possesses scattered deposits of valuable minerals including lead, zinc, copper, iron, vanadium, gold and silver,<sup>11</sup> and it ranks third in the world<sup>12</sup> among the producers of gem diamonds. In short, Namibia is one of the most richly endowed territories on the African continent.

At the outbreak of the First World War in 1914, South African troops occupied South-West Africa, which had been declared a colony by Germany in 1884.<sup>13</sup> After institution of the League of Nations mandate system in 1920, the Union of South Africa was given the mandate over South-West Africa, and was permitted to administer it as an integral part of South Africa, with the proviso that it administer in the interests of the indigenous population.<sup>14</sup> After the Second World War, the League of Nations was superseded by the United Nations, and the mandate system was superseded by the trusteeship system.<sup>15</sup> South Africa, however, refused to submit a trusteeship agreement for South-West Africa, arguing that the mandate had expired with the demise of the League, and that South Africa's sovereignty over South-West Africa was therefore unrestricted.<sup>16</sup>

In 1950, the International Court of Justice (the "Court") held that although South Africa had no competence to unilaterally modify the international legal status of South-West Africa, it was not legally obliged to place the territory under trusteeship.<sup>17</sup> In 1966, the Court refused to deal with substantive accusations made against South Af-

9. This region is larger than Great Britain, West Germany and Italy combined. See P. DUIGNAN & L. GANN, *SOUTH-WEST AFRICA - NAMIBIA* (1978).

10. *AFRICA SOUTH OF THE SAHARA* 721 (10th ed. 1988) [hereinafter *AFRICA*].

11. *Id.*

12. South Africa and the USSR are the leading producers. See *id.*

13. The historical account given below is extracted in large part from *AFRICA*, *supra* note 10, at 722. For a detailed account of the historical development of the dispute over Namibia, see generally, I. SAGAY, *THE LEGAL ASPECTS OF THE NAMIBIAN DISPUTE* (1975); I. DORE, *THE INTERNATIONAL MANDATE SYSTEM AND NAMIBIA* (1985); G. COCKRAM, *SOUTH-WEST AFRICAN MANDATE* (1976); A. OBOZUWA, *THE NAMIBIAN QUESTION: LEGAL AND POLITICAL ASPECTS* (1973); M. McDUGAL, H. LASSWELL & L. CHEN, *HUMAN RIGHTS AND WORLD PUBLIC ORDER* 536 (1980) [hereinafter *McDUGAL, LASSWELL & CHEN*].

14. See *AFRICA*, *supra* note 10, at 722.

15. *Id.*

16. *Id.*

17. *International Status of South-West Africa*, 1950 I.C.J. 128, discussed in T. ELIAS, *THE INTERNATIONAL COURT OF JUSTICE AND SOME CONTEMPORARY PROBLEMS* 330-33 (1983).

rica's administration of Namibia, on grounds of a lack of *locus standi* on the part of the two African countries (Ethiopia and Liberia) that had invoked the Court's compulsory jurisdiction.<sup>18</sup>

This decision of the Court received immediate negative responses.<sup>19</sup> The United Nations General Assembly resolved to terminate South African trusteeship, and consequently gave responsibility for administration of the territory to a United Nations Council for Namibia.<sup>20</sup> In 1971, the Court finally gave an opinion which was favorable to Namibia.<sup>21</sup> The Court held:

1. [The] continued presence of South Africa in Namibia being illegal, South Africa [was] under obligation to withdraw its administration from Namibia immediately and thus put an end to its occupation of the Territory;
2. [Member States] of the UN [were] under obligation to recognize the illegality of South Africa's presence in Namibia and the invalidity of its [actions] on behalf of or concerning Namibia, and to refrain from any acts and in particular any dealings with the government of South Africa implying recognition of the legality of, or lending support or assistance to, such presence and administration; and
3. It [was] incumbent upon [non-Member] States of the UN to give assistance . . . in the action[s] . . . taken by the UN with regard to Namibia.<sup>22</sup>

SWAPO was founded in 1960<sup>23</sup> with the stated objective of liberating the Namibian people "from colonial oppression and exploitation."<sup>24</sup>

18. South-West Africa, Second Phase, 1966 I.C.J. 6 (Judgment of July 18, 1966).

19. For a discussion and critique of the Court's position, see generally, T. ELIAS, *supra* note 17, at 347, nn. 7-9 and accompanying text.

20. By Resolution 2145 (XXI) of Oct. 27, 1966, the General Assembly placed Namibia under the direct responsibility of the UN in order to enable Namibians exercise their right of self-determination. It also established the UN Council for Namibia (by Resolution 2248 (s-v) of May 19, 1967) with the objective, *inter alia*, of obtaining the withdrawal of the South African regime from Namibia. See *Report of the United Nations Council for Namibia*, U.N. GAOR, Supp. (No. 24), at 1, U.N. Doc. A/38/24 (1984) [hereinafter *Report of the UN Council for Namibia (1984)*].

21. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. 16 [hereinafter *Namibia case*].

22. *Id.* at 58, para. 133.

23. See REVOLUTIONARY AND DISSIDENT MOVEMENTS 243 (H. Degenhardt ed. 1988) [hereinafter *REVOLUTIONARY MOVEMENTS*].

24. TO BE BORN A NATION: THE LIBERATION STRUGGLE FOR NAMIBIA 176 (Dept. of Info. & Publicity SWAPO, 1981). According to SWAPO's constitution, the two major tasks facing the Organization are:

Although SWAPO's outlook was predominantly political at its inception, its leaders subsequently decided that political and military efforts in pursuit of national liberation could be used concurrently, because the two were complementary, and not contradictory.<sup>25</sup> Accordingly, SWAPO launched a guerrilla struggle against South Africa in 1966.<sup>26</sup> Today, the struggle is carried out on two fronts. The "internal wing" of SWAPO is based largely in Namibia, and carries out mainly political propaganda activities.<sup>27</sup> The "external wing," on the other hand, is based outside of Namibia, and comprises, *inter alia*, the armed wing of SWAPO.<sup>28</sup> The external wing of SWAPO launches its raids into Namibia (against the South African army) from neighboring countries such as Angola and, to a lesser extent, Zambia.<sup>29</sup> Thus, for all intents and purposes, SWAPO is engaged in an armed conflict against South Africa. Although the facts and the legal issues implicated in the Namibian conflict are complex,<sup>30</sup> this Article discusses only those pertaining to the *jus ad bellum* and the *jus in bello*.

- 
1. The liberation and winning of independence for the people of Namibia by all possible means and the establishment of a democratic people's government; and
  2. The realization of genuine and total independence of Namibia in the spheres of politics, economy, defence, social and cultural affairs.

See REVOLUTIONARY MOVEMENTS, *supra* note 23, at 257.

25. *Id.* at 176; see also *infra* note 26. SWAPO justified its resort to armed force on grounds of self-defense.

26. It was not until 1971, however, that South Africa sent its army into Namibia. Legum, *The Southern African Crisis - Darkness at the End of the Tunnel*, 14 AFR. CONTEMP. REC. A4 (1981-82).

27. Interview with SWAPO activist, Washington, D.C. (Summer 1988).

28. The military wing of SWAPO was re-organized in 1973 and renamed the People's Liberation Army of Namibia ("PLAN"). SWAPO has maintained in the past that most of its attacks on the South African forces have been conducted from *within* Namibia itself. *But see supra* note 26 and accompanying text.

29. The war is carried out mainly in the Ovamboland region, where nearly 40% of the Namibian population lives. Legum, *supra* note 26, at A4.

30. The issues are further complicated by SWAPO's lack of status as a government in power, and by the existence of the UN Council for Namibia. The Council was set up as the Legal Administering Authority for Namibia until independence. As a major policy-making organ of the UN, the Council largely undertakes activities with a view to mobilizing concerted international action to seek an end to South Africa's occupation of Namibia. The Council has "continuously and resolutely supported the Namibian people in their just struggle under the leadership of SWAPO." See *Report of the UN Council for Namibia (1984)*, *supra* note 20, at 1.

In essence, SWAPO and the UN Council for Namibia have similar goals, although they are resorting to entirely different methods in pursuit of these goals. For purposes of the discussion here, however, this difference in approach is of no direct relevance. Discussion will be limited to the legal issues implicated in the armed struggle being waged by SWAPO.

### III. CLAIMS RELATING TO THE *JUS AD BELLUM*

#### A. *The Illegal Occupation of Namibia by South Africa is an Act of Aggression against the Namibian People*

The dispute over the continued control of Namibia by South Africa has been a regular feature on the agenda of the United Nations since its inception.<sup>31</sup> As far back as 1966, the General Assembly adopted a resolution declaring:

The Mandate conferred upon His Britannic Majesty to be exercised on his behalf by the Government of the Union of South Africa is therefore terminated, that South Africa has no other right to administer the Territory, and that henceforth South West Africa [Namibia] comes under the direct responsibility of the United Nations.<sup>32</sup>

The Security Council also declared, in 1969, that "the continued presence of South Africa in Namibia is illegal and contrary to the principles of the Charter and the previous decisions of the United Nations and is detrimental to the interests of the population of the territory and those of the international community."<sup>33</sup> South Africa has consistently ignored repeated resolutions<sup>34</sup> of the Council, despite United Nations Charter Article 25 which states that members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the Charter.<sup>35</sup>

South Africa's occupation of Namibia has also been described as "somewhat in the nature of usurpation and an occupation *mala fide*."<sup>36</sup> International opinion indicates that South Africa's armed occupation of Namibia is considered tantamount to an act of aggression. A United States representative stated: "The territory [*i.e.*, Namibia] is occupied by force against the will of the international authority entitled to administer it. Such occupation is as much belligerent occupation as the

---

31. The number of resolutions adopted on issues pertaining to decolonization has significantly decreased in the past three decades, due to the attainment of independence by a large number of nations. The question of Namibia, however, has been the subject of more resolutions than all other past decolonization issues combined. See Marin-Bosch, *How Nations Vote in the General Assembly of the United Nations*, 41 INT'L ORG. 705-06 (1987).

32. G.A. Res. 2145, 21 U.N. GAOR, Supp. (No. 16) at 2, U.N. Doc. A/6316 (1966).

33. S.C. Res. 264, 24 U.N. SCOR, U.N. Doc. S/INF/24/Rev.1. (1969).

34. See *e.g.*, S.C. Res. 385, 31 U.N. SCOR, U.N. Doc. S/INF/31 (1976); S.C. Res. 435, 33 U.N. SCOR, U.N. Doc. S/INF/33 (1978); S.C. Res. 532, 38 U.N. SCOR, U.N. Doc. S/INF/38 (1983).

35. U.N. CHARTER art. 25.

36. See Namibia case, *supra* note 21, at 218.



hostile occupation of the territory of another state."<sup>37</sup> The occurrence of an act of aggression<sup>38</sup> gives rise to an authorization for a military response and the right to involvement by third-party states through collective self-defense.<sup>39</sup> There has, therefore, evolved in African State practice the theory that groups like SWAPO are entitled to a right of "self-defense against permanent aggression."<sup>40</sup>

According to this theory, the OAU<sup>41</sup> can resort to collective self-

---

37. This statement was included in the text of a written submission to the International Court of Justice by the United States in the Namibia case. It was on the basis of this United States submission that the Vice-President of the Court concluded that South Africa's presence in Namibia is an act of aggression. See Namibia case, *supra* note 21, at 89.

38. For a discussion on the concept of an act of aggression, see generally J. STONE, *AGGRESSION AND WORLD ORDER* (1958). On the concept of aggression as applied to the southern African region, see Higginbotham, *International Law, the Use of Force in Self-Defense, and the Southern African Conflict*, 25 COLUM. TRANSNAT'L L. 529 (1987).

39. Kahn, *From Nuremberg to the Hague: The United States Position in Nicaragua v. United States and the Development of International Law*, 12 YALE J. INT'L L. 1, 21 (1987). The Vice-President of the International Court of Justice, in the Namibia case, relied extensively on the concept of self-defense in justifying the struggle being waged by SWAPO:

In law, the legitimacy of the people's struggle cannot be in any doubt, for it follows from the right of self-defense, inherent in human nature, which is confirmed by Article 51 of the UN Charter. It is also an accepted principle that self-defense may be collective; thus we see the other peoples of Africa, members of the Organization of African Unity, associated with the Namibians in their fight for freedom . . . the struggle of the Namibian people thus takes its place within the framework of international law, not least because the struggle of peoples in general has been one, if not indeed the primary factor in the formation of the customary rule whereby the right of peoples to self-determination is recognized.

Namibia case, *supra* note 21, at 70 (Vice-President Ammoun).

40. SWAPO has justified its liberation struggle in Namibia on grounds of self-defense in the following manner: "In law, the legitimacy of our struggle for national liberation cannot be in doubt, for it follows from the natural right of self-defense, inherent in human nature, which is confirmed by Article 51 of the United Nations Charter." Statement by SWAPO President Sam Nujoma, Dakar International Conference 1976: Namibia and Human Rights, *reprinted in* 9 HUM. RTS. J. 225 (1976).

The concept of self-defense against a continuing aggression was given prominence when India annexed the Portuguese colony of Goa in 1961. India justified its use of force against Goa on the grounds that Portugal's presence in Goa constituted an aggression that had been going on for 450 years. India was therefore entitled to retaliate in self-defense. See 16 U.N. SCOR (987th mtg.) at para. 46, U.N. Doc. S/PV.987 (1961). The Indian action was neither sanctioned nor condemned by the Security Council. *Id.* at paras. 128-29.

41. The Organization of African Unity (the "OAU") is an Organization formed pursuant to the Charter of the Organization of the African Unity, signed at Addis Adaba, on May 25, 1963. Its members include the Continental African States, Madagascar and other islands surrounding Africa. Its purposes are to promote the unity and solidarity of the African States; to coordinate and intensify their cooperation and efforts to achieve a

defense on behalf of Namibia. This Article argues below that although South Africa is illegally occupying Namibia, the struggle of the Namibian people cannot be equated with self-defense under Article 51 of the United Nations Charter.<sup>42</sup>

*B. The OAU and The Use of Force - The Traditional Inherent Right of Self-Defense in the African Context*

The preamble to the OAU Charter specifies that the African States believe in the inalienable right of all people to control their own destiny.<sup>43</sup> One of the basic aims of the Organization is "to eradicate all forms of colonialism from Africa."<sup>44</sup> The OAU thus demands of its members an "absolute dedication to the total emancipation of the African territories which are still dependent."<sup>45</sup>

In conformity with the OAU Charter, the African States claim that the use of armed force is justified to end colonialism and to implement the principle of self-determination, provided that result is not achievable by peaceful means.<sup>46</sup> In the context of the Namibian conflict, how-

---

better life for the African peoples; to defend their sovereignty, their territorial integrity and independence; to eradicate all forms of colonialism from Africa; and to promote international co-operation, having due regard to the Charter of the UN and the Universal Declaration of Human Rights. See OAU CHARTER arts. 1(1), 2(1)(a)-(e), reprinted in 58 AM. J. INT'L L. 873 (1964).

42. U.N. CHARTER art. 51, para. 7.

43. See OAU CHARTER, *supra* note 41, preamble.

44. See *id.* art. 2(1)(d).

45. *Id.* art. 3(6). For a justification for the inclusion of these anti-colonialist sentiments in the OAU Charter, see generally R. AKINDELE, *THE ORGANIZATION AND PROMOTION OF WORLD PEACE: A STUDY OF UNIVERSAL-REGIONAL RELATIONSHIPS* 121 (1976).

46. The argument was put before the Legal Committee of the General Assembly as follows:

[T]he [UN] Charter itself contemplated the lawful use of force in certain circumstances. One of these circumstances was individual or collective action in the exercise of the right of self-defense. The Addis Ababa Conference had simply exercised that right by providing for collective action to assist national liberation.

18 U.N. GAOR C.6 (805th mtg.) at para. 13, U.N. Doc. A/C.6/SR. 805 (1963). A more forceful variant of this argument was also put before the Committee on the Question of Defining Aggression. See Statement by Representative of Guinea, *Report of the Special Committee on the Question of Defining Aggression*, U.N. Doc. AC-91/SR.15 at 7 (1965). The Representative's argument is as follows:

The colonial system was the most flagrant act of aggression which could be perpetrated; thus Africa, throughout much of its territory, was . . . suffering acts of undoubted aggression, for which the colonialist Powers were responsible. All other forms of colonization - neo-colonialism, imperialism or economic colonialism - fell within that category of direct aggression.

*Id.* For a critique of this position, see generally Dugard, *The Organization of African*

ever, this argument is not tenable. Colonialism and racist domination, *per se*, do not involve an "armed attack" on subjected peoples.<sup>47</sup> Nor does the related argument of colonialism as permanent aggression justify a right of self-defense against racial and colonial domination. The claim that the OAU can collectively resort to self-defense against South Africa immediately brings into play the requirements of Article 51 of the United Nations Charter.<sup>48</sup> But the OAU Charter, unlike other regional treaties such as that of the OAS,<sup>49</sup> does not expressly provide for collective self-defense. There is no provision in the OAU Charter providing that an armed attack against any member State shall be considered as an attack on all member States.<sup>50</sup> Furthermore, Article 54 of the United Nations Charter provides that "[t]he Security Council shall at all times be kept fully informed of activities undertaken *or in contemplation* under regional arrangements or by regional agencies for the maintenance of international peace and security."<sup>51</sup> In conformity with this provision, the OAU would have to give the Security Council *prior* notice of its intention to forcefully intervene in Namibia.<sup>52</sup>

---

*Unity and Colonialism: An Inquiry into the Plea of Self-Defense as a Justification for the Use of Force in the Eradication of Colonialism*, 16 INT'L & COMP. L. Q. 157 (1967).

47. Kwakwa, *South Africa's May, 1986 Military Incursions into Neighboring African States*, 12 YALE J. INT'L L. 421, 437 (1987).

48. U.N. CHARTER art. 51, para. 7. It may be argued that Article 51 only gives the right of self-defense until the Security Council has taken measures necessary to maintain international peace and security, and that measures taken by the OAU, in any case, shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such measures as it deems necessary in order to maintain or restore international peace and security. In effect, the argument would be that the Security Council is currently seized of jurisdiction on the Namibian conflict, thus ousting the OAU or any other country's competence.

49. OAS CHARTER art. 24, 119 U.N.T.S. 3.

50. In 1968, however, the OAU Council of Ministers Resolution CM/154 (XI) declared that "any aggression on any OAU Member State by the colonialist and fascist regimes of Portugal, South Africa and Rhodesia is regarded as an aggression on all Members of the OAU." For a further discussion on this issue, see Andemicael, *The OAU and the UN - Relation in the Peace and Security Field*, in REGIONALISM AND THE UNITED NATIONS 225 (B. Andemicael ed. 1979). Although Namibia has been recognized by the OAU, it is technically not a "Member State" of the OAU.

51. U.N. CHARTER art. 54 (emphasis added).

52. There is precedent to suggest that *prior* notice is not required under Article 54 of the UN Charter. In 1965, an American, and later an Inter-American peace force, was sent into the Dominican Republic to restore and maintain order. For an informative background on the political situation in the Dominican Republic during the months preceding United States intervention, see R. BARNETT, *INTERVENTION AND REVOLUTION* 153 (1968). When the matter came before the Security Council, the United States argued that the landing of American troops was consistent with Article 52 of the UN Charter whereby a regional agency is permitted to deal with its own matters relating to the maintenance of international peace and security. Thus, American and Inter-American forces

South Africa's occupation of Namibia does not amount to an armed attack giving the people of Namibia the right of self-defense. *Semble*, neither Article 51 nor Chapter VIII of the United Nations Charter readily provide the OAU with a legal justification for forcefully intervening in Namibia against South Africa.<sup>53</sup>

*C. South Africa's Rule by Apartheid In Namibia Constitutes a Violation of International Norms*

South Africa's imposition of apartheid in Namibia began in 1964.<sup>54</sup> Proclamation AG8 was introduced in April 1980, with a view to dividing Namibia into eleven mutually exclusive groups on the basis of racial, ethnic and tribal origins.<sup>55</sup> The South African government openly admits and justifies the institutionalization of apartheid in Namibia. In its counter-memorial in the *South-West Africa* case, for example, it stated:

Having regard to the specific problem of the future of South West Africa and its peoples . . . [r]espondent can by way of solution see no alternative to an approach involving similar objectives and principles to those of the South African . . . policy of separate development.<sup>56</sup>

The policy of apartheid has, therefore, been institutionalized in Namibia.<sup>57</sup>

were not engaging in an enforcement action under Article 51 which would require approval by the Security Council. See 21 U.N. GAOR. Supp. (No. 2) at 3, U.N. Doc. A/6302 (1965); see also Nanda, *The United States Action in the 1965 Dominican Crisis: Impact on World Order*, 44 DEN. L. J. 225 (1967).

During the Cuban Crisis, the United States also took the position that prior authorization was not required under Article 53 of the UN Charter. See Meeker, *Defensive Quarantine and the Law*, 57 AM. J. INT. L. 515, 520 (1963) ("[I]t should not be assumed that 'authorization of the Security Council' automatically and necessarily means prior authorization . . . the Council could appropriately give its authorization after the fact"); cf. Wright, *The Cuban Quarantine*, 57 AM. J. INT'L L. 546, 559 (1963) (arguing that prior authorization was a prerequisite for regional action, and that it was only under Article 51 that prior authorization was not required).

53. It is, however, suggested that a more plausible argument for OAU intervention in Namibia can be found in the concept of humanitarian intervention. See *infra* note 224.

54. See *Report of the United Nations Council for Namibia*, 40 U.N. GAOR Supp. (No. 24) at 66, U.N. Doc. A/40/24 (1985) [hereinafter *Report of the UN Council for Namibia* (1985)].

55. *Id.*

56. 1966 I.C.J. Pleadings 472.

57. Further evidence of this institutionalization lies in the fact that four successive South African Ministers from 1948 to 1970 defined their concept of the apartheid policy as applicable in both South Africa and Namibia. See *Namibia case*, *supra* note 21, at 81-

South Africa's policy of apartheid has been the topic of prolonged debates and more General Assembly resolutions than any other single item ever to appear on the Assembly's agenda.<sup>58</sup> There has been a virtual deluge of United Nations resolutions and decisions giving authoritative interpretations of the United Nations Charter, the Universal Declaration of Human Rights and other related human rights prescriptions, all characterizing apartheid as unlawful under international law.<sup>59</sup> It has been referred to as "a comprehensive and systematic pattern of racial discrimination . . . compris[ing] a complex set of practices of domination and subjection, intensely hierarchized and sustained by the whole apparatus of the state, which affects the distribution of all values."<sup>60</sup> Apartheid has variously been described as "a threat to international peace and security,"<sup>61</sup> "a crime against humanity,"<sup>62</sup> a violation of the United Nations Charter,<sup>63</sup> and "a crime against the conscience and dignity of mankind."<sup>64</sup> Apartheid arguably also falls within the definition of genocide<sup>65</sup> incorporated in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide.<sup>66</sup> Above all,

---

82 (sep. op. Judge Ammoun).

58. See Marin-Bosch, *supra* note 31, at 706-07.

59. See McDUGAL, LASSWELL & CHEN, *supra* note 13, at 532-33; see also *Report of the Special Committee Against Apartheid*, 39 GAOR Supp. (No. 22), U.N. Doc. A/39/22 (1984) [hereinafter *Report of the Special Committee Against Apartheid*].

60. McDUGAL, LASSWELL & CHEN, *supra* note 13, at 521-23.

61. See, e.g., *The Policies of Apartheid of the Government of South Africa*, G.A. Res. 3151, 28 U.N. GAOR Supp. (No. 30) at 33, U.N. Doc. A/9030 (1973); G.A. Res. 2923, 27 U.N. GAOR Supp. (No. 30) at 25, U.N. Doc. A/8730 (1972); G.A. Res. 39/72, 39 U.N. GAOR Supp. (No. 51) at 40, U.N. Doc. A/8730 (1985). The OAU has similarly held that "[the] racist terrorist South Africa's . . . policy of apartheid constitutes a serious threat to international peace and security." See Nairobi Resolution of the 37th Ordinary Session of the OAU Council of Ministers, O.A.U. CM/Res. 854 (XXXVII), reprinted in 14 AFR. CONTEMP. REC. C5 (1981-82).

62. See, e.g., *The Policies of Apartheid of the Government of the Republic of South Africa*, G.A. Res. 2202, 21 U.N. GAOR Supp. (No. 16) at 20, U.N. Doc. A/6316 (1966); G.A. Res. 3324, 29 U.N. GAOR Supp. (No. 31) at 38, U.N. Doc. A/9631 (1974).

63. Namibia case, *supra* note 21, at 57.

64. See *International Convention on the Suppression and Punishment of the Crime of Apartheid*, G.A. Res. 3068, 28 U.N. GAOR Supp. (No. 30) at 75, U.N. Doc. A/9030 (1973).

65. On South Africa's campaign of terror in Namibia through the constant harassment, detention, torture and cold-blooded murder of innocent civilians and other inhuman practices, see *Report of the United Nations Council for Namibia (1985)*, *supra* note 54, at 3, 45; AMNESTY INTERNATIONAL ANNUAL REPORTS 62 (1982).

66. Convention on the Prevention of the Crime of Genocide, Dec. 9, 1948, T.I.A.S. No. 1021, 78 U.N.T.S. 277. The question of whether or not South Africa is a signatory to the Convention is moot, because the relevant provisions of the Convention have become customary international law. The International Court of Justice indicated in an advisory opinion that the prohibition on genocide is regarded as *jus cogens*. See *Reservations to*

apartheid contradicts the fundamental premise of the United Nations Charter that governments should treat all persons as equals before the law.<sup>67</sup> The contention that the practice of racial discrimination is a violation of a norm of international law can hardly be denied.<sup>68</sup>

#### *D. South Africa is Guilty of Aggression Against Neighboring African States*

International law prohibits states from allowing the use of their territory as bases from which illegal acts are carried out against other states. This principle was expressed in Article 4 of the International Law Commission's 1949 Draft Declaration of the Rights and Duties of States,<sup>69</sup> and in wider terms in the Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in accordance with the Charter of the United Nations.<sup>70</sup> This dictate would seem to suggest, *prima facie*, that African states such as Angola which allow SWAPO guerrillas to use their territory for incursions into Namibia are engaged in impermissible interventionist activity. The rules on non-intervention have, however, through the activities of the United Nations and the general practice of states, undergone

---

the Convention on the Prevention and Punishment of the Crime of Genocide, 1951 I.C.J. 15, 23-24; see also Jimenez de Arechaga, *International Law in the Past Third of a Century*, 159 HAGUE RECUEIL 1, 64-67 (1978). For a categorization of the various laws and activities of the South African government that establish its acts as genocide, see *Report of The Special Committee Against Apartheid*, *supra* note 59, at 54-56; see also Kiapi, *The Status of Apartheid in International Law*, 17 IND. J. INT'L L. 57-58 (1977).

67. Higginbotham, *supra* note 38, at 584.

68. The norm prohibiting the practice of racial discrimination has in fact been characterized as a rule of *jus cogens*. See I. SAGAY, *supra* note 13, at 144; see also, Namibia case, *supra* note 21, at 57, para. 131 ("To establish instead, and to enforce, distinctions, exclusions, restrictions and limitations exclusively based on grounds of . . . national or ethnic origin which constitute a denial of fundamental human rights is a flagrant violation of the purposes and principles of the Charter"); South-West Africa case, 1966 I.C.J. 4, 293 (dissenting op. of Judge Tanaka, arguing that the "norm of non-discrimination . . . on the basis of race has become a rule of customary international law.").

The question of human rights violations has been removed from the *domain reserve* of sovereign states, and the welfare of the individual is now treated by the international community as a matter of international concern. See Weston, *Human Rights*, 6 HUM. RTS. Q. 257 (1984). Thus, the question of human rights is not a domestic matter that falls outside the jurisdictional competence of the international community.

69. Draft Declaration on the Rights and Duties of States, U.N. Doc. A/CN.4, reprinted in part in [1949] 1 Y.B. INT'L L. COMM'N 93-97.

70. G.A. Res. 2625, 25 U.N. GAOR Supp (No. 28) at 121, U.N. Doc. A/8028 (1970) [hereinafter *Declaration on Friendly Relations*].

substantial modification.<sup>71</sup> The Declaration on Friendly Relations<sup>72</sup> and the Definition of Aggression Resolution<sup>73</sup> suggest that supporting armed liberation movements does not constitute aggression.<sup>74</sup> The practice of States is pointing towards an emerging consensus that the use of armed force in support of liberation movements is legal.<sup>75</sup>

From the above, it would appear that it is legitimate for Angola and other countries to support the SWAPO fighters. Assuming, without necessarily deciding, that such support is an act of intervention against South Africa, such intervention would not amount to an armed attack granting South Africa the right of self-defense under Article 51.<sup>76</sup> The International Court of Justice addressed the issue of armed attack in the *Nicaragua* case.<sup>77</sup> It stressed that "the Court does not believe that the concept of 'armed attack' includes not only acts by armed bands where such acts occur on a significant scale but also assistance to rebels in the form of the provision of weapons or logistical or other support."<sup>78</sup> The Court went on to hold: "While the concept of an armed attack includes the despatch by one State of armed bands into the territory of another State, the supply of arms and other support to such bands cannot be equated with armed attack."<sup>79</sup>

---

71. See Bowett, *Self-Determination and Political Rights in the Developing Countries*, 60 PROC. AM. SOC'Y INT'L L. 129, 132 (1966).

72. See *supra* note 70.

73. G.A. Res. 3314, 29 U.N. GAOR Supp. (No. 31) at 142, U.N. Doc. A/9631 (1974). Article 7 of this resolution provides:

Nothing in this Definition, and in particular article 3, could in any way prejudice the right . . . of peoples[,] . . . 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, in accordance with the principles of the Charter and in conformity with the above-mentioned Declaration.

*Id.*

74. For a more extensive discussion, see Kwakwa, *supra* note 47, at 437-38.

75. Even the Western States' traditional hostility to the idea of legitimizing the provision of support to liberation movements has crumbled. President Reagan, for example, has openly declared that "[s]upport for freedom fighters is . . . totally consistent with the OAS and UN Charters." 31 KEESING'S CONTEMP. ARCHIVES 33, 454 (1985).

76. U.N. CHARTER art. 51.

77. *Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.)*, Merits, 1986 I.C.J. 1 [hereinafter *Nicaragua Merits case*].

78. *Id.* at 103, para. 195.

79. *Id.* at 126, para. 247; cf. dissenting opinion of Judge Schwebel, *id.* at 331-48, paras. 154-173 (arguing that support for insurgents violates Article 2(4) and, accordingly, permits a violent response in self-defense). The International Court of Justice's decision was not accepted by the United States. For general commentaries on the *Nicaragua* case and the implications of the United States' decision to withdraw from the Court, see generally Maier, *Appraisals of the ICJ's Decision: Nicaragua v. United States (Merits)*, 81

The Court's holding is consistent with recent State practice. The Contra rebels are known to have bases in Honduras, from which they launch raids into Nicaragua against the Sandista government.<sup>80</sup> When the Sandinista forces crossed into Honduras in pursuit of the Contras, however, it was widely perceived by the international community as an armed attack against the territorial integrity of Honduras.<sup>81</sup> In effect, it is widely felt that the presence of Contra bases in Honduras does not amount to an armed attack on Nicaragua.<sup>82</sup> Similarly, the presence of SWAPO guerrillas in Angola or Zambia should not be equated with an armed attack by those countries against the South African government.<sup>83</sup>

*E. Swapo is Engaged in a Legitimate Struggle for Self-Determination*

As a matter of state practice, the international community has recently manifested a high degree of tolerance for the activities of recognized national liberation movements, particularly in their fight for freedom and self-determination.<sup>84</sup> The Declaration on Friendly Relations,<sup>85</sup> an "ambitious codification of contemporary international law [that] has been widely accepted,"<sup>86</sup> states:

By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter.<sup>87</sup>

---

AM. J. INT'L L. 77 (1987); Kahn, *supra* note 39.

80. Anderson, *The Contras Under The Gun*, NEWSWEEK, Mar. 28, 1988, at 36.

81. *Id.*

82. *Id.*; see also *Nicaragua: Whose Trump?*, ECONOMIST, Mar. 26, 1988, at 34.

83. Utilization of Namibia as a springboard for armed attacks and destabilization of neighboring countries has been repeatedly condemned by the Security Council. See, e.g., S.C. Res. 577, 40 SCOR at 19, U.N. Doc. S/INF./40 (1985); see also Kahn, *supra* note 39, at 21 ("To find an armed attack is to find authorization for a military response . . . Packed into a determination that an armed attack has occurred are many of the most important functions of an international legal order. It is not a determination that should be made lightly.").

84. See generally Kwakwa, *supra* note 47.

85. See *supra* note 70.

86. Reisman, *The Resistance in Afghanistan is Engaged in a War of National Liberation*, 81 AM. J. INT'L L. 906, 908 (1987).

87. *Declaration on Friendly Relations*, *supra* note 70, at 123.



The Declaration recognizes the legitimacy of the actions taken by oppressed peoples in the pursuit of self-determination and calls upon member states to contribute moral and material assistance to such movements.<sup>88</sup> It provides that

[i]n their actions against, and resistance to . . . forcible action in pursuit of the exercise of their right to self-determination . . . [.] peoples [under colonial and racist regimes or other alien forms of domination] are entitled to seek and to receive support in accordance with the purposes and principles of the Charter.<sup>89</sup>

Indeed, Judge Ammoun demonstrated in the *Namibia* case that the international community as a whole deems it legitimate to defend human rights by force of arms.<sup>90</sup> He went so far as to state that resort to force in pursuit of self-determination has become a custom within the ambit of Article 38 (1)(b) of the International Court of Justice statute.<sup>91</sup> SWAPO is, in effect, the military arm of a people engaged in a war of national liberation,<sup>92</sup> and the following "coordinate international rights and obligations"<sup>93</sup> exist in the Namibian conflict:

1. SWAPO is entitled to wage a war of liberation against South Africa's occupation<sup>94</sup> army in Namibia.
2. SWAPO is entitled to receive third-party assistance in its war with South Africa.
3. South Africa is under an obligation not to suppress SWAPO's fight for self-determination.
4. Third[-party] states do not incur any international responsibility in granting moral and material assistance to

---

88. See *id.* at 124.

89. *Id.* The effect of this declaration is that "the forcible denial of self-determination constitutes a violation of the Charter which justifies circumscribing the neutrality of the other member States, without engaging their international responsibility vis-a-vis that government." Abi-Saab, *Wars of National Liberation in the Geneva Conventions and Protocols*, 165 (IV) RECUEIL DES COURS 353, 373 (1979). Pursuant to these resolutions and declarations, the OAU has called upon member-states to contribute material assistance to SWAPO. For a critique of the OAU position, see Dugard, *supra* note 46.

90. See *Namibia* case, *supra* note 21, at 16.

91. *Id.* at 112 ("If there is any "general practice" which might be held, beyond dispute, to constitute law within the meaning of Article 38, paragraph 1(b) of the Statute of the Court, it must surely be that which is made up of the conscious action of the peoples themselves, engaged in a determined struggle.").

92. On recognition of SWAPO as the "true and legitimate representative" of the Namibian people, see *infra* note 133.

93. Reisman, *supra* note 86, at 909.

94. On the concept of occupation, see notes 121-25 and accompanying text.

SWAPO in the Namibian conflict.

5. Third[-party] states are under obligation not to assist South Africa in its suppression of SWAPO's fight for self-determination.<sup>95</sup>

The Namibian conflict presents a unique but clear case of the right to use force. The resort to force in pursuit of self-determination in Namibia does not conflict with any other traditional norm of international law. SWAPO is not seeking to secede from Namibia, it is fighting to uphold Namibia's territorial integrity and political independence. SWAPO is not seeking the overthrow of a legitimately installed government, it is seeking to remove a government that has been declared by the international community, without exception, to be in illegal occupation of Namibia. SWAPO's struggle in Namibia is consistent with the United Nations and OAU Charters, the "Lusaka Manifesto,"<sup>96</sup> and general international law norms.

#### IV. CLAIMS RELATING TO THE *JUS IN BELLO*

The law of war distinguishes between international armed conflicts,<sup>97</sup> on the one hand, and non-international armed conflicts,<sup>98</sup> on

---

95. Reisman, *supra* note 86, at 909. Apart from being one of the holdings in the Namibia case, it has also been established in state practice that a state may commit a wrongful act by executing a political act that promotes the wrongful act of another state. This concept of "complicity liability" arises where a state facilitates the commission by another state of an internationally wrongful act. See *Report of the International Law Commission to the General Assembly*, 33 U.N. GAOR Supp. (No. 10) at 243, U.N. Doc. A/33.10 (1978). For an excellent discussion of complicity liability in related areas of state practice, see generally Quigley, *Complicity in International Law: A New Direction in the Law of State Responsibility*, 57 BRIT. Y. B. INT'L L. 77 (1986).

96. The Lusaka Manifesto on Southern Africa was drawn at the Fifth Summit Conference of East and Central African States held in Lusaka in 1969. It has been endorsed by the OAU and the UN. See G.A. Res. 2505, 24 U.N. GAOR Supp. (No. 30) at 4, U.N. Doc. A/7630 (1969). Paragraph 20 of the Manifesto indicates that humanitarian intervention is "a responsibility to take action in defense of humanity." For the text of the Manifesto, see 24 U.N. GAOR Annex 2 (Agenda Item 106) at 3, U.N. Doc. A/7754 (1969).

97. Under Common Article 2 of the Geneva Conventions of 1949, *supra* note 6, international armed conflicts or any other armed conflict that may arise between two or more of the contracting parties, are all cases of declared war even if the state of war is not recognized by one of them. Likewise, partial or total occupation of the territory of a contracting party is considered a case of declared war, even if such occupation meets no armed resistance. *Id.* Article 1(4) of Protocol I extends this definition of international armed conflicts to include wars traditionally referred to as wars of liberation. See Protocol I, *supra* note 7; see also *infra* text accompanying notes 146-77.

98. Non-international armed conflicts are:

[A]ll armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions of 12 August, 1949, and relating to the Protec-

the other.<sup>99</sup> This distinction is significant. These two types of conflict are governed by significantly different legal regimes.<sup>100</sup> An objective characterization of the conflict in Namibia is therefore necessary in order to determine the applicable norms governing the conflict.<sup>101</sup>

---

tion of Victims of International Armed Conflicts (Protocol I) and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.

Protocol Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) art. 1(1), *opened for signature* Dec. 12, 1977, 16 I.L.M. 1442 (1977) [hereinafter Protocol II]. Excluded from the category of non-international armed conflicts, are situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts. *Id.* art. 1(2). Protocol II "develops and supplements" Common Article 3 of the Geneva Conventions of 1949. It will be argued that although these legal regimes were meant to deal with non-international armed conflicts, they also provide minimal guarantees in international conflicts such as the Namibian situation.

99. *Cf.* K. SUTER, *AN INTERNATIONAL LAW OF GUERRILLA WARFARE* 149 (1984) (arguing that the distinction between international and non-international conflicts is no longer feasible).

100. Common Article 3 of the Geneva Conventions of 1949 purports to govern "armed conflicts not of an international character," without defining what these conflicts are. It simply establishes a minimum set of provisions that apply in a non-international armed conflict occurring in the territory of one of the contracting Parties. *See* Geneva Conventions of 1949, *supra* note 6, common art. 3. Common Article 3 has been referred to as "a Convention in miniature." *See* THE GENEVA CONVENTIONS OF 12 AUGUST 1949, COMMENTARY IV - GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 34 (J.S. Pictet ed. 1960) [hereinafter PICTET COMMENTARY IV]. Common Article 3 provides certain important minimal guarantees — it "at least ensures the application of the rules of humanity which are recognized as essential by civilized nations," "provides a legal basis for charitable interventions by the ICRC," and "lays down certain mandatory rules." *Id.* It is, however, far from the functional equivalent of the legal regime applied by Common Article 2. On the relative inadequacy of Common Article 3, see generally, Reisman & Silk, *Which Law Applies to the Afghan Conflict?*, 82 AM. J. INT'L L. 454-66 (1988); Farer, *Humanitarian Law and Armed Conflicts: Toward the Definition of International Armed Conflict*, 71 COLUM. L. REV. 37 (1971).

101. In the seminal *Nicaragua Merits* case, *supra* note 78, however, the court stated:

Because the minimum rules applicable to international and to non-international conflicts are identical, there is no need to address the question whether [the actions of the United States in and against Nicaragua] must be looked at in the context of the rules which operate for the one or the other category of conflict.

*Id.* at para. 219.

### A. *The Conflict In Namibia is an International Armed Conflict*

In the absence of ratification by the United States<sup>102</sup> and other major military powers, the status of Protocol I still remains uncertain. As of April 1989, only eighty-three states were parties to Protocol I.<sup>103</sup>

The Geneva Conventions, in contrast, are widely and universally accepted. There are 165 state parties to the Conventions, including South Africa.<sup>104</sup> The universal acceptance of the Conventions as treaties is manifested by the fact that they are binding on more states than the United Nations Charter.<sup>105</sup> The International Law Commission has observed that "some of the [rules in the Conventions] are, in the opinion of the Commission, rules which impose obligations of *jus cogens*."<sup>106</sup> Thus, even though South Africa has not signed or ratified the Protocols, it is nevertheless bound by the Conventions<sup>107</sup> and those provisions of Protocol I that are customary international law.

#### 1. Common Article 2 of the Geneva Conventions

Common Article 2 of the Geneva Conventions provides guidelines for determining when a conflict is international.<sup>108</sup> A discussion of Common Article 2 is therefore important in assessing the extent to which the Namibian conflict can be classified as an international armed conflict. Common Article 2 to the Geneva Conventions provides:

In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of

102. See Letter of Transmittal from President Ronald Reagan on Protocol II, S. Doc. No. 2, 100th Cong., 1st Sess. 111 (1987), reprinted in 81 AM. J. INT'L L. 910 (1987) [hereinafter Protocol II Transmittal Letter]. For a discussion on the position of the Reagan Administration, see Sofaer, *Terrorism and the Law*, 64 FOREIGN AFF. 901, 912 (1986). On the United States decision not to ratify Protocol I, see Gasser, *An Appeal for Ratification by the United States*, 81 AM. J. INT'L L. 912 (1987).

103. 270 INT'L REV. OF THE RED CROSS, May-June 1989, at 255.

104. 8 I.C.R.C. DISSEMINATION, Dec. 1987, at 9.

105. See Meron, *The Geneva Conventions as Customary Law*, 81 AM. J. INT'L L. 348 (1987).

106. *Report of the International Law Commission on the Work of its Thirty-Second Session*, 35 U.N. GAOR Supp (No. 10) at 98, U.N. Doc. A/35/10 (1980). But see dissenting opinion of Sir Robert Jennings in the Nicaragua Merits case, *supra* note 77, at 537 (expressing serious doubt whether the Geneva Conventions could be regarded as embodying customary law).

107. The Conventions are binding on South Africa *qua* treaty law as well as customary law, both of which are listed in Article 38(1) of the International Court of Justices' statute as sources of law. For an argument that South Africa is not bound by the Conventions because it has not yet incorporated them into her domestic law, see *infra* note 200 and accompanying text.

108. See Geneva Conventions of 1949, *supra* note 6, common art. 2.

declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them . . . The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance . . . Although one of the Parties in conflict may not be a Party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.<sup>109</sup>

To establish the international nature of the Namibian conflict, it is sufficient to show that the conflict falls into any of the following categories: 1) a declared war or any other armed conflict between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them; 2) a case of partial or total occupation of the territory of a High Contracting Party; and 3) a situation in which a non-contracting Power accepts and applies the provisions of the Conventions.

a. "A Declared War or any other Armed Conflict . . ."

The use of the term "war" is an anachronism. Several wars are being fought today with high levels of intensity and destruction of lives.<sup>110</sup> Yet they are not labeled wars for the simple reason that there has been no formal declaration of war. Since the First World War, states have been unwilling to characterize conflicts as war,<sup>111</sup> because doing so would immediately trigger the laws of war. Some of the misconceptions about the legal consequences of a declaration of war were manifest during the Falklands crisis of 1982 when the British Prime Minister incorrectly stated in the British Parliament that the captured Argentinean forces were not being treated as prisoners of war *because there had been no declaration of war*.<sup>112</sup>

When Lieutenant Robert Goodman of the United States Navy was shot down and taken into custody by the Syrian Army in December 1983, President Reagan also stated erroneously: "I don't know how you

---

109. *Id.*

110. Immediate examples are the ongoing conflicts in Afghanistan, the Middle East, and Southern Africa.

111. For an account of the legal consequences flowing from a declaration of war, see I. BROWNLIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* 25 (1963).

112. 22 PARL. DEB., H.C. (5th ser.) 609 (1982), discussed in P. ROWE, *DEFENCE: THE LEGAL IMPLICATIONS* 141 (1987).

have a prisoner of war when there is no declared war between nations. I don't think that makes you eligible for the Geneva Accords [sic]."<sup>113</sup>

In light of the problems attached to the concept of war, greater emphasis must be placed on the phrase "or any other armed conflict." This implies that any use of arms between two or more Parties brings into play the full force of Common Article 2, irrespective of the existence of a formal declaration of war.<sup>114</sup>

There has not been a formal declaration of war in Namibia.<sup>115</sup> The existence of an ongoing armed conflict in the territory, however, cannot be denied. Paragraph 1 of Common Article 2 talks about an armed conflict "between two or more of the High Contracting Parties."<sup>116</sup> Thus, at least two of the Parties in conflict in Namibia must be Parties to the Geneva Conventions. South Africa is a Party to the Conventions.<sup>117</sup> SWAPO<sup>118</sup> was not an entity at the time the Conventions were drafted. Assuming, *arguendo*, that it were, the question would be whether the terms "Powers" or "Parties" include non-state entities such as SWAPO. The *travaux préparatoires* to the Conventions suggest that the terms were meant to refer exclusively to states.<sup>119</sup> The

113. N.Y. Times, Dec. 21, 1983, at A22, col. 6.

114. See Schindler, *The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols*, 163 (II) RECUEIL DES COURS 121, 131 (1979); see also THE GENEVA CONVENTIONS OF 12 AUGUST 1949, COMMENTARY III - GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 22-23 (J.S. Pictet ed. 1960) [hereinafter PICTET COMMENTARY III] ("There is no need for a formal declaration of war, or for the recognition of the existence of a state of war, as preliminaries to the application of the Convention. The occurrence of *de facto* hostilities is sufficient.").

115. On July 18, 1966, the day the International Court of Justice refused to issue a pronouncement on the legality of South Africa's mandate over Namibia, SWAPO issued a statement from its headquarters in Tanzania, declaring that the people of Namibia "[had] no alternative but to rise in arms and bring about [their] liberation." AFRICA, Oct. 1986, at 28. This proclamation may hardly be seen as a formal declaration of war. In any case, South Africa has never recognized the belligerency status of SWAPO.

116. See Geneva Conventions of 1949, *supra* note 6, common art. 2, para 1.

117. See INT'L RED CROSS HANDBOOK 403 (1983).

118. On the use of the term "SWAPO" interchangeably with "Namibia," see *infra* notes 132-34 and accompanying text.

119. The records of the 1974-77 Diplomatic Conference also support this position. See, e.g., Statement by Mr. Draper (U.K.), VIII OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE ON THE REAFFIRMATION AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS [hereinafter OFF. RECS.], CDDH/I/SR.4, at 29 (Federal Political Department Berne, 1978) ("the Geneva Conventions and the Draft Protocols . . . had been devised for entities capable of applying them: in other words, States"); VIII OFF. RECS., *supra*, CDDH/I/SR.3 (statement of Mr. Cassese (Italy)), at 22 ("In his delegation's opinion, the word 'Powers' used in the third paragraph of Art. 2 of the Conventions could only mean states and not authorities other than States.").

This position has also been reiterated in scholarly texts. See, e.g., Takemoto, *The 1977 Additional Protocols and the Law of Treaties*, in STUDIES AND ESSAYS ON INTERNA-

first paragraph of Article 2, it would seem, is therefore not applicable in the Namibian conflict.<sup>120</sup>

#### b. Partial or Total Occupation of the Territory of a High Contracting Party

South Africa has refused to recognize international prescriptions calling on it to withdraw from Namibian territory. Under the laws of armed conflict, "whenever a State intervenes with its armed forces in

---

TIONAL HUMANITARIAN LAW AND RED CROSS PRINCIPLES IN HONOR OF JEAN PICTET 249, 258 (C. Swinarski ed. 1984) [hereinafter PICTET COLLECTION]; Cassesse, *Wars in National Liberation and Humanitarian Law* in PICTET COLLECTION, *supra*, at 316 (arguing that the whole context and the wording of the various provisions of the Conventions make it clear that when they mention "Powers" they intend it to apply to states only).

120. The contemporaneous understanding of the drafters and signers, however, is not necessarily dispositive. Such a restricted reading of the Conventions is not warranted and serves no useful purpose. For example, a non-state Party such as the UN certainly must be seen as capable of becoming a "Power" in a conflict. This role is in fact dictated by the UN Charter. Moreover, Article 31(1) of the Vienna Convention on the Law of Treaties stipulates that a treaty shall be interpreted in good faith and in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. The object and purpose of the Conventions is to ensure adequate protection for combatants as well as non-combatants, and to increase the categories of persons who are entitled to the status of POW in the event of capture. *See* J. PICTET, *DEVELOPMENT AND PRINCIPLES OF INTERNATIONAL HUMANITARIAN LAW* 38 (1985). Interpreting the word "Power" to include non-state entities like SWAPO is therefore consistent with the object and purpose of the Conventions. *See* Dugard, *SWAPO: The Jus ad Bellum and the Jus in Bello*, 93 S. AFR. L. J. 144, 153 (1976) ("Liberation movements are not excluded from the Geneva Conventions, as the term 'Power,' which appears in those Conventions, is not necessarily limited to States.").

It is also instructive to note that "insurgents in a civil war may become a 'Power' or a 'Party' if the established government recognizes them as a belligerent party." Schindler, *supra* note 95, at 130; *see*, Mallison & Mallison, *The Juridical Status of Irregular Combatants under the International Humanitarian Law of Armed Conflict*, 9 CASE W. RES. J. INT'L L. 39, 55 (1977) (arguing that the interpretation of "a Party to the conflict" which is consistent with the Brussels and Hague criteria is that which makes a broad factual reference under which the organized resistance movement, like an irregular militia or volunteer corps, may be party to the conflict). Recognition of SWAPO as a "Power" in conflict does not automatically establish that SWAPO is also a Party to the Geneva Conventions. It may plausibly be argued, however, that if SWAPO were to deposit a declaration under Article 96(3) of Protocol I, this action would establish a strong presumption that SWAPO had at the same time become a Party to the Geneva Conventions in relation to its conflict with South Africa. This presumption arises because a State may become a Party to the Additional Protocols of 1977 only if it is, or at the same time becomes a Party to the Geneva Conventions of 1949. *See* 8 I.C.R.C. DISSEMINATION, Dec. 1987, at 9.

*Ex hypothesi*, this rule should apply, *mutatis mutandis*, to non-state entities. On the other hand, the customary law nature of the Conventions suggests that the issue of whether SWAPO is a Party thereto is a moot point.

another State, be it to alter the regime of that State or to exercise other acts of sovereign power, this is held to be an occupation within the meaning of Article 2(2)."<sup>121</sup> South Africa's presence in Namibia is an alien foreign presence.<sup>122</sup> For all intents and purposes, the situation can be classified as one of "total or partial occupation."<sup>123</sup> This interpretation is consistent with evidence of a more general tendency to think of the laws of war as a set of minimum rules to be observed in the widest possible range of situations. According to Roberts, "one might hazard as a fair rule of thumb that every time the armed forces of a country are in control of foreign territory, and find themselves face to face with the inhabitants, some or all of the provisions of the law on occupations are applicable,"<sup>124</sup> and "at the heart of almost all treaty provisions and legal writings about occupations is the image of the armed forces of a State exercising some kind of coercive control or authority over inhabited territory outside the accepted international frontiers of their State."<sup>125</sup> Roberts also observes that the United Nations and the International Committee of the Red Cross (the "ICRC")

---

121. Schindler, *supra* note 114, at 132. This may accord with Pictet's commentary that Article 2(2) "only refers to cases where the occupation has taken place without a declaration of war and without hostilities, and makes provision for the entry into force [of the code] in those particular circumstances." Reprinted in H. LEVIE, *THE CODE OF INTERNATIONAL ARMED CONFLICT* 714 (1986).

122. See U.S. DEP'T OF THE ARMY, *THE LAW OF LAND WARFARE* 139 (Field Manual No. 27-10, July 18, 1956) ("Military occupation is a question of fact.").

123. It is generally agreed that South Africa is illegally occupying Namibia. The unanimity of international opinion on this issue was recently summed up by the United States representative in the Security Council as follows:

[T]he problem of Namibia stems from the clear and simple fact that the Republic of South Africa is illegally occupying the Territory of Namibia. South Africa has no right to be in Namibia, no right to control the internal and external policies of that country, and no right to use it as a staging area from which to violate the borders of neighboring States.

Statement by Ms. Byrne, 53 U.N. GAOR Supp. (No. 19) at 54, U.N. Doc. A/42/PV.59 (1987). The decision whether to describe the occupation as partial or total will have to be based on an assessment of how much territory, if any, that SWAPO controls within Namibia.

124. Roberts, *What is a Military Occupation?*, 55 BRIT. Y. B. INT'L L. 249, 250 (1984).

125. *Id.* at 255. Roberts also demonstrates that in the Fourth Geneva Convention (the Civilians Convention),

many provisions other than common art. 2 indicate that occupation is conceived of more broadly than in the Hague Regulations. The most notable of such provisions are art. 6, which refers to occupations which continue after the end of military operations, and art. 47, which *inter alia* takes account of two possibilities; the first being an occupation in which the authorities of the occupied territory remain in post, and the second being an attempted annexation by the occupant of the whole or part of the occupied territory.

*Id.* at 253.



have often maintained that international humanitarian law is applicable to particular situations, "irrespective of the issue as to whether they count as international armed conflicts and/or occupations."<sup>126</sup>

Within the terms of Article 2(2), the occupation must take place in "the territory of a High Contracting Party."<sup>127</sup> In the absence of a minimal declaration by SWAPO, it would be mere legal sophistry to argue that SWAPO is nevertheless a "High Contracting Party."<sup>128</sup> Critics might even argue that a formal declaration by SWAPO will still not transform it into a High Contracting Party. Moreover, the language of Article 2(2) suggests that it was drafted to operate *prospectively*, i.e. to deal with occupations that took place *after*, and not *before*, 1949.<sup>129</sup>

Nevertheless, the third paragraph of Article 2 leaves the Convention open to non-contracting entities such as Namibia.<sup>130</sup> Even if it is maintained that the Geneva Conventions are open only to State entities, an argument can be made that Namibia's case is *sui generis*. The international community has consistently taken the view that sovereignty in Namibia resides in the Namibian people, and not in the South African government.<sup>131</sup> In effect, Namibia is viewed as possessing a kind of autonomy and sovereignty that is comparable to statehood. The General Assembly has transferred Namibian statehood to the United Nations Council for Namibia.<sup>132</sup> The Council and the international community, in turn, recognize SWAPO as "the true and legitimate representative" of the Namibian people.<sup>133</sup> Thus, both SWAPO and the United Nations Council for Namibia have the competence to undertake official acts on behalf of the Namibian people.<sup>134</sup>

---

126. *Id.* at 302.

127. See Geneva Conventions of 1949, *supra* note 6, common art. 2, para. 3.

128. *Id.*

129. *Id.*

130. *Id.*; see Dugard, *supra* note 120, at 153-54 ("In order to accede to the Geneva Conventions all that is required of a belligerent entity is that it have international status, which liberation movements derive from both international law and collective recognition by the General Assembly.").

131. See *infra* notes 132 & 133 and accompanying text.

132. See *Report of the UN Council for Namibia (1985)*, *supra* note 54, at 1.

133. In 1973, the UN Security Council unanimously declared SWAPO the "authentic representatives of the people of Namibia." See AFRICA, Oct. 1986, at 29. The General Assembly and the OAU also recognize SWAPO as the "sole and legitimate representative of the Namibian people." See *Report of the UN Council for Namibia (1985)*, *supra* note 54, at 1; cf. recent statement by United States representative, Ms. Byrne, U.N. GAOR Supp. (No. 19) at 54, U.N. Doc. A/42/PV.59 (1987) ("We object to the repeated references to SWAPO as the 'sole and authentic representative of the Namibian people.'").

134. See I. SAGAY, *supra* note 13, at 271-83 (arguing that the UN Council for Namibia has full powers of statehood and is the *de jure* government of Namibia); cf. I. BROWNLIE PRINCIPLES OF PUBLIC INTERNATIONAL LAW 175-79 (1979) (arguing that because the UN

Assuming *arguendo* that Namibia's *sui generis* position entitles it to be regarded as a potential party to the Conventions, it still remains to be answered whether Namibia, as a power in conflict, "accepts and applies the provisions" of the Conventions.<sup>135</sup> As pointed out by Pictet, "[t]here is no reason to assume that *acceptance* necessarily implies an explicit declaration. It can equally well be tacit. It may be implicit in *de facto* application."<sup>136</sup> SWAPO has stated that "[t]he Namibian Army must - and does - comply with the laws and customs of war as set out, in particular, in the Geneva Conventions of 1949 and South Africa's armed forces are bound by these provisions."<sup>137</sup>

SWAPO has therefore pledged its intention to comply with the laws of war in its conflict with South Africa.<sup>138</sup> It has been argued, however, that South Africa will require more evidence of SWAPO's intention in this regard than a statement presented to a non-governmental international conference.<sup>139</sup> This argument is seriously flawed. SWAPO's formal pledge to a conference organized by distinguished bodies such as the International Commission of Jurists, the Interna-

has limited international personality, the UN Council for Namibia does not have the competence to administer the territory).

135. See *supra* note 6.

136. PICTET COMMENTARY III, *supra* note 114, at 26; see Draper, *The Geneva Conventions of 1949* in (I) RECUEIL DES COURS 63, 74 (1965) (arguing that in a case where a Power in conflict in fact applies the Conventions, but makes no formal declaration of acceptance, there may be some justification for the view that such compliance ought to be taken as an implied acceptance of the Conventions).

137. See Dugard, *supra* note 120, at 152 (quoting *Namibia and the International Rule of Law*, submitted by SWAPO to the International Conference on Namibia and Human Rights, held in Dakar, Senegal, in January 1976 (Dakar Conference, NDH 76, IV.a., at 12, published by the Int'l Inst. of Human Rights of Strasbourg (1976)).

As discussed below, it is difficult to believe that SWAPO can strictly adhere to the laws of war in their entirety due to SWAPO's essential nature as a guerrilla group. The South African government regards SWAPO as a terrorist organization that frequently violates the laws of war by attacking civilian targets. In February 1988, after a bomb exploded in a Namibian bank, killing 18 civilians and injuring several others, the South African government accused and condemned SWAPO for this form of terrorist violence. See Van Graan & Sapa, *SWA Bank Blast: Toll Now 18*, *The Citizen* (Johannesburg), Feb. 20, 1988, at 1, col. 4. SWAPO's publicity and information spokesmen, however, denied any SWAPO involvement and insisted that "the bomb [was] part of South Africa's dirty propaganda campaign to smear the name of SWAPO." *Id.*

In an address to the Security Council, the South African Permanent Representative at the UN similarly spoke of "SWAPO terrorists moving southward to attack the civilian population of South West Africa/Namibia." *Reprinted in* 11 S. AFR. Y. B. INT'L L. 234 (1986).

138. SWAPO also took part in the Diplomatic Conference of 1974-1977 and signed the Final Act of the Conference. See D. SCHINDLER & J. TOMAN, *THE LAWS OF ARMED CONFLICTS* 49 (1981) [hereinafter SCHINDLER & TOMAN].

139. See Dugard, *supra* note 120, at 156.

tional Institute of Human Rights, as well as sponsorship by the United Nations Commissioner for Namibia, should suffice as a formal declaration imposing legal obligations on SWAPO.<sup>140</sup> Such declarations "concerning legal or factual situations" may indeed "have the effect of creating legal obligations" for those on whose behalf they are made.<sup>141</sup> SWAPO's declaration conveyed to the world at large, including South Africa, its intention to be bound by the Geneva Conventions and Protocols. The declaration is an official act of SWAPO and, thus, constitutes reliable evidence of SWAPO's intentions.

In addition to acceptance, SWAPO must apply the provisions of the Convention. Non-compliance by SWAPO could thus give rise to an international delict. It would mean that individual SWAPO combatants could be subjected to trial and punishment for their illegal acts. But this should not affect their entitlement to POW status.

### c. Third Party Involvement

It can also be argued that the conflict in Namibia derives an international character from the involvement of neighboring countries such as Angola. The policy of "hot pursuit" followed by the South African Defence Force (the "SADF") is such that the South African army almost invariably engages the Angolan army in conflict.<sup>142</sup> Thus, the Namibian conflict involves not only South Africa and SWAPO, but other sovereign States who are parties to the Geneva Conventions.<sup>143</sup>

---

140. To make doubly sure, this author suggests that SWAPO should, in addition, file a formal declaration with the Swiss government.

141. Frontier Dispute (Burkina Faso v. Republic of Mali), 1986 I.C.J. 554, 573, at para. 39, reiterating the observation made in the Nuclear Tests cases, 1974 I.C.J. 267, 472.

142. See Legum, *supra* note 26. The latest incident occurred on Feb. 20, 1988, when South African Air Force ("SAAF") fighter jets attacked SWAPO bases deep in Angola. The attacks were reprisals for a bomb blast allegedly carried out by SWAPO in Namibia. See *The Sunday Times* (S. Africa), Feb. 21, 1988, at 1, col. 1. In defense of the reprisals, the South African Defence Minister stated:

Making hot pursuit and pre-emptive strikes against SWAPO bases in Angola has long been the policy used by the South African Security forces in South-West Africa, and Saturday's strikes against SWAPO bases in Angola do not, therefore, represent a new development.

*The Citizen*, Feb. 22, 1988, at 2, col. 4. That the Namibian conflict involves third-parties was also manifest in statements made by the Chief of the SADF in December 1983, to the effect that SWAPO guerrillas had joined forces with Cuban and Angolan troops against South African forces. And in 1984, the SADF claimed it had killed 324 Cubans, Angolans and SWAPO members. See *REVOLUTIONARY MOVEMENTS*, *supra* note 23, at 246.

143. On September 20, 1984, Angola became the 46th country to accede to Protocol I. It thus became a Party to the Geneva Conventions at the same time. See 8 I.C.R.C. DISSEMINATION, Dec. 1987, at 10.

In this respect, the Namibian conflict is an "internationalized non-international armed conflict."<sup>144</sup> Even if it is argued that South Africa's presence in Namibia does not amount to an occupation within the sense of the Conventions, and that SWAPO is not a High Contracting Party, the fact remains that South Africa and Angola are both High Contracting Parties. Under paragraph 3 of Common Article 2, the two countries are therefore bound by the Conventions in their mutual relations.<sup>145</sup> The fact of third-party involvement internationalizes the conflict in Namibia. The rules of international armed conflict should, therefore, be applicable in the relations of all Parties to the conflict.

## 2. Article 1(4) of Protocol I

Article 1(4) of Additional Protocol I<sup>146</sup> extends the category of international armed conflicts discussed under Common Article 2 of the Geneva Conventions. It categorizes armed conflicts involving national liberation movements as international armed conflicts.<sup>147</sup> Article 1(4) provides:

The situations referred to in the preceding paragraph include armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.<sup>148</sup>

This provision engendered so much debate and controversy that it has been referred to as "[t]he most controversial clause in the Additional Protocols."<sup>149</sup> One of the principal objections to the inclusion of

---

144. Phrase respectively borrowed from Gasser, *Internationalized Non-International Armed Conflicts: Case Studies of Afghanistan, Kampuchea, and Lebanon*, 33 AM. U. L. REV. 145 (1983-84).

145. See Geneva Conventions of 1949, *supra* note 6, common art. 2, para. 3. This article is not suggesting that South Africa and Angola are in armed conflict. If that were the case, then South Africa would be free to attack Angolan territory. As discussed above, Angola's support to SWAPO cannot be equated with an armed attack against South Africa. Angolan support to SWAPO merely gives the Namibian conflict an international dimension.

146. See *supra* note 7.

147. *Id.*

148. *Id.*

149. Dinstein, *The New Geneva Protocols: A Step Forward or Backward?*, 33 Y. B. WORLD AFF. 265, 266 (1979). On the problems raised by the introduction of this amendment at the Diplomatic Conference, see generally, Forsythe, *The 1974 Diplomatic Con-*

Article 1(4) was the fact that terms such as "alien occupation" and "racist regime" are vague and subject to political interpretation. It is unlikely that states would accept the labels of "racist," "alien" or "colonial" necessary for invoking the provision.<sup>150</sup> The *travaux préparatoires* suggest, however, that these terms were used with specific situations in mind.<sup>151</sup> A leading authority and member of the United States delegation to the Diplomatic Conference confirmed that the references to "colonial domination" and "racist regimes" were directed essentially at Southern Africa - to South Africa, Namibia, (then) Rhodesia and to the Portuguese colonies.<sup>152</sup> The records of the Diplomatic Conference thus establish that Article 1(4) was meant to apply specifically to Namibia and other conflict areas.<sup>153</sup>

---

*ference on Humanitarian Law: Some Observations*, 67 AM. J. INT'L L. 77, 78-84 (1975).

150. Roberts, *New Rules for Waging War: The Case Against Ratification of Additional Protocol I*, 26 VA. J. INT'L L. 109, 125-26 (1985). But see Cassese, *supra* note 119, at 313, 318-19 (refuting notion that Article 1(4) introduced "subjectivity, uncertainty and ambiguity," and arguing that the terms "colonial," "racist" and "alien" are objectively defined. Cassese felt that the "extreme narrowness of [these] three categories should dispel any fear that the broad category of 'national liberation movements' might lead to Art. 1(4) having an excessively wide field of application.").

151. The writer concedes a change in methodology with respect to the question of treaty interpretation. Whereas the Geneva Conventions of 1949 were earlier construed in light of their plain language and their object and purpose, reliance is being placed here on the *travaux préparatoires*, in construing the Additional Protocols. Both approaches are perfectly legitimate methods of interpretation, and they are not necessarily incompatible with each other. The difference in methodology here is due to the result-oriented approach taken in construing both treaties.

152. Baxter, *Humanitarian Law or Humanitarian Politics?: The 1974 Diplomatic Conference on Humanitarian Law*, 16 HARV. INT'L L. J. 1, 12 (1975). Those fighting against "alien occupation" were the Palestinians. See *id*; accord Kalshoven, *Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts: The Diplomatic Conference, Geneva 1974-1977*, 8 NETH. Y. B. INT'L L. 107, 122 (1977) (Article 1(4) in effect referred to "the Peoples of Palestine and Southern Africa"); see M. BOTHE, K. PARTSCH & W. SOLF, *NEW RULES FOR VICTIMS OF ARMED CONFLICTS* 45-52 (1982) [hereinafter BOTHE, PARTSCH & SOLF].

In the words of Shabtai Rosenne, however, "there is nothing in the language of the provision or in the *travaux préparatoires* or in the language of what became Article 96 to support so narrow a definition." See Rosenne, *Participation in the Geneva Conventions (1864-1949) and the Additional Protocols of 1977*, in PICTET COLLECTION, *supra* note 119, at 803, n.15 and accompanying text. This reasonable interpretation may be because countries such as Australia declared, in explaining their vote, that they supported Article 1(4) with the understanding that the enumeration of the three categories was not exhaustive. See V OFF. RECS., *supra* note 119, CDDH/SR.22, at 228.

153. According to Roberts, all Article 1(4) does

is to close a tiny technical loophole in common art. 2 of the 1949 Conventions, by making a little clearer what was already widely accepted - namely, that the law on occupations is applicable even in situations (like the West Bank and Gaza) where the occupied territory was not universally viewed as having been

Another primary objection to Article 1(4) is that the terms used therein are political and not legal in nature, and that this is an attempt to politicize international humanitarian law.<sup>154</sup> Critics such as Ribeiro argue that Article 1(4) lacks precision and is too open-ended.<sup>155</sup> It is apparent that politics played a major role in negotiations at the Diplomatic Conference. This should not be seen to detract from the essence of the final document. It is a truism that the "rules of any legal system inevitably reflect the political preferences of the prevailing groups within that community."<sup>156</sup> In the words of the Australian delegation to the Diplomatic Conference, Article 1(4) simply echoed "the deeply felt view of the international community that law must take into account political realities which have developed since 1949."<sup>157</sup> In response to the assertion that "no State is ever going to admit it is a racist regime or exercising alien or colonial domination,"<sup>158</sup> it must be stressed that the problem of auto-interpretation "has long been regarded as a conspicuous Achilles heel in international law."<sup>159</sup> No matter how tightly-drafted any rule is, the problem of auto-interpretation, in the final analysis, gives a State the latitude to deny the applicability of the rules when they are not in the State's interest.<sup>160</sup> States have occasionally sought to deny the applicability of international law rules to specific cases, yet this has not prevented the international community from taking action.<sup>161</sup> The Legal Advisor to the directorate of the

---

part of 'the territory of a High Contracting Party.'

Roberts, *supra* note 124, at 254.

154. See, e.g., Feith, *Protocol I: Moving Humanitarian Law Backwards*, 19 AKRON L. REV. 531, 532 (1985-86); Protocol II Transmittal Letter, *supra* note 102.

155. See Ribeiro, *International Humanitarian Law: Advancing Progressively Backwards*, 97 S. AFR. L. J. 42, 50 (1980).

156. Bond, *Article 1 of Amended Draft Protocol I to the 1949 Geneva Conventions: The Coming of Age of the Guerrilla*, 32 WASH. & LEE L. REV. 65, 67 (1975).

157. VI OFF. RECS., *supra* note 119, CDDH/SR.36, at 59.

158. Statement by the Head of the United States' delegation, *reprinted in* N.Y. Times, June 11, 1977, at A5, col. 6.

159. McDougal, *The Impact of International Law upon National Law: A Policy-Oriented Perspective*, in A SUPPLEMENT TO INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE 437, 459 (1981).

160. The serious nature of the problem is manifest in the Afghan government's insistence that there is no civil war in Afghanistan, much less an international war, and that the revolutionary government of Afghanistan is in control of the entire country. See *Report of the Human Rights Committee*, 40 U.N. GAOR Supp. (No. 40) at 122, U.N. Doc. A/40/40 (1985). For reports to the contrary, see generally Report of the Independent Counsel on International Human Rights on the Human Rights Situation in Afghanistan (Nov. 18, 1987).

161. Although claims have frequently been made seeking to oust UN competence, both the Security Council and the General Assembly have increasingly resorted to an ever-less strict interpretation of Article 2(7) of the UN Charter. To cite a few examples,

ICRC has concluded that "[i]t is always the government of the state against which a group is opposed which ultimately decides on the character of the conflict."<sup>162</sup> This statement is not compatible with a basic principle of international law: A state may not be a judge in its own cause.<sup>163</sup>

The fact remains, though, that South Africa is not a Party to Protocol I. It is assumed that South Africa will not sign or ratify the Protocol.<sup>164</sup> Thus, South Africa can only be bound by Article 1(4) if and when that provision attains the status of custom.<sup>165</sup> It is still too early to predict the extent to which Article 1(4) will evolve into customary international law.<sup>166</sup> An assessment can be made, however, on the basis

---

in the Spanish question the claim was that the existence of the Franco regime, even if it endangered international peace and security, fell essentially within Spain's domestic jurisdiction. See 2 U.N. SCOR (34th mtg.) at 176-77 (1946). This claim was rejected by the Security Council, and the General Assembly actually recommended collective efforts to effect a change of government. See *Relations of Members of the United Nations with Spain*, G.A. Res. 39(1) (1946). Similarly, South Africa's claim that the treatment of one's nationals was essentially within a State's domestic jurisdiction was denied by the General Assembly. See generally L. GOODRICH, E. HAMBRO & A. SIMONS, *CHARTER OF THE UNITED NATIONS* 68 (1969) [hereinafter GOODRICH, HAMBRO & SIMONS].

162. Gasser, *A Brief Analysis of the 1977 Geneva Protocols*, 19 AKRON L. REV. 525, 529 (1986).

163. B. CHENG, *GENERAL PRINCIPLES OF LAW APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS* 279-89 (1953); see also 1 J. SCOTT, *ARTS AND DOCUMENTS, SECOND INTERNATIONAL PEACE CONFERENCE* 367 (1907) ("It is a universally accepted doctrine that no one can be a judge in his own cause and all systems of law adopt it.").

164. See Schindler, *supra* note 114, at 141 (arguing that countries like Israel and South Africa, against which wars of liberation are fought, will not sign the Protocol); Kalshoven, *Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts: The Diplomatic Conference, Geneva 1974-77, Part 1: Combatants and Civilians*, 8 NETH. Y. B. INT'L L. 107, 122 (1977); BOTHE, PARTSCH & SOLF, *supra* note 125, at 52.

165. It could, however, be argued that South Africa would not be bound by Article 1(4) even if it evolved into customary law (but not *jus cogens*), by virtue of the fact that South Africa withdrew from the Diplomatic Conference and has vigorously and consistently opposed attempts to declare wars of national liberation as international conflicts. This argument is consistent with the Anglo-Norwegian Fisheries case, 1951 I.C.J. 116, which suggests that a State can be exempted from the binding nature of a customary rule if it consistently and vigorously protested against the formation of the rule from its inception. The need for universality of international humanitarian law, however, detracts from the essence of this argument. The holding in the Anglo-Norwegian Fisheries case in relation to the Law of the Sea is not analogous to, and should therefore not be equated with, the formation of custom in the humanitarian law field.

166. Some authors have concluded, however, that Article 1(4) has already generated a general rule going beyond the conventional bonds instituted by the Protocol. The adoption of Article 1(4) "testified to the formation of a rule binding on all the States participating in the Conference (irrespective of whether or not they ratify the Protocol), save for Israel, which consistently rejected the provision." Cassese, *supra* note 119, at 322.

of the article's short history, from its introduction as an amendment at the Diplomatic Conference, to the present day.<sup>167</sup>

Opposition to Article 1(4) was very intense and vigorous at the first session of the Conference in 1974.<sup>168</sup> The result of a vote in 1974 was twenty in favor (predominantly African, Asian and Eastern European countries), twenty-one against (mostly Western countries) and thirteen abstentions (Western and some Latin American and Asian countries).<sup>169</sup> In 1977, however, when a final vote was taken on the same article, opposition to it had diminished. It received eighty votes in favor, only one against (Israel) and eleven abstentions (mostly Western countries and Guatemala).<sup>170</sup> Some authors suggest that the Western countries simply abstained because no vital interests of theirs were at stake, because they were unlikely to be involved in wars of national liberation.<sup>171</sup> The article was also accepted as long as it would be given a strict construction to apply only to the limited situations originally contemplated, such as Israel, South Africa and Portugal.<sup>172</sup>

Whatever reasons they had for abstaining, the fact remains that some of the countries who voted against it in 1974 voted for it in 1977. This shift could be due to a realization that the provision was, after all, in the supreme interest of international humanitarian law.<sup>173</sup> Subsequent practice has indicated that some of the countries that abstained have changed their position. For example, although Guatemala voted against Article 1(4), it ratified Protocol I on October 19, 1987.<sup>174</sup>

---

Such a categorical assertion does not seem to accord fully with state practice. *But see* discussion below.

167. While a longer period of time is more likely to evidence the uniformity and consistency of a custom, no minimum period of time is required. In an oft-quoted passage, the International Court of Justice pointed out that the length of time required depends on the peculiar nature of the subject-matter involved, and that in certain cases only a very short period of time may be required for the formation of a custom. *See* North Sea Continental Shelf (Denmark, Germany v. Norway), 1969 I.C.J. 3, 43.

168. On some of the debates that took place, see generally VIII OFF. RECS., *supra* note 119; *see also* H. LEVIE, 1 PROTECTION OF WAR VICTIMS (1979).

169. *See* BOTHE, PARTSCH & SOLF, *supra* note 152, at 43.

170. *Id.*

171. *See, e.g.,* Lysaght, *The Attitude of Western Countries*, in THE NEW HUMANITARIAN LAW OF ARMED CONFLICT 354 (A. Cassese ed. 1978).

172. Roberts, *supra* note 124, at n.97 and accompanying text.

173. Some of those who abstained made it clear in their explanation on the vote that they thought Article 1(4) safeguarded basic principles of humanitarian law. *See, e.g.,* VI OFF. RECS., *supra* note 119, CDDH/SR.36 (statement of Mr. Freeland (U.K.)), at 47. The Canadian delegation also stated that although it had abstained on the article as a whole, it "would have preferred to see the article adopted by consensus." It therefore "hoped the situations intended to be covered by paragraph 4 would indeed be covered." *See id.* at 49 (statement of Mr. Miller).

174. *See* INT'L RED CROSS BULLETIN, Nov. 1987. Discussions at the Conference also



On the basis of the evidence so far presented, it may be predicted that Article 1(4) will increasingly be invoked in the international arena. In this respect, we can view customary law as being created not only by the flow of international agreements, international and domestic tribunals, national constitutions, etc., but also by "all kinds of communications, even from individual human beings who have no explicit authoritative role."<sup>175</sup> Claims have already been made concerning its applicability to ongoing conflicts. A well-known critic has stated:

Article 1(4), however, has a legal scope too. It is not confined [to struggles between the PLO and Israel, and between SWAPO and South Africa]; it can apply to other fresh situations as well, witness the Soviet occupation of Afghanistan, which no doubt comes within the purview of the rule although the USSR has not ratified the Protocol and will probably refrain from doing so in the near future, as well as the Indonesian occupation of East Timor. To all these situations both Article 1(4) and the general principles on warfare which this article renders operative, can be deemed applicable.<sup>176</sup>

The recognition of such conventional rules as customary law will have the psychological effect of inducing more States to become parties to the treaty. Several States are in fact preparing to ratify Protocol I, or are seriously considering doing so.<sup>177</sup> Nevertheless, it can be concluded that Article 1(4) of Protocol I has not definitively passed into the *corpus* of customary international law. In light of non-ratification by South Africa, it will therefore be difficult to argue that the Namibian conflict is directly governed by that article.

### 3. Other International Prescriptions

A perusal of international opinion suggests that the Namibian conflict is an international armed conflict subject to the appropriate rules of humanitarian law. The United Nations General Assembly has consistently called for the application of the Geneva Conventions to armed

---

suggested that "the few States which voiced misgivings about the rule were not motivated by strong opposition to it, but rather considered that the rule was *bad law*," although it "represented a *new law of the international community*." Cassese, *supra* note 119, at 321.

175. McDougal, *Reflections on Order, Freedom, Justice and Power: The Challenges for International Law*, 75 PROC. AM. SOC'Y INT'L L. 186, 199 (1981).

176. A. CASSESE, *INTERNATIONAL LAW IN A DIVIDED WORLD* 279 (1986); see also Reisman, *supra* note 86, at 908 (arguing that the resistance in Afghanistan is engaged in an international conflict coming under Article 1(4) of Protocol I).

177. Gasser, *supra* note 102, at 924.

conflicts involving national liberation movements, thus implicitly characterizing them as international conflicts. In 1970, for example, it referred *expressis verbis* to the Namibian conflict by calling on South Africa

to treat the Namibian people captured during their struggle for freedom as prisoners of war in accordance with the Geneva Convention relative to the Treatment of Prisoners of War, of 12 August 1949 and to comply with the Geneva Convention relative to the Protection of Civilian Persons in Time of War  
 . . . .<sup>178</sup>

At its 28th session, the General Assembly proclaimed that these struggles were to be regarded as armed conflicts in the sense of the Geneva Conventions:

The armed conflicts involving the struggle of peoples against colonial and alien domination and racist regimes are to be regarded as international armed conflicts in the sense of the 1949 Geneva Conventions and the legal status envisaged to apply to the combatants in the 1949 Geneva Conventions and other international instruments are to apply to the persons engaged in armed struggle against colonial and alien domination and racist regimes.<sup>179</sup>

The international nature of the Namibian conflict is also discussed in the writings of eminent jurists. In a study on the conflict, Dugard concluded:

[I]t is difficult to categorize the hostilities inside and on the borders of South-West Africa as an ordinary internal conflict which South Africa can treat as a purely internal uprising. The international status of South-West Africa, coupled with the findings of the International Court of Justice and the Security Council that South Africa is in illegal occupation of South-West Africa, gives the conflict an international character which has been absent in other colonial conflicts.<sup>180</sup>

According to Reisman, "[p]eoples engaged in resisting the suppression of their right to self-determination are fighting what has come to be known as a 'war of national liberation.' Under the theory of such

178. G. A. Res. 2678, U. N. GAOR Supp. (No. 28) at 90, U. N. Doc. A/8028 (1970).

179. G. A. Res. 2678, U. N. GAOR Supp. (No. 30) at 142, U. N. Doc. A/9030 (1973).

180. Dugard, *supra* note 120, at 155-56.

wars, they are international conflicts."<sup>181</sup> The *jus ad bellum* establishes the international nature of the Namibian conflict. This conclusion implies that the applicable *jus in bello* is that pertaining to international, not internal, armed conflicts.

#### 4. Legal and Policy Implications

Some authors argue that national liberation movements such as SWAPO cannot fulfill their obligations under the Conventions.<sup>182</sup> They contend that this lack of practical reciprocity will destroy one of the important forces that exist for compliance with the law of armed conflict.<sup>183</sup> This argument is not tenable. The legal effect of SWAPO's declaration of intent<sup>184</sup> is to subject both SWAPO and South Africa to the same rights and obligations. They are both under an obligation to observe the laws of armed conflict in their entirety. While there exists a fundamental inequality in the legal status of SWAPO and South Africa, this inequality does not presuppose a lack of reciprocity. Nor does it suggest that a sovereign state is more likely to be humanitarian in its use of force in suppressing opposition than the group that is resisting such suppression. Indeed, reports prepared by various human rights groups have almost invariably indicated that the government in power violates the laws of war with greater frequency and intensity than does the group opposing it.<sup>185</sup> There is no convincing evidence to indicate

181. Reisman, *supra* note 86, at 908.

182. See, e.g., Baxter, *supra* note 152, at 16.

183. *Id.*; see Ribeiro, *supra* note 155, at 51.

184. Protocol I, *supra* note 7, art. 96(3). This requisite condition is even more stringent under Article 96(3) of Protocol I, which states:

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

- a) the Conventions and this Protocol are brought into force for the said authority as a Party to the conflict with immediate effect;
- b) the said authority assumes the same rights and obligations as those which have been assumed by a High Contracting Party to the Conventions and this Protocol; and
- c) the Conventions and this Protocol are equally binding upon all Parties to the conflict.

*Id.*

185. *Report of the Human Rights Committee, supra* note 160. But see HUMAN RIGHTS IN NICARAGUA 1986 (America's Watch Report, Feb. 1987) (concluding that although "the government of Nicaragua does not engage in systematic violations of the laws of war in the course of military operations," the *contras* "engage in selective but

that national liberation movements such as SWAPO will refuse to observe the laws of war. Members of the liberation movements stated at the Diplomatic Conference that they *could* and *would* observe the laws of war, and the disparities in resources of the parties involved would not prevent the liberation groups from respecting the principles of humanitarian law.<sup>186</sup>

Characterization of the Namibian conflict as an international one precludes South Africa's competence to classify captured SWAPO guerrillas as "dissidents" or "criminals" punishable (under South African municipal law in Namibia) for taking up arms against the government. SWAPO guerrillas are entitled to POW status and treatment upon capture.<sup>187</sup> The South African courts, however, have held otherwise. The *locus classicus* of the general attitude of the South African courts can be found in *S v. Sagarius En Andere*.<sup>188</sup> The three accused were part of a group of twenty-two SWAPO guerrillas who had been captured by the South African Defence Force when they entered Namibia from Angola.<sup>189</sup> Although the accused were all clad in clearly distinctive SWAPO uniforms, and despite its recognition that the ac-

---

systematic killing . . . , indiscriminate attacks against civilians or in disregard for their safety, and in outrages against the personal dignity of prisoners."'). *Id.* at 6.

186. See, e.g. VIII OFF. RECS., *supra* note 119, CDDH/I/SR.4 (statement of Mr. Monteiro (FRELIMO)), at 32. Mr. Armaly (PLO) has stated:

The argument that national liberation movements would be incapable of carrying out certain humanitarian obligations was not borne out by the facts. For instance, in the struggle the Palestinian people were waging against Israel, such international bodies as the ICRC, Amnesty International and even the Israeli League for Civil and Human Rights, had testified that Israel had committed many violations of humanitarian law, whereas the Palestinian resistance had always collaborated with the ICRC, in accordance with the Geneva Convention, and *inter alia*, had returned Israeli prisoners of war through the ICRC.

VIII OFF. RECS., *supra* note 119, CDDH/I/SR.5 at 38. In the first formal declaration ever made by a liberation movement to the ICRC, African National Congress ("ANC") President Oliver Tambo stated:

We undertake to treat members of the regular armed forces of the South African regime, captured by Umkhonto we Sizwe, as prisoners of war. We undertake to be bound by the other relevant provisions of the Conventions. In consequence, we demand that the South African regime make a similar commitment in accordance with the present day rule of war to treat the combatants of Umkhonto we Sizwe as protected combatants.

AFRICA Now, Jan. 1987, at 7. It remains to be seen the extent to which the ANC will adhere to the Conventions and Protocols.

187. See generally Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135 [hereinafter Geneva Convention (III)].

188. 1983 (1) S.A.L.R. 833.

189. *Id.*

cused had been captured in a "war situation," the court held that the SWAPO guerrillas could not be regarded as POWs.<sup>190</sup> In imposing a sentence on the SWAPO guerrillas, however, the court accepted the public international law aspects of the case as being relevant to the mitigating factors involved in sentencing.<sup>191</sup> Among the factors it took into consideration were the following:

1. That the International Court of Justice and other United Nations Organs and international actors had branded the South African presence in Namibia as illegal;<sup>192</sup>
2. That the SWAPO guerrillas regarded their actions as part of a just conflict with strong local and foreign support;<sup>193</sup>
3. That there is a tendency in general international law to accord POW status to captives that openly participate in a characteristic uniform in an armed conflict against a racist, colonial or foreign regime;<sup>194</sup>
4. That although the South African legislation had qualified the offenses as serious misconduct, this conflicted with the view of a major part of the community in Namibia, as well as of the international community, according to the undisputed evidence given in court;<sup>195</sup> and
5. That heavy penalties would not discourage other SWAPO activists from carrying out their operations, so particularly heavy sentences would not serve as a deterrent.<sup>196</sup>

In essence, while the court was denying POW status to the SWAPO combatants, it was admitting that, consistent with present trends in international law, SWAPO combatants should be entitled to POW status upon capture.<sup>197</sup> Cases such as *S v. Sagarius En Andere*

---

190. *Id.* at 833(G).

191. *Id.* at 834.

192. *Id.*

193. *Id.* at 833(H).

194. *Id.*

195. *Id.* at 837(D).

196. *Id.* at 838(A).

197. *But cf.* *S v. Mogoerane et. al.* (not reported in South African Law Reports), discussed in Murray, *The 1977 Geneva Protocols and Conflict in Southern Africa*, 33 INT'L & COMP. L. Q. 462 (1984), in which three accused ANC members, found to have been involved in attacks on three South African police stations, were denied POW status and sentenced to death, in spite of appeals from the international community for mitigation of the sentence. It would appear, however, that the court in *Mogoerane* did not consider the international law aspects of the case as being of relevance in the context of mitigating factors, because the ANC members involved had failed to distinguish themselves from ordinary civilians while carrying out the attacks.

are normally decided on the basis of South Africa's Domestic Terrorism Act of 1967.<sup>198</sup> The Terrorism Act is at variance with South Africa's obligations under the Third Geneva Convention, to which South Africa is a signatory.<sup>199</sup> In justification of the courts' attitudes, several authors argue that although South Africa acceded to the Conventions in 1952, they have not yet been incorporated into South Africa's domestic law.<sup>200</sup> They also argue that, in any event, the South African government cannot fetter its executive action by international law obligations, because "the security of the [South African] State is *suprema lex*."<sup>201</sup> It is a settled principle of international, however, law that a State may not invoke the provisions of its internal law as justification for its failure to perform a treaty obligation.<sup>202</sup> In addition, South Africa's own internal law contains a rule of construction that the South African legislature is presumed not to intend to infringe upon South Africa's international obligations.<sup>203</sup> The South African courts must therefore construe South Africa's municipal law in Namibia in such a way as to avoid conflict with South Africa's obligations under the Geneva Conventions.

SWAPO, on the other hand, has corresponding obligations. Article 4 of the Third Geneva Convention provides:

A. Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:

- 1) Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces.
- 2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:
  - a) that of being commanded by a person responsible for

---

198. Comment, *Considerations of International Humanitarian Law In Sentencing Members of SWAPO- S v. Sagarius*, 9 S. AFR. Y.B. INT'L L. 112 (1983).

199. Geneva Convention (III), *supra* note 187.

200. See, e.g., Dugard, *supra* note 120, at 152.

201. Booysen, *Treaties, Enemy Aliens and Prisoners of War in South African Law*, 90 S. AFR. L. J. 386, 391 (1973).

202. See Vienna Convention, *supra* note 8, art. 27.

203. Erasmus, *Mandates, Military Service and Multiple Choice*, 11 S. AFR. Y. B. INT'L L. 114, 128 (1985-86).

his subordinates;

- b) that of having a fixed distinctive sign recognizable at a distance;
- c) that of carrying arms openly;
- d) that of conducting their operations in accordance with the laws and customs of war.<sup>204</sup>

SWAPO will have to satisfy each of the requisite criteria outlined above. The internal, as well as the external wings of SWAPO may qualify under either "members of the armed forces of a Party to the conflict," or "other militias and members of other volunteer corps . . . belonging to a Party to the conflict and operating in or outside their own territory."<sup>205</sup> SWAPO's international recognition as the "sole and legitimate representative of the Namibian people"<sup>206</sup> should suffice to establish that it belongs to a Party to the Namibian conflict.<sup>207</sup>

SWAPO will also have to meet other minimal requirements. The need for organization, for example, is a very important criterion in ascertaining whether SWAPO forces are entitled to POW status upon capture.<sup>208</sup> This requirement exists because there is the need to distinguish irregulars fighting on their own or fighting a private war, from those operating under the supervision or orders of SWAPO. This makes it easier to attribute responsibility when there is a breach of the laws of war.<sup>209</sup> The requirement of organization should pose no prob-

204. Geneva Convention (III), *supra* note 187, art. 4.

205. *Id.* art. 4(A)(1) & (2). In wars of national liberation, a Party to a conflict is comprised of people represented by the liberation movement. Abi-Saab, *Wars of National Liberation in the Geneva Conventions and Protocols*, 165 (IV) RECUEIL DES COURS 353, 419 (1979).

206. *See supra* note 133.

207. This accords with Pictet's commentary on the provision:

It is essential that there should be a *de facto* relationship between the resistance organization and the Party to international law which is in a state of war, but the existence of this relationship is sufficient. It may find expression merely by tacit agreement, if the operations are such as to indicate clearly for which side the resistance organization is fighting.

PICTET COMMENTARY III, *supra* note 114, at 57.

208. *See* COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 5 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 (1987) [hereinafter ICRC COMMENTARY]:

The term "organized" is obviously rather flexible, as there are a large number of degrees of organization. In the first place, this should be interpreted in the sense that the fighting be collective in character, be conducted under proper control and according to rules, as opposed to individuals operating in isolation with no corresponding preparation or training.

*Id.* at 512.

209. Under Article 44 of Protocol I, however, an irregular who takes part in hostilities, although detached from the parent group (in this case, SWAPO) and not within its

lem to SWAPO, because it is met by the most rudimentary elements of a military organization.<sup>210</sup>

In order for SWAPO forces to be accorded POW status by the South African government, they must be "commanded by a person responsible for his subordinates."<sup>211</sup> Having a person responsible for his subordinates provides a reasonable assurance of adherence by irregular forces to the fundamental requirement of compliance with the laws of war. This requirement might, however, be problematic for SWAPO. Full details about the identity of military leaders and the command structure of resistance groups such as SWAPO are hardly ever revealed. For security reasons, this information is often a closely guarded secret, unknown even to most of the fighters.<sup>212</sup> It was due to these realities that Protocol I changed the requirement to that of a collegial command, in lieu of an individual commander.<sup>213</sup> In light of the conclusion that Protocol I is not directly applicable to the Namibian conflict, however, SWAPO will have to satisfy the Third Geneva Convention's requirement of being "commanded by a person responsible for his subordinates."<sup>214</sup>

Above all, SWAPO will be entitled to POW status only if its combatants "conduct their operations in accordance with the laws and customs of war."<sup>215</sup> SWAPO forces generally resort to guerrilla warfare in the conduct of the war in Namibia. But the concept of guerrilla warfare, by definition, is at variance with the laws of armed conflict.<sup>216</sup> Guerrilla warfare normally forces a status of quasi-belligerency on the civilian populace of the territory in which the conflict is taking place. It easily blurs the distinction between combatant and non-combatant.<sup>217</sup>

control, may be entitled to claim POW status. See Protocol I, *supra* note 7, art. 44.

210. Mallison & Mallison, *supra* note 120, at 50.

211. Geneva Convention (III), *supra* note 187, art. 4(A)2.

212. See *Respect for Human Rights in Armed, Report of the Secretary-General*, 25 U.N. GAOR Supp. (No. 21) at para. 176, U.N. Doc. A/8052 (1970) [hereinafter *Report of the Secretary-General*].

213. See Protocol I, *supra* note 7. SWAPO forces must be "under a command responsible to (the Namibian People) for the conduct of its subordinates, even if (the Namibian People) are represented by a government or an authority [i.e., SWAPO] not recognized by an adverse Party." *Id.* On the reasons for this significant change from the rule in Article 4(A)(2) of Geneva Convention (III), see BOTHE, PARTSCH & SOLF, *supra* note 152, at 237.

214. Geneva Convention (III), *supra* note 187, art. 4(A)(2)(a).

215. *Id.* art. 4(A)(2)(d).

216. Baxter, *So-Called Unprivileged Belligerency: Spies, Guerrillas and Saboteurs*, 28 BRIT. Y. B. INT'L L. 323, 327-28 (1951) ("It is reasonable to suppose that guerrillas and members of resistance movements will more frequently than not fail to conform to the [laws of war], since secrecy and surprise are the essence of such warfare.").

217. The distinction drawn between combatants and non-combatants is certainly one



It is therefore imperative that SWAPO refrain from adopting tactics which help to blur that distinction, because failure by SWAPO combatants to distinguish themselves from the civilian population of Namibia will expose the people on whose behalf SWAPO is fighting to greater risk.

Article 4(A)(2)(d) of the Third Geneva Convention refers to the respect of the laws and customs of war by SWAPO *as a whole*.<sup>218</sup> This qualification implies that if the majority of SWAPO guerrillas fail, at any time, to comply with the laws of war, no individual member of SWAPO will be entitled to POW status, even if the individual did not violate the laws of war. This result might discourage individual SWAPO guerrillas from strictly adhering to the laws and customs of war, especially if SWAPO as a whole indulges in practices inconsistent with the applicable laws. The question of the treatment of individual SWAPO guerrillas who faithfully adhere to the laws of war is therefore a problem deserving special consideration. Conversely, an individual SWAPO member who violates the laws of war, contrary to SWAPO's orders, will nevertheless remain entitled to combatant and POW status upon capture. He will, however, be liable to be tried as a POW, for war crimes.<sup>219</sup> This provision should have the salutary effect of providing SWAPO guerrillas with an incentive to comply with the laws of war.

## V. APPRAISAL AND CONCLUSION

In ascertaining the applicable laws of armed conflict in any situation, the inquiry should focus on the *nature of the human rights* being threatened, rather than on the *nature of the conflict*. This is because international humanitarian law is people-oriented, and is mainly concerned with protecting individuals from the horrors of war. Thus, in a conflict situation where the loss of lives and deprivation of basic human rights is at stake, a more stringent set of rules should be used to regulate the conduct of the conflict. A perusal of the Namibian conflict indicates that it is precisely the kind of conflict situation which needs maximum international regulation.<sup>220</sup> It presents a classic exam-

---

of the most fundamental principles of international law. It has been characterized as "the greatest triumph of international law." See J. SPAIGHT, *WAR RIGHTS ON LAND* 37 (1911); see also Nurick, *The Distinction between Combatant and Non-Combatant in the Law of War*, 39 AM. J. INT'L L. 680 (1945); Trainin, *Question of Guerrilla Warfare in the Law of War*, 40 AM. J. INT'L L. 534 (1946).

218. See *Report of the Secretary-General*, *supra* note 212, at para. 179.

219. Draper, *The Status of Combatants and the Question of Guerrilla Warfare*, 45 BRIT. Y. B. INT'L L. 173, 204 (1971).

220. See Dugard, *supra* note 120, at 155. Dugard argues that "[a]lthough it is impossible to extend the Geneva Conventions in their present form fully to wars of liberation,

ple of the potential risks of wider regional conflicts growing out of low-intensity conflicts.

As argued above, the factual situation in the Namibian conflict makes it an international conflict according to the provisions of Common Article 2 of the Conventions.<sup>221</sup> Thus, it is imperative that all parties to the conflict conduct the war according to the rules which apply to international armed conflicts. This position is not only dictated by the present state of international law, but is also consistent with the self-interest of the parties to the conflict. SWAPO will be more likely to observe the rules of warfare when it knows it will receive reciprocal treatment from the South African army. By applying Common Article 2 of the Geneva Conventions, the soldiers and civilians on both sides will be accorded a greater degree of protection than would be the case if only Common Article 3 were deemed applicable.<sup>222</sup> If, for any of the reasons discussed above, SWAPO is unable to care for captured South African soldiers in its custody, the prisoners must be released or handed over to a neutral Party for exchange. Such benevolence can only gain support for SWAPO's cause. Similarly, South Africa must treat captured SWAPO guerrillas as POWs. Those that are found to have violated the laws of war can rightly be tried as war criminals, rather than treated as criminals under the domestic penal system.

The conflict in Namibia, and, consequently, Southern Africa, is wreaking incalculable havoc on the economies in the region,<sup>223</sup> and undoubtedly poses one of the greatest threats to global conflict today. It is probably accurate to say there exists no political issue in the world today that enjoys such unanimity as the decolonization of Namibia. The process of decolonization in world social process would not have taken place without the threat or use of force. A resort to force in pursuit of the fundamental human rights of the Namibian people is therefore justified in contemporary international law. Similarly, SWAPO and the people of Namibia are entitled to international assistance from

---

the international community cannot afford to leave wars of national liberation without any legal regulation except the elementary safeguards referred to in Common Article 3 of the Conventions." *Id.*

221. See Geneva Conventions of 1949, *supra* note 6, common art. 2.

222. It does appear, however, that in addition to Common Article 2, Common Article 3 still provides for the minimal conduct expected of the parties. See *id.* common arts. 2 & 3.

223. It is estimated that between 1980 and 1986, South Africa's acts of aggression cost the nine countries of the Southern African Development Co-ordination Conference (the "SADCC") more than 18 billion United States dollars. See *Report of the Special Committee Against Apartheid*, 42 U.N. GAOR Supp. (No. 22) at 12, U.N. Doc. A/42/22 (1987); and in the last decade alone, Namibia's economy has fallen to less than half its output. See AFRICA, Sep. 1986, at 34.

the world community in their armed struggle against a situation that can be characterized as an illegal occupation *par excellence*.<sup>224</sup>

A growing realization in the world community of the international dimensions of the Namibian conflict and the strong *jus ad bellum* claims supporting SWAPO's cause should serve as an incentive for third-party states to assist the struggle of the Namibian people politically and materially. A legal analysis of the conflict indicates that continued South African occupation of Namibia is not justified. In this respect, it is hoped that international elites will play an effective and meaningful role in the ongoing attempts to bring an end to the Namibian conflict and to South African occupation of the territory.

---

224. The International Court of Justice recognized that "all States can be held to have a legal interest in the protection" of basic human rights, and that such rights are "obligations *erga omnes*." See *Barcelona Traction, Light and Power Co. (Belg. v Spain)*, 1970 I.C.J. 3-4, para. 33.

Indeed, there is a growing trend in state practice as well as a burgeoning jurisprudential literature in support of the proposition that the prohibition against massive human rights deprivations is a rule of *jus cogens*. There has also developed in the practice of states the doctrine of "humanitarian intervention", i.e., "the proportionate trans-boundary help, including forcible help, provided by governments to individuals in another state who are being denied basic human rights and who themselves would be rationally willing to revolt against their oppressive government." F. TESON, *HUMANITARIAN INTERVENTION: AN INQUIRY INTO LAW AND MORALITY* 5 (1988). The Congo crisis of 1964, the creation of Bangladesh in 1971, and the Tanzanian invasion of Uganda in 1979 are ample evidence of the permissibility of humanitarian intervention, provided it meets certain requisite conditions.

For positions defending the legality of humanitarian intervention, see generally A. D'AMATO, *INTERNATIONAL LAW: PROCESS AND PROSPECT* 223 (1987); Lillich, *Humanitarian Intervention: A Reply to Ian Brownlie and a Plea for Constructive Alternatives*, in *LAW AND CIVIL WAR IN THE MODERN WORLD* 229 (J. Moore ed. 1974); Reisman, *Humanitarian Intervention to Protect the Ibos*, in *HUMANITARIAN INTERVENTION AND THE UNITED NATIONS* 167 (R. Lillich ed. 1973); Levitin, *The Law of Force and the Force of Law: Grenada, The Falklands, and Humanitarian Intervention*, 27 *HARV. INT'L L. J.* 621 (1986); see also Higginbotham, *supra* note 38, at 586 ("Some authors have suggested that when a particular ideology or political system is so extreme in that it grossly violates human rights, it should not be protected by prohibitions against force."). Cf. N. RONZITTI, *RESCUING NATIONALS ABROAD AND INTERVENTION ON GROUNDS OF HUMANITY* 89 (1985); Verwey, *Humanitarian Intervention Under International Law*, 32 *NETH. INT'L L. REV.* 357 (1985); Farer, *The Regulation of Foreign Intervention in Civil Armed Conflict*, 142 *RECUEIL DES COURS* 291 (1974); Schachter, *The Legality of Pro-Democratic Invasion*, 78 *AM. J. INT'L L.* 645, 649 (1984).