

"International Law and Liberation Movements: The
Legal Status of Liberation Movements in Southern Africa, with
Rhodesia as a Case Study!"

A Dissertation submitted to the University of Zambia
School of Law in PARTIAL satisfaction of the degree of
Master of Laws.

by

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I do hereby declare that this
dissertation or any part of it has not
been submitted for a degree to this or
any other University.

Ennias Chikove

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Abstract

The question of the status of liberation Movements in Southern Africa is a topical controversy in both international law and politics. In some circles, liberation movements are branded as savage terrorist organisations and in some they are regarded as some kind of legitimate salvation armies which deserve all the support necessary to undertake their liberation programmes. These liberation movements have "caused" great loss of life and property and the international community is divided about their status and thereby indirectly creating a threat to international peace and security, a state of affairs which might result in a Third World War. Bearing all these considerations in mind, the question arises: What does international law say about this political phenomenon of liberation movements? What is the position of liberation movements in international law? Are they legal or illegal in international law? These questions have been a problem to the writer for sometime. In order to answer these questions, the writer, would therefore like to determine the status of liberation Movements in international law, in this dissertation. To be able to do this, he has selected relevant institutions of international law against

which he will examine the position or status^{of} liberation
Movements in Southern Africa with Rhodesia as a Case study.
These institutions are: Acquisition of Territory, Self-
Determination, Human Rights, Recognition, International
Humanitarian Law and The Use of Force.

project. This is your chance to champion our struggle!

I must be honest to say that I felt very much slighted by these two respective remarks. But I later realised that my role as a scholar had been ignored or misunderstood. I suppose the misunderstanding was due to the controversial nature of the subject. In fact it is this very controversial nature of the subject which made me choose it. It is a subject that urgently needs greater attention. It would be most unfortunate if this dissertation is understood or interpreted as championing any political cause as the two gentlemen mentioned above did. All the same, I am quite well aware that I chose a very difficult, controversial and sensitive subject and I have no illusions about it. My sincere hope is that this attempted determination might provoke further constructive debates leading to a legal breakthrough in this area.

One problem I experienced is that events in Southern Africa are changing very fast. It seems my dissertation has come in at the time the crisis there is reaching its climax when the issue will be decided one way or the other. However, as I point out in the introduction to this dissertation, any changes, remarkable or otherwise, that may take place after the Submission of this dissertation, will not affect the importance and purpose of the determination being made.

The writer may appear guilty of over-emphasis and repetition here and there. This is because of the nature of the subject which is inextricably compact and involved in such a way that one cannot intelligibly discuss one topic without referring to or involving another and also because of the desire to impress certain facts clearly in the mind of the reader. But this apparent certain measure of over-emphasis and repetition is confined to points of vital importance and to points that in the opinion of the writer continue with strange regularity to cause greatest difficulty in understanding the dissertation.

Acknowledgements

I have had casual and formal discussions on the subject of liberation Movements with many people of different walks of life. I thank these people very much for their kindness in agreeing to discuss such a Sensitive and controversial matter with me. But my acknowledgements would not be complete if I do not specifically express my indebtedness to the following:

My sponsors, the United Nations Development Programme who financed this study after other potential sponsors had described a postgraduate programme in law as an unnecessary luxury.

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The representatives of the Patriotic Front and SWAPO whom I interviewed during my field research. I thank also in particular Dr. Tjiriange, a Namibian Lecturer at the United Nations Institute for Namibia for the most informative discussion I had with him on International Humanitarian Law.

However, the views or opinions expressed in this dissertation are mine alone and I hold the responsibility for them.

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Introduction

Section I. Explanation of the Title

The full title is "International Law and Liberation Movements: The Legal status of liberation Movements in Southern Africa, with Rhodesia as a case study!"

The writer has particularly preferred to focus on Rhodesia as a case study because the fighting there is more involved and at the same time the problems of fact and law for the Rhodesian case are generally representative of the situations in South and South West Africa. Where the problems of fact and law for the Rhodesian case are not representative of the general situation in Southern Africa, the writer will compare and contrast them where it is necessary to determine the legal status of liberation movements.

The phrase "legal status" in the title is susceptible to interpretations which are unintended and misleading. By this phrase the writer does not mean that the liberation movements are legal in the sense of being allowed by law. "Legal" in the title does not mean lawful, for that is what the writer is setting out to determine and find out the position.

"Legal Status" in the title signifies a position in law, in this case, in international law. This "legal" in the title should be understood, for example, in contrast to say, "what is the political position or status?" It has to be determined whether or not this status or position is justified or tolerated in international law.

Section 2. Explanation of the use of the words "thesis" and "dissertation!"

The dictionary definition of "thesis" is that, it is a "statement or theory (to be) put forward and supported by argument, especially a written essay submitted for a University degree!" But a dissertation is also called an essay or account, though a comparatively long one. To avoid this possible confusion, the writer is going to use the word "thesis" in a non-technical sense, but just to signify a point of view he may be putting forward. For the whole account, he is going to use the word "dissertation". So, the writer's "dissertation" is on the determination of the legal position of liberation movements in international law. Having explained them, the two words: "thesis" and "dissertation," will from now on be written as thesis and dissertation without quotation marks, wherever, they appear.

Section 3. The Problem, Scope, and purpose
or aim of the dissertation

The problem is that the question of the status of liberation movements is a controversial political phenomenon whose legal position is not clear. It is important to determine the legal position of this political phenomenon because it has caused and is causing great loss of life and is indirectly a threat to international peace and Security. The main purpose of this dissertation is to determine the legal position of this political phenomenon of Liberation Movements.

The determination is being made within the context of international law because, in the municipal laws of the territories under study, liberation Movements are condemned as terrorist Organisations and are "unconstitutional". What makes it more important to determine the legal position of liberation movements is that the latter themselves claim that they are legitimate and justified in law, without actually proving it in legal terms and their opponents claim otherwise. These liberation Movements make statements which become very controversial when an effort is made to rationalise them in law.

They do all this in an attempt to justify their activities. Examples of such legally controversial statements are the following:-

"First I must say that resistance to foreign rule in Zimbabwe started not in 1967, nor in the post-war period, but when the first British Settlers invaded the country; and this resistance has continued in one form or another, with varied intensity, through 70 years. And we have always regarded our struggle as in the end, inevitably an armed struggle. The reasons which inhibited us from taking up arms in the past — in the 1940s and the early 1950s — were merely logistic reasons. Imperialist forces were still dominant throughout Africa, and there was no room for movement in one direction or another for acquiring supplies or training facilities. This is a historical fact. But the feeling of the people even at that time was that in order to get freedom and independence from the foreigners dominating our country, there was no other way except by armed struggle. The people of Zimbabwe are wholly committed to liberating themselves, and they have no other choice but to intensify the fight against the British imperialist Settler forces, and to dedicate

ourselves to fighting together with our brothers who are in similar circumstances in South Africa."¹

This is a political statement by an African nationalist. But is such a statement peculiar to African liberation politics? No. The following is a similar political statement in the form of a reply given to Lord John Russell in 1854 when he suggested that if the Italians would only keep quiet Austria would be more humane and grant them more privileges than they could secure by insurrection. "We do not ask that Austria be humane or liberal in Italy, which after all, would be impossible for her even if she desired; we ask her to get out. We have no concern with her humanity and her liberalism:

"We wish to be masters in our own house".²

Yet another important similar political statement is "I cannot sit with folded arms while four million people are suffering. You snatched away our country unlawfully..... We are going to fulfil the aims of the war we abandoned in 1897."³

The above are three highly charged political statements on liberation. One would like also to hear the views of jurists on the politics of liberation. The Conference of Afro-Asian Jurists held in

Conakry in October 1964 resolved, among other things, that :

"(a) all struggles undertaken by peoples for their national independence or for the restitution of their territories or occupied parts thereof, including armed struggle, are entirely legal."⁴

The above four statements have one thing in common. They are all trying to support or justify the restoration of territories or occupied parts thereof by physical means where necessary. The first two seem to suggest legitimacy as the justification and the latter two seem to suggest a legal justification. These four statements are significant in that they represent important views of a cross-section of people who generally talk about the politics of liberation and who want to justify the physical and otherwise activities of liberation Movement. First we have an official view of the liberation struggle, from a former Secretary General of a liberation Movement in the late 1960's; Second is the view of Italians in 1854 towards foreign occupation of their territory. This view is quoted to represent European

views during the 19th Century; third, we have the view of a freedom fighter who was actually involved in the physical combat, on trial and explaining what he regarded as the reason for the fighting, and last, the attitude and view of the Afro-Asian Jurists, the latter who are a very important factor on the question of oppression and human rights, all on the same subject of liberation movements. These views, one might say, represent a fairly correct general opinion on liberation Movements. The question is, is this general opinion articulated through these four views, legally valid or can it be rationalised in law? Can the purport of these statements be rationalised or justified in international Law? The implications of these political statements are generally taken for granted without any effort being made to determine their legal basis, if any. The writer is going to try and determine this. But this kind of determination cannot be intelligibly made without delving into the history of liberation Movements and of their respective territories under study. George Nyandoro, in his statement quoted above clearly shows the historical importance of the whole problem. He shows us that the current liberation struggle is ~~a continuing~~ *another form of*

reaction and resistance to colonialism, and in the case of Rhodesia, since 1890. He clearly shows the connection between what is happening now and what happened in 1890, showing that, the two cannot be separated. Because of this vital link it is necessary to briefly outline the genesis or original beginning of the colonial problem in the areas under study. This gives us a good background to the liberation issue. In the light of this brief history, one has also to determine the attitude of international law to colonialism, especially during the colonisation period. One has to know the legal status of the Royal Charter, the Royal Chartered British South Africa Company and the Rudd Concession, in international law. These are very important considerations in the determination of the legal status of liberation Movements.

A determination as to whether or not liberation Movements are justified in law, involves also a determination of the legal validity, or otherwise, of the rationale for the cause of the liberation Movements.

In order to make an effective determination of the legal status of liberation Movements the writer will critically deal with the following issues in the dissertation.

First, he is going to determine the legality or illegality of colonial occupation in international law. To this end, it is necessary and inevitable to give a brief history of the three territories under study and of their respective liberation Movements. Next will be an examination of the status of the Royal Charter, the Royal Chartered British South Africa Company and the Rudd Concession in international law, and the implications of this in the colonisation process and for the liberation struggle. In Chapter two, the writer is focusing on the acquisition of territory in international law. He is going to state the rules of international law governing the acquisition of territory; explain the meaning and significance etc. The aim here is to find out whether or not colonial Settlers or governments acquired title to the

respective territories they occupy, and whether or not that occupation has a legally valid basis in international law. If they acquired title, then it means that liberation Movements have no legal right to fight them. If they did not acquire title, then somebody else or some other group acquired it and an effort will be made to find out who that group is, and that group will be the one legally entitled to remove the other group from power. That group or population with title will then have a legal basis for its claim to rule the territory. In our context, the groups are the settlers and the indigenous populations as represented by their liberation Movements. So in this Chapter two, the aim is to find out which group acquired an indefeasible title to territories under study. This title will be the legal basis for the claim made by which group acquired it and it would mean that this population will be justified in law because it will be fighting to defend the title to the territory. Chapter three is on the principle of self-determination in relation to liberation Movements. Can the principle be used by the liberation Movements as an acceptable ground for their justification? This is the main

issue in Chapter three. A determination will be made as to whether or not the principle of Self-determination is now a legal norm associated with specific rights and obligations, and whether this can entitle liberation Movements to fight to enforce respect of this legal norm. If it is found that the principle has become a legal norm, the source of international law from which it emanates must be ascertained. It will be interesting in the same Chapter to find out why some colonial powers "gave" independence to their colonies. Was it an acknowledgement of the right of self-determination, or the realisation that they had no right to rule those territories, or an acknowledgement of defeat in the "battle field"?

Chapter four looks at colonialism as a violation of human rights and tries to determine whether or not liberation movements can successfully use this human rights plea as a ground for their legal justification. In this Chapter one finds it necessary to invoke jurisprudential theories to explain the concept of human rights. A determination will be made as to whether or not human rights are real rights like any other rights in Law.

Are they recognised by law or are they legal rights? If they are, then it is possible to argue that they can be a ground for the justification of liberation movements, where they are not being respected or where they are being totally denied. The attempt to determine whether or not human rights are recognised by law, will involve an examination of the attitudes of the positivists and "natural" lawyers towards international law. This makes it also necessary to trace the history of human rights up to date. The concept of equality before the law, its implications and significance to colonial peoples and their territories as subjects of international law will be looked into. Following this, the ideals of liberation movements will be discussed in relation to the American Declaration of Independence, the French Revolution and the Magna Carta.

Chapter five is on international support given to liberation Movements. The main thing here is to determine whether or not this international support is legal. This is important because this support is inextricably bound up with the object or subject of the support. This support has also provoked retaliatory raids into some of these supporting countries, in particular, into those

countries which host the guerrillas. The important question is, is it really necessary to give this support and is there a duty at all to host these liberation Movements and provide them with rear bases for their attacks? There is also another important aspect of this international support. This relates to the legal status of representatives of liberation Movements in a number of foreign capitals. Also to be examined in this Chapter is the concept of hot pursuit, its legality or otherwise and its applicability or inapplicability on host governments. This is important because it may suggest that, if the hosting of liberation movements is justifiable in international law, it would be logical that attacks on host governments by pursu~~ers~~ers are illegal.

Chapter Six is on the concept of recognition, in particular the rules of international law governing the recognition of belligerency and governments in exile. These rules will be applied to the liberation movements situation and a determination will be made as to whether or not recognition of belligerence is constitutive or declaratory of the legal justification or otherwise of liberation Movements. For instance, are the liberation movements legal or

fighting because the United Nations recognise them or because other states individually support them? Would liberation Movements be legal or illegal if the concept of recognition movements as belligerents has advantages like for instance, freedom fighters would not be regarded and treated as rebels or criminals, but would be protected by the Geneva Conventions. But recognition of liberation Movements as belligerents also means the observation of neutrality by the recognising states and this is prima facie inconsistent with international support given to liberation movements. The question that arises then is, because of this apparent discrepancy, can international support be regarded as recognition? If it is just ordinary support, what is its legal significance? If it is recognition, is it constitutive or declaratory of the legal justification or otherwise of the liberation Movements? It will be apparent here that the traditional international law may not be adequate in matters relating to liberation Movements. This is so because the concept of belligerent neutral relations seems to put the military strength of the liberation Movements on the same level with

that of the incumbent settler government which is being fought. As a result of this principle of belligerent neutral relations, liberation movements will automatically lose recognition and become illegal if they are defeated. But in reality, they may not necessarily become illegal because there may be other considerations or factors like the principle of Self-determination which may prevail over the principle of neutrality and legally justify their activities.

Chapter Seven is on liberation movements and International Humanitarian law. The main point in this chapter is to establish whether or not liberation movements can be parties to the Geneva Conventions and hence be afforded the appropriate protection and no longer regarded as criminals. This will help us to know whether or not liberation Movements are justified in international law, for they cannot be protected by law only in a war context and outside it they become rebels. Either they are criminal rebels or they are not. This will necessitate a brief examination of the whole jus in bello, including the 1949 Geneva Conventions and the development of international humanitarian law to cover or accommodate liberation Movements resulting in the

1977 Protocols additional to the Geneva Conventions of 12 August 1949. The prohibition of war or the use of force and the exception of liberation Movements to this, in the United Nations definition of aggression will be examined in relation to the Geneva Conventions.

Chapter eight is on the legality or illegality of the means or Methods used by the liberation Movements to achieve their aims. The means used by these liberation Movements are various. They include political education, propaganda and physical armed conflict. It is the use of the means of physical armed conflict which is controversial because it involves loss of life and Sabotage and the destruction of important installations essential to life. It is therefore the legality or otherwise of this type of method or means which is going to be the target of our determination. Can the philosophy of ends justifying means be legally justified in this case? Short of double standards, why should the liberation Movements be allowed to use armed force? All this will be examined alongside the concept of jus ad bellum and the right of Self-defence in order to find out if liberation Movements are justified in using armed force.

Chapter nine is an evaluation of the previous eight Chapters. It is a summary of the main points raised and the conclusion arrived at.

Section 4. Problems of International Law arising in the Dissertation

It is hardly necessary to state that the nature of the subject under discussion involves also the questioning of the validity of some aspects of traditional international law, like for instance, as we saw in section three, the apparent problems caused by the concept of recognition, the controversy as to whether or not the principle of Self-determination is now a legal norm and whether human rights are legal rights, depending on whether one looks at the controversy from the point of view of the positivist school of thought or the natural law School. We also have the problem of traditional international law apparently tolerating colonialism and regarding some territories and people therein as objects and not subjects of international law. The concept of *ius ad bellum* itself is very difficult to understand as a concept of international law. One wonders whether there was some kind of colonial international law or it was all municipal law that was

behind colonialism. For instance, what kind of international law would regard African Chiefs and Kings as Sovereigns with international legal personality, in particular, with capacity to enter into international treaties, as Lobengula did, and yet the very same Sovereigns had no right to vote in their own territories? The matter is also complicated by an apparent constant use of double standards in the application of international law. So, to be able to effectively determine the legal status of the liberation Movements in international law, it is not only a question of applying clear law to a factual situation. The international law itself, supposedly relevant and applicable to this area is not clear. There are a number of paradoxies, discrepancies and difficulties in traditional international law especially in relation to colonial peoples and liberation Movements. This makes the subject under study slightly complicated and difficult.

Section 5. Method of Presentation.

In this dissertation the writer has a genuine problem of language. The nature of the subject under discussion is such that one cannot

avoid using words like "colonialism", "colonialists", "Settlers" or other similar words without distorting the meaning intended. The writer is using these words because he cannot get better words. He is not using them in their highly emotional or pejorative sense: neither does he intend their pejorative connotations. He is using them because they seem to be the only words which can accurately describe or signify the colonial phenomenon under discussion without distortion. All the pejorative meanings or connotations associated with these terms are not intended at all in this dissertation.

The writer holds the view that a well-balanced judgment is good and this consists in finding as much in favour as against a certain view as much as possible. This is the spirit and manner in which he is going to approach the subject. To do this effectively, he is going to proceed by diagnosis, historical description and where necessary, the comparative methods. There will be no attempt to conceal or disguise the nature of the problem, for that would hinder an objective determination of the position in law of liberation Movements.

Unfortunately, much of the political literature, which gives facts about liberation Movements is propaganda, largely eulogistic and biased. This may make it difficult to convince those who may have fallen for this type of eulogy that the position may be otherwise.

Section 6. Territorial Scope of the
Dissertation.

The writer has confined himself to Southern Africa. "Southern Africa" in this dissertation refers to South and South West Africa and Rhodesia. In some quotations, names like Zimbabwe, Namibia and Azania are found. Zimbabwe refers to Rhodesia, Namibia to South West Africa and Azania to South Africa. Wherever they appear, these names should be understood accordingly. Thus "Southern Africa" has been chosen as the territorial context with Rhodesia as a case study because the writer is more familiar with the area, and in addition to this, the political situation there is a thorny problem for Africa and the world at large. It is a threat to international peace and security.

Section 7. Definition of Liberation

nts.

"Liberation Movements" in this dissertation, refers to those political organisations or associations, whether pacific or violent, composed wholly of the indigenous black people, which are engaged in, physically or verbally, the white rulers

order to have political power surrendered to

In Southern Africa, these Organisations are:-

Rhodesia (Zimbabwe) ZAPU and ZANU

South Africa: ANC and PAC.

South West Africa: SWAPO

ZAPU and ZANU stand for the Zimbabwe African Peoples Union and the Zimbabwe African National Front respectively.

ANC and PAC stand for the African National Congress and Pan African Congress respectively and SWAPO stands for South West African Peoples Organisation.

The result of the April 20, 1979 elections in Rhodesia and a possible solution of the Namibian question will not adversely affect the substance of this dissertation, because with or without a Successful or legally valid settlement in these territories, it still remains necessary and helpful in

international law to know the legal status of liberation Movements. In some literature, there are views to the effect that liberation Movements are a passing phase and hence it is not necessary to determine their legal position. It is true this may be so, but it is doubtful whether the phenomenon of liberation as such is a passing phase, because it is possible that this problem of liberation might be with us for quite some time to come in one form or another. For instance, how would one classify the Irish Republican Army and the Palestenian Liberation Organisation problems? The determination being made in this dissertation will help throw some light on some of these problems which may look very much remote from the colonial and liberation issue.

It is important at this juncture to point out that, the writer is not concerned about which Movement or party in Rhodesia is the legitimate representative of the people, now that there is the principle of one man one vote. The writer's theme is to try and find out the legal status of liberation movements. And as said above, this determination is necessary regardless of whether

or not all the three territories have majority rule or, one man one vote.

The writer hopes that this dissertation will go a long way in clarifying the legal status of liberation movements, which is not clear now. It is hoped that this attempted clarification will help in the identification of the crucial and operative problems and also influence the adjustment and choice of the means to achieve a lasting and durable solution to at least those liberation problems still outstanding at the time of writing.

Chapter I. Colonial Occupation in International
Law

The main purpose of this Chapter is to determine the legality or otherwise of colonial occupation. By occupation here is not meant occupation as a mode of acquiring title to territory. This is discussed in Chapter two. What is meant by occupation in this Chapter two. What is meant by occupation in this Chapter is the initial coming or advent of the settlers and their settling in these territories, the treaties they were signing with local rulers and their significance, if any, or purport in international law. All the preliminary and preparatory measures taken by the new comers for permanent Settlement need to be examined and explained in legal terms. For instance, was the initial advent of these people regular in international Law? This Chapter tries to determine all this. This means tracing the whole problem to its roots and finding out if the genesis, or original beginning of the Settlement itself was legal or illegal in international Law. If it was illegal, then we may have a prima facie case that what was subsequently built on this legally invalid settlement might be illegal. Chapter two is focusing

specifically on the modes of acquiring title to territory in international law and its purpose is to determine whether or not title was acquired through any or some of these modes of acquisition, although the original occupation might have been illegal or otherwise.

So, to start our determination on whether or not the initial stages of the Colonisation process were legal, it is necessary to give a brief history of the territories under study.

Section I - Brief History, Rhodesia.

What is now Rhodesia used to be the centre and larger part of the Monomotapa Empire which existed about Six hundred years ago. This empire began to disintegrate about three hundred years ago, mostly because the art of war had become unnecessary, and was forgotten during a long period of peace.

A story is told of Munhumutapa IV declaring "Complete disarmament" in the year 1645. He is reported to have called all his soldiers from all parts of the empire and counselled them:

"From this day on, you will put away your spears into your roof tops until they are red with smoke, and you will take your swords to the blacksmith and have him fashion hoes out of them to till the land⁵."

After that, the Portuguese came in from the East and the Zulus, as a result of the Mfecane, came from the South. The Va Shona successfully protected their way of life for three centuries before the arrival of the British. There is no record of a successful occupation of the Zimbabwe heartland by alien people at that time. Many Nguni tribes from the South attempted conquest but ended up in what is now Malawi and Zambia.

The British came in the 19th Century and the first step towards their occupation of what is now Rhodesia was the Moffat Treaty which dealt with the danger from foreign powers. It was at this time that, in April April 1888, the margui of Salisbury from the Foreign Office explained to Portugal that: "Her Majesty Government have satisfied themselves that Lo Bengula, with whom they have conducted a treaty, is the undisputed ruler over Matabeleland and Mashonaland and that he would tolerate no doubt of

his rule over both territories. His authority over Mashonaland is so complete that no person of any nationality can enter it without his permission⁶....." This was accomplished of Lobengula as Sovereign of Lotchesalaland and Mashonaland, the present day Rhodesia, by Her Majesty's Government.

The next step was the "winning" of the Rudd Concession which put off individual Concession seekers and gave Rhodes a foothold in Lobengula's territories.

The third step was the formation of the British South Africa Chartered Company which was incorporated by Royal Charter on October 29, 1889, and in accordance with clause 25, a deed⁷ of settlement was subsequently executed, which further defined the objects and purposes of the Company. It was a Commercial enterprise, but among its objects were the following: "To undertake and carry on the government or administration of any territories, districts; or places in Africa, and generally to exercise all rights and powers granted by or exercisable under the Charter, and particularly to improve, develop, and cultivate any lands

included within the territories of the Company, to settle any such territories and lands, and to aid and promote immigration, to grant lands for terms of years or in perpetuity, and either absolutely or by way of mortgage or otherwise."⁸

The fourth step was the march of the pioneers. In the middle of 1890, with the consent of the High Commissioner for South Africa, the Company, sent a pioneer force to occupy Mashonaland. The pioneer column hoisted the Union Jack at Harare⁹ on 12th September 1890. The VaShona did not realise that they had been "conquered". This occupation by the British was a new experience to them. More than a clash of arms, it was a clash of cultures and values which left the people disillusioned and lost. The two Communities did not communicate on such fundamental matters as treaties, war, occupation, conquest and flag-raising or surrender terms. For instance, it is in fact, reported that the pioneer column was welcomed by the local Africans in 1890 in the following way: The pioneer column soldiers awoke on September 13, 1890 to find a red heifer tied to the flag pole on which they had flown the Union Jack the night before. A young girl came to them about midday and explained

that the heifer was a sign of welcome. She indicated that the Chief expected nothing in return, except perhaps a few guns when the "hunters were ready to go back" at the end of the hunting Season. When the strangers had not gone away by the end of the Second hunting season, they found a black bullock tied to the flag pole on the second anniversary of their encampment at Barare. In the symbolic language of the Va Shona, the bullock was intended to say: "The strangers have overstayed their welcome. Now they must go."¹⁰ The occupation began to have meaning for the Va Shonas in 1895-6 when the settlers began to redistribute the land and to organise an administration. The resistance which started then and the efforts to clear the settler invaders have been designated the "Matabele Rebellion of 1893" and the "Mashona Rebellion of 1897" by historians. This war of self-defence" officially ended" with what are referred to as the Massacres of 1897. Individual Chiefs who continued to speak up were eliminated until there was no indigenous leadership that was genuine from the people and which they trusted.

By 1900, British military superiority had crushed any African pockets of resistance to the

invasion. But the resistance and self-defence continued and emerged ultimately as the "institution" of liberation Movements. In October 1922, a referendum of whites only was held to decide between joining the Union of South Africa or becoming a self-governing colony of Britain. The whites chose the latter. On 12th September 1923, after this referendum, Rhodesia was formally annexed¹¹ to the Dominions as a Colony and on 1st October 1923, by Letters Patent, the colony was granted "full Self-government", Save for legislation affecting African¹² rights, railways and international affairs.

After 1923, the most remarkable thing that happened was the formation of the Federation of the two Rhodesias and Nyasaland. This did not change the plight of the African. In 1961 the Europeans worked out a Constitution with the British Government. In this Constitution, fifty European Members of the legislature were to represent about 217,000 Europeans and fifteen Africans. Following the Declaration on the Granting of Independence to Colonial Countries and Peoples in 1960, in 1962, the General¹³ Assembly of the

United Nations affirmed that Southern Rhodesia was a non-self-governing territory within the meaning of Chapter XI of the Charter while the United Kingdom maintained that Southern Rhodesia was self-governing and that therefore it¹⁴ had no power to intervene in Rhodesia's internal affairs.

On 11 November 1965, the Rhodesian Government unilaterally proclaimed independence in order to forestall or pre-empt the "Granting of independence" to Africans by the British Government. On 17th November, 1965, the British Parliament intervened and declared its Sovereignty in the colony unaffected by the unilateral declaration of independence. By Section I of the Southern Rhodesia Act, it enacted that "Southern¹⁵ Rhodesia continues to be part of Her Majesty's dominions, and that the government and Parliament of the United Kingdom have responsibility heretofore and in respect of it." On 20th November 1965, the Security¹⁶ Council of the United Nations asked member states not to provide Rhodesia with arms, equipment and military material and to do their utmost to break off all economic relations including the institution of an embargo on oil and petroleum products.

On December 16, 1965, the Security¹⁷ Council meeting convened at the request of the United Kingdom imposed selective mandatory sanctions aimed at stopping Rhodesia's trade in certain key commodities and cutting off its supply of oil. In November 1968, the General Assembly¹⁸ urged States to render moral and material assistance to the "national liberation Movements of Zimbabwe." Similar resolutions were adopted in 1969. Again in the same year 1969 another Constitution was adopted which provided for fifty whites and sixteen Africans in Parliament. On March 2, 1970, Rhodesia proclaimed itself a Republic.

In December 1974, representatives of the Rhodesian government met with leaders of the Zimbabwe Liberation Movements for the first time in Lusaka, Zambia, to discuss the possibility of a Constitutional Conference on the future of Rhodesia. Further discussions were held in Geneva, under the auspices of the British Government from October to December 1976, focusing on proposals for an interim government pending independence. Both the Lusaka and Geneva talks ended without an agreement. In 1975, the General Assembly of the

United Nations demanded that the Rhodesian government Stop executing freedom fighters, release unconditionally all political prisoners, detainees, restrictees, remove all restrictions on political activities and discontinue repressive measures. The latest development in the Rhodesian political history is the agreement for an internal Settlement between the Rhodesia Front Party, United African National Council, Zimbabwe African National Union and Zimbabwe United Peoples Organisation signed on 3rd March 1978 leading to elections on 20th April 1979. The election was won by the United African National Council led by Bishop Muzorewa who formed a "government"¹⁹ physically dominated by the blacks.

This is a brief political history of Rhodesia and it is hoped that it will provide us with the raw materials and background to the Rhodesian liberation problem. It is now proposed to look at the historical development of what technically came to be called liberation Movements, their genesis, purpose and aim.

Liberation Movements of Rhodesia

Nyandoro's and the anonymous freedom fighters statements quoted in the introduction to this dissertation are apt and important here. Nyandoro says that resistance to foreign rule in Zimbabwe started not in 1967, nor in the post-war period, but when the first British Settlers invaded the country, and that this resistance has continued in one form or another upto today. "The anonymous freedom fighter on trial talked of going to fulfil the aims of the war abandoned in 1897. These statements serve to link the current liberation process with the events of 1890. This means that Liberation Movements are directly related to the events of 1890. This is so because, as will soon be shown, from the time of the "Rebellions" in the 1890s there was never a time and there has never been a time when the foreign rule was accepted. There was never a break in the continuity of the resistance. What was and has been different is the nature or form of the resistance from time to time, as a matter of strategy.

There are three main recorded reasons for the "rebellions" in the 1890s, and they are still

valid as part of the explanation of the liberation movements. This further strengthens the point that the liberation struggle did not start in 1967. The first and most important of all the reasons was the land question and its redistribution to the Settlers at the expense of the local inhabitants. Second was the appropriation of the cattle of the Africans by the settlers and third was forced labour. To the indigeneous people, the cause of all this was foreign rule. So, the fighting, designated rebellions started.

After the defeat of the Africans in 1897, there was no remarkable resistance, although there was some sporadic fighting. The decade from 1900 to 1910 was characterised by a lull in military activities on the part of the local people. Meanwhile, trying to mellow and penetrate African Society was the Christian Missionary with schools and Christianity, in advance of the Settler soldier and tax collector. In 1911, a new or different approach was launched against the British Settler invaders. In Salisbury, a Mr. Chirimuhuta formed the Southern Rhodesia Native Association, which was essentially a channel for protest against various arbitrary Settler measures.

In 1919, the African voters League was organised by Mr. Jerry Sobantu in order to give blacks a voice in the developing "democracy". In 1920, the Rhodesian Bantu Voters Association and the Southern Rhodesia Native Welfare Association were formed to campaign for the rights of Africans to vote and to cater for the general welfare of the African.

In 1924, a Mr. Ndlovu introduced the Industrial and Commercial Workers Union (ICU) in Bulawayo. Initially called the Bantu Congress, it subsequently became the African National Congress of Southern Rhodesia, being more reformist than its South African counterpart. This trade Union Movement dominated the African political scene upto about 1940. It appealed and fought for justice in industrial labour relations and resisted such laws as discriminated against Africans, the most remarkable of which was the law preventing Africans from walking on stoops and pavements on which the British Settlers walked.

In 1930, the British Settlers passed the Land Apportionment Act, similar to the South African Native Land Act of 1913, the common purpose of which was to give at least 49% of the

fertile land to the Settlers. Africans protested against this through the Bantu Congress led by Reverend Samkange and Mr. Jacha. In 1947, the British African Voice Association was founded to keep Africans politically alive and was banned in 1952. In 1953, an All African Convention was formed to fight the formation of the federation but it fell apart in 1954. In 1956 a Youth League was founded by George Nyandoro,²⁰ James Chikwano and Edson Sithole.

All these political organisations, since 1910, sought to achieve their political objective, to regain their independence from the Settlers by Constitutional means, for logistics reasons as Nyandoro says in his statement quoted in the introduction.

In 1957, a new African National Congress of Southern Rhodesia was formed out of the Youth League and Nkomo's then Bulawayo based African National Congress. This party was banned in 1959. The approach of this party like its predecessors, was reformist. It pleaded with the settlers not to impose oppressive laws but in vain. It was banned on the pretext that it was

working with the Congress of Nyasaland and Northern Rhodesia, and declared by a government Commission to be a Subversive organisation committed to a policy of violence. In January 1960, the National Democratic Party was formed and banned in December 1961. In the same year 1961 in December, Nkomo formed the Zimbabwe African Peoples Union and it was banned in September 1962 and outlawed. In the same year 1962, a group of young Africans were sent abroad to begin military training in Algeria, China, Czechoslovakia and Ghana. They were to form the first Cadres of the Zimbabwe liberation army.

On 8 August 1963, the Zimbabwe African National Union was formed by the Reverend Ndabawind Sitole who stated the objectives of the party as follows: "African politics in Zimbabwe, as well as in European ruled Africa began as 'reformist politics', but now we have entered the phase of "take-over" politics, as it is impossible for the present white minority to rule Zimbabwe for the benefit of the voteless African majority. We have entered the period of confrontation. ZANU represents the fighting spirit which began with an imposed rule in 1890 and

shows the unity of the spirit between those who have gone and those who are still living. We have a duty to ourselves and to unborn generations of Zimbabwe, and the duty to free Zimbabwe. We are our own liberators."²¹ The significance of this statement is that there is a patent preference for resorting to the armed confrontation methods of the 1890s in order to force a surrender of political power from the settlers to the indigenous blacks. This implies that Liberation Movements existed in Rhodesia since the 1890s. What differs only are the methods of forcing a surrender of power. Force was used from 1890 to about 1910. From 1910 to about 1957, a reformist policy was tried in vain. And from 1957 unto the time of writing we see a resort to armed force and confrontation. Because of this type of method, ZANU and Xhomo's Peoples Caretaker Party were banned and outlawed in August 1964. The leaders were detained, and the parties went underground and launched a guerrilla type of armed Confrontation from neighbouring states.

The next remarkable episode in the history of the liberation movements was the split of the nationalists resulting in ZANU led by

Robert Mugabe which forms the Patriotic Front together with Joshua Mqomo's ZAPU. Ndabaningi Sithole leads another faction of ZANU. Another group of fighters followed Bishop Muzonera into the United African National Council. All of them are concerned with the objective of majority rule, but differ in approaches. The Patriotic Front is "unconstitutional" as far as the Rhodesian government is concerned.

This was a brief history of Rhodesia, plus part of its liberation movements. We now move to a brief history of South West Africa and its liberation movements.

South West Africa.

The German control of South West Africa started with the declaration of a German Protectorate in the territory in 1884. By 1903, the Germans had taken more than half of the Herero cattle. This caused an uprising which resulted in the Herero - German war of 1904-7 in which ⁹²60,000 Hereros were killed for the loss of 2,000 Germans. As a result of this defeat, South West Africa became a colony of Germany. The Hereros were banned by law from raising cattle and this transferred them into cheap labour for the Germans.

who were already settling on the lands.

On the outbreak of the World War I, South African forces, as a component part of the British Empire Forces, attacked the Germans in South West Africa and succeeded in routing them in 1915. Until the Paris Peace Conference of 1919, South African forces remained in occupation of the territory on behalf of the Principal Allied and Associated Powers of which the British Empire was a member. The territory was ruled by martial law from 1915-1920.

Under Article 119 of the Treaty of Versailles 1919, Germany renounced all her "rights" in respect of the territory of South West Africa in favour of the Principal Allied and Associated Powers. In accordance with Article²³ 22 of the same treaty, the territory became a mandate, South Africa being appointed as the Mandatory in 1920.

The mandate system was formed as an attempt to reconcile the following three issues. First, there was the refusal to return the Colonies to Germany; Second the principle of non-annexation or cession, and third, the comparative or relative

underdeveloped state of the territories making it impracticable to grant them independence. A compromise of these three issues led to the creation of the Mandate system.

Basically, the system involved the administration of each of these territories by a developed territory, the Mandatory, on behalf of the League of Nations. The League itself retained reversionary and supervisory rights over each territory. The obligations of the mandatory included the promotion of the moral and material well-being of the inhabitants of the territory and their Social progress. Article 22 states that since the territory was one of those inhabited by peoples not yet able to stand by themselves under the strenuous Conditions of the modern world, there should be applied to it the principle that the well-being and development of such peoples form a sacred trust of civilization. It was also provided that South West Africa could be administered as an integral portion of the territory of South Africa, subject to certain safeguards in favour of the indigenous population.

South West Africa was thus not a colony but a dependent territory in which South Africa was legally bound to perform disinterested service to civilisation. Its administration as an "integral part" was merely for Convenience purposes, for the integrity of the territory was not to be compromised and the League cannot be imagined as having made South West Africa an integral part of South Africa, for that would defeat and contradict the whole purpose or idea of a mandate, that is, to lead the territory to mature statehood.

International interest in South West Africa became great from 1946 onwards, when the General Assembly of the United Nations rejected South Africa's proposal to annex the territory and recommended instead that the territory be placed under the international trusteeship system. As deadlock ensued over this, the General Assembly asked the International Court of Justice to give an Advisory Opinion. On 11th July 1950, the Court advised that South Africa remained bound by the obligation of Article 22 of the Covenant and the Mandate; that while South Africa could bring South West Africa within the

trusteeship system of the United Nations, **She** was not legally obliged to do so; and that South Africa alone could not modify the international status of the territory, the competence to do this resting with South Africa and the United Nations together.²⁴

In 1953, the General Assembly called upon South Africa to place the territory under the United Nations Trusteeship system and strongly criticised South Africa's administration of the territory, especially its policies of apartheid which it regarded as a violation of Article 2 of the Mandate and 22 of the Covenant.

In July 1966, the International Court of Justice ruled that Ethiopia and Liberia, which had, since 1960, instituted proceedings requesting the Court to find that South Africa had been acting in contravention of the mandate by not accepting United Nations Supervisory authority and by administering the territory in a manner contrary to the mandate, had not established legal interest in the subject-matter of their claims.

In October 1966, the General Assembly terminated South Africa's mandate, declaring that

South Africa had failed to carry out its responsibilities. It affirmed what it called the right of Namibians to Self-determination, freedom and independence. In May 1967, the General Assembly established a United Nations Council for Namibia as the legal authority for Namibia, to administer the territory until independence. From then on, the United Nations assumed a direct responsibility for the administration of the territory. The United Nations Council for Namibia was to be aided by a Special Commissioner, for the same purpose of administering the territory until independence.

In 1971, the International²⁵ Court of Justice stated that the continued presence of South Africa in Namibia was illegal and that South Africa was under an obligation to withdraw immediately and put an end to its occupation of the territory. It referred to the people of Namibia as a "jural entity" and as an "injured entity". It advised that States should refrain from any acts or dealings with South Africa, which would suggest recognition of the legality of the presence of South Africa in Namibia.

On 27 September 1974, the Council for Namibia enacted a Decree for the Protection of Natural Resources of Namibians, aimed at Securing for the Namibians "adequate protection of the natural wealth and resources of the territory which is rightfully theirs."²⁶

Under this decree, no person or entity may search for, take or distribute any natural resource found in Namibia without the Council's permission, and any person or entity contravening the decree may be held liable for damages by the future government of an independent Namibia. The Council also enacted a plan for the establishment of the Institute for Namibia to provide the necessary education and training for Namibians. The Institute was inaugurated in August 1976 and is located in Lusaka, Zambia.

SWAPO

In April 1959, SWAPO was founded by Sam Nujoma and Jacobs Kuanhous as the Ovambo Land Peoples Organisation. It was officially launched as a national party in 1960 by Nujoma and Herman Ja Toivo.

The International Court of Justice

ruling of 1966 and the subsequent apparent impotence of the United Nations to do anything more than vote platonic resolutions concerning the illegality of continuing South African rule gave strong impetus to the organisation of an armed struggle, in the technical sense of a Liberation Movement, against the South African regime, for since 1907 when the South West African indigenes were defeated by the Germans and subsequently administered by South Africa after the First World War, and since the formation of SWAPO, South West African indigenes, have been engaged in reformist type of politics like it happened in Rhodesia. From 1966 onwards, SWAPO had and has continued with a policy of armed struggle become the main form of resistance to South African rule. In 1973, SWAPO was recognised by the General Assembly of the United Nations as the authentic representative of the Namibian people.

This was a brief history of South West and its Liberation Movement and serves as a background to the determination being undertaken in this dissertation. We now move to South Africa and its Liberation Movements.

South Africa.

Africans moved into what is now South Africa many centuries before Europeans set foot in that country and carbon dating of some finds evidences that some culture of iron-using blacks flourished around A.D. 1100 West of the Fish River.²⁷

In 1652, Jan Van Riebeeck landed at the Table Bay in order to provide the East India Ships with herbs, meat, water and other needed refreshments. This was the beginning of European settlement in what is now South Africa. For centuries, the people of South Africa fought wars of resistance against the Europeans. These wars of reached their greatest intensity in the 19th Century. By 1880 the White colonists had established their rule over South Africa. In 1906 another remarkable war of resistance by the Zulus, commonly called the "Bambata Rebellion", broke out. The Zulus were defeated.

The Anglo-Boer war broke out from 1899-1902. The Boers were defeated and almost all of South Africa became British colonies in 1902.

In 1910, the British government granted self-government to the white minority, creating the Union of South Africa, with an all white Parliament.

The first African political organisation of a non-violent nature, Imbushu Yama Africa, that is, the Union of Africans, was formed in 1886, in the Eastern Cape, then part of the British Cape Colony. In spite of this non-violent attitude, like in the Rhodesian case, non-violence was not a deeply-held commitment; rather it was a tactical necessity in view of the superior weapons of the Europeans.

In 1912, the African National Congress was formed with the main object of building a United Nation to fight for its rights in South Africa. The Africans continued on using non-violence in their protest, in spite of the repression of these peaceful protests by violence on the part of the government. Non-violence politics was abandoned with the formation of Umkonto²⁸ We Sizwe on 16 December 1961, which marked a decision by the Africans to take up arms against the white minority government.

Perhaps the main problem of South Africa and the reasons for the fighting are epitomised in the following two statements.

"I prefer to call a spade a spade. Let us boldly say: in the past we have made mistakes about native representation. We intend to change all that We are going to be lords of this people and keep them in a subject position. ... They should not have the franchise because we do not want them on an equality with us These are my politics on native affairs and these are the politics of South Africa We must adopt a system of despotism, such as works so well in India, in our relations with the barbarians of South Africa."²⁹ This statement was made by Cecil John Rhodes, the then Premier of the British Colony, when he was introducing a "Native Bill for Africa" in 1884. Rhodes, at the same time went on to say, "Our idea is that the natives should be kept in these native reserves and not mixed with the white man at all."³⁰ This is what is happening in South Africa now. The system is now institutionalised as the policy of "Apartheid."

What then are the aims of the liberation Movements of South Africa? Robert Sobukwe, former

president of Pan African Congress of South Africa said: "The Chief aims of the PAC are the complete overthrow of white domination and the establishment of a non-racial democracy in South Africa as well as throughout the whole of Southern Africa."³¹

This statement is very significant in that it summarises the aims of all the Liberation Movements in Southern Africa. They are all directed for the complete overthrow of white domination and the transfer of political power to the majority indigenes and the establishment of non-racial governments. They all accept that the settlers are entitled to participate in the government of these territories. This is why it was pointed out in the introduction that problems of law and fact for the Rhodesian Case are generally representative of the situations in South and South West Africa.

The above brief historical introduction of the three territories gives us the background for our determination. It makes it easier now to have an intelligible determination of the status in international law of the Royal Chartered British South Africa Company, the Rudd Concession

and the legality or otherwise of the initial occupation of the territories by the Settlers.

Section 2. The British South Africa Company and the Royal Charter in International Law

The British South Africa Company was incorporated by a Royal Charter on 29th October 1889. The objects of the Company are stated in Section I. But for the sake of easy reference, we repeat the statement of the objects. The Company, then, has its objects the following:

"To undertake and carry on the government or administration of any territories, districts, or places, in Africa, and generally to exercise all rights and powers granted by or exercisable under the Charter, and particularly to improve, develop and cultivate, any lands included within the territories of the Company, to settle any such territories, and lands, and to aid and promote immigration, to grant lands for terms of years or in perpetuity, and either absolutely or by way of mortgage or otherwise."³²

From this, it is clear that the Company was authorized, with certain reservations, to make treaties and promulgate laws as well as to

maintain a police force and undertake public works. And yet in April 1888, as we saw in Section one, Lord Salisbury, of the Foreign office, on behalf of the British Government had asserted to Portugal, Lobengula's Sovereignty in the most unequivocal terms. How could a Royal Charter from the British Crown give anyone power to maintain police forces, levy taxes, or try a man for his life in Lobengula's territory? This supposed anti-colonialism was inconsistent with the British government recognition of Lobengula's Sovereignty over Mashonaland and Matabeleland.

³³
Fawcett says that, in fact Southern Rhodesia remained a protectorate of Britain until its annexation in 1923. Assuming that this alleged existence of a protectorate is true, it would still be inconsistent with the total recognition of Lobengula as the Sovereign of Mashonaland and Matabeleland by the British Government, and also because a protectorate is not a colony but a sovereign state. Some writers suggest that the Moffat Treaty was a Protection Treaty in the technical sense that, it made Rhodesia a Protectorate of the British Government. Before commenting on

this Moffat Treaty, it is helpful to say something about the institution of protection or protectorates.

A protected state or protectorate arises when a state puts itself by a treaty under the protection of a strong and powerful state, so that, the conduct of its most important international business and decisions on high policy are left to the protecting state.³⁴ Although not completely independent, a protected state enjoys a sufficient measure of Sovereignty to claim jurisdictional immunities in the territory of another state and it remains a state under international Law.³⁶

These protectorates are not based on a uniform pattern, each case depends on its special circumstances, particularly on the form of protectorate and the conditions under which the protectorate is recognised by third powers as against whom it is intended to rely on the treaty of protection.

In the case of the Moffat Treaty, what happened was that, there were stories that the Germans, who then had South West Africa and what was called German East Africa wanted to cut off

Rhodes from proceeding on his Cape to Cairo venture by colonising what is now Rhodesia. To this, Corn²⁷ says that there was little truth and that the Germans had their hands full with South West Africa, but Rhodes thought that no risk should be taken. He therefore suggested to Robinson³⁵ a kind of arrangement whereby Lobengula should undertake not to make any treaties without British consent, to which Robinson agreed. The Matabele for their part realised that they might receive aid against the Transvaalers and possibly even against the Portuguese who continued to claim Mashonaland.

On February 11, 1888, Lobengula signed what came to be known as the Moffat Treaty. It provided in the first article for peace and amity between Her Majesty and the Matabele, and in the Second, that Lobengula would "refrain from entering into any correspondence or treaty with any foreign state or Power to sell, alienate or cede the whole or any part of the country under his Chieftainship without the previous knowledge and sanction of Her Majesty's High Commissioner for South Africa."³⁹ This strongly suggests a protectorate, since

Lobengula has signed away the right to conduct an independent foreign policy. However, the following report by Sir Hercules Robinson, in a telegram received in the Colonial Office on 2nd April 1888, discounts the suggestion of a protectorate. "Transvaal has been trying to persuade Lobengula to accept their protection and a Resident but he refused. They will not of course like our success but I do not apprehend complications with them: agreement is simply promise by Lo Bengula not to give away his country over our heads and does not commit Her Majesty's Government to defence of Lo Bengula in case of attack. Lo Bengula is being urged on many sides to make alliances and grant Concessions and it will be a help to him to be able to point to agreement."⁴⁰

From this short account, it is clear that, Southern Rhodesia was never a protectorate of Britain because no such treaty of protection was entered into. In fact from the time of the Pioneer column in 1890, a difference of two years since the Moffat Treaty was signed, upto 1923, there was fighting and various types of resistances against the Settlers, although the Shonas

and Ndebeles had been defeated by 1910. The point being made here is that, there was still a state of war between the British Settlers and the black indigenes. How then could the British Government protect the people it was at war with and against whom was it fighting? The Moffat Treaty, as we have just seen dealt with the danger from foreign powers and Concession seekers and not a treaty of protection. It was essentially an agreement to the effect that Lobengula would not grant Concessions to any seekers. It had nothing to do with the surrender of jurisdiction on his foreign policy. The agreement was a diplomatic device to forestall or preempt other concession seekers particularly in the mining venture.

So, strictly speaking, the British government, through its settlers had no legal right to rule Southern Rhodesia either as a colony or protectorate or generally as it purported to do as is evident from the objects clause quoted above, of the Chartered British South Africa Company. A Royal Charter from the British Crown per se or under the Foreign Jurisdiction Act 1890 or the British Parliament per se has no inherent power or authority in international law, to sanction the imposition of its

rule on foreign Sovereign territories. British legislation or Royal Prerogative could not in international law effectively and validly sanction the colonisation of foreign territories. British Supremacy of Parliament did not and does not legally extend to other Sovereign territories like the one ruled by Lobengula whom they had just recognised as a Sovereign. If municipal legislations per se had this effect of extending to other sovereign territories, it would be a violation of the rule of international law which enjoins states to respect the territorial integrity and Sovereignty of other states, and there would be chaos in the world.

It is for this same reason that it is considered legally wrong to talk of the "Mashona Rebellion of 1897," the "Matebele Rebellion of 1893", the "Herero Rebellion of 1904-1907" or "the Bambata Rebellion of 1906" in South Africa. There could never have been anything like a rebellion at the time, even later on, because no such thing as British or Germany legal authority existed or was accepted by the indigenes in Southern Rhodesia. The same applies to the other

two territories in respect of other Powers. It was the indigenous people who exercised sovereignty, as we saw the case of Lobengula being recognised as Sovereign authority, over their territory at the time. And to call or describe the armed resistance, which might be called Self-defence in law, as a "rebellion" is misplaced and misleading in law.

Coming back to the Royal Chartered British South Africa Company, none of the Chartered Companies of the period whether British or otherwise, was considered endowed with international personality or to be subject of international law. But they were regarded as agents or organs of the States which had granted them their Charters. Whatever they did or acquired, for instance, territory, they did on behalf of their parent state and their charters were ultimately revocable by the parent⁴¹ state. They had, however, wide discretionary powers and used them in concluding treaties with or making war on local rulers. Some of these treaties⁴² make sense only on the assumption that the colonial company acknowledged the Sovereignty and international personality of the local rulers concerned. As

organs or agents of their parent states, it is clear that these Chartered Companies had ad hoc international capacity, that is, certain acts enforced by them produced consequences in international law and they had a certain status in international law. (The point being advanced here is that, the Company itself, had no international personality as such. The international personality was that of and vested in the parent state, and in our case of the British South Africa Company, it was vested in the United Kingdom exclusively. The Company and the parent state in this case are one in international law. It is clear that the United Kingdom would have borne international responsibility to other powers for the acts of the Company, as the latter was a "Subordinate government" with no capacity for the conduct of foreign affairs. This same "Subordinate government" is the one that was supposedly and purportedly given "full Self-government in 1923, after the 1922 referendum of whites only. The full-self-government was given to this white minority and had no legal validity or effect on the sovereign Africans who did not take part in it and as far as the Settlers were concerned, they

were objects of of law and irrelevant. In any case, the indigenous people, could not [logically] be given independence or full Self-government [which they had already] by a foreign power. We have already established that, foreign powers cannot do this to other Sovereign territories. It is for this same reason that to black Rhodesians and their Liberation Movements, Britain and the Rhodesian government led by the white minority are the same thing. The white minority led government is analogised to the "Subordinate government" referred to above.

The point and significance of the above discussion, which was mainly concerned about the status in international law of the Royal Chartered British South Africa Company, is that, for the purposes of colonisation, there was no separation between the United Kingdom government and the Royal Chartered British South Africa Company. Second, that, whatever was "acquired" by the Company as agent or organ of the principal, the latter which was the British government, was *invalid, null and void ab initio in international law*, because as we have established above, the British Government either through its Parliament or Royal

Prerogative had no legal power or capacity to sanction the ruling or subjection of another Sovereign people or territory against its will. Any purported Settlement or occupation or exercise of Sovereign power was therefore illegal in international law, because there was no legal basis for it. This means that the indigenes did not lose their sovereignty. Therefore the indigenous people have a legal basis for their claim to the territory and it may be submitted that Liberation Movements are defending this Sovereignty. They are fighting in Self-defence, that is, they are continuing the operations started in the 1890s as Nyandoro⁴³ and Sithole⁴⁴ only pointed out in their respective Statements. From this point of view, it is difficult to escape the conclusion that Liberation Movements are justified in international law. However, it is also important to determine the status and effect of the Rudd Concession in international law.

Section 3. The Rudd Concession in International Law

On October 30, 1888, Lobengula "agreed" to the Rudd Concession. The British South Africa

Company based its claim to occupy Mahonaland on this disputed Rudd Concession alleged to have been signed by Iobonule and by which the way was paved for the British settlement. This Concession provided for the payment to Iobonule and his heirs and successors of \$100 a month, for an unspecified period; 1,000 breech-loading rifles, and an armed steamboat on the Nerbezi, in consideration for which "I, Iobonule, King of Iataholand and Lesionland and other adjoining territories, in the exercise of my Sovereign powers and in the presence and with the consent of my Council of Indunas do hereby grant and assign..... complete and exclusive charge over all metals and minerals situated and contained in my Kingdoms, principalities and dominions, together with full power, to do all things they may deem necessary to win and procure the same....

..... and whereas I have been much molested of late by divers persons seeking to obtain grants and concessions of land and mining rights..

..... I do hereby authorise the said grantees....

..... to take all necessary and lawful steps to exclude from my Kingdoms..... all persons seeking land, metals and minerals and I

undertake to grant no concessions of land or mining rights without their concurrence."⁴⁵

This concession, as can be ascertained from the above quoted part of it, gave the grantees mining rights only, although there is that indefinite phrase: "all things they may deem necessary to win and procure the same". It also made it clear that no one else was to have either land or mining rights. There is no mention at all of jurisdiction and there was no concession of jurisdiction as far as the writer was able to ascertain. And yet, this concession, that is permission to dig in Mashonaland was interpreted as permission to occupy. Lobengula never ceded or delegated any authority that had to do with sovereignty. In fact that was the last thing he would do. Permission to dig was all that he granted. In fact after becoming aware of the misinterpretation of the Concession, Lobengula purported to withdraw it: "I have since had a meeting with my Indunas and they will not recognise the paper."⁴⁶ By September 1889, Lobengula had repudiated the Concession. In spite of this, the pioneer column went ahead and hoisted the

Union Jack, a symbol of sovereignty, in Salisbury. To impose and enforce law is a sovereign right, which the Company on behalf of the British government was in theory empowered to exercise only when the right had been delegated by a head of State. Johanna, whom they had recognised as head of state, had given no such powers. Remaining concession can only be granted by a state and a state cannot give or grant itself away in a concession.

But what exactly is the legal nature, and effect of a Concession in international law? A Concession agreement is in law an instrument concluded by a state and a private individual providing for the grant by the state to the individual of certain rights or powers which normally would be exercised by the state.⁴⁷ Usually the term is used to refer to agreements concluded between a state and an alien person or individual, or corporation for developing the natural resources belonging to the state. Although a concession agreement looks very much like a treaty both in the negotiation and in drafting, and some authorities tend to assimilate it to treaties, it is not an agreement between two subjects of international

Law, but between a state and an alien individual and cannot qualify to be regarded as a treaty. The Rudd Concession was an agreement of this nature. This Concession, it is submitted, would primarily be a municipal law contract.⁴⁸ However, if the concession agreement itself provides that international law will govern it, then, that will be the case. Otherwise its significance in international Law would be that of any other Concession, that is, that the state of nationality of the concession-holders would be entitled to exercise diplomatic protection in the event of a failure to honour the concession. And yet this is the kind of "agreement" that was used to occupy or colonise the present day Rhodesia. The view that a Concession agreement is ordinarily not a treaty is supported by the decision of the international Court of Justice in the Anglo-Iranian⁴⁹ Case rejecting the British contention that the 1933 Persian Settlement arrived at between the Persian Government and the Anglo-Persian Oil Company as a result of British intervention had a double character: both a Concessionary agreement and a treaty between two governments. Would the British government argue like this in relation to the Rudd Concession? The International Court of

Justice ruled that the agreement was nothing more than a Concession agreement between a government and a foreign corporation. The British government was not a party to it. The Court further held that the document bearing the signatures of the Indian Government and the Company had a single purpose of regulating the relations between that government and the Company in regard to the concession, and not to regulate in any way the relations between the two states. The significance of this expounded law to our denomination is that it shows that the British government could not successfully claim that the Rudd Concession was a treaty between it and Lohenzula giving it never to occupy Masheraland. The Rudd Concession, according to this legal position was therefore a municipal law agreement between a Sovereign "state" and individuals and it did not have the effect of a treaty. The Concession here must not be confused with the Company.

But was the repudiation of the Rudd Concession in September 1889 by Lohenzula and his Indians valid in international law? In other words, can a state abrogate or terminate a concession agreement when and if it chooses on its own terms?

The answer is that, a State's power to takeover or repudiate a concession by legislation is recognised as a lawful exercise of Sovereignty and Lobengula did this by "legislation" when he said "I have since had a meeting with my Indunas and they will not recognise the paper."⁵⁰ The only requirement is that such legislation should make provision for payment of fair compensation.

Lobengula could possibly have done this since he was desperate for peace, had the British South Africa Company not gone ahead in using a defective concession. From this, it is clear that, the Rudd Concession did not have any legally valid effect of conferring title to territorial sovereignty of Mashonaland or any parts thereof to the Chartered Company or the British government. Neither the Company as an independent legal entity or as an agent of the British government, nor the British government itself, or a combination of the two had any right recognised by international law to colonise the territory which is now Rhodesia and none of them acquired title to territorial Sovereignty as a result of the Rudd Concession. Therefore, the Settlers in Rhodesia

cannot claim any right to dominate the government because of the Rudd Concession. They have no legal basis for their holding on to power. As we saw in the previous section, the indigenes never lost their sovereignty strictly speaking, though they might have lost control or possession of the territory. They retained the title. It can be said that the claim of the indigenes through their liberation Movements is based on this title. From this point of view, it is again inescapable to conclude that liberation Movements are justified in international law. In spite of these legal deficiencies in their claims to dominate the territories, the Settlers went ahead. What other legal justification did they have for this? Is there any possible explanation of this? Yes, they tried to explain this on the theory that colonial peoples or their states were not subjects but objects of international law. It is important to examine this explanation closely, in order to find out whether, through it, the settlers acquired legally valid title to the Rhodesian territory. We look at this in Section four which looks at colonialism, African "states" and international Law.

Section 4. Colonialism and African States
in International Law.

African "states"⁵¹ were regarded as colonies and according to international law, the internal and external sovereignty of a colony is completely vested in the metropolitan country. This means that together with the metropolitan country, they form a unit which continues as such until it suffers reduction in size by the assumption on the part of the colony of full responsibility. The validity of this rule of international law is not disputed, for it is essentially stating an obvious thing that a province is part of the whole country. But what is questionable and most relevant for our purposes is how that "province" came to be part of a particular country. For instance, how did Mozambique come to be a province of Portugal and designated Portuguese East Africa? The explanation is that in the eyes of the metropolitan countries, these populations and their territories were not subjects of international law and they had to be annexed at will. The issue of annexation will be discussed in Chapter two. But it is important here to point out that, it is doubted very much if it was a concept of

international law, why, because it was as a result of Municipal legislation or Royal Prerogative of another country, and as we saw in Section two, this could not be effectively extended to other Sovereign territories and subjugate them. It is for this same reason that the purported annexation⁵² of Southern Rhodesia in 1923 by the British Government, is considered by the writer, to be contrary to international law. To the positivists, there were no states in Africa. According to the positivists, whose theory prevailed in the 18th and 19th Centuries, the family of nations originated in Europe. It was exclusively within this Europe that the law of nations grew through relations between the states which adopted Christian Civilisation. According to them, one of the important consequences which resulted from the formation of the Christian Community of countries in Europe was its consolidation into a smaller club of "original" states which assumed the power of admission of other states, either within the area of the same civilization or outside it. (This implies the adoption of a constitutive theory of recognition according to which a state acquired international personality

only through recognition by the existing States. As a result of this, African states did not exist until they were recognised by the European states. And as we know recognition depends on the discretion and interests of the recognising states, it is obvious that because of their Commercial interests, European states could not recognise African territories as states, for that would be incompatible with their colonial venture, and their venture would be a violation of the territorial sovereignty of such European states. This attitude was also partly due to a number of reasons approximating to ignorance. Europeans were accustomed to studying history through written records and for large parts of Africa no such documents existed. Another difficulty which bedevilled European understanding of Africa, was that 19th Century Europe had become so used to seeing political power embodied in national states that Europeans found it almost impossible to recognise any other form of political organisation, and came to regard the "absence" of identifiable states as proof of anarchy. Even with this problem, we saw that what is Rhodesia now was part of an empire and later in the 19th Century, the British

recognised Ichenjula as Sovereign of that identifiable territory. And there can be no sovereign without a State, for both "State" and "Sovereign" are concepts of international law. So, what is now Rhodesia was a State at the time the British attempted to annex it through its municipal law. This of course was illegal in international law as established above. There was no such thing as colonial international law. Colonial "Law" was not international law at all, neither was it inter-state law, but instead it was intra-state law. This means that no international law was being applied, because imperialism as that of the Roman Empire or British Empire was and is incompatible with the law of nations or international law, for it denied statehood to prospective states. This means that our purported annexation or occupation based on the ground that in Africa there were no states or subjects of international law but a mosaic of tribes, was illegal in international law. No title to territorial Sovereignty was therefore acquired through the use of these positivist theories.

Summary of Chapter I.

This Chapter has established the following points. That, from the history given, liberation Movements are not new at all although the designation "liberation Movements" has now acquired a technical Connotation. They date or relate back to the time the settlers invaded their territories. Their operations can be rightly designated Self-defence, Second, that the Royal Charter, the Royal Chartered British South Africa Company and the Rudd Concession did not have the effect of transferring title to the territorial Sovereignty from the indigenes to the settlers, at least in international law. This means that the indigenes never lost their title to the sovereignty of their territories and this title can be said to be the legal basis for the operations of liberation Movements, which in turn means that liberation Movements should be justified in international law. That imperialism which was being realised through colonialism was incompatible and contrary to the law of nations or international law and hence it was illegal as it was against the Sovereignty of other people. Therefore, colonial occupation as

defined in this chapter was illegal in international law. It had no legal basis. The legal basis pertains to the indigenous, who are fighting to protect a title recognised in international law, at least as far as this initial occupation is concerned. In so far from this point of view, it can be said that Liberation Movements are justified in international law.

There are, there are a number of methods or modes of acquisition title to territory. It is important to try and find out if title to the territories under discussion was acquired through any of these modes of acquisition, since we have established that the initial occupation was illegal in international law. This is what Chapter two is all about.

Chapter 2

Acquisition of Territory in International Law

Significance of title to Territory

Territory occupies a central place in international relations and law. It is one of the criteria recognised for statehood. It furnishes the state with the recognised setting for the exercise of its sovereign powers and according to international law, no state may lawfully attempt to exercise its sovereignty within the territory of another, for that would be a violation of the territorial integrity of another state. Territory also furnishes stability and the security that the inhabitants feel in the shelter of its recognised frontiers. Nationality depends upon a relationship of an individual to a territorial unit or state. The actual exercise of territorial jurisdiction tends to create a presumption in favour of the

right to exercise such jurisdiction. If such a defacto exercise of jurisdiction is continuous and in relation to other states, peaceful, that is to say, not contested, such a position would be as good as a title. So, when we speak of title to territory, we are not merely talking of territory in the physical or geographical sense, but also jurisdiction and sovereignty in respect of the territory. For instance, a territorial change, means not just a transference of the earth's surface and its resources from one regime to another, it usually involves a decisive change in the nationality, allegiance and way of life of a population. The legal right or title to territorial sovereignty is so important that it is capable of subsisting even when divorced from possession. This means that the territory or state or population in which is vested the right or title can fight for it on grounds of self-defence and can vindicate it before a court and be enabled to recover a possession which it will have been deprived of in fact. A title to territory, if it is to have any real significance must be at least capable of having this effect. It is the legal basis

right to exercise such jurisdiction. If such a defacto exercise of jurisdiction is continuous and in relation to other states, peaceful, that is to say, not contested, such a position would be as good as a title. So, when we speak of title to territory, we are not merely talking of territory in the physical or geographical sense, but also jurisdiction and sovereignty in respect of the territory. For instance, a territorial change, means not just a transference of the earth's surface and its resources from one regime to another, it usually involves a decisive change in the nationality, allegiance and way of life of a population. The legal right or title to territorial sovereignty is so important that it is capable of subsisting even when divorced from possession. This means that the territory or state or population in which is vested the right or title can fight for it on grounds of self-defence and can vindicate it before a court and be enabled to recover a possession which it will have been deprived of in fact. A title to territory, if it is to have any real significance must be at least capable of having this effect. It is the legal basis

the "title deeds" for a legal or legitimate claim to the territory. This is why it is important to determine in this Chapter two whether the Settlers or Indians acquired title to the territories under study. Whoever acquired or has title, has a legal basis for its claim to the territory, for we have just seen that title to territory also involves jurisdiction and sovereignty. In order therefore to be able to make a definite claim, it is useful first to look at the rules of international law governing the acquisition of territory.

Rules of International Law governing the Acquisition of title to Territory.

There are six generally recognised modes of acquisition. These are cession, prescription, occupation or accession, occupation, subjugation or conquest and adjudication. In this dissertation, the rules of international law governing acquisition by adjudication and occupation will not be discussed. Occupation or accession is irrelevant as a mode of acquisition to the nature of the acquisition being discussed because it involves acquiring a piece of land as a result of natural and/or geographical

forces and factors, and that is not in issue in this determination. Adjudication is not going to be discussed because it involves states going before a Court of law and neither the Settlers nor the indigenes used it to justify their respective exercise of jurisdiction and sovereignty in the areas under study. This leaves us with occupation, Cession, prescription and subjugation and or conquest. Each one of these will be examined separately.

Occupation is the appropriation of a territory which is not under the sovereignty of anyone or any state. It is a cardinal condition of this mode of acquisition that the territory should be *terra nullius*, that is, a territory belonging to no one at the time of the act alleged to constitute the occupation. But this does not mean that the territory should be uninhabited. For this purpose, Africans living under the so-called tribal organisations were not regarded as states and hence their territories were regarded as *terra nullius*. However, state practice of the relevant period indicates that territories inhabited by "tribes" or peoples who had a Social and

political organisation were not regarded as terra nullius.⁵⁵ In addition to this, we also saw in Chapter one that there were equivalents of states in Africa, particularly in Southern Rhodesia, as is evident from the recognition of Lobengula by the British Government as the Sovereign of what is now Rhodesia. And as we know, there is no sovereign without a state. The two always go together. South West Africa was also the equivalent of a state containing two main groups of populations, the Hereros and the Ovambos. This is evident from the recognition given to South West Africa from 1920 onwards when it was mandated. Although it was not capable of standing on its own in the "conditions of the modern world", there was that acknowledgment that Sovereignty lay with the inhabitants. The Mandate here can be analogised to the concept of a protectorate, save that in a mandate, the protector is supervised by an international organisation. Therefore, these two territories could not be said to be territories under the the Sovereignty of no-one, and hence they could not have been legally and technically occupied as such. And so, there was no occupation

and no title to territorial sovereignty was required through the mode of occupation. The case of South Africa is slightly different in this respect since whites settled there as early as 1652 and are regarded as permanently settled there as are the so-called indigenous blacks there. Although we saw in Chapter one that blacks are supposed to have settled there before the whites, the latter are now regarded as permanent as the blacks and they are about four million, unlike the case of South West Africa and Rhodesia where the permanently resident whites are not more than a quarter of a million in each case.

We do not know whether the indigenous acquired title by occupation. But what we know from history is that they were found there by the settlers and in Rhodesia the indigenous were recognised by the British government as Sovereign and also the same case with South West Africa as explained above.

The thing that is clear therefore is that the indigenous had at least a better title than the settlers.

Cession is a mode of transfer of territorial sovereignty from one state to another by an agreement or treaty, provision. But we should know

by now there are historical accounts given in Chapter one, no such treaties or agreements of the transfer of territorial sovereignty from the indigenous African rulers to the settlers were entered into. We saw that in the case of Rhodesia, the Rudd Concession and the Moffat Treaty did not have this legal effect. In South West Africa, indigenes did not sign any treaty or agreement of cession with Germany. They were defeated but no surrender terms were entered into and there was no voluntary cession of the German rule. And again South West Africa was never ceded to South Africa. We also have no evidence or recorded information to the effect that indigenous South Africans ceded South Africa to white settlers. So, in all the three territories there was no cession and therefore no title to territory was acquired by cession. So, sovereignty remained where it was found by the settlers, and that is with the indigenous people found in these territories by the Settlers.

Prescription may be defined "as the acquisition of sovereignty over a territory through continuous and undisturbed exercise of sovereignty even if during such a period as is necessary to

create under the influence of historical development the general conviction that the present condition of things is in conformity with international order."⁵⁶ Prescription may be looked at from two angles. First there is a possession⁵⁷ which has been so long established that its origins are beyond question and may be unknown. Could the settlers have acquired title through this type of prescription? The answer is no, because they did not originate in these territories and there were other people there before them. Could the indigenous Africans have acquired title through this type of prescription? The answer might be yes in the sense that nobody definitely know the origin of say the Mashonas of Rhodesia except that they are traced to the Monomotapa Empire. The same could be said of the situations prevailing in South and South West Africa; nobody can definitely tell when they were established in those territories. But one thing is clear and that these indigenous people are known to have been in these territories long before the advent of the settlers and hence have a better claim to title to territorial sovereignty than the settlers. And this better title can be said to have been acquired by the type of prescription

er discussion.

Then there is what might be called prescription⁵⁸ so-called, where the actual exercise of foreign rights over a period of time is allowed to cure a defect in title, that is, the case where the exercise of sovereign rights either rests upon defective title or is in origin wrongful or illegal. In this case, the title is acquired by means of an "adverse possession." The question is, did the settlers in Southern Africa acquire any title to these respective territories by adverse possession? The answer is, it is submitted, no. This is so because where the possession is adverse, it is not⁵⁹ sufficient that the dominant state display acts of sovereignty, there must also be an acquiescence on the part of the original sovereign, who in this case, are the indigenous Africans. If⁶⁰ the original sovereign keeps its claims alive by protest /like we saw in Nyandoro's statement in the introduction, and protests and resistance of the indigenous people to the invasion or advent of colonialism from the beginning up to date/ or the bringing of an action, there will not be that undisturbed or peaceful possession which alone enables a state to

prescribe a title. "Title by prescription arises out of a long-continued possession, where no original source of proprietary right can be shown to exist, or where possession in the first instance has been wrongful, the legitimate proprietor has neglected to assert his right or has been unable to do so."⁶¹ But as we saw in chapter one, the indigenous people in these territories never neglected to assert their right to these territories, in the case of studies from the 1890's up to date. There was no war and has never been any voluntary acceptance of the claims of the settlers to the sovereignty of these territories.

According to Fouchille⁶² the following condition, among others, must be fulfilled or satisfied before a prescriptive title can be established, that is, the possession of the prescriptive state must be exercised "l'Etat de souverain", meaning that a state cannot acquire a title by acquisitive prescription if, although administering a territory, it admits that the sovereignty over that territory belongs to another state or people, because the administering state will be, in its own admission estopped from claiming a prescriptive title to the territory.

Johnson⁶⁹ gives a case precedent for this. He says that in the period following 1878, it was difficult for Britain to acquire title by prescription over Cyprus, because by the terms of the Anglo-Turkish treaty signed at Constantinople on 4 June 1878, Britain had recognised the continuing sovereignty of the Sultan of Turkey over the island. We also saw in Chapter one that the British Government recognised Iokanula as the Sovereign but only in a or in non-hereditary and therefore the settlers would be estopped by this fact from acquiring it or posing any claim to the territory or acquisition by prescription. In the other two territories, there has been opposition since the settlers came upto date and possession maintained in the teeth of such opposition is not peaceful or undisturbed and cannot amount to prescription. So, in this case, we come to the conclusion that there was no acquisition of title to territorial sovereignty by prescription through adverse possession by the settlers. And that the indigenous populations acquired title by prescription, relating to immemorial possession, because the origins of their possession are not

definitively known. γ

We now come to the last and most controversial mode of territorial acquisition, and that is conquest and/or subjugation. This is the "acquisition" of territory by force of arms. According to the views of many authorities the conqueror must exercise effective control and manifest intention to establish his sovereignty. But conquest per se does not transfer sovereignty over occupied territory.⁶⁴ This is supported by the following view by the King's Advocate in 1764 in Britain:- "The publick law of Europe is a stranger to the idea of rights of conquest the Law of Arms may give possession but no rights of appropriation can pass or be vested securely but by Solemn Treaty and Cession between the belligerent parties and by the Acquiescence and Recognition of the rest of the Powers in Europe."⁶⁵ And on the same subject Vattel⁶⁶ says "when a nation has been entirely subdued, the question may arise whether a revolution can entitle it to the right of postliminium. The effect of postliminium in international law is the revival of a former condition of things. If a conquered people have⁶⁷ not acquiesced in their new

subjection, and have only ceased to resist from inability, such people are not subdued but defeated and oppressed. If delivered from oppression they doubtless return to their former situation. It is only in case of voluntary submission to the conqueror that a people can become subjects of the new sovereign. Then the former state is destroyed. All its relations, all its alliances are extinguished."

One thing that is clear from these two statements is that, even as early as 1764, there was and there is no such thing as "right of conquest" and conquest alone cannot vest title in the conqueror. According to the above two statements, conquest must be followed by a solemn treaty or cession, acquiescence or voluntary submission by the conquered people, and there must also be recognition by the international community of the state of affairs created. In Southern Africa, as we saw from the brief history in Chapter one, there were no solemn treaties to this effect; there was no acquiescence or voluntary submission by the defeated people and there was no cession. Short of the application of double

standards therefore, "conquest" of the indigenous populations could not have legally vested title to territorial sovereignty to the settlers or the imperial powers. This point applies in particular to Rhodesia and South West Africa. Of course the European powers could obviously recognise conquest as conferring title because it was in their interests to do so, as is evidenced by the Berlin Conference of 1884-5. But this Recognition, taken in the context of the statement by the King's advocate in 1764, does not refer to recognition of conquest, for that would be encouraging conquest, of other Sovereign states and that would cause chaos in the world. Recognition in the above context is recognition of the situation created by a solemn treaty and cession between the belligerent parties or recognition of acquiescence or voluntary submission by the conquered people. This interpretation is consistent with the first part of the statement of the King's advocate which says that "the public law of Europe is a stranger to the idea of the rights of conquest" So conquest alone cannot divest title and confer it on the conqueror. It seems that when people speak of acquiring title by conquest, either they

are not aware of the precise law or they just talk of conquest when they actually mean conquest followed by Cession or entering into an agreement on surrender terms. Otherwise conquest per se cannot be a mode of acquiring title to territory, at least in law. So, no territory could have been legally acquired in Southern Africa through conquest.

However, Oppenheim⁶⁸ adds another element to conquest. He says that to convey title conquest must be followed by a cession or by a formal act of annexation. According to him, annexation turns conquest into subjugation, which, according to him again, gives title. Brierly⁶⁹ similarly says that a declaration of the conquering states intention to annex is necessary. The new element brought in by Oppenheim and Brierly and supported by several others is "annexation." The immediate question is, is annexation, especially following conquest, without any solemn treaty, cession or voluntary submission, not contrary to international Law? Is there such a thing as the right to annex? To say that annexation is not contrary to international law is tantamount to saying that another state can legally intend to and acquire other states territory or sovereignty.

It is the same as allowing states to violate the territorial sovereignty or integrity of other states. It is submitted here that the intention of the conqueror to annex cannot be a substitute for a solemn treaty, cession, acquiescence or voluntary submission of the defeated people. So, annexation unaccompanied by these, it is submitted, is just the same as naked conquest and cannot therefore vest title. We also saw in Section two of Chapter one, that a formal piece of legislation or Royal prerogative, could not in international law effectively and validly sanction the subjugation and subjection of another population, people or sovereign state. To the writer, annexation alone without cession, acquiescence or voluntary submission seems to serve the purpose of a caveat to other foreign powers so that they would not attempt to colonise the "annexed" territory. Otherwise, annexation cannot act as a substitute for voluntary submission or acquiescence. With due respect therefore, the writer disagrees with opinions which support annexation. Annexation could have been in practice in the colonial

ere, but as discussed above, it had no legal basis in and was therefore contrary to international law.

It is curious that unlawful use of force could be used to acquire a legal title. If there is no right of conquest as established above, then one does not see how there could be a right to subjugate and annex, for that would be tantamount to formalizing the conquest.

However, the idea of an evolutionary traditional international law is towards stability, the status quo, and the present effective possession. From this kind of premise, it is asserted that the effect of any act is to be determined by the law of the time when it was done, and not of the law of the time when the claim is made. This is an aspect of the rule against retroactive laws or the retroactive application of laws. From this, it may be further argued that, unless the rule of intertemporal law is to be totally rejected, all titles by conquest must still remain valid, because if old roots of title are to be dug up and examined against the contemporary rather than the intertemporal law, there can be

a few titles that will escape without question. Yes this is a true and valid observation, but that is not the reason for not making an examination of the matter. Second, as far as the three territories under discussion are concerned, it is not a question of digging up old roots of title and examining them against the contemporary rather than the intertemporal law, because it has been established above that no title could validly be acquired by conquest even during the colonial day. The title remained with the Indians. We also established that, there was no acquisition of title by adverse possession. And so, there is no question of a retroactive application of laws or application of retroactive laws, because, even during the heyday of the colonial era, it was never legal to acquire title to territory by mere conquest. So, the conclusion come to under acquisition by conquest is that no title to the three territories under study was acquired by conquest or annexation.

Summary.

The purpose of this chapter was to determine whether or not title to territorial

sovereignty in the territories under study was acquired by the settlers or colonial powers. It has been found that there was no acquisition by Cession, prescription, occupation, and subjugation and or conquest; second that the indigenous populations retained the title which they acquired by prescription although they may have lost physical or effective possession of their respective territories. This title, they have now, is the legal basis for their claims to the exercise of sovereignty in those territories. The fighting therein is therefore, from this point of view, self-defence. Since liberation Movements represent the respective populations, they can be said to be justified in their activities which are specifically directed at the incumbent governments in an effort to force a surrender of political power.

However, liberation Movements also generally claim legal justification on the ground of Self-determination. In chapter three, we try to find out whether or not self-determination can be a legal justification for the liberation Movements, Chapter three is therefore on Self-determination and liberation Movements.

Chapter 3. Self-Determination and Liberation Movements.

The first important factor is to try and appreciate what self-determination is and what it entails. This is so because there is controversy over the exact meaning of this principle of self-determination, as well as over its content, its objectives and scope. There are also various opinions. This makes it difficult to present a universally accepted meaning and legal status for it.

In its oversimplified connotation,^{69(a)} the principle of self-determination signifies the "right" of a people to choose the form of government under which they wish to live or the sovereignty to which they wish to belong. This "right" belongs to a majority within a given territory which is under the domination of a foreign power. The basic principle within this "right" is that of national sovereignty.

It is however important to know the origin and development of this principle of Self-determination in order to find out whether or not it

has become a norm of international law. If it has become a norm of international law, then it means specific rights and obligations associated with it are recognised in law and can be lawfully defended. If it has not become a legal norm, then it means those who are fighting for self-determination cannot base that claim on law and hence cannot be justified in law. They will have a political cause and not a legal one.

The principle or concept of self-determination first appeared⁷⁰ in political thought during the early 14th Century. In those early days, it was primarily used in "domestic" politics to achieve a free constitutional order. It grew throughout the centuries as a revolutionary formula against the patrimonial concept of the state generally accepted in the middle ages. According⁷¹ to this patrimonial theory, the territory together with its inhabitants were considered sui generis, the property and possession of the ruler who, by virtue of this sovereignty exercised public power over both. Subsequently, a reaction against the patrimonial concept of the state became stronger and the idea came out that power should be vested

in the people and that they are endowed with an inalienable right to determine the state to which they would belong as well as the form of the government of that state. Here self-determination was being proclaimed as a natural right, as one of the abstract principles inherited from the theories of Locke and others:

Appeals⁷² to this principle were made as early as 1526 when the separation of Burgundy from the Crown of France was opposed on the ground that according to law no cities or provinces could be transferred to another power against the wishes of the inhabitants or subjects, but only with their expressed consent. However, in spite of this early appeal, the principle found its modern manifestation in the American Revolution and its Declaration of Independence on July 4, 1776. It was the leaders of the Thirteen Colonies who proclaimed that "all men are created equal: that they are endowed by their creator with certain inalienable rights: that among these are life, liberty and the pursuit of happiness, that to secure these rights, governments are instituted among men deriving their just powers from the consent of the governed."⁷³ It is

important to observe from the foregoing that self-determination is a human rights concept and cannot be intelligibly discussed outside the human rights context.

As far as the American experience was concerned, the case of Spanish and Portuguese Colonies in South America which achieved independence between 1810 and 1825, the threat of intervention by American General James Wilkinson to issue his celebrated General Order of 1823 in which recognition of the principle of self-determination of the then newly independent states gave moral and ultimately military support to the governments established according to the principle.²⁴ The principle of self-determination also found its modern manifestation in the French Revolution and the Declaration of the Rights of Man of 1789, and it became in the course of World War I, one of the fundamental principles of international politics, and as we shall soon see, it served as a guide for much of the reshaping of states in the post-Versailles period.

The 19th and 20th Centuries added the assumption that, since man is a rational animal, the

government to which he will give his consent is one representing his own nation. There was also recognised a principle of natural law which entitled nations to possess their own states, and regard illegitimate states with a non-national basis. This is implicit in what Woodrow Wilson said: "..... the Central Empires had been forced into political bankruptcy because they dominated alien peoples even when they had no natural right to rule."

In the 20th Century, there have been two major periods when self-determination has been used as an operative right but in each instance only for a relatively and closely defined category of peoples or territories. First, at the close of the First World War, Woodrow Wilson and others proclaimed the right of self-determination in universal terms but for practical purposes with a focus on bias on the European territorial settlement following the war. In substance, this involved particularly the destiny of the peoples or territories in Eastern Europe, the Balkans and the Middle East who were directly affected by the defeat or collapse of the German, Russian, Austro-Hungarian and Turkish land empires.

In the second category following the Second World War, attention was focused on the disintegration of the overseas empires which had remained effectively untouched in the round of Wilsonian X Self-determination, save the former German colonies which had been mandated. One important common bond and factor in these two categories is that each one of them involved the subjection of other peoples to alien rule. It is important to observe that the mandate system after the First World War presupposed or acknowledged the existence of "other peoples" or nations, or sovereign people, as subjects of international law who were placed in tutelage in anticipation of and as an interim administration pending self-determination or independence. This self-determination had been respected or recognised with respect to the peoples or territories in Eastern Europe, the Balkans and the Middle East. This is a clear indication or testimony to the effect that, in spite of the difficulties of a juridical definition, self-determination became part of the recognised law of nations after the First World War I as reflected by the peace treaties of 1919 and in the Covenant of the League of Nations. The peace treaties of 1919 and

the Covenant of the League of Nations did not create this right. It is a natural human right which may be said to have received recognition under Article 38(1)(c), the general principles of law recognised by civilised nations. It received express recognition by civilised nations in these peace treaties of 1919 and the Covenant of the League of Nations. The fact that it is a natural right is the reason why it defies a judicially definable definition.

The principle of self-determination was again proclaimed as one of the goals of the Anglo-American policy in the Atlantic Charter signed by Roosevelt and Winston Churchill in August 1941. Although Churchill is reported⁷⁶ to have asserted that the Atlantic Charter was not intended to apply to colonies but was concerned with the restoration of the Sovereignty, Self-government and national life of the states and nations of Europe under the Nazi Yoke, it is a fact that, self-determination as a natural human right is not only universal in character. Churchill's acceptance smacks of double standards. He, it may be inferred, did not want to risk the application of a concept of self-determination to the

British Colonial Empire, a practice which the Western powers like the United Kingdom still share at the United Nations, mostly through abstaining, ^{abstaining} otherwise a human right which is European in nature and not universal is a contradiction and inconceivable.

From the above brief historical account of the origin and development of the principle of self-determination, it can be said that the principle became part of the recognised law of nations under general ⁷⁷ principles of law recognised by civilised nations. Self-determination therefore is a legal norm which is associated with certain rights and obligations.

However, from the controversy about the legal status of the principle of self-determination as a legal norm, it is clear that one of the main problems is one of determining not why the norm should be binding, but how it is created or how it came into being, which serves to provide criteria for determining whether we are confronted with a rule of law or a non-obligatory practice. In fact the whole notion of sources of international law itself is not clear at all and is

controversial, and as a result, the question of identifying the source and of explaining where the relevant rules of international law can be found is not an easy one. For instance "Sources" has been confused with the basis, causes and evidence of international law. It is submitted that sources of international law should be looked at in a formal sense as indicating the methods or procedures by which a legal norm of international law is created. These methods or procedures are listed without being precisely defined in Article 38(1) of the statute of the International Court of Justice.

The procedure or method in which the writer is mainly interested is one in Article 38 (1)(c), the general principles of law recognised by civilised nations, because it is the one he has invoked as a source of the legal norm of self-determination. In this source, it is important to note that, the "Civilised" nations only recognise in a declaratory sense and do not create these general principles of law and this presupposes the existence of what is to be recognised as a matter of fact. This fact of the existence of the

principle of self-determination is natural in the sense that it is natural that "peoples" have to "self-determine" their destiny. This fact cannot be created by a treaty or custom. If it was created by international custom, then colonialism could be legal in international law because it was a recognised custom of the then "international" Community of the colonial masters according to the latter themselves that self-determination should be denied to the colonial peoples. The colonial peoples would then not complain "legally" because according to the international custom of the colonial masters in relation to recognition, they would not exist in international law. They would be objects of international law as they were regarded during the heyday of colonialism. It would be the recognition of the colonial masters which would constitute them as a "people" or states. To the writer, this would not be correct and would be contrary to the fact that the writer established in chapters one and two that colonialism was contrary to international law right from the beginning. For these reasons, to the writer, international custom did not create the legal norm of self-determination.

Second, the norm of self-determination cannot be said to have been created by the treaties or treaty-making process, for most of these treaties in the colonial era were used by the colonial masters to formalise colonialism. We also have no evidence that the Covenant of the League of Nations and the Charter of the United Nations created this norm, for they all presuppose the existence of this norm through declaratory recognition, and we have just seen in the brief historical account and development of the principle of self-determination, that, the latter existed a long time back before the two international organisations were formed. To the writer, therefore, the norm of self-determination was recognised under general principles of law recognised by civilised nations. The so-called civilised nations made a declaratory recognition of this norm after the First World War, although with a particular bias towards European territorial settlement. The institution of the Mandate system in respect of the former German African territories is also evidence of the recognition of this norm of self-determination under general principles of law. The general⁷⁸ principles of law recognised

by civilised nations has variously been regarded as authorising the international Court of Justice to, inter alia, apply legal analogies, natural law, general principles of international as opposed to specific rules of international law, customary international law, general principles of positive national law, and general theories of law. To the writer, of these interpretations of the provision of general principles of law, it is natural law which should be regarded as source of the norm of self-determination. According to natural law doctrine, this norm of natural law, that is self-determination, is binding upon mankind because it conforms to the dictates of reason and is immutable, and requires only to be declared. The point or reason for saying all this is to show that the norm of self-determination received recognition under general principles of law.

Above, we discounted the United Nations Charter as a treaty, as a source of the legal norm of self-determination. However, the United Nations Charter has a number of provisions on self-determination. It is important and useful to look at these provisions, interpret them and

see their connection to what has been said above. Article 1(2) talks of the purposes and principles of the United Nations as to "develop friendly relations among nations based on the respect for the principle of equal rights and self-determination of peoples and to take other appropriate measures to strengthen universal peace."

In Chapter IX of the Charter, Article 55 provides "..... with a view to the creation of conditions of stability and well-being which are necessary for peace and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples... .." One important observation to make in these two Articles is that they presuppose the existence of self-determination and equal rights, otherwise the phrase "on respect for" would be logically inconceivable and meaningless.

From these two Articles and taking the Charter as a multilateral treaty; it follows that the Member contracting states have undertaken an obligation to fulfil or implement the purposes of the United Nations on the basis of respect for the principle of self-determination and equal

rights. This implies that self-determination and equal rights are fundamental rights, some kind of jus cogens over which no derogations are allowed and are the fundamental or underlying basis for the purposes of the United Nations. Provisions of the Charter [Chapters XI and XII] on trust and non-self-governing territories also impose similar obligations on Member states.

As a result of the imposition of these obligations we know that the United Nations has played a distinct role in the process of decolonisation. This process has been mainly through resolutions, declarations and recommendations. But these resolutions per se are not rules of international law and have no force of law. What then is the effect of these resolutions on self-determination and what is the nature of the distinct role played by the United Nations in the decolonisation process? To answer this question, the writer proposes to look at and examine the resolutions and declarations relevant to self-determination. But how does one determine the legal status of a resolution?

Rosalyn Higgins has established a useful frame of reference when she insists that the key issue is not the non-binding Character of the General Assembly resolutions as such, but the cumulative effect of such resolutions taken as an indication of the emergence of rules of general customary law. "What is required is an examination of whether resolutions with similar content, repeated through time, voted for by overwhelming majorities, giving rise to a general opinio juris, have created the norm in question."⁷⁹

This point of view is echoed and shared by Judge Paul Tanaka in his dissenting opinion in the judgment on South West African Cases, the Second phase where he makes it clear that ".... the appearance of organisations as the League of Nations and the United Nations with their agencies and affiliated institutions, replacing an important part of the traditional individualistic method of international negotiations by the method of "Parliamentary Diplomacy" is bound to influence the mode of generation of customary international law. A State, instead of pronouncing its view to a few states directly concerned, has the opportunity, through the medium of an organisation to

declare its position to all members of the organisation and to know immediately their reaction on the same matter. In the contemporary age of highly developed techniques of communication and information, the formation of a custom through the medium of international organisations is greatly facilitated and accelerated; the establishment of such a custom would require no more than one generation or even less than that. What is required for customary international law is the repetition of some practice on the same matter in the same or diverse organisations must take place repeatedly. Parallel with such repetitions each resolution, declaration..... being considered as the manifestation of the collective will of the individual participant states, the will of the international community can certainly be formulated more quickly and more accurately as compared with the traditional method of the normative process. This collective cumulative and organic process of customary generation can be characterised as the middle way between legislation by Convention and the traditional process of custom making. In short, the accumulation of

authoritative pronouncements such as resolutions, declarations, decisions concerning the interpretation of the Charter by the competent organs of the international community can be characterised as evidence of the international custom referred to in Article 38(1)(b)."⁸⁰

We shall now try to apply this approach of Tanaka and Higgins and see the legal effect of these resolutions relevant to self-determination.

In trying to overcome the arguments that self-determination should be no more than a political principle, the General Assembly of the United Nations as early as 1952, by Resolution 545 (VI) of 5 February 1952 recognised that the violation of the rights of peoples and of nations of self-determination had resulted in war in the past and was considered a continuous threat to peace and requested the Commission on Human Rights to include in each Covenant on Human Rights an article on the right of Self-determination.⁸¹ It is again important to observe and note that this right of self-determination is due to "peoples" and "nations", and the "peoples" and "nations" are already there. What is in issue is the

realisation of this right which had been interfered with by alien rule in both Europe and Africa. Wherever there are "peoples" or "nations", there ought to be a government and if there is to be peace and viability, that government must reflect the aspirations of these "peoples" or "nations" and this can only happen when the "people" or "nations" self-determine their affairs and hence the right of self-determination is always associated with a "people" or "nations". There is of course a problem of how a "people" or "nation" can be identified. Is it an ethnic people or political people? Admittedly this is quite a difficult question to answer, but as said in the first page of this chapter, the people or nation here are supposed to be the majority within a given territory which is under the domination of a foreign power. It is natural that national sovereignty must lie in the majority and the writer can not imagine any other explanation other than that it is natural that the majority should self-determine in a given territory. This is of course assuming that this majority in a given territory acquired and has title to that territory. This is

one condition that the writer would like to add. Otherwise it is conceivable that a foreign power can flood a foreign territory with its nationals who will then form the majority in that given territory. This is why above it has been mentioned that the "people" must be the majority within a given territory, the latter which is under the domination of a foreign power. This supposes that the foreign power has no title or right to dominate that "people" and the territory in question.

However, coming back to the United Nations activities on self-determination, the Commission on Human Rights, at its eighth Session, after being requested to include in each Covenant on Human Rights an article on the right of self-determination, accordingly drafted an article for inclusion in the Covenants, providing, inter alia, that, all people and nations should have the right to self-determination, namely to determine freely their political, economic, social and Cultural status.⁸² It was also provided that all states, including those with the responsibility for the administration of non-self-governing and trust territories, and those controlling "in whatever manner" the exercise of that right by another people, should

promote the realisation of that right in all "their" territories, and respect the maintenance of that right in other states, in conformity with the provisions of the United Nations Charter. Again, one sees that the existence of the right to self-determine is not the issue, but its practical realisation which was denied to colonial people whether in Africa or Europe. This draft provision served as a starting point for the United Nations to take further action towards the implementation of the right of self-determination. For instance, by the United Nations General Assembly Resolution 637/A (VII) of 16 December 1952, "The States Members of the United Nations responsible for the administration of Non-Self-Governing and Trust Territories shall take practical steps, pending the realisation of the right of Self-determination and preparation thereof, to ensure the direct participation of the indigenous populations in the legislative and executive organs of those territories, and to prepare them for complete self-government or independence." Again here, the existence of the right to Self-government and to independence is assumed.

The most important of these resolutions is the General Assembly Resolution 1514 (XV) of 14 December 1960, entitled Declaration on the Granting of Independence to Colonial Countries and Peoples, sometimes referred to as the Magna Carta of Colonial Peoples, and its 27 November 1961 Successor Resolution 1654 (XVI) setting up a Special Committee to oversee the application of the Declaration. This Declaration was adopted by 89 votes to 0, with 9 abstentions and had been sponsored by 43 African and Asian Countries.⁸³ It solemnly proclaimed the need to put an immediate and unconditional end to colonialism in all its forms and manifestations and to take up steps to transfer all power to the inhabitants of trust, non-self-governing and other dependent territories. It also stressed that insufficient political, economic, and social preparedness cannot serve as a pretext for delaying independence. This Declaration therefore unequivocally condemns colonialism in all its forms and in this way, it obviates the apparent contradiction, as reflected in the Charter between the recognition of self-determination and the provisions relating to the trust and non-self-governing territories. In

short this Declaration is saying that colonialism and self-determination are incompatible and to achieve the realisation of self-determination, colonialism, which is an impediment, must be eradicated. Otherwise, this Declaration does not create or constitute the right of self-determination. It is mainly concerned about the practical implementation of the right of self-determination, whose existence it assumes and takes for granted.

This declaration also states that colonial rule is contrary to the Charter, for it impedes the implementation of the basic purposes of the United Nations, the basic purposes which are the promotion and Security of peace and international Cooperation which may not be possible if the right of self-determination is violated and causes war as it happened in the past. The significance of this provision of the Declaration as laid down in Paragraph I⁸⁴, is that it links the realisation of the right of self-determination with the maintenance of international peace and security. This is a clear indication to the effect that the assertion of the right of Self-determination is a matter of international concern and therefore no colonial power can successfully argue that by

virtue of Article 2(7) of the Charter on domestic jurisdiction, the United Nations cannot take action in defence of the right to self-determination of a people oppressed by a foreign power. This also shows that the right to self-determination is universal in character and should apply wherever it is denied, whether in Europe or Africa or Asia.

General Assembly Resolution 1810(XVII) of 17 December 1962 reaffirmed the principle laid down in the Declaration (Resolution 1514 (XV) of 1960) and condemned the efforts made to prevent the implementation of the provisions of the Declaration. Under this 1962 Resolution 1810 (XVII), the Special Committee set up on 27 November 1961 to oversee the application of the Declaration was enlarged and its membership was raised from seventeen to twenty-four. This Special Committee has been continually studying the situation in non-self-governing territories and submitting recommendations for the promotion of their independence.

General Assembly Resolution 2131(XX) of 21 December 1965, inter alia, states that all states

should respect the right of self-determination and independence of peoples and nations, the right which it says should be freely exercised without any foreign pressure and with absolute respect for human rights and fundamental freedoms. It requested all states to contribute to the complete elimination of racial discrimination and colonialism in all its forms and manifestations.

General Assembly Resolution 2160 (XXI) of 30 November 1966, inter alia, condemns all efforts to suppress colonial revolts and regards such efforts as constituting a violation of the Charter of the United Nations.

Paragraph 10 of Resolution 2105 (XX) of the General Assembly recognises what it calls the legitimacy of the struggle by the peoples under colonial rule to exercise their right to self-determination and independence and invites all states to provide material and moral assistance to the national liberation movements in colonial territories.

In the preamble of Resolution 2160 (XXI), the General Assembly recognises that peoples

subjected to colonial oppression are entitled to seek and receive all support in their struggle, which is in accordance with the purposes and principles of the Charter. In addition to these important resolutions, there are a number of other resolutions⁸⁵ on the same theme of self-determination, but specifically on Rhodesia. These resolutions sought the suspension of the 6th December 1961 Constitution and the executive acts thereunder, mainly because that Constitution upon which Rhodesia was alleged to have achieved self-government, ignored the fundamental principles of equality of rights and one man one vote by placing the minority of the white inhabitants in a superior status. These resolutions also spelt out the fact that self-determination is the right of the majority of the Rhodesians who held that the 1961 Constitution was an infringement upon their right to decide their political justice. The legitimacy of the Namibian struggle was also similarly recognised by four⁸⁶ General Assembly Resolutions and Security Council Resolution 269 of 1969.

According to Article 10 of the United Nations Charter, the resolutions of the General

Assembly have the Character of recommendations and do not by themselves create norms of international law. What then is the legal effect of these declarations and resolutions?

If we follow Tanaka's and Higgins' approach in respect of the cumulative effect of all these resolutions quoted and cited above on the same theme of **Self-determination**, and if we consider each resolution as the manifestation of the collective will of the individual participant states, one may come to the conclusion that the will of the international community, through these resolutions, can be characterised as evidence of the affirmation of the norm of self-determination. One important thing to note and which is clear from the above resolutions is that, the General Assembly does not in each one of them pretend to create or constitute the norm of self-determination, in which case these resolutions would be evidence of an international custom. These resolutions, read closely, assume and presuppose the existence of the right of self-determination, and they are concerned about its practical realisation and not its creation. This is

the legal effect of these resolutions. As far as self-determination is concerned, they are largely declaratory and not constitutive, because this norm being a human right norm is incapable of creation by a human being or organisation. The best that these agencies can do is to ensure the protection of this right. To say that the United Nations Charter or resolutions created this norm implies that, the latter did not exist before the formation of the United Nations and that those who are fighting for this right are doing so because the United Nations said so. Nothing can be further from the truth than this. If we look at the United Nations Charter as a multilateral treaty, we see that the Member states have undertaken an obligation to respect this right which already exists. They have committed themselves to working for the practical implementation and realisation of this right. With or without the United Nations, "peoples" or "nations" would still have fought for it. In fact, without the United Nations, the fight for this right would most probably have escalated into a Third World War. The United Nations has

tried and is trying to stop this by ensuring that this right is accorded quickly to those denied it and it has categorically excepted armed "struggles" by liberation Movements from the definition of aggression.

From this point of view, the writer, with all due respect, disagrees with the general view⁸⁷ held by some of the most highly qualified publicists that prior to the United Nations, the principle of Self-determination did not come within the rules of international law, for that is ascribing constitutive effect to the United Nations declarations. The writer does not subscribe to this. Eagleton⁸⁸ in particular, remarks that the textbooks of international law do not recognise any right to self-determination. He goes on to say that there is no community law, judge or machinery to uphold a claim to the right of self-determination. This view arises from the fact that its proponents do not recognise the right to self-determination, for the key issue here is whether or not the right exists. If it exists then there should be law to protect it and there should be the machinery to uphold a claim

To the writer, Eagleton seems to echo the
of traditional international Law which
not recognise "peoples" fighting for self-
determination as states and hence these
peoples" cannot appear before the International
Court of Justice. Even other countries cannot
successfully appear on their behalf if we are to
recall the 1966 "Judgment" on the South West Afri-
can Cases.

The right exists as the writer tried to
establish above. The only hitch is the technical
one, that these "peoples" have no capacity to
appear before the International Court of Justice.
It is submitted that these colonial people, should,
as a matter of right, be accorded this capacity
to appear before the International Court because
they have the title to their territorial Sovereignty
and they are the ones who are sovereign and
not their alien rulers. To deny them the capacity
to appear before the International Court is the
same thing as to deny them self-determination and
to deny their Sovereignty. It seems international
Law is behind in this respect.

Otherwise the writer would agree with Eagleton⁸⁹ when he says that the United Nations has no authority to issue any decree freeing people from a state and setting up a group as independent.

A criticism⁹⁰ has been raised that in reference to a nation's undeniable right to autonomy, self-determination is a meaningless expression and that there are no nations struggling to be free but only political parties struggling for control of administrations which were delimited during the partition of Africa among Europeans; that the nations of Africa are in the process of forming as a reaction to colonialism in respect to which they have become self-conscious and that it has been within the boundaries of the colonies that this consciousness has acquired a possibility for national expression. This criticism does not seem to be based on historical facts. It is well answered in Chapters one and two of this dissertation where it is proved that African nations were not a mosaic of groups or individuals as such, but were the equivalents of states, and they did not, in Law, lose title to their territorial sovereignty. Unfortunately, the criticism seems to have

been made under the mistaken assumption that self-determination applies to Africa only. One cannot successfully argue that the campaign for self-determination in Europe prior to the First World War was a reaction to colonialism and one again cannot say that the European states, whose right to self-determination was honoured immediately after the First World War, were political parties struggling for control of administrations "which were delimited during the partition of Europe among some powers." But it is true that most of the boundaries in Africa are colonial. These were deliberately retained intact in the interest of stability or else the whole map of Africa will be altered for most of these boundaries were mapped for various considerations like economic interests, strategic reasons, sociological factors and administrative convenience. Some of these boundaries have already become controversial like for instance, the case of Somalia on the one hand and Kenya and Ethiopia on the other hand.

Another important criticism that has been levelled against the right of self-determination is that, it is not universal, and that as a human

right, it must be universal in application and should not be confined to colonial debates. It is true that the right of self-determination is a human right and should therefore be universal. It seems the protagonists of this criticism are only focusing on the United Nations General Assembly debates and think that the right is a product of the United Nations. This is not correct. The position is that the right is universal in application. The United Nations in its resolutions is focusing on Africa because the latter is the area where the denial of the right has been and is very strong. After the First World War, this right, apparently, through the application of double standards was denied to most African territories, recognised in the African mandated territories and applied to some European territories which had been under the Nazi Yoke. As a human right, it was not supposed to be narrowly applied like that.

Nowhere in the Charter, as far as the writer has been able to ascertain, does the United Nations talk of European or an African right to self-determination. The right is universal and the writer is quite convinced that if there was

another Rhodesia or Namibia somewhere in Europe, the United Nations could have treated it similarly.

The conclusion that the principle of self-determination is now a legal norm also has support from the Special Committee on Principles of International Law Concerning Friendly Relations and Cooperation among States. In its report, inter alia, it stated "Nearly all representatives who participated in the debate emphasised that the principle (of self-determination) was no longer to be considered a mere moral or political postulate, it was rather a settled principle of modern international law.... A number of representatives in this connection referred to the pertinent resolutions of the General Assembly, and in particular to resolution 1514 (XV) of 14 December 1960 on the Declaration on the Granting of Independence to Colonial Countries and Peoples, which was adopted by a large majority."⁹¹

The Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations is perhaps the most

important resolution affecting the status of liberation Movements. By this resolution,⁹² self-determination was affirmed as a legal right and its denial as a violation of the Charter as a treaty under which they had undertaken obligations to respect this right.

The conclusion in this chapter is that, self-determination is now a legal norm under general principles of law. It signifies the right of a people to choose the form of government under which they wish to live or the sovereignty to which they wish to belong and this right belongs to a majority within a given territory which is under the domination of a foreign power or alien rule. The relevant United Nations Charter provisions and resolutions have treated the right of self-determination as necessarily involving a number of Correlative duties and obligations binding upon states, including the duty to promote by joint and separate action the realisation of the right and the transfer of sovereign powers to the peoples entitled to the right and the duty to refrain from any forcible action calculated to deprive a people of this right.⁹³ It is important here to note that these correlative duties

and obligations binding upon states, are measures, arising from the Charter as a treaty, to ensure the protection and practical realisation of the right of self-determination. They are procedural rules to ensure the realisation of this right; they do not constitute the content of this right as such, for they assume its existence. This means that the right exists, or else the taking of these measures based "on respect for equal rights and self-determination of peoples" in Articles 1(2) and 55 of the Charter would be inconceivable. Admittedly, it is very difficult to define the content of this right. This right, like any other right as a concept, defies a juridically infallible definition, as anybody who has done concepts in jurisprudence would be aware of. However, the fact that we are not able to give a juridical definition of a right does not mean that the right does not exist for there are many rights which defy a juridical definition, but nevertheless exist, not only in theory but in practice as well.

Therefore, from the fact that self-determination is now a legal norm, liberation Movements fighting for the latter are fighting for a right

recognised in international law and this right pertains to them and those they represent. A right has no meaning unless there is a remedy for its invasion, although it does not necessarily follow that fighting is the remedy. So, as far as the fighting for self-determination is concerned, one may say that liberation Movements are justified in international law.

The right of self-determination as has been mentioned several times in this chapter is a human right. The references⁹⁴ to human rights in the Charter of the United Nations have provided the basis for elaboration of the content of standards and of the machinery for implementing protection of human rights. Of the six Articles referring to human rights, the right of self-determination is mentioned in Articles 1 and 55 and implied in Articles 62, 68 and 76. In fact one of the main reasons for "outlawing" ["Outlawing" is in quotation marks because it was never lawful] colonialism is that it is a suppression and violation of human rights. Colonialism and human rights are incompatible and cannot coexist. The subjection of other peoples

to alien rule constitutes a denial of fundamental human rights. Because of this relationship between human rights in general and the right of self-determination, it is proposed to proceed on to Chapter four on human rights and liberation Movements. The main issue in this Chapter is to determine whether or not the human rights plea, in general, can be used successfully as a legally valid ground to justify liberation Movements in international law.

Chapter 4

Human Rights and Liberation Movements.

"I prefer to call a spade a spade. Let us boldly say: in the past we have made mistakes about native representations. We intend to change all that We are going to be lords of this people and keep them in a subject position..... . They should not have the franchise because we do not want them on an equality with us..... . These are my politics of South Africa. We must adopt a system of despotism, such as works so well in India, in our relations with the barbarians of South Africa."⁹⁵ This statement was made by Cecil John Rhodes, when he was introducing the "Native Bill for Africa" in 1894. He went on, "My⁹⁶ idea is that the natives should be kept in these reserves and not mixed with the white men at all."

In South and South West Africa this is the system which was developed and officially institutionlised as Apartheid. In Rhodesia it was also

instituted in a mild form. The problem in Southern Africa is therefore, one of inequality before the law which is systematically implemented through racial discrimination. The claim to equality before the law is in a substantial sense the most fundamental of all the rights of man. It occupies the first place in most written Constitutions. It is the starting point of all other liberties, and once denied, all other liberties are at stake. In South and South West Africa, inter alia the rights to freedoms of Movement, speech, security of person and the right to participate in the government of the country are very much restricted, that is, where they exist. The same thing obtained in Rhodesia on a lesser degree. It is important to note that in Southern Africa, the system of racial discrimination, though meant to preserve the privileges of and benefit the whites, adversely affect all the races including the whites as well, who can not freely live under the same roof with a non-white. So racial discrimination is not only a problem for non-whites, but of every inhabitant of South Africa and South West Africa. This

means that fighting against racial discrimination should not be a fight for reverse racialism.

However it is important to know what this racial discrimination is generally since in Southern Africa it is being used to effect inequality before the law. It has been defined to mean "any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life."⁹⁷ Article 2 of the Universal Declaration of Human Rights proclaimed by the United Nations includes religious grounds. This is a broad definition of racial discrimination. In Southern Africa, there is a specific form of racial discrimination based on colour. Normally, the authorities in Southern Africa try to justify this by saying that their aim is the progress and well-being of the native African; that they want to preserve the value of native institutions, especially the best of them:

a touch of the museum attitude, the game-warden benevolent intentions. This is not true at all, it is a pretext for keeping other races backward and hence prevent non-whites from being treated on an equal footing with whites.

As said above, racial discrimination in Southern Africa is based on the criterion of colour and race, a factor which is beyond human control. No man can biologically change his colour or race. If a man suffers because of his colour or race, which he cannot change, then he must become less than a human being or he must fight for his humanity. Man is so created that he will refuse to acquiesce in his own degradation and daily humiliation. He will destroy peace rather than suffer under it. In Southern Africa, apartheid and colonial oppression have goaded the people to desperation. People of these territories tried peaceful means as is clear from some sections of Chapter one; political organisations, petitioned their rulers, made petitions to international organisations, tried peaceful rallies, and tried publicising their wrongs

through the press of the world but to no avail. Their peaceful efforts were met with brutal force. The people of Southern Africa made a choice to fight for their humanity and one may say that they declared war against racialism. But, this kind of talking assumes and takes for granted a number of important factors. Is the principle of equality before the law recognised by law? Is there anything wrong in law in the "inequality" before the law? What in Law is wrong, with racialism? The above talk has assumed positive answers to these questions. But this may not be so in law. Talking on a political level, we can accept what has been said above as correct. But that may not be the position in law. To say that liberation movements are justified because they are fighting for equality before the law or that they are fighting racial discrimination means a lot of other things. It means and implies that racial discrimination is a crime or an offence against international Law. It again means equality is a norm of international Law or a rule or right recognised by international Law and that it has to find its source among other sources of international Law. But is this so? To

answer this question it is important to determine whether or not equality before the law is a principle of and recognised by international Law. After this determination, it will be intelligible to talk of liberation Movements being legal or illegal when they claim to fight for equality.

It is important right from the outset to observe that "equality before the law" is not a curious dogma as some biologists with a special taste for eugenics would like us to regard it. The "equality before the law" that we are talking about is not the equality of biological inheritance or cultural environment but of dignity and rights, founded on humanity. There has been a shift of emphasis from the political metaphysics of the equality of states to the cogency of the position that all men are created equal. The new emphasis on this equality in law of men rather than states has now found authoritative expression in the Universal Declaration of Human Rights and other International Conventions on Human Rights.⁹⁸

In reality, there is only one human right which is valid in both the international sphere

as well as the domestic. The principle of the protection of human rights is derived from the concept of man as a person and his relationship with society which cannot be separated from Universal human nature. If human nature or humanity is universal, it follows that the existence of human rights does not depend on the will of a state, neither internally on its law or any other legislative measure, nor internationally on treaty or custom, in which the express or tacit will of a state constitutes the essential element. A state is or states are not capable of creating human rights; they can only confirm their existence and give them protection. The role of the state is no more than declaratory recognition and protective. Human rights have always existed and are coeval with man. To talk of human rights is essentially to talk about humanity. To say that the existence of human rights depends upon the legislative measures of a state is to say that, that state can validly abolish or modify them at will, but this is not the case. If a law exists independently of the will of a state and accordingly cannot be abolished or modified even by its constitution, because it is deeply rooted in the

conscience of mankind, it may be called "natural law" in contrast to "positive law". Provisions of the Constitutions of most of the countries characterise fundamental human rights and freedoms as "inalienable; "sacred", "eternal" and "inviolable". This means that the guarantee of fundamental rights and freedoms possesses a supra-constitutional origin. From this point of view, one may say that colonial governments or settlers or the incumbent governments being fought in Southern Africa cannot legally derogate from these human rights because they are not founded on or created by their municipal laws. This interpretation of human rights is quite consistent with the appeal made by the leaders of the thirteen American Colonies, when they said that "all men are created equal: that they are endowed by their creator, with certain inalienable rights; that among these are life, liberty and the pursuit of happiness, that to secure these rights governments are instituted among men deriving their just powers from the consent of the governed."⁹⁹ If these inalienable rights are not

respected and honoured or protected, then the governed have a legitimate right to remove the government and institute a new one which will protect these rights. One may say again that, from this point of view, liberation Movements as representatives of the governed are justified in trying to remove the incumbent governments. From this, one can say that the law concerning the protection of human rights may be considered to belong to the jus cogens. But an interpretation of this nature is open to the criticism of falling into the error of natural Law dogma. Yes, this may be so, but equality before the law can be said to have its source in Article 38(1)(c) of the statute, the general principles of law recognised by civilised nations. These principles of law include what are called the rules of natural justice, viz rules like every man has a right to be heard, a man cannot be a judge in his own cause and the very idea or concept of equality or equal treatment before the law is among these. The concept of equality before the law is therefore a rule of international law given declaratory recognition in Article 38(1)(c) of the statute of the International Court of Justice. So the

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criticism that regarding protection of human rights may sound a natural law dogma does not hold water. What is now important is that human rights and their protection are recognised by international law and that they find their source among other sources. The concept of equality before the law already existed in the stoic philosophy and was developed by the scholarstic philosophers and treated by natural law scholars and encyclopaedists of the 17th and 18th centuries. It received legislative formulation at the end of the 18th century, first by the Bill of Rights of some American states, then by the Declaration of the French Revolution and then in the 19th century the "equality before the law" clause became one of the common elements of the constitutions of modern Europe and in the 20th century in the constitutions of African and Asian states. Thus the principle is a general one and has been recognised by civilised nations throughout history.

The principle of equality before the law and protection of human rights has also received declaratory recognition as a legal norm under international conventions [Article 38(1)(a) of the statute]. The most important

of these Conventions is the United Nations Charter itself. For instance, Article 1(3) talks of "promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion".

Article 13(1)(b) talks of "assisting in the realisation of human rights and fundamental freedoms for all....." Articles 55(c) and 56 talk of universal respect for and observance of, human rights and fundamental freedoms.

Article 62(2) talks of promoting respect for and observance of human rights and fundamental freedoms for all, and Article 76(c) talks of "to encourage respects for human rights and for fundamental freedoms for all". These efforts of the United Nations to ensure recognition and protection of human rights are in line with earlier efforts exemplified by the Magna Carta, the American Declaration of Independence and the Declaration of the Rights of Man following the French Revolution. From the provisions of the United Nations Charter quoted and cited above, it is clear that a legal obligation to respect human rights and fundamental freedoms is imposed on

Member States. There should therefore be no doubt of the existence of human rights and freedoms, otherwise respect for them is logically inconceivable, for one cannot respect what is not there or the non-existent. The Charter in making these protective provisions, presupposes the existence of human rights and freedoms. The existence of such rights and freedoms is unthinkable without corresponding obligations on persons concerned and a legal norm underlying them. Also it is clear that these obligations are not only moral, but they also have a legal character by the very nature of the subject-matter. Apart from the United Nations Charter, there are other¹⁰⁰ Conventions and Declarations on the same subject and support the view that the concept of equality before the law and protection of human rights has received declaratory recognition as a legal norm under international Conventions (Article 38(1)(a)).

One may safely conclude that the principle of equality before the law presents itself as a human right legal norm. Therefore what has been said on human rights in general can be applied to

the principle of equality. Therefore, also, the norm of non-discrimination on the basis of race and colour has become a rule of international law. Not only that, but on 27 October 1966, a General Assembly Resolution¹⁰¹ was adopted calling apartheid "a crime against humanity", and on 30 November 1973, the General Assembly adopted a resolution¹⁰² by which it adopted and opened for signature the International Convention on the Suppression and Punishment of the Crime of Apartheid. If these resolutions are looked at in relation to what has been said above and in relation to The International Convention on The Elimination of All Forms of Racial Discrimination, it will become even easier to conclude that equality before the law has received declaratory recognition as a legal norm under international Conventions and general principles of law recognised by civilised nations.

Therefore, in fighting for equality before the law, on which all other liberties or human rights depend, liberation Movements are fighting for rights recognised by international law. This means that they have a legally valid cause

and should be justified in international law. It may therefore be concluded that the human rights plea is a legally valid ground for the legality of liberation Movements.

We saw above that human rights are universal. They apply to every person every where at any time regardless of differences of sex, colour, race or religion, because they are founded on the intrinsic nature of man. This means that, a violation of them is essentially an international crime, and the international community will have its security imperilled. Now, since, in this Chapter, the problem of Southern Africa is, *inter alia*, mainly one of the violation of human rights, would the international community commit an offence if it joins the liberation Movements in trying to eradicate institutionalised racial discrimination which is being used to deny a Section of the people their human rights? Can the incumbent governments in Southern Africa raise the claim of domestic jurisdiction under Article 2(7) of the United Nations Charter? To answer all these questions, we move

on to the next Chapter on international support to liberation Movements and see the implications and significance of this support on the states of liberation Movements.

Chapter 5

International Support and Liberation
Movements.

International support is relevant to this dissertation in the sense that it is inextricably bound up with the object or subject of support. Second, this international support, especially by countries which physically host the guerrillas, has provoked retaliatory raids by the governments being fought into host countries in pursuit of the guerrillas. Lives have been lost in these raids. The question is, is it really necessary for the international community to support liberation Movements? And most important of all, can this international Support be justified in international Law? This Chapter is going to try and answer these questions. It is going to look at how much international support is given to liberation Movements and by who and of course the legality or otherwise of this support.

It is important to point out that the support being talked about here is international support in general. We are not talking about support in the sense of being physically involved in the armed struggle, although the latter is part of the support in general. This observation is important because there are countries and organisations which support liberation Movements in the general sense, but not the armed struggle as such directly. Countries like the United States of America and the United Kingdom, among others, support the cause of liberation Movements, while at the same time condemn what they call the use of violence by liberation Movements.

Who supports liberation Movements? It is the international community and this includes the United Nations and the Organisation of African Unity, although almost all Member states of the latter are also members of the former. Then there are states, which are members of both organisations, but support liberation Movements in Southern Africa in a special way. These are what have been referred to as the "Frontline States" which host liberation Movements and avail their countries

countries as springboards from which the military wings of the liberation Movements launch their attacks. These states are: Mozambique, Tanzania, Zambia, Angola and Botswana. They will be discussed as a special case. We shall therefore separately look at these three categories of international supporters, viz, the United Nations, the Organisation of African Unity and the Front-line States, although the latter are implementing the policies of the Organisation of African Unity.

We start with the Organisation of African Unity. At the establishment Conference of the Organisation of African Unity, it was recommended that Member States should receive in their respective territories "the nationalists from liberation Movements"¹⁰³ and also "encourage at the level of each state, the transit of material and the organisation of volunteers in various fields in order to provide National African Liberation Movements with the necessary assistance in the different sectors."¹⁰⁴

At the institutional level, the Organisation of African Unity set the Liberation Committee, with its headquarters in Dar-es-Salaam,

for organising direct action with a view to liberating dependent African territories. All this proceeded in conjunction with action in the United Nations, where the African delegations pleaded in favour of the legitimacy of anti-colonial armed struggle demanding legal recognition of liberation Movements. Where did the Organisation of African Unity get the authority to support the liberation Movements? It was authorised by its Charter. For one of the purposes of the Organisation, according to Article 2(1)(d) and (2)(1)(e) is "to eradicate all forms of colonialism from the continent of Africa" and "to promote international cooperation, having due regard to the Charter of the United Nations and the Universal Declaration of Human Rights." To this end, the Charter of the Organisation Commits all Member states to solemnly adhere to the principle of "absolute dedication to the total emancipation of the African territories which are still dependent."¹⁰⁵ It is easy to see that this support by the organisation is not so much to the liberation Movements as political Organisations, but to self-determination and

human rights. To the Organisation of African Unity, the right to Self-determination¹⁰⁶ is a categorical demand for which there shall be no exceptions, a sort of natural¹⁰⁷ right belonging to the jus cogens, valid in all places and for all the time, taking priority over all other provisions of the United Nations, in particular those relating to recourse to the threat or use of force;¹⁰⁸ the settlement of international disputes by peaceful means and the reserves¹¹⁰ of powers under domestic jurisdiction. As seen above, the Organisation of African Unity, in this case, is supporting the right of Self-determination and human rights, all which are recognised by international law as we saw in Chapters three and four. For this reason, support of the right of self-determination and human rights, through support to liberation Movements by the Organisation of African Unity is legal in international Law.

The next organisation to discuss is the United Nations. The United Nations General Assembly by Resolution 2189(XXI) of 13 December

1966, reaffirmed "the legitimacy of the struggle of the peoples under colonial rule to exercise their right to self-determination and independence" and urged "all states to give material and moral assistance to national liberation Movements in colonial territories." In another resolution,¹¹¹ the United Nations urged states "to render all moral or material assistance to the national liberation Movements of Zimbabwe, either directly or through the Organisation of African Unity." We have already seen the legal status of these resolutions in Chapter three. It is clear from the above discussion of the support given by these two organisations that the support is based on the right to self-determination which is a human right. And we saw in chapter four that human rights are universal and a violation of them is an international delict which involves the international Community. Hence international support by and through these two organisations is legally justified on the ground that the support is to the fight for human rights, essentially and ultimately. This is clear and evident from Paragraph I of the

Declaration¹¹² on the Granting of Independence to colonial Countries and Peoples which states "The subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and cooperation." The significance of this paragraph to international support and liberation Movements is that it links the realization of the right of self-determination with the maintenance of international peace and security. This is a clear indication to the effect that the assertion of the right of self-determination, which liberation Movements are fighting for, is a matter of international concern, which the international Community should support. No colonial power or settlers in the context of Southern Africa can therefore argue that by virtue of Article 2(7) of the United Nations Charter, the international Community, either through the United Nations or the Organisation of African Unity, cannot take action in defence or support of the right to self-determination of a people oppressed by alien rule. Since the Declaration on the Granting of

Independence to colonial countries and Peoples, considerable support has been gained for the view that colonialism is an international delict which empowers states to assist in its eradication. If international support is thus justified in international Law, then that which is being supported, i.e. the legal cause of self-determination and human rights and hence liberation Movements, is also justified in international Law because the Support and the object of support cannot be separated.

But there is still one outstanding aspect of this international support which needs a special treatment. This is the question of those countries which host guerrillas or freedom fighters and offer training facilities. Supporting the cause in general is slightly different from giving shelter to those who actually fight, because in the latter case, there are more legally complicated problems than in the former: For instance, in the latter case, the incumbent government being fought by guerrilla normally invade these host countries, ostensibly on the ground of self-defence by raiding guerrilla camps.

In international law, a state may not allow its territory to be used as a base for hostile operations against another state with which it is in a state of peace and every state must take all reasonable steps to prevent such activities. This obligation is also included in Article 10 of the Covenant of the League of Nations and implied in Article 2(4) of the United Nations Charter. Are the "Frontline states" being used as bases for hostile operations against another states with which they are in a state of peace? Is Rhodesia a state and hence a subject of international law? Are the "Frontline states" at peace with Rhodesia and South West Africa?

It must be made clear first that, the Rhodesia and South West Africa referred to here are the Rhodesia and South West Africa in which the white minority are ruling; otherwise ruled x by Africans, these two territories, as we saw in Chapters one and two, would be states. So long as Rhodesia is not recognised as a subject of international law, the only country against which any breach of the above mentioned rule of international law on territorial inviolability can be

committed is the United Kingdom, but the British government may be thought to have waived its "right" of international complaint on this score because it took the matter to the United Nations. Not only that, but as we saw in Chapters one and two, both the British government and the White Settlers in Rhodesia never had any and have no title to the territorial sovereignty of that country. The same with South Africa, as made clear by history and the United Nations Resolutions and Advisory Opinions of the International Court of Justice, it has no title to the territorial Sovereignty of South West Africa. So Rhodesia as ruled by the white settlers and South West Africa as ruled by South Africa are not contemplated in the clause "against another state with which it is in a state of peace." Apart from the fact that the incumbent governments in Rhodesia and South West Africa (as ruled by the white minority) have not been recognised by the international Community, the use of force in self-defence can be justified only in response to an act of aggression and an act of aggression can only be committed against a sovereign people

or population. The use of force by the liberation movements cannot be aggression to white minorities in these territories because these white minority governments are not sovereign there. Under the definition of Aggression adopted by Consensus in the General Assembly of the United Nations in Resolution 3315 (XXIX) on 14 December 1974, Article 7, the use of force by peoples forcibly deprived of their right to self-determination, freedom and independence, particularly people under colonial rule and "racist regimes" or other forms of alien domination is not aggression. It is important to note that this resolution on the definition of aggression was adopted by consensus. Consensus is a compromise procedure within the United Nations. If a resolution is passed by consensus, then it tends to be given legal validity or more respect than those given to resolutions passed through votes. Lawyers tend to see Consensus as a new way for developing rules of customary international law. Consensus reflects compromise or agreement on a new custom more than a resolution adopted through voting where some members

vote against and some abstain. There is therefore reason to give respect to this definition of aggression because it was arrived at by consensus.

In the light of the above discussion and circumstances, is there a right of hot pursuit in to the host countries? Can we characterise the Rhodesian and South African retaliatory raids on the "Frontline states" as self-defence? We discuss this below.

The "right of hot pursuit" simply refers to the right of pursuing rebels into bordering states. Rhodesia and South Africa initially used hot pursuit as a justification for their raids. Later, they abandoned it and involved self-defence as the justification. However, hot pursuit itself is a procedural right based upon the idea of self-defence and necessity. The invocation of both hot pursuit and self-defence though at different times, by both the Rhodesian white minority and the South African Government overlooks a number of important considerations. First it is highly doubted whether the right of

hot pursuit can be properly involved in the right of self-defence in that, in the present case, the actions of South Africa and Rhodesia are distinctively **punitive** in character and it therefore goes beyond the necessity of protection and can properly be classified as reprisals, not self-defence. From this point of view, raids by South Africa and Rhodesia into the "Frontline states" cannot be hot pursuit or self-defence. Second, the suggestion of a right of hot pursuit on land does not take into account jurisdictional differences. The maritime right ends the movement the pursued ship enters its own territorial waters or those of a third state. On land the right does not exist unless granted by specific treaty provisions or specific consent of the state from which the guerrilla band operates.¹¹³

The French claimed this right of hot pursuit and employed it in order to counteract the use of Tunisian territory by the Algerian¹¹⁴ National Liberation Front during the Algerian War. The Tunisian government refused to acknowledge that any such right existed and said that it would exercise its right of legitimate

defense to prevent any subsequent invasions of its territory by the French. After this, the French abandoned the right of hot pursuit as a justification and invoked and employed a "right of riposte." This was supposed to be the justification for firing into Tunisian territory, either from Algerian territory or Algerian air space, in answer to fire from Tunisian territory. On 28 May, 1957, for example, the French explained a bombardment of Tunisian territory by asserting that their planes had riposted after having been struck by bullets from machine guns fired from Tunisian territory. Tunisia still denied that any such right existed. On February 8, 1958, French military forces carried out a full-scale day light air raid as the Rhodesian and South African Forces are doing on the "Frontline states"7 against the Tunisian town of Sakiat-Sidi-Youssef, killing seventy nine and wounding one hundred and thirty others.¹¹⁵ Tunisia then filed a complaint to the Security Council and the matter was successfully mediated by the American and British governments. The

French refrained thereafter from large-scale attacks on Tunisian territory. It would seem to the writer, from the above discussion that the rights of hot pursuit and riposte, particularly in land warfare, have not yet been accepted by international law as exceptions to the rule against the violation of the territorial integrity of other states. This means that the "Frontline States" can give support to liberation movements and still be legally immune to any right that these pursuers of freedom fighters might claim. This in turn means that they are protected by law against invasion by pursuers of guerrillas. Their support is therefore recognised by law and justified, otherwise, the support would be hostile action against other states and would necessitate a direct war between them and the pursuers of guerrillas.

However, a plausible argument can be advanced that retaliation against hostile guerrillas would not be against the territorial integrity of the host government but against guerrilla targets. The Rhodesian government has used this argument and has actually distributed

leaflets in Zambia with a message to this effect. For instance, one of the leaflets dropped in Lusaka in June 1979 reads in part "..... Our action today is part of our struggle to protect our country. We attack ZAPU only and take great care not to harm the people of Zambia whom we want as our friends. ZAPU controls your territory, eats your food and attacks your citizens."¹¹⁶ The writer has observed that the raids have been, according to what this message, addressed to the People of Zambia, say. They have been very precise in locating and hitting their targets. There have been very few cases of overspilling. This kind of action would be correct in the case of ordinary hostile guerrilla bands outside a colonial context. But in the present colonial context, the argument may not hold water because, as we saw in chapters three and four, the cause being fought for by the liberation Movements is a legal one which is also recognised by the international community as such; and also liberation movements are fighting aggression, and therefore, they have and reserve the right to seek support in self-defence. So, the "Frontline States" cannot allow guerrilla

in their countries to be raided, for that would imply a failure to protect people who are fighting for self-determination and human rights, and thereby indirectly allowing a threat to international peace and Security. It is clear from this discussion that the issue will no longer be the violation of the territorial integrity of the state but one of shielding the liberation Movements. The important question that arises in this respect is; is there a duty to support liberation movements? Admittedly, this is a question capable of various answers depending on the philosophical biases of those who answer. However, the writer submits that, generally there is no duty to support another government to overthrow another government, but there is a duty on the international Community to support any effort to protect human rights. To the extent that liberation Movements are fighting for and trying to protect human rights being tempered with by colonialism, the "Frontline States" have a duty to Support them. In fact supporting liberation Movements is an indirect contribution to the maintenance of international

of international peace and Security, and as we know the international community has a duty to maintain the latter. Supporting liberation movements is an indirect way of trying to eradicate colonialism which is incompatible with human rights. Under the United Nations Charter as a Multilateral treaty, Member states which include the "Frontline States" have undertaken obligations to ensure the realisation of self-determination and thereby help maintain international peace and security. From this point of view therefore, the "Frontline States" have a duty to support liberation Movements.

Another important argument normally suggested against hosting liberation Movements is that, unhindered operation of guerrillas from areas of national territory implies the loss of authoritative jurisdiction, for one of the important facts behind the concept of Sovereignty is that a state has the competence to control or prevent certain activities within its boundaries. This simply means that, the *right of independence and territorial integrity*

implies the obligation to respect and protect within national territory these same rights of other states. The loss of capacity to control activities which are injurious to other states would indicate the loss of Sovereignty. In this case, action against guerrillas would not be considered as violation of the territorial integrity and independence of the host states but assistance in driving out guerrillas. Israel tried to use this argument to support and justify the "Entebbe Raid". The other argument of Israel was the protection of its nationals, held hostage by the terrorists, in Uganda. As far as Southern Africa is concerned, this argument cannot be successfully pleaded to justify the raids into the "Frontline States", because, Rhodesia as ruled by the white minority and Namibia as illegally ruled by South Africa are not in law subjects of international law in the sense of being states and are not therefore envisaged in the phrase "any state" in Article 2(4) of the United Nations Charter, whose territorial integrity should not be violated. South Africa has in law no territorial integrity in

Namibia and the white minority in Rhodesia have no territorial Sovereignty or integrity in Rhodesia.

Second, as far as "Frontline States" are concerned, it is not a question of loss of jurisdiction and failing¹¹⁷ to remove guerrillas from their territories, but a deliberate and well considered move to support liberation Movements, which are fighting for human rights recognised by and inextricably bound up with the interests of the international community. In any case if the raids are to be regarded as helping the host states to maintain their supposedly lost jurisdiction, that has to be done with the permission of the host states, which is not the case, as far as the "Frontline States" are concerned.

In this Chapter five, we were determining whether or not international support to liberation Movements can be justified in international law. Our determination shows that, while there are some aspects of international support which

are not very clear in international law, like support to the actual fighters, international support can be justified in international law on the grounds of the rights of self-determination and human rights.

International support is one face of recognition and for this reason we proceed on to the next chapter on recognition.

Chapter 6

Recognition and Liberation Movements.

Recognition is very important as far as the status of liberation Movements is concerned. It furnishes clear evidence that the Movement will enjoy and carry the rights and obligations recognised by international Law. But the matter will and does not end there. It will be and is necessary to find out whether recognition is constitutive or declaratory of the human rights or self-determination, or of the legality or otherwise of the liberation Movements. The implications of whatever conclusion is come to will have a very important bearing on the legality or otherwise of liberation Movements. For instance, the constitutive theory may lead us to the conclusion that, there is no inherent right of self-determination or human rights as

such, but that they are created or constituted by recognition. And yet we saw in Chapters three and four that no State is capable of creating human rights, and that the best a state can do is to acknowledge and protect these human rights which have a supra-constitutional origin.

To discuss the subject of recognition comprehensively, in order to determine the legality or otherwise of liberation Movements, it is proposed to approach the matter from two angles. First we shall try to find out whether or not liberation Movements are governments in exile. Second, we shall try to find out whether or not liberation movements are now recognised as belligerents and see the implications of whatever conclusion is arrived at.

First, are liberation movements governments in exile? There are generally two categories or cases of possible governments in exile. The first category is of governments whose heads or the whole cabinet move from the national territory temporarily during the times of crisis.

This was the case, for example, during the Second World War, when the governments of the Netherlands, Greece, Norway, Poland, Belgium, Yugoslavia and Luxemburg moved to London.¹¹⁸

In this case no formal recognition is necessary because there will have been no break in legal continuity.¹¹⁹ This situation cannot apply to liberation Movements. It would have applied if the liberation Movements or the then African "governments" had left the country in 1890¹²⁰ when they were invaded and began ruling from outside. The point being made is that, the indigenes could have remained the legitimate sovereign authorities and could still be, but they cannot, through liberation Movements, be governments in exile under this first category.

The Second category of a possible government in exile, is the case where "governments" are formed abroad and there is no legal connection or continuity between the government in exile and the incumbent government operating from the national territory. This was the case of the Czechoslovakian government in London and it was formally recognised.¹²¹ Problems arise

with this category. The cases of SWAPO and the Rhodesian Liberation Movements are rather complicated in this respect. However, the Rhodesian liberation movements have not pronounced that they are governments in exile yet and they are not operating any government administration from outside their national territory, purporting to rule those inside the national territory. It is only recently that these liberation Movements, ZAPU and ZANU, commonly known as the Patriotic Front, claim to be controlling three quarters of Rhodesia. There is no evidence that they are ruling three quarters of the country, but it is true that they have infiltrated three quarters of the country. If they were ruling three quarters of the country, then they would be in control of almost the whole country. But as said above, there is no evidence to support this. Therefore, the liberation Movements of Rhodesia are not governments in exile. They are hoping to form a government at some time in future. The only conceivable recognition might be that of belligerency. Some writers suggest what they call "anticipatory recognition." The writer did

not find any evidence in state practice and theory to show that anticipatory recognition is accepted or recognised by international law and in the absence of evidence in state practice, its potential significance in international law is difficult to determine.

But what is the status of the representatives of the Rhodesian liberation Movements in countries like Britain, the United States of America, the Soviet Union and many others? Does that imply recognition of liberation movements as governments in exile? From the scanty literature available on this, the answer seems to be no. For it is generally accepted that there is no implied recognition in the following cases:¹²²

(a) the appointment of consuls and agents or representatives not enjoying diplomatic status, as well as the maintenance of unofficial and informal contacts, especially with respect to routine and urgent matters;

(b) the maintenance of all forms of contact with insurgents during a civil conflict. But a formal declaration of neutrality in the case

of belligerency amounts to recognition of belligerency. From this statement of the law there is no indication or evidence that the Rhodesian liberation Movements are recognised as governments in exile, because their representatives in foreign Capitals do not enjoy diplomatic status. One may therefore conclude that the Rhodesian liberation movements are not governments in exile, and this conclusion unfortunately does not help us to know whether or not liberation movements are justified in international law. Had the conclusion been positive, then logically it was going to follow that they would be justified in international law, like any other recognised government.

The case of SWAPO is a difficult one because of the following events put together. In May 1967, the General Assembly of the United Nations established a United Nations Council and as the legal authority for Namibia to administer the territory until independence. In December 1973, the General Assembly recognised SWAPO as the authentic representative of the Namibian People. On 27 September 1974, the Council for Namibia enacted a Decree¹²³ for the

Protection of Natural Resources of Namibia, aimed at securing for the Namibians "adequate protection of the natural wealth and resources of the territory which is rightfully theirs." Under this Decree no person or entity may search for, take or distribute any natural resource found in Namibia without the Council's permission, and any person or entity contravening the Decree may be held liable for damages "by the future government of an independent Namibia."¹²⁴

This Council¹²⁵ also enacted a plan for the establishment of the Institute for Namibia to provide the necessary education and training to Namibians. The Institute was inaugurated in August 1976 and is located in Lusaka, Zambia and is operating very well. In spite of these persuasive events apparently suggesting a government in exile, the writer finds no evidence to come to the conclusion that SWAPO is a government in exile, mainly because, it is not SWAPO itself which is doing the "administration." To the writer, the Council for Namibia is meant to replace South Africa as the administering authority, whose continued presence in the territory

was declared illegal in October 1971 by the International Court of Justice. This purported replacement of South Africa is not as a mandate, but appears to be a novel version of the International Trusteeship system provided for in Articles 75-91 of Chapter XII of the United Nations Charter. The writer comes to the conclusion that SWAPO is therefore not or cannot be regarded as a government in exile.

South Africa is different from the above two cases. The South African government is recognised and the main problem there is inequality before the law implemented through institutionalised racial discrimination in the name of Apartheid. The ANC and PAC of South Africa have not claimed to be governments in exile and the problems of fact and law for the Rhodesian liberation movements as discussed above are generally representative of the South African liberation Movements situation.

So, the concept of government in exile, in the context of this dissertation, has not enabled us to know whether or not the liberation Movements can be justified in international

law, for as we have just seen from the discussion above, they cannot be recognised as any government.

But are these liberation Movements recognised as belligerents? According to traditional international law, the following conditions must be satisfied before insurgents can be recognised as belligerents. First, there must be an armed conflict of a general nature; second, the insurgents or rebels must occupy a substantial portion of the national territory which must be inhabited or where there are some interests of other states; third, hostilities must be conducted according to the rules of war; and fourth, vital interests of the prospectively recognising states must be threatened. In Rhodesia and Namibia, there is an armed conflict of a general nature but there is no evidence for this in South Africa, inspite of the reports of sporadic fighting occasionally. The liberation Movements of the three territories under study do not control any portion of their national territories. In Rhodesia and Namibia, they have heavily infiltrated their respective territories,

but this is not controlling a substantial portion of the territories. So this particular condition is not met. From the interviews that the writer had with some officials of the liberation movements, in particular with Dr. Tjiriange of SWAPO, who informed the writer that he had attended all the Conferences on the Development of International Humanitarian law, it was made clear that none of the liberation Movements of Southern Africa is a party to the Geneva Conventions of 1949, which are a very important part of the laws of war. But they informed the writer that although they are not parties to these Conventions, they are observing them and are making efforts to become parties. But they made it clear to the writer that, they find it difficult to strictly conduct hostilities according to the traditional rules of war because of the nature of their guerrilla war which Dr. Tjiriange said has assumed a Mau Mau Character in the sense that during the day the guerrillas are normal working people like anybody else and even "fraternise" with the incumbent government Security forces during the day, and during the night they "become" guerrillas. They also said

that it is very difficult for the guerrillas to stop using or wearing the Camouflage uniform of the incumbent government Security forces because when they wear these uniforms it is not so much that they want to confuse the enemy, as that they genuinely need the uniform as an item of clothing. They also said that they can not afford, in economic terms, to buy uniforms for their guerrillas and secondly that those uniforms would make them obviously visible to the enemy. The last criterion, that is, interests of other states must be threatened, is present, because interests, of other states, particularly those of Western states, in the form of their nationals and commercial investments are in an obvious danger.

On balance it is clear from the above discussion that the Liberation Movements do not satisfy all the conditions for recognition as belligerents. From this point of view, one may conclude that, according to traditional international law, liberation Movements cannot use recognition of belligerency as a ground for legality because they do not meet all the

traditional criteria for recognition as belligerents.

However, the writer would like to observe that, even if the liberation Movements were to satisfy all the conditions for the recognition of belligerency he would find it difficult and questionable to base the legal justification of liberation Movements in a colonial situation on recognition of belligerency. There are two main reasons for this difficulty. First, the concept of belligerent-neutral relations is inconsistent with the international support given to liberation Movements, the international support which is based on self-determination as we saw in Chapter five. Second, recognition of belligerency terminates automatically with the defeat of the other belligerent. This runs counter to the acknowledgment and recognition of self-determination and human rights as legal norms and which have a supra-constitutional origin, as established in Chapters three and four. From this point of view one concludes that recognition of belligerency cannot be constitutive of the legality of liberation Movements, because without

it, liberation Movements would be justified in international law on the grounds of self-determination, human rights in general and the fact that they are fighting in defence of the title to their territorial sovereignty. We established in Chapter two that the indigenes, who are represented by the liberation Movements, did not lose their title to the territorial Sovereignty when the settlers came. The acknowledgment of the right of self-determination and human rights cannot be based on might which is essentially what recognition of belligerency is all about. Might in this case would be constitutive of rights and this would be inconceivable, particularly in colonial wars. If that were the case, then colonial regimes would always be justified in international law, because in the majority of cases they would always be mightier than liberation Movements which largely bank on charity for their viability, and whose defeat in the battle field would mean an automatic termination or forfeiture of their recognition and also the concomitant legality supposedly based on that recognition. As we saw above, that would be

tantamount to saying that force or might is constitutive of human rights. And yet, as we know, a genuine legal right should be able to survive force and be successfully vindicated in spite of military force which may be illegal. Generally, and according to legal theory, might should come in to protect or defend human rights and not to create or constitute them where they do not exist. We saw in chapters three and four that nobody is capable of creating these rights which are essentially part of humanity. This was an observation on the possibility of recognition of belligerency being used as a ground to justify liberation Movements in international law.

However, the concept of recognition of belligerents vis-a-vis liberation Movements has been modified by the development of International Humanitarian Law. In this area of international humanitarian law a number of authorities categorically state that when one is dealing with colonial wars, the traditional criteria for recognition of belligerency should be qualified or modified. Among these authorities

is Profess Abi-Saab¹²⁶ who said that it is recognised that the thinking upto 1949 was that wars of national liberation constituted a category of internal wars until recognition of belligerency was achieved. But, he went on, one should take cognisance of the realities of guerrilla warfare and depart from the traditional theory of territorial control upon which recognition of belligerency was possible, and use, instead a flexible interpretation of the law based on effectiveness in relation to that of the colonial government.

Another authority, Kahn¹²⁷ is quoted as having made the following argument when talking about the condition of conducting hostilities according to the rules of war:- "To link the right of a people to defend its native land and its honour to a uniform would be to carry the question of defence to an absurdity. Patriotism is not packed only in a military uniform, just as it is impossible for the activities of the spontaneous hurricane to be set forth in the rules of a meteorological observatory." This is going to be discussed in the next

chapter seven in an effort to find out if liberation Movements can be justified on the ground of those new developments in the international humanitarian law, which as we shall also see is very much related to the Human Rights question.

But just before this, it is important to recall that in this chapter six we were trying to determine whether or not liberation Movements can be justified on the ground of recognition of belligerency. We have found that the liberation Movements of Southern Africa are not governments-in-exile and that they do not meet the criteria for recognition as belligerency and hence in law they are not belligerents in the technical sense. As a result we are unable to tell from this finding whether or not liberation Movements can be justified in international law. This conclusion, however, does not ~~t~~otally affect the established legality of international support discussed in chapter five because that legality is based on the grounds of self-determination and human rights in general and not on recognition of belligerency or governments in exile.

Chapter 7.

Liberation Movements and International
Humanitarian Law.

An important fact to observe right from the beginning is that human rights as discussed in chapter four afford the basis for humanitarian law. Humanitarian law is one means of protecting human rights. Human rights law relates to the basic rights of all human beings everywhere, at all times, while humanitarian law relates to the rights of particular categories of human beings, for instance, the sick, the wounded, prisoners of war and civilians during the period of armed conflict. The importance of this observation is that, international humanitarian rights are an aspect of human rights in general and cannot be divorced from the context of the latter. So, in our determination of the legality or otherwise of liberation movements in this aspect, we should always remember that we are dealing with an aspect of

human rights in general, the latter which received recognition in international law as established in Chapter four.

A study of international practice under the 1949 Geneva Conventions from 1949 to 1965 shows that no case existed of a conflict falling within Article 2 where parties to the conflict were not, at the start of the armed conflict, mutually recognising states. The main reason for this is that wars of national liberation were regarded as internal wars until recognition of belligerency was achieved. However, latest developments suggest that cognisance must be taken of the realities of guerrilla warfare which is generally associated with liberation Movements. There are indications towards departing from the traditional theories of territorial control upon which recognition of belligerency is possible.

The question is whether special rules should be framed for wars of national liberation. A realisation of the inadequacy of existing Conventions on some aspects of modern armed

conflicts, and in particular as a result of harsh sentences, very often involving capital punishment meted out to freedom fighters in Africa, prompted the General Assembly of the United Nations to request the Secretary General in continuing the study initiated under resolution 2444 (XXIII) to give "special¹²⁸ attention to the need for the protection of the rights of civilians and combatants in conflicts which arise from the struggles of peoples under colonial and foreign rule for liberation and self-determination and to better application of existing humanitarian Conventions and rules to such conflicts."

Not only this, but also the Organisation of African Unity Council of Ministers at its 11th Ordinary Session held in Algiers in September 1969, adopted a resolution on the Coordination of Liberation Movements, which, inter alia, recognised "the right of freedom fighters in colonial territories when captured to be treated as prisoners of war under the Red Cross Geneva Conventions of 1949."¹²⁹

In 1968, at its 23rd Session, the General Assembly¹³⁰ of the United Nations had recognised the right of freedom fighters in Southern Africa to be treated when captured, as prisoners of war under the Geneva Conventions of 1949.

By Resolution 2383 (XXIII) on Rhodesia, the General Assembly called upon the United Kingdom "in view of the armed conflict prevailing in the Territory and the inhuman treatment of prisoners to ensure the application to that situation of the Geneva Convention relative to the treatment of Prisoners of War of 12th August 1949." This was reaffirmed at the 25th Session of the General Assembly by Resolution 2652 (XXV). One of the most important resolutions in this connection adopted at the same 25th Session was number 2708 (XXV) which, inter alia, stated:- "5. Reaffirms its recognition of the legitimacy of the struggle of the colonial peoples and peoples under alien domination to exercise their right of self-determination and independence by all necessary means at their disposal and note with satisfaction the progress made in the colonial

Territories by the National Liberation Movements both in their struggle and through their reconstruction Programmes.....", and by Resolution 2674 (XXV) of 9 December 1970, the General Assembly considered that " 3. the principles of the Geneva Protocol of 1925 and the Geneva Conventions of 1949 should be strictly observed by all states and that states violating these international instruments should be condemned and held responsible to the World Community," and affirmed that "4 the participants in resistance movements and the freedom fighters in Southern Africa and Territories under colonial and alien domination and foreign occupation, struggling for their liberation and self-determination, should be treated, in case of their arrest, as prisoners of war in accordance with the principles of the Hague Convention of 1907 and the Geneva Conventions of 1949." Similar resolutions were adopted individually in respect of freedom fighters of South Africa,¹³¹ Namibia¹³² and Rhodesia.¹³³ By resolution 2396 (XXIII) on the policy of apartheid of South Africa, the General Assembly

expressed "grave concern over the treatment of freedom fighters who are taken prisoner during the legitimate struggle for liberation" and declared that such freedom fighters should be treated as prisoners of war under International law, particularly the 1949 Geneva Conventions on the Treatment of POW."

The relevance and importance of these resolutions is that as a result and in response to them, there was progress in the development of the international humanitarian law specifically accommodating liberation wars and the principle of self-determination, and thus going beyond the belligerent neutral relations. As we shall see below, liberation Movements are now specifically provided for within the Geneva Conventions of 1949. This means that liberation movements are recognised by the international humanitarian law not as a result of the belligerent-neutral relations concept but on grounds of self-determination. It is also important to point out that the Geneva Conventions are part of the jus in bello, that is, the international rules of the law of war, which can be

divided into two parts, viz, rules concerning the protection of the victims of war and the rules relating to the conduct of war.

In response to the above General Assembly Resolutions, the International Committee of the Red Cross convened a Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts. At the first of these Conferences of Government Experts in 1971 in Geneva, there was certain indecisiveness about the nature of a "war of national liberation." At the second of these Conferences in 1972, there was agreement that such a war is an international conflict. It was made clear that a war of national liberation may take the form of an anticolonial war or war fought against unlawful aggression or an unlawful occupation of territory. As far as anticolonialist wars are concerned, these were stated to be international conflicts because peoples fighting for self-determination and recognition of their separate statehood should

be recognised as international persons. These international persons, according to the Conference, were engaged in a war with states, and the conflicts accordingly were international ones within the meaning of Article 2 of the four Geneva Conventions of 1949.

Following these two Government Experts Conferences, the International Committee of the Red Cross prepared two Draft Additional Protocols to the Geneva Conventions of 1949, one providing additional protection in traditional wars between states and a second one introducing much more detailed provisions than existed in the Common Article 3 of the 1949 Conventions for wars not of an international character. The draft protocols were discussed in four sessions starting from 20th February 1974, to the fourth and final one on 10 June 1977 accompanied by the Ceremonial Signing of the Final Act.

The result of all this and what is very important for this dissertation are the "Protocols Additional To The Geneva Conventions of 12 August 1949", as adopted by the Diplomatic

Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts. Protocol I is one most relevant to the dissertation because it deals with protection in international armed conflicts and accommodates wars of national liberation. The most important Articles, for our purposes, in Protocol I are: Article 1(4), Article 4, and Article 44. Article 1(4) reads "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 Cooperation among states in accordance with the Charter of the United Nations."¹³⁴

At the first page and third paragraph of the introduction,¹³⁵ it stated: "These legal instruments are deposited with the Swiss Confederation They shall have the force of international law six months after two

instruments of ratification or accession have been deposited." It is here important to appreciate that the 1949 Geneva Conventions are recognised as international law under international Conventions, Article 38(1)(a) of the Statute of the International Court of Justice. Once instruments of ratification are deposited and the Protocols in question have the force of law, then there will be clear evidence that liberation Movements are legally accommodated by the Geneva Conventions and hence legal in international law. Under these Protocols, the law goes beyond belligerent-neutral relations and acknowledges the right of self-determination as discussed in Chapter three of this dissertation. This means that, as per these Protocols, international humanitarian law goes beyond its traditional context or framework of relating to the rights of human beings in particular circumstances like the sick, wounded and prisoners of war, but embraces the whole concept of self-determination as an aspect of human rights. This is a qualification and modification, in a progressive sense, to the customary

or traditional rules of belligerent - neutral relations which seem to be indifferent to the right of self-determination because it is based on might as pointed out in Chapter six. It is important to note that this modification is with the law as it applies to colonial wars, otherwise in cases of ordinary wars outside a colonial context the customary or traditional rules of belligerent-neutral relations will apply. This is why these Protocols are "Additional."

Article 4 of Protocol I, on the Legal Status of the parties to the Conflict states: "The application of the Conventions and of this Protocol, as well as the conclusion of the agreements provided for therein, shall not affect the legal status of the parties to the conflict. Neither the occupation of a territory nor the application of the Conventions and this Protocol shall affect the legal status of the territory in question."¹³⁶ Read in the light of Article 1(4) of Protocol I, this article implies that the acknowledgment of the legitimacy of liberation Movements and the right to self-determination by the Geneva Conventions shall not be affected by the application of

the Protocol. This means that it is no longer like the case that would obtain in the case of belligerent-neutral relations where the defeated party will automatically forfeit its recognition as belligerent and hence the legality based on it. In this Protocol, in as far as it refers to colonial wars, whatever legal status each party has prior to the conflict will not be adversely affected by the application of this Protocol. Thus, liberation Movements and their right to self-determination will still retain their recognition in international law whether or not they are defeated. Their right is by virtue of law and not might, and survives military defeat and should be capable of vindication before a court of law. This echoes and supports what has been said in Chapters three and four that self-determination and human rights are rights recognised by international law. This also obviates the criticism that the inclusion and accommodation of the notion of a war of national liberation in the international humanitarian law would suggest a distinction between good and bad wars, just and unjust wars and between the side which was

fighting lawfully and the side which was fighting unlawfully in terms of the initial legality of the resort to war. The fear expressed here is that this might bring in dissatisfaction against certain victims and might lead to charges that the enemy is always the wrongdoer, and yet victims of war must be put on a basis of equality. What the relevant articles of Protocol I have done is to remove these distinctions by putting liberation Movements on an equal footing with their enemies, unlike before when they would be regarded as rebels without protection of the Geneva Conventions, until they deserved and actually earned recognition as belligerents. The primary aim is to lessen suffering of human beings affected by and involved in the armed hostilities. Humanitarianism is the main aim.

In fact the accommodation of liberation Movements is very constructive in the sense that, in theory, it gives the liberation Movements a very ~~sense of~~ big responsibility as far as respect for humanitarianism is concerned. Once these liberation Movements become parties to the Geneva

Convention, then they will necessarily have an express obligation to comply with the Conventions and thereby sparing human life.

Articles 44(2) and 44(3) of Protocol I, in an effort to accommodate liberation Movements, modify the requirement that hostilities must be conducted according to the rules of war. Thus Article 44(2) provides: "while all combatants are obliged to comply with the rules of international law applicable in armed conflict, violations of these rules shall not deprive a combatant of his right to be a combatant, or, if he falls into the power of an adverse party, of his right to be a prisoner of war, except as provided in paragraphs 3 and 4" and Article 44(3) provides "..... Combatants are obliged to distinguish themselves from the Civilian population while they are engaged in an attack or in a military operation preparatory to an attack. Recognising, however, that there are situations in armed conflicts where, owing to the nature of the hostilities an armed Combatant cannot so distinguish himself, he shall

retain his status as a combatant, provided that, in such situations, he carries his arms openly:-

- (a) during each military engagement and
- (b) during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate." One can see from these two subsections of Article 44 of Protocol I, that the nature of a guerrilla warfare, which is being used by liberation Movements has been taken cognisance of in the development of international humanitarian law.

However, the above discussion on the Additional Protocol I has assumed that this Protocol has force of law. This is not the case. At the time of writing, and as far as the writer has been able to ascertain from the relevant scanty literature available, the Protocol is not yet in force. We do not know how many states have deposited their instruments of ratification and therefore it is difficult to predict or know how many states will be parties to it. Dr. Tjiriange, lecturer in law at the

Namibian Institute in Lusaka informed the writer that none of the liberation Movements of Southern Africa has ratified the Protocol, although, he added, SWAPO made a Declaration to the effect that it would comply with the Geneva Conventions of 1949 and the Additional Protocols pending its ratification of the Protocols.

Another difficulty arises from ^{the} fact that the Additional Protocols contain no clause on reservations. According to Article 19 of the Vienna Convention on the Law of Treaties, parties to a treaty may formulate reservations, unless the reservations are prohibited by the treaty itself, or the reservations are incompatible with the object and purpose of the treaty or the treaty provides for only specified reservations. We do not know what kind of reservations states will make in their instruments of ratification.

These two Additional Protocols also do not provide for de facto or provisional application. According to Article 25 of the Vienna Convention on the Law of Treaties, a treaty or

a part of a treaty is applied provisionally pending its entry into force if the treaty itself so provides or the negotiating states have in some other manner so agreed.

In view of all these difficulties, one would say that the relevant Additional Protocol I cannot, at the moment, be successfully used as a ground on which to base the legality of liberation Movements, because technically, it is not yet law.

To summarise this chapter, it can be said that, it has been found out that the Additional Protocol I, as part of the Geneva Conventions of 12 August 1949 which are rules of international law, acknowledges and accommodates wars of liberation, not only as belligerents, but as a result of the acknowledgment of the right to self-determination. This would justify liberation Movements in international law, but it is still difficult at the moment to use the Protocol as a basis for legality, because we do not know whether the latter has been ratified and what kind of reservations will be made and also there is no provision for provisional

application of the Protocol I. And hence the Protocol I is not yet in force.

However, there is still one important matter in respect of this legality which is yet to be determined. This is the legality or otherwise of the use of force or violence by the liberation Movements. We discuss this controversial matter in the next Chapter eight.

Chapter 8.

The Use of Force by Liberation Movements.

This chapter is concerned about the legality or otherwise of the use of force by liberation movements. It is also important to determine whether or not the use of force was ever legal at all, before the liberation movements adopted it.

It is important to remark right from the beginning that the propriety of statements that international law confers a right to resort to war and to exercise belligerent rights is highly questionable. It is probably more accurate to say that international law has dealt with and tolerated war as a state of fact which it has been powerless to prevent.¹³⁷ This concept of jus ad bellum has been questioned and condemned in chapters one and two of this dissertation. It is inconceivable that war as

such was ever sanctioned by international law. The fact that there are rules of war, in the name of jus in bello, which come after the fact of war to avoid suffering and further loss of life, does not mean that there was ever a legal right to go to war. Since society at times cannot prevent the fact of war, it cannot just watch lives being lost, but tries to regulate that war through jus in bello, but this does not assume or presuppose the legality of jus ad bellum.

In the light of this, it is important to make it clear that guerrilla warfare in colonial wars is not a different species or concept of the laws of war, it is war nevertheless, but conducted on non-conventional lines. It is a method of fighting a war which is different. This is the method being used by liberation Movements. The important point here is that, the liberation Movements are fighting a war which results in loss of human lives. We condemn all wars because of this loss of life and we should also condemn the use of force by the liberation Movements or else we risk the

application of double standards based on the distinction between just and unjust wars. Can the use of force by the liberation Movements be justified on any ground inspite of this condemnation?

Several attempts were made through the General Treaty for the Renunciation of War (Kellogg - Briand Pact of 27 August 1928) and the Covenant of the League of Nations to limit the so-called "right" to resort to war. These efforts culminated in Article 2(4) of the United Nations Charter which prohibits war or any threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations.

The important question for our purposes is, are the liberation Movements an exception to Article 2(4) of the United Nations Charter? If not, why and if yes, what is the legal justification for the exception? War is war regardless of who is waging it or the legality of the cause, for it is the loss of human life

which is the issue. In both just and unjust wars, people are killed. Should liberation Movements use the same means of war which is prohibited and which we condemn?

In order to answer this question, we will first discuss the right of self-determination and its relevance to the legality or otherwise of the use of force by liberation Movements. According to Article 2(4) of the Charter of the United Nations, states are required to refrain from the use of force "in their international relations." The question is whether the settlers' or colonial powers' relations with their dependent territories or peoples are to be considered international relations. The answer to this is yes, because the right of self-determination as we attempted to establish in Chapter three is recognised in international law and also the territories under study did not lose their title to their territorial Sovereignty when the settlers came. From this, it follows that dependent or colonial territories or peoples cannot in international law be regarded as parties of the "metropolitan" states, and so the

colonial powers or settler minority regimes are under an international legal obligation to let populations of such territories realise their right of self-determination. The relationship between the colonial powers or colonial settlers and the dependent territories or colonial people is therefore international and cannot fall within the domestic jurisdiction of the administering regime. In addition to this, international law also covers the relationships not only between states but also between other subjects of international law. It follows that, from the point of view of the prohibition in Article 2(4) of the United Nations Charter, by "international relations" is not only meant relations between states, but also between all subjects of international law. Since international law has recognised the right of self-determination, the use of force against a dependent or colonial territory or peoples by any state, government or group, in this context, could be qualified as being in defiance of Article 2(4). It follows that any forcible action by the colonial or settler incumbent

regimes to stifle the independence or liberation Movements of colonial peoples contrary to the prohibition in Article 2(4), like what is happening in Rhodesia and Namibia at the time of writing, is to be qualified as aggression in accordance with the valid rules of international law, and entails all the consequences that are attached to the Commission of acts of aggression, for instance, being fought in self-defence, in virtue of international law. This view is supported by the Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States, in accordance with the Charter of the United Nations, of 1970, which inter alia, states that every¹³⁸ State has a duty to refrain from any forcible action which deprives peoples of their right of self-determination, freedom and independence. In their actions against and resistance to such forcible action in pursuit of the exercise of their right of self-determination, such people receive¹³⁹ support in accordance with the purpose and principles of the Charter of the United Nations. Thus, according to this Declaration, colonial or

settler governments are prohibited from using force to prevent the achievement of self-determination; and armed resistance by liberation Movements against such colonial or settler power is regarded as legitimate, that is, such liberation Movements have a "right" in international law to wage war. This "right" to wage war being talked about here is not one in the sense of jus ad bellum, but that of self-defence which is also very controversial and will soon be elaborated on. The Declaration just cited above has great weight and is highly significant and authoritative in Character because it was unanimously adopted with the full participation and consent of the Western Powers who for the first time expressly recognised self-determination as a legal right in it.

It may be said that the use of force by the liberation Movements may be tolerated in international law as an action taken in self-defence against aggression which commenced with the advent and inception of colonial rule and which still continues. Liberation Movements, which date back to the time the settlers came,

as discussed in chapters one and two, are still defending the title to their territorial Sovereignty. This title was never lost to the settlers. Second, the use of force by the liberation Movements may be tolerated in international law as an action taken in self-defence in support of the right of self-determination. As said above, fighting aggression is a way of defending the territory and indirectly this is also fighting for self-determination, for one cannot self-determine if invaded by aggressors and therefore a people cannot exercise their sovereignty. Fighting aggression and fighting for self-determination are two sides of the same coin, the latter which is self-defence, that is, in this context of Southern Africa. What is important for our purposes is that the use of force in this context may be tolerated on the ground of self-defence.

The question then is, is there such a thing as the right of self-defence? If it is there under customary international law, what is the effect of the United Nations Charter on it and to its use as a ground for the justification of the use of force by the liberation

Movements? Is this right an exception to the prohibition against the use of force and why? To answer these questions, it is proposed first to look at the position of self-defence under customary international law and then under the United Nations Charter later in order to find out if the Charter has qualified the right of self-defence envisaged under customary international Law.

The right of self-defence exists under customary international law as an exception to the prohibition of the use of force. According to Bowett,¹⁴⁰ who has written extensively on the right of self-defence, the function of the right of self-defence is to justify action otherwise illegal, which is necessary to protect certain essential rights of the state against violation by other states. The substantive rights to which self-defence pertains, and for which it serves as a means of protection are: the right of territorial integrity, political independence, protection over nationals, and certain economic rights.¹⁴¹ This right is the main exception to the general prohibition

against the use of force. It has place in almost every system of law. Its universality indicates that its basis lies in natural law. It exists as a fundamental precept of natural law. It is preventive and protective of the human rights and is non-retributive. It is always an exception because it is founded on the preservation of basic human rights which have a supra-constitutional origin. This is the right of self-defence under customary international law. What does the United Nations Charter say about this right?

Under the Charter, the use of force is tolerated under the auspices of the Security Council¹⁴² and under regional¹⁴³ arrangements or in the case of individual or collective self-defence.¹⁴⁴ Article 51 in particular states "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations"

This Article 51 is controversial and has been interpreted in two¹⁴⁵ main conflicting ways. The first interpretation is that the Charter

left the content of the right of self-defence unimpaired since it refers to the right of self-defence as inherent in the French version: "natural right". The wording of Article 51 "Nothing shall impair....." is alleged to show that no change was contemplated. In an elaboration of this, it is maintained that the Charter only clarifies the legal position with respect to self-defence when an armed attack occurs but does not restrict the right of self-defence in situations other than the occurrence of such an attack. Otherwise self-defence continues to remain a lawful means of protecting certain essential rights and not only the right to be free from an armed attack. The argument goes and maintains that, certain international delicts do not involve force. From this point of view and according to Bowett;¹⁴⁵ self-defence can be resorted to on the violation, not only by force of armes, of the right of territorial integrity, political independence, protection over nationals and some rights of

an economic nature.

"When the delict does not involve force or threat of force, it would seem arbitrary to deny to the defending state the right to use force in defence of its rights as a matter of fixed principle. There is something to be said for the view that economic or ideological aggression can be as detrimental to a state security and if illegal, as dangerous a violation of the state's essential rights as the use or threat of force."¹⁴⁷

The Second¹⁴⁸ interpretation of Article 51 of the United Nations Charter takes the position that the Charter modified the customary right of self-defence. According to this interpretation, in view of the limitations that follow both from Article 2(4) and Article 51, a state may act in individual self-defence only if an armed attack occurs against it. Thus, under the Charter, there is no room for self-defence even if the most fundamental and vital rights of the state have been endangered or violated in a manner which does not constitute an armed attack. The decisive factor therefore is

no longer the content of the right of self-defence and the extent of its violation, but the form in which such violation takes place and that form must be "armed attack." Hence any preventive, anticipatory or pre-emptive use of force before the occurrence of an armed attack cannot be regarded as action in self-defence. The vexing question is: what is an "armed attack"?

Enemies may infiltrate a foreign territory before they actually physically attack. Is this type of violation of territorial integrity carrying weapons not an attack? This is just one of the problems with the second interpretation of Article 51 of the Charter.

Another big question is, is the oppressive behaviour and occasional brutality of settler regimes in the territories under study to be characterised as an "armed attack" against the indigenes and the liberation Movements? Is it the behaviour of the liberation Movements which is an "armed attack" against the settlers? According to the United Nations Document A/5746 at page 42, there is "a right of self-defence of peoples against colonial domination."

And the General Assembly resolutions 215 (XX) and 2189 (XXI) recognise the legitimacy of the struggle of peoples living under colonial Oppression. This is supported by General Assembly Resolution 3314 (XXIX) on the Definition of Aggression which in Article 7 specifically lays down that:- "Nothing in this Definition, and in particular Article 3, could in any way prejudice the right to self-determination, freedom and independence, as derived from the Charter, of peoples forcibly deprived of that right and referred to in the Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among states in accordance with the Charter of the United Nations, 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."

It is clear from this that the practice of the United Nations, particularly as evidenced

by the Declaration on the Granting of Independence to Colonial Countries and Peoples, is against viewing colonial struggles as "armed attack" or prohibited use of force against colonial and settlers powers, and that the right of self-determination as affirmed by the above Declaration would be meaningless if it could not be defended against colonial or settler regimes which attempted to deny it. According to the second interpretation of Article 51 discussed above, therefore, action in self-defence in support of the right of self-determination is a new exception to the prohibition of the use of force laid down in Article 2(4) of the United Nations Charter. From this point of view, the use of force by liberation Movements in support of the right of self-determination is justified under this new exception to the progressive interpretation of Article 51 of the Charter of the United Nations. The progressive interpretation referred to here, is the second interpretation.

Action or the use of force by the liberation Movements, purportedly taken in self-defence against an aggression which commenced with

the inception of colonial rule and which still continues has been criticised¹⁴⁹ on the ground that the notion of continued aggression is new and ignores the doctrine of intertemporal law by which titles acquired by force when this method of acquisition was lawful and that they (titles) are valid even today. This criticism cannot be sustained successfully, because it is not true that the notion of continued aggression is new and that, that method of acquisition was ever lawful. The phrase "continued aggression" itself is the most appropriate one to explain the correct position, in the sense that right from the beginning of the colonial saga, the advent of settlers and the occupation of the area under study, particularly Rhodesia and Namibia, was aggression and has continued so upto the present day. This occupation or the advent of settlers was never and has never been valid in international law and therefore the question of intertemporal law does not arise. In fact, it was discussed, established and made clear in Chapters one and two of this dissertation that no legally valid title to territorial sovereignty was acquired

by the colonial or settler regimes. The claim, by colonial powers or settlers to these territory cannot be valid in international law, because as pointed out in chapters one and two they were "acquired" and maintained by force on the theory prevalent in the age of discovery that territories not in the possession of a christian prince were "territorium nullius" subject to acquisition by Papal grant or by discovery and occupation without regard to the wishes of the indigenous inhabitants. From this point of view it is rather difficult to run away from the conclusion that action taken in self-defence against an aggression which commenced with the advent of colonial rule and which still continues is justified in international law. The action of liberation movements in self-defence against continued aggression is therefore justified on this score. The Algerian National Liberation Front [ANLF] used a version of this self-defence as a justification for their use of force. They asserted that a people suffering from colonial oppression had the right to use force against their oppressors, and that to establish the

legitimacy of their use of force they did not have to wait until they achieved sufficient military success to qualify as a belligerent or until they set up a government. They maintained that from the inception of their revolution to the moment of their ultimate victory their exercise of force was legitimate because they were fighting a war of self-defence, a delayed reaction but nevertheless a reaction to the French invasion of 1830. This case can be distinguished from the Southern African ones where there was no break in resistance as Nyandoro said. It was the form and nature of resistance which changed from time to time for reasons of logistics. The Algerian National Liberation Front assertion implies a "right" of reconquest, that is the right of a people to throw out a conqueror, even though the "conquest" had occurred over a hundred years earlier. The Algerians were then reasserting a **Sovereignty** they had never lost. But it is important here to Note that it is not an unrestricted might of reconquest, for that would cause chaos in the world, but an unrestricted

right to overthrow colonialism. This is one of the reasons why generally, the Afro-Asian Countries interpret self-determination to mean decolonization. From this point of view, these countries view colonialism as a form of continuing aggression which must be eliminated by the use of force in the exercise of the right of self-defence.

In what is now referred to as the Goa Incident, India tried to justify her use of force against the Portuguese colony on the ground that Portuguese presence in Goa constituted an aggression commenced in about 1510 but still continuing. The historical background of this case is not clear, but in 1961 the Security Council failed to condemn India for aggression and this seems like an acquiescence to India's use of force. Many of the new states and the Soviet Union felt that colonialism was so evil that the use of force to eliminate it should be tolerated. While this case may not prove anything, it shows the big support given to the use of force in self-defence against continued aggression.

The use of force in self-defence in support of the right of self-determination is not new nor is it peculiar to Africa, for history abounds in cases where political independence was achieved by ferocious struggle. It was the case, for example, in Greece, Belgium, and the Latin American States; and many national revolutions in the 19th Century troubled the work of the 1815 Congress of Vienna. The legitimacy of this type of violence had already been proclaimed by the French revolutionaries of the 18th Century, and later it inspired many theories stressing the ideal of national liberation.

Another point which may be added here in support of the resort to the use of force by the liberation movements, although it is not a justification for the use of force, is that, colonial peoples had no other peaceful alternative, especially taking into consideration that they have no capacity to litigate a case before the International Court of Justice. According to Article 34(1) of the Statutes, only states, according to the Criteria of the

Montevideo Convention of 1933 on the Rights and Duties of States, may be parties to a case before the International Court of Justice. Colonial Peoples and or liberation Movements cannot therefore vindicate their right to self-determination in this court, even to seek an Advisory Opinion. The Case of South West Africa is evidence for this. The Namibian Case had to be championed by Ethiopia and Liberia, resulting in the 1966 judgment that these nominal plaintiffs had no locus standi, among other things. The point being advanced is that, if liberation movements had the capacity to appear before the International Court of Justice as a party and had proceeded on to resort to the use of force without trying and exhausting the peaceful method, that is, of taking the matter before the Court, they would be blamed by the international community for preferring violence to peaceful means.

The above discussion has shown one important fact and that is, the right of self-defence exists both under customary international law and under the Article 51 of the Charter as interpreted in the Progressive sense and that the use

of force by liberation movements can be justified under both customary international law and Article 51 as interpreted in the progressive sense. This use of force by the Liberation Movements can be justified as action taken in self-defence against continued aggression and/or action in self-defence in support of the right of self-determination. This seems to be the legal position as far as the writer has been able to ascertain. This right of self-defence, is as an exception, otherwise the use of force is illegal and cannot be justified in any way.

But the peoples striving for the enforcement of the right of self-determination or political independence also have obligations under the Charter of the United Nations, especially with respect to the maintenance of peace and security. The principle of the maintenance and peaceful settlement of controversial matters obliges the peoples fighting for their freedom to seek, in harmony with their own interests, the peaceful means of putting an end to colonial rule. But if such efforts fail, then, as a

matter of fact, it becomes inevitable and necessary that they pay the colonial or settler powers for their forcible action in their own currency. Such use of force, however, if it is submitted, must not go beyond the necessary measure to realise the right to self-determination. Colonial peoples, through their Liberation Movements, as a matter of fact, should use armed force only as long as they absolutely have to do so. Liberation struggles, if it is submitted, conducted within such limits do not endanger international peace and security. On the contrary, the colonial or settler powers' efforts to keep the oppressed people under its rule must create in an area such a situation as may be a threat to international peace and security.

In summary therefore, in this Chapter, it has been found that the use of force by the liberation Movements can be tolerated [the writer prefers "tolerated" to "justified" because he still holds that the use of force in a war can never be "justified" as such regardless of how noble the cause is], on the ground

of self-defence in support of the right of self-determination and against continued aggression. The latter two are two sides of the same coin which is self-defence, in the context of this chapter. This means that, the use of force itself, is an exception to Article 2(4) in order to achieve the right of self-defence. No other ground was found to enable the law to tolerate the use of force by liberation Movements. There is therefore no basis for the criticism that there is an application of double standards in favour of liberation Movements. This use of force tolerated on the ground of self-defence, must not be retaliatory or retributive and must be directed solely towards the colonial or settler incumbent governments which are an obstacle to the realisation of the right of self-determination. Otherwise, any other use of force outside the context of self-defence, by the liberation Movements is illegal or contrary to international Law.

Chapter 9.

Evaluation and Conclusion.

In this dissertation the writer set out to determine whether or not liberation Movements of Southern Africa can be justified in international law. In this determination, he found the following:

1. The initial occupation of Southern Africa by the settlers had no legal basis in international law.

2. In the case of Rhodesia, the Royal Charter per se did not have power, in international law, to sanction the colonisation of other sovereign people against their wishes, because the British Parliament and its supremacy could not extend to other sovereign territories. Municipal legislations do not have such inherent power in international law.

3. The British South Africa Company did not have the effect of vesting the title to the territorial sovereignty of Rhodesia to the settlers because it derived its purported powers from the Royal Prerogative, through the Royal Charter, the latter which, as we have just seen, could not in international law validly effect the domination of other sovereign peoples.

4. The Rudd Concession was a municipal law contract for the development of the mineral resources of Southern Rhodesia and did not give any jurisdiction to the settlers, and no state can give itself away in a Concession.

5. Liberation Movements are not a new phenomenon. Their genesis dates back to the time the settlers came. Then, they started as self-defence wars and when they were defeated in the battle field, they resorted to constitutional means for logistics reasons. In the early sixties, they decided to revert to the use of force again and were technically designated liberation Movements. They are still fighting for the same reasons they fought for during the advent of the settlers.

6. The settlers did not, in international law, acquire title to any of the three territories under study by any of the relevant recognised modes of acquiring territory, viz adjudication, occupation, Cession, prescription through adverse possession, conquest or annexation. It was found that the indigenes retained title to the sovereignty of these territories. They had acquired this title by prescription. This title could be used as the legal basis for their claims to rule or dominate the governments of these territories. They are doing this through liberation Movements. From this point of view, the fighting by the liberation Movements may be regarded as in defence of this title.

7. The principle of self-determination received recognition as a legal norm under general principles of law. This is a right of people to choose the form of government under which they wish to live and the sovereignty to which they wish to belong. It belongs to a majority within a given territory under the domination of a foreign power. Since liberation Movements are fighting for self-determination,

they are therefore fighting for a right recognised by and hence are justified in international law.

8. Equality before the law received recognition as a legal norm in international law under general principles of law and declaratory recognition under international Conventions. This means that racial discrimination, which is a form of inequality before the law, and all other inequalities before the law are illegal in international law. Liberation Movements, by fighting for equality before the law are fighting for a human right recognised by international law and hence they are justified in international Law.

9. International support is legally justified on the grounds of self-determination and human rights in general. The breach of these rights, which are universal and have a supra-constitutional origin, endangers international peace and Security. Therefore international support is not hostile action against the incumbent governments being fought. The indigenous peoples, who never lost their title

to Sovereignty of the territories, have, through their liberation Movements, and reserve the right to seek and receive support in self-defence.

10. The concept of recognition of liberation movements as governments in exile and as belligerents did not help the writer to know whether or not liberation Movements can be justified in international law. Facts revealed that none of the liberation movements of Southern Africa is a government in exile or is recognised as a belligerent. The writer observed that, even if these liberation Movements had met the conditions for recognition as belligerents and had actually been recognised as belligerents, he would still question the use of recognition of belligerency as a ground of legality for liberation Movements because it is based on military might and also because it implies that the moment the belligerent is defeated or loses the war, it automatically forfeits the recognition and becomes illegal. This cannot be so in the case of liberation Movements because their legality can still be established under some grounds like self-determination and human rights.

11. Liberation Movements are expressly recognised, in a declaratory sense, by the Geneva Conventions of 12 August 1949, not only as belligerents where the liberation Movements meet the conditions, but also on the ground of self-determination. This is so because of the Additional Protocol I to the Geneva Conventions, which qualifies the latter. Liberation Movements are accommodated now by these Geneva Conventions as qualified by the Additional Protocol I. However, the qualification by the Protocol I is not yet in force at the time of writing as far as the writer has been able to ascertain and we do not know what kind of reservations the states or parties will make in their instruments of ratification.

12. Doubt was expressed as to whether international law ever conferred and confers any right to resort to war before and during the colonial period. It was submitted that jus ad bellum was never part of recognised international law, although tolerated as a matter of fact and reality. It was again found that guerrilla warfare is not a species or

different concept of the laws of war, especially in the context of colonial wars, but a non-Conventional method of fighting a war. The point which was being advanced was that liberation armed struggle is a war which is prohibited by international law. From this point of view, it was found that the use of force by the liberation movements is technically contrary to international law, just like any other war just or unjust, and cannot be classified as a just war, or else we risk the application of double standards, because whether or not it is just, it is still war. However, inspite of this, it was also found that the use of force by these liberation Movements could be excused and tolerated on the ground of self-defence, that is defending the title to their sovereignty and in support of the right of self-determination and human rights in general. Any other use of force by the liberation Movements outside the context of self-defence would be inexcusable.

One comes to an overall conclusion that liberation Movements are justified in international law subject to some difficulties raised in this dissertation. The indigenes of the territories

under study did not lose title to the Sovereignty of their territories and this title is the overall legal basis for the claims of the indigenes, through their liberation Movements, to dominate the governments in their respective territories. The rights based on this title should be vindicated.

NOTES

1. Statement by George Nyandoro [1968 Secretary General of ZAPU] in an interview with Sechaba, reported in Wolf Roder, Voices of Liberation in Southern Africa: The Perimeter of the White Bastion [Committee on Current Issues — African Studies Association 1972].
2. W.R. Thayer, The Life and Times of Cavour, Houghton Mifflin Co. 1914, at 424, also quoted in Rupert Emerson, From Empire to Nation Page 43.
3. Statement of a Rhodesian Freedom Fighter on Trial. High Court, Salisbury, Rhodesia. Rhodesia Herald 8.3.68.
4. (June 1969) No. 2. Review of the International Commission of Jurists 56-61.
5. Davis M'Gabe "Rhodesia's African Majority" (1967) vol. 12 No. 2 Africa Report 14-20.
6. P. Mason, The Birth of a Dilemma, The Conquest and Settlement of Rhodesia 114. See also In Re Southern Rhodesia (1919) A.C. 211 at 214 (PC).
7. The equivalent of our present Memorandum of Association and Articles of Association.
8. In Re Southern Rhodesia (1919) A.C.211 at 213 (P.C.). See also J.E. Fawcett, The British Commonwealth and International Law p. 109.
9. Now Salisbury.
10. Davis M'Gabe "Rhodesia's African Majority" (1967) Vol. 12. No. 2 Africa Report 15.
11. Southern Rhodesia (Annexation) Order 1923, S.R. and O. (1923) 1077.

12. Generally referred to as Benevolent Paternalism.
13. U.N. G.A. Res. 1747 (XVI) June 28, 1962.
14. Refers to the United Kingdom.
15. Nwabueze, B.O. Constitutionalism 208
16. S.C. Res. 216 of 1965.
17. S.C. Res. 217 of 1965.
18. U.N. G.A. Res. 2383 (XXIII) of 7 November 1968.
19. "Government" is written in quotation marks because its legitimacy and legality is, at the time of writing, being controverted.
20. Whose statement is quoted in the introduction to this dissertation.
21. Mwenje - Lusaka, a ZANU Department of Political Affairs Pamphlet, undated, quoted also in R. Gibson, African Liberation Movements, Contemporary struggles Against White Minority Rule (1972) at 175.
22. R. Gibson, African Liberation Movements, Contemporary Struggles Against White Minority Rule p. 113. (1972).
23. This Article came within that part of the Versailles Treaty known as the Covenant of the League of Nations.
24. (1950) I.C.J. Rep. 128.
25. (1971) I.C.J. Rep. 16 at 56.
26. United Nations, Basic Facts About the United Nations (1977) p. 82.
27. R. Gibson, African Liberation Movements, Contemporary Struggles Against White Minority Rule p. 22.

28. The Spear of the Nation
29. Quoted in UMSA - The Revolutionary Road for South Africa, Lusaka, UMSA-May 1969. UMSA-Unity Movement of South Africa.
30. Op. Cit, Note 29 Ibid.
31. M. Benson, Statements from South African and Namibian Nationalists, quoted in The Sun Will Rise (1974)
32. Op.Cit. Note 8 Ibid.
33. J.E.S. Fawcett The British Commonwealth and International Law (1963) p. 109.
34. J.G. Starke, Introduction to International Law 7th Ed. (1972) p. 123.
35. Per Lord Finlay in Duff Development Corporation v. Kelontion Government (1924) A.C. 797 at 814.
36. Case Concerning Rights of Nationals of the U.S.A. in Morocco. (1952) I.C.J. Reports 176
37. L.H. Gann, A History of Southern Rhodesia, Early Days to 1934 (1965) p. 75 ff.
38. Sir Hercules Robinson, the then British High Commissioner for South Africa, later Lord Rosmead.
39. P. Mason, The Birth of a Dilemma The Conquest and Settlement of Rhodesia (1962) p. 120.
40. Op.Cit. Note 39 Ibid.
41. J.E.S. Fawcett- The British Commonwealth and International Law P. 109. See also Musgrave v. Pulido (1879) 5.A.C. 102.P.C. In Re Southern Rhodesia (1919)A.C. 211 P.C. at 217.
42. e.g. the Rudd Concession.

43. Op.Cit. Notes 1 and 20 Ibid.
44. Op.Cit. Note 21 Ibid.
45. P. Mason, The Birth of a Dilemma, The Conquest and Settlement of Rhodesia. P. 124.
46. Op.Cit. Note 45 at 131.
47. Fotourous, Government Guarantees to Foreign Investors p. 125.
48. Serbian and Brazilian Loans Case (1929) Schwarzenberger, Vol. I p. 1.
D.P. O'Connell Vol. I P. 382.
49. (1952) I.C.J. Rep. 93.
50. Op.Cit. Note 46 Ibid.
51. Lobengula was a Sovereign, and there can be no Sovereign Without a State.
52. Op.Cit. Note 11 Ibid.
53. C.H. Alexandrawicz "New and Original States: The Issue of Reversion to Sovereignty" (July 1969) Vol. 45, No. 3. International Affairs 465-81.
54. Palmas Island Case (1928) 2 Int. Arb. Awards 829 at 839, also quoted in W. Bishop Jr. International Law, Cases and Materials 3rd Ed. (1971) at 400
55. Advisory Opinion Concerning Certain Questions Relating to Western Sahara by the International Court of Justice 16th October 1975, paragraph 80 at page 86.
56. Jennings, The Acquisition of Territory in International Law p. 21.
57. Op.Cit. Note 48 - Serbian and Brazilian Loans case p. 20.
58. Op.Cit. Note 56 page 20.

59. Frontier Land Case (1951) I.C.J. Reports 209. at 227 and Jennings p. 23.
60. Op.Cit. Note 59 Ibid.
61. Hall quoted by D.H.N. Johnson "Consolidation as a Root of Title in International Law" (1955) Cambridge Law Journal 218.
62. Quoted in D.H.N. Johnson "Acquisitive Prescription in International Law" (1950) XXVII B.Y.B.I.L. 333 at 344.
63. Op.Cit. Note 62. Ibid.
64. In Wong Man On v. The Commonwealth (1952) 86. C.L.R. 125.
65. McNair, International Law Opinions Vol.I P. 6.
66. Op.Cit. Note 53 at 477.
67. The writer's own underlining for emphasis.
68. Oppenheim, International Law Vol. I, 7th ed. 1948, 495-528.
69. Priorly- The Law of Nations 2nd Ed. 1936 p. 124.
- 69(a)- M.A. Shukri, The Concept of Self-Determination in the United Nations (1965) P. 5.
70. S.P. Sinha "Has Self-Determination Become a Principle of International Law" (July-Dec. 1974) Vol. 14, Nos. 3 and 4 I.J.I.L. at 358.
71. M.A. Shukri-The Concept of Self-Determination in the United Nations (1965) P. 18. See also Sorenson, Manual of Public International Law (1968) paragraph 6.02 on page 315.
72. Op.Cit. Note 71 (Shukri) at p. 19.

73. H.S. Commanger, I Documents of American History (1943) 72 quoted by M.A. Shukri in The Concept of Self-Determination in the United Nations (1965) p. 19.
74. Op.Cit. Note 73 Ibid.
75. Baker, Dodd, and Stannard-The Public Papers of Woodrow Wilson p. 542.
76. H.S. Johnson, Self-Determination Within the Community of Nations (1967) p. 34.
77. Article 38(1)(c) of the Statute of the International Court of Justice.
78. See (i) D.W. Greig, International Law (1970) 1-16.
(ii) H.W. Briggs, The Law of Nations, Cases, Documents and Notes, 43-48
(iii) M. Sorenson, Manual of Public International Law (1968) pp. 129-144.
(iv) G.J.G. Starke, Introduction to International Law (1972) 35-36.
79. R. Higgins, "The United Nations and Law Making: the Political Organs" (1970) 64 A.J.I.L. 43
See also, the same author, The Development of International Law Through the Political Organs of the United Nations, p. 2.
80. South West Africa Case-Second phase (1966) I.C.J. Reports 291-292.
See also I. Brownlie, Basic Documents on Human Rights (1971) pp. 465ff.
81. M. Sorenson, Manual of Public International Law (1968) 509.
82. Hanna Bokor-Szego, New States and International Law (1970) p. 19.
83. 1960 Y.B.U.N. 44-50 See also I. Brownlie, Basic Documents in International Law 2nd Ed. 187.

84. Para. I "The Subjection of Peoples to alien Subjugation, domination and exploitation Constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and Cooperation."
85. G.A. Res. 1747 (XVI) 28 June 1962.
" " " 1760 (XVII) 31 October 1962.
" " " 1883 (XVIII) 24 October 1963
" " " 1889 (XVIII) 6 November 1963
86. G.A. Res. 2372 (XXIII)
" " " 2402 (XXII)
" " " 2498 (XXIX)
" " " 2517 (XXIV)
See also Separate Opinion in (1971)
I.C.J. Rep. 69-70.
87. M.A. Shukri, The Concept of Self-Determination in the United Nations (February 1965)
P. 333.
88. C. Eagleton "Excesses of Self-Determination" (July 1953) 31 Foreign Affairs 502-604 at 593, quoted by H.S. Johnson, in Self-Determination Within the Community of Nations on p. 51.
89. H.S. Johnson, Self-Determination Within the Community of Nations 97.
90. Op.Cit. Note 89 Ibid.
91. A/AC. 125/L. 53/Add. 3 p.9.
92. I. Brownlie, Basic Documents in International Law, Second para. p. 39.
93. J.G. Starke, Introduction to International Law 7th Ed. (1972) P. 135.
94. See Preamble to the Charter and Articles 1, 55, 56, 62, 68 and 76.
95. Op.Cit. Note 29 Ibid.
96. Op.Cit. Note 29 Ibid.

97. Article I, The International Convention on The Elimination of All Forms of Racial Discrimination, G.Ass. Res. 2106A (XX) Annex. See also I. Brownlie, Basic Documents in International Law, 2nd Ed. p. 190.
98. See Part Six on Human Rights and Self-Determination in I. Brownlie, Basic Documents in International Law, 2nd Ed. pp. 144-230.
99. Op.Cit. Note 73 Ibid.
100. I Universal Declaration of Human Rights
II International Covenants on Human Rights:-
 - (a) International Covenant on Economic, Social and Cultural Rights
 - (b) International Covenant on Civil and Political Rights
 - (c) Optional ProtocolIII Declaration on the Granting of Independence to Colonial Countries and Peoples.
IV International Covenant on the Elimination of all Forms of Racial Discrimination.
V The European Convention on Human Rights.
101. Resolution 2145 (XXI)
102. Res. 3068 (XXVIII)
103. Yassin El-Ayouty, The OAU After Ten Years, Comparative Perspectives (1975) p. 98.
104. Op.Cit. Note 103 Ibid.
105. Article 3(6) of the OAU Charter
106. See Cap. 3 of this dissertation
107. See Cap. 4 of this dissertation
108. Article 2(4) of U.N. Charter
109. Article 2(3) of U.N. Charter
110. Article 2(7) of U.N. Charter

111. Res. 2383 (XXIII) of 7 November 1968
See also Resolutions:- 2105 (XX);
2107(XXI); 2160(XXI); 225 and 2403(XXIII)
112. For its legal status, see Cap. 3 of this dissertation.
113. Poulantzas, The Right of Hot Pursuit in International Law (1969) 11-16.
114. To be referred to as ANLF.
115. Article "The Agrerian Revolution as a Case Study in International Law" by A. Fraleagh in R.A. Falk, The International Law of Civil War P. 179-240 (1970)
116. The leaflets were later collected by the Police but the writer retained one with their permission.
117. Some British Newspapers like The Observer, commenting on the April 20 Elections in Rhodesia suggested that ZAPU is militarily larger and stronger than the Zambian Army and that the Zambian Army may not be able to remove them.
118. Sorenson, Manual of Public International Law (1968) p. 289.
119. Re Amand (No.1) (1941)2 I.B.239.
120. In the Case of Rhodesia and accordingly in the Cases of South and South West Africa.
121. Op.Cit. Note 118- at p. 289.
122. Op.Cit. Note 118 at 281-282.
123. United Nations, Basic Facts About the United Nations (1977) p. 82.
124. Op.Cit. Note 123- at p. 83.
125. Op.Cit. Note 124 Ibid.

126. Reported in Chimango p. 304 "The Relevant of Humanitarian International Law to Liberation Movements" (1975) VIII No.3 C.I.L.S.A. 287 - 317 at 304
127. Op.Cit. Note 126 at p. 308.
128. Resolution 2597 (XXIV) of 16 December 1969
129. O.A.U. Doc., CM/Res.1949(XI)-CM Res 155 (XI) and CM/Res. 154(XI) p. 3 para. 4.
130. U.N. Res. 2446 (XXIII)
131. G.A. Res. 2671 (XXV)
132. G.A.Res. 2678 IXXV)
133. G.A. Res. 2652 (XVX) See also Res. 2383 (XXIII) Supra.
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