

The Position of International Law on the Legal Statuses of Militant Groups Fighting for Freedom and Independence

Osunyikanmi Pius Olakunle

Faculty of Law,
University of Abuja

Abstract

This paper sheds light on the legal statuses of different categories of militant groups fighting for freedom, independence and recognition by host states and the international community. In this regard, special attention was given to the need to distinguish between rebellion, insurgency and belligerence since these are the most frequent instances of militancy in the modern world. The paper relied heavily on the position of international law and commentaries by legal luminaries published in reputable law journals across the world. This means that the paper adopted doctrinal approach in sourcing for, and in analyzing, relevant data. Extant literature revealed that recognition of rebels, insurgents, or belligerents depends on the extent to which the militants have been able to free themselves from national government and assert themselves sufficiently as legitimate, self-governing entities or nationality groups. It was recommended that indiscriminate and hasty recognition of militancy groups fighting mainly to achieve personal or ethnic ambition at the expense of national unity and solidarity should be resisted by individual countries.

Keywords: *Belligerency, Insurgency, Rebels, Legal Status, Aid to Rebels*

Corresponding Author: Osunyikanmi Pius Olakunle

Background to the Study

According to Brownlie¹, the principle of non-intervention is a part of customary international law founded upon the concept of respect for the territorial sovereignty and integrity of States. Intervention is prohibited where it bears upon matters on which each state is permitted to decide freely by virtue of the principle of state sovereignty. This includes, as international court of justice noted on the Nicaragua case, the choice of political, economic, social and cultural systems, and a recourse to coercion if need be. Under international law, there is no general right of intervention in support of an opposition within another state. In addition, acts constituting a breach of the customary principles of non-intervention will also, if they directly or indirectly involve the use of force, constitute the breach of the principle of use of force in international relations. The principle of respect for the sovereignty of state was another principle closely allied to the principle of prohibition of the use of force and of non-intervention.

Shaw² posits that International law treats civil wars as purely internal matters, with the possible exception of self determination conflicts. Article 2 (4)³ of the United Nations charter prohibits the threat or actual use of force in international relations, but not in domestic environment. Shaw contends that, for example, there is no rule against rebellion in international law. Internal crises are within the domestic jurisdiction of states and are left to be dealt with by the internal law of the states. Should a rebellion succeeds, the resulting situation will be dealt with primarily in the context of recognition. As far as third parties are concerned, traditional international law distinguishes between rebellion, insurgency and belligerency.

Once a state has defined its attitude and characterizes the situation, different international legal provisions would apply. If the rebels are regarded as criminals, the matter is purely within the hands of the authorities of the country concerned and no any other state would legitimately interfere. If the rebels are treated as insurgents, then other states may or may not agree to grant them certain rights. It is purely at the discretion of other interested states, since an intermediate status is involved. Rebels are not criminals, but they are not recognized belligerents⁴. Accordingly, individual states are at liberty to define their legal relationships with them. Insurgency is a purely provisional classification and would arise where a state needed to protect nationals or property in an area under the direct control of rebels. On the other hand, belligerency is a formal status involving rights and duties.

In the eyes of classical international law, some states may accord recognition of belligerency to rebels when certain conditions have been fulfilled. These are defined as the existence of an armed conflict of a general nature within a state, the occupation by the rebels of a substantial portion of the national territory, the conduct of hostilities in accordance with civilized rules of war and by organized groups operating under a

¹ Brownlie, I., *International Law and the use of force by state*. Oxford: Oxford Press, 1963.

² Malcom Shaw, *International law*, 5th edition. Cambridge: Cambridge Press, 2003.

³ Article 2 (4) of the United Nations.

⁴ Shaw, Op.cit

responsible authority and the existence of circumstances rendering it necessary for the states contemplating recognition to define their attitude to the situation. This would arise example where, for example, the parties to the conflict are exercising belligerent rights on the high sea. Other maritime countries would feel compelled to decide upon the respective status of the warring sides, since the recognition of belligerency entails certain international legal consequences. Once the rebels have been accepted by other statuses as belligerents they become subjects of international law and responsible under international law for all their acts. In addition, the rules governing the conduct of the hostilities become applicable to both sides, so that the recognition status of the belligerents becomes unquestionable, based on the position of neutrality of the recognizing states.

However, these concepts of insurgency and belligerency are lacking in clarity and are extremely subjective. The absence of clear criteria, particularly with regard to the concept of insurgency, has led to a great deal of confusion. This issue is important since the majority of conflicts over the years since the end of World War II have been in most cases civil wars. The reasons for this are many and complex, and ideological rivalry and decolonization within colonially imposed boundaries are amongst them. Intervention may be justified on other grounds, including response to earlier involvement by a third party. For instance, the USSR and Cuba justified their activities in the Angolan civil war of 1875 – 96 by reference to the prior South African intervention, while the United States argued that its aid to South Vietnam grew in proportion to the involvement of North Vietnam forces in the conflict.

The rules of International law relating to civil wars depend upon the categorization by third states of the relative status of the two sides to the conflict in question. In traditional terms, an insurgency means that the recognizing state may, if it wishes, create legal rights and duties as between itself and the insurgents, while recognition of belligerency involves an acceptance of a position of neutrality (although there are exceptions to this rule) by the recognizing states. But in practice, states very rarely make an express acknowledgement of the status of the parties to the conflict, precisely in order to retain as wide a room for maneuver as possible. This means that the relevant legal rules cannot really operate as intended in classical law and that it becomes extremely difficult to decide whether a particular intervention is justified or not⁵.

Aid to the Authority of a State

Shaw opines that it would appear that in general, outside aid to government authority to repress a revolt is legitimate under international law, provided, of course, it is requested by the government in question. The problem of defining the governmental authority entitled to make request for assistance was raised in the Grenada episode. In that situation, the appeal for the US intervention was allegedly made by the government-general of the Island, but controversy exists as to whether this in fact did take place prior

⁵ Doswald-Beck, A., *The legal Validity of Military Intervention by Invitation of the Government* (Manchester Press).

to the invasion, and whether the governor-general was the requisite authority to issue such an appeal. The issue resurfaced in a rather different form regarding the invasion of Panama in December 1989. One of the legal principles identified by the US department of state as the basis for the US action in Panama was that of assistance to the lawful and democratically elected government in that country. The problem with this was that this particular government had been prevented by General Noriega from actually taking office, and the issue raised was therefore whether an elected head of state who is prevented from ever acting as such may be regarded as a governmental authority capable of requesting assistance, including an armed force from another state. This fact runs counter to the test of acceptance in international law of governmental authority which is firmly based upon effective control rather than upon the nature of the regime, whether democratic socialist or otherwise⁶.

The general proposition, however, that aid to recognized governmental authorities is legitimate would be further reinforced where it could be shown that other states were encouraging or directing the subversive operations of the rebels. In that case, it appears that the doctrine of collective self defense would allow other states to intervene openly and lawfully on the side of the government authorities. Some writers have suggested that the traditional rule of permitting third-party assistance to governments would not extend to aid where the outcome of the struggle has become uncertain or whether the rebellion has become widespread and seriously poised to overthrow the government. However, it goes without saying that many forms of aid, such as economic, technical and arms provision arrangements to existing governments faced with civil strife, are acceptable. There is an argument, on the other hand, suggesting that substantial assistance to a government clearly in the throes of collapse might be questionable as intervention in a domestic situation where solution is in sight is condemnable, even though there are considerable definitional problems in this regard.

Force and Self Determination

According to Shaw⁷, Article 2(4) of the UN charter calls upon states to refrain in their international relations from the threat, or actual use, of force against another state. It does not cover as such a self determination situation where people resort to the use of force against a colonial power. Until recently, such situations were regarded as purely internal matters. A legitimate authority could use such force as it seems necessary to suppress a riot uprising without the issue impinging upon article 2(4). Shaw contends that with the growing support or acceptance of self determination as a legal right, the question as to the legitimacy of the use of force arises. This question was deliberated upon at length with particular reference to India's invasion of Goa, and was also looked into by the special Committee that adopted the declaration of principles of international law in 1970. The declaration emphasized that all states are under a duty to refrain from any forcible action capable of depriving a people of their right to self determination. This can now be regarded as acceptable by the international community. The declaration also pointed it

⁶ Shaw, Ibid.

⁷ Shaw, Ibid.

out that in their resistance to such forcible action, such people could receive support in accordance with the purpose and principles of the United Nations charter. This modest but ambiguous formulation cannot be taken as recognition of a right of self defense inherent in peoples entitled to self-determination.

Shaw⁸ admits that the United Nations charter neither confirms nor denies a right of rebellion; international law does not forbid rebellion, it leaves it within the ambit of domestic law. The General Assembly, however, adopted some resolutions in the 1970s reaffirming the legitimacy of the struggle by oppressed people for liberation from colonial domination and alien rule by all available means, including armed struggle. This approach was intensively debated, leading to the adoption by the General Assembly of the Consensus Definition of Aggression in 1974. The debate centered upon whether the use of force by peoples entitled to self determination was legitimate as self defense against the very existence of colonialism itself, or whether it is as a response to force utilized to suppress the right of self determination. The former view was taken by most Third world states, and the latter by many western states. In the event, a rather cumbersome formulation was presented in article 7 of the definition which referred in ambiguous vein to the right of peoples entitled to, but forcibly deprived of, the right to self determination, to struggle for it and to seek and receive support, in accordance with the principles of the charter and in conformity with the 1970 Declaration. It is more likely that the principle of self determination itself provides that where forcible action has been taken to suppress the right to self determination, force may be used to counter the force in order to achieve self determination. The use of force to suppress self-determination is now clearly unacceptable. Shaw argues that the question of third-party assistance to peoples struggling to attain self-determination is highly controversial and has remained a subject of disagreement between the western world and Third world states. A number of the United Nations General Assembly's resolutions have called on states to provide all forms of moral and material assistance to such people but the legal situation is still far from clear, and provision of armed help still appears to be unlawful.

Aid to Rebels

The reverse side of the proposition is that aid to rebels is contrary to international law. The 1970 Declaration on Principles of International Law⁹ emphasized that;

No state shall organize, assist, foment, finance, incite or tolerate subversive terrorist or armed activities directed towards the violent overthrow of the regime of another state, or interfere in civil strife in another state. Every state shall refrain from any action aimed at the partial or total disruption of the national unity and territorial integrity of any other state or country.

Shaw observes that this declaration may seem to be fairly conclusive, but in fact state practice is far from unanimous on this point. Where a prior, illegal intervention in favour of government has occurred, it may be argued that aid to the rebels is acceptable. He noted

⁸ Ibid.

⁹ The 1970 Declaration on Principles of International Law.

that this was argued by a number of states with regard to the Afghanistan situation where it was felt that the Soviet's intervention in that state amounted to an invasion.

This Situation in the Democratic Republic of Congo

The situation in the Democratic Republic of Congo in 1999 and after, with intervention against the government of that country by Uganda and Rwanda (initially seeking to act against rebel movements operating against them from Congolese territory, and later assisting rebels against the Congolese government) in collaboration with a number of other states, including Zimbabwe, Angola and Namibia, is instructive. Pursuant to resolution 1234 (1999)¹⁰, the Security Council recalled the inherent right of individual and collective self-defense in accordance with article 51, and reaffirmed the need for all states to refrain from interfering in the internal affairs of other states. The Council called for the orderly withdrawal of all foreign forces from the Congo in accordance with the Lusaka ceasefire agreement. In the period prior to the Lusaka agreement, the UN agreed that aid to rebels by foreign states was acceptable while aid by foreign states to government was not. Other issues in contention in the Congolese conflict included the treatment of civilian population, the rise of HIV/Aids infections, the use of child soldiers, and the looting of the natural resources of the Congo.

Humanitarian Interventions

Detter¹¹ alludes to the lingering argument that intervention in order to protect the lives of persons situated within a particular state, and not necessarily nationals of the intervening state, is permissible in pathetically grave situations. This has some support in pre-charter law and it would seem that in the nineteenth century such intervention was accepted under international law. But today, it is difficult to reconcile that view with article 2(4)¹² of the charter unless one either adopts a rather artificial definition of the concept of territorial integrity in order to permit temporary violation, or invokes the establishment of the right in customary law. Indeed, state practices in recent times with regard to this are generally unfavourable to the concept, primarily because it might be used to justify interventions by more powerful states in the territories of weaker states (Shaw, 2003). Nevertheless, it is not inconceivable that in some situations the international community might refrain from adopting a condemnatory stand where large numbers of lives have been saved in such interventions. In addition, it is possible that such a right might evolve in cases of extreme humanitarian need.

According to Detter, one argument used to justify the use of Western troops to secure a safe haven in northern Iraq after the Gulf War was that it was taken in pursuance of the customary international law principle of humanitarian intervention in an extreme situation. He said that Security Council Resolution 688 (1991) condemned the widespread repression by Iraq of its Kurd and Shia populations, citing the US, UK and France proclamation of 'no-fly zones' in the North and South of that country. There was

¹⁰ Resolution 1234 (1999) of the Security Council

¹¹ Detter, I., *The law of war*, 2nd edition (Cambridge Press, 2000).

¹² Article 2 (4) of the UN Charter.

no express authorization from the United Nations, but to that effect, it was argued by the UK that the no fly zones declaration was justified under international law as a response to a situation of overwhelming humanitarian necessity.

The Kosovo crises of 1999 clearly raised the question of humanitarian intervention, says Wright¹³. The justification for NATO bombing campaign without UN authorization in support of the repressed ethnic Albanian population of the Albanian province of Yugoslavia was said to be the imperative of humanitarian necessity. On this, the then UK Secretary of State for Defense said that “in international law, in exceptional circumstances and to avoid a humanitarian catastrophe, military action can be taken and it is on that legal basis that military action was taken” (in Yugoslavia). After the conflict, followed by an agreement reached between NATO and Yugoslavia, the Security Council adopted resolution 1244 (1999)¹⁴ which welcomed the withdrawal of Yugoslavian forces from the territory and ordered the deployment of UN forces to the territory. There was no formal endorsement of the NATO action, although there was no condemnation. Therefore, it can be concluded that the doctrine of humanitarian intervention in a crisis situation was invoked and not condemned by the United Nations, even though it only received meager support¹⁵. This implies that the Security Council should authorize action to halt or avert massive violations of humanitarian law and that, in response to such crises, force may be used in the face of overwhelming and imminent humanitarian catastrophe when the government cannot avert it, after all non-violent methods have been exhausted. The scale of real or potential suffering justifies the risk of military action, if there is a clear objective to avert or end the catastrophe. It is obvious that such an action would be welcomed by the people at risk since the humanitarian consequences of non-action would be worse than that of intervention. Furthermore, the use of force should be collective, limited in scope and proportionate to the humanitarian objective and consistent with international humanitarian law¹⁶.

One variant of the principle of humanitarian intervention is the contention that intervention to restore democracy is permitted as such under the international law. One of the grounds given for the US intervention in Panama in December 1989, was the restoration of democracy, but such an excuse is hardly accepted in international law in view of the clear provision of the UN Charter¹⁷ relating to such a situation.

The Conduct of Hostilities

Green posits that International law, in addition to seeking to protect victims of armed conflicts, also tries to limit the conduct of military operations in a humanitarian fashion. In analyzing the rules of international law, it is important to bear in mind the delicate balance to be maintained between military necessity and humanitarian consideration. A

¹³ Wright, Q., *Us Intervention in Lebanon* (University of Chicago Press).

¹⁴ The Security Council Resolution 1244 (1999).

¹⁵ Lugard, E., *The International Law of Civil War* (Oxford, 1972).

¹⁶ Green, I., *The Contemporary Law of Armed Conflict*, 2nd Edition (Manchester Press).

¹⁷ *Ibid.*

long standing principle that has not always been honored in practice is the requirement to protect civilians against the effect of hostilities. As far as the civilian population is concerned during hostilities, the basic rule formulated in article 48 of protocol I is that the parties to a conflict must at all times distinguish between such population and combatants and between civilians and military objectives, and must also direct their operations only against military objectives.

Green observes that military objectives are limited in article 52 (2) to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances prevailing at the time, offer a definite military advantage. Issues have arisen with regard to the so-called 'dual use' objects, such as bridges, roads, power stations and so forth, and so care must be taken to interpret these in view of the fact that not every military target, as defined in article 52 (2) makes an effective contribution to military action and offers a definite military advantage. He further said that Article 51 provides that the civilian population as such as well as individual civilians shall not be the objects of attack. Acts or threats of violence the primary purpose of which is to spread terror among civilian population are prohibited. Additionally, indiscriminate attacks are prohibited. Article 57 provides that in the conduct of military operations, adequate care shall be taken to spare the civilian population, civilian and civilian objectives¹⁸.

Non-International Armed Conflict

Meron¹⁹ is of the view that although the 1949 Geneva Conventions were basically concerned about international armed conflicts, common article 3 did provide that in cases of non-international armed conflicts occurring in the territory of one of the parties, there must be a series of minimum guarantees for protecting those not taking active part in hostilities, including the sick and wounded, adding that this article is difficult to define in all cases. Non-international armed conflicts typically range from full-scale civil wars to relatively minor disturbances. This poses problem for a state which may not appreciate the political implications of the application of the Geneva Conventions. The lack of reciprocity element due to the absence of another state adds to the problem of enforcement of the 1949 Geneva Conventions. Common Article 3²⁰ lists the following as the minimum safeguards:

- (a) Persons taking no active part in hostilities to be treated humanely without any adverse distinction based on race, colour, religion or faith, sex, birth or wealth. To this end, the following are prohibited
- (b) Violence to life and persons, in particular murder, cruel treatment and torture
- (c) Hostage - taking
- (d) Outrages upon human dignity, in particular humiliating and degrading treatment
- (e) The passing of sentences and the carrying out of executions in the absence of due process
- (f) The wounded and the sick to be cared for.

¹⁸ Ibid.

¹⁹ Meron, T., *Human Rights in Internal Strife*. Cambridge Press, 1987.

²⁰ Common Article 3

Common Article 3 was developed by protocol 11, 1977, which applies by virtue of article 1 to all non-international armed conflicts which take place between the armed forces of a state and dissident's armed forces in the territory of the state. The latter (dissident armed forces) have to be under responsible command and exercising such control over a part of the territory as to enable them to carry out sustained and concerted military operations in line with protocol II. It does not apply to situations of internal disturbance and tensions, such as riot, isolated and sporadic acts of a similar nature, not being armed conflict. The protocol lists a series of fundamental guarantees and other provisions calling for the protection of non-combatants. Meron²¹ explains that in particular, one may note that prohibition of violence to the lives, health, physical and mental well-being of persons, including torture, collective punishment, hostage-taking, acts of terrorism, outrages upon personal dignity, including rape and enforced prostitution, and pillage²².

Further provisions cover the protection of children; the protection of civilians including the prohibition of attacks on works or installations containing dangerous substances that might cause several losses among civilians; the treatment of civilians, including their displacement, and the treatment of prisoners and detainees, the wounded and the sick.

Meron²³ stated that the appeals chamber in its decision on jurisdiction in the tactic case noted that international legal rules have developed to regulate internal armed conflicts for a number of reasons, including the frequency of civil wars, the increasing cruelty of internal armed conflicts, the large-scale nature of civil strife making, third-party involvements. Thus, the distinction between inter-state and civil wars is losing its significance so far as human beings are concerned. Indeed one of the major aspects of international humanitarian law has been the growing move towards the rules of human rights law. There is a common foundation in the principle of respect for human dignity.

Meron²⁴ observes that the principles governing internal armed conflicts in humanitarian law are becoming more extensive, as much as the principle of international human rights law which are also rapidly evolving, particularly with regard to the fundamental human rights which cannot be breached even in times of public emergency. The area of overlap was recognized in 1970 in the General Assembly resolution 2675 (xxx) which emphasized that fundamental human rights continue to apply in situations of armed conflicts. Consistent with this, the European Commission on Human Rights in the Cyprus vs. Turkey (first and second Applications) case declared that belligerent operation in a state was bound to respect not only the humanitarian law laid down in the Geneva Conventions but also fundamental human rights.

The inter-American Commission on Human Rights in the La Tablada case against Argentina noted that the most difficult aspects of common article 3 relate to its

²¹ Ibid.

²² Ibid.

²³ Ibid.

²⁴ Ibid.

application of the blurred line at the lower end separating it from violent internal disturbances. It is in situations of internal armed conflicts that international humanitarian law and international human rights law most converge and reinforce each other. For example, common article 3 and article 4 of the inter-American Commission on Human Rights both protect the right to life and prohibit arbitrary executions. However, there are difficulties in resorting simply to human rights law when issues of the right to life arise in combat situations. Accordingly, the commission must necessarily look into and apply definitional standards and relevant rules of humanitarian law to serve as an authoritative guide in its resolution of such issues.

Conclusion

Many contentious issues regarding the position of international law on the use of force by militants were raised and discussed in the paper with relevant examples and with reference to test cases, including the Nicaragua case, US aid to South Vietnam, the US intervention in Panama, the Cyprus Vs Turkey case. In all of these, it was difficult to say precisely if and how they constituted violations of international law or specific UN resolutions on the nature of the conflict, whether they were internal or inter-state wars, or whether the militant groups concerned were rebels, insurgents, or belligerents.

Generally, the position of international law on the legal statuses of rebels, insurgents, and belligerents is not clear-cut as it depends on whether, for example, the rebels are at the verge of defeating the national government or whether they (the rebels) are confined to a small area. In the light of all of this, the logical conclusion that can be drawn is that the provisions of international law on critical issues relating to the use of force within and between states are ambiguous, and must therefore be straightened out for clearer understanding since they are important legal issues that border on the interests of nation-states.

References

- Bercovitch, J. & Garner, S. (2009). *International conflict mediation: New approaches and findings*. London: UK
- Brownlie, I. (1963). *International law and the use of force by state*. London: Oxford Press.
- Detter, I. (2000). *The law of war, 2nd edition*, London: Cambridge Press.
- Doswald-Beck, A., (1985). *The legal validity of military intervention by invitation of the government*. Manchester Press.
- Gray, C. (2000). *International law and the use of force*, London: Oxford Press.
- Gray, C. S. (1994). Force, order and justice: The ethnics of realism in state craft. *Global Affeins* 4 1-17.

- Green, I. (2000). *The contemporary law of armed conflict, 2nd edition*, Manchester Press.
- Henry, P. Knowles, (1971). *Personality and leadership behaviour*. Addison-Wesley Pub. Co., - Business & Economics.
- Lugard, E. (1972). *The international law of civil war*, London: Oxford Press.
- Malcolm Shaw (2003). *International law, 5th edition*, Cambridge Press.
- Meron, T. (1987). *Human rights in internal strife*, Cambridge Press.
- Wright, Q. (1959). *US intervention in the Lebanon*. University of Chicago Press.