

The Polisario Front and the Future of Article 1(4)

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In this Note, I discuss the implications of a 2015 decision from Switzerland on Article 1(4) of Additional Protocol I to the Geneva Conventions. The provision, which allows for the more comprehensive legal scheme of international armed conflict to apply to conflicts between states and national liberation movements, has never been successfully applied until this decision despite its controversial political history. After establishing the continued relevance of the provision's internationalizing mechanism, I discuss in detail the interpretive problems it has presented regarding the apparent failures of the provision in practice. Considering these issues, and similar problems presented by the provision's procedural process in Article 96(3), I review the circumstances behind Switzerland's sudden validation of Article 1(4)'s invocation by the Polisario Front, a national liberation movement from the Western Sahara, and the history of the conflict underlying the decision. Finally, I offer arguments for how the decision complicates established positions on the interpretation of Article 1(4) and lends to a more liberal construction and hopeful future for the provision's implementation. This piece contributes to the field of international humanitarian law by taking a more focused look at the current state of Article 1(4) and argues for its continued relevance while others have been quick to dismiss the provision as a "dead letter."

Introduction

In the great ocean of esoteric legal provisions and historical debates over vague language in International Humanitarian Law (IHL), much attention has been given to the controversial contents of Article 1, paragraph 4, of Additional Protocol I (AP I) to the Geneva Conventions (Article 1(4)). Even though the paragraph still managed to enter AP I by vote in 1977, a vocal and influential minority strongly objected to its inclusion.¹ In a letter of transmittal to the United States Senate, President Ronald Reagan claimed it "would undermine humanitarian law and endanger civilians in war" and recommended the Senate not ratify the Protocol in its entirety.² To this day, the United States has rejected ratification of AP I, and the Department of

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1. See KUBO MAČÁK, INTERNATIONALIZED ARMED CONFLICTS IN INTERNATIONAL LAW 65, 70 (2018) (listing states that made a point of criticizing Article 1(4)).

2. Message from the President of the United States, Jan. 29, 1987, S. TREATY DOC. NO. 100-2, III-IV (1987) [hereinafter Reagan].

Defense Law of War Manual still relies on the same justifications presented by President Reagan.³

Article 1(4) is a legal mechanism that can “internationalize” a conflict.⁴ One of the fundamental principles of the IHL apparatus is the distinction between International Armed Conflicts (IACs) and Non-international Armed Conflicts (NIACs). The importance of this distinction is that, generally, legal protections are much more robust in IACs, while NIACs only receive the bare minimum in terms of protections for participants in the conflict.⁵ When a conflict is internationalized, as in the case of Article 1(4), a conflict ceases to be seen as a NIAC and becomes an IAC in the eyes of IHL.⁶ Specifically, Article 1(4) internationalizes “armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination.”⁷ This language was meant to address the plethora of so-called “wars of national liberation” that surfaced as a result of the massive decolonization movement instigated by the United Nations.⁸ Article 1(4) was a meaningful expansion of the applicability of the IHL scheme, as the state-centric formulation of international conflict within the Geneva Conventions and other international treaties faced immediate difficulties in the post-colonial world.⁹

Countries like the United States, the United Kingdom, the Netherlands, Canada, and Switzerland attacked Article 1(4) on the basis that it inappropriately introduced subjective standards,¹⁰ and the United States held the position that the heightened legal recognition of these non-state actors would validate and encourage terrorism.¹¹ But counter to expectations, both

3. OFFICE OF GEN. COUNSEL, DEP'T OF DEF., DEPARTMENT OF DEFENSE LAW OF WAR MANUAL 77, n.39 (2016) [hereinafter DoD Manual].

4. See MAČÁK, *supra* note 1, at 17 (describing how AP I, which contains Article 1(4), internationalizes conflicts).

5. *Id.* at 14–15, 17–19.

6. *Id.* at 17. Distinguishing between IACs and NIACs and working through the ever-present complications that come with attempting to identify that distinction are fundamental concepts in International Humanitarian Law. See generally *id.* at 9–28 (detailing the history behind the present bifurcation between IACs and NIACS and the development of internationalization as a concept).

7. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 1(4), *adopted* June 8, 1977, 1125 U.N.T.S. 3, 7 [hereinafter Art. 1(4)].

8. Bruno Zimmermann, *Protocol I Article 1 – General Principles and Scope of Application*, in COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 33, 41–44 (Yves Sandoz, Christophe Swinarski & Bruno Zimmermann eds., 1987) [hereinafter Art. 1(4) Commentary].

9. MAČÁK, *supra* note 1, at 65–66.

10. *Id.* at 70.

11. Christopher Greenwood, *Terrorism and Humanitarian Law – The Debate Over Additional Protocol I*, 19 ISR. Y.B. HUM. RTS. 187, 187–189 (1989). Some have rejected this claim. See generally *id.* (analyzing and ultimately rejecting the arguments behind the claim that AP I encourages terrorism).

positive and negative, Article 1(4) had virtually no impact on the international armed conflict landscape.¹²

The bombastic entrance of Article 1(4) and the strength of the theoretical ideals behind its conception, followed by its complete lack of practical application over the course of decades, presented a quandary for the international law community. Without a history of application, those in favor of the provision could not rely on practice to answer criticisms of vagueness, while those who relied on arguments against the provision as justification for continuing to reject ratifying AP 1 lost legitimacy in the urgency of their arguments.¹³ Over time, after multiple failed attempts at implementing the mechanism of Article 1(4), scholars began to refer to the provision as a dead letter—destined to be nothing more than a conceptual footnote in IHL history without a radical shift in attitudes from both state and non-state actors.¹⁴ As one scholar lamented on the failures of the provision, “[i]f it opens up a Pandora’s box at all, it is an unexpectedly small one.”¹⁵ Many were therefore satisfied to end the story of Article 1(4) there, if not for a recent development that challenges the disappointed expectations of the international community.

For the past half a century, a conflict over territory, sovereignty, and self-government has raged in the Western Sahara between various state powers and a national liberation movement called the Polisario Front.¹⁶ On June 23, 2015, the Swiss Federal Department of Foreign Affairs (SDFA) issued a notice declaring that the Polisario Front had deposited a unilateral declaration pursuant to Article 96, paragraph 3, of Additional Protocol I to the Geneva Conventions (Article 96(3)) and that the declaration had the effects of that article.¹⁷ Other than a few blog posts by interested parties,¹⁸ this announcement did not cause a stir in the greater international law

12. MAČÁK, *supra* note 1, at 65.

13. In other words, the interpretative challenges to the provision have found no resolution. At the same time, it is hard to argue the provision will, like Reagan asserted, undermine all of IHL.

14. E.g., Konstantinos Mastorodimos, *National Liberation Movements: Still a Valid Concept (with Special Reference to International Humanitarian Law)?*, 17 OR. REV. INT’L L. 71, 109 (2015).

15. HEATHER A. WILSON, INTERNATIONAL LAW AND THE USE OF FORCE BY NATIONAL LIBERATION MOVEMENTS 168 (1988).

16. Fatemeh Ziai, *Western Sahara, Keeping It Secret: The United Nations Operation in the Western Sahara*, HUM. RTS. WATCH, Oct. 1995, <https://www.hrw.org/reports/1995/Wsahara.htm> [<https://perma.cc/333E-MBD3>]. The Popular Front for the Liberation of Saguia el Hamra and Rio de Oro, or the Polisario Front, is an armed national liberation movement representing the Sahrawi people that was formed in the 1970s to obtain independence from Spain in the Western Sahara territory. After Spain’s withdrawal from the region, conflict over the territory continued as Morocco and Mauritania made claims to sovereignty over the Western Sahara. *Id.*

17. Federal Department of Foreign Affairs of the Swiss Confederation, Notification to the Governments of the States Parties to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, U.N. Doc. GEN 4/15 (June 26, 2015) [hereinafter Notification].

18. E.g., *Geneva Conventions and Armed Movements: An Unprecedented Move*, GENEVA CALL (Aug. 4, 2015), <https://www.genevacall.org/geneva-conventions-armed-movements-unprecedented-move/> [<https://perma.cc/HE87-SJ4C>].

community. The news came and went, without much reflection over the fact that an event had just occurred that many scholars had considered impossible in the modern era: the legal status of an armed conflict had just definitively changed from non-international to international as a war of national liberation. Article 1(4) had finally found its first conclusively successful invocation in its almost four-decade-long lifespan.

While this occasion has been observed, the implications of its occurrence have not yet been the subject of systematic scrutiny. In this paper, I provide that scrutiny to the circumstances surrounding the on-paper success of the Polisario Front and formulate how this leads to a better understanding of the interpretation, importance, and longevity of Article 1(4). Part I gives a more detailed overview of Article 1(4) and the legal and practical issues that have resulted from its formulation. This Part also gives a similar overview of Article 96(3), which lays out the procedural process of activating Article 1(4). Part II gives a brief historical introduction to the circumstances surrounding the Polisario Front and reviews the purported reasons for the success of its Article 96(3) declaration. This Part concludes by discussing the arguments and implications that can be produced because of this success as they apply to the problems with Article 1(4). This Note concludes by reflecting on the future relevance and applicability of Article 1(4).

I. Article 1(4), Article 96(3), and Issues of Application

A. *The Significance of Internationalization*

It is worth explaining, before delving into the specific structure of Article 1(4), what is at stake when a conflict is determined to be an IAC as opposed to a NIAC. Common Article 2 (CA2) to the Geneva Conventions determines the applicability of Geneva law to IACs.¹⁹ Put simply, when the criteria of CA2 are satisfied, the full corpus of Geneva law, customary international law, and any other relevant treaties come into effect.²⁰ Due to the virtually universal acceptance of the Geneva Conventions by the international community, the contents of CA2 have likely become customary international law.²¹ When limited to the contents of CA2, a conflict qualifies as an IAC when: (1) armed conflict or a state of war arises between two contracting parties to the Geneva Conventions, even if no state of war is

19. See Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949 art. 2, *adopted* Aug. 12, 1949, 75 U.N.T.S. 32 [hereinafter CA2] (describing when the Geneva Conventions apply).

20. MAČÁK, *supra* note 1, at 15.

21. *Id.* Customary international law refers to legal obligations that come from established practices as opposed to written treaties. *Customary Law*, INT'L COMM. OF THE RED CROSS, <https://www.icrc.org/en/war-and-law/treaties-customary-law/customary-law> [https://perma.cc/XKA9-KA59].

recognized, and (2) in all cases of partial or total occupation of the territory of a contracting party.²²

All armed conflicts that do not fit within one of these categories and do not satisfy Article 1(4) are considered NIACs.²³ Common Article 3 (CA3) to the Geneva Conventions governs the law of NIAC and is considered the bare minimum applicable protections available for an armed conflict.²⁴ As opposed to the more comprehensive protections offered by the law of IAC, the International Court of Justice has described CA3 as “elementary considerations of humanity” and as “general principles of humanitarian law.”²⁵ For non-state actors, application of IAC law, at least in theory, can offer important restrictions on the behavior of state opponents, particularly in regards to prisoner-of-war status and information access.²⁶

The bifurcation between IAC and NIAC presents obvious difficulties for IHL: the most obvious to the modern observer being that twenty-first-century conflicts rarely resemble the circumstances referenced in CA2. Conflicts between state actors and non-state actors, often across the territory of multiple states and regions, are what make up the many of the conflicts that exist today.²⁷ This context can add more nuance to the rejection of AP I by states, like the United States, which have often been at odds with national liberation movements.²⁸

It is easy to see how important, at least in concept, the drafting of Article 1(4) was for many as a valiant attempt to expand the constrained application of Geneva law to the modern context. Since Article 1(4)’s introduction and apparent failure in practice, there has been a gradual increase in applicable protections in NIACs, slowly bringing them closer to the developed IAC scheme.²⁹ Due in part to the universal acceptance of the

22. CA2, *supra* note 19.

23. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts art. 1, *adopted* June 8, 1977, 1125 U.N.T.S. 611. The specific definition of NIAC is within Article 1, paragraph 1, of Addition Protocol II: “All armed conflicts which are not covered by Article 1 of [AP I] and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.” *Id.*

24. MAČÁK, *supra* note 1, at 18–19.

25. *Id.* at 19 (quoting two ICJ opinions).

26. Katharine Fortin, *Unilateral Declaration by Polisario under API accepted by Swiss Federal Council*, ARMED GROUPS AND INT’L LAW (Sept. 2, 2015), <https://armedgroups-internationalallaw.org/2015/09/02/unilateral-declaration-by-polisario-under-api-accepted-by-swiss-federal-council/> [https://perma.cc/5J54-642Y].

27. *A New Era of Conflict and Violence*, UNITED NATIONS, <https://www.un.org/en/un75/new-era-conflict-and-violence> [https://perma.cc/S85E-VGZX].

28. DoD Manual, *supra* note 3.

29. MAČÁK, *supra* note 1, at 21–22.

Geneva Conventions, a great deal of IHL has gained the status of customary international law and become applicable to both IAC and NIAC alike.³⁰

Still, the distinction remains relevant. While many states have claimed to apply IAC standards to NIACs as a matter of internal policy, those claims do not share the same force of law that comes with the codified scheme.³¹ The framework of the Geneva Conventions is designed around a purposeful distinction between interstate and intrastate conflict, and so the application of the many rules are not easily squared between the two.³² If the distinction were really meaningless, and the laws of IAC apply to all conflicts, one would hope that states like the United States would not be so committed to their objections to Article 1(4) on the basis of respecting the bifurcated system.³³

B. *Article 1(4) and Its Challenges*

At the heart of Article 1(4) is the concept of self-determination: national liberation movements themselves are defined as non-state actors fighting for legitimate self-determination.³⁴ Self-determination is universally considered a right, or a *jus cogens* norm, that belongs to and is binding on all states.³⁵ Even further, the right is enshrined in Article 1, paragraph 2 of the United Nations Charter,³⁶ and resistance against colonial powers was described as an exercise of the right by the United Nations General Assembly.³⁷ National liberation movements were seen as wars with a just cause, and during the 1974–1977 Diplomatic Conference in Geneva, states pushed to extend Geneva law to these movements in particular.³⁸ Debates over what would become Article 1(4) were fierce, as states differed radically in their stances on what protections should be afforded to national liberation movements and how those protections should be applied.³⁹ The resulting language is as follows:

The situations referred to in [CA2] include armed conflicts in which peoples are fighting against colonial domination and alien occupation

30. *Id.*

31. *See id.* at 22–23 (explaining that, despite some states declaring that they apply IHL to any conflict, “declarations in military manuals do not necessarily amount to an obligation under international law”).

32. *Id.* at 23.

33. *See* Reagan, *supra* note 2, at IV (“To rest on such subjective distinctions based on a war’s alleged purposes would politicize humanitarian law and eliminate the distinction between international and non-international conflicts.”).

34. Mastorodimos, *supra* note 14, at 72.

35. East Timor (Port. v. Austl.), Judgment, 1995 I.C.J. 90, 102 (June 30).

36. U.N. Charter art. 1, ¶ 2.

37. G.A. Res. 2625 (XXV), at 124 (Oct. 24, 1970).

38. MAČÁK, *supra* note 1, at 66.

39. *See* Art. 1(4) Commentary, *supra* note 8, at 49 (discussing the divisions among those drafting the article).

and against racist régimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.⁴⁰

It is difficult to argue against the claims that this provision is excessively vague.⁴¹ While self-determination is defined above by reference to the UN Charter and Friendly Relations Declaration,⁴² the terms “armed conflicts,” “peoples,” “colonial domination,” “alien occupation,” and “racist régimes” have no available definition within the article. This creates immediate uncertainty as to exactly what kind of movements the article applies to and at what point the provision applies at all. Looking to the context of the article’s drafting, it seems clear that these terms were meant to reflect the politics of the decolonization period.⁴³ Beyond that reference point, there are limited concrete determinations that can be made on the meaning of any of these terms.

Begin with the term “armed conflict”: despite no clear definition existing, it can at least be implied that some level of violence or intensity is required for a conflict to qualify.⁴⁴ Additionally, this term in conjunction with Article 43(1) of AP I may shed some light on what a qualifying national liberation movement needs to look like. Article 43(1) requires that any party to a conflict, regardless of whether its authority is recognized, maintains a level of organization with established command responsibility over the actions of subordinates and an internal disciplinary system that will enforce the rules of international conflict.⁴⁵

“Peoples” as a term was subject to a more rigorous reflection in the 1987 Commentary on the Additional Protocols by the International Committee of the Red Cross (ICRC). The term requires no objective or absolute criteria; a group can fall within the term “peoples” as long as there is some common and distinctive element that sets them apart from others and bonds them together.⁴⁶ This element could be an ethnic identity, a shared geography, a

40. Art. 1(4), *supra* note 7.

41. *E.g.*, Reagan, *supra* note 2, at 4.

42. This is not to imply that the concept of self-determination is cut and dried; it too comes with its own interpretive challenges. In particular, the right is not an internal right for minority groups to secede from States. Art. 1(4) Commentary, *supra* note 8, at 53.

43. Noelle Higgins, *The Regulation of Armed Non-State Actors: Promoting the Application of the Laws of War to Conflicts Involving National Liberation Movements*, 17 HUMAN RIGHTS BRIEF, no. 1, 2009, at 12, 13.

44. Greenwood, *supra* note 11, at 193.

45. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 43(1), *adopted* June 8, 1977, 1125 U.N.T.S. 23.

46. Art. 1(4) Commentary, *supra* note 8, at 52.

common language, or anything that can be associated with the “sentiment of forming a people[] and [the] political will to live together.”⁴⁷ Interestingly, the ICRC points out that this means a national liberation movement might represent a people not limited to a single geographic space.⁴⁸ This assertion runs fundamentally counter to the colonial mindset that Article 1(4) is often imbued with, which may bring forth memories of the systematic territorial determinations attempted by colonial powers and their successors.

This surprisingly liberal interpretation brings up an important area where Article 1(4) in theory clashes with practical reality. At no point, even within the procedural mechanism of Article 96(3) discussed below, does AP I determine who will make the determination of whether or not a group represented by a national liberation movement falls within “peoples” (let alone make any other determinations).⁴⁹ This hole in the scheme is likely one of the reasons President Reagan accused AP I of politicizing humanitarian law⁵⁰—the realm of sovereign legitimacy is one that is almost always passionately contested. During negotiations, a requirement for national liberation movements to be recognized by a regional intergovernmental organization to qualify for Article 1(4) was proposed but not adopted.⁵¹ The role has, impliedly in practice, fallen onto the depositary to the Protocol in accordance with Article 96(3). The depositary, Switzerland,⁵² has rejected every attempt at invoking Article 1(4) except for the Polisario Front in 2015.⁵³

Once a satisfactory armed conflict exists and qualifying “peoples” are represented, the provision further limits the circumstances of legitimate application to three scenarios: struggles against colonial domination, alien occupation, or racist regimes.⁵⁴ Regarding colonial domination, the commentary and scholars alike are consistent in not spending much time contemplating its meaning, choosing instead to assert that it refers to the classic example of colonialism “where a people has had to take up arms to free itself from the domination of another people.”⁵⁵ Almost unanimously, the circumstance of this kind of colonial domination is considered to be a

47. *Id.*

48. *Id.*

49. *See generally* Art. 1(4), *supra* note 7 (describing “peoples” but not mentioning who decides whether a movement qualifies under that label).

50. Reagan, *supra* note 2, at IV.

51. Art. 1(4) Commentary, *supra* note 8, at 53.

52. Switzerland is the designated depositary for the Geneva Conventions, AP I, AP II, and many other international treaties. *Depositary*, FED. DEP’T OF FOREIGN AFF., <https://www.eda.admin.ch/eda/en/home/foreign-policy/international-law/internationale-vertraege/depositary.html> [https://perma.cc/M9GP-YXC9].

53. *Geneva Conventions and Armed Movements: An Unprecedented Move*, *supra* note 18.

54. Art. 1(4) Commentary, *supra* note 8, at 53.

55. *Id.* at 54.

thing of the past and unlikely to reoccur in the sense contemplated by Article 1(4).⁵⁶

Alien occupation, on the opposite end to colonial domination, is considered the circumstance with the most longevity into the modern era.⁵⁷ In support of that stance, the Swiss Federal Department of Foreign Affairs situated the Polisario Front within this concept when approving its declaration to activate Article 1(4).⁵⁸ Alien occupation, as a concept, is considered distinct from “belligerent occupation,” which is a much more developed and frequently invoked area of IHL.⁵⁹ Recall the second category from CA2 by which the law of IAC is applied: all cases of partial or total occupation of the territory of a contracting party.⁶⁰

To interpret alien occupation as anything that fits underneath the umbrella of CA2 would make this part of Article 1(4) redundant, but the result is that the remaining available interpretations are limited. Two possibilities are: (1) territories belonging to a state not party to the Geneva Conventions, or (2) territories of questionable legal status.⁶¹ The former scenario is unlikely to occur due to the near universal ratification of the Geneva Conventions.⁶² The latter, more specifically, is meant to describe territories that were not yet fully developed into states before occupation began.⁶³ Before 2015, it had been theorized that the Polisario Front’s conflict in the Western Sahara could qualify as an alien occupation,⁶⁴ but this view was not unanimous.⁶⁵

Finally, “racist regime” presents particular trouble as a term because it is impossible to objectify, due to the fact that it is not specified what level of

56. Greenwood, *supra* note 11, at 194. *But see* Josalee S. Deinla, *International Law and Wars of National Liberation Against Neo-Colonialism*, 88 PHIL. L.J. 1, 35 (2014) (arguing that Article 1(4) should be interpreted liberally to qualify struggles against neo-colonialism).

57. MAČÁK, *supra* note 1, at 68.

58. Eidgenössisches Departement für auswärtige Angelegenheiten, *Declaration unilaterale du Front POLISARIO d’application des Conventions de Geneve et de leur premier Protocole additionnel dans son conflit avec le Maroc* (June 30, 2015), <http://www.kubomacak.org/wp-content/uploads/2018/07/Polisario-memorandum-30052015.pdf> [https://perma.cc/4TGD-UZAU] [hereinafter Swiss Memorandum].

59. *See generally* MAČÁK, *supra* note 1, 183–238 (evaluating the history, normative underpinnings, and practical application of belligerent occupation doctrine).

60. CA2, *supra* note 19.

61. MAČÁK, *supra* note 1, at 68.

62. *Id.* at 15.

63. Sten Verhoeven, *International and Non-International Armed Conflicts* 13 (Inst. for Int’l L., Working Paper No. 107, March 2007); Art. 1(4) Commentary, *supra* note 8, at 54.

64. *See, e.g.*, Verhoeven, *supra* note 63 (contending that the Polisario Front arguably qualified); Higgins, *supra* note 43, at 14 (suggesting that the Polisario Front could qualify).

65. *See, e.g.*, Mastorodimos, *supra* note 14, at 100 (arguing that the Western Sahara circumstances faced by the Polisario Front are more akin to belligerent occupation).

racial discrimination justifies the implementation of the provision.⁶⁶ The section appears tailor-made for a circumstance like Apartheid in South Africa—though South Africa escaped the implementation of the rule by refusing to ratify AP I until after Apartheid had ended.⁶⁷ The ICRC commentary’s contribution to this interpretive test was to assert that a racist regime is one “founded on racist criteria.”⁶⁸ This does not do much to change the potential scope of application: a society racially segregated on explicit terms like Apartheid South Africa certainly fits, but “racist criteria” is vague enough that it could encompass a wide variety of racial discrimination.⁶⁹

Although one delegation argued that this list was non-exhaustive and that a literal interpretation of the word “include” requires a more expansive reading, this stance was contradicted by another delegation.⁷⁰ The ICRC commentary argued that the list was exhaustive because there are no other foreseeable international circumstances where a people would take up arms against another in pursuit of self-determination.⁷¹ Overall, Article 1(4) as a text suffers from significant issues of interpretation that result in difficulty for the practical application of the rule. Although there is no theoretical requirement that a national liberation movement be recognized by a third party as legitimate, it is likely that any national liberation movement must overcome gargantuan political obstacles to achieve the respect and legitimacy necessary to successfully internationalize a conflict through Article 1(4).

C. *Challenges Posed by Article 96(3)*

Article 96(3), the procedural mechanism for implementing Article 1(4), further clarifies the contours of the obstacles faced by a group seeking to legitimately invoke this process. The language of Article 96(3) is as follows:

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

66. MAČÁK, *supra* note 1, at 68.

67. Rogier Bartels, *When Do Terrorist Organisations Qualify as “Parties to an Armed Conflict” under International Humanitarian Law?*, 56 MIL. L. & L. WAR REV. 451, 461 n.54 (2018).

68. Art. 1(4) Commentary, *supra* note 8, at 54.

69. You could argue, for example, that the United States Constitution was founded on racial criteria because of its acceptance of slavery, and systemic racial discrimination that exists today is a result of that founding.

70. Art. 1(4) Commentary, *supra* note 8, at 54.

71. *Id.* at 54–55. This conclusion, especially with the hindsight of many national liberation movements trying and failing to implement Article 1(4), is in my opinion overly restrictive.

its receipt by the depositary, have in relation to that conflict the following effects:

- (a) The Conventions and this Protocol are brought into force for the said authority as a Party to the conflict with immediate effect;
- (b) The said authority assumes the same rights and obligations as those which have been assumed by a High Contracting Party to the Conventions and this Protocol; and
- (c) The Conventions and this Protocol are equally binding upon all Parties to the conflict.⁷²

On its face, this process appears to give substantial strength to the national liberation movement in its ability to decide whether to apply the IHL framework. A unilateral declaration is made without the consent or participation of the state actor, thus allowing the non-state actor to force legal duty onto the state actor.⁷³ The language “upon receipt by the depositary . . . the Conventions and the Protocol are brought into force . . . with immediate effect” implies a temporal advantage for the non-state actor and a lack of ability for the state actor to contest the imposition of the IAC context.

National liberation movements certainly took advantage of this mechanism initially; many famous movements attempted to accede to Geneva Law by means of Article 96(3). These groups include the African National Congress (ANC), the National Democratic Front of the Philippines, and even the Palestinian Liberation Organization (PLO).⁷⁴ The Swiss government, in its capacity as the depositary for AP I and the Geneva Conventions, rejected every single one of the unilateral declarations it received.⁷⁵ In each case, the reasoning for rejection centered on the language “engaged against a High Contracting Party in an armed conflict.” To escape the duty of engaging these national liberation movements in the context of the full IHL corpus, South Africa, the Philippines, and Israel simply did not become High Contracting Parties to AP I and refused to ratify.⁷⁶

This procedural road stop ensured that, as a matter of politics, no state actor would be forced to respect the spirit or requirements of Article 1(4). Once the system of Apartheid ended, for example, South Africa ratified

72. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 96(3), *adopted* June 8, 1977, 1125 U.N.T.S. 3, 46 [hereinafter Art. 96(3)].

73. See Greenwood, *supra* note 11, at 195 (suggesting that the article could be read this way and describing how some have argued for this interpretation).

74. MAČÁK, *supra* note 1, at 71.

75. *Id.* Other declarations were deposited in the wrong place and so were never reviewed. *Id.*

76. See Fortin, *supra* note 26 (“[T]he relevant State was not a party to Additional Protocol I. This forced the Swiss government to reject any declaration pursuant to Article 96(3), as the first sentence of Article 96(3) requires an ‘authority representing a people’ to be ‘engaged against a High Contracting Party’”) (emphasis omitted).

API.⁷⁷ Some have tried to overcome this challenge by suggesting that Article 1(4) has achieved the status of customary international law due to the near universal ratification of API by parties to the Geneva Conventions (174 out of 196 states as of the publication of this Note).⁷⁸ This argument is unlikely to succeed as long as countries like the United States continue to object to the inclusion of Article 1(4) as custom.⁷⁹

Issues of recognition also rear their heads here within the phrase “authority representing the people.” Without a clear way to determine when a group adequately becomes a representative of the people, the theoretical technicality that no official recognition is necessary for qualification is dwarfed by the practical reality of the international stage.⁸⁰ Other questions about interpreting Article 96(3), such as what occurs when multiple groups claim to represent the same people, were generally resolved by the ICRC commentary or have never had a real-life corollary to justify arguing about them.⁸¹ The difficulties in interpretation and application presented by Article 1(4) and Article 96(3) have resulted in the failure of the mechanism to make a legal impact in IHL. By looking to the success of the Polisario Front in 2015, though, we can look for possible answers to questions about the survivability of Article 1(4).

II. The Polisario Front and the First Successful Article 96(3) Declaration

A. *Historical Background to the Western Sahara Conflict*

The Western Sahara is a territory on the coast of Africa, bordered by Morocco, Algeria, and Mauritania.⁸² The colonial forces of Spain occupied

77. Bartels, *supra* note 67, at 461 n.54.

78. Overview of Additional Protocol I, INT’L COMMITTEE OF THE RED CROSS, <https://ihl-databases.icrc.org/ihl/INTRO/470> [<https://perma.cc/PH6Y-R76T>]; see Mastorodimos, *supra* note 14, at 104 (recognizing that this point has been argued because “participation in the convention is certainly widespread and representative, and a considerable time has passed since the article’s existence”).

79. See Mastorodimos, *supra* note 14, at 104–05 (analyzing the argument, but ultimately rejecting that Article 1(4) has achieved the status of customary international law in part because the United States has objected to this article); DoD Manual, *supra* note 3, at 77–78 (explaining the United States’ rejection of this provision of AP I).

80. See Greenwood, *supra* note 11, at 197 (arguing that a national liberation movement must receive recognition from the UN or a regional organization, or it will be “practically impossible” to satisfy representation).

81. See, e.g., Bruno Zimmermann, *Article 96 – Treaty Relations upon Entry into Force of This Protocol*, in COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 1083, 1089 (Yves Sandoz, Christophe Swinarski & Bruno Zimmermann eds., 1987) [hereinafter Art. 96(3) Commentary] (asserting that in the case of multiple movements representing the people, the movements could either share a declaration or deposit two separate declarations).

82. Ziai, *supra* note 16.

the territory from 1904 until their withdrawal in 1975.⁸³ Despite the General Assembly's adopted resolution towards decolonization,⁸⁴ Spain took no action to organize a referendum for independence in the region.⁸⁵ The Polisario Front was formed in 1973 to fight Spain for Sahrawi independence, and after two years of fighting, Spain agreed to undertake an independence referendum.⁸⁶

In the meantime, the Kingdom of Morocco made claims of sovereignty over the Western Sahara.⁸⁷ The General Assembly asked the International Court of Justice to issue an advisory opinion on the legal status of the Western Sahara,⁸⁸ and the 1975 opinion asserted that no evidence had been found that could affect the independence efforts of Resolution 1514.⁸⁹ King Hassan II of Morocco responded by launching the "Green March," where 350,000 Moroccan citizens marched south into the Western Sahara.⁹⁰ This instigated the Western Sahara War between Morocco, Mauritania, and the Polisario Front.⁹¹ Spain ceded control of the region as a consequence of the secret "Madrid Accords" to Morocco and Mauritania at the expiration of its colonial mandate in 1976, the day after which the Polisario Front declared the independent state of the Sahrawi Arab Democratic Republic (SADR).⁹² Mauritania exited the conflict in 1978 after an internal military coup, and Morocco seized control of the territory opened by Mauritania's exit.⁹³

Fighting continued until both parties accepted a United Nations Settlement Plan in 1988, and a ceasefire was put in place between Morocco and the Polisario Front in 1991.⁹⁴ The majority of the territory in the Western Sahara remains under Moroccan control, with a heavily mined sand wall called "the berm" separating the Moroccan west from the Polisario east.⁹⁵ It has been suggested that the international community will continue to pay

83. *Id.*

84. *See* G.A. Res. 1514 (XV), at 67 (Dec. 14, 1960) (recognizing the self-determination rights of people under alien subjugation).

85. Ziai, *supra* note 16.

86. *Id.*

87. *Id.*

88. *Id.*

89. Western Sahara, Advisory Opinion, 1975 I.C.J. 12, 68 (Oct. 16).

90. Jerome B. Weiner, *The Green March in Historical Perspective*, 33 MIDDLE E. J. 20, 20 (1979).

91. Ziai, *supra* note 16.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

little attention to the ongoing stalemate due to the relatively small political and economic assets at issue outside of the region.⁹⁶

B. The Successful Unilateral Declaration

After the Green March, the United Nations Security Council passed a resolution denouncing the march and calling for the withdrawal of Moroccan citizens from the Western Sahara.⁹⁷ Since then the dynamic between Morocco and the United Nations has been generally antagonistic. In 1979, the General Assembly passed a resolution recognizing the right of the Sahrawi people to fight for self-determination and decrying Moroccan occupation.⁹⁸

Morocco declined to ratify AP I at the time of its drafting, but then, critically, acceded to it in 2011.⁹⁹ With Morocco now qualifying as a party, the most prevalent obstacle to Article 1(4) implementation was removed. The Polisario Front delivered its unilateral declaration to the S DFA on June 23, 2015,¹⁰⁰ and three days later a notice was issued establishing that that declaration had the effects set out in Article 96(3).¹⁰¹ The Western Sahara conflict was, or should have been, officially internationalized.

The notification sent out by the S DFA had no explanation for why the declaration had been accepted, but an internal memorandum was circulated that gave a brief analysis for their decision.¹⁰² Starting with the designation of armed conflict, the S DFA asserted that armed resistance is not a requirement in the case of military occupation, meaning that the twenty-one yearlong ceasefire agreement had no effect on the designation.¹⁰³ To satisfy “peoples . . . in the exercise of their right of self-determination,” the S DFA relied on resolutions by the General Assembly recognizing the Sahrawi people’s right to self-determination.¹⁰⁴

96. Alex Chitty, *Western Sahara – Territorial Dispute, Self-determination and the UN*, EXPLORING GEOPOLITICS (May 6, 2010), https://exploringgeopolitics.org/publication_chitty_alex_western_sahara_territorial_dispute_self_determination_un_polisario_sahrawi_plebiscite_minurso_morocco_rio_de_oro_territory_algeria_mauritania/ [<https://perma.cc/V8EF-XMP4>].

97. S.C. Res. 380, ¶¶ 1–3 (Nov. 6, 1975). The General Assembly also issued a resolution urging the parties to the conflict to respect the Sahrawi people’s right to self-determination. G.A. Res. 3458 (XXX), at 117 (Dec. 10, 1975).

98. G.A. Res. 34/37, at 204 (Nov. 21, 1979).

99. MAČÁK, *supra* note 1, at 68–69.

100. Front Polisario, Article 96(3) Declaration submitted to the United Nations Secretary-General (June 23, 2015), available at http://theirwords.org/media/transfer/doc/declarationofficielle_polisariofront_2015-f426d1a96a4465affd1f87e794374b06.pdf [<https://perma.cc/ZN7U-E8DU>].

101. Notification, *supra* note 17.

102. Swiss Memorandum, *supra* note 58.

103. *Id.*

104. *Id.*

The S DFA determined that between a struggle against colonial domination, alien occupation, or a racist regime, the Polisario Front's conflict with Morocco qualified as an alien occupation.¹⁰⁵ The reasoning offered for this decision was that the General Assembly had specifically linked Morocco's occupation to the general resolution toward decolonization and independence.¹⁰⁶ Lastly, the Polisario Front was considered an authority representing the Sahrawi people within the meaning of Article 96(3) because their de facto representation has been uncontested since the 1970s.¹⁰⁷ The S DFA also reiterated that no recognition by an international organization was necessary to make the determination.¹⁰⁸

C. *Implications for Article 1(4)*

Although the S DFA's memo offered some explanation for its decision, it did not provide much by way of justification—but there are still some lessons that can be gleaned from the reasons it chose to offer. From a political perspective, the decision to frequently rely on General Assembly resolutions as authority demonstrates both the de facto need for recognition, as scholars had already hypothesized, and the convenience of the relationship between the Polisario Front and the international community. Along with frequent offers of support from the official bodies of the UN, the Polisario Front was very public about its desire to accede to and respect the Geneva Conventions.¹⁰⁹ In 2005, the Polisario Front signed the Geneva Call Deed of Commitment, which banned anti-personnel mines, and has participated in five destructions of mine stockpiles since.¹¹⁰ This positive relationship, coupled with Morocco's history of disregarding the decisions of the international community,¹¹¹ likely created an environment ideal for looking past the practical and interpretive problems implicated by the decision in the memo.

The S DFA's designation of the conflict as one of alien occupation is worth contemplating with a critical eye. While it had previously been argued before the 2015 declaration that the situation in the Western Sahara was one of alien occupation (perhaps even the only possible qualifying situation,

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. Fortin, *supra* note 26.

110. *Western Sahara: The Polisario Front Destroys Stockpiles of Anti-personnel Mines*, GENEVA CALL (March 31, 2015), <https://www.genevacall.org/polisario-front-destroys-stockpiles-anti-personnel-mines/> [<https://perma.cc/4E2P-L8S4>]. Geneva Call is an organization dedicated to working with non-state actors to implement IHL as a matter of policy. *Mission*, GENEVA CALL, <https://www.genevacall.org/mission/> [<https://perma.cc/L4LG-BTC9>].

111. *See* Ziai, *supra* note 16 (detailing Morocco's refusal to accept prisoners of war released by the Polisario Front).

along with the Israeli–Palestinian conflict),¹¹² that position was not without strong counterarguments. Konstantinos Mastorodimos, in an article (ironically) published in 2015 shortly before the declaration was accepted, articulated the ways in which the Western Sahara conflict does not represent the imagined scheme for Article 1(4).¹¹³ First and foremost, the colonial power, Spain, exited the conflict forty years prior, yet the UN General Assembly continued to consider the conflict as one of decolonization for purposes of establishing the right to self-determination.¹¹⁴ Outside the colonial context, a perspective relied upon to limit the breadth of interpretations possible for Article 1(4), self-determination enters much murkier waters. Although the international community has rejected an interpretation of self-determination that allows for the secession of minority groups, a national liberation movement that is not resisting colonial forces fails to fit the affirmative definition as well.¹¹⁵

Going off the earlier proffered definition of alien occupation is not a clean fit either. If alien occupation is limited to the occupation of a territory by a state while the territory was in the process of becoming a state, the specifics of the history behind the Western Sahara conflict create complications. The change in power in the region between Spain, Morocco, and Mauritania is surrounded by legal controversy.¹¹⁶ If the Madrid Accords are considered legitimate, then power was transferred from Spain to Morocco and Mauritania immediately when Spain's colonial mandate expired.¹¹⁷ This would mean that there was no period of time between colonial rule and Moroccan occupation where the SADR would have been in the process of becoming a state for the purposes of fitting the alien occupation conception.

The disputed legal status of the SADR also complicates the acceptance of the unilateral declaration. The SADR has diplomatic relations with seventy-six states that are members of the UN and is a member state of the African Union (AU), over Morocco's protest.¹¹⁸ Although Morocco has impeded efforts of the UN to recognize the SADR,¹¹⁹ the existence of arguments that put its status into question has an impact on the Article 1(4)

112. MAČÁK, *supra* note 1, at 68.

113. Mastorodimos, *supra* note 14, at 100–01.

114. *Id.*; Ziai, *supra* note 16 (describing the history of Spain's exit from the conflict); *see also* G.A. Res. 40/50, at 269 (Dec. 2, 1985); G.A. Res. 41/16, at 218 (Oct. 31, 1986).

115. Greenwood, *supra* note 11, at 194.

116. *See* Ziai, *supra* note 16 (describing secret accords among Spain, Morocco, and Mauritania, which were followed by a declaration of independence by the Polisario Front).

117. *Id.*

118. *Id.* The AU, at the time called the Organization of African Unity (OAU), accepted the SADR as a member in 1984, and Morocco left the organization immediately after the decision was made. *Id.*

119. *See id.* (describing Moroccan efforts to prevent recognition of the Polisario Front).

determination. It suggests that the clarity required for such a classification, thought an impossible standard to reach previously, is lower than expected.

Finally, the reasons proffered to support the argument that the Polisario Front is a qualified authority representing the Sahrawi people imply that the requirement has a more liberal accessibility than previously thought. The fact that the Polisario Front has represented the Sahrawi people uncontested loses its weight when paired with the reaffirmation that no official recognition by an international organization is necessary. While it can safely be assumed that the decades the Polisario Front has been in public operation played a role in convincing the SDFA of its qualification, as a matter of interpreting the reasons proffered, the result is that the bar for achieving protection requires no more than the filing of the Article 96(3) declaration.

Conclusion

Four days after the SDFA released the notice of accepting the Polisario Front's declaration and seven days after the Polisario Front had deposited that declaration, the Kingdom of Morocco responded to the depositary's position with a strong objection.¹²⁰ The denouncement of the decision went as far as to claim that no situation of armed conflict existed between the Polisario Front and Morocco.¹²¹ That is to say, despite the historic moment of Article 1(4) finally being implemented, the result remains that IHL lacks a direct enforcement mechanism. Despite the fact that the entire corpus of IAC law now technically applies to the conflict in the Western Sahara, there is no way to, for example, ensure that Morocco will now comply with Article 33 of AP I regarding the recording and sharing of information on missing persons.¹²² This issue is not unique to Article 1(4), and in a way this result can be viewed as Article 1(4) finally leaving the starting line and facing the myriad of problems that other areas of IHL have been contending with.

The Polisario Front's successful declaration does not offer definitive answers to the burning questions that scholars have been holding onto for decades, and there is no way to predict if this decision will at some point lead to a wider application of the provision. It can be argued, however, that the

120. MAČÁK, *supra* note 1, at 69.

121. *Id.*

122. *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 33, *adopted* June 8, 1977, 1125 U.N.T.S. 3, 20 (describing certain requirements for reporting missing persons).

fast response by the SDFA and the implications of the justifications it put forward paint a picture of an Article 1(4) that is not as mechanically constrained and formalistically limited as it has been thought to be. Given that the first successful implementation of Article 1(4) did not fit into the mold theoretically laid out by scholars, there is hope that the article can still find relevance in a changing future that may continue to construe its contents more liberally.