Chapter 2
Wars of National Liberation – The Right to Self-Determination and the *Jus ad Bellum*

2.0 Introduction

Cassese believes that the term ‘war of national liberation’ was in use as far back as the 19th century. Although the main spate of these wars erupted in the second half of the 20th century, recourse to the use of armed force by peoples under oppressive regimes is certainly not a modern phenomenon. Indeed, Sluka comments that “[t]here have been national liberation movements since the evolution of the first states.” During the ‘War as Fact’ period, the concept of state sovereignty allowed for expansion and conquest as territory and peoples became swallowed up by new empires. The *jus ad bellum* during this period endorsed the forceful acquisition of new lands and the subjugation of populations. The main purpose of the present discussion, however, is to investigate the *jus ad bellum* from the opposite perspective, i.e. the legality of the use of force by national liberation movements for the attainment of their right to self-determination.

Despite the antiquity of such conflicts, the use of force during wars of national liberation was not accommodated by international law until the second half of the 20th century. As was discussed in Chapter 1, traditional international law concerning the *jus ad bellum* only dealt with the use of force by non-state actors in a very basic way. It was not until the right to self-determination had been widely accepted under international law and the outbreak of a large number of wars of national liberation in the decolonisation period that the issue of the legality of the use of force to obtain this right was considered in detail by the international community.

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2 Jeff Sluka, “National Liberation Movements in Global Context” available at: www.tamilnation.org/cnfNZ96/jeffsluka.html, last accessed 22/05/07. He goes on to comment: “States have proven to be the most efficient of social and military organisations ever devised by human beings for the pursuit of conquest or predatory expansion. The history of states is the history of empire, and from their beginning they spread by conquest and subjugation of neighbouring peoples until today all of the formerly independent nations or peoples have been conquered and included within their boundaries.”
The right to self-determination is a highly contentious one, over which various debates and discussions have taken place since its inception. Today it has gained the status of *jus cogens* and jurisprudence from the International Court of Justice supports the view that the right also possesses an *erga omnes* character. State practice has, however, illustrated that the right to self-determination is not easily implemented or enforced, obliging those seeking this right to resort to the use of force against a state in many instances. *Prima facie*, this use of force to attain self-determination is a challenge to the UN Charter paradigm on the *jus ad bellum*, specifically the prohibition on the use of force in Article 2(4). However, the adoption of a series of UN resolutions on self-determination, coupled with state practice, lend a degree of support to the contention that the use of force by national liberation movements to attain self-determination is legitimate.

In order to fully understand the framework of the *jus ad bellum* applicable to national liberation movements, an overview of the development of the principle of self-determination into a legal right and its status under the international legal

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The Inter-American Commission also dealt with the issue of the *erga omnes* status of self-determination in Press Communiqué No. 13/93 (May 25, 1993). However, in relation to the modern understanding of the right to self-determination, see Jan Klabbers, “The Right to be Taken Seriously: Self-Determination in International Law” 28 *Human Rights Quarterly* (2006), pp. 186 – 206, who suggests that “viewing the right to self-determination as an enforceable right possibly leading up to secession is no longer tenable, if it ever was. Instead, courts and quasi-judicial tribunals have reconceptualized self-determination as a legal principle rather than a right and have severed the connection with secession.” – p. 186.