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Joint Opinion in the PMOI case

We have been asked by the National Council of Resistance of Iran to advise on the legal status of members of the People's Mojahedin Organization of Iran in Iraq.

We have read the legal opinion of Professor Cherif Bassiouni. We agree substantially with his general conclusions. In the present opinion we add some comments and other considerations.

I The Mojahedins are not combatants under the Geneva Convention

- (i) We fully agree that the Mojahedins are not combatants under the Geneva Convention: the Mojahedins are neither regular members of the armed forces of a party to the conflict in Iraq nor an irregular group belonging to the armed forces of a Party to the conflict. As a consequence they cannot be regarded as prisoners of war certainly not during the fighting between the Coalition forces and the Iraqi army. They are even less so since the end of the hostilities in that country.
- (ii) Both Coalition governments have made statements in relation to the end of hostilities in Iraq. As well as President Bush on May 1st, the UK Foreign Affairs Secretary of State Jack Straw declared "that large scale combat operations are over. The overwhelming majority of the country is under coalition control. The vast bulk of Saddam Hussein's forces have been defeated, dispersed and isolated although some pockets of resistance remain in Baghdad and some other towns".¹
- (iii) The UN Security Council in Resolution 1483 (2003) also welcomes the first steps of the reconstruction of Iraq, notes the letter of 8 May from the US and UK representatives to the President of the Security Council (S/2003/538) and recognises

¹ 28 April, UK Mission to the UN.

“the specific authorities, responsibilities, and obligations under applicable international law of these states as occupying powers under unified command (the Authority)”.

- (iv) That resolution also “calls upon the Authority and relevant organisations and individuals to continue efforts to locate, identify, and repatriate all Kuwaiti and Third-State Nationals or the remains of those present in Iraq ...” Although it concerns mainly the first Gulf war (Iraq-Kuwait), it shows that hostilities are considered to be over at the international level. As a consequence and under Article 118 of the Geneva Convention III, “prisoners of war” should “be released and repatriated without delay after the cessation of active hostilities”. If the Mojahedins were regarded as POW they should have been released immediately after the cessation of hostilities.
- (v) To seek to treat them as POW (which in our view they are not) would raise the problem of repatriation. The Geneva Prisoners of war convention of 1949 provides that the POW should be released and “*repatriated*” without delay after the cessation of active hostilities (articles 118-119). It is obvious in the present situation that there is no desire of Mojahedins to return to Iran at the moment where there would be an evident risk of persecution. Such a situation has arisen in the past².

² Thus in the case of Korea (1851-1953) the UN command was faced to thousands of prisoners who feared persecution and therefore were not willing to be repatriated. On the grounds of humanity, a compromise was reached in the Korean Armistice Agreement of 27 July 1952, articles 34-38 (Mayda, American Journal of International Law (1953) 414; HP Ball Prisoner and war negotiations: the Korean experience and lesson, 62 US Naval War College International Law Studies (1980) 292.

After the Indian Pakistan war in 1971 and the creation of the new State of Bangladesh, India claimed to detain Pakistani POW, without repatriating them, on the ground of the possibility of a renewal of hostilities and that war crimes trials were contemplated. In May 1973, Pakistan filed an application in the ICJ against India, claiming that India was proposing to hand over Pakistani prisoners to Bangladesh in order to allow this country to try them for acts of genocide and crimes against humanity. In view of negotiation between the two countries, the proceedings before the Court were suspended and then the case was removed from the list. The dispute was settled by Agreement.

In the case of Vietnam, article 8(a) of the Four Party Agreement on Ending the war and Restoring the Peace in Vietnam (Paris 27 January 1973) provided that the return of captured military personnel and foreign civilians of the parties should be carried out simultaneously and completed not later than the same day as the troop withdrawal provided in the agreement, the parties exchanging complete lists of the persons to be returned.

Articles 1 and 2 of the Protocol to the Agreement provided for the return of captured servicemen and captured civilians to the country, authority, or party of which they were nationals or under whose command they served, such return to be controlled and supervised by the International Commission of Control and Supervision (Ball, op.cit. p 311 ; Richard Falk, AJIL, 1973, p 465 and HS Levie International Law, Aspects of repatriation of prisoners of war during hostilities: a reply, AJIL, 1973, p 693.

- (vi) In our opinion, the status of the Mojahedin in Iraq should be considered as the status of civilians under the Geneva Conventions, as stated in the legal opinion of Professor Bassiouni but also, more precisely, on the basis of what had been previously agreed by the Iraqi government before the military operations of the Coalition in that country.

II The status of the Mojahedins as civilians under the Geneva conventions

- (i) We fully agree with the content of Section II of the opinion as to the applicability of the Geneva Conventions, especially in view of the UN Security Council Resolution 1483 (2003) which refers to the Coalition as the “occupying powers under unified command”. We also agree with the statement according to which Mojahedins are protected persons under the Geneva Convention IV but it seems to us that some categories of Mojahedins may not be “protected persons” under the convention, namely the Mojahedins who have US nationality, the Mojahedins who are nationals of States which are not bound by the Geneva Conventions, the Mojahedins who are nationals of Co-belligerent States.
- (ii) We recognise the problem regarding Mojahedins who have dual nationality and the specific position of Stateless Mojahedins, as described in the opinion.
- (iii) We share the views expressed as to the various types of protection offered to the Mojahedins as civilians and protected persons under the Geneva Convention IV. However we add the following comments on:

A – Continuity of the status of the Mojahedins in Iraq

B - Recognition of the Mojahedins as a resistance movement

C – Non-refoulement of Mojahedins

A-Continuity of the status of the Mojahedin in Iraq –

The application of humanitarian law by the occupying powers has to be read in conjunction with the sovereignty of Iraq. It follows from the UN Security Council Resolution that “the sovereignty of Iraq resides in the State of Iraq” and whatever may be the situation and the role of the Coalition (referred to as *the Authority* by the UN resolutions) the powers of the occupying States are restricted to the needs of occupation. In Resolution 1511 (2003) the Security Council³ “reaffirms the sovereignty and territorial integrity of Iraq, and underscores, in that context, the temporary nature of the exercise by the Coalition provisional Authority of the specific responsibilities, authorities, and obligations under applicable international law recognised and set forth in Resolution 1483(2003), which will cease when an internationally recognised, representative government established by the people of Iraq is sworn in and assumes the responsibilities of the Authority ...”

- (1) – It is for Iraq to decide on the admission and on the status of foreigners on its own territory. It is well established now that the military intervention was not a war against Iraq, its aim was not the subjugation of the country and it should not lead to a permanent occupation. As a consequence it does not affect the independence or sovereignty of Iraq.⁴ Since the military intervention and the collapse of the Saddam Hussein regime and government, Iraq is under the military control of foreign troops i.e. in the present case, the American Military administration in the region where the Ashraf camp is situated.

- (2) Under international law, “as comprising the power of a state to exercise supreme authority over all persons and things within its territory, **sovereignty involves territorial authority**”.⁵ When considering the application of Humanitarian law and the Geneva Conventions, (in particular Geneva Convention IV relative to the protection of civilian persons in time of war and also in part The Hague Conventions (1907), to the Mojahedin in the light of the continuing sovereignty of Iraq, two points should underlined.

³ Also Res. 1500 (2003).

⁴ See: Security Council resolution 660 on Iraq invasion of Kuwait 1990.

⁵ Oppenheim’s International law, 9th ed. vol, 1996, § 117, p.382.

(a) The rights of protected persons are tangible and inalienable

This rule flows from Article 6, 6, 6 and 7 respectively of each of the four Geneva Conventions:

No special agreement shall adversely affect the situation of protected persons, as defined by the present convention, nor restrict the rights which it confers upon them.

And from Article 7, 7, 7 and 8 of the conventions:

Protected persons may in no circumstances renounce in part or in entirety the rights secured to them by the present conventions, and by the special agreements referred to in the foregoing article, if such there be.

(b) Occupation does not modify the status of the occupied territory

1 – Occupation is not subjugation

According to Oppenheim, » subjugation takes place only when a belligerent, after having annihilated the forces and conquered the territory of his adversary, destroys his existence by annexing the conquered territory. Subjugation may, therefore, be correctly defined as extermination in war of one belligerent by another through annexation of the former's territory after conquest, the enemy forces having been annihilated".⁶ In subjugation as in *Debellatio*, the State does not exist anymore and there are no hostilities on the part of those who represented it.

On the other hand occupation is temporary, the right of the occupant is merely a right of administration and in particular military administration. Occupation means the maintaining of the target State and even the continuation of hostilities against victorious troops.⁷ It is

⁶ Oppenheim's International law, Lauterpach ed vol. II Disputes, war and neutrality, 7th edition, London 1952 reimp. 1969, p.600; Subjugation is also defined as "la soumission complète due vaincu au vainqueur entraînant fin de la guerre et disparition de l'Etat vaincu »Basdevant, Dictionnaire de la terminologie due droit international, 1960, p.584. See also M. Whiteman, Digest vol X, p.547; McNair and Watts, The legal effects of war Cambridge, 1966.

⁷ See E. David. op. cit. p.425.

generally accepted that the occupant exercises authority and, as the local government is prevented from exercising its authority, the occupying power acquires the right of administration over the territory and its inhabitants “and all legitimate steps he takes in the exercise of this right must be recognised by the legitimate Government after occupation has ceased”.⁸

Rules 42 and ff of The Hague Convention Regulations and Articles 27 to 34 and 47 and ff of the 1949 Geneva Convention IV do not apply to subjugation., They apply to occupation which is temporary.

2 – Occupation does not lead to a change or a transfer of sovereignty –

Occupation is not to be regarded as the conquest of the territory, it does not lead to an annexation of the occupied State. There are strong authorities which support this view.

Thus

- (a) Oppenheim writes “although as regards the safety of his army and the purposes of war the occupant is vested with an almost absolute power, as he is not the sovereign of the territory he has no right to make changes in the laws, or in the administration, other than those which are temporarily necessitated by his interest in the maintenance of safety of his army and the realisation of the purpose of war. On the contrary, he has the duty of administering the country according to the existing laws and the existing rules of administration; he must ensure public order and safety, must respect family honour and rights, individual lives, private property, religious convictions and liberty”.⁹
- (b) In the Arbitral Award April 1925 Dette publique ottomane (RSA, I, 555): “*Quels que soient les effets de l’occupation d’un territoire par l’adversaire avant le rétablissement de la paix, il est certain qu’à elle seule cette occupation ne pouvait opérer juridiquement le transfert de souveraineté.*»

⁸ Oppenheim, op. cit. p.436-437.

⁹ Ibidem, p.437.

- (c) There are Resolutions from the UN Security Council in the same sense.¹⁰ Thus the UN Security Council Resolutions on Iraq welcome the establishment of a representative Governing Council of Iraq as an important step towards the formation by the people of Iraq of an internationally recognised, representative government that will exercise the sovereignty of Iraq.¹¹ It is plain that this is an interim administration “until an internationally recognised, representative government is established and assumes the responsibilities of the Authority”¹². Such an international recognised government would of course be subject to the liabilities of the State under international law and in particular with regard to human rights conventions.

3 – Laws of the occupied State are still applicable to its territory –

The duty of allegiance of the population to the territorial power remains. As a consequence, for instance, criminal jurisdiction of the occupied State may be still exercised and the duty to conform with the occupant’s decrees or ordinances does not mean that it is allowed to act against the rules of the State.

The Geneva convention also provides that “with the exception of special measures authorised by the present Convention, in particular by Articles 27 and 41 thereof, the situation of protected persons shall continue to be regulated, in principle, by the provisions concerning aliens in time of peace”.¹³

This provision as well as article 43 of The Hague regulations shows that not only the legal status of the territory remain unchanged by the occupying power, but its political institutions and public life in general should be allowed to continue with as little disturbance as possible.¹⁴

¹⁰ SC res. 662, 9 August 1990 (Iraq), 581 February 24 1985 (Iran-Iraq), 497 December 17 1981 (Golan heights) ...

¹¹ Res. 1500 (2003).

¹² Res. 1511 (2003) adopted on 16 October 2003.

¹³ Article 38 Geneva convention IV.

¹⁴ Dietr Fleck ex., The handbook of humanitarian law in armed conflicts, Oxford 1995, no. 531, p.246.

4 – Thus the occupying power should respect the rights of person in the occupied territory and as a consequence, individuals rights and liberties should be respected and laws remain in force. The occupying power as *de facto* administration must respect in particular the local legislations and the decisions which have been adopted on that basis and created rights on behalf of protected persons i.e. persons who lived on the occupied territory and remain there.

Under Article 43 of The Hague Convention Regulations, “*the authority of the legitimate power having in fact passed into the hands of the occupants, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented the laws in force in the country*”.¹⁵

Civilians as protected persons are entitled to respect for their persons, their honour, their rights, convictions, manners and customs. Their private property as acquired under the laws of the State is protected.¹⁶ Of course the occupant State is prohibited from deporting elements of the population of the occupied territory outside this territory.¹⁷

5 - We could also consider the situation in the light of State succession. However, this is not strictly a matter of State succession because the State (Iraq), as an international person, is unchanged. What is in the process of being changed is the government through which the State acts. It may be therefore convenient to consider here succession of governments with an interim period of foreign military administration.

In law, it is well established that either in a normal constitutional manner or as a result of a revolution, the new regime takes the place of the former regime in all matters affecting the international rights and obligations of the State. This was illustrated in many cases for example in relation to treaties (France Louis XVIII after the revolution and the Napoleonic period; or after Napoleon III’s coup d’Etat). It is also shown as for liability of a successor government for contracts concluded by its predecessor.¹⁸ Of course a new government may

¹⁵ See for example Special Committee of the UN General Assembly on violation of fundamental rights of Palestinians to a human treatment.

¹⁶ Art. 27 Geneva Convention IV; Art. 48 found 75 Protocol I 10 June 1977 Additional to the Geneva Convention; Art. The Hague Regulations.

¹⁷ Article 49 Geneva Convention IV. See UNSC resolutions 452 (1979), 465 (1980), 497 (1981), 799 (1992) etc. ... concerning Israel and 787 (1992) Yugoslavia and also resolution on Iraq Kuwait ...

¹⁸ Western Electric Co. Inc. Claims 1959. ILR 30 p.166.

wish to depart from the previous policy of the State followed by its predecessor. However, if it does so, it can only do so in accordance with the rules applicable to treaties denunciation and to vested rights (*droits acquis*). Particularly, it has to respect vested rights in relation with the protection of human rights, minority rights or refugees status.¹⁹

6 - In the present situation it seems that the Iraqi government previously granted the **status of refugees** to the Mojahedin not on the basis of the Geneva convention 1951 to which it is not a party, but on the basis of the Iraqi national legislation. It seems as if territorial asylum granted to the Mojahedin is one of “*political asylum*” rather than strictly speaking “refugees” asylum.

This view is based on Article 39 of the Constitution:

“The Republic of Iraq granted the right of political asylum to all the combatants who are under oppression and tyranny in their own country for defence of freedom and humanitarian principles which Iraqi people are dedicated to in their constitutional law”.

Under the Political Refugees Act No. 51 (1971) the refugee is anybody who takes refuge in the Republic of Iraq for political or military reasons.

According to article 4 of the Act the refugee cannot be deported to his country of origin: *le réfugié ne peut en aucune façon être renvoyé dans son pays d'origine*. The refugee must hand over his weapons to the Iraqi authorities. Otherwise he enjoys the same rights as Iraqi citizens in several areas (article 11).

It thus seems that the American authorities are bound to respect the *status quo* and to acknowledge the same status of the Mojahedins as existed prior to the occupation.

Under general international law it may be considered that the Mojahedin are entitled to enjoy the same status subject to conditions which the occupant authorities would impose on the basis of public order, safety or military needs such as restrictions on weapons, prohibitions of propaganda or of any use of the territory against a foreign State ...

¹⁹ Oppenheim's International law pp.234-235.

B – Recognition of the Mojahedins as a resistance movement

- (i) It seems that the Mojahedins enjoyed before the 2003 hostilities a *de facto* recognition as a movement of resistance. Such a decision of recognition is obviously of a political nature and it depends in practice on diplomatic consideration; there are no formal legal conditions to be strictly met and the consequences of such an act flow from the recognising State's decision.

- (ii) Because of some of the past military operations of the Mojahedin, it may be considered that they enjoyed recognition as insurgents. Such recognition is a unilateral act by which a State acknowledged a factual situation and relationship between the State and insurgents fighting against the incumbent government of another State. "Such recognition is an acknowledgement by a foreign State of the fact that a political revolt exists", "it is an indication that the recognising state regards the insurgents as legal contestants and not mere law breakers but it does not place on that State the legal burdens of a neutral. Moreover, it does not necessarily indicate an intention on the part of the recognising state to aid the insurgents nor does it afford any legal basis for aid to them of a material kind" according to the American practice.²⁰ The rights and duties are created by recognition only to the extent specifically granted and agreed upon

- (iii) O'Connell denies a difference between belligerency and insurgency; some authors as Charles De Visscher, regard the question as purely factual; Lauterpacht; McNair and in the US Richard Falk regard it as an intermediate position between rebellion and recognised and belligerency. Padelford in its essay published in 1939, *International law and Diplomacy in the Spanish Civil Strife*, as quoted by Marjorie Whiteman, writes: "Prior to the admission of insurgency by foreign States, rebels enjoy no recognition or standing in the society of states. Admission of insurgency by foreign states confirms their *de facto* existence, and to that extent gives them a position and a personality, albeit anomalous and temporary" (Digest ... p.493). It is clear that "a

²⁰ Assistant legal adviser Yongling to the office of Greek Turkish and Iranian Affairs, memorandum Nov. 25 1947, in Marjorie Whiteman, Digest of international law, vol. 2, 486.

State may recognise insurgents in order to avoid treating them as criminals.²¹ So the recognised insurgents are not entitled to rights under international law but recognition gives them a *de facto* existence in relation with the recognising State and by doing so this State may acknowledge such and such rights and duties.

- (iv) Lauterpacht wrote “Recognition of insurgency creates a factual relation in the meaning that legal rights and duties as between insurgents and outside States exist only insofar as they are expressly conceded and agreed upon for reasons of convenience, of humanity, or of economic interest”²² In that regard, The American Law Institute Restatement of the Law (Recognition, pt II 343, May 1962) notes: “In customary practice, recognition of insurgency has considerably less legal significance than a recognition of belligerency. Historically, the object of recognition of insurgency by non-contending states was the humanitarian one of obtaining for rebels carrying on organised military operations the protection given to soldiers by international law relating to the conduct of war”.

C – Non-refoulement of Mojahedins

A decision of the Iraqi Governing Council expelling or threatening to expel the PMOI and sending them back to Iran would be a serious violation of the general principle of non-refoulement of refugees.

This principle appears in Article 33 of the Geneva Convention relating to the status of refugees (1951)²³ but also in several multilateral treaties²⁴. It is also regarded as part of

²¹ H. Kelsen, *Principles of International law* 1932, p.292. Philip Jessup points out that “the principal consequence of a recognition of insurgency to protect the insurgents from having their warlike activities, especially on the high seas, from being regarded as lawless acts of violence which, in the absence of recognition, might subject them to treatment as pirates” *A Modern law of Nations*. 1948.

²² *Recognition in international law*, 1947, pp.270-271.

²³ “Article 33 Prohibition of expulsion or return (refoulement)

1 No contracting state shall expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

2 The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country”.

²⁴ Under the American Convention on Human Rights, 1969, « in no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status or political

customary international law and therefore binding on Iraq as well as the Occupying Authorities in Iraq : a State cannot return a refugee or asylum seeker to any territory where there is a risk for his/her life or freedom on account of race, religion, nationality, membership of a particular social group or political opinion. This has been regarded by international lawyers²⁵ and by the UN organs as a “peremptory rule of international law”²⁶.

This rule is even applicable to extradition of refugees and more generally in the context of human rights²⁷. There may be an exception on grounds of national security and public safety. However, this exception is not available if there is a risk of persecution and if the exception applies it should be applied restrictively and subject to due process of law. Also, the expelling authorities should take reasonable steps to secure the admission of the expelled people to a safe third country and in any case the rule imposes on the expelling State an assessment of each individual case.

Conclusions:

Application of these principles to the present case

PMOI has never kept a portion of territory of Iran under its control. The Mojahedin took several limited military actions against military installations in Iran from the Iraqi territory prior to the 1988 cease-fire between the two countries, then they later restricted their activities a) to self-defence of their camps and people in Iraq that have been targets of military actions by the Iranian government and b) to political propaganda to Iran calling for a

opinion » (Article 22(8)). In the same sense : Article 3 of the 1984 Convention Against Torture and other cruel, inhuman, degrading treatment or punishment, A/Res/39/46, 10 December 1984 ; 1969 Organization of Africa Unity Convention governing the specific aspects of Refugee Problems in Africa (Article II(3)) ; also the 1967 Declaration on Territorial Asylum adopted by the UN General Assembly (Resolution 2132 (XXII), 14 December 1967 and other instruments as construed by international organs and courts.

²⁵ Sir Elihu Lauterpacht and Daniel Bethlehem, The scope and content of the principle of *non-refoulement* : Opinion, in UNHCR Refugee Protection in International Law. UNCHR’s Global Consultations on International Protection, Ed. By Erika Feller, Volker Türk and Frances Nicholson, Cambridge, 2003, p 107

²⁶ In particular by the Executive Committee of the HCR in several statements quoted by Sir Elihu and D. Bethlehem and the UNGA, for example in A/RES/51/75, 12 Feb. 1997, emphasizes the non-derogable character and the fundamental importance of the non-refoulement principle.

²⁷ This is shown in the case-law of the European Court of Human Rights, for example : Soering v UK (1989) 11 EHRR 439; Chahal v UK (1997) 23 EHRR 413.

democratic regime in that country. For that reason and to that purpose the Iraqi government recognised the PMOI as a resistance movement.

It seems that this status was based on a verbal agreement between the Iraqi government and the PMOI who are entitled to enter and reside in Iraq and enjoy their freedom of action and independence. This is supported by a general practice of the Iraqi authorities and by some documents: a statement by the President of Iraq on June 15, 1986: “the Iraqi leadership respects the Iranian Resistance and its political and ideological independence and freedom of action of this resistance in its actions and movements to achieve its objectives ... The relations between Iraq and the Iranian Resistance are based on peace, mutual respect to national sovereignty and respect for each nation’s ideological and political choice”²⁸

PMOI were allocated by the Iraqi government various places to set up their camps and offices; the Iraqi authorities consider that “sites **belonging to the PMOI** are sites that the government of Iraq has allowed this organisation to use without any interference”.²⁹

PMOI were allowed initially to keep their weapons and to take actions against the Iranian territory from Iraq.

PMOI were allowed to broadcast in Iraq and outside Iraq

PMOI were allowed to carry out military and political training in their camps.

Those elements make clear that the Mojahedins were not and are not to be regarded by Iraq as criminals or terrorists inside or outside Iraq.

Several precedents of such recognition may be found in the past.³⁰

²⁸ Baghdad Observer 15-16 June 1986.

²⁹ Office of the President, National Monitoring Directorate December 9, 2002; even for the investigation of weapons of mass destruction an agreement with the foreign organisation was needed Ath Thawra Daily December 6, 1998.

³⁰ Thus

(a) in December 1939, such an authority has been recognised in Terijoki at the border between Finland and USSR; it disappeared after the signature of the peace treaty between Finland and USSR March 12, 1940.

In our opinion to seek to remove members of the national council of Iran as threatened in the Iraqi governing council's statement of 9 December 2003 could be contrary to international law as explained above. It would be also a breach of international human rights law.

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- (b) the French resistance movement had also been recognised as such before it was regarded as a government. It was first regarded as a resistance movement started in London in June 1940. Then the first step was the settlement of the *Comité National Français* (September 23, 1941) the seat of which had been established in London and recognised by the USSR (26 September) and the United Kingdom (26 November 1946). Later was set up the *Comité national de la France combattante* (July 13, 1942) recognised as such on the same day by the UK then in September by USSR followed by twenty States in December 19, 1942.
- (c) in a more recent past, other movements of resistance have been recognised as such: FLN of Algeria during the rebellion against France, SWAPO in Namibia and others which might have fled out the territory of the State against which they have been fighting by force or politically.