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Review Essay

The Use of Force by National Liberation Movements: Trends Toward a Developing Norm?

INTERNATIONAL LAW AND THE USE OF FORCE BY NATIONAL LIBERATION MOVEMENTS. By Heather Wilson.† *New York: Oxford University Press*, 1988. Pp. xi, 209. \$45.00 (hardbound).

Edward Kwakwa‡

What is traditional international law on the *jus ad bellum*¹ and the *jus in bello*?² How has self-determination evolved from a principle of political thought to a right in international law? Is the use of force by national liberation movements to secure the right of their peoples to self-determination legitimate? To what extent does the *jus in bello* apply in wars of national liberation? These questions are the focus of inquiry in Heather Wilson's recent book *International Law and the Use of Force by National Liberation Movements*.

Divided into four sections, the text initially discusses the nature and function of international law, and gives a historical synopsis of traditional international law norms relating to the *jus ad bellum*. The second part is devoted exclusively to the concept of self-determination and its present status in the international legal order. Parts three and four, the most important sections of the book, discuss the *jus ad bellum* and the *jus in bello* relating to wars of national liberation. The book concludes with a detailed and comprehensive bibliography.

Despite the complexity of the subject matter, *International Law and the Use of Force by National Liberation Movements* is concisely written and lucid in style. A wide range of international literature and sources are integrated into the text as well as the footnotes. It must be stressed,

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1. *Jus ad bellum* refers to the authority to resort to force.
2. *Jus in bello* denotes the rules applicable in an armed conflict.

however, that a book as brief as Wilson's cannot do more than begin to suggest the possible contours of inquiry into this fascinating area of public international law. Although the introductory chapters are well written, the more important sections of the book fail in several critical respects. First, the author restricts her discussion of state practice to events of the distant past, devoting hardly any attention to developments of the last decade. Worse yet, the author describes important issues pertaining to the use of force by national liberation movements without taking a position on any of the conflicting legal and policy arguments at stake. Unfortunately, the few times Wilson does state her beliefs, she makes conclusory statements that are contradicted by other assertions in the book. These basic defects seriously undermine the value of the work as a whole.

I. Traditional International Law on the *Jus ad Bellum* and the *Jus in Bello*

Wilson states in the first part of her book that "[t]he idea that only a sovereign state may legitimately wage war seems a foregone conclusion in the twentieth century."³ Such an absolute and conclusory statement is surprising and troubling in a book whose goal is to determine whether the use of force by national liberation movements is legitimate. The statement contradicts the author's introductory acknowledgement that in the last forty years ideas about what constitutes war and which entities in international politics may wage war have changed.⁴ In fact, the idea that sovereign states have the exclusive right to wage war was a foregone conclusion only through the first half of this century. The very notion of war during that period was inextricably linked to the concept of statehood. In an oft-quoted statement, war was defined as "a contention between two or more States through their armed forces, for the purpose of overpowering each other and imposing such conditions of peace as the victor pleases."⁵

State practice in the twentieth century, however, suggests that this state-based notion of war has undergone substantial modification. The terms "armed conflict" and "the use of force" have increasingly been used in lieu of the term "war."⁶ Traditionally defined, the rules of inter-

3. H. WILSON, INTERNATIONAL LAW AND THE USE OF FORCE BY NATIONAL LIBERATION MOVEMENTS 14 (1988) [hereinafter WILSON].

4. WILSON, at 1.

5. L. OPPENHEIM, II INTERNATIONAL LAW 202 (H. Lauterpacht 7th ed. 1952).

6. For example, each of the four 1949 Geneva Conventions uses the term "armed conflict" in their respective second article. See Common Article 2 of the 1949 Geneva Conventions: Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces

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national law neither condemned nor condoned the use of force within national boundaries against an established government.⁷ As aptly summarized by Wilson, insurgents had limited rights and duties within the territory that they occupied, but belligerents had rights within their territory *and* with respect to third states.⁸

A fundamental precept of the law of war is the distinction between the *jus ad bellum* and the *jus in bello*. Traditionally, the *jus in bello* was only intended to mitigate the pernicious effects of war, and not to sanction the use of force by any state or entity. Nevertheless, the *jus in bello* often included provisions relating to entities which were not states *stricto sensu*. Article 4A(2) of the Geneva Convention on Prisoners of War, for example, includes among those entitled to prisoner of war status members of militias and other organized resistance movements affiliated with "a Party to the conflict and operating in or outside their own territory," provided such organized resistance movements fulfill certain conditions.⁹

There is evidence to suggest that the drafters of the Geneva Conventions did not intend to include conflicts which have subsequently come to be known as wars of national liberation¹⁰ in the 1949 Geneva Conventions.¹¹ Wilson rightly concludes that Article 4A(2) of the Geneva Con-

in the Field, Aug. 12, 1949, 6 U.S.T. 3114, T.I.A.S. No. 3362, 75 U.N.T.S. 31 [hereinafter Geneva Convention on Wounded Armed Forces in the Field]; Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, T.I.A.S. No. 3363, 75 U.N.T.S. 85 [hereinafter Geneva Convention on Wounded Armed Forces at Sea]; Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135 [hereinafter Geneva Convention on Prisoners of War]; Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287 [hereinafter Geneva Convention on Protection of Civilians].

For an example of the use of the term "use of force," see U.N. CHARTER art. 2, para. 4.

7. WILSON, at 29.

8. *Id.* "Insurgents" generally refers to those who rise up in an insurrection against the constituted authorities. See BLACK'S LAW DICTIONARY 726 (5th ed. 1979). "Belligerents," on the other hand, are a body of insurgents who by reason of their temporary organized government, are regarded as conducting lawful hostilities. *Id.* at 141.

9. The conditions included: being commanded by a person responsible for his subordinates; having a fixed distinctive sign recognizable at a distance; carrying arms openly; and conducting operations in accordance with the laws and customs of war. See Geneva Convention on Prisoners of War, *supra* note 6, at art. 4A, para. 2.

10. Wilson describes a war of national liberation as "a conflict waged by a non-State community against an established government to secure the right of the people of that community to self-determination." WILSON, at 1-2 (footnote omitted).

11. See, e.g., *Summary Record of the 4th Meeting*, VIII OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE ON THE REAFFIRMATION AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS, GENEVA 1974-1977, CDDH/I/SR.4 at 29, para. 25 (Fed. Pol. Dept. Bern, 1978) [hereinafter OFF. RECS.] (statement by Mr. Draper) ("The Geneva Conventions and the draft Protocols had been devised for entities capable of applying them: in other words, States. Obviously, the application of many of the provisions of the Geneva Conventions could not be extended to national liberation movements . . ."). See also *id.* CDDH/I/SR.3 at 22, para. 38 (statement by Mr. Cassese) ("[T]he word

vention on Prisoners of War was drafted to remedy a problem of occupation, not national liberation.¹² She might, however, have added that such provisions, while not intended to sanction the use of force by national liberation movements, recognized the fact that the use of force in international relations was not the exclusive preserve of states. Non-state entities such as national liberation movements also resorted to military force, whether or not they had legal authority to do so. Wilson's book might have appeared more sequential and systematic had she acknowledged this fact in the conclusion of the first part, thus justifying her subsequent discussions on self-determination and the legitimacy of the use of force by national liberation movements.

II. Self-Determination in Contemporary International Law

Part two of *International Law and the Use of Force by National Liberation Movements* commences with contradictory and conclusory statements. After accurately noting that one of the most controversial issues in international law since the end of World War II has been "whether self-determination is a right in international law or simply a principle of political thought which has assumed great prominence in international affairs,"¹³ Wilson curiously states that her intention is to examine first "how self-determination developed into a legal right, and secondly, who the 'self' is that can exercise this right."¹⁴ Thus, Wilson summarily concludes that self-determination is a legal right, but fails to mention that arguments to the contrary exist. Professor Leo Gross, for example, has observed that:

[S]ubsequent practice as an element of interpretation does not support the proposition that the *principle* of self-determination is to be interpreted as a *right* or that the human rights provisions have come to be interpreted as rights with corresponding obligations either generally or specifically with respect to the right to self-determination.¹⁵

Recent state practice and juristic opinions suggest that the view represented by Professor Gross is not a majority view.¹⁶ This is clearly

'Powers' used in the third paragraph of Article 2 of the Geneva Conventions could only mean States and not authorities other than States.").

12. WILSON, at 20. Wilson concedes that there are situations in which belligerent occupation and wars of national liberation overlap. *Id.* Namibia after the withdrawal of the mandate and the Moroccan occupation of the Western Sahara are arguable examples. *Id.*

13. *Id.* at 55.

14. *Id.*

15. For a comparison of this and other positions, see Emerson, *Self-Determination*, 65 AM. J. INT'L L. 459, 460-61 (1971).

16. In fact, Professor Gross has subsequently modified his view. See L. GROSS, I ESSAYS ON INTERNATIONAL LAW AND ORGANIZATION 257 (1984) ("This right [of self-determina-

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brought out in Wilson's discussion of the development of self-determination to the present day.¹⁷ Although self-determination has more ancient historical roots, the concept is usually traced to President Woodrow Wilson's address to a joint session of the U.S. Congress in 1918.¹⁸ Self-determination, in its contemporary acceptance, was first mentioned in Articles 1(2) and 55 of the U.N. Charter.¹⁹ Chapters XI and XII of the Charter also contain implicit references to self-determination and its implementation in the international legal system.²⁰

The historical analysis of self-determination is not unique to Wilson's book. Indeed, there is a burgeoning literature on the evolution of the concept.²¹ What makes this book useful is its attempt to explore the right to self-determination and its effect on the law of war. It discusses the extent to which the concept of self-determination has conditioned emerging norms on the *jus ad bellum*. Unfortunately Wilson fails to address one very important issue—the position of neutral or third parties in wars of national liberation.²² As discussed below, the proposition that national liberation movements can resort to the use of force is controversial. Even more controversial, however, is the question of whether national liberation movements are entitled to third party assistance in their fight for self-determination. Although the question relates to the right of

tion] is well established in international law although its scope and range have not been precisely defined.”).

17. See WILSON, at 55-88.

18. For the text of the speech, see I THE PUBLIC PAPERS OF WOODROW WILSON 180 (R. Baker & W. Dodd eds. 1927).

19. One of the stated purposes of the United Nations is “[t]o develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples” U.N. CHARTER art. 1, para. 2. See also *id.* art. 55 (United Nations shall promote specified objectives with a view to creating conditions conducive to “peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples. . . .”).

20. See U.N. CHARTER ch. XI (“Declaration Regarding Non-Self-Governing Territories.”); *id.* ch. XII (“International Trusteeship System”).

21. See, e.g., M. POMERANCE, SELF-DETERMINATION IN LAW AND PRACTICE: THE NEW DOCTRINE IN THE UNITED NATIONS (1982); W. OFUATEY-KODJOE, THE PRINCIPLE OF SELF-DETERMINATION IN INTERNATIONAL LAW (1977).

22. WILSON, at 91 (“Although these situations are important, particularly the relationship of other States to a people denied self-determination, they are not the focus of this book.”).

Another weakness in Wilson's book is her failure to discuss the right of self-determination in relation to secessionist struggles and the principle of maintaining borders inherited at independence *uti possidetis juris*. As discussed by the International Court of Justice in its recent Burkina Faso/Mali frontier dispute judgment, the right to self-determination is in *prima facie* conflict with the principle of *uti possidetis*. See Concerning The Frontier Dispute (Burkina Faso v. Mali), 1986 I.C.J. 554, 564-67 (Judgment of Dec. 22) (“At first sight this principle [*uti possidetis*] conflicts outright with another one, the right of peoples to self-determination. . . . The essential requirement of stability in order to survive, to develop and gradually to consolidate their independence in all fields, has induced African States judiciously to consent to the respecting of colonial frontiers, and to take account of it in the interpretation of the principle of self-determination of peoples.” *Id.* at 567, para. 25.).

states, and not *national liberation movements*, to use force, such use of force is predicated on acceptance of the concept of self-determination as applied to national liberation movements.

Scholars are divided on this issue. One school of thought, represented by Professor Reisman, argues that self-determination is "the fundamental principle of political legitimacy in contemporary international politics" and "the main purpose of contemporary international law."²³ Under this theory, Article 2(4) of the U.N. Charter notwithstanding, states may resort to the use of unilateral coercion for the "enhancement of the ongoing right of peoples to determine their own political destinies."²⁴ Other authors strongly oppose this view. While agreeing with Reisman that self-determination is (or at least should be) a key principle of political legitimacy, Oscar Schachter takes issue with Reisman's assertion that states may assist other peoples in the "enhancement" of "ongoing self-determination." He argues that Reisman's position would introduce "a new normative basis for recourse to war that would give powerful states an almost unlimited right to overthrow governments alleged to be unresponsive to the popular will or to the goal of self-determination."²⁵ Lloyd Cutler takes a third position. Coming down between Reisman and Schachter, Cutler agrees with Reisman that Article 2(4) must be reconciled with the stated purposes of the United Nations to promote self-determination and free elections.²⁶ He agrees with Schachter, however, that Article 2(4) cannot be read to give other states an unlimited right to topple a repressive regime by force.²⁷ Cutler interprets Article 2(4) as permitting a third state to intervene only when two conditions exist: "an indigenous pro-democratic insurgency is engaged in a civil war with the repressive regime," and "some other third state has been giving military assistance to the repressive regime."²⁸

This debate has crucial implications for a discussion of self-determination and national liberation movements. Wilson's failure to discuss it seriously undermines the value of her book as a whole. This omission is especially regrettable since Wilson herself shows in the third part of her book that the issue has been extensively debated in the United Nations.

23. Reisman, *Coercion and Self-Determination: Construing Charter Article 2(4)*, 78 AM. J. INT'L L. 642, 643 (1984).

24. *Id.*

25. Schachter, *The Legality of Pro-Democratic Invasion*, 78 AM. J. INT'L L. 645, 649 (1984).

26. Cutler, *The Right to Intervene*, 64 FOREIGN AFF. 96, 106 (1985).

27. *Id.*

28. *Id.*

III. The Use of Force by National Liberation Movements

A discussion of the legitimacy of the use of force by national liberation movements forms the pith and marrow of Wilson's book. *International Law and the Use of Force by National Liberation Movements* is filled with information that is vital to an understanding of the current debate. Considerable space is devoted to the various international prescriptions and the practice of states pertaining to the use of force by national liberation movements. Unfortunately Wilson once again fails to take a position. The reader is therefore left wondering how much evidentiary value should be attached to Wilson's discussion of state practice.

The argument that national liberation movements have the authority to use force in pursuit of self-determination challenges Wilson's earlier assertion that only sovereign states may legitimately use force.²⁹ Wilson therefore has to concede that "there is some support for the use of force by national liberation movements to be included on the short list of situations in which the use of force is legitimate."³⁰ Indeed, she continues, "[t]here is also evidence that many States have not only acquiesced to the use of force by these movements, but actively support their use of force both politically and by more practical means."³¹ Wilson finds it adequate merely to describe state practice, rather than evaluate the evidence and come to a conclusion as to the present state of the law governing the use of force by national liberation movements.

What theories account for the practice of state and non-state entities, and what legal authority is there to support such practice? Several General Assembly resolutions have been cited by states in support of the proposition that national liberation movements are entitled to use force.³² The *locus classicus* of these U.N. resolutions is the 1970 Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations.³³ The Declaration recognizes the legitimacy of resort to armed force by national liberation movements and calls upon member states to contribute moral and material assistance to such movements. It states in relevant part:

29. See *supra* text accompanying note 3.

30. WILSON, at 92.

31. *Id.*

32. See generally *Abi-Saab, Wars of National Liberation in the Geneva Conventions and Protocols*, 165 (IV) RECUEIL DES COURS 357, 366-92 (1981).

33. G.A. Res. 2625, 25 U.N. GAOR Supp. (No. 28) at 121, U.N. Doc. A/8028 (1970) [hereinafter Declaration on Friendly Relations].

Every state has the duty to refrain from any forcible action which deprives peoples . . . of their right to self-determination and freedom and independence. In their actions against and resistance to such forcible action in pursuit of the exercise of self-determination, such peoples are entitled to seek and to receive support in accordance with the purposes and principles of the Charter.³⁴

The Declaration on Friendly Relations is supported by the United States and is frequently referred to by states and by the International Court of Justice as a codification of contemporary international law.³⁵ Georges Abi-Saab and other well-known authors have concluded from this Declaration that armed resistance to forcible denial of self-determination is legitimate.³⁶ However, as Wilson rightly points out, the Declaration does not expressly say that peoples may use force to secure their right to self-determination.³⁷ Neither does it expressly mention *armed* resistance. The absence of the word "armed," *pace* Wilson, leaves the idea of resistance ambiguous, which was no doubt the intention of the participants.³⁸

Wilson's attitude toward the effect of this Declaration is equivocal. Although she does an admirable job of setting out the arguments for and against the legal effect of this "ambitious codification of contemporary international law [that] has been widely accepted,"³⁹ Wilson leaves the reader with a feeling of dissatisfaction by failing to present an in-depth discussion of subsequent state practice and juristic opinions. She also avoids stating a position on any of the conflicting legal and policy issues at stake. She could have made her discussion more relevant by applying the issues involved to recent situations of conflict, such as the *mujahidin* in Afghanistan,⁴⁰ or the SouthWest Africa People's Organization

34. *Id.*

35. Reisman, *Old Wine in New Bottles: The Reagan and Brezhnev Doctrines in Contemporary International Law and Practice*, 13 YALE J. INT'L L. 171, 191 (1988).

36. WILSON, at 98.

37. *Id.* at 99.

38. *Id.*

39. Reisman, *The Resistance in Afghanistan Is Engaged in a War of National Liberation*, 81 AM. J. INT'L L. 906, 908 (1987).

40. Reisman has suggested that the Declaration on Friendly Relations establishes the following coordinate international rights and obligations as between the parties in the nearly concluded Afghan conflict:

1. the *mujahidin* are entitled to fight against the Soviet Union and the Soviet-supported Government in Kabul;
2. the *mujahidin* are entitled to call upon third states for support in their struggle;
3. third states are under an obligation to provide such help to the *mujahidin* in their resistance; and
4. neither the Soviet Union nor the Soviet-supported Government in Kabul is entitled to characterize the support that third states are obliged to and do, in fact, render to the *mujahidin* as a violation of international law or in any way a violation of its own rights.

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(SWAPO) in Namibia.⁴¹

Various arguments have been adduced in justification of the use of force by national liberation movements. Several Third World states argue that there is a right of self-defense against racist and colonial domination, and that if force is used to deprive subjected peoples of their right to self-determination, they have a right to resort to counter-force and to receive support from other states.⁴² For example, the African states claim that the use of force to prevent and respond to violations of the norms of decolonization and anti-racism is self-defense, and that the use of armed force is justified to implement self-determination, provided this result cannot be achieved by peaceful means.⁴³ This position is not justified by the U.N. Charter. To be sure, colonialism and racist domination do not, *per se*, involve an "armed attack" on subjected peoples. Nevertheless, state practice supports the argument that the use of force is justified to implement self-determination.⁴⁴ The international community has manifested a high degree of tolerance for the activities of national liberation movements in general, particularly in their fight for freedom and self-determination, and Wilson admits that "the trend over the last four decades and since 1960 in particular has been toward the extension of the authority to use force to national liberation movements."⁴⁵

Id. at 909.

41. For a discussion of the relevance of the Declaration on Friendly Relations to the Namibian conflict, see generally Kwakwa, *The Namibian Conflict: A Discussion of the Jus ad Bellum and the Jus in Bello*, 9 N.Y.L. SCH. J. INT'L & COMP. L. — (forthcoming 1989).

It is also instructive to note that in the *Namibia* case, one of the judges went so far as to state that resort to force in pursuit of self-determination has become a custom within the ambit of Article 38(1)(b) of the ICJ Statute. See *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276 (1970)*, 1971 I.C.J. 1, 74 (Ammoun, concurring) ("If there is any 'general practice' which might be held, beyond dispute, to constitute law within the meaning of Article 38, paragraph 1(b), of the Statute of the Court, it must surely be that which is made up of the conscious action of the peoples themselves, engaged in a determined struggle.").

42. Kwakwa, *South Africa's May 1986 Military Incursions into Neighboring African States*, 12 YALE J. INT'L L. 421, 436-37 (1987).

43. *Id.*

44. For example, in 1961, India used force to end Portuguese colonial domination of Goa. India argued at the Security Council that the Portuguese military occupation in 1510 did not confer good title, and force could be used to achieve freedom when no other means were available. See I REPERTORY OF PRACTICE OF UNITED NATIONS ORGANS 147-48 (Supp. No. 3 1972). As Wilson rightly notes, the Security Council failed to condemn the Indian action in Goa. WILSON, at 131. The inability of the Security Council to censure India, she might have added, had the effect of fortifying certain state expectations that the use of force for the express purpose of national liberation is legitimate.

45. WILSON, at 136.

IV. The *Jus in Bello* in Wars of National Liberation

One of the most controversial issues in the law of armed conflict today is the question of application *ratione materiae*, or material field of application—whether wars of national liberation are international armed conflicts, and the extent to which the laws of armed conflict apply to them. Wilson deserves commendation for providing insight into the legal and policy arguments involved. However, her position on the issue remains unclear.

The application of the humanitarian law of armed conflict to wars of national liberation, states Wilson, has met less resistance than the attempt to legitimize the resort to force by national liberation movements.⁴⁶ This is an overstatement. It is a truism that the extension of the authority to use force runs directly counter to the general trend of twentieth-century international legal developments towards a *jus contra bellum*.⁴⁷ However, the application of the laws of armed conflict to wars of national liberation has met as much, if not more, resistance as the attempt to legitimize the resort to force by national liberation movements. The crucial question centers on a policy consideration: should wars of national liberation be treated as international armed conflicts subject to customary and conventional international law, or as mere civil wars, also referred to as “armed conflicts not of an international character”?⁴⁸ Resolution of this critical issue has direct legal, political, and military consequences. If wars of national liberation are international armed conflicts, much more of the behavior of all the parties to the conflict would become legally cognizable under the four 1949 Geneva Conventions in their entirety, together with the ensemble of customary and conventional law applicable to such conflicts.⁴⁹ On the other hand, if wars of national liberation are civil wars, the only applicable law would be the norms referred to in Common Article 3 of the Geneva Conventions,⁵⁰ which is

46. *Id.* at 149.

47. *Id.*

48. T. MERON, HUMAN RIGHTS IN INTERNAL STRIFE: THEIR INTERNATIONAL PROTECTION 18 (1987).

49. Reisman & Silk, *Which Law Applies to the Afghan Conflict?*, 82 AM. J. INT'L L. 459, 460 (1988).

50. Common Article 3 gives a set of minimum conditions applicable in the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties. See Common Article 3 of the Geneva Convention on Wounded Armed Forces in the Field, *supra* note 6; Geneva Convention on Wounded Armed Forces at Sea, *supra* note 6; Geneva Convention on Prisoners of War, *supra* note 6; Geneva Convention on Protection of Civilians, *supra* note 6.

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widely viewed as being much less comprehensive than the legal regime defined in Common Article 2.⁵¹

The U.N. General Assembly has consistently called for the application of the Geneva Conventions to armed conflicts involving national liberation movements, thus implicitly characterizing them as international conflicts. For example, at its 28th session, the Assembly proclaimed that these struggles were armed conflicts under the Geneva Conventions:

The armed conflicts involving the struggle of peoples against colonial and alien domination and racist regimes are to be regarded as international armed conflicts in the sense of the 1949 Geneva Conventions, and the legal status envisaged to apply to the combatants in the 1949 Geneva Conventions and other international instruments is to apply to the persons engaged in armed struggle against colonial and alien domination and racist regimes.⁵²

The most recent relevant convention on the law of armed conflict classifies wars involving national liberation movements as international armed conflicts. Article 1(4) of Protocol I⁵³ is deceptively simple:

The situations [covered in this Convention] . . . include armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law Concerning Friendly Relations Among States in Accordance with the Charter of the United Nations.⁵⁴

It will be noticed that Article 1(4) refers both to armed conflicts in situations known as wars of national liberation and to the right of self-determination. In essence, Article 1(4) of Protocol I seems to provide for all the important issues raised in *International Law and the Use of Force by National Liberation Movements*.

51. Several authors argue that the effective application of Common Article 3's provisions is contingent on the discretion and good faith of the parties to the conflict, and that the article does not provide adequate protection in wars of national liberation. *See, e.g.,* K. SUTER, AN INTERNATIONAL LAW OF GUERRILLA WARFARE 17 (1984) (Common Article 3 of Geneva Conventions suffered from "the lack of clear applicability to guerrilla warfare in general and guerrillas in particular," and its provisions "were vague enough to permit a variety of interpretations even in a conventional non-international conflict."); Baxter, *Ius in Bello Interno: The Present and Future Law*, in LAW AND CIVIL WAR IN THE MODERN WORLD 518, 527-29 (J. Moore ed. 1974) ("Article 3 does not afford enough protection, and the application of the Conventions as a whole tends to be politically unacceptable and unworkable. . . . The obligations of Article 3 are cast in such general terms and leave so many things unsaid that they cannot, even under the best of circumstances, be an adequate guide to the conduct of belligerents in civil strife.")

52. G.A. Res. 3103, 28 U.N. GAOR Supp. (No. 30) at 121, U.N. Doc. A/9628 (1973).

53. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), *opened for signature* Dec. 12, 1977, 16 I.L.M. 1391 (1977).

54. *Id.* at art. 1, para. 4.

Wilson's discussion on the subject is inadequate because she does not provide the reader with an in-depth discussion of the implications of Article 1(4). This failure is all the more surprising because Article 1(4) engendered so much controversy that it has been referred to as "[t]he most controversial clause in the Additional Protocols."⁵⁵

Wilson's failure to devote more than six pages of her book to Article 1(4) may be explained by the need to maintain a definable boundary between the *jus ad bellum* and the *jus in bello*. Indeed, some of the strongest criticisms of Article 1(4) stem from the perceived need for such a demarcation: the criticisms are that Article 1(4) "introduced the regrettable innovation of making the motives behind a conflict a criterion for the application of humanitarian law,"⁵⁶ that it sought to legitimize national liberation movements,⁵⁷ and that it sanctioned the use of force and introduced the return of the "just war" doctrine.⁵⁸

Although the law of war has sometimes been applied in wars of national liberation, "there are significant exceptions to this rule and it cannot be considered a customary rule of international law."⁵⁹ A significant number of major military powers still have not ratified or acceded to the Protocol. Even among Contracting Parties, no state has incorporated the new provisions of Protocol I into its military manual. As Wilson states, "the scope of Article 1(4) is actually very limited," and "[i]f it opens up a Pandora's box at all, it is an unexpectedly small one."⁶⁰ Nevertheless, Wilson does not make enough of an effort to inform the reader about all aspects of Article 1(4). One of the most basic, and also most difficult, questions faced by scholars and practitioners of public international law is determining what state practice is with respect to any given area of customary law. This problem is particularly pronounced in the area of

55. Dinstein, *The New Geneva Protocols: A Step Forward or Backward?*, 33 Y.B. WORLD AFF. 265, 266 (1979). On the problems raised by the introduction of Article 1(4) at the 1974 Diplomatic Conference, see generally Forsythe, *The 1974 Diplomatic Conference on Humanitarian Law: Some Observations*, 69 AM. J. INT'L L. 77, 78-88 (1975).

56. *Summary Record of the 36th Plenary Meeting*, VI OFF. RECS., CDDH/SR. 36 at 46, para. 83 (statement by Mr. Freeland, U.K. representative).

57. Dinstein, *supra* note 55, at 267 ("What Article 1(4) professes to do is to confer *a priori* a belligerent status on all liberation movements despite the absence of recognition and heedless of the actual dimensions of the rebellion.").

58. Graham, *The 1974 Diplomatic Conference on the Law of War: A Victory for Political Causes and a Return to the "Just War" Concept of the Eleventh Century*, 32 WASH. & LEE L. REV. 25, 41 (1975); *Letter of Transmittal from President Reagan*, PROTOCOL II ADDITIONAL TO THE 1949 GENEVA CONVENTIONS, AND RELATING TO THE PROTECTION OF VICTIMS OF NON-INTERNATIONAL ARMED CONFLICTS, S. TREATY DOC. NO. 2, 100th Cong., 1st Sess. 111 (1987), reprinted in 81 AM. J. INT'L L. 910 (1987) (statement by President Reagan to Congress giving reasons for U.S. decision not to ratify Protocol I); Sofaer, *The Rationale for U.S. Decision*, 82 AM. J. INT'L L. 784, 784-87 (1988) (containing similar language).

59. WILSON, at 179.

60. *Id.* at 168.

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armed conflict. In this respect, Wilson's discussion on the *jus in bello* in wars of national liberation is the weakest section of the book. Whether Article 1(4) has been invoked in the international arena, for example, receives short shrift. Wilson ignores the fact that claims have already been made concerning the applicability of Article 1(4) to ongoing conflicts.⁶¹

Wilson gives few examples of the actual practice of states, and among those given, the events of the distant past prevail.⁶² This may be a result of her conclusion that states against which the drafters of Article 1(4) intended it to be directed, such as Israel and South Africa, have not acceded to the Protocol. Yet the South African courts have recognized the emerging norm that prisoners who were captured while openly fighting in a characteristic uniform against a racist, colonial or foreign regime are entitled to prisoner of war *status*, as well as *treatment*. In the case of *S. v. Sagarius En Andere*,⁶³ for example, in imposing a sentence on three SWAPO guerrillas, the court accepted the public international law aspects of the case as being relevant mitigating factors. Among the factors it took into consideration were the following:

the I.C.J. and other UN Organs and international actors had branded the South African presence in Namibia as illegal; the SWAPO guerrillas regarded their actions as part of a just conflict with strong local and foreign support; [and] . . . there is a tendency in general international law to accord prisoner of war status to captives that openly participate in a characteristic uniform in an armed conflict against a racist, colonial or foreign regime.⁶⁴

61. For example, Cassese has stated:

Art[icle] 1(4), however, has a legal scope too. It is not confined [to struggles between the PLO and Israel, and between SWAPO and South Africa]; it can apply to other, fresh situations as well, witness the Soviet occupation of Afghanistan, which no doubt comes within the purview of the rule although the USSR has not ratified the Protocol and will probably refrain from doing so in the near future, as well as the Indonesian occupation of East Timor or the Vietnamese occupation of Kampuchea. To all these situations both Art[icle] 1(4) and the general principles on warfare that it renders operative, should be deemed applicable. If in point of fact it has not been applied, this cannot be taken to mean that States do not feel bound by it.

Cassese, *Wars of National Liberation and Humanitarian Law*, in *STUDIES AND ESSAYS ON INTERNATIONAL HUMANITARIAN LAW AND RED CROSS PRINCIPLES* 313, 324 (C. Swinarski ed. 1984). See also Reisman, *supra* note 39, at 908 (arguing that conflict in Afghanistan comes under Article 1(4) of Protocol I).

62. For example, she discusses the Algerian war of 1954 and the Nigerian civil war of 1967. See WILSON, at 151-55. However, the Namibian conflict and the PLO uprising in the Middle East, both of which seem to have intensified after the introduction of Article 1(4), are relegated to a few lines of discussion. See *id.* at 160-62.

63. 1983 1 SA 833 (SWA).

64. *Id.* at 836. However, in *S. v. Mogoerane and Others*, (unpublished, but discussed in Murray, *The 1977 Geneva Protocols and Conflict in Southern Africa*, 33 INT'L & COMP. L.Q. 462 (1984)), three accused ANC members who had been involved in attacks on South African police stations were denied prisoner of war status and sentenced to death. The court in

A discussion of such domestic cases, including those of nonsignatory states, would have illuminated Wilson's analysis of emerging norms in the practice of states.

Conclusion

International Law and the Use of Force by National Liberation Movements gives the reader an insight into the legal and policy arguments pertaining to the use of force by national liberation movements. Unfortunately the value and importance of the book is greatly diminished by the fundamental inconsistencies in Wilson's thesis and arguments.

Although Wilson fails to state her position on many of the issues discussed, certain conclusions on the issues can be made. The book's basic, albeit hidden, premise is unassailable: the principle of self-determination has become so widely accepted that the use of force to secure it may be justified.⁶⁵ Recent trends in state practice point to an emerging norm that wars of national liberation are now considered international wars to which international law must apply.⁶⁶ Wilson's book serves the limited but useful purpose of introducing the reader to emerging trends in state practice on the use of force by national liberation movements. Despite its numerous flaws, it can serve well as introductory reading material on the topic.

Mogorane did not consider the international law aspects of the case as relevant, holding that the ANC members involved had failed to distinguish themselves from ordinary civilians while carrying out the attacks.

65. WILSON, at 187.

66. *Id.*