HEATHER A. WILSON

INTERNATIONAL LAW AND THE USE OF FORCE BY NATIONAL LIBERATION MOVEMENTS

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BY
National Liberation Movements

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In memory of my grandparents
George and Annie Wilson

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H.

List of Principal Abbreviations

AFDI	*Annuaire français de droit international*
AJIL	*American Journal of International Law*
Am. Univ. LR	*American University Law Review*
ANC	African National Congress
ANCZ	African National Council of Zimbabwe
ANLF	Afghan National Liberation Front
ASIL	*Proceedings of the American Society of International Law*
BYIL	*British Yearbook of International Law*
CDDH	Diplomatic Conference on the Reaffirmation and Development of International Law Applicable in Armed Conflicts, Geneva 1974–7
ECA	Economic Commission for Africa
EPLF	Eritrean People's Liberation Front
FFI	French Forces of the Interior
FLCS	Front de Libération de la Côte des Somalis (Afars and Issas)
FLN	National Liberation Front of Algeria
FNLA	Frente Naçional de Libertação de Angola
FRELIMO	Mozambique Liberation Front
GAOR	*General Assembly Official Records*
GPRA	Gouvernement Provisoire de la République Algérienne
GRAE	Angolan Revolutionary Government in Exile
ICJ Rep.	International Court of Justice Reports
ICJ Review	*Review of the International Commission of Jurists*
ICLQ	*International and Comparative Law Quarterly*
ICRC	International Committee of the Red Cross
IRRC	*International Review of the Red Cross*
ISA	Islamic Society of Afghanistan
KNP	Polish National Committee (World War I)
LNTS	*League of Nations Treaty Series*
LQR	*Law Quarterly Review*
MNLF	Moro National Liberation Front (Philippines)
MOLINACO	Mouvement de Libération Nationale des Comores
MPLA	Movimento Popular de Libertação de Angola
NYIL	*Netherlands Yearbook of International Law*
OAU	Organization of African Unity
OR	*Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva (1974–1977)*
PAC	Panafricanist Congress (South Africa)

PAIGC	Partido Africano da Independencia da Guine e Cabo Verde (Guinea-Bissau and Cape Verde)
PFLP	Popular Front for the Liberation of Palestine
PFLP—GC	Popular Front for the Liberation of Palestine—General Command
PLO	Palestine Liberation Organization
Polisario	Frente Popular para la Liberación de Saguia el-Hamra y Rio de Oro (Western Sahara)
SC	Security Council
SCOR	*Security Council Official Records*
SDAR	Saharan Arab Democratic Republic (Western Sahara)
SPUP	Seychelles People's United Party
SR	*Summary Records*
SWAPO	South West Africa People's Organization (Namibia)
UNGA	United Nations General Assembly
UNITA	União Naçional para a Independência Total de Angola
ZANU	Zimbabwe African National Union
ZAPU	Zimbabwe African People's Union

Contents

List of Principal Abbreviations x
Introduction 1

PART I: THE LAW

1. The Concept of Law 5
   1.1 Introductory 5
   1.2 Definitions and Subjects 5
   1.3 Sources of International Law 8
   1.4 The UN and the Development of Law 10
2. The Authority to Use Force in International Law 13
   2.1 Introductory 13
   2.2 The Concept of Legitimacy 13
   2.3 The Authority to Use Force in World Politics 14
      2.31 Legitimate Authority in International Armed Conflict 16
      2.32 Legitimate Authority in Non-international Armed Conflict 22
   2.4 Intervention in Internal Conflicts 29
3. Humanitarian Protection in International Law 34
   3.1 Introductory 34
   3.2 Humanity and Warfare: An Introduction to Paradox 34
   3.3 Humanitarian Protection When Belligerency is Recognized 36
   3.4 Humanitarian Protection Without Recognition of Belligerency 37
      3.41 Pre-1949 State Practice 38
      3.42 Article 3 Common to the 1949 Geneva Conventions 42
   3.5 National Liberation Movements: The Basis of Obligation 48

PART II: SELF-DETERMINATION

4. Self-determination in International Law 55
   4.1 Introductory 55
   4.2 Early Development: Wilson and the League 55

4.3 The UN Charter 58
4.4 Post-war Acceleration and Metamorphosis 61
4.41 The Early Years 61
4.42 French North Africa 63
4.43 The Fifteenth Session 67
4.44 The Maturation of the Right to Self-determination 69
4.5 Self-determination in Positive Law 75
4.6 Self-determination as a Right in Law 78
4.7 The Concept of 'Self' 79

PART III: RIGHT AUTHORITY

5. The Authority to Use Force by National Liberation Movements 91
5.1 Introductory 91
5.2 United Nations Resolutions 94
5.3 The Practice of States 103
5.31 Premature Recognition 105
5.32 Recognition of National Liberation Movements 117
5.33 The States in Opposition 123
5.4 The 1977 Protocols 127
5.5 The Legal Arguments 130
5.6 Conclusions 135
6. National Liberation Movements as Representative Authorities 137
6.1 Introductory 137
6.2 International Recognition 138
6.21 United Nations Practice 139
6.22 OAU Recognition 142

PART IV: PROTECTION OF VICTIMS

7. The Law of Armed Conflict in Wars of National Liberation 149
7.1 Introductory 149
7.2 United Nations Resolutions 150
7.3 Recent Trends in State Practice 151
7.4 The 1977 Protocols Additional to the Geneva Conventions 162
7.41 Scope of Application: Article 1(4) 163
7.42 Provisions for Application: Article 96(3) 168

7.43 Qualification of Combatants: Articles 43 and 44 173
7.44 The Process of Ratification 178
7.5 Conclusion 179
8. The Prospects for Application 181
Conclusion 186

Bibliography *188*
Index 203

Introduction

When Grotius wrote, 'Public war ought not to be waged except by the authority of him who holds the sovereign power,' he was explaining an idea that was already several hundred years old.[1] By the dawn of the twentieth century it was axiomatic that only States could wage war. There were different words for other forms of violence: insurrection, civil unrest, piracy, or rebellion. At most, there was 'civil war', where the adjective modified the idea and the law which applied.

In the last forty years ideas about what constitutes war and which entities in international politics may wage war have changed. The rapid dissolution of colonial empires and the growing consensus that there is a right of peoples to self-determination has led some to conclude that wars of national liberation are international wars, even though they are not inter-State wars. The purpose of this book is to explore how these changes in ideas have affected the law of war.

For most purposes, the law of war may be divided into two parts: the legitimacy of the resort to force, and the rules governing the conduct of hostilities. In legal texts these two branches are often called *jus ad bellum* and *jus in bello*, respectively. Both branches of the law, as they apply to wars of national liberation, have changed considerably in the last forty years and since 1960 in particular. This book examines these developments. More specifically, I have sought answers to four questions:

(i) What is traditional international law on the authority to use force and the humanitarian law of war?

(ii) How has self-determination developed from a principle of political thought to a right in international law?

(iii) Is the use of force by national liberation movements to secure the right of their peoples to self-determination legitimate?

(iv) To what extent does the humanitarian law of armed conflict apply in wars of national liberation?

The four parts of this book examine these questions in succession.

Defining 'national liberation movement' is a challenging task. The label, as popularly used, is imprecise. In the twentieth century, a war of national liberation may be described as a conflict waged by a non-State community

[1] Hugo Grotius, *De Jure Belli Ac Pacis*, i.3.5[7].

against an established government to secure the right of the people of that community to self-determination.[2] This definition begs the very difficult question of exactly who the 'self' is that has this right to self-determination. A large part of Chapter 4 discusses this problem.

The idea that national liberation movements may legitimately use force in world politics has profound implications for our conception of international society. It has long been accepted that international relations is not solely the study of relationships between States. More recently, it has been generally accepted that international law applies to entities other than States. Despite these incursions on the role of States in some aspects of international relations, until recently the use of force remained the exclusive province of the sovereign State. To suggest that entities other than States may legitimately use force, and that international wars need not necessarily be inter-State wars, challenges conventional ideas about the nature of international society.

Since 1945 the movement against colonialism, driven primarily by the newly independent States, has challenged some of our ideas about international law. One part of the law which has been affected by these changes is the law of war. There have been a number of studies on the rise of nationalism in the Third World, self-determination, and decolonization, but none concentrate on the right of self-determination and its effect on the law of war. It is here, in this small and as yet uncharted area, where I hope to make my contribution.

[2] See N. Ronzitti, 'Resort to Force in Wars of National Liberation', in *Current Problems of International Law: Essays on UN Law and on the Law of Armed Conflict*, ed. Antonio Cassese (Milan: Dott. A. Guiffre, 1975), 319; N. Ronzitti, 'Wars of National Liberation: A Legal Definition', *Italian Yb. IL*, 1 (1975), 197; Richard A. Falk, 'Intervention and National Liberation', in *Intervention in World Politics*, ed. Hedley Bull (Oxford: Clarendon Press, 1984), 123; Georges Abi-Saab, 'Wars of National Liberation and the Laws of War', *Annales d'Études internationales*, 3 (1972), 93; A. Belkherroubi, 'Essai sur une théorie juridique des mouvements de libération nationale', *Rev. égyptienne de droit international*, 28 (1972), 22; Michel Veuthey, *Guérilla et droit humanitaire* (Geneva: Institut Henry-Dunant, 1976), 11; S. N. MacFarlane, 'The Idea of National Liberation' (D.Phil. Thesis, Oxford, 1982), 364.

PART I

The Law

I

The Concept of Law

1.1 Introductory

This chapter addresses certain fundamental questions about the nature and function of international law without which this book would be incomplete. It is not intended to be an exhaustive examination of the definition, sources, and subjects of international law, as these questions have been amply discussed elsewhere. Rather, its purpose is to state briefly the assumptions on which later arguments are based, and to examine in a general way certain issues which are central to the discussion which follows. More specifically, this chapter addresses three questions:

(i) What is international law?
(ii) Who are the subjects of international law?
(iii) What are the sources of international law?

1.2 Definitions and Subjects

The absence of legislative bodies and clear judicial authority makes international law more difficult to define than municipal law. Yet a book which professes to address an issue of international law must clearly state from the outset what is meant by that term.

In 1876 Lord Russell of Killowen defined international law as 'the sum of the rules or usages which civilized states have agreed shall be binding upon them in their dealings with one another.'[1] Leading scholars in the first half of the twentieth century gave similar definitions,[2] as did the Permanent Court of International Justice in the *Lotus* case in 1927 which held that

[1] Lord Russell of Killowen in his address at Saratoga in 1876, quoted in *West Rand Central Gold Mining Co.* v. *The King* [1905] 2 KB 391.

[2] See T. J. Lawrence, *The Principles of International Law*, 7th edn. (London: Macmillan, 1923), 1; William E. Hall, *A Treatise on International Law*, 8th edn. (Oxford: Clarendon Press, 1924), 1; Henry Wheaton, *Elements of International Law*, reproduction of the edn. of 1866 by Richard Henry Dana, ed. George G. Wilson (Oxford: Clarendon Press, 1936), 20; Green H. Hackworth, *Digest of International Law* (Washington: GPO, 1940), i. 1; L. Oppenheim, *International Law: A Treatise*, 6th edn. (London: Longman, Green and Co., 1940), i. 4–5; Charles C. Hyde, *International Law Chiefly as Interpreted and Applied by the United States,* 2nd rev. edn. (Boston: Little, Brown and Co., 1947), i. 1; J. Hatschek, *An Outline of International Law* (London: Bell and Sons, 1930), 3; J. L. Brierly, *The Law of Nations: An Introduction to the International Law of Peace,* 1st edn. (Oxford: Clarendon

International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these coexisting independent communities or with a view to the achievement of common aims.[3]

Accepting these definitions would ignore many of the most controversial issues of the post-World War II era by including only States as the actors in the system. There is a growing tendency to acknowledge that the sovereign State is not the only recipient of rights and duties under international law. It is more correct to regard international law as a body of rules which binds States and other agents in world politics in their relations with one another and is considered to have the status of law.[4] That entities other than States can be subjects of international law is not a universally accepted idea, and exactly what entities do have this status is an even more controversial topic.

Hall notes that primarily international law governs the relations of independent States, but 'to a limited extent . . . it may also govern the relations of certain communities of analogous character'.[5] Schwarzenberger, Friedmann, and Lawrence share similar views, the latter noting that the subjects of international law are sovereign States 'and those other political bodies which, though lacking many of the attributes of sovereign states, possess some to such an extent as to make them real, but imperfect, international persons.'[6]

Whereas these scholars tend to define subjects of international law as States and certain unusual exceptions, there are others who go further in opening up the realm of reasonable subjects of the law of nations. Notable among them is Sir Hersch Lauterpacht. In his view,

> International practice shows that persons and bodies other than States are often made subjects of international rights and duties; that such developments are not inconsistent with the structure of international law and that in each particular case the question whether a person or a body is a subject of international law must be

Press, 1928), 1; H. W. Bowen, *International Law* (London: G. P. Putnam's Sons, 1896), 1; cf. Georg Schwarzenberger, *A Manual of International Law*, 1st edn. (London: Stevens and Sons, 1947), 1.

[3] *S. S. Lotus* (*France* v. *Turkey*), Permanent Court of International Justice, Judgment 9, 7 Sept. 1927, Ser. A, No. 10, 18.

[4] See Hedley Bull, *The Anarchical Society* (London: Macmillan, 1977), 127; Hersch Lauterpacht, 'The Subjects of the Law of Nations', *LQR*, 63 (1947), 444; Rosalyn Higgins, *The Development of International Law Through the Political Organs of the United Nations* (London: Oxford Univ. Press, 1963), 1; Philip Jessup, *A Modern Law of Nations* (n.p.: Archon Books, 1968), 17; J. G. Castel, *International Law: Chiefly as Interpreted and Applied in Canada*, 3rd edn. (Toronto: Butterworth, 1976), 1.

[5] Hall, 17.

[6] Lawrence, 69; Schwarzenberger, *Manual*, 48; Wolfgang Friedmann, *The Changing Structure of International Law* (London: Stevens and Sons, 1964), 213–15.

answered in a pragmatic manner by reference to actual experience and to the reason of the law as distinguished from the preconceived notion as to who can be the subjects of international law.[7]

The status of organizations in international law is less controversial than the assumption of rights and duties by individuals or groups of individuals. Although it may be argued that some international organizations derive their authority from the sovereignty of their members who have signed agreements creating these organizations, the authority of some organizations goes beyond the consent of the sovereign States participating and the organization can take on a character in international law separate from its members. The International Court in the *Reparation* case held:

> The subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community. Throughout its history, the development of international law has been influenced by the requirements of international life, and the progressive increase in the collective activities of States has already given rise to instances of action upon the international plane by certain entities which are not States.[8]

Referring to the United Nations, the Court concluded that

> [T]he Organization is an international person. That is not the same thing as saying that it is a State, which it certainly is not, or that its legal personality and rights and duties are the same as those of a State. . . . [I]t is a subject of international law and capable of possessing international rights and duties, and . . . it has capacity to maintain its rights by bringing international claims.[9]

The list of organizations which have legal personality is extensive and would include, for example, the European Economic Community, the various specialized agencies of the United Nations like the International Labor Organization, the Organization of African Unity, and the Organization of American States.

All of these examples are bodies composed of or created by States. When one moves beyond international organizations to consider individuals and groups not created by States and in some cases not even sanctioned by them, the issue becomes more controversial.

Early examples of individual responsibility like the laws against piracy and the prosecution of war criminals are often disregarded as 'weak samples of special pleading'.[10] But recent developments in human rights

[7] Lauterpacht, *LQR*, 444.

[8] *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion (1949) 4 ICJ Rep. 178–9.

[9] Ibid. 179.

[10] Georg Schwarzenberger, 'The Protection of Human Rights in British State Practice', in *Current Legal Problems*, vol. i. ed. George W. Keeton and Georg Schwarzenberger (London: Stevens and Sons, 1948), 153; see also Herbert W. Briggs (ed.), *The Law of Nations: Cases, Documents and Notes*, 2nd edn. (London: Stevens and Sons, 1953), 96.