BOOK REVIEW

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OLIVIER CORTEN, THE LAW AGAINST WAR: THE PROHIBITION ON THE USE OF FORCE IN CONTEMPORARY INTERNATIONAL LAW (HART PUBLISHING, 2010) 569 PP.

Olivier Corten's *The Law Against War* is a comprehensive, meticulously-researched study of contemporary international law governing the use of armed force in international relations. As a translated and updated version of a 2008 book published in French, it offers valuable insights into the positivist methodology that underpins much of the European scholarship of international law. Corten undertakes a rigorous analysis of state practice from 1945 onwards, with a view to clarifying the current meaning and scope of international law's prohibition on the use of force. His central argument is that the majority of states remain attached to a strict interpretation of this rule. For Corten, state practice indicates that the doctrines of anticipatory self-defence, pre-emptive force and humanitarian intervention have no basis in contemporary international law. His overall position accords with a traditional, restrictive view of the circumstances in which states are permitted to use force.

The Law Against War is divided into two sections, with a total of eight chapters. The first section examines the scope of the prohibition on the use of force. In chapter one Corten identifies crucial methodological issues which arise in relation to determining customary international law on the use of force.[2] He identifies two broad approaches: the 'extensive' and the 'restrictive'.[3] The former approach views custom as a means of adapting international law to meet defined goals or purposes. It treats practice as the main element of custom and assigns a dominant role to the conduct of major states that use force, such as the United States. The general flexibility of the extensive approach means that changes to custom may be discerned in a relatively short period of time or from a small number of incidents. The restrictive approach, which Corten favours, employs a stricter methodology for determining the evolution of customary law. For the law to change there must be first, clear invocation – in legal terms - of a new right or novel interpretation of an existing right, and second, acceptance of that claim by the international community as a whole. Unsurprisingly, scholars who utilise the restrictive approach are less likely to recognise new limitations or exceptions to the prohibition on the use of force. By outlining the terms of the methodological debate surrounding the use of force, this first chapter helps to explain why it is that international lawyers can reach radically different conclusions based on

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2 See also Corten's other work in this area: Olivier Corten, 'The Controversies Over the Customary Prohibition on the Use of Force: A Methodological Debate' (2005) 15 *European Journal of International Law* 803.

3 Olivier Corten, *The Law Against War: The Prohibition on the Use of Force in Contemporary International Law* (Hart Publishing, 2010), 5.

analysis of the same set of facts. Corten's aim is to 'mov[e] beyond the impression of the "dialogue of the deaf" that characterises the recurrent debates over the legality of military interventions.'[4]

In chapter two Corten examines the meaning of 'force' and 'threat of force' in Article 2(4) of the United Nations Charter. On the former, he draws a distinction between 'military force' falling within the scope of this provision, and more minor 'police measures' governed by other legal regimes. The gravity of force used and the intention behind its use are the main criteria used to distinguish the two categories. In relation to the 'threat of force', Corten argues that state practice reveals that the concept has been interpreted narrowly, meaning that only clear, explicit threats of force are prohibited. Chapter three considers whether the prohibition on the use of force applies to non-state actors as well as states. Corten adopts a traditional position that views the use of force in the context of inter-state relations, asserting that it is a 'rule binding States and not non-Sate actors.'[5] His analysis of the Afghanistan War and the post 9-11 state practice involving force against non-state entities, leads him to conclude that the international community has not yet accepted an expanded right of self-defence against private groups in circumstances where a host state is not legally responsible for an armed attack. This conservative interpretation provides a different conclusion from other recent studies on the applicability of self-defence against non-state actors.[6] In chapter four, Corten assesses the types of circumstances that can be invoked to justify a use of force. He argues that the whole of the prohibition on the use of force is a *jus cogens* rule. Its peremptory status means that states cannot rely on circumstances precluding wrongfulness - such as necessity, distress, and countermeasures – to justify violation of the rule.

Having analysed the meaning and scope of the prohibition on the use of force, in part two of *The Law Against War*, Corten examines exceptions or limitations to this rule. Chapter five covers the situation of consent to use force, which Corten terms 'intervention by invitation'. This aspect of the law governing the use of force has received little attention from scholars but is of significant practical importance. As Corten points out, there is no dispute that consent from a territorial state makes an intervening state's use of force lawful; the controversial question is what constitutes valid consent. In his view, consent must be given 'clearly and unequivocally' by the highest authorities of a state, prior to military intervention beginning, and for the specific purpose of justifying that intervention.[7] In the context of internal conflict, the question of consent may be complicated by the existence of different authorities claiming to be the government of that state. In such circumstances, Corten suggests that valid consent can only be provided by the internationally recognised government that exercises 'effective power' over the territory.[8] Chapter six examines United

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4 Ibid 27.

5 Ibid 195.

6 See for example, Christian Tams, 'The Use of Force Against Terrorists', (2009) 20 *European Journal of International Law* 359; Raphael Van Steenberghe, 'Self-Defence in Response to Attacks by Non-State Actors in the Light of Recent State Practice: A Step Forward?' (2010) 23 *Leiden Journal of International Law* 183.

7 Corten, above n 3, 276.

8 Ibid 309.

Nations Security Council authorisation of military action, one of the two exceptions to the general prohibition of the use of force. Here, Corten explains that an intervention authorised by the Security Council will be lawful if it meets two conditions. First, it must comply with Chapter VII requirements, most notably, the need for a situation to be declared a 'threat to the peace, breach of the peace or act of aggression.' Second, the military action undertaken must comply with the terms of the Security Council resolution authorising force in that situation. This latter requirement raises questions of interpretation which can be contentious, as illustrated by recent debate over the scope of the North Atlantic Treaty Organization's (NATO) mandate to use force to protect civilians in Libya in 2011. Even more controversial is the issue of 'presumed authorisation', in which authorisation to use force is claimed on the basis of earlier (or subsequent) Security Council resolutions. The most notable example is the legal justification advanced by the US, UK, and Australia in relation to the 2003 Iraq War. Corten clearly demonstrates that this argument – and other claims of presumed authorisation – did not receive significant support from other states, and therefore, cannot constitute valid authorisation of the use of force.

Chapter seven considers self-defence, the second and most commonly invoked exception, to the prohibition on the use of force. This area of the law has been under considerable pressure recently as a result of some states claiming a broader right of self-defence that would encompass both pre-emptive military action, and the use of force against states which harbour or support non-state actors that have committed armed attacks. On the former, Corten rejects the notion of 'preventive self-defence', asserting that neither pre-emptive action against non-imminent threats, nor the narrower category of anticipatory self-defence against an imminent armed attack has been accepted by the international community as a whole. In his view, self-defence can only be exercised in response to an armed attack that has actually occurred or one that has 'materially begun'.[9] On claims of a right of self-defence against states that harbour or support non-state actors, Corten denies that widespread support for the 2001 Afghanistan War illustrates acceptance of a lower threshold for attributing non-state conduct to a host state. To Corten, the absence of 'clear legal conviction' in favour of the harbouring doctrine means that an armed attack by a non-state actor will only be attributable to a host state where there is substantial involvement from that state.[10] His conclusions represent a narrow interpretation of self-defence which remains firmly attached to a traditional, inter-state understanding of the law on the use of force.

The final chapter of *The Law Against War* examines whether there is a right of humanitarian intervention that would constitute a further exception to the general prohibition on the use of force. Interestingly, Corten includes intervention to protect a state's nationals abroad within his discussion of humanitarian intervention, whereas most other authors consider these types of operations to be exercises of the right of self-defence. Corten's analysis of state practice reveals

[9] Ibid 414. The notion of responding to an armed attack that has 'materially begun' is what Dinstein terms 'interceptive self-defence'. See Yoram Dinstein, *War, Aggression and Self-Defence* (Cambridge University Press, 5th ed, 2011) 203.

[10] Ibid 470.

that very few intervening states have explicitly invoked a right of humanitarian intervention, and that there has been little support for recognising such a right in customary international law. Therefore, he concludes that intervention for humanitarian purposes is lawful only if there is Security Council authorisation or if consent has been obtained from a host state.

Overall, *The Law Against War* is a comprehensive, clearly argued account of international law governing the use of force. It offers a thorough analysis of relevant state practice using a strict, positivist methodology. Corten's conclusion that, despite recent pressures the prohibition on the use of force remains largely intact, represents a reaffirmation of a traditional, narrow interpretation of the circumstances in which armed force is permitted. In this respect, it provides a powerful counter-argument to those scholars who claim significant changes to the law have occurred in recent years. *The Law Against War* is an important addition to the literature on the use of force and should be read by all who are interested in this fundamental area of international law.