BOOK REVIEWS

THE USE OF FORCE AND INTERNATIONAL LAW BY CHRISTIAN HENDERSON (CAMBRIDGE UNIVERSITY PRESS, 2018) 440 PAGES. PRICE AUD127.95 (HARDBACK) ISBN 9781107036345.

The law on the use of force, or the *jus ad bellum*, is one of the most fundamental and controversial areas of international law. Over the last decade, there has been a large increase in the volume of scholarship dealing with this body of law, reflected in the creation of new, specialist journals such as the *Journal on the Use of Force and International Law* ('*JUFIL*'). As co-editor in chief and one of the founders of *JUFIL*, Christian Henderson is well-placed to explore the intricacies and uncertainties of the law on the use of force. His latest book, *The Use of Force and International Law*, is 'targeted at students, academics and practitioners' and 'aims to provide a contemporary introduction to international law governing the resort to force'.[1] While Henderson notes that 'space does not permit the depth of detail and discussion that the subject ultimately deserves',[2] he nevertheless manages to provide a clear and comprehensive overview of the law and the contemporary challenges it faces — one which establishes this work as more than just a textbook introducing students to this important area of law. Henderson argues that although uncertainty and disagreement persist over the scope and application of the *Charter of the United Nations* ('*UN Charter*') provisions and customary principles governing the use of force, 'there exists no general appetite amongst states for either the scrapping, rewriting or radical reinterpretation' of 'the rules'.[3] Instead, he contends that, to date, the *jus ad bellum* has proved to be flexible enough to accommodate new technological developments (eg cyber attacks) and security challenges (eg threats from non-state actors).[4]

The Use of Force and International Law consists of 411 substantive pages, organised into four parts with a total of 10 chapters. Each chapter ends with a list of key questions and suggested further readings, thus reflecting one of the book's aims of introducing students to the law. Henderson applies an 'objective positivist' approach to the law, which seeks to determine the current state of the legal rules (*lex lata*), while remaining conscious of, and pointing out, possible future developments in the law (*lex ferenda*).[5]

Part I of the book consists of two chapters discussing the prohibition of the threat or use of force. Chapter 1 investigates the breadth and scope of the prohibition as it exists under art 2(4) of the *UN Charter* and customary international law. Henderson examines the text of art 2(4) and assesses its status as a peremptory norm of international law, concluding that the existence of exceptions to the rule means the prohibition is best viewed as being 'a quirky or

[1] Christian Henderson, *The Use of Force and International Law* (Cambridge University Press, 2018) 3.
[2] Ibid 4.
[3] Ibid 408.
[4] Ibid 410–11.
[5] Ibid 4.

sui generis' type of *jus cogens* norm.[6] The chapter also includes a brief consideration of the less frequently discussed concept of 'threat of force',[7] before addressing the alleged 'death' of art 2(4) in light of violations over several decades.[8] On the latter issue, Henderson argues that states continue to recognise the existence of the prohibition and (usually) utilise the language of the *jus ad bellum* when justifying their use of military force.[9] However, he also observes that any new consensus among states on the scope of the right of self-defence will necessarily involve a 'converse narrowing of the prohibition of the use of force'.[10]

Chapter 2 focuses on the meaning of force. This is a particularly interesting and useful chapter which addresses a number of key issues, including the 'means' versus 'effects' approaches to defining force,[11] and the possible existence of a *de minimis* gravity threshold of applicability attaching to art 2(4).[12] This latter section engages with recent arguments made by Olivier Corten and other scholars that some minor uses of armed force in certain contexts fall outside the scope of the prohibition.[13] Henderson points to the wording of art 2(4), arguing that some types of forcible action by a state against private individuals/vessels/aircraft are unlikely to engage a state's 'international relations' and, for this reason, they do not fall within the scope of art 2(4).[14] In this context, the gravity of the force is not determinative of the applicable legal framework; even relatively large-scale or major uses of force against a private actor do not trigger the application of art 2(4) because the action is not undertaken in the context of 'international relations'.[15] On the other hand, where a state's 'international relations' are engaged — as in state versus state military action — state practice suggests that even minor uses of force are viewed as falling within the scope of art 2(4).[16] Overall, Henderson concludes that 'there is little state practice supportive of a *de minimis* threshold in the context of incidences involving armed force'.[17]

Chapter 2 also has an interesting and quite original discussion of what Henderson calls the '*mens rea*' element of the concept of 'force', namely an 'intention to use force'.[18] He suggests that 'while there is no express authority or primary rule on the element of *mens rea* in the determination that a prohibited use of force has occurred, it is arguable that an intention to use force is nonetheless

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6 Ibid 24–5.
7 Ibid 26–31.
8 Ibid 40–7.
9 Ibid 42–7.
10 Ibid 47.
11 Ibid 55–62.
12 Ibid 65–75.
13 See, eg, Olivier Corten, *The Law against War: The Prohibition on the Use of Force in Contemporary International Law* (Hart Publishing, 2010) 50–92; Mary Ellen O'Connell, 'The Prohibition of the Use of Force' in Nigel D White and Christian Henderson (eds), *Research Handbook on International Conflict and Security Law: Jus ad Bellum, Jus in Bello and Jus post Bellum* (Edward Elgar Publishing, 2013) 89, 102–7.
14 Henderson (n 1) 74.
15 Ibid.
16 See ibid 74–5, where Henderson gives the example of the Stuxnet cyber attack on the Iranian nuclear plant. In this example, even the breakage of test tubes — a very minor forcible action — was considered enough to engage art 2(4).
17 Ibid 74.
18 Ibid 75–9.

required'.[19] Building on Corten's arguments that an intention to coerce another state is a requirement for a use of force,[20] Henderson seeks to identify and elaborate on a possible subjective element contained in art 2(4). This requirement would mean that accidental uses of force or those resorted to in error would not fall within the scope of the prohibition of the use of force. It will be interesting to see if this particular interpretation of the prohibition of the use of force gains support; so far there are suggestions that some scholars are not comfortable with this reliance on intention.[21] While Henderson provides several examples of state practice to support his view, there is also evidence that states sometimes treat 'accidental' shots or territorial incursions as violations of art 2(4), suggesting that the relevance of intention remains uncertain.[22] Chapter 2 concludes with Henderson drawing together various elements to define the concept of 'force' in this context as 'the intentional physical coercion by one state of another through the direct or indirect use of an instrument which is at least capable of causing human harm or physical destruction'.[23]

Part II of *The Use of Force and International Law* consists of three chapters that examine the use of force in the context of collective security. Chapter 3 outlines the basic legal framework for the authorisation of force, focusing primarily on the UN Security Council's Chapter VII powers but also briefly considering the roles of the General Assembly and regional organisations in the maintenance of international peace and security.[24] Chapter 4 delves into specific issues relating to authorisation for force, including the revival of past Security Council authorisations, the doctrine of 'implied' authorisation and the implementation of the 'responsibility to protect' ('R2P') concept.[25] These issues relating to the interpretation of Security Council resolutions are explored through discussion of key incidents, such as Kosovo (1999), Iraq (2003), Côte d'Ivoire (2011) and Libya (2011). Henderson correctly observes that 'the lack of a clear method or practice in determining how such institutional resolutions should be interpreted' lies 'at the heart of the problems addressed in this chapter'.[26]

Chapter 5 discusses the use of force within the context of UN peacekeeping. Traditionally, peacekeeping operations have been distinguished from enforcement measures on the basis that the former are deployed on the basis of the principles of 'consent of the parties, impartiality and non-use of force except in self-defence'.[27] Yet in an attempt to make peacekeeping more effective on the ground,

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19 Ibid 75.

20 Corten (n 13) 76–84.

21 Christine Gray refers to Corten's reliance on a state's intention as 'problematic': see, eg, Christine Gray, *International Law and the Use of Force* (Oxford University Press, 4th ed, 2018) 37.

22 For example, Moshe Yaalon, the then Israeli Defence Minister, has explicitly stated that Israel would respond to incursions from Syria 'whether they stemmed from a mistake or were deliberate': Maayan Lubell, 'Israel Downs Syrian Warplane It Says Violated Its Golan Airspace', *Reuters* (online, 23 September 2014) <https://www.reuters.com/article/us-mideast-crisis-israel/israel-downs-syrian-warplane-it-says-violated-its-golan-airspace-idUSKCN0HI0IX20140923>, archived at <https://perma.cc/W4Y9-VRHW>.

23 Henderson (n 1) 79–80.

24 Ibid ch 3.

25 Ibid ch 4.

26 Ibid 165.

27 Ibid 173.

these core principles have been called into question by a shift towards the creation of more robust mandates for the use of force.[28] Henderson traces the evolution in the legal basis for the use of force in peacekeeping operations, from the original, narrow notion of personal self-defence to the broader concept of defence of the mandate of the operation. He observes that

> the debate regarding the constitutional basis of peacekeeping operations seems to be without practical significance as the institution has evolved through the practice of the UN without its legality having been the subject of significant or sustained challenge by either states or scholars.[29]

However, the chapter notes that more muscular peace missions, such as the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO), risk 'turning the peacekeepers into a de facto (if not de jure) party to the conflict'.[30]

Part III of the book, consisting of Chapters 6–8, focuses on the use of force in self-defence. It provides a comprehensive and insightful analysis of the right of self-defence, which is the most commonly invoked justification for the use of force in international relations. In Chapter 6, Henderson examines the general requirements of individual and collective self-defence. In relation to the 'armed attack' requirement, he notes that the International Court of Justice's ('ICJ') notion of a gravity threshold that distinguishes an 'armed attack' from a mere 'use of force' is not always evident in state practice.[31] He correctly observes that, in discussions of self-defence, states 'do not often distinguish between "uses of force" and "armed attacks" but instead focus upon the necessity and proportionality of the response taken'.[32] To date, though, it is only the United States that has explicitly rejected the notion of a gravity threshold for an 'armed attack', arguing that the right of self-defence arises in relation to any illegal use of force, thereby dismissing the ICJ's distinction between the two concepts.[33] Chapter 6 also contains a useful discussion of the concept of proportionality; one of the limitations on any response in self-defence. Here, Henderson traces three possible approaches to assessing proportionality — first, asking whether the response is quantitatively proportionate to the original armed attack; secondly, whether it is qualitatively proportionate to the armed attack; or thirdly, whether the response does 'no more than achieve the specific objective of defending' the

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28 Ibid 193.

29 Ibid 172.

30 Ibid 198.

31 Ibid 219–23. In *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits)* [1986] ICJ Rep 14, the International Court of Justice ('ICJ') held that not every 'use of force' in breach of art 2(4) is serious enough to constitute an 'armed attack' for the purposes of art 51. This gravity threshold means that only 'the most grave forms of the use of force' will qualify as 'armed attacks' triggering a victim state's right to respond with force in self-defence: at 101 [191]. According to the ICJ, the gravity of a 'use of force' is determined by assessing its 'scale and effects': at 103 [195].

32 Henderson (n 1) 222.

33 See the United States Legal Adviser, William H Taft's explanation of the US position in William H Taft, 'Self-Defense and the *Oil Platforms* Decision' (2004) 29(2) *Yale Journal of International Law* 295, 299–302.

state from the armed attack.[34] In his view, the third approach is the one that best reflects contemporary state practice.[35]

Chapter 7 deals with the temporal dimension of the armed attack requirement and is entitled 'Preventative Self-Defence'. At first glance, this term appears similar to 'preventive self-defence', which is often, though not always, understood as referring to self-defence against the most remote category of threats of armed attack.[36] However, Henderson explains that he is using 'preventative self-defence' here as an

> umbrella term for all forms of self-defence that have been employed in the various discussions on self-defence in preventing the physical manifestation of an armed attack from occurring — that is, interceptive, anticipatory and pre-emptive.[37]

Having clarified the choice of terminology, the chapter then presents a useful, well-balanced analysis of the ongoing debate over imminence. Henderson delves into key pieces of state practice, including the Bush Doctrine of pre-emptive self-defence and the 2007 Israeli airstrikes on a partially constructed Syrian nuclear reactor.[38] He also provides a strong critique of more recent proposals, such as the 'Bethlehem Principles',[39] which seek to shift 'the traditional conception of "temporal imminence" towards what might be described as "contextual imminence"'.[40] The chapter concludes by acknowledging that while there has been 'a discernible rise in … acceptance' of anticipatory self-defence, ongoing disagreements among states and scholars over the meaning of 'imminence' mean the 'precise parameters remain unclear'.[41]

Chapter 8 examines the use of force against non-state actors, one of the main contemporary challenges to the traditional state-centric concept of the *jus ad bellum*. Henderson explores the tension between a victim state's need to defend itself against non-state actors based on the territory of another state, and the territorial state's rights to sovereignty and territorial integrity. Interestingly, he draws a distinction between a victim state taking action 'solely against the non-state actor perpetrators', and one taking action against the territorial state as well as the non-state actor.[42] According to Henderson, in relation to the former, the 'sovereignty barrier may not be seen as causing an issue'.[43] This distinction is not explained in great detail, but at first glance it seems open to question. One might argue instead that sovereignty issues arise *in all circumstances* of non-consensual force on a third state's territory, including that which targets non-state actors only. Further explanation of this distinction would have strengthened what is otherwise

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34 Henderson (n 1) 234–8 (emphasis omitted).

35 Ibid 237.

36 See, eg, Ashley S Deeks, 'Taming the Doctrine of Pre-emption' in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (Oxford University Press, 2015) 661, 663, where Deeks describes 'preventive self-defence' as 'the furthest away', temporally, from an actual armed attack.

37 Henderson (n 1) 275.

38 Ibid 285–8, 290–1.

39 See Daniel Bethlehem, 'Self-Defense against an Imminent or Actual Armed Attack by Nonstate Actors' (2012) 106(4) *American Journal of International Law* 770.

40 Henderson (n 1) 297.

41 Ibid 306–7.

42 Ibid 316.

43 Ibid.

a clear and well-argued portion of the book. Chapter 8 also includes an insightful section in which Henderson identifies a number of theoretical and practical problems with the 'unable or unwilling' doctrine, before he concludes that the current legal position in relation to action against non-state actors remains uncertain.[44]

The final two chapters of *The Use of Force and International Law* in Part IV of the book deal with forcible intervention in situations of civil unrest. Chapter 9 examines issues of consent to intervention. Henderson frames force undertaken with host state consent not as a further exception to the prohibition of the use of force but rather as a form of action that does not violate international law in the first place because there is no breach of state sovereignty or art 2(4).[45] The key questions, of course, are who has authority to provide consent and what constitutes a valid form of consent. Here, Henderson explains that the right to consent lies with the recognised or legitimate government and that such consent must be provided prior to intervention (as opposed to operating retrospectively).[46]

Chapter 10 investigates the controversial doctrine of unilateral (ie without UN Security Council authorisation) humanitarian intervention. After analysing various incidents from the Cold War era through to the ongoing Syrian crisis, Henderson argues that, although there may be compelling moral justifications for intervening for humanitarian purposes, such action remains unlawful.[47] He also briefly discusses the R2P concept, the military dimension of which operates through the existing UN Security Council authorisation mechanism and therefore does not alter the *jus ad bellum* in any way. In fact, Henderson suggests that, 'rather than increasing the moral and legal currency of arguments regarding the existence of a right of unilateral humanitarian intervention, [R2P] has, instead, simply dampened, if not entirely halted, any prospects for a right to emerge'.[48]

Overall, *The Use of Force and International Law* is an impressive addition to the growing range of texts on the *jus ad bellum*. Henderson succeeds in his aim of providing a 'challenging yet accessible and comprehensive yet concise' introduction to the law.[49] He engages thoughtfully with a broad range of scholarly views, while also offering some original contributions of his own (eg the *mens rea* section of Chapter 2). In keeping with the book's 'objective positivist' approach to the law, its arguments and conclusions are underpinned by, what this reviewer considers to be, a balanced assessment of relevant state practice and contemporary security challenges.

Given its ambitious scope and wide target audience (students, academics and practitioners), it would be surprising if a work of this nature did not contain some limitations. In this instance, however, the shortcomings are few in number and minor in degree. As noted above, greater detail and clarity on the distinction between action *against* a state and action *within* a state would have been useful in Chapter 8's discussion of the use of force against non-state actors. Similarly, some further exploration of methodological issues might have been beneficial. Aside

44 Ibid 326–46.
45 Ibid 349–50.
46 Ibid 371–2.
47 Ibid 406.
48 Ibid.
49 Ibid 3–4.

from a brief comment in the introduction and a very short section on the prospects for normative change in Chapter 1, Henderson does not delve into the methodological schisms that divide *jus ad bellum* scholars and sometimes contribute to their reaching contrasting conclusions on the current state of the law.[50] Despite these minor limitations, *The Use of Force and International Law* is an important contribution to scholarship in what remains one of the most critical and controversial areas of international law. For those interested in the current state — and possible future direction — of the law on the use of force, Henderson's book is an indispensable resource.

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[50] For discussion of these methodological differences, see Gray (n 21) 10–12; Andrea Bianchi, 'The International Regulation of the Use of Force: The Politics of Interpretive Method' (2009) 22(4) *Leiden Journal of International Law* 651.

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