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# The Law against War or *Jus contra Bellum*: A New Terminology for a Conservative View on the Use of Force?

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## 1. INTRODUCTION

Inter-state use of force has always attracted much attention from international legal scholars. Many articles have been written on the subject. However, there are still a limited number of books addressing all the aspects of the contemporary prohibition on the use of force in a systematic way. Those written by Yoram Dinstein,[1] Christine Gray,[2] and Thomas Franck[3] are certainly the best known in the English-speaking literature. This literature is now enriched following the publication of a new book entitled *The Law against War* by Olivier Corten.[4] It is a translated and updated version of a book published in French and entitled *Le droit contre la guerre*,[5] which explains why it has been published in the French Studies in International Law collection of Hart Publishing.

Corten's book undoubtedly constitutes a significant contribution to the subject of inter-state use of force. The issues discussed by the author are particularly wide-ranging. The book not only addresses all the traditional aspects related to the matter, but also tackles a series of questions that have been quite neglected in legal literature, such as the prohibition on the threat of force, the application of the law on the use of force to non-state political entities, and the question of whether a circumstance precluding wrongfulness may be invoked to justify a use of force – a question that has led Corten to deeply analyse the peremptory nature of the prohibition on resorting to force. Moreover, the book constitutes a unique source of empirical information on the matter. The material upon which Corten bases his reasoning is indeed particularly

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1 Y. Dinstein, *War, Aggression and Self-Defence* (2005).

2 C. Gray, *International Law and the Use of Force* (2008).

3 T. Franck, *Recourse to Force: State Action against Threats and Armed Attacks* (2002).

4 O. Corten, *The Law against War: The Prohibition on the Use of Force in Contemporary International Law* (2010).

5 O. Corten, *Le droit contre la guerre: L'interdiction du recours à la force en droit international contemporain* (2008).

extensive, almost exhaustive. No relevant international instrument, practice, or work of scholarship seems to have escaped his attention. Besides, the reasoning is particularly well built up. The text is not affected by any superfluous digression. Arguments are finely structured and particularly rigorous.

The following paragraphs seek to provide a critical overview of Corten's main arguments. Although purposely descriptive as well as critical, the following developments will both offer some support for the author's approach and voice some reservations on particular issues, mainly with respect to the law of self-defence. This review essay also aims at weighting Corten's position on inter-state use of force in the light of the various concurrent doctrinal opinions held in that matter.

Although divided into eight parts, *The Law against War* (or *jus contra bellum* in accordance with the Latin expression used by Corten throughout the book) is actually founded upon three main pillars. This essay is articulated around these pillars. The first is *law* (*jus*), more precisely the restrictive approach adopted by Corten regarding the evolution of the fundamental rules of international law. This approach is explained in the first part of the book, entitled the 'terms of the methodological debate on the non-use of force' (Section I). Second is *war* (*bellum*), more particularly the restrictive interpretation made by Corten of the notions of use and threat of force prohibited under the UN Charter. This interpretation is developed in the second part of the book, which answers the question of 'what . . . "use of force" and "threat of force" means' (Section 2). Third is *law against war* (*jus contra bellum*), more exactly the conclusion reached by Corten, based on the restrictive above-mentioned methodology and interpretation, that all the contemporary claimed developments of the prohibition on the use of force, such as preventive self-defence or the right of humanitarian intervention, are unfounded. Those alleged changes are analysed in the subsequent parts of the book (Section 3). Each of these three paradigms will be scrutinized in detail with a view to demonstrating that Corten's argument, while informed by comprehensive practice, remains significantly conservative.

## 2. THE LAW (*JUS*)

In the first part of his book, Corten discusses the different methodological approaches that are generally adopted by scholars in the field of inter-state use of force before describing the positivist method that he has chosen to follow throughout his book (subsection 2.1 of this article). Being necessarily more restrictive than the policy-oriented methodological approaches, Corten's method seems particularly restrictive even from a positivist perspective (subsection 2.2).

### 2.1. A positivist methodology

As rightly emphasized by Corten, the divergences in the legal literature on the use of force are often due to the different methodologies followed by scholars. Although acknowledging the difficulty in classifying all the doctrinal opinions as applying one or another specific methodology, Corten distinguishes two main kinds of approach generally used by scholars: the extensive versus the restrictive approach. He

explains this distinction as follows.[6] The extensive approach, generally used by the 'current predominant in the English-speaking world that favours a "policy-oriented" perspective',[7] considers customary law as a privileged means of adapting international law, since it is more flexible and enables one to take into account values and other subjective factors in the evolution of a norm. This approach focuses on the practice element of custom and ascribes a particular weight to the decisions adopted by political organs such as the UN Security Council. Moreover, it does not exclude that custom be established on a relatively small number of cases and be inferred from the practice of only leading, democratic, and/or powerful states. Such an approach unsurprisingly makes it easier to conclude that contemporary law on the use of force has evolved. In contrast, the restrictive approach, generally used by scholars belonging to the positivist tradition and favouring a formalistic or voluntarist view of international law,[8] places treaties and custom on an equal footing. As far as the formation of customary law is concerned, this approach pays particular attention to the *opinio juris* element, particularly to clear legal declarations, especially those made by states in international fora such as the UN General Assembly. Moreover, according to this approach, evolutions of the customary law on the use of force are only possible if based on the repetition of numerous similar precedents, evidencing that all states have accepted such evolutions. The legal regime on inter-state use of force having a peremptory nature, any change of such a regime implies a 'near-unanimous' agreement among states. As a result, this approach makes it much harder to assert that the contemporary law on the use of force has evolved.

While not dismissing the extensive approach as irrelevant or unfounded, Corten clearly states at the beginning of his book that he will adopt the method applied by the International Court of Justice (ICJ), which, according to him, follows a restrictive approach with regard to the evolution of the customary law on the use of force.[9] In his view, any change in this law therefore requires, first, that a state *invokes* a new right and, second, that such a new right is *accepted* by the other states. The first requirement implies that, when using force, a state makes *a claim* formulated in legal terms and bearing on the evolution of the legal rule and not on the interpretation of facts. The second requirement involves the claimed evolution being *accepted*, preferably through express and clear approval rather than silence or tacit acceptance, and that such approval bears on the modification of the legal rule and is expressed by the international community as a whole.[10] Corten emphasizes in this respect the value of the general UNGA resolutions on the use of force – such as Resolution 3314 (XXIX) – as well as the debates preceding those resolutions, since both evidence clear official and legal positions of principle of a large number of states.

This methodological part is undoubtedly a crucial part of the book. Conclusions reached by the author on the contemporary law on the use of force directly ensue

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6 For a summary of this view, see schema at p. 6 of the book.

7 Corten, *supra* note 4, at 11; the author mentions Franck (*supra* note 3) as one scholar following such an extensive approach.

8 Corten mentions Gray (*supra* note 2) as one scholar following such a restrictive approach.

9 Corten, *supra* note 4, at 28.

10 This reasoning is developed in ibid., 28–47.

from the restrictive methodology that he has chosen to follow throughout his analysis of the matter. Therefore, particular attention will be paid to this first part. Two general comments will be made in that respect. A first comment is that the book reproduces almost entirely the French version, including the methodology part. This certainly has the merit of introducing into the broad English-speaking legal sphere, which is generally more sensitive to policy-oriented arguments, another way of thinking about the matter, particularly a strict positivist reasoning that is typical of French legal scholars. It is nonetheless difficult to determine in advance what impact the book will have in the English-speaking literature, especially among US scholars. Indeed, as carefully emphasized by the author himself, his conclusions are only relevant if one follows a restrictive method. Basically, another method, like a more policy-oriented approach, is perfectly arguable even if it leads to an entirely different conclusion. The risk is, then, that the book will be seen, at least by American scholars, as an unidentified flying object – that is, as an object that will be irrelevant to comment upon if those scholars adopt their proper methodological approach while at the same time difficult to discuss in the light of Corten's method since they are unfamiliar with such a method. More fundamentally, one may wonder why, although sometimes suggesting it,[11] Corten did not expressly contend that his methodology was the most valid. His approach suggests that international law is twofold and may be divided into one international-law regime applied by US scholars and another applied by positivist Continental lawyers. Yet, the ICJ – just to mention one example – does not apply two different kinds of international law when ruling on a case. Corten could perfectly argue against the extensive approach by invoking persuasive arguments, such as those put forward by scholars criticizing the inconsistent results of this approach.[12]

A second comment regarding Corten's distinction between the extensive and restrictive approaches concerns the elements upon which he bases this distinction. In his view, proponents of the extensive approach privilege *state practice* as they focus on *state material conduct* whereas proponents of the restrictive approach privilege the *opinio juris of states* as they focus on *state legal declarations*. This assertion is debatable for two main reasons. First, it seems difficult to equate state material conduct with state practice and state declarations with *opinio juris*. State material conduct and state declarations are, indeed, two types of state practice. The latter, like the former, are distinct from *opinio juris*, which is an abstract element requiring that state practice be followed out of a belief that it conforms to law. Therefore, it seems technically more accurate to consider that proponents of both approaches distinguish themselves by the fact that they focus on different types of state practice, state material conducts versus declarations, as a means for revealing the *opinio juris* of states. Second, it is not sure as a matter of fact that scholars following the extensive approach only focus on state material conduct, which seems logical, since such

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11 See, e.g., ibid., at 6.

12 See, e.g., the convincing criticisms made by M. Akehurst ('Notes and Comments: Letter to the Editor in Chief', (1986) 80 AJIL 147, at 147) against an extensive method.

conduct is itself meaningless.[13] Legal literature shows that, while putting emphasis on state material conduct, those scholars actually interpret such conduct in the light of other elements, including state – political, moral, historical, or even legal – declarations, those elements being sometimes very decisive in the interpretation of the case under review.[14] In sum, although the final aim of proponents of both approaches is to identify the *opinio juris* of states on the basis of their practice, those favouring an extensive approach distinguish themselves from the others to the extent that they are ready to rely on any state manifestation, including only material conduct if no other practice exists, in order to identify the *opinio juris* that is, in *reality* and not just *officially*, in the mind of the intervening states. The ultimate objective of such an approach seems to 'stick' international law as much as possible to the reality and to avoid asserting a legal discourse that would not correspond to the actual conducts of states.[15]

That being said, showing, as Corten does, that different methods are followed in legal literature on the use of force significantly helps us to understand the profoundly different conclusions that are often reached in that matter as well as to be aware that those conclusions are actually not conflicting, since they ensue from dissimilar methods. This should hopefully put an end to the frequent 'dialogues of the deaf'[16] appearing in the legal literature as well as in conferences on the use of force.

### 2.2. A restrictive positivist methodology

Corten's method is a restrictive method, typical of the legal positivist tradition. It is logically stricter than the extensive approach. One may nonetheless wonder whether it is not particularly restrictive even from a pure positivist perspective due to some explicit (sub-subsection 2.2.1) as well as implicit (sub-subsection 2.2.2) methodological choices that Corten seems to have made in his book.

#### *2.2.1. Explicit restrictive choices*

There are several examples of choices explicitly endorsed by the author, which make his positivist methodology particularly restrictive. A first one comes from his position that no particular states have more weight than others with respect to the development of the law on the use of force.[17] Yet, although it is clear that one cannot make the evolution of any international (customary) norm dependent

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13 This is acknowledged by the author: Corten, *supra* note 4, at 21; for a similar observation, see Akehurst, *supra* note 12, at 147.

14 See, e.g., the qualification by Franck of the military operation launched by Israel in Egypt on 5 June 1967 as a relevant precedent of preventive self-defence; such a qualification is made on the basis of both the 'acts and words' of the Israeli authorities (Franck, *supra* note 3, at 103); for a similar qualification, see A. M. Weisburd, *Use of Force: The Practice of States since World War II* (1997), 137. See, concerning the qualification of some other precedents on the basis of not only state material conduct, but also state political or moral declarations, F. R. Teson, *Humanitarian Intervention: An Inquiry into Law and Morality* (1988), 169, 192.

15 See, e.g., A. M. Weisburd, 'Customary International Law: The Problem of Treaties', (1988) 21 *Vanderbilt Journal of International Law* 1, at 45; S. Donaghue, 'Normative Habits, Genuine Beliefs and Evolving Law: Nicaragua and the Theory of Customary International Law', (1995) 16 *Australian Yearbook of International Law* 327, at 342.

16 Corten, *supra* note 4, at 27.

17 Ibid., at 44–5.

upon the practice of some particular states merely because of their powerfulness or democratic nature, a particular weight should nonetheless be attached in that respect to the practice of 'specially affected states' in accordance with ICJ case law.[18] Theoretically, all the states should be equally interested in the evolution of inter-state use of force. However, some may be more interested than others, not merely because of their military capacities and activities in international relations, but because of their political or geographical situation. This specific weight to be attributed to the practice of those states mainly derives from the fact that their particular involvement in use-of-force issues renders their legal declarations on those issues more trustable. Those declarations will, indeed, more likely be dictated by the belief in acting in accordance with international law rather than just for courtesy, convenience, or diplomatic concerns. In other words, the particular interest of those states renders the *opinio juris* expressed in their declarations less dubious. Similar considerations explain why, contrary to Corten's view, particular attention should be paid to state material conduct, too. Such conduct may, indeed, also play a role in reinforcing the weight to be attributed to state declarations. They may ascertain the true *opinio juris* apparently resulting from those declarations, since they imply that what has been said and claimed has been materialized into physical acts.[19]

The very strict nature of Corten's positivist approach also becomes apparent from his considerations on state silence, which evidence the great reluctance of the author to give a role to such silence in the formation of customary law. Yet, even from a traditional positivist perspective, state silence may be particularly meaningful, depending upon the context in which it takes place. A clear illustration thereof in the field of inter-state use of force is the international reaction to the 2008 Turkish military operation in Iraq in response to Kurdish attacks from Iraqi territory. It is true that the majority of states remained silent on the legality of this operation, most of them merely urging Turkey not to resort to disproportionate use of force.[20] Yet, this silence suggests some implicit support for the operation or, at least, no opposition to it, since it sharply contrasts with the condemnations usually pronounced by the same states with respect to similar operations conducted by Turkey in the past.[21] Corten also seems to have adopted a very restrictive approach regarding the notion of clear legal state opinion, especially of the notion of clear legal claim and acceptance, which in his view are the main elements upon which

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18 See, e.g., *North Sea Continental Shelf (Federal Republic of Germany v. Denmark/The Netherlands)*, Judgment of 20 February 1969, [1969] ICJ Rep. 3, at 43.

19 It is intriguing in this regard that Corten only attributes such a role (i.e., making more obvious the sincerity of the *opinio juris* expressed by states in their declarations) to the requirement of repeated similar cases over time (Corten, *supra* note 4, at 41).

20 See, e.g., statements from the EU: Presidency of the EU, Statement on the Military Action Undertaken by Turkey in Iraqi Territory', available online at www.eu2008.si/en/News_and_Documents/CFSP_Statements/February/0225MZZturkey.html.

21 See, e.g., the condemnations by the European states: Resolution of the European Parliament on the Kurdish situation in Turkey, 9 April 1992, *Document d'actualité internationale*, 15 June 1992, at 222; Resolution B3–1579 of the European Parliament on the situation in Iraqi Kurdistan, 19 November 1992, *Document d'actualité internationale*, 1 March 1993, at 84; Resolution of the European Parliament, 6 April 1995, *Document d'actualité internationale*, 1 June 1995, at 347; Resolution of the European Parliament on the political situation in Turkey, 19 September 1996, *Document d'actualité internationale*, 1 November 1996, at 866.

customary law is to be founded. A manifest example of such an approach is his reluctance to consider, as the majority of scholarship does,[22] that the legal opinions expressed by states having supported the US armed intervention in Afghanistan in 2001 clearly refer to the right of self-defence.[23]

*2.2.2. Implicit restrictive choices*

In addition to the above-mentioned express restrictive methodological choices, Corten seems to have implicitly endorsed some more debatable positions that also strongly reinforce the restrictive nature of his positivist method. The first is that the evolution of the law on the use of force is mainly seen by the author through the modification of customary law. Corten, indeed, describes his method by referring almost exclusively to the ICJ conclusions on the formation of customary law. However, as acknowledged by Corten himself, such a regime also has a conventional nature. One may, therefore, wonder what are the ways through which such a conventional regime may evolve on the basis of state practice and whether these ways impose similar conditions to those under which the modification of the customary regime is authorized. Before describing his method, Corten asserts on that issue:

> It is understood that, given the treaty-based character of the prohibition of the use of force, [the] evolution [of this prohibition] presupposes compliance with the interpretative principles set forth in the Vienna Convention on the Law of Treaties. Thus reliance on a novel right . . ., supposedly accepted by all other States . . ., would be both a *customary evolution* of the rule and a practice subsequently followed by the parties to the UN Charter and indicative of their agreement on the *interpretation of the text*.[24]

This statement is very short. Corten does not envisage the evolution of the law on the use of force through the interpretation of customary law or the modification of treaty law based on state practice. Yet, nothing prevents one from considering the first hypothesis and, although not codified in the Vienna Convention on the Law of Treaties (Vienna Convention), state practice as a means for modifying a treaty is perfectly arguable in the light of international case law, legal scholarship, and state practice.[25] What is nonetheless particularly intriguing is that Corten's statement seems to equate the conditions under which a *customary* norm can be *modified* with the condition under which a *conventional* norm can be *interpreted* on the basis of state practice.

The fact that the norm whose evolution is claimed is of a *conventional* or *customary* nature does not admittedly impact on the conditions under which this norm may evolve on the basis of state practice. In particular, it would be difficult in practice to distinguish between the evolution of the conventional and customary law on the use of force. The contemporary state practice as well as the fact that almost all

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22 Cf., e.g., note 75, *infra*.

23 Corten, *supra* note 4, at 461; see also Corten's very strict approach with respect to the interpretation of declarations made by African states before the adoption of the World Summit Outcome for the 60th anniversary of the United Nations, at 392.

24 Ibid., at 29 (emphasis added).

25 See, e.g., for such a view, G. Distefano, 'La pratique subséquente des Etats parties à un traité', (1994) 40 AIDI 41, at 61–70; I. Brownlie, *Principles of Public International Law* (2008), 630.

the states are now party to the UN Charter, indeed, make it hard to determine the exact source, either the Charter or customary law, upon which states intend to base their practice and, as a result, to determine whether the regime on the use of force is claimed to evolve through conventional or customary law. However, the above-quoted statement does also equate *interpretation* with *modification*. Yet, interpreting or modifying a norm does not seem to be the same thing. It is indicative that one of the main reasons why states agreed on state practice as a means for interpreting but not modifying a treaty in the Vienna Convention was that practice leading to the modification of a norm was difficult to distinguish from practice infringing such a norm.[26] This logically suggests that the quality and quantity of state practice must be particularly high in order for this practice to demonstrate a clear modification rather than the violation of a norm. By contrast, it would be irrelevant to adopt such a restrictive approach with respect to interpretation, since the problem of distinguishing between interpretation and violation does not *per definitionem* exist. As a result, the very strict method described by Corten on the basis of ICJ case law related to the formation (modification) of customary law does not seem adequate when the interpretation rather than the modification of an aspect of the law on the use of force is at stake, which seems to be the case, as will be seen below (cf. subsections 4.1 and 4.5, *infra*), at least with respect to some aspects of the law of self-defence.

This brings us to the second questionable aspect of the methodology implicitly endorsed by the author. Studying the prohibition on the use of force on the basis of a detailed scrutiny of state practice up to 1945, Corten starts the analysis of all the currently debated practices from the implicit assumption that they were clearly prohibited at the outset under the UN Charter regime, because either it was directly forbidden or, as not expressly permitted, it fell into the broad prohibition on the use of force. Following such a view, any claimed development of the law on the use of force is to be conceived as an *attempted modification* of a former well-established rule, which can logically be asserted only under strict conditions regarding the quality and quantity of state practice. As a result, Corten only needs to show that the contemporary practice does not meet such strict conditions with respect to the currently debated rights to use force in order to conclude that these rights are still unlawful. Yet, all the questions on the use of force were not necessarily settled after the adoption of the UN Charter. Some grey zones remained and they should not necessarily be considered as falling into the general prohibition on the use of force. Any claimed development of those grey zones should, therefore, preferably be viewed as an *attempted interpretation* of a norm whose content was still unclear. As a result, one should not automatically infer from the possible lack of unanimity of contemporary state practice regarding one aspect of such grey zones that this aspect is unlawful: either post-UN Charter practice is (still) clearly divided on the issue at stake and the conclusion at least should be to acknowledge that ambiguity remains on that point, which seems to be the case regarding some aspects of the law on the

26 See, e.g., statements from Chile, UN Doc. A/CONF.39/C.1/SR.37, para. 75; see, e.g., on this subject, P. Daillier, M. Forteau, and A. Pellet, *Droit international public* (2009), 325.

use of force, such as preventive self-defence (cf. subsection 4.5, *infra*), or post-UN Charter practice, although not devoid of any ambiguity that would preclude the modification of a former well-established rule, may be seen as sufficiently uniform and repeated over time to lead to the interpretation of the controversial grey zone. This seems to be the case, for example, with respect to the assertion of a right to respond in self-defence to private armed attacks (cf. subsection 4.1, *infra*).

A third and last implicit restrictive methodological feature is that ambiguity concerning the interpretation of particular texts, case law, or precedents is sometimes resolved by Corten in a way that supports or at least does not conflict with his restrictive view, even when it seems that this ambiguity should be left unsettled. Several examples may be cited in that respect. A first one is the author's interpretation of some African treaties, especially the Constitutive Act of the African Union (AU)[27] and the AU Non-Aggression Common Defence Pact.[28] In light of both the texts and their preparatory works, these treaties could arguably be interpreted as recognizing extensive rights, namely a right of the AU to undertake armed enforcement action without prior UNSC authorization, under the AU Constitutive Act,[29] and a right to act in self-defence preventively as well as in response to private armed attacks under the AU Non-Aggression Pact.[30] Corten's interpretation of those treaties is radically different, as he firmly argues that they do not support any claimed relaxation of the traditional regimes regarding UNSC authorization to use force and self-defence.[31] Yet, it seems that neither the former nor the latter interpretation may be definitely contended and that the meaning of those treaties simply remains unclear. The best approach seems to be to acknowledge this ambiguity and to wait for state practice in order to have a better view on the meaning of those treaties. A similar conclusion should be upheld regarding the interpretation of the World Summit Outcome, the document adopted in 2005 by the UN General Assembly in the context of the UN 60th anniversary,[32] with respect to the right to act in self-defence in order to counter imminent threats, which is often qualified in legal literature as the right of 'anticipatory self-defence'.[33] It is difficult to share Corten's firm position that this World Summit Outcome itself evidences a clear reluctance of states to recognize such a right. The author supports his conclusion by arguing that the Outcome does

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27 Adopted on 9 July 2002, available online at www.africa-union.org/about_au/constitutive_act.htm.

28 Adopted on 31 January 2005, available online at www.africa-union.org/root/au/Documents/Treaties/text/Non%20Aggression%20Common%20Defence%20Pact.pdf.

29 See, e.g., B. Kioko, 'The Right of Intervention under the African Union's Constitutive Act: From Non-Interference to Non-Intervention', (2003) 85 IRRC 821, at 852.

30 R. van Steenberghe, 'Le Pacte de non-agression et de défense commune de l'Union africaine: Entre unilatéralisme et responsabilité collective', (2009) 113 RGDIP 125, at 136–44.

31 Corten, *supra* note 4, at 342–3, 161, respectively.

32 See UNGA Res. 60/1 (2005).

33 See, e.g., T. Graham, 'National Self-Defense, International Law, and Weapons of Mass Destruction', (2003) 4 Chicago JIL 1, at 1; M. Nabati, 'International Law at a Crossroads: Self-Defense, Global Terrorism, and Preemption (A Call to Rethink the Self-Defense Normative Framework)', (2003) 13 TLCP 771, at 773; C. Greenwood, 'International Law and the Pre-Emptive Use of Force: Afghanistan, Al-Qaida, and Iraq', (2003) 4 San Diego ILJ 7, at 7; S. P. Sharma, 'The American Doctrine of "Pre-Emptive" Self-Defence', (2003) 43 *Indian Journal of International Law* 215, at 220; see also the Report of the High-Level Panel on Threats, Challenges and Change, 2 December 2004, UN Doc. A/59/565, para. 189.

not mention this right contrary to the will expressed by some states.[34] This silence may, however, be interpreted in the opposite way, since the World Summit Outcome does not contain any explicit exclusion of the right of anticipatory self-defence despite the opposition expressed by several states against this right.[35] Again, the best attitude seems to be to admit that the World Summit Outcome does not settle the issue.

Another example of one-sided interpretation is the way in which Corten presents ICJ case law with respect to the right of preventive self-defence. It is indicative that, although recognizing that this right 'has not been expressly excluded from [ICJ case law], the ICJ even specifying on two occasions that it was not ruling on that question',[36] Corten refers to this case law in order to demonstrate, as he mentions in the title of the heading section, 'the reluctance of international case law to admit preventive self-defence'.[37] It seems that the ICJ jurisprudence is simply not relevant with respect to the issue at stake, since this issue has never been addressed by the ICJ. The same may be said about Corten's references to ICJ case law in relation to the right to respond in self-defence to private armed attacks. Contrary to Corten's argument, it does not seem relevant to refer to the *Nicaragua* or *Armed Activities* cases in order to assert the ICJ's reluctance to admit a right to act in self-defence in response to private armed attacks. The Court was indeed never asked to rule on this issue by the states appearing before it. Those states only invoked the more traditional right to respond to an indirect aggression – that is, an armed attack that can be considered as committed by a state due to the involvement of this state in attacks committed by non-state actors abroad (cf. subsection 4.5, *infra*).

As a result, it is clearly understandable that, given all those restrictive methodological approaches, explicitly or implicitly followed in his book, Corten could hardly identify any development of what he assumes to be the traditional law on the use of force.

## 3. THE WAR (*BELLUM*)

In the second part of his book, Corten embarks upon a detailed analysis of the meaning of both the use (subsection 3.1, *infra*) and threat (subsection 3.2, *infra*) of force, this latter concept being purposely limited by the author to the notion of military force.[38] This is again a very interesting part of the book, as this issue has been quite rarely addressed in legal literature.

### 3.1. Use of force

As far as the notion of use of force is concerned, Corten's main contribution is to demonstrate the existence of a distinction between use of force and police measures

34 Corten, *supra* note 4, at 334–5.
35 Cf., e.g., note 158, *infra*.
36 Corten, *supra* note 4, at 443.
37 Ibid., at 441.
38 Corten acknowledges that there is still a debate on whether the force prohibited must exclusively be a military force, excluding economic, political, or ideological forces (ibid., at 50).

as well as to identify in great detail the criteria upon which such a distinction may be drawn in practice.[39] This original distinction is particularly relevant and very helpful. It enables one to avoid any cross reflections, which would confuse two different conceptual categories being regulated by two distinct regimes. It also enables Corten to show that, although the law on the use of force must be strictly conceived as not allowing any other exceptions than the traditionally admitted ones, a more flexible approach is nonetheless possible with respect to the right to take extraterritorial police measures. Indeed, circumstances precluding wrongfulness cannot be invoked to justify any resort to force, since, as will be argued by the author,[40] the whole prohibition on the use of force has a peremptory nature. Such circumstances could nevertheless serve as a means for excluding the wrongfulness resulting from the undertaking of police measures carried out in the territory of a state without its consent, since the rule allegedly infringed in this case would merely be the respect for the sovereignty of that state. In other words, it is thanks to such an original distinction that Corten may coherently argue for a restrictive view on the use of force, a 'law against war', whose scope does not, however, encompass the more flexible regime regarding police measures.

Such a distinction is founded upon an in-depth scrutiny of state practice and international case law. Corten addresses the three levels at which it appears: on land,[41] at sea,[42] and in the air.[43] It is on the basis of a similar comprehensive analysis that he identifies the two main criteria for qualifying a force as a military force or a police measure: the gravity of the force[44] and the intention behind this force.[45] Many examples are given in order to support this conclusion. For instance, the minor gravity of the force used by the Israeli commandos in order to abduct Adolf Eichmann from Argentina in 1960 is indicative of the *police* nature of this action. By contrast, the significant gravity of the US military operation in Panama, in 1989, notably aimed at abducting General Noriega, clearly reveals the *use-of-force* nature of this operation.[46] It is in light of this distinction and these criteria that Corten addresses the more debated question of the qualification of 'targeted' military operations,[47] encompassing all limited coercive actions undertaken in a foreign territory, such as the 'pursuit of an armed band of criminals who ha[ve] crossed the frontier'.[48] He then completes his analysis by summarizing a series of questions to which the answers are intended to facilitate the assessment of the two above-mentioned criteria in a particular case. Those questions relate to the place where the coercive action was taking place, the context in which it occurred, the persons who decided

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39 Ibid., at 51–92.
40 Cf. subsection 4.2, *infra*.
41 Corten, *supra* note 4, at 52–5.
42 Ibid., at 55–60.
43 Ibid., at 60–6.
44 Ibid., at 67–76.
45 Ibid., at 76–84.
46 Ibid., at 67.
47 Ibid., at 84–90.
48 Corten refers to the actions that the ILC has considered as only infringing the sovereignty of the foreign state in its work on the state of necessity (ibid., at 84).

to undertake and carry it out, the target thereof, the issue of whether it has given rise to confrontation between the agents of two states, and the scope of the means implemented by the intervening state.[49]

Such considerations, especially those related to the gravity and intention criteria, raise several remarks. The gravity criterion is undoubtedly decisive for assessing whether an armed (or military)[50] force is a use of force within the meaning of Article 2(4) of the UN Charter or a police measure. In identifying the threshold under which a coercive action must be considered as a police measure, Corten nonetheless appears to include precedents or examples that do not seem to involve any armed force at all in the sense in which this notion is commonly understood. In his reasoning, he analyses the passages of foreign military aircraft or missiles in the airspace of a state as not reaching the threshold necessary for being qualified as a use of force.[51] He reaches a similar conclusion with respect to the hypothetical situation in which 'soldiers cross the border illegally to sunbathe on the beach on another state's territory'.[52] As entailing no physical violence, causing or intended to cause no damage to persons or property, one may wonder whether those actions involve any force at all and are relevant in analysing the distinction between the concepts of use of force and police measures. In fact, the book does not contain any specific analysis of the notion of armed force that seems common to both concepts.

Corten also ascribes a significant role to the intention of states. At first glance, this may be quite unexpected, especially given his restrictive approach adopted in the matter. It is indeed well known that intention is a very subjective and, therefore, malleable criterion, which may be easily interpreted by states in a way as supporting their views. It is, moreover, difficult to identify it in practice. Corten is perfectly aware of such risks and makes an effort to define this criterion in a restrictive way. While asserting that such a criterion merely means *the intention to coerce one state to do or not to do something* by force,[53] he immediately makes it clear that it must not be confused with the objectives or motives pursued by a state using force. Basically, Corten wants to show that his definition of intention is unrelated to the argument – which is sometimes invoked in legal literature, as will be explained below[54] – that a military action should not be considered as amounting to a use of force prohibited under Article 2(4) of the UN Charter if it is not directed against the territorial integrity or political independence of a state or if it is exercised in a manner compatible with UN purposes. In Corten's view, this argument bears on the scope of the prohibition on the use of force while the intention criterion, as he

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49 Ibid., at 91–2.

50 The adjective 'armed' seems better suited than the adjective 'military' to qualify the notion of force prohibited under the UN Charter. It is obvious that an armed force falls within the scope of Art. 2(4) of the Charter, even if it is not committed by 'military' means; see, on this subject, R. Kolb, *Ius contra bellum: Le droit international relatif au maintien de la paix* (2009), 246, 290; P. M. Eisemann, 'Attaque du 11 septembre et exercice d'un droit naturel de légitime défense', in K. Bannelier, T. Christakis, O. Corten, and B. Delcourt (eds.), *Le droit international face au terrorisme: Après le 11 septembre 2001* (2002), 242.

51 Corten, *supra* note 4, at 86.

52 Ibid., at 84.

53 Ibid., at 76.

54 Cf. subsection 4.6, *infra*.

defines it, bears on the qualification to be given to a coercive action, either a use of force or a police measure.[55] This conceptual distinction is clearly relevant. Yet, Corten's definition of the intention criterion remains flexible. One may still hardly apply it in practice. It is, moreover, difficult to differentiate it from the criterion based on the objectives of a use of force. One could perfectly argue that, when invading Panama in 1989, the United States did not want to coerce Panama to do or not to do something or, more generally, to act against this state, but had the mere intention, for example, to protect their citizens. Why, when applying the intention criterion alone, could one not qualify this use of force by the United States as not amounting to a use of force within the meaning of Article 2(4) of the UN Charter? Why should one accept the validity of such argument only in cases like the Israeli abduction of Adolf Eichmann in Argentina? More generally speaking, all the limited self-defence actions undertaken in response to attacks by non-state actors could clearly be argued as not having involved any intention to coerce the state in the territory of which they took place to do or not to do something. Yet, they were considered by the intervening state as well as other states as an international use of force whose justification was claimed to be based on self-defence under Article 51 of the UN Charter.[56]

Such problems could be attenuated by restricting the meaning of the notion of intention and by not placing it on an equal footing with the gravity criterion, but rather by subordinating the former to the latter. State practice[57] clearly evidences that intention is an element taking part in the qualification of an armed action as a use of force or, at least, as an armed attack. However, this element must be related not to the *content* (or object) of the intention – that is, requiring, as Corten contends it, an assessment of whether the intervening state intended to coerce another state to do or not to do something – but rather to the *existence* of the intention itself – that is, requiring an assessment of whether the armed force was deliberate and not accidental or erroneously resorted to. Accordingly, frontier incidents should not be considered as uses of force within the meaning of Article 2(4) of the UN Charter, since such incidents often result from the crossing by mistake of frontiers by military troops or the uses of force by soldiers who had not been given any instruction from their government to that end.[58] Although more restrictive, such conception of the notion of intention still remains subjective and difficult to assess in practice. This shows that intention must be 'subordinated' to the gravity criterion. This criterion, which entails a more objective assessment, actually proves to be an easy means for revealing prima facie the existence or not of the intention, a high level of gravity of force supposing that such a force was not accidentally or erroneously resorted to, while a low level of gravity suggests the absence of any intention. This role

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55 Corten, *supra* note 4, at 77.

56 See, e.g., the US limited interventions in Afghanistan and Sudan in 1998 in response to alleged attacks committed by al Qaeda against US embassies abroad.

57 See, especially, the debates preceding the adoption of the UNGA Resolution 3314 (XXIX); see also some precedents in which states argued that they had not intentionally resorted to force and that such use of force could not, therefore, be seen as an act of aggression: see statements of Vietnam in 1964 (UN Doc. S/PV.1121, at 2) and Portugal in 1972 (UN Doc. S/10810, at 1) attempting to disqualify their use of force in Cambodia and Senegal, respectively.

58 See, supporting such a view on the notion of frontier incidents, note 57, *supra*.

of presumption, which is played by the gravity criterion with regard to intention, may find some support in state practice[59] and legal literature.[60] It seems better suited to guarantee international legal security, as it gives priority to more objective factors without preventing at the same time adapting the solution to the particular circumstances of the case. Indeed, as a presumption, the conclusion reached on the basis of the gravity criterion may be rebutted by the proof of the existence or absence of intention.

### 3.2. Threat of force

Having analysed the notion of use of force, Corten undertakes the study of the second situation, which is prohibited under Article 2(4) of the UN Charter – that is, threat of force. This study is particularly welcome, since there are very few general reflections on that issue in legal literature.[61] He analyses the meaning of the notion of threat of force as well as the legal regime applicable to this situation. Based on a detailed analysis of state practice, international case law, and the work of the International Law Commission (ILC), Corten's definition of the threat of force is clearly restrictive. In Corten's view, only identified, clearly established, and expressly formulated threats fall under Article 2(4) of the UN Charter. In other words, vague risks and uncertain and implied threats are excluded from the scope of this provision. Corten's positions about the scope of the prohibition on the threat of force are almost entirely devoted to refuting the arguments put forward by Romana Sadurska on this issue in a paper published in 1988 in the *American Journal of International Law*.[62] In her paper, Romana Sadurska concludes that there is a 'disjunction between the use of force as such, which is strictly prohibited by Article (4), and the threat of such use of force, which is supposedly prohibited only in a more flexible manner'.[63] Defending the symmetry between the threat of force and the corresponding use of force, Corten convincingly deconstructs all the arguments allegedly supporting the opposite view. Again, such a deconstruction is based on an all-encompassing study of state practice and international case law.[64]

## 4. THE LAW AGAINST WAR (*JUS CONTRA BELLUM*)

Having explained the positivist method that he has chosen to follow throughout his book and having expounded his restrictive interpretation of the notions of use and threat of force, Corten is able to develop his idea of a law *against* war and describe this law: the exclusion of non-state entities from the scope of the law

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59 See declarations made by states in relation to the claimed frontier incidents between Vietnam and Cambodia in 1964 (Cambodia, UN Doc. S/PV.1119, at 15; China, UN Doc. S/PV.1121, at 10) and between Portugal and Senegal in 1972 (Sudan, UN Doc. S/PV.1667, at 8–9). See also declarations made by states during the preparatory works of the UNGA Resolution 3314 (XXIX), and, e.g., the declaration by the Russian representative (UN Doc. A/2638, para. 67).

60 See, e.g., I. Brownlie, *International Law and the Use of Force by States* (1963), 366.

61 See, nonetheless, the recent book published by N. Stürchler, *The Threat of Force in International Law* (2007).

62 R. Sadurska, 'Threat of Force', (1988) 82 AJIL 239.

63 Corten, *supra* note 4, at 111.

64 Ibid., at 115–24.

on the use of force (subsection 4.1); the inadmissibility of invoking circumstances precluding wrongfulness in order to justify any violation of this law (subsection 4.2); the right for third states to provide military support only if this support is validly consented to by the effective and legitimate authorities, and, in case of civil wars, only if it is not designed to impact on the outcome of the conflict (subsection 4.3); the right to resort to force under prior and explicit UNSC authorization (subsection 4.4); the right to use force in self-defence only in response to an actual armed attack committed by the regular forces of a state or by non-state actors in which a state is substantially involved (subsection 4.5); and the exclusion of the right of humanitarian intervention (subsection 4.6).[65]

### 4.1. Do the prohibitions of the use of force and self-defence apply to non-state actors?

This chapter on the application of the law on the use of force to non-state actors is divided into two parts, the first being devoted to non-state political entities and the second to private groups. In the first part, Corten starts by demonstrating the inapplicability of the rule prohibiting the use of force to *civil wars*, mainly by relying on the traditional positions usually upheld by states in that respect[66] and by convincingly countering the idea supported by some scholars that changes have been made to that matter by recent state practice, such as the civil war in Yugoslavia in the 1990s.[67] He then draws a similar conclusion regarding the applicability of the law on the use of force to both national liberation struggles[68] and entities of controversial status.[69] This conclusion is mainly founded upon the analysis of declarations made by states during the preparatory works of the general UNGA resolutions on use of force as well as in relation to some particular precedents. This analysis reveals a clear disagreement among different groups of states about these issues. The socialist and non-aligned states were in favour of applying the law on the use of force to *national liberation struggles*, contrary to the Western states, whereas the latter were in favour of recognizing the applicability of this law to *entities of controversial status*, unlike the socialist and non-aligned states.[70] This disagreement could have led the author to acknowledge that ambiguity remains on that point. Yet, Corten's unequivocal rejection of the applicability of the law on the use of force, including self-defence, to the aforesaid entities in the light of state practice may be explained by both his assumption that it was initially the case and his conclusion that no general consensus has emerged in practice evidencing some change in that respect. This is actually in line with the general questionable methodological choice that he has implicitly endorsed, according to which, as mentioned above, he starts his

65 See, e.g., for a general overview of all these points, J. d'Aspremont, 'Mapping the Concept behind the Contemporary Liberalization of the Use of Force in International Law', (2009–10) 31 *University of Pennsylvania Journal of International Law* 1089.

66 Corten, *supra* note 4, at 127–30.

67 Ibid., at 131–5.

68 Ibid., at 135–49.

69 Ibid., at 149–59.

70 Ibid., at 160.

analysis of contemporary state practice by presuming that all the currently debated applications of the law on the use of force were originally, directly or indirectly, prohibited (cf. sub-subsection 2.2.2, *supra*).

In any event, the inapplicability of the prohibition on the use of force with respect to entities of controversial status may now find clear and direct support in ICJ case law, especially since the ICJ 2010 advisory opinion in the *Kosovo* case. The Court indeed held in this Opinion:

> In General Assembly resolution 2625 (XXV) . . ., which reflects customary international law . . ., the General Assembly reiterated '[t]he principle that States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State'. This resolution then enumerated various obligations incumbent upon States to refrain from violating the territorial integrity of other sovereign States. In the same vein, the Final Act of the Helsinki Conference on Security and Co-operation in Europe of 1 August 1975 . . . stipulated that '[t]he participating States will respect the territorial integrity of each of the participating States' (Art. IV). Thus, *the scope of the principle of territorial integrity is confined to the sphere of relations between States.*[71]

It is true that the entity at stake was an entity of controversial status, namely Kosovo. However, nothing a priori precludes one from applying the ICJ conclusions to any non-state entity. Those conclusions seem to contradict the position upheld by the Independent International Fact-Finding Mission on the conflict in Georgia – convincingly criticized by Corten[72] – that 'in so far as the parties to the internal armed conflict accept . . . them in particular agreements, Articles 2(4) and 51 of the UN Charter . . . apply to their relations'.[73]

Although particularly well structured and illustrated, Corten's reasoning is sometimes confusing. In some parts of his argumentation, he indeed analyses the question of the applicability of the law on the use of force to non-state actors by wondering whether it has been admitted that those actors could be the authors of an armed attack triggering the right of self-defence of the victim state.[74] Yet, the law with respect to which the applicability to non-state actors is questioned encompasses the prohibition on the use of force and the right of self-defence. The issue at stake is, therefore, to analyse whether those actors are *bound* by the prohibition on the use of force under Article 2(4) of the UN Charter and/or are *holders* of the right to respond in self-defence to an armed attack under Article 51 of this Charter and not whether they may commit an armed attack. If it was considered that attacks by non-state actors might amount to an armed attack in the sense of Article 51, then this would not, however, mean that the law on the use of force would be applicable to them.

This remark is particularly helpful in responding to the theoretical objections made by Corten against the development of the law on the use of force towards

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71 *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion of 22 July 2010, available online at www.icj-cij.org/docket/files/141/15987.pdf, para. 80 (emphasis added).

72 Corten, *supra* note 4, at 158.

73 *Report*, 30 September 2009, Vol. II, at 239–42, available online at www.ceiig.ch/pdf/IIFFMCG_Volume_II.pdf.

74 Corten, *supra* note 4, at, inter alia, 129, 134, 148.

the recognition of a right to self-defence in response to an armed attack committed by non-state actors only – that is, attacks by private groups, especially terrorists. Contrary to the mainstream of the legal literature,[75] Corten concludes in the second part of this chapter that such a right has not emerged yet. His reasoning is formulated in four main steps. The first relates to the letter as well as the object and purpose of the law on the use of force.[76] Corten's main argument in this regard is that state declarations clearly evidence that the prohibition on the use of force and the right of self-defence are still deemed as concerning only 'international relations' as relations among states.[77] The author moreover contends that the existing legal framework provides sufficient means for fighting against terrorism.[78] Finally, he claims that the recognition of a right to self-defence in response to private armed attacks would lead to absurd legal consequences, as, in his view, private groups should be considered as bound by Article 2(4) of the UN Charter and, having the right to act in self-defence in case they are themselves attacked, they should be recognized as having an international legal personality.[79] The second, third, and fourth elements upon which Corten bases his position against a right to self-defence in response to private armed attacks are state practice,[80] the work of the ILC,[81] and ICJ case law,[82] respectively. Those arguments deserve to be discussed.

A first general comment is that the question of the right to self-defence in response to private armed attacks does not seem to have been addressed from the most suitable perspective. Indeed, this question does not appear to be related to the applicability of the law on the use of force to private groups. Those groups may perfectly well be the authors of a factual occurrence, an armed attack – which means a force of some level of gravity (cf. subsection 3.1, *supra*) – without being *bound* by the prohibition on the use of force or being the *holders* of a right of self-defence under the UN Charter – that is, without the regulation on inter-state use of force being applicable to them. To be the author of an armed attack triggering the right of self-defence and to be the holder of such a right are definitely not the same thing. It seems difficult to share Corten's implicit reasoning that private groups must logically be considered as having themselves a right to self-defence when they are attacked – and, therefore, as enjoying an international legal personality – once it is admitted that they can commit an armed attack under Article 51 of the UN Charter. Although a dog can attack a person and possibly trigger this person's right of self-defence under the national legislation of some states,[83] it is clear that this dog has no right of self-defence if it is itself attacked – nor does it enjoy any legal personality. In any event,

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75 See the numerous scholars quoted by J. J. Paust, 'Self-Defence Targetings of Non-State Actors and Permissibility of US Use of Drones in Pakistan', (2010) 19 JTLP 237, at 238–41, footnote 3.

76 Corten, *supra* note 4, at 162–9.

77 Ibid., at 162.

78 Ibid., at 170–2. Corten's reasoning on that issue is certainly debatable (see the three situations envisaged by the author); constraints of space, however, prevent us from addressing it here.

79 Ibid., at 172–4.

80 Ibid., at 174–86

81 Ibid., at 186–8.

82 Ibid., at 188–96.

83 See, e.g., in the United States, *Devincenzi v. Faulkner* (1959) 174 Cal.App.2d 250, at 254–5.

one could expect that more specific developments would have been provided for by the author in order to support this highly questionable position that he indirectly endorses.

Moreover, admitting that private groups may commit an armed attack triggering the right of self-defence of the victim state does not mean that the exercise of this right would no longer be concerned with international relations 'as relations among states'. Again, it is uncontested that the right of self-defence, like the prohibition on the use of force,[84] is confined to the sphere of relations between states. Yet, even if exercised in response to a private armed attack, the action undertaken in self-defence by the victim state will remain in the sphere of international relations when it is exercised in the territory of another state – which must, moreover, as will be seen below, not be controlled by the state acting in self-defence. In this case, as in any other cases in which 'classical self-defence' is exercised, the action is still carried out by a *state*, which is the holder of the right of self-defence under Article 51 of the UN Charter, in the territory of another *state*, whose protection against unlawful use of force under Article 2(4) of the UN Charter should have been considered as violated if this action had not been justified by self-defence. It is therefore clear that such action in self-defence, although responding to a private armed attack, is still concerned with relations among states.

In fact, there is only one particular issue at stake that relates to the applicability of the law: indentifying the international rule under which the attacks committed by the non-state actors can be considered as unlawful and, as a result of such unlawfulness, trigger the right of self-defence of the victim state. Indeed, in order to amount to an armed attack within the meaning of the law on self-defence, the attacks must consist of a force that is not only serious and deliberate (cf. subsection 3.1, *supra*), but also unlawful. Again, it is clear that such unlawfulness cannot be assessed in the light of Article 2(4) of the UN Charter with respect to private armed attacks, since this article only applies to states. Referring to this rule is only relevant when determining whether an attack committed by a state is unlawful and may trigger the right of self-defence of the victim state. Yet, state practice clearly evidences that attacks committed by non-state actors have sometimes been clearly and unanimously judged as unlawful.[85] It may be argued that the rule in the light of which this judgement can be made is the prohibition on international terrorism. Although the comprehensive convention prohibiting international terrorism has not been adopted yet, debates held regarding the current draft clearly show that the adoption thereof is delayed because of problems related to the scope of the prohibition, mainly the issue of excluding some forms of struggle by non-state actors, such as the fight for self-determination,[86] from the definition of terrorism. The principle itself of

84 Cf. note 71, *supra*, about the ICJ Advisory Opinion in the *Kosovo* case.

85 See, e.g., the 9/11 attacks against which the United States responded by resorting to self-defence in Afghanistan in 2001.

86 See, e.g., the declarations made by Pakistan, speaking on behalf of the member states of the Organization of the Islamic Conference, UN Doc. A/C.6/62/SR.3, para. 47; Kuwait, para. 76; Bahrain, para. 97; Zambia, para. 104; Sudan, UN Doc A/C.6/62/SR.4, para. 28; Syria, para. 63; Qatar, para. 91; Cuba, para. 98; Yemen, A/C.6/63/SR.3, para. 30; Belarus, para. 36; Iran, para. 83.

prohibiting international terrorism is not contested.[87] In each particular case, states can then assess whether attacks committed by non-state actors are unlawful acts of international terrorism without basing such a judgement on Article 2(4) of the UN Charter. In the past, some states, mainly the socialist ones, have expressly claimed that the attacks committed by non-state actors could not trigger the right of self-defence of the alleged victim state, since those attacks were not unlawful terrorist acts, but legitimate acts of resistance against occupying powers or colonial regimes.[88]

Another general comment on Corten's reasoning regarding the right to respond in self-defence to private armed attacks concerns his interpretation of state practice on that issue. The author, indeed, concludes that the practice does not evidence any change in the law on the use of force towards the recognition of such a right. This conclusion is based upon two particular interpretations. First, Corten rejects a number of precedents as being not relevant for discussing the issue at stake. In his view, some precedents, such as the US Operation Enduring Freedom in Afghanistan in response to the 9/11 attacks[89] or the Israeli invasion of Lebanon in 2006 in reaction to the rocket attacks by Hezbollah,[90] are precedents in which the action in self-defence was considered as responding not only to the attacks by the non-state actors, but also to the armed attack committed by the host state, resulting from the implication of this state in these attacks. According to Corten, those precedents are only pertinent in analysing whether the traditional definition of state armed attack, which includes attacks committed by armed bands in which a state is substantially involved, has evolved and now encompasses minor state involvements in attacks by private groups. As a result, the author only discusses those precedents in relation to that question (cf. subsection 4.5, *infra*). In a second step, Corten nonetheless acknowledges the existence of some precedents in which self-defence was apparently exercised in response to attacks committed by non-state actors only, such as the 2008 Turkish intervention in Iraq in response to the Kurdish attacks from the Iraqi territory.[91] After analysing those precedents, he concludes, however, that they did not lead to any development of the law on the use of force, since the claimed change was not clearly formulated nor was it accepted by the international community as a whole.

One must admit that the latter precedents are not clear and sufficiently repeated to enable one to formulate any firm conclusion on the issue at stake. However, some of the precedents rejected by Corten carry more weight, since the right of self-defence was clearly invoked and accepted by a significant number of states,[92] at

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87 See, for a clear view that a prohibition on international terrorism is unanimously agreed upon, Draft Report of the Ad Hoc Committee Established by General Assembly Resolution 51/210 of 17 December 1996, 25–26 February and 6 March 2008, UN Doc. A/AC.252/2008/L.1, Annexe I, para. 1.

88 See condemnations by those states of the many actions allegedly undertaken in self-defence by Israel, South Africa, and Portugal in response to attacks committed from abroad by the Palestinian Liberation Organization (PLO), the African National Congress (ANC) or the South-West African People's Organisation (SWAPO), and the people struggling against Portuguese colonial power, respectively; see, for a general comment on those condemnations, Gray, *supra* note 2, at 139.

89 Corten, *supra* note 4, at 177–83.

90 Ibid., at 183–4.

91 Ibid., at 184.

92 This is obviously the case with respect to the US reaction in Afghanistan to the 9/11 attacks in 2001.

least as a matter of principle.[93] Yet, there is actually no decisive reason to consider those precedents as not relevant. It is true that, in each of those precedents, the intervening state and some other states have emphasized the existence of a link between the attacks committed by the non-state actors and the host state, the latter being generally considered as unwilling or unable to put an end to the attacks committed from its territory. However, the attacks that have been considered as the 'armed attack' triggering the right of self-defence under Article 51 of the UN Charter were those committed by the non-state actors and not the low level of implication of the host state in these attacks. While many states expressly qualified the attacks by the non-state actors as an armed attack or asserted that the state acting in self-defence had been attacked by the non-state actors,[94] they never qualified the host state's behaviour in the same way nor considered that the state acting in self-defence had been (indirectly) attacked by this state.[95] As argued in more detail elsewhere,[96] such references to the host state's behaviour do not actually play any role in the definition of the attacks as armed attacks in the meaning of Article 51 of the UN Charter. They merely serve as a means for emphasizing the necessity of the action in self-defence. Indeed, the condition of necessity requires, in one of its multiple aspects, that the action in self-defence be resorted to as a last resort – that is, after all the practical alternatives to self-defence have been exhausted.[97] The fact that the host state is considered as unable or unwilling to bring to book the activities of the groups that are hostile to another state is evidence that the latter can no longer rely on any action from the host state in order to defend itself, which

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93 Although the Israeli intervention in Lebanon in 2006 was condemned as being disproportionate, many states recognized, as a matter of principle, the right of Israel to resort to self-defence in response to the rocket attacks by Hezbollah: see, e.g., statements from Argentina (UN Doc. S/PV.5489, at 9); Japan (UN Doc. S/PV.5489, at 12); United Kingdom (UN Doc. S/PV.5489, at 12); Peru (UN Doc. S/PV.5489, at 14, and UN Doc. S/PV.5493 (Resumption 1), at 4); Denmark (UN Doc. S/PV.5489, at 5); Slovakia (UN Doc. S/PV.5489, at 16, and UN Doc. S/PV.5493, at 19); Greece (UN Doc. S/PV.5489, at 17, and UN Doc. S/PV.5493 (Resumption 1), at 3); the United States (UN Doc. S/PV.5493, at 17); Russia (UN Doc. S/PV.5493 (Resumption 1), at 2; Ghana (UN Doc. S/PV.5493 (Resumption 1), at 8; France (UN Doc. S/PV.5493 (Resumption 1), at 12); Finland speaking on behalf of the European Union (UN Doc. S/PV.5493 (Resumption 1), at 16); Switzerland (UN Doc. S/PV.5493 (Resumption 1), at 18); Brazil (UN Doc. S/PV.5493 (Resumption 1), at 19); Norway (UN Doc. S/PV.5493 (Resumption 1), at 23); Australia (UN Doc. S/PV.5493 (Resumption 1), at 27); Turkey (UN Doc. S/PV.5493 (Resumption 1), at 28); Djibouti (UN Doc. S/PV.5493 (Resumption 1), at 32); Canada (UN Doc. S/PV.5493 (Resumption 1), at 39); and Guatemala (UN Doc. S/PV.5493 (Resumption 1), at 41).

94 See, e.g., concerning the US reaction in Afghanistan to the 9/11 attacks in 2001, the statement from France in relation to the right of self-defence referred to by UNSC Resolution 1368 (2001) adopted after the attacks: '[Les membres du Conseil de sécurité ont] estimé, à l'unanimité, que 6000 personnes tuées par des avions civils devenus des missiles n'[était] plus un acte de terrorisme mais une véritable *agression armée*', in 'La question de la légitimité des ripostes aux attentats terroristes', *Le Monde*, 18–19 November 2001, at 14 (emphasis added); see also the declarations made by member states of collective defensive pacts to which the United States were party (declaration of 2 October 2001 from the NATO Secretary General, Lord Roberston, available online at www.hq.nato.int/docu/speech/2001/s011002b.htm; see, e.g., concerning the Israeli reaction to the attacks by Hezbollah in 2006, the statements from France (UN Doc. S/PV.5489, at 17); Denmark (UN Doc. S/PV.5493 (Resumption 1), at 7); Ghana (UN Doc. S/PV.5493 (Resumption 1), at 8).

95 This contrasts with other precedents in which the host state was much more involved in the attacks committed by the non-state actors and in which the state acting in self-defence expressly accused this state of having committed an (indirect) act of aggression; see, e.g., statements from Israel in relation to attacks committed by non-state actors from Egypt in 1956 (UN Doc. S/PV.749, at 14–15) and Jordan in 1968 (UN Doc. S/PV.1409, at 13–14) and 1969 (UN Doc. S/PV.1467, at 11–12).

96 R. van Steenberghe, 'Self-Defence in Response to Attacks by Non-State Actors in the Light of Recent State Practice: A Step Forward?', (2010) 23 LJIL 183, at 199–202.

97 Cf. subsection 4.5, *infra*, about that aspect of the condition of necessity.

increases the necessity to act in self-defence. Corten's particular interpretation of the aforementioned precedents, according to which emphasis put on the host state's behaviour means that this state was accused of an armed attack, actually seems to result from his intimate – but, as seen above, highly questionable – conviction that the right of self-defence will lose its international character when exercised in response to private armed attacks and the ensuing tendency to seek as much as possible to attribute such attacks to a state. Those precedents should not, therefore, be disregarded.

As a result, a clear trend towards recognizing a right to self-defence in response to non-state actors may be inferred from such precedents altogether with the other less-clear precedents. This conclusion is particularly arguable if one keeps in mind that, contrary to Corten's implicit methodological approach, the claimed evolution only implies an interpretation rather than the modification of a former rule and must not accordingly meet the strict conditions regarding the quality and quantity of state practice under which a modification of the law on the use of force is permissible (cf. sub-subsection 2.2.2, *supra*). Indeed, the most obvious unsettled question regarding this law at the time of the drafting of the UN Charter was the right to respond in self-defence to private armed attacks. Although this right was not expressly admitted at the San Francisco Conference, it was not expressly excluded either, whether before or at the time of the drafting of the Charter. Article 51 of this Charter does not expressly require that the armed attack triggering the right of self-defence has to be committed by a state. Even if it may be argued that the law of self-defence has been implicitly interpreted as entailing such a requirement,[98] this arguable position nevertheless remains a matter of interpretation. It does not assert the existence of a clearly well-established rule whose evolution should be considered as a modification thereof.

In a last part of the chapter on the applicability of the law on the use of force to non-state entities, Corten refers to ICJ case law in order to support his conclusion against the existence of a right to self-defence in response to private armed attacks. Yet, as already mentioned above,[99] the Court never expressly ruled out such a right. It was actually never asked to pronounce on this issue. In both the *Nicaragua* and *Armed Activities* cases, the United States and Uganda accused Nicaragua and Congo of having committed an armed attack by themselves – that is, through their involvement in the attacks launched in Salvador and Uganda by the anti-Salvadorean and anti-Ugandan rebels, respectively. They never claimed to have acted in self-defence, only in response to the attacks committed by those rebels. Nothing may therefore be inferred from those cases on the right to use force in self-defence in response to private armed attacks. It is nonetheless true that the Court stated in the *Wall* opinion that 'Article 51 of the Charter recognizes the existence of an inherent right of self-defence in

98 See, in this way, Separate Opinion of Judge Kooijmans annexed to the judgment of the ICJ in *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment of 19 December 2005, [2005] ICJ Rep. 168, at 313–14, para. 28 (hereafter, '*Armed Activities*').

99 Cf. sub-subsection 2.2.2, *supra*.

the case of armed attack *by one State* against another State'.[100] Yet, this reference is particularly brief. It must actually be read in the context of the whole of the Court's reasoning on this issue, especially in light of the subsequent sentences:

> However, Israel does not claim that the attacks against it are imputable to a foreign State. The Court also notes that Israel exercises control in the Occupied Palestinian Territory and that, as Israel itself states, the threat which it regards as justifying the construction of the wall originates within, and not outside, that territory. . . . Consequently, the Court concludes that Article 51 of the Charter has no relevance in this case.[101]

The Court's reference to an 'armed attack by one State' may arguably be interpreted as meaning that the law of self-defence is not relevant when the armed attack is not committed by a *foreign* state or does come from a foreign territory that is *controlled* by the state acting in self-defence. Such a conclusion is consistent, since invoking the law of self-defence is only relevant if it serves as a means for justifying a use of force that would otherwise be contrary to the prohibition on the use of force. This necessarily entails that such use of force has affected the sovereignty of *another state* and has not been exercised in a territory controlled by the state acting in self-defence. In the latter case, the use of force should normally be assessed in the light of the *jus in bello* rules on occupation.[102] In sum, those considerations do not preclude the assertion of a right to self-defence in response to private armed attacks when those attacks are committed from a foreign territory, which is not moreover controlled by the state acting in self-defence.

### 4.2. Can circumstances precluding unlawfulness be invoked to justify a use of force?

A specific analysis of the possibility to invoke circumstances precluding wrongfulness in the field of use of force was particularly needed. Several scholars, indeed, argue that such circumstances, especially the state of necessity, can justify some limited military actions, mainly interventions in a foreign state for humanitarian purposes[103] or for targeting terrorist groups sheltered by another state.[104] Such a position is generally derived from the idea that only one part of the prohibition on the use of force, namely the prohibition on aggression, has a peremptory nature. As a result, Article 26 of the ILC's articles of state responsibility, according to which no circumstance may 'preclud[e] the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm', would not prevent the invocation of a circumstance precluding wrongfulness to justify a minor

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100 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, [2004] ICJ Rep. 136, at 194, para. 139 (emphasis added).

101 Ibid.

102 See, e.g., on this subject, C. J. Tams, 'Light Treatment of a Complex Problem: The Law of Self-Defence in the Wall Case', (2005) 16 EJIL 963, at 970.

103 See, e.g., O. Spiermann, 'Humanitarian Intervention as a Necessity and the Threat or Use of *Jus Cogens*', (2002) 71 NJIL 530; I. Johnstone, 'The Plea of "Necessity" in International Legal Discourse: Humanitarian Intervention and Counter-Terrorism', (2004–05) 43 Col. JTL 337, at 365 ff.

104 See, e.g., T. Christakis, 'Vers une reconnaissance de la notion de guerre préventive', in K. Bannelier, O. Corten, T. Christakis, and P. Klein (eds.), *L'intervention en Irak et le droit international* (2004), 29 ff.

use of force that would not violate the prohibition on aggression. Such reasoning was suggested by the ILC's Special Rapporteur on state responsibility.[105]

Corten convincingly refutes all these arguments and reasoning in three main steps. First, he demonstrates that the whole prohibition on the use of force has a peremptory nature. Such demonstration is carried out with great care. The author mentions an impressive list of declarations in which states expressly consider the prohibition on the use of force as pertaining to *jus cogens*.[106] He also analyses the treaty practice from which he infers that no derogation from the prohibition on the use of force has ever been foreseen by the state parties to the treaties dealing with the use of force.[107] Second, Corten demonstrates that the ILC has not finally endorsed the opinion, evoked earlier in the context of its work on state responsibility, that a circumstance precluding wrongfulness could justify a minor use of force. This demonstration is particularly convincing.[108] As emphasized by the author, the ILC finally stated that it did not want to settle this issue,[109] while the new Special Rapporteur on state responsibility explicitly asserted his reluctance to divide the prohibition on the use of force and attribute a peremptory nature only to one part of it.[110] This reluctance also seems to have been shared by the ILC itself, as confirmed in other parts of its work.[111] Third, and finally, Corten demonstrates that the state of necessity has never been accepted in state practice as a legal basis for justifying any use of force. Many precedents are scrutinized in that respect.[112] The author persuasively shows that, in many of those precedents, the state of necessity was not the true official legal justification invoked by the intervening state, whereas it was not elaborately articulated in the rare precedents in which it seems to have been called upon.

Although Corten's conclusions are incontestable, parts of his reasoning call for some comments. A first comment concerns the list of declarations that he mentions in order to support his conclusion that the whole prohibition on the use of force is considered by the entire international community as having a peremptory nature. However, apart from a few states,[113] the majority of states did not expressly claim that both the prohibition on the use of force and the prohibition on aggression pertained to *jus cogens*. They merely recognized that the prohibition on the use of force had such a nature, without admittedly limiting such a nature to the prohibition on aggression but without specifying either that this nature covered the whole prohibition, although the issue had already been raised within the ILC. Therefore, it is not sure that, when having made such declarations, those states were aware of or felt concerned by this issue. One may then wonder whether a clear and firm *opinio juris* may be inferred from those declarations against the attribution of a peremptory

105 UN Doc. A/CN.4/318/Add.5–8, paras. 55–56.
106 Corten, *supra* note 4, at 204–7.
107 Ibid., at 211–13.
108 Ibid., at 217–25.
109 UN Doc. A/56/10, para. 21.
110 UN Doc. A/CN.4/498/Add.2, para. 287.
111 See, e.g., Art. 50 of the ILC's Articles on State Responsibility.
112 Corten, *supra* note 4, at 225–46.
113 See, e.g., statement from Mexico, A/C.6/35/SR.48, para. 17.

nature only to one part of the prohibition. Another and more fundamental argument, which could have been put forward against such attribution, is to contest the distinction between the notions of use of force and aggression based on the gravity of the force resorted to. It is difficult to imagine any use of force, which already entails a force of some gravity – otherwise it should be analysed as a police measure – (cf. subsection 3.1, *supra*), that would unlawfully be used against a state without amounting to an aggression. The question is not discussed by Corten in this chapter. It is only briefly addressed in the chapter on self-defence (cf. subsection 4.5, *infra*). As will be seen below, Corten asserts that an armed attack within the meaning of Article 51 of the UN Charter must be of a higher level of gravity than a use of force. Yet, the issue is not discussed in detail.

Another comment on Corten's reasoning concerns his criticisms vis-à-vis the position sustained by Judge Simma in his separate opinion in the *Oil Platforms* case, according to which a limited unlawful use of force, short of an armed attack, could justify in response a defensive limited use of force, short of an action in self-defence.[114] This position has the merit of allowing states victim of a minor use of force to respond to it militarily in a proportionate manner without altering the traditional idea that only a serious use of force may amount to an armed attack triggering the right of self-defence. Contrary to what is argued by Corten,[115] Judge Simma's argument does not seem to relate to the notion of armed reprisals as those reprisals are classically understood and now unanimously prohibited. Unlike the military measure described by Judge Simma, armed reprisals do not pursue a defensive objective, but more generally aim at compelling a state by force to comply with some of its international obligations. The element triggering the armed reprisals can, therefore, consist of the violation of any obligation binding upon the state against which reprisals are exercised and not only of the violation of the prohibition on the use of force. Besides, Corten calls into question the interpretation by Judge Simma of the statements made by the ICJ in the *Nicaragua* case and upon which the judge has defended his position.[116] Yet, the abundant literature on the subject clearly shows that the aforementioned ICJ statements are particularly ambiguous

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114 Separate Opinion of Judge Simma, annexed to the judgement of the ICJ in *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgement of 6 November 2003, [2003] ICJ Rep. 161, at 331–2, para. 12.

115 Corten, *supra* note 4, at 229–30.

116 The Court ruled out the argument put forward by the United States that the latter were acting in collective self-defence in response to the alleged military support given by Nicaragua to the anti-Salvadorean rebels, such support being not grave enough, according to the Court, to amount to an armed attack within the sense of Art. 51 of the UN Charter. The Court nonetheless wondered whether the United States could respond to this use of force of lesser gravity by invoking a right of counterintervention, encompassing a use of force short of an action in self-defence. The Court concluded in an ambiguous statement: 'On the legal level the Court cannot regard response to an intervention by Nicaragua as such a justification. While an armed attack would give rise to an entitlement to collective self-defence, a use of force of a lesser degree of gravity cannot, as the Court has already observed (paragraph 211 above), produce any entitlement to take collective countermeasures involving the use of force. The acts of which Nicaragua is accused, even assuming them to have been established and imputable to that State, could only have justified proportionate counter-measures on the part of the State which had been the victim of these acts, namely El Salvador, Honduras or Costa Rica. They could not justify counter-measures taken by a third State, the United States, and particularly could not justify intervention involving the use of force', *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment of 27 June 1986, [1986] ICJ Rep. 14, at 127, para. 249 (hereafter, '*Nicaragua*').

and clearly leave the door open to the interpretation sustained by Judge Simma.[117] Finally, Corten notes that, in the *Oil Platforms* case, the ICJ did not discuss whether the United States, although not the victim of a serious use of force amounting to an armed attack by Iran, could have responded in a limited way to this use of force, in accordance with Judge Simma's idea. In Corten's view, such a silence is indicative of the reluctance of the Court to endorse this idea.[118] Yet, the ICJ's silence is entirely consistent. Indeed, Judge Simma's argument is only applicable if the use of force that does not amount to an armed attack is considered as such because of its low level of *material* gravity. It is only against such a use of force that one can imagine a response that is also of limited gravity and, more particularly, of a lower level of *material* gravity than the one characterizing any action in self-defence. In the *Oil Platforms* case, it is true that the Court did not qualify the alleged Iranian use of force as sufficiently *grave* to amount to an armed attack against the United States. However, the gravity considered by the Court was related not to the *material* gravity of the contemplated Iranian use of force, but to the *intention* of Iran to specifically target the United States.[119] Yet, such intentional gravity, unlike material gravity, cannot be graduated into different levels. One can hardly envisage the state victim of an indiscriminate use of force resorting to a limited 'intentional' military response. The intention to target a specific state does or does not exist. As a result, Judge Simma's argument could not be applied in that case and nothing should be inferred from the ICJ's silence in that respect.

### 4.3. Intervention by invitation

Intervention by invitation is another issue that is neglected in the legal literature on the use of force. Yet, this issue raises many legal questions. Corten addresses all these questions in this chapter. The first and fundamental question relates to the compatibility of consented militarily interventions with the prohibition on the use of force. The author rightly questions in this respect the conclusion reached by the ILC in its final draft on state responsibility, that consent, as a circumstance precluding wrongfulness, can justify a use of force. As he emphasizes, this conclusion is quite paradoxical, since no such circumstance may preclude the wrongfulness resulting from the violation of a peremptory norm like the prohibition on the use of force.[120] He rightly contends that, in relation to use of force, consent does actually not act as a secondary rule (i.e., as a circumstance precluding wrongfulness), but as an intrinsic element of a primary rule, entailing that the consented intervention is actually outside the scope of the prohibition on the use of force. He nonetheless acknowledges that consenting to a genuine use of force could hypothetically be

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117 See, e.g., Kolb, *supra* note 50, at 271; Dinstein, *supra* note 1, at 193–4; J. L. Hargrove, 'The *Nicaragua* Judgment and the Future of the Law of Force and Self-Defense', (1987) 81 AJIL 135, at 138; L. B. Sohn, 'The International Court of Justice and the Scope of the Right of Self-Defense and the Duty of Non-Intervention', in Y. Dinstein (ed.), *International Law at a Time of Perplexity: Essays in Honour of Shabatai Rosenne* (1989), 877; T. J. Farer, 'Drawing the Right Line', (1987) 81 AJIL 112, at 113.

118 Corten, *supra* note 4, at 231.

119 *Oil Platforms*, *supra* note 114, at 192, para. 64.

120 Corten, *supra* note 4, at 253.

contrary to the prohibition on the use of force if consent is provided in a general treaty and not merely given on an ad hoc basis. However, according to him, no consented military operation has ever been conducted in practice on the basis of such kind of treaty.[121]

Corten then analyses the condition under which consent is validly given.[122] On the basis of an in-depth scrutiny of state practice, he concludes that consent must be given prior to the intervention by the state's highest authorities, which excludes the opposition and subaltern authorities. Consent must also be unvitiated, mainly not being given under coercion, as well as clearly established and relevant – that is, be unambiguous, even if it does not have to be given within specific formalities, and bear on the acts that it seeks to justify.

Corten finally addresses the specific problems of the intervention by invitation in the context of internal armed conflicts, such situations being highly problematic notably because several authorities may claim to be the legitimate government. The question of the authority to which the invitation can be consented to is first discussed.[123] Corten concludes that the consent can only come from the government that is internationally recognized as well as exercising an effective authority over the territory. Then, he addresses the most debated question pertaining to the matter, whether a third state is allowed to intervene in civil wars at the invitation of the internationally recognized and effective government.[124] In this respect, reference is usually made in legal literature to the opposing views upheld by the ICJ in the *Nicaragua* case and the International Law Institute in its resolution adopted in 1975. The ICJ a priori recognizes the lawfulness of the intervention at the request of the government[125] while the Institute rejects it if it does not respond to a prior outside intervention,[126] mainly because of the requirement to respect the right of peoples to self-determination, as contended by several members of the Institute.[127] Corten's position is clearly in line with the resolution adopted by the Institute. It is nonetheless more explicit and comprehensive. Analysing this issue from the angle of the purpose of the intervention by invitation, Corten clearly concludes that interventions whose purpose is to influence the outcome of the conflict in violation of the right of people to self-determination are unlawful in principle, while confirming the lawfulness of interventions responding to a prior outside intervention. However, he also expressly recognizes the lawfulness of other interventions by invitation – those whose purpose is precisely not to impact upon the conflict, but to carry out humanitarian aid or to maintain law and order or peace.[128]

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121 Ibid., at 257.

122 Ibid., at 259–76.

123 Ibid., at 277–87.

124 Ibid., at 288–309.

125 *Nicaragua*, *supra* note 116, para. 246.

126 *The Principle of Non-Intervention in Civil Wars*, 15 August 1975, Wiesbaden session, (1975) 56 *Yearbook of the International Law Institute* 536, at 546, Art. 2, para. 1.

127 See, e.g., the declarations of M. Žourek, (1975) 56 *Yearbook of the International Law Institute* 119, at 123–4; M. Münch, ibid., at 125; M. Castrén, ibid., at 126; M. Rousseau, ibid., at 127.

128 This view was expressed by one member of the International Law Institute, M. Skubiszewski, ibid., at 125.

These last considerations merit several remarks. One may first reflect on their relevance. Indeed, the aforementioned interventions, contrary to those whose purpose is to impact upon the conflict or to respond to an outside interference, do not seem to entail any genuine use of force and, as a result, do not seem to be pertinent in any debate on the lawfulness of foreign military interventions in civil wars or, more generally, in any discussion on the use of force. Those considerations nevertheless help to get a more comprehensive view on the question of intervention by invitation. They actually appear as a decisive argument enabling Corten to argue for the unlawfulness of foreign interventions whose design is incompatible with the right of self-determination. Indeed, given the limited state practice directly evidencing the unlawfulness of such controversial interventions, Corten goes to the trouble of showing that the only interventions that have been authorized are those designed to deliver humanitarian aid or to maintain law and order or peace as well as those undertaken in response to a prior outside interference, assuming that the other types of intervention are prohibited under international law.

This reasoning is nonetheless puzzling. It is not because some interventions are authorized that other kinds of intervention are necessarily prohibited. The purpose of such reasoning actually seems to be to emphasize the lack of any practice supporting the controversial interventions. As already shown above, this is a typical debatable aspect of Corten's method, which consists of analysing state practice from the presumed starting point that there is a prohibition with regard to the use-of-force aspect under review (cf. sub-subsection 2.2.2, *supra*). Corten is then able to demonstrate the maintaining of this presumed prohibition by showing that there are no or only few practices evidencing the modification thereof. This chapter is nonetheless specific in the sense that Corten expressly recognizes the lawfulness of some particular kinds of contemporary military intervention. If one follows the restrictive positivist method that he has adopted, such recognition should logically be based on a particularly clear, widespread, and repeated state practice. Yet, the state practice to which he refers lacks such features, especially with regard to the establishment of the right to intervene for humanitarian purposes or for maintaining law and order. The lawfulness of such interventions is indeed based on few as well as merely suggestive state practices.[129] This contrasts with the abundant state practice mentioned[130] in order to support the lawfulness of the intervention designed to respond to a prior foreign intervention.[131] One may wonder whether such a difference in treatment is justified by the fact that the right to intervene for humanitarian purposes or for maintaining law and order does not involve a genuine use of force and that, accordingly, Corten's restrictive method does not apply to this issue. The author does not expressly defend such a view. One is therefore left a little confused with respect to the method that has been adopted in this chapter.

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129 Corten, *supra* note 4, at 290–6.

130 Ibid., at 301–9.

131 The relevance of some of this practice is nonetheless doubtful, as the debates surrounding it were especially concerned with the question of whether collective self-defence was correctly exercised; see, e.g., the debates surrounding the military support given to Lebanon and Jordan in 1958 and the Russian interventions in Hungary (1956), Czechoslovakia (1967), and Afghanistan (1979).

### 4.4. Intervention authorized by the UN Security Council

In contrast with the intervention by invitation, the issue of intervention authorized by the UN Security Council has been widely covered by the legal literature on the use of force.[132] Corten has divided the analysis of this issue into two parts, the first being devoted to the general legal regime of interventions authorized by the UN Security Council and the second to the more controversial question of presumed authorizations. In the first part, Corten starts by confirming the now well-established lawfulness of armed interventions authorized by the UN Security Council,[133] before addressing the two general conditions under which such interventions are lawful:[134] first, the conformity of the resolution authorizing the intervention with the UN Charter (whereby Corten attributes a wide margin of discretion to the UN Security Council, apart from the obligation to qualify the situation as a threat to peace, a breach of the peace or an act of aggression); and, second, the conformity of the military intervention with the UNSC resolution (whereby the question is raised of whether the expression 'all necessary means or measures' mentioned in the UNSC resolution entails the right to use of force and whether the intervention has been limited to the circumstances provided in the resolution). Corten ends this first part by persuasively demonstrating that military interventions cannot be lawfully 'authorized' by another UN body or another subject of international law – that is, by either the UN General Assembly or a regional organization.[135]

Apart from questionable clear-cut conclusions regarding the interpretation of some African texts or declarations on that matter, the meaning of which should be considered as inconclusive, since they have not been put into practice yet (cf. sub-subsection 2.2.2, *supra*), Corten's considerations are particularly convincing. The same may be said about the opinions that he elaborates concerning the more debated question of presumed authorizations. He rightly refutes any interpretation inferring the lawfulness of presumed authorizations from state practice.[136] The main argument is that, in the majority of precedents, this contentious legal basis was never clearly invoked by the intervening states, the justification of the intervention being usually based on another right, such as self-defence or exceptional right to human intervention. Moreover, in all the precedents, including the few in which presumed authorization was invoked, especially by the United States with respect to their interventions in Iraq in the 1990s and in 2003, this legal basis has never been accepted by all the other states. The unlawfulness of presumed authorization is evidenced not only by the lack of precedents supporting it, but also by the declarations, quoted by

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132 See, e.g., on this subject, H. Freudenschub, 'Between Unilateralism and Collective Security: Authorizations of the Use of Force by the UN Security Council', (1994) 5 EJIL 492; N. Blokker, 'Is the Authorization Authorized? Powers and Practice of the UN Security Council to Authorize the Use of Force by "Coalition of the Able and Willing"', (2000) 11 EJIL 541; L.-A. Sicilianos, 'L'autorisation par le Conseil de sécurité de recourir à la force: Une tentative d'évaluation', (2002) 106 RGDIP 5.

133 Corten, *supra* note 4, at 314–16.

134 Ibid., at 316–29.

135 Ibid., at 329–48.

136 Ibid., at 349–89.

Corten, in which many states expressly emphasized their reluctance to admit such a legal basis,[137] as well as by the incompatibility of the latter with the UN Charter.[138]

### 4.5. Self-defence

Self-defence is the oldest and most debated institution under which states are allowed to resort to force.[139] It was already referred to by states before the now well-established general prohibition on the use of force,[140] although its contemporary scope and meaning were shaped at the time at which this prohibition was emerging, during the interwar period. It is understandable that, being the only legal means for unilaterally resorting to force, it was abundantly – most often unlawfully – invoked by states, especially during the Cold War period, when no collective use of force through the UN Security Council was available. Current state practice raises several controversial questions with respect to self-defence. Many of them are related to the scope of the notion of armed attack, whose occurrence, according to Article 51 of the UN Charter, authorizes the triggering of the right of self-defence. Corten analyses those questions in a first part before addressing in a second part the conditions under which this right must be exercised – that is, the necessity and proportionality of the response in self-defence as well as the relationships between this response and the measures decided by the UN Security Council.

In the first part, Corten mainly addresses two controversial issues: preventive self-defence and self-defence in response to indirect aggression. Before analysing these issues, he lists a series of positions that he considers as 'hardly contestable'.[141] He assumes, for example, that an armed attack is a use of force of certain gravity.[142] It is, however, doubtful that such a position is unanimously accepted. This is evidenced by the current doctrinal debates on the right to respond by force to a use of force of minor gravity. Such a right has been very much discussed, notably in the framework of the resolution on self-defence adopted in 2007 by the International Law Institute[143] and concerning the Israeli intervention in Gaza in 2009.[144] This question is actually an

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137 Ibid., at 390–4.

138 Ibid., at 394–8.

139 See, e.g., for recent books on self-defence in international law, T. Ruys, *'Armed Attack' and Article 51 of the UN Charter* (2010); R. van Steenberghe, *La légitime défense en droit international public* (2012).

140 It is usually referred in that regard to the famous *Caroline* case (1837), in W. R. Manning, *Diplomatic Correspondence of the United States: Canadian Relations, 1784–1860*, Vol. 3 (1943), 145. One can also mention other precedents, such as the US interventions in Spanish territory in 1815 (in F. Wharton, *A Digest of the International Law of the United States*, Vol. 1 (1886), 226) or in the United States of Mexico in 1836 (ibid., 420).

141 Corten, *supra* note 4, at 402.

142 Ibid., at 403.

143 This question was one of the most debated questions during the discussions preceding the drafting of the resolution on self-defence (see (2007) 72 *Yearbook of the International Law Institute* 75, especially at 178–85, 206–9, 219–21, 228–9). The result of such discussion was an ambiguous provision that allows diverging interpretations; see the ambiguous point 5 of the resolution: 'An armed attack triggering the right of self-defence must be of a certain degree of gravity. ... In case of an attack of lesser intensity the target State may also take *strictly necessary police measures* to repel the attack', available online at www.idi-iil.org/idiE/resolutionsE/2007_san_02_en.pdf (emphasis added).

144 See the letter, 'Israel's Bombardment of Gaza Is Not Self-Defence – It's a War Crime', published in the *Sunday Times* on 11 January 2009 and signed by numerous scholars, such as I. Brownlie, R. Falk, C. Chinkin, and M. C. Bassiouni, available online at www.timesonline.co.uk/tol/comment/letters/article5488380.ece. While the above-mentioned scholars considered that Hamas's attacks '[did] not, in terms of scale and effect amount

old doctrinal question and there are strong arguments for contending that, provided that it is directed against a state and is unlawful, any use of force may amount to an armed attack triggering a proportionate response in self-defence.[145]

Yet, it is certainly not currently the most debated question. One of such questions is the right of preventive self-defence, namely the right to counter the threat of an armed attack in self-defence. Corten's main argument is that such a right does not exist in the current state of international law, since no general consensus in favour of it has emerged from state practice. While some states are reluctant to prohibit preventive self-defence in general terms, a significant number of states have always been opposed to recognizing it.[146] This is an indisputable fact. However, Corten's argument is again based on the questionable methodological approach, according to which, as already mentioned above (cf. sub-subsection 2.2.2, *supra*), state practice is analysed from the presumption that all the currently debated applications of the law on the use of force, including preventive self-defence, were originally clearly prohibited. Yet, contrary to Corten's view, the existence of a clear-cut prohibition on preventive self-defence at the time of the drafting of the UN Charter is far from being obvious. The status of this right was controversial until the end of the Second World War. It had not been expressly admitted by states at the end of the interwar period, but it had not been excluded either, although it was invoked several times in practice.[147] Moreover, it seems to have been recognized in some treaties adopted just before the outbreak of the Second World War.[148] It is well known that the scope of the law of self-defence, especially the notion of armed attack, was not subject to any general discussion during the conferences preceding the adoption of the UN Charter and that there was no intention to bar the application of customary law pre-dating the UN Charter on that issue.[149] Although, as mentioned by Corten, some states nonetheless expressly declared that the right of self-defence could only be resorted to *after* an armed attack has occurred,[150] such declarations are not enough – particularly if one follows Corten's method – to establish a clear and definite interpretation of Article 51 of the UN Charter, the past and subsequent practice of those

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to an armed attack entitling Israel to rely on self-defence', they nonetheless recognized that Israel had 'a right to take reasonable and proportionate means to protect its civilian population from such attacks'.

145 See, e.g., on this debate, Kolb, *supra* note 50, at 288–9.

146 Corten, *supra* note 4, at 416 ff.

147 The argument was, e.g., put forward by Japan in order to justify its invasion of China in 1931 (see *Journal officiel de la Société des Nations*, Acts of the Extraordinary Session of the Assembly, Vol. III, Spec. Suppl. N° 111, at 105, 106). The invasion was condemned for reasons alien to this argument.

148 See, e.g., the treaties concluded in 1939 between the United Kingdom and Poland (text available in (1941) 35 *American Journal of International Law Supplement* 178, at 178) as well as between France and Poland (text quoted in J. A. S. Grenville, *The Major International Treaties 1914–1973: A History and Guide with Texts* (1974), 192).

149 See, e.g., on this subject, C. H. M. Waldock, 'The Regulation of the Use of Force by Individual States in International Law', (1952) 81 *Collected Course of The Hague Academy of International Law* 451, at 496; O. Schachter, 'International Law: The Right of States to Use Armed Force', (1984) 82 Mich. LR 1620, at 1634; E. Gordon, 'Article 2(4) in Historical Context', (1984–85) 10 Yale JIL 271, at 278; W. T. Mallison and S. V. Mallison, 'The Israeli Attack of June 7, 1981, upon the Iraqi Nuclear Reactor: Aggression or Self-Defense', (1982) 15 Vand. JTL 417, at 420; T. L. H. McCormack, 'Anticipatory Self-Defence in the Legislative History of the United Nations Charter', (1991) 25 *Israel Law Review* 1, at 8.

150 See the declaration made by the US and French special representatives at the San Francisco Conference, quoted in Corten, *supra* note 4, at 415.

states moreover evidencing a contrary position. As there was originally no well-established prohibition of the right of preventive self-defence, contrary to Corten's assumption, the manifest disagreement emerging from contemporary state practice with respect to this issue should lead us to the modest conclusion that the ambiguous status of preventive self-defence has not been clarified yet. As already mentioned above, ICJ case law is not helpful in that respect, since the Court has never been asked and has never ruled on the question of preventive self-defence (cf. sub-subsection 2.2.2, *supra*). The most that could be said about this question is that preventive self-defence is (only) *presumably* unlawful. This may be inferred both from the attitude of states, which, although opposed to prohibiting it in general terms, are nevertheless reluctant to invoke it,[151] and from the disapprobation of the many preventive non-authorized uses of force, although the latter have not been condemned only on the basis of the preventive nature of the force.[152]

There are also some doubts with respect to the right to prevent an *imminent* threat of armed attack in self-defence, namely the right of 'anticipatory self-defence' (cf. sub-subsection 2.2.2, *supra*). Corten rejects any form of preventive self-defence, including anticipatory self-defence. He nonetheless agrees with the right of a state to act in self-defence in order to counter a use of force, which, although not having reached its territory, 'has . . . materially begun'.[153] This is close to what some scholars qualify, according to Dinstein's wording,[154] as 'interceptive self-defence'.[155] In Corten's view, such self-defence has no preventive nature, since it is responding to an armed attack. Yet, this position is debatable, for two main reasons. First, it raises a problem of legal justification. This position is indeed based on a particular definition of the notion of armed attack, which is normally viewed as consisting of an actual violation of

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151 The practice reveals that states, including those a priori opposed to the prohibition on preventive self-defence, are reluctant to invoke such legal basis in order to justify uses of force that nonetheless have apparently all the features of a preventive self-defence action; see, e.g., the legal arguments put forward by the United States in order to justify the blockade of Cuba in 1962 (see UN Doc. S/5181, at 2, and UN Doc. S/PV.1022, at 16–17) and their intervention in Iraq in 2003 (UN Doc. S/2003/351, at 1–2); these precedents were justified on the basis of collective (regional) security systems and not of (preventive) self-defence.

152 Those precedents include not only the unique precedent in which the argument of preventive self-defence was officially and elaborately invoked, i.e., the destruction by Israel of the Iraqi nuclear reactor Osirak in 1981, but also the other preventive non-authorized uses of force, which have been interpreted as possibly based on preventive self-defence or about which states have given their opinion on preventive self-defence (cf. note 151, *supra*). With regard to Israeli intervention in Iraq in 1981, one can notice that, although some states condemned it because they considered that preventive self-defence was prohibited under international law, many others disapproved the operations because Israel did not prove that it was facing a real threat and/or that it had resorted to force as a last resort – that is, having exhausted all the practical alternatives to its defence, such as the inspections of the reactor by the International Atomic Energy Agency (IAEA). Some scholars have therefore asked themselves about the UNSC condemnation of this precedent: '[W]as the Council rejecting the notion of anticipatory self-defence as such, or was it – as seems more likely – condemning its use in circumstances in which conditions of imminent danger were not present – this is what the debate was largely concerned with – or even any threat at all? It is possible to see the resolution, not so much as a global rejection of the notion of anticipatory self-defence, but as a casuistic contribution to the determination of the situations in which self-defence might be used pre-emptively' (J. Combacau, 'The Exception of Self-Defence in UN Practice', in A. Cassese (ed.), *The Current Legal Regulation of the Use of Force* (1986), 24).

153 Corten, *supra* note 4, at 414.

154 Dinstein, *supra* note 1, at 190–1.

155 See, e.g., S. A. Alexandrov, *Self-Defense against the Use of Force in International Law* (1996), 164; Christakis, *supra* note 104, at 21.

the territorial sovereignty of a foreign state by force (or, arguably, in actual attacks against the agents or nationals of a foreign state). Moreover, such a position is not supported by any reference to state practice or international case law. Being a priori legitimate, this right to respond in self-defence to an already materialized use of force should preferably be founded on an alternative legal basis, taking into account state practice. It is true, as argued by Corten, that the right of anticipatory self-defence has not been explicitly agreed upon by all states.[156] Yet, the limited opposition to such a right, when it has not been manifestly formulated only for political purposes,[157] seems to be justified by the fear that the threat that would be responded to in self-defence would be too vague, opening a 'Pandora's box' for any preventive use of force.[158] It is therefore possible to argue that no opposition actually exists against – or that there is at least an implied general consensus in favour of – a right of self-defence responding to an imminent threat provided that such a threat is manifestly imminent, that is, has already materialized. This brings us to the second problem raised by Corten's view, which is a problem of legal qualification. Corten univocally qualifies the right to respond in self-defence to a use of force that 'has materially begun' as a form of traditional self-defence against an armed attack. This qualification is at least debatable. Nothing indeed prevents qualifying such a right as a particular form of preventive (anticipatory) self-defence, exceptionally permitted. One could object that this last solution is dangerous, since it favours a qualification that would be more easily subject to abuses. Yet, extending the traditional definition of an armed attack without giving any firm legal bases for such extension does entail the same risks. The best approach is perhaps to follow the doctrinal trend and to give to this particular self-defence a *sui generis* qualification, as 'interceptive self-defence'.[159]

A similar problem of qualification arises concerning the right to act in self-defence in order both to respond to past attacks and to prevent the repetition of future similar attacks. If such a right is not contested, provided that the response does not come too late after the attacks have occurred, it seems debatable whether it must be qualified as a form of traditional or preventive self-defence. Corten argues that the particularity of the self-defence action in that case must be analysed through the classical condition of necessity:[160] the action, although being undertaken after the attacks have been committed, is still *necessary*, as it is designed to repel similar

156 Corten, *supra* note 4, at 426–35.

157 See, e.g., the Iranian declaration contesting the idea of a right of anticipatory self-defence (UN Doc. A/59/PV.87, at 17); such declaration clearly conflicts with other declarations in which Iran expressly recognized such a right (see the Iranian written pleadings before the ICJ in the *Oil Platforms* case, *supra* note 114, reply, at 152) or admitted more generally the right to use force before being attacked (Interview of the Iranian Defense Minister Ali Shamkani, 18 August 2004, Fed. News Serv., 19 August 2004).

158 See, e.g., the declaration made by Costa Rica: 'On the use of force, we welcome the Panel's recommendation that art. 51 of the Charter should not be rewritten. However, as some other delegations have done before, we must express our concern for the introduction of the concept of imminent threat. Such concept could be subject to various interpretations, creating a dangerous grey area on the possible use of force. We advocate for a strict textual interpretation of article 51' ('Statement during the Informal Consultations on the Report of the High Level Panel', 31 January 2004).

159 Cf. notes 154 and 155, *supra*.

160 Corten, *supra* note 4, at 485.

attacks that are likely to happen in the near future. As a result, in Corten's view, the right to react to such attacks must be seen as a form of traditional self-defence. Yet, it is also possible to argue for an alternative qualification, preventive self-defence, since states acting in self-defence in this case usually put the accent on the future-oriented aspect of their actions. Moreover, those actions are justified only because the threat of future similar attacks still exists. In any event, the qualification as preventive self-defence has never been expressly excluded in state practice or international case law.[161] Again, the best solution seems to envisage a *sui generis* qualification.

The other main issue addressed by Corten with respect to the notion of armed attack is the right to respond in self-defence to an 'indirect aggression'. After an in-depth scrutiny of state practice and international case law, the author concludes that such a right has not been recognized yet and that self-defence can therefore be exercised only in reaction to a direct armed attack by a state.[162] Such conclusion can only be understood in the light of both Corten's own definition of the notion of 'indirect aggression' and his own interpretation of state practice. Indeed, the notion of *indirect aggression* is traditionally conceived as meaning an armed attack committed by a state through its involvement in attacks launched abroad by non-state actors. It is normally used as opposed to the notion of *direct aggression*, which means an aggression committed by the regular forces of a state. Such interpretation is adopted by many legal scholars[163] and supported by state practice,[164] especially in the debates preceding the adoption of the UNGA Resolution 3314 (XXIX).[165] Corten's definition is more restrictive. In his view, indirect aggression refers to the hypothesis in which the involvement of a state in attacks committed by armed groups abroad would be lower than a substantial involvement and would merely consist of, for instance, harbouring those groups on its territory or being unwilling or unable to put an end to their activities.[166] Arguing that such minor state involvements cannot amount to an armed attack under the current state of international law, Corten logically concludes that there is no right to respond in self-defence to indirect aggression.

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161 The qualification of such self-defence arose in two cases before the ICJ (see written pleadings in the *Oil Platforms* case, *supra* note 114, reply of Iran, at 151–5, and rejoinder of the United States, at 164; see oral pleadings in *Armed Activities*, *supra* note 98, public sitting of 12 April 2005, CR 2005/3, paras. 32–35, per M. Corten, and Uganda, public sitting of 18 April 2005, CR 2005/07, paras. 71–73, per M. Brownlie); the Court nonetheless did not pronounce on this issue.

162 Corten, *supra* note 4, at 444.

163 See, e.g., Ruys, *supra* note 139, at 368 ff.; B. B. Ferencz, 'Defining Aggression: The Last Mile', (1973) 12 Col. JTL 430, at 431; J. Verhoeven, 'Les "étirements" de la légitime défense', (2002) 48 AIDI 48, at 56; Kolb, *supra* note 50, at 274; see also, for a similar qualification, the preparatory works of the resolution adopted in 2007 by the International Law Institute, (2007) 72 *Yearbook of the International Law Institute* 75, especially at 180, 191, 206.

164 See, e.g., the invocation by Pakistan of an indirect aggression committed by India in 1971 with respect to East Pakistan (UN Doc. S/PV.1106, at 10).

165 It is indicative that the debates preceding the adoption of Resolution 3314 (XXIX) and concerning the inclusion in the resolution of aggressive acts committed by states through indirect means, i.e., support to armed bands, were classified under the title 'indirect aggression' in the many reports of the Special Committee on the question of defining aggression (see, e.g., UN Doc. A/2633, at 8; UN Doc. A/7185/Rev. 1, at 22); it is from such debates that the current Art. 3(g) of the resolution emerged, according to which is considered an aggression within the meaning of Art. 1 of the resolution '[t]he sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein'.

166 Corten, *supra* note 4, at 444.

One may wonder why the author did not follow another approach that would have consisted of adopting the traditional definition of indirect aggression and analysing whether the scope of this notion had evolved in the light of recent state practice and international case law.

That having been said, it is uncontested that minor involvements of a state in attacks committed by non-state actors, such as the above-mentioned ones, cannot be considered as amounting to an armed attack by this state. This is clearly supported by ICJ case law.[167] As far as state practice is concerned, one has already emphasized the questionable interpretation made by the author, according to which several self-defence responses to attacks committed by non-state actors, such as the US Operation Enduring Freedom against Afghanistan in reaction to the 9/11 attacks and the 2006 Israeli intervention in Lebanon in reaction to the rocket attacks by Hezbollah, have to be viewed as responses to an armed attack committed by a state and not as responses to attacks committed by the non-state actors only (cf. subsection 4.1, *supra*). As a result of such particular interpretation, Corten discusses those precedents at this stage.[168] Having analysed in detail the many reactions to those precedents, he concludes that those reactions do not evidence any change in the traditional position according to which only substantial state involvements in attacks committed by non-state actors amount to an armed attack under Article 51 of the UN Charter. Corten also supports this position by analysing the issue through the lens of the articles on state responsibility, particularly the attribution rules.[169] He concludes in this regard that minor state involvements in attacks committed by armed groups do not authorize attributing these attacks to the state involved therein and, therefore, considering this state as having committed an armed attack. Although the application of the attribution rules does not seem to contradict the conclusion reached by Corten, especially in light of ICJ case law and state practice, it is not sure, as argued elsewhere,[170] that it is relevant to refer to the law on state responsibility in defining a situation whose occurrence is not primarily related to a question of responsibility, but to the right of a state to defend itself against an armed attack.

Having analysed the notion of armed attack, Corten addresses the conditions under which the right of self-defence must be exercised. The first one is provided by Article 51 of the UN Charter, which states that the right of self-defence cannot be impaired 'until the Security Council has taken measures necessary to maintain international peace and security'. Relying on state practice, Corten argues that the UNSC decisions are 'superior' to the exercise of the natural right of self-defence[171] but must only be conceived as impairing such exercise and not as putting an end to the right of self-defence itself.[172] He also emphasizes three problems in that respect – problems that are well illustrated by references to state practice. The first

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167 Ibid., at 466–9.
168 Ibid., at 455–66.
169 Ibid., at 450–4.
170 See R. van Steenberghe, *supra* note 96, at 195–6; see, in the same way, Verhoeven, *supra* note 163, at 59; Dinstein, *supra* note 1, at 206.
171 Corten, *supra* note 4, at 473.
172 Ibid., at 474–5.

is determining when the Security Council has taken 'the measures necessary to maintain international peace and security', which will impair the exercise of the right of self-defence; this problem, for example, arose with regard to the measures adopted by the Security Council in Resolution 1373 (2001) with respect to the right of self-defence exercised by the United States in Afghanistan in response to the 9/11 attacks.[173] The second problem is determining the extent to which this exercise has been impeded by the UNSC measures; one may mention in this respect the UNSC Resolution 678 (1990) in which the Security Council authorized the use of force 'unless Iraq on or before 15 January 1991 fully implemente[d]' the previous SC resolutions. In Corten's view, this prevented the exercise of (collective) self-defence.[174] The third problem is determining whether the aggressed state may not respect the UNSC resolution imposing a ceasefire when the aggressor state refuses to abide by the resolution. Corten clearly admits such a hypothesis.[175]

This analysis of the relationships between the UNSC measures and the right of self-defence is certainly arguable, even if the conceptual distinction between impairing the exercise of the right of self-defence and putting an end to this right would perhaps have needed some more clarification. Such relationships can, however, be analysed from a different perspective. State practice, indeed, seems to reveal two distinct kinds of UNSC measure that may affect the right of self-defence. The first ones are what may be called 'negative measures', as they 'negatively' affect the exercise of the right of self-defence, such as the decision to impose a ceasefire on states claiming to act in self-defence.[176] Such a decision is often imposed by the Security Council in situations in which it is not able to identify the aggressor state or does not want to proceed to such identification in order not to impede the chances of resolving the conflict peacefully. These kinds of UNSC decision are obligatory and states must cease to resort to force even if Article 51 of the UN Charter starts with the words '*nothing* in the present Charter [arguably including the resolutions adopted by the UN organs] shall impair the right of self-defence'. The legal basis for such absolute obligation is actually provided by the final wording of Article 51, according to which the right of self-defence 'shall not in any way affect the authority . . . of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security'. Since the Security Council has the authority to adopt binding decisions under Article 25 of the UN Charter, this authority cannot be impaired by the right of self-defence. Such reasoning explains the absolute and clear precedence of the UNSC decisions over the right of self-defence. In that respect, it seems logical that, if a state infringes the UNSC decision imposing a ceasefire, the other state will be allowed to respond to it in self-defence.[177]

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173 Ibid., at 476.

174 Ibid., at 477–8.

175 Ibid., at 479.

176 See, e.g., UNSC Resolution 1227 (1999) imposing a ceasefire on Eritrea and Ethiopia, both claiming to act in self-defence.

177 See, in this respect, declarations made by some states suggesting a 'conditional' obligation for Israel to cease the hostilities in Lebanon against Hezbollah following the adoption of UNSC Resolution 1701 (2006) (United States, UN Doc. S/PV.5511, at 5, and Greece, UN doc. S/PV.5511, at 10).

The expression used in the first sentence of Article 51 of the UN Charter – that is, 'until the Security Council has taken measures necessary to maintain international peace and security' – seems to refer to an entirely different kind of situation: the Security Council has identified the aggressor state and adopts measures in order to substitute its action for the one taken in self-defence.[178] The purpose of those 'positive measures' is no longer to oppose the claimed right of self-defence, but to take over the exercise of this right, which has not been contested. The question of whether and when those measures imply the end of the exercise of the right of self-defence, as generally raised in legal literature,[179] must be analysed in light of state practice as well as the preparatory works of the UN Charter. The former,[180] like the latter,[181] reveals that only the measures that may effectively lead to the maintenance of the peace already restored can possibly have such effect. Yet, in that case, it is highly plausible that the action will no longer be necessary and its prolongation will be unlawful according to the condition of necessity of the law of self-defence. In other words, the expression 'until the Security Council has taken measures necessary to maintain international peace and security' does not seem to have any specific effect, distinct from the one resulting from the application of the condition of necessity under the law of self-defence.

The exercise of the right of self-defence must also meet other well-established customary conditions: necessity and proportionality. Corten starts by rejecting some approaches of the notion of necessity as too broad or too narrow before defining this notion and making some links between it and the condition of proportionality. In his view, necessity means neither that the assessment thereof must be left at the entire discretion of the state acting in self-defence nor that all peaceful means must have been exhausted before the action.[182] He argues that necessity fundamentally requires an objective assessment of the action in self-defence in relation to the exclusive purpose that such action is authorized to follow, to defend oneself against an armed attack.[183] He then explains the other requirements of the condition of necessity, which are the following: first, immediacy – not too narrowly construed – of the action in self-defence after the past attacks when the purpose of the action is

178 See, e.g., in this respect, UNSC measures adopted in Resolutions 232 (1966), 418 (1977), 502 (1982), and 678 (1990) against South Africa, Rhodesia, Argentina, and Iraq, respectively.

179 See, e.g., D. W. Greig, 'Self-Defence and the Security Council: What Does Article 51 Require?', (1991) 40 ICLQ 366, at 389 ff.; Dinstein, *supra* note 1, at 215; Gray, *supra* note 2, at 124; J. Brunnee, 'The Security Council and Self-Defense: Which Way to Global Security?', in N. Blokker and N. Schrijver (eds.), *The Security Council and the Use of Force* (2005), 130; A. Pellet and V. Tzankov, 'L'Etat victime d'un acte terroriste peut-il recourir à la force armée?', in *Les nouvelles menaces contre la paix et la sécurité internationales* (2004), 101; see also point 3 of the resolution adopted in 2007 by the International Law Institute on self-defence, *supra* note 143.

180 State practice reveals that even powerful UNSC measures, such as embargoes, do not seem to have entailed the end of the exercise of the right of self-defence; see, e.g., the UNSC Resolutions 546 (1984) and 574 (1985), imposing an arms embargo against South Africa, while recalling at the same time the right of self-defence of Angola; UNSC Resolution 661 (1990) imposing sanctions, including an arms embargo against Iraq, while recalling at the same time the right of individual or collective self-defence against the Iraqi invasion of Kuwait.

181 As far as the preparatory works of Art. 51 of the UN Charter are concerned, see the Russian and UK declarations, *Minutes of the Thirty-Sixth Meeting of the United States Delegation, Held at San Francisco*, 11 May 1945, in *Foreign Relations of the United States, Diplomatic Papers*, 1945, Vol. 1 (1967), 824.

182 Corten, *supra* note 4, at 480–3.

183 Ibid., at 484.

both to respond to such attacks and to prevent the repetition of similar attacks;[184] second, effectiveness of the measures adopted in self-defence, this effectiveness criterion being indeed expressly acknowledged in legal literature and state practice while often designated by another expression, *adequacy*[185] or *appropriateness*[186] of the self-defence measures; [187] third, the proportionate nature of the action in self-defence.

This last aspect of the condition of necessity is detailed by the author. The main part of the discussion concerns the link between necessity and proportionality.[188] Corten asserts in this respect that '[p]roportionality . . . seems to be one way to evaluate whether a measure is necessary . . ., [t]he disproportionality . . . be[ing] the mark that the State supposedly acting in self-defence was pursuing some other end than merely riposting to an attack'.[189] Such a view may a priori be interpreted as endorsing the solution, which appears to be the most persuasive in relation to the well-known debates on the definition of proportionality. The latter can, indeed, be defined either as requiring a quantitative equilibrium between the action in self-defence and the armed attack ('quantitative proportionality'), as it is evidenced in state practice[190] and ICJ case law,[191] or as requiring that the action in self-defence does not exceed what is not necessary to repel the armed attack ('teleological proportionality'),[192] this last approach entirely conflating proportionality with necessity. A convincing answer to this debate seems to consider quantitative proportionality as an easy means for assessing prima facie the necessity of the action in self-defence. This implies that, although it is intrinsically linked to the condition of necessity, proportionality remains distinct from it. Yet, having seemingly argued for such a position,

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184 Ibid., at 486.

185 See, e.g., *Oil Platforms*, *supra* note 114, at 198, para. 76; see also Separate Opinion of Judge Kooijmans, annexed to the judgment of the ICJ in *Oil Platforms*, *supra* note 114, at 264, 265, paras. 60, 63.

186 See the declarations made by states in various precedents: e.g., statements from the United States in relation to the 1962 crisis of the nuclear missiles in Cuba, UN Doc. S/PV.1025, at 3; in relation to their intervention in North Vietnam in 1964, UN Doc. S/PV.1141, at 10–11; in relation to the Israeli intervention in Uganda in 1976, UN Doc. S/PV.1941, at 8; or in relation to their intervention in Libya in March 1986, UN Doc. S/PV.2668, at 22; see also statements from Argentina in relation to the Israeli intervention in Lebanon in February 1972, UN Doc. S/PV.1644, at 3; South Africa in relation to its intervention in Angola in 1985, UN Doc. S/PV.2597, at 6; Iran in relation to its intervention in Iraq in 1994, UN Doc. S/1994/1273, at 1 (one may note that the adjectives 'nécessaires et appropriés' in the French version were translated into 'proportionate and necessary' in the English version of the document); Russia in relation to the Israeli intervention in Lebanon in 2006, UN Doc. S/PV.5489, at 7.

187 Corten, *supra* note 4, at 488.

188 See also Corten's discussion on whether a disproportionate response in self-defence must be considered as a whole or only in its exceeding part as unlawful and can trigger the right of self-defence of the former aggressor state (ibid., at 490–2).

189 Ibid., at 489.

190 Apart from Israel (see, e.g., UN Doc. SPV.1461, at 11), states usually adopt a quantitative conception of proportionality; the states' reaction to the 2006 Israeli intervention in Lebanon is a clear example thereof; see, in this respect, e.g., statements from Russia, UN Doc. S/PV.5489, at 7; Argentina, UN Doc. S/PV.5489, at 9; Qatar, UN Doc. S/PV.5489, at 10; China, UN Doc. S/PV.5489, at 11; Japan, UN Doc. S/PV.5489, at 12; Congo, UN Doc. S/PV.5489, at 13; Tanzania, UN Doc. S/PV.5489, at 13; Denmark, UN Doc. S/PV.5489, at 15; Greece, UN Doc. S/PV.5489, at 17; France, UN Doc. S/PV.5489, at 17; Ghana, UN Doc. S/PV.5493 (Resumption 1), at 8; Brazil, UN Doc. S/PV.5493 (Resumption 1), at 19; New Zealand, UN Doc. S/PV.5493 (Resumption 1), at 33.

191 See *Nicaragua*, *supra* note 116, at 122, para. 237; *Oil Platforms*, *supra* note 114, at 198, 223, paras. 76–77; *Armed Activities*, *supra* note 98, para. 147.

192 Most of the scholars who support such an understanding refer to the considerations held on this subject by the former ILC Special Rapporteur, R. Ago (UN Doc. A/CN.4/318/Add.5–8, at 67, para. 121).

by claiming that proportionality was one way to evaluate whether an action in self-defence was necessary, Corten curiously argues against the independent status of proportionality and seems to conflate it with necessity by stating that 'proportionality invariably implies comparing the military action justified by self-defence with its essential objectives . . . [and that it] must not . . . be understood as a simple comparison of the material damage caused'.[193] This statement makes Corten's position on the relationships between necessity and proportionality difficult to grasp.

The author identifies another link between necessity and proportionality. Having rejected a too narrow approach of necessity, requiring all peaceful means to be exhausted before acting in self-defence, he nonetheless acknowledges that:

> [i]f it is manifest that other means were, given the circumstances, appropriate for responding to an armed attack and that those other means were not used voluntarily, it might be thought that the military reaction is disproportionate and therefore not 'necessary'.[194]

This condition is actually fundamental. It is clearly in line with state practice[195] and legal literature, including the resolution of the International Law Institute on self-defence.[196] It entails the exhaustion not of all the peaceful means, but only of all the available practical alternatives to the action in self-defence, including the seizure of the UN Security Council. Although crucial, this condition does not seem to be linked to the condition of proportionality. It is not concerned with the exercise of the right of self-defence, but only with the *triggering* of such exercise. It is actually one particular aspect of the condition of necessity that should be distinguished from the other above-mentioned aspects, which indeed relate to the *exercise* of the action in self-defence once this action has been undertaken.

### 4.6. A right of humanitarian intervention?

The contemporary assertion of a right of humanitarian intervention has been mostly debated in the aftermath of the NATO intervention in Kosovo in 1999. This precedent has given rise to abundant legal literature on the subject, most of the scholars agreeing that, even after Kosovo, no such right had emerged in positive international law.[197] This view is completely shared by Corten. The latter persuasively counters all the arguments that have been evoked by states[198] or developed by

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193 Corten, *supra* note 4, at 489.

194 Ibid., at 489–90.

195 Numerous precedents have been condemned by states on the basis that the intervening state had not exhausted all the practical alternatives for its defence before acting in self-defence, such as the seizure of the Security Council (cf., e.g., note 152, *supra*).

196 See point 3 of the resolution adopted in 2007 by the International Law Institute on self-defence, *supra* note 143.

197 See, e.g., N. Krisch, 'Legality, Morality and the Dilemma of Humanitarian Intervention after Kosovo', (2002) 13 EJIL 323; J. I. Charney, 'Anticipatory Humanitarian Intervention in Kosovo', (1999) 32 Vand. JTL 1231; J. M. Welsh, 'Taking Consequence Seriously: Objections to Humanitarian Intervention', in J. M. Welsh (ed.), *Humanitarian Intervention and International Relations* (2004), 52; P. Weckel, 'L'usage déraisonable de la force', (2003) 107 RGDIP 377; M. G. Kohen, 'L'emploi de la force et la crise du Kosovo: Vers un nouveau désordre juridique international', (1999) 32 RBDI 122; see also Dinstein, *supra* note 1, at 72–3; Gray, *supra* note 2, at 51.

198 See, e.g., oral pleadings of Belgium in *Legality of Use of Force (Serbia and Montenegro v. Belgium)*, Provisional Measures, CR 1999/15, Public Sitting held on Monday 10 May 1999, per M. Foucart-Kleynen, at 15–17.

the minority of scholars[199] in favour of the lawfulness of a right of humanitarian intervention.

The first argument that is refuted is the *a contrario* interpretation of Article 2(4) of the UN Charter. According to this argument, humanitarian intervention does not fall within the scope of the prohibition on use of force because the latter is considered as prohibiting only uses of force directed against the territorial integrity or political independence of a state or exercised in a way that is incompatible with UN purposes, and that humanitarian intervention is not *per definitionem* either directed against the territorial integrity or political independence of any state or incompatible with UN purposes, such purposes including the protection of human rights. This argument is comprehensively refuted by Corten.[200] He could have limited himself to referring in that regard to the preparatory works of Article 2(4) of the UN Charter and the major UNGA resolutions on the use of force. Indeed, it is well known that the final wording of Article 2(4) was included at the request of 'small' states in order not to reduce the scope of the prohibition on the use of force, but rather to make it as general as possible.[201] Similarly, the UNGA Resolutions 2625 (XXV),[202] 3314 (XXIX),[203] and 42/22[204] clearly evidence that the prohibition on the use of force is still conceived as a general prohibition. Corten's response to the *a contrario* interpretation of Article 2(4) of the UN Charter goes further. In accordance with the Vienna Convention on the Law of Treaties, Corten also rejects this argument by interpreting the contentious words on the basis of their ordinary meaning[205] as well as the context in which they are provided.[206] He also refers to a series of declarations in which states expressly reject the *a contrario* argument.[207] Finally, he convincingly demonstrates that, although some states proposed to consider the objectives of a military operation as a relevant criterion for qualifying the operation as an aggression, during the debates preceding the adoption of UNGA Resolution 3315 (XXI), this criterion was not accepted by the other states. It is indicative in this respect that the resolution expressly provides that '[n]o consideration of whatever nature, whether political, economic, military or otherwise, may serve as a justification for aggression'.[208]

Another argument supporting the lawfulness of the right of humanitarian intervention could be based on the notion of *responsibility to protect* (R2P), which

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199 See, e.g., R. B. Lillich (ed.), *Humanitarian Intervention and the United Nations* (1973).

200 Corten, *supra* note 4, at 498–510.

201 Ibid., at 504.

202 This resolution provides that '[e]very State has the duty to refrain from the threat or use of force *to violate the existing international boundaries of another State* or as a means of solving international disputes' (emphasis added).

203 This resolution defines aggression as any 'use of force by a State against the *sovereignty*, territorial integrity or political independence of another State . . .' (emphasis added); see the Russian declaration regarding the addition of the notion of sovereignty in the report of the Special Committee on the question of defining aggression, 11 March–12 April, UN Doc. A/9619, Annexe I.

204 This resolution provides that 'states have the duty to abstain from armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements'.

205 Corten, *supra* note 4, at 499–500.

206 Ibid., at 501–2.

207 Ibid., at 506–7.

208 Ibid., at 507–9.

has recently been forged by the Commission on Intervention and Sovereignty of States. This notion basically means that any state has the primary responsibility to protect its population from genocide, war crimes, ethnic cleansing, and crimes against humanity, and that, in case such responsibility is not (adequately) exercised, the international community is entitled to intervene to protect the threatened populations.[209] Yet, as compellingly shown by Corten, neither the declarations made by the states in relation to that notion before and after the report of the Commission nor this report and the 2005 World Summit Outcome, which briefly refers to the R2P,[210] involves any recognition of a right of humanitarian intervention.[211] Only very few states declared themselves in favour of such a right while the Commission was working on the R2P.[212] Besides, those declarations were apparently made *de lege ferenda* and even fewer states maintained such a position in their declarations expressed in the context of the World Summit.[213] More fundamentally, the report of the Commission itself and the World Summit Outcome do not in any way entail the recognition of a right to use force beyond the traditional conception of the matter – that is, a general prohibition on the use of force with only two exceptions: self-defence and force authorized by the UN Security Council. This new concept and the debates surrounding it even seem to have reinforced such traditional conception.[214] The recent military operation in Libya (2011), whose official objective is to protect civilians against attacks, is in line with Corten's conclusion. Although the notion of R2P, as endorsed in the World Summit Outcome, was part of the arguments put forward by states to support the launching of the operation, those states sought an authorization to use force by the UN Security Council.[215] This authorization came with UNSC Resolution 1973 (2011). The same thing may be said with respect to the recent French and UN military operations in Ivory Coast. Those operations, although referred to by some states as undertaken in the context of R2P,[216] were authorized by UNSC resolutions.[217]

The final argument that had to be countered was the argument based on state practice. It was not difficult for Corten to object to such argument in light of his positivist methodological approach regarding state practice. Indeed, most of the precedents that are invoked in legal literature are not relevant, since the state's having used force did not justify it by relying on a right of humanitarian intervention, but invoked another, more classical, legal basis.[218] It is not helpful either to refer to

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209 See the report of the Commission, available online at www.iciss.ca/report-en.asp.

210 See *supra* note 32, paras. 138–139.

211 Corten, *supra* note 4, at 511–23.

212 Ibid., at 515.

213 Ibid., at 521.

214 Ibid., at 517–20.

215 See, e.g., statement from Colombia, UN Doc. S/PV.6498, at 7; see, more generally, preamble of the UNSC Resolution 1973 (2011).

216 See, e.g., statement from Colombia, UN Doc. S/PV.6508, at 6; see, more generally, preamble of UNSC Resolution 1975 (2011).

217 The French troops and the United Nations Operation in Côte d'Ivoire (UNOCI) was already authorized to use force to protect civilians in Ivory Coast by UNSC Resolutions 1464 (2003) and 1528 (2004), respectively; such authorizations have been renewed. The last UNSC resolution on that issue is Resolution 1975 (2011), para. 6.

218 Corten, *supra* note 4, at 527–34, 537–46.

precedents in which such a right seems to have been argued, since the declarations of the intervening state are often unclear[219] or explicitly affirm that the intervention must not be counted as a precedent contributing to the emergence of a general right of humanitarian intervention.[220]

Corten's demonstration with regard to the right of humanitarian intervention is particularly convincing. It seems incontestable, at least from a positivist perspective,[221] that such a right does not exist in the current state of international law. As demonstrated in this last chapter, such a conclusion also applies to the claimed right to use force in order to rescue nationals in the territory of another state other than in self-defence.[222] None of the above-mentioned arguments, which could be invoked in support of such a right, is founded. Particular attention is paid to the debates in the context of diplomatic protection. Corten clearly demonstrates in this regard that no right to use force for rescuing nationals abroad on another basis than in self-defence was finally recognized during these debates, the final outcome of which even seems to reject such a right.[223]

## 5. Conclusion

*The Law against War* is incontestably a crucial study in the field of inter-state use of force. The systematic analysis undertaken by Olivier Corten of all the traditional but also underexplored aspects of the law on the use of force is particularly rigorous, well structured and well illustrated. Most of the conclusions are persuasive, while some limited reservations may be formulated with respect to particular issues. Corten's general position on inter-state use of force is clear. The entire book may be viewed as a long and in-depth demonstration, based on a restrictive methodology and interpretation of the notions of use and threat of force, towards the assertion of a rather conservative conclusion that the prohibition on the use of force has not been relaxed since the adoption of the UN Charter. Such a view can be summarized by the Latin expression *jus contra bellum*, used by Corten throughout the book. This new terminology has been chosen on purpose, as it reflects the restrictive understanding of the law on the use of force under the UN Charter. In Corten's view, the expression seems more appropriate than the traditional expression *jus ad bellum*, as this latter expression dates back to the period prior to the UN Charter when the prohibition on the use of force was only in its infancy.[224]

Basically, Corten's general approach to inter-state use of force, including the use of a new terminology to qualify it, gives the impression of being motivated by a strong opposition to war. This transpires from several aspects of his reasoning: the very restrictive features – expressly or implicitly endorsed by the author – of the

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219 Ibid., at 542.

220 Ibid., at 542–3.

221 See, for authors supporting such a right but from another perspective, Teson, *supra* note 14.

222 See Corten, *supra* note 4, inter alia at 510, 534–7, 546–8.

223 Ibid., at 523–6.

224 See, on this subject, R. Kolb, 'Sur l'origine du couple terminologique ius ad bellum/ius in bello', (1997) 827 *Revue de droit international de la Croix Rouge* 593.

positivist methodology that he has chosen to follow, such a methodology being already much stricter than the alternative policy-oriented one; the interpretation of ambiguous texts, case law, or precedents in a way that supports or at least does not conflict with his restrictive view, even when it seems that this ambiguity should be left unsettled; and the ascription of a very limited scope to the classically admitted exceptions to the prohibition on the use of force, especially the law of self-defence. More generally, Corten seems to have embarked upon a vigorous struggle against any extension of the law on the use of force, seemingly fearing that such extension may open a 'Pandora's box' and lead to abuses that, as committed in the context of the use of force, could have very serious consequences.

Conceptually, this position, as evidenced by its Latin qualification as *jus contra bellum*, suggests an opposition between law and war. Yet, one must keep in mind that the law on the use of force does not just consist of a one-dimensioned general prohibition. Armed violence may sometimes be desirable and legitimate. This is confirmed by the existence of limitations to the prohibition on the use of force such as self-defence and interventions authorized by the UN Security Council. Generally speaking, the law should not always be opposed to war. Legitimate violence is one of the most fundamental elements of any social legal order, including the international one.[225] This is particularly obvious with respect to the military 'police' measures that can be decided by the UN Security Council. This is nonetheless also relevant with regard to self-defence. Although the primary function of the right of self-defence is to enable states to protect their survival, this function indirectly serves a more general and social aim, which is to maintain the existing international legal order. Moreover, recent state practice clearly shows that the law of self-defence is also increasingly used in order to pursue some common general objectives, like the fight against international terrorism, whose realization is normally designed to safeguard international peace and security and, more generally, the stability of inter-state relations. In this sense, the whole law on the use of force should be more objectively conceived as providing for a set of rules whose ultimate design is to regulate a specific phenomenon in a way that contributes to the organization of the international legal order.

225 P. d'Argent, J. d'Aspremont, F. Dopagne, and R. van Steenberghe, 'Article 39', in J.-P. Cot, A. Pellet, and M. Forteau (eds.), *La Charte des Nations Unies. Commentaire article par article* (2005), 1165.