

## ***Use of Force: Practice of States Since World War II: A Conflict by Conflict Analysis of the Customary Law of International Disputes***

by A. Mark Weisburd, *Use of Force: The Practice of States, 1945–1991*, Pennsylvania State University Press, Pennsylvania, 1997, xvii pp, 322 pp, note 323–364 pp, bibliography 365–376 pp, index 377–396 pp. Price: soft cover \$90.00.

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Mark Weisburd's *Use of Force: Practice of States, 1945–1991* is an intelligent and well considered examination of the role customary law plays in controlling international armed conflict. As the title suggests, his work, almost all 321 pages of it, consists of an examination of every notable international conflict from 1945 to 1991. Despite the potential for this to lead to little more than an historical narrative, Weisburd's work is a solid analysis of the issue.

Weisburd seeks to demonstrate the error of those who suggest that international law is irrelevant as a mechanism to control states' decisions to use force. Instead, he asserts that customary law provides a restriction on the use of armed conflict. According to his analysis, a legal system, and hence legal rules, can only be established if it can be shown that coercion is available to enforce it if required. That is, legality depends upon the existence of an obey-or-be-sanctioned system being in place. This argument is initially grounded within domestic law, with much support from legal philosophers. However, it is the author's objective to expand this notion to the international arena, with the rules of international law being the sanction imposing mechanism.

The starting point of such an analysis is that the rules of international law are those that are obeyed generally by states or are the basis of sanctions in the case of disobedience. Although such international institutions as the Security Council have available a range of methods to indicate disapproval of state action, the general non-hierarchical nature of the international community suggests that in an obey-or-be-sanctioned model the sanctions must come from other states. If, as asserted, customary law is a restricting factor on armed conflict, the rules of customary law must be supported by the imposition of sanctions by other states in the event of their violation. However, state practice does not support this. The appeal of his theory is damaged by the inconsistency of state behaviour, both in initiation and reaction, a problem he foreshadows in his introduction and demonstrates through his examples.

The author recognised several arguments against the fatality of divergent practice to the existence of customary rules. However, none could be successfully sustained. As such, the conflict by conflict examination of the post War world results in a finding that there is limited customary law with respect to armed conflict. Whilst the using of force in a way that poses a significant threat to the international status quo consistently evokes sanctions when it occurs and therefore can be called 'illegal', such disturbances do not account for the bulk of interstate conflicts. State practice does not clearly support any rule prohibiting the use of force that does not threaten the status quo and therefore such a rule does not satisfy the obey-or-be-sanctioned model and can not be said to form a part of customary law. The only customary law restricting armed forces arises in the small category of cases that Weisburd calls 'classic invasions', which involve the crossing of a recognised border by regular troops thus initiating the use of force between previously independent states. This conclusion lacks the strength of his original assertions as to the controlling influence customary law provides on armed conflict. This does not mean that

international law is irrelevant in this area but that, at least through its customary law mechanism, it does not have a remarkable impact. Indeed, it was negotiation and states' respect for the Security Council that appeared most important to international dispute resolution. These factors are not, however, part of customary law or part of Weisburd's theory, but are merely additional to it. It is in this way that Weisburd's approach differs from other international law commentators, and, in his own opinion, makes his theory original.

Despite Weisburd's assertion as to the uniqueness of his approach, a proper analysis of it reveals that it is original only with respect to his methods, not conclusions. Other international law writers<sup>1</sup> put forward a similar proposition that some international laws relating to armed conflict exist, though they are for the most part unclear and hampered by inconsistent state practice. Within the sphere of certainty, however, international law is a real restraining influence on the action of states, a conclusion that is not at odds with Weisburd's, though his original assertions were more far reaching. His work does differ, however, in his approach to the subject. Where other authors use the United Nations Charter and other multilateral treaties for asserting the existence of international law prohibiting aggressive international relations, Weisburd's theory is based almost exclusively upon state practice, a branch of evidence given secondary consideration by others. Due to his emphasis on conduct rather than rhetoric, Weisburd is able to identify more accurately the relevant rules in practice, as opposed to general theoretical propositions. He also makes a better attempt at explaining the divergence of state practice, rather than dismissing it as an anomaly.

Although his detailed analysis of individual armed conflicts of this century limited the range of materials that could be considered, his text provides a good contrast to other, more general commentaries. Accordingly, it also has a more limited aim than others in the area. His concern is only with armed international conflict, thus excluding such events as civil wars and tensions that do not materialise. In addition, his focus on state practice limits his consideration of the role of treaties and United Nations' initiatives to little more than passing comment. It is unclear whether this is a reflection of the lack of importance Weisburd places on such instruments in restricting armed conflict or is merely outside the purpose of his text. Certainly he does not find the solution to armed conflict as resting in an expansion of the Security Council.

Weisburd's method of analysing a large number of individual cases from which conclusions are drawn has certain advantages. Although all good research essays are based upon assertions drawn from referenced evidence or authorities, Weisburd's practice of setting out, at least in summary form, his factual basis makes his text useful to a broader range of readers. Whilst a basic understanding of the jurisprudential issues relating to the concept of law or a legal system is advantageous, it is not essential to have a legal or historical background to follow his theory. The main principles from which his conclusions are drawn, particularly state practice in the various conflicts, are set out for the reader. Therefore it provides not only a well researched and useful starting point for those in the field but can be equally followed by those who could not name more than a handful of post World War II conflicts let alone appreciate their significance!

The case by case approach Weisburd adopted brings with it the obvious danger of creating a repetitive list of invasions and retaliations with little direction. However, he has managed to use the examples to the best of their advantage. Weisburd groups the various conflicts in an organised manner, with each group or chapter of them being analysed in light of his original proposition as to customary law. It is a good combination of fact and analysis that is well set out and clear.

1 See e.g. A. Shearer, *Starke's International Law*, Butterworths, London, 1994.

In light of the above considerations, Weisburd's text provides a solid addition to the existing international law literature. With the increasing importance of the international community and awareness of the devastation of war, it addresses an important and relevant issue. It draws basically similar conclusions as other works but its novel approach to the topic makes it an interesting read or study. Although the original assertions are departed from without acknowledgment, his conclusions are fairly made and accurately reflect the case studies presented.