

## BOOK REVIEW

Marie Aronsson-Storrier, *Publicity in International Lawmaking: Covert Operations and the Use of Force*, Cambridge University Press, 2020, 172 pp., £85.00, ISBN 9781108494380  
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International law-making is a broad and ongoing process of co-operation and communication between and among states and international organisations. In that sense, treaties and other international agreements written between sovereign states or between states and international organizations, and custom that evidenced general practice of states produce international law which becomes binding upon all states and international organizations.<sup>1</sup> Hence, international law-making is a process that concerns both customary international law and treaty making.

The recent changes in state practice by using remote warfare methods with increased public knowledge of covert operations have made it necessary to reconceive the concept of publicity in international law-making. *Publicity in International Law-making: Covert Operations and the Use of Force* by Marie Aronsson-Storrier tackles the publicity for state practice to answer a wide range of questions about the ways in which covert and quasi-covert acts of states influence the development of customary international law. Noteworthy is that while the book's title refers to law-making in general, including thus law-making by means of treaties, the author engages in a stimulating discussion of the role of publicity in the development of 'customary international law'. The reader might expect more accurate title, which simply identifies the work and its central argument.

Aronsson-Storrier has addressed these questions as part of her PhD research. The book is an insightful study in which the author elaborately discusses that states' *publicly known and acknowledged* operations are the essential dual requirements for identifying the relevant practice by states as a conduct that will require other states to react.<sup>2</sup> The book's central concern is to reconceive international law-making on the strength of increased reporting and legal debate around covert and quasi-covert use of force.

The book is divided into four substantive chapters, followed by concluding remarks. Chapter 2 sets out the conceptual framework and development of the law on the use of force that will inform the rest of the book, giving special prominence to the role of publicity requirement in making international law. Having discussed 'the prohibition of the use of force' under Article 2(4) and 'right to use force' under Article 51 of the UN Charter, Aronsson-Storrier highlights the challenges that arises from ambiguous nature of these rules and the absence of a certain definition of the 'force' and 'armed attack'. She rightly argues that unacknowledged targeted killings and covert

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<sup>1</sup>See, in general, R. McCorquodale, 'Sources and the Subjects of International Law: A Plurality of Law-Making Participants', in S. Besson, J. d'Aspremont and S. Knuchel (eds.), *The Oxford Handbook on the Sources of International Law* (2017), at 749–68. See also W. M. Reisman, 'International Law-making: A Process of Communication: The Harold D. Lasswell Memorial Lecture', (1981) 75 *Proceedings of the Annual Meeting (American Society of International Law)* 101, at 101–2.

<sup>2</sup>M. Aronsson-Storrier, *Publicity in International Lawmaking: Covert Operations and the Use of Force* (2020), at 74–8.

cyber-attacks have left room for the development of the interpretation of the conventional and customary rules of the law on the use of force due to the ambiguous nature of the UN Charter rules. However, the author highlights that the development of customary international law and publicly known state practice would render the interpretation of the UN Charter rules possible. The chapter largely relies on the ambiguous nature of the UN Charter rules on the law on the use of force but goes no further to analyse them. It does not clearly explore what makes the nature of Article 2(4) and Article 51 ambiguous, while the application of Article 51 and self-defence in line with its restrictive language would require an empirical investigation. While the author turns to the role of 'covert operations' in developing the law on the use of force, the last subsection on these operations is quite short and basic. The subject has not been elucidated as might have been expected and therefore it may not be of much value to international law scholars. However, it succinctly establishes a wider context at the outset that will be invaluable for readers who are not just unfamiliar with the law on the use of force but international law generally.

Chapter 3 deals with public and covert acts to put forward the role of acknowledged and public knowledge in the development of customary international law. The author seeks to assert how unacknowledged acts of force may affect the development of international law. In so doing, she has distinguished between physical and verbal state practice such as national security strategies and justifications of physical acts of force. The author takes this analysis one step further by identifying the role of both physical and verbal practice in the development of customary international law. The chapter's ambitious question, how customary international law is developed, is fairly well answered by the author. Having analysed different scenarios, the author argues that a normative force is 'to be found in physical practice coupled with verbal acknowledgment, justifications, and reactions as evidence of *opinio juris*'.<sup>3</sup> Turning to the role of states' reactions in the formation of customary rules, the author then notes that silence in response to an operation cannot always be interpreted as acceptance of the legality of that operation. She concludes by underlining that states' silence is often considered a lack of publicly understandable response to a legal position or to the explicit communication of a legal position. The chapter then elaborates on the role of publicity in developing customary international law and interpretation of its existing rules. The author does not shy away from criticising different rationales and approaches which believe that covert and unacknowledged acts are illegal and cannot constitute state practice favouring an interpretation of a rule. Instead, she claims that covertness of an act cannot be necessarily linked to illegality because secrecy and lack of acknowledgment may be due to non-legal reasons such as national security. However, the author does not provide actual examples from states' practices to highlight this argument. Although Aronsson-Storrier favours the importance of covert operations in influencing the development of the law on the use of force, she is herself relatively persistent in following the idea that an act should be acknowledged and publicly known.

With respect to justifications, acknowledgment and public knowledge, in particular, Aronsson-Storrier raises some interesting points that provide fertile ground for future debate. She argues, for example, that although states' justifications are evidence of *opinio juris*, the law could be developed even without justified physical practice, and acknowledgment of conduct is sufficient for conduct to be considered as state practice due to its function in triggering the possibility of acquiescence. Yet, she is of the view that press reports and statements by states may constitute public knowledge of an operation in the absence of justifications and acknowledgment by states. In view of this, Aronsson-Storrier responds quite simply that state practice might be constituted as a result of states' reactions to reported and publicly debated operations which in itself will affect the development of international law.

The central part of the book, comprised of two chapters (4–5), provides an interesting analysis of the role of quasi-covert operations and covert operations in the development of the law on the use of force. Chapter 4 begins with defining quasi-covert operations as 'operations that are either

<sup>3</sup>*Ibid.*, at 50–1.

acknowledged in part; acknowledged sometime after they have taken place; or reported and hypothetically justified without being acknowledged by the acting state'.<sup>4</sup> To shed light on how quasi-covert practice influences the development of the law on the use of force, the chapter delves further into the US drone strikes and the US government's legal justifications for the strikes in Pakistan. In response to the ambitious question of to what extent US drone strikes may count as state practice, the author points out that the US verbal practice and unclear acknowledgments, including statements justifying drone strikes, self-defence, and counterterrorism, cannot be considered as a precedent. She argues persuasively that the US government has never clearly acknowledged its quasi-covert and preventive drone strikes in self-defence. This has consequently made most states remain silent to US drone strikes in Pakistan. The author then concludes that only the attacks could be considered a physical practice that matches clear acknowledgments. Given that the US has not clearly claimed preventive self-defence through drone strikes against non-state actors within the areas of active hostilities, the US verbal practice in using drone strikes against imminent attacks would not contribute to the development of *jus ad bellum*.

Despite the chapter's in-depth approach, some principal issues have not been adequately discussed. The subsection on the US drone strikes and the development of the *jus ad bellum* includes a notable discussion of 'unwilling or unable' theory as the US justification for drone strikes in Pakistan, but it does not explore the legality of this disputed theory which could substantially change the direction of the discussion.<sup>5</sup> Reviewing the unwilling or unable theory whose parameters have not been well defined, while perhaps not deserving of its own subsection, is dealt with in a manner that feels anomalous given the chapter's focus.

The final substantial chapter, Chapter 5 provides an extended discussion of the role of unacknowledged operations in the development of the law on the use of force, taking into account devastating cyberattacks that could distort her analysis to demonstrate what constitutes 'force' and 'armed attack'. Having engaged with the different levels of publicity of unacknowledged operations, the author argues that although unacknowledged operations do not constitute claims by the acting state, such acts may have important indirect effects on the development of customary rules of the law on the use of force, providing that they have been made publicly known to some extent. The author essentially deals with the question of how unacknowledged operations may affect the law when state and intergovernmental organisations remain silent. While the author argues that such operations may have influence on the development of the interpretation of *jus ad bellum* rules, the problems surrounding the acceptance of silence of unacknowledged and publicly unknown operations as state practice continue to weigh against discussions on the role of such operations in the development of *jus ad bellum* in different levels. Finally, having relied on the US cyberattacks on Iran and Estonia, the author notes that such attacks can reach the threshold of an armed attack, and therefore, the existing law on the use of force shall apply to these attacks. This is because it is not clear under what circumstances states consider cyberattacks to be regulated by the UN Charter. For Aronsson-Storrier, although the US cyberattacks do not constitute a precedent for the development of custom, such unacknowledged but scholarly debated operations will prove to have a significant influence on the interpretation of *jus ad bellum* rules.

*Publicity in International Law-making: Covert Operations and the Use of Force* is an impressive and comprehensive contribution to the field of international law. The author has carefully compared and analysed different approaches and scenarios as a consistent way of presenting her final understanding of the role of publicity in international law-making. The author's case study approach in Chapter 4 and Chapter 5 substantiates the accuracy of her arguments. The cases discussed by the author include the most prominent examples of covert and quasi-covert operations

<sup>4</sup>*Ibid.*, at 88.

<sup>5</sup>See, for example, O. Corten, 'The "Unwilling or Unable" Test: Has it Been, and Could it be, Accepted?', (2016) 29 *Leiden Journal of International Law* 777, at 777–9; A. Deeks, "'Unwilling or Unable": Toward a Normative Framework for Extra-Territorial Self-Defense', (2012) 52 *Virginia Journal of International Law* 483, 483–550.

of the twenty-first century. The cases were selected based on the research question and the central argument of the book in which the author has substantially focused on the scope of the prohibition of the use of force and self-defence. Having used a series of focused case studies, the author has developed empirical support for the central argument of her research. The evaluated cases properly represent the way in which the covert and quasi-covert operations affect the development of customary international law on the use of force.

Therefore, my minor criticisms should not detract from the fact that the author's outstanding and impressive research provides a fresh look at the extent to which covert acts of states may influence the development of international law. Reading this book, I appreciated the questions and arguments raised by Aronsson-Storrier and that the book offers noteworthy coverage of the topic, meeting its primary goal of acting as a major reference work in public international law.

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