6

Elements of 'Use of Force'

Effects, Gravity and Intention

INTRODUCTION

This chapter will continue the analysis of the meaning of a 'use of force' in article 2(4) of the UN Charter with respect to its required effects, whether there is a gravity threshold for an unlawful use of force, and if a particular intent is required to bring a forcible act within the scope of this provision.

EFFECTS

Building on the previous chapter's conclusions that 'force' in article 2(4) includes physical force (and not non-physical forms of coercion) but that physical means are not necessarily required, this section will show that it is the *effects* of a 'use of force' that are likely to be decisive in its characterisation as such[1] and will analyse the type of effects that are relevant. The following section will evaluate the required nature of the effects of a 'use of force' under article 2 (4) by discussing if the relevant harm is confined to harm to persons and property only, the required level of directness between the act and its harmful effect, whether the effect should be permanent or if temporary effects suffice and if the effect should actually ensue or if merely potential effects count.

Physical Harm to Persons or Objects

Although it is clear that a forcible act that directly results in physical harm to persons or property (and that meets the other requirements of article 2(4)) will

[1] For a different (policy- rather than legal-based) argument that the consequences (i.e. effects) of a 'use of force' are what count, see Michael N Schmitt, 'Computer Network Attack and the Use of Force in International Law: Thoughts on a Normative Framework (1999) 37 *Columbia Journal of Transnational Law* 1998–9, 900–23.

be characterised as a 'use of force' under article 2(4),[2] there is nothing explicit in the text of article 2(4) itself that restricts its scope to physical harm or harm to certain objects. A physical effect may not always be required for an act to constitute a prohibited 'use of force'.[3] However, *non*-physical effects alone (such as psychological, economic or more abstract forms of harm) are not likely to be legally relevant to the determination of whether an act is a 'use of force'. During the 1964 meeting of the Friendly Relations Special Committee, '[i]t was . . . pointed out that force could not be exercised in the abstract; when used, it was directed against an international legal entity, including its political organization, population and territory'.[4] More abstract forms of harm, such as breaking a diplomatic bag[5] or an unauthorised visit by a Head of State such as the visit by Turkish prime minister Ahmet Davutoglu to visit an Ottoman tomb within the Syrian border on 10 May 2015, which the Syrian government called 'a clear aggression',[6] are unlikely to be widely considered by States as a 'use of force' and will fall instead under other legal principles such as the principle of non-intervention.

Christian Henderson states, '[i]t may also be that humans are neither killed or injured, nor property damaged or destroyed, when the prohibition is engaged'.[7] This is due to the emphasis in article 2(4) on territorial integrity and political independence, which does not require harm to persons or property. This is a similar argument to that in Chapter 4 regarding the interpretation of 'international relations' and whether uses of force against objects with no nexus to another State fall within the scope of the prohibition. The object or target of the 'use of force' can therefore be relevant to both elements: whether the act is in 'international relations' and whether it is in fact

[2] Michael N Schmitt (ed), *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations* (Cambridge University Press, 2017), commentary to rule 69, para. 8: '[a]cts that injure or kill persons or physically damage or destroy objects are uses of force'.

[3] There are some notable exceptions to the requirement for direct physical effects, such as an unresisted invasion, and potentially, certain forms of non-kinetic and indirect uses of force such as interfering with satellites and jamming or disrupting radio or television signals. These exceptions and their implications for the interpretation of a 'use of force' under article 2(4) are discussed in more detail in Part III.

[4] First Report of the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States, UN Doc A/5746 (16 November 1964), para. 37.

[5] Yoram Dinstein, *War, Aggression and Self-Defence* (Cambridge University Press, 5th ed, 2011), 208.

[6] Reuters, 'Turkish Prime Minister's Visit to Tomb in Syria Likely to Anger Damascus' *The Guardian* (11 May 2015), www.theguardian.com/world/2015/may/11/turkish-prime-ministers-visit-to-tomb-in-syria-likely-to-anger-damascus.

[7] Christian Henderson, *The Use of Force and International Law* (Cambridge University Press, 1st ed, 2018), 58–9.

a 'use of force'. A forcible act that targets or causes damage to something other than a person or an object is likely to fall outside the scope of the prohibition on both counts.

Directness

The physical effect of a 'use of force' must be 'sufficiently direct'.[8] The commentary to rule 69 in the Tallinn Manual 2.0 (which defines a 'use of force' with respect to cyber operations) suggests that the criterion of directness relates to States' perception of the military nature of the act, since '[i]n armed actions ... cause and effect are closely related'.[9] Directness here refers not to the time elapsed between the use of force and its effect (since in the case of nuclear weapons[10] or cyber operations[11] for example, some of the most damaging effects may be delayed) but rather to proximity, that is, the lack of intermediate steps between the action and its result. This means that the use of force should be the proximate cause of harm. This would exclude non-physical 'force' such as cyber operations adversely affecting financial markets or the electricity grid. The potential problem with including such acts within the scope of article 2(4) is a lack of sufficient directness of the physical effects, rather than the effects themselves, since clearly interruptions to a power supply of, for instance, a nuclear power plant or a hospital can lead to physical harm to persons and property, or in the case of interruption of power supply or radio signals to a military facility, this could yield a military advantage to the attacking State.

[8] Claus Kreß, 'The State Conduct Element' in Claus Kreß and Stefan Barriga (eds), *The Crime of Aggression: A Commentary* (Cambridge University Press, 2017), 412, 425.

[9] *Tallinn Manual* 2.0, n. 2, para. 9.

[10] Judge Weeramantry notes in his dissenting opinion in the *Legality of the Threat or Use of Nuclear Weapons* Advisory Opinion (1996) ICJ Reports 226, 469 (citation omitted) that:

> Unlike other weapons, whose direct impact is the most devastating part of the damage they cause, nuclear weapons can cause far greater damage by their delayed after-effects than by their direct effects. The detailed technical study, *Environmental Consequences of Nuclear War*, while referring to some uncertainties regarding the indirect effects of nuclear war, states: 'What can be said with assurance, however, is that the Earth's human population has a much greater vulnerability to the indirect effects of nuclear war, especially mediated through impacts on food productivity and food availability, than to the direct effects of nuclear war itself'.

[11] A main characteristic of cyber operations is 'that they often produce the intended prejudicial effects indirectly as the consequence of the alteration, deletion, or corruption of data or software or the loss of functionality of infrastructure.' Marco Roscini, *Cyber Operations and the Use of Force in International Law* (Oxford University Press, 2014), 49, citing Harrison Dinniss.

Permanent and Temporary Effects

The text of article 2(4) does not reveal whether the effects of an act must be permanent for it to be characterised as a 'use of force'. The Tallinn Manual 2.0 does not explicitly list permanence of effects as a criterion for characterising a cyber operation as a 'use of force', but the application of its listed criteria (severity, immediacy, directness, invasiveness, measurability of effects, military character, State involvement and presumptive legality) would implicitly include certain cyber operations with only temporary effects, for example, if there is a severe and immediate effect of a military character.[12] Acts which do not cause permanent damage but which could potentially be regarded as a 'use of force' include cyber operations such as Denial of Service[13] and non-kinetic, non-cyber operations that interfere with satellites such as dazzling with lasers, electromagnetic interference for orbital jamming, terrestrial jamming, hijacking, spoofing or scanning.[14] For instance, Kazuto Suzuki notes that

> [j]amming space-based or terrestrial receivers of satellite signals by overwhelming them with energy is one way to interfere with space-based communication, GPS signals, and radio frequency sensors. In 2013, for example, North Korea directed a very strong radio frequency signal toward South Korea to disrupt GPS signals. This mass-scale jamming caused huge confusion for air traffic and other vital socioeconomic infrastructures.[15]

It is not clear if these acts which cause temporary physical effects would be considered uses of force by States. For instance, in response to further GPS disruption by the DPRK in 2016, South Korea wrote to the UN Security Council that '[t]he GPS jamming by DPRK is an act of provocation that poses a threat to the security of the Republic of Korea'[16] but did not invoke the

[12] *Tallinn Manual* 2.0, n. 2, commentary to rule 69, para. 9.

[13] 'The non-availability of computer system resources to their users. A denial of service can result from a "cyber operation" . . .' *ibid.*, 564.

[14] Space Security Index, *Electromagnetic Interference with Space Systems* (November 2020), https://spacesecurityindex.org/2020/11/electromagnetic-interference-with-space-systems/.

[15] Kazuto Suzuki, 'A Japanese Perspective on Space Deterrence and the Role of the U.S.-Japan Alliance and Deterrence in Outer Space', in Scott W Harold et al (eds), *The U.S.-Japan Alliance and Deterring Gray Zone Coercion in the Maritime, Cyber, and Space Domains* (RAND Corporation, 2017), 91, 97.

[16] *Letter dated 5 April 2016 from the Permanent Representative of the Republic of Korea to the United Nations addressed to the President of the Security Council* (5 April 2016) UN Doc S/2016/315, para. 2.

language of article 2(4) of the UN Charter or the right of self-defence under article 51. Uses of force which have only temporary effects are not excluded from a textual interpretation of article 2(4), but it remains to be seen whether subsequent practice of States will demonstrate their agreement regarding such an interpretation. Significant problems of attribution for these types of non-kinetic operations may complicate State's response and legal characterisation of these acts.

It is interesting to consider whether acts with temporary effects would require a higher gravity threshold (or some other factor) to qualify as a prohibited use of force; in the aforementioned examples of cyber attacks and interference with satellites, it is the gravity (e.g. military nature) of the effects or of the potential effects (e.g. in the case of GPS disruption, potential aviation disasters) that is important rather than the actual direct (temporary) damage/disruption of function. With increasing reliance by States on satellite technology (for instance, the reliance of the United States on satellite technology with respect to its military presence and potential military operations in geographically distant theatres such as the South China Sea[17]), it is entirely plausible that even acts with only a temporary effect of disabling or interfering with space systems may in future be treated by States as violating the prohibition of the use of force. Uses of force in outer space are further analysed and discussed in Chapter 8.

Actual or Potential Effects

The wording of article 2(4) of the UN Charter with respect to the threat or use of force is distinguished from article 51 regarding temporality. The phrase 'if an armed attack occurs' has been the subject of much controversy and debate as to whether it limits the right of self-defence to after an armed attack 'occurs'.[18] However, article 2(4) does not mention effects or temporality at all (which is sensible, given that unlike article 51, it does not define conditions for the exercise of a right) but only refers to the terms 'threat' and 'use' of force. It is therefore textually ambiguous whether any physical effect (i.e. harm) must actually ensue for such acts to fall within the scope of the prohibition of the

[17] Dean Cheng, 'Space Deterrence, the U.S.-Japan Alliance, and Asian Security: A U.S. Perspective' in Harold et al, n. 15, 74, 75.

[18] The International Law Association Committee on the Use of Force's 'Final Report on Aggression and the Use of Force' (2018) ('2018 Report') notes that '[t]he ensuing debate over the legality of anticipatory self-defence has been one of the most hotly contested issues surrounding the right to self-defence under international law' (18 with further references).

use of force, or if it is sufficient if there is a potential for physical effects/harm to result.

State practice is mixed and insufficient to draw a definite conclusion regarding whether potential harmful effects would suffice to constitute a prohibited 'use of force' under article 2(4). There are some notable examples of merely potential effects being treated as a 'use of force' and even an 'armed attack', such as the attempted assassination of former US President George Bush in Kuwait in 1993 (discussed in Chapter 8).[19] But of recent alleged State-sponsored assassinations and attempted assassinations involving the use of radioactive (Litvinenko) or chemical weapons (Skripal – analysed in greater detail in Chapter 8, and the assassination of Kim Jong-nam allegedly by North Korean agents in Malaysia on 13 February 2017 with XV nerve agent), article 2(4) was only invoked in relation to the Skripal incident and by only one State (the UK).[20] It is therefore unclear if potential effects would suffice to meet the requirements of article 2(4).

It may be that acts with merely potential effects would only meet the threshold of a 'use of force' under article 2(4) if they occur in combination with other elements, such as a higher gravity of the potential effects, a clear hostile or coercive intention, or a particularly close connection between another State and the object/target of the act. These considerations may relate to the element of 'international relations', since the targeted (attempted) killing of an individual may rise to the level of an international incident due to the use of a prohibited weapon with serious potential effects for the population of the territorial State (as was the case in the attempted assassination of Sergei Skripal with the prohibited nerve agent Novichok). The notion of a combined threshold of elements for an act to constitute a 'use of force' and the relationship between the elements of a 'use of force' and contextual elements such as 'international relations' is explored in more detail in Part III.

Conclusion

It is clear that forcible acts with direct (i.e. sufficiently proximate) physical effects on persons or objects may constitute a 'use of force' and fall within the scope of the prohibition of the use of force in article 2(4) if the other

[19] Henderson observes in relation to this example that 'mere attempts to use force by one state against another have been construed as armed attacks, and therefore by implication a use of force in breach of the prohibition' (n. 7, 59).

[20] Marc Weller, 'An International Use of Force in Salisbury?', *EJIL: Talk!* (14 March 2018), www.ejiltalk.org/an-international-use-of-force-in-salisbury/.

requirements of that provision are met. It is textually unclear and remains to be seen through the subsequent practice of States if forcible acts with only temporary effects would fall within the scope of the prohibition in article 2(4). It is similarly legally uncertain if forcible acts with potential but unrealised effects would suffice to constitute a prohibited 'use of force' under article 2(4). It is likely that other elements of a 'use of force' will be decisive for determining whether such acts meet the definition of this term. The rest of this chapter will consider if there is a requirement for a particular gravity or intention for a prohibited 'use of force'.

GRAVITY

It is debated among legal scholars whether there is a '*de minimis*' gravity threshold for a prohibited use of force under article 2(4) of the UN Charter. The concept of a gravity threshold for prohibited uses of force under article 2 (4) of the UN Charter is a hotly contested topic in three respects: firstly, whether there is a lower gravity threshold that a forcible act must reach before it will constitute a 'use of force' and fall within the scope of article 2(4); secondly, if there is such a threshold, how high or low it is and how it is to be assessed; and thirdly, the implications of the previous two issues for the 'gap conundrum'.

This conundrum refers to the gap between the gravity threshold of an unlawful 'use of force' under article 2(4) of the UN Charter, and the gravity threshold of an 'armed attack' under article 51, which would permit a use of force in self-defence by the victim State. In the *Nicaragua* case, the International Court of Justice (ICJ) found it 'necessary to distinguish the most grave forms of the use of force (those constituting an armed attack) from other less grave forms'.[21] The problem resulting from this approach was pointed out by Judge Jennings in that case:

> The original scheme of the United Nations Charter, whereby force would be deployed by the United Nations itself, in accordance with the provisions of Chapter VII of the Charter, has never come into effect. Therefore an essential element in the Charter design is totally missing. In this situation it seems dangerous to define unnecessarily strictly the conditions for lawful self-defence, so as to leave a large area where both a forcible response to force is

[21] *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America), Merits, Judgment* (1986) ICJ Reports 14 ('*Nicaragua* case'), para. 191.

> forbidden, and yet the United Nations employment of force, which was intended to fill that gap, is absent.[22]

Clearly then, the gravity threshold for prohibited uses of force is of utmost relevance to the permissibility question, with respect to acts falling below the threshold for an unlawful 'use of force' (and hence permissible under *jus contra bellum*) and with respect to acts above the threshold for a 'use of force' but not amounting to an 'armed attack' (in respect of which States are not permitted to respond using force under the *jus contra bellum*). It is a matter of controversy how high the gravity threshold for an 'armed attack' is.[23] Notwithstanding where the upper limit of the 'gap' between an unlawful 'use of force' under article 2(4) and an 'armed attack' under article 51 falls, the lower limit of the gap – that is, the lower threshold of a 'use of force' – also affects the size of the gap between the two.[24] A very low gravity threshold for an unlawful 'use of force' increases the size of the 'gap' and reduces the range of forcible measures lawfully available to States in their international relations, such as with respect to security measures. Conversely, a relatively high threshold of a prohibited 'use of force' reduces the size of the 'gap' but is also more permissive, since a wider range of forcible measures would be lawfully available to States before the prohibition in article 2(4) is engaged. Therefore, the view that one takes of a *de minimis* threshold for 'use of force' under article 2(4) is likely to be influenced by one's position on the aforementioned matters, including one's position on the appropriate balance between State security and international peace and security, which is liable to be affected by a more permissible regime of potentially escalatory forcible acts. The treatment of these matters in scholarship is analysed next.

Ian Brownlie does not directly discuss the concept of a gravity threshold for article 2(4). He notes that

> from the point of view of assessing responsibility ex post facto, the distinction [between a use of force and 'frontier incidents'] is only relevant in so far as the minor nature of an attack is prima facie evidence of absence of intention to attack, of honest mistake, or simply the limited objectives of an attack. When

[22] Dissenting Opinion of Judge Jennings, *ibid.*, 533–4.

[23] See discussion in ILA Committee on the Use of Force, 2018 Report, n. 18, 6.

[24] As discussed in the Introduction, some States and scholars take the (minority) position that there is no gap between a prohibited 'use of force' under article 2(4) and an 'armed attack' under article 51, which entails clear consequences for justifying the use of force in self-defence.

> the justification of self-defence is raised the question becomes one of fact, viz., was the reaction proportionate to the apparent threat.[25]

According to this position, a lower gravity intensity is an indicator of lack of intention, which is relevant either to whether it is actually an 'armed attack' (if intention is a criterion) or to the necessity of using force in self-defence. The relationship between gravity and intention is discussed in Chapter 8.

The more recent discussion by scholars including Olivier Corten,[26] Tom Ruys[27] and Mary Ellen O'Connell[28] frames the question as to whether there is a '*de minimis*' threshold for a use of force under article 2(4). A note on this terminology: in terms of legal doctrine, '*de minimis*' is often short for '*de minimis non curat lex*' – a common law principle available for judges to apply to prevent the strict application of the law to trifles but which does not render the conduct itself lawful.[29] 'The defence of *de minimis* does not mean that the act is justified; it remains unlawful, but on account of its triviality it goes unpunished.'[30] It is an interesting question to consider whether this principle would be applicable in proceedings before the ICJ regarding an article 2(4) violation claim. For violations of the prohibition of the use of force, it is rare that legal claims are brought, and if we limit ourselves to those uses of force that are adjudicated, then we would probably find a much higher gravity threshold for uses of force since States are more likely to bring more grave cases with clearer evidence for adjudication, given the risks, uncertainty and expense of litigation. The term '*de minimis*' can also be used in the sense employed by Corten, Ruys and O'Connell. The Merriam-Webster dictionary defines '*de minimis*' as 'lacking significance or importance: so minor as to merit disregard'.[31] It is in this latter sense that the term is used in the present discussion.

[25] Ian Brownlie, *International Law and the Use of Force by States* (Clarendon, 1963), 365–6, footnote omitted.

[26] Olivier Corten, *The Law against War: The Prohibition on the Use of Force in Contemporary International Law* (Hart Publishing, 2010).

[27] Tom Ruys, 'The Meaning of "Force" and the Boundaries of the *Jus Ad Bellum*: Are "Minimal" Uses of Force Excluded from UN Charter Article 2 (4)?' (2014) 108(2) *American Journal of International Law* 159.

[28] Mary Ellen O'Connell, 'The Prohibition of the Use of Force' in Nigel D White and Christian Henderson (eds), *Research Handbook on International Conflict and Security Law:* Jus ad Bellum, Jus in Bello *and* Jus post Bellum (Elgar, 2013), 89.

[29] Duhaime's Law Dictionary, *De Minimis Non Curat Lex Definition*, www.duhaime.org/LegalDictionary/D/DeMinimisNonCuratLex.aspx.

[30] 2004 Supreme Court of Canada decision of *Canadian Foundation for Youth v Attorney General*, Justice B. Wilson, in dissent.

[31] Merrian-Webster Dictionary, 'De Minimis', www.merriam-webster.com/dictionary/de minimis.

The three scholars mentioned earlier devote considerable attention to the question of a *de minimis* threshold and fundamentally disagree on this point. Corten and O'Connell take the position that the prohibition of the use of force contains a *de minimis* threshold; Ruys posits it does not. Corten argues that 'it can be concluded that there is a threshold below which the use of force in international relations, while it may be contrary to certain rules of international law, cannot violate article 2(4). The conclusion holds not just on land but also at sea and in the air.'[32] On land, he discusses instances of hot pursuit, unlawful arrest and international abductions as police measures falling outside the scope of law enforcement co-operation treaties and not treated as violations of article 2(4).[33] His discussion of police/military measures at sea makes a stronger distinction between police measures (hot pursuit, inspections, prevention of pollution) and the use of inter-State armed force.[34] The discussion of measures in the air relates to illegal trespass and shooting down of aeroplanes as a police measure to guarantee air safety or in self-defence of individual aircraft (not the State).[35] As to where to place the threshold, Corten argues that the factors determining this are where the action took place (if within the State's zone of jurisdiction or not, i.e. can it be considered as an enforcement measure within its jurisdiction?) and the context in which the action occurred (whether there is pre-existing inter-State tension or an international dispute).[36]

According to O'Connell, 'under the best interpretation, Article 2(4) prohibits any use of armed force or armed force equivalent by a state against another state when the force involved is more than de minimis'.[37] She excludes law/maritime enforcement, terrorist attacks by or attributable to States, limited force to rescue hostages, border incursions and serious violations of maritime space including submarines in territorial waters, shooting down planes (e.g. Gulf of Sidra incident) and cyber operations from the scope of article 2(4). '[T]he type of force associated with law enforcement does not come within the Article 2(4) prohibition. Shooting across the bow of a ship, shooting at the legs of a person evading arrest and dropping a bomb on an oil tanker to prevent coastal pollution are all examples of such minimal or de minimis armed force.'[38] She bases this conclusion on the interpretation of ICJ

[32] Corten, n. 26, 55.
[33] *Ibid.*, 53–5.
[34] *Ibid.*, 55–60.
[35] *Ibid.*, 60–7.
[36] *Ibid.*, 73–4.
[37] O'Connell, n. 28, 99.
[38] *Ibid.*, 102, footnote omitted.

judgments (namely, the *Corfu Channel* case, *Nicaragua* case, *Oil Platforms* case, the *Wall* Advisory Opinion and the *DRC v Uganda* case)[39] and examples from State practice, and acknowledges that '[t]here is no express authority on the point'.[40] Examples of State practice that O'Connell provides include the 1981 Gulf of Sidra incident (in which the United States shot down Libyan planes), the 31 March 1999 border incursion by three US soldiers into Serbia, Iranian detention of British sailors in 2007 during the Iraq war, North Korean Navy submarines in Japanese territorial waters, and the 1982 Swedish attempt to bring a submarine to the surface with depth charges and mines. With respect to the latter, she states that '[p]lainly the use of depth charges and mines constitutes armed force, but in this case the use did not violate Article 2(4) because it was a minimal use to detain the submarine'.[41] This example implies that it is not the amount or intensity of force or its (potential) effects that are relevant to determining whether the threshold is met but its purpose.

In contrast to Corten and O'Connell, Ruys argues there is no *de mininis* threshold for a 'use of force' under article 2(4). He disagrees with Corten that minimal uses of force within a State's own territory are justified by law enforcement rights under other legal regimes for land/sea/air, because '[n]one of the conventions cited provides a legal basis for forcible action against unlawful territorial incursions by military or police forces of another state'.[42] He argues that there are theoretical reasons against the idea that there is a gravity threshold for article 2(4): armed confrontations between police/military of two States involve 'international relations', and the law enforcement paradigm is hierarchical and therefore not suited to equal sovereigns.[43] It also cannot be justified by reference to other legal frameworks. According to Ruys, Corten's arguments depend heavily on omission, that is, interpreting a failure by States to protest or raise articles 2(4) or 51 as indicating their *opinio juris* that those provisions do not apply to the incidents in question.

Christian Henderson makes a more nuanced observation about a *de minimis* gravity threshold, noting 'the *de minimis* threshold is normally based upon the distinction between law enforcement actions and uses of force',[44] and that this distinction is more complex than whether a certain gravity threshold is

[39] *Ibid.*, 102–4.
[40] *Ibid.*, 102.
[41] *Ibid.*, 106.
[42] Ruys, n. 27, 181.
[43] *Ibid.*, 180.
[44] Henderson, n. 7, 69.

met.[45] He observes that it is not a matter of 'quantifying the use of force'[46] in terms of its gravity but rather determining whether 'international relations' are engaged, at which point the prohibition of the use of force becomes applicable.[47] Henderson argues that 'the gravity of the use of force against such private actors does not by itself determine the applicability of the prohibition … Indeed, it is more a qualitative – state or private – as opposed to quantitative – small- or large-scale – distinction, making a clear *de minimis* threshold hard to discern' and that 'when the "international relations" between states are engaged there is little state practice supportive of a *de minimis* threshold in the context of incidences involving armed force.'[48]

This author takes a slightly different view to Henderson. With respect to the prohibition of the use of force, gravity of effects is relevant to two separate elements of article 2(4). Firstly, it is relevant to the contextual element of whether the act occurs in 'international relations'. For example, acts of a higher gravity are more likely to be perceived by States as of a military rather than law enforcement nature and thus as engaging their international relations (discussed in Chapter 8). Also, acts of higher gravity may evince a hostile or coercive intention (discussed in the following section) with respect to another State and thus engage 'international relations' on that basis. The second point of relevance of gravity is to the question of whether the act constitutes a 'use of force' at all. Since, as Ruys convincingly argues, State practice makes clear that when 'international relations' are engaged, 'any actual armed confrontation between two states, even if small-scale or localized, comes within the ambit of the *jus ad bellum*',[49] it does appear that there is no *de minimis* gravity threshold. However, gravity of effects remains a relevant factor in the assessment of whether an act constitutes a 'use of force'. As the preceding discussion of effects noted, gravity may be an especially relevant factor in converting some types of acts into a 'use of force', such as when the act has only temporary effects, or merely potential but unrealised effects. The relationship between these different elements of a 'use of force' and the contextual elements of article 2(4) such as 'international relations' is the subject of Chapter 8 and is explored through case studies of subsequent State practice.

[45] *Ibid.*, 68–9, 74.
[46] *Ibid.*, 68.
[47] *Ibid.*, 74.
[48] *Ibid.*.
[49] Ruys, n. 27, 209.

A further consideration is that the (perceived) gravity of a use of force is strongly influenced by the domain in which it takes place, namely, land, sea, air or outer space. These domains differ in the following relevant ways: firstly, the type of acts that are possible or frequent in those domains (e.g. interdiction of vessels, satellite interference); secondly, the perceived or actual security threat to the State (i.e. potential effects and security interests at stake); and, thirdly, the legal rights and obligations of States under other applicable legal frameworks (e.g. different maritime spaces under the law of the sea). Within several of these domains, it may be relevant whether the forcible act took place vis-a-vis the States concerned:

- within a State's own territory (land/air/sea – internal waters, territorial waters);
- within territory of another State (land/air/sea);
- within territory governed by a special regime allocating rights and duties between States (Exclusive Economic Zone and contiguous zone, international straits, archipelagic waters, etc);
- within a space beyond the territory of any State (international airspace/high seas/Antarctica/outer space, the Moon and other celestial bodies);
- on movable objects: ships, submarines, aircraft, spacecraft, satellites and other man-made space objects registered to a State; or
- on extra-territorial manifestations of the State: e.g., embassies and diplomatic premises and warships.

As noted by Judge Alejandro Alvarez in the *Corfu Channel* case:

> Sovereignty confers rights upon States and imposes obligations on them. These rights are not the same and are not exercised in the same way in every sphere of international law. I have in mind the four traditional spheres – terrestrial, maritime, fluvial and lacustrine – to which must be added three new ones – aerial, polar and floating (floating islands). The violation of these rights is not of equal gravity in all these different spheres.[50]

Conclusion

Ultimately, the controversy regarding the gravity threshold of a 'use of force' under article 2(4) is not solved by the text of that provision, which neither specifies nor excludes a gravity threshold for an act to constitute a 'use of force'

[50] *Corfu Channel Case (UK v Albania), Merits, Judgment* (1949) ICJ Reports 4 ('*Corfu Channel* case'), Separate Opinion of Judge Alvarez, 43.

and therefore fall within the scope of the prohibition. Accordingly, the matter is uncertain at the legal of textual interpretation. The issue of whether article 2 (4) has a *de minimis* gravity threshold depends on the subsequent practice of States in their application of this provision. The analysis of subsequent practice by other scholars in relation to this issue, especially by Corten and Ruys, demonstrates that the interpretation of this practice and the conclusion of whether a 'use of force' has a gravity threshold is strongly influenced by the position one takes regarding the legal significance of silence and inaction. This author finds Ruys' analysis of State practice on this matter convincing and agrees that there is no *de minimis* gravity threshold as such for a prohibited 'use of force' under article 2(4). However, this section has argued that gravity is nonetheless a relevant factor to an assessment of whether an act violates article 2(4) on two bases: firstly, as a factor relevant to whether the act occurs in 'international relations' (e.g. as an indicator of intention), and, secondly, as a relevant factor to whether the act constitutes a 'use of force' for acts that may otherwise not meet the threshold of the definition, for instance, because its effects are temporary or only potential. The complex relationship between 'international relations' and of gravity and intention as elements of a 'use of force' is illustrated in further detail in Part III.

INTENTION

Although intention is regarded by some as a requirement for an 'armed attack' under article 51 of the UN Charter,[51] this is disputed, since hostile intent is perhaps better considered in terms of whether a use of force in self-defence is necessary.[52] The picture is even less clear when it comes to a 'use of force' under article 2(4). According to the commentary to the International Law Commission (ILC) Draft Articles on State Responsibility, intention is not a necessary requirement for an act to be internationally wrongful; whether intention is necessary depends on the obligation in question.[53] It is not clear from the text of article 2(4) if a prohibited 'use of force' entails a particular intention. Whether a particular intention is an element of a prohibited 'use of

[51] See Tom Ruys, *'Armed Attack' and Article 51 of the UN Charter* (Cambridge University Press, 2010), 29 for an overview of ICJ case law and State practice in support of this position.

[52] 2018 Report, n. 18, 6–7.

[53] See ILC, 'Draft Articles on Responsibility of State for Internationally Wrongful Acts, with Commentaries, in Report of the International Law Commission on the Work of Its Fifty-Third Session' UN Doc A/56/10 (2001) ('ILC Draft Articles'), commentary to article 2, at paras. 3 and 10. Paragraph 10: 'In the absence of any specific requirement of a mental element in terms of the primary obligation, it is only the act of a State that matters, independently of any intention.'

force' under article 2(4) is illuminated by examining the other prohibition in that provision which is more clearly associated with coercion, namely, the 'threat . . . of force'. If prohibited threats to use force require a coercive intent and the two prohibitions of threats and use of force are coupled, this would indicate that the latter also requires a coercive intent. This section will firstly examine these questions and then analyse if and what kind of intention may be required for an act to constitute prohibited force, and problems of evidence and proof.

Intention and 'Threat . . . of Force'

The meaning of prohibited threats of force in article 2(4), similar to its counterpart of prohibited force, has received relatively little treatment in scholarship[54] and jurisprudence.[55] The ICJ's jurisprudence does not make clear whether coercion is required for an unlawful 'threat of force'. The *Corfu Channel* case could be interpreted this way, since in that case the ICJ held that the UK was entitled to make threats if the purpose was to deter Albania from firing on its ships, but it was not entitled to make a demonstration of force 'for the purpose of exercising political pressure' on Albania.[56] However, this case is of little precedential value in determining the meaning of article 2 (4), because it is so ambiguous and has been cited in support of diametrically opposed positions.[57]

The two main scholars who have examined the meaning of threats of force in article 2(4), Nikolas Stürchler[58] and Romana Sadurska, have different views

[54] See Romana Sadurska, 'Threats of Force' (1988) 82(2) *American Journal of International Law* 239; Nikolas Stürchler, *The Threat of Force in International Law* (Cambridge University Press, 2009); Corten, n. 26, 92–125; Nicholas Tsagourias, 'The Prohibition of Threats of Force' in Nigel D White and Christian Henderson (eds), *Research Handbook on International Conflict and Security Law:* Jus ad Bellum, Jus in Bello *and* Jus post Bellum (Elgar, 2013), 67.

[55] *Corfu Channel* case, n. 50; *Nicaragua* case, n. 21; *Nuclear Weapons* Advisory Opinion, n. 10.

[56] *Corfu Channel* case, n. 50, 35; Stürchler, n. 54, 90.

[57] See Claus Kreß, 'The International Court of Justice and the Non-Use of Force' in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (Oxford University Press, 2015), 561, 575 (footnotes with further references omitted):

> While the use of the term 'force' may be taken to suggest that the ICJ *implicitly* qualified Operation Retail as an unlawful use of force, it is also *possible* to interpret the Court's avoidance of any explicit reference to Article 2(4) as implying the view that the threshold for a use of force in its technical legal meaning had not been reached.

[58] Stürchler summarises his interpretation of the term as follows:

> In order for there to be a violation of article 2(4), a state must *credibly communicate its readiness to use force in a particular dispute*. . . . specifically, article 2(4) outlaws (1) explicit promises to resort to force and (2) demonstrations of force, the latter defined as

on whether coercion is a necessary element of prohibited threats. Stürchler argues that coercion is not an essential element of a prohibited 'threat of force'. Despite article 2(7) of the Charter, which guarantees States freedom of choice, the primary purpose of the UN Charter is the prevention of war rather than freedom of choice (i.e. freedom from coercion).[59] He gives the example of a war-mongering State that is no longer trying to ensure compliance with anything – a threat or use of force by that State is thus not coercive (no compliance is sought), but it is still unlawful.[60] But coercion could still be a 'strong indicator'[61] in determining the unlawfulness of threats under article 2 (4), in which case what distinguishes unlawful threats from unlawful intervention is the 'military dimension'.[62] The relevance of coercion as a criterion is in showing 'that the threat of force is not, when properly understood, the mere preparation for the use of force.'[63] Rather, threats can be ends in themselves by ensuring compliance at a much lower cost than an actual use of force. Sadurska agrees that the prohibition of threats of force is aimed at international security rather than the individual liberty of each State from external pressure[64] but takes as her starting point a concept of threat of force as 'a form of coercion because it aims at the deliberate and drastic restriction or suppression by one actor of the choices of another'.[65] Hence, it is uncertain whether coercion constitutes an essential ingredient of a prohibited threat of force, although, at the very least, it may be considered a strong indicator of unlawfulness.

Relationship of 'Threat' to 'Use' of Force

Even if coercion were a necessary element of a prohibited threat of force, it is unclear what consequence this would have for whether coercion is required for a prohibited *use* of force. This depends on the relationship between threats and uses of force under article 2(4) (whether they are coupled or uncoupled), and whether the two prohibitions of 'threat' and 'use' of force are regarded as a continuum or as separate but related prohibitions (and therefore distinct

> any militarised act that reveals hostile intent; and (3) the use of force may also constitute a threat of force if the purpose of a military operation is to signal that more force may be forthcoming.
>
> (n. 54, 273–4)

[59] *Ibid.*, 61.
[60] *Ibid.*.
[61] *Ibid.*.
[62] *Ibid.*, 60.
[63] *Ibid.*, 61.
[64] Sadurska, n. 54, 249–50, footnote omitted.
[65] *Ibid.*, 241.

concepts). Stürchler identifies three possibilities for the direct relationship between 'threat' and 'use' of force in article 2(4).[66] The two (minority) possibilities for the relationship between the prohibition of the threat of force and the use of force both hold that the two prohibitions are uncoupled. These two related though opposed possibilities are predicated on differing models, namely, the spiral and deterrence models of international conflict.[67] The first 'uncoupled' option emphasises that threats can spiral into armed conflict and takes the position that threats are unlawful under any circumstances, even if the force threatened would be lawful, such as the threat to use force in self-defence.[68] The second option holds that threats can serve peace through deterrence and are more justifiable than uses of force since the consequences are lower and threats are more likely than actual uses of force to be proportionate. Therefore, according to this view, as propounded by Sadurska, threats to use force may be lawful even if the force threatened would be unlawful.[69] The basic idea is that the rationale behind prohibiting threats or use of force differs in its application to those two concepts, since uses of force are destabilising to international peace and security, whereas threats of force do not always have destructive effects (lower gravity) and can sometimes help maintain international security (purposes of UN Charter).[70] This asymmetry theory has been critiqued as inconsistent with the UN Charter drafters' intention and with State practice,[71] although Stürchler cogently argues that 'States rely on these themes [of the deterrence and spiral models of conflict] in order to judge the permissibility or otherwise of countervailing threats', especially in the context of protracted conflict.[72] The final (and mainstream) position is that threats are coupled to a use of force so that if the force threatened would be unlawful, the threat is unlawful.[73] ICJ jurisprudence and State practice tend to confirm that threats and use of force are coupled and that the threat of force is justified in self-defence.[74] According to the ICJ in its *Nuclear Weapons* Advisory Opinion, 'the notions of "threat" and "use" of force . . . stand together in the sense that if

[66] *Ibid*., 38–64.
[67] Stürchler, n. 54, 45–7.
[68] *Ibid*.
[69] See Sadurska, n. 54.
[70] *Ibid*., 250.
[71] For example, Corten, n. 26, 111ff critiques the asymmetry theory between threats and force put forward by Romana Sadurska by setting out State practice that is inconsistent with this argument.
[72] Stürchler, n. 54, 250.
[73] Brownlie, n. 25, 36: 'If the promise is to resort to force in conditions in which no justification for the use of force exists, the threat itself is illegal.'
[74] Stürchler, n. 54, 91.

the use of force itself in a given case is illegal – for whatever reason – the threat to use such force will likewise be illegal'.[75]

The ICJ's above statement in the *Nuclear Weapons* Advisory Opinion also appears to interpret threats and uses of force as a continuum: concepts that share the same elements but are differentiated merely in form (with threats as a potential but as yet unrealised 'use' of force). Stürchler takes a different view and asserts that threats of force are a separate though related prohibition to the prohibition of the use of force. According to Stürchler, threats do not fit easily into a forcible intervention –> use of force continuum since threats can be broken down along two axes of method (words/actions) and motivation (compellence/deterrence); that is, not all threats are forcible since they may but do not necessarily involve demonstrations of force, and some uses of force are better characterised as threats of further force.[76] Furthermore, threats may but do not necessarily involve coercion and can be ends in themselves and not a prelude to a use of force. Stürchler concludes: 'The dichotomy of threat and use, as suggested by the formulation of article 2(4), is misleading. Although the threat and use of force are conceptually different, that does not mean that they exclude each other in the field.'[77] If one adopts the view of the ICJ that threats and uses of force are coupled and form a continuum, then if 'threat of force' requires coercive intent, the same holds true for 'use of force'. However, different views may be taken on each of these issues with respect to the 'threat of force', and the text of article 2(4) remains open to different interpretations on this point.

Intention and 'Use of Force'

There is a similar lack of consensus among scholars focusing on the meaning of 'use of force' as to whether intention is an element of a prohibited 'use of force'. Ian Brownlie argues that intention is not part of the criteria of prohibited use of force and believes this is a good thing, because to hold otherwise would create unacceptable loopholes in the prohibition.[78] In contrast to Brownlie, Corten argues that '[s]uch an intention appears to be an essential characteristic of the use of force under the Charter'.[79] Henderson also argues that 'it is clear that there must be an intention to use force, or an *animus*

[75] *Nuclear Weapons*, Advisory Opinion, n. 10, para. 47.
[76] Stürchler, n. 54, 262.
[77] *Ibid.*
[78] Brownlie, n. 25, 377.
[79] Corten, n. 26, 76.

belligerandi, in order to breach the prohibition of the threat or use of force'.[80] Ruys notes that 'state practice reveals that, when faced with territorial incursions ostensibly or allegedly lacking hostile intent, territorial states often refrain from invoking the language of Article 2(4) or 51'.[81] However, he notes that this does not necessarily reflect a legal conviction and that State responsibility is 'objective' so does not require intent unless this forms part of the primary rule.[82] For small-scale incursions, Ruys states that 'the key is to determine whether they reflect a hostile intent' to exclude unintentional or harmless acts.[83] With respect to law enforcement within a State's own territory, Ruys argues that manifest hostile intent is sufficient but not necessary for an act to be a 'use of force'.[84]

Adding to the lack of clarity is that the scholarly literature is not consistent in the use of this term. A hostile intention may refer to an intended *action*, intended *effects* or intended *coercion*. The difference is significant, because it may capture or exclude different categories of forcible acts. To speak of a mental state of an abstract entity such as a State is a fiction, since States have neither a physical body nor mind and can only act indirectly through individuals. Therefore, a mental element attaching to a State obligation (in this case, to refrain from the 'use of force' under article 2(4) of the UN Charter) would be satisfied if it is held by a person whose conduct is attributable to the State under the rules set out in the ILC Articles on State Responsibility relating to attribution.[85] This could be either the individual using force (e.g. a soldier) or directing the use of force (a military commander or government official). With respect to what is meant by a hostile intention, at the very least, it requires 'that the State in question is *aware* it is undertaking an action against another State'.[86]

Intended Action

If a hostile intent means intended *action*, this would rule out forcible acts that are accidental, but it would not necessarily rule out mistaken acts. Ruys argues that State practice shows there is a distinction between incursions that are accidental and 'the accidental projection of armed force … across a border' (e.g. shots or shells fired). 'In the latter scenario … the territorial state is not

[80] Henderson, n. 7, 75.
[81] Ruys, n. 27, 189.
[82] *Ibid*., 190–1.
[83] *Ibid*., 172–3.
[84] *Ibid*., 190–1.
[85] ILC Draft Articles, n. 53, arts. 4 to 11.
[86] Corten, n. 26, 78, emphasis in original.

necessarily precluded from characterizing the act as a use of force'.[87] The text of article 2(4) strongly indicates that an intended action is required, through the italicised words: 'All Members *shall refrain* in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.'

Intended Effect

If a hostile intent means an intention to have a certain *effect*, this could rule out mistake, since the action itself is intended but the target, effect or the factual basis may be mistaken. Corten notes that use of force in error was raised in the *travaux préparatoires* of the 1974 GA Definition of Aggression and 'States unanimously excluded the possibility of characterising an act committed by mistake as an aggression'.[88] However, as Corten acknowledges, a problem with this analysis is that although intention may be a requirement for an act of aggression, a use of force may not necessarily amount to aggression. He goes on to argue that 'a review of practice as a whole allows us to affirm that States consider an act, even of a military type, committed by mistake, does not constitute an aggression or even a use of force by one State against another contrary to article 2(4)'.[89] Such practice includes instances of aerial incursion, incursion by South African police into Basutoland (then a British colony) on 26 August 1961, a mistaken attack by UAR on the Federation of South Arabia due to 'pilot's error' on 15 July 1965, and a mistaken firing of five shells by Swiss artillery onto the territory of Liechtenstein during a military exercise on 14 October 1968.[90] In none of these cases did States invoke article 2(4) (although this does not exclude the characterisation of these incidents as internationally wrongful on other legal grounds, such as a violation of sovereignty).

Defining a hostile intent for the purposes of article 2(4) as an intention to produce a particular effect could also rule out deliberate acts with no intention to have a forcible effect within another State. For example, Corten notes that

> [d]uring the discussion before the adoption of General Assembly resolution 3314 (XXIX), Iraq's representative raised the case of a regiment that crosses a State border, knowingly and without authorisation, to go sunbathing on a

[87] Ruys, n. 27, 191.
[88] Corten, n. 26, 79 and footnote 195 with extensive references.
[89] *Ibid.*, 79.
[90] *Ibid.*, 80 with further references.

> beach. No State characterised such a hypothesis as a use of force in the debates in the General Assembly, whether in the Sixth Commission or in the special committee on the definition of aggression.[91]

Corten contrasts this situation with deliberate acts which do not directly target the territorial State but which nevertheless use force, for example, targeted operations such as rescue of nationals abroad and targeted killing. He argues that in respect of targeted operations,

> [i]f the intervening State's objective is not to challenge another State, and if consequently it uses very limited military means, article 2(4) will not be invoked (as in the Rainbow Warrior or 1990 Liberia precedents). If the military action is against another State that supposedly supports 'terrorists' or threatens nationals of the intervening State, the action will involve the rules on the prohibition of the use of force (as in the Mayaguez or Entebbe precedents).[92]

The fundamental point is that:

> For the prohibition of the use of force to be applicable, it is necessary but sufficient for a State to decide to take action that it knows will involve defying another State, whether its central government, its agents, its population, its territory or its infrastructure. . . . If such an intention is found, article 2(4) will be applicable, regardless of any more general motive for the intervention.[93]

This point relates to a coercive intent and is addressed in the following section.

With respect to intended effects, there is nothing in the text of article 2(4) to indicate or to exclude this as necessary for a prohibited 'use of force'. (There is also a question of whether the notion of hostile intent would require an intended harmful effect or if some other mental State would suffice, such as negligence, recklessness or reasonable foreseeability. But this is going even further beyond the text.) It will therefore depend upon the subsequent practice of States in their application of article 2(4). As set out earlier, there is practice indicating that States do not usually invoke article 2(4) in cases of mistake of fact.

Coercive Intent

Finally, hostile intent may refer to a coercive intent. Corten argues that '[t]he only intention to be considered is that of forcing the will of another State'.[94]

[91] *Ibid.*, 84, footnote omitted.
[92] *Ibid.*, 91.
[93] *Ibid.*, 89–90.
[94] *Ibid.*, 76–7.

Corten sees this requirement as so essential that 'when a State takes even limited military measures and admits that such measures are part of a policy conducted against one State, there is no doubt that article 2(4) is applicable'.[95] The position that coercive intent is a requirement for a prohibited use of force finds some support in a textual interpretation of article 2(4), due to the relationship between the prohibition of threats and uses of force (as discussed earlier); the relationship of the non-intervention principle and the principle of the non-use of force; and the object and purpose of the prohibition of the use of force in article 2(4).

The principle of non-intervention is found in customary international law and is a 'corollary of the sovereign equality of States' set out in article 2(1) of the UN Charter.[96] In the *Nicaragua* case, the ICJ defined the content of the principle of non-intervention (as it related to the dispute in question) as follows:

> the principle forbids all States or groups of States to intervene directly or indirectly in internal or external affairs of other States. A prohibited intervention must accordingly be one bearing on matters in which each State is permitted, by the principle of State sovereignty, to decide freely. One of these is the choice of a political, economic, social and cultural system, and the formulation of foreign policy. Intervention is wrongful when it uses methods of coercion in regard to such choices, which must remain free ones.[97]

Henderson argues that intention is necessary for a breach of the prohibition of the use of force in article 2(4) because '[f]orce … is a particular kind of intervention'.[98] He follows the ICJ's approach in *Nicaragua* and views a 'use of force' as 'a more specific form of intervention' 'involving physical coercion'.[99] This is yet another continuum approach; since intervention requires coercion and a use of force is a form of intervention, a use of force also requires coercion. However, it is not clear from the judgment whether a use of force must always be coercive. Just as an unlawful intervention can be forcible or non-forcible, it is arguable that a prohibited use of force can violate the principle of non-intervention or not. In other words, not all violations of the prohibition of the use of force in article 2(4) will necessarily comprise violations of the principle of non-intervention. For example, a non-combatant evacuation of nationals from a generalised situation of violence or civil unrest

[95] *Ibid.*, 78.
[96] *Nicaragua* case, n. 21, para. 202.
[97] *Ibid.*, para. 205.
[98] Henderson, n. 7, 50.
[99] *Ibid.*, 52.

abroad is not aimed at coercing a choice 'on matters in which each State is permitted, by the principle of State sovereignty, to decide freely' such as 'the choice of a political, economic, social and cultural system, and the formulation of foreign policy'[100] but may nevertheless constitute a use of force in the territory of another State.

The final argument that a 'use of force' requires a coercive intent is based on the object and purpose of article 2(4). As discussed in Chapter 4, the main objects of article 2(4) are protecting State sovereignty (also protected by the non-intervention principle) and the maintenance of international peace and security. The protection of State sovereignty by article 2(4) is further supported by the principles of sovereign equality and non-intervention set out in articles 2(3) and 2(7) (although it is important to note that article 2(7) does not actually prohibit intervention by States in the internal affairs of other States; as mentioned earlier, the non-intervention principle is found in customary international law and not directly in the UN Charter itself). Considering this purpose behind the prohibition in article 2(4), it would make sense to interpret it as prohibiting conduct that is employed to bring about coercion/interference with the sovereign equality of States.

With respect to the second object and purpose of article 2(4) – to maintain international peace and security – one of the propositions Stürchler tests is that article 2(4) can be read together with article 2(3) to imply a positive obligation to achieve peaceful settlement of disputes without recourse to threats to use force.[101] This idea could be applied to the interpretation of a 'use of force' in article 2(4) to argue that the prohibition of the use of force is directed towards uses of force in contradistinction to the obligation of peaceful settlement of disputes (which Stürchler notes was recognised by the ICJ as a positive obligation in the *North Sea Continental Shelf* cases[102]). In other words, it could be argued that only those minimal uses of force that are used as a tool for foreign policy (i.e. accompanied or motivated by an element of coercion) would violate the prohibition. This would also reflect the notion of 'use of force' as a broader concept but in many ways a continuation of the old concept of 'war' from the preceding treaty, the Kellogg–Briand Pact, which condemns 'recourse to war for the solution of international controversies' and embodies its renunciation 'as an instrument of national policy'.[103] The

[100] *Nicaragua* case, *ibid*., para. 205.
[101] Stürchler, n. 54, 53.
[102] *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands) Judgment, Merits* (1969) ICJ Reports 3 (20 February 1969) at paras. 83–101.
[103] *Ibid*., art. 1.

Principle set out in article 2(3) of the UN Charter that '[a]ll Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered' is a continuation of this aim to prevent the settlement of international disputes by force.[104] This also connects to the term 'international relations' in article 2(4);[105] as Chapter 8 will show, the elements of 'international relations', gravity and intention are interrelated.

A requirement of coercive intent may also play a role in determining whether an act falls within the scope of the *jus contra bellum* or another legal framework applicable within a particular domain, such as law of the sea. With respect to the location of the forcible act, as noted earlier in the discussion about gravity, the domain in which it occurs may impact on the legal characterisation of the act due to the sovereign rights and applicable legal framework within that space as well as the different nature of the perceived security threat. Measures which may be governed by another legal framework (such as the exercise of law enforcement jurisdiction at sea) could fall within or outside the scope of article 2(4) of the UN Charter, depending on a number of factors – including the element of a hostile or coercive intention vis-à-vis another State (in this case, the flag State of the vessel) – which may bring an act of purported maritime law enforcement within the realm of 'international relations' and thus a prohibited 'use of force' under article 2 (4) of the UN Charter. Interestingly, legal clarity over certain types of acts as definitely constituting unlawful uses of force may relate to intention. For example, as discussed in Chapter 5, the listed acts of aggression in the 1974 GA Definition of Aggression constitute a 'subsequent agreement' by UN Member States that those acts are unlawful 'uses of force' in violation of article 2(4). Thus, if a State commits one of these acts, it is highly likely that it had a hostile intent, since the act is unambiguously unlawful.

Evidence of Hostile Intent

If a hostile intent (however defined) is required for an act to be an unlawful 'use of force' under article 2(4), this raises questions of what kind of evidence counts and the required standard of proof. A problem with hostile intent is that intention is a subjective standard requiring a particular mental state, as opposed to an objective standard in which only the action or omission is

[104] Kreß, n. 8, 432 footnote 93, citing Kirsten Sellars, *Crimes against Peace and International Law* (Cambridge University Press, 2013), 25.
[105] See discussion in Chapter 5.

relevant for the prohibition to be engaged.[106] The problem of subjectivity is addressed by Ruys by adding the term 'manifest' to allow for an objective assessment of intention behind the act.[107] But on another view, manifest hostile intent relates to an 'armed attack', for example, to determine the necessity of using force in response.

Indicators that have been suggested for a hostile intent include 'the gravity or magnitude of the attack';[108] for less grave acts, States take into account other factors to determine intent, such as geopolitical context, repeated nature, location, nature of units, and specific indications related to weapons being fired up.[109] Corten provides six criteria that indicate gravity and intention (which in his view are interrelated): (1) where the act was carried out, (2) the context, (3) who decided on it and who conducted it, (4) the target, (5) whether 'the military operation [has] given rise to confrontation between the agents of two States' and (6) 'the scope of the means implemented by the intervening State'.[110] The Independent International Fact-Finding Mission on the Conflict in Georgia also set out indicators of hostile intent:

> According to State practice ... not all militarised acts amount to a demonstration of force and thus to a violation of Art. 2(4) of the UN Charter. Many are routine missions devoid of any hostile intent and are meaningless in the absence of a sizeable dispute. But as soon as they are non-routine, suspiciously timed, scaled up, intensified, geographically proximate, staged in the exact mode of a potential military clash, and easily attributable to a

[106] ILC Draft Articles, n. 53, commentary to article 2, at para. 3:

> Whether there has been a breach of a rule may depend on the intention or knowledge of relevant State organs or agents and in that sense may be 'subjective'. ... In other cases, the standard for breach of an obligation may be 'objective', in the sense that the advertence or otherwise of relevant State organs or agents may be irrelevant. Whether responsibility is 'objective' or 'subjective' in this sense depends on the circumstances, including the content of the primary obligation in question. The articles lay down no general rule in that regard. The same is true of other standards, whether they involve some degree of fault, culpability, negligence or want of due diligence. Such standards vary from one context to another for reasons which essentially relate to the object and purpose of the treaty provision or other rule giving rise to the primary obligation. Nor do the articles lay down any presumption in this regard as between the different possible standards. Establishing these is a matter for the interpretation and application of the primary rules engaged in the given case.

[107] Ruys, n. 27, 189.
[108] Henderson, n. 7, 78; Ruys, n. 27, 175.
[109] Ruys, n. 27, 175–6.
[110] Corten, n. 26, 91–2.

foreign-policy message, the hostile intent is considered present and the demonstration of force manifest.[111]

There thus appears to be a connection between these objective indicators of a subjective hostile intent and the elements of gravity and international relations. The relationship between these elements is explored further in Part III.

Conclusion

Ultimately, whether or not intention is required for a prohibited use of force under article 2(4) cannot be definitively resolved at the level of textual analysis. It is possible that hostile intent is an indicative factor that can turn a forcible act that would otherwise not meet various criteria, such as gravity or if the harm is only potential but unrealised, into a 'use of force'. This discussion about the interrelationship between different elements of a 'use of force' (including the relationship between intention, gravity and international relations with respect to maritime law enforcement versus 'use of force') is continued in Part III.

CONCLUSION

The above textual analysis of article 2(4) of the UN Charter supports the following conclusions regarding the interpretation of the term 'use of force':

- ***Effects:***
  - *Physical effects*: Usually required but with some notable exceptions (discussed in Chapter 7).
  - *Object/target*: There is nothing explicit in the text of article 2(4) itself that restricts its scope to certain objects of harm, i.e. harm to physical property or persons. However, abstract forms of harm are probably excluded from the scope of an unlawful 'use of force'.
  - *Directness*: The relevant harmful effects must have sufficient proximity to the application of force. This refers to the intermediate steps between the act and its result, not how long it takes for the harm to manifest.

[111] 'Independent International Fact-Finding Mission on the Conflict on Georgia, Report' (2009), available at www.mpil.de/en/pub/publications/archive/independent_international_fact.cfm, para. 232.

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  - *Permanent versus temporary*: The text of article 2(4) is not conclusive on this point. More State practice is required to determine whether it will reveal their agreement regarding this interpretation.
  - *Actual versus potential*: It is textually ambiguous whether any physical effect (i.e. harm) must actually ensue from such acts for them to fall within the scope of the prohibition, or if it is sufficient if there is merely a potential for physical effects/harm to result.
- ***Gravity of effects***: Although this work takes the position that there is no *de minimis* gravity threshold for a 'use of force' under article 2(4), gravity is relevant to the contextual element of 'international relations' (e.g. as an indicator of intention), and is a relevant factor to whether the act constitutes a 'use of force' for acts that may otherwise not meet the required threshold of the definition, for instance, because its effects are temporary, or only potential.
- ***Hostile intent***: The text of article 2(4) strongly indicates that at the very least, an intended *action* is required. The text does not explicitly require or exclude an intended *effect*, although State practice indicates that mistaken forcible acts are usually not treated as violating the prohibition of the use of force. There is textual support for the position that a coercive intent is required under article 2(4), due to the relationship between the prohibition of threats and uses of force, the relationship of the non-intervention principle and the principle of the non-use of force, and the object and purpose of the prohibition of the use of force in article 2 (4). However, such textual support is not definitive and the argument can be made both ways. It is possible that hostile intent is an indicative factor that can turn a forcible act that would otherwise not meet various criteria (such as gravity or if the harm is only potential but unrealised) into a 'use of force'.

However, it is clear that some 'uses of force' that are widely accepted as such; for instance an unopposed invasion or military occupation does not contain some of the elements identified above, particularly physical means or a physical effect. These examples challenge the conventional understanding of a prohibited 'use of force' as displaying the elements identified in this and the preceding chapter. How are these accepted forms of 'use of force' to be reconciled with the above analysis? This is the subject of Part III.