

Introduction

Recent events such as Russia's illegal invasion of Ukraine on 24 February 2022 have drawn renewed attention to the international law prohibiting the use of force between States. The prohibition is enshrined in article 2(4) of the UN Charter¹ and customary international law and is considered a 'cornerstone' of the modern international legal system.² Article 2(4) of the UN Charter provides as follows:

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.

This legal framework – the *jus contra bellum* – introduced in the aftermath of World War II to 'save succeeding generations from the scourge of war',³ clearly did not prevent the use of force in this instance. But it is not irrelevant; to the contrary, such egregious violations highlight the urgent need to bolster the existing rules aimed at preventing the use of force in international relations. Indeed, the continued salience of these rules was affirmed by the outrage and strong response of the international community to Russia's

¹ *Charter of the United Nations 1945* (adopted 26 June 1945, entered into force 24 October 1945), 1 UNTS 16 ('UN Charter').

² *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America), Merits, Judgment* (1986) ICJ Reports 14 ('Nicaragua case'), Separate Opinion of President Nagendra Singh, 153; *Oil Platforms (Islamic Republic of Iran v United States of America), Judgment* (2003) ICJ Reports 161 ('Oil Platforms case'), Dissenting Opinion of Judge Elarby, para. 1.1; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (2005) ICJ Reports 168 ('Armed Activities case'), para. 148.

³ UN Charter, n. 1, preamble.

aggression, which explicitly condemned the invasion as a violation of the prohibition of the use of force and an act of aggression.⁴

Although large-scale violations of the prohibition of the use of force garner significant international attention, it is in fact violations at the lower end of the intensity spectrum which occur more frequently and over which uncertainty reigns. The international reaction to and scholarly analysis of incidents such as North Korea's ballistic missile tests over Japan on 28 August and 15 September 2017;⁵ the attempted assassination of the former Russian spy Sergei Skripal in Salisbury, United Kingdom, on 4 March 2018;⁶ and the major US cyber attack on Iran on 20 June 2019 in response to Iran's targeting of oil tankers⁷ demonstrate the lack of a shared analytical framework to determine if they violate the prohibition of the use of force. In addition, new forms and applications of technology with potential military effects (such as cyber operations⁸ and counter-space capabilities in outer space⁹) present increasingly significant security threats and defy clear legal categorisation under the *jus contra bellum*.

Notwithstanding the central importance of the prohibition of the use of force in the international legal order, there remains genuine uncertainty among States, scholars and jurists about the meaning of prohibited force. As Andrea Bianchi notes, 'despite the rhetorical commitment to the Charter, the interpretation of its provisions, particularly Article 2(4) and Article 51, has become highly controversial. In other words, the social consensus on the centrality of the Charter regulatory framework to the use of force evaporates

⁴ UN General Assembly Resolution on Aggression against Ukraine, UN Doc A/RES/ES-11/1 (2 March 2022), adopted by a vote of 141 in favour to 5 against with 35 abstentions. In the resolution, the UN General Assembly '[d]eplores in the strongest terms the aggression by the Russian Federation against Ukraine in violation of Article 2 (4) of the Charter' (para. 2).

⁵ Arms Control Association, 'Chronology of US-North Korean Nuclear and Missile Diplomacy' (2022), www.armscontrol.org/factsheets/dprkchron.

⁶ 'Russian Spy: What Happened to the Skripals?' *BBC News* (18 April 2018), www.bbc.com/news/uk-43643025.

⁷ Julian E Barnes, 'U.S. Cyberattack Hurt Iran's Ability to Target Oil Tankers, Officials Say', *New York Times* (28 August 2019) www.nytimes.com/2019/08/28/us/politics/us-iran-cyber-attack.html.

⁸ For instance, in 2016 NATO declared cyber space as an operational domain, and in October 2018 it established a Cyberspace Operations Centre: Laura Brent, 'NATO's Role in Cyberspace', *NATO Review* (12 February 2019) www.nato.int/docu/review/2019/Also-in-2019/natos-role-in-cyberspace-alliance-defence/EN/index.htm.

⁹ NATO declared outer space as an operational domain in 2019: NATO, 'NATO's Approach to Space' (2 December 2021) www.nato.int/cps/en/natohq/topics_175419.htm. Space security and the use of force is discussed in Chapter 8 of this book.

when it comes to interpreting the content and scope of application of its most fundamental provisions.¹⁰

The International Court of Justice (ICJ) has made scant contribution to clarifying the meaning of a prohibited ‘use of force’. The ICJ first considered the interpretation and application of article 2(4) in its earliest decision in the *Corfu Channel* case in 1949.¹¹ Since then, it has had occasion to consider the interpretation and application of article 2(4) either directly or indirectly in a number of cases, including the 1974 *Fisheries Jurisdiction* case (*Federal Republic of Germany v Iceland*);¹² the 1980 *Tehran Hostages* case;¹³ the 1986 *Nicaragua* case;¹⁴ the 1995 *Fisheries Jurisdiction* case (*Spain v Canada*);¹⁵ the 1996 *Nuclear Weapons Advisory Opinion*;¹⁶ the 2003 *Oil Platforms* case;¹⁷ the 2004 *Wall Advisory Opinion*¹⁸ and the 2005 *Armed Activities* case.¹⁹ Of these, the *Nicaragua* case and the *Armed Activities* case are the most relevant to the meaning of a prohibited ‘use of force’. These cases are discussed in further detail in the relevant sections of this work.

Similarly, few scholars have examined the question directly.²⁰ As early as 1963, Ian Brownlie noted:

¹⁰ Andrea Bianchi, ‘The International Regulation of the Use of Force: The Politics of Interpretive Method’ (2009) 22 *Leiden Journal of International Law* 651, 659.

¹¹ *Corfu Channel Case (UK v Albania), Merits, Judgment* (1949) ICJ Reports 4.

¹² *Fisheries Jurisdiction Case (Federal Republic of Germany v Iceland), Merits, Judgment* (1974) ICJ Reports 175.

¹³ *United States Diplomatic and Consular Staff in Tehran (USA v Iran), Judgment* (1980) ICJ Reports 3.

¹⁴ *Nicaragua* case, n. 2.

¹⁵ *Fisheries Jurisdiction Case (Spain v Canada), Jurisdiction of the Court, Judgment* (1998) ICJ Reports 432.

¹⁶ *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion* (1996) ICJ Reports 226.

¹⁷ *Oil Platforms (Islamic Republic of Iran v United States of America), Judgment* (2003) ICJ Reports 161.

¹⁸ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* (2004) ICJ Reports 136.

¹⁹ *Armed Activities* case, n. 2.

²⁰ Scholars who have analysed the meaning of ‘use of force’ include Olivier Corten, *The Law against War: The Prohibition on the Use of Force in Contemporary International Law* (Hart Publishing, 2021), chapter 2; 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; 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; Christian Henderson, *The Use of Force and International Law* (Cambridge University Press, 2018), chapter 2.

Although the terms ‘use of force’ and ‘resort to force’ are frequently employed by writers they have not been the subject of detailed consideration. There can be little doubt that ‘use of force’ is commonly understood to imply a military attack, an ‘armed attack’, by the organized military, naval, or air forces of a state; but the concept in practice and principle has a wider significance.²¹

Most of the scholarly attention to date has instead been on clarifying the meaning of ‘armed attack’ under article 51 and the definition of aggression. Defining aggression has been an international law project of central importance for various reasons including its connection to crimes against peace (and more recently the crime of aggression under the Rome Statute of the International Criminal Court (ICC)) and its triggering of UN Security Council enforcement powers and international State responsibility.²² It is also significant because it is seen as the other side of the coin to self-defence and hence connected to protecting the territorial integrity of the State.²³ As a major exception to the general prohibition of the use of force, the right to self-defence is not only an essential bastion of security and survival of the State but also a key source of insecurity due to its potential for abuse. The meaning of ‘force’ has to date received significantly less attention, though it is also (though perhaps less obviously) of fundamental importance for the reasons that follow further below.

Thus far, scholarly analysis of the meaning of an unlawful ‘use of force’ leaves unclear the actual content and meaning of a prohibited ‘use of force’, namely, its elements, the relationship between those elements, and the lower threshold of prohibited force. Generally, scholars are more comfortable analysing and arguing about ‘armed attack’ because it has more substance; it is at least clear what precisely we are arguing about. In contrast, since the criteria for an act to fall within the scope of the *jus contra bellum* are less clear, there is no shared language to talk about international incidents in terms of the prohibition of the use of force. The concept of a ‘use of force’ thus appears inchoate, even if there is an emergent language developing with respect to a *de minimis* gravity threshold and hostile intent.²⁴

Clearly, this situation is unsatisfactory for a norm of fundamental importance to the international legal system and one that is said to be a primary

²¹ Ian Brownlie, *International Law and the Use of Force by States* (Clarendon, 1963), 361, footnote omitted.

²² See Dapo Akande and Antonios Tzanakopoulos, ‘The International Court of Justice and the Concept of Aggression’ in Claus Kreß and Stefan Barriga (eds), *The Crime of Aggression: A Commentary* (Cambridge University Press, 2017), 214.

²³ Brownlie, n. 21, 351–2.

²⁴ See Chapter 6.

example of *jus cogens*.²⁵ For these reasons, setting out the scope of the prohibition of the use of force and identifying its criteria is essential – at the very least, even if the criteria themselves are debated, it provides a framework for analysing and discussing these issues using a shared language, leading to a clearer understanding of the law and ultimately increasing its compliance pull.

THE RESEARCH QUESTION

This book addresses the fundamental question: what is the meaning of a prohibited ‘use of force’ between States under international law? The focus is on the interpretation of the term ‘use of force’ as such in *jus contra bellum*. Some of the fundamental grey areas regarding the meaning of ‘use of force’ that will be addressed include the following:

- Does ‘force’ mean physical/armed force only, and are kinetic means or the use of particular weapons required?
- Is a (potential) physical effect required? What is the required nature of such effects: must they be permanent, what object or target must experience the effect and what is the required level of directness between the means employed and these effects?
- Is there a gravity threshold below which a forcible act violates international law but does not violate the prohibition of the use of force in article 2(4) of the UN Charter? If there is such a threshold, how low is it? Does mere unauthorised presence of a State’s armed forces in the territory of another State suffice?
- Is a coercive intent required in order for conduct to qualify as a prohibited ‘use of force’? Or are forcible acts which are unintentional, mistaken or with a limited purpose also prohibited by article 2(4)?
- Does the *jus contra bellum* govern a State using force in response to a small-scale incursion within its territory, such as a small troop of soldiers crossing the border, unauthorised overflight of a military aircraft, or a submerged submarine passing through its territorial waters? States have the right to respond to such incursions but on what legal basis?
- What distinguishes a prohibited ‘use of force’ under article 2(4) from police measures against civil aircraft or merchant vessels registered to another State, either within a State’s own territory or outside its territory (e.g. within the territory of another State, or beyond)? When does the

²⁵ See Chapter 3 for a discussion of the prohibition of the use of force and *jus cogens*.

exercising by a State of its sovereign rights within its own jurisdiction become a prohibited use of force?

The main focus of the book is on the meaning of a ‘use of force’ but necessarily also covers contextual elements which bring a ‘use of force’ within the scope of the *jus contra bellum* in the first place, in particular, the meaning of a use of force ‘in international relations’. It does not examine the scope of exceptions to the prohibition of the use of force, such as the right to self-defence under article 51 and customary international law or uses of force authorised by the UN Security Council acting under Chapter VII of the UN Charter, as these do not affect whether an act meets the definition of a ‘use of force’ falling within the scope of the *jus contra bellum*.

WHY DOES IT MATTER?

It is important to determine the meaning of a prohibited ‘use of force’ between States because it has significant practical implications for contemporary challenges States face as well as international legal consequences. Significantly, the definition of prohibited force and its lower threshold have direct relevance for the right to self-defence and the lawful responses available to States to security threats. Under article 51 of the UN Charter and customary international law, States are only permitted to use force in self-defence in response to prohibited uses of force rising to the level of an ‘armed attack’. In the *Nicaragua* case, the ICJ distinguished ‘the most grave forms of the use of force (those constituting an armed attack) from other less grave forms’.²⁶ There is some controversy over this distinction between ‘use of force’ and ‘armed attack’, with some States such as the United States taking the view that there is no gap between the gravity thresholds of the two.²⁷ However, the International Law Association Committee on the Use of Force noted in its report on aggression that ‘[d]epending upon the interpretations given to the thresholds of “use of force” and “armed attack”, conflation of the two terms may have dangerous implications’.²⁸

²⁶ *Nicaragua* case, n. 2, para. 191.

²⁷ For example, remarks by then-Legal Adviser to the US Department of State, Harold Hongju Koh, ‘International Law in Cyberspace’ (at the USCYBERCOM Inter-Agency Legal Conference, Ft. Meade, MD, 18 September 2012) <https://2009-2017.state.gov/s/l/releases/remarks/197924.htm>.

²⁸ ILA Committee on the Use of Force, ‘Final Report on Aggression and the Use of Force’ (2018), 5. The ILA committee took the position that

The lower threshold of a prohibited use of force affects the size of the gap between prohibited force under article 2(4) and an armed attack giving rise to a right of self-defence under article 51 by making the gap larger (if article 2(4) has a low threshold) or smaller (if article 2(4) has a high threshold). If one holds that there is a large gap between ‘use of force’ and ‘armed attack’, this reduces the scope for States to take forcible measures in response to acts falling within the gap since a higher article 2(4) threshold means that a State that is a victim of ‘gap’ measures cannot itself use measures falling above the threshold of article 2(4) in response since it is prohibited unless it is the victim of an ‘armed attack’. For instance, if a particular cyber operation is characterised as a ‘use of force’ but does not rise to the level of an armed attack, this raises the problem of the inability of the victim State to lawfully respond with in-kind countermeasures. Conversely, if one holds that there is a small gap between ‘use of force’ and ‘armed attack’ due to a high threshold of the former, this results in greater permissibility for States to have recourse to forcible measures which fall short of that threshold.

More often, forcible incidents fall within the category of ‘use of force’ under article 2(4) and do not reach the threshold of an ‘armed attack’ giving rise to a right of self-defence under article 51 of the UN Charter – for example, cyber operations. Despite this, there is an imbalance in scholarly attention between these two categories, leaving the lower threshold of the *jus contra bellum* unclear. It is therefore useful for States to be able to determine whether an act constitutes prohibited force. This provides legal certainty to States about the range of measures they may lawfully use to address modern security threats outside of self-defence or UN Security Council authorisation. This is increasingly important with respect to law enforcement, counter-terrorism and counter-proliferation measures.

The existing legal uncertainty over the interpretation of prohibited force is open to exploitation by States, in so-called grey zone operations, which are designed to take advantage of ambiguity in the law or to remain below legal thresholds for armed response.²⁹ It is surmised that there is increased instability at the lower boundary of the *jus contra bellum* (‘use of force’) due to

[o]verall, it would appear that the determining criteria would more appropriately be centred upon questions of scale and effects of the attack. Moreover, in practice it appears that the gravity threshold attached to armed attacks is not markedly high, and would include most uses of force likely to cause casualties or significant property damage. As such, if there is a gap between ‘use of force’ and ‘armed attack’, it would be relatively narrow.

²⁹ Scott W Harold et al (eds), *The U.S.-Japan Alliance and Detering Gray Zone Coercion in the Maritime, Cyber, and Space Domains* (RAND Corporation 2017), introduction, fn1, 1.

increased stability at the higher end ('armed attack'), resulting in more frequent 'grey zone challenges' at the lower end of the spectrum.³⁰ Such grey zone operations include the use of maritime militia in disputed zones of the South China Sea.³¹ The US cyber attack on Iran in September 2019 was also reportedly 'calibrated to stay well below the threshold of war'.³² In the face of these modern security threats and the increasingly bellicose geopolitical stance in regions such as the Middle East and the South and East China Seas, it is more important than ever to increase legal certainty over the interpretation of the applicable norms and, in particular, the meaning of prohibited force between States. Strengthening international norms can play a role in deterring or reducing incentives for grey zone activities and responds to the changing nature of conflict.³³

The meaning of a prohibited 'use of force' also matters because acts which meet the threshold give rise to distinct legal consequences for States under both the UN Charter and customary international law. Under the UN Charter, the concept of a 'use of force' is important for delineating between articles 41 and 42. These two articles set out the measures that the Security Council may decide shall be taken to maintain or restore international peace and security once it has determined the existence of a threat to the peace, breach of the peace or act of aggression under Chapter VII of the Charter.³⁴ Articles 41 and 42 distinguish between forcible and non-forcible coercive

³⁰ Junichi Fukuda, 'A Japanese Perspective on the Role of the U.S.-Japan Alliance in Deterring – Or, If Necessary, Defeating – Maritime Gray Zone Coercion' (RAND Corporation, 2017), 23, 30, citing the 'stability-instability paradox' discussed by Glenn Snyder in relation to nuclear and conventional weapons, in 'The Balance of Power and the Balance of Terror', in Paul Seabury (ed), *The Balance of Power* (Chandler, 1965).

³¹ James Kraska, 'China's Maritime Militia Upends Rules on Naval Warfare' *The Diplomat* (10 August 2015), <https://thediplomat.com/2015/08/chinas-maritime-militia-upends-rules-on-naval-warfare/>.

³² Barnes, n. 7.

³³ See further Michael J Mazarr, *Mastering the Gray Zone: Understanding a Changing Era of Conflict* (United States Army War College Press, December 2015), who argues that large-scale grey zone operations will be the 'dominant form of state-to-state rivalry in the coming decades' (p. 2). According to Mazarr, grey zone conflict is not a new phenomenon but is becoming increasingly important for three reasons: increased reliance on these techniques by Russia, China and Iran; global economic interdependence and high costs of outright military aggression incentivise grey zone conflict; and new tools (such as cyber; new forms of information campaigns and new forms of State force such as coastguards) intensify grey zone conflict (p. 3). The overall idea is that strategic gradualism (through salami-slicing and series of small fait accompli) (p. 34) is being combined with grey zone actions (including with new tools) to pursue revisionist intent.

³⁴ Article 39 of the UN Charter, n. 1.

measures.³⁵ Under article 41, the UN Security Council may call on States to take certain coercive measures not involving the use of armed force to give effect to its decisions. In contrast, the Security Council may only ‘take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security’ if it considers that ‘measures provided for in Article 41 would be inadequate or have proved to be inadequate’. Therefore, the definition of a ‘use of force’ may be relevant to whether, for example, certain types of cyber operations,³⁶ maritime interdictions³⁷ and peace operations³⁸ may be authorised under article 42 of the UN Charter without a need to establish that non-forcible measures are inadequate.³⁹

Under customary international law, a prohibited use of force gives rise to international State responsibility and the obligation to cease the unlawful act,⁴⁰ make reparation⁴¹ and the right of the victim State to take non-forcible countermeasures.⁴² There are additional consequences if a use of force in violation of article 2(4) is considered to be a serious breach of a peremptory norm,⁴³ namely, that other States shall co-operate using lawful means to bring the violation to an end, shall not recognise the situation as lawful and shall not render aid or assistance in maintaining the situation,⁴⁴ and that the prohibition cannot be overridden by inconsistent treaty. In addition, under article

³⁵ See Nico Krisch, ‘Chapter VII Powers: The General Framework. Articles 39 to 43’ in Bruno Simma et al (eds), *The Charter of the United Nations: A Commentary* (Oxford University Press, 3rd ed, 2012), vol. I, 1237.

³⁶ See Michael N Schmitt, ‘The Use of Cyber Force and International Law’ in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (Oxford University Press, 2015), 1110, 1118.

³⁷ Douglas Guilfoyle, ‘Interdicting Vessels to Enforce the Common Interest: Maritime Countermeasures and the Use of Force’ (2007) 56(1) *The International and Comparative Law Quarterly* 69.

³⁸ See James Sloan, *The Militarisation of Peacekeeping in the Twenty-First Century* (Hart Publishing, 2011), 256 who notes that the legal basis for use of force by peacekeepers going beyond self-defence could be based on article 40 or 41 of the UN Charter rather than article 42 if it is sufficiently limited.

³⁹ Although this may be of little practical relevance as the general practice of the Security Council is to just refer to Chapter VII: see Niels Blokker, ‘Outsourcing the Use of Force: Towards More Security Council Control of Authorized Operations?’ in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (Oxford University Press, 2015), 202, 209.

⁴⁰ ILC Draft Articles, n. 46, art. 30.

⁴¹ *Ibid.*, art. 31.

⁴² *Ibid.*, art. 22.

⁴³ See discussion in Chapter 3.

⁴⁴ ILC, ‘Draft Articles on Responsibility of States 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’), art. 41.

52 of the Vienna Convention on the Law of Treaties (VCLT), '[a] treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations'. This was held by the ICJ in the *Fisheries Jurisdiction case (UK v Iceland)* to reflect customary international law: 'There can be little doubt, as is implied in the Charter of the United Nations and recognized in Article 52 of the Vienna Convention on the Law of Treaties, that under contemporary international law an agreement concluded under the threat or use of force is void.'⁴⁵

Furthermore, the threshold for a prohibited use of force under article 2(4) determines the availability of circumstances precluding wrongfulness: acts falling below the threshold could be legally justified by necessity, *force majeure*, distress and countermeasures, whereas acts falling above it may only be lawfully justified by an accepted exception to the prohibition, namely, self-defence or UN Security Council authorisation. The justification is necessary to the extent that those acts violate other rules of international law, such as the non-intervention principle. For instance, how far can countermeasures go before violating the prohibition in article 2(4)?⁴⁶

Further legal consequences of whether an act is a 'use of force' or not are that it may constitute a breach of an *erga omnes* norm, which could permit third States to take (non-armed) countermeasures against the breaching State under customary international law⁴⁷ and that it may bring into effect an international armed conflict between the two States concerned,⁴⁸ thus making the international law of armed conflict applicable (though any further use of

⁴⁵ *Fisheries Jurisdiction (UK v Iceland)*, *Jurisdiction* (1973) ICJ Reports 3, para. 14; see further 1966 ILC Yearbook, vol. II, 246, draft article 49 of the Draft Convention on the Law of Treaties with commentary, reprinted in ILC, 'Report of the International Law Commission on the Work of Its Eighteenth Session' 4 May–19 July 1966, Official Records of the General Assembly, Twenty-First Session, Supplement No. 9, UN Doc A/CN.4/191, UN Doc A/6309/Rev.1 (1966), chapter II Law of Treaties.

⁴⁶ ILC Draft Articles, n. 44, art. 49. Article 50 (1)(a) of the ILC Draft Articles provides that '[c]ountermeasures shall not affect the obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations'.

⁴⁷ The commentary to article 54 of the ILC Draft Articles notes (para. 6) that

the current state of international law on countermeasures taken in the general or collective interest is uncertain. State practice is sparse and involves a limited number of States. At present, there appears to be no clearly recognized entitlement of States referred to in article 48 to take countermeasures in the collective interest. . . . chapter II includes a saving clause which reserves the position and leaves the resolution of the matter to the further development of international law.

⁴⁸ Although it is uncertain whether a 'use of force' under *jus contra bellum* has the same meaning as for an international armed conflict under *jus in bello*. See further discussion in Chapter 8 in

force e.g. in self-defence remains subject to the rules of the *jus contra bellum*).⁴⁹ An additional consequence of this is the possibility of prosecuting certain acts as a war crime either before an international tribunal (such as the ICC) or before domestic courts, subject to issues of immunity *ratione materiae*.⁵⁰ Uses of force reaching the threshold of aggression may also give rise to international criminal responsibility for the individuals responsible and be prosecuted as the crime of aggression.

Often States' reactions to a particular incident are unclear in legal terms, or an incident does not provoke a widespread reaction or debate among States at all. Legal practitioners and scholars need tools apart from relying solely on ex-post-facto State assessments of a particular incident to determine if it is a prohibited use of force. It is also important for a State considering deploying a potential use of force to be able to make a legal assessment of whether the act would violate the *jus contra bellum*. Defining the meaning of prohibited force under international law provides legal certainty for States, their legal advisers and international adjudicators as to when an act falls within the scope of the prohibition. Legal certainty increases the 'compliance pull' of the norm and makes it harder to justify acts which are prohibited by the rule.⁵¹ Setting out the meaning of prohibited force is essential to clarify the scope and content of a cardinal rule of public international law.

AIMS AND CONTRIBUTION OF WORK

This book sets out to provide a framework for identifying a prohibited 'use of force' under article 2(4) of the UN Charter; in other words, when an act falls within the scope of the prohibition of the use of force set out in that article. In doing so, it makes the following original contributions:

Firstly, it explains the emergence of the customary prohibition of the use of force and its relationship with article 2(4) of the UN Charter. Surprisingly, it is not known how or precisely when the customary prohibition of the use of

relation to classification of international armed conflict and 'use of force' under *jus contra bellum*.

⁴⁹ Dapo Akande, 'The Use of Nerve Agents in Salisbury: Why Does It Matter Whether It Amounts to a Use of Force in International Law?' *EJIL: Talk!* (17 March 2018) www.ejiltalk.org/the-use-of-nerve-agents-in-salisbury-why-does-it-matter-whether-it-amounts-to-a-use-of-force-in-international-law/.

⁵⁰ *Ibid.*

⁵¹ Thomas M Franck, 'Legitimacy in the International System' (1988) 82(4) *American Journal of International Law* 705, 713.

force arose, a question made more complex by Baxter's paradox.⁵² The answer has profound implications for the relationship between the prohibition under article 2(4) of the UN Charter and custom, including which source to interpret or apply in order to ascertain the meaning of a prohibited use of force under international law and how the norm may change over time. In delving into this complex question, this book untangles the intricate relationship between the treaty and customary prohibition of the use of force and answers the question of which source to interpret or apply to discover the meaning of prohibited force.

Secondly, it identifies the elements of a prohibited 'use of force' and their content. In stark contrast to the concept of 'armed attack' in article 51 of the UN Charter with respect to the right of self-defence, in the analysis and discussion among States and legal scholars of lower-level forcible incidents falling below this threshold, so far there is no established criteria for determining whether an act violates the prohibition of the use of force in article 2(4). While some elements of prohibited force have been identified and debated (such as whether 'force' means armed/physical force only,⁵³ if there is a *de minimis* gravity threshold and if or what kind of intent is required⁵⁴), thus far there are few examples of a detailed and systematic analysis of which elements form part of a prohibited 'use of force' and, especially, how these elements interrelate with one another.⁵⁵

Thirdly, this book proposes a definition of prohibited force and offers an original framework – type theory – to identify unlawful uses of force, particularly those which are at the lower end of the gravity spectrum, use emerging technology or take place in newer military domains. Its major contribution is to propose the idea that an unlawful 'use of force' is not a concept (with a checklist of necessary elements) but rather a type, characterised by a basket of elements which must not all be present and which must be weighed and balanced to determine whether the threshold for the definition is met and an act is an unlawful 'use of force' under article 2(4) of the UN Charter.

⁵² RR Baxter, 'Treaties and Custom' (1970) 129 *Recueil des cours: Collected Courses of the Hague Academy of International Law* 25, 64. The 'paradox' relates to the challenges of separately adducing the content of the parallel customary prohibition in the presence of the parallel near-universal treaty obligation. Baxter's paradox and the prohibition of the use of force is discussed in Chapter 2.

⁵³ See Chapter 6.

⁵⁴ See Chapter 7.

⁵⁵ Some examples that do discuss the elements of a prohibited 'use of force' include Corten, n. 20, — chapter two; Ruys, n. 20; Marco Roscini, *Cyber Operations and the Use of Force in International Law* (Oxford University Press, 2014), 45–67 in relation to cyber operations; Henderson, n. 20, 50–80.

A framework for defining a 'use of force' under article 2(4), bringing together each of the elements of that provision, is set out in the Conclusion.

Through these contributions, this book aims to enable a meaningful discussion and debate of the lawfulness of specific incidents using a shared language. This will be practically useful to States, legal advisers and scholars and lead to a clearer understanding of the law. The ultimate aim of this book is to thereby increase the compliance pull of the international legal prohibition of the use of force between States and indirectly contribute to international peace and security.

OUTLINE OF BOOK

Part I deals with how to determine the meaning of a prohibited 'use of force' between States under international law. Since the prohibition of the use of force is found in both treaty (the UN Charter) and customary international law, this part examines whether its content is identical under both sources and which one to interpret or apply. It argues that the customary rule emerged as a result of article 2(4) and that due to the relationship between the two sources, we should focus on interpreting the UN Charter to determine the meaning of prohibited force. Part I is divided into three chapters. Chapters 1 and 2 analyse how and when the customary norm arose, with Chapter 1 focusing on the status of the norm pre-UN Charter and Chapter 2 then analysing the emergence of the norm after the entry into force of the UN Charter in 1945. This chapter grapples with the challenges raised by Baxter's paradox for analysing the emergence and content of the customary norm using the standard two-element approach of State practice and *opinio juris* and proposes an alternative approach. Chapter 3 then examines the current relationship between the treaty and customary international law prohibitions, the possibilities for the norm to change over time (including the constraints on this posed by the peremptory nature of the prohibition), and argues in favour of interpreting and applying article 2(4) to discover the meaning of prohibited force.

Part II applies treaty interpretation to article 2(4) of the UN Charter, looking at all of the terms of that provision. Chapter 4 sets out the contextual elements that must be present for a 'use of force' to fall within the scope of article 2(4), including the requirement that the 'use of force' be in 'international relations'. Chapters 5 and 6 identify the elements of a 'use of force' under article 2(4) and their content. Chapter 5 examines the ordinary meaning of this term, before delving into the element of means. In particular, it examines whether 'use of force' refers to physical/armed force only and if kinetic means or the use of particular type of weapon is required. Chapter 6

continues the analysis of the elements of a prohibited 'use of force' by examining its required effects, the object or target of a 'use of force', gravity and intention. This chapter discusses the type of effects that may be relevant to the characterisation of an act as a 'use of force' under article 2(4), namely, whether a (potential) physical effect is required; if such effect should be permanent; the required object or target that must experience the effect; the required level of directness between the means employed and these effects; if a hostile intent is required and if there is a lower threshold of gravity of effects below which a forcible act will not fall within the scope of article 2(4) of the UN Charter.

Part III challenges the previously accepted paradigm of a 'use of force' as a coherent concept and proposes an original framework for defining an unlawful 'use of force' under article 2(4), bringing together each of the elements of that provision. Chapter 7 considers anomalous examples of 'use of force' in the subsequent agreement and subsequent practice of States that do not conform with the usual understanding of this term because they do not display one or more of the elements discussed in Part II. It also discusses anomalous examples of non-'use of force', namely, acts which appear to meet the criteria for an unlawful 'use of force' but are not characterised as such by States. Chapter 8 then puts forward a hypothesis that explains these anomalous examples and proposes a definitional framework for prohibited force. In contrast to the prevailing view, this book argues that none of the elements of a 'use of force' – including physical means or physical effects – is strictly necessary for the definition to be met. Rather, it proposes that a 'use of force' is a 'type', meaning that its elements must be weighed and balanced to reach a certain threshold. It proposes an original framework for defining an unlawful 'use of force' under article 2(4), bringing together each of the elements of that provision. This final chapter applies the proposed framework to concrete case studies in State practice and to the rapidly developing field of outer space security to demonstrate the potential value of this theory as a tool for legal scholars and practitioners.