

Conclusion

A Definition of Prohibited 'Use of Force'

Until now, it has often been implicitly assumed that the use of force is a concept, for which certain elements must always be present for the definition to be met. This has led to the rejection by scholars of particular elements as being relevant to the assessment of whether an act is a 'use of force' due to anomalous examples of 'use of force' which do not display that element.¹ The idea that a 'use of force' is a concept has been disproven in this work, by showing that for each element of a 'use of force', there are widely accepted examples of unlawful 'use of force' which do not contain this element. Therefore, none of the elements of a 'use of force' – including physical means or physical effects – is strictly necessary for the definition to be met. This work has argued that rather than a concept, a 'use of force' is a type, characterised by a basket of elements which do not all have to 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.

The following framework for an unlawful 'use of force' under article 2(4) in accordance with type theory is proposed:

A 'use of force' must take place within the context of the following fundamental requirements to fall within the scope of article 2(4):

- Two or more States (including that the object/target of the 'use of force' has a sufficient nexus to another State)

¹ For example, Marco Roscini rejects directness as an element of 'use of force' on this basis. *Cyber Operations and the Use of Force in International Law* (Oxford University Press, 2014), 48.

- International relations
- ‘Against the territorial integrity or political independence of any state or in any other manner inconsistent with the Purposes of the United Nations’

The following (non-essential) elements of a ‘use of force’ must be identified and weighed up to determine whether an act meets the threshold of the definition of a ‘use of force’:

- Physical force
- Direct physical effects (which may possibly be temporary and/or potential)
- Object/target
- Gravity
- Coercive or hostile intent

Each of these elements is explained in greater detail in Part II of this work.

It is an interesting question whether these are formal legal criteria, or ‘merely factors that influence States making use of force assessments’.² In so far as these criteria are supported by principles of treaty interpretation including the subsequent agreement and subsequent practice of States in their application of article 2(4) of the UN Charter³ (the approach taken in this work), they are legal and not merely political criteria, although the distinction may be a fine one in practice. This is due to the inherent connection between international law and political decision-making, which is recognised in the process of customary international law formation (through the requirements of State practice and *opinio juris*) as well as in principles of treaty interpretation (through the elements of subsequent agreement and subsequent practice of States). This close connection between international law and politics comes to the fore especially in matters close to the heart of State power, such as the prohibition of the use of force. However, in respect of the interpretation of the term ‘use of force’ in the UN Charter, a legal process of treaty interpretation applies, and it has been the purpose of this work to apply this process to identify legal criteria for identifying an unlawful ‘use of force’ under international law.

A related question is how the process of applying type theory relates to the general process of treaty interpretation regarding subsequent agreement and subsequent practice. This work has used the latter to interpret article 2(4) in

² This is the approach taken by the *Tallinn Manual 2.0*, Commentary to rule 69, para. 9.

³ *Vienna Convention on the Law of Treaties*, art. 31(3)(b).

order to identify the elements of a 'use of force' and then proposed type theory to place those elements within a framework that can be applied to specific incidents to assess whether they constitute a prohibited use of force. Of course, the incidents being analysed may themselves contribute to subsequent practice under article 31(3) of the VCLT. The legal justification of the attacking State and the response of the victim State and international community are indeed relevant in assessing whether States regard the incident as a prohibited use of force and may contribute to subsequent practice in the interpretation of the treaty (and State practice and *opinio juris* regarding the scope of the customary rule). What type theory adds is criteria that States and scholars can use to themselves legally assess whether a particular act is a use of force and, importantly, to be able to articulate *why*.

Some may be sceptical of this framework, seeing it as artificial and not representing the process that States and legal scholars actually go through to determine whether a particular instance is a 'use of force' or not. But so far there is no generally shared framework or process for analysing potentially forcible incidents to determine if they fall within the scope of article 2(4) of the UN Charter or not. This theory is an attempt to develop such a language and shared framework and is offered as a potential tool of analysis. The alternative is a legal black box/rule of thumb approach, as with the distinction some claim between art and pornography: 'I know it when I see it'. The decision of whether or not to use potentially forcible measures, as well as how to respond to such measures (be it verbally or with other actions), have a real impact on the interpretation of this cornerstone provision, on international relations, but also on the ground, in terms of property and human life. For such a foundational rule of the international legal system, it is not satisfactory to apply vague, ad hoc standards. It is desirable to develop a language for talking about the use of force in concrete instances, if only to bring to light differences of opinion and method in interpreting and applying this term.

The identification of the elements of a prohibited 'use of force' and the proposal of type theory for the first time provides an analytical framework and shared language for analysing forcible incidents and assessing whether or not they meet the threshold for a 'use of force' between States under international law. Type theory sets out a systematic analytical framework that can be interrogated, debated, discussed and applied. Even if the particular elements, their relationship and their combined threshold are debated, at the very least, the benefit of type theory is that it provides a shared language and coherent framework for legal analysis and scholarly debate regarding the content of a prohibited 'use of force' between States under international law.

The framework of type theory has the potential to facilitate clearer analysis of 'uses of force' between States. It is hoped that this clarity will in turn lead to greater compliance with the prohibition of the use of force between States in their international relations and contribute to our shared endeavour of international peace and security.