4

Contextual Elements of a Prohibited 'Use of Force'

International Relations

INTRODUCTION

The text of article 2(4) reads as follows:

> The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles.
>
> (4) 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 chapter will carry out a textual analysis of the terms of article 2(4) of the UN Charter other than 'threat or use of force',[1] in order to delineate the contextual elements of prohibited force. These terms – 'all Members', 'international relations' and 'against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations' – are fundamental, contextual elements that must be present in order for a 'use of force' to fall within the scope of article 2(4). This chapter will briefly examine each of these terms in turn to understand how they delineate the scope and context of a prohibited 'use of force'.

'ALL MEMBERS'

States Only

In the first place, the prohibition in article 2(4) binds only States, as confirmed by State practice and case law.[2] With respect to the parallel customary rule, it

[1] 'Threat' of force is discussed in Chapter 6 with respect to intention.

[2] Claus Kreß, 'The State Conduct Element' in Claus Kreß and Stefan Barriga (eds), *The Crime of Aggression: A Commentary* (Cambridge University Press, 2017), 412, with further references;

is an interesting question whether the customary prohibition also applies only to States or if it also binds non-State actors, international organisations or individuals.[3]

Member States Only

As a treaty, the provisions of the UN Charter are clearly binding on its parties, that is, the Member States of the United Nations. Non-Member States are bound by the prohibition only indirectly through the UN Charter (since they could be subject to enforcement action/sanctions for failing to comply with the relevant principles),[4] but the source of their legal obligation is customary international law.

Use of Force by Non-State Armed Groups

In certain circumstances, State support or involvement in forcible acts of other States, or in forcible acts of non-State actors against another State will violate the prohibition of the use of force.[5] However, this is relevant not to who are the addressees of the prohibition (States) but to what acts or level of support will result in attribution to a State or amount to an indirect 'use of force' in violation of article 2(4). With respect to attribution, the general principles of State responsibility apply, as set out in articles 4 to 11 of the International Law Commission (ILC) Articles on State Responsibility. In particular, article 8 of the ILC Articles on State Responsibility provides that:

> The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.

The International Court of Justice (ICJ) had applied a similar standard of attribution in the *Nicaragua* case, in which it held that:

cf Tarcisio Gazzini, *The Changing Rules on the Use of Force in International Law* (Manchester University Press, 2005), 188, who notes that '[i]t has been suggested, in particular, that Art. 2(4) of the Charter should be read as imposing the prohibition on threat or use of force not only on States but also on individuals' (citing A-M Slaughter and W Burke-White, 'An International Constitutional Moment' (2002) 43 *Harvard International Law Journal* 1, 2), although he does not adopt a position on this issue.

[3] See discussion in Chapter 3.

[4] See Chapter 2 for a discussion of article 2(6).

[5] See Chapter 6.

> For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had *effective control* of the military or paramilitary operations in the course of which the alleged violations were committed.[6]

Although the International Criminal Tribunal for the former Yugoslavia in the *Tadic* case applied a different test for attribution of 'overall control',[7] this has been criticised by both the ILC[8] and the ICJ, which declined to adopt this standard.[9] Other forms of support that do not meet the standard for attribution of the conduct of the non-State armed group to a State may nevertheless constitute an indirect 'use of force' by a State under article 2(4) of the UN Charter. Indirect force is discussed further in Chapter 5.

'SHALL REFRAIN ... FROM'

This is obligatory language that reflects the binding legal obligation set out in article 2(4).

'IN THEIR INTERNATIONAL RELATIONS'

The confinement of the prohibition of the threat or use of force by States to those 'in their international relations' 'continues the tradition of article I of the Kellogg-Briand Pact, which confines the scope of application of the prohibition of the recourse to war as an instrument of national policy to the realm of the "solution of international controversies"'.[10] This section will discuss the meaning of the term 'international relations' and whether it requires that the object of a prohibited use of force be another State, as well as looking at the types of acts that fall within and outside the scope of this term.

[6] *Merits, Judgment* (1986) ICJ Reports 14, para. 115, emphasis added. The ICJ later applied the test in article 8 of the ILC Draft Articles on State Responsibility in the *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (2005) ICJ Reports 168, para. 160.

[7] *Prosecutor v Duško Tadic*, ICTY Appeals Chamber Judgment of 15 July 1999, IT-94-1-A, para. 120 ff.

[8] 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), commentary to art. 8 at para. 5.

[9] *Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro), Judgment* (2007) ICJ Reports 43, para. 403.

[10] Kreß, n. 2, 432, footnote 93, citing K Sellars, *Crimes against Peace and International Law* (Cambridge University Press, 2013), 25.

Another State?

The wording of article 2(4), in particular the terms 'international relations' and 'in any other manner', does not explicitly require the damage to be to another State.[11] The reference to 'international relations' implies that a prohibited use of force must affect the *relations* between the State using force and another State. This leaves open the possibility that the actual damage is not to a State but affects inter-State relations. With respect to the phrase, 'in any other manner', the second half of article 2(4) was introduced to prevent loopholes in interpretation (see discussion of this term later in the chapter). Thus, interpreting the term 'international relations' to prohibit another type of use of force (in addition to uses of force against the territorial integrity or political independence *of a State*) would comply with this intended purpose of making the prohibition more expansive. Furthermore, a natural reading of the second part of article 2(4) is to read the listed elements conjunctively (i.e. as alternatives). This would result in the following categories of prohibited conduct: firstly, uses of force in the international relations of Members against the territorial integrity or political independence of any State, and secondly, uses of force in the international relations of Members in any other manner inconsistent with the Purposes of the United Nations.[12]

This interpretation would potentially encompass a use of force that is in 'international relations' outside the context of State damage, such as damage to *terra nullius*. Claus Kreß notes that '[i]t is an unsettled question whether the use of force by a state ... on terra nullius occurs in international relations and thus within the meaning of article 2(4) of the UN Charter'.[13] Since there are hardly any areas of *terra nullius* (rare examples include Bir Tawil between Egypt and Sudan, an area that neither claims, and parts of Antarctica), this

[11] Kreß, n. 2, 434–5: 'the text of article 2(4) does not unambiguously require a use of force against another state. As a matter of textual interpretation, the words "international relations" can be construed so as to cover any use of force by a state outside its territory.'

[12] Kelsen supports this interpretation (Hans Kelsen, *The Law of the United Nations: A Critical Analysis of Its Fundamental Problems* (Stevens, 1950), 726–7):

> The phrase 'or in any other manner inconsistent with the Purposes of the United Nations' is an addition to the words 'against the territorial integrity, etc.' The meaning is: the Members shall refrain from the threat or use of force not only against the territorial integrity and political independence of any state; they shall refrain from the threat or use of force also in any other manner inconsistent with the Purposes of the United Nations, that is to say: with the provisions of Article I of the Charter.

Kreß (n. 2, 432–5) has also argued that the term 'in any other manner' leaves open the possibility that the use of force does not have to be directed against another State.

[13] Kreß, n. 2, 434, footnote omitted.

issue is unlikely to be raised in practice. However, both on Earth (with respect to the high seas)[14] and in outer space (with respect to celestial bodies),[15] there are vast areas which do not form part of the territory of any State and are not subject to claims of sovereignty, so it is conceivable that a 'use of force' could be directed against these environments (for instance, as part of a malicious attack, or in the process of exploiting natural resources located in these environments), thus raising the question of whether such an act occurs in 'international relations' even though no State suffers direct damage.

Object and Purpose

The object and purpose of the UN Charter and in particular article 2(4) are also relevant to determining whether the range of interpretive possibilities of the term 'international relations' includes damage to objects without a nexus to another State.[16] Subsequent agreements with respect to article 2(4) of the UN Charter demonstrate the agreement of Member States that the primary purposes of that provision are international peace and security and the sovereign equality of States.[17] The Friendly Relations Declaration emphasises international peace and security as among the fundamental purposes of the UN Charter[18] and sets out related principles that are 'interrelated with'[19] the prohibition of the use of force, including the obligation to settle international disputes by peaceful means[20] and the principle of sovereign equality of States.[21] Resolution 42/22 (1987) also notes that the principle of peaceful settlement of disputes 'is inseparable from the principle of refraining from the

[14] *United Nations Convention on the Law of the Sea*, 1994 UNTS 397 (concluded 10 December 1982, entered into force 16 November 1994), article 89 provides that '[n]o State may validly purport to subject any part of the high seas to its sovereignty'.

[15] With respect to celestial bodies, the Outer Space Treaty provides that '[o]uter space, including the Moon and other celestial bodies, is not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means'. *Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies* (adopted 27 January 1967, entered into force 10 October 1967), 610 UNTS 205, art. II.

[16] *Vienna Convention on the Law of Treaties 1969* (adopted 22 May 1969, entered into force 27 January 1980), 1155 UNTS 331 ('VCLT'), art. 1.

[17] For a discussion of subsequent agreements regarding article 2(4) of the UN Charter, see Chapter 5.

[18] UN General Assembly, *Resolution 2625: Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations*, UN Doc A/Res/2625(XXV) (24 October 1970) ('Friendly Relations Declaration'), first preambular para.

[19] *Ibid.*, para. 2.

[20] *Ibid.*, principle 2.

[21] *Ibid.*, principle 5.

threat or use of force in their international relations'.[22] Resolution 42/22 explicitly reaffirms the purpose of article 2(4) is the 'establishment of lasting peace and security for all States'.[23] In the 2005 World Summit Outcome Document (adopted by consensus), the UN General Assembly emphasised the purposes of the UN Charter as international peace and security and sovereign equality of States. In that document, the UN General Assembly 'reaffirm[ed] that the purposes and principles guiding the United Nations are, inter alia, to maintain international peace and security, to develop friendly relations among nations based on respect for the principles of equal rights and self-determination of peoples and to take other appropriate measures to strengthen universal peace'.[24] These two primary values protected by article 2(4) – international peace and security and the sovereign equality of States – give rise to arguments for and against including uses of force that are not against a State, depending on which purpose is emphasised, as discussed below.

STATE SOVEREIGNTY Article 2(4) of the UN Charter protects sovereign equality by prohibiting the use of force to settle international disputes. The term 'of any state' suggests that the protected object of article 2(4) is States, and in particular their 'territorial integrity' and 'political independence'. This is also supported by the Friendly Relations Declaration, which holds that the principle of sovereign equality of States includes the inviolability of the territorial integrity and political independence of the State.[25] (The protected interest of State sovereignty in article 2(4) read together with articles 2(3) and 2(7) also supports an interpretation of a 'use of force' as requiring a coercive intent – this is discussed further in Chapter 6.) The protected object of State sovereignty tends to exclude the use of force against objects with no sufficient nexus to another State from the scope of article 2(4).

INTERNATIONAL PEACE AND SECURITY However, the second and arguably main purpose of article 2(4), the maintenance of international peace and security, may concern damage to non-State objects (objects with no sufficient

[22] UN General Assembly, *Resolution 42/22: Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations*, UN Doc A/Res/42/22 (18 November 1987), para. 16.

[23] *Ibid.*, preambular para. 21.

[24] UN General Assembly, *2005 World Summit Outcome*, UN Doc A/RES/60/1 (24 October 2005), para. 77.

[25] Friendly Relations Declaration, n. 18, principle 1(d). Another possibility is to construe the protected value of State sovereignty to include the right of a State's people and the protection of their common life: see Kreß, n. 2, 418 ff.

nexus to another State) under certain circumstances. This possibility is supported firstly by the Purposes of the United Nations, and secondly by reading article 2(4) in the context of the collective security framework provided for in the Charter.[26] The Purposes are referred to in the *chapeau* of article 2, which provides: 'The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles' (one of which is of course the principle of the prohibition of the use of force in article 2(4)). The first of the Purposes set out in article 1 in paragraph 1 is

> To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.

The Preamble of the UN Charter (which according to article 31(2) of the VCLT comprises part of the context for the purpose of treaty interpretation) further supports this as the primary value of article 2(4). The Preamble states in its opening lines, '[w]e the peoples of the United Nations determined to save succeeding generations from the scourge of war'. In the first meeting of Commission 1 (responsible for drafting the general provisions of the UN Charter including the preamble, Purposes and Principles) at the San Francisco Conference, the President of the Commission, Mr Rolin of Belgium, stated with respect to the 'first object' of the maintenance of peace: 'We are not state worshippers, and when we speak of the prevention of war we have, of course, in mind only what sufferings war is causing to humanity'.[27] In its Advisory Opinion on *Certain Expenses*, the ICJ held that '[t]he primary place ascribed to international peace and security is natural, since the fulfilment of the other purposes will be dependent upon the attainment of that basic condition'.[28]

The primary purpose of article 2(4) as the maintenance of international peace and security is also supported by the context of the collective security framework provided for in the Charter.[29] The UN Charter sets out two

[26] Kelsen, n. 12, 13.

[27] UNCIO, 'First Session of Commission I, June 14, 1945', vol. VI, Doc 1006 I/6 (15 June 1945), 12.

[28] *Certain Expenses of the United Nations (Article 17, paragraph 2 of the Charter), Advisory Opinion* (1962) ICJ Reports 151, 168.

[29] For a historical account of the Dumbarton Oaks conference (where the four Great Powers met to lay out the framework for the future UN, prior to the San Francisco conference), see Robert C Hilderbrand, *Dumbarton Oaks: The Origins of the United Nations and the Search for Postwar Security* (University of North Carolina Press, 1990) explaining the factors that lead to

exceptions to the prohibition of the use of force, namely, self-defence in response to an armed attack under article 51 and the authorisation of force by the UN Security Council acting under Chapter VII. These provisions (article 2(4), article 51 and Chapter VII) together comprise the collective security system of the United Nations; under international law in the post-Charter era, States do not have a right to unilaterally use force but must settle their international disputes by peaceful means. This system is supplemented by the customary international law duty of non-intervention (in recognition of the sovereign equality of States). The context of article 2(4) and its relationship with other Charter provisions illuminates the interpretation of article 2(4) by emphasising its primary aim of maintaining international peace and security. In this light, the purpose of maintaining international peace and security points towards the inclusion of forcible acts against non-State objects within the scope of the prohibition, when those acts affect the international relations between States and therefore endanger international peace and security.

In sum, the text of article 2(4) does not unambiguously require that a State be the object or target of a 'use of force', and the primary value protected by article 2(4) of international peace and security supports a broad interpretation. During the drafting of the 1970 Friendly Relations Declaration, '[t]hose who discussed the point generally agreed that the term had the effect of limiting the prohibition in Article 2, paragraph 4, to disputes between States'.[30] However, this does not constitute a 'subsequent agreement' within the meaning of article 31(3) of the VCLT, and such an interpretation remains to be either confirmed or rejected through the subsequent agreement and subsequent practice of States. So far this author is not aware of any State practice seeking to extend the interpretation of article 2(4) beyond damage to States. While a broader interpretation remains textually open, since article 2(4) also protects States' sovereignty and territorial integrity, it is likely that another State must be the object/target in order for a 'use of force' to be in 'international relations' and fall within the scope of article 2(4).

Required Nexus

This then raises the question of the required nexus between the object/target of a use of force and another State, particularly with respect to forcible acts against non-State objects such as nationals of a State, individuals present

the Great Powers establishing the UN with a watered-down power and authority, and what the objectives and motives of the drafters were.

[30] 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. 36.

within the territory of a State or private property such as private and merchant vessels or aircraft registered to a State. In some cases, attacks on individuals due to their nationality have been regarded as armed attacks (and therefore uses of force under article 2(4)) against the State of nationality, such as the Entebbe incident, where all hostages were released apart from those of Israeli nationality.[31] In certain circumstances, article 2(4) applies to uses of force by a State against private vessels and aircraft registered to another State. This results from article 3(g) of the Annex to 1974 General Assembly Resolution 3314, which lists as an act of aggression an 'attack by the armed forces of a State on the ... marine and air fleets of another State'. The issue of required nexus to another State is of particular relevance to emerging forms of practice in disputed maritime zones such as in the South China Sea, firstly, with respect to '[t]he use of Coast Guard and other maritime law enforcement agency vessels and officials, and indeed merchant vessels and fishing vessels under obvious governmental orders, to enforce presence and to employ force in disputed maritime areas' and, secondly, to 'the use of private citizens – especially fishermen – to assert claims, act as state proxies in confrontation situations, or to provoke harassment which is then used to justify escalated intervention by more formal state forces such as Coast Guard vessels'.[32] For non-State objects/targets that do not have a close association with a State, more will be required to bring the act within 'international relations' and into the scope of article 2(4), such as the presence of other factors including the gravity of the (potential) effects, a coercive or hostile intent against a State or a pre-existing dispute between States.

Political Context

If there is a pre-existing dispute between the States concerned, such as contested territory, this may bring the use of force within the realm of 'international relations' and thus within the scope of the *jus contra bellum*.[33] The political context may be relevant to whether the act itself constitutes a 'use of force', since it may increase the gravity of the act and indicate a hostile

[31] See Claus Kreß and Benjamin K Nußberger, 'The Entebbe Raid – 1976' in Tom Ruys and Olivier Corten (eds), *The Use of Force in International Law: A Case-Based Approach* (Oxford University Press, 2018), 220.

[32] Rob McLaughlin, 'Some Contributions from Asia to the Development of LOAC', Speech Delivered at International Law Association Meeting, South Africa (2016) (on file with author).

[33] 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, 206.

or coercive intention. A pre-existing dispute between States or otherwise hostile relations could thus explain why friendly States do not view certain acts as an unlawful 'use of force', which, if committed by an unfriendly State, would be so regarded. The State experiencing the forcible act (the 'victim' State) will interpret the *intention* or motivation of the forcible act and the perceived threat to its security (*gravity*) taking into account this political context; thus, the interpretation of the situation is influenced by this context, meaning that the State could in fact be applying the same criteria for a 'use of force' but to differently viewed 'facts'. For example, when on 1 March 2007, 170 Swiss Army infantry troops armed with rifles lost their bearings and crossed the border into Liechtenstein, the incursion did not provoke any official protest.[34] It is easy to imagine that the response and legal characterisation of such an incursion would be vastly different if it occurred between States with heightened tensions or pre-existing disputes, such as India/Pakistan or Democratic People's Republic of Korea/South Korea. The relationship between intention, gravity and international relations is explored further in Chapter 8. A 'use of force' in the context of an existing international dispute may also relate to whether the act is 'in any other manner inconsistent with the Purposes of the United Nations' (the second part of article 2(4), discussed later), since such a use of force is inconsistent with the Purpose to maintain international peace and security through the peaceful settlement of international disputes (article 1(1), UN Charter).

The remainder of this section will look at particular categories of acts falling within and outside the scope of the term 'international relations'.

Extra-Territorial Sovereign Manifestations of a State

The classic paradigm is a use of force by a State on the territory of another State,[35] but 'international relations' also covers a use of force against an extraterritorial sovereign manifestation of a State including on the high seas or on the territory of the State using force, such as armed forces or embassies.[36]

Disputed Territory and Armistice Lines

In the case of disputed territory that is claimed by more than one State, the prohibition of the use of force acts in favour of the State in de facto control of

[34] Peter Stamm, 'Switzerland Invades Liechtenstein', *The New York Times* (13 March 2007), sec. Opinion. www.nytimes.com/2007/03/13/opinion/13iht-edstamm.4893796.html.
[35] Kreß, n. 2, 432.
[36] *Ibid.*, 433.

the territory even against the State holding the sovereign title.[37] This is an example of a use of force against another State that does not violate its territorial integrity. Kreß suggests that what is being protected by the prohibition in such a case is 'the peaceful common life on the disputed territory and the maintenance of international peace and security'.[38] However, this interpretation is without prejudice to the right of a victim State to act in self-defence against a State that has established military occupation over its territory as a result of an armed attack under article 51;[39] a State may not use force against a State in de facto control of its territory unless it is in self-defence or with UN Security Council authorisation.[40] A 'use of force' is also in 'international relations' and falls within the scope of article 2(4) if it '"violate[s] international lines of demarcation, such as armistice lines, established by or pursuant to an international agreement to which it is a party or which it is otherwise bound to respect", provided that these lines run between two states'. Kreß argues that in the case of disputed territory and armistice lines, 'international law subordinates the protection of territorial sovereignty to the protection of a peaceful common life on a certain piece of territory and the maintenance of international peace and security'.[41] With respect to entities whose statehood is disputed (e.g. North and South Vietnam during the Vietnam War; North and South Korea during the Korean War; Taiwan; Kosovo; Abkhazia; South Ossetia), the situation is more complicated. The *jus contra bellum* does not require all States to recognise the statehood of the entity in question, and it is an open question if article 2(4) covers a use of force violating an 'international demarcation line delimiting the territory of a non-State political entity'.[42]

Use of Force by a State within Its Own Territory

An interesting question is raised as to whether and when a use of force by a State within its own territory is in 'international relations' and falls within the

[37] *Ibid.*, citing art. 2(3); Olivier Corten, *The Law against War: The Prohibition on the Use of Force in Contemporary International Law* (Hart Publishing, 2010), 149–50.

[38] Kreß, n. 2, 432.

[39] *Ibid.*, 433. For a discussion of this question, see Tom Ruys and Felipe Rodríguez Silvestre, 'Illegal: The Recourse to Force to Recover Occupied Territory and the Second Nagorno-Karabakh War' (2021) 32(4) *European Journal of International Law* 1287; Dapo Akande and Antonios Tzanakopoulos, 'Legal: Use of Force in Self-Defence to Recover Occupied Territory' (2021) 32(4) *European Journal of International Law* 1299.

[40] Corten, n. 37, 149–50; Tomohiro Mikanagi, 'Establishing a Military Presence in a Disputed Territory: Interpretation of Article 2(3) and (4) of the UN Charter' (2018) 67(4) *International & Comparative Law Quarterly* 1021.

[41] Kreß, n. 2, 433.

[42] Corten, n. 37, 152.

scope of article 2(4). Differing views were expressed on the inclusion of the use of force within a State within the scope of the prohibition during the drafting of the 1970 Friendly Relations Declaration. In the 1966 meeting of the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States ('Special Committee'), one representative suggested the Special Committee include a statement that 'the prohibition on the threat or use of force did not in any way affect the use of force within a State'.[43] In the 1970 meeting of the Special Committee,

> [t]he Italian delegation reiterated, with respect to the prohibition of the threat or use of force, its firm opinion that that prohibition was, according to the Charter, a general prohibition which must be complied with under any circumstances other than the exceptions contemplated in the Charter ... including, inter alia, the high seas, outer space and, as his delegation had stressed at the Committee's eighty-ninth meeting in 1968 ... even the very territory of the States to which the prohibition was addressed.[44]

However, this point was not further discussed and does not appear in the text of the Friendly Relations Declaration.

The use of force within a State's own territory can be further broken down into several types of incidents, namely, a use of force by a State in its own territory: (a) against its own population, (b) against territorial incursion by the armed forces of another State, and (c) against foreign private actors such as individuals, merchant vessels or civilian aircraft. These are briefly dealt with in turn in the following sections.

A. Use of Force within a State's Own Territory against Its Own Population

The *Nuclear Weapons Advisory Opinion* can be interpreted as excluding uses of force by a State 'within its own boundaries' from the scope of the prohibition in article 2(4) since the Court decided not to deal with this issue.[45] However, the contrary interpretation is also possible, since the ICJ stated that '[t]he terms of the question put to the Court by the General Assembly in resolution 49175 K ("Is the threat or use of nuclear weapons in any circumstance permitted under international law?") could in principle also cover a

[43] Second Report of the 1966 Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States, UN Doc A/6230 (27 June 1966), para. 54.

[44] Sixth Report of the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States, UN Doc A/8018 (31 March to 1 May 1970), para. 136.

[45] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion* (1996) ICJ Reports 226, para. 50.

threat or use of nuclear weapons by a State within its own boundaries', and decided that it was not called upon to deal with an internal use of nuclear weapons because no State addressing the Court raised this issue.[46] Kreß notes that 'it would probably overstate the significance' of the Court's statement to conclude that the Court would totally exclude all uses of force by a State within its territory from the prohibition,[47] but he does note that it is uncontroversial that a use of force by a State *against its own population* within its territory would not fall within the scope of the prohibition,[48] although this may well violate other norms of international law including international human rights and humanitarian law.

B. Legal Basis for Forceful Response by a State to Small-Scale Territorial Incursions by Armed Forces of Another State

It is controversial whether a use of force by a State within its own territory against small-scale intruding police or military units of another State (including ships and aircraft) falls within the scope of the prohibition of the use of force in article 2(4). The crux of the debate is the legal basis for a forcible response by a State to low-scale incursions within its own territory, with some arguing that the legal basis is law enforcement based on the exercise of sovereign jurisdiction,[49] and others arguing that the legal basis is the *jus contra bellum* as it engages international relations (and that it is therefore restricted with respect to territorial incursion falling short of armed attack).[50]

Ian Brownlie argued that forcible response to aerial trespass (but not maritime trespass)[51] is a justified exception to the prohibition of the use of force, separate from self-defence. He sets out some specific requirements that must be met for the exception to apply:

> In general the practice seems to be that there is no right to shoot down trespassers unless they refuse or appear to refuse to land. However, if the penetration is by unidentified fast aircraft which persist in a deliberate and deep penetration of airspace, it may be that, in view of the destructive power of even a single nuclear weapon carried by an aircraft, the territorial sovereign

[46] *Ibid.*
[47] Kreß, n. 2, 432.
[48] *Ibid.*
[49] For example, Albrecht Randelzhofer and Oliver Dörr, 'Article 2(4)' in Bruno Simma et al (eds), *The Charter of the United Nations: A Commentary* (Oxford University Press, 3rd ed, 2012), 200, 215, MN34, with footnote listing concurring scholars.
[50] For example, Ruys, n. 33.
[51] Ian Brownlie, *International Law and the Use of Force by States* (Clarendon, 1963), 374, emphasis added.

> is justified in taking without any warning violent and immediate preventive measures.[52]

He argued that '[t]his is a rare instance in which a use of force may be justified although no actual attack has occurred'.[53]

Judge Stephen Schwebel in his dissenting opinion in the *Nicaragua* case argued that 'contemporary international law recognizes that a third State is entitled to exert measures of force against the aggressor on its own territory and against its own armed forces and military resources'.[54] Judge Schwebel quotes the Thirteen Powers draft definition of aggression,[55] which specified that

> [w]hen a State is a victim in its own territory of subversive and/or terrorist acts by irregular, volunteer or armed bands organized or supported by another State, it may take all reasonable and adequate steps to safeguard its existence and its institutions, without having recourse to the right of individual or collective self-defence against the other State under Article 51 of the Charter.

Olivier Corten and Mary Ellen O'Connell also argue that the basis for forcible response to territorial incursions falling short of armed attack is law enforcement. Corten argues that 'the State has sovereign rights over its territory, authorising it to deploy military forces there without having to appeal to any rule creating an exception whatsoever, whether self-defence or not'.[56]

Tom Ruys disagrees 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 none of the other legal frameworks cited 'provide[] a legal basis for forcible action against unlawful territorial incursions by military or police forces of another state'.[57] He makes the argument that forcible response to small-scale incursions falls within the scope of article 2(4) of the UN Charter but frames the argument in terms of the gravity threshold for a 'use of force', rather than in terms of 'international relations'. He notes that there are theoretical reasons against the idea that there is a gravity threshold for article 2(4), including that armed confrontations between police/military of two States involve 'international relations', and the law enforcement paradigm is

[52] *Ibid*., 373–4, footnotes omitted.
[53] *Ibid*., 374.
[54] *Case concerning Military and Paramilitary activities in and against Nicaragua (Nicaragua v United States of America), Merits, Judgment* (1986) ICJ Reports 14, Dissenting Opinion of Judge Schwebel 176.
[55] *Ibid*., para. 163.
[56] *Ibid*., 405.
[57] Ruys, n. 33, 181.

hierarchical and therefore not suited to equal sovereigns.[58] According to Ruys, the way States treat these confrontations in their legal discourse shows that even when they use force within their own territory in response to an unlawful incursion, this falls within the *jus contra bellum*, and therefore, no *de minimis* gravity threshold exists.[59]

The wording of the text of article 2(4) leaves the interpretation of 'international relations' in this respect uncertain. As can be seen from the previous discussion, a use of force by a State in response to small-scale territorial, maritime or aerial incursion raises several intertwined issues, such as the gap between 'use of force' and an 'armed attack' giving rise to a right of self-defence, the relationship of the *jus contra bellum* and other applicable legal frameworks such as law of the sea and law enforcement, whether there is a gravity threshold for a 'use of force' under article 2(4) and if a hostile or coercive intention is required to enliven article 2(4). But the main legal issue with respect to whether such incidents fall within the scope of the prohibition of the use of force under article 2(4) is the 'international relations' element. As Christian Henderson notes, it is not a matter of 'quantifying the use of force' 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.[60] The relationship between 'international relations', gravity and intention is discussed further in Chapter 8.

C. Law Enforcement against Foreign Private Actors within or outside Own Territory

There is greater agreement among scholars that law enforcement by a State against foreign private actors within its territory does not usually fall within the scope of article 2(4) as it is not in 'international relations'.[61] Ruys draws a

[58] *Ibid.*, 180.

[59] *Ibid.*, 170ff; See also Yoram Dinstein, *War, Aggression and Self-Defence* (Cambridge University Press, 5th ed, 2011), 213, footnote 130 on the basis for forcible response by the territorial State against small-scale incursion:

> It has been suggested that the problem may be solved by excluding from the 'proscribed categories of article 2(4)' of the Charter the enforcement by a State of its territorial rights against an illegal incursion (Schachter, *supra* note 517, at 1626). But, in the present writer's opinion, the span of the prohibition of the use of inter-State force, as articulated in Article 2(4), is subject to no exception other than self-defence and collective security (see supra 244). When one State uses force unilaterally against another, even within its own territory, this must be based on the exercise of self-defence against an armed attack.

[60] Christian Henderson, *The Use of Force and International Law* (Cambridge University Press, 2018), 68.

[61] Kreß, n. 2, 434.

https://doi.org/10.1017/9781009022897.008 Published online by Cambridge University Press

distinction between the previous example discussed (use of force by a State within its own territory in response to incursions by armed forces of another State) and law enforcement against foreign individuals, merchant vessels and civilian aircraft. He argues this is different to the previous categories because there is a clear legal basis in other legal frameworks such as law of the sea, air law and the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.[62] Since States must be able to take enforcement measures within their jurisdiction, it does not engage international relations.[63] States generally do not invoke use of force language for measures taken under those regimes, even if they go beyond what is lawful.[64] However, such acts could be a prohibited 'use of force' if it 'directly arises from a dispute between sovereign states'[65] since law enforcement is hierarchical so it cannot apply between sovereign States and thus international relations are engaged.[66]

However, as discussed in further detail in the case study on excessive or unlawful maritime law enforcement and 'use of force' in Chapter 8, the issue is not so straightforward. There is mixed State practice regarding these types of incidents. Whether purported law enforcement against foreign private actors is characterised by States as an unlawful 'use of force' in 'international relations' under article 2(4) depends on a number of factors, including the gravity of the physical means or effects, intention, nexus of the object of the use of force and another State and if there is a political dispute between the States concerned. Such incidents highlight the complex relationship between these different elements of a prohibited 'use of force'. This is explored further in Chapter 8.

Conclusion

In sum, it is generally agreed that the following uses of force by a State are usually in its 'international relations' and therefore fall within the scope of article 2(4):

- Use of force on the territory of another State or against its extraterritorial sovereign manifestations.
- Use of force to reclaim disputed territory not within de facto control.
- Use of force in violation of international demarcation lines.
- Use of force directly arising from a political dispute between States.

[62] Ruys, n. 33, 201 ff.
[63] *Ibid.*, 202.
[64] *Ibid.*, 203.
[65] *Ibid.*, 209.
[66] *Ibid.*, n. 33, 201.

It is also generally accepted that the following uses of force by a State are not in its 'international relations' and therefore usually fall outside the scope of article 2(4):

- Use of force by a State within its own territory against its own population.
- Use of force by a State in the exercise of its law enforcement jurisdiction against private foreign actors absent other factors (such as an existing international dispute, excessive force, coercive intent, or lack of sufficient connection to law enforcement jurisdiction).
- Use of force by a State against objects with no close association with another State. For non-State objects/targets that do not have a close association with a State, more will be required to bring the act within the scope of article 2(4), such as the presence of other factors including the gravity of the (potential) effects, a pre-existing dispute between States or a coercive intent against a State. The interplay of the various elements of a 'use of force' is discussed in more detail in Chapter 8.

It is controversial whether or under what circumstances the following uses of force by a State are in its 'international relations' and therefore fall within the scope of article 2(4):

- Use of force against entities falling short of Statehood.
- Use of force with no nexus to another State but against an international organisation or on *terra nullius*.
- Use of force within a State's own territory against small-scale incursions by armed forces of another State.
- Use of force by a State in the exercise of its law enforcement jurisdiction against private foreign actors in the presence of additional factors. This is discussed further in Chapter 6.

'AGAINST THE TERRITORIAL INTEGRITY OR POLITICAL INDEPENDENCE OF ANY STATE OR IN ANY OTHER MANNER INCONSISTENT WITH THE PURPOSES OF THE UNITED NATIONS'

Against the Territorial Integrity...

Despite the arguments by some scholars that these terms permit uses of force for a benign purpose,[67] the second part of article 2(4) was introduced to

[67] Kreß, n. 2, 431: 'For an early exposition of this view, see Stone, supra note 6, at 95–96; for a prominent later version, see W. M. Reisman, "Coercion and Self-Determination: Construing Charter Article 2(4)", *American Journal of International Law*, 78 (1984), 642–45.'

ensure the prohibition was all-encompassing. This is made clear in the *travaux préparatoires*.[68] For instance, at the San Francisco Conference, '[t]he Delegate of the United States made it clear that the intention of the authors of the original text was to state in the broadest terms an absolute all-inclusive prohibition; the phrase "or in any other manner" was designed to insure that there should be no loopholes'.[69] This view was later confirmed during the drafting of the 1970 Friendly Relations Declaration. In the 1964 meeting of the Friendly Relations Special Committee, representatives who commented on the term 'against the territorial integrity or political independence of any State' said that this term

> did not limit or circumscribe the prohibition on the threat or use of force contained in the same Article. It had been inserted at the United Nations Conference on International Organization, San Francisco, in order to guarantee the territorial integrity and political independence of small and weak States, and was not intended to mean that one State could use force against another on the pretext that it had no designs on the latter's territorial integrity or political independence but sought to maintain the established constitutional order or to protect a minority, or on any other pretext.[70]

Furthermore, the notion of a permissible use of force for a benign purpose is not supported by State practice, was implicitly rejected by the ICJ[71] and is

[68] Under article 32 of the VCLT,

> [r]ecourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
>
> (*a*) leaves the meaning ambiguous or obscure; or
> (*b*) leads to a result which is manifestly absurd or unreasonable.

[69] Vol. VI, 335. See also Brownlie, n. 51, 267, who draws the same conclusion that the *travaux préparatoires* support a broad reading of this provision: 'The conclusion warranted by the *travaux préparatoires* is that the phrase under discussion was not intended to be restrictive but, on the contrary, to give more specific guarantees to small states and that it cannot be interpreted as having a qualifying effect' (Footnote omitted).

[70] First Report, n. 30, Doc A/5746, para. 37.

[71] In the *Corfu Channel* case, in response to the UK's justification of its minesweeping operation in Albanian territorial waters, the ICJ held that: 'The Court can only regard the alleged right of intervention as the manifestation of a policy of force, such as has, in the past, given rise to the most serious abuses and such as cannot, whatever be the present defects in international organization, find a place in international law' (*Corfu Channel Case (UK v Albania), Merits, Judgment* (1949) ICJ Reports 4, 35). For a legal analysis of this finding arguing that the Court thereby implicitly rejected the argument that a use of force for a benign purpose falls outside the scope of article 2(4), see Claus Kreß, 'The International Court of Justice and the Non-Use

overwhelmingly rejected by scholars.[72] Therefore, an otherwise prohibited use of force cannot be legally justified by arguing that it has a limited purpose.

Consent

This wording of article 2(4) does carve out an exclusion from the prohibition in the case of consent, which is not a circumstance precluding wrongfulness but forms an intrinsic part of the primary rule itself.[73] According to the International Law Commission:

> the consent of the State must be *valid in international law, clearly established, really expressed (which precludes merely presumed consent), internationally attributable to the State and anterior to the commission of the act to which it refers*.[74]

of Force' in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (Oxford University Press, 2015), 561, 573–4.

[72] Kreß, n. 2, 431. See Kreß for an overview of the different positions on these issues with extensive references. Note that Kreß's analysis is referring to the slightly different formulation that was used in the definition of the crime of aggression in article 8 *bis*(2) of the Rome Statute, which itself is taken from the language used in article 1 of the 1974 Definition of Aggression. That formulation is 'against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations'. It mentions 'sovereignty' and is slightly broader by including uses of force 'in any other manner inconsistent with the *Charter* of the United Nations' (emphasis added) rather than only the Purposes of the United Nations.

[73] James Crawford, Second Report on State Responsibility, UN Doc A/CN.4/498/Add.2 (30 April 1999), 12–13, para. 240(b). See also ILA Committee on the Use of Force, 'Final Report on Aggression and the Use of Force' (2018), 18–20. Cf Federica I Paddeu, 'Military Assistance on Request and General Reasons against Force: Consent as a Defence to the Prohibition of the Use of Force' (2020) 7(2) *Journal on the Use of Force and International Law* 227, arguing that consent should be reconstrued as a defence and not part of the primary rule.

[74] (1979) Yearbook of the International Law Commission, vol. 2, Part II, 112. See further Corten, n. 37, 250 ff, who looks at the conditions for lawful military intervention by consent. A matter of some controversy is whether a State may lawfully militarily intervene in an internal conflict within another State at the invitation of the government of that State. This controversy raises two potential issues: the identity of the legitimate government, and whether it is permitted to intervene in such a conflict even with the consent of the central authorities. On these points, see Corten, n. 37, 276–7, 280–1, 284, 287. The purpose of a government's invitation to another State to military intervene on its territory has been argued to be potentially relevant with respect to two contexts: firstly, an internal conflict engaging the right to self-determination, and, secondly, a government which is massively violating the human rights of its own population. For further exposition of these issues, see Kreß, n. 2, 429–31. For a comprehensive general assessment of this topic, see Erika de Wet, *Military Assistance on Request and the Use of Force* (Oxford University Press, 2020).

CONCLUSION

The factors discussed in this chapter delineate the scope and context of the prohibition of the use of force in article 2(4). In other words, they are fundamental contextual elements which must be present in order for a 'use of force' to fall within the scope of article 2(4) and be unlawful under that provision. Accordingly, 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: The use of force must be by a State. It is likely that the object/target of the 'use of force' must have a sufficient nexus to another State for the 'use of force' to be in 'international relations' and fall within the scope of article 2(4).
- In 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'.

From the above analysis of these terms, the following can be concluded regarding acts that fall within and outside the scope of article 2(4):

Uses of force falling outside the scope of article 2(4):

- Use of force by non-UN Member States (although they are bound by the identical customary international law prohibition of the use of force; see Part I).
- Uses of force that are not committed by a State (including indirectly – see discussion of indirect force in Chapter 5) and are not attributable to a State.
- Uses of force not in international relations. It is generally accepted that the following uses of force by a State are not in its 'international relations' and therefore usually fall outside the scope of article 2(4):
  1. Use of force by a State within its own territory against its own population.
  2. Use of force by a State in the exercise of its law enforcement jurisdiction against private foreign actors absent other factors (such as an existing international dispute, excessive force, coercive intent or lack of sufficient connection to law enforcement jurisdiction).
- Use of force falling within an exception to the prohibition recognised in the UN Charter, namely, forcible acts in lawful self-defence or validly authorised by the UN Security Council.
- Use of force that is validly consented to.

Uses of force falling within the scope of article 2(4):

- Use of force on the territory of another State or against its extraterritorial sovereign manifestations.
- Use of force to reclaim disputed territory not within de facto control.
- Use of force in violation of international demarcation lines.
- Use of force directly arising from a political dispute between States.
- Use of force for a benign purpose, provided the other requirements of article 2(4) are met. The limited purpose of the use of force does not exclude it from the scope of this provision.

Uses of force for which it is unclear if they fall within scope of article 2(4):

It is controversial whether or under what circumstances the following uses of force by a State are in its 'international relations' and therefore fall within the scope of article 2(4):

- Use of force against entities falling short of Statehood.
- Use of force with no nexus to another State, such as against an international organisation or on *terra nullius*.
- Use of force by a State within its own territory against small-scale incursions by armed forces of another State.
- Use of force by a State in the exercise of its law enforcement jurisdiction against private foreign actors in the presence of other factors (such as an existing international dispute, excessive force, coercive intent or lack of sufficient connection to law enforcement jurisdiction).