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Anomalous Examples of 'Use of Force' and Non-'Use of Force' under Article 2(4) of the UN Charter

INTRODUCTION

The conclusions drawn in Part II regarding the meaning and elements of a 'use of force' under article 2(4) of the UN Charter are supported by the principles of treaty interpretation. But there is an interesting and important problem: there are several well-known and accepted 'uses of force' that violate the prohibition in article 2(4) but do not conform to all of the criteria set out above. Conversely, there are also some acts that *do* use physical means or have physical effects but are still not regarded as violating article 2(4). This chapter will set out some of these anomalous examples and then put forward some possible explanations and the implications for the interpretation of a prohibited 'use of force' under article 2(4).

ANOMALOUS EXAMPLES OF 'USE OF FORCE'

Subsequent Agreements Regarding Anomalous Categories of 'Use of Force': The 1974 Definition of Aggression

It is instructive to examine anomalous acts which States agree fall within the scope of article 2(4). For this purpose, the 1974 Definition of Aggression serves as a key example.[1] As explained in Chapter 5, the 1974 Definition is a subsequent agreement on the interpretation of the prohibition of the use of force in article 2(4) of the UN Charter under article 31(3)(a) of the Vienna Convention on the Law of Treaties (VCLT). Some of the acts of aggression (and therefore 'uses of force') referred to in the 1974 Definition of Aggression

[1] UN General Assembly, 'Definition of Aggression' (14 December 1974), GA Res 3314 (XXIX).

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are not strictly 'armed' or kinetic forms of force. Article 2 of the 1974 Definition of Aggression provides that:

> The first use of armed force by a State in contravention of the Charter shall constitute *prima facie* evidence of an act of aggression although the Security Council may, in conformity with the Charter, conclude that a determination that an act of aggression has been committed would not be justified in the light of other relevant circumstances, including the fact that the acts concerned or their consequences are not of sufficient gravity.

Article 3 lists acts which may qualify as acts of aggression and is set out and discussed later in the chapter. It provides that: 'Any of the following acts, regardless of a declaration of war, shall, subject to and in accordance with the provisions of article 2, qualify as an act of aggression'. Article 4 notes that '[t]he acts enumerated [in article 3] are not exhaustive and the Security Council may determine that other acts constitute aggression under the provisions of the Charter'. Since articles 1 and 2 of the Definition refer to 'armed force', the acts listed in article 3 must all only relate to *armed* force. As some of the listed acts do not conform to a normal understanding of 'force' and do not exhibit all the elements identified in the preceding chapters, it is helpful to examine those acts to assist in the interpretation of the term 'use of force' in article 2(4) of the UN Charter. The relevant acts that will be analysed are invasion and military occupation (article 3(a)), blockade (article 3(c)), mere presence in violation of a Status of Forces Agreement (SOFA) (article 3(e)) and indirect use of force either through inter-State assistance (article 3(f)) or through non-State armed groups (article 3(g)).

Article 3(a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof

Ian Brownlie has noted that '[i]nvasion and unopposed military occupation following a threat of force, as in the case of the German occupations of the Czechoslovakian territories Bohemia and Moravia in March 1939, are usually regarded as a case of actual resort to force.'[2] However, the inclusion of military occupation in itself (as opposed to the preceding invasion or attack) as an act of aggression in the 1974 Definition (and therefore an illegal use of force under article 2(4) of the UN Charter) is anomalous because occupation may

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

follow from either a lawful or an unlawful use of force and is not unlawful in itself under the *jus contra bellum*. Article 42 of the 1907 Hague Regulations defines a territory as occupied 'when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised'.[3] The lawfulness of an occupation is determined under the *jus contra bellum*, but once it is factually in place then an occupation is regulated by the laws of occupation, including the 1907 Hague Regulations,[4] the Fourth Geneva Convention 1949[5] and customary international humanitarian law.[6] As with an unresisted invasion, an occupation may also meet with no armed resistance and may therefore involve no physical means or physical effects in terms of damage to persons or property.

In the *Armed Activities* case, the International Court of Justice (ICJ) held that the illegal occupation of Ituri by Uganda constituted a violation of the principle of the non-use of force.[7] However, this characterisation of the occupation of Ituri was criticised by Judge Pieter Kooijmans since it undermines the separation of the *jus contra bellum* (which prohibits aggression) and the *jus in bello* (which sets out the regime governing military occupation and makes no distinction 'between an occupation resulting from a lawful use of force and one which is the result of aggression').[8] Judge Kooijmans argued that article 3(a) of the 1974 Definition of Aggression 'lent credibility' to the impression of Governments that '"occupation" has become almost synonymous with aggression and oppression', and held: '[t]his resolution, as important as it may be from a legal point of view, does not in all its terms reflect customary law. The reference to military occupation as an act of aggression is in my opinion less than felicitous.'[9] As Bengt Broms has stated: 'it could be argued in view of the way in which the paragraph has been construed that the

[3] *Regulations Respecting the Laws and Customs of War on Land*, *Annex to Hague Convention Respecting the Laws and Customs of War on Land 1907* (adopted 18 October 1907, entered into force 26 January 1910). There is debate over when the laws of occupation begin to apply: see Marten Zwanenburg, Michael Bothe, and Marco Sassòli, 'Is the Law of Occupation Applicable to the Invasion Phase?' (2012) 94 *International Review of the Red Cross* 29.

[4] *Regulations Respecting the Laws and Customs of War on Land*, *Annex to Hague Convention Respecting the Laws and Customs of War on Land 1907*, n. 3.

[5] *Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War 1949* (adopted 12 August 1949, entered into force 21 October 1950), 75 UNTS 287.

[6] See ICRC, *Customary IHL Database*, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul.

[7] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (2005) ICJ Reports 168, para. 345 ('*Armed Activities* case').

[8] *Ibid.*, Separate Opinion of Judge Kooijmans, paras. 56, 58–63.

[9] *Ibid.*, para. 63, footnote omitted.

military occupation or the annexation presupposes the existence of an act of aggression in the form of an invasion or attack and that it would therefore not have been necessary to include them separately in this paragraph.'[10] The inclusion in article 3(a) of military occupation as an act of aggression (and therefore a 'use of force') is therefore controversial. Nevertheless, since it is a listed act in the 1974 Definition of Aggression, it may be considered that States have made a subsequent agreement under article 31(3)(a) of the VCLT that it is a 'use of force' in a violation of article 2(4) of the UN Charter.

Article 3(c) The blockade of the ports or coasts of a State by the armed forces of another State;

A blockade is

> a belligerent operation to prevent vessels and/or aircraft of all nations, enemy and neutral, from entering or exiting specified ports, airports, or coastal areas belonging to, occupied by, or under the control of an enemy nation. The purpose of establishing a blockade is to deny the enemy the use of enemy and neutral vessels or aircraft to transport personnel and goods to or from enemy territory.[11]

For a blockade to be binding under treaty and customary international law, it must meet certain requirements, including that it be effective[12] and 'applied impartially to the vessels and aircraft of all States'.[13] A blockade is an anomalous example of an illegal use of force because until it is challenged and enforced, there is a lack of employment of physical means or physical effects – only an expressed intention to use force under certain circumstances (when

[10] 'The Definition of Aggression' (1977) 154 *Recueil des cours* 348, cited by Judge Kooijmans, Separate Opinion, n. 7, para. 63 at footnote 12.

[11] Wolff Heintschel von Heinegg, 'Blockade', *Max Planck Encyclopedia of Public International Law* (Oxford University Press, October 2015), http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e252, para. 1. On the law of blockade generally, see further Lassa Oppenheim and Hersch Lauterpacht (eds), *International Law, vol. II: Disputes, War and Neutrality* (Longman, 7th ed, 1952), 768–97; Robert W Tucker, *The Law of Neutrality at Sea* (United States Government Printing Office, 1957, reprinted 2006 and 2008).

[12] Heintschel von Heinegg, n. 11, para. 33; *Declaration Respecting Maritime Law between Austria, France, Great Britain, Prussia, Russia, Sardinia and Turkey* (signed and entered into force 16 April 1856) (1856) 115 CTS 1 ('Paris Declaration'), para. 4; *Déclaration relative au droit de la guerre maritime* [Declaration concerning the Laws of Naval War] (26 February 1909, not entered into force) (1909) 208 CTS 338 ('London Declaration'), art. 2; San Remo Manual on International Law Applicable to Armed Conflicts at Sea (adopted 12 June 1994) reproduced in Louise Doswald-Beck (ed), *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (Cambridge University Press, 1995), para. 95.

[13] Heintschel von Heinegg, n. 11, para. 44; London Declaration, n. 12, art. 5.

the blockade is challenged). According to Brownlie, 'a naval blockade involves an unlawful use of force, although the tactical posture is passive, since its actual enforcement includes the use of force against vessels of the coastal state'.[14]

Article 3(c) of the 1974 Definition of Aggression does not specify that a blockade must actually be enforced in order to qualify as an act of aggression. An unchallenged blockade could be considered an act of aggression and therefore a 'use of force' because it is an act of warfare that confers a military advantage and is usually employed in conjunction with other forms of force as part of a broader military operation against the armed forces of the blockaded State.[15] However, as with the example to be discussed later of overstaying a Status of Forces agreement, it is not clear if a blockade that is unchallenged may really amount to a 'use of force' under article 2(4) of the UN Charter.[16] Nevertheless, an unchallenged blockade constitutes a 'threat of force' against the blockaded State and may therefore still violate article 2(4) of the UN Charter.

If a neutral warship or military aircraft attempts to or does breach a blockade, the neutral State commits a violation of the law of neutrality, but the blockading State does not have a right to attack it unless in the exercise of the right of self-defence.[17] But a more interesting legal issue is raised when it comes to the enforcement of a blockade against a neutral merchant vessel on the high seas. Under the *jus contra bellum*, the enforcement of a blockade against a ship flagged to a neutral State may amount to a use of force within the meaning of article 2(4) and violate the prohibition of the use of force unless justified by one of the recognised exceptions, that is, self-defence. This view is supported by State practice, for example, the position taken by the UK during the Gulf War, when it claimed that Iran's visit of a British-flagged merchant vessel on the high seas was justified as a measure of self-defence under article 51 of the UN Charter.[18] This implies the legal view that stopping and searching a foreign-flagged merchant vessel on the high seas would otherwise constitute an unlawful use of force in violation of article 2(4) of

[14] Brownlie, n. 2, 365–6, footnote omitted.
[15] Heintschel von Heinegg, n. 11, para. 1.
[16] This is noted by 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, 111.
[17] Heintschel von Heinegg, n. 11, para. 48.
[18] Statement by the Minister of State, Foreign and Commonwealth Office, 28 January 1986, House of Commons Debates, vol. 90, col. 426, printed in 57 *British Year Book of International Law* 583 (1986).

the UN Charter – that is, that it would not be justified by the law of neutrality.[19] It is not the blockade itself that transforms the capture or attack of the neutral ship into a use of force – due to the principle of exclusive flag State jurisdiction, such interference with a vessel flagged to a third State on the high seas takes place in 'international relations' and is arguably itself a use of force unless the capturing/attacking State has lawful grounds for the exercise of jurisdiction over the vessel, for example, under article 110 of the UN Convention on the Law of the Sea.[20]

But under the laws of naval warfare (*jus in bello*), 'since neutral merchant vessels and civilian aircraft are obliged to respect a blockade that conforms to the legal requirements of publicity and effectiveness they become liable to interception and capture if they act in violation of the legitimate right of the blockading power to prevent egress from, or ingress to, the blockaded area'.[21] Under the *jus in bello*, neutral merchant vessels and civilian aircraft are liable to be attacked if they are clearly resisting interception and capture, because such an act leads to loss of civilian status and renders the vessel or aircraft a legitimate military objective.[22] However, these rules apply under the laws of neutrality and armed conflict, not under the *jus contra bellum*. The law of blockade and *jus in bello* do not prohibit the attack, but neither do they justify it under the *jus contra bellum*. Therefore, attacking a merchant vessel attempting to resist intercept and capture by the blockading State in these circumstances would be an unlawful use of force unless justified by self-defence.

This raises the question of whether the law of neutrality and these rights of blockade continue to apply in the post-Charter era in the traditional way of providing a full justification for certain forcible action. On one view, belligerent rights and the traditional law of neutrality continue to exist in the post-Charter era, which means that the impairment of the rights of third States must be accepted.[23] On another view, the law of neutrality was abolished by the UN Charter and either belligerent rights no longer exist, or they have

[19] This legal position has been criticised by Wolff Heintschel von Heinegg as not reflective of State practice and irreconcilable with the equal application of the *jus in bello*: '"Benevolent" Third States in International Armed Conflicts: The Myth of the Irrelevance of the Law of Neutrality' in MN Schmitt and J Pejic (eds), *International Law and Armed Conflict: Exploring the Faultlines* (Koninklijke Brill BV, 2007), 562–3.

[20] See discussion of maritime law enforcement against foreign-flagged vessels with no basis for jurisdiction later in this chapter for a further discussion of this point.

[21] Heintschel von Heinegg, n. 11, para. 42.

[22] *Ibid*., para. 47.

[23] Heintschel von Heinegg argues in the affirmative, n. 19, 543–68.

continued in a modified form under the rubric of self-defence.[24] As Stephen Neff notes, there are serious difficulties with each position,[25] and this controversial question remains open. Even if one takes the position that these belligerent rights continue to exist but have been modified by the modern *jus contra bellum*, a further question would be raised of whether the very imposition of a blockade remains a lawful instrument even for a State acting in self-defence, since the principle of effectiveness requires that the blockading State enforce the blockade against neutral vessels resisting interception and capture – in other words, that the blockading State use force against the vessels of third States.[26]

Article 3(e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;

This is an anomalous example of a 'use of force' because *mere continuing presence* of the armed forces of one State within the territory of another State in contravention of a Status of Forces Agreement, even without the actual employment of physical means or the producing of physical effects, may suffice under article 3(e) of the 1974 Definition of Aggression to constitute an act of aggression (and therefore a 'use of force' in violation of article 2(4) of the UN Charter), although this is a controversial proposition. Thomas Bruha observes that:

[24] For a discussion of the scope of application of the laws of war and the law of neutrality in the post-Charter era with respect to the enforcement of blockades against neutral vessels, see Douglas Guilfoyle, 'The Mavi Marmara Incident and Blockade in Armed Conflict' (2011) 81 (1) *British Yearbook of International Law* 171, 177, with further references. See further Michael Bothe, 'Neutrality in Naval Warfare: What Is Left of the Traditional Law?', in Astrid JM Delissen and Gerard J Tanja (eds), *Humanitarian Law of Armed Conflict, Challenges Ahead* (Martinus Nijhoff, 1991), 387; Dietrich Schindler, 'Transformations in the Law of Neutrality since 1945' in Delissen and Tanja, *ibid.*, 367.

[25] See Stephen C Neff, 'Towards a Law of Unarmed Conflict: A Proposal for a New International Law of Hostility' (1995) 28(1) *Cornell International Law Journal* 1 for a critique of the different schools of thought on this question.

[26] James Farrant ('Modern Maritime Neutrality Law' (2014) 90 *International Law Studies* 198, 200–307) argues for policy reasons that the requirement of impartiality should be removed from the law of blockade, so that the blockading belligerent is not required to enforce the blockade against neutral shipping. For an original proposal to overcome the associated legal and policy issues with belligerent rights in the post-Charter era, see Neff, n. 25.

> The mere continuance of the presence of armed forces in the territory of another state in violation of, or after the termination of the agreement concluded with it, does not necessarily entail the use of armed force in the ordinary sense of the word. . . . even if one considers the continued stationing of armed forces 'within' another state as a *special case of non–transfrontier* use of armed force comparable to occupation, it leaves many questions open: what degree of violation of the agreement is required? Must the continued presence of the armed forces in the host state be enforced with threats or other manifestations of the use of armed force?[27]

The ICJ dealt with this point in the *Armed Activities* case. In that case, the Court found that Uganda's actions were not justified by consent or self-defence and that they were a violation of the prohibition of the use of force. The Court acknowledged the Democratic Republic of the Congo (DRC) had previously consented to the presence of Ugandan troops on its territory for a limited purpose of responding to cross-border attacks but that the DRC had a right to unilaterally withdraw this consent without any formalities required.[28] The Court found that the DRC had at least by 8 August 1998 withdrawn its consent to the presence of Ugandan troops on its territory.[29] The Lusaka Agreement provided for the withdrawal of Ugandan troops from the DRC within a particular timeframe, but the Court found that this did not constitute consent by the DRC to the presence of the Ugandan troops during the withdrawal period[30] and that such presence could only be justified, if at all, on the basis of self-defence.[31] A more recent example is provided by Bruha with respect to

> [t]he involvement of units of the Russian Black Sea forces stationed in the Ukraine harbour of Sevastopol in the interventionist activities of Russia leading to the illegal annexation of the Crimea . . . *even if no use of armed force was involved*, these activities may be considered as aggression according

[27] Thomas Bruha, 'The General Assembly's Definition of the Act of Aggression' in Claus Kreß and Stefan Barriga (eds), *The Crime of Aggression: A Commentary* (Cambridge University Press, 2017), 142, 163.

[28] *Armed Activities* case, n. 7, para. 47.

[29] *Ibid*., para. 53.

[30] *Ibid*., para. 99. This finding was contested by Judge Parra-Aranguren (Separate Opinion, paras. 3–20) and Judge *ad hoc* Kateka (Dissenting Opinion, para. 22).

[31] *Ibid*., para. 112; cf Claus Kreß, 'The State Conduct Element' in Claus Kreß and Stefan Barriga (eds), *The Crime of Aggression: A Commentary* (Cambridge University Press, 2017), 412, 445, who argues that 'the ICJ refrained from characterising as a use of force the unlawful presence of Ugandan troops during the withdrawal period' on the basis of paragraph 99 in conjunction with paragraph 345(1) and draws from this the implication of the 'requirement that the armed forces of the aggressor state adopt a hostile intent' (footnote omitted).

> to article 3(e) of the Definition, because they were instrumental to and occurred in the context of aggressive activities of Russia against Ukraine.[32]

Article 3(f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;

This 'use of force' is also characterised by its lack of physical means or direct physical effects, unless one considers purely indirect means. This form of act of aggression is distinct from the other acts in that it appears to be either a new form of attribution or a broad understanding of the concept of 'force'.[33] This is because the conduct referred to in article 3(f) is more 'properly characterised as *aid or assistance* in the commission of an unlawful use of force by another State within the meaning of Article 16 of the International Law Commission (ILC) Articles on State Responsibility and customary international law'.[34] The analysis of article 3(f) by Claus Kreß[35] observes that paragraph 8 of the ILC commentary is ambiguous on this point because it characterises the conduct of the assisting State firstly as a breach of the obligation not to use force but in the same paragraph also discusses the Federal Republic of Germany's acceptance 'that the act of a State in placing its own territory at the disposal of another State in order to facilitate the commission of an unlawful use of force by that other State was itself an internationally wrongful act'. Kreß observes that:

> While the first formulation suggests that the ILC believes that the state conduct described in *littera* (f) constitutes as such a use of force, the second rather suggests that the ILC characterises such aid and assistance in the commission of an unlawful use of force by another state as an internationally wrongful act related to but distinguishable from a use of force. In any event, the ILC has emphasised that 'the assisting State is responsible for its own act in deliberately assisting another State to breach an international obligation by which they are both bound' and that 'it is not responsible, as such, for the act of the assisted State'.[36]

If the internationally wrongful act of the assisting State is not a result of the attribution of the act of aggression of the acting State to it but is an unlawful

[32] Bruha, n. 27, 163, footnote 145 (emphasis added).
[33] Kreß, n. 31, 446. Kreß notes (446, footnote 167) that the 1970 Friendly Relations Declaration does not contain a similar provision.
[34] Kreß, *ibid.*, 446, citations omitted.
[35] *Ibid.*, 446.
[36] *Ibid.*, footnotes omitted.

act in its own right, then because of the wording of the 1974 Definition the conduct described in article 3(f) must be considered a 'use of force' even though it does not conform to a normal understanding of this term.

This unique form of a prohibited 'use of force' requires that the assisting State place its territory at the disposal of another State, that the other State use the territory to perpetrate an act of aggression and that the assisting State 'allowed' the use of its territory for this purpose. In terms of the acting State 'making use of' the territory of the assisting State for perpetrating an act of aggression, Kreß notes that this occurs 'if its armed forces or the weapons that are used in the act of aggression are located on that territory' but that article 3 (f) does not require a direct territorial connection with the act of aggression.[37] Examples of use of territory falling within the scope of article 3(f) would thus include 'a command-and-control facility through which the act of aggression is being directed, or a military base from which targeting information for use in the course of the act of aggression is provided'.[38] The required degree of involvement of the aggressor (assisting) State within the meaning of article 3 (f) requires something approaching 'active collusion' rather than 'mere acquiescence' or a failure to prevent the use of its territory for perpetrating an act of aggression.[39] This degree of involvement therefore requires that the assisting State foresee the misuse of its territory and have 'knowledge of the circumstances' of the acts concerned[40] but does not require that the assisting State place its territory at the disposal of the acting State with the intention that the acting State use it for the purpose of carrying out an act of aggression.[41]

An example of inter-State assistance in which article 51 was invoked is Germany's assistance to the coalition's use of force in Syria and Iraq in 2015. The German parliament approved the military measures against IS in Iraq and Syria on the basis of article 51 of the UN Charter, article 42(7) of Treaty of the European Union and Security Council Resolutions 2170 (2014), 2199 (2015) and 2249 (2015).[42] Germany notified the UN Security Council under article 51 of the UN Charter that it had 'initiated military measures against the

[37] *Ibid*., 447.
[38] *Ibid*.
[39] Bruha, n. 27, 164.
[40] *Ibid*.
[41] Kreß, n. 31, 446.
[42] Antrag der Bundesregierung, Drucksache 18/6866 (1 December 2015), Einsatz bewaffneter deutscher Streitkräfte zur Verhütung und Unterbindung terroristischer Handlungen durch die Terrororganisation IS auf Grundlage von Artikel 51 der Satzung der Vereinten Nationen in Verbindung mit Artikel 42 Absatz 7 des Vertrages über die Europäische Union sowie den Resolutionen 2170 (2014), 2199 (2015), 2249 (2015) des Sicherheitsrates der Vereinten Nationen.

terrorist organization Islamic State in Iraq and the Levant (ISIL)' 'in the exercise of the right of collective self-defence', and that '[e]xercising the right of collective self-defence, Germany will now support the military measures of those States that have been subjected to attacks by ISIL'.[43] Germany's invocation of article 51 could be evidence of a belief that the acts being justified would otherwise violate article 2(4), namely, support of coalition forces through the provision of intelligence, aerial refuelling and weapons delivery to coalition States. But the legal reasons for invoking article 51 were not explained and despite article 3(f) of the 1974 Definition of Aggression, there is a lack of clear subsequent practice of the parties to the UN Charter demonstrating their agreement that the term 'use of force' in article 2(4) includes such forms of inter-State assistance.

Article 3(g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein

Similar to article 3(f), article 3(g) of the 1974 Definition of Aggression relates to forms of indirect aggression in which a State facilitates the unlawful use of force by another actor, in this case, by non-State actors. According to the ICJ in the *Nicaragua* case, the description in article 3(g) applies to the concept of 'armed attack' and is customary international law.[44]

There is debate about whether the State's 'substantial involvement' must relate to 'sending' or to the acts of armed force of the armed bands.[45] Kreß

[43] *Letter Dated 10 December 2015 from the Chargé d'affairs a.i. of the Permanent Mission of Germany to the United Nations Addressed to the President of the Security Council*, UN Doc S/2015/946 (10 December 2015), paras. 1 and 3.

[44] *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America), Merits, Judgment* (1986) ICJ Reports 14 ('*Nicaragua* case'), para. 195:

> The Court sees no reason to deny that, in customary law, the prohibition of armed attacks may apply to the sending by a State of armed bands to the territory of another State, if such an operation, because of its scale and effects, would have been classified as an armed attack rather than as a mere frontier incident had it been carried out by regular armed forces. But the Court does not believe that the concept of 'armed attack' includes not only acts by armed bands where such acts occur on a significant scale but also assistance to rebels in the form of the provision of weapons or logistical or other support. Such assistance may be regarded as a threat or use of force, or amount to intervention in the internal or external affairs of other States.

[45] Bruha, n. 27, 165.

points out that the French version is unambiguous that substantial involvement refers to substantial involvement in the sending:

> L'envoi par un Etat ou en son nom des bandes ou de groupes armés, de forces irrégulières ou de mercenaires qui se livrent à des actes de force armée contre un autre Etat d'une gravité tel qu'ils équivalent aux actes énumérés ci-dessus, ou le fait de s'engager d'une manière substantielle dans *une telle action*.[46]

There is also some debate about whether 'substantial involvement' is an alternative to or an application of the attribution test (direction or control); in other words, whether the conduct described is a form of 'indirect force' by the State itself or a form of attribution of the use of force by the armed group to the State. Article 3(g) of the 1974 Definition of Aggression must be read together with the chapeau of article 3 and article 2 of the Definition of Aggression, which refers to the first use of force by a State. Later ICJ judgments also discuss article 3(g) in terms of attribution.[47] Dapo Akande and Antonios Tzanakopolous[48] argue that article 3(g) reflects a customary rule for the attribution of acts by non-State actors to a State. Their position is that article 3(g) is merely an application of the direction or control test and that this is how the ICJ has interpreted it in *Nicaragua* and in the *Armed Activities* case.

Kreß argues that the test of attribution as set out in article 8 of the ILC Draft Articles should be applied to interpret the term 'sending', which according to the ICJ 'requires *effective* control over the specific acts in question, which is a very demanding threshold'.[49] But he goes on to discuss the 'alternative of the *substantial involvement* of a state *in the sending*', suggesting that this 'should, at the present stage of the legal development at least, be confined to the exercise of *overall* control by the aggressor state over the persons concerned, within the meaning of the case law of the international criminal courts, as initiated by the International Criminal Tribunal for the former Yugoslavia' in the *Tadic* case.[50] Kreß's argument is that it is controversial whether the overall control test of attribution forms part of customary international law (the ICJ has held that it does not). If we follow the ICJ, then 'the substantial involvement-limb of article 3(g) of the Annex to 1974 GA Resolution

[46] Kreß, n. 31, 448 (emphasis on the singular added by Kreß).
[47] For example, the *Armed Activities* case, n. 7, para. 146.
[48] 'The International Court of Justice and the Concept of Aggression' in Kreß and Barriga, n. 31, 214, 223–4.
[49] Kreß, n. 31, 449, footnote omitted.
[50] *Ibid*., 449, referring to *Prosecutor v Duško Tadic*, ICTY Appeals Chamber Judgment of 15 July 1999, para. 145.

3314 should perhaps best be considered as the articulation of a *lex specialis* on attribution in the legal context of the prohibition of the use of force', especially considering that the ICJ has not elaborated on the meaning of 'substantial involvement in the sending'.[51] But if one adopts this interpretation, the result is that the 'substantial involvement' alternative in article 3(g) is rendered 'entirely redundant'.[52]

Kreß acknowledges that '[t]he ordinary meaning of "substantial involvement" is even wide enough to cover, beyond the exercise of overall control by a state over violent non-state actors, the (mere) toleration by a state of acts of armed force carried out by non-state actors from the territory of that state against another state'.[53] But he argues against this broad interpretation since the negotiations on the 1974 resolution do not show consensus on this point, the ICJ has not adopted this interpretation and since the lack of general acceptance of the US attempt to establish a 'harbouring doctrine' after the 9/11 terror attacks does not support a new customary international law rule on attribution.[54] Other scholars, such as Raphaël van Steenberghe interpret the ICJ case law and article 3(g) of the 1974 Definition differently and address the issue in terms of State 'substantial involvement' as an alternative to attribution.[55]

In the end, the interpretation of the term 'substantial involvement' in article 3(g) affects the scope of article 2(4) (as well as article 51). If one accepts that 'substantial involvement' is an alternative to the standard attribution test, the scope of articles 2(4) and 51 may be slightly broader and cover more State forms of involvement in attacks by non-State armed groups. In any case, this unlawful use of force is anomalous because, like the other form of indirect use of force under article 3(f) of the 1974 Definition, it is characterised by its lack of physical means or direct physical effects, unless one considers purely indirect means.

Conclusion

Although articles 1 and 2 of the 1974 Definition refer to 'armed force', the acts in article 3 listed earlier do not correspond to a normal understanding of 'force'. This shows that UN Member States interpret the concept of 'force' to include particular acts which do not correspond with the general definition of

[51] Kreß, n. 31, 449.
[52] *Ibid.*, 449.
[53] *Ibid.*, 450, footnote omitted.
[54] *Ibid.*
[55] Raphaël van Steenberghe, *La légitime défense en droit international public* (Larcier, 2012), 319–22.

this term because they lack physical means and/or (direct) physical effects. Some explanations for this are considered at the end of this chapter.

Lower Gravity Anomalous Examples of 'Use of Force'

In addition to the acts set out in the 1974 Definition, there are other anomalous examples of acts characterised by States as a prohibited 'use of force' despite a lack of certain elements such as 'use' of physical force or a lack of physical effects. These include the following:

Intentionally Crossing a Border Bearing Arms with an Intention to Use Them Even before Any Weapons Are Fired

The mere crossing of a border by armed forces has sometimes been treated by States as a violation of the prohibition of the use of force, despite a lack of employment of physical means or of physical effects. For example, in the case of the *Temple of Preah Vihear*, Cambodia argued that Thailand committed a 'flagrant violation of Article 2, paragraph 4 of the Charter'[56] when it sent detachments of its armed forces to territory claimed by Cambodia in 1954 but subject to a border dispute between those two States, despite a lack of armed confrontation.[57] Similarly, in September 1964, Malaysia complained to the UN Security Council that Indonesia had committed 'blatant and inexcusable aggression' when it sent heavily armed paratroopers into Malaysian territory in the context of a broader political dispute.[58] The practice is however not clear-cut. For example, when Israeli commandos assassinated Khalil al-Wazir in Tunis on 16 April 1988, the UN Security Council adopted Resolution 611 (1988) condemning 'the aggression ... against the sovereignty and territorial integrity of Tunisia in flagrant violation of the Charter of the United Nations, international law and norms of conduct'.[59] However, it is unclear from the international response to this incident whether the mere act of *sending* Israeli armed forces into Tunisia for the purpose of carrying out the assassination (as opposed to the actual assassination itself) was sufficient in itself to constitute a

[56] *Temple of Preah Vihear, Application Instituting Proceedings, 30 September 1959, Pleadings, Oral Arguments, Documents* (1962) ICJ Reports vol. 1, 15.

[57] See also Olivier Corten, *The Law against War: The Prohibition on the Use of Force in Contemporary International Law* (Hart Publishing, 2010), 83.

[58] *Letter Dated 3 September 1964 from Representative of Malaysia to the President of the Security Council*, UN Doc S/5930 (17 September 1964), S/5930, OR, 19th year, Suppl. for July–September 1964, 263. See also Corten, *ibid.*, 78.

[59] UN Security Council, *Resolution 611* (25 April 1988) UN Doc S/RES/611.

prohibited 'use of force', having regard to the fact that no direct combat took place between the Israeli commando unit and Tunisian armed forces.[60]

Aerial Incursion

Similarly, there have been numerous instances of aerial incursion that States have treated as violations of the prohibition of the use of force, and in some cases, as an armed attack under article 51 of the UN Charter giving rise to a right to self-defence *despite the lack of employment of physical force and lack of physical effects*. For instance, Iraq, Lebanon and Libya have issued complaints to the UN Security Council regarding recurrent US incursions into their airspace, invoking the right of self-defence.[61] Likewise, the attempted US hostage rescue operation in Tehran on 24 April 1980 was characterised by both the United States (due to its invocation of article 51)[62] and Iran[63] as 'force' despite the relatively short period of the incursion and lack of any direct encounter with Iranian forces.[64] But the practice is mixed, since in similar cases of aerial incursion, article 2(4) or article 51 were not invoked. In the *Nicaragua* case, unauthorised overflight of territory was treated as a violation of sovereignty and was not characterised as a use of force.[65]

In the *Nicaragua* case, the ICJ held that '[t]he principle of respect for territorial sovereignty is . . . directly infringed by the unauthorized overflight of a State's territory by aircraft belonging to or under the control of the government of another State'.[66] However, the practice surveyed earlier demonstrates that States sometimes treat aerial incursion as an unlawful 'use of force' and not only a violation of sovereignty. If one considers that aerial incursion may

[60] For a detailed legal analysis of this incident, see Erin Pobjie, Fanny Declercq, and Raphaël van Steenberghe, 'The Killing of Khalil Al-Wazir by Israeli Commandos in Tunis – 1988' in Tom Ruys and Olivier Corten (eds), *The Use of Force in International Law: A Case-Based Approach* (Oxford University Press, 2018), 403.

[61] 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, 184.

[62] *Letter Dated 25 April 1980 from the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council*, UN Doc S/13908 (25 April 1980).

[63] *Note Verbale Dated 28 April 1980 from the Permanent Representative of Iran to the United Nations Addressed to the Secretary-General*, UN Doc S/13915 (29 April 1980).

[64] For an overview of the facts and the positions taken by the main protagonists and third States, see Mathias Forteau and Alison See Ying Xiu, 'The US Hostage Rescue Operation in Iran – 1980' in Ruys and Corten, n. 60, 306.

[65] *Nicaragua* case, n. 44, Dispositif para. 5 and paras. 87–92, referring to Nicaragua's claims of high-altitude reconnaissance flights and low-altitude flights which caused 'sonic booms'.

[66] *Ibid.*, para. 251.

indeed constitute an unlawful use of force, then the interesting question is raised of why this should be so, even when there is no application of physical force or physical effects. Note that this differs slightly from the issue of the legal regime governing the territorial State's response to such incursion, which is discussed later in the context of anomalous *non*-uses of force.

Conclusion

The anomalous examples of 'use of force' discussed earlier seem to be characterised by no use of weapon or no physical effects but an interference with sovereignty. The first category involves *military incursion without recourse to the use of weapons*, for example: unopposed invasion and unopposed military occupation, intentionally crossing a border bearing arms with an intention to use them even before any weapons are actually fired and aerial incursion into sovereign airspace. Other examples involve *unconsented mere presence* in territory, such as an unchallenged blockade and overstaying a Status of Forces Agreement. Another category of anomalous examples relates to the *indirect use of force* through assisting another State or non-State armed groups in their use of force.

ANOMALOUS EXAMPLES OF NON-'USE OF FORCE'

In addition to the above anomalous accepted instances of 'use of force' that do not correspond to the general interpretation of this term, there are also anomalous examples of forcible acts that appear to meet the key criteria of a 'use of force' but are nevertheless *not* characterised as illegal uses of force under article 2(4) of the UN Charter. This part will discuss anomalous examples of non-use of force in the air and at sea.

Forcible Response to Aerial Incursion

The previous analysis discussed State practice regarding aerial incursion into sovereign airspace and its characterisation as a 'use of force' in some instances. A related anomaly is the legal characterisation of forcible response to such incursion, such as shooting down the aircraft, as *not* a 'use of force' and therefore falling outside the scope of the *jus contra bellum*. For instance, in 1983, the Korean aircraft KAL flight 007 was mistaken for a spy plane and shot down by fighters in Soviet airspace. This was widely condemned but article 2 (4) was not invoked; instead, the shooting down of the aircraft was condemned as inhumane and disproportionate and in violation of Annex 2 of the Chicago Convention on International Civil Aviation ('Chicago Convention') regarding

interception of civilian aircraft.[67] In 1996, the Cuban Air Force shooting down two civil aircraft was widely condemned as a violation of article 3bis of the Chicago Convention and resulted in UN Security Council Resolution 1067 (1996) condemning it without mentioning article 2(4) of the UN Charter.[68]

Scholars are divided over the question of whether the use of force by a State against intruding military aircraft in its own territory is governed by the *jus contra bellum*, or law enforcement/air law.[69] For example, Olivier Corten argues that the shooting down of a single military aircraft intruding in airspace is governed by air law rather than the *jus contra bellum*: 'if the measures taken against an intruding aircraft are considered police measures for air security, we are referred on to other conditions of lawfulness: prior warning, unless there is a manifest hostile intent, necessary and proportionate measure, or riposte in self-defence'.[70] In Corten's view, air law and the *jus contra bellum* have 'two separate domains of application'.[71] In support of this view, he cites articles 1 and 3bis(a) of the Chicago Convention (the latter which however states that '[t]his provision shall not be interpreted as modifying in any way the rights and obligations of States set forth in the Charter of the United Nations'). Corten also notes the International Law Commission's discussion of circumstances precluding wrongfulness uses the example of an aircraft in distress entering airspace unauthorised as being justified as *force majeure* or distress. Since the ILC regards article 2(4) as a peremptory norm, this aircraft example must not fall under the *jus contra bellum* but under aviation rules since violations of *jus cogens* cannot be justified by circumstances precluding wrongfulness and *lex specialis* is not applicable to such norms.[72] According to Corten, the way to determine which body of rules is applicable depends 'on the type of action in question, whether a simple police measure in the first instance, or an act of force in international relations in the second'.[73]

In contrast to Corten, Tom Ruys argues:

[67] This led to the drafting of article 3bis with specific rules for intercepting civilian aircraft (considered customary international law). For a discussion of this incident, see Corten, n. 57, 61–2.

[68] Ruys, n. 61, 204, footnotes 275–8, 207 at footnote 299; Corten, n. 57, 62–3. See also Corten, n. 57, 63–4 for a discussion of other aerial incidents in which article 2(4) was not invoked.

[69] See discussion in Chapter 4, 'International Relations', on whether this falls under the scope of the prohibition, or if the response is governed by law enforcement jurisdiction.

[70] Corten, n. 57, 60.

[71] *Ibid.*, 61, citing K-G Park.

[72] *Ibid.*, 64–5.

[73] *Ibid.*, 65.

> One cannot rely on the argument that 'minimal' use of armed force by way of enforcement measures within a state's own territory would somehow find its legal basis in 'particular (and mainly conventional) legal regimes on land (such as the Schengen convention), at sea (such as the Montego Bay convention), or in the air (such as the Chicago convention).' None of the conventions cited provides a legal basis for forcible action against unlawful territorial incursions by military or police forces of another state.[74]

He concludes that: 'whenever state A deliberately uses (potentially) lethal force within its own territory – including its territorial sea and its airspace – against military or police units of state B acting in their official capacity, that action by state A amounts to the interstate use of force in the sense of UN Charter Article 2(4).'[75]

A more recent incident raising this issue concerned the shooting down of a Russian fighter jet by Turkey on 24 November 2015. The jet was in the region as part of Russia's ongoing operation in Syria fighting the opposition with the consent of the Assad government. Russia disputes that its jet crossed the Turkish border, but Turkey claimed that:

> 2 SU-24 planes, the nationality of which are unknown have approached Turkish national airspace in Yayladaga/Hatay region. The planes in question have been warned 10 times during a period of 5 minutes via 'Emergency' channel and asked to change their headings south immediately. Disregarding these warnings, both planes, at an altitude of 19.000 feet, violated Turkish national airspace to a depth of 1,36 miles and 1,15 miles in length for 17 seconds from 9.24′.05″ local time. Following the violation, plane 1 left Turkish national airspace. Plane 2 was fired at while in Turkish national airspace by Turkish F-16s performing air combat patrolling in that area in accordance with the rules of engagement. Plane 2 crashed onto the Syrian side of the Turkish-Syrian border.[76]

Russia strongly protested against the shooting down of its jet and claimed that at the time it was shot down, it was 4 km within Syrian territory. It is clear that if Russia's aerial incursion was an armed attack, Turkey would have the right to use force in self-defence under article 51 of the UN Charter. Under the *jus contra bellum*, Turkey's response would be governed by the conditions of necessity and proportionality.[77] If it is proportionate to the goal of halting the

[74] 'Ibid'.

[75] Ruys, n. 61, 181–8, footnote omitted.

[76] *Letter Dated 24 November 2015 from the Permanent Representative of Turkey to the United Nations Addressed to the President of the Security Council.*

[77] *Nicaragua* case, n. 44, para. 176; *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion* (1996) ICJ Reports 226 ('*Nuclear Weapons* Advisory Opinion'), para. 41.

attack,[78] then the plane may be shot down. The key issue would then be when the right to self-defence arises – that is, when an 'armed attack' 'occurs'. There are different views regarding when the right to self-defence arises: for example, 'interceptive self-defence'[79] or imminence.[80] But if such an aerial incursion does not constitute an armed attack, then there is difficulty with explaining the legal basis for response to those small-scale incidents due to the 'gap' between a prohibited 'use of force' under article 2(4) and the higher gravity threshold of an 'armed attack' under article 51.

It remains disputed whether there is a right to use force against intruding military aircraft unless in self-defence.[81] But since it is very restrictive to hold that States can only respond to aerial incursions by military aircraft within their territory with force in the event of a strictly construed armed attack, there are three legal possibilities to address this. Firstly, one can interpret a lower threshold for 'armed attack' giving rise to a right of self-defence. Secondly, one can find an exception to the prohibition of the use of force outside article 51 self-defence and Chapter VII enforcement action – for example, 'proportionate defensive action against incipient attack',[82] or forcible countermeasures by the victim State to acts violating article 2(4) but falling short of article 51 armed attack[83] (however, this view is firmly in the minority position since it is widely

[78] David Kretzmer, 'The Inherent Right to Self-Defence and Proportionality in *Jus Ad Bellum*' (2013) 24(1) *European Journal of International Law* 235.

[79] Yoram Dinstein, *War, Aggression and Self-Defence* (Cambridge University Press, 5th ed, 2011), 204–5: 'Interceptive self-defence is lawful, even under Article 51 of the Charter [fn], for it takes place after the other side has committed itself to an armed attack in an ostensibly irrevocable way. . . . an interceptive strike counters an armed attack which is already in progress, even if it is still incipient.'

[80] On the requirement of imminence, see Noam Lubell, 'The Problem of Imminence in an Uncertain World' in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (Oxford University Press, 2015), 697.

[81] See discussion in Chapter 4.

[82] Ruys, n. 61, 176.

[83] *Oil Platforms (Islamic Republic of Iran v United States of America), Judgment* (2003) ICJ Reports 161 ('*Oil Platforms*'), Separate Opinion of Judge Simma, para.13:

> To sum up my view on the use of force/self-defence aspects of the present case, there are two levels to be distinguished: there is, first, the level of 'armed attacks' in the substantial, massive sense of amounting to 'une agression armée', to quote the French authentic text of Article 51. Against such armed attacks, self-defence in its not infinite, but still considerable, variety would be justified. But we may encounter also a lower level of hostile military action, not reaching the threshold of an 'armed attack' within the meaning of Article 51 of the United Nations Charter. Against such hostile acts, a State may of course defend itself, but only within a more limited range and quality of responses (the main difference being that the possibility of collective self-defence does not arise, cf. Nicaragua) and bound to necessity, proportionality and immediacy in time in a particularly strict way.

accepted that since the advent of the UN Charter, forcible countermeasures, that is armed reprisals,[84] are unlawful).[85] The third possibility – which would constitute an anomalous example of non-use of force – is to interpret the prohibition of the use of force as not applying to a State's use of force against incursions by the military of another State within its own territory. This could either be on the basis that the contextual requirements of article 2(4) are not met, since the forcible act is not 'in international relations' or against the territorial integrity or sovereignty of another State or against the purposes of the United Nations, or on the basis that the act does not constitute a 'use of force'.

Maritime Law Enforcement against Foreign-Flagged Vessels with No Basis for Jurisdiction

A further example of forcible acts that appear to meet the criteria for a 'use of force' but are not consistently characterised as such relates to maritime law enforcement against foreign-flagged vessels that is without lawful basis. The use of force at sea is a complex issue, because it is governed by a parallel legal regime: the law of the sea. The law of the sea as embodied in the UN Convention on the Law of the Sea (UNCLOS)[86] recognises different legal spaces at sea and strikes a balance between the rights of coastal States and the general interest of all States to freedom of navigation and peaceful uses of the sea. The resulting regime can result in multiple States having enforcement jurisdiction over the same physical space because of the principle of exclusive flag State jurisdiction, territorial sovereignty of the coastal State over internal waters and the territorial sea (with the territorial sea subject to certain rights of other States such as innocent passage), a customs and immigration enforcement area within the contiguous zone but outside territorial waters, and the exclusive economic rights of the coastal State within its Exclusive Economic Zone (subject to freedoms of the high seas such as navigation, overflight and laying of cables). This is the most fraught zone of the seas, because it is here that there is a complex balance between the rights of the coastal State and the rights of all other States; this is a result of a compromise to create a new zone,

[84] Claus Kreß, 'The International Court of Justice and the Non-Use of Force' in Weller, n. 79, 561, 593.

[85] *Nuclear Weapons* Advisory Opinion, n. 76, para.46; 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), art. 50.

[86] *United Nations Convention on the Law of the Sea 1982* (adopted 10 December 1982, entered into force 16 November 1994), 1833 UNTS 397.

the Exclusive Economic Zone of 200 nautical miles, while preserving other rights of third States. Not all rights are assigned within this area, so there remains uncertainty over the legal rights that the coastal State and other States are entitled to exercise within this zone. UNCLOS also recognises other maritime spaces such as transit straits, archipelagic seas and the high seas (subject to freedom of navigation and peaceful uses).[87]

In respect of purported maritime law enforcement with no basis for jurisdiction, despite the presence of elements of a 'use of force' identified in Part II, States do not always characterise such acts as a violation of article 2(4) of the UN Charter. The following section will discuss two examples of anomalous non-uses of force: response to non-innocent passage through the territorial sea by submerged submarines and unlawful attempts to exercise law enforcement jurisdiction on the high seas against foreign vessels (which has no legal basis outside certain recognised exceptions under customary international law and treaty, e.g. article 110 of UNCLOS).

An anomalous example of forcible acts which are not usually characterised as an unlawful 'use of force' is the forcible response to non-innocent passage of submerged submarines through the territorial waters of another State. The coastal State has sovereignty over the territorial sea, which may extend twelve nautical miles from the baseline.[88] Foreign vessels, including warships and submarines, have a right of innocent passage through the territorial sea.[89] According to article 19(1) of UNCLOS, '[p]assage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State. Such passage shall take place in conformity with this Convention and with other rules of international law'. Article 19(2) of UNCLOS specifies acts which render passage not innocent, including '(a): any threat or use of force against the sovereignty, territorial integrity or political independence of the coastal State, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations'. Article 20 states that: '[i]n the territorial sea, submarines and other underwater vehicles are required to navigate on the surface and to show their flag'. Furthermore, according to article 25(1): '[t]he coastal State may take the necessary steps in its territorial sea to prevent passage which is not innocent'. Under customary international law, foreign government vessels such as warships and submarines have

[87] For an overview of maritime zones and the implications for maritime security, see Natalie Klein, *Maritime Security and the Law of the Sea* (Oxford University Press, 2011), 62–146. See also Francesco Francioni, 'Peacetime Use of Force, Military Activities, and the New Law of the Sea' (1985) 18 *Cornell International Law Journal* 203.

[88] UNCLOS, note 86, arts. 2 and 3.

[89] *Ibid.*, art.17.

sovereign immunity from the jurisdiction of any State except their flag State.[90] UNCLOS is silent on the measures that may be taken in response to non-innocent passage, and its article 25 does not explicitly authorise a forcible response to non-innocent passage. Thus, it is unclear which legal regime governs the forcible response of the coastal State to non-innocent passage by foreign government vessels.

This issue comes to the fore in instances of submerged submarines entering the territorial waters of another State in violation of article 20 of UNCLOS. For example, in 1982,

> Sweden utilized depth charges and mine detonations in its efforts to force a submarine that was near one of its naval bases to the surface, and further threatened to sink foreign submarines if they refused to surface and leave Sweden's waters. This threat was generally tolerated by other states, and could thus be indicative of what responses may lawfully be taken to respond to this particular security concern.[91]

A similar issue was raised in 2004 when a submerged submarine which was later identified as Chinese entered Japan's territorial sea. '[A] "maritime security operation" (*kaijo-keibi-kodo*) was ordered to the Commander of the Japan Maritime Self-Defense Force (JMSDF) Fleet, and patrol helicopters and vessels of the JMSDF joined the operation.'[92] The incident was framed by Japan as a violation of international law (specifically of article 20 of UNCLOS to which Japan and China are party). There was no invocation of the language of article 2(4) or article 51 of the UN Charter. Japan demanded an apology, explanation and assurance of non-repetition. Despite calls in the Japanese Diet for greater clarity over the measures that may be taken against submerged submarines in such situations, the government response plan does not address what measures it believes a State may take in response to violations of article 20.[93]

[90] Klein, n. 86, 64; UNCLOS, n. 87, art. 32: 'With such exceptions as are contained in sub-section A and in articles 30 and 31, nothing in this Convention affects the immunities of warships and other government ships operated for non-commercial purposes.'

[91] Klein, n. 86, 41, footnotes omitted. For a discussion of the international response to this incident, see Corten, n. 57, 118–19 and Romana Sadurska, 'Foreign Submarines in Swedish Waters: The Erosion of an International Norm' (1984) 10 *Yale Journal of International Law* 34.

[92] Yukiya Hamamoto, 'The Incident of a Submarine Navigating Underwater in Japan's Territorial Sea' (2005) 48 *The Japanese Annual of International Law* 123, 123.

[93] See further Tomohiro Mikanagi and Hirohito Ogi, 'The Japanese View on Legal Issues Related to Security' (2016) 59 *Japanese Yearbook of International Law* 360, 367–9 for extracts of parliamentary question and answer sessions relating to measures against foreign government ships conducting non-innocent navigation inside the territorial sea:

These examples are anomalous because a coastal State may not exercise law enforcement jurisdiction over a foreign warship or submarine, since foreign government vessels enjoy sovereign immunity. Thus, a use of force against submerged submarines in the territorial sea in an attempt to bring them to the surface and require them to leave the territorial sea is not authorised by UNCLOS nor customary international law. 'To the extent that any maritime security threats or breaches are state sponsored, law enforcement powers against sovereign immune vessels are not available. Instead, questions involving the threat or use of force may arise and diplomatic or other avenues for dispute settlement must be pursued.'[94] In the absence of a basis for the exercise of jurisdiction against such vessels, a use of force against them would appear to be in international relations and fall within the ambit of the prohibition of the use of force under article 2(4) of the UN Charter, so it is curious that States do not always invoke self-defence to respond to submerged submarines in territorial waters. However, omitting to invoke article 2(4) or article 51 does not necessarily indicate an *opinio juris* that such incidents definitively fall outside the scope of article 2(4), since it could be motivated by other considerations (such as political) and also due to uncertainty over the applicable legal framework.

With respect to attempted law enforcement against foreign-flagged vessels on the high seas, this is sometimes but not always characterised as an unlawful use of force under the *jus contra bellum*. On the high seas, the principle of *mare liberum* and exclusive flag State jurisdiction with only few exceptions applies. This was affirmed by the Permanent Court of International Justice in the *SS Lotus* case: 'It is certainly true that – apart from certain special cases which are defined by international law – vessels on the high seas are subject to no authority except that of the State whose flag they fly.'[95] Exceptions to sole flag State jurisdiction on the high seas include the right of hot pursuit, plus 'the right of visit in relation to piracy, slave trading, drug trafficking, people

> Regarding the following question, Deputy Commandant of the Japan Coast Guard Kunio Kishimoto explained as follows:
>
> '(Question asked by Member of the House of Councilors Masahisa Sato) The Japan Coast Guard can take necessary steps to require foreign government ships to leave the territorial sea which are permitted under Article 25 of the United Nations Convention on the Law of the Sea. While it cannot conduct forcible boarding or arrest, I think that in certain circumstances, it can take forcible steps to require foreign government ships to leave the territorial sea, including ramming and the use of water cannons, as an exercise of police power. I would like to ask the view of the Coast Guard.'

[94] Klein, n. 86, 65.

[95] *SS Lotus Case (France v Turkey)* [1927] PCIJ Series A No 10 (7 September) 25.

smuggling, and unauthorized broadcasting'.[96] Therefore, attempts by a State to exercise jurisdiction against a foreign vessel on the high seas outside of these recognised exceptions or on the basis of a specific treaty (such as the 1995 Fish Stocks Agreement[97]) have no legal basis. With respect to interdiction (unilateral boarding and arrest of a vessel) by the non-flag State on the high seas, Douglas Guilfoyle argues that such unauthorised interference is 'a clear attack on a State's sole means of exercising a fundamental right'.[98]

A prominent example of high-gravity employment of force in purported law enforcement on the high seas without lawful basis is the 1967 bombing of a Liberian-flagged oil tanker, *Torrey Canyon*, by the United Kingdom to prevent marine pollution after it ran aground on the high seas outside British territorial waters.[99] 'The operation, conducted by the RAF, lasted several days with napalm bombs being dropped on the wreck to release and burn the oil remaining in the ship's tanks.'[100] The legal debate following the incident turned around the lawfulness of police measures on the high seas to prevent the risk of pollution, including the possibility of invoking necessity as a ground precluding wrongfulness.[101] Although the UK had no grounds for exercising law enforcement jurisdiction over the Liberian-flagged vessel on the high seas, and despite the high gravity of means and physical effects, the incident was not characterised as a 'use of force' under article 2(4) of the UN Charter. Corten argues that this precedent confirms that two separate legal frameworks can apply to the use of force at sea: one relating to police measures based on treaty or customary rules of the law of the sea, and the other governed by the *jus contra bellum*.[102] However, due to the lack of legal grounds for exercising law enforcement jurisdiction in this case, this argument is not convincing and the reasoning may lie elsewhere.[103]

[96] Klein, n. 86, 108; see UNCLOS, n. 87, arts. 99–111.

[97] *United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks 1995* (adopted 4 August 1995, entered into force 11 December 2001), 2167 UNTS 88, art. 21(14), discussed in Klein, n. 86, 78.

[98] 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, 80.

[99] See Ruys, n. 61, 203, footnote 271; Corten, n. 57, 58–9.

[100] Corten, n. 57, 59, citing Keesing's Contemporary Archives (1967) 22.003.

[101] *Ibid*., 59.

[102] *Ibid*.

[103] This case is discussed further in Chapter 8.

The *Fisheries Jurisdiction (Spain v Canada)* case[104] before the ICJ is also sometimes cited in support of the argument that there is a *de minimis* gravity threshold that divides a '"minimum use of force", that can be ascribed to simple police measures, and a more serious use, that might come within the ambit of article 2(4)'.[105] In this case, Canada had entered a reservation to its acceptance of the Court's compulsory jurisdiction excluding the Court's jurisdiction over 'disputes arising out of or concerning conservation and management measures taken by Canada with respect to vessels fishing in the NAFO Regulatory Area, as defined in the Convention on Future Multilateral Co-operation in the Northwest Atlantic Fisheries, 1978, and the enforcement of such measures'. On the same day, Canada introduced domestic legislation regarding conservation and management measures over parts of the high seas. Canada then later enforced that legislation on the high seas 245 miles from the Canadian coast against a Spanish fishing vessel, the *Estai*, by boarding, inspecting and seizing the vessel. Spain protested and claimed that this was an unlawful use of force in violation of article 2(4). Canada argued that the Court had no jurisdiction to hear the dispute, since it fell within the scope of its reservation. Spain argued that since the acts complained of were unlawful under the UN Charter, they could not be regarded as falling within the scope of the Canadian reservation. Consequently, the case ultimately concerned whether the matter was a 'dispute[] arising out of or concerning conservation and management measures taken by Canada with respect to vessels fishing in the NAFO Regulatory Area, as defined in the Convention on Future Multilateral Co-operation in the Northwest Atlantic Fisheries, 1978, and the enforcement of such measures'.

The Court found that it had no jurisdiction because the measures taken against the *Estai* fell within the scope of Canada's reservation. In particular, it stated:

> Boarding, inspection, arrest and minimum use of force for these purposes are all contained within the concept of enforcement of conservation and management measures according to a 'natural and reasonable' interpretation of this concept.[106]

This statement has been relied upon by Corten to support his position regarding a *de minimis* gravity threshold distinguishing law enforcement

[104] *Fisheries Jurisdiction Case (Spain v Canada), Jurisdiction of the Court, Judgment* (1998) ICJ Reports 432.
[105] Corten, n. 57, 172, footnote omitted.
[106] *Spain v Canada*, n. 103, para. 84.

measures from a 'use of force' at sea. However, a close reading of the judgment shows that the Court was not drawing a boundary between 'use of force' under article 2(4) and the enforcement of conservation and management measures at sea. In fact, the Court explicitly declined to scrutinise the legality of the measures under international law (including article 2(4) of the UN Charter) since it did not have jurisdiction to do so.[107] The Court confined itself to interpreting 'conservation and management measures' in a technical sense (to see if the acts fell within the scope of Canada's reservation from its acceptance of the Court's jurisdiction) and was careful to distinguish this from the legality of the measures under international law. It was therefore left unsettled whether the enforcement measures violated article 2(4). This case therefore provides no support either in favour or against a gravity threshold that distinguishes law enforcement measures and a 'use of force' under article 2(4).

Conclusion

An analysis of anomalous examples of non-'use of force' such as forcible response to aerial and maritime incursion and purported maritime law enforcement may further clarify the complex relationship between competing applicable legal frameworks and where the boundaries between them lie, as well as indicate which elements of a 'use of force' are necessary and the relationship between those elements. The next section will discuss possible legal explanations for these anomalous 'uses of force' and non-'uses of force' under article 2(4) of the UN Charter.

POSSIBLE EXPLANATIONS

The problem remains of how to reconcile these seemingly anomalous examples with a coherent definition of a prohibited 'use of force' under article 2(4) of the UN Charter. There are several possible explanations for these anomalous examples of 'use of force' and non-'use of force', namely, that these are agreed exceptions to the general interpretation of a 'use of force' under article 2(4), the concept of 'use of force' is broader than generally understood or that a 'use of force' is characterised not by a checklist of essential elements

[107] There was disagreement between the judges over this approach. See Dissenting Opinion of Judge Torres Bernárdez, paras. 343 and 345; and Dissenting Opinion of Vice-President Weeramantry, para. 23 ff.

but of a basket of elements to be weighed and balanced. Each of these interpretive possibilities are canvassed further in the following sections.

1. *These Are Agreed Exceptions to the General Interpretation of Article 2(4)*

One possibility is that these anomalous examples are merely agreed exceptions to the general interpretation of a 'use of force' under article 2(4) and customary international law. This possibility is not excluded but would need to be strongly supported by subsequent agreement or evidence of subsequent practice demonstrating the parties' agreement to this interpretation. If one considers 1974 GA Resolution 3314 as a subsequent agreement regarding the interpretation of article 2(4) of the UN Charter,[108] an argument could be constructed to support recognised exceptions to the general interpretation of this term, as set out in the preceding section, namely: military occupation (as distinct from the invasion or armed attack preceding it) (article 3(a)), an unenforced blockade (article 3(c)), mere continuing presence in contravention of SOFA (article 3(e)) and indirect aggression either through '[t]he action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State' (article 3(f)) or '[t]he sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein' (article 3(g)). In this case, the general definition of a prohibited 'use of force' would apply, requiring the presence of the identified elements of a 'use of force', unless an act fell within the scope of an agreed special case.

This is of course possible, but there are two issues with this explanation. The first is that it would be preferable to find a solution that results in a consistent interpretation of this provision. This is not an insurmountable objection, since it may be that this is the situation *lex lata* even though it may not be the preferred interpretive outcome as a matter of legal policy. The second and more important issue with this explanation is that, although it explains certain anomalous examples of 'use of force' that do not display the usual elements (such as physical means or physical effects), it does not fully explain the phenomena in question. For instance, it does not explain anomalous examples of non-use of force discussed earlier (although of course, these could also be subsequent agreements regarding acts that fall outside the scope

[108] See Chapter 5.

of the prohibition). It also does not provide a satisfactory definition of an unlawful 'use of force' for acts that do not fall within subsequently agreed special exceptions to the general definition. As will be argued in more detail in the following chapter, a prohibited 'use of force' (even one that is a 'standard' type of force and not a special case such as unresisted invasion) is not characterised by a checklist of essential elements. The theory of subsequently agreed special types of 'use of force' therefore does not provide a full explanation of how to identify whether certain acts fall within the general definition.

2. *The Interpretation of 'Use of Force' Is Broader than Generally Understood*

An alternative explanation for these anomalous uses of force and non-uses of force is that the definition of a prohibited 'use of force' is broader than previously understood and encompasses acts which do not conform with the typical understanding of 'force' as derived in Part II. The 1974 Definition of Aggression could be regarded as a subsequent agreement that shows that UN Member States share a broader understanding of the concept of 'armed force'. The majority of the acts listed (articles 3(a)–(d)) involve classical acts of inter-State warfare, namely, invasion, military occupation, bombardment, blockade and attacks on the armed forces of a State or its marine and air fleets. The remainder of listed acts involve a special case of violation of sovereignty that could be (at a broad level) considered similar to military occupation due to the unconsented to and thus unlawful presence of the armed forces of another State within a State's territory (in the case of article 3(e)), and as closing loopholes in unlawful conduct by enclosing forms of indirect aggression such as certain forms of assistance to another State to commit aggression (article 3 (f)) or through sending/substantial involvement in the armed attack against a State by a non-State armed group (article 3(g)). All of these acts (including the case of attacks against the marine or air fleets of a State, due to the nexus to the State demanded by the scale of the attack, as denoted by the term 'fleets') share in common a violation of the territorial integrity, sovereignty and political independence of the victim State and serve to protect these interests. Therefore, in this sense it could be hypothesised that an unlawful use of force is something broader than the application of violence between States and encompasses any significant injury to the fundamental rights of State sovereignty and political independence.

This is more satisfactory than the previous hypothesis, because it provides a coherent (if presently vague) definition of a 'use of force'. But it is also problematic because like the first hypothesis, it does not fully explain *why* some acts fall within or outside the definition. Why is it that these acts should

still be considered a 'use of force' under article 2(4) despite lacking certain elements, such as physical means or physical effects? Does it mean that those elements are not really necessary for an act to constitute a prohibited 'use of force'? How is this to be reconciled with the fact that most uses of force *do* display these elements? And, even more problematically, the possibility under consideration does not explain why other acts which may very well violate the territorial integrity, sovereignty and political independence of the victim State are *not* characterised as prohibited 'uses of force', such as certain forms of support for armed non-State groups. To conclude that the anomalous examples discussed earlier are explained by a broader understanding of 'use of force' is also unsatisfactory because it risks giving the prohibition of the use of force an overreach.

3. *'Use of Force' as a Type Rather than a Concept*

The third and arguably more convincing hypothesis is that these anomalous examples of use of force and non-use of force may be reconciled with a consistent interpretation of 'use of force' if it is accepted that a 'use of force' under article 2(4) of the UN Charter is a type rather than a concept. In other words, it may be that not all of the elements identified in Part II are necessary, although in particular combinations they may be sufficient, to constitute a 'use of force'. This hypothesis is explored in more detail in Chapter 8.