

## Elements of 'Use of Force'

*Means*

## INTRODUCTION

Having interpreted the meaning of the contextual elements of article 2(4) of the UN Charter, the following two chapters will apply a process of textual interpretation to the term 'use of force' in that article. Chapter 5 will firstly set out subsequent agreements regarding article 2(4), and then examine whether 'use of force' means physical/armed force only, and if a particular type of means is required. Chapter 6 will look at the required effects of an unlawful 'use of force', and if gravity and intent are required elements of a 'use of force' under article 2(4).

## SUBSEQUENT AGREEMENTS REGARDING ARTICLE 2(4)

Subsequent agreements on the interpretation of the prohibition of the use of force in article 2(4) of the UN Charter include 1970 UN General Assembly (GA) Resolution 2625 (XXV), the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations ('Friendly Relations Declaration'); the General Assembly's 1974 Definition of Aggression,<sup>1</sup> 1987 General Assembly Resolution 42/22 and the 2005 World Summit Outcome Document. These subsequent agreements may contribute to clarifying the meaning of the treaty<sup>2</sup> and its object and purpose.<sup>3</sup> This may be done by:

- <sup>1</sup> UN General Assembly, *Resolution 3314: Definition of Aggression*, UN Doc A/Res/29/3314 (14 December 1974) ('1974 Definition of Aggression').
- <sup>2</sup> International Law Commission, 'Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties', annexed to UN GA Resolution 73/202 (A/RES/73/202, 3 January 2019), conclusion 7(1).
- <sup>3</sup> Georg Nolte, 'Second Report on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties' UN Doc A/CN.4/671 (International Law Commission, 26 March 2014) ('Nolte Second Report'), 14, para. 27.

- determining whether a special meaning was intended by the treaty parties, and if so, what it is;<sup>4</sup>
- after determining the 'ordinary meaning' of the terms of a treaty, subsequent agreements and subsequent practice may be consulted to determine 'whether such conduct confirms or modifies the preliminary result arrived at by the initial textual interpretation or by other means of interpretation';<sup>5</sup> and
- contributing, 'in their interaction with other means of interpretation, to the clarification of the meaning of a treaty. This may result in narrowing, widening, or otherwise determining the range of possible interpretations, including any scope for the exercise of discretion which the treaty accords to the parties.'<sup>6</sup>

There is debate over whether an international organisation's 'own practice' (such as UN General Assembly and UN Security Council resolutions) should be characterised as a form of subsequent agreement and practice under article 31(3) of the Vienna Convention on the Law of Treaties (VCLT).<sup>7</sup> However, the International Court of Justice (ICJ) has recognised three types of practice that may bear on the interpretation of a constituent instrument of an international organisation (such as the UN Charter):

- (a) the subsequent practice of the parties to constituent instruments of international organizations under articles 31 (3) (b) and 32 of the Vienna Convention; (b) the practice of organs of an international organization; (c) a combination of practice of organs of the international organization of subsequent practice of the parties.<sup>8</sup>

The practice of organs of the international organisation may have a different weight with respect to interpretation than the practice of the parties to the constituent instrument themselves.<sup>9</sup> With respect to (b) the jurisprudence of the ICJ shows that practice of organs of the United Nations such as the General Assembly and the Security Council in the application of the Charter may be relevant as a form of other subsequent practice under article 32 of the VCLT (i.e. as a supplementary means of interpretation),

<sup>4</sup> *Ibid.*, 12, para. 21.

<sup>5</sup> *Ibid.*, citation omitted.

<sup>6</sup> International Law Commission, n. 2, conclusion 7(1).

<sup>7</sup> See Georg Nolte, 'Third Report on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties' UN Doc A/CN.4/683 (International Law Commission, 7 April 2015) ('Nolte Third Report'), 26–8, paras. 69–73.

<sup>8</sup> *Ibid.*, 12, paras. 31 and 32.

<sup>9</sup> *Ibid.*, 29–30, paras. 76–78.

independently of the practice or acceptance of all parties to the UN Charter.<sup>10</sup> Such resolutions will carry more weight when they deal with an area for which the burden of obligation falls on those bodies, such as the Security Council determining what is an act of aggression under article 39 of the Charter. But since that is a political rather than a legal determination, it does not have a direct bearing on the interpretation of the term ‘use of force’ in article 2(4) of the UN Charter.

An example of the practice referred to in (c) is the practice of the UN Security Council and UN General Assembly in the application of the UN Charter that is generally accepted by UN Member States. For example, when a UN Security Council resolution is passed without dissenting votes and is accompanied by the general acceptance of UN Member States, then this may be considered as potentially relevant subsequent conduct confirmed by the practice of the parties demonstrating their agreement regarding the interpretation of the UN Charter under article 31(3)(b) of the VCLT. Nolte observes that the ICJ applied this approach in its *Namibia* Advisory Opinion, where the Court interpreted the term ‘concurring votes’ in article 27(3) of the UN Charter as including voluntary abstentions ‘primarily by relying on the practice of the organ concerned in combination with the fact that it was then “generally accepted” by member States’.<sup>11</sup> Nolte notes that “[g]eneral acceptance” requires “at a minimum” acquiescence’.<sup>12</sup> If the UN General Assembly or UN Security Council pass a resolution with dissenting votes, this may constitute other subsequent practice as a supplementary means of interpretation under article 32 of the VCLT but not as practice establishing the agreement of the parties regarding the interpretation of the UN Charter under article 31(3) of the VCLT.<sup>13</sup>

<sup>10</sup> *Ibid.*, 16–19, paras. 43–51; see especially *Certain Expenses of the United Nations (Article 17, paragraph 2 of the Charter)*, Advisory Opinion (1962) ICJ Reports 151,168:

Proposals made during the drafting of the Charter to place the ultimate authority to interpret the Charter in the International Court of Justice were not accepted; the opinion which the Court is in course of rendering is an advisory opinion. As anticipated in 1945, therefore, each organ must, in the first place at least, determine its own jurisdiction. If the Security Council, for example, adopts a resolution purportedly for the maintenance of international peace and security and if, in accordance with a mandate or authorization in such resolution, the Secretary-General incurs financial obligations, these amounts must be presumed to constitute ‘expenses of the Organization’.

<sup>11</sup> Nolte Third Report, n. 7, 19, para. 52.

<sup>12</sup> *Ibid.*, 30, para. 80, footnote omitted.

<sup>13</sup> *Ibid.*, 30, para. 79.

The decisions of plenary bodies, such as resolutions of the UN General Assembly, may be characterised in certain circumstances as a form of subsequent *agreement* regarding the interpretation of the constituent instrument.<sup>14</sup> Thus, when a UN General Assembly resolution is passed without dissent (e.g. by acclamation), then this may be considered in certain circumstances as a form of subsequent agreement regarding the interpretation of the UN Charter. The ICJ has considered UN General Assembly resolutions when interpreting provisions of the UN Charter but has made clear that mere adoption is not sufficient and has taken into account the attitudes of States towards such resolutions.<sup>15</sup> Since subsequent agreement between the parties is a means of authentic interpretation of the treaty under article 31(3)(a) of the VCLT because it demonstrates the shared understanding of the parties regarding the interpretation of a treaty, UN General Assembly resolutions may be valued as evidence of such a shared understanding when they are passed without objection (i.e. unanimously or by consensus). This is the case with each of the resolutions discussed below.

#### *1970 Friendly Relations Declaration*

The most important and comprehensive subsequent agreement of UN Member States on the interpretation of article 2(4) of the UN Charter is the Friendly Relations Declaration, which was adopted on 24 October 1970 by consensus by the UN General Assembly on the twenty-fifth anniversary of the United Nations. Principle 1 of the Declaration proclaims:

The principle that States 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.

In the elaboration of this principle, UN Member States took a clear position on the interpretation of article 2(4) with respect to its scope of application to include the following: international boundaries, international lines of demarcation such as armistice lines;<sup>16</sup> forcible acts of

<sup>14</sup> *Ibid.*, 24–6, para. 67, with extensive further references.

<sup>15</sup> *Ibid.*

<sup>16</sup> 'Every State has the duty to refrain from the threat or use of force to violate the existing international boundaries of another State or as a means of solving international disputes, including territorial disputes and problems concerning frontiers of States.' Principle 1, para. 4; 'Every State likewise has the duty to refrain from the threat or use of force to violate international lines of demarcation, such as armistice lines, established by or pursuant to an

reprisal;<sup>17</sup> using force to deprive peoples of the right to self-determination;<sup>18</sup> certain forms of interference in civil strife or terrorist acts in another State<sup>19</sup> and military occupation or territorial acquisition resulting from the threat or use of force.<sup>20</sup> (Paragraph 8 of Principle 1 of the Friendly Relations Declaration refers to ‘organizing or encouraging the organization of irregular forces or armed bands, including mercenaries, for incursion into the territory of another State’, however unlike other paragraphs listed under Principle 1, it does not link the legality of this action to a threat or use of force.<sup>21</sup> Indirect force is discussed in more detail later.) In addition to comprising subsequent agreement of UN Member States on the interpretation of article 2(4), the ICJ relied on the Friendly Relations Declaration in the *Nicaragua* case as an indication of States’ *opinio juris* on the existence and content of the customary prohibition of the use of force<sup>22</sup> due to its references to ‘all States’,<sup>23</sup> ‘principle’,<sup>24</sup> ‘States’, ‘every State’,<sup>25</sup> ‘a violation of international law and the Charter’<sup>26</sup> and the statement that ‘[t]he principles of the Charter

international agreement to which it is a party or which it is otherwise bound to respect. Nothing in the foregoing shall be construed as prejudicing the positions of the parties concerned with regard to the status and effects of such lines under their special régimes or as affecting their temporary character.’ Principle 1, para. 5.

<sup>17</sup> ‘States have a duty to refrain from acts of reprisal involving the use of force.’ Principle 1, para. 6.

<sup>18</sup> ‘Every State has the duty to refrain from any forcible action which deprives peoples referred to in the elaboration of the principle of equal rights and self-determination of their right to self-determination and freedom and independence.’ Principle 1, para. 7.

<sup>19</sup> ‘Every State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force.’ Principle 1, para. 9.

<sup>20</sup> ‘The territory of a State shall not be the object of military occupation resulting from the use of force in contravention of the provisions of the Charter. The territory of a State shall not be the object of acquisition by another State resulting from the threat or use of force. No territorial acquisition resulting from the threat or use of force shall be recognized as legal.’ Principle 1, para. 10.

<sup>21</sup> In the case *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Vice-President Yusuf considered this paragraph in the context of a violation of territorial integrity rather than a use of force: Judgment of 16 December 2015, 2015 ICJ Reports, 665, Declaration of Vice-President Yusuf, 743, para. 8.

<sup>22</sup> *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment (1986) ICJ Reports 14, para. 191.

<sup>23</sup> *Ibid.*, 10th preambular paragraph.

<sup>24</sup> *Ibid.*, Principle 1.

<sup>25</sup> *Ibid.*

<sup>26</sup> *Ibid.*, Principle 1, para. 1.

which are embodied in this Declaration constitute basic principles of international law'.<sup>27</sup>

### 1974 *Definition of Aggression*

1974 GA Resolution 3314 annexing the Definition of Aggression was adopted by acclamation (consensus) and was the first time that the international community agreed on a definition of aggression.<sup>28</sup> Despite the significance of the 1974 Definition of Aggression, one should be careful about characterising the 1974 Definition as a 'subsequent agreement' regarding the interpretation of article 2(4), since it is actually defining aggression as a guideline for the UN Security Council's political determination. Thomas Bruha argues that because of the politically negotiated nature of the 1974 Definition and its constructive ambiguity, the Definition must be read as a whole and in its context. One cannot extract elements of the 'definition' without taking this into account (as Bruha argues the ICJ did in the *Nicaragua* case). But given the wording in the Definition itself, which refers to uses of force, and the relationship between use of force and aggression – the annex to 1974 GA Resolution 3314 itself notes that 'aggression is the most serious and dangerous form of the illegal use of force'<sup>29</sup> – it is sound to infer a shared agreement or understanding that those acts listed in the Definition constitute 'use of force' under article 2(4)).

### 1987 *GA Resolution 42/22*

1987 GA Resolution 42/22 (adopted by consensus) was a Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations. This resolution reflects provisions of the 1970 Friendly Relations Declaration regarding

<sup>27</sup> *Ibid.*, para. 3 of Declaration.

<sup>28</sup> See 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 for an in-depth analysis of the 1974 Definition of Aggression, including the negotiations leading up to it. Bruha notes the purpose of the 1974 Definition, which began with three groups: non-aligned, pushing for an extensive, legal definition to protect their interests as newly independent States; Western, seeking to make the definition a discretionary guideline for the UN Security Council's political determination of aggression; and the Soviet Union, which was in between the two.

<sup>29</sup> 1974 Definition of Aggression, n. 1, Fifth preambular para.

non-intervention.<sup>30</sup> Like the Friendly Relations Declaration, Resolution 42/22 confirms States' view that the prohibition of the threat or use of force is universal and binding, referring to the prohibition as a 'principle',<sup>31</sup> holding that '[e]very State' has the duty to comply with the prohibition<sup>32</sup> and explicitly stating that '[t]he principle of refraining from the threat or use of force in international relations is universal in character and is binding, regardless of each State's political, economic, social or cultural system or relations of alliance'.<sup>33</sup>

### *2005 World Summit Outcome Document*

The 2005 World Summit at the United Nations Headquarters in New York was attended by over 170 Heads of State and Government. This summit produced and adopted by consensus the 2005 World Summit Outcome Document, which is historically and symbolically important as a united stand by UN Member States to reaffirm their commitment to the UN Charter and its purposes and principles in the face of modern challenges to the international order and human security. The principal importance of the 2005 World Summit Outcome Document for our purposes is that in it, the Member States of the UN 'reaffirm that the relevant provisions of the Charter are sufficient to address the full range of threats to international peace and security'.<sup>34</sup> This affirms States' view of the continued relevance of the collective security framework of the UN Charter. The Outcome Document abridges the wording of article 2(4) in a way that makes it broader, by leaving out

<sup>30</sup> 'Reaffirming the duty of States to refrain in their international relations from military, political, economic or any other form of coercion aimed against the political independence or territorial integrity of any State' (*ibid.*, preambular para. 18); para. (6) 'States shall fulfil their obligations under international law to refrain from organizing, instigating, or assisting or participating in paramilitary, terrorist or subversive acts, including acts of mercenaries, in other States, or acquiescing in organized activities within their territory directed towards the commission of such acts.'; para. (7) 'States have the duty to abstain from armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements.'; para. (8) 'No State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind.'

<sup>31</sup> 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), annex, preambular paras. 1 and 1(2).

<sup>32</sup> *Ibid.*, annex, para. 1(1).

<sup>33</sup> *Ibid.*, annex, para. 1(2).

<sup>34</sup> UN General Assembly, 2005 World Summit Outcome, UN Doc A/RES/60/1 (24 October 2005), para. 79.

reference to 'against the territorial integrity or political independence of any State'<sup>35</sup> and replacing reference to 'against the Purposes' of the Charter with the threat or use of force 'inconsistent with the Charter'.<sup>36</sup> The document states<sup>37</sup> '[w]e rededicate ourselves to . . . refrain in our international relations from the threat or use of force in any manner inconsistent with *the purposes and principles of the United Nations*'. Although the earlier parts of the sentence which mention upholding the sovereign equality of States and respecting their territorial integrity and political independence could probably be said to implicitly cover the other parts of article 2(4), it is not clear what, if anything, this shows about the way that States interpret article 2(4).

#### *Listed 'Uses of Force' in Subsequent Agreements*

The aforementioned UN General Assembly resolutions passed by acclamation (consensus) show that UN Member States have taken a position regarding the interpretation of article 2(4) of the UN Charter with respect to its primary purposes and certain acts which fall within its scope. In particular, the 1970 Friendly Relations Declaration and the 1974 GA Definition of Aggression clearly demonstrate UN Member States' subsequent agreement that the prohibition of the use of force in article 2(4) includes the following specific acts listed in those documents:

- The 'use of force to violate the existing international boundaries of another State or as a means of solving international disputes, including territorial disputes and problems concerning frontiers of States';<sup>38</sup>
- The 'use of force to violate 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';<sup>39</sup>
- Forcible acts of reprisal;<sup>40</sup>
- '[A]ny forcible action which deprives peoples referred to in the elaboration of the principle of equal rights and self-determination of their right to self-determination and freedom and independence';<sup>41</sup>

<sup>35</sup> *Ibid.*, paras. 5 and 77.

<sup>36</sup> *Ibid.*, para. 77.

<sup>37</sup> *Ibid.*, para. 5, emphasis added.

<sup>38</sup> Friendly Relations Declaration, Principle 1, para. 4.

<sup>39</sup> *Ibid.*, Principle 1, para. 5.

<sup>40</sup> *Ibid.*, Principle 1, para. 6.

<sup>41</sup> *Ibid.*, Principle 1, para. 7.



- '[M]ilitary occupation resulting from the use of force in contravention of the provisions of the Charter';<sup>42</sup>
- Acquisition of the territory of a State resulting from the threat or use of force;<sup>43</sup>
- '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';<sup>44</sup>
- 'Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State';<sup>45</sup>
- 'The blockade of the ports or coasts of a State by the armed forces of another State';<sup>46</sup>
- 'An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State';<sup>47</sup>
- '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'.<sup>48</sup>
- The following forms of indirect uses of force are also prohibited:
  - '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'.<sup>49</sup>
  - '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'.<sup>50</sup>

The 1974 Definition of Aggression shows that UN Member States interpret the concept of 'armed force' quite broadly. However, these subsequent agreements of UN Member States leave unclear whether article 2(4) prohibits 'armed' force only, and what the elements of a prohibited 'use of force' are.

<sup>42</sup> *Ibid.*, Principle 1, para. 10.

<sup>43</sup> *Ibid.*

<sup>44</sup> 1974 Definition of Aggression, n. 1, art. 3(a).

<sup>45</sup> *Ibid.*, art. 3(b).

<sup>46</sup> *Ibid.*, art. 3(c).

<sup>47</sup> *Ibid.*, art. 3(d).

<sup>48</sup> *Ibid.*, art. 3(e).

<sup>49</sup> *Ibid.*, art. 3(g).

<sup>50</sup> *Ibid.*, art. 3(f).

As there are no statements in the *travaux préparatoires* that a special meaning of the term 'use of force' was intended by the parties under article 31(4) of the VCLT, Chapters 5 and 6 will now examine the ordinary meaning of this term.

#### ORDINARY MEANING

According to article 111 of the UN Charter, the Chinese,<sup>51</sup> French,<sup>52</sup> Russian,<sup>53</sup> English<sup>54</sup> and Spanish<sup>55</sup> texts are equally authentic. However, all of these language versions employ the same terms for 'use of force' and do not appear to add any further connotations to this term which could assist with shedding light on its interpretation.<sup>56</sup>

According to the Oxford English Dictionary (OED), the noun 'use' means '[t]he act of putting something to work, or employing or applying a thing, for any (esp. a beneficial or productive) purpose; the fact, state, or condition of being put to work, employed, or applied in this way; utilization or appropriation, esp. in order to achieve an end or pursue one's purpose'.<sup>57</sup>

<sup>51</sup> 各会员国在其国际关系上不得使用威胁或武力,或以与联合国宗旨不符之任何其他方法,侵害任何会员国或国家之领土完整或政治独立。The Chinese text emphasises 'states' ('all member states' and 'any member states or states') and re-orders the two final subclauses, but these differences do not appear to change the meaning of the text. (I thank Yuwen Fan for her translation of the Chinese text into English and her observations.)

<sup>52</sup> Les Membres de l'Organisation s'abstiennent, dans leurs relations internationales, de recourir à la menace ou à l'emploi de la force, soit contre l'intégrité territoriale ou l'indépendance politique de tout État, soit de toute autre manière incompatible avec les buts des Nations Unies.

<sup>53</sup> Все Члены Организации Объединенных Наций воздерживаются в их международных отношениях от угрозы силой или ее применения как против территориальной неприкосновенности или политической независимости любого государства, так и каким-либо другим образом, несовместимым с Целями Объединенных Наций.

<sup>54</sup> 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.

<sup>55</sup> Los Miembros de la Organización, en sus relaciones internacionales, se abstendrán de recurrir a la amenaza o al uso de la fuerza contra la integridad territorial o la independencia política de cualquier Estado, o en cualquier otra forma incompatible con los Propósitos de las Naciones Unidas.

<sup>56</sup> The Russian language version of article 2(4) does appear to slightly differ from the others with respect to the term 'against the territorial integrity': против территориальной неприкосновенности. Неприкосновенность. Here, the translation for 'integrity' would mean 'inviolability'. This carries a different connotation, as the term 'territorial integrity' indicates unity or wholeness of the territory rather than only 'inviolability' of State borders. (I am indebted to Nino Burdiladze for her translation of the Russian text and these observations.)

<sup>57</sup> 'Use, N', OED Online (Oxford University Press, December 2018), [www.oed.com/view/Entry/220635](http://www.oed.com/view/Entry/220635).

The following definition of ‘force’ in the OED most closely corresponds to the way this term is employed in article 2(4):

‘5. a. Physical strength or power exerted upon an object; *esp.* the use of physical strength to constrain the action of persons; violence or physical coercion’.

‘b. *esp.* in phr. *by force* = by employing violence, by violent means, also †under compulsion. †Formerly also *through, with, of force*’

‘c. *spec.* in *Law*: Unlawful violence offered to persons or things’.<sup>58</sup>

This naturally leads to the question of whether the term ‘force’ in article 2(4) is confined to this ‘ordinary meaning’ of physical/violent means only and whether it requires certain types of physical effects.

#### MEANS

This section will discuss whether ‘force’ in article 2(4) of the UN Charter is restricted to particular means, namely, if ‘force’ means physical/armed force only, if a weapon must be employed, what is considered a ‘weapon’ and if a release of kinetic energy is required for an act to qualify as a prohibited ‘use of force’.

#### *Physical/Armed Force Only?*

The role of article 2(4) in the UN collective security system and its primary objective of the maintenance of international peace and security supports interpreting the term ‘use of force’ as confined to armed/physical force only. This is because forms of non-physical coercion do not directly concern international peace and security but relate more to sovereign equality and the non-intervention principle. Some scholars such as Nikolas Stürchler have argued that the latter (i.e. freedom of choice for States) is not the primary concern of article 2(4). This understanding of article 2(4) excludes non-forcible forms of intervention from the scope of the prohibition of the use of force. This interpretation is further borne out by the following factors: firstly, the choice of the drafters to employ the term ‘use of force’ to overcome the problems associated with the term ‘war’; secondly, references to ‘force’ elsewhere in the UN Charter refer to ‘armed force’; and thirdly, that economic

<sup>58</sup> ‘Force, n.1’, OED Online (Oxford University Press, December 2018), [www.oed.com/view/Entry/72847#eid4006249](http://www.oed.com/view/Entry/72847#eid4006249).

coercion was explicitly rejected by the drafters as a form of 'force' falling under article 2(4).

Regarding the choice of term 'use of force', as discussed earlier, the historical context of article 2(4) was intended to address the problems of the Covenant of the League of Nations and the Kellogg–Briand Pact, which used the restrictive notion of 'war'.<sup>59</sup> References to 'armed force' in the UN Charter further support this interpretation of force (referred to later). In particular, preambular paragraph 7 of the Charter refers to armed force, stating one of the goals of the Charter is 'to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest'. With respect to other forms of non-forcible coercion such as economic coercion, the proposal of the Brazilian delegate to the San Francisco conference to include 'the threat or use of economic measures' under article 2(4) was rejected by the drafting committee.<sup>60</sup> The counter-argument, that the explicit reference to 'armed force' in other parts of the UN Charter might indicate that the absence of the qualifier 'armed' in article 2(4) shows that the drafters did not intend to restrict the term 'force' in this way, is less plausible if the latter provision is read in its historical context and in the light of the exclusion of economic coercion. It is then far more persuasive to hold that 'force' in article 2(4) only refers to *armed* force.

The question of whether article 2(4) extends to other forms of coercion was re-opened and subject to extensive debates in the drafting of the Friendly Relations Declaration, but there was ultimately no subsequent agreement overturning the drafter's clear intent on this point. In each session of the

<sup>59</sup> See Part I discussion of how the customary international law rule arose. See also Rüdiger Wolfrum, 'Preamble' in Bruno Simma et al (eds), *The Charter of the United Nations: A Commentary* (Oxford University Press, 3rd ed, 2012), vol. I, 45. See Olivier Corten, *The Law against War: The Prohibition on the Use of Force in Contemporary International Law* (Hart Publishing, 2010), 52, footnote 13 for a list of statements by States in the debates in the UN General Assembly preceding votes on major resolutions on the boundaries of the prohibition, reaffirming that article 2(4) prohibits all measures 'short of war'.

<sup>60</sup> UNCIO, vol. VI, UN Doc 784/1/1/27 (5 June 1945), 335. But note, UNCIO, vol. VI p400, UN Doc 885/1/1/34 (9 June 1945), Report of the Rapporteur of Committee 1 to Commission I, regarding article 2(4):

The Committee likes it to be stated in view of the Norwegian amendment to the same paragraph that the unilateral use of force or similar coercive measures is not authorized or admitted. The use of arms in legitimate self-defense remains admitted and unimpaired. The use of force, therefore, remains legitimate only to back up the decisions of the Organization at the start of a controversy or during its solution in the way that the Organization itself ordains. The intention of the Norwegian amendment is thus covered by the present text.

Special Committee,<sup>61</sup> delegates debated this issue and could not reach agreement about the definition of 'force' in article 2(4) and, in particular, whether it included armed force only or also other forms of pressure threatening the territorial integrity or political independence of a State, such as economic coercion. Many (mostly newly independent and developing) States were in favour of a broad interpretation of 'force' to include not only armed force but also economic, political and other forms of pressure or coercion.<sup>62</sup> Several proposals included provisions to the effect that the term 'force' should be interpreted broadly to cover not only armed force but also economic, political and other forces of pressure,<sup>63</sup> particularly those which 'had the effect of undermining the territorial integrity or political independence of a State'.<sup>64</sup> Some States in favour of a broad interpretation of the term 'force' beyond armed force were nevertheless cautious about including other forms of

<sup>61</sup> In particular, the 1967 session of the Special Committee extensively discussed 'economic, political and other forms of pressure or coercion': Third Report of the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States, UN Doc A/6799 (26 September 1967) ('Third Report'), see para. 51 ff for summary of debate.

<sup>62</sup> See 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) ('First Report'), annex B, p99 section D: India (SR.3, pp. 7, 8, SR.17, p4), Czechoslovakia (SR.4, p6, SR.8, pp.4–6), Yugoslavia (SR.4, p.9, SR.9, pp.20–21, SR.17, pp.5–9) Nigeria, (SR.4, p.10, SR.7, p.23), Union of Soviet Socialist Republics (SR.5, p.8, SR.14, pp.10–11), Ghana (SR.5, p.17, SR.10, p.14), Romania (SR.7, p.17, SR.16, pp.4–5), United Arab Republic (SR.8, p.9), Poland (SR.9, p.8), Madagascar (SR.9, p.17), and Burma (SR.9, pp.18–19). Fifth Report of the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States, UN Doc A/7619 (October 1969) ('Fifth Report'), para. 124 (Nigeria); 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) ('Sixth Report'), para. 114 (Venezuela), 120 (Romania), para. 182 (Nigeria), para. 194 (Czechoslovakia).

<sup>63</sup> For example, in the 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) ('Second Report') at para. 64, it was noted that Chile's proposal included provisions 'to the effect that the principle under consideration should be formulated in the light of the practice of States and of the United Nations during the past twenty years and that the term "force" should be broadly understood to cover not only armed force, but also all forms of political, economic or other pressure.'; Third Report, n. 61, UN Doc A/6799, para. 51: 'paragraph 5 of the 1966 proposal of Czechoslovakia and paragraph 2 (b) of the proposal of Algeria, Cameroon, Ghana, India, Kenya, Madagascar, Nigeria, Syria, the United Arab Republic and Yugoslavia . . . contained provisions to the effect that economic, political and other forms of pressure against the territorial integrity or political independence of any State were prohibited uses of force'.

<sup>64</sup> Fourth Report of the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation Among States, UN Doc A/7326 (1968) ('Fourth Report'), para. 50.

coercion within the concept 'in order to avoid enlarging the scope of self-defence'.<sup>65</sup>

Textual arguments in favour of a broad interpretation of 'force' included the terms 'in any other manner' in article 2(4) of the UN Charter,<sup>66</sup> and the fact that since other provisions of the UN Charter refer to 'armed force' (the Preamble and articles 41, 42, 43, 44 and 46) it is to be presumed that the drafters of the Charter did not intend to limit the term 'force' in article 2(4) in this way.<sup>67</sup> The newly independent States emerging after the process of decolonisation noted that they had not had a chance to shape the interpretation of article 2(4) during the San Francisco Conference and argued that 'economic and political forms of pressure were sometimes even more dangerous than armed force, particularly for developing countries'.<sup>68</sup> 'Many representatives emphasized the need to interpret the term "force" in the light of developments subsequent to the drafting of the Charter.'<sup>69</sup> Reference was made to the fact that various international declarations, resolutions and treaties had included a broad understanding of 'force' and recognised the duty of States to refrain from undue pressure, including economic or other forms of pressure, such as the Bandung, Belgrade and Cairo Declarations, UN General Assembly Resolutions 2131 (xx) and 2160 (xxi), the Charter of the Organization of African Unity and article 51 VCLT and the Declaration on the Prohibition of Military, Political or Economic Coercion adopted by the Vienna Conference on the Law of Treaties.<sup>70</sup>

The third report of the Special Committee sums up 'the arguments advanced during the debate in favour of a broad interpretation of the term "force" in formulating the principle of the prohibition of the threat or use of force':

(a) a considerable number of delegations, both in the Special Committee and in the General Assembly, had expressed themselves in favour of a broad interpretation of the term 'force'; (b) that interpretation was supported by a large sector of opinion and by many writers; (c) that interpretation was recognized in recent international documents such as the Programme for Peace and International Co-operation adopted by the Second Conference of Heads of State or Government of Non-Aligned Countries held at Cairo in

<sup>65</sup> For example, First Report, n. 62, annex B, 99, section D 'Mexico (SR.9, pp.14–15)'; Fourth Report, *ibid.*, para. 127 (Chile); Second Report, n. 63, para. 70.

<sup>66</sup> Fifth Report, n. 62, para. 90.

<sup>67</sup> Second Report, n. 63, para. 66.

<sup>68</sup> Fourth Report, n. 64, para. 52.

<sup>69</sup> Second Report, n. 63, para. 71.

<sup>70</sup> *Ibid.*, para. 73; Fifth Report, n. 62, paras. 52 and 91.

1964; (d) it was necessary to take into account the purposes aimed at in drafting the principle, so that the wording adopted could be made appropriate and useful by taking into account the practices and possibilities of international relations as they existed in reality; (e) it would not be realistic to limit the formulation of the principle to an examination of the provisions of the Charter, in an effort to make a distinction between *lex lata* and *lex ferenda*; (f) economic and political forms of pressure were sometimes as dangerous as armed force, particularly for developing countries, new States and peoples under colonial domination, and could accomplish the same illicit results; they constituted a violation of international law and a threat to the maintenance of international peace and co-operation; (g) the existence of international relations based on the free consent of independent sovereign States necessarily implied prohibition both of armed force and of other forms of pressure and coercion; (h) the authors of the Charter, in drafting Article 2, paragraph 4, had used the generic term 'force' without any qualification, and consequently a broad interpretation of that term was perfectly compatible with the text of that provision; (i) there was nothing in the *travaux préparatoires* of the San Francisco Conference to preclude a broad interpretation of 'force' in Article 2, paragraph 4, of the Charter; (j) the very fact that the San Francisco Conference had rejected a Brazilian amendment that a reference to economic forms of pressure be added was proof that such a reference was not considered necessary in view of the broad meaning of the term 'force' in Article 2, paragraph 4, of the Charter; (k) the notion and conditions of self-defence had not yet been clearly defined, and hence no argument for the exclusion of the various forms of pressure could be based on that notion.<sup>71</sup>

On the other hand, many States strongly maintained that 'force' within the meaning of article 2(4) was confined to armed force.<sup>72</sup> Delegates of these States opposed the inclusion of economic, political and other forms of

<sup>71</sup> Third Report, n. 61, para. 55.

<sup>72</sup> See for example, First Report, n. 62, annex B, 99, section D: Argentina (S.R., p. 11), United States of America (SR.3, p. 12, SR.15, pp. 17–18), United Kingdom (SR.5, pp. 12–13, SR.16, p. 12), France (SR.6, pp. 5–6), Italy (SR.7, p. 6), Netherlands (SR.7, p. 8), Lebanon (SR.7, p. 14), Australia (SR.10, p. 7, SR.17, p. 12), Sweden (SR.10, p. 10), Guatemala (SR.14, p. 7) and Venezuela (SR.16, p. 16). Fourth Report, n. 64: para. 114 (USA, stressing that 'the term "force" in Article 2, paragraph 4, of the Charter related exclusively to armed or military force and did not cover non-military acts, even of a coercive character'.); para. 117 (Canada – 'use of force' with respect to acts of reprisal means exclusively 'armed force'); para. 119 (UK); para. 131 (Australia). Fifth Report, n. 62, para. 128 (Italy); Sixth Report, n. 62, para. 106 (Argentina), para. 227 (The United Kingdom of Great Britain and Northern Ireland), para. 256 (USA).

coercion within the scope of article 2(4). The third report of the Special Committee sums up their arguments as follows:

In their turn, those representatives who considered that the term 'force' in Article 2, paragraph 4, of the Charter meant only armed force put forward the following arguments: (a) the intention of the authors of the Charter was clearly to limit the term 'force' to armed force; (b) the *travaux préparatoires* of the Charter argued against those who held that, because the term 'force' in Article 2, paragraph 4, was not qualified by the adjective 'armed', that term should be given a broad interpretation which covered other forms of pressure; (c) the San Francisco Conference rejected a Brazilian amendment designed to broaden the prohibition laid down in Article 2, paragraph 4, by adding the words 'and the threat or use of economic measures'; (d) the very fact that Brazil had found it necessary to submit its amendment was proof, and the rejection of that amendment conclusive proof of the meaning which should be given to the word 'force' in Article 2, paragraph 4, of the Charter; (e) in Article 44 of the Charter the term 'force' was also used without any qualification, and there was no doubt that it referred exclusively to armed force; (f) if Article 2, paragraph 4, was analysed in the context of the other provisions of the Charter, the legal conclusion reached was that the term 'force' used in that paragraph could be interpreted only to mean armed force; (g) a broad interpretation of the term 'force' in Article 2, paragraph 4, of the Charter would completely alter the existing relationship between that Article and the provisions of Chapter VII of the Charter; (h) a broad interpretation of the term 'force' in Article 2, paragraph 4 would also imply a broader interpretation of the inherent right of individual or collective self-defence provided for in Article 51 of the Charter, although it was obvious that the protection established in that Article was intended to operate solely in the case of the threat or illegitimate use of force and until such time as the Security Council had taken the necessary steps to maintain international peace and security; (i) a broad interpretation of the term 'force' would undermine the integrity of the Charter as a legal instrument – an outcome which could not be accepted on the pretext of progressive development; (j) any attempt to amend the Charter must be made in accordance with the procedure laid down in Article 108; (h) most writers supported a limitative interpretation of the term 'force' in Article 2, paragraph 4, of the Charter.<sup>73</sup>

It was also argued that 'apart from basic legal objections to the inclusion of economic and political pressures in the definition of force, there was no legally satisfactory definition of economic and political pressures'.<sup>74</sup>

<sup>73</sup> Third Report, n. 61, para. 56. For further elaboration of arguments, see also Second Report, n. 63, paras. 67–69; Fourth Report, n. 64, para. 51; Fifth Report, n. 62, para. 92.

<sup>74</sup> Second Report, n. 63, para. 75.



The Friendly Relations Declaration left open the issues of whether a prohibited use of force must be ‘armed’, and whether coercion falls within the scope of the prohibition. Although the Declaration was adopted by acclamation (consensus), seventy-nine delegations made statements on the formulation of the draft declaration at the time of its adoption,<sup>75</sup> and the Rapporteur of the Sixth Committee, Mr Owada, noted that ‘the text of the declaration should be read in conjunction with the statements made for the record which are included in the relevant part of the summary records of the Sixth Committee, contained in documents A/C.6/SR.1178 to 1184’.<sup>76</sup> The delegate for the UK, Sir Vincent Evants, drew

attention to the statements summarized in paragraphs 90 to 273 of the Special Committee’s report [A/8018] and in the summary records of the 1178th to 1184th meetings of the Sixth Committee. Individual delegations have made it clear that the acceptance of the declaration by their Governments is subject to the views and positions there expressed and the declaration must consequently be read in conjunction with [those] records.<sup>77</sup>

In particular, the delegate for Nigeria, Mr Shittabey, on behalf of the African Group of States expressed regret over ‘the Committee’s failure to accept the legitimate notion that the expression “force” as employed in the principle of the non-use of force denotes economic and political pressures as well as every kind of armed force’.<sup>78</sup>

In the text of the adopted Declaration, the prohibition of coercion is mentioned twice, firstly in the ninth preambular paragraph which ‘[r]ecall[s] the duty of States to refrain in their international relations from military, political, economic or any other form of coercion aimed against the political independence or territorial integrity of any State’ (emphasis added). The prohibition of coercion is also included with respect to the principle of the duty of non-intervention.<sup>79</sup> However, the Special Committee reached no ultimate agreement on the issue of whether the prohibition of the use of force

<sup>75</sup> UN General Assembly, *Verbatim Record of Plenary Meeting No. 1860*, UN Doc A/PV.1860 (6 October 1970), para. 24. Thomas Bruha (n. 28, at 142, 151) observes that these interpretive declarations were ‘a kind of substitute for votes’.

<sup>76</sup> UN General Assembly, *Verbatim Record Plenary Meeting No. 1860*, *Ibid.*, para. 25.

<sup>77</sup> *Ibid.*, para. 83.

<sup>78</sup> *Ibid.*, para. 60.

<sup>79</sup> Para. 2: ‘No State may use or encourage the use of economic political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind.’

includes the prohibition of other forms of coercion.<sup>80</sup> Some delegations expressed their understanding that '[t]he forms of coercion referred to in [preambular paragraph 9] were examples of unlawful forms of the threat or use of force, which was prohibited under the Charter',<sup>81</sup> and others criticised the fact that 'the principle concerning the prohibition of political, economic and other forms of coercion' was 'covered only in the preamble and not in the operative part' and considered that it should have been placed in the principle concerning the non-use of force or in the general part of the declaration.<sup>82</sup>

Ultimately the lack of agreement regarding the definition of 'force' with respect to the principle of the non-use of force in the 1970 Friendly Relations Declaration was left unresolved. Accordingly, the 1970 Friendly Relations Declaration does not constitute a subsequent agreement regarding whether or not 'force' in article 2(4) refers to physical/armed force only.

Another potential subsequent agreement regarding whether 'force' in article 2(4) refers to armed/physical force only is the 1974 Definition of Aggression. Article 1 of the 1974 Definition provides that:

Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this Definition.<sup>83</sup>

The introduction of the qualifier 'armed' before 'force' is the most significant difference to the text of article 2(4).<sup>84</sup> On first glance, the use of the term

<sup>80</sup> First Report, n. 62, para. 42: 'the Special Committee was unable to arrive at a consensus on a comprehensive definition of "force" in view, *inter alia*, of a disagreement as to whether the term embraced political, economic and other forms of pressure'.

<sup>81</sup> For example, Sixth Report, n. 62, para. 120, Romania.

<sup>82</sup> *Ibid.*, para. 194, Czechoslovakia.

<sup>83</sup> The Explanatory note:

in this Definition the term 'State':

(A) is used without prejudice to questions of recognition or to whether a State is a member of the United Nations;

(B) includes the concept of a 'group of States' where appropriate.

<sup>84</sup> Bruha, n. 28, 159 sets out the differences between article 1 of the 1974 Definition and article 2(4) of the UN Charter (footnote omitted):

The other deviations from article 2(4) of the UN Charter concern the following: explicit mention of the use of 'armed' force; the added reference to 'sovereignty'; the replacement of 'any' state by 'another' state; the clause 'inconsistent with the Charter' instead of 'inconsistent with the purposes of the United Nations'; and the final clause 'as set out in this definition'. Whereas the last two variations are to be seen as additional escape clauses to defend one's own military actions against the accusation of aggression, the others are less significant or of more historical importance: (i) the adjective 'armed'

'armed' tends to bolster the view that article 2(4) of the UN Charter is directed at armed force only, since that article forms part of the collective security framework of the UN (which is also the context of the Definition of Aggression, for the purposes of providing guidance to the UN Security Council in making a determination under article 39 of the Charter). As discussed, the debates leading up to the Friendly Relations Declaration did not resolve the disagreements between States about whether article 2(4) was confined to armed force only, so the use of the qualifier 'armed' in article 1 of the Definition of Aggression could be viewed as a progressive development of international law through the subsequent agreement of the parties regarding the interpretation of article 2(4). Bruha argues that the use of this adjective 'ended the discussion on "economic" or "ideological" aggression, which had lost much of its significance in the atmosphere of détente looming at that time'.<sup>85</sup> However, since article 1 is defining *aggression*, the most serious form of illegal use of force, it does not follow that all illegal uses of force involve *armed* force. Hence, article 1 of the Definition of Aggression does not unequivocally indicate agreement of the UN Member States regarding the interpretation of article 2(4) as referring to armed force only.<sup>86</sup>

In absence of a subsequent agreement regarding the interpretation of 'force' in article 2(4), according to article 32 of the VCLT:

Recourse 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.

Accordingly, given the ambiguity of the text of article 2(4) regarding the meaning of 'force' and in the absence of a subsequent agreement regarding its interpretation, one should revert to the clear drafter's intent expressed in San Francisco by the rejection of the Brazilian proposal to include economic coercion, that 'force' does not extend to other forms of non-armed/non-

before force ended the discussion on 'economic' or 'ideological' aggression, which had lost much of its significance in the atmosphere of détente looming at that time; (ii) the inclusion of the word 'sovereignty' met the respective 'sensitivity' of the newly established states of the South, and was considered harmless by the other groups; (iii) likewise, the replacement of 'any' by 'another' state, as already contained in the Soviet and non-aligned countries drafts, was also considered to have no practical impact.

<sup>85</sup> *Ibid.*, 159.

<sup>86</sup> For a discussion of whether economic coercion is otherwise unlawful under international law, see Antonios Tzanakopoulos, 'The Right to Be Free from Economic Coercion' (2015) 4 *Cambridge Journal of International and Comparative Law* 616.

physical coercion. Despite some earlier scholarly views,<sup>87</sup> the position that 'force' in article 2(4) includes only armed/physical force and excludes other forms of non-armed coercion is today overwhelmingly supported by scholars.<sup>88</sup>

### Weapons

The ICJ has confirmed that article 2(4) does 'not refer to specific weapons'; articles 2(4), 51 and 42 of the UN Charter 'apply to any use of force regardless

<sup>87</sup> For example, in the negotiations of the Friendly Relations Special Committee during the discussion on the meaning of 'force' in article 2(4), it was noted that Kelsen 'supported the view that the use of force under Article 2, paragraph 4, of the Charter included both use of arms *and violations of international law which involved an exercise of power in the territorial domain of other States without the use of arms.*' Second Report, n. 63, para. 66, citing Hans Kelsen, *The Law of the United Nations: A Critical Analysis of Its Fundamental Problems* (Stevens, 1950), emphasis added by author. However, Ian Brownlie (*International Law and the Use of Force by States* (Clarendon, 1963)) argued in response to Kelsen that:

It is true that the travaux préparatoires do not indicate that the phrase applied only to armed force but there is no evidence either in the discussions at San Francisco or in state or United Nations practice that it bears the meaning suggested by Kelsen. Indeed, in view of the predominant view of aggression and the use of force in the previous twenty years it is very doubtful if it was intended to have such a meaning.

(361 ff, citation omitted)

But interestingly, Brownlie argued that although 'it is very doubtful if [article 2(4)] applies to economic measures of a coercive nature', 'it is correct to assume that paragraph 4 applies to force other than armed force' (footnotes omitted).

<sup>88</sup> For example, Robert Kolb, *Ius contra bellum: Le droit international relatif au maintien de la paix: précis* (Helbing & Lichtenhahn, 2e éd, 2009), 246; 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, 163; 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, 208, MN16; Claus Kreß, 'The State Conduct Element' in Claus Kreß and Stefan Barriga (eds), *The Crime of Aggression: A Commentary* (Cambridge University Press, 2017), 412; 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, 101; Christian Henderson, *The Use of Force and International Law* (Cambridge University Press, 1 ed., 2018), 55; the *travaux préparatoires* of the UN Charter, subsequent resolutions and subsequent State practice 'would seem to confirm that the prohibition is targeted towards armed force, to the exclusion of the other types of force.' Of recent scholars who have analysed the concept of 'force' in article 2(4), Corten refrains from stating an opinion about whether the concept of 'force' extends further than armed force, deliberately leaving the question open. Instead, he focuses on whether there is a threshold for conduct to qualify as a 'use of force' as opposed to a 'simple police measure', arguing in the affirmative.

of the weapons employed'.<sup>89</sup> The ICJ's view has been affirmed by States in the comment to article 3(b) of the 1974 Definition of Aggression. Article 3(b) 1974 Definition of Aggression lists as an act of aggression: 'Bombardment by the armed forces of a State against the territory of another State or *the use of any weapons* by a State against the territory of another State' (emphasis added). The comment annotated to article 3(b) refers to paragraph 20 of the 1974 GA Special Committee report, which states: 'the Special Committee agreed that the expression "any weapons" is used without making a distinction between conventional weapons, weapons of mass destruction and any other kind of weapon.' This makes clear States' agreement that at least with respect to aggression (and there is no apparent reason it should not extend to all illegal uses of force), the type of weapon used does not affect the lawfulness of the use of force under the *jus contra bellum*. Although explicitly referring to use of weapons, this term is broadly understood in the annotated comment of the Special Committee. It could also further be argued that as article 3(b) of the 1974 Definition refers to the most serious uses of force (i.e. aggression), it is not necessary that all uses of force (those below the threshold of an act of aggression) should require the employment of a weapon. In any event, the ICJ's well-known statement does not explicitly state that a weapon must be employed for an act to fall under article 2(4) of the UN Charter, merely that no specific weapon is referred to by article 2(4) and that article 2(4) applies 'to any use of force regardless of the weapons employed'. Although this does imply that some kind of weapon should be employed, it is not explicitly stated. Apparently, then, the type of weapon is not relevant to whether an act falls under the scope of article 2(4). But this still leaves the question: is the use of a weapon required at all for an act to fall under the prohibition of the use of force in article 2(4), and if so, what is a 'weapon'?

### Is Use of a 'Weapon' Required by Article 2(4)?

The question of whether a 'weapon' is required by article 2(4) and the definition of 'weapon' is particularly relevant to new forms of technology that may be used to commit acts of violence or create a military effect, such as cyber operations (e.g. to attack satellite systems by spoofing telemetry data),<sup>90</sup>

<sup>89</sup> *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion* (1996) ICJ Reports 226 ('Nuclear Weapons'), para. 39.

<sup>90</sup> Kazuto Suzuki, 'A Japanese Perspective on Space Deterrence and the Role of the U.S.-Japan Alliance and Deterrence in Outer Space' in Scott W Harold et al (eds), *The U.S.-Japan Alliance and Deterring Gray Zone Coercion in the Maritime, Cyber, and Space Domains* (RAND Corporation, 2017), 91–7: 'Spoofing is a technique to provide false information about a satellite's location, position, and health (in this case, its mechanical condition). It can be

the use of radio frequencies (for jamming and disrupting space systems including satellite signals – discussed further below), or an electromagnetic pulse to damage electrical power and control systems, which could lead to the meltdown of a nuclear reactor.<sup>91</sup> Could these means be considered 'weapons', and is the use of a weapon required by article 2(4)? Of course, textually, in article 2(4) there is no mention of weapons. Any requirement for a 'use of force' to be effected by a 'weapon' must therefore derive from the interpretation of the term 'use of force' in that provision. As seen earlier, the ordinary meaning of the term also does not require the use of weapons but merely 'physical strength or power exerted upon an object; *esp.* the use of physical strength to constrain the action of persons; violence or physical coercion' and 'violent means'.<sup>92</sup>

### What Is a 'Weapon'?

The answer to whether a 'use of force' requires the use of a weapon is made clearer when one considers what a 'weapon' is. Some objects (conventional weapons, weapons of mass destruction) are clearly understood to be weapons because they are created, designed and employed to achieve physical damage. But almost anything can achieve physical damage depending on how it is used – so it is either its employed function (which could entail an element of hostile intent) and/or its effect (the harm or damage caused) that determines its character as a 'weapon'. As Christian Henderson notes, '[t]he design of an object as a weapon does not appear to be the determining factor as to whether an action constitutes "force"; rather a weapon is instead "a thing designed *or used* for inflicting bodily harm or physical damage"'.<sup>93</sup> Take the example of an unarmed ballistic missile, such as the Hwasong-12 ballistic missiles that it is believed North Korea launched on 28 August and 15 September 2017 over Hokkaido, Japan.<sup>94</sup> These appear to be single-stage intermediate-range ballistic missile designed to deliver a payload of a single (conventional or nuclear)

done by either hacking satellite frequencies or providing false signals to ground station networks', which 'can direct the satellite onto a collision course with another satellite'.

<sup>91</sup> This possibility was mentioned by the ICJ in its *Nuclear Weapons* Advisory Opinion, n. 89, para. 35, though in the context of the electromagnetic pulse generated by nuclear weapons.

<sup>92</sup> 'Force, n.1', *OED Online*, n. 58.

<sup>93</sup> Henderson, n. 88, 56, citing the OED with emphasis added and *Black's Law Dictionary* for the definition of 'weapon'. He also notes the Stuxnet attack and that 'a computer may be used as a weapon for inflicting physical damage.' 57, citation omitted.

<sup>94</sup> Arms Control Association, 'Chronology of US-North Korean Nuclear and Missile Diplomacy' (2018), [www.armscontrol.org/factsheets/dprkchron](http://www.armscontrol.org/factsheets/dprkchron).

warhead.<sup>95</sup> An intermediate or long-range ballistic missile is a large, high-speed rocket-fuel propelled projectile and so, even unarmed, could be employed as a ‘weapon’. On the other hand, the unarmed missiles themselves are weapon *delivery systems* that do not actually carry weapons. In other words, an unarmed missile does not belong to the category of conventional weapon, but it has features that allow it to be employed in a way that will achieve the same effect as conventional weapons if it strikes a target (namely, the kinetic energy of the missile will be transferred to the object that it strikes; the friction will ignite the rocket fuel and the missile will explode). Therefore, to be employed as a weapon, an unarmed ballistic missile must have a physical effect, which it would only have by actually striking a target (as opposed to its usual function and effect of describing a ballistic trajectory and landing in water).<sup>96</sup> Therefore, it is not helpful to speak of ‘weapons’, since in the discussion of what is a ‘weapon’ and whether use of a ‘weapon’ is required, ‘weapons’ is really a signifier standing for other potential requirements for an act to constitute a prohibited use of force under article 2(4), namely, kinetic/physical means, kinetic/physical effects, object of harm, directness of harm and possibly, hostile intent and gravity. These elements will now be considered.

### *Kinetic/Physical Means*

‘Kinetic’ is defined as ‘[p]roducing or causing motion’.<sup>97</sup> Although the scholarly literature often refers to ‘kinetic force’, it is more accurate to speak of *kinetic energy* and the transfer or release of kinetic energy to other objects. In conventional weapons, the transfer of kinetic energy occurs when, for example, a bullet that is discharged from a firearm strikes an object and transfers its kinetic energy to that object in the form of kinetic energy and heat, causing physical damage. Since the prohibition of the use of force in article 2(4) undoubtedly covers the use of chemical, biological and nuclear

<sup>95</sup> 38 North, ‘A Quick Technical Analysis of the Hwasong-12’ (19 May 2017), [www.38north.org/2017/05/hwasong051917/](http://www.38north.org/2017/05/hwasong051917/).

<sup>96</sup> In the absence of any physical effect, the missile passing through airspace would not violate article 2(4) because there is no use of armed/physical force. It is more likely that an unarmed ballistic missile passing through another State’s airspace would be denounced as a violation of UN Security Council resolutions (in the case of North Korea), a violation of sovereignty and possibly responded to as an imminent armed attack (i.e. shot down). If the missile does not land or hit any target within the State it is overflying, then in the absence of physical effect arguably it would not be a violation of the prohibition of the use of force in article 2(4).

<sup>97</sup> ‘Kinetic, Adj. and N’, *OED Online* (Oxford University Press, December 2018), [www.oed.com/view/Entry/103498](http://www.oed.com/view/Entry/103498).

weapons,<sup>98</sup> a kinetic release of energy is clearly not always required for an act to fall within the scope of the prohibition. Other examples that may fall under the category of forcible acts through employing means other than the release of kinetic energy may include cyber operations;<sup>99</sup> certain types of interference with space systems such as 'deliberate interference and "soft kill" techniques against satellites, such as laser dazzling and radio frequency jamming'<sup>100</sup> or spoofing;<sup>101</sup> non-conventional weapons such as chemical, biological or nuclear weapons;<sup>102</sup> use of the environment as a weapon<sup>103</sup> such as diverting a river or spreading fire across a border; and other measures such as contaminating a water source, releasing harmful substances into the air and expulsion of populations.<sup>104</sup>

<sup>98</sup> Brownlie considers whether 'weapons which do not involve any explosive effect with shock waves and heat involves a use of force [such as] bacteriological, biological, and chemical devices such as poison gas and "nerve gases".' These could be regarded as a use of force on two grounds, firstly that they are 'commonly referred to as "weapons"', and, secondly, 'the fact that these weapons are employed for the destruction of life and property, and are often described as "weapons of mass destruction".' Brownlie, n. 87, 362.

<sup>99</sup> For an overview, see Marco Roscini, *Cyber Operations and the Use of Force in International Law* (Oxford University Press, 2014).

<sup>100</sup> Dean Cheng, 'Space Deterrence, the U.S.-Japan Alliance, and Asian Security: A U.S. Perspective', in Harold et al, n. 90, 74, 78.

<sup>101</sup> Suzuki, n. 90, 97.

<sup>102</sup> On the characteristics and effects of nuclear weapons, see *Nuclear Weapons Advisory Opinion*, n. 89, para. 35:

The Court has noted the definitions of nuclear weapons contained in various treaties and accords. It also notes that nuclear weapons are explosive devices whose energy results from the fusion or fission of the atom. By its very nature, that process, in nuclear weapons as they exist today, releases not only immense quantities of heat and energy, but also powerful and prolonged radiation. According to the material before the Court, the first two causes of damage are vastly more powerful than the damage caused by other weapons, while the phenomenon of radiation is said to be peculiar to nuclear weapons. These characteristics render the nuclear weapon potentially catastrophic. The destructive power of nuclear weapons cannot be contained in either space or time. They have the potential to destroy all civilization and the entire ecosystem of the planet. The radiation released by a nuclear explosion would affect health, agriculture, natural resources and demography over a very wide area. Further, the use of nuclear weapons would be a serious danger to future generations. Ionizing radiation has the potential to damage the future environment, food and marine ecosystem, and to cause genetic defects and illness in future generations.

See also the Dissenting Opinion of Judge Weeramantry, 468.

<sup>103</sup> On ecological aggression, see Dissenting Opinion of Judge Weeramantry in *Nuclear Weapons Advisory Opinion*, *ibid.*, 503.

<sup>104</sup> Brownlie, n. 87, 362–3, footnotes omitted: 'More difficult to regard as a use of force are deliberate and forcible expulsion of population over a frontier, release of large quantities of water down a valley, and the spreading of fire through a built up area or woodland across a



Not all of these examples are necessarily ‘uses of force’ within the meaning of article 2(4); this is merely to illustrate the different means through which it is possible to create physical effects without the kinetic release of energy typically associated with a conventional weapon. One factor that may contribute to the characterisation of some of these non-‘kinetic’ means as a ‘use of force’ is indeed their *effect*. In sum, physical means are not essential for an act to be characterised as a ‘use of force’ within the meaning of article 2(4) but rather a certain physical effect. Henderson argues that ‘a consideration of the *effects* of the action takes on a greater importance the further one moves away from what we might consider to be conventional weapons’.<sup>105</sup> This approach also coincides with the Tallinn Manual’s commentary on the definition of the use of force with respect to cyber operations, which sets out indicative factors for whether a cyber operation is a ‘use of force’, focusing on its effects rather than its means.<sup>106</sup>

### *Indirect Use of Force*

In addition, with respect to means, the 1970 Friendly Relations Declaration and the 1974 GA Definition of Aggression clearly demonstrate UN Member States’ subsequent agreement that the prohibition of the use of force in article 2(4) includes the following forms of indirect uses of force: ‘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’;<sup>107</sup> ‘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’;<sup>108</sup> and ‘organizing or encouraging the organization of irregular armed forces or armed bands, including mercenaries, for incursion into the territory of another State’.<sup>109</sup> These refer to indirectness of means, rather than of effects, and are discussed further in Chapter 7 (anomalous examples of ‘use of force’).

frontier.’ See also UN Security Council Debates, *1606th Meeting* (4 December 1971), para. 161 in which India claimed that mass expulsions (India/Bangladesh) were a use of force.

<sup>105</sup> Henderson, n. 88, 59, for example, cyber attacks and the arguments of some scholars that the physical effects are what count.

<sup>106</sup> Michael N Schmitt (ed), *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations* (Cambridge University Press, 2017), Commentary to rule 69, para. 9.

<sup>107</sup> 1974 Definition of Aggression, n. 1, art. 3(f)).

<sup>108</sup> *Ibid.*, art. 3(g).

<sup>109</sup> Friendly Relations Declaration, para. 8 of principle 1 (duty to refrain from the threat or use of force).

CONCLUSION

The above textual analysis of article 2(4) of the UN Charter supports the following conclusions regarding the interpretation of the term 'use of force' with respect to its required means:

- **Means:**
  - *Type of force:* Article 2(4) refers to physical force and not to non-physical forms of coercion.
  - *Type of weapon:* It is not necessary that a 'weapon' be used; what counts are the (physical) effects.
  - *Kinetic energy:* It is not required that kinetic energy be released.
  - *Physical means:* This is not essential, as what counts are the physical effects.

Chapter 6 will explore the required physical effects of a 'use of force', as well as whether a particular intention is required.