IUSTITIA et PULCHRITUDO (ISSN 1607-4319)
Vol. 03, No. 01, Enero - Junio 2022
pp. 12 - 17

Are minimal uses of force excluded from Article 2(4) and should they be excluded?*

GIANFRANCO SMITH[Ψ]

*Autor para Correspondencia. E-mail: gsmith@gmsatlaw.com

Recibido: 1 de enero de 2022
Aceptado: 15 de enero de 2022

Resumen
El presente trabajo analiza si los usos mínimos de fuerza deberían ser excluidos de la responsabilidad de los Estados de no recurrir a la fuerza en el ejercicio de sus relaciones internacionales bajo el marco de la Carta de las Naciones Unidas. Para lo mismo, el trabajo contiene (I) Una breve introducción a la prohibición del uso de fuerza, y al debate académico actual sobre "formas menos graves", (II) Una explicación de los argumentos prominentes en contra de la exclusión de los usos mínimos de fuerza de la regla general, (III) Un análisis que establece porque los usos mínimos de fuerza no deben ser excluidos de la regla general, (IV) Una conclusión que establece como la aceptación de los usos mínimos de fuerza puede amenazar la paz y seguridad internacional.
Palabras clave: Uso de fuerza, Umbral de Gravedad, Articulo 2(4) de la Carta de las Naciones Unidas, Interpretación Amplia, Formas menos graves de fuerza, Contramedidas.

Abstract
This paper considers if minimal uses of force should be excluded from the general prohibition on the use of force established in the UN Charter. To this end, the paper offers (I) a brief introduction of the prohibition on the use of force and the current academic debate on "less grave forms" of it, (II) an explanation of the leading arguments against the exclusion of minimal uses force from the general rule, (III) an analysis stating why minimal uses of force should not be excluded from the general rule, and (IV) a conclusion which emphasizes on how the acceptance of minimal uses of force could threaten international peace and security.

* The following essay was presented by the author at the University of Oxford's International Law course as part of the Master in Diplomatic Studies.

Ψ Licenciado en Derecho y Ciencias Políticas (Universidad Santa María La Antigua, Magna Cum Laude); Especialista en Docencia Superior (Universidad Santa María La Antigua, Summa Cum Laude), Maestría en Estudios Diplomáticos (Oxford University). Profesor Adjunto de Filosofía del Derecho, Derechos Humanos y Derecho Internacional Público en la Universidad Santa María La Antigua. Relator de Panamá para el módulo "International Law in Domestic Courts" de Oxford University Press. Cursos y seminarios especializados en Derecho Internacional en la Academia de la Haya de Derechos Internacional y la Oficina de las Naciones Unidas en Ginebra.

Keywords: Use of Force, Gravity Threshold, Article 2(4) of the Charter of the United Nations, Broad Interpretation, Less grave forms of force, Countermeasures.

I. Introduction

The prohibition of the use of force between States is a fundamental principle of international law. Its primary source is Article 2(4) of the United Nations Charter[1], whose text provides as follow: "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".[2]

Any use of force conducted outside the framework of the UN Charter is considered a violation of international law[3]. Nevertheless, whether the concept of force enshrined in Article 2(4) is subject to a gravity threshold is still a point of contention among scholars. This discussion is led primarily by Olivier Corten and Tom Ruys[4]. Corten differentiates between enforcement measures and the use of force based on the gravity of the conduct[5], an argument supported by the Independent International Fact-Finding Mission on the Conflict in Georgia (2009) that concluded that "the prohibition of the use of force covers all physical force which surpasses a minimum of intensity"[6]. Supporters of this view argue that, among others, targeted killings, forced abductions, small-scale counterterrorism operations abroad, interceptions of a single aircraft, and localized hostile encounters between military units, produce such a minimal effect that they fall outside the scope of Article 2(4)[7]. Ruys, on the other hand, argues against the *de minimis* threshold by taking a broad interpretation of Article 2(4) to include all types of forces, regardless of their intensity or gravity[8].

This essay disagrees with the former statement, arguing that uses of force are not and should not be excluded from Article 2(4). To this end, it will be divided into two parts. The first one argues that all types of forces, including those with minimal effects, are covered by Article 2(4). Accordingly, three arguments will be presented: i) that exclusion of minimal uses of force cannot be legally interpreted from Article 2(4); ii) that additionally, international jurisprudence is inclined to favor the interpretation of Article 2(4) in its broadest form; iii) that in any event, there is insufficient state practice to support the existence of a customary rule allowing the excluding of minimal uses of force from the scope of

---

1. *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America*), International Court of Justice, Judgment, I.C.J. Reports 1986, page 14, paras.188-190. *[Note that the prohibition of the use of force has also been recognized as a customary international law and as a jus cogens rule]*

2 CHARTER OF THE UNITED NATIONS (29 June 1945)

3 INTERNATIONAL LAW COMMISSION, COMMITTEE ON THE USE OF FORCE, "Final Report on Aggression and the Use of Force in International Law Association Report of the Seventy-eighth Conference" Resolution 4/2018. *[The exceptions provided in the UN Charter are self-defense in cases of armed attack (Art. 51) and the authorization of the Security Council in accordance with the Chapter VII of the UN Charter. Note that consent of the territorial State is not an exception because it is not contrary to Article 2(4).]*

4 O' CONNELL, Mary Ellen (2014): "The True Meaning of Force", *American Journal of Internacional Law,* vol. 108, pp. 141-144.

5 CORTEN, Olivier and SUTCLIFFE, Christopher (2010): *The Law Against War: The Prohibition on the Use of Force in Contemporary International Law* (London, Hart Publishing).

6 INDEPENDENT INTERNATIONAL FACT-FINDING MISSION ON THE CONFLICT IN GEORGIA (2009) Vol. II, p. 242.

7 KOLB, Robert (2009): *Ius contra Bellum: Le droit international relative au maintien de la paix* (Brussels, Editions Bruylant) p. 247.

8 RUYS, Tom (2014): "The meaning of "Force" and the Boundaries of the Jus Ad Bellum: Are "Minimal" Uses of Force Excluded from UN Charter Article 2(4)", *American Journal of International Law,* vol. 108, Nº 2, pp. 159-210.

Article 2(4). Finally, from a policy perspective, the second part explains why the exclusion of acts of force should not be excluded from Article 2(4) based on their gravity or intensity, as this may endanger international peace and security.

II. Arguments

a. Exclusions based on the gravity of the conduct cannot be inferred from the interpretation of Article 2(4)

First, exclusions of minimal uses of force cannot be inferred from a legal interpretation of Article 2(4). To determine whether this provision should be construed broadly to encompass all types of force, the meaning of "force" must be interpreted in accordance with the rules of the Vienna Convention on the Laws of Treaties. According to Article 31(1) of the VCLT, "treaties shall be interpreted in light of its object and purpose"[9]. The residual catch-all phrase "or any other manner inconsistent with the purpose of the United Nations" at the end of Article 2(4) suggests that this provisions' object and purpose was to restrict all types of forces, including those with minimal effects[10].

Furthermore, the broad scope of Article 2(4) can be supported with the UN Charter's *travaux préparatoires*, which makes clear that "the intention of the authors of the original text was to state in the broadest term an absolute all-inclusive prohibition; the phrase 'or any other manner' was designed to ensure that there should be no loophole".[11] As such, one can logically deduce that the UN Charter drafters intended to prohibit all types of interstate force through Article 2(4), regardless of their gravity or intensity.

b. The international jurisprudence favors a broad interpretation of Article 2(4)

The distinction made in *Nicaragua* between "most grave forms" and "other less grave forms" of force based on the "scale and effects" of forcible acts[12] demonstrates that forcible acts do not have to be particularly grave to qualify as a use of force[13]. In other words, there is no such standard of gravity for a forcible act to fall under the scope of Article 2(4).

Furthermore, the ICJ has applied a broad interpretation of Article 2(4) in several cases. In *Nicaragua*, it was established that "sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out of armed forces against another State" constituted an armed attack[14]. The ICJ also stated that "the assistance to rebels in the form of the provision of weapons or logical

---

[9] VIENNA CONVENTION ON THE LAW OF TREATIES (23 May 1969)

[10] UNITED NATIONS CONFERENCE ON INTERNATIONAL ORGANIZATION (1945): "Documents of the United Nations Conference on International Organization" (San Francisco, April 25 to June 26, 1945) Docs.334, 339, 340, 609. *[One should note that it is generally accepted that this prohibition only includes military forcible acts. Other type of coercive acts, such as economic coercion, were not included during the negotiation of the UN Charter]*

[11] UNITED NATIONS CONFERENCE ON INTERNATIONAL ORGANIZATION (1945): "Documents of the United Nations Conference on International Organization" (San Francisco, April 25 to June 26, 1945) Docs. 334, 335.

[12] *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America*), International Court of Justice, Judgment, I.C.J. Reports 1986, page 14, paras. 191-195.

[13] RUYS, Tom (2014): "The meaning of "Force" and the Boundaries of the Jus Ad Bellum: Are "Minimal" Uses of Force Excluded from UN Charter Article 2(4)", *American Journal of International Law,* vol. 108, Nº 2, p. 165.

[14] *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America*), International Court of Justice, Judgment, I.C.J. Reports 1986, page 14, para. 195.

or other support" falls within the scope of the use of force and may also be considered an armed attack[15]. Similarly, in *Oil Platform*, the ICJ "did not exclude the possibility that mining of a single military vessel might be sufficient to bring into play the 'inherent right of self-defense'"[16].

If the actions referred above –the majority of which are excluded from Article 2(4) by proponents of the gravity threshold– rise to the level of armed attack and trigger the right to self-defense, it is reasonable to assume that they also fall within the definition of force in Article 2(4).

In contrast, the *Corfu Channel* is frequently cited in support of the gravity threshold because the ICJ determined that the mine-sweeping operations were a violation of Albania's sovereignty rather than a "demonstration of force"[17]. This precedent, according to Corten, 'illustrates the need to cross a certain threshold of gravity before characterizing an action as a use of force under Article 2(4)'[18]. This conclusion is because the Security Council did not invoke Article 2(4) when dealing with this issue, and because the mine-sweeping operation lasted some hours "without causing any injury or damage"[19].

However, there are several problems with these conclusions. Firstly, the Security Council is a political body that does not always speak in legal terms. As a result, the absence of an express reference to Article 2(4) does not exclude the possibility that the minesweeping was an act of force. Secondly, this case was brought before the ICJ under a special agreement, with the question of whether the United Kingdom's actions violated Albania's sovereignty, rather than whether such violation related to Article 2(4).[20] In *Continental Shelf* (Libya v. Malta), the ICJ determined in that it could not exceed its jurisdiction conferred in special agreements[21]. Thus, it is probably that the ICJ did not consider the UK's operation to be a use of force because it fell outside the jurisdiction conferred, and not because it did not believe that it had not caused any injury or damage.

c. State practice is insufficient to support a restrictive interpretation of Article 2(4)

The lack of condemnation of forcible acts under Article 2(4) is frequently used as evidence of a gravity threshold. Corten cited Adolf Eichmann and Manuel Antonio Noriega's abduction to support this claim, asserting that none of the victim States invoked Article 2(4) when such abductions occurred.

However, omissions may be unrelated to international law. As resolved in the *Lotus* case, silence is not

---

[15] *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America*), International Court of Justice, Judgment, I.C.J. Reports 1986, page 14, para. 195.

[16] *Oil Platforms (Islamic Republic of Iran v. United States of America)*, International Court of Justice, Judgment, I.C.J. Reports 2003, page 161, para. 72; RUYS, Tom (2014): "The meaning of "Force" and the Boundaries of the Jus Ad Bellum: Are "Minimal" Uses of Force Excluded from UN Charter Article 2(4)", *American Journal of International Law*, vol. 108, Nº 2, p.166.

[17] *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v Albania),* International Court of Justice, Judgment, I.C.J. Reports 1949, page 35.

[18] CORTEN, Olivier and SUTCLIFFE, Christopher (2010): *The Law Against War: The Prohibition on the Use of Force in Contemporary International Law* (London, Hart Publishing) p.70.

[19] CORTEN, Olivier and SUTCLIFFE, Christopher (2010): *The Law Against War: The Prohibition on the Use of Force in Contemporary International Law* (London, Hart Publishing) pp. 6970.

[20] RUYS, Tom (2014): "The meaning of "Force" and the Boundaries of the Jus Ad Bellum: Are "Minimal" Uses of Force Excluded from UN Charter Article 2(4)", *American Journal of International Law*, vol. 108, Nº 2, p.166.

[21] *Continental Shelf (Libyan Arab Jamahiriya v. Malta)*, International Court of Justice, Judgment, I.C.J. Reports 1985, page 13, para. 19.

always evidence of customary law when the *opinio juris* is absent[22]. Accordingly, several reasons, which are not necessarily of legal nature, can explain why Argentina and Panama did not protest based on Article 2(4). First, as Ruys correctly pointed out, elements of justice and responsibility may have influenced Argentina's decision to bring the Eichmann kidnapping as a violation of its sovereignty rather than a use of force case[23]. As such, presenting this case as a violation of Article 2(4) may have been interpreted as an endorsement of Eichmann's crimes during World War II, which ultimately could have had a negative impact on Argentina's political and international reputation. A similar argument applies to the abduction of Noriega in Panama, since protesting against the United States for abducting Noriega as part of military intervention in 1989 could have been interpreted as an act of approval of Noriega's dictatorial regime by the newly elected government. It could thus be argued that, despite having been invaded by the United States, representatives of Panama's new democratic government voted against the United Nations General Assembly Resolution 44/240 – which condemned the use of force by the United States against Panama[24]– because of the domestic political consequences rather than legal consequences.

As the two cases cited above demonstrate, the absence of condemnation of forcible acts under Article 2(4) does not imply the existence of an international customary international law supporting the gravity threshold in Article 2(4). As explained, the silence of States in these instances is not evidence of *opinio juris*, because the absence of such a claim may be based on political and not necessarily legal grounds.

III. Should minimal uses of force be excluded from article 2(4)?

Conducts below the so-called gravity threshold should not be excluded from Article 2(4) because doing so could endanger international peace and security. First, in the absence of an objective way of measuring the gravity of conducts, States may resort to acts of disproportionate force as countermeasures in response to conducts below the gravity threshold, which is not currently permitted under the rules of State responsibility.[25]

Allowing States to use minimal acts of force through countermeasures to repel any act of force below the minimum threshold could lead to disproportionate use of force, which in turn could generate further responses by one of the States and, consequently, an escalation of the conflict that might endanger international peace and security. For instance, one State might invade the territory of another State for the sole purpose of abducting a suspected terrorist. In response, the invaded State may use military force against the intruding State, justifying its actions as a countermeasure. As a result, the intruding State may argue that the use of military force was disproportionate and may subsequently respond with greater force. Since such escalation of force poses a real threat to international peace and security, Article 2(4) should continue to regulate all acts of force, regardless of their gravity or intensity, as it does now.

---

[22] *The Case of the S.S. Lotus (France v. Turkey)*, Permanent Court of International Justice, Judgment, Series A No. 10, 1927, page 28; *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America*), International Court of Justice, Judgment, I.C.J. Reports 1986, page 14, para. 188.

[23] RUYS, Tom (2014): "The meaning of "Force" and the Boundaries of the Jus Ad Bellum: Are "Minimal" Uses of Force Excluded from UN Charter Article 2(4)", *American Journal of International Law*, vol. 108, Nº 2, p.168.

[24] UNITED NATIONS, GENERAL ASSEMBLY: "Effects of the military intervention by the United States of America in Panama on the situation in Central America", A/RES/44/240 (29 December 1989).

[25] INTERNATIONAL LAW COMMISSION: "Draft Articles on Responsibility of States for International Wrongful Acts", A/56/10 Supplement No. 10, Art.50. (2001).

IV. Conclusion

This paper has demonstrated that minimal uses of force are not and should not be excluded from Article 2(4). Firstly, the phrase "or any other manner inconsistent with the purpose of the United Nations" of Article 2(4) and the *travaux préparatoires* of the UN Charter provides strong evidence to argue that the object and purpose of Article 2(4) were to prohibit all types of forces, including those with minimal effects. Secondly, the distinction made in *Nicaragua* between "most grave forms" and "other less grave forms" of forces highlighted proves that conducts do not have to be grave to qualify as force. This means, in other words, that even discussions on the intensity and gravity of acts of force are considered to fall within the scope of Article 2(4). Thirdly, there is no evidence of *opinio juris* to support the existence of customary international law regarding the exclusion of less grave uses of force. As explained, although on several occasions States have avoided using the language of Article 2(4) to condemn forcible acts, this is often for political reasons. Finally, the law on the prohibition of the use of force should remain as it is, since excluding acts of force from Article 2(4) on the basis of their intensity or gravity could threaten international peace and security. As demonstrated, excluding less grave forms of forces from Article 2(4) would imply that the State's responsibility regime would cover such types of acts. If so, States would be allowed to resort to force through constant and mutual countermeasures, which could ultimately escalate violence strong enough to compromise international peace and security.