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When ‘the Use of Force’ is Prohibited? – Article 2 (4) and the ‘Threshold’ of the Use of Force

Introduction

Article 2 (4) of the UN Charter demands that ‘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’.¹ The prohibition of the use of force was introduced into the international legal order to – using the language of the Charter’s preamble – ‘save succeeding generations from the scourge of war’. Thus, beyond all doubt, it was established to prevent States from armed interventions, armed conflicts, aggression and any other major forms of armed measures. However, some authors ponder whether the prohibition of the use of force covers all kinds of coercion, even minor ones, or whether perhaps it was supposed to regulate interstate relations only, at a level necessary for preventing large-scale forcible measures. This issue is related to the question of the so-called ‘threshold of the use of force’.

This article advances the thesis that there is no threshold for the use of force. i.e. no level of the use of force which decides whether and which forcible actions undertaken by States are prohibited. The examples of actions discussed in the doctrine of law which supposedly would be ‘below’ such a threshold in fact either are regulated by

¹ Moreover, the prohibition of the use of force nowadays also constitutes a customary norm (A. Randelzhofer, *Commentary to Article 2 (4)* in: *The Charter of the United Nations: a Commentary*, ed. B. Simma, Oxford 2002, p. 134; T. Hillier, *Sourcebook on Public International Law*, London 1998, p. 595; C. Kreß, *Major Post-Westphalian Shifts and Some Important Neo-Westphalian Hesitations*, in: “Journal on the Use of Force and International Law”, 2015, vol. 1 no. 1, p. 11, 40; E. Gordon, *Article 2 (4) in Historical Context*, in: “Yale Journal of International Law”, 1984–1985, vol. 10, p. 271, 275; M. Shaw, *International Law. Sixth Edition*, Cambridge 2008, p. 1123; I. Brownlie, *International Law and the Use of Force by States Revisited*, in: “Chinese Journal of International Law”, 2002, no. 1, p. 1, 1; S. T. Helmersen, *The Prohibition of the Use of Force as Jus Cogens Explaining Apparent Derogations*, in: “Netherlands International Law Review”, 2014, vol. 61, p. 167, 175; A. Cassese, *International Law*, Oxford 2005, p. 56).

other principles of international law, are not considered as regulated by *ius ad bellum*, or States deliberately resign from calling them a use of force for both legal and extra-legal reasons. Thus, the existence of such a threshold is not confirmed by States' practice. This thesis will be explored using three examples: the cases of the evacuation of nationals and extraterritorial abductions demonstrate that the presence of armed forces of one State on the territory of another State does not have to be always related to the use of force, and may also involve other principles of international law than the one from Art. 2 (4); the third example of the Falklands/Malvinas Islands invasion of 2 April 1982 discusses a specific situation when a State did not invoke the use of force in the face of an armed invasion, which proves that even the lack of an assertion of a breach of the prohibition of the use of force does not mean that a full-scale invasion can be considered as being below the threshold of the use of force. The article starts with a brief discussion of the opinions expressed in the doctrine of international law on the threshold, as well as the applicable case law.

The Doctrine of Law and Case Law

In the discussion over the threshold, multiple authors point out that there is indeed such a scale of forcible measures. O. Corten assumes that there is a threshold, 'below which the use of force in international relations (...) cannot violate Article 2 (4)'. Thus, according to Corten there are two separate bodies of rules applicable to the use of force: the first relates to cases of police measures, which are based on customary rules or treaty provisions and thus do not constitute a case of the use of force in international relations prohibited by Art. 2 (4). The second category of rules covers a violation of the prohibition of the use of force when the *jus contra bellum* rules are at stake. Moreover, in order to distinguish those cases of the use of force which are below the threshold, Corten offers two criteria: the gravity of the coercive act, and State's intention to resort to force against another State. As examples of actions below the threshold of the use of force, he enumerates the arrest of a person by authorities of one State in another State's territory without informing that State; inspection of a foreign vessel; and police measures against a foreign aircraft that has entered a State's airspace without authorization.²

Likewise, R. Higgins points out that 'minor coercion' does not 'involve the use of force at all; or may involve it to a very low degree'. She claims that the term 'force', as used in UN practice, 'excludes low-level non-military coercion', while by 'low level' Higgins understands 'coercion enough to limit the freedom of action of the State at which it is di-

² O. Corten, *The Law against War: The Prohibition on the Use of Force in Contemporary International Law*, Oxford and Portland, Oregon 2012, pp. 50–55, 67–76.

rected, but not adversely enough to affect its national security.³ C. Kreß indicates that there are a number of situations when it is difficult to stipulate whether the threshold of the use of force has been reached. In this context, he enumerates 'intrusion or otherwise uninvited presence of military (or even police organs) on foreign soil without actual fighting' and actions involving minimal coercion, like 'arrest of a person, the seizure of foreign fishing vessel, or the opening of a diplomatic bag'; and includes transnational computer attacks as being at stake as well.⁴ O. Dörr enumerates some examples of actions which were not 'treated in practice under the principle of the non-use of force': the deliberate cross-frontier employment of natural forces; cross-border pollution; the expulsion of parts of a population and causing a massive influx of refugees.⁵ F. R. Teson, referring to the special case of extraterritorial abductions, calls them 'low-intensity operations'. According to him, such operations are justified when there is a moral reason behind them; the government which conducts the operation is a legitimate one; the targeted State or government is illegal; the operation does not violate human rights; and the operation is necessary and proportionate.⁶

On the other hand, Tom Ruys claims that 'excluding the small-scale or "targeted" forcible acts from the scope of Article 2(4) is "conceptually confused, inconsistent with customary practice, and undesirable as a matter of policy.' He argues that States' practice does not support the existence of a threshold of the use of force, pointing out that any use of lethal force on the territory of another State triggers Art. 2 (4), and that setting the threshold in order to legalize some law enforcement actions is counterproductive. However, when it comes to the forcible actions against civil aircraft, merchant vessels and private individuals, he claims that these cases should be assessed on a case-by-case basis.⁷ Among those examples which seem to be the most discussed in the context of the alleged threshold, he enumerates, *inter alia*, rescuing nationals abroad, 'hot pursuit' operations, small-scale counterterrorism operations, and territorial incursions by the military or police units of another State.

Bearing the above in mind, the majority of commentators argue for the existence of a threshold of the use of force, which would relate to low-level coercion. However, it

3 R. Higgins, *The Development of International Law Through the Political Organs of the United Nations*, Oxford 1963, pp. 175–176.

4 C. Kreß, *The International Court of Justice and the "Principle of Non-Use of Force"* in: *The Oxford Handbook of the Use of Force in International Law*, ed. M. Weller, Oxford 2015, pp. 575–576.

5 O. Dörr, *Use of Force, Prohibition of*, in: "Max Planck Encyclopedia of Public International Law", <http://opil.ouplaw.com>, par 12.

6 F. R. Teson, *International Abductions, Low-Intensity Conflicts and State Sovereignty: A Moral Inquiry*, in: "Columbia Journal of Transnational Law", 1994, vol. 31 issue 3, pp. 551, 553–554.

7 T. 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)?*, in: "American Journal of International Law", 2014, vol. 108, pp. 159, 159, 208–210.

seems that some of the examples invoked in the legal doctrine are not regulated by the *jus ad bellum* at all (like a massive influx of refugees), while others require a case-by-case analysis, since specific cases of intrusions on the territory of another state or of rescuing nationals abroad may involve considerably different levels of the use of force.

When it comes to the case law, the International Court of Justice (ICJ) has never issued any comprehensive and clear statements on the threshold of the use of force, although the Court has differentiated between different levels of the use of force.⁸ Probably the most discussed case in relation to the threshold of the use of force is the *Corfu Channel* case. The ICJ, in its judgement of 9 April 1949, decided that the passage of four British warships through the Corfu Channel, 'close to the Albanian coast, at a time of political tensions in this region' amounted to an intention 'not only to test the Albania's attitude, but at the same time to demonstrate such force that she would abstain from firing against passing ships'.⁹ However, the ICJ arrived at the conclusion that these activities did not constitute a violation of Albania's sovereignty.

The Court also ruled on minesweeping, which was treated by the United Kingdom as 'a new and special application of the theory of intervention, by means of which the State intervening would secure possession of evidence in the territory of another State, in order to submit it to an international tribunal and thus facilitate its task'.¹⁰ This reasoning, called 'the policy of force', was invoked to justify the United Kingdom's conduct as an action taken on behalf of the international community.¹¹ However, the ICJ did not recognize this argumentation, pointing out that 'the alleged right of intervention as the manifestation of a policy of force, such as has, in the past, given rise to most serious abuses (...) cannot (...) find a place in international law'.¹² Moreover, in response to another argument presented by the United Kingdom – that the minesweeping operations

8 Much of the case law quoted in the doctrine of law under the notion of the threshold of the use of force refers not to the threshold in the meaning of breach of Art. 2 (4), but to the qualification of the use of force as an armed attack (e.g. ICJ's case law in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, *Oil Platforms (Islamic Republic of Iran v. United States of America)*). The present author is aware of this case law but it does not contribute to the problem discussed in this topic. For a comprehensive study on the differences between the use of force and armed attack vid. M. Kowalski, *Prawo do samoobrony jako środek zwalczania terroryzmu międzynarodowego* [Right to Self-Defence as a Means of Counter-terrorism], Warszawa 2013, pp. 76–83.

9 *Corfu Channel case, Judgment of April 9th, 1949*, ICJ Reports 1949, p. 4, 31. One should also note that Albania became a UN Member in 1955, so it was not a Member State when the dispute was adjudicated before the ICJ. However, Albania accepted 'in the present case all the obligations which a Member of the United Nations would have to assume in a similar case'; *Corfu Channel case, Judgment on Preliminary Objection*: ICJ Reports 1948, p. 17.

10 *Ibidem*, p. 34.

11 C. Gray, *A Policy of Force in: The ICJ and the Evolution of International Law* ed: K. Bannelier, T. Christakis, S. Heathcote, Abingdon 2012, p. 4.

12 *Corfu Channel case*, p. 35.

were a method of self-protection or self-help – the ICJ noted that 'Between independent States, respect for territorial sovereignty is an essential foundation of international relations'.¹³ However, despite that, the ICJ did not refer to Art. 2 (4) of the UN Charter at all.

Although some commentators claim that the ICJ's analysis indicates that the Court considered minesweeping as being below the threshold of the use of force¹⁴, it is important to bear in mind that the ICJ was asked to adjudicate on whether the sovereignty of Albania had been violated, and it did not have to refer to the possible breach of Art. 2 (4) of the Charter.¹⁵ Nevertheless, it is true that the Court's language was very vague. T. Ruys quotes the passage from the very last paragraph of the judgment, that the Court 'does not consider that the action of the British Navy was a demonstration of force for the purpose of exercising political pressure on Albania', pointing out that the phrase 'demonstration of force for the purpose of exercising political pressure' can be subjected to different interpretations. Thus, one may deduce that, for instance, the minesweeping in fact fell within the scope of Art. 2 (4) since the prohibition of the use of force is not limited only to 'exercising political pressure'¹⁶. On the other hand, C. Gray points that by using such careful language and avoiding direct reference to the prohibition of the use of force, the ICJ may have tried to 'avoid controversy about its power to determine the existence of an act of aggression and/or about the possible consequences of such a determination.'¹⁷ However, in case of the Corfu Channel dispute, it was the United Nations Security Council (UN SC) which recommended that the United Kingdom and Albania have recourse to the ICJ in order to obtain a judicial resolution of the dispute.¹⁸

One should also mention the judgement in *Land and Maritime Boundary between Cameroon and Nigeria*,¹⁹ when the ICJ was asked by Cameroon to decide whether Nigeria had, by invading and occupying its territory, violated 'the principle of non-use of force set out in Article 2, paragraph 4, of the United Nations Charter and the principle of non-intervention repeatedly upheld by the Court'.²⁰ Nigeria responded to these allega-

13 Ibidem, p. 35.

14 A. Shibata, *The Court's decision in silentium on the sources of international law* in: K. Bannelier, T. Christakis, S. Heathcote (eds.), op. cit., § 13.5.

15 T. Ruys, *The Meaning...*, p. 166.

16 Ibidem.

17 C. Gray, *The ICJ and the Use of Force* in: *The Development of International Law by the International Court of Justice*, eds. C. J. Tams, J. Sloan, Oxford 2013, p. 4, available at: <http://dx.doi.org/10.2139/ssrn.2311217> [access: 20 January 2018].

18 Ibidem, p. 5.

19 C. Gray mentions this case, all along with *Certain Activities Carried Out by Nicaragua in the Border Area*, as examples of when 'The Court avoided a decision on responsibility for unlawful use of force arising out of a boundary dispute' (Ibidem, ft 8).

20 *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, Judgment, ICJ Reports 2002, p. 303, § 310.

tions by claiming that it deployed force to respond to Cameroon's campaign of systematic encroachment on Nigerian territory and that it acted in self-defence.²¹ However, the Court did not address the problem of violation of the prohibition of the use of force by either of the parties to the conflict, but only observed that both Cameroon and Nigeria were under an obligation to withdraw their administrative and military and police forces from the territories that fell under the sovereignty of the other State expeditiously and without condition.²²

Similarly, the ICJ avoided any conclusive statements as to the use of force in *Certain Activities Carried Out by Nicaragua in the Border Area*. Costa Rica asked the Court to find that Nicaragua breached the prohibition of the use of force, by, *inter alia*, incursion into and occupation of Costa Rican territory. The Court observed that '[t]he fact that Nicaragua considered that its activities were taking place on its own territory does not exclude the possibility of characterizing them as an unlawful use of force. This raises the issue of their compatibility with both the United Nations Charter and the Charter of the Organization of American States. However, in the circumstances, given that the unlawful character of these activities has already been established, the Court need not dwell any further on this submission',²³ in the meantime asserting that Nicaragua had violated the territorial sovereignty of Costa Rica by excavating channels and establishing a military presence on Costa Rican territory. Thus once again, even though the ICJ was asked to decide on the prohibition of the use of force, it avoided mentioning it.

Summing up, the ICJ avoided any complex statements not only on the threshold of the use of force, but also on qualifying certain activities as a breach of the use of force, despite explicit claims in this regard made by parties to these disputes. However, one needs to observe that in place of the prohibition of the use of force, the ICJ mentioned other principles of international law, including the sovereignty and territorial integrity of the States concerned.

States' Practice Towards a Threshold of the Use of Force

Rescuing Nationals Abroad

The doctrine of international law uses the phrase 'intervention to rescue nationals abroad' to name a foreign intervention of a State aimed at rescuing its nationals who find themselves in danger while staying in a third State. According to some authors, such inter-

²¹ *Ibidem*, § 311.

²² *Ibidem*, § 314–315.

²³ *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)*, Judgment, ICJ Reports 2015, p. 665, § 97.

ventions are justifiable and legal under international law since they do not violate the 'territorial integrity or political independence' of the State where the intervention takes place, a State is obliged to assist its nationals if their life is endangered, or the attack on nationals abroad amounts to an attack on the State itself and thus triggers the right to self-defence.²⁴

Among the most widely discussed interventions whereby States have invoked right to protect their nationals by armed interventions, one may enumerate: the US attempt to rescue the hostages kept in the US Embassy in Teheran;²⁵ the Russian intervention in Georgia in 2008;²⁶ the UK (and French) intervention in Egypt in 1956;²⁷ the Israeli intervention in the Entebbe airport;²⁸ the US intervention in Panama;²⁹ the Belgian intervention in Congo in 1964;³⁰ the US intervention in Grenada in 1983;³¹ as well as the Russian intervention in Ukraine in 2014.³² However, it should be kept in mind that in none of these cases did the intervening State claim that the operation was justified because it did not reach the threshold of the use of force. Indeed, the intervening States were aware that their actions involved armed force and sought solid legal justifications thereof. What's more, none of the States mentioned above invoked the customary norm allowing a state to forcibly rescue nationals abroad, but rather argued that the

24 D. W. Bowett, *The Use of Force in the Protection of Nationals*, The Grotius Society. Transactions for the Year 1957, pp. 111, 111–113; T. D. Gill, P. A. L. Ducheine, *Rescue of Nationals in: The Handbook of the International Law of Military Operations*, ed. T. D. Gill, D. Fleck, Oxford 2010, p. 218; J. Kranz, *Kilka uwag na tle aneksji Krymu przez Rosję* [A few remarks on the annexation of Crimea by Russia], in: "Państwo i Prawo", 2014, no. 8, pp. 23, 33; R. Amer, *The United Nations' Reactions to Foreign Military Intervention – A Comparative Case Study Analysis*, Umeå Working Papers in Peace and Conflict Studies 2007, vol. 2, p. 7; R. P. Chatham, *Defense of Nationals Abroad: The Legitimacy of Russia's Invasion of Georgia*, in: "Florida Journal of International Law", 2011, vol. 23, pp. 75, 88–89.

25 *Letter Dated 25 April 1980 from the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council*, S/13908.

26 *Letter dated 11 August 2008 from the Permanent Representative of the Russian Federation to the United Nations addressed to the President of the Security Council*, S/2008/545.

27 *Middle East (Situation)*. *The Secretary of State for Foreign Affairs*, HC Deb 31 October 1956 vol. 558, c 1565–1566.

28 UN Security Council Official Records, 31st year: 1939th meeting, 9 July 1976, S/PV.1939, § 98, 104, 115, 119.

29 *Letter Dated 20 December 1989 from the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council*, S/21035.

30 *Letter Dated 24 November 1964 from the Permanent Representative of Belgium Addressed to the President of the Security Council/ Letter Dated 21 November 1964 Addressed to Count de Kerchove de Denterghem, Ambassador of Belgium at Leopoldville/ Statement by Mr. P.H. Spaak, Minister of Foreign Affairs of Belgium, on 24 November 1964*, S/6063, pp. 1–2, 5.

31 *Ambassador Kirkpatrick's Statement*, UN Security Council, Oct. 27, 1983, Department of State Bulletin, vol. 83, no. 2061, December 1983, p. 75.

32 UN Security Council Provisional Records, 69th year: 7124th meeting, 1 March 2014, S/PV.7124, p. 5.

rescue operations were legal under the right to self-defence; or because the organs of the State where the intervention took place consented to it (no matter how dubious such consent was, to mention only the US intervention in Panama³³ or Russian intervention in Ukraine³⁴); or that the intervention was authorized by a regional organization. However, it is important to note that all of the above mentioned interventions were ultimately condemned by the international community.

In attempting to justify the legality of the operations carried out, Belgium and the UK set out the criteria for a lawful intervention to rescue nationals abroad. Thus, Belgium assumed that such interventions are legal if the life of nationals is endangered; peaceful negotiations are ineffective; the situation is continuing to deteriorate; and the purpose of the intervention is only to assist the nationals of the intervening State.³⁵ On the other hand, the UK government claimed that an intervention to rescue nationals abroad is allowed under customary law if there is an imminent threat to the nationals; the State where the nationals are located cannot or is not willing to provide them with the sufficient protection; and that the operation is limited in its goals.³⁶ To sum up, both the UK and Belgium argued that their operations were legal because they were necessary and proportional to the ends meant to be achieved, not because they did not reach the threshold of the use of force. Moreover, the Belgium intervention in Congo and the Israeli intervention in Uganda are considered to be model operations of their kind,³⁷ not however because they did not involve the use of force, but because of their effectiveness as well as the limited measures and goals.

In addition to the above, one needs to also take note of more recent cases of operations to rescue nationals abroad which were neither widely discussed nor explicitly condemned. Here one may mention the operations carried in Albania in 1997 and in

33 A. Tancredi, *The Russian annexation of the Crimea: questions relating to the use of force*, in: "Questions of International Law", Zoom out 2014, vol. I, p. 5, 16; L. Henkin, *The Invasion of Panama Under International Law: A Gross Violation*, Columbia Journal of Transnational 1991, vol. 29, pp. 293, 299; *Fighting in Panama: The State Dept.; Excerpts From Statement by Baker on U.S. Policy*, New York Times, 21 December 1989, available at: <http://www.nytimes.com/1989/12/21/world/fighting-in-panama-the-state-dept-excerpts-from-statement-by-baker-on-us-policy.html>, [access: 20 January 2018].

34 S/PV.7124, p. 2; J. A. Green, *Editorial Comment: The annexation of Crimea: Russia, Passportisation and the Protection of Nationals Revisited*, Journal on the Use of Force 2015, vol. 1 no. 1 p. 3, 6; O. Corten, *The Russian intervention in the Ukrainian crisis was jus contra bellum 'confirmed rather than weakened'*, in: Journal on the Use of Force and International Law 2015, vol. 2 no. 1, pp. 17, 19.

35 S/6063, p. 1.

36 *Middle East (Situation)*.

37 J. H. H. Weiler, *Armed Intervention in a Dichotomized World: The Case of Grenada* in: *The Current Legal Regulation of the Use of Force*, ed. A. Cassese, Dordrecht/ Boston/ Lancaster 1986, p. 250; L. Henkin, *The Invasion...*, p. 297.

Lebanon in 2006 by a few Western States;³⁸ the US evacuations of nationals from Liberia in 1990 and Lebanon in 1976; or numerous French operations in African States³⁹. Probably the most recent case of this type of operation took place in Libya in 2011. After the breakout of the civil war in that state, over twenty States decided to evacuate their nationals from Libya. There was no single pattern on how to proceed with these evacuations. Some States, like the UK, sent in their Special Forces, which travelled around the Libya gathering British nationals and other foreigners stuck in Libya.⁴⁰ Many States acted similarly, sending their warships (like Germany), chartered ships (India), chartered planes (South Korea) or military planes (e.g. Canada). Others, like for example Bangladesh or Vietnam, requested the assistance of international organizations, neighbouring States, or foreign companies employing their nationals.⁴¹ None of these States faced any criticism of their evacuations, except for Netherlands' operation – which was termed by Libyan authorities as an unauthorized, and thus unlawful, incursion into the Libyan airspace.⁴² No international organs ever debated over these evacuations or objected to them. Moreover, none of the States, even those which sent in their militaries to evacuate nationals, attempted to offer a legal justification, nor were they were requested to do so by any State or international organization.

To sum up, the operations mentioned above vary considerably, both when it comes to the grounds for these operations and the reactions of the international community towards them. T. Ruys suggests abandoning the 'one size fits all' approach and making a case-by-case assessment of such operations.⁴³ However, it seems that one can go even a step further since one needs to clearly distinguish between forcible interventions which involve the use of considerable military measures (not to mention those where the label 'protection of nationals' is used only to cover up the real reasons behind the intervention, like in case of the Russian intervention in Ukraine), and evacuations which, even if carried out with military means such as armed forces, warships and military planes, cannot be considered as 'use of force'. Thus, one may contrast the British intervention in Egypt in 1956, which started with the ultimatum to the Egyptian government and bombardment of Egyptian airports,⁴⁴ with the evacuation of the British nationals

38 CNN, *Westerners flee Lebanon any way they can*, 19 July 2006, available at: <http://edition.cnn.com/2006/WORLD/meast/07/18/lebanon.evacuation.int/>, [access: 20 January 2018].

39 T. Ruys, *The 'Protection of Nationals' Doctrine Revisited*, in: "Journal of Conflict and Security Law", 2008, vol. 13 issue 2, pp. 233, 251–253.

40 F. Grimal, G. Melling, *The Protection of Nationals Abroad: Lawfulness or Toleration? A Commentary*, in: "Journal of Conflict & Security Law", 2012, vol. 16, pp. 541, 544.

41 BBC News, *Libya protests: Evacuation of foreigners continues*, 25 February 2011, available at: <http://www.bbc.com/news/world-middle-east-12552374>, [access:] 20 January 2018.

42 F. Grimal, G. Melling, op. cit., p. 545.

43 T. Ruys, *The Protection...*, op.cit., p. 271.

44 Q. Wright, *Intervention, 1956*, in: *American Journal of International Law* 1957, vol. 51, pp. 257, 257–258.

from Libya, carried out by special forces that lasted only a few days and was limited only to this end. The former case undoubtedly constitutes an example of the use of force, while the latter should not be considered as such.

Taking the above into account, one needs to observe that, first of all, not every presence of military forces on the territory of another State amounts to the use of force. Thus, if military forces are present in third State only to evacuate their States' nationals and not to 'intervene' into the internal affairs of that State, Art. 2 (4) of the UN Charter is not at stake at all. Secondly, in cases where the State on whose territory the evacuation takes place does not object to the evacuation, it cannot be treated as an illegal intervention. Thus such evacuations are certainly allowed in cases when the territorial State agreed to the operation.⁴⁵ At the same time, one can assume that such evacuations are also allowed in the case of a civil war, where there are no reliable authorities to consent to the operation.⁴⁶ Thirdly, the difference between a mere evacuation and a prohibited intervention can be very vague and change over the course of the operation. Finally, the evacuation should be genuinely aimed at providing assistance to foreigners in leaving the State, and any measures used during the evacuation should be limited only to this strict end, without causing material damage or fatalities. Thus, in general evacuations of nationals under the conditions as mentioned above cannot be considered in the category of the use of force.⁴⁷ This view is also confirmed by State practice, since not only has no State has claimed that any of the evacuations mentioned in the previous paragraph constituted a breach of the prohibition of the use of force, but also not even that they constituted a violation of the State's sovereignty or the principle of non-intervention.

Extraterritorial Abductions

One of the most frequently discussed cases of the unlawful presence of armed forces of one State on the territory of a third State in the context of the threshold of the use

45 The lawfulness of the presence of the military forces of one State in the territory of another State under the consent of that State is widely accepted, for example under the special agreements concluded between States. Only if the armed forces are present on the territory of the third State in contravention of that agreement or beyond the State's consent, may their presence amount to an aggression (W. A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, Oxford 2016, p. 316).

46 T. Ruys, *The 'Protection...'*, *op.cit.* p. 252.

47 A. Thomas and A. J. Thomas claim that such actions are not directed against territorial integrity or political independence of the territorial State since their aim is merely to rescue nationals (*The Dominican Republic Crisis 1965 – Legal Aspects*, Hammarskjöld Forum 1996, p. 16). However, the present author does not claim that the use of force is allowed when it is not directed against territorial integrity or political independence of the State, but simply that the evacuation operations constitute a different category of States' actions than the use of force.

of force are so-called 'extraterritorial abductions'.⁴⁸ Such 'abductions' take place when a State carries out an operation in order to capture and transfer a suspect from the territory of a third State, which is either unaware of this plan or unwilling to give its consent for the extradition. This problem may occur even if there is an extradition treaty between the States, which in principle should resolve all problems connected with extradition. However, in the first place, most international agreements concerning extradition allow States to block this procedure under certain circumstances;⁴⁹ as a result, the cooperation of States is not secured even when there is an appropriate extradition treaty. Secondly, States tend to use abductions anytime they consider it in their national interest to bring the alleged criminal in front of their domestic justice system. K. B. Weissman points out that extraterritorial abductions may be considered as a type of armed reprisal.⁵⁰ Even if such a statement may be considered an exaggeration, States may treat abductions as a kind of revenge against the criminals they wish to prosecute.

One of the most famous examples of an extraterritorial abduction was the Israeli Security Forces' operation in Argentina in 1960, which was aimed at capturing Adolf Eichmann, the Nazi war criminal, and transferring him to Israel. The Israeli intelligence agents who took part in the operation in Buenos Aires and captured Eichmann, interrogated him for a week on Argentinian territory and finally transported him to Israel.⁵¹ This operation was preceded by observation of Eichmann, which was launched when the Israeli Security Services obtained information that he might be an Argentinian resident.

The Israeli government was aware of the unlawfulness of its actions, since the Israeli ambassador to the United Nations called this operation as the violation of Argentinian law and an interference into the sovereignty of Argentina. Also, the Prime Minister of Israel addressed a letter to the President of Argentina, expressing 'our most sincere regret for any violation of the laws of the Argentine Republic'.⁵² However, at the same time the Israeli government justified the operation by its 'special significance' and its 'supreme moral force', owing to the nature of crimes committed by Eichmann. Likewise, the Israeli Supreme Court, assessing the potential violation of Eichmann's rights and lack of

48 M. Shaw names such cases as 'unlawful apprehension' (M. Shaw, op. cit., p. 680), while M. J. Glennon mentions 'state-sponsored kidnapping' and 'state-sponsored abductions' (M. J. Glennon, *State-Sponsored Abduction: A Comment on United States v. Alvarez Machain*, American Journal of International Law 1992, vol. 86, pp. 746–756).

49 K. B. Weissman, *Extraterritorial Abduction: The Endangerment of Future Peace*, in: "University of California David Law Review", 1993–1994, vol. 27, pp. 459, 467–468.

50 *Ibidem*, p. 471.

51 M. Bohlander, R. Boed, R. Wilson, *Defense in International Criminal Proceedings*, Leiden/Boston 2014, p. 58.

52 *Note Verbale of the Embassy of Israel in Buenos Aires to the Ministry for Foreign Affairs and Religion of the Argentine Republic, dated 3 June 1960*, par 8; *Letter from Prime Minister Ben-Gurion to President Frondizi dated 7 June 1960*, p. 5 in: *Letter Dated 21 June 1960 from the Permanent Representative of Israel to the President of the Security Council*, S/4342.

Israeli jurisdiction, stated that ‘the mode of bringing the accused into the area of the State has no relevance to his trial’.⁵³

Argentina protested that the ‘illicit and clandestine transfer of Eichmann from Argentine territory constitutes a flagrant violation of the Argentine State’s right of sovereignty’,⁵⁴ and demanded ‘the only appropriate reparation for this act’, that is ‘returning Eichmann within the current week and punishing the persons guilty of violating our national territory’.⁵⁵ Moreover, Argentina based its case upon Art. 33 of the UN Charter,⁵⁶ ‘because of the dangers which this act and any others like it may involve for the maintenance of international peace and security.’⁵⁷ However, despite Argentina’s assertion that the Eichmann abduction was ‘an act of force’,⁵⁸ it claimed that the threats to international peace and security came not from the use of forcible measures, but resulted from ‘the supreme importance of the principle impaired by that violation: the unqualified respect which States owe to each other and which precludes the exercise of jurisdictional acts in the territory of other States.’⁵⁹

During the debate within the UN Security Council, the majority of States, like the USSR, the USA or the UK, attempted to not make any decisive statements on the Israeli operation. The USSR representative claimed that Argentina had the obligation to arrest and extradite Eichmann but added that ‘the violation of State sovereignty is inadmissible under any circumstances and can in no way be justified.’⁶⁰ The US ambassador stated that the case under discussion could not be considered in isolation from the crimes committed by Eichmann; however, he also asserted that the USA understood the Argentinian concerns.⁶¹ Likewise, the UK representative claimed that ‘[t]he kidnapping by nationals of one State of a person or persons within the territory of another State is clearly an illegal act’, but at the same time asserted that the United Kingdom under-

53 *Attorney General v. Eichmann*, American Journal of International Law 1962, vol. 56, p. 41.

54 *Letter Dated 15 June 1960 from the Representative of Argentina Addressed to the President of the Security Council*, S/4336, p. 3.

55 *Letter dated 60/06/10 from the Permanent Representative of Argentina addressed to the President of the Security Council*, S/ 4334, § 8.

56 Article 33 of the UN Charter: 1. The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice. 2. The Security Council shall, when it deems necessary, call upon the parties to settle their dispute by such means.

57 UN Security Council Official Records, 15th year: 865th meeting, 22 June 1960, New York, S/PV.865, § 5.

58 *Ibidem*, § 43.

59 *Ibidem*, § 34.

60 UN Security Council Official Records, 15th year: 866th meeting, 22 June 1960, New York, S/PV.866, § 60, 68.

61 *Ibidem*, § 71, 76.

stood the reasons behind the Israeli conduct.⁶² Other States, like Ceylon, unequally called the Israeli operation 'a violation of the sovereign rights of Argentina'.⁶³ The only State that mentioned the use of force was Ecuador, whose representative claimed that 'The United Nations constitutes in fact a supreme effort to eliminate the use of force in any degree whatsoever in international relations' and referred to the UNSC Resolution 135.⁶⁴ However, the representative of Ecuador did not claim explicitly that the abduction amounted to a use of force.

Ultimately, the UN Security Council adopted Resolution 138 (1960) which did not mention the use of force, and only declared that 'acts such as the one under consideration, which affect the sovereignty of a Member State and therefore cause international friction, may, if repeated, endanger international peace and security' (par. 1).⁶⁵ The Resolution was supported by 13 States, with 2 abstentions (Poland and the USSR)⁶⁶.

It follows from the above quotations that the Eichmann abduction was not considered as a violation of the prohibition of the use of force, neither by Argentina itself nor by any other State. One may claim that the attitude adopted by States is in fact reflected in the position taken by the Permanent Court of International Justice in the *Lotus* judgement, when the Court stated that the 'first and foremost restriction imposed by international law upon a State is that – failing the existence of a permissive rule to the contrary – it may not exercise its power in any form in the territory of another State'.⁶⁷ Thus, it seems that extraterritorial abductions are considered rather as a violation of principle of non-intervention and as a breach of a State's sovereignty.⁶⁸ Even if T. Ruys correctly suggests that Argentina's attitude was the result of its awareness that claiming the use of force in

62 Ibidem, § 88–89.

63 UN Security Council Official Records, 15th year: 868th meeting, 22 June 1960, New York, S/PV.868, § 12.

64 UN Security Council Official Records, 15th year: 867th meeting, 22 June 1960, New York, S/PV.867, § 51–52.

65 UN Security Council Resolution 138 (1960) of 23 June 1960, S/RES/138.

66 S/PV.868, § 52.

67 *Case of the SS Lotus*, ICJ Series A No 10, p. 18. The question of illegal abductions is in fact the question within the domain of international criminal law, as connected with the problem of jurisdiction and extradition (for example: *International Criminal Law. Second Edition*, eds. I. Bantekas, S. Nash, London/Sydney/Portland, OR 2003, pp. 218–225; T. Henquet, *Accountability for Arrests: The Relationship between the ICTY and NATO's NAC and SFOR in: International Criminal Law Developments in the Case Law of the ICTY*, eds. G. Boas, W. A. Schabas, Leiden/Boston 2003, pp. 113–155).

68 Likewise, M. Shaw points out that 'unlawful apprehension of a suspect by state agents acting in the territory of another state (...) constitute[s] a breach of international law and the norm of non-intervention involving state responsibility' (M. Shaw, op. cit., p. 680). J. Paust mentions also the violation of territorial integrity (J. Paust et al., *International Criminal Law: Cases and Materials*, Durham 1996, pp. 435–437) and L. Henkin points out the possible violation of human rights of a person arrested, by the way of abduction (L. Henkin, *Correspondence*, American Journal of International Law 1993, vol. 87 issue 1, pp. 100, 101).

a case where a Nazi war criminal was involved would be politically difficult, and not necessarily because the Argentinian government really considered the Eichmann abduction as a merely unlawful coercion,⁶⁹ at the end even the States which were the most critical towards Israel's conduct did not mention the use of force.

Taking these considerations into account, it seems that extraterritorial abductions are not considered by States as a violation of the prohibition of the use of force, but rather as a violation of the principle of non-intervention. However, as M. H. Cardozo correctly points out, if all States decided they could abduct the alleged criminals they wished to bring to domestic justice from any State in the world, it would create incredible chaos.⁷⁰ He refers to the example of Andrija Artukovic, a war criminal prosecuted by the Serbian administration of justice who was hiding in California, and rightly asserts that it would have been unthinkable if a group of Serbs, 'inspired by hatred, revenge and patriotism had decided to literally kidnap Artukovic from US territory'⁷¹ as Israel had done in the Eichmann case. Uncontrolled and discretionary abductions on a large scale would certainly constitute a threat to international peace and security. Thus, it may happen that an extraterritorial abduction, conducted with the use of weapons and harming third persons or causing substantial material losses, will be qualified differently.

Falkland/Malvinas Islands

On 2 April 1982 at 5 a.m., the Argentinian armed forces launched the invasion of Falkland/Malvinas Islands, starting the 1982 Argentinian – British conflict over that territory. Only a few hours later, at 1:25 p.m., the UK Governor called for a ceasefire and surrendered. As the result of fights conducted on that day, one Argentinian soldier was killed, one British serviceman was seriously wounded, and there were some materials losses. Approximately 3.000 Argentinian troops and the British Royal Marines regiment took part in the fights. The Government in London, alarmed by these events, sent the British naval task forces which were ready to leave and continue the fight over the islands right away. The conflict terminated in June 1982⁷².

On the very day the invasion was launched, the United Kingdom submitted a draft resolution to the UN SC. The draft referred to a statement of the President of the Security Council calling on both the UK and Argentina to refrain from the threat or use of

69 T. Ruys, *The Meaning...*, *op.cit.* pp. 168–169.

70 Apart from the Eichmann case, one needs to observe that there were at least a few famous cases of extraterritorial abductions, to name only such cases as *United States v. Alvarez-Machain*, *Ker v. Illinois*, *Frisbie v. Collins* (*within the US jurisdiction*), *State v. Ebrahim* (*South Africa*), *R. v. Horseferry Road Magistrate's Court, ex parte Bennett* (*United Kingdom*) (T. Henquet, *op. cit.*, pp. 153–154). In none of these cases, breach of the prohibition of the use of force was mentioned.

71 M. H. Cardozo, *When Extradition Fails, is Abduction the Solution?*, in: "American Journal of International Law", 1961, vol. 55, pp. 127, 132.

72 K. Kubiak, *Falklandy – Port Stanley 1982*, Warszawa 2007, pp. 57–62.

force; determining that the 'armed forces of Argentina' launched an invasion and stating that 'there exists a breach of peace in the region of Falkland Islands'; the statement also demanded the cessation of hostilities, withdrawal of all Argentinian forces from the Falkland islands, and search for a diplomatic solution.⁷³ Thus, the United Kingdom labelled the Argentinian action an 'invasion' and not the use of force. However, later, before the UN SC, the UK called the Argentina's conduct as 'an armed attack' and 'armed invasion'.⁷⁴ Moreover, in House of Lords Prime Minister Margaret Thatcher called the events of 2 April an act of 'aggression',⁷⁵ and in a letter of 28 April to the President of the UN SC the UK called the Argentinian invasion a breach of Art. 2 (4).⁷⁶ It was only the draft resolution submitted by the UK that did not mention the use of force.

Other States which took part in the discussion within the UN SC had no doubts about the character of the Argentinian action: France, Ireland, Australia, Canada, New Zealand⁷⁷, Japan, the USA, Uganda, Togo, Zaire and Guyana⁷⁸ called the invasion not only a 'glaring' and 'clear' violation of Art. 2 (4), but also an act of aggression. Jordan and Spain condemned the Argentinian conduct more moderately and did not explicitly call it a breach of Art. 2 (4).⁷⁹ The representatives of Brazil, Bolivia, Peru, Panama, Paraguay, the USSR and Poland supported the Argentinian action,⁸⁰ claiming that the islands were never legally acquired by the UK, and thus Argentina could not be guilty of using force against its own territory.

It is hard to say why the United Kingdom avoided mentioning the use of force in its draft resolution, which it subsequently endorsed; all the more so since a few weeks later it had no doubts as to the character of the Argentinian actions. Moreover, the scholarly literature does not mention such reasons. The rationales behind such an attitude could be the fact that the UK was aware that it did not have strong legal title to the islands (the UK had occupied the islands since 1833, facing protests on the part of

⁷³ *United Kingdom of Great Britain and Northern Ireland: draft resolution*, S/14947. The resolution, almost without any amendment (S/14947/Rev.1), was adopted on 4 April, as the UN SC Resolution 502 (1982).

⁷⁴ UN Security Council Official Records, 37th year: 2350th meeting, 3 April 1982, S/PV.2350, §157, 160.

⁷⁵ *Text of Falkland Speech by Prime Minister Thatcher in House of Commons*, The New York Times 21 May 1982, available at: <http://www.nytimes.com/1982/05/21/world/text-of-falkland-speech-by-prime-minister-thatcher-in-house-of-commons.html?pagewanted=all> accessed 20 January 2018.

⁷⁶ *Letter dated 28 April 1982 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the President of the Security Council*, S/15007.

⁷⁷ UN Security Council Official Records, 37th year: 2349th meeting, 2 April 1982, S/PV.2349, § 7, 10–12, 22, 28, 33.

⁷⁸ S/PV.2350, § 66, 73, 215, 222–223, 248, 260.

⁷⁹ *Ibidem*, § 57, 203–207.

⁸⁰ *Ibidem*, § 47–55, 77–83, 85–92, 93–133, 148–153, 230–231, 265.

Argentina which continuously claimed sovereignty over them); the direct reason for the invasion, which was the defence of Argentinian salvage workers from South Georgia Island;⁸¹ or the opinions expressed by British politicians and journalists that the invasion was a 'humiliating affront' to the UK, which ended with the resignation of Lord Carrington, the British Foreign Secretary.⁸² The fact that the British government had little doubts as to the character of the Argentinian actions from the very beginning is supported by the fact that the Resolution 502 mentions the 'breach of peace', which can be considered as a euphemism for 'the use of force', since if the UN SC determines there has been a 'breach of peace', it does so because the use of armed force occurred.⁸³

Summing up, the fact that a State, even the one which was attacked, does not mention the use of force does not necessarily mean that it considers the actions taken against it as being below the threshold of the use of force. The determination of a breach of the prohibition of the use of force may be uncomfortable or undesired for political reasons, which may cause a State to refrain from making such firm allegations before the events evolve. Moreover, as the example of invasion of the Falkland/Malvinas Islands shows, a State may refrain from claiming a violation of Art. 2 (4) even if in fact it considers that the prohibition was breached.

Conclusions

The suggestions made in the legal doctrine that some measures involving a low level of the use of force are not covered by the prohibition of the use of force, since they are below certain 'threshold' of violence, are not confirmed by States' practice. This article has discussed two cases of actions mentioned in the scholarly literature as being below such a threshold, i.e. operations to rescue nationals, as well as extraterritorial abductions. The operations aimed at assisting nationals abroad may take the form of an armed intervention, but the use of armed forces may also be limited exclusively to evacuation, wherein no force is actually used. On the other hand, extraterritorial abductions are not considered in the category of the use of force, but rather as violations of the principle

81 J. F. Gravelle, *The Falkland (Malvinas) Islands: An International Law Analysis of the Dispute Between Argentina and Great Britain*, in: *Military Law Review* 1985, vol. 107, pp. 5, 14–15.

82 The New York Times, *Foreign Secretary Resigns in Britain in Falkland Crisis*, 6 April 1982, available at: <http://www.nytimes.com/1982/04/06/world/foreign-secretary-resigns-britain-falkland-crisis-text-carrington-letter-page-a6.html>, [access: 20 January 2018].

83 M. Wood compares the 'breach of peace' to the term 'aggression', claiming that it is more specific than 'threat to peace'; on the other hand, the difference between the 'breach of peace' and 'aggression' is that the latter term refers rather to more serious the breach of peace (M. Wood, *Peace, Breach of* in: *The Law of Armed Conflict and the Use of Force: The Max Planck Encyclopedia of Public International Law*, eds. F. Lachenmann, R. Wolfrum, Oxford 2017, p. 925).

of non-intervention. Finally, the example of Argentinian invasion over the Falkland/Malvinas Islands shows that the fact that an invaded State does not mention the breach of the prohibition of the use of force does not necessarily mean that it considers the action against it as being below the 'threshold'. At the same time, one needs to highlight the indispensable need to make a case-by-case analysis.

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SUMMARY

When 'the Use of Force' is Prohibited? – Article 2 (4) and the 'Threshold' of the Use of Force

This article advances the thesis that there is no threshold of the use of force. i.e. no level of the use of force which decides whether and which forcible actions undertaken by States are prohibited. The examples of actions discussed in the doctrine of law which supposedly would be 'below' such a threshold in fact either are regulated by other principles of international law, are not considered as regulated by *ius ad bellum*, or States deliberately resign from calling them a use of force for both legal and extra-legal reasons. Thus, the existence of such a threshold is not confirmed by States' practice. This thesis will be explored using three examples: the cases of the evacuation of nationals, the extra-territorial and the Falklands/Malvinas Islands invasion of 2 April 1982. The article starts with a brief discussion of the opinions expressed in the doctrine of international law on the threshold, as well as the applicable case law.

Keywords: extraterritorial abduction, evacuation of nationals, Falklands/Malvinas, threshold, use of force

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