Law, Force and Contingency. Notes on a Bold Monograph on Article 2(4) and the Problems of Finding a Proper Basis for International Legal Reasoning

By Pål Wrange*

Introduction
This relatively short but unusually well written doctoral thesis, “Prohibition of Force under the UN Charter. A Study of Article 2(4)”, concerns the subject of controversy par excellence in international law: the scope of Article 2(4) of the U.N. Charter. In order to come up with something new on this perpetuum mobile topic, one would imagine that a writer would have to concentrate on one limited aspect of the problem. The author of this book, Belatchew Asrat1, however, reviews the whole scope of the article, including its exceptions, and manages to come up with a reading which is forceful, interesting, partly original, highly controversial and yet not unreasonable.

In this article I will try to show how general problems of contingency and the lack of an objective foundation of international law appear also in the writing of a radical2 author such as Dr. Asrat. Concerning his concrete arguments I admire the skilful reasoning, but I disagree on almost every point. However, since my purpose is not to “correct” Dr. Asrat – which I believe to be impossible in a game with no given answers – my own counterarguments appear only in notes3 while the main text is devoted to a more theoretical analysis of the structure of Dr. Asrat’s restatement of the law of force. I will start by drawing up the general framework for the inquiry, then present Dr. Asrat’s main arguments4 and conclude with a critical analysis of them.

The problem of international law – the sovereign and the law
As Thomas Franck has shown, one of the factors influencing States’ compliance with international law is the internal quality of this law.5 If international law is to have a major influence on the decisions of high politics, it desperately needs to be coherent, consistent and plausible. If the one hand of law is raised to say “no”, the other cannot have its fingers crossed behind the back.

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However, in recent years a forceful criticism of international law has come along, claiming that international law as we would like to perceive it – a foreseeable, objective and normative task – is impossible. In fact, it is “singularly useless as a means for justifying or criticising international behaviour”. Current legal arguments show that it appears to be impossible to argue consistently, because in every legal system there is a fundamental contradiction – that between the autonomous and sovereign subject on the one hand and the necessity to abide by (someone else’s) laws on the other. Consequently, law is “based on contradictory premises”, a deficiency which is particularly evident, and detrimental, in international law, which lacks the supreme power of force which can stop an endless legal debate within a country.

The law of force – between anarchy and community

One could read the whole international order as pivoting round the prohibition of force. On the one hand, this restriction preserves peace, which serves States’ interests of self-preservation (in a wide sense). On the other hand, States have to be able to defend themselves against threats to their existence, and therefore, there must be room for exceptions. But, since one State’s contented act of self-preservation is another State’s threat, these interests have to be balanced. In a world of sovereign States, there can probably be no other political equilibrium than the status quo, and article 2(4) translates this into a legal point of balance. This is further emphasized by the fact that the only explicit exceptions to this prohibition are the right of self-defence and collective actions for the preservation and restoration of peace, coupled with the obligation for States not to recognize changes effected by means of aggression.

This peaceful status quo corresponds to what Hedley Bull calls the Grotian tradition, conceiving the international community as a number of States acting in co-existence, interacting but also competing, within a legal order. The other two traditions in Bull’s scheme – Hobbes’ anarchy and Kant’s universal community – would respond to, respectively, a freedom to resort to war for political purposes and communitarian action for the improvement of justice (e.g. human rights).

Dr. Asrat’s book

Dr. Asrat recognises this precarious balance but opts to restate it. The plan of the book is this: After an introductory chapter, Dr. Asrat describes the state of the law preceding Art. 2(4). Thereafter he considers the legal status of this provision – whether it is a part of customary law, whether it is a part of jus cogens – followed by an account of the article’s “operational frames” – the criteria of “international relations” and “any State”. He continues with two long chapters on the scope of the prohibited force and the protected values and concludes with the exceptions of self-defence and necessity.

The two main theses of his dissertation are: “Firstly, modalities of coercion other than armed or physical force and entities other than States proper, which can affect the protected values of States and cause a threat to or breach of international peace