



# The Use of Force in relation to Sovereignty Disputes over Land Territory

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British Institute of  
International and  
Comparative Law

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# Introduction

## THE SCOPE, ORIGIN AND AIMS OF THE REPORT

1. There are disputes over territory across the globe. At the cut-off date of the present research, at least 120 States (or ‘quasi-States’)<sup>1</sup> are involved in a territorial dispute of some kind, involving approximately 100 separate territories, continental or island.<sup>2</sup> This report considers the rules regulating the threat or use of force between States under current international law and examines how these rules operate specifically in the context of sovereignty disputes over land territory (referred to in the report as ‘territorial disputes’).
2. Territorial disputes raise several legal questions. Normally, a State with sovereignty over a given territory has the power to act upon such territory and to exclude other States from acting upon it; this power encompasses full and exclusive governmental authority over the territory.<sup>3</sup> But

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<sup>1</sup> The term ‘quasi-State’ is used here as referring to States that have ‘*de facto* control over their own territory but are unlikely to be recognized by the international community’, see G Lapidus, ‘Ethnicity and State Building: Accommodating Ethnic Difference in Post-Soviet Eurasia’, in MR Beissinger and C Young (eds) *Beyond State Crisis? Postcolonial Africa and Post-Soviet Eurasia in Comparative Perspective* (Woodrow Wilson Center Press 2002) 341; see also P Kolstø, ‘The Sustainability and Future of Unrecognized Quasi-States’ (2006) 43(6) *Journal of Peace Research* 723, noting that the term quasi-States ‘ought to be reserved for unrecognized, *de facto* states’.

<sup>2</sup> According to the Central Intelligence Agency (CIA) World Factbook, <<https://www.cia.gov/library/publications/the-world-factbook/fields/2070.html>>; E Brunet-Jailly, *Border Disputes: A Global Encyclopedia* Volumes I-III (ABC-CLIO 2015) lists 80 current territorial and border disputes; Prescott and Schofield list 20 territorial disputes over islands and other offshore geographic features all of which are of long duration and only two that have been settled at the cut-off date of the present research (that of Pedra Branca between Malaysia and Singapore and that of New Moore between Bangladesh and India), see V Prescott and C Schofield, *The Maritime Political Boundaries of the World* (Martinus Nijhoff 2015) 265–84; A (non-peer reviewed) interactive map of territorial disputes can be found on Metrocosm, ‘Mapping Every Disputed Territory in the World (2015)’ <<http://metrocosm.com/mapping-every-disputed-territory-in-the-world/>>; Other territorial dispute datasets include the Issue Correlates of War (ICOW) project, led by P Hensel <<http://www.paulhensel.org/icow.html>> and a dataset created by KA Schultz, ‘Mapping Interstate Territorial Conflict: A New Dataset and Applications’ 61(7) (2017) *Journal of Conflict Resolution* 1565-1590.

<sup>3</sup> S T Bernárdez, ‘Territorial Sovereignty’ *Encyclopedia of Public International Law* Vol 10 (North Holland 1987) 487–94; Besson defines sovereignty as the ‘supreme authority within a territory’ pursuant to which States can enjoy ‘the plenitude of internal jurisdiction, their immunity from other States’ own jurisdiction and their freedom from other States’ intervention on their territory (Art. 2 (4) and (7) UN Charter), but also their equal rank to other sovereign States’, S Besson, ‘Sovereignty’ in *Max Planck Encyclopedia of Public International Law* (online edition) paras 1–2.



what if the territory in question is also claimed by another State? Competing claims of sovereignty might arise both in respect of continental territories and in respect of islands. Moreover, competing claims of sovereignty might give rise to associated claims in the maritime areas which appertain to the territory in question, thereby triggering the need for maritime boundary delimitation. A report published by the British Institute of International and Comparative Law (BIICL) in 2016 considered the obligations of States in respect of maritime areas subject to overlapping entitlements and the types of State activities that are legally permissible or impermissible in those areas under the UN Convention on the Law of the Sea (UNCLOS), specifically under Articles 74(3) and 83(3).<sup>4</sup> The 2016 report analysed the content and application of the duty enshrined in those articles to refrain from activities that could ‘jeopardise or hamper’ the reaching of a final agreement on delimitation. In doing so, it drew a distinction between ‘undelimited areas’ (areas of overlapping or potentially overlapping maritime entitlements where no final delimitation is in place) and ‘disputed areas’ (ie maritime areas that are actively disputed by the coastal States concerned).<sup>5</sup>

3. The present report builds on existing knowledge whilst focusing on the law applicable to disputed areas on land (that is to say terrestrial areas that are actively disputed by two or more States) and the legal obligations of States acting in those areas. Specifically, the present report critically reviews recent disputes involving sovereignty claims over land territory in order to assess how certain actions of a military nature, rising or not to the level of a threat or use of force, are regulated under public international law as it currently stands. It is not the purpose of this report to identify all sovereignty disputes that have existed in the past or have been brought to light in recent years, or to address the merits and offer particular solutions to any of those disputes. Rather, this report examines a sample of relevant cases in international law with a view to better understanding: a) the basic rules that every State is expected to follow in disputed land territories, informed both by the law and practice in this area; and b) the consequences deriving from a breach of these rules. As such, the report does not consider the laws governing the modes of territorial acquisition, the evidentiary weight to be accorded to certain authoritative grounds on which sovereign title

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<sup>4</sup> BIICL, ‘Report on the Obligations of States under Articles 74(3) and 83(3) of UNCLOS in respect of Undelimited Maritime Areas’ (30 June 2016).

<sup>5</sup> *Ibid*, paras 4, 100–7.

may be asserted or the rules relative to the determination of land boundaries between States.<sup>6</sup>

*'Territorial Disputes'*

4. A territorial dispute can be defined as a legal dispute between two or more States over the acquisition or attribution of territory (continental or island)<sup>7</sup>, or to the creation, location and effect of territorial boundaries.<sup>8</sup> Many authors have sought to distinguish between 'boundary disputes',<sup>9</sup> 'delimitation disputes',<sup>10</sup> and 'territorial disputes'.<sup>11</sup> For the purposes of the present report, it is not important to distinguish between these categories. Territorial disputes are disputes over land territory, as the name suggests (*terra* in Latin means earth or land). Boundary disputes and boundary delimitation disputes (perhaps the most common types of disputes over territory) revolve around the question of the location, construction or implementation of the land boundary between the parties. In practice, both boundary disputes and territorial disputes, necessarily involve, at their core, a dispute about sovereignty over land territory.<sup>12</sup> The existence of a full and final territorial boundary marks the extent of a State's sovereignty (ie those geographical areas over which sovereignty may be exercised). As Shaw explains, it also marks the territorial exclusivity of that State (ie the competence to act upon its own territory to the exclusion of any other State).<sup>13</sup> The International Court of Justice (ICJ) in many of its

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<sup>6</sup> For a discussion, see MG Kohen and M Hebie, 'Territory, Acquisition' in *Max Planck Encyclopedia of Public International Law* (online edition); see also V Prescott and G Triggs, *International Frontiers and Boundaries* (Martinus Nijhoff 2008).

<sup>7</sup> On the legal definition of 'islands' and their classifications, see SD Murphy, 'International Law Relating to Islands' (2016) 386 *Recueil Des Cours* 13, Ch III.

<sup>8</sup> HA Thirlway, 'Territorial Disputes and Their Resolution in the Recent Jurisprudence of the International Court of Justice' (2018) 31(1) *Leiden Journal of International Law* 117.

<sup>9</sup> Often used interchangeably in the literature as 'border' or 'frontier' disputes even though these terms are not synonymous from a geographer's point of view, see V Prescott and G Triggs, *International Frontiers and Boundaries* (Martinus Nijhoff 2008) 11–2.

<sup>10</sup> Strictly speaking 'boundary delimitation' refers to the selection of a boundary site and its definition. Another close concept, 'boundary demarcation', refers to the construction of a boundary line on the ground, see Prescott and Triggs (ibid) 12, 147–8.

<sup>11</sup> SP Sharma, *Territorial Acquisition, Disputes and International Law* (Springer 1997) 21–8; AO Cukwurah, *The Settlement of Boundary Disputes in International Law* (Manchester University Press 1967) 6; N Hill, *Claims to Territory in International Law and Relations* (Oxford University Press 1945) 25.

<sup>12</sup> V Prescott and G Triggs, *International Frontiers and Boundaries* (Martinus Nijhoff 2008) 148.

<sup>13</sup> M Shaw, *Title to Territory in Africa* (Clarendon Press 1986) 1–11.

judgments recognised the intrinsic correlation between the two issues. In the *Temple of Preah Vihear* case the ICJ stated:

[T]he subject of the dispute submitted to the Court is confined to a difference of view about sovereignty over the region of the Temple of Preah Vihear. To decide this question of territorial sovereignty, the Court must have regard to the frontier line between the two States in this sector.<sup>14</sup>

5. In *Libya/Chad*, the parties disagreed about the exact characterisation of their dispute. Libya argued that the case concerned the attribution of territory ('territorial dispute'). In Chad's view, the dispute concerned the location of the boundary ('boundary dispute') which, according to Chad, existed as a matter of treaty law.<sup>15</sup> The ICJ found that if an existing boundary was in place, this furnished the answer to both questions: 'it would be a response at one and the same time to the Libyan request to determine the limits of the respective territories of the Parties and to the request of Chad to determine the course of the frontier'.<sup>16</sup> Similarly, in *Burkina Faso/Mali*, the Special Chamber of the ICJ took the view that the distinction (between 'border' and 'territorial' disputes) was not so important: '[t]he effect of any delimitation, no matter how small the disputed area crossed by the line, is an apportionment of the areas of land lying on either side of the line'.<sup>17</sup>
6. 'Apportionment' or 'acquisition' of territory is used in this report as meaning the establishment of a title of sovereignty by a State over a given piece of land territory which may be continental or island.<sup>18</sup> This definition is often extended to include non-State entities, such as national liberation movements. It follows, therefore, that a territorial dispute exists when two entities and/or States raise conflicting claims to the same tract of territory (eg the Israeli-Palestinian conflict).<sup>19</sup>

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<sup>14</sup> *Temple of Preah Vihear (Cambodia v Thailand)* [1962] ICJ Rep 6, 12; See also *Case concerning Sovereignty over Certain Frontier Land (Belgium/The Netherlands)* (Judgment) [1959] ICJ Rep 209, 212 (the Court determined the sovereignty over the territorial plots in dispute having regard to the frontier between the two States in the area).

<sup>15</sup> *Territorial Dispute (Libya/Chad)* (Judgment) [1994] ICJ Rep 6 para 20.

<sup>16</sup> *Territorial Dispute (Libya/Chad)* (Judgment) [1994] ICJ Rep 6 para 38.

<sup>17</sup> *Frontier Dispute (Burkina Faso/Republic of Mali)* (Judgment) [1986] ICJ Rep 554 para 17.

<sup>18</sup> RY Jennings, *The Acquisition of Territory in International Law* (Melland Schill Lectures 1962); see also, G Distefano, 'The Conceptualization (Construction) of Territorial Title in the Light of the International Court of Justice Case Law (2006) 19(4) Leiden Journal of International Law 1041-75.

<sup>19</sup> U Resnick, 'Territorial Disputes: Perspectives on the Israeli-Palestinian Conflict' (2008) 2(3) *Israel Journal of Foreign Affairs* 87.

7. Two basic categories of territorial disputes are considered for the purpose of this research:

**When two or more States disagree over the exact location of their land boundary line.**

This category includes disputes over the definition of the course of a land boundary (ie delimitation) or over the way it is positioned on the ground (ie demarcation). States may agree on the existence of a boundary but they cannot precisely agree on the demarcation of their land border on the surface of the earth, due to inconsistencies or inaccuracies in the maps used at the time of the delimitation or competing material interests in border resources. At some point, the exact course of the land boundary has to be defined for a territory to be attributed.<sup>20</sup> The boundary marks the limit of each side's sovereignty and associated sovereign rights.

**When two or more States are making competing sovereignty claims over continental territories or islands.**

Not all territorial disputes are boundary problems relating to the delimitation or demarcation of a boundary line.<sup>21</sup> This second category includes multidimensional disputes relating to much wider territorial issues than just the location of a boundary. A territorial dispute may be relevant to the exploitation of natural resources (eg Tanzania and Congo over oil and gas resources in Lake Tanganyika);<sup>22</sup> may involve competing claims of sovereignty over an island and sovereign rights in its surrounding ocean space (eg South China Sea features); or may even be based on one State questioning the very existence of another State (eg Guatemala and Belize).<sup>23</sup> Various recognisably distinct legal issues

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<sup>20</sup> *Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear (Cambodia v Thailand)* (Oral Pleadings of Cambodia) (31 May 2011) CR 2011/15 para 6.

<sup>21</sup> N Hill, *Claims to Territory in International Law and Relations* (Oxford University Press 1945) 25.

<sup>22</sup> E Kabendera, 'DR Congo ready for talks on Lake Tanganyika oil and gas prospects' (The East African, 28 August 2016) <<http://www.theeastafrican.co.ke/news/Congo-ready-for-talks-on-Lake-Tanganyika-oil-and-gas-prospects/2558-3360790-lydhcx/index.html>>; An agreement for the joint exploitation of the lake was signed between the two parties in October 2016, F Ng'wanakilala 'Tanzania, Congo sign deal for joint petroleum exploration in Lake Tanganyika' (Reuters, 4 October 2016) <<https://af.reuters.com/article/africaTech/idAFL5N1CA40M>>.

<sup>23</sup> Belize became independent in 1981, however, Guatemala did not recognise it until 1992. Guatemala still claims half of the territory of Belize, see JB Allcock (ed) *Border and Territorial Disputes* (3rd edn, Gale 1992) see also H Fox, 'Belize Dispute' in *Max Planck Encyclopedia of Public International Law* (online edition); P Huth, *Standing Your Ground: Territorial Disputes and International Conflict* (University of Michigan 1996) 19–32.

relating to maritime areas might be involved in a single sovereignty dispute over a land territory, for example:

- Two adjacent coastal States disagree over the exact location of their land border. Each State advances its entitlement to the maritime zones generated by the same land territory. Whichever way the land border is determined, the two States have a maritime boundary that needs to be delimited between them and/or between them and third States.
- Two or more States raise competing titles of sovereignty over the same island(s). Depending on how the question of sovereignty over the island(s) is resolved, a maritime boundary, taking the island into account, may need to be delimited between the concerned States.
- State A claims part of State B's territory and the territory in question lies next to the sea. Whichever way sovereignty is ultimately determined could have implications for associated maritime rights/entitlements and also for maritime delimitation vis-à-vis the two States and/or vis-a-vis third States.

#### *Existence of a Territorial Dispute*

8. As a matter of principle, a territorial dispute exists when two or more parties advance competing titles of sovereignty over a given land territory.<sup>24</sup> The dispute is considered settled by virtue of an agreement between the parties concerned, an authoritative decision of a third party,<sup>25</sup> or the disappearance of the object of a sovereignty claim.<sup>26</sup>

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<sup>24</sup> A legal dispute is 'a disagreement on a point of law or fact, a conflict of legal views or interests between persons', see *Mavrommatis Palestine Concessions (Greece v Great Britain)* (Judgment No 2) [1924] PCIJ Series A 11; *Northern Cameroons (Cameroon v United Kingdom)* (Judgment) [1963] ICJ Reports 27; *East Timor (Portugal v Australia)* (Judgment) [1995] ICJ Rep 99 para 22; 'In order to establish the existence of a dispute, it must be shown that the claim of one party is positively opposed by the other', *South West Africa (Liberia v South Africa)* (Preliminary Objections) [1962] ICJ Rep 328.

<sup>25</sup> L Caffisch, 'Cent Ans De Règlement Pacifique Des Différends Interétatiques' (2001) 288 *Recueil des Cours* 268.

<sup>26</sup> For example, the South Talpatty/New Moore Island, which was the subject of a protracted dispute between Bangladesh and India, is now fully submerged as a result of rising sea levels; the dispute is considered settled, <<https://www.theguardian.com/world/cif-green/2010/mar/24/india-bangladesh-sea-levels>>; it has been reported that at least eight low-lying islands in the Pacific Ocean have disappeared under rising seas, see A Klein, 'Eight low-lying Pacific Islands Swallowed Whole by Rising Seas' (*Newscientist*, 7 September 2018) <[www.newscientist.com/article/2146594-eight-low-lying-pacific-islands-swallowed-whole-by-rising-seas/](http://www.newscientist.com/article/2146594-eight-low-lying-pacific-islands-swallowed-whole-by-rising-seas/)>.

9. In reality, the existence of a territorial dispute may not always be self-evident and at times it may itself be disputed (ie ‘a dispute whether there is a dispute’).<sup>27</sup> This is the case when one of the disputing parties categorically refuses to accept the existence of a territorial dispute. As an indicative example, with respect to the Aegean Sea, Turkey’s position is that amongst its outstanding Aegean disputes with Greece is ‘the attribution of territorial sovereignty’ over certain geographical features in the region.<sup>28</sup> Greece takes the view that the sovereignty status of the Aegean islands, islets and rocks is ‘crystal clear’ and that Turkey’s contentions are ‘unfounded’.<sup>29</sup>
10. In the context of international adjudication, the existence of an international dispute can play a decisive role in establishing an international court’s or tribunal’s jurisdiction.<sup>30</sup> If a dispute does not exist at the date of institution of legal proceedings, the adjudicating body has no jurisdiction to deal with the case.<sup>31</sup> It is not infrequent that one of the disputing parties denies the existence of an international dispute in order to contest the jurisdiction of an international court or tribunal. In *Greece v Turkey*, for example, Turkey raised the point that there was ‘no dispute between the parties’ and, thus, the ICJ could not for that reason be seised of jurisdiction in this case.<sup>32</sup> Similarly, in *Georgia v Russia*, Russia contended that ‘there was no dispute’ between the parties.<sup>33</sup> In *Nicaragua v Colombia*, Colombia contended that prior to the filing of Nicaragua’s application there was no dispute between the parties with respect to the claims advanced in the application.<sup>34</sup> More recently, in

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<sup>27</sup> HA Thirlway, *The International Court of Justice* (Oxford University Press 2016) 53.

<sup>28</sup> Republic of Turkey, Ministry of Foreign Affairs, ‘The Outstanding Aegean Issues’ <[www.mfa.gov.tr/maritime-issues—the-aegean-sea—the-outstanding-aegean-issues.en.mfa](http://www.mfa.gov.tr/maritime-issues—the-aegean-sea—the-outstanding-aegean-issues.en.mfa)>.

<sup>29</sup> Hellenic Republic, Ministry of Foreign Affairs, ‘Turkish claims’ <[www.mfa.gr/en/issues-of-greek-turkish-relations/relevant-documents/turkish-claims.html](http://www.mfa.gr/en/issues-of-greek-turkish-relations/relevant-documents/turkish-claims.html)>.

<sup>30</sup> HA Thirlway, *The International Court of Justice* (Oxford University Press 2016) 53; CH Schreuer, ‘What is a Legal Dispute?’ in, I Buffard and others (eds) *International Law between Universalism and Fragmentation, Festschrift in Honour of Gerhard Hafner* (BRILL 2008) 959.

<sup>31</sup> ‘[T]he existence of a dispute is the primary condition for the Court to exercise its judicial function’, *Nuclear Tests (Australia v France, New Zealand v France)* (Judgment) [1974] ICJ Rep 253, para 55.

<sup>32</sup> The Court rejected this argument pointing out that ‘there are certain sovereign rights being claimed by both Greece and Turkey, one against the other and it is manifest that legal rights lie at the root of the dispute that divides the two States’, *Aegean Sea Continental Shelf (Greece v Turkey)* (Merits) (Judgment) [1978] ICJ Rep 3 paras 30-31.

<sup>33</sup> *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation)* (Preliminary Objections) (Judgment) [2011] ICJ Rep 70 para 23.

<sup>34</sup> *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v Colombia)* (Preliminary Objections) (Judgment) [2016] ICJ Rep 26 para 49.

*Marshall Islands v United Kingdom*, the ICJ declined to exercise its judicial function on the basis of the absence of a dispute between the parties.<sup>35</sup> As noted by Judge Tomka in his separate opinion on this case, this was ‘the first time in almost a century of adjudication of inter-State disputes in the Peace Palace, the “World” Court...has dismissed a case on the ground that no dispute existed between the Applicant and the Respondent...’.<sup>36</sup> Accordingly, the identification of an international dispute may have important implications on the settlement of the dispute itself. The same applies in determining the existence of a territorial dispute.

11. In the *Interpretation of Peace Treaties* case, the ICJ found that ‘whether there exists an international dispute is a matter for objective determination’ and that ‘the mere denial of the existence of a dispute does not prove its non-existence’.<sup>37</sup> The question of particular interest here concerns the use of objective criteria for determining the existence of an international dispute between two parties. Based on the well-established

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<sup>35</sup> *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v United Kingdom)* (Preliminary Objections) (Judgment) [2016] ICJ Rep 833; for a commentary, see L Palestini, ‘Forget About Mavrommatis and Judicial Economy: The Alleged Absence of a Dispute in the Cases Concerning the Obligations to Negotiate the Cessation of the Nuclear Arms Race and Nuclear Disarmament’ (2017) 8(3) *Journal of International Dispute Settlement* 557; MA Becker, ‘The Dispute that Wasn’t there: Judgments in the Nuclear Disarmament Cases at the International Court of Justice’ (2017) 6(1) *Cambridge International Law Journal* 4; D P Stewart, ‘International Decisions’ (2017) 111(2) *American Journal of International Law* 444; B I Bonafé, ‘Establishing the Existence of a Dispute Before the International Court of Justice: Drawbacks and Implications’ (2017) 47 *Questions of International Law* 3.

<sup>36</sup> *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v United Kingdom)* (Preliminary Objections) (Sep Op Judge Tomka) [2016] ICJ Rep 833 para 1.

<sup>37</sup> *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase* (Advisory Opinion) [1950] ICJ Rep 65, 74; see also *East Timor (Portugal v Australia)* (Judgment) [1995] ICJ Rep 100 para 22; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United Kingdom)* (Preliminary Objections) (Judgment) [1998] ICJ Rep 17 para 22; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United States of America)* (Preliminary Objections) (Judgment) [1998] ICJ Rep 122 para 21; *Certain Property (Liechtenstein v Germany)* (Preliminary Objections) (Judgment) [2005] ICJ Rep 18 para 24; *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v Colombia)* (Preliminary Objections) (Judgment) [2016] ICJ Rep 26 para 50; see also *South West Africa (Ethiopia v South Africa, Liberia v South Africa)* (Preliminary Objections) (Judgment) [1962] ICJ Rep 328 para 87: ‘It is not sufficient for one party to a contentious case to assert that a dispute exists with the other party. A mere assertion is not sufficient to prove the existence of a dispute any more than a mere denial of the existence of the dispute proves its non-existence’.

jurisprudence of the ICJ and its predecessor, the Permanent Court of International Justice (PCIJ), the existence of a dispute is to be objectively determined by taking into account the following non-exhaustive criteria.

12. **First**, a dispute is said to exist when it is demonstrated that the two sides ‘hold clearly opposite views’ with respect to the issue in question.<sup>38</sup> Specifically, a dispute exists when it is shown that ‘the claim of one party is positively opposed by the other’<sup>39</sup> and that ‘the respondent was aware, or could not have been unaware, that its views were “positively opposed” by the applicant’.<sup>40</sup> Accordingly, in order for a simple ‘disagreement’ or a mere ‘discussion of divergent legal opinions’<sup>41</sup> to rise to the level of an international dispute, a certain amount of communication evidencing the parties’ opposing claims and denials (‘complaints of fact and law’ formulated by one side and denied by the other) is required.<sup>42</sup> This is what the PCIJ had in mind in the *Mavrommatis Palestine Concessions* case when it referred to a ‘conflict of legal views or of interests’ between two parties.<sup>43</sup>
13. Seen from this angle, it is clear that when what is being complained of is an unlawful act that has been committed, for example State B’s armed forces enter a disputed territory administered by State A on the ground that State B holds a valid title of sovereignty over that territory and State A indicates its opposition or indignation by raising a competing title of sovereignty, there is no doubt about there being the existence of a territorial dispute. For a territorial dispute to emerge, it does not matter whether the sovereignty claims of State A or State B are justified on their merits. What matters for this purpose is that there is a dispute over, in effect, the sovereignty status of the territory in question.

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<sup>38</sup> *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase* (Advisory Opinion) [1950] ICJ Rep 74.

<sup>39</sup> *South West Africa (Ethiopia v South Africa, Liberia v South Africa) (Preliminary Objections)* (Judgment) [1962] ICJ Rep 328.

<sup>40</sup> *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v United Kingdom)* (Preliminary Objections) (Judgment) [2016] ICJ Rep 833 para 41, citing *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v Colombia)* (Preliminary Objections) (Judgment) [2016] ICJ Rep 26 para 73; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation)* (Preliminary Objections) (Judgment) [2011] ICJ Rep 70 paras 61, 87, 104.

<sup>41</sup> *Certain Property (Liechtenstein v Germany)* (Preliminary Objections) (Judgment) [2005] ICJ Rep 6 para 23.

<sup>42</sup> *Ibid.*

<sup>43</sup> *Mavrommatis Palestine Concessions (Greece v Great Britain)* (Judgment No 2) [1924] PCIJ Series A 11.



14. **Second**, the determination of the existence of a dispute between the parties ‘requires an examination of the facts’.<sup>44</sup> The matter is ‘one of substance, not of form’.<sup>45</sup> For this reason, the ICJ pays close attention to public statements or other diplomatic exchanges between the parties, any exchanges made in multilateral settings as well as to the ‘overall conduct’ of the parties with respect to the issue at hand – prior to the institution of proceedings.<sup>46</sup> Whilst prior negotiations and exchanges of views between the parties are not an absolute pre-condition, negotiations consultations and other means of diplomatic settlement may be an important step to bring a claim of one party to the attention of the other and, thus, offer strong evidence of the existence of the dispute.<sup>47</sup>
15. In the context of a territorial dispute, bilateral diplomatic exchanges between the parties demonstrating their conflicting sovereignty claims are usually the strongest evidence of the existence of a territorial dispute. Parties would, for example, advance arguments and counter-arguments invoking evidence of long and effective control and jurisdiction in the area(s) under dispute; the validity of an international treaty as evidence of the existence and location of a boundary; and prescriptions regarding the prohibition of force for the settlement of disputes over territory.<sup>48</sup> Frequently, legal claims would be underpinned by other relevant considerations, for example, references to history (arguments based on historic facts evidencing effective possession, or facts showing

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<sup>44</sup> *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation)* (Preliminary Objections) (Judgment) [2011] ICJ Rep 70 para 30.

<sup>45</sup> *Ibid.*

<sup>46</sup> *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v United Kingdom)* (Preliminary Objections) (Judgment) [2016] ICJ Rep 833 citing among others, *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation)* (Preliminary Objections) (Judgment) [2011] ICJ Rep 70 paras 51, 53, 63; *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* (Judgment) [2012] ICJ Rep 3 paras 50–55; The conduct of the parties assumes particular significance when there have been no bilateral diplomatic exchanges, see *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v Colombia)* (Preliminary Objections) (Judgment) [2016] ICJ Rep 26 paras 71 and 73; In the *South China Sea*, the Arbitral Tribunal concluded that it was legally entitled ‘to examine the conduct of the parties – or, indeed, the fact of silence in a situation in which a response would be expected – and draw appropriate consequences’, *South China Sea Arbitration, (Philippines v China)* (Award on Jurisdiction and Admissibility of 29 October 2015) para 149 <<https://www.pcacases.com/web/sendAttach/1506>>.

<sup>47</sup> *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation)* (Preliminary Objections) (Judgment) [2011] ICJ Rep 70 para 30.

<sup>48</sup> SP Sharma, *Territorial Acquisition, Disputes and International Law* (Springer 1997) 23.

that possession was lost by the use of force); geography (arguments regarding the exact location of the mouth of a river in relation to the demarcation of the boundary) and; economics (arguments premised on the need for adequate access to natural resources).

16. In *Nicaragua v Colombia* (2012), for example, the ICJ found that the critical point for the emergence of the territorial dispute was the exchange of diplomatic notes of protest in 1969 between Colombia and Nicaragua as a ‘manifestation of a difference of views between the Parties regarding sovereignty over certain maritime features’.<sup>49</sup> Moreover, in *Nicaragua v Colombia* (2016), the ICJ relied *inter alia* on unilateral declarations and statements of the senior officials of the two States to demonstrate that the parties held opposing views on the question of their respective rights in the maritime areas covered by the 2012 Judgment. It concluded that:

Although Nicaragua did not send its formal diplomatic Note to Colombia in protest at the latter’s alleged violations of its maritime rights at sea until 13 September 2014...in the specific circumstances of the present case, the evidence clearly indicates that, at the time when the Application was filed, Colombia was aware that its enactment of Decree 1946 and its conduct in the maritime areas declared by the 2012 Judgment to belong to Nicaragua were positively opposed by Nicaragua...Colombia could not have misunderstood the position of Nicaragua over such differences.<sup>50</sup>

17. In *Costa Rica v Nicaragua*, Judge Robinson remarked that the first item of evidence of the existence of a territorial dispute between the parties was ‘as soon as Costa Rica’s government noticed the Nicaraguan military presence [in the disputed area] and made its objections thereto known’.<sup>51</sup> As another example, in *Pedra Branca/Pulau Batu Puteh*, it was accepted by the ICJ that, with regard to the disputed islands ‘the dispute crystallized in 1980, when Singapore and Malaysia *formally opposed* each other’s claims to the islands’.<sup>52</sup>

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<sup>49</sup> *Territorial and Maritime Dispute (Nicaragua v Colombia)* (Judgment) [2012] ICJ Rep 624 para 71.

<sup>50</sup> *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v Colombia)* (Preliminary Objections) (Judgment) [2016] ICJ Rep 26 para 73.

<sup>51</sup> *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v Nicaragua)*; *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v Costa Rica)* (Sep Op Judge Robinson) para 62.

<sup>52</sup> *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)* (Judgment) [2008] ICJ Rep 12 para 33. Emphasis added.

18. Therefore, even when State A denies the existence of a territorial dispute with State B, and at the same time both States lodge explicit official statements on the validity of their respective sovereignty claims and such claims are positively opposed to each other (ie competing claims of sovereignty over the same territory often accompanied by formal protests hinting at each other's internationally wrongful acts), it would be difficult to deny that a proper territorial dispute does in fact exist.<sup>53</sup> The critical point for the crystallisation of the dispute is 'when one side asserts its sovereignty and the other side protests for the first time, or when the first protest by one State is rejected by the other'.<sup>54</sup>
19. On the other hand, statements of a 'general nature',<sup>55</sup> 'general criticism[s]',<sup>56</sup> or statements 'formulated in hortatory terms'<sup>57</sup> without advancing a specific allegation, (ie without specifying whose State's conduct gave rise to an alleged breach of international law) do not in themselves give rise to the existence of a dispute. As the ICJ has explained, in order for a statement to give rise to an international dispute, it must refer to the subject-matter of a claim 'with sufficient clarity to enable the State against which [that] claim is made to identify that there is, or may be, a dispute with regard to that subject-matter'.<sup>58</sup> This was exactly the case in *Marshall Islands v United Kingdom*, where the ICJ concluded that because the Marshall Islands failed to articulate a specific allegation against the UK, the latter could not have been aware of Marshall Islands' claim, hence, no dispute existed at the time of instituting proceedings.<sup>59</sup> In the words of the ICJ:

In all the circumstances, on the basis of those statements — whether taken individually or together — it cannot be said that the United Kingdom was aware, or could not have been unaware, that the

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<sup>53</sup> Judge Oda in *Portugal v Australia* underscored the requirement that the parties assert the legal rights forming the issue brought before the Court to qualify the case as an international dispute, *East Timor (Portugal v Australia)* (Merts) (Sep Op Judge Oda) [1995] ICJ Rep 90, 108

<sup>54</sup> MG Kohen and M Hebie, 'Territory Acquisition' in R Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (Oxford University Press 2012) 897.

<sup>55</sup> *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v United Kingdom)* (Preliminary Objections) (Judgment) [2016] ICJ Rep 833 para 28.

<sup>56</sup> *Marshall Islands v United Kingdom* (ibid) para 50.

<sup>57</sup> *Marshall Islands v United Kingdom* (ibid) para 49.

<sup>58</sup> *Marshall Islands v United Kingdom* (ibid) para 49, citing *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation)* (Preliminary Objections) (Judgment) [2011] ICJ Rep 70 para 30.

<sup>59</sup> *Marshall Islands v United Kingdom* (ibid) paras 57–8.

Marshall Islands was making an allegation that the United Kingdom was in breach of its obligations.<sup>60</sup>

20. **Third**, a simple failure to respond to a claim does not exclude the existence of a dispute.<sup>61</sup> Indeed, the ICJ has held on a number of occasions that ‘the existence of a dispute may be inferred from the failure of a State to respond to a claim in circumstances where a response is called for’.<sup>62</sup> Returning to the hypothetical above,<sup>63</sup> in the event that State B stops short of responding to State A’s claims and protestations, this will not indicate the absence of the dispute, rather the opposite.<sup>64</sup> What is decisive for the existence of a dispute in this instance is not necessarily the explicit denial or rejection of the claimant’s position, but the respondent’s failure to accede to its demands (ie that State B’s armed forces be removed from the disputed area).<sup>65</sup> Indeed, as Judge Donoghue said in *Marshall Islands v United Kingdom*, ‘even in the absence of an explicit statement of the Respondent’s opposition to the claim, there would have been a basis for the Court to infer opposition from an unaltered course of conduct’.<sup>66</sup>
21. A **fourth** and final requirement is that the dispute must exist at the time of the submission of the application instituting proceedings.<sup>67</sup> In other

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<sup>60</sup> *Marshall Islands v United Kingdom* (ibid) para 52.

<sup>61</sup> ‘Silence of a party in the face of legal arguments and claims for reparation by the other party cannot be taken as expressing agreement and hence the absence of a dispute’, CH Schreuer, ‘What is a Legal Dispute?’ in, I Buffard and others (eds) *International Law between Universalism and Fragmentation, Festschrift in Honour of Gerhard Hafner* (BRILL 2008) 959, 964–5.

<sup>62</sup> *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation)* (Preliminary Objections) (Judgment) [2011] ICJ Rep 70 para 30, citing *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria)* (Preliminary Objections) (Judgment) [1998] ICJ Rep 315 para 89.

<sup>63</sup> See para 13 of this report.

<sup>64</sup> According to Quintana, the dispute is ‘born at the very moment’ at which the claim is denied or where a claim is ignored, see JJ Quintana, *Litigation at the International Court of Justice: Practice and Procedure* (BRILL 2015) 58.

<sup>65</sup> CH Schreuer, ‘What is a Legal Dispute?’ in, I Buffard and others (eds) *International Law between Universalism and Fragmentation, Festschrift in Honour of Gerhard Hafner* (BRILL 2008) 959, 965.

<sup>66</sup> *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v United Kingdom)* (Preliminary Objections) (Judgment) (Declaration of Judge Donoghue) [2016] ICJ Rep 833, 1036.

<sup>67</sup> *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v United Kingdom)* (Preliminary Objections) (Judgment) [2016] ICJ Rep 833, citing *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v Colombia)* (Preliminary Objections) (Judgment) [2016] ICJ Rep 26 para 72 para 52; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation)* (Preliminary Objections) (Judgment) [2011] ICJ Rep 70 para 30.

words, for the ICJ to be able to exercise its judicial function, the dispute must have crystallised *before* the filing of the application. According to the ICJ, '[n]either the application nor the parties' subsequent conduct and statements made during the judicial proceedings can enable the Court to find that the condition of the existence of a dispute has been fulfilled in the same proceedings.'<sup>68</sup>

### *'Militarised' Territorial Disputes*

22. This research focuses on territorial disputes and adds a 'militarised' dimension to the territorial dispute definition provided above. A 'militarised' dispute is defined here as being where one State conveys either a possible threat to use force by means of verbal statements, or actually resorts to the use of force. The targeted State may respond with a counter-threat or counter-force, or limit itself to diplomatic protests and other non-coercive countermeasures.<sup>69</sup>
23. The key objective of this report is, first and foremost, to identify situations involving competing claims to territory and, also, to examine when those claims escalate to the threat or actual use of armed force in contravention of international law. To that end, the report looks primarily at cases where disputing parties have used *military means* in pursuit of their sovereignty claims over the land territory in question. Such 'military means' may involve the direct threat or use of force as a means to gain control and/or occupy and/or recover the disputed territory from the other claiming State.<sup>70</sup> They may also involve activities that would not necessarily rise to the level of Article 2(4) of the UN Charter with a view to advancing claims of sovereignty over the areas in question.
24. A large number of territorial disputes worldwide have been peacefully settled, either by agreement between the parties or by a court, without recourse to military means. Such cases fall outside the scope of this report and have not been analysed in depth, except to the extent that

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<sup>68</sup> *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v United Kingdom (Preliminary Objections) (Judgment) [2016] ICJ Rep 833 para 43.*

<sup>69</sup> Adapted definition of a 'militarised dispute' as suggested by Huth, see P Huth, *Standing Your Ground: Territorial Disputes and International Conflict* (University of Michigan 1998) 20; see also PF Diehl, 'Territorial Disputes' in R Kurtz, *Encyclopedia of Violence, Peace, and Conflict* (Elsevier 2008) 2078–87; KE Wiegand, 'Militarized Territorial Disputes: States' Attempts to Transfer Reputation for Resolve' (2011) 48(1) *Journal of Peace Research* 101–13.

<sup>70</sup> It should be noted that the report also covers armed actions taken by police forces, particularly in relation to law enforcement activities in a disputed territory.

they provide evidence of State practice and *opinio juris* as to the obligations of States involved in territorial disputes.

### *'Unilateral Acts'*

25. The phrase 'unilateral acts', also used in the research, refers to actions or activities which are attributed to a State.<sup>71</sup> Hence, armed actions or activities carried out by private individuals (eg civilians), or entities acting in a purely private capacity, are excluded from consideration, except for cases where such individuals or entities have been authorised or allowed to exercise elements of public authority.<sup>72</sup> The term 'unilateral' is understood as an action or activity carried out by a State in the disputed territory which is not covered by an agreement or a consensus between the parties to the dispute.<sup>73</sup>

### *Cases not covered in this research*

26. **Non-territorial military incidents** Cases involving military activities carried out by States for purposes other than advancing sovereignty claims over a territory (eg US-led military operations against the so-called Islamic State group in Syria and Iraq and the example of NATO's armed intervention in 1999 against Yugoslavia to end atrocities against the Albanian population in Kosovo) fall beyond the scope of this research and, thus, are excluded from consideration.
27. **Secessionist disputes** Whether violent or peaceful, these often entail issues over the acquisition of territory. This may be the case 'when part(s) of the territory and population of an existing state try to break

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<sup>71</sup> On the attribution of conduct to a State, see *United Nations, Materials on the Responsibility of States for Internationally Wrongful Acts* (22 Oct 2013) 27–96 <[http://legal.un.org/legislative-series/documents/Book25/Book25\\_part1\\_ch2.pdf](http://legal.un.org/legislative-series/documents/Book25/Book25_part1_ch2.pdf)>.

<sup>72</sup> On whether an act is attributable to a State, see JR Crawford, 'State Responsibility' in *Max Planck Encyclopedia of Public International Law* (online edition).

<sup>73</sup> On whether certain declarations of government officials can bind their States in their international relations, see International Law Commission, 'Guiding Principles Applicable to Unilateral Declarations of States Capable of Creating Legal Obligations' (58th Session, 2006) UN Doc A/61/10, para 176; see also *Armed Activities on the Territory of the Congo (Congo v Uganda)* (Judgment) [2005] ICJ Rep 168; *Customs Regime between Germany and Austria (Protocol of March 19th, 1931)* (Advisory Opinion) [1931] PCIJ Rep Series A/B No 41, p 47; *Legal Status of the Eastern Greenland* (Judgment) [1933] PCIJ Rep Series A/B No 53, p 71; *Nuclear Tests (Australia v France)* (Judgment) [1974] ICJ Rep 253, paras 43–46; *Nuclear Tests (New Zealand v France)* (Judgment) [1974] ICJ Rep 457, paras 46–49; *Frontier Dispute (Burkina Faso/Republic of Mali)* (Judgment) [1986] ICJ Rep 554 paras 39–40; R Jennings and A Watts (eds), *Oppenheim's International Law*, Vol I (9th edn, Longman 1992) 1190–2.

away from this state to create a new state (example of Kosovo) or several new states (example of the dissolution of Yugoslavia) or to unite with an existing one (example of Crimea).<sup>74</sup> Secessionist disputes raise different questions which require distinct legal treatment. In the interest of keeping the research within sizeable bounds, such conflicts are examined only insofar as they may shed light on the nature and extent of States' international obligations in disputed territories.

28. **Maritime Boundary Disputes** The research acknowledges that there are a number of cases worldwide in which competing sovereignty claims over land territory (continental or island) are mixed with issues of competing sovereign rights/entitlements and questions of maritime delimitation.<sup>75</sup> However, because maritime issues raise distinct legal issues that require different treatment, these and other law of the sea matters are only covered to the extent that they are relevant to the legal obligations of States in disputed territories. While sovereignty over the territorial sea (as its name denotes) is closely linked to sovereignty over land territory (eg *Grisbådarna* case),<sup>76</sup> territorial sea issues are regulated by UNCLOS.<sup>77</sup> The latter is not, however, applicable to sovereignty disputes over land territory.<sup>78</sup> Therefore, in collating judicial precedent

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<sup>74</sup> See T Christakis and A Constantinides, 'Territorial Disputes in the Context of Secessionist Conflicts', in M Kohen and M Hebie (eds) *Research Handbook on Territorial Disputes in International Law* (Edward Elgar Publishing, forthcoming October 2018) 4 (on file with the authors).

<sup>75</sup> V Prescott and C Schofield, *The Maritime Political Boundaries of the World* (Martinus Nijhoff 2015) 265–84.

<sup>76</sup> *The Grisbådarna Case (Norway v Sweden)* (Award) (1909) XI RIAA155, '[M]aritime territory is an essential appurtenance of land territory...'

<sup>77</sup> United Nations Convention on the Law of the Sea (signed 10 December 1982, entered into force 16 November 1994) 1833 United Nations Treaty Series 397 [hereafter, UNCLOS].

<sup>78</sup> According to Dupont, 'UNCLOS is not concerned with sovereignty over land territory and islands, and assumes for the purposes of delimitation that the issue of sovereignty is resolved...UNCLOS has no provisions governing the rights and obligations of competing claimants in disputed territory and the maritime zones to which this disputed territory creates an entitlement...', Paper delivered by PE Dupont at a conference held at King's College London on 'Stress Testing the Law of the Sea: Dispute Resolution, Disasters and New Challenges' (30 September–1 October 2016) (on file with PE Dupont); Boyle suggests that mixed disputes are in principle subject to compulsory binding settlement under UNCLOS, even where they also involve disputed sovereignty over islands, see A Boyle, 'Dispute Settlement and the Law of the Sea Convention: Problems of Fragmentation and Jurisdiction' (1997) 46(1) *International and Comparative Law Quarterly* 37, 44–5; in the *Marine Protected Area Arbitration (Mauritius v United Kingdom)* (Award of 18 March 2015) a tribunal constituted under Annex VII of UNCLOS found that the Parties' dispute with respect to Mauritius' First Submission concerned 'sovereignty over the Chagos Archipelago' – this did not concern the interpretation or application of UNCLOS – consequently, it was without jurisdiction to address Mauritius' First Submission, see paras 213–221.

and State practice, the present research has limited itself to sovereignty disputes over land territory (continental or island) without attempting to analyse in depth associated issues relative to the existence of competing sovereign rights in the maritime areas in question and the consequent need for maritime boundary delimitation. Such issues are governed by UNCLOS and have been discussed in BIICL's 2016 report<sup>79</sup> and BIICL's edited collection *Law of the Sea: UNCLOS as a Living Treaty*.<sup>80</sup>

### Methodology

29. The methodological approach applied to the conduct of this research was 'inductive'. The research identified relevant judicial and State practice; discussed in the secondary literature; referred to in the proceedings of formal dispute settlement (awards, judgments, advisory opinions, pleadings, annexes, memorials submitted to the courts, etc); and, particularly for contemporary practice, as reported in news media and other secondary sources.<sup>81</sup> This report does not claim to provide a comprehensive list of all potentially relevant judicial and State practice.
30. In compiling a list of relevant cases that may shed light on the legal obligations of States in relation to disputed territories, the research considered four main categories of materials:
  - **The case law of the ICJ and other international or arbitral tribunals.** The jurisprudence on territorial disputes is no exception. The jurisprudence of the ICJ on territorial matters has been critical in the identification and development of the legal obligations incumbent upon States acting in disputed territories.<sup>82</sup> Dispute resolution proceedings are also important in that they provide access to the stated, formal, positions of both sides and, thus, ensure an important measure of impartiality and conclusiveness when analysing each case.

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<sup>79</sup> BIICL, 'Report on the Obligations of States under Articles 74(3) and 83(3) of UNCLOS in respect of Undelimited Maritime Areas' (30 June 2016).

<sup>80</sup> J Barrett and R Barnes, *Law of the Sea: UNCLOS as a Living Treaty* (BIICL 2016).

<sup>81</sup> Useful Databases: International Court of Justice - List of All Cases, <http://www.icj-cij.org/en/list-of-all-cases>; Geneva Academy of International Humanitarian Law and Human Rights: Rule of Law in Armed Conflicts (RULAC) Database, <http://www.rulac.org/>; The Hague Justice Portal, <http://www.haguejusticeportal.net/?id=2>.

<sup>82</sup> HA Thirlway, 'Territorial Disputes and Their Resolution in the Recent Jurisprudence of the International Court of Justice' (2018) 31(1) *Leiden Journal of International Law* 117, 120.



- **The practice of States and other intergovernmental actors.** Important in the identification and interpretation of these legal obligations are the resolutions of the UN General Assembly and the Security Council passed in reaction to specific incidents involving the practice of States. While these are political bodies, it is broadly accepted that the widespread condemnation of a certain action or activity by the majority of States is strong evidence of its illegality.<sup>83</sup> These resolutions, especially when adopted by a consensus, are generally considered as statements of customary international law or authoritative interpretations of the UN Charter and other rules and principles of international law. However, failure to condemn the conduct of a given State or States is not necessarily evidence that the actions in questions are lawful, given the various political motives influencing States in these situations.<sup>84</sup>
- **The work of other international law bodies.** The ongoing work of the International Law Commission (ILC) has played an important role on the codification and progressive development of international law and its drafts are often referred to in the judgments of the ICJ.<sup>85</sup>
- **Scholarly writings.** Article 38 of the ICJ Statute lists as a 'subsidiary means for the determination of rules of law' the 'teachings of the most highly qualified publicists of the various

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<sup>83</sup> C Gray, *International Law and the Use of Force* (4th edn Oxford University Press) 22, 'it may be argued that condemnation of a particular use of force by the Security Council or General Assembly is conclusive or at least persuasive as to illegality.'

<sup>84</sup> I Brownlie, 'Some Problems in the Evaluation of the Practice of States as an Element of Custom', in G Arangio-Ruiz (ed) *Studi di diritto internazionale in onore di Gaetano Arangio Ruiz* Vol I (Editoriale Scientifica 2004) 313–15: 'A minority of academics have asserted that, in the case of the Security Council, a failure to condemn a particular action by a State constitutes approval of the action concerned. This approach is much too simplistic. Everything depends upon the context and the precise content of the records of the debates. Failure to express disapproval of the conduct of a State may have a number of procedural and political causes unconnected with the issue of legality', reported in Third Report on identification of customary international law by Michael Wood, Special Rapporteur <<http://legal.un.org/docs/?symbol=A/CN.4/682>>.

<sup>85</sup> In his speech to the UN General Assembly in 1997, President Schwebel remarked, in referring to the decision of the ICJ in the Gabcíkovo-Nagymaros Project, that the judgment is notable 'because of the breadth and depth of the importance given in it to the work product of the International Law Commission...This is not wholly exceptional; it rather illustrates the fact that just as the judgments and opinions of the Court have influenced the work of the International Law Commission, so the work of the Commission may influence that of the Court', see MN Shaw (ed) *International Law* (5th edn, Cambridge University Press 2008) 113; see also PS Rao, 'International Law Commission (ILC)' in Max Planck *Encyclopedia of Public International Law* (online edition) para 1.

nations'.<sup>86</sup> Scholarly writings on the use of force, territorial disputes, and more broadly, are a practical and useful tool for identifying what the applicable law actually is in a particular context, highlighting any particular defects or ambiguities that exist within the law itself, and pointing to future directions.<sup>87</sup>

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<sup>86</sup> United Nations, 'Statute of the International Court of Justice' (18 April 1946).

<sup>87</sup> MN Shaw (ed) *International Law* (5th edn, Cambridge University Press 2008) 106.



# *The Obligation Not to Resort to Force or Threat of Force*

## INTRODUCTION

31. This section examines international law and practice on the prohibition of the threat or use of force in the context of territorial disputes. The discussion identifies the most important primary rules regulating the threat or use of force between States under international law (*jus ad bellum*) and examines how these rules operate specifically in the context of territorial disputes.
32. This section seeks to ascertain which State actions in disputed territories are prohibited under the prohibition on the threat or use of force. To do so, it is necessary to, first, establish the applicability of *jus ad bellum* rules to territorial disputes and the implications of qualifying certain acts as a use of force within the meaning of Article 2(4) of the UN Charter. Second, it examines the meaning and constituent aspects of the prohibition on the use of force in Article 2(4), looking successively at the prohibition of force; the prohibition on the threat of force; territorial integrity; and the distinction between law enforcement activities and an unlawful threat or use of force. Third, this section discusses the notion of the existing *status quo* on the ground as the appropriate baseline to test the application of Article 2(4) in the context of a disputed territory. Finally, this section considers the main exception to this rule in the context of territorial disputes, namely, the right of self-defence laid down in Article 51 of the UN Charter.

## APPLICABILITY OF *JUS AD BELLUM* RULES TO TERRITORIAL DISPUTES

33. The principle that force must not be used or threatened to be used to settle international disputes, including territorial disputes, is well established under both treaty law and customary international law. It is embodied in Article 2(4) of the UN Charter, which provides 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<sup>88</sup>

The obligation in Article 2(4) supplements Article 2(3) of the UN Charter, which requires States to settle their disputes through peaceful means, which will be discussed further below.

34. These obligations were reaffirmed in the 1970 UN General Assembly Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations (hereafter, Declaration on Friendly Relations). The Declaration provides that States have a 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*'.<sup>89</sup>
35. The ICJ has observed that the adoption by the majority of States of the Declaration on Friendly Relations 'affords an indication of their *opinio juris* as to customary international law on the question'.<sup>90</sup> The illegality of the use of force for the acquisition of territory or the settlement of territorial disputes is also underscored by various treaties entered into by States after World War II. Many of these treaties set out that, in accordance with the principles of the UN Charter, armed conflicts and invasions cannot be used as a means to acquire territory.<sup>91</sup>

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<sup>88</sup> Charter of the United Nations (signed 26 June 1945; entered into force 1 August 1965) (1945) 1 United Nations Treaty Series XVI [hereafter, UN Charter].

<sup>89</sup> Principle 1, Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, UN General Assembly Resolution (UNGA) 2625 (XXV) (24 October 1970) reprinted in (1970) 9 International Legal Materials 1292. Emphasis added.

<sup>90</sup> *Military and Paramilitary Activities in and against Nicaragua Case (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14 para 191.

<sup>91</sup> See, for example, 'Act of Chapultepec: Declaration on Reciprocal Assistance and American Solidarity by the Governments Represented at the Inter-American Conference on War and Peace' (signed 3 March 1945) (1945) 108(2) World Affairs 119, 120 providing that 'In any case, invasion by armed forces of one state into the territory of another, trespassing boundaries established by treaty by marked in accordance therewith, shall constitute an act of aggression'; Art 5, 'Pact of the Arab League' (Egypt, Iraq, Lebanon, Saudi Arabia, Syria, Transjordan, Yemen Arab Republic) (signed 22 March 1945; entered into force 10 May 1945) 70 United Nations Treaty Series 237, prohibits the use of force for settlement of disputes among members; Art 1, 'Inter-American Treaty of Reciprocal Assistance' (Rio Treaty) (signed 2 September 1947; entered into force 12 March 1948), provides that '...Parties formally condemn war and undertake in their international relations not to resort to the threat or the use of force in any manner inconsistent with the provisions of the Charter of the United Nations or of this Treaty; Art 9, Rio Treaty qualifies as an armed invasion the 'trespassing of boundaries demarcated in

36. In its jurisprudence, the ICJ has consistently held that the prohibition on the threat or use of force in Article 2(4) of the UN Charter represents customary international law and even *jus cogens*.<sup>92</sup> The same view was expressed by the ILC, during its work on the codification of the law of treaties: '[T]he law of the Charter concerning the prohibition of the use of force in itself constitutes a conspicuous example of a rule in international law having the character of *jus cogens*'.<sup>93</sup>
37. The rules of international law on the use of force do not distinguish between disputed territories and those not subject to dispute. The UN Charter makes no exception to the prohibition of the threat or use of force in respect of disputes over territory. The Eritrea-Ethiopia Claims Commission considered that recognising such an exception would significantly weaken the fundamental rule of international law prohibiting the

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accordance with a treaty, judicial decision, or arbitral award, or, *in the absence of frontiers thus demarcated, invasion affecting a region which is under the effective jurisdiction of another State*'; Art 7, Final Communiqué of the Afro-Asian Conference of Bandung (signed 24 April 1955) <<https://www.cvce.eu/s/3n>>; 'Five Principles of Peaceful Co-Existence' (Panchsheel Treaty) (India/China) (signed and entered into force 29 April 1954) – despite the ongoing border tensions between China and India at Doklam, the Chinese president has stated that the five principles of peaceful coexistence remain 'as relevant and important as ever in handling international relations', BBC Monitoring Asia Pacific (London 29 June 2014); see also Arts 19–21 Organization of American States (OAS), *Charter of the Organisation of American States* (signed 30 April 1948; entered into force 13 December 1951) (amended by the Protocol of Buenos Aires of 27 February 1967; by the Protocol of Cartagena de Indias of 16 November 1985 and by the Protocol of Managua of 6 October 1993 (entered into force 29 January 1996) <[www.oas.org/en/sla/dil/inter\\_american\\_treaties\\_A-41\\_charter\\_OAS.asp](http://www.oas.org/en/sla/dil/inter_american_treaties_A-41_charter_OAS.asp)>; Art 13, Treaty of Amity and Cooperation in Southeast Asia (signed 24 February 1976; entered into force 26 April 2012), 'The High Contracting Parties shall have the determination and good faith to prevent disputes from arising. In case disputes on matters directly affecting them should arise, especially disputes likely to disturb regional peace and harmony, they shall refrain from the threat or use of force and shall at all times settle such disputes among themselves through friendly negotiations', <<http://ec.europa.eu/world/agreements/prepareCreateTreatiesWorkspace/treatiesGeneralData.do?redirect=true&treatyId=9261>>.

<sup>92</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Jurisdiction and Admissibility) [1984] ICJ Rep 392 para 73; *Military and Paramilitary Activities in and against Nicaragua Case (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14 para 186, 188, 190; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136 para 87 [hereafter, *Construction of a Wall*].

<sup>93</sup> Draft Articles on the Law of Treaties with Commentaries (1966) Yearbook of the International Law Commission 187, 247, '[T]he law of the Charter concerning the prohibition of the use of force in itself constitutes a conspicuous example of a rule in international law having the character of *jus cogens*.'; *Military and Paramilitary Activities in and against Nicaragua Case (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14 para 190; see also O Corten, *The Law Against War: The Prohibition on the Use of Force in Contemporary International Law* (Hart 2010) 200–13.

use of force.<sup>94</sup> It noted: ‘Border disputes between States are so frequent that any exception to the prohibition of the threat or use of force for territory that is allegedly occupied unlawfully would create a large and dangerous hole in a fundamental rule of international law’.<sup>95</sup> In *Cameroon v Nigeria*, the ICJ considered claims relating to the unlawful use of force within a disputed territory without questioning the admissibility of such claims in the context of territorial disputes.<sup>96</sup> The *Guyana/Suriname* Arbitration Tribunal also stated clearly that the asserted incompatibility between claims of State responsibility for the unlawful threat or use of force and territorial claims has no basis in international law.<sup>97</sup>

38. That the rule on the non-use of force applies to territorial disputes is also supported by State practice, as shown in the following examples:

- UN Security Council Resolutions 242 (1967) and 298 (1971), adopted by majority vote in response to the Israeli-Palestinian conflict, stressed the inadmissibility of acquiring territory by force whilst calling for the ‘[w]ithdrawal of Israel armed forces from territories occupied in the recent conflict’ and ‘[t]ermination of all claims or states of belligerency’.<sup>98</sup>
- The majority of the members of the Security Council strongly condemned Argentina’s 1982 military invasion of the Falkland Islands, to recover them from the United Kingdom, whose territorial title over the Falklands Argentina rejected.<sup>99</sup>

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<sup>94</sup> Eritrea-Ethiopia Claims Commission, Partial Award, *Jus ad Bellum: Ethiopia’s Claims* 1–8 (19 December 2005) (2006) 45 International Legal Materials 430 para 10; also cited in *Guyana v Suriname* (Annex VII Tribunal) (Award) (2007) 47 International Law Reports 166 para 423.

<sup>95</sup> Eritrea-Ethiopia Claims Commission, Partial Award, *Jus ad Bellum: Ethiopia’s Claims* 1–8 (19 December 2005) (2006) 45 International Legal Materials 430 para 10.

<sup>96</sup> *Land and Maritime Boundary (Cameroon v Nigeria)* (Judgment) (Merits) [2002] ICJ Rep 303.

<sup>97</sup> *Guyana v Suriname* (Annex VII Tribunal) (Award) (2007) 47 International Law Reports 166 para 423; see also E Milano and I Papanicopolulu, ‘State Responsibility in Disputed Areas on Land and at Sea’ (2011) 71 Heidelberg Journal of International Law 587, 597.

<sup>98</sup> Security Council Resolutions 242 (1967) (22 November 1967) and 298 (1971) (25 September 1971).

<sup>99</sup> Security Council Official Records S/PV 2345 (1 April 1982); Security Council Official Records S/PV 2346 (2 April 1982); Security Council Resolution 502 (3 April 1982) noted that the ‘invasion on 1982 by armed forces of Argentina’ and demanded Argentina to withdraw its forces from the Falklands; Security Council Resolution 505 (26 May 1982), noting ‘with the deepest concern that the situation in the region of the Falkland Islands (Islas Malvinas) has seriously deteriorated’.

- In relation to the military conflict in the former Yugoslavia, the UN Security Council restated the inadmissibility of the alteration of international boundaries through the use of force.<sup>100</sup>
  - In response to the armed conflict between Eritrea and Ethiopia over the disputed territory of Badme, the Security Council passed Resolution 1177 (1998) expressing its ‘grave concern at the conflict’ and stressed that ‘the use of armed force was not acceptable as a means of addressing territorial disputes or changing circumstances on the ground’.<sup>101</sup> In 1999, after the conflict escalated to a full-scale war, the Security Council, in Resolution 1227 (1999), condemned the recourse to force by Ethiopia and Eritrea in contravention of international law and demanded an immediate end to the hostilities.<sup>102</sup>
39. Therefore, the debate on the prohibition on the threat or use of force has hardly ever questioned the universality of the prohibition in the international relations of States. Rather, what has been debated repeatedly in the practice of States and legal scholarship is ‘the scope and content of certain exceptions to the prohibition’.<sup>103</sup> As posited by the ICJ, resort to the use of force, without denying the norm on the prohibition of force, but instead by relying on one or more possible exceptions to the rule, only strengthens the rule that the use of force is prohibited between States.<sup>104</sup>
40. Indeed, in the context of territorial disputes, States which have resorted to the threat or use of armed force in the context of territorial disputes have rarely done so by denying the existence of a general and well-recognised rule on the prohibition on the threat or use of force. Rather they have sought to defend and justify their actions by appealing to certain exceptions contained within the rule itself, such as the exercise of a right of self-defence.
41. In many instances, States have maintained that they were justified in using force to recover what they alleged was part of their own territory. For example:

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<sup>100</sup> Security Council Resolutions 752 (15 May 1992) and 757 (30 May 1992), ‘no territorial gains or changes brought about by violence are acceptable’.

<sup>101</sup> Security Council Resolution 1177 (26 June 1998).

<sup>102</sup> Security Council Resolution 1227 (10 February 1999).

<sup>103</sup> O Dörr, ‘Use of Force, Prohibition of’, in R Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (Oxford University Press 2012) 607.

<sup>104</sup> *Military and Paramilitary Activities in and against Nicaragua Case (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14 para 186.



- Turkey contended that its armed intervention and occupation of Cyprus in 1974 was justified on the basis of restoring the constitutional order.<sup>105</sup>
- Argentina justified its armed action into the Falkland Islands as an effort to take back control over its own territory.<sup>106</sup> Argentina also relied on the exercise of a right of self-defence.<sup>107</sup> The same justification was used by the United Kingdom when it sought to recover possession of the islands shortly after the Argentine armed action.<sup>108</sup>
- Iraq carried out a military intervention in Kuwait in 1990 on the basis that it had a legitimate pre-colonial title over the territory in question; this argument was rejected by Kuwait.<sup>109</sup>
- Eritrea argued that its resort to the use of force in 1998 in the border town of Badme was justified as an effort to regain control over territory to which it had a valid claim.<sup>110</sup> It also contended that its actions were lawful measures of self-defence, consistent with Article 51 of the UN Charter.<sup>111</sup>

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<sup>105</sup> In particular, Turkey invoked Article 4(2) of the Treaty of Guarantee (Cyprus/Greece/Turkey/United Kingdom) (signed and entered into force 16 August 1960) 382 UNTS 3, which stipulated that in the event of an infringement of the independence, territorial integrity and security of the Republic of Cyprus, if the three Guarantor Powers fail to agree on concerted action, each of them has the right 'to take action' unilaterally in order to restore the constitutional order. Turkey interpreted the said provision as justifying armed intervention; for a discussion, see ZM Necatigil, *The Cyprus Question and the Turkish Position in International Law* (Oxford University Press 1989) 79–81, 102–103; LG Papadopoulos, *The Cyprus Problem: Documents 1959–1974* (USP 1999) [in Greek] 111–2; F Hoffmeister, *Legal Aspects of the Cyprus Problem: Annan Plan and EU Accession* (Martinus Nijhoff 2006) 42; Opinion of Sir Eli Lauterpacht to the Cyprus Government, reprinted in I Kareklas, *International Law and Politics on Salamis* (Research Center of Kykkos Monastery 2007) 323; J Crawford, *The Creation of States in International Law* (2nd edn, Oxford University Press 2006) 243; '[n]o right to intervene can be established in a treaty'; G Nolte, 'Intervention by Invitation' in *Max Planck Encyclopedia of Public International Law* (online edition) para 24.

<sup>106</sup> See Argentina's statement at Security Council debate, Security Council Official Records S/PV 2345 (1 April 1982) paras 65, 70; see also Argentina's statement at Security Council debate, Security Council Official Records S/PV 2346 (2 April 1982) para 12.

<sup>107</sup> *Ibid.*

<sup>108</sup> 'Throughout the conflict each party maintained that it was acting in accordance with international law and that the other party was acting in breach of its requirements', see H Fox, 'Legal Issues in the Falkland Islands Confrontation 1982' (1983) 7 *International Relations* 2454, 2456.

<sup>109</sup> A Sadi, *Crushing State's Sovereignty: Iraq Project* (AuthorHouse 2011) 76–8; As a reaction to the Iraqi invasion to Kuwait, Security Council Resolution 660 (2 August 1990) condemned the invasion and demanded full withdrawal of Iraqi troops.

<sup>110</sup> Eritrea-Ethiopia Claims Commission, Partial Award, *Jus ad Bellum: Ethiopia's Claims* 1–8 (19 December 2005) (2006) 45 *International Legal Materials* 430 para 10.

<sup>111</sup> *Ibid.*

- Nigeria justified its forcible military action in the Bakassi Peninsula on the basis of legitimate self-defence in response to Cameroon's 'campaign of systematic encroachment' on Nigerian territory; Cameroon refuted this line of argument.<sup>112</sup>
- Israel argued that the construction of a wall in the occupied Palestinian territories (OPT) was consistent with its inherent right to self-defence enshrined in Article 51 of the UN Charter and was necessary to stem terrorist attacks on its civilian population emanating from the OPT.<sup>113</sup> Palestine rejected the legality of Israel's use of force on several legal grounds.<sup>114</sup>

42. Therefore, while the relevance of the use of force in the context of territorial disputes appears clear and uncontested, its 'edges' (that is to say the extent of the prohibition) 'are in need of further definition'.<sup>115</sup>

#### THE PROHIBITION ON THE USE OF FORCE

##### *Why is it important to qualify certain acts as a use of force?*

43. Before analysing the specific parameters of the prohibition on the use of force, it is important to give a brief general account of the implications in international law of qualifying a certain act as a use of force in the sense of Article 2(4).
44. First and foremost, qualifying an act as a use of force under international law opens up the possibility that forcible action in self-defence

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<sup>112</sup> *Land and Maritime Boundary (Cameroon v Nigeria)* (Judgment) (Merits) [2002] ICJ Rep 303 paras 310–11.

<sup>113</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136 para 138; Sir Arthur Watts, 'Israeli Wall Advisory Opinion (Legal Consequences of the Construction a Wall in the Occupied Palestinian Territory)' in R Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (Oxford University Press 2012) 434.

<sup>114</sup> For an analysis, see SD Murphy, 'Self-Defense and the Israeli Wall Advisory Opinion: An Ipse Dixit from the ICJ?' (2005) 99(1) *American Journal of International Law* 70–2; I Scobbie, 'Words My Mother Never Taught Me: "In Defense of the International Court"' (2005) 99(1) *American Journal of International Law* 76–88.

<sup>115</sup> *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v Nicaragua)*; *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v Costa Rica)* (Judgment) (Sep Op Judge Robinson) 8; see also C Gray, 'The Use of Force and the International Legal Order' in MD Evans (ed) *International Law* (2nd edn, Oxford University Press 2006) 591–2; Gray wrote, 'The use of force is one of the most controversial areas of international law; even from the early days of the UN many disagreement between states (between developed and developing, between East and West) as to the law were apparent', see C Gray, *International Law and the Use of Force* (4th edn, Oxford University Press 2018) 10.

may be taken in response to it. If the initial act does not rise to the level of a use of force then, in principle, it will not be an armed attack, given that an armed attack is a grave use of force. As Ruys explains, ‘acts that are deemed sufficiently grave to constitute an armed attack will automatically also be sufficiently grave to qualify as a use of force in the sense of Article 2(4)’.<sup>116</sup> Vice versa, ‘for something to be an armed attack which would justify a response in self-defence, it would have to be a use of force’.<sup>117</sup>

45. As an example, State A and State B both advance claims of sovereignty over a certain territory. State B rejects the validity of State A’s legal title and accuses it of unlawfully occupying and administering the disputed territory in violation of State B’s sovereignty and territorial integrity. State A counters that State B’s claims are legally unfounded. As a means to advance its claims in the area, State B despatches a small armed unit and, without exercising any lethal force against State A, tactically occupies certain parts of the disputed area. In view of this factual scenario, if State A were contemplating taking forcible action in response to an alleged use of force by State B, it would be crucial to establish whether the unilateral deployment of armed forces of State B in the disputed area counts as an armed attack (which in turn means it was a use of force).
46. Second, because the prohibition on the use of force is generally considered to be a rule having the character of *jus cogens*, the characterisation of a certain act as a use of force (rather than a mere breach of a State’s sovereignty and territorial integrity, for example) has important ramifications, especially as regards the possibility of invoking ‘grounds precluding wrongfulness’ to justify those acts. If it is accepted that Article 2(4) is a rule of *jus cogens*, the invocation of any grounds precluding wrongfulness is ‘automatically excluded’ as per Article 26 of the Articles on State Responsibility.<sup>118</sup> To return to the above example, if the despatch of armed forces by State B and their unilateral deployment in the disputed territory qualifies as a use of force against State A,

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<sup>116</sup> 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)?’ (2014) 108(2) *American Journal of International Law* 159, 162.

<sup>117</sup> D Akande, ‘The Use of Nerve Agents in Salisbury: Why Does it Matter Whether it Amounts to a Use of Force in International Law?’ (*EJILTalk!*, 17 March 2018) <[www.ejiltalk.org/the-use-of-nerve-agents-in-salisbury-why-does-it-matter-whether-it-amounts-to-a-use-of-force-in-international-law/](http://www.ejiltalk.org/the-use-of-nerve-agents-in-salisbury-why-does-it-matter-whether-it-amounts-to-a-use-of-force-in-international-law/)>.

<sup>118</sup> 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)?’ (2014) 108(2) *American Journal of International Law* 159, 161; see also D Akande (*ibid*).

then the acting State B will not be able to preclude the wrongfulness of its act as a countermeasure in response to a perceived violation of international law by State A.<sup>119</sup>

47. *A contrario*, if a certain act falls short of a use of force in the sense of Article 2(4), it means that such an act may potentially be justified by circumstances precluding wrongfulness. Therefore, to say that the unilateral deployment of armed forces in the disputed territory by State B does not rise to the level of a use of force in contravention of the UN Charter, is also to say that it can be lawful to do it as a countermeasure.<sup>120</sup>
48. Third, the finding that a State has been the victim of a use of force might open the door for third party countermeasures. There is a wide consensus to the effect that the prohibition of the use of force is an obligation *erga omnes* (ie an obligation under general international law which a State owes to the ‘international community as a whole’).<sup>121</sup> According to Frowein, where a breach of an *erga omnes* obligation occurs, the States to which the obligation is owed (that includes States other than an injured State) ‘shall endeavour to bring the breach to an end...and are entitled to take non-forcible countermeasures under conditions analogous to those applying to a State specially affected by the breach’.<sup>122</sup> Tams cites various examples in State practice to show that States can respond to breaches of obligations *erga omnes* by resorting to lawful countermeasures.<sup>123</sup> In the use of force and territorial disputes context, of considerable interest are the sanctions imposed by several States against the Soviet Union because they regarded the latter

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<sup>119</sup> This violation could be, for example, the possible breach of State B’s sovereignty and territorial integrity due to State A’s unlawful administration of the territory in question.

<sup>120</sup> ‘[I]f it is accepted that certain forcible acts are not covered by Article 2(4) nothing would prevent the state concerned from arguing that the conditions for countermeasures or the (very strict) conditions for relying on a state of necessity are met’, see 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)?’ (2014) 108(2) American Journal of International Law 159, 162.

<sup>121</sup> *Barcelona Traction, Light and Power Co Ltd (Belgium v Spain)* (Second Phase) [1970] ICJ Rep 3.

<sup>122</sup> JA Frowein, ‘Obligations *Erga Omnes*’ in *Max Planck Encyclopedia of Public International Law* (online edition) paras 11–13, citing Art 54, United Nations International Law Committee ‘Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries’ (2001) GAOR 56th Session Supp 10, 43; and Art 5, *Institut de Droit International ‘Resolution on Obligations Erga Omnes in International Law’* (2005) 71(2) *Annuaire de l’Institut de Droit International* 286.

<sup>123</sup> CJ Tams, *Enforcing Obligations Erga Omnes in International Law* (Cambridge Studies in International and Comparative Law 2005).

as responsible for a threat to international peace by amassing its troops along the Polish border,<sup>124</sup> the sanctions imposed by the European Community against Argentina following its armed invasion on the Falkland Islands, which was condemned as a ‘breach of the peace’ by the UN Security Council<sup>125</sup> and the sanctions imposed by the European Union and the United States against Russia for annexing Crimea and intervening in Eastern Ukraine.<sup>126</sup>

49. Accordingly, as an example, if the unilateral deployment and forcible occupation of certain parts of the disputed territory by State B qualifies as a use of force against State A, and so would qualify as a breach of an *erga omnes* norm, third States, even if they are not specially affected by the breach, can invoke State B’s international responsibility. Such a breach would mean that States, other than State A, can also impose measures consisting of acts that would otherwise breach international law, on State B.
50. Given what is at stake in characterising certain acts as a use of force, it is all the more crucial to sketch the precise contours of the prohibition on the use of force. The following section, thus, outlines what constitutes force in the sense of Article 2(4) of the UN Charter.

*‘Armed’ force and the principle of non-intervention*

51. The prevailing view in legal doctrine and practice is that Article 2(4) of the UN Charter only proscribes ‘armed’ force.<sup>127</sup> This can be gleaned from the language of the UN Charter itself which refers to ‘armed force’ in its Preamble and in Article 44 equates ‘force’ to ‘armed force’. It can also be seen in the rejection of calls to define force as including

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<sup>124</sup> Ibid, 214–15.

<sup>125</sup> Ibid.

<sup>126</sup> BBC, ‘Ukraine Crisis: Russia and Sanctions’ (19 December 2014) <<http://www.bbc.co.uk/news/world-europe-26672800>>; ‘EU Sanctions Against Russia over Ukraine Crisis’ <[https://europa.eu/newsroom/highlights/special-coverage/eu-sanctions-against-russia-over-ukraine-crisis\\_en](https://europa.eu/newsroom/highlights/special-coverage/eu-sanctions-against-russia-over-ukraine-crisis_en)>.

<sup>127</sup> Dörr and Randelzhofer use the term ‘armed’ force, although occasionally in the text they refer to ‘military’ force (ie ‘the *travaux préparatoires* of the UN Charter illustrate the fact that only military force is the concern of the prohibition of the use of force’), see O Dörr and A Randelzhofer, ‘Purposes and Principles, Article 2 (4)’ in B Simma (ed), *The Charter of the United Nations: A Commentary*, Volume I (3rd edn, Oxford University Press 2012) paras 16–21; according to Brownlie, the agency concerned is not confined to the ‘military’ but it covers all armed forces of a State (‘militia’, ‘naval’, ‘security forces’, ‘police forces’) which may be quite heavily armed and may employ armed vehicles, see I Brownlie, *International Law and the Use of Force by States* (Oxford University Press 1963) 365.

economic and political coercion.<sup>128</sup> Thus, non-armed forms of coercion, including political and economic coercion as a means to secure territory or to achieve more favourable settlement terms, are not covered by the prohibition on the threat or use of force laid down in the UN Charter.<sup>129</sup>

52. Non-armed forms of coercion, and hence non-forcible measures, may be adequately addressed under the principle of non-intervention.<sup>130</sup> The principle of non-intervention, as defined by the ICJ in *Nicaragua v United States*, ‘involves the right of every sovereign State to conduct its affairs without outside interference.’<sup>131</sup> Under this principle, a State is prohibited from interfering, either directly or indirectly, in the internal or external affairs of another State, whether through military, subversive, economic, or even diplomatic means.<sup>132</sup> Whilst the non-intervention

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<sup>128</sup> The Brazilian delegation to the San Francisco Conference in 1945 proposed that Article 2(4) address ‘the threat or use of economic measures in any manner inconsistent’ with the United Nations’ purposes, 6 Documents of the United Nations Conference on International Organization 339, 340, 609 (1945); for a discussion on the reason see discussion in ‘The Use of Nonviolent Coercion: A Study in Legality under Article 2(4) of the Charter of the United Nations Source’ (1974) 122 University of Pennsylvania Law Review 983, 944–5; before the 1968 Special Committee on Principles of International Law concerning Friendly Relations and Cooperation among States, a joint proposal by Algeria, Cameroon, Ghana, India, Kenya, Madagascar, Nigeria, Syria, the United Arab Republic and Yugoslavia defined ‘force’ as including ‘the use by a State of its regular military, naval or air forces and of irregular or voluntary forces’ and ‘[a] forms of pressures, including those of a political and economic character, which have the effect of threatening the territorial integrity or political independence of any State.’

<sup>129</sup> O Dörr and A Ranzelzhofer, ‘Purposes and Principles, Article 2 (4)’ in B Simma (ed), *The Charter of the United Nations: A Commentary*, Volume I (3rd edn, Oxford University Press 2012) para 19; TJ Farer, ‘Political and Economic Coercion in Contemporary International Law’ (1985) 79 American Journal of International Law 405; a debate has emerged recently as to whether cyberwarfare could fit within Article 2(4) of the UN Charter, see, in particular, MN Schmitt, ‘Computer Network Attack and the Use of Force in International Law: Thoughts on a Normative Framework’ (1999) 37 Columbia Journal of Transnational Law 885 and Y Dinstein, *War, Aggression and Self Defence* (5th edn, Cambridge University Press 2011) 88, who argues that the term ‘force’ in Article 2(4) denotes violence by whatever means, whether ‘kinetic’ or ‘electronic’.

<sup>130</sup> O Dörr and A Ranzelzhofer, ‘Purposes and Principles, Article 2 (4)’ in B Simma (ed), *The Charter of the United Nations: A Commentary*, Volume I (3rd edn, Oxford University Press 2012) para 19.

<sup>131</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Judgment) [1986] ICJ Rep 14 para 202.

<sup>132</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Judgment) [1986] ICJ Rep 14 para 205, noting that ‘the principle forbids all States or groups of States to intervene directly or indirectly in internal or external affairs of other States’; Oppenheim defines intervention as a ‘dictatorial interference in the affairs of another State for the purpose of maintaining or altering the actual condition of things’, L Oppenheim, *International Law: Vol I Peace* (8th edn, Longman 1955) 305; Kunig observes that ‘without the

principle is not explicitly spelt out in the UN Charter, it is corollary to the principle of sovereign equality of States in Article 2(1) of the UN Charter and it has the status of jus cogens.<sup>133</sup>

53. The ICJ in *Nicaragua v United States* also noted that, ‘an intervention which uses force’ would be wrongful in light of both principles of non-use of force and non-intervention.<sup>134</sup> Thus, while any armed force engages both the prohibition on the use of force and the principle of non-intervention; non-forcible coercive conduct only runs counter to the latter. The illegality of non-armed coercive measures could also flow from other legal obligations incumbent upon parties to a dispute, discussed in subsequent sections of this report, such as the duty to seek peaceful settlement in good faith and the auxiliary duty to exercise self-restraint.

#### *Direct and indirect use of force*

54. While Article 2(4) of the UN Charter is limited to the prohibition of armed force, the means through which such force may be exercised have been interpreted *lato sensu* to encompass both the direct and indirect use of force by one State against another.<sup>135</sup> Direct forms of use of force include an open invasion or attack by regular military forces directed at the territory of another State. This is the case also where the given territory is subject to a dispute but remains under the administration of the other party (eg Eritrea and Ethiopia).<sup>136</sup> Direct use of force also includes cross-border shooting, outside or within the disputed area, as well as the laying of mines in the disputed area (eg Nicaragua and the United States).<sup>137</sup>
55. Indirect use of force encompass the participation of a State in the use of force, either through another State, or by arming and training private individuals (eg unofficial bands of irregulars, mercenaries, or

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prohibition of intervention, the principle of sovereignty could not be fully realized. Thereby, the *raison d'être* of the non-intervention rule is the protection of the sovereignty of the State’, see P Kunig, ‘Intervention, Prohibition of’ in *Max Planck Encyclopedia of Public International Law* (online edition) para 9.

<sup>133</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Judgment) [1986] ICJ Rep 14 paras 202, 205.

<sup>134</sup> *Nicaragua v United States of America* (ibid) para 205.

<sup>135</sup> O Dörr, ‘Use of Force, Prohibition of’, in R Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (Oxford University Press 2012) 610.

<sup>136</sup> Eritrea/Ethiopia, Partial Award, *Ius Ad Bellum* Ethiopia’s Claims 1–8, 19 December 2005 reprinted in (2006) *International Legal Materials* 430.

<sup>137</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Judgment) [1986] ICJ Rep 14 para 227.

rebels organised in military fashion), who then carry out armed operations and other acts of violence against another State.<sup>138</sup> However, the 'mere supply of funds' to such groups does not in itself constitute an infringement of the prohibition on the threat or use of force.<sup>139</sup>

56. Thus, a violation of the prohibition on the threat or use of force could be established in the context of a territorial dispute where, for example, first, one of the parties has supported private violence through military training and/or provision of arms and, second, the units receiving the support then engaged in the threat or use of force against the claimant party to gain control over a disputed territory.

#### *Individual forcible acts*

57. An individual use of force by one State against another State can constitute a violation of Article 2(4) of the UN Charter, even absent a pattern of forcible conduct between the two States. In the *Oil Platforms* case, for instance, the ICJ did 'not exclude the possibility that the mining of a single military vessel might be sufficient to bring into play the "inherent right of self-defence"' and, thus, be equivalent to an armed attack.<sup>140</sup> An armed attack, by definition, constitutes a use of force. Indeed, as will be analysed below, an armed attack constitutes one of 'the *most grave* forms of the use of force'.<sup>141</sup> To the extent that a single act can constitute an armed attack, it necessarily follows that a single act can violate the non-use of force principle. State practice examined in the section below on the existence of a gravity threshold clearly illustrates the point that individual instances of forcible acts may well fall within the scope of Article 2(4).

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<sup>138</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Judgment) [1986] ICJ Rep 14 para 228; *Armed Activities on the Territory of the Congo (Congo v Uganda)* (Judgment) [2005] ICJ Rep 168 paras 160–166; the Declaration on Friendly Relations provides in the 8th and 9th paragraphs of its section dealing with the prohibition of force that 'Every State has the duty to refrain from organizing or encouraging the organization of irregular forces or armed bands, including mercenaries, for incursion into the territory of another State...when the acts referred to in the present paragraph involve a threat or use of force'; in both *Nicaragua v United States of America* and *Congo v Uganda*, the ICJ treated this provision as declaratory of customary international law.

<sup>139</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Judgment) [1986] ICJ Rep 14 para 228; *Armed Activities on the Territory of the Congo (Congo v Uganda)* (Judgment) [2005] ICJ Rep 168 paras 160–166.

<sup>140</sup> *Oil Platforms (Iran v United States of America)* (Judgment) [2003] ICJ Rep 161 para 72.

<sup>141</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Judgment) [1986] ICJ Rep 14 para 228; *Armed Activities on the Territory of the Congo (Congo v Uganda)* (Judgment) [2005] ICJ Rep 168 para 191.



*Force between States 'in their international relations'*

58. Article 2(4) makes it clear that the use of force by States is prohibited only in 'their international relations'. Thus, to come under the prohibition, the 'use of armed force by a State must be directed against the territory of another State.'<sup>142</sup> The prohibition, hence, does not cover use of force purely internal to one State, such as clashes between government armed forces and insurgents within the same State or forcible law enforcement actions against private individuals.<sup>143</sup>
59. It has been noted that Article 2(4) 'seeks to prohibit the use of force by one State against another' as opposed to forcible measures which contain 'some foreign element'.<sup>144</sup> Not every forcible act within a State that has a foreign element will affect the international relations of the two States. The arrest of a foreign national by the police within a given State, for instance, will typically constitute a law enforcement activity, not engaging Article 2(4). However, as will be elaborated below, where force is used in a 'State-to-State' relationship between the agents of two States, whether military or police units, will affect the States' international relations and trigger the application of Article 2(4).<sup>145</sup>

*De minimis force and the question of a gravity threshold*

60. Some authors and limited State practice have supported the existence of a gravity threshold inherent in Article 2(4) of the UN Charter to trigger the prohibition on the use of force. *De minimis* uses of force would be excluded from the ambit of Article 2(4).<sup>146</sup> This position was

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<sup>142</sup> O Dörr, 'Use of Force, Prohibition of', in R Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (Oxford University Press 2012) 610.

<sup>143</sup> Dörr (ibid) 610; Y Dinstein, *War, Aggression and Self Defence* (5th ed, Cambridge University Press 2011) 87; 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)?' (2014) 108(2) American Journal of International Law 159, 163.

<sup>144</sup> O Corten, *The Law Against War: The Prohibition on the Use of Force in Contemporary International Law* (Bloomsbury Publishing 2010) 77; 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)?' (2014) 108(2) American Journal of International Law 159, 180.

<sup>145</sup> See section 'Law Enforcement vs Unlawful Threat or Use of Force', paras 113–118.

<sup>146</sup> O Corten, *The Law Against War: The Prohibition on the Use of Force in Contemporary International Law* (Bloomsbury Publishing 2010) 55, observing that 'there is a threshold below which the use of force in international relations, while it may be contrary to certain rules of international law, cannot violate Article 2(4)'; M E O'Connell, 'The Prohibition on the Use of Force' in N D White and C Henderson (eds) *Research Handbook on International Conflict and Security Law* (2013) 102, arguing that 'Article 2(4) is narrower than it might appear on its face. Minimal or de minimis uses of force are likely to fall below the threshold of the Article 2(4) prohibition', although she acknowledges that '[t]here is no express authority on the point'.

endorsed by the Independent International Fact-Finding Mission on the Conflict in Georgia. Its report states that the ‘prohibition of the use of force covers all physical force which surpasses a minimum threshold of intensity’.<sup>147</sup> Examples of ‘very small incidents’ below this threshold would include ‘the targeted killing of single individuals, forcible abductions of individual persons, or the interception of a single aircraft’.<sup>148</sup> Corten, in support of the existence of a gravity threshold in Article 2(4), has argued that small-scale forcible acts are typically: a) condemned as violations of a State’s sovereignty rather than the prohibition on the use of force; and b) regarded as permissible despite not constituting lawful actions in self-defence under Article 51 of the UN Charter.<sup>149</sup>

61. However, Ruys persuasively argues that there is no basis to recognise a gravity or *de minimis* threshold that would exclude small-scale forcible acts from the scope of Article 2(4).<sup>150</sup> In Ruy’s view, the examples listed by Corten are all instances of silence and omissions on the part of the States.<sup>151</sup> International jurisprudence has emphasised that omissions cannot give rise to customary international law, absent explicit evidence of *opinio juris*.<sup>152</sup>
62. That even small-scale forcible incidents come within the ambit of the *jus ad bellum* is supported by a number of considerations. First, the different relationships between force, armed attack, and aggression, which came to the fore during the preparatory work to the General Assembly’s Definition of Aggression, illustrate an understanding of force much broader than armed attack or aggression.<sup>153</sup> During the negotiations,

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<sup>147</sup> Independent International Fact-Finding Mission on the Conflict in Georgia, Report, Vol II (2009) 242.

<sup>148</sup> Ibid.

<sup>149</sup> O Corten, *The Law Against War: The Prohibition on the Use of Force in Contemporary International Law* (Bloomsbury Publishing 2010) 51–92.

<sup>150</sup> 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)?’ (2014) 108(2) *American Journal of International Law* 159; On omissions, see also J Klabbbers, ‘Reflections on Role Responsibility: The Responsibility of International Organizations for Failing to Act’ (2017) 28(4) *European Journal of International Law* 1133.

<sup>151</sup> Ibid, 168–71.

<sup>152</sup> *SS Lotus (France v Turkey)* [1927] PCIJ, Series A-No10, 28; *Military and Paramilitary Activities in and against Nicaragua Case (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14 para 188. On omissions, see also J Klabbbers, ‘Reflections on Role Responsibility: The Responsibility of International Organizations for Failing to Act’ (2017) 28(4) *European Journal of International Law* 1133.

<sup>153</sup> 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)?’ (2014) 108(2) *American Journal of International Law* 164.

many States put forward a level of gravity or intensity at the heart of acts of aggression which distinguish them from other forms of use of force which could include more minor incidents.<sup>154</sup> This notion of gravity inherent in the concept of aggression was adopted in the preamble of the Definition of Aggression, which explicitly considers aggression as the ‘most serious and dangerous form of the illegal use of force.’ The fact that gravity is at the core of the concept of aggression does not presuppose that it is also true for the understanding of ‘force’ in the UN Charter. There would instead be a ‘cascading relationship’ between small events included in force, armed attack, and aggression.<sup>155</sup>

63. Second, the ICJ has frequently put forward a broad reading of Article 2(4). In *Nicaragua v United States*, the ICJ distinguished the ‘most grave forms of the use of force (those constituting an armed attack) from other less grave forms.’<sup>156</sup> The difference, it stated, is one of ‘scale and effects’.<sup>157</sup> Its broad reading of Article 2(4) is also evident in its finding that the provision covers ‘assistance to rebels in the form of the provision of weapons or logistical or other support.’<sup>158</sup> Accordingly, a forcible act does not have to be grave to qualify as a use of force.
64. Third, Article 2(4) or Article 51 has often been invoked in the context of small-scale armed confrontations between States. Examples include the shooting of aircrafts and incursions into airspace:
- The downing of an American military air transport in Yugoslav airspace in 1946 was condemned by the United States as a ‘plain violation of the obligations ... under the Charter of the United Nations not to use force except in self-defence’.<sup>159</sup>
  - In the context of rising tensions between the United States and Libya, a confrontation between military aircraft belonging to the two States in 1981 resulted in the downing of two Libyan aircraft.

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<sup>154</sup> The Soviet Union, for instance, declared that ‘it was essential to introduce the concept of “intensity” of the act, so that a distinction could be drawn between acts of aggression and other forms of the use of force’, Special Committee on the Question of Defining Aggression, UN GAOR, 6th Sess ,105th meeting, UN Doc A/AC134/SR68 (31 July 1970), 16.

<sup>155</sup> 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)?’ (2014) 108(2) American Journal of International Law 159, 164.

<sup>156</sup> *Military and Paramilitary Activities in and against Nicaragua Case (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14 paras 51, 64.

<sup>157</sup> *Ibid*, para 195.

<sup>158</sup> *Ibid*, 195.

<sup>159</sup> Quoted in 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)?’ (2014) 108(2) American Journal of International Law 159, 184.

Libya stated before the UN Security Council that the United States by 'using force and direct threat' against Libya had committed 'an act of aggression, thus violating the United Nations Charter and the principles of International Law.'<sup>160</sup> The United States asserted it had complied with Article 51.<sup>161</sup>

- Pakistan claimed that India had violated Article 2(4) after India allegedly downed a Pakistani military aircraft over Pakistani territory.<sup>162</sup>
- Iraq, Lebanon and Libya have often complained of recurrent incursions into their airspace before the Security Council and asserted their right of self-defence.<sup>163</sup> Lebanon, for instance, argued that Israeli violations of Lebanese airspace constituted 'unlawful acts of aggression and provocation, in response to which Lebanon would exercise its lawful right of self-defence'.<sup>164</sup>
- Among other military manuals, the United States' *Commander's Handbook on the Law of Naval Operations* states that '[m]ilitary aircraft intruding into foreign airspace on a military mission may constitute a sufficient threat to justify the use of force in self-defence'.<sup>165</sup>

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<sup>160</sup> Letter from the Chargé d'Affaires of the Permanent Mission of the Libyan Arab Jamahiriya addressed to the President of the Security Council, UN Doc S/14642/Rev.1 (25 August 1981); Letter from the Chargé d'Affaires of the Permanent Mission of the Libyan Arab Jamahiriya to the United Nations Addressed to the President of the Security Council, UN Doc S/14636 (20 August 1981); the League of Arab States also denounced the United States' conduct as aggression, see Letter Dated 21 August 1981 from the Chargé d'Affaires of the Permanent Mission of the Libyan Arab Jamahiriya to the United Nations Addressed to the President of the Security Council, UN Doc S/14638/Rev1 (24 August 1981).

<sup>161</sup> Letter Dated 19 August 1981 from the Acting Representative of the United States of America to the United Nations Addressed to the President of the Security Council, UN DocS/14632(19 August 1981).

<sup>162</sup> Memorial of the Government of Pakistan before the International Court of Justice on Jurisdiction, Aerial Incident of 10 August 1999 (*Pakistan v India*) (7 January 2000).

<sup>163</sup> Letter from the Chargé d'Affaires of the Permanent Mission of Lebanon to the United Nations addressed to the Secretary-General, UN Doc S/2003/148 (5 February 2003); Letter from the Permanent Representative of Iraq to the United Nations addressed to the Secretary-General, UN Doc S/2001/370 (17 April 2001) on US and UK violations of Iraqi airspace and referring to Article 51; Letter from the Chargé d'Affaires of the Permanent Mission of the Libyan Arab Jamahiriya to the United Nations addressed to the Secretary-General, Annex, at 2–3 UN Doc S/13094 (6 August 1980) on US aerial incursions and reserving the 'right of legitimate defence'.

<sup>164</sup> Letter from the Chargé d'Affaires of the Permanent Mission of Lebanon to the United Nations addressed to the Secretary-General, UN Doc S/2003/148 (5 February 2003).

<sup>165</sup> US Commander's Handbook on the Law of Naval Operations para 4.4.2 <[www.jag.navy.mil/documents/NWP\\_1-14M\\_Commanders\\_Handbook.pdf](http://www.jag.navy.mil/documents/NWP_1-14M_Commanders_Handbook.pdf)>.

65. Article 2(4) and Article 51 have also been invoked in small naval incidents in territorial waters. This includes the following examples:

- The United States argued in the 1964 Gulf of Tunkin incident that it had been forced to resort to self-defence because of North Vietnamese torpedo boat attacks.<sup>166</sup> In 1967 the Israeli destroyer *Eilat* was sunk in United Arab Republic's territorial waters. The United Arab Republic argued that the naval incursion was an aggressive act in flagrant violation of the Security Council's ceasefire resolution after the Six-Day War which had compelled it to act in self-defence.<sup>167</sup>
- The seizure of the USS *Pueblo* by North Korea in 1968 was condemned by the United States as an 'aggressive military action' in violation of the United Nations Charter.<sup>168</sup> North Korea justified its action on the basis of self-defence as the vessel was spying in its territorial waters.<sup>169</sup>
- Sweden relied on self-defence in 1982 when it used depth charges and mines against a foreign submarine near a Swedish naval base.<sup>170</sup>

66. The language of self-defence has also been invoked in the context of small-scale confrontations between ground troops. This includes the following examples:

- In 1976, China stated that its checkpoint staff had been forced to open fire in self-defence against Indian troops who had intruded into Tibet and opened fire against the checkpoint.<sup>171</sup>
- Israel invoked self-defence in 2006 in response to a cross-border attack on an Israeli border patrol.<sup>172</sup> Most States regarded the original provocation as an armed attack under Article 51.<sup>173</sup> In 2007,

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<sup>166</sup> UN SCOR, 19th Session, 1140th meeting, UN Doc S/PV.1140 (5 August 1964), referring to a 'deliberate armed attack' and 'aggression' and invoking UN Charter Article 51.

<sup>167</sup> Letter from the Permanent Representative of the United Arab Republic Addressed to the President of the UN Security Council, UN Doc S/8205 (23 October 1967).

<sup>168</sup> Letter from the Permanent Representative of the United States of America Addressed to the President of the Security Council, UN Doc S/8360 (25 January 1968).

<sup>169</sup> UN SCOR, 23rd Session, 1389th meeting, UN Doc S/PV.1389 (27 January 1968), paras 63–4.

<sup>170</sup> See 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)?' (2014) 108(2) *American Journal of International Law* 159, 186.

<sup>171</sup> *Ibid.*, quoted in Keesing's Record of World Events (1976) at 27548.

<sup>172</sup> Identical Letters dated 12 July 2006 from the Permanent Representative of Israel to the United Nations Addressed to the Secretary-General and the President of the Security Council, UN Doc S/2006/515 (12 July 2006).

<sup>173</sup> For an overview of the reactions of the international community, see T Ruys, 'Crossing the Thin Blue Line: An Inquiry into Israel's Recourse to Self-Defense against Hezbollah' (2007) 43 *Stanford Journal of International Law* 265, 268–71.

Israel claimed that its own soldiers had been fired upon by the Lebanese army; in these circumstances, returning fire, it said, was in self-defence.<sup>174</sup>

- In 2008, as a result of an armed incident between Cambodian and Thai troops in the area of the Temple of Preah Vihear, Thailand considered that: ‘Cambodian soldiers’ intrusion into Thailand’s territory and their shooting at Thai soldiers” constituted both a ‘serious violation of Thailand’s sovereignty and territorial integrity’ and a ‘provocation constitute[ing] an act of aggression in blatant violation of international law’, in response to which Thailand invoked Article 51.<sup>175</sup> Cambodia countered that it had acted in accordance with Article 51.<sup>176</sup>

67. These examples illustrate that small-scale attacks can constitute an armed attack for self-defence purposes and, thus, by definition a use of force in the sense of Article 2(4).<sup>177</sup> Accordingly,

[W]henver state A deliberately uses (potentially) lethal force within its own territory—including its territorial sea and its airspace—against military or police units of state B acting in their official capacity, that action by state A amounts to the interstate use of force in the sense of UN Charter Article 2(4). It immediately follows that, in the context of armed confrontations between states, the application of Article 2(4) is not subject to any *de minimis* threshold.<sup>178</sup>

68. Further problems arise in the case of unilateral stationing armed forces in a disputed territory where the armed units in question are deployed in that territory without making use of their weapons (no shots are fired, no injuries to people or property are inflicted). Does the mere stationing of armed forces in a disputed territory constitute an unlawful ‘use’ of force?

69. Corten argues that one of the factors in assessing whether the threshold of Article 2(4) has been met is whether the forcible act gave rise to

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<sup>174</sup> Letters from the Permanent Representative of Israel to the United Nations Addressed to the Secretary-General and the President of the Security Council, UN Doc S/2007/69 (8 February 2007).

<sup>175</sup> Letter from the Permanent Representative of Thailand to the United Nations Addressed to the President of the Security Council, UN Doc S/2008/657 (17 October 2008).

<sup>176</sup> Letter from the Permanent Representative of Cambodia to the United Nations Addressed to the President of the Security Council, UN Doc S/2008/653 (15 October 2008).

<sup>177</sup> 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)?’ (2014) 108(2) *American Journal of International Law* 187.

<sup>178</sup> *Ibid*, 188.

confrontations between the agents of the two States.<sup>179</sup> This is, however, a circular argument; the reaction of the injured State cannot be taken to determine the illegality, or otherwise, of the trespassing State's initial act.<sup>180</sup> A State, for various reasons, may not react by force to the incursion of another State on its territory and yet claim that it would have been entitled to use force in self-defence in these circumstances.

70. This report posits that even unlawful incursions that are not accompanied by any actual armed confrontations can fall within the scope of Article 2(4). There are four elements which support the argument that 'bloodless invasions' – where no shots are fired and which do not result in human death, injury or destruction – can constitute force within the meaning of Article 2(4).
71. First, Article 3(e) of the Definition of Aggression lists as one of the examples of an 'act of aggression' the situation where the armed forces of a State in another State's territory extend their presence on the territory after the consent of the host State's territory has been withdrawn. It necessarily follows that an act of aggression could encompass situations of territorial incursions where there was no consent given in the first place.<sup>181</sup>
72. Second, the Nuremberg Trials found that both the 1938 *Anschluss* of Austria and the 1939 seizure of Czechoslovakia amounted to 'acts of aggression' as premeditated and planned through a combination of intimidation and threat.<sup>182</sup>
73. Third, a parallel can be drawn with international humanitarian law which recognises that an occupation may arise 'even if the said occupation meets with no armed resistance.'<sup>183</sup>
74. Finally, there is State practice supporting the proposition that territorial incursions not resulting in an armed confrontation fall within the ambit of Article 2(4). The reaction of the international community to the annexation of Crimea by Russia in early 2014 illustrates that a troop

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<sup>179</sup> O Corten, *The Law Against War: The Prohibition on the Use of Force in Contemporary International Law* (Bloomsbury Publishing 2010) 92.

<sup>180</sup> 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)?' (2014) 108(2) *American Journal of International Law* 189.

<sup>181</sup> *Ibid.*

<sup>182</sup> *Judgment of the International Military Tribunal for the Trial of German Major War Criminals* reprinted in (1947) 41 *American Journal of International Law* 192–7.

<sup>183</sup> Common Article 2 to the Geneva Conventions of 1949.

deployment, even when not accompanied by hostilities, constitutes a use of force.<sup>184</sup>

75. There have also been several instances in recent years in which the mere entry of soldiers onto the territory of another State was described as a use of force, an act of aggression in violation of the UN Charter or justified on the basis of self-defence. Examples include Turkish armed forces' movements onto other States' territories in the context of attacks carried out by Turkey against the Kurdistan Worker's Party (PKK). Iraq, in 2015, noted that the 'entry of Turkish forces, including heavy combat equipment and a large number of troops, deep into Iraq territory is an act of provocation and violates international law' adding that 'those military movements are an act of aggression under the Charter.'<sup>185</sup> Syria, similarly, noted a 'flagrant aggression when hundreds of soldiers and Turkish military vehicles entered the territory of the Syrian State.'<sup>186</sup> The Turkish armed forces relocated the remains of a shrine into Turkey.<sup>187</sup> Syria, additionally, noted that '[t]he use of military forces by Turkey to move the shrine is a blatant aggression against a sovereign State Member of the United Nations and a violation of international law and conventions, in particular Article 2 of the Charter of the United Nations.'<sup>188</sup> Turkey, in return, has invoked the language of self-defence to justify its operations.<sup>189</sup> A further notable example is

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<sup>184</sup> See, for instance, UN SCOR, 69th Session, 7124th meeting, UN Doc S/PV 7124 (1 March 2014); UN SCOR 69th session, 7125th meeting, UN Doc S/PV 7125 (3 March 2014); UN SCOR, 69th Session, 7138th meeting, UN Doc S/PV 7138 (15 March 2014); for an alternative perspective on this, see BS Chimni, 'Customary International Law: A Third World Perspective' (2018) 112(1) *American Journal of International Law* 1.

<sup>185</sup> Letter dated 11 December 2015 from the Permanent Representative of Iraq to the United Nations Addressed to the President of the Security Council, UN Doc S/2015/963 (11 December 2015).

<sup>186</sup> Identical letters dated 23 February 2015 from the Permanent Representative of the Syrian Arab Republic to the United Nations Addressed to the Secretary-General and the President of the Security Council, UN Doc S/2015/132 (23 February 2015).

<sup>187</sup> 'Turkish Military Enters Syria to Evacuate Soldiers, Relocate Tomb' (Reuters, 22 February 2015) <<https://www.reuters.com/article/us-syria-crisis-turkey/turkish-military-enters-syria-to-evacuate-soldiers-relocate-tomb-idUSKBN0LQ03U20150222>>.

<sup>188</sup> Identical letters dated 23 February 2015 from the Permanent Representative of the Syrian Arab Republic to the United Nations Addressed to the Secretary-General and the President of the Security Council, UN Doc S/2015/132 (23 February 2015).

<sup>189</sup> UN SCOR, 7589th meeting, UN Doc S/PV.7589 (18 December 2015) 5, noting that '[if] the Iraqi Government claims that it has full sovereignty over all its territory, then it is our right to expect that it will prevent the use of Iraqi soil for terrorist attacks against our own territory. However, both Daesh and the PKK continue to pose significant threats to Turkey's safety and security from areas beyond the reach of the Iraqi Government, and it is our right to exercise self-defence.'



the United Arab Emirates (UAE) ‘bloodless’ military deployment and occupation of the remote Yemeni Island of Socotra in May 2018; a move that was condemned as an ‘act of aggression’ by Yemeni officials.<sup>190</sup>

76. The report endorses the view that an armed incursion in the disputed area, even if small in scale, that reflects a coercive intent may come within the ambit of Article 2(4) irrespective of whether the other claiming State chose to respond by force.<sup>191</sup> The underlying idea of the coercive intent is to exclude actions in the disputed territory that are completely unintentional and to underscore that Article 2(4) applies to situations in which a State deliberately engages in forcible acts as a means of coercion against another State.<sup>192</sup>
77. This position, and particularly the focus on determining the coercive intent of the occupying State, appears to be shared by Judge Robinson. In his separate opinion in *Costa Rica v Nicaragua*, Judge Robinson supported the position that armed actions of a lesser ‘gravity’ are caught by Article 2(4). Judge Robinson considered that ‘non-violent use of force’ is not exempted from the prohibition according to the ICJ’s jurisprudence: ‘[n]o shots need be fired, no heavy armaments need be used and certainly no one need be killed before a State can be said to have violated the prohibition’.<sup>193</sup> He, nonetheless, posited that such ‘non-violent’ measures would still need to reach ‘a certain gravity’ and have an ‘unlawful *purpose*’ before they cross the threshold and qualify as a use of force’; both elements are to be assessed on a case-by-case basis.<sup>194</sup> In this case, the combination of the ‘prolonged presence’ of

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<sup>190</sup> AlJazeera News, ‘UAE forces “occupy” sea and airports on Yemen’s Socotra’ (4 May 2018) <<https://www.aljazeera.com/news/2018/05/uae-forces-occupy-sea-airports-yemen-socotra-180504181423573.html>>; It should be noted, however, that in a letter dated 5 May 2018, addressed to the UN Secretary General, Yemen did not describe UAE’s military deployment as an aggression but as an ‘unjustified military action’, see ‘Summary of the Statement of the Republic of Yemen on the Recent Developments in the Yemeni Island of Socotra’ <<https://pbs.twimg.com/media/DcyePStXUAIij4.jpg>>.

<sup>191</sup> 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)?’ (2014) 108(2) *American Journal of International Law* 189.

<sup>192</sup> *Ibid.*

<sup>193</sup> Judge Robinson criticised the Court for not making an express and discrete finding on the claim that the prohibition of the use of force had been breached as a result of Nicaragua’s ‘army encampment’ and presence of military personnel within the disputed territory, *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v Nicaragua)*; *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v Costa Rica)* (Judgment) (Sep Op Judge Robinson), para 43.

<sup>194</sup> *Ibid.*

Nicaragua's military camps and personnel, its refusal to withdraw its troops from the disputed territory, in violation of the ICJ's Provisional Measures Order of 2011, and the 'pointing of weapons' at the Costa Rican aircraft, clearly signalled Nicaragua's 'coercive purpose', namely its 'readiness to apply force, whenever Nicaragua considered it necessary' as a means 'to challenge Costa Rica's sovereign rights'.<sup>195</sup> According to Judge Robinson, Nicaragua's conduct warranted a finding of use of force in breach of Article 2(4) of the UN Charter.<sup>196</sup>

78. This report aligns with Judge Robinson's findings to the extent that the '*intention and purpose*' and the '*motivations*' of the intruding State are amongst the relevant factors that may be used to test whether an unlawful incursion in the disputed area, even when not accompanied by an actual armed confrontation, falls within the scope of Article 2(4).<sup>197</sup>
79. Assessing the coercive intent or purpose behind a particular act is to be determined with respect to the specific context at hand. 'Coercive intent' reflects the objectively discernible object or effect of placing 'pressure' on another State in relation to an unlawful purpose.<sup>198</sup> As Corten puts it, 'the only intention to be considered is that of forcing the will of another State' rather than the 'more fundamental motives guiding the State's action, whether they are humanitarian, strategic, economic or other.'<sup>199</sup> Unintentional conduct will generally not be considered in the context of Article 2(4).<sup>200</sup> Accidental trespass, even of an armed unit, would not, without more, indicate the relevant coercive intent. The intention of the conduct is to be determined on a case-by-case basis and on the context. For example, an unauthorised crossing of the border between North and South Korea is far less plausibly 'unintentional' than would be an unauthorised crossing of the border between, say, Nepal and India, which enjoy excellent bilateral ties. Bad weather conditions or other emergencies could also be taken into account.
80. The following factors may be considered when assessing a State's coercive intent: the geopolitical and security context between the two

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<sup>195</sup> Ibid, para 62.

<sup>196</sup> Ibid, para 63.

<sup>197</sup> Ibid, paras 58–59. Emphasis added.

<sup>198</sup> *Corfu Channel case (United Kingdom/Albania)* (Judgment) [1949] ICJ Rep 4 para 35.

<sup>199</sup> O Corten, *The Law Against War: The Prohibition on the Use of Force in Contemporary International Law* (Bloomsbury Publishing 2010) 76–7.

<sup>200</sup> 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)?' (2014) 108(2) *American Journal of International Law* 159, 172–3.

States; the repeated or isolated nature of incursions; the location of the intrusion, including in relation to significant security or other infrastructure and/or a territory subject to an ongoing dispute; the nature of the intruding forces, especially their military status; and specific indications, such as detection or engagement of targeting systems, weapons systems, trajectory of units.<sup>201</sup> In particular, the ‘friendly or hostile character of the relationship between the territorial and the intruder state’, will be a key factor in establishing the trespassing State’s coercive intent.<sup>202</sup> This would necessitate looking at whether there are ceasefire agreements in effect with respect to the two States and, more specifically, a territory in dispute.

81. Notwithstanding their disagreement on the question of the existence of a gravity threshold, Ruys and Corten agree that ‘the gravity of the action merely reflects the intention of one State to attack another’<sup>203</sup> and that gravity and intention have an ‘interactive relation.’<sup>204</sup> Thus, the gravity of the forcible conduct may be a powerful indicator of the trespassing State’s coercive intent.
82. The absence of coercive intent in situations of unlawful incursions or very small projections of force in respect of a disputed area will not necessarily prevent a finding of a breach of Article 2(4). Where there is no coercive intent, such as in situations of purely accidental incursions, a State will likely be reluctant to invoke Article 2(4) or Article 51. However, even an ‘accidental projection of armed force’, for example, shots or shells fired across a border, may be characterised as uses of force according to Article 2(4).<sup>205</sup>
83. Mikanagi has put forward the argument that the unilateral stationing of armed forces in a disputed area runs contrary to Article 2(4) of the UN Charter and, perhaps the separate obligation to pursue settlement via peaceful means, ‘if it involves coercive use of armed forces’.<sup>206</sup> He relies, *inter alia*, on the ICJ’s Advisory Opinion in the *Israeli Wall* case to argue that the construction of the wall in the disputed territory

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<sup>201</sup> Ibid, 175–6.

<sup>202</sup> Ibid, 175.

<sup>203</sup> O Corten, *The Law Against War: The Prohibition on the Use of Force in Contemporary International Law* (Bloomsbury Publishing 2010) 66; 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)?’ (2014) 108(2) *American Journal of International Law* 159, 175.

<sup>204</sup> Ruys (Ibid) 175.

<sup>205</sup> Ruys (Ibid) 191.

<sup>206</sup> T Mikanagi, ‘Establishment of a Military Presence in a Disputed Territory and Article 2(3) and (4) of the United Nations Charter’ (Working paper, February 2018) (on file with T Mikanagi).

contravened the principle of the inadmissibility of the acquisition of territory by force, enshrined in Article 2(4) of the UN Charter and general international law. *Mutatis mutandis*, the unilateral deployment of military forces in a disputed territory, because it necessarily creates a *fait accompli* on the ground and forces the other party to accept the new *status quo*, likewise would constitute an illegal territorial expansion through coercive means in violation of Article 2(4). It is instructive that the ICJ ‘note[d] the assurance given by Israel’ that the wall was temporary, but concluded that ‘the construction of the wall and its associated regime create a *“fait accompli”* on the ground that could well become permanent, in which case, and notwithstanding the formal characterization of the wall by Israel, it would be tantamount to *de facto* annexation.’<sup>207</sup> The ICJ found that Israel was under a duty to cease construction of the wall and dismantle the parts that extend past the Green Line into the West Bank, including East Jerusalem.<sup>208</sup>

84. This section has illustrated that the meaning of ‘force’ in Article 2(4) extends beyond situations of States making actual use of their weapons in a disputed territory. Calls for a general *de minimis* threshold to be met before forcible acts constitute a use of force are not supported by State practice. Any armed confrontations between two States, even if small-scale and limited to a small location, including a disputed territory, are caught by the prohibition on the use of force. Furthermore, the unlawful incursion by one State over the territory of another State, even if not accompanied by an actual armed confrontation, arguably also constitutes a use of force in the sense of Article 2(4) – this will clearly be the case when it exhibits a coercive intent, namely, when it is used as a means of coercion against another claimant State.

#### THE PROHIBITION ON THE THREAT OF FORCE

85. In Rossini’s view, ‘a threat of force under Article 2(4) can be defined as an explicit or implicit promise of a future and unlawful use of armed force against one or more states, the realization of which depends on the threatener’s will’.<sup>209</sup> In its 1996 *Nuclear Weapons* Advisory Opinion,

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<sup>207</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136 paras 87, 121.

<sup>208</sup> *Ibid*, paras 149–151; for a commentary, see G R Watson, ‘The “Wall” Decisions in Legal and Political Context’ (2005) 99 *American Journal of International Law* 6.

<sup>209</sup> M Roscini, ‘Threats of Armed Force and Contemporary International Law’ (2007) 54(2) *Netherlands International Law Review* 229, 235; see also R Sadurska, ‘Threats of Force’ (1988) 82(2) *American Journal of International Law* 246.

the ICJ considered that '[t]he notions of "threat" and "use" of force under Article 2, paragraph 4, of the Charter stand together in the sense that if the use of force itself in a given case is illegal – for whatever reason – the threat to use such force will likewise be illegal.'<sup>210</sup> According to the ICJ, in order to be lawful, the declared readiness of a State to use force 'must be a use of force that is in conformity with the Charter'.<sup>211</sup> As a result, the signalled readiness of a forcible defensive reaction by the victim of an armed attack would not violate Article 2(4) of the UN Charter.<sup>212</sup>

86. In that sense, the threat to use force is conceptually similar to the actual use of force. According to Brownlie, a threat of force consists of 'an express or implied promise by a government of a resort to force conditional on non-acceptance of certain demands of that government. If the promise is to resort to force in conditions in which no justification for the use of force exists, the threat itself is illegal'.<sup>213</sup>
87. It is, therefore, illegal for a State to threaten to resort to force to secure territory from, or settle a territorial dispute with, another State. However, the declared readiness of a State to use armed force to defend its territory against belligerent occupation, in principle, does not constitute a prohibited threat of force.<sup>214</sup> It is, moreover, generally agreed that the type of threat of force prohibited by Article 2(4) of the UN Charter should necessarily have a coercive intent directed towards specific behaviour on the part of another State.<sup>215</sup> The piling-up of military arms or the conduct of military exercises, though implying a potential threat of force against a given State, would not in itself constitute a prohibited threat of force.

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<sup>210</sup> *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226 para 47.

<sup>211</sup> *Ibid.*

<sup>212</sup> M Roscini, 'Threats of Armed Force and Contemporary International Law' (2007) 54(2) *Netherlands International Law Review* 229, 237.

<sup>213</sup> I Brownlie, *International Law and the Use of Force by States* (Oxford University Press 1963) 365, offers as an example the invasion and unopposed military occupation of Bohemia and Moravia by Germany in March 1939 following a threat of force.

<sup>214</sup> O Schachter, *International Law in Theory and Practice* (Nijhoff Publishers 1991) 111; O Schachter, 'The Right of States to Use Armed Force' (1984) 82 *Michigan Law Review* 1620, 1625; see also *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226 para 47.

<sup>215</sup> O Dörr and A Randelzhofer, 'Purposes and Principles, Article 2 (4)' in B Simma (ed), *The Charter of the United Nations: A Commentary*, Volume I (3rd edn, Oxford University Press 2012) para 43.

88. Commentators have indicated that there may be important practical difficulties in qualifying certain acts of State as a prohibited threat of force.<sup>216</sup> One problem in the context of a territorial dispute may be that, at the time of the threat, the accuracy of the evidence might not be sufficient to assess whether the eventual use of force in response would be lawful. This is because, according to the ICJ's jurisprudence, the legality, or illegality, of a State's signalled intention to use armed action to defend the relevant territory from belligerent occupation largely depends, first, on the 'scale and effect' of the armed action by the other State (and whether it rises to the level of an armed attack) and, second, on whether the envisaged act of self defence on the part of the defending State would be in conformity with the principles of necessity and proportionality.<sup>217</sup>

TERRITORIAL INTEGRITY AND ARTICLE 2(4) BEFORE THE COURTS

89. Another important element of the prohibition on the threat or use of force relates to the notion of territorial integrity. Article 2(4) of the UN Charter provides that members shall refrain from the threat or use of force 'against the territorial integrity... of any State'.
90. The ICJ has repeatedly emphasised that the principle of territorial integrity is an important feature of the international legal order.<sup>218</sup> In *Costa Rica v Nicaragua*, Judge Dugard explained that the prohibition on the use of force is 'directly related to the principle of respect for territorial integrity' and that 'respect for the territorial integrity of a State by other States is a norm of *jus cogens*'.<sup>219</sup> He further observed that 'incursions across borders, that is, violations of territorial integrity, bring with

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<sup>216</sup> M Roscini, 'Threats of Armed Force and Contemporary International Law' (2007) 54(2) *Netherlands International Law Review* 229, 231; O Dörr and A Randelzhofer, 'Purposes and Principles, Article 2 (4)' in B Simma (ed), *The Charter of the United Nations: A Commentary*, Volume I (3rd edn, Oxford University Press 2012) paras 43-44.

<sup>217</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States)* (Judgment) [1986] ICJ Rep 14 para 195. See also SD Murphy, 'Self-Defense and the Israeli Wall Advisory Opinion: An Ipse Dixit from the ICJ?' (2005) 99(1) *American Journal of International Law* 62, 65.

<sup>218</sup> *Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo* (Advisory Opinion) [2010] ICJ Rep 437, para 80; *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v Nicaragua)*; *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v Costa Rica)* (Order of 16 July 2013) (Provisional Measures) [2013] ICJ Rep 275, paras 13-14.

<sup>219</sup> *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v Nicaragua)* (Provisional Measures) (Order of 8 March 2011) (Sep Op Judge Dugard) paras 15-18.

them not only a risk of irreparable prejudice to the State whose border has been violated, but also risk of loss of life arising from the likelihood of armed confrontations between the forces of the invader and the invaded'.<sup>220</sup> For this reason, in cases involving a State's violation of the sovereignty and territorial integrity, the invading State is under an obligation to withdraw its military forces pending the resolution of the dispute.<sup>221</sup>

91. The prohibition on the threat or use of force does not need to be directed against a State's territorial integrity or political independence to be within the scope of Article 2(4) of the UN Charter.<sup>222</sup> Rather than restrict the scope of the prohibition on the threat or use of force or detract from it, the inclusion of the term 'territorial integrity' was added to supplement the prohibition.<sup>223</sup> The *travaux préparatoires* together with the broad formulation used in the third strand of Article 2(4) – 'in any other manner inconsistent with the purposes of the United Nations' – also support an expansive interpretation of the prohibition on the threat or use of force laid down in the UN Charter.<sup>224</sup> That a forcible act on a State's territory may violate Article 2(4) even if it is not intended to deprive that State of part of its territory is supported by the practice of States invoking Articles 2(4) or 51 of the UN Charter in the context of targeted operations by one State within the territory of another State where there is no desire to alter that State's *status quo*<sup>225</sup> – such as targeted killings, small counterterrorist operations and operations to rescue nationals.<sup>226</sup> Thus, a violation of Article 2(4) of the UN Charter can be established even if the threat or

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<sup>220</sup> Ibid, para 18.

<sup>221</sup> Ibid.

<sup>222</sup> For an opposite view, see A D'Amato, *International Law: Process and Prospect* (Transnational Publishers 1995) revised edition available at <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2321806](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2321806)>.

<sup>223</sup> Ibid.

<sup>224</sup> I Brownlie, *International Law and the Use of Force by States* (Clarendon Press 1963) 365–8; O Dörr and A Randelzhofer, 'Purposes and Principles, Article 2 (4)' in B Simma (ed), *The Charter of the United Nations: A Commentary*, Volume I (3rd edn, Oxford University Press 2012) para 39.

<sup>225</sup> See section, 'The status quo as the baseline to test the application of Article 2(4)', paras 119–136.

<sup>226</sup> For instance, the assassination of PLO Executive Committee member Khalil al-Wazir by Israeli forces in Tunisia in 1988 was widely condemned as a breach of Article 2(4), including by the Security Council, Security Council Resolution 611 (25 April 1988); for other examples, see, 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)?' (2014) 108(2) *American Journal of International Law* 191–5.

use of force is not intended to deprive the administering State of all or part of the disputed territory or alter the territorial *status quo*.<sup>227</sup> An example is where the intruding armed forces intend to withdraw swiftly after completing their operations.

92. Scholars, who support the existence of a *de minimis* threshold in Article 2(4), have argued that actions or activities that do not result in actual armed confrontations – such as unopposed or undetected military intrusions onto the territory of another – are much more adequately dealt with as violations of the sovereignty and territorial integrity of the concerned State rather than as a use of force under Article 2(4) of the UN Charter.<sup>228</sup> Corten, for instance, argues that the ‘mere presence’ of a State’s forces in a territory claimed by another State ‘will not be considered as a use of force, even if that presence is indeed a violation of the territorial sovereignty of the “invaded” State’.<sup>229</sup> As has been seen above, there is no principled basis to support the existence of a gravity threshold for the use of force.
93. At first sight, the judgment of the ICJ in *Corfu Channel* complicates the picture. Albania argued that the British Navy’s unauthorised minesweeping operations in its territorial waters violated Article 2(4).<sup>230</sup> The UK asserted that its minesweeping activities were not intended to threaten or harm Albanian’s territorial rights.<sup>231</sup> The ICJ held that Albania’s sovereignty and territorial integrity had been violated – even if there had been no intent to deprive that State of part of its territory. Cryptically, the ICJ added that it did ‘not consider that the action of the British Navy was a demonstration of force for the purpose of exercising political pressure on Albania’.<sup>232</sup> It later referred to the British operation as a ‘manifestation of a policy of force’.<sup>233</sup> As has been pointed out elsewhere, however, the question facing the ICJ

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<sup>227</sup> O Dörr and A Randelzhofer, ‘Purposes and Principles, Article 2 (4)’ in B Simma (ed), *The Charter of the United Nations: A Commentary*, Volume I (3rd edn, Oxford University Press 2012) paras 37–38.

<sup>228</sup> I Brownlie, *International Law and the Use of Force by States* (Clarendon Press 1963) 365–8; O Dörr, ‘Use of Force, Prohibition of’, in R Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (Oxford University Press 2012) 610.

<sup>229</sup> O Corten, *The Law Against War: The Prohibition on the Use of Force in Contemporary International Law* (Bloomsbury Publishing 2010) 82.

<sup>230</sup> Reply submitted by the Albanian Government according to Order of the Court of 28 March 1948, *Corfu Channel case (United Kingdom/Albania)* (20 September 1948) para 154.

<sup>231</sup> *Corfu Channel case (United Kingdom/Albania)* (Judgment) [1949] ICJ Rep 4, para 32–33.

<sup>232</sup> *Ibid.*, para 35.

<sup>233</sup> *Ibid.*



was whether the acts of the Royal Navy had violated the sovereignty of Albania and, not, whether they gave rise to a breach of Article 2(4).<sup>234</sup>

94. The *Corfu Channel* case and successive jurisprudence suggests that the ICJ has avoided making declarations of breach of Article 2(4). It has done so even in cases of regular military force being deployed to alter a territorial *status quo*, which, pursuant to the above discussion, fall within the scope of Article 2(4) as unlawful incursions clearly accompanied by coercive intent. Instead, Courts have relied on the principle of territorial integrity *per se* as a basis for ordering reparation for the breach. Such judgments where the ICJ abstained from adjudicating on claims of breach of the prohibition on the threat or use of force are not free from ambiguities and should not be taken to mean that there was no parallel breach of Article 2(4) in addition to a violation of the injured State's territorial integrity.
95. In *Cameroon v Nigeria*, Cameroon had advanced a series of claims with regard to Nigeria's international responsibility, including those concerning Nigeria's continued military occupation of the Bakassi Peninsula and the Lake Chad area. Cameroon alleged, *inter alia*, that Nigeria's conduct amounted to a breach of Article 2(4) of the UN Charter as well as a violation of Cameroon's sovereignty and territorial integrity.<sup>235</sup> Cameroon claimed that Nigeria was under an obligation to end its presence in the disputed territory, evacuate the occupied areas and to make reparation for material and non-material injury.<sup>236</sup> Given the unsettled status of the territory in question, Nigeria countered that it had peacefully administered the disputed areas in good faith and had every reason to believe that its activities were lawful.<sup>237</sup> Specifically, it argued that the sending of military troops to those areas only reinforced an already well established security presence in those areas with a view to controlling a situation of civil unrest and the increasing incursions by Cameroon's army and police forces.<sup>238</sup>

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<sup>234</sup> 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)?' (2014) 108(2) *American Journal of International Law* 166.

<sup>235</sup> *Land and Maritime Boundary (Cameroon v Nigeria)* (Judgment) (Merits) [2002] ICJ Rep 303 para 310.

<sup>236</sup> *Ibid.*

<sup>237</sup> *Ibid.*, paras 62, 311.

<sup>238</sup> For a discussion, see E Milano, 'Territorial Disputes, Wrongful Occupations and State Responsibility: Should the International Court of Justice Go the Extra Mile?' (2004) 3 *Law and Practice of International Courts and Tribunals* 509, 515.

96. In its judgment, the ICJ recognised that an injury was suffered by Cameroon due to Nigeria's occupation but declined to adjudicate on Cameroon's claims of breach of the prohibition on the use of force. It held that the re-establishment of lawful sovereignty over territory by Cameroon, together with Nigeria's expeditious and unconditional withdrawal, was a sufficient remedy for the injury suffered by Cameroon as a result of Nigeria's incursion into parts of its territory.<sup>239</sup> The ICJ also held that in respect of 'various boundary incidents', which each party alleged had breached the other party's international obligations, neither party had proved their case.<sup>240</sup>
97. In the *Temple of Preah Vihear* case, Cambodia asked the ICJ to determine the sovereignty over the region of the Temple and claimed the return of pieces of cultural property as an ancillary to Thailand's withdrawal following the attribution by the ICJ of the area in question.<sup>241</sup> Cambodia also alleged a violation by Thailand of Cambodia's territorial sovereignty over the region of the Temple and its precincts.<sup>242</sup> In its application instituting proceedings, Cambodia accused Thailand of 'flagrant violation of Article 2, paragraph 4 of the Charter' for sending detachments of its armed forces in a territory under the sovereignty of Cambodia and despite the repeated protests, diplomatic representations and complaints of Cambodia. However, Cambodia did not raise this violation in its final submissions.<sup>243</sup>
98. The ICJ ordered the occupying State (Thailand) to, first, withdraw behind the boundary line determined by the ICJ and, second, to restore to Cambodia any objects that had been removed from the Temple or the Temple area during the occupation.<sup>244</sup> Due to renewed tensions

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<sup>239</sup> *Land and Maritime Boundary (Cameroon v Nigeria)* (Judgment) (Merits) [2002] ICJ Rep 303 para 319.

<sup>240</sup> *Cameroon v Nigeria* (ibid), paras 323–324; Corten suggests that the Court declined to settle the dispute on the basis of international responsibility because of 'the not very serious character of the events in question', see O Corten, *The Law Against War: The Prohibition on the Use of Force in Contemporary International Law* (Bloomsbury Publishing 2010) 82.

<sup>241</sup> *Temple of Preah Vihear (Cambodia v Thailand)* (Judgment) (Preliminary Objections) [1961] ICJ Rep 17; *Temple of Preah Vihear (Cambodia v Thailand)* (Judgment) (Merits) [1962] ICJ Rep 6, 8–11.

<sup>242</sup> Ibid.

<sup>243</sup> Corten notes that the presence, in the 1940s, of three Thai guardians in the Temple area did not give rise to any accusations based on Article 2(4) of the UN Charter. It was only in 1954 that the despatch of Thai armed troops to the area prompted Cambodia to raise such accusations, see O Corten, *The Law Against War: The Prohibition on the Use of Force in Contemporary International Law* (Bloomsbury Publishing 2010) 82–3.

<sup>244</sup> *Temple of Preah Vihear (Cambodia v Thailand)* (Judgment) (Merits) [1962] ICJ Rep 6, 34–35; Milano and Papanicolopulu note that the case is instructive in that the 'occupying State

between the two parties over the Temple area, in 2011 Cambodia asked the ICJ to declare that the obligation of Thailand to withdraw all military and security forces from the area of the temple and its surroundings was a consequence of the general obligation to respect the integrity of the territory of Cambodia.<sup>245</sup> The ICJ upheld this request. It found that Thailand was under a continuing legal obligation to respect the integrity of Cambodian territory and this applied to any territory found by the ICJ to be under Cambodian sovereignty.<sup>246</sup> The ICJ added that ‘once a dispute regarding territorial sovereignty has been resolved and uncertainty removed, each party must fulfil in good faith the obligation which all States have to respect the territorial integrity of all other States’.<sup>247</sup>

99. In the *Costa Rica v Nicaragua* case, Costa Rica argued that Nicaragua had, *inter alia*, breached the obligation to respect the sovereignty and territorial integrity of Costa Rica and ‘the prohibition of the threat or use of force under Article 2 (4) of the UN Charter’ by invading and occupying Costa Rican territory and by conducting works, such as dredging of the San Juan River.<sup>248</sup> Having determined that the activities had taken place in the territory of Costa Rica, the ICJ went on to hold that Nicaragua had breached Costa Rica’s sovereignty and territorial integrity by carrying out various activities in the disputed territory, including excavating three canals (*caños*) and establishing a military presence in parts of that territory.<sup>249</sup> For this reason, Nicaragua was found internationally responsible and consequently under an obligation to make reparation for the damage caused by its unlawful conduct.<sup>250</sup> The ICJ also held that the fact that Nicaragua considered its activities to have taken place on its own territory did not preclude its international responsibility for unlawful acts against Costa Rica, including ‘a potential violation of the prohibition of the use of force’.<sup>251</sup> However, the ICJ followed its approach in *Cameroon v Nigeria* and held that “‘by

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is responsible under international law, and should provide full reparation for the injury caused to the sovereign State through its occupation’, E Milano and I Papanicolopulu, ‘State Responsibility in Disputed Areas on Land and at Sea’ (2011) 71 Heidelberg Journal of International Law 587, 595.

<sup>245</sup> *Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear (Cambodia v Thailand)* (Judgment) [2013] ICJ Rep 281, paras 11–13, 51.

<sup>246</sup> *Ibid.*, para 105.

<sup>247</sup> *Ibid.*

<sup>248</sup> *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v Nicaragua)*; *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v Costa Rica)* (Judgment) [2015] ICJ Rep 665 paras 1, 48.

<sup>249</sup> *Ibid.*, para 93.

<sup>250</sup> *Costa Rica v Nicaragua* (*ibid.*).

<sup>251</sup> *Costa Rica v Nicaragua* (*ibid.*) para 97.

the very fact of the present Judgment and of the evacuation” of the disputed territory, the injury suffered by Costa Rica “will in all events have been sufficiently addressed”.<sup>252</sup>

100. Overall, when considering incidents involving armed actions or activities aimed at modifying the *status quo* in a disputed area (particularly small scale incidents such as the deployment of armed forces or construction works), it appears that the ICJ proceeded as follows. First, it determined which State has sovereignty over the territory in question (where unilateral actions or activities were said to have taken place). Second, having determined to whom the given territory belongs, it ascertained whether that State’s sovereignty had been breached by these activities. As the ICJ stated in *Costa Rica v Nicaragua*, ‘[s]ince it is uncontested that Nicaragua conducted certain activities in the disputed territory, it is necessary, in order to establish whether there was a breach of Costa Rica’s territorial sovereignty, to determine which State has sovereignty over that territory’.<sup>253</sup> Finally, if the ICJ answered the previous question in the affirmative, it determined the reparation (if any) to be awarded as a consequence of the breach.
101. Overall, where the parties alleged that incidents crossed the threshold of the prohibition of the use of force, the ICJ has avoided addressing them in light of Article 2(4) of the UN Charter, but rather treated them as violations of the invaded State’s sovereignty and territorial integrity. That was the case in both *Cameroon v Nigeria* and *Costa Rica v Nicaragua*.
102. In practice, the determination of a breach of the complaining party’s sovereignty and territorial integrity is of great significance: the violation of a State’s sovereignty or territorial integrity is one of the two conditions (the other being attribution) for the existence of an internationally wrongful act from which State responsibility may flow.<sup>254</sup> However, the refusal of the ICJ to adjudicate on the issue of Article

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<sup>252</sup> *Costa Rica v Nicaragua* (ibid).

<sup>253</sup> *Costa Rica v Nicaragua* (ibid) para 69.

<sup>254</sup> It is instructive that among the examples of continuing wrongful acts given by the International Law Commission (ILC) is that of the ‘unlawful occupation of part of the territory of another State or stationing armed forces in another State without its consent’, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001) 2(2) Yearbook of the International Law Commission 31, 60 (hereafter, ILC Draft Articles on State Responsibility); see also Art 37 (point 4), ILC Articles on State Responsibility; for an analysis, see E Milano, ‘Territorial Disputes, Wrongful Occupations and State Responsibility: Should the International Court of Justice Go the Extra Mile’ (2004) 3 *Law and Practice of International Courts and Tribunals* 509, 533.

2(4) on the basis that reparation for a breach of the norms of sovereignty and territorial integrity sufficiently addresses a breach of the prohibition of the use of force is particularly problematic. This issue was pointed out by Judges Owada and Robinson in their separate opinions in *Costa Rica v Nicaragua*. Judge Owada posited that ‘it would have been more appropriate for the Court to have gone further by declaring that these internationally wrongful acts by Nicaraguan authorities constituted an unlawful use of force under Article 2 (4) of the United Nations Charter’ because the action of Nicaragua sought to ‘alter the existing status quo through unilateral means’.<sup>255</sup> Moreover, Judge Robinson stressed that the ICJ ‘should have separately and explicitly determined the claim that there was a breach of that provision [Article 2(4)]’. He went on to say, that ‘[if] indeed a line of jurisprudence is developing in which the Court abstains from ruling on the merits of claims of the use of force in a disputed territory, this course is to be regretted’.<sup>256</sup>

#### LAW ENFORCEMENT VS UNLAWFUL THREAT OR USE OF FORCE

103. A further issue that might pose considerable challenges in the context of territorial disputes concerns the legality of armed actions lying on the borderline between law enforcement activities and an unlawful threat or use of force. This issue was particularly evident in *Guyana/Suriname*. There, Surinamese naval vessels boats had warned Guyana’s concessionaires operating an oil rig in the disputed areas to ‘leave the area in 12 hours’ or ‘the consequences will be [theirs]’.<sup>257</sup> Suriname believed it had a valid claim to the area in question and, thus, that it had the right to expel the operators of the rig as part of legitimate law enforcement measures.<sup>258</sup> An Arbitral Tribunal constituted under Annex VII of UNCLOS found that the action by Surinamese Navy was more akin to a threat of military action than a law enforcement activity.<sup>259</sup>

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<sup>255</sup> *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v Nicaragua)*; *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v Costa Rica)* (Judgment) (Sep Op Judge Owada) paras 10–12.

<sup>256</sup> *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v Nicaragua)*; *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v Costa Rica)* (Judgment) (Sep Op Judge Robinson), para 64.

<sup>257</sup> *Guyana/Suriname* (Annex VII Tribunal) (Award) (2007) 47 International Law Reports 166 para 433, 445.

<sup>258</sup> *Guyana/Suriname* (ibid) para 433.

<sup>259</sup> *Guyana/Suriname* (ibid) paras 433, 445.

104. This report finds that the mere fact of an ongoing dispute over territory cannot elevate an otherwise legitimate law enforcement action into an infringement of Article 2(4) of the UN Charter. Otherwise, the orderly administration of disputed areas would not be possible. *Guyana/Suriname* should instead stand for the principle that whether a forcible action is law enforcement or an unlawful use of force depends on the specific circumstances at hand. The case further lays out that in international law force may only be used in law enforcement activities provided that such force is ‘unavoidable reasonable and necessary.’<sup>260</sup> Law enforcement actions that meet these requirements will not, in principle, be labelled as a use of force in the sense of Article 2(4) of the UN Charter.<sup>261</sup>
105. Suriname in its pleadings relied on the ICJ’s judgment in *Fisheries Jurisdiction (Spain v Canada)*.<sup>262</sup> Spain, in that case, had argued that the seizure by Canadian authorities of a Spanish fishing boat and the arrest of its captain constituted a violation of Article 2(4) of the UN Charter. In *Fisheries Jurisdiction*, the ICJ found that it lacked jurisdiction and therefore did not rule on the question. However, in analysing Canadian enactments to enforce fisheries conservation, the ICJ found that:

[T]he use of force authorized by the Canadian legislation and regulation falls within the ambit of what is commonly understood as enforcement of conservation and management measures ... Boarding, inspection, arrest and minimum use of force for those purposes are all contained within the concept of enforcement of conservation and management measures.<sup>263</sup>

106. This suggests that moderate use of force to seize another State’s vessel, in compatibility with the principles of reasonableness and necessity, would constitute an acceptable law enforcement jurisdiction on the part of the intercepting State – and not a use of force within the scope of Article 2(4). This is confirmed by the judgment of ITLOS in *M/V ‘Saiga’ (No. 2)*.<sup>264</sup> The case concerned an oil tanker flying the St Vincent flag which was seized by a Guinean customs patrol boat following a hot pursuit during which shots were fired by the Guinean

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<sup>260</sup> Ibid, para 445.

<sup>261</sup> 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)?’ (2014) 108(2) American Journal of International Law 159, 201–2.

<sup>262</sup> *Fisheries Jurisdiction (Spain v Canada)* [1998] ICJ Rep 432.

<sup>263</sup> Ibid, para 156.

<sup>264</sup> *M/V Saiga (No 2) (St Vincent and the Grenadines v Guinea)* (Provisional Measures (1999) 117 International Law Reports 111.

vessel. Guinea argued that it was exercising its law enforcement jurisdiction for the arrest. The Tribunal's judgment places the incident squarely in the category of law enforcement rather than use of force by applying the customary law standards of forcible actions for the purposes of law enforcement. It reaffirmed that the use of force in the arrest of a ship at sea 'must not go beyond what is reasonable and necessary in the circumstances.'<sup>265</sup> Further, force may only be used as a last resort, following appropriate warning and all efforts to ensure that life is not endangered.<sup>266</sup>

107. A number of factors may help distinguish a lawful law enforcement activity from an unlawful use of force pursuant to Article 2(4). A criterion often put forward to determine the nature of a given forcible action is the 'functional objective of the forcible action'.<sup>267</sup> If the action's objective is to uphold the rule of law (eg by enforcing a State's criminal and administrative laws against violations by private individuals and criminal groups), it should be in principle legally permissible as a law enforcement activity, provided that it meets the requirements laid out above.<sup>268</sup> Conversely, if the forcible action is taken to defend a State's sovereignty by protecting or asserting a sovereign right or entitlement in a disputed area, this would fall within the remit of Article 2(4) of the UN Charter as an impermissible violation of the prohibition on the use of force.
108. Another factor relevant to determine the nature of a given forcible action is the status of the acting forces. Forcible action taken by police forces 'normally leaves less room to doubt the law enforcement purpose and legal basis of the action than might under certain circumstances be the case with warships'.<sup>269</sup> One cannot, however, infer the legality or illegality of a forcible action exclusively on the basis of the uniform of

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<sup>265</sup> *St Vincent and the Grenadines v Guinea* (ibid) para 155.

<sup>266</sup> *St Vincent and the Grenadines v Guinea* (ibid) para 156; according to Ioannides, 'the use of force in law enforcement operations must be the last resort and may not be excessive of what is reasonable and necessary', Communication with Dr Nicholas Ioannides, Adjunct Professor, University of Nicosia (12 March 2018).

<sup>267</sup> P J Kwast, 'Maritime Law Enforcement and the Use of Force: Reflections on the Categorisation of Forcible Action at Sea in the Light of the Guyana/Suriname Award' (2008) 13(1) *Journal of Conflict and Security Law* 49, 72–89.

<sup>268</sup> TD Gill, 'The Forcible Protection, Affirmation and Exercise of Rights by States under Contemporary International Law' (1992) 23 *Netherlands Yearbook of International Law* 105, 121–122.

<sup>269</sup> PJ Kwast, 'Maritime Law Enforcement and the Use of Force: Reflections on the Categorisation of Forcible Action at Sea in the Light of the Guyana/Suriname Award' (2008) 13(1) *Journal of Conflict and Security Law* 49, 74.

the acting forces, whether police or military. In many instances, it is the military that performs law enforcement functions at sea (eg Malta). Relatedly, the level of decision making may be relevant; namely whether the forcible action was decided at the highest levels of the command chain and authorities of the State, as opposed to individual agents, such as coastguards or police officers.<sup>270</sup>

109. The reasonableness, necessity and proportionality of the forcible action may also distinguish law enforcement activities from an impermissible use of force.<sup>271</sup> Minimal targeted force, together with small arms and light weapons, following appropriate warning, is consistent with law enforcement and its requirements of reasonableness, proportionality and necessity.<sup>272</sup> On the other hand, the use of military-grade weaponry and equipment and extensive destruction more logically adheres to a use of force under Article 2(4) of the UN Charter.
110. The target of the forcible action may also have an impact on the classification of the forcible action. The examples given above concern the seizure of commercial, private, vessels. Indeed, international law provides a basis for law enforcement activities directed at merchant vessels within a State's territorial sea. Under Article 25 of UNCLOS, the State may 'take the necessary steps in its territorial sea to prevent passage which is not innocent'. The situation is different where force is used against governmental vessels. Indeed, it has been noted that:

The exercise of routine police powers in enforcing a State's criminal and administrative laws against violations by private individuals, criminal groups and other non-governmental entities, such as

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<sup>270</sup> 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)?' (2014) 108(2) *American Journal of International Law* 159, 207; O Corten, *The Law Against War: The Prohibition on the Use of Force in Contemporary International Law* (Hart 2010) 91.

<sup>271</sup> An analogy may be drawn with international humanitarian law, where the notion that the distribution and type of weapons, the number and calibre of munitions fired, the extent of material distribution are among the factors to be considered in distinguishing a law enforcement action from a non-international armed conflict is firmly established, see *Prosecutor v Tadić* Case No IT-94-1, Opinion and Judgment (International Criminal Tribunal for the Former Yugoslavia, 7 May 1997); see also 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)?' (2014) 108(2) *American Journal of International Law* 159, 207; O Corten, *The Law Against War: The Prohibition on the Use of Force in Contemporary International Law* (Hart 2010) 92.

<sup>272</sup> See, for instance, 'Basic Principles on the Use of Force and Firearms by Law Enforcement Officials' Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba (7 September 1990), in particular Principles 2, 4, and 5, which provide that where force is necessary in a law enforcement context, graduated use of force should be used as far as possible, privileging nonlethal weapons.



merchant ships and fishing vessels, differs both conceptually and in practice from the use of force in the protection and affirmation of rights in the relationship of State to State.<sup>273</sup>

111. Warships, in particular, differ from merchant ships as being subject to naval discipline, being commanded by a naval officer and identifiable as belonging to the naval forces of a State.<sup>274</sup> As they constitute a ‘sovereign instrumentality of a foreign State’,<sup>275</sup> forcible action taken against a warship should be approached with extreme caution.<sup>276</sup> Thus, it has been argued that in ‘State-to-State-relationships’, force against foreign warships would inevitably come upon the scope of Article 2(4).<sup>277</sup>
112. By analogy, beyond the seizure at sea context, forcible actions committed against public entities, such as a State’s armed forces, would most likely prevent classifying the action as law enforcement. Forcible action taken by one State against a State’s military but also arguably against that State’s military buildings, materials, armaments or means of transportation and communication would constitute an inter-State use of force rather than law enforcement.<sup>278</sup> This would be the case regardless of whether such forcible action has been taken by the State’s police forces or its military, to enforce relevant domestic provisions or has occurred in a disputed territory.
113. It is, however, important to note that the example of *Guyana/Suriname* illustrates that forcible measures against merchant vessels are not necessarily outside the scope of Article 2(4). Thus, the simple fact that the object of the forcible action is a private vessel does not mean that this will amount to law enforcement activities. Whether or not a forcible

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<sup>273</sup> TD Gill, ‘The Forcible Protection, Affirmation and Exercise of Rights by States under Contemporary International Law’ (1992) 23 *Netherlands Yearbook of International Law* 105, 122.

<sup>274</sup> FD Froman, ‘Uncharted Waters: Non-Innocent Passage of Warships in the Territorial Sea’ (1984) 21(3) *San Diego Law Review* 625, 632.

<sup>275</sup> BH Oxman, ‘The Regime of Warships Under the United Nations Convention on the Law of the Sea’ (1984) 24(4) *Virginia Journal of International Law* 809, 815.

<sup>276</sup> D Froman, ‘Uncharted Waters: Non-Innocent Passage of Warships in the Territorial Sea’ (1984) 21 *San Diego Law Review* 625, 632.

<sup>277</sup> PJ Kwast, ‘Maritime Law Enforcement and the Use of Force: Reflections on the Categorisation of Forcible Action at Sea in the Light of the *Guyana/Suriname Award*’ (2008) 13(1) *Journal of Conflict and Security Law* 49, 84; F Francioni, ‘Peacetime use of Force, Military Activities, and the New Law of the Sea’ (1985) 18(2) *Cornell International Law Journal* 203, 217; 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)?’ (2014) 108(2) *American Journal of International Law* 159, 180.

<sup>278</sup> O Corten, *The Law Against War: The Prohibition on the Use of Force in Contemporary International Law* (Hart 2010) 91–2.

action against a private vessel amounts to a use of force or law enforcement activities will depend on the totality of circumstances of the case in light of the various factors of classification currently being discussed.

114. The location and questions of jurisdiction may also be considered in classifying a forcible action as either law enforcement or use of force in the sense of Article 2(4). In *Fisheries Jurisdiction*, Spain argued that, as the forcible action had occurred on the high seas, over which Canada had no title and hence no jurisdictional basis, it would necessarily constitute a use of force under Article 2(4) rather than law enforcement. The ICJ, however, as shown above, indicated that the actions were of a law enforcement nature. The jurisdictional basis for the exercise of law enforcement, or lack thereof, did not prevent the characterisation of the event as law enforcement.<sup>279</sup> The arrest in *M/V 'Saiga' (No. 2)* took place outside Guinea's Exclusive Economic Zone (EEZ), which did not prevent its classification as law enforcement. In *Guyana v Suriname*, Suriname argued that Guyana's claim should be dismissed 'based on the erroneous premise that Guyana has title to the disputed maritime area.'<sup>280</sup> The Tribunal rejected the argument and affirmed that the threat or use of force does not have to be against the territorial integrity or political independence of another State.<sup>281</sup>
115. The above cases suggest that a 'disputed/doubtful jurisdictional basis of legislation in the exercise of which forcible action is taken does not necessarily preclude the characterisation of the measures as law enforcement, rather than the use of force.'<sup>282</sup> Nonetheless, it must, once again, be noted that territorial disputes are prone to escalation. Questions of location and jurisdiction are, hence, closely related to the final factor that may be relevant to the distinction between law enforcement and use of force: the existence of a dispute. As the risk of escalation grows,

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<sup>279</sup> PJ Kwast, 'Maritime Law Enforcement and the Use of Force: Reflections on the Categorisation of Forcible Action at Sea in the Light of the Guyana/Suriname Award' (2008) 13(1) *Journal of Conflict and Security Law* 49, 87; Note, however, that the *Spain v Canada* decision was a jurisdictional decision in which the Court essentially found that Canada's reservation of 'conservation and management' activities from the jurisdiction of the Court did not allow it to examine the legality of the extension into the high seas – the Court looked at whether the specific use of force was covered by that exception but said that the reservation was to be read with 'no special connotations with regard to place', *Fisheries Jurisdiction (Spain v Canada)* [1998] ICJ Rep 432.

<sup>280</sup> *Guyana v Suriname* (Annex VII Tribunal) (Award) (2007) 47 *International Law Reports* 166 para 433.

<sup>281</sup> *Ibid*, para 423.

<sup>282</sup> PJ Kwast, 'Maritime Law Enforcement and the Use of Force: Reflections on the Categorisation of Forcible Action at Sea in the Light of the Guyana/Suriname Award' (2008) 13(1) *Journal of Conflict and Security Law* 49, 89.

the distinction between law enforcement and use of force grows thinner. The political context and the existence of a dispute between the parties may lead to a forcible action being seen in the context of Article 2(4).<sup>283</sup>

116. It will sometimes be 'fairly straightforward to determine whether forcible action remains within the law enforcement paradigm or whether it arises from a dispute between sovereign States' and thus bring Article 2(4) into play.<sup>284</sup> Thus, Ruys contrasts the 2013 seizure of the *Arctic Sunrise* ship to the 1959 shooting by Guatemalan forces of Mexican fishing vessels.<sup>285</sup> The first incident concerned an arrest at gunpoint by Russian authorities of a crew of Greenpeace activists protesting against Arctic oil production on board a Dutch-flagged vessel. The situation was unconnected to any dispute between Russia and the Netherlands and seemingly constituted a clear law enforcement operation. The second incident took place in the context of a political dispute and mounting tensions between the two States and therefore much more naturally brings Article 2(4) into play. In many in-between cases, adequate classification will require a careful appraisal of the facts.
117. An incident where one State's coastguard chases and sinks a private vessel from another State fishing illegally in its EEZ, after firing several warning shots and repeatedly attempting to contact the offending ship is likely to amount to law enforcement.<sup>286</sup> The situation may be different where State A's fishing boat is rammed and sunk by a vessel from State B in a disputed territory where tensions are heightened and both

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<sup>283</sup> O Corten, *The Law Against War: The Prohibition on the Use of Force in Contemporary International Law* (Hart 2010) 91.

<sup>284</sup> 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)?' (2014) 108(2) *American Journal of International Law* 159, 207.

<sup>285</sup> *Ibid.*

<sup>286</sup> See, for instance, the incident in 2016 where Argentina's coastguard chased and sank a Chinese vessel it said was fishing illegally in Argentina's EEZ after having made repeated attempts to contact the vessel, BBC News, Argentina sinks Chinese fishing boat Lu Yan Yuan Yu 010 (16 March 2016) <[www.bbc.co.uk/news/world-latin-america-35815444](http://www.bbc.co.uk/news/world-latin-america-35815444)>; the Chinese Foreign Ministry Spokesperson, in response, made no mention of Article 2(4) and employed clear law enforcement language, demanding that the 'Argentine side conduct a thorough investigation, inform the Chinese side of the details, ensure the safety and legitimate rights and interests of the Chinese crew, and take effective measures to avoid any repetition of such an incident', Foreign Ministry Spokesperson Lu Kang's Remarks on Sinking of Chinese Fishing Boat by Argentina's Coast Guards in Argentine Waters (16 March 2016) <[www.fmprc.gov.cn/mfa\\_eng/xwfw\\_665399/s2510\\_665401/2535\\_665405/t1348148.shtml](http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2535_665405/t1348148.shtml)>.

States are attempting to disrupt the other State's operations in the area.<sup>287</sup>

118. Whether State B's vessel is either police or military will not suffice to determine the forcible action's nature. Adequately classifying the forcible action as either law enforcement or use of force will require a careful analysis of the facts at hand, including the action's means, effect and, importantly, functional objective as well as the broader context.<sup>288</sup> In a territorial dispute, close attention must be paid to the circumstances at hand to determine the action's functional purpose and whether what appeared, at first, to be law enforcement measures may, in fact, constitute an attempt to undermine the sovereignty, or sovereign rights, of another State (such as in *Guyana/Suriname*) or whether the action is indeed a necessary and proportionate response to an ostensibly unlawful conduct. Where the forcible action is an attempt to assert

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<sup>287</sup> See, for instance, the 2014 incident where a Vietnamese boat was rammed and sunk by Chinese vessels, near the disputed Paracel islands, BBC News, Vietnam boat sinks after collision with Chinese vessel (27 May 2014) <<http://www.bbc.co.uk/news/world-asia-27583564>>. China claimed that Vietnam had 'forcefully disrupted' its normal drilling operation and 'seriously violated China's sovereignty, sovereign rights and jurisdiction', Ministry of Foreign Affairs of China, The Chinese Side Requires the Vietnamese Side to Stop Any Form of Disruptions of the Chinese Company's Operations (8 May 2014) <[www.fmprc.gov.cn/mfa\\_eng/wjbxw/t1154056.shtml](http://www.fmprc.gov.cn/mfa_eng/wjbxw/t1154056.shtml)>. Further it claimed that the Vietnamese actions were 'serious infringements upon China's sovereignty, sovereign rights and jurisdiction, grave threats to the safety of Chinese personnel and the HYSY 981 drilling rig, and gross violations of the relevant international laws, including the Charter of the United Nations', Ministry of Foreign Affairs of China, The Operation of the HYSY 981 Drilling Rig: Vietnam's Provocation and China's Position (8 June 2014) <[www.fmprc.gov.cn/mfa\\_eng/zxxx\\_662805/t1163264.shtml](http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1163264.shtml)>. Vietnam's statement in returned emphasised that China had 'rammed and fired water cannon at Vietnamese civilian law enforcement ships, which are on duty in the waters within Viet Nam's sovereign rights and jurisdiction' resulting in the injuries of fishery control officers and damages to several maritime law enforcement boats, Ministry of Foreign Affairs of Vietnam, Contents of the International Press Conference on developments in the East Sea June 5th, 2014 <[www.mofa.gov.vn/en/tt\\_baochi/tcbc/ns140609024213](http://www.mofa.gov.vn/en/tt_baochi/tcbc/ns140609024213)>. Mr Tran Duy Hai, Deputy Chairman of the National Boundary Committee, Vietnam Ministry of Foreign Affairs, stated that 'Chinese activities not only violated international law concerning the prohibition of the threat or use of force, but were also inhuman towards Vietnamese fishermen', Contents of the International Press Conference on developments in the East Sea June 16th, 2014 <[www.quangngai.gov.vn/dofa/Pages/qnp—qnpprint-102-qnpnc-23-qnptype-1-qnp-site-1.html](http://www.quangngai.gov.vn/dofa/Pages/qnp—qnpprint-102-qnpnc-23-qnptype-1-qnp-site-1.html)>.

<sup>288</sup> The determination as to whether an action constitutes law enforcement operation or threat or use of force depends on 'the factual circumstances of each case in the framework of the relations between the concerned states', see M Roscini, 'Threats of Armed Force and Contemporary International Law' (2007) 54(2) *Netherlands International Law Review* 229, 241; see also 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)?' (2014) 108(2) *American Journal of International Law* 159, 206–7.

State B's claims over the area, this would likely constitute an impermissible use of force in light of Article 2(4) of the UN Charter.

THE *STATUS QUO* AS THE BASELINE TO TEST THE APPLICATION OF  
ARTICLE 2(4)

119. As indicated above, the ICJ has so far avoided making pronouncements on claims of breach of the prohibition on the use of force in the context of territorial disputes. In both *Costa Rica v Nicaragua* and *Cameroon v Nigeria*, the ICJ found that it did not need to dwell on whether there has been a use of force because it had already found State responsibility on some other ground, notably a breach of the claimants' sovereignty and territorial integrity. The norms of sovereignty and territorial integrity protect the legitimate holder of title of sovereignty over the given territory against adverse occupation and armed intrusions, even when a minimal, and often 'non-violent', use of force has been engaged.
120. In the context of a disputed territory, where two or more States oppose each other's sovereignty claim, and where there is no clear answer as to which State holds title, the norms of sovereignty and territorial integrity take on a different meaning. As put by Nigeria's counsel during the *Cameroon v Nigeria* case proceedings: 'what counts in the context of a territorial dispute is not so much the [territorial] title disputed by the two parties...What counts is the control and peaceful administration of the territory, which determines the *status quo* protected by law.'<sup>289</sup> That applies even if its territory is disputed by another State.'<sup>290</sup>

*Defining the status quo on the ground*

121. The next issue is how to define the *status quo* in a disputed territory. The term's vague and all-encompassing character – as simply meaning 'the existing situation' – lends itself to manifold interpretations. If misinterpreted, it might limit its usefulness as the baseline to test the extent of each party's rights and obligations. For the notion of a territorial *status quo* to have any practical utility in the use of force context, it must be capable of objective identification and determination. One useful criterion to determine the existing *status quo* on the ground is the administrative state of play between the claimants in the disputed area. By that

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<sup>289</sup> *Cameroon v Nigeria* (Oral Pleadings of Nigeria) (CR 2002120) (Friday 15 March 2002) para 7.

<sup>290</sup> *Ibid*, para 19.

criterion, one has to ascertain: a) whether a degree of administrative order and stability is in place between the disputing States in relation to the disputed territory, despite their competing claims of sovereignty; and b) which State was the first to attempt to alter this situation by force.

122. In determining the administrative situation on the ground – and, thus, the *status quo* immune from unilateral forcible modifications – one should look for the presence of an internationally monitored line of control (examples of the ‘Blue Line’ between Israel and Lebanon,<sup>291</sup> the ‘Purple Line’ between Israel and Syria in the region of Golan<sup>292</sup> and the ‘Line of Control’ between India and Pakistan in the region of Kashmir)<sup>293</sup>; a demilitarised zone (eg the United Nations Buffer Zone in Cyprus),<sup>294</sup> an armistice demarcation line (eg the armistice demarcation lines between Israel, on the one hand, and Egypt, Lebanon, Jordan, and Syria, on the other);<sup>295</sup> and other provisional inter-State

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<sup>291</sup> Security Council Resolution 1701 (11 August 2006); for the origin and current status of the line, see B O’Shea (2004) ‘Lebanon’s “Blue Line”: A New International Border or Just Another Cease-fire Zone?’ (2010) 27(1) *Studies in Conflict and Terrorism* 19.

<sup>292</sup> The Purple Line was put in place shortly after the ceasefire that followed the 1967 Six Day War. In 1973 Syria attempted to forcibly reclaim the territory but was eventually pushed back by Israeli forces. Israeli forces moved further in from the Purple Line, capturing about 350 km<sup>2</sup> more territory than they previously held. In implementation of UN Security Council Resolution 338 (22 October 1973), Israel and Syria agreed to disengage their forces in Golan and restore the *status quo* to the positions they had originally; for a discussion, see Y Shlomo, ‘The Israeli–Syrian Disengagement Negotiations of 1973–74’ (2015) 51 (4) *Middle Eastern Studies* 636; see also Israel–Syria Disengagement Agreement (1974) (signed and entered into force 31 May 1974) <<https://ecf.org.il/issues/issue/178>>.

<sup>293</sup> Art IV of the Simla Agreement on Bilateral Relations (India/Pakistan) (signed 3 July 1972; entered into force 4 August 1972) reprinted in (1972) 11(5) *International Legal Materials* 954–7 provides that ‘the line of control resulting from the cease-fire of December 17, 1971 shall be respected by both sides without prejudice to the recognised position of the either side’ and that both sides ‘undertake to refrain from the threat or the use of force in violation of this line’; for a chronology, see BBC, ‘Kashmir Territories Profile’ <<http://www.bbc.co.uk/news/world-south-asia-11693674>>.

<sup>294</sup> United Nations Peacekeeping Force in Cyprus, ‘About the Buffer Zone’ <<https://unficypr.unmissions.org/about-buffer-zone>>.

<sup>295</sup> General Armistice Agreement between Israel and Egypt (with Annexes and Accompanying Letters) (signed 24 February 1949) 42 *United Nations Treaty Series* 251; General Armistice Agreement between Israel and Jordan (with Annexes) (signed 3 April 1949) 42 *United Nations Treaty Series* 303; General Armistice Agreement between Israel and Lebanon (with Annexes) (signed 23 March 1949) 42 *United Nations Treaty Series* 287; General Armistice Agreement between Israel and Syria (with Annexes and Accompanying Letters) (signed 20 July 1949) 42 *United Nations Treaty Series* 327; Dinstein explains that armistice demarcation lines ‘cannot be altered by force, and remain binding indefinitely pending agreement to revise them by a treaty of peace or otherwise’. Accordingly, ‘there is in substance little or no difference between armistice demarcation lines and permanent boundaries’, see Y Dinstein, ‘Armistice’ in *Max Planck Encyclopedia of Public International Law* (online edition) para 14.

arrangements over disputed territories without prejudice to the final determination of the legal status of the territories in question (examples of the Kuwait-Saudi Arabia Neutral Zone<sup>296</sup> and the Antarctic Treaty Regime).<sup>297</sup> These are only a few indicative examples of territorial disputes in which a certain and defined *status quo*, protected by law, is in place to regulate the competing parties' conduct in and, with respect to, the territories under dispute pending their full and final settlement.

123. The preservation of the factual situation on the ground assumes great importance in the context of a territorial dispute. As noted above, the principle of territorial integrity protects the legitimate holder of sovereignty over a given territory from adverse occupation, unilateral intrusions and violations of its borders by other States. However, when that title of sovereignty is actively rejected by another State, or when the legal status and location of the border itself is unclear, the protection afforded by this principle is truly meaningful only after the dispute has been settled and the situation is characterised *ex-post facto* as an unlawful occupation or as a breach of that State's territorial integrity in contravention of international law.<sup>298</sup> If the essential basis for the protection of sovereignty, namely a title to territory, remains obscure and will not become clear until the dispute resolution process is completed, then the preservation of the factual situation on the ground becomes relevant.

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<sup>296</sup> As a means of freezing their territorial dispute over a track of territory along the eastern head of the Persian Gulf, Kuwait and Saudi Arabia agreed to jointly share the territory as a neutral zone until a permanent international boundary was achieved. According to Onorato, the form of ownership in the neutral zone was defined by the Islamic concept of *mashaa*, meaning 'equal shares in joint and undivided property, each co-owner having an equal right (until partition) to every part of the property', see W T Onorato, 'A Case Study in Joint Development: The Saudia Arabia-Kuwait Partitioned Neutral Zone (1985) 10 (3/4) Energy 539, 540; The neutral zone was partitioned in 1965 but an oil-revenue sharing regime remained in place, 'Agreement To Partition The Neutral Zone' (Kuwait/Saudi Arabia) (1965) 4(6) International Legal Materials 1134–38.

<sup>297</sup> Article I (1), Antarctic Treaty provides that 'any measures of a military nature, such as the establishment of military bases and fortifications, the carrying out of military manoeuvres, as well as the testing of any type of weapons' is prohibited, Antarctic Treaty (Argentina, Australia, Belgium, Chile, the French Republic, Japan, New Zealand, Norway, the Union of South Africa, the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland, and the United States of America) (signed 1 December 1959, entered into force 23 June 1961) 402 United Nations Treaty Series 71; for a commentary, see J Grob 'Antarctica's Frozen Territorial Claims: A Meltdown Proposal' (2007) 30 (2) Boston College International and Comparative Law Review 461; J Crawford 'The Antarctic Treaty after 50 Years' in D French and others (eds), *International Law and Dispute Settlement: New Problems and Techniques* (Hart Publishing Oxford 2010) 271–96.

<sup>298</sup> E Milano and I Papanicolopulu, 'State Responsibility in Disputed Areas on Land and at Sea' (2011) 71 Heidelberg Journal of International Law 587, 589.

124. As an example, a territory is administered by State A but also claimed by State B which starts to carry out small-scale armed intrusions in the area in question in order to undermine the authority of the administering State (State A) and alter the existing territorial *status quo*. As Chubb explains, if such armed incursions start to take place frequently and at comparable times as an established pattern of actions, a new *status quo* could be created.<sup>299</sup> Under this scenario, the principle of territorial integrity might not offer meaningful protection to State A pending the settlement of the dispute. Only the final settlement of the dispute (whether through diplomatic or judicial means, or a combination thereof) would ultimately determine to whom the disputed area belongs. If the area in question is found to belong to State A, State B will no longer have a claim to the area and will be bound by the agreement or judgment, as well as general international law, to respect State A's sovereignty and territorial integrity. Conversely, if the area belongs to State B, State A will have to withdraw its military and civil administration from the area and will have no right to continue acting upon that territory.
125. Nevertheless, the requirement to respect and preserve the *status quo* in a given territory, while the boundary is pending delimitation or demarcation or when the sovereignty status of the territory is yet to be resolved, means that none of the claimants may unilaterally alter this *status quo* – for example, by stationing armed forces in the area in question, especially if no such armed presence existed previously.
126. It can, thus, be argued that what the law protects, pending the settlement of a territorial dispute, is not so much the territorial integrity of the holder of a valid title in the disputed territory (which can be either of the two claimants), but rather the existing territorial *status quo* on the ground.<sup>300</sup> Seen from this angle, the factual reality on the ground forms the relevant baseline against which to test the limits of each side's rights and duties, including the application of *jus ad bellum* where the use of force is engaged in the context of a territorial dispute. The relevant exercise in any given situation is to ascertain which of the two claimants has crossed this baseline, in other words, which party was the first to disturb the existing territorial *status quo* on the ground through the use of force.

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<sup>299</sup> A Chubb, 'The South China Sea: Defining the 'Status Quo'' (*The Diplomat*, 11 June 2015) <<https://thediplomat.com/2015/06/the-south-china-sea-defining-the-status-quo/>>.

<sup>300</sup> It should be made clear, however, that while international law protects the *status quo* on the ground it does not necessarily recognise it as lawful - if, for example, it came about through the use of force. See paras 34-35 of this report.



127. One illustrative example can be found in the dispute between Ethiopia and Eritrea over Badme.<sup>301</sup> The Badme border region was controlled by Ethiopia but it was also claimed by Eritrea. Eritrea despatched its troops to reclaim the territory and chase off Ethiopian troops. The Eritrea/Ethiopia Boundary Commission demarcated the boundary on the ground and awarded the territory in question to Eritrea.<sup>302</sup> The Eritrea/Ethiopia Claims Commission found that even if Eritrea held a valid title of sovereignty over the disputed territory, this could not condone the illegality of its resort to force against Ethiopia (ie the administering State).<sup>303</sup>
128. The forcible takeover of Goa by India is also of relevance in that regard. On 18 December 1961, after a brief military campaign, India occupied the Portuguese colony of Goa and annexed it to the Indian Union.<sup>304</sup> The basis of the Indian action was that Goa constituted an integral part of India that had been illegally occupied for more than 450 years by Portugal and that, accordingly, force could be used to ‘remedy the wrong’.<sup>305</sup> Shortly after the invasion, India announced the ‘swift and bloodless’ end of the military operation while asserting that the Indian forces had carried out their task with ‘a minimum of force’.<sup>306</sup> India’s Defence Minister VK Krishna Menon strongly denied that India had violated the UN Charter: ‘We have not violated anybody’s integrity and we have not attacked Portugal. We have not violated Goa’s territorial integrity because it forms part of our own.’<sup>307</sup> Speaking at the Security Council, the Indian representative stated, ‘there can be no question of aggression against your own frontier...’.<sup>308</sup>
129. Commenting on India’s legal position on Goa, Shaw wrote that ‘as a matter of international law, such contentions cannot be regarded as a valid mechanism for the transfer of territorial sovereignty’.<sup>309</sup> Indeed,

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<sup>301</sup> Eritrea-Ethiopia Claims Commission, Partial Award, *Jus ad Bellum: Ethiopia’s Claims 1-8* (19 December 2005) (2006) 45 International Legal Materials 430; for a commentary, see C Gray, ‘The Eritrea/Ethiopia Claims Commission Oversteps Its Boundaries: A Partial Award?’ (2006) 17(4) European Journal of International Law 699.

<sup>302</sup> Eritrea-Ethiopia Boundary Commission: Decision regarding Delimitation of the Border between Eritrea and Ethiopia (2002) International Legal Materials 1057.

<sup>303</sup> Eritrea-Ethiopia Claims Commission, Partial Award, *Jus ad Bellum: Ethiopia’s Claims 1-8* (19 December 2005) (2006) 45 International Legal Materials 430 para 10.

<sup>304</sup> For a commentary, see Q Wright, ‘The GOA Incident’ (1962) 56(3) American Journal of International Law 617.

<sup>305</sup> M Shaw, *Title to Territory in Africa: International Legal Issues* (Clarendon Press 1986) 21.

<sup>306</sup> Keessing’s Record of World Events (1962) Vol 8 at 18623.

<sup>307</sup> *Ibid.*

<sup>308</sup> Security Council Official Records, 16th Year: 987th meeting (18 December 1961) para 46.

<sup>309</sup> M Shaw, *Title to Territory in Africa: International Legal Issues* (Clarendon Press 1986) 21.

according to Shaw, India's territorial claim, despite its merit, could not in any way legitimatise the use of force against Portugal.<sup>310</sup> Several States, including the United States, United Kingdom, France, Turkey, China, Ecuador, and Chile recognised that the action of India amounted to a use of force against Portugal in violation of the UN Charter and that the process through which India attempted to change the territorial *status quo* was illegal.<sup>311</sup> A draft resolution, introduced by the first four of these States, called for a cease-fire and withdrawal of Indian forces from the territory of Goa.<sup>312</sup> The resolution failed, however, to carry in the light of the exercise of the Soviet veto.

130. As another, more recent, example, the military standoff between China and India at the disputed border region of Doklam is an important reflection of States' legal perception that the *status quo* in a disputed territory is legally protected and cannot be modified or altered unilaterally through the use of force.<sup>313</sup> The Doklam incident, which raised fears of a wider armed conflict between the two States, erupted when Chinese troops attempted to build a road through the disputed area. This action was met with rigorous protests by Bhutan and India with the latter supporting Bhutan's sovereignty claim in the area.<sup>314</sup>
131. Bhutan claimed that the construction of a road by Chinese armed forces in the Doklam area affects the process of demarcating the boundary between the two States and constitutes a 'direct violation' of the 'Sino-Bhutanese Guiding Principles on the Settlement of the Boundary Issues' (1988) and the 'Sino-Bhutanese Agreement for Maintenance of

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<sup>310</sup> Ibid.

<sup>311</sup> Security Council Official Records, 16th Year: 987th meeting (18 December 1961) paras 64, 71, 99.

<sup>312</sup> Draft Security Council Resolution S/5033, proposed by France, Turkey, the United Kingdom, and the United States at the 988th Meeting of the Security Council on 18 December 1961 (vetoed by the Soviet Union); see also Council Official Records, 16th Year: 988th meeting (18 December 1961).

<sup>313</sup> The region of Doklam (known as Dong Lang in Chinese) lies at the tri-junction where Bhutan borders the Indian State of Sikkim and the Tibet Autonomous Region of China. China takes the view that the Doklam region is indisputably part of China and has always been under China's continuous and effective jurisdiction but accepts that the land boundary with Bhutan in the region is yet to be delimited, see Ministry of Foreign Affairs of the People's Republic of China, 'The Facts and China's Position Concerning the Indian Border Troops' Crossing of the China-India Boundary in the Sikkim Sector into the Chinese Territory' (2 August 2017) <[www.fmprc.gov.cn/mfa\\_eng/xwfw\\_665399/s2510\\_665401/t1481979.shtml](http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/t1481979.shtml)>.

<sup>314</sup> Kalyanaraman and Ribeiro wrote that India decided to send troops to the disputed area and halt the road construction because the Bhutanese Government had asked for help pursuant to the treaty of friendship with Bhutan, see S Kalyanaraman and E H Ribeiro, 'The China-India Doklam Crisis, Its Regional Implications and the Structural' (2017) 2 *Boletim de Conjuntura NERINT* 9.

Peace and Tranquillity Along the Border Areas' (1998).<sup>315</sup> The 1988 Agreement provides explicitly that, 'pending the settlement of the boundary question', the parties agree to maintain 'tranquillity on the border and *status quo* of the boundary' and to refrain 'from unilateral action or the use of force to change the *status quo* of the boundary'.<sup>316</sup> The 1998 Agreement likewise provides for the maintenance of the status quo of the boundary and the parties' undertaking not to resort to any unilateral action to alter the *status quo*.<sup>317</sup> India saw China's actions as an attempt to unilaterally change the *status quo* with 'serious security implications for India' and despatched its troops in the area to obstruct China's activities.<sup>318</sup>

132. In the wake of the incident, China published a 15-page memorandum articulating its position on the issue.<sup>319</sup> China argued that its road construction activities were on its side of the 'yet to be formally delimited' border with Bhutan and were aimed at improving local transportation, a 'completely lawful and legitimate' activity.<sup>320</sup> China considered India's crossing into Doklam to be an unlawful intrusion into Chinese territory in violation of China's territorial sovereignty and as an attempt to change the *status quo*.<sup>321</sup> China and India both refrained from making an express reference to Article 2(4) of the UN Charter, possibly because both had reportedly 'crossed the line' on earlier occasions.<sup>322</sup> However, China did invoke UN General Assembly

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<sup>315</sup> Ministry of Foreign Affairs Royal Government of Bhutan, Press Release (29 June 2017) <<http://www.mfa.gov.bt/?p=4799>>.

<sup>316</sup> 'Guiding Principles on the Settlement of the Boundary Issues' (1988) reported in W van Eekelen, *Indian Foreign Policy and the Border Dispute with China* (Springer 2015) 147–8.

<sup>317</sup> Art 2, 'Agreement on the Maintenance of Peace and Tranquillity Along the Sino-Bhutanese Border Areas' (China/Bhutan) (signed 8 December 1998, entered into force 8 December 1998) reprinted in Thierry Mathou, 'Bhutan-China Relations: Towards a New Step in Himalayan Politics', K Ura and S Kinga (eds), *The Spider and the Piglet* (Centre for Bhutan Studies 2004).

<sup>318</sup> Ministry of External Affairs, Government of India 'Recent Developments in Doklam Area' (30 June 2017) <<http://mea.gov.in/press-releases.htm?dtl/28572/Recent+Developments+in+Doklam+Area>>.

<sup>319</sup> Ministry of Foreign Affairs of the People's Republic of China, 'The Facts and China's Position Concerning the Indian Border Troops' Crossing of the China-India Boundary in the Sikkim Sector into the Chinese Territory' (2 August 2017) <[www.fmprc.gov.cn/mfa\\_eng/xwfw\\_665399/s2510\\_665401/t1481979.shtml](http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/t1481979.shtml)>.

<sup>320</sup> *Ibid*, para 8.

<sup>321</sup> *Ibid*, para 8.

<sup>322</sup> In 1976, for example, it was reported that a group of Indian patrol units intruded into Tibet leading to an exchange of fire with Chinese border troops. Four Indian soldiers died. China invoked self-defence, see Keesing's Record of World Events (1976) Vol 22 at 27548; as another example, in 1956 the Burmese Foreign Ministry reported that Chinese troops had intruded into Burmese territory and established outposts in Wa State (on the Chinese frontier east of Mandalay), see Keesing's Record of World Events (1957) Vol 11 at 15334.

Resolution 3314 on the Definition of Aggression to argue that India could not justify ‘the *invasion or attack* by the armed forces of a State of the territory of another State’ by invoking ‘serious security implications’.<sup>323</sup>

133. China drew a distinction between an armed intrusion in ‘areas where there is a clear and defined boundary’ and an armed intrusion or armed ‘friction’ in ‘areas with an undelimited boundary’.<sup>324</sup> It noted that an armed intrusion is ‘fundamentally different’ when it occurs in an area with a clear and delimited boundary.<sup>325</sup> It further considered that the crossing by armed troops of an ‘already delimited boundary’ is a very serious incident as it violates a State’s sovereignty and territorial integrity and contravenes the UN Charter.<sup>326</sup>
134. If China believes that a small-scale armed intrusion itself qualifies as an ‘*invasion or attack*’, and hence necessarily a use of force in the sense of Article 2(4), it is puzzling to draw a subsequent distinction between delimited and undelimited areas, and, in doing so, imply that an armed intrusion or armed ‘friction’ between two States escapes the scope of Article 2(4) because it takes place in an undelimited territory. It would be legally questionable if the legal status of the territory in question, where an inter-State armed ‘friction’ is alleged to have taken place, determined the characterisation of the armed incident as a use of force in the sense of Article 2(4). As the Eritrea/Ethiopia Claims Commission and the *Guyana/Suriname* Tribunal respectively confirmed, there can be no exception to the prohibition of the threat or use of force for disputed areas, be they terrestrial or maritime.<sup>327</sup>
135. In any case, the Doklam incident revealed the underlying consensus on the part of the States involved – as well as third States such as Japan<sup>328</sup>

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<sup>323</sup> Ministry of Foreign Affairs of the People’s Republic of China, ‘The Facts and China’s Position Concerning the Indian Border Troops’ Crossing of the China-India Boundary in the Sikkim Sector into the Chinese Territory’ (2 August 2017) para 9 <[www.fmprc.gov.cn/mfa\\_eng/xwfw\\_665399/s2510\\_665401/t1481979.shtml](http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/t1481979.shtml)>.

<sup>324</sup> Ibid, para 6.

<sup>325</sup> Ibid, para 6.

<sup>326</sup> Ibid, para 6.

<sup>327</sup> Eritrea-Ethiopia Claims Commission, Partial Award, *Jus ad Bellum*: Ethiopia’s Claims 1–8 (19 December 2005) (2006) 45 International Legal Materials 430 para 10; *Guyana v Suriname* (Annex VII Tribunal) (Award) (2007) 47 International Law Reports 166 para 423.

<sup>328</sup> According to media sources, the Japanese Ambassador to India Kenji Hiramatsu, remarked that ‘[w]hat is important in disputed areas is that all parties involved do not resort to unilateral attempts to change the status quo by force [but] resolve the dispute in a peaceful manner’, see R Basrur and SN Kutty (eds), *India and Japan: Assessing the Strategic Partnership* (Palgrave MacMillan 2018) 115, citing S Roy, ‘India-China standoff at Doklam: Japan throws

and Australia<sup>329</sup> – that unilateral actions aimed at changing the *status quo in* a disputed territory through the use of force are legally impermissible.

136. It is also worth noting that this view is implicit in the ICJ's Advisory Opinion in the *Israeli Wall* case. The ICJ considered that the construction of the wall in the disputed territory would create a new *status quo* on the ground that could well become permanent (ie '*fait accompli*'). As such, and notwithstanding the characterisation of the wall by Israel as a temporary security measure, it would be tantamount to a *de facto* territorial expansion by force.<sup>330</sup>

#### *Acquisition and effectivités*

137. International law distinguishes between titles of sovereignty and mere administrative titles.<sup>331</sup> In the above section the role of *de facto* administrative situations in the context of territorial disputes was discussed. The present section briefly discusses legal conditions for whether, how and when a title of sovereignty may emerge from that administration.
138. This report does not endorse the theories of prescriptive acquisition or historical consolidation. Neither approach has ever been applied by the ICJ or a tribunal considering a territorial dispute,<sup>332</sup> and States have

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weight behind India and Bhutan, says no side should try to change status quo by force' (The Indian Express, 19 August 2017) <<http://indianexpress.com/article/india/standoff-over-doklam-tokyo-throws-weight-behind-delhi-4801881/>>.

<sup>329</sup> The Australian Foreign Minister, Julie Bishop, has reportedly expressed her country's concern over the 'possibility of an escalation of tensions' in Doklam and highlighted Australia's opposition to Beijing's construction and militarisation activities in the disputed areas in the South China Sea; I Bagchi, 'Australia raises Doklam standoff with India' (*The Times of India*, 19 July 2017) <<https://timesofindia.indiatimes.com/india/australia-raises-doklam-standoff-with-india/articleshow/59657072.cms>>; 'Doklam standoff: Australia Minister's take on India China border issue shows global tension, top 5 things she said' (*Financial Express Online*, 19 July 2017) <<http://www.financialexpress.com/india-news/australia-minister-julie-bishop-india-china-border-issue-sikkim-standoff-global-tension-top-5-things/769411/>>.

<sup>330</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136 paras 87, 121.

<sup>331</sup> M G Kohen and M Hebie, 'Territory, Acquisition' in *Max Planck Encyclopedia of Public International Law* (online edition) para 6.

<sup>332</sup> In *Kasikili/Sedudu Islands (Botswana/Namibia)* [1999] ICJ Rep 1045, 97, the Parties accepted that prescriptive acquisition was applicable international law on certain conditions, but the Court said that it 'need not concern itself with the status of prescriptive acquisition in international law' since the conditions cited by Namibia were not fulfilled in any case; see also *Land and Maritime Boundary (Cameroon v Nigeria)* (Judgment) (Merits) [2002] ICJ Rep 303; *Minquiers and Ecrehos (France/United Kingdom)* [1953] ICJ Rep 47; *Temple of Preah Vihear (Cambodia v Thailand)* (Merits) [1962] ICH Rep 6; *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)* (Judgment) [2008] ICJ Rep 12.

been 'careful not to rely on acquisitive prescription as the main basis of their title to territory.'<sup>333</sup> Rather, this report prefers the view that these mechanisms are unsuccessful attempts to develop the law of acquiescence.<sup>334</sup>

139. In international law, sovereignty over a particular territory may pass from one State to another only by consent. Consent may be expressed in a treaty, or may be implicit through the unilateral acts of the second State on the territory of the first.<sup>335</sup> The ICJ in the *Pedra Branca* case explained the latter situation in this way:

Under certain circumstances, sovereignty over territory might pass as a result of the failure of the State which has sovereignty to respond to conduct a *titre de souverain* of the other State or, as Judge Huber put it in the *Island of Palmas* case, to concrete manifestations of the display of territorial sovereignty by the other State. Such manifestations of the display of sovereignty may call for a response if they are not to be opposable to the State in question. The absence of reaction may well amount to acquiescence. The concept of acquiescence "is equivalent to tacit recognition manifested by unilateral conduct which the other party may interpret as consent...".<sup>336</sup>

140. Accordingly, two matters must be established before sovereignty may pass. First, unilateral conduct a *titre de souverain* or *effectivités* must be established such that the State with sovereign title has direct or constructive knowledge of the conduct and is considered under a duty to react to them. This will occur when there is a 'clear claim of sovereignty over a territory'<sup>337</sup> which may be indicated expressly or by a range of *effectivités*. *Effectivités* are 'acts undertaken in the exercise of State authority through which a State manifests its intention to act as the sovereign over a territory.'<sup>338</sup> General rules of State responsibility

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<sup>333</sup> MG Kohen and M Hebie, 'Territory, Acquisition' in *Max Planck Encyclopedia of Public International Law* (online edition) para 21.

<sup>334</sup> *Ibid* para 19.

<sup>335</sup> *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)* (Judgment) [2008] ICJ Rep 12, para 121.

<sup>336</sup> *Ibid* citing *Island of Palmas Case (Netherlands/United States of America)*, Award of 4 April 1928, RIAA, Vol. II, (1949) 839; *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)*, ICJ Rep 1984, 130.

<sup>337</sup> *Temple of Preah Vihear (Cambodia v Thailand)* (Judgment) (Merits) [1962] ICJ Rep 6, 30-1.

<sup>338</sup> MG Kohen and M Hebie, 'Territory, Acquisition' in *Max Planck Encyclopedia of Public International Law* (online edition) para 25.

apply such that the focus is on acts of State organs or authorities.<sup>339</sup> The acts of private individuals or even the existence of substantial populations on the ‘wrong side’ of a border are not sufficient;<sup>340</sup> rather, acts in a legislative, administrative or judicial capacity which indicate that the State intends to act as sovereign – a *titre de souverain* – must be identified.<sup>341</sup>

141. Military activities, police conduct and naval patrols can be considered *effectivités* in the appropriate context.<sup>342</sup> In the *Rann of Kutch* arbitration, the tribunal considered that *effectivités* in the territory in question should be considered in light of the particular circumstances, including the need for a military presence or the existence of complex administrative and juridical entities matching those elsewhere in the claiming State’s jurisdiction.<sup>343</sup> It therefore may be that military presence in an otherwise unpopulated area could be sufficient. However, unlawful *effectivités*, such as those involving a breach of Article 2(4) cannot form the basis of sovereignty.<sup>344</sup>
142. Having shown sufficient *effectivités*, the victim State must be found to have consented to the claim of sovereignty. Consent to the use of force does not amount to consent to the claim of sovereignty. As noted above, this consent may be tacit or construed, but must nevertheless be ‘manifested clearly and without any doubt’.<sup>345</sup> Isolated acts must be carefully scrutinised: in *Pedra Branca* even a letter sent by the Secretary

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<sup>339</sup> Ibid, para 26; note that in *Preah Vihear* the Court found that acts of local authorities could not override consistent central authority conduct to the contrary, whether or not the local authority acts were formally attributable to the State: *Temple of Preah Vihear (Cambodia v Thailand)* (Judgment) (Merits) [1962] ICJ Rep 6, 31.

<sup>340</sup> *Land, Island and Maritime Frontier Dispute (El Salvador v Honduras; Nicaragua Intervening)* (Judgment) [1992] ICJ Rep 351, 97; *Land and Maritime Boundary (Cameroon v Nigeria)* (Judgment) (Merits) [2002] ICJ Rep 303 para 67.

<sup>341</sup> In *Pulau Ligitan* Malaysian sovereignty was declared on the basis of legislative and administrative measures regulating turtle egg fishing: *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)* [2002] ICJ Rep 625, paras 70–71.

<sup>342</sup> In *Pedra Branca* the Court held that in the geographic and diplomatic context where it appeared the Parties shared naval patrolling duties in the Straits of Singapore, neither Party could rely on this to show sovereignty over Pedra Branca: *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)* (Judgment) [2008] ICJ Rep 12 para 240.

<sup>343</sup> *Rann of Kutch (India v Pakistan)* (1968) 17 Reports of International Arbitral Awards. 553, 674–5.

<sup>344</sup> *Land and Maritime Boundary (Cameroon v Nigeria)* (Judgment) (Merits) [2002] ICJ Rep 303 para 70.

<sup>345</sup> *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)* (Judgment) [2008] ICJ Rep 12, para 122.

of State of Johor to the British Government, noting that ‘the Johor Government does not claim ownership’ of the territory in question was not considered determinative in itself, and instead was addressed in the context of the Parties’ conduct over the century since title was claimed to have passed.<sup>346</sup> Any form of resistance to the *effectivités* of the opposing State, including formal protest or ongoing treatment of the territory in question within a domestic legal system may defeat a claim based on acquiescence.<sup>347</sup>

THE RIGHT OF SELF-DEFENCE

143. It is firmly established that the use of force as a means of acquiring territory, altering land borders (whether settled or disputed) and settling international disputes is contrary to international law.<sup>348</sup> Nevertheless, there exists a significant exception to the prohibition on the threat or use of force under international law: the exercise of the right of self-defence ‘if an armed attack occurs’, enshrined in Article 51 of the UN Charter.<sup>349</sup>
144. The ICJ has repeatedly recognised that Article 51 does not create a right of self-defence. Instead, it preserves an inherent right of self-defence, which existed in customary international law prior to the enactment of the Charter in 1945.<sup>350</sup> Pursuant to this inherent right, the victim of an armed attack may respond by taking forcible action against an aggressor State, without itself being in violation of Article 2(4) of the UN Charter.<sup>351</sup> Pursuant to the ILC Articles on State Responsibility, self-defence ‘forms part of the definition of the obligation to refrain from the threat or use of force laid down in Article 2,

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<sup>346</sup> Ibid, paras 195–223.

<sup>347</sup> M G Kohen and M Hebie, ‘Territory, Acquisition’ in *Max Planck Encyclopedia of Public International Law* (online edition) para 15.

<sup>348</sup> J Crawford, *The Creation of States in International Law* (2nd edn, Clarendon Press 2006) 131-132.

<sup>349</sup> I Brownlie, *Principles of Public International Law* (6th edn, Oxford University Press 2003) 699–700; Article 51 provides for two forms of self-defence: ‘individual’ or ‘collective’. This research is devoted to the specific issues related to the exercise of an individual right of self-defence in the context of territorial disputes.

<sup>350</sup> S D Murphy, ‘Self-Defense and the Israeli Wall Advisory Opinion: An Ipse Dixit from the ICJ?’ (2005) 99(1) *American Journal of International Law* 62, 64; Y Dinstein, *War, Aggression and Self-Defence* (3rd edn, Cambridge University Press 2001) 163-165.

<sup>351</sup> It is accepted that the Security Council also has the power to order sanctions pursuant to Chapter VII of the UN Charter without amounting to a breach of Article 2(4) of the UN Charter.



paragraph 4.<sup>352</sup> Self-defence is, hence, a primary rule, a constituent element of the obligation itself: the prohibition enjoins States not to use force unless in self-defence.<sup>353</sup>

*Requirements of self-defence*

145. There are three key requirements for the exercise of self-defence: a) self-defence can only be taken in response to ‘an armed attack’<sup>354</sup>; b) it must be directed against the State responsible for the attack (the State to whom the armed attack can be attributed);<sup>355</sup> and c) any act of self-defence must be carried out within the limits of necessity and proportionality.<sup>356</sup>
146. A State, which invokes a right of self-defence to justify the use of force against another State, must prove that the conditions giving rise to the right of self-defence were met and that the exercise of this right was

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<sup>352</sup> Art 21 (point 1), ILC Articles on State Responsibility.

<sup>353</sup> FI Paddeu, ‘Self-Defence as a Circumstance Precluding Wrongfulness: Understanding Article 21 of the Articles on State Responsibility’ (2015) 85(1) *British Yearbook of International Law* 90–1.

<sup>354</sup> An ‘armed attack’ is a type of aggression which, as provided by UNGA Res 3314 (XXIX) (14 December 1974) on the Definition of Aggression, includes inter alia:

- (a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;
- (b) 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;
- (c) The blockade of the ports or coasts of a State by the armed forces of another State;
- (d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;
- (e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;
- (f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;
- (g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.

<sup>355</sup> *Armed Activities on the Territory of the Congo (Congo v Uganda)* (Judgment) [2005] ICJ Rep 168 para 146.

<sup>356</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Judgment) [1986] ICJ Rep 14 paras 194, 237; *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226 para 41.

both necessary and proportionate.<sup>357</sup> Necessity denotes that there are no alternative options other than to rely on the use of force in response to an armed attack.<sup>358</sup> Proportionality indicates a standard of ‘reasonableness’ or ‘symmetry’ between the unlawful use of force and the lawful counter-force.<sup>359</sup>

147. Article 51 of the UN Charter lays out a further procedural requirement to report any measures taken in self-defence to the Security Council and the closely associated obligation to cease forcible actions when the Security Council has ‘taken measures necessary to maintain international peace and security’.<sup>360</sup>

*Self-defence and circumstances precluding wrongfulness*

148. The exercise of lawful self-defence may have implications for other fundamental norms of international law, in particular the principles of territorial integrity and non-intervention. Lawful acts of self-defence may, for instance, occur in the territory of the aggressor State: ‘a measure of self-defence, lawful in accordance with Article 2(4) and the customary prohibition of force, may still be a breach of the territorial sovereignty of the aggressor State and an intervention in its internal affairs.’<sup>361</sup> Yet, the ICJ has invariably found that the lawful exercise of self-defence on the territory of the aggressor State does not breach these other principles of international law.<sup>362</sup> If the right of self-defence is only an exception to the prohibition on the use of force, the impairment of the other obligations owed to the aggressor State is explained by

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<sup>357</sup> *Oil Platforms (Iran v United States of America)* (Judgment) [2003] ICJ Rep 161 para 57.

<sup>358</sup> Y Dinstein, *War, Aggression and Self-Defence* (3rd edn, Cambridge University Press 2001) 208–11.

<sup>359</sup> *Ibid.*, 212–3.

<sup>360</sup> Art 51, UN Charter; in *Nicaragua v United States of America*, the Court implied that when the use of force is governed by the UN Charter, failure to adhere to the reporting duty under the Charter carries irrevocable consequences for the invocation of the right of self-defence, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Judgment) [1986] ICJ Rep 14 para 199; the Eritrea-Ethiopia Commission remarked that Eritrea was precluded from invoking the right to self-defence because it failed to comply with the requirement of reporting to the Security Council as required by Art 51 of the Charter, see Eritrea-Ethiopia Claims Commission, Partial Award, *Jus ad Bellum: Ethiopia’s Claims 1–8* (19 December 2005) (2006) 45 International Legal Materials 430 para 11.

<sup>361</sup> FI Paddeu, ‘Self-Defence as a Circumstance Precluding Wrongfulness: Understanding Article 21 of the Articles on State Responsibility’ (2015) 85(1) British Yearbook of International Law 90.

<sup>362</sup> See for instance, *Military and Paramilitary Activities in and against Nicaragua Case (Nicaragua v United States of America) (Merits)* [1986] ICJ Rep 14 and *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* [2005] ICJ Rep 168.

Article 21 of the ILC Articles on State Responsibility which states that '[t]he wrongfulness of an act of a State is precluded if the act constitutes a lawful measure of self-defence taken in conformity with the Charter of the United Nations'. Forcible measures taken in accordance with the right of self-defence, hence, will not constitute violations of the prohibition on the use of force, nor breach the principles of territorial sovereignty and non-intervention.

149. It must also be noted that international humanitarian law, non-derogable human rights and environmental protection continue to be binding on States when acting in self-defence, pursuant to the ICJ's *Nuclear Weapons* Advisory Opinion.<sup>363</sup> A State would have to take these obligations into consideration when assessing the necessity and proportionality of a forcible response in self-defence. Thus, these obligations of 'total restraint'<sup>364</sup> cannot be impaired either by the right in Article 51 of the UN Charter or the justification contained in Article 21 of the ILC Articles on State Responsibility.

#### *Preventive self-defence?*

150. There has been a long-standing debate as to whether the right of self-defence exists not just in the event of an actual armed attack but extends to situations where there is a threat of a use of force. Various theories of 'preventive self-defence' have been put forward in the event that no armed attack has yet been launched.<sup>365</sup>
151. Much of the debate has revolved around the intensity of the threat necessary to trigger the right to self-defence. Some have referred to the need that the armed attacked be 'imminent'.<sup>366</sup> Others have made the case that self-defence should be admitted when faced with a more latent

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<sup>363</sup> FI Paddeu, 'Self-Defence as a Circumstance Precluding Wrongfulness: Understanding Article 21 of the Articles on State Responsibility' (2015) 85(1) *British Yearbook of International Law* 90.

<sup>364</sup> *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226 para 30.

<sup>365</sup> For a detailed discussion, see O Corten, *The Law Against War: The Prohibition on the Use of Force in Contemporary International Law* (Hart Publishing 2012), 406–43.

<sup>366</sup> See, for instance, SM Schwebel, 'Aggression, Intervention and Self-Defence in Modern International Law' (1972) 136 *Recueil des Cours*, Collected Courses of the Hague Academy of International Law 411, 479; R Higgins, *The Development of International Law Through the Political Organs of the United Nations* (Oxford University Press 1963), 199; R Hofmann, 'International Law and the Use of Military Force Against Iraq' (2002) 45 *German Yearbook of International Law* 31; J Brumée, 'The Security and Self-Defence: Which Way to Global Security?' in N Blokker and N Schrijver (eds) *The Security Council and the Use of Force: A Need for Change?* (Martinus Nijhoff 2005) 118–9.

threat.<sup>367</sup> The first group has sometimes been referred to as ‘pre-emptive self-defence’, as opposed to the ‘anticipatory self-defence’ claimed by the second.<sup>368</sup> In any event, mere threat of the use of force which is ‘patently unaccompanied by deeds’ will not, in principle, constitute an armed attack.<sup>369</sup> As has been rightly pointed out these distinctions are essentially doctrinal: States remain fundamentally divided on this question suggesting that the controversial notion of preventive self-defence has not made its way into customary international law.<sup>370</sup>

### *Self-defence and territorial disputes*

#### *Immediacy and the territorial status quo*

152. The question of permissibility of forcible action in self-defence in the context of territorial disputes raises a number of important issues. A State cannot legitimately invoke a right of self-defence to gain control over a disputed area which is under the *de facto* control and administration of another State, on the basis of rectifying a situation of unlawful possession or generally correcting a ‘past injustice’.<sup>371</sup> The requirement that forcible action in self-defence only be exercised in response to an armed attack implies a condition of immediacy, namely that the action cannot be taken long after the armed attack has occurred.<sup>372</sup>
153. The armed conflict between Argentina and Britain over the Falkland Islands is a useful example of the application of this rule. On 2 April 1982, Argentina invaded and occupied the Falkland Islands which had been under Britain’s control and administration since 1832. Argentina considered that because Britain had seized the territory by force in

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<sup>367</sup> See, for instance, M Reisman, ‘International Legal Responses to Terrorism’ (1999) 22 *Houston Journal of International Law* 17; A D Sofaer, ‘On the Necessity of Pre-emption’ (2003) 14 *European Journal of International Law* 209; L R Beres, ‘On Assassination as Anticipatory Self-Defence: The Case of Israel’ (1991) 20(2) *Hofstra Law Review* 321, 322 fn 2.

<sup>368</sup> O Corten, *The Law Against War: The Prohibition on the Use of Force in Contemporary International Law* (Hart Publishing 2012), 406; NA Shah, ‘Self-defence, Anticipatory Self-defence and Pre-emption: International Law’s Response to Terrorism’, 12 *Journal of Conflict and Security Law* 95, 111.

<sup>369</sup> Y Dinstein, *War, Aggression and Self-Defence* (3rd edn, Cambridge University Press 2001) 165–7, citing N Singh and E McWhinney, *Nuclear Weapons and Contemporary International Law* (2nd edn, Martinus Nijhoff 1989) 87.

<sup>370</sup> C Gray, *International Law and the Use of Force* (Oxford University Press 2018) 175.

<sup>371</sup> AC Arend, ‘The Obligation to Pursue Peaceful Settlement of International Disputes During Hostilities’ (1984) 24(1) *Virginia Journal of International Law* 97, 102.

<sup>372</sup> Y Dinstein, *War, Aggression and Self-Defence* (3rd edn, Cambridge University Press 2001) 165–7.

1833, and given the lack of progress in diplomatic negotiations, it was justified in reclaiming the islands despite the intervening time.<sup>373</sup> Speaking before the UN Security Council shortly after the Argentine takeover of the Islands, Argentina's representative stated:

[T]oday the Government of Argentina has proclaimed the recovery of its national sovereignty over the territories of the Malvinas, South Georgia and South Sandwich islands in an act which responds to a just Argentine claim and is also an act of *legitimate defence* in response to the acts of aggression by the United Kingdom.<sup>374</sup>

154. The British government swiftly despatched a Royal Navy task force to the area and appealed to the Security Council to demand the immediate withdrawal of Argentine forces. The Security Council, by Resolution 502 of 3 April 1982, demanded that both governments immediately cease all hostilities and that Argentina immediately withdraw all its forces from the Falkland Islands.<sup>375</sup> The Resolution recognised the existence of a 'breach of the peace' as a result of the Argentine invasion and placed the onus on Argentina to withdraw, whilst calling upon both sides to pursue the peaceful settlement of this dispute. The British forces were able to dislodge Argentine forces from the Islands after 72 days of Argentine occupation. The two States reached a *de facto* ceasefire in June 1982.
155. The Falklands crisis of 1982 revealed the belief of the majority of the members of the Security Council that the use of force by Argentina to gain control over the Islands constituted an armed attack against the United Kingdom.<sup>376</sup> The latter, being the attacked State, acted legitimately in self-defence to protect its possession of the Islands.<sup>377</sup>

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<sup>373</sup> Prior to the invasion, General Galtieri, leader of the Argentine military government told US President that the British had failed to relinquish sovereignty in 149 years and that 'time had run out', see 'Reagan, In a Phone Call, Tried to Deter Invasion' (*New York Times*, 3 April 1982) cited in F Hassan, 'The Sovereignty Dispute over the Falkland Islands' (1982) 23(1) *Virginia Journal of International Law* 54, 59.

<sup>374</sup> Security Council Official Records S/PV 2346 (2 April 1982) para 12.

<sup>375</sup> UN Security Council Res 502/1982 reprinted in (1982) 21 *International Legal Materials* 679.

<sup>376</sup> As evidenced by the widespread support (10 yes, 1 no and 4 abstentions) for Security Council Resolution 502/1982 demanding the 'immediate withdrawal of all Argentine forces from the Falkland Islands (Islas Malvinas)'.

<sup>377</sup> C Greenwood, 'Self-Defence', in R Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (Oxford University Press 2012) 108; M Waibel, 'Falkland/Islas Malvinas', in R Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (Oxford University Press 2012) 1113, 1116.

156. It should be noted that whilst forcible action in self-defence cannot be taken long after an armed attack on the disputed territory, delayed forcible action may still be legitimate if the lapse of time is warranted by the circumstances. For example, adequate time is usually required as the attacked State deliberates on, or plans, its next move, or if an attempt is first made to resolve the matter amicably via diplomatic means prior to resorting to self-defence but is persistently refuted by the attacking State.<sup>378</sup>
157. The immediacy requirement and the existence of a territorial *status quo* to test the applicability of Article 2(4)<sup>379</sup> have crucial implications for a dispossessed State's right to use forcible means to retake its territory. There are only two situations where a State which has lost a territory can forcibly reclaim it. The first situation is where there has been a UN Security Council's authorisation to use force. This is not done pursuant to the right of self-defence but instead the Security Council's power to maintain or restore international peace and security under Chapter VII of the UN Charter. One example is Security Council Resolution 678, which authorised UN Member States to use 'all necessary means' to uphold and implement resolution 660 to drive Iraq out of Kuwait following its invasion in 1990.<sup>380</sup>
158. The second situation is where a State is attacked and uses force in self-defence, pursuant to the requirements of Article 51 of the UN Charter, to protect the territory it administers. International law, as was seen above, protects the factual reality in existence on the ground, included in a disputed territory. The immediacy requirement is of crucial importance here: if State A attacks neighbouring State B and occupies part of State B's territory and State B does not respond within a reasonable period of time, it loses the ability to rely on self-defence to retake its territory by force at a later stage. The right to use force in self-defence

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<sup>378</sup> Y Dinstein, *War, Aggression and Self-Defence* (3rd edn, Cambridge University Press 2001) 212–3.

<sup>379</sup> See section, 'The *status quo* as the baseline to test the application of Article 2(4)', paras 119–136.

<sup>380</sup> UN Security Council Resolution 678 (29 November 1990); for other examples and analyses of UN Security Council authorisation of the use of force, including Resolution 678, see, among others, B Weston, 'Security Council Resolution 678 and Persian Gulf Decision Making: Precarious Legitimacy' (1991) 85 *American Journal of International Law* 516–7; N Blokker, 'Is the Authorisation Authorised? Powers and practice of the UN Security Council to authorize the use of force by 'coalitions of the able and willing'' (2000) 11 *European Journal of International Law* 541; N Blokker, 'Outsourcing the Use of Force: Towards More Security Council Control of Authorized Operations?' in M Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (Oxford University Press 2015), 202–26.

cannot be reactivated at a later stage. Thus, unless the attacked State makes a forcible response which conforms to the requirements of self-defence within a reasonable time, it may be confronted with the newly established territorial *status quo* which it will not be legally permitted to alter retroactively by force.

159. Dinstein offers an alternative view based on international humanitarian law and his argument is that ‘there are only two states of affairs in international relations – war and peace – with no undistributed middle ground.’<sup>381</sup> Dinstein posits that the suspension of hostilities, such as through a truce or ceasefire, should not be confused with their termination.<sup>382</sup> Where a state of war has not been formerly closed between the parties to a conflict, hostilities could resume, even after a lengthy interruption, without the need to provide a new *jus ad bellum* argument for the use of force. Thus, Dinstein asserts ‘a ceasefire violation is irrelevant to the determination of armed attack and self-defence.’<sup>383</sup> He offers the example of the destruction of a nuclear reactor on Iraqi soil in 1981 which, he argues, represented another round of hostilities in the war which started between Iraq and Israel in 1948.<sup>384</sup>
160. Dinstein’s argument is problematic given its reliance on the doctrine of belligerent rights. This international humanitarian law doctrine determined, prior to the adoption of the UN Charter, the actions that could be taken by a State after the cessation of hostilities and remained available to States until the state of war had come to a real end.<sup>385</sup> In the post-Charter era, it is the *jus ad bellum* rather than the *jus in bello* and the doctrine of belligerent rights which determines the legality of a State’s forcible acts after hostilities have ceased. One example is Egypt’s claim in 1951 that its action against shipping passing through the Suez to and from Israel was a lawful exercise of its belligerent rights on the basis that Israel and Egypt were at war, despite the 1949 armistice with

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<sup>381</sup> Y Dinstein, *War, Aggression and Self-Defence* (4th edn, Cambridge University Press, 2005) 16.

<sup>382</sup> *Ibid*, 55.

<sup>383</sup> *Ibid*, 54.

<sup>384</sup> *Ibid*, 47–8.

<sup>385</sup> J Gardam, *Necessity, Proportionality and the Use of Force* (Cambridge University Press 2009) 168; additionally, it could be argued that Dinstein’s understanding of the IHL doctrine of belligerent rights is flawed. Its purpose is better understood ‘not to confer benefits upon the parties to a conflict but to protect individuals and to give expression to concepts of international public policy’, see C Greenwood, ‘The Relationship between *Ius ad Bellum* and *Ius in Bello*’ (1983) 9(4) *Review of International Studies* 221, 227.

Israel.<sup>386</sup> The UN Security Council rejected Egypt's claim of belligerent rights, declaring:

[S]ince the armistice regime, which has been in existence for nearly two and a half years, is of a permanent character, neither party can reasonably assert that it is actively a belligerent or required to exercise the right of visit, search, and seizure for any legitimate purpose of self-defence.<sup>387</sup>

161. Thus, once the hostilities have ceased and there has been a prolonged absence of fighting, the States cannot resume or reopen hostilities unless there is a newly created legal basis under the *jus ad bellum* for the recourse to force (eg a UN Security Council authorisation or a new armed attack).<sup>388</sup>

162. To test the extent and scope of the territorial *status quo* in its interaction with the right of self-defence, one can construct a 'double unlawful occupation' hypothetical.<sup>389</sup> An area is administered by State A but is also claimed by States B and C. States B and C occupy parts of the territory by force and establish their administration in the area. New lines of control are drawn and a *de facto* ceasefire is established. This new factual reality on the ground in the disputed area forms the new, legally protected, territorial *status quo*. Once the hostilities have ceased and the States have established their respective administrations, how the administering States established themselves on the disputed territory and, how the new *status quo* came into existence does not affect their right to defend the territory in question against future attacks.<sup>390</sup> Thus, according to the hypothetical, if State B attacks the area occupied by State C, State C can use force in self-defence to protect the territory it occupies. The same result would be struck where State A, the previous possessor of the disputed territory, reactively takes up arms and attacks the area which State C currently occupies, arguing it can do so on the

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<sup>386</sup> For a longer discussion of the incident's implications, see C Greenwood, 'The Concept of War in Modern International Law' (1987) 36(2) *International and Comparative Law Quarterly* 283, 287–288.

<sup>387</sup> UN Security Council Resolution 95 (1 September 1951).

<sup>388</sup> T Ruys, *Armed Attack' and Article 51 of the UN Charter* (Cambridge University Press 2010) 120; J Gardam, *Necessity, Proportionality and the Use of Force* (Cambridge University Press 2009) 168; D Kritsiotis, 'Topographies of Force' in M Schmitt and J Pejic (eds), *International Law and Armed Conflict: Exploring the Faultlines: Essays in Honour of Yoram Dinstein* (BRILL 2007) 29, 37–40.

<sup>389</sup> Adapted hypothetical situation suggested by Dr Federica Paddeu, John Tiley Fellow in Law at Queens' College, University of Cambridge, International Conference (27 March 2018).

<sup>390</sup> This hypothetical assumes that all the requirements of self-defence under Article 51 of the UN Charter are satisfied.



basis of self-defence. State C, as the occupier and administrator of the disputed area, may defend the territory by using self-defence against State A.<sup>391</sup>

163. In another hypothetical, this time of entrenching occupation, an area is administered by State A and State B occupies part of the territory by force up to point X. State B establishes its administration over the area. A new territorial *status quo* comes into existence. State A did not react at the time of the attack and has lost the ability to rely on self-defence. Subsequently, State B deploys further into the territory administered by State A, occupying a greater portion of State A's territory, up to point Y. Provided that the requirements of self-defence under Article 51 of the UN Charter are satisfied, State A may rely on self-defence in response to State B's most recent attack. Accordingly, State A can use force to take back the area between point Y and point X; State A, however, cannot use force to push State B's forces over the border and, thus, retake the territory it lost in State B's first attack. This also illustrates that a dispossessed State is protected from any additional incursions onto the territory it administered. Any expanded occupation could create a new legal *jus ad bellum* basis for using self-defence.

*Gravity threshold and forcible countermeasures in frontier incidents*

164. An armed incident in or near the disputed area in question will only amount to an armed attack, triggering the right of self-defence, if it meets the required level of gravity. In *Nicaragua v United States of America*, the ICJ focused on the 'scale and effects' of an 'armed attack' to distinguish it from a 'mere frontier incident'.<sup>392</sup> It considered that, in establishing that an 'armed attack' has occurred, the State invoking the right of self-defence must prove that it was the target of a large-scale use force (such as an invasion or bombardment) or other 'most grave form of the use of force'.<sup>393</sup> By opposition, the judgment envisaged 'legitimate counter-measures "analogous" to but less grave than self-defence, in response to use of force which is less grave than an armed

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<sup>391</sup> It should be noted that the occupier does have certain legal responsibilities in relation to the inhabitants of the territory it occupies, including positive obligations, such as the provision of educational and health services and the provision of security, see E Milano and I Papanicolopulu, 'State Responsibility in Disputed Areas on Land and at Sea' (2011) 71 Heidelberg Journal of International Law 587, 603–6.

<sup>392</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States)* (Judgment) [1986] ICJ Rep 14 para 195.

<sup>393</sup> See SD Murphy, 'Self-Defense and the Israeli Wall Advisory Opinion: An Ipse Dixit from the ICJ?' (2005) 99(1) American Journal of International Law 62, 65.

attack.<sup>394</sup> The existence of a gravity requirement was affirmed by the ICJ in the *Oil Platforms* case.<sup>395</sup>

165. The prevailing view in the scholarship in this area is that this approach has opened up a gap between the use of force, which is prohibited by Article 2(4) of the Charter, and the notion of an ‘armed attack’ for the purpose of self-defence.<sup>396</sup> As Greenwood explains, ‘[a]ccording to the Court, if a use of force did not rise above the level of a “mere frontier incident”, then, even though it constituted a violation of Art. 2 (4) UN Charter, the victim of that violation was not entitled to respond by way of action in self-defence...’.<sup>397</sup> This was confirmed by the Eritrea-Ethiopia Claims Commission, which recognised that ‘localized border encounters between small infantry units, even those involving the loss of life, do not constitute an armed attack for purposes of the Charter’.<sup>398</sup>

166. In the *Cameroon v Nigeria* case, Nigeria alleged that it had acted in self-defence when deploying its forces in the Bakassi Peninsula in response to Cameroon’s campaign of systematic encroachment on Nigerian territory.<sup>399</sup> According to the counsel of Nigeria:

Nigeria was perfectly entitled to strengthen its security forces... there was a serious risk of civil disturbance in Bakassi as well as a perceived threat also from Cameroon, and to avoid possible trouble security reinforcements were sent to the area... There was no “invasion” of Cameroonian territory, only deployments to defend Nigeria’s sovereign interests and territorial integrity.<sup>400</sup>

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<sup>394</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States)* (Judgment) [1986] ICJ Rep 14 paras 210–211 cited in Y Dinstein, *War, Aggression and Self-Defence* (3rd edn, Cambridge University Press 2001) 165–7.

<sup>395</sup> *Oil Platforms (Iran v United States of America)* (Judgment) [2003] ICJ Rep 161 paras 51, 62.

<sup>396</sup> C Greenwood, ‘Self-Defence’, in R Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (Oxford University Press 2012) 106–7; Y Dinstein, *War, Aggression and Self-Defence* (3rd edn, Cambridge University Press 2001) 173–6; A Randelzhofer, ‘Article 51’, in B Simma (ed), *The Charter of the United Nations: A Commentary*, Volume I (3rd edn, Oxford University Press 2012) 790, cites a number of legal authorities supporting this view; T Ruys, *Armed Attack and Article 51 of the UN Charter* (Cambridge University Press 2010) 139–49, who argues that this distinction has been inspired by a desire to reduce the risk of escalating violence.

<sup>397</sup> C Greenwood, ‘Self-Defence’, in R Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (Oxford University Press 2012) 106–7.

<sup>398</sup> Eritrea-Ethiopia Claims Commission, Partial Award, *Jus ad Bellum: Ethiopia’s Claims* 1–8 (19 December 2005) (2006) 45 International Legal Materials 430 para 11.

<sup>399</sup> *Land and Maritime Boundary (Cameroon v Nigeria)* (Judgment) (Merits) [2002] ICJ Rep 303 para 311.

<sup>400</sup> *Cameroon v Nigeria* (Oral Pleadings of Nigeria) (Friday 15 March 2002) para 7.

The ICJ did not address this line of argument. It was content with ordering each of the parties to ‘expeditiously and without condition’ withdraw their administration and their military and police forces from areas falling within the other party’s sovereignty.<sup>401</sup>

167. The distinction between an ‘armed attack’ triggering the right of self-defence and a ‘mere frontier incident’ short of an armed attack is problematic and ambiguous. As Sir Gerald Fitzmaurice has remarked, ‘[t]here are frontier incidents and frontier incidents. Some are trivial, some may be extremely grave.’<sup>402</sup> Indeed, on many occasions, frontier incidents (eg across or within a disputed border area) have led to military confrontations. Thus, attempting to dissociate such incidents from other forms of armed attack may be difficult.<sup>403</sup> As aptly put by Kunz, ‘if an “armed attack” means illegal armed attack it means, on the other hand, any illegal armed attack, even a small border incident’.<sup>404</sup> An armed invasion (the foremost type of aggression) can be effected, not only when a full-scale, all-out armed attack has been initiated on the disputed territory, but also when a smaller unit of the aggressor State’s armed forces enters the territory in question, positions itself in strategic locations and, thus, gains an important strategic advantage vis-à-vis the injured State. In such a case, as Dinstein suggests, it would be fallacious to deny the right of the victim State to take forcible action in self-defence that complies with the conditions of necessity and proportionality.<sup>405</sup> However, for forcible action to be taken lawfully in self-defence, the aggressor State’s behaviour must amount to an armed attack.
168. This is not an uncontroversial area of international law. Much has been written about the admissibility, or inadmissibility, of forcible countermeasures or armed reprisals where the challenging State resorts to the use of force short of an armed attack and, hence, not triggering the right of self-defence under the UN Charter. For example, Judge Simma in his separate opinion in the *Oil Platform* case asserted that the permissibility of ‘proportionate defensive measures’ taken against armed

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<sup>401</sup> *Cameroon v Nigeria* (ibid) paras 314–315.

<sup>402</sup> GG Fitzmaurice, ‘The Definition of Aggression’ (1952) 1(1) *International and Comparative Law Quarterly* 137, 139.

<sup>403</sup> See Y Dinstein, *War, Aggression and Self-Defence* (3rd edn, Cambridge University Press 2001) 174–6.

<sup>404</sup> JL Kunz, ‘Individual and Collective Self-Defence in Article 51 of the Charter of the United Nations (1947) 41(4) *American Journal of International Law* 1, 96.

<sup>405</sup> Y Dinstein, *War, Aggression and Self-Defence* (3rd edn, Cambridge University Press 2001) 174–5.

actions falling short of an armed attack cannot be denied.<sup>406</sup> Specifically, he argued that there are ‘smaller-scale use[s] of force’, short of an armed attack in the sense of Article 51, against which the victim State can respond by similar smaller-scale uses of force (subject to the requirements of necessity and proportionality).<sup>407</sup> However, the view that forcible countermeasures by an injured State are permissible or legitimate has been strongly opposed by the majority of scholars.<sup>408</sup>

*On-the-spot reaction permissible as self-defence*

169. While the concept of permissible forcible countermeasures in response

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<sup>406</sup> *Oil Platforms (Iran v United States of America)* (Judgment) (Sep Op of Judge Simma) [2003] ICJ Rep 161, para 12; for a discussion, see T Mikanagi, ‘The Legal Basis of Missile Defense – An Examination of the Japanese Situation’ (2005) 48 *Japanese Annual of International Law* 65.

<sup>407</sup> *Ibid.*

<sup>408</sup> See for instance, TD Gill, ‘The Forcible Protection, Affirmation and Exercise of Rights by States under Contemporary International Law’ (1992) 23 *Netherlands Yearbook of International Law* 105, 116 noting that forcible responses to small-scale territorial incursions is a ‘separate and distinct right to ... forcibly protect and affirm substantive rights which have been unlawful denied or violated’; N Tsagourias, ‘The Tallinn Manual on the International Law Applicable to Cyber Warfare: A Commentary on Chapter II—The Use of Force’ (2012) 15 *Yearbook of International Humanitarian Law* 19, 26; D W Bowett, ‘Reprisals Involving Recourse to Armed Force’ (1972) 66 *American Journal of International Law* 1; B Levenfeld, ‘Israeli Counter-Fedayeen Tactics in Lebanon Self-Defence and Reprisals under Modern International Law’ (1982) 21 *Columbia Journal of International Law* 1; RB Lillich, ‘Forcible Self-Help in International Law’ (1980) 62 *International Law Studies* 129; S Darcy, ‘Retaliation and Reprisal’ in M Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (Oxford University Press 2015) 879–92; a 1946 commentary to the UN Charter states that pursuant to the obligation in Art 2(3) to pursue peaceful settlement of disputes ‘[it] is obvious that this rules out recourse to certain measures short of war which involve the use of force, such as armed reprisal’, see LM Goodrich and E Hambro, *Charter of the United Nations; Commentary and Documents* (World Peace Foundation, 1946), 67; the *Commentary on the Charter of the United Nations* also maintains that ‘reprisal, once the most frequently used form of force, is today likewise only admissible in so far as it does not involve the use of armed force’, B Simma et al (eds), *The Charter of the United Nations: A Commentary*, Vol 1 (Oxford University Press 2012) 794; F Paddeu, ‘Countermeasures’ in *Max Planck Encyclopedia of Public International Law* (online edition); 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)?’ (2014) 108(2) *American Journal of International Law* 159, 161 argues that the inadmissibility of forcible countermeasures is backed by the majority of legal scholars as established doctrine, it also finds support in the UN General Assembly’s affirmation that ‘States have a duty to refrain from acts of reprisal involving the use of force; and it was explicitly confirmed by the arbitral tribunal in the *Guyana/Suriname* case; S Mahmoudi, ‘Use of Armed Force against Suspected Foreign Submarines in the Swedish Internal Waters and Territorial Sea’ (2018) 33 *International Journal of Marine and Coastal Law* 1, 9 argues that where a foreign warship is illegally present in the territorial sea, no use of force is permitted except in self-defence.

to uses of force not amounting to armed attacks appears to be a minority one, on the other hand, the idea of proportionate on-the-spot defensive actions in response to small-scale or confined armed incidents has received wide support in scholarly writings.<sup>409</sup> A number of authors, including amongst others Brownlie, Dinstein and Ruys, have suggested that on-the-spot uses of force in response to small-scale or limited armed incidents should be permissible as self-defence, subject to the strict application of the standards of immediacy (ie the counterforce must be ‘temporally interwoven with the armed incident triggering it’)<sup>410</sup>; necessity (ie that there is no alternative option other than to rely on the use of counter force to repel the attack); and proportionality (ie the scale of counterforce used by the victim State ought to be similar with the original force employed).<sup>411</sup> According to Dinstein, on-the-spot forcible reaction applies in situations ‘in which a small-scale armed attack elicits at once, and in situ, the employment of counter-force by those under attack or present nearby’ (eg State A’s soldiers open fire at State B’s troops as they move along the disputed area; State B’s soldiers return fire in order to defend themselves and repel the attack).<sup>412</sup>

170. It is important to note that the concept of on-the-spot reaction in self-defence was applied by the Independent International Fact-Finding Mission on the Conflict in Georgia in relation to Georgia’s military operations in South Ossetia.<sup>413</sup> Moreover, as noted above, the language of self-defence, including in situations involving on-the-spot reactions has been invoked in the context of small-scale armed confrontations between States in disputed territories. For example:

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<sup>409</sup> Ruys writes that ‘it would be absurd and counter-intuitive to hold that military units are prohibited from defending themselves when attacked. In fact, no author has been willing to take such stance’, T Ruys, *Armed Attack’ and Article 51 of the UN Charter* (Cambridge University Press 2010) 521; see also Y Dinstein, *War, Aggression and Self-Defence* (3rd edn, Cambridge University Press 2001) 219–21; Brownlie argues that on certain occasions it may be permissible for a State to take forcible measures on-the-spot against unlawful territorial incursions short of an armed attack but he does not clarify the exact legal basis for taking action against such incursions, I Brownlie, *International Law and the Use of Force by States* (Oxford University Press 1963) 373,

<sup>410</sup> Y Dinstein, *War, Aggression and Self-Defence* (3rd edn, Cambridge University Press 2001) 219–21; T Ruys, *Armed Attack’ and Article 51 of the UN Charter* (Cambridge University Press 2010) 181.

<sup>411</sup> See para 146 of this report.

<sup>412</sup> Y Dinstein, *War, Aggression and Self-Defence* (3rd edn, Cambridge University Press 2001) 219–21; T Ruys, *Armed Attack’ and Article 51 of the UN Charter* (Cambridge University Press 2010) 181; 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)?’ (2014) 108(2) *American Journal of International Law* 159, 178.

<sup>413</sup> Independent International Fact-Finding Mission on the Conflict in Georgia, Report, Vol II (2009) 249.

- When Israeli soldiers were fired on by Lebanese troops south of the Blue Line, in February 2007, Israeli soldiers returned fire on-the-spot.<sup>414</sup> According to Israel, ‘returning the fire was entirely legitimate and in self-defence’.<sup>415</sup>
- Thailand argued that when Cambodian troops entered and occupied areas situated inside Cambodian territory, in October 2015, it had no choice but to open fire in accordance with Article 51 of the UN Charter.<sup>416</sup>
- China contended, in June 2017, that the action by Chinese border troops ‘to dismantle the facilities installed by the Indian military’ were ‘contingency response measures on the spot’ aimed at deterring the unlawful advancement of Indian troops ‘in the Chinese side of the border’.<sup>417</sup>

*Non-forcible responses*

171. Where the requirements for a lawful act of self-defence are not met, other measures are available to the aggrieved State in response to another State’s acts in the disputed area: countermeasures and measures of retorsion. Countermeasures are lawful unilateral measures taken by a State (the ‘injured’ State) in response to the internationally wrongful conduct of another State (the ‘aggressor’ State) which are aimed at providing the cessation of the international wrongful act and reparation for the injured State.<sup>418</sup> In the *Gabcikovo-Nagymaros Project* case, the ICJ recognised that countermeasures might justify an otherwise unlawful conduct if ‘taken in response to a previous international wrongful act of another State and ... directed against that State’.<sup>419</sup> Retorsion is not a countermeasure; it is another means of enforcing responsibility.
172. The ILC Articles on State Responsibility lay out a detailed countermeasure regime. Countermeasures cannot affect the prohibition on the threat or use of force, as seen above; fundamental human rights norms; humanitarian obligations prohibiting reprisals; and other peremptory

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<sup>414</sup> UN Doc S/2007/69.

<sup>415</sup> Ibid.

<sup>416</sup> UN Doc S/2008/653.

<sup>417</sup> Ministry of Foreign Affairs of the People’s Republic of China, ‘The Facts and China’s Position Concerning the Indian Border Troops’ Crossing of the China-India Boundary in the Sikkim Sector into the Chinese Territory’ (2 August 2017) paras 2–3, 10.

<sup>418</sup> F Paddeu, ‘Countermeasures’ in *Max Planck Encyclopedia of Public International Law* (online edition).

<sup>419</sup> *Gabcikovo-Nagymaros Project (Hungary/Slovakia)* (Judgment) [1997] ICJ Rep 7 para 85.

rules.<sup>420</sup> Additionally, an injured State taking countermeasures will continue to have to fulfil its obligations under dispute settlement procedure applicable between it and the aggressor State and to respect the inviolability of diplomatic or consular agents, premises, archives and documents.<sup>421</sup> The Commentary to the ILC Draft Articles states that this is crucial 'to the maintenance of channels of communication between the two States concerned, including machinery for the resolution of their disputes.'<sup>422</sup>

173. Countermeasures must be proportionate to the injury suffered.<sup>423</sup> The injured State must also abide by two procedural conditions for the taking of countermeasures: it must call on the aggressor State to cease the violation and provide reparation and notify that State of its intention to adopt countermeasures and offer to negotiate with that State.<sup>424</sup> States are precluded from taking or continuing countermeasures if the other State's internationally wrongful act has ceased and as soon as the dispute is pending before a court or tribunal.<sup>425</sup>
174. It is interesting to note that when it comes to imposing countermeasures, there is no immediacy requirement similar to that inherent in the right of self-defence to take countermeasures within a reasonable time of the aggressor State's internationally wrongful act. A State is free to take countermeasures as long as the internationally wrongful act and its effect is continuing. If there is an immediacy requirement to countermeasures, one could argue it applies conversely: the injured State must immediately cease countermeasures where the wrongful act has ceased, or the dispute is referred to adjudication.
175. As a result, where State A has been dispossessed of parts of its territory by State B and a new protected territorial *status quo* has come into existence, State A cannot rely on self-defence to retake the territory, as discussed above. If State A uses force against the disputed territory, State B could use force in self-defence against State A, provided that all the requirements in Article 51 of the UN Charter are satisfied. State A, however, can take countermeasures in response to State B's internationally wrongful act – the annexation of territory by force. Such countermeasures will be lawful provided that they comply with the

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<sup>420</sup> Art 50(1), ILC Articles on State Responsibility.

<sup>421</sup> Art 50(2), ILC Articles on State Responsibility.

<sup>422</sup> Commentary (2) Art 50, ILC Articles on State Responsibility.

<sup>423</sup> Art 51(2), ILC Articles on State Responsibility.

<sup>424</sup> Art 52(1), ILC Articles on State Responsibility.

<sup>425</sup> Art 52(3), ILC Articles on State Responsibility.

substantive and procedural requirements laid down in the ILC Draft Articles. So long as State B's annexation persists, the internationally wrongful act will be continuing, and State A will be able to take or continue to take countermeasures against State B.

176. Hence, while State B is protected from State A's forcible actions to retake the disputed territory, pursuant to Article 2(4) and the right of self-defence; State A can take lawful countermeasures in response, against State B, to incite State B to cease the wrongful act (eg evacuate the disputed territory from all foreign civil and military presence).<sup>426</sup> This example illustrates that, while international law protects the existing territorial *status quo* on the ground, it does not recognise this *status quo* as lawful; rather it recognises that an internationally wrongful act has been committed and empowers the dispossessed State to take non-forcible measures against the aggressor State in response.
177. One of the key questions in territorial disputes is to identify which wrongful acts in the disputed area will trigger the injured State's right to take non-forcible countermeasures against the aggressor State in response. A wrongful act within the disputed territory will trigger countermeasures only if it amounts to a violation of an international obligation by the aggressor State against the injured State. Territorial aggression and annexation of the disputed territory constitute examples of an internationally wrongful act triggering the right to take countermeasures.<sup>427</sup> Other examples could include the aggressor State's persistent refusal to negotiate a settlement<sup>428</sup> or the situation where the aggressor State enters into a treaty with a neighbouring State or gives a concession to a company for the exploitation of resources in the disputed territory.<sup>429</sup>
178. The existence of a wrongful act is an objective standard; the determination of the State taking the countermeasure is, however, both unilateral and subjective.<sup>430</sup> Its determination may be incorrect, in which case the violation of the aggressor State's rights will be unlawful, and the

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<sup>426</sup> See section, 'Territorial integrity and Article 2(4) before the Courts', at paras 89–102.

<sup>427</sup> E Milano, 'Territorial Disputes, Wrongful Occupations and State Responsibility: Should the International Court of Justice go the Extra Mile?' (2004) 3 *The Law and Practice of International Courts and Tribunals* 509, 512.

<sup>428</sup> SD Murphy, 'International Law Relating to Islands' (2016) 386 *Recueil Des Cours* 13, 204.

<sup>429</sup> E Milano, *Unlawful Territorial Situations in International Law: Reconciling Effectiveness, Legality, and Legitimacy* (Martinus Nijhoff Publishers 2006) 140–1.

<sup>430</sup> F Paddeu, 'Countermeasures' in *Max Planck Encyclopedia of Public International Law* (online edition).



allegedly injured State may incur responsibility for its own wrongful conduct by becoming itself the target of lawful countermeasures. This is why the ILC Commentary states that a State resorting to countermeasures ‘does so at its own risk.’<sup>431</sup>

179. A wide range of countermeasures can be taken by the injured State, assuming all the procedural and substantive requirements are met, including freezing assets of the target State held in the injured State and suspending trade or aid agreements.
180. As mentioned earlier, the aggrieved State may also take measures of retorsion against the aggressor State to enforce responsibility. Retorsion measures, unlike countermeasures, are lawful acts that do not infringe on the aggressor State’s rights under international law and do not require there to be a prior internationally wrongful act.<sup>432</sup> Retorsion is “unfriendly” conduct which is not inconsistent with any international obligation of the State engaging in it even though it may be a response to an internationally wrongful act.<sup>433</sup>
181. States may take a great variety of measures of retorsion against the aggressor State. This includes severing diplomatic relations; declaring a foreign diplomat persona *non grata*; imposing legally permissible economic sanctions, such as banning exports or placing quotas on specified imports; restricting fishing rights in its EEZ; and terminating or suspending treaty relations on account of the material breach of a treaty by the attacking State under Article 60 of the 1969 Vienna Convention.

#### CONCLUSION

182. Under the UN Charter and customary international law, the resort to force is never an acceptable means of altering an existing territorial *status quo*, including in situations of disputed territories. As McDougal and Feliciano have explained, the UN Charter system prohibits the use of force for territorial expansion (‘value extension’) on the ground.<sup>434</sup> Forcible means cannot be used to gain control over a disputed territory

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<sup>431</sup> Commentary (3) Art 49, ILC Articles on State Responsibility.

<sup>432</sup> M Dawidowicz, *Third-Party Countermeasures in International Law* (Cambridge University Press 2017) 27; T Giegerich, ‘Retorsion’ in *Max Planck Encyclopedia of Public International Law* (online edition).

<sup>433</sup> Commentary (3), Commentary to Chapter II of Part Three, Articles on State Responsibility.

<sup>434</sup> M McDougal and F Feliciano, *Law and Minimum World Public Order: The Legal Regulation of International Coercion* (Yale University Press 1961) 14–18.

or to alter in any way the existing factual situation on the ground in the attacking State's favour. Moreover, force cannot be used to correct retroactively situations of perceived past injustice on grounds of self-defence. As indicated above, an immediacy requirement applies, namely that the action cannot be taken long after the armed attack has occurred. Ultimately, force can only be used as a means to protect and preserve the existing territorial *status quo* in an exercise of self-defence in response to an armed attack, within the parameters of Article 51 of the UN Charter, and where such force is both necessary and proportionate.



# *The Obligation to Pursue Peaceful Settlement and General Obligations of Restraint*

## INTRODUCTION

183. Article 2(3) of the UN Charter makes clear that States must attempt to settle their disputes by peaceful means ‘in such a manner that international peace and security, and justice, are not endangered’. In this context, major territorial conflicts which, absent peaceful resolution, may seriously threaten international peace and security are of paramount concern. This section reflects on the application of the principle of peaceful settlement to territorial disputes. It is suggested that unilateral actions of a military nature in, or in respect of, a disputed territory, which do not constitute a lawful exercise of self-defence, lack the characteristic of peacefulness and run contrary to the spirit and objective of Article 2(3) of the UN Charter.
184. The discussion also examines whether there is a parallel obligation incumbent upon parties to a territorial dispute, pending the settlement of the dispute, to refrain from certain actions in, or in respect of, the disputed territory that could aggravate or extend the dispute or, in any case, make its resolution more difficult (hereafter, general obligations of self-restraint). The terms, ‘obligation of self-restraint’, ‘obligation of restraint’, and ‘obligation not to aggravate’ are used interchangeably as shorthand for the obligation to ‘refrain from aggravating or extending the dispute and to act in such manner as would render the dispute more difficult to resolve’ emanating from judicial and State practice and other similar obligations in customary international law. The analysis suggests that these general obligations are linked to the fundamental obligation of States to resolve their disputes through peaceful means (Article 2(3) of the UN Charter) and complement the prohibition on the threat or use of force (Article 2(4) of the UN Charter). The analysis argues that unilateral armed actions or activities in disputed territories aimed at changing the *status quo* on the ground (eg new deployment of armed forces) may breach these obligations.

## OBLIGATION TO PURSUE PEACEFUL SETTLEMENT

185. Article 2(4) of the UN Charter expressly outlaws the resort to coercive means as a method of settling international disputes, including sovereignty disputes over land territory, as discussed above. Article 2(3) of the UN Charter provides that '[a]ll Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered'. The sequence of these two paragraphs in the Charter is by no means accidental.<sup>435</sup> On the contrary, there appears to be a logical order set out in the Charter: first the obligation to resolve disputes peacefully; second, the prohibition on the use of force that supplements and strengthens the obligation of resolving disputes peacefully and is both a corollary to the obligation to resolve disputes peacefully and a stand-alone principle.
186. The Declaration on Friendly Relations echoes the language of the UN Charter by stipulating that States shall refrain from the threat or use of force in their international relations and, immediately after, that 'States shall settle their international disputes by peaceful means in such a manner that international peace and security and justice are not endangered'.<sup>436</sup> The Charter of the Organization of American States (Article 2(c)),<sup>437</sup> the Constitutive Act of the African Union (Article 4 (e)),<sup>438</sup> the Manila Declaration on the Peaceful Settlement of International Disputes<sup>439</sup> and the Declaration on the Prevention and Removal of Disputes<sup>440</sup> further reinforce the substantive obligation to employ peaceful means for the settlement of international disputes. The UN General Assembly has consistently emphasised that the peaceful settlement of disputes constitutes one of the foundation stones of the rule of

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<sup>435</sup> JG Merrills, 'The Principle of Peaceful Settlement of Disputes' in V Lowe and C Warbrick (eds) *The United Nations and the Principles of International Law: Essays in Memory of Michael Akehurst* (Taylor and Francis 1994) 50.

<sup>436</sup> Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, UN General Assembly Resolution 2625 (XXV) (24 October 1970) reprinted in (1970) 9 *International Legal Materials* 1292.

<sup>437</sup> Organization of American States (OAS), Charter of the Organisation of American States (signed 30 April 1948, entered into force 13 December 1951) 19 UN Treaty Series 3.

<sup>438</sup> Organization of African Unity (OAU), Constitutive Act of the African Union (signed 11 July 2000, entered into force 26 May 2001) OAU Doc CAB/LEG/23.15 (2001).

<sup>439</sup> UN General Assembly, Manila Declaration on the Peaceful Settlement of International Disputes (15 November 1982) A/RES/37/10.

<sup>440</sup> UN General Assembly, Declaration on the Prevention and Removal of Disputes and Situations Which May Threaten International Peace and Security and on the Role of the United Nations in this Field (5 December 1988) A/RES/43/51.

law in international relations.<sup>441</sup> The principle of the peaceful settlement of disputes is considered binding on every State as a customary rule.<sup>442</sup> The ICJ has explicitly confirmed that this principle, which complements other principles of a prohibitive nature, is not merely precatory but a substantive positive obligation binding under customary international law.<sup>443</sup>

187. A report by the David Davies Memorial Institute of International Studies argued that the obligation to pursue peaceful settlement is an 'independent' and 'autonomous' obligation that is 'distinct' from the obligation under Article 2(4) to refrain from the use of force.<sup>444</sup> It added that Article 2(3) of the UN Charter requires Members to seek the settlement of their disputes 'actively and in good faith' by peaceful means in such a manner that international peace and security, and justice, are not endangered.<sup>445</sup>
188. Article 33(1) of the Charter provides, even more clearly than Article 2 (3), that States involved in an international dispute are subject to a legally binding obligation to seek a peaceful solution and lists the means available:

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.

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<sup>441</sup> UNGA Res 61/39 (4 December 2006) UN Doc A/RES/61/39 preamble para 5; UNGA Res 62/70 (6 December 2007) UN Doc A/RES/62/70 preamble para 6; UNGA Res 63/128 (11 December 2008) UN Doc A/RES/63/128 preamble para 6; UNGA Res 64/116 (16 December 2009) UN Doc A/RES/64/116 preamble para 6; UNGA Res 65/32 (6 December 2010) UN Doc A/RES/65/32 preamble para 6. For an extensive debate in the UNGA Sixth Committee see (14 October 2009) UN Doc A/C.6/64/SR.9.

<sup>442</sup> C Tomuschat 'Purposes and Principles, Article 2 (3)' in B Simma and others (eds) *The Charter of the United Nations: A Commentary*, Volume I (3rd edn, Oxford University Press 2012) para 19; AG Koroma, 'The Peaceful Settlement of International Disputes' (1966) 43(2) *Netherlands International Law Review* 227, 232; see also H Mosler, *The International Society as a Legal Community* (Sijthoff & Noordhoff 1980) 227.

<sup>443</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Judgment) [1986] ICJ Rep 14 para 290; see also *Aerial Incident of 10 August 1999 (Pakistan v India)* (Judgment) [2000] ICJ Rep 12 para 53, 'The Court's lack of jurisdiction does not relieve States of their obligation to settle their disputes by peaceful means. The choice of those means admittedly rests with the parties under Article 33 of the United Nations Charter. They are nonetheless under an obligation to seek such a settlement, and to do so in good faith in accordance with Article 2, paragraph 2, of the Charter'.

<sup>444</sup> David Davies Memorial Institute of International Studies, 'Report of a Study Group on the Peaceful Settlement of International Disputes' (1966) 6–7.

<sup>445</sup> *Ibid.*

189. Similarly, the Declaration on Friendly Relations provides that States shall 'seek early and just settlement of their international disputes by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements or other peaceful means of their choice'.<sup>446</sup> The Declaration then provides that, even if no solution is reached after recourse to one of these peaceful means, States are under a continuous duty to pursue a peaceful resolution of their disputes. To achieve that objective, the Declaration also stipulates that States parties to an international dispute 'shall refrain from any action which may aggravate the situation so as to endanger the maintenance of international peace and security and shall act in accordance with the purposes and principles of the United Nations'.<sup>447</sup>
190. The Manila Declaration repeats the above language (at para 8) while adding that States shall fulfil their obligations 'in good faith and in a spirit of co-operation'.<sup>448</sup> Thus, the Declaration on Friendly Relations and the Manila Declaration lay out a 'code of conduct' that includes non-aggravation, self-restraint, active and continuous settlement efforts in a spirit of cooperation and good faith. It has been argued that this code of conduct is implicit in the Charter, even though these principles are not expressly provided for in the UN Charter's provisions on the peaceful settlement of disputes.<sup>449</sup> The Declarations appear to clarify the Charter's obligation to pursue peaceful settlement, while also reflecting international practice.<sup>450</sup>

#### *An Obligation of Conduct not of Result*

191. The duty enshrined in Article 2(3) of the UN Charter to settle disputes by peaceful means is an obligation of conduct rather than an obligation

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<sup>446</sup> Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, UN General Assembly Resolution 2625 (XXV) (24 October 1970) reprinted in (1970) 9 *International Legal Materials* 1292.

<sup>447</sup> Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, UN General Assembly Resolution 2625 (XXV) (24 October 1970) reprinted in (1970) 9 *International Legal Materials* 1292.

<sup>448</sup> See paras 1, 2, 5, 11, UN General Assembly, Manila Declaration on the Peaceful Settlement of International Disputes (15 November 1982) A/RES/37/10.

<sup>449</sup> JG Merrills, 'The Principle of Peaceful Settlement of Disputes' in V Lowe and C Warbrick (eds) *The United Nations and the Principles of International Law: Essays in Memory of Michael Akehurst* (Taylor and Francis 1994) 50.

<sup>450</sup> *Ibid.*

requiring the achievement of any particular result or solution.<sup>451</sup> According to Tomuschat, this conclusion logically derives from the fact that each international dispute has at least two parties, neither of which, because of the principle of sovereign equality, can impose its will upon the other.<sup>452</sup> Negotiation (ie ‘the first and classical mode of settlement’)<sup>453</sup> presupposes, according to the ICJ, ‘a genuine attempt by one of the disputing parties to engage in discussions with the other disputing party, with a view to resolving the dispute’.<sup>454</sup> As McNair explained, there is a ‘valid obligation upon the parties to negotiate in good faith, and a refusal to do so amounts to a breach of the obligation. But the obligation is not the same as an obligation to conclude a treaty or to accede to an existing treaty’.<sup>455</sup>

### Good Faith

192. United Nations General Assembly Resolution 53/101 (1998) sets forth principles and guidelines for international negotiations.<sup>456</sup> It provides a framework for the conduct of negotiations in the international context,

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<sup>451</sup> On the obligation of conduct, see *Mavrommatis Palestine Concessions (Greece v Great Britain)* (Judgment No 2) [1924] PCIJ Series A 11 p 13; *Railway Traffic between Lithuania and Poland* (Advisory Opinion) [1931] PCIJ Rep Series A/B No 42, p 116 (an obligation to negotiate does not entail an obligation to reach an agreement); *Tacna-Arica Question (Chile/Peru)* [1925] 2 Reports of International Arbitral Awards 921, 929–34; *Lac Lanoux Arbitration (Spain v France)* [1957] 12 Reports of International Arbitral Awards 281, 306–17; *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark and Netherlands)* (Judgment) [1969] ICJ Rep 3 paras 85–87; *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v United States of America)* (Judgment) [1984] ICJ Rep 246 para 87; *Dispute Concerning Delimitation of the Maritime Boundary (Ghana/Côte d’Ivoire)* (ITLOS Judgment of 23 September 2017) paras 604, 627; *Heathrow Airport User Charges (United States/United Kingdom)* (1992) Vol XXIV 1 para 10.39.

<sup>452</sup> C Tomuschat ‘Purposes and Principles, Article 2 (3)’ in B Simma and others (eds) *The Charter of the United Nations: A Commentary*, Volume I (3rd edn, Oxford University Press 2012) para 19.

<sup>453</sup> I Brownlie, ‘The Peaceful Settlement of International Disputes’ (2009) 8 Chinese Journal International Law 267, 270.

<sup>454</sup> *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation)* (Preliminary Objections) (Judgment) [2011] ICJ Rep 70 para 157; On the requirement that negotiations ought to be meaningful, see also *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark and Netherlands)* (Judgment) [1969] ICJ Rep 3 para 85; *Gabcikovo-Nagymaros Project (Hungary/Slovakia)* (Judgment) [1997] ICJ Rep 7 para 141; *Pulp Mills on the River Uruguay (Argentina v Uruguay)* (Judgment) [2010] ICJ Rep 14 para 146.

<sup>455</sup> AD McNair, *The Law of Treaties* (Oxford University Press 1961) 20.

<sup>456</sup> ‘Principles and Guidelines for International Negotiations’, UNGA Res 53/101 (8 December 1998) UN Doc S/RES/53/101 <[http://dag.un.org/bitstream/handle/11176/222067/A\\_RES\\_53\\_101-EN.pdf?sequence=3&isAllowed=y](http://dag.un.org/bitstream/handle/11176/222067/A_RES_53_101-EN.pdf?sequence=3&isAllowed=y)>.



stressing the relevance of ‘conducting negotiations in accordance with international law in a manner compatible with and conducive to the achievement of the stated objective of negotiations’.<sup>457</sup>

193. The Resolution provides guidance as to how this is to be achieved. This includes requiring that negotiations be conducted in good faith and that the purpose and object of all negotiations be fully compatible with the principles and norms of international law, including the UN Charter. States are to ‘maintain a constructive atmosphere during negotiations and to refrain from any conduct which might undermine the negotiations and their progress’ (para 2 e).<sup>458</sup> Good faith negotiation requires engagement with the other party and meaningful consideration of their position. The exercise of restraint is also necessary: parties must refrain from acts which would frustrate or obstruct the negotiations, in particular, irreversible acts affecting the subject-matter of the negotiations.

#### *Peaceful Settlement and Territorial Disputes*

194. Territorial issues are more prone to escalation and armed conflict than any other types of international disputes; their resolution, or at least containment, frequently becomes essential to general peace and security.<sup>459</sup> As Vasquez has noted, ‘[t]erritorial issues are so fundamental that the behavior associated with their settlement literally constructs a world order’.<sup>460</sup> It is, thus, particularly important to examine the application of the obligation of peaceful settlement in the context of disputes over territory.
195. First, in view of the preceding discussion, there may be a breach of the duty to pursue peaceful settlement (ie the principal objective of Article 2(3)) where one of the parties to the dispute persistently refuses to even engage in an attempt to reach a settlement after the dispute has emerged.<sup>461</sup> The fact that a State closes off any avenue for a judicial settlement is not contrary to the obligation to negotiate in good faith or to the broader duty to resolve disputes peacefully: States are entitled, on the basis of the principle of sovereign equality, to choose freely the

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<sup>457</sup> Ibid.

<sup>458</sup> Ibid.

<sup>459</sup> ‘[T]erritorial disputes have been the major cause of enduring interstate rivalries, the frequency of war, and the intensity of war’, MW Zacher, ‘The Territorial Integrity Norm: International Boundaries and the Use of Force’ (2001) 55(2) *International Organisation* 215, 216.

<sup>460</sup> JA Vasquez, *The War Puzzle* (Cambridge University Press 1993) 151.

<sup>461</sup> See section, ‘Existence of a territorial dispute’, paras 8–21.

means for the peaceful settlement of their disputes without being tied to a specific procedure.<sup>462</sup> Thus, while the dispute persists, the State must demonstrate a continuous willingness to: a) participate in either direct or indirect negotiation; b) discuss all pertinent issues of the dispute (even those concerning the existence of a dispute); c) make proposals for the settlement of the dispute; and d) adhere to the UN Charter's principles, including the prohibition on the threat or use of force to gain territory or create a *fait accompli* on the ground.<sup>463</sup>

196. Second, by definition, unilateral actions encroaching upon the prohibition on the threat or use of force, pursuant to Article 2(4) of the UN Charter, cannot be characterised as 'peaceful'. As a result, such actions may give rise to violations of both Articles 2(3) and 2(4) of the UN Charter. If at the time of the action, or with the benefit of hindsight, it is clear that a unilateral act by State A rising to the level of a use of force has occurred on the territory of State B, the issue will primarily fall to be decided by the law on the use of force.<sup>464</sup> Indeed, there have been few judicial pronouncements on violations of the obligation of peaceful settlement in relation to territorial disputes. The usual practice of the ICJ and other adjudicating bodies has been to decide territorial questions on other grounds, for instance by finding a breach of the territorial integrity of the aggrieved party (including the examples of *Cambodia v Thailand* and *Cameroon v Nigeria*)<sup>465</sup> or by finding an unlawful use of force (eg Eritrea-Ethiopia).<sup>466</sup>

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<sup>462</sup> See, for instance, *Fisheries Jurisdiction (Spain v Canada)* [1998] ICJ Rep 432, 456; *Dispute Concerning Delimitation of the Maritime Boundary (Ghana/Côte d'Ivoire)* (ITLOS Judgment of 23 September 2017) para 60; Conversely, unilateral recourse to adjudication is not an unfriendly act, see: UNGA Res 3232 (XXIX) (12 December 1974); 'Peaceful Settlement of Disputes Between States' (Manila Declaration), UNGA Res 37/10 (15 November 1982) Part II, para 5; 'the judicial settlement of international disputes, with a view to which the Court has been established, is simply an alternative to the direct and friendly settlement of such disputes between the Parties; as consequently it is for the Court to facilitate, so far as is compatible with its Statute, such direct and friendly settlement', *Case of the Free Zones of the Upper Savoy and the District of Gex (France v Switzerland)* [1929] PCIJ Rep Series A No 22, p 13; *South China Sea Arbitration, (Philippines v China)* (Award of 12 July 2016) para 126 <<https://pca-cpa.org/wp-content/uploads/sites/175/2016/07/PH-CN-20160712-Award.pdf>>.

<sup>463</sup> AC Arend, 'The Obligation to Pursue Peaceful Settlement of International Disputes During Hostilities' (1984) 24(1) *Virginia Journal of International Law* 97, 123.

<sup>464</sup> J Crampin, 'Good Faith in the Settlement of Territorial Disputes' (Working paper, on file with the author).

<sup>465</sup> *Temple of Preah Vihear (Cambodia v Thailand)* (Merits) [1962] ICJ Rep 6; *Land and Maritime Boundary (Cameroon v Nigeria)* (Judgment) (Merits) [2002] ICJ Rep 303.

<sup>466</sup> Eritrea-Ethiopia Claims Commission, Partial Award, *Jus Ad Bellum Ethiopia's Claims* 1–8 (19 December 2005) (2006) *International Legal Materials* 430, 434–5.

197. One possible exception is the *Guyana/Suriname* case. As mentioned earlier, while this is a law of the sea case, it is remarkable in that a threat of force by Suriname, characterised by requests by law enforcement to oil rigs operating under concessions granted by Guyana to vacate the maritime area claimed by Suriname, also represented a breach of both Article 2(3) of the UN Charter and Article 2(4) of the UN Charter, which the Tribunal said it remains applicable in the context of both territorial and maritime boundary disputes.<sup>467</sup> The Tribunal found that Suriname had a number of peaceful options to address Guyana's oil activities, including direct negotiations and compulsory dispute settlement under Part XV, Section 2 of UNCLOS but instead 'resorted to self-help'.<sup>468</sup> It held that Suriname's threat of force in the disputed area, 'while also threatening international peace and security, jeopardised the reaching of a final delimitation agreement'.<sup>469</sup> Accordingly, the *Guyana/Suriname* award indicates that, notwithstanding limited judicial pronouncements, unilateral actions entailing the threat or use of force in a disputed area, whether terrestrial or maritime, may also violate the obligation to resolve disputes peacefully and in good faith.
198. Third, after the crystallisation of the dispute, any armed actions in, or in respect of, the disputed territory aimed at modifying the *status quo* on the ground necessarily lack the characteristic of 'peacefulness'.<sup>470</sup> The reason is that they have the potential to lead to a spiral of violence and are likely to hinder ongoing or future peaceful settlement efforts.<sup>471</sup> As a result, the unilateral deployment of armed forces in the disputed areas (where there was no such armed presence prior to the emergence of the dispute) aimed at altering the existing factual situation in the first mover's favour, is likely to give rise to breaches under Article 2(3) of the UN Charter.

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<sup>467</sup> *Guyana/Suriname* (Annex VII Tribunal) (Award) (2007) 47 International Law Reports 166 paras 423, 483–4.

<sup>468</sup> *Ibid*, para 484.

<sup>469</sup> *Ibid*.

<sup>470</sup> See section, 'The status quo as the baseline to test the application of Article 2(4)', paras 119–136.

<sup>471</sup> See GA A/RES/31/49 of 1 December 1976 concerning the question of sovereignty over the Falkland/Malvinas Islands, calling upon the Governments of Argentina and the United Kingdom to expedite direct negotiations aimed at finding a final and definitive settlement of the issue and, pending this process, 'refrain from taking decisions that would imply introducing unilateral modifications in the situation' <<https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/302/32/IMG/NR030232.pdf?OpenElement>>; as Raimondo explains, the motivation underlying this call was the prevention of a spiral of military incidents in the South Atlantic escalating to the point of an armed conflict, see F Raimondo, 'The Sovereignty Dispute Over The Falklands/Malvinas: What Role For The UN?' (2012) 59(3) *Netherlands International Law Review* 399, 413.

*Conclusion*

199. Although prominent in all international disputes, the obligation to pursue peaceful settlement becomes particularly pressing in the context of territorial disputes which are more prone to escalation and armed conflict than any other kind of dispute.<sup>472</sup> Article 2(3) of the UN Charter encapsulates this substantive, standalone, legal obligation which is universally recognised as crystallising customary international law. States are required to seek actively and meaningfully the settlement of their disputes by recourse to one or more of the peaceful means listed in Article 33(1) of the UN Charter. Whilst not required to select a particular settlement method, or reach a specific solution, disputing States are under a duty to negotiate in good faith and, pending resolution, refrain from any actions that might aggravate or extend the dispute or render the territorial dispute more difficult to resolve, as will be seen in the following section. Given the propensity of unilateral armed actions to escalate to the point of armed conflicts, especially in, or in respect of, a disputed territory, such actions lack the characteristic of peacefulness and must, therefore, be avoided throughout the settlement process.

## GENERAL OBLIGATIONS OF RESTRAINT

*Introduction*

200. In the context of maritime boundary disputes, Articles 74(3) and 83(3) of UNCLOS impose an obligation upon States to exercise restraint in, and in respect of, undelimited maritime areas, that is to say, not to engage in any conduct during the period prior to agreeing a maritime boundary that would 'jeopardize or hamper' the reaching of such an agreement.<sup>473</sup> This obligation applies when opposite or adjacent States have entitlements to maritime zones that overlap, or may overlap, and therefore require delimitation. It would appear that no such explicit obligation can be found in treaty law in respect of disputed land territories (ie terrestrial areas that are subject to competing sovereignty claims). The question then arises as to whether and to what extent a corresponding legal obligation exists in relation to territorial disputes.

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<sup>472</sup> DM Gibler, 'What They Fight For: Specific Territorial Issues in Militarized Interstate Disputes, 1816–2001' (2017) 34(2) *Conflict Management and Peace Science* 194, 196.

<sup>473</sup> BIICL 2016 Report para 74.

201. In this connection, the *South China Sea Arbitration (Merits)* is notable to the extent that it provides an authoritative insight into the legal substance of the obligation of restraint as corollary to the peaceful settlement of disputes in the sense of Article 2(3) of the UN Charter.<sup>474</sup> The Tribunal considered that the duty to exercise restraint and not aggravate the dispute is embedded in Articles 279 and 300 of UNCLOS.<sup>475</sup> Article 279 provides that ‘States Parties shall settle any dispute between them concerning the interpretation or application of this Convention by *peaceful means in accordance with Article 2, paragraph 3, of the Charter of the United Nations*’.<sup>476</sup> Article 300 of UNCLOS provides that parties are under a duty to ‘fulfil in good faith the obligations assumed under this Convention and...exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner which would not constitute an abuse of right’. Accordingly, the Tribunal linked the obligation of non-aggravation and restraint with the obligation to pursue peaceful settlement under Article 2(3) of the UN Charter and with the principle of good faith, the latter being ‘no less applicable to the provisions of a treaty relating to dispute settlement’.<sup>477</sup>
202. Applying the obligation of non-aggravation to China’s actions, the Tribunal specified a number of criteria for determining the breach of the obligation in the course of dispute resolution proceedings. According to the Tribunal, States may aggravate a dispute: a) by taking actions that are alleged to violate the rights of the other party in such a way as to render the alleged violation more serious; b) by taking actions that would frustrate the effectiveness of a potential decision, or render its implementation by the parties significantly more difficult; c) by undermining the integrity of the dispute resolution proceedings themselves, including by rendering the work of a court or tribunal significantly more onerous or; d) by taking other actions that decrease the likelihood of the proceedings in fact leading to the resolution of the parties’ dispute.<sup>478</sup> By applying these criteria, the Tribunal ruled that China’s intensified island-construction and dredging activities on several features irrevocably aggravated the dispute between the parties.

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<sup>474</sup> *South China Sea Arbitration (Philippines v China)* (Award of 12 July 2016) para 126 <<https://pca-cpa.org/wp-content/uploads/sites/175/2016/07/PH-CN-20160712-Award.pdf>>.

<sup>475</sup> *Ibid.*, paras 1171–2.

<sup>476</sup> Emphasis added.

<sup>477</sup> *Ibid.*

<sup>478</sup> *Ibid.*, para 1179.

203. The existence of a general obligation of restraint as corollary to the principle of peaceful settlement of international disputes, including territorial disputes, is also evident in the language of many international treaties and other legal instruments concerning the peaceful settlement of international disputes. Both the Declaration on Friendly Relations and the Manila Declaration (Part I (8)) lay down the principle that parties to a dispute must refrain from any action ‘which may aggravate the situation’ so as ‘to endanger the maintenance of international peace and security’.<sup>479</sup> The 1992 Association of Southeast Asian Nations (ASEAN) Declaration on the South China Sea calls for the peaceful resolution of ‘all sovereignty and jurisdictional issues pertaining to the South China Sea’; the exercise of ‘restraint’; and the application of the principles contained in the Treaty of Amity and Cooperation in Southeast Asia ‘as the basis for establishing a *code of international conduct* over the South China Sea’.<sup>480</sup> The non-binding Declaration of Conduct of Parties in the South China Sea, adopted by ASEAN and China in 2002 (hereafter 2002 Declaration), reiterates different aspects of earlier agreements, including the Manila Declaration. In particular, parties undertake to ‘exercise self-restraint’ from any activities that could complicate or escalate disputes; to settle their disputes by peaceful means; and to respect freedom of navigation in and overflight above the South China Sea.

204. The 2002 Declaration provides as follows:

The Parties undertake to exercise self-restraint in the conduct of activities that would complicate or escalate disputes and affect peace and stability including, among others, refraining from action of inhabiting on the presently uninhabited islands, reefs, shoals, cays, and other features and to handle their differences in a constructive manner.<sup>481</sup>

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<sup>479</sup> Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, UN General Assembly Resolution 2625 (XXV) (24 October 1970) reprinted in (1970) 9 International Legal Materials 1292; UN General Assembly, Manila Declaration on the Peaceful Settlement of International Disputes (15 November 1982) A/RES/37/10.

<sup>480</sup> ASEAN Declaration on the South China Sea (adopted 22 July 1992) <<https://cil.nus.edu.sg/wp-content/uploads/formidable/18/1992-ASEAN-Declaration-on-the-South-China-Sea.pdf>>; for a discussion, see R C Severino, ‘ASEAN and the South China Sea’ (2010) 6(2) Security Challenges 37–47.

<sup>481</sup> Declaration on the Conduct of Parties in the South China Sea (4 November 2002) <[http://asean.org/?static\\_post=declaration-on-the-conduct-of-parties-in-the-south-china-sea-2](http://asean.org/?static_post=declaration-on-the-conduct-of-parties-in-the-south-china-sea-2)>. Emphasis added.

According to some authors, the inclusion of a duty of ‘self-restraint’ in the 2002 Declaration had two principal objectives: ‘maintaining the present *status quo* of occupied positions and avoiding actions that complicate the situation’.<sup>482</sup> This also raises the point that self-restraint is necessary to protect the rights of concerned parties even when no formal dispute settlement procedure has been initiated.

205. Moreover, Article 39 of the UN Charter provides the Security Council with the authority to make recommendations and decide on provisional measures to be taken ‘in order to prevent an aggravation of the situation’.<sup>483</sup> It further calls upon parties concerned to comply with such provisional measures. The American Treaty on Pacific Settlement states that pending the process of settlement under the conciliation procedures laid down in the Treaty, ‘the parties shall refrain from any act that might make conciliation more difficult’.<sup>484</sup> The European Convention on the Peaceful Settlement of Disputes stipulates that the disputing parties ‘shall abstain from any sort of action whatsoever which may aggravate or extend the dispute’.<sup>485</sup> The Revised General Act for the Pacific Settlement of International Disputes provides that, pending the judicial settlement of their dispute, parties undertake to ‘abstain from any sort of action whatsoever which may aggravate or extend the dispute’.<sup>486</sup> The Contadora Act for Peace and Cooperation in Central America required parties to ‘[a]void any spoken or written declaration that may aggravate the existing situation of conflict in the area’.<sup>487</sup>

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<sup>482</sup> N H Thao, ‘The 2002 Declaration on the Conduct of Parties in the South China Sea: A Note (2003) 34(4) *Ocean Development and International Law* 279, 280; see also W Shicun and R Huaifeng, ‘More than a Declaration: A Commentary on the Background and the Significance of the Declaration on the Conduct of the Parties in the South China Sea (2003) 2 *Chinese Journal of International Law* 311; In November 2017, it was reported that the leaders of ASEAN and China formally announced the start of negotiations on the fine print of a non-binding Code of Conduct in the South China Sea as a confidence-building mechanism to help improve trust and mutual understanding to help facilitate cooperation, L YingHui ‘South China Sea Code of Conduct: Is Real Progress Possible?’ (*The Diplomat*, 18 November 2017) <<https://thediplomat.com/2017/11/a-south-china-sea-code-of-conduct-is-real-progress-possible/>>.

<sup>483</sup> Arts 39 *et seq*, UN Charter.

<sup>484</sup> Art XVI, American Treaty on Pacific Settlement (Pact of Bogotá) Organization of American States (OAS) (signed 30 April 1948; entered into force 6 May 1949) 30 United Nations Treaty Series 55.

<sup>485</sup> Art 31(3), European Convention on the Peaceful Settlement of Disputes (signed 29 April 1957; entered into force 30 April 1958) 320 United Nations Treaty Series 243.

<sup>486</sup> Revised General Act for the Pacific Settlement of International Disputes (signed 28 April 1949; entered into force 20 September 1950) 71 United Nations Treaty Series 101.

<sup>487</sup> Reprinted in *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)* ‘Exhibits and Documents Submitted by Nicaragua and the United

*Obligations of Restraint before the Courts*

206. The obligation incumbent upon parties to a dispute to exercise restraint is deeply enshrined in the jurisprudence of the ICJ and other international law tribunals (such as ITLOS and arbitral tribunals established under Annex VII of UNCLOS).<sup>488</sup> On multiple occasions, the ICJ, both in its final judgments and in orders for provisional measures, has called upon parties to refrain from aggravating or extending their dispute and to avoid actions that might render more difficult the resolution of their dispute.<sup>489</sup>

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States of America in Connection with the Oral Procedure on Jurisdiction and Admissibility' 324 <<http://www.icj-cij.org/files/case-related/70/9631.pdf>>; see also 'Communication from the Ministers for Foreign Affairs of the Contadora Group to the General Assembly of the Organization of American States' (Colombia, Mexico, Panama and Venezuela): 'We also reaffirmed the obligation incumbent on States not to resort to the threat or use of force in international relations and to refrain from any acts which might aggravate the situation and create the danger of a generalized conflict spreading to all States of the region', reprinted in *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)* (Oral Arguments on the Request for the Indication of Provisional Measures) 294 <<http://www.icj-cij.org/files/case-related/70/070-19840425-ORA-01-00-BI.pdf>>.

<sup>488</sup> *M/V Saiga (No 2) (St Vincent and the Grenadines v Guinea)* (Provisional Measures (1999) 117 International Law Reports 111, 124: 'parties should ensure that no action is taken by their respective authorities or by vessels flying their flag which might aggravate or extend the dispute submitted to the Tribunal'; *Southern Bluefin Tuna (Australia v Japan; New Zealand v Japan)* (Provisional Measures) (1999) 117 International Law Reports 148, 158: 'the parties [must] ensure that no action of any kind [be] taken which might aggravate, extend or render more difficult of solution the dispute submitted'; *Dispute Concerning Delimitation of the Maritime Boundary (Ghana/Côte d'Ivoire)* (Provisional Measures) (Order of 24 April 2015) para 108(1)(c), the parties are to 'refrain from any unilateral action that might lead to aggravating the dispute'; *The "Enrica Lexie" Incident (Italy v India)* (Provisional Measures) (Order of 24 August 2015) paras 141(1): 'Italy and India shall both suspend all court proceedings and shall refrain from initiating new ones which might aggravate or extend the dispute submitted to the Annex VII arbitral tribunal or might jeopardize or prejudice the carrying out of any decision which the arbitral tribunal may render'; In the *South China Sea Arbitration (Merits)*, the Tribunal considered that the 'duty on parties engaged in a dispute settlement procedure to refrain from aggravating or extending the dispute... exists independently of any order from a court or tribunal to refrain from aggravating or extending the dispute and stems from the purpose of dispute settlement and the status of the States in question as parties in such a proceeding', see *South China Sea Arbitration (Philippines v China)* (Award of 12 July 2016) para 1169 <<https://pca-cpa.org/wp-content/uploads/sites/175/2016/07/PH-CN-20160712-Award.pdf>>.

<sup>489</sup> *Anglo-Iranian Oil Co Case (United Kingdom/Iran)* (Interim Protection) (Order of 5 July 1951) [1951] ICJ Rep 89, 93; *Nuclear Tests (Australia v France)* (Interim Protection) (Order of 22 June 1973) [1973] ICJ Rep 99 para 35; *Nuclear Tests (New Zealand v France)* (Interim Protection) (Order of 22 June 1973) [1973] ICJ Rep 135 para 36; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Provisional Measures) (Order of 8 April 1993) [1993] ICJ Rep 3 para 52 B; *Bosnia and Herzegovina v Serbia and Montenegro* (Provisional Measures) (Order of 13 September 1993) [1993] ICJ Rep 325 paras 5, 46, 53; *LaGrand (Germany v United States of America)* (Judgment) [2001] ICJ Rep 466 para 103; for a review of the Court's practice on provisional



207. The most quoted recognition of the obligation to exercise restraint incumbent on parties to a dispute dates back to as early as 1939. In the *Electricity Company of Sofia and Bulgaria* case, the PCIJ considered the principle that the parties to a dispute must ‘not allow any step of any kind to be taken which might aggravate or extend the dispute’ to be ‘universally accepted by international tribunals and likewise laid down in many conventions’.<sup>490</sup> According to Miles, this statement suggests ‘that parties to international litigation are under general obligation to avoid taking any action that may escalate a dispute’.<sup>491</sup> Even before the PCIJ, the Central American Court of Justice in *Honduras v El Salvador and Guatemala* (1908) awarded measures ‘so as to cool a situation of armed conflict between the parties’.<sup>492</sup>
208. The jurisprudence of the ICJ shows that the duty of parties to a dispute to make every effort to exercise restraint has featured in almost all cases involving border or cross-border armed incidents between States.<sup>493</sup> In fact, the ICJ, in almost all cases involving military activities in a disputed territory, has indicated provisional measures aimed, not least at preserving the rights of either party before the ICJ, but also at containing the conduct of parties and preventing the further aggravation of the dispute (also known as ‘non-aggravation measures’).<sup>494</sup>

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measures to prevent the aggravation of the dispute, see P Palchetti, ‘The Power of the International Court of Justice to Indicate Provisional Measures to Prevent the Aggravation of a Dispute’ (2008) 21 *Leiden Journal of International Law* 623–42.

<sup>490</sup> *Electricity Company of Sofia and Bulgaria (Belgium v Bulgaria)* (Provisional Measures) (Order of 5 December 1939) [1939] PCIJ Rep 79, 199; see also S Rosenne, *Provisional Measures in International Law: The International Court of Justice and the International Tribunal for the Law of the Sea* (Oxford University Press 2005) 1–2.

<sup>491</sup> C Miles, *Provisional Measures before International Courts and Tribunals* (Cambridge University Press 2017) 209.

<sup>492</sup> Editorial Comment, ‘The First Case before the Central American Court of Justice’ (1908) 2 *American Journal of International Law* 835–8, cited in Miles (ibid) 209; note that Article XVIII of the Convention for the Establishment of a Central American Court of Justice (20 December 1907) provided that ‘From the moment in which any suit is instituted against any one or more governments up to that in which a final decision has been pronounced, the court may at the solicitation of any one of the parties fix the situation in which the contending parties must remain, to the end that the difficulty shall not be aggravated and that *things shall be conserved in status quo pending a final decision*’ (emphasis added).

<sup>493</sup> On the power of the Court to order non-aggravation measures in cases involving the use of force, see Y Tanaka, ‘A New Phase of the Temple of Preah Vihear Dispute before the International Court of Justice: Reflections on the Indication of Provisional Measures of 18 July 2011’ (2012) 11(1) *Chinese Journal of International Law* 191.

<sup>494</sup> According to Tanaka, ‘non-aggravation measures’ are those measures which ‘seek to ensure that the parties in dispute take no action which might aggravate or extend the dispute before the Court’. He also notes that such measures are ‘particularly warranted in armed conflict situations’, ibid 207–08.

Measures directing the parties to exercise restraint have been indicated in virtually all cases involving armed incidents between the parties, both in disputed territories and those not subject to the dispute: *Nicaragua v United States of America*,<sup>495</sup> *Cameroon v Nigeria*,<sup>496</sup> *Bosnia and Herzegovina v Serbia and Montenegro*,<sup>497</sup> *Costa Rica v Nicaragua*,<sup>498</sup> *Burkina Faso/Mali*,<sup>499</sup> *Congo v Uganda*<sup>500</sup> and *Cambodia v Thailand*.<sup>501</sup> This practice is premised on the idea that the ICJ, as the principal judicial organ of the United Nations, has an important function to play in the maintenance of international peace.<sup>502</sup> According to Brownlie,

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<sup>495</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Provisional Measures) (Order of 10 May 1984) [1984] ICJ Rep 169 para 41(B) points 1 and 3 of the operative part.

<sup>496</sup> *Land and Maritime Boundary (Cameroon v Nigeria)* (Provisional Measures) (Order of 15 March 1996) [1996] ICJ Rep 22 paras 41, 49 point 1 of the operative part.

<sup>497</sup> Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v Serbia and Montenegro*) (Provisional Measures) (Order of 8 April 1993) [1993] ICJ Rep 24 para 52(A) point 2.

<sup>498</sup> *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v Nicaragua)* (Provisional Measures) (Order of 8 March 2011) [2011] ICJ Rep 6 para 86.

<sup>499</sup> *Frontier Dispute (Burkina Faso/Mali)* (Provisional Measures) (Order of 10 January 1986) [1986] ICJ Rep 3 para 18; as noted by Merrills, 'the containment of the dispute was perhaps seen as a matter of priority in this case', JG Merrills, 'Interim Measures of Protection in the Recent Jurisprudence of the International Court of Justice' (1995) 44(1) *International Comparative Law Quarterly* 90, 123; According to Rosenne, 'What is involved is not only the preservation of the object of the dispute or of the relevant evidence, but also the prevention of the use of force in violation of the Charter of the United Nations or of any aggravation or extension of the dispute and of risk to human life. This broader approach to the requirement for provisional measures of protection is on the whole the outcome of the Charter and of the establishment of the International Court of Justice as a principal organ of the United Nations', S Rosenne, *Provisional Measures in International Law: The International Court of Justice and the International Tribunal for the Law of the Sea* (Oxford University Press 2005) 8.

<sup>500</sup> *Armed Activities on the Territory of the Congo (Congo v Uganda)* (Provisional Measures) (Order of 1 July 2000) [2000] ICJ Rep 111 paras 44, 47(1).

<sup>501</sup> *Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear (Cambodia v Thailand)* (Provisional Measures) (Order of 18 July 2011) [2011] ICJ Rep 555 paras 63 and 69(B) points 1 to 4 of the operative part.

<sup>502</sup> Judge Shi in his Dissenting Opinion on *Yugoslavia v Belgium*, said that, confronted with an urgent situation of use of force, the Court must contribute to the maintenance of international peace and security and therefore, it is appropriate, to call upon parties to act in compliance with their obligations under UN Charter and all other rules of international law relevant to the situation, and at least not to aggravate or extend their dispute, see *Legality of the Use of Force (Yugoslavia v Belgium)* (Provisional Measures) (Order of 2 June 1999) [1999] ICJ Rep 207 (Diss Op Shi); Judge Vereshchetin likewise opined that the power of Court to call upon parties to exercise self-restraint 'flows from its responsibility for the safeguarding of international law and from major considerations of public order', *Legality of the Use of Force (Yugoslavia v Belgium)* (Provisional Measures) (Order of 2 June 1999) [1999] ICJ Rep 209 (Diss Op Vereshchetin); Similarly, *Land and Maritime Boundary (Cameroon v Nigeria)* (Provisional Measures) (Order of 15 March 1996) [1996] ICJ Reports 13 (Decl Judge Ranjeva); see also C Gray, 'The Use and

amongst the principle purposes of the ICJ is, first, to settle disputes effectively and; second, to remove issues of public order, such as uncertain boundary lines, and thus to reduce the risk of conflict.<sup>503</sup>

209. The following sub-section looks at certain categories of measures ordered by the ICJ and other international tribunals in the context of militarised disputes over territory, which required the parties to exercise some form of restraint pending the settlement of their dispute. Because the cases are both relatively numerous and complex, it is impossible to explore all the many multi-faceted procedural and substantive issues presented by this jurisprudence. Therefore, this sub-section assesses how the ICJ and other relevant international law tribunals have handled cases involving unilateral armed actions or activities in disputed territories and focuses on four categories of measures: a) to cease immediately any armed conflict; b) to withdraw armed forces from the disputed area or the provisionally demilitarised zone (if applicable), and refrain from any future deployment; c) to freeze the *status quo* on the ground or restore the situation which existed prior to the armed incident, even while the dispute is pending settlement; and d) to refrain from destroying evidence or impeding a UN fact-finding mission.<sup>504</sup>

### *Cessation of Armed Conflict*

210. In *Nicaragua v United States of America*, the ICJ ordered the disputing parties to cease all hostile activities and refrain from certain actions which might aggravate or extend the dispute. Specifically, the ICJ demanded that the US ‘immediately cease and refrain from any action restricting, blocking or endangering access to or from Nicaraguan ports, and, in particular, the laying of mines’ and that both parties ensure that ‘no action of any kind is taken which might aggravate or

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Abuse of the International Court of Justice: Cases concerning the Use of Force after Nicaragua’ (2003) 14(5) *European Journal of International Law* 867–905; P Palchetti, ‘The Power of the International Court of Justice to Indicate Provisional Measures to Prevent the Aggravation of a Dispute’ (2008) 21(3) *Leiden Journal of International Law* 623–42.

<sup>503</sup> I Brownlie, ‘The Peaceful Settlement of International Disputes’ (2009) 8(2) *Chinese Journal International Law* 267.

<sup>504</sup> Note that Tanaka divides such measures into five separate categories: a) general non-aggravation measures; b) measures requiring parties to refrain from particular actions including hostile activities; c) measures aimed at securing evidence in the dispute before the court; d) measures requiring parties to provide information relating to the implementation of the judgment; and e) measures requiring parties to take some positive action, see Y Tanaka, ‘A New Phase of the Temple of Preah Vihear Dispute before the International Court of Justice: Reflections on the Indication of Provisional Measures of 18 July 2011’ (2012) 11(1) *Chinese Journal of International Law* 191, 207–10.

extend the dispute'.<sup>505</sup> In its judgment on the merits, the ICJ stated that measures of this kind should be taken into account seriously by the parties, particularly in the case of an armed conflict.<sup>506</sup>

211. In *Congo v Uganda*, the ICJ ordered *proprio motu* each of the two parties to refrain from any action, and 'in particular any armed action', which 'might aggravate or extend the dispute before the Court or make it more difficult to resolve'.<sup>507</sup> In its judgment on the merits, the ICJ found that Uganda had failed to comply with the obligations incumbent upon it under the UN Charter and the Charter of the Organization of African Unity by carrying out military acts in the territory of the Congo, in violation of international law, while the dispute was pending before the ICJ.<sup>508</sup>

212. In *Cambodia v Thailand*, the ICJ noted that armed clashes had taken place and continued to take place in the disputed area, leading to fatalities, injuries and the displacement of local inhabitants, and damages to the Temple of Preah Vihear and property associated with it.<sup>509</sup> In view of 'the persistent tensions and absence of a settlement to the conflict' it defined *proprio motu* a provisional demilitarised zone, without prejudice to normal administration.<sup>510</sup> It ordered both parties to withdraw all military personnel currently present in this provisional demilitarized zone and refrain both from any military presence within that zone and from any armed activity directed at that zone.<sup>511</sup> It is to be noted that the provisional demilitarised zone created by the ICJ extended to parts of the parties' undisputed territories but it was necessary 'to minimize the risk of further armed clashes – including shelling – in the disputed

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<sup>505</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Provisional Measures) (Order of 10 May 1984) [1984] ICJ Rep 169 para 41(B) points 1 and 3 of the operative part.

<sup>506</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) (Judgment) [1986] ICJ Rep 14 para 289.

<sup>507</sup> *Armed Activities on the Territory of the Congo (Congo v Uganda)* (Provisional Measures) (Order of 1 July 2000) [2000] ICJ Rep 111 paras 44 and 47 point 1 of the operative part.

<sup>508</sup> *Armed Activities on the Territory of the Congo (Congo v Uganda)* (Judgment) [2005] ICJ Rep 168 paras 264 and 347 point 7 of the operative part.

<sup>509</sup> *Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear (Cambodia v Thailand) (Cambodia v Thailand)* (Provisional Measures) (Order of 18 July 2011) [2011] ICJ Rep 555 paras 61–69; for a discussion, see Y Tanaka, 'A New Phase of the Temple of Preah Vihear Dispute before the International Court of Justice: Reflections on the Indication of Provisional Measures of 18 July 2011' (2012) 11(1) Chinese Journal of International Law 191.

<sup>510</sup> *Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear (Cambodia v Thailand) (Cambodia v Thailand)* (Provisional Measures) (Order of 18 July 2011) [2011] ICJ Rep 555 paras 61–66.

<sup>511</sup> *Ibid.*

area while the case is pending before the Court'.<sup>512</sup> In her dissenting Opinion, Judge Donoghue expressed the view that:

Regarding a region of disputed sovereignty, particularly where there is a risk to life, the concept of non-aggravation lends credence to the extension of provisional measures beyond the perimeter of the territory in dispute, despite the more attenuated link to the dispute over territory.<sup>513</sup>

*Withdraw Armed Forces and Refrain From New Deployment*

213. In *Burkina Faso/Mali*, the ICJ's Chamber stated that 'the measures which the Chamber contemplates indicating, for the purpose of eliminating the risk of any future actions likely to aggravate or extend the dispute, must necessarily include the withdrawal of the troops of both Parties...'.<sup>514</sup> The Chamber welcomed the fact that the parties had reached a ceasefire and had, thus, brought to an end the armed actions which gave rise to the requests for provisional measures. The Chamber, nevertheless, ordered measures 'to avoid the recrudescence of regrettable incidents' and to ensure the maintenance of the ceasefire.<sup>515</sup>

214. In *Costa Rica v Nicaragua*, the ICJ indicated that each party shall *inter alia* 'refrain from sending to, or maintaining in the disputed territory, including the *caño*, any personnel, whether civilian, police or security' (except for people charged with the protection of the environment).<sup>516</sup> Judge Xue observed that allowing one Party to despatch personnel, whether civilian or military, to the disputed area 'may incline to aggravate the situation on the ground'.<sup>517</sup> The duty incumbent upon parties

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<sup>512</sup> *Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear (Cambodia v Thailand) (Cambodia v Thailand) (Provisional Measures) (Order of 18 July 2011) (Declaration of Judge Koroma) [2001] ICJ Rep 555 para 3, see Y Tanaka, 'A New Phase of the Temple of Preah Vihear Dispute before the International Court of Justice: Reflections on the Indication of Provisional Measures of 18 July 2011' (2012) 11(1) Chinese Journal of International Law 191, 216–8.*

<sup>513</sup> *Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear (Cambodia v Thailand) (Cambodia v Thailand) (Provisional Measures) (Order of 18 July 2011) [2001] ICJ Rep 555 (Diss Op Judge Donoghue) 613 para 55.*

<sup>514</sup> *Frontier Dispute (Burkina Faso/Mali) (Provisional Measures) (Order of 10 January 1986) [1986] ICJ Rep 3 paras 5–6.*

<sup>515</sup> *Frontier Dispute (Burkina Faso/Mali) (Order of 10 January 1986) [1986] ICJ Rep 3 paras 23–25.*

<sup>516</sup> *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v Nicaragua) (Provisional Measures) (Order of 8 March 2011) [2011] ICJ Rep 6 para 86.*

<sup>517</sup> *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v Nicaragua) (Provisional Measures) (Order of 8 March 2011) (Decl Judge Xue) 52, 53.*

to exercise restraint was further emphasised by the ICJ in its Provisional Measures Orders of 16 July 2013<sup>518</sup> and 22 November 2013.<sup>519</sup> According to Judge Dugard, '[t]he Court's intention was to clear the disputed territory of any persons that might exacerbate the dispute'.<sup>520</sup> It should also be noted that in its judgment on the merits, the ICJ found that Nicaragua acted in breach of its obligations under the Order of 8 March 2011 by *inter alia* establishing a military presence in the disputed territory.<sup>521</sup> The ICJ considered that this violation also constituted a breach of the sovereignty and territorial integrity of Costa Rica.<sup>522</sup>

215. In *Cameroon v Nigeria*, Nigeria argued that Cameroon's request for provisional measures had become moot because mediation by Togo had led to a ceasefire agreement. The ICJ ruled that this fact had not deprived the ICJ of the right to order further measures to prevent a future escalation of the dispute, which included the unconditional withdrawal of all troops.<sup>523</sup> In his declaration appended to the judgment, Judge Mbaye suggested that, when an armed conflict breaks out between the parties to a case pending before the ICJ, the latter is required to indicate provisional measures to eliminate the risk of any future action likely to 'aggravate or extend the dispute'; such measures would 'necessarily include the withdrawal of troops'.<sup>524</sup> Finally, as seen above, in *Cambodia v Thailand*, the ICJ, in view of serious armed incidents along the border near the Temple area, ordered both parties to immediately withdraw their military personnel present in the provisional demilitarised zone.<sup>525</sup>

#### *Freeze or Restore the Pre-Existing Status Quo on the Ground*

216. In *Burkina Faso/Mali*, the Chamber of the ICJ ordered that there not be any alteration to the administrative *status quo*, which had prevailed prior

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<sup>518</sup> Ibid.

<sup>519</sup> *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v Nicaragua)*; *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v Costa Rica)* (Order of 22 November 2013) [2013] ICJ Rep 354 para 47.

<sup>520</sup> *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v Nicaragua)* (Provisional Measures) (Order of 8 March 2011) (Diss Op Judge Dugard) 271.

<sup>521</sup> *Costa Rica v Nicaragua* (Judgment) [2015] ICJ Rep 665 para 127.

<sup>522</sup> Ibid, para 129.

<sup>523</sup> *Land and Maritime Boundary (Cameroon v Nigeria)* (Provisional Measures) (Order of 15 March 1996) [1996] ICJ Rep 22 paras 36–37.

<sup>524</sup> *Land and Maritime Boundary (Cameroon v Nigeria)* (Provisional Measures) (Order of 15 March 1996) [1996] ICJ Rep (Decl Judge Mbaye) 33.

<sup>525</sup> *Temple of Preah Vihear case (Cambodia v Thailand)* (Provisional Measures) (Order of 18 July 2011) [2011] ICJ Rep 555 paras 63 and 69(B) points 1 to 4 of the operative part.

to the armed actions that had given rise to the requests for provisional measures.<sup>526</sup> After quoting with approval the reasoning of the PCIJ in the case of the *Legal Status of the South-Eastern Territory of Greenland*, the Chamber held that incidents likely to aggravate or extend the dispute ‘cannot in any event, or to any degree, affect the existence or value of the sovereign rights claimed by [either of the Parties] over the territory in question, were these rights to be duly recognized by the [Chamber] in its future judgment on the merits of the dispute’.<sup>527</sup>

- 217 In *Cameroon v Nigeria*, the ICJ also instructed that parties ensure that the presence of armed forces in the Bakassi Peninsula not extend beyond the positions they occupied prior to the armed incidents.<sup>528</sup> In effect, it thus ordered the restoration of the *status quo* that had existed prior to those incidents.
218. In another example, the Eritrea/Ethiopia Boundary Commission reaffirmed ‘the duty of the Parties to do nothing that would aggravate the dispute’ and found that any government-sponsored settlement of nationals in the area in question ‘should not have taken place’.<sup>529</sup> The Commission mandated Ethiopia to restore the *status quo ex ante* by arranging for the withdrawal of the individuals that had been sent into the area by Ethiopia. Ethiopia, further, was required to report on the implementation of that decision to the Commission. Each party was to ensure that no further population resettlement would take place across the delimitation line established by the Decision of 13 April 2002.<sup>530</sup> Previously, the Organization of African Unity had mandated that all armed forces in and around the disputed area be redeployed to positions held before the armed conflict had erupted between the parties around the town of Badme and that the civilian administration in place before 6 May be restored.<sup>531</sup>

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<sup>526</sup> *Frontier Dispute (Burkina Faso/Mali)* (Provisional Measures) (Order of 10 January 1986) [1986] ICJ Rep 3 para 32.

<sup>527</sup> *Legal Status of South-Eastern Territory of Greenland (Norway v Denmark)* [1932] PCIJ (ser A/B) No 48 (Provisional Measures) (Order of 3 August 1932) 285 cited in *Frontier Dispute (Burkina Faso/Republic of Mali)* (Judgment) [1986] ICJ Rep 554 para 17.

<sup>528</sup> *Land and Maritime Boundary (Cameroon v Nigeria)* (Provisional Measures) (Order of 15 March 1996) [1996] ICJ Rep 22 para 49 (2).

<sup>529</sup> Eritrea/Ethiopia Boundary Commission: Order of the Commission (17 Jul 2002) para 18 <<https://reliefweb.int/report/eritrea/eritrea-ethiopia-boundary-commission-order-commission>>.

<sup>530</sup> *Ibid.*

<sup>531</sup> Framework Agreement (17 December 1998) reprinted in UN Doc S/1998/1223 (28 December 1998) cited in C Gray, ‘The Eritrea/Ethiopia Claims Commission Oversteps Its Boundaries: A Partial Award?’ (2006) 17(4) *European Journal of International Law* 699, 701–2.

219. In his separate opinion in *Costa Rica v Nicaragua*, Judge Dugard explained that the ICJ's Provisional Measures Order of 2011, which indicated that both Costa Rica and Nicaragua should refrain from sending their civilian, police or security personnel into the disputed territory but, at the same time, allowing Costa Rica's civilian personnel charged with the protection of the environment to enter the disputed territory, 'in effect, restore[d] the *status quo ante* as before Nicaragua dispatched military personnel and environmental workers into the territory in October 2010'.<sup>532</sup>

*Refrain from Destroying Evidence or Impeding the UN Fact-Finding Mission*

220. In a number of cases, international courts and tribunals have called upon the parties to secure evidence and allow each party, or even third parties, to inspect the relevant areas or copies of official documents. In the *Rann of Kutch* case between India and Pakistan (a major instance of international arbitration over territorial issues) the arbitral tribunal called upon each party to make available for inspection and/or furnish the other party with such documents as may be required in the dispute before the Tribunal.<sup>533</sup> Furthermore, in the *Burkina Faso/Mali* case, the ICJ's Chamber ordered both parties 'to refrain from any act likely to impede the gathering of evidence material to the present case'.<sup>534</sup>
221. Similarly, in *Cameroon v Nigeria*, the ICJ required both parties to 'take all necessary steps to conserve evidence relevant to the present case within the disputed area'.<sup>535</sup> In addition, the ICJ indicated that both parties should 'lend every assistance to the fact-finding mission which the Secretary-General of the United Nations has proposed to send to the Bakassi Peninsula'.<sup>536</sup>
222. In the *South China Sea Arbitration* (Merits), the Annex VII Tribunal considered that China had aggravated the dispute by 'permanently destroying evidence' regarding the natural status of the features in the

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<sup>532</sup> *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v Nicaragua)* (Provisional Measures) (Order of 8 March 2011) (Sep Op Judge Dugard) 60.

<sup>533</sup> Indo-Pakistan Western Boundary (Rann of Kutch) Tribunal (1968) Reports of International Arbitral Awards Vol XVII 1, 9; for a discussion, see JG Wetter, 'The Rann of Kutch Arbitration' (1971) 65(2) *American Journal of International Law* 346.

<sup>534</sup> *Frontier Dispute (Burkina Faso/Mali)* (Order of 10 January 1986) [1986] ICJ Rep 3 para 32(1) (B).

<sup>535</sup> *Land and Maritime Boundary (Cameroon v Nigeria)* (Provisional Measures) (Order of 15 March 1996) [1996] ICJ Rep 13 para 49(4).

<sup>536</sup> *Ibid*, para 49(5).



Spratly Islands through its construction work.<sup>537</sup> The assessment of the legal status of the maritime features as above or below water at high tide was rendered 'significantly more difficult' to determine as a result of China's actions.<sup>538</sup>

223. It follows that, once a territorial dispute crystallises, a general obligation arises on the parties to make every effort to exercise restraint when acting in the disputed area and while the dispute persists. The need for self-restraint is embedded primarily in the peaceful settlement of disputes, the principle of good faith and the non-use of force principle. It aims at the maintenance of the pre-established factual or legal situation while the dispute is pending resolution. As Murphy explains, '[t]he peaceful resolution of conflict is dependent upon the positive restraint of states; failure to exercise such restraint in accordance with the framework of the United Nations Charter seriously undermines world order – and that freedom from the fear of violence which is its basic objective.'<sup>539</sup>
224. The following section examines incidents of State practice involving certain activities in, or in respect of, disputed territories with a view to identifying the types of actions or activities that States have perceived as having the effect of aggravating or extending the dispute.

#### *Analysis of State Practice*

225. The case law of the ICJ does not clearly lay out the test that should be applied to determine the propensity of certain unilateral actions to aggravate a conflict (and the associated obligation incumbent upon disputing parties to refrain from such actions). Each action's propensity to conflict aggravation must be ascertained in light of each case's particular circumstances. Indeed, defining the specific types or characteristics of unilateral actions that may entail this aggravating effect is less certain and requires deeper investigation into relevant State practice. As will be discussed further below, the relevant State practice reveals an understanding, express or implied, on the part of the parties to a territorial dispute of the requirement to exercise restraint in respect of the areas in question, pending the final settlement of the dispute.

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<sup>537</sup> *South China Sea Arbitration, (Philippines v China)* (Award of 12 July 2016) para 1181 (d) <<https://pca-cpa.org/wp-content/uploads/sites/175/2016/07/PH-CN-20160712-Award.pdf>>.

<sup>538</sup> *Ibid*, paras 1176-1179, 1181(d).

<sup>539</sup> C F Murphy, 'The Obligation of States to Settle Disputes by Peaceful Means' (1973) 14(1) *Virginia Journal of International Law* 57, 68.

*Armed Conflict*

226. Armed incidents between troops of the parties to a dispute are not merely likely to extend or aggravate the dispute but also comprise a resort to force that runs contrary to the obligation to pursue the peaceful settlement of international disputes.<sup>540</sup> A review of relevant State practice indicates States' understanding that armed conflicts within a disputed territory or along an unsettled land border pose the risk of a serious and significant escalation of the conflict. In many instances involving armed confrontations, whether minor or large scale, States have resorted to the ICJ to request that a border be delimited or that the sovereignty status of a given territory be determined while, at the same time, requesting provisional measures to avoid the further escalation of the dispute. In some other instances, States have been more proactive and agreed on certain restraint measures or inter-State mechanisms to prevent armed incidents from occurring.
227. For example, Honduras strongly objected to various border and trans-border incidents on 24 February, 6 and 22 March 1988 where Sandinista People's Army soldiers from Nicaragua entered Honduran territory. According to a letter, dated 22 March 1988, communicated to the Minister for Foreign Affairs of Nicaragua by the Minister for Foreign Affairs of Honduras, incidents of this nature 'tend to aggravate the already tense situation on the frontiers of our two countries'.<sup>541</sup> In its Memorial to the ICJ, Honduras cited the 1983 Declaration of Contadora Island to the effect that '[t]he use of force is an approach that does not dissolve, but aggravates the underlying tensions'.<sup>542</sup> On 31 March 1988, Nicaragua informed the ICJ in a letter that, in view of the formal assurances given by Honduras for the immediate removal of the *contras*, it had decided to withdraw its request for provisional measures. An out-of-court agreement was reached between the two States in 1992 in the context of the Contadora initiative.<sup>543</sup>

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<sup>540</sup> *Frontier Dispute (Burkina Faso/Mali)* (Order of 10 January 1986) [1986] ICJ Rep 3 para 89.

<sup>541</sup> For a chronology, see the correspondence between the parties and the Court at <<http://www.icj-cij.org/files/case-related/74/9673.pdf>>.

<sup>542</sup> 'Declaration of Contadora Island' (9 January 1983) (Colombia, Mexico, Panama and Venezuela): 'reaffirming the obligation of the States not to resort to threats or to the use of force in their international relations' and to 'refrain from acts which could aggravate the situation, creating the danger of a generalized conflict that would spread throughout the region', Memorial of Honduras (Jurisdiction and Admissibility) Vol 1 <<http://www.icj-cij.org/files/case-related/74/9667.pdf>>.

<sup>543</sup> ES Obregon and B Samson (eds), *Nicaragua Before the International Court of Justice: Impacts on International Law* (Springer 2017) 81.

228. On 3 February 1996, an armed incident broke out between the armed forces of Nigeria and Cameroon in the Bakassi Peninsula. The incident cost the life of one person on each side. Following that incident, the governments of the two States released a joint statement in which they expressly recognised that the border incident had resulted in '*l'aggravation de la crise du différend qui oppose à Bakassi le Cameroun au Nigéria*'<sup>544</sup> and declared their readiness to ensure that peace prevailed in the region pending the settlement of the dispute.<sup>545</sup> Cameroon, however, considered that frequent armed incidents on the ground would make it impossible to reach a meaningful settlement of the dispute. For this reason, it initiated legal proceedings before the ICJ while requesting the ICJ to order, pending the final settlement of the dispute, that both parties' armed forces withdraw to the position they were occupying before the incidents of 3 February 1996; abstain from all military activity along the entire boundary; and refrain from any act which might aggravate the situation. Nigeria did not challenge this request.<sup>546</sup>
229. In a different example, Nicaragua alleged that Honduras had allowed and assisted armed bands, known as *contras*, in carrying out incursions on Nicaraguan territory and also that Honduran armed forces had directly participated in attacks on Nicaragua.<sup>547</sup> In its application instituting legal proceedings against Honduras, Nicaragua stated that it opted to refer the matter for resolution to the ICJ so as 'to ensure that the conflict is not aggravated'; it further committed to discontinue the case if Honduras took the required steps to disarm and dismantle the mercenary camps based in Honduras.<sup>548</sup>
230. On 28 April 2011, together with its application for an interpretation of the *Temple of Preah Vihear* (1962) judgment, Cambodia submitted an

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<sup>544</sup> Unofficial Translation: 'the aggravation of the crisis of the Bakassi dispute between Cameroon and Nigeria', Letter from the Federal Republic of Nigeria addressed to the Court (16 February 1996) and Statement from the Chairmanship of the Non-Aligned Movement urging both parties to adopt all the necessary measures to avoid new incidents and 'persist in the zeal to search for the pacific settlement of disputes' <<http://www.icj-cij.org/files/case-related/94/13293.pdf>>.

<sup>545</sup> *Land and Maritime Boundary (Cameroon v Nigeria)* (Provisional Measures) (Order of 15 March 1996) [1996] ICJ Rep 13 para 16.

<sup>546</sup> *Land and Maritime Boundary (Cameroon v Nigeria)* (Judgment) (Merits) [2002] ICJ Rep 303 para 311.

<sup>547</sup> *Border and Transborder Armed Actions (Nicaragua v Honduras)* (Application Instituting Proceedings) (28 July 1986); Request for the Indication of Provisional Measures submitted by the Government of Nicaragua (21 March 1988); for a commentary, see D Trooboff, 'Border and Transborder Armed Actions (Nicaragua v Honduras), Jurisdiction and Admissibility 1988 ICJ Rep. 69, 28 ILM 335 (1989)' (1989) 83(2) *American Journal of International Law* 353-357.

<sup>548</sup> *Ibid.*

urgent request for provisional measures. It alleged that numerous armed incidents had taken place since 15 July 2008 along the frontier with Thailand and in the area of the Temple after the Temple was included on the UNESCO World Heritage list.<sup>549</sup> These armed incidents caused damage to the Temple, loss of human life and bodily injuries and also entailed the ‘associated risk of aggravation of the dispute’. Thailand countered that it was ‘Cambodia’s actions of continuing to enhance its military presence beyond the Temple of Preah Vihear that [was] bringing instability to the area and aggravating the differences between the parties’ and that in any case, the duty of non-aggravation applied to both parties to a dispute.<sup>550</sup> Cambodia asked the ICJ to indicate the following provisional measures pending the delivery of its judgment: a) the immediate and unconditional withdrawal of all Thai forces from those parts of Cambodian territory in the Temple area; b) a ban on all military activity by Thailand in the area of the Temple; and c) that Thailand refrain from any act or action which could interfere with the rights of Cambodia or aggravate the dispute in the principal proceedings.<sup>551</sup>

231. Similarly, Burkina Faso and Mali entered into a ceasefire agreement to prevent a serious escalation of the armed conflict that erupted between the armed forces of the two States along their disputed border.<sup>552</sup> Subsequently, a Special Agreement was adopted by the two States to submit their dispute for settlement to a Chamber of the ICJ.<sup>553</sup> Before the Chamber was able to hear the case, another serious incident broke out between the two States’ armed forces in the disputed area on 25 December 1985 resulting in losses on both sides. Mali and Burkina Faso, through simultaneous requests, dated 27 and 30 December, respectively, asked the Chamber to indicate provisional measures with a view ‘to ensure that a stop is put to any act of whatsoever description which might aggravate or extend the dispute submitted to the Chamber

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<sup>549</sup> Application Instituting Proceedings; Oral Pleadings of Cambodia Public sitting held on Monday 30 May 2011, at 10 am, at the Peace Palace, President Owada presiding, in the case concerning the Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear (Cambodia v Thailand) .

<sup>550</sup> Oral Pleadings of Thailand, Public sitting held on Monday 30 May 2011, at 4 pm, at the Peace Palace, President Owada presiding, in the case concerning the Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear (Cambodia v Thailand) .

<sup>551</sup> Request by the Kingdom of Cambodia for the Indication of Provisional Measures (28 April 2011) 2.

<sup>552</sup> *Frontier Dispute (Burkina Faso/Mali)* (Judgment) [1986] ICJ Rep 559 para 10.

<sup>553</sup> Special Agreement, <<http://www.icj-cij.org/files/case-related/149/17108.pdf>> .

of the Court'.<sup>554</sup> It further noted that 'the armed conflict between the two Parties poses a threat to the judicial settlement of the dispute'.<sup>555</sup> On 18 January 1986, the Heads of State of Burkina Faso and Mali agreed to restore the *status quo ante* by withdrawing all their armed forces from either side of the disputed area.<sup>556</sup>

### *Presence of Armed Forces*

232. Relevant State practice shows that dispute aggravation is particularly likely in situations involving armed conflict between the parties resulting in the loss of life, destruction of property and similar actions. This, however, does not mean that actions not involving armed conflict do not pose a risk of escalation, or of making the dispute more difficult to resolve, whether through diplomatic or judicial means. Indeed, even actions falling short of an armed conflict in a strict sense may aggravate the dispute, such as the swift intrusion and stationing of armed forces in the disputed area, especially if no such armed presence existed before in the disputed area. According to Palchetti, '[a]n aggravation or extension of the dispute may be caused by actions that, without involving the threat or use of force, may have similar negative effects on the relations between the parties'.<sup>557</sup>
233. Indeed, the range of acts which have the potential to aggravate, escalate or lead to incidents that make a dispute more difficult to resolve are not limited to those involving full-scale armed conflict. Relevant State practice confirms this understanding. There have been multiple situations where one of the claiming parties vigorously objected to, and/or attempted to prevent another claiming party from deploying its armed forces, and generally from carrying out any military-related activities, in the disputed territory.
234. An example on point is the 1978 Beagle Channel dispute between Argentina and Chile.<sup>558</sup> The dispute concerned sovereignty over three

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<sup>554</sup> *Frontier Dispute (Burkina Faso/Mali)* (Order of 10 January 1986) [1986] ICJ Rep 3 para 5.

<sup>555</sup> *Frontier Dispute (Burkina Faso/Mali)* (Order of 10 January 1986) [1986] ICJ Rep 3 para 5.

<sup>556</sup> *Frontier Dispute (Burkina Faso/Mali)* (Judgment) [1986] ICJ Rep 559 para 10.

<sup>557</sup> P Palchetti, 'The Power of the International Court of Justice to Indicate Provisional Measures to Prevent the Aggravation of a Dispute' (2008) 21(3) *Leiden Journal of International Law* 623, 629.

<sup>558</sup> For a comment, see T Princen, 'International Mediation? The Mew from the Vatican' (1987) 3(4) *Negotiation Journal* 347; LA de La Fayette, 'Beagle Channel Dispute' in *Max Planck Encyclopedia of Public International Law* (online edition); P van Aert, 'The Beagle Conflict' (2016) 11(1) *Island Studies Journal* 307; see also Y Tanaka, *The Peaceful Settlement of International Disputes* (Cambridge University Press 2018) 214.

islands (Picton, Nueva and Lennox) and the maritime boundary along the Beagle Channel between Argentina and Chile at the southernmost tip of South America. Negotiations in the 1960s resulted in the 1981 Boundary Treaty between the two States.<sup>559</sup> This was subsequently disputed by Argentina and the dispute was submitted by the two parties to arbitration by the British Crown in 1971.<sup>560</sup> An arbitral tribunal rendered an award in February 1977, giving all three disputed islands to Chile and tracing a maritime boundary by a median line through the Beagle Channel. This result was rejected as ‘fundamentally null’ by the Argentine government in 1978.<sup>561</sup> Chile seemed more inclined to refer the matter to the ICJ but Argentina rejected this option. Tensions escalated to a dangerous point when armed forces of the two States were deployed along the disputed border.<sup>562</sup> On 8 January 1979, the two States signed the Act of Montevideo by which they requested the Holy See to act as a mediator with regard to their dispute over the southern region.<sup>563</sup> The request for mediation was accompanied by an undertaking that ‘the two States will not resort to the use of force in their mutual relations, will bring about a gradual return to the military situation existing at the beginning of 1977’ (thus restoring the *status quo ante* with respect to the presence of armed forces in the disputed areas) ‘and will refrain from adopting measures that might impair harmony in any sector.’<sup>564</sup>

235. The above exchanges and undertakings illustrate the interlinkage between the obligations, on the one hand, to pursue peaceful settlement, and to refrain from the threat or use of force and to exercise some form of restraint on the other. The Beagle Channel dispute was eventually settled

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<sup>559</sup> Boundary Treaty (signed 23 July 1881; entered into force 22 October 1881) 21 Reports of International Arbitral Awards 84.

<sup>560</sup> LA de La Fayette, ‘Beagle Channel Dispute’ in *Max Planck Encyclopedia of Public International Law* (online edition) para 2.

<sup>561</sup> ‘Note from the Minister for Foreign Affairs of the Argentine Republic to the Ambassador of Chile in Argentina’ (25 January 1978) 21 Reports of International Arbitral Awards 226.

<sup>562</sup> P van Aert wrote: ‘Towards the end of the year, Argentina decided to prepare for war. Under the term Operation Sovereignty, a plan was designed to take possession of Picton, Nueva and Lennox, and if necessary, invade and divide continental Chile. Thousands of infantry troops, known as *Albatros*, were sent to the Argentine portion of Tierra del Fuego Island. Army boats guarded the waters and ground weapons, such as missile launchers, were installed along the Beagle Channel’s coast...’, see van Aert, ‘The Beagle conflict’ (2016) 11(1) *Island Studies Journal* 307, 310.

<sup>563</sup> Act of Montevideo by which Chile and Argentina Request the Holy See to Act as a Mediator with Regard to their Dispute over the Southern Region and Undertake not to Resort to Force in their Mutual Relations (with Supplementary Declaration) (signed and entered into force 8 January 1979) 21 Reports of International Arbitral Awards 240.

<sup>564</sup> *Ibid.* Emphasis added.

through the Treaty of Peace and Friendship of 1984 [hereafter, 1984 Treaty].<sup>565</sup> The Preamble of the 1984 Treaty reiterated the parties' commitment 'always to solve all [their] disputes by peaceful means and never to resort to the threat or use of force in their mutual relations'. To that end, Article 1 of the 1984 Treaty provided that the parties shall make every effort to ensure that any difference in their viewpoints shall not result in the '*occurrence or situation which is likely to alter the harmony between them*'. Accordingly, the specific drafting of the treaty may itself be an instance of State practice in formalising this element of restraint in the context of disputes over territory.

236. In another example, Cambodia protested the presence of Thai armed forces in the Temple area.<sup>566</sup> During its oral pleadings in the *Temple of Preah Vihear* case, Cambodia noted that even though its protest went unheeded by Thailand, it refrained from despatching Cambodian troops in the area 'in order not to aggravate the situation'.<sup>567</sup>
237. Likewise, Eritrea wrote to the Eritrea/Ethiopia Boundary Commission asking it to order Ethiopia to cease immediately the settlement of all military and civilian personnel in territory that had been determined to fall within Eritrean sovereignty.<sup>568</sup> Following an investigation on site, the Commission accepted this request ordering the return of the *status quo ante*.<sup>569</sup>
238. The example of Costa Rica and Nicaragua is also relevant here. Costa Rica considered that 'the presence of Nicaraguan armed forces on Costa Rica's territory contribut[ed] to a political situation of extreme hostility and tension'.<sup>570</sup> Costa Rica alleged that, on two separate occasions, Nicaraguan armed forces had occupied Costa Rica's territory in connection with the construction of a canal (*caño*). Costa Rica argued that the immediate withdrawal of Nicaraguan military and civilian presence from the disputed territory was justified 'so as to prevent the aggravation and/or extension of the dispute'.<sup>571</sup> Nicaragua initially countered

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<sup>565</sup> Treaty of Peace and Friendship (Chile/Argentina) (signed 29 November 1984; entered into force 2 May 1985) (1985) 24 International Legal Materials 11.

<sup>566</sup> *Temple of Preah Vihear (Cambodia v Thailand)* (Judgment) (Merits) [1962] ICJ Rep 6, 32.

<sup>567</sup> *Ibid.*

<sup>568</sup> Eritrea/Ethiopia Boundary Commission: Order of the Commission (17 Jul 2002) para 1 <<https://reliefweb.int/report/eritrea/eritrea-ethiopia-boundary-commission-order-commission>>.

<sup>569</sup> *Ibid.*, para 18.

<sup>570</sup> *Certain Activities Carried out by Nicaragua in the Border Area (Costa Rica v Nicaragua)* (Application Instituting Proceedings, 18 November 2010) para 41 and (Request by Costa Rica for the Indication of Provisional Measures, 18 November 2010) paras 16, 19.

<sup>571</sup> *Ibid.*

that Nicaragua's police together with the military exercised their 'duty of ensuring public order and security in the zone between the Harbor Head Lagoon and the surrounding streams, where [they] constantly had patrols to prevent crime and drug trafficking'.<sup>572</sup> Following the ICJ's Order of 8 March 2011, Nicaragua stated that it had withdrawn all its military personnel from the disputed territory; had acted with due diligence; and had taken appropriate measures to ensure that 'the disputed territory remains free of Nicaraguan personnel'.<sup>573</sup>

239. A vigorous protest was also launched by Costa Rica when a Nicaraguan military camp was moved from its previous location on the beach separating Los Portillos Lagoon from the Caribbean Sea to the beach of Isla Portillos to the north-east of Los Portillos Lagoon. The latter beach was alleged to be part of Costa Rican territory. Costa Rica considered the relocation a violation of Costa Rica's sovereignty over that territory and an action 'that may aggravate the dispute...or which may make those proceedings more difficult to resolve'.<sup>574</sup> Nicaragua rejected Costa Rica's claim as unfounded on the basis that the 'military observation post' was clearly outside the disputed territory.<sup>575</sup> At no point in the oral pleadings and written submissions of the case that followed did Nicaragua allege that it was entitled to maintain a military camp in a disputed territory. On the contrary, it consistently maintained that the military post was 'no longer located in what was the disputed territory in the [*Costa Rica v Nicaragua*] case'.<sup>576</sup>
240. Last but not least, as the Doklam incident revealed, the unilateral despatch of China's armed forces in the disputed area in connection with the construction of a road was seen by Bhutan and India, and

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<sup>572</sup> Memorial of Nicaragua (19 December 2012) <<http://www.icj-cij.org/files/case-related/152/18514.pdf>>.

<sup>573</sup> Written observations of Costa Rica on Nicaragua's Request for the modification of the Court's Order indicating provisional measures in the *Costa Rica v Nicaragua* case; see also public sitting held on Tuesday 11 January 2011, at 3 pm, at the Peace Palace, President Owada presiding, in the case concerning Certain Activities carried out by Nicaragua in the Border Area (*Costa Rica v Nicaragua*) | Translation; see Order N005 from the Chief of the South Military Detachment: 'It is prohibited to carry out operations, patrols or any type of presence in the territory defined by the International Court of Justice as Disputed Territory, located north of the disputed channel, bordered on the west by the right bank of the San Juan de Nicaragua River (0806-7), (1005-8) and on the east by Harbour Head Lagoon (0907-6), (1007-3)', Counter-Memorial of Nicaragua | volume III (6 August 2012).

<sup>574</sup> Application instituting proceedings; Land Boundary in the Northern Part of Isla Portillos (*Costa Rica v Nicaragua*); Memorial of Costa Rica; see also Oral Pleadings of Costa Rica Verbatim record 2017/7

<sup>575</sup> Oral Pleadings of Nicaragua Verbatim record 2017/12

<sup>576</sup> Oral Pleadings of Nicaragua Verbatim record 2017/12; Verbatim record 2017/16.



other States in the region, as a dangerous departure from the existing *status quo* with serious implications for the future demarcation of the border. The incident, which persisted for nearly three months, almost led China and India into an armed conflict.

### *Environmental Harm*

241. In the case of a disputed territory, there will be a risk, until the determination of sovereignty, that any action a State takes with regard to that disputed territory, may affect the environment of another State. This is because, prior to determination of the issue, the disputed territory may in fact belong to another State. Thus, even if the State believes in good faith that it has sovereignty over the disputed area, it will be required to ensure that it does not cause any environmental harm to the disputed area.
242. In *Costa Rica v Nicaragua*, the ICJ found that Costa Rica had breached the procedural aspect of the no-harm principle by failing to undertake and communicate an environmental impact assessment before constructing a road next to the San Juan River.<sup>577</sup> However, the substantive element of the obligation had not been breached, as Nicaragua could not prove that it had incurred significant environmental harm as a result of the construction.<sup>578</sup>
243. Furthermore, the ICJ considered that even though at the time of its actions Nicaragua exercised control over the disputed territory, it owed a duty to ensure that it did not act in a manner that could possibly cause significant harm to that territory.<sup>579</sup> Nicaragua was found not to have failed in its obligation: procedurally, environmental studies had been undertaken, which had concluded that there was no risk of significant transboundary harm<sup>580</sup> and, substantively, the available evidence did not show that any transboundary harm had been caused to Costa Rica.<sup>581</sup> The finding that Nicaragua had obligations under international law not to cause environmental harm onto the disputed territory has practical implications for the conduct of States acting in disputed territories.

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<sup>577</sup> *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)* [2015] ICJ Rep 665 para 173.

<sup>578</sup> *Costa Rica v Nicaragua* (ibid) paras 196, 207, 213, 216–217.

<sup>579</sup> *Costa Rica v Nicaragua* (ibid) para 105.

<sup>580</sup> Ibid.

<sup>581</sup> *Costa Rica v Nicaragua* (ibid) para 119, 120,

244. The *South China Sea* Arbitration provides an interesting example that a breach of the obligation of restraint may occur when harm to the environment of the disputed area is inflicted. In this case, the Tribunal found that, through its conduct, China had breached Article 192 and Article 194(1) and (5) of UNCLOS concerning environmental protection.<sup>582</sup> China was found to have violated its obligation to protect and preserve the environment, substantively, by undertaking coral bleaching, island building and numerous other harmful activities, and, procedurally, by failing to communicate an adequate environmental impact assessment to the Philippine government. The Tribunal drew the following far-reaching conclusions:

China's artificial island-building activities on the seven reefs in the Spratly Islands have caused devastating and long-lasting damage to the marine environment. ...through its construction activities, China has breached its obligation under Article 192 to protect and preserve the marine environment, has conducted dredging in such a way as to pollute the marine environment with sediment in breach of Article 194(1), and has violated its duty under Article 194(5) to take measures necessary to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life.

(...)

[T]he Tribunal finds that China has, through its toleration and protection of, and failure to prevent Chinese fishing vessels engaging in harmful harvesting activities of endangered species at Scarborough Shoal, Second Thomas Shoal and other features in the Spratly Islands, breached Articles 192 and 194(5) of the Convention.<sup>583</sup>

245. Therefore, the above cases indicate clearly that States ought to respect and preserve the environment of the disputed territory and that this duty is inherently linked to the obligation of restraint. States involved in territorial disputes must refrain from causing environmental harm onto the disputed territory. To that end, States must take precautionary measures to minimise the risk of any potential harm to another State. The preventative aspect of the obligation includes the preparation of environmental impact assessments.<sup>584</sup>

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<sup>582</sup> *South China Sea Arbitration (Philippines v China)* (Award of 12 July 2016) paras 941, 992–993.

<sup>583</sup> *Ibid* paras 983–993.

<sup>584</sup> *Costa Rica v Nicaragua* [2015] ICJ Rep (Sep Op Judge Donoghue) para 104; International Law Commission, 'Prevention of Transboundary Harm from Hazardous Activities' [2001] 2(2) Yearbook of International Law Commission 148, 157–9.

*Provisional Arrangements*

246. The prevention of actions likely to aggravate the dispute might be proactively sought by the parties through provisional agreements while the dispute is pending resolution. The Protocol of Peace, Friendship, and Boundaries between Ecuador and Peru is a good example in that regard. On 20 July 1941, shortly after the outbreak of an armed conflict between the two States over their long-disputed land border, leading to mutual charges of aggression, the two States entered into an agreement aimed at ending, or at least containing the conflict, and facilitating, in due course, the final demarcation of the boundary.<sup>585</sup> Article I of the Protocol underscored the parties' readiness, in a spirit of 'understanding and good faith', to abstain from 'any action capable of disturbing [their] relations'.<sup>586</sup> To ensure this, the Protocol provided for the withdrawal of Peruvian forces from the disputed areas, the delimitation of the land boundary and the monitoring of the agreement by armed observers from States in the region. Importantly, the Protocol stipulated that, pending the 'definitive demarcation of the frontier line', the military forces of the two States shall remain in the positions described by the Protocol, behind the yet-to-be-delimited areas, thus, encapsulating the essence of the parties' belief that the presence of armed forces within the area subject to delimitation might hinder the demarcation process on the ground.<sup>587</sup>
247. The example of Botswana and Namibia is also notable. Namibia accused Botswana of occupying Kasikili/Sedudu Island and hoisting its national flag over the Island in 1991 'without any discussion or consultation with the government of the newly-independent Namibia'.<sup>588</sup> According to the agent of Namibia in the ICJ proceedings, this action clearly constituted 'a unilateral use of force to change the *status quo*...in contravention of international law'.<sup>589</sup> He added that Namibia 'opted not to aggravate the situation in any way by word or by deed'.<sup>590</sup> Rather Namibia attempted to settle the dispute peacefully on the basis

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<sup>585</sup> Protocol of Peace, Friendship, and Boundaries (Peru/Ecuador) (signed 29 January 1942; entered into force 26 February 1942) [known as the Rio Protocol] reprinted in (1942) 36(2) American Journal of International Law 168-170; for a commentary, see I Bowman, 'The Ecuador-Peru Boundary Dispute' (1942) 20(2) Foreign Affairs 757-761;

<sup>586</sup> Protocol of Peace, Friendship, and Boundaries (ibid).

<sup>587</sup> Arts I, IV, VIII, Protocol of Peace, Friendship, and Boundaries (ibid); Note that the Protocol was declared void by Ecuador in 1960, see G Maier, 'The Boundary Dispute Between Ecuador and Peru' (1969) 63(1) American Journal of International Law 28, 44.

<sup>588</sup> Oral Pleadings of Namibia Verbatim record 1999/1 para 9.

<sup>589</sup> Oral Pleadings of Namibia Verbatim record 1999/1 para 9.

<sup>590</sup> Oral Pleadings of Namibia Verbatim record 1999/1 para 17.

of the applicable rules and principles of international law by ‘encouraging settlement of international disputes by peaceful means’.<sup>591</sup> He further noted that Namibia had ‘exercised *maximum restraint* in the boundary disputes with Botswana along the Chobe River in general and Kasikili Island in particular’ because of its commitment to these principles.<sup>592</sup> In its response, Botswana stated that a boundary dispute was recognised to exist around Kasikili Island in March 1992 when Namibia made its first formal protest to Botswana following a ‘border incident’ in the vicinity of the island. It added that the two governments had then agreed to resolve the dispute peacefully and that a Memorandum of Understanding (MOU) had been drafted on 23 December 1992. The documents submitted to the ICJ suggest that one of the issues the parties had agreed to pay attention to, even before deciding to submit the matter to the ICJ, was the ‘the avoidance of cross-border shooting incidents’.<sup>593</sup>

248. As another example, on 20 July 2010 Burkina Faso and Niger submitted a frontier dispute to the ICJ by virtue of their joint agreement. Article 10 of the Agreement provided that: ‘Pending the Judgment of the Court, the Parties undertake to maintain peace, security and tranquillity among the populations of the two States in the frontier region, *refraining from any act of incursion* into the disputed areas...’.<sup>594</sup> Article 10 also added that parties were to hold preliminary consultations prior to the construction of any socio-economic infrastructure in the disputed border area. In their respective Memorials submitted to the ICJ, the parties recognised that Article 10 of the Special Agreement reflects the parties’ ‘desire to preserve the climate of calm which characterizes [their] relations’<sup>595</sup> and that such undertaking was based on ‘the principle universally accepted by international tribunals and likewise laid down in many conventions...to the effect that the parties to a case must...not allow any step of any kind to be taken which might aggravate or extend the dispute’.<sup>596</sup>
249. Similar undertakings ‘to preserve peace, security and quiet among the peoples of the two States’ and which included as a necessary prerequi-

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<sup>591</sup> Oral Pleadings of Namibia Verbatim record 1999/1 para 37.

<sup>592</sup> Oral Pleadings of Namibia Verbatim record 1999/1 para 36.

<sup>593</sup> Oral Pleadings of Namibia, Verbatim record 1999/1 para 12.

<sup>594</sup> Special Agreement between the two States (Burkina Faso/Niger) (signed 24 February 2009; entered into force 20 November 2009) reprinted in *Frontier Dispute (Burkina Faso/Niger) (Judgment)* [2013] ICJ Rep 44, 50–2. Emphasis added.

<sup>595</sup> Memorial of Niger (April 2011) para 3.21.

<sup>596</sup> Memorial of Burkina Faso (April 2011) paras 0.8–0.9.

site the withdrawal of troops pending the full and final settlement of the dispute, were included in the Special Agreement whereby Benin and Niger agreed to submit to a Chamber of the ICJ a dispute concerning the determination of their land border<sup>597</sup> and the Special Agreement between Chad and Libya concerning the determination of their land border and the sovereignty status of the Aouzou strip.<sup>598</sup> In the latter case, the parties agreed, ‘pursuant to the fundamental principles of the United Nations’ (citing in particular the peaceful settlement of disputes, sovereign equality of all States and the non-use of force) ‘to withdraw the forces of the two countries from the positions which they currently occupy in the disputed region’ and ‘to refrain from establishing any new presence in any form in the said region’.<sup>599</sup> The parties expressed the view that such measures were ‘concomitant with the judicial settlement [of the dispute]’.<sup>600</sup>

250. A further example worthy of consideration concerns the bilateral security system agreed between the United Kingdom and Argentina (known as ‘Interim Reciprocal Information and Consultation System’) around the Falkland Islands.<sup>601</sup> After setting aside the issue of disputed sovereignty (through the so-called ‘formula on sovereignty’)<sup>602</sup> the two States, ‘in order to reduce the possibility of incidents and limit their consequences if they should occur’, agreed to establish direct links of communication between their respective military authorities and a concrete system of mutual prior notification for naval, aerial and land-based military exercises in the vicinity of the Islands.<sup>603</sup> The overall aim was to ‘avoid any movement or action that might be interpreted as a

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<sup>597</sup> Special Agreement (signed 15 June 2001; entered into force 11 April 2002) reprinted in *Frontier Dispute (Benin/Niger)* (Judgment) [2005] ICJ Rep 90, 95–7.

<sup>598</sup> Framework Agreement [Accord-Cadre] on the Peaceful Settlement of the Territorial Dispute (Libya/Chad) (signed and entered into force 31 August 1989) reprinted in *Territorial Dispute (Libya/Chad)* (Judgment) [1994] ICJ Rep 6, 9–10.

<sup>599</sup> Framework Agreement [Accord-Cadre] on the Peaceful Settlement of the Territorial Dispute (Libya/Chad) (signed and entered into force 31 August 1989) reprinted in *Territorial Dispute (Libya/Chad)* (Judgment) [1994] ICJ Rep 6, 9–10.

<sup>600</sup> *Ibid.*

<sup>601</sup> see M Evans, ‘The Restoration of Diplomatic Relations between Argentina and the United Kingdom’ (1991) 40(2) *International and Comparative Law Quarterly* 473, 778–9.

<sup>602</sup> Whereby they agreed that nothing in the content of the agreement or the conduct of the parties pursuant to the agreement shall be interpreted as changing the parties’ position with regard to sovereignty or territorial and maritime jurisdiction over the Falkland Islands, see Art 2, Joint Statement (United Kingdom/Argentina) (19 October 1989).

<sup>603</sup> Joint Statement (United Kingdom/Argentina) (15 February 1990); see also, M Evans, ‘The Restoration of Diplomatic Relations between Argentina and the United Kingdom’ (1991) 40(2) *International and Comparative Law Quarterly* 473, 778–9.

hostile act or an act carried out with *hostile intent*.<sup>604</sup> This attitude of seeking to restrain military activities likely to escalate the conflict and lead to a renewed spiral of violence finds expression in the parties' commitment (as per Article 3 of the Joint Statement) to:

[R]espect fully the principles of the Charter of the United Nations, in particular:

- The obligation to settle disputes exclusively by peaceful means; and
- The obligation to refrain from the threat or use of force.<sup>605</sup>

### *Conclusion*

251. General obligations of restraint are particularly important in situations involving armed actions or activities in relation to territories whose sovereignty status is disputed by two or more States. Due to their political sensitivity, disputed territories are prone to lead to States' use of force. It follows that any unilateral actions or activities involving a State's armed forces in a disputed territory should be restricted and contained as possible.
252. When dealing with militarised territorial disputes, the ICJ and other international courts and tribunals have consistently held that non-aggravation, as a general principle of international law, is not merely aimed at preserving the integrity of the parties' rights and 'exists independently of any order from a court or tribunal to refrain from aggravating or extending the dispute'.<sup>606</sup> Its object is also to prevent the advent of armed incidents or other unilateral actions rising to the level of a use of force. This also preserves the integrity and effectiveness of the final resolution of the territorial conflict. Seen in this way, general obligations of restraint constitute a kind of auxiliary procedural code of conduct complementing the principal substantive obligations governing international disputes, namely the obligation to resolve disputes peacefully (Article 2(3) of the UN Charter) and the prohibition on the threat or use of force (Article 2(4) of the UN Charter).
253. It may be said from the foregoing that the test of whether a certain form of conduct aggravates the conflict is largely a subjective one. For example, if one of the disputants regards the conduct of the other as an

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<sup>604</sup> Joint Statement (United Kingdom/Argentina) (15 February 1990) Annex II. Emphasis added.

<sup>605</sup> Art 3, Joint Statement (United Kingdom/Argentina) (19 October 1989).

<sup>606</sup> *South China Sea Arbitration (Philippines v China)* (Award of 12 July 2016) para 1169.

irrevocable modification of the territorial *status quo* that adversely affects the subject-matter of the dispute (eg the process of border demarcation on the ground) such conduct will be likely to contravene the general duty to exercise restraint in relation to the disputed territory. Given the broad-brush substantive scope of the obligation, this may be a reasonable assumption. However, in the course of judicial proceedings, a court or tribunal faced with an allegation of a breach of the obligation of non-aggravation and restraint would need to apply a set of objective criteria, as the tribunal in the *South China Sea* case appears to have done. To interpret the meaning of the obligation as requiring the subjective conviction of other affected claimants for any military-related action or activity would be going beyond the intended objective of the obligation, as it is possible that some kind of activities (eg law enforcement carried out by the military) could be conducted without consent and that would not necessarily complicate the dispute. Nevertheless, a State that follows a cautious approach and proactively seeks, in good faith, to refrain from any unilateral actions likely to alter the *status quo* in the disputed territory would be very unlikely to breach the obligation.

## Conclusions

254. This report has considered in detail the legal obligations binding upon States parties to a territorial dispute and the consequences flowing from a breach of these obligations. This entailed an analysis of key international legal principles and their specific application in the context of territorial disputes.
255. First, the prohibition on the threat or use of force – enshrined in customary international law, Article 2(4) of the UN Charter, and reiterated in numerous successive Declarations and by international courts and tribunals – precludes force from being used or threatened to be used to settle international disputes. The prohibition applies equally to disputed territories and territories not subject to dispute. Consequently, forcible means cannot be used to gain control over a disputed territory or to change the existing *status quo* on the ground in that territory. States, which have resorted to the threat or use of force in the context of territorial disputes, have not questioned the existence of the prohibition. Rather, they have relied on exceptions to the rule, and particularly the right of self-defence.
256. Force may only be used to preserve the factual situation in a disputed territory where it is a lawful instance of self-defence. Per Article 51 of the UN Charter, such forcible action must be in response to an armed attack and must be both necessary and proportionate.
257. The prohibition on the threat or use of force in Article 2(4) of the UN Charter has an expansive meaning. Territorial incursions in a disputed territory that do not result in an armed confrontation between the disputing parties, so-called ‘bloodless invasions’, are not excluded from the scope of Article 2(4). In such cases, courts have been satisfied with finding that there was a breach of a State’s sovereignty and territorial integrity.
258. Nonetheless, the prohibition on the use of force extends to any unilateral armed actions aimed at altering the *status quo* on the ground in a disputed territory. Determining the existing territorial *status quo* which is immune from modification by the use of force or the threat of force is, hence, crucial to establish the disputing parties’ rights and duties and the application of the *jus ad bellum* in a disputed territory.
259. Second, a necessary corollary to the prohibition on the threat or use of force is the obligation to resolve disputes by peaceful means, so as not to endanger international peace and security and justice, per Article 2(3) of the UN Charter. The principle of peaceful settlement



is particularly important in the context of territorial disputes given their propensity for violent escalation. This is an obligation of means and not of result. States parties to a territorial dispute must actively, meaningfully, and in good faith, seek the resolution of their disputes through peaceful means. States are not required to select any particular settlement method or reach a specific solution. Unilateral acts of a military nature, conducted by one State to change the *status quo* in a disputed territory and which do not constitute lawful instances of self-defence, lack the necessary element of peacefulness and, hence, must be avoided.

260. Third, general obligations of restraint are incumbent upon States parties to a territorial dispute, for the entire duration of the dispute. Such obligations, affirmed in successive Declarations, constitute a corollary to the principle of peaceful resolution of disputes and the prohibition on the threat or use of force. Obligations of restraint are directed at maintaining the existing *status quo*. Accordingly, States must refrain from aggravating or extending the dispute and from acting in such a manner that would render the dispute's resolution more difficult. Armed incidents and other similar activities directed at changing the character of the disputed territory violate such obligations of restraint. The duty to exercise restraint has featured prominently in recent jurisprudence featuring border and cross-border military activities or the actual use of force between States. State practice confirms that parties to a territorial dispute, expressly or impliedly, recognise the requirement to exercise restraint in the disputed area pending the final settlement of the dispute.

*Areas of continued uncertainty and further research*

261. Given the number, breadth and complexity of territorial disputes, this report's scope of study has been purposely constrained. This research has focused primarily on situations where disputing States used military means or other comparable activities to support their claims of sovereignty over the territory in dispute. As a result, territorial disputes not involving such military or comparable means were not considered. These disputes warrant further study, including, perhaps, to identify the factors that allowed for a peaceful resolution given the noted propensity of territorial disputes to escalate into outbreaks of violence and armed conflict. Situations of secession and self-determination also entail territorial disputes raising a host of issues, which require separate analysis. Maritime boundary disputes likewise were not considered, despite involving sovereignty claims over islands which are further complicated by disputes over competing sovereign rights and entitlements and issues of maritime delimitation.

# *ANNEX I*

## *Advisory Board Roundtable*

(12 October 2017)

262. An Advisory Board Roundtable was held in London on 12 October 2017.

**Attendees:** Professor Nicholas Tsagourias (University of Sheffield), Professor Tadashi Mori (University of Tokyo), Dr Patricia Jimenez Kwast (University of Oxford), Mr Tomohiro Mikanagi (Lauterpacht Centre for International Law), Mr Hiroyuki Hamai (First Secretary, Embassy of Japan), Professor Marc Weller (University of Cambridge) (by phone), Dr Marko Milanovic (University of Nottingham) (by phone), Professor Robert McCorquodale (Director, BIICL), Dr Markus Gehring (Arthur Watts Senior Research Fellow, BIICL), Dr Jean-Pierre Gauci (Associate Senior Research Fellow, BIICL), Dr Constantinos Yiallourides (Arthur Watts Research Fellow, BIICL),

263. Ahead of the Roundtable, the research team circulated a discussion paper, setting out certain aspects of the project and key research questions. It was noted that this is a very topical research project and one that touches upon a broad range of areas of international law, including human rights and the law of the sea. Participants were invited to share their views as to other areas of law that should be examined. One of the participants suggested that trade law (eg Taiwan and its WTO membership) and investment law (eg the application of bilateral investment treaties to disputed territories) could potentially be of relevance. In the course of general discussion, some participants suggested that the international law pertaining to the threat/use of force in the context of territorial disputes should form the main plank of the research.

264. The members of the research team presented aspects of their research to the advisors present at the Roundtable and discussed questions raised by jurisprudence and State practice on territorial disputes. The tentative title of the project as presented at the Roundtable was 'The Legality of Unilateral Acts in relation to Territorial Sovereignty Disputes'. It was highlighted that the primary objectives of the research were: a) to identify the relevant legal obligations of States involved in territorial disputes; and b) to review and analyse the legal-

ity of certain unilateral State acts in relation to disputes over territorial sovereignty.

265. Several comments were made on the wording ‘unilateral acts’, particularly in relation to the scope of the project as indicated by that title. Some participants suggested that the language ‘unilateral State acts’ may give rise to misinterpretation. It was suggested that the project should specifically target ‘actions or activities’ carried out by public authorities aimed at the advancement of sovereignty claims (‘muscular exhibition of State authority’). It was also suggested that issues of secession and self-determination (eg Kosovo and South Ossetia), even though they may have a territorial component, are borderline situations that raise distinct legal issues. One participant suggested that special attention should be paid to cases involving the manifestation of territorial sovereignty claims through military means. Under this approach, military and paramilitary actions would be relevant to the research, but construction activities and other non-forcible measures (eg the issuance of passports) in a disputed territory would go beyond the present research’s scope. Participants agreed that the research should exclude circumstances where States do not attach sovereignty claims to their actions (or sovereignty claims that are simply in preparation). Some participants suggested that emphasis should also be placed on unilateral State actions that do not, as such, violate the prohibition of use of force, under Article 2(4) of the UN Charter and customary international law, but may nonetheless be contrary to other international law principles applicable in territorial disputes (such as the principles of non-aggravation and no-harm).
266. On the meaning of a ‘territorial dispute’ for the purpose of this research, it was acknowledged that sovereignty claims over land territory (whether continental or island) are frequently mixed with disputes over maritime entitlements/rights. However, it was noted that law of the sea disputes raise distinct legal issues which require different treatment. Therefore it was suggested that, in the interest of keeping the research with sizeable bounds, law of the sea cases may have to be excluded. One participant cautioned that excluding law of the sea cases posed a risk of excluding too many important disputes.
267. Regarding the selection of case studies and methodology, participants agreed that the analysis of ICJ jurisprudence on land and boundary disputes would be the most appropriate starting point, supplemented by other legal materials that may provide evidence of relevant State practice in the area (eg inter-State treaties/provisional arrangements and Security Council debates and resolutions). It was also queried

whether national courts' decisions should be looked at or whether only international judicial practice should be considered. The need for methodological and analytical clarity was highlighted, particularly in relation to the basis of decisions (ICJ, arbitration, national) because the interpretation process may be different in each forum.

## *ANNEX II*

### *The Use of Force in relation to Sovereignty Disputes over Land Territory Conference Report*

(27th March 2018)

268. An International Conference on ‘The Use of Force in relation to Sovereignty Disputes over Land Territory’ was held in London on 27 March 2018 to discuss the draft report.

**Panel Chairs and Speakers:** Professor Dapo Akande (University of Oxford), Mr Tomohiro Mikanagi (Lauterpacht Centre for International Law), Professor Tom Ruys (Gent University), Professor Nicholas Tsagourias (University of Sheffield), Professor Tadashi Mori (University of Tokyo), Dr Federica Paddeu (University of Cambridge), Professor Naoki Iwatsuki (Rikkyo University), Mr Robert Volterra (Volterra Fietta), Professor Yoshifumi Tanaka (Copenhagen University), Professor Enrico Milano (University of Verona), Ms Jill Barrett (Queen Mary University London), Judge David Anderson CMG (Former Judge, International Tribunal for the Law of the Sea), Ms Alison Macdonald QC (Matrix Chambers), Dr Brendan Plant (University of Cambridge), Professor Aristoteles Constantinides (University of Cyprus), Dr Niaz A Shah (University of Hull), Dr Markus Gehring (Arthur Watts Senior Research Fellow, BIICL), Dr Jean-Pierre Gauci (Associate Senior Research Fellow, BIICL), Dr Constantinos Yiallourides (Arthur Watts Research Fellow, BIICL).

269. Ahead of the Conference, the research team circulated a working draft of the research project. Participants were invited to share their views and suggestions on the draft report. Members of the research team opened the Conference by presenting an overview of the project, its research findings and the aims of the Conference. The Conference was then divided into four successive panel sessions. Panel speakers were invited to comment or expand on a specific topic of the draft report in a discussion moderated by a panel chair.

270. The first panel discussed the scope of the obligation not to resort to

the threat or use of force, pursuant to Article 2(4) of the UN Charter, in the context of a territorial dispute, analysed in Section 1 of the draft report. It was highlighted that the use of force in international law has been very topical beyond situations of territorial disputes. Discussions around the use of force in territorial disputes may draw important lessons for the prohibition on the use of force in international law more generally. Participants all agreed that Article 2(4) of the UN Charter applies in a territorial dispute.

271. Discussions revolved around the threshold on the use of force at the heart of Article 2(4). One participant discussed the establishment of a military presence in a disputed territory in light of Article 2(4) of the UN Charter. It was suggested that a military action in a disputed territory does not have to be violent to constitute an unlawful use of force. Rather, it must involve a coercive use of force to deter other claimants from interfering with the State's control over the territory. Coercion could be inferred from a range of factors, including the length of military presence, the type of weapons deployed and the scale of activities. Another participant agreed that small-scale forcible acts should not be excluded from the prohibition. Hence, non-violent acts could still violate Article 2(4).
272. It was highlighted that a use of force paves the way for the imposition of lawful countermeasures, including potentially by third parties, and has implications for the application of international humanitarian law and international criminal law. One participant suggested that the report should delve more deeply into relevant State practice into the use of force. It was also pointed out that identifying the territorial *status quo* as the baseline to test the application of Article 2(4) may be difficult on the ground.
273. The second panel commented on the right of self-defence in the context of a territorial dispute also discussed in Section 1 of the draft report. Participants stressed that the right of self-defence under Article 51 of the UN Charter arises when an armed attack has occurred, including in the context of a territorial dispute. One participant detailed the distinction between an armed attack and a mere frontier incident, in light of the *travaux préparatoires* on the drafting of Article 51 of the UN Charter.
274. It was pointed out, however, that some States have argued that a customary right of self-defence independently exists in the context of use of force falling short of an armed attack. Another participant noted the existence of a debate under international law on the admissibility of countermeasures involving the use of force.

275. Countermeasures have implications in light of the principle of peaceful settlement of international disputes. Accordingly, countermeasures could only be resorted to when necessary to secure the effectiveness of negotiations and other amicable dispute settlement procedures for the purpose of reaching a settlement. Similarly, countermeasures may also entail a State's international responsibility, under Article 52 of the International Law Commission's Draft Articles on State Responsibility. Another participant noted that the report should more fully examine the interaction of Article 21 of the Draft Articles and Article 51 of the UN Charter.
276. A participant questioned the extent and scope of the report's legal premise for the use of force, namely the peaceful administrative *status quo*. It was suggested that the existence and definition of this notion should be expanded in the report and supported by relevant State practice. A hypothetical scenario was discussed where a territory is claimed by three States and two of the States occupy the territory by means of force to establish an administration. It was pointed out that both States' administrations would not be peaceful and hence, according to the report, could never lawfully exercise self-defence over that occupied territory. The draft report, it was said, should grapple with the implications of the notion of peaceful administration and the resort to self-defence in such a double unlawful occupation situation.
277. The third panel considered the obligation to pursue peaceful settlement and the existence of general obligations of restraint in disputed areas, examined in Sections 2 and 3 of the draft report. Various participants stressed that the existence of a territorial dispute may be unclear or be contested by one or more of the parties to the dispute. It was noted that the report should lay out criteria for the identification of a dispute. Participants argued that the existence of an international dispute is a matter of substance rather than form. The claim of one party must be shown to have been positively opposed by the other. A formal diplomatic protest is not a necessary condition to a dispute.
278. Discussions revolved around the substance of the obligation of restraint in a territorial dispute. The *South China Sea* Arbitration was said to provide useful indications on that point. Actions that violate the rights of other State parties to the dispute, that would frustrate the effectiveness of an eventual decision, or that would undermine the integrity of the dispute resolution proceedings themselves all violate the obligation of restraint. The obligation of restraint would prevent the destruction of evidence. The *South China Sea* Arbitration also

illustrates that the breach of the obligation of restraint may lead to the breach of another obligation, here not to cause harm to the environment.

279. Another participant expressed support for the report's proposition that there is a general obligation to pursue peaceful settlement of territorial disputes and, as a corollary, an obligation of restraint in the context of such disputes. It was pointed out, however, that there are no treaty provisions, similar to Articles 74 and 83 of UNCLOS, expressly laying out an obligation of restraint in the context of a territorial dispute.
280. There were questions as to the project's scope and whether its focus on militarised disputes was too narrow. Many territorial disputes do not see the involvement of armed forces. Regulatory and judicial activities, such as legislations conferring nationality *en masse*, could also violate the obligation of restraint and are not considered by the report due to its focus on militarised disputes. It was further suggested that the report could discuss how the obligation of restraint interacts with the acquisition of title through *effectivités*.
281. Another participant cautioned that although such an obligation of restraint may be desirable, the true query is whether there is such evidence of general customary international law in respect of disputed territory. An obligation of restraint in the context of disputed territories would be much broader than the very specific obligations laid out in Article 83 of UNCLOS for maritime entitlements. It was pointed out that the territorial disputes referred to as evidence in the report are examples of disputes that have been presented to a court for adjudication. It was questioned whether such cases support the existence of a general obligation of restraint binding on disputing parties prior to the initiation of litigation.
282. The fourth and final panel was invited to address aspects of the draft report not discussed in previous panels and topics not addressed in the current draft but which could be the subject of further research. Participants noted that compensation for environmental harm is a novel question in international law which, because of its complexity, could by itself form an independent research project.
283. The ICJ's judgment in *Nicaragua v Costa Rica* leaves room for considerable debate as to the correct methodology for estimating environmental harm and appropriate compensation. Additionally, there is uncertainty as to how to establish causation in the context of environmental damage where there may be several concurrent causes. An



additional important issue pointed out was the use of science and experts in oral proceedings to guide the judgment of international courts and tribunals.

284. It was highlighted that territorial status can be changed by means other than force, through a combination of *effectivités* and consent by the opposing State. Territorial *status quo* operates to preserve the facts on the ground. International law, however, upholds the title of the dispossessed State, even if that State does not exercise factual control over the territory. Military activities in the context of territorial disputes falling short of the use of force constitute an *effectivités* that can change the *status quo* on the ground where they are accompanied by the explicit or implicit consent of the other State. It was, hence, suggested that the report should engage with the law of acquisition to provide a fuller picture of the various ways by which the territorial *status quo* may be changed in the context of a territorial dispute.
285. Another participant discussed the obligations of States and other entities in disputed territories arising under other bodies of international law not considered in the report. It was submitted that obligations under international human rights law and international humanitarian law incumbent upon an occupying power are, by and large, the same whether a territorial dispute lies at the beginning of the conflict or arises over time. International humanitarian law places limitations on an occupying State to preserve the *status quo ante* in the occupied territory. International human rights law places obligations on the occupying State or States but also on third States, such as the duty of non-recognition.
286. Finally, Kashmir was pointed out as a current and live territorial dispute which underlines the complex interactions of obligations under various areas of international law and of different actors – States, non-State actors and international organisations – in the context of a disputed territory.

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