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MILITARY ACTION TO RECOVER OCCUPIED LAND: LAWFUL SELF-DEFENCE OR PROHIBITED USE OF FORCE?

THE 2020 NAGORNO-KARABAKH CONFLICT REVISITED

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The 2020 Nagorno-Karabakh conflict revisited

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Keywords

Jus ad bellum – military occupation – self-defence – Nagorno-Karabakh

1 Introduction

On the morning of September 27 of 2020, heavy fighting[3] erupted along the Nagorno-Karabakh Line of Contact established in the aftermath of the 1988-1994 war over the region, also referred to as the First Nagorno-Karabakh War. This latest episode of violence in the South Caucasus pitted once again the troops of Azerbaijan, supported by Turkey on this occasion,[4] against the forces of the self-proclaimed Republic of Artsakh and Armenia.

After two months of military confrontations, which included the deployment of drones and heavy artillery[5] resulting in substantial military and civilian casualties on both sides,[6] the hostilities came to an end with the signing of a tripartite statement between Armenia, Azerbaijan, and the Russian Federation on the 9th of November 2020.[7] Notably, the agreement substantially modifies the existing territorial *status quo* resulting from the 1994 Bishkek Protocol ceasefire.[8]

In spite of the conflict's intensity and inter-State dimension, very few States commented on the compatibility of the protagonists' conduct with the international law on the use of force (the *jus ad bellum*). This silence may partly be due to the difficulty in ascertaining the facts on the ground – with both Armenia and Azerbaijan accusing each other of triggering hostilities.[9] Still, the events raise a fundamental question of *jus ad bellum* – and one that is surprisingly overlooked in legal doctrine.

The question is this: when part of a State's territory is occupied by another State for a prolonged duration, can the former still invoke the right of self-defence to justify military operations aimed at recovering its land? Put differently:

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[3] *Armenia and Azerbaijan fight over disputed Nagorno-Karabakh*, BBC News (Sept. 27, 2020), https://www.bbc.com/news/world-europe-54314341.

[4] Alexander Gabuev, *Viewpoint: Russia and Turkey - unlikely victors of Karabakh conflict*, BBC News, (Nov. 12, 2020), https://www.bbc.com/news/world-europe-54903869.

[5] Robyn Dixon, *Azerbaijan's drones owned the battlefield in Nagorno-Karabakh — and showed future of warfare*, The Washington Post (Nov. 11, 2020), https://www.washingtonpost.com/world/europe/nagorno-karabkah-drones-azerbaijan-aremenia/2020/11/11/441bcbd2-193d-11eb-8bda-814ca56e138b_story.html.

[6] *Nagorno-Karabakh conflict killed 5,000 soldiers*, BBC News (Dec. 3, 2020), https://www.bbc.com/news/world-europe-55174211 (Early reports indicate that around 5000 soldiers and over 140 civilians lost their life during the 2020 confrontations).

[7] *Statement by President of the Republic of Azerbaijan, Prime Minister of the Republic of Armenia and President of the Russian Federation* (Nov. 10, 2020), http://en.kremlin.ru/events/president/news/copy/64384.

[8] *See Bishkek Protocol* (May 5, 1994), https://peacemaker.un.org/sites/peacemaker.un.org/files/Bishkek%20Protocol.pdf; *See Bishkek Ceasefire Agreement* (May 11, 1994), https://www.peaceagreements.org/viewmasterdocument/990.

[9] Permanent Representative of Azerbaijan to the United Nations, Letter dated 27 September 2020 from the Permanent Representative of Azerbaijan to the United Nations addressed to the Secretary-General, U.N. Doc. S/2020/948 (Sep. 28, 2020); Permanent Representative of Armenia to the United Nations, Letter dated 28 September 2020 from the Permanent Representative of Armenia to the United Nations addressed to the Secretary-General, U.N. Doc. S/2020/955 (Sep. 29, 2020).

can unlawful occupation be regarded as a "continuing" armed attack permitting the recourse to self-defence at any given point in time — possibly years after the occupation commenced?

The relevance of the question is clear: ever since the 1994 ceasefire agreement, the position widely held by the international community has been that the Nagorno-Karabakh region is occupied by Armenia, as confirmed e.g. by the UN General Assembly and the European Court of Human Rights.[10] Assuming that the region indeed belongs to Azerbaijan and was (and partly remains) unlawfully occupied by Armenia, could Azerbaijan effectively claim self-defence to lawfully recover it, even though the pre-2020 territorial *status quo* in the region had existed for more than a quarter of a century? And can it again invoke self-defence in the near or distant future to recover those parts of the region that remain under Armenian control now that the guns have fallen silent once more?

Clearly, the stakes extend far beyond the Caucasus. The answer to the above question is indeed of potential relevance for a wide range of conflicts around the globe. The purpose of the present paper then is not to pass judgment on the conduct of Armenia and Azerbaijan in their latest confrontation, but rather to offer a broader appraisal of how the international legal framework governing the use of force applies to situations of prolonged occupation.

Our analysis proceeds as follows. As a preliminary matter, we examine – and discard – the suggestions that efforts to recover territory subject to prolonged occupation through armed force are somehow excluded from the scope of the *jus ad bellum*, (i) because they are governed exclusively by international humanitarian law, or (ii) because of their supposedly 'intra-State' nature (Section 3). Subsequently, we delve into the legal arguments for and against the idea that an occupied State is permitted to use force to recover long-lost land (Section 4). Specifically, we look at the impact of the immediacy requirement (as a condition for the lawful exercise of self-defence), and the idea that occupation might be construed as a 'continuing' armed attack. In addition, we consider the interaction with the principle of the non-use of force to settle territorial disputes, as well as the role of armistice and ceasefire agreements. Section 5 turns to examples from State practice, including, most notably the 1973 Yom Kippur War, to see how the legal framework sketched in previous sections has been applied in practice. Lastly, section 6 draws attention to the clash between competing values – the protection of territorial integrity versus the quest for international peace and security – that underlies the legal conundrum before us. Ultimately, we argue that the latest confrontation between Armenia and Azerbaijan does not lend support to the concept of unlawful occupation as a "continuing armed attack".

Before diving into the substantive legal analysis, however, a short introduction to the Nagorno-Karabakh conflict is in order (Section 2).

2 The Nagorno-Karabakh conflict in a nutshell

The latest confrontation over the Nagorno-Karabakh region is yet another harrowing episode of a long-standing territorial dispute between Armenia and Azerbaijan,[11] a conflict often referred to as frozen,[12] albeit one prone to rekindle periodically, riddled with complex ethnic and political ramifications.

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[10] G.A. Res. 62/243 (Apr. 25, 2008); Chiragov and Others v. Armenia, App. No. 13216/05, ¶ 186 (2015) (Eur. Ct. H.R.), https://hudoc.echr.coe.int/fre?i=001-155353.

[11] *See* Tim Potier, Conflict in Nagorno-Karabakh, Abkhazia and South Ossetia. A legal appraisal *(2000);* Heiko Krüger, The Nagorno-Karabakh Conflict, A Legal Analysis (2010).

[12] Thomas D. Grant, *Frozen Conflicts and International Law*, 50 Cornell Journal of International Law 361, 377 (2017); Milena Sterio, *The "Frozen" Conflict in Nagorno-Karabakh*, Opinio Juris (Oct. 2, 2020), http://opiniojuris.org/2020/10/02/the-frozen-conflict-in-nagorno-karabakh/.

The conflict can be traced back to the dawn of the Soviet Union, when the Nagorno-Karabakh region, despite being inhabited by a large majority of ethnic Armenians, was designated in 1921 as an autonomous oblast (NKAO) within the territory of the newly formed Soviet Socialist Republic of Azerbaijan.[13] While the region remained relatively calm under soviet rule, tensions fuelled by the discontent of the Karabakh Armenians living in NKAO began to escalate and reached a boiling point at a time when the USSR was starting to collapse and its constituent states were gaining independence. After unsuccessfully attempting to secede from Azerbaijan and join Armenia to no avail in 1988,[14] the 'Nagorno-Karabakh Republic' (NKR), later renamed the 'Republic of Artsakh', declared its independence from Azerbaijan on 6 January 1992 after holding a referendum in which 99.9% of the participants voted in favour of secession. However, it is worth mentioning that the Azeri minority living in the region boycotted the referendum.[15]

After more than six years of hostilities in Nagorno-Karabakh, and its adjacent regions by spillover, leaving an estimated 30.000 fatalities and more than one million refugees and internally displaced persons,[16] hostilities came to an end in May 1994 after the mediation of Russia,[17] under the auspices of the OSCE Minsk Group,[18] with the signing of a ceasefire agreement between representatives of Armenia, Azerbaijan and the NKR.[19]

The outcome of the First Nagorno-Karabakh War significantly reshaped the balance of powers in the region. From an international law standpoint, when Azerbaijan declared its independence from the Soviet Union in 1991, Nagorno-Karabakh remained an integral part of its sovereign territory, in accordance with the principles of territorial integrity and *uti possidetis juris*.[20] Yet, despite its unambiguous legal status, ever since the aftermath of the war, Armenia had been widely regarded by the international community as the occupying power in Nagorno-Karabakh and its seven Azeri adjacent regions, a *status quo* which had stood unaltered until the armed conflict that broke out in September 2020.

As early as 1993, the Security Council issued four resolutions condemning the escalation of the hostilities in Nagorno-Karabakh, requesting the withdrawal of troops from the occupied territories of Azerbaijan.[21] While the resolutions did not refer explicitly to Armenia as the occupying force, it was heavily implied in their wording and context. Furthermore, the United Nations General Assembly passed a resolution in 2008, declaring that Nagorno-Karabakh is occupied by Armenia and requesting the withdrawal of its troops from the region.[22] Other international organizations

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[13] Heiko Krüger, *Nagorno-Karabakh*, *in* Self-Determination and Secession in International Law 214, 215 (*Christian Walter, Antje von Ungern-Sternberg & Kavus Abushov eds., 2014).*

[14] *Chiragov*, *supra* note 10, ¶ 14.

[15] *Id.* ¶ 17.

[16] Human Rights Watch, Azerbaijan: Seven Years of Conflict in Nagorno-Karabakh 98-99 (1994). ("Most of the 750,000-800,000 Azeri were displaced or made refugees as a result of violations of the rules of war by the Karabakh Armenians").

[17] *Chiragov*, *supra* note 10, ¶ 24.

[18] The OSCE Minsk Group has sustained long-standing international mediation attempts since its inception in 1992. *See*, https://www.osce.org/minsk-group/108306.

[19] Bishkek Ceasefire Agreement, *supra* note 8.

[20] Anne Peters, *The Principle of Uti Possidetis Juris: How Relevant Is It for Issues of Secession?, in* Self-Determination and Secession in International Law 95, 110 (*Christian Walter, Antje von Ungern-Sternberg & Kavus Abushov eds., 2014) ("*The better view is that today *uti possidetis* has the value of a customary rule which applies to secession beyond the colonial context"); Andriy Y Melnyk, *Nagorny-Karabakh*, Max Planck Encyclopedia of Public International Law (May 2013), https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e2073?prd=EPIL.

[21] S.C. Res. 822, U.N. Doc. S/RES/822 (Apr. 30, 1993); S.C. Res. 853, U.N. Doc. S/RES/853 (July 29, 1993); S.C. Res. 874, U.N. Doc. S/RES/874 (Oct. 14, 1993); S.C. Res. 884, U.N. Doc. S/RES/884 (Nov. 14, 1993).

[22] G.A. Res. 62/243 (Apr. 25, 2008). It is worth noting, however, that the resolution was passed with a recorded vote of 39 in favour, 7 against and 100 abstentions.

voiced the same appraisal of the situation, including, for instance, the Parliamentary Assembly of the Council of Europe in 2005[23] and the European Parliament in 2010.[24]

In practical terms, while the day-to-day administration over Nagorno-Karabakh has been carried out by the self-proclaimed Republic of Artsakh since 1994, Armenia continued to exercise effective control over the region until the outbreak of the 2020 conflict.[25] At the outset, since its declaration of independence in 1992, the NKR has not gained recognition from any state or international organization, including Armenia. Moreover, from its very inception, the subsistence of the NKR has heavily depended on the military, political and economic support provided by Armenia.[26] The NKR and Armenian military forces have been described as 'highly integrated', with the latter's involvement being considered as the decisive factor behind the success of the continuous occupation over the region.[27] In its assessment of the situation on the ground in the *Chiragov* case, the European Court of Human Rights found that "the NKR and its administration survive by virtue of the military, political, financial and other support given to it by Armenia which, consequently, exercises effective control over Nagorno-Karabakh".[28] In light of the foregoing, authors have described the Republic of Artsakh as a "puppet regime" or a *de facto* Armenian province.[29]

The inter-state character of the Nagorno-Karabakh territorial dispute is further underscored by the 2020 conflict and its outcome. Notably, the agreement which put an end to hostilities on 10 November 2020 was signed exclusively between Armenia, Azerbaijan and Russia, without the participation of the NKR, providing further proof of the latter's lack of sufficient autonomy to be considered an independent actor in the current conflict.[30]

Within this framework of reference, a territorial *status quo* settled in the region over the last quarter of a century. Admittedly, violence resurged sporadically after more than a decade of relative calm, including a four-day war in 2016,[31] yet, for over 25 years the prevailing state of affairs was one of stability. Hence, no substantial changes to the territorial control over the region took place before the 2020 hostilities. By contrast, the recent military confrontations have significantly altered the existing *status quo* in the South Caucasus. Azerbaijan regained control over all seven districts surrounding Nagorno-Karabakh, in addition to reclaiming the city of Shusha, an important enclave inside of the latter, only 10 kilometres away from its capital Stepanakert. As a consequence, the newly established line of contact – to be monitored by Russian peacekeepers – runs straight through Nagorno-Karabakh, which, besides the Lachin corridor guaranteed in the ceasefire, was cut-off from the rest of the territory of Armenia.[32]

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[23] Parliamentary Assembly, Council of Europe, Resolution 1416, *The conflict over the Nagorno-Karabakh region dealt with by the OSCE Minsk Conference* (Jan. 25, 2005), https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17289&lang=en.

[24] European Parliament, *Resolution of 20 May 2010 on the need for an EU strategy for the South Caucasus* (May 20, 2010), https://www.europarl.europa.eu/doceo/document/TA-7-2010-0193_EN.html.

[25] *See Military occupation of Azerbaijan by Armenia*, RULAC, https://www.rulac.org/browse/conflicts/military-occupation-of-azerbaijan-by-armenia#collapse3accord (last visited Jan. 12, 2021).

[26] KRÜGER, *supra* note 10, at 228, MELNYK, *supra* note 17.

[27] *Chiragov*, *supra* note 10, ¶ 180; INTERNATIONAL CRISIS GROUP, NAGORNO-KARABAKH: VIEWING THE CONFLICT FROM THE GROUND 10 (2005).

[28] *Chiragov*, *supra* note 10, ¶ 186.

[29] *See* MELNYK, *supra* note 20.

[30] Dapo Akande & Antonios Tzanakopoulos, *Use of Force in Self-Defence to Recover Occupied Territory: When is it Permissible?*, EJIL:TALK! (Nov. 18, 2020), https://www.ejiltalk.org/use-of-force-in-self-defence-to-recover-occupied-territory-when-is-it-permissible/; Bernhard Knoll-Tudor & Daniel Mueller, *At Daggers Drawn: International Legal Issues Surrounding the Conflict in and around Nagorno-Karabakh*, EJIL:TALK! (Nov. 17, 2020), https://www.ejiltalk.org/at-daggers-drawn-international-legal-issues-surrounding-the-conflict-in-and-around-nagorno-karabakh/; Júlia Miklasová, *The Recent Ceasefire in Nagorno-Karabakh: Territorial Control, Peacekeepers and Question of Status*, EJIL:TALK! (Dec. 4, 2020), https://www.ejiltalk.org/the-recent-ceasefire-in-nagorno-karabakh-territorial-control-peacekeepers-and-unanswered-question-of-status/.

[31] GRANT, *supra* note 11, at 381.

[32] *See* STATEMENT BY PRESIDENT OF THE REPUBLIC OF AZERBAIJAN, PRIME MINISTER OF THE REPUBLIC OF ARMENIA AND PRESIDENT OF THE RUSSIAN FEDERATION, *supra* note 7. Additionally, the parties agreed to exchange prisoners of war, hostages and bodies of the deceased, while Russia committed to deploy peacekeeping forces along the contact line for a renewable period of five years, while internally displaced persons and refugees are to return to the territory of Nagorno-Karabakh and its adjacent districts under the oversight of the UN High Commissioner for Refugees.

In light of the foregoing, the question that arises is whether Azerbaijan could legally justify the recovery of occupied land as an exercise of self-defence – and whether it might again do so in future years to recover those parts of the Nagorno-Karabakh region that remain under Armenian control in the wake of the 2020 hostilities.

A question that must be tackled first, however, is whether the *jus ad bellum* is even applicable in this context in the first place.

3 Military action to recover Occupied Territory – A Matter Governed by the Law on the use of force?

3.1 A question of jus in bello only?

In contemporary international law, *jus ad bellum* and *jus in bello*, also referred to as international humanitarian law (IHL), are two independent and self-contained branches of international law,[33] both dealing with the phenomenon of armed force from a different perspective. Whereas the former regime focuses on determining the legality of the use of force between states, restricting its recurrence to a bare minimum by establishing limited exceptions and conditions under which military action may be justified, the latter operates when the use of force has already materialized and reached the threshold of an armed conflict, regulating aspects of the hostilities such as the weapons employed, or the protection of persons *hors de combat*.

The relationship between these two legal regimes remains the subject of much academic attention. In classical international law, their separation was characterized as a dichotomy between the norms operating in times of peace and those applicable in times of war.[34] Put differently, both sets of rules were understood to operate at different stages in exclusion of the other,[35] before and after force had been carried out. Thus, the traditional conception of the relationship between both regimes suggested that once *jus in bello* entered the fray as the applicable normative framework, *jus ad bellum* was no longer relevant for the conflict and ceased to operate.[36]

Following the preceding approach, some authors maintain that, as soon as a large-scale international armed conflict erupts between two States, and until the time when that conflict is conclusively brought to an end (in particular through a formal peace agreement), military confrontations between the two States are governed exclusively by IHL, thus rendering moot the application inter se of the jus ad bellum.[37] *The foregoing would also apply to a situation of belligerent occupation, as this* inevitably entails the continuation of an international armed conflict between the States concerned (as per Common Article 2 of the Geneva Conventions).

In stark contrast to that position, however, it is submitted here that military action to recover occupied territory will always need to be justified under *jus ad bellum* in order to be deemed as lawful. As Greenwood explains, the above interpretation made sense in times when a sharp divide existed between the rules applicable in times of peace and in times of war,[38] due to the fact that the use of force was not yet proscribed as a means to settle disputes between states and once war was declared it altered almost every aspect of the relationship between the parties involved.

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[33] Federica D'Alessandra & Robert Heinsch, *Rethinking the Relationship Between Jus in Bello and Jus ad Bellum: A Dialogue Between Authors*, *in* SEEKING ACCOUNTABILITY FOR THE UNLAWFUL USE OF FORCE 453, 490 (Leila Nadya Sadat ed. 2018).

[34] Marko Milanovic & Vidan Hadzi-Vidanovic, *A taxonomy of armed conflict*, *in* RESEARCH HANDBOOK ON INTERNATIONAL CONFLICT AND SECURITY LAW 256, 258 (Nigel White & Christian Henderson eds., 2013).

[35] Cristopher Greenwood, *The Relationship between ius ad bellum and ius in bello*, 9 REVIEW OF INTERNATIONAL STUDIES 221, 221 (1983).

[36] MARCO LONGOBARDO, THE USE OF ARMED FORCE IN OCCUPIED TERRITORY 118 (2018).

[37] The main proponent of this approach is arguably Yoram Dinstein: *See* YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE 61-64 (2017). But see also: LONGOBARDO, *supra* note 36, at 130; Michael N. Schmitt, *Iraq (2003 onwards)*, *in* INTERNATIONAL LAW AND THE CLASSIFICATION OF CONFLICTS 356, 364-5 (Elizabeth Wilmshurst ed., 2012).

[38] GREENWOOD, *supra* note 35, at 221.

The position asserting that only the initial recourse to force leading to occupation falls under the realm of *jus ad bellum*, leaving the rest of the hostilities in the exclusive hands of *jus in bello* is a minority position that is outdated in modern international law. It is nowadays generally accepted in legal doctrine that *jus ad bellum* and *jus in bello* are complementary regimes[39] and, depending on the type of armed conflict, apply simultaneously,[40] as opposed to in sequence.[41] This position also finds support in the International Court of Justice's *Nuclear Weapons* Advisory Opinion.[42] Accordingly, while the legality of the initial use of force is dealt exclusively by *jus ad bellum*, once hostilities have commenced subsequent hostilities will be subject cumulatively[43] to the provisions of both legal frameworks.[44]

An important implication arising from the foregoing reasoning is that states involved in hostilities need to circumscribe their military activities, *throughout the entire conflict*, to necessary and proportionate measures adopted in the context of self-defense, while at the same time they must observe the existing rules on methods and means of warfare and the law of occupation,[45] essential components of IHL. Hence, armed force initially justified under *jus ad bellum* may become unlawful during the course of the hostilities if it stops being proportionate, necessary and, defensive in nature, even if the military actions comply with all the rules engrained in IHL.[46] Conversely, a state entitled to use force in accordance with the *jus ad bellum* may also breach international law, for instance, if it employs means and methods of warfare forbidden under *jus in bello*.[47] A further direct consequence of the cumulative, yet independent[48], application of both *jus ad bellum* and *jus in bello* to an armed conflict is that the legality of a certain act under one regime does not render it as lawful in the other.[49]

In the specific context of belligerent occupation, the dual application of *jus ad bellum* and IHL is particularly present throughout its entire duration.[50] While the legality of the conduct leading to occupation is determined solely by *jus ad bellum*, once the facts on the ground reveal that part of the territory of a state is being occupied by the forces of a foreign power, the law of occupation is fully applicable, independently of the legal qualification of the acts which led to it.[51]

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[39] Keiichiro Okimoto, The Distinction and Relationship between Jus ad Bellum and Jus in Bello 31 (2011).

[40] Jasmine Moussa, *Can jus ad bellum override jus in bello? Reaffirming the separation of the two bodies of law*, 90 International Review of the Red Cross 963, 968 (2008); Greenwood, *supra* note 35, at 221.

[41] *See* Greenwood, *supra* note 35, at 224. ("There is nothing in those provisions to suggest that they cease to apply once a state of war has come into existence. To hold otherwise would be to allow a state to avoid the application of some of the most fundamental rules contained in the Charter by the unilateral act of characterizing its relations with another state as war. It is true that a declaration of war may mean that the range of measures which may be employed in self-defence becomes more extensive but this is no longer an automatic consequence flowing from the initiation of a state of war").

[42] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Rep. 226, ¶ 42 (July 8): "[a] use of force that is proportionate under the law of self-defence, must, in order to be lawful, also meet the requirements of the law applicable in armed conflict which comprise in particular the principles and rules of humanitarian law."

[43] Terry Gill, *The Nuclear Weapons Advisory Opinion of the International Court of Justice and the Fundamental Distinction Between the Jus ad Bellum and the Jus in Bello*, 12 Leiden Journal of International Law 613, 614 (1999), at 615-616; Keiichiro Okimoto, *The Cumulative Requirements of Jus ad Bellum and Jus in Bello in the Context of Self-Defense*, 11 Chinese Journal of International Law 45, 58 (2012).

[44] Vaios Koutroulis, *Of Occupation, Jus ad Bellum and Jus in Bello: A Reply to Solon Solomon's "The Great Oxymoron: Jus In Bello Violations as Legitimate Non-Forcible Measures of Self-Defense: The Post-Disengagement Israeli Measures towards Gaza as a Case Study"*, 10 Chinese Journal of International Law 897, 912 (2011); Greenwood, *supra* note 35, at 222.

[45] Okimoto, *supra* note 43, at 63.

[46] Moussa, *supra* note 40, at 968; Greenwood, *supra* note 35, at 223. *See* also: Eliav Lieblich, *On the Continuous and Concurrent Application of Ad Bellum and In Bello*, in Necessity and Proportionality in International Peace and Security Law 41 (Claus Kress and Robert Lawless, eds., 2020).

[47] Christopher Greenwood, *The Advisory Opinion on nuclear weapons and the contribution of the International Court to international humanitarian law*, 37 International Review of the Red Cross 65, 74.

[48] Koutroulis, *supra* note 44, at 913; Okimoto, *supra* note 43, at 74.

[49] D'Alessandra & Heinsch, *supra* note 33, at 472; Koutroulis, *supra* note 44, at 910; Moussa, *supra* note 40, at 968; Okimoto, *supra* note 43, at 50.

[50] Rotem Giladi, *The Jus Ad Bellum/Jus In Bello Distinction and the Law of Occupation*, 41 Israel Law Review 246, 249 (2012).

[51] *See* Eyal Benvenisti, *Occupation, Belligerent*, Max Planck Encyclopedia of Public International Law (May 2009), https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e359.

At the same time, while a situation of occupation will generally arise as a consequence of an international armed conflict between two states, it is not uncommon to encounter occupations which endure for a long period of time, during which no active hostilities take place between the parties for years and even decades of relative calm and peaceful administration of the occupied territory.[52] In these cases of prolonged occupation, which are the type of situations which inform the current study, it has been suggested that occupation outlives the international armed conflict that originated it in the first place.[53] As Milanovic points out, "[t]he original armed conflict can be distinguished from any subsequent new armed conflicts occurring in an occupied territory. The two Palestinian intifadas are not legally a part of the international armed conflict in which the Palestinian territories were occupied, namely the 1967 Six Day War, which is now long over".[54] Against this, Longobardo argues that "occupation is, by definition, an episode in an ongoing armed conflict"[55] from its beginning to its very end. Alternatively, other authors have claimed that given belligerent occupation is necessarily the result of an armed conflict, both situations are mutually exclusive and once hostilities restart, occupation, on the other hand, comes to an end.[56]

Whether occasional flare-ups of inter-State hostilities against the background of an ongoing situation of belligerent occupation are part of a single overarching armed conflict, or whether these constitute separate international armed conflicts of their own is to some extent an exercise in semantics, and is, in any case, a debate that exceeds the scope of the current analysis. The crucial point for present purposes is that the mere existence of an ongoing situation of (prolonged) belligerent occupation does not eclipse the need for a proper legal basis under the *jus ad bellum* when one of the States launches a (new) attack against the other.

Importantly, the foregoing is also borne out in actual State practice. Thus, when in 1973, Syria, Egypt and Israel crossed swords in the Yom Kippur War, this was undeniably regarded as a matter governed by *jus ad bellum*, notwithstanding the ongoing Israeli occupation of Arab land in the wake of the Six-Day-War.[57] In more recent years too, when clashes have taken place between Israel and Syria, the States concerned have repeatedly framed their actions by reference to the Charter rules governing the use of force, instead of simply hiding behind the existence of an international armed conflict flowing from the occupation of the Golan Heights.[58] The same is true for the military confrontation between Armenia and Azerbaijan in 2020: both countries invoked the right of self-defence, respectively blaming each other for initiating the hostilities.[59]

As things stand, a state whose territory has been occupied without its consent may use force to recover it as long as its actions can be justified under *jus ad bellum*, that is, if the military operation qualifies as a measure of self-defence both necessary and proportionate in relation to the armed attack that is responding to. Additionally, the simultaneous

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[52] Kenneth Watkin, *Use of force during occupation: law enforcement and conduct of hostilities*, 94 International Review of the Red Cross 267, 277 (2012).

[53] Milanovic & Hadzi-Vidanovic, *supra* note 34, at 301.

[54] Marco Milanovic, *Lessons for human rights and humanitarian law in the war on terror: comparing Hamdan and the Israeli Targeted Killings case*, 89 International Review of the Red Cross 373, 384 (2007).

[55] Longobardo, *supra* note 36, at 166.

[56] Adam Roberts, *Occupation, Military, Termination of*, Max Planck Encyclopedia of Public International Law (June 2009), https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1927.

[57] *See* the discussion *infra* in Section 5.

[58] *See*, for instance, Permanent Representative of Israel to the United Nations, Letter dated 23 May 2013 from the Permanent Representative of Israel to the United Nations addressed to the Secretary-General and the President of the Security Council, U.N. Doc. S/2013/314 (May 23,2013); Permanent Representative of Israel to the United Nations, Letter dated 16 July 2013 from the Permanent Representative of Israel to the United Nations addressed to the Secretary-General and the President of the Security Council, U.N. Doc. S/2013/425 (July 17,2013).

[59] Permanent Representative of Armenia to the United Nations, Letter dated 28 September 2020 from the Permanent Representative of Armenia to the United Nations addressed to the Secretary-General, U.N. Doc. S/2020/955 (Sep. 29, 2020); Permanent Representative of Azerbaijan to the United Nations, Letter dated 29 September 2020 from the Permanent Representative of Azerbaijan to the United Nations addressed to the Secretary-General, U.N. Doc. S/2020/956 (Sep. 30, 2020).

application of the rules concerning the conduct of hostilities will depend on whether there is an active international armed conflict at the time military action is deployed with the purpose of recovering territory. In any case, the rules pertaining to the law of occupation will remain in force until its termination. Accordingly, the view that each of the parties involved in a situation of occupation may resume hostilities at any point in time without the need for a justification under the jus ad bellum, appears to be a minority position that finds no support in State practice. The specific aspects concerning the application and temporal scope of the right of self-defence in the context of occupation will be assessed in the subsequent sections.

3.2 Military action to recover occupied territory as a purely 'intra-State' phenomenon?

The *jus ad bellum* legal framework enshrined in the UN Charter, as well as in customary international law, has a manifest inter-state scope,[60] as it has been consistently upheld by the International Court of Justice.[61] Article 2(4) prohibits explicitly the threat or use of force solely between States and, more specifically, in the exercise of their international relations. Similarly, article 51 recognizes the right of self-defence in response to an armed attack against a member of the United Nations, thus confirming that states are the sole subjects of international law bound and protected by the prohibition of the use of force and, consequently, entitled to the right of self-defence as a temporary measure of self-help. As follows, only conduct amounting to armed force perpetrated by a state against another state will trigger the provisions laid down under *jus ad bellum*.

Conversely, the use of force carried out by a state within its territory in the exercise of its domestic jurisdiction does not fall under the scope of the prohibition of the use of force.[62] In other words, military operations of a purely internal character, such as hostilities arising in the context of a civil war between government troops and insurgents or secessionist movements operating from within its sovereign territory are considered to be domestic matters and do not need to be justified under the *jus ad bellum* regulatory frame.[63]

In light of the foregoing, could it be argued that an Azeri attempt to recover (parts of) the Nagorno-Karabakh region does not qualify as a 'use of force' inasmuch as the operation is limited to its own territory? A number of observations are in order.

First, several authors take the view that the prohibition on the use of force is not limited to inter-State relations *sensu stricto*, but extends also to the relationship between a State and a breakaway region that has established itself as a so-called '*de facto* regime'.[64] Some adopt a restrictive approach, accepting that *jus ad bellum* is not applicable in relations between a State and a non-State entity,[65] unless the non-state political entity manages to establish itself

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[60] Christine Gray, International Law and the Use of Force 9-10 (2018).

[61] Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S), Judgment, 1986 I.C.J. Rep. 14, ¶ 195 (June 27); Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. Rep. 168, ¶¶ 146-147 (Dec. 19); Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. Rep. 136, ¶ 139 (July 9).

[62] Albrecht Randelzhofer & Oliver Dörr, *Article 2(4), in* The Charter of the United Nations: A Commentary 200, 214 (Bruno Simma et al. eds., 2012).

[63] Olivier Corten, Le droit contre la guerre 227 (2020); Oliver Dörr, *Use of Force, Prohibition of*, Max Planck Encyclopedia of Public International Law (Aug. 2019), https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e427; Dinstein, *supra* note 37, at 89-90; Some authors have nonetheless argued (*de lege ferenda*) in favour of an 'internal *jus ad bellum*'. See in particular Eliav Lieblich, *Internal* Jus ad Bellum, 67 Hastings Law Journal 687 (2016). But see Tom Ruys, *The Quest for an Internal* Jus ad Bellum*: International Law's Missing Link, Mere Distraction or Pandora's Box?* in Necessity and Proportionality in International Peace and Security Law 169 (Claus Kress and Robert Lawless, eds., 2020).

[64] Jochen Frowein, Das de facto-Regime im Völkerrecht: eine Untersuchung zur Rechtstellung nichtanerkannter Staaten und ähnlicher Gebilde 52-66 (1968); Max Planck Encyclopedia of Public International Law (March 2013), https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1395, ¶¶ 4-5. *See also* Stefan Oeter, De facto *Regimes in International Law*, in Unrecognised Subjects in International Law 59, 70-71 (Wladysaw Czaplinski and Agata Kleczkowska eds., 2019).

[65] Corten, *supra* note 63, 264.

as a stabilized de-facto regime,[66] with autonomous effective control over a territory for a sustained period of time, or the entity can be assimilated to a state.[67] The General Assembly's 1974 Definition of Aggression is often cited to substantiate this claim.[68] Article I of the cited resolution indeed contains an explanatory note asserting that the term state should be "used without prejudice to questions of recognition or to whether a State is a member of the United Nations."[69]

Support for the foregoing position can also be found in the 2009 report of the Independent International Fact-Finding Mission on the Conflict in Georgia (IIFFMCG). The IIFFMCG affirmed that the prohibition of the use of force was fully binding upon all the parties involved in the conflict,[70] including South Ossetia and Abkhazia, which were characterized in the report as an 'entity short of statehood' and a 'state-like entity' respectively.[71] According to the IIFFMCG, the existence of agreements of different legal nature between the parties, expressing their commitment to certain principles and purposes recognized in the UN Charter, in particular, the peaceful settlement of disputes and a call to not use force between them, rendered article 2(4) and 51 as binding upon all the parties involved in the conflict, irrespective of their legal status.

On the other hand, the reasoning of the IIFFMCG remains controversial. The drafters were criticized for swiftly concluding that the signing of certain agreements between the parties equated to the full applicability of articles 2(4) and 51 to the non-state actors involved in the conflict, even though none of the parties involved invoked any of such provisions to justify their actions during or after the hostilities.[72] Naturally, states are able to commit to not use force against non-state political entities, yet, it does not follow from this that the latter become bound and protected by the core provisions of the *jus ad bellum* regime, or that article 2(4) and 51 must be understood as incorporated to a certain agreement which includes actors other than states between its signatories.[73] Further, some have objected that there is no evidence to affirm that the interpretation advanced by the IIFFMCG has received widespread acceptance by the international community of states,[74] suggesting that the report's conclusions on this subject must be considered at most as *lex ferenda*.[75] As to Article I of the Definition of Aggression, and notwithstanding the resolution's importance, it may be observed that the resolution in question did not extend the applicability of articles 2(4) and 51 to non-state entities, as only a modification of the text of the UN Charter or a change in customary international law would alter the current state of affairs.[76]

In the end, for present purposes, it is not necessary to take a firm stance on the application of the prohibition on the use of force vis-à-vis *de facto* regimes – even if the 'Republic of Nagorno-Karabakh' could potentially be so qualified.[77] The reason is that the mere fact that a State uses armed force within its own territory does not *a priori* prevent the application of the *jus ad bellum*, inasmuch as the force is (deliberately) *directed against* another State or its external

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[66] Randelzhofer & Dörr, *supra* note 62, at 213. ("It is almost generally accepted that *de facto* regimes exercising their authority in a stabilized manner are also bound and protected by Art. 2(4)"); *See* Frowein, *supra* note 64.

[67] Corten, *supra* note 63, at 263.

[68] *See* Frowein, *supra* note 64; Christian Henderson & James A Green, *The Jus Ad Bellum and entities short of statehood in the report on the conflict in Georgia*, 59 International & Comparative Law Quarterly 129, 134 (2010).

[69] G.A. Res. 3314 (XXIX), Definition of Aggression art. 1 (Dec. 14, 1974).

[70] 2 REPORT OF THE INDEPENDENT INTERNATIONAL FACT-FINDING MISSION ON THE CONFLICT IN GEORGIA 238-242 (2009).

[71] *Id.* at 229.

[72] Corten, *supra* note 63, at 262.

[73] Henderson & Green, *supra* note 68, at 133.

[74] Corten, *supra* note 63, at 263.

[75] Henderson & Green, *supra* note 68, at 138.

[76] Dapo Akande, *The Diversity of Rules on the Use of Force: Implications for the Evolution of the Law*, EJIL:Talk! (Nov. 11, 2019).

[77] The counter-argument against the presentation of the NKR as a stable and *de facto* autonomous regime is that the NKR could 'survive [only] by virtue of the military, political, financial and other support given to it by Armenia'. *See*, *Chiragov*, *supra* note 10, ¶ 186.

manifestations.[78] Thus, when State A invites foreign troops of State B on its soil and the latter troops overstay their welcome after the invitation has been retracted, a subsequent attempt by State A to forcibly repel these troops is not a question of simple law enforcement, but a matter for *jus ad bellum*. In a similar vein, when a State uses armed force against a foreign warship or military aircraft within its territorial sea or airspace, such conduct requires a justification under the Charter framework governing the use of force.[79]

A fortiori, in the specific context of occupation, whereas it could be argued that the recovery of occupied territory through military means could qualify as an exclusively internal affair, mainly due to the fact that every state is entitled to deploy forces all across its sovereign territory, such viewpoint ignores that there is an unequivocal *inter-state* component behind occupation and the military response to it. Indeed, military occupation is regarded as a textbook example of the use of force against the territorial integrity of another state,[80] and it is listed as an act of aggression under article 3(a) of the 1974 UNGA Definition of Aggression.[81] Occupation has been described as a situation where the forces of one or more states exercise effective control over a portion of the territory of another State without the latter's consent.[82] It will usually involve the deployment of ground forces by the occupying power in the occupied territory.[83] ([B]elligerent) occupation in the legal sense is necessarily linked to the existence of an inter-state conflict between two or more states.[84] Thus, military action to recover territory occupied by another state falls unequivocally under the prohibition established in article 2(4) UN Charter, and its legality will ultimately depend on whether it can be justified as an act of self-defence or if it has been authorized by the Security Council. The fact that a state only uses force within its own territory, in order to regain control over it, does not take away the inter-state nature of the force employed, which is defined by the involvement of two more sovereign states faced against each other.[85]

In light of the foregoing, the assumption that the Nagorno-Karabakh region is a part of Azeri territory under Armenian occupation does not imply that the prohibition on the use of force was inapplicable to the 2020 war between the two countries – which undeniably involved a recourse to armed force *between States* (as the casualty figures on both sides regrettably illustrate). Nor did Azerbaijan, for that matter, dismiss the relevance of the *jus ad bellum*, instead construing its actions as a 'counter-offensive … within the right of self-defence'.[86]

Having established the relevance of the jus ad bellum, we now turn to its substantive application in situations of (prolonged) occupation.

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[78] Tom Ruys, *The Meaning of "Force" And The Boundaries of The Jus Ad Bellum: Are "Minimal" Uses of Force Excluded from UN Charter Article 2(4)?* 108 American Journal of International Law 159, (2014), 171 ff.

[79] It is telling in this respect that documents such as the U.S. Commander's Handbook on the Law of Naval Operations or the Australian Operations Law for RAAF Commanders seek to explain such actions against intruding aircraft by reference to the right of self-defence enshrined in Article 51 UN Charter. *See Id.,* at 185 (with references).

[80] Tom Ruys, 'Armed Attack' and Article 51 of the UN Charter: evolutions in customary law and practice 5 (2010).

[81] Definition of Aggression, *supra* note 69, art. 3(a).

[82] *See* Benvenisti *supra* note 51.

[83] Leaving aside the exceptional situation in the Gaza Strip following the Israeli disengagement in 2005. *See* e.g. Hanne Cuyckens, *Is Israel Still an Occupying Power in Gaza?*, 63 Netherlands International Law Review 275 (2016).

[84] Yoram Dinstein, The International Law of Belligerent Occupation 37 (2019). In other words, the occupation legal regime does not apply in conflicts of an internal nature, as "the majority view maintains that the retaking by government armed forces of national territory previously held by insurgents is not occupation, nor can insurgents occupy part of the national territory within the law of occupation's meaning." *Philip Spoerri,* The Law of Occupation, in *The Oxford Handbook of International Law in Armed Conflict 182, 185 (Andrew Clapham & Paola Gaeta eds., 2014).*

[85] Milanovic, *supra* note 54, at 384.

[86] Letter dated 27 September 2020 from the Permanent Representative of Azerbaijan to the United Nations addressed to the Secretary-General, *supra* note 9.

4 Military action to recover Occupied Territory – applying the law on the use of force

4.1 Applying the right of self-defence

(a) Self-defence and the principle of immediacy

Let us take a closer look at the *jus ad bellum* then. As a first point, it is recalled that under customary international law any exercise of self-defence is subject to the so-called 'immediacy' requirement. This requirement – sometimes regarded as part of the broader 'necessity' requirement[87] and sometimes as a self-standing requirement under customary international law[88] – entails that there must be a close proximity in time between the start of an armed attack and the response in self-defence. It is generally accepted in legal doctrine,[89] and also finds support in State practice[90] and case-law.[91] The immediacy requirement primarily serves to distinguish between lawful acts of self-defence, on the one hand, and (unlawful) punitive reprisals that are not justified by any 'necessity' to act in self-defence, on the other hand. One interesting bone of contention in this context is whether self-defence can be exercised when an armed attack is factually over, for instance, when a State conducts a cross-border attack and subsequently withdraws from the victim State's territory. This issue came up in the *Oil Platforms* case.[92] While the Court did not directly tackle the issue, customary practice and legal doctrine effectively indicate that if a State has been subject, not to an isolated attack, but to a series of armed attacks, and if there is considerable likelihood that more attacks will imminently follow, then self-defence is not automatically excluded when a 'pin-prick' attack is factually over.[93]

While the immediacy requirement primarily serves to exclude punitive reprisals, authors have also stressed its broader importance in preventing that inter-State hostilities are re-opened at a much later stage in time without the occurrence of a new 'armed attack' and subject to renewed application of the proportionality and necessity criteria.[94] In the words of Schachter: "[w]ithout that [temporal] limitation, self-defense would sanction armed attacks for countless prior acts of aggression and conquest. It would completely swallow up the basic rule against use of force".[95]

It is clear that the immediacy requirement does not lend itself to a simple quantitative test, but must be interpreted in a flexible and pragmatic manner, taking into account the circumstances of each case.[96] In particular, practice suggests that the requirement should leave sufficient leeway, for instance, to conduct investigations (who was

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[87] *See* James Green, *The ratione temporis elements of self-defence*, 2 Journal on the Use of Force and International Law 97, 108 (2015); Ruys, *supra* note 80, at 99.

[88] *See* Dinstein, *supra* note 37, at 252.

[89] Green, *supra* note 87, at 108. (regarding this as 'uncontroversial'); Corten, *supra* note 63, at 765-7; Dinstein, *supra* note 40, at, 252; Ruys, *supra* note 73, at 99 ff.

[90] *See*, e.g., U.N. Doc. S/PV 1644 (Feb. 27-28, 1972), ¶ 25; U.N. Doc. S/PV 1107 (Apr. 3, 1964), ¶ 17; Green, *supra* note 87, at 109.

[91] Nicaragua, *supra* note 61, ¶ 237.

[92] Iran argued against the permissibility of *post facto* self-defence, thereby expressly relying on the immediacy requirement: '[T]he principle of immediacy … means that the employment of counter-force must be temporally interlocked with the armed attack triggering it. (…) [I]n cases of single armed attacks (as distinguished from a general situation of armed conflict), the attack is terminated when the incident is over. In such a case the subsequent use of counter-force constitutes a reprisal and not an exercise of self-defence.' Oil Platforms (Iran v. U.S.), Reply and Defence to Counter-claim submitted by the Islamic Republic of Iran, 1999, ¶ 7.47. The United States objected vehemently, arguing that Iran's narrow understanding of the immediacy requirement 'would render self-defence illusory' in cases, for instance, where 'armed attacks … lasted only a few seconds'. Oil Platforms (Iran v. U.S.), Counter-Memorial and Counter-claim submitted by the United States of America 1997, ¶ 4.29.

[93] Ruys, *supra* note 80, at 106; Corten, *supra* note 63, at 767.

[94] Constantinos Yiallourides, Markus Gehring, Jean-Pierre Gauci, The Use of Force in relation to Sovereignty Disputes over Land Territory ¶¶ 152, 157, 161 (2018).

[95] Oscar Schachter, *The Lawful Resort to Unilateral Use of Force*, 10 Yale Journal of International Law 291, 292 (1984)

[96] In this sense *See*, Corten, *supra* note 63, at 768; *See* Dinstein, *supra* note 37, at 252, 287-8; Ruys, *supra* note 80, at 100; Green, *supra* note 87, at 109-111. (stressing the need for a 'reasonable temporal proximity').

responsible for the attack?), to exhaust peaceful means, or to take military preparations prior to the actual exercise of self-defence. The latter two factors may be of particular importance in situations of large-scale territorial incursions (potentially) resulting in occupation or annexation. Thus, when in 1982 Argentinian forces invaded the contested Falklands/Malvinas Islands, third States implicitly agreed that the passage of several weeks before the UK initiated active military operations against Argentina, did not of itself deprive the UK of its right of self-defence.[97] On the other hand, due to the principle of immediacy, the State whose territory is invaded in breach of the prohibition on the use of force loses the possibility to invoke the right of self-defence if (i) either it refrains from responding with counter-force for a prolonged period of time (taking into account the need for negotiations, military preparations, efforts to seek third-State support, etc.), or; (ii) if it responds with counter-force, but ultimately fails to repel the invading forces from its territory before a prolonged cessation of active hostilities materializes.[98] In both cases, the underlying idea is that the right of self-defence ceases to apply when a new territorial *status quo* is established whereby the occupying State peacefully administers the territory concerned for a prolonged period of time – that is, until the occupying State were to commit a new armed attack.[99] One might of course critique[100] the uncertainty resulting from the fact that no clear time limit can be determined. In the words of Schachter, however, "[t]he difficulty of defining a precise time limit – a statute of limitations, as it were – does not impugn the basic idea. In most cases, irredentist demands for lost territory or claims for restoration of the *status quo ante* are based on attacks that occurred many years, even decades, ago. To extend self-defense to such cases is to stretch the notion of defense far beyond its essential sense of a response to an attack or immediate threat of attack."[101] Put differently, while the principle of immediacy can – and arguably should – be construed flexibly in cases of occupation, the lapse of time between the initial attack and the invocation of self-defence cannot be extended indefinitely. Otherwise, the *ratione temporis* dimension of self-defence would be rendered meaningless in this context.

(b) Occupation as a continuing armed attack?

Admittedly, while some authors apply the immediacy requirement not only to pin-prick attacks, but also to territorial incursions resulting in occupation, others fundamentally disagree. In particular, the main counter-argument is that unlawful occupation is not subject to this principle because it allegedly constitutes a *continuing* armed attack, thus permitting the State concerned to exercise the right of self-defence for as long as the occupation continues[102] – even

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[97] *See Etienne Henry*, *The Falklands/Malvinas War - 1982*, *in* THE USE OF FORCE IN INTERNATIONAL LAW: A CASE-BASED APPROACH 361 (Tom Ruys, Olivier Corten, & Alexandra Hofer eds., 2018); In a similar vein, *See*, e.g., CHRISTIAN HENDERSON, THE USE OF FORCE AND INTERNATIONAL LAW 231 (2018); DINSTEIN, *supra* note 37, at 288.

[98] YIALLOURIDES ET AL., *supra* note 94, at ¶ 158; Quincy Wright, *The Goa Incident*, 56 AMERICAN JOURNAL OF INTERNATIONAL LAW 617, 623-4 (1962). ("A state that neglects to defend its frontiers against hostile encroachments soon loses its right to do so, and can rely only on negotiation or action by the United Nations to restore its rightful possession and thus remove a threat to international peace and security."); Constantinos Yiallourides & Zeray Yihdego, *Disputed Territories and the Law on the Use of Force: Lessons from the Eritrea-Ethiopia Case*, *in* ETHIOPIAN YEARBOOK OF INTERNATIONAL LAW 2018: IN PURSUIT OF PEACE AND PROSPERITY 35, 52-57 (Zeray Yihdego, Melaku Geboye Desta & Martha Belete Hailu eds., 2018).

[99] YIALLOURIDES ET AL., *supra* note 94, at ¶¶ 158, 163. Having regard to the necessity and proportionality criteria, it is submitted that the later occurrence of a minor territorial incident – even if regarded as an armed attack – would allow at most for limited on-the-spot-reaction and cannot serve as an excuse on the part of the occupied State to launch a major offensive with a view to recovering the occupied territory; On the concept of on-the-spot-reaction, *See* DINSTEIN, *supra* note 37, at 261-263. The present authors would not go as far as to suggest that if the occupying State itself conducts a new large-scale armed attack and re-activates a major international armed conflict with the occupied State, the proportionality principle would automatically prevent the occupied State from recovering (part of) the occupied territory as part of the exercise of its right of self-defence. For the contrary position, *See* YIALLOURIDES ET AL., *supra* note 94, at ¶ 163 ("Provided the requirements of self-defence… 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 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."). *See* also *infra*, Section 2.5 on the impact of the law of State responsibility and the concept of contributory fault. *See* also KNOLL-TUDOR & MUELLER, *supra* note 30 (drawing attention i.a. to the requirement of immediacy and stressing that '[c]ontinued occupation cannot be equated with "continued attack"').

[100] See further on this point *infra* section 4.3.

[101] SCHACHTER, *supra* note 95, at 292.

[102] CORTEN, *supra* note 63, at 766-7.

if this entails challenging a year-long territorial *status quo*. This argument has occasionally been put forward in legal doctrine[103] – including in connection with the 2020 Nagorno-Karabakh conflict.[104] As we will see in Section 5 below, it has also been invoked in State practice. By way of illustration, when it sought to argue in the *Oil Platforms* case that *post-facto* self-defence is excluded pursuant to the principle of immediacy, Iran juxtaposed situations of occupation to other forms of attack, asserting that '[i]n the case of the invasion of another State's territory, in principle an attack still exists as long as the occupation continues."[105]

In support of this reading, authors[106] primarily refer to the illustrative list of 'acts of aggression' in Article 3 of the 1974 UNGA Definition of Aggression,[107] and integrated in full in Article 8bis(2) of the ICC Rome Statute.[108] Specifically, paragraph (a) of the list identifies as one such 'act of aggression' '[t]he 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'. On its face, the clause signals that it is not just the initial 'invasion or attack' resulting in occupation that constitutes an 'act of aggression', but also the resulting 'military occupation', irrespective of its length.

Some authors[109] further draw attention to Article 14(2) of the ILC Articles on State Responsibility (ARSIWA), which affirms that internationally wrongful acts can have 'a continuing character', implying that the illegality extends 'over the entire period during which the act continues and remains not in conformity with the international obligation'. The ILC Commentary highlights various examples of such continuing wrongful acts, including most notably, "unlawful occupation of part of the territory of another State or stationing armed forces in another State without its consent."[110]

At the same time – and leaving aside, for the time being, relevant State practice (see *infra* Section 5) – the above arguments call for some observations.

First, the reference to the notion of a 'continuing' breach as per Article 14 ARSIWA seems beside the point. As a preliminary matter, one must of course distinguish between the continuation of a 'breach' and the continuation of its 'effects'.[111] Consider, for instance, the State of Colnago launching territorial incursions into the State of Pinarello, resulting in an international armed conflict between the two. In the course of that conflict, Colnago kills several troops of Pinarello, but also takes hundreds of POWs. In addition, it takes possession of numerous valuable works of art from Pinarello, which are taken along to Colnago. Let us assume that, when the guns finally fall silent, Colnago continues to detain numerous POWs and refuses to return the stolen works of art. Surely, this attitude can be seen as a continuing consequence of Pinarello's unlawful resort to force – which may moreover entail (a) separate breach(es)

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[103] Longobardo, *supra* note 36, at 121; Henry, *supra* note 97, at 375; More ambiguous, *See*, e.g., Green, *supra* note 87, at 110 (suggesting that the acceptance of the British response 23 days after Argentina's invasion of the Falklands 'may have simply been due to the fact that … there was a continued occupation of the islands, which, on one assessment, could be perceived as an ongoing armed attack').

[104] Akande & Tzanakopoulos, *supra* note 30; ULB, *Le conflit au Haut-Karabakh et le droit international*, YouTube (Oct. 15, 2020), https://www.youtube.com/watch?v=eGE7o_sBc8w&ab_channel=CentrededroitinternationalULB (comments by Olivier corten).

[105] Oil Platforms, Reply and Defence to Counter-claim, *supra* note 92, at ¶ 7.47.

[106] Akande & Tzanakopoulos, *supra* note 30; Le conflit au Haut-Karabakh et le droit international, *supra* note 104.

[107] Definition of Aggression, *supra* note 69, art. 3(a).

[108] Rome Statute of the International Criminal Court art. 8 *bis* (2), July 1, 1998, 2187 U.N.T.S. 90.

[109] Corten, *supra* note 63, at 766; Longobardo, *supra* note 36, at 121.

[110] International Law Commission, Report on the Work of its Fifty-Third Session, U.N. Doc. A/56/10, at 60 (2001), *reprinted* in [2001] 2 Yearbook of the International Law Commission 32, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Part 2). [hereinafter ARSIWA].

[111] As Crawford explains, this distinction is not always easy to make (as illustrated by case-law on expropriation). Nor is it always easy to distinguish between instantaneous and continuing breaches. *See*, James Crawford, State Responsibility: The General Part 254-264 (2013).

of international (humanitarian) law[112] –, yet it does not *ipso facto* mean that the prohibited use of force itself is continuing, let alone that there is an ongoing armed attack.

One could argue that the situation is qualitatively different when Colnago retains control over part of the territory of Pinarello. In this case, it is the breach of the prohibition on the use of force itself (and possibly also of the right of self-determination) that is continuing, rather than merely its consequences – as the ILC's ARSIWA Commentary appears to affirm.[113] Even so, this does not necessarily imply that there is also a continuing *armed attack* as per Article 51 of the U.N. Charter. Indeed, the notions of 'use of force' and 'armed attack' have different meanings and functions. The former notion is linked to a prohibitive norm of international law, the breach of which gives rise to State responsibility. The concept of 'armed attack' by contrast, serves as the trigger to determine whether a victim State can exercise its right of self-defence. Put differently: there is no autonomous prohibition of 'armed attack' as a norm of primary international law. In sum, the concept of a 'continuing breach' under Article 14(2) ARSIWA is ill-suited for examining the temporal scope of an 'armed attack'.

Second, as is well-known, the language of Article 51 UN Charter refers to self-defence "if an armed attack occurs". The latter language – specifically the word 'occurs' as well as the notion of an 'attack' itself – suggests a more or less instantaneous event or a series of events happening at a particular point in time – read: the initial invasion resulting in occupation –, rather than a prolonged state of affairs that is moreover characterized by an absence of active hostilities. Put differently, it seems counter-intuitive to hold that an 'attack' is 'occurring' when a State peacefully administers a certain area for successive years in a row – even if unlawfully. The textual argument is, however, objected to by some,[114] and is admittedly not dispositive of its own.

Third, caution is needed in relying on Article 3 of the Definition of Aggression to define the concept of 'armed attack' under Article 51 UN Charter. On the one hand, a substantial share of UN Members admittedly saw the drafting of the UN Definition of Aggression as an exercise in circumscribing the scope for lawful self-defence. Furthermore, the value of the Definition of Aggression in interpreting the notion of 'armed attack' – whether as a collective expression of *opinio juris* and/or as a subsequent agreement or subsequent practice in the sense of Article 31(3)(c) VCLT – was further embraced in the *Nicaragua* judgment, where the ICJ famously relied on Article 3(g) of the Definition of Aggression to conceptualize self-defence in situations of indirect military aggression.[115] On the other hand, one cannot overlook the fact that many other States involved in the work of the Fourth Special Committee on the Question of Defining Aggression saw the resolution rather as an attempt to elucidate the notion of 'act of aggression' for purposes of determining the Chapter VII powers of the UN Security Council (as per Article 39 UN Charter) – moreover in a non-binding manner. Thus, Article 6 further stipulates that '[n]othing in this Definition shall be construed as in any way enlarging or diminishing the scope of the Charter, including its provisions concerning cases in which the use of force is lawful. A majority in legal doctrine would seem to agree that the 1974 resolution does not directly restrict or expand the scope for lawful self-defence.[116] As one of the present authors has noted elsewhere,[117] the Definition of Aggression may well provide a useful point of departure to indirectly examine the scope of self-defence, yet it is certainly not the final word. In particular, due consideration must be paid to other elements, including the *travaux* of the resolution and customary practice.[118]

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[112] E.g., if POWs are not returned 'without delay' upon the end of the conflict in accordance with Article 118 of the Third Geneva Convention.
[113] But see, however, infra, on the travaux of the UNGA Definition of Aggression, where this issue was subject to discussion.
[114] AKANDE & TZANAKOPOULOS, *supra* note 30.
[115] NICARAGUA, *supra* note 61, ¶ 195.
[116] *See* RUYS, *supra* note 80, at 137 (with references in note 58).
[117] See *Id.*, 138-9.
[118] *Id.*

Upon closer scrutiny, the discussions preceding the inclusion of the reference to 'occupation' in Article 3(a) of the UNGA Definition of Aggression indicate that the debate focussed mostly on whether 'occupation' ought to be seen as an act of aggression, or as a *consequence* thereof, rather than with any possibility to use self-defence to recover occupied land. Thus, US delegate (and later ICJ judge) Stephen Schwebel defended the absence of any reference to 'occupation' in the Six-Power Draft, arguing that:

> [m]ilitary occupation and annexation were consequences of aggression, since they always followed the use of armed force. As the Committee was trying to determine what forms of the use of force constituted aggression, it would be inappropriate to introduce such matters as military occupation and annexation into the definition.[119]

This position was challenged by several countries who expressly disagreed that occupation and annexation were mere consequences of aggression, but should instead be regarded as acts of aggression of an indefinite or permanent character in and of themselves.[120] Against this, the United Kingdom and Canada cautioned against the view that any form of occupation would *ipso facto* constitute aggression, since some temporary occupations could be justified as an exercise of self-defence.[121] In response, the Syrian delegate clarified that the Thirteen-Power draft 'was not dealing with legal occupation, but only with occupation in violation of the provisions of the United Nations Charter; occupation in the exercise of the right of self-defence was consequently not included…".[122] Reflecting the overall mood, France observed that "[t]he discussion had shown that the occupation and annexation of territory were closer to aggression itself than to its consequences", and therefore merited a place in the envisaged resolution.[123]

Ultimately, however, hardly any State drew a link between the qualification of occupation as an 'act of aggression', on the one hand, and the possible recourse to self-defence. The only two exceptions were (unsurprisingly[124]) Syria, and Egypt, the two most vocal proponents of the inclusion of a reference to occupation, both of whom noted in passing that military occupation gave the occupied country the right to use self-defence.[125] Both would reiterate this position not long hereafter in the UN debates over the Yom Kippur War (see *infra*). However, other States did not expressly consider the link between occupation and self-defence, and there was no discussion of the temporal limitation of the right to self-defence in this context.

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[119] U.N. Doc. A/AC.134/SR.67-78 (Oct. 19, 1970), at 66. Consider also the position of Iraq in the same debate ("The acquisition of territory by force was a consequence of aggression, but the definition could not remain silent on the subject and should state clearly that such acquisitions must not be recognized").

[120] *Id.*, at 65 (Syria), at 66 (Turkey), at 67 (United Arab Republic: qualifying both occupation and annexation as 'continuing acts of aggression'), 68 (Uruguay: asserting that 'occupation and forcible annexation were not merely consequences of invasion, but were themselves acts of aggression'), 74 (Bulgaria), 84 (United Arab Republic), 136 (United Arab Republic). *See* also: U.N. Doc. A/AC.134/SR.79-91 (Feb. 8, 1971), at 40 (Syria), at 63 (Ghana), at 68 (Romania).

[121] *Id.*, at 72-3 (United Kingdom: "[disagreeing]with the Thirteen Powers that any military occupation, however temporary, was ipso facto aggression; it might become aggression in certain circumstances, for example, when occupation was no longer justified as an exercise of self-defence"; 73-4 (Canada: "[T]he USSR representative must agree that not all military occupation was aggression; for example, there was the case of territories occupied, and in some cases annexed, both before and after the Second World War.").

[122] *Id.*, at 74-5 (Syria).

[123] *Id.*, at 82 (France).

[124] Recall that the discussion took place in 1970, just three years after the Six-Day-War.

[125] A/AC.134/SR.67-78, *supra* note 119, at 100 (United Arab Republic: "The right of self-defence of [States whose territories were occupied] did not derive from declarations or pronouncements on self-determination; it derived from Article 51 of the UN Charter."), at 102 (Syria: insisting there was "confusion between self-determination and the right of self-defence recognized in Article 51 of the Charter. Military occupation gave the occupied country the right to use self-defence."). Reference can also be made to the statement of Sudan in the same debate, which criticized the idea that "a State which tried to regain territory occupied by foreign troops or annexed would be considered an aggressor".

In the end, the authors do not believe that reliance on the UNGA Definition of Aggression settles the matter in favour a continuing right of self-defence as long as the occupation continues – and would instead argue that the UNGA Friendly Relations Declaration[126] tilts the balance in the opposite direction.

4.2 The principle of the non-use of force in international relations

(a) The duty to refrain from the use of force as a means of settling territorial disputes

Like the UNGA Definition of Aggression, the Friendly Relations Declaration has been relied upon by the International Court of Justice, and has at times been regarded as a codification of customary international law.[127] For present purposes, two clauses from the resolution, specifically from the section related to the principle of the non-use of force, merit further scrutiny. The relevant parts read as follows:

> Every State has the duty to refrain from the threat or use of force … as a means of solving international disputes, including territorial disputes and problems concerning frontiers of States.
>
> Every State likewise has the duty to refrain from the threat or use of force to violate international lines of demarcation, such as armistice lines, established by or pursuant to an international agreement to which it is a party or which it is otherwise bound to respect. …

The present section focusses on the former principle, whereas the second clause will be tackled in the subsequent section.

First, the principle that States cannot settle *territorial* disputes through military means is itself a corollary of the prohibition on the use of force and the duty to settle disputes through peaceful means, norms that are enshrined in Articles 2(4) and 2(3) respectively and which form part of customary international law.[128] It also finds explicit affirmation in the practice of the UN Security Council. In resolution 1177(1998), for instance, relating to the conflict between Ethiopia and Eritrea, the Council "[affirmed] the principle of peaceful settlement of disputes and [stressed] that the use of armed force is not acceptable as a means of addressing territorial disputes or changing circumstances on the ground."[129]

Crucially, the principle only makes sense inasmuch as it operates *irrespective* of whether a State holds a valid title over land or not. If not, it would simply restate the prohibition of aggression, by emphasizing that States cannot forcibly annex territory over which they do not hold a valid title. Having regard among other things to the *effet utile* principle, it is clear that the obligation also applies vis-à-vis the State that has a valid title over territory that is *de facto* administered by another State. This position also finds confirmation in actual State practice. Thus, with respect to the 1982 Falklands War, Henry notes how "even the numerous states that fully supported Argentina's claims of sovereignty over the Falklands Islands (Islas Malvinas) disapproved the recourse to force – thus confirming the customary character of the prohibition of the use of force to settle territorial disputes."[130]

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[126] G.A. Res. 2625 (XXV), Declaration on the Principles of International Law Concerning Friendly Relations and Co-Operation among States in Accordance with the Charter of the United Nations (Oct. 24, 1970).

[127] NICARAGUA, *supra* note 61, ¶ 191.

[128] RANDELZHOFER & DÖRR, *supra* note 62, at 203; Christian Tomuschat, *Article 2(3)*, *in* THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 181, 188 (Bruno Simma et al. eds., 2012); On the obligation to pursue peaceful negotiations, *See* further C. YIALLOURIDES ET AL., *supra* note 94, at ¶ 183 ff.

[129] S.C. Res. 1177, U.N. Doc. S/RES/1177 (June. 26, 1998).

[130] HENRY, *supra* note 97, at 372; *See* also *infra* on the Falklands War.

The Ethiopia-Eritrea Claims Commission in its Partial Award on the Jus ad Bellum also supports this position in unequivocal terms.[131] In particular, the Commission could not accept that Eritrea's recourse to force would have been lawful on the basis that it held a valid claim over the land it sought to recover.[132] Referring to the Friendly Relations Declaration, as well as scholarly works, the Commission opined that:

> the practice of States and the writings of eminent publicists show that self-defense cannot be invoked to settle territorial disputes. In that connection, the Commission notes that 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.[133]

Accordingly, although it confirmed Eritrea's sovereignty over Badme, the Commission held that Eritrea had breached Article 2(4) UN Charter "by resorting to armed force … to attack and occupy the town of Badme, then under peaceful administration by [Ethiopia]".[134]

The present authors broadly agree with the position put forth by the Commission. And while some will disagree, we find ourselves in fine company. Thus, in his seminal peace in the *Michigan Law Review*, Oscar Schachter notes how an exception for recovering 'illegally occupied' territory would render Article 2(4) meaningless in many cases.[135] In sum, the obligation to settle territorial disputes through peaceful means *prima facie* pushes against any entitlement to use force to recover occupied territory that is peacefully administered by another State for a prolonged period of time. Marcelo Kohen in turn arrives at the same conclusion, in part by drawing an analogy with the concept of '*protection possessoire*' under domestic law:

> « *La portée de l'interdiction de … la menace et de l'emploi de la force (ONU) est donc de proscrire tout changement territorial par la force. On peut parler en ce sens d'une protection de la possession, quelle que soit la nature de celle-ci. Ainsi, même celui qui possède illégalement un territoire saura que le droit international n'autorise pas le titulaire de la souveraineté de se faire justice soi-même.* »[136]

In a similar vein, Quincy Wright has argued that:

> the Charter reference to territorial integrity means *de facto* possession, not de jure title. If his were not true, and a state were free to occupy territory in the *de facto* possession of another state, to which territory it believes it has legal title, attacks would be permissible in every boundary dispute, and the barriers by which the Charter seeks to protect territorial integrity would be broken down.[137]

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[131] Partial Award: *Jus Ad Bellum*, Ethiopia's Claims 1-8 (Eri. v. Eth.), 26 R.I.A.A. 457 (Eri.–Eth. Claims Comm'n 2005); The principle was also confirmed in the context of the maritime boundary dispute between Guyana and Suriname Delimitation of the Maritime Boundary (Guy. v. Surin.), 30 R.I.A.A., ¶¶433, 435 (Perm. Ct. Arb. 2007).

[132] Eritrea-Ethiopia Claims Commission, *supra* note 131, ¶ 10.

[133] *Id.*

[134] *Id.* ¶ 16.

[135] Oscar Schachter, The Right of States to Use Armed Force, 82 Michigan Law Review 1620, 1627-1628 (1984).

[136] *Marcelo Kohen, Possession Contestée et Souveraineté Territoriale* ¶ 115 (1997).

[137] Wright, *supra* note 98, at 623.

(b) Territorial disputes as opposed to… unlawful occupation?

Let us again turn to the counter-argument(s) put forward by scholars that argue in favour of a continuing right of self-defence to recover unlawfully occupied territory. In essence, the counter-argument holds that the concept of 'territorial disputes' must be narrowly construed. Two sub-strands can be distinguished.

First, it has been suggested that no 'territorial dispute' exists, where an occupying State has not explicitly laid a claim over the territory it occupies.[138] Thus, with respect to Nagorno-Karabakh, Corten draws attention to the fact that Armenia had not claimed title over the territory prior to the eruption of the 2020 conflict, implying that there was allegedly no 'territorial dispute' which States were obliged to settle through peaceful means. If this line of reasoning is followed through, the same conclusion should *mutatis mutandis* be upheld in respect of various other territories that are (at least partly) controlled by a third State, including the Turkish Republic of Northern Cyprus (by Turkey), or Transnistria, South Ossetia and Abkhazia (by Russia).[139] All of these 'frozen conflicts' would not involve a territorial dispute for lack of an explicit territorial claim by the third/occupying State.

Against this, it is easy to see how problematic – and potentially counterproductive – the attempted distinction ultimately is. The outcome would be that a State would be able to invoke self-defence to recover unlawfully occupied territory, but would lose that right when the occupying State lays a claim over the territory concerned. Thus, Syria would supposedly have been entitled to invoke self-defence to recover the Golan Heights lost to Israel in the 1967 Six-Day-War, but would subsequently have lost this right of self-defence when Israel formally annexed the territory in 1981 (supposedly creating a 'territorial dispute' that did not theretofore exist). In a similar vein, Russia's annexation of Crimea would presumably have turned the situation into a 'territorial dispute' (in contrast, for instance, to the frozen conflict over Transnistria) excluding further reliance on self-defence by Ukraine. In the end, the suggested interpretation would lead to arbitrary and absurd results, and would actually provide an incentive to occupying powers to assert a claim over the occupied land, or even seek to formally annex it.

The idea that no 'territorial dispute' exists when an occupying State has not formally laid out a territorial claim at the international level is also questionable for other reasons. The approach is indeed artificial in that it ignores the fact that the occupying State, even if not expressly claiming the territory for its own, will often challenge the sovereign title of the occupied State over the territory concerned. Thus, while Turkey has not claimed the northern part of the island of Cyprus as 'belonging' to the Republic of Turkey, it has nonetheless formally recognized the self-proclaimed Turkish Republic of Northern Cyprus (and remains the only State to have done so). And while Armenia had, prior to the 2020 outbreak of hostilities, merely 'threatened' to recognize the independence of Nagorno-Karabakh, it has challenged the claim that the region forms an integral part of Azerbaijan.[140] In other words, the above scenarios do

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[138] François Dubuisson & Vaios Koutroulis, *The Yom Kippur War—1973*, *in* THE USE OF FORCE IN INTERNATIONAL LAW: A CASE-BASED APPROACH 189, 199 (Tom Ruys, Olivier Corten, & Alexandra Hofer eds., 2018); LE CONFLIT AU HAUT-KARABAKH ET LE DROIT INTERNATIONAL, *supra* note 104; YIALLOURIDES ET AL., *supra* note 95, ¶¶ 7-9 ff. (They also define a 'territorial dispute' as one involving a dispute where 'two or more States are making competing sovereignty claims over continental territories or islands', although they acknowledge that the existence of a territorial dispute may not always be self-evident).

[139] *See Cyprus,* RULAC, https://www.rulac.org/browse/countries/cyprus (last visited Jan. 27, 2021) ("Since 1974, Turkey has occupied the northern part of Cyprus"); *See Military occupation of Georgia by Russia,* RULAC, https://www.rulac.org/browse/conflicts/military-occupation-of-georgia-by-russia#collapse1accord (last visited Jan. 27, 2021) ("Russia is occupying the regions of South Ossetia and Abkhazia in Georgia."); *See Moldova,* RULAC, https://www.rulac.org/browse/countries/moldova (last visited Jan. 27, 2021) ("Part of Moldovan territory is occupied by Russia. The Russian occupation extends over a strip of land … known as Transdniestria.").

[140] Permanent Representative of Armenia to the United Nations, Letter dated 28 July 2020 from the Permanent Representative of Armenia to the United Nations addressed to the Secretary-General, U.N. Doc. E/2020/6 (July 28, 2020).

involve situations where – to paraphrase the Hague Court – 'the claim of one party is positively opposed to the other'[141] and which centre around the exercise of sovereignty over territory.

The second, and most important, sub-strand seeks to distinguish situations of 'unlawful occupation' from 'territorial disputes', deeming the two to be mutually exclusive, with the implication that the right of self-defence persists in the former situation. Akande and Tzanakopoulos put it as follows:

> The distinction that needs to be drawn then is between an outstanding territorial dispute where no force has yet been used by any of the disputing parties, and a situation where one party creates (or escalates) a territorial dispute by invading and occupying territory held by another State. While no force can be used by either party in the former instance, the latter instance is clearly one where an armed attack has taken place, and the right of self-defence is triggered.[142]

In reality, the dichotomy presented here is far less straightforward than the authors wish us to believe, and might well be a chimera. Indeed, the authors would seem to suggest that territorial disputes appear out of thin air, while in reality of course many, if not most, territorial disputes, have, in one way or another, been created or shaped by a prior use of force (whether years, decades or even centuries ago).

By way of illustration, reference can be made to various territorial disputes that have been brought before the International Court of Justice in previous years. Consider, for instance, *Cameroon v. Nigeria*.[143] In the latter case, Cameroon advanced a series of claims with regard to Nigeria's international responsibility, including in respect of its continued military occupation of the Bakassi peninsula and the Lake Chad area.[144] Thus, Cameroon argued *inter alia* that following several temporary infiltrations by the Nigerian army before 1993, the Nigerian armed forces had launched an attack on the peninsula 'as part of a carefully and deliberately planned invasion' and had 'subsequently maintained and advanced its occupation'.[145] In Cameroon's view, these actions were contrary to Article 2(4) UN Charter

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[141] South West Africa (Ethiopia v. South Africa; Liberia v. South Africa), Preliminary Objections, Judgment, 1962 I.C.J. Rep. 319, 328 (Dec. 21).

[142] Akande & Tzanakopoulos, *supra* note 30. (The authors continue as follows: "To put it differently, it is one thing to invoke alleged title to territory in order to justify the use of force against another state (impermissible), and quite another to respond to an armed attack of another state that has led to the occupation of territory you previously held (without having occupied it through resort to force). In the former instance we have an attempt to settle a territorial dispute by force (which is impermissible). In the latter, we have an instance of the use of force in self-defence, even though it may still be possible that the title to territory continues to be in dispute, and such dispute has to be resolved by peaceful means since no use of force can lead to annexation or otherwise lawful title to territory.")

[143] Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Eq. Guinea intervening), Judgment, 2002 I.C.J. Rep. 303 (Oct. 10, 2002).

[144] Yiallourides et al., *supra* note 94, ¶ 95.

[145] Cameroon v. Nigeria, *supra* note 143, ¶ 310. ("In respect of the Lake Chad area, Cameroon states that Nigerian fishermen have over recent decades gradually settled on Cameroonian territory as the lake has receded. According to Cameroon, from the middle of the 1980s the Nigerian army made repeated incursions into the Cameroonian territory on which those fishermen had settled. Those incidents are alleged to have been followed by a full-scale invasion beginning in 1987, so that by 1994 a total of 18 villages and 6 islands were occupied by Nigeria and continue to be so occupied. In respect of Bakassi, Cameroon states that before 1993 the Nigerian army had on several occasions temporarily infiltrated into the peninsula and had even attempted in 1990 to establish a "bridgehead" at Jabane, but did not maintain any military presence in Bakassi at that time; Cameroon, on the contrary, had established a sub-prefecture at Idabato, together with all the administrative, military and security services appertaining thereto. Theri, in December 1993, the Nigerian armed forces are said to have launched an attack on the peninsula as part of a carefully and deliberately planned invasion; Nigeria subsequently maintained and advanced its occupation, establishing a second bridgehead at Diamond in July 1994. In February 1996, following an attack by Nigerian troops, the Cameroonian post at Idabato is alleged to have fallen into Nigeria's hands. The same fate is said to have subsequently befallen the Cameroonian posts at Uzama and Kombo a Janea. These Cameroonian territories are allegedly still occupied. Cameroon contends that, in thus invading and occupying its territory, Nigeria has violated, and continues to violate, its obligations under conventional and customary international law. In particular, Cameroon claims that Nigeria's actions are contrary to the principle of non-use of force set out in Article 2, paragraph 4, of the United Nations Charter and to the principle of non-intervention repeatedly upheld by the Court, as well as being incompatible with Cameroon's territorial sovereignty.")

as well as the principled of non-intervention.[146] The Court circumvented the application of Article 2(4) UN Charter, but agreed that 'sovereignty over the Bakassi Peninsula lies with the Republic of Cameroon', and ordered 'the evacuation of the Cameroonian territory *occupied by* Nigeria' (our emphasis).[147] Similarly, in *Costa Rica v Nicaragua*,[148] Costa Rica argued that in 2010, Nicaragua had breached the prohibition on the use of force by sending 'military units and other personnel' into a border area, which the Court ultimately found to belong to Costa Rica.[149] Again, the Court found it unnecessary to pronounce on whether Nicaragua had breached Article 2(4) UN Charter, because it had 'already established that the presence of military personnel of Nicaragua in the disputed territory was unlawful because it violated Costa Rica's territorial sovereignty'.[150] Several judges nonetheless strongly criticized the Court's failure to pronounce on the application of Article 2(4).[151]

If we attempt to fit the facts at the heart of both ICJ proceedings in the framework proposed by Akande and Tzanakopoulos, one would be hard pressed not to conclude that we are faced, on both occasions, with 'a situation where one party *creates (or escalates)* a territorial dispute by invading and occupying territory held by another State', rather than 'an outstanding territorial dispute where no force has yet been used by any of the disputing parties'.[152] As a result, adopting the position put forth by Akande and Tzanakopoulos would lead to the conclusion that both Cameroon and Costa Rica were perfectly entitled to invoke self-defence to recover the territories concerned at any given point in time. More generally, the same conclusion would appear to impose itself in respect of numerous other border conflicts around the globe (even if we use 1945, the year of adoption of the UN Charter, as the cut-off date and wipe the slate clean for any prior cases of unlawful occupation). Indeed, many, if not most, territorial disputes – e.g., between India and Pakistan, between India and China, etc.[153] … - would ultimately escape from the prohibition against the use of force to settle territorial disputes, rendering the latter largely meaningless.

A more nuanced attempt to define the point where self-defence stops and the prohibition against the use of force to settle territorial disputes kicks in, would consist in excluding from the latter manifest cases of unlawful occupation. Such effort to seek a more balanced distinction between territorial disputes that are covered by the principle of the non-use of force and those that are not is certainly laudable, but comes with plenty of challenges of its own.

Would the distinction depend on the importance of the occupied area, for instance in terms of geographical scope (cf. the 260 square mile of the Bakassi peninsula versus the 1,700 square mile of Nagorno-Karabakh?), its number of inhabitants, or its economic/cultural/historical importance vis-à-vis the occupied State? These factors, or some thereof, may well weigh on the question whether there is a necessity to act in self-defence, and may moreover, from a political standpoint, influence the occupied State's decision to take action in self-defence. Yet, they hardly serve as useful pointers to separate (manifestly) unlawful occupations from other (?) territorial disputes.

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[146] *Id.*

[147] *Id.*, ¶ 319.

[148] Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicar.) and Construction of a Road in Costa Rica along the San Juan River (Nicar. v. Costa Rica), 2015 I.C.J. Rep. 665 (Dec. 16, 2015); Similar observations can be made in respect of the Temple of Preah Vihear case. *See*, Temple of Preah Vihear (Cambodia v. Thail.), Judgment, 1962 I.C.J. Rep. 6 (June 15, 1962).

[149] COSTA RICA V. NICARAGUA, *supra* note 149, ¶¶ 63, 96.

[150] *Id.,* ¶ 99.

[151] *See* in particular the Separate Opinion of Judge Robinson (expressing regret over the Court's failure to find a breach of the prohibition on the use of force). See also: Separate Opinion Judge Owada, paras. 9, 11 ("it is my view 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").

[152] AKANDE & TZANAKOPOULOS, *supra* note 30.

[153] At least 120 States (or 'quasi-States') are reportedly involved in a territorial dispute of some kind, involving approximately 100 separate territories, continental or island. *See*, YIALLOURIDES ET AL., *supra* note 94, ¶ 1, fn. 2.

Another, perhaps more convincing approach, would be to distinguish between situations of occupation resulting from a manifestly unlawful use of force, and those where the occupying State is supposedly acting in good faith. This distinction to some extent echoes the argument raised by Nigeria in the case concerning *Land and Maritime Boundary*, according to which "even if the Court should find that Cameroon [had] sovereignty over [the contested areas], the Nigerian presence there was the result of a "reasonable mistake" or "honest belief".'[154] The risk with this approach, however, is that the truth may be in the eye of the beholder: the occupying State will surely claim to be acting in good faith, whereas the occupied State will surely denounce any such claim. Again, problems abound: if an occupying State claims to have acted in good faith in taking control over a piece of neighbouring land without encountering any military resistance, because it believed to hold valid title over such land, must this retroactively be seen as a manifestly unlawful occupation when e.g., an arbitral award later finds that no such valid title exists? Further, is it relevant if the occupying State claims to have acted in the pursuit of the right of self-determination of the inhabitants of the occupied territory? Thus, is it of any relevance that in 1991, a large majority of the inhabitants Nagorno-Karabakh voted in favour of independence from Azerbaijan?[155] Or, should any weight be attached to the deeply flawed referendum in Crimea that preceded the peninsula's 'integration' in to the Russian Federation?[156]

And what if the occupying State asserts – rightly or not – that the occupation resulted from a lawful recourse to self-defence? This is exactly the argument that Israel used to justify the prolonged occupation of the West Bank, the Golan Heights and the Sinai Peninsula in the wake of the 1967 Six-Day War (even though Israel did not respond to prior armed attack, but acted 'pre-emptively' against its Arab neighbours).[157] Whatever one makes of the Israeli argument, the prospect of occupation resulting from a lawful exercise of self-defence is real possibility. This scenario was also entertained during the negotiations over the UNGA Definition of Aggression, where several States emphasized that such occupation was not unlawful and should accordingly not be qualified as 'aggression' (see *supra*). Yet, if one accepts – as the present authors do – that self-defence can never justify an *indefinite* occupation of foreign land (in the form of a purported 'buffer zone' established for security reasons), and that such occupation must inevitably be brought to an end within a reasonable period of time lest it breach i.a. the right of self-determination and the territorial integrity of the affected country, the question remains what happens if the occupying State fails to do so. Are we then again confronted with a manifestly unlawful occupation that does not enjoy protection under the principle on the non-use of force, or does the lawful start of the occupation dictate otherwise?

The foregoing questions also illustrate that any attempt to distinguish between territorial disputes and unlawful occupations not caught by the principle on the non-use of force quickly collapses into a question of authority: who decides whether a situation of unlawful occupation exists? The obvious response would be to look at international judicial organs, primarily the International Court of Justice, to provide the answer. At the same time, there is something patently absurd in the idea that a ruling by an international court or tribunal, determining title over contested land, would serve, not to achieve a peaceful resolution of the dispute, but would rather provide the green light for the State holding valid title to use military force to recover the land concerned. Relying on the position of the UN Security Council and the General Assembly for authoritative guidance comes with pitfalls of its own, which are

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[154] Cameroon v. Nigeria, *supra* note 143, ¶ 311.

[155] As explained in the *Chiragov* case (*supra* note 10), 99,9% of those participating in the referendum voted in favour of secession (¶ 17). According to a USSR census of 1989, 77% of the region's population was ethnic Armenian, with 22% ethnic Azeris and Russian and Kurdish minorities (*ibid.*, ¶ 13).

[156] Note that the referendum was held after Russian troops had taken control over the Crimean peninsula and was boycotted by the Crimean Tatar minority. *See* for instance g. Simone Van den Driest, *Crimea's Separation from Ukraine: An Analysis of the Right of Self-Determination and (Remedial) Secession in International Law*, 62 Netherlands International Law Review 329 (2015); Christian Marxsen, *The Crimea Crisis: an International Law Perspective*, 74 Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht 367, 380-2 (2014).

[157] On the particular conflict *See*, John Quigley, The Six-Day War and Israeli Self-Defense: Questioning the Legal Basis for Preventive War (2013); *See* also J Green, *supra* note 87, at 114.

essentially linked to the political nature of both organs, and the impact of the veto power at the level of the Council. Thus, while the Security Council often refrains from expressly taking a position with regard to inter-State recourse to force,[158] the General Assembly, when it does so, often proves to be highly divided. By way of illustration, it is worth recalling that, while most international lawyers regard the Russian intervention in Crimea as a clear breach of the prohibition on the use of force,[159] (unsurprisingly) no action was undertaken by the Security Council. The General Assembly for its part, has repeatedly condemned the 'ongoing temporary occupation of [Crimea]' by the Russian Federation, thereby urging 'the occupying Power' to end the occupation 'without delay'.[160] At the same time, the voting record of these resolutions are hardly impressive, and suggest that less than a third of UN Members actually voted in favour.[161] As for Nagorno-Karakakh itself, it is recalled that several pre-1994 Security Council resolutions did call for the withdrawal of occupying forces from Azerbaijan, but that the Council has since remained silent. The General Assembly for its part adopted a resolution in 2008 similarly calling for "the withdrawal of all Armenian forces from all the occupied territories of the Republic of Azerbaijan", yet the resolution was adopted with as few as 39 votes in favour, 7 votes against, and 100 abstentions.[162]

In the end, attempts to carve out an exception from the principle of the non-use of force for situations of unlawful occupation (esp. by regarding the latter as situations of 'continuous' armed attack) fail to convince. Instead, the better view seems to be that the obligation to settle territorial disputes through peaceful means *prima facie* pushes against any entitlement to use force to recover occupied territory that is peacefully administered by another State for a prolonged period of time.

The question remains to what extent this position is confirmed, or rather rejected, by the reference in the Friendly Relations Declaration relating to 'international lines of demarcation, such as armistice lines'. This is the question we turn to next.

(c) Relevance or irrelevance of international lines of demarcation and armistice lines

As mentioned above, the paragraph in the UNGA Friendly Relations Declaration pertaining to the prohibition against the use of force to settle territorial disputes, is followed by a further paragraph, which reads as follows:

> Every State likewise has the duty to refrain from the threat or use of force to violate international lines of demarcation, such as armistice lines, established by or pursuant to an international agreement to which it is a party or which it is otherwise bound to respect. Nothing in the foregoing shall be construed as prejudicing the positions of the parties concerned with regard to the status and effects of such lines under their special regimes or as affecting their temporary character.[163]

The statement relates to international lines of demarcation that are 'established by or pursuant to an international agreement' to which the State concerned is a party – in other words, a bilateral or multilateral treaty. It also covers

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[158] As Greenwood points out, "in most armed conflicts there is no authoritative determination by the Security Council of which party is the aggressor, both parties usually claim to be acting in self-defence." Christopher Greenwood, *Historical Development and Legal Basis*, *in* THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW 8 (Dieter Fleck ed., 2008).

[159] See, for instance, Robin Geiß, *Russia's Annexation of Crimea: The Mills of International Law Grind Slowly but They Do Grind*, 91 INTERNATIONAL LAW STUDIES 425, 426 (2015); Olivier Corten, *The Russian intervention in the Ukrainian crisis: was jus contra bellum 'confirmed rather than weakened'?*, 2 JOURNAL ON THE USE OF FORCE AND INTERNATIONAL LAW 17 (2015).

[160] *See*, e.g., G.A. Res. 74/17 (Dec. 9, 2019).

[161] *Id*., The resolution passed with a of 63 in favour; 19 against; 66 abstentions; *See* also G.A. Res. 74/168 (Jan. 21, 2020), 65 in favour; 23 against; 83 abstentions

[162] G.A. Res. 62/243 (Apr. 25, 2008).

[163] DECLARATION ON THE PRINCIPLES OF INTERNATIONAL LAW CONCERNING FRIENDLY RELATIONS, *supra* note 126.

any such agreement which a State 'is otherwise bound to respect', the obvious example being a line of demarcation imposed by the UN Security Council pursuant to its Chapter VII powers.

'Demarcation lines' are provisional borderlines separating territories under different jurisdictions.[164] As von Bernstorff explains, they separate territories between States or within territories governed by one or more occupying powers or in the context of secession. While they are used 'for transitional purposes only, during this time they in principle fulfil the same functions as a final State boundary'.[165] For this reason, 'they should be differentiated from military front lines in the context of a ceasefire agreement during an armed conflict, which [does] not fulfil the same function as a State boundary."[166]

'Armistice lines' then are, as the quote from the Friendly Relations Declaration suggests, a specific sub-category of demarcation lines. According to Dinstein, an armistice is 'an agreement concluded between two or more States waging war against each other.'[167] As Dinstein explains, however, there is some degree of confusion concerning the specific meaning of the concept, and specifically its relationship to the parallel concept of a 'ceasefire' under the law of armed conflict. In particular, until the World Wars, an armistice meant an agreement designed to bring about a mere suspension of hostilities between belligerent parties who remained locked in a state of war with each other, whereas[168]

> under contemporary international law, the locution employed in the general practice of States for a suspension of hostilities is ceasefire (or truce). As for armistice, its meaning has been transformed from suspension of hostilities to termination of war, without, however, introducing peace in the full sense of that term. [169]

Thus, according to Dinstein, the provisions in the 1907 Hague Regulations relating to armistices, "have to be read today as applicable to ceasefire, rather than to armistice. A modern armistice agreement divests the parties of the right to renew military operations at any time and under any circumstances whatsoever. By putting an end to war, an armistice today does not brook resumption of hostilities as an option."[170] Accordingly, a genuine armistice can never be 'local', but must necessarily be 'general' in nature, 'for termination of war cannot be localized'.[171]

An example of a short-term ceasefire can be found in UN Security Council resolution 50 (1948), adopted in the context of the Israeli-Arab war, and which called for 'a cessation of all acts of armed force for a period of four weeks'.[172] Distinguishing between short-term ceasefires and armistices proper, however, is no straightforward exercise, in part due to the 'semantic confusion' in the usage of the terms, [173] and because parties often conclude a 'ceasefire

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[164] Jochen von Bernstorff, *Demarcation Line*, MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶ 1 (APR. 2010), https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e285?rskey=dTC2rX&result=1&prd=MPIL.

[165] *Id.*

[166] *Id.*

[167] Yoram Dinstein, *Armistice*, MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶ 1 (Sep. 2015), https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e245?rskey=86ZcUn&result=1&prd=MPIL; *See* also: DINSTEIN, *supra* note 40, at 44 ff.

[168] DINSTEIN, *supra* note 167, ¶ 1.

[169] *Id.*

[170] *Id.*, ¶ 3.

[171] *Id.*, ¶ 27.

[172] *Id.*, ¶ 1.

[173] Sydney D. Bailey, *Cease-Fires, Truces, and Armistices in the Practice of the UN Security Council* 71 AMERICAN JOURNAL OF INTERNATIONAL LAW 461, 467-9.

agreement' without providing for a specific duration, while a temporary ceasefire may well lapse without any resumption of hostilities occurring.

The ceasefire that factually ended the 1994 war over Nagorno-Karabakh and which paved the way for a new territorial *status quo* that would continue until 2020 is case in point. Following various short-term ceasefires in the summer of 1993,[174] on 11 May 1994, the Ministers of Defence of Azerbaijan and Armenia, as well as the 'Nagorno Karabakh Army Commander' concluded a tripartite 'ceasefire agreement', putting in place a 'full cease-fire and cessation of hostilities'.[175] Pursuant to paragraph 3, the agreement would be "used to complete the negotiations in the next 10 days and conclude an Agreement on Cessation of the Armed Conflict no later than May 22 [1994]." On 26 July 1994, the same actors concluded another agreement confirming their commitment to the ceasefire.[176] The final paragraph of the (short) agreement asserts that the parties agree "to maintain the ceasefire regime until the signing of a comprehensive political agreement which provides for the total cessation of hostilities". While no specific timeframe was provided for, a preceding paragraph confirmed the parties' aim 'to intensify efforts to complete the comprehensive political agreement within 30 days of August 1994. On 4 February 1995, the same protagonists moreover expressed their agreement to a set of measures proposed by the OSCE with a view to 'strengthening' the existing ceasefire regime, in particular by putting in place a mechanism to deal with and de-escalate possible breaches of the ceasefire (e.g., through exchanges of information, and a commitment not to engage in reciprocal actions that could lead to the aggravation of an incident).[177] These obligations became effective beginning on 6 February 1995. No time limitation was mentioned in the document. To the authors' knowledge, no further ceasefire or armistice agreements were concluded in subsequent years, although several joint statements were adopted stressing the need to seek a peaceful, negotiated solution to the conflict, based on the principles of international law and the UN Charter.[178]

Ultimately, while the cited passage from the Friendly Relations Declaration refers to 'armistice lines', it can be assumed that the statement applies equally to ceasefire lines – a position that finds support in the resolution's *travaux*.[179] But how must this statement ultimately be understood, and what is its impact for the recovery of occupied territory?

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[174] Before the adoption of the 1994 ceasefire agreement, the parties had previously agreed (particularly in the summer of 1993) to a range of – initially partial, and subsequently general – temporary ceasefires. The list of agreements includes the Agreement on the Cessation of Shelling of Stepanakert and Agdam (17 June 1993), the Agreement on the Cessation of Hostilities in the Area between Magadiz and Agdam (27 June 1993), the Agreement on a Universal Ceasefire for a period of 3 days (25 July 1993), the Agreement to extend the ceasefire for a period of 7 days (28 July 1993), and the subsequent Agreement to extend the ceasefire for a period of 3 days (5 August 1993). Translations of these agreements can be consulted through the University of Edinburgh's Peace Agreements Database (PA-X), at https://www.peaceagreements.org/search.

[175] BISHKEK CEASEFIRE AGREEMENT, *supra* note 8. The agreement was adopted a week after the Bishkek Protocol, a provisional ceasefire, had called upon the conclusion of a definite agreement between the parties. *See supra* note 8.

[176] *Agreement on Confirmation of Commitment to Ceasefire* (July 27, 1994), https://www.peaceagreements.org/viewmasterdocument/1733.

[177] *Agreement on strengthening the ceasefire* (Feb. 4, 1995), https://www.peaceagreements.org/viewmasterdocument/1684.

[178] OSCE, Joint Statement by the Heads of Delegation of the OSCE Minsk Group Co-Chair Countries and the Presidents of Azerbaijan and Armenia at the OSCE Summit in Astana (Dec. 1, 2010), https://www.osce.org/home/74234; Joint Statement by the Presidents of the Republic of Azerbaijan, the Republic of Armenia and the Russian Federation on the Nagorno-Karabakh settlement (Mar. 5, 2011), https://www.peaceagreements.org/viewmasterdocument/1687.

[179] *See*, e.g., Report of the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States, U.N. Doc. A/7326 (1968), ¶ 68. ("According to some representatives, the expression "international lines of demarcation" signified lines resulting from armistice agreements *or other agreements for the cessation of hostilities* which carried no implication as to the status of the territories they divided but which would not be violated by force without infringing Article 2, paragraph 4, of the Charter." (our emphasis). Note, however: Report of the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States, U.N. Doc. A/8018 (1970), ¶ 33 (referring to a suggestion 'that an interpretive text on the difference between cease-fire lines and lines of territorial demarcation should be included in the declaration').

Two points would seem to be rather uncontroversial. First, a binding agreement (or Security Council resolution) that imposes a ceasefire along a certain line of demarcation for a specified duration must be respected by the States concerned. A breach of such agreement is not regarded 'merely' as contravening a conventional norm, but also as an infringement of the general prohibition of the use of force, the cornerstone of the UN Charter.[180]

Second, agreements (or Security Council resolutions) providing for an international line of demarcation, even if concluded for a long period of time or for an indefinite duration, do not of themselves alter title over territory. More specifically, the occupying State does not acquire a title over the occupied land merely because of the agreement (or resolution). Such change in sovereign title over territory can come about only when the other State validly consents thereto, e.g., as part of a comprehensive peace agreement.[181] This follows from the Friendly Relations Declaration's assertion that international lines of demarcation (notwithstanding their protection by the principle of the non-use of force) do not prejudice the positions of the parties regarding status, and emphasizing their temporary character.

The more difficult question then is what the paragraph means when an agreement puts in place a *temporary* ceasefire, or when it provides for an armistice or a ceasefire of indefinite duration. Can an occupied State lawfully resume hostilities in such scenarios?

Some argue that the 'temporary' character of lines of demarcation also entails that the principle of the non-use of force applies on a temporary basis only. Thus, once the specific duration agreed to in a ceasefire agreement lapses, hostilities can lawfully be resumed by the defending State. According to Akande and Tzanakopoulos the same applies *mutatis mutandis* to ceasefire and armistice agreements concluded for an indefinite period of time.[182] According to the authors, the conclusion of such agreement temporarily removes the 'necessity' for acting in self-defence, since it provides time to seek other, peaceful means to deal with the armed attack that has taken place. However, "when this armistice line is no longer 'temporary', rather it turns into *status quo*, then at some point it becomes necessary again to use force in self-defence, all other means to repel the armed attack having failed."[183] In sum, when no definite duration is provided, it is for the occupied State to assess whether peaceful means have been exhausted or not. If it finds the answer to be negative, it is supposedly at liberty to resume the exercise of its original right of self-defence, whether weeks, months, or even years after the conclusion of the original ceasefire or armistice agreement.

Against this, Greenwood explains how

> [t]he changes in the law regarding resort to force brought about by the adoption of the UN Charter have had a particular effect on the right of the parties to resume hostilities after the conclusion of an armistice or ceasefire of indefinite duration. Whereas the law once admitted there was a general right to resume hostilities (Article 36 Hague Reg), today it would be a violation of Article 2(4) for a state to resume hostilities

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[180] E.g., Constantine Antonopoulos, The unilateral use of force by States in international law *181 (1997) (PhD thesis, University of Nottingham):* "To use force across an armistice line entails the same effect as the crossing of existing and permanent boundaries in every respect but for the name of the line crossed. For, in both cases force serves as the means to promote settlement of the dispute unilaterally by the imposition of the claim of the State that resorts to force against the other party to the dispute without the latter being offered any opportunity whatever to argue its case."

[181] On the validity of a Treaty of Peace, See, e.g., Dinstein, *supra* note 37, at 41-44; Serena Forlati, *Coercion as a Ground Affecting the Validity of Peace Treaties*, *in* The Law of Treaties beyond the Vienna Convention 320 (Enzo Cannizzaro ed., 2011).

[182] Akande & Tzanakopoulos, *supra* note 30.

[183] *Id.* This position bears some resemblance to the approach of Dinstein with respect to ceasefire agreements of indefinite duration. According to Dinstein, such agreements 'ought to be read as undertaken for a reasonable period'. '[W]hen a reasonable period has elapsed', the continued operation of the agreement is deemed to 'depend on the goodwill of both Belligerent Parties, and the ceasefire may be unilaterally denounced at will.' *See*, Dinstein, *supra* note 37, at 62. The main difference of course is that Dinstein does not limit this view to cases of unlawful occupation, but to any large-scale international armed conflict. Furthermore, as explained above in Section 2.1(a), Dinstein is of the (minority) position that as long as a state of war continues between two States, the jus ad bellum is of no relevance. On this point, see *supra* Section 3.1.

> unless the behavior of the other party to the armistice or ceasefire amounted to an armed attack or the threat of an armed attack.[184]

In the latter view, a new armed attack is required to permit the lawful resumption of hostilities. By contrast, the mere fact that part of the State's territory remains occupied and that negotiations have not produced the desired breakthrough does not of itself 'revive' the right of self-defence.

A closer look at the *travaux* of the Friendly Relations Declaration reveals that many States were keen on asserting that the peaceful maintenance of international lines of demarcation was in line with the purpose of the UN Charter and that the use of force to violate them contravened Article 2(4) UN Charter.[185] At the same time, States stressed that there should be no recognition of military occupation or territorial acquisition achieved by force,[186] that armistice and ceasefire agreements 'carried no implication as to the status of the territories they divided', and that international lines of demarcation should not be placed on the same footing as international boundaries.[187]

The negotiations do not reveal any significant evidence to support the view put forth by Akande and Tzanakopoulos, according to which the reference to the 'temporary' character of international lines of demarcation was meant to preserve the right of self-defence of occupied States, specifically to enable them to reopen hostilities if political negotiations proved unsuccessful over time. To the present authors' knowledge, only one State explicitly questioned the continued application of the principle of non-use of force to international lines of demarcation. In particular, Syria, while expressing support for the relevant paragraph in the UNGA Friendly Relations Declaration, did so

> on the understanding that no concept of inviolability should be attached to any line of demarcation resulting from an act or war of aggression. International demarcation lines and armistice lines, because of their very temporary nature, could not benefit from the inviolability accorded to national and historical boundaries where such demarcation lines and armistice lines were the outcome of the unjustified use of force.[188]

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[184] Christopher Greenwood, *Scope of Application of Humanitarian Law*, *in* THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW 45, 68 (Dieter Fleck ed., 2008).

[185] *See*, e.g., 1967 Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States, U.N. Doc. A/AC.125/SR.66 (Dec. 4, 1967), 22. (Australia: "the peaceful maintenance of such international lines of demarcation was manifestly in accordance with the purposes of the United Nations and the use or threat of force to violate them was contrary to the spirit of Article 2(4)"; Report of the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States, U.N. Doc. A/7326 (1968), 29 (¶ ¶ 67-68), 12 (joint proposal by Australia, Canada, the UK and the United States according to which 'every State has the duty to refrain from the threat or use of force to violate the existing boundaries of another State or other international lines of demarcation, or as a means of solving international disputes, including territorial disputes…'), 13 (proposal by the UK, idem), 15 (joint proposal by Argentina, Chile, Guatemala, Mexico and Venezuela, idem), 40, 46 (UK), 50 (Australia); Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States, U.N. Doc. A/AC.125/SR.114 (1 May 1970), 47 (France); Report of the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States, U.N. Doc. A/7619 (1969), 13, 18, 19, 21, 27-8 (¶¶ 62-68); Report of the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States, U.N. Doc. A/8018 (1970), 29, 120 (¶ 258, United States), 147 (France).

[186] *See*, e.g., 1967 Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States, U.N. Doc. A/AC.125/SR.66 (Dec. 4, 1967), 19 (Argentina), 21 (Madagascar); Report of the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States, U.N. Doc. A/7326 (1968), 49 (Lebanon); Report of the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States, U.N. Doc. A/7619 (1969), 20 (proposal by Algeria, Cameroon, Ghana, India, Kenya, Madagascar, Nigeria, Syria, the United Arab Republic and Yugoslavia), 21, 23, 30 (¶ 77 et seq.), 39-40, 46 (Romania).

[187] *See*, e.g., Report of the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States, U.N. Doc. A/7326 (1968), 29 (¶¶ 66, 68-69), 40; Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States, U.N. Doc. A/AC.125/SR.114 (1 May 1970), 47 (France); Report of the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States, U.N. Doc. A/7619 (1969), 28 (¶ 68), 38.

[188] Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States, U.N. Doc. A/AC.125/SR.114 (1 May 1970), 64 (Syria); Report of the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States, U.N. Doc. A/8018 (1970), 105-106 (¶ 207, Syria). *See* also, more ambiguously, Report of the Special Committee on Principles of

The Syrian statement does not explain how and when the right of self-defence of the occupied State would revive. Nor did other States echo the Syrian position throughout the negotiations.

In light of the foregoing, the present authors do not believe that the sole reference to the 'temporary' character of international lines of demarcation can erode the prohibition against the use of force to settle territorial disputes, as discussed above. That is not to say, of course, that a State that has suffered an armed attack whereby it has lost control over part of its territory, and which agrees, for instance, to a three-day ceasefire, instantaneously forfeits its right of self-defence *ad aeternam*. In the following section, we try to make sense of how the right of self-defence interacts (or might interact) with the principle of the non-use of force to settle territorial disputes in a range of scenarios.

4.3 Making sense of the interaction between self-defence and the principle of the non-use of force to settle territorial disputes

When conceiving a State whose territory is attacked by a neighbouring State and which subsequently takes control over part of the former State's territory – or at least of territory that was previously held by the former State (with a valid title or not) – a multitude of scenarios and outcomes can be envisaged.

First, it may be that the victim State does not engage in any forcible response pursuant to Article 51 UN Charter – whether alone or with the backing of one or more third States acting in collective self-defence. One such scenario would be a 'bloodless invasion', that is not met by any form of armed resistance (such as the Russian intervention in Crimea). It may well be that in such scenario the victim State will need time to make military preparations, or seek third-State support, or will first attempt to achieve a negotiated solution to the conflict. Such efforts may well justify a delay in the forcible response of, for instance, several weeks or even months – in line with the flexible and pragmatic understanding of the immediacy requirement (cf. supra). Ultimately, however, if the victim State fails to trigger its right of self-defence within a reasonable period of time, and a new and stable territorial *status quo* materializes, it is submitted that the victim State loses its right of self-defence. In sum: the victim State will find itself bound by the prohibition on the use of force, and, specifically, the prohibition to use force to settle territorial disputes, save if its right of self-defence were to be triggered anew by a subsequent armed attack.

Alternatively, the victim State may effectively exercise its right of self-defence – whether individually or collectively – with a view to pushing back the invading forces. If the defensive riposte is successful, then there will be no (more) foreign occupation to consider. More relevant for present purposes of course is the opposite outcome, whereby the initial action in self-defence does not succeed in repelling the foreign troops and a situation of prolonged occupation ensues. Several further sub-scenarios can again be distinguished.

First, it may be that there is a *de facto* cessation of hostilities, without any agreement whatsoever being concluded between the occupying State and the occupied State. In such setting, the above considerations would apply *mutatis mutandis*. Specifically, the victim State may choose to temporarily halt hostilities, for instance, so as to regroup its forces or to engage in diplomatic negotiations. Such temporary lull in the fighting does not automatically put an end

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International Law concerning Friendly Relations and Co-operation among States, U.N. Doc. A/7619 (1969), 45 (¶ 127, Syria: "International lines of demarcation could only exist as a result of binding international agreements, and no formulation could sanction *de facto* situations that had arisen as a result of aggressive action."); Report of the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States, U.N. Doc. A/7326 (1968), 48 (Syria, stressing that "none of the agreed statements in the report on non-use of force affected the right of peoples of occupied territories to employ against the aggressor any form of self-defence they saw fit." - but note how the statement refers to the 'peoples of occupied territories' rather than the occupied State itself).

to the right of self-defence (and the necessity to act in self-defence). However, if the *de facto* cessation of hostilities continues over a prolonged period of time, the prohibition on the use of force will again kick in.

Second, the cessation of hostilities may result from, or be confirmed by, an international agreement between the two States. Such agreement may be a fully-fledged peace agreement, putting a conclusive end to the armed conflict and potentially redrawing the States' boundaries. Or, more relevant for our purposes, it may be a temporary ceasefire with a specific duration, whether several days, weeks, or potentially even months. Lastly, we may be confronted with an agreement providing for an indefinite suspension of hostilities – whether formally labelled a 'ceasefire' agreement or an 'armistice'.

If the parties conclude a short-term (general) ceasefire, and the term lapses without negotiations being successful, then the occupied State can arguably resume the action in self-defence that was temporarily suspended. If it fails to do so, however, we are back in the previous scenario, viz. the situation of a *de facto* cessation of hostilities, meaning that the continuation of the territorial *status quo* gradually extinguishes the right of self-defence.

If the agreement is of an indefinite nature, it is of course important – as always – to consider the specific terms and conditions of the agreement. Does the agreement assert the application of the prohibition on the use of force and the obligation to pursue a peacefully negotiated solution? Is it termed an armistice rather than a ceasefire (with the former term normally indicating a stronger intention to exclude any resumption of hostilities). Does it contain any clause on its denunciation or identify potential material breaches that would allow the aggrieved party to terminate it?[189] Aside from the foregoing considerations, it is again argued that if the ceasefire is upheld for a prolonged duration and the territorial *status quo* acquires a degree of stability, then the occupied State's right of self-defence is gradually extinguished, only to be reanimated upon the occurrence of a new *casus foederis*. In other words: as time passes, the occupied State will no longer be in a position to invoke the olden rule enshrined in Article 36 of the Hague Regulations, according to which "the belligerent parties may resume operations at any time, provided always that the enemy is warned within the time agreed upon, in accordance with the terms of the armistice". The reason for this is, as Greenwood rightly points out, that the latter rule has been overtaken by the contemporary *jus contra bellum*. By way of illustration, in 1951, the UN Security Council found Egypt's continued exercise of belligerent rights against shipping to be incompatible with the 1949 Egypt-Israeli Armistice Agreement.[190] According to the Council: "since the armistice, 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 requires to exercise the right of visit, search and seizure for any legitimate purpose of self-defence…"[191]

It is stressed in this context that the situation in case of a ceasefire or armistice agreement of an indefinite duration cannot fundamentally depart from that which exists if no such agreement is concluded and there is instead a mere *de facto* cessation of hostilities. Indeed, since the prohibition on the use of force is of a customary nature and part of *jus cogens;*[192] States cannot contractually sign out of it by concluding a ceasefire or armistice agreement. In other words: such agreement may well prohibit action that would otherwise be permitted pursuant to Article 51 UN Charter (by putting an end to action lawfully undertaken in self-defence. Conversely, it cannot, however, be used to preserve the victim State's right of self-defence in the long run (beyond what the Charter permits). For the same reason, if the occupying State peacefully administers the occupied territory for a prolonged period of time, concluding a 'ceasefire'

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[189] On the application of the concept of 'material breach' to ceasefire agreements, *See*, e.g., DINSTEIN, *supra* note 37, at, 63.
[190] GREENWOOD, *supra* note 184, at 235.
[191] S.C. Res. 95, U.N. Doc. S/2322 (Sep. 1, 1951).
[192] *See,* for instance, CORTEN, *supra* note 63, Chapter 4.1(A). But see: James A. Green, *Questioning the Peremptory Status of the Prohibition of the Use of Force*, 32 MICHIGAN JOURNAL OF INTERNATIONAL LAW 215 (2011).

agreement for a specific, yet very long, duration (e.g., a period of two years), or concluding multiple successive ceasefire agreements of a shorter duration, will not assist the occupied State in keeping the flame burning and preserving the right of self-defence over time.

For all of the foregoing scenarios, it is impossible to apply a quantitative test, that is, to pinpoint an exact duration at which self-defence ceases to apply and the principle of the non-use of force again makes its entry. The analysis is inevitably contextual, and is influenced by a variety of factors, including the extent to which hostilities – even localized hostilities – continue to take place, the peaceful nature of the occupying Power's control over the occupied area, the presence of peacekeepers, or the extent to which military manoeuvres continue to take place along the line of demarcation. The result is that some degree of uncertainty is unavoidable in applying the above framework to specific disputes. Some authors criticize this uncertainty and see it as a (further) reason to argue that self-defence does not expire in situations of prolonged occupation. Thus, Akande and Tzanakopoulos question the idea that self-defence 'ceases at some (unclear) point in time when a *status quo* established', without '[telling] us where that point in time is'.[193]

The present authors would in turn respond with a twofold observation. First, the observed uncertainty is not unique to the *jus ad bellum* and the exercise of self-defence. Rather, it mirrors the parallel uncertainty that exists with respect to the law of armed conflict, particularly in regard to the end of its application. Obviously, when an international armed conflict erupts, the law of armed conflict does not in principle cease to apply merely because of a specific lapse of time (save for the partial exception of the 1-year limit found in Article 6 of the Fourth Geneva Convention).[194]

The general rule is that, in the absence of an actual peace agreement, "the determination that an international armed conflict has ended is based… on an appreciation of the facts on the ground."[195] As the ICRC Commentary to Common Article 2 of the Geneva Conventions explains "[h]ostilities must end with a degree of stability and permanence for the [IAC] to be considered terminated".[196] And further: "[t]he general close of military operations would include not only the end of active hostilities but also the end of military movements of a bellicose nature, including those that reform, reorganize or reconstitute, so that the likelihood of the resumption of hostilities can reasonably be discarded".[197] The Commentary further acknowledges that ceasefire agreements or related instruments – irrespective of their exact labelling – leading to or coinciding with a *de facto* general close of military operations may indicate the point at which the armed conflict will be considered to have ended.[198] The point here is not to argue that the factual test used to identify the end of an IAC and the expiry of the occupied State's right of self-defence are (or ought

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[193] Akande & Tzanakopoulos, *supra* note 30.

[194] Article 6 GCIV indeed stipulates that, in case of occupied territory, the application of the Convention "shall cease one year after the general close of military operations". Article 6 GC IV does enumerate various provisions that do remain applicable after this one-year period. Further, Article 3(b) of the First Additional Protocol sets aside the one-year 'time limit' enshrined in Article 6 GC IV, at least in respect of those States that are parties to it. According to Article 3(b) of AP I, "the application of the Conventions and of this Protocol shall cease, in the territory of Parties to the conflict, on the general close of military operations and, in the case of occupied territories, on the termination of the occupation, except, in either circumstance, for those persons whose final release, repatriation or re-establishment takes place thereafter. These persons shall continue to benefit from the relevant provisions of the Conventions and of this Protocol until their final release, repatriation or re-establishment." *See* for further reference, Julia Grignon, L'applicabilité Temporelle du Droit International Humanitaire 308-324 (2014).

[195] International Committee of the Red Cross, Commentary on the Third Geneva Convention: Convention (III) Relative to the Treatment of Prisoners of War, Common Article 2 ¶ 309 (2020) [hereinafter Commentary on the Third Geneva Convention]. *See* further, Grignon, *supra* note 194, at 208 ff. For a rare argument to the contrary, *See*, Dinstein, *supra* note 37, at 51 ff. According to Dinstein, there must be 'some supplementary evidence (other than the fact that the front line is dormant)' to demonstrate the intention of the parties to terminate the armed conflict, such as the resumption of rupture diplomatic relations.

[196] Commentary on the Third Geneva Convention, *supra* note 195, ¶ 310.

[197] *Id.*, ¶ 311.

[198] *Id.*, ¶ 315.

to be) identical. Rather, the former test, which looks at the 'general close of military operations', would seem to be stricter than the latter. Thus, the ICRC Commentary suggests that the "mobilizing or deploying troops for defensive or offensive purposes should be regarded as military measures with a view to combat", which may rule out a 'general close of military operations'.[199] Surely, the factors that are used to factually establish a cessation of 'active hostilities' for IHL purposes[200] are similar to those that are relevant for ad bellum purposes (see *supra*). In turn, the mere fact that the two protagonists keep their troops mobilized on their respective sides of the line of demarcation does not in our view prevent the gradual extinction of the occupied State's right of self-defence if the cessation of active hostilities persists. In the end, our excursion into IHL is meant to illustrate the point that, in the words of Schachter "[t]he difficulty of defining a precise time limit … does not impugn the basic idea"[201] that the occupied State's right of self-defence extinguishes, any more than it would impugn the basic idea that IAC's can terminate even in the absence of a formal peace agreement.

The critical observer might further object that the analogy is irrelevant for situations of occupation since the mere cessation of hostilities does not change the fact that, as long as the occupation continues, the law of armed conflict (particularly the Fourth Geneva Convention) continues to apply. Yet, it is worth recalling that, here too, the active cessation of hostilities in principle triggers the obligation pursuant to Article 118 of the Third Geneva Convention to release and repatriate prisoners of war 'without delay'.[202] In other words: prolonged occupation does not absolve the occupied State (or the occupying State of course) from repatriating POWs. In this context too, "[i]t is impossible to state in the abstract how much time needs to pass without armed confrontations taking place to conclude with an acceptable degree of certainty that active hostilities have ended in a sustainable way. Such an assessment always needs to take into account all the factual circumstances in a given case, including past patterns of surging and declining violence in the armed conflict in question."[203]

Leaving aside the analogy with IHL, the critique relating to the difficulty in ascertaining when the *status quo* extinguishes the occupied State's right of self-defence calls for a second observation. Recall that the alternative scenario put forward by some critics is that right of self-defence of the occupied State is temporarily *suspended* when the two sides engage in peaceful negotiations for a prolonged period of time and/or conclude an indefinite ceasefire,

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[199] *Id.*, ¶ 312.

[200] *See*, for instance, *Marco Sassòli,* Release, Accommodation in Neutral Countries, and Repatriation of Prisoners of War, in *THE 1949 GENEVA CONVENTIONS: A COMMENTARY 1039, 1046-7 (Andrew Clapham, Paola Gaeta & Marco Sassòli eds., 2015) (*"The concept of 'active hostilities' is more restrictive than that of 'military operations', because the former necessarily consist of acts of violence while the latter need not. … Ongoing troop movements do not preclude there being an end to active hostilities. … On the one hand, mere absence of fighting is certainly not sufficient. On the other hand, it is too much to require that the conditions must 'render it out of the question for the defeated party to resume hostilities', since this would not be the case even when a peace treaty has been concluded. There must be a reasonable expectation that hostilities will not resume. The complete defeat and occupation of one party satisfies this condition. In other cases, the determination of whether a risk of resumption exists must take agreements (such as a ceasefire which is unlimited in duration) into account. If agreements actually end hostilities, the repatriation process must start, even if sporadic ceasefire violations and military casualties continue to occur. If an armistice is monitored by peacekeeping forces, this is generally a good indication of a lasting cessation of hostilities. The same applies to a United Nations Security Council (UNSC) Resolution calling for an end of hostilities if it is respected on the ground, as well as to unilateral declarations by both belligerents that they will stop the fighting. In the absence of an agreement or unilateral declarations, it is reasonable to wait for a certain period to determine whether active hostilities have actually ended. A determination then equally depends on what parties are saying. In the reverse situation, when there is continuing fighting on the ground (despite an agreement or unilateral declarations), it is decisive whether this fighting corresponds with the will of the parties. A declaration by a party that it will not resume hostilities, responding to a similar declaration by the adverse party, must be presumed to be genuine, except where the facts on the ground clearly contradict it, or where the declaring authority has lost control over the state it represented. Indeed, a party that resumes hostilities it has declared to have ended will inevitably meet the opprobrium of the UN and third states.")

[201] SCHACHTER, *supra* note 95, at 292.

[202] COMMENTARY ON THE THIRD GENEVA CONVENTION, *supra* note 195, Art. 118, ¶ 4454; *See* also *SASSÒLI*, *supra* note 200, at 1047. ("[T]he mere fact that the adversary continues to occupy part of the territory of the Detaining Power constitutes an even weaker justification for not repatriating POWs.").

[203] COMMENTARY ON THE THIRD GENEVA CONVENTION, *supra* note 195, Art. 118, ¶ 4458.

but revives when peaceful efforts are deemed to be exhausted – supposedly because this entails is a renewed 'necessity' to act in self-defence.[204] If anything, however, the uncertainty is all the greater in such alternative scenario. Indeed, while there are certain objective parameters (comparable to those used for IHL purposes) that allow us to identify a continued cessation of active hostilities, the question of examining the exhaustion of peaceful negotiations in situations of unlawful occupation lends itself far less to such objective assessment. To take just one example, could one say, 46 years after the invasion of Turkish forces in Northern Cyprus and the *de facto* partition of the island, that the peaceful route has hit a dead end? Or does the intermittent organization of (mostly UN-led) peace talks point in the other direction? As one observer astutely points out,[205]

> "*frozen conflicts can last for decades, with bursts of negotiations, sometimes with glimmers of hope that they might produce something …, but most often with much disappointment. How exactly can could one reliably say, aha, at this point the peaceful options were exhausted and self-defence became necessary? Couldn't one always object that the lawful sovereign should wait a bit more, hoping say for a change of government in their adversary? Couldn't one conversely always say that the lawful sovereign has waited long enough?*"

With regard to the conflict over Nagorno-Karabakh, for example, one could point to the numerous bilateral and multilateral meetings in the years preceding the 2020 war to suggest that negotiations were still ongoing and could and should have been continued.[206] Yet, one might just as well argue that any refusal by the occupying State (e.g. expressed in diplomatic statements or during a political summit) to return the occupied territory in its entirety and without delay to the rightful owner can automatically be taken to reflect a failure of peaceful negotiations. In sum, "the imponderability of [this] assessment is a good reason to favour the other option, protective of the *status quo*."[207]

4.4 In the margin: legal consequences of an attempted recovery of occupied territory through armed force

To complete the above analysis, it is worth pausing a moment to reflect on the legal consequences of the approach developed above. Those who see armed action to recover unlawfully occupied territory as a lawful exercise of the right of self-defence take the view that the occupying State cannot invoke the right of self-defence to resist such effort (as 'there can be no self-defence against self-defence'[208]). If the occupied State succeeds in its attempt, it will be permitted to retain the recovered territory over which it holds a valid title and to exercise its jurisdiction to the fullest.

But what of the contrary position, which the present authors subscribe to? Critics of this position might point at the absurdity that a State that succeeds in recovering long-lost territory through the use of armed force would be legally compelled to again hand it over to the former occupier. But is this truly so? Put differently: is Azerbaijan required under the law of international responsibility to return to Armenia those parts of Nagorno-Karabakh which it recovered during the hostilities in 2020?

The purpose of the present interlude is not to dive into the intricacies of determining the proper reparation for breaches of the *jus ad bellum* or the complex questions of causality that arise in such setting – and which are amply

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[204] AKANDE & TZANAKOPOULOS, *supra* note 30; LE CONFLIT AU HAUT-KARABAKH ET LE DROIT INTERNATIONAL, *supra* note 104.

[205] Marko Milanovic, Comment in *Use of Force in Self-Defence to Recover Occupied Territory: When is it Permissible?* (Dapo Akande & Antonios Tzanakopoulos), EJIL:TALK! (Nov. 18, 2020), https://www.ejiltalk.org/use-of-force-in-self-defence-to-recover-occupied-territory-when-is-it-permissible/.

[206] *See*, for instance, the timeline 2015-2020 of the Nagorno-Karabakh Conflict https://www.crisisgroup.org/content/nagorno-karabakh-conflict-visual-explainer.

[207] MILANOVIC, *supra* note 205.

[208] E.g., Noam Lubell, *EXTRATERRITORIAL USE OF FORCE AGAINST NON-STATE ACTORS* 41 (2010).

reflected in the (controversial) approach to *jus ad bellum* liability by the Ethiopia-Eritrea Claims Commission.[209] Suffice it to note that the present authors do not believe that the wrongful nature of the occupied State's forcible recovery of lost territory necessarily entails that the territory should be handed back to the former occupier.

Indeed, we are presented here with a scenario that features two wrongs that exist in parallel, namely the continuing breach of Article 2(4) UN Charter resulting from the initial occupation, on the one hand, and the breach of Article 2(4) resulting from the occupied State's attempt to recover land that had been peacefully administered by the occupying State, on the other hand. Such concurrence of parallel wrongs is not unique to the present context. One can easily think of various other illustrations, whether or not connected to the *jus ad bellum*. One example would be where State A uses armed force to recover an area that is the object of a territorial dispute with pre-Charter origins with State B, after B has refused to implement an arbitral ruling finding that valid title over the area rests with State A. Or imagine the (admittedly completely unrealistic) scenario that, frustrated with the UK's reluctance to give effect to the ICJ's Advisory Opinion finding an obligation, on the part of the UK to end its administration of the Chagos archipelago[210] Mauritius would take matters in its own hands.

It is a cliché to say that two wrongs do not make a right. Yet, this does not mean that the concurrence of two wrongs is without any consequence from the perspective of the law of State responsibility. Rather, the ILC's Articles on State Responsibility expressly embrace the idea of so-called 'contributory fault'. More specifically, Article 39 ARSIWA acknowledges that "[i]n the determination of reparation, account shall be taken of the contribution to the injury by wilful or negligent action or omission of the injured State…" The Commentary further clarifies that the relevance of contributory fault is not limited to the context of compensation, but 'may also be relevant to other forms of reparation',[211] including restitution. The basic message here is that, determining that the recovery of occupied territory was achieved through an unlawful use of force, does not automatically mean that the State must return land over which it held a valid title. One can indeed imagine other solutions under the law of State responsibility, chiefly involving the payment of compensation to repair the damage directly caused by the unlawful recourse to force. The work for the Ethiopia-Eritrea Claims Commission and the Ethiopia-Eritrea Boundary Commission effectively confirm that it is possible to order a State to pay compensation for an unlawful use of force against neighbouring territory, while nonetheless confirming that the aggressor State holds a valid title over part of the land it obtained (or regained) through the use of armed force.

5 STATE PRACTICE

While the approach sketched above is based on conceptual-legal arguments, the question remains whether it is at all reflective of State practice. A number of precedents merit closer scrutiny in this context.

First, reference can be made to two occasions where States used force to recover territories claimed to be theirs, but which had come to be occupied by a third State long before the UN Charter saw the light of day,[212] i.e., the Indian intervention in Goa in 1961 and the Falkland/Malvinas War in 1982.

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[209] Eritrea-Ethiopia Claims Commission, *supra* note 131.

[210] Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, 2019 I.C.J. Rep. 95 (Feb. 25, 2019).

[211] ARSIWA, *supra* note 111, ¶ 4.

[212] A third example could in theory be added: When Iraq invaded Kuwait in 1990, it submitted that it was reclaiming a part of Iraqi territory that had been severed against Iraq's will at the end of the First World War pursuant to the Anglo-Ottoman Treaty of 29 July 1913. *See*, Erika de Wet, *The Gulf War-1990-91*, *in* The Use of Force in International Law: A Case-Based Approach 456, 456-459 (Tom Ruys, Olivier Corten, & Alexandra Hofer eds., 2018); HE Tariq Aziz, Deputy Prime Minister and Foreign Minister of the Republic of Iraq, Letter addressed by to the Ministers of Foreign Affairs of all Countries in the World on the Kuwait Question (Sep. 4, 1990), excerpts reprinted in 13 *Houston Journal of International Law*, 286-293 (1990). Clearly, this argument was not accepted by the international community. By resolution 662 of 9 August 1990, the Council unanimously decided that the 'annexation of Kuwait by Iraq … [had] no legal validity, and is considered null and void', U.N. Doc. S/RES/662 (Aug. 9, 1990).

On 18 December 1961, India dispatched its military forces to the territory of Goa,[213] a Portuguese overseas enclave conquered by Alfonso de Albuquerque in 1510. After short-lived armed confrontations that lasted no longer than a day, mostly due to the sizable disparity of military personnel engaged in active hostilities on both sides, India comfortably seized control and annexed the territory, as the outnumbered Portuguese troops swiftly withdrew.[214]

Upon the request of Portugal, which accused India of an unprovoked act of aggression against its territory,[215] the Security Council held two urgent meetings on the conflict. India denied outright having acted in contravention to the UN Charter, justifying its military incursion on the basis that Portugal had illegally occupied Goa for 450 years. In particular, India claimed that 'there can be no question of aggression against your own frontier',[216] and labelled the dispute as a colonial question.[217]

Neither of the two draft resolutions that were put to the vote were adopted by the Council, as the views expressed during the debates were far apart from each other[218]. Nevertheless, the majority position held by the United States, the United Kingdom, France, Turkey, China, Chile and Ecuador[219] denounced the conduct of India as an unlawful use of force against Portugal, rejecting the notion that the crux of the dispute was colonialism, holding instead that the relevant matter at hand was the prohibition of the use of force to settle territorial disputes.[220] The predominant position at the Security Council can be partially explained by the fact that, while India made haphazard and ambiguous references to the right of self-defence during the debates, it failed to provide any substantial evidence that a recent armed attack had taken place,[221] or that Portugal had provoked their military intervention in the region. Thus, most States sitting at the Council at the time considered that India, regardless of the validity of its territorial claim, had breached Article 2(4) of the UN Charter by attempting to alter the existing *status quo*[222] and settle a territorial dispute by forceful means.[223] It follows that none of these States believed that India had retained a right of self-defence ever since the Portuguese conquest of Goa in 1510.

Likewise, the idea that Portugal's prolonged occupation of Goa amounted to a continuing armed attack was not directly argued by India, and it can only be implied from the arguments presented at the Security Council.[224] Furthermore, India's attempt to circumscribe its conduct in the broader context of decolonization, avoiding to provide a cogent justification of its actions under *jus ad bellum*, certainly hints at their lack of conviction regarding the legality of its acts under the latter legal framework. At the same time, the four states which sided with India at the Security Council, did so by focusing on the relevance of the 'Declaration on the granting of independence to colonial countries and peoples',[225] and Portugal's failure to abide by its obligations as an

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[213] YIALLOURIDES ET AL., *supra* note 94, at 66.

[214] Tom Ruys, *The Indian Intervention in Goa—1961*, *in* THE USE OF FORCE IN INTERNATIONAL LAW: A CASE-BASED APPROACH 85, 85 (Tom Ruys, Olivier Corten, & Alexandra Hofer eds., 2018); YIALLOURIDES & YIHDEGO, *supra* note 98, at 51; YIALLOURIDES ET AL., *supra* note 94, at 66.

[215] Permanent Representative of Portugal to the United Nations , Letter dated 18 December 1961 from the Permanent Representative of Portugal to the United Nations addressed to the President of the Security Council, U.N. Doc. S/5030 (Dec. 18, 1961).

[216] U.N. Doc. S/PV 987 (Dec. 18, 1961), ¶ 46. ('[t]he fact that [Portugal] has occupied [Goa] for 450 years is of no consequence, because, during nearly 425 or 430 years of that period we really had no chance to do anything because we were under colonial domination ourselves. But during the last fourteen years, from the very day when we became independent, we have not ceased to demand the return of the peoples under illegal domination to their own countrymen…').

[217] *Id.*, ¶ 40.

[218] RUYS, *supra* note 214, at 86. Both resolutions were respectively vetoed by permanents members of the UNSC.

[219] U.N. Doc. S/PV 987, *supra* note 216, ¶¶ 72-76 (United States), ¶ 101 (Turkey), ¶ 87 (United Kingdom,), ¶ 99 (Turkey:); U.N. Doc. S/PV 988 (Dec. 18, 1961), ¶ 9 (France:), ¶¶ 9-10 (Ecuador:), ¶ 17 (China:), ¶¶ 27-29 (Chile).

[220] RUYS, *supra* note 214, at 89.

[221] WRIGHT, *supra* note 98, at 622; RUYS, *supra* note 214, at 91.

[222] YIALLOURIDES ET AL., *supra* note 94, at 66.

[223] RUYS, *supra* note 214, at 89.

[224] U.N. Doc. S/PV 987, *supra* note 216, ¶ 46.

[225] G.A. Res. 1514 (XV), Declaration on the Granting of Independence to Colonial Countries and Peoples (Dec. 14, 1960).

administering power under Chapter XI of the UN Charter, instead of providing an elaborate explanation of the incident under *jus ad bellum*.[226]

While it is true that the Goa precedent represents the first time in which the Security Council failed to condemn the annexation of territory by the use of force,[227] this is largely explained by the deep political division which reigned at the time between the west and socialist States, a separation often emphasized in the context of decolonization. On closer scrutiny, however, the Goa precedent did not end up altering the basic idea that States must not use force to settle territorial disputes, as demonstrated by the next relevant precedent, the Falkland/Malvinas Islands War.

On 2 April 1982, Argentina's military *junta* sent around 1,400 troops to occupy the Falkland Islands,[228] also known as the Malvinas, an archipelago located in the South Atlantic Ocean around 500 kilometers in front of its coast. At the time of the invasion, the Islands had been occupied and administered by the United Kingdom for over 150 years, after Argentina, who had taken possession over the archipelago as a consequence of the principle of *uti possidetis juris* after gaining independence from Spain, was forced out by British forces in 1833.Argentina had historically and consistently rejected the British territorial title over the islands,[229] regarding them as illegally occupied. Thus, the military invasion was presented as an act of legitimate defense[230] against the continuous act of aggression perpetrated by the United Kingdom since the forceful seizure of the islands in 1833.[231] In other words, Argentina claimed to be acting in self-defence in response to a continuous armed attack, despite the prolonged peaceful administration exercised by the United Kingdom over the Islands.

The British government reacted by commissioning a task force, in exercise of its own right of self-defence, and calling an urgent meeting of the Security Council.[232] The large majority of the members of the Security Council, and the delegations which were allowed to take part in the meeting, condemned the Argentinian invasion, qualifying it as an armed attack against the United Kingdom, hence, a breach of the prohibition of the use of force.[233] As a result, Resolution 502 was passed on 3 April 1982, acknowledging the existence of a breach of the peace caused by the invasion of the armed forces of Argentina, demanding both states to immediately cease all hostilities and calling for the immediate withdrawal of Argentina's troops from the islands.[234] The voting records reflect the overwhelming support of the British position,[235] whereas the text of the resolution was reproduced almost exactly from the draft presented by the United Kingdom.[236]

The British forces managed to overcome and expel the Argentinian troops from the Islands after 10 weeks of hostilities, recovering possession of the Island. Both parties agreed to a *de facto* ceasefire in June 1982.[237] Outside of the institutional veil of the Security Council, the vast majority of the international community condemned Argentina's invasion as a violation of the prohibition of the use of force and the obligation to settle disputes by peaceful means.

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[226] RUYS, *supra* note 214, at 93.

[227] GRAY, *supra* note 60, at 73.

[228] Michael Waibel, *Falkland Islands/Islas Malvinas*, MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (May 2011), https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1282?prd=EPIL.

[229] YIALLOURIDES & YIHDEGO, *supra* note 98, at 49.

[230] U.N. Doc. S/PV 2346 (Apr. 2, 1982), ¶ 12.

[231] U.N. Doc. S/PV 2345 (Apr. 1, 1982), ¶ 59.

[232] YIALLOURIDES ET AL., *supra* note 94, at 78.

[233] U.N. Doc. S/PV 2349 (Apr. 2, 1982), ¶ 7 (France), ¶ 22 (Australia), ¶ 33 (New Zealand), ¶¶ 10-18 (Ireland), ¶¶ 26-30 (Canada); U.N. Doc. S/PV 2350 (Apr. 3, 1982), ¶¶ 71-74 (United States), ¶ 260 (Guyana), ¶ 215 (Uganda), ¶¶ 220-223 (Togo), ¶¶ 61-62 (Jordan).

[234] S.C. Res. 502, U.N. Doc. S/RES/502 (Apr. 3, 1982).

[235] The resolution was adopted with 10 votes in favour (United States, United Kingdom, France, Guyana, Ireland, Japan, Jordan, Togo, Uganda, and Zaire), 1 against (Panama), with 4 abstentions (USSR, China, Poland, and Spain). *See*, U.N. Doc. S/PV 2345, *supra* note 231, ¶ 145.

[236] *See*, United Kingdom of Great Britain and Northern Island draft resolution, U.N. Doc. S/14947 (Apr. 2, 1982).

[237] WAIBEL, *supra* note 228; YIALLOURIDES ET AL., *supra* note 94, at 78.

It is particularly telling that many of the States that supported or recognized the validity of Argentina's territorial claims over the Falkland Islands, still denounced the invasion as an unlawful use of force.[238] Accordingly, this precedent is widely regarded as a compelling confirmation of the prohibition of the use of force in the context of territorial disputes, as the Argentinian attempt to recover territory by forceful means was largely disregarded.[239]

It must be acknowledged that, in each of the cases discussed above, the origins of the supposed occupation (long) predated the introduction of the contemporary prohibition on the use of force. It follows that – for all its flaws – their precedential value may be limited in light of the principle of intertemporality. The question then remains whether there have been other instances where States sought to forcibly recover territory supposedly under foreign occupation originating *after* 1945.

A first observation in this respect is that, for all the lingering territorial disputes and situations that could be seen as entailing a form of occupation, there have been remarkably few cases where States made use of armed force to challenge the existing territorial *status quo*, and even fewer cases where they have done so by relying on a right of self-defence against a continuing armed attack. This is not insignificant, since State inaction and omissions equally qualify as State practice or subsequent practice for purposes of identifying customary law[240] and/or interpreting the relevant treaty rules.

True, in the proceedings before the Ethiopia-Eritrea Claims Commission, Eritrea justified its actions on the ground that 'Ethiopia was unlawfully occupying Eritrean territory in the area around Badme',[241] and that it was exercising its right of self-defence. At the same time, it is noted (i) that this argument was only raised during the arbitral proceedings, but not at the actual start of the conflict (when Eritrea instead denied allegations of incursions and accused Ethiopia of having acted first); (ii) that it was combined with other arguments, namely that Ethiopia had first attacked Eritrean troops, and that it had Ethiopia had declared war on Eritrea[242]; and (iii) that the Commission unequivocally dismissed the argument that Eritrea could lawfully recover territory over which it held valid title.[243]

The main example from State practice that could be seen to dispel the legal framework laid out in the previous section – and which accordingly commands a closer analysis – concerns the 1973 Yom Kippur War, in which Egypt and Syria, reportedly supported by several other Arab States, unsuccessfully sought to recover the land occupied by Israel in the aftermath of the 1967 Six-Day War.[244]

It is recalled that, on 22 November 1967, the UN Security Council adopted resolution 242(1967),[245] imposing a ceasefire on the parties, and setting forth a series of principles that ought to guide the search for a just and lasting peace in the Middle East, including the need for Israel to withdraw 'from territories occupied in the recent conflict'. Notwithstanding the formal acceptance of the ceasefire by the various stakeholders, a so-called 'war of attrition' ensued between Egypt and Israel, involving i.a. artillery shelling, amphibious raids, along with occasional confrontations and incursions by non-State armed groups along the Israel-Jordan and Israel-Syria ceasefire lines. A

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[238] HENRY, *supra* note 97, at 372; *See*, U.N. Doc. S/PV 2349, *supra* note 233, ¶ 18 (Ireland); S/PV 2350, *supra* note 233, ¶ 203 (Spain); U.N. Doc. S/PV 2362 (May 22, 1982), ¶¶ 11-12 (Spain).

[239] HENRY, *supra* note 97, at 377.

[240] International Law Commission, Report on the Work of its Seventieth Session, U.N. Doc. A/73/10, at 133 (Draft Conclusion 6) (2018).

[241] ERITREA-ETHIOPIA CLAIMS COMMISSION, *supra* note 131, ¶ 9.

[242] *Id.*

[243] Sean D. Murphy, *The Eritrean–Ethiopian War—1998–2000*, *in* THE USE OF FORCE IN INTERNATIONAL LAW: A CASE-BASED APPROACH 552, 560-561 (Tom Ruys, Olivier Corten, & Alexandra Hofer eds., 2018).

[244] *See* in particular, DUBUISSON & KOUTROULIS, *supra* note 138.

[245] S.C. Res. 242, U.N. Doc. S/RES/242 (Nov. 22, 1967).

new 90-day ceasefire was agreed to by Israel and Egypt (as well as Jordan) in August 1970.[246] A three-month extension followed in September 1970, and in February 1971, Egypt agreed to a final extension of the ceasefire for another 30 days, during which it called for a partial Israeli withdrawal along the east bank of the Suez Canal.[247] In the absence of such withdrawal, Egypt in March 1971 declared that it no longer considered itself bound by the ceasefire.[248] Meanwhile, UN-led mediations failed to achieve a breakthrough, especially due to Israel's refusal to commit 'on withdrawal to the international boundary' existing before the 1967 war',[249] and was ultimately abandoned in 1972.[250] Against this background, Egypt and Syria sought to take back their land by force.

At first sight, this precedent would appear to flatly contradict the analysis above. Indeed, the Yom Kippur is undeniably a case where States resorted to armed force to recover land that had been occupied for several years. The offensive was not formally condemned by either the UN Security Council or the UN General Assembly. Quite the contrary, many States expressed their support for Egypt and Syria, while no State took the view that the Israeli response constituted a lawful exercise of self-defence.[251] What is more, as hinted at above, both Egypt and Syria expressly argued in the Security Council debates that Israel's occupation amounted to a continuing armed attack justifying action in self-defence to recover the occupied land.[252] Both countries dismissed as absurd the idea that Israel could rely on the ceasefire imposed by the UN Security Council in resolution 242(1967) as a proverbial 'licence to occupy'.[253] In the words of the Egyptian UN representative:

> Regarding the Security Council cease-fire in June 1967, it is closely linked with withdrawal from occupied territories. The strange theory that this or any cease-fire is for an unlimited time obviously means that the occupation is unlimited. Should we accept that the cease-fire must be observed until both parties-the occupier and the occupied-agree to put an end to it, then we would accept that the occupying Power can be evacuated only by its own consent.[254]

What is more, numerous countries, particularly from the Soviet bloc and from the group of non-aligned countries,[255] expressly supported the action undertaken by Syria and Egypt to liberate their occupied territory, at times explicitly couching their arguments in terms of the right to self-defence (which, according to India, could 'never be …

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[246] See Israel Ministry of Foreign Affairs, *The War of Attrition and the Cease-Fire Introduction*, https://mfa.gov.il/mfa/foreignpolicy/mfadocuments/yearbook1/pages/the%20war%20of%20attrition%20and%20the%20cease%20fire%20-%20introduc.aspx (last consulted Jan. 27, 2021).

[247] Ibid.

[248] Report of the Secretary-General under Security Council Resolution 331(1973) of 20 April 1973, 18 May 1973, U.N. Doc. S/10929, ¶ 89 (May 18, 1973).

[249] Ibid., ¶ 88.

[250] In July 1973, a draft UN Security Council resolution expressing 'serious concern at Israel's lack of cooperation with the Special Representative of the Secretary-General' received 13 votes in favour, but was vetoed by the United States. *See*, U.N. Doc. S/10974 (July. 24, 1973); U.N. Doc. S/PV 1735, ¶ 10 (July 26, 1973).

[251] Dubuisson & Koutroulis, *supra* note 138, at 195; For Israel's position, *See*, e.g., U.N. Doc. S/PV 1746, ¶ 86 (Oct. 12, 1973).

[252] U.N. Doc. S/PV 1744, ¶ 82 (Oct. 9, 1973). (Syria: "We are at present fighting to repel the aggressor, we are exercising our right of self-defence."); U.N. Doc. S/PV 1755, ¶ 190 (Nov. 12, 1973) (Egypt).

[253] U.N. Doc. S/PV 1743, ¶ 46 (Oct. 8, 1973) (Egypt: "Israel's attempt to make the cease-fire an established legal regime … [makes]a mockery of the Charter… since in the end it means that this Council has given a country a licence to occupy the lands of other countries until it desires and agrees to leave them…"); U.N. Doc. S/PV 1744, ¶ 79 (Syria: "The cease-fire cannot be considered as a permanent regime, as this would in fact simply transform the cease-fire line into a definitive border between the belligerents.").

[254] U.N. Doc. S/PV 1745, ¶ 47 (Oct. 11, 1973) (Egypt).

[255] Note: a few months earlier, at its Algiers summit, the Non-aligned Movement had adopted a declaration "[reaffirming] its total and effective support to Egypt, Syria and Jordan in their lawful struggle to regain, by all means, all their occupied territories". *See*, 4th Summit Conference of Heads of State or Government of the Non-Aligned Movement, *Resolution on the Middle-East Situation and the Palestine Issue*, NAC/ALG/CONF.4/P/Res.2, ¶ 2 (Sep. 9, 1973).

extinguished')[256]. Thus, the military efforts of Syria and Egypt were approved i.a. by the Soviet Union,[257] China,[258] India,[259] Indonesia,[260] Yugoslavia,[261] and others.[262]

There is, however, more than meets the eye. Indeed, leaving aside the – highly questionable – argument that Israel's occupation of neighbouring territory resulted from a lawful exercise of self-defence and was therefore not unlawful,[263] it is remarkable that, at the outset of the Yom Kippur War, both Egypt and Syria informed the Security Council that they were acting in self-defence in reaction to an Israeli offensive along the 'cease-fire line'.[264] While the claim that Israel had itself triggered the conflict turned out to be false[265] – UN observers reported a 'sudden surprise attack' by the Egyptian and Syrian armies[266] – it remains striking that Egypt and Syria felt the need to shift the responsibility for the first use of force to Israel. Such approach sits uneasily with the idea that the Israeli occupation was in and of itself sufficient to justify action in self-defence, and signals that the two Arab countries were not themselves convinced of the strength of that argument and/or of third States' receptiveness to this argument.[267] It is not excluded moreover that this impacted the appraisal of the conflict by third States.[268]

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[256] U.N. Doc. S/PV 1743, ¶¶ 179-180 (Oct. 8, 1973) ("What Egypt and Syria are doing now is nothing more than upholding the provisions of the Charter in asserting their right to self-defence and to territorial integrity."; stressing that the right of self-defence of Egypt and Syria "can never be and has never been extinguished").

[257] U.N. Doc. S/PV 1743, ¶ 76 (Oct. 8, 1973) (speaking of a "legitimate and just desire to return to their own homes"); U.N. Doc. S/PV 1744, ¶ 99 (Oct. 9, 1973); U.N. Doc. S/PV 1745, ¶¶ 159,161 (Oct. 11, 1973) ("the Arab States are fully entitled to fight for the liberation of their occupied territories. They are so entitled under Article 51 of the Charter…").

[258] U.N. Doc. S/PV 1743, ¶¶ 54-7 (Oct. 8, 1973) (referring to "just action…to resist the aggressors").

[259] U.N. Doc. S/PV 1743, ¶¶ 179-80 (Oct. 8, 1973).

[260] U.N. Doc. S/PV 1744, ¶¶ 166-168 (Oct. 9, 1973) (accepting that, after the US vetoed a draft Security Council resolution in July 1973, the only option left for Egypt 'was to have recourse to force if it wanted to recover its territories occupied by Israel').

[261] U.N. Doc. S/PV 1744, ¶¶ 4-5, 13, 16-17 (Oct. 9, 1973) (referring to "constant aggression" (by Israel) and to the "just struggle" for the liberation of Arab territories; dismissing the attempt to construe ceasefire as creating a '*status quo* in the interests of the conqueror'; referring i.a. to the right of self-defence and stressing that an occupied State could not be expected to 'stand idly by').

[262] *See*, e.g., U.N. Doc. S/PV 1745, ¶¶ 35-8 (Oct. 11, 1973) (Guinea: "any attempt to recuperate from the usurper what belongs to you is a source of legitimate action"); ¶¶ 57-8 (Peru).

[263] *See*, *supra* Section 2.3(b).

[264] Permanent Representative of the Syrian Arab Republic to the United Nations, Letter dated 6 October 1973 from the Permanent Representative of the Syrian Arab Republic to the United Nations addressed to the President of the Security Council, U.N. Doc. S/11009 (Oct. 6, 1973) ("the Israeli forces have launched military aggression against Syrian forward positions all along the cease-fire line. Our forces had to return the fire. Formations of Israeli aircraft took part in this aggression and penetrated our air space in the northern sector of the front, thus leading to their confrontation by our air force."); Minister for Foreign Affairs of Egypt, Letter dated 6 October 1973 from the Minister for Foreign Affairs of Egypt to the President of the General Assembly, 6 October 1973, U.N. Doc. A/9190 (Oct. 6, 1973) ("At 6.30 hours a.m. … today… Israeli air formations attacked Egyptian forces …, while Israeli naval units were approaching the Western Coast of the Gulf of Suez from the Egyptian territory of Sinai occupied by Israel as a result of the war it launched on 5 June 1967. The Egyptian forces are at present engaged in military operations against the Israeli forces of aggression in the occupied territories. Israel has prepared for this latest act of aggression by its military aggression against Syria on 13 September 1973. This has been followed by Israeli military movements all along Syrian and Lebanese lines. … Egypt [is] exercising its legitimate right of self-defence…"); U.N. Doc. S/PV 1743, ¶¶ 38,41 (Oct. 8, 1973) (Egypt); U.N. Doc. S/PV 1744, ¶¶ 45,49 (Syria).

[265] Just as Israel's earlier claim in 1967 that its Arab neighbours had themselves started the Six-Day War proved unfounded. It is a strange twist of irony indeed that in both episodes the party escalating hostilities tried to accuse the other of the first use of force.

[266] The Soviet Union appeared to agree with the facts as presented by Egypt and Syria, *See*, Permanent Representative of the Soviet Union to the United Nations, Letter dated 7 October 1973 from the Permanent Representative of the Soviet Union to the United Nations addressed to the Secretary-General, U.N. Doc. S/11012 (Oct. 7, 1973) ("In the last few days, Israel has concentrated substantial armed forces on the cease-fire lines with Syria and Egypt …and… has launched military operations."). Yet, this presentation of the facts was rebutted by the UN Truce Supervision Organization (UNTSO): "Egyptian and Syrian armies launched a sudden surprise attack. On the Syrian front, 40,000 soldiers supported by 850 tanks broke into the Golan Heights while Syrian jets bombed Israeli settlements in the Huley Valley. Egyptian forces crossed the Suez Canal under cover of artillery and tank fire, while Egyptian airplanes bombed Israeli installations in Sinai." *See*, UNTSO, Reports on Outbreak of Hostilities, U.N. Doc. S/7930/Add. 2141, 2142 (Oct. 6, 1973).

[267] Just as Israel's flawed attempt to accuse its Arab neighbours of having started the Six-Day-War signalled its discomfort with the doctrine of pre-emptive self-defence.

[268] Thus, some countries participating in the UN debates did stress that Israel had commenced the hostilities. *See*, e.g., U.N. Doc. S/PV 1743, ¶ 53 (Oct. 8, 1973) (China: accusing Israel of "fresh military attacks on a large scale" on 6 October 1973). However, *see*, U.N. Doc. S/PV 1746, ¶ 7 (Oct. 12, 1973) (Nigeria).

Further, several States refrained from apportioning blame, but instead focussed on the need for a peaceful solution to the conflict, and an end to hostilities to end the human suffering.[269]

Third and last, one cannot overlook the many skirmishes and other incidents that took place between Israel and its Arab neighbours in the wake of the Six-Day War. This was particularly the case throughout the 'War of Attrition' between Israel and Egypt (1967-1970).[270] Yet, even after the conclusion of a new short-term ceasefire in the summer of 1970 and the temporary extension thereof, incidents continued to take place along the ceasefire lines.[271] Thus, a UN report dated May 1973 cited seventeen major incidents disrupting the ceasefire that took place between July 1967 and April 1973 and that were discussed in the UN Security Council (while several other incidents were simply not brought before the Security Council).[272] Only 4 weeks before the outbreak of the Yom Kippur War, Israeli and Syrian jets clashed over the Mediterranean in their biggest air battle since the 1967 war.[273] Egypt also repeatedly threatened with war in 1972 and 1973. Against this background, Dubuisson and Koutroulis find that "it can hardly be suggested that the occupied Arab territories were under the peaceful administration of Israel".[274] In light hereof, the two authors also argue that the Yom Kippur War does not contradict (nor support) the analysis put forth by the Ethiopia-Eritrea Claims Commission in its Partial Award on the Jus ad Bellum as discussed above.[275]

Of course, our overview of relevant practice would not be complete without a closer look at the 2020 Nagorno-Karabakh war itself. While the background and facts have been treated earlier, a few points are worth observing. First, it is admitted that at least two countries – both allies of Azerbaijan – appeared to support the idea that Azerbaijan could invoke the right of self-defence to recover territory occupied by Armenia. A statement to this end was made by the Pakistani ambassador to Azerbaijan.[276] In turn, in a letter to the Security Council, Turkey asserted that Azerbaijan was "exercising its inherent right of self-defence, since the hostilities are taking place exclusively on its own sovereign territory".[277] Azerbaijan itself, however, seemingly refrained from developing this argument. Instead, similar to the approach of Egypt and Syria during the Yom Kippur War, Azerbaijan accused Armenia of having 'launched another aggression against Azerbaijan, by intensively shelling the positions of [its] armed forces' on 27 September 2020.[278] Azerbaijan's action then was, in its own words, no more than a 'counter-offensive… within the right of self-defence'.[279]

Further, while the conflict was not debated within the UN Security Council, and States generally refrained from taking a stance of the legality of the protagonists' conduct under the *jus ad bellum* – a silence partly due to the uncertainty

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[269] See, e.g., U.N. Doc. S/PV 1743, ¶ 15 (Oct. 8, 1973) (United States), ¶ 67 (United Kingdom); U.N. Doc. S/PV 1744, ¶ 27 (Oct. 9, 1973) (France), ¶¶ 38-9 (Austria); U.N. Doc. S/PV 1747, ¶ 5 (Oct. 21, 1973) (United States), ¶ 53 (United Kingdom), ¶ 105 (Kenya), ¶ 111 (Panama).

[270] For an Israeli account, see Israel Ministry of Foreign Affairs, *supra* note 246.

[271] In light of the continued confrontations, it has been suggested that the 'War of Attrition' "refers to the period between 1967 and 1973 and not only the battles between Israel and Egypt in 1967-1970". *See*, Israeli Defence Forces, *The War of Attrition*, https://www.idf.il/en/minisites/wars-and-operations/the-war-of-attrition/#:~:text=The%20War%20of%20Attrition%20(Hebrew,and%20ended%20in%20August%201970.

[272] Report of the Secretary-General under Security Council Resolution 331(1973) of 20 April 1973, 18 May 1973, U.N. Doc. S/10929, ¶¶ 3-11 (May 18, 1973). Consider also the following (selective) overview of 'fedayeen' and 'non-fedayeen' attacks against Israel compiled by the CIA: https://www.cia.gov/library/readingroom/docs/DOC_0005764836.pdf; *See* also, U.N. Doc. S/PV 1744, ¶ 67 (Oct. 9, 1973) (Syria, accusing Israel of multiple "grave and flagrant violations of the cease-fire" since 1967).

[273] *Israeli and Syrian planes in major fight off coast; Tel Aviv claiming 13 MICS*, New York Times (Sep. 14, 1973), https://www.nytimes.com/1973/09/14/archives/israeli-and-syrian-planes-in-major-fight-off-coast-tel-aviv.html.

[274] Dubuisson & Koutroulis, *supra* note 138, at 199.

[275] *Id.*

[276] *See*, *Pakistan reiterates support for Azerbaijan's 'self-defense' against Armenian* occupation, Yeni Şafak (Oct. 14, 2020), https://www.yenisafak.com/en/news/pakistanreiterates-support-for-azerbaijans-self-defense-againstarmenian-occupation-3551697. The official statement of the Pakistani foreign ministry, however, rather appears to suggest that Azerbaijan could lawfully respond in self-defence to prior military action by Armenia. *See*, http://mofa.gov.pk/renewed-tension-in-nagorno-karabakh/.

[277] Permanent Representative of Turkey to the United Nations, Letter dated 16 October 2020 from the Permanent Representative of Turkey to the United Nations addressed to the Secretary-General, U.N. Doc. S/2020/1024 (Oct. 19, 2020).

[278] Letter dated 27 September 2020 from the Permanent Representative of Azerbaijan to the United Nations addressed to the Secretary-General, *supra* note 9.

[279] *Id.*

as to who triggered the outbreak of hostilities – numerous countries did call for an immediate end to all hostilities and stressed that the conflict over the region could be solved only through peaceful negotiations.[280] In a joint statement, the Presidents of the Russia, the United States and France '[condemned] in the strongest the recent escalation of violence along the Line of Contact' (without pointing the blame at one party or the other).[281] In the end, these reactions hardly evidence support for the position that an occupied State is at liberty to challenge the territorial *status quo* and pursue the recovery of its land through military means. All things considered, we do not believe that the latest confrontation between Armenia and Azerbaijan lends support to the concept of an unlawful occupation as a 'continuing armed attack'.

6 EPILOGUE: Peace against justice?

In the present paper, we sought to examine to what extent international law permits resort to armed force with a view to recovering territory that is occupied by another State. We saw how some authors view occupation as a 'continuous' armed attack. According to this view, the occupied State's right of self-defence is not extinguished by the emergence of a new territorial *status quo*, even if the occupying State peacefully administers the territory concerned for a prolonged period of time (whether multiple years or even decades). Rather, this right is at most temporarily *suspended* when the protagonists conclude a ceasefire or otherwise engage in peaceful negotiations. The counter-argument emphasizes that any exercise of self-defence is subject to a requirement of 'immediacy', and that a victim State ultimately forfeits its right of self-defence if it fails to act within a reasonable time and a new *status quo* materializes. It was argued that this position finds support in the principle of the non-use of force to settle territorial disputes, and that attempts to carve out an exception from the former principle for (certain) situations of unlawful occupation are problematic and unconvincing.

Subsequently, we examined how, in State practice, there exists little evidence to support the view that the occupied State preserves its right of self-defence in perpetuity, albeit that the 1973 Yom Kippur War in particular serves as an important counter-example.

In the end, it is difficult to escape the impression that the dilemma before us is one on which legal scholars remain deeply divided, which remains lacking of an authoritative answer (at least if we discount the – oft-criticized- *Jus ad Bellum* Award of the Ethiopia-Eritrea Claims Commission[282]), and which leaves little or no room for compromise, i.e., some form of middle ground between the two juxtaposed views.

Inevitably then, we cannot ignore the – closely entwined – teleological and utilitarian dimensions of the debate, which largely explain for this deep divide. Indeed, the debate raises hard questions about the fundamental purposes of the Charter framework on the use of force, and the priority to accord to those objectives where they tend to collide, as well as the desired outcomes, having regard to the manifold territorial disputes potentially affected.

One of the Charter objectives that is pivotal in this context concerns the protection of States' territorial integrity, which is expressly mentioned in Article 2(4), and, on a related note, the 'suppression of aggression' (Article 1(1) UN Charter). Surely then, this purpose is defeated when we allow aggressor States to 'get away' with invasion and occupation by providing only a limited timeframe within which the 'victim State' must act before forfeiting its right of self-defence? It has indeed been argued that the latter position tends to 'reward' the aggressor, and may even 'encourage' aggression. Such surrender to the 'realist' position that the strong do as they can and the weak suffer as

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[280] *Armenia-Azerbaijan clashes: How the world reacted*, Al-Jazeera *(Sep. 27, 2020), https://www.aljazeera.com/news/2020/9/27/armenia-azerbaijan-clashes-world-reactions.*

[281] *Statement of the presidents of the Russian Federation, the United States of America and the French Republic on Nagorno-Karabakh* (Oct. 1, 2020), https://ge.usembassy.gov/statement-of-the-presidents-of-the-russian-federation-the-united-states-of-america-and-the-french-republic-on-nagorno-karabakh/.

[282] Eritrea-Ethiopia Claims Commission, *supra* note 131.

they must has moreover been regarded as contravening the principle of *ex iniuria jus non oritur*,[283] according to which legal rights cannot arise from unlawful acts.

The present authors fully acknowledge that an occupied State may feel unfairly disadvantaged if it has limited time to react to occupation. To suggest that this 'incites' aggression may be a bridge too far. A State that is planning to launch an offensive and send its troops into neighbouring territory will be guided by a variety of factors, including the political support at home, the military strength and likely response of the target State, and the expected response from the international community (e.g., in the form of sanctions, collective self-defence or UN enforcement action). The possibility that the victim State might still be legally entitled to exercise self-defence at some point in the future after a new territorial *status quo* has materialized is not likely to figure (high) on this list. Yet, the frustration that the aggressor is 'rewarded' since the law favours the consolidation of the unlawful territorial *status quo* is understandable and legitimate.

Still, this frustration must be put into perspective. First, from a strictly legal perspective, it seems difficult to sustain that a prohibition to resort to force to recover (long-)occupied territory breaches the principle of *ex iniuria jus non oritur*. Indeed, whatever the latter principle's normative status and scope,[284] the mere fact that States cannot resort to armed force to undo internationally wrongful conduct of which they have been the victim, should not be taken to imply that the wrongdoing State obtains an actual right, a legal entitlement, from its wrongful behaviour. In the present case, the core of the *ex iniuria* principle is indeed protected in that the peaceful administration of occupied territory does not give birth to a legal entitlement to the territory concerned, as the Friendly Relations Declaration, for example, re-affirms.

Second, against the perception that the law leaves the occupied State in the cold, and surrenders to the maxim that 'might makes right', it is recalled that the international legal framework does provide important tools to deter aggression and support the cause of the victim State. Thus, while a smaller State may well be powerless of its own in the face of a territorial invasion by a stronger neighbour, Article 51 of the UN Charter confirms the victim's right to request the support from third States in countering the aggression (pursuant to the right of collective self-defence). In addition, the UN Security Council may take enforcement measures under Chapter VII of the UN Charter, whether by authorizing military enforcement action (as it did following Iraq's invasion of Kuwait) and/or by imposing economic sanctions. Unilateral sanctions may also be imposed by individual States or regional organizations such as the EU[285] - the victim State itself is of course remains entitled to take countermeasures.[286] Whether support from the UN Security Council and/or from third States is forthcoming will ultimately and inevitably depend on a range of, essentially political, considerations, yet what matters is that the UN Charter facilitates such support. Furthermore, third States are in any case bound by the duty of non-recognition of conquest, an important corollary of the prohibition on the use of force that finds confirmation in Article 41(2) of the ILC Articles on State Responsibility[287] (albeit that the doctrine has recently come under attack from the very State responsible for its creation[288]). To this may be added the criminalization of aggression, and the recent activation of the International Criminal Court's jurisdiction over the crime of aggression[289] – which has yet to be put to the test.

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[283] See e.g., Alessandro Mario Amoroso, *The Israeli Strikeson Iranian Forces in Syria: a case study on the use of force in defence of annexed territories,* EJIL:TALK! (June 8, 2018), https://www.ejiltalk.org/the-israeli-strikes-on-iranian-forces-in-syria-a-case-study-on-the-use-of-force-in-defence-of-annexed-territories/.

[284] Further, see: Anne Lagerwall, LE PRINCIPE EX INJURIA JUS NON ORITUR EN DROIT INTERNATIONAL (2016).

[285] In this sense, *See*, e.g., YIALLOURIDES & YIHDEGO, *supra* note 98, ¶ 3.5. Note, however, that the legality of third-party countermeasures remains a source of controversy. See e.g. Martin Dawidowicz, *Third-party countermeasures: a progressive development of international law?*, in 29 QUESTIONS OF INTERNATIONAL LAW 3 (2016).

[286] YIALLOURIDES ET AL., supra note 94, at 88.

[287] ARSIWA, *supra* note 110, art. 41(2).

[288] On the origins of the 'Stimson doctrine', see David Turns, *The Stimson Doctrine of Non-Recognition: its historical genesis and influence on contemporary international law* 2 CHINESE JOURNAL OF INTERNATIONAL LAW 105 (2003). Recent steps by the Trump administration, such as the recognition of Israeli sovereignty over the Golan Heights, or the announcement that the United States would no longer qualify Israel's West Bank settlements as 'inconsistent with international law' seem to directly repudiate the duty of non-recognition. See: US White House, *Proclamation on recognizing the Golan Heights as part of the State of Israel*, 25 March 2019, at www.whitehouse.gov/presidential-actions/proclamation-recognizing-golan -heights-part-state-israel/; Speech by US Secretary of State Mike Pompeo, 18 November 2019, full text available at www.timesofisrael.com/full-text-of-pompeos-statement-on-settlements/ (last accessed Jan. 27, 2021).

[289] E.g., Claus Kress, *On the Activation of ICC Jurisdiction over the Crime of Aggression*, 16 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 1 (2018).

Third, and more fundamentally, it is stressed that the protection of States' territorial integrity is but one of various objectives of the UN Charter. To this must be added other competing objectives, such as the maintenance of international peace and security and the peaceful resolution of disputes between States. It has rightly been observed that, notwithstanding the many debates pertaining to the scope of the right of self-defence and the legality of 'humanitarian intervention', the outlawry of war is 'the biggest single change in the international order' of the 20th century and deserves some credit for the marked decline in inter-State armed conflict since 1945.[290] A significant number of territorial disputes have been submitted to judicial dispute settlement over the past decades.[291] Many others remain at present unresolved. One of many such examples is the *de facto* separation of the island of Cyprus into two parts, one of which – the self-proclaimed Turkish Republic of Northern Cyprus – has been under Turkish occupation ever since 1974.[292] The case of Cyprus serves as a striking illustration of the dilemma before us. Surely, one could argue that, inasmuch as 47 years have passed after the Turkish invasion and many thousands of Turkish troops remain on the island, the peaceful route has hit a dead end. But are we willing to accept that the military option is therefore again on the table? Having regard to the case of Cyprus as well as many other frozen conflicts around the globe, it is submitted that the goal of achieving international stability is better served by adopting a broad reading of the principle of the non-use of force (to settle territorial disputes), rather than by granting occupied States an open-ended right to self-defence with no time constraint. This is all the more so, of course, if it is accepted that this right can be exercised collectively – in other words, if a country can seek military support from others to recover occupied land. The risk of third-State involvement and spill-over effects, or even of the transformation of a conflict into a regional war, should not lightly be dismissed (as the far-reaching support of Turkey to Azerbaijan in the course of the 2020 conflict over Nagorno-Karabakh well illustrates[293]).

In addition to its aim of maintaining international peace and security, the Charter's preamble also stresses the fundamental human rights of individual human beings – including, first and foremost, the right to life -as well as the United Nations' prime desire, namely to 'save future generations from the scourge of war'. Ever since its adoption, the international legal order has moreover undergone a marked trend of 'humanization' – in the words of Theodor Meron,[294] with individuals' well-being and rights overtaking abstract State interests as its point of gravity. This trend is illustrated by the recently adopted General Comment No. 36 of the Human Rights Committee (HRC) on the right to life, seen as the 'supreme right',[295] in which the HRC draws a link between the right to life and the *jus ad bellum*. Thus, the HRC posits that "States parties engaged in acts of aggression as defined in international law, resulting in deprivation of life, violate ipso facto article 6 of the [International] Covenant [on Civil and Political Rights]".[296] And further: "States parties that fail to take all reasonable measures to settle their disputes by peaceful means might fall short of complying with their positive obligation to ensure the right to life."[297] In other words, apart from the conceptual arguments laid out in detail in the previous section, one must also be cognizant of the human cost at stake. Indeed, while situations of occupation often go hand in hand with individual human rights violations and a prolonged occupation may itself contravene the right of self-determination, inter-State armed hostilities inevitably result in – often widespread – loss of life, material destruction and internal displacement. The 44-day war between Armenia and Azerbaijan in 2020 claimed the lives of 5,000 soldiers and at least 140 civilians.[298] Many of the Armenian and Azeri soldiers that were killed on the battlefield were not even born when Armenia gained control over the Nagorno-Karabakh region in 1993-4. According to UNICEF, more than 130,000 civilians were displaced by the

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[290] *See*, e.g., STEVEN PINKER, ENLIGHTENMENT NOW: THE CASE FOR REASON, SCIENCE, HUMANISM AND PROGRESS 163-4 (2018). See also Oona A. Hathaway and Scott J. Shapiro, THE INTERNATIONALISTS: HOW A RADICAL PLAN TO OUTLAW WAR REMADE THE WORLD (2017).

[291] *See* e.g., Hugh Thirlway, *Territorial Disputes and their Resolution in the recent Jurisprudence of the International Court of Justice*, 31 LEIDEN JOURNAL OF INTERNATIONAL LAW 117 (2018).

[292] *See* e.g. *Cyprus,* RULAC, https://www.rulac.org/browse/countries/cyprus (last visited Jan. 27, 2021) ("Since 1974, Turkey has occupied the northern part of Cyprus").

[293] VIEWPOINT: RUSSIA AND TURKEY - UNLIKELY VICTORS OF KARABAKH CONFLICT, *supra* note 4.

[294] THEODOR MERON, THE HUMANIZATION OF INTERNATIONAL LAW 552 (2006).

[295] U.N. Human Rights Committee (HRC), General Comment No. 36, Article 6: Right to Life (Sep. 3, 2019), CPR/C/GC/35, ¶ 2.

[296] *Id.*, ¶ 70.

[297] *Id.*

[298] *See*, s*upra* note 6.

fighting.[299] Hundreds of homes and vital infrastructure such as schools and hospitals were destroyed, with unexploded weapons posing a continuing threat to life and limb in populated areas.[300] And while Azerbaijan recovered part of the occupied area from Armenia, and the parties agreed to the deployment of Russian peacekeepers, the ceasefire agreement merely 'refreezes' the new *status quo*, without bringing an end to the conflict over the region,[301] a goal that can be achieved only through further peaceful negotiations.

The 2020 war over Nagorno-Karabakh between Armenia and Azerbaijan has put the spotlight on important dilemma for international law (on the use of force) – and one that has been partly overlooked in legal doctrine: can a State use armed force to recover (unlawfully) occupied territory? The question seemingly finds us caught between the Scylla of injustice and the Charybdis of insecurity. According to the present authors, however, the protection of territorial integrity cannot be pursued at all costs or operate in a vacuum, disregarding other core values enshrined in the UN Charter, such as the peaceful settlement of disputes, the maintenance of peace and stability between nations, and the protection of fundamental human rights. In the end, in the context of occupation, the objective behind the prohibition of the use of force is better accomplished by protecting the territorial *status quo* instead of granting an open-ended right to self-defence with no time constraint. Or, as the Ethiopia-Eritrea Claims Commission rightly put it:

> 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.[302]

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[299] UNICEF, *Statement on one month of fighting in and beyond Nagorno-Karabakh* (Oct. 28, 2020), https://www.unicef.org/press-releases/unicef-statement-one-month-fighting-and-beyond-nagorno-karabakh.

[300] ICRC, *Nagorno-Karabakh conflict: Operational Update December 2020 – one month after ceasefire deal, deep humanitarian needs persist* (Dec. 15, 2020), https://www.icrc.org/en/document/nagorno-karabakh-conflict-operational-update-december-2020.

[301] *See*, e.g., Knoll-Tudor & Mueller, *supra* note 30 ('In the medium run, the *status quo* will be re-frozen under the tutelage of the Russian Federation.'; referring to a 'continuing limbo'); Anoush Baghdassarian & Cameron Pope, *Why the Nagorno-Karabakh Cease-Fire Won't End the Conflict*, Lawfare (Nov. 25, 2020), https://www.lawfareblog.com/why-nagorno-karabakh-cease-fire-wont-end-conflict; Miklasová, *supra* note 30 (noting that the status of Nagorno-Karabakh is not mentioned once in the 2020 ceasefire agreement).

[302] Eritrea-Ethiopia Claims Commission, *supra* note 131, ¶ 10.