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Military Action to Recover Occupied  
Land: Lawful Self-defense or  
Prohibited Use of Force? The 2020  
Nagorno-Karabakh Conflict  
Revisited

*Tom Ruys and Felipe Rodríguez Silvestre*

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# Military Action to Recover Occupied Land: Lawful Self-defense or Prohibited Use of Force? The 2020 Nagorno-Karabakh Conflict Revisited

*Tom Ruys\* and Felipe Rodríguez Silvestre\*\**

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## I. INTRODUCTION

On the morning of September 27, 2020, heavy fighting erupted along the Nagorno-Karabakh Line of Contact established in the aftermath of the 1988–1994 war over the region,<sup>1</sup> also referred to as the First Nagorno-Karabakh War. This latest episode of violence in the South Caucasus once again pitted the troops of Azerbaijan, supported by Turkey on this occasion,<sup>2</sup> 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,<sup>3</sup> resulting in substantial military and civilian casualties on both sides,<sup>4</sup> 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.<sup>5</sup> Notably, the agreement substantially modifies the existing territorial status quo resulting from the 1994 Bishkek Protocol ceasefire.<sup>6</sup>

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

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1. *Armenia and Azerbaijan Fight over Disputed Nagorno-Karabakh*, BBC NEWS (Sept. 27, 2020), <https://www.bbc.com/news/world-europe-54314341>.

2. Alexander Gabuev, *Viewpoint: Russia and Turkey – Unlikely Victors of Karabakh Conflict*, BBC NEWS, (Nov. 12, 2020), <https://www.bbc.com/news/world-europe-54903869>.

3. Robyn Dixon, *Azerbaijan's Drones Owned the Battlefield in Nagorno-Karabakh—and Showed Future of Warfare*, WASHINGTON POST (Nov. 11, 2020), [https://www.washingtonpost.com/world/europe/nagorno-karabakh-drones-azerbaijan-armenia/2020/11/11/441bcbd2-193d-11eb-8bda-814ca56e138b\\_story.html](https://www.washingtonpost.com/world/europe/nagorno-karabakh-drones-azerbaijan-armenia/2020/11/11/441bcbd2-193d-11eb-8bda-814ca56e138b_story.html).

4. *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 5,000 soldiers and over 140 civilians lost their life during the 2020 confrontations).

5. Permanent Rep. of the Russian Federation to the U.N., Letter dated Nov. 10, 2020 from the Permanent Rep. of the Russian Federation to the United Nations addressed to the President of the Security Council, Annex, U.N. Doc. S/2020/1104 (Nov. 11, 2020), [https://reliefweb.int/sites/reliefweb.int/files/resources/S\\_2020\\_1104\\_E.pdf](https://reliefweb.int/sites/reliefweb.int/files/resources/S_2020_1104_E.pdf) [hereinafter Statement by President of the Republic of Azerbaijan, Prime Minister of the Republic of Armenia, and President of the Russian Federation].

6. See Bishkek Protocol (May 5, 1994), <https://peacemaker.un.org/sites/peacemaker.un.org/files/Bishkek%20Protocol.pdf>; see also Bishkek Ceasefire Agreement (May 11, 1994), <https://www.peaceagreements.org/viewmasterdocument/990>.

Armenia and Azerbaijan accusing each other of triggering hostilities.<sup>7</sup> Still, the events raise a fundamental question of the *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-defense to justify military operations aimed at recovering its land? Put differently: can unlawful occupation be regarded as a “continuing” armed attack permitting recourse to self-defense at any point in time—even 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, for example, by the UN General Assembly and the European Court of Human Rights.<sup>8</sup> Assuming that the region belongs to Azerbaijan and was (and partly remains) unlawfully occupied by Armenia, could Azerbaijan effectively claim self-defense 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-defense 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 article is not to pass judgment on Armenia and Azerbaijan’s conduct 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. In Section II we provide a summary of the Nagorno-Karabakh conflict. In Section III we preliminarily examine—and discard—the suggestion that efforts to recover territory subject to prolonged occupation through armed force are somehow excluded from the scope of the *jus ad bellum* because they are governed exclusively by IHL or

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

8. G.A. Res. 62/243 (Apr. 25, 2008); *Chiragov v. Armenia*, 2015-III Eur. Ct. H.R. 135, ¶ 186 (2015).

because of their supposedly “intra-State” nature. In Section IV 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. Specifically, we look at the impact of the immediacy requirement (as a condition for the lawful exercise of self-defense) 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 and the role of armistice and ceasefire agreements. Section V 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 VI 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.

## II. 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,<sup>9</sup> a conflict often referred to as frozen,<sup>10</sup> albeit one prone to rekindle periodically and one riddled with complex ethnic and political ramifications.

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 the Nagorno-Karabakh Auton-

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9. 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).

10. 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/>.

onomous Oblast (NKAO) within the territory of the newly formed Soviet Socialist Republic of Azerbaijan.<sup>11</sup> While the region remained relatively calm under Soviet rule, tensions fueled by the discontent of the Karabakh Armenians living in NKAO began to escalate. They reached a boiling point when the USSR started to collapse, and its constituent States were gaining independence. After unsuccessfully attempting to secede from Azerbaijan and join Armenia to no avail in 1988,<sup>12</sup> the “Nagorno-Karabakh Republic” (NKR), later renamed the “Republic of Artsakh,” declared its independence from Azerbaijan on January 6, 1992, after holding a referendum in which 99.9 percent of the participants voted in favor of secession. (The Azeri minority living in the region boycotted the referendum.<sup>13</sup>)

After more than six years of hostilities in Nagorno-Karabakh and its adjacent regions, leaving an estimated 30,000 fatalities and more than one million refugees and internally displaced persons,<sup>14</sup> hostilities came to an end in May 1994 after the mediation of Russia,<sup>15</sup> under the auspices of the Organization for Security and Co-operation in Europe (OSCE) Minsk Group,<sup>16</sup> with the signing of a ceasefire agreement between representatives of Armenia, Azerbaijan, and the NKR.<sup>17</sup>

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*.<sup>18</sup>

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11. Heiko Krüger, *Nagorno-Karabakh*, in SELF-DETERMINATION AND SECESSION IN INTERNATIONAL LAW 214, 215 (Christian Walter, Antje von Ungern-Sternberg & Kavus Abushov eds., 2014).

12. See *Chiragov*, 2015-III Eur. Ct. H.R. ¶ 14.

13. *Id.* ¶ 17.

14. 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.”).

15. See *Chiragov*, 2015-III Eur. Ct. H.R. ¶ 24.

16. The OSCE Minsk Group has sustained long-standing international mediation attempts since its inception in 1992. See *Minsk Group*, OSCE, <https://www.osce.org/minsk-group/108306> (last visited Mar. 22, 2021).

17. Bishkek Ceasefire Agreement, *supra* note 6.

18. Anne Peters, *The Principle of Uti Possidetis Juris: How Relevant Is It for Issues of Secession?*, in SELF-DETERMINATION AND SECESSION IN INTERNATIONAL LAW, *supra* note 11, at 95, 110 (“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 (updated May 2013),

Yet, despite its unambiguous legal status, in 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 that 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 and requesting the withdrawal of troops from the occupied territories of Azerbaijan.<sup>19</sup> While the resolutions did not refer explicitly to Armenia as an occupying force, it was heavily implied in their wording and context. Furthermore, the General Assembly passed a resolution in 2008 reaffirming Armenia's occupation of Nagorno-Karabakh and demanding the immediate withdrawal of its troops from the region.<sup>20</sup> Other international organizations voiced the same appraisal of the situation, including, for instance, the Parliamentary Assembly of the Council of Europe in 2005<sup>21</sup> and the European Parliament in 2010.<sup>22</sup>

In practical terms, while the self-proclaimed Republic of Artsakh has carried out the day-to-day administration of Nagorno-Karabakh since 1994, Armenia continued to exercise effective control over the region until the outbreak of the 2020 conflict.<sup>23</sup> 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 Armenia's military, political,

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<https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e2073?prd=EPIL>.

19. S.C. Res. 822 (Apr. 30, 1993); S.C. Res. 853 (July 29, 1993); S.C. Res. 874 (Oct. 14, 1993); S.C. Res. 884 (Nov. 14, 1993).

20. G.A. Res. 62/243 (Apr. 25, 2008). It is worth noting, however, that the resolution was passed with a recorded vote of thirty-nine in favor, seven against, and one hundred abstentions.

21. 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>.

22. European Parliament, Resolution of 20 May 2010 on the Need for an EU Strategy for the South Caucasus, O.J. (C 161 E/20), [https://www.europarl.europa.eu/doceo/document/TA-7-2010-0193\\_EN.html](https://www.europarl.europa.eu/doceo/document/TA-7-2010-0193_EN.html).

23. See *Military Occupation of Azerbaijan by Armenia*, RULAC, <https://www.rulac.org/browse/conflicts/military-occupation-of-azerbaijan-by-armenia#collapse3accord> (last visited Mar. 2, 2021).

and economic support.<sup>24</sup> Armenian and NKR military forces have been described as “highly integrated,” with Armenia’s involvement being considered as the decisive factor behind the success of the continuous occupation of the region.<sup>25</sup> 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.”<sup>26</sup> In light of the foregoing, authors have described the Republic of Artsakh as a “puppet regime” or a de facto Armenian province.<sup>27</sup>

The 2020 conflict and its outcome further underscored the inter-State character of the Nagorno-Karabakh territorial dispute. Notably, the agreement that put an end to hostilities on November 10, 2020, was signed exclusively between Armenia, Azerbaijan, and Russia, without the NKR’s participation, providing further proof of the latter’s lack of sufficient autonomy to be considered an independent actor in the current conflict.<sup>28</sup>

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,<sup>29</sup> yet, for over twenty-five years, the prevailing state of affairs was one of stability. Hence, no substantial changes to 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

24. Krüger, *supra* note 9, at 228, Melnyk, *supra* note 18.

25. *Chiragov v. Armenia*, 2015-III Eur. Ct. H.R. 135, ¶ 180 (2015); INTERNATIONAL CRISIS GROUP, NAGORNO-KARABAKH: VIEWING THE CONFLICT FROM THE GROUND 10 (2005).

26. *Chiragov*, 2015-III Eur. Ct. H.R. ¶ 186.

27. See Melnyk, *supra* note 18.

28. 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/>.

29. Grant, *supra* note 10, at 381.



Nagorno-Karabakh and reclaimed the city of Shusha, an important enclave inside the latter, only ten kilometers 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.<sup>30</sup>

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-defense—and whether it might again use force in an exercise of self-defense 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.

### III. MILITARY ACTION TO RECOVER OCCUPIED TERRITORY— A MATTER GOVERNED BY THE LAW ON THE USE OF FORCE?

#### A. *A Question of the Jus in Bello Only?*

In contemporary international law, the *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,<sup>31</sup> 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 and the protection of persons *hors de combat*.

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30. See Statement by President of the Republic of Azerbaijan, Prime Minister of the Republic of Armenia, and President of the Russian Federation, *supra* note 5. 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, and internally displaced persons and refugees are to return to the territory of Nagorno-Karabakh and its adjacent districts under the oversight of the U.N. High Commissioner for Refugees.

31. 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).

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.<sup>32</sup> Put differently, both sets of rules were understood to operate at different stages to the exclusion of the other,<sup>33</sup> before and after force had been carried out. Thus, the traditional conception of the relationship between the regimes suggested that once the *jus in bello* entered the fray as the applicable normative framework, the *jus ad bellum* was no longer relevant for the conflict and ceased to operate.<sup>34</sup>

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*.<sup>35</sup> This 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<sup>36</sup>).

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 the *jus ad bellum* to be deemed lawful. As Christopher 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,<sup>37</sup> since 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. The position asserting that

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32. 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).

33. Christopher Greenwood, *The Relationship Between Ius ad Bellum and Ius in Bello*, 9 REVIEW OF INTERNATIONAL STUDIES 221, 221 (1983).

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

35. The main proponent of this approach is arguably Yoram Dinstein. See YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE 61–64 (6th ed. 2017). But see also: LONGOBARDO, *supra* note 34, at 130; Michael N. Schmitt, *Iraq (2003 Onwards)*, in INTERNATIONAL LAW AND THE CLASSIFICATION OF CONFLICTS 356, 364–65 (Elizabeth Wilmshurst ed., 2012).

36. See, e.g., Convention (I) for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field art. 2, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31.

37. Greenwood, *supra* note 33, at 221.

only the initial recourse to force leading to occupation falls under the realm of the *jus ad bellum*, leaving the rest of the hostilities in the exclusive hands of the *jus in bello*, is a minority position that is outdated in modern international law. Today it is generally accepted in legal doctrine that the *jus ad bellum* and *jus in bello* are complementary regimes<sup>38</sup> and, depending on the type of armed conflict, apply simultaneously<sup>39</sup> instead of in sequence.<sup>40</sup> This position also finds support in the International Court of Justice's (ICJ) *Nuclear Weapons* advisory opinion.<sup>41</sup> Accordingly, while the legality of the initial use of force is dealt with exclusively by the *jus ad bellum*, once hostilities have commenced, they will be subject cumulatively<sup>42</sup> to the provisions of both legal frameworks.<sup>43</sup>

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. At the same time, they must observe the existing rules on methods and means of warfare and the law of occupation,<sup>44</sup>

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38. KEIICHIRO OKIMOTO, *THE DISTINCTION AND RELATIONSHIP BETWEEN JUS AD BELLUM AND JUS IN BELLO* 31 (2011).

39. 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 33, at 221.

40. *See* Greenwood, *supra* note 33, 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.”).

41. 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”).

42. 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, 614–16 (1999); 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).

43. 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 33, at 222.

44. Okimoto, *supra* note 42, at 63.

essential components of IHL. Hence, armed force initially justified under the *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.<sup>45</sup> Conversely, a State entitled to use force under the *jus ad bellum* may also breach international law, for instance, if it employs means and methods of warfare forbidden under the *jus in bello*.<sup>46</sup> A further direct consequence of the cumulative, yet independent,<sup>47</sup> application of both the *jus ad bellum* and *jus in bello* to an armed conflict is that the legality of an act under one regime does not render it as lawful in the other.<sup>48</sup>

In the specific context of belligerent occupation, the dual application of the *jus ad bellum* and IHL is particularly present throughout its entire duration.<sup>49</sup> While the legality of the conduct leading to occupation is determined solely by the *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.<sup>50</sup>

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 that endure for extended periods 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.<sup>51</sup> In these cases of prolonged occupation, which are the type of situations which inform the current study, it has been suggested that

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45. Moussa, *supra* note 39, at 968; Greenwood, *supra* note 33, 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 & Robert Lawless eds., 2020).

46. 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.

47. Koutroulis, *supra* note 43, at 913; Okimoto, *supra* note 42, at 74.

48. D'Alessandra & Heinsch, *supra* note 31, at 472; Koutroulis, *supra* note 43, at 910; Moussa, *supra* note 39, at 968; Okimoto, *supra* note 42, at 50.

49. Rotem Giladi, *The Jus ad Bellum/Jus in Bello Distinction and the Law of Occupation*, 41 ISRAEL LAW REVIEW 246, 249 (2012).

50. See Eyal Benvenisti, *Occupation, Belligerent*, MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (updated May 2009), <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e359>.

51. Kenneth Watkin, *Use of Force During Occupation: Law Enforcement and Conduct of Hostilities*, 94 INTERNATIONAL REVIEW OF THE RED CROSS 267, 277 (2012).

occupation outlives the international armed conflict that originated it in the first place.<sup>52</sup> As Marko 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.<sup>53</sup>

Against this, Marco Longobardo argues that “[e]ven if actual hostilities have diminished down, the situation of occupation inherently preserves the existence of an armed conflict in the occupied territory.”<sup>54</sup> Alternatively, other authors have claimed that because belligerent occupation is necessarily the result of an armed conflict, both situations are mutually exclusive, and once hostilities restart, occupation comes to an end.<sup>55</sup>

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 preceding is 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 the *jus ad bellum*, notwithstanding the ongoing Israeli occupation of Arab land in the wake of the Six-Day War.<sup>56</sup> 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 UN Charter rules governing the use of force,

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52. Milanovic & Hadzi-Vidanovic, *supra* note 32, at 301.

53. Marko 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).

54. LONGOBARDO, *supra* note 34, at 126.

55. Adam Roberts, *Occupation, Military, Termination of*, MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (updated June 2009), <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1927>.

56. See discussion *infra* Section IV(B)(2).

instead of simply hiding behind the existence of an international armed conflict flowing from the occupation of the Golan Heights.<sup>57</sup> The same is true for the military confrontation between Armenia and Azerbaijan in 2020: both countries invoked the right of self-defense, respectively blaming the other for initiating the hostilities.<sup>58</sup>

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 the *jus ad bellum*, that is, if the military operation qualifies as a measure of self-defense both necessary and proportionate to the armed attack to which it is responding. Additionally, the simultaneous 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 undertaken 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 an 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-defense in the context of occupation will be assessed in the subsequent Sections.

B. *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,<sup>59</sup> as has been

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57. See, e.g., Permanent Rep. of Israel to the U.N., Letter dated May 23, 2013 from the Permanent Rep. of Israel to the United Nations addressed to the U.N. Secretary-General and the President of the Security Council, U.N. Doc. S/2013/314 (May 23, 2013); Permanent Rep. of Israel to the U.N., Letter dated July 16, 2013 from the Permanent Rep. of Israel to the United Nations addressed to the U.N. Secretary-General and the President of the Security Council, U.N. Doc. S/2013/425 (July 17, 2013).

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

59. CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE 9–10 (2018).

consistently upheld by the ICJ.<sup>60</sup> Article 2(4) of the UN Charter<sup>61</sup> 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-defense in response to an armed attack against a member of the United Nations,<sup>62</sup> thus confirming that States are the sole subjects of international law and, as such, are bound and protected by the prohibition of the use of force and, consequently, entitled to the right of self-defense as a temporary measure of self-help. It follows that only conduct amounting to armed force perpetrated by a State against another State will trigger the provisions laid down under the *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.<sup>63</sup> 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 framework.<sup>64</sup>

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 since the operation is limited to its own territory? A number of observations are in order.

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60. See *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, ¶¶ 146–47 (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).

61. U.N. Charter art. 2, ¶ 4.

62. *Id.* art. 51.

63. Albrecht Randelzhofer & Oliver Dörr, *Article 2(4)*, in *THE CHARTER OF THE UNITED NATIONS: A COMMENTARY* 200, 214 (Bruno Simma et al. eds., 2012).

64. OLIVIER CORTEN, *LE DROIT CONTRE LA GUERRE [THE LAW AGAINST WAR]* 227 (2020); Oliver Dörr, *Use of Force, Prohibition of*, *MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* (updated Aug. 2019), <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e427>; DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENCE*, *supra* note 35, at 89–90; Some authors have nonetheless argued (*de lege ferenda*) in favor of an “internal *jus ad bellum*.” See, e.g., 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*, *supra* note 45, at 169.

First, several authors take the view that the prohibition on the use of force is not limited to inter-State relations *sensu stricto* but also extends to the relationship between a State and a breakaway region that has established itself as a so-called “*de facto* regime.”<sup>65</sup> Some adopt a restrictive approach, accepting that the *jus ad bellum* is not applicable in relations between a State and a non-State entity,<sup>66</sup> unless the non-State political entity manages to establish itself as a stabilized *de facto* regime,<sup>67</sup> with autonomous, effective control over territory for a sustained period of time, or the entity can be assimilated to a State.<sup>68</sup> The General Assembly’s 1974 Definition of Aggression<sup>69</sup> is often cited to substantiate this claim.<sup>70</sup> 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.”<sup>71</sup>

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,<sup>72</sup> including South Ossetia and Abkhazia, which were characterized in the report as an “entity short of statehood” and a “state-like entity,” respectively.<sup>73</sup> According to the IIFFMCG, the existence of agreements of different legal

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65. JOCHEN FROWEIN, DAS DE FACTO-REGIME IM VÖLKERRECHT: EINE UNTERSUCHUNG ZUR RECHTSTELLUNG NICHTANERKANNTER STAATEN UND ÄHNLICHER GEBILDE [THE DE FACTO REGIME IN INTERNATIONAL LAW: AN INVESTIGATION ON THE LEGAL LAW IN UNRECOGNIZED STATES AND SIMILAR SITUATIONS] 52–66 (1968); Jochen A. Frowein, *De Facto Regime*, ¶¶ 4–5, MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (updated Mar. 2013), <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1395>. See also Stefan Oeter, *De facto Regimes in International Law*, in UNRECOGNISED SUBJECTS IN INTERNATIONAL LAW 59, 70–71 (Wladyslaw Czaplin-ski & Agata Kleczkowska eds., 2019).

66. CORTEN, *supra* note 64, 264.

67. Randelzhofer & Dörr, *supra* note 63, 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 also FROWEIN, *De Facto Regime*, *supra* note 65.

68. CORTEN, *supra* note 64, at 263.

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

70. See FROWEIN, *De Facto Regime*, *supra* note 65; 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).

71. G.A. Res. 3314 (XXIX), *supra* note 69, art. 1.

72. 2 REPORT OF THE INDEPENDENT INTERNATIONAL FACT-FINDING MISSION ON THE CONFLICT IN GEORGIA 238–42 (2009).

73. *Id.* at 229.



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 Articles 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 either of those provisions to justify their actions during or after the hostilities.<sup>74</sup> 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 Articles 2(4) and 51 must be understood as incorporated into an agreement that includes actors other than States as signatories.<sup>75</sup> 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,<sup>76</sup> suggesting that the report's conclusions on this subject must be considered at most as *lex ferenda*.<sup>77</sup> As to Article I of the Definition of Aggression, and notwithstanding the General Assembly's 1974 resolution's importance, it may be observed that the resolution did not extend the applicability of Articles 2(4) and 51 to non-State entities, as that could only be accomplished through a modification of the text of the UN Charter or a change in customary international law.<sup>78</sup>

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.<sup>79</sup> The reason is that the mere fact that a State uses armed force

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74. CORTEN, *supra* note 64, at 262.

75. Henderson & Green, *supra* note 70, at 133.

76. CORTEN, *supra* note 64, at 263.

77. Henderson & Green, *supra* note 70, at 138.

78. Dapo Akande, *The Diversity of Rules on the Use of Force: Implications for the Evolution of the Law*, EJIL:TALK! (Nov. 11, 2019), <https://www.ejiltalk.org/the-diversity-of-rules-on-the-use-of-force-implications-for-the-evolution-of-the-law/>.

79. The counterargument 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 v. Armenia*, 2015-III Eur. Ct. H.R. 135, ¶ 186 (2015).

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 manifestations.<sup>80</sup> Thus, when State A invites foreign troops of State B onto its soil, and they overstay their welcome after the invitation has been retracted, a subsequent attempt by State A to forcibly expel these troops is not a question of simple law enforcement, but a matter for the *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.<sup>81</sup>

*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 because every State is entitled to deploy forces all across its sovereign territory, such a viewpoint ignores the 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 a State<sup>82</sup> and is listed as an act of aggression under Article 3(a) of the 1974 UN General Assembly Definition of Aggression.<sup>83</sup> 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.<sup>84</sup> It will usually involve the deployment of ground forces by the occupying power in

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80. 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, 171 (2014).

81. 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-defense enshrined in Article 51 U.N. Charter. U.S. NAVY, U.S. MARINE CORPS & U.S. COAST GUARD, NWP 1-14M/MCTP 11-10B/COMDTPUB P5800.7A, THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS § 4.4.3 (2017); ROYAL AUSTRALIAN AIR FORCE, AA 1003, OPERATIONS LAW OF RAAF COMMANDERS ¶ 2.25 (2004). (See Ruys, *supra* note 80 at 185 (with references).

82. TOM RUYSS, 'ARMED ATTACK' AND ARTICLE 51 OF THE UN CHARTER: EVOLUTIONS IN CUSTOMARY LAW AND PRACTICE 5 (2010).

83. G.A. Res. 3314 (XXIX), art. 3(a), *supra* note 71.

84. See Benvenisti, *supra* note 50.

the occupied territory.<sup>85</sup> Belligerent occupation in the legal sense is necessarily linked to the existence of an inter-State conflict between two or more States.<sup>86</sup> Thus, military action to recover territory occupied by another State falls unequivocally under the prohibition established in Article 2(4). Its legality will ultimately depend on whether it can be justified as an act of self-defense or has been authorized by the Security Council. The fact that a State only uses force within its own territory 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.<sup>87</sup>

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, 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.”<sup>88</sup>

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

#### IV. MILITARY ACTION TO RECOVER OCCUPIED TERRITORY—APPLYING THE LAW ON THE USE OF FORCE

##### A. *Applying the Right of Self-defense*

##### 1. Self-defense and the Principle of Immediacy

Let us take a closer look at the *jus ad bellum*. As a first point, recall that under customary international law any exercise of self-defense is subject to the so-

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85. 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).

86. YORAM DINSTEIN, *THE INTERNATIONAL LAW OF BELLIGERENT OCCUPATION* 37 (2d ed. 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).

87. Milanovic, *supra* note 53, at 384.

88. Azerbaijan U.N. Letter dated Sept. 27, 2020, *supra* note 7.

called “immediacy” requirement. Immediacy—sometimes regarded as part of the broader “necessity” requirement<sup>89</sup> and sometimes as a self-standing requirement under customary international law<sup>90</sup>—requires close proximity in time between the start of an armed attack and the response in self-defense. It is generally accepted in legal doctrine<sup>91</sup> and also finds support in State practice<sup>92</sup> and case-law.<sup>93</sup> The immediacy requirement primarily serves to distinguish between lawful acts of self-defense, on the one hand, and (unlawful) punitive reprisals that are not justified by any “necessity” to act in self-defense on the other hand. One interesting issue of contention in this context is whether self-defense 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 arose in the *Oil Platforms* case.<sup>94</sup> While the Court did not directly tackle the issue, customary practice and legal doctrine effectively indicate that if a State has been subjected, not to an isolated attack, but to a series

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89. See James A. Green, *The Ratione Temporis Elements of Self-Defence*, 2 JOURNAL ON THE USE OF FORCE AND INTERNATIONAL LAW 97, 108 (2015); RUY, ‘ARMED ATTACK,’ *supra* note 82, at 99.

90. See DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE, *supra* note 35, at 252.

91. See, e.g., Green, *supra* note 89, at 108. (regarding this as “uncontroversial”); CORTEN, *supra* note 64, at 765–67; DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE, *supra* note 35, at 252; RUY, ‘ARMED ATTACK,’ *supra* note 82, at 99.

92. See, e.g., U.N. GAOR 27th Sess., 1664th mtg. ¶ 25, U.N. Doc. S/PV 1644 (Feb. 27–28, 1972); U.N. GAOR 19th Sess., 1107th mtg. ¶ 17, U.N. Doc. S/PV 1107 (Apr. 3, 1964); Green, *supra* note 89, at 109.

93. Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, ¶ 237 (June 27).

94. Iran argued against the permissibility of post facto self-defense, 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 Iran, ¶ 7.47 (Mar. 10, 1999), <https://www.icj-cij.org/public/files/case-related/90/8630.pdf> [hereinafter Reply and Defence to Counter-claim]. The United States objected vehemently, arguing that Iran’s narrow understanding of the immediacy requirement “would render self-defense 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, ¶ 4.29 (June 22, 1997), <https://www.icj-cij.org/public/files/case-related/90/8632.pdf>.

of armed attacks, and if there is considerable likelihood that more attacks will imminently follow, then self-defense is not automatically excluded when a “pin-prick” attack is factually over.<sup>95</sup>

While the immediacy requirement primarily serves to exclude punitive reprisals, authors have also stressed its broader importance in preventing inter-State hostilities that are re-opened much later in time without the occurrence of a new “armed attack” and without being subjected to a renewed application of the proportionality and necessity criteria.<sup>96</sup> In the words of Oscar 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.”<sup>97</sup>

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 that takes into account the circumstances of each case.<sup>98</sup> In particular, practice suggests that the requirement should leave sufficient leeway, for instance, to conduct investigations (who was responsible for the attack?), to exhaust peaceful means, or to take military preparations prior to the actual exercise of self-defense. The last two factors may be of particular importance in situations of large-scale territorial incursions (potentially) resulting in occupation or annexation. Thus, in 1982 when Argentinian forces invaded the contested Falkland/Malvinas Islands, third States implicitly agreed that the passage of several weeks before the United Kingdom initiated active military operations against Argentina did not of itself deprive it of its right of self-defense.<sup>99</sup> 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 ability to invoke the right of self-defense if either (i) it refrains from

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95. RUY, ‘ARMED ATTACK,’ *supra* note 82, at 106; CORTEN, *supra* note 64, at 767.

96. CONSTANTINOS YIALLOURIDES ET AL., THE USE OF FORCE IN RELATION TO SOVEREIGNTY DISPUTES OVER LAND TERRITORY ¶¶ 152, 157, 161 (2018).

97. Oscar Schachter, *The Lawful Resort to Unilateral Use of Force*, 10 YALE JOURNAL OF INTERNATIONAL LAW 291, 292 (1984).

98. In this sense, see CORTEN, *supra* note 64, at 768; DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE, *supra* note 35, at 252, 287–88; RUY, ‘ARMED ATTACK,’ *supra* note 82, at 100; Green, *supra* note 89, at 109–11 (stressing the need for a “reasonable temporal proximity”).

99. 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, WAR, AGGRESSION AND SELF-DEFENCE, *supra* note 35, at 288.

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) it responds with counter-force, but ultimately fails to repel the invading forces from its territory before a prolonged cessation of active hostilities materializes.<sup>100</sup> In both cases, the underlying concept is that the right of self-defense ceases to apply when a new territorial status quo is established whereby the occupying State peacefully administers the territory concerned for a prolonged period—that is, until the occupying State commits a new armed attack.<sup>101</sup> One might, of course, critique the uncertainty resulting from the fact that no clear time limit can be determined.<sup>102</sup> Schachter states, however,

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100. YIALLOURIDES ET AL., *supra* note 96, ¶ 158; Quincy Wright, *The Goa Incident*, 56 AMERICAN JOURNAL OF INTERNATIONAL LAW 617, 623–24 (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).

101. YIALLOURIDES ET AL., *supra* note 96, ¶¶ 158, 163. With 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, WAR, AGGRESSION AND SELF-DEFENCE, *supra* note 35, at 261–63. 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-defense. For the contrary position, see YIALLOURIDES ET AL., *supra* note 96, ¶ 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 IV(D) on the impact of the law of State responsibility and the concept of contributory fault. See also Knoll-Tudor & Mueller, *supra* note 28 (drawing attention, *inter alia*, to the requirement of immediacy and stressing that “[c]ontinued occupation cannot be equated with ‘continued attack’”).

102. See further on this point *infra* Section IV(C).

[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.<sup>103</sup>

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-defense cannot be extended indefinitely. Otherwise, the *ratione temporis* dimension of self-defense would be rendered meaningless in this context.

## 2. 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 counterargument 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-defense for as long as the occupation continues—even if this entails challenging a years-long territorial status quo.<sup>104</sup> This argument has occasionally been put forward in legal doctrine,<sup>105</sup> including in connection with the 2020 Nagorno-Karabakh conflict.<sup>106</sup> As we will see in Section V 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-defense is excluded pursuant to the principle of immediacy, Iran juxtaposed situations of occupation to other forms of attack, asserting that “[i]n the case

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103. Schachter, *supra* note 97, at 292.

104. CORTEN, *supra* note 64, at 766–67.

105. LONGOBARDO, *supra* note 34, at 121; Henry, *supra* note 99, at 375. More ambiguous, see, e.g., Green, *supra* note 89, at 110 (suggesting that the acceptance of the British response twenty-three 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”).

106. See Akande & Tzanakopoulos, *supra* note 28; Olivier Corten, Vaios Koutroulis & François Dubuisson, *Le Conflit au Haut-Karabakh et le Droit International* [*The Nagorno-Karabakh Conflict and International Law*] YOUTUBE (Oct. 15, 2020), [https://www.youtube.com/watch?v=eGE7o\\_sBc8w&ab\\_channel=CentrededroitinternationalULB](https://www.youtube.com/watch?v=eGE7o_sBc8w&ab_channel=CentrededroitinternationalULB) (comments by Olivier Corten).

of the invasion of another State's territory, in principle an attack still exists as long as the occupation continues."<sup>107</sup>

In support of this reading, authors<sup>108</sup> primarily refer to the illustrative list of "acts of aggression" in Article 3 of the 1974 Definition of Aggression,<sup>109</sup> a list integrated in full in Article 8*bis*(2) of the Rome Statute of the International Criminal Court.<sup>110</sup> Specifically, subparagraph (a) identifies as one "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."<sup>111</sup> 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<sup>112</sup> further draw attention to Article 14(2) of the International Law Commission's Articles on State Responsibility, 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."<sup>113</sup> The International Law Commission's commentary highlights various examples of 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."<sup>114</sup>

At the same time—and leaving aside, for the time being, relevant State practice<sup>115</sup>—the above arguments supporting occupation as a continuing armed attack call for some observations.

107. Reply and Defence to Counter-claim, *supra* note 94, ¶ 7.47.

108. Akande & Tzanakopoulos, *supra* note 28; Corten, Koutroulis & Dubuisson, *supra* note 106.

109. G.A. Res. 3314 (XXIX), *supra* note 71, art. 3.

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

111. *Id.* art. 8*bis*(2)(a); G.A. Res. 3314 (XXIX), *supra* note 71, art. 3(a).

112. CORTEN, *supra* note 64, at 766; LONGOBARDO, *supra* note 34, at 121.

113. G.A. Res. 56/83, annex, art. 14(2), Responsibility of States for Internationally Wrongful Acts (Jan. 28, 2002) [hereinafter ARSIWA].

114. Int'l Law Comm'n, *Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries*, 56 U.N. GAOR Supp. No. 10, at 30, 60, ¶ 3, U.N. Doc. A/56/10 (2001), reprinted in [2001] 2 Y.B. Int'l L. Comm'n 30, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Part 2) [hereinafter ILC Commentary].

115. See *infra* Section V.



First, the reference to the notion of a “continuing” breach under Article 14 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.”<sup>116</sup> Consider, for instance, the State of Colnago unlawfully launching territorial incursions into the State of Pinarello, resulting in an international armed conflict between the two. In that conflict, Colnago kills several Pinarello troops and takes hundreds of prisoners of war. In addition, it takes possession of numerous valuable works of art from Pinarello, which are taken to Colnago. Let us assume that, when the guns finally fall silent, Colnago continues to detain numerous prisoners of war and refuses to return the stolen works of art. Certainly, the fact that these POWs and artworks remain in the hands of Colnago can be seen as a continuing consequence of Colnago’s unlawful resort to force—which may moreover entail (a) separate breach(es) of international (humanitarian) law<sup>117</sup>—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 International Law Commission’s Articles on State Responsibility commentary appears to affirm.<sup>118</sup> Even so, this does not necessarily imply that there is also a continuing *armed attack* within the meaning of Article 51 of the UN Charter.

Indeed, the notions of “use of force” and “armed attack” have different meanings and functions. The use of force 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

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116. 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* 254–64 (2013).

117. Such as if prisoners of war are not returned “without delay” upon the end of the conflict in accordance with Article 118 of the Third Geneva Convention. Convention (III) Relative to the Treatment of Prisoners of War art. 118, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135. In relation to the unlawfulness arising from the seizure of works of art, see Rule 40. Respect for Cultural Property, ICRC, [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule40](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule40).

118. *But see*, however, *infra*, on the *travaux* of the Definition of Aggression, where this issue was subject to discussion.

whether a victim State can exercise its right of self-defense. 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), Articles on State Responsibility, is ill-suited for examining the temporal scope of an armed attack.

Second, as is well-known, the language of Article 51 refers to self-defense “if an armed attack occurs.” This language—specifically the word “occurs,” as well as the notion of an “attack”—suggests a more or less instantaneous event or a series of events happening at a particular point in time, i.e., the initial invasion resulting in occupation, rather than a prolonged state of affairs characterized by an absence of active hostilities. Put differently, it seems counter-intuitive to hold that an “attack” is “occurring” when a State continuously and peacefully administers an area for a period of years—even if unlawfully. This textual argument is, however, objected to by some,<sup>119</sup> and is admittedly not dispositive on its own.

Third, caution is needed in relying on Article 3 of the General Assembly’s Definition of Aggression to define the concept of armed attack under Article 51 of the UN Charter. On the one hand, many UN members admittedly saw the drafting of the Definition of Aggression as an exercise in circumscribing the scope of lawful self-defense.<sup>120</sup> 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) of the Vienna Convention on the Law of Treaties<sup>121</sup>—was further embraced in the *Nicaragua* judgment, where the ICJ famously relied on Article 3(g) of the Definition of Aggression resolution to conceptualize self-defense in situations of indirect military aggression.<sup>122</sup> On the other hand, one cannot overlook the fact that many States involved in the work of the Fourth Special Committee on the Question of Defining Aggression saw the resolution as an attempt to elucidate the notion of act of aggression for purposes of determining the Chapter

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119. See Akande & Tzanakopoulos, *supra* note 28.

120. For instance, the Thirteen-Power proposal submitted by Colombia, Cyprus, Ecuador, Ghana, Guyana, Haiti, Iran, Madagascar, Mexico, Spain, Uganda, Uruguay, and Yugoslavia included a definition of armed attack as the most serious and dangerous form of aggression. See U.N. Doc. A/AC.134/L.16.

121. Vienna Convention on the Law of Treaties art. 31(3), May 23, 1969, 1155 U.N.T.S. 331

122. Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, ¶ 195 (June 27).

VII powers of the Security Council under Article 39<sup>123</sup>—moreover, doing so 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.”<sup>124</sup> A majority in legal doctrine would seem to agree that the 1974 resolution does not *directly* restrict or expand the scope for lawful self-defense.<sup>125</sup> As one of the present authors has noted elsewhere, the Definition of Aggression may well provide a useful point of departure to indirectly examine the scope of self-defense, yet it is certainly not the final word.<sup>126</sup> In particular, due consideration must be paid to other elements, including the *travaux* of the resolution and customary practice.<sup>127</sup>

Upon closer scrutiny, the Fourth Special Committee discussions preceding the inclusion of the reference to “occupation” in Article 3(a) of the UNGA Definition of Aggression indicate that the debate focused mostly on whether occupation ought to be seen as an act of aggression or a *consequence* thereof, rather than whether occupation would justify the use of self-defense to recover occupied land. Thus, U.S. delegate (and later ICJ judge) Stephen Schwebel defended the absence of any reference to occupation in the Six-Power Draft, arguing,

[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.<sup>128</sup>

This position was challenged by several countries who expressly disagreed that occupation and annexation were mere consequences of aggression but

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123. U.N. Charter art. 39.

124. G.A. Res. 3314 (XXIX), *supra* note 71, art. 6.

125. See RUYSS, “ARMED ATTACK,” *supra* note 82, at 137 (with references in note 58).

126. See *id.* at 138–39.

127. *Id.*

128. Special Committee on the Question of Defining Aggression, Summary Records of the Sixty-Seventh to Seventy-Eighth Meetings, U.N. Doc. A/AC.134/SR.67-78, at 66 (Oct. 19, 1970). 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.” *Id.*

should instead be regarded as acts of aggression of an indefinite or permanent character in and of themselves.<sup>129</sup> 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-defense.<sup>130</sup> 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-defense was consequently not included . . . .”<sup>131</sup> 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.<sup>132</sup>

Ultimately, however, hardly any State drew a link between the qualification of occupation as an act of aggression and the possible recourse to self-defense to regain occupied territory. The only two exceptions were (unsurprisingly) Syria and Egypt,<sup>133</sup> the two most vocal proponents of the inclusion of a reference to occupation, both of which noted in passing that military occupation gave the occupied country the right to use self-defense.<sup>134</sup> Both

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129. *See id.* at 65 (Syria), 66 (Turkey), 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* Special Committee on the Question of Defining Aggression, Summary Records of the Seventy-Ninth to Ninety-First Meetings, U.N. Doc. A/AC.134/SR.79-91 (Feb. 8, 1971), at 40 (Syria), 63 (Ghana), 68 (Romania).

130. Special Committee on the Question of Defining Aggression, *supra* note 128, at 72–73 (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”), 73–74 (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.”).

131. *Id.* at 74–75 (Syria).

132. *Id.* at 82 (France).

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

134. Special Committee on the Question of Defining Aggression, *supra* note 128, 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.”), 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

would reiterate this position not long thereafter in the UN debates over the Yom Kippur War.<sup>135</sup> However, other States did not expressly consider the link between occupation and self-defense, and there was no discussion of the temporal limitation of the right to self-defense in this context.

In the end, the authors do not believe that reliance on the Definition of Aggression settles the matter in favor of a continuing right of self-defense as long as the occupation continues—and would instead argue that the General Assembly’s Friendly Relations Declaration<sup>136</sup> tilts the balance in the opposite direction.

B. *The Principle of the Non-Use of Force in International Relations*

1. The Duty to Refrain from the Use of Force as a Means of Settling Territorial Disputes

Like the Definition of Aggression, the Friendly Relations Declaration has been relied upon by the ICJ and has at times been regarded as a codification of customary international law.<sup>137</sup> 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.<sup>138</sup>

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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.” *Id.* at 65.

135. *See id.* at 64–66.

136. 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).

137. Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, ¶ 191 (June 27).

138. G.A. Res. 2625 (XXV), *supra* note 136, annex, ¶ 1, paras. 3–4.

The present Section focuses on the former principle; the latter principle will be tackled in the following 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 enshrined in UN Charter Articles 2(4) and 2(3), respectively, and which form part of customary international law.<sup>139</sup> 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.”<sup>140</sup>

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 merely 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, for the 1982 Falkland/Malvinas War, Etienne 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.”<sup>141</sup>

The Ethiopia-Eritrea Claims Commission in its Partial Award on the *Jus ad Bellum* also supports this position in unequivocal terms.<sup>142</sup> 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

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139. Randelzhofer & Dörr, *supra* note 63, at 203; Christian Tomuschat, *Article 2(3)*, in THE CHARTER OF THE UNITED NATIONS: A COMMENTARY, *supra* note 63, at 181, 188; on the obligation to pursue peaceful negotiations, see further YIALLOURIDES ET AL., *supra* note 96, ¶ 183.

140. S.C. Res. 1177 pmb. para. 3 (June 26, 1998).

141. Henry, *supra* note 99, at 372; see also *infra* pp. 724–25 on the Falkland/Malvinas War.

142. 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) [hereinafter Eritrea-Ethiopia Claims Commission]; The principle was also confirmed in the context of the maritime boundary dispute between Guyana and Suriname in Delimitation of the Maritime Boundary (Guy. v. Surin.), 30 R.I.A.A. 1, ¶¶ 433, 435 (Perm. Ct. Arb. 2007).

recover.<sup>143</sup> Referring to the Friendly Relations Declaration, as well as scholarly works, the Commission opined,

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.<sup>144</sup>

Accordingly, although it confirmed Eritrea's sovereignty over Badme, the commission held that Eritrea had breached Article 2(4) of the UN Charter "by resorting to armed force . . . to attack and occupy the town of Badme, then under peaceful administration by [Ethiopia]."<sup>145</sup>

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 piece in the *Michigan Law Review*, Schachter notes how an exception for recovering "illegally occupied" territory would render Article 2(4) meaningless in many cases.<sup>146</sup> In sum, the obligation to settle territorial disputes through peaceful means *prima facie* pushes against any entitlement to use force to recover occupied territory peacefully administered by another State for a prolonged period of time. Marcelo Kohén, 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.*<sup>147</sup>

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143. Eritrea-Ethiopia Claims Commission, *supra* note 142, ¶ 10.

144. *Id.*

145. *Id.* ¶ 16.

146. Oscar Schachter, *The Right of States to Use Armed Force*, 82 MICHIGAN LAW REVIEW 1620, 1627–28 (1984).

147. MARCELO KOHEN, POSSESSION CONTESTÉE ET SOUVERAINETÉ TERRITORIALE [CONTESTED TERRITORY AND TERRITORIAL SOVEREIGNTY] ¶ 115 (1997) ["The scope of the UN prohibition on . . . the threat and use of force is therefore to prohibit any territorial change by force. We can speak in this sense of a protection of possession, whatever the nature of the latter. Thus, even those who illegally own a territory will know that international law does not allow the holder of sovereignty to take justice into their own hands."].

In a similar vein, Quincy Wright has argued,

the Charter reference to territorial integrity means *de facto* possession, not *de jure* title. If this 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.<sup>148</sup>

## 2. Territorial Disputes as Opposed to . . . Unlawful Occupation?

Let us again turn to the counterargument put forward by scholars that argue in favor of a continuing right of self-defense to recover unlawfully occupied territory. In essence, this 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.<sup>149</sup> Thus, with respect to Nagorno-Karabakh, Olivier 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 with regard to 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).<sup>150</sup> These “frozen conflicts” would not involve a territorial dispute for lack of an explicit territorial claim by the occupying State.

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148. Wright, *supra* note 100, at 623.

149. François Dubuisson & Vaïos Koutroulis, *The Yom Kippur War—1973*, in *THE USE OF FORCE IN INTERNATIONAL LAW: A CASE-BASED APPROACH*, *supra* note 99, at 189, 199; Corten, Koutroulis & Dubuisson, *supra* note 106; YIALLOURIDES ET AL., *supra* note 96, ¶¶ 7–9. (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.)

150. *See Cyprus*, RULAC, <https://www.rulac.org/browse/countries/cyprus> (last visited Mar. 23, 2021) (“Since 1974, Turkey has occupied the northern part of Cyprus”); *see also Military Occupation of Georgia by Russia*, RULAC, <https://www.rulac.org/browse/conflicts/military-occupation-of-georgia-by-russia> (last visited Mar. 23, 2021) (“Russia is occupying the regions of South Ossetia and Abkhazia in Georgia.”); *Moldova*, RULAC,



Against this, it is easy to see how problematic—and potentially counter-productive—the attempted distinction ultimately becomes: a State would be able to invoke self-defense to recover unlawfully occupied territory but would lose that right when the occupying State asserts a claim over the territory concerned. Thus, Syria would supposedly have been entitled to invoke self-defense to recover the Golan Heights lost to Israel in the 1967 Six-Day War but would subsequently have lost this right of self-defense when Israel formally annexed the territory in 1981 (supposedly creating a territorial dispute that did not theretofore exist). Similarly, 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-defense by Ukraine. In the end, the suggested interpretation would lead to arbitrary and absurd results and would actually provide an incentive for 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 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.<sup>151</sup> In other words, the above scenarios involve situations where—to paraphrase the Hague Court—“the claim of one party is positively opposed to the other”<sup>152</sup> and center on the exercise of sovereignty over territory.

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<https://www.rulac.org/browse/countries/moldova> (last visited Mar. 23, 2021) (“Part of Moldovan territory is occupied by Russia. The Russian occupation extends over a strip of land . . . known as Transdnistria.”).

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

152. South West Africa (Eth. v. S. Afr.; Liber. v. S. Afr.), Preliminary Objections, Judgment, 1962 I.C.J. Rep. 319, 328 (Dec. 21).

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-defense persists in the former situation. Dapo Akande and Antonios 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.<sup>153</sup>

In reality, the dichotomy presented here is far less straightforward than those authors wish us to believe and might well be a chimera. Indeed, they would seem to suggest that territorial disputes appear out of thin air. 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 earlier).

By way of illustration, reference can be made to various territorial disputes brought before the ICJ. Consider, for instance, *Cameroon v. Nigeria*.<sup>154</sup> In this case, Cameroon advanced a series of claims concerning Nigeria's international responsibility, including its continued military occupation of the Bakassi peninsula and the Lake Chad area.<sup>155</sup> Thus, Cameroon argued 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

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153. Akande & Tzanakopoulos, *supra* note 28. The authors continued:

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.

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

155. YIALLOURIDES ET AL., *supra* note 96, ¶ 95.

maintained and advanced its occupation.”<sup>156</sup> In Cameroon’s view, these actions were contrary to UN Charter Article 2(4) and the principle of non-intervention.<sup>157</sup> The Court circumvented the application of Article 2(4) 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.”<sup>158</sup>

Similarly, in *Costa Rica v Nicaragua*,<sup>159</sup> 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.<sup>160</sup> Again, the Court found it unnecessary to pronounce on whether Nicaragua had breached Article 2(4) because it had

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156. *Land and Maritime Boundary*, 2002 I.C.J. Rep. ¶ 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. Then, 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.

157. *Id.*

158. *Id.* ¶ 319 (emphasis added).

159. *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)*, Judgment, 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. Thai.)*, Judgment, 1962 I.C.J. Rep. 6 (June 15, 1962).

160. *Certain Activities*, 2015 I.C.J. Rep. 665, ¶¶ 63, 96.

“already established that the presence of military personnel of Nicaragua in the disputed territory was unlawful because it violated Costa Rica’s territorial sovereignty.”<sup>161</sup> Several judges nonetheless strongly criticized the Court’s failure to pronounce on the application of Article 2(4).<sup>162</sup>

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.”<sup>163</sup> 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-defense to recover the territories concerned at any given point in time. More generally, the same conclusion would appear to impose itself in 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., India-Pakistan or India-China<sup>164</sup>) would ultimately escape from the prohibition against the use of force to settle territorial disputes, rendering the prohibition largely meaningless.

A more nuanced attempt to define the point where self-defense stops and the prohibition against the use of force to settle territorial disputes begins would exclude from the latter manifest cases of unlawful occupation. Such an effort to seek a more balanced distinction between territorial disputes 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 (for example, the 260 square

161. *Id.* ¶ 99.

162. *See, e.g.*, the separate opinion of Robinson, J., *id.* (expressing regret over the Court’s failure to find a breach of the prohibition on the use of force); see also the separate opinion by Owada, J., *id.* ¶ 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”).

163. Akande & Tzanakopoulos, *supra* note 28.

164. 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.” YIALLOURIDES ET AL., *supra* note 96, ¶ 1.

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

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 *Land and Maritime Boundary* case, 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.’”<sup>165</sup> However, the risk with this approach 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 of a piece of neighboring land without encountering any military resistance because it believed it held valid title over the land, must this retroactively be considered a manifestly unlawful occupation when, for example, 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 of Nagorno-Karabakh voted in favor of independence from Azerbaijan?<sup>166</sup> Or, should any weight be attached to the deeply flawed referendum in Crimea that preceded the peninsula's “integration” into the Russian Federation?<sup>167</sup>

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165. *Land and Maritime Boundary between Cameroon and Nigeria* (Cameroon v. Nigeria; Eq. Guinea intervening), Judgment, 2002 I.C.J. Rep. 303, ¶ 311 (Oct. 10, 2002).

166. As explained in the *Chiragov* judgment, 99.9 percent of those participating in the referendum voted in favor of secession. *Chiragov v. Armenia*, 2015-III Eur. Ct. H.R. 135, 138 (2015). According to a USSR census of 1989, 77 percent of the region's population was ethnic Armenian, with 22 percent ethnic Azeris and Russian and Kurdish minorities. *Id.* ¶ 13.

167. Note that the referendum was boycotted by the Crimean Tatar minority and was held after Russian troops had taken control of the Crimean peninsula. See Simone Van den

And what if the occupying State asserts—rightly or not—that the occupation resulted from a lawful recourse to self-defense? 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 a prior armed attack, but acted “pre-emptively” against its Arab neighbors).<sup>168</sup> Whatever one makes of the Israeli argument, the prospect of occupation resulting from the lawful exercise of self-defense is a real possibility. This scenario was also entertained during the negotiations over the Definition of Aggression, where several States emphasized that such occupation was not unlawful and should accordingly not be qualified as “aggression.”<sup>169</sup> Yet, if one accepts—as the present authors do—that self-defense can never justify an *indefinite* occupation of foreign land (for example, in the form of a purported “buffer zone” established for security reasons), and that such occupation must be brought to an end within a reasonable period lest it breach, *inter alia*, 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 confronted with a manifestly unlawful occupation that does not enjoy protection under the principle of the non-use of force, or does the lawful start of the occupation dictate otherwise?

The preceding 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 ICJ, to provide the answer. At the same time, there is something patently absurd in the notion 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 instead provide the green light for the State holding valid title to use military force to recover the land concerned. Relying on the UN Security Council and the General Assembly for authoritative guidance

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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 [MAGAZINE FOR FOREIGN PUBLIC LAW AND INTERNATIONAL LAW] 367, 380–82 (2014).

168. On this particular conflict, see JOHN QUIGLEY, *THE SIX-DAY WAR AND ISRAELI SELF-DEFENSE: QUESTIONING THE LEGAL BASIS FOR PREVENTIVE WAR* (2013); see also Green, *supra* note 89, at 114.

169. See *supra* note 130.

comes with pitfalls of its own, which are essentially linked to the political nature of both organs, and the impact of the veto power at the Security Council. Thus, while the Security Council often refrains from expressly taking a position with regard to inter-State recourse to force,<sup>170</sup> 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,<sup>171</sup> (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.”<sup>172</sup> At the same time, the voting record on these resolutions is hardly impressive and suggests that less than a third of UN members actually voted in favor.<sup>173</sup>

As for Nagorno-Karabakh itself, several pre-1994 Security Council resolutions did call for the withdrawal of occupying forces from Azerbaijan, but the Council has since remained silent. The General Assembly adopted a resolution in 2008 similarly calling for the “withdrawal of all Armenian forces from all the occupied territories of the Republic of Azerbaijan,”<sup>174</sup> yet the resolution was adopted with as few as thirty-nine votes in favor, seven votes against, and 100 abstentions.

In the end, attempts to carve out an exception from the principle of the non-use of force for situations of unlawful occupation (especially 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

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170. 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., 2d ed. 2008).

171. See, e.g., 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).

172. See, e.g., G.A. Res. 74/17 (Dec. 9, 2019).

173. *Id.* The Resolution passed with a vote of sixty-three in favor, nineteen against, and sixty-six abstentions; see also G.A. Res. 74/168 (Jan. 21, 2020), with sixty-five in favor, twenty-three against, and eighty-three abstentions.

174. G.A. Res. 62/243, ¶ 2 (Apr. 25, 2008).

use force to recover occupied territory that is peacefully administered by another State for a prolonged period.

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

### 3. Relevance or Irrelevance of International Lines of Demarcation and Armistice Lines

As set forth above, the text of the Friendly Relations Declaration prohibits the use of force to settle territorial disputes. The second paragraph set forth there reads as follows in its entirety:

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.<sup>175</sup>

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

"Demarcation lines" are provisional borderlines separating territories under different jurisdictions.<sup>176</sup> As Jochen 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

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175. G.A. Res. 2625 (XXV), *supra* note 136, annex, ¶ 1, para 4.

176. Jochen von Bernstorff, *Demarcation Line*, MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶ 1 (updated Apr. 2010), <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e285?rskey=l8ZdqU&result=1&prd=OPIL>.



functions as a final State boundary.”<sup>177</sup> 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.”<sup>178</sup>

“Armistice lines” then are, as the quote from the Friendly Relations Declaration suggests, a specific sub-category of demarcation lines. According to Yoram Dinstein, an armistice is “an agreement concluded between two or more States waging war against each other.”<sup>179</sup> As Dinstein explains, however, there is some confusion concerning the specific meaning of the concept, particularly its relationship to the parallel concept of ceasefire under the law of armed conflict. In particular, until the two 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,<sup>180</sup> whereas “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.”<sup>181</sup>

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.<sup>182</sup>

Accordingly, a genuine armistice can never be “local” but must necessarily be “general” in nature, “for termination of war cannot be localized.”<sup>183</sup>

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177. *Id.*

178. *Id.*

179. Yoram Dinstein, *Armistice*, MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶ 1 (updated Sept. 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 35, at 44.

180. Dinstein, *Armistice*, *supra* note 179, ¶ 1.

181. *Id.*

182. *Id.* ¶ 3.

183. *Id.* ¶ 27.

An example of a short-term ceasefire can be found in Security Council Resolution 50 (1948), adopted in the context of the Israeli-Arab war, which called for “a cessation of all acts of armed force for a period of four weeks.”<sup>184</sup> 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,<sup>185</sup> and because parties often conclude a ceasefire 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 a case in point. Following various short-term ceasefires in the summer of 1993,<sup>186</sup> on May 11, 1994, the Ministers of Defence of Azerbaijan and Armenia and the “Nagorno Karabakh Army Commander” concluded a tripartite “ceasefire agreement,” putting in place a “full cease-fire and cessation of hostilities.”<sup>187</sup> 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].”<sup>188</sup> On July 26, 1994, the same actors concluded another agreement confirming their commitment to the ceasefire.<sup>189</sup> The final paragraph of the (short) agreement asserts that the par-

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184. S.C. Res. 50, ¶ 1 (May 29, 1948).

185. Sydney D. Bailey, *Cease-Fires, Truces, and Armistices in the Practice of the UN Security Council*, 71 AMERICAN JOURNAL OF INTERNATIONAL LAW 461, 467–69 (1977).

186. Before the adoption of the 1994 ceasefire agreement, the parties had previously agreed (particularly in the summer of 1993) to a range of temporary ceasefires, initially partial, and subsequently general. The list of agreements includes the Agreement on the Cessation of Shelling of Stepanakert and Agdam (June 17, 1993), the Agreement on the Cessation of Hostilities in the Area between Magadiz and Agdam (June 27, 1993), the Agreement on a Universal Ceasefire for a period of three days (July 25, 1993), the agreement to extend the ceasefire for a period of seven days (July 28, 1993), and the subsequent agreement to extend the ceasefire for a period of three days (August 5, 1993). Translations of these agreements are found on the University of Edinburgh’s Peace Agreements Database. *Peace Agreements Database*, UNIVERSITY OF EDINBURGH, <https://www.peaceagreements.org/search> (last visited Mar. 23, 2021).

187. Bishkek Ceasefire Agreement, *supra* note 6. The agreement was adopted a week after the Bishkek Protocol, a provisional ceasefire, had called for the conclusion of a definite agreement between the parties. *See supra* note 6.

188. Bishkek Ceasefire Agreement, *supra* note 6, ¶ 3.

189. Agreement on Confirmation of Commitment to Ceasefire (July 27, 1994), <https://www.peaceagreements.org/viewmasterdocument/1733>.

ties agree “to maintain the ceasefire regime until the signing of a comprehensive political agreement which provides for the total cessation of hostilities.”<sup>190</sup> 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 February 4, 1995, the same protagonists agreed 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).<sup>191</sup> These obligations became effective on February 6. The agreement contained no time limitation. 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.<sup>192</sup>

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*.<sup>193</sup> But how must this statement ultimately be understood, and what is its impact for the recovery of occupied territory?

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190. *Id.* para. 3.

191. Agreement on Strengthening the Ceasefire (Feb. 4, 1995), <https://www.peaceagreements.org/viewmasterdocument/1684>.

192. *See, e.g.*, 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, OSCE (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>.

193. *See, e.g.*, Report of the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States, ¶ 68, U.N. Doc. A/7326 (1968) [hereinafter 1968 Report of the Special Committee on Principles of International Law] (“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.” (emphasis added)). Note, however, Report of the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States, ¶ 33, U.N. Doc. A/8018 (1970) [hereinafter 1970 Report of the Special Committee on Principles of International Law] (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 specific line of demarcation for a specified duration must be respected by the States concerned. A breach of such an 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.<sup>194</sup>

Second, agreements (or Security Council resolutions) providing for an international line of demarcation, even if concluded for an extended 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). Change in sovereign title over territory can come about only when the other State validly consents to it, e.g., as part of a comprehensive peace agreement.<sup>195</sup> 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 parties’ positions regarding status and are temporary.

The more difficult question then is what this 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 these scenarios?

Some argue that the “temporary” character of lines of demarcation also entails that the principle of the non-use of force applies only temporarily. 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.<sup>196</sup> According

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194. E.g., Constantine Antonopoulos, *The Unilateral Use of Force by States in International Law* 181 (1997) (Ph.D. dissertation, 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.”).

195. On the validity of a treaty of peace, see, e.g., DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENCE*, *supra* note 35, 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).

196. Akande & Tzanakopoulos, *supra* note 28.

to them, the conclusion of such an agreement temporarily removes the necessity for acting in self-defense 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-defense, all other means to repel the armed attack having failed.”<sup>197</sup> In sum, under this view, 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, in that case, it is supposedly at liberty to resume the exercise of its original right of self-defense, whether weeks, months, or even years after the conclusion of the original ceasefire or armistice agreement.<sup>198</sup>

Greenwood, however, explains,

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197. *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.” DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE, *supra* note 35, 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 III(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.

198. This is also the position set forth by Yoram Dinstein concerning the Nagorno-Karabakh conflict. In 2008, Azerbaijan sent a letter to the Secretary-General to the United Nations, annexing a document titled “Report of the Legal Consequences of Armed Aggression by the Republic of Armenia against the Republic of Azerbaijan.” While at the time the authorship of the report was not disclosed, further communications from Azerbaijan addressed to the Secretary-General in 2017 (U.N. Doc. S/2017/316) and 2021 (U.N. Doc. S/2021/39) revealed that the drafting of the cited report was commissioned to Dinstein. In the report, it is argued that,

A cease-fire, even when long-standing, is not meant to last forever *qua* cease-fire. A cease-fire is merely supposed to be a springboard for diplomatic action . . . This is precisely what the Republic of Azerbaijan has been striving to accomplish all these years. But, once the Republic of Azerbaijan arrives at the firm conclusion that a peaceful settlement—based on withdrawal by the Republic of Armenia from Nagorny Karabakh and surrounding areas—is unattainable, it is entitled to terminate the cease-fire and resume the exercise of self-defence.

Permanent Rep. of Azerbaijan to the U.N., Annex to the letter dated Dec. 22, 2008 from the Permanent Rep. of Azerbaijan to the United Nations addressed to the Secretary-General 11, U.N. Doc. A/63/662 - S/2008/812 (Dec. 24, 2008).

[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 unless the behavior of the other party to the armistice or ceasefire amounted to an armed attack or the threat of an armed attack.<sup>199</sup>

According to this view, a new armed attack is required to permit the lawful resumption of hostilities. 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-defense.

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 consistent with the purpose of the UN Charter and that the use of force to violate them contravened Article 2(4).<sup>200</sup> At the same time, States stressed that there should be no recognition

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199. Christopher Greenwood, *Scope of Application of Humanitarian Law*, in THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW, *supra* note 170, at 45, 68.

200. *See, e.g.*, Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States 22, U.N. Doc. A/AC.125/SR.66 (Dec. 4, 1967) [hereinafter 1967 Special Committee on Principles of International Law] (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)"); 1968 Report of the Special Committee on Principles of International Law, *supra* note 193, ¶¶ 23, 67–68 (joint proposal by Australia, Canada, the United Kingdom, 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"), 24 (an identical proposal by the United Kingdom), 26 (an identical joint proposal by Argentina, Chile, Guatemala, Mexico and Venezuela), 111 (Report of the Drafting Committee, ¶ 3), 119 (United Kingdom), 131 (Australia); Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States, 47, U.N. Doc. A/AC.125/SR.114 (May 1, 1970) [hereinafter 1970 Special Committee on Principles of International Law] (France); Report of the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States 13, 18, 19, 21, 27–28 (¶¶ 62–68), U.N. Doc. A/7619 (1969) [hereinafter 1969 Report of the Special Committee on Principles of International Law]; 1970 Report of the Special Committee on Principles of International Law, *supra* note 193, at 29, ¶¶ 258 (United States), 147 (France).

of military occupation or territorial acquisition achieved by force,<sup>201</sup> 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.<sup>202</sup>

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-defense 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. Syria, while expressing support for the relevant paragraph in the 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.<sup>203</sup>

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201. See, e.g., 1967 Special Committee on Principles of International Law, *supra* note 200, at 19 (Argentina), 21 (Madagascar); 1968 Report of the Special Committee on Principles of International Law, *supra* note 193, ¶ 129 (Lebanon); 1969 Report of the Special Committee on Principles of International Law, *supra* note 200, at 20 (proposal by Algeria, Cameroon, Ghana, India, Kenya, Madagascar, Nigeria, Syria, the United Arab Republic and Yugoslavia), 21, 23, 30, 39–40, 46 (Romania).

202. See, e.g., 1968 Report of the Special Committee on Principles of International Law, *supra* note 193, ¶¶ 66, 68–69, 75–76, at 40 (Report of the Drafting Committee, ¶ 3); 1970 Special Committee on Principles of International Law, *supra* note 200, at 47 (France); 1969 Report of the Special Committee on Principles of International Law, *supra* note 200, ¶ 68, at 38.

203. 1970 Special Committee on Principles of International Law, *supra* note 200, at 64 (Syria), ¶ 258, ¶ 207 (Syria). See also, more ambiguously, 1969 Report of the Special Committee on Principles of International Law, *supra* note 200, ¶ 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.”); 1968 Report of the Special Committee on Principles of International Law, *supra* note 193, ¶ 123 (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.).

The Syrian statement does not explain how and when the right of self-defense 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. Of course, that is not to say 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-defense *ad infinitum*. In the following Section, we try to make sense of how the right of self-defense interacts (or might interact) with the principle of the non-use of force to settle territorial disputes in a range of scenarios.

C. *Making Sense of the Interaction Between Self-defense and the Principle of the Non-Use of Force to Settle Territorial Disputes*

When considering a State whose territory is attacked and occupied by a neighboring State, 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—whether alone or with the backing of one or more third States acting in collective self-defense. One such scenario would be a “bloodless invasion;” that is one not met by any form of armed resistance (such as the Russian intervention in Crimea). It may well be that in this 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. These efforts may well justify a delay in the forcible response of, for instance, several weeks or even months; a delay consistent with the flexible and pragmatic understanding of the immediacy requirement.<sup>204</sup> Ultimately, however, if the victim State fails to trigger its right of self-defense 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-defense. In sum, the victim State will find itself bound by the prohibition on the use of force; specifically, the prohibition on the use of force to settle territorial disputes, save if its right of self-defense were to be triggered anew by a subsequent armed attack.

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204. See *supra* Section IV(A)(1).



Alternatively, the victim State may effectively exercise its right of self-defense—whether individually or collectively—to push 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 in which the initial action in self-defense 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 being concluded between the occupying State and the occupied State. In such a setting, the above considerations would apply *mutatis mutandis*. Specifically, the victim State may choose to temporarily halt hostilities, perhaps to regroup its forces or to engage in diplomatic negotiations. A temporary lull in the fighting does not automatically end the right of self-defense (and the necessity to act in self-defense). However, if the *de facto* cessation of hostilities continues over a prolonged period, the use of force will be prohibited.

Second, the cessation of hostilities may result from, or be confirmed by, an international agreement between the two States. The agreement may be a full-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, an agreement may provide for an indefinite suspension of hostilities—whether formally labeled a ceasefire 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 action in self-defense. However, if it fails to do so, we are back in the previous scenario; namely, the situation of a *de facto* cessation of hostilities, meaning the continuation of the territorial status quo gradually extinguishes the right of self-defense.

If the agreement is indefinite in duration, 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?<sup>205</sup> Aside from the foregoing considerations, it is again argued that if the ceasefire has a prolonged duration and the territorial status quo acquires a degree of stability, then the occupied State's right of self-defense 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 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."<sup>206</sup>

The reason for this, as Greenwood rightly points out, is that the contemporary *jus contra bellum* has overtaken the Hague rule.<sup>207</sup> 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.<sup>208</sup> 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."<sup>209</sup>

It is stressed in this context that the situation in case of a ceasefire or armistice agreement of indefinite duration cannot fundamentally depart from that which would exist if no agreement is concluded and there is 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*,<sup>210</sup> States cannot contractually sign out of it by concluding a ceasefire or armistice agreement. In other words, such an agreement may well prohibit action that would otherwise be permitted under Article 51 UN Charter (by putting an end to action lawfully undertaken in self-defense). Conversely, it cannot, however, be used to preserve the victim State's right of self-defense in the long run (beyond what

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205. On the application of the concept of "material breach" to ceasefire agreements, see, e.g., DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE, *supra* note 35, at 63.

206. Regulations Respecting the Laws and Customs of War on Land art. 36, annexed to Convention No. IV Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2227, T.S. No. 539.

207. Greenwood, *supra* note 199, at 68.

208. General Armistice Agreement, Egypt-Isr., Feb. 24, 1949, 42 U.N.T.S. 252.

209. S.C. Res. 95 (Sept. 1, 1951).

210. See, e.g., CORTEN, *supra* note 64, ch. 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).

the Charter permits). For the same reason, if the occupying State peacefully administers the occupied territory for a prolonged period, concluding a ceasefire 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 preserving the right of self-defense 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-defense 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 maneuvers 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-defense does not expire in situations of prolonged occupation. Thus, Akande and Tzanakopoulos question the idea that self-defense “ceases at some (unclear) point in time when a status quo is established,” without “[telling] us where that point in time is.”<sup>211</sup>

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-defense. 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 one-year limit found in Article 6 of the Fourth Geneva Convention).<sup>212</sup>

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211. Akande & Tzanakopoulos, *supra* note 28.

212. Article 6 of the Fourth Geneva Convention indeed stipulates that, in case of occupied territory, the application of the Convention “shall cease one year after the general close of military operations.” Convention (IV) Relative to the Protection of Civilian Persons in Time of War art. 6, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287. Article 6 does enumerate various provisions that 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, at least for those States that are parties to it. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 3(b), June 8, 1977, 1125 U.N.T.S. 3. According to Article 3(b),

The general rule is that “the determination that an international armed conflict has ended is based not on the existence of a peace agreement, but rather on an appreciation of the facts on the ground.”<sup>213</sup> 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 [international armed conflict] to be considered terminated.”<sup>214</sup> 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.”<sup>215</sup> The *Commentary* further acknowledges that ceasefire agreements or related instruments—irrespective of their exact labeling—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.<sup>216</sup>

The point here is not to argue that the factual test used to identify the end of an international armed conflict and the expiry of the occupied State’s right of self-defense are (or ought 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* suggestion that “mobilizing or deploying troops for defensive or offensive purposes should be regarded as military measures with a view to combat” may rule out a “general

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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.

For further reference, see JULIA GRIGNON, *L’APPLICABILITÉ TEMPORELLE DU DROIT INTERNATIONAL HUMANITAIRE* [THE TEMPORAL APPLICABILITY OF INTERNATIONAL LAW] 308–24 (2014).

213. INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY ON THE THIRD GENEVA CONVENTION: CONVENTION (III) RELATIVE TO THE TREATMENT OF PRISONERS OF WAR ¶ 309 (2020) [hereinafter COMMENTARY ON THE THIRD GENEVA CONVENTION]. See also GRIGNON, *supra* note 212, at 208. For a rare argument to the contrary, see DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE, *supra* note 35, at 51. 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 diplomatic relations.

214. COMMENTARY ON THE THIRD GENEVA CONVENTION, *supra* note 213, ¶ 310.

215. *Id.* ¶ 311.

216. *Id.* ¶ 315.

close of military operations.”<sup>217</sup> Surely, the factors used to factually establish a cessation of active hostilities for IHL purposes<sup>218</sup> are similar to those that are relevant for *ad bellum* purposes. 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-defense 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”<sup>219</sup> that the occupied State’s right of self-defense extinguishes, any more than it would impugn the basic idea that international armed conflicts 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

217. *Id.* ¶ 312.

218. See, e.g., Marco Sassòli, *Release, Accommodation in Neutral Countries, and Repatriation of Prisoners of War*, in *THE 1949 GENEVA CONVENTIONS: A COMMENTARY* 1039, 1046–47 (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.

219. Schachter, *supra* note 97, at 292.

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 under Article 118 of the Third Geneva Convention to release and repatriate prisoners of war “without delay.”<sup>220</sup> In other words, prolonged occupation does not absolve the occupied State (or the occupying State, of course) from repatriating prisoners of war. 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.<sup>221</sup>

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-defense calls for a second observation. Recall that the alternative scenario put forward by some critics is that the right of self-defense 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 but revives when peaceful efforts are deemed to be exhausted—supposedly because this entails a renewed necessity to act in self-defense.<sup>222</sup> If anything, however, the uncertainty is all the greater in this 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 objective assessment. To take just one example, could one say, forty-seven 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

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220. COMMENTARY ON THE THIRD GENEVA CONVENTION, *supra* note 213, ¶ 4454 (Article 118); *see also* Sassòli, *supra* note 218, 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.”).

221. COMMENTARY ON THE THIRD GENEVA CONVENTION, *supra* note 213, ¶ 4458 (Article 118).

222. Akande & Tzanakopoulos, *supra* note 28; Corten, Koutroulis & Dubuisson, *supra* note 106.

does the intermittent organization of (mostly UN-led) peace talks point in the other direction? As one observer astutely points out,

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 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?<sup>223</sup>

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.<sup>224</sup> 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*.”<sup>225</sup>

D. *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-defense take the view that the occupying State cannot invoke the right of self-defense to resist such effort (as “there can be no self-defence against self-defence”<sup>226</sup>). If the occupied State succeeds in its attempt, it will

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223. Marko Milanovic, *Comment on Akande & Tzanakopoulos*, *supra* note 28.

224. See, for instance, the 2015–20 timeline of the Nagorno-Karabakh conflict. *The Nagorno-Karabakh Conflict: A Visual Explainer*, CRISIS GROUP (updated Oct. 26, 2020) <https://www.crisisgroup.org/content/nagorno-karabakh-conflict-visual-explainer>.

225. Milanovic, *supra* note 223.

226. See, e.g., NOAM LUBELL, EXTRATERRITORIAL USE OF FORCE AGAINST NON-STATE ACTORS 41 (2010).

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, to which the present authors subscribe? 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 reflected in the (controversial) approach to *jus ad bellum* liability by the Ethiopia-Eritrea Claims Commission.<sup>227</sup> 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) 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 United Kingdom to end its administration of the Chagos archipelago,<sup>228</sup> 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 the concurrence of two wrongs is without consequence from the perspective of the law of State responsibility. Rather, the International Law Commission's Articles on State Responsibility expressly embrace the idea of

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227. Eritrea-Ethiopia Claims Commission, *supra* note 142.

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



so-called “contributory fault.” More specifically, Article 39 of the Articles on State Responsibility 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.”<sup>229</sup> 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,”<sup>230</sup> including restitution. The basic message here is that determining that the recovery of occupied territory was achieved through 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 of 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 neighboring 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.

#### V. 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 1945 UN Charter saw the light of day:<sup>231</sup> the Indian intervention in Goa in 1961 and the Falkland/Malvinas War in 1982.

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229. ARSIWA, *supra* note 113, art. 39.

230. ILC Commentary, *supra* note 114, at 110, ¶ 4.

231. 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 July 29, 1913. See Erika de Wet, *The Gulf War — 1990-91*, in *THE USE OF FORCE IN INTERNATIONAL LAW: A CASE-BASED APPROACH*, *supra* note 99, at 456, 456–59; Letter from Tariq Aziz, Deputy Prime Minister and Foreign Minister of the Republic of Iraq, to the Ministers of Foreign Affairs of all Countries in the World on the Kuwait Question (Sept. 4, 1990), excerpts *reprinted in* 13 *HOUSTON JOURNAL OF INTERNATIONAL LAW* 286–93 (1990). Clearly, this argument was not accepted by the international community. By Resolution 662 of August 9, 1990, the Security Council unanimously decided that the “annexation of Kuwait by

On December 18, 1961, India dispatched its military forces to the territory of Goa,<sup>232</sup> a Portuguese overseas enclave conquered by Alfonso de Albuquerque in 1510. After 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.<sup>233</sup>

Upon the request of Portugal, which accused India of an unprovoked act of aggression against its territory,<sup>234</sup> 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”<sup>235</sup> and labeled the dispute a colonial question.<sup>236</sup>

Neither of the two draft resolutions that were put to the vote was adopted by the Council, as the views expressed during the debates were far apart from each other.<sup>237</sup> Nevertheless, the majority position held by the United States, the United Kingdom, France, Turkey, China, Chile, and Ecuador<sup>238</sup> denounced India’s conduct as an unlawful use of force against Portugal. They rejected the notion that the crux of the dispute was colonialism, holding instead that the relevant matter at hand was the prohibition of the

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Iraq . . . [had] no legal validity, and is considered null and void.” S.C. Res. 662, ¶ 1 (Aug. 9, 1990).

232. YIALLOURIDES ET AL., *supra* note 96, at 66.

233. Tom Ruys, *The Indian Intervention in Goa — 1961*, in *THE USE OF FORCE IN INTERNATIONAL LAW: A CASE-BASED APPROACH*, *supra* note 99, at 85, 85; Yiallourides & Yihdego, *supra* note 100, at 51; YIALLOURIDES ET AL., *supra* note 96, at 66.

234. Permanent Rep. of Portugal to the U.N., Letter dated Dec. 18, 1961 from the Permanent Rep. of Portugal to the United Nations addressed to the President of the Security Council, U.N. Doc. S/5030 (Dec. 18, 1961).

235. U.N. SCOR, 16th Sess., 987th mtg. ¶ 46, U.N. Doc. S/PV 987 (Dec. 18, 1961) [hereinafter U.N. Doc. S/PV 987] (“The 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 . . .”).

236. *Id.* ¶ 40.

237. Ruys, *The Indian Intervention in Goa*, *supra* note 233, at 86. Both resolutions were vetoed by permanent members of the Security Council.

238. U.N. Doc. S/PV 987, *supra* note 235, ¶¶ 72–76 (United States), 101 (Turkey), 87 (United Kingdom), 99 (Turkey); U.N. SCOR, 16th Sess., 988th mtg. ¶¶ 9 (France), 10 (Ecuador), 17 (China), 27–29 (Chile), U.N. Doc. S/PV 988 (Dec. 18, 1961).

use of force to settle territorial disputes.<sup>239</sup> 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-defense during the debates, it failed to provide any substantial evidence that a recent armed attack had taken place<sup>240</sup> or that Portugal had provoked their military intervention in the region. Thus, most States sitting on the Council at the time considered that India, regardless of the validity of its territorial claim, had breached Article 2(4) by attempting to alter the existing status quo<sup>241</sup> and settle a territorial dispute by forceful means.<sup>242</sup> It follows that none of these States believed that India had retained a right of self-defense 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.<sup>243</sup> Furthermore, India's attempt to circumscribe its conduct in the broader context of decolonization and its failure to provide a cogent justification of its actions under the *jus ad bellum* certainly hints at its lack of conviction regarding the legality of its acts under that legal framework. The four States that sided with India at the Security Council focused on the relevance of the "Declaration on the granting of independence to colonial countries and peoples"<sup>244</sup> and Portugal's failure to abide by its obligations as an administering power under Chapter XI of the UN Charter, instead of providing an elaborate explanation of the incident under the *jus ad bellum*.<sup>245</sup>

While the Goa precedent represents the first time in which the Security Council failed to condemn the annexation of territory by the use of force,<sup>246</sup> 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

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239. Ruys, *The Indian Intervention in Goa*, *supra* note 233, at 89.

240. Wright, *supra* note 100, at 622; Ruys, *The Indian Intervention in Goa*, *supra* note 233, at 91.

241. YIALLOURIDES ET AL., *supra* note 96, at 66.

242. Ruys, *The Indian Intervention in Goa*, *supra* note 233, at 89.

243. U.N. Doc. S/PV 987, *supra* note 235, ¶ 46.

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

245. Ruys, *The Indian Intervention in Goa*, *supra* note 233, at 93.

246. GRAY, *supra* note 59, at 73.

settle territorial disputes, as demonstrated by the next relevant precedent, the Falkland/Malvinas War.

On April 2, 1982, Argentina's military junta sent around 1,400 troops to occupy the Falkland Islands,<sup>247</sup> also known as the Malvinas, an archipelago located in the South Atlantic Ocean some 500 kilometers off the Argentine coast. Argentina had taken possession of the archipelago under the *uti possidetis juris* principle after gaining independence from Spain. It was forced out by British forces in 1833; thus, the islands had been occupied and administered by the United Kingdom for over 150 years at the time of the invasion. Historically, Argentina had consistently rejected the British territorial title over the islands, regarding them as illegally occupied.<sup>248</sup> The military invasion was presented as an act of legitimate defense<sup>249</sup> against the continuous act of aggression perpetrated by the United Kingdom since the forceful seizure of the islands in 1833.<sup>250</sup> In other words, Argentina claimed to be acting in self-defense 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 deploying a naval task force in the exercise of its right of self-defense and calling an urgent meeting of the Security Council.<sup>251</sup> A large majority of the Security Council members, and the delegations that 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.<sup>252</sup> As a result, Resolution 502 was passed on April 3, 1982, acknowledging the existence of a breach of the peace caused by the invasion of the armed forces of Argentina, demanding both States immediately cease all hostilities, and calling for the immediate withdrawal of Argentina's troops from the islands.<sup>253</sup>

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

248. Yiallourides & Yihdego, *supra* note 100, at 49.

249. U.N. SCOR, 37th Sess., 2346th mtg. ¶ 12, U.N. Doc. S/PV 2346 (Apr. 2, 1982).

250. U.N. SCOR, 37th Sess., 2345th mtg. ¶ 59, U.N. Doc. S/PV 2345 (Apr. 1, 1982) [hereinafter U.N. Doc. S/PV 2345].

251. YIALLOURIDES ET AL., *supra* note 96, at 78.

252. U.N. SCOR, 37th Sess., 2349th mtg. ¶¶ 7 (France), 22 (Australia), 33 (New Zealand), 10–18 (Ireland), 26–30 (Canada), U.N. Doc. S/PV 2349 (Apr. 2, 1982) [hereinafter U.N. Doc. S/PV 2349]; U.N. SCOR, 37th Sess., 2350th mtg. ¶¶ 71–74 (United States), 260 (Guyana), 215 (Uganda), 220–23 (Togo), 61–62 (Jordan), U.N. Doc. S/PV 2350 (Apr. 3, 1982) [hereinafter U.N. Doc. S/PV 2350].

253. S.C. Res. 502 (Apr. 3, 1982).

The voting records reflect the overwhelming support of the British position,<sup>254</sup> with the text of the resolution reproduced almost exactly from the draft presented by the United Kingdom.<sup>255</sup>

The British forces managed to overcome and expel the Argentinian troops from the islands after ten weeks of hostilities. Both parties agreed to a de facto ceasefire in June 1982.<sup>256</sup> Outside 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. It is particularly telling that many of the States that supported or recognized the validity of Argentina's territorial claims over the Falkland/Malvinas Islands still denounced the invasion as an unlawful use of force.<sup>257</sup> 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 condemned.<sup>258</sup>

It must be acknowledged that, in these cases, 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 inter-temporality. 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 is that for all the lingering territorial disputes and situations that could be seen as involving 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-defense against a continuing armed at-

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254. The resolution was adopted with ten votes in favor (United States, United Kingdom, France, Guyana, Ireland, Japan, Jordan, Togo, Uganda, and Zaire), one against (Panama), with four abstentions (USSR, China, Poland, and Spain). See U.N. Doc. S/PV 2345, *supra* note 250, ¶ 145.

255. See United Kingdom of Great Britain and Northern Island: Draft Resolution, U.N. Doc. S/14947 (Apr. 2, 1982).

256. Waibel, *supra* note 247; YIALLOURIDES ET AL., *supra* note 96, at 78.

257. Henry, *supra* note 99, at 372; see U.N. Doc. S/PV 2349, *supra* note 252, ¶ 18 (Ireland); U.N. Doc. S/PV 2350, *supra* note 252, ¶ 203 (Spain); U.N. SCOR, 37th Sess., 2362d mtg. ¶¶ 11–12 (Spain), U.N. Doc. S/PV 2362 (May 22, 1982).

258. Henry, *supra* note 99, at 377.

tack. This is not insignificant since State inaction and omissions equally qualify as State practice or subsequent practice for purposes of identifying customary law<sup>259</sup> 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”<sup>260</sup> and that it was exercising its right of self-defense. At the same time, it is noted (i) that this argument was only raised during the arbitral proceedings, 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 been Ethiopia that had declared war on Eritrea;<sup>261</sup> and (iii) that the Commission unequivocally dismissed the argument that Eritrea could lawfully recover territory over which it held valid title.<sup>262</sup>

The primary example from State practice that could be seen to dispel the legal framework laid out in Section III—and which accordingly commands a closer analysis—is 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.<sup>263</sup>

It is recalled that on November 22, 1967, the Security Council adopted Resolution 242, 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.”<sup>264</sup> Notwithstanding the formal acceptance of the ceasefire by the various stakeholders, a so-called “war of attrition” ensued between Egypt and Israel, involving, *inter alia*, artillery shelling and amphibious raids, along with occasional confrontations and incursions by non-State armed groups along the Israel-Jordan and Israel-Syria ceasefire lines. A new ninety-day ceasefire was agreed to by Israel and Egypt (and Jordan) in

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

260. Eritrea-Ethiopia Claims Commission, *supra* note 142, ¶ 9.

261. *Id.*

262. Sean D. Murphy, *The Eritrean–Ethiopian War — 1998–2000*, in *THE USE OF FORCE IN INTERNATIONAL LAW: A CASE-BASED APPROACH*, *supra* note 99, at 552, 560–61.

263. See, in particular, Dubuisson & Koutroulis, *supra* note 149.

264. S.C. Res. 242 (Nov. 22, 1967).

August 1970.<sup>265</sup> A three-month extension followed in September 1970, and in February 1971, Egypt agreed to a final extension of the ceasefire for another thirty days, during which it called for a partial Israeli withdrawal along the east bank of the Suez Canal.<sup>266</sup> In the absence of such withdrawal, Egypt in March 1971 declared that it no longer considered itself bound by the ceasefire.<sup>267</sup>

Meanwhile, UN-led mediations failed to achieve a breakthrough, primarily due to Israel's refusal to commit to "withdrawal to the international boundary" existing before the 1967 war. The mediation attempt was ultimately abandoned in 1972.<sup>268</sup> 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 War 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 Security Council or the 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-defense.<sup>269</sup> 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-defense to recover the occupied land.<sup>270</sup> Both coun-

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265. 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 visited Mar. 23, 2021).

266. *Id.*

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

268. In July 1973, a draft U.N. Security Council resolution expressing "serious concern at Israel's lack of cooperation with the Special Representative of the Secretary-General" received thirteen votes in favor, but was vetoed by the United States. See Guinea, India, Indonesia, Panama, Peru, Sudan and Yugoslavia: Draft Resolution, ¶ 10, U.N. Doc. S/10974 (July 24, 1973); U.N. SCOR, 28th Sess., 1735th mtg., U.N. Doc. S/PV 1735 (July 26, 1973).

269. Dubuisson & Koutroulis, *supra* note 149, at 195; For Israel's position, see, e.g., U.N. SCOR, 28th Sess., 1746th mtg. ¶ 86, U.N. Doc. S/PV 1746 (Oct. 12, 1973) [hereinafter U.N. Doc. S/PV 1746].

270. U.N. SCOR, 28th Sess., 1744th mtg. ¶ 82 (Syria: "We are at present fighting to repel the aggressor, we are exercising our right of self-defence."), U.N. Doc. S/PV 1744

tries dismissed as absurd the idea that Israel could rely on the ceasefire imposed by the Security Council in Resolution 242 (1967) as a proverbial “licence to occupy.”<sup>271</sup> 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.<sup>272</sup>

Additionally, numerous countries, particularly from the Soviet bloc and group of non-aligned countries,<sup>273</sup> 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-defense, which, according to India, could “never be . . . extinguished.”<sup>274</sup> Thus, Syria and

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(Oct. 9, 1973) [hereinafter U.N. Doc. S/PV 1744]; U.N. SCOR, 28th Sess., 1755th mtg. ¶ 190 (Egypt), U.N. Doc. S/PV 1755 (Nov. 12, 1973).

271. U.N. SCOR, 28th Sess., 1743d mtg. ¶ 46, U.N. Doc. S/PV 1743 (Oct. 8, 1973) [hereinafter U.N. Doc. S/PV 1743] (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, *supra* note 270, ¶ 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.”).

272. U.N. SCOR, 28th Sess., 1745th mtg. ¶ 47, U.N. Doc. S/PV 1745 (Oct. 11, 1973) (Egypt) [hereinafter U.N. Doc. S/PV 1745].

273. 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 ¶ 2, NAC/ALG/CONF.4/P/Res.2 (Sept. 9, 1973).

274. U.N. Doc. S/PV 1743, *supra* note 271, ¶¶ 179–80 (“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-defense of Egypt and Syria “can never be and has never been extinguished”).



Egypt's military efforts were approved by the Soviet Union,<sup>275</sup> China,<sup>276</sup> India,<sup>277</sup> Indonesia,<sup>278</sup> Yugoslavia,<sup>279</sup> and others.<sup>280</sup>

There is, however, more to this than meets the eye. Indeed, leaving aside the highly questionable argument that Israel's occupation of neighboring territory resulted from a lawful exercise of self-defense and was therefore not unlawful,<sup>281</sup> 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-defense in reaction to an Israeli offensive along the "cease-fire line."<sup>282</sup> While

275. *Id.* ¶ 76 (speaking of a "legitimate and just desire to return to their own homes"); U.N. Doc. S/PV 1744, *supra* note 270, ¶ 99; U.N. Doc. S/PV 1745, *supra* note 272, ¶¶ 159, 161 ("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 . . .").

276. U.N. Doc. S/PV 1743, *supra* note 271, ¶¶ 54–57 (referring to "just action . . . to resist the aggressors").

277. *Id.* ¶¶ 179–80.

278. U.N. Doc. S/PV 1744, *supra* note 270, ¶¶ 166–68 (accepting that, after the United States 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").

279. *Id.* ¶¶ 4–5, 13, 16–17 (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 *inter alia* to the right of self-defense and stressing that an occupied State could not be expected to "stand idly by").

280. *See, e.g.*, U.N. Doc. S/PV 1745, *supra* note 272, ¶¶ 35–38 (Guinea: "any attempt to recuperate from the usurper what belongs to you is a source of legitimate action"), 57–58 (Peru).

281. QUIGLEY, *supra* note 168, at 40.

282. Permanent Rep. of the Syrian Arab Republic to the U.N., Letter dated Oct. 6, 1973 from the Permanent Rep. 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) ("[T]he 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 Oct. 6, 1973 from the Minister for Foreign Affairs of Egypt to the President of the General Assembly, 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. 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, *supra* note 271, ¶¶ 38, 41 (Egypt); U.N. Doc. S/PV 1744, *supra* note 270, ¶¶ 45, 49 (Syria).

the claim that Israel had itself triggered the conflict turned out to be false<sup>283</sup>—UN observers reported a “sudden surprise attack” by the Egyptian and Syrian armies<sup>284</sup>—it remains striking that Egypt and Syria felt the need to shift the responsibility for the first use of force to Israel. This approach sits uneasily with the notion that the Israeli occupation was in and of itself sufficient to justify action in self-defense 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.<sup>285</sup> It is not excluded, moreover, that this impacted the appraisal of the conflict by third States.<sup>286</sup>

Further, several States refrained from apportioning blame but instead focused on the need for a peaceful solution to the conflict and an end to hostilities to end the human suffering.<sup>287</sup>

Finally, one cannot overlook the many skirmishes and other incidents between Israel and its Arab neighbors in the wake of the Six-Day War. This was particularly the case throughout the 1967 to 1970 war of attrition between Israel and Egypt.<sup>288</sup> Yet, even after the conclusion of a new short-term

283. Just as Israel’s earlier claim in 1967 that its Arab neighbors 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.

284. The Soviet Union appeared to agree with the facts as presented by Egypt and Syria. *See* Permanent Rep. of the Soviet Union to the U.N., Letter dated Oct. 7, 1973 from the Permanent Rep. 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 U.N. Truce Supervision Organization (UNTSO). *See* UNTSO, Reports on Outbreak of Hostilities, U.N. Doc. S/7930/Add. 2141, 2142 (Oct. 6, 1973) (“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.”).

285. Just as Israel’s flawed attempt to accuse its Arab neighbors of having started the Six-Day War signaled its discomfort with the doctrine of pre-emptive self-defense.

286. Thus, some countries participating in the U.N. debates did stress that Israel had commenced the hostilities. *See, e.g.*, U.N. Doc. S/PV 1743, *supra* note 271, ¶ 53 (China: accusing Israel of “fresh military attacks on a large scale” on October 6, 1973). *See, however*, U.N. Doc. S/PV 1746, *supra* note 269, ¶ 7 (Nigeria).

287. *See, e.g.*, U.N. Doc. S/PV 1743, *supra* note 271, ¶¶ 15, (United States), 67 (United Kingdom); U.N. Doc. S/PV 1744, *supra* note 270, ¶¶ 27 (France), 38–39 (Austria); 287. U.N. SCOR, 28th Sess., 1747th mtg. ¶¶ 5 (United States), 53 (United Kingdom), 105 (Kenya), 111 (Panama), U.N. Doc. S/PV 1747 (Oct. 21, 1973).

288. For an Israeli account, see Israel Ministry of Foreign Affairs, *supra* note 265.

ceasefire in the summer of 1970, incidents continued to occur along the ceasefire lines.<sup>289</sup> A May 1973 UN report cited seventeen major incidents disrupting the ceasefire between July 1967 and April 1973 that were discussed in the UN Security Council (while several other incidents were simply not brought before the Security Council).<sup>290</sup> Only four 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.<sup>291</sup> Egypt also repeatedly threatened war in 1972 and 1973. Against this background, François Dubuisson and Vaios Koutroulis find that “it can hardly be suggested that the occupied Arab territories were under the peaceful administration of Israel.”<sup>292</sup> In light thereof, the two authors also argue that the Yom Kippur War neither contradicts nor supports the analysis put forth by the Ethiopia-Eritrea Claims Commission in its Partial Award on the *Jus ad Bellum*.<sup>293</sup>

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, statements by at least two countries—both allies of Azerbaijan—appeared to support the idea that Azerbaijan could invoke the right of self-defense to recover territory occupied by Armenia. One was a statement by the Pakistani ambassador to Azerbaijan.<sup>294</sup> The other was a letter to the Security Council in which Turkey asserted that Azerbaijan was “exercising

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289. 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 *The War of Attrition*, IDF, <https://www.idf.il/en/minisites/wars-and-operations/the-war-of-attrition/> (last visited Mar. 23, 2021).

290. See Report of the Secretary-General under Security Council Resolution 331, *supra* note 267, ¶¶ 3–11; see also U.N. Doc. S/PV 1744, *supra* note 270, ¶ 67 (Syria, accusing Israel of multiple “grave and flagrant violations of the cease-fire” since 1967).

291. *Israeli and Syrian Planes in Major Fight Off Coast; Tel Aviv Claiming 13 MIGs*, NEW YORK TIMES (Sept. 14, 1973), <https://www.nytimes.com/1973/09/14/archives/israeli-and-syrian-planes-in-major-fight-off-coast-tel-aviv.html>.

292. Dubuisson & Koutroulis, *supra* note 149, at 199.

293. *Id.*

294. 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-againstarmerian-occupation-3551697>. The official statement of the Pakistani foreign ministry, however, rather appears to suggest that Azerbaijan could lawfully respond in self-defense to prior military action by Armenia. See Press Release, Ministry of Foreign Affairs, Renewed Tension in Nagorno-Karabakh (Sept. 27, 2020), <http://mofa.gov.pk/renewed-tension-in-nagorno-karabakh/>.

its inherent right of self-defense, since the hostilities are taking place exclusively on its own sovereign territory.”<sup>295</sup> Azerbaijan itself, however, seemingly refrained from developing this argument.<sup>296</sup> 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 September 27, 2020.<sup>297</sup> Azerbaijan’s action then was, in its own words, no more than a “counter-offensive . . . within the right of self-defence.”<sup>298</sup>

Further, the conflict was not addressed by the UN Security Council, and States generally refrained from taking a stance on the legality of the protagonists’ conduct under the *jus ad bellum*—a silence partly due to the uncertainty as to who triggered the outbreak of hostilities. Numerous countries did call for an immediate end to all hostilities and stressed that the conflict could be solved only through peaceful negotiations.<sup>299</sup> In a joint statement, the presidents of Russia, the United States, and France “[condemned] in the strongest terms the recent escalation of violence along the Line of Contact in the Nagorno-Karabakh conflict zone” (without pointing the blame at one party or

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

296. Nevertheless, it should be noted that in the “Report of the Legal Consequences of Armed Aggression by the Republic of Armenia against the Republic of Azerbaijan,” annexed to a letter sent by Azerbaijan to the Secretary-General to the United Nations back in 2008, Yoram Dinstein developed this argument in relation to Azerbaijan’s alleged right of self-defense in response to the occupation of Nagorno-Karabakh by Armenia. *See supra* note 198, at 5-10.

297. Azerbaijan U.N. Letter dated Sept. 27, 2020, *supra* note 7.

298. Permanent Rep. of Azerbaijan to the U.N., Letter dated Jan. 12, 2021 from the Permanent Rep. of Azerbaijan to the United Nations addressed to the U.N. Secretary-General, U.N. Doc. S/2021/39 (Jan. 13, 2021) (“As a result of the counteroffensive operation undertaken and successfully accomplished by the armed forces of Azerbaijan, in the exercise of the inherent right of self-defence, the Fuzuli, Gubadly, Jabrayil and Zangilan districts, the city of Shusha and more than 300 cities, towns and villages of Azerbaijan were liberated from occupation”).

299. *Armenia-Azerbaijan Clashes: How the World Reacted*, ALJAZEERA (Sept. 27, 2020), <https://www.aljazeera.com/news/2020/9/27/armenia-azerbaijan-clashes-world-reactions>.

the other).<sup>300</sup> 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. In summary, 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.

#### VI. EPILOGUE: PEACE AGAINST JUSTICE?

In the present article, we sought to examine to what extent international law permits resort to armed force to recover territory 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-defense 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 (whether multiple years or even decades). Instead, this right is at most temporarily *suspended* when the protagonists conclude a ceasefire or otherwise engage in peaceful negotiations.

The counterargument emphasizes that any exercise of self-defense is subject to a requirement of “immediacy” and that a victim State ultimately forfeits its right of self-defense if it fails to act within a reasonable time and after a new status quo has materialized. 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 this principle for (certain) situations of unlawful occupation are problematic and unconvincing.

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

In the end, it is difficult to escape the conclusion that the dilemma before us is one on which legal scholars remain deeply divided and one lacking an authoritative answer (at least if we discount the oft-criticized *Jus ad Bellum* award of the Ethiopia-Eritrea Claims Commission<sup>301</sup>). It also leaves little or

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300. 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/>.

301. Eritrea-Ethiopia Claims Commission, *supra* note 142.

no room for compromise, i.e., some form of middle ground between the two juxtaposed views.

Inevitably, we cannot ignore the closely entwined teleological and utilitarian dimensions of the debate, which largely explain this deep divide. Indeed, the debate raises challenging questions about the fundamental purposes of the Charter framework on the use of force, and the relative priority to accord to those objectives when they 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)). Indeed, 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-defense. It has 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 they must has been regarded as contravening the principle of *ex iniuria jus non oritur*,<sup>302</sup> 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 militarily 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 neighboring 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-defense or UN enforcement action). The possibility that the victim State might still be legally entitled to exercise self-defense 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 favors 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 maintain that a prohibition to resort to force to recover (long-)occupied territory breaches the principle of *ex iniuria*

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302. See, e.g., Alessandro Mario Amoroso, *The Israeli Strikes on 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/>.

*jus non oritur*. Indeed, whatever the latter principle's normative status and scope,<sup>303</sup> 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 behavior. 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, reaffirms.

Second, against the perception that the law surrenders to the maxim that “might makes right” and leaves the occupied State without a remedy, 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 on its own in the face of a territorial invasion by a stronger neighbor, Article 51 confirms the victim's right to request support from third States in countering the aggression (pursuant to the right of collective self-defense). In addition, the Security Council may take enforcement measures under Chapter VII of the 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 European Union,<sup>304</sup> and the victim State itself is, of course, entitled to take countermeasures.<sup>305</sup> Whether support from the 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 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 International Law Commission Articles on State Responsibility<sup>306</sup> (albeit that doctrine has recently

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303. Further, see ANNE LAGERWALL, *LE PRINCIPE EX INJURIA JUS NON ORITUR EN DROIT INTERNATIONAL [THE PRINCIPLE EX INJURIA JUS NON ORITUR IN INTERNATIONAL LAW]* (2016).

304. In this sense, see, e.g., Yiallourides & Yihdego, *supra* note 100, ¶ 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?*, QIL (June 30, 2016).

305. YIALLOURIDES ET AL., *supra* note 96, at 88.

306. ARSIWA, *supra* note 113, art. 41(2).

come under attack from the very State responsible for its creation<sup>307</sup>). 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<sup>308</sup>—a jurisdiction yet to be put to the test.

Third, and more fundamentally, it is stressed that the protection of States' territorial integrity is but one of the 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 on the scope of the right of self-defense and the legality of "humanitarian intervention," the outlawry of war is "the biggest single change in the international order" of the twentieth century and deserves some credit for the marked decline in inter-State armed conflict since 1945.<sup>309</sup> A significant number of territorial disputes have been submitted to judicial dispute settlement over the past decades.<sup>310</sup> 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 since 1974.<sup>311</sup> Cyprus serves as a striking illustration of the dilemma before us. One could argue that since forty-seven years have passed after the Turkish invasion and many thousands of Turkish troops remain on the island, the

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307. 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). 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 Proclamation on Recognizing the Golan Heights as Part of the State of Israel, U.S. EMBASSY IN ISRAEL (Mar. 25, 2019), <https://il.usembassy.gov/proclamation-on-recognizing-the-golan-heights-as-part-of-the-state-of-israel/>; Michael R. Pompeo, U.S. Secretary of State, Remarks to the Press, <https://2017-2021.state.gov/secretary-michael-r-pompeo-remarks-to-the-press//index.html> (Nov. 18, 2019).

308. See, e.g., Claus Kress, *On the Activation of ICC Jurisdiction over the Crime of Aggression*, 16 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 1 (2018).

309. See, e.g., STEVEN PINKER, ENLIGHTENMENT NOW: THE CASE FOR REASON, SCIENCE, HUMANISM AND PROGRESS 163–64 (2018). See also OONA A. HATHAWAY & SCOTT J. SHAPIRO, THE INTERNATIONALISTS: HOW A RADICAL PLAN TO OUTLAW WAR REMADE THE WORLD (2017).

310. 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).

311. See, e.g., *Cyprus*, *supra* note 150 ("Since 1974, Turkey has occupied the northern part of Cyprus.").



peaceful route has hit a dead end. But are we willing to accept that the military option is, therefore, again on the table? In considering Cyprus and the many other existing frozen conflicts, 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-defense 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<sup>312</sup>).

While emphasizing the purpose of the United Nations is “to maintain international peace and security” and “save future generations from the scourge of war,” the Charter’s preamble also stresses the fundamental human rights of individual human beings—including, first and foremost, the right to life. Since the Charter’s adoption in 1945, the international legal order has undergone a marked trend towards “humanization”—in the words of Theodor Meron<sup>313</sup>—with individuals’ well-being and fundamental rights overtaking abstract State interests as its center of gravity. This trend is illustrated by the recently adopted General Comment No. 36 of the Human Rights Committee on the right to life, seen as the “supreme right,”<sup>314</sup> in which the Human Rights Committee draws a link between the right to life and the *jus ad bellum*.

Thus, the Human Rights Committee 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].”<sup>315</sup> 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.”<sup>316</sup> 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.

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312. Gabuev, *supra* note 2.

313. THEODOR MERON, *THE HUMANIZATION OF INTERNATIONAL LAW* 552 (2006).

314. U.N. Human Rights Committee, General Comment No. 36: Article 6: Right to Life, ¶ 2, U.N. Doc. CPR/C/GC/36 (Sept. 3, 2019).

315. *Id.* ¶ 70.

316. *Id.*

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 forty-four-day war between Armenia and Azerbaijan in 2020 claimed the lives of 5,000 soldiers and at least 140 civilians.<sup>317</sup> Many of the Armenian and Azeri soldiers killed on the battlefield were not even born when Armenia gained control over the Nagorno-Karabakh region in 1993–94. According to UNICEF, more than 130,000 civilians were displaced by the fighting.<sup>318</sup> Hundreds of homes and vital infrastructure such as schools and hospitals were destroyed, with unexploded ordnance posing a continuing threat to life and limb in populated areas.<sup>319</sup> 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 “re-freezes” the new status quo, without bringing an end to the conflict over the region,<sup>320</sup> a goal that can be achieved only through further peaceful negotiations.<sup>321</sup>

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317. See *supra* note 4.

318. UNICEF *Statement on One Month of Fighting in and beyond Nagorno-Karabakh*, UNICEF (Oct. 28, 2020), <https://www.unicef.org/press-releases/unicef-statement-one-month-fighting-and-beyond-nagorno-karabakh>.

319. *Nagorno-Karabakh Conflict: Operational Update December 2020—One Month After Cease-fire Deal, Deep Humanitarian Needs Persist*, ICRC (Dec. 15, 2020), <https://www.icrc.org/en/document/nagorno-karabakh-conflict-operational-update-december-2020>.

320. See, e.g., Knoll-Tudor & Mueller, *supra* note 28 (“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 28 (noting that the status of Nagorno-Karabakh is not mentioned once in the 2020 ceasefire agreement).

321. Interestingly, Azerbaijan has recently claimed that the tripartite ceasefire agreement concluded on the 9th of November 2020 “has put an end to the almost three-decades-old armed conflict,” and referred to “[t]he end of aggression and occupation.” See Azerbaijan U.N. Letter dated Jan. 13, 2021, *supra* note 298 (“As a result of the counteroffensive operation undertaken and successfully accomplished by the armed forces of Azerbaijan, in the exercise of the inherent right of self-defence . . . the enemy’s military capability in the occupied territories of Azerbaijan was destroyed, the puppet regime’s functionality was dismantled; and Armenia was enforced to peace”). However, this statement bluntly contradicts the content of several communications both parties have been sending to the UN Secretary-General after the ceasefire came into effect. In these letters, Armenia and Azerbaijan have continued accusing each other of triggering the hostilities in the first place and of breaching the tripartite ceasefire in several occasions. See, e.g., Permanent Rep. of Armenia to the

The 2020 war over Nagorno-Karabakh between Armenia and Azerbaijan has spotlighted an 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-defense 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.”<sup>322</sup>

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United Nations, Letter dated Feb. 4, 2021 from the Permanent Representative of Armenia to the United Nations addressed to the U.N. Secretary-General, U.N. Doc. S/2021/105 (Feb. 4, 2021):

On 11, 12 and 15 December 2020, the Azerbaijani armed forces, in violation of the trilateral statement on the complete ceasefire and cessation of all hostilities signed by the leaders of Armenia, Russia and Azerbaijan on 9 November 2020, launched an attack on the villages of Khtsaberd and Hin Tagher in the Hadrut Region of the Republic of Artsakh, taking advantage of the absence of Russian peacekeeping forces there.

Permanent Rep. of Azerbaijan to the U.N., Letter dated Mar. 2, 2021 from the Permanent Rep. of Azerbaijan to the United Nations addressed to the U.N. Secretary-General, U.N. Doc. S/2021/212 (Mar. 3, 2021):

I am writing to draw your attention to the continued attempts of Armenia to deploy its armed personnel to the internationally recognized territories of Azerbaijan. According to credible information available to the Azerbaijani side, which is also validated by the reports of independent mass media sources, members of the armed forces of Armenia, wearing civilian dress, are transferred to the territory of Azerbaijan through the “Lachin Corridor” in civilian trucks, including disguised among construction cargo, in an attempt to escape the control procedures of the Russian peacekeeping contingent.

322. Eritrea-Ethiopia Claims Commission, *supra* note 142, ¶ 10.