7. Territorial disputes and the use of force

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INTRODUCTION

In the history of humankind, the use of force has been a recurrent means to acquire territories. The drawing of many present boundaries is thus the product of violence of one degree or another. The fact that most of these boundaries are based on international agreements or on adjudication does not belie the observation that sovereignty was established in the first place over the territories at stake through forcible means. As some eminent authors put it, ‘[c]essions of territory have often been part of a treaty of peace imposed by the victor.’ In that area – as in so many others – international legal instruments constituted a mere formalization of power relations. The regions of the world that have been subjected to colonization certainly bear witness to such phenomena, but so does Europe, where many current boundaries are the result of violent intercourse between the continent’s nations.

The evolution of international law in the course of the twentieth century resulted in the design of a totally different framework with the unequivocal effect of ruling out the use of forcible means to acquire new territories or to resolve territorial disputes. The main steps towards the elaboration of this legal regime as well as its content and implications will be recalled briefly in the first part of this chapter (Section I). In spite of this evolution, practice shows that the use of force continues to occur frequently in the context of territorial disputes. However, whenever military actions take place in such contexts, far from challenging the existing legal regime as such, states rather argue that they were acting either in good faith on a territory upon which they thought they enjoyed sovereignty or in self-defence, in order to regain control of a territory unlawfully occupied by another state. Such situations raise complex questions relating to the application of rules prohibiting the use of force in the context of territorial disputes.

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1 ROBERT JENNINGS AND ARTHUR WATTS (EDS.), OPPENHEIM’S INTERNATIONAL LAW 681 (9th ed., 2008).
3 See, for instance, the evolution of the boundaries of Germany, France, Italy, the Netherlands or Poland as depicted in GEORGES DUBY, ATLAS HISTORIQUE 92–100, 108–16, 136–40, 143–5, 148–51 (1978).
disputes. These questions will be addressed in depth in the second part of this chapter (Section II).

I. THE OUTLAWING OF THE USE OF FORCE AS A MEANS TO ACQUIRE TERRITORIES OR SOLVE TERRITORIAL DISPUTES

The commonly accepted understanding of the use of force is that, for a very long time, international law imposed little constraints upon states regarding the possibility to use force in their mutual relations. Consequently, force globally constituted a perfectly acceptable means for the acquisition of territories or the resolution of territorial disputes. However, some kind of legal formalization of territorial situations resulting from violent confrontations gradually became necessary. Hence, at the beginning of the eighteenth century, the conclusion of a peace treaty emerged as a condition for a cession of territory to be considered valid, as opposed to the mere victory in the battlefield.

This state of things underwent a significant evolution from the end of the nineteenth century. In 1890, the American states decided to proscribe territorial conquest in their mutual relations and instituted a duty not to recognize all territorial acquisitions made by force. Subsequently, the gradual outlawing of war ‘as an instrument of national policy’ and the corollary undertaking to resolve international disputes by peaceful means proclaimed in the 1928 Kellogg-Briand Pact and – with much wider impact – in the United Nations (UN) Charter made unlawful at the universal level any use of force for the acquisition of territories or the resolution of territorial disputes. Thus Article 2(4) of the UN Charter stipulates that ‘[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations’.

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4 Such limitations were in particular flowing from the ‘just war’ doctrine(s); see, for example, Stephen C. Neff, War and the Law of Nations 49 and 102 (2005). For a critical view on this understanding, see Agatha Verdebout, The Contemporary Discourse on the Use of Force in the Nineteenth Century: A Diachronic and Critical Analysis, 1 J. USE & FORCE INT’L L. 223 (2014).


7 In the words of art. 1 of the Kellogg-Briand Pact.


9 On the progressive outlawing of war in international law generally, see Mary Ellen O’Connor, Peace and War in The Oxford Handbook on the History of International Law 272 ff (Bardo Fassbender and Anne Peters eds., 2012).

While this provision does not explicitly mention territorial disputes as such, several resolutions adopted by the UN General Assembly leave no doubt as to the application of the prohibition to use force to territorial disputes and problems regarding boundaries of states. To mention one example, the 1970 Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States (Declaration on Friendly Relations), widely considered to reflect customary international law,\(^{11}\) asserts that ‘[e]very State has the duty to refrain from the threat or use of force to violate the existing international boundaries of any State or as a means of solving international disputes, including territorial disputes and problems regarding frontiers of States’ and that ‘[t]he territory of a State shall not be the object of acquisition by another State resulting from the threat or use of force. No territorial acquisition resulting from the threat or use of force shall be recognized as legal.’\(^{12}\)

These provisions should be read in conjunction with the obligation to settle international disputes peacefully as set out in Article 2(3) of the UN Charter.\(^{13}\)

As it is obvious from the text of the Declaration on Friendly Relations, the prohibition on the use of force in international relations establishes two principles, or, more specifically, two subsequent prohibitions, in relation to territorial disputes. The first principle is that the acquisition or transfer of sovereignty over a territory as a result of the threat or use of force is illegal (Sub-section A). This goes to the core of a territorial dispute since it affects its main object: sovereignty over the territory. The second principle is that threat or use of force in order to resolve a territorial dispute is prohibited (Sub-section B). This prohibition is broader than the former and concerns the means that may be used in order to resolve a territorial dispute.

A. The Illegality of Acquisition or Transfer of Sovereignty over a Territory as a Result of the Threat or Use of Force

In relation to the first principle, in specific instances where it was at stake, the political organs of the UN were adamant to condemn attempts at acquiring or annexing territories by force. One of the most obvious precedents in that respect is the attempted annexation of Kuwait by Iraq in 1990, the latter claiming the territory of the former as its ‘19th province’. A few days after the invasion of Kuwait, the UN Security Council unanimously decided ‘that annexation of Kuwait by Iraq under any form and whatever pretext has no legal validity, and is considered null and void’. The Council called upon ‘all States, international organizations and specialized agencies not to recognize that annexation and to refrain from any action or dealing that might be interpreted as an indirect recognition of the annexation’.\(^{14}\) Similarly, in relation to the partition of Crimea from the territory of Ukraine in March 2014, the General Assembly recalled the

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\(^{11}\) See, for example, Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Merits, 1986 I.C.J. 14, at 100–101, paras. 188 and 191 (27 June).


\(^{13}\) U.N. Charter, art. 2(3).

aforementioned basic principles proclaimed in the Declaration on Friendly Relations and called upon ‘all States to desist and refrain from actions aimed at the partial or total disruption of the national unity and territorial integrity of Ukraine, including any attempts to modify Ukraine’s borders through the threat or use of force or other unlawful means’. Mindful that the incorporation of Crimea within the territory of the Russian Federation – originally made possible by a Russian military intervention – had been given a gloss of legality through a referendum, the General Assembly also underscored that the said referendum, ‘having no validity, cannot form the basis for any alteration of the status of the Autonomous Republic of Crimea or of the city of Sevastopol’. It called upon states and international organizations not to recognize on that basis any alteration of the status of the territory concerned.

The centrality of this rule in the modern international legal order is further emphasized by the fact that the passage of time alone will not allow for the normalization of territorial acquisitions based on the use of force. The case of the Baltic states, which were considered by a number of states as having been annexed by the Soviet Union in 1940 and ‘re-born’ as sovereign states in the beginning of the 1990s, is certainly a case in point in that respect. Indeed, a significant number of states refused to recognize – de jure at least – the Soviet annexation of these three states, and in 1991, the European Community member states based their decision to re-establish diplomatic relations with the Baltic states on state continuity.

Overall, no transfer of sovereignty may result in modern international law from any use of force. Such a result is warranted even in situations where force has been used in conformity with the international rules governing the use of force – such as when a state argues that it may establish sovereignty over a territory it occupied in the exercise of self-defence or based on an authorization given by the UN Security Council. The

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16 Id. 5 and 6.
17 For more on the events that affected these states and their treatment by third states, see Peter Van Elsuwege, Baltic States, in 1 ENCY’L. PUB. INT’L L. 803 ff (Rüdiger Wolfrum ed., 2012).
19 See the references to such arguments in KOHEN, supra note 5, 394, n. 73–5 and 395–6; Marcelo G. Kohen, La longue marche vers la reconnaissance territoriale de l’autre, in ISRAEL ET L’AUTRE 43 (William Ossipow ed., 2005); Derek Bowett, International Law Relating to Occupied Territory: A Rejoinder, 87 L. Q. REV. 473, 475 (1971); Reply of Cameroon, Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Eq. Guinea interven-ing), 2000 I.C.J., at 141–2, para. 390 (4 April): ‘La nullité de toute acquisition de territoire vaut même en cas de recours à la force conformément aux règles de la Charte et par exemple en cas de légitime défense, ce qui n’est certainement pas le cas de l’invasion et de l’occupation des villages du lac Tchad par le Nigéria.’
possibility of invoking self-defence as a legal basis for the transfer of sovereignty is clearly excluded from the text of the Declaration on Friendly Relations. The relevant paragraph reads as follows:

The territory of a State shall not be the object of military occupation resulting from the use of force in contravention of the provisions of the Charter. The territory of a State shall not be the object of acquisition by another State resulting from the threat or use of force.20

Thus a clear distinction is made between military occupation and acquisition of a territory. Military occupation is prohibited only when it results from a use of force contrary to the UN Charter. Therefore, a contrario, it is lawful in the context of a use of force which is not prohibited under the UN Charter (in self-defence or authorized by the UN Security Council). On the contrary, the prohibition of acquisition of territory applies in the event of any use of force, be it lawful or unlawful.

However, one should note in that regard that the solid entrenchment of rules prohibiting the use of force in international relations in the contemporary legal order does not imply that territorial situations resulting from such use of force prior to its outlawing should be regarded as deprived of any legal basis. To the contrary, according to the doctrine of intertemporal law, "a juridical fact must be appreciated in the light of the law contemporary with it, and not with the law in force at a time when a dispute in regard to it arises".21 As long as a territorial situation was established in conformity with the legal requirements applicable at the time, it remains perfectly valid nowadays, except in cases where it contradicts a peremptory norm of international law that emerged in the interim.22

B. The Prohibition on Resolving Territorial Disputes by the Threat or Use of Force

The second principle applying the prohibition of the threat or use of force in territorial disputes is the prohibition on resolving such disputes by the threat or use of force. This principle is also firmly established in international law23 and was reaffirmed on many an occasion in international practice.24 That being said, one may wonder whether, against the legal background that has just been exposed, the issue of the use of force in

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20 G.A. Res. 2625, supra note 12, 1. First principle, 10 [emphasis added].
22 Such would in particular be the case of situations where peoples' right to self-determination is at stake. Cf. the precedent of Goa discussed below in the text accompanying the footnotes 58 to 62. For the impact of the prohibition to use force which emerged as a jus cogens norm after 1945, see infra Section II, Sub-section B, 2.
24 See the precedents cited below.
relation to territorial disputes calls for any further enquiry in view of the fact that the resolution of such disputes by non-peaceful means appears clearly ruled out under contemporary international law. While this is undoubtedly true as a matter of principle, various precedents evidence the fact that states often resorted to force in the context of territorial disputes, arguing that such uses of force were actually in full conformity with international law.

Examples spanning the second half of the twentieth century are numerous. They include:

- India’s taking over of Goa, formerly controlled – and claimed – by Portugal, in 1961;
- China’s People’s Liberation Army’s intervention to oust South Vietnamese troops from the Paracel Islands, claimed by both China and Vietnam, in 1974;
- Argentina’s military action in the Falkland/Malvinas Islands, under British administration, in 1982;
- military activities by both Nigeria and Cameroon in disputed territory in the 1990s; and
- military operations undertaken by Eritrean armed forces in an area claimed by both Eritrea and Ethiopia in 1998.

These various situations have one thing in common: they all entail the use of force in the context of a territorial dispute. However, the states having resorted to force claimed that they were merely exercising their right of self-defence and (re-)establishing their control over a territory upon which they enjoyed sovereignty, or justified military presence and activities in disputed stretches of territory by arguing they were the rightful sovereign.

In this respect, it is important to note that none of these states suggested that sovereignty over a territory can be acquired by force. Thus the first principle identified above is not put into doubt. Instead, the arguments advanced by states in the aforementioned precedents do raise the question whether – and, if so, to what extent – it remains permissible to resort to force or otherwise assert authority through means of coercion, in relation to territories or spaces over which sovereignty is disputed.

25 These terms will here be used in their widest sense, as referring to any situation of conflicting claims expressed by two or more states over the same territory. On the notion of ‘territorial dispute’, cf. the analysis in Chapter 1 of this book.

26 For more on these various cases, see infra.

27 Only situations involving the use of force within the meaning of art. 2(4) of the U.N. Charter – based on the characterization by either or both parties to the dispute and/or by any authority that was seized of the dispute – will be taken into consideration here. For more on that threshold, see CORTEN, supra note 23, at 51 ff.

28 Such was for instance the case for Nigeria over territories that were later determined by the International Court of Justice to belong to Cameroon, see Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Eq. Guinea intervening), Merits, 2002 I.C.J. 303, at 450–2, paras. 310–15 (10 October).

29 See supra, Sub-section I.A.
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Such arguments relate to the prohibition of use of force in order to solve territorial disputes.\textsuperscript{30} Before delving into the matter, we should recall that in its 1986 judgement in the \textit{Nicaragua} case, the International Court of Justice distinguished ‘the most grave forms of the use of force (those constituting armed attack) from other less grave forms’, placing the threat or use of force as a means of solving territorial disputes in the latter category.\textsuperscript{31} Despite the generality of the Court’s statement, it is obvious that not all resorts to force in order to resolve a territorial dispute will be ‘less grave forms of the use of force’. If isolated incidents asserting sovereign rights may be classified under this heading, it definitely seems counterintuitive to include in this category the invasion of a disputed territory aiming at restoring territorial sovereignty.

One may distinguish between two different cases of use of force in connection to a territorial dispute. Firstly, force has sometimes been used in order to restore sovereignty over a territory claimed and controlled by another state. Secondly, there have been a number of specific incidents of military confrontation between two states claiming sovereignty over the same territory, where resort to force is merely the manifestation of the opposing claims to sovereignty. In this case, the use of force takes place in the context of a territorial dispute but does not purport to ‘solve’ the dispute definitely, through complete restoration of sovereignty. As it will be seen below, in these cases, states have sought to justify their military actions either as an exercise of their right to self-defence (mainly in relation to the first case) or as simple acts of coercion on their territory (mainly in relation to the second case). These justifications relate more generally to the application of the rules regulating the use of force in international relations (\textit{jus contra bellum}) in the context of disputed territories and indicate that uncertainties persist regarding the circumstances under which force may legally be used in such situations. The following section of this chapter will therefore aim at clarifying the current state of international law in this respect through an analysis of the relevant practice and case law.

II. THE IMPACT OF TERRITORIAL DISPUTES ON THE APPLICATION OF THE RULES REGULATING THE USE OF FORCE

In order to illustrate the difficulties raised by competing \textit{jus contra bellum} claims in the context of a territorial dispute, we shall refer to the positions advanced by Cameroon and Nigeria in the context of the case concerning the \textit{Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)}. This was one of the rare examples where claims relating to the violation of the prohibition to use force were raised in a case relating to a territorial dispute before the International Court of Justice.\textsuperscript{32}

\textsuperscript{30} G.A. Res. 2625, \textit{supra} note 12, First principle, para. 4.
\textsuperscript{31} Military and Paramilitary Activities in and against Nicaragua, \textit{supra} note 11, at 101, para. 191.
\textsuperscript{32} See also the claims by Costa Rica against Nicaragua in Certain Activities Carried out by Nicaragua in the Border Area (Costa Rica v. Nicar.), Application Instituting Proceedings, 2010
In this case of boundary delimitation, *jus contra bellum* was invoked mainly in relation to Nigerian military presence in some of the disputed areas, namely the Bakassi peninsula and the Lake Chad area. According to Cameroon, since at least 1981 and especially in 1987 and from 1993 to 1994, Nigeria conducted repeated military incursions and occupied several disputed areas. Cameroon concluded that Nigeria’s actions constituted a persistent and flagrant resort to force against Cameroon’s sovereignty and territorial integrity and, as such, were in violation of Article 2(4) of the UN Charter. For its part, Nigeria asserted that its presence and military actions did not breach any international obligation because the areas at issue were under Nigerian sovereignty. Thus it was Cameroon’s presence and resort to force in the disputed areas that violated Article 2(4) of the UN Charter, any use of force against these troops being merely an exercise of Nigeria’s right to self-defence. In case the International Court of Justice decided that the areas did belong to Cameroon, Nigeria alternatively claimed that its presence and incursions were the result of a reasonable mistake and honest belief, and therefore not in violation of Article 2(4). While disputing the facts, Cameroon responded that even if the incidents flagged by Nigeria were established, they did not constitute an internationally wrongful act either because they were manifestations of Cameroon’s normal exercise of sovereignty over its territory, or because they were linked to military operations in the context of Cameroon’s exercise of self-defence against the Nigerian invasion and occupation.

As will be seen below, most of these arguments are common to several precedents relating to the use of force. Indeed, when a state resorts to the use of force with respect to a disputed territory, two justifications are usually put forth. The first is to claim that the actions of the intervening state are nothing more than the exercise of its national sovereignty over the territory in question. According to this justification, the forcible

I.C.J., at 26, para. 41 (18 November); Alleged Violation of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicar. v. Colom.), Application Instituting Proceedings, 2013 I.C.J., at 10, 12, 22, paras. 9 and 21 respectively (26 November). For a discussion on the invocation of *jus contra bellum* in the dispute between Cambodia and Thailand relating to the Temple of Preah Vihear case, see CORTEN, supra note 23, at 82–3.


Id., at 645, para. 24.48.

measures taken by the state would not come under the scope of the prohibition set out in Article 2(4) of the UN Charter. The second justification is that, if resort to force by the (allegedly) sovereign state of a disputed territory does come under the prohibition of Article 2(4), it constitutes an exercise of this state’s right to self-defence. This is particularly the case when another state exercises control over the disputed territory: Such control may be considered as occupation and thus as an armed attack, giving the right to the (allegedly) sovereign state to resort to force in self-defence in order to recover its own territory.

One can easily identify the two conflicting imperatives at play here. On the one hand, it is obvious that allowing states the right to use force to (re-)claim territories of which they pretend to be the rightful sovereign would create a significant loophole in the international legal regime prohibiting the use of force, which could possibly unravel completely in turn. It would indeed suffice for a state to claim that it enjoys sovereign rights over a given territory to justify using force at any given moment against the state exercising factual control over the said territory. On the other hand, it seems difficult to limit a state’s right to use coercive means to assert its authority or to protect the integrity of a territory over which it claims to be sovereign for the mere reason that this sovereignty is disputed by another state. Here again, it would suffice for a state to lay claims over a territory to block use of force in relation to that territory, including possibly the use of force by the state who had exercised control over the territory but was ousted by another claimant state. This would clearly appear to run counter to well-established principles relating to states’ rights to protect and defend themselves.

Both lines of argument identified above have been put forth in the precedents relating to the use of force in connection with territorial disputes. Their validity will be examined in turn. Firstly, when a state uses force in order to regain control of its own territory, does Article 2(4) apply at all? In other words, in cases where the acting state claims to have a valid title to the territory in question, are we not faced with a ‘simple’ exercise of this state’s sovereignty, rather than with a resort to force in international relations against the territorial integrity of another State prohibited by Article 2(4) of the UN Charter (Sub-section A)? Secondly, if it is accepted that such resort to force comes under Article 2(4), we shall turn to the argument of self-defence: when the intervening state has a valid title to the territory in question, will the control exercised by another state over the disputed territory not constitute an armed attack giving the intervening state the right to self-defence in accordance with Article 51 of the UN Charter? In this respect, does the application of the rules on the use of force, Article 51 in particular, depend on the validity of the territorial claims put forth by the parties (Sub-section B)?

A. Does Resort to Force in Disputed Territories Come Within the Scope of Article 2(4) of the UN Charter?

To answer the question whether resorting to force in disputed territories comes within the scope of application of Article 2(4) of the UN Charter, we shall start with an analysis of state practice in the relevant precedents (Sub-section A.1), in order to determine what this practice teaches us about the legal framework applicable in such situations (Sub-section A.2).
1. The precedents relating to resort to force in the context of territorial disputes: analysis of state practice

The issue of the applicability of Article 2(4) was explicitly raised in the context of the 1982 conflict between Argentina and the United Kingdom (UK) over the Falkland/Malvinas Islands. Against the backdrop of the long-standing dispute between the two states regarding the sovereignty over the islands, Argentina resorted to the use of force in April 1982. Among the justifications advanced, which, as it will be seen in the next section, also included the invocation of self-defence, Argentina insisted heavily on its claims concerning the sovereignty over the islands. Speaking before the Security Council in favour of Argentina’s intervention, Panama formulated the argument most forcefully, rejecting the qualification of the situation in Falkland/Malvinas as ‘a breach of the peace’ because ‘there is an exercise there on the part of Argentina of its sovereign rights over its own territory.’

According to Panama’s delegate:

It has been suggested here (...) that Argentina is invading the Malvinas Islands. That is not true. A State cannot invade its own territory. The Malvinas Islands are Argentine territory. Thus this situation cannot be presented as one of invasion: rather, it is a situation in which Argentina is exercising its sovereign rights.

This argument was rejected by the majority of the states participating in the debate, even by some of them supporting the Argentine claim. Indeed, the Security Council issued one presidential statement and adopted two resolutions on this question, inviting the parties involved to refrain from the use of force and to restore peace in the region. The absence of reference to the argument based on Argentina’s territorial claim may be viewed as an implicit rejection of its relevance with regard to the legality of the use of force. This is confirmed by the debate before the Security Council, in which the majority of states did not take up Argentina’s argument. Instead, some states drew a

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39 Id. The two arguments (exercise of sovereignty and self-defence) were closely linked. However, the terms used by Argentina seem to indicate that the sovereignty claim is independent as a justification: ‘today the Government of Argentina has proclaimed the recovery of its national sovereignty over the territories of the Malvinas, South Georgia and South Sandwich islands, in an act which responds to a just Argentine claim and is also an act of legitimate self-defence in response to the acts of aggression by the United Kingdom.’ U.N. SCOR, 2346th mtg. at 2, para. 12, U.N. Doc. S/PV.2346 (2 April 1982) [emphasis added].
40 These were the terms used in S.C. Res. 502 ¶ 3, preamble, U.N. Doc. S/RES/502 (3 April 1982). The resolution was adopted by 10 votes in favour, one against, and four abstentions. Panama was the state that voted against the resolution.
42 Id. at 10, para. 106. See also Paraguay’s position, id. at 14, para. 152. The position of Peru is more ambiguous: While it supported Argentina’s claims and did not condemn the use of force, it asserted ‘its position of principle that international disputes should be resolved peacefully’. See id. at 8, para. 92. In general, Latin American states put emphasis on the colonial aspect of the Falklands/Malvinas dispute.
clear distinction between the territorial dispute and the use of force and thus rejected the relevance of the former when it came to assess the legality of the latter. This was the position not only of the UK\textsuperscript{44} but also of Ireland, Japan, Togo and Guyana.\textsuperscript{45} Most importantly, this distinction was also drawn by states supporting Argentina’s claims to sovereignty over the Falklands/Malvinas, such as Spain, Uganda, Zaire and Jordan.\textsuperscript{46} Thus, for example, while explicitly stating that it ‘associates itself with (…) the just, historical claims of Argentina’, Jordan affirmed that the threat or use of force is inadmissible and condemned the Argentinian actions as a violation of the UN Charter.\textsuperscript{47}

In Resolution 502, adopted on 3 April 1982, the UN Security Council, ‘[d]eeply disturbed at reports of an invasion on 2 April 1982 by armed forces of Argentina’, determined that the situation amounted to a breach of peace and demanded ‘an immediate withdrawal of all Argentine forces’ from the Falklands/Malvinas islands.\textsuperscript{48}

Similar arguments have been expressed, albeit less forcefully, in the context of the territorial dispute relating to the sovereignty over the Paracel (Hoang Sa in Vietnamese, Xisha in Chinese) and Spratly (Truong Sa in Vietnamese, Nansha in Chinese) Islands in the South China Sea. Several states have voiced claims over all or some of these islands: China (PRC and Taiwan), Brunei, Vietnam, Malaysia and the Philippines. These opposing claims have given rise to multiple incidents involving resort to force, which, lately, have notoriously intensified.\textsuperscript{49} China and Vietnam have on many an occasion accused each other for actions violating international law, although the dispute was never brought before the Security Council. In 1988, in reaction to Chinese military

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\item[44] U.N. Doc. S/PV.2345, \textit{supra} note 38, at 3, para. 22: ‘What is unacceptable is an attempt to change the situation by force.’
\item[45] For Ireland’s position, \textit{see} U.N. SCOR, 2349th mtg. at 1–2, para. 10, U.N. Doc. S/PV.2349 (2 April 1982); for Japan’s position, \textit{see id.} at 6, paras. 67–8; for Togo’s position, \textit{see id.} at 20, paras. 222–4; and for Guyana’s position, \textit{see id.} at 22, paras. 260 and 262.
\item[46] \textit{See} U.N. Doc. S/PV.2350, \textit{supra} note 38, at 18, para. 203 (Spain), at 19, para. 215 (Uganda) and at 22, para. 252 (Zaire).
\item[47] \textit{Id.} at 6, para. 62.
\item[48] U.N. Doc. S/RES 502, \textit{supra} note 40, at preamble, paras. 1 and 2 (ten votes in favour, one against, and four abstentions).
\item[49] \textit{See, for example,} 20 \textit{KEESING’S CONTEMPORARY ARCHIVES} 26388–89 (1974) regarding the occupation of the Paracel islands by China in 1974; regarding the occupation of six of the Spratly Islands by Vietnam in 1975, \textit{see} 21 \textit{KEESING’S CONTEMPORARY ARCHIVES} 27197 (1975); \textit{see also} China, Letter dated 20 April 1987 from the Permanent Representative of China to the United Nations addressed to the Secretary-General, 2, U.N. Doc. A/42/236 – S/18818 (21 April 1987): China accused Vietnam of illegally occupying one of the Spratly Islands, ‘strongly condemned’ Vietnam’s illegal invasion and occupation of some of the islands and ‘reserved the right to recover these occupied territories at an appropriate time’; 34 \textit{KEESING’S CONTEMPORARY ARCHIVES} 35902–3 (1988), regarding mutual accusations for military activities in the area in 1987–88; 56 \textit{KEESING’S RECORD OF WORLD EVENTS} 49987, 49989, 49846–7 (2010), regarding harassment of Vietnamese fishing boats by Chinese ships; 57 \textit{KEESING’S RECORD OF WORLD EVENTS} 50511 (2011), regarding a Chinese patrol vessel which fired warning shots near a Philippine fishing boat; patrol of a Philippine warship near Spratly Islands; 58 \textit{KEESING’S RECORD OF WORLD EVENTS} 52384 (2012), regarding allegations by Vietnam that a survey vessel of a state-owned oil company was sabotaged by Chinese fishing boats; 59 \textit{KEESING’S RECORD OF WORLD EVENTS} 52550 (2013), regarding claims by Vietnam that a Chinese patrol boat fired on four Vietnamese fishing boats near the Paracel Islands.
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[[In January 1974, the People’s Liberation Army and militiamen of China drove the invading South Vietnamese troops out of the Xisha islands in defence of China’s territorial sovereignty. Over a long period of time, Chinese troops, fishermen and scientific workers have never ceased patrolling, surveying, and fishing and other productive activities on the Xisha and Nansha islands and their adjacent waters.\footnote{Id. at 3.}

As for Vietnam, while citing Article 2(4) of the UN Charter and asserting that China’s actions violate international law, it affirmed that, despite the violation of its sovereignty and territorial integrity, it ‘respects the principle of refraining from the threat to use force or the use of force to settle disputes’.\footnote{Letter from Vietnam, supra note 50, at 20.} Along the same lines, on several occasions Vietnam raised the dispute over the Paracel and Spratly Islands during discussions in the UN General Assembly, asserting that ‘[t]he parties concerned (...) should maintain stability on the basis of the status quo and refrain from any act that may further complicate the situation and from the use of force or the threat of force’.\footnote{U.N. GAOR, 49th Sess., 77th mtg. at 14, U.N. Doc. A/49/PV.77 (6 December 1994). Along the same lines, see U.N. GAOR, 51st Sess., 77th plen. mtg. at 8, U.N. Doc. A/51/PV.77 (9 December 1996); U.N. GAOR, 52nd Sess., 57th plen. mtg. at 12, U.N. Doc. A/52/PV.57 (26 November 1997). See also the statement by Malaysia, which also has claims over some of the Spratly Islands: U.N. GAOR, 53rd Sess., 69th plen. mtg. at 37, U.N. Doc. A/53/PV.69 (24 November 1998).} As for third states, in a statement on the current developments in the South China Sea adopted at the 2014 summit of the Association of Southeast Asian Nations (ASEAN), the Ministers for Foreign Affairs of the ASEAN member states ‘urged all the parties concerned, in accordance with the universally recognised principles of international law (...) to resolve disputes by peaceful means without resorting to threat or use of force’.\footnote{ASEAN, ASEAN Foreign Ministers’ Statement on the Current Developments in the South China Sea (10 May 2014), http://www.asean.org/images/documents/24thASEANSummit/ASEAN%20Foreign%20Ministers%20Statement%20on%20the%20Current%20Developments%20in%20the%20South%20China%20Sea.pdf. It should be noted that several of the states that have claims over the islands, such as Vietnam, Philippines and Malaysia, are members of the Association.} The United States (US) has been more explicit in distinguishing between the validity of the territorial claims and the question of the use of force. In relation to one of the
incidents between China and Philippines over the Spratly Islands that occurred in 2010, the US Embassy in the Philippines issued a statement according to which ‘the US government took no sides in territorial disputes in the South China Sea and opposed “the use or threat of force” by any of the claimant parties’. Along the same lines, in 2014 the Assistant Secretary of the US Bureau of East Asian and Pacific Affairs made a similar declaration:

I think it is imperative that we be clear about what we mean when the United States says that we take no position on competing claims to sovereignty over disputed land features in the East China and South China Seas. First of all, we do take a strong position with regard to behavior in connection with any claims: We firmly oppose the use of intimidation, coercion or force to assert a territorial claim.

It is also interesting to note that even in more complex situations, where other legal arguments come into play, states’ positions on the use of force in disputed territories do not change substantially. This is illustrated by the analysis of India’s attack against the Portuguese enclave of Goa in December 1961, which, while involving a disputed territory, was also directly linked to the question of decolonization. With respect to this attack, the Indian representative in the Security Council explained his country’s position as follows:

I have already said that this is a colonial question, in the sense that part of our country is illegally occupied by right of conquest by the Portuguese (...) I would like to put this matter very clearly before the Council: that Portugal has no sovereign right over this territory. There is no legal frontier – there can be no legal frontier – between India and Goa. And since the whole occupation is illegal as an issue – it started in an illegal manner, it continues to be illegal today and it is even more illegal in light of resolution 1514(XV) – there can be no question of aggression against your own frontier, or against your own people, whom you want to liberate.

(...) These are the circumstances in which we had to have recourse to armed action, and this armed action is not an invasion. It cannot be an invasion because there cannot be an invasion of one’s own country.

The delegates of the Soviet Union, Liberia and Ceylon expressed the same position. However, the majority of the states intervening before the Security Council rejected the
argument,60 and a clear distinction was drawn between the substance of the Indian claims with respect to the sovereignty over Goa and the use of force in enforcing these claims.61 Seven out of the eleven members of the Security Council voted in favour of a draft resolution recalling Article 2(4) of the Charter and deploring the use of force by India, but the resolution was not adopted because of a negative vote by the Soviet Union.62

As all the precedents show, the distinction between the underlying claims to sovereignty and the prohibition of the use of force with respect to disputed areas comes up often in relation to territorial disputes. This distinction allows states to keep their distance from the substance of the claims if, for some reason, they do not want to pronounce themselves upon them, while preserving the fundamental rule of the prohibition of the use of force.

2. **The context of a territorial dispute cannot be invoked to exclude the application of Article 2(4) of the UN Charter**

What do the aforementioned precedents teach us about the application of the prohibition to use force in territorial disputes? Firstly, can a state argue that, in such cases, the use of force does not take place ‘in the international relations’ of UN member states and that it is merely an exercise of its domestic jurisdiction? The answer is clearly negative. As we have seen, the argument was raised and defeated in the context of the Goa incident.63 In any case, this interpretation seems rather tenuous since, as the precedents show, in the context of a territorial dispute opposing the claims of at least two states, the resort to force by one of them will necessarily constitute a manifestation of this state’s will to impose to the other claimant(s) the abandonment of their claims.64

Secondly, can the application of Article 2(4) be excluded on the basis that the use of force does not take place ‘against the territorial integrity’ of a member state, because it

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60 For example, the U.S.S.R. delegate argued that, since the matter fell under the exclusive domestic jurisdiction of India, it was not subject for consideration by any U.N. body, including the Security Council, and suggested that it should not be included in the Security Council’s agenda. The proposition was defeated by seven votes to two, with two abstentions; *Id.* at 1–2.

61 *Id.* at 16–17, paras. 74–7 for the USA’s statement: ‘What is the world to do if every State whose territorial claims are unsatisfied should resort with impunity to the rule of armed conflict to get its way?’ *See also* at 18, paras. 82–3 for the UK’s statement, and at 21, paras. 99 and 101 for Turkey’s position. *See U.N. Doc. S/PV.988, supra note 58, at 2, para. 8 for France’s position, at 4, paras. 17, 19, 21 for China’s position and at 6, para. 29 for Chile.


63 See *supra* notes 58–62 and the relevant text.

64 For an analysis of the terms ‘in their international relations’, *see* CORTEN, *supra* note 23, at 77–8. *See also* YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENCE* 87 (5th ed., 2011).
is aimed at asserting the territorial integrity of the state holding a valid title over the disputed territory? Under this interpretation, the term ‘against the territorial integrity’ in Article 2(4) would refer only to territory over which a state has a valid legal title and thus exclude cases where a state is in possession of a territory without any such title. The Falklands/Malvinas precedent dispels this argument. Indeed, the condemnation of Argentina’s resort to force in the 1982 conflict by the majority of states in the Security Council indicates that the term ‘against the territorial integrity’ covers all cases of actual possession of territory by a state, whether supported by a valid legal title or not. The distinction made by many states in all of the precedents analysed above between the validity of the territorial claims over the disputed territory and the resort to force points in the same direction. This interpretation is in accordance with the text of the Declaration on Friendly Relations. Firstly, the paragraph setting out the prohibition to resort to force as a means of solving territorial disputes is silent on the question of the validity of the alleged title over the territory and therefore cannot be interpreted as making the application of the prohibition dependent on the validity of the title. Secondly, aside from territorial disputes, the Declaration on Friendly Relations gives another example of incidents falling under the scope of Article 2(4), which is particularly relevant to the question under examination. The Declaration 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. 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.

Applying the prohibition on resorting to force with respect to demarcation lines and armistice lines, while explicitly insisting on the status and temporary character of such lines, confirms that Article 2(4) applies even in cases where the territory concerned is clearly not under the sovereignty of the state against which the resort to force is directed. A restrictive interpretation of the terms ‘against territorial integrity’, which would limit the application of the prohibition to resort to force only to territory over which a state has a valid legal title, is extremely difficult to reconcile with the text of the Declaration on Friendly Relations and the purpose of the prohibition of the use of

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65 Art. 2(4) of the U.N. Charter.
66 See supra, at 244–5. The following states condemned Argentina’s use of force, usually by characterizing it as an unlawful use of force. See U.N. Doc. S/PV.2349, supra note 45, paras. 7–8 (France), para. 22 (Australia), para. 28 (Canada, implicitly), paras. 33–4 (New Zealand); see also U.N. Doc. S/PV.2345, paras. 61–2 (Jordan), para. 67 (Japan), para. 215 (Uganda), paras. 222–3 (Togo), para. 248 (Zaire) and paras. 260–1 (Guyana). Ireland and the U.S condemned Argentina’s resort to force albeit not in legal terms, see U.N. Doc. S/PV.2349 at para. 18 and U.N. Doc. S/PV.2350, para. 73 respectively.
67 In the words of Professor Oscar Schachter, ‘the expression “territorial integrity” in article 2 (4) refers to the State which actually exercises authority over the territory, irrespective of disputes as to the legality of that authority.’ See Oscar Schachter, International Law in Theory and Practice – General Course in Public International Law, 178 R.C.A.D.I. 9, 143 (1982-V).
68 G.A. Res. 2625, supra note 12, First principle, para. 5.
force in international relations. The rejection of such a restrictive interpretation is confirmed by the positions put forth by states in the discussions relating to the adoption of the Declaration on Friendly Relations and is in harmony with the rejection of the a contrario interpretation of the last part of Article 2(4). In other words, Article 2(4) cannot be interpreted as allowing a resort to force in cases where the intervening state pretends that its actions are not directed against territorial integrity or political independence, or are consistent with the purposes of the UN.

The above analysis shows that the existence of a dispute over the status of a territory does not exclude the use of force by the intervening state from the scope of Article 2(4) of the UN Charter. This is valid for both cases of use of force in connection to a territorial dispute identified above, namely, on the one hand, a large-scale resort to force in order to recover a territory controlled by another state and, on the other, small-scale resorts to force, which constitute mere manifestations of the opposing claims to sovereignty over the disputed territory. Indeed, the positions adopted in the context of the Paracel Islands dispute indicate that the prohibition of use of force to solve a territorial dispute is not limited to resorts to force aiming at definitively resolving the dispute through the restoration of sovereignty by a claimant state; it also covers uses of force aimed merely at asserting claims to sovereign rights over the disputed territory. The 2007 Guyana/Suriname arbitral award may be seen as supporting this interpretation. In this case, the incident under scrutiny was a minor one: two patrol boats of the Surinamese navy ordered an oil rig and a drill ship to withdraw from a maritime zone disputed between Guyana and Suriname. While Suriname characterized the operation of its two patrol boats as ‘a law enforcement measure’, Guyana claimed that Suriname ‘had breached Article 2(4) of the UN Charter’. The tribunal held that ‘in the circumstances of the present case’ Suriname’s operation ‘seemed more akin to a threat of military action rather than a mere law enforcement activity’ and as such amounted to a threat to resort to force contrary to international law.

In spite of the fact that this award was viewed with scepticism by some authors, it confirms that context plays a significant role in deciding whether in a given case the resort to force has ‘crossed the Rubicon’ of Article 2(4). In this regard, the Guyana/Suriname precedent may be seen as an indication that the existence of a territorial dispute is an element that needs to be taken into account when appreciating whether a state has the intent to resort to force against another state. However, exactly how this
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Element influences the application of Article 2(4) is a question that has given rise to different appreciations in practice. In some cases, the context of a territorial dispute may bring within the scope of application of Article 2(4) incidents of resort to force akin to law enforcement, which would normally fall below this provision’s threshold of application, as was arguably the case in *Guyana/Suriname*. In other cases, states have been reluctant to invoke Article 2(4) of the UN Charter, thus pointing towards a restrictive interpretation of the threshold needed for a threat or use of force to come within the scope of Article 2(4). State practice in relation to the Paracel and Spratly Islands dispute is a relevant example in this respect. As stated earlier, despite the great number of confrontational incidents between China and Vietnam, in its 1988 letter to the UN Secretary-General, Vietnam accused China of using force only on three occasions: In 1956, in 1974 and in 1988. Statements concerning later incidents in the same dispute are along the same lines. Naturally, one should be conscious of the differences in the context of the two precedents and of the fact that the arguments invoked before a court may differ from the ones put forth outside pending legal proceedings. With these words of caution in mind, it would appear that state practice in relation to the Paracel and Spratly Islands dispute indicates that, even in the context of a territorial dispute, there is still room for law enforcement activities and that all forcible measures will not necessarily come under the prohibition to use force.

In conclusion of all the above: Article 2(4) of the UN Charter will apply to resort to force in territorial disputes even when it is the — alleged — rightful sovereign that resorts to force in order to reclaim its own territory. The same goes for small-scale resorts to force which are expressions of opposing territorial claims over a given territory. This does not mean that every resort to force by a sovereign state in order to recover or assert its sovereignty over a territory will be a violation of *jus contra bellum*. It simply means that such resort to force may not be considered a purely internal issue and that its legality will be determined by *jus contra bellum*. Obviously, if the use of force falls under the exercise of a state’s right to self-defence, it will be lawful. The extent to which this is the case will be examined below.

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78 CORTEN, supra note 23, at 67–76.
79 See Letter from Vietnam, supra note 50.
81 CORTEN, supra note 23, at 83: ‘each border dispute gives rise to claims to sovereignty that are sometimes materialised by the ephemeral despatching of a few troops into the disputed territory, without that implying for the other State an accusation of violation of article 2(4).’
B. The Interplay between the Prohibition of Use of Force in Territorial Disputes and the Right to Self-defence

It may be tempting to suggest that the interplay between the prohibition to use force in territorial disputes and the right to self-defence can be resolved by the simple proposition that, irrespective of whether the context of a resort to force is a territorial dispute or not, a state may exercise its right to self-defence in an armed attack. However, identifying when an armed attack exists is not always easy when it comes to territorial disputes. For one, the (allegedly) displaced sovereign could argue that the control exercised by the administering state over its territory constitutes an armed attack which, as a violation of a continuous character, allows the sovereign state to resort to force in self-defence at any time in order to recover its territory, while the state currently in control of the territory would have no right to react to this use of force, since no self-defence is allowed against self-defence. Under this reasoning, title to territory becomes a crucial question in the application of Article 51 of the UN Charter. Is this argument valid under current international law? Moreover, even if the prohibition of use of force protects the state administering the territory irrespective of the validity of its title and blocks the displaced sovereign from restoring its sovereignty through force, it is not always clear, as the Cameroon v. Nigeria case shows, who was in fact administering the disputed territory in the first place.

The key issue to be considered here is whether a state may resort to force in self-defence against the state in control of a disputed territory (Sub-section B.2). In order to answer this question, it is important to first look at the relevant precedents (Sub-section B.1).

1. The precedents relating to the invocation of the right to self-defence in the context of territorial disputes: analysis of state practice

India’s annexation of Goa in 1961 is a rare example where the illegality of the existent administration as such was put forward as a justification for the resort to force. India...
asserted that, in view of the right to self-determination, colonial administration of dependent territories amounted to permanent aggression and was thus illegal under Article 2(4). This in turn, allegedly gave India the right to resort to force against Portugal in Goa without violating the prohibition to use force.88 This precedent is fraught with the divide existing among states at the time, between those pleading in favour of an exception to the prohibition of the use of force in cases of self-determination and those (mainly Western States) rejecting such an exception.89 While, in the end, the appreciation of India’s argument depends on whether one considers self-determination to have modified *jus contra bellum* or not, it should be noted that India’s argument was rejected by the majority of states within the Security Council.90

With the exception of the Indian position cited above, it appears that states have usually preferred to invoke recent military activities by opposing states as constituting the armed attack that triggers their right to resort to force in self-defence. In the Falklands/Malvinas dispute, Argentina did qualify the occupation of the islands by the UK since 1833 as aggression.91 However, in connection with this 150-year occupation, it mainly invoked the dispatch by the UK of military vessels with the intention of exercising force against Argentinian nationals as an act of aggression justifying its resort to force in self-defence:

[Argentine is] the object of aggression through the dispatch of vessels to its national waters with the declared intention of exercising force against workers who (...) have been engaged in peaceful commercial activities (...) carried out in accordance with the procedures that were agreed to by the two Governments in compliance with recommendations put forward by the United Nations.

(...) 

[The] serious and imminent threat to utilize force that the presence and activities of British warships in Argentine waters and against Argentinian nationals signify means that there is a right to exercise legitimate defence.

(...) 

[There can be no doubt whatever that there is a serious and imminent threat by the United Kingdom to utilize force against Argentina’s islands, waters and mainland, leaving my —and the people of Goa are as much Indians as the people of any other part of India. We cannot accept any other position.’


90 See supra, at 247–8.

91 See U.N. Doc. S/PV.2345, supra note 38, at 6, para. 59: ‘This narration of events demonstrates one undeniable fact: the Argentine Republic has been and continues to be the object of continuous acts of aggression perpetrated by the United Kingdom. This has gone on for nearly 150 years. It is nothing other than the maintenance of a colonial situation which originated in an act of force, which was then followed by illegal occupation, usurpation …’
country no other course than immediately to adopt the necessary measures to ensure its legitimate defence.92

Argentina’s argument indicates that the mere invocation of the long-lasting and continuous occupation of the Falklands/Malvinas by the UK was not considered as constituting sufficient grounds to trigger a response in self-defence.

Along the same lines, in 1974, recent military activities rather than the pre-existing control of the disputed islands were at the heart of *jus contra bellum* accusations exchanged between China and Vietnam in relation to the Paracel Islands. Thus, China affirmed that it had ‘the right to take all necessary actions in self-defence’ as a response to Vietnam’s attempts of invasion and occupation of the islands which took place between 15 and 19 January 1974.93 Equally, Vietnam accused China of having resorted to acts of aggression with respect to Chinese military activities on 19–20 January 1974.94

The last relevant precedent to be examined here relates to the territorial dispute between Eritrea and Ethiopia. Between 1998 and 2000, the two states were involved in an armed conflict over disputed territory at their common border, including among others the area of Badme. Prior to the conflict, Badme was administered by Ethiopia. Considering that Eritrea acceded to independence in 1993, Ethiopia’s administration of Badme had lasted five years.95 During the conflict, Eritrea took control of Badme, ousting the forces of Ethiopia. In its 2002 decision on delimitation, the Boundary Commission established by a peace agreement concluded between the two states96 held, among others, that the area around Badme belonged to Eritrea. At a later stage,97

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92 *Id.* at 3, para. 29, at 7, para. 65 and at 7, para. 68. In addition to that, Argentina also maintained that ‘the continued refusal of the United Kingdom to take effective steps to settle the dispute, as demonstrated by the delays over the past 16 years added to the long-standing Argentine claim, constitutes an additional form of aggression against my country’. *See id.* at 7, para. 63.


95 In this respect, it is also important to note that the Boundary Commission did not find much evidence of Ethiopia’s administration over Badme after 1935 (the date that was held as decisive for drawing the boundary between the two States in the relevant sector); *see* Eritrea-Ethiopia Boundary Commission, Decision Regarding Delimitation of the Border, annexed to U.N. Secretary-General, Letter dated 15 April 2002 from the Secretary-General to the President of the Security Council, at 84, para. 5.94, U.N. Doc. S/2002/423 (15 April 2002): ‘there is some evidence of policing activities in the Badme Wereda in 1972–73 and of the evaluation of an elementary school at Badme town. There are, in addition, a few items dating from 1991 and 1994.’


97 Ethiopia’s Statement of Claim was filed on 12 December 2001, that is before the Boundary Commission handed down its decision on delimitation on 13 April 2002. However, all
before the Eritrea/Ethiopia Claims Commission (EECC), Ethiopia submitted that from 12 May 1988 to 11 June 1998 Eritrea carried out a series of armed attacks and launched a full-scale invasion against Ethiopia.98 Eritrea replied that Ethiopia was unlawfully occupying Eritrean territory, namely the Badme area, and that its actions of 12 May constituted self-defence in response to forcible incursions by Ethiopia into Eritrean territory as well as the use of force against Eritrean soldiers in early May 1998 (mainly on 6 and 7 May).99 It should be noted in this respect that, similarly to the arguments raised in the Falklands/Malvinas and the Paracel Islands precedents, Eritrea’s self-defence plea was not explicitly linked to the pre-existing occupation of its territory by Ethiopia, but only to the early-May Ethiopian attacks against Eritrean forces.100

This did not prevent the EECC from making itself the link between Ethiopia’s allegedly unlawful occupation of Badme and Eritrea’s invocation of self-defence. The Commission found that Eritrea had committed an armed attack in violation of Article 2(4) of the UN Charter ‘by resorting to armed force on 12 May 1998 and the immediately following days to attack and occupy the town of Badme, then under peaceful administration by [Ethiopia] as well as other [Ethiopian] territory’.101 Most importantly for our purposes, it rejected the argument relating to Ethiopia’s unlawful occupation of Eritrean territory by asserting that self-defence cannot be invoked to settle territorial disputes. The relevant passage of the partial award deserves to be quoted in full:

The Commission cannot accept the legal position that seems to underlie the first of these Eritrean contentions – that recourse to force by Eritrea would have been lawful because some of the territory concerned was territory to which Eritrea has a valid claim. It is true that the boundary between Eritrea and Ethiopia in the area of Badme was never marked in the years when Eritrea was an Italian colony, during Eritrea’s subsequent incorporation into Ethiopia, or after Eritrean independence in 1993, and it is clear that the Parties had differing conceptions of the boundary’s location. However, the practice of States and the writings of eminent publicists show that self-defence 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

other written submissions before the Claims Commission were submitted after the decision on delimitation; Eritrea’s Statement of Defence was filed on 16 December 2002, Ethiopia’s Memorial on 1 November 2004, Ethiopia’s Counter-Memorial on 17 January 2005, and Ethiopia’s Reply on 10 March 2005; see Eritrea-Ethiopia Claims Commission: *Jus Ad Bellum – Ethiopia’s Claims 1–8, Partial Award*, 2005, XXVI R.I.A.A. 457, at 464, para. 7 (19 December).


99 *Id.*, at 464–5, para. 9.

100 At least, this is how Eritrean submissions are presented in the 2005 partial award. The parties’ submissions to the Commission have not been made public.

occupied unlawfully would create a large and dangerous hole in a fundamental rule of international law.102

This finding is interesting in two respects. Firstly, the EECC places much emphasis on the ratio for not allowing self-defence to be invoked in territorial disputes. The danger of creating a gap in a prohibition that is a fundamental rule of international law seems to have motivated the position adopted by the Commission. Secondly, it is important to note that the partial award was delivered after the Boundary Commission’s determination that Badme belonged to Eritrea. Despite this finding, the EECC concluded that Eritrea could not exercise its right to self-defence in order to recover Badme. The Commission insisted on the fact that at the time of the conflict the area was disputed between the two states, pointing to two elements: An objective one (the boundary had never been marked) and a subjective one (the two states had different claims on the boundary’s location).

2. The limits to the exercise of the right to self-defence in the context of territorial disputes: the protection extended by jus contra bellum to the state peacefully administering a territory

In view of the above, it is obvious that the key question arising in connection with resort to force in territorial disputes is whether the control exercised by the administering state amounts to an armed attack, giving the right to the state which is allegedly the displaced sovereign to resort to self-defence. Such control may predate the emergence of the prohibition to the use of force. In such cases, as it has already been mentioned,103 by application of the doctrine of intertemporal law, the conquest of a territory by force cannot be treated as an armed attack if it was considered as valid title to territory under the applicable international law at the time.

The question is more delicate in the case of forcible occupation of a territory predating the prohibition of the use of force, which, under intertemporal law, does not give rise to a valid title to sovereignty, due to the existence for example of a legal title in favour of the displaced sovereign. This is the situation of the Falklands/Malvinas islands, according to Argentina’s view. Here one needs to distinguish between the occupation before and after the emergence of the prohibition to use force in international law, that is, at the latest, in 1945. Again, on the basis of intertemporal law, no question of illegality arises with respect to the occupation of the territory before the emergence of the prohibition to use force. However, the occupation of the territory without any valid legal title after 1945 comes within the scope of Article 2(4) and constitutes an armed attack against the displaced sovereign. For example, in the Falklands/Malvinas dispute, if one accepts the validity of Argentina’s legal title over the islands, this armed attack has started in 1945. As state practice in the Falklands/Malvinas precedent clearly shows, Argentina may not resort to force against this armed attack in 1982.

103 See supra, at 239.
The same problem arises in situations of occupation of a disputed territory that occurred after 1945. Vietnam’s position with respect to the Paracel and Spratly Islands dispute illustrates this point clearly. Although it accused China of having resorted to force and unlawfully occupying part of what it considers to be its own territory, Vietnam has repeatedly affirmed that all the parties involved ‘should maintain stability on the basis of the status quo and refrain (…) from the use of force or the threat of force’. Therefore, Vietnam seems to exclude the possibility of invoking self-defence in order to recover the part of the islands that, in its view, China has been unlawfully occupying since 1974. The same goes for the Eritrea/Ethiopia precedent with respect to the Badme area.

These positions seem to contradict the established conception of the right to self-defence against an ongoing armed attack. If the unlawful occupation of territory is always to be considered as an ongoing armed attack, why is Argentina prohibited from resorting to force in reaction to what it views as the UK’s unlawful occupation of the Falklands since 1945, Vietnam against what it views as China’s unlawful occupation of the Paracel Islands since 1974 and Eritrea against Ethiopia’s unlawful occupation of Badme since 1993?

One possible explanation is that this is so because the prohibition of use of force in order to solve territorial disputes operates as a limit on the exercise of the right to self-defence. This seems to be the view adopted by the EECC with respect to Eritrea’s resort to force. However, this view is not easy to reconcile with the Declaration on Friendly Relations, which states that ‘[n]othing in the foregoing paragraphs shall be construed as enlarging or diminishing in any way the scope of the provisions of the Charter concerning cases in which the use of force is lawful’. Moreover, if the existence of a territorial dispute precludes resort to force in self-defence, then it would suffice for state A to raise a claim over part of state B’s territory in order to render every subsequent resort to force by state B illegal under international law. In the case of the occupation of the North Kivu province by Uganda between 1998 and 2003, where Uganda was found to have violated the prohibition to use force, this reasoning would have prevented the Democratic Republic of the Congo from responding militarily to Uganda’s occupation had Uganda laid territorial claims over the occupied province. Such reasoning does not reflect current international law. After all, even Kuwait’s annexation by Iraq was a manifestation of Iraqi claims over the territory annexed

104 See supra, at 245.
105 See supra, at 255.
106 CORTEN, supra note 23, at 486.
107 See supra, at 255–6.
110 See the declaration by the Iraqi representative to the UN Security Council in U.N. SCOR, 2934th mtg. at 46, U.N. Doc. S/PV.2934 (9 August 1990): ‘a part of the region cherished by Iraq – Kuwait – was separated from Iraq … The colonizers did not hesitate to do in Iraq what they did in other countries of the region. That is why the Iraqi Revolutionary Command Council decided to restore to our country the portion taken away from it, thus re-establishing the eternal, indestructible unity of our country.’
(thus of a territorial dispute), and that did not affect in any way the legality of the military action undertaken against Iraq.

Another possible legal justification for rejecting the ousted state’s right to react in self-defence against foreign occupation of a disputed territory is to be found in the definition of the concept of armed attack, as informed by Resolution 3314 (XXIX) defining aggression.111 This resolution defines as aggression/armed attack as ‘… any military occupation, however temporary, resulting from [an] invasion or attack, or any annexation by the use of force of the territory of another State or part thereof’.112 However, in cases of disputed territory, it is far from clear that the territory occupied is the territory ‘of another State’. In this respect, the ousted state cannot be considered as the victim of an armed attack, since it is not clear that its own territory is being occupied. Thus, in these cases, the armed attack against the ousted state will be limited to the attack by the armed forces of the intervening state against its own armed forces113 but will not extend to the ensuing occupation of territory. This means that the ousted state may resort to force in self-defence as long as the active hostilities between the two states last. However, once control is established over the disputed territory by the intervening state, the armed attack ceases to be ongoing and the ousted state may not invoke its right to self-defence. Naturally, the key element here is to distinguish between ‘genuine’ and ‘abusive’ sovereignty claims over a given territory. Thus, it is clear that claims like the one (belatedly) put forth in August 1990 by Iraq in relation to the annexation of Kuwait will not suffice to characterize a territory as disputed and exclude the occupation as part of the armed attack. However, things may be different in the context of long-standing territorial disputes, the existence of which is recognized by third states and/or international organizations, which involve objectively plausible opposing claims over the disputed territory and where the administering state has established and has been peacefully exercising control over the territory. In such a context, it is possible to consider that the control exercised by a state over a disputed territory does not constitute an armed attack against another state because there is no occupation of another state’s territory.

In conclusion, the above analysis indicates that, in territorial disputes, any use of force disrupting an established territorial status quo would be prohibited by Article 2(4), including the use of force by the rightful sovereign seeking to recover its territory from the state, which is allegedly unlawfully in possession of it.114 The salient question of course is how to define what constitutes an ‘established territorial status quo’. State practice indicates that the more years are allowed to go by without any reaction from the part of the state whose territory is presumably occupied, the more the administration of the territory by another state will come closer to being considered an ‘established territorial status quo’. Two elements seem to be of crucial importance in

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111 See supra, at 252.
112 U.N. Doc. A/RES/3314 (XXIX), supra note 83, art. 3(a).
113 Id. art. 3(d): ‘Any of the following acts (…) shall (…) qualify as an act of aggression: (…) (d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State.’
this respect: The lapse of time and the absence of reaction on behalf of the occupied state, which gives the administration its peaceful character. How much time is needed in order for a territorial status quo to be considered as being established is of course difficult to determine in abstracto. Some cases, such as the UK’s administration of the Falklands/Malvinas or China’s administration of the Paracel Islands, are relatively easy to determine. However, the more short-lived the administration in question, the more difficult the answer becomes. In any case, if the EECC arbitral award on the Eritrea/Ethiopia conflict can be viewed as offering any indication, five years of inaction are enough for a status quo to be considered as established.

Obviously, the lapse of time will not be relevant in case of active hostilities between the intervening state and the ousted state over the disputed territory. In such a case, any lapse of time may not contribute to create an established territorial status quo. This brings us to the criterion of the peaceful character of the administration, which was mentioned in the EECC arbitral award, although the award does not explicitly link it to the question of self-defence.\textsuperscript{115} The criterion of ‘peaceful administration’ cited by the EECC echoes Professor Abi-Saab’s position in his pleadings before the International Court of Justice as counsel to Nigeria in the Cameroon v. Nigeria case. In the words of Professor Abi-Saab:

\textit{[i]f (…)} the Court were to conclude that title to these territories belongs to Cameroon, that would not be enough, contrary to what Cameroon has claimed (…) to change the legal characterization, ‘deployment and stationing of forces’, into ‘aggression and occupation’. For it would remain to be proved that at that time (…) Cameroon was administering those territories, and that it was attacked and dislodged by force.

What really counts in this type of situation, where there is a territorial or boundary dispute, is not so much the title disputed between the parties (…) [b]ut control and peaceful administration of the territory; these determine the status quo protected by law.\textsuperscript{116}

From the above, Abi-Saab concludes that:

\textit{U}ntil the judgment – your judgment – the law protects the party in peaceful possession, administering the territory ‘à titre de souverain’, in the belief, for credible legal reasons, that it has title to that territory. And that applies even if its territory is disputed by another State. But in this scenario there is not use of force by the peaceful possessor, for it was already there.\textsuperscript{117}

Nigeria’s position in the Cameroon v. Nigeria case points to a third element, namely ‘the honest belief, based on credible legal grounds, that that territory belongs’ to the

\textsuperscript{115} Element cited in relation to the finding on the violation of art. 2(4) by Eritrea; \textit{see} Eritrea-Ethiopia Claims Commission: \textit{Jus Ad Bellum} – Ethiopia’s Claims 1–8, Partial Award, 2005, XXVI R.I.A.A. 457, at 468–9, para. 19 and B.1 (19 December).


\textsuperscript{117} Oral submissions for Nigeria, Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Eq. Guinea intervening), 2002 Verbatim Record, CR2002/20, at 5–6, paras. 20–22 (8 March) [italics in the original].

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This criterion may indeed be useful in order to distinguish between genuine situations of territorial disputes and the invocation of claims over a territory as a mere pretext for aggressive resorts to force (as in the case of Iraq’s arguments concerning the annexation of Kuwait). The fulfilment of these criteria does not mean that an administration of a territory constituting an ‘established territorial status quo’ will necessarily cease to be in itself a violation of Article 2(4). It simply means that the use of force on behalf of the sovereign state in order to reclaim the territory that has been peacefully administered by another state for a long period will not be justified as self-defence. Since Article 51 cannot be invoked in such a case, the use of force by the sovereign state will violate Article 2(4) of the UN Charter.

CONCLUSION

Two main conclusions appear to emerge from the foregoing analysis. First, while issues relating to the determination of sovereignty, on the one hand, and to responsibility ensuing from a recourse to force, on the other, may be closely intertwined in a number of territorial disputes, the analysis shows that each question must be appraised on its own merits. Practice indeed evidences that the validity of arguments concerning sovereignty and responsibility is assessed separately. Thus third states may express support for the merits of the claims to sovereignty put forward by one of the parties to such a dispute, while at the same time taking the view that any attempt to regain control over the disputed territory by force runs contrary to international law. Alternatively, a court may determine, as in Cameroon v. Nigeria, which state is the rightful sovereign over a disputed space, but decline to entertain claims involving responsibility issues following (alleged) uses of force in respect of that territory. Faced with a similar case, the International Court of Justice could conversely adjudicate the sole issue of the use of force even if it were, for procedural reasons, deprived of jurisdiction to entertain the territorial dispute as such.

The second main conclusion of the analysis is that the factual situation on the ground, as far as actual control over the disputed territory is concerned, carries very significant weight when it comes to assessing the validity of the argument that force was used to regain control over a territory of which the intervening state was the rightful sovereign. Practice indeed clearly shows that the use of force is not justified in such situations – irrespective of the validity of the claim to sovereignty – whenever it results in a disruption of the status quo ante. One is thus faced here, as in so many other areas of international law, with the classical issue of the interplay between facts and law. On the one hand, it may be concluded from the above that, in the present area, the existing factual situation – the actual administration of the disputed territory by a state, whenever it meets the criteria set out above – does produce a legal effect: it

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118 *Id.*

119 One may for instance think of a case brought before the International Court of Justice on the basis of art. 36 optional declarations in a situation in which one or both declarations excludes territorial disputes from the Court’s jurisdiction.

120 *See* the last paragraph of Sub-section II.B.
deprives any contending state from the right to use force to reassert its authority over the territory concerned. However, this legal effect should not be taken for more than what it is – strictly provisional. Absolutely nothing in the practice examined in the context of the present study, suggests that the mere lapse of time – combined in casu with the ongoing occupation and administration of a disputed stretch of territory – may anyhow result in the validation of the administering state’s claim. As exposed above, the title to sovereignty will still have to be assessed on its own merits. In addition, whenever the current state of things is itself the result of a use of force, the basic illegality remains. In that sense, the principle according to which ex injuria jus non oritur keeps all its strength.

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121 Provided, again, that the abovementioned criteria are met.
122 For a general study on this principle see Anne Lagerwall, Le Principe ex injuria jus non oritur en droit international (2016).