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Respect for the Inviolability of State Territory

A thesis submitted for the degree of
Doctor of Philosophy in Law

By

Rev Fr Josephat Chukwuemeka Ezenwajiaku

Department of Politics, History and the Brunel Law School

Brunel University
London

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Abstract

This dissertation examines the problems associated with the restrictive interpretation of Article 2(4) of the Charter of the United Nations (hereinafter referred to as UN Charter) to the threat or use of force. This restrictive approach appears no longer helpful in furthering the maintenance of international peace and security. Equally, it does not adequately protect the entire territory of States for the following two reasons.

Firstly, the UN member States shelter in the first limb of Article 2(4) to engage in conducts that violate the territory of other States while claiming subservience to the provision of Article 2(4). This occurs through mere frontier incidents, covert and overt support of the activities of the non-State actors. However, the State practice shows that such conducts are always resisted by the victim State no matter how insignificant the breach might be.

Secondly, the UN member States have asserted their jurisdiction in cyberspace by adopting appropriate legislation to regulate the cyberspace activities and to curb cybercrimes. To legislate is an exercise of the sovereign power which is by nature, territorial. Thus, it is difficult to equate the non-kinetic character of the cyberspace activities to physical armed attack if Article 2(4) were narrowly construed.

Because of these developments, this dissertation advocates for a broad interpretation of Article 2(4), which is respect for the inviolability of State territory. The fact that State practice is repugnant to mere frontier incidents indicates that the restrictive approach is unacceptable. Moreover, Article 2(7) of the UN Charter which prohibits intervention in the internal affairs of a State supports a broad approach.

This dissertation adds to the scholarly debate as to whether Article 2(4) applies in cyberspace. It answers in the affirmative if the international community accepts the broad interpretation it proposes. Otherwise, the answer would be negative given the non-kinetic nature of the cyberspace activities.

Lists of abbreviations

African Capacity for Immediate Response to Crises	ACIRC
African Mission to Burundi	AMIB
African Standby Force	ASF
African Union	AU
Al-Nusrah Front for the People of the Levant	ANF
Alien Tort Claims Act	ATCA
And what follows	*et seq*
Arab Maghreb Union	AMU
Committee against Torture	CAT
Committee on Space Research	COSPAR
Confer	cf
Conference on Security and Co-operation in Europe	CSCE
Counter-Terrorism Committee	CTC
Democratic Republic of the Congo	DRC
Early Warning Mechanism of Central Africa	MARAC
East African Standby Brigade	EASBRIG
Economic Community of Central African States	ECCAS
Economic Community of West African States	ECOWAS
ECOWAS Cease-fire Monitoring Group	ECOMOG
Electronic Communications and Transactions Act	ECT
European Community	EC
European Court of Human Rights	ECtHR
European Court of Justice	ECJ
European Union	EU
Exclusive Economic Zones	EEZ
Federal Bureau of Investigation	FBI
Financial Conduct Authority	FCA
Financial Services and Markets Act	FSMA
Free Syrian Army	FSA
Group of Seven Industrialised Democracies	G7
Human Rights Council	HRC
Humanitarian Ceasefire Agreement	HCA
Inter-Governmental Authority for Development	IGAD
International Civil Aviation Organisation	ICAO
International Commission on Intervention and State Sovereignty	ICISS
International Convention on Civil and Political Rights	ICCPR
International Court of Justice	ICJ
International Criminal Court	ICC
International Criminal Tribunal for the Former Yugoslavia	ICTY
International Law Commission	ILC
International Tribunal for the Law of the Sea	ITLOS
Internet Service Providers	ISP
Islamic State in Iraq and the Levant	ISIL
Multinational Force of Central Africa	FOMAC
Non-State Actors	NSAs
North African Regional Capability	NARC
North Atlantic Treaty Organisation	NATO
Organisation of African Unity	OAU
Palestine Liberation Organisation	PLO
Peace and Security Council	PSC
People's Liberation Army	PLA
Permanent Court of Arbitration	PCA
Permanent Court of International Justice	PCIJ

Permanent Members of the Security Council	P5
Project of an International Declaration Concerning the Laws and Customs of War	PDC
Responsibility to Protect	R2P
Security Council	SC
Socialist Federal Republic of Yugoslavia	SFRY
South African Development Coordination Conference	SADC
Southern African Development Community Brigade	SADCBRIG
Syrian Opposition Council	SOC
The rest	*et cetera*
U.S. Cyber Command	USCYBERCOM
UN/AU Hybrid Operation in Darfur	UNAMID
United Kingdom	UK
United Nations	UN
United Nations Assistance Mission for Rwanda	UNAMIR
United Nations Convention on the Law of the Sea	UNCLOS
United Nations General Assembly Official Records	UNGAOR
United Nations General Assembly Resolution	UNGA Res
United Nations Group of Governmental Experts on Development in the Field of Information and Telecommunications in the Context of International Security	UN-GGE
United Nations Protected Areas	UNPA
United Nations Security Council Official Records	UNSCOR
United Nations Security Council Resolution	UNSC Res
United States	US
Universal Declaration of Human Rights	UDHR
Universal Periodic Review	UPR
US-Africa Command	AFRICOM
Vienna Convention on the Law of Treaties	VCLT
Weapons of Mass Destruction	WMD

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Chapter One

General Introduction

1.0 Introduction

This dissertation deconstructs Article 2(4) of the UN Charter [1] and observes two things. One is that this provision has two limbs to it for ensuring international peace and security. The other is that both state practice and scholarship on this provision has fixated itself on the first limb to the exclusion of the second limb. Consequently, the realisation of the international peace and security ideal has remained illusory for many years. Global Conflict Tracker lists over 25 current and ongoing conflicts around the world.[2]

The first limb refers to the prohibition of the threat or use of force against a State. This has been exhaustively written about and there are advisory opinions[3] and contentious cases[4] of the International Court of Justice's (hereinafter referred to as ICJ) decisions that refer to it. The second and mutely referred to is what this dissertation focuses on. Its neglect might even be the reason why international peace and security has been remote since the second world war. It is the requirement to uphold the inviolability of State territory.

This dissertation argues that the second limb is the dominant norm and that the prohibition of the threat or use of force is only an example of the larger requirement to respect the inviolability of State territory. This interpretive approach to Article 2(4) has some advantages. First, it gives the required maximum protection to States' territory which now includes the cyberspace. Second, it minimises the levity with which States treat Article 2(4) when they

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[1] United Nations, *Charter of the United Nations* (Signed at San Francisco on 26 June 1945, entered into force on 24 October 1945) 1 UNTS XVI [Art. 2] [hereinafter *UN Charter*].

[2] See Global Conflict Tracker at <https://www.cfr.org/global/global-conflict-tracker/p32137#!/> accessed 10 July 2017.

[3] *Legality of the Threat or Use of Nuclear Weapons* Advisory Opinion ICJ Reports (1996) p. 226 [para. 38] [hereinafter *Legality of the Threat or Use of Nuclear Weapons*]; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* Advisory Opinion ICJ Reports (2004) p. 136 [paras. 86-88] [hereinafter *Advisory Opinion on Palestine Wall*].

[4] *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v United States of America) Judgment ICJ Reports (1986) p. 14 [paras. 98-101, 190-191, 227] [hereinafter *Nicaragua case*]; *Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v Uganda) Judgment ICJ Reports (2005) p. 168 [para. 162] [hereinafter *DRC v Uganda*]; *The Case of the S.S. "Lotus"* (France v Turkey) Judgment PCIJ Series A, No. 10 (1927) 18-19 [hereinafter *Lotus case*].

breach other States' territory while claiming not to have violated international law. Third, it enhances the maintenance of international peace and security if religiously obeyed.

By emphasising the primary substantive norm and not on its secondary example, respect for the inviolability of State territory becomes the focal point. How to achieve that in a complexly ever evolving world dynamic of inter-State relations becomes the issue. This objective is not defeated from the outset since it is in the interest of States that their territories should be respected by others.

The approach this dissertation adopts departs from the traditional view that restricts the meaning of Article 2(4) to the threat or use of force.[5] Seventy-two years after the United Nations Charter was adopted, it is imperative to re-evaluate how Article 2(4) described by the ICJ as the cornerstone of the United Nations has fostered international peace and security.[6] Obviously, the maintenance of international peace and security[7] stands out as first among the other purposes of the United Nations. Thus, the UN member States' strict compliance with the provision of Article 2(4) is indispensable.

While Louis Henkin argues that States observe international law,[8] Thomas Franck laments the demise of Article 2(4).[9] This dissertation avers that the bigger issue is the UN member States' over dependence on the first limb of Article 2(4). Hence, the scholarly debate that often focuses on which violation is acceptable and which violation is not, is misplaced. Authors like Olivier Corten accepts that *de minimis* incursions into the territory of a State are not prohibited[10] as against Tom Ruys who advocates for an all-inclusive prohibition.[11] It suffices to say that this kind of debate emboldens the UN member States to avoid the threat or use

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[5] *Nicaragua case* (n 4) [paras. 98-101, 190-191, 227]; *Legality of the Threat or Use of Nuclear Weapons* (n 3) [para. 105]; *ICJ Advisory Opinion on Palestinian wall* (n 3) [paras. 86-88]; *DRC v Uganda* (n 4) [para. 162]; *Lotus case* (n 4) 18-19.

[6] *DRC v Uganda* (n 4) [para. 148].

[7] *UN Charter* (n 1) [Art. 1(1)].

[8] Louis Henkin, *How Nations Behave: Law and Foreign Policy* (Second Edition, New York, Columbia University Press 1968) 49.

[9] Thomas M. Franck, 'Who Killed Article 2(4) or: Changing Norms Governing the Use of Force by States' (1970) 64(4) *American Journal of International Law* 809-837.

[10] Corten Olivier, *The Law Against War: The Prohibition on the Use of Force in Contemporary International Law* (Oxford and Portland, Oregon, Hart Publishing 2010) 77.

[11] Tom Ruys, 'The meaning of "Force" and the Boundaries of the *Jus ad bellum*: Are Minimal uses of Force excluded from UN Charter 2(4)?' (2014) 108(2) *American Journal of International Law* 159-210.

of force while engaging in mere frontier incidents or support the nefarious activities of the non-State actors. They do that in the belief that they are complying with their obligation under Article 2(4), notwithstanding that such incremental breaches could lead to world anarchy. The situation is compounded by the "armed attack" threshold[12] established in the *Nicaragua* case without which the right to self-defence is unavailable.

Another historic event that calls for a review of the relevance of the first limb of Article 2(4) is the recognition of cyberspace as part of States territory.[13] This change is monumental for two reasons. First, the borderless nature of cyberspace encourages the free-flow of economic activities, information and cybercrime. In some cases, some of the criminalities are sponsored by States or carried out by their agents. Although the cyberspace activities are non-kinetic, they could cause harm to the target State. In some cases, the effects of the cyberspace attacks are equivalent to those caused by conventional warfare.

The cyberspace has changed the dynamics of warfare as traditionally understood. Thus, warfare has been mechanised and could be fought electronically or with remotely controlled machines such as the unmanned aerial vehicles. The same principle applies to the intercontinental ballistic missiles. Therefore, the usefulness of the narrow meaning of Article 2(4) described by the ICJ as "sending armed forces" of a State into the territory of another State[14] appears obsolete.

This dissertation seeks to address the problems identified above in eight chapters. The remaining part of chapter one will discuss the research question, purpose of the research, methodology, propose a hypothesis, review the existing literature and highlight the research limitations.

Chapter two sets out the theoretical framework upon which the subsequent chapters build. It starts by evaluating the definition of territory under the modern international law. It moves on to clarify why respect for the inviolability of a State territory is important for States. This

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[12] *Nicaragua case* (n 4) [para. 92].

[13] See chapter four below.

[14] *Nicaragua case* (n 4) [para. 195]; *DRC v Uganda* (n 4) [para. 97].

will be followed by an analysis of the theoretical basis of the right to respect the inviolability of State territory. Four theories have been selected for analysis.

First, the Natural Law Theory will be studied against the backdrop that States as artificial legal persons derive their legal rights from humans and that every human person is inviolable. Second, the New Haven School will be evaluated because its tenet goes beyond the text of a legal norm in pursuit of values. Third, the International Relations Theory will be examined against the demand for an interdisciplinary approach to studying legal texts. Fourth, the legal positivism will be analysed to show the importance of interpreting a legal text in a context.[15]

The other issues analysed in chapter two is the historicity of the principle under investigation. This was done under two periods, namely, Westphalia and Modern. The Westphalia State Model looks at the balance of power when Christianity and the Holy Roman Empire dominated world affairs. It will demonstrate how the balance of power changed with the Treaty of Westphalia[16] which accorded "exclusive authority" to leaders of autonomous entities in political and religious matters. The Modern State System elaborates on how the exclusive authority over States territory evolved over the years in multilateral and bilateral instruments. This chapter argues that this historical development should be construed broadly.

Chapter three offers a detailed analysis of the provision of Article 2(4). The purpose of this chapter is to draw the attention of the reader to the deliberations that went on during the drafting of Article 2(4) at San Francisco. It argues that the fact that some States proposed that the scope of Article 2(4) should include economic coercion and others advocated for the insertion of the word "inviolability" suggests that some Member States have intended a broad meaning. This argument is supported by the peremptory character of Article 2(4). Besides, a debate regarding the nature of Article 2(4) was revisited before the United Nations General

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[15] For a discussion of the theories, see Andrea Bianchi, *International Law Theories: An Inquiry into Different Ways of Thinking* (United Kingdom, Oxford University Press 2016) 91-109; Robert Cryer, Tamara Hervey, Bal Sokhi-Bulley and Alexandra Bohm, *Research Methodologies in EU and International Law* (Oxford and Portland, Oregon, Hart Publishing 2011) 37.

[16] *Treaty of Westphalia* (1648) [Arts. 64 and 65] available at <http://avalon.law.yale.edu/17th_century/westphal.asp> accessed 22 November 2015 [hereinafter *Treaty of Westphalia*].

Assembly adopted Resolution 2625 (XXV)[17] in 1970. These are pointers to the second limb of Article 2(4). Otherwise, the General Assembly Resolution 2625 which was based on the "progressive development and codification of the principles of international law"[18] would have been a failure if it repeats the existing norm.

Chapter four reappraises the difficulties in applying the narrow meaning of Article 2(4) to cyberspace. It examines how the UN member States have started claiming jurisdiction in the cyberspace and evaluates whether the breaches of States' cyber-territory fall within the restrictive interpretation of Article 2(4). It argues that it does not but that the direct application of Article 2(4) is engaged if the second limb were invoked.

Chapter five evaluates how the first limb of Article 2(4) has short-changed international peace and security. It will investigate various breaches of States' territory on land, at territorial sea and in the airspace. The purpose is to underscore that these breaches are factual and to counter the claim often made that they fall beyond the scope of Article 2(4).

Chapter six evaluates the lawful exceptions to the prohibited act under Article 2(4) in the context of the conduct or otherwise of non-State actors. It questions whether States could enforce self-defence against non-State actors occupying a part of another State's territory without its consent or an authorisation from the Security Council? The aim is to caution against the undue extension of the permitted exceptions following the 9/11 terrorist attacks on the United States. This chapter argues that State practice does not indicate that a new custom has emerged in that regard.

Chapter seven examines humanitarian intervention as a contemporary issue militating against the principle of the inviolability of State territory. It begins by evaluating the theories of humanitarian intervention, the fundamental human rights and how the international human rights instruments are enforced. Further, it examines the emerging principle of the

[17] UNGA Res. A/RES/2625 (XXV) (24 October 1970). For the debate in the United Nations General Assembly see United Nations Secretary-General, 'Systematic Summary of the Comments, Statements, Proposals and Suggestions of the Member States in respect of the consideration by the General Assembly of Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations,' UN Doc. A/AC.119/L.1 (24 June 1964).
[18] UNGA Res. A/RES/2533 (XXIV) (8 December 1969) [preamble para. 5].

Responsibility to Protect, its codification in Article 4(h) of the Constitutive Act of the African Union[19] and whether it has been accepted as a customary law. It argues that the Responsibility to Protect in its current form does not dispel the sanctity of States territory in the event of gross human rights abuses.

Chapter eight summarises the dissertation and makes recommendations.

1.1 Research question

The question this research seeks to address is: Whether Article 2(4) could be interpreted as respect for the inviolability of State territory?

To further clarify the research question, this research asks:

1. To what extent is state practice that condemns mere frontier incidents indicative of the broad prohibition of Article 2(4)?
2. Does Article 2(4) accommodate States' conducts less than the threat or use of force?
3. How would the maintenance of international peace and security be better achieved?
4. What could be the consequences of an intentional violation of a State territory without the threat or use of force?

1.2 Hypothesis

This dissertation argues that the respect for the inviolability of State territory is the second limb of Article 2(4) of the UN Charter. The basis for this hypothesis is as follows:

1) The primary purpose of the United Nations is to maintain international peace and security; it is unlikely that the Charter would feel unperturbed with minor violations that could strain inter-States relations.

2) To suggest that only the threat or use of force is prohibited does not explain the need for Article 2(7) of the UN Charter or the General Assembly Resolution 2625 (XXV) of 24 October 1970.

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[19] Organisation of African Unity, *Constitutive Act of the African Union* (Adopted on 11 July 2000, entered into force on 26 May 2001) 2158 UNTS 3 [Art. 4(h)] [hereinafter *Constitutive Act of the African Union*].

3) The narrow interpretation of Article 2(4) no longer covers the scope of States' territory which now includes the cyberspace.

1.3 Purpose of the Research

The purpose of this dissertation is to stimulate academic discussions towards changing the international community's fixation at the first limb of Article 2(4). There is a need to re-focus the discussion on Article 2(4) to the respect for the inviolability of State territory because it stands a better chance of enhancing international peace and security. Insofar as spying on a state does not count as the threat or use of force, it could damage inter-states relations in a way that could jeopardise international peace and security. As shall be seen, the diplomatic row between the United States and Russia over the alleged latter's meddling in the former's 2016 presidential election is a case in point.

1.4 Research Methodology

This research uses doctrinal method for its analysis. The doctrinal method questions 'what the law is in a particular area.'[20] For our purposes, "area" refers to Article 2(4) of the UN Charter. This research seeks to verify the substantive normative value of Article 2(4) with the tool of legal positivism. Legal positivism focuses on describing the law as it is without moral and ethical considerations.[21] The vestiges of the legal positivism are seen when this dissertation condemns any breach of a State territory that does not conform to the permitted exceptions. This kind of argument is the melting-pot for the doctrinal method and legal positivism in that while the former evaluates the "black-letter law,"[22] the latter interrogates what States consented to as reflected in the content of a rule.[23]

However, this dissertation risks being accused of a double standard because while it relies on the "black-letter law" to dispel the violation of a State territory as contrary to international

[20] Mike McConville and Wing H. Chui (eds), *Research Methods for Law* (Edinburgh, Edinburgh University Press 2007) 18-19.

[21] Steven R. Ratner and Anne-Marie Slaughter, 'Appraising the Methods of International Law: A Prospectus for Readers' (1999) 93(2) *American Journal of International Law* 291-302, 293.

[22] Bianchi 2016 (n 15) 21.

[23] Bruno Simma and Andreas L. Paulus, 'The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positive View' (1999) 93(2) *American Journal of International Law* 302-316, 303.

law, it tends to broaden the scope of Article 2(4). The textual analysis of Article 2(4) would consider the thesis propounded by this dissertation as exaggerated. But this dissertation's consideration is more on what promotes international peace and security. Conceivably, it sometimes digresses to "values"[24] which is the legacy of the New Haven School as a critique of the legal positivism. One could argue that the "emerging" state practice that favours humanitarian intervention is a "value" capable of dissipating the inviolability of State territory.

Nevertheless, the overarching principle guiding this research is the legality of Article 2(4) as manifested in state practice. Since the legal positivism admits that international law is made through the consent of States,[25] then State practice indicates what States believe they have consented to. There is no indication that the UN member States have agreed that humanitarian intervention could oust the second limb of Article 2(4). By not depending solely on the analysis of the "black-letter law," this research enhances the primary purpose of the United Nations which is the maintenance of international peace and security.

The primary sources for this research include the UN Charter, the United Nations Conventions, Treaties and their Protocols, and the Case law of international judicial bodies. Other primary sources include the Resolutions of the Security Council and the General Assembly or such documents from other organs of the United Nations. This research will equally use other multilateral or bilateral treaties, and conventions concluded at the regional levels. The same applies to national legislation or case law from the domestic courts.

The secondary sources are published works on the relevant topic. This includes Books, Journal Articles, Report from the Non-Government Organisations, Independent Experts' Report on Conflicts and Wars, Newspaper Articles, Working Papers and the relevant websites (such as the Uppsala Conflict Data Program).

The analysis of the existing literature whether primary or secondary sources is done in a manner that shows how state practice favours the broad interpretation of Article 2(4). It will also help to expose how the determinacy or indeterminacy of Article 2(4) enhances or

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[24] Bianchi 2016 (n 15) 76; Ratner and Slaughter 1999 (n 21) 293-294.
[25] Simma and Paulus 1999 (n 23) 303.

weakens states' compliance pull. Thomas Franck argues that legitimacy is a matter of degree.[26] It manifests through states' attitude towards Article 2(4) especially now that its scope extends to cyberspace.

Finally, this research is library-based. It does not engage in empirical research and does not require the approval of the Research Ethics Committee. The research was carried out in the following libraries in the United Kingdom: Brunel University, Institute of Advanced Legal Studies, British Library and the School of Oriental and African Studies.

1.5 Literature Review

The originality of this dissertation is not questionable. To date, no work (that this dissertation is aware of) has argued that the primary substantive norm of Article 2(4) should be the respect for the inviolability of State territory. However, the word "inviolability" in connection with a State's territory is used in the United Nations Conventions regarding the status of diplomats, diplomatic premises, properties, documents, bags and communications.[27] It raises the question as to why "inviolability" is used to refer to extra-territorial properties belonging to a State but not in Article 2(4).

This research is aware that Article 2(4) is one of the most published areas under Public International Law. There is hardly any textbook on Public International Law that does not have a section on the Use of Force. It is equally true that "territorial integrity," which is the exact phrase used in Article 2(4) cuts across issues relating to the use of force, acquisition of legal title, conquest, intervention against foreign territories, self-determination among others.

[26]Thomas M. Franck, *The Power of Legitimacy among Nations* (New York, Oxford University Press 1990) 41.
[27] *Vienna Convention on Diplomatic Relations* (Done at Vienna on 18 April 1961, entered into force on 24 April 1964) 500 UNTS 95 [Arts. 22, 24, 27, 29, 30, 38 and 40].

Concerning how Article 2(4) relates to the threat or use of force, works written by Ian Brownlie,[28] Olivier Corten,[29] Yoram Dinstein,[30] Christine Gray,[31] Rosalyn Higgins,[32] Thomas Franck,[33] Anthony D'Amato[34] among others[35] are useful resources. Additionally, two reference materials that discuss themes on International Law such as the *Commentary on the Charter of the United Nations* edited by Bruno Simma[36] and the Oppenheim's International Law[37] endorse this interpretation.

Concerning the relationship of Article 2(4) with the acquisition of a valid territorial title, works written by Michael Shaw[38] and Joshua Castellino[39] are an invaluable resource to engage with. Sharon Korman's work[40] evaluates how conquest has been outlawed as a mode of acquisition under the modern international law. The book published by James Crawford[41] highlights that

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[28] See generally, Ian Brownlie, *International Law and the Use of Force by States* (New York, Oxford University Press 1963).

[29] Corten Olivier, *The Law Against War: The Prohibition on the Use of Force in Contemporary International Law* (Oxford and Portland, Oregon, Hart Publishing 2010) 51.

[30] Dinstein Yoram, *War Aggression and Self-defence* (Fifth Edition, The United Kingdom, Cambridge University Press 2011) 95.

[31] Christine Gray, *International Law and the Use of Force* (Third Edition, United Kingdom, Oxford University Press 2008) 42.

[32] Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Oxford, Oxford University Press 1994) 240.

[33] Thomas M. Franck, *Recourse to force: state action against threats and armed attack* (United Kingdom, Cambridge University Press 2002) 20.

[34] Anthony D'Amato, *International Law: Process and Prospect* (Second Edition, New York, Transnational Publishers 1995) 57.

[35] Malcolm N. Shaw, *International Law* (Seventh Edition, United Kingdom, Cambridge University Press 2014) 811 (footnotes 1-2); Romana Sadurska, 'Threats of Force' (1988) 82(2) *American Journal of International Law* 239-268; Marco Roscini, 'Threats of Armed Force and Contemporary International Law' (2007) 54(2) *Netherlands International Law Review* 229-277; Mark W. Zacher, 'The Territorial Integrity Norm: International Boundaries and the Use of Force' (2001) 55(2) *International Organization* 215-250.

[36] Bruno Simma *et al.,* (eds), *The Charter of the United Nations: A Commentary* (Volume II, Third Edition, Oxford, Oxford University Press 2012) 2110.

[37] Robert Jennings and Arthur Watts (eds), *Oppenheim's International Law* (Ninth Edition, Volume 1, Peace, Part 1, London and New York, Longman 1996) 428 [hereinafter *Oppenheim 1996*].

[38] Shaw 2014 (n 35) 358; *Oppenheim 1996* (n 37) 667; see generally, Michael N. Shaw, *Title to Territory in Africa: International Legal Issues* (Oxford, Oxford University Press 1986); Michael N. Shaw, *Title to Territory* (United Kingdom, Taylor and Francis Limited 2005).

[39] Joshua Castellino, *Title to Territory in International Law: A Temporal Analysis* (England, Ashgate 2003) 33-56.

[40] Sharon Korman, *The Right of Conquest: The Acquisition of Territory by Force in International Law and Practice* (Oxford Clarendon Press 1996) 8.

[41] James Crawford, *The Creation of States in International Law* (Second Edition, New York, Oxford University Press 2006) 132.

the modern international law does not recognise the validity of the legal title acquired by force.

Another area of concern is the interface between the inviolability of State territory and "self-determination." Article 1(2) of the UN Charter states that one of the purposes of the UN is 'to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples ….'[42] It is unclear whether the Charter allows States to intervene in the territory of another State to facilitate self-determination. Authors such as Antonio Cassese[43] and George Nolte[44] have argued that customary law supports intervention in favour of self-determination. A similar conclusion is reached for cases involving the gross violations of human rights.[45]

Abdellhamid El Ouali's book titled *Territorial Integrity in a Globalizing World*[46] approached the discourse on the inviolability of State territory from a new perspective. He observed that scholarship that links the inviolability of State territory with themes such as the use of force or self-determination misses the point.[47] He proposes that the essence of the inviolability of State territory is 'intimately linked to the state as a legal entity the main objective of which is to ensure its perennial existence within a specific territory whose borders have been established in accordance with International Law.'[48] This dissertation agrees with his findings but adds that that sort of legal existence imposes upon States the duty to respect the inviolability of other States territory. It traces the source of this obligation to Article 2(4), or farther still, to the Treaty of Westphalia.

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[42] *UN Charter* (n 1) [Art. 1(2)].

[43] Antonio Cassese, *International Law in a Divided World* (New York, Oxford University Press 1986) 131-136; Antonio Cassese, *Self-determination of Peoples: A Legal Reappraisal* (United Kingdom, Cambridge University Press 1995) 174-176.

[44] George Nolte, 'Secession and external intervention' in Marcelo G. Kohen (ed), *Secession: International Law Perspective* (New York, Cambridge University Press 2006) 72-73; Joshua Castellino, *International Law and Self-determination* (The Hague and London, Martinus Nijhoff 2000) 22.

[45] Joshua Castellino, 'International law and self-determination: Peoples, Indigenous Peoples, and Minorities' in Christian Walter, Antje Von Ungern-Sternberg and Kavus Abushov (eds), *Self-determination and Secession in International Law* (United Kingdom, Oxford University Press 2014) 31; Nolte (n 44) 73.

[46] See generally Abdelhamid El Ouali, *Territorial integrity in a Globalizing World: International Law and States' Quest for Survival* (London and New York, Springer Heidelberg Dordrecht 2012).

[47] Ouali (n 46) 2.

[48] ibid., 2.

1.6 Research Limitation

This research has been limited by various factors such as the duration of time, resources, language barriers and the University's regulation on the number of words for a doctoral dissertation. Regarding the duration of time, the United Kingdom's policy that allows four years for a doctoral project makes continuation of the research difficult. To that is added, that the lack of funding to continue this research makes it even more difficult.

The author of this dissertation is not a polyglot. That deficiency impeded its' ability to access or read legislations written in languages other than English such as Russian, Chinese, French, Dutch or Ukrainian. Where this problem applies, the dissertation relies on unofficial translation for which the author cannot verify authenticity or accuracy.

Furthermore, the Brunel University's policy requires that a doctoral dissertation should not exceed a certain number of words. This constrained this dissertation and made it selective in the cases studied to buttress its argument. It does, however, try to mitigate the adverse effects these limitations would have on its findings by justifying its decisions where applicable.

1.7 Clarification of some of the basic concepts used

This dissertation is titled the respect for the inviolability of State territory. In some cases, "inviolability" is used while in others "respect" of a State territory is used. Both words refer to the same thing, whether used separately or together. Therefore, respect and inviolability are used interchangeably to mean the same thing.

Chapter Two

Theoretical framework of the requirement to respect the inviolability of State territory

2.0 Introduction

This chapter lays out the theoretical framework under which an evolutive[1] interpretation of Article 2(4) could be read as respect for the inviolability of State territory. This dissertation is driven by the inadequacy of the first limb of Article 2(4) in enhancing international peace and security. The disrespect of a State's territory through illegal conduct sets in motion an action that may lead to inter-State armed conflict. Unfortunately, the previous attempt made by the United Nations General Assembly[2] to broaden the scope of Article 2(4) was not entirely successful.

This chapter starts by studying what territorial sovereignty entails. It goes on to evaluate the emergence of the principle of the requirement to respect the inviolability[3] of State territory from the viewpoint of the Peace of Westphalia. To achieve that, this chapter applies deductive reasoning to thresh out the requirement to respect the inviolability of State territory from the legal instruments enacted from the Peace of Westphalia going forward. Therefore, references made to the threat or use of force are intended to unearth the inadequacies of the first limb in fostering international peace and security.

2.1 Definitions

2.1.1 State Territory under the Modern International Law

A meaningful discussion on the requirement to respect the inviolability of State territory

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[1] The method of "evolutive interpretation" first appeared in the jurisprudence of the European Court of Human Rights when the Court argued that law is a living instrument. See *Case of Tyrer v the United Kingdom* (Application No. 5856/72) Judgment (1978) 2 EHRR 1 [para. 31]. The word, "inviolability" meaning an all-inclusive terminology has been advocated for by authors such as Lauterpacht, Verdross, Simma and D'Amato. See Bruno Simma *et al.,* (eds), *The Charter of the United Nations: A Commentary* (Second Edition, New York, Oxford University Press 2002) 123.

[2] UNGA Res. A/RES/25/2625 (24 October 1970), 'Principle concerning the duty not to intervene in matters within the domestic jurisdiction of any state, in accordance with the Charter' [para. 1].

[3] The UN Charter does not contain the word "inviolability," but it has been adopted by some regional bodies. See *Conference on Security and Cooperation in Europe: Final Act Helsinki* (Done at Helsinki on 1 August 1975) [Art. 3] available at available at <https://www.osce.org/mc/39501?download=true> accessed 14 April 2017 [hereinafter *Helsinki Final Act 1975*].

should begin with the basic understanding of a State. Such an inquiry is disappointing for lack of a satisfactory definition.[4] Presumably, this is due to the fact that 'the formation of a new state … is a matter of fact and not of law.'[5] Previous attempts by the International Law Commission (hereinafter referred to as ILC) to come up with a definition have been stalled by the polarised views held by the UN member States.[6] This impasse partly contributes to the UN member States' refusal to adopt the ILC's Draft Declaration on the Rights and Duties of States.[7] The concepts, "State" and "Nation" have remained highly contested themes because of the divisive effect of the right of peoples to self-determination.[8]

A couple of definitions from political philosophers and legal theorists might clarify the concept of a State. Hugo Grotius defined State as 'a complete association of free men, joined together for the enjoyment of rights and for their common interest.'[9] The idea that a State is composed of "free men" is typical of a patriarchal society where women play a subsidiary role. Generically, Grotius' definition reflects the Hobbesian's Social Contract Theory[10] which suggest that States are created through the free association of people. The individual's right and interest is achieved if the parties respect the rights of the other person as agreed upon.[11] Vattel equates the natural rights of human beings with the sovereign equality of States as follows:

> since men are by nature equal and their individual rights and obligations the same, as coming from nature, nations, which are composed of men and may be regarded as so many free persons living together in a state of nature, are by nature equal and hold from nature the same obligations and the same rights. Power or weakness does not in this respect produce any difference. A dwarf is as

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[4] Thomas D. Grant, 'Defining Statehood: The Montevideo Convention and its Discontents' (1999) 37(2) *Columbia Journal of Transnational Law* 403-458, 408.
[5] James Crawford, *The Creation of States in International Law* (Second Edition, New York, Oxford University Press 2006) 4.
[6] Crawford 2006 (n 5) 31.
[7] *Draft Declaration on Rights and Duties of States* (Adopted by the International Law Commission at its first session in 1949) (Volume I, Yearbook of International Law Commission 1949) [Art. 1].
[8] For details, see International Law Commission, 'Draft Declaration on Rights and Duties of States – (A/CN.4/2) General Debate of the Seventh Meeting held on 21 April 1949' (Volume I, Yearbook of International Law Commission 1949) 61-62.
[9] Crawford 2006 (n 5) 6.
[10] Thomas Hobbes, *Leviathan* (Edited by Richard Tuck) (Great Britain, Cambridge University Press 1991) 121.
[11] David Gauthier, 'Symposium Papers, Comments and an Abstract: Hobbes's Social Contract' (1988) 22(1) *Noûs* 71-82, 72; Samuel Freeman, 'Reason and Agreement in Social Contract Views' (1990) 19(2) *Philosophy & Public Affairs* 122-157, 123; David Gauthier, 'The Social Contract as Ideology' (1977) 6(2) *Philosophy & Public Affairs* 130-164, 134.

> much a man as a giant; a small republic is no less a sovereign State than the most powerful kingdom.[12]

In other words, States' sovereignty derives from the natural right of its citizens. However, it does not explain how a State acquires the right to its territory. In 1890, Pasquale Fiore defined State as 'an association of a considerable number of men living within a definite territory, … and subject to the supreme authority of a sovereign.'[13] Fiore added a crucial point that a State must have a delimited territory that is under the authority of a sovereign.

Thomas Baty went further to posit that a State is an 'assemblage of human beings among whom the will of an ascertainable number habitually prevails.'[14] This definition resembles an oligarchy system of government.[15] However, Baty's major contribution is his position that the authority of a sovereign excludes the participation of the outside world.[16] Again this position is contestable in that no State is self-sufficient. Regardless, Franz Von Liszt maintains that 'independence (*Selbstdndigkeit*) and supremacy over territory (*Landeshoheit*) were indispensable attributes of the State.'[17]

It was Hans Kelsen's approach to the discourse that was based on a legal foundation. He equates a State with the legal order that regulates the citizens of a State:

> One of the distinctive results of the pure theory of law is its recognition that the coercive order which constitutes the political community we call a State, is a legal order. What is usually called the legal order of the State, or the legal order set up by the State, is the State itself.[18]

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[12]Emer de Vattel, *The Law of Nations, or the Principles of Natural Law Applied to the Conduct and Affairs of Nations and Sovereigns* (Sixth American Edition from A New Edition by Joseph Chitty) (Philadelphia, T. & J. W. Johnson, Law Booksellers 1844) [preliminaries § 18]; see also *American Declaration of Independence* (1776) § 2 available at <http://www.constitution.org/us_doi.pdf> accessed 20 April 2017. Baker traces the origin of the doctrine of equality to Puffendorf. See P. J. Baker, 'The Doctrine of Legal Equality of States' (1923-1924) 4 *British Year Book of International Law* 1-20, 6; J. L. Brierly, *The Law of Nations: An Introduction to the International Law and Peace* (Sixth Edition, Oxford, Clarendon Press 1963) 49.

[13] Pasquale Fiore, *International Law Codified and its Legal Sanction or the Legal Organization of the Society of States* (New York, Baker, Voorhis and Company 1918) 106.

[14] Grant (n 4) 409.

[15] Oligarchy is described both as the rule of a few and as the rule for the rich. See Abel H. J. Greenidge, *A Handbook of Greek Constitutional History* (London, Macmillan and Co. Limited 1911) 60.

[16] Grant (n 4) 409.

[17]ibid., 409.

[18] Hans Kelsen, 'The Pure Theory of Law and Analytical Jurisprudence' (1941) 55(1) *Harvard Law Review* 44-70, 64-65; Hans Kelsen, 'Recognition in International Law: Theoretical Observations' (1941) 35(4) *American Journal of International Law* 605-617, 606-610.

Kelsen made no distinction between law and State and sought to bridge the dualism[19] that had existed before him. Kelsen's approach is exaggerated because not every aspect of a State's life is regulated by law. To date, no State has a law on how its citizens should breathe in oxygen and breathe out carbon dioxide in public spaces. Yet, breathing constitutes an essential means of safeguarding the continuity of a State, especially where the air has been polluted and could cause health hazards. Despite a foreseeable objection that breathing is an act of humans, it highlights that law, which Kelsen equates to a State, is more than a coercive order.

Besides, the argument that States exist to provide individuals with a unified object of desire in order to preserve their physical, as well as moral well-being[20] is not always the case. It is deficient in that a State's law does not always appeal to all its citizens[21] even when it might be in keeping with the State's obligation to protect the life of its citizens.

The absence of a universally accepted definition of a State could be a barrier to this dissertation proposing respect for the inviolability of State territory. Thus, the international law determines statehood based on the conditions set out in the *Montevideo Convention on the Rights and Duties of States of 1933*[22] (hereinafter referred to as Montevideo Convention). One of the conditions is that a State must have "a defined territory."[23]

2.1.2 A defined territory

According to L. Oppenheim, 'a State territory constitutes the defined portion of the surface

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[19] Andrea Bianchi has defined tradition as 'a commitment to a certain worldview, which is reiterated in specific communicative situations and handed down from one generation of international lawyers to another.' See Andrea Bianchi, *International Law Theories: An Inquiry into Different Ways of Thinking* (United Kingdom, Oxford University Press 2016) 22.

[20] Samuel Weber, 'In the name of the law' in Drucilla Cornell *et al.,* (eds), *Deconstruction and the Possibility of Justice* (Great Britain, Routledge, Taylor and Francis 1992) 243.

[21] An example is the tension between State's surveillance and the individual's right to privacy. See UNGA Res. A/RES/68/167 (21 January 2014) [operative paras. 1-6]; Nick Taylor, 'State Surveillance and the Right to Privacy' (2002) 1(1) *Surveillance and Society* 66-85.

[22] Article 1 provides as follows: 'The state as a person of international law should possess the following qualifications: a) a permanent population; b) a defined territory; c) government; and d) capacity to enter into relations with the other states.' See *Convention on Rights and Duties of States adopted by the Seventh International Conference of American States* (Signed at Montevideo on 16 December 1933, entered into force on 26 December 1934) 165 LNTS 19 [Art. 1] [hereinafter *Montevideo Convention*].

[23] *Montevideo Convention* (n 22) [Art. 1(b)].

of the globe which is subjected to the sovereignty of the State.'[24] Judge Max Huber in the *Island of Palmas*[25] dispute explains that within a defined territory, a state has the right to exercise its functions to the exclusion of any other State.

This means that there cannot be a State without a territory although what constitutes "a defined portion of the earth surface" is ambiguous. Obviously, there are States without delimited boundaries.[26] While the Former Socialist Federal Republic of Yugoslavia (hereinafter referred to as FRY) was denied *locus standi* in the United Nations Security Council for lack of a defined territory,[27] the ICJ allowed it to appear before it in the Bosnia Genocide case.[28] This suggests that the FRY was a State at the material time given that the ICJ jurisdiction extends only to States parties.[29]

In the *North Sea Continental Shelf*[30] cases, the ICJ held that 'there is no rule that the land frontiers of a State must be fully delimited and defined.' This view was upheld in a territorial dispute between Libya and Chad in 1994.[31] In 1991, Croatia's internal boundaries transformed to international borders through the principle of *uti possidetis* when the Socialist Federal Republic of Yugoslavia disintegrated.[32] The dissolution did not obliterate the existence of the FRY in principle. While "a defined territory" is pivotal, its' absence does not obscure the conceptual identity of the State in question. As shall be seen in chapter five, the Permanent Court of Arbitration held that China violated the territory of the Philippines even though it

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[24] L. Oppenheim, *International Law: A Treatise* (Seventh Edition, London, Longmans, Green and Co Ltd 1963) 451 [hereinafter *Oppenheim 1963*]; Robert Jennings and Arthur Watts (eds), *Oppenheim's International Law* (Ninth Edition, Volume 1, Peace, Parts 2-4, London and New York, Longman 1996) 563 [hereinafter *Oppenheim 1996*].

[25] *Island of Palmas Case (Netherlands v USA)* 2 RIAA 829-871, 838 [hereinafter *Island of Palmas case*].

[26] See Jure Vidmar, 'Territorial integrity and the law of statehood' (2013) 44(4) *The George Washington International Law Review* 697-747, 702; Abdul Aziz Jaafar, 'The Majority of Potential Maritime Boundaries Worldwide and the South China Sea remain undelimited: Does it matter?' (2013) 4(1) *The Journal of Defence and Security* 1-10.

[27] UNSC Res. S/RES/757 (30 May 1992) [preamble para. 10]; UNSC Res. S/RES/777 (16 September 1992) [operative para. 1].

[28] *Application of Convention on Prevention and Punishment of Crime of Genocide* (Bosnia & Herzegovina v Yugoslavia) Preliminary Objections ICJ Reports (1996) p. 595, 596 [hereinafter *Bosnia Genocide case*].

[29] *Statute of the International Court of Justice* (Adopted at San Francisco on 26 June 1945, entered into force on 24 October 1945) (1945) 39(3) *American Journal of International Law Supplement* 215-229 [Art. 34(1)] [hereinafter *ICJ Statute*].

[30] *North Sea Continental Shelf Cases* (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands) Judgment ICJ Reports (1969) p. 3 [para. 46].

[31] *Territorial Dispute* (Libyan Arab Jamahiriya/Chad) Judgment ICJ Reports (1994) p. 6 [paras. 44, 52].

[32] UNGA Res. A/RES/46/238 (22 May 1992) (admission of Croatia to the United Nations); UNGA Res. A/RES/46/236 (22 May 1992) (admission of Slovenia to the United Nations); UNGA Res. A/RES/46/237 (22 May 1992) (admission of Bosnia-Herzegovina to the United Nations).

had acted in error and Nigeria was not absolved of its wrongful act over what it calls "reasonable mistake" in her territorial dispute with Cameroon.

Therefore, a "defined portion of the surface of the globe" traditionally refers to the legal "title" which every State possesses over land, territorial sea and the airspace.[33] In the *Burkina Faso v Mali* case,[34] the ICJ held that the word "title" 'comprehends both any evidence which may establish the existence of a right and the actual source of that right.'[35] While Shaw locates the source of the legal title to the Roman rules dealing with property,[36] Crawford argues that States by nature are territorial entities.[37] A defined territory is the circumscribed portion of the earth's surface within which States have the right to display their activities to the exclusion of others.[38] It seems that a defined territory could exist in fact or in law.

2.2 The concept of territoriality

Technically, the concept of territoriality deals with the wholeness/unity of a State territory.[39] Sack has defined territoriality as the 'circumscription of things in space with the intent to influence, affect and control them.'[40] Note that the three elements of this definition (influence, affect and control) are restricted to "a defined territory." While a State's sovereignty extends to its citizens abroad, territoriality is limited to the State's legitimate physical space.[41] The Permanent Court of International Justice (hereinafter referred to as PCIJ) in *the Case of the S.S. Lotus*[42] held that jurisdiction is territorial.

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[33] Malcolm N. Shaw, *International Law* (Seventh Edition, Cambridge, Cambridge University Press 2014) 354.

[34] *Frontier Dispute* (Burkina Faso v Mali) Judgment ICJ Reports (1986) p. 554 [para. 18].

[35] *Case concerning the Land, Island and Maritime Frontier Dispute* (El Salvador v Honduras: Nicaragua intervening) Judgment ICJ Reports (1992) p. 351 [para. 45].

[36] Shaw 2014 (n 33) 354.

[37]Crawford 2006 (n 5) 46; *Oppenheim 1963* (n 24) 452.

[38] *Island of Palmas case* (n 25) 839; *Oppenheim 1996* (n 24) 564; *The Case of the S.S. "Lotus"* (France v Turkey) Judgment PCIJ Series A, No. 10 (1927) 18 [hereinafter *The Lotus case*]; *Legal Status of Eastern Greenland*, Judgment PCIJ Series A/B, No. 53 (1933) 82 (Dissenting opinion of Judge M. Anzilotti) [hereinafter *Eastern Greenland case*].

[39] Abdelhamid El Ouali, 'Territorial Integrity: Rethinking the Territorial Sovereign Right of the Existence of the States' (2006) 11(4) *Geopolitics* 630-650, 631.

[40] Robert D. Sack, 'Human Territoriality: A Theory' (1983) 73(1) *Annals of the Association of American Geographers* 55-74, 56 (emphasis added).

[41] Kal Raustiala, 'The evolution of territoriality: International Relations and American Law' in Miles Kahler and Barbara F. Walter (eds), *Territoriality and Conflict in an Era of Globalisation* (Cambridge, Cambridge University Press 2006) 222.

[42] *The Lotus Case* (n 38) 18; see also *McDonald v Mabee* 243 US 90 (1917) 91 (the US Supreme Court holding that the foundation of jurisdiction is physical power); For further discussions, see Hugh Handeyside, 'The Lotus

A State's right to "influence," "affect" and "control" activities is absolute if confined to a defined territory. In the *S.S. Lotus* case mentioned above, the PCIJ did not find Turkey in breach of the French territory since it has the power to legislate on any topic and the said arrest and prosecution of the French citizens took place within the Turkish territory.

Territoriality manifests in many forms, namely, political, economic, social or legal. These forms confer upon a State the power to influence, affect and control its affairs and impose upon other States the obligation to refrain from conduct that undermines the legitimate exercise of this right. The Westphalian origin of territoriality[43] shows it was meant to safeguard the territory of some political units governed by princes. According to Chigara and Wheaton, territoriality gives States exclusive sovereignty and jurisdiction such that no State can by its laws directly affect, bind, or regulate its internal affairs.[44]

This view may be disputed on two grounds. First, Dicey had articulated Parliamentary Sovereignty according to which a State could make or unmake any law whatsoever.[45] In Europe, this thesis became obsolete when the European Community (hereinafter referred to as EC) was established.[46] Second, the extra-territorial application of law is recognised by the modern international law insofar as the law of a State does not apply to consulate and diplomatic mission.[47] These exceptions do not, however, obscure the fact that a State could

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Principle in ICJ Jurisprudence: Was the Ship Ever Afloat?' (2007) 29(1) *Michigan Journal of International Law* 71-94.

[43] Raustiala (n 41) 222.

[44] Ben Chigara, *Legitimacy Deficit in Custom: A Deconstructionist Critique* (England, Ashgate Publishing Company 2001) 72; David R. Koepsell, 'Sovereigns, squatters, and property rights: From Guano Island to the Moon' in Barry Smith, David M. Mark, and Isaac Ehrlich, *The Mystery of Capital and Construction of Social Reality* (Chicago, Open Court 2008) 282.

[45] A. V. Dicey, *Introduction to the Study of the Law of the Constitution* (London, Macmillan and Co Ltd 1959) 39-40; cf John McGarry, 'The Principle of Parliamentary Sovereignty' (2012) 32(4) *Legal Studies* 577–599, 577.

[46] See *Treaty establishing European Economic Community* (Signed at Rome on 25 March 1957, entered into force on 1 January 1958) 294 UNTS 2 [Art. 189] (this citation is in French language). The English version is available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3Axy0023> accessed 20 April 2017 (it states as follows, 'Regulations shall have a general application. They shall be binding in every respect and directly applicable in each Member State'); *Treaty on European Union* (Concluded at Maastricht on 7 February 1992, entered into force on 1 November 1993) 1757 UNTS 3 [Art. 108a(2)]. The United Kingdom gave effect to this legislation through the act of the Parliament. See *European Communities Act 1972* [Section 2(1)] available at <http://www.legislation.gov.uk/ukpga/1972/68/contents> accessed 20 April 2017.

[47] *Vienna Convention on Consular Relations* (Done at Vienna on 24 April 1963, entered into force on 19 March 1967) 596 UNTS 261 [Arts. 31-36]; *Vienna Convention on Diplomatic Relations* (Done at Vienna on 18 April 1961, entered into force on 24 April 1964) 500 UNTS 95 [Arts. 22, 23, 24, 26, 27, 29, 30 and 31].

take back control of its territory occupied by diplomats,[48] or regain its Parliamentary Sovereignty as shown by the formal exit of the United Kingdom[49] from the European Union (hereinafter referred to as EU).

2.2.1 The Elements of Territoriality

The principle of territoriality has four essential elements, namely, sovereignty, integration, delimited borders and national security. We will discuss each in turn.

2.2.1a Sovereignty

Jean Bodin[50] and Thomas Hobbes'[51] research on the concept of "sovereignty" in the 16th and 17th century was meant to stem the tide of revolution at that time.[52] Both scholars believe that the supreme power of a State government is necessary to curtail a world driven by sectarian strife. Sovereignty became a useful tool to protect the power of the State authority from being challenged, questioned or fought against.[53] Sovereignty so conceived excludes the foreign powers insofar as it is meant to enhance domestic integration.

In the *Nicaragua case*,[54] the USA had attempted to justify its support of the *Contras* because of Nicaragua's 'significant steps towards establishing a totalitarian Communist dictatorship.'[55] The ICJ rejected the United States' defence as unfounded, holding that a political ideology of

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[48] Lauren Gambino, Sabrina Siddiqui and Shaun Walker, 'Obama expels 35 Russian Diplomats in retaliation for US election hacking' (The Guardian, 30 December 2006) available at <https://www.theguardian.com/us-news/2016/dec/29/barack-obama-sanctions-russia-election-hack> accessed 20 April 2017.

[49] Theresa May, 'Prime Minister's letter to Donald Tusk triggering Article 50' (The United Kingdom Prime Minister's Office, 29 March 2017) 1-6 available at <https://www.gov.uk/government/publications/prime-ministers-letter-to-donald-tusk-triggering-article-50> accessed 20 April 2017; *R (on the application of Miller and another) (Respondents) v Secretary of State for Exiting the European Union (Appellant) REFERENCE by the Attorney General for Northern Ireland - In the matter of an application by Agnew and others for Judicial Review REFERENCE by the Court of Appeal (Northern Ireland) – In the matter of an application by Raymond McCord for Judicial Review* [2017] UKSC 5 [paras. 43-46, 129].

[50] Jean Bodin, *On Sovereignty: Four Chapters from the Six Books of the Commonwealth* (Cambridge, Cambridge University Press 1992) 1 (Bodin defined sovereignty as the absolute and perpetual power of a commonwealth).

[51] See Hobbes 1991 (n 10) 121 (he argues that a commonwealth is instituted when a multitude of men enter a covenant).

[52] Stephen D. Krasner, 'Sovereignty' (2001) 122 *Foreign Policy* 20-29, 21; Carl Schmitt, *The Leviathan in the State Theory of Thomas Hobbes: Meaning and Failure of a Political Symbol* (London, Greenwood Press 1996) 5; Preston T. King, *The ideology of Order: A Comparative Analysis of Jean Bodin and Thomas Hobbes* (London, George Allen and Unwin Ltd 1974) 47.

[53] Hartmut Behr, 'Political Territoriality and De-Territorialization' (2007) 39(1) *Area* 112-115, 113.

[54] *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v United States of America) Judgment ICJ Reports (1986) p. 14 [para. 263] [hereinafter *Nicaragua case*].

[55] ibid., [para. 263].

a State is no justification to violate the fundamental principle of State sovereignty.[56]

According to Krasner, the 'international legal sovereignty refers to the practices associated with mutual recognition, usually between territorial entities that have formal juridical independence.'[57] The work done by Krasner on sovereignty[58] is worth consulting. Attention should be paid to his classifications of sovereignty and how it safeguards States' territory.[59] Technically, sovereignty refers to the absolute authority which a State has over a defined territory.[60] It involves a State's full legislative autonomy[61] in relation to its population[62] and in its relations with other States.[63]

Sovereignty has three aspects, namely, the external, the internal and the territorial aspects. The external aspect consists of the right of a State to freely determine its relations with other States, without the control or restraint of another State.[64] This aspect of sovereignty concerns the rules of international law. The internal aspect is a direct consequence of the external aspect of sovereignty. It refers to a State's exclusive right to shape its life: politically, socially, economically, legally and otherwise. The territorial aspect refers to the State's exclusive authority over all persons and objects existing on, under or above its territory.[65] Therefore, a

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[56]ibid., [para. 263]; see also *The Lotus Case* (n 38)18; On the issue concerning the type of government, Anthony D'Amato agrees with the Court's finding that there is yet no proof that democracy is a better system of government than communism. See Anthony D'Amato, *International Law: Process and Prospect* (Second edition, New York, Transnational Publishers 1995) 350.

[57]Stephen D. Krasner, *Sovereignty: Organized Hypocrisy* (New Jersey, Princeton University Press 1999) 3; Stephen D. Krasner, 'Compromising Westphalia' (1995/96) 20(3) *International Security* 115-151,115.

[58] See generally, Krasner 1999 (n 57); Stephen D. Krasner, *Power, the State, and Sovereignty: Essays on International Relations* (London, Routledge 2009); Stephen D. Krasner, 'Pervasive Not Perverse: Semi-Sovereigns as the Global Norm' (1997) 30(3) *Cornell International Law Journal* 651-680; Stephen D. Krasner, 'Structural causes and Regime consequences: Regimes as Intervening variables' (1982) 36(2) *International Organization* 185-205, 185.

[59] See Krasner 1999 (n 57) 3.

[60] Hedley Bull, *The Anarchical Society: A Study of Order in World Politics* (Fourth Edition, New York, Palgrave Macmillan 2012) 3-4; M. N. Shaw, 'Territory in International Law' (1982) 13 *Netherlands Yearbook of International Law* 61-91, 61.

[61] Krasner 1997 (n 58) 652; For a discussion on Parliamentary sovereignty see K. J. Keith, 'Sovereignty at the beginning of the 21st Century: Fundamental or Outmoded?' (2004) 63(3) *Cambridge Law Journal* 581-604, 583.

[62] There is a widely held view that states could legitimately use armed physical force against its population within its territory. *See* Chalmers Johnson, *Revolutionary Change* (Second Edition, California, Stanford University Press 1982) 19.

[63] *Eastern Greenland case* (n 38) 48; *The Lotus Case* (n 38) 20; *Klinghoffer v SNC Achille Lauro,* 795 F. Supp. 112 (S.D.N.Y 1992) 116; John Fischer Williams, 'Sovereignty, Seisin, and the League' (1926) 7 *British Year Book of International Law* 24-42, 29.

[64] Chigara 2001 (n 44) 71; Abram Chayes and Antonia Handler Chayes, *The New Sovereignty* (Cambridge, Harvard University Press 1995) 26.

[65] Chigara 2001 (n 44) 72.

State's sovereign right is breached when the conduct of another State has an affect (whether positive or negative) on its territory.

However, there is a paradigm shift from the perception of sovereignty as an exercise of *exclusive* authority to sovereignty as responsibility.[66] This new way of thinking developed around a theory that proposes that States should be held accountable for gross violations of human rights.[67] Thus, the idea that States have exclusive control of their territory[68] is downplayed since sovereignty-as-autonomy is no longer tenable.[69] Although persuasive this view might seem, it remains a conceptual idea unsupported by state practice and not a customary law.

2.2.1b Integration

The principle of territoriality enhances integration. The element of integration is inward looking, in that it is meant to discourage secession and to build a harmonious society. The objective of integration is to build, to maintain and to strengthen the unity of a State.[70] This element assumes that the citizens of a State are united by common values, norms and political ideologies.[71]

The element of integration is credible as an ideal but not all governments pursue inclusive policies in practice. Otherwise, the agitations for self-determination by minorities in some countries would not have been a regular occurrence. Alienation of the ethnic groups and minorities from the politico-socio and economic life of a State remains the primary cause of

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[66] Francis M. Deng *et al.*, *Sovereignty as Responsibility* (Washington D.C., The Brookings Institution 1996) 14.
[67] Brad R. Roth, 'Sovereign Equality and Non-Liberal Regimes' (2012) 43 *Netherlands Yearbook of International Law* 25-52, 27; Neil Walker, 'The Idea of Constitutional Pluralism' (2002) 65(3) *Modern Law Review* 317-359, 318; Jean L. Cohen, 'Whose Sovereignty? Empire versus International Law' (2004) 18(3) *Ethics and International Affairs* 1-24, 2-6; Joshua Castellino, 'International law and self-determination: Peoples, Indigenous Peoples, and Minorities' in Christian Walter, Antje Von Ungern-Sternberg and Kavus Abushov (eds), *Self-determination and Secession in International Law* (United Kingdom, Oxford University Press 2014) 31; United Nations, *Charter of the United Nations* (Signed at San Francisco on 26 June 1945, entered into force on 24 October 1945) 1 UNTS XVI [Art. 1(3)] [hereinafter *UN Charter*].
[68] The International Criminal Court has issued two warrant of arrest for the President of the Republic of Sudan. See *The Prosecutor v Omar Hassan Ahmad Al Bashir,* Pre-trial ICC-02/05-0/09 (2009).
[69] Anne-Marie Slaughter, *A New World Order* (New Jersey; United Kingdom, Princeton University Press 2004) 267; Shaw 1982 (n 60) 64; Janice E. Thomson, 'State Sovereignty in International Relations: Bridging the Gap Between Theory and Empirical Research' (1995) 39(2) *International Studies Quarterly* 213-233, 216.
[70] Behr (n 53) 114.
[71] ibid., 114.

intra-state's conflicts.[72] It also accounts for foreign interventions in the internal affairs of States.[73]

2.2.1c Delimited Borders

The element of "delimited borders" performs legal, security, socio-psychological and ideological functions[74] for the principle of territoriality. It should not be mistaken for "a defined territory" discussed above. Though similar, there is dissimilarity in that the delimited borders imply certitude of a State territory. It delineates the scope upon which a State has jurisdiction to enforce its laws and maintain order.[75]

The basic assumption regarding certitude of delimited borders has been challenged by the complexity and diffusion brought about by globalisation, especially in the cyberspace. The invention of the internet has liquefied the notion that the State borders are solid physical spaces. Transnational trade concluded through the internet compounds the job of the regulatory agencies. In most cases, the national courts and law enforcement agencies grapple with how to determine the jurisdiction of the cross-border transactions that occur in cyberspace (designated as nowhere) or on the interconnected global market (designated as everywhere).[76] How the cyberspace affects Article 2(4) of the UN Charter codified with a static jurisdiction's mindset will be examined in greater detail in chapter four.

As seen earlier, there are States with undelimited State borders. That could raise some problems in the exercise of the sovereign powers. The United States avoids such gaps through the provision of the *Alien Tort Claims Act*[77] (hereinafter referred to as ATCA) which enables the American District Courts to acquire jurisdiction in civil matters for torts committed in violation of international law or any treaty to which the United States is a party. But the enforcement of this law could be problematic if a State were the tortfeasor.

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[72] Paul K. Huth, *Standing your Ground: Territorial Disputes and International Conflict* (USA, The University of Michigan Press 1998) 21-22.
[73] Deng *et al.*, (n 66) 14.
[74] Behr (n 53) 114.
[75] Hannah L. Buxbaum, 'Territory, Territoriality, and the Resolution of Jurisdictional Conflict' (2009) 57(3) *American Journal of Comparative Law* 631-675, 632.
[76] Buxbaum (n 75) 632.
[77] *Alien Tort Claims Act*, 28 U. S. C. (1948) [para. 1350].

The Supreme Court of the United States' Judgment in the *Kiobel v Royal Dutch Petroleum*[78] held that the ATCA is subject to the presumption against extra-territoriality. Commentators like Raustiala,[79] Berman[80] and Ford[81] are researching a new approach to understanding delimited borders and jurisdictional authority in this age of globalisation.

2.2.1d National Security

The fourth element is that territoriality enhances national security.[82] This idea is based on the presupposition that territorial disputes have been the major cause of enduring inter-State rivalries, the frequency of war, and the intensity of war.[83] The frequency of the inter-State wars decreased following the international community's commitment to Article 2(4) and its resolve not to recognise territory acquired through force.[84] This understanding was based not only on the principle of *ex injuria jus non oritur*[85] (law does not arise from injustice), but also on furthering international peace and security.

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[78] *Kiobel v Royal Dutch Petroleum*, 133 S.Ct. 1659 (2013) [paras. 9-10].

[79] Kal Raustiala, 'The Geography of Justice' (2005) 73(6) *Fordham Law Review* 2501-2560, 2550; Kal Raustiala, *Does the Constitution Follow the Flag? Territoriality and Extraterritoriality in American Law* (USA, Oxford University Press 2011).

[80] Paul Schiff Berman, 'The Globalization of Jurisdiction' (2002) 151(2) *University of Pennsylvania Law Review* 311-546, 319.

[81] Richard T. Ford, 'Law's Territory (A History of Jurisdiction)' (1999) 97(4) *Michigan Law Review* 843-930, 855 (Ford argues that jurisdiction is a discourse, a way of speaking and understanding the social world).

[82] Behr (n 53) 114.

[83] Kalevi J. Holsti, *Peace and War: Armed Conflicts and International Order, 1648-1989* (Cambridge, Cambridge University Press 1991) 306-34; John A. Vasquez, *The War Puzzle* (Cambridge, Cambridge University Press 2009) 136-45; Mark W. Zacher, 'The Territorial Integrity Norm: International Boundaries and the Use of Force' (2001) 55(2) *International Organization* 215-250, 215-16; Huth (n 72) 20; see generally, Gary Goertz, and Paul F. Diehl, *Territorial Changes and International Conflict* (New York, Routledge 1992).

[84] The right of conquest may be defined as the right of the victor, in virtue of military victory or conquest, to sovereignty over the conquered territory and its inhabitants. See Sharon Korman, *The Right of Conquest: The Acquisition of Territory by Force in International Law and Practice* (Oxford Clarendon Press 1996) 8; Charles Cheney Hyde, *International Law Chiefly as Interpreted and Applied by the United States* (Volume I, Second Revised Edition, Boston, Little Brown and Company 1922) 356; P. K. Menon, 'The Acquisition of Territory in International Law: A Traditional Perspective' (1994) 22 *Korean Journal of Comparative Law* 125-182, 157. For the literature on the abolishment of conquest, see *Western Sahara,* Advisory Opinion ICJ Reports [1975] p. 12, 122 (Separate opinion of Judge Dillard) [hereinafter *Western Sahara Advisory Opinion*]; Korman (n 84) 135; Albert Shaw (ed), *The Messages and Papers of Woodrow Wilson* (Volume 1, New York, The Review of Reviews Corporation 1924) 353.

[85] *Case of the Free Zones of Upper Savoy and the District of Gex* (Second phase) Order PCIJ Series A, No. 48 (1930) 16; *Case concerning the Legal Status of South-Eastern Territory of Greenland,* Order PCIJ Series A/B, No. 48 (1932) 285; *Jurisdiction of the Courts of Danzig,* Advisory Opinion PCIJ Series B, No. 15 (1928) 26; *Eastern Greenland case* (n 38) 95; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* Advisory Opinion ICJ Reports (1971) p. 16, 46-7; *See also* Hersch Lauterpacht, 'The Principle of Non-Recognition in International Law' in Quincy Wright (ed), *Legal Problems in the Far Eastern Conflict* (New York, Institute of Pacific Relations 1941) 139.

The threat to national security which this element is meant to safeguard has not been eradicated completely. The “reunification”[86] of Russia with Crimea in 2014 illustrates this, although it was unequivocally condemned by the United Nations General Assembly.[87] Moreover, the Organisation of African Unity (hereinafter referred to as OAU) has reiterated that border problems continue to threaten the prospect of peace and security on the continent.[88] In 2015 alone, the number of territory-related conflicts increased from the 41 percent it was in 2013 to 52 percent.[89]

Except for fewer cases of the inter-State territory-related wars and conflicts recorded in the 21st century,[90] the vast majority of conflicts are internationalised intra-State conflicts.[91] This refers to conflicts where at least one of the parties gets support from a third State.[92] About 590 conflicts have been recorded by the *Uppsala Conflict Data Program* between 1989 and 2015.[93] Such covert and overt supports to insurgents undermine the national security of the affected State.

However, the security challenges confronting States, such as the transnational terrorism, have necessitated the formation of security alliances such as the North Atlantic Treaty

[86] “Reunification” was the word which President Vladimir Putin used to described Russia’s annexation of Crimea and Sevastopol from Ukraine in 2014. To be discussed in detail in chapter five.
[87] See UNGA Res. A/RES/68/262 (1 April 2014) [operative para. 2].
[88] Francis Nguendi Ikome, ‘Africa’s international borders as potential sources of conflict and future threats to peace and security’ (Institute for Security Studies Paper No. 233 May 2012) 5 available at <https://www.issafrica.org/uploads/Paper_233.pdf> accessed 20 April 2017; Efem N. Ubi, ‘Territorial theory and the resolution of African conflicts: the case of Ethiopia/Eritrea Boundary conflict’ (Working paper no. 9, May 2010) available at <http://www.japss.org/upload/WP_no._9_May_2010__Efem_Ubi_[1].pdf> accessed 20 April 2017.
[89] Erik Melander, Therése Pettersson, and Lotta Themnér, ‘Organized violence, 1989–2015’ (2016) 53(5) *Journal of Peace Research* 727-742, 728-729.
[90] Melander *et al.*, (n 89) 728-729; Huth (n 72) 4; Zacher 2001 (n 83) 223; Peter Wallensteen and Margareta Sollenberg, ‘Armed Conflict and Regional Conflict Complexes, 1989-97’ (1998) 35(5) *Journal of Peace Research* 621-634; *see also* The figures given by the Center for International Development and Conflict Management, Monty G. Marshall and Ted Robert Gurr, *Peace Conflict* (USA, Center for International Development and Conflict Management 2005) 25-26; Kathleen Gallagher Cunningham, ‘Actor Fragmentation and Civil War Bargaining: How Internal Divisions Generate Civil Conflict’ (2013) 57(3) *American Journal of Political Science* 659-672, 659.
[91] Melander *et al.*, (n 89) 729-730.
[92] ibid., 729-730.
[93] ibid., 730; Cunningham (n 90) 665; see also Michael Brecher, Jonathan Wilkenfeld and Sheila Moser, *Crises in the Twentieth Century* (Volume 1, New York, Pergamon Press 1988) 143-346.

Organisation[94] (NATO), Warsaw Pact[95] and so forth. This presupposes that the national security element of territoriality is inadequate to protect States' territory.[96] Besides, the non-kinetic nature of cyberattacks[97] has rendered the conventional inter-State warfare dormant.[98] The national security policy must take the multilateral cooperation seriously considering the unpredictability of the modern forms of threats to the national security.[99]

2.3 The theoretical basis for the requirement to respect the inviolability of State territory

To posit that a State's territory is inviolable provokes a fundamental question of the legal basis for such a claim. A default response would refer to civility as a source of international law.[100] But that approach appears simplistic if not supported by state practice. Moreover, it neglects a more fundamental issue regarding why the sources of international law came into being in the first place.

The requirement to respect the inviolability of State territory is traceable to many theories such as, the law of nature, positivism, and so forth.[101] For brevity, we shall limit the scope of our inquiry to four theories. They are, the Law of Nature, New Haven School, International Relations Theory, and the Legal Positivism. These four theories are relevant to our quest but other theories could be accessed from a book published by Andrea Bianchi on "*International law theories*."[102] It elaborates on the diversity of approaches and theoretical understandings of the modern international law.

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[94] *The North Atlantic Treaty* (Signed in Washington on 4 April 1949, entered into force on 24 August 1949) 34 UNTS 243 [Art. 5].
[95]*Treaty of Friendship, Co-operation and Mutual Assistance Between the People's Republic of Albania, the People's Republic of Bulgaria, the Hungarian People's Republic, the German Democratic Republic, the Polish People's Republic, the Romanian People's Republic, the Union of Soviet Socialist Republics and the Czechoslovak Republic* (Signed at Warsaw on 14 May 1955, entered into force on 6 June 1955) 219 UNTS 3 [Arts. 4-5] (this treaty was dissolved in Prague on 1 July 1991).
[96] Kenneth N. Waltz, 'Structural realism after the Cold War' (2000) 25(1) *International Security* 5-41, 19.
[97] The word cyberspace was coined in William Gibson's 1984 classic, Neuromancer to mean an alternative universe that people could participate in. See Martin C. Libicki, *Conquest in Cyberspace: National Security and Information Warfare* (New York, Cambridge University Press 2007) 5.
[98] Jason Andress and Steve Winterfeld, *Cyber Warfare: Techniques, Tactics and Tools for Security Practitioners* (Second Edition, Amsterdam, Elsevier 2014) 1; Paul Rosenzweig, *Cyber warfare: How Conflicts in Cyberspace are Challenging America and Changing the World* (California, Praeger 2013) 3.
[99]Behr (n 53) 114.
[100] *ICJ Statute* (n 29) [Art. 38].
[101] For details, see Steven R. Ratner and Annie-Marie Slaughter, 'Appraising the Methods of International Law: A Prospectus for Readers' (1999) 93(2) *American Journal of International Law* 291-423, 352.
[102] For other legal theories, see generally, Bianchi (n 19).

2.3.1 The Natural Law

The earliest jurists that discussed natural law traced its origin to the biblical text. Gratian's lecture notes on law, *Tractatus de legibus* (a treatise on the laws) had argued that the "Human Race" is ruled by two things: namely, natural *ius* and *mos*.[103] He deduced natural law from the passage of the Christian Bible which obliges States to treat other States as they would like to be treated.[104] Obviously, States would like their territory to be respected.

The word "*ius*" could mean three different things. It could mean what is equitable and good in the sense used in Matthew 7: 12. It could mean what is in the interest of all or many in a State (*ius civitas*) or to describe a "place" where a judgment was handed down by a praetor.[105] These layers of interpretation cover the moral, territorial and jurisdiction aspects of sovereignty.

However, the natural law theory operates on the basis that human beings could by reason discern what laws are and act accordingly. Thomas Aquinas defined natural law as those rules to which people are "naturally" inclined through reason.[106] Aquinas describes internalised ideals as "rules" transcribed into legislation.[107] Thus, he argues that such a law is common to all nations since it has its origin in nature and not in any constitution.[108] An example would be the union of a man and a woman or the acquisition of things from the heavens, earth or sea.[109] This reasoning informed the Roman Law that protected the property right of *peregrinus* through the principle of *uti possidetis*.[110]

The tenets of the natural law are disputed. Take the example of the traditional definition of marriage as a union between a man and a woman. Same sex union has been legalised in the

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[103] Kenneth Pennington, '*Lex Naturalis* and *Ius Naturale*' (2008) 68(2) *The Jurist* 569-591, 570.
[104] Matthew 7: 12 (it states, 'in everything do to others as you would have them do to you; for this is the law and the prophets').
[105] Pennington (n 103) 571.
[106] Thomas Aquinas, *Philosophical Texts* (selected and translated with notes and an introduction by Thomas Gilby) (London, Oxford University Press 1951) 358-361.
[107] Charles M. Yablon, 'Forms' in Drucilla Cornell *et al.,* (eds), *Deconstruction and the Possibility of Justice* (Great Britain, Routledge 2008) 260.
[108] Pennington (n 103) 581.
[109] ibid., 581.
[110] John B. Moore, *Memorandum on uti possidetis* (USA, The Commonwealth Co., Printers 1913) 5.

United Kingdom[111] and criminalised in Nigeria[112] based on the natural law theory. States in favour of same sex marriage base their argument on equal right for all,[113] albeit formal equality is utopic.[114] States that oppose same sex marriage consider it unnatural,[115] despite the claim that homosexuality is natural and genetically motivated.[116] The debate on whether "right" is synonomous with "law" is beyond our scope.[117]

Nonetheless, the concept of "right" has played a significant role in transferring the individual's proprietary right to the State through the Social Contract theory[118] for individuals that have acquired the rights lawfully.[119] According to John Locke, a State acquires right over a certain portion of the earth if: (a) its citizens hold pre-political, 'natural' property rights in parcels of that territory, and (b) each of those citizens has wilfully transferred that right to the State.[120] But the point at which the legal title passes from individuals to the State is uncertain. Hence, the dictum of Seneca, *Omnia rex imperio possidet, singuli dominio*[121] (the king possesses all by right of his sovereignty, while everyone [possesses] by his own property right) recognises that both rights could exist simultaneously.

The argument that a State's right over its territory is derived from the natural right of its citizens is unconvincing because conquest used to be a valid mode of acquisition.[122] Hugo Grotius excluded land and waters from properties that could be appropriated by

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[111] The United Kingdom, *Marriage (Same Sex Couples) Act 2013* [section 1] available at <http://www.legislation.gov.uk/ukpga/2013/30/contents/enacted> accessed 8 February 2017.
[112] Federal Republic of Nigeria, *Same Sex Marriage (Prohibition) Act, 2013* [section 5(1)] available at <http://www.refworld.org/docid/52f4d9cc4.html> accessed 8 February 2017.
[113] *Obergefell et al., v Hodges, Director, Ohio Department of Health, et al.,* (Certiorari to the United States Court of Appeals for the Sixth Circuit) 576 US (2015) 28.
[114] Peter Westen, 'The Empty Idea of Equality' (1982) 95(3) *Harvard Law Review* 537-596, 547.
[115] See generally, Sherif Girgis *et al.*, *What is marriage? Man and Woman: A Defence* (New York, Encounter Books 2012).
[116] Daniel A. Morris, '"Natural law" arguments against same sex marriage break down in face of evidence' (Political theology, 21 July 2016) available at <http://www.politicaltheology.com/blog/natural-law-arguments-against-same-sex-marriage-break-down-in-face-of-evidence/> accessed 8 February 2017.
[117] Westen (n 114) 551.
[118] Anna Stilz, 'Why do States have Territorial Rights?' (2009) 1(2) *International Theory* 185–213, 188.
[119] Alan J. Simmons, *The Lockean Theory of Rights* (Princeton, Princeton University Press 1992) 124; Robert Nozick, *Anarchy, State, and Utopia* (New York, Basic Books 2013) 150-153; Lief Wenar, 'Original Acquisition of Private Property' (1998) 107(428) *Mind* 799–819; Lief Wenar, 'The nature of rights' (2005) 33(3) *Philosophy and Public Affairs* 223–253.
[120] John Locke, *Second Treatise of Government* (Edited by Richard H. Cox) (Illinois, Harlan Davidson Inc., 1982) 50-51; Stilz (n 118) 190.
[121] *Oppenheim 1963* (n 24) 452.
[122] Charles G. Fenwick, *International Law* (Fourth Edition, New York, Meredith Publishing Company 1965) 424.

individuals.[123]

Additionally, part of the purposes of the Social Contract Theory was to compel citizens to obey the State.[124] Moreover, there is no indication as to whether individuals can claim back their right if the terms of the Social Contract were repudiated by the State. If the Social Contract Theory were credible, one could argue that a State's territory is violable if a State grossly violates the rights of its citizens or peoples.[125] This reasoning is in line with Kant's position on the conditions under which a State acquires territorial right from its citizens.[126]

One last remark about natural law theory concerns the idea that the sovereign equality of States[127] stems from the equality of all human beings.

> Since men are by nature equal and their individual rights and obligations the same, as coming from nature, nations, which are composed of men and may be regarded as so many free persons living together in a state of nature, are by nature equal and hold from nature the same obligations and the same rights. Power or weakness does not in this respect produce any difference. A dwarf is as much a man as a giant; a small republic is no less a sovereign state than the most powerful kingdom.[128]

That all human beings were created equal was enshrined in the United States Declaration of Independence of 4 July 1776.[129] The Declaration equally held that governments were instituted through the consent of the people to secure their rights.[130] But the claim

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[123] Wenar 1998 (n 119) 802.

[124] Robert P. Kraynak, 'Thomas Hobbes: From Classical natural law to Modern Natural Rights' available at <http://www.nlnrac.org/earlymodern/hobbes> accessed 8 February 2017; Anne Peters, 'Membership in the Global Constitutional Community' in Jan Klabbers *et al.*, (eds), *The Constitutionalization of International Law* (New York, Oxford University Press 2009) 183.

[125] Lee C. Buchanan, *Secession: The Legitimacy of Self-Determination* (New Haven and London, Yale University Press 1978) 46-48.

[126] Stilz (n 118) 198; Immanuel Kant, *Political writings* (Edited with an introduction and notes by Hans Reiss and H. B. Nisbet) (Second, Enlarged Edition, USA, Cambridge University Press 1970) 73.

[127] *UN Charter* (n 67) [Art. 2(1)]; *Charter of the Organization of American States* (Signed at Bogota on 30 April 1948, entered into force on 13 December 1951) 119 UNTS 3 [Art. 6]; *Charter of the Organisation of African Unity* (Done at Addis Ababa on 25 May 1963, entered into force on 13 September 1963) 479 UNTS 39 [Art. 3]; *Corfu Channel* (United Kingdom of Great Britain and Northern Ireland v Albania) (Merits) Judgment ICJ Reports (1949) p. 4, 35.

[128] Vattel (n 12) preliminaries § 18; see also *American Declaration of Independence* (1776) § 2 available at <http://www.constitution.org/us_doi.pdf> accessed 20 September 2015 [hereinafter *US Declaration of Independence*]; Baker (n 12) 6 (he traces the origin of the doctrine of equality to Puffendorf); Brierly (n 12) 49.

[129] *US Declaration of Independence* (n 128) [para. 2].

[130] ibid., [para. 3].

concerning the universal equality of all human beings is weak insofar as state practice has supported slavery and racial discrimination until recently abrogated.[131] However, from the viewpoint of the natural law theory, States are equal, at least, in their duty to secure the rights of their citizens. This imposes a moral obligation on every State to respect the territory of other States if so doing will enhance the protection of the fundamental equality of all human beings.

Nonetheless, argument based on the equality of human beings helped to dislodge the hierarchically structured Christian worldview in the seventeenth century. Contrary to the notion that the territories occupied by non-Christians were *ipso facto territoria nullius*,[132] Grotius and Victoria argued that "barbarians" have a natural right to possess their land.[133]

Suarez had argued that 'while permissive natural law allowed the exercise of certain rights, preceptive natural rights protected those rights against violation by others.'[134] Therefore, a State's territory should be respected since it is one of the requirements of a State as laid down by the Montevideo Convention.[135] A counter-argument could be that the territory of a State that repudiates its fundamental obligations could be breached.[136]

2.3.2 The New Haven School

The "New Haven School" position is analysed here to support this dissertation's quest for a re-discovery of the second limb of Article 2(4) of the United Nations Charter. The "New Haven School" was established by Harold Lasswell and Myres McDougal[137] to counter the positivists' textual legalism which described laws as body of rules and principles.[138] Their work, "Legal

[131] See *Slavery Convention* (Signed at Geneva on 25 September 1926, entered into force on 9 March 1927) 212 UNTS 17 [Art. 2(b)]; *The Civil Rights Act 1964* (enacted on 2 July 1964) Pub.L. 88-352, 78 Stat. 241.
[132] M. F. Lindley, *The Acquisition and Government of Backward Territory in International Law: Being a Treatise on the Law and Practice Relating to Colonial Expansion* (London, Longmans, Green and Co. Ltd 1926) 11; Hannis Taylor, *A Treatise on International Public Law* (Chicago, Callaghan and Company 1901) § 40.
[133] Lindley (n 132) 13.
[134] Brian Tierney, 'Natural Law and Natural Rights Old Problems and Recent Approaches' (2002) 64(3) *The Review of Politics* 389-406, 403.
[135] *Montevideo Convention* (n 22) [Art. 1(b)].
[136] This argument which is based on the doctrine of the responsibility to protect will be examined in chapter six.
[137] Bianchi (n 19) 91; W. Michael Reisman, Siegfried Wiessner and Andrew R. Willard, 'The New Haven School: A Brief Introduction' (2007) 32(2) *Yale Journal of International Law* 575-582, 575; W. Michael Reisman, 'Myres S. McDougal: Architect of a Jurisprudence for a Free Society' (1996) 66(1) *Mississippi Law Journal* 15-26, 17.
[138] Reisman 1996 (n 137) 17.

Education and Public Policy"[139] published in 1943 argued that law should be situated in a context of the relevant "values"[140] at any given time.[141] Their view, published at the period when the United Nations Charter was drafted, may have been influenced by the two World Wars. It follows that the UN Charter is not just a dead "body of rules" unconnected with reality but must be contextualised to the human conditions for its implementation.[142]

The New Haven School focuses on the link between law and policy.[143] Law is an ongoing process of authoritative and controlling decision.[144] The positivists' objection to the New Haven School is that it "conflates law, political science and politics."[145] Besides, it coalesces norms and values,[146] thereby obscuring objectivity associated with norms[147] and could blur legality regarding what the law is.[148]

That said, the tenet of the New Haven School is credible because it emphasises that the context clarifies the *mens legislatoris*, especially when the law is unclear. Understandably, the carnage caused by the two World Wars leads to the conclusion that Article 2(4) is meant to prevent anything that could endanger international peace and security. To that extent, the UN Charter is a living instrument[149] and its interpretation should be adapted to the current challenges confronting international peace and security. Authors like Merrills with a

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[139] Harold D. Lasswell and Myres S. McDougal, 'Legal Education and Public Policy: Professional Training in the Public Interest' (1943) 52(2) *Yale Law Journal* 203-295.
[140] They identified eight values, namely, power, enlightenment, wealth, well-being, skill, affection, respect and rectitude. See Lasswell and McDougal (n 139) 217.
[141] Lasswell and McDougal (n 139) 212.
[142] Siegried Wiessner and Andrew R. Willard, 'Policy-Oriented Jurisprudence and Human Rights Abuses in Internal Conflict: Toward a world public order and human dignity' (1999) 93(2) *American Journal of International Law* 316-334, 319.
[143] Reisman *et al.*, 2007 (n 137) 577.
[144] Wiessner and Willard (n 142) 319.
[145] Bruno Simma and Andreas L. Paulus, 'The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View' (1999) 93(2) *American Journal of International Law* 302-316, 305.
[146] Simma and Paulus (n 145) 305.
[147] The New Haven School applies various commonsense intellectual tasks when it assesses whether a law should be binding in a given context. One of the tasks is the clarification of the observer's standpoint. See Wiessner and Willard (n 142) 322.
[148] Simma and Paulus (n 145) 305.
[149] This expression, a "living instrument" was used by the European Court of Human Rights to argue that the European Convention on Human Rights could be interpreted in a manner that makes it relevant to the present-day conditions. See *Case of Tyrer v the United Kingdom* (Application No. 5856/72) Judgment (1978) 2 EHRR 1 [para. 31]; Alastair Mowbray, 'The Creativity of the European Court of Human Rights' (2005) 5(1) *Human Rights Law Review* 57-79, 60-61.

positivist's mind-set ignores "judicial activism"[150] when applying the law. Nonetheless, the New Haven School might be useful when Article 2(4) is applied to the cyberspace.

2.3.3 The International Relations Theory

The International Relations Theory (hereinafter referred to as IR) is based on the claim that an understanding of a sister discipline will enrich international law in its doctrinal analysis and policy prescriptions.[151] It is, therefore, a departure from the orthodoxy of the legal positivism often fixated on the textual analysis as immutable truth amidst the changing world. The IR draws ideas from international relations when it interprets legal texts.

The IR is relatively new and how it relates to Article 2(4) is yet to be seen considering that the role of the judicial institutions is to apply the law. Besides, the *travaux préparatoires* of the UN Charter presupposes that policy considerations precede the formulation of legal texts. Therefore, the norm-making process is by character interdisciplinary. Thus, the legality of a norm would be an issue if judges were to base their application of law on a progressive interdisciplinary assessment.

However, the IR is discussed here because "international relations"[152] is explicitly mentioned in Article 2(4) of the UN Charter. That phrase appears to situate Article 2(4) within the context of a political discourse,[153] and fits in well into the debate of whether international law is a law or a foreign policy.[154] In his dissenting opinion in the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*,[155] Judge Sir Gerald Fitzmaurice was close to indicting the court

[150] J. G. Merrills, *The Development of International Law by the European Court of Human Rights* (Second Edition, Manchester, Manchester University Press 1993) 231.
[151] Anne-Marie Slaughter, Andrew S. Tulumello and Stepan Wood, 'International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship' (1998) 92(3) *American Journal of International Law* 367-397, 373.
[152] *UN Charter* (n 67) [Art. 2(4)].
[153] Kenneth W. Abbott, 'International relations theory, international law, and the regime governing atrocities in internal conflicts' (1999) 93(2) *American Journal of International Law* 361-379, 362.
[154] Note that the New Haven School perceives international law more as a policy instead of a body of rule. See generally, Wiessner and Willard (n 142); Edward McWhinney, 'Contemporary International Law and Law-Making' (1985) 40(3) *International Journal* 397-422, 418 (he argues that there is a contemporary denial of universal character to classical international law).
[155] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* Advisory Opinion ICJ Reports (1971) p. 16, 303.

for arriving at its opinion based on policy issues.[156] This shows an effort to resist any attempt to fuse law and policy together.

Having said that, Abbott and Slaughter have argued that it is time for a genuine interdisciplinary dialogue between law and the IR.[157] Abbott explains that the collaboration of both disciplines would advance the development of international law in terms of description, explanation and instrumental functions.[158] The descriptive function of the IR explores the various theories relevant to any legal issues under investigation in order to provide lawyers with resource materials to make informed judgments.[159] To illustrate this with the "teleological" method of interpreting legal text, beneath every treaty provision lays an unstated understanding that the contracting parties would act in good faith.[160] It follows that the interdisciplinary approach which goes beyond the "black-letter law"[161] is preferable when interpreting Article 2(4) of the UN Charter. Such an understanding, fosters institutional function which deals with a harmonious collaboration in a democratic manner. Consequently, the explanation function becomes self-evident that Article 2(4) is conceived to enhance international peace and security.[162]

Overall, the approach is interdisciplinary and seeks to harmonise international law with international relations. The uniting element for both disciplines is their quest for a mechanism that promotes good neighbourliness at the various levels of interdependence.[163] Undeniably, both disciplines share a common objective centred around States and their conduct.[164] The requirement to respect the inviolability of State territory is an attempt to harmonise a shared-goal in a changing world.

[156] ibid., 303.
[157] Bianchi (n 19) 114.
[158] Kenneth W. Abbott, 'Elements of a joint discipline' (1992) 86 *American Society of International Law Proceedings* 167-172, 168.
[159] Abbott 1992 (n 158) 168-169.
[160] ibid., 169.
[161] An expression used by Oran Young to describe the IR's desire to move away from positivism. See Oran R. Young, 'Remarks by Oran R. Young' (1992) 86 *American Society of International Law Proceedings* 172-175, 173.
[162] Robert O. Keohane, 'International Institutions: Two Approaches' (1988) 32(4) *International Studies Quarterly* 379-396, 379-380; Abbott 1992 (n 158) 168.
[163] Young (n 161) 173.
[164] Bianchi (n 19) 110.

2.3.4 Legal Positivism

The "Legal Positivism" is a generic word for theories associated with positivism.[165] On its part positivism is a philosophical ideology holding that only logic, mathematics and phenomena that can be perceived through the senses are scientifically knowable.[166] In legal terms, legal positivism argues that States are bound only by laws to which they have expressly consented. Over simplification this might seem, the legal positivism discountenances the normativeness of unwritten laws. For our purposes, we shall limit our analysis to how the classic view of legal positivism relates to Article 2(4) of the Charter.

The main tenet of the classic legal positivism is that it identifies international law as an emanation of States.[167] It defines international law as 'a system of objective principles and neutral rules that emanate from States' will, either directly through treaty or indirectly through custom.'[168] Unlike the theories discussed above, the legal positivism does not take extra-legal factors (economic, moral, social and political) into account when it applies the law.[169] This point was emphasised by the ICJ in the *South West Africa* case[170] when the Court ruled that humanitarian considerations do not create enforceable rights and obligations if the moral principles were not given a sufficient expression in legal form.[171]

The strongest basis for propounding the requirement to respect the inviolability of State territory is Article 2(4) of the UN Charter read in conjunction with Article 2(7) of the same Charter. Article 2(4) states:

> All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.[172]

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[165]Ulrich Fastenrath, 'Relative Normativity in International Law' (1993) 4(3) *European Journal of International Law* 305-340, 306-307.
[166] ibid., 306.
[167] Simma and Paulus (n 145) 303.
[168] Bianchi (n 19) 21.
[169] ibid., 21.
[170] *South West Africa Cases* (Ethiopia v South Africa; Liberia v South Africa) (Second Phase) Judgment ICJ Reports (1966) p. 6 [para. 49].
[171] ibid., [para. 49]; H. L. A. Hart, *The Concept of law* (Second Edition, New York, Oxford University Press 1994) 200-202; H. L. A. Hart, 'Positivism and the Separation of Law and Morals' (1958) 71(4) *Harvard Law Review* 593-629, 606-615.
[172] *UN Charter* (n 67) [Art. 2(4)].

Similarly, Article 2(7) provides as follows:

> Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.[173]

To an average legal positivist, the text of Article 2(4) deals with the threat or use of force. As shall be seen, an exegesis of these texts in hindsight of the carnage caused by the Two World Wars supports our claim that its scope is not restricted to the threat or use of force. Hence, the UN member States' over-dependence on the first limb of Article 2(4) created an atmosphere that supported States' indulgence in conducts capable of undermining the maintenance of international peace and security. This is a consequence of an internalised positivist's mind-set that dwarfed the second limb of Article 2(4).

Since the classic legal positivism deals mainly with positive law[174] that emanates from States' consent (voluntarism),[175] the major criticism levelled against it has been that it is out of touch with the changes taking place in the modern world.[176] As shall be seen, the cyber warfare has challenged the positivist's view on Article 2(4) considering the difficulties in classifying the cyberspace attack as an armed physical force.[177]

Moreover, the restraint shown at first instance by the European Court of Justice (hereinafter referred to as ECJ) in *Kadi* case[178] to review the Security Council Resolution 1390[179] would almost depict the UN Charter as an immutable World Constitution.[180] Consequently,

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[173] ibid., [Art. 2(7)].
[174] Hans Kelsen, *Pure Theory of Law* (Translated from the second revised and enlarged German Edition by Max Knight) (Berkeley, University of California Press 1970) 1.
[175] *The Lotus Case* (n 38) 18.
[176] Simma and Paulus (n 145) 305; J. H. H. Weiler and Andreas L. Paulus, 'The Structure of Change in International Law or Is There a Hierarchy of Norms in International Law' (1997) 8(4) *European Journal of International Law* 545-565, 551.
[177] Matthew C. Waxman, 'Cyber-Attacks and the Use of Force: Back to the Future of Article 2(4)' (2011) 36(2) *Yale Journal of International Law* 421-460, 437; Ido Kilovaty, 'Rethinking the Prohibition on the Use of Force in the Light of Economic Cyber Warfare: Towards a Broader Scope of Article 2(4) of the UN Charter' (2015) 4(3) *Journal of Law & Cyber Warfare* 210-244, 214.
[178] See *Joined Cases C-402/05 P and C-415/05 P, Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* [2008] ECR I-6351 [para. 68].
[179] UNSC Res. S/RES/1390 (28 January 2002) [operative para. 2]; UNSC Res. S/RES/1333 (19 December 2000) [operative paras. 4-5].
[180] Jorg Kammerhofer, 'The Pure Theory of Law and its "Modern" Positivism: International Legal uses for Scholarship' (2012) 106(1) *American Society of International Law Proceedings* 365-367, 366 (he argues that the

Kammerhofer opines that upholding the narrow interpretation of Article 2(4) is a disaster for the world peace.[181] Even Article 2(7) which was intended to augment the shortfall of the first limb of Article 2(4)[182] is frequently violated by the UN member States.[183] The intervention of Russia in Ukraine leading to the annexation of Crimea in 2014 is a case in point.[184]

There seems to be a discord between *lex lata* and *lex ferenda* regarding the prohibited act under the provision of Article 2(4).[185] This dissertation has opted for a rediscovery of the second limb of Article 2(4). To support this proposal, the next section will examine the evolution of Article 2(4) within the context of the Two World Wars that gave rise to the birth of the United Nations.

2.4 Historicizing the Requirement of the Right to Respect the Inviolability of State Territory

The evolution of the requirement to respect the inviolability of State territory developed in two stages, namely, the Westphalian State System and the Modern State System. Without prejudice to the fact that the concept of territory predates these periods, Hassan and others write that the Peace of Westphalia is the first Treaty of the Modern International Law.[186] Our choice of the phrase "modern state system" is equally problematic insofar as the "modern period" dates back to the sixteenth century.[187] Therefore, the "Modern State System" as used

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view by some scholars that the UN Charter does not change when the political constellations change does not accurately portray the law); Ronald St. J. Macdonald, 'The Charter of the United Nations as a World Constitution' (2000) 75 *International Law Studies Series US Naval War College* 263-300; Blaine Sloan, 'The United Nations Charter as a Constitution' (1989) 1 *Pace Yearbook of International Law* 61-126, 61; Bianchi (n 19) 47.

[181] Grainne de Burca, 'The European Court of Justice and the International Legal Order after Kadi' (2010) 51(1) *Harvard International Law Journal* 1-50, 44-45.

[182] It was regarded as the highest principle of international law when it was drafted. See Macdonald (n 180) 267.

[183] See George Nolte, 'Secession and external intervention' in Marcelo G. Kohen (ed), *Secession: International Law Perspective* (United Kingdom, Cambridge University Press 2006) 87-93.

[184] To be discussed in greater detail in chapter five.

[185] This topic has been debated of late. See Tom Ruys, 'The meaning of "Force" and the Boundaries of the *Jus ad bellum*: are Minimal uses of Force excluded from UN Charter 2(4)?' (2014) 108(2) *American Journal of International Law* 159-210, 168-70; cf Corten Olivier, *The Law Against War: The Prohibition on the Use of Force in Contemporary International Law* (Oxford and Portland, Oregon, Hart Publishing 2010) 77.

[186] Daud Hassan, 'The Rise of the Territorial State and the Treaty of Westphalia' (2006) 19 *Yearbook of New Zealand Jurisprudence* 62-70, 64; Antonio Cassese, *International Law in a Divided World* (New York, Oxford University Press 1986) 37; Leo Gross, 'The Peace of Westphalia, 1648-1948' (1948) 42(1) *American Journal of International Law* 20-41, 26.

[187] John Gerard Ruggie, 'Territoriality and Beyond: Problematizing Modernity in International Relations' (1993) 47(1) *International Organization* 139-174, 148; Raymond Williams, 'When was Modernism?' (1989) 175 *New Left Review* 48-52, 48; H. Duncan Hall, 'The International Frontier' (1948) 42(1) *American Journal of International Law* 42-65, 42

here refers to a period beginning from the eighteenth century when the establishment of international boundaries was regarded as 'a basic rule of co-existence.'[188]

An article published by Ruggie[189] proposes that the international community is sliding into a "Postmodern State System." We do not intend to discuss that here since he recognises that there is no substantive legal framework that spelt it out.[190] One way of explaining postmodernity could be the regionalisation[191] brought about by integration through multilateral documents or the impact of globalisation on States' territoriality. The book written by Ouli[192] explains this in greater detail.

We shall start our analysis with the Westphalian State System because it was during this period that "*terra"* (land) was construed as belonging to the ruler (*torium*), which means "territory."[193] Gottmann associated this period with the unification of two essential elements of a State, namely, jurisdiction and sovereignty,[194] although his views on this were rejected by Elden.[195]

2.4.1 Westphalia State System

As early as 800 AD, the two recognised powers in the world were Christianity and the Holy Roman Empire.[196] We will examine each of them briefly.

2.4.1.1 Christianity

Christianity acquired a legal status when Emperor Constantine made a proclamation (Edict of Milan) that tolerated Christianity within the Roman Empire in 313 AD.[197] This led to the idea

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[188] Bull (n 60) 35.
[189] Ruggie 1993 (n 187) 144.
[190] ibid., 144.
[191] An example is the effect which the European Union Law has on the territorial borders of the member States. See European Union, *Consolidated version of the Treaty on European Union* (13 December 2007) 2008/C 115/01 [Art. 3(2)] available at <http://www.refworld.org/docid/4b179f222.html> accessed 13 February 2017; *Case 6/64 Costa v ENEL* [1964] ECR 585-600, 593.
[192] See generally, Abdelhamid El Ouali, *Territorial integrity in a Globalizing World: International Law and States' Quest for Survival* (London, Springer Heidelberg Dordrecht 2012).
[193] Jean Gottmann, *The Significance of Territory* (Charlottesville, University of Virginia Press 1973) 36.
[194] Gottmann (n 193) 2.
[195] S. Elden, 'The Significance of Territory' (2013) 68(1) *Geographica Helvetica* 65-68, 66.
[196] Cassese 1986 (n 186) 35.
[197] James Bryce, *The Holy Roman Empire* (London, Macmillan and Co., Limited 1901) 99; Sir George Clark, *Early Modern Europe: from about 1450 to about 1720* (Second Edition, London, Oxford University Press 1966) 40.

that the Church is a perfect society[198] with its separate laws and institutions and that the Pope possesses a supreme power.[199] Starting with Pope Leo I onwards, Christianity claimed a universal jurisdiction in spiritual and temporal matters all over the world.[200]

Such a claim resulted in a conflict between Popes and the Holy Roman Emperors and climaxed during the pontificate of Pope Gregory VII who opposed the practice of allowing European Monarchies to appoint bishops and abbots of monasteries. As a result, an inevitable conflict ensued[201] with Pope Gregory VII maintaining that to 'the Pope, as God's Vicar, all mankind is subject, and all rulers responsible.'[202] This power struggle was resolved by the *Concordat of Worms* concluded between Pope Callistus II and Emperor Henry V in the year 1122 AD.[203] According to de Mesquita, this pact informed the Westphalian State System because it recognised 'kings as fiduciaries in vacant territorially defined bishoprics.'[204]

As the Vicar of God, Popes command absolute power. This undermined the requirement to respect the inviolability of State territory in the following ways. First, it legitimised crusades.[205] Second, it authorised conquest of territories inhabited by non-Christians.[206] Again, not only that evangelism through force jeopardised international peace and security,

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[198] This idea is enshrined in canon 22 of the Code of Canon Law which states: 'when the law of the Church remits some issue to the civil law, the latter is to be observed with the same effects in canon law, in so far as it is not contrary to divine law, and provided it is not otherwise stipulated in canon law.' See *Codex Iuris Canonici*, c. 22 in Gerard Sheehy *et al.,* (eds), *The Canon Law: Letter and Spirit* (Minnesota, The Liturgical Press 1995) 21.

[199] Joseph P. Canning, 'Ideas of the State in Thirteenth and Fourteenth-Century Commentators on the Roman Law' (1983) 33 *Transactions of the Royal Historical Society* 1-27, 14.

[200] C. Emmott (ed), *European History* (London, Grolier society limited 1965) 9; Bryce (n 197) 161.

[201] For further discussion, see Bryce (n 197) 158-162.

[202] Bryce (n 197) 160.

[203] ibid., 163.

[204] Bruce Bueno de Mesquita, 'Popes, Kings, and Endogenous Institutions: The Concordat of Worms and the Origins of Sovereignty' (2000) 2(2) *International Studies Review* 93-118, 96.

[205] Dana C. Munro, 'The Popes and the Crusades' (1916) 55(5) *Proceedings of the American Philosophical Society* 348-356; James M. Powell, 'Church and Crusade: Frederick II and Louis IX' (2007) 93(2) *The Catholic Historical Review* 251-264, 252.

[206] Pope Adrian IV authorised Henry II to conquer Ireland. For the text see 'The Bull of Pope Adrian IV empowering Henry II to conquer Ireland A.D. 1155' available at <http://avalon.law.yale.edu/medieval/bullad.asp> accessed 17 February 2017. Pope Nicholas V issued *Dum Diversas* on 18 June 1452. It authorised Alfonso V of Portugal to reduce any Saracens and pagans and any other unbelievers to perpetual slavery. *Romanus Pontifex* was a follow-up on that, issued on 5 January 1455. It authorised the same Emperor to seize non-Christian lands and to enslave non-Christian peoples in Africa and the New World. In 1493 Alexander VI issued *Inter Caetera*, which prohibited one Christian nation from establishing dominion over lands previously dominated by another Christian nation without outlawing conquest. For the English translation of this text these, visit <http://www.papalencyclicals.net/Nichol05/> accessed 17 February 2017.

it also undermined the fundamental human rights. Moreover, the thirty years war that ravaged Europe between 1618 and 1648 was triggered partly by religious intolerance and power tussle between the Catholic Church and the European kings.[207]

2.4.1.2 The Roman Empire

The Ancient Roman Empire exhibited characteristics similar to the modern States in that it comprised of the city-states which were closed communities. This political structure prohibited non-residents of a city-state from participating in the internal political life of others.[208] But it is unlikely that that could evidence the birth of the principle of the inviolability of State territory because the city-states were directly under the Roman Law. The *Imperium Populi Romani* (literally meaning the "power of the magistrate") depicted the Roman Empire as an unparalleled world power.[209] Consequently, the Roman Empire treated nations it conquered as vassals.[210] Thus, the city-states in the Roman Empire do not reflect independent States in any meaningful way.

Aside from other interpretations of *imperium*,[211] Cicero's interpretation is closer to the eighteenth century's interpretation that designated *imperium* as a State with an independent authority. The Roman Empire is distinguishable in two ways. First, it granted *peregrini* (foreigners) the right to trade (*ius commercii*).[212] Second, it puts in place other legal institutions that regularised the status of foreigners in Rome and their legal relationship with the Roman citizens.[213] Colognesi argues that on these two legal principles lay what later came to be regarded as *ius gentium* (law of nations) contrary to *ius civile* (civil law) that applied only to *cives Romani* (full Roman citizens).[214] Thus, an extensive system of international treaties

[207] Myron P. Gutmann, 'The Origins of the Thirty Years' War' (1988) 18(4) *The Journal of Interdisciplinary History* 749-770, 749; Mesquita (n 204) 93.
[208] L. Capogrossi Colognesi, 'Peregrini and Slaves in the Roman Empire' (1996) 2(2) *Fundamina* 236-248, 236.
[209] Benedict Kingsbury and Benjamin Straumann (eds), *The Roman Foundation of the Law of Nations: Alberico Gentili and the Justice of Empire* (Oxford, Oxford University Press 2010) 23-26; Andrew Lintott, 'What Was the 'Imperium Romanum'?' (1981) 28(1) *Greece and Rome* 53-67, 53; J. S. Richardson, '*Imperium Romanum*: Empire and the Language of Power' (1991) 81 *Journal of Roman Studies* 1-9, 5.
[210] Jeremy Adelman, 'An Age of Imperial Revolutions' (2008) 113(2) *American Historical Review* 319-340, 324.
[211] Richardson (n 209) 7.
[212] Saskia T. Roselaar, 'The Concept of *Commercium* in the Roman Republic' (2012) 66(3/4) *Phoenix* 381-413, 381.
[213] Colognesi (n 208) 273.
[214] ibid., 273; Ralph W. Mathisen, '*Peregrini*, *Barbari*, and *Cives Romani*: Concepts of Citizenship and the Legal Identity of Barbarians in the Later Roman Empire' (2006) 111(4) *American Historical Review* 1011-1040, 1015-1016; Jennifer Pitts, 'Empire and Legal Universalisms in the Eighteenth Century' (2012) 117(1) *American*

with the purpose of introducing political relationship between independent States evolved over time.[215] Not only that the Roman Law was the cradle of what came to be known as the "law of nations," it may have also informed the recognition of the exclusive autonomy of Princes at the Peace of Westphalia.

2.4.1.3 The Thirty Years' War and the Peace of Westphalia

The Peace of Westphalia refers to two peace treaties signed at Munster and Osnabruck in 1648 to end the Thirty Years' War in Europe.[216] The Peace of Westphalia brought significant changes in the way authority was exercised over a territory from the 13th century going forward. The key to this change was Articles 64 and 65 of the Treaty of Osnabruck.[217]

Article 64 provides as follows:

> And to prevent for the future any differences arising in the Politick State, all and every one of the Electors, Princes and States of the Roman Empire, are so established and confirmed in their ancient Rights, Prerogatives, Liberties, Privileges, free exercise of Territorial Right, as well Ecclesiastick, as Politick Lordships, Regales, by virtue of this present Transaction: that they never can or ought to be molested therein by any whomsoever upon any manner of pretence.[218]

This right is far-reaching to include exclusive authority in political and religious matters. Also, it allows Electors, Princes and States of the Roman Empire, the free exercise of "territorial right" and expressly forbids the contracting parties from molestation "upon any manner of pretence." It seems to convey the idea of the respect for the inviolability of State territory. An objection might be that this provision did not envisage the "Modern State" as we have it today. However, the law was made for political units similar to the modern State.

Moreover, Article 65 established the "right of suffrage" for all the heads of the political unit when important issues affecting the Empire are decided. That gave each political unit a voice

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Historical Review 92-121, 96; Tenney Frank, 'Race Mixture in the Roman Empire' (1916) 21(4) *American Historical Review* 689-708.

[215] Colognesi (n 208) 236-273.

[216] Nicholas Lanza, 'The Thirty Years War' (2014) 1(1) *Histories* 43-51, 44; J. V. Polišenský, 'The Thirty Years War' (1954) 6 *Past and Present* 31-43, 32.

[217] *Treaty of Westphalia* (1648) [Arts. 64 and 65] available at <http://avalon.law.yale.edu/17th_century/westphal.asp> accessed 22 November 2015 [hereinafter *Treaty of Westphalia*].

[218] *Treaty of Westphalia* (n 217) [Art. 64].

similar to what is obtainable in the United Nations. It equally established that each of the States in the Empire shall freely conclude treaty of alliance with foreign States. This seems an exclusive autonomy in political and legal matters.

Before the Peace of Westphalia was concluded, no such a right was established in the legal instrument of the early Medieval Europe.[219] The Peace of Westphalia legitimised the *idea* that States within the Roman Empire should have political autonomy from the control of the Church and the Roman Empire.[220]

Neither in the Munster nor in Osnabruck treaty was the concept "the inviolability of State territory" used. Even the word "sovereignty" was not used in any of these documents.[221] However, Hinsley argues that it is implied from 'the idea that there is a final and absolute authority in the political community … and no final and absolute authority exists elsewhere.'[222] Hence, the Peace of Westphalia is acclaimed the beginning of the requirement to respect the inviolability of State territory.[223]

Note that the idea behind the political autonomy predates the Peace of Westphalia. Westphalia merely activated the religious and political liberty latent in the Treaty of Nuremberg of 1532 and the Peace of Augsburg (1555).[224] Within the religious sphere, the doctrine of *cuius regio, eius religio* secured for the kings and princes the right to ensure that their religion is practiced within their territory without the external interference of the Pope or the Holy Roman Emperor. In the political arena, it unified territory and the people

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[219] Sir George Clark, *The Seventeenth Century* (Second Edition, London, Oxford University Press 1947) 171-207; Alexander B. Murphy, 'The Sovereign state system as political-territorial ideal: historical and contemporary considerations' in Thomas J. Biersteker and Cynthia Weber (eds), *State Sovereignty as Social Construct* (Great Britain, Cambridge University Press 1996) 84.

[220] F. H. Hinsley, *Sovereignty* (Second Edition, London, Cambridge University Press 1986) 26; Holsti 1991 (n 83) 39.

[221] Derek Croxton, 'The Peace of Westphalia of 1648 and the Origins of Sovereignty' (1999) 21(3) *International History Review* 569-591, 577.

[222] Hinsley 1986 (n 220) 26.

[223] Derek Croxton, *Westphalia: The Last Christian Peace* (New York, Palgrave Macmillan 2013) 3; Ronald G. Asch, *The Thirty Years War: The Holy Roman Empire and Europe 1618-1648* (London, Macmillan Press 1997) 142-49.

[224] Croxton 1999 (n 221) 570; John Gerard Ruggie, 'Continuity and Transformation in the World Polity: Toward a Neorealist Synthesis' (1983) 35(2) *World Politics* 261-285, 275-276; F. H. Hinsley, 'The Concept of Sovereignty and relations between States' in W. J. Stankiewicz (ed), *In Defense of Sovereignty* (New York, Oxford University Press 1969) 275-278.

inhabiting that territory and made them subject to no external authority.[225] The most significant contribution made by the Peace of Westphalia was its ability to disentangle these two spheres of conflicting power structure. Ronald Asch writes that Westphalia bequeaths sovereignty to the Dutch Republic and the Helvetian Confederation.[226]

However, the claim that the Peace of Westphalia gave rise to the emergence of Independent States is disputed. Croxton, for example, argues that the treaties made no reference to the United Provinces' independence or sovereignty.[227] He pointed out that the Peace of Westphalia referred to independence in a clause that excluded Burgundian Circle (of which they were a part) from the provisions of the treaty until Spain makes peace with France.[228] The conditionality of this clause indicates that it is a diplomatic ploy to compel France to sue for peace with the Roman Empire since the treaty explicitly recognises that the Circle of Burgundy remains part of the Roman Empire.[229]

Additionally, Croxton has observed that the Peace of Westphalia is loosely drafted[230] such that its purpose is not easily ascertainable. On the one hand, the Peace of Westphalia manifests the act of sequestration of people (vassals, subjects, and people) and territories.[231] In some instances, there were clauses requiring the Holy Roman Empire to transfer part of its territory to France.[232] On the other hand, there were clauses that seem to preserve rather than break off the Imperial tie.[233] Also to be noticed were clauses aimed at restoring territories to their previous owners.[234] By and large, the legal position is weak. Hence, both political scientists and historians claim that the Peace of Westphalia did not enshrine the inviolability of State territory.[235]

[225] Bruce Russett, Harvey Starr, and David Kinsella, *World Politics: The Menu for Choice* (Ninth Edition, USA, Wadsworth 2010) 57-59.
[226] Asch (n 223) 144.
[227] ibid., 144.
[228] Croxton 1999 (n 221) 577.
[229] *Treaty of Westphalia* (n 217) [Art. 4].
[230] Croxton 1999 (n 221) 577-79.
[231] *Treaty of Westphalia* (n 217) [Arts. 9, 23, 30, 76 and 92].
[232] ibid., [Arts. 80 and 87]
[233] Croxton 1999 (n 221) 581.
[234] *Treaty of Westphalia* (n 217) [Arts. 15, 18, 32 and 90].
[235] Justin Rosenberg, 'A Non-realist theory of Sovereignty?: Giddens' the Nation-State and Violence' (1990) 19(2) *Journal of International Studies* 249-259, 253.

Although the Peace of Westphalia accorded more powers to kings and princes over their territories, it did not abolish all forms of intervention and interference in the affairs of others. This is shown by a series of annexations that followed afterward. However, by establishing the principle of *cuius regio, eius religio*, it seems to have declared all the existing rights of the Princes and Estates inviolable. It appears that the right conferred by the Peace of Westphalia is *persona* than *territorial*. This explains why the pact allows the transfer of peoples and territories while vesting exclusive authority in kings and princes.

France interpreted the Thirty Years' War as an attempt to resist the Habsburgs' unlawful absolutism.[236] This implies that a State may legitimately intervene in another State's internal affairs in defence of other's fundamental laws. If so, it weakens the Westphalian State Model as the origin of the inviolability of State territory. While this view is typical of France, Sweden's interest during the negotiation was independence. That said, the respect for a constituted authority established by the Peace of Westphalia became for the European powers a paradigm for international relations. This *metanoia* in a way of thinking was not disputed by the European States save Pope Innocent X's bull *Zelo domus dei* that despised it as null and void.[237]

2.5 Modern State System

It is hard to pinpoint an event that initiated the Modern State System. However, the main feature of the modern era was the way political power was exercised.[238] The modern state evolved over time and through a chain of events. As seen, the pre-Modern Europe concentrated political authority on the Pope and the Roman Emperor with a hierarchically decentralised power structure shared by kings, princes, nobility, bishops and abbots.[239]

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[236] Croxton 1999 (n 221) 583; Asch (n 223) 144-45; Murphy (n 219) 88-89.

[237] Derek Croxton and Geoffrey Parker, 'A swift and sure peace': the Cogress of Westphalia 1643-1648' in Williamson Murray and Jim Lacey (eds), *The Making of Peace: Rulers, States, and the Aftermath of War* (United Kingdom, Cambridge University Press 2009) 73.

[238] Marco Gatti and Simone Poli, 'Accounting and the Papal States: The influence of the *Pro Commissa* Bull (1592) on the Rise of an Early Modern State' (2014) 19(4) *Accounting History* 475-506, 475.

[239] Charles Tilly, 'Reflections on the history of European State-making' in Charles Tilly (eds), *The Formation of National States in Western Europe* (Princeton, New Jersey, Princeton University Press 1975) 21; Roland Axtmann, 'The State of the State: The Model of the Modern State and its Contemporary Transformation' (2004) 25(3) *International Political Science Review* 259–279, 259.

The practice of establishing international boundaries was shaped in the eighteenth century as 'a basic rule of co-existence.'[240] It was adopted in international relations at the beginning of the 19th century.[241] By the mid 19th century, nationalism was too strong that annexation without the consent of the inhabitants was considered illegal.[242] However, the feeling of nationalism disrupted the stability of boundaries. The wars of unification of the Germans and the Italians and the partitioning of the Ottoman empires into various nation-states are examples.[243] Between 1849 and 1914, industrialised societies emerged with new forms of states and of diplomatic and military alliances.[244] Although independence was emphasised, the need for security alliances dominated the legal discourse.

In the Americas, President Monroe's Seventh Annual Message to Congress[245] asserted that the United States will no longer recognise territorial acquisition in the Americas. It did, however, pledge not to interfere with the existing colonies or dependencies of any European power.[246] Consequently, Asia and Africa remained *terra nullius*, technically speaking.[247] However, some bilateral and multilateral treaties concluded in Europe during this period designated States' borders as inviolable. We shall analyse a few of them.

2.5.1 The Final Act of the Congress of Vienna 1815[248]

The Final Act of the Congress of Vienna of 1815 which ended the Napoleonic Wars delimited

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[240] Bull (n 60) 35.
[241] S. Akweenda, 'Territorial Integrity: A Brief Analysis of a Complex Concept' (1989) 1(3) *African Journal of International and Comparative Law* 500-506, 500.
[242] Korman (n 76) 93.
[243] Zacher 2001 (n 83) 218; Alfred Cobban, *The Nation State and National Self-Determination* (Revised Edition, London, Collins 1969) 28.
[244] William Woodruff, *A Concise History of the Modern World* (Fourth Edition, New York, Palgrave Macmillan 2002) 136.
[245] James Monroe, 'Seventh Annual Message to the US Congress' (2 December 1823) [paras. 61-62] available at <http://www.presidency.ucsb.edu/ws/index.php?pid=29465&st=&st1=> accessed 20 April 2017 [hereinafter *Monroe Doctrine*].
[246] ibid., [para. 61].
[247] Woodruff (n 244) 44; *General Act of the Conference of Berlin Concerning the Congo* (1909) 3(1) *American Journal of International Law* Supplement 7-25 [Art. 10] (it declares certain parts of the territories in Africa neutral for free trade).
[248] *General Treaty between Great Britain, Austria, France, Portugal, Prussia, Russia, Spain, and Sweden* (Signed at Vienna on 9 June 1815) reproduced in Edward Hertslet, *The Map of Europe by Treaty: Showing the Various Political and Territorial Changes Which Have Taken Place since the General Peace of 1814; With Numerous Maps and Notes* (Volume 1, London, Butterworths 1875) 208 [hereinafter *Final Act of the Vienna Congress 1815*].

States' boundaries in Europe and accorded "full sovereignty" to title holders.[249] Its' 'Protocol of 3rd November 1815'[250] and the 'Act signed by the Protecting Powers'[251] recognise that Switzerland's territory is inviolable. In clear terms, the "Act" declares that the Powers acknowledge the inviolability of Switzerland as well as affirms her independence of all foreign influence.[252] A lecture titled "territorial principle"[253] (*ius territorii*) delivered by Heffter in 1844 argued that *ius territorii* is a principle that 'grants a right to integrity and inviolability of States.'[254]

2.5.2 The Peace Treaty of Paris 1856[255]

The inviolability of State territory was further enshrined in Article 7 of the Congress of Paris as follows, '… [t]heir majesties engage each on his part, to respect the Independence and the territorial integrity of Ottoman Empire.…'[256] The word "respect" should be noted. Anthony D'Amato has suggested that the intent of the parties was to prevent any permanent loss of a portion of the territory of the Ottoman Empire.[257] This interpretation is deficient insofar as "respect" has a deeper legal connotation than the prohibition from territorial acquisition. Against this backdrop, the Israeli's airstrike on Iraqi nuclear reactor in 1981 violated the latter's territory even though no territory was lost.[258]

In the 20th century, three interrelated questions defined territoriality. First, whether the

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[249] *Final Act of the Vienna Congress 1815* (n 248) [Arts. 2, 4, 7 and 39].
[250] *Protocol of Conference between Great Britain, Austria, Prussia, and Russia, respecting the Territorial Arrangements, and Defensive System of the Germanic Confederation* (Signed at Paris on 20 November 1815) [Art. 4] reproduced in Hertslet (n 248) 326.
[251] See generally, *Act, signed by the Protecting Powers, Austria, France, Great Britain, Prussia and Russia, for the acknowledgment and guarantee of the Perpetual Neutrality of Switzerland, and the Inviolability of its Territory* (Concluded at Paris on 20 November 1815) reproduced in Hertslet (n 248) 370 [hereinafter *Act signed by the Protecting Powers 1815*].
[252] *Act signed by the Protecting Powers 1815* (n 251) 371.
[253] Principles are codes of conduct, operating guidelines, or yardsticks used to ascertain when decisions and actions are taken, evaluated, criticised and when changes are proposed. See Andrew M. Song, Ratana Chuenpagdee and Svein Jentoft, 'Values, Images, and Principles: what they Represent and how they may improve Fisheries Governance' (2013) 40 *Marine Policy* 167-175, 168.
[254] Christian Marxsen, 'The Concept of territorial integrity in international law – what are the implications for Crimea' available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2515911> accessed 20 April 2017.
[255] *General Treaty of Peace between Great Britain, Austria, France, Prussia, Russia, Sardinia, and Turkey* (Signed at Paris on 30 March 1856) reproduced in Hertslet (n 248, Volume 2) 1250 [hereinafter *Peace of Paris 1856*].
[256] *Peace of Paris 1856* (n 255) [Art. 7].
[257] D'Amato (n 56) 58.
[258] UNGA Res. A/RES/36/27 (13 November 1981) [operative para. 1].

victorious States should appropriate territory belonging to the vanquished States as spoils of war? Second, whether States are obliged to respect the territory of States defeated during war? Third, whether self-determination of peoples should take priority over respect for the vanquished States' boundaries? We shall analyse how these questions were addressed in the remaining sections of this chapter.

Regarding the first question, state practice supported the acquisition of the territory of the vanquished State in the early years of the First World War as evidenced by the Allied Secret Treaties of 1915-17.[259] But the situation changed following the United States' entry into the war, the Russian revolution of 1917, and the upsurge in nationalism consciousness that erupted in many countries.[260] President Woodrow Wilson had initiated the process that crumbled the right of conquest,[261] although the 1919 Treaty of Versailles ceded territories to the victorious powers.

2.5.3 The Treaty of Peace with Germany 1919[262]

Following the defeat of Germany in the First World War, the Treaty of Versailles ceded territories that used to be part of Germany to the victorious powers.[263] It compelled Germany to renounce its sovereign right over its colonies.[264] Under the regime of the League of Nations,

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[259] Leon Trotsky drew the attention of the World to the Allied secret pact. See *Statement by Trotsky on the Publication of the Secret Treaties* (22 November 1917) available at <https://www.marxists.org/history/ussr/government/foreign-relations/1917/November/22.htm> accessed 20 April 2017; Woodrow Wilson, 'Address to a joint session of Congress on the conditions of Peace' (8 January 1918) [opening statement para. 5] available at <http://www.presidency.ucsb.edu/index.php> accessed 20 April 2017 [hereinafter *President Wilson's Fourteen Points*]; For more of such secret treaties, see C. A. McCurdy, *The Truth about the Secret Treaties* (London, W. H. Smith and Son 1918). For some of the conditions for a post-war distribution of defeated states territories see H. W. V. Temperley (ed), *A History of the Peace Conference of Paris* (Volume 1, London, Oxford University Press 1920) 169-71; *Agreement between France, Russia, Great Britain and Italy* (Signed at London on 26 April 1915) (1920) *Great Britain Parliamentary Papers, London, LI Cmd. 671, Miscellaneous No. 7* [Arts. 4-12] available at <http://parlipapers.proquest.com/parlipapers/result/pqpdocumentview?accountid=14494&groupid=96146&pgId=0c2384ed-ad44-4d5a-8761-a973a37d08e3&rsId=15AF5821A71> accessed 21 April 2017.

[260] *President Wilson's Fourteen Points* (n 259) [opening statement para. 5]; Korman (n 76) 132-36; Zacher 2001 (n 83) 219.

[261] President Wilson insisted that treaty of peace must not be based on secret treaties but must be based on *status quo ante. See President Wilson's Fourteen Points* (n 259) [opening statement para. 5]; Erich Ludendorff, *My War Memories* (Vol. 1, London, Hutchinson & Co 1919) 319-323; Korman (n 76) 135.

[262] *The Treaty of Peace with Germany* (Signed at Versailles on 28 June 1919, entered into force on 10 January 1920) (1919) 13(3) *American Journal of International Law Supplement* 151 [hereinafter *The Treaty of Versailles 1919*].

[263] *The Treaty of Versailles 1919* (n 262) [Art. 32].

[264] ibid., [Art. 119].

Mandate System was established for new colonies with an implicit obligation for mandatory powers to prepare the colonial peoples for self-governance.[265] Korman rightly concludes that the Treaty of Versailles which ended the First World War did not abrogate the right of a victor to dispose of the territory of the vanquished by right of conquest but marked a moral turning point.[266]

Concerning the second question, state practice does not oblige States to respect the territory of the vanquished State. However, President Wilson's involvement in that war encouraged the respect of the territory of the vanquished State. His "Fourteenth points" envisaged institutional reform by way of 'specific covenants for the purpose of affording mutual guarantees of political independence and territorial integrity to great and small States alike.'[267] As shall be seen, the law of armed conflict imposes obligations upon the occupying power to maintain the *status quo* within the territory of the defeated State.

2.5.4 The Covenant of the League of Nations

Article 10 of the Covenant of the League of Nations obliges the member States to "respect" and "preserve" the territory and political independence of all Members of the League.[268] The insertion of the phrase, "respect and preserve" was crucial even though it was hotly contested during the drafting period. It was considered too broad. Hence, New Zealand's amendment observed that it imposed upon States a positive obligation to preserve the territory of other States.[269] Its omission from Article 2(4) of the UN Charter is surprising.

However, Wilson's idea about the inviolability of State territory was weak because the involvement of the United States in that war was partly to grant political autonomy to the peoples of Austria-Hungary.[270] That *ipso facto* affected the existing boundaries of certain States. Although the League of Nations was established to, *inter alia,* punish States that

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[265] See *The Covenant of the League of Nations* (Adopted at Paris on 29 April 1919, entered into force on 10 January 1920) (1919) 13(2) *American Journal of International Law Supplement* 128-139 [Art. 22] [hereinafter *Covenant of the League of Nations*]; Zacher 2001 (n 83) 219; Inis L. Claude, *Swords into Plowshares: The Problems and Progress of International Organization* (Fourth Edition, New York, Random House 1971) 43-56.
[266] Korman (n 76) 161.
[267] *President Wilson's Fourteen Points* (n 259) [point 14].
[268] *Covenant of the League of Nations* (n 265) [Art. 10].
[269] Leland M. Goodrich and Edvard Hambro, *Charter of the United Nations: Commentary and Documents* (Boston, World Peace Foundation 1946) 68.
[270] *President Wilson's Fourteen Points* (n 259) [point 10].

violated the territory of others,[271] the League System inadvertently failed.[272] In fact, academics such as Borden were critical of how Article 10 was drafted because it did not rule out the possibility of invasion of another State's territory.[273] Kelsen agreed with Borden and further stressed that Article 10 permitted the violation of States' territory by other means short of aggression and equally legitimised aggression as means of re-establishing a territorial claim.[274]

Regarding the third question, state practice and *opinio juris* are divided. Although President Wilson advocated for national self-determination, state practice favours the view that a State's territory is inviolable. Although self-determination was not explicitly mentioned in the Covenant of the League of Nations, Franck has argued that it was implied into Article 25 of the Covenant of the League of Nations.[275] Nevertheless, the Committee of Jurists in *Aaland Island dispute* maintained that 'the recognition of this principle in a certain number of international treaties cannot be considered as sufficient to put it upon the same footing as a positive rule of the law of Nations.'[276] The ICJ in the *Burkina Faso v Mali* case[277] confirmed this when it adopted *uti possidetis* as a general principle that establishes territorial boundaries.

It is sufficient to say that the nature of the territorial right protected by the Treaty of Versailles is limited. The legal content was frustrated by States' unwillingness to respect the territory of other States. As a result, decades of inter-State wars culminated in the Second World War.

However, there was a problem of inconsistency in the application of the principle of the

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[271] David Stevenson, *The First World War and International Politics* (Oxford, Clarendon Press 1991) 244-251.
[272] Goodrich and Hambro (n 269) 3-4; see generally, L. Oppenheim, *The League of Nations and its Problems: Three Lectures* (London, Longmans, Green and Co., 1919).
[273] David Hunter Miller, *The Drafting of the Covenant* (New York, G. P. Putnams' Sons 1928) 358.
[274] D'Amato (n 56) 63.
[275] Thomas M. Franck, *The Power of Legitimacy among Nations* (New York, Oxford University Press 1990) 154-162.
[276] League of Nations, 'Report of the International Committee of Jurists entrusted by the Council of the League of Nations with the task of giving an advisory opinion upon the legal aspects of the Aaland Islands Question' (1920) 3 *League of Nations Official Journal Supplement* 3-19, 5; Philip Marshall Brown, 'Self-Determination in Central Europe' (1920) 14(1) *American Journal of International Law* 235-239. *Cf* League of Nations, 'The Aaland Islands Question: Report Submitted to the Council of the League of Nations by the Commission of Rapporteurs,' LN Council Doc.B7.21/68/106 (1921) 318 (the Committee of Rapporteurs argues that a state territory could be breached as a last resort).
[277] *Frontier Dispute* (Burkina Faso v Republic of Mali) Judgment ICJ Reports (1986) p. 554 [para. 23].

inviolability of State territory, especially in the manner in which the territorial disputes were settled by the Treaty of Versailles. Admittedly, some States were dissatisfied that Italy inherited a territory that was formerly a part of Austro-Hungary, and where few Italians lived. It was a repeat of the prevailing state practice that ceded territories with little or no concession to the sensibility of the local populace.[278] Even when some States acquired territories by force, such as the territorial expansion orchestrated by Japan, Germany, and Italy, other world powers tolerated it.[279]

2.5.5 The Kellogg-Briand Pact[280]

The Kellogg-Briand Pact of 1928 is another important instrument that safeguarded State territory. Article 1 prohibits States from waging war as instrument of national policy in their international relations.[281] This pact does not mention respect for the inviolability of State territory. Korman and Zacher argue that it was meant to prohibit territorial aggressions, although it did not explicitly focus on territorial aggrandisement.[282]

Following the conquest of Manchuria by Japan in 1931, the United States Secretary of States, Henry Stimson declared that the United States would no longer recognise any territorial changes obtained by force.[283] Consequently, the Western Allied Powers manifested their willingness to support the principle of respect for the inter-States' boundaries after the Second World War. The victorious powers did not vie for or obtain sovereignty over territories that previously belonged to the defeated powers, except perhaps for some UN Trust Territories that were formerly the colonies of Japan and Italy.[284]

However, the United States was requested to take control over some of the Pacific Island that formerly belonged to Japan.[285] Apart from the Soviet Union, which upheld the classical view

[278] Zacher 2001 (n 83) 220.
[279] ibid., 220.
[280] *General Treaty for Renunciation of War as Instrument of National Policy* (Signed at Paris on 27 August 1928, entered into force on 25 July 1929) 94 UNTS 57 [Art. 1] [hereinafter *Kellogg-Briand Pact*].
[281] *Kellogg-Briand Pact* (n 280) [Art. 1].
[282] Korman (n 76) 192-99; Zacher 2001 (n 83) 220.
[283] Arnold D. McNair, 'The Stimson doctrine of Non-Recognition' (1933) 14 *British Yearbook of International Law* 65-75, 65.
[284] Zacher 2001 (n 83) 220.
[285] ibid., 220; Korman (n 76) 176.

of acquisition of territories of the defeated State, it could be said that the authority of States over their territory was exclusive at the time the UN Charter was drafted.

2.6 Concluding Remarks

This chapter has clarified the nature of State and State territory under the modern international law. It has dealt with definitions of the basic concepts, the theoretical framework and the historical evolution of the idea of the inviolability of State territory.

This chapter started by attempting a definition of a State and discovered that no universally accepted definition exists under the modern international law. It is surprising that a State can only be known in the abstract based on certain criteria, of which a defined territory is one. However, some definitions from political philosophers and legal theorists such as Hugo Grotius and Hans Kelsen were examined to give this dissertation a sense of direction. Analysis conducted in this chapter has shown that a State is a free association of human beings which Kelsen regarded as the legal order.

This legal order according to the Montevideo Convention on the Rights and Duties of State should have a defined territory. It is within this space called territory that States exercise what Kelsen regarded as coercive order to the exclusion of any other State. Unfortunately, many States exist without clearly delimited borders such that the conditionality of a defined territory does not always block the *de facto* existence or emergence of new States.

Nonetheless, the State's exclusive authority within a defined territory, otherwise known as territoriality, has four elements. They include sovereignty, integration, delimited borders and national security. These elements are meant to secure and safeguard the authority which a State has over its territory from external invasion.

This chapter went on to consider what could probably be the theoretical basis for the requirement to respect the inviolability of State territory. It studied four schools, namely the Natural Law, the New Haven, International Relations and the Legal positivism. Each of these schools could justify why States should regard the territory of other States as inviolable.

Based on the rationale that necessitated the formation of State as propounded by the Social Contract Theorists, the Natural Law School would argue that respect for the inviolability of State territory is a better way of maintaining international peace and security. It does not, however, resolve all the issues associated with States who may be prone to wrongful conduct against others. The New Haven School highlights the need to update the prescriptions of the law with the changing values to forestall the danger that legalism might short-change the lived experiences of its addressees. This theory supports this dissertation's quest for a re-discovery of the broader meaning of Article 2(4) of the UN Charter.

The International Relations Theory’s position is that a proper interpretation of the law is enriched when interdisciplinary approach is used. To that end, the international relations supports that States' territory should be respected. This enhances international diplomacy. The Legal Positivism maintains that the law on any given subject must be sieved through the text of a legislation. It follows then that Article 2(4) of the UN Charter provides the legal basis for any discussion on the requirement to respect the inviolability of State territory.

This chapter went further to evaluate the historical emergence of the requirement to respect the inviolability of State territory. It situated its study within the context of the Peace of Westphalia, which *opinio juris* supports was the origin of the modern nation-State in Europe. It examined how the hegemony of the political authority exercised by Christianity and the Roman Empire resulted in the Thirty Years’ War in Europe and how the Peace of Westphalia bequeathed States with exclusive authority over their territory. This chapter argued that this was the origin of the right of States to exercise “exclusive” authority within their territory. Consequently, some of the Peace Treaties concluded in modern times expressly obliged States to “respect” the “inviolability” of other States territory.

Chapter Three

The Principle of the inviolability of State territory and Article 2(4) of the UN Charter

3.0 Introduction

This chapter deconstructs Article 2(4) to establish the principle of respect for the inviolability of State territory. Note that the word "inviolability" did not appear anywhere in the UN Charter. By "respect" is meant a positive obligation not to undermine the integrity of another State for whatever reasons whether directly or indirectly without its consent. This is not without prejudice to the lawfully permitted exceptions, namely, self-defence or when authorised by the Security Council.

This chapter argues that the legacies of the "exclusive authority" inherited from the Peace of Westphalia was not diminished in Article 2(4). To substantiate that claim, this chapter will analyse the legislative history of Article 2(4) in conjunction with Article 2(7) of the UN Charter. It will also evaluate other instruments[1] which recognise and promote the requirement to respect other States' territory at the universal, regional[2] and national levels.[3] This analysis is done with the understanding that Article 2(4) is a norm *jus cogens*.

3.1 Article 2(4) of the United Nations Charter

Article 2(4) of the UN Charter came as a response to the Moscow Conference of 1943[4] seeking

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[1] See UNGA Res. A/RES/25/2625 (24 October 1970) [Principle 1] [hereinafter *Declaration on Friendly Relations*]; UNGA Res. A/RES/29/3314 (14 December 1974) [Art. 3] hereinafter *GA Definition of Aggression*]; *Convention (IV) Relative to the Protection of Civilian Persons in Time of War* (Done at Geneva on 12 August 1949, entered into force on 21 October 1950) 75 UNTS 287 [Arts. 47 and 54] [hereinafter *The 1949 Geneva Convention IV*]; *Hague Convention (II) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land* (Concluded at The Hague on 29 July 1899, entered into force on 4 September 1900) 32 Stat. 1803 [Arts. 43 and 55] [hereinafter *The Hague Regulation II*].

[2] *Charter of the Organization of American States* (Signed at Bogota on 30 April 1948, entered into force on 13 December 1951) 119 UNTS 3 [Art. 21] [hereinafter *OAS Charter*]; *Charter of the Organisation of African Unity* (Done at Addis Ababa on 25 May 1963, entered into force on 13 September 1963) 479 UNTS 39 [Art. 3] [hereinafter *OAU Charter*]; *Conference on Security and Cooperation in Europe: Final Act Helsinki* (Done at Helsinki on 1 August 1975) [Arts. 3 and 4] available at available at <https://www.osce.org/mc/39501?download=true> accessed 14 April 2017 [hereinafter *Helsinki Final Act 1975*].

[3] See *The Constitution of the Russian Federation* (Ratified on 12 December 1993) [Art. 4(3)] available at <http://www.departments.bucknell.edu/russian/const/constit.html> accessed 23 March 2017; *Constitution of the Azerbaijan Republic as amended through 1995* (Enacted on 21 April 1978) [Art. 11] available at <http://confinder.richmond.edu> accessed 23 March 2017.

[4] See *The Moscow Conference of 1943* [Arts. 5-6] available at <http://avalon.law.yale.edu/wwii/moscow.asp> accessed 4 April 2017.

a lasting solution to international peace and security. It provides as follows:

> All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.[5]

This provision has been described as a customary international law.[6] However, if it were to be understood as prohibiting only "the threat or use of force," then what distinguishes it from the previous peace treaties would be contentious. As shown in chapter two, the Kellogg-Briand Pact expressly prohibits recourse to war as a means of settling international disputes or as an instrument of national policy.[7] Article 10 of the Covenant of the League of Nations[8] obliges the States Parties to 'respect and preserve as against external aggression the territorial integrity and existing political independence of all Members.' It equally prohibits the Member States from resorting to war without fulfilling the conditions in Articles 12, 13 and 15 of the Covenant of the League of Nations.[9]

It is disconcerting that Article 2(4) departed from the legal history by not inserting "respect and preserve" as contained in the Covenant of the League of Nations.[10] Was its omission because of the UN Member States' constructive knowledge that it is implied into Article 2(4) based on the deliberations at San Francisco? Admittedly, "preserve" was omitted because it creates a positive duty for States to prevent forcible violation of other States' territory.[11] But

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[5] United Nations, *Charter of the United Nations* (Signed at San Francisco on 26 June 1945, entered into force on 24 October 1945) 1 UNTS XVI [Art. 2(4)] [hereinafter *UN Charter*].

[6]See *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v United States of America) Judgment ICJ Reports (1986) p. 14 [paras. 98-101, 190-191, 227] [hereinafter *Nicaragua Case*]; *Legality of the Threat or Use of Nuclear Weapons,* Advisory Opinion ICJ Reports (1996) p. 226 [para. 105] [hereinafter *Legality of the Threat or Use of Nuclear Weapons*]; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* Advisory Opinion ICJ Reports (2004) p. 136 [paras. 86-88]; *Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v Uganda) Judgment ICJ Reports (2005) p. 168 [para. 162] [hereinafter *DRC v Uganda*]; *The Case of the S.S. "Lotus"* (France v Turkey) Judgment PCIJ Series A, No. 10 (1927) 18-19 [hereinafter *Lotus case*].

[7] *General Treaty for Renunciation of War as Instrument of National Policy* (Signed at Paris on 27 August 1928, entered into force on 25 July 1929) 94 UNTS 57 [Art. 1] [hereinafter *Kellogg-Briand Pact*].

[8] *The Covenant of the League of Nations* (Adopted at Paris on 29 April 1919, entered into force on 10 January 1920) (1919) 13(2) *American Journal of International Law Supplement* 128-139 [Art. 10] [hereinafter *The League of Nations Covenant*].

[9] *The League of Nations Covenant* (n 8) [Arts. 12, 13 and 15]. Bruno Simma describes the conditions as the "cooling-off period." See Bruno Simma *et al.,* (eds), *The Charter of the United Nations: A Commentary* (Second Edition, New York, Oxford University Press 2002) 115.

[10]Leland M. Goodrich, Edvard Hambro and Anne Patricia Simons, *Charter of the United Nations: Commentary and Documents* (Third and Revised Edition, New York, Columbia University Press 1969) 45.

[11] Leland M. Goodrich and Edvard Hambro, *Charter of the United Nations: Commentary and Documents* (Boston, World Peace Foundation 1946) 68.

why "respect" which imposes upon States a negative obligation to refrain from violating the territory of other State was equally omitted remains elusive.

The primary purpose of the United Nations as enshrined in Article 1 is to maintain international peace and security. The Peace Treaties discussed in chapter two prohibited wars and aggression. An example is Article 2 of the Treaty of Mutual Guarantee between Germany, Belgium, France, Great Britain and Italy[12] (hereinafter referred to as The Locarno Pact). Against this backdrop, the relevance of Article 2(4) might be in issue if it restates the existing norm. Besides, the omission of the word "inviolability" in the text of Article 2(4) is disturbing given that the United States and the Soviet Union had used it in their bilateral treaties with other States.[13] One is left with the presumption that inviolability is, at least, intended.

3.2 *Travaux préparatoires* of Article 2(4)

The UN was born at the time regionalisation of the security outfit was a topical issue in the Americas, Europe and the Arab countries.[14] The Act of Chapultepec concluded in Mexico in March 1945 declares that every attack against the integrity or the inviolability of a member State's territory shall be considered an act of aggression.[15] This instrument was contemporaneous with the United Nations Charter and should have influenced its drafting. In other words, legal texts that adopted an inclusive language when the Charter was drafted abound, although at the regional level or as bilateral treaties.

The initial proposals put forward by the United States did not mention the "inviolability of

[12] *Treaty of Mutual Guarantee between Germany, Belgium, France, Great Britain and Italy* (Done at Locarno on 16 October 1925, entered into force on 14 September 1926) 54 LNTS 289 [Arts. 1-2] [hereinafter *Locarno Pact*].
[13] *U. S. S. R. – Estonia: Treaty of Non-Aggression and Peaceful Settlement of Dispute* (Signed at Moscow on 4 May 1932; ratifications exchanged on 18 August 1932) (1933) 27(4) *American Journal of International Law Supplement* 167-169 [Art. 1]; *U. S. S. R. – Poland: Treaty of Non-Aggression* (Signed at Moscow on 25 July 19S2; ratifications exchanged on 23 December 1932) (1933) 27(4) *American Journal of International Law Supplement* 188-190 [Art. 1]; Inter-American Conference on War and Peace, 'Act of Chapultepec' (Concluded at Mexico on 3 March 1945) (1945) 12(297) *Department of State Bulletin* 339-340, 340 [see in particular, Part 1, Third declaration] [hereinafter *Act of Chapultepec*]; *U. S. S. R. – Estonia: Treaty of Non-Aggression and Peaceful Settlement of Dispute* (Signed at Moscow on 4 May 1932; ratifications exchanged on 18 August 1932) (1933) 27(4) *American Journal of International Law Supplement* 167-169 [Art. 1].
[14] Committee on Foreign Relations, *The Charter of the United Nations: Hearings before the Committee on Foreign Relations United States Senate Seventy-Ninth Congress* (Washington, United States Government Printing Office 1945) 96 [hereinafter *The US Committee on Foreign Relations Commentary on the UN Charter*].
[15] *Act of Chapultepec* (n 13) [Part 1, Third declaration].

State territory" or "political independence."[16] The Dumbarton Oaks redraft reads: 'All members of the Organisation shall refrain in their international relations from the threat or use of force in any manner inconsistent with the purposes of the Organisation.'[17] This redraft proposal led to further negotiations and discussions. The Prime Minister of New Zealand at the time, Peter Fraser recommended that the Charter should contain an explicit clause prohibiting external aggression against the territory of States and political independence of any member of the organisation.[18] His views were collaborated by the Deputy Prime Minister of Australia.[19]

However, the member States were wary that the Dumbarton Oaks' Proposal could erode their territorial sovereignty due to the sweeping powers it assigned to the Security Council.[20] According to New Zealand,[21] such a measure is a threat to State sovereignty. Hence, the phrase "in conformity with the principles of justice and international law" was inserted in Article 1 to protect small States[22] at San Francisco's Conference. Additionally, the weaker States demanded that the Charter should include a clause that protects the territory and political independence of States.[23]

As shall be seen, the idea of sovereign equality of States was understood to mean that States are free and sovereign to the extent not limited by the Charter.[24] States delegate some powers to the United Nations but retain the residue of their sovereign powers.[25] An exception perhaps is that States may be bound by future amendments in accordance with the provision of Article 109.[26] More so, Article 25 of the UN Charter obliges the Member States to

[16] Anthony D'Amato, *International Law: Process and Prospect* (Second Edition, New York, Transnational Publishers 1995) 68-72.
[17] United States Department of State, 'Proposals for the Establishment of a General International Organisation' (1944) 11(276) *The Department of State Bulletin* 368-374, 368.
[18] D'Amato 1995 (n 16) 69.
[19] ibid., 69.
[20] ibid., 69.
[21] Goodrich and Hambro (n 11) 68.
[22] ibid., 60-61.
[23] *The US Committee on Foreign Relations Commentary on the UN Charter* (n 14) 56.
[24] Goodrich and Hambro (n 11) 64.
[25] ibid, 64.
[26] It provides as follows: 'Any alteration of the present Charter recommended by a two-thirds vote of the conference shall take effect when ratified in accordance with their respective constitutional processes by two thirds of the members of the United Nations including all the permanent members of the Security Council.' See *UN Charter* (n 5) [Art. 109(2)].

implement the decisions of the Security Council. The progressive nature of these provisions, though contractual, means that a State's future interest could be hindered.

It should be noted that the consequences of wars necessitated the desire for a workable means to achieving international peace and security. To defuse the fear that the Charter might create "super-states," the United States Secretary of State at the time explained that the Charter would have an inbuilt mechanism to protect the integrity of every State.[27] Hence, the delegations at San Francisco knew that the Charter was contractual and that Article 2 concerns the principle of the sovereign equality of States.[28] This idea informed the insertion of the phrase, "territorial integrity" in Article 2(4) at the insistence of the weaker States.[29] It was a buffer for the less powerful States against unlawful intimidations from the more powerful States.[30]

Consequently, Anthony D'Amato has pointed out that the provision of Article 2(4) means that the frontier could not be extended by external forces and that "political independence" means that a "State's Independence" could not be abrogated.[31] This interpretation suggests that only the threat or use of force is prohibited. But the fact that Bolivia insisted on the insertion of "inviolability"[32] in the text of Article 2(4) clearly shows that the weaker States intended nothing less than an all-inclusive protection.

3.3 Is Article 2(7) of the UN Charter a clawback Article?

The proximity of Article 2(7)[33] which prohibits all forms of intervention in the internal affairs of a State to Article 2(4) is rather curious. Was this a clawback article meant to protect the territory of States from all manner of violation and unauthorised interventions from the UN?

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[27] Edward Stettinius, 'What the Dumbarton Oaks Peace Plan means' (1945) 12(292) *The Department of State Bulletin* 115-119, 117.
[28] Goodrich and Hambro (n 11) 19.
[29] Countries like Australia, Bolivia, Brazil, Czechoslovakia, Ecuador, Egypt, Ethiopia, Mexico, Peru, and Uruguay proposed the inclusion of territorial integrity in the Charter. See Christian Marxsen, 'The Concept of territorial integrity in international law – what are the implications for Crimea' 1-19, 2 available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2515911> accessed 3 April 2017.
[30] Ian Brownlie, *International Law and the Use of Force by States* (New York, Oxford University Press 1963) 267.
[31] D'Amato 1995 (n 16) 70; Goodrich and Hambro (n 11) 68-69.
[32] D'Amato 1995 (n 16) 70.
[33] It states: 'Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.' See *UN Charter* (n 5) [Art. 2(7)].

The United States has explained that the link between paragraphs 4 and 7 is that paragraph 7 'makes clear that the obligation (it) referred to springs from Article 2, paragraph 4 of the Charter.'[34] Other relevant instruments on non-intervention in the internal affairs of a State are the two Resolutions[35] adopted by the United Nations General Assembly.

Intervention, which is the key word in Article 2(7) has been analysed in detail here.[36] In the *Case Concerning Military and Paramilitary Activities in and against Nicaragua,*[37] the ICJ held that Article 2(7) is meant to protect the sovereignty of States.[38] The ICJ's interpretation applied to unauthorised unilateral interventions, whether individual or collective. But how to determine the "unacceptable limits"[39] of the UN's intervention is problematic.[40]

Two deductions are possible. First, that the prohibition of the threat or use of force in paragraph 4 and intervention in paragraph 7 are examples of the requirement to respect the inviolability of State territory. In Cassese's opinion, '[a] radical turning point was the adoption of the UN Charter, which in Article 2.4 proscribes any threat or use of force, thus creating *inter alia* a right of all member states … to non-intervention in their internal or external relations by the threat or use of force.'[41]

In other words, Article 2(4) is implicated whenever the intervenor uses threat or force. *Argumentum a fortiori,* all other interventions do not involve the threat or use of force. This is not usually the case. Although most interventions are by the threat or use of force, it is not

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[34] United Nations General Assembly, Special Committee on Principles of International Law concerning friendly relations and co-operation among States, 'United States: Amendment to the United Kingdom Proposal (A/AC.119/L.8)' UN Doc. A/AC.119/L.26 (21 September 1964) 1 [para. 3] (emphasis added).

[35] See UNGA Res. A/RES/36/103 (9 December 1981) [operative para. 1] [hereinafter *Inadmissibility of non-intervention in States Affairs*]; UNGA Res. A/RES/20/2131 (21 December 1965) [operative para. 1] [hereinafter *Inadmissibility of non-intervention in Domestic Affairs*].

[36] D. R. Gilmour, 'The Meaning of "Intervene" within Article 2 (7) of the United Nations Charter—An Historical Perspective' (1967) 16(2) *International and Comparative Law Quarterly* 330-351.

[37] *Nicaragua Case* (n 6) [para. 205].

[38] ibid., [para. 205]; George Nolte, 'Secession and external intervention' in Marcelo G. Kohen (ed), *Secession: International Law Perspectives* (United Kingdom, Cambridge University Press 2006) 69; Christine Gray, *International Law and the Use of Force* (Third Edition, United Kingdom, Oxford University Press 2008) 67; Robert Jennings and Arthur Watts (eds), *Oppenheim's International Law* (Ninth edition, London and New York, Longman 1996) 428 [hereinafter *Oppenheim 1996*].

[39] George Nolte, 'Article 2(7)' in Simma *et al.,* (eds), (n 9) 152.

[40] Gilmour (n 36) 330; Luke T. Lee, 'The Mexico City Conference of the United Nations Special Committee on Principles of International Law Concerning Friendly Relations and Co-Operation among States' (1965) 14(4) *International and Comparative Law Quarterly* 1296-1313, 1305-1306.

[41] Antonio Cassese, *International Law in a Divided World* (New York, Oxford University Press 1986) 145.

necessarily so. For example, a peaceful entry into a State territory on invitation could turn out to be a threat, use of force or an unlawful intervention if an invitee refuses to withdraw its troops when asked.[42] Initially, Article 2(7) was restricted to acts of the United Nations but was later interpreted as embodying the general principle of non-intervention.[43] Restricting its' application only to the organs of the United Nations which can lawfully intervene in the internal affairs, renders it redundant. Besides, the Security Council is the only supranational body that can authorise or use threat or force against a State.

Second, the text of Article 2(7) explicitly refers to "matters which are essentially within the domestic jurisdiction of a state."[44] The two Resolutions of the General Assembly mentioned earlier refer to civil strife and condemn "all other forms of interference" directed against the political, economic and cultural elements of a State.[45] These post-UN Charter Resolutions that adopted inclusive language manifest the Member States' resolve not to contract out their territorial sovereignty.

According to Nolte, the "domestic jurisdiction" in Article 2(7) is not limited to physically delimited boundaries of a State[46] but also includes extra-territorial jurisdiction. Thus, a State sovereignty extends to its flagged ship at the High Sea, its embassy in a foreign State and its aircraft in the airspace of another State. Presently, the said jurisdiction has extended to the cyberspace.

As shall be seen, the boundary between Article 2(4) and Article 2(7) is fluid, mostly in cases dealing with the enforcement of the right to the Exclusive Economic Zone.[47] This makes Article 2(7) looks more like a clawback Article whose need would not have arisen had the phrase, "the inviolability of a state territory" been inserted in Article 2(4).[48] This conclusion is

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[42] *DRC v Uganda* (n 6) [para. 53].
[43] Nolte, 'Article 2(7)' in Simma *et al.,* (eds), (n 9) 153.
[44] *UN Charter* (n 5) [Art 2(7)].
[45] *Inadmissibility of non-intervention in Domestic Affairs* (n 35) [operative paras. 1-2]; *Inadmissibility of non-intervention in States Affairs* (n 35) [Art. 1(b)].
[46] George Nolte, 'Article 2(7)' in Simma *et al.,* (eds), (n 9) 157.
[47] See *Guyana v Suriname* (Arbitral Tribunal constituted pursuant to Article 287, and in accordance with Annex VII, of the United Nations Convention on the Law of the Sea) Award PCA (2007) 30 *RIAA* 1-144 [paras. 425-447].
[48] Yugoslavia's proposal contains the word inviolability, but it was not inserted in the text of Article 2(7). See Special Committee on Principles of International Law concerning friendly relations and co-operation among

supported by the proposals submitted by States during the drafting of the *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*[49] (hereinafter refered to as Declaration on Friendly Relations).

The proposals of the delegation from Czechoslovakia[50] and Yugoslavia[51] prohibit direct or indirect intervention in the internal or external affairs of any other State through threat or exerting pressure (whether political, economic and/or diplomatic) to change the target State's social or political order.[52] A joint proposal submitted by Ghana, India and Yugoslavia lists the following conducts as examples of the prohibited interference:

> (a) organise, assist, foment, incite or tolerate subversive or terrorist activities against another state or interfere in civil strife in another State;
> (b interfere with or hinder, in any form or manner, the promulgation or execution of laws in regard to matters essentially within the competence of any state;
> (c) use duress to obtain or maintain territorial agreements or special advantages of any kind; and
> (d) recognise territorial acquisitions or special advantages obtained by duress of any kind by another state.[53]

The United Kingdom objected to the zero tolerance in influencing the policies and actions of other States in an interdependent world.[54] Such law, the UK argues, is beyond the objective of the international law insofar as it does not conflict with the principles of self-determination of peoples or the sovereign equality of States.[55]

States, 'Yugoslavia's proposal,' UN Doc. A/AC.119/L.7 (31 August 1964) 2 [hereinafter *Yugoslavia's proposal on Non-intervention*].

[49] See generally, *Declaration on Friendly Relations* (n 1).

[50] Special Committee on Principles of International Law concerning friendly relations and co-operation among States, 'Czechoslovakia's proposal,' UN Doc. A/AC.119/L.6 (29 August 1964) 2 [hereinafter Czechoslovakia Proposal].

[51] *Yugoslavia's proposal on Non-intervention* (n 48) 2-3.

[52] Edward McWhinney, 'The New Countries and the New International Law: The United Nations' Special Conference on Friendly Relations and Co-Operation among States' (1966) 60(1) *American Journal of International Law* 1-33, 21.

[53] Special Committee on Principles of International Law concerning friendly relations and co-operation among States, 'Ghana, India and Yugoslavia's proposal,' UN Doc. A/AC.119/L.27 (21 September 1964) 1 [hereinafter *Ghana-India-Yugoslavia combined proposal*].

[54] Special Committee on Principles of International Law concerning friendly relations and co-operation among States, 'The United Kingdom's proposal,' UN Doc. A/AC.119/L.8 (31 August 1964) 7.

[55] ibid., 7.

This kind of debate shows the uneasiness between the positions taken by the powerful States on the one hand and the position of the weaker States on the other hand. The troubling aspect of the viewpoint of the powerful States is how to measure the degree of influence that would be permitted given the asymmetric bargaining power of the weaker States. Equally troubling from the viewpoint of the less powerful States is how to evolve an exhaustive list of what constitutes intervention.[56]

3.4 Other Documents from the United Nations

3.4.1 The Decolonisation Period

The United Nations General Assembly Resolution on the *Declaration on the Granting of Independence to Colonial Countries and Peoples*[57] dealt with territorial issues during the decolonisation period. The relevant section declares as incompatible with the purposes of the UN Charter, any attempt aimed at a partial or total disruption of the territory of a State.[58] Note that "disruption" does not occur only through armed intervention but could be initiated and supported covertly. Hence, the ICJ in the *Frontier Dispute* case[59] upheld the doctrine of *uti possidetis* to protect new States from fratricidal struggles that could result from the withdrawal of the administering power. The African Heads of State and Government agree to 'respect the borders existing on their achievement of national independence.'[60]

The ICJ's judgment in the *Frontier Dispute* case departed from the *Treaty of Peace with Germany*[61] that restored the territories of Alsace-Lorraine back to France in order to redress the unlawful acquisition by Germany. Therefore, state practice as reflected in the UN General Assembly's Resolutions recognise that States could facilitate external self-determination for

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[56] Mexico's draft contains eight different categories of prohibited intervention. It defines intervention as any form of interference or attempted threat against the personality of a state or against its political, economic and cultural elements. See Special Committee on Principles of International Law concerning friendly relations and co-operation among States, 'Mexico's proposal,' UN Doc. A/AC.119/L.24 (21 September 1964) 1-2.
[57] UNGA Res. A/RES/15/1514 (14 December 1960) [preamble para. 11, declarations 4, 6 and 7].
[58]ibid., [declaration 6].
[59] *Frontier Dispute* (Burkina Faso/Republic of Mali) Judgment ICJ Reports (1986) p. 554 [para. 20] [hereinafter *Burkina Faso v Mali*].
[60] Organisation of African Unity, 'Border disputes among African States' (Cairo, 17-21 July 1964) AHG/Res.16(I) [para. 2] [hereinafter *OAU Resolution on Border Disputes among African States*]; Saadia Touval, 'The Organization of African Unity and African Borders' (1967) 21(1) *International Organization* 102-127, 104.
[61] *The Treaty of Peace with Germany* (Signed at Versailles on 28 June 1919, entered into force on 10 January 1920) (1919) 13(3) *American Journal of International Law Supplement* 151 [Section V, Art. 51] [hereinafter *The Treaty of Versailles 1919*].

peoples under colonial powers.[62] The UN supervised referendum leading to independence for seventy territories between 1945 and 1979[63] and many others afterwards.[64] The United Nations General Assembly declared 1990 through 2000 as the International Decade for the Eradication of Colonialism.[65] Consequently, the General Assembly's Resolution 65/119[66] calls on the Member States to support the 'effective implementation of the plan of action for the Second International Decade for the Eradication of Colonialism.' It follows from this that the Member States may disregard the inviolability of State territory for cases relating to decolonisation.

3.4.2 During the Period of Military Occupation

Article 43 of The Hague Regulations IV (1907)[67] obliges the occupying power to respect the laws in force in a country it occupies. The occupying power is not the sovereign and must protect the territory of the State.[68] This Article applies equally to the UN whenever its Organ or Agency embarks upon a peacekeeping mission. To borrow a terminology from the Private Law of Tort, the occupying power assumes the duty of care and is obliged by Article 55 of the same instrument to safeguard the State properties and administer them in accordance with the rules of usufruct.[69]

Similarly, Article 54 of the Geneva Conventions IV (1949)[70] prohibits the occupying power from altering the judicial or administrative status in the occupied territories. Instead, the occupying power must take necessary steps to safeguard the rights of the "protected persons" should there be any change in the institutions of government between the

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[62] Antonio Cassese, *Self-determination of Peoples: A Legal Reappraisal* (United Kingdom, Cambridge University Press 1995) 90; UNGA Res. A/RES/1514 (XV) [preamble para. 6].

[63] Hector G. Espiell, 'Implementation of United Nations Resolutions Relating to the Right of Peoples under Colonial and Alien Domination to Self-Determination,' UN Doc. E/CN.4/Sub.2/405/Rev.1 (1 January 1980) 46.

[64] Cassese 1995 (n 62) 75.

[65] UNGA Res. A/RES/43/47 (22 November 1988) [operative para. 1].

[66] UNGA Res. A/RES/65/119 (10 December 2010) [preamble para. 4].

[67] *The Hague Regulation II* (n 1) [Art. 43].

[68] Marco Sassòli, 'Article 43 of the Hague Regulations and Peace Operations in the Twenty-First Century' (Background Paper prepared for Informal High-Level Expert Meeting on Current Challenges to International Humanitarian Law, Cambridge, 25-27 June 2004) 1 available at <http://www.hpcrresearch.org/sites/default/files/publications/sassoli.pdf> accessed 26 March 2017.

[69] *The Hague Regulation II* (n 1) [Art. 55].

[70] *The 1949 Geneva Convention IV* (n 1) [Art. 54].

occupying power and the State.[71] These laws protect not only the integrity of the occupied States but also the fundamental human rights of their citizens. This leads to the conclusion that war situation does not diminish or abrogate the sanctity of a State's territory. The occupying power may only introduce changes that are necessary for the welfare of the State and its populace.[72]

3.4.3 Vienna Conventions

A treaty binds the Contracting Parties if the condition of facts were substantially the same.[73] After the Palau's independence of 1993, the Security Council terminated the United Nations Trusteeship Agreement because of the substantial change in the circumstance.[74] This refers to the doctrine of *rebus sic stantibus,*[75] which according to the *Vienna Convention on the Law of Treaties*[76] (hereinafter referred to as VCLT) may not affect boundaries established by treaties*.* Similarly, the *Vienna Convention on Succession of States in Respect of Treaties*[77] observes that succession of States does not affect a boundary established by a treaty. The unforeseen circumstances do not render a State territory violable. James L. Brierly reaffirms the judgment of the PCIJ that the doctrine of *rebus sic stantibus* does not defeat the "presumed intention" of the parties but merely fulfils it.[78] The presumed intention in Article 2(4) is that States should respect the inviolability of other States' territories and not merely abstain from the threat or use of force.

[71] ibid., [Art. 47].
[72] Eyal Benvenisti, *The International Law of Occupation* (New Jersey, Princeton University Press 1993) 11; Yoram Dinstein, *The International Law of Belligerent Occupation* (Cambridge, Cambridge University Press 2009) 115.
[73] Riaz Mohammad Khan, 'Vienna Convention on Law of Treaties — Article 62 (Fundamental Change of Circumstances)' (1973) 26(1) *Pakistan Horizon* 16-28, 17.
[74] *UN Charter* (n 5) [Chapter XII]; The United Nations and Decolonization, 'International Trusteeship System' available at <http://www.un.org/en/decolonization/its.shtml> accessed 27 March 2017.
[75] For further discussion, see Oliver J. Lissitzyn, 'Treaties and Changed Circumstances (*Rebus Sic Stantibus*)' (1967) 61(4) *American Journal of International Law* 895-922; J. W. Garner, 'The Doctrine of *Rebus Sic Stantibus* and the Termination of Treaties' (1927) 21(3) *American Journal of International Law* 509-516; Herbert W. Briggs, '*Rebus Sic Stantibus* Before the Security Council: The Anglo-Egyptian Question' (1949) 43(4) *American Journal of International Law* 762-769.
[76] United Nations, *Vienna Convention on the Law of Treaties* (Done at Vienna on 23 May 1969, entered into force on 28 January 1980) 1155 UNTS 331 [Art. 62(2)] [hereinafter VCLT].
[77] *Vienna Convention on Succession of States in Respect of Treaties* (Done at Vienna on 23 August 1978, entered into force on 6 November 1996) 1946 UNTS 3 [Art. 11].
[78] J. L. Brierly, *The Law of Nations: An Introduction to the International Law of Peace* (Sixth Edition, Oxford, Clarendon Press 1963) 336-337.

3.4.4 Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations

In 1970, the United Nations General Assembly adopted the Declaration on Friendly Relations. McWhinney describes this declaration as an attempt by the international community to re-engage with the debate on the specificity of the concept of coexistence as articulated in the old international law doctrine.[79]

The UN General Assembly's Resolution 1966 (XVIII) of 16 December 1963 established a Special Committee on the Declaration on Friendly Relations.[80] The preambular paragraph 3 recalled the previous Resolutions[81] of the General Assembly which encouraged 'making the (provision of the Charter) a more effective means of furthering the purposes and principles set forth in Article 1 and 2 of the Charter.'[82] The Special Committee's mandate was to understudy the proposed Declaration on Friendly Relations to ascertain 'their progressive development and codification, so as to secure their more effective application.'[83] The substantive paragraphs 3(a) and 4 of Resolution 1815 (XVII) invite the Member States to submit their proposals on the Declaration on Friendly Relations to the Secretary-General.[84]

Particularly interesting is the degree of divergence of opinions by States delegations to the Special Committee. On the policy level, there were concerns regarding respect for human rights, economic exploration and exploitation, cultural preservation as well as the need to put an end to colonialism.[85] The Sixth Committee was to navigate this complex intertwine problems to evolve a politico-legal instrument acceptable to the member States. While the delegates of the developed world interpreted the mandate of the Commission as strengthening the existing principle, some of the delegates of the developing world were thinking about rewriting Article 2(4).[86]

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[79] McWhinney (n 52) 2.
[80] UNGA Res. A/RES/18/1966 (16 December 1963) [operative para. 1].
[81] UNGA Res. A/RES/15/1505 (12 December 1960) [preamble para. 3]; UNGA Res. A/RES/16/1686 (18 December 1961) [preamble para. 1]; UNGA Res. A/RES/17/1815 (18 December 1962) [preamble para. 1].
[82] UNGA Res. A/RES/18/1966 (16 December 1963) [preamble para. 2] (emphasis added).
[83] UNGA Res. A/RES/18/1966 (16 December 1963) [preamble para. 4]; UNGA Res. A/RES/17/1815 (18 December 1962) [operative para. 2].
[84] UNGA Res. A/RES/17/1815 (18 December 1962) [operative paras. 3(a) and 4].
[85] John N. Hazard, 'The Sixth Committee and New Law' (1963) 57(3) *American Journal of International Law* 604-613, 604.
[86] McWhinney (n 52) 3.

The Czechoslovakia's draft resolution[87] proposes that 'planning, preparation, initiation and waging of a war of aggression' should be prohibited.[88] It considers these conducts as 'international crimes against peace' attributable to States.[89] It also included in the prohibited acts 'any propaganda for war, incitement to or fomenting of war and any propaganda for preventive war and for striking the first nuclear blow.'[90] Additionally, Czechoslovakia argues that States are prohibited from 'economic, political or any other form of pressure aimed against the political independence or territorial integrity of any State.'[91] The only exceptions that Czechoslovakia recognises as lawful are those provided for in the UN Charter.

Other draft proposals similar in scope to the draft submitted by Czechoslovakia were the proposal by Yugoslavia[92] and a draft co-authored by Ghana, India and Yugoslavia.[93] Other States that extended the scope of the prohibited act to include the exerting of pressure, whether military, economic or political are Algeria, Afghanistan, Ceylon, Cambodia, Ethiopia, Indonesia, Mali, Morocco, Somalia and the United Arab Republic.[94] Syria argues that the prohibited act covers all forms of pressure, avowed or unavowed, direct or indirect.[95] States such as Canada, Japan, Liberia, Cameroon, Colombia, Denmark, Central African Republic, Nigeria, Chile, Pakistan, Congo, Tanganyika and Sierra Leone argue that the principle imposes upon States the obligation to respect the territory of states.[96]

Apart from the formal written submissions, some States commented on proposals submitted, others asked for clarifications and made observations on the written submissions. Sweden, for instance, observed that the principle raises fundamental questions of interpretation of the UN Charter, compatibility with customary international law and state practice under the

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[87] *Czechoslovakia Proposal* (n 50) 1.
[88] ibid., 1.
[89] ibid., 1.
[90] ibid., 1.
[91] ibid., 1.
[92] *Yugoslavia's proposal on Non-intervention* (n 48) 1.
[93] *Ghana-India-Yugoslavia combined proposal* (n 53) [para. 1].
[94] United Nations Secretary-General, 'Systematic Summary of the Comments, Statements, Proposals and Suggestions of the Member States in respect of the consideration by the General Assembly of Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations,' UN Doc. A/AC.119/L.1 (24 June 1964) 10 [para. 8] [hereinafter *The UN Secretary-General summary of proposals on the Declaration on Friendly Relations*].
[95] *The UN Secretary-General summary of proposals on the Declaration on Friendly Relations* (n 94) 17 [para. 26].
[96] ibid., 9 [para. 7].

Charter.[97] It highlights that it is unclear whether the "threat or use of force" is limited to armed physical force or extends to various types of economic coercion, revolutionary propaganda and subversion and so forth.[98] The United States argues that in principle, Article 2(4) of the Charter covered a broad range of prohibited acts when it was drafted, but that the diversity of the prohibited acts has grown beyond what the drafters anticipated.[99]

The Ghanaian representative recalled that the principle is established in some post-war international instruments,[100] namely, the Bandung Declaration,[101] the Belgrade Declaration,[102] the Charter of the Organisation of African Unity,[103] and the Charter of the Organization of American States.[104]

The push for the inclusion of political and economic coercion as part of the prohibited act was again dropped. The United Kingdom among others, for example, suggested that the issues concerning political and economic coercion could come under the principle of non-intervention.[105] The Soviet Union representative noted the difficulty in defining the "propaganda of war"[106] as suggested by Czechoslovakia. The United Kingdom highlighted that the *travaux preparatoires* of Article 2(4) refers to physical force and does not include economic or political pressure.[107] Guatemala's representative was sceptical that political pressure of the powerful States might collapse the internal structure of small States.[108]

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[97] ibid., 12 [para. 15].
[98] ibid., 12 [para. 15].
[99] ibid., 12 [para. 17].
[100] ibid., 13 [para. 18].
[101] *Final Communiqué of the Asian-African Conference of Bandung* (24 April 1955) [section G: Declaration on the promotion of world peace and co-operation, para. 7] available at <http://franke.uchicago.edu/Final_Communique_Bandung_1955.pdf> accessed 28 March 2017 [hereinafter *Bandung Declaration 1955*].
[102] *Belgrade Declaration of Non-Aligned Countries* (Adopted at the first conference of Head of State or Government of Non-Aligned Countries, Belgrade, 6 September 1961) [part 1] available at <http://cns.miis.edu/nam/documents/Official_Document/1st_Summit_FD_Belgrade_Declaration_1961.pdf> accessed 12 April 2017 [hereinafter *Belgrade Declaration*].
[103] *OAU Charter* (n 2) [Art. 3].
[104] ibid., [Art. 5(e)].
[105] United Nations General Assembly, 'Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States,' UN Doc. A/AC.119/L.8 (31 August 1964) 3 [para. 2].
[106]See McWhinney (n 52) 10.
[107] United Nations Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States, 'United Kingdom Proposal,' UN Doc. A/AC.119/L.8 (31 August 1964) 3 [para. 2].
[108] Hazard (n 85) 609.

Again, this resonated with the debate that occurred when Article 2(4) was drafted. The final resolution that was adopted retains the provision of Article 2(4) but uses a stronger word "duty"[109] to refer to such an obligation instead of what appears like a recommendation "refrain" in the Charter. It also declares that "a war of aggression constitutes a crime against the peace" and that "States have the duty to refrain from propaganda for a war of aggression."[110] Equally, it imposes upon States the duty to refrain from violent reprisal, 'organizing or encouraging the organisation of irregular forces or armed bands including mercenaries, for the incursion into the territory of another state.'[111] Equally prohibited are all forms of activities that initiate, instigate, organise, participate in acts of civil strife or a terrorist act in another State.[112]

If our proposition that the line between the provisions of Articles 2(4) and 2(7) is fluid, then the differentiation is unnecessary. Arguably, the Vienna Conventions and the Declaration on Friendly Relations reveal the conviction of many States that the inviolability of States territory is intended. The work done by the UN peacekeeping in the Congo in the 1960s[113] and its present work in other war-torn countries[114] attest to this. This might have informed the adoption of the word "inviolability" in some regional instruments.

3.4.5 Regional Instruments

Aside from the UN Charter, the requirement to respect the inviolability of State territory is codified in some regional legal instruments. Among them are the Charter of the Organization of American States (1948),[115] the Charter of the Organisation of African Unity (1963),[116] and the Conference on Security and Cooperation in Europe Helsinki Final Act (1975).[117] The idea was implicit in the Charter of the Arab League (1945),[118] although it was not highlighted by

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[109] *Declaration on Friendly Relations* (n 1) [para. 1].
[110] ibid., [paras. 1-3].
[111] ibid., [paras. 6-8].
[112] ibid., [para. 9].
[113] Michael N. Barnett and Martha Finnemore, 'The Politics, Power, and Pathologies of International Organizations' (1999) 53(4) *International Organization* 699-732, 713.
[114] For up-to-date peacekeeping fact sheet, visit <http://www.un.org/en/peacekeeping/resources/statistics/> last visited 14 July 2017.
[115] *OAS Charter* (n 2) [Arts. 17, 24 and 25].
[116] *OAU Charter* (n 2) [Art. 3].
[117] *Helsinki Final Act 1975* (n 2) [Arts. 3 and 4].
[118] League of Arab States, *Charter of Arab League* (Done at Cairo on 22 March 1945, entered into force on 10 May 1945) 70 UNTS 248 [Art. 5].

the founding member states.[119]

The wars of territorial revisionism by Morocco and Somalia provide a platform for the evaluation of the implementation of the principle of the inviolability of States' territory in the African context. Against this backdrop, the African Heads of State and Government in 1964 reaffirmed their commitment to 'respect the borders existing on the achievement of national independence.'[120] That summit upheld one of the principles listed in the Charter of the OAU, namely, 'respect for the sovereignty and territorial integrity of each state and for its inalienable right to independent existence.'[121] A similar text was inserted in the *Constitutive Act of the African Union*.[122] However, Article 4(h) of the Constitutive Act of the African Union authorises the Member States to intervene in the territory of others to prevent war crimes, genocide and crimes against humanity.[123] The analysis of this provision will be done in chapter seven.

In Europe, a couple of treaties safeguarded States' territory prior to the adoption of the Helsinki Final Act in 1975.[124] The bilateral treaties between the West Germany and its Communist neighbours obliged the parties 'to respect without restriction the territorial integrity of each state.'[125] The *1990 Charter of Paris for a New Europe*[126] reiterates the parties' commitment to refrain from the threat or use of force against the territory of any State. The *General Framework Agreement for Peace in Bosnia and Herzegovina*[127] obliges the parties to

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[119] Mark W. Zacher, *International conflicts and collective security, 1946-77: The United Nations, Organization of American States, Organization of African Unity and Arab League* (New York, Praeger 1979) 165, 189.
[120] See *OAU Resolution on Border Disputes among African States* (n 60) [operative para. 2].
[121] *OAU Charter* (n 2) [Art. III(3)].
[122] Organisation of African Unity, *Constitutive Act of the African Union* (Adopted on 11 July 2000, entered into force on 26 May 2001) 2158 UNTS 3 [Art. 4(b)] [hereinafter *Constitutive Act of the African Union*]; Organisation of African Unity, 'The Territorial Integrity of Basutoland, Bechuanaland and Swaziland' (Adopted by the Assembly of Heads of State and Government in its first Ordinary Session in Cairo, UAR, from 17 to 21 July 1964) AHG/Res.12(I) [operative para. 1].
[123] *Constitutive Act of the African Union* (n 122) [Art. 4(h)].
[124] *Helsinki Final Act 1975* (n 2) [Art. 3].
[125] John J. Maresca, *To Helsinki: The Conference on Security and Cooperation in Europe, 1973-1975* (Durham and North Carolina, Duke University Press 1985) 86-87.
[126] *Charter of Paris for a New Europe* (Done at Paris on 21 November 1990) [see in particular the section on 'Friendly relations among participating States'] available at <http://www.osce.org/mc/39516?download=true> accessed 11 September 2015; The European Community, 'Declaration on Yugoslavia and on the Guidelines on the Recognition of New States' (1992) 31(6) *International Legal Materials* 1485-1487, 1487 [operative para. 3] [hereinafter *EC Guidelines on Recognition of New States*].
[127] Dayton Peace Accords, *General Framework Agreement for Peace in Bosnia and Herzegovina* (Done at Paris on 21 November 1995, entered into force on 14 December 1995) [Art. 1] available at <http://avalon.law.yale.edu/20th_century/day01.asp> accessed 11 April 2017.

‘fully respect the sovereign equality of one another.’

Similarly, the Badinter Arbitration Committee held that whatever the circumstances, ‘the right to self-determination must not involve changes to existing frontiers.’[128] It also held that respect for the inviolability of States territory is ‘a great principle of peace, indispensable to international stability.’[129] However, the strongest instrument that expressly contains the requirement of the inviolability of State territory is the *Conference on Security and Cooperation in Europe Helsinki Final Act*.[130] Article 3 provides as follows: ‘the participating States regard as inviolable all one another's frontiers as well as the frontiers of all States in Europe and therefore they will refrain now and in the future from assaulting these frontiers.’[131] The word, “assaulting” is broader than the threat or use of force.

Note the change in the text of this instrument concluded nearly three decades after the UN Charter. Interestingly, Article 4 obliges the participating States to “respect” the territory of each participating State.[132] It is only in Article 4(3) that military actions leading to the occupation or acquisition of a State territory either in part or in whole are expressly prohibited.[133] Hierarchically, the threat or use of force dissipates if inviolability were upheld.

Moreover, the exclusive right of a sovereign State to its territory can only be modified by agreement.[134] Therefore, the status of Kosovo[135] vis-à-vis Martti Artisaari’s recommendation[136] and the Security Council Resolutions[137] affirming respect for the territory of the Federal Republic of Yugoslavia remains ambiguous. The written statements submitted

[128] Alain Pellet, ‘The Opinions of the Badinter Arbitration Committee: A second breath for the Self-determination of Peoples’ (1992) 3(1) *European Journal of International Law* 178-185, 180.
[129] ibid., 180; *Island of Palmas Case (Netherlands v USA)* 2 RIAA 829-871, 839 [hereinafter *Island of Palmas case*].
[130] *Helsinki Final Act 1975* (n 2) [Art. 3].
[131] ibid., [Art. 3(1)].
[132] ibid., [Art. 4(1)].
[133] ibid., [Art. 4(3)].
[134] Malcolm N. Shaw, *International Law* (Seventh Edition, Cambridge, Cambridge University Press 2014) 718.
[135] Andreas Zimmermann and Carsten Stahn, ‘Yugoslav territory, United Nations Trusteeship or Sovereign state? Reflection on the current and future Legal Status of Kosovo’ (2001) 70(4) *Nordic Journal of International Law* 423-460.
[136] United Nations Secretary-General, ‘Report of the special envoy of the Secretary-General on Kosovo’s future status,’ UN Doc. S/2007/168 (26 March 2007) [para 5] (the report states ‘I have come to the conclusion that the only viable option for Kosovo is independence’).
[137]UNSC Res. S/RES/1160 (31 March 1998) [preamble para. 7]; UNSC Res. S/RES/1199 (23 September 1998) [preamble para. 14].

to the ICJ by States that participated in the *Kosovo Advisory Proceedings*[138] appear to favour self-determination. About 37 Member States that submitted written statements justified Kosovo's secession attempt as legal. Although 37 out of the 193[139] current members of the United Nations are not widespread to evidence a new custom, it may well signal that States' territories are not inviolable.[140] Edwin has pointed out that Kosovo sets a precedent which undermines the requirement of the inviolability of State territory[141] even as the States that supported NATO's activities perceive Kosovo as a case *sui generis*.

However, the dissolution of Yugoslavia in the early 1990s did not persuade the EC and the Conference on Security and Co-operation in Europe (hereinafter referred to as CSCE) to change their position on the inviolability of Yugoslavia's territory.[142] The "troika" of the EC Foreign Ministers (Italy, Luxemburg and the Netherlands) initiated peace negotiations while upholding the territory of Yugoslavia.

The European Council's meetings held in 1991[143] was to determine for the first time the interpretation of the principles enunciated in the Helsinki Final Act as it relates to the inviolability of State territory, self-determination and non-intervention. The British Foreign Secretary Douglas Hurd's initial reaction was that the "integrity of Yugoslavia" must be respected.[144] The Secretary-General of the Western European Union, Willem van Eckelen suggested that troops could be sent not to defend the territory of Yugoslavia but to understudy the sources of the crisis and observe the process.[145] The Soviet Union objected

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[138] *Accordance with international law of the unilateral declaration of independence in respect of Kosovo,* Advisory Opinion ICJ Reports (2010) p. 403. See in particular the written statements of the following states: Albania at pp. 23-24, Estonia at p. 15, Finland at p. 10, Germany at p. 26, the Netherlands at p. 13, Switzerland at pp. 17-18, Ireland at p. 12, Poland at p. 22, Latvia at p. 2, Luxembourg at pp. 1-3, Maldives at pp. 1-2, Slovenia at p. 2, France at pp. 25-26, Japan at pp. 5-6, and the United Kingdom at p. 9.
[139] As at September 2017.
[140] Daniel H. Meester, 'The International Court of Justice's Kosovo Case: Assessing the Current State of International Legal Opinion on Remedial Secession' (2010) 48 *Canadian Yearbook of International Law* 215-254, 246.
[141] Edwin Bakker, 'The Recognition of Kosovo: Violating Territorial Integrity is a recipe for trouble' (2008) 19(3) *Security and Human Rights* 183-186, 185; Svante E. Cornell, S. Frederick Starr, and Mamuka Tsereteli, *A Western Strategy for the South Caucasus* (Washington, The Central Asia-Caucasus Institute and Silk Road Studies Program 2015) 27.
[142] Marc Weller, 'The International Response to the Dissolution of the Socialist Federal Republic of Yugoslavia' (1992) 86(3) *American Journal of International Law* 569-607, 570.
[143] ibid., 571.
[144] ibid., 572.
[145] ibid., 574-575.

that that amounts to intervention.[146]

This legal impasse from three fundamental principles of international law led the EC to convene a peace conference and to establish an arbitration commission.[147] The EC made a few remarkable points. First, it reiterates its determination not to recognise changes to frontiers brought about by the use of force or as *fait accompli*.[148] Second, it affirms that territorial conquest will not be tolerated in the new Yugoslavia and calls on all warring parties to cease-fire and resort to peaceful negotiations.[149] Third, it recommends the establishment of Arbitration Commission, arguing that the "community and its member states cannot stand idly by as the bloodshed in Croatia increases day by day."[150]

Deductively, while a State territory remains inviolable from an external agent, the international community may be under a moral obligation to initiate a political process to resolve the conflict. The Arbitration Commission chaired by Robert Badinter was constituted to find a solution without undermining the territory of Yugoslavia or the wishes of the seceding States. In total, the Commission issued fifteen opinions[151] which have been analysed here.[152]

For our purposes, the first legal question was whether the "Republics" that make-up the Socialist Federal Republic of Yugoslavia (hereinafter referred to as SFRY) were in the process of "secession" or in the process of "dissolution"? The Commission held that the SFRY was in the process of dissolution.[153] Its second opinion concerns the effect of the right of self-determination on the territory of a State? The Commission held that the established principle

[146] ibid., 575.
[147] Commission of the European Communities, 'Joint statement on Yugoslavia – 28 August 1991' (1991) 24(7/8) *Bulletin of the European Communities* 115-116 [section 1.4.25].
[148] ibid., 116.
[149] ibid., 116.
[150] ibid., 116.
[151] For the legal issue and the opinion of the Commission, see Maurizo Ragazzi, 'Conference on Yugoslavia Arbitration Commission: Opinions on Questions arising from the Dissolution of Yugoslavia' (1992) 31(6) *International legal materials* 1488-1493; Robert Badinter, 'Conference on Yugoslavia Arbitration Committee – Opinions' (1991) 31(6) *International legal materials* 1494-1526.
[152] Matthew C. R. Craven, 'The European Community Arbitration Commission on Yugoslavia' (1996) 66(1) *British Yearbook of International Law* 333-413.
[153] Badinter (n 151) 1497 [para 3(b)].

of international law does not admit changes to the existing frontiers at the time of independence except where the parent State consents to its alteration.[154]

Consequently, the EC issued a Guideline[155] by which new States will be recognised. The guideline recognises 'respect for the inviolability of all frontiers which can only be changed by peaceful means and by common agreement.'[156] Even though the guideline was silent on whether third States could facilitate the actualisation of self-determination, it expressly obliges the parties to respect the UN Charter and the Helsinki Final Act.[157] It follows that the principle to respect the inviolability of States territory is equally binding.

Consequently, countries in the Eastern European and the Soviet Union aspiring for membership of the EU delimited their boundaries.[158] It also crystallised the position taken by the EU leaders in the wake of the territorial disputes in the Aegean between Greece and Turkey.[159] Therefore, the written statements made by States in the Kosovo dispute which admitted the recalibration of the territory of the SFRY through force are troubling, without prejudice to *sui generis'* argument which some States posited.[160] Unfortunately, the ICJ that would have clarified the law on this matter limited its opinion to whether the said declaration was in accordance with international law.

Article 3 of the *Charter of the Commonwealth of Independent States*[161] uses the word "inviolability" interchangeably with the phrase "respect for the sovereignty of member states." As seen earlier, President Woodrow Wilson's Fourteen Point Agenda indicated the

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[154] ibid., 1498 [para 1(b)].
[155] See generally, *EC Guidelines on Recognition of New States* (n 126).
[156] ibid., 1487 [para. 3].
[157] ibid., 1487 [para. 1].
[158] Mark W. Zacher, 'The Territorial Integrity Norm: International Boundaries and the Use of Force' (2001) 55(2) *International Organization* 215-250, 222.
[159] Selcuk Gultasli, 'Stalemate overcome by intense diplomacy' (Turkish Daily News, 12 December 1999) available at <http://www.hurriyetdailynews.com/default.aspx?pageid=438&n=stalemate-overcome-by-intense-diplomacy-1999-12-12> accessed 12 September 2015; For the facts that necessitated the European Union's offer of membership to Turkey, see Yucel Acer, 'The Aegean disputes towards a comprehensive settlement' (The Journal of Turkish Weekly, 5 March 2005) available at <http://www.turkishweekly.net/2005/03/05/article/the-aegean-disputes-towards-a-comprehensive-settlement/> accessed 12 September 2015.
[160] See footnote number 138 above.
[161] *Charter of the Commonwealth of Independent States (with declaration and decisions)* (Adopted at Minsk on 22 January 1993, entered into force on 24 January 1994) 1819 UNTS 58 [Art. 3] [hereinafter *CIS Charter*]; Michael B. Bishku, 'The South Caucasus Republics: Relations with the U.S. and the EU' (2015) 22(2) *Middle East Policy* 40-57.

unwillingness of the United States to acquire the territory of the defeated States. The Monroe doctrine equally shows the United States' resolve not to recognise territories acquired by force. These views were articulated in Articles 17, 24 and 25 of the Charter of the Organisation of American States.[162] Unfortunately, both the United States and the Soviet Union that promoted the principle of the respect for the inviolability of State territory have been accused of not supporting it with altruistic reason.[163] We conclude that the insertion of "inviolability" and "respect" in all the regional instruments is indicative that the respect for the inviolability of State territory is a customary law.

3.5 Textual Analysis of the Essential Components of Article 2(4) of the UN Charter

This section briefly evaluates the essential components of Article 2(4) in a descending order.

3.5.1 The "threat of force"

While the "threat of force" is prohibited both in Article 2(4) and other soft laws,[164] it was not defined[165] and has not been discussed extensively by academics.[166] The previous legal instruments[167] referred to the threat of force indirectly but it was first encoded in the Dumbarton Oaks proposals and was unanimously adopted without any debate or contention.[168]

The ICJ's Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*[169] addresses the crucial question of whether the "threat of force" is sufficient to violate a State territory. The court held, 'the notion of threat and use of force under Article 2, paragraph 4,

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[162] *OAS Charter* (n 2) [Arts. 17, 24 and 25].
[163] Ryan Griffiths, 'The Future of Self-Determination and Territorial Integrity in the Asian Century' (2014) 27(3) *The Pacific Review* 457-478, 460.
[164] See generally, *Declaration on Friendly Relation* (n 1); *GA Definition of Aggression* (n 1) [Art. 3]; UNGA Res. A/RES/42/22 (18 November 1987) [operative para 1].
[165] Corten Olivier, *The Law Against War: The Prohibition on the Use of Force in Contemporary International Law* (Oxford and Portland, Oregon, Hart Publishing 2010) 93; James A. Green and Francis Grimal, 'The Threat of Force as an Action in Self-Defense under International Law' (2011) 44(2) *Vanderbilt Journal of Transnational Law* 285-329, 291.
[166] Romana Sadurska, 'Threats of Force' (1988) 82(2) *American Journal of International Law* 239-268, 254; Marco Roscini, 'Threats of Armed Force and Contemporary International Law' (2007) 54(2) *Netherlands International Law Review* 229-277, 231; Green and Grimal (n 165) 285.
[167] Josef L. Kunz, '*Bellum justum* and *bellum legale*' (1951) 45(3) *American Journal of International Law* 528-534, 533.
[168] Corten (n 165) 92.
[169] See generally, *Legality of the Threat or Use of Nuclear Weapons* (n 6).

of the Charter stand together in the sense that, if the use of force itself in a given case is illegal … the threat to use such force will likewise be illegal.'[170]

This opinion, which appears to make the "threat of force" an adjunct to the use of force has been criticised.[171] The United States, for instance, is of the view that a 'military aircraft intruding into foreign airspace on a military mission may constitute a sufficient threat to justify the use of force in self-defense.'[172] In other words, a threat could independently violate the territory of a State without the actual use of force. This argument seems logical considering the possible devastating effect that the WMD could have on a State's territory if allowed to occur. Thus, a credible threat of force could justify a pre-emptive measure in self-defence.

3.5.1.1 Problem with the definition of the Threat of Force

According to Brownlie,[173] 'a threat of force consists in an express or implied promise by a government of a resort to force, conditional on non-acceptance of certain demands of that government.' Sadurska[174] defines threat as 'a form of coercion which aims at a deliberate and drastic restriction or suppression by one actor of the choices of another.' The report by the ILC on the Draft Code of Offences against Peace and Security of Mankind, [175] defines the threat of force as 'acts undertaken with a view to making a state believe that force will be used against it if certain demands are not met by that state.'

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[170] ibid., [para. 47].

[171] Sadurska (n 166) 250; Roscini (n 166) 230; The 2001 Report of the International Law Commission explains that threat of conduct, incitement or attempt to incite threat constitute in themselves wrongful acts, see UNGAOR, UN Doc. A/56/10(SUPP) (23 April – 1 June and 2 July – 10 August 2001) 143.

[172] Department of the Navy, Department of Homeland Security, *The commander's handbook on the law of Naval Operations* (July 2007 edition) [para. 4.4.2] available at <http://catalog.gpo.gov/F/6SBP2F9GP93DN9VHIL4V5M8U8YE86TR711XAIDHENSG74RV9QS-28967?func=find-acc&acc_sequence=008689679> accessed 10 December 2015.

[173] Brownlie 1963 (n 30) 364; Sadurska (n 166) 241.

[174] Sadurska (n 166) 241; Friedrich A. Hayek, *The Constitution of Liberty* (London, Routledge and Kegan Paul 1960) 20-21.

[175] International Law Commission, *Document A/44/10: Report of the International Law Commission on work of its Forty-first session* (Volume II part II Yearbook of the International Law Commission 1989) 68.

Most of these definitions perceive threat as coercion with demands attached.[176] They are deficient in that not all threats make a demand.[177] Some State-sponsored cyberattacks[178] do not make demands but pose threats to the national security of the target State. The alleged Russia's meddling in the 2016 presidential election in the United States[179] is a case in point.

The draft proposal of Article 2(4) submitted by Brazil includes any intervention that threatens the national security of another State.[180] Argentina's draft proposal to the Special Committee on *Declaration on Friendly Relations*[181] is similar and includes 'any action, direct or indirect, whatever form it may take.'[182] Ghana's draft proposal includes military alliances, the manufacture or acquisition of the WMD and the concentration of armed forces on the borders of other States within the meaning of the threat of force.[183]

These proposals cover a broad range of activities from explicit and implicit threats, including financial inducements. However, the modern international law accepts economic coercion and retaliatory economic threat as lawful.[184]

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[176] Albrecht Randelzhofer, 'Article 2(4)' in Simma *et al.,* (eds), (n 9) 124; cf Nigel D. White and Robert Cryer, 'Unilateral Enforcement of Resolution 687: A Threat too Far' (1999) 29(2) *California Western International Law Journal* 243-282, 253-54; Dinstein Yoram, *War Aggression and Self-defence* (Fifth Edition, The United Kingdom, Cambridge University Press 2011) 89.

[177] Most of the military actions sanctioned by the Security Council carry implicit threats but do not make any demand from states concerned. See the following Security Council Resolutions: S/RES/678 (29 November 1990) [operative para. 2]; S/RES/816 (31 March 1993) [operative para. 4]; S/RES/836 (4 June 1993) [operative para. 10]; S/RES/794 (3 December 1992) [operative para. 10]; S/RES/929 (22 June 1994) [operative para. 3]; S/RES/1080 (15 November 1996) [operative para. 5]; S/RES/1114 (19 June 1997) [operative para. 4]; S/RES/1244 (10 June 1999) [operative para. 10]; S/RES/1386 (20 December 2001) [operative para. 1]; S/RES/1511 (16 October 2003) [operative para. 13]; S/RES/1484 (30 May 2003) [operative paras. 1 and 4]; S/RES/1464 (4 February 2003) [operative para. 9].

[178] David P. Fidler, 'The U.S. Election Hacks, Cybersecurity, and International Law' (2016) 110 *American Journal of International Law Unbound* 337-342, 339.

[179] Director of National Intelligence, Press Release, 'Joint Statement from the Department of Homeland Security and Office of the Director of National Intelligence on Election Security' (Department of Homeland Security, 7 October 2016) available at <https://www.dhs.gov/news/2016/10/07/joint-statement-department-homeland-security-and-office-director-national> accessed 29 March 2017.

[180] D'Amato 1995 (n 16) 70.

[181] Hans Blix, 'Report of the Special Committee on Principles of International Law Concerning Friendly Relations and Co-operation among States – Nineteenth Session' UN Doc. A/5746 (16 November 1964) 61 [hereinafter *The 1964 Report by the Commission on Friendly Relations*].

[182] ibid., 61.

[183]See *The UN Secretary-General summary of proposals on the Declaration on Friendly Relations* (n 94) 13-14 [para. 18]; UNGAOR, UN Doc. A/C.6/SR.815 (20 November 1963) [para. 33].

[184]*Case concerning the Air Service Agreement of 27 March 1946 between the United States of America and France* (Decision of 9 December 1978) 18 RIAA 417-493, 442-43.

The ICJ's Advisory Opinion in the *Legality of the Threat or Use of Nuclear Weapons* held, '[w]hether a signalled intention to use force if certain events occur is or is not a "threat" within Article 2, paragraph 4, of the Charter depends upon various factors.'[185] However, the ICJ did not expatiate on what those "factors" were.

Although an "intent" was not a precondition during the drafting of Article 2(4), it played an evidentiary role in cases concerning the threat of force.[186] But the problem of how to ascertain the "intent" of a warship trespassing the territorial waters of a State without authorisation remains unresolved.

In 1962, the United States quarantined Cuba in the belief that the construction of nuclear sites was indicative of its hostile intent against the US. Some members of the Security Council accepted the US' argument[187] contrary to the ICJ's position that a hostile intent may be implied if the actual use of force will be directed against the territory of the State.[188] Such a claim cannot be discharged even though the relationship between Cuba and the US was precarious at the material time. It could improve over time. If the quarantine of Cuba was justified, why was the Israeli destruction of the nuclear reactor of Iraq in 1981 condemned by the Security Council as a violation of the Charter and the norms of international conduct? [189] Again, the traditional view that limits threat to armed force[190] is unrealistic, although some international lawyers still accept it.[191] As seen, the Declaration on Friendly Relations seems to

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[185] *Legality of the Threat or Use of Nuclear Weapons* (n 6) [para. 47].

[186] Sadurska (n 166) 266.

[187] UNSCOR, UN Doc. S/PV.1022 (23 October 1962) [Cuba's objections at paras. 88, 110, and 122-23, USSR's observation at paras. 157-58, 173]; UNSCOR, UN Doc. S/PV.1023 (24 October 1962) [Romania's position at para. 58]; UNSCOR, UN Doc. S/PV.1024 (24 October 1962) [UAR's position at paras. 67-76]. Other states did not contest whether the approach adopted by the United States amounts to a threat of force but only argued it was consistent with Chapter VII of the Charter, see UNSCOR, UN Doc. S/PV.1024 (24 October 1962) [France's position at para. 10, China's position at paras. 18-19]; UNSCOR, UN Doc. S/PV.1025 (25 October 1962) [USA's position at paras. 15-16]; For further reading, see Quincy Wright, 'The Cuban Quarantine' (1963) 57(3) *American Journal of International Law* 546-565.

[188] *Legality of the Threat or Use of Nuclear Weapons* (n 6) [para. 48].

[189] For argument in favour that Iran's Nuclear ambition was a threat to Israel, see Benjamin M. Greenblum, 'The Iranian Nuclear Threat: Israel's Options under International Law' (2006) 29(1) *Houston Journal of International Law* 55-112; For the Security Council Resolutions condemning Israel's offensive, see UNSC Res. S/RES/487 (19 June 1981) [operative para. 1]; UNGA Res. A/RES/36/27 (13 November 1981) [operative para. 1].

[190] According to Ian Brownlie the 'use of force' is not limited to activities of organized military, naval, or air forces of a state but includes those actions that could be performed by a state government through militia, security forces, or police forces if they were heavily armed and may employ armoured vehicles. See Brownlie 1963 (n 30) 361.

[191] Goodrich *et al.*, (n 10) 48-50; Sadurska (n 166) 242.

have broadened the scope to include clandestine assistance given to non-State actors by States.[192] Therefore, the failure to include political and economic coercion within the meaning of threat still undermines the maintenance of international peace and security.

3.5.1.2 Kinds of Threat of Force

A threat of force could be explicit or implicit. An explicit threat could be (1) oral[193] or contained in a document or in a *communiqué*. An example is a note of warning issued by the United Kingdom to Albania indicating its readiness to defend itself if any of its warships were attacked while sailing through the Corfu Channel.[194] (2) An explicit threat could be codified in a bilateral or multilateral agreement on military assistance[195] or enshrined in a domestic legislation.[196] (3) It could equally be deduced from the pattern of communications that suggest the willingness to attack the target State if it fails to comply with certain demands. This was the case in 1939 when Germany pressured Poland to unify with the Free City of Danzig.[197]

An implicit threat derives from positive actions or inaction of a State towards another State.[198] A case in point is the 1962 construction of medium-range ballistic missile sites in Cuba by the Soviet Union.[199] The United States' abstention from voting in the Security Council's Resolution 573[200] which condemned the Israeli's attack on the Palestine Liberation Organisation (hereinafter referred to as PLO) headquarters in Tunisia was construed by some UN member

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[192] *Declaration on Friendly Relations* (n 1) [paras. 6-9].

[193] Israel made several oral threats of its readiness to destroy other similar installations in Iraq or in its neighbouring countries whenever it deemed it necessary. See UNGA Res. A/RES/37/18 (16 November 1982) [operative paras. 3-4]; UNGA Res. A/RES/36/27 (13 November 1981) [operative para. 2]; UNGA Res. A/RES/38/9 (10 November 1983) [operative paras. 2, 3, 4, and 6]; UNGA Res. A/RES/39/14 (16 November 1984) [operative para. 2-4]; UNGA Res. A/RES/40/6 (1 November 1985) [operative paras. 2 and 4]; UNGA Res. A/RES/41/12 (29 October 1986) [operative para. 2]; UNSC Res. S/RES/487 (19 June 1981) [operative para. 2].

[194] *Corfu Channel* (United Kingdom of Great Britain and Northern Ireland v Albania) (Merits) Judgment ICJ Reports (1949) p. 4, 27 [hereinafter *Corfu Channel Case*].

[195] *Treaty of Friendship, Co-operation, and Mutual Assistance* (Signed at Warsaw on 14 May 1955, entered into force on 6 June 1955) 219 UNTS 3 [Art. 4]; *The North Atlantic Treaty* (Signed in Washington on 4 April 1949, entered into force on 24 August 1949) 34 UNTS 243 [Art. 5]; *Southeast Asia Collective Defense Treaty* (Signed at Manila on 8 September 1954, entered into force on 19 February 1955) 209 UNTS 23 [Art. 4].

[196] Union of Soviet Socialist Republics, *Law on the State Boundary of the U.S.S.R*, (1983) 22(5) *International Legal Materials* 1055-1078 [Art. 36] (translated from the original language by W. E. Butler).

[197] Sadurska (n 166) 243.

[198] ibid., 243.

[199] John F. Kennedy, 'The Soviet threat to the Americas' (1962) 47(1220) *Department of State Bulletin* 715-720, 716-18.

[200] UNSC Res. S/RES/573 (4 October 1985) [operative para. 1].

States as the US' readiness to act in a similar manner if faced with a similar situation.[201] This was confirmed when the US attacked Tripoli in 1986.[202] It does not follow, however, that inaction by a State means acquiescence since the motive may be unconnected with international law.[203] Hence, omission neither creates customary law nor provides concrete content for customary rules.[204]

3.5.1.3 State practice regarding the threat of force

Whether explicit or implicit, state practice despises unlawful[205] threat that could jeopardise international peace and security. All threats of force are illegal except for lawful self-defence or if authorised by the Security Council.[206] The UN General Assembly condemned Turkey for the threats and subsequent invasion of Cyprus.[207] The Security Council Resolution 581 condemns South Africa for the threats against the Frontline States and other States in Southern Africa.[208] Concerning the impasse between the United Kingdom and Spain over Gibraltar, the former accuses the latter of resorting to threat of force.[209] A State may, however, warn another State without necessarily threatening it. The threat of force may be

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[201] Sadurska (n 166) 243.

[202] Bernard Gwertzman, 'U.S. defends action in U.N. on raid' (International New York Times, 7 October 1985) available at <http://www.nytimes.com/1985/10/07/world/us-defends-action-in-un-on-raid.html> accessed 3 December 2015; 'Excerpt's from Shultz's Address on International Terrorism' (International New York Times, 26 October 1984) available at <http://www.nytimes.com/1984/10/26/world/excerpt-s-from-shultz-s-address-on-international-terrorism.html> accessed 3 December 2015; '1986: US launches air strikes on Libya' (BBC News, 15 April 1986) available at <http://news.bbc.co.uk/onthisday/hi/dates/stories/april/15/newsid_3975000/3975455.stm> accessed 3 December 2015.

[203] Tom Ruys, 'The meaning of "Force" and the Boundaries of the *Jus ad bellum*: are Minimal uses of Force excluded from UN Charter 2(4)?' (2014) 108(2) *American Journal of International Law* 159-210, 168-70; In *S.S. Lotus*, the ICJ held, 'for only if such abstention were based on their being conscious of having a duty to abstain would it be possible to speak of an international custom.' See *Lotus Case* (n 6) 28; see also *Nicaragua Case* (n 6) [para. 188].

[204] Ruys (n 203) 168.

[205] Some threats – be it collective or unilateral could be lawful if they promote international peace and security. The United Nations General Assembly and the Security Council often use threat as a means of maintaining world order. See Security Council Press Release, 'Security Council Press Statement on Libya,' UN Doc. SC/12084-AFR/3247 (17 October 2015) [para. 5]; 'UN threatens force if chlorine used in Syria attacks' (Aljazeera News, 7 March 2015) available at <http://www.aljazeera.com/news/2015/03/security-council-condemns-chlorine-attacks-syria-150306180737834.html> accessed 19 January 2016.

[206] Brownlie 1963 (n 30) 431.

[207] White and Cryer (n 176) 245.

[208] UNSC Res. S/RES/581 (13 February 1986) [operative para. 1].

[209] White and Cryer (n 176) 245.

implicated whenever the threatener holds itself out as both willing and able to inflict a severe harm if its demands were not met. [210]

3.5.1.4 Case law – Corfu Channel

The *Corfu Channel* of 1949 was the first case to consider threats of force in modern international law. It arose out of the destruction of two British destroyers – Saumarez and Volage – by mines off the Albanian coast.[211] In response to a case filed before the ICJ by the United Kingdom, Albania argued that its right to territorial sea was violated.[212] Of relevance to us is the argument posited by Albania that the way the United Kingdom's ships were manoeuvring and sailing in a diamond combat formation with soldiers on board constitutes a threat of force.[213] The Court agrees that *prima facie* such a formation could constitute a threat if conducted in time of war. However, it ruled that the United Kingdom did not violate Albania's sovereignty.[214]

The second issue that was examined by the Court was the *Operation Retail* (mine sweeping operation) conducted by the United Kingdom to secure evidence from being destroyed by Albania. The Court held that such an operation is a manifestation of the policy of force unacceptable under the modern international law.[215] Thus, the Court held that 'between independent States, respect for territorial sovereignty is an essential foundation of international relations.'[216] Consequently, the Court declared that the action of the British Navy constituted a violation of Albanian Sovereignty.[217]

While the Court held that the respect for territorial sovereignty is an essential foundation of international relations, it refused to accept that it was a massive display of force that politically pressured Albania.[218] Apparently, the Court arrived at this conclusion because of the State practice that allowed innocent passage of warships through the strait of a State

[210] Sadurska (n 166) 245.
[211] *Corfu Channel Case* (n 194) 10.
[212] ibid., 12, 31.
[213]ibid., 30.
[214]ibid., 30-31.
[215] ibid., 35.
[216] ibid., 35.
[217]ibid., 35.
[218] ibid., 35.

without its prior authorisation.[219] One wonders why a prior authorisation should be discountenanced if States enjoy exclusive authority over the strait even in peace time. The Court missed this opportunity to broaden the scope of Article 2(4) to include respect for the inviolability of State territory.

3.5.2 The "Use of Force"

The "use of force" was not defined in the Charter[220] and its exact meaning was contentious at the San Francisco Conference. During the drafting of the Declaration on Friendly Relations at Mexico, the developing countries' attempt to expand its scope to include political and economic coercion was again rejected.[221] Traditionally, the "use of force" refers to physical force[222] or armed force.[223] This interpretation is supported by preamble paragraph 7 of the UN Charter.[224]

However, scholars disagree on its scope and meaning. Kelsen argues that the "use of force" in Article 2(4) prohibits any force.[225] Brownlie argues that the *travaux preparatoire* and the state practice does not support Kelsen's position.[226] Dinstein endorses the view expressed by Lauterpacht that "force" in the UN Charter denotes violence and that the specific means used to effectuate it is irrelevant.[227]

This debate was repeated in 1963 when the Declaration on Friendly Relations was drafted. A Jamaican note *verbale* to the Secretary-General of 11 July 1963 recommended a review of the Article 2(4) 'in the light of the existing realities affecting the international society.'[228] It further

[219] ibid., 28.
[220] Randelzhofer, 'Article 2(4)' in Simma *et al.,* (eds), (n 9) 117.
[221] For draft proposals by States, see generally, *The UN Secretary-General summary of proposals on the Declaration on Friendly Relations* (n 94).
[222] For the definition of physical force see Randelzhofer, 'Article 2(4)' in Simma *et al.,* (eds), (n 9) 118-119.
[223] Brierly (n 78) 415; International Law Association Johannesburg Conference (2016), 'Report on aggression and the Use of Force,' 2-3 available at <http://www.ila-hq.org/index.php/committees> accessed 20 April 2017 [hereinafter *ILA Report on the use of force*]; Randelzhofer, 'Article 2(4)' Simma *et al.,* (eds), (n 9) 117.
[224] *UN Charter* (n 5) [preamble para. 7, Art. 44]; Brierly (n 78) 415; Randelzhofer, 'Article 2(4)' in Simma *et al.,* (eds), (n 9) 118; Corten (n 165) 50; Goodrich *et al.*, (n 10) 48.
[225] Hans Kelsen, 'Collective Security under International Law' (1954) 49 *International Law Studies* 34-100, 57.
[226] Brownlie 1963 (n 30) 362.
[227] Dinstein 2011 (n 176) 88.
[228] United Nations General Assembly Eighteenth Session, 'Contents received from Governments regarding consideration of Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations,' UN Doc. A/5470 (7 August 1963) 27 [hereinafter *Jamaica Draft Proposal for the Declaration on Friendly Relations*].

argues that "force" in its original form has disappeared due to the narrow interpretive approach adopted by the Charter.[229] Note that part of the United Kingdom's justification of *Operation Retail* in the *Corfu Channel* case was that Albania 'suffered neither territorial loss nor any part of its political independence.'[230] During the drafting of the Declaration on Friendly Relations, the United Kingdom clarified that Article 2(4) should 'be read in the light of the Charter as a whole and of the general rules of international law when the Charter had been concluded.'[231]

The inadequacy of the narrow-minded approach to enhance international peace and security is evident from the cyberspace attack. Therefore, the Jamaican observation that "force" in a 'subtler form has been severely undermining international peace and security'[232] is prophetic. Regardless, the 2014 report released by the International Committee on the "Use of Force" endorsed the traditional view.[233]

This has not resolved all the issues associated with the nature of an armed physical force. For example, must the assault be committed by one armed person or by corps, division, brigade and so forth? Must the armed invasion be unlawful only when committed in time of peace? Does the use of unmanned aerial vehicles qualify as armed invasion? The quintessence of these questions shows a world in a flux and that the use of force, short of armed physical force could lead to war.[234]

3.5.2.1 Contextualising the "use of force" in 1945 world

The ICJ's *obiter,* which held that Article 2(4) is the cornerstone of the United Nations Charter,[235] should be assessed against the backdrop of the deficiencies of its predecessors.

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[229] ibid., 27; Thomas M. Franck, 'Who Killed Article 2(4) or: Changing Norms Governing the Use of Force by States' (1970) 64(4) *American Journal of International Law* 809-837.
[230] *Corfu Channel Case* (n 194) Pleadings, Oral Arguments, Documents, (First part, Volume III) 296.
[231] *The UN Secretary-General summary of proposals on the Declaration on Friendly Relations* (n 94) 14 [para. 19].
[232] *Jamaica Draft Proposal for the Declaration on Friendly Relations* (n 228) 27 [para. 4(b)].
[233] *ILA Report on the use of force* (n 223) 2-3; Tom J. Farer, 'Political and Economic Coercion in Contemporary International Law' (1985) 79(2) *American Journal of International Law* 405-413, 410; Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Oxford, Clarendon Press 1994) 248.
[234] *UN Charter* (n 5) [Art. 2(7)]; *ILA Report on the use of force* (n 223) 3.
[235] *DRC v Uganda* (n 6) [para. 148]; Brierly (n 78) 414.

Article 1 of the Kellogg-Briand Pact of 1928[236] prohibits war but accommodates other ways that force might be used against the territory of a State. For a "state of war" to exist, The Hague Convention of 1907[237] requires a declaration of war. This means that technically war may exist before or after the initiation of armed hostilities.[238] Put differently, there could be a "state of war" without the use of force or after cessation of hostilities, or there could be the use of force without a state of war.[239]

The Kellogg-Briand Pact outlawed war but not armed hostilities.[240] Therefore, its scope was limited although it was the bedrock of state practice between the years 1928 and 1945.[241] It provided the legal framework for the prosecution of individuals charged with international crimes at the International Military Tribunals in Nuremberg and Tokyo.[242] Way back to the Peace of Westphalia, the international community has been seeking for a lasting solution to international peace and security. Article 2(4) which prohibited armed physical force was ground-breaking for prohibiting armed hostilities as well. The narrow interpretation of Article

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[236] It provides as follows: 'The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it, as an instrument of national policy in their relations with one another.' See *Kellogg-Briand Pact* (n 7) [Art. 1].

[237] It provides as follows: 'The Contracting Powers recognize that hostilities between themselves must not commence without previous and explicit warning, in the form either of a reasoned declaration of war or of an ultimatum with conditional declaration of war. See *Convention Relative to the Opening of Hostilities* (Done at The Hague on 18 October 1907, entered into force on 26 January 1910) 1 Bevans 619 [Art. 1] [hereinafter *Convention on declaration of hostilities 1907*]. For an example of a declaration of war, *see* Vi Kyuin Wellington Koo, 'Declaration of War by China on Germany and Austria' (1917) 11(4) *American Journal of International Law (Supplement)* 159-162, 161.

[238] *Convention on declaration of hostilities 1907* (n 237) [Art. 1]; Ellery C. Stowell, 'The Convention Relative to the Opening of Hostilities' (1908) 2(1) *American Journal of International Law* 50-62, 50; Clyde Eagleton, 'The Attempt to Define War' (1933) 15 *International Conciliation* 237-292, 262; Dinstein 2011 (n 176) 9; Quincy Wright, 'Changes in the Conception of War' (1924) 18(4) *American Journal of International Law* 755-767, 758.

[239] Brownlie 1963 (n 30) 26-27; George Grafton Wilson, 'Editorial Comment: Use of Force and War' (1932) 26 *American Journal of International Law* 327-328, 328; John Fischer Williams, 'Sovereignty, Seisin, and the League' (1926) 7 *British Year Book of International Law* 24-42, 27; John M. Lindsey, 'Conquest: A Legal and Historical Analysis of the Root of United Kingdom Title in the Falkland Islands' (1983) 18(1) *Texas International Law Journal* 11-36, 31.

[240] Clarence A. Berdahl, 'The Implications of the Kellogg Pact with Respect to American Foreign Policy' (1937) 15(1) *New York University Law Quarterly Review* 82-107, 82; Brownlie 1963 (n 30) 235 (he writes, 'Kellogg's original conception was a complete renunciation of war').

[241] Ian Brownlie, 'International Law and the Use of Force by States Revisited' (2002) 1(1*) Chinese Journal of International Law* 1-19, 5.

[242] Brownlie 2002 (n 241) 5; for the offences for which the Tribunal has jurisdiction see *Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis* and *Charter of the International Military Tribunal* (Signed at London on 8 August 1945, entered into force on 8 August 1945) 82 UNTS 280 [see in particular Section II: Jurisdiction and general principles, Art. 6] [hereinafter *The Nuremberg Charter*].

2(4) does not capture many actions which States engage in that could hinder the maintenance of international peace and security.[243]

3.5.3 "Against"

The word, "against" in Article 2(4) weakens its normative value and provides a leeway for the *de minimis* theory. As shall be seen, authors like Olivier Corten, Robert Kolb, and Mary Ellen O'Connell argue that Article 2(4) 'covers all physical force which surpasses a minimum threshold of intensity.'[244] How this proposal enhances friendly relations among States[245] is anybody's guess. Although the aim of the *de minimis* theory is to minimise confrontation at any slightest provocation, it does not set a good precedent.

The legal antecedent of the preposition "against" is relatively new. It seems to have emerged in the neutrality and non-aggression treaties in the 1920s. An example is Article 5 of the Treaty of Friendship between Persia and the Russian Socialist Federal Soviet Republic.[246] Similarly, Article 6 prohibits Persia from allowing her territory to be used as a base of operations by a foreign power to carry out hostilities against Russia.[247]

In the *Corfu Channel* case, the British government argued that *Operation Retail* was "not directed against" Albania but to secure vital evidence.[248] The Court rejected that defence, observing that the respect of territorial sovereignty is essential for international relations.[249]

The *travaux preparatoires*[250] of Article 2(4) does not accommodate such an exception. Hence, 'there is no indication in the records that the phrase (against) was intended to have a

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[243] Brownlie 2002 (n 241) 6-10; George Brand, 'Development of the International Law of War' (1950-1951) 25(2) *Tulane Law Review* 186-204, 202.
[244] Independent International Fact-Finding Mission on the Conflict in Georgia, 'Reports' (Volume II, September 2009) 242 available at <http://www.mpil.de/en/pub/publications/archive/independent_international_fact.cfm> accessed 18 April 2017 [hereinafter *Report on the Conflict in Georgia*]; Corten (n 165) 77.
[245] *UN Charter* (n 5) [Art. 1(2)].
[246] *Treaty of Friendship between Persia and the Russian Socialist Federal Soviet Republic* (Signed at Moscow on 26 February 1921, entered into force on 26 February 1922) 9 LNTS 384 [Art. 5].
[247] ibid., [Art. 6].
[248] *Corfu Channel Case* (n 194) Pleadings, Oral Arguments, Documents, (First part, Volume III) 296; D'Amato 1995 (n 16) 57-77 (he argues that Israel's airstrike upon a nuclear reactor within Iraq violated the latter's airspace but not directed against the territorial integrity).
[249] *Corfu Channel Case* (n 194) 35.
[250] Brownlie 1963 (n 30) 265-65.

restrictive effect.'[251] Rather, it prohibits all threat or use of force inconsistent with the purposes of the United Nations. Perhaps, another way of interpreting "against" is that it excludes invasions permitted by the Charter, namely, self-defence and when authorised by the Security Council. The preposition "against" was inserted to protect small States and cannot be interpreted as having a qualifying effect.[252]

3.5.4 "Territorial integrity" or "political independence"

The phrase "territorial integrity" as used in the UN Charter should be interpreted as to whether a State could violate the territory of another State without its prior consent. During the drafting of the Declaration on Friendly Relations, the representatives of Ceylon, Cyprus and the United States clarified that the primary purpose of Article 2(4) as conceived at San Francisco was to protect the territories of the weaker States.[253] There is no positive duty to preserve the territory of a State undergoing a political crisis.[254] An unsolicited intervention is unacceptable[255] and any unlawful penetration of the territory of another State is prohibited.[256]

However, state practice regarding intervention in the internal affairs of a State in order to evacuate its nationals, is ambiguous. And again, the ICJ in *the Case of the S.S. Lotus*[257] held that jurisdiction is territorial. Guatemala maintains that the integrity of a State in political crisis must not be compromised.[258] Austria demands a fuller clarification of what might constitute pressure, subversion and revolutionary propaganda.[259] Pakistan, Columbia and Japan held that non-intervention is a consequence of the duty to respect the territory and political independence of another State.[260] The general response of the UN member States has always been that the territories of States should be respected.[261]

[251] ibid., 267 (emphasis added).
[252] Goodrich *et al.*, (n 10) 44-45; Brownlie 1963 (n 30) 267.
[253] Goodrich and Hambro (n 11) 68-69; D'Amato 1995 (n 16) 68-72.
[254] *The UN Secretary-General summary of proposals on the Declaration on Friendly Relations* (n 94) 26 [para. 51].
[255] ibid., 27 [para. 53].
[256] ibid., 27 [para. 52].
[257] *Lotus case* (n 6) 18.
[258] *The UN Secretary-General summary of proposals on the Declaration on Friendly Relations* (n 94) 27 [para. 54].
[259] ibid., 27 [para. 55].
[260] ibid., 28 [para. 57].
[261] Goodrich and Hambro (n 11) 68; see also the position argued for by the representative of the Democratic Republic of the Congo in the Security Council regarding Rwanda's violation of what it calls "sacrosanct principle" enshrined in Article 2(4) of the UN Charter. See UNSCOR, UN Doc. S/PV.6866 (20 November 2012) 3.

Concerning the expression “political independence,” the delegations at San Francisco agree that coercing a State through the threat or use of force to do what it should otherwise not do is in breach of Article 2(4).[262] The presumption is that, the coercion suggested is military coercion since the interpretation of the threat or use of force was restricted to physical armed force.

3.5.5 “In their international relations”

The meaning of the phrase “in their international relations” is self-explanatory and was not contested during the drafting of the Charter. Article 2(4) applies to inter-States relations. The threat or use of force is permitted in domestic affairs. Hence, Article 2(7) prohibits the United Nations from interfering in the domestic affairs of States.

Sometimes, it is difficult to categorise what constitutes "domestic affairs" of a State when the activities occurring within a State have a direct or indirect effects on another State. An example could be an armed struggle within a State which destabilises the neighbouring States or a region. The “effect” test would probably determine the passivity or intervention of third States in the domestic affairs of others.

Where a domestic affair has extra-territorial effect, a premature intervention breaches the territory of the affected State.[263] This is without prejudice to the fact that international law has no fixed rule on when recognition is permitted.[264] This is illustrated by the diplomatic row that erupted between Tanzania and Nigeria when the former recognised the defunct Republic of Biafra.[265] Nigeria severs its diplomatic ties with Tanzania and argues the latter’s conduct breaches the OAU Charter that demands respect for the territory of the member States.[266] Whether a State could take a military action in self-defence against non-State actors occupying part of another State’s territory without the consent of the host State has been

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[262] Goodrich and Hambro (n 11) 69.

[263] James Crawford, *The Creation of States in International Law* (Second Edition, New York, Oxford University Press 2006) 12; Herbert W. Briggs, ‘Recognition of States: some reflections on Doctrine and Practice’ (1949) 43(1) *American Journal of International Law* 113-121.

[264] Brierly (n 78) 138.

[265] David A. Ijalaye, ‘Was "Biafra" at Any Time a State in International Law?’ (1971) 65(3) *American Journal of International Law* 551-559.

[266] Ijalaye (n 265) 554; Organisation of African Unity, ‘Resolution on Nigeria’ (13-16 September 1968) AHG/Res. 54(V) [para. 7].

controversial.[267] We shall discuss that in detail in chapter five but our analysis so far does not support it.

3.5.6 "In any other manner inconsistent with the purposes of the United Nations"

The phrase, "in any other manner inconsistent with the purposes of the United Nations" favours a broad approach to interpreting Article 2(4). However, it allows two exceptions, namely, self-defence, and when authorised by the Security Council acting under Chapter VII. Ironically, the State of Israel relied on it to destroy Iraqi's Nuclear Reactor which it considered endangered international peace and security.[268]

One of the purposes of the UN is the 'disarmament and the regulation of armaments.'[269] Was Israel justified in taking a unilateral step to prevent Iraq from enriching its Nuclear Reactor? Anthony D'Amato argues that the result achieved was desirable for the international community.[270]

Nonetheless, there is a contradiction in D'Amato's application. The phrase, "in their international relation" implies an "absolute all-inclusive prohibition"[271] of any kind. Thus, Quincy Wright argues that the US quarantine of Cuba is inconsistent with the purposes of the UN Charter.[272] It is immaterial that the said interdiction is an "offensive" or a 'defensive" measure.[273]

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[267] Christian J. Tams, 'The Use of Force against Terrorists' (2009) 20(2) *European Journal of International Law* 359-397; Monica Hakimi, 'Defensive Force against Non-State Actors: The State of Play' (2015) 91 *International Law Studies* 1-31; Marko Milanovic, 'Self-defence and non-state actors: Indeterminacy and the Jus ad bellum' (Blog of the *European Journal of International Law*, EJIL: *Talk!* 21 February 2010) available at <https://www.ejiltalk.org/self-defense-and-non-state-actors-indeterminacy-and-the-jus-ad-bellum/> accessed 3 April 2017; Irene Couzigou, 'The Fight Against the "Islamic State" in Syria: Towards the Modification of the Right to Self-Defence?' (2017) 9(2) *Geopolitics, History, and International Relations* 80–106; Jonathan I. Charney, 'The Use of Force against Terrorism and International Law' (2001) 95(4) *American Journal of International Law* 835-838.

[268] Anthony D'Amato, 'Israel's Air Strike upon the Iraqi Nuclear Reactor' (1983) 77(3) *American Journal of International Law* 584-588, 585.

[269] *UN Charter* (n 5) [Art. 11(1)].

[270] D'Amato 1983 (n 268) 587.

[271] Cassese 1986 (n 41) 137.

[272] Wright 1963 (n 187) 555.

[273] Brunson argues that the lawfulness of the quarantine of Cuba should be assessed on whether it is an offensive or a defensive measure and whether the means taken is proportionate to the threat faced. See Brunson MacChesney, 'Some Comments on the "Quarantine" of Cuba' (1963) 57(3) *American Journal of International Law* 592-597, 594-595.

Another issue to highlight is the tension between the inviolability of State territory and self-determination. Cassese points out exceptional conditions under which the respect of a State territory may be overlooked. Firstly, when the right of peoples to self-determination is at stake such as during the decolonisation era.[274] Secondly, when there is a gross violation of human rights.[275] These views find expression in the ICJ judgment that the core human rights have acquired the status of *jus cogens* as well as customary international law.[276]

Nonetheless, State practice does not evidence that self-determination or human rights are preferred to the requirement to respect the inviolability of State territory. Waging of wars in contravention of international treaties and agreements is inconsistent with the purposes of the UN Charter.[277] The first purpose of the UN is to maintain international peace and security and to foster peace in accordance with the principles of justice and international law through peaceful resolution of international disputes.[278] Any unlawful breach of a State territory does not further this objective neither is it in accordance with the provision of Article 2(4).[279]

During the drafting of the Declaration on Friendly Relations, the meaning of the phrase, "in any order manner inconsistent with the purposes of the United Nations" was not contested. However, the representative of Ceylon noted that the phrase imposes upon States the obligation to act in accordance with the provision of Article 1 of the Charter.[280] This clarification is not very useful because self-determination and human rights are part of the purposes of the UN. However, the representative of the United States explains that the purpose enshrined in Article 1(1) is "particularly pertinent" to understanding the phrase, "in any other manner inconsistent with the purposes of the United Nations."[281] This justifies our

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[274] Cassese 1995 (n 62) 174-176; Cassese 1986 (n 41) 131-136; *UN Charter* (n 5) [Art. 1(2)]; *Western Sahara*, Advisory Opinion ICJ Reports (1975) p. 12, 122 (Separate Opinion of Judge Dillard states "It is for the people to determine the destiny of the territory and not the territory the destiny of the people").

[275] Joshua Castellino, 'International law and self-determination: Peoples, Indigenous Peoples, and Minorities' in Christian Walter, Antje Von Ungern-Sternberg and Kavus Abushov (eds), *Self-determination and Secession in International Law* (United Kingdom, Oxford University Press 2014) 31; George Nolte, 'Secession and external intervention' in Kohen (ed), (n 38) 73; *UN Charter* (n 5) [Art. 1(3)].

[276] *Barcelona Traction, Light and Power Co. Ltd* (Belgium v Spain) Judgment ICJ Reports (1970) p. 3 [paras. 33-34]**;** *United States Diplomatic and Consular Staff in Tehran* (United States of America v Iran) Judgment ICJ Reports (1980) p.3 [para. 91].

[277] David Luban, 'Just War and Human Rights' (1980) 9(2) *Philosophy & Public Affairs* 160-181, 162.

[278] *UN Charter* (n 5) [Art. 1(1)].

[279] Wright 1963 (n 187) 557.

[280] *The UN Secretary-General summary of proposals on the Declaration on Friendly Relations* (n 94) 29 [para. 62].

[281] ibid., 29 [para. 63].

claim that the maintenance of international peace and security is the primary purpose of the United Nations. Therefore, any action that undermines this objective is prohibited.

3.6 The deficit of Article 2(4) – An unintended error?

The major deficit of Article 2(4) that could undermine the principle of respect for the inviolability of State territory is that it does not prohibit intra-State forcible measures[282] or the threat or use of force by non-State actors. This creates uneasiness on how to establish intra-State circumscribed conflicts. Conflict breeds migration of refugees and in that regard, creates external effect. Besides, the citizens of third States are often caught up in intra-State conflicts.

Modern international law permits States to intervene militarily in a civil war upon the request and in favour of a legitimate government or at least with its consent. The complexities of civil wars have made it difficult to ascertain which of the factions is the legitimate government.[283] Hence, support has shifted in favour of the responsibility to protect.[284] Reisman has identified eight conditions that could legitimise the breach of the inviolability of State territory,[285] and which he argues, are duties owed *erga omnes*. As shall be seen, this view conflicts with the peremptory character of Article 2(4).

Moreover, the first limb of Article 2(4) prohibits the threat or use of force instead of war. It abrogates not just war[286] but hostilities that might disrupt international peace and security. In 1956, the Anglo-French's troops classified their attempted occupation of the Suez Canal as beyond the scope of Article 2(4).[287] But that defence is problematic insofar as Article 2(4) is engaged irrespective of whether or not the parties are in a state of war. In fact, Kelsen's broad

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[282] Randelzhofer, 'Article 2(4)' in Simma *et al.,* (eds), (n 9) 120-121.

[283] ibid., 122; Robert R. Wilson, 'Recognition of Insurgency and Belligerency' (1937) 31(4) *American Society of International Law Proceedings* 136-143, 136-37.

[284] Bruno Simma, 'NATO, the UN and the Use of Force: Legal Aspects' (1999) 10(1) *European Journal of International Law* 1-22, 2. The emerging Responsibility to Protect will be analysed in chapter seven.

[285] W. Michael Reisman, 'Criteria for the Lawful Use of Force in International Law' (1985) 10(2) *Yale Journal of International Law* 279-285, 281; Oscar Schachter, 'The Lawful Resort to Unilateral Use of Force' (1985) 10(2) *Yale Journal of International Law* 291-294, 291.

[286] *Convention on declaration of hostilities 1907* (n 237) [Art. 1].

[287] Peter Malanczuk, *Akehurst's Modern Introduction to International Law* (Seventh Revised Edition, London and New York, Routledge 1997) 309.

approach includes 'any illegal action of one state which violates the legally protected interest of another and which is undertaken against the will of this other state.'[288]

Admittedly, the conjunctive phrase, 'in any other manner inconsistent with the purposes of the United Nations' implies measures that vitiate the purposes of the United Nations. Technically, a State may argue that supporting self-determination is consistent with the purpose of the United Nations. Thus, a textual analysis of Article 2(4) does not indicate whether it refers to the permitted exceptions unless it is read in conjunction with paragraph 7 of the Preamble to the Charter and/or Articles 41, 44 and 46 of the Charter. Malanczuk writes that Article 2(4) is poorly drafted if it prohibits *only* the threat or use of force.[289]

3.6.1 The proximity of the Use of Force and Aggression – A concurrent violation?

The proximity between the use of force in Article 2(4) and an act of aggression is that every aggression is an unlawful use of force against the territory of a State.[290] The criminalisation of the act of aggression implies that the breaches of States' territory could be subject for criminal prosecution.[291]

In 1954, the ILC adopted a Draft Code of the Offences against the Peace and Security of Mankind[292] (hereinafter referred to as Code on the Peace). The elements of the threat of aggression were patterned after the text of Article 2(4), the Declaration on Friendly Relations, among others.[293] Article 2(1) of the Code on the Peace defined an act of aggression as the 'employment by the authorities of a State of armed force against another State for any

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[288] Kelsen 1954 (n 225) 55.
[289] Malanczuk (n 287) 309.
[290] Dinstein 2011 (n 176) 124; UNSC Res. S/RES/573 (4 October 1985) [paras. 1-2].
[291] The representative of Argentina in the Security Council argues that the crime of aggression is the corollary of the prohibition of the threat or the use of force as provided for in Article 2(4) of the UN Charter. See UNSCOR, UN Doc. S/PV.6849 (Resumption 1) (17 October 2012) 12.
[292] International Law Commission, *Draft Code of Offences against the Peace and Security of Mankind (1954)* (Volume II, Yearbook of International Law Commission 1954) 159 [hereinafter *Draft Code of Offences against the Peace*].
[293] International Law Commission, *Report of the Commission to the General Assembly on the work of its forty-first session* (Volume II, Part II, Yearbook of International Law Commission 1989) 68 [para. 2]; International Law Commission, 'Text of a Draft Code of Offences against the Peace and Security of Mankind suggested as a working paper for the International Law Commission' (Volume II, International Law Commission Yearbook 1950) 277-78; International Law Commission, 'Document A/CN.4/44: Second report on a Draft Code of Offences against the Peace and Security of Mankind by Mr. J. Spiropoulos, Special Rapporteur' (Volume II, International Law Commission Yearbook 1951) 58.

purpose other than' the legitimate exceptions.[294] The Commentary on Article 16 of the Code on the Peace[295] reiterates that aggression is a State's crime with individual criminal liability.[296]

According to the Definition of Aggression adopted by the United Nations General Assembly, '[t]he first use of armed force by a State in contravention of the Charter shall constitute prima facie evidence of an act of aggression ….'[297] Article 3 of this resolution enumerates acts that qualify as aggression irrespective of whether war was declared or not. It includes, but is not limited to, armed physical assault by a State on the territory of another State, all manner of armed invasion, armed attack, armed occupation or annexation by the use of force on the territory of another State or part thereof.[298] Equally prohibited is any attempt to prevent coastal States from exercising their right over their ports or coasts through the armed forces of another State.[299] States are also not permitted to make their territory or part thereof available to a third State for the commission of aggression against another State or sponsor the commission of aggression against a third State through armed bands, groups, irregulars or mercenaries.[300]

In the *Nicaragua case*,[301] the ICJ held that an armed attack sponsored by a State against another State is prohibited under customary international law. Therefore, Article 3(g) of the General Assembly's Definition of Aggression may require culpability to be attributed to States for wrongful acts of non-State actors within its territory.[302] Thus, a State's substantial

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[294] *Draft Code of Offences against the Peace* (n 292) [Art. 2(1)].
[295] International Law Commission, *Draft Code of Offences against the Peace and Security of Mankind with Commentary (1996)* (Volume II, Yearbook of International Law Commission 1966) 187 [Art. 16] [hereinafter *Draft Code of Offences against the Peace with Commentary*].
[296] ibid., 43; Office of United States Chief Counsel for Prosecution of Axis Criminality, *Nazi Conspiracy and Aggression* (Washington, United States Government Printing Office 1947) 53 (it argues that 'Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced'); *The Nuremberg Charter* (n 242) [section II, Art. 6].
[297] *GA Definition of Aggression* (n 1) [Art. 2].
[298] ibid., [Art. 3(a)].
[299] ibid., [Art. 3(c)].
[300] ibid., [Art. 3(d)-(g)].
[301] *Nicaragua case* (n 6) [para. 195].
[302] It is arguable whether a certain degree of a state's involvement is required for actions of non-state actors to be attributed to a state. See Gray (n 38) 130. Judge Schwebel suggested that "substantial involvement" suffices, see *Nicaragua Case* (n 6) (Dissenting Opinion of Judge Schwebel at paras. 239, 246, 165, 166, 169, 170, 176, 263 and 264).

involvement may be construed a crime against the peace as provided for in Article 6(a) of the Nuremberg Charter.[303]

Deductively, a State may be held responsible for the direct or indirect breach of the territory of another State. Therefore, the Iraqi's invasion of Kuwait in 1991, the Vietnamese intervention in Cambodia (Kampuchea) in 1979,[304] and the financial assistance which the United States gave to the *Contras* violate the territories of the affected States.[305] However, the financial assistance does to amount to an armed attack.[306]

3.6.2 The Crime of Aggression under international law

Although the Nuremberg Charter[307] did not define the "crime of aggression," the International Military Tribunal at Nuremberg held that crimes against the peace are inseparable from aggressive wars.[308] Aggression was not listed as a substantive crime in the *Principles of International Law Recognized in the Charter of the Nüremberg Tribunal and in the Judgment of the Tribunal 1950*[309] but was part of the Crime against the Peace.[310] In the absence of a definition of the crime of aggression, Paulus argues that the Nuremberg conflates the "acts of aggression" with the "crime of aggression," muddling private criminal jurisdiction with the international legal system.[311]

However, Article 5(2) of the Rome Statute of the International Criminal Court[312] (hereinafter referred to as Rome Statute) provides that the Court shall exercise jurisdiction over the crime of aggression if a provision setting out its elements and the Court's jurisdiction over such a

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[303]See *The Nuremberg Charter* (n 242) [section II, Art. 6(a)].
[304] Gerry Simpson, 'Stop calling it Aggression: War as Crime' (2008) 61(1) *Current Legal Problems* 191-228, 227.
[305] *Nicaragua case* (n 6) [para. 195].
[306] ibid., [para. 195].
[307] *Charter of the International Military Tribunal* [Art. 6] available at <http://avalon.law.yale.edu/imt/imtconst.asp> accessed 6 August 2017; Dinstein 2011 (n 176) 127-134.
[308] *International Military Tribunal (Nuremberg) Judgment and Sentences, October 1, 1946*, Judgment (1947) 41(1) *American Journal of International Law* 172-333, 186-187.
[309] International Law Commission, *Principles of International Law Recognized in the Charter of the Nüremberg Tribunal and in the Judgment of the Tribunal 1950,* [principle VI] available at <http://legal.un.org/ilc/texts/instruments/english/draft_articles/7_1_1950.pdf> accessed 4 April 2017.
[310] ibid., [principle VI(a)].
[311] Andreas Paulus, 'Second Thoughts on the Crime of Aggression' (2009) 20(4) *European Journal of International Law* 1117-1128, 1120.
[312] See *Rome Statute of the International Criminal Court* (Adopted in Rome, Italy on 17 July 1998, entered into force on 1st July 2002) 2187 UNTS 90 [Art. 5(2)] [hereinafter *Rome Statute*].

crime were adopted. A decision to that effect was made at the International Criminal Court (hereinafter referred to as ICC) Review Conference in Kampala, Uganda in June 2010. The drafters agree that aggression is 'only the most dangerous and serious forms of illegal use of force.'[313] To qualify as a "crime of aggression," three components, namely, character, gravity and scale must be evidenced.[314]

The General Assembly requires the Security Council to make a determination that an "act of aggression" has been committed if on the fact, the necessary conditions were met.[315] It is unlikely that an "act of aggression" as defined by the General Assembly could meet the threshold set out for the "crime of aggression" if it does not involve waging a war against a State.[316]

Regardless, both the "crime of aggression" and the "act of aggression" are recognised offences within the ICC jurisdiction.[317] Article 8*bis*, paragraph 2 of the *Rome Statute* has criminalised the content of Article 3 of the General Assembly's *Definition of Aggression.* The problem of determining the legal implications of the act of aggression in the criminal jurisdiction of the ICC is done elsewhere.[318]

3.6.3 The positive effect of the criminalisation of the Act of Aggression for States' territory

Pursuant to Articles 12 and 15*bis* of the ICC Statute,[319] a State that uses excessive force against the territory of another State may be prosecuted.[320] This strengthens the first limb of Article

[313] Claus Kress and Leonie von Holtzendorff, 'Kampala Compromise on the Crime of Aggression' (2010) 8(5) *Journal of International Criminal Justice* 1179-1218, 1206.
[314] Erin Creegan, 'Justified Uses of Force and the Crime of Aggression' (2012) 10(1) *Journal of International Criminal Justice* 59-82, 60; Kress and von Holtzendorff, (n 313) 1206; Dinstein 2011 (n 176) 136.
[315] *GA Definition of Aggression* (n 1) [Art. 2].
[316] Dinstein 2011 (n 176) 136; Paulus, (n 311) 1120 (see in particular footnote number 10).
[317] *Rome Statute* (n 312) [Art. 8*bis*].
[318] See generally, Creegan (n 314); Dan ZHU, 'China, the Crime of Aggression, and the International Criminal Court' (2015) 5(1) *Asian Journal of International Law* 94-122, 98 (pay attention to footnote number 25); David Scheffer, 'The Complex Crime of Aggression under the Rome Statute' (2010) 23(4) *Leiden Journal of International Law* 897-904.
[319] For more analysis, see Kress and von Holtzendorff, (n 313) 1212-1216. Yeal examined whether Palestine could initiate proceedings against Israel before the ICC following a three-week military offensive in the Gaza Strip in 2008. See Yael Ronen, 'ICC Jurisdiction over Acts Committed in the Gaza Strip' (2010) 8(1) *Journal of International Criminal Justice* 3-28.
[320] Simpson (n 304) 226.

2(4) of the UN Charter and has been enforced by the Nuremberg and Tokyo[321] Criminal Tribunals. The prohibition of aggression is recognised as a general principle of law by the civilised nations.[322]

In the *R v Jones and Others,*[323] the appellants pleaded with the United Kingdom's House of Lords to adjudicate whether force could be used under section 3 of the *Criminal Law Act 1967*[324] to prevent a crime of aggression against Iraq. The House of Lords acknowledged that the crime of aggression is a part of international law[325] but refused to accept its direct applicability to the English legal system.[326]

In the wake of the on-going civil war in Syria, concerns have been raised whether States supporting the Assad's regime or the moderate opposition in Syria are committing crime of aggression against Syria.[327] In Stahn's opinion, 'Syria marks a case in which the implications of this qualifier (aggression) have become relevant for the semantics of intervention and international law.'[328] But a fair assessment of the necessity of intervention should take Article 5(1) of the GA *Definition of Aggression*[329] into account.

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[321] See International Military Tribunal for the Far East, 'Judgments Part B, Chapter V – Japanese Aggression against China' (Volume I, Sections I and II) 521 available at <https://www.legal-tools.org/en/browse/ltfolder/0_29706/> accessed 17 April 2017.

[322] See *Statute of the International Court of Justice* (Adopted at San Francisco on 26 June 1945, entered into force on 24 October 1945) (1945) 39(3) *American Journal of International Law Supplement* 215-229 [Art. 38(c)] [hereinafter *ICJ Statute*].

[323] *R v Jones and Others* [2006] UKHL 16 [para. 12].

[324] United Kingdom, *Criminal Law Act 1967* [section 3] available at <http://www.legislation.gov.uk/ukpga/1967/58/pdfs/ukpga_19670058_en.pdf> accessed 11 April 2017.

[325] *R v Jones and Others* [2006] UKHL 16 [para. 12].

[326] ibid., [para. 62].

[327] Carsten Stahn, 'Syria and the Semantics of Intervention, Aggression and Punishment; On "Red lines and Blurred Lines"' (2013) 11(5) *Journal of International Criminal Justice* 955-978, 958-59, 971; Beth Van Schaack, 'The Crime of Aggression and Humanitarian Intervention on Behalf of Women' (2011) 11 *International Criminal Law Review* 477-494, 491; Michael P. Scharf and Gregory S. McNeal, 'Saddam on Trial: Understanding and Debating the Iraqi High Tribunal 225' (Grotian Moment Blog, 19 October 2005) available at <http://law.case.edu/Academics/Academic-Centers/Cox-International-Law-Center/Grotian-Moment/ArtMID/804/ArticleID/504> accessed 17 April 2017.

[328] Stahn (n 327) 971-72 (emphasis added).

[329] It states, '[n]o consideration of whatever nature, whether political, economic, military or otherwise, may serve as a justification for aggression.' See *GA Definition of Aggression* (n 1) [Art. 5(1)]; William A. Schabas, 'Attacking Syria? This is the Crime of Aggression' (PhD studies in human rights weblog, 30 August 2013) available at <http://humanrightsdoctorate.blogspot.co.uk/2013/08/attacking-syria-this-is-crime-of.html> accessed 17 April 2017.

The ICJ's judgment in the *Case Concerning the Democratic Republic of Congo v Uganda*[330] held that Uganda breached Article 2(4) but failed to examine whether an act of aggression had occurred. Thus, the criminalisation of aggression does not lend much support to the prosecution of States that have violated the territory of other States since the Second World War.[331] The foreseeability that the situation will change anytime soon is brink especially now that the African Union (AU) has accused the ICC of bias against Africa.[332] Despite the latent ambiguity in the three thresholds of the crime of aggression,[333] its criminalisation has strengthened the inviolability of State territory.[334]

3.7 The Contemporary Interpretation of Article 2(4) of the UN Charter

None of the legal documents discussed above defined the inviolability of State territory as implied in Article 2(4).[335] The reason could be because it was not a new concept or because cases relating to the prohibited act should be decided on their merits.[336] Even the Security Council has not formulated a universally accepted interpretation of Article 2(4) because its mandate under the Charter is to deal with disputes and situations as they arise.[337]

On its part, the General Assembly is not a legislative body that makes binding laws. It may 'consider the general principles of cooperation in the maintenance of international peace and security'[338] and make recommendations accordingly.[339] Besides, the General Assembly's

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330 *DRC v Uganda* (n 6) [para. 163].
331 Dinstein 2011 (n 176) 130.
332 Benedict Abrahamson Chigara and Chidebe Matthew Nwankwo, (2015) 'To be or not to be? The African Union and its Member States Parties' Participation as High Contracting States Parties to the Rome Statute of the International Criminal Court (1998)' (2015) 33(3) *Nordic Journal of Human Rights* 243-268, 245; Manisuli Ssenyonjo, 'Analysing the Impact of the International Criminal Court Investigations and Prosecutions of Kenya's serving Senior State Officials' (2014) 1(1) *State Practice and International Law Journal* 17-44, 33; Akalemwa Ngenda, 'Reflection on the collapse of the Kenyatta case at the International Criminal Court' (2015) 2(2) *State Practice and International Law Journal* 165-174, 170.
333 Mary Ellen O'Connell and Mirakmal Niyazmatov, 'What is Aggression?: Comparing the *Jus ad Bellum* and the ICC Statute' (2012) 10(1) *Journal of International Criminal Justice* 189-208, 204-205; Kevin Jon Heller, 'The Uncertain Legal Status of the Aggression Understandings' (2012) 10(1) *Journal of International Criminal Justice* 229-248.
334 Stahn (n 327) 973; Friedrich Rosenfeld, 'Individual Civil Responsibility for the Crime of Aggression' (2012) 10(1) *Journal of International Criminal Justice* 249-265.
335 S. Akweenda, 'Territorial Integrity: A Brief Analysis of a Complex Concept' (1989) 1(3) *African Journal of International and Comparative Law* 500-506, 502.
336 ibid., 502-503.
337 Goodrich *et al.*, (n 10) 46; Akweenda (n 335) 503.
338 *UN Charter* (n 5) [Art. 11(1)].
339 For a discussion on the legal effect of the UN General Assembly Recommendation, see D. H. N. Johnson, 'The Effect of Resolutions of the General Assembly of the United Nations' (1955-1956) 32 *British Year Book of*

resolutions and recommendations do not create legal obligations for the member States.[340] However, the General Assembly could initiate studies and make recommendations leading up to the development and codification of international law.[341]

The General Assembly invoked Article 13's power when it adopted Resolution 1815 (XVII) on 18 December 1962 to, among others, review Article 2(4).[342] The Declaration on Friendly Relations was the outcome of that process and could be regarded as the state of the art on the scope of Article 2(4). As seen earlier, its scope is broader than just the threat or use of force.

Thomas Franck and Louis Henkin argue that there is a definitional gap which has resulted in inconsistencies in state practice.[343] Burghardt has equally suggested that the requirement to respect the inviolability of State territory includes all claims based on relative location of an area.[344] Its constituent's parts include the right to jurisdiction, the right to the territory's resources and the right to control borders.[345]

3.7.1 Dual meaning of Article 2(4) of the UN Charter

It is evident from all that has been said so far that the narrow interpretation has dominated the discourse on Article 2(4).[346] That approach is inadequate and neglects other unlawful

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International Law 97-122, 107–108; Marko Divac Öberg, 'The Legal Effects of Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ' (2006) 16(5) *European Journal of International Law* 879-906; see generally, Jorge Castañeda, *Legal Effects of UN Resolutions* (Nueva York, Columbia University Press 1969).

[340] *South-West Africa-Voting Procedure,* Advisory Opinion of June 7th 1955, ICJ Reports (1955) p. 67, 114-115 (Separate Opinion of Judge Lauterpacht).

[341] *UN Charter* (n 5) [Art. 13].

[342] UNGA Res. A/RES/17/1815 (18 December 1962) [operative para. 1(a)].

[343] Louis Henkin, *How Nations Behave: Law and Foreign Policy* (Second edition, New York, Columbia University Press 1968) 69; Thomas M. Franck, *The Power of Legitimacy among Nations* (New York, Oxford University Press 1990) 52.

[344] Andrew F. Burghardt, 'The Bases of Territorial Claims' (1973) 63(2) *Geographical Review* 225-245, 235.

[345] David Miller, 'Territorial Rights: Concept and Justification' (2012) 60(2) *Political Studies* 252-268; Malanczuk (n 287) 109.

[346] Paul R. Hensel, Michael E. Allison and Ahmed Khanani, 'Territorial integrity treaties and armed conflict over territory' (2009) 26(2) *Conflict Management and Peace Science* 120-143,123; *The Covenant of the League of Nations* (n 8) [Art. 10]; *Anti-war Treaty of Non-aggression and Conciliation* (Saavedra Lamas Treaty) (Adopted at Rio de Janeiro Brazil on 10 October 1933) [Art. 2] available at <http://avalon.law.yale.edu/20th_century/intam01.asp> accessed 17 September 2015 (note that this Treaty has been superseded by the American Treaty on Pacific Settlement (Pact of Bogota 1948). It only applies if the parties to a dispute have ratified the Pact of Bogota 1948); *Convention on Rights and Duties of States adopted by the Seventh International Conference of American States* (Signed at Montevideo on 16 December 1933,

means by which the territory of sovereign States could be violated.

The first limb overlooks the correlation of various factors that destabilise international order. Studies conducted by Hensel and Mitchell have shown that intangible issue such as ethnic affiliation or past historical memories could cause cross-border conflicts.[347] This was the situation in Northern Ireland, Kosovo, and Kurdistan.[348] States fall victim to their national interest by covertly instigating, supporting or funding conflicts in other States and yet claim not to have breached their international obligations.

Presently, cyberattacks remain a significant threat to international peace and security.[349] In fact, the Parliamentarians of the Council of Europe 'reiterate that any country that relies extensively on cyberspace might be influenced by cyberattacks the same way as by conventional acts of aggression.'[350] As chapter four shows, the first limb of Article 2(4) does not account for this.

Therefore, the narrow interpretation has failed to adequately protect the territory of States not only in scope but most importantly due to how the Member States navigate around its broad prohibition. Cassese opines that the legislative history of Article 2(4) shows that it was meant to be an "absolute all-inclusive prohibition."[351] Anthony D'Amato suggested that this was why the phrase "or in all other manner" was inserted in the text.[352]

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entered into force on 26 December 1934) 165 LNTS 19 [Art. 11]; *UN Charter* (n 5) [Art. 2(4)]; OAS Charter (n 2) [Art. 21]; *Protocol on Non-Aggression* (Concluded at Lagos on 22 April 1978, entered into force provisionally on 13 May 1982) 1690 UNTS 39 [Arts. 1, 2]; *SADC Protocol on Politics, Defense and Security Co-operation* (Done at Blantyre on 14 August 2001, entered into force on 2 March 2004) [Art. 11] available at <http://www.sadc.int/files/3613/5292/8367/Protocol_on_Politics_Defence_and_Security20001.pdf> accessed 17 September 2015.

[347] Paul R. Hensel and Sara McLaughlin Mitchell, 'Issue Indivisibility and Territorial Claims' (2005) 64(4) *GeoJournal* 275-285, 275; Shannon O'Lear, Paul F. Diehl, Derrick V. Frazier and Todd L. Allee, 'Dimensions of territorial conflict and resolution: Tangible and Intangible values of Territory' (2005) 64(4) *GeoJournal* 259-261, 259; Paul F. Diehl, 'What are they fighting for? The importance of issues in International Conflict Research' (1992) 29(3) *Journal of Peace Research* 333-344, 334.

[348] Hensel and Mitchell 2005 (n 347) 277; O'Lear *et al.*, (n 347) 259.

[349] Organisation for Security and Co-operation in Europe Parliamentary Assembly, 'Resolution on Cyber Security' [paras. 1-4] available at <https://www.oscepa.org/meetings/annual-sessions/2013-istanbul-annual-session/2013-istanbul-final-declaration/1652-15> accessed 4 April 2017 [hereinafter *Council of Europe Resolution on Cyber Security*]; UNSC Res. S/RES/2341 (13 February 2017) [preamble para. 15]; UNGA Res. A/RES/57/239 (31 January 2003) [preamble para. 2].

[350] *Council of Europe Resolution on Cyber Security* (n 349) [para. 5].

[351] Cassese 1986 (n 41) 137.

[352] D'Amato 1995 (n 16) 71-72.

The broad interpretive approach looks at the notion more generally. The emphasis is on "respect" for all borders rather than rejection of violent acquisition of territory.[353] By this interpretation, disrespect of international borders constitutes a breach of Article 2(4). Hence, the dumping of toxic wastes or refugees in another country[354] is disrespectful.

The broad scope has been recognised at the regional level. First, Article 15 of the 1948 Charter of the Organisation of American States[355] prohibits 'any other form of interference or attempted threat against the personality of a State.' Similarly, Article 16 prohibits the 'use of coercive measures of an economic or political character to force the sovereign will of another state.'[356] Second, the *communiqué* issued by the African-Asian World Peace Conference in 1955 requires States to abstain "from exerting pressures on other countries."[357] Third, the Belgrade Declaration[358] recognises that the reduction in the growth of military blocs will enhance world peace and international relations. Fourth, virtually all regional instruments[359]

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[353] *Locarno Pact* (n 12) [Art. 1]; *Final Communiqué of the Asian-African Conference of Bandung* (1955) [principle 2] available at <http://franke.uchicago.edu/Final_Communique_Bandung_1955.pdf> accessed 17 September 2015; *OAU Charter* (n 2) [Arts. 2, 3]; *Charter of the Organisation of Islamic Conference* (1973) [Art. 2(4)] available at <http://www.oicun.org/2/24/20140324031549266.html> accessed 17 September 2015. This charter has been repealed by the *Charter of the Organisation of Islamic Cooperation* (Done at Dakar on 14 March 2008) [Art. 2(4)] available at <http://www.oicun.org/2/24/20140324031549266.html> accessed 17 April 2017; *Helsinki Final Act 1975* (n 2) [points I, III, and IV]; *Treaty of Amity and Cooperation in Southeast Asia Indonesia* (Done at Denpasar on 24 February 1976, entered into force on 21 June 1976) [Arts. 2, 10] available at <http://www.asean.org/news/item/treaty-of-amity-and-cooperation-in-southeast-asia-indonesia-24-february-1976-3> accessed 17 September 2015; *Charter of the South Asian Association of Regional Cooperation* (Done at Dhaka on 8 December 1985) [Art. 2] available at <http://www.saarc-sec.org/SAARC-Charter/5/> accessed 17 September 2015; *CIS Charter* (n 161) [Art. 3]; *Declaration of the Principles guiding the Relations among the CICA Member States* (Done at Washington on 14 September 1999) [Art. 3(1)] available at <https://2001-2009.state.gov/t/ac/csbm/rd/22670.htm> accessed 17 September 2015; *Charter of Organisation for Democracy and Economic Development – GUAM* (Done at Kylv on 23 May 2006) [Art. 2] available at <http://guam-organization.org/en/node/450> accessed 17 April 2017. For other instruments visit <http://www.paulhensel.org/Research/cmps09app.pdf> last visited 17 June 2017.

[354] Cahal Milmo, 'Dumped in Africa: Britain's toxic waste' (The Independent, 18 February 2009) available at <http://www.independent.co.uk/news/world/africa/dumped-in-africa-britain8217s-toxic-waste-1624869.html> accessed 17 September 2015; Lizzie Dearden, 'Refugee crisis: Hungary accuses Croatia of 'violating international law' as tensions continue to rise over chaos in the Balkans' (The Independent, 19 September 2015) available at <http://www.independent.co.uk/news/world/europe/refugee-crisis-hungary-accuses-croatia-of-violating-international-law-as-tensions-continue-to-rise-over-chaos-in-the-balkans-10508888.html> accessed 20 September 2015.

[355] *OAS Charter* (n 2) [Art. 15].

[356] ibid., [Art. 16].

[357] *Bandung Declaration 1955* (n 101) [Art. 6(b)].

[358] *Belgrade Declaration* (n 102) [Part 1, para. 9]; *The 1964 Report by the Commission on Friendly Relations* (n 181) 34-35.

[359] See *Locarno Pact* (n 12) [Art. 1]. Some authors have argued that the Locarno Pact permits adjustment of boundaries through peaceful negotiations, see Philip M. H. Bell, *The Origins of the Second World War in Europe* (Second Edition, New York, Longman 1997) 36-37. Other scholars argue that the boundaries delimited by the pact were meant to be final, see Felix Gilbert, *The End of the European Era, 1890 to the Present* (Second Edition,

inserted the word “inviolability” or “respect” instead of the threat or use of force.

3.7.2 Re-reading Article 2(4) through the Resolutions of the UN Organs

The resolutions adopted by the Security Council between the years 2000 and 2009 made no reference to Article 2(4)[360] except in two instances where the Council discussed the principles of the Charter as set out in Article 2.[361] But one resolution adopted by the General Assembly during this period explicitly referred to Article 2(4).[362] The survey conducted between the years 2012 and 2013 shows that the Security Council explicitly invoked Article 2(4) twice in its resolutions and referred to it once.[363]

Aside from these, resolutions abound where the General Assembly or the Security Council quoted the text of Article 2(4) in the preambular paragraphs[364] or implicitly cited the basic provision codified in Article 2(4).[365]

New York and London, Norton 1984) 221-222; *OAU Charter* (n 2) [Arts. 2 and 3]; Jeffrey Herbst, ‘The Creation and Maintenance of National Boundaries in Africa’ (1989) 43(4) *International Organization* 673-692, 674-77; Malanczuk (n 287) 162; Steven R. Ratner, ‘Drawing a better line: *Uti Possidetis* and the Borders of New States’ (1996) 90(4) *American Journal of International Law* 590-624, 595-596; Zacher 2001 (n 158) 221-223; *Helsinki Final Act 1975* (n 2) [Art. 3(1)].

[360] United Nations Codification Division Publication, *Repertory of Practice of United Nations Organs Supplement No. 10 – Article 2(4) (separate study)* 3 available at <http://legal.un.org/repertory/art2.shtml> accessed 12 April 2017 [hereinafter *Repertory Supplement No. 10*].

[361] See UNSC Res. S/RES/1353 (13 June 2001) [preamble para. 5]; UNSC Res. S/RES/1296 (19 April 2000) [preamble para. 8].

[362] See UNGA Res. A/RES/58/188 (22 December 2003) [operative paragraph 2]; *Repertory Supplement No. 10* (n 360) 3.

[363] United Nations Security Council, *Repertory of Practice of Security Council 18th Supplement 2012-2013,* 9-10 available at <http://www.un.org/en/sc/repertoire/principles.shtml> accessed 16 April 2017.

[364] UNGA Res. A/RES/63/39 (2 December 2008) [preamble paras. 6, 7, and 9]; UNGA Res. A/RES/55/132 (8 December 2000) [preamble para. 1]; UNGA Res. A/RES/56/4 (5 November 2001) [preamble para. 3]; UNGA Res. A/RES/55/209 (20 December 2000) [preamble para. 3]; UNSC Res. S/RES/1785 (21 November 2007) [preamble para. 2]; UNSC Res. S/RES/1756 (15 May 2007) [preamble para. 2].

[365] UNGA Res. A/RES/63/128 (11 December 2008) [preamble para. 6]; UNGA Res. A/RES/64/68 (2 December 2009) [preamble paras. 10 and 12, operative para. 2]; UNGA Res. A/RES/63/39 (2 December 2008) [preamble paras. 6 and 7]; UNGA Res. A/RES/63/189 (18 December 2008) [preamble para. 3]; UNGA Res. A/RES/63/164 (18 December 2008) [preamble paras. 2, 3, 6 and 8, operative para. 4]; UNGA Res. A/RES/62/145 (18 December 2007) [preamble paras. 3 and 5, operative paras. 2 and 4]; UNGA Res. A/RES/62/39 (5 December 2007) [preamble paras. 6 and 7]; UNGA Res. A/RES/61/101 (13 December 2006) [preamble para. 8, operative para. 2]; UNGA Res. A/RES/61/160 (19 December 2006) [preamble para. 3]; UNGA Res. A/RES/61/151 (13 December 2006) [preamble paras. 3 and 5]; UNGA Res. A/RES/60/288 (8 September 2006) [preamble paras. 5 and 7]; UNGA Res. A/RES/60/53 (8 December 2005) [preamble para. 7]; UNGA Res. A/RES/60/94 (8 December 2005) [preamble para. 7, operative para. 2]; UNGA Res. A/RES/59/193 (20 December 2004) [preamble para. 3]; UNGA Res. A/RES/59/178 (20 December 2004) [preamble paras. 2, 3 and 5, operative para. 5]; UNGA Res. A/RES/58/70 (8 December 2003) [preamble para. 7, operative para. 2]; UNGA Res. A/RES/58/317 (5 August 2004) [preamble paras. 1, 2 and 4, operative paras. 3 and 8]; UNGA Res. A/RES/58/192 (22 December 2003) [preamble paras. 4, 8 and 11, operative paras. 4 and 5]; UNGA Res. A/RES/58/35 (8 December 2003) [preamble para. 7]; UNGA Res. A/RES/57/213 (18 December 2002) [preamble para. 3]; UNGA Res. A/RES/57/99 (22 November 2002) [preamble

These resolutions are consistent in condemning actions of States, short of the threat or use of force. In some instances, the resolutions use phrases or words such as 'threat or use of force,'[366] 'aggression'[367] or 'military intervention,'[368] 'occupation'[369] and 'annexation.'[370]

para. 7, operative para. 2]; UNGA Res. A/RES/57/56 (22 November 2002) [preamble paras. 6 and 7]; UNGA Res. A/RES/56/232 (24 December 2001) [preamble paras. 3 and 5, operative para. 4]; UNGA Res. A/RES/56/151 (19 December 2001) [preamble para. 3]; UNGA Res. A/RES/56/18 (29 November 2001) [operative para. 2]; UNGA Res. A/RES/55/86 (4 December 2000) [preamble paras. 3 and 4, operative paras. 2 and 4]; and UNGA Res. A/RES/54/151 (17 December 1999) [preamble para. 3, operative para. 4].

[366] See UNSC Res. S/RES/1827 (30 July 2008) [operative para. 2]; UNSC Res. S/RES/1741 (30 January 2007) [operative para. 6]; UNSC Res. S/RES/1711 (29 September 2006) [operative para. 9]; UNSC Res. S/RES/1653 (27 January 2006) [operative para. 11]; UNSC Res. S/RES/1649 (21 December 2005) [preamble para. 9]; UNSC Res. S/RES/1640 (23 November 2005) [operative para. 2]; UNSC Res. S/RES/1531 (12 March 2004) [operative para. 5]; UNSC Res. S/RES/1291 (24 February 2000) [preamble para. 2]; UNSC Res. A/RES/62/70 (6 December 2007) [preamble para. 7]; UNGA Res. A/RES/62/166 (18 December 2007) [operative para. 2]; UNGA Res. A/RES/60/1 (16 September 2005) [operative para. 5]; UNGA Res. A/RES/59/314 (13 September 2005) [operative para. 5]; UNGA Res. A/RES/ES-10/15 (2 August 2004) [preamble para. 4]; UNGA Res. A/RES/58/189 (22 December 2003) [operative para. 6]; UNGA Res. A/RES/58/192 (22 December 2003) [preamble para. 8]; UNGA Res. A/RES/58/188 (22 December 2003) [operative para. 2]; UNGA Res. A/RES/58/161 (22 December 2003) [preamble para. 3]; UNGA Res. A/RES/56/154 (19 December 2001) [operative para. 7]; UNGA Res. A/RES/55/85 (4 December 2000) [preamble para. 3]; UNGA Res. A/RES/55/38 (20 November 2000) [operative para. 2].

[367] UNGA Res. A/RES/63/163 (18 December 2008) [preamble para. 5]; UNGA Res. A/RES/59/180 (20 December 2004) [preamble para. 5]; UNGA Res. A/RES/60/145 (16 December 2005) [operative para. 5]; UNGA Res. A/RES/63/44 (2 December 2008) [preamble para. 8]; UNGA Res. A/RES/62/27 (5 December 2007) [preamble para. 3]; UNGA Res. A/RES/62/126 (18 December 2007) [operative para. 8]; UNGA Res. A/RES/58/316 (1 July 2004) [operative para. 4]; UNGA Res. A/RES/58/161 (22 December 2003) [preamble para. 5, operative para. 2]; UNGA Res. A/RES/58/189 (22 December 2003) [operative para. 6]; UNSC Res. S/RES/1625 (14 September 2005) [operative para. 8].

[368] See UNGA Res. A/RES/63/163 (18 December 2008) [preamble para. 5]; UNGA Res. A/RES/62/144 (18 December 2007) [preamble para. 5]; UNGA Res. A/RES/61/150 (19 December 2006) [preamble para. 5]; UNGA Res. A/RES/60/145 (16 December 2005) [preamble para. 5]; UNGA Res. A/RES/59/180 (20 December 2004) [preamble para. 5]; UNGA Res. A/RES/58/161 (22 December 2003) [preamble para. 5, operative para. 2]; UNGA Res. A/RES/57/197 (18 December 2002) [preamble para. 5]; UNGA Res. A/RES/56/141 (19 December 2001) [preamble para. 5]; UNGA Res. A/RES/55/85 (4 December 2000) [preamble para. 5].

[369] UNGA Res. A/RES/64/68 (2 December 2009) [operative para. 2]; UNGA Res. A/RES/63/95 (5 December 2008) [operative para. 5]; UNGA Res. A/RES/63/86 (2 December 2008) [operative para. 2]; UNGA Res. A/RES/62/58 (5 December 2007) [operative para. 2]; UNGA Res. A/RES/59/180 (20 December 2004) [operative para. 3]; UNGA Res. A/RES/59/123 (10 December 2004) [operative para. 3]; UNGA Res. A/RES/58/229 (23 December 2003) [preamble paras. 4, 5, 6 and 8, operative paras. 2 and 4]; UNGA Res. A/RES/58/161 (22 December 2003) [preamble paras. 2 and 3, operative para. 5]; UNGA Res. A/RES/58/96 (9 December 2003) [preamble para. 5]; UNGA Res. A/RES/58/70 (8 December 2003) [operative para. 2]; UNGA Res. A/RES/57/337 (3 July 2003) [preamble para. 17]; UNGA Res. A/RES/57/128 (11 December 2002) [preamble para. 2]; UNGA Res. A/RES/56/63 (10 December 2001) [preamble paras. 2 and 6]; UNGA Res. A/RES/55/134 (8 December 2000) [preamble paras. 2 and 6]; UNSC Res. S/RES/1546 (8 June 2004) [preamble para. 1].

[370] UNGA Res. A/RES/63/97 (5 December 2008) [preamble para. 16]; UNGA Res. A/RES/63/99 (5 December 2008) [preamble para. 7]; UNGA Res. A/RES/63/31 (26 November 2008) [operative para. 4]; UNGA Res. A/RES/63/29 (26 November 2008) [operative para. 12]; UNGA Res. A/RES/62/83 (10 December 2007) [operative para. 13]; UNGA Res. A/RES/62/108 (17 December 2007) [preamble para. 16]; UNGA Res. A/RES/61/120 (14 December 2006) [preamble para. 7]; UNGA Res. A/RES/61/27 (1 December 2006) [operative para. 4]; UNGA Res. A/RES/61/25 (1 December 2006) [operative para. 11]; UNGA Res. A/RES/61/118 (14 December 2006) [preamble para. 16]; UNGA Res. A/RES/60/40 (1 December 2005) [operative para. 4]; UNGA Res. A/RES/60/108 (8 December 2005) [preamble para. 7]; UNGA Res. A/RES/60/106 (8 December 2005) [preamble para. 16]; UNGA

Mindful of the debate regarding the legal effect of the General Assembly's Resolutions,[371] or the legitimacy deficit of the Security Council,[372] a positivist would settle with the narrow meaning of Article 2(4). Cassese concedes that the textual reading of Article 2(4) means that:

> First, the ban on force is an absolute all-inclusive prohibition…. Second, only military force was proscribed…. Third, only the use or threat of force in interstate relations are banned ….[373]

This pattern of thinking creates a necessary link between Article 2(4) and the principle of *ex injuria jus non oritur.*[374] Thus, the meaning of Article 2(4) has been restricted to the use of force[375] either for the purposes of acquisition, annexation, or occupation.[376] The usufruct

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Res. A/RES/58/100 (9 December 2003) [preamble para. 7]; UNGA Res. A/RES/58/98 (9 December 2003) [preamble para. 11]; UNGA Res. A/RES/57/128 (11 December 2002) [preamble para. 7]; UNGA Res. A/RES/56/63 (10 December 2001) [preamble para. 7]; UNGA Res. A/RES/55/134 (8 December 2000) [preamble para. 7].

[371] Marko Divac Oberg, 'The Legal Effects of Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ' (2005) 16(5) *European Journal of International Law* 879-906, 884.

[372] Martin Binder and Monika Heupel, 'The legitimacy of the UN Security Council: Evidence from recent General Assembly Debates' (2015) 59(2) *International Studies Quarterly* 238-250.

[373] Cassese 1986 (n 41) 137.

[374] According to this principle, 'acts which are contrary to international law cannot become a source of legal rights for a wrongdoer.' See *Oppenheim 1996* (n 38) 184. This principle is established in international law. See *Case of the Free Zones of Upper Savoy and the District of Gex* (Second phase) Order PCIJ Series A, No. 48 (1930) 16; *Case Concerning the Legal Status of South-Eastern Territory of Greenland,* Order PCIJ Series A/B, No. 48 (1932) 285; *Jurisdiction of the Courts of Danzig,* Advisory Opinion PCIJ Series B, No. 15 (1928) 26; *Legal Status of Eastern Greenland,* Judgment PCIJ Series A/B, No. 53 (1933) 75, 95; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* Advisory Opinion ICJ Reports [1971] p. 16, 46-47; Hersch Lauterpacht, 'The Principle of Non-Recognition in International Law' in Quincy Wright (ed), *Legal Problems in the Far Eastern Conflict* (New York, Institute of Pacific Relations 1941) 139.

[375] For detailed Resolutions from the General Assembly and the Security Council on 'inadmissibility of acquisition by force' and 'inviolability of territorial borders,' see footnote 24 of the *Repertory Supplement No. 10* (n 360) 9.

[376] UNGA Res. A/RES/63/95 (5 December 2008) [operative para. 4]; UNGA Res. A/RES/62/106 (17 December 2007) [operative para. 4]; UNGA Res. A/RES/61/116 (17 December 2007) [operative para. 4]; UNGA Res. A/RES/63/98 (5 December 2008) [preamble para. 19]; UNGA Res. A/RES/62/109 (17 December 2007) [preamble para. 19]; UNGA Res. A/RES/59/290 (13 April 2005) [preamble para. 13].

therefrom is 'illegal,'[377] and 'null and void'[378] or without 'international legal effect.'[379]

In the 21st century where cyberspace and the nefarious activities of the non-State actors pose threats to the national security of States, a broad perspective has become imperative. The rediscovery of the broader meaning enhances the purposes of the UN and will make States more accountable for their wrongful acts.[380]

3.7.3 The *de minimis* rule and the issue regarding a broad interpretation

The *de minimis* rule originates from the Roman Law and has two aspects, namely, procedural and substantive.[381] The procedural aspect deals with the practice by which the praetor does not concern himself with triviality (*de minimis non curat praetor*). The substantive aspect is derived from the *de minimis non curat lex* maxim, which means that the law does not deal with triviality.[382]

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377 UNGA Res. A/RES/63/98 (5 December 2008) [operative para. 1]; UNGA Res. A/RES/62/109 (17 December 2007) [operative para. 1]; UNGA Res. A/RES/62/108 (17 December 2007) [operative para. 1]; UNGA Res. A/RES/61/118 (14 December 2006) [operative para. 1]; UNGA Res. A/RES/61/119 (14 December 2006) [operative para. 1]; UNGA Res. A/RES/61/25 (1 December 2006) [preamble para. 13]; UNGA Res. A/RES/60/107 (8 December 2005) [operative para. 1]; UNGA Res. A/RES/60/39 (1 December 2005) [preamble para. 13]; UNGA Res. A/RES/59/124 (10 December 2004) [operative para. 1]; UNGA Res. A/RES/59/125 (10 December 2004) [preamble para. 7]; UNGA Res. A/RES/59/33 (1 December 2004) [preamble para. 7]; UNGA Res. A/RES/59/32 (1 December 2004) [operative para. 1]; UNGA Res. A/RES/59/31 (1 December 2004) [preamble para. 13]; UNGA Res. A/RES/58/98 (9 December 2003) [preamble para. 13]; UNGA Res. A/RES/58/21 (3 December 2003) [preamble para. 10]; UNGA Res. A/RES/56/63 (10 December 2001) [preamble para. 7]; UNGA Res. A/RES/56/36 (3 December 2001) [preamble para. 9].

378 UNGA Res. A/RES/63/31 (26 November 2008) [operative para. 2]; UNGA Res. A/RES/63/30 (26 November 2008) [operative para. 1]; UNGA Res. A/RES/63/99 (5 December 2008) [operative para. 1]; UNGA Res. A/RES/62/84 (10 December 2007) [preamble para. 2]; UNGA Res. A/RES/62/110 (17 December 2007) [operative para. 1]; UNGA Res. A/RES/62/85 (10 December 2007) [operative para. 2]; UNGA Res. A/RES/61/120 (14 December 2006) [operative para. 1]; UNGA Res. A/RES/61/26 (1 December 2006) [operative para. 1]; UNGA Res. A/RES/61/27 (1 December 2006) [operative para. 2]; UNGA Res. A/RES/60/108 (8 December 2005) [operative paras. 1 and 3]; UNGA Res. A/RES/60/41 (1 December 2005) [preamble para. 2, operative para. 1]; UNGA Res. A/RES/60/40 (1 December 2005) [operative para. 2]; UNGA Res. A/RES/59/125 (10 December 2004) [operative paras. 1 and 3]; UNGA Res. A/RES/59/32 (1 December 2004) [operative para. 1]; UNGA Res. A/RES/58/100 (9 December 2003) [operative paras. 1 and 3]; UNGA Res. A/RES/57/128 (11 December 2002) [operative paras. 1 and 3]; UNGA Res. A/RES/56/63 (10 December 2001) [operative paras. 1 and 3]; UNGA Res. A/RES/55/134 (8 December 2000) [operative paras. 1 and 3].

379 UNGA Res. A/RES/ 63/99 (5 December 2008) [operative para. 1]; UNGA Res. A/RES/ 62/110 (17 December 2007) [operative para. 1]; UNGA Res. A/RES/ 61/120 (14 December 2006) [operative para. 1]; UNGA Res. A/RES/ 60/108 (8 December 2005) [operative para. 1]; UNGA Res. A/RES/58/100 (9 December 2003) [operative para. 1]; UNGA Res. A/RES/57/128 (11 December 2002) [operative para. 1]; UNGA Res. A/RES/56/63 (10 December 2001) [operative para. 1]; UNGA Res. A/RES/55/134 (8 December 2000) [operative para. 1].

380 See generally, Annex to UNGA Res. A/RES/56/83 (12 December 2001) [hereinafter *States responsibility*].

381 Janja Hojnik, 'De Minimis Rule within the EU Internal Market Freedoms: Towards a More Mature and Legitimate Market?' (2013) 6(1) *European Journal of Legal Studies* 25-45, 26.

382 Hojnik (n 381) 26-27.

The distinction made by the ICJ in the *Nicaragua* case between a graver and a lesser form of the use of force appears to have applied this rule. The ICJ uses the phrase "mere frontier incidents" to refer to minimal incursions[383] that do not trigger the right to self-defence. This interpretation is widely debated.[384]

In the Eritrea/Ethiopia Claims Commission Award on Ethiopia's *jus ad bellum* Claims 1-8,[385] the Commission was to determine which of the States fired the first shot in May and in June 1998 and whether the supposedly victim State could rely on the right to self-defence. The Commission was unable to determine who fired the first shot based on the facts placed before it. However, the Commission held that the incursions were relatively minor incidents that do not qualify as an armed attack.[386]

The *de minimis* theorists like Olivier Corten, Robert Kolb, and Mary Ellen O'Connell argue that the right to self-defence 'covers all physical force which surpasses a minimum threshold of intensity.'[387] It excludes 'targeted Killing of single individuals, forcible abductions of individual persons or the interception of a single aircraft.'[388] Others include 'operations aimed at rescuing nationals abroad, "hot pursuit" operations, small-scale counterterrorist operations abroad, and localized hostile encounter between military units.'[389] Corten illustrates his claim with examples.[390] For our purposes, this could mean that a State territory is breached when the gravity threshold is crossed.

For want of space, those incidents that could fall below the gravity threshold will not be analysed individually here. Some of them will be dealt with later in subsequent chapters to buttress the deficiency of the *de minimis* rule. However, Ruys' reappraisal of the *de minimis*

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[383] *Nicaragua Case* (n 6) [paras. 191, 195 and 247]; *Corfu Channel Case* (n 194) 30-31 (the Court argues that the passage of the Royal Navy could 'demonstrate such force' means that it constitutes a threat. However, the Court held that it was not sufficient to violate Albania's sovereignty).

[384] Corten (n 165) 55, 77; Mary Ellen O'Connell, 'The true meaning of force' (AJIL Unbound blog, 4 August 2014) available at <https://www.asil.org/blogs/true-meaning-force> accessed 18 April 2017; Gray (n 38) 148; *Report on the Conflict in Georgia* (n 244) 242.

[385] *Eritrea/Ethiopia Claims Commission Partial Award – Jus Ad Bellum – Ethiopia's Claims 1-8* (2006) 45 *International Legal Materials* 430-435 [para. 11].

[386] ibid., [para 12].

[387] *Report on the Conflict in Georgia* (n 244) 242; Corten (n 165) 77.

[388] *Report on the Conflict in Georgia* (n 244) 242 (footnote 49).

[389] Ruys (n 203) 159.

[390] Corten (n 165) 54-77.

rule is worth reading.[391] He pointed out that the prohibition of the use of force under Article 2(4) is a *jus cogens* norm. Therefore, 'no consideration of whatever nature may be invoked to warrant resorting to the threat or use of force in violation of the Charter.'[392] Sharp agrees with Ruys' analysis and reiterates that Article 2(4) prohibits unarmed physical force, such as the spreading of fire across a State frontier.[393] Henkin concludes that the conjunctive phrase, "inconsistent with the purposes of the United Nations" in Article 2(4) is a comprehensive ban.[394]

From a conceptual standpoint, the *de minimis* school and the broad approach school have a common objective, namely, prevention of war. While the *de minimis* approach is precautionary, the broad approach is preventive. It is incorrect to assert that all actions that violate the territory of a State amount to physical or armed force in the sense already discussed. The spreading of fire across a State's frontier does not qualify as an armed force but is a breach of the territory of the victim State. It should not be forgotten that such acts could lead to the destruction of lives and properties.

Again, a State may embark upon law enforcement activities to secure its fisheries jurisdiction,

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[391] Ruys (n 203) 159-210.

[392] ibid., 161-62; UNGA Res. A/RES/42/22 (18 November 1987) [Annex – Section I, para. 3]. For whether the use of force is permitted as a countermeasure operation see Josef Mrazek, 'Prohibition of the Use and Threat of Force: Self-Defence and Self-Help in International Law' (1989) 27 *Canadian Yearbook of International Law* 81-112, 90; *Draft Articles on Responsibility of States for Internationally Wrongful Acts* (Adopted by the International Law Commission at its fifty-third session in 2001) (Volume II, Part II, Yearbook of International Law Commission 2001) 26 [Art. 66] [hereinafter *Articles on Responsibility of States*]; *Arbitral Tribunal Constituted Pursuant to Article 287, and in accordance with Annex VII, of the United Nations Convention on the Law of the Sea in the Matter of an Arbitration Between Guyana and Suriname* (Permanent Court of Arbitration, The Hague 17 September 2007) 30 RIAA 1-144 [para. 446] [hereinafter *Guyana/Suriname Award*]; Argument against necessity, see Gray (n 38) 217-19; Roberto Ago, 'Addendum to the eight report on State Responsibility' (Volume II, Part I, Yearbook of International Law Commission 1980) 13 [paras. 7, 8, 18, 56, 40-41, 58-59, 44 and 66]; cf Jens David Ohlin, 'The Bounds of Necessity' (2008) 6(2) *Journal of International Criminal Justice* 289-308; *Articles on Responsibility of States* (n 392) [Art. 25(2)].

[393] Walter Gary Sharp, *Cyberspace and the Use of Force* (USA, Aegis Research Corporation 1999) 101; Daniel B. Silver, 'Computer network attack as a use of force under Article 2(4) of the United Nations Charter' in Michael N. Schmitt and Brian T. O'Donnell (eds), *Computer Network Attack and International Law* (Newport / Rhode Island, US Naval War College 2002) 82-83.

[394] Henkin 1968 (n 343) 39-40; Sean D. Murphy, 'Terrorism and the Concept of Armed Attack in Article 51 of the U.N. Charter' (2002) 43(1) *Harvard International Law Journal* 41-52, 42; Dino Kritsiotis, 'When states use armed force' in Christian Reus-Smit (ed), *The Politics of International Law* (Cambridge, Cambridge University Press 2004) 58-59.

kept within the limit of reasonableness and necessity.[395] The Arbitration Committee in Guyana/Suriname Arbitral Award of 17 September 2007 held that law enforcement does not violate a State territory.[396] Judge Simma supports the idea that proportionate countermeasures undertaken by a victim State to stop the violation are permissible.[397]

However, issues relating to law enforcement are more complex than they might appear at first sight, particularly regarding the enforcement of universal jurisdiction in criminal matters without extradition treaty. For instance, was the abduction of Adolf Eichmann from Argentina's territory, the kidnapping of Herr Lampersberger from the Czechoslovakian territory, and the abduction of Herr Berthold Jacob-Salomon from Swiss territory lawful without a prior authorisation?[398] Are they attributable to States if they were carried out by their agents? The *de minimis* theorists would argue that they are trivial matters but do they further the purposes of the UN?

Although exceptions to the law are based on practicality and common sense,[399] it must be admitted that a State's conduct which strains its relations with another State do not enhance international peace and security. Respect entails attitudinal change towards accepting other States as sovereigns and equals. It must be stressed that the persistent minimal incursions into the territory of other States could endanger international peace and security.[400] That some States choose to ignore it does not legitimise it as the acceptable standard of behaviour. Ruys has identified reasons why States may choose to ignore it[401] but that does not diminish the *jus cogens* character of Article 2(4).

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[395] International Tribunal for the Law of the Sea, *The M/V "Saiga" (No. 2) Case* (Saint Vincent and Grenadines v Guinea) Judgment (1999) 38 *International Legal Materials* 1323-1364 [para. 155]; *ILA Report on the use of force* (n 223) 3.

[396] *Guyana/Suriname Award* (n 392) [para. 445]; *S.S. "I'm Alone"* (Canada/United States) Award 30 June 1933 and 5 January 1935, 3 RIAA 1609-1618, 1615.

[397] *Oil Platforms* (Islamic Republic of Iran v United States of America) Judgment ICJ Reports (2003) p. 161 [hereinafter *Oil platforms case*] (see the Separate Opinion of Judge Simma at p. 331 para. 12).

[398] Edwin D. Dickinson, 'Jurisdiction Following Seizure or Arrest in Violation of International Law' (1934) 28(2) *American Journal of International Law* 231-245; Lawrence Preuss, 'Kidnaping of Fugitives from Justice on Foreign Territory' (1935) 29(3) *American Journal of International Law* 502-507; Hans W. Baade, 'The Eichmann Trial: Some Legal Aspects' (1961) 10(3) *Duke Law Journal* 400-420; Felice Morgenstern, 'Jurisdiction in Seizures Effected in violation of International Law' (1952) 29 *British Year Book of International Law* 265-282.

[399] O'Connell 2014 (n 384) (the Internet page).

[400] Mario Amadeo, 'Letter dated 15 June 1960 from the Representative of Argentina addressed to the President of the Security Council,' UN Doc. S/4336 (15 June 1960) 1-3; UNSC Res. S/138 (23 June 1960) [para. 1]; see generally, UNSCOR, UN Doc. S/PV.865 (22 June 1960); UNSCOR, UN Doc. S/PV.868 (23 June 1960).

[401] Ruys (n 203) 168-69.

Besides, the recent Resolutions issued by the Security Council lay emphasis on good-neighbourliness among States.[402] Viewed as such, the minimal incursions are inadmissible and States whose territories are breached could take reasonable steps to redress the wrongful act.[403]

3.8 The *Jus Cogens* Character of Article 2(4)

According to the ILC, 'the law of the Charter concerning the prohibition of the use of force in itself constitutes a conspicuous example of a rule in international law having the character of *jus cogens.*'[404] Both the ICJ's jurisprudence[405] and scholarship[406] endorse this interpretation. Article 53 of the VCLT[407] designates a peremptory norm as a norm 'accepted and recognised by the international community of States as a whole as a norm from which no derogation is

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[402] See preamble paragraph 2 of the following Security Council Resolutions: S/RES/1945 (14 October 2010); S/RES/1944 (14 October 2010); S/RES/1962 (20 December 2010); S/RES/1911 (28 January 2010); S/RES/1933 (30 June 2010); S/RES/2031 (21 December 2011); S/RES/1975 (30 March 2011); S/RES/1980 (28 April 2011); S/RES/2000 (27 July 2011).

[403] *Lotus Case* (n 6) 28; *Nicaragua Case* (n 6) [para. 188]; Ruys (n 203) 167-69.

[404] *Draft Code of Offences against the Peace with Commentary* (295) 247.

[405] *Nicaragua Case* (n 6) [para. 190]; *Oil Platforms case* (n 397) 378 (Separate Opinion of Judge Rigaux); *DRC v Uganda* (n 6) 223-225 (the Court described the prohibited act under Article 2(4) as the cornerstone of the United Nations Charter).

[406] Alexander Orakhelashvili, *Peremptory Norms in International Law* (Oxford, Oxford University Press 2006) 51; Ian D. Seiderman, *Hierarchy in International Law: the Human Rights Dimension* (Antwerp, Intersentia 2001) 61; Corten (n 165) 200-213; Crawford 2006 (n 263) 146; Dinstein 2011 (n 176) 99-104; Nicholas J. Wheeler, *Saving Strangers: Humanitarian Intervention in International Society* (Oxford, Oxford University Press 2000) 44-45; Mohammad Taghi Karoubi, *Just or Unjust War? International Law and Unilateral Use of Armed Force by States at the turn of the 20th Century* (Burlington, Ashgate Publishing Company 2004) 108-109; Lindsay Moir, *Reappraising the Resort to Force: International Law, Jus Ad Bellum and the War on Terror* (Oxford, Hart Publishing 2010) 9; Lauri Hannikainen, *Peremptory Norms (Jus Cogens) in International Law: Historical Development, Criteria, Present Status* (Helsinki, Finnish Lawyers Publication Co., 1988) 323, 356; Ian Sinclair, *The Vienna Convention on the Law of Treaties* (Second Edition, Manchester, Manchester University Press 1984) 215-216, 222-223; Robert Kolb, *Peremptory International Law – Jus Cogens: A General Inventory* (Oxford, Hart Publishing 2015) 124; Dino Kritsiotis, 'Reappraising Policy Objections to Humanitarian Intervention' (1998) 19(4) *Michigan Journal of International Law* 1005-1050, 1042-1043; Carin Kahgan, 'Jus Cogens and the Inherent Right to Self- Defense' (1997) 3(3) *ILSA Journal of International & Comparative Law* 767-828, 777-781; Jonathan I. Charney, 'Anticipatory Humanitarian Intervention in Kosovo' (1999) 93(4) *American Journal of International Law* 834-841, 837; Michael N. Schmitt, 'Computer Network Attack and the Use of Force in International Law: Thoughts on a Normative Framework' (1999) 37(3) *Columbia Journal of Transnational Law* 885-938, 922; Oscar Schachter, 'In Defense of International Rules on the Use of Force' (1986) 53(1) *University of Chicago Law Review* 113-146, 129; Egon Schwelb, 'Some Aspects of International *Jus Cogens* as Formulated by the International Law Commission' (1967) 61(4) *American Journal of International Law* 946-975, 952; Pamela J. Stephens, 'A Categorical Approach to Human Rights Claims: Jus Cogens as a Limitation on Enforcement?' (2004) 22(2) *Wisconsin International Law Journal* 245-272, 253-254; Alfred Verdross, 'Jus Dispositivum and Jus Cogens in International Law' 60(1) *American Journal of International Law* 55-63, 60; Simma 1999 (n 284) 3; Marjorie M. Whiteman, 'Jus Cogens in International Law, with a Projected List' (1977) 7(2) *Georgia Journal of International & Comparative Law* 609-628, 625.

[407] VCLT (n 76) [Art. 53].

permitted.' By "derogation" is meant that no treaty could modify or set aside a peremptory norm,[408] except a subsequent peremptory norm having the same character.[409] Even the distinction between aggression and the lesser form of the use of force does not affect the peremptory character of Article 2(4).[410]

The peremptory norms are "the concern of all states"[411] and States have a legal interest in their protection.[412] In the *Case Concerning Armed Activities on the Territory of the Congo*,[413] Judge Simma showed his dissatisfaction with the Court's reluctance to classify Uganda's invasion of the Democratic Republic of the Congo as an act of aggression. In his words, 'if there ever was a military activity before the Court that deserves to be qualified as an act of aggression, it is the Ugandan invasion of the DRC.'[414] It must be stressed that the initial entry by invitation is immaterial. The ICJ's reluctance puts the *jus cogens* character of Article 2(4) into jeopardy.[415]

The Judicial institutions often run into difficulties when they qualify the "use of force," "armed attack" or "aggression" because of the narrow interpretive approach to Article 2(4). Admittedly, there is a disconnect between the conceptual designation of Article 2(4) as a peremptory norm on which no derogation is permitted on the one hand and the state practice on the other hand. Sometimes, the UN Member States disregard the peremptory character of Article 2(4) on certain grounds, such as human rights, self-determination, humanitarian intervention, *et cetera*.[416]

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[408] Corten (n 165) 200.
[409] VCLT (n 76) [Art. 53]; Ruys (n 203) 160.
[410] Corten (n 165) 200.
[411] *Barcelona Traction, Light and Power Company, Limited,* (Second Phase) Judgment ICJ Reports (1970) p. 3 [para. 33].
[412] ibid., [para. 33].
[413] *DRC v Uganda* (n 6) 334-335 (Separate Opinion of Judge Simma).
[414] ibid., 335 (Separate Opinion of Judge Simma).
[415] James A. Green, 'Questioning the Peremptory Status of the Prohibition of the Use of Force' (2011) 32(1) *Michigan Journal of International Law* 215-257.
[416] Simma 1999 (n 284) 2-3; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v Serbia and Montenegro) Judgment ICJ Reports (2007) p. 43 [paras. 163, 165]; Anthony D'Amato, 'The invasion of Panama was a lawful response to tyranny' (1990) 84(2) *American Journal of International Law* 516-524, 516, 520; W. Michael Reisman, 'Coercion and self-determination: Construing Charter Article 2(4)' (1984) 78(3) *American Journal of International Law* 642-645, 643; cf Louis Henkin, 'The Use of Force: Law and U.S. Policy' in Louis Henkin *et al*., (eds), *Right v. Might: International Law and the Use of Force* (New York and London, Council on Foreign Relation Press 1989) 38 (Henkin argues that these other objectives must be sought via other means order than the use of force); Cassese 1995 (n 62) 199-200;

It is arguable whether these grounds qualify as *jus cogens* norms capable of modifying or abrogating Article 2(4).[417] It would indeed appear not to be so. Although the ICJ in the *East Timor case* affirms that the right to self-determination has an *erga omnes* character,[418] not all *erga omnes* obligations derive from peremptory norms.[419] It is not justified to violate a State territory if not strictly in accordance with the permitted exceptions under the UN Charter.

3.8.1 Treaty regime that derogates the *jus cogens* character of Article 2(4)

A question concerning the peremptory character of Article 2(4) might arise where a treaty[420] expressly permits that a State territory might be violated under certain circumstances. Article 42 of the UN Charter authorises the Security Council to take "such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security."[421] Similarly, Article 51 of the UN Charter permits a coercive measure in self-defence for a State that is a victim of an armed attack. *Prima facie*, this suggests that the State territory is not inviolable. However, an objection could be that the normative value of the UN Charter is

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Oscar Schachter, 'The Legality of Pro-democratic Invasion' (1984) 78(3) *American Journal of International Law* 645-650, 649.

[417] David Wippman, 'Treaty-Based Intervention: Who Can Say No' (1995) 62(2) *University of Chicago Law Review* 607-688, 619.

[418] *Case Concerning East Timor* (Portugal v Australia) Judgment ICJ Reports (1995) p. 90 [para. 29].

[419] Alain Pellet, 'Can a State commit a Crime? Definitely, Yes!' (1999) 10(2) *European Journal of International Law* 425-434, 429.

[420] *UN Charter* (n 5) [Arts. 42 and 51]; United Nations*, Convention on the Law of the Sea* (Concluded at Montego Bay on 10 December 1982, entered into force on 16 November 1994) 1833 UNTS 397 [Arts. 105, 110 and 111] [hereinafter *UNCLOS*]; *Treaty of Guarantee between the Republic of Cyprus and Greece, the United Kingdom and Turkey* (Adopted 16 August 1960, entered into force 16 August 1960) 382 UNTS 8 [Art. 4]; *Treaty of friendship between Persia and the Soviet Union* (Signed at Moscow on 26 February 1921) 9 LNTS 384 [Art. 6]. This treaty was abrogated by Iran in 1979, see W. Michael Reisman, 'Termination of the USSR's Treaty Right of Intervention in Iran' (1980) 74(1) *American Journal of International Law* 144-154; *Inter-American Treaty of Reciprocal Assistance* (Signed at Rio de Janeiro on 2 September 1947, entered into force on 3 December 1948) 21 UNTS 77 [Arts. 3, 6, 8 and 17]; *North Atlantic Treaty* (Signed at Washington 4 April 1949, entered into force on 24 August 1949) 34 UNTS 243 [Art. 5]; *Treaty of Friendship, Co-operation and Mutual Assistance Between the People's Republic of Albania, the People's Republic of Bulgaria, the Hungarian People's Republic, the German Democratic Republic, the Polish People's Republic, the Romanian People's Republic, the Union of Soviet Socialist Republics and the Czechoslovak Republic* (Signed at Warsaw on 14 May 1955, entered into force on 6 June 1955) 219 UNTS 3 [Art. 4] (this treaty was abrogated officially at a meeting in Prague on 1 July 1991); *Southeast Asia Collective Defense Treaty* (Signed at Manila on 8 September 1954, entered into force 13 February 1955) 209 UNTS 23 [Art. 4]; *Pact of the League of Arab States* (Signed at Cairo 22 March 1945, entered into force on 10 May 1945) 70 UNTS 248 [Art. 6]; *Charter of the Organisation of African Unity* (Done at Addis Ababa on 25 May 1963, entered into force on 13 September 1963) 479 UNTS 39 (1963) [Arts. 8, 10 and 14]; *Constitutive Act of the African Union* (n 122) [Art. 4(h)].

[421] *UN Charter* (n 5) [Art. 42].

contractual. Therefore, good faith requires States to comply with what they have signed up to and ratified.

The *pacta sunt servanda* is a recognised principle that binds parties to a treaty morally as well as legally.[422] Conceptually, a treaty "limits" the sovereignty of a State[423] as held by the ECJ in *Costa v Enel*.[424] For instance, the quota scheme for relocation and resettlement of refugees[425] adopted by the European Parliament was resisted by some European States.[426] Obviously, the said quota scheme breaches the right of the affected States to regulate the inflow of migrants into their territory if they had not contracted such a right out by consenting to the membership of the EU. But a State's sovereignty is not abrogated by a treaty regime as shown by the Brexit of the United Kingdom from the EU.[427]

However, this does not explain the legal basis for unilateral collective forcible measures against a State. Except for the right to collective self-defence, other collective actions should be expressly authorised by the Security Council.[428] A peremptory norm is 'accepted and recognized by the international community of States as a whole.'[429] Article 52 of the UN Charter does not delegate this function to regional bodies.

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[422]VCLT (n 76) [Arts. 26, 27, 46]; Brownlie 1963 (n 30) 377; W. Paul Gormley, 'The Codification of *Pacta Sunt Servanda* by the International Law Commission: The Preservation of Classical Norms of Moral Force and Good Faith' (1970) 14(3) *Saint Louis University Law Journal* 367-428. Treaty may be suspended, terminated or consent withdrawn, see *Oppenheim 1996* (n 38) 1296-1311. There could be circumstances where lack of free consent could generally serve as a defence or falls within *force majeure* defence, see VCLT (n 76) [Arts. 61, 62]; *States responsibility* (n 379) [Arts. 23, 25]; Christina Binder, 'Stability and Change in Times of Fragmentation: The Limits of *Pacta Sunt Servanda* Revisited' (2012) 25(4) *Leiden Journal of International Law* 909-934.

[423] Timothy Zick, 'Are the States Sovereign' (2005) 83(1) *Washington University Law Quarterly* 229-338, 229.

[424] *Case 6/64 Costa v Enel* [1964] ECR 585, 593.

[425] European Commission, 'European schemes for relocation and resettlement of refugees' available at <https://ec.europa.eu/commission/priorities/migration_en> accessed 6 April 2017.

[426] See 'Euro Commission Chief says "no" to Austria's plea to quit refugee quota scheme' (RT News, 5 April 2017) available at <https://www.rt.com/news/383641-eu-austria-refugee-quota/> accessed 6 April 2017; Will Kirby, 'EU ultimatum: Brussels tells Poland and Hungary to "accept more migrants or leave the bloc"' (Express, 4 April 2017) available at <http://www.express.co.uk/news/world/787554/eu-poland-hungary-accept-more-migrants-leave-the-bloc-quotas-beata-szydlo-viktor-orban> accessed 6 April 2017.

[427] The United Kingdom has initiated the withdrawal from the European Union. See '"No turning back" on Brexit as Article 50 triggered' (BBC News, 30 March 2017) available at <http://www.bbc.co.uk/news/uk-politics-39431428> accessed 6 April 2017.

[428] *UN Charter* (n 5) [Art. 53(1)]; Jens Elo Rytter, 'Humanitarian Intervention without the Security Council: From San Francisco to Kosovo - and Beyond' (2001) 70(1-2) *Nordic Journal of International Law* 121-160, 128-130.

[429] For why "as a whole" was inserted in Article 53 of the VCLT, see Rafael Nieto-Navia, 'International peremptory norms (*jus cogens*) and international humanitarian law' 1-27, 10-13 available at <http://www.iccnow.org/documents/WritingColombiaEng.pdf> accessed 14 January 2016.

For instance, Article 4(h) of the *Constitutive Act of the African Union* authorises the 'Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity.'[430] This provision seems not to require a prior authorisation of the Security Council if the stipulated conditions were met.[431] Similarly, Article 10(2)(c) of the *Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peace-Keeping and Security*[432] 'authorise(s) all forms of intervention … particularly on the deployment of political and military missions.' Consequently, the ECOWAS Cease-fire Monitoring Group's (ECOMOG) intervened in Liberia without authorisation from the Security Council.[433] The Security Council Resolution 788 ratified the ECOMOG's intervention in Liberia because the situation constituted a threat to peace and security in West Africa.[434]

The *Protocol on Politics, Defence and Security Co-operation* of the South African Development Coordination Conference (SADC) prescribes for intervention in the territory of a Member State.[435] The only difference is that Article 11(3)(d) of this protocol provides that any action must be authorised by the Security Council.[436] This notwithstanding, in 1998, Angola, Namibia, and Zimbabwe intervened militarily in the DRC without the SADC or the Security Council's authorisation.

[430] *Constitutive Act of the African Union* (n 122) [Art. 4(h)].
[431] Erika De Wet, 'The Evolving Role of ECOWAS and the SADC in Peace Operations: A Challenge to the Primacy of the United Nations Security Council in Matters of Peace and Security?' (2014) 27(2) *Leiden Journal of International Law* 353-369, 366.
[432] *Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peace-Keeping and Security* (Done at Lomé on 10 December 1999) [Art. 10(2)(c)] available at <http://www.zif-berlin.org/fileadmin/uploads/analyse/dokumente/ECOWAS_Protocol_ConflictPrevention.pdf> accessed 31 December 2015 (emphasis added).
[433] De Wet (n 430) 360; Ugo Villani, 'The Security Council's Authorization of Enforcement Action by Regional Organisations' in J. A. Frowein and R. Wolfrum (eds), *Max Planck Yearbook of United Nations Law* (Volume 6, The Netherlands, Kluwer Law International 2002) 543.
[434] UNSC Res. S/RES/788 (19 November 1992) [operative para 1]; UNSC Res. S/RES/813 (26 March 1993) [operative para. 2]; UNSC Res. S/RES/856 (10 August 1993) [operative para. 6]; UN Doc. S/22133 (22 January 1991) [para. 3].
[435] South African Development Community, *Protocol on Politics, Defence and Security Co-operation* (Signed at Blantyre on 14 August 2001, entered into force on 2 March 2004) [Art. 11(2)] available at <http://www.sadc.int/files/3613/5292/8367/Protocol_on_Politics_Defence_and_Security20001.pdf> accessed 17 April 2017 [hereinafter *SADC Protocol on Defence*]; Ben Chigara, 'Operation of the SADC Protocol on Politics, Defence and Security in the Democratic Republic of Congo' (2000) 12(1) *African Journal of International and Comparative Law* 58-69, 62 (Chigara argues that the said intervention in DRC was illegal).
[436] *SADC Protocol on Defence* (n 434) [Art. 11(3)(d)].

3.8.2 Does State's consent precludes the jus cogens' character of Article 2(4)?

The violation of a State's territory is lawful under three conditions, namely, self-defence, authorised by the Security Council pursuant to Chapter VII, and with the consent of the concerned State.[437] Consent precludes the wrongfulness of an act.[438] A detailed analysis of how this applies is done here.[439] Additionally, Deeks has suggested that an *ad hoc* consent could legitimise the breach of the territory of the consenting State[440] as provided for by Article 20 of the Articles on State Responsibility.[441]

What is unclear is whether the consent of a State could be disregarded if that State were accused of a wrongful act. For example, Articles 105, 110, and 111 of the *United Nations Convention on the Law of the Sea*[442] (hereinafter referred to as UNCLOS) permitted forcible measures against a ship or an aircraft registered in another State in certain situations. To the extent that a treaty regime lawfully entered into could preclude the applicability of Article 2(4),[443] a treaty regime that derogates Article 2(4) could potentially contravene the provision of Article 53 of the VCLT.

In that case, the provision of Article 103 of the UN Charter prevails. In fact, Paulus and Leib have suggested that Article 103 prohibits any derogation from Article 2(4), either through

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[437] Antonio Cassese, *International Law* (Second Edition, Oxford, Oxford University Press 2005) 346-374; Monica Hakimi, 'To Condone or Condemn - Regional Enforcement Actions in the Absence of Security Council Authorization' (2007) 40(3) *Vanderbilt Journal of Transnational Law* 643-686, 645; *North Sea Continental Shelf Cases* (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands) Judgment ICJ Reports (1969) p. 3, 42 [hereinafter *North Sea Continental Shelf*]; Karl M. Meessen, 'Unilateral Recourse to Military Force against Terrorist Attacks' (2003) 28(2) *Yale Journal of International Law* 341-354, 341.

[438] Oscar Schachter, 'The Right of States to Use Armed Force' (1984) 82(5 & 6) *Michigan Law Review* 1620-1646, 1645; David Wippman, 'Military Intervention, Regional Organizations, and Host-State Consent' (1996) 7(1) *Duke Journal of Comparative & International Law* 209-240, 209.

[439] Ashley S. Deeks, 'Consent to the Use of Force and International Law Supremacy' (2013) 54(1) *Harvard International Law Journal* 1-60.

[440] ibid., 9-12. For a discussion on whether explicit authorization of the Security Council must be given, see Villani (n 433) 549-53.

[441] *Articles on Responsibility of States* (n 392) [Art. 20].

[442] Sondre Torp Helmersen, 'The Prohibition of the Use of Force as Jus Cogens: Explaining Apparent Derogations' (2014) 61(2) *Netherlands International Law Review* 167-193, 178.

[443] Cassese 2005 (n 437) 369; Ademola Abass, 'Consent Precluding State Responsibility: A Critical Analysis' (2004) 53(1) *International and Comparative Law Quarterly* 211-225, 224; Ole Spiermann, 'Humanitarian Intervention as a Necessity and the Threat or Use of Jus Cogens' (2002) 71(4) *Nordic Journal of International Law* 523-544, 535.

treaty or consent.[444] But the view expressed by the ILC is that a State can validly dispense another State from its obligation under Article 2(4) momentarily without eliminating it completely.[445] This applies when a State 'validly consents to a foreign military presence on its territory for a lawful purpose.'[446]

The ILC's choice of word "may" shows that the requirement to consent is hypothetical. Importantly, the ILC was dealing with circumstances precluding the wrongfulness of States' action and not States' responsibility.[447] Hence, the ICJ held that the refusal of Uganda to withdraw its troops from the territory of the DRC breaches Article 2(4).[448] That said, it is wary that although Article 2(4) is a norm *jus cogens*, exceptions derogating its *erga omnes* character were built into the Charter itself in Articles 41, 51 and 53. A possible explanation is that the territory of a State can only be violated when the conditions stipulated in these provisions are strictly met.

3.8.3 The inherent ambiguity in the peremptory character of Article 2(4)

According to Ian Brownlie, the major feature distinguishing *jus cogens* norms from other principles is their relative indelibility.[449] The relative character means that their normativeness is always evolving.[450] This was alluded to by Article 53 of the VCLT that suggests that the earlier peremptory norms can be modified or abrogated by the later norms.

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[444] A. Paulus and P. Leiß, 'Article 103' in Bruno Simma *et al.,* (eds), *The Charter of the United Nations: A Commentary* (Volume II, Third Edition, Oxford, Oxford University Press 2012) 2110; Helmersen (n 442) 177.

[445] International Law Commission, 'Second Report on State Responsibility by James Crawford – Document A/CN.4/498 and Add. 1-4' (Volume II, Part I, Yearbook of the International Law Commission 1999) 63 [hereinafter *Report of James Crawford on State Responsibility*].

[446] James Crawford, *International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (United Kingdom, Cambridge University Press 2002) 188.

[447] *Report of James Crawford on State Responsibility* (n 445) 63.

[448] *DRC v Uganda* (n 6) [paras. 42, 47, 57 and 149].

[449] Ian Brownlie, *Principles of Public International Law* (Seventh Edition, Oxford, Oxford University Press 2008) 510.

[450] See United Nations Conference on the Law of Treaties Official Records, 'Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966' (Summary Records of the Plenary Meetings and of the Meetings of the Committee of the Whole, First Session, Vienna, 26 March – 24 May 1968) UN Doc. A/CONF.39/11 (1968) 294 [para 8] (Mr Suarez, a delegate from Mexico argues that *jus cogens* norms 'although few in number at the time when inter-State obligations were equally few, they had been increasing since and would continue to increase with the expansion of human, economic, social and political relations'); S. E. Nahlik, 'The Grounds of Invalidity and Termination of Treaties' (1971) 65(4) *American Journal of International Law* 736-756, 745.

Article 2(4) is acclaimed a peremptory norm, but it is sometimes difficult to grasp the scope of its peremptory status. Authors such as Parker and Neylon ascribe the peremptory character to the entire provision of Article 2(4).[451] This ascription draws heavily from the judgment of the ICJ in the *Nicaragua* case,[452] although not everyone accepts that interpretation.[453] Authors that ascribe the peremptory character to Article 2(4) in its entirety make no distinction between the threat of force and the use of force. Green, for instance, argues that 'it is the prohibition of the use of force alone that is *jus cogens* – rather than Article 2(4) as a whole.'[454] At first glance, the ICJ's opinion that the lawfulness or otherwise of the threat of force is predicated upon the lawfulness or otherwise of the actual use of force supports this view.[455]

However, the division of Article 2(4) into two components, "threat" and "use of force" creates more problems than it solves. Preferably, Article 2(4) should be treated as one legal principle meant to protect the integrity of a State. A practical challenge could be that not all threats give rise to a breach like when a non-nuclear State makes a verbal threat of a nuclear attack to a State that has nuclear weapons. Nonetheless, the UN Member States take preventive measures against credible threats.[456] The ICJ's *obiter* in the *Nicaragua* case that the "threat of force" is equally forbidden supports the view that both the "threat of force" and the "use of force" are two separate rights that are substantively equal.[457] Therefore, the peremptory status can be attributed to the threat of force as well.[458] This dissertation agrees with

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[451] Karen Parker and Lyn Beth Neylon, '*Jus Cogens*: Compelling the Law of Human Rights' (1989) 12(2) *Hastings International and Comparative Law Review* 411-464, 436-437; Simma 1999 (n 284) 3; Whiteman 1977 (406) 625; Alfred Verdross, 'Jus Dispositivum and Jus Cogens in International Law' (1966) 60(1) *American Journal of International Law* 55-63, 60.
[452] *Nicaragua Case* (n 6) [para. 190].
[453] Dinah Shelton, 'Righting Wrongs: Reparations in the Articles on State Responsibility' (2002) 96(4) *American Journal of International Law* 833-856, 843; Orakhelashvili (n 406) 41-42; Michael Byers, 'Conceptualising the Relationship between Jus Cogens and Erga Omnes Rules' (1997) 66(2-3) *Nordic Journal of International Law* 211-240, 215.
[454] Green (n 415) 228.
[455] *Legality of the Threat or Use of Nuclear Weapons* (n 6) [para. 47].
[456] For a discussion on how state practice has impacted upon the *jus cogens* status of the use of force, see A. Mark Weisburd, 'The Emptiness of the Concept of Jus Cogens, as Illustrated by the War in Bosnia-Herzegovina' (1995) 17(1) *Michigan Journal of International Law* 1-52.
[457] *Nicaragua Case* (n 6) (n 1) [para. 227].
[458] Green (n 415) 228; Whiteman 1977 (n 406) 625.

Schachter's view that the seeming inherent ambiguity is peripheral and does not affect the core meaning of the prohibited act in Article 2(4).[459]

3.9 The Traditional Scope of the Application of Article 2(4)

Traditionally, Article 2(4) applies to a determinate land, territorial sea and the air space. Chapter four re-appraises the contemporary relevance of this categorisation amidst the emerging cyberspace-territory. Our analysis here is limited to the classical view, which equally applies to overseas territory belonging to a State.[460]

3.9.1 Land

The definition of land is settled at law.[461] Land includes subsoil, sea coast, internal waters, reefs and bays.[462] The internal waters refer not only to 'waters on the landward side of the baseline of the territorial sea…'[463] but also to lakes, rivers and/or similar substances landlocked within the boundaries of a State up to the territorial sea.[464] Also land includes the navigable inter-states waterways created by treaty.[465] The exceptions are the 'Danube and its mouth' created under the Treaty of Paris of 1856[466] and the Peace Treaties that transformed some rivers in Europe to free international waterways.[467]

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[459] Schachter 'The Right of States to Use Armed Force' (n 438) 1625.

[460] The United Kingdom made a commitment to defend its overseas territory. See Foreign and Commonwealth Office, *The Overseas Territories: Security, Success and Sustainability* (2012) 8 available at <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/12249/ot-wp-0612.pdf> accessed 10 October 2015.

[461] *Mott v Palmer* 1 N Y (1848) 564, 569; Nicola Jackson, John Stevens and Robert Pearce, *Land Law* (Fourth Edition, London, Sweet and Maxwell 2008) 11-12; K. J. Gray and P.D. Symes, *Real Property and Real People: Principles of Land Law* (London, Butterworths 1981) 50-51.

[462] *Oppenheim 1996* (n 38) 572; Brownlie 1963 (n 30) 203.

[463] *UNCLOS* (n 420) [Art. 8].

[464] *Oppenheim 1996* (n 38) 574; *UNCLOS* (n 420) [Art. 9]; cf *Convention on the law of the non-navigational uses of international watercourse* (Concluded at New York on 21 May 1997, entered into force on 17 August 2014) [Annex, Art. 8] available at <https://treaties.un.org/doc/Publication/UNTS/No%20Volume/52106/Part/I-52106-0800000280025697.pdf> accessed 22 August 2017 (these waters do not fall within the definition of internal waters).

[465] *Oppenheim 1996* (n 38) 575.

[466] See *General Treaty of Peace between Great Britain, Austria, France, Prussia, Russia, Sardinia, and Turkey* (1856) [Art. 15] reproduced in Edward Hertslet, *The Map of Europe by Treaty: Showing the Various Political and Territorial Changes Which Have Taken Place since the General Peace of 1814; With Numerous Maps and Notes* (Volume 2, London, Butterworths 1875) 1257.

[467] *The Treaty of Versailles 1919* (n 61) [Arts. 331-337]; *Convention and Statute on Freedom of Transit* (Concluded at Barcelona on 20 April 1921, entered into force on 31 October 1922) 7 LNTS 11 [Art. 2]; United Nations, *Convention on the Protection and Use of Transboundary Watercourses and International Lakes* (Done at Helsinki on 17 March 1992, entered into force on 6 October 1996) 1936 UNTS 269 [Art. 14]; *Final Act of the Congress of Vienna* (1815) reproduced in Hertslet (n 466) (Volume 1, London, Butterworths 1875) 269-270 [Arts. 108-109];

Note that these exceptions are contractual and could be revoked by the State affected.[468] Germany rescinded its consent from the free international waterways.[469]

Furthermore, canals[470] constructed within a State fall within the definition of land and are under the territorial sovereignty of the State in whose territory they are constructed. But if constructed like international waterways, they might be subject to the principle applicable to the free international waterways. How reefs, bays and straits form part of land can be accessed from Oppenheim.[471]

International boundaries are often demarcated through natural formations such as mountain ranges, rivers, oceans, and other bodies of water.[472] Territorial disputes arise where boundary delimitations are imprecise. As seen in chapter two, undelimited territorial boundaries do not diminish a State's sovereignty. Instead, Article 2(4) requires that disputes about legal title should be resolved peacefully. Where a treaty does not delimit boundaries between States, the judicial institutions take other factors into account such as effective control[473] or *uti possidetis*.[474] The Court may also consider whether the claimant State has acquired sovereignty over the land through *dereliction*.[475]

Case Relating to the Territorial Jurisdiction of the International Commission of the River Order, Judgment PCIJ Series A, No. 23 (1929) 26-27. In some cases, conditions were attached, see Jan H. W. Verzijl, *International law in Historical Perspective* (Volume 3, Leyden, A.W. Sijthoff 1970) 122-25.

[468] *The Treaty of Versailles 1919* (n 61) [Art. 338]. To show that the consent of the states parties must be obtained, see *Lotus Case* (n 6) 18; International Law Commission, *Report of the Secretary-General on the Legal Problems Relating to the Utilization and Use of International Rivers and documents of the twenty-sixth session of the Commission prepared by the Secretariat* (Volume II, Part II, Yearbook of International Law Commission 1974) 59-67.

[469] *Oppenheim 1996* (n 38) 580.

[470] For a discussion on some of the canals such as Corinth Canal, Suez Canal, Kiel Canal, and Panama Canal see *Oppenheim 1996* (n 38) 591-598; Clive Parry (ed), *A British Digest of International Law: Compiled Principally from the Archives of the Foreign Office* (Volume 2b, London, Stevens and Sons 1967) 321-338.

[471] *Oppenheim 1996* (n 38) 626-660.

[472] Brian Taylor Sumner, 'Territorial Disputes at the International Court of Justice' (2004) 53(6) *Duke Law Journal* 1779-1812, 1783.

[473] *Island of Palmas case* (n 129) 846, 869; Lea Brilmayer and Natalie Klein, 'Land and Sea: Two Sovereignty Regimes in Search of a Common Denominator' (2001) 33(3) *New York University Journal of International Law and Politics* 703-768, 714-716; D. H. N. Johnson, 'Acquisitive Prescription in International Law' (1950) 27 *British Year Book of International Law* 332-354, 345.

[474] *Burkina Faso v Mali* (n 59) [para. 20].

[475] *Oppenheim 1996* (n 38) 716; Brownlie 1963 (n 30) 228; Geoffrey Marston, 'The British Acquisition of the Nicobar Islands, 1869: A Possible Example of Abandonment of Territorial Sovereignty' (1998) 69(1) *British Yearbook of International Law* 245-265, 263.

Every State has exclusive right to control its land. Such rights as could be exercised by the three arms of government. In *the Case of the S.S. Lotus*,[476] France and Turkey requested the PCIJ to determine whether Turkey has jurisdiction to dock the French steamer *S.S. Lotus* at Constantinople and the criminal prosecution of the captain of the ship over the collision incident that happened on the high seas. The PCIJ held that the high sea where the incident occurred is not subject to the jurisdiction of any of the parties.[477]

Article 6 of the Turkish Penal Code, Law No. 765 of 1 March 1926[478] authorises the Turkish Courts to prosecute an offence committed abroad against Turkey or its subjects provided the accused is arrested in Turkey. The PCIJ was to determine 'whether or not the principles of international law prevent Turkey from instituting criminal proceedings against Lieutenant Demons under Turkish Law.'[479] The PCIJ held that 'restriction imposed by international law upon a state is … not (to) exercise its power in any form in the territory of another state.'[480] The Court went on to say that jurisdiction is territorial and cannot be exercised by a State outside its territory.[481]

Interestingly, the PCIJ held that a victim State acquires jurisdiction over a wrongful act of another State when the wrongful act has effects on its' territory.[482] However, this judgment paid little attention to the exclusive right of France to sail freely in the High Seas. The PCIJ held that the freedom of the High Seas is inapplicable in criminal matters.[483] This case evince that a State has an exclusive right within its territory to make laws and to enforce it against another State or its subjects that violate its territory.

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[476] See generally, *Lotus Case* (n 6).
[477] ibid., 12.
[478] The original text is available at the World Intellectual Property Organisation website. See *Turkish Criminal Law* (Law No. 765 of 1 March 1965, entered into force on 1 July 1926) [Art. 6] available at <http://www.wipo.int/edocs/lexdocs/laws/tr/tr/tr030tr.pdf> accessed 6 April 2017.
[479] *Lotus Case* (n 6) 15.
[480] ibid., 18 (emphasis added).
[481] ibid., 18.
[482] ibid., 25.
[483] ibid., 27.

The doctrine of "absolute territorial sovereignty"[484] denotes States' right to explore and exploit the natural resources in their land. The scope of its application was put to test in 1895. The Attorney General of the United States, Judson Harmon argued that no international obligation prevents the US from diverting the upper basin of the Rio Grande from flowing down to the Mexican border.[485] Mexico had objected that the said diversion violated Article 7 of the Treaty of Guadalupe Hidalgo.[486] Although the United States did not implement Harmon's advice nor was it adopted as a precedent by other States, it shows the extent a State may go in controlling its land and resources. Such a right can be limited by laws applicable to Consulate[487] and Diplomatic Mission[488] as shown by the political asylum granted to Julian Assange in the Ecuadorian embassy in London.[489]

[484] Stephen C. McCaffrey, 'The Harmon Doctrine One Hundred Years Later: Buried, Not Praised' 36(3) *Natural Resources Journal* 549-590, 551.

[485] Paul S. Kibe and Gabriel Eckstein, 'America first and the Harmon doctrine's demise – A history lesson' (The New Jurist, 1 March 2017) available at <http://newjurist.com/america-first-and-the-harmon-doctrines-demise-a-history-lesson.html> accessed 7 April 2017.

[486] *Treaty of Peace, Friendship, Limits, and Settlement between the United States of America and the United Mexican States* (Concluded at Guadalupe Hidalgo on 2 February 1848, ratification advised by the U.S. Senate, with amendments on 10 March 1848, ratified by the U.S. President on 16 March 1848, ratifications exchanged at Queretaro on 30 May 1848, proclaimed on 4 July 1848) [Art. 7] available at <http://avalon.law.yale.edu/19th_century/guadhida.asp> accessed 7 April 2017 (it prohibits any construction work along the basin that may impede or interrupt the free passage of vessels and citizens of both countries without the consent of both governments).

[487] *Vienna Convention on Consular Relations* (Done at Vienna on 24 April 1963, entered into force on 19 March 1967) 596 UNTS 261 [Arts. 31-36]; *Draft Declaration on Rights and Duties of States* (Adopted by the International Law Commission at its first session in 1949) (Volume I, Yearbook of International Law Commission 1949) 287 [Art. 2]. Note that this draft declaration is not in force.

[488] *Vienna Convention on Diplomatic Relations* (Done at Vienna on 18 April 1961, entered into force on 24 April 1964) 500 UNTS 95 [Arts. 22, 23, 24, 26, 27, 29, 30 and 31].

[489] Peter Walker, 'Timeline: Julian Assange and Sweden's prosecutors' (The Guardian, 12 October 2015) available at <http://www.theguardian.com/media/2015/oct/12/timeline-julian-assange-and-swedens-prosecutors> accessed 15 October 2015.

3.9.2 Territorial Sea

The two Conferences on the Law of the Sea held in 1958[490] and 1960[491] by the United Nations failed to delimit the boundaries of the territorial sea.[492] The 1958 Convention adopted four conventions and an optional protocol.[493] Article 1 of the *Convention on the Territorial Sea* (1958) states: 'the sovereignty of a State extends, beyond its land territory and its internal waters, to a belt of sea adjacent to its coast, described as the territorial sea.'[494] None of the four Conventions delimited the breadth of the territorial sea. It was at the third Conference held by the United Nations in 1982 that the participants agreed on the permissible breadth of the territorial sea[495] and the outcome was codified in Article 3 of the UNCLOS.[496]

Under the UNCLOS regime, there are four maritime zones over which a State could legitimately exercise its sovereignty. They are the Territorial Sea,[497] the Contiguous Zone,[498]

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[490] For proposals and comments by states on this, see United Nations Conference on the Law of the Sea Official Records, 'Comments by Governments on the draft Articles concerning the Law of the Sea adopted by the International Law Commission at its eight session' (Geneva, 24 February to 27 April 1958) UN Doc. A/CONF.13/5 and Add. 1 to 4, 75-113 available at <http://legal.un.org/diplomaticconferences/lawofthesea-1958/lawofthesea-1958.html> accessed 17 April 2017.

[491] The Proceedings of the Second United Nations Conference on the Law of the Sea is available at <http://legal.un.org/diplomaticconferences/lawofthesea-1960/Vol1-SummaryRecordsAnnexes_and_Final_Act_e.html> accessed 17 April 2017.

[492] See *Convention on the Territorial Sea and the Contiguous Zone* (Concluded at Geneva on 29 April 1958, entered into force on 10 September 1964) 516 UNTS 206 [Art. 3] [hereinafter *Convention on the Territorial Sea*].

[493] They are, *Convention on the Territorial Sea* (n 492); *Convention on the High Seas* (Concluded at Geneva on 29 April 1958, entered into force on 30 September 1962) 450 UNTS 11; *Convention on Fishing and Conservation of the Living Resources of the High Seas* (Done at Geneva on 29 April 1958, entered into force on 30 March 1966) 559 UNTS 285; *Convention on the Continental Shelf* (Done at Geneva on 29 April 1958, entered into force on 10 June 1964) 499 UNTS 311 [hereinafter *Convention on the Continental Shelf*]; and *Optional Protocol of Signature concerning the Compulsory Settlement of Disputes* (Done at Geneva on 29 April 1958, entered into force on 30 September 1962) 450 UNTS 169.

[494] *Convention on the Territorial Sea* (n 492) [Art. 1]; *Convention on the Continental Shelf* (n 493) [Art. 2].

[495] United Nations Conference on the Law of the Sea, *Third United Nations Conference on the Law of the Sea 1973-1982* (Concluded at Montego Bay on 10 December 1982) U.N. Doc. A/CONF.62/121 (27 October 1982) [see Annex II at p. 148] available at <http://legal.un.org/diplomaticconferences/lawofthesea-1982/docs/vol_XVII/a_conf-62_121.pdf> accessed 17 April 2017.

[496] *UNCLOS* (n 420) [Arts. 3, 33, and 76].

[497] The territorial sea is a belt of the sea of 12 nautical miles in breadth adjacent to the territory of a coastal State, including land territory and internal waters and, in the case of an archipelagic State, its archipelagic waters. See *UNCLOS* (n 420) [Art. 3].

[498] The contiguous zone is an area extending up to 24 nautical miles from the territorial sea baseline. See UNCLOS (n 420) [Art. 33(2)].

the Continental Shelf[499] and the Exclusive Economic Zones (EEZ).[500] For our purposes, we refer to all as territorial sea since the single claim we make is that States have exclusive authority over them. Beyond the four zones is designated "Area" or the "High Seas" not subject to national jurisdiction.[501] How States exercise limited sovereignty over the High Seas is beyond the scope of this work.[502] In the past, States have extended their jurisdiction over the High Seas as shown by the *Fisheries Jurisdiction case*.[503]

The fact of this case is that Canada relied on its *Coastal Fisheries Protection Act*[504] and its subsequent amendments[505] to seize a fishing vessel flying the Spanish flag and manned by a Spanish crew on the High Seas. Canada had wanted to inaugurate a new custom by exceeding the accepted 200-mile in the EEZ. The International Community condemned Canada's action as illegal, and a departure from the customary and positive international law.[506] However, the ICJ's jurisprudence does not have one parameter for deciding territorial sea's disputes. In the *Qatar v Bahrain case*,[507] the Court identified four steps that must be considered when adjudicating territorial sea disputes.[508]

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[499] The continental shelf comprises the seabed and subsoil of the submarine areas that extend beyond the territorial sea to a distance of up to 350 nautical miles where the natural prolongation of the land territory extends up to or beyond that distance, or to 200 nautical miles where the natural prolongation of the land territory does not extend to that distance. See *UNCLOS* (n 420) [Art. 76].

[500] The Exclusive Economic Zone (EEZ) is an area beyond and adjacent to the territorial sea but may not extend beyond 200 nautical miles from the territorial sea baselines. See *UNCLOS* (n 420) [Art. 57]. However, it has been suggested that EEZ does not fall within the territory of a state. UNCLOS Article 56 specifies the rights, jurisdiction and duties of the coastal state in the EEZ while Article 58 sets out the rights and duties of other States in the EEZ.

[501] *UNCLOS* (n 420) [Arts. 1, 89].

[502] See generally, Efthymios Papastavridis, *The Interception of Vessels on the High Seas: Contemporary Challenges to the Legal Order of the Oceans* (Oxford and Portland, Oregon, Hart Publishing 2013).

[503] *Fisheries Jurisdiction* (Spain v Canada) (Jurisdiction of the Court) Judgment ICJ Reports (1998) p. 432 [hereinafter *Spain v Canada Fisheries Jurisdiction case*].

[504] Canada, *Coastal Fisheries Protection Act* (R.S.C., 1985, c. C-33) [section 3] available at <http://laws-lois.justice.gc.ca/eng/acts/C-33/> accessed 20 April 2017.

[505] See Canada, 'Coastal Fisheries Protection Act as Amended in 1994' (Received Royal Assent on 12 May 1994) (1994) 33(5) *International Legal Materials* 1383-1388 [sections 3 and 4].

[506] *Spain v Canada Fisheries Jurisdiction case* (n 503) [para. 20]; Kritsiotis 2004 (n 394) 69.

[507] *Case Concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (Qatar v Bahrain) (Merits) Judgment ICJ Reports (2001) p. 40 [hereinafter *Qatar v Bahrain case*].

[508] Jiuyong SHI, 'Maritime Delimitation in the Jurisprudence of the International Court of Justice' (2010) 9(2) *Chinese Journal of International Law* 271-291, 274; R. R. Churchill and A. V. Lowe, *The Law of the Sea* (Third Edition, United Kingdom, Manchester University Press 1999) 182-183.

The analysis of how the four elements apply is done here[509] and will not be repeated. In most of the cases, the ICJ expresses the view that the coastal State's maritime rights derive from its sovereignty over land.[510] When judicial institutions adjudicate disputes on maritime delimitation, they should decide, at the preliminary stage, questions concerning the sovereignty over the disputed islands or certain coastal regions of land territory. It follows that islands, regardless of their sizes, enjoy the same status as other land territories with respect to maritime rights.[511]

In principle, "the land dominates the sea"[512] such that a State is barred from exercising sovereignty over a territorial sea that has no proximity to its land. Where the same continental shelf is adjacent to the territories of two or more States whose coasts are opposite each other, a special agreement must be negotiated by the concerned states. These special circumstances are not rules of customary international law.[513]

Another point to take note of is the nature of the right accruing to States on the territorial sea. The debate is whether or not it is jurisdictional or a mere control of resources.[514] For example, Article 2 of the 1942 treaty between the United Kingdom and Venezuela[515] makes sovereignty over certain maritime areas subject to future territorial right which Venezuela might acquire. It failed to delimit the frontiers of the territorial sea in accordance with the relevant laws on the Continental Shelf.[516] It constitutes a "shared right" over resources and not territorial as recognised by law.[517]

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[509] SHI (n 508) 271-291.
[510] *Qatar v Bahrain case* (n 507) [para. 185]; *North Sea Continental Shelf* (n 437) [para. 96]; *Aegean Sea Continental Shelf* (Greece v Turkey) Judgment ICJ Reports (1978) p. 3 [para. 86]; *UNCLOS* (n 420) [Art. 121(2)].
[511] *UNCLOS* (n 420) [Art. 121(2)].
[512] *Convention on the Continental Shelf* (n 493) [Arts. 6(1) and 6(2)]; *Convention on the Territorial Sea* (n 492) [Art.12(1)].
[513] *North Sea Continental Shelf* (n 437) [para. 83]. See also Judge Muhammad Zafrulla's declaration on page 55 of this case.
[514] Hersch Lauterpacht, 'Sovereignty over Submarine Areas' (1950) 27 *British Year Book of International Law* 376-433, 387.
[515] *Treaty between Great Britain and Northern Ireland and Venezuela relating to the Submarine Areas of the Gulf of Paria* (Done at Caracas on 26 February 1942, entered into force on 22 September 1942) 205 LNTS 121 [Art. 2].
[516] Lauterpacht 1950 (n 514) 380.
[517] See *In the matter of the Bay of Bengal Maritime Boundary Arbitration between the People's Republic of Bangladesh and the Republic of India,* Award PCA (The Hague, 7 July 2014) 156 [para. 507]; *UNCLOS* (n 420) [Arts. 56, 58, 78 and 79].

However, an exclusive territorial right involves five major claims: (1) claims relating to control over access, (2) claims to apply authority to vessels belonging to other States, and (3) claims to prescribe policy for events in the territorial sea.[518] Others include, (4) claims to prescribe and apply a policy to events aboard vessels, and (5) claims to an exclusive appropriation of resources.[519]

These rights are broad and exclusive in nature. It gives States sovereignty as well as jurisdiction over their territorial sea except for the "shared right" in the EEZ and the Continental Shelf. The exclusive right of a State to its maritime environment is a customary international law.[520] Such a right is limited by the right of innocent passage[521] enshrined in the UNCLOS. Nonetheless, Lauterpacht argues that such limitations are compatible with restrictions imposed by the customary international law or undertaken by treaty.[522]

3.9.3 Airspace

The 1944 Convention on International Civil Aviation[523] (hereinafter referred to as Chicago Convention) regulates how international airspace is to be used. Article 1 states: 'the contracting States recognize that every State has complete and exclusive sovereignty over the airspace above its territory.'[524] It is a breach of international law for a State's aircraft to defy the airspace of another State. The disrespect of other States' airspace has caused several aerial accidents in the past.[525] It could have resulted in frequent shooting down of trespassers aircraft but for Lissitzyn's suggestion that the use of force against civil aircraft should be prohibited.[526]

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[518] Myres S. McDougal and William T. Burke, 'Claims to Authority over the Territorial Sea' (1962) 1(1) *Philippine International Law Journal* 29-138, 33.
[519] ibid., 33.
[520] SHI (n 508) 275.
[521] *UNCLOS* (n 420) [Arts. 17-21].
[522] Lauterpacht 1950 (n 514) 391. Note that a state can contract out its territorial right in lieu of other interests such as security through multilateral or bilateral treaties. See Elizabeth Samson, 'Is Gaza Occupied: Redefining the Status of Gaza under International Law' (2010) 25(5) *American University International Law Review* 915-968, 936-938.
[523] *Convention on International Civil Aviation* (Done at Chicago on 7 December 1944, entered into force on 4 April 1947) 15 UNTS 295 [hereinafter *Chicago Convention*].
[524] ibid., [Art. 1].
[525] Malanczuk (n 287) 198-99.
[526] Oliver J. Lissitzyn, 'The Treatment of Aerial Intruders in Recent Practice and International Law' (1953) 47(4) *American Journal of International Law* 559-589, 586.

The International Civil Aviation Organisation[527] (hereinafter referred to as ICAO) has prohibited the violation of civil aircraft in its Standards, Practices and Procedures for the Rules of the Air. In 1984, the ICAO adopted an amendment (Article 3*bis*) to the Chicago Convention[528] which empowers States to order intruding civil aircraft to land at a designated airport for proper checks.

But the *Chicago Convention* did not set limit to States' territory in the airspace. It seems to have adopted the maxim *cuius est solum, eius est usque ad caelum et ad inferos* (for whoever owns the soil, it is theirs up to Heaven and down to Hell) which is no longer a valid principle.[529] In fact, the UN General Assembly's Resolution 2222 (XXI) designates the "outer space" as a 'global commons.'[530]

The limit to which a State territory applies in the airspace was initially set at the lowest height of satellites placed in the orbit.[531] But a later discovery by the Committee on Space Research (hereinafter referred to as COSPAR) led to the adoption of 100 km as the lower boundary of the outer space.[532] That relatively solved the problem of the limit that a State could lawfully exercise its sovereignty in the airspace.

[527] International Civil Aviation Organisation, 'Rules of the Air' (1983) 22 *International Legal Materials* 1154-1189, 1187; International Humanitarian Law Research Initiative, *Commentary on the HPCR Manual on International Law Applicable to Air and Missile Warfare* (USA, Program on Humanitarian Policy and Conflict Research at Harvard University 2010) 146 available at <http://www.ihlresearch.org/amw/> accessed 16 April 2017.
[528] *Protocol relating to an amendment to the Convention on International Civil Aviation* (Signed at Montreal on 10 May 1984, entered into force on 1 October 1998) 2122 UNTS 337 [Art. 3bis].
[529] Clement L. Bouve, 'Private Ownership of Airspace' (1930) 1(2) *Air Law Review* 232-258, 246-248.
[530] *Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies* (Opened for signature at Moscow, London and Washington on 27 January 1966, entered into force on 10 October 1967) 610 UNTS 205 [Art. 2].
[531] Bin Cheng, 'The legal status of Outer Space and Relevant Issues: Delimitation of Outer Space and Definition of Peaceful Use' (1983) 11(1&2) *Journal of Space Law* 89-105, 92-94; Paul G. Dembling and Daniel M. Arons, 'The Evolution of the Outer Space Treaty' (1967) 33(3) *Journal of Air Law and Commerce* 419-446, 432-436; D. Goedhuis, 'Reflections on the Evolution of Space Law' (1966) 13(2) *Netherlands International Law Review* 109-149, 127.
[532] He Qizhi, 'The Problem of Definition and Delimitation of Outer Space' (1982) 10(2) *Journal of Space Law* 157-164, 162; Cheng (n 531) 94; Stephen Hobe argues that "space activities" at an altitude of 100 km above sea level is in line with current international space law and state practice. See Committee on the peaceful uses of outer space, 'Draft model law on national space legislation and explanatory notes,' UN Doc. A/AC.105/C.2/2013/CRP.6 (26 March 2013) 4.

Unlike the "right of innocent passage," there is no consensus among the UN member States whether or not the right of innocent overflight is allowed.[533] It was recommended in a report submitted by the Legal, Commercial and Financial Sub-commission to the Aeronautical Commission.[534] The freedom of "innocent passage" was provided for in Article 2 of the *Paris Convention* 1919,[535] Article 2 of the *Madrid Convention* 1926,[536] and Article 4 of the *Havana Convention* 1928.[537] But these provisions, in the opinion of the ILC, do not evidence the rule of international law.[538] There could be a conflict between the "right of transit passage" in Article 38 of the UNCLOS with Article 39 which imposes duties upon vessels on transit not to violate the territory of the State.

The text of Article 1 of the three regional conventions mentioned above is similar[539] to Article 1 of the *Chicago Convention* of 1944.[540] They emphasise that States have a *complete and exclusive* sovereignty over their airspace. The ILC has explained that the phrase "complete and exclusive" means that the inviolability of the airspace is a customary rule of international law.[541] Perhaps, the ILC arrived at this conclusion from its analysis of the *travaux preparatoires* of the *Chicago Convention* which did not permit "innocent overflight" as was the case with the three regional instruments.[542] Therefore, States could not justify an intrusion into the airspace of other States, except if it were a case of *force majeure*. Note, however, that States

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[533] John Cobb Cooper, 'The International Air Navigation Conference, Paris 1910' (1952) 19(2) *Journal of Air Law and Commerce* 127-143, 128; Dean N. Reinhardt, 'The vertical limit of State Sovereignty' (An unpublished dissertation submitted to the Institute of Air and Space Law, McGill University, Montreal Canada 2005) 7-8; Marjorie M. Whiteman, *Digest of International Law* (Volume 4, Washington, Department of States 1965) 460.

[534] E. Pepin, *The Law of the Air and the draft Articles concerning the Law of the Sea* (Adopted by the International Law Commission at its eighth session) UN Doc. A/CONF.13/4 (4 October 1957) 64 [see footnote 1] [hereinafter *ILC Report on Air*]; For further discussion see Stephen Latchford, 'Freedom of the Air – Early theories, Freedom, Zone, Sovereignty' (1948) 1(5) *Documents & State Papers* 303-322.

[535] *Convention relating to the Regulation of Aerial Navigation* (Signed at Paris on 13 October 1919, entered into force on 29 March 1922) 11 UNTS 173 [Art. 2].

[536] The Spanish text of the *Convenio Ibero-Americano de Navegacion Aerea* 1926 is available at <http://www.sct.gob.mx/fileadmin/_migrated/content_uploads/3_Decreto_por_el_cual_se_promulga_el_Convenio_Iberoamericano.pdf> accessed 17 April 2017. Note that the *Madrid Convention* was not registered with any international body and was overlooked during the drafting of the Chicago Convention. For more, visit <http://www.icao.int/secretariat/PostalHistory/1926_the_Ibero_american_convention.htm> accessed 19 April 2017.

[537] For the text see *Pan-American Convention on Commercial Aviation* (Signed at Havana on 20 February 1928) (1931) 1(1) *Revue Aeronautique Internationale* 77-82; *UNCLOS* (n 420) [Arts. 17-22].

[538] *ILC Report on Air* (n 534) 67.

[539] ibid., 64-65.

[540] *Chicago Convention* (n 523) [Art. 1].

[541] *ILC Report on Air* (n 534) 65.

[542] The provisions made in Part I and Article 68 in Part III of the Chicago Convention imply that the subjacent state enjoys complete and exclusive sovereignty. See *Chicago Convention* (n 523) [Arts. 1-10 and 68].

could grant other States express right of overflight in exchange for security through bilateral agreements.[543]

3.10 The effects of the Supranational Bodies on States' exclusive territorial sovereignty

3.10.1 The UN General Assembly

We now consider the effect of the supranational organisations on the requirement to respect the inviolability of State territory. The decision to establish the United Nations was reached at the World Conference held in Moscow[544] in 1943. Consequently, the UN and its Organs have "control" over the activities of the member States.[545]

The exclusive authority of States may be disputed if States often designated as "subjects" of international law were under the authority of the UN. However, the word, "subject" is misleading in that States are not subservient to an "absolute sovereign UN" in Austinian sense[546] or as defined by Bodin.[547] It does mean, however, that the UN is an established mechanism for States' accountability. To that extent, States' authority is somehow limited.

It could be argued that "subject" is a nomenclature for artificial legal entities eligible for the membership of the UN, sharing equal rights and obligations.[548] Therefore, "subject" connotes the *locus standi* in international arena and does not obliterate States' sovereignty.[549] A State territory is inviolable insofar as a State exercises its powers in line with internationally recognised standards. Its domestic authority is not compromised as such since the UN's

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[543] *Peace Treaty between Israel and Egypt* (Signed at Washington on 26 March 1979, entered into force on 25 April 1979) 1136 UNTS 115 [Annex 1, Art. 3]; Dore Gold, 'Legal Acrobatics: The Palestinian Claim that Gaza is Still "Occupied" Even After Israel Withdraws' (2005) 5(3) *Jerusalem Issue Brief* available at <http://jcpa.org/brief/brief005-3.htm> accessed 17 April 2017.

[544] See The Moscow Conference of October 1943, 'Joint Four-Nation Declaration' [declaration 4] available at <http://avalon.law.yale.edu/wwii/moscow.asp> accessed 23 April 2017.

[545] For Resolutions of the United Nations General Assembly or the Security Council that direct the UN member States, see the footnotes on section titled "Re-reading Article 2(4) through the Resolutions of the UN Organs" above.

[546] H. L. A. Hart, *The Concept of Law* (Second Edition, Oxford, Oxford University Press 1994) 28; Franck 1990 (n 343) 35.

[547] W. J. Rees, 'The Theory of Sovereignty Restated' (1950) 59(236) *Mind* 495-521, 499.

[548] Alan James, 'Comment on J. D. B. Miller' (1986) 12(2) *Review of International Studies* 91-93, 92 (emphasis in the original); J. D. B. Miller, 'Sovereignty as a Source of vitality for the State' (1986) 12(2) *Review of International Studies* 79-89; Ben Chigara, *Legitimacy Deficit in Custom: A Deconstructionist Critique* (England, Ashgate Publishing Company 2001) 73.

[549] Hans Kelsen, 'The Principle of Sovereign Equality of States as a basis for International Organisation' (1944) 53(2) *Yale Law Journal* 207-220, 208.

system operates the principle of sovereign equality of States.[550]

The implications of the sovereign equality of States have been articulated by Oppenheim as follows: (1) any matter raised on the floor of the UN, which has to be settled by consent, must be decided by the doctrine of "one-state-one-vote,"[551] (2) the vote of the weakest and smallest State has equal weight as the vote of the largest and most powerful State, (3) No State can claim jurisdiction over another, and (4) domestic courts have jurisdiction within a State and no court can question the validity of acts of another State insofar as those acts purport to take effect within the sphere of the latter State's jurisdiction.[552]

However, Brierly[553] has reservations regarding the legal ramification of this doctrine due to the apparent inequality among States. This doctrine is reasonable if it refers to rights protected by law but does not mean that all States have equal rights.[554] A case in point is the voting arrangement in the Security Council that gives the permanent members the power to veto resolutions which the non-permanent members do not have.[555]

Lucy contested Brierly's position by classifying sovereign equality of States into three elements. First, the presumptive identity, this means that States have the same entitlement to the same bundle of formal and legal rights and abilities.[556] Second, the uniformity identity, this implies that the judicial interpretation and enforcement of the positive international law must be based on a general and objective legal standard equally applicable to all.[557] Third, the limited avoidability element which reinforces the second element by observing that the

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[550] *UN Charter* (n 5) [Art. 2(1)]; *OAS Charter* (n 2) [Art. 6]; *OAU Charter* (n 2) [Art. 3]; *Corfu Channel Case* (n 194) 35.
[551] For the voting system for the UN member States, see *UN Charter* (n 5) [Art. 18]. For the Security Council members voting system, see *UN Charter* (n 5) [Art. 27]. For the ECOSOC members voting system, see *UN Charter* (n 5) [Art. 67]. For the Trustee Council members voting system (now suspended), see *UN Charter* (n 5) [Art. 89].
[552] Herbert Weinschel, 'The Doctrine of the Equality of States and Its Recent Modifications' (1951) 45(3) *American Journal of International Law* 417-442, 419; *Oppenheim 1996* (n 38) 339; *Nicaragua Case* (n 6) [paras. 59, 70, 202 and 284]; *Chae Chan Ping v United States,* Supreme Court of the United States (1888) 130 U.S. 581, 604.
[553] Brierly (n 78) 131-32.
[554] ibid., 131-32; *Oppenheim 1996* (n 38) 339; Edwin D. Dickinson, *The Equality of States in International Law* (Cambridge, Harvard University Press 1920) 334-335; Weinschel (n 552) 438.
[555] *UN Charter* (n 5) [Art. 27(3)].
[556] William Lucy, 'Equality under and before the Law' (2011) 61(3) *The University of Toronto Law Journal* 411-466, 413.
[557] ibid., 413.

inequality that exists in law is an exception to the general rule.[558]

The points made by Lucy are credible but cannot nullify Brierly's objection. One wonders the inability of the Security Council to intervene militarily in Syria to end the war. Was it because of the requirement to respect the inviolability of Syria's territory? Or was it that the Security Council has not made the necessary determination that the situation in Syria constitutes a threat to the international peace and security? Or was it an evidence that the veto power in the voting arrangement in the Security Council is deficient?

Sovereign equality of States remains controversial where certain laws apply to certain States. The ICJ Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*[559] is binding[560] upon States that have nuclear arsenals and are party to the international instrument on Non-proliferation of Nuclear Weapons.[561] Why would the law expressly permit "State A" the right to have or retain nuclear weapons and not "State B"?

3.10.2 The Security Council

The idea that the SC makes laws that are universally binding upon States seems an inaccurate representation of the modern international law. When the Security Council established the two *ad hoc* Tribunals for the trial of the war crimes committed in the former Yugoslavia[562] and Rwanda,[563] Martti Koskenniemi described it as a "precarious close to international legislation."[564] Following the 9/11 terrorist attacks on the United States, the Security Council adopted Resolution 1373 (2001),[565] which for Costa Rica was "the first time in history, the Security Council enacted legislation for the rest of the international community."[566]

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[558] ibid., 414.

[559] See generally, *Legality of the Threat or Use of Nuclear Weapons* (n 6).

[560] Note that the ICJ Advisory opinions have no binding effect but they have legal weight and moral authority. See International Court of Justice, 'Jurisdiction – Advisory Opinion' available at <http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=2> accessed 19 April 2017.

[561] An example is the *Treaty on the Non-Proliferation of Nuclear Weapons* (Adopted at London on 1 July 1968, entered into force on 5 March 1970) 729 UNTS 161. For other instruments, visit the website of the United Nations Office for Disarmament Affairs at <https://www.un.org/disarmament/wmd/nuclear/> accessed 7 April 2017.

[562] UNSC Res. S/RES/827 (25 May 1993) [operative para. 2].

[563] UNSC Res. S/RES/955 (8 November 1994) [operative para. 1].

[564] Martti Koskenniemi, 'The Police in the Temple Order, Justice and the UN: A Dialectical View' (1995) 6(3) *European Journal of International Law* 325-348, 326.

[565] UNSC Res. S/RES/1373 (28 September 2001) [operative para. 1].

[566] UNGAOR, UN Doc. A/56/PV.25 (15 October 2001) 3 (statement by Niehaus, the representative of Costa Rica).

Consequently, the notion that the Security Council is the "World legislator"[567] emerged. The debate on whether the Security Council is authorised to make laws binding on all States is irrelevant since Article 38 of the Statute of the ICJ stipulates the sources of international law.[568] The Appeals Chamber in *Tadic* case[569] dismisses the claim that the Security Council is 'empowered to enact laws directly binding on international subjects.' What one needs to be aware of is that customs are made through state practice and *opinio juris*.[570]

That said, the Security Council Resolution 1373 is remarkable in many respect. First, it recognises that the action by non-State actors qualifies as an armed attack that could trigger the right to self-defence against the host state.[571] President Bush had argued that the United States makes no distinction between terrorists and those who harbour them.[572] In contrast, the ICJ in the *Nicaragua* case held that assistance given to non-State actors does not constitute an armed attack.[573]

Secondly, Resolution 1373 calls on the Member States to criminalise all manner of support given to terrorist whether direct or indirect.[574] This recognises that financial support to such groups either by a State or individuals constitutes a crime. It could be recalled that the weaker States at San Francisco advocated for the inclusion of economic coercion as part of the prohibited act within the meaning of Article 2(4). The question remains, what is the difference between financing a terrorist group and funding an insurgent group to achieve a regime change in another State? The answer lies in Henkin's observation that nations disrespect the integrity of other States when they pursue their national interest.[575]

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[567] Stefan Talmon, 'The Security Council as World Legislature' (2005) 99(1) *American Journal of International Law* 175-193, 175; Matthew Happold, 'Security Council Resolution 1373 and the Constitution of the United Nations' (2003) 16(3) *Leiden Journal of International Law* 593-610, 596; Jose E. Alvarez, 'The UN's War on Terrorism' (2003) 31(2) *International Journal of Legal Information* 238-250, 241; Jose E. Alvarez, 'Hegemonic International Law Revisited' (2003) 97(4) *American Journal of International Law* 873-887, 874.

[568] *ICJ Statute* (n 322) [Art. 38].

[569] *The Prosecutor v Dusko Tadic a/k/a "Dule"* (Case No. IT 94-1-AR72) (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) ICTY (2 October 1995) [para. 43].

[570] Chigara 2001 (n 548) 7.

[571] UNSC Res. S/RES/1373 (28 September 2001) [operative paras. 5 and 8].

[572] George W. Bush, 'Address to the Nation on Terrorist Attacks' (11 September 2001) available at <http://www.presidency.ucsb.edu/ws/?pid=58057> accessed 17 June 2017.

[573] *Nicaragua Case* (n 6) [para. 195].

[574] UNSC Res. S/RES/1373 (28 September 2001) [operative para. 1].

[575] Henkin 1968 (n 343) 107.

Concerning the primary role of the Security Council under Chapter VII of the Charter, two elements are involved. The first element deals with whether the Security Council undermines the requirement to respect the inviolability of State territory. This depends on how the Security Council complies with the procedural and substantive mechanism as stipulated in the Charter. Chapter five discusses this in greater detail.

The second element deals with how the voting arrangement affects the sovereign equality of States. That law is made for, or enforced against some States does not undermine the principle of the sovereign equality of States. The key factor in determining "equality" in this regard is whether under the same condition States have the same duties and the same rights.[576] In the Security Council, therefore, the P5 are equal among themselves and all the elected members are equal among themselves. But there is no equality between the P5 and other elected members.[577] The justification for this disparity is that it makes for fast and effective enforcement of the mandate of the Security Council.[578] Inevitably, the P5 enjoys certain privileges even in matters they have interest in[579] which inadvertently undermines the common equality of all States.

That said, treaty sometimes imposes obligation upon States against their consent. A State that abstains from voting or voted against a resolution which passed will still be bound by the decision of the majority.[580] There are treaties that bind States irrespective of their consent, such as the Convention abolishing international servitudes.[581] Another example could be where a treaty establishes a principal-agent relationship. In which case, any agreement entered by the agent, provided it does not act *ultra vires*, would legally bind the principal States.[582] But all these instruments are contractual. Supposedly, if and only if the P5 acts

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[576] Kelsen 1944 (549) 209.
[577] Weinschel (n 552) 438-440.
[578] Hans Kelsen, 'Organization and Procedure of the Security Council of the United Nations' (1946) 59(7) *Harvard Law Review* 1087-1121, 1102-1103.
[579] Kelsen 1946 (n 578) 1111.
[580] *UN Charter* (n 5) [Art. 25]; Weinschel (n 552) 428; see also Cassese 1995 (n 62) 188 (he argues that Sovereign Power does not enjoy unfettered rights).
[581] These treaties oblige *erga omnes*. For a detailed discussion see Office of the United Nations High Commissioner for Human Rights, *Abolishing Slavery and its Contemporary Forms* (New York; Geneva, United Nations 2002) UN Doc. HR/PUB/02/4 (2002) 3 [para. 7].
[582]Kelsen 1944 (n 549) 210.

within its mandate,[583] their privileged position does not undermine the sovereign equality of States.[584] Therefore, there is no legal order that safeguards absolute equality in a heterogeneous society.

3.10.3 The Judicial Institution

The United Nations adopted the ICJ as its principal judicial organ.[585] Article 93 of the UN Charter makes all member States *ipso facto* parties to the ICJ's Statute.[586] Article 94 declares that the ICJ has jurisdiction over the member States and obliges them to comply with the decisions of the Court.[587] Article 35(1) of the ICJ's Statute provides that the Court has jurisdiction over States parties to its Statute.[588] It acquires jurisdiction over cases submitted to it in accordance with the provision of Article 38 of its Statute.[589]

The Informal Inter-Allied Committee of jurist that revised the Statute of the PCIJ considered whether the ICJ's statute should contain provision making the jurisdiction of the Court compulsory for States Parties.[590] It recommends that States Parties be allowed to accept the jurisdiction of the ICJ in general or in defined cases.[591] The ICJ's compulsory jurisdiction as provided for in Article 36 of the ICJ's Statute[592] kicks-in under two conditions: (1) when a State signs a special agreement referring a dispute to the ICJ or are parties to a treaty providing for the ICJ's dispute resolution, and (2) when in accordance with Article 36(2), a State makes a declaration to the effect that it agrees to be sued by any State depositing a similar declaration.[593]

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[583] The UN Charter confers the power on them to maintain peace and security. See *UN Charter* (n 5) [Arts. 24-27].
[584] *UN Charter* (n 5) [Art. 39]; Peter Hulsroj, 'The Legal Function of the Security Council' (2002) 1(1) *Chinese Journal of International Law* 59-93, 60
[585] *UN Charter* (n 5) [Art. 92].
[586] ibid., [Art. 93].
[587] ibid., [Art. 94].
[588] *ICJ Statute* (n 322) [Art. 35(1)].
[589] ibid., [Art. 38].
[590] United States Department of State, *The International Court of Justice: Selected Documents Relating to the Drafting of the Statute* (Washington, Government Printing Office 1946) 33 [hereinafter *The US Department of State Draft of the ICJ Statute*]; Lucius C. Caflisch, 'The Recent Judgment of the International Court of Justice in the Case Concerning the Aerial Incident of July 27, 1955, and the Interpretation of Article 36 (5) of the Statute of the Court' (1960) 54(4) *American Journal of International Law* 855-868, 586-587.
[591] *The US Department of State Draft of the ICJ Statute* (n 590) 33.
[592] *ICJ Statute* (n 322) [Art. 36].
[593] George P. Shultz, 'U.S. Terminates acceptance of ICJ Compulsory Jurisdiction' (1986) 86(2106) *Department of State Bulletin* 67-71, 68.

Compulsory jurisdiction's historical antecedent – the League of Nations

Article 14 of the Covenant of the League of Nations[594] authorised the establishment of the PCIJ.[595] Article 36(2) of the statutue of the PCIJ contains a clause on the compulsory jurisdiction adopted by the First Assembly of the League of Nations as a compromise between the draft proposal of the 1920 Committee of Jurist and the amendment proposed by the Council of the League of Nations.[596] It is an "optional compulsory"[597] clause which has an ambiguous legal history.

But Hudson explains that it was the English text that designated the French version *obligatoire* to read compulsory.[598] Therefore, "obligatory" seems most apropriate to indicate that the PCIJ exercises jurisdiction not as an external compulsion but because it has assumed an obligation in respect of the States concerned.[599] Besides, the *compulsory* clause has inherent claw-back clauses. First, the Court will have jurisdiction when the parties have submitted a special agreement referring a dispute to it.[600] Second, when a State accepts the Court's compulsory jurisdiction through an express declaration.[601] Moreover, a State can make reservation when depositing its acceptance[602] or opt-out of the compulsory jurisdiction.[603] Thus, the enforcement of the compulsory jurisdiction was unsuccessful under the League of Nations[604] as buttressed by the case of *Belgium v China.*[605]

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[594] *The League of Nations Covenant* (n 8) [Art. 14].
[595] See generally, *Statute for the Permanent Court of International Justice* (Done at Geneva on 16 December 1920, entered into force on 8 October 1921) 6 LNTS 390.
[596] Manley O. Hudson, 'Obligatory jurisdiction under Article 36 of the Statute of the Permanent Court of International Justice' (1933-1934) 19(2) *Iowa Law Review* 190-217, 190.
[597] Hudson 1933-1934 (n 596) 191.
[598] ibid., 191 (see footnote number 1).
[599] ibid., 191 (see footnote number 1); Kelsen 1944 (n 549) 214.
[600] Cullen Bryant Gosnell, 'The Compulsory Jurisdiction of the World Court' (1927-1928) 14(8) *Virginia Law Review* 618-643, 620-621; Manley O. Hudson, 'Permanent Court of International Justice' (1921-1922) 35(3) *Harvard Law Review* 245-275, 259; *The League of Nations Covenant* (n 8) [Art. 12].
[601] Hudson 1921-1922 (n 600) 259. For example, Lithuania accepted the compulsory jurisdiction for a period of five years. See *Protocol of signature relating to the Statute of the Permanent Court of International Justice provided for by Article 14 of the Covenant of the League of Nations* (Done at Geneva on 16 December 1920) 6 LNTS 380, 387 [hereinafter *Reservations on Compulsory Jurisdiction of Article 36 of the PCIJ Statute*].
[602] States such as Switzerland, Denmark, Salvador, Costa Rica, Uruguay, Luxemburg, Finland, the Netherlands, Liberia, Sweden, Norway, Panama, Brazil, Austria and China accepted the compulsory clause on the condition of reciprocity. See *Reservations on Compulsory Jurisdiction of Article 36 of the PCIJ Statute* (n 601) 384-388.
[603] Hudson 1933-1934 (n 596) 191
[604] Gosnell (n 600) 623-624.
[605] *Denunciation of the Treaty of November 2nd, 1865 between China and Belgium* (Belgium v China) Orders of 8

Essentially, the ICJ's compulsory jurisdiction is contractual. The grey area is that States Parties acceding to it lack the foreknowledge of whom or on what issue a suit may be brought against them. This is because a declaration covers any issue of international law.[606] Like the League of Nations System, States rely on reservations,[607] the principle of reciprocity (exclusion clause in their opponent's declaration)[608] to defeat the ICJ's compulsory jurisdiction. Additionally, an aggrieved State could raise non-jurisdictional objections to the Court adjudicating a dispute or withdraw from the Court's compulsory jurisdiction.[609] The United States terminated the Court's compulsory jurisdiction in the *Nicaragua case* for what it called the defect in the Court's procedure.[610]

Justice Oda has observed that States are disinterested in adjudicating their legal disputes before the ICJ.[611] In fact, the ICJ has been accused of being a propaganda instrument to legitimise political agenda of some States.[612] In criminal jurisdiction, some African States have notified the ICC of their intent to withdraw from its jurisdiction.[613]

As such, the jurisdiction of the judicial institutions depends on the member States' willingness to be bound by it. Currently, the number of the member States that are parties to the compulsory jurisdiction of the ICJ is 72.[614] Kelsen has recommended that the compulsory jurisdiction should apply to all cases and for all member States to avoid disputes being

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January, 15 February and 18 June 1927 PCIJ Series A, No. 8 (1927) 5; *Denunciation of the Treaty of November 2nd, 1865 between China and Belgium* (Belgium v China) Orders of 25 May 1929 PCIJ Series A, Nos. 18/19 (1929) 7; L. H. Woolsey, 'China's termination of unequal Treaties' (1927) 21(2) *American Journal of International Law* 289-294.

[606] *ICJ Statute* (n 322) [Art. 38].

[607] VCLT (n 76) [Arts. 19-23]; Shultz (n 593) 68.

[608] Shultz (n 593) 68.

[609] ibid., 68; *Declaration Recognizing as Compulsory the Jurisdiction of the Court, in conformity with Article 36, Paragraph 2, of the Statute of the International Court of Justice* (Washington, 14 August 1946) 1 UNTS 11, 11-12 (the declaration made by the United States).

[610] Shultz (n 593) 68-71.

[611] Shigeru Oda, 'The Compulsory Jurisdiction of the International Court of Justice: A Myth? A Statistical Analysis of Contentious Cases' (2000) 49(2) *International and Comparative Law Quarterly* 251-277, 252.

[612] Gary L. Scott and Karen D. Csajko, 'Compulsory Jurisdiction and Defiance in the World Court: A Comparison of the PCIJ and the ICJ' (1988) 16(2 & 3) *Denver Journal of International Law and Policy* 377-392, 388.

[613] See 'African Union backs mass withdrawal from ICC' (BBC News, 1 February 2017) available at <http://www.bbc.co.uk/news/world-africa-38826073> accessed 9 April 2017.

[614] International Court of Justice, 'Declarations recognising the jurisdiction of the Court as compulsory – Status as at 1 September 2017' available at <http://www.icj-cij.org/jurisdiction/?p1=5&p2=1&p3=3> accessed 9 April 2017.

classified as nonjusticiable.[615] He argues that taking such a measure is compatible with the sovereign equality of States provided States consent to new obligations.[616] Kelsen's advice is well founded to the extent that he strikes a balance between the respect of a State territory and the need to hold States accountable for their wrongful acts. However, the conditionality of the future consent to new obligations might obstruct the judicial process.

The ICJ assumes jurisdiction when cases are referred to it by States or when an authorised UN organ[617] seeks its advisory opinion on any legal matter. Strictly, powers exercised by judicial institutions or indeed by any organ of the United Nations are delegated. Laws emanating therefrom do not diminish State's sovereignty as such. Article 38 of the ICJ's Statute recognises that States are major actors in the creation of rules of customary international law.

3.11 Concluding Remarks

This chapter concludes that every State has exclusive sovereign authority over its territory which other States should respect in the interest of world peace. Unfortunately, the text of Article 2(4) was not explicit on this but this chapter agues it is implied. Otherwise, the primary purpose of the UN Charter could have been defeated on the day the Charter was concluded. It makes little sense to suppose that the UN, established to maintain international peace and security would support States to engage in activities, which although short of the threat or use of force, could strain inter-states relations.

This chapter started with a claim that the second limb of Article 2(4) is the respect for the inviolability of State territory. The international community, international lawyers, scholars and the judges of the ICJ have overstressed the first limb, which is, the prohibition of the threat or use of force. Even if it were to be argued that the narrow approach is visible from the text of Article 2(4), it no longer provides adequate protection for States' territory. This shall be shown in chapter four with the UN member States' claim of territorial sovereignty in cyberspace. Our analysis so far has shown that the "threat" or "use of force" refers to physical armed force and that cannot apply in cyberspace.

[615] Kelsen 1944 (n 549) 216.
[616] ibid., 216.
[617] *UN Charter* (n 5) [Art. 96].

However, the argument advanced in this chapter is that several elements support a broader perspective. They include, (1) a careful analysis of the deliberations that went on during the drafting of Article 2(4). (2) The context – the two World Wars that necessitated the need for a regime that safeguards the world peace. (3) The textual analysis of the components of Article 2(4). (4) The juxtaposition of Articles 2(4) and 2(7) of the UN Charter. (5) The effort to expand the provisions of the Declaration on Friendly Relations to include economic coercion. (6) The insertion of the word "inviolability" in the regional instruments and other bilateral treaties.

This chapter argued that time is ripe to re-discover the latent broad meaning of Article 2(4) given the upsurge in covert or overt means through which States violate the territory of others. The narrow interpretive approach undermines the *jus cogens* character of Article 2(4). As seen, a treaty that derogates a peremptory norm is void and a State cannot give a consent that its territory should be violated. Hence, the criminalisation of "aggression" is a welcome development that could facilitate the prosecution of States that violate the territory of other States. As shall be seen in chapter five, States resist the violation of their territory, no matter how insignificant. This supports the broad perspective for which this dissertation advocates.

Chapter Four

A reappraisal of Article 2(4) in the light of the discourse on Cyberspace Territory

4.0 Introduction

Chapter three observed that the traditional scope of State territory is land, territorial sea and the airspace. The current political discourse has extended it to cyberspace.[1] This chapter argues that this development is reasonable considering that national security is an integral element of territoriality as we saw in chapter two. On this basis, this chapter pursues two objectives. First, that States may claim sovereignty in cyberspace if, for instance, the cyberspace infrastructure were installed in a State's territory, as traditionally designated. The second objective is tied to the first, although the cyberspace could be part of a State territory, the first limb of Article 2(4) does not apply to cyberattack. Therefore, the narrow interpretation of Article 2(4) is inadequate to protect States' territory.

4.1 The Definition of Cyberspace

The United States Joint Chiefs of Staff defined cyberspace as

> [a] global domain within the information environment consisting of the interdependent network of information technology infrastructures and resident data, including the Internet, telecommunications networks, computer systems, and embedded processors and controllers.[2]

The complexities of cyberspace makes it difficult to have one generally accepted definition of it.[3] The cyberspace 'is not a place… *but* a term that refers to an environment created by the confluence of cooperative networks of computers, information systems, and telecommunication infrastructures….'[4] The difficulty to territorially delimit such a place often

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[1] Wolff Heintschel von Heinegg, 'Territorial Sovereignty and Neutrality in Cyberspace' (2013) 89 *International Law Studies* 123-156, 123-124.

[2] Joint Chiefs of Staff, *Joint Publication 1-02, Department of Defense Dictionary of Military and Associated Terms* (8 November 2010, as amended March 2017) 60 available at <http://www.dtic.mil/doctrine/new_pubs/dictionary.pdf> accessed 22 April 2017.

[3] For other definitions, see Jason Andress and Steve Winterfeld, *Cyber Warfare: Techniques, Tactics and Tools for Security Practitioners* (Second Edition, Amsterdam, Elsevier Inc., 2014) 3; Centre for the Protection of National Infrastructure, 'Cyber' available at <https://www.cpni.gov.uk/cyber> accessed 3 May 2017.

[4] Thomas C. Wingfield, *The Law of Information Conflict: National Security Law in Cyberspace* (Falls Church, VA, Aegis Research Corp. 2000) 17; Derek S. Reveron, 'An introduction to national security and cyberspace' in Derek S. Reveron (ed), *Cyberspace and National Security: Threats, Opportunity, and Power in a Virtual World* (Washington Georgetown University Press 2012) 5; Heinegg (n 1) 125 (emphasis added).

designated as "no place"[5] makes its' status equivalent to that of the high seas, international airspace or the outer space.[6] The classical view regards cyberspace as a *res communis omnium* beyond the jurisdiction or sovereignty of any single State or group of States.[7]

4.2 Cyberspace and the changing territorial scope of States

The invention of the Internet revolutionised the transnational free flow of information, *e*-commerce and cyber-crimes.[8] It diminished the prevailing view that States have exclusive control over matters within their territory. The conventional International laws inherited from Westphalia predicate territorial jurisdiction upon a State physical and geographical location.[9] To authors like Burstein, that old way of thinking is obsolete and has been replaced by a new understanding of the State's borders as delimited by networks, domains and hosts.[10]

The political, social, economic and military affairs of States are conducted online these days. Thus, the rate at which the computer technology grows could lead to the digitisation of the essential components of the State. Consequently, the State's territory is more vulnerable now than ever because of the way cyberspace operates and the threat it poses to the national security.[11] This is evident from the cybercrimes report[12] and the free flow of extremist's ideologies on the Internet. The cyber-threats are not only from individuals or corporate

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[5] Geoffrey L. Herrera, 'Cyberspace and Sovereignty: Thought on Physical space and digital space' in Myriam D. Cavelty, Victor Mauer and Sai Felicia Krishna-Hensel (eds), *Power and Security in the Information Age: Investigating the role of the State in Cyberspace* (England, Ashgate Publishing 2007) 69.

[6] Heinegg (n 1) 125.

[7] ibid., 125-126.

[8] UNGA Res. A/RES/57/239 (20 December 2002) [operative para. 10]; Haitao Yang and Jian Zhang, 'Network Boundary and Protection' (A Conference paper presented at the International Conference on Cyber-Enabled Distributed Computing and Knowledge Discovery on 13-15 October 2016) (2016) *Institute of Electrical and Electronics Engineers* 81-85, 81.

[9] Richard S. Zembek, 'Jurisdiction and the Internet: Fundamental Fairness in the Networked World of Cyberspace' (1996) 6(2) *Albany Law Journal of Science & Technology* 339-382, 341-342.

[10] Matthew R. Burnstein, 'Conflicts on the Net: Choice of Law in Transnational Cyberspace' (1996) 29(1) *Vanderbilt Journal of Transnational Law* 75-116, 81-82.

[11] Richard Clarke and Robert K. Knake, *Cyber war: The Next Threat to National Security and What to do About it* (New York, Harper Collins Publishers 2010) 64-68; European Parliament, *Cyber defence in the EU Preparing for cyber warfare?* (Briefing October 2014) 2 available at <http://www.europarl.europa.eu/EPRS/EPRS-Briefing-542143-Cyber-defence-in-the-EU-FINAL.pdf> accessed 10 May 2017; Catherine A. Theohary and Anne I. Harrington, *Cyber Operations in DOD Policy and Plans: Issues for Congress* (Congressional Research Service 2015) 1 available at <http://fas.org/sgp/crs/natsec/R43848.pdf> accessed 10 May 2017.

[12] See generally, United States Federal Bureau of Investigation, *2015 Internet Crime Report* available at <https://pdf.ic3.gov/2015_IC3Report.pdf > accessed 7 May 2017.

bodies but they are also State-sponsored.[13] At least four known cases of States-sponsored cyberattacks have been recorded.[14] Those attacks, designated as Programmable Logic Controllers have undermined the integrity of the affected States even if such attacks were for cyber espionage.[15]

The question is: did the drafters of Article 2(4) of the UN Charter intend to prohibit this kind of behaviour? If no, does it mean that such attacks cannot endanger international peace and security? If yes, how could that be sustained by the narrow interpretation that limits Article 2(4) to physical armed force? The cyberattacks became a major concern for States in the 1990s. Are such attacks, no matter their gravity or effect, equal to physical armed force as conceived by the first limb of Article 2(4)? Is a State that is a victim of cyberattack entitled to self-defence by physical armed force against the attacker?

This dissertation argues that cyberattacks fall within the purview of Article 2(4) if construed broadly. Otherwise, an interpretive approach that could designate non-kinetic attacks as physical armed force would be disproportionate. While the positive international law has not addressed the lacuna created by the restrictive interpretive approach, state practice strenuously tries to transpose the provision of Article 2(4) to the cyberspace.

4.3 The Emerging Political Discourse on Cyberspace Territory

Jeremy Paquette writes that "(c)Brain" was the first known case of computer virus recorded in 1986.[16] Two years later, the "Worm Morris"[17] malware circulated across the world through

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[13] David E. Sanger, 'Obama Order Sped Up Wave of Cyberattacks Against Iran' (New York Times, 1 June 2012) available at <http://www.nytimes.com/2012/06/01/world/middleeast/obama-ordered-wave-of-cyberattacks-against-iran.html?_r=0> accessed 7 May 2017; Yoram Dinstein, 'Cyber War and International Law: Concluding remarks at the 2012 Naval War College International Law Conference' (2013) 89 *International Law Studies* 276-287, 276.

[14] John F. Murphy, 'Cyber War and International Law: does the International Legal Process constitute a threat to U.S. vital Interest?' (2013) 89 *International Law Studies* 309-340, 311.

[15] Ellen Nakashima, Greg Miller and Julie Tate, 'U.S., Israel developed Flame computer virus to slow Iranian nuclear efforts, officials say' (Washington Post, 19 June 2012) available at <https://www.washingtonpost.com/world/national-security/us-israel-developed-computer-virus-to-slow-iranian-nuclear-efforts-officials-say/2012/06/19/gJQA6xBPoV_story.html> accessed 7 May 2017.

[16] Jeremy Paquette, 'A history of Viruses' (Symantec Corporation, 16 July 2000) available at <https://www.symantec.com/connect/articles/history-viruses> accessed 8 August 2017.

[17] Paul Schmehl, 'Malware infection vectors: past, present and future' (Symantec Corporation, 5 August 2002) available at <https://www.symantec.com/connect/articles/malware-infection-vectors-past-present-and-future> accessed 8 August 2017.

the Internet. In 2007, "zombies" viruses disabled Estonia's military and government computer infrastructure.[18] In 2010, Ralph Lagner described "Stuxnet" malware 'as a military-grade cyber missile that was used to launch an all-out cyber strike against the Iranian nuclear program.'[19] In 2013, the media reported that "Red October" or "Rocra" which was an advanced espionage network was targeting diplomatic and government agencies.[20]

The negative impact which these attacks and many others had on the national security of States, left States with no option than to strategize on how to regulate the uses of the cyberspace. It is now an issue regularly debated in the academia and in the UN General Assembly.[21] This political discourse unearths the difficulty in ascribing sovereignty to the cyberspace. Before now, States did not have such rights because there is no common understanding of the applicable international rules for State behaviour in the cyberspace.[22]

In 2011, the Obama administration argued that the existing customary international law guiding State behaviour in times of peace and conflict apply in cyberspace.[23] In September 2014, sixty world leaders including the NATO Member States held a summit in Wales and adopted a policy on cyber defence which affirms that 'international law, including international humanitarian law and the UN Charter, applies in cyberspace.'[24] NATO took a stronger position in July 2016 when it issued a statement recognising that cyberspace is a

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[18] Stephen Herzog, 'Revisiting the Estonian Cyber attacks: Digital threats and Multinational Responses' (2011) 4(2) *Journal of Strategic Security* 49-60, 52.

[19] James P. Farwell and Rafal Rohozinski, 'Stuxnet and the future of Cyber War' (2011) 53(1) *Survival* 23-40, 23.

[20] Jari Rantapelkonen and Harry Kantola 'Insights into cyberspace, cyber security, and cyberwar in the Nordic countries' in Jari Rantapelkonen and Mirva Salminen (eds), *The Fog of Cyber Defence* (Helsinki, National Defence University 2013) 24; Matthew C. Waxman, 'Cyber-Attacks and the Use of Force: Back to the Future of Article 2(4)' (2011) 36(2) *Yale Journal of International Law* 421-460, 423.

[21] UN Doc. A/68/98 (24 June 2013) [para. 1]; UN Doc. A/65/201 (16 July 2010) [para. 1]; UNGA Res. A/RES/60/45 (6 July 2006) [operative para. 1]; see generally, UN Doc. A/71/172 (19 July 2016).

[22] Detlev Wolter, 'The UN takes a big step forward on cybersecurity' (Posted on Arms Control Association website on 4 September 2013) available at <https://www.armscontrol.org/act/2013_09/The-UN-Takes-a-Big-Step-Forward-on-Cybersecurity> accessed 23 April 2017.

[23] The White House, *International Strategy for Cyberspace: Prosperity, Security, and Openness in a Networked world* (Washington, May 2011) 9 available at <https://obamawhitehouse.archives.gov/sites/default/files/rss_viewer/international_strategy_for_cyberspace .pdf > accessed 23 April 2017 [hereinafter *International strategy for cyberspace*].

[24] NATO Summit 2014, *Wales Summit Declaration* (Issued by the Heads of State and Government participating in the meeting of the North Atlantic Council in Wales from 4 to 5 September 2014) [para. 72] available at <http://www.nato.int/cps/en/natohq/official_texts_112964.htm?mode=pressrelease> accessed 23 April 2017 [hereinafter *NATO Summit 2014*].

domain of operation in which NATO must defend itself as effectively as it does in the air, on land and at sea.[25] The sort of defence required is imprecise.

It is to be seen how judicial institutions apply this policy in legal terms. How would the threat or use of force in Article 2(4) of the UN Charter extend to cyberattack? Can a soft computer attack be equated with physical armed attack within the Charter meaning or be classified as an armed attack as established in the *Nicaragua* case? How would international humanitarian law be applied in cyberspace? Who is an armed force personnel, mercenary or civilian in cyberwarfare? There are no simple answers to these questions. Obviously, the cyberwarfare[26] is unconventional.

However, the political discourse shows the commitment of the member States to regulate the cyberspace activities. Demchak and Dombrowski have summarised this development as a new phenomenon that allows States to extend 'their sovereign control in the virtual world in the name of security and economic sustainability.'[27] They contend that this process envisages a Westphalian State model of total independence which Wolter argues is no longer desirable.[28] While their view is reasonable, it will be problematic to extrapolate from the current regime that is restrictive unless the broad approach is adopted.

4.3.1 The major concerns in Cyberspace

As mentioned earlier, the free flow of information, *e*-trade and commerce, social networking and online religious radicalisation, among others, have impeded States' ability to control and to regulate their borders. Chapter two noted that national security is an element of territoriality. Hence, States are deeply concerned about three cyberspace activities, namely,

[25] NATO Summit 2016, *Warsaw Summit Communiqué* (Issued by the Heads of State and Government participating in the meeting of the North Atlantic Council in Warsaw 8-9 July 2016) [para. 70] available at <http://www.nato.int/cps/en/natohq/official_texts_133169.htm> accessed 23 April 2017.

[26] The United Nations does not have a definition of cyber warfare. Robert S. Owen defines it as 'the use of exploits in cyberspace as a way to intentionally cause harm to people, assets, or economies.' See Robert S. Owen, 'Infrastructures of Cyber Warfare' in Lech J. Janczewski and Andrew M. Colarik (eds), *Cyber Warfare and Cyber Terrorism* (Hershey and New York, Information Science Reference 2008) 41; Andress and Winterfeld (n 3) 4-5.

[27] Chris C. Demchak and Peter Dombrowski, 'Rise of a Cybered Westphalian Age' (2011) 5(1) *Strategic Studies Quarterly* 32-61, 32.

[28] Detlev Wolter, 'UNIDIR Cyber Security Conference 2012: The Role of Confidence Building Measures in Assuring Cyber Stability' (Geneva, 8th-9th of November 2012) 1 available at <http://www.unidir.org/programmes/emerging-security-issues/cyber-security-conference-2012-the-role-of-confidence-building-measures-in-assuring-cyber-stability> accessed 23 April 2017.

cybercrime, espionage and cyberwarfare.[29] We shall briefly define each of them and subsequently refer to them collectively as cyber offences.

4.3.1.1 Cybercrime

There is no universally accepted definition of cybercrime although it is one of the fastest-growing offences committed in cyberspace.[30] Sylvia Kierkegaard defined it as 'any illegal act involving a computer and all activities done with criminal intent in cyberspace or which are computer-related.'[31] This definition is broad and makes no distinction between illegal act perpetrated by individual or corporate bodies from those committed by States. But it contains the elements of a crime, namely, the *actus reus* and *mens rea*.

The United Nations General Assembly started its campaign against cybercrime in 1990 when it adopted a resolution dealing with computer crime.[32] It recommends that the Member States should put in place legislative framework that will facilitate extradition and mutual assistance in computer-related crimes.[33] This resolution was expanded in 2000 and again in 2002 to cover the Misuse of Information and Communication Technologies.[34]

Prior to the adoption of the UN General Assembly's Resolution, the Russian Federation included cybercrime in the amended Chapter 28 of its penal code in 1996.[35] Article 272 prohibits unauthorised access to legally-protected computer information with a fine in the

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[29] Melissa E. Hathaway and Alexander Klimburg, 'Preliminary considerations: On national cyber security' in Alexander Klimburg (ed), *National Cyber Security Framework Manual* (Tallinn, NATO CCD COE Publication 2012) 13-20.

[30] ibid., 13.

[31] Sylvia Mercado Kierkegaard, 'EU tackles cybercrime' in Lech J. Janczewski and Andrew M. Colarik (eds), (n 26) 438.

[32] United Nations, 'Eighth United Nations Congress on the prevention of crime and the treatment of offenders' (Havana, 27 August to 7 September 1990) UN Doc. A/CONF.144/28/Rev.1 at p. 140 [hereinafter *Havana Convention on Cybercrime*]; UNGA Res. A/RES/45/121 (14 December 1990) [operative para. 4]; see also, United Nations Office on Drugs and Crimes, 'Emerging Crimes' available at <http://www.unodc.org/unodc/en/organized-crime/emerging-crimes.html> accessed 8 May 2017.

[33] *Havana Convention on Cybercrime* (n 32) 142 [para. 5].

[34] Harmonization of ICT Policies, Legislation and Regulatory Procedures in the Caribbean, 'Cybercrimes/e-Crimes Assessment Report' (Harmonization of ICT Policies, Legislation and Regulatory Procedures in the Caribbean, ITU 2012) 1 available at <http://www.itu.int/en/ITU-D/Cybersecurity/Documents/HIPCAR%20Assessment%20Cybercrimes.pdf> accessed 8 May 2017.

[35] Russian Federation, *The Criminal Code of the Russian Federation No. 63-Fz of June 13 1996* (Adopted by the State Duma on 24 May 1996, adopted by the Federation Council on 5 June 1996) [Art. 272] available at <http://legislationline.org/documents/section/criminal-codes/country/7> accessed 8 May 2017.

amount up to 200 thousand roubles on conviction of an offence.[36] The People's Republic of China also revised its penal law in 1997 to criminalise illegal intrusion, exploitation or attack of computer information or computer system.[37] As shall be seen, the criminalisation of cybercrime is an exercise of jurisdiction in cyberspace previously designated as "no place."

4.3.1.2 Cyber espionage

Espionage has been defined as 'the practice of spying or obtaining secrets from rivals or enemies for military, political, or business advantage.'[38] While some States might describe such an intrusion as unauthorised access to information stored on legally-protected computer, the status of espionage in international law is disputed.[39] Depending on how a State perceives it, cyber espionage could be a crime if done with an intent of wrongdoing and could constitute a cyberattack if it disrupts the function of the computer system it spies upon. The kind of malicious software used for cyber espionage is designated as *Trojan horse* and can be used in cyber warfare, cyber terrorism and cyber espionage.[40]

Generally, cyber espionage is designed to steal intellectual property from its victim undetected. There are reports of massive increase in State-sponsored industrial espionage,[41] yet the status of espionage in international law is ambiguous. Unlike espionage involving human agents, cyber espionage is risk-free and lucrative for countries that rely on it to stimulate their economic growth or to advance their technology.[42] Its legal justification is disturbing since theft of the intellectual property is a crime under domestic penal law.

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[36] ibid., [Art. 272].

[37] The People's Republic of China, *Criminal Law of the People's Republic of China* (Adopted at the Second Session of the Fifth National People's Congress on 1 July 1979, revised at the Fifth Session of the Eighth National People's Congress on 14 March 1997) [Arts. 285-288] available at the International Labour Organisation website <https://www.ilo.org/dyn/natlex/docs/MONOGRAPH/5375/83719/F869660960/CHN5375.pdf> accessed 8 May 2017.

[38] Kenneth J. Knapp and William R. Boulton, 'Ten information warfare trends' in Janczewski and Colarik (eds) (n 26) 25.

[39] To be discussed below.

[40] Stefan Kiltz, Andreas Lang and Jana Dittmann, 'Malware: Specialized Trojan Horse' in Janczewski and Colarik (eds) (n 26) 155.

[41] Hathaway and Klimburg (n 29) 16.

[42] ibid., 16.

4.3.1.3 Cyberwarfare

The term "cyberwarfare" is borrowed from the conventional terminology associated with *jus ad bellum*[43] to describe the malicious attack on the cyber "critical infrastructure"[44] of a State. The practice is contentious and controversial.[45] In some cases, it is used synonymously with "Information Warfare" (IW) or "Information Operation" (IO).[46]

Cyberwarfare is defined as

> the offensive and defensive use of information and communication systems to gain adversarial advantage by denying use of information or systems on which such information is created, resides, or is transmitted, by copying, altering, or destroying information or the means to communicate by electronic means.[47]

This is a new area of law modelled after the conventional military terminology and in defiance of the "placeless-ness" myth attributable to cyberspace. States now exercise control in cyberspace.

4.3.1.3a Chinese Cyberwarfare Model

China has developed military commands structure for cyberspace operations. At the level of strategic planning, the Ministry of State Security is a spy agency that gathers intelligence and assesses the risk of cyberattacks. The People's Liberation Army (hereinafter referred to as PLA) performs multiple integrated operations known as the C4ISR (command, control,

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[43] *Jus ad bellum* designates a branch of law that stipulates legitimate reasons under which a state might go to war. Under the regime of the United Nations, hostilities are prohibited by Article 2(4) of the Charter. But war is allowed if it were for self-defence (either individual or collective) or authorised by the Security Council. To ascribe warfare to cyberspace seems exaggerated.

[44] Critical infrastructures are systems and assets that if destroyed, would have an impact on physical security, national economic security, and/or national public health or safety. See Owen (n 26) 36.

[45] Alexander Klimburg and Heli Tirmaa-Klaar, *Cybersecurity and Cyberpower: Concepts, conditions and capabilities for cooperation for action within the EU* (Brussels, European Parliament 2011) 14 available at <http://www.oiip.ac.at/fileadmin/Unterlagen/Dateien/Publikationen/EP_Study_FINAL.pdf> accessed 8 May 2017.

[46] Roland Heickerö, *Emerging Cyber Threats and Russian Views on Information Warfare and Information Operations* (Stockholm, Swedish Defence Research Agency 2010) 13-18 available at <http://www.highseclabs.com/data/foir2970.pdf> accessed 8 May 2017; John H. Nugent and Mahesh Raisinghani, 'Bits and bytes vs. Bullets and bombs: A new form of warfare' in Janczewski and Colarik (eds) (n 26) 33.

[47] Nugent and Raisinghani (n 46) 33.

communications, computers, intelligence, surveillance and reconnaissance).[48] The C4ISR is designed to enhance effective information and intelligence sharing among its services. The PLA's work is consolidated by the Strategic Support Force composed of the Aerospace Systems Department that controls critical mass of the PLA's space-based C4ISR systems.[49]

The general operations which include both defensive and offensive are coordinated by the General Staff Departments. At various levels, the PLA has set up battalions properly integrated into military district and field-army unit structure.[50] These units are equipped for surgical and strategic strike on the enemy's critical infrastructure. Note that "surgical strikes" are not physical armed attack but the State hackers' ability to disrupt the incoming attack or an offensive attack on the enemy's critical infrastructure.[51]

4.3.1.3b Russian Cyberwarfare Model

Russia considers that the best way to check cybercrime is to develop a State owned personal computer operating system and an Internet search engine similar to google.[52] Russia has produced good software programmers.[53] Overall, Russia's system of combating cyber intrusion is decentralised and operate within the intelligence services.[54]

The *Komitet gosudarstvennoy bezopasnosti* (Committee for State Security) was the leading security agency for the Soviet Union before its dissolution in 1991. Boris Yeltsin wanted to

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[48] Elsa Kania, 'PLA strategic support force: the information umbrella for China's military' (The Diplomat, 1 April 2017) available at <http://thediplomat.com/2017/04/pla-strategic-support-force-the-information-umbrella-for-chinas-military/> accessed 9 May 2017.

[49] John Costello, 'The Strategic Support Force: Update and Overview' (2016) 16(19) *China Brief,* available at <https://jamestown.org/program/strategic-support-force-update-overview/> accessed 9 May 2017.

[50] Klimburg and Tirmaa-Klaar (n 45) 16.

[51] Demetri Sevastopulo, 'Chinese hacked into Pentagon' (Financial Times, 3 September 2007) available at <https://www.ft.com/content/9dba9ba2-5a3b-11dc-9bcd-0000779fd2ac> accessed 9 May 2017; Wendell Minnick, 'Computer attacks from China leave many questions' (Defence News, 19 September 2009) available at <http://minnickarticles.blogspot.co.uk/2009/09/computer-attacks-from-china-leave-many.html> accessed 9 May 2017.

[52] Open Source Center, 'Report: Russia – Russia Cyber Focus' (7 May 2010) 3-4 available at <https://info.publicintelligence.net/OSC-RussiaCyberFocus9.pdf> accessed 9 May 2017; Klimburg and Tirmaa-Klaar (n 45) 16.

[53] Alexander Klimburg, 'Mobilising Cyber Power' (2011) 53(1) *Survival* 41-60, 44.

[54] Andrei Soldatov and Irina Borogan, 'The mutation of the Russian Secret Services' (Research Institute for European and American Studies, 31 January 2008) available at <http://www.rieas.gr/researchareas/2014-07-30-08-58-27/russian-studies/557-the-mutation-of-the-russian-secret-services> accessed 9 May 2017.

form the Ministry of Security and Internal Affairs but was stopped by the Constitutional Court.[55] The Federal Security Service that survived the dissolution of the Soviet Union became Russia's major security outfit responsible for counter-intelligence. One of the measures it uses to counter cyberattacks is by mandating all the Internet Service Providers (hereinafter referred to as ISP) to comply with the System for Ensuring Investigative Activities[56] Legislation. By this legislation, the Federal Security Service is authorised to secretly monitor and intercept online activities without the knowledge of the ISP or the individual. The European Court of Human Rights has ruled that such a measure is a breach of individual's right to privacy.[57]

Russia has other measures to control domestic cyberspace and monitor external invasion. It has Foreign Intelligence Service mandated with intelligence gathering. It has also established the Main Directorate of Electronic Intelligence which monitors and scrutinises the socio-political structures around the world.[58] The procedure of the Russian Cyber Security Network is complicated, and there are indications that Russia coordinates counterattacks with the non-State hacker Patriots and the armed forces.[59] This was witnessed in the cyberattack on Georgia and Estonia which was alleged to have been perpetrated by Russia.[60]

4.3.1.3c The United States Cyberwarfare Model

The move to establish a sub-unit of the US Cyber Command (hereinafter referred to as USCYBERCOM) with full operational capacities started in 2009.[61] The mission of the USCYBERCOM ranges from planning to military cyberspace operations in all domains belonging to the United States or its allies and to denying access to their adversaries.[62] This

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[55] Soldatov and Borogan (n 54) 1.

[56] See Russian Federation, *Order of the Russian Federation Communications Ministry No. 25 of February 18, 1997, on Cooperation Between Communications Organizations and the Federal Security Service in Conducting Investigative Activities over Electronic Communications Networks*, the original text is available at <https://www.lawmix.ru/prof/76083> accessed 9 May 2017.

[57] *Case of Roman Zakharov v Russia (Application no. 47143/06)* Grand Chamber, Judgment ECtHR (2015) [paras. 175 and 297].

[58] Soldatov and Borogan (n 54) 1.

[59] Klimburg and Tirmaa-Klaar (n 45) 17.

[60] Jon Swaine, 'Georgia: Russia "conducting cyber war"' (The Telegraph London, 11 August 2008) available at <http://www.telegraph.co.uk/news/worldnews/europe/georgia/2539157/Georgia-Russia-conducting-cyber-war.html> accessed 3 May 2017.

[61] United States Strategic Command, 'U.S. Cyber Command,' available at <http://www.stratcom.mil/components/> accessed 9 May 2017.

[62] ibid., 1.

mission is broken down into three components which include, to defend the Department of Defence, to defend the U.S. national interest, and to provide cyber intelligence to other agencies within the Department of Defence.[63]

The USCYBERCOM is divided into five units. Each of the units is further subdivided into teams. The first unit which consists of 13 national mission teams is responsible for defending the United States' interests against major cyberattacks. The second unit which is made up of 68 cyber protection teams is mandated to defend the Department of Defence networks and systems against cyberattacks. The third unit which is made up of 27 combat mission teams provides combatant commands with operational plans and contingency operations based on intelligence. The fourth unit which consists of 25 support teams provides analytic and planning support to the National Mission and Combat Mission teams.[64]

To date, the US has the most advanced cyberwarfare model in the world. Since the early 1990's, it has progressively expanded its doctrine of cyberwarfare. Besides, the largest cyberspace domain is domiciled in the US[65] and it could deny its adversaries access to it.[66] The U.S. Federal Government's annual budget on security is the highest in the world.[67] While it is fair to say that the US has a robust and integrated cyberwarfare strategy,[68] it is still vulnerable to cyberattacks. In fact, both China and Russia have broken down the US cyber-wall.[69] The

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[63] See U.S. Department of Defence, 'Cyber strategy' available at <https://www.defense.gov/News/Special-Reports/0415_Cyber-Strategy/> accessed 9 May 2017.

[64] ibid., 1.

[65] Klimburg and Tirmaa-Klaar (n 45) 18.

[66] President Donald Trump had suggested that it might be proper to shut down the internet because of the danger of extreme ideology being disseminated through it. See Sean Lawson, 'The law that could allow Trump to shut down the US Internet' (Forbes, 2 December 2016) available at <https://www.forbes.com/sites/seanlawson/2016/12/02/the-law-that-could-allow-trump-to-shut-down-the-u-s-internet/#6cd7916c4dac> accessed 9 May 2017.

[67] See 'World military spending: Increases in the USA and Europe, decreases in oil-exporting countries' (Stockholm International Peace Research Institute, 24 April 2017) available at <https://www.sipri.org/media/press-release/2017/world-military-spending-increases-usa-and-europe> accessed 9 May 2017.

[68] Klimburg and Tirmaa-Klaar (n 45) 18.

[69] The United States Department of Justice, 'U.S. Charges Russian FSB Officers and Their Criminal Conspirators for Hacking Yahoo and Millions of Email Accounts' (Justice News, 15 March 2017) available at <https://www.justice.gov/opa/pr/us-charges-russian-fsb-officers-and-their-criminal-conspirators-hacking-yahoo-and-millions> accessed 9 May 2017; Reuben F. Johnson, 'Experts: The US has fallen dangerously behind Russia in cyber warfare capabilities' (Business Insider UK, 27 July 2016) available at <http://uk.businessinsider.com/us-behind-russia-cyber-warfare-2016-7?r=US&IR=T> accessed 9 May 2017.

latest in the series of cyberattacks against the US is the alleged Russia's hacking into the 2016 Presidential elections.[70] However, no military action has been taken against the Russian Federation or China by the US.

4.4 The "placeless-ness" character of Cyberspace and Territorial Sovereignty

The major setback to States' territorial claim in cyberspace is due to what Herrera calls the "placeless-ness hypothesis."[71] This means that the activities in the virtual environment are not located within a State's geographical territory. In the physical world, boundaries between States could be delimited in law (*de jure*) or exist in fact (*de facto*). This is not usually the case in cyberspace where for instance 'cloud computing uses Infrastructure as a Service (IaaS), Platform as a Service (PaaS), or Software as a Service (SaaS) to provide … remote services.'[72]

The cyberspace allows action that could produce physical effects to be initiated or concluded remotely. Paul Rosenzweig argues that every computer is a possible border entry point.[73] This does not mean that every computer connected to the Internet is a critical infrastructure that could endanger the national security of a State. But it does mean that any computer belonging to the State that contains some vital information if hacked into could threaten the national security of that State.

The "placeless-ness hypothesis" is built on two interlinked elements, namely, the physical component of the cyber hardware and the configuration that allows the free flow of information.

The cyber hardware consists of the various physical components that 'permit the circulation of bits[74] whether reified as radio-frequency (RF) energy, electrical signals or photons.'[75] It

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[70] Office of the Director of National Intelligence, 'Statement on Requests for Additional Information on Russian Interference in the 2016 Presidential Election' (Washington, 16 December 2016) available at <https://www.dni.gov/index.php/search?q=Hacking> accessed 9 May 2017.

[71] Herrera (n 5) 69.

[72] Andress and Winterfeld (n 3) 37.

[73] Paul Rosenzweig, *Cyber warfare: How Conflicts in Cyberspace are Challenging America and Changing the World* (California, Praeger 2013) 201.

[74] A bit refers to a digit in the binary numeral system. See Nugent and Raisinghani (n 46) 33.

[75] Martin C. Libicki, *Conquest in Cyberspace: National Security and Information Warfare* (New York, Cambridge University Press 2007) 24.

could be wires, antennae, routers, satellites, computer hardware, modem or ground terminals.[76] The hardware provides the layout, design and protocol that governs the cyberspace and through which information freely travels around the world regardless of national borders.[77]

The organisational structure of nodes[78] allows for the free flow of data. This is done on purpose to speed up information dissemination which a hierarchical configuration may obstruct.[79] Every node receives information and passes it on to the next node making information in cyberspace readily accessible everywhere across the globe once it has been released. This places States at a high risk of digital attacks. In 2004, it took "Sasser virus" less than one hour to reach every core Internet router, causing damages estimated at US$3.5 billion.[80]

The most disturbing aspect of the "placeless-ness hypothesis" is its support for unconventional warfare. As Mike McConnell observed, 'information managed by computer networks can be exploited or attacked in seconds from a remote location overseas.'[81] Thus, Farwell and Rohozinski argue that cyberspace provides a template for the commission of crimes.[82]

4.4.1 Placeless-ness Hypothesis and States' Responsibilities in Cyberspace

The view that cyberspace is "no-place" inhibits States from taking responsibility for activities happening there.[83] But this view is mistaken. Take the "placeless-ness theory" as an example, although cyberspace is intangible and not easily identifiable,[84] States do exercise sovereignty over some part of their un-delimited physical territory.

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[76] ibid., 24.
[77] Herrera (n 5) 69.
[78] A node is a connection point.
[79] Herrera (n 5) 70.
[80] Nugent and Raisinghani (n 46) 29.
[81] Clarke and Knake (n 11) 70.
[82] Farwell and Rohozinski (n 19) 26.
[83] Patrick W. Franzese, 'Sovereignty in Cyberspace: Can It Exist' (2009) 64(1) *Air Force Law Review* 1-42, 33.
[84] Herrera (n 5) 12.

An article written by Jan Paulson[85] shows high figures of land and maritime boundary disputes across the world. But that did not stop States from exercising exclusive authority over their territory. In fact, such disputes were anticipated by the drafters of Article 2(4) which requires States to resolve such matters through peaceful means. As pointed out in chapter three, the Former Yugoslavia had *locus standi* before an *ad hoc* Tribunal even though its boundaries had disintegrated.[86]

The *Island of Palmas* case[87] establishes that such cases could be determined in favour of a party that peacefully and continuously displays rights of sovereignty over the disputed area. The sovereign right could equally be established through continuous and peaceful exploitation of the natural resources.[88] In the *North Sea Continental Shelf* cases,[89] the ICJ acknowledges that the delimitation of States' boundaries may lead to 'an overlapping of the areas appertaining to them.'[90] The cyberspace is a perfect example depicting the confluence of boundaries with overlapping rights and interest. Therefore, the placeless-ness argument cannot prevent States from exercising their territorial right.

Herrera has suggested that the global digital networks are characterised by politics and as such not a legal matter because cyberspace has been shaped by geopolitics.[91] The delimitation of cyberspace to look more territorial is not an impossibility. China has attempted configuring its cyberspace network to conform with its natural and geographical physical territory.[92]

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[85] Jan Paulson, 'Boundary Disputes into the Twenty-First Century: Why, How...and Who' (2001) 95 *American Society of International Law Proceedings* 122-128, 123.

[86] UNSC Res. S/RES/780 (6 October 1992) [preamble para. 5]; UNGA Res. A/RES/47/121 (18 December 1992) [operative para. 1].

[87] *Island of Palmas Case (Netherlands v USA)* 2 RIAA 829-871, 839 [hereinafter *Island of Palmas case*]; *Maritime Delimitation in the Area between Greenland and Jan Mayen* (Denmark v Norway) Judgment ICJ Reports (1993) p. 38, 49.

[88] *The Eritrea – Yemen Arbitration, Phase I: Territorial Sovereignty and Scope of Dispute,* Award (1998) 12 RIAA 209-332 [paras. 10, 239].

[89] *North Sea Continental Shelf Cases* (Federal Republic of Germany v Denmark; Federal Republic of Germany v the Netherlands) Judgment ICJ Reports (1969) p. 3 [para. 97].

[90] ibid., [para. 99].

[91] Herrera (n 5) 12.

[92] Demchak and Dombrowski (n 27) 44; Yang and Zhang (n 8) 81.

Besides, the problem posed by "placeless-ness" theory is avoidable if Herrera's proposed two-way approaches, namely, "reterritorialization" of cyberspace and "deterritorialization" of national security networks, were adopted.[93] "Reterritorialization" means putting in place appropriate legislations for adequate control of cyberspace activities while "deterritorialization" is States' adaptation to the digital non-territorial lines.[94] This could assist States to exercise sovereignty in cyberspace and improve upon inter-States collective fight against cyber offences. To this end, the current efforts being made by the United Nations General Assembly[95] and other international cyber organisations[96] are commendable.

4.5 Factors establishing Territorial Right in Cyberspace

Despite the "placeless-ness hypothesis," States could exercise sovereign rights in cyberspace in virtue of the location of the cyberspace infrastructures.

4.5.1 The location of the cyberspace infrastructure – *Ratione loci*

The hardware that provides the cyberspace environment is usually installed within a State territory, whether on land, at territorial sea or in airspace. A question regarding the ownership of the Outer Space has been asked following the symbolic hoisting of the US flag on the Moon by Neil Armstrong in 1969.[97] The Outer Space Treaty[98] prohibits States from claiming ownership of the Outer Space. However, the cyberspace infrastructure installed within a State territory is under its exclusive authority and control. This includes such infrastructures owned or managed by or which belongs to cooperate bodies or private individuals and are registered in a State.

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[93] Herrera (n 5) 12-13.

[94] ibid., 75.

[95] UNGA Res. A/RES/58/199 (23 December 2003) [operative para. 1].

[96] See *The International Cyber Security Protection Alliance* available at <https://www.icspa.org/about-us/> accessed 20 October 2015.

[97] Yasmin Ali, 'Who owns outer space?' (BBC News, 25 September 2015) available at <http://www.bbc.co.uk/news/science-environment-34324443> accessed 10 May 2017.

[98] *Treaty on principles governing the activities of States in the exploration and use of outer space, including the moon and other celestial bodies* (Concluded at Washington, Moscow and London on 27 January 1967, entered into force on 10 October 1967) 610 UNTS 206 [Art. 2]; for other relevant documents, see United Nations Office for Outer Space Affairs, *United Nations Treaties and Principles on Outer Space and Related General Assembly Resolutions* (New York, United Nations 2008) available at <http://www.unoosa.org/pdf/publications/st_space_11rev2E.pdf > accessed 10 May 2017.

In the *Island of Palmas* dispute,[99] Judge Max Huber held that 'sovereignty in the relations between States signifies independence. Independence regarding a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State.'[100] This could apply to cyberspace infrastructures. In the *South China Sea* dispute,[101] the Permanent Court of Arbitration (hereinafter referred to as PCA) reiterates that the exclusive right of a State over its Exclusive Economic Zone cannot be exploited by another State even when it lays untapped. A State can confer the right to exploit its resources to corporate bodies through the issuance of licenses as established in the *Legal Status of Eastern Greenland*.[102]

It follows that a State does not relinquish its exclusive right over the cyberspace infrastructure installed in its aircraft flying over the Pacific Ocean or the airspace of another State. Neither would a State be deemed to have abrogated its sovereign right to the cyberspace infrastructures installed in a ship sailing in the internal waters and territorial sea of another State or in the High Seas. States have emphasised their commitment to exercise control over cyberspace infrastructure within their territory and to protect such infrastructures against trans-border intrusion by other States or by individuals.[103] A State may initiate a legal action against a State or individuals that hacked into such gadgets for whatever reasons.

Under the customary international law, States are prohibited from engaging in a conduct that violates the territorial sovereignty of another State.[104] The works done by the Internet Corporation of Assigned Names and Numbers[105] have made delimitation of cyberspace not

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[99] *Island of Palmas case* (n 87) 838.
[100] ibid., 838.
[101] *Case No 2013-19 In the Matter of the South China Sea Arbitration between the Republic of the Philippines and the Peoples Republic of China,* Award PCA (12 July 2016) [para. 251].
[102] *Legal Status of Eastern Greenland*, Judgment PCIJ Series A/B, No. 53 (1933) 39.
[103] United States Department of Defense, 'A report to the Congress pursuant to the National Defense Authorization Act for Fiscal Year 2011, Section 934' (November 2011) 7-9 available at <http://nsarchive.gwu.edu/NSAEBB/NSAEBB424/docs/Cyber-059.pdf> accessed 25 April 2017; *NATO Summit 2014* (n 24) [para. 72].
[104] Robert Jennings and Arthur Watts (eds), *Oppenheim's International Law* (Ninth Edition, Volume 1, Peace, Parts 2-4, London and New York, Longman 1996) 406 [hereinafter *Oppenheim 1996*]; *Draft Articles on Responsibility of States for internationally wrongful acts* (Adopted by the International Law Commission at its fifty-third session in 2001) (Volume II, Part II, Yearbook of International Law Commission 2001) [Arts. 1-2].
[105] See Internet Corporation of Assigned Names and Numbers, 'Developing policy at ICANN' available at <https://www.icann.org/policy> accessed 10 May 2017; for an argument in support of the need to have a global coordination, see Internet Assigned Numbers Authority, 'Introducing IANA' available at <http://www.iana.org/about> accessed 10 May 2017.

intractable. Therefore, the cyberspace infrastructures create proxy rights and obligations for States over activities which they undertake or should reasonably prevent in cyberspace. For reasons of *ratione loci,* States' territory extends to their cyberspace infrastructures.[106] The infraction of such a right does not mean an armed attack as enshrined in Article 2(4) of the UN Charter.[107] It is, however, disrespectful and an infringement upon the victim State's territory.

4.6 Proving Sovereign Territorial Rights through Cyberspace Regulations

The 2011 policy by the Obama administration that cyberspace does not require further regulation[108] is unsustainable. Heinegg argues that the rules and principles of international law are inapplicable to cyberspace because of the peculiar features of the cyberspace environment.[109] As a result, legislations on how to regulate the cyberspace in the areas of globalised electronic economy, public policy as well as cybercrimes have emerged at the national,[110] regional[111] and international levels.[112]

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[106] UN Doc. A/70/174 (22 July 2015) [operative paras. 27-29].

[107] Except for self-defence as provided for in Articles 51 and 52 of the UN Charter; see also Andreas Zimmerman, 'International Law and Cyber Space' (2014) 3(1) *European Society of International Law* 1-6, 4.

[108] *International strategy for cyberspace* (n 23) 9.

[109] Heinegg (n 1) 127.

[110] United States of America, *National Defense Authorization Act for Fiscal Year 2017* (Adopted by the U.S. Congress during its one hundred and fourteenth Congress, second session, Washington on 4 January 2016) [section 240] (it recommends a methodology for synchronizing and overseeing electronic warfare strategies, operational concepts, and programs across the Department of Defense, including electronic warfare programs that support or enable cyber operations) available at <https://www.congress.gov/114/bills/s2943/BILLS-114s2943enr.pdf> accessed 24 April 2017.

[111] Asia-Pacific Economic Cooperation, *APEC Principles for Action against Spam* (Adopted by the 2005 APEC Telecommunications and Information Ministerial Meeting at Lima, Peru on 1 June 2005) [para. B] available at <http://www.apec.org/Meeting-Papers/Sectoral-Ministerial-Meetings/Telecommunications-and-Information/2005_tel/annex_e.aspx> accessed 25 April 2017; Council of Europe, *Convention on Cybercrime* (Concluded at Budapest on 23 November 2001, entered into force on 1 July 2004) 2296 UNTS 167 [Art. 5] hereinafter *Convention on Cybercrime*]; Australian Government, *Seoul-Melbourne multilateral memorandum of understanding on cooperation in countering spam* (Concluded on 27 April 2005) [para. 2] available at <http://www.acma.gov.au/~/media/Unsolicited%20Communications%20Compliance/Information/pdf/Spam%20International%20Cooperation%20Memorandum%20of%20Understanding%20Between%20Australia%20and%20South%20Korea.PDF> accessed 10 May 2017.

[112] UNGA Res. A/RES/57/239 (20 December 2002) [operative para. 3] (calls on the member States to develop throughout their societies a culture of cybersecurity in the application and use of information technology); United Nations World Summit on the Information Society Geneva 2003 – Tunis 2005, 'Declaration of Principles, building the information society: a global challenge in the New Millennium,' UN Doc. WSIS-03/GENEVA/DOC/4-E (12 December 2003) [para 36] (authorises the United Nations to interfere with the integrity of cyberspace infrastructure within a state to prevent its use for purposes that are inconsistent with the objectives of maintaining international stability and security), [para. 39] (recommends regulatory framework reflecting national realities) [hereinafter *World Summit on Information Technology*]; UNGA Res. A/RES/56/121 (19

4.6.1 The Globalised Electronic Economy

The *e-commerce*[113] is one area that inhibits States from exercising exclusive control over the financial transactions taking place in cyberspace. According to Kobrin, the electronic cash (e-cash) has rendered 'borders around national markets and nation-states increasingly permeable.'[114] He further argues that the flow of private electronic currencies has made it difficult for central banks to control, measure or define monetary aggregates.[115]

Traditionally, States could regulate the physical movements of goods and services across their borders. It is difficult for digital goods and services which could be purchased online without the individuals undergoing rigorous border checks. Consequently, States are denied the right to tax goods and services coming into their country appropriately and to ensure that they conform to their quality standards.[116] Additionally, it has led to an increase in fraud and criminal activity associated with the *e-commerce*.

All that has changed with the robust domestic laws and inter-states regulations that govern economic activities in cyberspace. Two examples illustrate this point.

First, the iTunes music store from Apple Computers shows how *e-commerce* could be aligned with States' territory. The iTunes is carefully designed to apply rules set out by States cyber regulatory agency in conformity with its domestic jurisdiction and international copyright law.[117] The Apple Computers' iTunes Music Store (hereinafter referred to as iTMS) 'music files are protected by Digital Rights Management[118] encryption to prevent illegal distribution.'[119] It allows every State to acquire a separate iTMS by entering an agreement with Apple and the relevant rights holders. This mechanism allows for quality control on tax evasion and

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December 2001) [operative para. 1] (invites the member States to develop national law, policy and practice to combat the criminal misuse of information technologies).

[113] The *e-commerce* refers to business and financial transaction initiated and concluded online.

[114] Stephen J. Kobrin, 'Electronic Cash and the End of National Markets' (1997) 107 *Foreign Policy* 65-77, 71.

[115] ibid., 71.

[116] Herrera (n 5) 79.

[117] ibid., 80.

[118] Digital Rights Management is a class of technologies that allow rights owners to set and enforce terms by which people use their intellectual property. See 'Q&A: What is DRM' (BBC News Channel, 2 April 2007) available at <http://news.bbc.co.uk/1/hi/technology/6337781.stm> accessed 26 April 2017.

[119] Herrera (n 5) 80.

avoidance and enables States to monitor trans-border movement of digital goods and services.

Although, this regime has been successfully compromised,[120] at least, it demonstrates the State's ability to control the *e-commerce*. When Napster was successfully prosecuted in the United States, the peer-to-peer file sharing computer network was invented to prevent copyright abusers from falling prey to Napster-like-liability.[121] The case went up to the US Supreme Court and the Court held that 'one who distributes a device with the object of promoting its use to infringe copyright … is liable for the resulting acts of infringement by third parties using the device, regardless of the device's lawful uses.'[122] This is an exercise of jurisdiction in cyberspace.

The second aspect of the *e-commerce* deals with the control of electronic money (hereinafter referred to as *e-money*). The *e-money* refers to 'an electronic payment method specialised for micropayment.'[123] It exists in the form of debit or credit card, various forms of smart cards or true digital money which has various properties of the physical cash.[124] The prediction when the *e-money* first emerged in the mid-1990s was that States would be unable to regulate its monetary policy.[125] It increases the risk of fraud, money-laundering and other financial crimes[126] due to the absence of border control.

However, States have evolved monetary policies to track the movement of *e-money*. One example in the United Kingdom is the *Electronic Money Regulations 2011.*[127] Additionally, the

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[120] See generally, *A & M Records, Inc. v Napster, Inc.* 114 F.Supp.2d 896 (N.D.Cal. 2000).
[121] See generally, *Metro-Goldwyn-Mayer Studios Inc., et al., v Grokster Ltd., et al.,* 125 S. Ct. 2764 (2005).
[122] ibid., 2767.
[123] Imho Kang and Jeong-yoo Kim, 'Standardization in Electronic Money' (2005) 19(3) *International Economic Journal* 447-459, 447.
[124] Kobrin (n 114) 66.
[125] ibid., 67; Herrera (n 5) 81.
[126] Kobrin (n 114) 67; Jake Ryan, Nigel Bunyan and Matt Wilkinson, 'UK's biggest cyber fraudster – dubbed The Voice due to his use of fake accents – raked in £113million after scamming 750 businesses' (The Sun, 22 September 2016) available at <https://www.thesun.co.uk/news/1828912/uks-biggest-cyber-fraudster-dubbed-the-voice-due-to-his-use-of-fake-accents-raked-in-113-million-after-scamming-750-businesses/> accessed 26 April 2017.
[127] The United Kingdom, *Electronic Money Regulations 2011* (Enacted on 19 January 2011, entered into force on 9 February 2011) available at <http://www.legislation.gov.uk/uksi/2011/99/contents/made> accessed 26 April 2016.

Financial Conduct Authority[128] (hereinafter referred to as FCA) is a regulatory body for 56, 000 financial institutions in the United Kingdom accountable to the UK Government. The FCA's mandate is based on the *Financial Services and Markets Act 2000*[129] (hereinafter referred to as FSMA) and other relevant Electronic Money Directives from the European Union.[130] Section 6 of the FSMA noted that one of its objectives is to reduce financial crimes.[131]

On its part, the EU launched the *e*Europe initiative[132] to grow its economies and to protect the EU member States' territories from cybercrime. The EU's Action Plan[133] emphasised the need to secure the cyberspace and to fight against cybercrime.[134]

The EU's Action Plan is modelled after the United States, who have been at the forefront in protecting its economic interests in cyberspace.[135] In 1995, the US' Joint Chiefs of Staff rolled out the *US Joint Vision 2010*[136] which outlined the 25 years military strategic goals. It observes

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[128] For details visit <https://www.fca.org.uk/about/the-fca> accessed 26 April 2017.

[129] The United Kingdom, *Financial Services and Markets Act 2000* (Enacted on June 2000) available at <http://www.legislation.gov.uk/ukpga/2000/8/contents/enacted> accessed 26 April 2017 [hereinafter *FSMA 2000*].

[130] European Parliament, 'Directive 2009/110/EC of the European Parliament and of the Council of 16 September 2009 on the taking up, pursuit and prudential supervision of the business of electronic money institutions amending Directives 2005/60/EC and 2006/48/EC and repealing Directive 2000/46/EC' (Done at Strasbourg on 16 September 2009) (2009) *Official Journal of the European Communities* L 267 [para. 18]; European Parliament, 'Directive 2000/46/EC of the European Parliament and of the Council of 18 September 2000 on the taking up, pursuit of and prudential supervision of the business of electronic money institutions' (Done at Brussels on 18 September 2000) (2000) *Official Journal of the European Communities* L 275 [Arts. 1-4].

[131] *FSMA 2000* (n 129) [section 6].

[132] European Union, 'eEurope - An information society for all' (Communication of 8 December 1999 on a Commission initiative for the special European Council of Lisbon, 23 and 24 March 2000) available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV:l24221> accessed 26 April 2017.

[133] Commission of the European Communities, *eEurope 2002 An Information Society for All Draft Action Plan prepared by the European Commission for the European Council* (Done at Feira on 19-20 June 2000) 11 available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1493236486290&uri=CELEX:52000DC0330> accessed 27 April 2017; The European Parliament, 'European Parliament legislative resolution on the Commission communication on e-Europe An Information Society For All: a Commission Initiative for the Special European Council of Lisbon, 23/24 March 2000 (COM(1999)687 C5-0063/2000 2000/2034(COS))' (2000) *Official Journal of the European Communities* C 377 [preamble para. O, operative para. 1].

[134] Commission of the European Communities, 'Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions – Network and Information Security: Proposal for A European Policy Approach, COM(2001)298 final' (Done at Brussels on 6 June 2001) available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52001DC0298&from=pl> accessed 27 April 2017.

[135] See generally, the United States Department of Justice, 'Pro IP Act Annual Report of the Attorney General FY 2016' available at <https://www.justice.gov/iptf/pro-ip-act-reports> accessed 27 April 2017.

[136] United States Joint Chiefs of Staff, *Joint Vision 2010* available at <http://www.iwar.org.uk/rma/resources/jv2020/jv2010.pdf> accessed 27 April 2017.

that the 21st century requires new vision in warfighting in the information age.[137] The United States has intensified its crackdown on terrorist cyber networks by blocking the free flow of their finances. Its *Vision 2020*[138] classifies cyber warfare as non-kinetic and it has established the USCYBERCOM as a special command devoted to cyberspace-related issues.[139]

4.6.2 Criminalisation of illegal activities in Cyberspace

In addition to an increase in the surveillance[140] of *e*-transactions, States have taken steps to exercise criminal jurisdiction in cyberspace.[141] In the *Case of S.S. "Lotus,"*[142] the ICJ held that international law as established by the practice of civilised nations prohibits States from extending the criminal jurisdiction of their Court to crimes committed abroad. The only exception is where there is an express or implied agreement that permits that.[143]

Usually, the public international law deals with States' conduct. The debate on whether to extend it to the conduct of non-State actors is underway.[144] The positivists would argue that

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[137] ibid., 1.

[138] United States Joint Chiefs of Staff, *Joint integrated air and missile defense: Vision 2020* (5 December 2013) 1 available at <http://www.jcs.mil/Portals/36/Documents/Publications/JointIAMDVision2020.pdf> accessed 27 April 2017.

[139] United States Cyber Command, *Beyond the build: Delivering outcomes through Cyberspace* (Department of Defense United States Cyber Command, 3 June 2015) available at <https://www.defense.gov/Portals/1/features/2015/0415_cyber-strategy/docs/US-Cyber-Command-Commanders-Vision.pdf> accessed 27 April 2017; also visit <http://www.stratcom.mil> last visited 27 April 2017.

[140] Jack Goldsmith, 'The Contributions of the Obama Administration to the Practice and Theory of International Law' (2016) 57(2) *Harvard International Law Journal* 455-474, 460.

[141] Patrick W. Franzese, 'Sovereignty in Cyberspace: Can It Exist' (2009) 64(1) *Air Force Law Review* 1-42, 13; Heinegg (n 1) 126; see generally, *Convention on Cybercrime* (n 111).

[142] *The Case of the S.S. "Lotus"* (France v Turkey) Judgment PCIJ Series A, No. 10 (1927) 7 [hereinafter *Lotus case*].

[143] ibid., 7.

[144] Joel R. Reindenberg, 'Technology and Internet Jurisdiction' (2005) 153(6) *University of Pennsylvania Law Review* 1951-1974, 1951 (arguing that 'jurisdiction over activities on the Internet has become one of the main battlegrounds for the struggle to establish the rule of law in the Information Society'); Demchak and Dombrowski (n 27) 35 (arguing that '[w]hile it is not recognized as such nor publicly endorsed by most democratic leaders, a cyberspace regulating process is happening, building the initial blocks of emergent national virtual fences'); Jack L. Goldsmith, 'Against Cyberanarchy' (1998) 65(4) *University of Chicago Law Review* 1199-1250, 1200 (challenging the idea that the cyberspace cannot be regulated); Michael Geist, 'Cyberlaw 2.0' (2003) 44(2) *Boston College Law Review* 323-358, 332-35 (arguing that the cyberspace is "bordered"); David R. Johnson and David Post, 'Law and Borders—The Rise of Law in Cyberspace' (1996) 48(5) *Stanford Law Review* 1367-1402, 1367 (arguing that '[c]yberspace requires a system of rules quite distinct from the laws that regulate physical, geographically-defined territories'); Joel R. Reidenberg, 'Yahoo and Democracy on the Internet' (2002) 42(3) *Jurimetrics* 261-280, 261 (proposing that "the policy rules embedded in the technical infrastructure must recognize values adopted by different statutes").

States lack jurisdiction over criminal conduct of the non-State actors. But the doctrine of *ratione loci* discussed above argues that a State may acquire territorial jurisdiction over the cyberspace infrastructures installed on, or registered in its territory. Therefore, individuals and corporate bodies using such cyberspace infrastructures are obliged to comply with the domestic laws of the State. This does not, however, address the problems associated with the attribution of responsibility to States for illegal acts of non-State actors.

For the sake of emphasis, let us draw an analogy from the Private Law, Common Law jurisdiction. In the *Mostyn v Fabrigas* case,[145] a tortious action was initiated in England against Mostyn for an assault and false imprisonment he authorised when he was the governor of the Island of Minorca. The defendant argued that the alleged tortious act was not justiciable on two counts. First, it was not a crime in the region when he was the governor. Second, the alleged offence was committed outside the UK. The judgment of the Court of First Instance which the Appellate Court upheld ruled that an action could be instituted against Mostyn in England for cases arising out of personal torts committed abroad or places designated as having no law if such cases were justiciable in England.[146] This is because Mostyn was there as the governor representing the Crown and cannot absolve himself of any connection with the UK.

On the contrary, a widow of a carpenter that died while working in Antarctica for the United States brought a wrongful death action against the United States based on the Federal Tort Claims Act.[147] Paragraph 2674 of the said Act attributes liability to the United States for unlawful death if the law where the act or omission complained of occurred prescribes it. The US Supreme Court held that this provision does not apply to Antarctica because Antarctica lacks territorial sovereignty of its own but Justice Stevens dissented from the Court's judgment.[148]

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[145] *Mostyn v Fabrigas* [1775-1802] All ER Rep 266.
[146] ibid., 269.
[147] *Federal Tort Claims Act* (Adopted by the 79th Congress, second session on 2 August 1946) 60 Stat. 842, 28 U.S. Code § 2674.
[148] *Sandra Jean Smith v United States* 113 S. Ct. 1178 (1993), 1180

The thrust of the judgment of the English Court, which the dissent of Justice Stevens affirmed is that persons bring their nationality to the "place" where no law applies.[149] But the US's Supreme Court refused to apply it in the Antarctica. It follows that the application of this principle to cyberspace would hold States accountable for wrongful acts, conducts or omissions of their citizens in civil and criminal matters. No State would accept this onerous responsibility. But it could also mean that States have jurisdiction over their citizens' conduct in cyberspace and could initiate civil or criminal proceedings against them in their domestic courts.

Therefore, there is a positive obligation for States to take necessary steps to prevent the commission of cybercrimes. It might well be that the law in force at the "origin" of the wrongful act and the law in force at the "target" State, conflict with each other. Menthe proposes that laws seeking to criminalise or regulate the cyberspace activities should apply to persons resident within the physical geography of the State's jurisdiction or under its' sovereignty.[150]

From the viewpoint of national security, the States' attempt to criminalise cybercrimes is a legislative function which the Lotus case establishes is an exclusive function of a State. The customary international law principle recognised by the civilised nations allows States to legislate on any matter whatsoever provided it does not prescribe for or affect the interest of other States.[151]

4.7 The emerging *e-Legislations* on Cyberspace

4.7.1 UN General Assembly – International Code of Conduct for Information Security

In 2011, China, Russia, Tajikistan and Uzbekistan proposed an International Code of Conduct for Information Security[152] (hereinafter referred to as Draft Code of Conduct) to the United

[149] Darrel C. Menthe, 'Jurisdiction in Cyberspace: A Theory of International Spaces' (1998) 4(1) *Michigan Telecommunications and Technology Law Review* 69-103, 93.
[150] Menthe (n 149) 93-95; cf The United Kingdom, *Computer Misuse Act 1990* (Enacted on 29 June 1990) [section 4] available at <http://www.legislation.gov.uk/ukpga/1990/18/contents> accessed 30 April 2017.
[151] *Lotus case* (n 142) 20; *Vienna Convention on Diplomatic Relations* (Done at Vienna on 18 April 1961, entered into force on 24 April 1964) 500 UNTS 95 [Art. 34] (it exempts diplomats from all dues and taxes).
[152] UN Doc. A/66/359 (14 September 2011) [hereinafter *Draft Code of Conduct*]; UNGA Res. A/RES/53/70 (4 December 1998) [operative para. 2].

Nations. It consists of three parts, namely, preamble, purpose and scope and the Code of Conduct. The preamble which consists of nine paragraphs recognises considerable economic and information opportunities that cyberspace offers to the global community. It highlights the need for the international community to prevent the use of cyberspace for nefarious ends.

The second part observes that the purpose and scope of the Draft Code of Conduct are to identify the rights and responsibilities of States in cyberspace and to harmonise States' approaches to achieving these objectives. The third part enumerates lists of pledges which the member States willing to commit themselves to the code of conduct should observe.

Worthy of note is that the first operative paragraph of the Draft Code of Conduct obliges States to “respect” the sovereignty, territory and political independence of all States.[153] The choice of the word "respect" buttresses the non-kinetic character of the activities in cyberspace. Equally it confirms that the first limb of Article 2(4) is inapplicable in cyberspace. Unfortunately, the Draft Code of Conduct is not a binding document.

The United Nations Group of Governmental Experts on Development in the Field of Information and Telecommunications in the Context of International Security[154] (hereinafter referred to as UN-GGE) was established in 2004 to device means of protecting States from cyber threats. Its’ reports[155] explain the norms, rules and principles for a responsible behaviour in cyberspace. The reports elaborate on how international law could be applied to the use of Information and Communications Technologies.[156] The search for the United Nations sponsored Convention on cyberspace is still on. Perhaps it will clarify whether a malicious malware attack is an armed attack within the meaning of Article 2(4).

[153] *Draft Code of Conduct* (n 152) [operative para. (a)].

[154] UNGA Res. A/RES/58/32 (8 December 2003) [operative para. 5]; for details visit <https://dig.watch> last visited on 28 April 2017.

[155] UN Doc. A/70/174 (22 July 2015) [operative paras. 9-15]; UN Doc. A/68/98 (24 June 2013) [operative para. 20].

[156] UN Doc. A/70/174 (22 July 2015) [operative paras. 24-29].

4.7.2 World Summit on Information Society

The international community held its first World Summit on the Information Society in Geneva from 10-12 December 2003 and issued a *communiqué* entitled "Declaration of Principles Building the Information Society: A Global challenge in the New Millennium."[157]

Paragraph 36 of this communique acknowledges that illegal cyberspace activities are a threat to the maintenance of international peace and security.[158] It recommends that appropriate legislation should be adopted to address it at the national and international levels.[159] It further observes that 'the rule of law, accompanied by a supportive … regulatory framework reflecting national realities, is essential for building a people-centred Information Society.'[160]

Additionally, it recognises that the '[p]olicy authority for Internet-related public policy issues is the sovereign right of States.'[161] What that means is that States could make laws to regulate cyberspace activities. Consequently, Bulgaria, Japan, Nigeria, Philippines, Gambia, Bahrain, Ghana, Ireland, Switzerland, Trinidad and Tobago, among others, have enacted cyberspace laws.[162]

4.7.3 G7 Legislation on cyberspace

The "G7" is an acronym for the Group of Seven Industrialised Democracies.[163] It was formerly G8 but Russia was suspended for "illegally annexing" Crimea in March 2014. The G7 Information and Communication Technology Ministers issued a Joint Declaration[164] during its meeting in Japan in 2016. The Ministers pledged to strengthen international collaboration,

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[157] See generally, *World Summit on Information Technology* (n 112).
[158] ibid., [para. 36].
[159] ibid., [para. 37].
[160] ibid., [para. 39].
[161] ibid., [para. 49].
[162] World Summit on the Information Society, *Report on the World Summit on the Information Society on Stocktaking 2015* (Geneva, International Telecommunication Union 2015) 80-89 available at <http://www.itu.int/net4/wsis/forum/2015/Outcomes/#Forum> accessed 29 April 2017; International Telecommunication Union, *National e-Strategy for Development Global Status and Perspectives 2010* (Geneva, International Telecommunication Union 2011) 28-41 available at <http://www.itu.int/ITU-D/cyb/estrat/estrat2010.html> accessed 29 April 2017.
[163] Detail about the G7 is available on their website. Visit <http://www.g7italy.it/en> accessed 29 April 2017.
[164] The G7, 'Joint Declaration by G7 ICT Ministers' (Action plan on implementing the Charter, adopted by the G7 Information and Communication Technology Ministers at Japan on 29-30 April 2016) available at <http://www.japan.go.jp/g7/_userdata/common/data/000416959.pdf> accessed 29 April 2017.

capacity building and public-private partnership in the fight against cyber-attack as well as to support risk management approaches to cybersecurity.[165]

A Joint *Communiqué*[166] issued by the Foreign Ministers of the G7 in 2016 reiterates its Member States' commitment to respect the territory of other States. They also emphasised the need for States' 'cooperation with the private sector, civil society and communities in investigating, disrupting and prosecuting terrorists' illegal activities online.'[167] The heads of Governments of the G7 adopted the *Principles and Actions on Cyber*[168] which affirmed that the UN Charter applies to cyberspace with a caveat that they look forward to the outcome of the UN-GGE on how that could be implemented. This signalled a shift in policy consideration which earlier held that Article 2(4) could apply directly in cyberspace.

4.7.4 Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations[169]

The Tallinn Manual 2.0 on the International Law Applicable to Cyber Operation is an attempt to articulate comprehensive substantive norms applicable in cyberspace. It shall not be reviewed here. However, it suffices to highlight that its content covers various topics treated in International law textbooks and how they could apply in cyberspace. It covers topics such as sovereignty, jurisdiction, the law of armed conflict, cyber armed conflict, the use of force, self-defence, among others. However, it is a manual that unveils various aspects that legislation seeking to apply international law to cyberspace, should be aware of. As the name suggests, it is a guide to assist legislators in formulating national, regional and international instruments and cannot be construed as a binding legal document.

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[165] ibid., [para. 19].
[166] The G7, 'Joint communiqué' (Adopted by the G7 Foreign Ministers at Hiroshima Japan on 10-11 April 2016) [preamble para. 2] available at <http://www.mofa.go.jp/files/000147440.pdf> accessed 29 April 2017.
[167] ibid., 3-4.
[168] The G7, 'Principles and Actions on Cyber' (Adopted at the G7 Summit held at Ise-Chima Japan on 26-27 May 2016) 1-3 available at <http://www.japan.go.jp/g7/> accessed 29 April 2017.
[169] See generally, Michael N. Schmitt, *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations* (Cambridge, Cambridge University Press 2017).

4.8 Substantive Legal Instruments Applicable to Cyberspace

4.8.1 The Council of Europe Convention on Cybercrime[170]

The Council of Europe adopted the first International Convention on Cybercrime[171] (hereinafter referred to as Convention on Cybercrime) in November 2001 and it came into force in July 2004. Paragraph 4 of its preamble affirmed the need to pursue 'a common criminal policy aimed at the protection of society against cybercrime, *inter alia*, by adopting *appropriate legislation* and fostering international co-operation.'[172] We emphasised "appropriate legislation" to contest Obama administration's proposal that the existing international legal principles could apply in cyberspace. The Convention on Cybercrime indicates the inadequacy of the first limb of Article 2(4) in protecting the entire territory of a State.

The Convention on Cybercrime has procedural and substantive aspects. The substantive aspect covers broad areas of illegal activities in cyberspace, namely, infringement of copyright, child pornography, computer-related fraud, and violations of network security. The prohibited acts are categorised into five. They are, (1) offences against the confidentiality, integrity, and availability of computer data and systems,[173] (2) computer-related offences,[174] (3) data and systems,[175] (4) offences related to infringements of copyright and related rights,[176] and (5) ancillary liability and sanctions.[177]

A further analysis of these offences is irrelevant insofar as they establish that States could exercise sovereign power and jurisdiction in cyberspace.[178] The same consideration justifies

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[170] Cybercrime has been defined as any illegal act involving a computer and all activities done with criminal intent in cyberspace or which are computer-related. See Kierkegaard (n 31) 438.

[171] See generally, *Convention on Cybercrime* (n 111); Council of Europe, *Additional Protocol to the Convention on cybercrime, concerning the criminalization of acts of a racist and xenophobic nature committed through computer systems* (Concluded at Strasbourg on 28 January 2003, entered into force on 1 March 2006) 2466 UNTS 205.

[172] *Convention on cybercrime* (n 111) [preamble para. 4] (emphasis added).

[173] ibid., [Arts. 2-6].

[174] ibid., [Arts. 7-8].

[175] ibid., [Art. 9].

[176] ibid., [Art. 10].

[177] ibid., [Arts. 11-13].

[178] For further analysis, see Miriam F. Miquelson-Weismann, 'The Convention on Cybercrime: A Harmonized Implementation of International Penal Law: What Prospects for Procedural Due Process' (2005) 23(2) *John Marshall Journal of Computer and Information Law* 329-362.

why the procedural aspect of the Convention will not be analysed here. However, issues concerning enforcement might occur where the cybercriminal is resident in a foreign territory. Such difficulties will be examined below when we analyse domestic laws.

The Convention on Cybercrime is a multilateral treaty and requires States parties, to establish domestic laws prohibiting cybercrimes and to ensure that offenders are investigated and prosecuted.[179] Article 4 provides as follows: '[e]ach Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally, the damaging, deletion, deterioration, alteration or suppression of computer data without right.'[180] The Convention on Cybercrime is a step towards territorialisation of cyberspace. However, it has been criticised for giving excess powers to governments at the detriment of the individuals' right to privacy.[181] Similarly, it has been treated as a regional instrument that lacks universal application.[182]

4.8.2 National laws on cyberspace – state practice

This section briefly examines State practice as evidence of the UN member State's commitment to exercising jurisdiction in cyberspace. For want of space, one State each from the United Nations Regional Groups of Member States[183] will be analysed. No condition is attached to the method of selection because not all UN member States have enacted a cyber law. However, preference is given, where possible, to States that are regional headquarters. Take note of the year the States studied enacted their law in light of the principle of *nullum crimen nulla poena sine lege*[184] and the claim that the narrow approach of Article 2(4) applies in cyberspace.

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[179] *Convention on cybercrime* (n 111) [Arts. 11-14].
[180] ibid., [Art. 4].
[181] Kierkegaard (n 31) 433.
[182] Stein Schjolberg and Solange Ghernaouti-Helie, *A global treaty on cybersecurity and cybercrime* (Second Edition, Norway, AiTOslo 2011) ii available at <http://pircenter.org/kosdata/page_doc/p2732_1.pdf> accessed 30 April 2017.
[183] The regional grouping is based on the United Nations standard. See United Nations Department for General Assembly and Conference Management, 'United Nations Regional Groups of Member States' available at <http://www.un.org/depts/DGACM/RegionalGroups.shtml> accessed 30 April 2017.
[184] No offence is committed if no law has criminalised it. See Theodor Meron, 'Revival of the customary humanitarian law' (2005) 99(2) *American Journal of International Law* 817-834, 817.

4.8.2.1 Africa

Ethiopia – Computer Crime Proclamation No. 958/2016[185]

The Federal Democratic Republic of Ethiopia is the headquarters of the African Union. On 7 July 2016, it adopted the Computer Crime Proclamation No. 958/2016. It contains substantive crimes and procedural rules for prosecuting cybercrimes in the Federal High Court of Ethiopia. Section 40, subsection 1 authorises the Federal High Court to prosecute cybercrimes.[186] Section 40, subsection 2 provides as follows, '[t]he judicial jurisdictions stipulated under Article 13 and Article 17 (1) (b) of the Federal Democratic Republic of Ethiopia Criminal Code shall include computer crimes.'[187] Article 13 of the Criminal Code of Ethiopia[188] concerns crimes committed against the State of Ethiopia, its safety or integrity, its institutions, vital interests or currency from outside of Ethiopia. Similarly, Article 17 (1) (b) refers to the crime against public health, or morals committed outside of Ethiopia.[189]

These two provisions empower Ethiopia's Federal High Court to prosecute cybercrimes initiated from outside Ethiopia. It is unlikely that such provisions apply retroactively. But having been criminalised, the prosecution of cybercrime that originates from outside Ethiopia would still be difficult without the cooperation of the State from whose territory the crime originates. Consequently, section 42 provides that the Federal Attorney General should cooperate or enter into an agreement with the competent authority of another State in matters concerning computer crime.[190]

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[185] See generally, The Federal Democratic Republic of Ethiopia, *Computer Crime Proclamation No. 958/2016* (Adopted at Addis Ababa on 7 July 2016, Federal Negarit Gazette, No. 83, 7 July 2016) available at the website of the International Labour Organisation <http://www.ilo.org/dyn/natlex/natlex4.countrySubjects?p_lang=en&p_country=ETH&p_order=ALPHABETIC> accessed 30 April 2017 [hereinafter *Computer Crime Proclamation*].

[186] ibid., [section 40(1)].

[187] ibid., [section 40(2)].

[188] See *The Criminal Code of the Federal Democratic Republic of Ethiopia Proclamation No. 414/2004* (Adopted in 2005, published in the Federal Negarit Gazetta 9 May 2005) [Art. 13] available at the website of the International Labour Organisation <http://www.ilo.org/dyn/natlex/natlex4.countrySubjects?p_lang=en&p_country=ETH&p_order=ALPHABETIC> accessed 30 April 2017.

[189] ibid., [Art. 17(1)(b)].

[190] *Computer Crime Proclamation* (n 185) [section 42(1)].

4.8.2.2 Asia-Pacific

Thailand – Computer Crime Act B.E. 2550 (2007)[191]

The Computer Crime Act of the Kingdom of Thailand came into force on 18 July 2007. It contains 30 sections divided into two chapters, excluding sections 1 to 4 that deal with the definition of the basic terms. Chapter one deals with the substantive prohibited conduct (computer-related offences) and Chapter two deals with procedural matters.

Section 18 gives the competent States' officials the right to, among others, access, inspect, search, seize and to decode or order a service provider to decode encrypted data if they have reasonable cause to believe that cybercrime is perpetrated.[192] A major deficit of this Act is that it failed to explain how extra-territorial cyber incursions could be prosecuted in Thailand. It makes no express provision regarding the jurisdiction of the Courts in Thailand over malicious cyberattacks initiated from outside Thailand. However, it indicates that the government of Thailand has control over activities in its cyber-territory.

4.8.2.3 Eastern Europe

Estonia

In the aftermath of the cyberattack on the Republic of Estonia's critical infrastructure in 2007, Estonia adopted a National Security Strategy in 2008.[193] Its' mandate was to address the national cybersecurity challenges involving 'electronic information, data, and media services that affect a country's interests and wellbeing.'[194]

As a member of the EU and the Council of Europe, Estonia is by law required to give effect to the laws of both regional bodies through domestic legislation. Estonia recognises the

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[191] See generally, *Computer Crime Act B.E. 2550 (2007)* (Adopted on 10 June 2007, published in Government Gazette in volume 124 section 27 KOR on 18 June 2007). Prachatai Unofficial English Translation is available at <https://prachatai.com/english/node/117> accessed 1 May 2017.

[192] ibid., [section 18].

[193] See generally, Estonian Ministry of Defence, *Cyber Security Strategy* (Estonia, Tallinn 2008) available at <https://www.unodc.org/res/cld/lessons-learned/cyber-security-strategy_html/Cyber_Security_Strategy_Estonia.pdf> accessed 1 May 2017.

[194] ibid., 7.

supremacy of the EU Law, although the Constitutional Amendment Act that provides for that has been challenged by some Judges of the Supreme Court of Estonia.[195]

Nonetheless, Directive (EU) 2016/1148[196] adopted by the European Parliament on 6 July 2016 is the EU primary legislation on cybercrime. The preambular paragraph (8) authorises the member States to investigate, detect and prosecute criminal offences committed against its sovereignty in cyberspace.[197] Similarly, paragraph (62) of the preamble authorises the member States to request a report from service providers of serious criminal activities through established diplomatic channels.[198] It must be stressed that this "Directive" is not a unified penal code for the EU member States but was meant to enhance economic activities among the Member States. Yet, it makes provision for the cooperation of the member States in the fight against cybercrime.

Additionally, the Convention on Cybercrime discussed earlier provides that member States shall adopt legislation to implement the convention at the national level.[199] Estonia became a signatory to this Convention on 23 November 2001, ratified it on 12 May 2003 and it entered into force on 1 July 2004.[200] Therefore, Estonia could rely on its provisions to institute criminal proceedings against persons or corporate bodies that breach its cyberspace.

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[195] Tatjana Evas, *Judicial Application of European Union Law in Post-Communist Countries: The cases of Estonia and Latvia* (London and New York, Routledge 2012) 35-37.

[196] European Parliament, 'Directive (EU) 2016/1148 of the European Parliament and of the Council of 6 July 2016 concerning measures for a high common level of security of network and information systems across the Union' (Adopted on 6 July 2016, entered into force on 8 August 2016) (2016) *Official Journal of the European Union* L 194, 1–30.

[197] ibid., [preamble para. (8)].

[198] ibid., [preamble para. (62)].

[199] *Convention on cybercrime* (n 111) [Arts. 11-14].

[200] Council of Europe, 'Chart of signatures and ratifications of Treaty 185 – Status as of 01 May 2017' available at <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/185/signatures?p_auth=vOOvmMUS> accessed 1 May 2017 [hereinafter *Convention on Cybercrime Status*].

Aside from these instruments, Estonia has other domestic legislations. They include, the *Penal Code*,[201] *Code of Criminal Procedure*,[202] *Databases Act*,[203] *Information Society Services Act*,[204] and *Electronic Communications Act*.[205] While these domestic laws could aid the prosecution of illegal cybercrimes, penal codes do not apply retroactively. Hence, paragraph 2 of the *Penal Code* establishes that *nullum crimen nulla poena sine lege* is the fundamental principle of the criminal justice system.[206]

4.8.2.4 Latin American and Caribbean

About 30 Member States of the Organisation of American States have criminalised computer related offences.[207] The number is impressive and shows the Latin American's commitment to exercise sovereign right in cyberspace. We shall, however, examine instruments enacted by the Commonwealth of the Bahamas.

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[201] See generally Republic of Estonia, *Penal Code* (Passed on 6 June 2001, entered into force on 1 September 2002) available at <http://www.cyberlawdb.com/gcld/estonia/> accessed 1 May 2017 [hereinafter *Estonia Penal Code*].

[202] Republic of Estonia, *Code of Criminal Procedure* (Passed on 12 February 2003, entered into force on 1 July 2004) §§ 114, 115, 118-119 available at <http://www.cyberlawdb.com/gcld/estonia/> accessed 1 May 2017.

[203] Republic of Estonia, *Digital Signatures Act* (Adopted on 8 March 2000, entered into force on 15 December 2000) [see chapter vii, section on "proprietary liability of service providers and insurance," § 38] available at <http://www.cyberlawdb.com/gcld/estonia/> accessed 1 May 2017.

[204] Republic of Estonia, *Information Society Services Act* (Passed on 14 April 2004, entered into force on 1 May 2004) §§ 4-6, 12-15 available at <http://www.cyberlawdb.com/gcld/estonia/> accessed 1 May 2017.

[205] The Republic of Estonia, *Electronic Communications Act* (Adopted on 8 December 2004, entered into force on 1 January 2005) §§ 135-145 available at <http://www.cyberlawdb.com/gcld/estonia/> accessed 1 May 2017.

[206] *Estonia Penal Code* (n 201) § 2.

[207] Organisation of American States Department of Legal Cooperation, 'Inter-American Portal on Cybercrime' available at <https://www.oas.org/juridico/english/cyber.htm> accessed 2 May 2017.

Bahamas – Computer Misuse Act, 2003[208]

The Computer Misuse Act of the Commonwealth of the Bahamas was passed in 2003 alongside the Data Protection (Privacy of Personal Information) Act[209] and Electronic Communications and Transactions Act.[210]

The *Computer Misuse Act* which is the primary penal code for computer-related offences covers eight sections which include, (1) unauthorised access to a computer.[211] (2) Unauthorised access to a computer with the intent to commit or facilitate the commission of an offence.[212] (3) The modification of computer material.[213] (4) Unauthorised use or interception of computer service.[214] (5) Unauthorised obstruction of use of computer.[215] (6) unauthorised disclosure of access code.[216] (7) Enhanced punishment for offences involving protected computers[217] and (8) Incitement, abatements and attempts punishable as full offences.[218]

Section 11 deals with procedural matters and provides that such offences be tried in accordance with Chapter 84 of the Penal Code of the Bahamas.[219] It further provides that, the law applies to persons of any nationality or citizenship both from within and outside of the

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208 Commonwealth of the Bahamas, *Computer Misuse Act* (Passed by Parliament in 2003, Assented to on 11 April 2003, entered into force on 16 June 2003) available at <http://www.oas.org/juridico/english/cyb_bhs.htm> accessed 2 May 2017 [hereinafter *Bahamas Computer Misuse Act*].

209 Commonwealth of the Bahamas, *Data Protection (Privacy of Personal Information) Act* (Passed by Parliament in 2003, Assented to on 11 April 2003, entered into force on 2 April 2007) available at <http://laws.bahamas.gov.bs/cms/images/LEGISLATION/PRINCIPAL/2003/2003-0003/DataProtectionPrivacyofPersonalInformationAct_1.pdf > accessed 2 May 2017.

210 Commonwealth of the Bahamas, *Electronic Communications and Transactions Act* (Passed by Parliament in 2003, Assented to on 11 April 2003, entered into force on 16 June 2003) available at <http://laws.bahamas.gov.bs/cms/images/LEGISLATION/PRINCIPAL/2003/2003-0004/ElectronicCommunicationsandTransactionsAct_1.pdf> accessed 2 May 2017.

211 *Bahamas Computer Misuse Act* (n 208) [section 3].

212 ibid., [section 4].

213 ibid., [section 5].

214 ibid., [section 6].

215 ibid., [section 7].

216 ibid., [section 8].

217 ibid., [section 9].

218 ibid., [section 10].

219 Commonwealth of the Bahamas, *Penal Code,* 1924 (CH. 84) (as Amended up to law No. 1 of 2007) (Enacted on 15 May 1924, entered into force on 1 January 1927) available at the website of World Intellectual Property Organisation <http://www.wipo.int/wipolex/en/details.jsp?id=15087> accessed 2 May 2017.

Bahamas.[220] The strongest territorial-causal link in the *Computer Misuse Act* is section 11, subsection 4 which permits such offences to be tried if '(a) the accused was in The Bahamas at the material time; or (b) the computer, program or data was in The Bahamas at the material time.'[221] However, section 11, subsection 3 provides that such offences if committed against the Bahamas from any part of the world could be dealt with as if committed in the Bahamas. How extra-territorial cyber offences initiated from outside the Bahamas could be prosecuted in the Bahamas if the accused resides in a State that has no extradition treaty with the Bahamas is not stated.

4.8.2.5 Western Europe

Belgium – Legislations on cybercrimes

The Kingdom of Belgium is a member of the EU as well as the Council of Europe. Therefore, it is obliged to give effect to the EU Directives in the Belgian domestic law.[222] Belgium is also a signatory to and has ratified the Council of Europe's Convention on Cybercrime on 20 August 2012 and has equally domesticated it.[223]

The substantive offences are similar to those discussed above. It relates to, among others, unauthorised interference, illegal access/hacking, computer-related fraud and computer-related forgery. On the procedural aspect, Article 88*ter* provides that a search order may extend to another computer order than the one located where the warrant is issued.[224] But where the search overreach the territory of other States, the Ministry of Justice should notify the competent authority of the concerned State.[225]

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[220] *Bahamas Computer Misuse Act* (n 208) [section 11(2)].
[221] ibid., [section 11(4)].
[222] *Convention on Cybercrime Status* (n 200) [check the column for ratification for Belgium].
[223] The legislations include, among others, Act of 28 November 2000 on cybercrime (Belgian State Gazette of 3 February 2001); Act of 15 May 2006 modifying articles 259bis, 314bis, 504quater, 550bis and 550ter of the Belgian Criminal Code (Belgian State Gazette of 12 September 2006); Act of 6 June 2010 introducing a Social Criminal Code (Belgian State Gazette of 1 July 2010). The texts in Dutch and French languages are available at <http://www.ejustice.just.fgov.be/cgi/welcome.pl>; for Unofficial English Translation of the Act of 28 November 2000 on Cybercrime by Prof Johan Vandendriessche, visit <https://www.slideshare.net/Johan_Vdd/unofficial-translation-of-the-belgian-cybercrime-act-of-28-november-2000> accessed 2 May 2017 [hereinafter *Belgian Cybercrime Act 2000*].
[224] *Belgian Cybercrime Act 2000* (n 222) [Art. 88*ter* §2].
[225] ibid., [Art. 88*ter* §3].

This seems reasonable in that while States acquire jurisdiction to prosecute cybercrimes committed in their territory, an extradition of the suspect may be required for such crimes that originate from outside their State. Alternatively, the victim State might request the host State to prosecute the suspect. This could resolve the ambiguity in section 11, subsection 3 of the Bahamas' *Computer Misuse Act* 2003 that gives jurisdiction to its Courts over such crimes. However, the Belgian model raises a problem of enforcement if a competent authority to which a matter should be referred, was indeed the source of the attack. A diplomatic backlash might ensue between States when a referred cybercrime is not properly investigated or prosecuted.

Unfortunately, cybercrimes do not fall within the jurisdiction of the International Criminal Court.[226] Until proven otherwise, States might in good faith depend on the fraternal cooperation with other States to be able to prosecute extra-territorial cybercrimes where there is no extradition treaty.

We sum up by observing that these legislations have shown that cyberspace is part of a State territory. It is an addition to the traditionally recognised scope of Article 2(4) of the UN Charter. It follows that the narrow interpretation of Article 2(4) does not adequately protect States territory. This leads us to the second aspect of this chapter, that is, to establish that while a State may acquire a territorial right in cyberspace, the breach of such a right does not constitute physical armed force.

4.9 The soft character of the threat or attacks in cyberspace

The notion that "soft attacks"[227] in cyberspace amount to the threat or use of force is exaggerated from the positivist's perspective. Apart from the physical armed attack on the computer hardware installations within a State, other computer attacks are soft in character, that is, they consist of malware[228] designed to exploit or to disrupt the functionality of the

[226] *Rome Statute of the International Criminal Court* (Adopted in Rome, Italy on 17 July 1998, entered into force on 1st July 2002) 2187 UNTS 90 [Art. 5].

[227] By "soft attack" is meant any unauthorised electronic access to another person's computer for economic purposes or with the intent to impair, disrupt or destroy its functionality that does not require physical disconnection or destruction of the said computer hardware or infrastructure.

[228] Malware refers to malicious software that causes damage to computer systems by eavesdropping, infection, replication, propagation, congestion, and slowdown of the entire network. See B. Bhagyavati, 'Social engineering' in Janczewski and Colarik (eds) (n 26) 190.

targeted computer system. Such “attacks” fall within the second limb of Article 2(4) which takes “value” into account. Before we examine this point further, let us examine some cases on cyberattacks.

4.9.1 Case study

4.9.1.1 Cyber-attack on Estonia in 2007

According to Tamkin, Russia’s attack of Estonia in 2007 was a punishment for the latter’s relocation of the Soviet Union’s World War II Memorial from Tallinn to its suburbs.[229] 0n 27 April 2007, the Estonian Government website was hacked with what was technically described as the distributed denial-of-service[230] (hereinafter referred to as DDoS). As a result, political, business and social activities in Estonia were grounded to a halt for weeks.[231] The banking sector was paralysed and the credit card companies shutdown their system for fear of being hacked. The media outlet and cable television networks were offline. Estonia’s defence minister, Jaak Aaviksoo described it as a national security threat equivalent to closing all the country’s sea ports.[232]

NATO approached the attack with a deep sense of national security emergency and responded by establishing the Cooperative Cyber Defence Centre of Excellence in Tallinn, Estonia.[233]

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[229] Emily Tamkin, ‘Estonia: 10 years after its cyber attacks’ (Financial review, 1 May 2017) available at <http://www.afr.com/news/special-reports/cyber-security/estonia-10-years-after-its-cyber-attacks-20170501-gvwbdh> accessed 3 May 2017.

[230] See Alexander Klimburg (ed), *National Cyber Security Framework Manual* (Estonia, NATO CCD COE Publications 2012) 50; Clarke and Knake (n 11) 13. The Distributed denial of service (DDoS) attacks are advanced types of denial-of-service (DoS) attacks. By bundling the resources of multiple coordinated systems attack network are created, consisting of attackers, handlers and agents. See George Disterer, Ame Alles and Axel Hervatin, ‘Denial-of-service (DoS) attacks: Prevention, intrusion detection, and mitigation’ in Janczewski and Colarik (eds) (n 26) 272.

[231] Nathan A. Sales, ‘Regulating Cyber-Security’ (2013) 107(4) *Northwestern University Law Review* 1503-1568, 1504.

[232] Mark Landler and John Markoff, ‘Digital fears emerge after data siege in Estonia’ (New York Times, 29 May 2007) available at <http://www.nytimes.com/2007/05/29/technology/29estonia.html> accessed 3 May 2017.

[233] Cooperative Cyber Defence Centre of Excellence, ‘Centre is the first International Military Organization hosted by Estonia’ (NATO Cooperative Cyber Defence Centre of Excellence Tallinn, Estonia, 28 October 2008) available at <https://ccdcoe.org/centre-first-international-military-organization-hosted-estonia.html> accessed 3 May 2017.

4.9.1.2 Cyber-attack on Georgia in 2008

In 2008, Georgia's Government website was hacked following the civil disturbances that erupted when South Ossetia and Abkhazia wanted to secede from Georgia.[234] Georgia accused Russia of being responsible for the attacks as part of its military strategy concerning the conflict between the two States over the province of South Ossetia.[235] The international community condemned Russia's actions against Georgia.[236]

The Independent International Fact-Finding Mission on the Conflict in Georgia condemned it[237] as deplorable but did not classify it as the use of force. Instead, it hypothetically argued if such attacks were attributable to the Russian government, then 'it is likely that this form of warfare was used for the first time in an inter-state armed conflict.'[238] The report concludes that 'the nature of defence against cyberattacks at this stage of its development means that such attacks are easy to carry out, but difficult to prevent, and to attribute to a source.'[239]

Hence, the Fact-Finding Mission did not classify it as the threat or use of force within the meaning of Article 2(4). The report did not say that self-defence should be available for such attacks. It follows that the claim that the UN Charter applies to cyberspace is unsustainable. How do we justify that in 1945, the drafters of the UN Charter intended Article 2(4) to apply to a non-kinetic cyberattack that developed in the 1990s?[240] Such construction is reasonable if Article 2(4) were interpreted broadly to mean respect for the inviolability of State territory.

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[234] Clarke and Knake (n 11) 18.

[235] Swaine (n 60) 1.

[236] Christopher Waters, 'South Ossetia' in Christian Walter, Antje Von Ungern-Sternberg and Kavus Abushov (eds), *Self-termination and Secession in International Law* (United Kingdom, Oxford University Press 2014) 180; Independent International Fact-Finding Mission on the Conflict in Georgia, 'Reports' (Volume II, September 2009) 187-190 available at <http://www.mpil.de/en/pub/publications/archive/independent_international_fact.cfm> accessed 18 April 2017 [hereinafter *Report on the Conflict in Georgia*]; Helen Womack, 'NATO joins US in condemning Russia's response in South Ossetia' (The Guardian, 11 August 2008) available at <https://www.theguardian.com/world/2008/aug/11/georgia.russia7> accessed 3 May 2017.

[237] *Report on the Conflict in Georgia* (n 236) 217-218.

[238] ibid., 219.

[239] ibid., 219.

[240] David C. Mowery and Timothy Simcoe, 'Is the Internet a US invention? — An Economic and Technological History of Computer Networking' (2002) 31 *Research Policy* 1369–1387, 1369-1370.

4.9.1.3 Stuxnet

Stuxnet is a name given to malware that struck the Iranian Nuclear facility at Natanz in 2010. When Stuxnet was released, it quickly infected over 60 000 computers in several countries like India, China, the United Kingdom, Indonesia, South Korea, the United States, Malaysia and Azerbaijan.[241] The drastic effect was felt in Iran's Nuclear Facility which was the primary target. Ralph Lagner described it as 'all-out cyber strike against the Iranian Nuclear Program.'[242]

Obviously, the invention of Stuxnet changed the conventional thinking about warfare. Prior to that, it was not believed that malware could cause material damage to a State's infrastructure. Liam O Murchu, a Symantec security expert that detected Stuxnet affirmed that such has never been seen before because it controls the way the physical machines work.[243] It disrupts the frequencies and speed of the factory machines, thereby sabotaging the normal operation of the industrial control process without detection.[244] This is because it comes with a rootkit[245] which enables it to conceal commands that are being executed. Thus, it remains one of the most sophisticated malware ever created.[246]

The inventor of Stuxnet worm remains unknown although the New York Times had suggested it was carried out by Israel and the United States to stop Iran's nuclear ambitions.[247] The author of Stuxnet is not prejudicial to our analysis but relevant in that Article 2(4) deals with States' conduct. But suppose it was perpetrated by a State, was that enough to place it in the

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[241] Farwell and Rohozinski (n 19) 23.

[242] Ralph Langner, 'The Big Picture' (Blog, posted on 19 November 2010) available at <https://www.langner.com/2010/11/the-big-picture/> accessed 2 May 2017.

[243] Robert McMillan, 'Siemens: Stuxnet worm hit industrial systems' (Computerworld, 14 September 2010) available at <http://www.computerworld.com/article/2515570/network-security/siemens--stuxnet-worm-hit-industrial-systems.html> accessed 2 May 2017.

[244] Farwell and Rohozinski (n 19) 25; Eric Chien, 'Stuxnet: A Breakthrough' (Symantec Official Blog, 12 November 2010) available at <https://www.symantec.com/connect/blogs/stuxnet-breakthrough> accessed 2 May 2017.

[245] Rootkits are tools used to disguise the fact that a machine has been rooted. A rootkit is not used to crack into a system, but rather to ensure that a cracked system remains available to the intruder. See Nugent and Raisinghani (n 46) 33.

[246] McMillan (n 243) 1.

[247] Sanger (n 13) A1; Michael J. Glennon, 'The Dark Future of International Cybersecurity Regulation' (2013) 6(2) *Journal of National Security Law and Policy* 563-570, 567; Mary Ellen O'Connell, 'Cyber Security without Cyber War' (2012) 17(2) *Journal of Conflict and Security law* 187-210, 187.

same category with the Israeli air raid on the Iraqi Nuclear Reactor on 7 June 1981? Probably not.

4.9.1.4 Other Cyberattacks

From the year 2008 going forward, there have been allegations of state-sponsored cyberattacks. Duqu which was a similar malware like Stuxnet was discovered in 2011.[248] Duqu was designed for cyber-espionage to enable hackers perfect in designing a malware that could not be detected.[249] In 2012, Flame virus was discovered as part of the United States cyber operation in the Middle East.[250] On a closer examination, Flame was discovered to have the same properties with Stuxnet.[251] In the same year that Flame was discovered, another complex espionage malware named Gauss was discovered by Kaspersky Lab.[252] It was designed to intercept and steal credit cards details and e-mail accounts from financial institutions and social communications networks.

The state-sponsored malicious malware targeting other States or businesses has increased. In the last quarter of 2016, about 500 million user accounts of Yahoo subscribers were hacked.[253] The 2017 report by the Malwarebytes shows that almost one billion malware were detected in 2016.[254] The Obama administration accused Russia of meddling in the US 2016

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[248] Symantec Security Response, 'W32.Duqu: The precursor to the next Stuxnet' (Symantec Official Blog, 18 October 2011) 1 available at <https://www.symantec.com/connect/w32_duqu_precursor_next_stuxnet> accessed 3 May 2017.

[249] ibid., A1.

[250] See Timo Kiravuo and Mikko Sarela, 'The care and maintenance of cyberweapons' in Jari Rantapelkonen and Mirva Salminen (eds) (n 10) 228.

[251] Alexander Gostev, 'Back to Stuxnet: the missing link' (Securelist, 11 June 2012) 1 available at <https://securelist.com/blog/incidents/33174/back-to-stuxnet-the-missing-link-64/> accessed 3 May 2017.

[252] Symantec Security Response, 'Complex Cyber Espionage Malware Discovered: Meet W32.Gauss' (Symantec Official Blog, 9 August 2012) available at <https://www.symantec.com/connect/blogs/complex-cyber-espionage-malware-discovered-meet-w32gauss> accessed 3 May 2017.

[253] Damian Paletta, 'State-sponsored cyberattacks prompt debate' (The Wall Street Journal, 22 September 2016) 1 available at <https://www.wsj.com/articles/state-sponsored-cyberattacks-prompt-debate-1474589513> accessed 3 May 2017; United States Department of Justice, 'U.S. Charges Russian FSB Officers and Their Criminal Conspirators for Hacking Yahoo and Millions of Email Accounts' (Justice News, 15 March 2017) available at <https://www.justice.gov/opa/pr/us-charges-russian-fsb-officers-and-their-criminal-conspirators-hacking-yahoo-and-millions> accessed 10 May 2017.

[254] Malwarebytes, '2017 state of malware report' (Malwarebytes Lab, 27 March 2017) 1 available at <https://press.malwarebytes.com/2017/03/27/malwarebytes-releases-asia-pacific-state-malware-report/> accessed 3 May 2017.

Presidential elections.[255] On 14 March 2017, Mark Vartanyan, a Russian hacker that developed "Citadel malware toolkit" was charged with one count of computer fraud after being successfully extradited to the US from Norway.[256] The statistics are disturbing and obviously, violates the territory of the victim States.

4.10 The enforcement of Domestic Law on Cyberspace Offenders

Chapter three demonstrates how state practice limits the meaning of Article 2(4) to physical armed force in total neglect of its broader meaning. As seen above,[257] the Independent International Fact-Finding Mission on the Conflict in Georgia did not classify cyberattack as an armed force. Chapter five shows how the breaches of Article 2(4) of the UN Charter have been interpreted over the years. The idea that cyberattack could be classified as an armed attack started with the Obama administration that claimed that international law applies in cyberspace.[258] The ICC is yet to adjudicate cybercrimes claims if it ever falls within its jurisdiction. To date, no State has instituted a claim before the ICJ or has taken a military action against another State that hacked its computers. Instead, States have brought civil or criminal actions in their domestic courts against individual cyberspace offenders.

4.10.1 The United States – *US v Gorshkov*[259]

The facts of the case are as follows. The suspect hackers of Russian nationality demonstrated their hacking skills to undercover agents of the Federal Bureau of Investigation (hereinafter referred to as FBI) and were subsequently arrested. Through the FBI computer which they used to demonstrate their hacking skills, the FBI accessed and retrieved evidence concerning their intrusion of American businesses from their private computers in Russia. The legal question before the Court was whether the FBI violated their right to privacy and overreached the Russian territory. The District Court held that none of those rights were violated under

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[255] Julie H. Davis and Maggie Haberman, 'Donald Trump Concedes Russia's Interference in Election' (New York Times, 11 January 2017) A1 available at <https://www.nytimes.com/2017/01/11/us/politics/trumps-press-conference-highlights-russia.html?_r=0> accessed 11 May 2017.

[256] U.S. Attorney's Office Northern District of Georgia, 'Russian Hacker "Kolypto" Extradited from Norway' (United States Department of Justice, 14 March 2017) A1 available at <https://www.justice.gov/usao-ndga/pr/russian-hacker-kolypto-extradited-norway> accessed 3 May 2017.

[257] *Report on the Conflict in Georgia* (n 236) 219.

[258] *International strategy for cyberspace* (n 23) 9.

[259] See generally, *United States of America v Vasiliy Vyacheslavovich Gorshkov* (2001) WL 1024026.

the Fourth Amendment to the United States Constitution. The Russian government charged the FBI agents with hacking and demanded that the hackers should be extradited to Russia for trials, but the request was ignored by the American government.[260]

Relevant argument – the effect test

The United States Courts have in some cases applied the "effect test" when litigating computer-related offences. This was probably adjudicated for the first time in the *United States v Robert Thomas*.[261] Although this case concerns domestic litigation, it has a cross-border dimension that could apply to transnational cybercrime.

The defendants from California had disseminated electronic obscene graphic images across the United States. However, it could be accessed only by those that subscribed to them, paid the required fee and were issued with a password. An undercover agent from Tennessee subscribed and downloaded the material from Tennessee. The defendants were charged to Court in Tennessee for violating the Federal Obscenity Statute. Their defence was that Tennessee lacks jurisdiction over the act perpetrated in California. The Sixth Circuit held that 'the effects of the Defendants' criminal conduct reached the Western District of Tennessee, and that that district was suitable for accurate fact-finding.'[262]

While being sentenced in Tennessee, the defendants were indicted in the District of Utah for criminal offences contrary to the statute on certain activities relating to material involving the sexual exploitation of minors.[263] It follows that States parties to the Convention on Cybercrime could rely on Article 9 to initiate proceedings against such persons resident in their State that disseminate obscene materials across international borders. This was in issue in *Playboy Enterprises, Inc., v Chuckleberry Publishing Inc.,*[264] where the US Court stopped the circulation of online publication of a magazine registered in Italy because of its effect (passing

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[260] F. Cassim, 'Formulating Specialised Legislation to Address the Growing Spectre of Cybercrime: A Comparative Study' (2009) 12(4) *Potchefstroom Electronic Law Journal* 36-79, 45.

[261] See generally, *United States v Thomas* 74 F.3d 701 (6th Cir. 1996).

[262] ibid., 710.

[263] *United States v Thomas*, 113 F.3d 1247 (10th Cir. 1997); United States, *Certain activities relating to material involving the sexual exploitation of minors,* 18 U. S. Code § 2256.

[264] *Playboy Enterprises, Inc. v Chuckleberry Publishing, Inc.* 486 F.Supp. 414 (1980) 434-435; *United States v Aluminium Co. of America*, 148 F.2d 416 (2nd Cir. 1945) 444.

off) on the trademark of an existing company in the US. Therefore, a case may be filed in a civil or a criminal court against persons for their illegal cyberspace activities that have an effect on individuals, corporate bodies or a State abroad. Recently, the Attorney General of Minnesota issued a general "warning to all internet users and providers" that the State of Minnesota will exercise jurisdiction over acts that have an effect on Minnesota.[265]

Any State that relies on "effect theory" could based its argument on the controversial universal jurisdiction[266] or if prescribed by law.[267] Obviously, that States should exercise jurisdiction in cyberspace has been accepted[268] although its excesses have been criticised.[269] States should enforce its cyberspace law by cooperating with the State in whose territory the offender resides or risk violating the territorial right of the State in question.

4.10.2 The United Kingdom – *R v Smith* (Wallace Duncan) (No 4)[270]

This case deals with a Merchant Bank that went into administration due to unsecured creditor totalling £92m. The owner of the bank was charged with, among others, obtaining property by deception, contrary to section 15(1) of the Theft Act 1968.[271] The criminal charge was based on the fact that, although the bank was sited in England, the owner had inflated the size of the bank's profits from the gains made from his companies overseas.

Part of the defendant's argument was that the English Courts lack jurisdiction over offences committed abroad. The Court held that the English Courts have jurisdiction because the

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[265] The Office of Minnesota Attorney General, 'Statement of Minnesota Attorney General on Internet Jurisdiction,' available at <https://cyber.harvard.edu/ilaw/Jurisdiction/Minnesota_Full.html> accessed 4 May 2017.

[266] There is a growing concern that cyberspace globalises cybercrime and that prosecution of cyberspace offenders applies *erga omnes*. See Stephen Wilske and Teresa Schiller, 'International Jurisdiction in Cyberspace: Which States May Regulate the Internet' (1997) 50(1) *Federal Communications Law Journal* 117-178, 143; James Crawford, *Brownlie's Principles of Public International Law* (Eight Edition, United Kingdom, Oxford University Press 2012) 687-690.

[267] As discussed above.

[268] Jason Coppel, 'A Hard Look at the Effects Doctrine of Jurisdiction in Public International Law' (1993) 6(1) *Leiden Journal of International Law* 73-90, 73; Margaret Loo, 'IBM v Commissioner: The Effects Test in the EEC' (1987) 10(1) *Boston College of International and Comparative Law Review* 125-133, 125.

[269] Wilske and Schiller (n 266) 133.

[270] See generally, *R v Smith (Wallace Duncan) (No 4)* [2004] EWCA Crim 631 [hereinafter *R v Smith (Wallace Duncan)*].

[271] The United Kingdom, *Theft Act 1968* (Enacted by the Parliament on 26 July 1968) [section 15(1)] available at <http://www.legislation.gov.uk/ukpga/1968/60/pdfs/ukpga_19680060_en.pdf> accessed 4 May 2017.

substantial part of the offence was committed in England and Wales and the offender resides in London.[272] Thus, a State may prosecute a cyber offender domiciled within its territory. However, the Court's judgment in this case is a departure from the English Common Law that allows for the prosecution of acts committed or omissions made in England.[273]

4.10.3 Australia – *Director of Public Prosecution v Sutcliffe*[274]

The Commonwealth of Australia has taken the war against cyber-related offences farther than most States have done. Contrary to the PCIJ's *obiter* in *the Case of the S.S. Lotus*[275] that jurisdiction is territorial, Australia seems to have adopted the sovereignty approach to prosecute its citizens in any part of the world.

Section 15 of the Australian *Criminal Code Act, 1995*[276] provides for extended geographical jurisdiction. It provides that Australia has jurisdiction over its citizens' conduct which occurred partially or wholly outside Australia.[277] The *Cybercrime Act of 2001*[278] has improved upon evidence-gathering by introducing expanded search warrant powers which allow the police to conduct covert surveillance. How Australia will prosecute a cyber-offender working for, or is an agent of a foreign State in whose territory he or she resides is yet to be seen. Equally unclear is how to enforce such a law on Australians with dual or single citizenship, but who are not resident in Australia if Australia has no extradition treaty with the country in question.

By and large, the Australian criminal law system presumes that "all crime is local," that is, 'an act is done or omission is made or a result occurs within the domestic territory.'[279] In the *Director of Public Prosecution v Sutcliffe,* the Supreme Court of Victoria convicted an

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[272] *R v Smith (Wallace Duncan)* (n 270) [para. 47].
[273] *Cox v Army Council* [1963] AC 48, 67; *Air-India v Wiggins* [1980] 1 WLR 815, 819; *R v Jameson and Others* [1896] 2 QB 425, 430.
[274] *Director of Public Prosecution v Brian Andrew Sutcliffe* (In a matter of an appeal on a question of law pursuant to section 92 Magistrates' Court Act 1989) [2001] VSC 43 [hereinafter *DPP v Sutcliffe*].
[275] *Lotus case* (n 142) 18.
[276] See generally, Commonwealth of Australia, *Act No. 12 of 1995, Criminal Code Act 1995* (Done on 15 March 1995) available at <https://www.legislation.gov.au/Details/C2016C01150> accessed 5 May 2017.
[277] ibid., [section 15(1)(a)(c)].
[278] Commonwealth of Australia, *Act No. 161 of 2001, Cybercrime Act 2001* (Assented to 1 October 2001) [schedule 2] available at <https://www.legislation.gov.au/Details/C2004A00937> accessed 5 May 2017.
[279] *DPP v Sutcliffe* (n 274) [para. 38].

Australian citizen stalking a Canadian actress domiciled in Toronto through telephone and letters over several years. The Court's *obiter* emphasises that there is nothing to displace the presumption that Australian penal code has extra-territorial operation.[280] The only limitation is that the law must be 'for the peace, order and good government of the state of Victoria.'[281]

The Court further argues that what is required to establish jurisdiction is a link between the crime and the State of Victoria. This nexus can be remote and general[282] provided it is real and substantial[283] and concerns the State of Australia.[284] Cassim applauds legislations that recognise the extra-territorial effects of cybercrime.[285] Such legislations may fail during enforcement when there is no intermediate legal framework to facilitate them.

In conclusion, the legal framework of the three common law States examined shows the States' willingness to exercise sovereign rights in cyberspace. The same practice is evident in other States. In South Africa, for instance, crimes are traditionally understood as dealing with tangibles whereas cybercrimes are intangibles.[286] In the *S v Mashiyi,*[287] a computer-generated document was adjudged inadmissible in evidence in a criminal trial. Judge Miller, however, described such a decision as a gap in the law that needs to be filled with legislation.[288] That gap was closed with the adoption of the *Electronic Communications and Transactions Act* in 2002[289] (hereinafter referred to as ECT). Section 15(1)(a) of the ECT allows the admissibility of data messages in legal proceedings and this was relied upon by the Court in the *Ndlovu v Minister of Correctional Services*.[290]

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[280] ibid., [para. 43].
[281] ibid., [para. 43].
[282] *Union Steamship Co of Australia Pty Ltd v King* [1988] HCA 55 [para. 24].
[283] *Re Anne Hamilton-Byrne and Others* [1995] 1 VR 129, 142.
[284] *Pearce v Florenca* [1976] HCA 26 [para. 5, according to Gibbs J.].
[285] Cassim (n 260) 50.
[286] ibid., 55.
[287] See generally, *S v Mashiyi and Another* [2002] (2) SACR 387 (TkD).
[288] ibid., 393.
[289] See generally, Republic of South Africa, *Electronic Communication and Transactions Act, 2002* (Assented to on 31 July 2002, Government Gazette No 23708, 2 August 2002) available at <http://www.gov.za/sites/www.gov.za/files/a25-02.pdf> accessed 5 May 2017.
[290] See generally, *Ndlovu v Minister of Correctional Services* [2006) 4 All SA 165 (W).

In summary, the domestic legislations and case laws support that States could exercise sovereign right in cyberspace. Yet, no State has used physical armed force against another State that violates such a right. On this premise, the narrow approach to Article 2(4) does not accommodate such breaches since self-defence is not available for such violations.

4.11 Cyber Offences and the Law of Armed Conflict

One of the issues raised by the Obama administration in connection with cyberspace is that the law of armed conflict applies in cyberspace. An attempt to adapt the law of armed conflict to cyberspace oversimplifies a complex cyberspace bureaucracy that could involve civilians in the chain of commands. How would the civilians that engage in cyberwarfare be classified? Are they enemy combatant, mercenaries or civilians? These demarcations may not be obvious in cyberwarfare.

The laws and customs of war require that the right of the civilians should be respected.[291] Should we say that any civilian who has the capacity to attack a State's critical infrastructure is *ipso facto* a military or a combatant? If this were correct and Article 2(4) of the UN Charter is invoked, then their houses and computer could be attacked by the military of the victim State in self-defence. Note that views on what constitutes self-defence in cyberspace differ.[292]

How to treat a captured enemy combatant in the time of war is stipulated by the Hague Regulations of 1907,[293] the Geneva Conventions[294] and the First Protocol Additional to the Geneva Conventions.[295] How does this apply in cyberspace? Again, the title of these

[291] *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol II)* (Concluded at Geneva on 8 June 1977, entered into force on 7 December 1978) 1125 UNTS 609 [Art. 13].

[292] Oona A. Hathaway *et al.*, 'The Law of Cyber-Attack' (2012) 100(4) *California Law Review* 817-886.

[293] *Hague Convention IV - Laws and Customs of War on Land* (Signed at The Hague on 18 October 1907, entered into force on 26 January 1910) 36 Stat. 2277 [Annex Regulation, Art. 1].

[294] *Convention (IV) Relative to the Protection of Civilian Persons in Time of War* (Done at Geneva on 12 August 1949, entered into force on 21 October 1950) 75 UNTS 287 [Arts. 29-31]; *Hague Convention (II) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land* (Concluded at The Hague on 29 July 1899, entered into force on 4 September 1900) 32 Stat. 1803 [Arts. 29-31].

[295] *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)* (Concluded at Geneva on 8 June 1977, entered into force on 7 December 1978) 1125 UNTS 3 [Art. 46].

instruments deal with the “laws and customs of war on land.” Do we infer that every cybercrime necessarily occurs on land?

How the law of armed conflict applies in cyberspace will remain contentious in the foreseeable future.[296] Klimburg and Tirmaa-Klaar have suggested that any cyberattacks should be conducted with precision between military and civilian targets and in compliance with the proportionality principle.[297] What does this exactly means? It probably refers to a state-owned information and communication technology infrastructure. But how will a counter-cyber-strike be conducted? Will it be confined to a counter-cyberattack or accommodate physical armed force against a State cyberspace infrastructure?

Furthermore, it is the duty of nation-States to prevent cyberspace infrastructure installed within their territory from being deployed against another State. The debate on what constitutes the appropriate counter measures is underway.[298] While the western powers are optimistic that the inter-States’ cyberwar could be minimised if States stand up to their responsibility to control non-State cyberattacks,[299] Russia and China advocate for an international treaty banning the development of cyber weapons.[300]

Consequently, the United Nations has embarked upon creating the cyber-culture awareness to sensitize the member States on the cyberspace behavioural norms.[301] This implies that the rules that regulate States’ conduct in cyberspace must be amenable to cyberspace’s peculiarities. Thus, it is inaccurate to aver that the laws and customs of armed conflict are directly applicable in cyberspace.

On average, the study on the global conflict conducted by the Uppsala Universitet recorded only one inter-state conflict in 2014, between India and Pakistan.[302] In the same year, it

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[296] Klimburg and Tirmaa-Klaar (n 45) 13.
[297] ibid., 13.
[298] ibid., 13.
[299] UNGA Res. A/RES/55/63 (4 December 2000) [operative para. 1]; UN Doc. A/68/98 (24 June 2013) [para. 23].
[300] Klimburg and Tirmaa-Klaar (n 45) 13; UNGA Res. A/RES/53/70 (4 December 1998) [preamble paras. 5-8].
[301] UNGA Res. A/RES/57/239 (20 December 2002) [operative para. 2 and Annex document]; UN Doc. A/70/174 (22 July 2015) [paras. 9-15].
[302] Therese Pettersson and Peter Wallensteen, ‘Armed Conflicts, 1946-2014’ (2015) 52(4) *Journal of Peace Research* 536-550, 537.

recorded about 39 intra-state conflicts, 13 of which were internationalised, that is, the combatants were assisted by third States.[303] In 2016, the figure rose to 50 intra-State conflicts.[304]

Since what is prevalent now is “internationalised armed conflict” which obviously was not the context upon which the relevant laws of armed conflict were drawn up, we are faced with a dilemma of classification. It seems that the international community is yet to have a legal instrument with the title “Internationalised Armed Conflict.” This resonates the perennial debate regarding the permissible intervention in the internal affairs of other States. In Syria for instance, is Russia and the United States with their allies at war with Syria or the opposition or ISIS? The United States declares war on ISIS.[305] At some stage, Turkey that was initially fighting alongside the United States without the approval of the Assad government, turned around to fight with Russia in favour of Syria.

It could be difficult to evaluate the level of States’ involvement in “internationalised armed conflict” let alone understanding how to apply the law of armed conflict in cyberspace. Although Protocol II Additional to the Geneva Conventions 1949[306] applies to States as well as to non-State actors, it was designed for non-international armed conflicts. However, Article 1 of this Protocol delineates its scope to ‘armed forces and dissident armed forces or other organised armed groups under responsible command.’[307] While some military personnel or a member of a dissident armed group could be said to be under responsible command, it is unlikely that a civilian is. Yet to be seen is how an "organised armed group" will be interpreted with respect to cybercrimes.

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[303] ibid., 537.

[304] See generally, Uppsala Conflict Data Program, ‘Number of conflicts 1975-2016’ available at <http://ucdp.uu.se/#/encyclopedia> accessed 7 May 2016.

[305] Ashley Fantz, ‘War on ISIS: Who’s doing what?’ (CNN, 27 November 2015) available at <http://edition.cnn.com/2015/11/20/world/war-on-isis-whos-doing-what/> accessed 7 May 2017.

[306] See generally, *Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II)* (Adopted at Geneva on 8 June 1977, entered into force on 7 December 1978) 1125 UNTS 609.

[307] ibid., [Art. 1].

The judgment of the ICJ in the *Nicaragua* and *Oil Platforms* cases that arms support given to insurgents by a State does not constitute an armed attack[308] may hinder victims of cyberattack from succeeding in their claims. Although the ICJ's position was criticised as bad law,[309] it may well indicate the need for a clarification of what constitutes an armed conflict in cyberspace.

The state practice that acquiesces to espionage for security and economic reasons[310] may ultimately defeat the essence of criminalising unauthorised access to a State's critical infrastructure. Thus, States can cherry-pick which unauthorised access should be prosecuted and which intrusion is to be ignored. This makes legality clumsy and could introduce subjectivity in determining when an unauthorised access is prohibited.

4.12 The Nature of the Obligations imposed upon States in Cyberspace

Scholars opinions are divided on the nature of the obligations imposed upon States in cyberspace. Oppenheim would argue that a State's conduct that results in a material damage in another State constitutes a violation of the sovereignty of the affected State.[311] Heinegg considers this provision too broad and suggests that the damage must not just be material but severe.[312] Both schools consider damage a requirement since espionage, including cyber espionage is not prohibited under international law.[313]

But it could be argued that damage is irrelevant. Mere intrusion suffices to establish the required nexus to prove State's intention to exercise jurisdiction on a foreign territory. To draw an analogy from the UK criminal jurisdiction, the offence of burglary is established as soon as the offender trespasses with an intention to steal.[314] The PCIJ stated that 'the first

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[308] *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v United States of America) Judgment ICJ Reports (1986) p. 14 [paras. 191, 195] [hereinafter *Nicaragua case*]; *Oil Platforms* (Islamic Republic of Iran v United States of America) Judgment ICJ Reports (2003) p. 161 [para. 51].
[309] Abraham D. Sofaer, 'International Law and the Use of Force' (1988) 82 *American Society of International Law Proceedings* 420-428, 425.
[310] Murphy (n 14) 320-321.
[311] *Oppenheim 1996* (n 104) 385; Heinegg (n 1) 129.
[312] Heinegg (n 1) 129.
[313] ibid., 129.
[314] The United Kingdom, *Theft Act 1968* [section 9] available at <http://www.legislation.gov.uk/ukpga/1968/60/section/9> accessed 18 October 2015.

and foremost restriction imposed by international law upon a State is that, failing the existence of a permissive rule to the contrary, it may not exercise its power in any form in the territory of another State.'[315] In the *Corfu Channel* case, the ICJ maintained that 'between independent States, respect for territorial sovereignty is an essential foundation of international relations.'[316]

The inviolability of State territory imposes upon States, the duty to respect the territory of others. Therefore, Iran's outcry of 'mass data loss'[317] constitutes a breach of its territory.[318] The respect for a State's territory covers the exclusive sovereign right of a State over its cyberspace infrastructures and their contents.

It might sound trivial but a State that sets alight the national flag of another State in a live television broadcast may have initiated an action that could lead to war between both States. Article 2(4) of the UN Charter imposes upon States the duty to respect such cyberspace infrastructures as belonging to or is operated by a State. It includes such infrastructures belonging to private entities or private individuals registered in, or resident in a State territory. It also includes such infrastructures located on board a State's aircraft, ships, and other facilities that enjoy the sovereign immunity of a State.[319]

However, caution must be applied when attributing liability to the State for crimes committed by 'private entities'[320] in cyberspace. Such liabilities could arise if States from which the cyberspace offence originates fail to take the necessary steps to protect the cyberspace infrastructures of the victim State. Even when this applies, a State may not be directly

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[315] *Lotus case* (n 142) 18.

[316] *Corfu Channel case*, Judgment ICJ Reports (1949) p. 4, 35.

[317] Dave Lee, 'Flame: Massive cyber-attack discovered, researchers say' (BBC News, 28 May 2012) available at <http://www.bbc.co.uk/news/technology-18238326> accessed 7 October 2015.

[318] Murphy (n 14) 325.

[319] Heinegg (n 1) 129; United Nations*, Convention on the Law of the Sea* (Concluded at Montego Bay on 10 December 1982, entered into force on 16 November 1994) 1833 UNTS 397 [Arts. 95-96]. State civilian aircrafts are granted immunity, see *Commentary on the HPCR Manual on International Law Applicable to Air and Missile Warfare* (Program on Humanitarian Policy and Conflict Research, Harvard University 2010) 146 available at <http://ihlresearch.org/amw/Commentary%20on%20the%20HPCR%20Manual.pdf> accessed 11 May 2017.

[320] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* Advisory Opinion ICJ Reports (2004) p. 136 [para. 139]; *Nicaragua case* (n 308) 57.

responsible unless a case of negligence to investigate, prosecute and/or punish the offender is established.

One more observation to make is that although state practice accommodates espionage,[321] it is incompatible with the broad interpretation of Article 2(4) of the Charter. A recent decision by the Canadian Court prohibits the Canadian Security Intelligence Service from collecting covert intelligence abroad.[322] Therefore, the practice of *remote sensing* could potentially breach the sovereign right of a State[323] if it were done covertly or the data gathered were undisclosed due to the inability of the *sensed state* to meet its financial obligations.

4.13 Concluding Remarks

This chapter had two objectives. First, to prove that the cyberspace has become part of State territory, unlike the traditional categorisation that recognises only land, territorial sea and airspace. Second, to argue that the narrow interpretation of Article 2(4) of the UN Charter is inapplicable in cyberspace. The overarching aim was to show the deficit of the narrow interpretation of Article 2(4) in order to advance the course for the adoption of the broad interpretation.

To justify these objectives, this chapter examined the nature of cyberspace and observed that its emergence has affected the traditional notion regarding the "solidity" of State borders. The reason being partly because the cyberspace was designed not to conform strictly to the physical or geographical boundaries of States.

Over the years, the mystery that the cyberspace is "no-place" has prevented States from exercising sovereign rights in cyberspace. As a result, there has been a steady increase in the number of cyber crimes, cyber espionage and cyber warfare against individuals, corporate

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[321] Zahra Baheri and Ali Shojaei Fard, 'Status of Espionage from the Perspective of International Laws with emphasis on Countries' Diplomatic and Consular Relations' (2015) 2(1) *Journal of Scientific Research and Development* 41-45, 43; Philip Rosen, 'Communications Security Establishment, Canada's Most Secret Intelligence Agency' (1993) available at <http://www.parl.gc.ca/Content/LOP/researchpublications/bp343-e.htm> accessed 11 May 2017.

[322] Craig Forcese, 'Spies without Borders: International Law and Intelligence Collection' (2011) 5(1) *Journal of National Security Law and Policy* 179-210, 179-208; see generally, *Re Canadian Security Intelligence Service Act*, 2008 FC 301 [2008].

[323] UNGA Res. A/RES/41/65 (3 December 1986) [principle iv].

bodies and State institutions. The cyberspace offences are perpetrated not by individuals or corporate bodies alone but also by a State against other States.

This chapter argued that the "placeless-less" mythology surrounding the cyberspace has been debunked in the early 1990s through a series of legislations regulating cyber-activities. The process of law-making is an exercise of a sovereign right which according to the PCIJ is territorial.[324] That States now exercise sovereign right in cyberspace means that state practice recognises cyberspace as part of States territory.

States could exercise territorial rights in cyberspace on two grounds. Firstly, on the basis of sovereignty which States have over their citizens. Secondly, on the basis of jurisdiction which they acquire over the cyberspace infrastructures installed within their physical territory. The upsurge in cyberspace legislations is indicative of the member States' commitment to exercise sovereignty in cyberspace. Consequently, States have enforced their cyberspace penal laws against cyberspace offenders. This means that the exclusive territorial rights which States reclaim in cyberspace are justiciable.

However, the textual analysis done in chapter three showed that Article 2(4) has, regrettably been interpreted as prohibiting only the threat or use of force. On that premise, this chapter argued that that interpretation does not cover the non-kinetic cyberspace activities. Moreover, the principle that nobody could be punished for performing an act which is not a crime at the time of commission remains a fundamental principle of the criminal justice system. Therefore, the contemporary cyberspace penal code cannot be applied retroactively. It follows that although States acquire territorial sovereignty in cyberspace, the narrow interpretive approach to Article 2(4) does not protect States' territory adequately.

Besides, the cobweb character of the cyberspace requires the cooperation of States for any effective implementation of the cyberspace legislation. It is unnecessary to have an unenforceable legislation at the domestic level if this corporation were lacking.

Regardless, States have a legal duty to prevent cyberattacks being initiated from their territory. Many States have assumed that responsibility through legislation. An extra-

[324] *The Lotus Case* (n 142) 18.

territorial enforcement is realistic if States decide to respect the territory of other States. Otherwise, States-sponsored cyberattacks will continue to threaten international stability and Article 51 of the United Nations Charter will not be available to the victims of such attacks.

Chapter Five

Breaches of the Principle of the Inviolability of State territory

5.0 Introduction

Writing in 1970, Thomas Franck asked, who killed article 2(4)?[1] This chapter searches for answers through investigating breaches of States' territory on land, territorial sea and in airspace. According to a survey conducted by the Metrocosm, about 124 countries are currently involved in territorial disputes.[2] A similar study by the Uppsala Conflict Data Program[3] discloses a geometric progression in "internationalised" intra-state's conflicts.

This chapter focuses on such breaches on land, in territorial waters and in airspace. It will not adjudicate the validity of any territorial claim but will unveil how the first limb of Article 2(4) has inhibited, instead of enhancing the maintenance of international peace and security.

5.1 Land

The 124 cases of the breaches of States' territory reported by the Metrocosm cut across all the continents. It shows how widespread the problem is. All the cases will not be studied but at least one case each has been selected from each continent. They include, (1) Russia's annexation of Crimea and Sevastopol in 2014, (2) the dispute between Kenya and Uganda over the Migingo Island, (3) the dispute between Cambodia and Thailand over the Preah Vihear, (4) NATO's intervention in Serbia, and (5) the Falkland Islands' dispute. We shall establish the facts of these cases before discussing the legal issues concurrently.

[1] Thomas M. Franck, 'Who Killed Article 2(4) or: Changing Norms Governing the Use of Force by States' (1970) 64(4) *American Journal of International Law* 809-837.

[2] See 'Mapping every disputed territory in the world' (Metrocosm, 20 November 2015) available at <http://metrocosm.com/mapping-every-disputed-territory-in-the-world/> accessed 31 May 2017; United States of America, Central Intelligence Agency, 'The World Factbook' available at <https://www.cia.gov/library/publications/the-world-factbook/fields/2070.html> accessed 31 May 2017.

[3] Uppsala Conflict Data Program, 'Number of conflicts 1975-2016' available at <http://ucdp.uu.se> accessed 31 May 2017.

5.1.1 Russia's annexation of Crimea in 2014

Facts leading up to the annexation of Crimea and Sevastopol

The crisis that erupted in Ukraine in 2014 resulted in the "reunification"[4] of Crimea and Sevastopol with the Russian Federation. When Ukraine celebrated its twenty-second independence anniversary, the US Secretary of State, John Kerry urged Ukraine to fulfil the conditions for the proposed European Union Trade Agreement.[5] The said Trade Agreement was part of the *Association Agreement*[6] that provided for an all-embracing framework for Ukraine's integration with the EU. Ukraine's President at the time, Viktor Yanukovych reneged on signing the pact and sought closer ties with Russia. It triggered a pro-EU protest and Yanukovych's government used excessive force to crack down on demonstrators.[7] The crisis escalated, and Yanukovych was deposed in February 2014.[8]

On 27 February 2014, the pro-Russian militia occupied the Crimean Parliament building.[9] Amidst the standoff between the pro-EU and the pro-Russian protesters, the Crimean Parliament declares independence from Ukraine[10] and hold *"All-Crimean Referendum*"[11]

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[4] The exact word used by President Vladimir Putin. See *Letter dated 19 March 2014 from the Permanent Representative of the Russian Federation to the United Nations addressed to the Secretary-General* UN Doc. A/68/803-S/2014/202 (20 March 2014) 10 [hereinafter *President Putin's address on Crimea*].

[5] John Kerry, 'On the Occasion of Ukraine's National Day' (Washington DC, 22 August 2013) available at <http://www.state.gov/secretary/remarks/2013/08/213369.htm> accessed 4 July 2016.

[6] See generally, European Commission, *Association Agreement between the European Union and its member states, of the one part, and Ukraine, of the other part* (2014) *Official Journal of the European Union* L 161/3.

[7] Kristina Daugirdas and Julian Davis Mortenson, 'Contemporary Practice of the United States Relating to International Law' (2014) 108(4) *American Journal of International Law* 784-842, 784.

[8] Shaun Walker, 'Ukraine's former PM rallies protesters after Yanukovych flees Kiev' (The Guardian, 23 February 2014) available at <https://www.theguardian.com/world/2014/feb/22/ukraine-president-yanukovych-flees-kiev> accessed 5 July 2016.

[9] Harriet Salem, Shaun Walker, and Luke Harding, 'Crimean Parliament Seized by Unknown Pro-Russian Gunmen' (The Guardian, 28 February 2014) available at <https://www.theguardian.com/world/2014/feb/27/crimean-parliament-seized-by-unknown-pro-russian-gunmen> accessed 5 July 2016.

[10] See 'Crimea Parliament declares independence from Ukraine ahead of Referendum' (RT News, 11 March 2014) available at <https://www.rt.com/news/crimea-parliament-independence-ukraine-086/> accessed 11 August 2017.

[11] See 'Crimea Parliament announces referendum on Ukrainian regime's future' (RT News, 27 February 2014) available at <https://www.rt.com/news/ukraine-crimea-referendum-future-014/> accessed 11 August 2017.

which the Ukrainian Court held was unconstitutional.[12] The outcome of the referendum[13] supported a reunification of Crimea and Sevastopol with the Russian Federation. Russia formerly annexed them on 21 March 2014.[14] President Putin justified the annexation on the outcome of the referendum conducted in accordance with the international law.[15] The international community, however, denounced it as an illegal annexation.[16]

5.1.2 Occupation of Migingo Island by Uganda

In 2004, Uganda invaded and hoisted its flag on Migingo Island which has been administered by Kenya since 1926.[17] The inhabitants of the island were mostly Kenyans of Luo ethnic community and were predominantly fishermen. In response, the Kenyan Parliament voted for military actions.[18] Attempts by the international community to resolve the dispute based on deed established by Britain in 1926 failed when Uganda withdrew from the negotiations.[19]

However, the borders around the disputed area were poorly delimited along the maritime areas and on land. Ugandan President Yoweri Museveni once said that the island belongs to Kenya, and the waters surrounding it belong to Uganda.[20] This argument is unsustainable in lieu of the doctrine of "*la terre domine la mer*" (land dominates the sea).

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[12] See *Judgment of the Constitutional Court of Ukraine on all-Crimean Referendum* Case No. 1-13/2014 (15 March 2014) [para. 4.3] available at <http://mfa.gov.ua/en/news-feeds/foreign-offices-news/19573-rishennya-konstitucijnogo-sudu-v-ukrajini-shhodo-referendumu-v-krimu> accessed 5 July 2016; President of Russia Press Release, 'Executive Order on Recognising Republic of Crimea' (17 March 2014) available at <http://en.kremlin.ru/acts/news/20596/print> accessed 31 May 2017.

[13] See 'Crimea referendum: Voters back Russia union' (BBC News, 16 March 2014) available at <http://www.bbc.co.uk/news/world-europe-26606097> accessed 5 July 2016.

[14] See President of Russia Press Release, 'Ceremony signing the Laws on admitting Crimea and Sevastopol to the Russian Federation' (21 March 2014) available at <http://en.kremlin.ru/events/president/news/20626> accessed 4 July 2016.

[15] See President of Russia Press Release, 'Telephone conversation with US President Barack Obama' (17 March 2014) available at <http://en.kremlin.ru/events/president/news/20593> accessed 5 July 2016.

[16] UNGA Res. A/RES/68/262 (27 March 2014) [operative para. 5]; UNSCOR, UN Doc. S/PV.7253 (28 August 2014) 13 (statement by the President, Mark Lyall Grant as the representative of the United Kingdom).

[17] Gbenga Oduntan, *International Law and Boundary Disputes in Africa* (London and New York, Routledge 2015) 7.1.4 (Kindle edition).

[18] Peter Wafula Wekesa, 'Old Issues and New Challenges: The Migingo Island controversy and the Kenya-Uganda Borderland' (2010) 4(2) *Journal of Eastern African Studies* 331-340.

[19] Wekesa (n 18) 332.

[20] ibid., 331; 'Breaking: Uganda Army Police Arrest Kenya Migingo Island Assistant Chief, sparks tension' (Kenya Today, 13 March 2016) available at <http://www.kenya-today.com/global/uganda-army-police-arrest-kenya-migingo-island-assistant-chief-sparks-tension> accessed 20 September 2016 [hereinafter *New conflict in Migingo*].

Nonetheless, the Kenya-Ugandan borders have been one of the borders in Africa that divide peoples with common historical ties, such as the Luyia, Sabaot, Iteso, Pokot and Luo. When both countries gained their independence in 1962 and 1963 respectively, border-related issues were a destabilising factor. However, Article III(3) of the Charter of the OAU obliges the member States to respect the sovereignty and territory of other States as obtained at independence.[21]

Since 2004, the Kenyan and Ugandan armed forces have been in occupation of the Migingo Island at various times.[22] In March 2016, voters registration exercise conducted by the Kenyan government was halted, and some members of the staff of the Independent Electoral and Boundaries Commission were arrested by the Ugandan police.[23]

5.1.3 Cambodia and Thailand's dispute over Preah Vihear Temple

In 2013, the International Court of Justice handed down yet another judgment ordering Thailand to withdraw its troops from the Cambodian territory. This ruling was based on the 1962 judgment handed down by the ICJ and which held that the disputed Preah Vihear Temple belonged to Cambodia.[24] This judgment is significant for many reasons. Firstly, it contains several elements on which claims to territorial title are often made such as treaty, history, effective control, geography and culture. Secondly, the ruling upheld that boundaries establish by a treaty devolve to successor States. Part of the judgment confirmed the principle of *uti possidetis* in favour of Cambodia even though Thailand was in effective control at the material time. Consequently, the Court ordered Thailand to withdraw its military and paramilitary armed forces stationed at the Temple or within the vicinity of the Cambodian territory.[25]

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[21] *Charter of the Organisation of African Unity* (Done at Addis Ababa on 25 May 1963, entered into force on 13 September 1963) 479 UNTS 39 [Art. III (3)].

[22] Oduntan (n 17) 7.1.4.

[23] *New conflict in Migingo* (n 20) (the Internet page).

[24] *Case concerning the Temple of Preah Vihear* (Cambodia v Thailand) (Merits) Judgment ICJ Reports (1962) p. 6, 36 [hereinafter *Preah Temple Case*].

[25] ibid., 37.

5.1.4 NATO's intervention in Serbia

In 1945, Kosovo was a province of Serbia within the Federal Socialist Republic of Yugoslavia (hereinafter referred to as FSRY). It has a "nationality" status and was not entitled to statehood like "republics" under the Constitution of the FSRY.[26] Vickers, however, argues that under the 1974 Constitution of the FSRY, "nationalities" were of equal status with "republics."[27]

The attempt by Kosovars to secede from the FSRY was fiercely resisted by the Yugoslav forces.[28] NATO intervened in 1999 to prevent ethnic cleansing of Kosovar Albanians by the Yugoslav forces. That intervention implicitly furthered the course of self-determination of Kosovars and has been cited by Russia as a precedent in a couple of secession cases.[29] At this stage, the reason for NATO's intervention is deferred.[30]

The Badinter Arbitration Commission[31] established by the European Community (hereinafter referred to as EC) and the European Community's Guidelines on the Recognition of New States[32] do not encourage secession. Initially, the EC rejected any attempt that would destabilize the integrity of the FSRY.[33] In 1998, war broke out between the Kosovo Liberation Army (hereinafter referred to as KLA) and the Yugoslav forces, leading to the ethnic cleansing of the Albanian population.[34] The Security Council condemns Serbia's excessive use of force against the civilians and the peaceful demonstrators in Kosovo but equally describes the

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[26] James Summers, 'Kosovo' in Christian Walter *et al*., (eds), *Self-determination and secession in international law* (United Kingdom, Oxford University Press 2014) 237.

[27] Miranda Vickers, *Between Serb and Albanian: A History of Kosovo* (New York, Columbia University Press 1998) 145-46, 160, 169-70.

[28] Chris Hedges, 'Kosovo's Next Masters' (1999) 78(3) *Foreign Affairs* 24-42; Summers (n 26) 238.

[29] Russia cited Kosovo when Abkhazia and South Ossetia broke away from Georgia, see UNSCOR, UN Doc. S/PV.5969 (28 August 2008) 8.

[30] To be discussed in chapter seven on humanitarian intervention.

[31] Alain Pellet, 'The Opinion of the Badinter Arbitration Committee: A Second Breath for the Self-Determination of Peoples' (1993) 3(1) *European Journal of International Law* 178-185 (see opinion no. 2) [hereinafter *Badinter Opinion*].

[32] The European Community, 'Declaration on Yugoslavia and on the Guidelines on the Recognition of New States' (1991) 31 *International legal material* 1485-1486, 1486 (it specifies applications from those republics).

[33] See 'Report of the Secretary-General pursuant to paragraph 3 of Security Council Resolution 713 (1991)' UN Doc. S/23169 (25 October 1991) 8 [para. 21].

[34] Richard Caplan, 'International Diplomacy and the Crisis in Kosovo' (1998) 74(4) *International Affairs* 745-761, 761.

militancy by the KLA as acts of terrorism.[35] It affirms the member States' commitment to respect the sovereignty and territory of the Federal Republic of Yugoslavia.[36] The Security Council also expresses support for a substantial degree of autonomy, and meaningful self-administration for Kosovar Albanians.[37] Finally, the Council '[d]ecides to remain seized of the matter.'[38]

5.1.5 Falkland Islands dispute

The dispute over the Falkland Islands between the United Kingdom and Argentina concerns two large islands, East and West Falkland, and some smaller ones, which lie in the South Atlantic. This dispute has a tenuous and complicated history dating back to 1690 when it became known to England.[39] Its complexity stems from the fact that it contains a bit of all the legitimate mode of acquisition of title under the modern international law.[40]

Both Spain and England are claiming to have discovered the islands. But there were strong indications that England discovered the West Falkland and exercised sovereignty over it.[41] At the same period, France wanted to claim ownership of the East Falkland but withdrew when Spain objected.

Spain co-opted the armed forces of Argentina to evict England from the West Falkland but later handed it back to Britain on 16 September 1771. At a stage, England abandoned the islands but left a plaque that reads: 'in witness whereof this plate is set up and his Britannic Majesty's colours left flying as a mark of possession.'[42] Thus, indicating that *dereliction* has not taken place. The French invasion of Spain severs the latter's tie with its overseas possessions and resulted in its abandonment of its right over the Falklands in 1811. As a

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[35] UNSC Res. S/RES/1160 (31 March 1998) [preamble para. 4].
[36] ibid., [preamble para. 8].
[37] ibid., [operative para. 5].
[38] ibid., [operative para. 20].
[39] J.C.J. Metford, 'Falklands or Malvinas? The Background to the Dispute' (1968) 44(3) *International Affairs* 463-481, 466-467; Peter Calvert, 'Sovereignty and the Falklands Crisis' (1983) 59(3) *International Affairs* 405-413, 405.
[40] Robert Jennings and Arthur Watts, *Oppenheim's International Law* (Ninth Edition, Volume 1, PEACE, Oxford, Oxford University Press 1996) 677 [hereinafter *Oppenheim 1996*].
[41] Metford (n 39) 467.
[42] ibid., 468.

Spanish colony, Argentina claims the legal title by inheritance based on the principle of *uti possidetis*.

It could be recalled that all the territories in the Indies to the West were ceded to Spain by the Treaty of Tordesillas[43] and Pope Alexander VI's bull, *Inter Caetera*.[44] Argentina does not have evidence to prove that the Falkland Islands were ceded to it by Spain.[45] When Argentina wanted to claim the title over the Falkland Islands, England objected. Although the United Nations General Assembly advised the parties to resolve their dispute peacefully,[46] the tussle over the Falkland Islands has persisted till date.[47]

5.2 Claims to legal title as a justificatory ground for breaching State's territory

Sumner has identified and analysed nine categories on which territorial claims are brought before the ICJ.[48] They are, treaty, economy, culture, geography, effective control, elitism, *uti possidetis*, history and ideology. Although each of these categories legitimises a territorial claim, its wrongful enforcement inadvertently breaches the exclusive authority of the rightful legal title owner. How each of the categories applies has been analysed by Sumner[49] and will not be repeated.

We shall limit our analysis on treaty law, *uti possidetis* and self-determination. As one would expect, self-determination was not listed by Sumner as one of the elements, yet it constitutes, together with humanitarian intervention, a factor that attracts foreign States to the internal affairs of other States.

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[43] *Treaty between Spain and Portugal* (Concluded at Tordesillas on 7 June 1494, entered into force on 3 September 1494) [Art. 1] available at <http://avalon.law.yale.edu/15th_century/mod001.asp> accessed 11 August 2017.

[44] See 'The Papal bull *Inter Caetera* Alexander VI' (4 May 1493) available at <http://www.nativeweb.org/pages/legal/indig-inter-caetera.html> accessed 11 August 2017.

[45] Metford (n 39) 471.

[46] UNGA Res. A/RES/2065 (16 December 1965) [operative para. 1].

[47] As at the time of writing in August 2017, see Emily Thornberry, 'Emily Thornberry hardens Labour Party line on Falkland Islands' (The Guardian, 14 May 2017) available at <https://www.theguardian.com/politics/2017/may/14/emily-thornberry-hardens-labour-party-line-on-falkland-islands> accessed 31 May 2017.

[48] Brian Taylor Sumner, 'Territorial Disputes at the International Court of Justice' (2004) 53(6) *Duke Law Journal* 1779-1812, 1789; Andrew F. Burghardt, 'The Bases of Territorial Claims' (1973) 63(2) *Geographical Review* 225-245.

[49] Sumner (n 48) 1779-1812.

5.3 Treaty and the Inviolability of State Territory – Ukraine's Experience

When the Soviet Union collapsed in August 1991, the *Verkhovna Rada* of Ukraine declared the independence of Ukraine.[50] A referendum was held on 1 December 1991, and about 90% voted in favour of secession. The percentage that supported the secession from Crimea was the lowest (about 54.19%) compared with figures obtained elsewhere.[51] Arguably, the greater number of the Crimean populations wanted to remain with Russia. Nonetheless, the international community, including Russia recognised Ukraine as an independent sovereign State.[52]

Consequently, Russia has avowed explicitly to respect the territory of Ukraine in a series of bilateral and multilateral treaties.[53] Article 2 of the *Treaty on Friendship, Cooperation and Partnership between Ukraine and the Russian Federation*[54] (hereinafter referred to as treaty of friendship) invoked the provision of the UN Charter as well as the Final Act of the Conference on Security and Cooperation in Europe (Helsinki Final Act 1975). It states: '… High Contracting Parties shall respect each other's territorial integrity and reaffirm the inviolability of the borders existing between them.'[55] Is this treaty binding upon Russia or is Russia's obligation based on other political considerations?[56]

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[50] Mark R. Beissinger, *Nationalist Mobilization and the Collapse of the Soviet State* (Cambridge, Cambridge University Press 2002) 197; Council on Foreign Relations, 'Declaration of Independence of Ukraine' available at <http://www.cfr.org/ukraine/declaration-independence-ukraine/p32894> accessed 7 July 2016.

[51] See 'Independence' (The Ukrainian Weekly, Volume 59 No. 49, 8 December 1991) 1 available at <http://ukrweekly.com/archive/1991/The_Ukrainian_Weekly_1991-49.pdf> accessed 7 July 2016; Beissinger (n 50) 197.

[52] Robert J. Delahunty, 'The Crimean Crisis' (2014) 9(1) *University of St. Thomas Journal of Law and Public Policy* 125-187, 129.

[53] See *The Alma-Ata Declaration* (Done on 21 December 1991) (1992) 31(1) *International legal materials* 147-154, 148 [preamble para. 4]; *Accord on the Creation of the Commonwealth of Independent States* (1996) 20 *Harvard Ukrainian Studies* 297-301 [Art. 5]; *Treaty between the Ukrainian Soviet Socialist Republic and the Russian Soviet Federative Socialist Republic* (1996) 20 *Harvard Ukrainian Studies* 291-296 [Art. 6]; *Treaty on Friendship, Cooperation and Partnership between Ukraine and the Russian Federation* (1996) 20 *Harvard Ukrainian Studies* 319-329 [Arts. 2 and 3] [hereinafter *Russia-Ukraine Treaty of Friendship*].

[54] *Conference on Security and Co-operation in Europe Final Act* (Signed at Helsinki on 1 August 1975) (1975) 73(1888) *Department of State Bulletin* 323-350 [Art. 4] [hereinafter *Helsinki Final Act 1975*].

[55] *Russia-Ukraine Treaty of Friendship* (n 53) [Art. 2]; United Nations, *Charter of the United Nations* (Signed at San Francisco on 26 June 1945, entered into force on 24 October 1945) 1 UNTS XVI [Art. 2(4)] [hereinafter *The UN Charter*]; Helsinki Final Act 1975 (n 54) [Art. 4].

[56] For details, see Roman Solchanyk, 'Ukraine, Russia, and the CIS' (1996) 20 *Harvard Ukrainian Studies* 19-43.

The doctrine of the intertemporal law requires that a dispute should be adjudicated based on the applicable law at the material time.[57] A treaty validly made cannot be deemed null and void unless it has been procured by the threat or use of force.[58] There is no indication that Ukraine forced Russia into signing the pact or that Russia intended the treaty to be hortatory at the time it was concluded.

As successor States to the Former Soviet Union, Russia and Ukraine were signatories to the Helsinki Final Act 1975. Article 1 obliges the participating States to 'respect each other's sovereign equality and individuality as well as all the rights inherent in … including … the right to territorial integrity.'[59] Similarly, Article 3 relates to the inviolability of the frontiers and Article 4 deals with the territory of States. Deductively, Russia is obligated to respect the territory of Ukraine based on the treaty law and the doctrine of *uti possidetis*.

5.3.1 The legality of Treaty of Accession between Russia and Crimea

On 17 March 2014, President Putin issued an executive order 'On recognising Republic of Crimea.'[60] On 18 March 2014, he notified the State Duma and the Federation Council that the Crimean State Council proposes to reunite with the Russian Federation.[61] He also signed an executive order authorising such an agreement to be drawn up.[62] Still, on the same day, Russia and the Crimean State Council signed an agreement that made Crimea and Sevastopol

[57] *Island of Palmas case* (The Netherlands v USA) (The Hague, 1928) II RIAA 829-871, 846 [hereinafter *Island of Palmas case*].
[58] *Vienna Convention on the Law of Treaties* (Concluded at Vienna on 23 May 1969, entered into force on 27 January 1980) 1155 UNTS 331 [Art. 52] [hereafter *VCLT*].
[59] Helsinki Final Act 1975 (n 54) [Art. 1].
[60] See President of Russia Press Release, 'Executive Order on recognising Republic of Crimea' (17 March 2014) available at <http://en.kremlin.ru/events/president/news/20596> accessed 13 July 2016.
[61] See President of Russia Press Release, 'The President has notified the Government, the State Duma and the Federation Council of proposals by the Crimean State Council and Sevastopol Legislative Assembly regarding their admission to the RF and the formation of New Constituent Territories' (18 March 2014) available at <http://www.en.kremlin.ru/acts/news/20599> accessed 13 July 2016.
[62] President of Russia Press Release, 'Executive Order on executing Agreement on Admission of Republic of Crimea into the Russian Federation' (18 March 2014) available at <http://en.kremlin.ru/events/president/news/20600> accessed 13 July 2016.

part of the Russian Federation.[63] Article 1 states, '[t]he Republic of Crimea is considered accepted to the Russian Federation from the date of the signing of this treaty.'[64]

However, annexation requires the concession of the conquered state to be valid unless a *post facto* celebratory declaration was performed.[65] Hence, Moscow ordered a celebratory gun salute in Moscow, Simferopol and Sevastopol on the 21st March 2014.[66] Before the signing of the Treaty mentioned above, President Putin had on the 18 March 2014 inquired from the Constitutional Court of the Russian Federation whether the proposed reunification was in breach of the Constitution of the Russian Federation.[67] The Court answered in the negative.[68]

The Russian Constitutional Court rightly referred to the said agreement as an "international treaty."[69] It raises a fundamental question of the Crimeans power to cede the territory to Russia.[70] The Crimea State Council does not possess the plenary competence to conclude a treaty of cession or annexation[71] under the Ukrainian Constitution or the Russian Federation

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[63] See *Treaty Between the Russian Federation and the Republic of Crimea on the Admission to the Russian Federation of the Republic of Crimea and the Formation of New Components within the Russian Federation,* official version is available at <http://www.kremlin.ru/events/president/news/20605>; For unofficial English translation, visit <https://en.wikisource.org/wiki/Treaty_on_the_Accession_of_the_Republic_of_Crimea_to_Russia> accessed 31 May 2017 [hereinafter *Russia/Crimea Treaty Unofficial version*]; see also President of Russia Press Release, 'Agreement on the Accession of the Republic of Crimea to the Russian Federation signed' available at <http://en.kremlin.ru/events/president/news/20604> accessed 31 May 2017.

[64] *Russia/Crimea Treaty Unofficial version* (n 63) [Art. 1].

[65] Leon Sheleff, 'Application of Israeli Law to the Golan Heights is Not Annexation' (1994) 20(2) *Brooklyn Journal of International Law* 333-354, 353.

[66] President of Russia Press Release, 'Executive Order on holding a celebratory gun salute in Moscow, Simferopol and Sevastopol' available at <http://www.en.kremlin.ru/acts/news/20628> accessed 13 July 2016.

[67] President of Russia Press Release, 'Request to verify compliance of agreement on accession of Republic of Crimea to the Russian Federation with the Constitution' (18 March 2014) available at <http://en.kremlin.ru/acts/news/20614> accessed 26 September 2016.

[68] See Constitutional Court of the Russian Federation, 'Summary of Judgment No. 6-II/2014, Appraisal of Constitutionality of the International Treaty between the Russian Federation and the Republic of Crimea' (19 March 2014) available at <http://www.ksrf.ru/en/Decision/Judgments/Documents/Resume19032014.pdf> accessed 14 July 2016.

[69] A state could enter into an agreement with other subjects of international law that are not states. See *VCLT* (n 58) [Arts. 2(1)(a) and 3(c)]; James Crawford, *The Creation of States in International Law* (Second Edition, Oxford, Oxford University Press 2006) 28 (he refers to such entity as international personality); *Oppenheim 1996* (n 40) 16-17.

[70] Crimea's declaration of independence was recognised by six states. See Jeremy Bender, 'These are the 6 countries on board with Russia's illegal annexation of Crimea' (Business Inside UK, 31 May 2016) available at <http://uk.businessinsider.com/six-countries-okay-with-russias-annexation-of-crimea-2016-5> accessed 14 July 2016; Crawford 2006 (n 69) 22-23.

[71] Thomas D. Grant, 'Current developments: Annexation of Crimea' (2015) 109 *American Journal of International Law* 68-95, 71.

law.[72] In the absence of such authority, Lauterpacht writes that an entity that enters such an agreement acts *ultra vires*.[73]

Cession of a territory is the transfer of sovereignty over the territory by the owner-State to another State.[74] The right to cede part of a State's territory is a characteristic feature attributable to independent States that are subject of international law.[75] A valid cession requires full and lawfully given consent by the owner-State.[76] In the *Island of Palmas* case, Max Huber held that 'Spain could not transfer more rights than she herself possessed.'[77] Crimeans may have the right to free association with an independent State under the provision of Principle VI of the General Assembly Resolution 1541 (1960).[78] But they appear to have acted *ultra vires* by ceding a part of Ukraine to Russia.

5.3.2 Lex specialis – ceding unstable and failed State's territory?

Another issue worth considering is whether the modern international law permits a special rule for ceding an unstable or a failed State's territory. The answer is probably no.[79] As Judge Hobhouse put it, 'a loss of control by the constitutional government may not immediately

[72] See *Constitution of Ukraine* (With the amendments and supplements borne by the law of Ukraine from 8 December 2004) [Art. 2] available at <https://www.justice.gov/sites/default/files/eoir/legacy/2013/11/08/constitution_14.pdf> accessed 14 July 2016; *The Case of S.S. Lotus* (France v Turkey) Judgment PCIJ Series A, No. 10 (1927) 19 [hereinafter *Lotus case*].

[73] Tom Grant, 'Who can make treaties? Other subjects of international law' in Duncan B. Hollis, *The Oxford Guide to Treaties* (United Kingdom, Oxford University Press 2012) 28.

[74] *Oppenheim 1996* (n 40) 679; 'Reparation Commission v German Government – Case No. 199' in John Fischer Williams and H. Lauterpacht (eds), *Annual Digest of International Law Cases* (Longmans, Green and Co 1933) 341.

[75] *Island of Palmas Case* (n 57) 838.

[76] Georg Schwarzenberger*, International Law* (Volume 1, London, Stevens and Sons 1957) 303; *VCLT* (n 58) [Art. 52] (A treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations).

[77] *Island of Palmas Case* (n 57) 838-843.

[78] It provides as follows: A Non-Self-Governing Territory can be said to have reached a full measure of self-government by (a) Emergence as a sovereign independent state; (b) Free association with an independent State; or (c) Integration with an independent State. See UNGA Res. A/RES/1541 (XV) (15 December 1960) [Annex, Principle VI].

[79] Riikka Koskenmaki, 'Legal Implications Resulting from State Failure in Light of the Case of Somalia' (2004) 73(1) *Nordic Journal of International Law* 1-36, 6; Daniel Thurer, 'The "Failed State" and International Law' (1999) 81(836) *International Review of the Red Cross* 731-761, 737.

deprive it of its status, whereas an insurgent regime will require to establish control before it can exist as a government.'[80]

In countries experiencing humanitarian crises such as Somalia, Sierra-Leone, Bosnia-Herzegovina and Rwanda, the Chapter VII of the UN Charter[81] authorises the Security Council to restore or prevent the collapse of law and order. A unilateral intervention by a State without an explicit authorisation from the Security Council is unacceptable.[82] That the UN Member States tolerate unilateral interventions[83] not aimed at territorial acquisition do not legitimise it. An acquisition of part of the territory of a State that is politically unstable is in breach of Article 2(4).[84] The requirement to respect the inviolability of State territory imposes upon States the duty to refrain from engaging in conduct capable of destabilising another State.

5.4 *Uti possidetis* and delimitation of international boundaries

According to the ICJ, *uti possidetis* is 'a principle which upgraded former administrative delimitations, established during the colonial period, to international frontiers.'[85] It originated from Latin America but was adopted as a general principle applicable to all forms of decolonisation.[86] This means that Ukraine, Kenya, Uganda, Cambodia and Serbia's boundaries

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[80] *Republic of Somalia v Woodhouse Drake & Carey (Suisse) S.A. and Other* [1993] QB 54, 67.

[81] The Security Council makes a determination in line with Article 39 of the UN Charter before it authorises forcible measures against a State. See UNSC Res. S/RES/688 (5 April 1991) [preamble para. 3, operative para. 6]; UNSC Res. S/RES/794 (3 December 1992) [operative para. 10]; UNSC Res. S/RES/837 (6 June 1993) [operative para. 5]; UNSC Res. S/RES/814 (26 March 1993) [operative para. 5].

[82] For example, the ECOWAS' intervention in Liberia in 1990. See Jeremy Levitt, 'Humanitarian Intervention by Regional Actors in Internal Conflicts: The Cases of ECOWAS in Liberia and Sierra Leone' (1998) 12(2) *Temple International and Comparative Law Journal* 333-376, 339-347. NATO intervened in the former Yugoslavia, see Dino Kritsiotis, 'The Kosovo Crisis and NATO's Application of Armed Force against the Federal Republic of Yugoslavia' (2000) 49(2) *International and Comparative Law Quarterly* 330-359.

[83] The invasion of Iraq by Israel in 1981. See Anthony D'Amato, *International Law: Process and Prospect* (Second Edition, New York, Transnational Publishers 1995) 73.

[84] VCLT (n 58) [Art. 52]; *Oppenheim 1996* (n 40) 699.

[85] *Frontier Dispute* (Burkina Faso v Republic of Mali) Judgment ICJ Reports (1986) p. 554 [para. 23] [hereinafter *Burkina Faso v Mali case*]; *The Indo-Pakistan Western Boundary (Rann of Kutch) between India and Pakistan (India, Pakistan)* 17 RIAA 1-576, 447-448.

[86] *Burkina Faso v Mali case* (n 85) [para. 23]; Ian Brownlie, *Principles of Public International Law* (Seventh Edition, Oxford, Oxford University Press 2008) 129-130; Anne Peters, 'The principle of *uti possidetis juris*: how relevant is it for issue of secession?' in Christian Walter *et al.,* (eds), (n 26) 95-137; Organisation of African Unity, 'On border disputes,' AHG/Res. 16(I) [operative para. 2]; *Charter of the Commonwealth of Independent States* (Adopted at Minsk on 22 January 1993) (1995) 34 *International Legal Materials* 1279-1297 [Art. 3]; *Badinter Opinion* (n 31) (see opinions no. 1 and no. 3).

with their neighbouring States became international borders at the time of independence. However, this is not always the case where a treaty stipulates otherwise.

On the African Continent where border disputes are a major destabilising factor, the African Union has established the African Union Border Programme to address it.[87] As shall be seen, the ICJ in most cases relating to border disputes gives greater weight to treaty law.

Although Russia was reluctant to delimit its borders with Ukraine,[88] it signs a series of legally binding treaties to respect Ukraine's borders. Besides, its failure to persistently object to the 1954 ceding of Crimea to Ukraine weakens its argument. In the *Fisheries Case*,[89] the ICJ held that Norway was not bound by the "ten-mile rule" which was a customary practice because it had persistently opposed its application to its coast. Thus, Russia's "reunification" theory could have been persuasive if it had persistently objected to the ceding of Crimea to Ukraine in 1954.[90]

In the *Preah Temple Case,*[91] the ICJ held that Thailand's failure to raise with the French authorities the incorrectness in the map showing that *Preah Temple* was within Cambodia's territory meant acceptance. Similarly, the event leading up to the dissolution of the Soviet Union presented Russia with an opportunity to claim back Crimea.[92] Instead, Russia committed itself to respecting the territory of Ukraine through a series of agreements. Both

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[87] For details see 'African Union Border Programme' available at <http://www.peaceau.org/en/page/27-au-border-programme-aubp> accessed 23 September 2016; 'Resolution CM/Res.1069(XLIV) on peace and security in Africa through negotiated settlement of boundary disputes' (Adopted by the 44th Ordinary Session of the Council of Ministers of the OAU, held in Addis Ababa, in July 1986) [operative para. 1].

[88] Borys Tarasyuk, 'Ukraine in the World' (1996) 20 *Harvard Ukrainian Studies* 9-15, 12.

[89] *Fisheries Case* (United Kingdom v Norway) Judgment ICJ Reports (1951) p. 116, 131.

[90] Ben Chigara argues that the persistent objector principle could oust the customary international law. See Ben Chigara, *Legitimacy Deficit: A Deconstructionist Critique* (England, Ashgate Publishing Limited 2001) 216; I. C. MacGibbon, 'Some Observations on the Part of Protest in International Law' (1953) 30 *British Year Book of International Law* 293-319, 318-319. Regarding the debate on the legality of the ceding of Crimea to Ukraine in 1954, see Doris Wydra, 'The Crimea Conundrum: The Tug of war between Russia and Ukraine on the Questions of Autonomy and Self-Determination' (2003) 10(2) *International Journal on Minority and Group Rights* 111-130, 115; Josephat Ezenwajiaku, 'Territorial Integrity and Russia's Annexation of Crimea under International Law' (2015) 2(2) *State Practice and International Law Journal* 105-142, 118.

[91] *Preah Temple case* (n 24) 27-28.

[92] Solchanyk (n 56) 26, 34-39.

the ICJ's case law and Article 11 of the *Vienna Convention on Succession of States in Respect of Treaties*[93] affirm that boundaries established by treaty cannot be altered by force.

One of the purposes of *uti possidetis* is to minimise war and to strengthen international relations.[94] Hence, it has been described as a "general principle,"[95] though not as codified in Article 38(1)(c) of the ICJ's Statute.[96] Kohen writes that even as a customary rule,[97] *uti possidetis* does not impede the process of self-determination.[98] This applies where self-determination is purely an internal affair and would not justify external intervenor. But we shall examine argument on self-determination later.

Not all internal boundaries have transformed into international boundaries.[99] This is a source of concern for international stability should they be exploited by States. Arguably, the contention by authors like Ratner that *uti possidetis* is devoid of a legal content[100] could mean that States have watered down its normativity.[101] Therefore, the international judicial institutions take *compromis* and the interests[102] of the parties into account when adjudicating boundary disputes. Russia has not formerly contested the ceding of Crimea and Article 72 of the 1977 Constitution of the USSR provides as follows: '[e]ach Union Republic shall retain the

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93 *Vienna Convention on Succession of States in Respect of Treaties* (Done at Vienna on 23 August 1978, entered into force on 6 November 1996) 1946 UNTS 3 [Art. 11]; *Territorial Dispute* (Libyan Arab Jamahiriya/Chad) Judgment ICJ Reports (1994) p. 6 [paras. 72-73]; *Preah Temple case* (n 24) 34; *Aegean Sea Continental Shelf* (Greece v Turkey) Judgment ICJ Reports (1978) p. 3, 35-36.

94 UNSC Res. S/RES/713 (25 September 1991) [preamble para. 8]; UNSC Res. S/RES/1065 (12 July 1996) [operative para. 3]; UNSC Res. S/RES/1808 (18 April 2008) [operative para. 1].

95 *Burkina Faso v Mali case* (n 85) [para. 20]; *Badinter Opinion* (n 31) [opinion No. 3, para. 3].

96 Peters (n 86) 99.

97 *Burkina Faso v Mali case* (n 85) [para. 21]; Peters (n 86) 99.

98 Marcelo G. Kohen, 'Introduction' in Marcelo G. Kohen (ed), *Secession: International Law Perspectives* (Cambridge, Cambridge University Press 2006) 15; Peters (n 86) 126.

99 Steven R. Ratner, 'Drawing a Better Line: *Uti Possidetis* and the Borders of New States' (1996) 90(4) *American Journal of International Law* 590-624, 591.

100 ibid., 599; Abdelhamid El Ouali, *Territorial integrity in a Globalizing World: International Law and States' Quest for Survival* (London and New York, Springer Heidelberg Dordrecht 2012) 133.

101 *Case concerning a dispute between Argentina and Chile concerning the Beagle Channel* (18 February 1977) 21 RIAA 53-264 [paras. 11-12]; *Case concerning the Arbitral Award made by the King of Spain on 23 December 1906,* Judgment ICJ Reports (1960) p.192, 215.

102 The ICJ has broadened the meaning of title to include "non-documented evidence." See *Land, Island and Maritime Frontier Dispute* (El Salvador v Honduras: Nicaragua intervening) Judgment ICJ Reports (1992) p. 351 [para. 45]; Ratner (n 99) 600.

right freely to secede from the USSR.'[103] Arguably, *uti possidetis* has transformed the administrative borders between Russia and Ukraine into international boundaries.[104]

5.5 Russia's justification and the principle of non-intervention

Russia deployed its armed forces to Ukraine[105] and justified it as follows.[106] Firstly, that it was a response to the plight of the Russian-speaking Crimea worsened by the illegal removal of Yanukovych from office.[107] Thus, Russia merely created 'conditions so that the residents of Crimea … were able to peacefully express their free will regarding their own future.'[108] The international law prohibits States from intervening in the internal political affairs of other States.[109] Secondly, President Putin argues that the Russian armed forces were "lawfully"[110] deployed[111] and in compliance with the Partition Treaty.[112]

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[103] *Constitution (Fundamental Law) of the Union of Soviet Socialist Republics* (Adopted at the seventh (special) session of the Supreme Soviet of the USSR, Ninth Convocation, on 7 October 1977) [Art. 72] available at <http://www.constitution.org/cons/ussr77.txt> accessed 8 July 2016.

[104] Malcolm N. Shaw, 'The Heritage of States: The Principle of *Uti Possidetis Juris* Today' (1996) 67(1) *British Yearbook of International Law* 75-154, 77.

[105] Grant 2015 (n 71) 68.

[106] Delahunty argues that President Putin's statement is political instead of a legal argument, see Delahunty (n 52) 128.

[107] Ministry of Foreign Affairs of the Russian Federation, 'Annex to the letter dated 12 May 2014 from the Permanent Representative of the Russian Federation to the United Nations addressed to the Secretary-General,' UN Doc. A/68/875-S/2014/331 (4 June 2014) 11.

[108] *President Putin's address on Crimea* (n 4) 5.

[109] Antonio Cassese argues there is an obligation to enforce self-determination, see Antonio Cassese, *Self-Determination of Peoples: A legal Reappraisal* (United Kingdom, Cambridge University Press 1995) 155-158.

[110] President Putin sought for the Parliament's approval, and it was given. See President of Russia, 'Vladimir Putin submitted appeal to the Federation Council' available at <http://en.kremlin.ru/events/president/news/20353> accessed 4 July 2016; 'Russian parliament approves troop deployment in Ukraine' (BBC News, 1 March 2014) available at <http://www.bbc.co.uk/news/world-europe-26400035> accessed 4 July 2016.

[111] *President Putin's address on Crimea* (n 4) 5.

[112] *Agreement Between the Russian Federation and Ukraine on the Status and Conditions of the Russian Federation Black Sea Fleet's Stay on Ukrainian Territory* (28 May 1997) [Art. 4] [hereinafter *Black Sea Fleet's Stay Agreement*]; *Agreement Between the Russian Federation and Ukraine on the Parameters for the Division of the Black Sea Fleet* (28 May 1997); *Agreement Between the Russian Federation Government and the Government of Ukraine on Clearing Operations Associated with the Division of the Black Sea Fleet and the Russian Federation Black Sea Fleet's Stay on Ukrainian Territory* (28 May 1997). None of these agreements were registered in accordance with Article 102 of the UN Charter and therefore not readily accessible in the English language. However, they are available in the Ukrainian Language at <http://zakon4.rada.gov.ua/laws/ show/643_076>; The unofficial translation into English of the *Black Sea Fleet's Stay Agreement* is available at <https://en.wikisource.org/wiki/Partition_Treaty_on_the_Status_and_Conditions_of_the_Black_Sea_Fleet> accessed 5 July 2016.

The first point looks more like a defence or justification while the second point provides the legal basis for Russia's intervention in Ukraine's political crisis. The Partition Treaty legitimises the military intervention. A political question of the timing of Russia's reinforcement in disregard of Ukraine's objection might be in issue. What is legal may not always promote international peace and security.

In the *Nicaragua* case,[113] the ICJ distinguishes "the most grave forms" of the use of force from "other less grave forms" but held that 'sending by or on behalf of a state …. or its substantial involvement therein' constitutes the threat or use of force.[114] The distinction is made to clarify that self-defence is available for the grave forms of armed attack. The Court, however, based its assessment on the Declaration on Friendly Relations which provides as follows:

> Every State has the duty to refrain from the threat or use of force to violate the existing international boundaries of another State or as a means of solving international disputes, including territorial disputes and problems concerning frontiers of States.[115]

Moreover, States are to refrain from assisting or participating in acts of civil strife in another State.[116] In the *Nicaragua* case*,* the ICJ expresses the opinion that resolutions adopted by the UN General Assembly are indicative of the member States' *opinio juris* that it is a customary international law.[117] Although, the Black Sea Fleet Agreements adopted in 1997 and renewed in 2010[118] provided the legal framework for the military reinforcement, the timing of Russia's intervention and the purpose it is meant to achieve are crucial. Such timing negates the fact that Article 103 of the UN Charter gives more weight to the Charter obligations to any other treaties.

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[113] *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v United States of America) (Merits) Judgment ICJ Reports (1986) p. 14 [para. 191] [hereinafter *Nicaragua case*].
[114] *Nicaragua case* (n 113) [para. 195].
[115] UNGA Res. A/RES/25/2625 (24 October 1970) [para. 4].
[116] UNGA Res. A/RES/25/2625 (24 October 1970) [para. 9]; *Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty,* UNGA Res. A/RES/20/2131 (21 December 1965) [para. 1]
[117] *Nicaragua case* (n 113) [para. 195].
[118] For the text of the 2010 version, visit <http://www.pravda.com.ua/articles/2010/04/22/4956018/> accessed 10 July 2016.

As held in the *Corfu Channel* case,[119] "Operation retail" conducted by the British Navy to secure *corpora delicti* was a “manifestation of a policy of force” against Albanian territory. The ICJ’s judgment in the *Nicaragua case* condemned the circumstances on which the US’ military exercises were conducted near the borders of Nicaragua.[120] One could reasonably infer that the timing of Russia’s military reinforcement and the purpose (safeguard the plebiscite) are non-compliant with international law. Such deployment is manifestly ill-founded since it was intended to stop Ukraine’s armed forces from stopping the proposed referendum.[121] If this reasoning were correct, it breaches the Declaration on Friendly Relations and the inadmissibility of intervention in the domestic affairs of other States.[122]

Nonetheless, an unsolicitated military presence in the territory of another State that is devoid of self-defence or authorised by the Security Council is prohibited.[123] In 2007, the Constitutional Court of Latvia held that the peaceful deployment of the Soviet troops into Latvia in June 1940 was in breach of Latvia’s sovereignty because Latvian Parliament consented under duress.[124]

Since not all militarised acts evidence an intent to undermine the integrity of a State, a violation may be implied if such actions are ‘non-routine, suspiciously timed, scaled up, intensified … and staged in the exact mode of a potential military clash.’[125] Moreover, Article

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[119] *Corfu Channel case* (United Kingdom of Great Britain and Northern Ireland v Albania) Judgment ICJ Reports (1949) p. 4, 35 [hereinafter *Corfu Channel case*].

[120] *Nicaragua case* (n 113) [para. 227].

[121] *President Putin’s address on Crimea* (n 4) 5 (President Putin argues that it was meant to provide the Crimeans the enabling atmosphere to decide their own future freely); The ICJ held that possession of a nuclear weapon could justify the inference of preparedness to use them. See *Legality of the Threat or Use of Nuclear Weapons,* Advisory Opinion ICJ Reports (1996) p. 226 [para. 48] [hereinafter *ICJ Opinion on Nuclear Weapons*]; *Independent International Fact-Finding Mission on the Conflict in Georgia Report* (Volume II, 2009) 232 available at <http://www.mpil.de/en/pub/publications/archive/independent_international_fact.cfm> accessed 10 July 2016 [hereinafter *Fact-finding Mission in Georgia*].

[122] UNGA Res. A/RES/25/2625 (24 October 1970) [see section on ‘the principle concerning the duty not to intervene in matters within the domestic jurisdiction of any State, in accordance with the Charter’].

[123] *Nicaragua case* (n 113) [para. 195]; UNGA Res. A/RES/25/2625 (24 October 1970) [paras. 1, 8 and 9]; *Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v Rwanda) (Merits) Judgment ICJ Reports (2005) p.168 [paras. 163-164] [hereinafter *DRC v Uganda*].

[124] See *Border Treaty, Re, Kariņš and ors v Parliament of Latvia and Cabinet of Ministers of Latvia, Constitutional Review*, Case No 2007-10-0102, ILDC 884 (LV 2007) [para. 25.6] available at <http://opil.ouplaw.com/view/10.1093/law:ildc/884lv07.case.1/law-ildc-884lv07?prd=ORIL> accessed 19 July 2016.

[125] *Fact-finding Mission in Georgia* (n 121) 232.

15 of the Black Sea Fleet's Stay Agreement[126] permits only the cross-border movement of Russia's troops, vessels and their materiel that is in accordance with the Ukrainian legislation. Hence, Ukraine has raised concerns that Russia may have violated its existing obligations under the Conventional Arms Control.[127]

5.5.1 Argument based on Self-Determination

Russia's action in Ukraine is a repeat of what happened in Northern Cyprus in 1974[128] and in Sri Lanka in 1987.[129] Similarly, NATO's military intervention in Serbia facilitated the secession of Kosovo. The Economic Community of West African States (hereinafter referred to as ECOWAS) militarily intervened in Liberia in the early 1990s without the Security Council's authorisation. Uganda intervened in South Sudan's crisis uninvited and without any authorisation from the Security Council.[130] The African Union had wanted to intervene in South Sudan without the consent of President Kiir's government.[131]

Russia claims it created 'conditions so that the residents of Crimea … were able to peacefully express their free will regarding their own future.'[132] As it stands, the international law regards self-determination as a domestic affair.[133]

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[126] *Black Sea Fleet's Stay Agreement* (n 112) [Art. 15]; Grant 2015 (n 71) 78.

[127] Organisation of Security and Co-operation in Europe, *Treaty on Conventional Armed Forces in Europe* (Signed on 19 November 1990) (1991) 30 *International Legal Materials* 1-67 [Art. 1]; see also 'Annex to the letter dated 17 September 2014 from the Permanent Representative of Ukraine to the United Nations addressed to the President of the Security Council,' UN Doc. S/2014/677 (18 September 2014) [para. 2].

[128] Turkey sent in troops and occupied the Northern part of Cyprus to support the Turkish-speaking minority which later declared its independence. See UNSC Res. S/RES/541 (18 November 1983) [operative para. 1]; UNSC Res. S/RES/353 (20 July 1974) [operative paras. 1-3].

[129] Georg Nolte, 'Secession and external intervention' in Kohen (ed) (n 98) 77.

[130] Lauren Ploch Blanchard, 'The crisis in South Sudan' (Congressional Research Service, 9 January 2014) 1-19, 13 available at <http://www.markswatson.com/south%20sudan%20-%20CRS.pdf> accessed 23 September 2016; Kuajien Lual Wechtuor, 'Uganda's military intervention in South Sudan under international law' (Sudan Tribune, 19 April 2014) available at <http://www.sudantribune.com/spip.php?iframe&page=imprimable&id_article=50707> accessed 23 September 2016.

[131] See African Union, 'Decision on the situation in South Sudan,' Assembly/AU/Dec.613 (XXVII) [para. 8]; UNSC Res. S/RES/2304 (12 August 2016) [operative para 11]; cf Tito Justin, 'South Sudan rejects regional troop deployment by UN' (Voice of America News, 10 August 2016) available at <http://www.voanews.com/a/south-sudan-rejects-regional-troop-deployment-united-nations/3459401.html> accessed 23 September 2016.

[132] *President Putin's address on Crimea* (n 4) 5.

[133] Nolte (n 129) 72.

However, that self-determination is a *jus cogens* norm[134] and obliges *erga omnes*[135] could reinforce Russia's position and perhaps adds to the push for the international law to permit pro-self-determination interventions.[136] Chigara argues that the inviolability of State territory could be ignored when a government fails in its duty to safeguard the inherent rights of its people.[137] This seems to comply with the ICJ's decision in the *East Timor*[138] and *Western Sahara* cases.[139] But for the decolonisation period, there is no evidence to support that state practice endorses that States could facilitate self-determination unilaterally.[140]

There is no blueprint on what States' response to agitations for self-determination should be. It is often discretional. Sometimes, member States condemn interventions aimed at the acquisition of title as buttressed by Crimea,[141] but NATO's intervention in Kosovo[142] indicates a tacit support for self-determination with a view to alleviate human sufferings.

When Chechnya wanted to secede from Russia, the international community criticised the measures Russia took to prevent that, as disproportionate.[143] Yet, no State intervened to facilitate Chechnya's secession even though Chechnya qualifies as a "people" by the International Law standard.[144] Why would it be necessary for Kosovars? It could be recalled that Russia's troops facilitated the breakaway of Transdniestria from Moldova,[145] South

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[134] Cassese 1995 (n 109) 133-140.

[135] *Case Concerning East Timor* (Portugal v Australia) Judgment ICJ Reports (1995) p. 90 [para. 29] [hereinafter *East Timor case*].

[136] Brad R. Roth, *Governmental Illegitimacy in International Law* (Oxford, Oxford University Press 2000) 284.

[137] Ben Chigara, 'The Right to Democratic Entitlement: Time for Change?' (2004) 8(1) *Mediterranean Journal of Human Rights* 53-89; Ben Chigara, 'Humanitarian Intervention Missions – Elementary Considerations, Humanity and the Good Samaritans' (2001) 2001 *Australian International Law Journal* 66-89, 73; Peters (n 86) 126.

[138] *East Timor case* (n 135) [para. 29].

[139] *Western Sahara,* Advisory Opinion ICJ Reports (1975) p. 12 [paras. 54-56].

[140] Christine Gray, *International Law and the use of force by State* (Third Edition, United Kingdom, Oxford University Press 2008) 56; Thomas M. Franck, *Recourse to force: state action against threats and armed attack* (United Kingdom, Cambridge University Press 2002) 136.

[141] UNGA Res. A/RES/68/262 (1 April 2014) [operative para 1].

[142] See UNSCOR, UN Doc. S/PV.3988 (24 March 1999) 4; UN Doc. S/1999/328 (26 March 1999) [operative para. 1] (this draft resolution did not pass).

[143] Christian Tomuschat, 'Secession and self-determination' in Kohen (ed), (n 98) 31; see also 'Russian Federation – Republic of Chechnya' (New York, Yearbook of the United Nations 1995) 819-820.

[144] Anup Shah, 'Crisis in Chechnya' available at <http://www.globalissues.org/article/100/crisis-in-chechnya> accessed 16 July 2016 (Shah argues that the Chechens were recognised as a distinct group since the 17th century); Thomas D. Grant, 'A Panel of Experts for Chechnya: Purposes and Prospects in Light of International Law' (1999) 40(1) *Virginia Journal of International Law* 115-192, 175-176.

[145] William Hill, 'Making Istanbul a Reality: Moldova, Russia, and Withdrawal from Transdniestria' (2002) 13(2)

Ossetia and Abkhaz from Georgia.[146] Russia sees these interventions as "peace enforcement operation" while Georgia regards it as a breach of its territory.[147]

In the past, the Security Council had authorised coercive measures in favour of self-determination[148] and democracy.[149] But such measures were mostly through economic sanctions and political alienation.[150] Russia's reunification with Crimea adds to the growing agitation for a change of the *status quo*. Nolte writes that strict compliance with the principle of non-intervention will render many provisions of the Charter ineffectual.[151] Since self-determination interlaces with human rights, non-intervention is considered inapplicable where both issues conflict.[152]

The support for self-determination on the ground of human rights appears consistent with the purposes of the United Nations.[153] However, self-determination is not always the panacea for international peace and security as the case of South Sudan indicates. Although President Woodrow Wilson intended peoples to determine their territory, States are expected not to get actively involved in the process.[154]

The General Assembly Declaration on Friendly Relations prohibits interference in the internal affairs of other States.[155] Hence, India's action in Goa violated the territory of Portugal.[156] In

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Helsinki Monitor 129-145, 131-134.

[146] *Fact-finding Mission in Georgia* (n 121) (Volume 1) 13-21; Nolte (n 129) 91-92; Hopf Ted, 'Identity, Legitimacy, and the Use of Military Force: Russia's Great Power Identities and Military Intervention in Abkhazia' (2005) 31 *Review of International Studies* 225-243, 230.

[147] *Fact-finding Mission in Georgia* (n 121) (Volume 1) 22.

[148] This was mainly during decolonisation period. See UNGA Res. A/RES/2105 (20 December 1965) [operative para. 10]; Cassese 1995 (n 109) 182; Gray 2008 (n 140) 59.

[149] UNSC Res. S/RES/940 (31 July 1994) [operative para. 4].

[150] UNSC Res. S/RES/232 (16 December 1966) [operative para. 2]; UNSC Res. S/RES/418 (4 November 1977) [operative paras. 1, 2 and 3]; UNSC Res. S/RES/713 (25 September 1991) [operative para. 6]; UNSC Res. S/RES/794 (3 December 1992) [operative para. 10].

[151] Nolte (n 129) 73.

[152] ibid., 73; Cassese 1995 (n 109) 174.

[153] *The UN Charter* (n 55) [Art. 2(4)]; UNGA Res. A/RES/25/2625 (24 December 1970) [see the section on 'the principles of equal rights and self-determination of peoples' at para. 10].

[154] Antonio Cassese, *International Law in a Divided World* (New York, Oxford University Press 1986) 131-133.

[155] UNGA Res. A/RES/25/2625 (24 December 1970) [see section on 'the principles of equal rights and self-determination of peoples' at para. 1].

[156] See 'Questions concerning GOA, DAMAO and DIU' (New York, Yearbook of the United Nations 1961) 129. Note that the United Nations General Assembly Resolution 1514 (1960) made no mention of force.

fact, the world powers never supported the idea that peoples agitating for self-determination should have recourse to force.[157] The ICJ put it succinctly,

> Indeed, it is difficult to see what would remain of the principle of non-intervention in international law if intervention, which is already allowable at the request of the government of a State, were also to be allowed at the request of the opposition.[158]

Unfortunately, the ICJ was silent on the process of decolonisation.[159] Russia's annexation of Crimea reinvents an abrogated state practice, although it has premised its conduct on NATO's intervention in Serbia.[160] In fact, the waves of globalisation require States to strengthen ties to better protect their borders. The 1998 China and Turkmenistan bilateral deal[161] and the joint communiqué by ASEAN ministers are reasonable steps in that direction.[162]

5.5.2 Illegal occupation

Ukraine and some States have described Russia's military activities in Ukraine as an illegal occupation.[163] The ICJ held a similar view in the *Temple of Preah Vihear* case and ordered Thailand to withdraw its troops from the Cambodian territory.[164]

The Hague Conventions and their annexed Regulations govern belligerent occupation.[165] The definition of occupation in Article 42 of the annexed Regulation of 1907 is the same as the provision of Article 1 of the *Project of an International Declaration Concerning the Laws and*

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[157] Some resolutions of the United Nations General Assembly and the Security Council have either recommended or commended states for assisting peoples agitating for self-determination. See UNGA Ress. A/RES/46/87 (16 December 1991) [operative para. 2]; A/RES/47/82 (16 December 1992) [operative para. 2]; A/RES/48/94 (20 December 1993) [operative para. 2]; see also UNSC Res. S/RES/445 (8 March 1978) [operative para. 2]; S/RES/428 (8 May 1978) [operative para. 6].

[158] *Nicaragua case* (n 113) [para. 246].

[159] ibid., [para. 206].

[160] See *President Putin's address on Crimea* (n 4) 6.

[161] See 'Turkmenistan and China say no to separatism,' (BBC News, 2 September 1998) available at <http://news.bbc.co.uk/1/hi/world/asia-pacific/164025.stm> accessed 5 July 2016.

[162] Li-Ann Thio, 'International law and secession in the Asian and Pacific regions' in Kohen (ed) (n 98) 345.

[163] UNSCOR, UN Doc. S/PV.7253 (28 August 2014) 14; UNSCOR, UN Doc. S/PV.7683 (28 April 2016) 12.

[164] *Preah Temple case* (n 24) 37.

[165] *Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land* (The Hague, 18 October 1907) available at <http://avalon.law.yale.edu/20th_century/hague04.asp> accessed 11 July 2016 [hereinafter *Hague Regulations*].

Customs of War[166] (hereinafter referred to as PDC). It provides as follows, a '[t]erritory is considered occupied when it is actually placed under the authority of the hostile army.'[167]

Occupation is established when an occupying power is in effective control of a part or whole of a territory belonging to another sovereign State. There is, however, no consensus on what "actually placed under the authority" means. But Article 2 of the PDC refers to the suspension of the authority of a legitimate government.[168] Usually, occupation is temporary and applies even when there are no hostilities or armed resistance between the High Contracting Party.[169]

Every occupation violates the territory of the occupied State, although state practice tolerates occupation meant to stop abuses of human rights.[170] For example, Bassiouni writes that the invasion of Iraq by the US-led coalition in 2003 was expedient to maintaining international peace and security.[171] And since occupation is factual,[172] the need to stop Saddam Hussein from developing WMD justified the said unauthorised invasion. The UN member States that supported the regime change in Iraq argued that it was part of the United Nations peacekeeping mission.[173] But that justification is unpersuasive. It is not legally founded and may have breached Iraqi's territory. At most, a State can rely on Article 1(4) of the First Additional Protocol to the 1949 Geneva Conventions[174] if it were a case of colonial domination.

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[166] *Project of an International Declaration concerning the Laws and Customs of War* (Done at Brussels on 27 August 1874) [Art. 1] available at <https://www.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=337371A4C94194E8C12563CD005154B1> accessed 17 July 2016 [hereinafter *Project of International Declaration 1874*].

[167] *Hague Regulations* (n 165) [Art. 42].

[168] *Project of International Declaration 1874* (n 166) [Art. 2].

[169] *Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (Done at Geneva on 12 August 1949, entered into force on 21 October 1950) 75 UNTS 287 [Art. 2].

[170] Cassese 1995 (n 109) 99.

[171] M. Cherif Bassiouni, 'Legal Status of US Forces in Iraq from 2003-2008' (2010) 11(1) *Chicago Journal of International Law* 1-38, 3.

[172] Yael Ronen, 'Illegal Occupation and Its Consequences' (2008) 41(1 & 2) *Israel Law Review* 201-245, 201.

[173] Anne-Marie Slaughter, 'Good Reasons for Going Around the U.N.' (New York Times, 18 March 2003) available at <http://www.nytimes.com/2003/03/18/opinion/good-reasons-for-going-around-the-un.html> accessed 11 July 2016.

[174] *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts* (Protocol I) (Concluded at Geneva on 8 June 1977, entered into force on 7 December 1978) 1125 UNTS 3 [Art. 1(4)] [hereinafter *Additional Protocol I*]. It 'provides that armed conflicts in which peoples are fighting against colonial domination, alien occupation or racist regimes are to be considered international conflicts.' This means that the insurgent could legitimately seek help from third states.

The occupying power cannot alter the territorial borders of the State it occupies[175] but must maintain the *status quo*.[176] After the dissolution of the Baltic States, the Helsinki District Court held that Estonia is not liable for the debt resulting from a contract entered by an occupying power with Skop bank.[177]

The justification of occupation on account of human rights has been faulted by Dugard's report on the *Violation of Human Rights in the Occupied Arab Territories.*[178] The report reveals that 'violations of human rights are a necessary consequence of military occupation.'[179] Further, it says that a 'unilateral redrawing of the border in the name of security is simply a pretext for the illegal annexation of Palestinian territory.'[180] Sadly, even the UN Peacekeeping Forces have been accused of violating human rights.[181]

While military occupation authorised by the UN is legal,[182] Falk and Scheffer argue that unilateral interventions for a regime change and for annexation are not.[183] Arguably, every unlawful occupation is disrespectful and a breach of the victim State's territory.[184]

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[175] Martti Koskenniemi, 'Occupied Zone - A Zone of Reasonableness' (2008) 41(1 & 2) *Israel Law Review* 13-40, 30.

[176] *Hague Regulations* (n 165) [Art. 43].

[177] Tarja Langstrom, *Transformation in Russia and International Law* (Leiden/Boston, Martinus Nijhoff Publishers 2003) 195-196.

[178] See UN Doc. A/57/366 (29 October 2002) [paras. 15-23].

[179] ibid., [para. 2]; *Additional Protocol I* (n 174) [Art. 1(1) and (4)] (the High Contracting Parties undertake to respect the principle and scope of the Protocol in the context of peoples fighting for self-determination and against colonial occupation would suggest that the latter is illegal).

[180] UN Doc. A/57/366 (29 October 2002) [para. 20].

[181] David Smith and Paul Lewis, 'UN peacekeepers accused of killing and rape in the Central African Republic' (The Guardian, 11 August 2015) available at <https://www.theguardian.com/world/2015/aug/11/un-peacekeepers-accused-killing-rape-central-african-republic> accessed 12 September 2016.

[182] Orna Ben-Naftali, Aeyal M. Gross & Keren Michaeli, 'Illegal Occupation: Framing the Occupied Palestinian Territory' (2005) 23(3) *Berkeley Journal of International Law* 551-614, 557-558; UNSC Res. S/RES/1483 (22 May 2003) [preamble para. 14].

[183] Richard A. Falk, 'What Future for the UN Charter System of War Prevention?' (2003) 97(3) *American Journal of International Law* 590-598, 596-597; David J. Scheffer, 'Beyond Occupation Law' (2003) 97(4) *American Journal of International Law* 842-859, 851.

[184] Ronen (n 172) 206-207.

5.5.2.1 Crisis of the legality of a prolonged occupation

When in 2012, Mr Kofi Annan called on Israel to "end the illegal occupation"[185] of Palestine, his critics condemned his choice of word “illegal” as provocative.[186] Soon after, a spokesman for the Secretary-General clarified that by “illegal” is meant Israeli’s failure to comply with its obligations as an occupying power.[187]

This explanation blocks any meaningful dialogue on the legality of the initial occupation that followed after Israel’s victory in a six-day war in 1967, contrary to the Green lines that were established by the 1949 Armistice Agreements.[188] Dinstein opines that ‘the longer Israel’s rule in East Jerusalem continues *de facto* … the situation of actual possession could give rise to a complete and unfettered proprietary right.’[189] In the same vein, Nigeria defended its occupation of Bakassi Peninsula as a “peaceful possession.”[190]

The ICJ in the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*[191] failed to adjudicate the legality of Israel’s initial occupation. The Court restricted its *Advisory Opinion* to the construction of the wall by Israel.[192] However, the Court arrived at a different conclusion in the *Namibia* case[193] following the Security Council’s Resolution 276 (1970) that terminated South Africa’s mandate.[194] If the separate opinion of Judge Ammoun in the *Namibia* case was accepted, then the Court’s narrow approach in its advisory opinion

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[185] Secretary-General Press Release, ‘Calls on Palestinians, Israelis to “Lead Your Peoples Away from Disaster,”’ UN Doc. SC/7325 (12 March 2002) [para. 12].

[186] George P. Fletcher, ‘Annan's Careless Language’ (New York Times, 21 March 2002) available at <http://www.nytimes.com/2002/03/21/opinion/annan-s-careless-language.html> accessed 11 July 2016.

[187] Frederic Eckhard, ‘A Delicate Word in the Mideast’ (New York Times, 23 March 2002) available at <http://www.nytimes.com/2002/03/23/opinion/l-a-delicate-word-in-the-mideast-210803.html> accessed 11 July 2016.

[188] *Jordanian-Israeli General Armistice Agreement* (3 April 1949) [Art. IV (2)] available at <http://avalon.law.yale.edu/20th_century/arm03.asp> accessed 13 July 2016 [hereinafter *Armistice Agreement*].

[189] Sheleff (n 65) 344 (emphasis added).

[190] *Land and Maritime Boundary between Cameroon and Nigeria* (Cameroon v Nigeria: Equatorial Guinea intervening) Judgment ICJ Reports (2002) p. 303 [para. 66] [hereinafter *Cameroon v Nigeria*].

[191] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* Advisory Opinion ICJ Reports (2004) p. 136 [hereinafter *Advisory Opinion on Palestine Wall*].

[192] Ben-Naftali *et al.,* (n 182) 552.

[193] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276 (1970),* Advisory Opinion ICJ Reports (1971) p. 16 [paras. 117-118, 132] [hereinafter *Namibia Advisory Opinion*].

[194] UNSC Res. S/RES/276 (30 January 1970) [para. 2].

on the Palestine Wall[195] is disturbing considering that both cases were mandates.[196] One could ask, at what point and under what circumstances will Russia's occupation and annexation of Crimea be considered legal? Does international law grant *sanatio in radice* (heal from the root) to an inchoate title after a prolonged illegal occupation?

5.5.2.2 Lesson from Israel's occupation of the West Bank and the Gaza Strip

Israel occupied the West Bank and the Gaza Strip in 1967 when their legitimate owners were disputed.[197] As former British territories, the West Bank and the Gaza Strip were British mandates and part of the Jewish national home.[198] Their capture by Israel in 1967 was described as a "reversion"[199] and not an occupation in accordance with the Geneva Convention.[200] When Israel recaptured the territories in 1967, it extended its sovereignty by adopting Amendment No. 11 to the Law and Administration Ordinance 5708-1948.[201] The relevant section states: '[t]he law, jurisdiction and administration of the State shall extend to any area of Eretz Israel designated by the Government by order.'[202] How to classify this piece of legislation is controversial. While Sheleff argues that it was not meant to annex the occupied territories, which originally belong to Israel,[203] Maoz holds a contrary view.[204]

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[195] He argues that the Court should have considered self-determination and other human rights issues affecting the people. See *Namibia Advisory Opinion* (n 193) 71-72 (separate opinion of Vice President Ammoun).

[196] *Advisory Opinion on Palestine Wall* (n 191) [paras. 70-88].

[197] The West Bank and the Gaza Strip used to be British Mandates until 1948. Egypt occupied the Gaza Strip from 1948-1956 and again from 1957-1967. Jordan occupied the West Bank from 1948-1967 and tried to annex it but was resisted by the Arab League. The Arab League declared that Jordan was holding the territory on trust for Palestine. See Yahuda Z. Blum, 'The Missing Reversioner: Reflections on the Status of Judea and Samaria' (1968) 3(2) *Israel Law Review* 279-301, 288; Talia Einhorn, 'The status of Judea and Samaria (The West Bank) and Gaza and the settlements in international law' (2014) 19 available at <http://jcpa.org/wp-content/uploads/2014/08/THE_STATUS_OF_JUDEA_&_SAMARIA_(THE_WEST_BANK)_AND_GAZA.pdf> accessed 18 July 2016; The sessions of the Arab League are documented at <https://www.jewishvirtuallibrary.org/jsource/Peace/legsess.html> accessed 18 July 2016 [hereinafter *Arab League sessions*].

[198] Einhorn (n 197) 19.

[199] Note that the doctrine of reversion is controversial and has not been established as part of international law. See *Territorial sovereignty and scope of the dispute* (Eritrea v Yemen) (1998) 22 RIAA 209-332 [para. 125] [hereinafter *Eritrea v Yemen Dispute*].

[200] Blum 1968 (n 197) 288, 294; Stephen M. Schwebel, 'What weight to Conquest?' (1970) 64(2) *American Journal of International Law* 344-347, 346.

[201] See generally, *Law and Administration Ordinance (Amendment No. 11)* available at <http://www.mfa.gov.il/mfa/foreignpolicy/mfadocuments/yearbook1/pages/13%20law%20and%20administration%20ordinance%20-amendment%20no.aspx> accessed 18 July 2016.

[202] ibid.

[203] Sheleff (n 65) 335.

[204] Asher Maoz, 'Application of Israeli Law to the Golan Heights is Annexation' (1994) 20(2) *Brooklyn Journal of*

However, Israel has applied it to territories under the control of the Israel Defense Forces (hereinafter referred to as IDF) irrespective of the legitimate legal title owner.[205] Whether any UN Organ can unilaterally delimit territorial borders without the consent of the disputants is beyond our scope.[206] Although Palestine is not a State,[207] it has persistently objected to Israel's occupation of the West Bank and the Gaza Strip. Besides, Palestine was not a signatory to the 1949 UN-brokered Armistice Agreements.[208] This raises doubt whether it could be compelled to comply with it. If the Armistice Treaty were not binding, then Israel's claim of reversion is contestable. It could be argued that Palestine retains the proprietary right and that Jordan is a "trustee"[209] at the material time.

Nevertheless, Israel has progressively enacted laws to consolidate its title in most of the territories it occupied.[210] Note that the ICJ rejected Nigeria's argument that it has acquired a valid title based on "historical consolidation."[211] Israel has maintained that the 1907 Hague Regulation does not apply to the Israeli-Palestine question but has selectively applied the section that deals with humanitarian provisions.[212] In 1977, the Israeli Foreign Minister told the United Nations General Assembly, '[i]n view of this (Jordan's) illegal annexation of the

International Law 355-396, 359-360.

205 Einhorn (n 197) 19; For the UN Partition Plan, see generally, UNGA Res. A/RES/181 (II) (29 November 1947).

206 The People's Republic of China had declared that it would not accept any solution imposed on it regarding issues of territorial sovereignty and maritime rights and interests in the South China Sea. See Ministry of Foreign Affairs, People's Republic of China, 'Statement of the Ministry of Foreign Affairs of the People's Republic of China on the Award on Jurisdiction and Admissibility of the South China Sea Arbitration by the Arbitral Tribunal Established at the Request of the Republic of the Philippines' (30 October 2015) [para. I] available at <http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1310474.shtml> accessed 21 July 2016.

207 At the time of writing in September 2017. By "State" is meant a sovereign independent State recognised as such as a member of the United Nations.

208 *Armistice Agreement* (n 188) [Art. IV(2)]; For a summary of the territorial disputes between Israel and Palestine visit <http://www.un.org/Depts/dpi/palestine/ch2.pdf> accessed 18 July 2016.

209 *Arab League sessions* (n 197) [sessions 12(I) and (II) May-June 1950].

210 *Area of jurisdiction and powers ordinance No. 29 of 5708-1948* (Passed by the Knesset on 22 September 1948) [Art. 1] available at <http://www.israellawresourcecenter.org/israellaws/fulltext/areajurisdictionpowersord.htm> accessed 18 July 2016; *Protection of Holy Places Law 5727* (1967) available at <http://www.knesset.gov.il/laws/special/eng/HolyPlaces.htm> accessed 18 July 2016; *Basic Law: Jerusalem, Capital of Israel* available at <https://www.knesset.gov.il/laws/special/eng/basic10_eng.htm> accessed 18 July 2016.

211 *Cameroon v Nigeria* (n 190) [para. 120].

212 Einhorn (n 197) 20; Nissim Bar-Yaakov, 'The Applicability of the Laws of War to Judea and Samaria (The West Bank) and to the Gaza Strip' (1990) 24(3 and 4) *Israel Law Review* 485-506, 488-489.

West Bank, the Fourth Geneva Convention is not applicable.'[213] But the Supreme Court of Israel departed from that view in *Beth-El* case.[214]

The *Beth-El* case concerns the legality of establishing Jewish civilian settlements on private Arab lands previously requisitioned for military and security needs. The Court held that the case would not have been successful if it were solely based on Article 49 of the Fourth Geneva Convention which remains in the realm of international consensual law. It, however, ruled that the 1907 Hague Convention is a customary international law and forms part of Israel's municipal law.[215]

The international community has condemned Israel's occupation of the Palestinian territory.[216] Both the Security Council and the jurisprudence of the ICJ have denounced it while upholding the Fourth Geneva Convention.[217] It is regrettable that the ICJ limited its advisory opinion to the construction of the wall on Palestine. The critics of Mr Annan's statement should reassess whether a prolonged occupation could legitimise a legal title. Judge Elaraby, Falk and Weston answer in the negative.[218] Therefore, an illegal occupation, no matter how prolonged is a continuing violation if the victim State persistently objects to the illegal act.

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[213] UNGAOR, UN Doc. A/32/PV.27 (10 October 1977) [para. 200] (emphasis added); UNGAOR, UN Doc. A/32/PV.47 (26 October 1977) [para. 102]; Adam Roberts, 'Prolonged Military Occupation: The Israeli-Occupied Territories Since 1967' (1990) 84(1) *American Journal of International Law* 44-103, 61-62. A couple of resolutions of the Security Council and the General Assembly maintain that the Fourth Geneva Conventions apply to Israel. See, UNSC Res. S/RES/237 (14 June 1967) [operative para. 2]; UNSC Res. S/RES/446 (22 March 1979) [operative para. 3]; UNSC Res. S/RES/681 (20 December 1990) [operative paras. 4-5]; UNSC Res. S/RES/799 (18 December 1992) [operative para. 2]; UNSC Res. S/RES/904 (18 March 1994) [operative para. 2]; UNGA Res. A/RES/35/122A (11 December 1980) [operative paras. 1-2]; UNGA Res. A/RES/56/60 (14 February 2002) [operative paras. 1-2]; UNGA Res. A/RES/58/97 (17 December 2003) [operative paras. 1-2]; UNGA Res. A/RES/ES-10/7 (20 October 2000) [operative para. 6]; UNGA Res. A/RES/ES-10/16 (4 April 2010) [operative para. 4].

[214] Grant T. Harris, 'Human Rights, Israel, and the Political Realities of Occupation' (2008) 41(1&2) *Israel Law Review* 87-174, 93.

[215] ibid., 93.

[216] UNGA Res. A/RES/2443 (XXIII) (19 December 1968) [preamble para. 6(a), operative para. 1]; UNGA Res. A/RES/2727 (XXV) (15 December 1970) [preamble para. 7, operative para. 1]; UNGAOR, UN Doc. A/ES-10/PV.9 (17 March 1998) 1-2, 4-5 (statements from the representatives of Tunisia, Indonesia and Bahrain).

[217] UNSC Res. S/RES/237 (14 June 1967) [operative para. 2]; *Advisory Opinion on Palestine Wall* (n 191) [paras. 102-114]; *DRC v Uganda* (n 123) [paras. 172-178].

[218] *Advisory Opinion on Palestine Wall* (n 191) 256 (Separate opinion of Judge Elaraby); Richard A. Falk and Burns H. Weston, 'The Relevance of International Law to Palestinian Rights in the West Bank and Gaza: In Legal Defense of the Intifada' (1991) 32(1) *Harvard International Law Journal* 129-158, 155.

5.5.2.3 Refusal to withdraw Armed Forces from another State's Territory

Consent is an exception to the prohibition against the use of force[219] and precludes the wrongfulness of a State's action.[220] States are duty-bound to withdraw their armed forces from the territory of another State if asked to do so.[221] This was established in the *Armed Activities on the Territory of the Congo*[222] (hereinafter referred to as DRC). Although the DRC authorised the initial entry,[223] Uganda's refusal to withdraw its troops when it was requested infringed the sovereign right of the DRC.[224]

The Court went as far as holding that Uganda breached the territory of the DRC by operating in locations and for purposes for which it had no consent whatever.[225] It presupposes that the invitor could restrict the invitee's *modus operandi* to a geographical location or for a specific purpose. Thus, the invitee's failure to comply with the rule of engagement as directed by the invitor could breach the latter's territory.

5.6 Territorial waters[226]

Territorial waters are used generically to refer to the rights accruing to a State in a maritime environment. It includes but not limited to internal waters, territorial sea, exclusive economic zone and the continental shelf. Subject to the specificity of laws applicable to each,[227] a breach of any of those laws is a breach of the territory of the affected State.

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[219] *Nicaragua case* (n 113) [para. 246].

[220] *Draft Articles on Responsibility of States for internationally wrongful acts* (Adopted by the International Law Commission at its fifty-third session in 2001) (Volume II, Part II, Yearbook of International Law Commission 2001) [Art. 20].

[221] *Preah Temple case* (n 24) 37; *Cameroon v Nigeria* (n 190) [para. 314].

[222] *DRC v Uganda* (n 123) [para. 105].

[223] ibid., [para. 56].

[224] ibid., [paras. 96-100, 165].

[225] ibid., [para. 149].

[226] Territorial waters are used here as a generic word to refer to the maritime environment without prejudice to the debate during the third session of the drafting committee of the International Law Commission calling for a clear separation of internal waters, territorial sea and so forth. See 'Document A/CN.4/99/Add.1 – transmitted by a letter dated 27 March 1956 from the Permanent Mission of Norway to the United Nations' in *Yearbook of the International Law Commission* (Volume II, Yearbook of the International Law Commission 1956) 68.

[227] For instance, the Coastal States' right to enforce their domestic laws on the users of their Exclusive Economic Zone would not amount to a breach of the territorial integrity of the flag state. See Rob McLaughlin, 'Coastal state use of force in the EEZ under the Law of the Sea Convention 1982' (1999) 18(1) *University of Tasmanian Law Review* 11-21.

5.6.1 Applicable law

The United Nations Convention on the Law of the Sea[228] (hereinafter referred to as UNCLOS) is the regime that applies to territorial waters. Article 301 provides as follows:

> [i]n exercising their rights and performing their duties under this Convention, States Parties shall refrain from any threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the principles of international law embodied in the Charter of the United Nations.[229]

This provision is an adaptation of Article 2(4) of the UN Charter to maritime environment. It could apply both ways, that is, to protect the sovereign right of the Coastal States as well as the right of vessels enjoying the right of innocent passage. It prohibits unlawful conducts as may be executed by States' vessels and warships[230] making innocent passage[231] through a State's territorial waters.

However, the scope of the rights covered by Article 301 is not entirely clear. For instance, Article 286[232] of the UNCLOS provides that the Court and Tribunals could acquire jurisdiction over such disputes as may be submitted to it by an aggrieved State. But Article 298(b)[233] is an exception to that provision in respect of disputes concerning military activities. Oxman

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[228] United Nations*, Convention on the Law of the Sea* (Concluded at Montego Bay on 10 December 1982, entered into force on 16 November 1994) 1833 UNTS 397 [Art. 301] [hereinafter *UNCLOS*].

[229] ibid., [Art. 301].

[230] The term "warship" means a ship belonging to the naval forces of a State and bearing the external marks distinguishing warships of its nationality, under the command of an officer duly commissioned by the government and whose name appears in the Navy List, and manned by a crew who are under regular naval discipline. See *Convention on the High Seas* (Concluded at Geneva on 29 April 1958, entered into force on 30 September 1962) 450 UNTS 11 [Art. 8(2)] [hereinafter *Convention on the High Seas*].

[231] Article 8 paragraph 1 of the *Convention on the High Seas* states: 'Warships on the high seas have complete immunity from the jurisdiction of any State other than the flag State' and Article 30 states: 'The provisions of this Convention shall not affect conventions or other international agreements already in force, as between States Parties to them'; Article 14 of the *Convention on the Territorial Sea and the Contiguous Zone* provides as follows: 'Subject to the provisions of these articles, ships of all States, whether coastal or not, shall enjoy the right of innocent passage through the territorial sea.' See *Convention on the Territorial Sea and the Contiguous Zone* (Concluded at Geneva on 29 April 1958, entered into force on 10 September 1964) 516 UNTS 206 [Art. 14] [hereinafter *Convention on Sea and Contiguous Zone*].

[232] *UNCLOS* (n 228) [Art. 286].

[233] ibid., [Art. 298(b)].

questions what remains of Article 301[234] given this "opt-out"[235] provision that excludes military activities from the scope of the UNCLOS' compulsory regime. This exception makes the violation of States' vessels likely save that certain conditions must be met.[236]

Nevertheless, coercive measures against a State's vessel are deemed prohibited because Article 301 of the UNCLOS has an overarching effect in lieu of Article 103 of the UN Charter.[237] Besides, Article 2(4) is a norm *jus cogens* and obliges *erga omnes*.

Having said that, the provision of the UNCLOS that allows the right of innocent passage for warships[238] through a State's territorial waters is problematic. The ICJ's *obiter* in the *Legality of the Threat or Use of Nuclear Weapons* that '[p]ossession of nuclear weapons may justify an inference of preparedness to use them'[239] could apply to warships. Thus, Jessup and Brownlie argue that the right of innocent passage[240] for "warships" is incompatible with the sovereignty of the coastal States.[241] Another viewpoint which shall not be investigated here is whether the damages caused by States' warships are covered by immunity clause.[242] However, the exercise of the right of innocent passage for warships must conform to stringent conditions.[243] Otherwise, the vessel making an innocent passage breaches the territory of the littoral State.

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[234] Bernard H. Oxman, 'The Regime of Warships under the United Nations Convention on the Law of the Sea' (1984) 24(4) *Virginia Journal of International Law* 809-864, 814-815.

[235] *UNCLOS* (n 228) [Art. 298(b)]; Francesco Francioni, 'Peacetime use of Force, Military Activities, and the New Law of the Sea' (1985) 18(2) *Cornell International Law Journal* 203-226, 204.

[236] For details, see Francioni (n 235) 203-226.

[237] Article 103 states: In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail. See *The UN Charter* (n 55) [Art. 103].

[238] *UNCLOS* (n 228) [Art. 24]; *Convention on Sea and Contiguous Zone* (n 231) [Arts. 14-23]; Lawrence Juda 'Innocent passage by warships in the territorial seas of the Soviet Union: Changing doctrine' (1990) 21(1) *Ocean Development & International Law* 111-116

[239] *ICJ Opinion on Nuclear Weapon*s (n 121) [para. 48].

[240] *UNCLOS* (n 228) [Art. 17]; *Convention on Sea and Contiguous Zone* (n 231) [Art. 14].

[241] Phillip C. Jessup, 'The law of territorial waters and maritime jurisdiction' in Harvard Law School's Draft Convention on Territorial waters (1929) 23 *American Journal of International Law* (Special Supplement) 243-380, 295; Brownlie 2008 (n 86) 188-190.

[242] *UNCLOS* (n 228) [Art. 32]; *Convention on Sea and Contiguous Zone* (n 231) [Art. 22]; *Jurisdictional Immunities of the State* (Germany v Italy: Greece intervening) Judgment ICJ Reports (2012) p. 99 [para. 72].

[243] The UNCLOS prohibits warships from engaging in any military activities that might constitute a threat or use of force to other states. See *UNCLOS* (n 228) [Art. 19(2)]. Article 20 requires submarines and other underwater vehicles to navigate on the surface and to show their flag. See *UNCLOS* (n 228) [Art. 20].

5.6.1.1 International Judicial Institutions' interpretation of Article 301 of the UNCLOS

The International Judicial Institutions have arbitrated a couple of cases involving the violation of States' territorial waters. In *the Kingdom of the Netherlands v the Russian Federation*,[244] the Permanent Court of Arbitration (hereinafter referred to as PCA) reiterates that the conduct prohibited by Article 2(4) of the UN Charter is a primary rule as well as a general principle of international law.[245]

In the *M/V "SAIGA" No. 2,*[246] the International Tribunal for the Law of the Sea (hereinafter referred to as ITLOS) held that Article 293 of the UNCLOS 'requires that the use of force must be avoided as far as possible and, where force is unavoidable, it must not go beyond what is reasonable and necessary in the circumstances.'[247] A similar position was held in the *"I'm Alone" case*[248] and the *Red Crusader case.*[249]

Against this backdrop, the PCA has explained that Article 301 of the UNCLOS is implicated when a State violates the integrity of other States and when a State exercises its sovereign right to enforce compliance.[250] In the *South China Sea case*,[251] both of the disputing parties accuses the other of violating Article 2(4) of the UN Charter. China[252] particularly noted that using warship to harass unarmed Chinese fishers is a display of force.[253]

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[244] *The Kingdom of the Netherlands v the Russia Federation*, Award on the Merits, PCA (14 August 2015) [para. 191] [hereinafter *PCA Award on Greenpeace*].
[245] ibid., [para. 191].
[246] See *M/V "SAIGA" (No. 2)* (Saint Vincent and the Grenadines v Guinea) Judgment ITLOS Reports (1999) p. 10 [hereinafter *SAIGA No. 2*].
[247] ibid., [para. 155].
[248] *S.S. "I'm Alone"* (Canada v the United States) (1935) 3 RIAA 1609-1618, 1615, 1617 [hereinafter *I'm Alone case*].
[249] See *Investigation of certain incidents affecting the British Trawler Red Crusader* (1962) 29 RIAA 521-539 [hereinafter *Red Crusader case*].
[250] See *Award in the Arbitration Regarding the Delimitation of the Maritime Boundaries between Guyana v Suriname* (Award of 17 September 2007) 30 RIAA 1-144 [para. 269] [hereinafter *Guyana v Suriname*].
[251] See generally, *An Arbitral Tribunal constituted under Annex VII to the 1982 United Nations Convention on the Law of the Sea between the Republic of the Philippines and the People's Republic of China,* Award PCA (12 July 2016) [hereinafter *Philippines v China*].
[252] The People's Republic of China objected to the PCA's jurisdiction to arbitrate the dispute and did not participate in the proceedings.
[253] *Philippines v China* (n 251) [para. 790]. For the position of the Philippines see [paras. 1118-1121].

5.6.2 Cases on the breaches of territorial waters

A research paper presented by Niels Andersen *et al*., during the Offshore Technology Conference held in the US in 2014 provides an overview of the maritime boundary disputes globally.[254] It held that three-quarters of the potential acreage in marine environment are yet to be explored and/or exploited.[255] This includes about 14% of the deep and ultra-deep waters of the Extended Continental Shelf.[256] Although Article 76 of the UNCLOS permits States to extend their Continental Shelf up to 350 nautical miles, it is scientifically not feasible yet.[257] Currently, there are about 155 coastal States globally, about 209 maritime boundary agreements in force and about 311 disputed maritime boundaries.[258]

Within the first two decades of the 21st century, about ten maritime boundary disputes have been decided on the Merits by the international judicial institutions.[259] Robert van de Poll predicts the rise in maritime boundary disputes in Africa due to inexecutable boundary agreements.[260] At present, two cases are pending at the PCA, namely, Kenya v Somalia and Ghana v Ivory Coast. For our purposes, we shall study one case each from Asia, Latin America and Africa. They are: *Philippines v China*,[261] *Costa Rica v Nicaragua*,[262] and *Cameroon v Nigeria.*[263] We shall expose the facts before examining the breaches concurrently.

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[254] Niels Andersen *et al.,* 'International Boundary Disputes: An unfinished tale of Geology, Technology, Money, Law, History, Politics and Diplomacy' (Offshore Technology Conference, Houston Texas USA, 5-8 May 2014) 1-22.

[255] Andersen *et al*., (n 254) 2.

[256] ibid., 2.

[257] ibid., 2.

[258] ibid., 2-3.

[259] Cases already decided by the ICJ, the PCA, the ITLOS, the UNCLOS Annex VII Tribunal or *Ad hoc* Tribunal. See Andersen *et al*., (n 254) 12. For instance, the cases decided between 2013 and 2016 include: (1) the ICJ's judgment on *Certain Activities carried out by Nicaragua in the Border Area* (Costa Rica v Nicaragua), (2) the Permanent Court of Arbitration (PCA) delivered its Award on *The Arctic Sunrise Arbitration* (The Netherlands v Russia) on 14 August 2015, (3) PCA Award on *The Republic of Philippines v The People's Republic of China* was delivered on 12 July 2016) and so forth.

[260] Wendell Roelf, 'Spike seen in African offshore disputes, oil companies watching' (Reuters, 6 November 2014) available at <http://uk.reuters.com/article/uk-africa-oil-disputes-idUKKBN0IQ1OL20141106> accessed 4 July 2017.

[261] See generally, *Philippines v China* (n 251).

[262] See generally, *Certain Activities carried out by Nicaragua in the Border Area* (Costa Rica v Nicaragua) Judgment ICJ Reports (2009) p. 1 [hereinafter *Costa Rica v Nicaragua*]; *Dispute regarding Navigational and Related Rights* (Costa Rica v Nicaragua) Judgment ICJ Reports (2009) p. 213.

[263] See generally, *Cameroon v Nigeria* (n 190).

5.6.2.1 *Philippines v China* (South China Sea)

The Republic of Philippines (hereinafter referred to as Philippines) initiated proceedings before the PCA[264] against the People's Republic of China (hereinafter referred to as China) pursuant to Article 286[265] of the UNCLOS on 22 January 2013. Philippines alleges, *inter alia*, that China has, (1) interfered with its sovereign rights to exploit the living and non-living resources of its EEZ and Continental Shelf, (2) exhibited dangerous and unlawful conduct at Scarborough Shoal, (3) exhibited unlawful conduct at Second Thomas Shoal after the Philippines had initiated the proceedings.[266]

Although China made no formal submission to, and had no legal representation during the proceedings, the PCA deduced what might likely be the Chinese position from China's *notes verbales* communicated either to the Philippines or to the PCA. The *notes verbales* reject all the charges, claiming that China possesses indisputable sovereignty over the "nine-dash line."[267] China equally claims it has sovereign rights over the relevant waters as well as the seabed and subsoil thereof.[268] China based its claim on historical and legal evidence[269] and further argued that the PCA lacked jurisdiction over any dispute that borders on territorial sovereignty.[270]

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[264] In accordance with Article 1 of Annex VII, see *UNCLOS* (n 228) [Art. 1 Annex VII].

[265] Article 286 provides as follows: '[s]ubject to section 3, any dispute concerning the interpretation or application of this Convention shall, where no settlement has been reached by recourse to section 1, be submitted at the request of any party to the dispute to the court or tribunal having jurisdiction under this section.' See *UNCLOS* (n 228) [Art. 286].

[266] *Philippines v China* (n 251) (Memorial of the Philippines, Volume 1, 30 March 2014) 161.

[267] The "nine-dash line" refers to nine dotted lines on the map as reproduced by China representing the Islands over which China claims sovereignty. See Zhiguo Gao and Bing Bing Jia, 'The Nine-Dash Line in the South China Sea: History, Status, and Implications' (2013) 107(1) *American Journal of International Law* 98-124. For the map, see *Philippines v China* (n 251) (Memorial of the Philippines, Volume 1, 30 March 2014) Figure 1.1.

[268] *Philippines v China* (n 251) [para. 182]; see also 'Note Verbale from the Permanent Mission of the People's Republic of China to the United Nations to the Secretary-General of the United Nations, No. CML/17/2009' (New York, 7 May 2009) [para. 2] available at <http://www.un.org/depts/los/clcs_new/submissions_files/mysvnm33_09/chn_2009re_mys_vnm_e.pdf> accessed 2 August 2016; 'Note Verbale from the Permanent Mission of the People's Republic of China to the United Nations to the Secretary-General of the United Nations, No. CML/18/2009' (New York, 7 May 2009) [para. 2] available at <http://www.un.org/depts/los/clcs_new/submissions_files/vnm37_09/chn_2009re_vnm.pdf> accessed 2 August 2016.

[269] See 'Note Verbale from the Permanent Mission of the People's Republic of China to the United Nations to the Secretary-General of the United Nations, No. CML/8/2011' (New York, 14 April 2011) [para. 2] available at <http://www.un.org/depts/los/clcs_new/submissions_files/mysvnm33_09/chn_2011_re_phl_e.pdf> accessed 2 August 2016.

[270] *Philippines v China* (n 251) [para. 14] (Award on Jurisdiction and Admissibility, 29 October 2015).

The PCA overruled the preliminary objections raised by China, holding that territorial sovereignty does not obscure the possibility of other contingent claims as well.[271] The PCA admitted it lacks jurisdiction over disputes that deal with the delimitation of territory but emphasised it could adjudicate breaches of territorial rights. Disregarding the declaration which China made in accordance with Article 298 of the UNCLOS,[272] the PCA went ahead to adjudicate whether China violated the territory of the Philippines.

5.6.2.2 *Costa Rica v Nicaragua*

The Republic of Costa Rica (hereinafter referred to as Costa Rica) instituted proceedings against the Republic of Nicaragua (hereinafter referred to as Nicaragua) before the ICJ on 18 November 2010. The application alleges that Nicaragua has in two separate incidents occupied Costa Rican territory.[273] Equally, it alleges that Nicaragua is constructing a canal across the Costa Rican territory from the San Juan River to Laguna Los Portillos, as well as dredging the San Juan River.[274] These activities violate the established treaty regime between both States, the principles of the inviolability of State territory and the prohibition of the threat or use of force.[275]

The Counter-Memorial of Nicaragua pleaded the Court to dismiss and reject the requests and submissions made by Costa Rica. Instead it submitted four counter-claims, one of which is that the Court should adjudge and declare that Nicaragua has full sovereignty over the disputed territory.[276] The Court ruled in favour of Costa Rica.[277] It held that the dredging work and the military presence of Nicaraguan troops in parts of that territory constitute a breach

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[271] ibid., [para. 152].

[272] It states: '[t]he Government of the People's Republic of China does not accept any of the procedures provided for in Section 2 of Part XV of the Convention with respect to all the categories of disputes referred to in paragraph 1 (a) (b) and (c) of Article 298 of the Convention.' See *UNCLOS* (n 228) (People's Republic of China, declaration under Article 298, 25 August 2006) available at <http://www.un.org/depts/los/convention_agreements/convention_declarations.htm> accessed 26 August 2017.

[273] *Costa Rica v Nicaragua* (n 262) [para. 4] (Application instituting proceedings).

[274] ibid., [para. 4]

[275] ibid., [para. 2].

[276] ibid., [paras. 15 and 48].

[277] ibid., [para. 92].

of Costa Rica's territorial sovereignty.[278]

5.6.2.3 *Cameroon v Nigeria*

On 29 March 1994, the Republic of Cameroon (hereinafter referred to as Cameroon) lodged a complaint against the Federal Republic of Nigeria (hereinafter referred to as Nigeria) before the ICJ,[279] alleging that Nigeria has violated its territory through the occupation of the area of Lake Chad.[280] Cameroon argues that Nigeria has by her action breached its obligations under treaty law as well as its obligations under the customary international law.[281]

Nigeria pleaded the Court to reject and dismiss Cameroon's claim over the disputed areas,[282] claiming it acquired good title for the following reasons. First, an historical consolidation of title through long occupation. Second, an effective administration of the disputed area through the display of the act of sovereignty. Third, that Cameroon has acquiesced to its manifestations of sovereignty in the disputed area.[283] Finally, Nigeria argues that these conditions could apply both individually and jointly to confer a good title.

5.7 Historic rights and the inviolability of State Territory

The three cases examined above are claims to legal title based on historic rights.[284] Such claims are common phenomenon associated with the breach of States territory.[285] Russia alluded to its historic ties with Crimea[286] when it annexed it and Sevastopol in 2014.

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[278] ibid., [para. 93].
[279] *Cameroon v Nigeria* (n 190) (Application instituting proceedings filed in the Registry of the Court on 29 March 1994) [para. 18].
[280] *Cameroon v Nigeria* (n 190) [para. 25].
[281] ibid., [para. 25].
[282] ibid., 322.
[283] ibid., 349-350.
[284] There is no established definition of historic rights under international law. The widely-accepted description by Blum denotes it as the 'possession by a State, over certain land or maritime areas, of rights that would not normally accrue to it under the general rules of international law, such rights having been acquired by that State through a process of historical consolidation.' See Yehuda Z. Blum, 'Historic Rights' in Rudolf Bernhardt (ed.), *Encyclopaedia of Public International Law* (Instalment 7, The Netherlands, Elsevier Science Publishers B.V. 1984) 120.
[285] Zou Keyuan, 'Historic Rights in International Law and in China's Practice' (2001) 32(2) *Ocean Development and International Law* 149-168, 154-157; Andrea Gioia, 'Tunisia's claims over Adjacent Seas and the Doctrine of "Historic Rights"' (1984) 11(2) *Syracuse Journal of International Law and Commerce* 327-376, 327.
[286] *President Putin's address on Crimea* (n 4) 9.

In the 1980s, the dispute between Libya and Tunisia over the Gulf of Tunis and the Gulf of Gabes was based on historic rights.[287] Libya objected strongly to Tunisia's claim by pointing out that '[a]t no stage prior to 1973, did Tunisia claim the "Gulf of Gabes" as territorial waters, let alone internal waters.'[288] Historic rights were a factor in Eritrea-Yemen Arbitration of 1998.[289] The disputants specifically requested the PCA to adjudicate the disputed island in the Red Sea 'in accordance with principles, rules and practices of international law applicable to the matter, and on the basis, in particular, of historic titles.'[290]

Without prejudice to the scale of preference which Sumner has identified,[291] the international judicial institutions take many factors into account when adjudicating territorial disputes. For instance, where a treaty delimiting a boundary is poorly drafted, the *Island of Palmas case* establishes that effective control could confer a good title.[292]

Traditionally, a claim of historic right appreciates with the passage of time when no counterclaim is brought against the claimant by States whose territorial sovereignty is compromised.[293] Even though Tunisia had argued that historic rights could *ipso facto* confer a good title,[294] historic tracing of the first occupant might result in infinite regress. Unfortunately, the ICJ in that case did not make a definitive statement on the relevance of historic rights in delimiting Continental Shelf.

The name – the South China Sea – may indicate that China has historic rights over the disputed

[287] Gioia (n 285) 340-341.
[288] *Continental Shelf* (Tunisia/Libyan Arab Jamahiriya) (Memorial of Libyan Arab Jamahiriya) Pleading ICJ Reports (1980) p. 455, 506; *Continental Shelf* (Tunisia/Libyan Arab Jamahiriya) (Reply of the Libyan Arab Jamahiriya) Pleading ICJ Reports (1981) p. 103 [para. 29] [hereinafter *Tunisia v Libya Continental Shelf case*].
[289] *Eritrea v Yemen Dispute* (n 199) 244. For a detailed analysis see Barbara Kwiatkowska, 'The Eritrea/Yemen Arbitration: Landmark Progress in the Acquisition of Territorial Sovereignty and Equitable Maritime Boundary Delimitation' (2000) 8(1) *IBRU Boundary and Security Bulletin* 66–86.
[290] *Eritrea v Yemen Dispute* (n 199) [para. 2].
[291] Sumner argues that the ICJ seems to prioritise territory-related cases in a way that gives preference to the treaty law and then followed by the principle of *uti possidetis*. See Sumner (n 48) 1779-1812; *Cameroon v Nigeria* (n 190) [para. 65].
[292] *Island of Palmas case* (n 57) 838-839.
[293] Sumner (n 48) 1789.
[294] *Tunisia v Libya Continental Shelf case* (n 288) (Reply of Tunisia) Pleading ICJ Reports (1981) Vol. IV [para. 3.13].

area.[295] To deny that such rights ever existed seems a distortion of historic facts. The Continental Shelf Doctrine of "inherency" preserves any historic rights previously acquired.[296] It follows that a historic right that predates a treaty law takes precedence over other legitimate modes of acquisition. Consequently, Article 14 of the *Exclusive Economic Zone and Continental Shelf Act*[297] enacted by China in 1998 appears to preserve this right.

Nonetheless, Judge Jiménez de Aréchaga has challenged the need to uphold claims based on historic rights.[298] Historic rights were adopted in 1958 at the Geneva Conference to safeguard yet-to-be-declared rights which coastal States had over their continental shelf and was never intended to abrogate any acquired or existing rights.[299] The *Abyei Arbitration* held that the "traditional rights" remain unaffected by any territorial delimitation in the absence of any explicit agreement to the contrary.[300] However, the Abyei Arbitration Tribunal's understanding of "traditional rights" reflects entitlements.

The PCA in the South China Sea's dispute has clarified that "historic rights" unlike "historic title" could mean entitlements short of a claim of sovereignty.[301] The possession of such entitlements does not eclipse the sovereign rights which the coastal States have over their Exclusive Economic Zone.[302] China's conducts that impeded the Philippines from exercising its

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[295] For the historical perspective of China see, Jianming Shen, 'China's Sovereignty over the South China Sea: A Historical Perspective' (2002) 1(1) *Chinese Journal of International Law* 94-157.

[296] Daniel P. O'Connell, *The International Law of the Sea* (Volume 2, Oxford, Clarendon Press 1984) 713; Keyuan 2001 (n 285) 162.

[297] See *Exclusive Economic Zone and Continental Shelf Act* (Adopted at the third session of the Standing Committee of the Ninth National People's Congress, 26 June 1998) [Art. 14] available at <http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/chn_1998_eez_act.pdf> accessed 6 August 2016.

[298] *Tunisia v Libya Continental Shelf case* (n 288) Judgment ICJ Reports (1982) p. 18 [para. 82] (Separate Opinion of Judge Jiménez de Aréchaga); Nguyen Hong Thao, 'China's maritime moves raise neighbors' hackles' (1998) 4(47) *Vietnam Law & Legal Forum* 21-22; *Annex to the letter dated 28 May 2014 from the Chargé d'affaires a.i. of the Permanent Mission of Viet Nam to the United Nations addressed to the Secretary-General,* UN Doc. A/68/897 (30 May 2014) [para. 1].

[299] *Tunisia v Libya Continental Shelf case* (n 288) (Judgment) [para. 82] (Separate Opinion of Judge Jiménez de Aréchaga).

[300] *Abyei Arbitration* (Government of Sudan v Sudan People's Liberation Movement/Army) Final Award (2009) 30 RIAA 145-416 [para. 766] [hereinafter *Abyei Arbitration*]; *Award between the United States and the United Kingdom relating to the Rights of Jurisdiction of United States in the Bering's Sea and the Preservation of Fur Seals* (United Kingdom v United States) Award (1893) 28 RIAA 263-276, 271 [hereinafter *Award between the US and the UK on Indigenous Indians*] (this award exempted indigenous Indians from hunting of fur seals in the Bering Sea).

[301] *Philippines v China* (n 251) [para. 225].

[302] ibid., [para. 243].

exclusive right over the "nine-dash line" was incompatible with the UNCLOS.[303] By its accession to the UNCLOS, China is deemed to have relinquished the rights it previously had over the South China Sea.[304]

5.8 Unacceptable States' conducts in other States' Territorial Waters

5.8.1 Extra-territorial administrative structure

As the *Lotus case* establishes, 'the first and foremost restriction imposed by international law upon a State is that – failing the existence of a permissive rule to the contrary – it may not exercise its power in any form in the territory of another State.'[305] In the *Cameroon v Nigeria* case*,* Nigeria claims that it has peacefully administered the disputed areas without any formal protest from Cameroon until 1987.[306] Cameroon argues that *effectivités* plays a subordinate role in legitimising title acquired through conventional methods.[307] In the *Burkina Faso v Mali* case,[308] the ICJ emphasised that *effectivités* performs a supportive role. *Effectivités* comes to prominence when any of the conventional methods is not dispositive of a legal title.[309] This could apply to a scenario where the treaty law lacks clarity or fails to establish the parties' mutual intent.[310] For instance, if Kenya had exercised effective control over the Migingo Island to the exclusion of Uganda, depending on other factors being constant, the Court might argue that Kenya has acquired a valid title.

In the *Cameroon v Nigeria case,* the ICJ favours treaty law which it admitted had some technical imperfection[311] against the overwhelming evidence of *effectivités.* This is a repeat

[303] ibid., [para. 244]; *UNCLOS* (n 228) [Arts. 77, 81].
[304] *Philippines v China* (n 251) [para. 257]; cf *Fisheries Jurisdiction* (United Kingdom v Zeeland) (Merits) Judgment ICJ Reports (1974) p. 3 [para. 62] (the Court holding that the coastal states exclusive right in their EEZ is not without prejudice to nationals of states that had habitually fished in the area).
[305] *Lotus case* (n 72) 18.
[306] *Cameroon v Nigeria* (n 190) [para. 62].
[307] ibid., [para. 63].
[308] *Burkina Faso v Mali case* (n 85) [para. 63].
[309] ibid., [para. 63]; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (Qatar v Bahrain) (Merits) Judgment ICJ Reports (2001) p. 40, 83-91.
[310] *Sovereignty over Pulau Ligitan and Pulau Sipadan* (Indonesia/Malaysia) Judgment ICJ Reports (2002) p. 625, 653-656; Sumner (n 48) 1803.
[311] *Cameroon v Nigeria* (n 190) [paras. 50-52].

of the Court's approach in *the Case concerning Sovereignty over certain frontier land.*[312] Therefore, Nigeria's argument that its conduct in the disputed area of Lake Chad was a "reasonable mistake"[313] was rejected by the Court.

Consequently, the presence of the Nigerian military on the Cameroonian territory breached the latter's sovereignty. Jurisdiction is territorial and cannot be exercised by a State outside its territory.[314] A State would still violate Article 2(4) of the UN Charter when it exercises jurisdiction in another State's territory in good faith or due to error regarding the status of the disputed territory.[315] At most, an action done in good faith could mitigate the wrongfulness of the act if the said act qualifies as *force majeure* but does not exonerate the State of its culpability.

5.8.2 Extra-territorial legislation

Another point raised by the *Lotus case* is that every sovereign State is at liberty to legislate on any and every subject it wants to.[316] This is known as the Parliamentary Sovereignty in the English Legal System. According to Dicey, the Parliamentary Sovereignty means that the Parliament has the right to make or unmake any law which no person or body can set aside.[317] Whether this law is still a good law is unclear. The Law Lords in the *McCarthy's Ltd v Smith*[318] held that the EC Law takes precedence over the United Kingdom's statute when there is a conflict between them.

Having said that, the modern international law[319] serves as a regulatory framework for

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[312] The Court accepts Belgium's claim of sovereignty based on treaty law whereas the Netherlands had effective control over the disputed territory. See *Case Concerning Sovereignty over Certain Frontier Land* (Belgium v Netherlands) Judgment ICJ Reports (1959) p. 209, 227.

[313] *Cameroon v Nigeria* (n 190) [para. 311].

[314] *Lotus case* (n 72) 18-19.

[315] *Costa Rica v Nicaragua* (n 262) [para. 97]; When China banned fishing in the South China Sea in the summer of 2012, Philippines protested that such a ban infringes upon the Philippines' right on its EEZ, see *Philippines v China* (n 251) [paras. 671-673].

[316] *Lotus case* (n 72) 19.

[317] Albert V. Dicey, *Introduction to the Study of the Law of the Constitution* (London, Macmillan and Co Ltd 1959) 39-40.

[318] *McCarthy's Ltd v Smith* [1981] QB 180, 201 (per Lord Cumming-Bruce]; *Case 6/64 Costa v ENEL* [1964] ECR 585-600, 594; T. R. S. Allan, 'Parliamentary Sovereignty: Lord Denning's Dexterous Revolution' (1983) 3(1) *Oxford Journal of Legal Studies* 22-33.

[319] Without prejudice to the debate as to whether international law qualifies as a law.

domestic constitutional laws.[320] States by their consent have accepted that the positive international law could abrogate their domestic law which portends danger to international peace and security.[321] Hence, a reservation that derogates from the obligation of Article 2(4) is void because of its *jus cogens* character.[322]

China made a reservation on 25 August 2006 excluding section 2 of Part XV of the UNCLOS from applying to China. This section concerns the UNCLOS' compulsory procedures and the judicial institutions' binding decisions. In 2012, China revised *the Hainan Provincial Regulation on the Control of Coastal Border Security*[323] (hereinafter referred to as Hainan Provincial Regulation) and included the Spratly Island, Paracel Islands and Scarborough Shoal as part of Hainan Province. Articles 31 and 47[324] give China jurisdiction over the disputed areas to enable it enforce border control. China relied upon this provision to prevent the Philippines fishing vessels from fishing at the Second Thomas Shoal.

The PCA held that China has no legal basis for claiming any entitlement in the disputed areas and that the Philippines, not China possesses the sovereign rights concerning resources there.[325] Therefore, legislations seeking to apply extra-territorially have no effect[326] such that any action executed on that basis breaches the territory of the affected State. It follows that China violated the territory of Philippines in other ways short of the use of force.[327] This supports the broad construction of Article 2(4) of the UN Charter.

5.8.3 Law enforcement and the inviolability of State territory

The UNCLOS regime provides two conditions under which coastal States may enforce their rights against the vessels of another State in their territorial waters. First, as a law

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[320] *Lotus case* (n 72) 19.
[321] This is a direct consequence of the provisions of Articles 25 and 103 of the UN Charter.
[322] *VCLT* (n 58) [Art. 19].
[323] *Philippines v China* (n 251) [paras. 674-678].
[324] The texts of the Articles are reproduced in the PCA Award. See *Philippines v China* (n 251) [para. 674].
[325] ibid., [paras. 692-697].
[326] *Compania Naviera Vascongado Appellants v Steamship "Cristina" and Persons Claiming An Interest Therein Respondents* [1938] A.C. 485, 488 (The Court of Appeals held that Spanish decree requisitioning all ships on the Bilbao register could have no extra-territorial force); *Russian Bank for Foreign Trade v Excess Insurance Ltd* [1918] 2 KB 123, 130.
[327] *Nicaragua Case* (n 113) [para. 195]; UNGA Res. A/RES/25/2625 (24 October 1970) [para. 4].

enforcement mechanism against the provocative act by a foreign ship.[328] Second, when a foreign ship tries to assert its navigational claim.[329] While law enforcement is lawful,[330] it could violate the territory of the affected State if it were unreasonable, unnecessary and disproportionate.[331]

However, the dividing line between law enforcement and violation of the principle of the inviolability of State territory is fluid. When the UNCLOS was drafted, the rift between the exclusive rights of the coastal States and the right of innocent passage for third States was manifest.[332] The drafters got around it through constructive ambiguity[333] that restricts the right of the coastal States to accommodate the right of innocent passage. Nonetheless, the coastal State gives effect to the relevant enforcement provisions through customary international law, conventions and regulation.[334] As Rothwell rightly observed, the rift between the Coastal States' right over their territorial waters and the right of innocent passage militates against the implementation of the UNCLOS.[335]

5.8.3.1 Legitimate enforcement under UNCLOS

The UNCLOS gives a clue as to when enforcement could be legitimate. First, when a coastal State wants to protect the marine environment from pollution, and second when a coastal State wants to enforce the EEZ-specific provisions.[336] Article 221 of the UNCLOS authorises States 'to take and enforce measures beyond the territorial sea proportionate to the actual or threatened damage to protect their coastline or related interests….'[337] This empowers the

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328 For the definition of a ship, see *Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation* (Done at Rome on 10 March 1988, entered into force on 1 March 1992) 1678 UNTS 221 [Art. 1].

329 Francioni (n 235) 207.

330 ibid., 204-207; *SAIGA No. 2* (n 246) [paras. 1155-156].

331 *SAIGA No. 2* (n 246) [paras. 155-156]; *PCA Award on Greenpeace* (n 244) [paras. 221-224]; *M/V "Virginia G"* (Panama v Guinea-Bissau) Judgment ITLOS Reports (2014) p. 1 [para. 270].

332 I. A. Shearer, 'Problems of Jurisdiction and Law Enforcement against Delinquency Vessels' (1986) 35(2) *International and Comparative Law Quarterly* 320-343, 322.

333 McLaughlin (n 227) 12.

334 Michael C. Stelakatos-Loverdos, 'The Contribution of Channels to the Definition of Straits Used for International Navigation' (1998) 13(1) *International Journal of Marine and Coastal Law* 71-90, 87 (it elucidates how domestic laws could give effects to Article 42 of the UNCLOS).

335 Donald Rothwell, 'The Mururoa Exclusion Zone' (1995) 83 *Maritime Studies* 12-14, 12.

336 McLaughlin (n 227) 14.

337 *UNCLOS* (n 228) [Art. 221].

coastal States to use coercive measures to protect marine environment.[338] "Measure" is the word which the Security Council uses to authorise the use of force. It is believed to include, among others, the use of force to destroy both the vessel and its cargo.[339]

Additionally, Article 210 of the UNCLOS permits the coastal States 'to take other measures as may be necessary to prevent, reduce and control such pollution.'[340] McLaughlin interpreted this provision as limiting forcible measures to prevention, reduction and control of dumping.[341] The failure of the UNCLOS to define and elucidate "measures" that the coastal States could take might result in a clash between domestic law and international law.[342] For instance, there is no specification regarding the level of oil spillage that might constitute pollution that would warrant the coastal State taking the necessary measure. It is subject to the Littoral States' discretion as evidenced by the *Torrey Canyon*,[343] the *Amoco Cadiz*,[344] and the *Kirki incidents.*[345]

The *International Convention Relating to Intervention on High Seas in Cases of Oil Pollution Casualties*[346] has provided some guidelines.[347] Nonetheless, the tension persists even as Article 1(2) of this Convention exempts warships or other ship owned or operated by a State from such enforcement measures.[348]

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[338] Jane Gilliland Dalton, 'The Chilean Mar Presencial: A Harmless Concept or a Dangerous Precedent' (1993) 8(3) *International Journal of Marine and Coastal Law* 397-418, 408.

[339] McLaughlin (n 227) 15.

[340] *UNCLOS* (n 228) [Art. 210].

[341] McLaughlin (n 227) 15.

[342] Antonio Nicita and Matteo M. Winkler, 'Cost of Transnational Accidents: Lessons from Bhopal and Amoco' (2009) 43(4) *Journal of World Trade* 683-706.

[343] Albert E. Utton, 'Protective Measures and the Torrey Canyon' (1968) 9(3) *Boston College Industrial and Commercial Law Review* 613-632; Archie Hovanesian, 'Post Torrey Canyon: Toward a New Solution to the Problem of Traumatic Oil Spillage' (1970) 2(3) *Connecticut Law Review* 632-647.

[344] Stefan Nagel, 'Parliamentary Action on the Amoco Cadiz' (1978) 4(4) *Environmental Policy and Law* 167-171.

[345] Michael White, 'The Kirki Oil Spill: Pollution in Western Australia' (1992) 22(1) *University of Western Australia Law Review* 168-177.

[346] *Convention on the High Seas* defined the phrase "high seas" as all parts of the sea that are not included in the territorial sea or the internal waters of a State. See *Convention on the High Seas* (n 230) [Art. 1].

[347] Article 5 paragraph 1 states: 'Measures taken by the coastal states in accordance with Article 1 shall be proportionate to the damage actual or threatened to it.' See *International Convention Relating to Intervention on High Seas in Cases of Oil Pollution Casualties* (Concluded at Brussels on 29 November 1969, entered into force 6 May 1975) 970 UNTS 212 [Art. 5(1)].

[348] ibid., [Art. 1(2)].

5.8.3.2 Unnecessary and unreasonable law enforcement

Hot pursuit is a law enforcement mechanism enshrined in Article 111 of the UNCLOS.[349] It sets out the parameters for its lawfulness. It includes, *inter alia*, that it commences when the offending foreign ship or one of its boats is within the waters considered to be under the sovereignty of the pursuing State but must be discontinued if the pursuit has been interrupted.[350] The Arbitration Commission in the *I'm Alone case*, held that 'necessary and reasonable force might be used for the purpose of boarding, searching, seizing, and the bringing into port of suspected vessel.'[351]

The word, "necessary" means that the forcible measures can only be applied as a last resort with the intent to end the on-going violation or to inspect a foreign vessel.[352] The *United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks*[353] urges the inspecting State to deploy forcible measures only when it is reasonable and to the degree, necessary. As McLaughlin put it, "necessary" deals essentially with proportionality.[354] Proportionality addresses whether the limitation of a fundamental right conforms with the constitution or not.[355] This entails making an informed judgment based on the available facts. Reasonableness applies when a State intending to interdict a foreign vessel has grounds to believe that a ship has breached its obligations.[356]

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[349] *UNCLOS* (n 228) [Art. 111]; *Convention on the High Seas* (n 230) [Art. 23]. Also, Article 25 paragraph 1 authorises the coastal state to take the necessary steps in its territorial sea to prevent passage which is not innocent. Rothwell argues that "to take necessary step" means to use reasonable and proportionate force to arrest and escort foreign ships out of its territorial waters. Rothwell (n 335) 13.

[350] *UNCLOS* (n 228) [Art. 111(1)].

[351] *I'm Alone case* (n 248) 1615, 1617.

[352] Robin R. Churchill and Alan V. Lowe, *The Law of the Sea* (Third Edition, Manchester University Press 1999) 216; *ICJ Opinion on Nuclear Weapon*s (n 121) [para 41]; *Nicaragua case* (n 113) [para. 176].

[353] *Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks* (Concluded at New York on 4 August 1995, entered into force on 11 December 2001) 2167 UNTS 3 [Art. 22(1)(f)].

[354] McLaughlin (n 227) 18.

[355] Pavel Ondrejek, 'Limitations of Fundamental Rights in the Czech Republic and the Role of the Principle of Proportionality' (2014) 20(3) *European Public Law* 451–466, 451.

[356] The UNCLOS is not specific on what constitutes reasonableness. However, it uses terminology which gives a clue as to what might be considered the threshold required before a state could enforce its sovereign rights on

In the *M/V "SAIGA" (No. 2)*[357] dispute, the International Tribunal for the Law of the Sea (hereinafter referred to as ITLOS) established that all the conditions must be satisfied for the law enforcement measures to be lawful. For instance, firing warning shots without issuing repeated orders to the vessel to leave the area would be disproportionate. On the contrary, a State engulfed by internal armed conflict might be justified to sink a ship attempting to smuggle in ammunitions to dissidents in its country.[358] But applying coercive measures against vessels fishing illegally in a State's territorial waters would be unreasonably disproportionate.[359] Instead, such vessels could be arrested or escorted out of the State's territorial waters.[360] This makes enforcement mechanism largely unregulated and subject to the coastal State's discretion.

There were cases of law enforcement that went beyond the provision of Article 111 of the UNCLOS.[361] In some of the cases, the State whose territory is violated did not explicitly invoke Article 2(4) of the UN Charter. An example is the case of *Netherlands v Russia*.[362] This case raises complex issues affecting the inviolability of State territory. The Greenpeace movement proposed a demonstration at Prirazlomnaya to protest the danger that Russia's exploratory activities pose to the Arctic environment. Apparently, this conflicts with Russia's rights to explore and exploit living and non-living resources in its EEZ.[363] The third States' right to the freedom of navigation and overflight over the coastal States' EEZ must comply with the laws and regulations adopted by the littoral State.[364] Before the date for the protest, Russia declared Prirazlomnaya a safety zone and prohibited navigation around it[365] but the

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the territorial sea. Phrases such as: "reasonable grounds for believing" see *UNCLOS* (n 228) [Arts. 108, 206 and 211(6)]; "clear grounds for believing" see *UNCLOS* (n 228) [Arts. 217(3), 220 and 226].

[357] *SAIGA No. 2* (n 246) [para. 146]; *PCA Award on Greenpeace* (n 244) [para. 246].

[358] Shearer (n 332) 330.

[359] Zou Keyuan, 'The Sino-Vietnamese Agreement on Maritime Boundary Delimitation in the Gulf of Tonkin' (2005) 36(1) *Ocean Development and International Law* 13-24, 20.

[360] Malcolm Barrett, 'Illegal Fishing in Zones Subject to National Jurisdiction' (1998) 5 *James Cook University Law Review* 1-26, 6-7.

[361] *PCA Award on Greenpeace* (n 244) [paras. 275-278] (the PCA held that the pursuit was interrupted and cannot serve as the legal basis for the boarding, seizure, and detention of the *Arctic Sunrise*].

[362] *PCA Award on Greenpeace* (n 244) (Award on Jurisdiction) [para. 3].

[363] *UNCLOS* (n 228) [Arts. 56, 60, 73]; *Philippines v China* (n 251) [para. 690].

[364] *UNCLOS* (n 228) [Art. 58]; *SAIGA No. 2* (n 246) [para. 127].

[365] *PCA Award on Greenpeace* (n 244) [para. 249]; *UNCLOS* (n 228) [Art. 60(5)].

Greenpeace movement defied the order.

The resolve to carry on with the planned demonstration portrays Greenpeace's conduct as a hostile act aimed at undermining Russia's exclusive authority in the area.[366] However, Russia defaulted in its enforcement measure by its failure to give a visual or auditory signal to the Arctic Sunrise RHIBs.[367]

Similarly, the Arbitrators in the *I'm Alone*[368] and the *Red Crusader*[369] faulted the measures taken by the respective littoral States as disproportionate and in breach of International law.[370] In the *Guyana v Suriname*, the captain of the Surinamese Patrol Boats ordered Guyanese drilling at the disputed waters to "leave the area within 12 hours" or the "consequences will be yours."[371] The PCA construed this to mean an explicit threat that force might be used if the order were not complied with.[372]

Whether such an order contravenes Article 2(4) depends on two factors. First, whether the proposed use of force is unlawful. Second, whether its purpose is to secure a territory or to cause the ordered State or its agent to follow or not to follow a certain course of action.[373] In the *Fisheries jurisdiction* case,[374] Spain argued that a coercive measure against a vessel of another State is in any event unlawful and a breach of Article 2(4) of the UN Charter. The *S.S.*

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[366] For example, the New Zealand's amendment to the *Crown Minerals Act 1981* allows for the designation of "specified non-interference zones" of 500 meters. See *Crown Minerals Act* (1991) [Art. 101B(7)(C)] available at <http://www.legislation.govt.nz/act/public/1991/0070/latest/DLM242536.html> accessed 13 August 2017; Richard Caddell, 'Platforms, Protestors and Provisional Measures: The Arctic Sunrise Dispute and Environmental Activism at Sea' (2014) 45 *Netherlands Yearbook of International Law* 358-384, 375.

[367] *PCA Award on Greenpeace* (n 244) [para. 255]; *UNCLOS* (n 228) [Art. 111(4)].

[368] *I'm Alone case* (n 248) 1615, 1617.

[369] *Red Crusader case* (n 249) 538; Corten Olivier, *The Law Against War: The Prohibition on the Use of Force in Contemporary International Law* (Oxford and Portland, Oregon, Hart Publishing 2010) 58-59.

[370] *SAIGA No. 2* (n 246) [para. 159]; *Oil Platforms* (Islamic Republic of Iran v United States of America) Judgment ICJ Reports (2003) p. 161 [para. 76] [hereinafter *Oil Platforms* case].

[371] *Guyana v Suriname* (n 250) [para. 433]. Similarly, the PCA held that China violated Philippines' sovereign rights under Article 77 of the UNCLOS when two of its vessels ordered MV Veritas Voyager to stop the production and leave the area. See *Philippines v China* (n 251) [paras. 707-708].

[372] *Guyana v Suriname* (n 250) [para. 439].

[373] ibid., [para. 439]; *ICJ Opinion on Nuclear Weapon* (n 122) [para. 47]; Ian Brownlie, *International Law and the Use of Force by States* (New York, Oxford University Press 1963) 364.

[374] *Fisheries Jurisdiction* (Spain v Canada) (Jurisdiction of the Court) Judgment ICJ Reports (1998) p. 432 [para. 78].

Lotus case held a similar view.[375]

The language used by the Arbitration Tribunal in the *M/V "SAIGA" (No. 2)* is worded slightly different but essentially similar. It held 'that Guinea used excessive force … and thereby violated the rights of Saint Vincent and the Grenadines under International Law.'[376] The reference to international law presupposes Article 2(4) of the UN Charter since an unlawful force is directed against Saint Vincent and the Grenadines. In the *Rainbow Warrior* case,[377] New Zealand argued that France violated its sovereignty when it sank its vessel.

It could be recalled that the ICJ designated "Operation Retail" as a manifestation of the policy of force that is no longer acceptable under international law.[378] The Chinese vessels manifestly displayed force in the Scarborough Shoal in the disputed South China Sea.[379] In its Award, the PCA held that those conducts were official acts of China[380] and that they violated some provisions of the Convention on the International Regulations for Preventing Collisions at Sea.[381] The cases examined so far indicate that the international peace and security could be undermined by means other than the threat or use of force. Therefore, Article 2(4) is directly or indirectly engaged.

5.8.3.3 The limit of the right of innocent passage

Article 17 of the UNCLOS provides as follows: '[s]ubject to this Convention, ships of all States, whether coastal or land-locked, enjoy the right of innocent passage through the territorial sea.'[382] This provision limits the coastal State's sovereignty in the interests of international

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375 ibid., [para. 78]; *Lotus case* (n 72) 9.
376 *SAIGA No. 2* (n 246) [para. 159].
377 *Case concerning the differences between New Zealand and France arising from the Rainbow Warrior affair* (1986) 19 RIAA 199-221, 201.
378 *Corfu Channel case* (n 119) 35.
379 *Philippines v China* (n 251) [paras. 1069-1079].
380 ibid., [para. 1091].
381 *Convention on the International Regulations for Preventing Collisions at Sea, 1972* (Concluded at London on 20 October 1972, entered into force on 15 July 1977) 1050 UNTS 18 [hereinafter *COLREGS*] (the Tribunal held that China violated Rules: 2, 6, 7, 8, 15, and 16 of the COLREGS and was therefore in breach of Article 94 of the UNCLOS). See *Philippines v China* (n 251) [para. 1109].
382 *UNCLOS* (n 228) [Art. 17].

intercourse[383] but does not constitute the freedom of navigation as on the High Seas.[384] Therefore, it is a qualified right that does not divest the coastal States of their territorial sovereignty.

Article 18 defines passage.[385] The "passage" must be continuous and expeditious but could equally accommodate stopping and anchoring.[386] Hovering or cruising around the territorial sea would not constitute passage.[387] Additionally, submarines and underwater vehicles must navigate on the surface and show their flag.[388]

The word, "innocent" refers to the *manner* or the *act* of the passage itself. The ICJ in the *Corfu Channel case* laid emphasis on the *manner* in which the passage was carried out.[389] A passage is "innocent" if it were conducted in a fashion that does not pose a threat to the coastal State. To evaluate that, other factors must be put into consideration. For example, the passage of a warship in a ready-combat-mode could be innocent if the said ship had been attacked previously.[390]

Nonetheless, the coastal States have a right to intercept "innocent passage" if they have reasonable suspicion of any acts that could be prejudicial to the peace, good order or national

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383 W. E. Butler, 'Innocent Passage and the 1982 Convention: The Influence of Soviet Law and Policy' (1987) 81(2) *American Journal of International Law* 331-347, 346.

384 The disagreement over what constitutes the high seas between Libya and the United States on the Gulf of Sidra led to the downing of two Libyan Su-22 fighter Jets on 19 August 1981. See John M. Spinnato, 'Historic and Vital Bays: An Analysis of Libya's Claim to the Gulf of Sidra' (1983) 13(1) *Ocean Development and International Law* 65-86.

385 Passage means navigation through the territorial sea for the purpose of:

1 (a) traversing that sea without entering internal waters or calling at a roadstead or port facility outside internal waters; or

(b) proceeding to or from internal waters or a call at such roadstead or port facility.

2. Passage shall be continuous and expeditious. However, passage includes stopping and anchoring, but only in so far as the same are incidental to ordinary navigation or are rendered necessary by force majeure or distress or for the purpose of rendering assistance to persons, ships or aircraft in danger or distress. See *UNCLOS* (n 228) [Art. 18].

386 *UNCLOS* (n 228) [Art. 18(2)].

387 Churchill and Lowe (n 352) 82.

388 *UNCLOS* (n 228) [Art. 20].

389 *Corfu Channel case* (n 119) 30.

390 ibid., 31.

security of their State.[391] Such acts include but not limited to passages characterised by threat or use of force, fishing activities or carrying out research.[392]

The ICJ's *obiter* in the *Corfu Channel case* held that coastal States cannot prohibit innocent passage or subject other States to obtain special authorisation before they embark on an innocent voyage.[393] But state practice has departed from that judgment. For instance, the Islamic Republic of Iran maintains that 'prior authorisation for warships willing to exercise the right of innocent passage through the territorial sea'[394] is required. Similarly, the *Maritime Zones of Maldives Acts No. 6/96*[395] states: 'no foreign vessel shall enter the (internal waters, territorial sea, or exclusive economic zone) of Maldives except with prior authorization from the Government of Maldives in accordance with the laws of Maldives.'[396]

Consequently, there has been an upsurge in the number of such restrictions. Saudi Arabia,[397] Malaysia,[398] Yemen,[399] Iran,[400] Egypt[401] and Seychelles[402] require prior authorisation before a foreign ship can exercise the right of innocent passage in their territorial waters. Pakistan,[403]

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[391] *UNCLOS* (n 228) [Art. 19]; see also United Nations Law of the Sea, 'Declaration made by Brazil upon signature of the Convention' (September 1983) 1 *Law of the Sea Bulletins* 21 [hereinafter *Law of the Sea Bulletins*].

[392] Article 6 paragraph g of the *Act on the Marine Areas of the Islamic Republic of Iran in the Persian Gulf and the Oman Sea* states: 'Any act of pollution of the marine environment contrary to the rules and regulations of the Islamic Republic of Iran' shall not be considered innocent. Similarly, paragraph K of the same Article states that 'any other activity not having a direct bearing on passage' is not innocent. The text is reproduced in *Law of the Sea Bulletins* (n 391) (Issue No. 24, December 1993) [Art. 6].

[393] *Corfu Channel case* (n 119) 29.

[394] *Law of the Sea Bulletins* (n 391) (Issue No. 1, September 1983) 17; see also 'Declaration No. 2 on the passage of warships through Omani territorial waters' in *Law of the Sea Bulletins* (n 391) (Issue No. 25, June 1994) 17.

[395] The text of this document is reproduced in the *Law of the Sea Bulletins* (n 391) (Issue No. 41, 1999) 16-18.

[396] *Law of the Sea Bulletins* (n 391) (Issue No. 41, 1999) 16-17 (emphasis added). Note that the wordings used for territorial sea are slightly different from those of the other two. The relevant section states, 'no vessel shall enter the territorial sea of Maldives except in accordance with the laws and regulations of Maldives.'

[397] *Law of the Sea Bulletins* (n 391) (Issue No. 31, 1996) 10 [para. 6].

[398] ibid., (Issue No. 33, 1997) 10 [para. 4].

[399] ibid., (Issue No. 25, 1994) 20 [para. 1].

[400] ibid., (Issue No. 25, 1994) 30 [para. 2].

[401] Egypt, 'Declaration concerning the passage of nuclear-powered and similar ships through the territorial sea of Egypt' requires prior authorisation but 'Declaration concerning the passage of warships through the territorial sea of Egypt' requires prior notification. See *Law of the Sea Bulletins* (n 391) (Issue No. 3, 1984) 13.

[402] See *Seychelles Maritime Zone Act 1999 (Act No. 2 of 1999)* reproduced in *Law of the Sea Bulletins* (n 391) (Issue No. 48, 2002) 21 [para. 16(2)].

[403] *Territorial Waters and Maritime Zones Act, 1976* (see the section on 'Use of territorial waters by foreign ships') [para. 4(2)] available at

Malta,[404] South Korea[405] and UAE[406] require a notification before the intended passage. Lithuania[407] and Romania[408] proscribe passage for ships carrying nuclear and other WMD. These declarations indicate how reluctant coastal States are in contracting out their territorial sovereignty.[409] Apparently, these reservations do not conform to the essence of innocent passage as enshrined in Article 17 of the UNCLOS.

5.8.3.4 Right to intercept, arrest, seize or detain a foreign ship

Discussions so far have shown that coastal States may intercept, arrest, seize and/or detain crew members of foreign vessels that violate their territorial waters.[410] Such actions are lawful provided they are reasonable, necessary and proportionate. Again, the law enforcement actions may be a lawful self-defence.[411] An example is the covert naval operations with submarines in the Scandinavian internal waters and the Gulf of Taranto.[412]

Following the arrest, seizure and detention of the members of the Pueblo by North Korea in 1968, Aldrich contested the legality of North Korea's action based on immunity of warship on the international waters.[413] Aldrich's argument was based on Article 8 of the 1958 Convention

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<http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/IND_1976_Act.pdf> accessed 14 August 2016.

[404] *Law of the Sea Bulletins* (n 391) (Issue No. 25, 1994) 16.

[405] Republic of Korea, *Territorial Sea and Contiguous Zone Act* (Law No. 3037, promulgated on 31 December 1977, Amended by Law No. 4986 which was promulgated on 6 December 1995) reproduced in *Law of the Sea Bulletins* (n 391) (Issue No. 33, 1997) 45-54 [Art. 5].

[406] United Arab Emirates, *Federal Law No. 19 of 1993 in respect of the delimitation of the Maritime Zones of the United Arab Emirates* (17 October 1993) reproduced in *Law of the Sea Bulletins* (n 391) (Issue No. 25, 1994) 94-100 [Art. 5(4)].

[407] Lithuania, *Legislation on the Territorial Sea* (25 June 1992) reproduced in *Law of the Sea Bulletins* (n 391) (Issue No. 25, 1994) 75-81 [Art. 12].

[408] Romania, *Act concerning the legal regime of the internal waters, the territorial sea and the contiguous zone of Romania* (7 August 1990) reproduced in *Law of the Sea Bulletins* (n 391) (Issue No. 19, 1991) 9-20 [Art. 10].

[409] The member States examined here are not exhaustive of all that made a declaration upon ratification. However, the number is small compared with 168 member States that are parties to the UNCLOS as at 1 June 2017.

[410] Caddell (n 366) 358-384; *SAIGA No. 2* (n 246) [para. 155]; *Guyana v Suriname* (n 250) [para. 270].

[411] Francioni (n 235) 210-212, 226; *UNCLOS* (n 228) [Art. 25(1)].

[412] Francioni (n 235) 212.

[413] George H. Aldrich, 'Questions of International Law raised by the Seizure of the U.S.S. Pueblo' (1969) 63 *Proceedings of the American Society of International Law* 2-6.

on the High Seas.[414] He contested that the seizure violated the immunity of Pueblo[415] because Pueblo was a lightly armed vessel that posed no threat to North Korea.[416]

Aldrich is correct to the extent that the use of force in law enforcement should be a last resort. However, law enforcement is discretionary and it is for the enforcer to determine what is reasonable. A contrary argument would be, why would warships intending to make innocent passage not notify the coastal State?[417] This perhaps shows the problem associated with construing Article 2(4) narrowly. More disturbing is Aldrich's argument that 'there is neither precedent nor scholarly support for a claim that warship may be seized in self-defence to prevent it from making a visual or electronic observation of a coastal state.'[418] This sort of defence is worrying considering that the United States signed an agreement with North Korea, in which it admitted that Pueblo trespassed the territorial waters of North Korea and had on many occasions conducted espionage activities.[419]

Conceptually, the *impasse* between the two schools: namely, the complete immunity of foreign warships and the coastal states' inherent right to interdict hostile foreign vessels has not been resolved.[420] Neither of them gives a satisfactory result. The immunity-based school does not provide alternative measures for the coastal states should the intruding warships

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[414] Article 8 provides as follows:
1. Warships on the high seas have complete immunity from the jurisdiction of any State other than the flag State.
2. For the purposes of these articles, the term "warship" means a ship belonging to the naval forces of a State and bearing the external marks distinguishing warships of its nationality, under the command of an officer duly commissioned by the government and whose name appears in the Navy List, and manned by a crew who are under regular naval discipline. See *Convention on the High Seas* (n 230) [Art. 8].

[415] Aldrich (n 413) 3.

[416] ibid., 3; *Convention on Sea and Contiguous Zone* (n 231) [Art. 23].

[417] Malta's declaration upon ratification states: 'Effective and speedy means of communication are easily available and make the prior notification of the exercise of the right of innocent passage of warships reasonable and not incompatible with the convention.' See *Law of the Sea Bulletins* (n 391) (Issue No. 25, 1994) 16.

[418] Aldrich (n 413) 4.

[419] See 'North Koreans release crew of U.S.S. Pueblo' (January 1969) Keesing's Record of World Events, available at <http://web.stanford.edu/group/tomzgroup/pmwiki/uploads/1379-1969-01-KS-e-EYJ.pdf> accessed 14 August 2016. However, it could be argued that this was a political strategy meant to secure the release of the crew because the United States quickly denounced the agreement when they were released. See United States, 'Department of State telegram of 8 February 1968 – Seizure of USS Pueblo' (1968) 62 *American Journal of International Law* 756-757.

[420] For some cases, see 'Seizures, detention and harassment of Tuna vessels' (1964) 3 *International legal materials* 61-62; 'Seizures of United States fishing vessels – the status of the wet war' (1969) 6(3) *San Diego Law Review* 428-430.

refuse to obey their orders. The inherent right to intercept school of thought dilutes the normativity of international law through domestic legislation. This creates tension between the international legal system and domestic legal system.

The way forward is unclear, especially in view of the fact that advancement in science and technology could lead to the development of equipment capable of cyber espionage from the High Seas. Thus, a redefinition of the High Seas is foreseeable. Unless the second limb of Article 2(4) of the UN Charter is embraced by States, war on territorial waters cannot be ruled out.[421]

5.8.3.5 Armed attack on a State's infrastructures on the seas

Following the Iraqi's invasion of Iran in 1980,[422] attacks on foreign vessels intensified in the Persian Gulf from 1984. The Security Council's Resolution 552 calling on all States to respect the right of free navigation in the international waters[423] was not complied with. Instead, the prevention of the enemy's oil exports became a military strategy to win the war.[424] Kuwait's vessel, *Sea Isle City,* reflagged to the US was hit by a missile near the Kuwait harbour and the US responded by destroying the Resalat and Reshadat offshore platforms.[425] Again, the warship USS *Samuel B. Roberts* struck a mine in the international waters while returning from escort mission and the US responded by destroying the Nasr and Salman platforms.[426]

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[421] Ian Patrick Barry, 'The Right of Visit, Search and Seizure of Foreign flagged Vessels on the High Seas pursuant to Customary International Law: A defense of the proliferation of Security Initiative' (2004) 33(1) *Hofstra law review* 299-330. *Cf Guyana v Suriname* (n 250) [para. 274]; Luke T. Lee, 'Jurisdiction over Foreign Merchant Ships in the Territorial Sea: An Analysis of the Geneva Convention on the Law of the Sea' (1961) 55(1) *American Journal of International Law* 77-96, 78; Michael Tousley, 'United States seizure of Stateless drug smuggling Vessels on the High Seas: Is it legal?' (1990) 22(2) *Case Western Reserve Journal of International Law* 375-401.

[422] Frank Russo, 'Targeting Theory in the Law of Naval Warfare' (1992) 40 *Naval Law Review* 1-44, 5; Christian Gray, 'The British Position in Regard to the Gulf Conflict' (1988) 37(2) *International and Comparative Law Quarterly* 420-428, 421; Harry H.G. Post, 'Boarder Conflicts Between Iran and Iraq: Review and Legal Reflections' in Ige F. Dekker and Harry H.G. Post (eds), *The Gulf War of 1980-1988: The Iran-Iraq War in International Legal Perspective* (The Hague, Martinus Nijhoff Publishers 1992) 7-38; Ross Leckow, 'The Iran-Iraq Conflict in the Gulf: The Law of War Zones' (1988) 37(3) *International and Comparative Law Quarterly* 629-644, 636-644; James A. Green, 'The Oil Platforms Case: An Error in Judgment' (2004) 9(3) *Journal of Conflict and Security law* 357-386, 358; Andreas Laursen, 'The Judgment of the International Court of Justice in the Oil Platforms Case' (2004) 73(1) *Nordic Journal of International Law* 135-160.

[423] UNSC Res. S/RES/552 (1 June 1984) [para. 1].

[424] Leckow (n 422) 636.

[425] *Oil Platforms case* (n 370) [para. 25].

[426] ibid., [para. 25].

Iran alleged that the US had violated certain provisions of the 1955 Treaty of Amity between both States.[427] The US argued that it acted in self-defence.[428] The ICJ ruled that the matter in issue relates to the legality or illegality of the force used by the US against Iran[429] but failed to adjudge and declare that it constitutes a violation of the territory of Iran.

As Judge Elaraby explained, the ICJ's finding should have led to an inescapable conclusion that the US violated the territory of Iran.[430] He decries the Court's restraint in making such a finding in a world that Article 2(4) of the UN Charter is being challenged to the "breaking point."[431] Equally sad is the Court's failure to find in favour of the US' counter-claim regarding the excessive force which Iran used against the foreign ships in the international waters.

According to Judge Simma, the Court should have arrived at that conclusion in line with the principle of joint-and-several responsibility.[432] The Court should have equally examined whether Iraq violated international law under the doctrine of indispensable third party, even though it was not part of the proceedings.[433]

The Court's approach in *Oil Platforms* did not further its jurisprudence set out in the *Nicaragua* case regarding the *jus cogens* character of Article 2(4). The Court declares that the force used by the US against Iran based on Article XX (1)(d) of the 1955 Treaty of Amity cannot be justified[434] and failed to specify whether the US violated the territory of Iran. Judge Buergenthal contends that the Court exceeded its jurisdiction by interpreting Article XX (1)(d) in the light of international law on the use of force.[435] Having established the nexus between the Treaty of Amity and the use of force, the Court should have clarified whether: (1) a treaty could permit States to derogate from its obligation under international law, and (2) a treaty

[427] Iran claims that the US particularly violated Articles I and X (1) of the *Treaty of Amity, Economic Relations, and Consular rights between the United States of America and Iran* (signed at Tehran on 15 August 1955). See *Oil Platforms case* (n 370) (Application instituting proceedings filed in the Registry of the Court on 2 November 1992) 5.
[428] *Oil Platforms case* (n 370) [paras. 25 and 37].
[429] ibid., [paras. 37-38].
[430] ibid., 290-291 (Dissenting opinion of Judge Elaraby); ibid., 327 (Separate opinion of Judge Simma).
[431] ibid., 329 (Separate opinion of Judge Simma); ibid., 290-291 (Dissenting opinion of Judge Elaraby).
[432] ibid., 358 (Separate opinion of Judge Simma); ibid., [para. 28] (Separate opinion of Judge Higgins).
[433] ibid., 358 (Separate opinion of Judge Simma).
[434] *Oil Platforms case* (n 370) [para. 78].
[435] ibid., [para. 20] (Separate opinion of Judge Buergenthal).

provision that conflicts with a norm *jus cogens* is binding.

Moreover, if the Court had applied the principle of joint-and-several responsibility, it would have eased the difficulties in attributing responsibility to States for their remote *delict* acts or those of their agents. Although the *Nicaragua* case adjudicated issues regarding the attribution of responsibility, the *Oil Platforms* case should have approached it from the perspective of laying of mines remotely with the intent of sinking or damaging another State's vessel. The ICJ should have examined States' obligations to ensure that mines are not indiscriminately laid in a manner that endangers foreign vessels. Hence, neither Iran, the US nor Iraq would have been exonerated from the use of force in the absence of an armed attack.[436]

However, this dissertation agrees with the submissions made by Judges Simma and Elaraby that the Court's analysis of whether the platforms are functional at the time of the attack is unnecessary.[437] They belong to Iran and should be respected as such. It is not a case of a territory in *dereliction* or *terra nullius*. Therefore, a coercive measure against a State's infrastructures without its consent – whether functional or not – falls within the meaning of Article 2(4) of the UN Charter. The same argument is valid if a foreign vessel on the High Seas or within a State's territorial waters were unlawfully interdicted.

5.8.4 *De minimis* breaches of States' Territory

It is relevant to mention without going into much detail that a sailing vessel could violate the littoral State's territory when it fails to comply with the conditions required to exercise the right of innocent passage as codified in Article 19 of the UNCLOS. Having said this, we shall briefly examine other violations that, if left unchecked, could lead to international armed conflict. They are: exploration and exploitation of resources in another State's EEZ, engaging in activities where there is overlapping entitlements (dredging) or the creation of artificial islands.

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[436] *Oil Platforms case* (n 370) 329, 345-358 (Separate opinion of Judge Simma).

[437] ibid., 337-338 (Separate opinion of Judge Simma); ibid., 296-297 (Dissenting opinion of Judge Elaraby).

5.8.4.1 Interference with the coastal State's right of exploration and exploitation

The UNCLOS provides that the coastal States have the right to explore, exploit, conserve and manage the natural resources, whether living or non-living in their EEZ and/or Continental Shelf.[438] Article 57 of the UNCLOS provides as follows, '[t]he exclusive economic zone shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured.'[439] Similarly, Article 76 of the UNCLOS states:

> The continental shelf of a coastal State comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.[440]

The word "exclusive" simply means that only coastal States possess the sovereign rights[441] to explore or exploit the resources thereof.[442] An exception is perhaps that international law recognises that "traditional rights" or "private rights" are unaffected by territorial delimitation.[443] Private rights refer to the rights of indigenous peoples[444] to explore and

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[438] *UNCLOS* (n 228) [Arts. 56(1) and 77(1)].

[439] ibid., [Art. 57].

[440] ibid., [Art. 76].

[441] UNCLOS did not define sovereign rights, but some of its provisions give the impression that sovereign rights are territorial. Compare the provisions of the following Articles of the UNCLOS: Articles 56, 73, 77, 194 and 246 with Article 137. The Permanent Court of Arbitration held that the notion that a state has sovereign rights over the living and non-living resources in the EEZ is incompatible with the idea that another state could have historic rights over the same resources. See *Philippines v China* (n 251) [para. 243].

[442] *UNCLOS* (n 228) [Art. 77].

[443] *Abyei Arbitration* (n 300) [para. 766]; *Award between the US and the UK* on Indigenous Indians (n 300) 271; *Philippines v China* (n 251) [para. 799].

[444] See *International Convention on Civil and Political Rights* (Concluded at New York on 16 December 1966, entered into force on 23 March 1976) 999 UNTS 171 [Art. 1]; *International Convention on Economic, Social and Cultural Rights* (Concluded at New York on 16 December 1966, entered into force on 3 January 1976) 993 UNTS 3 [Art. 1]; *United Nations Declaration on the rights of Indigenous Peoples* (Adopted by the General Assembly on 2 October 2007) UNGA Res. A/RES/61/295 (2 October 2007) [Art. 4] [hereinafter *UNDRIP*].

exploit their ancestral land which States have an obligation to respect and protect.[445] This is a departure from the Westphalian State-centric Model.[446]

In the *South China Sea* dispute, the Philippines alleged that China interfered with its sovereign rights and jurisdiction over all the waters, seabed, and subsoil within the "nine-dash line."[447] Regarding the non-living resources, China objected to the conversion of the Philippines' contract with Sterling Energy for exploration of oil and gas deposits within Spratly Islands.[448] Regarding living resources, China had prevented the Philippines' vessels from fishing at the Mischief Reef since 1995.[449] China claimed it had indisputable sovereignty, sovereign rights and jurisdiction over the disputed area.[450]

The PCA held that the disputed areas constitute the EEZ and Continental Shelf of the Philippines.[451] It further held that China did not breach its obligations under the UNCLOS by erroneous claims made in good faith[452] but by its conduct to assert those claims.[453] The ICJ arrived at a similar conclusion in the *Costa Rica v Nicaragua*.[454] Invariably, a State could breach the territory of another State unwittingly when it exercises a function that rightfully belongs to a sovereign State.

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[445] *UNDRIP* (n 444) [Art. 8]; International Labour Organization (ILO), *Indigenous and Tribal Peoples Convention* (Done at Geneva on 27 June 1989, entered into force on 5 September 1991) [Art. 4] available at <http://www.refworld.org/docid/3ddb6d514.html> accessed 1 June 2017; Joji Carino, 'Indigenous Peoples' Right to Free, Prior, Informed Consent: Reflections on Concepts and Practice' (2005) 22(1) *Arizona Journal of International and Comparative Law* 19-40, 20; Committee on the Elimination of Racial Discrimination, 'General Recommendation 23, Rights of indigenous peoples (Fifty-first session, 1997),' U.N. Doc. A/52/18, Annex V at 122 (1997) [para. 5].

[446] See *Second stage of the proceedings between Eritrea and Yemen* (Maritime delimitation) (17 December 1999) 22 RIAA 335-410 [para. 101].

[447] *Philippines v China* (n 251) [para. 685].

[448] ibid., [para. 685].

[449] ibid., [para. 686].

[450] ibid., [para. 688]; Ministry of Foreign Affairs of the People's Republic of China, 'Position paper of the Government of the People's Republic of China on the matter of Jurisdiction in the South China Sea Arbitration initiated by the Republic of the Philippines (7 December 2014) [para. 4] available at <http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1217147.shtml> accessed 19 August 2016.

[451] *Philippines v China* (n 251) [para. 697].

[452] ibid., [para. 705].

[453] ibid., [paras. 708-716].

[454] *Costa Rica v Nicaragua* (n 262) [para. 93].

5.8.4.2 Attribution of international tort committed by a State's citizens

Another issue that arose from the South China Sea dispute is whether a State could breach the territory of another State through a tort committed by its nationals. The Philippines alleged that China violated its territory by allowing at least 33 Chinese fishing vessels to be fishing at the Chinese-occupied Mischief Reef.[455] China establishes a *de facto* control in the area which prospered the Chinese fishing industry at the detriment of the Filipino fishers. The Philippines alleged that such behaviour contravened Article 56 of the UNCLOS which placed an obligation upon state parties to prevent its nationals from committing a tort.[456] While the Philippines did not attribute the conduct to China as such, it held China responsible for its failure to prevent or to control them.

The debate on the attribution of responsibility to a State for the actions of its nationals abroad whether in civil or in criminal matters is beyond our scope. However, the ITLOS has explained that Article 192 of the UNCLOS imposes positive obligations upon States to ensure that vessels flying their flag comply with the relevant provisions of the Convention.[457] This requires the flagged-state to take 'due diligence to take all necessary measures to ensure compliance and prevent illegal unreported and unregulated fishing by fishing vessels flying its flag.'[458] This duty is not result-oriented provided a State has taken reasonable steps to prevent its nationals from committing a tort.

The PCA ruled that China breached the sovereign right of the Philippines to its EEZ. Not only that China failed to take "due regard" for the "rights" of the Philippines,[459] the illegal fishing was organised and coordinated by the Chinese government. As such, the illegal fishing was attributable to China.[460] A State will be deemed to have violated the territory of another State if it fails to take due steps to prevent the commission of such torts, and if the said tort were attributable to it. Thus, the escort by the PLA Navy ship and CMS vessels secured for the

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[455] *Philippines v China* (n 251) [paras. 721-724].
[456] ibid., [paras. 725-726].
[457] *Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission* (SRFC) (Request for Advisory Opinion submitted to the Tribunal) Advisory Opinion ITLOS Reports (2015) p. 1 [para. 120].
[458] ibid., [para. 129].
[459] *Philippines v China* (n 251) [para. 756]; *UNCLOS* (n 228) [Art. 58].
[460] *Philippines v China* (n 251) [paras. 755-757].

Chinese fishers, an enabling environment for the illegal fishing in the Philippines' territorial waters. It also prevented the Filipinos' fishers from fishing in their legitimate territory.

5.9 Freedom of the High Seas and the inviolability of States' vessels

Activities such as drug trafficking, piracy, slave trade, smuggling of migrants and illegal fishing have triggered a proportionate increase in the interception of vessels on the High Seas. This is disturbing because not only that it compromises the exclusive jurisdiction of the flag State,[461] it also strains relations among States. Besides, such interceptions apparently contravene the freedom of navigation as explicitly provided for in Article 87 of the UNCLOS.[462]

The *Convention on the High Seas* defines the term "High Seas" as 'all parts of the seas that are not included in the territorial sea or in the internal waters of a state.'[463] Impliedly, 'no state may validly purport to subject any part of the high seas to its sovereignty.'[464]

Regrettably, the UNCLOS did not define the "high seas." As a result, there is a disputation between those who perceive the high seas as *res nullius* and those that perceive it as *res communis*.[465] But it could be both. It is *res nullius* insofar as it is subject to the jurisdiction of the flag State. However, since no State could exercise absolute jurisdiction to the exclusion of every other State, it is *res communis*.

Although the freedom of the high seas is a general principle of international law,[466] States' activities that undermine its free use have been on the increase of late. We shall limit our discussions to two aspects: namely, closure and weapon testing and the right of visit.

5.9.1 Closure and weapon testing on the High Seas

The closure of part of the high seas to test weapons could constitute an exercise of

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[461] *UNCLOS* (n 228) [Art. 92]; *Lotus case* (n 72) 25.
[462] *UNCLOS* (n 228) [Art. 87].
[463] *Convention on the High Seas* (n 230) [Art. 1].
[464] *Oppenheim 1996* (n 40) 726; *Convention on the High Seas* (n 230) [Art. 2]; *UNCLOS* (n 228) [Art. 89].
[465] Efthymios Papastavridis, *The Interception of Vessels on the High Seas: Contemporary Challenges to the Legal Order of the Oceans* (Oxford, Hart Publishing Ltd 2013) 23.
[466] Brownlie 2008 (n 86) 225; James Crawford, *Brownlie's Principles of Public International Law* (Eight Edition, Oxford, Oxford University Press 2012) 298.

sovereignty over the *res communis* contrary to Grotius' principle that the use of the high seas by a State must not exclude others.[467] This accentuates the inherent tension between *mare clausum* and *mare liberum* which the freedom of the seas was meant to address. Such exercise no matter how temporary appears incompatible with the nature of the freedom of the high seas if, for instance, it obstructs the freedom of navigation or freedom of overflight for other States.[468]

According to Jennings and Watts, States may not exercise jurisdiction or police over the high seas.[469] Although a temporal closure does not amount to subjecting the high seas to a State sovereignty, it restricts other States from conducting other activities for which the high seas are designated as *res communis*.

Under the modern international law, "jurisdiction" refers to a State's ability to regulate the conduct of natural and juridical persons.[470] Regulation here contemplates the activities of the three branches of government. The *Lotus case* establishes that jurisdiction is limited to a State's territory, but could apply extra-territorially in criminal matters.[471] The European Court of Human Rights case law upholds this.[472]

As the narrow interpretation of Article 2(4) of the UN Charter indicates, a State is responsible for the action of its military outside its national territory – whether lawful or unlawful.[473] It follows that the closure of the high seas could be attributed to the State in question. The same applies to whatever consequences from the said closure, such as any damages caused to the

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[467] Brownlie 2008 (n 86) 225; Hugo Grotius, *The Rights of War and Peace: Including the Law of Nature and of Nations* (translated by A. C. Campbell with an Introduction by David J. Hill) (Washington and London, M. Walter Dunne Publisher 1901) 104; *Island of Palmas Case* (n 57) 838. For a brief discussion on the origin of the right of the freedom of the high seas, see Efthymios Papastavridis, 'The Right of Visit on the High Seas in a Theoretical Perspective: *Mare Liberum* versus *Mare Clausum* Revisited' (2011) 24(1) *Leiden Journal of International Law* 45–69.

[468] Crawford 2006 (n 69) 298.

[469] *Oppenheim 1996* (n 40) 727.

[470] Crawford 2012 (n 466) 457.

[471] *Lotus case* (n 72) 20; Sarah Miller, 'Revisiting Extraterritorial Jurisdiction: A Territorial Justification for Extraterritorial Jurisdiction under the European Convention' (2009) 20(4) *European Journal of International Law* 1223–1246.

[472] *Case of Assanidze v Georgia* (Application no. 71503/01) Judgment ECtHR (2004) [para. 137]; *Case of Issa and Others v Turkey* (Application no. 31821/96) Judgment ECtHR (2004) [para. 67] [hereinafter *Issa v Turkey*]; *Case of Loizidou v Turkey* (Application no. 15318/89) Judgment ECtHR (1996) [para. 52].

[473] *Issa v Turkey* (n 472) [para. 69].

marine environment or the air pollution by radioactive particles from hydrogen bomb test.[474]

In the *Nuclear tests* case,[475] New Zealand lodged an application against France before the ICJ over a series of nuclear tests which France conducted in the South Pacific region.[476] New Zealand pleaded the Court to adjudicate and declare that such actions violate its right not to have radioactive material enter its territory. Equally, it argues that the action of France 'violates the right of New Zealand to freedom of the high seas, including freedom of navigation and overflight … without interference or detriment resulting from nuclear testing.'[477]

The Court restricted its judgment to the environmental hazards from the fallout of the radioactive particles.[478] Judges Onyeama, Dillard, Jimenez de Arechaga and Sir Humphrey Waldock reasoned that the Court should have adjudicated whether the said nuclear tests violated New Zealand's territory and the rights it derived from the character of the high seas as *res communis*.[479] Unfortunately, the Court failed to strengthen the law on the freedom of the high seas which would have confirmed the *erga omnes* character of the Treaty banning nuclear weapon tests.[480] This observation is made with due respect to the ICJ's advisory opinion on the *Legality of the threat or use of Nuclear Weapons*.[481]

Nonetheless, the increase in military activities on the high seas in time of peace is disturbing to the international community. For example, North Korea continues to conduct nuclear tests

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[474] For further reading see Emmanuel Margolis, 'The Hydrogen Bomb Experiments and International Law' (1955) 64(5) *Yale Law Journal* 629-647.

[475] *Nuclear Tests* (New Zealand v France) Judgment ICJ Reports (1974) p. 457 [hereinafter *New Zealand v France*].

[476] ibid., (Pleadings, Nuclear tests Volume II, 1973) 3.

[477] ibid., [para. 28].

[478] A. M. Bracegirdle, 'Case to the International Court of Justice on Legality of French Nuclear Testing' (1996) 9(2) *Leiden Journal of International Law* 431-443, 441.

[479] *New Zealand v France* (n 475) [para. 7] (Joint Dissenting Opinion of Judges Onyeama, Dillard, Jiménez de Aréchaga and Sir Humphrey Waldock).

[480] See generally, *Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water* (Concluded at Moscow on 5 August 1963, entered into force on 10 October 1963) 480 UNTS 43; *Treaty on the Non-Proliferation of Nuclear Weapons* (Done at London, Moscow and Washington on 1 July 1968, entered into force on 5 March 1970) 729 UNTS 161; *Treaty on the Limitation of Anti-Ballistic Missile Systems* (Signed at Moscow on 26 May 1972, entered into force on 3 October 1972) 944 UNTS 13.

[481] The Court held: 'there is in neither customary nor conventional international law any comprehensive and universal prohibition of the threat or use of nuclear weapons as such,' see *ICJ Opinion on Nuclear Weapon*s (n 121) [para. 105].

despite the Security Council's sanctions,[482] albeit it is not a State party to the Comprehensive Nuclear-Test-Ban Treaty.[483] The ballistic missile it launched from a submarine entered Japan's air defence identification zone before falling into the Sea of Japan.[484] This kind of behaviour strains international relations. The usage of the high seas requires States to exercise "due regard" for the rights of other States.[485]

5.9.2 Right to visit - Policing

A State might visit and search a vessel of another nationality on the high seas in peacetime when there is a "reasonable suspicion" that it is used for commission of a crime.[486] This provision was augmented by the *Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA)*.[487] The right to visit is becoming increasingly important because of the high rates of crimes on the high seas.[488] Besides, drug and human trafficking and the proliferation of WMD are equally high.

However, the increase in crime on the high seas does not permit indiscriminate interception of States' vessels.[489] A unilateral enforcement of the right of visit without the consent of the flag State is unacceptable. Consequently, the *Protocol of 2005 to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation*[490] provides a

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[482] UNSC Res. S/RES/2270 (2 March 2016) [operative para. 1].

[483] See *Comprehensive Nuclear-Test-Ban Treaty Organisation* available at <https://www.ctbto.org/the-treaty/status-of-signature-and-ratification/> accessed 9 September 2016.

[484] Julian Ryall, 'Japan condemns 'unforgivable' act after North Korea launches ballistic missile from submarine' (The Telegraph, 24 August 2016) available at <http://www.telegraph.co.uk/news/2016/08/23/north-korea-test-fires-submarine-launched-ballistic-missile-says/> accessed 10 September 2016.

[485] *Oppenheim 1996* (n 40) 729.

[486] *UNCLOS* (n 228) [Art. 110]. In time of war, states may visit and search any vessels on the high seas irrespective of its nationality or destination, see Papastavridis 2013 (n 465) 42.

[487] *Protocol to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation* (Concluded at Rome on 10 March 1988, entered into force on 1 March 1992) 1678 UNTS 201 [Art. 6].

[488] Tullio Treves, 'Piracy, Law of the Sea, and Use of Force: Developments off the Coast of Somalia' (2009) 20(2) *European Journal of International Law* 399-414, 399-400; UNSC Res. S/RES/2018 (31 October 2011) [operative para. 1]; UNSC Res. S/RES/2039 (24 May 2012) [operative para. 1].

[489] We shall not discuss whether states could be liable for a criminal act committed by its agent or non-state actors on board a vessel flying its flag. See United Nations Legislative Series, *Book 25: Materials on the Responsibility of States for Internationally Wrongful Acts,* 7-96 available at <http://legal.un.org/legislativeseries/documents/Book25/Book25_part1_ch2.pdf> accessed 10 September 2016.

[490] International Conference on the Revision of the SUA Treaties, *Protocol of 2005 to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation*, UN Doc. LEG/CONF.15/21 (1 November 2005).

comprehensive framework for the enforcement of the right to visit on the high seas. For example, Article 8*bis*(5)(b) provides that a State may board the flag State if it asks for permission and obtains authorisation to do so.[491] A State shall not board and search the flag State if that consent was declined.[492]

Additionally, there are universal and regional instruments that harmonise enforcement of the right to visit. They include but are not limited to the *Proliferation of Security Initiative*,[493] the *European Agency for the Management of Operational Cooperation at the External Borders of the European Union*,[494] the *2000 Smuggling Protocol*[495] and the *2008 CARICOM Maritime and Airspace Security Co-operation Agreement*.[496]

5.10 Stateless vessels

Stateless vessels refer to vessels that are not duly registered in one State. The applicable rule is that such vessels have no nationality.[497] This equally applies to vessels that sail with flags of two or more States for the sake of convenience. Subject to the principles of necessity and proportionality, enforcement mechanism against such vessels does not breach the territory of the States whose flags they fly.[498]

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491 ibid., [Art. 8bis(5)(b)].

492 ibid., [Art. 8bis(5)(c)(iv)].

493 For more, visit <http://www.state.gov/t/isn/c10390.htm> accessed 10 September 2016.

494 For its mission and tasks visit <http://frontex.europa.eu> accessed 10 September 2016.

495 See generally, *Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime* (Concluded at New York on 15 November 2000, entered into force on 28 January 2004) 2241 UNTS 480.

496 See generally, *CARICOM Maritime and Airspace Security Co-operation Agreement,* available at <http://caricom.org/about-caricom/who-we-are/our-governance/about-the-secretariat/offices/office-of-the-general-council/treaties-and-agreements/caricom-maritime-and-airspace-security-co-operation-agreement> accessed 10 September 2016.

497 *UNCLOS* (n 228) [Art. 92]; Joint departments of Defense and Homeland Security, *Commander's Handbook on the Law of Naval Operations* (July 2007 Edition) [para. 4.4.4.1.5] available at <http://www.jag.navy.mil/documents/NWP_1-14M_Commanders_Handbook.pdf> accessed 1 June 2017 [hereinafter *The US Commander's Handbook*].

498 *The US Commander's Handbook* (n 497) [para. 4.4.4.1.5]; *UNCLOS* (n 228) [Art. 92]; Rachel Canty, 'Developing Use of Force Doctrine: A Legal Case Study of the Coast Guard's Airborne Use of Force' (2000) 31(3) *University of Miami Inter-American Law Review* 357-382, 372-374.

5.11 Airspace

In 2014 alone, the report published by the European Leadership Network[499] shows that Russia trespassed the airspaces of some European States almost 40 times. In the same year, the member States of NATO intercepted the Russian aircraft over 100 times, three times what it was in 2013.[500] Russia admitted its warplanes violated Turkish airspace by mistake[501] although Turkey shot down the trespassed Russian Military Jet.[502]

Following the escalation of tension between China and Philippines over the South China Sea, there have been reports of China's intrusion into the airspaces of some Asian countries.[503] Israel was alleged to have breached Syrian airspace recently[504] and China accuses the U.S. of trespassing its air defence identification zone.[505] On 17 May 2016, the Sudanese government warned that it will take a decisive action after 20 aircraft belonging to Ilyushin and 76 aircraft belonging to international and regional organisations violated its airspace.[506]

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[499] Thomas Frear, Łukasz Kulesa and Ian Kearns, *Dangerous Brinkmanship: Close Military Encounters Between Russia and the West in 2014,* available at <http://www.europeanleadershipnetwork.org/medialibrary/2014/11/09/6375e3da/Dangerous%20Brinkmanship.pdf> accessed 4 October 2015.

[500] *NATO Tracks Large-Scale Russian Air Activity in Europe; Allied Command Operations release, 29th October 2014,* available at <http://www.aco.nato.int/nato-tracks-largescale-russian-air-activity-in-europe.aspx> accessed 4 October 2015.

[501] Taku Dzimwasha, 'Russian jet 'shot down' by Turkish forces after entering Turkish airspace' (International Business Times, 10 October 2015) available at <http://www.ibtimes.co.uk/russian-jet-shot-down-by-turkish-forces-after-entering-turkish-air-space-1523426> accessed 20 October 2015.

[502] See 'Turkey shoots down Russian warplane on Syria border' (BBC News, 24 November 2015) available at <http://www.bbc.co.uk/news/world-middle-east-34907983> accessed 25 November 2015.

[503] Associated Press, 'Japan warns China over fighters challenging Airspace' (Real Clear Defence, 26 September 2016) available at <http://www.realcleardefense.com/articles/2016/09/26/japan_warns_china_over_fighters_challenging_airspace_110125.html> accessed 7 April 2017; Zee Media Bureau, 'Another Chinese incursion, PLA's bomber JH-7 violates India's airspace in Aksai Chin' (Z News, 20 June 2016) available at <http://zeenews.india.com/news/india/another-chinese-incursion-plas-bomber-jh-7-violates-indias-airspace-in-aksai-chin_1897992.html> accessed 8 April 2017).

[504] Vanessa Beeley, 'Israel violates depot in Mazzeh, Damascus' (21st Century Wire, 12 January 2017) available at <http://21stcenturywire.com/2017/01/12/israel-violates-syrian-airspace-bombs-ammunition-depot-in-mazzeh-damascus/> accessed 8 April 2017.

[505] Patrick Knox, 'China threatens American bomber flying off the coast of South Korea claiming it violated the Country's defence zone' (The Sun, 23 March 2017) available at <https://www.thesun.co.uk/news/3159674/china-us-airforce-b1b-bomber-south-korea-airspace-defense-zone-intercept/> accessed 8 April 2017.

[506] See 'Sudan: Govt issues stern warning on airspace violations' (All Africa, 1 June 2016) available at <http://allafrica.com/stories/201606020181.html> accessed 8 April 2017.

5.11 Unauthorised intrusion in time of peace

5.11.1 Civil aircraft

The Chicago Convention of 1944[507] defined a State aircraft as an 'aircraft used in military, customs and police services.' By the doctrine of *expressio unius est exclusio alterius*, all other aircrafts are civil. Nonetheless, the definitional gap remains as affirmed by the Legal Committee of the International Civil Aviation Organisation in 2015.[508] For instance, how would a civil aircraft with civil crew used for military purposes be classified? Inversely, what is the status of a State aircraft with a military crew used to carry civilians? Therefore, the meaning of "civil" and "state" needs further elucidation. It poses a challenge to States' territory and constitutes a danger to the safety of civil aviation. For our purposes, civil aircraft refers to aircraft registered as such and used for purposes other than military objectives.

5.11.1.1 Korean Airlines Flight 007

The downing of KAL-007 revolutionised thinking on the nature of a State's right over its airspace. On 31 August 1983, a Korean Air Lines Boeing 747, Flight 007 that strayed into the Soviet's airspace was shot down, killing all the 269 passengers and crew on board. This incident led to a debate within the Security Council on the nature of the right which States have in their airspace.[509] The inviolability of the Soviet's territory was not disputed but rather the reasonableness of its forcible countermeasure. Japan, for instance, asks: '[h]ow can we live in a small world if *trespassing* will immediately result in mortal danger?'[510]

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[507] *Convention on International Civil Aviation* (Done at Chicago on 7 December 1944, entered into force on 4 April 1947) 15 UNTS 295 [Art. 3(b)] [hereinafter *Chicago Convention*]; *Pan-American Convention on Commercial Aviation* (Signed at Havana on 20 February 1928) (1931) 1(1) *Revue Aeronautique Internationale* 77-82 [Art. 3(b)]; *Convention relating to the Regulation of Aerial Navigation* (Signed at Paris on 13 October 1919) 11 UNTS 173 [Art. 30] [hereinafter *Paris Convention*].

[508] International Civil Aviation Organisation, 'Report of the Legal Committee 36th Session' (Montreal, 30 November to 3 December 2015) [paras. 2.29-2.33] available at <https://www.icao.int/Meetings/LC36/Report/Forms/AllItems.aspx> accessed 3 June 2017.

[509] See generally, UNSCOR, UN Doc. S/PV.2470 (2 September 1983); UNSCOR, UN Doc. S/PV.2471 and Corr 1 (6 September 1983); UNSCOR, UN Doc. S/PV.2472 (6 September 1983).

[510] UNSCOR, UN Doc. S/PV.2470 (2 September 1983) [para. 65] (emphasis added).

Except for the United States that criticized the Soviet's action as a breach of Article 2(4) of the UN Charter,[511] other States based their evaluation of the Soviet's action on other principles. Canada was critical of its proportionality.[512] The US later invoked the doctrine of consideration of humanity.[513] Japan questioned the procedure for intercepting a civil aircraft.[514] Bill Hayden, an Australian Minister of Foreign Affairs at the time argued that shooting down a civilian aircraft serving no military purpose cannot be justified under any circumstance.[515] The White House described it as a crime against humanity.[516]

5.11.1.2 Previous aerial incidents between 1952-1978

The period between 1952 and 1978 had recorded at least five cases where civil aircrafts were attacked. On 29 April 1952, a civil aircraft, Douglas DC-4 (F-BELI) belonging to France was attacked by two Soviet MiG 15 fighters for unauthorised entry into the Soviet's airspace.[517] Armed forces of the People's Republic of China brought down a Cathay Pacific plane over the Hainan Island on 23 July 1954.[518] Bulgaria shot down an EL AL Airlines aircraft near the Greco-Bulgarian border on 27 July 1955 even though it could not properly identify the aircraft.[519]

In a protest, the United States, the United Kingdom and Israel filed applications before the ICJ against Bulgaria.[520] Although the ICJ upheld Bulgaria's preliminary objection that it lacks

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[511] ibid., [para. 39]; *Letter dated 1 September 1983 from the Acting Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council*, UN Doc. S/15947 (1 September 1983) [paras. 9-10]; UNSCOR, UN Doc. S/PV.2471 and Corr 1 (6 September 1983) [para. 18].

[512] UNSCOR, UN Doc. S/PV.2470 (2 September 1983) [para. 79].

[513] ibid., [para. 38].

[514] ibid., (Japan – para. 64, USA – para. 39).

[515] John T. Phelps, 'Aerial intrusions by Civil and Military Aircraft in time of Peace' (1985) 107 *Military Law Review* 255-304, 257.

[516] See 'Address to the Nation on the Soviet attack on a Korean civilian airliner' (5 September 1983) [para. 1] available at <https://reaganlibrary.archives.gov/archives/speeches/1983/90583a.htm> accessed 25 August 2016.

[517] Oliver J. Lissitzyn, 'The Treatment of Aerial Intruders in Recent Practice and International Law' (1953) 47(4) *American Journal of International Law* 559-589, 574.

[518] William J. Hughes, 'Aerial Intrusions by Civil Airliners and the Use of Force' (1980) 45(3) *Journal of Air Law and Commerce* 595-620, 601-602.

[519] David B. Green, 'This day in Jewish history 58 dead after EL AL plane shot down over Bulgaria' (Haaretz, 25 August 2016) available at <http://www.haaretz.com/jewish/this-day-in-jewish-history/.premium-1.607298> accessed 25 August 2016.

[520] See generally, *Aerial Incident of 27 July 1955* (Israel v Bulgaria; United States v Bulgaria; United Kingdom v Bulgaria) Application Instituting the Proceedings and Pleadings ICJ Reports (1957) p.1,5 [hereinafter *Aerial incident – Israel v Bulgaria*].

jurisdiction to adjudicate the case,[521] the UK had strongly maintained that States do not have right to shoot down a civil aircraft in time of peace.[522] Ironically, Israel shot down the Libyan Airlines Boeing 727 over Sinai on 21 February 1973.[523] Egypt described Israel's action as 'a monstrous and savage crime which is full of perfidy and which is not only a violation of international law but of all human values.'[524] The cycle continues almost on a yearly basis.[525]

It seems that the Member States condemn such actions especially when lives of innocent civilians are involved and yet there is no law granting innocent overflight for civil aircraft. Instead, Article 3*bis* of the *Protocol relating to an Amendment to the Convention on International Civil Aviation*[526] (hereinafter referred to as Chicago Convention Protocol) urges the contracting States to refrain from resorting to use of weapons against civil aircraft in flight. The word "refrain" is more recommendatory than prohibitory. But should there be an interception, the contracting state must not endanger the lives of persons on board as well as the safety of the aircraft.[527]

In no tangible way did Article 3*bis* derogate the absolute right of a subjacent State to control its airspace.[528] Conversely, it upheld the rights and duties of States as enshrined in the UN Charter.[529] While unauthorised intrusion breaches the territory of the affected States, shooting down a civil aircraft could breach the integrity of the flag state if the following conditions were present. First, the state whose airspace is breached knows or would be deemed to have known that the intruding aircraft is a civil aircraft with no malicious intent. Second, the violation was unintended or due to *force majeure*. Third, the offended state has

[521] *Case concerning the Aerial Incident of July 27th, 1955* (Israel v Bulgaria) Preliminary Objections Judgment ICJ Reports (1959) p. 127, 146.
[522] Hughes (n 518) 604.
[523] ibid., 611.
[524] ibid., 611.
[525] Jin-Tai Choi, *Aviation Terrorism: Historical Survey, Perspectives, and Responses* (New York, St Martin's Press 1994) 199-203.
[526] *Protocol relating to an amendment to the Convention on International Civil Aviation* (Signed at Montreal on 10 May 1984, entered into force on 1 October 1998) 2122 UNTS 337 [Art. 3*bis*] [hereinafter *Protocol to Convention on Civil Aviation*].
[527] ibid., [Art. 3*bis* (a)].
[528] Farooq Hassan, 'The Shooting Down of Korean Airlines Flight 007 by the USSR and the Future of Air Safety for Passengers' (1984) 33(3) *International and Comparative Law Quarterly* 712-725, 715.
[529] *Protocol to Convention on Civil Aviation* (n 526) [Art. 3*bis* (a)].

taken all reasonable steps to discontinue the violation.[530] Otherwise, Article 6 of the Chicago Convention prohibits scheduled flight over or into the territory of a State without prior authorisation.[531]

5.11.2 State aircraft

Articles 30 and 31 of the Paris Convention[532] provide the definition of a state aircraft. Article 32 prohibits State aircrafts from flying 'over the territory of another Contracting State nor land thereon without special authorisation.'[533] Thus, a rebuttable presumption is that an intrusion by a State aircraft has a malicious intent. On that basis, Hughes suggested that an intrusion by a State aircraft should be treated with scepticism.[534] The reaction of the UN member States when an American U-2 was shot down by the Soviet Union in 1960 supported this view.[535] Even the United States did not protest the action of the Soviet Union.

In contrast, the United States protested when its Air Force RB-47 plane was downed by the Soviet Union over what the US said was the High Seas.[536] In the Security Council's meeting following the incident, Ceylon, Poland, Ecuador, Argentina and Tunisia explicitly or implicitly argued that the Soviet's airspace is inviolable.[537] The "cold war" was believed to have

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[530] Hassan (n 528) 722-724.

[531] *Chicago Convention* (n 507) [Art. 6].

[532] Article 30 provides as follows: The following shall be deemed to be State aircraft:
(a) Military aircraft. *(b)* Aircraft exclusively employed in State service, such as Posts, Customs, Police. Every other aircraft shall be deemed to be private aircraft. All State aircraft other than military, customs and police aircraft shall be treated as private aircraft and as such shall be subject to all the provisions of the present Convention. Article 31 states: Every aircraft commanded by a person in military service detailed for the purpose shall be deemed to be a military aircraft. See *Paris Convention* (n 507) [Arts. 30 and 31]; *Chicago Convention* (n 507) [Art. 3].

[533] *Paris Convention* (n 507) [Art. 32].

[534] Hughes (n 518) 597.

[535] Oliver J. Lissitzyn, 'Some Legal Implications of the U-2 and Rb-47 Incidents' (1962) 56(1) *American Journal of International Law* 135-142, 137; Myres S. McDougal, Harold D. Lasswell and Ivan A. Vlasic, *Law and Public Order in Space* (New Haven, Yale University Press 1965) 274-275.

[536] As President Kennedy rightly observed, the significant difference between the U-2 and the RB47 flights was that 'one was an overflight and the other was a flight of a different nature.' See Lissitzyn 1962 (n 535) 136; Quincy Wright, 'Legal Aspects of the U-2 Incident' (1960) 54(4) *American Journal of International Law* 836-854, 845-846.

[537] UNSCOR, UN Doc. S/PV.858 (24 May 1960) [at para. 58, Argentina calls for respect of territorial sovereignty of every country, great and small; at para. 83, Poland argues that the United States overflight violated international law which recognises complete and exclusive sovereignty of Soviet Union over its airspace]; UNSCOR, UN Doc. S/PV.859 (25 May 1960) [at para. 4, Tunisia argues that it is difficult to condone the violation of the airspace of a sovereign state; at para. 51, Ceylon argues that the sanctity of a sovereign right is inviolable]; UNSCOR, UN Doc. S/PV.863 (26 May 1960) [at para. 9, Ecuador appeals to all member governments to respect

informed the Soviet's decision to shoot down the United States' aircraft or any aircraft that violated its airspace.[538] That States refrain from taking such drastic measures in time of peace does not mean that their airspace could be violated. The customary international law[539] allows States complete and exclusive right over their airspace.

5.12 Right to shoot down trespassing aircraft

5.12.1 State aircraft

5.12.1.1 The Russian Sukhoi SU-24 incident

On 24 November 2015, Turkey shot down a Russian *Sukhoi* SU-24 military jet that strayed into its airspace for about 17 seconds.[540] Russia's contention was that the aircraft was attacked when it was 1 km (0.62 mile) inside the Syrian airspace.[541] Turkey insisted that the military jet had entered its airspace after being warned 10 times in five minutes to change direction.[542] Russia did not contest the lawfulness of the action of Turkey but argued that it was triggered by the prevailing political crisis in the region.[543] The incident exacerbated the already tensed conflict between Russia and the West.

Some commentators and *de minimis* theorists might consider Turkish downing of the Russian aircraft disproportionate.[544] Nonetheless, statements put out by NATO and the United States affirm that Turkey has a right to protect its territory.[545] This dilutes any justificatory argument

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international law].

538 UNSCOR, UN Doc. S/PV.880 (22 July 1960) [para. 54].

539 Lissitzyn 1962 (n 535) 137. *Cf* Spencer M. Beresford, 'Surveillance Aircraft and Satellites: A Problem of International Law' (1960) 27(2) *Journal of Air Law and Commerce* 107-118, 112 (his analysis of Article 2 of the Chicago Convention led him to conclude that, under customary international law, the airspace above a State is not a part of its territory and hence not subject to its sovereignty except by specific agreement).

540 Etienne Henry, 'The Sukhoi SU-24 Incident between Russia and Turkey' (2016) 4(1) *Russian Law Review* 8-25, 11.

541 Tulay Karadeniz and Maria Kiselyova, 'Turkey Downs Russian Warplane near Syria Border, Putin warns of "Serious Consequences"' (Reuters, 25 November 2016) available at <http://www.reuters.com/article/us-mideast-crisissyria-turkey-idUSKBN0TD0IR20151125> accessed 26 August 2016).

542 Karadeniz and Kiselyova (n 541) (the internet page).

543 ibid; Henry (n 540) 18-19. The Foreign Minister Sergei Lavrov says it was an obvious ambush, see 'Downing of Russian Su-24 Looks Like a Planned Provocation – Lavrov' (RT, 25 November 2015) available at <https://www.rt.com/news/323404-lavrov-syria-s24-turkey/> accessed 27 August 2016.

544 Henry (n 540) 19; Gray 2008 (n 140) 183; John Lawrence Hargrove, 'The Nicaragua Judgment and the Future of the Law of Force and Self-defence' (1987) 81(1) *American Journal of International Law* 135-143, 142.

545 See 'World leaders react to downing of Russian jet' (Aljazeera, 24 November 2015) available at <http://www.aljazeera.com/news/2015/11/russian-jet-shot-turkey-syria-reaction-151124210400768.html> accessed 27 August 2016.

based on *de minimis* principle. Besides, the Soviet's position had been that 'a single aircraft can carry bombs of colossal destructive power'[546] in this age of WMD. Thus, a millisecond overflight could be devastating.

Moreover, repeated actions might suggest an intent to commit a wrong. Prior to the Su-24 incident, Russia had admitted that its fighter plane Su-30 briefly entered the Turkish airspace by accident due to adverse weather conditions.[547] The NATO member States have also recorded several similar incursions into their airspace.[548] Therefore, no law prohibits States from protecting its territory as it deems fit.[549]

According to Williams, the recent military incursions into the national airspace of several States is a major threat to international peace and security.[550]

5.12.2 Civil aircraft

As said earlier, Article 3*bis* of the Protocol on Chicago Convention[551] governs the interception of civil aircrafts. It provides, among others, that the intercepting State must not resort to the use of weapons against civil aircraft in flight.[552] Additionally, the intercepting State must not endanger the lives of persons on board and the safety of the aircraft but can order the intruding aircraft to land at some designated airport.[553]

A rebuttable presumption of innocence is attributed to a trespassing civil aircraft unless the

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[546] UNSCOR, UN Doc. S/PV.880 (22 July 1960) [para. 22].

[547] Kareen Shaheen, 'Turkey 'Cannot Endure' Russian Violation of Airspace, President Says' (The Guardian, 6 October 2015) available at <https://www.theguardian.com/world/2015/oct/06/nato-chief-jens-stoltenberg-russia-turkish-airspace-violations-syria> accessed 27 August 2016; NATO Press Release, 'Statement by the North Atlantic Council on incursions into Turkey's airspace by Russian aircraft' (NATO, 5 October 2015) available at <http://www.nato.int/cps/en/natohq/news_123392.htm?selectedLocale=en> accessed 28 August 2016.

[548] See generally, Thomas Frear, Lukasz Kulesa and Ian Kearns, *Dangerous brinkmanship: close military encounters between Russia and the West in 2014* (European Leadership Network Policy Brief, November 2014) available at <http://www.europeanleadershipnetwork.org/medialibrary/2014/11/09/6375e3da/Dangerous%20Brinkmanship.pdf> accessed 28 August 2016.

[549] R. C. Hingorani, 'Aerial Intrusions and International Law' (1961) 8(2) *Netherlands International Law Review* 165-169, 166.

[550] Alison J. Williams, 'A crisis in Aerial Sovereignty? Considering the Implications of recent Military violations of National Airspace' (2010) 42(1) *AREA* 51-59.

[551] *Protocol to Convention on Civil Aviation* (n 526) [Art. 3*bis*].

[552] ibid., [Art. 3 *bis*].

[553] ibid., [Art. 3*bis*].

three conditions mentioned above are discharged. For instance, a civil aircraft may serve a military purpose. On that basis, Hobe argues that even a minor intrusion into the airspace of a State amounts to an armed attack.[554] But Hobe's position is disputable under the definition of an armed attack as established in the *Nicaragua* case.[555]

If other less grave forms of the use of force were applicable, the rule by the *Institut de droit international*[556] could apply. The relevant paragraph states:

> … Acts involving the use of force of lesser intensity may give rise to counter-measures in conformity with international law. In case of an attack of lesser intensity the target State may also take strictly necessary police measures to repel the attack.

However, Article 22 of the Draft Articles on States Responsibility[557] prohibits coercive countermeasures. Besides, the legitimate countermeasures must satisfy substantive and procedural conditions.[558] In the *Gabcíkovo-Nagymaros Project* case,[559] the ICJ pointed out that one of the conditions to be satisfied is that 'the injured State must have called upon the State committing the wrongful act to discontinue its wrongful conduct or to make reparation for it.'[560]

This opens a Pandora's box of how to deal with a hijacked civil aircraft that refuses to obey the directive to land at a designated airport. Yet, the State whose territory has been breached is entitled to protect itself from any potential threat. It follows that respect for the territory of other States applies both ways. Article 2(3) of the UN Charter requires the member States to 'settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.'[561] States may take necessary steps to

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[554] Stefan Hobe, 'Airspace' in Rüdiger Wolfrum (ed), *The Max Planck Encyclopaedia of Public International Law* (Volume 1, Oxford University Press 2012) 266.
[555] *Nicaragua case* (n 113) [para. 191].
[556] Institut de Droit International, 'Present Problems of the Use of Armed Force in International Law – A Self-defence (27 October 2007) [operative para. 5] available at <http://www.justitiaetpace.org/idiE/resolutionsE/2007_san_02_en.pdf> accessed 1 September 2016.
[557] International Law Commission, *Draft Articles on Responsibility of States for internationally wrongful acts* (Adopted by the International Law Commission at its fifty-third session in 2001) (Volume II, Part II, Yearbook of International Law Commission 2001) [Art. 22].
[558] International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentary* (Volume II, Part II, Yearbook of International Law Commission 2001) 75 [para. 2].
[559] See generally, *Gabcikovo-Nagymaros Project* (Hungary v Slovakia) Judgment ICJ Reports (1997) p. 7.
[560] ibid., [para. 84].
[561] *The UN Charter* (n 55) [Art. 2(3)].

prevent or stop the breach[562] but may resort to proportionate use of force as a last resort.

5.13 Lessons learned from past interceptions – State Practice

Analysis of the aerial incidents involving two or more States, whether civil or state aircrafts, has shown a certain pattern of behaviour. A State whose airspace is breached would likely resist the violation if *inter alia* the trespasser disobeys instructions given to it by the intercepting fighter jet. Turkey says it warned the Russian Su-24 fighter jet ten times before it was gunned down.[563] The Soviet Union gave a similar reason when it shot down KAL-007 in 1983[564] and so on.[565] This shows that except perhaps for the Cold War era,[566] no state has intentionally shot down another State's aircraft for accidental trespassing,[567] presumably. It comes as a last resort when the wrongful act persists despite warnings to discontinue. Sometimes, the underlying reason could be political and a show of military strength. This will not augur well for the international peace and security.

However, not all cases of aerial incursions result in the downing of the intruding aircraft.[568] But States whose territory is breached usually protest the violation through diplomatic channels. While this approach is commendable, the rate at which the violations occur is worrisome.

In wartime, a belligerent state aircraft that sends a distress signal could be forced to land and is liable to internment.[569] Should such an aircraft stray into a neutral State's territory, Article

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[562] *Chicago Convention* (n 507) [Art. 12]; *Paris Convention* (n 507) [Art. 32].

[563] See 'Leaked Ankara UN letter claims SU-24's air space violated' lasted 17 seconds' (RT, 24 November 2015) available at <https://www.rt.com/news/323343-turkey-un-syria-russian-plane/> accessed 5 September 2016.

[564] Phelps (n 515) 258-259.

[565] Hughes (n 518) 614-619.

[566] The Soviet Union had maintained an open policy of shooting down any aircraft that violates its airspace. See Phelps (n 515) 255-304.

[567] Hughes (n 518) 614.

[568] See 'British Airways flight to London Heathrow intercepted by fighter jets over Hungary' (The Telegraph, 1 May 2016) available at <http://www.telegraph.co.uk/news/2016/05/01/british-airways-flight-intercepted-by-fighter-jets-over-hungary/> accessed 7 September 2016; Gill Cohen, 'Israeli Defense Minister: Russia also violated our airspace' (Haaretz, 29 November 2016) available at <http://www.haaretz.com/israel-news/.premium-1.688977> accessed 7 September 2016.

[569] Lissitzyn 1953 (n 517) 562.

42 of The Hague *Rules of Air Warfare*[570] allows the neutral state to compel it to alight. However, it must be admitted if it sends a distress signal.[571]

Deductively, States have the right to intercept any aircraft that violate their airspace. This right can be enforced, as a State deems necessary in consideration of its security interest. On the balance of probabilities, security threats could be higher if the trespasser is a state aircraft. It does not, however, mean that state aircraft are immune from *force majeure*. However, the intercepting State must act reasonably to mitigate as far as possible, any collateral damage that could result from the said interception.

5.13.1 Pre-emptive self-defence[572] and military necessity

The United States has argued that military necessity[573] could legitimise shooting down an intruding aircraft if an attack were imminent.[574] But not all the UN Member States share this view. In the aftermath of the 9/11, a civil aircraft circled over the Frankfurt banking district on 5 January 2003. As a result, Germany Federal Government enacted Aerial Security Act which authorised its armed forces to shoot down civil aircraft suspected to have been hijacked.[575] When challenged before the Federal Constitutional Court of Germany, the Court

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570 International Committee of the Red Cross, *Rules concerning the Control of Wireless Telegraphy in Time of War and Air Warfare* (Drafted by a Commission of Jurists at The Hague in December 1922, adopted on 19 February 1923) [Art. 42] available at <https://ihl-databases.icrc.org/ihl/INTRO/275?OpenDocument> accessed 1 June 2017.

571 Lissitzyn 1953 (n 517) 563.

572 This dissertation will not analyse self-defence in any depth because it has received considerable literature. See generally, James A. Green, *The International Court of Justice and Self-defence in International Law* (Oxford and Portland, Oregon, Hart Publishing 2009).

573 The principle of military necessity states that 'force resulting in death and destruction will have to be applied to achieve military objectives, but its goal is to limit suffering and destruction to that which is necessary to achieve a valid military objective.' See *The US Commander's Handbook* (n 497) [para. 5.3.1]; Dinstein Yoram, *War Aggression and Self-defence* (Fifth Edition, The United Kingdom, Cambridge University Press 2011) 262; Yishai Beer, 'Humanity Considerations Cannot Reduce War's Hazards Alone: Revitalizing the Concept of Military Necessity' (2015) 26(4) *European Journal of International Law* 801-828, 803; Niaz A. Shah, 'The Use of Force under Islamic Law' (2013) 24(1) *European Journal of International Law* 343-365, 359; Janina Dill, 'The 21st-Century Belligerent's Trilemma' (2015) 26(1) *European Journal of International Law* 83-108, 91.

574 *Aerial incident – Israel v Bulgaria* (n 520) (Memorial submitted by the Government of the United States of America, 2 December 1958) 240.

575 Nina Naska and Georg Nolte, 'Legislative Authorization to shoot down Aircraft abducted by Terrorists if innocent passengers are on board incompatibility with Human Dignity as guaranteed by Article 1(1) of the German Constitution' (2007) 101(2) *American Journal of International Law* 466-471, 466; *Act on the Reorganisation of Aviation Security Tasks (Luftsicherheitsgesetz, LuftSiG)* (11 January 2005) [Section 14(3)] available at <http://germanlawarchive.iuscomp.org/?p=735> accessed 5 September 2016.

held that the provision is incompatible with the right to life and therefore void.[576] This judgment appears to have considered two distinct but inter-related legal systems: (1) Public International Law and (2) International Human Rights Law. In some cases, Humanitarian Law is equally considered.

The Public International Law deals with States. It allows a State to invoke Article 51 of the UN Charter if it were a victim of an armed attack. President George W. Bush formulated Pre-emptive self-defence after the 9/11. Thus, he ordered the US armed forces to shoot down any aircraft suspected to have been hijacked. However, the judgment of the Federal Constitutional Court of Germany departs from that, but on a wrong footing. It could be justified on the basis that no armed attack has occurred.

But for Article 3*bis* of the Protocol to Chicago Convention, neither the 1919 Paris Convention nor the 1944 Chicago Convention limited the permissible law enforcement available to States. The strict compliance with the provision of Article 3*bis* does not exonerate the intruding aircraft from the wrongful act or eliminate the possibility that the intercepting State might take disproportionate measures to stop the violation. States ought to respect each other's territory. When Israel shot down the Libyan airliner over the occupied Egyptian territory of Sinai in 1973, the Assembly of the ICAO condemned Israel's action as a breach of the Chicago Convention.[577] The ICAO Assembly upheld the sanctity of the Libyan's territory (aircraft) when it implicitly rejected Israel's aggravating factor as justification.

5.13.2 Unmanned Aerial Vehicles and the inviolability of State territory

The last two decades have seen the deployment of unmanned aerial vehicles[578] (hereinafter

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[576] *Germany Federal Constitutional Court* Judgment of the First Senate of 15 February 2006 - 1 BvR 357/05 [paras. 131-132] available at <http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2006/02/rs20060215_1bvr035705en.html> accessed 5 September 2016. The British position supports the view that force cannot be used against a civil airliner. See *Aerial incident – Israel v Bulgaria* (n 520) (Memorial submitted by the Government of the United Kingdom of Great Britain and Northern Ireland, 28 August 1958) [para. 78].

[577] International Civil Aviation Organisation, 'Shooting down of a Libyan Civil Aircraft by Israeli Fighters on 21 February 1973 – A19-1' in *Assembly Resolutions in Force* (5 October 2001) I-27 available at <http://www.icao.int/publications/Documents/9790_en.pdf> accessed 5 September 2016.

[578] It is also known as unmanned aircraft. The term 'unmanned aircraft' means 'an aircraft that is operated without the possibility of direct human intervention from within or on the aircraft,' see *FAA Modernization and Reform Act of 2012* (Signed into law by the US President on 14 February 2012) [sec. 331(8)] available at <https://www.gpo.gov/fdsys/pkg/CRPT-112hrpt381/pdf/CRPT-112hrpt381.pdf> accessed 31 August 2016.

referred to as drone) for military and counterterrorism purposes. In the year 2010, Barack Obama administration was said to have witnessed more drone strikes in north-west Pakistan than during the entire regime of George W. Bush.[579] By early 2012, it was estimated that the US Pentagon was in control of about 7, 500 drones.[580] This resulted in an endless penetration of territories of many States with or without their consent. Topmost in the list of the affected States are Pakistan, Afghanistan, Yemen and Somalia.

The use of drones has changed the conventional idea about warfare just like the cyberspace. Apparently, it seems a customary law in the making and some analysts forecast it will determine the future of warfare.[581] Whether the use of drones complies with international humanitarian law or international human rights law is to be seen.[582] However, it raises some ethical, moral and legal questions.[583] Two of such issues are accountability and responsibility for the civilian deaths.[584]

The use of drones does not seem to fit into the cross-border movement of armed forces as contemplated by the ICJ in *Armed Activities on the Territory of the Congo*.[585] But such conduct is disrespectful and undermines the integrity of the affected State if overflown without its consent.

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[579] Stuart Casey-Maslen, 'Pandora's box? Drone strikes under *jus ad bellum, jus in bello,* and International Human Rights Law' (2012) 94(886) *International Review of the Red Cross* 597-625, 598.

[580] W. J. Hennigan, 'New drone has no pilot anywhere, so who's accountable?' (Los Angeles Times, 26 January 2012) available at <http://articles.latimes.com/2012/jan/26/business/la-fi-auto-drone-20120126> accessed 31 August 2016.

[581] Afsheen John Radsan, 'Loftier standards for the CIA's remote-control killing' (Accepted Paper No. 2010–11, William Mitchell College of Law, St Paul, Minnesota, May 2010) 1-10 available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1604745> accessed 1 September 2016.

[582] See, for instance, Kate Martin, 'Are U.S. drone strikes legal? A guide to the relevant legal questions' (Center for American Progress, 1 April 2016) available at <https://www.americanprogress.org/issues/security/report/2016/04/01/134494/are-u-s-drone-strikes-legal/> accessed 28 August 2016; Rosa Brooks, 'Drones and the International rule of Law' (2014) 28(1) *Ethics and International Affairs* 83-103.

[583] International Committee of the Red Cross, 'Articles and Interviews in New technologies and warfare' (2012) 94(886) *International Review of the Red Cross* 457-876; Jelena Pejic, 'Extraterritorial targeting by means of armed drones: Some legal implications' (2014) 96(893) *International Review of the Red Cross* 67-106.

[584] UNSC Res. S/RES/2286 (3 May 2016) [para. 18].

[585] *DRC v Uganda* (n 123) [paras. 35, 47, 110, 114 and 131]; Robert D. Kaplan, 'Hunting the Taliban in Las Vegas' (The Atlantic, September 2006) available at <http://www.theatlantic.com/magazine/archive/2006/09/hunting-the-taliban-in-las-vegas/305116/> accessed 1 September 2016.

Furthermore, the argument that drones do not qualify as state aircraft[586] within the Convention meaning is unsustainable insofar as they are used for military purposes.[587] But even if they were not for the sake of argument, they cannot be flown over a State territory without authorisation.[588] It suffices to say that flying drones over Pakistan's airspace without its approval is in breach of Pakistan's territory.[589]

Some organs of the United Nations have iterated that the use of drones must be in accordance with international law and the UN Charter.[590] Article 2(4) was meant to check possible excesses of the superpowers. Schwedler has even suggested that if Yemen is a failed State, it was partly due to the activities of the external States violating its territory with impunity.[591]

The invention of drones increases the chances that the airspace of weaker States will be violated with impunity because of the zero-risk of human casualties from the point of view of the intruder. For the same reason, it could promote soft violations such as surveillance and reconnaissance thereby enhancing the possibility of conflicts among States.[592]

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586 Paul W. Khan, 'Imagining warfare' (2013) 24(1) *European journal of international law* 199-226, 222-226.

587 Michael N. Schmitt, 'Drone Attacks under the *Jus ad Bellum* and *Jus in Bello*: Clearing the "Fog of Law"' (2010) 13 *Yearbook of International Humanitarian Law* 311-326, 315; *The US Commander's Handbook* (n 497) [para. 2.4.4]; *Chicago Convention* (n 507) [Art. 8].

588 *Chicago Convention* (n 507) [Art. 8].

589 See Government of Pakistan Press Information Department, '*PR No. 8* Pakistan demands end to illegal drone strikes' (Islamabad, 2 July 2016) available at <http://www.pid.gov.pk/?p=22382> accessed 28 August 2016; Peshawar High Court, *Writ Petition No. 1551-P/2012,* Judgment by Justice Dost Muhammad Khan (11 April 2013) 18 available at <https://www.peshawarhighcourt.gov.pk/app/site/75/c/Mr._Justice_Dost_Muhammad_Khan.html> accessed 2 June 2017; National Assembly of Pakistan, 'Resolution: The House strongly condemns the Drone Attacks by the Allied Forces on the Territory of Pakistan' (10 December 2013) available at <http://www.na.gov.pk/en/resolution_detail.php?id=140> accessed 2 June 2017; UNGA Res. A/RES/68/178 (18 December 2014) [para. 6(s)]; United Nations, 'Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston,' UN Doc. A/HRC/14/24/Add.6 (28 May 2010) [para. 4]; European Parliament, 'Resolution on the use of armed drones' (Adopted by European Parliament at Strasbourg on 27 February 2014) P7_TA(2014)0172 [preamble para. E].

590 UNGA Res. A/RES/68/178 (18 December 2014) [operative paras. 6(s) and 17].

591 Jillian Schwedler, 'Is the U.S. drone program in Yemen working?' available at <https://www.lawfareblog.com/us-drone-program-yemen-working> accessed 29 August 2016; United Nations Human Rights Office of the High Commissioner, 'UN experts condemn lethal drone airstrikes in Yemen' (Geneva, 26 December 2013) available at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14145&LangID=E> accessed 1 September 2016.

592 For further reading see Matthias Maass, 'From U-2s to Drones: U.S. Aerial Espionage and Targeted Killing during the Cold War and the War on Terror' (2015) 34(2) *Comparative Strategy* 218-238.

5.14 A unilateral imposition of a no-fly zone

Attention has been drawn to how the imposition of a no-fly zone could breach the territory of a State if not explicitly authorised by the Security Council. The United States, the United Kingdom, and France enforced no-fly zones in northern Iraq to protect Kurds and in southern Iraq to protect Shiite Muslims after the Gulf War of 1991.[593] The trio implied their intervention into the Security Council Resolution 688.[594] In Williams opinion, the trio's action breached the territory of Iraq[595] and the then UN Secretary-General condemned it as illegal.[596]

But that does not arrest the debate on whether there exist, a higher legal principle above the principle of the inviolability of State territory. As shall be seen in chapter seven, there is a growing awareness that people are more fundamental than territorial borders. After all, States are artificial legal constructs that derive their existence from individuals as legal persons. The idea that a State territory could be suspended when there is a humanitarian crisis is gaining recognition in the modern legal discourse.[597] But this could jeopardise international peace and security if not properly regulated by the Security Council.

Therefore, a unilateral action by States has proven inimical to the purposes of the UN Charter as shown by the civil war in Syria.[598] Accordingly, the 2005 UN World Summit states: 'the relevant provisions of the Charter are sufficient to address full range of threats to international peace and security.'[599] It further reaffirms that it is only the Security Council that could authorise coercive action against a State.[600] The UN member States commit themselves

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[593] See David M. Malone, *The International Struggle over Iraq* (Oxford, Oxford University Press 2006) 84-113. In Libya's case, the League of Arab States requested the United Nations to impose a no-fly zone over Libya. See *Letter dated 14 March 2011 from the Permanent Observer of the League of Arab States to the United Nations addressed to the President of the Security Council,* UN Doc. S/2011/137 (15 March 2011) [operative para. 1]; UNSC Res. S/RES/1973 (17 March 2011) [paras. 6-7].

[594] UNSC Res. S/RES/688 (5 April 1991) [operative para. 1].

[595] Williams (n 550) 54-55; 'No-fly zones: the Legal position' (BBC News, 18 November 2002) available at <http://news.bbc.co.uk/1/hi/world/middle_east/2490361.stm> accessed 6 September 2016.

[596] Centre for the study of intervention, 'UN Security Council Resolution 688 on Iraq' (5 April 1991) available at <http://www.interventionism.info/en/UNSC-Res-688> accessed 6 September 2016.

[597] Noam Chomsky, *Failed States: The Abuse of Power and the Assault on Democracy* (England, Hamish Hamilton 2006) 79.

[598] UNSCOR, UN Doc. S/PV.7774 (21 September 2016) 23 (the representative of the United Kingdom, Boris Johnson argues that the 'barbaric proxy war … is being fed, nourished, armed, abetted, protracted and made more hideous by the actions and inactions of Governments represented in this Chamber).

[599] UNGA Res. A/RES/60/1 (16 September 2005) [para. 79].

[600] ibid., [para. 79].

‘to helping states to build capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and to assisting those who are under stress before crises and conflicts break out.'[601]

5.15 Aerial Espionage

Espionage is committed when a person clandestinely or under false pretences, obtains or endeavours to obtain information with the intention of divulging it to the hostile party.[602] The debate on its legality is inconclusive. For authors like Wright, espionage in peacetime is illegal[603] but lawful in wartime.[604] Delupis argues that its lawfulness depends on the means used.[605] For others,[606] espionage is illegal when it involves trespassing into the territory of other States. Delupis concludes that international law prohibits espionage in peacetime irrespective of whether or not it involves trespass.[607]

If respect for States' territory were the bedrock of international relations, it is absurd to assume that States would be pleased to be spied upon. Hence, most cases of aerial incidents involving civil aircrafts were mistaken for intelligence gathering.[608] It shows the level of mistrust among the UN Member States. Since a high-altitude surveillance could amount to espionage,[609] scheduled flights should ask for permission and obtain authorisation to fly into or over a state airspace.

Spying on other States whether for espionage or intelligence gathering does not enhance international relations. Amidst the ongoing Timor Sea Treaty Arbitration between East Timor and Australia, the latter had spied on the former, invaded the business premises of its Legal

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[601] ibid., [para. 139].
[602] *Hague Regulations* (n 165) [Art. 29].
[603] Wright (n 536) 849; Ingrid Delupis, ‘Foreign Warships and Immunity for Espionage’ (1984) 78(1) *American Journal of International Law* 53-75, 67; A. A. Majid, ‘Jural Aspects of Unauthorised Entry into Foreign Airspace’ (1985) 32(2) *Netherlands International Law Review* 251-287, 256.
[604] Wright (n 536) 849; Delupis (n 603) 67.
[605] Delupis (n 603) 67.
[606] ibid., 67
[607] ibid., 67
[608] The Soviet Union claims that KAL-007 was used for intelligence gathering. See Phelps (n 515) 264. Israel gave a similar reason when it shot down the Libyan Airliner over the Sinai in 1973. See Hughes (n 518) 611-614.
[609] Beresford (n 539) 113.

Counsel on 3 December 2013 and seized confidential documents.[610] The ICJ has issued an Order restraining Australia from interfering in any way in communication between East Timor and its Legal Counsel.[611]

5.16 Concluding Remarks

This chapter concludes that States are responsible for the demise of Article 2(4). The reasons are vast but largely due to State's fixation at the first limb of Article 2(4). This chapter has proven a series of violations of States' territory on land, at territorial waters and in the airspace. The cases studied were selected from across the continents to show its diversity.

The first section examined how inadvertent claim to legal title and enforcement could breach the territory of the rightful title owner. Error does not obliterate the wrongfulness of an act. Thus, the defence of "reasonable mistake" did not absolve Nigeria of culpability and China's claim to historic right in the "nine dash line" did not exonerate it of its duty to respect the territory of the Philippines.

However, the lack of a universally accepted standard of adjudicating territorial claims remains a major setback. Where international boundaries are poorly delimited, States are obliged, in some cases against their will, to comply with the decision of a judicial body. Legality requires that the substantive and procedural norm on a legal issue should be clear and lucid. For instance, if China had historic rights over the South China Sea before its accession to the UNCLOS, it seems reasonable that the reservation it made to that effect subsists.

Perhaps, a standardisation of the criteria for adjudication of international boundary disputes and strict adherence to it by the judicial bodies could mitigate the frequency of territorial disputes. But the extent that the standardisation could go in dispute resolution is questionable. For instance, the adoption of *uti possidetis* on the African Continent has not resolved all border disputes in Africa.

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[610] *Questions relating to the Seizure and Detention of Certain Documents and Data* (Timor-Leste v Australia) Provisional Measures, Order of 3 March 2014, ICJ Reports (2014) p. 147 [para. 55].
[611] ibid., [para. 55].

Aside from the standardisation issue, States' territories are mostly violated through covert or overt intervention in the internal affairs of other States. These interventions take the form of supports which States give to insurgents, self-determinationists or intervention on humanitarian ground. The cases of the Russia's intervention in Ukraine and NATO's intervention in Kosovo are recent examples. The legal basis of those interventions is ambiguous considering the *jus cogens* character of Article 2(4).

The law concerning the principle of the inviolability of State territory is complicated when it comes to the law applicable to the sea and airspace. At present, there is no right of innocent overflight. Yet state practice acquiesces to overflight by a civil aircraft. The first limb of Article 2(4) prohibits threat or use of force against the territory of a State. The jurisprudence of the ICJ permits self-defence for victim of an armed attack. But recovery from aerial attacks in this age of WMD could be remote. Moreover, scepticism and mistrust among States would make the development of custom to ignore trespassing civil aircraft difficult. A viable option is for States to imbibe the culture of respect for other States' airspace. This can be achieved through effective communication.

The same principle applies to the controversial right of innocent passage of States' vessels and warships as provided for in the law of the sea. The phrase "complete and exclusive" in treaties and conventions relating to the law of the sea means States' absolute sovereignty and jurisdiction over their territory. Therefore, the littoral States should authorise any passage through their territory. This would minimise the chances that the vessels enjoying the right of innocent passage would be violated.

Additionally, the use of drones for aerial espionage or war against terrorism without the consent of the host State, the exercise of the right of visit to the high seas for crimes' control and the use of the high seas in a way that would have a negative impact on States is unacceptable. The level of inter-State relations anticipated by the UN Charter could be achieved if States cultivate the culture of respect for the inviolability of State territory.

Chapter Six

Non-State actors and the Inviolability of State Territory

6.0 Introduction

The adoption of the UN Charter led to a reduction in inter-State armed conflicts but an increase in "internationalised" armed conflict misconceived as not within the purview of Article 2(4). This chapter investigates the credibility of such claims. As the chapter progresses, keep in mind that the UN Charter deals with inter-States relations. Therefore, three interrelated issues are examined. Firstly, whether States' covert and overt support of the NSAs falls within the prohibited act under Article 2(4)? Secondly, if yes, what would be the appropriate response for a State faced with such violations? Thirdly, if no, could such conduct jeopardise international peace and security?

This chapter reviews the States' conduct in favour of, or directed against the activities of the non-State actors (hereinafter referred to as NSAs) without the consent of the host[1] State or authorised by the Security Council. To the first question, this chapter argues that such conducts fall within the purview of Article 2(4), if broadly construed. To the second question, this chapter advocates for strict compliance with the lawfully permitted exceptions. Therefore, the manner in which the Security Council exercises the Chapter VII's powers will be evaluated. To the third question, this chapter argues that States' support of the NSAs is a major factor that destabilises the international peace and security.

6.1 Working definition of the non-State actors

The NSAs could be defined from a national or international perspectives. Nationally, it refers to groups which may or may not be independent of a State such as financial institutions, intergovernmental organisations, or state-sponsored terrorist groups.[2] Internationally, it

[1] By "host" state is meant a state that enjoys exclusive authority over the portion of its territory under the effective control or occupation of non-State actors.

[2] Daphne Josselin and William Wallace, 'Non-state Actors in World Politics: A Framework' in Daphne Josselin and William Wallace (eds), *Non-state Actors in World Politics* (New York, Palgrave 2001) 2.

refers to 'certain territorial or political units other than states and which to a limited extent, may be directly the subject of rights and duties under international law.'[3]

For our purposes, the NSAs include the militia, belligerents, insurgents or terrorist groups. In other words, it covers all groups with some political or religious affinity and which possess the *de facto* economic, financial and institutional government capable of controlling part of a state territory and in opposition to, or running a parallel government. It does not include any state-sponsored insurgent group since such bodies technically constitute an agent of the State such that their activities are attributable to the State. Also, it excludes Non-Governmental Organisations (NGOs)[4] or State-like entities such as Palestine or the Vatican City State.[5]

6.1.1 Legal status of Non-State Actors

As a general rule, the modern international law does not recognise the NSAs that have not attained the status of belligerent.[6] According to Cassese, the modern international law recognises the NSAs as insurgents when they satisfy the basic minimal conditions such as effective control over the territory they occupy and when the conflict has reached a certain degree of intensity and duration.[7]

However, there is no consensus among the UN member States on when these conditions are met because the international law does not specify when a group of rebels starts to possess international rights and duties.[8] Consequent upon this, States confronted by armed resistance classify them as terrorists in order to retain the monopoly of the use of force. This is not unusual in that the recognition of insurgent confers certain rights and duties upon the recognised group. For instance, a third State may lawfully assist such groups with arms and fund without fear of violating the territory of the defunct state. But much depends on the

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[3] Robert Jennings and Arthur Watts (eds), *Oppenheim's International Law* (Ninth Edition, Vol. 1, Peace, London and New York, Longman 1996) 17 (emphasis added) [hereinafter *Oppenheim 1996*].

[4] *Oppenheim 1996* (n 3) 18.

[5] John R. Morss, 'The International Legal Status of the Vatican/Holy See Complex' (2015) 26(4) *European Journal of International Law* 927-946.

[6] Andrew Clapham, *Human Rights Obligations of Non-State Actors* (New York, Oxford University Press 2006) 271.

[7] Antonio Cassese, *International Law* (Second Edition, Oxford, Oxford University Press 2005) 125.

[8] Antonio Cassese, *International Law in a Divided World* (New York, Oxford University Press 1986) 82.

"terms" of the recognition which in some cases could be a mere political ploy instead of the conferment of a legal right.[9] Even when it is a case of terrorism, there is no universally accepted legal framework used to designate groups as terrorists. Thus, a group classified as terrorist by some States might be regarded as freedom fighters by others.[10]

Nonetheless, other branches of international law such as the international humanitarian law and the international human rights law attribute corporate responsibility to the NSAs. For example, Article 3 Common to the four Geneva Conventions of 1949 obliges the warring parties to respect the human personality of the *hors de combat*.[11] Article 13 of the 1977 Protocol II to the four Geneva Conventions[12] provides that the civilian population shall not be an object of attack. Article 19 of the *Convention for the Protection of Cultural Property in the Event of Armed Conflict*[13] obliges the warring parties to respect the cultural property.

That these treaties are binding upon the NSAs diminish the claim that they lack international legal status. Therefore, the NSAs are "quasi-States"[14] because they enjoy limited rights and duties. They exercise a *de facto* authority over the portion of a State territory they occupy.

But falling short of "subjects" of international law, Bekker argues that the NSAs cannot be held directly liable under international law.[15] Except for the cases of colonial domination,

[9] James Crawford, *The Creation of States in International Law* (Second Edition, New York, Oxford University Press 2006) 17-23.

[10] Boaz Ganor, 'Defining Terrorism: Is One Man's Terrorist another Man's Freedom Fighter?' (2002) 3(4) *Police Practice and Research* 287-304, 287; Walter Laqueur, *The Age of Terrorism* (Boston and Toronto, Little, Brown and Company 1987) 7, 302.

[11] *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (Done at Geneva on 12 August 1949, entered into force on 21 October 1950) 75 UNTS 31 [Art. 3]; *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea* (Concluded at Geneva on 12 August 1949, entered into force on 21 October 1950) 75 UNTS 85 [Art. 3]; *Geneva Convention relative to the treatment of prisoners of war* (Done at Geneva on 12 August 1949, entered into force on 21 October 1950) 75 UNTS 135 [Art. 3]; *Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (Done at Geneva on 12 August 1949, entered into force on 21 October 1950) 75 UNTS 287 [Art. 3].

[12] *Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II)* (Adopted at Geneva on 8 June 1977, entered into force on 7 December 1978) 1125 UNTS 609 [Art. 13].

[13] *Convention for the Protection of Cultural Property in the Event of Armed Conflict* (Done at The Hague on 14 May 1954, entered into force on 7 August 1956) 249 UNTS 240 [Art. 19].

[14] Cassese 1986 (n 8) 84.

[15] Pieter H. F. Bekker, 'Corporate aiding and abetting and conspiracy liability under international law' in Wybo P. Heere (ed), *From Government to Governance* (The Hague, T. M. C. Asser Press 2004) 209-216.

alien occupation and racist regime,[16] international law does not recognise the NSAs. In fact, Israel refused to recognise the Popular Front for the Liberation of Palestine[17] and the South African Court denied Petane the status of a prisoner of war.[18]

6.2 The NSAs' activities and the Host State's Responsibility

A State's exclusive right to its territory creates rights and obligations. The International Law Commission adopted the *Draft Articles on Responsibility of States for Internationally Wrongful Acts*[19] in 2001 (hereinafter referred to as Draft Articles). The UN General Assembly resolution 56/83[20] commends the Draft Articles as a means to promote inter-States relations. Consequently, the General Assembly has studied it in its subsequent sessions[21] and has also considered comments and observations made by States[22] regarding the Draft Articles in connection with the decisions of the judicial institutions.[23]

The views expressed by the UN member States concerning the normativity of the Draft Articles are diverse. The United States recognises it as a non-binding document that provides a guide to States and other international actors on what the law is and how it might be developed.[24] Portugal proposed a convention[25] that will examine the important issues raised in the Draft Articles. For instance, there were concerns regarding the nature of counter measures in Articles 49 through 54 as well as Article 48 that permits the invocation of

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[16] UNGA Res. A/RES/3103 (XXVIII) (12 December 1973) [operative para. 1].

[17]See generally, *Military Prosecutor v Omar Mahmud Kassem and Others* [1971] 42 ILR 470.

[18] See generally, *S v Petane* [1988] 3 SALR 51.

[19] See generally, International Law Commission, *Draft Articles on Responsibility of States for internationally wrongful acts* (Adopted by the International Law Commission at its fifty-third session in 2001) (Volume II, Part II, Yearbook of International Law Commission 2001) [hereinafter *Articles on States Responsibility*].

[20] UNGA Res. A/RES/56/83 (12 December 2001) [preamble para. 2]; UNGA Res. A/RES/59/35 (2 December 2004) [preamble para. 3, operative paras. 1 and 4].

[21] UNGA Res. A/RES/59/35 (2 December 2004) [operative para. 4]; UNGA Res. A/RES/62/61 (6 December 2007) [operative para. 4]; UNGA Res. A/RES/65/19 (6 December 2010) [operative para. 4]; UNGA Res. A/RES/68/104 (16 December 2013) [operative para. 5].

[22] For the summary of the statements made by 32 states that deliberated on the matter, see generally, UNGAOR, UN Doc. A/C.6/59/SR.15 (28 October 2004); UNGAOR, UN Doc. A/C.6/59/SR.16 (29 October 2004).

[23] For a compilation of the relevant decisions by the United Nations Secretary-General, see generally, UN Doc. A/62/62 and Corr.1 and Add.1 (17 April 2007); UN Doc. A/65/76 (8 December 2010); UN Doc. A/68/72 (30 April 2013).

[24] UN Doc. A/62/63/Add.1 (12 June 2007) [para. 4].

[25] UN Doc. A/68/69 and Add.1 (28 June 2013) [para. 3].

responsibility by a State other than an injured State.[26] Another concern is the character of the provisions of Articles 40 and 41 which deal with "serious breaches" of norms *jus cogens*. Hence, the Russian Federation recommended the establishment of a working group to understudy the Draft Articles even as El Salvador called for its codification.[27]

In a nutshell, state practice regarding the legal status of the Draft Articles is uncertain. The *opinio juris,* especially within the academia favours the view that States have inherent obligations to protect, prevent, prosecute and punish the NSAs' nefarious activities.[28] While these obligations prohibit States from allowing their territory to be used as a safe haven, it does not presuppose that the failure to discharge such duties creates a nexus for the imputation of liability.

As shall be seen, the jurisprudence of the judicial organs gives conditions[29] under which a State may be held responsible for the actions of the NSAs. In the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide,*[30] the ICJ reiterates that the act in question must be a conduct of a State organ. Article 8 of the Draft Articles explains that attribution is allowed when a State exercises effective control over such groups or persons.[31] What constitutes a "state organ" will be examined later. For now, State practice does not overwhelmingly presuppose that a new custom has emerged or that it is now a positive law to breach a State territory if it fails to contend with the NSAs operating from within its territory.

6.2.1 State-sponsor of the NSAs activities

In June 2017, five Arab States closed their territorial borders (land, sea and air) with Qatar for allegedly sponsoring terrorism.[32] Although Qatar argues that the measures lack "legitimate

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[26] James Crawford and Simon Olleson, 'The Continuing Debate on a UN Convention on State Responsibility' (2005) 54(4) *International and Comparative Law Quarterly* 959-972, 961.

[27] ibid., 961; UN Doc. A/65/96/Add.1 (30 September 2010) [para. 2].

[28] Robert P. Barnidge, *Non-State Actors and Terrorism* (The Hague, T. M. C. Asser Press 2008) 68-78.

[29] UN Doc. A/62/62/Add.1 (17 April 2007) 1-9.

[30] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v Serbia and Montenegro) Judgment ICJ Reports (2007) p. 43 [para. 385] [hereinafter *Genocide case*].

[31] *Articles on States Responsibility* (n 19) [Art. 8].

[32] Aubrey Allegretti, 'Qatar isolated as Gulf States cut links over terror claims' (Sky News, 5 June 2017) available at <http://news.sky.com/story/qatar-isolated-as-gulf-states-cut-links-over-terror-claims-10904788>

justification,"[33] it signals a new approach to promoting the inviolability of State territory. This measure is unprecedented in the history of the fight against terrorism. It departs from the levity with which the UN member States have treated such matters before.

The UN member States have concluded several multilateral treaties,[34] yet terrorism seems to be on the increase. Thus, the US President, Donald J. Trump describes the isolation of Qatar as a possible "beginning of the end to the horror of terrorism."[35] If Qatar is guilty of the offence, then the measures taken by the Arab States inaugurate a new custom on dealing with covert violation of State territory devoid of a threat or military intervention.

6.2.2 Resolution 1373 (2001)

The Security Council (hereinafter referred to as SC) condemned the 9/11 attacks on the United States in the strongest terms[36] and unanimously adopted Resolution 1373[37] which has been described as a cornerstone in the United Nations' anti-terrorist actions.[38] Resolution 1373 urges States to prevent and suppress the financing of terrorist acts.[39] It also calls upon

accessed 11 June 2017; 'Qatar-Gulf crisis: All the latest updates' (Aljazeera News, 25 July 2017) available at <http://www.aljazeera.com/news/2017/06/qatar-diplomatic-crisis-latest-updates-170605105550769.html> accessed 25 July 2017.

[33] The text in Arabic Language is available at <https://www.mofa.gov.qa/جميع-أخبار-الوزارة/التفاصيل/2017/06/05/قطر-تعرب-عن-اسفها-لقرار-السعودية-والامارات-والبحرين-قطع-العلاقات>, for English translation by the Aljazeera cable news network, see 'Gulf diplomatic crisis: Qatar's reaction in full' (Aljazeera News, 5 June 2017) available at <http://www.aljazeera.com/news/2017/06/gulf-diplomatic-crisis-qatar-reaction-full-170605071246160.html> accessed 11 June 2017.

[34] See generally, *International Convention for the Suppression of the Financing of Terrorism* (Approved by the General Assembly on 9 December 1999, entered into force on 10 April 2002) 2178 UNTS 197 [hereinafter *Convention on Financing of terrorism*]; *International Convention for the Suppression of Acts of Nuclear Terrorism* (Approved by the General Assembly on 13 April 2005, entered into force on 7 July 2007) 2445 UNTS 89 [hereinafter *Nuclear Terrorism*]; *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation* (Signed at Montreal on 23 September 1971, entered into force on 26 January 1973) 974 UNTS 177 [hereinafter *1971 Montreal Convention*]; *Convention on the Suppression of Unlawful Acts against the Safety of Maritime Navigation* (Signed at Rome on 10 March 1988, entered into force on 1 March 1992) 1678 UNTS 221 [hereinafter *Safety of Maritime Navigation*]; *International Convention for the Suppression of Terrorist Bombings* (Approved by the General Assembly on 15 December 1997, entered into force on 10 April 2002) 2149 UNTS 256 [hereinafter *Suppression of Terrorist Bombings*].

[35] Roberta Rampton, 'Trump takes sides in Arab rift, suggests support for isolation of Qatar' (Reuters, 7 June 2017) available at <http://www.reuters.com/article/us-gulf-qatar-idUSKBN18X0KF> accessed 11 June 2017.

[36] UNSC Res. S/RES/1368 (12 September 2001) [operative para. 1]; UNSC Res. S/RES/1267 (15 October 1999) [operative para. 1].

[37] UNSC Res. S/RES/1373 (28 September 2001) [operative paras. 1-9].

[38] See Javier Ruperez, 'The UN's fight against terrorism: five years after 9/11' available at <http://www.un.org/en/terrorism/ruperez-article.shtml> accessed 1 February 2016.

[39] UNSC Res. S/RES/1373 (28 September 2001) [operative para. 1(a)].

States to deny safe haven to individuals and terrorist groups and their accomplices.[40] Equally, it encourages States to sign up to the relevant international conventions and protocols[41] relating to terrorism.[42]

Resolution 1373 was adopted under the Chapter VII's powers and is binding on all the UN member States.[43] To monitor its implementation[44] as well as other terrorism-related instruments,[45] Resolution 1373 establishes a Counter-Terrorism Committee.[46]

However, Resolution 1373 and other terrorism-related instruments encourage member States to work together[47] to defeat terrorism and it does not authorise unilateral actions. According to Murphy, 9/11 does not qualify as an armed attack and should have been subject

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[40] ibid., [operative para. 2(c)].

[41] See generally, *Convention on Offences and Certain Other Acts Committed on Board Aircraft* (Signed at Tokyo on 14 September 1963, entered into force on 4 December 1969) 704 UNTS 220; *Convention for the Suppression of Unlawful Seizure of Aircraft* (Signed at The Hague on 16 December 1970, entered into force on 14 October 1971) 860 UNTS 105; *1971 Montreal Convention* (n 34); *Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation* (Signed at Montreal on 24 February 1988, entered into force on 9 August 1989) 1589 UNTS 474; *Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons* (Opened for signature at New York on 14 December 1973, entered into force on 20 February 1977) 1035 UNTS 167; *International Convention against the Taking of Hostages* (Signed at New York on 18 December 1979, entered into force on 3 June 1983) 1316 UNTS 205; *Convention on the Physical Protection of Nuclear Material* (Signed at New York and Vienna on 3 March 1980, entered into force on 8 February 1987) 1456 UNTS 124; *Safety of Maritime Navigation* (n 34); *Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf* (Signed at Rome on 10 March 1988, entered into force on 1 March 1992) 1678 UNTS 304; *Protocol of 2005 to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation* (Done at London on 14 October 2005, entered into force on 28 July 2010) IMO Doc. LEG/CONF.15/21; *2005 Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf* (Done at London on 14 October 2005, entered into force on 28 July 2010) available at <http://cil.nus.edu.sg/2005/2005-protocol-for-the-suppression-of-unlawful-acts-against-the-safety-of-fixed-platforms-located-on-the-continental-shelf/> accessed 1 February 2016; *Convention on the Marking of Plastic Explosives for the Purpose of Detection* (Signed at Montreal on 1 March 1991, entered into force on 21 June 1998) available at <http://www.icao.int/secretariat/legal/Administrative%20Packages/mex_en.pdf> accessed 1 February 2016; *Suppression of Terrorist Bombings* (n 34); *Convention on Financing of terrorism* (n 34); *Nuclear Terrorism* (n 34).

[42] UNSC Res. S/RES/1373 (28 September 2001) [operative para. 3(d)].

[43] United Nations, *Charter of the United Nations* (Signed at San Francisco on 26 June 1945, entered into force on 24 October 1945) 1 UNTS XVI [Art. 25] [hereinafter *The UN Charter*].

[44] The Security Council's Provisional Rules of Procedure authorises the Security Council to appoint a Commission or Committee or a Rapporteur for a special question. See UN Doc. S/96/Rev.7 [Rule 28]; see also *The UN Charter* (n 43) [Art. 30].

[45] See footnote 41 above.

[46] UNSC Res. S/RES/1373 (28 September 2001) [operative para. 6].

[47] See generally, UN Doc. A/60/825 (27 April 2006); UNGA Res. A/RES/56/1 (12 September 2001) [operative para. 4].

to the domestic criminal code[48] through any of the instruments relating to terrorism.[49] He might be correct to the extent that the first limb of Article 2(4) refers to armed physical force. Therefore, self-defence was inappropriate because of the difficulty in establishing that the hijackers (Al Qaeda) are an "organ" of the Taliban government.[50] The instruments relating to terrorism, such as the *Convention for the Suppression of Unlawful Seizure of Aircraft*[51] should have facilitated the extradition and prosecution of the suspects linked to the hijackers.

However, the international community accepted Resolution 1373 as the legal basis for the *"Operation Enduring Freedom"* because the 9/11 terrorist attacks qualified as an armed attack within the meaning established in the *Nicaragua* case.[52] Otherwise, no express right of intervention in the territory of other States was recognised before Resolution 1373 was adopted. For example, the US's air campaign in Tripoli and Benghazi in 1986[53] and Israel's bombing of the PLO's Headquarters in Tunisia in 1985[54] were condemned by the SC.

6.2.3 Resolution 1441 (2002)

The United States' justified its invasion of Iraq in 2003 on the ground that Iraq was in material breach of its international obligations.[55] The United States argued that the continuing material breach could revive the authorisation dormant in Resolution 678. But resolution

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[48] Sean D. Murphy, 'Terrorism and the Concept of Armed Attack in Article 51 of the U.N. Charter' (2002) 43(1) *Harvard International Law Journal* 41-52, 46.
[49] See the Conventions enumerated on footnote number 41 above.
[50] Murphy 'Terrorism and the concept of Armed Attack' (n 48) 46.
[51] As enumerated in footnote number 41 above.
[52] UNSC Res. S/RES/1368 (12 September 2001) [preamble para. 3]; UNGA Res. A/59/565 (2 December 2004) [para. 146] [hereinafter *A More Secure World*]; NATO, 'Statement by the North Atlantic Council' (Press Release, 12 September 2001) available at <http://www.nato.int/docu/pr/2001/p01-124e.htm> accessed 4 February 2016; *Organization of American States, Terrorist Threat to the Americas, Twenty-Fourth Meeting of Consultation of Ministers of Foreign Affair*s, OEA/Ser.F/11.24 (Washington D.C., 21 September 2001) available at <http://www.oas.org/OASpage/crisis/RC.24e.htm> accessed 4 February 2016.
[53] UNGA Res. A/RES/41/38 (20 November 1986) [operative para. 1]; Elaine Sciolino, 'Attack on Libya: The View from Capital Hill, US Defends Raid before UN Body' (New York Times, 16 April 1986) A1; Christopher Greenwood, 'International Law and the United States' Air Operation against Libya' (1987) 89(4) *West Virginia Law Review* 933-960; Edward Schumacher, 'The United States and Libya' (1986-1987) 65 *Foreign Affairs* 329-348; UNSC Res. S/RES/573 (4 October 1985) [operative para. 1] (condemns vigorously the act of armed aggression perpetrated by Israel against Tunisian territory).
[54] UNSC Res. S/RES/573 (4 October 1985) [operative para. 1].
[55] UNSC Res. S/RES/1441 (8 November 2002) [operative paras. 1 and 4]; Mahmoud Hmoud, 'The Use of Force against Iraq: Occupation and Security Council Resolution 1483' (2004) 36(3) *Cornell International Law Journal* 435-453, 436.

1441 did not expressly say so[56] although it could be argued that the context (material breach) subsisted.

The legal basis for implying resolution 678 into resolution 1441 is confusing.[57] The text of resolution 1441 indicates that the SC shall hear the matter "for assessment"[58] to decide on compliance mechanism[59] if Iraq persists in the material breach. The Member States that implied force into resolution 1441 did so in the belief that other Member States have a constructive knowledge of that.[60] Other States argue that such interpretation is unreasonable.[61]

The member States' incoherent interpretation of the legal principles is often a justificatory ground for violating other States' territory.[62] In some instances, coercive measures permitted for the protection of the civilians[63] have been applied in a way that oust a legitimate government.[64] This calls to question whether the interpretation of the SC's resolutions[65]

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[56] Michael Byers, 'Agreeing to Disagree: Security Council Resolution 1441 and Intentional Ambiguity' (2004) 10(2) *Global Governance* 165-186, 172.

[57] ibid., 173; Ruth Wedgwood, 'NATO's Campaign in Yugoslavia' (1999) 93(4) *American Journal of International Law* 828-834, 829-30; Barbara Crossette, 'Conflict in the Balkans: At the UN; Council Seeks Punishment for the Kosovo Massacre' (New York Times, 2 October 1998) available at <http://www.nytimes.com/1998/10/02/world/conflict-balkans-un-council-seeks-punishment-for-kosovo-massacre.html> accessed 14 June 2017.

[58] UNSC Res. S/RES/1441 (8 November 2002) [operative para. 4].

[59] ibid., [operative para. 12].

[60] To proof that the Security Council members had the constructive knowledge that the continued material breach would trigger the use of force, see Maria Luisa B. Bunggo, 'Legal authority for the possible use of force against Iraq' (1998) 92 *American Society of International Law Proceedings* 136-150, 141; Ruth Wedgwood, 'The Enforcement of Security Council Resolution 687: The Threat of Force against Iraq's Weapons of Mass Destruction' (1998) 92(4) *American Journal of International Law* 724-728, 727; UN Doc. S/25091 (11 January 1993) [para. 9] (the president of the Security Council warned 'Iraq of the serious consequences that will flow from such continued defiance').

[61] UNSCOR, UN Doc. S/PV.4726 (26 March 2003) (Malaysia's position at page 8, the League of Arab States' position at page 8, Algeria's position at page 10, Yemen's position at page 13 *et cetera*).

[62] Louis Henkin, 'Kosovo and the law of "Humanitarian Intervention"' (1999) 93(4) *American Journal of International Law* 824-828.

[63] UNSC Res. S/RES/1973 (17 March 2011) [operative para. 4].

[64] See 'Libya removing Gaddafi not allowed, says David Cameron' (BBC News, 21 March 2011) available at <http://www.bbc.co.uk/news/uk-politics-12802749> accessed 26 March 2016.

[65] For a discussion, see Michael C. Wood, 'The Interpretation of the Security Council Resolutions' (1998) 2(1) *Max Planck Yearbook of United Nations* 73-95, 82-86; Efthymios Papastavridis, 'Interpretation of Security Council Resolutions under Chapter VII in the Aftermath of the Iraqi Crisis' (2007) (56(1) *The International and Comparative Law Quarterly* 83-118, 90-91.

should be reserved to the SC or anybody it authorises to do so.[66] The PCIJ held that 'an authoritative interpretation of a legal rule belongs solely to the person or body who has power to modify or suppress it.'[67]

Applicable rule of interpretation of the SC Resolutions

It is unfortunate that most SC's resolutions that purport to authorise force do not explicitly use the word "force." One wonders why the SC would not adopt phrases such as "hereby authorise the use of force" in such resolutions. The imprecision in terminology is a deficit that needs to be remedied irrespective of the general rule of interpretation.[68]

Admittedly, the modern international law places emphasis on the interpretation of treaties than resolutions.[69] However, the general rule of interpretation could be extended to the SC's resolutions through legal hermeneutics.[70] One way of doing that is to upgrade the SC's resolutions to the same status with treaties.[71] For example, since the SC resolution 1441 (2002) noted that Iraq is in *material breach*[72] of its international obligations, a material breach is part and parcel of the *sedes materiae* of the law of treaties.[73] Parties to a treaty must observe their obligations in good faith and in accordance with the doctrine of the *pacta sunt servanda*.[74] The contractual nature of treaty allows the victim of a repudiatory breach to elect

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[66] Wood 1998 (n 65) 82; Sarooshi Dan, *The United Nations and the Development of Collective Security: The Delegation by the UN Security Council of Its Chapter VII Powers* (Oxford, Oxford University Press 1999) 171.

[67] *Question of Jaworzina* (Polish-Czechoslovakian Frontier) Advisory Opinion PCIJ Series B, No. 8 (1923) 37.

[68] United Nations, *Vienna Convention on the Law of Treaties* (Concluded at Vienna on 23 May 1969, entered into force on 27 January 1980) 1155 UNTS 331 [Arts. 31-33) [hereinafter *VCLT*].

[69] Papastavridis 2007 (n 65) 84.

[70] Hermeneutics is defined as the theory of the operations of understanding in their relation to the interpretation of texts. See Paul Ricceur, *Hermeneutics and the Human Sciences: Essays on Language, Action and Interpretation* (Cambridge, Cambridge University Press 1981) 43.

[71] Papastavridis 2007 (n 65) 87.

[72] Article 60(3) of the VCLT defines material breach as 'a repudiation of the treaty not sanctioned by the present Convention; or *(b)* The violation of a provision essential to the accomplishment of the object or purpose of the treaty. See *VCLT* (n 68) [Arts. 60(3)].

[73] Papastavridis 2007 (n 65) 87.

[74] The principles of good faith and *pacta sunt servanda* are universally recognized. See *VCLT* (n 68) [preamble para. 4].

to suspend or terminate the operation of the contract.[75] This could apply to the SC's resolutions that bind *erga omnes* in virtue of Article 25 of the Charter.[76]

Having said that, a careful reading of most SC's resolutions shows that they are not identical to treaties.[77] The wordings of the SC's resolutions are general and the character of their obligations is abstract.[78] Take the SC resolution 1373 (2001) as an example, it does not specify 'a single country, society or a group of people'[79] that will enforce it. It merely relies on the goodwill of able and willing member States. To that extent, it is general, speculative and abstract.

Unlike treaties, the SC's resolutions do not evolve out of States' consent such that the principles of good faith and *pacta suct servanda* would not apply. Without prejudice to the presumed consent of the UN member States in virtue of Article 25 of the UN Charter, States obligation to a treaty regime is subject to the principle of *pacta tertiis nec nocent nec prosunt*.[80] The obligations which the UN Charter impose upon States are mandatory while the treaty obligations are voluntary or contractual.

Therefore, the correct interpretation of the SC's resolutions permitting the violation of a State territory might consider applying a three-tier approach undertaken by the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (hereinafter referred to as

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[75] Mohammed M. Gomaa, *Suspension or Termination of Treaties on Grounds of Breach* (The Hague/Boston/London, Martinus Nijhoff Publishers 1996) 5.

[76] Papastavridis 2007 (n 65) 87-88.

[77] See *Slobodan Milosevic Case No. IT-99-37-PT* (Decision on Preliminary Motions) Trial Chamber III, ICTY (8 November 2001) [para. 47] (the Chamber argues that 'the statute of the International Tribunal is interpreted as a treaty'). The SC resolutions can be broadly classified into three categories: (1) those that make recommendations to the United Nations General Assembly to establish a subsidiary organ in accordance with Article 29 of the UN Charter, (2) those that make recommendations in accordance with Article 40 of the UN Charter to prevent an aggravation of situation that poses a threat to international peace and security, and (3) those that make decisions in accordance with Articles 41 to 42 of the UN Charter. See Papastavridis 2007 (n 65) 87; Sydney D. Bailey and Sam Daws, *The Procedure of the United Nations Security Council* (Third Edition, Oxford, Clarendon Press 1998) 18-20.

[78] Stefan Talmon, 'The Security Council as World Legislature' (2005) 99(1) *American Journal of International Law* 175-193, 176-77.

[79] Maggie Farley, 'U.N. Measure Requires Every Nation to Take Steps Against Terrorism' (Loss Angeles Times, 28 September 2001) available at <http://articles.latimes.com/2001/sep/29/news/mn-51270> accessed 30 March 2016.

[80] See *VCLT* (n 68) [Art. 34]; G. G. Fitzmaurice, 'The Law and Procedure of the International Court of Justice: Treaty Interpretation and Certain Other Treaty Points' (1951) 28 *British Year Book of International Law* 1-28, 3.

ICTY) in the *Tadic case*.[81] The Appeals Chamber applied the three-tier approach while interpreting Articles 2 and 3 of the 1949 Geneva Conventions.[82]

Firstly, the Chamber examined the provisions of the said Articles and found that their literal interpretation will not bring out the drafters' intended meaning and scope. Secondly, the Chamber applied a teleological interpretation by examining the purpose for which the SC resolution 827 (1993) established the ICTY. It observed that the SC intended that the ICTY should have jurisdiction over the subject-matter both in internal and international armed conflicts.[83] Thirdly, the Chamber applied logical and systematic interpretation of the Articles in question to arrive at the conclusion that it had jurisdiction over the acts alleged in indictment, regardless of whether they occurred within an internal or in an international armed conflict.[84]

Rarely do the member States apply this methodology when they analyse the SC's resolutions authorising the breach of a State's territorial sovereignty.[85] Instead, they adopt any interpretation that best suits their national interests. While the United States and its allies implied the "principle of maximum effectiveness"[86] into the SC resolution 1441 (2002), other member States contested that. These conflicting views leave inconclusive the debate as to whether the meaning of such resolutions should reside in the text (objective – textualist) or in the reader (subjective - teleologist). The middle course between these schools of thought is the interpretive legal theory.[87] It locates the meaning neither in the text nor in the reader's mind but in the interpretive community, which in this case is either the SC or its deputed organ.[88]

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[81] *The Prosecutor v Dusko Tadic a/k/a "Dule"* (Case No. IT 94-1-AR72) (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) ICTY (2 October 1995) [paras. 71-95] (hereinafter *Tadic Appeal on Jurisdiction*].

[82] For all Geneva Conventions and their Commentaries, visit <https://www.icrc.org/en/war-and-law/treaties-customary-law/geneva-conventions> last visited 17 June 2017.

[83] *Tadic Appeal on Jurisdiction* (n 81) [para. 78].

[84] ibid., [para. 137].

[85] For the relevant steps to be taken when interpreting the SC resolution, see Wood 1998 (n 65) 89-95.

[86] Fitzmaurice 1951 (n 80) 8.

[87] According to Ronald Dworkin, '[i]nterpretation is an enterprise, a public institution.' See Ronald Dworkin, 'Law as Interpretation' (1982) 60(3) *Texas Law Review* 527-550, 535; Stanley Fish, 'Interpretation and the Pluralist Vision' (1982) 60(3) *Texas Law Review* 495-506, 498; Ian Johnstone, 'Security Council Deliberations: The Power of the Better Argument' (2003) 14(3) *European Journal of International Law* 437-480, 450.

[88] Ian Johnstone, 'Treaty Interpretation: The Authority of Interpretive Communities' (1991) 12(2) *Michigan*

Nevertheless, it is disputed whether the members of the SC share one "world of meaning" or "values."[89] Perhaps not, in that not all the SC resolutions are adopted unanimously. Even the resolutions adopted unanimously do not necessarily represent the views of every member of the SC or all the UN member States. The reasons being that: (1) the members of the SC are not adequate representation of all the UN member States, or (2) the SC procedural voting system that accords "the right to veto"[90] to the five permanent members (hereinafter referred to as P5) is undemocratic and needs to be reformed.[91]

6.2.4 Self-defence against non-State actors and the inviolability of a State Territory

The relevant section of Article 51 of the UN Charter states:

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations ….[92]

The precise scope of this right is contested.[93] Recently, the debate is whether or not it extends to an imminent and actual armed attack by the NSAs.[94] Brownlie argues that it does not without an express consent of the host State.[95] Gray and Dinstein think otherwise because of the phrase, "inherent right" in the opening statement of Article 51, which they say is an

Journal of International Law 371-419, 375.

[89] Thomas Risse, '"Let's Argue!'': Communicative Action in World Politics' (2000) 54(1) *International Organisation* 1-39, 10-11.

[90] *The UN Charter* (n 43) [Art. 27].

[91] The popular opinion is that an undemocratic body such as the Security Council is unsuitable for international lawmaking. See, Talmon 2005 (n 78) 179; UNGAOR, UN Doc. A/56/PV.36 (1 November 2001) (Statement by Mr. Gauto Vielman, the representative of Paraguay at page 2).

[92] *The UN Charter* (n 43) [Art. 51].

[93] Malcolm N. Shaw, *International Law* (Seventh Edition, United Kingdom, Cambridge University Press 2014) 821; Christine Gray, *International Law and the Use of Force* (Third Edition, New York, Oxford University Press 2008) 114; Peter Malanczuk, *Akehurst's Modern Introduction to International Law* (Seventh Revised Edition, London and New York, Routledge 1997) 311.

[94] Daniel Bethlehem, 'Self-Defense Against an Imminent or Actual Armed Attack by Nonstate Actors' (2012) 106 *American Journal of International Law* 770-777, 769.

[95] Ian Brownlie, *International Law and the Use of Force by States* (New York, Oxford University Press 1963) 112-113; *Oppenheim 1996* (n 3) 417.

indication that it is a customary law.[96] Thus, the ICJ's *obiter* that the right to self-defence is fundamental[97] has been interpreted by Bowett to include the NSAs.[98]

Apparently, the pressure is building towards a flexible construction of Article 51 to include the use of force against the NSAs irrespective of whether or not the host state gives its consent.[99] Such a move is a direct consequence of the 9/11 terrorist attacks on the United States.[100] Prior to that incident, terror orchestrated by the NSAs against a State is governed by national criminal code.[101] Although a teleological interpretation of Article 51 could justify it, it does not furnish the legal basis for violating the territory of the host state.[102] Hence, state practice,[103] *opinio juris*[104] and the jurisprudence of the ICJ[105] do not favour the broadening of Article 51.

6.2.4.1a The NSAs – *Jus Ad Bellum* and *Jus in bello*

The *jus ad bellum* and *jus in bello* are the two limbs of the laws of war regulating the lawful violation of a State territory under the modern international law. The *jus ad bellum* provides

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[96] Gray 2008 (n 93) 117; *Oppenheim 1996* (n 3) 417; Dinstein Yoram, *War Aggression and Self-defence* (Fifth Edition, The United Kingdom, Cambridge University Press 2011) 191.

[97] *Legality of the Threat or Use of Nuclear Weapons,* Advisory Opinion ICJ Reports (1996) p. 226, 263.

[98] Derek W. Bowett, *Self-defence in International Law* (Manchester, Manchester University Press 1958) 185.

[99] Christian J. Tams, 'The Use of Force against Terrorism' (2009) 20(2) *European Journal of International Law* 359-397, 367; Olivier Corten, *The Law Against War: The Prohibition on the Use of Force in Contemporary International Law* (Oxford and Portland, Oregon, Hart Publishing 2010) 5.

[100] For an account, see Sean D. Murphy, 'Contemporary Practice of the United States Relating to International Law' (2002) 96(1) *American Journal of International Law* 237-263.

[101] See generally, Antonio Cassese, 'Terrorism is also Disrupting some Crucial Legal Categories of International Law' (2001) 12(5) *European Journal of International Law* 993-1001; Gareth D. Williams, 'Piercing the Shield of Sovereignty: An Assessment of the Legal Status of the Unwilling or Unable Test' (2013) 36(2) *University of New South Wales Law Journal* 619-641, 622. For a traditional view, see Oscar Schachter, 'The Lawful Use of Force by a State against Terrorists in another Country' (1989) 19 *Israel Yearbook on Human Rights* 209-232, 216.

[102] Constantine Antonopoulos, 'Force by Armed Groups as Armed Attack and the broadening of Self-Defence' (2008) 55(2) *Netherlands International Law Review* 159-180, 168.

[103] Gray 2008 (n 93) 136-140; UNSC Res. S/RES/573 (4 October 1985) [operative paras. 1 and 3]; UNSC Res. S/RES/527 (15 December 1982) [operative para. 1]; UNSC Res. S/RES/546 (6 January 1984) [operative para. 1]; UNGA Res. A/RES/41/38 (20 November 1986) [operative para. 1].

[104] Patrick Thornberry, 'International Law and its Discontents: The U.S. raid on Libya' (1986) 8(1) *Liverpool Law Review* 53-64, 57.

[105] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* Advisory Opinion ICJ Reports (2004) p. 136 [para. 139] [hereinafter *ICJ Opinion on the Palestinian Wall*].

the grounds that justify the breach of a State territory, while *jus in bello* moderates how such a breach may proceed within the ambit of the law.[106]

Traditionally, the *jus ad bellum* allows a State to wage war against the offending State to seek redress for an injury suffered.[107] In its Roman Law origin, such a war is considered "just." The word "just" is not tied to morality, albeit the fact that *fetiales* (priests in Ancient Rome) must legitimise wars implies that just wars are morally justifiable.[108] A war is "*justum*" (legally correct) if it complies with the rules of the *fetial* proceedings,[109] and "*pium*" if sanctioned by a religious authority.[110]

Consequently, the two limbs of the current regime on *jus ad bellum* are self-defence and authorisation by the SC. Therefore, the legality of the US's invasion of Afghanistan in the late 2001 would have been a matter for concern if it were not expressly authorised by the SC. But its justification could be disputed if the 9/11 terrorist attacks were not attributable to Afghanistan or that Afghanistan had objected to the said invasion.

Hugo Grotius' work, *De Jure Belli ac Pacis* deals with the concept of law and war in general as well as the justness in the conduct of war.[111] One of his legacies is his ability to evolve the law of nations from the law of nature,[112] particularly his argument that public war is a conduct of

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[106] Carsten Stahn, '*Jus ad bellum*', '*jus in bello*' . . . '*jus post bellum*'? – Rethinking the Conception of the Law of Armed Force' (2007) 17(5) European Journal of International Law 921-943, 926; Steven R. Ratner, '*Jus Ad Bellum* and *Jus in Bello* after September 11' (2002) 96(4) *American Journal of International Law* 905-921, 905-906.

[107] John F. Coverdale, 'An Introduction to the Just War Tradition' (2004) 16(2) *Pace International Law Review* 221-277, 229; Jean Bethke Elshtain, 'The Just War Tradition and Natural Law' (2005) 28(3) *Fordham International Law Journal* 742-755, 750.

[108] Coleman Phillipson, *The International Law and Custom of Ancient Greece and Rome* (Volume I, London Macmillan and Co., Limited 1911) 327; Arthur Nussbaum, 'Just War – A Legal Concept' (1943) 42(3) *Michigan Law Review* 453-479.

[109] Note that the member states opinion is divided on whether compliance with the fetial proceedings was enough justification for waging war. Minority opinion seems to suggest that there must be a primordial justifiable cause while the majority opinion maintains that the fetial proceedings confer the necessary legitimacy. See Joachim von Elbe, 'The Evolution of the Concept of the Just War in International Law' (1939) 33(4) *American Journal of International Law* 665-688, 666; Robert Phillimore, *Commentaries upon International Law* (Volume III, London Butterworths 1879) 79; Coverdale (n 107) 229.

[110] Elbe (n 109) 667; Phillipson 1911 (n 108) 180.

[111] See generally, Hugo Grotius, *The Rights of War and Peace: Including the Law of Nature and of Nations* (translated by A. C. Campbell with an Introduction by David J. Hill) (Washington and London, M. Walter Dunne 1901).

[112] ibid., 36.

a sovereign power.[113] Strictly, the NSAs are not "subject of international law" and States cannot lawfully engage them in a public war without certification from the host State.

As shall be seen, the jurisprudence of the ICJ has not departed from this ideal. But the modern "just war theorists" like Walzer and Coverdale endorse a unilateral military action if it were aimed at protecting a State's national interest or for humanitarian purposes.[114] This sort of consideration is based on the assumption of the inevitability of war when the interests of a State are compromised.[115] Thus, the "justness" of the right to self-defence does not solely depend on the doctrine of *jus ad bellum* but on other variables.[116]

This development could short-circuit the maintenance of international peace and security.[117] As Corten rightly observed, this is a worrisome adaptation of the UN Charter to the changing times[118] which may not augur well for the international peace and security.

6.2.4.1b Nicaragua's *jus ad bellum* threshold

The jurisprudence of the ICJ maintains that a State's territory could be breached either for reasons of self-defence or when authorised by the Security Council. One of the questions before the Court in the *Nicaragua v USA* case[119] was whether the United States had breached its customary international law obligation not to intervene in the affairs of another State when it trained, armed, equipped and financed the contra forces?[120]

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[113] ibid., 55.
[114] Coverdale (n 107) 224; Nenad Miscevic, 'The Dilemmas of Just War and the Institutional Pacifism' (2010) 13 *Revus: Journal for Constitutional Theory and Philosophy of Law* 69-88, 70.
[115] Jackson H. Ralston, 'Some Supposed Just Causes of War' (1910) 1910-1912(1) *World Peace Foundation Pamphlet Series* 3-10, 7.
[116] Miscevic (n 114) 76-8.
[117] For ways of avoiding war, see J. L. Brierly, *The Law of Nations: An Introduction to the International Law of Peace* (Sixth Edition, Oxford, Clarendon Press 1963) 398.
[118] Corten 2010 (n 99) 15.
[119] See generally, *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v United States of America) Judgment (Merits) ICJ Reports (1986) p. 14 [hereinafter *Nicaragua case*].
[120] ibid., [para. 15].

The victim of an armed attack threshold

For self-defence to be available, the ICJ has established that a State must prove it is a victim of an armed attack from the State in question.[121] The State of Nicaragua pleaded the Court to find that the United States violated its territory by sponsoring the *contras*.[122] The US justified its financial support to the *contras* as a measure to prevent unelected Sandinista junta from undermining democracy in Nicaragua.[123] It further argued that it was meant to stop Nicaragua from supplying arms to El Salvadoran guerrillas.[124] In other words, to prevent Nicaragua from exporting terrorism abroad.

The ICJ rejected the US's arguments on two grounds. First, the right to self-defence is exercised by a State that is a victim of an armed attack which the US is not.[125] Second, the US cannot rely on the right to collective self-defence since El Salvador did not substantiate it had suffered an armed attack perpetrated by Nicaragua.[126] However, the ICJ clarified that an armed attack includes

> not merely action by regular armed forces across an international border, but also the sending by or on behalf of a state of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to (inter alia) an actual armed attack conducted by regular forces, or its substantial involvement therein.[127]

This judgment provides the definition of an armed attack which was lacking in the UN Charter. It also extends the right to self-defence to the actions of the NSAs acting as the agent of the State. However, it failed to address the procedural and substantive issues regarding when a State may rely on Article 51 of the UN Charter.

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[121] ibid., [para. 195].

[122] ibid., [para. 20].

[123] *Nicaragua case* (n 119) Counter-memorial of the United States, Pleadings Vol II, 17 August 1984 (Annex 44, Congressional Record, 2 August 1984) 280; *Nicaragua case* (n 119) [para. 126].

[124]*Nicaragua case* (n 119) Counter-memorial of the United States, Pleadings Vol II, 17 August 1984 (Annex 53, Press Conference with President Duarte (San Salvador, 7 July 1984) 298.

[125] *Nicaragua case* (n 119) [para. 195]; *Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v Rwanda) Merits, Judgment ICJ Reports (2005) p.168, 223-224 [hereinafter *DRC v Uganda*]; *Case Concerning Oil Platforms* (Iran v United States of America) Judgment ICJ Reports (2003) p. 161, 189 [hereinafter *Oil Platforms case*]; *Eritrea/Ethiopia Claims Commission Partial Award – Jus Ad Bellum – Ethiopia's Claims 1-8* (2005) 26 RIAA 457-469 [para. 11].

[126] *Nicaragua case* (n 119) [para. 211].

[127] ibid., [para. 195].

Procedurally, there is no mechanism for establishing when an armed attack has occurred.[128] This has been a thorny issue among the UN member States[129] and has resulted in ambivalence in state practice that undermines Article 2(4).[130] For example, the Swedish Government faulted the United States' meddling in the 1958 crisis in Lebanon on the basis that there was no armed attack, since the United Nations has taken seized of the matter.[131] A State seeking to rely on the right to self-defence must report the interim measures it has undertaken to the SC empowered to overrule such measures through its subsequent decision.

Substantively, the definition of an armed attack as provided by the ICJ in the *Nicaragua* case does not accommodate direct supports given to the NSAs. To establish that an armed attack has occurred, there must be a cross-border sending of armed bands capable of carrying out an armed attack to a degree of armed forces.[132] Arguably, this threshold[133] tacitly supports *de minimis* incursions, thereby diluting the efficacy of States' obligation to respect the inviolability of State territory.[134] It does not take into account that the "intent" to support the NSAs undermines the principle of the inviolability of State territory[135] even when such attacks accumulate over the years.[136]

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[128] Thomas M. Franck, 'Who Killed Article 2(4) or: Changing Norms Governing the Use of Force by States' (1970) 64(4) *American Journal of International Law* 809-837, 816.

[129] Judge Addulqawi A. Yusuf, 'The Notion of 'Armed Attack' in the Nicaragua Judgment and Its Influence on Subsequent Case Law' (2012) 25(2) *Leiden Journal of International Law* 461-470, 462.

[130] Franck 1970 (n 128) 816.

[131] UNSCOR, UN Doc. S/PV.830 (16 July 1958) [paras. 44-49]; see also 'Letter dated 22 May 1958 from the Representative of Lebanon addressed to the President of the Security Council,' UN Doc. S/4007 (23 May 1958) 1; UNSC Res. S/RES/128 (11 June 1958) [operative para. 1].

[132] *Nicaragua case* (n 119) [para. 195].

[133] ibid., [para. 191]; *Oil Platforms case* (n 125) [para. 191].

[134] Martin A. Harry, 'The Right of Self-Defense and the Use of Armed Force against States Aiding Insurgency' (1986-1987) 11(4) *Southern Illinois University Law Journal* 1289-1304, 1302-1303.

[135] *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts* (Protocol I) (Concluded at Geneva on 8 June 1977, entered into force on 7 December 1978) 1125 UNTS 3 [Art. 51(4)]; *Protocol [II] on Prohibitions or Restrictions on the Use of Mines, Booby Traps and Other Devices as Amended on 3 May 1996 (Protocol II as Amended on 3 May 1996) Annexed to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be excessively injurious or to have indiscriminate effects* (Done at Geneva on 3 May 1996, entered into force on 3 December 1998) 2048 UNTS 93 [Art. 3(8)]; *Corfu Channel* (United Kingdom v Albania) (Merits) Judgment ICJ Reports (1949) p. 4, 22 [hereinafter *Corfu Channel case*]; *Nicaragua case* (n 119) [para. 215) (the Court warns against indiscriminate laying of mines).

[136] The accumulation theory could be relevant in evaluating the proportionality of the countermeasures taken by the affected state. See Michael Wood *et al.*, *Report on aggression and the Use of Force* (International Law Association, Committee on the Use of Force) 4 available at <http://www.ila-

Furthermore, state practice allows self-defence for mere frontier incidents.[137] Turkey shot down the Russian warplane for violating its air space for 17 seconds.[138] Turkey cannot justify its action under the authority established in *Nicaragua* because an armed attack has not occurred.[139] Yet both the United States and NATO argued that Turkey has a right to defend its airspace.[140] This conforms with the separate opinion of Judge Simma in the *Oil Platforms* case.[141]

Therefore, the armed attack threshold established in Nicaragua may have been informed by the narrow construction of Article 2(4). It may have been intended to prevent inter-state war at the slightest provocation. However, it has inadvertently encouraged "mere frontier incidents" through direct and indirect material and financial support of the NSAs. Although the ICJ held that such assistance could breach the territory of the affected State,[142] it rejected the statement of the US that it acted on the ground of collective self-defence at the request of El Salvador.[143] The unnecessary distinction between the "grave" and "lesser" form of the use of force makes the latter more attractive.

Invariably, the "armed attack threshold" departs from the customary law that permits States that suffer material breach to redress the wrong through the right to self-defence.[144] Besides, the ICJ refrained from adjudicating whether the United States acted under military necessity or to evaluate whether collective self-defence is an inherent right of States.[145]

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hq.org/en/committees/index.cfm/cid/1036> accessed 6 December 2015 [hereinafter *ILA Report on the use of force*].

[137] ibid., 4.

[138] See 'Turkey's downing of Russian warplane – what we know' (BBC News, 1 December 2015) available at <http://www.bbc.co.uk/news/world-middle-east-34912581> accessed 28 May 2016.

[139] *Nicaragua case* (n 119) [paras. 194].

[140] Barack Obama, 'The President's News Conference with President Francois Hollande of France' (24 November 2015) available at <http://www.presidency.ucsb.edu/ws/index.php?pid=111263&st=&st1=> accessed 15 August 2017; North Atlantic Treaty Organisation, 'Statement by the NATO Secretary General after the extraordinary NAC meeting' (24 November 2015) available at <http://www.nato.int/cps/en/natohq/news_125052.htm> accessed 15 August 2017.

[141] *Oil Platforms case* (n 125) [para. 12] (Separate Opinion of Judge Simma).

[142] *Nicaragua case* (n 119) [paras. 195, 230].

[143] ibid., [para. 48].

[144] Harry (n 134) 1302-1303; Dinstein 2011 (n 96) 209; Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Oxford, Clarendon Press 1994) 250.

[145] *Nicaragua case* (n 119) [para. 96] (Dissenting Opinion of Judge Oda).

Judge Jennings questions why the court assumes jurisdiction of the dispute on the basis of the customary international law.[146] But having accepted jurisdiction, the court should have adjudicated whether States that support the NSAs in other States could by so doing breach the territory of those States. Article 2(4) appears to have been violated if on the fact, the US or Nicaragua had supported the NSAs fighting legitimate governments in Nicaragua or El Salvador respectively.

Again, the ICJ in the *Oil Platforms* case[147] examined whether a single attack constitutes an armed attack for the purposes of self-defence[148] or whether there must be an accumulation of events. It held, and rightly too, that other factors should be considered such as whether there is a specific intent to commit an international tort.[149] It follows that what might appear mere frontier incidents could, in fact, meet the gravity threshold if the tortfeasor had malicious intent.

Accordingly, Higgins argues that the “gravity threshold” undermines the right to self-defence[150] and Judge Jennings advocates for a liberal interpretation of an armed attack to include a substantial assistance given to the NSAs.[151] A question might be asked, what constitutes a substantial assistance? The failure to respect the inviolability of State territory leaves States’ territory vulnerable to violation by opportunist States. Syria presents a true picture of how recovery from a civil war might be difficult when States play covert roles.[152]

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[146] ibid., 531 (Dissenting Opinion of Judge Sir Robert Jennings).

[147] *Oil Platforms case* (n 125) [para. 64]; *Nicaragua case* (n 119) [para. 231]; *DRC v Uganda* (n 125) [para. 146].

[148] *Oil Platforms case* (n 125) (written Proceedings, Iran *Reply and defence to counter-claim* 10 March 1999) [para. 7.32]; ibid., (US *Rejoinder* 23 March 2001) [paras. 5.16, 5.19].

[149] *Oil Platforms case* (n 125) [para. 64].

[150] Higgins 1994 (n 144) 250-251; Judge Fitzmaurice argues that such a differentiation is uncalled for. See G. G. Fitzmaurice, ‘The Definition of Aggression’ (1952) 1(1) *International and Comparative Law Quarterly* 137-144, 139. For an argument on small-scale incursions, see Corten 2010 (n 99) 403.

[151] *Nicaragua case* (n 119) 543-44 (Dissenting Opinion of Judge Sir Robert Jennings); Shaw 2014 (n 93) 823.

[152] Judge Jennings’ position is as follows: ‘the United Nations employment of force, which was intended to fill that gap, is absent.’ See *Nicaragua case* (n 119) 544 (Dissenting Opinion of Judge Sir Robert Jennings).

6.2.4.1c The addressees of the right to self-defence

The ICJ's judgment in the *Nicaragua* case limits the beneficiary of the right to self-defence to States for an armed attack from another State or its agents.[153] But what constitutes a State's agent is uncertain. Stahn's suggestion that the right to self-defence could apply to the NSAs[154] is disputed.[155] In fact, some robust suggestions[156] on how to adapt the right to self-defence to the actions of the NSAs have encountered stiff oppositions.[157] Insofar as self-defence is an exception to the *jus cogens* character of Article 2(4), Article 51 should be interpreted strictly.[158] The provision of Article 51 is ill-equipped to deal with the conduct of the NSAs[159] since a victim State can only use force if authorised by the SC or with the consent of the host State.

6.3 The legal basis for applying Self-defence to the NSAs

There are two conditions under which the right to self-defence could be applied against the NSAs without the consent of the host State. Firstly, if authorised by the SC, and secondly, when the wrongful act is attributed to the State. We shall take each in turn.

6.3.1 Authorisation by the Security Council

The authorisation by the SC is the strongest basis for violating the territory of another State. To be lawful, the SC shall, in accordance with Article 39 of the UN Charter, 'determine the

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[153] *Nicaragua case* (n 119) [paras. 195, 199, 232-236]; Albrecht Randelzhofer, 'Article 51' in Bruno Simma *et al.,* (eds), *The Charter of the United Nations: A Commentary* (Second Edition, Volume 1, New York, Oxford University Press 2002) 792.

[154] Carsten Stahn, 'Terrorist Acts as Armed Attack: The Right to Self-Defense, Article 51(1/2) of the UN Charter, and International Terrorism' (2003) 27(2) *Fletcher Forum of World Affairs* 35-54, 36; cf *ICJ Opinion on the Palestinian Wall* (n 105) [para. 139].

[155] *ICJ Opinion on the Palestinian Wall* (n 105) [paras. 138-140].

[156] Elizabeth Wilmshurst, 'Principles of International Law on the Use of Force by States in Self-Defence' (2006) 55(4) *International and Comparative Law Quarterly* 963-972; Bethlehem 2012 (n 94) 769; Nico Schrijver & Larissa van den Herik, 'Leiden Policy Recommendations on Counter-terrorism and International Law' (2010) 57(3) *Netherlands International Law Review* 531-550.

[157] Mary Ellen O'Connell, 'Dangerous Departures' (2013) 107(2) *The American Journal of International Law* 380-386, 381; Gabor Rona and Raha Wala, 'No Thank You to a Radical Rewrite of the Jus ad Bellum' (2013) 107(2) *American Journal of International Law* 386-390.

[158] Corten 2010 (n 99) 402; O'Connell 2013 (n 157) 381; Mary Ellen O'Connell, 'The Choice of Law Against Terrorism' (2010) 4(2) *Journal of National Security Law & Policy* 343-368, 359; *Oil Platforms case* (n 125) [paras. 61–64]; *DRC v Uganda* (n 125) [paras. 146, 301]; *Genocide case* (n 30) [para. 391].

[159] *A More Secure World* (n 52) [para. 18].

existence of any threat to the peace, breach of the peace or act of aggression.'[160] Upon determination, the Council could make recommendations or binding decisions upon all the UN member States.[161] In the *Namibia Advisory Opinion*,[162] the ICJ held that 'the language of a resolution of the Security Council should be carefully analysed before a conclusion can be made as to its binding effect.'

6.3.1.1 Un-systematised formula of authorisation

Article 42 of the UN Charter empowers the SC to use "force" to maintain or restore international peace and security when non-forcible measures prove inadequate.[163] Yet, the formulae for the draft of the SC's resolutions that allow States to intervene in the internal affairs of other States are not the same. Some of the Resolutions that explicitly use the word "force"[164] do not comply with the provision of Article 39 while others do not reference Chapter VII's powers.[165] This inconsistency raises the question of clarity regarding what has been authorised. Sometimes, the ambiguity is intentional and is meant to secure the imprimatur of the principal actors.[166] Because it is likely that any resolution that fails to satisfy the interests of, at least, all the P5 will be vetoed.[167]

The SC is presumed to have permitted the violation of a State territory whenever its resolution states that the SC is 'acting under Chapter VII of the Charter of the United Nations.'[168] The

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[160] *The UN Charter* (n 43) [Art. 39].

[161] ibid., [Art. 25].

[162] See generally, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970),* Advisory Opinion ICJ Reports (1971) p. 16 [para. 114] [hereinafter *Namibia Advisory Opinion*].

[163] *The UN Charter* (n 43) [Arts. 41 and 42]; August Reinisch, 'Article 42' in Simma *et al.,* (eds), (n 153) 753.

[164] UNSC Res. S/RES/169 (24 November 1961) [operative para. 4].

[165] See 'The report of the sub-committee on the Spanish question appointed by the Security Council on 29 April 1946,' UN Doc. S/75 (1 June 1946) [para. 20].

[166] Ian Johnstone, *The Power of Deliberation: International law, Politics and Organizations* (New York, Oxford University Press 2011) 127; for further analysis, see Byers (n 56) 173-75.

[167] Corten 2010 (n 99) 321. The total number of draft resolutions vetoed by one or more of the permanent members of the Security Council is about 267 between 1946 and 2017. See Foreign and Commonwealth Office, 'Vetoed draft resolutions in the United Nations Security Council' available at <https://www.gov.uk/government/publications/vetoed-draft-resolutions-in-the-un-security-council-1946-2015> accessed 17 June 2017; 'Security Council – Veto list' available at <http://research.un.org/en/docs/sc/quick> accessed 17 June 2017.

[168] See the following Security Council Resolutions: S/RES/794 (3 December 1992) [operative para. 16]; S/RES/816 (31 March 1993) [operative para. 4]; S/RES/940 (31 July 1994) [operative para. 4]; S/RES/1264 (15 September 1999) [operative para. 3]; S/RES/1973 (17 March 2011) [operative para. 4].

same applies when a SC's resolution '… authorises Member States … to take all necessary measures….'[169] In some cases, the SC 'decides,'[170] 'recommends'[171] or 'calls upon'[172] States to take military measures to address a threat to international peace and security. As shall be seen, the inconsistencies in the drafting of the SC's Resolutions create loopholes that make the violation of State territory very likely.

The SC unanimously adopted Resolution 2249 on 20 November 2015[173] and determined pursuant to Article 39 that ISIL 'constitutes a global and un-precedented threat to international peace and security.'[174] This is a precondition for the SC to exercise its Chapter VII's powers.[175] The Council, therefore '[c]alls upon all the Member States that have the capacity to do so to take all necessary measures, … on the territory under the control of ISIL ….'[176] Though richly worded, this resolution does not provide a firm legal basis for the use of force against ISIL in Syria for the reasons to be addressed below.[177]

6.3.1.1a Acting under Chapter VII of the Charter of the United Nations

The *chapeau*, "acting under Chapter VII…" which expresses the SC's intent to authorise force is lacking from resolution 2249 (2015). Most of the SC's Resolutions authorising the breach of States' territory contain the *chapeau*. In some resolutions, the *chapeau* covers all the

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[169] UNSC Res. S/RES/816 (31 March 1993) [operative para. 4]; UNSC Res. S/RES/940 (31 July 1994) [operative para. 4].
[170] UNSC Res. S/RES/1373 (28 September 2001) [operative para. 1].
[171] UNSC Res. S/RES/83 (27 June 1950) [preamble para. 7].
[172] UNSC Res. S/RES/82 (25 June 1950) [operative para. 3]; S/RES/221 (9 April 1966) [operative para. 5].
[173] See generally, UNSC Res. S/RES/2249 (20 November 2015).
[174] ibid., [preamble para. 5].
[175] The Security Council would be acting *ultra vires* if it were to authorise the use of force against a state in the absence of any action that poses a threat to international peace and security. Regarding the UNSC Res. S/RES/1422 (12 July 2002), see Canada's argument at page 3 in UNSCOR, UN Doc. S/PV.4568 (10 July 2002); and with regard to the UNSC Res. S/RES/1487 (12 June 2003), see the views expressed by Canada, Liechtenstein, Trinidad and Tobago on pages 5, 7 and 15 respectively in UNSCOR, UN Doc. S/PV.4772 (12 June 2003); see also UNSCOR, UN Doc. S/PV.4568 (Resumption 1) (10 July 2002) (a view expressed by Samoa and Germany on pages 7 and 9 respectively).
[176] UNSC Res. S/RES/2249 (20 November 2015) [operative para. 5] (emphasis added).
[177] Dapo Akande and Marko Milanovic, 'The constructive ambiguity of the Security Council's ISIS Resolution' (EJIL *Talk!* 21 November 2015) available at <http://www.ejiltalk.org/the-constructive-ambiguity-of-the-security-councils-isis-resolution/> accessed 29 March 2016.

operative paragraphs,[178] while in others it covers one or a few operative paragraphs.[179] In some resolutions, the *chapeau* appears in the preambular paragraph[180] while in others it relates to specific articles of the Chapter VII powers.[181]

It does not mean that all the paragraphs covered by the *chapeau* are automatically binding.[182] Equally, it does not mean that all the paragraphs not immediately preceded by the *chapeau* are non-binding. However, Akande and Milanovic argue that the textual analysis of resolution 2249 (2015) indicate that it does not authorise the member States to intervene in Syria and in Iraq.[183]

Firstly, it omitted the *chapeau*, and secondly, its' operative paragraph purporting to authorise force uses a weak word – "calls upon" instead of "decides."[184] The omission of these two key factors undermines its normative value. However, Erika de Wet is of the opinion that skipping the *chapeau* is not fatal to the normative value of any resolution.[185] The SC resolution 54 (1948)[186] ordered cessation of hostilities without mentioning the *chapeau* as the source of the order. Similarly, resolution 83 (1950)[187] recommended that the member States should assist South Korea to repel the armed attack from North Korea without reference to the *chapeau*.

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[178] See generally, UNSC Res. S/RES/1373 (28 September 2001).

[179] UNSC Res. S/RES/713 (25 September 1991) [operative para. 6]. Johansson argues that paragraph 6 is the only paragraph that is covered by the *chapeau.* See Patrik Johansson, 'The Humdrum use of ultimate Authority: Defining and Analysing Chapter VII Resolutions' (2009) 78(3) *Nordic Journal of International Law* 309-342, 319 (particularly footnote number 40).

[180] UNSC Res. S/RES/687 (8 April 1991) [preamble para. 26].

[181] For instance, the Security Council Resolution 232 (16 December 1966) states: *'[a]cting* in accordance with Article 39 and 41 of the United Nations Charter … *Decides* that all States Members of the United Nations shall ….' [preamble para. 4, operative para. 2]; see also UNSC Res. S/RES/1696 (31 July 2006) [preamble para. 10]; UNSC Res. S/RES/1737 (27 December 2006) [preamble para. 10].

[182] Words like *urges and requests* are not legally binding. See UNSC Res. S/RES/1782 (29 October 2007) [operative para. 14]; Security Council Report, 'Security Council Action under Chapter VII: Myths and Realities' (2008) 1 *Special Research Report* 1-36, 4 [hereinafter *Special Research Report*].

[183] Akande and Milanovic (n 177) (the Internet page).

[184] ibid.

[185] Erika De Wet, *The Chapter VII Powers of the United Nations Security Council* (Oxford, Hart Publication 2004) 40.

[186] UNSC Res. S/RES/54 (15 July 1948) [operative paras. 2 and 5].

[187] UNSC Res. S/RES/83 (27 June 1950) [preamble para. 7].

However, while “order” appears forceful when *chapeau* is absent, “recommends” is recommendatory and lacks the tone of a command. That said, the SC’s intent to authorise force could be implied into a resolution when it is not explicitly stated.[188] But since the practice of including the *chapeau* has evolved,[189] there is no logical explanation for its exclusion from resolution 2249 (2015). A counterargument could be that resolution 1376 (2001)[190] complied with Article 39 provision without reference to the *chapeau*.

As often said, compliance with the provision of Article 39 is sufficient to show the intent to authorise intervention.[191] But this is not always the case. Even if it were to be so, the SC has not been systematic in applying that rule either.[192] While resolution 1373 (2001) contains the *chapeau*, resolution 2249 (2015) does not. To that end, Akande and Milanovic argue that resolution 2249 (2015) does not give a prior authorisation for intervention in Syria or in Iraq but merely legitimises the ongoing use of force.[193]

The first US-led coalition had started its air campaign in Syria and in Iraq before Resolution 2249 was adopted.[194] Such an authorisation should have been prior to the invasion and when the host State is "unable or unwilling"[195] to prevent the terrorism. Therefore, three requirements need to be met for a SC’s resolution to be deemed to have authorised a coercive invasion of a State. First, the SC must make a determination in accordance with Article 39 of the UN Charter.[196] Second, the SC should declare it is acting under the powers invested upon

[188] *Namibia Advisory Opinion* (n 162) [para 113].
[189] The *chapeau* was first used in a draft resolution introduced by Algeria, Ethiopia, India, Pakistan and Senegal on 16 April 1968. See UN Doc. S/8545 (16 April 1968) [preamble para. 12]; *Special Research Report* (n 182) 3.
[190]UNSC Res. S/RES/1376 (9 November 2001) [preamble para. 6].
[191] *Special Research Report* (n 182) 3.
[192] The SC resolution 1737 (2006) was intended to invoke Chapter VII powers and yet did not make a determination in accordance with Article 39. See *Special Research Report* (n 182) 4.
[193] Akande and Milanovic (n 177) (the Internet page).
[194] Jim Sciutto, Mariano Castillo and Holly Yan, ‘U.S. airstrikes hit ISIS inside Syria for first time’ (CCN, 23 September 2014) available at <http://edition.cnn.com/2014/09/22/world/meast/u-s-airstrikes-isis-syria/index.html> accessed 17 June 2017.
[195] These words “unwilling” and “unable” shall be analysed later.
[196] When Libya refused to extradite two Libyans suspected to have downed the Pan American Flight 103 in 1992, the SC adopted resolution 731 (1992) in which it denounces Libya’s non-compliance as constituting a threat to international peace and security. Consequently, the ICJ held that resolution 731 decisions are binding on Libya and that the SC has not acted *ultra vires*. See *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie* (Libyan Arab Jamahiriya v United States of America) Order of 14 April 1992 ICJ Reports (1992) p. 114, 126 [hereinafter *Libya’s request for provisional measures in Lockerbie*].

it by Chapter VII of the UN Charter. Third, the SC should expressly state what it authorises in an unambiguous term.[197]

6.3.1.1b Explicit word of authorisation

The word which the SC uses to authorise force varies. In most cases, the Council "decides,"[198] "orders," "demands," or "authorises"[199] the Member States to *use all necessary means*[200] to maintain international peace and security. Cot and Pellet argue that words such as "orders," "decides" and "demands" are binding as opposed to words like "calls upon," "urges" and "requests."[201] If this reasoning were correct, then resolution 2249 (2015) does not authorise the use of force in Syria. Its operative paragraph 5

> [c]alls upon Member States that have the capacity to do so to take all necessary measures, in compliance with international law, in particular with the United Nations Charter, as well as international human rights, refugee and humanitarian law, on the territory under the control of ISIL also known as Da'esh, in Syria and Iraq…. [202]

Care must be taken when interpreting the phrase, "to take all necessary measures" as an evidence that force has been expressly authorised.[203] The word "measures" can be omitted in the SC's resolutions purporting to authorise force. Compare the operative paragraph 5 of resolution 221 (1966)[204] with the preambular paragraph 5 of resolution 2213 (2015).[205] Resolution 221 (1966) "calls upon" the government of the United Kingdom "to prevent, by the use of force if necessary" any vessels reasonably believed to be transporting oil to Southern Rhodesia. The conditionality of this provision, "if necessary" lacks precision as to what has been authorised. But note that it did not use the word measures. In resolution 2213 (2015), the language that suggests the authorisation of force appears in the preambular

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[197] Johansson (n 179) 310.
[198] UNSC Res. S/RES/1373 (28 September 2001) [operative paras. 1 and 2].
[199] UNSC Res. S/RES/678 (29 November 1990) [operative para. 2].
[200] The consensus among scholars is that the expression "use all necessary means" explicitly refers to the "use of military force." See Jules Lobel and Michael Ratner, 'Bypassing the Security Council: Ambiguous Authorizations to Use Force, Cease-Fires and the Iraqi Inspection Regime' (1999) 93(1) *American Journal of International Law* 124-154, 129.
[201] Johansson (n 179) 320-21.
[202] UNSC Res. S/RES/2249 (20 November 2015) [operative para. 5].
[203] Akande and Milanovic (n 177) (the Internet page).
[204] UNSC Res. S/RES/221 (9 April 1966) [operative para. 5].
[205] UNSC Res. S/RES/2213 (27 March 2015) [preamble para. 5].

paragraph 5. It reaffirms the need to combat by all means, threats to international peace and security caused by terrorist acts. Although it contains the *chapeau*, it uses the phrase "all means" and omitted "necessary measures."[206]

This has been interpreted to mean that there is no prior authorisation of force but rather a ratification of the ongoing use of force.[207] The same pattern of textual manoeuvring could be deduced from resolutions 1368 and 1373 (2001) adopted by the SC after the 9/11 terrorist attacks.[208]

To address these pitfalls, a special report by experts recommends that the SC should adopt the word "decides" or "authorises" in the relevant operative paragraphs[209] intending to authorise coercive measures. Some recent resolutions not dealing with the authorisation of coercive measures have adopted a consistent pattern.[210] For clarity of intent, this dissertation recommends that the SC should state, "hereby decides or authorises the use of force."

6.3.1.1c Implied authorisation

The state practice does not overwhelmingly support implying authorisation into the SC's resolutions.[211] What applies is a minimal *ex-post facto* argument in favour of implicit authorisation in the context of genocide, war crimes, ethnic cleansing and crimes against humanity.[212] To illustrate, the SC resolution 1973 (2011) authorised forcible measures in

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[206] ibid., [preamble para. 5]

[207] Akande and Milanovic (n 177) (the internet page). Note that the preambles and the previous resolutions could be part of the context when interpreting the SC resolutions. See Wood 1998 (n 65) 89-95.

[208] Akande and Milanovic (n 177) (the internet page); Marko Milanovic, 'Self-defence and non-State actors: indeterminacy and the *Jus ad Bellum*' (EJIL: *Talk!* 21 February 2010) available at <http://www.ejiltalk.org/self-defense-and-non-state-actors-indeterminacy-and-the-jus-ad-bellum/> accessed 6 April 2016; Tams 2009 (n 99) 378 (arguing that *Operation Enduring Freedom* is justified as a self-defense).

[209] *Special Research Report* (n 182) 4.

[210] See the following resolutions of the Security Council: S/RES/1718 (14 October 2006) [preamble paras. 9 and 10, operative para. 8]; S/RES/1747 (24 March 2007) [preamble paras. 9 and 10, operative para. 5]; and S/RES/1803 (3 March 2008) [preamble paras. 12 and 13, operative para. 5].

[211] UNSCOR, UN Doc. S/PV.3937 (24 October 1998) 6-7 (Costa Rica argues that the SC should neither authorise missions with military troops without explicitly stating the limits and scope of its mandate nor give a conditional authorisation subsequent to the decision of other organs or groups of states).

[212] UNGA Res. A/RES/60/1 (24 October 2005) [para. 139] [hereinafter *2005 World Summit Outcome*]; Bruno Simma, 'NATO, the UN and the Use of Force: Legal Aspects' (1999) 10(1) *European Journal of International Law* 1-22, 7-10; Geir Ulfstein and Hege Føsund Christiansen, 'The Legality of the NATO Bombing in Libya' (2013) 62(1) *International and Comparative Law Quarterly* 159-171, 167-168.

Libya, specifically to protect the civilian populations.[213] Its enforcement in a manner that achieved a regime change is questionable,[214] although the Secretary-General of the UN argued that the enforcement complied with the SC's mandate.[215]

A textual analysis of operative paragraph 4 of resolution 1973 (2011) does not support Ban Ki-moon's position. Therefore, he may have contextually interpreted this paragraph *ex-post facto* considering his previous statement that the resolution was not aimed at a regime change.[216] Perhaps, he judged the removal of Gaddafi necessary to protect and prevent the Libyan civilians from future attacks.[217] But this ambiguity buttresses the need for clarity in what the Council authorises.

The state practice is sceptical in endorsing the violation of a State territory if it were not explicitly authorised by the SC. The *opinio juris* does not applaud it either. When India seized Goa from Portugal in 1961, the member States[218] and International lawyers[219] condemned it.

The refusal of the SC's Members to vote on the Soviet Union's sponsored resolution to stop the United States' interdiction of its ships en route to Cuba was construed by some States as

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[213] UNSC Res. S/RES/1973 (17 March 2011) [operative para. 4].

[214] Arm Moussa, 'The goal in Libya is not regime change' (International New York Times, 23 March 2011) available at <http://www.nytimes.com/2011/03/24/opinion/24iht-edmoussa24.html?_r=0> accessed 12 April 2016; United Kingdom, *Libya: Examination of intervention and collapse the UK's Future Policy Options,* [para. 17] available at <https://www.publications.parliament.uk/pa/cm201617/cmselect/cmfaff/119/11902.htm> accessed 17 June 2017.

[215] United Nations Secretary-General Press Conference, 'Press Conference by Secretary-General Ban Ki-moon at United Nations Headquarters,' (14 December 2011) [para. 70] available at <https://www.un.org/press/en/2011/sgsm14021.doc.htm> accessed 17 June 2017.

[216] UN News Centre, 'Speedy, Decisive International Action to Protect Civilians in Libya is vital – Ban' (24 March 2011) available at <https://www.un.org/apps/news/story.asp?NewsID=37885#.WUFc4saZOb8> accessed 17 June 2017.

[217] Ulfstein and Christiansen (n 212) 168.

[218] Rakesh Krishnan Simha, 'Goa liberation: how Russia vetoed the West' (Russia and India Report, 12 December 2014) available at <https://in.rbth.com/blogs/2014/12/12/goa_liberation_how_russia_vetoed_the_west_40297> accessed 12 April 2016.

[219] Louis Henkin, *How Nations Behave: Law and Foreign Policy* (Second Edition, New York, Columbia University Press 1968) 144; Quincy Wright, 'The GOA Incident' (1962) 56(3) *American Journal of International Law* 617-632, 629.

a tacit acceptance of the interdiction.[220] But to equate inaction to authorisation[221] does not correlate with the provision of Article 27 of the UN Charter, which requires the "affirmative vote" of the members. Article 2(4) does not allow States the right to use force to maintain or restore international peace and security.[222]

The SC's acquiescence or inaction towards stopping an ongoing intervention could mean an approval but not a prior authorisation.[223] On this premise, the SC resolution 2249 (2015) merely ratifies the air campaign in Syria and does not authorise it. To recap, the SC could be deemed to have authorised a lawful breach of a State territory if the following conditions were met. First, it is explicit and not implicit. Second, the resolution invokes the *chapeau* and clearly articulates the nature and limit of the breach it authorises. Third, the resolution stipulates when the lawful breach terminates.[224]

6.3.1.1d Enforcement of the SC's Resolution

When the SC authorises forcible measures against a State, all or some capable Member States could enforce it[225] directly or through the international organisations of which they are members.[226] The eligible international organisations include the UN Peacekeeping

[220] Abram Chayes, 'Law and the Quarantine of Cuba' (1963) 41(3) *Foreign Affairs* 550-557, 556; Leonard C. Meeker, 'Defensive Quarantine and the Law' (1963) 57(3) *American Journal of International Law* 515-524, 522.
[221] Meeker (n 220) 522.
[222] Wright (n 219) 628.
[223] This view is contested by those who held that subsequent action of the SC could mean authorisation. See Chayes (n 220) 556-557. It was suggested that the SC implicitly authorised the ECOWAS use of force in Liberia. See Ugo Villani, 'The Security Council's Authorization of Enforcement Action by Regional Organizations' (2002) 6 *Max Planck Yearbook of United Nations Law* 535-555, 542-543.
[224] Lobel and Ratner (n 200) 125.
[225] *The UN Charter* (n 43) [Arts. 45 and 48].
[226] United Nations, *Repertoire of the practice of the Security Council 18th supplement 2012-2013: Part VII – Actions with respect of threats to the peace, breaches of the peace, and acts of aggression (Chapter VII of the Charter)* 80 available at <http://www.un.org/en/sc/repertoire/actions.shtml> accessed 21 March 2016.

Operations,[227] regional[228] or sub-regional bodies,[229] as well as bilateral[230] and multilateral security alliances.[231]

The SC's resolution that authorised the use of force against pirates at the sea off the coast of Somalia in 2008[232] was enforced by 27 countries including the P5.[233] Sometimes, States amend their domestic law to give effect to the SC's resolution. China did that in November 2006[234] in response to the SC's resolutions on anti-terrorism and the prevention of nuclear proliferation.[235] Equally, New Zealand pursuant to section 2 of the United Nations Act 1946[236] enacted the 'United Nations Sanctions (Iran) Regulations 2007'[237] to give effect to the SC resolution 1737 (2006).

Deductively, the SC's resolutions authorising the breach of a State territory is either implemented collectively or given effect by States through legislation such that their domestic courts can enforce it. In the *Diggs v Richardson*,[238] the plaintiff pleaded the US Court to order the United States to comply with the SC resolution 301 (1971) by boycotting any dealings with

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[227] For more information, visit <http://www.un.org/en/peacekeeping/> last visited 27 June 2017.

[228] As provided for in Article 52 of the UN Charter. Examples are: *The Organisation of Security and Co-operation in Europe* (OSCE) and the ASEAN Regional Forum (ARF).

[229] An example is the Southern African Development Community (SADC).

[230] Such as, *Treaty between the United Kingdom of Great Britain and Northern Ireland and the French Republic for Defence and Security Co-operation* (Done at London on 2 November 2010, entered into force on 1 September 2011) available at <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/238153/8174.pdf> accessed 27 April 2016.

[231] Such as *North Atlantic Treaty* (Signed at Washington on 4 April 1949, entered into force on 24 August 1949) 34 UNTS 243 [Art. 5].

[232] UNSC Res. S/RES/1851 (16 December 2008) [operative para. 2].

[233] Zou Keyuan, 'Marine Enforcement of United Nations Security Council Resolutions: Use of force and Coercive Measures' (2011) 26(2) *International Journal of Marine and Coastal Law* 235-262, 239-240.

[234] People's Republic of China, *Regulations of the People's Republic of China on control of Nuclear Export* (2006 Revision) [Art. 1] available at <http://www.lawinfochina.com/display.aspx?lib=law&id=11890> accessed 27 April 2016.

[235] For a list of the SC's resolutions prohibiting terrorism, visit <http://www.un.org/en/sc/ctc/resources/res-sc.html> accessed 27 April 2017. For the SC resolution on Non-proliferation of Nuclear Weapons, see UNSC Res. S/RES/1887 (24 December 2009) [operative para. 1]; also visit <http://www.un.org/disarmament/WMD/Nuclear/> accessed 27 April 2016.

[236] New Zealand, *United Nations Act 1946* [section 2] available at <http://legislation.govt.nz/act/public/1946/0007/latest/DLM240502.html> accessed 27 April 2016.

[237] For the text, visit <http://legislation.govt.nz/regulation/public/2007/0074/1.0/DLM431042.html> accessed 27 April 2016.

[238] See generally, *Charles Coles Diggs Jr., et al., v Elliot L. Richardson* 555 F.2d 848 (1976).

South Africa. The Court held that the said resolution is 'non-self-executing,'[239] that is, it does not apply to the US laws directly as the ICJ's *Advisory Opinion*[240] would suggest. But the same Court had previously upheld the direct applicability of the SC's resolution 232[241] in the *Diggs v Shultz* case.[242] The Court had ruled that the 1971 Byrd Amendment[243] passed by the US Congress contravened International Law.[244]

In the *Kuwait Airways Corpn v Iraqi Airways Co,*[245] the House of Lords of the United Kingdom accepts the enforceability of the SC resolution 369 over the Iraqi domestic law to support the *erga omnes* character of Article 2(4).[246] When a conflict arises between the domestic law and a resolution adopted under Chapter VII of the Charter, the latter takes precedence.[247] It follows that the SC's resolutions 1373 (2001) and 2249 (2015) does not provide the legal basis for the intervention in the territory of the host States.[248]

6.3.1.1e Collective enforcement – The Counter-Terrorism Committee

The SC established the Counter-Terrorism Committee (hereinafter referred to as CTC) after the 9/11 terrorist attacks on the United States.[249] Resolution 1373 (2001) makes no suggestions that the fight against terrorism should oust the principle of the inviolability of a State territory. Instead, it reaffirms the principle contained in the General Assembly Resolution 2625 (XXV) of 1970.[250] Equally, it reiterates that the Security Council Resolution 1189 (1998) imposes upon the member States, the general duty to refrain from the commission of, acquiescing in or supporting such acts.[251]

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[239] ibid., 850.
[240] *Namibia Advisory Opinion* (n 162) [paras. 115 and 131].
[241] UNSC Res. S/RES/232 (16 December 1966) [operative para. 2].
[242] *Charles Coles Diggs v George P Shultz* 470 F2d 461 (1972) 463.
[243] See 'United States: Law regulating the importation of strategic materials (17 November 1971)' (1972) 11(1) *International legal materials* 178-179.
[244] *Charles Coles Diggs v George P Shultz* 470 F2d 461 (1972) 466.
[245] *Kuwait Airways Corpn v Iraqi Airways Co* (Nos 4 and 5) [2002] 2 AC 883 [para. 114].
[246] ibid., [para. 114].
[247] *The UN Charter* (n 43) [Art. 103]; Katherine Reece Thomas, 'The Changing Status of International Law in English Domestic Law' (2006) 53(3) *Netherlands International Law Review* 371-398, 395.
[248] Peter J. van Krieken (ed), *Terrorism and the International Legal Order* (The Hague, T.M.C. Asser Press 2002) 141.
[249] UNSC Res. S/RES/1373 (28 September 2001) [operative para. 6].
[250] ibid., [preamble para. 10].
[251] ibid., [preamble para. 10].

In summary, the SC Resolution 1373 calls upon the member States to implement the existing counterterrorism legal instruments. Such measures include, among others, to criminalise the financing of terrorism, to freeze any accounts belonging to terrorists or persons relating to terrorist acts, to deny all forms of financial support for terrorist groups and to suppress the provision of a safe haven for terrorist groups.[252] The member States are equally encouraged to share intelligence information, cooperate with other governments and international organisations, and to facilitate the investigation, extradition and prosecution of terrorist suspects.[253]

The mandate of the CTC is to coordinate these objectives and to ensure that the Member States comply with their obligations. It does this through country visits to monitor the level of progress that a country makes and to evaluate the kind of support a country might need to implement Resolution 1373. The CTC is also meant to provide technical assistance, receive and evaluate country reports.[254] To assist the CTC in carrying out its mandates, the SC has established a Counter-terrorism Committee Executive Directorate.[255] These subsidiary bodies provide the SC with the necessary information to make decisions on a case-by-case basis. What appears to be lacking among the UN member States is the political will of cooperation and not the legal framework to curb terrorism.

6.3.2 The limits to the SC's powers under the UN Charter

The *travaux preparatoires* of the UN Charter shows that the SC was not given *carte blanche* powers.[256] As an Organ of the UN, its actions must be Charter-compliant.[257] The Charter limits the powers of the SC in two ways; namely, substantive and procedural.

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[252] Security Council, 'Counter-terrorism Committee – Our mandate' available at <http://www.un.org/en/sc/ctc/> accessed 22 March 2016 [hereinafter *CTC Mandate*]; UNSC Res. S/RES/1624 (14 September 2005) [operative para. 1].

[253] UNSC Res. S/RES/1373 (28 September 2001) [operative para. 3].

[254] See generally, *CTC Mandate* (n 252).

[255] UNSC Res. S/RES/1535 (26 March 2004) [operative para. 2].

[256] Department of state, *The United Nations Conference on International Organization* (United States, Government Printing Office 1946) 762 [hereinafter *San Francisco Selected Documents*].

[257] Thomas M. Franck, 'The "Powers of Appreciation": who is the ultimate Guardian of UN legality?' (1992) 86(3) *American Journal of International Law* 519-523, 523.

6.3.2a Substantive limitation

Article 24(2) of the UN Charter states: '[i]n discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations.'[258] One of the duties referred to is the maintenance of international peace and security.[259] The "purposes" and "principles" referred to are contained in Articles 1 and 2 of the UN Charter. Judge Weeramantry observed that the phrase, "in conformity with the principles of justice and international law" in Article 1(1) of the Charter was designed to protect States from enormous powers of the SC.[260] Since the respect for the inviolability of State territory is listed in Article 2(4) as one of the principles of the UN, it follows that it could limit the SC's powers.

Following the *Lockerbie* incident, Judge Weeramantry emphasises that the SC's mandate to comply with the Charter provision limits its powers.[261] Judge Lauterpacht corroborates Weeramantry's view.[262] After the Suez Canal's incident, Egypt reiterates the need for the SC to concern itself with settling international disputes in conformity with the principles of justice and international law.[263] Akande has observed that the inherent limitation which Articles 1 and 2 of the UN Charter[264] impose upon the SC shows that States could not have derogated their sovereign rights to an Organ they instituted.[265]

However, Kelsen has taken a different position as follows: '[t]he purpose of the enforcement action under Article 39 is not to maintain or restore the law but to maintain or restore the peace, which is not necessarily identical with the law.'[266] This presupposes that the SC can enforce its resolution when the existing law is unsatisfactory and with that, set a precedent

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[258] *The UN Charter* (n 43) [Art. 24(2)].
[259] ibid., [Art. 24(1)].
[260] *Libya's request for provisional measures in Lockerbie* (n 196) (Order of 14 April 1992) 64 (Dissenting Opinion of Judge Weeramantry).
[261] *Libya's request for provisional measures in Lockerbie* (n 196) 61 (Dissenting Opinion of Judge Weeramantry).
[262] *Genocide case* (n 30) (Order of 13 September 1993) [para. 101] (Separate opinion of Judge *ad hoc* Lauterpacht).
[263] UNSCOR, UN Doc. S/PV.553 (16 August 1951) [para. 94].
[264] Dapo Akande, 'The International Court of Justice and the Security Council: Is There Room for Judicial Control of Decisions of the Political Organs of the United Nations' (1997) 46(2) *International and Comparative Law Quarterly* 309-343, 317.
[265] Akande 1997 (n 264) 317.
[266] Hans Kelsen, *The Law of the United Nations. A Critical Analysis of its Fundamental Problems* (New York, Frederick A. Praeger 1964) 294.

for the creation of new law.[267] Kelsen supports his thesis by dissecting the text of Article 1(1) of the UN Charter into two elements. The first element deals with the SC's powers to enforce "effective collective measures" and the second element deals with a peaceful means of adjustment and settlement of international disputes. Kelsen concludes that the limitation of the SC powers can only apply in the second scenario.[268]

It is unlikely that Kelsen's position is the correct interpretation of the law. When the Charter was drafted, Norway asked whether the SC's powers would impair States' future security and welfare?[269] This ignited a discussion among the members of Committee I/1. Although the Committee failed to reach an agreement, it was believed that the reference to justice and international law in Article 1 of the Charter binds the SC.[270] However, the SC's powers to maintain international peace and security are not subject to the discretion of States except that the Council cannot abrogate or alter the territorial rights.[271]

6.3.2b Procedural limitation

Before the SC can invoke its powers under Articles 41 and 42 of the UN Charter, it must make a determination of any (1) threat to the peace, (2) breach of the peace, or (3) act of aggression.[272] Making such a determination[273] is a prerequisite[274] for the Council's discretionary powers, which includes the use of force, coercive measures, or peaceful means.[275] This implies that the Council is limited by its procedure.[276] A different

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[267] ibid., 295.
[268] ibid., 295.
[269] See *Document of the United Nations Conference on International Organization San Francisco 1945* (Volume XI, London and New York, United Nations in formation Organizations 1945) 378.
[270] ibid., 378-380.
[271] *Namibia Advisory Opinion* (n 162) [paras. 114-115] (Dissenting opinion of Judge Sir Gerald Fitzmaurice). *Cf* UNSC Res. S/RES/687 (8 April 1991) [paras. 2-4]; UNSC Res. S/RES/773 (26 August 1992) [preamble para. 5].
[272] *The UN Charter* (n 43) [Art. 39].
[273] Judge Lauterpacht argues that making a determination under Article 39 is a political step that is not subject to judicial review. See *Genocide case* (n 30) (Order of 13 September 1993) 439 (Separate opinion of Judge Lauterpacht).
[274] Justin Morris and Nicholas J. Wheeler, 'The Security Council's crisis of legitimacy and the Use of Force' (2007) 44 *International Politics* 214-231, 214-215.
[275] Jared Schott, 'Chapter VII as Exception: Security Council Action and the Regulative Ideal of Emergency' (2007) 6(1) *Northwestern Journal of International Human Rights* 24-80, 29.
[276] In the words of the ICTY, the SC is not *legibus solutus*, see *Tadic Appeal on Jurisdiction* (n 81) [para. 28].

interpretation could be that Article 39 empowers, but does not oblige the SC to act.[277] Yet, the idea of "empowerment" could imply a prescribed code of conduct, which will require compliance if the SC decides to act.

However, the procedural limitation confers legitimacy on the actions of the SC by ensuring legality and predictability.[278] Conformity to the provision of Article 39 would enhance the legality of the SC's enforcement mechanism, which otherwise would be deemed as acting *ultra vires*.[279] As seen, Libya alleged that the SC resolution 748 (1992) violated its sovereignty but the ICJ disagreed because Article 103 of the Charter takes precedent over the Montreal Convention.[280]

6.3.3 The SC's powers and the *jus cogens* character of Article 2(4)

Chapter three argues that Article 2(4) is a *jus cogens* norm.[281] It is unlikely that the SC could contravene it because of the illegal activities orchestrated by the NSAs.[282] Thus, Akande opines that the SC's resolution that conflicts with a *jus cogens* norm is null and void.[283] However, that the ICJ gave more weight to the SC resolution 748 instead of Article 5 of the Montreal Convention in the *Lockerbie* incident indicates that the resolution of the SC could override a *jus cogens* norm.

In the *Bosnia Genocide Convention* case,[284] Bosnia pleaded the Court to make an order to restrict the enforcement of the SC resolution 713 (1991) to Yugoslavia alone. It argued that the SC would have acted *ultra vires* by denying Bosnia of its right to self-defence if the arms

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[277] Jochin Abr. Frowein, 'Article 39' in Simma *et al.,* (eds), (n 153) 719.

[278] Jurgen Habermas, *Between facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (translated by William Rehg) (Cambridge, Polity Press 1996) 134-135; Thomas M. Franck, *The Power of Legitimacy among Nations* (New York, Oxford University Press 1990) 52.

[279] *Certain expenses of the United Nations* (Article 17, paragraph 2, of the Charter) Advisory Opinion ICJ Reports (1962) p. 151, 168 [hereinafter *Certain expenses case*].

[280] Franck 1992 (n 257) 521.

[281] *VCLT* (n 68) [Art. 53].

[282] The international community did not condemn the secession of the Baltic States fifty years after the Soviet Union illegally occupied their territories. See Susan E. Himmer, 'The Achievement of Independence in the Baltic States and Its Justifications' (1992) 6(1) *Emory International Law Review* 253-292, 253-254.

[283] Akande 1997 (n 264) 322.

[284] *Genocide case* (n 30) (Order of 13 September 1993) [para. 2(m)-(q)].

embargo were extended to Bosnia. The Court declined to make such an order.[285] Judge Lauterpacht dissented from the Court's position, arguing that the possibility that the SC resolution 713 could inadvertently aid and abet the commission of genocide cannot be ruled out.[286] When such is the case, and in lieu that genocide is a *jus cogens* norm, such resolutions are void and legally ineffective.[287] Lauterpacht concludes that the SC should be mindful of the *jus cogens* norms when it authorises the use of force against a State.[288]

Some States that indicated their willingness to supply arms to Bosnia accepted Judge Lauterpacht's analysis. For example, the Organisation of Islamic Conference said that the resolution was invalid and illegal.[289] Malaysia declares its intent to send arms to Bosnians.[290] The 104th US Congress voted for *Bosnia and Herzegovina self-defence Act of 1995*,[291] but President Clinton vetoed it.[292] It could be said that the SC's enforcement mechanism is limited by *jus cogens* norms.[293] This raises the question of justiciability of *ultra vires* SC's resolutions.

Justiciability of the ultra vires SC's decisions

As an organ of the UN, the SC's conducts are attributable to the United Nations, although what counts as conduct is less obvious.[294] If the SC acts *ultra vires*, no organs of the UN can reverse such decisions. Delegations at San Francisco envisaged this problem and suggested that the General Assembly or States that were not members of the Council should moderate the decisions of the SC.[295] Czechoslovakia amended the Dumbarton Oaks Proposals to read

[285] ibid., [paras. 41 and 61].
[286] *Genocide case* (n 30) (Order of 13 September 1993) [para. 102] (Separate opinion of Judge Lauterpacht).
[287] ibid., [para. 104] (Separate opinion of Judge Lauterpacht).
[288] ibid., [para. 104] (Separate opinion of Judge Lauterpacht).
[289] UNSCOR, UN Doc. S/PV.3370 (27 April 1994) 5, 9, 12.
[290] Michael Richardson, 'Malaysia says it will send arms to Bosnians' (International New York Times, 24 July 1995) available at <http://www.nytimes.com/1995/07/24/news/24iht-malay_0.html> accessed 17 June 2017.
[291] For the text, visit <https://www.congress.gov/bill/104th-congress/senate-bill/21/text> last visited 3 June 2017.
[292] William J. Clinton, 'Message to the Senate returning without approval the Bosnia and Herzegovina Self-Defence Act of 1995' (11 August 1995) available at <http://www.presidency.ucsb.edu/ws/?pid=51739> accessed 18 June 2017.
[293] George Nolte, 'Secession and external intervention' in Marcelo G. Kohen (ed), *Secession: International Law Perspectives* (New York, Cambridge University Press 2006) 72-73.
[294] Antonios Tzanakopoulos, 'An overview of disobeying the Security Council' (EJIL: *Talk!*, 24 May 2011) available at <http://www.ejiltalk.org/an-overview-of-disobeying-the-security-council/> accessed 3 May 2016.
[295] *San Francisco Selected Documents* (n 256) 761.

that the enforcement measures that will affect the territory of a State should be "laid before the Assembly" and that the "Assembly should decide by a two-thirds majority vote."[296] This proposal was dropped because of the fear that it will hinder swift implementation and the effectiveness of the enforcement measures.[297]

Article 92 of the UN Charter recognises the ICJ as the principal judicial organ of the UN, yet it lacks the powers to review the decisions of the SC.[298] It can only give an *Advisory Opinion* on any legal question at the request of the General Assembly or the SC.[299] The Court had restricted its *Advisory opinion* to whether such actions were validly taken and not whether any of the political organs exceeded its powers.[300] However, the ICJ appears to have reviewed whether the General Assembly acted *ultra vires* in the *Namibia case*[301] even though it was not bound to give such an opinion.[302]

The debate on whether there should be a judicial review of the decisions of the UN Political Organs resonates the bigger question of the democratisation of the UN. Such a debate, often patterned after the role that the domestic courts play in a democratic system of government is countered by the fact that not all the judgments of the domestic courts are flawless.[303] This is a setback for the judicial supremacy doctrine[304] and a boost to the concurrent review theory.[305]

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[296] ibid., 145.
[297] ibid., 761.
[298] *The UN Charter* (n 43) [Art. 12]. The Belgian proposal to permit such a review was rejected. See Geoffrey R. Watson, 'Constitutionalism, Judicial Review, and the World Court' (1993) 34(1) *Harvard International Law Journal* 1-46, 8-14.
[299] *The UN Charter* (n 43) [Art. 96].
[300] *Namibia Advisory Opinion* (n 162) [para. 89]; *Certain Expenses case* (n 279) 168.
[301] *Namibia Advisory Opinion* (n 162) [para. 103].
[302]See *Statute of the International Court of Justice* (Adopted at San Francisco on 26 June 1945, entered into force on 24 October 1945) (1945) 39(3) *American Journal of International Law Supplement* 215-229 [Art. 65] (the language is that the Court *may* give….') (emphasis mine) [hereinafter *ICJ Statute*].
[303] To illustrate this, the US Constitution has been amended four times to overrule the Supreme Court decisions. See Watson (n 298) 28-29 (see footnote number 172).
[304] Thomas Jefferson argues that holding that Judges are the ultimate arbiters is a very dangerous doctrine. See 'Letter from Thomas Jefferson to William Charles Jarvis of 28 September 1820' in Paul Leicester Ford (ed), *The Writings of Thomas Jefferson* (Volume X, New York, Knickerbocker Press 1899) 160.
[305] Letter from Thomas Jefferson to George Hay on 2 June 1807 states: '[w]here different branches have to act in their respective lines, finally and without appeal, under any law, they may give to it different and opposite constructions .... From these different constructions of the same act by different branches, less mischief arises than from giving to any one of them a control over the others.' See David E. Engdahl, 'John Marshall's

The US Supreme Court in the *Marbury v Madison*[306] held that the act of the Congress can be reviewed in the light of the Constitution which is the supreme law. Based on this judgment, Franck had expected the ICJ to use the SC resolution 748 (1992) as a blueprint to establish that the resolutions of the Political Organs of the UN can be reviewed in the light of the UN Charter .[307] A considerable debate has been devoted to how this could be achieved and its consequences for the international community.[308] The Court's power to review the SC's decisions will enhance the credibility of the international legal order and better protect States' territory.

In the *Kadi case*,[309] the ECJ struck down the European Communities Regulation[310] that transposed the SC resolution 1267 (1999)[311] into the Community Law.[312] Firstly, the ECJ admitted that it lacked the powers to review the "internal lawfulness" of the SC resolutions but could examine its compatibility with the norm *jus cogens*.[313] Since human rights belong to that category of norms, the ECJ held that an international agreement cannot impede it from carrying out its constitutional duty under the EC Treaty. Consequently, the ECJ held that the respondent member States violated the fundamental human rights of the petitioner.[314] This reasoning could apply to the inviolability of State territory by virtue of its *jus cogens* nature vis-à-vis the SC's resolutions that breach the integrity of a State.

Jeffersonian Concept of Judicial Review' (1992) 42(2) *Duke Law Journal* 279-339, 304.

306 *William Marbury v James Madison, Secretary of State of the United States* (1 Cranch) 5 U.S. 137 (1803) 177-180.

307 Franck 1992 (n 257) 520.

308 Jose E. Alvarez, 'Judging the Security Council' (1996) 90(1) *American Journal of International Law* 1-39; Kamrul Hossain, 'Legality of the Security Council Action: Does the International Court of Justice Move to Take up the Challenge of Judicial Review' (2009) 5(17) *Review of International Law & Politics* 133-164; Michael Bothe, 'Limitations of the powers of the Security Council? – The role of Human Rights' (Audiovisual library of international law) available at <http://legal.un.org/avl/ls/Bothe_PS.html#> accessed 3 May 2016.

309 See *C-402/05 P – Kadi and Al Barakaat International Foundation v Council and Commission,* Judgment of the Court (Grand Chamber) of 3 September 2008 [hereinafter *Kadi case*].

310 European Union, 'Council Regulation (EC) No. 881/2002 of 27 May 2002' (2002) *Official Journal of the European Communities* L 139/9 [Art. 2 and Annex I].

311 UNSC Res. S/RES/1267 (15 October 1999) [operative para. 4]; UNSC Res. S/RES/1333 (19 December 2000) [operative para. 4]; UNSC Res. S/RES/1390 (28 January 2002) [operative para. 2].

312 European Union, 'Council Common Position 2002/402/CFSP' (2002) *Official Journal of the European Communities* L 139/4 [Art. 1].

313 *Kadi case* (n 309) [para. 280].

314 ibid., [para. 285].

However, Watson has endorsed the ICJ's refusal to review the SC's resolutions.[315] The adoption of such measures will not only contravene Article 25 of the Charter, but most importantly will not be binding like other *Advisory opinion* of the ICJ.[316] Even in contentious cases, 'the decision of the Court has no binding force except between the parties and in respect of that particular case.'[317] Nevertheless, the ICJ's judgments and *Advisory Opinions* are persuasive and can shape state practice. While the ICJ's refusal to overrule the SC resolution 748 (1992) based on the provision of Article 103 of the UN Charter is commendable, its failure to give an equal consideration to Article 2(4) pursuant to Article 5 of 1971 Montreal Convention is regrettable.

6.3.4 The SC's legitimacy deficit and the inviolability of State territory

Since a SC's resolution that undermines a State territory is not subject to judicial review,[318] the legitimacy of the SC's resolutions has dominated the legal discourse in the last two decades.[319] The idea of "legitimacy" is elusive and means different things to different disciplines.[320] Legally, it is a condition of being in conformity with the relevant body of legal doctrine.[321]

The criteria on which the SC is assessed are sometimes derived from democratic theory.[322] It probes the SC's 'compliance with its legal mandate (legal legitimacy), the quality of its

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[315] Watson (n 298) 16.

[316] *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania,* Advisory Opinion ICJ Reports (1950) p. 65, 71.

[317] *ICJ Statute* (n 302) [Art. 59].

[318] Jose E. Alvarez, 'The once and future Security Council' (1995) 18(2) *The Washington Quarterly* 3-20, 5; Bruce Cronin and Ian Hurd (eds), *The UN Security Council and the Politics of International Authority* (Milton Park, Routledge 2008) 3. This is against the backdrop of the general claim that the laws of the International organisations induce states' compliance. See Henkin 1968 (n 219) 47; David A. Lake, 'Rightful Rules: Authority, Order, and the Foundations of Global Governance' (2010) 54(3) *International Studies Quarterly* 587–613; Michael Zürn, Martin Binder and Matthias Ecker-Ehrhardt, 'International Authority and its Politicization' (2012) 4(1) *International Theory* 69-106.

[319] See generally, Hilary Charlesworth and Jean-Marc Coicaud (eds), *Fault Lines of International Legitimacy* (New York, Cambridge University Press 2010).

[320] Christian Reus-Smit, 'International Crises of Legitimacy' (2007) 44 *International Politics* 157-174, 158-160.

[321] ibid., 160; Daniel Bodansky, 'The Legitimacy of International Governance: A Coming Challenge for International Environmental Law' (1999) 93(3) *American Journal of International Law* 596-624, 605.

[322] Majone has identified six criteria. See Giandomenico Majone, 'Europe's 'Democratic Deficit': The Question of Standards' (1998) 4(1) *European Law Journal* 5-28, 15-27; Andrew Moravcsik, 'In defence of the "democratic deficit": Reassessing Legitimacy in the European Union' (2002) 40(4) *Journal of Common Market Studies* 603-624.

decision-making procedures (procedural legitimacy), or its effectiveness (performance legitimacy).'[323]

As Franck put it, legitimacy is 'the perception of those addressed by a rule or a rule-making institution that the rule or institution has come into being and operates in accordance with generally accepted principles of right process.'[324] To this end, a research[325] conducted by Binder and Heupel in the UN General Assembly indicates that the SC suffers legitimacy deficit.[326] The number of States that disapprove of the SC's meddling in the internal affairs of States outweigh the number of States that approve of it.[327]

The report of the research of Binder and Heupel contradicts the views previously held on the same topic. For instance, Claude describes the SC as the "dispenser of legitimacy"[328] and as an agency of legitimisation. In Hurd's opinion, this is the reason why the UN member States 'associate themselves with the Council as a means to legitimize their actions, decisions and identities.'[329] Finnemore echoes a similar sentiment by referencing how States seek the approval of the SC as a justification for humanitarian intervention.[330] Even the works by Sandholtz and Stone Sweet[331] and Johnstone[332] endorse the SC as a universally acceptable normative framework.

These positive appraisals, be it expressly or implicitly, underestimate the extent to which the Council's legitimacy is contested. Brewer argues that the collective security function of the

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[323] Martin Binder and Monika Heupel, 'The Legitimacy of the UN Security Council: Evidence from Recent General Assembly Debates' (2015) 59(2) *International Studies Quarterly* 238-250, 239.
[324] Franck 1990 (n 278) 19.
[325] This is an empirical research based on a systematic sampling of seven debates on the reports which the SC submitted to the General Assembly between the years 1990 and 2010. See Binder and Heupel (n 323) 242.
[326] Binder and Heupel (n 323) 239.
[327] ibid., 239.
[328] Inis L. Claude, 'Collective Legitimization as a Political Function of the United Nations' (1966) 20(3) *International Organization* 367-379, 374.
[329] Ian Hurd, *After Anarchy: Legitimacy and Power in the United Nations Security Council* (Princeton New Jersey, Princeton University Press 2007) 176; Ian Hurd, 'Legitimacy, Power, and the Symbolic Life of the UN Security Council' (2002) 8(1) *Global Governance* 35-52, 38-39.
[330] Martha Finnemore, *The Purpose of Intervention: Changing Beliefs about the Use of Force* (Ithaca, Cornell University Press 2003) 81-82.
[331] Wayne Sandholtz and Alec Stone Sweet, 'Law, politics and international governance' in Christian Reus-Smit (ed), *The politics of international law* (Cambridge, Cambridge University Press 2004) 238-271.
[332] Johnstone 2003 (n 87) 437-480.

UN has fallen into disrepute.[333] Haas traces the genesis of the SC's legitimacy deficit to the America's intervention in Korea.[334] The outcome of the Binder and Heupel's report indicates that the SC is deficient in three areas: namely, legal, procedural and performance.

6.3.4a Legal legitimacy

The legal or formal school argues that legitimacy depends on consent.[335] Under this model, the SC's legitimacy appreciates if it adheres strictly to the provision of the Charter and other secondary rules to which the member States consented.[336] Therefore, the SC's undue evolutive interpretation or adaptation of the primary and the secondary legal norms to contemporary issues could amount to acting *ultra vires*.[337] Chesterman has noticed an incremental interpretation in the manner Article 39 of the Charter is used to allow humanitarian interventions since the post-Cold War Era.[338] The UN member States condemn such teleological approach as beyond the SC's mandate.[339]

The figures in the Binder and Heupel's report show that about 73% (1123) of 1531 statements relevant for the assessment of the legitimacy of the Council is negative, while only 27% (408) is positive.[340] Out of the 73% of the negative statements, only 11% relates to legal legitimacy.[341] It includes statements questioning the Council's usurpation of competence.[342] Others are statements questioning the Council's free-handed interpretation of Article 39 of

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[333] Thomas L. Brewer, 'Collective Legitimization in International Organizations Concept and Practice' (1972) 2(1) *Denver Journal of International Law and Policy* 73-88, 80.

[334] Ernest B. Haas, 'The Comparative Study of the United Nations' (1960) 12(2) *World Politics* 298-322, 315.

[335] Mattias Kumm, 'The Legitimacy of International Law: A Constitutionalist Framework of Analysis' (2004) 15(5) *European Journal of International Law* 907-931, 918; A. John Simmons, *On the Edge of Anarchy: Locke, Consent, and the Limits of Society* (Princeton New Jersey, Princeton University Press 1993) 59-60, 218-224.

[336] Allen Buchanan and Robert O. Keohane, 'The Legitimacy of Global Governance Institutions' (2006) 20(4) *Ethics and International Affairs* 405-437, 405-406.

[337] Bodansky 1999 (n 321) 605, 608.

[338] Simon Chesterman, *Just War or Just Peace? Humanitarian Intervention and International Law* (Oxford, Oxford University Press 2001) 113; Nicholas J. Wheeler, *Saving Strangers: Humanitarian Intervention in International Society* (Oxford, Oxford University Press 2000) 172-241.

[339] Morris and Wheeler (n 274) 220; Wheeler 2000 (n 338) 222.

[340] Binder and Heupel (n 323) 244.

[341] ibid., 245.

[342] UNGAOR, UN Doc. A/55/PV.35 (17 October 2000) 22 (Vietnam argues that the SC should not expand its authority beyond what is authorised under the Charter).

the Charter,[343] statements questioning the Council's increased adoption of Chapter VII resolutions,[344] and statements questioning the Council's use of an intrusive instrument to invoke the Chapter VII's powers.[345]

6.3.4b Procedural legitimacy

The procedural legitimacy focuses on the procedural standards of the process.[346] Of interest to this school is whether the SC's procedures allow for equal participation of the members,[347] transparency[348] and accountability.[349] The procedural school observes that legitimacy deficit occurs when some or all the criteria are not met. Against Claude's claim that the SC is the "defender of legitimacy," Voeten argues that the SC 'has been inconsistent in applying legal principles and that its decision-making procedure is not inclusive, transparent, or based on egalitarian principles.'[350]

Most criticism of the SC is based upon its procedure. About 65% of the negative statement from the member States refers to it.[351] The SC is accused of being undemocratic for not allowing States that would be affected by its action to participate in its decision-making process.[352] But does Article 28 of the Charter permit such representation? The Permanent Members of the SC argued that it would impede efficiency and swift action. Although the veto

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[343] UNGAOR, UN Doc. A/61/PV.73 (11 December 2006) 7 (Columbia argues that the Council should focus its efforts on threats to international peace and security); see also 'The report of the sub-committee on the Spanish question appointed by the Security Council on 29 April 1946,' UN Doc. S/75 (1 June 1946) [para. 21] (it warns the Security Council not to use its powers in any way which will strain the intention of the Charter).

[344] Schott (n 275) 65.

[345] UNGAOR, UN Doc. A/55/PV.35 (17 October 2000) 19 (Peru argues 'there is no clear basis of action and interpretation for so-called humanitarian intervention, which would justify the use of force due to serious violations of humanitarian law and human rights'); Binder and Heupel (n 323) 243-245.

[346] Kumm (n 335) 926.

[347] For further discussion see generally, Klaus Dingwerth, *The New Transnationalism: Transnational Governance and Democratic Legitimacy* (Basingstoke, Palgrave Macmillan 2007).

[348] Simon Caney, 'Cosmopolitan Justice and Institutional Design: An Egalitarian Liberal Conception of Global Governance' (2006) 32(4) *Social Theory and Practice* 725-756, 748-749.

[349] Ruth W. Grant and Robert O. Keohane, 'Accountability and Abuses of Power in World Politics' (2005) 99(1) *American Political Science Review* 29-43.

[350] Erik Voeten, 'The Political Origins of the UN Security Council's Ability to Legitimize the Use of Force' (2005) 59(3) *International Organization* 527-557, 528; Michael N. Barnett and Martha Finnemore, 'The Politics, Power, and Pathologies of International Organizations' (1999) 53(4) *International Organization* 699-732, 708-709.

[351] Binder and Heupel (n 323) 245.

[352] UNGAOR, UN Doc. A/55/PV.28 (22 September 2000) 12 (Venezuela argues that the SC should be reformed to ensure its credibility as a democratic, transparent and impartial organ); Binder and Heupel (n 323) 241.

system and uneven regional representation in the Council undermine its legitimacy,[353] the Charter prescribes it.[354]

Nevertheless, the dominance of the super powers obscures the transparency of the SC's procedure.[355] Binder and Heupel observe that 20% of the member States cast negative votes on this.[356] In fact, most of the decisions of the Council are reached in informal consultations among the P5.[357] This renders the "participation" of the non-permanent members nominal and adds to the existing problem of uneven regional representation. Reisman described the non-permanent members' role as "liaison" instead of participation.[358]

Additionally, there is an issue of accountability which accounts for about 16% of the negative votes of the member States.[359] The UN General Assembly has acknowledged the SC's legitimacy deficit.[360] Proposals for reform are underway[361] and it is hopeful that this will improve its credibility and make it more representative and efficient.[362]

6.3.4c Performance legitimacy

The outcome of the decisions of the SC directly affects its legitimacy.[363] For example, Russia justified its negative vote against the draft resolution on Syria by referring to how Resolution

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[353] David D. Caron, 'The Legitimacy of the Collective Authority of the Security Council' (1993) 87(4) *American Journal of International Law* 552-558, 562-566.

[354] *The UN Charter* (n 43) [Art. 27(3)].

[355] Note that the Charter gives the SC the liberty to adopt its own rules of procedure. See *The UN Charter* (n 43) [Art. 30].

[356] Binder and Heupel (n 323) 245.

[357] Caron (n 353) 564; W. Michael Reisman, 'The Constitutional Crisis in the United Nations' (1993) 87(1) *American Journal of International Law* 83-100, 85-86; Loie Feurle, 'Informal Consultation: A Mechanism in Security Council Decision-Making' (1985) 18(1) *New York University Journal of International Law and Politics* 267-308; UNGAOR, UN Doc. A/53/PV.40 (21 October 1998) 10 (Mexico describes it as mysterious conclaves).

[358] Reisman (n 357) 99.

[359] Binder and Heupel (n 323) 245.

[360] See generally, UNGAOR, UN Doc. A/71/PV.42 (7 November 2016); UNGAOR, UN Doc. A/71/PV.43 (7 November 2016).

[361] Yehuda Z. Blum, 'Proposals for UN Security Council Reform' (2005) 99(3) *The American Journal of International Law* 632-649.

[362] UNSCOR, UN Doc. S/PV.6300 (22 April 2010) 2, 4, 6; *A More Secure World* (n 52) 64; UNGA Res. A/59/2005 (21 March 2005) 60.

[363] Thomas Franck disagrees with the idea that justice directly affects legitimacy. See Franck 1990 (n 278) 208.

1973 (2011) was misused by NATO.[364] On the contrary, the United States argues that it is Russia's veto that puts the Council's legitimacy at risk.[365]

The state practice does not place much emphasis on the SC's performance. About 24% of negative statements were recorded.[366] To illustrate, the effectiveness and efficiency of the SC is measured by performance. For instance, Kazakhstan complained about the Council's poor performance because of its inability to respond in a timely and effective manner to the emerging security concerns.[367] Understandably, the inefficient response is caused by the inability of the SC to make a timely determination in accordance with Article 39 or for the P5 to agree on the text of the draft resolution. The performance legitimacy deficit was witnessed in the Rwandan genocide. It may have accounted for the impasse among the P5 regarding the ongoing civil war in Syria.

Having said that, the SC still enjoys rudimentary legitimacy. Binder and Heupel's research indicates that 27% of all the statements about the Council were positive.[368] Overall, its legitimacy deficit is worrisome to the extent that it portends a danger to the principle of the inviolability of State territory. If the credibility of the only UN Organ that could authorise force against a State were questionable, the demise of the principle of inviolability is but a matter of time.

6.4 Attribution of Responsibility to Host State and the right to Self-defence

The ICJ's judgment in the *Nicaragua* case held that States could be responsible for an armed attack by the NSAs through the doctrine of attribution.[369] This is a good compromise between

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[364] UNSCOR, UN Doc. S/PV.6627 (4 October 2011) 4.

[365] Julian Borger and Bastien Inzaurralde, 'Russian vetoes are putting UN Security Council's legitimacy at risk, says UN' (The Guardian, 23 September 2015) available at <https://www.theguardian.com/world/2015/sep/23/russian-vetoes-putting-un-security-council-legitimacy-at-risk-says-us> accessed 17 June 2017.

[366] Binder and Heupel (n 323) 245.

[367] UNGAOR, UN Doc. A/61/PV.75 (12 December 2006) 7.

[368] Binder and Heupel (n 323) 246.

[369] Attribution is implied when the Court states: 'the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to, (inter alia) an actual armed attack conducted by regular forces, or its substantial involvement therein.' See *Nicaragua case* (n 119) [para. 195]; *DRC v Uganda* (n 125) [para. 146].

the classic inter-State interpretation of Article 2(4)[370] and liberalism that extends the right to self-defence to the NSAs irrespective of the consent of the host State.[371] However, some regional instruments recognise the independent identity of the NSAs. The provision of Article 1 of the Non-Aggression and Common Defence Pact[372] affirm that the NSAs could commit an act of aggression.

Invariably, a State can enforce the right to self-defence contrary to the view held by the ICJ in the *Nicaragua* case if the wrongful act is attributed to the host State. Articles 4 to 6 of the Draft Articles on State Responsibility provide the basis under which such attribution could be made. They include, (1) when the NSA is an organ of the State as provided for in article 4, (2) when the persons or entities exercise element of governmental control as codified in article 5, and (3) when the conduct of a State is placed at the disposal of a State by another State as enshrined in article 6. Apart from determining whether the group is an organ of a State, the judicial institutions also consider whether the host State has "strict control," "overall control" or "effective control" over the activities of the NSAs. We shall briefly discuss the "strict control" and "effective control" tests.

6.4.1 Strict-control test – whether the NSAs are organs of the State

In the *Nicaragua* case, the ICJ identified the elements of the strict control test as follows:

> … whether or not the relationship of the contras to the United States Government was so much one of dependence on the one side and control on the other that it would be right to equate the contras, for legal purposes, with an organ of the United States Government, or as acting on behalf of that Government.[373]

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[370] Tams 2009 (n 99) 364; *ICJ Opinion on the Palestinian Wall* (n 105) [para. 139]; Tom Ruys and Sten Verhoeven, 'Attacks by Private Actors and the Right of Self-Defence' (2005) 10(3) *Journal of Conflict and Security law* 289-320, 291.

[371] This School would argue that such force is not directed "against" the territory of the host state as analysed in chapter three. See *ICJ Opinion on the Palestinian Wall* (n 105) [para. 33] (Separate Opinion of Judge Higgins); Thomas M Franck, 'Terrorism and the Right of Self-Defense' (2001) 95(4) *American Journal of International Law* 839-842, 840; Dinstein 2011 (n 96) 227-228.

[372] See *African Union Non-Aggression and Common Defence Pact* (Adopted at Abuja on 31 January 2005, entered into force on 18 December 2009) [Art. 1(c)] available at <https://www.au.int/web/en/treaties/african-union-non-aggression-and-common-defence-pact> accessed 17 June 2017.

[373] *Nicaragua case* (n 119) [paras. 109 and 115].

The ICJ based its evaluation of the said relationship on the Report issued by the Intelligence Committee in May 1983.[374] It reasoned that the United States financing of the *contras* suggested it had control over the *contras*.[375] But the aid was not overwhelming to justify treating the *contras* as acting on behalf of the United States.[376] Therefore, the assistance was 'insufficient to demonstrate their complete dependence on the United States aid.'[377]

The "complete dependence" theory implies that the dependant group has no real autonomy and therefore constitutes a *de facto* "organ" of the controlling power.[378] This requires the victim State to prove that the host State has, not only the capacity to, but equally controlled the NSAs "in all fields" of activities.[379] This makes attribution remote and unrealistic. It restricts attribution to States' actions,[380] and completely negates that external financial assistance is crucial to the dismemberment of a State.[381]

6.4.2 Effective control test

According to Tams, the test for attribution in the *Nicaragua* case is "effective control."[382] It means that a victim State must show that the host State is substantially involved in the attacks by a terrorist group.[383] Trapp disagrees with Tams, noting that the *Nicaragua*'s judgment formulated the effective control test as a tool to evaluate the US's responsibility for an internationally wrongful act for the humanitarian law violated by the *contras*.[384]

Assuming the "effective control" is the applicable test, it is difficult to discharge the burden of proof. The victim State must evidence its claim by tracing the delict conduct up to the policy

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374 ibid., [para. 95].

375 ibid., [para. 109].

376 ibid., [para. 109].

377 ibid., [para. 110].

378 Stefan Talmon, 'The Responsibility of Outside Powers for Acts of Secessionist Entities' (2009) 58(3) *International and Comparative Law Quarterly* 493-518, 499.

379 Talmon 2009 (n 378) 499-500.

380 *Articles on States Responsibility* (n 19) [Art. 7].

381 Daniel Byman *et al.*, *Trends in Outside Support for Insurgent Movements* (Pittsburgh, RAND 2001) 83-100.

382 *Nicaragua case* (n 119) [para. 115]; Tams 2009 (n 99) 385-386.

383 Tams 2009 (n 99) 368.

384 Kimberley N. Trapp, 'The Use of Force against terrorists: A reply to Christian J. Tams' (2009) 20(4) *European Journal of International Law* 1049-1055, 1050 (see footnote 6).

and the operational ladder of command and control of the host State.[385] Attempt to establish these links failed in the *DRC v Uganda*.[386]

Consequently, some States that have been victims of the nefarious activities of the NSAs do not consider attribution requirement obligatory. In 2006 for instance, Israel embarked upon counter defensive measures against Hezbollah's rocket attacks.[387] Similarly, Burundi invaded Tanzania for providing military training and weapons to the rebels fighting against the government forces in 1997.[388] These incursions were neither justified on attribution,[389] nor on the Draft Article on State Responsibility[390] but on the right to self-defence.

6.4.3 The *Nicaragua*'s threshold, the Bush's policy and the ICTY Appeals Chamber

After the 9/11 terrorist attacks on the United States, the Bush administration made no contrast between terrorists and those who harbour them.[391] The Bush doctrine aligns itself more with the "overall control" threshold established by the judgment of the Appeal Chamber of the ICTY.[392] The ICTY held that the test for the imputation of liability is met when a State coordinates or helps in the general planning of the group's military activity.[393] Judge Schwebel echoed a same opinion in his dissent in the *Nicaragua* case.[394] Although the

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[385] Talmon 2009 (n 378) 502.

[386] *DRC v Uganda* (n 125) [paras. 130, 160]. On whether the actions of armed bands or irregulars can be attributed to the DRC, see ibid., [para. 146].

[387] Enzo Cannizzaro, 'Contextualizing proportionality: *jus ad bellum* and *jus in bello* in the Lebanese War' (2006) 88(864) *International Review of the Red Cross* 779-792, 780.

[388] Ruys and Verhoeven (n 370) 314.

[389] *Mohammed Almandi and others v The Minister of Defence and others* [2002] HCJ 3451/02 [para. 9].

[390] *Articles on States Responsibility* (n 19) [Arts. 6 and 8].

[391] The White House, *The National Security Strategy of the United States of America* (Washington, The White House 2002) 5 available at <http://www.state.gov/documents/organization/63562.pdf> accessed 22 April 2016 [hereinafter *US National Security Strategy*].

[392] *The Prosecutor v Tadić (Duško)* (Case No IT-94-1-A, ICL 93) Appeal Judgment ICTY (1999) [paras. 120, 122, 123 and 128] [hereinafter *Tadic Appeal Chamber 1999*].

[393] ibid., 131; *The Prosecutor v Du [Ko Tadi]* (Case No. IT-94-1-T) Judgment Trial Chamber ICTY (1997) [para. 584]. The Tribunal states: 'the relationship of *de facto* organs or agents to the foreign Power includes those circumstances in which the foreign Power "occupies" or operates in certain territory solely through the acts of local *de facto* organs or agents'; see also United Kingdom Ministry of Defence, *The Manual of the Law of Armed Conflict* (Oxford, Oxford University Press 2004) [para. 11.3.1].

[394] See *Nicaragua case* (n 119) [paras. 165 and 170] (Dissenting Opinion of Judge Schwebel).

attribution test in the *Nicaragua* case has been faulted,[395] state practice does not classify assistance given to the NSAs as an armed attack.[396] Therefore, the right to self-defence on the basis of assistance given to the NSAs is not a customary law. This dissertation maintains that such actions breach Article 2(4) and could jeopardise international peace and security.

6.4.4 Aiding and abetting the wrongful act

To avoid the difficulty in interpreting what a "substantial involvement" could mean, Tams has suggested a re-introduction of the criminal term of aiding and abetting the commission of a crime.[397] This proposal would be problematic because terrorism is not an international crime.[398] Besides, attributing individual criminal responsibility to a State conflict with the legal framework on the immunity for State officials.[399] In the *Germany v Italy* case,[400] the ICJ held that State immunity is 'one of the fundamental principles of the international legal order.'[401] A departure from it would jeopardise the doctrines of the inviolability of State territory and sovereign equality.[402]

Regardless, both the ICTY[403] and the International Criminal Tribunal for Rwanda[404] insist that aiding and abetting a wrongful act is a form of accessory liability. What is required to prove complicity is that the aider and/or abettor has a constructive knowledge of the crime.[405] This

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[395] John N. Moore, 'The *Nicaragua* case and the deterioration of World Order' (1987) 81(1) *American Journal of International Law* 151-159, 154; Thomas M. Franck, 'Some Observations on the ICJ's Procedural and Substantive Innovations' (1987) 81(1) *American Journal of International Law* 116-121, 120-21.

[396] Gray 2008 (n 93) 132.

[397] Tams 2009 (n 99) 385-386.

[398] *Rome Statute of the International Criminal Court* (Adopted at Rome on 17 July 1998, entered into force on 1 July 2002) 2187 UNTS 3 [Art. 25] [hereinafter *Rome Statute*].

[399] Pierre d'Argent, 'Immunity of state officials and obligation to prosecute' in Anne Peters *et al*., (eds), *Immunities in the Age of Global Constitutionalism* (Leiden and Boston, Brill Nijhoff 2014) 244-266.

[400] *Jurisdictional Immunities of the State* (Germany v Italy: Greece intervening) Judgment ICJ Reports (2012) p. 99 [hereinafter *Germany v Italy 2012*].

[401] ibid., [para. 57]; see also 'Draft Articles on jurisdictional immunities of States and their property' (Volume II Part II Yearbook of the International Law Commission 1980) 147 [para. 26].

[402] *Germany v Italy 2012* (n 400) [para. 57].

[403] *Tadic Appeal Chamber 1999* (n 392) [para. 138]; *The Prosecutor v Kunarac et al.,* (Case no. IT-96-23-T) Trial Chamber, Judgment ICTY (2001) [paras. 391-399].

[404] *The Prosecutor v Akayesu* (Case no. ICTR-96-4-T) Trial Chamber I ICTR (1998) [paras. 704-705]; *The Prosecutor v Alfred Musema* (Case no. ICTR-96-13-A) Trial Chamber I ICTR (2000) [paras. 125-126].

[405] Antonio Cassese, *Cassese's International Criminal Law* (Third Edition, Oxford, Oxford University Press 2013) 193-205.

burden of proof can be discharged when the claimant substantiates the existence of a physical or a moral support.[406]

Apparently, States supplying arms to the Assad's government or the moderate opposition in Syria could be aiding and abetting the commission of war crimes in Syria.[407] According to Trapp, the ICJ's refusal to adjudicate the circumstances under which the use of force against the NSAs in a host State would be legitimate[408] could mean that attribution is not always required.[409]

Customarily, the doctrine of necessity allows States to defend themselves from an armed attack.[410] But the use of force is unnecessary if the host State were doing all it could to prevent its territory from being used as safe haven for the NSAs. Complicity could narrowly justify the violation of a State territory.[411]

However, Trapp failed to show how her formula would apply to States that are willing but unable[412] to prevent the NSAs from using its territory. To determine whether Syria is willing but perhaps unable to fight terrorist groups in its country, it must be shown that Syria co-operates with States that are "able" to help it fight the NSAs within its territory. The failure to co-operate with other States could be indicative of complicity and justify the invasion of a State territory.[413] To what extent can a State be accused of being "unwilling" or "unable" to cooperate with other States if it has a reasonable suspicion of foul play?

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406 *The Prosecutor v Alfred Musema* (n 404) [para. 126].

407 Tom Ruys, 'Of Arms, funding and "Non-lethal Assistance" – Issues surrounding Third-state Intervention in the Syrian Civil War' (2014) 13(1) *Chinese Journal of International Law* 1-53, 21.

408 *DRC v Uganda* (n 125) [para. 147].

409 Trapp 2009 (n 384) 1052-1053.

410 Kimberley N. Trapp, 'Back to Basics: Necessity, Proportionality and the Right of Self-Defence against Non-State Terrorist Actors' (2007) 56(1) *International and Comparative Law Quarterly* 141-156, 145-156.

411 Trapp 2009 (n 384) 1053.

412 To be analysed later.

413 Trapp 2009 (n 384)1055.

6.4.5 Draft Articles on Responsibility of States for Internationally Wrongful Acts

The ICJ's analysis of attribution in *Nicaragua* appeared to have focused on Article 3(g) of the *UN General Assembly Resolution on the Definition of Aggression*.[414] That inadvertently made "gravity threshold" part of the elements of an internationally wrongful act contrary to the provision of Article 2 of the *Draft Articles on State Responsibility*.[415] Although the Draft Articles are non-binding, the ICJ expressed a similar view in the *United States Diplomatic and Consular Staff in Tehran*.[416] It states:

> [f]irst, it must determine how far, legally, the acts in question may be regarded as imputable to the Iranian State. Secondly, it must consider their compatibility or incompatibility with the obligations of Iran under treaties in force or under any other rules of international law that may be applicable.[417]

Similarly, the General Claims Commission in the *Dickson Car Wheel Company* case[418] confirms that a State incurs international responsibility if 'there exists a violation of a duty imposed by an international juridical standard.' On this basis, the ICJ has been criticised for its refusal to adopt an inquisitorial approach to establish whether or not, Nicaragua assisted Farabundo Martí National Liberation Front (FMLN) in a manner that would have amounted to intervention in the internal affairs of El Salvador.[419] The literal meaning of the word "intervene" in Article 2(7) of the UN Charter is "interfere" which does not need to be dictatorial.[420] States that interfere in matters within the domestic jurisdiction of another

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[414] For factual details of this case, see John N. Moore, 'The Secret War in Central America and the Future of World Order' (1986) 80(1) *American Journal of International Law* 43-127; *DRC v Uganda* (n 125) [paras. 131-135, 146].

[415] It states: There is an internationally wrongful act of a State when conduct consisting of an action or omission: (*a*) is attributable to the State under international law; and (*b*) constitutes a breach of an international obligation of the State. See *Articles on States Responsibility* (n 19) [Art. 2].

[416] See generally, *United States Diplomatic and Consular Staff in Tehran* (United States of America v Iran) Judgment ICJ Reports (1980) p. 3.

[417] ibid., [para. 56]; *Gabcikovo-Nagymaros Project* (Hungary v Slovakia) Judgment ICJ Reports (1997) p. 7 [para. 78].

[418] *Dickson Car Wheel Company (U.S.A.) v United Mexican States* (1931) 4 RIAA 669-691, 678.

[419] Paul S. Reichler, 'The Impact of the *Nicaragua* Case on Matters of Evidence and Fact-Finding' (2012) 25(1) *Leiden Journal of International Law* 149-156.

[420] United Nations, 'Repertory of Practice of United Nations Organs: Extracts Relating to Article 2(7) of the Charter of the United Nations' (Volume I, 1945-1954) 130 available at <http://legal.un.org/repertory/> accessed 13 June 2017 [hereinafter *Repertory of the United Nations*].

State have violated the latter's integrity. But the factual evidence[421] adduced to support the claim that Nicaragua was assisting the FMLN was unconvincing to the Court.[422]

However, the attribution criterion in the *Nicaragua* case is described as a disaster for the world order.[423] It shows the Court's apathy to covert means used by States to breach the territory of other States through support to terrorist groups[424] and 'liberation movements.'[425]

6.4.6a The Requirements of Necessity and Proportionality

Necessity and proportionality were established as requirements that trigger self-defence after the destruction of a steamboat, named Caroline by the British forces on 29 December 1837.[426] The US requested Britain to justify its conduct by showing the existence of 'necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation.'[427]

The British Government seems to have imputed wrongfulness to the US Government because of its failure to prevent its nationals from assisting the rebels.[428] As shall be seen, this sort of defence is becoming a standard practice in the fight against terrorism. However, Webster

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[421] John N. Moore condemned the Court's failure to examine whether evidence confirms that Nicaragua supported Farabundo Martí National Liberation Front. See Moore 1987 (n 395) 151-159.

[422] Paul S. Reichler, 'The Nicaragua Case: A Response to Judge Schwebel' (2012) 106(2) *American Journal of International Law* 316-321; Reichler 'The Impact of the Nicaragua …' (n 419) 149-156; *Nicaragua case* (n 119) (Pleadings, ICJ Doc. CR 1985/17 Volume V) 52-55 (evidence of MacMichael denying knowledge of any shipment of weaponry from Nicaragua to rebels in El Salvador); *Nicaragua case* (n 119) [para. 29] (the Court holding that the facts on which a case is based must be supported by a convincing evidence).

[423] Moore 1987 (n 395) 152; Michla Pomerance, 'The ICJ's Advisory Jurisdiction and the Crumbling Wall between the Political and the Judicial' (2005) 99(1) *American Journal of International Law* 26-42.

[424] Soliman M. Santos and Paz Verdades M. Santos, *Primed and Purposeful: Armed Groups and Human Security Efforts in the Philippines* (Switzerland, Small Arms Survey 2010) 73; Rose Ehrenreich Brooks, 'War Everywhere: Rights, National Security Law, and the Law of Armed Conflict in the Age of Terror' (2004) 153(2) *University of Pennsylvania Law Review* 675-762, 717; Moore 1987 (n 395) 151; John Lawrence Hargrove, 'The *Nicaragua* Judgment and the Future of the Law of Force and Self-Defense' (1987) 81(1) *American Journal of International Law* 135-143, 143.

[425] Moore 1987 (n 395) 151; Meir Rosenne, 'Terrorism: who is responsible? What can be Done?' (1985-86) 148(3) *World Affairs* 169-172, 170.

[426] For facts regarding this case, see R. Y. Jennings, 'The Caroline and McLeod Cases' (1938) 32(1) *American Journal of International Law* 82-99; Martin A. Rogoff and Edward Collins, 'The Caroline Incident and the Development of International Law' (1990) 16(3) *Brooklyn Journal of International Law* 493-528.

[427] John Bassett Moore, *A Digest of International Law* (Vol. II, Washington, Government Printing Office 1906) 412; Daniel Webster, 'Enclosure 1-Extract from note of April 24, 1841' (Avalon Project) available at <http://avalon.law.yale.edu/19th_century/br-1842d.asp#web1> accessed 17 November 2015.

[428] Rogoff and Collins (n 426) 497.

strongly objected to the British Government's broad scope of self-defence.[429] In his view, self-defence must be limited to necessity and proportionality.

Necessity means 'that resort to force in response to an armed attack, or the imminent threat of an armed attack is allowed when an alternative means of redress is lacking.'[430] Proportionality requires that the use of force in self-defence must not exceed in manner or aim, the necessity provoking it.[431]

6.4.6b Necessity and proportionality in the ICJ's jurisprudence

The requirements of necessity and proportionality traverse the ICJ's jurisprudence[432] but when to apply each of them to the activities of the NSAs is uncertain. In the *Oil Platforms* case, the Court was 'not satisfied that the attacks on the platforms were necessary to respond to the Iranian attacks.'[433] This is because the United States did not complain to Iran of any military presence or activity on the Reshadat Oil Platforms.[434]

It begs the question as to whether the so-called "war on terror" dispenses with necessity and proportionality as a standard for assessing the harm suffered?[435] Taft opines that the requirement limiting self-defence to the source of the attack is inconsistent with state practice and unsupported by relevant authorities.[436]

Regarding proportionality, the ICJ held that the US' extensive operation against the alleged harm suffered was disproportionate.[437] To be efficient, the requirement of proportionality

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[429] Jennings 1938 (n 426) 89; Rogoff and Collins (n 426) 497-98.
[430] Rogoff and Collins (n 426) 498; Dinstein 2011 (n 96) 232; Oscar Schachter, 'The Right of States to Use Armed Force' (1984) 82(5&6) *Michigan Law Review* 1620-1646, 1635-1637.
[431] Rogoff and Collins (n 426) 498; Dapo Akande, 'UK Parliamentary inquiry into UK policy on the use of drones for targeted killing' (EJIL: *Talk!* 23 December 2015) available at <http://www.ejiltalk.org/uk-parliamentary-inquiry-into-uk-policy-on-the-use-of-drones-for-targeted-killing/#more-13935> accessed 24 February 2016.
[432] *Nicaragua case* (n 119) [para. 194]; *ICJ Opinion on Nuclear Weapon* (n 96) [para. 41]; *Oil Platforms case* (n 125) [paras. 43 and 76]; *DRC v Uganda* (n 125) [para. 147].
[433] *Oil Platforms case* (n 125) [para. 76].
[434] ibid., [para. 76].
[435] Gray 2008 (n 93) 150, 241-252.
[436] William H. Taft, 'Self-Defense and the Oil Platforms Decision' (2004) 29(2) *Yale Journal of International Law* 295-306, 303-304.
[437] *Oil Platforms case* (n 125) [para. 77].

enjoys flexibility.[438] That is, the international law is not particularly keen at the means of achieving the desired goal, provided the measures taken would do no more than to protect the integrity of the victim State.[439] This makes the doctrine of proportionality subjective to the extent that it allows States the right to take reasonable steps to halt and repel the attack. Anything beyond halting and repelling the attack could be an unlawful reprisal[440] and therefore disproportionate. The lack of an objective criterion for quantifying the level of apprehension by the victim State dissipates the view advocating for sameness in the intensity of force to be used.[441]

6.4.6c Lessons from Israel v Hezbollah

When Hezbollah attacked Israel in 2006,[442] eight Israeli soldiers were killed, and two soldiers were abducted. Israel regarded it as a declaration of war and attributed responsibility to the Lebanese government, from whose territory the attacks were launched.[443] Israel's use of force in self-defence lasted for a month and resulted in the death of 1056 civilian Lebanese, injured over 3,500 and displaced almost a million people.[444] During this period, Hezbollah fired hundreds of rockets into Israel, causing fifty civilian casualties and an estimated 114 military deaths, disrupting the lives of hundreds of thousands of civilians.[445]

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[438] Robert Ago, *Addendum to Eighth Report on State Responsibility* (Volume II Part I, International Law Commission Yearbook 1980) 69.
[439] Taft (n 436) 305.
[440] Derek Bowett, 'Reprisals involving Recourse to Armed Force' (1972) 66(1) *American Journal of International Law* 1-36, 33-36.
[441] Frederic L. Kirgis, 'Some proportionality issues raised by Israel's use of force in Lebanon' (2006) 10(20) *American Society of International Law Insight* available at <https://www.asil.org/insights/volume/10/issue/20/some-proportionality-issues-raised-israels-use-armed-force-lebanon> accessed 26 June 2017.
[442] For an account of the outbreak of this conflict, see 'Report of the Secretary-General on the United Nations Interim Force in Lebanon,' UN Doc. S/2006/560 (21 July 2006) [para. 3]; UN Doc. S/2007/392 (28 June 2007) [para. 2].
[443] UN Doc. S/2006/515 (12 July 2006) [para. 2].
[444] UN Press Release, 'Humanitarian Fact sheets on Lebanon,' IHA/1215 (11 August 2006) available at <http://www.un.org/press/en/2006/iha1215.doc.htm> accessed 25 February 2016; Security Council Press Release, 'Security Council calls for end to hostilities between Hizbollah, Israel, unanimously adopting resolution 1701 (2006),' available at <http://www.un.org/press/en/2006/sc8808.doc.htm> accessed 25 February 2016.
[445] Gray 2008 (n 93) 238.

The question is whether Israel had a right to self-defence against Hezbollah in Lebanon? *Prima facie* it would be difficult to square the death of 8 Israeli soldiers and the abduction of two soldiers with the 9/11 terrorist attacks on the United States. In comparison, the Hezbollah's attacks could be designated as mere frontier incidents, even though it violates Israel's territory. But if such attacks persist or were imminent, Israel could defend itself provided Lebanon is unwilling or unable to prevent such attacks and Israel has negotiated other peaceful means with the Lebanese government.[446] Since Hezbollah is not a State, the ICJ's *Advisory Opinion on Palestine Wall* should have been applied.[447]

Even though Judges[448] and *opinio juris*[449] have distanced themselves from the Court's opinion, Kretzmer maintained that self-defence is only available when armed attacks by the NSAs are of sufficient scale and effects.[450] The international community supported *Operation Enduring Freedom* on this basis. It is sufficient to say that state practice is divided on the requirements of necessity and proportionality as applied by Israel in Lebanon.[451] Therefore, the collective self-defence authorised by a reformed SC is the safest means to counter-terrorism.

6.5 Post *Nicaragua* – the inviolability of State territory v the right to Self-defence

Whether the threshold established by the ICJ in the *Nicaragua* case is a colossal defeat of individual and collective self-defence remains a controversial issue. On the substantive level, the *Nicaragua*'s judgment is ground-breaking because it reaffirms that coercion makes an intervention in the internal affairs of another State unlawful.[452] It reiterates that '[b]etween

[446] *The UN Charter* (n 43) [Arts. 11, 33, 34, 35, 36-38, and 99].
[447] *ICJ Opinion on the Palestinian Wall* (n 105) 139.
[448] ibid., [paras. 33-34] (Separate Opinion of Judge Higgins), [paras. 35-36] (Separate Opinion of Judge Kooijmans), [paras. 5-6] (Declaration of Judge Buergenthal).
[449] Franck 2001 (n 371) 840; Davis Brown, 'Use of Force against Terrorism after September 11th: State Responsibility, Self-Defense and Other Responses' (2003) 11(1) *Cardozo Journal of International and Comparative Law* 1-54, 24-25; Stahn 2003 (n 154) 36.
[450] David Kretzmer, 'Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?' (2005) 16(2) *European Journal of International Law* 171-212, 187; Antonio Cassese, 'The International Community's Legal Response to Terrorism' (1989) 38(3) *International and Comparative Law Quarterly* 589-608, 596.
[451] See generally, the debate in the Security Council on UNSCOR, UN Doc. S/PV.5488 (13 July 2006); UNSCOR, UN Doc. S/PV.5489 (14 July 2006); see also Michael N. Schmitt, '21st Century Conflict: Can the Law Survive?' (2007) 8(2) *Melbourne Journal of International Law* 443-476, 453.
[452] Marcelo Kohen, 'The Principle of Non-Intervention 25 Years after the *Nicaragua* Judgment' (2012) 25(1) *Leiden Journal of International Law* 157-164, 161.

independent States, respect for territorial sovereignty is an essential foundation of international relations.'[453] The principle of non-intervention involves the right of every sovereign State to conduct its affairs without outside interference.[454] Admittedly, the right to self-defence retains its inter-State character.

In its *Advisory Opinion* on Kosovo,[455] the ICJ was expected to make a pronouncement as to whether States could intervene to support secessionist groups.[456] It avoided that and limited its opinion on determining whether or not the declaration of independence was in accordance with international law.[457] Yet, no judge sitting at that Court contested the inter-State character of Article 2(4).[458] Even when some States argued that Kosovo was a case *sui generis*,[459] meaning that intervention could be permitted,[460] the Court refuses to adjudicate that.[461] Instead, the Court restated the classical view that secession is legally neutral and should be confined to domestic jurisdiction.[462]

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453 *Nicaragua case* (n 119) [para. 201].

454 ibid., [para. 201].

455 See generally, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo,* Advisory Opinion ICJ Reports (2010) p. 403 [hereinafter *ICJ Advisory Opinion on Kosovo*].

456 Elena Cirkovic, 'An Analysis of the ICJ Advisory Opinion on Kosovo's Unilateral Declaration of Independence' (2010) 11(7-8) *German Law Journal* 895-912, 897-98.

457 *ICJ Advisory Opinion on Kosovo* (n 455) [paras. 82-83].

458 ibid., [para. 21] (Judge Koroma Dissenting Opinion).

459 *ICJ Advisory Opinion on Kosovo* (n 455) [para. 82]; see also ibid., written statements submitted by the following states: France [paras. 2.1, 2.17, 2.19], the Republic of Latvia [para. 8], the Grand Duchy of Luxembourg [paras. 5-8]; see also the position of the United States in the Security Council Meeting in UNSCOR, UN Doc. S/PV.6367 (3 August 2010) 19-20.

460 *ICJ Advisory Opinion on Kosovo* (n 455) [para. 11] (Separate Opinion of Judge Yusuf), [paras. 41-41] (Separate Opinion of Judge Cancado Trindade); Hurst Hannum, 'The Advisory Opinion on Kosovo: An Opportunity Lost, or a Poisoned Chalice Refused?' (2011) 24(1) *Leiden Journal of International Law* 155-161, 157.

461 *ICJ Advisory Opinion on Kosovo* (n 455) [paras. 83-84]; UNSCOR, UN Doc. S/PV.6367 (3 August 2010) 23-24 (the position argued for by Serbia).

462 Olivier Corten, 'Territorial Integrity Narrowly Interpreted: Reasserting the Classical Inter-State Paradigm of International Law' (2011) 24(1) *Leiden Journal of International Law* 87-94, 93-94.

Although the Court's approach has been criticised,[463] it shows the Court's insistence on maintaining the inter-State character of Article 2(4).[464] In Crawford's opinion, state practice does not permit a State to support the NSAs because of the principle of the inviolability of State territory.[465] In some instances, the Court has refused to accept that self-defence could be available against what has been perceived as a military necessity due to new political realities.[466] This could be inferred from the *Palestinian Wall Advisory Opinion*[467] and the ICJ's decision in *Armed Activities on the Territory of the Congo*.[468] Hence, it is still debated whether NATO's assistance to rebels in Libya violated the latter's territory.[469]

6.5.1 The consequences of breaching a State territory without its consent

The *opinio juris* agrees that a validly given consent legitimises a military operation within a State territory.[470] The ICJ upheld this view in the *Armed Activities on the Territory of the Congo* with a caveat that the refusal of a State to withdraw its troops when asked could amount to an act of aggression.[471] In cases where many factions are claiming to be the legitimate government, the difficulty is how to establish the party whose consent is valid.[472] In that case, the Principle of Non-Intervention in Civil Wars applies.[473]

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[463] Thomas Burri, 'The Kosovo Opinion and Secession: The Sounds of Silence and Missing Links' (2010) 11(7-8) *German Law Journal* 881-890, 886; Bjorn Arp, 'The ICJ Advisory Opinion on the Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo and the International Protection of Minorities' (2010) 11(7-8) *German Law Journal* 847-866, 847; Daniel H. Meester, 'The International Court of Justice's Kosovo Case: Assessing the Current State of International Legal Opinion on Remedial Secession' (2011) 48 *Canadian Yearbook of International Law* 215-254, 222-23.

[464] Corten 2011 (n 462) 87.

[465] Crawford 2006 (n 9) 390; Antonio Cassese, *Self-Determination of Peoples: A legal Reappraisal* (United Kingdom, Cambridge University Press 1995) 340.

[466] Corten 2011 (n 462) 90; Franck 2001 (n 371) 839-842; Murphy 'Terrorism and the concept of Armed Attack' (n 48) 45-52; Nico J. Schrijver, 'The Future of the Charter of the United Nations' (2006) 10(1) *Max Planck Yearbook of United Nations Law* 1-34, 21-22.

[467] *ICJ Opinion on the Palestinian Wall* (n 105) [para. 139].

[468] *DRC v Uganda* (n 125) [paras. 146-147].

[469] Ulfstein and Christiansen (n 212) 168-69.

[470] *Oppenheim 1996* (n 3) 435; Corten 2010 (n 99) 249; Kohen 2006 (n 293) 78-93; Dinstein 2011 (n 96) 119-123; Gray 2008 (n 93) 67.

[471] *DRC v Uganda* (n 125) [paras. 53-54].

[472] Kohen 2006 (n 293) 78-79.

[473] Dinstein 2011 (n 96) 119.

6.5.1a *Bushism* and the emerging unilateral right to fight the NSAs

Bushism refers to George W. Bush's doctrine of pre-emptive self-defence against the NSAs and the State that harbours them to disrupt their plans before it materialises.[474] This doctrine, which became part of the US' rule of engagement[475] was based on the customary international law on self-preservation.[476] It is a departure from the inter-States character of Article 51 of the UN Charter.

Bushism has supposedly given the United States an unprecedented right to fight terrorism without the consent of the host State. Common sense would endorse this approach given the nature of the threat which criminal activities of the NSAs, cyber-terrorism and the WMD pose to the States' security. However, Gardner argues that these contemporary security challenges are not strong enough to undermine the inviolability of State territory.[477] The modern International law does not provide for an unfettered right to a unilateral pre-emptive action.[478]

Bushism inaugurates international law that is based on the primacy of the national security interests over territorial sovereignty.[479] It seeks to combat terrorism by discarding the existing norm on the sovereign equality of States.[480] Thus, it dismantles the sources of international law[481] mostly based on States' consent.[482] Despite the alternative sources of international law

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[474] See George W. Bush, 'Address to the Nation on Terrorist Attacks' (11 September 2001) available at <http://www.presidency.ucsb.edu/ws/?pid=58057> accessed 17 June 2017.

[475] *US National Security Strategy* (n 391) 6, 15.

[476] John F. Kennedy, 'Radio and Television report to the American people on the Soviet arms buildup in Cuba' (22 October 1962) available at <http://www.presidency.ucsb.edu/ws/?pid=8986> accessed 12 June 2017; *US National Security Strategy* (n 391) 15.

[477] Richard N. Gardner, 'Neither Bush nor the Jurisprudes' (2003) 97(3) *American Journal of International Law* 585-589, 588.

[478] Henry A. Kissinger, 'Consult and Control: By words for battling the New Enemy' (Washington Post, 16 September 2002) available at <https://www.washingtonpost.com/archive/opinions/2002/09/16/consult-and-control-bywords-for-battling-the-new-enemy/89b7bb09-bbb1-4ca7-a7f4-0350b46d981d/> accessed 12 June 2017.

[479] Duncan B. Hollis, 'Why state consent still matters – Non-State Actors, Treaties, and the changing Sources of International Law' (2005) 23(1) *Berkeley Journal of International Law* 137-174, 138.

[480] Thomas M. Franck, 'What Happens Now - The United Nations after Iraq' (2003) 97(3) *American Journal of International Law* 607-620, 610; Michael J. Glennon, 'The Fog of Law: Self-Defense, Inherence, and Incoherence in Article 51 of the United Nations Charter' (2002) 25(2) *Harvard Journal of Law & Public Policy* 539-558, 540.

[481] *ICJ Statute* (n 302) [Art. 38].

[482] Ian Brownlie, *Principles of Public International Law* (Seventh Edition, Oxford, Oxford University Press 2008) 3.

as scholarship suggests,[483] States' approval appears fundamental to all the sources enumerated in Article 38 of the Statute of the ICJ.[484]

Goodhart has questioned the rationale for respecting States territory in the event of nefarious activities of the NSAs given the legitimacy deficit of the SC.[485] Consequently, Gardner has outlined four conditions under which a State consent could be discarded. First, when the host State fails to discharge its international obligations to suppress terrorism. Second, when the host State does not prevent the supply of WMD to terrorists. Third, when the victim State wants to rescue its nationals abroad. Fourth, when the intervention is meant to prevent genocide or crimes against humanity.[486] However, he failed to elaborate on the specificity of these conditions. What, for example, amounts to a failure of a State to discharge its international obligations?[487]

A High-Level Panel constituted to evaluate the positive international law in the light of the contemporary threats, challenges and change has rejected any advocacy for the rewriting or reinterpreting of Article 51.[488] Instead of endorsing a unilateral pre-emptive measures, the Panel recommends that such matters be tabled before the SC for authorisation.[489] Although the report acknowledges that the SC's Chapter VII's powers have been paralysed for 44 years,[490] it maintains that allowing unilateral pre-emptive actions will put the global order at risk.[491] This dissertation subscribes to this informed analysis.

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[483] Such as the General Assembly Resolutions, the SC resolutions or the work of the International Law Commission *etcetera*, see Hollis (n 479) 143.

[484] Alfred P. Rubin, *Ethics and Authority in International Law* (Cambridge, Cambridge University Press 2007) 198.

[485] Arthur L. Goodhart, 'Some legal aspects of the Suez situation' in Philip W. Thayer (ed), *Tensions in the Middle East* (Baltimore, Johns Hopkins Press 1958) 243 *et seq*.

[486] Gardner (n 477) 590; Richard A. Falk, 'What Future for the UN Charter System of War Prevention?' (2003) 97(3) *American Journal of International Law* 590-598, 593-594.

[487] Would the Afghan government deemed to have failed to discharge its international obligations when it was not in total control of the Al-Qaeda? See Nico Schrijver *et al*., (eds), *Counterterrorism Strategies in a Fragmented International Legal Order* (Chatham House, the Royal Institute of International Affairs, 10 March 2014) 4.

[488] *A More Secure World* (n 52) [paras. 78-79, 192]; Mary Ellen O'Connell, 'The Right of Self-Defense' (Oxford Bibliographies, 30 November 2015) available at <http://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0028.xml> accessed 12 May 2016.

[489] *A More Secure World* (n 52) [para. 190].

[490] ibid., [para. 186].

[491] ibid., [para. 191].

6.5.1b Argument based on “unable” or “unwilling” to stop the NSAs

After the Pan American Flight 103 incident on 21 December 1988, two Libya nationals were indicted by the United States Grand Jury on 193 felony counts.[492] Both the United States and the United Kingdom made an informal extradition request through Belgium.[493]

The Libyan government refused to grant the request. Instead, it wanted to exercise jurisdiction in accordance with the provision of Article 5(2) of the Montreal Convention.[494] Libya solicited the cooperation of the US and the UK and requested that they provide it with intelligence information so that the accused would be prosecuted in Libya.[495] Both countries rejected the request and threatened Libya with use of armed force if it failed to extradite the suspects.[496] Libya maintained its position and alleged that the US’ refusal to cooperate was a breach of Article 11(1) of the Montreal Convention.[497]

This case raises the question of how far a State could go in addressing the wrongful act of the NSAs when the host State is "unwilling or unable" to prevent the crime. Apparently, Libya manifested the "willingness" to prosecute the suspects based on the treaty law to which all the countries involved were a party. Since *nemo judex in causa sua*, the US and its allies doubted the fairness (ability) of Libya’s judicial system in prosecuting the crime. But the legal basis for the extradition was questionable because neither the US nor the UK had diplomatic relations or extradition treaties with Libya at the material time.[498]

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[492] UN Doc. S/23317 (23 December 1991) 9 [para (v)]; George Lardner, ‘2 Libyans Indicted in Pan Am Blast’ (Washington Post, 15 November 1991) available at <http://www.washingtonpost.com/wp-srv/inatl/longterm/panam103/stories/libyans111591.htm> accessed 17 June 2017.

[493] Michael Plachta, ‘The Lockerbie case: The Role of the Security Council in Enforcing the Principle *Aut Dedere aut Judicare*’ (2001) 12(1) *European Journal of International Law* 125-140, 126; UN Doc. S/23308 (31 December 1991) [Annex, para. 4]; UN Doc. S/23306 (31 December 1991) [Annex, para. 4]; UN Doc. S/23309 (31 December 1991) [Annex, para. 3].

[494] *1971 Montreal Convention* (n 34) [Art. 5(2)].

[495] Plachta (n 493) 127.

[496] ibid., 127-128.

[497] *1971 Montreal Convention* (n 34) [Art. 11].

[498] Trevor Rowe, ‘U.N. presses Libya on bombing’ (Washington Post, 22 January 1992) available at <http://www.washingtonpost.com/wp-srv/inatl/longterm/panam103/stories/un012292.htm> accessed 17 June 2017.

The SC adopted resolution 748 (1992) which decided that the Libyan government must provide a full and efficient response to those requests.[499] Additionally, the SC imposed economic sanctions on Libya.[500] Perhaps, not only that resolution 748 prevailed over the relevant provisions of the 1971 Montreal Convention,[501] but also it confirmed the US's position that Libya was an accomplice and could not evade its responsibility under international law.[502] Put differently, the legal maxim *nemo iudex in causa sua* disengages the Lotus principle.[503] Libya petitioned the ICJ and applied for a provisional order to stop the US from taking any forcible measures that could undermine its territorial sovereignty.[504] The ICJ declined,[505] thereby validating the SC resolution 748.[506]

This provokes some issues, among which are: (1) can a State be termed "unwilling or unable" to fight terrorism when it expresses eagerness to do so? (2) Does the SC's powers under Chapter VII override the Treaty Law?[507] A detailed analysis of these issues is done elsewhere.[508] Note, however, that there was no indication that the US had intended to take a unilateral action against the accused or the territory of Libya following the *Lockerbie* incident.

In the past, States have applied "lawful" lethal force against insurgents in the territory of the host State by claiming that the host State is "unwilling or unable" to tackle the problem.[509] Sometimes, States do that to evacuate their nationals. Except for the 2005 World Summit that

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[499] UNSC Res. S/RES/748 (31 March 1992) [operative para. 1]; UNSC Res. S/RES/731 (21 January 1992) [operative para. 3].
[500] UNSC Res. S/RES/883 (11 November 1993) [operative para. 3].
[501] *Libya's request for provisional measures in Lockerbie* (n 196) [para. 42]; *The UN Charter* (n 43) [Art. 103].
[502] This is how the United States interpreted the SC resolution 731 (1992). See Department of Political Affairs, *Repertoire of the practice of the Security Council: Supplement 1989-1992* (New York, United Nations 2007) 284.
[503] *Case of S.S 'Lotus'* (France v Turkey) Collection of Judgments, PCIJ Series A, No. 10 (1927) 19.
[504] *Libya's request for provisional measures in Lockerbie* (n 196) [para. 3].
[505] ibid., [para. 46].
[506] Note that the Court declared it was not called upon to determine definitively the legal effect of the said resolution. See *Libya's request for provisional measures in Lockerbie* (n 196) [para. 43].
[507] Erika de Wet, 'The Security Council as a law maker: the adoption of (Quasi) judicial decisions' in Rudiger Wolfrum and Volker Roben (eds), *Developments of International Law in Treaty making* (New York, Springer 2005) 187-188; Plachta (n 493) 129.
[508] Plachta (n 493) 125-140.
[509] Ian Brownlie, 'International Law and the Activities of Armed Bands' (1958) 7(4) *International and Comparative Law Quarterly* 712-735, 732-733.

established the R2P,[510] state practice condemns such invasions as a violation of the territory of the host State.[511] After the phenomenon of the use of chemical weapon was established in Syria, the Obama administration attributed it to the Assad's government and wanted to enforce the R2P.[512] This dissertation agrees with *opinio juris* that such measures would have been unlawful without an express authorisation from the SC.[513] The Committee on the use of force has stated that both requirements of "unwilling and unable" must be satisfied before force could be deployed against the NSAs in a host State without its consent.[514]

6.5.2 The ICJ's position

The position of the ICJ appears consistent in upholding that the Member States must seek and obtain the consent of the host State. Exceptions to law are construed strictly. In the *Corfu Channel* case,[515] the ICJ rejected the United Kingdom's argument that *'Operation Retail'* was justified to secure *corpora delicti*.[516]

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[510] *2005 World Summit Outcome* (n 212) [para. 139]. Note that this instrument does not expressly authorise forcible measures against the territory of any state but rather preserved the UN Charter's provisions. See paragraphs 5, 77 and 106. Mary O'Connell has argued that paragraph 139 implied an authorisation of the use of force. See, Mary Ellen O'Connell, 'The true meaning of force' (AJIL Unbound, 4 August 2014) available at <https://www.asil.org/blogs/true-meaning-force> accessed 17 June 2017; see also *Barcelona Traction, Light and Power Co. Ltd* (Belgium v Spain) Judgment ICJ Reports (1970) p. 3 [para. 33]; *Articles on States Responsibility* (n 19) [Art. 48].

[511] Jorg Kammerhofer, 'The Armed Activities Case and Non-State Actors in Self-Defence Law' (2007) 20(1) *Leiden Journal of International Law* 89-113, 105.

[512] White House Office of the Press Secretary, 'Statement by the President on Syria' (31 August 2013) available at <https://www.whitehouse.gov/the-press-office/2013/08/31/statement-president-syria> accessed 27 April 2016; Prime Minister's Office Guidance, 'Chemical weapon use by Syrian regime: UK government legal position' (29 August 2013) available at <https://www.gov.uk/government/publications/chemical-weapon-use-by-syrian-regime-uk-government-legal-position/chemical-weapon-use-by-syrian-regime-uk-government-legal-position-html-version> accessed 27 April 2013; White House Office of the Press Secretary, 'Joint Statement on Syria' (6 September 2013) available at <https://www.whitehouse.gov/the-press-office/2013/09/06/joint-statement-syria> accessed 27 April 2013.

[513] Carsten Stahn, 'Syria and the Semantics of Intervention, Aggression and Punishment; On "Red lines and Blurred Lines"' (2013) 11(5) *Journal of International Criminal Justice* 955-978, 958-963; Kohen 2012 (n 452) 162 (he argues that the R2P is not a recognised rule of international law).

[514] *ILA Report on the use of force* (n 136) [section B.2.c].

[515] *Corfu Channel case* (n 135) 35.

[516] ibid., 35.

Similarly, *Nicaragua*,[517] *DRC v Uganda*[518] and *Oil Platforms*[519] cases construed Article 2(4) of the UN Charter broadly. Coercive measures can only be directed against a State without its consent if the activities of the NSAs were attributable to it.[520] In the *DRC v Uganda* case,[521] the ICJ declined from adjudicating whether a victim State could take forcible action against irregular forces where the delict act is not attributed to the host State. But its *Advisory Opinion on Palestinian Wall* seems to have answered in the negative.[522] In fact, the Court explains that while the 9/11 attacks are exogenous, the construction of the wall originates from within the territory under Israel's occupation.[523]

However, the ICJ's comparison of the factual difference between the 9/11 attacks and the construction of the wall in Palestine appears superfluous. The Court failed to explain how the difference impacts on the right to self-defence.[524] Besides, the 9/11 terrorist attacks were committed by terrorists resident in the US and under the US's control.[525] It does not strictly reflect the cross-border sending of irregular forces as depicted in the *Nicaragua*[526] and *DRC v Uganda*[527] cases.

The ICJ's *Advisory Opinion on the Palestinian Wall* did not give enough weight to Israel's submission that the terrorist attacks were supported by a foreign assistance.[528] The SC

[517] *Nicaragua case* (n 119) [paras. 187-190].
[518] *DRC v Uganda* (n 125) [paras. 148-149].
[519] *Oil Platforms case* (n 125) [para. 51].
[520] *Corfu Channel case* (n 135) 16-18; *DRC v Uganda* (n 125) [paras. 131-135, 146]; *Oil Platforms case* (n 125) [para. 64]; *Nicaragua case* (n 119) [paras. 57, 79, 123].
[521] *DRC v Uganda* (n 125) [para. 147].
[522] *ICJ Opinion on the Palestinian Wall* (n 105) [paras. 138-139]; *Genocide case* (n 30) [paras. 158, 209]; *Corfu Channel case* (n 135) 17 (the Court holding that charges against a state must be substantiated with conclusive evidence).
[523] *ICJ Opinion on the Palestinian Wall* (n 105) [para. 139].
[524] Sean D. Murphy, 'Self-defence and the Israeli *Wall* Advisory Opinion: an *ipse dixit* from the ICJ?' (2005) 99(1) *American Journal of International Law* 62-76, 68.
[525] National Commission on Terrorist Attacks upon the United States, *The 9/11 Commission Report* (Washington, 21 August 2004) 1-4 available at <https://9-11commission.gov/report/> accessed 15 June 2017.
[526] *Nicaragua case* (n 119) [para. 195].
[527] *DRC v Uganda* (n 125) [para. 110].
[528] *ICJ Opinion on the Palestinian Wall* (n 105) [paras. 3.59 and 3.61] (Written Statement of the Government of Israel on Jurisdiction and Propriety, 30 January 2004).

appears to have taken that into consideration in its resolution 1373,[529] although most terrorist acts have international connection.[530]

It suffices to say that the SC resolution 1373 (2001) authorised the use of force in Afghanistan without attributing the unlawful act to the Taliban Government. Therefore, in the absence of consent or attribution, the SC may still authorise the breach of a State territory.[531] The separate opinion of Judge Kooijmans in the *Advisory Opinion on the Palestinian Wall* lends support to the inherent nature of the right to self-defence against armed attacks from the NSAs.[532] Both NATO[533] and the Organisation of American States[534] (OAS) endorsed this interpretation.

Apparently, the conflicting messages from the Organs of the United Nations do not clarify the position of the law regarding whether the host State's consent is indispensable. While the ICJ's jurisprudence that emphasises "attribution" appears to accept that consent is indispensable, the SC does not give much attention to that. But that the SC Resolution 1373 does not expressly mention attribution does not mean that it cannot be implied into it.

6.5.3 Clarifications from the Committee on the Use of Force

After the 9/11 terrorist attacks and the 2003 invasion of Iraq, the International Law Association established a committee on the Use of Force with the mandate to review the law on the right to self-defence.[535] Regarding pre-emptory self-defence, the committee argues

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[529] See UN Doc. S/2001/946 (7 October 2001) [para. 2] (the United States argues that the Taliban regime in Afghanistan supported the Al-Qaeda organization that masterminded the attacks).

[530] Oscar Schachter, 'The Extraterritorial Use of Force against Terrorist Bases' (1989) 11(2) *Houston Journal of International Law* 309-316, 309.

[531] Tams 2009 (n 99) 365; O'Connell 2013 (n 157) 381; O'Connell 2010 (n 158) 359.

[532] *ICJ Opinion on the Palestinian Wall* (n 105) [para. 35] (Separate opinion of Judge Kooijmans); Murphy 2005 (n 524) 67; Thomas M. Franck, *Recourse to Force: State Action against Threats and Armed Attacks* (Cambridge, Cambridge University Press 2002) 54; Gray 2008 (n 93) 136, 194; Cassese 2001 (n 101) 996.

[533] The statement issued by the North Atlantic Council after the 9/11 attacks states that such attacks from abroad fall within the provision of Article 5 of the North Atlantic Treaty. See NATO Press Release (2001) 124, 'Statement by the North Atlantic Council' available at <http://nato.int/docu/pr/2001/index.html> accessed 14 May 2016; NATO Speeches, 'Statement by NATO Secretary General, Lord Robertson' (2 October 2001) available at <http://www.nato.int/docu/speech/2001/s011002a.htm> accessed 14 May 2016.

[534] Organization of American States (OAS), 'Resolution on terrorist threat to the Americas' (2001) 40(5) *International Legal Materials* 1273-1274 [Resolve 1].

[535] Mary Ellen O'Connell, 'Description Study Committee on the Use of Force' 2 available at <http://www.ila-hq.org/en/committees/index.cfm/cid/1022> accessed 12 May 2016.

that the state practice in recent years suggests that the right to self-defence could be available to manifestly imminent attacks.[536] However, any measures to be taken must be necessary, proportionate and give primacy to the effective measures by the SC.[537]

Concerning using force against the NSAs within the territory of another State, the committee agrees that a textual analysis of Article 51 of the UN Charter could accommodate that.[538] However, there is no uniform state practice yet, albeit *opinio juris* seems to support it[539] because it was not directed against the State. The danger is how to distinguish a force directed against the terrorist group and a force directed against the host State. It would also render the idea of territorial sovereignty which by nature is exclusively ineffective. Nonetheless, the Committee concludes that the use of force in such circumstances will be unlawful unless justified by self-defence or authorised by the SC.[540]

6.6 The NSAs in Syria and Unlawful Interventions

Based on what has been said so far, this section narrows down to the Syrian civil war to buttress the state practice towards the NSAs and terrorist groups. Syria is a good example because it contains all the relevant variables that might lead to a breach of a State territory through the assistance given to the NSAs, or by fighting a terrorist group. It also shows how a State territory might be breached if a third State intervenes without an explicit authorisation from the SC or the consent of the host States.

6.6.1 Facts about the Syrian civil war[541]

On 6 March 2011 in the Southern City of Deraa, fifteen schoolboys between the ages of 10 and 15 were arrested and detained by the members of the *Idaraat al-Amn al-Siyasi* for

[536] *ILA Report on the use of force* (n 136) [section B.2.b].
[537] ibid., [section B.2.b].
[538] ibid., [section B.2.c].
[539] Schachter 'The Extraterritorial Use of Force against Terrorist Bases' (n 530) 311; Wilmshurst (n 156) 969-970; Murphy 2005 (n 524) 67-70.
[540] *ILA Report on the use of force* (n 136) [section B.2.c].
[541] Note that "civil war" has no legal meaning as such. Some writers use it to refer to a non-international armed conflict as enshrined in Article 3 common to the Four Geneva Conventions of 1949. See, International Committee of the Red Cross, 'Internal conflicts or other situations of violence – what is the difference for victims? (An interview conducted on 10 December 2012) available at <https://www.icrc.org/eng/resources/documents/interview/2012/12-10-niac-non-international-armed-conflict.htm> accessed 15 April 2016.

painting revolutionary slogan: *Al-shaab yureed eskaat al-nizaam* (the people want to topple the regime) on a school wall.[542] The arrest sparked off protest in Deraa, and the protesters demanded an end to the authoritarian practices of the Assad regime and the release of political prisoners. The security forces used excessive force to disperse the protesters and in the process killed some of them.[543] This triggered off violent civil unrest across Syria and led to the formation of militias.[544] By 2012, the pro-democratic protest had turned into a civil war.[545] More on the continuing civil war could be found here.[546]

6.6.2 The emergence of insurgents and terrorist groups

The civil war led to the proliferation of insurgents and terrorist groups in Syria. In 2011, the Free Syrian Army (hereinafter referred to as FSA) which was an organised and moderate opposition was formed. By early 2015, it was estimated that about 150, 000 armed men and women were fighting in Syria and about 1, 500 operated as distinct armed groups.[547] The FSA's military strength did not match the forces loyal to the Assad's government because of its weak organisational structure, command and control.[548] It lacks coordination due to the proliferation of oppositions competing among themselves for external funding and support.[549]

The Jihadist Groups, which were better funded, more professional, well organised and better armed took advantage of the un-coordinated moderate oppositions to establish

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[542] Charles R. Lister, *The Syrian Jihad: Al-Qaeda, the Islamic State and the Evolution of an Insurgency* (New York, Oxford University Press 2015) 12.
[543] See 'Syria: the story of the conflict' (BBC News, 11 March 2016) available at <http://www.bbc.co.uk/news/world-middle-east-26116868> accessed 18 June 2018.
[544] For details on the various militia groups fighting in Syria, see Melanie De Groof, *Arms transfers to the Syrian Arab Republic – practice and legality,* 8-17 available at <http://www.grip.org/sites/grip.org/files/RAPPORTS/2013/rapport_2013-9.pdf> accessed 15 March 2016.
[545] Online Encyclopaedia Britannica, 'Syria Civil War' available at <http://www.britannica.com/event/Syrian-Civil-War> accessed 9 March 2016; Syria profile – Timeline (BBC News, 11 May 2017) available at <http://www.bbc.co.uk/news/world-middle-east-14703995> accessed 18 June 2017.
[546] See generally, Lister (n 542).
[547] Lister (n 542) 2; Aron Lund, 'The non-State militant landscape in Syria' (Combating Terrorism Centre, 27 August 2013) available at <https://www.ctc.usma.edu/posts/the-non-state-militant-landscape-in-syria> accessed 18 June 2017.
[548] Lister (n 542) 2.
[549] Elizabeth O'Bagy, *The Free Syrian Army: Middle East Security Report 9* (United States of America, Institute for the Study of War 2013) 6.

themselves.[550] The two notable jihadist groups are the Islamic State in Iraq and the Levant (hereinafter referred to as ISIL) and the Al-Nusrah Front for the People of the Levant (hereinafter referred to as ANF). ISIL is also known as *Da'esh* (an acronym for *al-Dawla al-Islamiya al-Iraq al-Sham*). Both ISIL and ANF are regarded as associates of al-Qaeda,[551] although each has its unique mode of operation.[552] The SC[553] and the United States[554] have designated both of them as terrorist groups.[555] The SC has determined that they constitute 'a global and unprecedented threat to international peace and security.'[556] It further states that they have the 'capacity and intention to carry out further attacks.'[557] Therefore, the SC calls upon the member States to take all necessary measures to prevent[558] and suppress terrorist acts committed specifically by ISIL.[559] Apparently, this looks like a legitimisation of force against ISIL in Syria.

Essentially, three major groups are fighting in Syria, namely, the State Armed Forces, the moderate opposition[560] and the terrorist groups. On the one hand, the moderate opposition's primary objective is to oust the Assad's regime.[561] To that extent, it is a non-international armed conflict. On the other hand, ISIL and the ANF are based on religious jihadist ideology.

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[550] Lister (n 542) 3.
[551] UN Doc. S/2014/815 (14 November 2014) [para. 2].
[552] ibid., [paras. 20-22].
[553] UNSC Res. S/RES/2253 (17 December 2015) [preamble para. 3, operative para 1].
[554] United States Department of States, 'Foreign terrorist organizations' available at <http://www.state.gov/j/ct/rls/other/des/123085.htm> accessed 27 May 2016.
[555] At the time of writing in June 2017, there is no universally accepted definition of terrorism. See *A More Secure World* (n 52) [para. 157]. Terrorism is defined as 'an act intended to cause death or serious bodily harm to a civilian, or to any other person not taking part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act,' see *Convention on Financing of terrorism* (n 34) [Art. 2(b)]; *A More Secure World* (n 52) [para. 164(d)]; UNGA Res. A/RES/49/60 (9 December 1994) [Annex, operative para. 3]; UNSC Res. S/RES/1566 (8 October 2004) [operative para. 3].
[556] UNSC Res. S/RES/2249 (20 November 2015) [preamble paras. 5-6].
[557] ibid., [operative para. 1].
[558] UNGA Res. A/RES/60/288 (8 September 2006) [Annex – Plan of Action].
[559] UNSC Res. S/RES/2249 (20 November 2015) [operative para. 5].
[560] Moderate opposition refers to all the opposition groups calling for a regime change. It excludes terrorist groups and was at some point recognised by some States as the *de facto* representative of the Syrian people. See Gareth Bayley, 'Who are the moderate opposition in Syria' (The Huffington Post, 23 October 2015) available at <http://www.huffingtonpost.co.uk/gareth-bayley/syria-crisis-opposition_b_8358910.html> accessed 14 April 2016.
[561] De Groof (n 544) 11; *Final communiqué of the action group for Syria – Geneva* (30 June 2012) [para. 4] available at <http://www.un.org/News/dh/infocus/Syria/FinalCommuniqueActionGroupforSyria.pdf> accessed 27 May 2016.

They fight against the moderate opposition as well as the Assad's government. The ISIL declared itself an Islamic State.[562] By so doing, it claims a status reserved for the UN member States under international law.[563] However, ISIL's operation is flexible, and in most cases geographically linked with other terrorist networks.

The international law is yet to codify a universally accepted treaty on international terrorism.[564] Even the Rome Statute of the International Criminal Court did not include terrorism as one of 'the most serious crimes of concern to the international community as a whole.'[565] This explains the difficulties associated with classifying ISIL's activities under the laws of war. It is neither non-international armed conflict nor international armed conflict. At best, ISIL could be regarded as internationalised armed conflict if it were proven that foreign States sponsor their activities.[566] Still the "internationalised armed conflict" has no unique status under the modern international law.

The civil war in Syria touches on two major aspects of the debate. Firstly, it questions the contemporary relevance of the law on non-intervention in matters which are essentially within the domestic jurisdiction of a State.[567] Can a foreign State support the *de jure* government or the "moderate opposition" in a civil war? Secondly, to what extent can a State use force against ISIL without the consent of the Assad's government? Do we have a legitimate government in Syria or is Syria a failed State? These among others are pertinent issues confronting the requirement to respect the inviolability of State territory.

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[562] Lister (n 542) 221-222.

[563] Graeme Wood, 'What ISIS really wants' (The Atlantic, March 2015) available at <http://www.theatlantic.com/magazine/archive/2015/03/what-isis-really-wants/384980/> accessed 27 March 2016.

[564] Javaid Rehman and Saptarshi Ghosh, 'International Law, US Foreign Policy and Post-9/11 Islamic Fundamentalism: The legal status of the "War on Terror"' (2008) 77 (1-2) *Nordic Journal of International Law* 87-103, 91.

[565] *Rome Statute* (n 398) [Art. 5(1)].

[566] James G. Stewart, 'Towards a single definition of Armed Conflict in International Humanitarian Law: A critique of Internationalized Armed Conflict' (2003) 85(850) *International Review of the Red Cross* 313-349, 315.

[567] UNGA Res. A/RES/36/103 (9 December 1981) [preamble para. 7] [hereinafter *Declaration on inadmissibility of intervention*]; UNGA Res. A/RES/25/2625 (24 October 1970) [principle 1] [hereinafter *Declaration on Friendly Relations*]; *The principle of non-intervention in civil wars* (Justitia et pace instut de droit international, Session of Wiesbaden 1975) [Art. 2] available at <http://www.justitiaetpace.org/idiE/resolutionsE/1975_wies_03_en.pdf> accessed 23 May 2016.

6.6.3 Assisting parties to a civil war and the principle of non-intervention

As analysed in Chapter three, the principle of non-intervention prohibits States from interfering in the civil strife of another State. The Syrian civil war appears to defy this doctrine. It has both regional and international dimensions with States arming either of the parties to the conflict.[568] The report of the Independent Commission of Inquiry on the Syrian civil war described the situation in Syria as 'a multisided proxy war steered from abroad by intricate network of alliances.'[569] Paradoxically and as Kofi Annan remarked, some member States pushing for the resolution to the Syrian civil war were covertly escalating the problem by assisting parties to the conflict.[570]

On the one hand, Russia sends ammunition, anti-aircraft systems and rocket launchers to the Assad's forces.[571] It tries to justify its actions on two grounds. Firstly, Russia argues that there is no SC's arms embargo on Syria. This argument is weak because Russia and China vetoed the SC's draft resolution that would have interdicted arms supply to Syria.[572] Although the United States has warned Russia to desist from arming the Assad regime,[573] no UN member State has accused Russia of violating international law.[574]

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568 Jamal Wakim, *The Struggle of Major Powers over Syria* (Middle East Studies, Ithaca Press 2013) 174; UNGAOR, UN Doc. A/66/PV.124 (3 August 2012) 2 (statement by the Secretary-General).

569 United Nations Human Rights Council, 'Report of the Independent Commission of Inquiry on the Syrian Arab Republic,' A/HRC/31/68 (11 February 2016) [para. 17]; UN Doc. A/HRC/24/46 (16 August 2013) [para. 23] [hereinafter *Report on chemical weapon used in Syria*].

570 Ian Black, 'Kofi Annan attacks Russia and west's "destructive competition" over Syria' (The Guardian, 6 July 2012) available at <https://www.theguardian.com/world/2012/jul/06/kofi-annan-syria-destructive-competition> accessed 17 June 2017.

571 Ruys 2014 (n 407) 15.

572 UN Doc. S/2011/612 (4 October 2011) [operative para. 9].

573 UNSCOR, UN Doc. S/PV.7922 (12 April 2017) 11 (statement by the representative of the United States); Associated Press, 'Russia Warned Not to Deliver Missiles to Syria' (CBC News, 31 May 2013) available at <http://www.cbc.ca/news/world/russia-warned-not-to-deliver-missiles-to-syria-1.1330034> accessed 17 June 2017.

574 Ruys 2014 (n 407) 17.

Secondly, Russia has defended its action as an execution of the existing contractual agreement it has with Syria.[575] We shall pick on this point later. Similarly, Iran and Hezbollah send troops to assist the Assad's military forces.[576]

On the other hand, Saudi Arabia and Qatar have funded the FSA.[577] They have also given FSA logistical support, including the transfer of weaponry.[578] Pressured by the humanitarian crisis in Syria,[579] the Council of Europe has lifted the arms embargo on Syria in favour of the moderate opposition.[580] The EU has also recognised the moderate opposition as the *de facto* representative of the Syrian people.[581] The United States' Congress approved the supply of weapons to the FSA after chemical weapons were used near Damascus on the 21 August 2013.[582]

6.6.4 The legality of arming a *de jure* government during civil wars

The classic international law allows States the monopoly of the use of armed force. [583] They can seek help and be assisted by other States.[584] The same is not applicable to insurgents

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[575] UNSCOR, UN Doc. S/PV.6627 (4 October 2011) 4 (Russia pledging continued support for the Assad regime); Anatoly Isaikin, 'Russia to keep supplying Syria leader Bashar Assad's regime with "defensive" weapons' (CBS News, 13 February 2013) available at <http://www.cbsnews.com/news/russia-to-keep-supplying-syria-leader-bashar-assads-regime-with-defensive-weapons/> accessed 17 June 2017.

[576] Robert Fisk, 'Iran to Send 4,000 Troops to Aid President Assad Forces in Syria' (The Independent, 16 June 2103) available at <http://www.independent.co.uk/news/world/middle-east/iran-to-send-4000-troops-to-aid-president-assad-forces-in-syria-8660358.html> accessed 17 June 2017; Henry Rome, 'Elite Hezbollah Fighters are Spearheading Battle in Syria, IDF Commander Warns' (Jerusalem Post, 25 October 2013) available at <http://www.jpost.com/Middle-East/Elite-Hezbollah-fighters-are-spearheading-battle-in-Syria-IDF-commander-warns-329707> accessed 17 June 2017.

[577] For details, see generally, De Groof (n 544).

[578] Mark Mazzetti, Christopher John Chivers and Eric Schmitt, 'Taking Outsize Role in Syria, Qatar Funnels Arms to Rebels' (New York Times, 29 June 2013) available at <http://www.nytimes.com/2013/06/30/world/middleeast/sending-missiles-to-syrian-rebels-qatar-muscles-in.html> accessed 17 June 2017.

[579] The Responsibility to Protect (R2P) will be examined in greater detail in chapter seven.

[580] European Union, 'Council Decision 2013/109/CFSP of 28 February 2013 amending Decision 2012/739/CFSP concerning restrictive measures against Syria,' (2013) *Official Journal of the European Union* L 58/8 [preamble para. 3, Art. 3(1)(b) and (c)].

[581] See 'UK to send armoured vehicles to Syrian opposition' (BBC News, 6 March 2013) available at <http://www.bbc.co.uk/news/uk-politics-21684105> accessed 17 June 2017.

[582] Mark Hosenball, 'Congress secretly approves U.S. weapons flow to "moderate" Syrian rebels' (Reuters, 27 January 2014) available at <http://www.reuters.com/article/us-usa-syria-rebels-idUSBREA0Q1S320140127> accessed 17 June 2017.

[583] Max Weber, *Economy and Society: An Outline of Interpretive Sociology* (Volume 1, Berkeley, CA and London: University of California Press 1978) 54-55; Markus Jachtenfuchs, 'The Monopoly of Legitimate Force: Denationalization, or Business as Usual' (2005) 13(supplement 1) *European Review* 37-52, 37.

[584] *Oppenheim 1996* (n 3) 438.

fighting a *de jure* government[585] because they are treated as criminals violating the domestic penal code[586] even when they seem to be fighting a just course.[587] To this end, States are under a moral duty to assist a State fighting insurgents if passivity will endanger international peace and security.[588] A possible exception to this obligation is where the civil war is a case of self-determination.[589] The support for a *de jure* government was encouraged during decolonisation period.[590] However, the submissions made by States during the Court's proceedings in Kosovo's *Advisory Opinion*[591] have condemned it as illegal under international law.[592]

The legality of assisting a *de jure* government that at some point lost effective control of most of its territory is doubtful.[593] In cases where insurgent has attained the status of belligerency,[594] assisting any of the warring parties could amount to intervention.[595] The reason is that a *de facto* government can exercise executive powers, such as levying taxes and imposing customs duty within the territory under its control.[596] Hence, Article 3 common to the four 1949 Geneva Conventions and the 1977 Protocol II apply to a *de facto* government.[597]

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585 *Nicaragua case* (n 119) [para. 246]; Cassese 2005 (n 7) 429.

586 Cassese 2005 (n 7) 429.

587 For example, states are prohibited from assisting those fighting for self-determination unless it is a case of decolonisation. See *Repertory of the United Nations* (n 420) [Supplement 1 Article 2(7), paras. 160-163]; Cassese 1995 (n 465) 175.

588 *Declaration on Friendly Relations* (n 567) [see paragraph (a) of the section titled 'the duty of states to co-operate with one another in accordance with the Charter'].

589 ibid., [see paragraph 7 of the section titled 'the principle of equal rights and self-determination of peoples'].

590 UNGA Res. A/RES/35/227 (6 March 1981) [operative para. 5]; UNGA Res. A/RES/37/43 (3 December 1982) [operative para. 2]; Cassese 2005 (n 7) 199 *et seq*; *Nicaragua case* (n 119) [para. 206].

591 See generally, *ICJ Advisory Opinion on Kosovo* (n 455).

592 Kohen 2012 (n 452) 159 (see footnote 10).

593 Kohen 2006 (n 293) 78.

594 Rosalyn Higgins has enumerated four conditions that must be met for a belligerent status to be attained. They are: (1) the existence within a state of a widely spread armed conflict, (2) the occupation and administration by rebels of a substantial portion of the territory, (3) the conduct of hostilities in accordance with the rules of war and through armed forces responsible to an identifiable authority and (4) the existence of circumstances which make it necessary for third parties to define their attitude by acknowledging the status of belligerency. See Rosalyn Higgins, 'International law and civil conflict' in Evan Luard (ed), *The International Regulation of Civil Wars* (London, Thames and Hudson 1972) 170-171.

595 *Oppenheim 1996* (n 3) 432-33.

596 ibid., 167-168.

597 For the texts, visit <https://www.icrc.org/en/war-and-law/treaties-customary-law/geneva-conventions> accessed 27 May 2016.

Past experiences have shown that third States' intervention in civil wars exacerbates the conflict and is counter-productive.[598] Therefore, Russia's persistence in supplying Assad government with weapons when other UN member States have recognised the opposition as the *de facto* representative of the Syrian people is dubious.[599] A counter argument could be that the said recognition is premature if the Assad's regime has not lost its legitimacy.

Moreover, the recognition of a *de facto* government is a political act[600] that requires further legal actions to regularise.[601] On the authority of *Nicaragua*,[602] and with due respect to the soft laws[603] prohibiting States from intervening in the internal affairs of other States, Ruys may have argued rightly that Russia did not breach international law by assisting Assad's government on request.[604]

6.6.5 Arming a *de facto* government (moderate opposition)

The ICJ in the *Nicaragua* and *DRC v Uganda* cases grappled with whether States could assist insurgents during civil wars. In the *Nicaragua* case, the Court held that the United States violated Article 2(4) of the Charter by arming and training the *contras*.[605] However, the supply of funds to the *contras* does not amount to an armed attack but contravenes the principle of non-intervention in the internal affairs of *Nicaragua*.[606] Arguably, both actions violated the territory of Nicaragua. The Court merely differentiated between the two violations to clarify that the right to self-defence is available if it were a case of an armed attack. The Court later affirmed it in the *DRC v Uganda*.[607]

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[598] Richard Little, *Intervention: External Involvement in Civil Wars* (London, Martin Robertson 1975) 30.

[599] Although a *de facto* recognition of a new government is a political statement, it confers some rights and obligations on the new government and imposes duty on the recognising state. See *Oppenheim 1996* (n 3) 155-158.

[600] *Oppenheim 1996* (n 3) 156-157; Crawford 2006 (n 9) 22-23.

[601] But it depends on whether one adopts the declaratory or the constitutive theory of recognition. For a discussion on this, see Crawford 2006 (n 9) 19-28.

[602] *Nicaragua case* (n 119) [para. 246].

[603] *Declaration on Friendly Relations* (n 567) [paragraph 1]; *Declaration on inadmissibility of intervention* (n 567) [operative para. 1].

[604] Ruys 2014 (n 407) 32.

[605] *Nicaragua case* (n 119) [paras. 228 and 251].

[606] ibid., [para. 228].

[607] *DRC v Uganda* (n 125) [para. 165].

The ICJ's position in the *Nicaragua* case has been criticised. Judge Schwebel argued that the cumulative of the unlawful Nicaragua's activities on El Salvador amount to an armed attack.[608] This implies that the US could support both the El Salvador and the *contras* by relying upon the collective right to self-defence.[609] D'Amato and Kirgis have rejected the Court's interpretive approach.[610] Kirgis argues that the customary and the conventional international laws are flexible norms.[611]

Nevertheless, the UN member States[612] and some writers[613] have questioned the legitimacy of supporting the moderate opposition in Syria. Austria, for example, has identified four reasons why such support is illegal. First, it breaches the customary principle of non-intervention and Article 2(4) of the UN Charter. Second, it violates the EU Council Common Position 2008/944/CFSP on arms export control by the EU member States.[614] Third, it could breach the SC's resolutions establishing an arms embargo against individuals and entities associated with Al-Qaida.[615] Fourth, it could amount to aiding and assisting in the commission of an internationally wrongful act.[616] Austria's list is not exhaustive as suggested by Ruys.[617]

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[608] *Nicaragua case* (n 119) [para. 6] (Dissenting Opinion of Judge Schwebel); Franck 1987 (n 395) 120; Anthony D'Amato, 'Trashing Customary International Law' (1987) 81(1) *The American Journal of International Law* 101-105, 102-103.

[609] *Nicaragua case* (n 119) [para. 6] (Dissenting Opinion of Judge Schwebel).

[610] D'Amato 1987 (n 608) 102-103; Frederic L. Kirgis, 'Custom on a Sliding Scale' (1987) 81(1) *The American Journal of International* 146-151, 147.

[611] Kirgis 1987 (n 610) 147.

[612] De Groof (n 544) 41; *Nicaragua case* (n 119) [paras. 202-204].

[613] Dapo Akande, 'Would it be lawful for European (or other) States to provide arms to the Syrian opposition?' (EJIL: Talk! 17 January 2013) available at <http://www.ejiltalk.org/would-it-be-lawful-for-european-or-other-states-to-provide-arms-to-the-syrian-opposition/> accessed 15 March 2016; André Nollkaemper, 'A Shared Responsibility Trap: Supplying Weapons to the Syrian Opposition' (EJIL: Talk! 17 June 2013) available at <http://www.ejiltalk.org/a-shared-responsibility-trap-supplying-weapons-to-the-syrian-opposition/> accessed 15 March 2016.

[614] European Union, 'Council Common Position 2008/944/CFSP of 8 December 2008 defining common rules governing control of exports of military technology and equipment' (2008) *Official Journal of the European Union* L 335/99 [preamble para. 4, Art. 2].

[615] UNSC Res. S/RES/2083 (17 December 2012) [operative para. 1]; UNSC Res. S/RES/2253 (17 December 2015) [operative para. 2(c)].

[616] For the English translation of the text, see 'Syria: Austrian position on arms embargo (as of 13 May 2013)' available at <http://im.ft-static.com/content/images/1721c482-bcbc-11e2-b344-00144feab7de.pdf> accessed 18 April 2016 [hereinafter *Austria position on arms embargo*].

[617] Ruys 2014 (n 407) 17-18.

Austria has analysed how each of these conditions could violate international law here[618] and it shall not be repeated. However, the EU Council Common Position 2008/944/CFSP binds only the EU member States. It is also not an absolute ban and can be repealed by the European Parliament, or any legislative body deputed to do so. The EU Foreign Affairs Ministers chooses not to repeal it[619] but instead permits arms transfer to the FSA.[620] Apparently, there are two conflicting laws from the same body. However, the lifting of the ban has a precautionary clause requiring the EU member States to deny export licenses if there were evidence that they may be used in violation of international humanitarian law.[621] Such a clause minimises the danger that arms could fall into the hands of terrorist groups in Syria.[622]

The documented evidence has shown that the forces loyal to the Assad's regime and the opposition have violated the international human rights law, the international humanitarian law and the Law of Armed Conflict.[623] This raises concerns as to whether States that supplied weapons to the warring parties in Syria have aided and abetted the commission of international crimes in Syria.[624]

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[618] See generally, *Austria position on arms embargo* (n 616).

[619] Council of the European Union, 'Council Declaration on Syria' (3241st Foreign Affairs Council Meeting, Brussels, 27 May 2013) [para. 2].

[620] ibid., [para. 2].

[621] ibid., [para. 2].

[622] Austria had argued that Al-Nusra Front, whose fighters take part in military operation with the Free Syrian Army, is linked with Al-Qaida in Iraq and pays allegiance to Al-Qaida leader Al-Zawahiri. See *Austria position on arms embargo* (n 616) [para. 3]; 'Syria Crisis: Guide to Armed and Political Opposition' (BBC News, 13 December 2013) available at <http://www.bbc.co.uk/news/world-middle-east-15798218> accessed 17 June 2017.

[623] See generally, *Report on chemical weapon used in Syria* (n 569).

[624] Ruys 2014 (n 407) 20-25.

6.6.6 Does recognition legitimises support of a *de facto* government?

Shortly after the Syrian Opposition Council (hereinafter referred to as SOC) was formed,[625] several States recognised it as the 'legitimate representative' of the Syrian People.[626] The aim was to make SOC the *de jure* government and to legitimise the supply of arms.[627]

However, Stefan argues that the discrepancies in the words used by States waters down the legal significance of the recognition. States like the UK and France recognise SOC as the "sole"[628] legitimate representative of the Syrian people. The Arab League Ministerial Council recognises SOC as a '"legitimate representative" for the aspirations of the Syrian people.[629] The EU Foreign Ministers dropped the word, "sole" and recognised them as the "legitimate representatives" of the aspirations of the Syrian People.[630] The Nordic and Baltic States use the word "accept" instead of "recognise."[631] The *communiqué* issued by the Group of Friends of the Syrian People use the word "acknowledge"[632] or "consider."[633]

These discrepancies indicate that the said recognition is meant to achieve "political" rather than "legal" purpose.[634] It does not absolve the recognising States of their obligations to

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[625] See *Agreement on the formation of the National Coalition of Syrian Revolutionary and Opposition Forces* (Done at Doha on 11 November 2012) reprinted in Stefan Talmon, 'Recognition of Opposition Groups as the Legitimate Representative of a People' (2013) 12(2) *Chinese Journal of International Law* 219-253, 252.

[626] See '"Friends of Syria" recognise opposition' (Aljazeera, 12 December 2012) available at <http://www.aljazeera.com/news/middleeast/2012/12/201212124541767116.html> accessed 17 March 2016.

[627] See 'Syria: France Backs Anti-Assad Coalition' (BBC News, 13 November 2012) available at <http://www.bbc.co.uk/news/world-middle-east-20319787> accessed 17 March 2016.

[628] The United Kingdom House of Commons, 'Parliamentary Debates (Hansard)' (20 November 2012) 553(71) *Official Reports* [columns 445] [hereinafter *Hansard 20 November 2012*]; 'François Hollande reconnaît la coalition nationale syrienne' (France 24, 13 November 2012) available at <http://www.france24.com/fr/20121113-paris-syrie-hollande-nouvelle-coalition-opposition-bachar-al-assad-livraisons-armes-asl> accessed 24 May 2016.

[629] Talmon 2013 (n 625) 220.

[630] Council of the European Union, 'Council conclusions on Syria 16392/12' (Brussels, 19 November 2012) [para. 2] available at <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2016392%202012%20INIT> accessed 17 June 2017.

[631] Iceland Ministry of Foreign Affairs, 'Friends of Syria meeting in Marrakech, 12 December 2012, Nordic-Baltic Intervention' available at <https://www.mfa.is/media/mannrettindi/Syrland-yfirlysing-121212.pdf> accessed 17 June 2017.

[632] Republic of Turkey Ministry of Foreign Affairs, 'The Chairman's Conclusions Second Conference of the Group of Friends of the Syrian People, 1 April 2012, Istanbul' [para. 10] available at <http://www.mfa.gov.tr/chairman_s-conclusions-second-conference-of-the-group-of-friends-of-the-syrian-people_-1-april-2012_-istanbul.en.mfa> accessed 24 June 2017.

[633] Talmon 2013 (n 625) 226.

[634] Ruys 2014 (n 407) 37; Talmon 2013 (n 625) 226.

respect the territory of Syria,[635] and to abide by the principle of non-intervention, which prohibits a transfer of arms to SOC.[636]

Nicaragua establishes that no such a right exists in contemporary international law.[637] Besides, Britain and France stated clearly that the recognition does not permit an immediate supply of weapons.[638] Traditionally, international law favours *de jure* government even when the opposition has acquired the status of insurgents through the exercise of effective control over a portion of State's territory.[639] Ruys considers these recognitions as premature and unlawful.[640]

6.6.7 Recognition of self-determinationist under international law

It is worth considering whether the recognition granted to SOC is indicative of a case of self-determination.[641] Akande argues that it could be and that the international law does not prohibit a third State's assistance.[642] In that case, past similar recognitions would be considered.

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[635] For example, the Assad Government continues to appoint representatives to the UN and calls for the Assad's regime to cede Syria's seat at the UN to SOC were rejected. See National Coalition of Syrian Revolution and Opposition Forces, 'Syrian Coalition and British Envoy discuss giving Syria's UN seat to the Syrian Coalition' (10 March 2015) available at <http://en.etilaf.org/all-news/news/syrian-coalition-and-british-envoy-discuss-giving-syria-s-un-seat-to-the-syrian-coalition.html > accessed 17 June 2017. However, SOC was invited by the Arab League to participate in the Ministerial meeting following the suspension of Syria in November 2011. National Coalition of Syrian Revolution and Opposition Forces, 'Arab League invites Syrian Coalition to participate in the Ministerial Meeting' (6 September 2014) <http://en.etilaf.org/all-news/news/arab-league-invites-the-syrian-coalition-to-participate-in-the-ministerial-meeting.html> accessed 17 June 2017.

[636] Talmon 2013 (n 625) 244.

[637] *Nicaragua case* (n 119) [para. 209].

[638] *Hansard 20 November 2012* (n 628) [column 452].

[639] Ruys 2014 (n 407) 38; Crawford 2006 (n 9) 23; *Oppenheim 1996* (n 3) 165-168.

[640] Ruys 2014 (n 407) 38.

[641] United Nations, *International Covenant on Civil and Political Rights* (Concluded at New York on 19 December 1966, entered into force on 23 March 1976) 999 UNTS 171 [Art. 1]; United Nations, *International Convention on Economic Social and Cultural Rights* (Concluded at New York on 19 December 1966, entered into force on 3 January 1976) 993 UNTS 3 [Art. 1].

[642] Dapo Akande, 'Self-Determination and the Syrian Conflict – Recognition of Syrian Opposition as Sole Legitimate Representative of the Syrian People: What does this Mean and What Implications Does it Have?' (EJIL: *Talk!* 6 December 2012) available at <https://www.ejiltalk.org/self-determination-and-the-syrian-conflict-recognition-of-syrian-opposition-as-sole-legitimate-representative-of-the-syrian-people-what-does-this-mean-and-what-implications-does-it-have/> accessed 17 June 2017.

The UN General Assembly has recognised such groups in the past. They include, the Palestinian Liberation Organisation (PLO),[643] the South West Africa People's Organisation[644] and the national liberation movements of Angola, Guinea-Bissau and Cape Verde and Mozambique.[645] In some cases, the Organisation of African Unity has recognised more than one group as the legitimate representatives of the people.[646]

Nevertheless, self-determination as one of the purposes of the UN Charter[647] was not designed to undermine the principle of the inviolability of States' territory.[648] Hence, *uti possidetis*[649] confirms the existing international boundaries at the time of independence.[650] Article 1 of the Constitution of the Syrian Arab Republic[651] observes that the Syrian territory is indivisible. Akande's attempt to legitimise the supports given to SOC is unpersuasive. In fact, some of the countries arming the moderate opposition in Syria did not support that such help could be rendered during the decolonisation period.[652] The condition of Libya following the removal of Muammar Gaddafi remains an unresolved issue.[653]

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[643] UNGA Res. A/RES/37/43 (3 December 1982) [operative para. 23].
[644] UNGA Res. A/RES/35/227 (6 March 1981) [operative para. 4].
[645] UNGA Res. A/RES/2918 (XXVII) (14 November 1972) [operative para. 2].
[646] Akande 2012 (n 642) (the internet page).
[647] *The UN Charter* (n 43) [Art. 1(2)].
[648] Cassese 1986 (n 8) 133.
[649] It means 'as you possess, so may you possess.' See John Bassett Moore, *Costa Rica – Panama Arbitration: Memorandum on Uti Possidetis* (U.S.A., The Commonwealth Co. 1913) 9; Dirdeiry M. Ahmed, *Boundaries and Secession in Africa and International Law: Challenging Uti Possidetis* (United Kingdom, Cambridge University Press 2015) 15-16.
[650] *Case concerning the Frontier Dispute* (Burkina Faso v Republic of Mali) Judgment ICJ Reports (1986) p. 554 [para. 20]; Cassese 1995 (n 465) 190-193; Organisation of African Unity, 'Border disputes among African States' (Ordinary Session held in Cairo 1964) AHG/Res. 16(1) [operative para 2].
[651] See *Constitution of the Syrian Arab Republic – 2012* [Art. 1] available at <http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---ilo_aids/documents/legaldocument/wcms_125885.pdf> accessed 19 April 2012.
[652] Victor-Yves Ghebali, *The International Labour Organisation: A Case study on the Evolution of U.N. Specialised Agencies* (London, Martinus Nijhoff Publishers 1989) 154-155.
[653] See 'President Obama: Libya aftermath "worst mistake" of presidency' (BBC News, 11 April 2016) available at <http://www.bbc.co.uk/news/world-us-canada-36013703> accessed 14 June 2017.

Moreover, if the weapons supplied to SOC end up in the hands of ISIL,[654] it could violate the SC Resolution 2083.[655] Therefore, arming SOC could violate the international law on the non-intervention in the internal affairs of other States. That said, international law seems hypocritical if it allows States to support a *de jure* government but denies a similar support to a *de facto* government that has gained effective control.[656]

6.6.8 Legitimacy deficit of SC and the continuing war in Syria

Since the Syrian civil war started in 2011, at least eight draft resolutions[657] meant to address certain issues with the Assad government have been vetoed by Russia or together with China. The SC's legitimacy deficit became evident when Russia vetoed a draft resolution[658] after chemical weapons were supposedly used in Khan Shaykhun, in Idlid, Syria on 4 of April 2017. In fact, the Syrian civil war has divided the international community along the political lines of States that support the United States and States that support the Russian Federation.[659] Like the Rwandan genocide where the SC did nothing, the Syrian civil war has shown that the SC should be reformed.

6.7 Concluding remarks

This chapter started with an observation that one of the contemporary challenges to international peace and security is the nefarious activities of the NSAs. It argues that States hide under the first limb of Article 2(4) to covertly or overtly support "internationalised" armed conflict. Such conduct is a breach of States' obligation to respect the inviolability of State territory.

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[654] The UN Fact-finding team could not establish the group that used the chemical weapon in Syria. See *Report on chemical weapon used in Syria* (n 569) 21. The allegation is that either Assad's regime, the opposition or the terrorist groups had used the chemical weapons. See 'Damascus "chemical attack": Syria activists accuse government' (BBC News, 23 December 2015) available at <http://www.bbc.co.uk/news/world-middle-east-35167849> accessed 17 June 2017.

[655] UNSC Res. S/RES/2083 (17 December 2012) [operative para. 1 (c)].

[656] Ruys 2014 (n 407) 17.

[657] See generally, UN Docs. S/2011/612 (4 October 2011); S/2012/77 (4 February 2012); S/2012/538 (19 July 2012); S/2014/348 (22 May 2014); S/2016/846 (8 October 2016); S/2016/847 (8 October 2016); S/2016/1026 (5 December 2016); S/2017/315 (12 April 2017).

[658] UN Doc. S/2017/315 (12 April 2017) [operative para. 7].

[659] UNSCOR, UN Doc. S/PV.7915 (5 April 2017) 6 (the representative of the Plurinational state of Bolivia calls for unity so that the council chamber is not used as a sounding board for war propaganda); see generally, UNSCOR, UN Doc. S/PV.7922 (12 April 2017).

To date, the international law does not accord legal status to the NSAs. Political agitation within a State is a domestic affair. An exception is when the group has attained the status of insurgency. Yet, no defined condition stipulates when "insurgency" has been attained since the two elements that must be met, namely, "degree" and "intensity" are to a large extent discretionary. Therefore, assisting rebel groups could inadvertently violate the territory of the concerned State.

Furthermore, the customary law and the positive law do not allow States to apply the right to self-defence against the NSAs without the consent of the host State or an authorisation from the SC. Despite the floodgate of interventions which started in the wake of the 9/11 terrorist attacks on the United States, State practice does not support that. The justification of intervention on the basis that the host State is “unwilling” or “unable” to stop the wrongful act is unacceptable. At most, they perform an evidentiary role in assessing the attribution of culpability to the State in question. The international community supports the right to self-defence when the delict conduct is attributable to the host State.

There is no urgency to extend the lawful exceptions to the conducts of the NSAs. States’ compliance with the existing legal framework for the collective fight against terrorism through a reformed SC suffices. On its part, the SC should abstain from intervening in the internal affairs of a State in a way that contravenes Article 2(7) of the UN Charter. Similarly, the permanent members of the SC should not allow the indiscriminate use of the veto power to undercut its primary mandate of the maintenance of international peace and security. Again, the SC’s resolutions should avoid textual ambiguity regarding what it authorises to avoid being used by States to further other purposes.

Even if those actions were not classified as armed attack within the meaning established in the *Nicaragua* case, they do not enhance or promote international peace and security. The isolation of Qatar for its alleged financing of terrorism by some Gulf States is a case in point if it were proven that Qatar was culpable.

Chapter seven

Humanitarian Intervention: A Contemporary Challenge to the Principle of the Inviolability of State Territory

7.0 Introduction

This dissertation has argued that respect of State territory will enhance international peace and security. It raises a practical problem of compliance where such principle could lead to gross violations of human rights. The contemporary debate questions whether the sanctity of States' territory must be upheld at the expense of human lives. According to Article 64 of the VCLT,[1] the emergence of a new peremptory norm of general international law abrogates any existing treaty which conflicts with it. This chapter examines whether human rights can overrule the principle of the inviolability of State territory.

This chapter begins by examining the philosophy underpinning humanitarian intervention by comparing the viewpoint of Hegel and Kant. It will then assess some of the legal theories on humanitarian intervention, such as the natural law, the fiduciary theory and the just war theory. It will evaluate human rights, the legal instruments that protect human rights and how they are enforced upon the defaulting States. It will examine the degree of violation of human rights that could trigger the responsibility to protect. To this end, the impact of Article 4(h) of the Constitutive Act of the African Union[2] which expressly authorises intervention in the internal affairs of the African States on the inviolability of State territory will be analysed.

7.1 States are Absolute – the Hegelian Perspective

The motif behind humanitarian interventions is to stop States from violating the fundamental rights of their citizens or people residing within their territory. Such a claim would appear strange to Hegel from a philosophical point of view because a "people" devoid of a government is a "formless mass."[3] Conceptually, a State came into being when the "formless

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[1] United Nations, *Vienna Convention on the Law of Treaties* (Concluded at Vienna on 23 May 1969, entered into force on 27 January 1980) 1155 UNTS 331 [Art. 64].

[2] African Union, *Constitutive Act of the African Union* (Done at Lomé on 11 July 2000, entered into force on 26 May 2001) 2158 UNTS 3 [Art. 4(h)] [hereinafter *AU Constitutive Act*].

[3] G.W.F. Hegel, *Philosophy of Right* (translated by S.W Dyde) (Canada, Batoche Books 2001) 227.

mass" decides to transform into an organic totality.[4] Ideally, it is absurd to attribute disorderliness to a State since its essence is to bring order to the formless mass. As an "organic totality," states exist and individuals are an integral part of it.

From this ontic perspective, a State is an absolute whole and encapsulates the totality of what it stands for. As a distinct but abstract ontological reality, individuals define themselves and find meaning by identifying with the State. Government officials hold offices on trust for the State. Therefore, the State and not "the people" or office holders is sovereign. The idea behind humanitarian intervention is flawed in that it attributes to States elements of error which are not of its character. Actions undertaken by the government officials are not attributable to the State. Thus, the agents of the State may change over time, but the State remains.

A possible objection to Hegel's position is that a State sometimes disintegrates through the process of self-determination. In other words, States are subject to the law of flux. Besides, States do not exist in the abstract. Such a platonic world undermines the doctrine of the attribution of responsibility.[5] However, the Hegelian argument that a State's officials are not synonymous with the sovereign State remains valid. To what extent are humanitarian interventions directed to the erring State's officials?

Hegel argues that a State is rational and has an independent existence with its set of truths and ethical standards different from those of its officials.[6] In that case, every sovereign State possesses an "intrinsic universal will" to make sensible rational decisions, unlike the individual's subjective freedom which might seek particular ends.[7] It follows that a State as such is not answerable for individual's misconduct and to destroy the infrastructures of a State, to punish a few individuals, would appear unreasonable.

[4] ibid., 227; Joachim Ritter, 'Person and property in Hegel's Philosophy of Right' in Robert B. Pippin and Otfried Hoffe (eds), *Hegel on Ethics and Politics* (New York, Cambridge University Press 2004) 116.

[5] Hegel 2001 (n 3) 96; G.W.F. Hegel, *Elements of the Philosophy of Right* (Edited by Allen W. Wood, translated by H.B. Nisbet) (United Kingdom, Cambridge University Press 1991) XIV.

[6] Hegel 2001 (n 3) 195; Pierre Hassner, 'From war and peace to violence and intervention: Permanent moral dilemmas under changing political and technological conditions' in Jonathan Moore (ed), *Hard Choices: Moral Dilemmas in Humanitarian Intervention* (Lanham, Rowman and Littlefield Publishers 1998) 13.

[7] Hegel 2001 (n 3) 195; Terry Pinkard, *Hegel: A Biography* (New York, Cambridge University Press 2000) 483.

Kant would not support civil disobedience because of institutionalised injustice.[8] Chigara questions the temerity of intervening when it could create more sufferings for those to be rescued.[9] Although this line of argument might appear pessimistic regarding humanitarian interventions in general, it does not diminish its probative value from the conceptual viewpoint. The Republic of Rwanda did not commit genocide against Rwandans, individuals did. The protagonists of humanitarian intervention want to resolve a conceptual problem from a teleological perspective and sometimes in total ignorance of the long-term effects. Hence, humanitarian intervention would be credible if it were directed solely at the individuals who were subjectively responsible for the violations.

Nonetheless, a strict application of the Hegelian theory obscures accountability and the dynamics of how States function. For instance, the Human Rights Council (HRC) conducts a periodic review of States' compliance with international human rights instruments. This is indicative of the fact that a State can be held to account.

While the Hegelian's perspective regarding the need to separate the State from the conduct of State's officials is credible, it fails to address how a State can be held liable. Ultimately, individuals act for the State. If a State signs up to a treaty, it would be held to account for its misconduct based on the provision of the treaty. But again, this creates some problem of who determines when a State has violated the human rights of its citizens? To date, there is no consensus in the Security Council that Assad's government is violating the rights of the Syrians.

7.1.1 Is Humanitarian Intervention a Legal or a Moral Assessment? – A Reflection on Kant's Categorical Imperative

The analysis of the Hegelian perspective demands further investigation into whether States exist *in rem* or whether they owe duties to their citizens and the international community. It seems that the Hegelian notion that "the people" is a formless mass without a government presupposes that the formation of a State has some inherent purpose. For Social Contract theorists, the inviolability of State territory loses its normative value when State officials

[8] Paul Guyer (ed), *The Cambridge Companion to Kant* (United Kingdom, Cambridge University Press 1992) 360.

[9] Ben Chigara, 'Humanitarian Intervention Missions: Elementary Considerations, Humanity and the Good Samaritans' (2001) *Australian International Law Journal* 66-89.

repudiate the fundamental terms of the contract. In our scenario, it applies when a State violates or fails to, or is unwilling to protect the life and property of its citizens.

As shall be seen, this kind of argument conflates law with morality since there is yet no universally accepted legal framework that allows humanitarian intervention. But Kant would argue that morality is the basis of legal obligation.[10] Hart recognises that the "rule of recognition"[11] compels compliance due to the inherent morality that legitimises the norm.

The 19th century philosophers maintain that moral acts affect both the subject and the object. Accordingly, Kant argues that "good will" is possibly the only thing in the world that can be conceived as good.[12] A "good will" is an intention to act in accordance with a moral law which is in itself, constant.[13] For instance, a systematic and widespread killing of unarmed innocent civilians cannot be justified on any ground.

Kant traces the source of moral justification to what he calls *categorical imperative*.[14] It refers to an act which is intrinsically good-in-itself and which is performed in "good will" without any motivations attached.[15] It follows that for a State to be regarded as "Absolute *Geist*," its conduct towards its citizens must be universally acceptable. Only such conducts are binding on everyone and compel respect for the State territory.

Although the views of Hegel and Kant expressed here are simplistic, the extracted nuggets inform the direction of our discussion on the theories on humanitarian intervention. Note that Kant's position is not without some criticisms. For instance, he does not provide the foundation for his thesis in a moral law as the foregrounding norm.[16] The objections are

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[10] Immanuel Kant, *Groundwork and the Metaphysics of Morals* (Edited by Herbert J. Paton) (New York, HarperCollins 1964) 27; T. K. Seung, *Kant's Platonic Revolution in Moral and Political Philosophy* (Baltimore and London, Johns Hopkins University Press 1994) 95; Allen W. Wood, 'The supreme principle of morality' in Paul Guyer (ed), *The Cambridge Companion to Kant and Modern Philosophy* (Cambridge, Cambridge University Press 2006) 342.

[11] H. L. A. Hart, *The Concept of Law* (Second Edition, Oxford, Oxford University Press 1994) 94.

[12] Kant 1964 (n 10) 9; Immanuel Kant, 'Good Will, Duty, and the Categorical Imperative' in Anthony Serafini, *Ethics and Social Concern* (New York, Paragon House Publishers 1989) 29; Wood, 'The supreme principle of morality' in Guyer (ed), 2006 (n 10) 347.

[13] Ed. Miller and Jon Jensen, *Questions that Matter: An Invitation to Philosophy* (Third edition, Colorado, McGraw-Hill, Inc.,1992) 461.

[14] ibid., 31.

[15] ibid., 31.

[16] H. P. Owen, *The Moral Argument for Christian Theism* (London, Allen and Unwin 1965) 49-50.

addressed here.[17]

7.2 Theories on Humanitarian Intervention

The major theories on humanitarian intervention have been treated here.[18] We shall restrict our discussions to three most essential, namely, *ius naturale* and *ius gentium*, Guardianship/Fiduciary theory and Just war theory.

7.2.1 *Ius naturale and Ius gentium*

The *ius naturale* and *ius gentium* theories could be traced to Hugo Grotius's treatise "*On the Law of War and Peace*."[19] The *Ius naturale* (the law of nature) refers to rules that can be derived from "right reason."[20] He defined "natural law" as 'the dictate of right reason, shewing the moral turpitude, or moral necessity.'[21] The *ius gentium* (the law of nations) represents the positive law that derives its authority from the consent of States.[22]

Grotius had argued that when a sovereign State grossly violates the rights of its citizens through negligence of the laws of nature or the law of nations,[23] other States could intervene for important causes.[24] This contrast sharply with the Hegelian notion that States make "objective rational decision."[25] But how would the heinous crimes committed during the Nazi regime be justified as an objective rational decision, although they were sanctioned by law?[26]

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[17] George A. Schrader, 'Autonomy, Heteronomy, and Moral Imperatives' (1963) 60(3) *The Journal of Philosophy* 65-77, 67-68; P. S. Greenspan, 'Conditional Oughts and Hypothetical Imperatives' (1975) 72(10) *The Journal of Philosophy* 259-276.

[18] Nicholas J. Wheeler, *Saving Strangers: Humanitarian Intervention in International Society* (Oxford, Oxford University Press 2000) 21-52.

[19] See generally, Hugo Grotius, *On the Law of War and Peace (1625)* (translated by A. C. Campbell) (Canada, Batoche Books 2001).

[20] ibid., book 1, chapter 1, part x.

[21] ibid., book 1, chapter 1, part x.

[22] ibid., book 1, chapter 1, part xiv.

[23] ibid., book 2, chapter 25, part viii.

[24] ibid., book 2, chapter 20, part vii; Hugo Grotius, *The Rights of War and Peace: Including the Law of Nature and of Nations* (translated by A. C. Campbell with an Introduction by David J. Hill) (London, Walter Dunne 1901) 227.

[25] Hegel 1991 (n 5) 275-277.

[26] Thomas M. Franck, 'Interpretation and change in the law of humanitarian intervention' in J. L. Holzgrefe and Robert O Keohane (eds), *Humanitarian Intervention: Ethical, Legal, and Political Dilemmas* (United Kingdom, Cambridge University Press 2003) 210.

However, the *ius naturale* theory is not entirely wholesome. Firstly, what constitutes a "right reason" would be difficult to determine. Secondly, "right reason" from whose perspective – the State violating the right of its citizens, the citizens themselves or a bystander? No humanitarian intervention in human history has been condemned or accepted unanimously by the international community. A moral assessment could be biased by subjective motif. Is a situation unlawful because the majority saw it as morally repugnant? Besides, the objectivity of a "right reason" could be stained by a subjective national interest.

Again, Grotius advocated that the law of nature should impose moral obligations upon States but did not 'explicitly distinguish a category of human rights from those of states or citizens or princes.'[27] Additionally, Grotius recognises that human rights may not apply in cases of extreme necessity.[28] This conditionality seems to prefer the inviolability of State territory to humanitarian intervention in certain circumstances. Hence, Grotius advocates that civilised nations should establish a rule of non-resistance to sovereign authority as *jus gentium*.[29] His thoughts on humanitarian intervention are not definitive. Instead, his views are better interpreted as upholding the maintenance of international order. Even if his ideas about the *ius naturale* were valid, it is dated.[30]

Needless commenting on *ius gentium* since this chapter is devoted to evaluating whether there is a positive law allowing humanitarian intervention. As shall be seen, the Supreme Court of Canada in *Reference re Secession of Quebec*[31] answered in the negative.

7.2.2 Guardianship/Fiduciary Theory of Intervention

The report issued by an Independent Inquiry into the action of the United Nations during the genocide in Rwanda regrets the failure of the United Nations to prevent or stop the

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[27] R. J. Vincent, 'Grotius, Human Rights, and Intervention' in Hedley Bull, Benedict Kingsbury and Adam Roberts (eds), *Hugo Grotius and International Relations* (Oxford, Clarendon Press 1990) 241-242.

[28] Grotius 2001 (n 19) book 2, chapter 18, part iv; Bull *et al.,* (n 27) 246.

[29] Peter Paul Remec, *The Position of the Individual in International Law According to Grotius and Vattel* (The Hague, Martinus Nijhoff Publishers 1968) 214-215; Bull *et al.,* (n 27) 246.

[30] Evan J. Criddle, 'Three Grotian Theories of Humanitarian Intervention' (2015) 16(2) *Theoretical Inquiries in Law* 473-505, 474-475; Bull *et al.,* (n 27) 242.

[31] *Reference re Secession of Quebec* [1998] 2 SCR 217 [paras. 140, 154-155] [hereinafter *Reference re Secession of Quebec*].

genocide.[32] The reason lies in the belief that human rights are norm *jus cogens* as well as customary international law.[33] Thus, the delinquent States must be accountable to the international community[34] since human rights laws oblige *erga omnes*.[35]

The theory of fiduciary obligation is traceable to Grotius' idea of guardianship. Grotius conceives that States could use force to render temporary assistance or protection when a State has systematically violated the fundamental rights of its citizens.[36] Humanitarian intervention 'constitutes a fiduciary relationship in which a state undertakes to represent the people of another state for the purpose of conducting collective self-defence on their behalf and for their benefit.'[37] Such conducts, Grotius argued, does not violate the natural law or the law of nations.

A century before Grotius, Francesco de Vitoria's treatise, *On the Indian lately Discovered* used the analogy of the "guardian-ward relationship" to justify the European States' colonial rule in the Americas.[38] Victoria advocated that the indigenous peoples in the Americas have dominion over their land like the Spanish Christians. However, he supported conquest if indigenous peoples violate the natural right of their Spanish visitors or engaged in uncivilised acts such as cannibalism or human sacrifice against their own people.[39] This invokes the Kantian morality threshold.

There has always been tension between the inviolability of State territory and intervention on humanitarian ground. This tension dominated the legal discourse during the period of the League of Nations. Yet, the "sacred trust" and "mandate system"[40] prohibited other States

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[32] UN Doc. S/1999/1257 (15 December 1999) 3.

[33] Marcelo G. Kohen, *Secession: International Law Perspectives* (United Kingdom, Cambridge University Press 2006) 73; *Barcelona Traction, Light and Power Co. Ltd* (Belgium v Spain) Judgment ICJ Reports (1970) p. 3 [para. 33]; *United States Diplomatic and Consular Staff in Tehran* (United States of America v Iran) Judgment ICJ Reports (1980) p.3 [para. 91].

[34] Antonio Cassese, *International Law in a Divided World* (New York, Oxford University Press 1986) 148.

[35] UNGAOR, UN Doc. A/51/PV.78 (10 December 1996) 3.

[36] Grotius 2001 (n 19) book 2, chapter 25, parts vii and viii.

[37] Criddle 'Three Grotian Theories of Humanitarian Intervention' (n 30) 483.

[38] ibid., 483.

[39] Criddle 'Three Grotian Theories of Humanitarian Intervention' (n 30) 483-484.

[40] Susan Pedersen, *The Guardian: The League of Nations and the Crisis of Empire* (New York, Oxford University Press 2015) 1-3.

from interference in the affairs of non-self governing territories. In fact, the Covenant of the League of Nations was silent on what should be an option “B” should the governing power abuses the principles of the "sacred trust."[41]

Under the regime of the United Nations, the Trusteeship[42] which was later abrogated respected the guardianship system. The United Nations requires the administering power to regularly transmit to the Secretary-General of the United Nations, the general well-being of the people under its jurisdiction. It could be argued that guardianship was implemented for non-self-governing territories and not for “sovereign equal States.” Other States were obliged to respect the right of the administering power.[43] Hence, Portugal objected to Australia’s intervention during the East Timor crisis.

As shall be seen, the *International Commission on Intervention and State Sovereignty*[44] appears to have departed from the non-interventionist ideology with its new doctrine of the Responsibility to Protect.[45] The legal justification is often based on two grounds. First, the right of the oppressed people to defend themselves, and second, if the intervention were authorised by the Security Council.[46]

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[41] ibid., 2.

[42] United Nations, *Charter of the United Nations* (Signed at San Francisco on 26 June 1945, entered into force on 24 October 1945) 1 UNTS XVI (see Chapters XI and XII) [hereinafter *The UN Charter*].

[43] ibid., [Art. 74].

[44] This commission was established by the Canadian Government to device what the international community’s response should be where a state grossly and systematically violates the human rights of its citizens like those witnessed in Rwanda, Srebrenica and Kosovo. See generally, International Commission on Intervention and State Sovereignty, *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* (International Development Research Centre, Ottawa 2001) available at <http://responsibilitytoprotect.org/ICISS%20Report.pdf> accessed 27 October 2016 [hereinafter *ICISS Report 2001*].

[45] Monica Hakimi, ‘State Bystander Responsibility’ (2010) 21(2) *European Journal of International Law* 341-385; Bruno Simma, ‘NATO, the UN and the Use of Force: Legal Aspects' (1999) 10(1) *European Journal of International Law* 1-22, 2; Eyal Benvenisti, ‘Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders’ (2013) 107(2) *American Journal of International Law* 295-333; Evan J. Criddle, ‘A Sacred Trust of Civilization: Fiduciary Foundations of International Law’ in Andrew S. Gold and Paul B. Miller (eds), *Philosophical Foundations of Fiduciary Law* (Oxford, Oxford University Press 2014) 404; Evan J. Criddle, ‘Proportionality in Counterinsurgency: A Relational Theory’ (2012) 87(3) *Notre Dame Law Review* 1073-1112, 1077; Evan J. Criddle, ‘Standing for Human Rights Abroad’ (2015) 100(2) *Cornell Law Review* 269-334, 274; Evan J. Criddle and Evan Fox-Decent, ‘A Fiduciary Theory of Jus Cogens’ (2009) 34(1) *Yale Journal of International Law* 331-388; Evan Fox-Decent and Evan J. Criddle, ‘The Fiduciary Constitution of Human Rights’ (2009) 15(4) *Legal theory* 301-336, 309; Jeremy Waldron, ‘Are Sovereigns entitled to the Benefit of the International Rule of Law?’ (2011) 22(2) *European Journal of International Law* 315-343.

[46] Criddle ‘Three Grotian Theories of Humanitarian Intervention’ (n 30) 488.

This dissertation does not contest the Chapter VII Powers of the SC but a unilateral action in defence of the private right of individuals. To start with, what constitutes a fiduciary relationship and how duties emanate from it are still disputed under private law.[47] The general definition of fiduciary power as 'a form of authority derived from the legal capacity of the beneficiary or a benefactor'[48] appears contractual. The imposition of the duty of care upon the UN member States appears exaggerated. Such a duty of care if valid should equally apply in other cases of humanitarian catastrophe caused by natural disaster. Leib and Galoob rightly held that such attribution of the duty of care is incompatible with the modern international law.[49]

7.2.3 Just War Theory of Intervention

Most of Michael Walzer's writings are devoted to promoting humanitarian intervention[50] as a last resort to 'acts that shock the conscience of humanity.'[51] Such interventions are just if four basic conditions are met: namely, occasions, agents, means and timing.[52]

The "occasions" that require intervention must be extreme cases.[53] The "agents" could be a State or group of States that decide to stop the wrongful act irrespective of whether or not, the intervention is unilateral or authorised by the Security Council.[54] The "means" to be used are physical armed force.[55] The "timing" for the intervention must be based on "quickly in and quickly out"[56] rule, provided the "means" used are necessary and proportionate.

The Walzer's just war theory is plausible but can be difficult to apply. Take the US'

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[47] Paul B. Miller, 'Justifying Fiduciary Duties' (2013) 58(4) *McGill Law Journal* 969-1026, 969.
[48] ibid., 969.
[49] Ethan J. Leib and Stephen R Galoob, 'Fiduciary Political Theory: A Critique' (2016) 125(7) *Yale Law Journal* 1820-1878, 1820.
[50] See generally, Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (Fourth Edition, New York, Basic Books 1977); Michael Walzer, 'The Argument about Humanitarian Intervention' (2002) 49(1) *Dissent* 29-36; Michael Walzer, *Thinking Politically: Essays in Political Theory* (New Haven and London, Yale University Press 2007).
[51] Walzer 2002 (n 50) 29.
[52] ibid., 29.
[53] ibid., 29.
[54] ibid., 31.
[55] ibid., 33
[56] ibid., 34.

intervention in Cambodia as an example, the "quickly in and quickly out" rule failed because of its repercussions on the civilian populations.[57] It begs the essence of intervention if it leaves the civilians worse off than they were before the intervention.[58] President Obama has admitted that the untimely withdrawal of the UK's troop from Libya worsened the situation in Libya.[59]

Besides, the motives for intervening in the internal affairs of another State could be flawed. Not only that the "quickly in and quickly out" rule was ineffectual in Libya but it was based on inaccurate intelligence information.[60] Nardin concludes that so many issues were not clarified. For instance, just war theory does not elucidate the criteria for determining the rightful intervenor, how the decision should be made and whether a State guilty of human rights violation could lawfully intervene in another State's affairs.[61] While "sit and watch" is not a viable option, a reformed Security Council should explicitly authorise any intervention.[62] Moreover, humanitarian intervention is palliative insofar as it does not address the root causes of the problem.[63]

7.3 Conflicting Theories of Humanitarian Intervention – Any meeting point?

One last remark on theories of intervention is whether there is a convergence for the various schools on humanitarian intervention. It seems that the theories examined above could either

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[57] Richard A. Falk, 'The Cambodian Operation and International Law' (1971) 65(1) *American Journal of International Law* 1-25; Wolfgang Friedmann, 'Comments on the Articles on the Legality of the United States Action in Cambodia' (1971) 65(1) *American Journal of International Law* 77-79, 78; Robert H. Bork, 'Comments on the Articles on the Legality of the United States Action in Cambodia' (1971) 65(1) *American Journal of International Law* 79-81, 79. Cf John N. Moore, 'Legal Dimensions of the Decision to Intercede in Cambodia' (1971) 65(1) *American Journal of International Law* 38-75.

[58] Chigara 'Humanitarian Intervention missions' (n 9) 85.

[59] Tim Walker and Nigel Morris, 'Barack Obama says David Cameron allowed Libya to become a shit show' (Independent, 10 March 2016) available at <http://www.independent.co.uk/news/uk/politics/barack-obama-says-david-cameron-allowed-libya-to-become-a-s-show-a6923976.html> accessed 22 October 2016.

[60] House of Common Foreign Affairs Committee, 'Libya: Examination of intervention and collapse and the UK's future policy option – third report of session 2016-17' (HC 119, 14 September 2016) 3 available at <https://www.publications.parliament.uk/pa/cm201617/cmselect/cmfaff/119/119.pdf> accessed 22 October 2016; William D. Rogers, 'The Constitutionality of the Cambodian Incursion' (1971) 65(1) *American Journal of International Law* 26-37, 31-32 (Rogers argues that the invasion of Cambodia has no legal precedent).

[61] Terry Nardin, 'From Right to Intervene to Duty to Protect: Michael Walzer on Humanitarian Intervention' (2013) 24(1) *European Journal of International Law* 67-82, 74.

[62] Louis Henkin, 'Kosovo and the Law of "Humanitarian Intervention' (1999) 93(4) *American Journal of International Law* 824-828, 826.

[63] Bhikhu Parekh, 'The Dilemmas of Humanitarian Intervention: Introduction' (1997) 18(1) *International Political Science Review* 5-7, 7.

fall into the realist school or the liberal school or both.[64]

The realists regard interventions based on ethical ground as self-delusory[65] but support intervention that is altruistic. Thus, realists are critical of interventions because of their assumption that States "only" act when it is in their interest to do so.[66] If the intervenor has ulterior motive, it faults the bedrock on which the fiduciary theory is based. A State's interest could be "soft" such as instituting a subservient democratic government or the maintenance of the balance of power. It could be "hard" such as the exploitation of the mineral resources of the occupied State.

In cases where the pre-interventionist's intention is salient, it sometimes manifests after the intervention. In the *Nicaragua* case,[67] for instance, part of the United States' interest was to change the political system of Nicaragua. That was rejected by the ICJ. However, state practice may condone altruistic interventions or what Wolfers calls milieu goals.[68] Therefore, it is incorrect to discountenance all interventions as driven by national interest accruable to the intervenor. A complex example would be the international community's intervention in Nazi Germany, although it is difficult to classify it as purely altruistic.[69]

The liberal school proposes that any intervention that is aimed at emancipating an oppressed people is legitimate. Inherent in this ideology is that sovereignty resides with the people. However, a generous application of the liberal ethos could lead to a global anarchy[70] because self-determination remains the major cause of intra-state conflicts. Besides, liberalism does not prescribe how "a people" can define itself, the means that must be adopted when doing

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[64] Some writers have three broad classifications: namely, Realism, Liberalism and Socialism. See generally, Michael W. Doyle, *Ways of War and Peace: Realism, Liberalism and Socialism* (New York, W. W. Norton and Company 1997); Stanley Hoffmann, 'Notes on the Elusiveness of Modern Power' (1975) 30(2) *International Journal* 183-206.

[65] Michael J. Smith, 'Humanitarian Intervention: An overview of the Ethical Issues' (1998) 12(1) *Ethics and International Affairs* 63-79, 70.

[66] ibid., 70.

[67] *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v United States of America) (Merits) Judgment ICJ Reports (1986) p. 14 [para. 263] [hereinafter *Nicaragua case*].

[68] Arnolds Wolfers, *Discord and Collaboration: Essays on International Politics* (Baltimore Md.; London, John Hopkins Press 1965) 73-75; Monica Gariup, *European Security Culture: Language, Theory, Policy* (England, Ashgate Publishing Limited 2009) 33.

[69] Smith 1998 (n 65) 71-72.

[70] ibid., 72.

so or what legitimate goals that a people may pursue were. It is equally unclear from the liberal point of view, how a people could advance its course for freedom and autonomy and the extent that third States could legitimately intervene to promote self-determination.[71]

To the extent that *opinio juris* considers "people" as primordial to artificially delimited territory,[72] the literal application of the liberal manifesto could lead to an upsurge in new States. In summary, neither realism nor liberalism provides the legal basis for humanitarian intervention. Both theories are political ideologies that justify humanitarian intervention. Their tenets are persuasive if strict application of the principle of the inviolability of State territory protects the political elites at the expense of the ordinary citizens.

7.4 Any positive duties to intervene to prevent human rights violations?

After the Second World War, the body of human rights started expanding in number. That influenced the development of international policy on assessment of States' performance. For example, the European Community's Guidelines on the Recognition of New States[73] stipulates that such States must pledge their commitment to respect the rule of law, democracy and human rights.

It could be recalled that the Supreme Court of Canada held that secession could be a last resort 'when a people is blocked from a meaningful exercise of its right to self-determination internally.'[74] A similar view was expressed by the International Committee of Jurists in Aaland Islands dispute.[75] It follows that the principle of the inviolability of State territory is not absolute. This idea perhaps informed the "safeguard clause" inserted into most international

[71] ibid., 72.

[72] Albert Shaw (ed), *The Messages and Papers of Woodrow Wilson* (Volume 1, New York, The Review of Reviews Corporation 1924) 353; *Western Sahara,* Advisory Opinion ICJ Reports (1975) p. 12, 122 (Separate Opinion of Judge Dillard); Stuart Elden, 'Contingent Sovereignty, Territorial Integrity and the Sanctity of Borders' (2006) 26(1) *SAIS Review* 11-24, 19.

[73] See The European Community, 'Declaration on Yugoslavia and on the Guidelines on the Recognition of New States' (1992) 31(6) *International Legal Materials* 1485-1487, 1487.

[74] *Reference re Secession of Quebec* (n 31) [para. 134].

[75] See The League of Nations, 'Report of the International Committee of Jurists entrusted by the Council of the League of Nations with the task of giving advisory opinion upon the legal aspect of the Aaland Islands Question' (1920) *League of Nations Official Journal* (Special Supplement No. 3) 3-19, 5; see also 'Report presented to the Council of the League of Nations by the Commission of Rapporteurs,' LN Doc. B7 21/68/106 (1921) 1-14, 4 available at <https://www.ilsa.org/jessup/jessup10/basicmats/aaland2.pdf> accessed 10 October 2016.

legal instruments in the event of gross violations of human rights.[76] But self-determination remains an internal affair of a State.

The Declaration 5 of the *Vienna Declaration and Programme of Action*[77] provides that '[a]ll human rights are universal, indivisible and interdependent and interrelated.' It further obliges the international community to treat human rights related issues globally in a fair and equal manner.[78] This could mean that the law upholding human rights obliges *erga omnes*. Thus, the advocates of humanitarian intervention base their argument on the failure of the delinquent States to respect, protect and fulfil their human rights obligations.[79]

To "respect" imposes upon States, the duty not to interfere with the exercise of the basic rights of persons within their territory. To "protect" obliges States to take reasonable steps to prosecute any violation of the fundamental rights of persons resident within their territory. To "fulfil" requires States to ensure a safe atmosphere for the realisation of human rights. But there is no law which empowers third States to unilaterally enforce these objectives.

Consequently, some academics have suggested a possible legal leeway.[80] Three incidents that occurred in the last decade of the 20th century have changed the international community's thinking about the principle of the inviolability of State territory. They are, the genocides committed in Rwanda and Srebrenica and the 1999 ethnic cleansing of Kosovar Albanians. As shall be seen, the international community endorsed the sanctity of State borders in Rwanda and Srebrenica but disregarded it in Kosovo. Before we examine these violations, let us first

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[76] UNGA Res. A/RES/25/2625 (24 October 1970) see section on 'The principle of equal rights and self-determination of peoples' [para. 7]; *Vienna Declaration and Programme of Action* (Adopted by the World Conference on Human Rights in Vienna on 25 June 1993) (1993) 32(6) *International Legal Materials* 1661-1687 [Declaration I(2)] [hereinafter *Vienna Declaration and Programme of Action*].

[77] *Vienna Declaration and Programme of Action* (n 76) [Declaration I(5)].

[78] ibid., [Declaration I(5)].

[79] Steven Weimer, 'Autonomy-based Account of the Right to Secede' (2013) 39(4) *Social Theory and Practice* 625-642, 637; Daniel Philpott, 'In Defense of Self-Determination' (1995) 105(2) *Ethics* 352-385; Allen Buchanan, *Secession: The Morality of Political Divorce from Fort Sumter to Lithuania and Quebec* (Boulder, Westview 1991) 40; Allen Buchanan, 'Toward a Theory of Secession' (1991) 101(2) *Ethics* 322-342, 330; Lea Brilmayer, 'Secession and Self-determination: A Territorial Interpretation' (1991) 16(1) *Yale Journal of International Law* 177-202, 189; Allen Buchanan, 'Theories of Secession' (1997) 26(1) *Philosophy and Public Affairs* 31-61, 37.

[80] Jack Donnelly, 'International Human Rights: A regime Analysis' (1986) 40(3) *International Organization* 599-642; 0ona A. Hathaway, 'The Cost of Commitment' (2003) 55(5) *Stanford Law Review* 1821-1862; Andrew Moravcsik, 'The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe' (2000) 54(2) *International Organization* 217-252; Jerome Slater and Terry Nardin, 'Nonintervention and Human Rights' (1986) 48(1) *Journal of Politics* 86-96.

analyse the nature and scope of human rights as enshrined in the international legal instruments.

7.5 The Scope of Human Rights

There are a couple of "soft"[81] and "hard"[82] legal instruments covering individual and group rights protected by the international human rights law. The Universal Declaration of Human Rights[83] and the two 1966 International Conventions on Human Rights[84] will be examined here. These instruments cover the substantive rights that other instruments amplified to meet the specificity of certain protected groups or persons, such as the right of women or the right of the child.

7.5.1 The Universal Declaration of Human Rights

On 10 December 1948, the United Nations General Assembly adopted the Universal Declaration of Human Rights (hereinafter referred to as UDHR) as a common human rights standard for all peoples and all nations. Paragraph 1 of its preamble acknowledges that the 'recognition of the inherent dignity and of equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.'[85] "Inherent" means that human rights are not acquired. We may run into difficulties with this categorisation when we evaluate certain rights, such as, the right to acquire property or to seek and be granted asylum. To what extent could it be said that it is inherent in every person? If no such absolute right exists, then the idea that human rights are "inalienable" is questionable.

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[81] See generally, UNGA Res. A/RES/3/217 A (10 December 1948) [hereinafter *UDHR*]; UNGA Res. A/RES/61/295 (13 September 2007).

[82] For the relevant instruments visit <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx> last visited 29 July 2017.

[83] *UDHR* (n 81) [Arts. 1-30].

[84] See generally, *International Convention on Civil and Political Rights* (Adopted at New York on 16 December 1966, entered into force on 23 March 1976) 999 UNTS 171 [hereinafter *ICCPR*]; *International Convention on Economic, Social and Cultural Rights* (Adopted at New York on 16 December 1966, entered into force on 3 January 1976) 993 UNTS 3 [hereinafter *ICESCR*].

[85] *UDHR* (n 81) [preamble para. 1].

Strictly, the UDHR is not legally binding,[86] but a prototype of what later devolved into two International Human Rights Covenants in 1966.[87] The UDHR protects the right to life, liberty and security of persons.[88] It guarantees, among others, the right to freedom of peaceful assembly and association.[89] Thus, the UDHR protects individual and groups' rights.

States have a positive obligation to protect human rights and a negative obligation not to interfere with the lawful exercise of those rights. A State would be deemed in breach of its positive obligation if, for instance, it fails to take the necessary steps[90] to protect a person's right to life. The "necessary steps" could mean putting in place a mechanism that prevents an unlawful killing of innocent civilians.[91]

Conversely, a state breaches its negative obligations if it puts in place a mechanism that inhibits the actualisation of those rights. For instance, a State that prevents a minority group from constructing a place of worship could be violating its negative obligation.[92] The jurisprudence of the PCIJ,[93] the ICJ[94] and the European Court of Human Rights[95] support this view.

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[86] United Nations, 'Human Rights Law' available at <http://www.un.org/en/sections/universal-declaration/human-rights-law/> accessed 10 September 2016.

[87] See generally, *ICCPR* (n 84); *ICESCR* (n 84).

[88] *UDHR* (n 81) [Art. 3].

[89] ibid., [Art. 20].

[90] United Nations, 'General Comment No. 28: Equality of Rights between men and women (article 3),' UN Doc. CCPR/C/21/Rev.1/Add.10 (29 March 2000) [para. 3].

[91] Javaid Rehman, *International Human Rights Law* (Second Edition, England, Pearson 2010) 187-188.

[92] Human Rights Committee, 'The Nature of the General Legal Obligations imposed on States Parties to the Covenant – General Comment No. 31,' UN Doc. CCPR/C/21/Rev.1/Add. 13 (26 May 2004) [paras. 5-7].

[93] *Certain Questions Relating to Settlers of German Origin in the Territory Ceded by Germany to Poland,* Advisory Opinion PCIJ Series B, No. 6 (1923) 16-17; *Rights of Minorities in Upper Silesia* (Minority Schools) Judgment PCIJ Series A, No. 15 (1928) 42; *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory,* Advisory Opinion PCIJ Series A/B, No. 44 (1932) 10; *Minority Schools in Albania,* Advisory Opinion PCIJ Series A/B, No. 64 (1935) 5.

[94] *Case Concerning East Timor* (Portugal v Australia) Judgment ICJ Reports (1995) p. 90 [para. 14]; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970*) Advisory Opinion ICJ Reports (1971) p. 16 [paras. 52-53]; *Western Sahara,* Advisory Opinion ICJ Reports (1975) p. 12 [paras. 54-59]; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* Advisory Opinion ICJ Reports (2004) p. 136 [para. 49]; see also Sandy Ghandhi, 'Human Rights and the International Court of Justice: The Ahmadou Sadio Diallo Case' (2011) 11(3) *Human Rights Law Review* 527-555.

[95] *Osman v UK* (2000) 29 EHRR 245 [para. 115]; *Ergi v Turkey* (2001) 32 EHRR 18; *McCann and Others v UK* (1996) 21 EHRR 97; *Kaya v Turkey* (1999) 28 EHRR 1.

Although not all human rights are absolute,[96] in some cases, State may be obliged to take special measures to promote these rights.[97] Where there are inequalities, substantive equality prevails on States to treat unalike differently, if formal equality would further marginalise the disadvantaged group. A State could breach a minority's freedom of peaceful assembly and association if it uses excessive physical armed force against such a group protesting against an oppressive government.

7.5.2 The 1966 International Conventions on Human Rights

The two 1966 Conventions mentioned above codified international human rights. An elaborate discussion of the substantive rights is done here.[98] For our purposes, it is sufficient to mention that States, by signing up to, and ratifying conventions on human rights intend to be bound by them. The two 1966 conventions have the highest number of States parties to date.[99] Currently, there are about 18 multilateral instruments on Human Rights.[100] Nine of them are core human rights instruments, each of which has a treaty body that monitors its implementation by States parties.[101]

The International Convention on Civil and Political Rights (hereinafter referred to as ICCPR), often referred to as the "first generation rights" deals with civil and political rights. These rights developed concomitantly with the Modern State to counter the medieval monarchical absolutism.[102] The origin of civil and political rights could be traced to documents such as the

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[96] No limitation can be placed upon human rights that are absolute such as the right to life and the prohibition against torture. Other rights can be limited by the state such as the freedom of expression or the right to manifest religious belief. See generally, *Case of Ramzy v The Netherlands* (Application No. 25424/05) Judgment ECtHR (2010); *Chahal v UK* (1997) 23 EHRR 413.

[97] *Case of O'Keeffe v Ireland* (Application No. 35810/09) Grand Chamber, Judgment ECtHR (2014) [para. 146].

[98] See generally, Manisuli Ssenyonjo and Mashood A. Baderin (eds), *International Human Rights Law: Six Decades after the UDHR and Beyond* (Farnham, Ashgate 2010).

[99] As at 20 June 2017, the ICCPR has 169 states parties while the ICESCR has 165 states parties.

[100] See United Nations Treaty Collection, 'Chapter IV: Human Rights – Multilateral Treaties deposited with the Secretary-General' available at <https://treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&clang=_en> accessed 10 October 2016.

[101] United Nations Human Rights Office of the High Commissioner, 'The Core International Human Rights instruments and their monitoring bodies' available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx> accessed 10 September 2016.

[102] Adrian Vasile Cornescu, 'The generations of human rights' (Dny práva – 2009 – Days of Law: The Conference Proceedings, First Edition, Brno, Masaryk University 2009) 2 available at <https://www.law.muni.cz/sborniky/dny_prava_2009/files/tvorba_prava.html> accessed 10 October 2016.

Magna Carta of 1215, the Petition of Rights of 1628,[103] the Bill of Rights of 1688,[104] the American Declaration of Independence of 1776,[105] and the French Declaration of Human and Citizen Rights of 1789.[106]

7.5.2.1 The nature of human rights

The human rights documents recognise that human rights are natural to every person and as such inalienable. These rights include in broad terms, political, civil, liberty, property, security, groups and resistance to oppression.[107] States must respect the right of individuals and/or groups of individuals and foster an environment in which they prosper.

The political rights include but are not limited to the rights to participate in government and electoral processes.[108] The civil rights include the freedom of thought, religion, and expression. Others are freedom of movement and peaceful assembly and association.[109]

The two 1966 Bill of Rights elaborated on civil, political, social, economic and cultural rights of every person. They also consolidated personal rights, such as, the right to life, which became as it were a norm *jus cogens*.[110]

In 1984, the UN General Assembly adopted resolution 39/46 which prohibited torture and

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[103] See generally, *The Petition of Rights* 1628 available at <http://www.constitution.org/eng/petright.htm> accessed 11 October 2016.
[104] See generally, *English Bill of Rights 1688* available at <http://www.legislation.gov.uk/aep/WillandMarSess2/1/2/introduction> accessed 11 October 2016.
[105] See generally, *American Declaration of Independence 1776* available at <http://avalon.law.yale.edu/18th_century/declare.asp> accessed 11 October 2016.
[106] See generally, *French Declaration of Human and Citizen Rights of 1789* (Approved by the National Assembly of France, 26 August 1789) available at <http://avalon.law.yale.edu/18th_century/rightsof.asp> accessed 11 October 2016.
[107] ibid., [Art. 2].
[108] *UDHR* (n 81) [Art. 21].
[109] ibid., [Arts. 13, 18-20].
[110] *ICCPR* (n 84) [Arts. 4 and 6]; *European Convention on Human Rights* (As amended by Protocols Nos. 11 and 14; supplemented by Protocols Nos. 1, 4, 6, 7, 12 and 13) [Arts. 2 and 15] available at <http://www.echr.coe.int/Documents/Convention_ENG.pdf> accessed 11 October 2016; Organisation of American States, *American Convention on Human Rights* (Concluded at San Jose on 22 November 1969, entered into force on 18 July 1978) 1144 UNTS 123 [Art. 4]; Organisation of African Unity, *African Charter on Human and Peoples' Rights* (Concluded at Nairobi on 27 June 1981, entered into force on 21 October 1986) 1520 UNTS 217 [Art. 4]; *ASEAN Human Rights Declaration* [Art. 11] available at <http://www.mfa.go.th/asean/contents/files/other-20121217-165728-100439.pdf> accessed 11 October 2016.

other cruel, inhuman or degrading treatment or punishment.[111] Interestingly, the nine core human rights instruments allow individuals whose rights have been violated by the State to initiate a communication against that State. It means that States cannot breach the human rights of its citizens – whether as individuals or as a group.

In 2007, the United Nations General Assembly adopted the Declaration on the Rights of Indigenous Peoples[112] which complemented the International Labour Organisation Convention 169[113] in protecting groups rights. In summary, there are Conventions, General Assembly Resolutions and multilateral treaties that protect individuals as well as groups' rights.

7.6 Enforcement of Human Rights Treaties through the Treaty Bodies

As one would expect, the idea that States are equal makes enforcement of the international law upon a defaulting State difficult. Therefore, States are persuaded to comply with their international obligations. The subsidiary organ of the United Nations that monitors States' compliance with the ICCPR is the Human Rights Council[114] (hereinafter referred to as HRC) established in 2006. This body undertakes three main functions, namely, the universal periodic review, complaint procedure and advisory committee.

7.6.1 Universal Periodic Review

The Universal Periodic Review (hereinafter referred to as UPR) is a mechanism which enables the HRC to review how States comply with their human rights obligations. The HRC has successfully reviewed all the UN member States as of October 2011.[115] To review a State, the HRC relies on a report issued by a State to be reviewed, a report submitted to it by an independent human rights experts and groups (Special Procedures) concerning the State to

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[111] See *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Adopted at New York on 10 December 1984, entered into force on 26 June 1987) 1465 UNTS 85 [Art. 1].
[112] UNGA Res. A/RES/61/295 (13 September 2007) [Art. 1].
[113] International Labour Organisation, *Convention concerning Indigenous and Tribal Peoples in Independent Countries* (Adopted at Geneva on 27 June 1989, entered into force on 5 September 1991) (1989) 28(6) *International Legal Materials* 1382-1392 [Art. 3].
[114] UNGA Res. A/RES/60/251 (12 March 2006) [operative para. 1].
[115] United Nations Human Rights Office of the High Commissioner, 'Universal Periodic Review' available at <http://www.ohchr.org/EN/HRBodies/UPR/Pages/UPRMain.aspx> accessed 20 June 2017 [hereinafter *UPR*].

be reviewed and other reports from the national human rights organisations within the State in question. This broadens the scope of sources on which the HRC bases its assessment of States' compliance.[116] The HRC issues recommendations to the State reviewed, on how to improve upon its human rights obligations and subsequently follows it up[117] to ensure compliance.

The aim of the UPR is to improve upon the human rights situation in all countries and to address human rights violations wherever they occur.[118] In 2013, the HRC adopted a resolution[119] on how to deal with a State that fails to comply with its human rights obligations following Israel's abdication from the UPR. It could be said that the international community has instituted legitimate means to persuade States to comply with their human rights obligations. Generally, States do not want to be portrayed as human rights abusers.[120] Henkin warns against opening the floodgate of intervention in the internal affairs of States because of human rights violations.[121]

7.6.2 Complaint Procedures

The complaint procedures were established in 2007[122] to assuage the consistent patterns of gross violations of human rights in any part of the world and under any circumstances. It accepts communications from individual or group of individuals claiming to be victims of violations of human rights and fundamental freedom.[123] Therefore, it was a good step towards protecting human rights considering that the HRC's predecessor, the Commission on Human Rights had no such powers.[124]

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[116] For the national report on Afghanistan see UN Doc. A/HRC/WG.6/18/AFG/1 (20 November 2013).
[117] See generally, UN Doc. A/HRC/DEC/17/119 (19 July 2011).
[118] See generally, *UPR* (n 115).
[119] UN Doc. A/HRC/OM/7/1 (4 April 2013) [preamble para. 5].
[120] Louis Henkin, *How Nations Behave: Law and Foreign Policy* (Second Edition, New York, Columbia University Press 1968) 52.
[121] ibid., 145.
[122] UN Doc. A/HRC/RES/5/1 (18 June 2007) [para. 85].
[123] ibid., [para. 87].
[124] UN Doc. E/259(SUPP) (10 February 1947) [para. 22]; UN Doc. E/RES/75(V) (5 August 1947) [preamble para. 2].

However, the Economic and Social Council Resolution 1235 (XLII)[125] allowed the Commission on Human Rights to have an annual debate on human rights violations in all countries. That was the basis for the establishment of special thematic and country procedures to respond to the gross violations of human rights wherever they occur.[126]

One could say that appreciable progress has been made in terms of the legal framework to address gross human rights violations. The Commission on Human Rights was useful in addressing the human rights issues in South Africa,[127] the Israeli Occupied Territories and Chile in 1975.[128] With the establishment of Complaint Procedures under the HRC, the inadequacies of the previous mechanism were significantly reduced in that it allows inter-state complaints, individual and group complaints and independent inquiry. These complaints procedures are not only available at the level of the HRC but also have been adopted by the treaty-monitoring bodies.

7.6.2.1 Inter-states complaints

Article 41 of the International Convention on Civil and Political Rights (hereinafter referred to as ICCPR) authorises its Monitoring Committee to consider inter-State complaints.[129] Thus, a Member State that observes that another State is not fulfilling its human rights obligations could petition the Committee. This applies under certain conditions, such as, where both States are parties to the Convention. The aim is to strengthen the member States' resolve to collaborate in upholding human rights. A State accused of gross violation of human rights can explain the measures it is taking to tackle the problem or offer explanations based on its domestic law. While individuals who are victims of a State's brutality may be incapacitated and unable to fight for their right, other sovereign States can apply the fiduciary theory through this legitimate means to bring the culpable State to account.

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[125] UN Doc. E/RES/1235 (XLII) (6 June 1967) [operative para. 1].

[126] Jeroen Gutter, 'Special Procedures and the Human Rights Council: Achievements and Challenges Ahead' (2007) 7(1) *Human Rights Law Review* 93-108, 97.

[127] UN Doc. E/CN.4/1993/14 (8 January 1993) [para. 1].

[128] Gutter (n 126) 97.

[129] *ICCPR* (n 84) [Art. 41].

7.6.2.2 Individual communications

The ICCPR Treaty-Based Committee may consider individual communications where the accused State is a party to the First Optional Protocol to the International Covenant on Civil and Political Rights.[130]

The individual communications provision allows individual victims to lodge a complaint with the Committee against a State that has jurisdiction over the territory where the violation occurs.[131] A third party State can lodge a complaint with the HRC on behalf of a victim, provided the consent of the individual was obtained, or could not be obtained because the individual has been incarcerated.[132]

A complaint that passes the admissibility check list[133] will be considered by the Committee on its merits. If the Committee makes a finding to the effect that the rights of the complainant have been violated, it will make recommendations requesting the State party to discontinue the violation and to take necessary steps to provide a remedy for the violations. Since the Committee's recommendations are not binding, the treaty bodies have developed follow-up procedures to monitor the States parties' compliance.

However, the results achieved so far by the HRC or other treaty bodies are negligible compared with the result from the regional body such as the European Court of Human Rights. The States parties to the ICCPR are currently 169,[134] yet the number of individual

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[130] *Optional Protocol to the International Covenant on Civil and Political Rights* (Adopted at New York on 16 December 1966, entered into force 23 March 1976) 999 UNTS 302 [Art. 1].

[131] United Nations, 'Human Rights Bodies – Complaints procedures,' available at <http://www.ohchr.org/EN/HRBodies/TBPetitions/Pages/HRTBPetitions.aspx#individualcomm> accessed 13 January 2017 [hereinafter *Human Rights Bodies Complaints Procedures*].

[132] ibid., (the Internet page).

[133] Such as exhaustion of domestic remedies, the complainant must be a victim of the allegedly violated rights or must be duly authorised by the victim, the complaint must be sufficiently substantiated, the communication must not be manifestly ill-founded, among others. See *Human Rights Bodies Complaints Procedures* (n 131) (the Internet page); United Nations, 'Human Rights Council Complaint Procedure,' available at <http://www.ohchr.org/EN/HRBodies/HRC/ComplaintProcedure/Pages/HRCComplaintProcedureIndex.aspx> accessed 13 January 2017.

[134] Status as at 1 September 2017 available at <https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-4&chapter=4&lang=en> accessed 21 June 2017.

communications lodged before the Committee as at June 2017 from 89 countries is 2474.[135] This should be contrasted with 140, 000 individual complaints filed before the European Court of Human Rights from the 47 member states in 2010 alone.[136]

The reason could be, on the one hand, due to lack of awareness of the availability of individual complaint procedure. It could also be due to its inefficiency in providing remedies for the victims or that the regional mechanisms provide the required remedy. On the other hand, it could be that States comply with their human rights obligations. This second option is unlikely given the huge case file with the European Court of Human Rights, although the European States are generally perceived as human rights compliant. Therefore, the treaty bodies should create more awareness in the developing world of the services they offer in addressing human rights violation by State.

7.6.2.3 Inquiries

Unlike the Committee on the ICCPR, other treaty bodies[137] can adopt an inquisitorial approach to verify the credibility of communications they receive. Each treaty body determines when and how to conduct its investigation with the consent of the accused State. In general, the United Nations uses the procedures discussed above to ensure States' compliance with human rights law.

However, neither the HRC nor any of the treaty body committees have the mandate to make

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[135] United Nations Human Rights Committee, 'Monitoring Civil and Political Rights – Statistical survey on individual complaints,' available at <http://www.ohchr.org/EN/HRBodies/CCPR/Pages/CCPRIndex.aspx> accessed 13 January 2017.

[136] Christian Walter, 'The Protection of Freedom of Religion within the Institutional System of the United Nations' (2012) 17 *Pontifical Academy of Social Sciences, Acta* 588-603, 594.

[137] *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Adopted at New York on 10 December 1984, entered into force on 26 June 1987) 1465 UNTS 85 [Art. 20] [hereinafter *CAT*]; *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women* (Concluded at New York on 6 October 1999, entered into force on 22 December 2004) 2131 UNTS 83 [Art. 8]; *Optional Protocol to the Convention on the Rights of Persons with Disabilities* (Done at New York on 13 December 2006, entered into force on 3 May 2008) 2518 UNTS 283 [Art. 6]; *International Convention for the Protection of All Persons from Enforced Disappearance* (Done at New York on 20 December 2006, entered into force on 23 December 2010) 2716 UNTS 3 [Art. 33]; *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights* (Adopted at New York on 10 December 2008, entered into force on 5 May 2013) 2922 UNTS 1 [Art. 11]; *Optional Protocol to the Convention on the Rights of the Child on a communications procedure* (Adopted at New York on 19 December 2011, entered into force on 14 April 2014) UNGA Res. A/RES/66/138 (19 December 2011) [Art. 13].

a formal evaluation of or comment on compliance or noncompliance of individual States.[138] At most, they can "study" States parties' report, investigate the reported cases (if applicable) and transmit their concluding observations and general comments to the States parties and the General Assembly.[139] They can follow up on their concluding observations to ensure States' compliance through lobbying and diplomatic persuasion. To that end, their mandate is not to enforce the human rights law through military intervention.[140] Thus, Walter opines that a concluding observation is a diplomatic document.[141]

Regardless, the regional courts[142] have adjudicated cases of human rights violations. The European Court of Human Rights and the Inter-American Court of Human Rights have been largely successful in adjudicating various cases of human rights violations. The judgments handed down by these regional courts are enforceable upon the defaulting State. Therefore, the international community may consider empowering the UN Treaty Body Committees to institute legal proceedings against a State that refuses to obey its recommendations at the regional courts.

7.7 Historicizing Humanitarian Intervention

The dictum, *salus populi suprema lex esto* (let the welfare of the people be the supreme law) is a recognised principle of international law.[143] One wonders the legality of the laws enacted during the Nazi regime with the intent of killing all the Jews?

Humanitarian intervention was institutionalised in the 19th century.[144] Before that, it was

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[138] Donnelly (n 80) 609-610; Farrokh Jhabvala, 'The Practice of the Covenant's Human Rights Committee, 1976-82: Review of State Party Reports' (1984) 6(1) *Human Rights Quarterly* 81-106; Dana D. Fischer, 'Reporting under the Covenant on Civil and Political Rights: The First Five Years of the Human Rights Committee' (1982) 76(1) *American Journal of International Law* 142-153.

[139] *ICCPR* (n 84) [Art. 40(4)].

[140] For more on why states obey international law, see Henkin 1968 (120) 52.

[141] Walter (n 136) 594.

[142] Visit the European Court of Human Rights website at <http://www.echr.coe.int/Pages/home.aspx?p=home> last visited 19 August 2017; the Inter-American Court of Human Rights, available at <http://www.corteidh.or.cr/index.php/en> last visited 19 August 2017; African Court on Human and Peoples' Rights, available at <http://www.african-court.org/en/> last visited 19 August 2017.

[143] H. L. A. Hart, 'Positivism and the Separation of Law and Morals' (1958) 71(4) *Harvard Law Review* 593-629, 615-624.

[144] Jean-Pierre Fonteyne, 'The Customary International Law Doctrine of Humanitarian Intervention: Its Current Validity under the U.N. Charter' (1974) 4(2) *California Western International Law Journal* 203-270, 205-206.

promoted through the religious doctrine that advocates the respect for the dignity of the human person. The medieval philosophers like St Thomas Aquinas argued that a sovereign State can intervene in the internal affairs of another State if the latter grossly maltreats its subjects.[145] Vitoria sanctioned it, if the purpose were to stop a Prince from coercing neophytes to abandon Christianity for paganism.[146] Grotius supported it if the aim was to protect citizens from oppression.[147]

An upsurge in the cases of interventions started in the late 19th century and the early 20th century. Perhaps earliest is the United States' intervention in Cuba in 1898[148] and the French intervention in Morocco in 1830.[149]

7.7.1 What is "humanitarian" in humanitarian intervention?

The word "humanitarian" is open to multiple interpretations. It deals essentially with interventions – militarily or otherwise – because of common humanity.[150] The aim could be to ameliorate the human sufferings caused by natural disaster or by civil conflict and war.[151]

The word 'intervention" in a narrow sense is restricted to military invasion of a State by another State without its consent or an express authorisation by the SC.[152] This is the sense in which humanitarian intervention is used in this dissertation.

Surprisingly, the term "humanitarian intervention" was not used in the report of the International Commission on Intervention and State Sovereignty[153] (hereinafter referred to as the Commission). It shows that the legal history is ambiguous. The report uses either

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[145] ibid., 214.
[146] James Brown Scott, *The Spanish Origin of International Law: Francisco de Vitoria and His Law of Nations* (New Jersey, Lawbook Exchange 2000) (De Indis, Sect. III) Xliii [para. 401].
[147] Grotius 2001 (n 19) book 2, Chapter 25, part viii.
[148] Fonteyne (n 144) 206; Thomas G. Paterson, 'United States Intervention in Cuba, 1898: Interpretations of the Spanish-American-Cuban-Filipino War' (1996) 29(3) *The History Teacher* 341-361.
[149] Fonteyne (n 144) 206; Norman Dwight Harris, 'European Intervention in Morocco' (1910) 19(7) *Yale Law Journal* 549-563, 553.
[150] Anne Ryniker, 'The ICRC's position on "Humanitarian Intervention"' (2001) 83(842) *International Committee of the Red Cross* 527-532, 528.
[151] Moore (ed), 1998 (n 6) 16.
[152] ibid., 16.
[153] *ICISS Report 2001* (n 44); Gareth Evans, 'From Humanitarian Intervention to the Responsibility to Protect' (2006) 24(3) *Wisconsin International Law Journal* 703-722, 708 (see footnote number 8).

"intervention" or "military intervention" for "humanitarian protection purposes."[154] This creates a positive obligation for States to intervene in all known cases of humanitarian crisis. This ideal should apply across-the-board but it is not the case since humanitarian intervention is restricted to gross violation of human rights by the State.

However, the Commission's report provided the basis on which the 2005 World Summit deliberated on the principle of the Responsibility to Protect. The outcome of that Summit was Resolution 63/308 adopted by the UN General Assembly.[155] The General Assembly has not accepted it as a positive law, neither does it make it a binding law. Thus, a humanitarian intervention which is often justified on moral grounds is plagued by lack of implementation.[156]

7.7.2 Definition of humanitarian intervention

Although the doctrine of humanitarian intervention is becoming popular, it has no universally accepted definition. Abiew defined it as 'the right of one state to exercise international control over the acts of another in regard to its internal sovereignty when contrary to the laws of humanity.'[157] One problem with this definition is that it recognises humanitarian intervention as a right *in rem* without substantiating its source. The modern international law does not provide the legal basis for that.[158] The idea that humanitarian intervention has become a custom[159] is unsustainable.

Customary norms evolve through repeated acts by States over time in the belief that that practice was binding.[160] As shall be seen, this is not the case with humanitarian intervention.

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[154] *ICISS Report 2001* (n 44) 7-9 [para. 1.37].

[155] UNGA Res. A/RES/60/1 (16 September 2005) [paras. 138-140]; Office of the Special Adviser on the Prevention of Genocide, 'The responsibility to protect' available at <http://www.un.org/en/preventgenocide/adviser/responsibility.shtml> accessed 27 October 2016; UNGA Res. A/RES/63/308 (14 September 2009) [operative para. 2].

[156] Ben Kioko, 'The Right of Intervention under the African Union's Constitutive Act: From Non-interference to Non-intervention' (2003) 85(852) *International Review of the Red Cross* 807-825, 818-819.

[157] Francis Kofi Abiew, *The Evolution of the Doctrine and Practice of Humanitarian Intervention* (The Hague; London, Kluwer Law International 1999) 31.

[158] *Statute of the International Court of Justice* (Adopted at San Francisco on 26 June 1945, entered into force on 24 October 1945) (1945) 39(3) *American Journal of International Law Supplement* 215-229 [Art. 38].

[159] Ted van Baarda, 'Quo Vadis? Concepts of Moral and Legal Philosophy underpinning the Laws of Armed Conflict' (2014) 5(2) *Journal of the Philosophy of International Law* 1-43, 15.

[160] Ben Chigara, *Legitimacy Deficit in Custom: A Deconstructionist Critique* (England, Ashgate Publishing Company 2001) 1.

Moreover, the idea that a State could lawfully exercise control over the territory of another State without its consent contravenes the customary law.[161]

Mark Christiansen defined humanitarian intervention as the 'coercive action by states involving the use of armed force in another state without the consent of its government, with or without the authorisation from the United Nations Security Council….'[162] This definition is broad and contains various elements of humanitarian intervention. It recognises that it is a unilateral coercive action involving an armed military force against the territory of a State. This clearly violates Article 2(4) of the UN Charter. Such actions could be legitimate if sanctioned by the Security Council. Although these definitions allude to "natural necessity"[163] as the justificatory ground, their claims are unsupported by the treaty law,[164] the ICJ's jurisprudence[165] or state practice.[166]

7.7.3 *Jus ad bellum* and *jus in bello* – two distinct legal frameworks

It is important, at this point, to clarify the difference between "humanitarian intervention" and "humanitarian law." The latter deals with a body of law built around the *jus in bello* with the objective of protecting the civilian population and the captured enemy combatants. The international humanitarian law is governed by the Geneva Convention of 1949 and Additional Protocols I and II of 1977.[167] These instruments create legal obligations for parties to an armed conflict regarding how war should be waged and do not provide the right to wage wars.

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[161] *The Case of the S.S. "Lotus"* (France v Turkey) Judgment PCIJ Series A, No. 10 (1927) 18.

[162] Mark Gry Christiansen, *Humanitarian Intervention: Legal and Political Aspects* (Copenhagen, Danish Institute of International Affairs 1999) 11.

[163] Baarda (n 159) 11; Anne Ryniker, 'The ICRC's position on "Humanitarian Intervention"' (2001) 83(842) *International Review of the Red Cross* 527-532, 528; Robert Kolb, 'Note on Humanitarian Intervention' (2003) 85(849) *International Review of the Red Cross* 119-134, 119.

[164] *The UN Charter* (n 42) [Arts. 2(4) and 2(7)].

[165] *Corfu Channel Case* (Albania v United Kingdom) Judgment ICJ Reports (1949) p. 4, 35; *Nicaragua case* (n 67) [paras. 185 and 202]; *Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v Uganda) Judgment ICJ Reports (2005) p. 169 [paras. 163-164].

[166] UNGA Res. A/RES/25/2625 (24 October 1970) [Principle 1]; UNGA Res. A/RES/29/3314 (14 December 1974) [Art. 1]; UNGA Res. A/RES/20/2131 (21 December 1965) [para. 1].

[167] For the texts, visit <https://www.icrc.org/en/war-and-law/treaties-customary-law/geneva-conventions> accessed 13 October 2016.

The right to wage war lies within the provision of the UN Charter.[168] Hence, the four Geneva Conventions and their Protocols do not derogate from the UN Charter's obligations. Article 89 of Additional Protocol I of 1977 provides as follows: '[i]n situations of serious violations of the Conventions or of this Protocol, the High Contracting Parties undertake to act, jointly or individually, in co-operation with the United Nations and in conformity with the United Nations Charter.'[169] Similarly, Article 3 of Additional Protocol II of 1977 prohibits the High Contracting Parties from 'intervening, directly or indirectly, for any reason whatever, in the armed conflict or in the internal or external affairs of the High Contracting Party in the territory of which that conflict occurs.'[170]

Jacques Forster advises that "humanitarian intervention" and "humanitarian law" should be kept separate and that the international humanitarian law should not be used as the legal basis for armed intervention.[171] Humanitarian intervention contemplates when a State or group of States have a right to wage war. The answer should be sought in Chapters VII and VIII of the UN Charter since the reason to wage war must conform to the *jus ad bellum* standards.[172]

7.7.3.1 Case study of Humanitarian Interventions

We shall examine three cases: viz, Rwanda, Srebrenica and Kosovo.[173] In Rwanda and

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[168] See 'Humanitarian Intervention and International Humanitarian Law' (Keynote address by Jacques Forster, Vice-President of the International Committee of the Red Cross, presented at the Ninth Annual Seminar on International Humanitarian Law for Diplomats accredited to the United Nations, Geneva, 8-9 March 2000) available at <https://www.icrc.org/eng/resources/documents/statement/57jqjk.htm> accessed 13 October 2016 [hereinafter *Forster's Keynote Address 2000*].

[169] *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts* (Protocol I) (Concluded at Geneva on 8 June 1977, entered into force on 7 December 1978) 1125 UNTS 3 [Art. 89].

[170] *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol II)* (Done at Geneva on 8 June 1977, entered into force on 7 December 1978) 1125 UNTS 609 [Art. 3].

[171] *Forster's Keynote Address 2000* (n 168) (the Internet page).

[172] For details see J. Bryan Hebir, 'Military intervention and national sovereignty' in Moore (ed), 1998 (n 6) 44.

[173] For further discussions on humanitarian interventions, see Ellery C. Stowell, *Intervention in International Law* (Washington D.C., John Byrne 1921) 51-361; see generally, Anne Orford, *Reading Humanitarian Intervention: Human Rights and the Use of Force in International Law* (Cambridge and New York, Cambridge University Press 2003); Gregory H. Fox, *Humanitarian Occupation* (Cambridge, Cambridge University Press 2008); Mats R. Berdal, *United Nations Intervention, 1991-2004* (Cambridge and New York, Cambridge University Press 2007); Richard Haass, *Intervention: The Use of American Military Force in the Post-cold War World* (Washington D.C., Brookings Institution Press 1999).

Srebrenica, there was no intervention, but there was intervention in Kosovo.

7.7.3.1.1 Rwanda (1994)

The Rwandan genocide started in 1994 after President Juvenal Habyarlmana and his colleague Cyprien Ntaryamira of Burundi were assassinated.[174] The war that broke out between the Hutu and the Tutsi resulted in the death of about 500, 000 to one million Tutsis within 100 days.[175] It was a state-coordinated systematic killing of innocent civilians and was considered a "national duty" by the *interahamwe* and its supporters.[176]

While the genocide unfolded, the UN member States did not intervene. This appears to be a strict compliance with the principle of the inviolability of State territory. Belgium, which had about 450 armed forces in Rwanda withdrew its soldiers when ten of them were killed.[177] France later launched *Operation Turquoise* for humanitarian reasons pursuant to Resolution 929 of the SC.[178] But the French motive became questionable when it was alleged that France supplied arms to the Rwandan Armed Forces and helped to train the *interahamwe* militias that committed the crimes.[179]

The UN's effort to stop the genocide was minimal even though the United Nations Assistance Mission for Rwanda (hereinafter referred to as UNAMIR) was already present in Rwanda.[180] The UNAMIR's mandate was restricted to the maintenance of peace and security and the troops were not properly equipped to confront the genocidists. The SC did not discern the gross human rights violations taking place in Rwanda and did not authorise intervention.[181]

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[174] The literature on the fact of this case is vast and available in the public domain. See Nigel Eltringham, *Accounting for Horror: Post-Genocide Debates in Rwanda* (London, Pluto Press 2004) 1; George W. Mugwanya, *The Crime of Genocide in International Law: Appraising the Contribution of the UN Tribunal for Rwanda* (London, Cameron May 2007) 31.

[175] Mahmood Mamdani, *When Victim become Killers: Colonialism, Nativism, and the Genocide in Rwanda* (Princeton; Oxford, Princeton University Press 2001) 5; Eltringham (n 174) 1-2.

[176] Mamdani (n 175) 5; Eltringham (n 174) 1.

[177] Alan J. Kuperman, *The Limits of Humanitarian Intervention: Genocide in Rwanda* (Washington D.C., Brookings Institution Press 2001) 40; Gregory H. Stanton, 'Could the Rwandan Genocide have been Prevented?' (2004) 6(2) *Journal of Genocide Research* 211-228, 223.

[178] UNSC Res. S/RES/929 (22 June 1994) [Operative para. 2].

[179] Stanton (n 177) 223.

[180] UNSC Res. S/RES/872 (5 October 1993) [Operative para. 2].

[181] An example is that the US Defense Intelligence Agency (DIA) knew from its radio intercepts on 7 April that centrally organised mass killings of Tutsis were underway. See Stanton (n 177) 218; Eltringham (n 174) 1-6.

The SC condemned it as genocide when the action had been consummated.[182]

One could argue that the SC failed to make a determination in accordance with Article 39 of the UN Charter that the Rwandan's incident was a threat to international peace and security. Thus, the international community failed to take necessary and reasonable steps to prevent and stop the genocide in Rwanda. Barnett criticises the UN action in Rwanda[183] even as Suhrke and Jones applaud it.[184]

Presently, scholars speculate on what the SC should have done. Kuperman argues that intervention by the world powers would not have averted the holocaust.[185] He, however, argues that preventive diplomacy could have prevented it if the SC had authorised Dallaire's request for a military re-enforcement.[186] Des Forges disagrees with Kuperman's assessment, observing that timely intervention could have aborted the genocide.[187]

Regardless of the view one takes, the Rwandan genocide changed the political discussion concerning the sanctity of States' territory. Opinions are diverse in lieu of the *jus cogens* character of Article 2(4) of the UN Charter. Argument in favour of humanitarian intervention is sustainable if it were proven that human rights as a new peremptory norm has abrogated the peremptory character of Article 2(4).[188] Thus, the discourse on whether the international community aided and abetted the wrongful act is ongoing[189] because of the member States'

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[182] UNSC Res. S/RES/2150 (16 April 2014) [operative para. 2].

[183] Michael Barnett, *Eyewitness to a Genocide: The United Nations and Rwanda* (Ithaca and London, Cornell University Press 2002) 4; Howard Adelman, 'Review Article: Bystanders to Genocide in Rwanda' (2003) 25(2) *International History Review* 357-374, 359.

[184] Astri Suhrke and Bruce Jones, 'Preventive Diplomacy in Rwanda: Failure to Act or Failure of Actions?' in Bruce W. Jentleson (ed), *Opportunities Missed and Opportunities Seized: Preventive Diplomacy in the Post-Cold War World* (Lanham, Rowman and Littlefield Publishers 2000) 238-265.

[185] Alan J. Kuperman, 'Rwanda in Retrospect' (2000) 79(1) *Foreign Affairs* 94-118, 94-95.

[186] In October 1993, Romeo Dallaire was named by the Security Council as the commander of the UN Peacekeeping Force for Rwanda. Based on his observations of an imminent danger of genocide against the Tutsis, he requested for permission to use force to prevent that but the Security Council declined. See Adelman (n 183) 358.

[187] Alison L. Des Forges, 'Shame: Rationalise Western Apathy on Rwanda' (2000) 79(3) *Foreign Affairs* 141-142.

[188] Hennie Strydom, 'The Srebrenica Genocide and the Responsibility of States and International Organizations' (2008) 2008(3) *Journal of South African Law* 499-517, 508; Alexander Orakhelashvili, *Peremptory Norms in International Law* (Oxford, Oxford University Press 2006) 64; James Crawford, *The International Law Commission's Articles on State Responsibility* (United Kingdom, Cambridge University Press 2002) 248; James Crawford, 'The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect' (2002) 96(4) *American Journal of International Law* 874-890, 880 (see in particular footnote 23).

[189] Stanton (n 177) 212.

foreknowledge that genocide was imminent but failed to prevent or stop it.[190]

7.7.3.1.2 Srebrenica (Bosnia 1995)

The national sentiment due to inequitable power-sharing among the republics of the Former Yugoslavia contributed to its dissolution.[191] When Croatia and Slovenia declared their independence in 1991, the regime of Milosevic wanted to stop their actualisation with military force. Slovenia resisted the Serbs' armed forces but the war in Croatia dragged on.

As the wars escalate, the international community avoided military intervention. However, the EC's swift diplomatic negotiations resulted in the Brioni Agreement[192] that allayed human casualties. The EC's diplomatic intervention is commendable even though Finland has argued that it impacted negatively on the territory of Yugoslavia.[193] For example, war broke out on 6 April 1992 when the EC recognised Bosnia-Hercegovina's independence.[194]

The United Nations took some positive steps to stop the fighting but the outcome was insignificant. The SC passed forty-seven Resolutions between 1992 and 1993 but none could stop the fighting.[195] In 1991, the SC placed a 'general and complete embargo on all deliveries of weapons and military equipment to Yugoslavia.'[196] The locally made weapons and illegal ammunitions smuggled into the former Yugoslavia sustained the war. In 1992, the SC took advantage of the EC's negotiated ceasefire to set up the United Nations Protection Force.[197] It despatched 14 000 troops to certain areas in Croatia, designated as the United Nations

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[190] ibid., 211-212.

[191] Alastair Finland, *Essential Histories: The Collapse of Yugoslavia 1991-1999* (USA, Osprey Publishing 2004) 16-17; Joel M. Halpern and David A. Kideckel, *Neighbours at War: Anthropological Perspectives on Yugoslav Ethnicity, Culture, and History* (USA, Pennsylvania State University Press 2000) 81-186; Stevan K. Pavlowitch, *Hitler's New Disorder: The Second World War in Yugoslavia* (London, Hurst and Company 2008) 21-89; Wayne Bert, *The Reluctant Superpower: United States' Policy in Bosnia, 1991-95* (USA, St Martin's Press 1997) 33-43; United Nations, 'Report of the Secretary-General pursuant to General Assembly Resolution 53/35,' UN Doc. A/RES/54/549 (15 November 1999) 8-9.

[192] See generally, European Community, *Joint Declaration of the EC Troica and the Parties directly concerned with Yugoslav Crisis (Brioni Accord)* available at <http://peacemaker.un.org/croatia-slovenia-serbia-brioni91> accessed 31 July 2017.

[193] Finland (n 191) 24.

[194] ibid., 24-29.

[195] ibid., 29.

[196] UNSC Res. S/RES/713 (25 September 1991) [operative para. 6].

[197] UNSC Res. S/RES/743 (21 February 1992) [operative para. 2]; UNSC Res. S/RES/749 (7 April 1992) [preamble para. 4]; UNSC Res. S/RES/721 (27 November 1991) [preamble para. 6].

Protected Areas (hereinafter referred to as UNPA) to ensure that a lasting cease-fire was maintained.[198]

In 1995, Srebrenica, which was one of the UNPAs, was handed over to Bosnian Serb soldiers led by General Mladic. Under Mladic's supervision, about 7 000 Bosnian Muslims men and boys were systematically killed.[199] Whether that qualifies as genocide[200] is irrelevant since the ICJ and the ICTY have classified it as such.[201] Additionally, a High Regional Court of Dusseldorf in Germany convicted Nikola Jorgic of genocide in Bosnia in 1992[202] and his appeal to the European Court of Human Rights was dismissed.[203]

The three Secretary-Generals that served the United Nations between 1991 and 1999 have been criticised for their failure to prevent or stop the bloodletting in Srebrenica. Boutros Boutros-Ghali was credited with saying that it was a 'rich man's war.'[204] Although many high-level mediators such as Richard Holbrooke brokered the Dayton Agreement in 1995, the role of the UN peacekeeping mission was limited to peace support operations.[205]

None of the world powers was willing to intervene militarily in the Former Yugoslavia. In Europe, Lord Carrington resigned his post as the first official mediator when he failed to secure a consensus on how to end the war.[206] The British Prime Minister at the time, John Major, his Foreign Secretary, Douglas Hurd and the Defence Secretary, Malcolm Rifkind strongly opposed any military intervention. The United States did not intervene militarily but

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[198] For details visit, <http://www.un.org/en/peacekeeping/missions/past/unprofor.htm> accessed 23 June 2017.

[199] Finland (n 191) 9.

[200] See generally, Ryan H. Ash, 'Was Srebrenica a Genocide' (2013) 5(2) *Elon Law Review* 261-270; Ehlimana Memišević, 'Battling the Eighth Stage: Incrimination of Genocide Denial in Bosnia and Herzegovina' (2015) 35(3) *Journal of Muslim Minority Affairs* 380-400; Edina Becirević, 'The Issue of Genocidal Intent and Denial of Genocide: A Case Study of Bosnia and Herzegovina' (2010) 24(4) *East European Politics and Societies* 480-502, 480.

[201] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia & Herzegovina v Serbia & Montenegro) Judgment ICJ Reports (2007) p. 43 [para. 297] [hereinafter *Bosnia v Serbia case*]; *The Prosecutor v Radislav Krstic* (Case No. IT-98-33-T) Judgment ICTY (2 August 2001) [para. 599].

[202] Marko A. Hoare, 'A Case Study in Underachievement: The International Courts and Genocide in Bosnia and Herzegovina' (2011) 6(1) *Genocide Studies and Prevention* 81-97, 82.

[203] *Case of Jorgic v Germany* (Application No. 74613/01) Judgement ECtHR (12 July 2007) [para. 88].

[204] Bert (n 191) 73.

[205] Finland (n 191) 18, 53.

[206] ibid., 66.

assisted with the delivery of humanitarian aids. This is because the US' Foreign policy prioritises security interests over purely humanitarian interests.[207]

Most of the US's interventions such as in Panama and Haiti occurred in the Western hemisphere because of the direct security threats they pose to the United States.[208] An objection could be that the United States' intervention in Somalia and Libya was based on humanitarian grounds.[209] However, there is concern that these countries pose a threat to the United States. Therefore, the primordial intent for "humanitarian intervention" remains elusive.

States such as Russia supported NATO's air campaign against the Former Yugoslavia at various stages during the war. The Organisation of Islamic Countries showed sympathy for the plight of Bosniaks. Countries from Africa, Asia, the Americas and the Middle East contributed troops for the United Nations Protection Force in former Yugoslavia.[210] In other words, there was no unilateral intervention in the internal affairs of the Former Yugoslavia on humanitarian grounds.

On the contrary, the EC established an International Conference for Peace in Yugoslavia.[211] The Arbitration Commission (hereinafter referred to as Badinter Commission) issued several opinions on the matter.[212] The Badinter Commission noted that the Socialist Federal Republic of Yugoslavia (hereinafter referred to as SFRY) was in the process of dissolution and no longer met all the criteria for statehood under the modern international law.[213] Consequently, the

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[207] Bert (n 191) 74.

[208] ibid., 75-76.

[209] Susan M. Crawford, 'U.N. Humanitarian Intervention in Somalia' (1993) 3(1) *Transnational Law & Contemporary Problems* 273-292.

[210] Finland (n 191) 68-69.

[211] Commission of the European Communities, 'Joint statement published in The Hague and Brussels on 28 August – Yugoslavia' (1991) 24(7/8) *Bulletin of the European Communities* 115-116 [para. 1.4.25].

[212] Maurizio Ragazzi, 'Conference on Yugoslavia Arbitration Commission: Opinions on Questions arising from the dissolution of Yugoslavia' (1992) 31(6) *International Legal Materials* 1488-1526 [hereinafter *Badinter Commission Opinions*]; Matthew C. R. Craven, 'The European Community Arbitration Commission of Yugoslavia' (1996) 66(1) *British Yearbook of International Law* 333-413.

[213] *Badinter Commission Opinions* (n 212) (see Opinion No. 1); *Vienna Convention on Succession of States in Respect of Treaties* (Done at Vienna on 23 August 1978, entered into force on 6 November 1996) 1946 UNTS 3 [Art. 2(b)] (it states '"succession of States" means the replacement of one State by another in the responsibility for the international relations of territory').

Badinter Commission adjudged that the SFRY has lost its legal personality as evidenced by the SC's Resolutions referring to it as "the former SFRY."[214]

Even as the Badinter Commission admitted that self-determination was a right accruing to peoples, it equally emphasised that respect for the frontiers existing at the moment of independence was non-negotiable.[215] If Yugoslavia were a case of self-determination, it raises the question of whether the international community's intervention in the internal affairs of the former FSRY was in breach of Article 2(7) of the UN Charter? It is admissible if it complies with the Chapter VII's mandate as discussed above.

7.7.3.1.3 Kosovo (1999) – intervention upheld

The NATO's swift intervention in Kosovo appears remedial to its inaction during the genocide that occurred in Srebrenica. As McCullough put it, 'the Kosovo war must be seen against the background of the disintegration of the Socialist Federal Republic of Yugoslavia.'[216]

The Kosovars' agitation for independence intensified when Slobodan Milošević revoked the autonomous status of Kosovo and Vojvodina in 1989. It was followed by the abuse of rights of the Albanians and a deliberate attempt to colonise Kosovo's province while special privileges were granted to Serbs domiciled in Kosovo.[217] Also, there were cases of a widespread and systemic abuses of human rights of the Kosovar Albanians.[218]

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[214] UNSC Res. S/RES/752 (15 May 1992) [preamble para. 6, operative para. 6]; UNSC Res. S/RES/757 (30 May 1992) [operative para. 14]; UNSC Res. S/RES/777 (16 September 1992) [preamble para. 3] (it states, 'considering that the state formerly known as the Socialist Federal Republic of Yugoslavia has ceased to exist').

[215] *Badinter Commission Opinions* (n 212) (see Opinion No. 2 at para. 1; Opinion No. 3 – it states: '[a]ll external frontiers must be respected in line with the principles stated in the United Nations Charter, in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations (General Assembly Resolution 2625 (XXV)) and in the Helsinki Final Act, a principle which also underlies Article 11 of the Vienna Convention of 23 August 1978 on the Succession of States in Respect of Treaties').

[216] H. B. McCullough, 'Intervention in Kosovo: Legal Effective' (2001) 7(2) *ILSA Journal of International & Comparative Law* 299-314, 299; The Independent International Commission on Kosovo, *The Kosovo Report: Conflict, International Response, Lessons Learned* (United States, Oxford University Press 2000) 34 [hereinafter *ILC Report on Kosovo*].

[217] *ILC Report on Kosovo* (n 216) 42.

[218] Seth Ackerman and Jim Naureckas, 'Following Washington's Script: The United States Media and Kosovo' in Philip Hammond and Edward S. Herman (eds), *Degraded Capability: The Media and Kosovo Crisis* (London, Pluto Press 2000) 97; *ILC Report on Kosovo* (n 216) 42; Alex J. Bellamy, *Kosovo and International Society* (New York, Palgrave Macmillan 2002) 17-19.

The killing of forty-five Kosovar Albanians in Racak on 15 January 1999[219] culminated in the Rambouillet Accords[220] which gave NATO unfettered rights over the territory of Serbia. Commenting on the development in Kosovo, then British Prime Minister, Tony Blair said that Kosovo had shifted the balance in favour of human rights and against the State sovereignty.[221]

NATO's air campaign over Serbia started on 24th March 1999 after several attempts to get Milosevic to stop massacring the Kosovar Albanians failed.[222] The legal basis for this intervention remains unclear. Firstly, it was not a case of self-defence. Secondly, it was not explicitly authorised by the Security Council. Therefore, many writers consider it as unilateral and as such, illegal.[223]

7.7.3.1.3a Is Kosovo a customary law in the making?

As suggested by Cassese, the NATO's action in Kosovo has initiated a customary law that can allow humanitarian intervention when the SC is dysfunctional.[224] Again quoting Tony Blair, the world has advanced to 'a new internationalism where the brutal repression of whole ethnic groups will no longer be tolerated.'[225]

To argue that this sort of crime is new to human history and was never anticipated by the drafters of the UN Charter would be superfluous. The international community should be bold enough to adopt a convention on humanitarian intervention. Otherwise, why would a

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[219] For detail see generally, *ILC Report on Kosovo* (n 216); NATO, 'NATO's role in relation to the conflict in Kosovo' available at <http://www.nato.int/kosovo/history.htm#B> accessed 1 November 2016.

[220] For the text, see United Nations Peacemaker, 'Interim Agreement for Peace and Self-Government in Kosovo (Rambouillet Accords),' UN Doc. S/1999/648 (7 June 1999) [Appendix B, Art. 8].

[221] Tony Blair, 'Doctrine of the International Community' (Speech to the Economic Club of Chicago, 22 April 1999) available at <http://webarchive.nationalarchives.gov.uk/+/www.number10.gov.uk/Page1297> accessed 1 November 2016; Michael Ignatieff, *Virtual War: Kosovo and Beyond* (London, Chatto and Windus 2000) 72.

[222] For diplomatic processes undertaken to end the war, see U.S. Department of State, 'Kosovo Timeline – Fact Sheet' (Bureau of European and Eurasian Affairs, 21 December 2015) available at <http://www.state.gov/p/eur/rls/fs/2015/250812.htm> accessed 2 November 2016.

[223] McCullough (n 216) 302; Simma 1999 (n 45) 5; Chigara 'Humanitarian Intervention missions' (n 9) 69; Peter Hilpold, 'Humanitarian Intervention: Is there a need for a Legal Reappraisal?' (2001) 12(3) *European Journal of International Law* 437-467, 442; Antonio Cassese, '*Ex iniuria ius oritur:* Are we moving towards International Legitimation of forcible Humanitarian countermeasures in the World Community?' (1999) 10(1) *European Journal of International Law* 23-30, 24; Holzgrefe and Keohane (n 26) 214-215.

[224] Antonio Cassese, 'A follow-up: Forcible Humanitarian Countermeasures and *Opinio Necessitatis*' (1999) 10(4) *European Journal of International Law* 791-799, 791.

[225] As quoted in Noam Chomsky, *The New Military Humanism: Lessons from Kosovo* (Vancouver, New Star Books 1999) 3.

unilateral forcible measure be a better option to the reform of the Security Council? Should the General Assembly not obtain an enforcement order from the ICJ if a permanent member of the SC vetoes a resolution which in the General Assembly's judgment endangers international peace and security? If a customary law on humanitarian intervention was evolving,[226] what are its elements?

In Cassese's view, only a few States objected to NATO's intervention.[227] Other States expressed doubts about its legality[228] but the majority did not condemn it. Yet it does not validate unauthorised intervention as an acceptable mode of behaviour for States. Franck's element of "determinacy" is indispensable if States were to obey international law. Chigara questions the civility of customary law that initiates a change of "outdated" legal principles through unilateral actions.[229] This affects the legitimacy, coherence and consistency of the new norm.[230] Such a process could be abused as evident from Russia's justification of its intervention in Ukraine in 2014.[231]

Another way of examining NATO's action is whether it is a vigilante exercise owed *erga omnes* as stated in *Barcelona Traction case*.[232] The content of this obligation is debatable but it seems to include gross violations of human rights. The earliest list of conditions that must be fulfilled before an intervention could be deemed justifiable was drafted by the sub-committee on the protection of human rights in 1974.[233]

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[226] In the *Nicaragua case,* the ICJ recognises the possibility of the evolution of customary law when it states: '[r]eliance by a state on a novel right or an unprecedented exception to the principle might, if shared in principle by other states, tend towards a modification of customary law,' see *Nicaragua case* (n 67) [para. 207].

[227] They are the Federal Republic of Yugoslavia, Russia, China, Cuba, Belarus, Ukraine, Namibia, India and Mexico. See Cassese 'A follow-up…' (n 224) 792.

[228] States such as Brazil and Costa Rica. See Cassese 'A follow-up…' (n 224) 792.

[229] Chigara, *Legitimacy deficit* (n 160) 224.

[230] ibid., 102-114.

[231] Note that the fear that a law might be abused cannot deter the process of law-making or law enforcement. For views on the contrary, see Dino Kritsiotis, 'Reappraising Policy Objections to Humanitarian Intervention' (1998) 19(4) *Michigan Journal of International Law* 1005-1050, 1020; cf Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Oxford, Clarendon Press 1994) 247 (she argues that 'we delude ourselves if we think that the role of norms is to remove the possibility of abusive claims ever being made'); Fonteyne (n 144) 269.

[232] *Barcelona Traction, Light and Power Company, Limited*, Judgment ICJ Reports (1970) p. 3 [para. 33]; Nicholas J. Wheeler, 'Reflections on the legality and legitimacy of NATO's intervention in Kosovo' in Ken Booth, *The Kosovo Tragedy: The Human Rights Dimensions* (London, Frank Cass 2001) 146.

[233] Hilpold's work published in 2001 contains an extensive list of about 12 conditions. See Hilpold (n 223) 455-456.

Nonetheless, *opinio juris* has not endorsed that humanitarian intervention is permissible or an obligation owed *erga omnes*.[234] Reference could be made to the language of the General Assembly's Resolution on the doctrine of the Responsibility to Protect.[235] Although States contribute to the development of international law, the concept of *erga omnes* obligations does not identify elements to be evaluated when adjudicating lawfulness or otherwise of humanitarian intervention.[236] In Kosovo's case, none of the countries that intervened justified its actions on customary or positive law, save Belgium that argued it wanted to prevent the humanitarian catastrophe as predicted by the resolutions of the SC.[237] Chomsky dismisses the Belgian argument as a resort to force cloaked in moralistic righteousness.[238] As seen in chapter six, States cannot lawfully imply the use of force into the SC's Resolution.

7.7.3.1.3b The Necessity of Humanitarian Intervention

NATO's intervention in Kosovo was considered necessary to stop the atrocities perpetrated by the Serbs.[239] But "necessity" as a condition for breaching Article 2(4) is very contentious.[240] "Necessity" started as a Machiavellian guiding principle that permits the infringement of moral laws.[241] Over the years, the UN member States have applied it to contravene positive

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[234] Peter Malanczuk, *Akehurst's modern introduction to international law* (Seventh Revised Edition, London and New York, Routledge 1997) 271; Hilpold (n 223) 456 (he argues that some of the conditions enumerated by the subcommittee on the protection of human rights can only be fulfilled by a state or groups of states acting in bad faith).

[235] UNGA Res. A/RES/63/308 (14 September 2009) [operative para. 2] (provides as follows, "decides to continue its consideration of the responsibility to protect").

[236] Hilpold (n 223) 453-454.

[237] *Legality of Use of Force* (Serbia and Montenegro v Belgium) (Verbatim Record, 10 May 1999) ICJ Reports (2004) p. 279, 29.

[238] Chomsky (n 225) 9.

[239] UNSCOR, UN Doc. S/PV.3988 (12 March 1999) at pp. 4-5 (argument by the United States), at p. 12 (argument by the United Kingdom); UNSCOR, UN Doc. S/PV.4011 (Resumption 1) (10 June 1999) at p. 2 (argument by Germany).

[240] James Crawford, *Brownlie's Principles of Public International Law* (Eight Edition, United Kingdom, Oxford University Press 2012) 564-565; Dapo Akande and Thomas Lieflander, 'Clarifying Necessity, Imminence, and Proportionality in the Law of Self-Defense' (2013) 107(3) *American Journal of International Law* 563-570; Ian Johnstone, 'The Plea of Necessity in International Legal Discourse: Humanitarian Intervention and Counter-Terrorism' (2005) 43(2) *Columbia Journal of Transnational Law* 337-388, 357; Ole Spiermann, 'Humanitarian Intervention as a Necessity and the Threat or Use of Jus Cogens' (2002) 71(4) *Nordic Journal of International Law* 523-544, 524; Andreas Laursen, 'The Use of Force and (the State of) Necessity' (2004) 37(2) *Vanderbilt Journal of Transnational Law* 485-526, 495.

[241] Robert D. Sloane, 'On the Use and Abuse of Necessity in the Law of State Responsibility' (2012) 106(3) *American Journal of International Law* 447-508, 447.

international law.

A state of necessity exists when ‘the situation of a State whose sole means of safeguarding an essential interest threatened by a grave and imminent peril is to adopt conduct not in conformity with what is required of it by an international obligation to another State.’[242] Can this be said of Kosovo when the United Nations Peacekeeping Kosovo Force[243] started entering Kosovo? Perhaps not. While NATO’s member States considered it necessary,[244] Johnstone warns that necessity’s “safety valve” is unwarranted.[245]

If the protection of Kosovars was the primary objective, Solzhenitsyn wonders why that was not extended to Kurds in Turkey?[246] The gravitational pull towards compliance with legal norms is at its peak when enforcement is non-selective. However, the available evidence does not support unilateral intervention on humanitarian grounds.[247]

7.7.3.1.3c The lawfulness of a collective intervention

In 1999, President William J. Clinton of the United States told the UN General Assembly that ‘sometimes collective military force is both appropriate and feasible.’[248] He praised NATO’s intervention in Kosovo and West Africa’s intervention in Sierra Leone.[249] Thus, he legitimised un-authorized collective interventions in the internal affairs of sovereign States.[250] This approach is more pragmatic than positivistic.

As Hilpold pointed out, the discourse on whether an un-authorized collective intervention could be lawful is merely political.[251] In Somalia, for instance, the SC classified the

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[242] Spiermann (n 240) 524.
[243] See generally, UNSC Res. S/RES/1244 (10 June 1999).
[244] Christian Gray, *International Law and the Use of Force* (Third Edition, United Kingdom, Oxford University Press 2008) 40-41.
[245] Johnstone (n 240) 358.
[246] Chomsky (n 225) 10.
[247] UNGA Res. A/RES/60/1 (16 September 2005) [paras. 77-80, 138-140].
[248] UNGAOR, UN Doc. A/54/PV.6 (21 September 1999) 4; UNGAOR, UN Doc. A/54/PV.8 (22 September 1999) 19-20 (address to the UN General Assembly by the Italian Foreign Minister, Lamberto Dini).
[249] UNGAOR, UN Doc. A/54/PV.6 (21 September 1999) 4.
[250] Andrew McGregor, ‘Quagmire in West Africa: Nigerian Peacekeeping in Sierra Leone (1997-98)’ (1999) 54(3) International Journal 482-501, 482.
[251] Hilpold (n 223) 460.

humanitarian situation as of *unique character*[252] and authorised the UN member States to intervene to save the situation. The same applied to the situation in Haiti in 1994.[253] During the Rwandan genocide, the SC described the situation as *unique* and authorised the UN member States to cooperate with the Secretary-General to arrest the situation.[254] The SC did not determine that the situation in Kosovo was of a unique character that would require a humanitarian response.[255]

These cases happened within a decade and the SC showed restraint in authorising the breach of the territory of the States involved. Even in Rwanda that engaged in systematic and widespread killings of the civilian populations,[256] the SC did not authorise humanitarian intervention. The SC's refusal to authorise intervention in Kosovo cannot be interpreted as a selective application of the law. Obviously, China and Russia's threat to veto any such resolution prevented its realisation,[257] yet the veto system encourages checks and balances and better safeguards for the integrity of States.

Therefore, an unauthorised collective action does not legitimise a violation of a State territory[258] just as the end does not justify the means. Judge Simma's attempt to legitimise NATO's intervention in Kosovo based on the SC's Resolutions 1160 and 1199 and on what appeared to be a tacit support from the General Assembly[259] should be resisted. First, silence does not always mean acquiescence. Second, the problem which the veto system creates cannot be solved by opening the floodgates of unilateral collective humanitarian interventions. Perhaps, the international community should rethink whether the time is ripe to empower the ICJ to review cases requiring humanitarian intervention if vetoed by a

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[252] UNSC Res. S/RES/794 (3 December 1992) [preamble para. 3] (emphasis added).
[253] UNSC Res. S/RES/940 (31 July 1994) [operative paras. 2 and 4].
[254] UNSC Res. S/RES/929 (22 June 1994) [preamble para. 10, operative para 1].
[255] UNSC Res. S/RES/1160 (31 March 1998) [operative para. 5]; UNSC Res. S/RES/1199 (23 September 1998) [operative para. 1] (talks about reducing the risks of a humanitarian catastrophe).
[256] UNSC Res. S/RES/929 (22 June 1994) [preamble para. 9].
[257] Ove Bring, 'Should NATO take the lead in formulating a doctrine of humanitarian interventions?' (1999) 47(3) *NATO Review – Online Library* 24-27, available at <http://www.nato.int/docu/review/1999/9903-07.htm> accessed 19 August 2017.
[258] Ademola Abass, *Regional Organisations and the Development of Collective Security beyond Chapter VIII of the UN Charter* (Oxford and Portland, Hart Publishing 2004) 62-63; Simma 1999 (n 45) 19 (Simma argues that 'legally, the alliance has no greater freedom than its member states'); Hilpold (n 223) 448-454.
[259] Simma 1999 (n 45) 12.

permanent member of the SC.[260]

7.8 International Commission on Intervention and State Sovereignty[261]

The International Commission on Intervention and State Sovereignty (hereinafter referred to as ICISS) was established by the Canadian Government to proffer solutions to Kofi Annan's request to the General Assembly.[262] The ICISS final report titled "the responsibility to protect"[263] (hereinafter referred to as R2P) held that it is a primary responsibility of States to protect their citizens from avoidable catastrophe. But when States are unwilling or unable to do so, the burden shifts to the international community.[264] The report identified the elements of the R2P as follows, 'who should exercise it, under whose authority, and when, where and how.'[265] Equally, it elucidates that the four foundations of the R2P include,

- obligations inherent in the concept of sovereignty;
- the responsibility of the Security Council, under Article 24 of the UN Charter, for the maintenance of international peace and security;
- specific legal obligations under human rights and human protection declarations, covenants and treaties, international humanitarian law and national law;
- the developing practice of states, regional organisations and the Security Council itself.[266]

Points 3 and 4 are similar in content to the recognised sources of international law in Article 38 of the ICJ Statute, namely, International Conventions, Customs and the general principle of law recognised by civilised nations. It seems that the sources of the R2P are deduced from

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[260] For a discussion see Dapo Akande,'The International Court of Justice and the Security Council: Is There Room for Judicial Control of Decisions of the Political Organs of the United Nations?' (1997) 46(2) *International and Comparative Law Quarterly* 309-343; Jose E. Alvarez, 'Judging the Security Council' (1996) 90(1) *American Journal of International Law* 1-39; Vera Gowlland-Debbas, 'The Relationship between the International Court of Justice and the Security Council in the Light of the Lockerbie Case' (1994) 88(4) *American Journal of International Law* 643-677; Bernhard Graefrath, 'Leave to the Court What Belongs to the Court: The Libyan Case' (1993) 4(2) *European Journal of International Law* 184-204; see generally, Antonios Tzanakopoulos, *Disobeying the Security Council: Countermeasures against Wrongful Sanctions* (Oxford, Oxford University Press 2011).

[261] See generally, *ICISS Report 2001* (n 44).

[262] Mr Kofi Annan asked the General Assembly, 'if humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica—to gross and systematic violations of human rights that affect every precept of our common humanity?' See Kofi A. Annan, *We the People: The Role of the United Nations in the 21st Century* (New York, United Nations 2000) 48 available at <http://www.un.org/en/events/pastevents/pdfs/We_The_Peoples.pdf> accessed 5 November 2016.

[263] *ICISS Report 2001* (n 44) viii.

[264] ibid., viii.

[265] ibid., viii.

[266] ibid., xi.

the existing Conventions, treaties and state practice and not a positive law as such. The three essential objectives of the R2P are to prevent, react and rebuild.[267] A detailed analysis is done here.[268]

The ICISS has inaugurated a new way of understanding sovereignty as "responsibility."[269] This has a direct consequence for the Westphalian State Model under which States have total and "exclusive control" over their territory. The idea of responsibility recaptures the old idea of "sacred trust" on a global scale. It would appear that States are holding their territories on trust for the international community who have an obligation to intervene if States repudiate the terms of the contract.

The United Nations General Assembly adopted the ICISS report on the R2P during its World Summit in 2005. The Assembly speaks: 'we accept that responsibility and will act in accordance with it.'[270] As would be expected, there have been commentaries, analysis and huge literature on what the R2P actually means.[271] There have been claims that the R2P supports unilateral actions against the territory of a State.[272] This view appears inconsistent

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[267] ibid., xi.

[268] Catherine Lu, *Just and Unjust Interventions in World Politics: Public and Private* (New York, Palgrave Macmillan 2006) 170-188; Luke Glanville, 'The Responsibility to Protect Beyond Borders' (2012) 12(1) *Human Rights Law Review* 1-32; William A. Schabas, 'Preventing Genocide and Mass Killing: The Challenge for the United Nations' (Minority Rights Group International 2006) available at <http://minorityrights.org/wp-content/uploads/old-site-downloads/download-157-Preventing-Genocide-and-Mass-Killing-The-Challenge-for-the-United-Nations.pdf> accessed 5 November 2016; Gareth Evans and Mohamed Sahnoun, 'The Responsibility to Protect' (2002) 81(6) *Foreign Affairs* 99-110; Alicia L. Bannon, 'The Responsibility to Protect: The U.N. World Summit and the Question of Unilateralism' (2006) 115(5) *Yale Law Journal* 1157-1166; Rebecca J. Hamilton, 'The Responsibility to Protect: From Document to Doctrine - But What of Implementation' (2006) 19 *Harvard Human Rights Journal* 289-298; see generally, James Pattison, *Humanitarian Intervention and the Responsibility to Protect: Who Should Intervene?* (Oxford, Oxford University Press 2010).

[269] Evans and Sahnoun (268) 101-102.

[270] UNGA Res. A/RES/60/1 (16 September 2005) [paras. 138-140] [hereinafter *2005 World Summit Document*].

[271] Ban Ki-moon, 'Report of the Secretary-General – Implementing the Responsibility to Protect' UN Doc. A/63/677 (12 January 2009) [para. 2]; Ban Ki-moon, 'Report of the Secretary-General – Early warning, assessment and the Responsibility to Protect,' UN Doc. A/64/864 (14 July 2010) 1-8; Ban Ki-moon, 'Report of the Secretary-General - the Role of Regional and Sub-regional Arrangements in Implementing the Responsibility to Protect,' UN Doc. A/65/877 (28 June 2011) 1-13; High-Level Panel on Threats, Challenges, and Change, 'A More Secure World: Our Shared Responsibility' (The United Nations, 2004) 17 available at <http://www.un.org/en/peacebuilding/pdf/historical/hlp_more_secure_world.pdf> accessed 6 November 2016; see also the following Security Council Resolutions: S/RES/1674 (28 April 2006) [operative para. 4]; S/RES/1894 (11 November 2009) [preamble para. 8]; S/RES/1970 (26 February 2011) (preamble para. 10]; S/RES/1973 (17 March 2011) [preamble para. 5, operative para. 4]; see also UNGA Res. A/RES/63/308 (14 September 2009) [operative para. 2].

[272] Bannon (n 268) 1161.

with the position expressed by Ban Ki-moon in his report on the "Implementing the Responsibility to Protect"[273] which laid out a tripod strategy for its implementation.

The first pillar reiterates that it is the primary responsibility of States to protect their populations from genocide, ethnic cleansing, war crimes and crimes against humanity.[274] The second pillar acknowledges that other states share in that responsibility by assisting one another and through capacity-building.[275] The third pillar sets out a range of mechanisms available for the international community for timely and decisive response should States fail to protect their citizens.[276] Most importantly, such interventions must be based on accurate, well-informed circumstances on the ground to be fully considered in the decision-making of the relevant international and regional bodies, including the Security Council.[277]

Therefore, care must be taken when construing the R2P as a right to undertake a unilateral militarily action against a State. Otherwise, NATO would not have waited for the SC's authorisation to intervene in Libya in 2011.[278] The 2015's report by the UN Secretary-General, Ban Ki-Moon states that regardless of the International Community's commitment to the R2P, acts that may constitute genocide, war crimes, ethnic cleansing and crimes against humanity may have occurred in the Central African Republic, Nigeria, Syria and Yemen.[279] Yet, no country has invoked the R2P to intervene in these countries.[280]

7.8.1 The ICJ's response to gross violations of Human Rights – any positive obligation to intervene on account of humanity?

Before the ICJ handed down its judgment in *Bosnia and Herzegovina v Serbia and*

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[273] UN Doc. A/63/677 (12 January 2009) [para. 66].

[274] UN Doc. A/69/981 (13 July 2015) [para. 18]; UNGA Res. A/RES/60/1 (16 September 2005) [para. 138].

[275] UN Doc. A/69/981 (13 July 2015) [paras. 26-35]; UNGA Res. A/RES/60/1 (16 September 2005) [para. 139].

[276] UN Doc. A/69/981 (13 July 2015) [paras. 36-44].

[277] UN Doc. A/69/981 (13 July 2015) [para. 40].

[278] UNSC Res. S/RES/1973 (17 March 2011) [operative para. 4]; Glanville (n 268) 12 (he argues that there was express agreement among the UN General Assembly that the duty to intervene is tied to the authority of the Security Council and that it is limited to specific crimes of genocide, war crimes, ethnic cleansing and crimes against humanity).

[279] Ban Ki-Moon, 'Report of the Secretary-General – A vital and enduring commitment: Implementing the responsibility to protect,' UN Doc. A/69/981-S/2015/500 (13 July 2015) [para. 1].

[280] The reason is that the R2P does not allow unauthorised unilateral action. See Bannon (n 268) 1162; Carsten Stahn, 'Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?' (2007) 101(1) *American Journal of International Law* 99-120, 104; Hamilton (n 268) 293, 296.

Montenegro[281] (hereinafter referred to as Bosnia v Serbia), States were not held accountable for crime of genocide. It was an international crime with individual criminal responsibility both at the Nuremberg Trials and the 1948 Genocide Convention.[282]

Cases of human rights violations by a State were mostly addressed through the UN Human Rights Treaty Bodies.[283] However, the international human rights treaties contain "jurisdiction clause" that defers to territory of States.[284] States rarely assume positive obligation to protect human rights in other States' jurisdiction[285] save for the controversial principle of the universal jurisdiction.[286] In other words, third States do not claim extra-territorial jurisdiction over human rights violations except in two instances. First, when a State seeking to enforce those rights is a victim. Second, when the accused State has "effective control" or "overall control" over the territory from which the said wrong originates or when a wrongful act of the non-State actors could be attributed to it.[287]

In the *Bosnia v Serbia*'s judgment, the ICJ articulated conditions that could trigger a bystander State's obligation to act to prevent genocide from occurring in another State. The Court restricted its jurisdiction to finding whether genocide was committed in Bosnia and excluded other crimes such as war crimes, ethnic cleansing and crimes against humanity.[288] Glanville argues that the Court's decision could apply to breaches of norms *jus cogens* which oblige

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[281] See generally, *Bosnia v Serbia case* (n 201).

[282] *Convention on the Prevention and Punishment of the Crime of Genocide* (Adopted at Paris on 9 December 1948, entered into force on 12 January 1951) 78 UNTS 277 [Art. 1] (hereinafter Genocide Convention).

[283] Such as through Universal Periodic Review, Country Annual Reports, Country visits or Special procedures. In most cases, Human Rights Treaty Bodies adopt "concluding observations," "general comments" or "general recommendations" which in themselves are not binding.

[284] For example, Article 2(1) of the ICCPR provides as follows: 'Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant....' see *ICCPR* (n 84) [Art. 2(1)]; *CAT* (n 137) [Art. 2]; *Convention on the Rights of the Child* (Adopted in New York on 20 November 1989, entered into force on 2 September 1990) 1577 UNTS 3 [Art. 2].

[285] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion ICJ Reports (2004) p. 36 [para. 109] (the Court held that jurisdiction of states is primarily territorial).

[286] See generally, *Arrest Warrant of 11 April 2000* (Democratic Republic of the Congo v Belgium) Judgment ICJ Reports (2002) p. 3; Crawford 2012 (n 240) 469-471.

[287] *Nicaragua case* (n 67) [para. 115]; *The Prosecutor v Dusko Tadic* (Case No. IT-94-1-A) Appeals Chamber Judgment ICTY (1999) [paras 120-123, 128, 131-132, 145-146]; *The Prosecutor v Predrag Banovic* (Case No. IT-02-65/1-S) Trial Chamber ICTY (2003) [para. 28]; *Théoneste Bagosora Anatole Nsengiyumva v The Prosecutor* (Case No. ICTR-98-41-A) Judgment ICTR (2011) [para. 494].

[288] *Bosnia v Serbia case* (n 201) [para. 147].

erga omnes.[289] All international crimes, except perhaps ethnic cleansing, are crimes within the jurisdiction of the International Criminal Court.[290]

The Genocide Convention[291] provides that genocide is a crime under international law which States undertake to prevent and to punish. Under this Convention, States acquire extra-territorial jurisdiction to prevent and to punish the crime of genocide.[292] The ICJ agrees with the judgment of the ICTY that genocide was committed in Srebrenica in 1995.[293] To ascertain whether Serbia violated its obligation under the Genocide Convention, the Court applied the doctrine of attribution as codified by the ILC.[294] Even though Serbia was neither directly involved in the Srebrenica genocide, nor was it complicit in it,[295] the Court held that Serbia was responsible for its failure to prevent it and to punish the perpetrators.[296]

The Court justified its decision by analysing the scope of the obligations to prevent and to punish the crime of genocide under the Genocide Convention. The Court held that these obligations extend beyond referral by a competent organ of the United Nations to states parties' affirmative action to prevent genocide from occurring, and their willingness to implement the decisions that a competent UN body may take.[297] States could be liable if they fail to assess the *de facto* situation with "due diligence."[298] It follows that NATO could intervene to prevent the ongoing genocide. This is limited only to the crime of genocide.

The relevance of this judgment in clarifying the doctrine of attribution has been applauded

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[289] Glanville (n 268) 16.

[290] See *Rome Statute of the International Criminal Court* (Done at Rome on 17 July 1998, entered into force on 1 July 2002) 2187 UNTS 90 [Arts. 5-9] [hereinafter *Rome Statute*].

[291] *Genocide Convention* (n 282) [Art. 1].

[292] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide,* Preliminary Objections Judgment ICJ Reports (1996) p. 595, 616.

[293] *Bosnia v Serbia case* (n 201) [para. 197].

[294] International Law Commission, International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentary* (Volume II, Part II, Yearbook of International Law Commission 2001) [Art. 2] [hereinafter *Draft Article on State Responsibility*].

[295] *Bosnia v Serbia case* (n 201) [para. 386]; Marko Milanović, 'State Responsibility for Genocide: A Follow-Up' (2007) 18(4) *European Journal of International Law* 669-694, 670.

[296] *Bosnia v Serbia case* (n 201) [para. 169].

[297] ibid., [para. 427].

[298] ibid., [para. 420].

by some[299] and denigrated by others.[300] Luban and Gaeta question how a government as a whole, instead of individuals, could be held to account for the crime of genocide.[301] Kreβ questions the Court's rationale for applying the "effective control" test without testing its viability.[302] Wittich doubted the legal basis on which the Court assumed jurisdiction over the case since the SC Resolution 777 (1992) determined that the SRFY has ceased to exist.[303] Arguably, the legal status of the Former Republic of Yugoslavia that appeared before the Court is unclear since the same personality was rejected by the SC.

The ICJ has manifested the desire to hold States accountable for their failure to prevent and to punish the crime of genocide but that has also created some ambiguity regarding how States could intervene in the internal affairs of others. For instance, in the *Bosnia v Serbia* case, the ICJ held that 'the combined efforts of several States, each complying with its obligation to prevent, might have achieved the result - averting the commission of genocide.'[304] Does this make unauthorised collective unilateral intervention legal? Perhaps not, although the Court could be interpreted as suggesting that it does. The Court argues that one of the parameters to be considered to ascertain whether a State has discharged its obligations to prevent the commission of genocide is the "capacity to influence effectively the action"[305] of the potential offender.

It could be argued that States could also intervene to prevent other crimes, such as crimes against humanity on moral grounds.[306] But to attribute a legal obligation to the ICJ's hypothetical *obiter* would create a problem of determinacy of the legal norm. Otherwise, the ICJ could be understood as attributing liability to all States "capable to influence effectively

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[299] Milanović (n 295) 670; Glanville (n 268) 15-32.

[300] David Luban, 'Timid Justice: The ICJ should have been harder on Serbia' (Slate Magazine, 28 February 2007) available at <http://www.slate.com/articles/news_and_politics/jurisprudence/2007/02/timid_justice.html> accessed 8 November 2016; Stephan Wittich, 'Permissible Derogation from Mandatory Rules? The Problem of Party Status in the Genocide Case' (2007) 18(4) *European Journal of International Law* 591-618; Claus Kreβ, 'The International Court of Justice and the Elements of the Crime of Genocide' (2007) 18(4) *European Journal of International Law* 619-629; Paola Gaeta, 'On What Conditions Can a State Be Held Responsible for Genocide?' (2007) 18(4) *European Journal of International Law* 631-648.

[301] Luban (n 300); Gaeta (n 300) 633.

[302] Kreβ (n 300) 620.

[303] Wittich (n 300) 592; UNSC Res. S/RES/777 (16 September 1992) [operative para. 1].

[304] *Bosnia v Serbia case* (n 201) [para. 430]; *Draft Article on State Responsibility* (n 294) [Art. 41(1)].

[305] *Bosnia v Serbia case* (n 201) [para. 430].

[306] J. L. Holzgrefe, 'The humanitarian intervention debate' in Holzgrefe and Keohane (n 26) 22.

the action" of the State that fail to prevent and or to punish such crimes. It is unlikely that China will accept liability for the action of North Korea if it fails to prevent it. A different conclusion might be reached if the UK fails to control the actions of its overseas territory such as the British Virgin Islands. The European Court of Human Rights held that the R2P 'must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities.'[307]

Regardless of the judicial opinion on the R2P, the 2005 world summit has reaffirmed the inviolability of State territory.[308] The world summit specifically argues that the 'relevant provisions of the Charter are sufficient to address the full range of threats to international peace and security and that only the Security Council can authorise coercive action against a State.[309] Potentially, there could be a clash if the ICJ's judgment in *Bosnia v Serbia* intends to allow unilateral military actions against defaulting States, if not specifically for the crime of genocide. Instead, "due diligence" has been interpreted to mean that States must use all the available peaceful means reasonably.[310]

It is sufficient to say that the current form of the R2P needs more clarification. In Alvarez's opinion, the R2P is 'absurdly premature and not likely to be affirmed by state practice.'[311] A plausible interpretation seems to be leaning towards international cooperation through the SC.[312] Hence, the 2005 world summit did not agree on the criteria for intervening in the internal affairs of a State. Consequently, no unilateral humanitarian intervention has occurred

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[307] *Case of Osman v The United Kingdom* (Application No. 87/1997/871/1083) Judgment ECtHR (1998) [para. 116].

[308] UNGA Res. A/RES/60/1 (16 September 2005) [paras. 77-80].

[309] ibid., [paras. 79].

[310] Glanville (n 268) 20.

[311] Jose E. Alvarez, 'The Schizophrenias of R2P' in Philip Alston and Euan McDonald, *Human Rights, Intervention, and the Use of Force* (Oxford, Oxford University Press 2008) 282; Mark Kersten, 'Whose R2P? The responsibility to protect post-Syria' (Justice in Conflict, 3 September 2013) available at <https://justiceinconflict.org/2013/09/03/whose-r2p-is-it-the-responsibility-to-protect-post-syria/> accessed 9 November 2016.

[312] Glanville (n 268) 21-23; Emma Gilligan, 'Redefining Humanitarian Intervention: The Historical Challenge of R2P' (2013) 12(1) *Journal of Human Rights* 21-39, 30; Evans and Sahnoun (n 268) 106; UNGA Res. A/RES/60/1 (16 September 2005) [paras. 78] (it states: 'we reiterate the importance of promoting and strengthening the multilateral process and of addressing international challenges and problems by strictly abiding by the Charter and the principles of international law, and further stress our commitment to multilateralism'); Simma 1999 (n 45) 4; Martha Brenfors and Malene Maxe Petersen, 'The Legality of Unilateral Humanitarian Intervention – A Defence' (2000) 69(4) *Nordic Journal of International Law* 449–499, 450.

in the genocide alleged to have been committed in Darfur.[313] By all standards, the situations in Darfur and in Syria meet the required threshold that could trigger the R2P. Regarding Darfur, the SC's resolution 1706[314] refers to the R2P but the subsequent resolutions were silent on that.[315] The situation in Syria appears complicated because of the disagreement among the permanent members of the SC.[316]

In fact, the debate on the content of the R2P was resurrected in the UN General Assembly in 2008 following Ban Ki-Moon's appointment of Edward Luck as the Special Adviser on the R2P.[317] Luck's initial mandate includes the 'examination of how to further the ideas contained in paragraphs 138 to 139 of the Summit Outcome Document.'[318] When challenged by the Non-Aligned Movement, the appointment was approved without the R2P in the title.[319] This shows how unsustainable it might be to argue that the R2P has ousted the principle of the inviolability of State territory.[320]

7.9 Regionalisation of the R2P on the African Continent

The African Union is the only regional body within the UN that has codified the right to intervene in the internal affairs of its member States on humanitarian grounds.[321] The implementation is yet to be seen, but the mechanisms for its enforcement have been established. For instance, from 19 October to 8 November 2015, over 6,000 military, police

[313] Alex de Waal, 'Why Darfur intervention is a mistake' (BBC News, 21 May 2008) available at <http://news.bbc.co.uk/1/hi/world/africa/7411087.stm> accessed 9 November 2016.

[314] UNSC Res. S/RES/1706 (31 August 2006) [preamble para. 3];

[315] Gilligan (n 312) 31-33.

[316] For detail, see Global Centre for the Responsibility to Protect, 'Current crisis – Syria' available at <http://www.globalr2p.org/regions/syria> accessed 9 November 2016.

[317] General Assembly Fifth Committee, 'United Nations Human Resources Structures must be adapted to meet growing demands of peacekeeping, other field operations; Budget Committee told,' UN Doc. GA/AB/3837 (3 March 2008) available at <https://www.un.org/press/en/2008/gaab3837.doc.htm> accessed 9 November 2016 [para. 85] [hereinafter *Appointment of Luck as Special Adviser on R2P*].

[318] *Appointment of Luck as Special Adviser on R2P* (n 317) [para. 83-85].

[319] For detail visit 'Office of the Special Adviser on the prevention of genocide' available at <http://www.un.org/en/preventgenocide/adviser/edwardluck.shtml> accessed 9 November 2016.

[320] To follow interesting online discussions on this topic see Opinio Juris, 'Syria insta-symposium' available at <http://opiniojuris.org/?s=Syria+Insta-Symposium> accessed 9 November 2016.

[321] Yvonne Kasumba and Charles Debrah, 'An overview of the African Standby Force (ASF)' in Cedric de Coning and Yvonne Kasumba (eds), *The Civilian Dimension of the African Standby Force: Peace Support Operations Division of the African Union Commission* (South Africa, Accord 2010) 11.

and civilian officers from across the five standby brigades[322] participated in the Amani Africa II training exercise conducted in Addis Ababa and South Africa.[323]

7.9.1 Legal Framework's Historical Antecedent

In 1993, the Organisation of African Unity (hereinafter referred to as OAU) established a mechanism for Conflict Prevention, Management and Resolution.[324] It has three basic functions, namely, preventing, managing and resolving conflicts in Africa. This mechanism failed[325] for a couple of reasons but mostly because of the principle of the inviolability of State territory.[326] The African Union (hereinafter referred to as AU) that replaced the OAU changed the mechanism with the Peace and Security Council[327] (hereinafter referred to as PSC) in 2003. The PSC is the current organ of the AU with the mandate 'to facilitate timely and efficient response to conflict and crisis situations in Africa.'[328] The PSC is supported by five

[322] These brigades are based on three regional economic communities (RECs) and two regional mechanisms (RMs), namely the Economic Community of West African States (ECOWAS), the Economic Community of Central African States (ECCAS), the South African Development Community (SADC), the Eastern African Standby Force (EASF) and the North African Regional Capability (NARC).

[323] Africa Union Media Release, 'Landmark Amani Africa II field training exercise concludes in South Africa' available at <http://www.peaceau.org/uploads/landmark-amani-africa-ii-field-training-exercise-concludes-in-south-africa.pdf> accessed 17 November 2016; The Presidency Republic of South Africa, 'Remarks by H. E. Mr Jacob Zuma, President of the Republic of South Africa, at the closing ceremony of Amani Africa II field training exercise, Lohatla, Northern Cape, South Africa' (8 November 2015) available at <http://www.peaceau.org/uploads/remarks-by-president-jacob-zuma-at-closing-ceremony-of-amani-africa-ii-field-training-exercise.pdf> accessed 17 November 2016; 'Statement by Ambassador Smail Chergui, Commissioner for Peace and Security, African Union Commission at the distinguished visitors closing ceremony of the Amani II field training exercise, Lohatla, South Africa on 8 November 2015,' available at <http://www.peaceau.org/uploads/statement-by-amb-smail-chergui-au-commissioner-for-peace-and-security-at-closing-ceremony-of-amani-africa-ii-field-training-exercise.pdf> accessed 17 November 2016.

[324] Organisation of African Unity, 'Declaration of the Assembly of Heads of state and government on the establishment within the OAU of a mechanism for conflict prevention, management and resolution,' AHG/DECL.3 (XXIX) [paras. 12-13].

[325] Except for a few cases like the OAU's limited military involvement in then Zaire in 1978/79 and the truncated peacekeeping mission it deployed to Chad between 1979 and 1982.

[326] Kristiana Powell, *The African Union's Emerging Peace and Security Regime: Opportunities and Challenges for Delivering on Responsibility to Protect* (Canada, The North-South Institute 2005) 10.

[327] See *Protocol Relating to the Establishment of the Peace and Security Council of the African Union* (adopted at the Durban Summit in 2002) available at <http://www.peaceau.org/uploads/psc-protocol-en.pdf> accessed 11 November 2016 [hereinafter *Protocol to PSC*]; for overview development see Charles Burton *et al.*, 'The African Union's Standby Force: Canadian foreign and defence policy options' (2004) 11(1) *Canadian Foreign Policy* 47-79.

[328] *Protocol to PSC* (n 327) [Art. 2(1)].

other agencies: namely; the Panel of the Wise[329] the Continental Early Warning System,[330] the African Standby Force,[331] the Common African Defence and Security Policy,[332] and a Special Fund.[333]

7.9.2 Article 4(h) of the Constitutive Act of the African Union

Article 4(h) of the Constitutive Act of African Union[334] (hereinafter referred to as Union Act) provides as follows: 'the right of the Union to intervene in a member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity.' This article was later amended in 2003 by the insertion of 'as well as a serious threat to legitimate order to restore peace and stability to the member State of the Union upon the recommendation of the Peace and Security.'[335] Apparently, this seems to derogate the provision of Article 2(4) of the UN Charter. However, there are provisions in the Union Act and its Protocol that advocate for non-interference in the internal affairs of the member State.[336]

Article 4(h) of the Union Act was meant to guard against a repeat of three gross violations of human rights that have occurred in Africa such as the brutal regime of Idi Amin of Uganda, the tyranny of Bokassa of the Central African Republic and the Rwandan genocide.[337] Sequel to the Rwandan genocide, the African heads of State and government set up an International

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[329] This consists of a five-person panel of 'highly respected African personalities from various segments of society who have made outstanding contributions to the cause of peace, security and development on the continent.' Their task is 'to support the efforts of the PSC and those of the Chairperson of the Commission, particularly in the area of conflict prevention.' See *Protocol to PSC* (n 327) [Art. 11].

[330] This was established by Article 12 of the PSC Protocol to facilitate the anticipation and prevention of conflicts in Africa. See *Protocol to PSC* (n 327) [Art. 12].

[331] *Protocol to PSC* (n 327) [Art. 13].

[332] See generally, African Union, 'Solemn Declaration on a Common African Defence and Security Policy' available at <http://www.peaceau.org/uploads/declaration-cadsp-en.pdf> accessed 11 November 2016.

[333] See generally, African Union, 'Peace and Security Council' available at <http://www.peaceau.org/en/page/38-peace-and-security-council> accessed 11 November 2016.

[334] *AU Constitutive Act* (n 2) [Art. 4(h)].

[335] See *Protocol on Amendments to the Constitutive Act of the African Union* (Done at Maputo on 11 July 2003, entered into force on 25 April 2012) [Art. 4(h)] available at <http://www.au.int/en/treaties/protocol-amendments-constitutive-act-african-union> accessed 10 November 2016 [hereinafter *2003 Protocol to the Union Act*].

[336] See *Protocol to PSC* (n 327) [Art. 4(f)]; *AU Constitutive Act* (n 2) [Arts. 3(b), 4(g)].

[337] Kioko (n 156) 811-812.

panel of eminent personalities to investigate the genocide.[338] The report of the Panel blamed States neighbouring Rwanda, the OAU, the United Nations and the international community for their failure to prevent or to stop the inhuman act.[339] Within the OAU, a consciousness grew that Article 2(4) of the UN Charter and the provision of the OAU Charter that prohibits interference in the internal affairs of other States could be ignored in matters concerning the sanctity and inviolability of human life.[340]

In fact, the OAU Secretary-General, Salim Ahmed Salim once argued that the OAU Charter was created to preserve the humanity, dignity, and the rights of the Africans.[341] Therefore, the inviolability of a State territory must be re-interpreted from the African values of kinship and solidarity.[342] Thus, the "never again" slogan imposes a moral obligation upon the African leaders not to remain "indifferent" to the tragedy of their people.[343]

7.9.3 The implementation of R2P in Africa - the African Standby Force

Article 13 of the *Protocol Relating to the Establishment of the Peace and Security Council of the African Union*[344] established the African Standby Force (hereinafter referred to as ASF). The ASF consist of five multi dimensional (military, police and civilians) brigades of 5,000 troops each.[345] Part of the ASF mandate is to 'intervene in a member state in respect of grave

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[338] See Organisation of African Unity, 'CM/DEC.409 (LXVIII) Establishment of the Panel of Eminent Personalities to Investigate the Genocide in Rwanda and the Surrounding Events - Doc. CM/2063 (LXVIII)' available at <http://www.au.int/en/sites/default/files/decisions/9611-council_en_4_7_june_1998_council_ministers_sixty_eight_ordinary_session_third_ordinary_session_aec.pdf> accessed 10 November 2016.

[339] See 'International Panel of Eminent Personalities (IPEP): Report on the 1994 Genocide in Rwanda and Surrounding Events (Selected Sections)' (2001) 40(1) *International Legal Materials* 141-236; United Nations, 'Report of the Independent Inquiry into the actions of the United Nations during the 1994 genocide in Rwanda,' UN Doc. S/1999/1257 (16 December 1999) 3.

[340] Dan Kuwali, 'The rationale for Article 4(h)' in Dan Kuwali and Frans Viljoen (eds), *Africa and the Responsibility to Protect: Article 4(h) of the African Union Constitutive Act* (New York, Routledge 2014) 18; Obiora Chinedu Okafor, *Re-defining Legitimate Statehood: International Law and State Fragmentation in Africa* (The Hague, Martinus Nijhoff Publishers 2000) 146.

[341] Kuwali (n 340) 18.

[342] ibid., 18.

[343] Powell (n 326) 1.

[344] *Protocol to PSC* (n 327) [Art. 13].

[345] Jason Warner, 'Complements or Competitors? The African Standby Force, the African Capacity for Immediate Response to Crises, and the Future of Rapid Reaction Forces in Africa' (2015) 8 *African Security* 56-73, 59; Cédric de Coning, 'Enhancing the Efficiency of the African Standby Force: The Case for a Shift to a Just-in-Time Rapid Response Model?' (2014) 2014(2) *Conflict Trends (ACCORD)* 34-40, 34.

circumstances … in accordance with Article 4(h) and (j) of the Constitutive Act.'[346] To enforce "never again" slogan, the ASF is to operate a rapid deployment capability – that is, the readiness to deploy troops to the country in crisis within 14 days of a crisis being identified.[347] With the successful training of over 6,000 ASF personnel in 2015, it is hoped that the ASF is ever combat-ready.

However, the military and paramilitary personnel that make up the ASF are not an independent "Standby Force" as such. They will be drawn from their regions and countries when the need arises.[348] Thus, logistical issues in the chain of commands could obstruct rapid deployment capability.[349]

In 2003, the African Chiefs of Defence Staff proposed to the African Heads of State and government to set up a system of five regionally managed multidisciplinary contingents comprising 3,000 to 4,000 troops that would be on standby in their countries of origin.[350] The aim was to have an African standing army ready to be deployed for peacekeeping missions, peace enforcement and post-conflict activities on the continent.[351] Each of the five sub-regional organisations (East, West, North, South and Central Africa) is expected to establish its own response brigade.

As research conducted by Kinzel has shown,[352] this goal is yet to be realised in some sub-regions despite the progress that has been made in other sub-regions.[353] Warner is sceptical that having parallel armed forces in all sub-regions could undermine a unified ASF.[354] This

[346] *Protocol to PSC* (n 327) [Art. 13(3)(c)].
[347] Jonathon Rees, 'Africa's Army guns for Peace' (African Independent, 27 November 2015) 14-15, 14 available at <https://issafrica.s3.amazonaws.com/site/uploads/2-12-2015-ASF_AfricanIndependent.pdf> accessed 17 November 2016.
[348] Coning argues that the use of the phrase "Standby Force" is inappropriate, see Cedric de Coning 'Refining the African Standby Force Concept' (2004) 2004(2) *Conflict Trends* 20-26, 22.
[349] Rees (n 347) 14-15.
[350] Powell (n 326) 15.
[351] African Union, 'Report of the 4th Meeting of African Chiefs of Defence Staff and Experts on the Establishment of the African Standby Force and the Common African Defence and Security Policy' (Addis Ababa, Ethiopia, 20-21 January 2004) EXP/Def.&Sec.Rpt.(IV) [para. 7].
[352] See generally, Wolf Kinzel, *The African Standby Force of the African Union: Ambitious Plans, Wide Regional Disparities, An Intermediate Appraisal* (Germany, Stiftung Wissenschaft und Politik 2008).
[353] ibid., 13-22; Powell (n 326) 16.
[354] Warner (n 345) 61.

concern is informed considering the scarce human and material resources. Moreover, an uneven political and economic development in Africa cannot match with the current security issues it faces.[355]

Additionally, the composition of the ASF personnel involving the military, the police and civilians create some difficulties on how to classify such missions in legal terms. Since the Panel of the Wise engages in conflicts prevention,[356] involving civilians in what should otherwise be a military intervention complicate the rule of engagement.

7.9.3.1 East African sub-region

The East African Standby Brigade (hereinafter referred to as EASBRIG)[357] was established in September 2004. It was established by the *Policy Framework for the Establishment of East African Standby Brigade* and the *Memorandum of Understanding on the Establishment of the Eastern Africa Standby Brigade*.[358] The EASBRIG is made up of four components, namely, the Secretariat; the Planning Element; the Headquarters and its Logistics Base.[359] An overview of the functions performed by each of the components is discussed here.[360]

The EASBRIG is still in the process of formation and has not achieved its full operational capabilities. However, it has performed limited roles in the maintenance of peace and security

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355 Powell (n 326) 20; Rees (n 347) 14-15.

356 For a discussion see generally, Joao Gomes Porto and Kapinga Yvette Ngandu, *The African Union's Panel of the Wise: A concise history* (South Africa, African Centre for the Constructive Resolution of Disputes (ACCORD) 2015); Paul Nantulya, 'The African Union's Panel of the Wise and Conflict Prevention' (African Centre for Strategic Studies, 8 June 2016) available at <http://africacenter.org/spotlight/african-union-panel-wise-conflict-prevention/> accessed 17 November 2016.

357 Note that the EASBRIG was changed to East African Standby Force (EASF) during the 6th Extraordinary Council Ministers meeting held in Nairobi Kenya on 18 June 2010. See Louis M. Fisher *et. al*., *African Peace and Security Architecture (APSA): 2010 Assessment Study* (Report Commissioned by the African Union's Peace and Security Department and adopted by the third meeting of the Chief Executives and Senior Officials of the AU, RECs and RMs on the Implementation of the MoU on Cooperation in the Area of Peace and Security, held from 4-10 November 2010, Zanzibar Tanzania) 40 available at <https://unoau.unmissions.org/sites/default/files/african_peace_and_security_architecture.pdf> accessed 16 November 2016 [hereinafter *APSA 2010 Assessment Study*].

358 African Union, *Policy framework for the establishment of the African Standby Force and Military Staff Committee (Part 1)* (Adopted by the Third Meeting of African Chiefs of Defence Staff, 15-16 May 2003 at Addis Ababa, Ethiopia) Exp/ASF-MSC/2 (1) 14; *Memorandum of Understanding on the Establishment of the Eastern African Standby Brigade (EASBRIG)* (Addis Ababa, Ethiopia, 11 April 2005) available at <http://www.easfcom.org/index.php/en/> accessed 23 June 2017.

359 See *APSA 2010 Assessment Study* (n 357) 40-42.

360 ibid., 41-42.

in the region through military advice, observer missions and fact-finding missions.[361] At the request of the AU, the EASBRIG sent a fact-finding mission to Somalia to observe the situation on the ground, and that informed the AU's decision to deploy peacekeeping force to Somalia.[362] The EASBRIG participated in that mission and had been partnering with the United Nations Political Office for Somalia to prevent further conflict in the region.[363]

The EASBRIG's success-story has been impeded by many factors some of which are the lack of funding, withdrawal of member states, and lack of commitment. Regarding funding, the States that make up the EASBRIG do not form one sub-regional economic community. Some of the States are members of the International Conference on Great Lakes Region. Others belong to the Inter-Governmental Authority for Development (IGAD) or to the East African Community.[364] These subdivisions go with various security interests which affect the member States' payment of their annual due.[365] Moreover, some member States such as Tanzania, Madagascar and Mauritius aligned more with the Southern Africa brigade.[366] Eritrea is inactive because of its long-standing conflict with Ethiopia. These setbacks among others[367] have hindered the EASBRIG's effectiveness in the region.

7.9.3.2 West African sub-region

The ECOBRIG is an acronym for a "Standby Force" of the Economic Community of West African States[368] (hereinafter referred to as ECOWAS). The *Protocol Relating to the*

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[361] C. A. Mumma-Martinon, *Efforts towards Conflict Prevention in the Eastern African Region: The Role of Regional Economic Communities and Regional Mechanisms* (Occasional Paper, Series 1, No. 1, Kenya, International Peace Support Training Centre 2010) 25 available at <http://www.undp.org/content/dam/kenya/docs/Implementing%20Partner%20Reports/Collaborative_efforts_revised_version.pdf> accessed 23 June 2017.

[362] Endalcachew Bayeh, 'The Eastern Africa Standby Force: Roles, Challenges and Prospects' (2014) 2(9) *International Journal of Politics Science and Development* 197-204, 198.

[363] Bayeh (n 362) 198.

[364] Mumma-Martinon (n 361) 3.

[365] Bayeh (n 362) 201.

[366] Jakkie Cilliers, 'The African Standby Force: An update on progress' (2008) 160 *Institute for Security Study* 1-24, 14.

[367] For detail see Bayeh (n 362) 197-204.

[368] Economic Community of West African States, *Articles of Association for the establishment of an Economic Community of West Africa* (Done at Accra on 4 May 1967, entered into force on 4 May 1967) 595 UNTS 287 [Art. 1]; Economic Community of West African State, *Treaty Establishing the Economic Community of West African States* (Signed at Cotonou 24 July 1993) [Art. 2] available at <http://www.ecowas.int/wp-content/uploads/2015/01/Revised-treaty.pdf> accessed 23 June 2017.

Mechanism for Conflict Prevention, Management, Resolution, Peace-keeping and Security[369] provides the legal framework that allows the member States to intervene in the internal affairs of other States. Article 25 provides that the Protocol shall be applied in case of internal conflict that "threatens to trigger a humanitarian disaster," "poses a serious threat to peace and security in the sub-region," and "in the event of serious and massive violation of human rights and the rule of law."[370]

The choice of word "shall" in Article 25 appears to make intervention obligatory, and the decision to intervene should be made by the ECOWAS Mediation and Security Council.[371] The Protocol established ECOMOG,[372] which has intervened in Liberia, Sierra Leone, Guinea-Bissau, Mali and along the Guinea-Liberian border.[373]

However, the ECOBRIG has some deficiencies. Firstly, there is no Memorandum of Understanding between the ECOWAS and the member States that contribute to its standby force.[374] Secondly, the ECOBRIG lacks sufficient airlift capability and logistics problem of harmonisation between the different battalions of different backgrounds. Although the ECOWAS member States fund its budgets, funding is inadequate, and the ECOBRIG depends on external donors.[375] These shortcomings could impede rapid deployment capability in due course.

7.9.3.3 North African sub-region

The North African sub-region is still grappling with the formation of its brigade inhibited by division among the Arab Maghreb Union (hereinafter referred to as AMU) member States

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[369] *Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peace-keeping and Security* (Done at Lomé on 10 December 1999) [Art. 3(a)] available at <http://www.operationspaix.net/DATA/DOCUMENT/3744~v~Protocole_relatif_au_Mecanisme_de_prevention_de_gestion_de_reglement_des_conflits_de_maintien_de_la_paix_et_de_la_securite.pdf> accessed 16 November 2016.

[370] ibid., [Art. 25].

[371] ibid., [Arts. 8 and 11].

[372] ibid., [preamble para. 20, section on "Definitions" para. 15, Art. 21].

[373] Dorina Bekue and Aida Mengistu, *Operationalizing the ECOWAS Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security* (Senegal, International Peace Academy in partnership with Economic Community of West African States 2002) 12.

[374] *APSA 2010 Assessment Study* (n 357) 44.

[375] ibid., 44.

over the Western Sahara's dispute.[376] Egypt which has a strong military that would have contributed to the standby force is not a member of AMU. Libya has assumed the leadership role in coordinating the establishment of the North African Regional Capability (hereinafter referred to as NARC). In 2009, the NARC ministers of defence approved Tripoli as the location for the Executive Secretariat.[377] The NARC has signed the Memorandum of Understanding[378] with other regional blocs and the AU to float the North African Brigade.

7.9.3.4 Southern African sub-region

The South African Development Community[379] Brigade (hereinafter referred to as SADCBRIG) was established in August 2008.[380] The SADCBRIG was established on the previously existing policy on collective self-defence such as the 1996 *Organ for Politics, Defence and Security*[381] and its Protocol.[382] In 2009, the Protocol was amended to incorporate and accommodate the ASF's policy.[383] The SADCBRIG has developed the basic elements required of a sub-regional standby force such as a brigade headquarters, planning element, memorandum of understanding (MoU), and centre of excellence.[384]

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[376] Four (Morocco, Sudan, Egypt and Tunisia) out of six members of NARC do not recognise the Sahara Arab Democratic Republic. This non-recognition affects the operationalisation of NARC's standby force. See *APSA 2010 Assessment Study* (n 357) 47.

[377] *APSA 2010 Assessment Study* (n 357) 46.

[378] African Union, 'Memorandum of Understanding on cooperation in the area of Peace and Security between the African Union, the Regional Economic Communities and the Coordinating Mechanisms of the Regional Standby Brigades of Eastern African and Northern Africa,' available at <http://www.peaceau.org/uploads/mou-au-rec-eng.pdf> accessed 17 November 2016.

[379] Southern African Development Community was established in 1992 through a treaty signed by Heads of State and Government of the majority ruled Southern African States. See *Declaration and Treaty of the Southern African Development Community* (Signed at Windhoek on 17 August 1992) available at <http://www.sadc.int/files/8613/5292/8378/Declaration__Treaty_of_SADC.pdf> accessed 17 November 2016.

[380] Southern African Development Community, 'Standby Force and SADC Brigade' available at <http://www.sadc.int/themes/politics-defence-security/regional-peacekeeping/standby-force/> accessed 17 November 2016.

[381] Southern African Development Community, 'Organ for Politics, Defence and Security' available at <http://www.sadc.int/sadc-secretariat/directorates/office-executive-secretary/organ-politics-defense-and-security/> accessed 17 November 2016.

[382] See *Protocol on Politics, Defence and Security Cooperation* (Signed at Blantyre on 14 August 2001) available at <http://www.sadc.int/files/3613/5292/8367/Protocol_on_Politics_Defence_and_Security20001.pdf> accessed 17 November 2016.

[383] Southern African Development Community, 'Towards a common future' available at <http://www.sadc.int/documents-publications/show/Protocol_on_Politics_Defence_and_Security20001.pdf> accessed 17 November 2016.

[384] Olivia V. Davies, 'SADC Standby Force: Preparation of Peacekeeping Personnel' (2014) 2014(2) *Conflict Trends* 26-29, 26.

The SADCBRIG has participated in several peacekeeping missions such as in Tanzania (2002), Botswana and South Africa (2009).[385] Like other sub-regional brigades, the SADCBRIG has its own challenges which include, among others, the inadequate funding, lack of human resources to operationalize its force and language barriers.[386]

Because of logistical and cost implications of running sub-regional brigades, South Africa has suggested a more unified standby response. It has instituted the African Capacity for Immediate Response to Crises[387] (hereinafter referred to as ACIRC) which involves only military response. Not many African States accepted this proposal and the AU risks gross inefficiency if it were to float many security outfits concurrently.

7.9.3.5 Central African sub-region

The Economic Community of Central African States[388] (hereinafter referred to as ECCAS) was established as an economic organisation. Its' mandate was expanded to include the maintenance of peace and security after the crisis that plagued the region in the 1990s. That also resulted in the establishment of the Council for Peace and Security in Central Africa[389] (hereinafter referred to as COPAX). The COPAX became operational in 2003, when 8 ECCAS member States out of 11 ratified its instruments.[390] The COPAX has three subsidiary bodies, namely, the Defence and Security Commission, the Multinational Force of Central Africa (hereinafter referred to as FOMAC) and the Early Warning Mechanism of Central Africa[391]

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[385] Southern African Development Community, 'Regional Peacekeeping Training Centre' available at <http://www.sadc.int/sadc-secretariat/services-centres/rptc/> accessed 18 November 2016.

[386] *APSA 2010 Assessment Study* (n 357) 48-49.

[387] African Union, Assembly of the Union twenty-first Ordinary Session, 'Decision on the establishment of an African Capacity for Immediate Response to Crises' (Addis Ababa, Ethiopia, 26-27 May 2013) Assembly/AU/Dec.489 (XXI) [para. 2].

[388] Economic Community of Central African States, *Treaty establishing the Economic Community of Central African States* (done at Libreville on 18 October 1983) [Art. 4] available at <http://www1.chr.up.ac.za/undp/subregional/docs/eccas1.pdf> accessed 18 November 2016.

[389] Economic Community of Central African States, 'Council for Peace and Security in Central Africa,' available at <https://www.uia.org/s/or/en/1100055777> accessed 20 August 2017.

[390] ibid.

[391] African Union, 'Economic Community of Central African States,' available at <http://au.int/en/recs/eccas> accessed 18 November 2016; Angela Meyer, *Peace and Security Cooperation in Central Africa: Developments, Challenges and Prospects* (Uppsala, Nordiska Afrikainstitutet 2011) 9; Angela Meyer, 'Preventing conflict in Central Africa: ECCAS caught between ambitions, challenges and reality' (2015) 2015(3) *Central Africa Report* 1-19, 1-3.

(hereinafter referred to as MARAC). Analysis of how these bodies function is done here.[392]

The FOMAC is the ECCAS Standby Force with three standby brigades ready for the deployment of troops at short notice.[393] The FOMAC is expected to have between 4, 800 to 5, 000 standby forces comprising military, police and civilians. The FOMAC's rule of engagement allows for the deployment of the standby force for prevention.[394] A preventive measure may not involve military intervention but could be a collective enforcement of sanctions or investigations into the gross violations of human rights.

Like other sub-regional brigades, the FOMAC has limited human and financial resource. By August 2015, the MARAC had only eight executive staff members at its Libreville headquarters as against 15 members originally proposed.[395]

In summary, the codification of Article 4(h) of the Union Act sets in motion the formation of regional and sub-regional brigades that could enforce the R2P on the Continent. This has initiated the codification of humanitarian intervention that could possibly oust the inviolability of State territory.

7.10 The Enforcement of the R2P in Africa - has it worked?

According to Ibok, the Security Council's failure to prevent genocide in Rwanda, Somalia, the Democratic Republic of the Congo, Burundi, Liberia and Côte d'Ivoire[396] triggered the need for the ASF. But is this really the case? Article 2(7) of the UN Charter prohibits the organs of the United Nations from meddling in the internal affairs of a sovereign State. The claim by some AU member States that the International Criminal Court targets African Leaders[397] adds to the debate whether the SC should be more cautious in the way it intervenes in the internal affairs of States. Even the AU has not deployed the ASF to many intra-states conflicts in Africa without the consent of the concerned State.

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[392] See generally, Meyer 2015 (n 391).
[393] Cilliers (n 366) 15.
[394] Meyer 2015 (n 391) 8.
[395] ibid., 8.
[396] Sam B. Ibok, 'The OAU/AU: Records, challenges and prospects' in Abdalla Bujra and Hussein Solomon (eds), *Perspectives on the OAU/AU and Conflict Management in Africa* (Oxford, African Books Collective 2004) 16.
[397] Karen Allen, 'Is this the end for the International Criminal Court?' (BBC News, 24 October 2016) available at <http://www.bbc.co.uk/news/world-africa-37750978> accessed 11 November 2016.

7.10.1 Burundi Crisis

The decision by President Nkurunziza in 2015 to stand for a third term started the current political crisis in Burundi.[398] The conflict has claimed the lives of hundreds of Burundians and displaced thousands.[399] According to the 2016/2017 report by the Amnesty International, there have been cases of unlawful killings, enforced disappearances, torture and other ill-treatment, among others.[400]

The c*ommuniqué* adopted by the PSC to deploy 5, 000 troops[401] to Burundi was blocked by Burundi.[402] The members of the Burundi Parliament held that any action by the AU 'would be in violation of the country's constitution and sovereignty.'[403] This challenged the enforceability of Article 4(h) of the Union Act.[404]

The position held by Powell that the PSC's *communiqué* is merely a threat and not an invocation of Article 4(h) of the Union Act is unsustainable.[405] First, if it was an unlawful

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[398] Amnesty International, 'Annual Report – Burundi 2016/2017,' available at <https://www.amnesty.org/en/countries/africa/burundi/report-burundi/> accessed 1 August 2017 [hereinafter *2017 Amnesty International Report on Burundi*]; See 'Burundi Country profile' (BBC News, 2 June 2016) available at <http://www.bbc.co.uk/news/world-africa-13085064> accessed 10 November 2016; African Union, 'Peace and Security Council 571st meeting at the level of Heads of state and government' (Addis Ababa, Ethiopia, 29 January 2016) PSC/AHG/COMM.3(DLXXI) [para. 3].

[399] Human Rights Watch, 'World Report 2017 – Burundi events of 2016,' available at <https://www.hrw.org/world-report/2017/country-chapters/burundi> accessed 1 August 2017.

[400] *2017 Amnesty International Report on Burundi* (n 398) (the Internet page).

[401] African Union Peace and Security Council 565th meeting, 'Communique' (Addis Ababa, Ethiopia, 17 December 2015) PSC/PR/COMM.(DLXV) [para. 13(a)(iii)] [hereinafter *PSC Resolution authorising force in Burundi*].

[402] Fred Oluoch, 'AU Leaders abandon plans to send troops to Burundi' (The East African, 6 February 2016) available at <http://www.theeastafrican.co.ke/news/AU-leaders-abandon-plans-to-send-troops-into-Burundi-/-/2558/3065114/-/hl009r/-/index.html> accessed 10 November 2016; 'African Union decides against peacekeepers for Burundi' (Aljazeera News, 1 February 2016) available at <http://www.aljazeera.com/news/2016/01/african-union-decides-peacekeepers-burundi-160131102052278.html> accessed 10 November 2016; 'Burundi crisis: Pierre Nkurunziza threatens to fight AU peacekeepers' (BBC News, 30 December 2015) available at <http://www.bbc.co.uk/news/world-africa-35198897> accessed 13 November 2016.

[403] Moses Havyarimana, 'Burundi: AU peacekeepers will violate sovereignty, says Burundi MPs' (The East African, 22 December 2015) available at <http://allafrica.com/stories/201512220942.html> accessed 13 November 2016.

[404] Powell (n 326) 12.

[405] Paul D. Williams, 'Special report: The African Union's coercive diplomacy in Burundi' (IPI Global Observatory, 18 December 2015) available at <https://theglobalobservatory.org/2015/12/burundi-african-union-maprobu-arusha-accords/> accessed 14 November 2016

threat, it would breach the territory of Burundi under the provision of Article 2(4) of the UN Charter. But it does not look like a mere threat because the *communiqué* was adopted after a report by a *Fact-finding Mission of the African Commission on Human and Peoples' Rights to Burundi*[406] had established that there were gross human rights violations in Burundi. The report also confirmed the previous report adopted by the AU human rights observer.[407]

Therefore, the AU's intervention in defiance of Burundi government's objections would have qualified as humanitarian intervention. Literally, Article 4(h) of the Union Act empowers the AU to intervene in the internal affairs of a State to stop gross violations of human rights without its consent or authorisation by the SC. This creates some friction between Article 4(h) of the Union Act and Article 53 of the UN Charter. For instance, paragraph 15 of the PSC *communiqué* which authorised force against Burundi requested 'the UN Security Council to adopt, under Chapter VII of the Charter of the United Nations, a resolution in support of the present *communiqué*.'[408]

Take note of the wording of this resolution asking for a "support" and not an "authorisation" or a "permission." But the AU was unable to accomplish its proposed intervention without the consent of Burundi. It could be recalled that the AU's *Roadmap for the Operationalisation of the African Standby Force*[409] mandated the AU to seek the UN Security Council's authorisation before taking forcible actions against a State.

7.10.2 Darfur crisis

The UN Humanitarian Coordinator for Sudan described the situation in Darfur as 'the world's greatest humanitarian and human rights catastrophe.'[410] Darfur is often compared with the

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[406] African Commission on Human and Peoples' Rights, 'Fact-Finding Mission of the African Commission on Human and Peoples' Rights to Burundi – Final communiqué' (Bujumbura, 13 December 2015) available at <http://www.achpr.org/press/2015/12/d285/> accessed 14 November 2016.

[407] Africa Union Peace and Security 551st meeting, 'Communique' (Addis Ababa, Ethiopia, 17 October 2015) PSC/PR/COMM.(DLI) [para. 5] available at <http://www.peaceau.org/uploads/psc.551.burundi.17.10.2015.pdf> accessed 14 November 2016.

[408] *PSC Resolution authorising force in Burundi* (n 401) [para. 15].

[409] See Experts' Meeting on the relationship between the AU and the Regional Mechanisms for Conflict Prevention, Management and Resolution, 'Roadmap for the Operationalization of the African Standby Force' (Addis Ababa, Ethiopia 22-23 March 2005) EXP/AU-RECs/ASF/4(I) [para. 10].

[410] See 'West Sudan's Darfur conflict world's greatest humanitarian crisis' (Sudan Tribune, 19 March 2004) available at <http://www.sudantribune.com/spip.php?article2161> accessed 14 November 2016.

1994 genocide in Rwanda.[411] Consequently, two warrants of arrest for Omar Hassan Ahmad Al Bashir have been issued by the International Criminal Court on 4th March 2009 and on 12th July 2010 respectively.[412] President Al-Bashir is wanted at The Hague for charges of war crimes, crimes against humanity and genocide committed in Darfur between March 2003 and July 2008.[413]

However, the African States which President Al-Bashir has visited and who are parties to the Rome Statute have failed to arrest and surrender him to the ICC.[414] This questions not only the political will of the African States to intervene in the internal affairs of others on humanitarian grounds, but also, the chances that the perpetrators could be brought to account.[415] Although an accused is not guilty until proven beyond doubt, the warrant for arrest for President Al Bashir suggests that the situation in Darfur merits intervention on humanitarian grounds.[416]

The role played by the AU is discussed here.[417] To summarise it, then chairperson of the AU Commission, Alpha Oumar Konaré said that the AU has the responsibility to intervene and resolve the crisis in Darfur.[418] The PSC has issued strong public statements regarding the

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[411] House of Commons International Development Committee, 'Darfur, Sudan: The responsibility to protect' (Fifth Report of Session 2004–05 together with formal minutes ordered by The House of Commons to be printed 16 March 2005) 9-18 available at <http://www.parliament.uk> accessed 23 June 2017; United Nations Commission on Human Rights, 'Situation of human rights in the Darfur region of the Sudan' UN Doc. E/CN.4/2005/3 (7 May 2004) 21-36.

[412] Sudan is not a State Party to the Rome Statute, but the ICC may have jurisdiction over any situation referred to it by the United Nations Security Council. The Security Council has referred the situation in Darfur to the ICC by Resolution 1593 adopted on 31 March 2005. See generally, *Al Bashir Case* (The Prosecutor v Omar Hassan Ahmad Al Bashir) ICC-02/05-01/09 (2009).

[413] *Al Bashir Case* (The Prosecutor v Omar Hassan Ahmad Al Bashir) ICC-02/05-01/09 (2009) available at <https://www.icc-cpi.int/darfur/albashir/Documents/AlBashirEng.pdf> accessed 14 November 2016.

[414] See ibid; ICC Office of the Prosecutor, 'Twenty-third report of the prosecutor of the International Criminal Court to the UN Security Council pursuant to UNSCR 1593 (2005)' [paras. 4-11] available at <https://www.icc-cpi.int/iccdocs/otp/23-otp-rep-UNSC-darfur_ENG.pdf> accessed 23 June 2017.

[415] Recently, three African States: Burundi, South Africa and Gambia withdrew from the ICC. See Solomon Dersso, 'Africa's challenge to the ICC' (Aljazeera, 12 November 2016) available at <http://www.aljazeera.com/indepth/opinion/2016/11/africa-challenge-icc-161109120331097.html> accessed 14 November 2016.

[416] Gareth Evans, 'The world should be ready to intervene in Sudan' (International Herald Tribune, 14 May 2004) available at <http://www.globalr2p.org/publications/184> accessed 14 November 2016.

[417] Powell (n 326) 42-50.

[418] ibid., 42.

"grave humanitarian situation in the Darfur region."[419] Also, the AU engaged the government of Sudan and the rebel groups in a series of negotiations, which resulted in the Humanitarian Ceasefire Agreement (hereinafter referred to as HCA) signed on 8 April 2004.[420]

However, a Cease Fire Commission that was established under the HCA was not mandated to protect the civilian populations. Instead, a *Protocol on establishing a Humanitarian Assistance in Darfur* was enacted in conformity with the 1949 Geneva Conventions and the two 1977 Additional Protocols.[421] The AU also played a vital role in the negotiated Darfur Peace Agreement.[422] The AU sent 300 troops to Darfur to "protect civilians under imminent threat" with the consent of the Sudanese government.[423] Before the troops were deployed, the AU Peace and Security Director, Sam Ibok in a news conference said, 'we are confident (Sudan) will accept.'[424] Therefore, the extent that Article 4(h) of the Union Act could be used in furtherance of the R2P without the State's consent is debatable. Besides, the PSC's *communiqué* that expanded the scope of the mandate of the African Union Mission in Sudan[425] (hereinafter referred to as AMIS) to include the protection of civilians was rejected by the Sudanese Government.[426]

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[419] African Union, 'Report of the Chairperson of the Commission on the Establishment of a Continental Peace and Security Architecture and the Status of Peace Processes in Africa' (Addis Ababa, Ethiopia, 25 May 2004) PSC/AHG/3 (IX) 11 [para. 42].

[420] United Nations Peacemaker, *Humanitarian Cease Fire Agreement on the Conflict in Darfur* (Done at N'Djamena on 2 April 2004) available at <http://peacemaker.un.org/sudan-darfur-humanitarian2004> accessed 15 November 2016.

[421] See *Protocol on establishing a Humanitarian Assistance in Darfur* (Done at N'Djamena on 2 April 2004) available at <http://peacemaker.un.org/sites/peacemaker.un.org/files/SD_040408_Humanitarian%20Ceasefire%20Agreement%20on%20the%20Conflict%20in%20Darfur.pdf> accessed 15 November 2016.

[422] See *Darfur Peace Agreement* (Done at Abuja, Nigeria on 5 May 2006) available at <http://www.un.org/zh/focus/southernsudan/pdf/dpa.pdf> accessed 15 November 2016.

[423] African Union, 'Peace and Security Council 13th meeting communique' (Addis Ababa, 27 July 2004) PSC/PR/COMM.(XIII) [para. 8]; African Union Peace and Security Council, 'Report of the Chairperson of the Commission on the situation in Darfur, the Sudan' (Addis Ababa, Ethiopia, 20 October 2004) PSC/PR/COMM.(XVII) [paras. 17 and 67] [hereinafter *Report on Darfur crisis of 20 October 2004*]; 'Darfur: African Union to bolster observers with armed protection force' (Sudan Tribune, 5 July 2004) available at <http://www.sudantribune.com/spip.php?article3804> accessed 15 November 2016 [hereinafter *Sudan Tribune News of 5 July 2004*].

[424] *Sudan Tribune News of 5 July 2004* (n 423) (the Internet page).

[425] See *Report on Darfur crisis of 20 October 2004* (n 423) [para. 6].

[426] Powell (n 326) 44; Opheera McDoom, 'Sudan rejects use of force by UN-AU Darfur mission' (Reuters World News, 22 July 2007) available at <http://www.reuters.com/article/us-sudan-un-rejection-idUSHAR25688820070722> accessed 15 November 2016.

To sum up, while the AU has codified humanitarian intervention in Article 4(h) of the Union Act, it remains a theory which lacks detailed procedural mechanism for enforcement. As Ibok put it, the AU full-scale humanitarian intervention in the internal affairs of its member States will take several years to materialise.[427] The AU has merely demonstrated its commitment to respond to crisis on the continent. Such a step could be a reaction to what it perceives as apathy on the part of the SC to prevent or stop such conflicts in Africa. But this is not the whole truth insofar as the successes recorded by the AU in its peacekeeping missions on the Continent were supported by the UN and the international community.[428]

That said, the Government of Sudan's attempt to block international players,[429] except the AU, from participating in the political negotiations and ceasefire monitoring needs a careful examination. The reason may not be unconnected with the withdrawal of some AU member States from the ICC.

7.11 International Community's Response to the African Model of the R2P

The international community seems supportive of the way Africa is responding to the security challenges that it faces.

7.11.1 The United Nations

A couple of African-led interventions since the inception of the ASF were backed-up by the United Nations Security Council. The United Nations authorised the African Union to deploy troops to Somalia in 2007[430] and to Mali in 2012.[431] The AU-led intervention in Guinea-Bissau in 2012 was a response to an invitation by the deposed government and was welcomed by

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[427] *Sudan Tribune News of 5 July 2004* (n 423) (the Internet page).

[428] Cedric de Coning, 'The civilian dimension of African Peace and Support Operations' in Coning and Kasumba (eds), (n 321) 30 (Coning describes Darfur mission as a hybrid operation between UN and AU).

[429] The Government of Sudan refused to attend the inter-Sudanese talks held in N'Djamena on 31 March 2003 because it argued that except the AU, no other member of the international community was to be present. See African Union Peace and Security Council, 'Report of the chairperson of the commission on the situation in the Sudan (crisis in Darfur)' (Addis Ababa, Ethiopia, 13 April 2004) PSC/PR/2(V) [para. 13]; Tim Youngs, 'Sudan: Conflict in Darfur' (House of Commons Library Research Paper 04/51, 23 June 2004) 11-12 available at <http://researchbriefings.parliament.uk/ResearchBriefing/Summary/RP04-51#fullreport> accessed 15 November 2016.

[430] UNSC Res. S/RES/1744 (20 February 2007) [operative para. 4].

[431] UNSC Res. S/RES/2085 (20 December 2012) [operative para. 9].

the Security Council.[432] However, the troops' mandate in Mali and in Guinea-Bissau did not specify that it was on humanitarian grounds.

The AU approved the African Prevention and Protection Mission in Burundi without a prior authorisation by the SC[433] but the SC welcomed it.[434] However, the UN/AU Hybrid Operation in Darfur (hereinafter referred to as UNAMID) in 2007 was authorised by the Security Council.[435] It is fair to conclude that the United Nations would not object to, or condemn a collective action initiated by the AU in pursuant to Chapter VIII of the UN Charter. The rejection of the ACIRC proposed by South Africa by some AU member States supports the view that an unauthorised breach of a State territory is unacceptable.[436]

7.11.1.1 The establishment of an AU Peace Support Team

The United Nations established a ten-year plan for capacity-building with the AU during the 2005 World Summit[437] and it was launched a year later when both organs signed a declaration.[438] Consequently, the AU Peace Support Team was established at the UN Headquarters and at the AU Commission in Addis Ababa.[439] The purpose of these measures is to strengthen the AU's Security architecture to meet the exponential rise in the number of the UN peacekeeping missions globally and in Africa in particular.

As the experience of the UNAMID has shown, the UN needs strong regional security outfits that could take on the security issues so that it can perform a supervisory and supportive role.

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[432] See 'Report of the Joint ECOWAS/AU/CPLP/EU/UN assessment mission to Guinea-Bissau,' [para. 1] available at <http://www.peaceau.org/en/article/report-of-the-joint-ecowas-au-cplp-eu-un-assessment-mission-to-guinea-bissau> accessed 20 November 2016.

[433] It merely requested the Security Council to support the deployment of MAPROBU. See African Union Peace and Security Council 565th meeting, 'Communique' (Addis Ababa, Ethiopia, 17 December 2015) PSC/PR/COMM.(DLXV) [para. 13(a)(vi)].

[434] United Nations Security Council, 'Security Council Press Statement on the situation in Burundi,' UN Doc. SC/12174-AFR/3293 (19 December 2015) [para. 4].

[435] UNSC Res. S/RES/1769 (31 July 2007) [operative para. 1].

[436] Warner (n 345) 63-64.

[437] *2005 World Summit Document* (n 270) [para. 93].

[438] United Nations, 'Declaration on Enhancing UN-AU Cooperation: Framework for the Ten-Year Capacity-building Programme for the African Union,' UN Doc. A/61/630 (12 December 2006) [para. 2].

[439] International Peace Institute, 'Operationalizing the African Standby Force' (January 2010) 7 available at <https://www.ipinst.org/wp-content/uploads/publications/ipi_meetnote_african_standby_force__8_.pdf> accessed 21 November 2016.

This is because a hybrid mission that lacks cohesion in strategy and training is not always effective in peace operations. Hence, the AU's effort to build a strong African security outfit is a welcome development for the UN. Other UN engagements with the AU and its progress reports on how Africa can build a strong security network is available here.[440]

Besides, there is a growing perception that the best way to maintain international peace and security is for the UN to partner and cooperate with the regional security bodies who have better knowledge of the demographic security problems in their areas.[441] In 2010, the United Nations entered into a security partnership with Shanghai Cooperation Organization.[442] Therefore, the support which the UN gives to the regional security bodies is not a safety net to disrespect the territory of a State.

7.11.2 The European Union

The EU remains one of the major donors to the AU's peace and security initiative. In 2004 and based on the AU's request, the EU established the African Peace Facility (hereinafter referred to as APF) through which it has remitted €250 million to Africa to support its peace project.[443] A part of this fund (€35 million) was allocated for capacity building, such as helping the AU to develop its security policy, logistics planning of the AU's Peace and Security Department, and the overall planning and managing of peacekeeping operations in Africa.[444] Since the APF's inception, the EU has allocated more than €2 billion to Peace and Security programmes in Africa.[445] A total amount of €1.6 billion has been paid out, and about €1.7 billion are pledges yet to be redeemed.[446] Since 2007, the EU has supported African Union Mission in Somalia with over €1 billion.[447]

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[440] ibid., 6-11; see generally, UNSCOR, UN Doc. S/PV.7343 (16 December 2014); United Nations, 'Cooperation between the United Nations and regional and other organisations,' UN Doc. A/69/228-S/2014/560 (4 August 2014) [hereinafter *UN partnership with regional Security Bodies*]; United Nations Security Council, 'Partnering for peace: moving towards partnership peacekeeping,' UN Doc. S/2015/229 (1 April 2015).
[441] UN Doc. S/2016/867 (17 October 2016) 2.
[442] For more on those partnerships, see generally, *UN partnership with regional Security Bodies* (n 440).
[443] See *Securing peace and stability for Africa: The EU-funded African Peace Facility* <http://ec.europa.eu/development/body/publications/docs/flyer_peace_en.pdf> accessed 19 November 2016.
[444] Powell (n 326) 25.
[445] European Commission, *African Peace Facility Annual Report 2015* (Luxembourg, Publications Office of the European Union 2016) 5.
[446] ibid., 5.
[447] ibid., 15.

Aside funding, the APF assists in training the ASF troops and give other technical support. In 2015, the APF helped the African-led Peace Support Operations in Somalia, Mali, Guinea-Bissau and the Central African region. The APF's financial and technical assistance contributed to the success of AMANI AFRICA II in keeping with the *Joint Africa-EU Strategy*[448] adopted in Lisbon in 2007. The partnership was aimed at supporting Africans to find solutions to African problems.[449] At the 2014 EU-AU Summit in Brussel,[450] the EU reiterated its commitment to supporting African Peace and Security initiatives in achieving the AU's set objectives for 2014-2017.[451]

7.11.3 The United States

The United States is also supportive of the ASF project especially in technical, logistics and operational capacity building. The US-Africa Command[452] (hereinafter referred to as AFRICOM) has provided communication links to the ASF. This has improved the ASF's intelligence gathering and has led to the success of the simulated AMANI AFRICA training sessions.[453] The AFRICOM is also committed to providing the ASF with the most accurate, detailed and relevant information to enhance its planning and conduct of operations.

In 2014, the White House issued a statement that 'the United States has trained and equipped more than a quarter-million African troops and police for service in UN and AU peacekeeping

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[448] Council of the European Union, 'The Africa-EU Strategic Partnership: A Joint Africa-EU Strategy' (Lisbon, 9 December 2007) [para. 8(ii)] available at <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/er/97496.pdf> accessed 19 November 2016.

[449] European Union, 'EU-Africa Summit' (Tripoli, 29-30 November 2010) 5 available at <https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/er/117953.pdf> accessed 19 November 2016.

[450] See 'Fourth EU-Africa Summit' (2-3 April 2014, Brussels) [para. 2] available at <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/142096.pdf> accessed 19 November 2016.

[451] ibid., [para. 6].

[452] For more, visit <http://www.africom.mil> accessed 21 November 2016.

[453] United States Mission to the African Union, 'Amani Africa exercise gauges Africa Standby Force readiness,' available at <https://www.usau.usmission.gov/program-activites/amani-africa-exercise-gauges-africa-standby-force-readiness.html> accessed 21 November 2016.

operations.'[454] The US is a major financial donor to the UN peacekeeping operations working in various parts of Africa. During the US-Africa Leaders' Summit held in the year 2014, the Obama's administration initiated the African Peacekeeping Rapid Response Partnership similar to the South Africa's proposal (ACIRC) in 2013. The US has indicated its willingness to partner with Africa on "Early Warning and Response Partnership" through intelligence information sharing and "Security Governance Initiative."[455]

As Libya's experience has shown, these mechanisms may not produce the needed result if applied without the consent of the State. Thus, Williams has suggested that the external actors should focus their attention more on how to detect the causes of the conflict in order to prevent the consequences through preventive diplomacy and mediation.[456]

7.12 Possible limitations of the implementation of the R2P in Africa

There are a few textual inconsistencies regarding the AU's position on the R2P. First, while the AU member States accept the language of "responsibility" to protect as used in the 2005 World Summit Document,[457] the AU's Union Act and its Protocol use the word, "right."[458] "Responsibility" and "Rights" are not interchangeable. Individuals are not bound to exercise their civic right to vote, but they may be obliged to pay their taxes. Second, the AU has not defined the crimes that trigger humanitarian intervention nor adopted the definitions given in the Rome Statute.

Besides, the 2003 Protocol on amendments to the Constitutive Act includes a "serious threat to legitimate order"[459] as a ground for intervention. On the one hand, this element lowers the

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[454] United States Office of the Press Secretary, 'Fact Sheet: U.S. support for peacekeeping in Africa' (6 August 2014) available at <https://www.whitehouse.gov/the-press-office/2014/08/06/fact-sheet-us-support-peacekeeping-africa> accessed 21 November 2016.

[455] United States Office of the Press Secretary, 'Fact Sheet: U.S. support for peace, security, and countering violent extremism in Africa,' (27 July 2015) available at <https://www.whitehouse.gov/the-press-office/2015/07/27/fact-sheet-us-support-peace-security-and-countering-violent-extremism> accessed 21 November 2016.

[456] Paul D. Williams, *Enhancing U.S. Support for Peace Operations in Africa* (United States of America, Council on Foreign Relations 2015) 9.

[457] African Union Executive 7th Extraordinary Session, 'The Common African Position on the proposed reform of the United Nations: "The Ezulwini Consensus"' (Addis Ababa, Ethiopia, 7-8 March 2005) Ext/EX.CL/2 (VII) 6 [para. ii].

[458] *AU Constitutive Act* (n 2) [Art. 4(h)].

[459] *2003 Protocol to the Union Act* (n 335) [Art. 4(h)].

threshold of what is generally recognised as the most serious crimes of international concern.[460] It makes the breach of a State territory more likely than not. The worst scenario of its application is when a government uses excessive force to quell a legitimate democratic protest. On the other hand, Sturman and Baimu observe that this element is inconsistent with the general legal framework of the Union Act, in that it prioritises "national security" over "human rights."[461] In other words, the R2P applies only when there are serious threats to lawful order.

Third, the AU is yet to clarify the form a decision on intervention would take. That is, whether it should be a binding regulation or directive or whether it should be a recommendation, resolution or opinion.[462] Fourth, the AU is yet to clarify the method of intervention. That is, whether it will be restricted to the use of force or includes other measures such as mediation, economic sanctions, peacekeeping missions and any other non-forcible measures.[463]

Despite these shortcomings, ambiguities and textual inconsistencies, Article 4(h) of the Union Act provides the legal basis for the AU member States' right to intervene in the internal affairs of its members when there are gross violations of human rights.

7.13 Concluding Remarks

This chapter has evaluated humanitarian intervention as a contemporary issue that confronts the principle of the inviolability of State territory. This chapter started by assessing the philosophies underpinning the demand for the State border to be disregarded when a State grossly violates the human rights of its citizens. Such a claim seems absurd from the Hegelian perspective that perceives States as capable of objective and moral decisions. Kant argues that the inviolability of a State territory can only be respected if a State's conduct were universally accepted. State practice shows that the UN member States hardly arrive at a consensus on any issue.

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[460] *Rome Statute* (n 290) [Art. 1].

[461] Evarist Baimu and Kathryn Sturman, 'Amendment to the African Union's Right to Intervene: A shift from Human Security to Regime Security' (2003) 12(2) *African Security Review* 37-45, 42.

[462] Powell (n 326) 42-50.

[463] Corinne A. A. Packer and Donald Rukare, 'The New African Union and Its Constitutive Act' (2002) 96(2) *American Journal of International Law* 365-378, 372-373; Baimu and Sturman (n 461) 40.

This chapter went on to evaluate the theories of humanitarian intervention. It examined three theories, namely *ius naturale*, the fiduciary and the just war. Conceptually, these theories held that the principle of the inviolability of State territory should be disregarded when a State's conduct is *contra* human rights. However, this is an area where morality entangles with law. The modern international law does not permit the breach of State territory save for self-defence or authorised by the SC. Hence, humanitarian interventions are often criticised by the academics and the UN member States.

This chapter further examined the nature and scope of human rights. It considered the UDHR and the two bills of rights adopted by the UN General Assembly in 1966. These documents represent both the soft law and the hard law protecting the fundamental human rights. It observed that human rights could be a right enjoyed by a person or in association with others, otherwise known as the group rights. These rights, some of which are non-derogable, impose positive and negative obligations upon States. A gross violation of these rights is a fundamental repudiation of the international human rights instruments, which States have signed and ratified. But since a State cannot be coerced into complying with its international obligations, enforcement is usually persuasive and recommendatory. However, the Human Rights Treaty Bodies are deputed agents of the United Nations that enforce human rights law.

The genocides committed in Rwanda and Srebrenica changed the thinking of the international community on the sanctity of State territory. It seems no longer reasonable to standby while innocent civilians are killed. While the international community maintains that a State territory must be respected, it has re-interpreted sovereignty as responsibility. This means that the territory of a State that grossly and systematically violates human rights of its citizens could be violated. But no treaty has expressly permitted this, except Article 4(h) of the Constitutive Act of the African Union. It is to be seen whether Article 4(h) initiates the process of the codification of the right to humanitarian intervention. The contested debate, however, is that NATO's intervention in Kosovo has initiated the custom.

In the interim, the SC's authorisation is required for any intervention to be lawful if it were not a case of self-defence. Instead of undertaking unilateral actions against a State, it is preferable that States should avoid overt and covert action that might further the violations of human rights. The question remains, will the war in Syria, Yemen, Darfu, South Sudan have

continued without States supporting either the government or the opposition? If States genuinely respect the inviolability of State territory, it will mitigate some of the intra-States conflicts threatening international peace and security.

Chapter Eight

Conclusion and Recommendation

8.1 Conclusion

This dissertation started off with a hypothesis that the second limb of Article 2(4) is respect for the inviolability of State territory. Since the Charter was drafted, the UN member States have been obsessed with the first limb of Article 2(4), restricted to the threat or use of force. This unwittingly short-changed the realisation of the maintenance of international peace and security because the reason why the ICJ described Article 2(4) as the cornerstone of the United Nations Charter[1] fizzles out with incremental violations.

This narrow mind-set has delegalised Article 2(4) that should have been an all-inclusive prohibition against all forms of violation against a State. Consequently, States take advantage of its weak normative value to violate other States' territory while claiming to be subservient to their international obligations under the provision of Article 2(4). This applies when States covertly or overtly support the activities of non-State actors that violate the integrity of a State or engage in actions that are often regarded as mere frontier incidents.

Moreover, the narrow interpretation of Article 2(4) has left a gap which must be filled by a new law. Obviously, legislation is an exercise of the sovereign power.[2] The Permanent Court of International Justice held that a State might not exercise its power in any form in the territory of another State.[3] The judicial jurisprudence has also proven that jurisdiction is territorial.[4] Since States now legislate for cyberspace, it follows that the cyberspace has become part of States' territory. Meanwhile, the first limb of Article 2(4) restricted to physical armed force cannot apply in cyberattacks. The multiplicity of laws makes little sense when the broad meaning of Article 2(4) could protect States' territory adequately.

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[1] *Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v Uganda) Judgment ICJ Reports (2005) p. 168 [para. 148] [hereinafter *DRC v Uganda*].

[2] *Legal Status of Eastern Greenland*, Judgment PCIJ Series A/B, No. 53 (1933) 48.

[3] *The Case of the S.S. "Lotus"* (France v Turkey) Judgment PCIJ Series A, No. 10 (1927) 18 [hereinafter *Lotus case*].

[4] *Lotus case* (n 3) 18.

This dissertation argued that the total neglect of the broad meaning of Article 2(4) was an error given the context under which the UN Charter was drafted as well as its legal history. It, therefore, recommends a broad interpretation of Article 2(4) that reads, the respect for the inviolability of State territory. To achieve this objective, this dissertation consists of eight chapters.

Chapter one provides a general overview of the research, outlining the research question, methodology, aim, hypothesis, literature review and limitations.

Chapter two sets out the theoretical framework upon which the requirement of the respect for the inviolability of State territory is based. The first section defined a State. It evaluated territory as one of the conditions for statehood and why respect for a State territory is vital for the existence of any State. The second section analysed some theories that could give rise to a claim on the respect for the inviolability of State territory. Theories such as the Natural Law, the New Haven School, the International Relations as well as the Legal Positivism were studied. The third section traced the evolution of the law on the requirement to respect other States' territory under two periods, namely, Westphalia and Modern. Under the Westphalian State Model, the chapter argued that the treaty of Westphalia was intended to give the leaders of political units, exclusive powers over political and religious matters in their territory. Under the Modern State System, the chapter evaluated a series of multilateral and bilateral instruments aimed at protecting States' territory from an illegal external invasion.

Chapter three analysed Article 2(4) as the legal framework supporting the inviolability of State territory. It argued that this broad approach could be inferred from the contributions made by the UN member States during the drafting of the UN Charter, especially by the "weaker States." It is, therefore, not an accident that Article 2(7) which prohibited unlawful intervention in the internal affairs of a Sovereign State was codified. Moreover, the United Nations General Assembly showed strong commitment to prohibit unlawful violation of States' territories when it adopted Resolution 2625 (XXV) in 1970.[5] Therefore, arguments that support minimal incursions into the territory of a State are misplaced considering that Article 2(4) is a peremptory norm. Although arguments on *de minimis* incursions were meant to de-

[5] See generally, UNGA Res. A/RES/25/2625 (24 October 1970).

escalate conflicts among States, in the long term, they create distrust among States. As a result, the regional bodies have adopted legal instruments that expressly codified the inviolability of State territory.

Chapter four evaluated the problems associated with the narrow interpretation of Article 2(4) by examining the activities taken place in the cyberspace. It argued that the “threat or use of force” as traditionally understood cannot apply in cyberspace. However, the cybercrimes pose a serious threat to international peace and security if orchestrated or sponsored by a State against another State. This chapter demonstrated that a State-sponsored cyber warfare could produce a result similar in “effect” to those perpetrated by a State armed forces. Equally shown was that a State-sponsored or orchestrated cyber warfare could accompany or facilitate an armed attack. Consequently, States have enacted laws to assert their jurisdiction in cyberspace and by so doing have shown that the cyberspace has become part of their territory. This practice is contrary to the traditional scope that recognised only land, territorial sea and the airspace. It follows that the narrow interpretation of Article 2(4) does not adequately protect States’ territory.

Chapter five analysed various ways that States territories are violated to demonstrate its gravity and how it militates against the maintenance of international peace and security. It examined some of the breaches which have occurred on land, at territorial sea and in the airspace. This chapter unearthed the frivolity of the arguments often used by States to justify the breach of other States’ territory. The aim was to show that such excuses often classified as mere frontier incidents do not stand legal scrutiny because Article 2(4) is a peremptory norm. On that note, this dissertation raised objections against a possible clash between some instruments which purport to give States the right of innocent passage and the littoral States’ exclusive right over their territory. Such instruments are admissible insofar as they are contractual but cannot derogate the peremptory character of Article 2(4).

Chapter six is a continuation of chapter five from the viewpoint of the covert and overt support which States give to non-State actors. This chapter aimed at testing the viability of the requirement of the inviolability of States territory when part of a State territory is under the effective control of the non-State actors. It asks whether States could take reasonable steps to stop a violation perpetrated by non-State actors without the consent of the host

State or an explicit authorisation by the Security Council? This chapter observed that Article 2(4) does not apply to the actions of non-State actors. Therefore, there is no right to self-defence against the non-State actors without the consent of the host State, unless the wrongful act is attributed to the State in question. However, State practice appears to support the right to self-defence when the host State is "unwilling" and "unable" to prevent or to stop the said violation. But there is no evidence to assume that it has become a custom. Reliance on the condition of "unwilling" and "unable" could undermine the principle of the inviolability of State territory. This chapter recommends that a reformed Security Council should authorise any measure short of the right to self-defence as traditionally recognised.

Chapter seven evaluated whether humanitarian intervention is legally permitted when States' officials grossly violate the human rights of their citizens. A school of thought proposes that human rights are primordial to States' territory. Consequently, the inviolability of State territory has been understood as "responsibility." The international community could protect the fundamental rights of every human being when States fail in their responsibility to do so. The African Union has inserted such a right in Article 4(h) of the Constitutive Act of the African Union. This development is commendable and might signal the beginning of the process of codification of humanitarian intervention. While the responsibility to protect was not enforced during the genocides that occurred in Rwanda (1994) and Srebrenica (1995), it was enforced in Kosovo (1999). However, the African Union did not enforce the provision of Article 4(h) in the alleged gross violations of human rights that happened in Darfur in 2003 and Burundi in 2016. This indicates that the law has not changed much.

8.2 Recommendation

Given the gap created by the narrow interpretation of Article 2(4), this dissertation recommends the following resolution to the United Nations General Assembly as a remedy.

Proposed A/RES/2017/001

20 October 2017

<u>Proposal: Declaration on the Requirement to Respect the Inviolability of State Territory</u>

The General Assembly,

Mindful that Article 2(4) of the Charter requires that all members shall refrain in their international relations from the threat or use of force against the inviolability of State territory and political independence of any State,

Aware that Article 2(7) of the Charter requires the United Nations not to intervene in matters which are essentially within the domestic jurisdiction of any State,

Reaffirming that the Charter of the United Nations promotes the maintenance of international peace and security,

Recognising that the Security Council, acting under the mandate entrusted to it under Chapter VII of the United Nations Charter could authorise the breach of a State territory,

Considering that its resolution 2625 (XXV) of 24 October 1970 recognises that the development of friendly relations and co-operation between nations are among the fundamental purposes of the United Nations,

Recalling its resolutions 2131 (XX) of 21 December 1965 and 103 (XXXVI) of 9 December 1981, which affirmed the inadmissibility of intervention in the internal affairs of any State,

Recalling its resolutions 2533 (XXIV) of 8 December 1969, 2463 (XXIII) of 20 December 1968, 2327 (XXII) of 18 December 1967, 2181 (XXI) of 12 December 1966, 2103 (XX) of 20 December 1965, 1966 (XVIII) of 16 December 1963 and 1815 (XVII) of 18 December 1962, in which it recommended the importance of the progressive development and codification of the principles of international law concerning friendly relations and co-operation among States,

Convinced that the strict observance by States of the obligation to respect the inviolability of State Territory is an essential condition to ensure that nations live together in peace with one another since the practice of any form of violation could undermine the purposes of the Charter or could create situations which threaten international peace and security,

Solemnly declare the following principles:

1. That State shall respect the inviolability of State territory or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations.
2. That the principle referred to in paragraph 1 above shall be regarded as the principle to respect for the inviolability of State territory.
3. That the principle of respect for the inviolability of State territory shall not prevent the Security Council from exercising its primary function as codified in the Charter of the United Nations.
4. That the Security Council is authorised to exercise its mandate in accordance with the principles of international law and in pursuance of the purposes of the Charter of the United Nations.

8.3 The Justification of the Thesis' Proposal

The success or failure of the United Nations depends largely on its' ability to safeguard international peace and security. The first two sentences of the UN Charter read: 'We the peoples of the United Nations determined to save succeeding generations from the scourge of war, which twice in our life-time has brought untold sorrow to mankind….'[6] This preamble provides the context upon which the success or failure of the United Nations in achieving the provision of Article 2(4) must be assessed.

This dissertation has shown that seventy years after the UN Charter was drafted, the world is not free from the scourge of war. Stephen O'Brien, the UN under Secretary-General for Humanitarian Affairs and Emergency Relief Coordinator while addressing the Security Council in March 2017 said that the world is facing 'the largest humanitarian crisis since the creation of the United Nations.'[7] Although war is not the only material cause, O'Brien's report emphasised the need to stop all fighting.[8]

[6] United Nations, *Charter of the United Nations* (Signed at San Francisco on 26 June 1945, entered into force on 24 October 1945) 1 UNTS XVI [preamble para. 1(1)] [hereinafter *UN Charter*].
[7] UNSCOR, UN Doc. S/PV.7897 (10 March 2017) 4 [para. 5].
[8] ibid., 5 [para. 5].

It seems right to observe that the United Nations has not achieved its aims and objectives. Therefore, the thesis proposed above seeks to forestall a foreseeable failure of the United Nations in achieving its primary aim for the following reasons:

The first is a conceptual reason. According to Albert Einstein, 'peace is not the absence of war but the presence of justice, of law ….'[9] Peace in international politics is a relational process among international subjects toward a harmonious order of cooperation.[10] Therefore, peace-building is a process that must be based on mutual trust and respect. The level of trust required to maintain international peace and security will remain an illusion if States are prisoners of the first limb of Article 2(4). Conceptually, States will actively engage in a genuine dialogue with other States if their territory is respected. Otherwise, the pursuit of national interest will continue to undermine international peace and security. The thesis proposed here creates an atmosphere that could enthrone mutual trust, thereby providing a platform to achieving international peace and security.

The second is the teleological reason that examines the purpose for which the United Nations was established in the first place. If the aims and objectives of the United Nations were to be realised, States must rise from the minimalistic compliance with the provision of Article 2(4) to an unfettered commitment to respecting the inviolability of other States' territory. This requirement is directly and principally intended by those that drafted the UN Charter. International armed conflict does not start abruptly but developes over time due to a series of unpleasant experiences. That States protest whenever their territory is breached, either verbally or through diplomatic channels, implies they would want their territory to be respected. Therefore, the requirement to respect the inviolability of State territory is a viable principle that could enhance international peace and security.

The third is for practical reason. The chances that internal armed conflicts will persist if not covertly or overtly armed, financed, assisted or supported by States are slim. Would the Syrian civil war have dragged on for years if not for the assistance which States gave to the Assad's government or the moderate opposition? Perhaps not, because the defeated party

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[9] Otto Nathan and Heinz Norden (eds), *Einstein on Peace* (New York, Schocken 1968) 371.

[10] Jong Kun Choi, 'Crisis stability or general stability? Assessing Northeast Asia's absence of war and prospect for liberal transition' (2016) 42(2) *Review of International Studies* 287-309, 288.

will likely sue for peace. With due respect to the fact that a State confronted by internal armed struggles has a right to seek for and be assisted by other States, the law prohibits such assistance in the case of a civil war. Although the ICJ in the *Nicaragua* case ruled that financial and other assistance given to rebels do not constitute an armed attack,[11] how such assistance fosters international peace and security is yet to be seen. This thesis proposes that for practical reasons, neutrality is a reasonable option because active involvement often prolongs internal armed conflict and exacerbates humanitarian crisis. An objection might be that States should assist other States in need or that passivity toward the plight of the freedom fighters could entrench tyranny. However, this thesis proposes that these exceptions or any legitimate claim should be addressed through the Security Council.

The fourth reason is that the first limb of Article 2(4) does not cover the cyber-territory which has become an integral part of States' territory. If the ICJ's *obiter* that Article 2(4) is the cornerstone of the United Nations Charter[12] has merit, there is a need to extend its provision to the cyberspace. To avoid the duplication of laws, the requirement to respect the inviolability of State territory gives all-round protection to States' territory.

8.4 Further Research

This dissertation recommends further research on how this proposed draft resolution would be accepted by the International Community. It equally recommends further research on the compatibility of the thesis it proposes with the emerging principle of the responsibility to protect.

[11] *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v United States of America) Judgment ICJ Reports (1986) p. 14 [para. 195].
[12] See *DRV v Uganda* (n 1) [para. 148].

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