Military action to recover occupied territory – a lawful exercise of self-defence?

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1. Introduction

1.1 Introduction

The recent conflict between Armenia and Azerbaijan has raised important questions about the nature and scope of the right to self-defence under international law. Despite the intensity of the 2020 Nagorno-Karabakh inter-State conflict, few states have commented on the compatibility of the states’ measures under the *jus ad bellum* regime. One legal issue arising from this conflict, and that is surprisingly absent from the discourse in legal doctrine, is whether a state can invoke self-defence to forcibly recover part of its territory that is being occupied by another state.

Under the United Nations (UN) Charter, the right to self-defence is recognized as one of the few exceptions to the prohibition of the use of force. While the right for states to invoke self-defence is uncontroversial, the boundaries of this exception to the general prohibition of force are regularly tested and stretched in response to modern threats and challenges. While much academic scrutiny has been concentrated on the preventative forms of self-defence and when the right to self-defence can be triggered, not as much attention has been given to when self-defence ends. The question of whether a state can use force to recover occupied territory raises complex issues about the scope of self-defence. This is especially so due to the ongoing nature of occupation and whether this has implications on the temporal aspect of self-defence.

There are diverging views on the extent to which self-defence can be invoked in the context of military occupation. This issue also raises other concerns under international law such as the risk of undermining the principles of territorial integrity and respect for state sovereignty, as well as the risk of widening the scope of lawful use of force taken in self-defence. Denying a state the right to forcibly recover part of its territory that is under occupation may be construed as condoning the forcible occupation and favouring the aggressor. The question of whether a state can use force in self-defence to recover its occupied territory is an important issue with significant implications for international law and the maintenance of peace and stability in the international system. Thus, it is critical to carefully analyse the legal principles involved and the potential consequences of allowing or denying states such a right.
1.2 Research question and thesis statement

The aim of this thesis is to determine whether self-defence can be invoked by a state to recover parts of its territory that has been forcibly occupied as a result of an armed attack. The thesis will examine the legal conditions for when self-defence may be invoked under the *jus ad bellum* regime in order to apply these conditions in the context of forcible occupation. An assessment of whether occupation that has followed from an invasion preserves the existence of an armed attack or if the occupation itself can be considered as an armed attack must therefore be made. The thesis is not concerned with situations of active hostilities whereby the armed force is assessed under international humanitarian law. Instead, the aim of the thesis is to examine if self-defence can be invoked as a legal justification for using force to recover territory in the absence of active hostilities or where the occupied area is under the peaceful administration of the occupying power. Such an assessment also demands an examination of fundamental norms relating to the non-use of force to settle territorial disputes. In conclusion, the question this thesis seeks to answer is: Can a state invoke self-defence to forcibly recover a part of its territory that has been occupied as a result of an armed attack?

1.3 Structure

The thesis consists of six chapters. The second chapter presents the fundamental norms in international law relating to the prohibition of the use of force and the duty to settle territorial disputes peacefully. It also includes a discussion of territorial disputes and occupation of territory and why *jus ad bellum* is applicable when analysing states’ recourse to force in these scenarios. The third chapter describes the legal conditions for invoking self-defence. Chapter four is divided into two parts. The first part examines the characterization of forcible occupation within the framework of international law and its relevance for the possibility of invoking self-defence in such a scenario. The second part examines state practice by reviewing three conflicts in which armed force has been deployed in an attempt to recover occupied territory. In the fifth chapter the analysis of whether armed force can be justified as an exercise of self-defence when a state seeks to recover territory that is under occupation is made. In order to do so, the thesis will examine if forcible occupation can be considered to constitute an armed attack of an ongoing nature and what implications that may have for the conditions of self-defence. The sixth and final chapter analyse and summarize the previously reviewed material by presenting the conclusions drawn in the thesis as well as offering reflections of these findings.
2. Non-use of force as a fundamental norm in international law

2.1 The prohibition on the use of force

The most important primary rule regulating the prohibition on the use of force between states under international law can be found in article 2(4) of the UN Charter. The provision establishes that: All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purpose of the United Nations. This prohibition, also referred to as the ‘principle of non-use of force’, is a fundamental rule for the maintenance of international peace and security and for saving “succeeding generations from the scourge of war”.

An important aspect for this thesis on the prohibition on the use of force relates to the notion of territorial integrity. The ICJ has highlighted the importance of the principle of territorial integrity in the international legal order. The inclusion of “territorial integrity” in art. 2(4) of the UN Charter indicates that particular emphasis is given to the protection of this attribute of statehood.

2.2 The principle of peaceful settlement of international disputes

Closely intertwined with the prohibition of the use of force is the principle of peaceful settlements of international disputes. Article 2(3) of the UN Charter establishes that: All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.

There has been an enormous effort by the international community to strengthen the meaning of this principle and increase its relevance. The principle has been affirmed in several documents, one of which is in the 1970 UN General Assembly (UNGA) Declaration on Principle of International Law Concerning Friendly Relations and Cooperation among States.

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2 Ibid, Art. 2(4).
4 Preamble to the UN Charter (n 1).
7 UN Charter (n 1), art. 2(3).
in Accordance with the Charter of the United Nations (Declaration of Friendly Relations).\textsuperscript{8} The document confirms the duty of all states to refrain from the use of force to violate existing international boundaries of other states and to not use force as a means of solving international territorial disputes and problems concerning frontiers of states.\textsuperscript{9} It also confirms that states must refrain from using force to violate international lines of demarcation, such as armistice lines.\textsuperscript{10}

In addition to the obligation for states to solve their international disputes by peaceful means, states are also required to prevent conflict situations. Several international documents recognizes that states must refrain from acting in a way that risk aggravating disputes in their international relations since this may endanger the maintenance of international peace and security, making a peaceful settlement of the dispute more difficult.\textsuperscript{11} In the 2005 World Summit, UNGA once again emphasized its determination to uphold the resolution of disputes by peaceful means in conformity with the principle of justice in international law.\textsuperscript{12} In the World Summit Outcome Document it is stated that peace and security, development, and human rights are the pillars of the UN system and the foundation for collective security and well-being.\textsuperscript{13} The focus by the UNGA thus seem to be on reorienting international disputes away from aggression and towards partnership and cooperation in an effort not to jeopardize international peace, security and justice.

\subsection*{2.2.1 Territorial disputes and occupation of territory}
Territorial disputes usually revolve around competing claims to a territory. Such disputes often involve one state being dissatisfied with the current territorial \textit{status quo}\textsuperscript{14} and another state wanting to maintain the \textit{status quo} of the territory.\textsuperscript{15} Although not all situations of military occupation have come about due to a territorial dispute or competing claims over a

\begin{footnotesize}
\begin{enumerate}
\item UNGA Res 2625 (XXV) (24 October 1970).
\item Ibid, Principle 1.
\item Ibid.
\item See e.g. Declaration on the Prevention and Removal of Disputes and Situations Which May Threaten International Peace and Security and on the Role of the United Nations in This Field, UNGA Res. 43/51 (5 December 1988), para 1; Organization for Security and Co-operation in Europe, Conference on Security and Co-operation in Europe: Final Act of Helsinki, 1 August 1975, art. V.
\item UNGA, 2005 World Summit Outcome, UNGA Res. 60/1 (24 October 2005), para 5.
\item Ibid, para 9.
\item \textit{Status quo} meaning ‘the existing situation’.
\end{enumerate}
\end{footnotesize}
territory, the rules governing territorial disputes have significance in such situations, as will be elaborated on in this thesis. The focus of the thesis will however be on situations of military occupation that has materialized after an invasion or attack. This scenario will be referred to as a ‘forcible occupation’.

One important legal aspect in the situation of forcible occupation of territory is that occupation cannot produce a transfer of title over the territory to the occupying power. Even if the occupied state loses possession of the occupied territory, its sovereign title over the territory remains.\textsuperscript{16} Art. 4 of Additional Protocol 1 to the Geneva Conventions, affirms the principle that occupation of territory will not affect the legal status of it.\textsuperscript{17}

The principle of peaceful settlements of disputes, combined with the prohibition on the use of force, regulates the illegality for states to use force to settle territorial disputes. Consequently, international law does not permit the use of force to acquire territory. Art. 5(3) of UNGA’s Definition of Aggression, adopted in 1974, declares that no territorial acquisition resulting from aggression “is or shall be recognized as lawful”\textsuperscript{18}. Art. 3(a) of the same document defines an invasion that is followed by occupation as an act of aggression.\textsuperscript{19} The rules of not recognizing a situation of unlawful occupation as lawful are firmly established under international law. Articles 40 and 41 of the 2001 International Law Commission’s (ILC) Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA) stipulate that, when a serious breach of an obligation under peremptory norms of general international law happens, no state shall recognize as lawful a situation created by such a serious breach.\textsuperscript{20}

In order to examine when a territory is considered occupied one must turn to international humanitarian law (IHL). The presence of foreign troops in a territory does not automatically render that territory occupied. The legal criteria for determining if a situation amounts to an occupation is contained in art. 42 of the 1907 Hague Regulations. It stipulates that:

“\texttt{[t]erritory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been}”

\textsuperscript{16} Yoram Dinstein. \textit{The International Law of Belligerent Occupation} (Cambridge University Press 2009), 49.
\textsuperscript{17} Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1125 UNTS 3, 8 June 1977, art. 4.
\textsuperscript{18} UNGA Res 3314 (XXIX) (14 December 1974), art. 5(3).
\textsuperscript{19} Ibid, art. 3(a).
established and can be exercised". The notion of occupation was expanded by art. 2 common to the 1949 Geneva Conventions, to also include occupation that does not encounter any armed resistance. Hence, forcible occupation can come about without any hostilities either preceding or following it. Whether an invasion has developed into an occupation is determined by the facts on ground. The particular legal requirements of determining a state of occupation under IHL is outside the scope of this thesis. But, in short, the determination of a situation of occupation is based on the effective control exercised in the territory by the occupying power. Although the existence of occupation is determined under IHL, the forcible occupation of a territory have implications for legal assessments under the jus ad bellum regime.

2.3 The applicability of jus ad bellum to the use of force in occupied territory

The next chapter will examine one of the few exceptions to the prohibition on the use of force, namely self-defence. In order to examine how self-defence operate in the context of forcible occupation and to ascertain which forcible actions taken by states are prohibited, it is necessary to first establish the applicability of jus ad bellum to using force to recover occupied territory.

The relationship between jus ad bellum and jus in bello is not completely clear. They are two independent branches of international law that deals with the phenomenon of armed force from different perspectives. The jus ad bellum framework governs the legality of inter-State forcible measures. The jus in bello, or IHL, comes into play once the use of force has materialized and reached the threshold of an armed conflict and regulates the different aspects of the hostilities.

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21 Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land, 18 October 1907, art. 42.
22 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention), 12 August 1949, 75 UNTS 31, art. 2.
23 Armed Activities Case (n 3), para. 173.
24 For a more detailed discussion on determining a state of occupation see e.g. Tristan Ferraro, ‘Determining the beginning and end of an occupation under international humanitarian law’, (2012) 94 International Review of the Red Cross 133.
The interplay between these two regimes has been subjected to much academic attention.\textsuperscript{26} The traditional conception of this interplay proposes that once \textit{jus in bello} is applicable then \textit{jus ad bellum} cease to operate.\textsuperscript{27} Since common article 2 of the Geneva Conventions provides that IHL applies in situations of occupation, the traditional approach would be that the \textit{jus ad bellum} regime is not relevant in such situations. However, the view that \textit{jus in bello} can operate unaffected by \textit{jus ad bellum} does not seem to apply in practice. It is generally accepted today that the \textit{jus ad bellum} and \textit{jus in bello} are complementary regimes and can apply simultaneously. The position that only the initial use of force leading to occupation falls within the scope of \textit{jus ad bellum} and the subsequent hostilities is exclusively governed by \textit{jus in bello} is deemed to be outdated in modern international law.\textsuperscript{28}

The position taken in this thesis is that there is a dual application of \textit{jus ad bellum} and \textit{jus in bello} in the context of forcible occupation. Since the focus of the thesis is not on the initial stage of an invasion, but rather the subsequent situation in which a state has forcibly occupied another state’s territory, the fact that IHL is applicable does not obscure the need for a proper legal basis under the \textit{jus ad bellum} regime when resorting to using force. The view that the parties involved in a situation of occupation can resume hostilities during any point in time without the need for a justification under the \textit{jus ad bellum} regime appears to be a minority position that does not find support in state practice.\textsuperscript{29}

Lastly, it should be noted that situations of forcible occupation cannot be regarded as a purely intra-state phenomenon. Under \textit{jus ad bellum}, the use of force that is carried out by a state on its own territory does not fall within the scope of the prohibition of the use of force. In situations of occupation, a state is \textit{de facto} carrying out force within its own territory when it is undertaking military action within the occupied area. However, the circumstances in a situation of occupation does not prevent the application of \textit{jus ad bellum}, if the force is directed against another state or its external manifestations.\textsuperscript{30} Since forcible occupation is regarded as an act of aggression and as using force against the territorial integrity of a state, such a situation confirms the existence of an inter-State conflict.\textsuperscript{31}

\begin{footnotesize}
\begin{itemize}
\item[27] Marco Longobardo, The Use of Armed Force in Occupied Territory (Cambridge University Press 2018), 118.
\item[28] Ruys and Silvestre, ‘Military Action to Recover Occupied Land’ (n 25), 674.
\item[29] Ibid, 677.
\item[30] Ibid, 681.
\item[31] Dinstein, Belligerent Occupation (n 16), 32.
\end{itemize}
\end{footnotesize}
occupied territory therefore falls within the scope of art. 2(4) of the UN Charter. The legality of such action depends on whether it can be justified as an act of self-defence or if it has been authorized by the Security Council.
3. Self-defence

3.1 Self-defence as a rule and as custom

The most significant exception to the prohibition on the use of force is the possibility for states to exercise the right of self-defence. The rule is set out in art. 51 of the UN Charter. It proscribes that states have an inherent right of individual or collective self-defence if an armed attack occurs. The Charter itself thus seem to confirm that the possibility of invoking self-defence was part of customary international law prior to the establishment of the UN Charter in 1945.

Art. 51 in the UN Charter must be read in conjunction with article 2(4). As previously noted, art. 2(4) outlines the general obligation to refrain from the use of inter-state force. An exception to art. 2(4) in which states can initiate force unilaterally is by invoking self-defence. There are some requirements that must be met for a state to be able to exercise this right. First and foremost, self-defence can only be taken in response to an armed attack, as made explicit in art. 51 of the UN Charter. Secondly, the response may only be directed against the state that is responsible for the attack. And lastly, the lawfulness of the response depends on the necessity and the proportionality of the measures taken by a state in self-defence. Consequently, for a state to invoke self-defence to justify forcible measures, the state must prove that the conditions giving rise to the exercise of self-defence were met and that the measures taken were both necessary and proportionate.

Additionally, it should be noted that there are also procedural requirements to the exercise of self-defence. Art. 51 of the UN Charter requires a state to report any measures taken in self-defence to the Security Council. It is however generally accepted that a failure to report does not turn a lawful exercise of self-defence into an unlawful one.

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32 UN Charter (n 1), art. 51.
34 Armed Activities Case (n 3), para 146.
35 Nicaragua Case (n 33), paras 194 and 237.
36 Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America) (Merits) [2003] ICJ Rep 161, paras 51 and 57.
also requires a state exercising self-defence to stop its forcible action once the Security Council have taken measures in response the armed attack.\textsuperscript{38}

\textbf{3.1.1 Requirements of self-defence}

\textit{3.1.1.1 Armed Attack}

Any state that is subjected to an armed attack has the possibility of resorting to counterforce in self-defence. Art. 51 of the UN Charter sets out the threshold requirement of force. Only an armed attack can legitimize a response in self-defence. Conversely, any violation of international law falling short of an armed attack does not legitimize such a response.\textsuperscript{39} To define what constitutes an armed attack is not the easiest undertaking. Nothing in the UN Charter describes what an armed attack is. The International Court of Justice (ICJ) has expressed that an armed attack constitutes “the most grave form of the use of force”.\textsuperscript{40} Thus, an armed attack must consist of use of force of a certain gravity taken by one state against other and being aimed at the territory, or the agents, of the targeted state.\textsuperscript{41}

The ICJ has acknowledged that there seem to exist a general agreement on the nature of acts that could be viewed as constituting an armed attack. The Court cited art. 3(g) of the Definition of Aggression and affirmed that the action by regular forces, or the sending by or on behalf of a state of armed bands carrying out acts of armed forces across an international border, is generally agreed to be considered as an armed attack. According to ICJ, this paragraph may be taken to reflect customary international law.\textsuperscript{42}

\textit{3.1.1.2 Necessity and proportionality}

The ICJ has repeatedly pointed out that when exercising the right of self-defence, a state needs to meet the conditions of necessity and proportionality. Although these conditions are part of customary law and are not mentioned in art. 51 of the UN Charter, the ICJ have affirmed that they apply to any use of force taken in self-defence.\textsuperscript{43}

\textsuperscript{38} UN Charter (n 1), art. 51.
\textsuperscript{39} Dinstein, War, Aggression and Self-Defence (n 33), 205.
\textsuperscript{40} Nicaragua Case (n 33), para 191.
\textsuperscript{41} Corten (n 33), 400-01.
\textsuperscript{42} Nicaragua Case (n 33), para 195; Armed Activities Case (n 3), para 146.
\textsuperscript{43} Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion) [1996] ICJ Rep 226, para 41; Nicaragua Case (n 33), para 176.
The necessity criterion of self-defence requires the state that has been the victim of an armed attack to show that it would have been unreasonable to expect an attempt of non-forcible measures in response. This means that a forcible response in self-defence must be the last resort in the sense that there were no other practical or reasonable alternatives. The criterion does not require that other means, such as negotiation, have been attempted before the resort to counterforce. Although, have such means been attempted, and failed, it could be an indication of the necessity to respond forcibly. Hence, force is left as the only reasonable option for the state to repel the attack.

The proportionality criterion requires a responding state to take forcible measures that is proportionate to the established defensive necessity. Some scholars argue that the criterion indicate that there is an equivalence or symmetry between the armed attack and the response taken in self-defence. Others argue that proportionality instead require that the force taken in response is not excessive in relation to the aim of abating or repelling the armed attack.

It is important to note that both criterions are flexible and context specific. Since the necessity and proportionality of a response in self-defence will depend on the specific circumstances, both criterions lack certainty. The response will also depend on whether the international community accept that the response was reasonably taken as a last resort and that it was not excessive in relation to the need to act.

3.1.1.3 The temporal aspect of self-defence
The requirements of necessity and proportionality are accompanied by a third condition. The condition of immediacy. It is debated whether immediacy is a standalone criterion for exercising self-defence, or if it only is closely intertwined with the dual customary requirements. The notion of immediacy has not been expressly acknowledged by the ICJ in its jurisprudence. However, the Court’s assessment of the necessity criterion in the Nicaragua case seems to be heavily influenced with the notion of immediacy. The Court held that the forcible measures taken by the United States, several months after the occurrence of the attack

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44 Green (n 37), 101.
45 Ibid.
47 Green (n 37), 101.
48 Ibid.
49 See e.g. Ibid, 108; Dinstein, War, Aggression and Self-Defence (n 33), 249.
and when the main threat could be eliminated in a different manner, did not meet the requirement of necessity.\textsuperscript{50} An interpretation of this could be that if a response is taken long after the initial attack, it likely shows that there was no genuine immediate need to respond, making the response unnecessary.

The condition of immediacy does not necessarily demand that self-defence can only be exercised while an armed attack is still in progress. However, it does signify the temporal element of responding to an armed attack. There is a need to distinguish between the lawful force taken in self-defence and the concept of armed reprisals, which has no legal basis under international law.\textsuperscript{51} The distinction between legitimate self-defence and illegal armed reprisals does not only lie in the time-lapse between the attack and the response. Other factors such as the nature of the response, its purpose and objectives are also of importance.\textsuperscript{52} The difference between a state exercising legitimate self-defence or making a punitive response or pursuing some other purpose rather than repelling the attack is not necessarily an easy distinction. Normally, self-defence is only admissible if it began while the attack was ongoing and not once it has already ended.\textsuperscript{53} Still, a flexible approach to the need for an immediate response to an armed attack is generally accepted. As noted under the necessity criterion, if a state tries to first negotiate and then realizes that there is nonetheless a need to resort to defensive force due to failure of the negotiations, the possible delay in the response does not automatically render the act unlawful. This would also be true for situations when a victim state need time to gather intelligence, or time to prepare a coordinated response or if there is a need for a domestic political decision-making process before the armed response.\textsuperscript{54}

\textsuperscript{50} Nicaragua Case (n 33), para 237.
\textsuperscript{52} Ibid, 369.
\textsuperscript{53} Corten (n 33), 482.
\textsuperscript{54} Tom Ruys, ”Armed Attack” and Article 51 of the UN Charter: Evolutions in Customary Law and Practice (Cambridge University Press 2010), 100.
4. Forcible occupation of territory

4.1 What does the law say?

IHL sets out the legal criteria for determining if a situation amounts to occupation. However, it does not give any guidance on the notion of occupation under the *jus ad bellum* regime. Art. 3(a) of UNGA’s Definition of Aggression provides that military occupation, however temporary, resulting from an invasion or attack by the armed forces of a state, qualifies as an act of aggression.\(^{55}\) The paragraph specifies that it is not just the initial invasion or attack that constitutes an act of aggression, but also the resulting military occupation. The phrasing that “any military occupation, however temporary” is regarded as an act of aggression indicates that the aggression could be of an ongoing nature since occupation of territory can maintain during long periods. Regardless of whether forcible occupation constitutes an act of aggression of a continuing nature under international law, this would not inevitably allow a state to invoke self-defence to take forcible action. Such a justification for using force can only be taken in response to an armed attack.

The ICJ observed in the *Armed Activities* case that “article 51 of the UN Charter may justify a use of force in self-defence only within the strict confines there laid down”\(^{56}\). In the *Oil Platforms* case, the ICJ also noted that a state needs to demonstrate that it has been the victim of an “armed attack” in order to justify the use of armed force in self-defence.\(^{57}\) That only an armed attack can justify the invocation of self-defence has also been reiterated by the Eritrea-Ethiopia Claims Commission in its Partial Award on *Jus ad Bellum*. The Commission held that the text in art. 51 of the UN Charter makes it clear that a valid claim of self-defence can only be established when the state resorting to force has been subjected to an armed attack.\(^{58}\) Thus, in the absence of an armed attack, invoking self-defence is not an option available to states. Unless an act of aggression also could be construed as amounting to an armed attack, such action cannot trigger the invocation of self-defence. While the terms of armed attack and aggression may partly coincide, they are not interchangeable.

The existence of forcible occupation also constitutes a continuing wrongful act. Art. 14(2) ARSIWA provides that internationally wrongful acts can have a continuing character and that

\(^{55}\) UNGA Res 3314 (n 18), art. 3(a).
\(^{56}\) Armed Activities Case (n 3), para 148.
\(^{57}\) Oil Platforms Case (n 36), para 57.
the breach of an international obligation can extend over the entire period during which the act continues and remains not in conformity with the international obligation.\(^{59}\) According to the ILC, one example of a continuing wrongful act is the “unlawful occupation of part of the territory of another State or stationing armed forces in another State without its consent”\(^{60}\). The continuation of occupation over a territory would constitute a breach of a state’s international obligations, such as the prohibition on the use of force. Nevertheless, simply defining occupation as a continuing international wrongful act does not have any legal implications for the invocation of self-defence. The prohibition of the use of force and the notion of armed attack have different meanings and functions under international law. The principle of non-use of force is a prohibitive norm, giving rise to state responsibility if breached. The notion of an armed attack instead serves as the trigger to determine if a state can invoke self-defence to use force.\(^{61}\)

Construing forcible occupation as an ongoing armed attack that allows an occupied state to invoke self-defence to forcibly recover the occupied territory is a concept that has been voiced by both states and scholars. For example, Iran argued in the ICJ *Oil Platforms* case that “in the case of the invasion of another State’s territory, in principle an attack still exists as long as the occupation continues”\(^ {62}\). In order to assess state practice and the arguments put forth by states in situations where military action has been used by states to try to recover occupied territory, the thesis will highlight three conflicts that centres around this issue. As will be illustrated, state practice and the arguments invoked by states on this issue are not cohesive, nor do the arguments put forth by states necessarily rely on a legal assessment of the forcible action taken under the *jus ad bellum* regime.

### 4.2 State practice

#### 4.2.1 Yom Kippur War

The Yom Kippur War, also known as the Fourth Arab-Israeli War, was fought between Israel on one side and Egypt and Syria together with armed forces from other Arab states on the other. The conflict lasted between 6\(^{th}\) to 24\(^{th}\) October 1973 and is closely intertwined with the

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\(^{59}\) ARSIWA (n 20), art. 14(2).

\(^{60}\) ILC, Draft Articles on the Responsibility of States for Internationally Wrongful Acts (DARSIWA), with Commentaries (November 2001) 2 Yearbook of International Law Commission 31, p 60, para. 3.

\(^{61}\) Ruys and Silvestre, ‘Military Action to Recover Occupied Land’ (n 25), 689.

\(^{62}\) *Case Concerning Oil Platforms* (Islamic Republic of Iran v. United States of America) (Reply and Defence to Counter-Claim submitted by Iran) [1999] para 7.47.
1967 Six Day War, after which Israel had occupied several Arab territories.\textsuperscript{63} The Six Day War ended with a ceasefire, requested by the Security Council.\textsuperscript{64} In 1967 the Security Council also adopted Resolution 242 (1967) that emphasized the inadmissibility of acquiring territory by war and required Israel to withdraw its armed forces from the occupied territories.\textsuperscript{65} Israel refused to withdraw its armed forces from pre-war lines\textsuperscript{66} and there were several major incidents that disrupted the ceasefire in the years following the Six Day War.\textsuperscript{67} The Yom Kippur War began when Egypt and Syria decided to take back their territories by force and launched a large-scale attack against Israel on 6\textsuperscript{th} October 1973.\textsuperscript{68} Egypt and Syria initially succeeded in taking back parts of the occupied territories, but at the end of the hostilities Israel had managed to reclaim the contested territories.\textsuperscript{69}

It is difficult to determine the precise legal arguments put forth in the Yom Kippur War since the parties to the conflict as well as third states and other actors largely referred to the general context of the Arab-Israeli conflict. Moreover, the uncertainty regarding the facts on the ground further complicates the analysis of the different positions that were invoked.\textsuperscript{70} Israel and the Arab States accused each other of aggression and violations of the ceasefire agreement. Syria claimed that Israel had launched the military aggression and that they had responded, without explicitly invoking self-defence as a justification for its use of force.\textsuperscript{71} Egypt accused Israel of committing an act of aggression by attacking its forces and declared that it was exercising its legitimate right of self-defence.\textsuperscript{72} Conversely, Israel accused the two states of launching the attack across the ceasefire lines and invoked its right to self-defence.\textsuperscript{73} Egypt further elaborated on a Security Council meeting the 11\textsuperscript{th} October 1973 that the

\textsuperscript{65} UNSC Res 242 (22 November 1967) UN Doc S/RES/242.
\textsuperscript{66} Further: Report by the Secretary-General on the activities of the Special Representative to the Middle East (1971) UN Doc S/10070/Add.2, para 12.
\textsuperscript{68} UN Truce Supervision Organization Reports on Outbreak of Hostilities (6 October 1973) UN Doc S/7930/Add. 2141, 2142.
\textsuperscript{69} Dubuisson and Koutroulis (n 63), 191.
\textsuperscript{70} Ibid, 192.
\textsuperscript{71} Letter from the Permanent Representative of the Syrian Arab Republic to the United Nations addressed to the President of the Security Council (6 October 1973), UN Doc S/11009.
\textsuperscript{72} Letter from the Minister for Foreign Affairs of Egypt to the President of the General Assembly (6 October 1973), UN Doc A/9190.
\textsuperscript{73} Letter from the Minister for Foreign Affairs of Israel to the Secretary-General (7 October 1973), UN Doc S/11011.
hostilities are taking place in their national territory and that they will continue to defend themselves since the Arab people have been the victim of aggression since 1967. An interpretation of this is that Egypt invoked a subsidiary justification for its resort to force in response to the aggression by Israel that Egypt argued had been ongoing for six year.

Many states supported the Arab States in their use of force against Israel in the attempt to liberate and retake their national occupied territory and restore their territorial integrity. There were only a few instances where specific mention of the exercise of self-defence by Egypt and Syria were made in relation to the occupation of their territories by Israel. No state explicitly supported Israel’s invocation of self-defence. This may suggest that most states condemned Israel’s continuing occupation and opposed Israel’s use of force to remain in the territory. When looking at states’ views on the Yom Kippur War, the general consensus seemed to be that Israel was viewed as the aggressor, and that Egypt and Syria’s resort to force was justified due to the occupation of their territories. Although not explicitly articulated by the states, it is possible that the supporting states equated Israel’s continuing occupation and aggression with a continuing armed attack in the sense that it justified forcible response in self-defence for Egypt and Syria.

4.2.2 Falklands War

The 1982 Falklands War was a conflict between Argentina and the United Kingdom over the sovereignty of the Falkland Islands and the Falkland Islands Dependencies. Both states had competing claims over the validity of the title over the territory. In 1965, UNGA called attention to the existence of a territorial dispute and requested the parties to negotiate to find a peaceful solution. Between 1966 and 1982 there were bilateral negotiations between UK and Argentina. The dispute swiftly turned into a military conflict when Argentina invaded the Falkland Islands on the 2nd of April in 1982. The conflict ended shortly thereafter, on June 14th, with Argentina surrendering.

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74 UNSC Official Records, 28th Year, 1745th Meeting (7 October 1973) UN Doc S/PV.1745, para 190.
75 See e.g. Ibid, paras 36 (Guinea) and 54-58 (Peru); UNSC Official Records, 28th Year, 1744th Meeting (9 October 1973) UN Doc S/PV.1744, paras 166 (Indonesia) and 199 (Sudan).
76 See e.g. UN Doc S/PV.1744 (n 84), paras 16 (Yugoslavia) and 179 (India); UN Doc S/PV.1745 (n 74), para 159 (Union of Soviet Socialist Republics).
77 Dubuisson and Koutroulis (n 63), 197.
78 Question of the Falkland Islands (Malvinas), UNGA Res 2065 (XX) (16 December 1965) UN Doc A/RES/2065.
Argentina invoked various justification for its military actions. Argentina claimed that for nearly 150 years they had been the object of continuous acts of aggression perpetrated by the UK, who maintained a colonial situation that originated from an act of force followed by illegal occupation. They also argued that UK’s continued refusal to take effective steps to settle the dispute over the past 16 years constituted an additional form of aggression against them. UK condemned the invasion and said that it was a blatant violation of art. 2(3) and 2(4) of the UN Charter.

The Security Council adopted Resolution 502 (1982) which qualified the invasion as a breach of the peace and demanded that Argentina immediately ceased the hostilities and withdrew its forces. There was an unanimous condemnation of Argentina’s invasion among the western states. Although there were many states that endorsed the validity of Argentina’s claim to the territory, they remained critical of Argentina’s actions. The overwhelming majority of states requested an immediate cessation of hostilities and for the states to peacefully settle the dispute. The UK also viewed Argentina’s invasion and continuing presence in the territory as an illegal occupation and invoked Argentina’s failure of complying with Resolution 502 (1982) as a justification for taking whatever measures may be needed in exercise of their inherent right of self-defence.

One striking feature of the Falklands War is that despite the strong support for Argentina’s claim of sovereignty over the territory, states did not approve of Argentina’s recourse to force to reclaim the territory. This demonstrates a strong confirmation by states of the relevance of the prohibition of using force to settle territorial disputes, regardless of the merits of the territorial claim. The response indicates that most states would agree that the prohibition against force is applicable also in situations where a state, who holds the valid title over a territory, seeks to recover that territory. Thus, the protective scope of the prohibition to use

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80 UNSC Official Records, 37th Year, 2345th Meeting (1 April 1982) UN Doc S/PV.2345, paras 59 and 63.
81 UNSC Official Records, 37th Year, 2346th Meeting (2 April 1982) UN Doc S/PV.2346, para 5.
83 See e.g. UNSC Verbatim Record (2 April 1982) UN Doc S/PV.2349, paras 7 (France), 18 (Ireland), 21-22 (Australia), 27-28 (Australia) and 33 (New Zealand).
84 Henry (n 79), 367-68.
85 See e.g., UNSC Official Records, 37th Year, 2360th Meeting (21 May 1982) UN Doc S/PV.2360, paras 155 (Ireland), 176 (Japan), 187 (Brazil) and 201 (Ecuador).
86 Letter from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the President of the Security Council (13 April 1982) UN Doc S/14973; Letter from the Permanent Representative of the United Kingdom of Great Britain and Northern Island to the United Nations addressed to the President of the Security Council (28 April 1982) UN Doc S/15006.
force does not cease to apply in situations of territorial disputes, even if the territory may be considered to have been illegally taken from the state that seeks to recover it by force.

Another aspect worth mentioning is the situation relating to Southern Thule, an island belonging to the island group the South Sandwich Islands. The island group had long been administered by the UK, but Argentina had advanced a claim to the islands in 1937. In 1976, Argentina established a station on Southern Thule without seeking authorization from the UK. Shortly after the UK had recovered possession of the Falkland Islands in 1982, they reported to the Security Council that they had successfully recovered possession of the South Sandwich Islands through the formal surrender by the Argentinian station’s personnel. The UK stated that the action was undertaken in an exercise of its inherent right of self-defence as recognized under art. 51 of the UN Charter. The UK therefore invoked self-defence to recover a part of an island where they said Argentina had been illegally present for six years. Whether the UK regarded the ten naval and one air force personnel stationed at Southern Thule as Argentina illegally occupying the island is not expressed in their letter to the Security Council. The legality of invoking self-defence to recover an island, far away from, and not involved in the hostilities on the Falkland Islands, six years after the station was established there, was also not commented on in the letter.

4.2.3 Nagorno-Karabakh

The dispute over the territory of Nagorno-Karabakh between Armenia and Azerbaijan has a long history. In 1918 Azerbaijan had proclaimed its independence and Nagorno-Karabakh had been recognized as part of its territory. During the subsequent Soviet Era, the region enjoyed political, economic and cultural autonomy. In the late 1980s the Nagorno-Karabakh region declared its wish to separate from Azerbaijan. The dispute quickly escalated into a full-scale war that ended with a ceasefire in 1994. The ceasefire agreement left Nagorno-Karabakh de facto independent, although it was heavily reliant on Armenia, who had taken part in the hostilities and had occupied several of Azerbaijan’s regions. Prior to the ceasefire

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87 Letter from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the President of the Security Council (21 June 1982) UN Doc S/15246.
agreement, the Security Council adopted several resolutions calling for the immediate withdrawal of all occupying forces, reaffirming the sovereignty and territorial integrity of Azerbaijan as well as reiterating the inviolability of international borders and the inadmissibility of using force to acquire territory.91

Since the 1994 ceasefire agreement the widely held consensus have been that Nagorno-Karabakh is occupied by Armenia. For example, the European Court of Human Rights has recognized that Armenia is supporting the “Nagorno-Karabakh Republic” with military, political and financial support and concludes that Armenia is exercising effective control over Nagorno-Karabakh and the surrounding territories.92 Moreover, UNGA has called upon Armenia to withdraw its armed forces from the occupied territory of Azerbaijan and reaffirmed that the situation resulting from the occupation of Azerbaijan’s territories shall not be recognized as lawful by any state.93 Despite the relative tense coexistence, the territorial status quo established after the ceasefire in 1994 remained unaltered until the breakout of renewed hostilities in the region in 2020. An Azerbaijani offensive led to the recapturing of parts of its previously occupied territory.94 Six weeks after the breakout of renewed hostilities, the parties agreed to a ceasefire.95 Armenia also agreed to accept the outcome of Azerbaijan’s offensive and retrocede control over districts that remained occupied.96 The outcome of the conflict in 2020 led to Azerbaijan recapturing much of the territory it had lost more than a quarter of a century ago.97

Despite the intensity of the conflict and the victorious outcome for Azerbaijan in recovering parts of its previously occupied territory, few states have commented on Azerbaijan’s military actions compatibility with the jus ad bellum regime. A contributing factor may be due to the difficulty of ascertain the facts on the ground.98 Armenia and Azerbaijan accused each other

92 European Court of Human Rights, Case of Chiragov and Others v. Armenia, Application Number. 13216/05 (2015), para 186.
94 Statement/Europe & Central Asia (n 90)
96 Ibid, paras 2 and 6.
97 Statement/Europe & Central Asia (n 90)
of triggering the hostilities. Armenia claimed that there were undeniable facts that Azerbaijan initiated the aggression.99 Azerbaijan on the other hand, claimed that the armed forces of Armenia blatantly violated the ceasefire when they launched an aggression against Azerbaijan by intensive shelling of their armed forces. Azerbaijan also stated that their counter-offensive measures were taken in exercise of their right of self-defence.100

Azerbaijan justified its military measures as a ‘counter-offensive’ in response to Armenia’s alleged use of force, rather than explicitly invoking self-defence in response to Armenia’s occupation of its territory. Neither Azerbaijan, nor any other state, have explicitly invoked the notion of Armenia’s forcible occupation as an ongoing armed attack or that the occupation itself would justify resort to force in self-defence. Still, the military offensive launched by Azerbaijan led them to retake large parts of their territory. The ceasefire that was concluded between the parties also involves the phased withdrawal of Armenian military from the occupied territories. The latest ceasefire thus alters the previous territorial status quo and stipulates that Azerbaijan will retain the territories it recovered during the hostilities.101

Turkey is one of the few states that have expressed its support for Azerbaijan’s action, citing it as an exercise of Azerbaijan’s “inherent right of self-defence, since the hostilities are taking place exclusively on its own sovereign territory”102. The international community have, instead of analysing the legality of Azerbaijan’s action under international law, focused on imploring the parties to cease the hostilities. The United States, Russia and France expressly condemned “in the strongest terms the recent escalation of violence along the Line of Contact”103. The states, representing the Co-Chair countries of the OSCE Minsk Group, called for the immediate cessation of hostilities and urged the leaders of Armenia and Azerbaijan to resume the substantive negotiations in good faith and without preconditions.104

100 Letter from the Permanent Representative of Armenia to the United Nations to the Secretary-General (28 September 2020) UN Doc A/75/366-S/2020/955.
102 Letter from the Permanent Representative of Turkey to the United Nations to the President of the Security Council (19 October 2020) UN Doc. S/2020/1024.
104 Ibid.
5. Military action to recover occupied territory

5.1 Forcible occupation as a continuing armed attack?

Legal doctrine concerned with self-defence rarely include a discussion of the issue of self-defence in relation to forcible occupation. If the issue is mentioned, it is often in a brief passing without a deeper legal analysis. For example, Corten briefly mentions occupation when discussing self-defence. In his view, occupation is an ongoing unlawful act as well as an aggression. He concludes that “nothing in principle prohibits a state whose territory has been occupied in part of full for some time from exercising its right of self-defence, since an occupation of the kind cannot create rights for the aggressor state”\(^\text{105}\). He also concludes that the continuing character of the unlawful act renders the condition of immediacy ineffective in practice.\(^\text{106}\) Thus, he never argues that occupation constitutes an armed attack, but still agrees that a state that is the victim of such an aggression can invoke self-defence. The concluding remark of removing the immediacy criterion from the applicability of self-defence suggests that a state maintains the possibility of invoking self-defence to recover the occupied territory, at least for some time.

Two scholar that have elaborated on their view of resorting to self-defence in situations of forcible occupation are Akande and Tzanakopoulos. They argue that when occupation of territory is the result of an armed attack, the occupation must be considered as a continuing armed attack in which the victim state does not lose the right to forcible recover its territory in self-defence simply due to the passage of time.\(^\text{107}\) To support the claim of occupation as a continuing armed attack, they have turned to the UNGA Definition of Aggression. As aforementioned, art. 3(a) provide that military occupation resulting from an invasion or attack qualifies as an act of aggression.\(^\text{108}\) In their view, this provision disproves the belief that occupation would at some point cease to be an armed attack. They point to the jurisprudence of the ICJ and the fact that the Court essentially equated the notion of aggression with the notion of armed attack by relying on the UNGA Definition of Aggression when determining if the use of force constituted an armed attack.\(^\text{109}\) However, it must be noted that the jurisprudence by the ICJ that are referenced to only refer to art. 3(g) UNGA as a generally

\(^{105}\) Corten (n 33), 482.
\(^{106}\) Ibid.
\(^{108}\) UNGA Res 3314 (n 18), art. 3(a).
\(^{109}\) Akande and Tzanakopoulos (n 107), 1303.
acknowledged definition of armed attack. The ICJ does not mention art. 3(a) which provides the definition of military occupation as aggression. The argument that ICJ jurisprudence confirms the definition of forcible occupation as an armed attack, simply because another paragraph in the UNGA Definition of Aggression is accepted as an armed attack, does not appear as rather convincing.

Moreover, the Definition of Aggression is a non-binding document that defines the notion of aggression, for the purposes of determining the Chapter VII powers of the Security Council under art. 39 of the UN Charter. The inclusion of occupation in the document shows that the debate was on whether occupation was itself an act of aggression, or a consequence thereof. In the drafting of the Definition of Aggression, states did not draw a link between the characterization of occupation as an act of aggression and the possibility to invoke self-defence to recover occupied territory. The UK explicitly held that it was the Committee’s task to define aggression and not self-defence, and that the former is a broader concept than the latter. Additionally, art. 6 lays down that the Definition of Aggression set out in the document in no way enlarges or diminishes the scope of the UN Charter. The fact that the document establishes occupation as an act of aggression does not entail that the scope of art. 51 in the UN Charter is in any way affected. The UNGA Definition of Aggression is therefore not a document that sets out the criterions for when self-defence can be invoked against certain acts taken by states.

Another author, Longobardo, also emphasize that the ICJ have considered the Definition of Aggression relevant for determining the existence of an armed attack under customary international law. He argues that forcible occupation constitutes an armed attack that entitles the victim state to react in self-defence. However, Longobardo signifies the trend towards peaceful resolutions in situations of occupation and notes that the international community seem to disfavour recourse to armed force in self-defence when an occupation is firmly established. As an example, he points to the Turkish occupation of North Cyprus that has lasted for more than four decades and argues that it is highly unlikely that the international

110 Nicaragua Case (n 33), para 195; Armed Activities Case (n 3), para 146.
111 Ruys and Silvestre, ‘Military Action to Recover Occupied Land’ (n 25), 690.
113 Ibid, 5.
114 UNGA Res 3314 (n 18), art. 6.
115 Longobardo (n 27), 119.
community would support an armed attempt by Cyprus to recover the territory. On the contrary, the international community have struggled to peacefully solve the dispute and the negotiations between Tukey and Cyprus have intensified since 2014. Longobardo claims that this trend suggests that once the occupation has settled, an armed response is no longer available under the law of self-defence. Once the parties have initiated negotiations or resorted to other peaceful measures of dispute resolution, this would render an armed response unnecessary. Lastly, he argues that one cannot come to the same conclusion when turning to the immediacy criterion. He invokes the idea that occupation should also be regarded as a continuing wrongful act in accordance with art. 14(2) ARSIWA. Accordingly, he argues that an armed response during any time of the occupation is in line with the immediacy criterion. Thus, Longobardo argues that self-defence against forcible occupation is in accordance with the immediacy criterion but may not meet the necessity criterion if the occupation has already settled and negotiations have been initiated.

In opposition to Longobardo’s view, Dapo and Tzanakopoulos argue that if peaceful mechanisms have been unsuccessful in resolving a situation of forcible occupation, the necessity criterion of self-defence could be revived. The passage of time between the initial attack and the forcible response may demonstrate that the use of force is necessary because the state has no other means of bringing the occupation to an end. This interpretation of the necessity criterion includes viewing forcible occupation as an ongoing armed attack whereby the immediacy criterion is continuously met. The authors argue that the passage of time may work in favour of the occupied state since it could display that turning to force is the last available resort for a state to recover its territory.

There are several reasons to reject this line of argument. Firstly, there is the problematic issue of determining when peaceful efforts are deemed to be exhausted. For example, could Cyprus claim that, since the dispute over Northern Cyprus hasn’t been resolved in almost half a century, peaceful options have been exhausted which allows a renewed assessment of the necessity criterion of self-defence. A second issue that arises is who determines that peaceful routes have hit a dead end. If it is up to the occupied state, this may incline them to

116 Longobardo (n 27), 120-21.
117 Ibid, 121.
118 Akande and Tzanakopoulos (n 107), p. 1305-07.
negotiate in bad faith to claim that peaceful resolutions cannot resolve the issue and that no other means than military force can bring the occupation to an end. To allow a revival of self-defence based on a new necessity assessment relies on viewing forcible occupation as a continuing armed attack which removes the immediacy criterion from the application. It also opens up for ambiguous assessments of the success or failure of peaceful efforts. Such an interpretation of the necessity criterion is difficult to reconcile with under international law. The obligation to settle territorial disputes by peaceful means is absolute. The prohibition is not dependent on the success or failure of the means and methods used to resolve a conflict. The prohibition against settling territorial disputes by force goes directly against the view of being able to re-open frozen conflicts or challenge the existing territorial status quo through military means.

When looking at state practice, it does not illustrate that states invoke the idea of occupation as a continuing armed attack. While some states have resorted to force with the aim of recovering occupied territory, they have not unequivocally relied on justifying their response in self-defence against the forcible occupation. As the examination of the conflicts demonstrated, states seem reluctant to only rely on the situation of occupation as a justification for its recourse to armed force. The initial recourse to force is more often justified as a response in self-defence against an alleged recent use of force by the occupying state.

5.2 Forcible occupation as a continuing internationally wrongful act?

Some scholars have turned to art. 14(2) ARSIWA when assessing the continuing character of occupation and its relation to the immediacy criterion of self-defence. As aforementioned, the provision stipulates that an internationally wrongful act can be of a continuing character during which the illegality extends over the entire period the act remains contrary to a state’s international obligations. The fact that forcible occupation of part of a state’s territory constitute a continuing wrongful act has been affirmed by ILC. The arguments invoked by some scholars are that because forcible occupation is both an act of aggression and an ongoing unlawful act, the immediacy requirement of invoking self-defence becomes ineffective in practice.

120 ARSIWA (n 20), art. 14(2).
121 DARIWA (n 60), 60.
122 See e.g. Longobardo (n 27), 121; Corten (n 33), 482.
Without contending that occupation constitutes a continuing wrongful act or an act of aggression, it does not automatically follow that occupation must equally be regarded as a continuing armed attack or that it would allow a state to respond in self-defence. Characterizing forcible occupation as a continuing wrongful act, in the sense of an ongoing violation of the prohibition to use force, does not entail a subsequent characterization of the situation as an armed attack. As previously discussed, use of force is a broader concept compared to an armed attack and the two concepts have different meanings and functions under international law. The gap created between the two phrases makes it possible in practice for a state to unlawfully use force against another state without the situation amounting to an armed attack. Therefore, it does not appear appropriate or well suited to invoke the concept of a continuing breach under art. 14(2) ARSIWA to address the temporal scope of an armed attack or remove the immediacy assessment of self-defence.

5.3 Removing the immediacy requirement from the application of self-defence?

One overarching issue relating to the notion of invoking self-defence to recover occupied territory is the condition of immediacy. The criterion, closely intertwined with the necessity criterion, stipulates a close proximity in time between the initial attack and the response in self-defence. One of the purposes is to distinguish military action taken in lawful self-defence and punitive reprisals. The immediacy criterion is subject to a degree of flexibility and practicality based on the circumstances at hand. In a situation where occupation has followed from an invasion, there appears to be an acceptance of an extended time lapse when assessing the legality of taking military action to recover the occupied territory in self-defence. Still, if the invocation of self-defence is extended indefinitely in situations of forcible occupation, the temporal element of self-defence would become devoid of meaning.

Some scholars have referred to the wording of art. 51 of the UN Charter when assessing the temporal scope of self-defence. The phrasing “if an armed attack occurs”, is argued to imply that only the initial invasion or attack resulting in occupation can be responded to by invoking self-defence. A prolonged situation of occupation that is characterized by an absence of active

123 Dinstein, War, Aggression and Self-Defence (n 33), 206.
124 See e.g. Corten (n 33), 482.
hostilities must thus be excluded from the meaning of the text in art. 51.\textsuperscript{125} Self-defence is essentially reactive since it is invoked as a response to a prior or ongoing armed attack.\textsuperscript{126}

An additional argument demoting the idea of removing the immediacy condition to the application of self-defence relates to the establishment of a new territorial \textit{status quo} in the occupied area that cannot be altered by force. Two authors that have repeatedly denied the possibility for a state to invoke self-defence to recover occupied territory are Ruys and Silvestre. In their view a state can lose its ability to invoke self-defence to recover the occupied territory in two different scenarios. The first is where the victim state refrains from responding with counterforce for a prolonged period. The second is if military action is taken in response but the victim state fails to repel the invading forces from its territory before a prolonged cessation of active hostilities occur. They argue that the underlying idea in both scenarios is that the possibility to invoke self-defence ceases when a new territorial \textit{status quo} is established, whereby the occupying state has peacefully administered the territory for a prolonged period.\textsuperscript{127}

The significance of territorial \textit{status quo} in relation to use of force is elaborated on in a report by three scholars from 2018.\textsuperscript{128} According to the report, establishing a territorial \textit{status quo} in a disputed area is important since it provides a baseline against which any changes or attempts to alter the situation can be evaluated. It is particularly relevant in the context of the prohibition on the use of force. Territorial \textit{status quo} can be protected from forcible modifications by international agreements or arrangements, such as an internationally monitored line of control, a demilitarized zone, an armistice demarcation line, or other provisional inter-state determinations of the legal status of the territory in question.\textsuperscript{129} Thus, the existing territorial \textit{status quo} could serve as a means of preventing the use of force in the resolution of territorial disputes.

The authors of the 2018 report argue that while the norms of sovereignty and territorial integrity protect the legitimate holder of title of sovereignty over an occupied territory, the

\begin{footnotesize}
\textsuperscript{125} Ruys and Silvestre, ‘Illegal’ (n 119), 1290.
\textsuperscript{126} Terry Gill, ‘When Does Self-Defence End?’ in Marc Weller (eds), The Oxford Handbook of the Use of Force in International Law (Oxford University Press 2015), 739
\textsuperscript{127} Ruys and Silvestre, ‘Illegal’ (n 119), 1289.
\textsuperscript{128} Yiallourides, Gehring and Gauci (n 46).
\textsuperscript{129} Ibid, 63-64.
\end{footnotesize}
principle of peaceful settlement of territorial disputes prohibits the recourse to force to resolve the dispute. The factual reality on the ground and the existing territorial status quo determines the parties’ rights and duties as well as the application of jus ad bellum where force is used by the parties in the context of a territorial dispute.130 Without delving deep into the issue of establishing territorial status quo, this component is highlighted to further strengthen the argument that self-defence is subjected to a temporal assessment and cannot be proceeded indefinitely. Once forcible occupation has settled, in the sense that there is an absence of hostilities whereby the occupying state is peacefully administering the territory or where there is an agreement or arrangement of monitored lines in the occupied territory, there are principles that prohibits the recourse to force to alter the territorial status quo.

The prohibition on the use of force to recover sovereign territory that is being peacefully administered by another state has also been emphasized in the judgment of the Eritrea-Ethiopia Claims Commission.131 In this case, Eritrea had resorted to force to recover parts of its territory that it claimed Ethiopia was unlawfully occupying. A Boundary Commission confirmed that Eritrea was the sovereign over the disputed territory.132 Yet, the Claims Commission held that Eritrea’s recourse to force could not be lawful because Eritrea had a valid claim to some of the territory and concluded that self-defence cannot be invoked to settle territorial disputes.133 In the absence of an armed attack, Eritrea could not justify its actions as lawful self-defence. Eritrea’s resort to force thus violated art. 2(4) of the UN Charter.134 The Claims Commission explicitly noted that “border disputes between states are so frequent that any exception to the prohibition of the threat or use of force for territory that is allegedly occupied unlawfully would create a large and dangerous hole in a fundamental rule of international law”135.

5.4 Distinguishing between territorial disputes and forcible occupation?
It is well established that states are obliged not to resort to force to settle territorial disputes.136 However, it is not apparent that occupation of territory should be construed as a territorial
dispute in the sense that the occupied state is under an obligation to resolve the conflict through peaceful means. The duty to peacefully settle territorial disputes does not exclusively apply to situations of competing claims to a territory where no force has yet been used by any of the parties. Several cases before the ICJ, such as the *Temple of Preah Vihear*\(^ {137}\), *Cameroon v. Nigeria*\(^ {138}\) or *Costa Rica v. Nicaragua*\(^ {139}\) illustrate that territorial disputes do not spontaneously arise without any apparent cause. Many territorial disputes have been formed or influenced by prior acts of force.\(^ {140}\) State practice in conflicts such as the Falkland Wars and the Eritrea and Ethiopia conflict, also illustrate that states cannot use force to recover territory that is allegedly unlawfully occupied. The states were not permitted to use force to challenge the occupation to try to recover what it claimed was its sovereign territory and were instead obliged to settle the dispute over the territory through peaceful measures.

Whether to make a distinction between territorial disputes and situations involving the invasion and occupation of territory held by another state is not entirely clear and raises some concerns. One concern relates to the issue of whether the law should differentiate between forcible occupation that has emerged because of competing claims to the occupied territory and forcible occupation where the aggressor has not challenged the sovereignty of the occupied territory. In both scenarios the occupied state could initially resort to force in self-defence against the invasion. In the former instance, if the dispute over the title to the territory persists, such a dispute must be resolved though peaceful means.\(^ {141}\) In the latter instance, it is difficult to reconcile that the situation should be regarded as a territorial dispute that needs to be resolved exclusively through peaceful means. However, if the occupying power would advance a claim or formally annex the occupied territory, a territorial dispute may emerge. This could provide an incentive for an occupying state to assert a claim over the territory or formally annex it.\(^ {142}\) The next issue that arises is whether there is a need to distinguish between a genuine, substantial claim to a territory and an illegitimate claim that lacks credible basis. Essentially, whether an occupying state is acting in good or bad faith when asserting a claim over the occupied territory. In the absence of an authoritative ruling from an

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\(^ {139}\) *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)* (Merits) [2015] ICJ Rep 665.

\(^ {140}\) Ruys and Silvestre, ‘Illegal’ (n 119), 1293.

\(^ {141}\) Akande and Tzanakopoulos (n 107), 1302.

\(^ {142}\) Ruys and Silvestre, ‘Illegal’ (n 119), 1292.
international judicial body and considering the potential division among UN members of the validity of the claim, the issue of who determines the credibility of a state’s claim to the territory emerges.  

The assessment of whether to equate all, some, or no situations of forcible occupation as territorial disputes merits further discussion. To strictly separate situations involving forcible occupation from other instances of dispute over territory and exempt it from the application of peaceful settlements of disputes may introduce legal ambiguity and lead to arbitrary results. Nevertheless, if the occupation has settled and a new territorial status quo has been established, the occupied state cannot challenge the existing territorial status quo through force. In the absence of any other justification under jus ad bellum to resort to force, the occupied state is left with little choice but to turn to non-military measures to address the situation. The issue of whether an occupied state is obliged to address the situation as a territorial dispute that must exclusively be resolved through peaceful means or if it simply has a duty not to resort to force to challenge the existing territorial status quo, will however need to be explored further.

143 Ruys and Silvestre, ‘Illegal’ (n 119), 1292
144 Ibid.
6. Concluding remarks

6.1 Conclusion

Drawing on the analysis made in the previous chapters, the conclusion of whether self-defence can be invoked to recover forcibly occupied territory can be summarized as followed.

Military occupation resulting from an invasion or attack by the armed forces of a state qualifies as an act of aggression according to art. 3(a) UNGA Definition of Aggression. International law does not classify forcible occupation as an armed attack, as affirmed by the lack of such characterization by the ICJ and the prevalent state practice of referring to occupation as aggression. The fact that military occupation has materialized, following an armed attack, does not transform the occupation itself into an armed attack, but rather establishes it as a consequence thereof. Self-defence can be justified only within the specific parameters outlined in art. 51 of the UN Charter. Thus, self-defence can be invoked against an armed attack, but not the consequences thereof.

If self-defence could be invoked against forcible occupation it would necessitate that forcible occupation is classified as an armed attack. Since forcible occupation is of an ongoing nature that can endure for long periods, lasting for years or even decades, it would compel viewing occupation as an armed attack that persists over time. To adopt this view would mean that self-defence is not triggered in response to a specific military action taken by an adversary. Instead, self-defence would be continuously applicable due to the ongoing nature of occupation. However, self-defence is subjected to several conditions that affect the application of it. The interpretation of occupation as a continuing armed attack would render the immediacy criterion ineffective in practice and remove the temporal aspect of self-defence.

Furthermore, self-defence, as an exception to the prohibition on the use of force, grant states the right to initiate armed force against another state in order to halt or repel an armed attack. Expanding the notion of self-defence to include forcible occupation as an ongoing armed attack would broaden the scope under which states could unilaterally resort to force. The expansion would introduce unpredictability in the resort to armed force, as such forcible measures any time during the occupation could be considered in accordance with the
immediacy criterion. It would also undermine the prohibition on the use of force and contradict the development towards peaceful resolution of disputes.

Another aspect worth mentioning is the other purposes behind the prohibition on the use of force. The principle of non-use of force to settle disputes is not merely designed to protect states and their territorial integrity. The prohibition is also fundamental when considering the human rights perspective of protection of human life. As the Human Rights Committee put it: “State parties that fail to take all reasonable measures to settle their international disputes by peaceful means might fall short of complying with their positive obligation to ensure the right to life.”145 The prohibition also serves to protect international peace and stability. The Friendly Declarations especially sets out that use of force cannot be used as a means of solving international territorial disputes and problems concerning frontiers of states.146

The assessment of the question this thesis aims to answer demonstrate that self-defence can only be invoked against an armed attack and cannot be extended indefinitely. The conclusion of the thesis does however not provide an exhaustive assessment of when self-defence against an invasion followed by occupation ceases. A state that has been the victim of an invasion resulting in occupation of its territory has the option to respond with military action against the invading force, since the invasion itself constitutes an armed attack. But, if a state refrains from using armed force in response, the opportunity to do so in self-defence will eventually end. The cessation of self-defence also applies when a state employs armed force but fails to repel the invading forces before an extended cessation of active hostilities occur. Other factors such as peaceful administration of the occupied territory or the establishment of a new territorial status quo will also affect the application of self-defence.

Under international law, there is no quantitative test that precisely defines the circumstances in which self-defence is no longer available to a state. Temporal uncertainty is unavoidable since the criterions of self-defence are flexible and pragmatic, taking into account the circumstances of each case. The requirements of self-defence provide a general set of criteria but do not remove the need to review the reliance on self-defence within a factual context. In situations involving invasion followed by occupation, a more permissive approach to the

145 UN Human Rights Committee, General Comment no. 36, Article 6 (Right to Life) (3 September 2019) UN Doc CCPR/C/GC/36, para 70.
146 UNGA Res 2625 (n 8), Principle 1.
temporal aspect of self-defence seems to be commonly accepted. The nature of the attack is relevant when determining how long action in self-defence is justified. Large scale attacks or an invasion that materialize into occupation may require a more permissible approach to the duration of the response in order to neutralize the threat of the continuation.\textsuperscript{147} For example, additional time may be needed to prepare a coordinated response or, if the invading forces possess significant military power, additional time may be needed to request collective self-defence from third states. Such circumstances will affect the application of the customary criterions. For a state to invoke self-defence it must demonstrate that the criterions of self-defence are met. Whether an armed response can be justified as a legitimate exercise of self-defence will also depend on the response of the international community to such action.

The challenge of defining a precise time limit for the cessation of a state’s possibility to invoke self-defence does not negate the notion that self-defence cannot be invoked indefinitely. At a certain point, a state’s ability to justify the use of force in self-defence will come to an end, giving way to the prohibition on the use of force and the need to address the conflict through non-military measures. Failure to acknowledge this would permit states to employ force to re-open frozen conflicts. Yet, an occupied state cannot resume hostilities at any given time without a proper justification under the \textit{jus ad bellum} framework. This observation is further supported by examining state practice. In situations where occupied states have employed force against the occupying power during a ceasefire or in the absence of active hostilities, they have invoked various justification for their use of force. It is not common for states to assert that the occupation itself constitutes an ongoing armed attack warranting the use of force. This indicates that states are cautious about invoking forcible occupation as an armed attack and recognizes that other principles take precedence in such a scenario which would render a response in self-defence against the occupation unjustified.

\textbf{6.2 Peace v Justice}

Besides the legal issues addressed in this thesis, there are other concerns being voiced by scholars discussing the continuing nature of occupation in relation to the exercise of self-defence. The prohibition of the use of force seeks to protect the territorial integrity of a state. The purpose of this prohibition could be claimed to be defeated if the victim state is only

\textsuperscript{147} Gill, ‘When Does Self-Defence End?’ (n 125), 750.
provided with a limited timeframe in which it must act in self-defence before it loses its right to forcibly respond. There is also an issue with the principle of e iniuria jus non oritur (legal rights cannot arise from unlawful acts). If the aggressor state’s occupation establishes a new territorial status quo in the territory, that is protected under international law, the law favours the aggressor rather than the victim.\textsuperscript{148} Without disregarding the merit of these concerns, there are more compelling arguments to consider.

The principle of territorial integrity cannot be pursued without regard for other fundamental rules and principles that uphold the international legal order. The principles of non-use of force to settle disputes must prevail, also in situations where peaceful means of resolving territorial issues have proven futile. As Schachter noted already in 1984, the UN and the ICJ were initially excepted to effectively address territorial disputes. Their inability to prevent situations from escalating into violence “has undoubtedly influenced the tendency to regard article 2(4) as an ineffective restraint”\textsuperscript{149}. It may also have influenced a tendency to broaden the circumstances under which states can resort to force in self-defence. Schachter also notes that justice may need to be sacrificed in order to attain peace. He concludes that force tends to escalate and spread which is why no exception to art. 2(4) when it comes to territorial disputes has been recognized by the international community.\textsuperscript{150} It is crucial to acknowledge that the protection of territorial integrity cannot be pursued at all costs or operate in a vacuum. In the specific circumstances of occupation, the purpose of the prohibition against using force is more effectively accomplished by protecting the existing territorial status quo, rather than allowing an unrestricted right to self-defence without any temporal limitations.\textsuperscript{151} Alternative, non-military, options exist for victim states and third parties to respond to a situation of occupation. For example, art. 33(1) of the UN Charter sets out a range of measures that can be used to seek a peaceful solution to a dispute and ARSIWA allows for countermeasures to be taken in response to a wrongful act. Additionally, if such measures do prove ineffective, the Security Council can authorize force to address the situation.

If the conclusion of this thesis appears disproportionately unfavourable for states facing occupation, it is not a call to alter the underlying principles or values. Rather, it highlights the

\textsuperscript{148} Ruys and Silvestre, ‘The Nagorno-Karabakh Conflict’ (n 101).
\textsuperscript{150} Ibid, 1628.
\textsuperscript{151} Ruys and Silvestre, ‘The Nagorno-Karabakh Conflict’ (n 101).
need for an efficient international response and remedy for the victim state in such situations. The persistence of forcible occupation without an adequate international response reflects the shortcomings in the international security system’s ability to effectively address threats to peace and security. Expanding the scope of when states are permitted to unilaterally deploy force and diminishing the prohibition on the use of force is not a viable solution. Instead, efforts should focus on strengthening the international security system and promoting peaceful dispute resolution.

The conflicts assessed in this thesis highlights some of the various views that states have invoked when assessing use of force to recover occupied territory. However, it is important to not disregard the numerous territorial disputes that involves some form of occupation or administration over a disputed area and the fact that there are remarkably few cases in which states have taken forcible measures to challenge the existing territorial status quo. Even fewer have done so by invoking occupation as a continuing armed attack and relying on self-defence to justify its aim of recovering the territory.\(^{152}\) In a study of territorial conflicts between 1945 – 2000, the authors found a strong support for the pacifying effect of international law. States that have a strong legal claim to a territory and are dissatisfied with the territorial status quo are more likely to challenge it through negotiation processes than they are likely to resort to threats or uses of force. The study observed 165 cases of territorial disputes between 1945 – 2000, in which they found that 96 of them were resolved peacefully.\(^{153}\)

On a final note, the issue examined in this thesis merits further discussion. Returning to the recent conflict in the Nagorno-Karabakh region, it is regrettable that states have not taken the opportunity to express their legal views on the issue. Similar situations relating to questions of the legality of armed force under *jus ad bellum* may soon occur. The need to further analyse the scope of self-defence and the legality of resorting to armed force to reclaim occupied territory is important when faced with modern conflicts such as the Russian occupation of territory belonging to Ukraine and Georgia. Or possibly, the potential scenario of China invading and occupying Taiwan. Depending on the international community’s response to military actions taken by states in such scenarios, this may very well challenge or develop the existing legal framework.

\(^{152}\) Ruys and Silvestre, ‘Illegal’ (n 119), 1292.
\(^{153}\) Huth, Croco and Appel (n 15), 416-17.
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