

The Place of Non-Aggravation in the Peaceful Settlement of Territorial and Maritime Disputes

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ABSTRACT

The present paper argues that the ‘non-aggravation of disputes’ is a fundamental principle of international law. Evidence of the non-aggravation of disputes as a principle of international law has long existed in the work of qualified publicists and in numerous multilateral treaties with dispute settlement provisions, including the UN Convention on the Law of the Sea. International courts and tribunals have indicated ‘non-aggravation measures’ to preserve the subject matter of the dispute and the rights of either party to the dispute. The principle of non-aggravation is gaining recognition and importance in the broader context of the peaceful settlement of international disputes, particularly territorial and maritime disputes which are often prone to armed escalation and pose risks to peace and security.

Key words : non-aggravation, peaceful settlement, territorial & maritime disputes, United Nations Charter, UN Convention on the Law of the Sea (UNCLOS)

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1. Introduction

International law requires the peaceful settlement of disputes but does not provide any compulsory means for reaching such settlement (Kohen and Hébié, 2018). Dispute resolution, within and outside the United Nations (UN), operates only upon the consent of the states concerned (Northedge and Donelan, 1971). States are not bound, in the absence of an agreement to the contrary, to submit their disputes to third-party adjudication or arbitration (Shaw, 2021). Peaceful resolution is crucial in the domain of territorial disputes, which are ‘traditionally regarded as the most common sources of war’ (Forsberg, 1996). According to Hensel (2017) ‘a territorial claim is defined as explicit contention between two or more nation-states claiming sovereignty over a specific piece of territory’. A territorial dispute can be broadly defined as a legal dispute between two or more states over the acquisition or attribution of land territory or over the creation, location and effect of territorial boundaries (Prescott, 2016; Thirlway, 2017). As Vasquez (2009) writes, ‘Of all the various issues over which wars can arise, I have found territorial disputes between neighbours to be the main source of conflict that can give rise to a sequence of actions that ends in war.’

States with good relations may manage and resolve their territorial disputes peacefully, most often through diplomatic negotiations and consultations, which may prevent conflicts from escalating (Cançado Trindade, 2004). Where the disputing states have poor relations, territorial disputes are often longstanding and, from time to time, escalate. The territorial dispute serves, in essence, as a proxy for the states; ‘broader rivalry’ (Fravel, 2008). Dormant or simmering territorial disputes have served as ‘political dynamites’ countless times in history: they ebb and flow until they suddenly become explosive and occasionally turn into armed conflicts (Dodds, 2022). Thus, many of ongoing territorial disputes entail the risk of escalation which might endanger international peace and security.

Despite the known and foreseeable risks to peace and security, many disputes never come before an international court or tribunal. Settlement by institutional third-party adjudication mechanisms ‘remains rather the exception’ (Tanaka, 2018). States involved in politically sensitive territorial disputes are often unwilling to place their interests in the hands of a third-party decision-making body (Shaw, 2021). The duty of UN Member States to peacefully settle disputes which may put international security at risk coexists with the prerogative of choice left to the disputing states to decide how to resolve such disputes (Cançado Trindade, 2004). Negotiations on territorial disputes may last years without satisfactory results (Shaw, 2021). Moreover, even where there is consent to third-party adjudication, the international court or tribunal will frequently be limited to the resolving the specific legal issue submitted before it by the states concerned. All the various and multifaceted constituting aspects of the territorial dispute may not be heard before, or indeed resolved by, the court or tribunal (Collier and Lowe, 2000; Jen-

nings, 1994). Thus, the legal and political engineering required to prevent the aggravation of territorial disputes does not lie in the hands of international courts and tribunals, but in the conduct of the disputing states concerned. The events which could transform disputes into violent conflicts are to be found outside the course of litigation or arbitration proceedings. Thus, the disputing states' exercise of self-restraint, to avoid any action or incident which might lead to the aggravation of the dispute, is crucial to the final peaceful resolution of the dispute (Vasquez, 2009).

Previous publications on the 'non-aggravation of disputes' have read the concept mainly through the narrow lens of international jurisprudence, particularly the power of international courts and tribunals to indicate 'non-aggravation measures' in order to preserve, first, the subject matter of disputes submitted to litigation or arbitration and, second, the respective rights of the parties before the court or tribunal (Ratner, 2020; Yiallourides et al., 2018). According to Miles (2017), 'parties to international litigation are under a general obligation to avoid taking any action that may escalate a dispute'. However, beyond interlocutory proceedings, international law and practice must be explored further to understand the substantive and procedural scope of the non-aggravation principle under the UN Charter and customary international law, specifically within the broader peaceful settlement domain. Such exploration can promote a better understanding of the peaceful settlement legal tools which are available to prevent dispute aggravation and safeguard peace and stability, including in areas with a high concentration of territorial disputes.

The present paper addresses the meaning and importance of non-aggravation and establishes the legal foundation of non-aggravation under international law. It focuses in particular on territorial and maritime disputes which are characterised by high levels of diplomatic and military confrontation and whose existence endanger international peace and security (Huth, 2009). The paper is divided into three sections. Following this introduction, Section 2 explores the legal foundations of the duty of non-aggravation in the peaceful settlement of territorial and maritime disputes and how this duty has been interpreted by international courts and tribunals and academic commentators. Section 3 examines the temporal scope of the duty of non-aggravation. Section 4 provides some conclusory remarks and future directions.

2. The Place of Non-Aggravation in the Peaceful Settlement of Disputes

2.1 Non-Aggravation of Disputes

General and multilateral dispute settlement treaties up to the post-World War II period stipulated general duties of non-aggravation. Such duties focused on

the timely and peaceful resolution of disputes during the stages of the settlement procedure, be it through diplomatic negotiations or other judicial or quasi-judicial modes. Ratner (2020) notes that ‘the ancestor of the modern idea of non-aggravation lies in the notion of the unfriendly act in international law’. According to this understanding, if negotiation, conciliation or other dispute settlement efforts were ongoing, both sides should conduct themselves so as to avoid ‘unfriendly acts’ causing undue frictions that may adversely impact the settlement process and ultimately endanger peace and security.

Among the central objectives of the UN, set out in Article 1 of the UN Charter (UN, 1945), is the maintenance of ‘international peace and security’, the ‘removal of threats to the peace’, and the ‘adjustment or settlement of international disputes or situations which might lead to a breach of peace’. The provisions laid out in the UN Charter are largely based upon The Covenant of the League of Nations (1919). The Covenant was designed to facilitate the peaceful settlement of international disputes. It embodied the fundamental principle that states were legally obliged under the Covenant to submit the disputes ‘likely to lead to a rupture’ either to a legal decision or to inquiry by the Council or Assembly of the League (Lauterpacht, 1958; Shaw, 2021).

Numerous international dispute settlement treaties provide similar obligations. The American Treaty on Pacific Settlement (Pact of Bogotá, 1948) provides that pending the process of settlement under the conciliation procedures laid down in the Treaty, ‘the parties shall refrain from any act that might make conciliation more difficult’. The Revised General Act for the Pacific Settlement of International Disputes (UN, 1949) provides that, pending the judicial settlement of their dispute, parties undertake to ‘abstain from any sort of action whatsoever which may aggravate or extend the dispute’. The Contadora Act for Peace and Cooperation in Central America (1985) requires parties to ‘[a]void any spoken or written declaration that may aggravate the existing situation of conflict in the area’. The European Convention on the Peaceful Settlement of Disputes (UN, 1957) stipulates that the disputing parties ‘shall abstain from any sort of action whatsoever which may aggravate or extend the dispute’.

Nowadays, the notion of non-aggravation of inter-state disputes has become a keyword in the lexicon of international relations and diplomacy. States involved in a dispute will frequently call upon the other disputing party to ‘exercise restraint’ and refrain from actions which could ‘aggravate’ the dispute (Nishimoto, 2019). Identical or similar wording is frequently used in resolutions by third-parties or international organisations calling upon the disputing states to expedite negotiations or to refrain from actions which may escalate the dispute or make its resolution more difficult. Thus, international organisations have emphasised the need for ‘good faith and willingness’ of the disputing parties to pursue vigorously direct negotiations; appealed to them to ‘exercise restraint and moderation’; and entreated them to ‘refrain from any action which might jeopardize the negotiations, and to

take steps which would facilitate the creation of the climate necessary for the success of those negotiations' (UN, 1992). In other resolutions, international organisations have urged that negotiations between disputing parties resume as soon as possible; be meaningful and constructive on the basis of comprehensive and concrete proposals; and that dialogues be pursued in a sustained and result-oriented manner to non-aggravate and peacefully settle the dispute at hand (UN, 1992).

Defining what is meant by 'non-aggravation' is a complicated exercise. The duty of states to exercise restraint and refrain from aggravating existing disputes has, at times, functioned as a rhetorical instrument for criticising certain states' actions and sending messages of reinforcement among victim states. However, its lack of clarity limits its usefulness as a normative tool for peaceful settlement. The concept simply means to 'avoid making a bad situation worse'. Its generic character has been appealing to diplomats but, at the same time, lends itself to many different interpretations under international law. To have any functional utility, this duty must be capable of a least some objective identification and determination under relevant rules and principles of international law. As Ratner (2020) puts it: 'with little guidance on the meaning of this supposed duty [of non-aggravation] in international law, it risks signalling no more than "be nice to one another"'.

As will be seen, the duty of non-aggravation is not merely a procedural duty intended to safeguard litigation proceedings and preserve the subject matter of a dispute during the pendency of the judicial settlement process. Non-aggravation is 'more than merely a best practice or good policy' (Ratner, 2018). The duty of non-aggravation is also an important corollary to the substantive obligation under the UN Charter and customary international law to pursue the peaceful settlement of international disputes. It is firmly embedded in the modern international legal architecture for the peaceful settlement of disputes both within and, perhaps more importantly, outside judicial and arbitral proceedings. Therefore, this duty carries an important role in the domain of the peaceful settlement of international disputes and the maintenance of international peace and security.

2.2 Non-Aggravation under the UN Charter and Related Legal Instruments

Under the UN Charter, states are not, in principle, obliged to settle their disputes. This applies to both mere political disagreements as well as to maritime and territorial disputes which are 'likely to give rise to conflict and even occasionally war' (Crawford, 2014). Articles 2(3) and 33(1) of the UN Charter are of particular importance here. Article 2(3) provides that states must attempt to settle their disputes by peaceful means 'in such a manner that international peace and security, and justice, are not endangered'. Article 33(1) provides that states involved in a dispute, 'the continuance of which is likely to endanger the maintenance of international peace and security', are required to seek a peaceful solution. Article 33(1) lists the means of peaceful resolution: 'negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or

other peaceful means of their own choice.’ Article 2(4) of the UN Charter is also relevant: it posits a general prohibition on the use or threat of force as a method of settling international disputes, including territorial disputes (Yiallourides and Yihdego, 2019).

Thus, the UN Charter follows a logical order: first the obligation to pursue settlement by peaceful means only, and second, the prohibition on the use or threat of force which supplements and strengthens the obligation to resolve disputes peacefully (Merrills, 1994). The obligation to pursue peaceful settlement, which complements other principles of a prohibitive nature, is a substantive, positive, obligation binding under customary international law (Simma et al., 2012). The obligations set out in Articles 2(3) and 33(1) of the UN Charter are obligations of conduct, there is no obligation to reach a specific result. Nevertheless, the peaceful settlement of international disputes entails a positive obligation to seek settlement governed by the principle of good faith. As the International Court of Justice (ICJ), held in the *Aerial Incident* (ICJ, 2000):

The Court’s lack of jurisdiction does not relieve States of their obligation to settle their disputes by peaceful means. The choice of those means admittedly rests with the parties under Article 33 of the United Nations Charter. They are nonetheless under an obligation to seek such a settlement, and to do so in good faith in accordance with Article 2, paragraph 2, of the Charter’.

Where any one of the means of dispute settlement fails, the parties to an international dispute remain under a continuing duty to seek a settlement of the dispute by other peaceful means agreed upon by them in a spirit of understanding, cooperation, and good faith (Tanaka, 2018).

Articles 2(3) and 33(1) of the UN Charter do not specifically mention non-aggravation as intrinsic to the peaceful settlement of disputes. However, the correlation between non-aggravation and the peaceful settlement of disputes is highlighted in the Declaration on Friendly Relations (1970) and in the Manila Declaration (UN, 1982a). Both Declarations are premised on the provisions of the UN Charter. The Declaration on Friendly Relations stipulates that states shall refrain from the threat or use of force in their international relations and, immediately after, that ‘states shall settle their international disputes by peaceful means *in such a manner that international peace and security and justice are not endangered*’. The Declaration on Friendly Relations provides that, ‘states shall accordingly seek early and just settlement of their international disputes by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements or other peaceful means of their choice.’ These are the same methods of dispute settlement in Article 33(1) of the UN Charter.

States are generally free to have recourse to the peaceful settlement mechanisms of their choice. Yet, when an obligation to negotiate is provided in a treaty, states will be legally required to enter negotiations. For instance, a dispute may

relate to the possession of a territorial feature and its legal status as a fully-fledged island under Article 121 of the UNCLOS (1982a). This dispute would raise simultaneously questions of maritime entitlement and possible effects on maritime delimitation. Parties would be required to ‘proceed expeditiously to an exchange of views regarding its settlement by negotiations or other peaceful means’ (UNCLOS, Art 293(1)).

In these circumstances, according to the ICJ the obligation to pursue peaceful settlement would require ‘a genuine attempt by one of the disputing parties to engage in discussions with the other disputing party, with a view to resolving the dispute’ (*Georgia v Russian Federation*, (ICJ, 2011)). The ICJ has often emphasised that states are under a duty to conduct negotiations ‘meaningfully’ and ‘in good faith’, paying ‘reasonable regard to the legal rights of [each] other’ (*North Sea Continental Shelf Cases* ICJ (1969); *Fisheries Jurisdiction* (ICJ, 1974); *Gabčíkovo-Nagymaros Project*, 1997; *Pulp Mills on the River Uruguay* (ICJ, 2010)).

The UN General Assembly Resolution 53/101 (ICJ, 1998) on ‘Principles and Guidelines for International Negotiations’ emphasises the importance of conducting negotiations ‘in a manner compatible with and conducive to the achievement of the stated objective of negotiations’. The Resolution calls upon states ‘to maintain a constructive atmosphere during negotiations and to *refrain from any conduct which might undermine the negotiations and their progress*’. Resolution 53/101 makes it clear that, during the diplomatic settlement process, the exercise of mutual restraint and avoidance of aggravation are indispensable. Parties must refrain from any aggravating conduct. Thus, they must refrain from acts which would frustrate or obstruct the negotiations, including any acts affecting the subject matter of the negotiations.

The Manila Declaration (UN, 1982a) enshrines the principle of preventing disputes ‘likely to affect friendly relations among states’. It calls on states to pursue peaceful settlement ‘in good faith and in a spirit of co-operation’ and ‘in conformity with the purposes and principles enshrined in the Charter’. To that end, it expressly provides that:

States parties to an international dispute, as well as other states, *shall refrain from any action whatsoever which may aggravate the situation* so as to endanger the maintenance of international peace and security and make more difficult or impede the peaceful settlement of the dispute.

As Roucouas (2008) writes, the Manila Declaration was adopted by consensus between states ‘that had already consented to the contents of Article 33 of the Charter of the United Nations and States which subsequently became Members of the United Nations’. Therefore, the Manila Declaration advances and consolidates the legal framework of peaceful settlement of international disputes under general international law; the UN Charter, particularly Article 33(1) and related legal instruments such as the Declaration on Friendly Relations. The Manila Dec-

laration expands the duty of non-aggravation to encompass ‘acts that could endanger the peaceful settlement of the dispute’ (Ratner, 2020).

The fundamental character of the duty of non-aggravation in the peaceful settlement of international disputes, both within and beyond the normal course of adjudication proceedings, is also highlighted in the UN Declaration on the Prevention and Removal of Disputes (1988). The Declaration (1988) upholds the duty of states, in the interest of preventing and removing international disputes the continuance of which may threaten the maintenance of international peace and security, to ‘act so as to prevent in their international relations the emergence or *aggravation of disputes or situations*, in particular by fulfilling in good faith their obligations under international law’.

Finally, mention may also be made to the UN Model Rules for the Conciliation of Disputes, adopted by the UN General Assembly in 1995. As stated in their Preamble, the Model Rules (1995) incorporate ‘the results of the most recent scholarly work of experience in the field of international conciliation’ and contribute to the development of the Charter’s provisions on dispute settlement, particularly Article 33(1). Model Rule 27 provides that during the conciliation proceedings, parties ‘shall refrain from any measure which might *aggravate or widen the dispute*’.

2.3 Non-Aggravation under UNCLOS

UNCLOS also contains provisions pertaining to non-aggravation applying to maritime boundary disputes involving overlapping claims to an exclusive economic zone (EEZ) and a continental shelf. Articles 74(3) and 83(3) of UNCLOS require contending states to pursue the timely delimitation of their boundaries and, pending resolution, exercise restraint in, and in respect of, undelimited maritime areas (Yiallourides, 2019). Prior to agreeing a maritime boundary, states must not engage in any conduct that would ‘jeopardize or hamper’ the reaching of a delimitation agreement (BIICL, 2016). This obligation applies when opposite or adjacent states have entitlements to maritime zones which overlap, or may overlap, and therefore require maritime delimitation. It is premised on the ‘desire to avoid, as far as possible, any unilateral action that could worsen the dispute and could threaten international peace and security’ (Murphy, 2020). Murphy (2020) further notes that, while the obligation not to aggravate the boundary dispute is informed by the law and practice associated with disputed maritime areas, there is, ‘some *cross-over with respect to rules associated with contested land boundaries*’. However, no such explicit rules feature in multilateral treaty law in respect of disputed land boundaries and territories subject to competing sovereignty claims (Milano and Papanicolopulu, 2011). According to Dupont (2018), ‘UNCLOS has no provisions governing the rights and obligations of competing claimants in disputed territory and the maritime zones to which this disputed territory creates an entitlement’.

Therefore, the question is whether a general obligation of non-aggravation

exists in respect to territorial disputes, similar to the one found in Articles 83(3) and 74(4) of UNCLOS. This has practical significance in international law. Maritime and territorial disputes are often legally entangled (Klein, 2018). For instance, two adjacent coastal states may disagree over the exact location of their land boundary line. The disputes may relate to the course of a land boundary i.e., delimitation, or over the physical way it is positioned on the ground i.e., demarcation. States may agree on the existence of a boundary but can disagree on the demarcation of their land border on the surface of the earth. Such disagreement may stem from inconsistencies or inaccuracies in the maps used at the time of the delimitation or competing material interests in border resources. Eventually, the exact course of the land boundary must be defined for a territory to be attributed to either of the two claimant states. Thus, the determined land boundary marks the limit of each side's sovereignty and associated sovereign rights. The determination of the land boundary may impact the location of the maritime boundary and the attribution of sovereignty rights offshore.

Territorial and maritime issues also become intertwined when a state's maritime claims are predicated on a sovereignty claim over a land territory, continental or island, where the later claim is contested by another state (Anderson and van Logchem, 2014; Klein, 2018). This situation may include multidimensional or 'mixed' disputes where the territorial issues at stake go beyond the location of a boundary. A territorial dispute may involve competing claims of sovereignty over an island and sovereign rights in its surrounding ocean space e.g., Falkland/Malvinas, East and South China Sea territorial features, or may include one state questioning the very existence of another state e.g., Guatemala and Belize. Here too, resolving the sovereignty status of the disputed land territory may impact the location of the maritime boundary and the attribution of sovereignty rights offshore.

A report by the British Institute of International and Comparative Law (BIICL, 2016) considered the obligations of states in respect of maritime areas subject to overlapping entitlements and the types of state activities which are legally permissible or impermissible in those areas under Articles 74(3) and 83(3) of UNCLOS. The BIICL Report found that Articles 74(3) and 83(3) of UNCLOS reflect customary international law, but do not apply to outstanding sovereignty disputes over an island or a strip of coastal land. It stated that obligations enshrined in Articles 74(3) and 83(3) of UNCLOS 'relate to the final determination of the maritime boundary, and do not relate to the territorial sovereignty dispute'. The Report concluded that 'where the dispute between the two states concerns sovereignty, whether over an island or a piece of a mainland territory, *general international law applies*'. Indeed, the fundamental rules of general international law will apply unless the dispute over the land territory, which could be an island or mainland territory, is governed by an international treaty setting out in detail the obligations of claimant states over that territory, such as the Antarctic Treaty (Voenekey and Addison-Agyei, 2019). Consequently, the way states conduct themselves in the terrestrial domain and associated duties of non-aggravation pending the resolution of

the territorial dispute will have to be assessed against fundamental principles of international law. These fundamental principles include, notably, the principle of territorial integrity, the principle of inviolability of boundaries, and the obligation to pursue the peaceful settlement of international disputes (Kohen and Hébié, 2018; Milano, 2004; Milano and Papanicolopulu, 2011).

The Association of Southeast Asian Nations (ASEAN) Declaration on the South China Sea (1992) is a useful case-study of non-aggravation in multidimensional territorial and maritime disputes. The ASEAN Declaration (1992) calls for the peaceful resolution of 'all sovereignty and jurisdictional issues pertaining to the South China Sea'; the 'exercise of restraint'; and the application of the principles contained in the Treaty of Amity and Cooperation in Southeast Asia 'as the basis for establishing a code of international conduct over the South China Sea'. The Treaty of Amity and Cooperation in Southeast Asia (adopted on 24 February 1976; entered into force on 26 April 1985), provides that:

The High Contracting Parties shall have the determination and good faith to prevent disputes from arising. In case disputes on matters directly affecting them should arise, especially disputes likely to disturb regional peace and harmony, they shall refrain from the threat or use of force and shall at all times settle such disputes among themselves through friendly negotiations.

In 2002, China and ASEAN signed the Declaration on the Conduct of Parties in the South China Sea. The ASEAN Declaration (2002) states:

Parties undertake to exercise self-restraint in the conduct of activities that would complicate or escalate disputes and affect peace and stability including, among others, refraining from action of inhabiting on the presently uninhabited islands, reefs, shoals, cays, and other features and to handle their differences in a constructive manner. Pending the peaceful settlement of territorial and jurisdictional disputes, the Parties concerned undertake to intensify efforts to seek ways, in the spirit of cooperation and understanding, to build trust and confidence between and among them.

The 2002 Declaration makes it clear that parties considered such 'self-restraint' to be connected to the obligation to resolve disputes peacefully. The Declaration reiterates different aspects of earlier agreements, including importantly the Manila Declaration. ASEAN members and China undertake to 'exercise self-restraint' and avoid any actions or activities that could complicate or escalate disputes with a view to settle their disputes by peaceful means. According to commentators, including a duty of self-restraint in the Declaration serves two principal objectives: 'maintaining the present status quo of occupied positions and avoiding actions that complicate the situation' (Shicun and Huaifeng, 2003; Thao, 2003). This also highlights the fact that self-restraint is necessary to protect the rights of the disputing parties, including where no formal dispute settlement procedure has been initiated.

Subsequent maritime treaty practice in the region confirms this understanding and the relevance of non-aggravation in the peaceful settlement of disputes (Buszynski and Sazlan, 2007). For instance, China, the Philippines and Vietnam concluded an agreement in 2005 to regulate the conduct of marine seismic surveys in a maritime area disputed between the parties (Tripartite Agreement, 2005). The Tripartite Agreement refers explicitly to the commitment of the parties' respective governments to 'pursue peaceful efforts to transform the South China Sea into an area of peace, stability, cooperation and development' and 'fully implement UNCLOS and the 2002 ASEAN-China Declaration on the Code of Conduct in the South China Sea'. The Tripartite Agreement establishes a Joint Operating Committee and an inter-state mechanism for undertaking joint maritime surveys in a specified zone. It also establishes lines of communication between the parties. Further, it requires the parties to give mutual assistance in conducting surveys, inter alia, by taking reasonable efforts to obtain necessary approvals from their respective governments and to facilitate the entrance of vessels and personnel in relevant areas. Setting aside its irregular structure, the agreement forms a provisional arrangement designed to overcome difficulties in conducting seismic surveys in the disputed areas. Set for a duration of three years, the agreement is no longer in force.

As another example, a Memorandum of Understanding (MoU) between Indonesia and Malaysia was adopted in 2012 to regulate the conduct of law enforcement activities against fishermen in 'all unresolved maritime boundary areas between the Parties' (MoU, 2012). The MoU emphasises the wellbeing of the fishermen of the parties. It provides that any violence should be avoided (MoU, Art. 2(b)) and that fishing vessels should be inspected and requested to leave the area where they are found to use illegal fishing gears (MoU, Art. 3(b)). It also establishes lines of communication and coordination between the relevant governmental agencies (MoU, Art. 4). Again, these provisions establish a framework for avoiding any aggravation, in line with the parties' duties under the UN Charter and UNCLOS, as parties undertake to refrain from taking unilateral law enforcement measures against the other parties' fishing vessels in the disputed maritime area.

2.4 Non-Aggravation in the Practice of International Courts and Tribunals

The duty of non-aggravation has featured prominently in international jurisprudence. The first reference point is the much-cited dictum of the Permanent Court of International Justice (PCIJ) in *The Electricity Company of Sofia and Bulgaria* (PCIJ, 1939), according to which: it is 'a principle universally accepted by international tribunals and likewise laid down in many conventions' that the parties to a dispute must 'not allow any step of any kind to be taken which *might aggravate or extend the dispute*' (emphasis added). The Central American Court of Justice in the *Honduras v El Salvador and Guatemala* (1908) had already awarded non-aggravation measures 'so as to cool a situation of armed conflict between the parties'

(Miles, 2017). It is worth noting that Article XVIII of the Convention for the Establishment of a Central American Court of Justice (1907) provided that

From the moment in which any suit is instituted against any one or more governments up to that in which a final decision has been pronounced, the court may at the solicitation of any one of the parties fix the situation in which the contending parties must remain, to the end that the difficulty shall not be aggravated...

The ICJ held, in its very first provisional measures order in the *Anglo-Iranian Oil Co. case* (ICJ, 1951), that the parties ‘should each ensure that no action of any kind is taken which might aggravate or extend the dispute’. The subsequent practice of the ICJ shows that the duty of parties not to aggravate their dispute has featured in the majority of cases involving border or cross-border military incidents between states (Tanaka, 2012). The ICJ has indicated provisional measures in all cases involving military activities aimed, not just at preserving the rights of either party before the ICJ, but also at restraining the conduct of parties and preventing the further aggravation of the dispute. International courts and tribunals have issued four categories of non-aggravation measures with regard to military activities: a) to cease immediately any armed conflict; b) to withdraw armed forces from the disputed territory or the provisionally demilitarised zone, where applicable, and refrain from future deployment; c) to freeze the status quo on the ground or restore the situation which existed prior to the armed incident, including while the dispute is pending settlement; and d) to refrain from destroying evidence or impeding a UN fact-finding mission (Yiallourides et al., 2018).

The ICJ has indicated provisional measures aimed at non-aggravation in virtually all cases involving unilateral territorial incursions or the possibility of armed hostilities between the parties: *USA v Iran* (ICJ, 1979), *Nicaragua v United States of America* (ICJ, 1984), *Cameroon v Nigeria* (ICJ, 1996), *Bosnia and Herzegovina v Serbia and Montenegro* (ICJ, 1993), *Costa Rica v Nicaragua* (ICJ, 2011a), *Burkina Faso/Mali* (ICJ, 1986), *Congo v Uganda* (ICJ, 2000), *Cambodia v Thailand* (ICJ, 2011b), and *Ukraine v Russian Federation* (ICJ, 2022). Where courts and tribunals have not acceded to requests for provisional measures, they have sometimes nonetheless called upon the parties concerned to fulfil their obligations under the UN Charter and ‘refrain from any actions which might render more difficult the resolution of the dispute’ (Gray, 2003). According to Brownlie, this ‘non-aggravation’ practice is premised on the idea that the ICJ, as the principal judicial organ of the UN, has an important function to play in the peaceful settlement of disputes and the maintenance of international peace and security (Brownlie, 2009). In the *Legality of the Use of Force* (1999), Judge Vereshchetin opined that the power of ICJ to call upon parties to exercise self-restraint ‘flows from its responsibility for the safeguarding of international law and from major considerations of public order’. Moreover, according to Judge Koroma: ‘Where the risk of irreparable harm is said to exist or further action might aggravate or extend a dis-

pute, the granting of the relief becomes all the more necessary. It is thus one of the most important functions of the Court' (*Legality of the Use of Force*, 1999).

In the *South China Sea Arbitration* (Annex VII Arbitral Award, 2016), the Annex VII Arbitral Tribunal discussed the applicability and legal character of the duty of non-aggravation of disputes, albeit in the context of a maritime dispute and without considering questions relating to territorial sovereignty. The Philippines submitted that 'it has a right to have a dispute settled peacefully, and that China is under a corresponding obligation not to aggravate or extend a dispute pending its resolution' (*South China Sea Arbitration* (Annex VII Arbitral Award, 2016)). The Philippines argued that China had conducted acts which aggravated and extended the dispute pending its resolution. The Tribunal found that there is, indeed, 'a duty on parties engaged in a dispute settlement procedure to refrain from aggravating or extending the dispute or disputes at issue' and that such duty is embedded in Articles 279 and 300 of UNCLOS. Article 279 of UNCLOS relates to the UN Charter: it provides that 'States Parties shall settle any dispute between them concerning the interpretation or application of this Convention by peaceful means in accordance with Article 2, paragraph 3, of the Charter of the United Nations'. Article 300 of UNCLOS provides that parties have a duty to 'fulfil in good faith the obligations assumed under this Convention and... exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner which would not constitute an abuse of right'. Thus, the *South China Sea* Tribunal linked the duty of non-aggravation of disputes with, first, the obligation to pursue the peaceful settlement of disputes under Article 2(3) of the UN Charter and, second, the principle of good faith which was 'no less applicable to the provisions of a treaty relating to dispute settlement'.

If a duty of non-aggravation corollary to the fundamental legal principle of peaceful settlement exists, and such duty manifest in the principle of good faith and non-abuse of rights, this duty should apply at all stages of disputes, including outside judicial or arbitral proceedings (Bernardez, 1995). Indeed, states are obliged under the UN Charter and customary international law to pursue the peaceful settlement of their disputes and, pending such resolution, to avoid any action likely to aggravate such disputes. This duty certainly applies to states *pendente lite*, but would also apply to all state conduct during the entire lifespan of the dispute, including prior to the institution of judicial or arbitral proceedings.

The findings of the *Guyana/Suriname* Tribunal (2007) support this point. The *Guyana/Suriname* Tribunal found that a threat of force by Suriname, where law enforcement had requested that oil rigs operating under concessions granted by Guyana vacate the disputed area, represented a breach of Article 2(3) of the UN Charter. The *Guyana/Suriname* Tribunal found that Article 2(3) applies to both territorial and maritime disputes pending their full and final resolution. Suriname's conduct in the disputed area took place before the arbitral proceedings were instituted. The *Guyana/Suriname* Tribunal observed that Suriname had several peaceful options at its disposal to address Guyana's authorisation of exploratory drilling

in the disputed area, including direct negotiations and third-party dispute settlement under UNCLOS, but resorted to aggravating conduct in violation of both UNCLOS and the UN Charter. The *Guyana/Suriname* Tribunal found that Suriname's conduct in the disputed area both 'threaten[ed] international peace and security' and jeopardised the reaching of a final delimitation agreement. The *Guyana/Suriname* case highlights the illegality of certain aggravating actions, particularly entailing the threat of force and raising the risk for escalation in a disputed area, in light of the obligation to pursue peaceful settlement under Article 2(3) of the UN Charter.

2.5 Non-Aggravation in the Practice of the UN Security Council and Other UN Organs

The UN Security Council is authorised under the UN Charter to investigate disputes (Art. 34) make recommendations upon its own initiative (Art. 36.1) or that of the parties to a dispute (Art.37); and call upon parties to comply with any provisional measures it deems necessary or desirable 'in order to prevent an aggravation of the situation' (Art. 40). For example in its Resolution 2238 (2015) on Libya, the Security Council expressed its deep concern over the increased tensions and displacement of civilians resulting from violence between armed groups, including in the South of Libya, and urge[d] all groups to 'exercise restraint' and work towards local and national reconciliation initiatives'. In Resolution 2337 (2017) on the Gambia, the Security Council demanded 'that all stakeholders and parties act with maximum restraint, refrain from violence and remain calm.'

According to Bernardez (1995), the Security Council 'has historically made, and is making at present, important contributions to the prevention of aggravation of disputes and situations endangering the maintenance of international peace and security'. Indeed, most of the Security Council's historical contributions to the prevention of dispute aggravation were made within the framework of Chapter VI of the UN Charter on the peaceful settlement of disputes. For example, with respect to the territory of Indonesia, the Security Council considered, in Resolution 67 (1949), that the

...continued occupation of the territory of the Republic of Indonesia by the armed forces of the Netherlands is incompatible with the restoration of good relations between the parties and with the final achievement of a just and lasting settlement of the Indonesian dispute.

It then called upon the parties to ensure the 'maintenance of law and order throughout the area' affected and settle their dispute by peaceful means, including by arbitration, in accordance with the UN Charter. When the issue was first brought to the Security Council, the Dutch delegation had insisted that 'no case existed in Indonesia which endangered international peace, that no dispute existed', and, consequently, that 'no case existed with which the Security Council was competent to

deal with' (Munkres, 1953). This did not prevent the Security Council from recommending peaceful means and procedures for preventing the further aggravation of the dispute.

With respect to the disputed territory of Jammu and Kashmir, the Security Council demanded in Resolution 211 (1965) that India and Pakistan observe a ceasefire; withdraw all armed personnel to the positions held before the commencement of armed hostilities in the disputed area; and 'refrain from any action which might aggravate the situation in the area.' Relatedly, the UN Secretary-General appealed for 'maximum restraint' and recalled the applicability of the 1972 Simla Agreement between India and Pakistan (UN Secretary-General Statement, 2019). The Simla Agreement (1972) is founded on the peaceful settlement provisions of the UN Charter and provides that:

[T]he two countries are resolved to settle their differences by peaceful means through bilateral negotiations or by any other peaceful means mutually agreed upon between them. Pending the final settlement of any of the problems between the two countries, neither side shall unilaterally alter the situation and both shall prevent the organization, assistance or encouragement of any acts detrimental to the maintenance of peaceful and harmonious relations.

Thus, regarding the disputed territory of Jammu and Kashmir, the UN Security Council and the UN Secretary-General both linked the duties of non-aggravation of disputes with the peaceful settlement of dispute enshrined in the UN Charter.

The UN Security Council has also called in Resolution 395 (1976) for negotiations between Turkey and Greece over the Aegean Sea island dispute and for both parties to 'avoid any incident which might lead to the aggravation of the situation and which, consequently, might compromise their efforts towards a peaceful solution.' It also urged the Governments of Greece and Turkey 'to do everything in their power to reduce the present tensions in the area so that the negotiating process may be facilitated' and to continue to consider submitting the dispute for adjudication, in particular the ICJ (Acer, 2017; Syrigos, 1998). Similarly, on the subject of Cyprus, the UN Security Council noted in Resolution 401 (1976) that a just and lasting settlement lies in meaningful and productive negotiations between the parties concerned and that the usefulness of such negotiations depends upon the willingness of all parties 'to show the necessary flexibility and avoid actions which increase tension' on the Island. To that end, it urged the parties

to act with the utmost restraint to refrain from any unilateral or other action likely to affect adversely the prospects of negotiations for a just and peaceful solution and to continue and accelerate determined co-operative efforts to achieve the objectives of the Security Council.

With regard to the Iraq-Kuwait dispute, the UN Security Council demanded through Resolution 687 (1991) that both Iraq and Kuwait respect the inviolability

of the international boundary. Further, it called upon the UN Secretary-General to lend his assistance to demarcate the boundary on land and at sea and, pending demarcation, to 'observe any hostile or potentially hostile action mounted from the territory of one state to another'. In response to Iraq's objection, the President of the Security Council replied that the UN Security Council was merely exercising its duty to help prevent the further aggravation of the underlying dispute to facilitate its peaceful resolution (Brownlie, 1998).

Similarly, when small-scale armed clashes broke out between Thai and Cambodian troops in 2011 near the disputed Preah Vihear temple on the Cambodian-Thai border, the Security Council called on the two sides 'to establish a permanent ceasefire, and to implement it fully'; 'resolve the situation peacefully and through effective dialogue'; and, in so doing, 'display maximum restraint and avoid any action that may aggravate the situation' (Security Council Press Statement, 14 February 2011).

The above are only a few indicative examples of the UN Security Council's practice in relation to the prevention of aggravation of disputes which may endanger peace and security. The UN General Assembly and the UN Secretary-General have also emphasised that states involved in disputes must, pursuant to their non-aggravation duty, avoid unilateral actions, particularly military actions, in the dispute area to avoid escalation and ultimately ensure the peaceful settlement of the dispute. UN Secretary Generals have frequently supported the implementation of mechanisms of reciprocal communications, good offices and conciliation in the prevention of the aggravation of controversies. Thus, it seems that UN political organs have emphasised the duty of non-aggravation as its general policy for the peaceful settlement of international disputes to avoid escalation in situations of unilateral territorial incursions and violations of land boundaries and to prevent the further aggravation of the situation. According to scholars, this is line with UN political organs' 'calming function' and active 'preventive diplomacy' for the maintenance of international peace and security (Bernardez, 1995).

3. The Temporal Scope of Non-Aggravation

3.1 Non-Aggravation Applies at All Stages of the Dispute

As evidenced above, the rules and principles in the UN Charter, particularly Articles 2(3) and 33(1), the 1970 Declaration on Friendly Relations, the 1982 Manila Declaration, the 1988 Declaration on the Prevention and Removal of Disputes, and associated legal instruments comprise an essential architectural framework for the peaceful settlement of disputes. This 'code of conduct' is particularly relevant where the continuance of such disputes could endanger international peace and security. This essential framework necessarily includes the need to exercise restraint and to avoid the aggravation of disputes. Such non-aggravation principle is

also a manifest expression of the legal duty under the UN Charter to fulfil obligations in good faith so as not to endanger the maintenance of peace and security. If the obligation to pursue the peaceful settlement of disputes ‘in such a manner that international peace and security, and justice, are not endangered’ is to have practical meaning, states involved in disputes, which could endanger peace and security, must at the very least refrain from actions likely to aggravate or extend the ongoing dispute or otherwise complicate its resolution. Therefore, a positive and continuous duty of non-aggravation must be seen as inherent to the peaceful settlement of international disputes, or else a peaceful settlement would be difficult to be achieved.

3.2 Existence of a Dispute

Be that as it may, two further questions must be answered: first, at what exact point in time does the duty of non-aggravation arise? Second, how long is this duty to last? Here the answer must be that non-aggravation arises when a dispute with the crystallisation of the territorial dispute and ends once the territorial dispute is resolved. A territorial dispute arises when two or more parties advance competing titles of sovereignty over a given land territory. The dispute is considered settled by virtue of an agreement between the parties concerned, an authoritative decision of a third party, or the disappearance of the object of a sovereignty claim (Yiallourides et al., 2018).

It is not infrequent that one of the disputing parties denies the existence of an international dispute in order to contest the jurisdiction of an international court or tribunal (Tanaka, 2018). In the *Aegean Sea Continental Shelf case* (ICJ, 1978), for example, Turkey raised the point that this was a merely political issue, there was in fact ‘no dispute between the parties’ and, thus, the ICJ could not for that reason be seised of jurisdiction in this case. The ICJ rejected this argument pointing out that ‘there are certain sovereign rights being claimed by both Greece and Turkey, one against the other and it is manifest that legal rights lie at the root of the dispute that divides the two States’. In *Georgia v Russian Federation* (ICJ, 2011), Russia contended that there was ‘no dispute’ between the parties. In *Nicaragua v Colombia* (ICJ, 2016a), Colombia contended that prior to the filing of Nicaragua’s application there was no dispute between the parties with respect to the claims advanced in the application. In *Marshall Islands v United Kingdom* (ICJ, 2016b), the ICJ declined to exercise its judicial function on the basis of the absence of a dispute between the parties (Becker, 2017).

Accordingly, the existence of an international dispute may have important implications on the settlement of the dispute itself (Bonafe, 2017). The same applies in determining the existence of a territorial dispute. That said, the question of particular interest here concerns the use of objective criteria for determining the existence of a territorial dispute between two states. The discussion below provides a brief overview of the key criteria which can be used to determine the existence of an international territorial dispute.

First, a dispute is said to exist when it is demonstrated that the two sides 'hold clearly opposite views' with respect to the issue brought before litigation (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania* (ICJ, 1957)). Specifically, a dispute exists when it is shown that 'the claim of one party is positively opposed by the other' (*South West Africa* (ICJ, 1962)) and that 'the respondent was aware, or could not have been unaware, that its views were "positively opposed" by the applicant' (*Marshall Islands v United Kingdom* (ICJ, 2016a)). Accordingly, in order for a simple political 'disagreement' or a mere 'discussion of divergent legal opinions' to rise to the level of an international dispute, a certain amount of communication evidencing the parties' opposing claims and denials ('complaints of fact and law' formulated by one side and denied by the other) is required (*Liechtenstein v Germany* (ICJ, 2005)). This is what the PCIJ had in mind in the *Mavrommatis Palestine Concessions case* (PCIJ, 1924) when it referred to a 'conflict of legal views or of interests' between two parties. It is, thus, clear that when what is being complained of is an unlawful act that has been committed (for example State A despatched its navy to chase off State B's fishermen operating in the vicinity of a territorial feature administered by State B on the ground that state A holds a valid title of sovereignty over that territory and State A indicates its opposition or indignation by raising a competing claim of sovereignty) no issue arises as to the existence of a territorial dispute. For a territorial dispute to emerge, it does not matter whether the sovereignty claims of State A or State B are justified on their merits. What matters for this purpose is that there is a dispute over, in effect, the sovereignty status of the territory in question and associated maritime entitlements.

Second, the determination of the existence of a dispute between the parties 'requires an examination of the facts' (*Georgia v Russian Federation* (ICJ, 2011)). The matter is 'one of substance, not of form' (*Marshall Islands v United Kingdom* (ICJ, 2016b)). The conduct of the parties is particularly important (*Nicaragua v Colombia* (ICJ, 2016b)). To establish when a territorial dispute begins between two states, one has to pay attention to public statements or other diplomatic exchanges between the parties, any exchanges made in multilateral settings as well as to the 'overall conduct' of the parties with respect to the issue at hand - prior to the institution of proceedings (*Marshall Islands v United Kingdom* (ICJ, 2016a)). Whilst prior negotiations and exchanges of views between the parties are not an absolute pre-condition, negotiations consultations and other means of diplomatic settlement may be an important step to bring a claim of one party to the attention of the other and, thus, offer strong evidence of the existence of the dispute (*Georgia v Russian Federation* (ICJ, 2011)).

In the context of a territorial dispute, bilateral diplomatic exchanges between the parties demonstrating their conflicting sovereignty claims is surely the strongest evidence of the existence of a territorial dispute. Written official documents or public statements in which the leaders of one government claim a piece

of territory or question the existing location of the boundary or in which they dispute the right of a state to exercise sovereign rights in, or in respect of, a given territory would indicate the existence of a dispute. In response, if the targeted government rejects the challenger's position and maintains that the delimitation of the boundary or sovereign rights to surrounding waters are not open to question and negotiations would also indicate the existence of a dispute. Indeed, parties would normally advance claims, counter-claims and mutual denials, often invoking evidence of long and effective control and jurisdiction in the area(s) under dispute; the validity of an international treaty as evidence of the existence and location of a boundary; and prescriptions regarding the prohibition of the threat or use of force for the acquisition of title over territory (Sharma, 1997). For example, in *Pedra Branca/Pulau Batu Puteh* (ICJ, 2008) the ICJ accepted that, with regard to the disputed islands 'the dispute crystallized in 1980, when Singapore and Malaysia formally opposed each other's claims to the islands'. As another example, in *Nicaragua v Colombia* (ICJ, 2012), the ICJ found that the critical point for the emergence of the territorial dispute was the exchange of diplomatic notes of protest in 1969 between Colombia and Nicaragua as a 'manifestation of a difference of views between the Parties regarding sovereignty over certain maritime features'. Judge Oda in *Portugal v Australia* (ICJ, 1995) underscored the requirement that the parties assert the legal rights forming the issue brought before the Court to qualify the case as an international dispute.

Therefore, even when State A denies the existence of territorial dispute with State B but at the same time both states lodge explicit official statements on the validity of their respective sovereignty claims and such claims are positively opposed to each other (i.e., competing claims of sovereignty over the same territory and/or surrounding ocean space often accompanied by formal protests hinting at each other's internationally wrongful acts) it would be difficult to deny that a proper dispute does in fact exist. The critical point for the crystallisation of the dispute is when one side asserts its sovereignty and associated sovereign rights and the other side protests for the first time, or when the first protest by one state is rejected by the other (Kohen and Hébié, 2018). On the other hand, statements of a 'general nature', 'general criticism[s]', or statements 'formulated in hortatory terms' without advancing a specific allegation (i.e., without specifying whose state's conduct gave rise to an alleged breach of international law) do not in themselves give rise to the existence of a dispute (Yiallourides et al., 2018).

As the ICJ has explained, in order for a statement to give rise to an international dispute, it must refer to the subject-matter of a claim 'with sufficient clarity to enable the State against which [that] claim is made to identify that there is, or may be, a dispute with regard to that subject-matter' (*Marshall Islands v United Kingdom* (ICJ, 2016b)).

Third, a simple failure to respond to a claim does not exclude the existence of a dispute. According to Schreuer (2008) 'silence of a party in the face of legal

arguments and claims for reparation by the other party cannot be taken as expressing agreement and hence the absence of a dispute'. Indeed, 'the existence of a dispute may be inferred from the failure of a State to respond to a claim in circumstances where a response is called for' (*Georgia v Russian Federation* (ICJ, 2011)). Returning to the hypothetical above, in the event that State A stops short of responding to State B's claims and protestations, this will not necessarily indicate the absence of the dispute, rather the opposite in some instances. According to Quintana (2015), the dispute is 'born at the very moment' at which the claim is denied or where a claim is ignored. What is decisive for the existence of a dispute is not necessarily the explicit denial or rejection of the claimant's position but the failure by the respondent to accede to its demands (i.e., that State A's naval forces be withdrawn from the disputed area immediately and never return). If State A keeps sending its navy in the vicinity of the disputed territory despite State B's protests, that would surely indicate the existence of a dispute. Indeed, as Judge Donoghue said in *Marshall Islands v United Kingdom* (ICJ, 2016b), 'even in the absence of an explicit statement of the Respondent's opposition to the claim, there would have been a basis for the Court to infer opposition from an unaltered course of conduct'.

4. Conclusory Remarks

4.1 Non-Aggravation: A Fundamental Principle of International Law

The preceding analysis has placed the duty of non-aggravation in the context of the peaceful settlement of international disputes, focusing on territorial and maritime disputes. The paper has put forward the proposition that the 'non-aggravation of disputes' is a fundamental principle of international law which is gaining recognition and importance in the context of the peaceful settlement of international disputes, particularly disputes which are often prone to armed escalation and pose risks to international peace and security. General duties of non-aggravation in the context of peaceful settlement can be found in the Declaration on Friendly Relations (1970) and the Manila Declaration (UN, 1982a). These Declarations lay down the principle that parties to a dispute must refrain from any action 'which may aggravate the situation' so as 'to endanger the maintenance of international peace and security'. Specific duties of non-aggravation are enshrined in numerous multilateral treaties with dispute settlement provisions, including UNCLOS. International courts and tribunals have emphasised the principle of non-aggravation articulated in terms of 'general duties' or 'specific measures'. These so-called 'non-aggravation' measures form a corollary to preserve the subject matter of the dispute and the rights of either party to the dispute, while the adjudicatory proceedings are pending.

The UN Security Council under Chapter VI of the UN Charter can call

upon disputing states, without prejudice to their rights, claims or positions, to comply with any provisional measures it deems necessary or desirable ‘in order to prevent the aggravation of disputes or situations’. States recognise non-aggravation as a rule of law-oriented approach which encompasses obligations to cooperate in implementing practical initiatives to avoid the outbreak and escalation of tensions in the course of their disputes.

The rules of international law associated with territorial and maritime disputes stipulate that, once a dispute has crystallised, and pending its full and final resolution, states should actively and meaningfully seek to resolve the dispute by recourse to peaceful means of their choice. Where one method proves insufficient or inadequate to settle the given dispute, the states concerned are under a continuous duty to use other methods to avoid aggravating the dispute. Pending the peaceful settlement, neither party is permitted to embark on unilateral actions likely to aggravate or extend the dispute.

4.2 Non-Aggravation: Ensures Fairness in the Peaceful Settlement of Disputes

As seen earlier, the duty of non-aggravation serves the fundamental objective of preserving peace and security. Crucially, the duty of non-aggravation also preserves fairness in the peaceful settlement of disputes. It promotes the idea that states are equal in the exercise of their sovereignty and political independence. Crawford (2014) writes ‘sovereignty does not mean freedom from the law but freedom within the law’. Indeed, the concept of sovereign equality is the founding basis for territorial sovereignty and associated maritime entitlements and is inherent in the process of land and maritime boundary delimitation. Thus, where a state proclaims the limits of its EEZ from a defined land territory, this is principally a matter for that state. The state exercises its territorial sovereignty and applies the well-established principle that maritime rights derive from the coastal state’s sovereignty over the land, a principle commonly formulated as ‘the land dominates the sea’ (*North Sea Continental Shelf Cases* ICJ (1969)). However, when that state seeks to unilaterally enforce such limits against other states, which possess similarly exercisable maritime entitlements in the same area, the principle of sovereign equality also applies. Indeed, an obvious manifestation of sovereign ‘inequality’ in international territorial and maritime disputes emanates from the belief that the militarily powerful state will only abstain from unilateral actions in the disputed area when it is in its interest to do so. This state, relying on obscure historic evidence of territorial discovery and linguistic indeterminacies in the applicable provisions, could deploy military structures, facilities, and personnel on a disputed territory, continental or island, which is also claimed by other states, as a means of deterring the other states from pursuing their sovereignty claims and maritime

rights in that territory and surrounding waters. There is no use of force in this hypothetical. No shots are fired. No bodily injury or damage to property has occurred through the military deployment. The sovereignty rights of the other states are not displaced or forfeited, despite the first state's military action and the mere passing of time will not change the legal situation (Kohen and Hébié, 2018). On the ground, however, the sovereign rights of the other states cannot be pursued in any meaningful way, without projecting some form of force, thus without risking escalation and conflict (Mikanagi, 2018). Therefore, military escalation by one more militarily powerful state, while it will not change the legal situation on the ground, may push the other less powerful claimant states to project force to attempt to exercise their sovereign rights in the disputed area.

The considerations above are not theoretical. They have far-reaching implications for the peaceful settlement of many existing territorial and maritime disputes across the world. A practical issue for the peaceful settlement of territorial and maritime disputes is that if the possessor of a disputed land territory rejects any means to settle the question of territorial sovereignty, i.e., to determine which of the disputing states is the legal owner of that territory, and there is no jurisdictional basis for third-party adjudication or arbitration, the possessor state may continue to hold onto the territory, while the other state or states will be unable to settle the dispute. As a result, the dispute and its delicate status quo will ebb and flow. Pending the resolution, states must actively maintain a friendly atmosphere conducive to peaceful settlement and act with maximum caution in avoiding any aggravating conduct. This serves the integrity and effectiveness of the final resolution of the dispute, whether through diplomatic or adjudicatory means. The position that non-aggravation only comes into play when the dispute is referred to adjudication or arbitration, and thus in the hypothetical when the militarily powerful state magically decides to agree to third-party dispute settlement, is not defensible. For without exercising restraint and continuous meaningful efforts towards peaceful settlement, the territorial dispute and the fragile status quo which often goes with it will not simply be wished away. The territorial dispute will not cease to be a 'dangerous' dispute where the option of third-party settlement has been persistently rejected by the possessor state.

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