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CONTENTS

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The Legality of Militarization of the South China Sea and Its Legal Implications

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ABSTRACT

Maritime entitlement associated with territorial boundaries in the South China Sea has been disputed for a long time, but until recently it does not seem settled. Despite the instability, China has continued expanding its military presence in disputed areas to enhance its maritime power. China has taken various methods to militarize the area, including unlawful restrictions, construction of military bases, and mobilization of maritime militia in an unreasonable manner. This paper aims to examine the legal ground upon which China has claimed its territorial sovereignty to assess whether they have such authority over the region in the South China Sea. Subsequently, the paper will closely analyse the legality of China's militarisation of the region under international law and suggest how international society would have to react to China's excessive domination.

Key words : South China Sea, militarization, maritime militia, sovereign right, United Nations Convention on the Law of the Sea (UNCLOS)

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1. Introduction

The South China Sea is one of the "zone-locked" areas by exclusive economic zone (EEZs) of different nations. It is surrounded by China, the Philippines, Vietnam, Malaysia, Indonesia, and Taiwan, meaning that some states cannot reach the high sea or enter the South China Sea without passing through at least one of these coastal states' EEZs.[1] Therefore, it is particularly important to clarify the maritime boundary in the South China Sea to identify the coastal State's rights associated with it. The problem is that China has continuously claimed its territorial sovereignty within the nine-dash line and tried to exercise its authority within it without reasonable legal grounds. Conflicts in the South China Sea contain some legal ambiguity concerning historic rights or limited sovereignty in the EEZ, and it leaves some room for different interpretations of relevant provisions depending on states' own national interests. By taking advantage of such legal ambiguity, it appears that China has attempted to expand its presence in the South China Sea and territorialise or even militarise the area to reinforce its maritime power so that it becomes crucial to rightly investigate whether China's attempts conform with the United Nations Convention on the Law of the Sea (UNCLOS). This paper is divided into three main parts: 1) The Status of the South China Sea and Historic Claims, 2) China's Militarisation of the South China Sea, and 3) Regional and International Responses to China's Militarisation. The first part highlights the tensions between China and neighbouring states concerning maritime entitlement associated with the occupation of the South China Sea. Part 2 is divided into three sections and each elaborates on different ways of militarizing the area: unlawful restrictions on freedom of navigation, military constructions, and maritime militia. Part 3 focuses on the responses of the international community to China's actions from the view of Association of Southeast Asian Nations (ASEAN) and the US in particular and aims to suggest a possible direction that the international community ought to pursue to restrain China's excessive military activities. Ostensibly, the South China Sea dispute may be seen as the tension created in the course of balancing between securing national security rights and ensuring the freedom of navigation. Yet, the matter in the South China Sea is not that simple. Given the growing maritime power of China and its influences on the world, the international community is required to pay great attention to China's movement and react wisely and collectively.

1 Kraska, J. (2011) *Maritime Power and Law of the Sea: Expeditionary Operations in World Politics* (Oxford University Press 2011) ch1.

2. The Status of the South China Sea and Historic Claim

The South China Sea is a highly disputed area where numerous maritime boundary and entitlement disputes remain unresolved, and such disputes seem very likely to soon turn into warfare at any time. The major cause of the disputes is China's constant attempt to exercise its authority over the South China Sea. In 1948, China first issued a 'U-shaped' dotted line which occupied 80% of the South China Sea, which was immediately rejected by neighbouring countries such as Vietnam, Malaysia, Indonesia, and the Philippines.[2] Nonetheless, China unilaterally reaffirmed the extended EEZ and its authority by drawing so-called a "nine-dash line". As shown in figure 1 below, a nine-dash line is largely overlapped with other states' EEZs and China has nevertheless claimed its territorial sovereignty within the area without reasonable legal grounds.

In the past, the world's ocean was simply divided into territorial water and

Figure 1. The map of the South China Sea.[3]

2 Kraska, J. and Pedrozo, R. (2013) *International Maritime Security Law* (BRILL 2013) 313-354, 320.

3 BBC News. (2020). South China Sea dispute: China's Pursuit of Resources 'Unlawful', says US' BBC News <https://www.bbc.co.uk/news/world-us-canada-53397673>.

international water. The latter was further divided into more specific water areas: a contiguous zone, exclusive economic zone, and high sea, as different national interests, such as fishing, or marine scientific research, were highlighted to be protected to some extent under the coastal state's authority. One of the fundamental principles under UNCLOS is the principle of "freedom of navigation". According to article 87, freedom of navigation shall be enjoyed by all States in the high sea, and such right is applied to the EEZ pursuant to article 58.[4] China guarantees the right of freedom of navigation beyond its territorial sea under international and domestic law.[5] However, it preserves its way out to deter this right by inserting article 14 in the Exclusive Economic Zone and Continental Shelf Act, stating that the "[t]he provisions of this Law shall not affect the *historical rights* of the People's Republic of China." (emphasis added)[6] Moreover, given the use of the term 'relevant water' in China's Note Verbale submitted to the UN Secretary-General, which arguably means to refer to ocean area within the nine-dash line,[7] it may well be said that China's position is rather ambiguous and its claims stem from both UNCLOS and domestic law in a somewhat inconsistent manner. Therefore, it is also important to keep an eye on the interaction of UNCLOS with Chinese domestic law and see how China tries to leverage these different bodies of law for the sake of their own interests and benefits.

In the *South China Sea Arbitration*, China claimed that they have established historic rights over the South China Sea over a long course of history since they first drew a dotted line, as what has become known as the nine-dash line, into the official map.[8] Along with immediate objections by neighbouring states,[9] the Philippines further challenged China's historic rights on the ground that whatever rights China may have enjoyed before the establishment of UNCLOS were extinguished since China's accession to the Convention.[10] In addition, there was a lack of documented evidence showing China's intensive involvement in the disputed area, at least it failed to obtain international recognition, demonstrating a lack of connection between China and the area in dispute.[11] The document developed by the United Nation in the early 1960s about the Juridical Regime of Historic Waters would be one of the most useful sources to understand what constitutes a historic

4 United Nations Convention on the Law of the Sea 1982 (UNCLOS 1982) art 58 (1) In the exclusive economic zone, all States, whether coastal or land-locked, enjoy, subject to the relevant provisions of this Convention, the freedoms referred to in article 87 of navigation […].

5 Law on the Exclusive Economic Zone and the Continental Shelf of the People's Republic of China (1998), art 11. The People's Republic of China, Exclusive Economic Zone and Continental Shelf Act 1998, art 11 Any State […] shall enjoy in the exclusive economic zone and Continental shelf of the People's Republic of China freedom of navigation and overflight […].

6 Law on the Exclusive Economic Zone and the Continental Shelf of the People's Republic of China (1998), art 14. The People's Republic of China, Exclusive Economic Zone and Continental Shelf Act 1998, art 14.

7 The South China Sea Arbitration. (2016) PCA 2013-19, 184.

8 The South China Sea Arbitration. (2016) PCA 2013-19, 180-187.

9 The South China Sea Arbitration. (2016) PCA 2013-19, 184.

10 The South China Sea Arbitration. (2016) PCA 2013-19, 188.

11 *Ibid*., 194, 197.

title. It elucidates critical elements to make valid claims for a historic title, including acquiescence of foreign states, long and continued usage, the exercise of authority, and its effectiveness.[12] The requirements for such claims are well summarised by Kraska in his book, explaining that States must make historic claims *openly* and have exercised *exclusive authority* over the area throughout *an extended period of time*, and other states must have *acquiesced* in the exercise of authority.[13]

Among all the requirements proposed, the present paper concentrates on analysing the valid scope of exclusive authority as a means of deterring China's claim. Regarding exclusive authority, it can be argued that historic claims on the mere ground that a state has habitually engaged in fishing without any objections from other states would not be successful. It can be hardly said that the state has exclusive authority over the area when the activity (i.e., fishing in the high sea) is already considered the internationally lawful use of the sea which every state is entitled to exercise. There is simply no need for other states to object to such activity not because they respect the state's exclusive authority, but because it is a lawful use of the sea. On the other hand, assuming that a state has effectively *restricted* other states from fishing in a certain area without any objections, it may well be said that the state has exercised the exclusive authority, and accordingly, the state may issue a valid historic claim so far as the other requirements are also met. According to the aforementioned document, the exclusive authority can be even understood as the exercise of *sovereignty* if the claim to historic waters is in fact a claim to sovereignty over the area.[14] It sheds light on the importance of perceiving the correct meaning of authority that is required for the test. Exclusive authority is different from and cannot be equated with a higher level of engagement in maritime activities over the region. Through this line of thinking, it appears that China, whose claim is more on factual activities not enforcement power against foreign vessels within the area, did not have exclusive authority over the region, therefore, as it was also decided in the *South China Sea Arbitration*, China's historic claim is invalid.

3. China's Militarization of the South China Sea

Despite unsuccessful China's historic claims, China has sought to militarise the area in various ways in an attempt to expand its dominance over the South

12 International Law Commission. (1962) Juridical Regime of Historic Waters, Including Historic Bays, UN Doc A/CN.4/143, 6-19.

13 Ashley Roach, J. and Smith, R. W. (2012) *Excessive Maritime Claims* (Publication on Ocean Development, Vol. 73, 3rd edn, Martinus Nijhoff 39-40; Kraska, J. (2011) *Maritime Power and Law of the Sea: Expeditionary Operations in World Politics* (Oxford University Press), 314.

14 International Law Commission. (1962) Juridical Regime of Historic Waters, Including Historic Bays, UN Doc A/CN.4/143, 85.

China Sea. Part 3 is divided into three sections, including unlawful restriction on freedom of navigation, construction of military bases, and mobilization of maritime militia and aims to examine the legality of such activities under international law.

3.1 Unlawful Restriction on Freedom of Navigation

The legality of the nine-dash line employed by China and other baselines claimed by Malaysia, the Philippines, Taiwan, and Vietnam does not only create tensions between China and states bordering the South China Sea but is also questioned by the third states, notably the US.[15] Putting aside all these geological features and the legality of these 'inferred' baselines, a more critical question is whether the coastal states respect the principle of freedom of navigation consistent with UNCLOS within the disputed area. It is crucial to observe whether China has sought to unlawfully implement its domestic law on other vessels in the region. There are some incidents reported, both in aviation and maritime context, about China's unlawful restrictions on the freedom of navigation within the nine-dash line.[16]

In 2016, China seized a U.S. unmanned underwater vehicle launched by U.S. naval vessel, *USNS Bowditch*. The U.S. claimed that China's seizure was unlawful because China does not have jurisdiction over the water where the underwater vehicle was captured and it was conducting routine scientific research.[17] The incident occurred outside of the area delimited by a nine-dash line, but within the Philippines' EEZ over which China has neither sovereign rights nor jurisdiction. Although the dispute was resolved when China returned the vehicle, this incident highlights China's vigorous attempt to expand its maritime power. China sought to justify their action by stating that it seized the drone to ensure that the device was not causing any harm to the safety of navigation.[18] China also insisted that the device could have been used for gathering intelligence for military purposes.[19] However, China's counterclaims are not supported by UNCLOS or any other international regulations. First of all, China does not have sovereign rights or jurisdiction over the water where the incident occurred which was the philippines' EEZ so it certainly has no right to take enforcement measures, such as the seizure of the device. Nevertheless, China exercised excessive territorial rights as if the incident

15 Ashley Roach, J. and Smith, R. W. (2012) *Excessive Maritime Claims* (Publication on Ocean Development, Vol. 73, 3rd edn, Martinus Nijhoff, 80-101.

16 The EP-3 Incident 2001, The USNS Impeccable Incident 2009, The USNS Bowditch Incident 2016.

17 Kraska, J. and Pedrozo, R. (2016) China's Capture of U.S. Underwater Drone Violates Law of the Sea (Lawfare, 16 December 2016) <https://www.lawfareblog.com/chinas-capture-us-underwater-drone-violates-law-sea>; Valencia, M. J. (2017) US-China Underwater Drone Incident: Legal Grey Areas (THE DIPLOMATE) <https://thediplomat.com/2017/01/us-china-underwater-drone-incident-legal-grey-areas/>.

18 Daugirdas, K. and Mortenson, J. D. (2017) United State Confront China over Seizure of Unmanned Drone in the South China Sea, 111(2) *American Journal of International Law* 513.

19 *Ibid*., 517.

occurred in their territorial sea. UNCLOS allows coastal states to restrict innocent passage in the territorial sea only if the passage of a foreign ship is prejudicial to the peace, good order or security of the coastal state, and that includes 'any act aimed at collecting information to the prejudice of the defence or security of the coastal state' and 'carrying out of research or survey activities.'[20] In addition, Article 21 permits the coastal state to adopt the law and regulations in respect of the safety of navigation.[21] However, the application of those articles is firmly limited to the territorial sea, not the EEZ of the coastal state, and certainly not the EEZ of the foreign state. Thus, the seizure of the U.S. device may be well understood as China's desire to expand its maritime power, and a bold attempt to challenge the status quo to gradually turn their unlawful activities into a new norm in a way that they can obtain more maritime power. Moreover, given that the drone was not fully autonomous but was being remotely operated by U.S. navy personnel and research scientists on Bowditch and there was a radio communication available between Bowditch and China's PRC Navy ship, China should have given a warning and demanded the U.S. to cease the operation despite its unqualified status to do so. Even if military surveillance were suspected, the proper action should have been taken in due regard under international law, which China has clearly failed to do so in the *Bowditch* incident.[22] As examined earlier, China is not entitled to claim territorial sovereignty within a nine-dashed line. Therefore, the Chinese restriction on the freedom of navigation of other states is surely incompatible with UNCLOS, and even if State thinks such restriction is needed for whatever reasons, necessary steps should be taken in a proper and reasonable manner.

In fact, China is not the only country that has increased its military profile other bordering states have also been expanding their military capability and imposed restrictions on military activity within their area. For example, Vietnam and Malaysia have also made excessive maritime claims over their territorial sea and the EEZ based on security concerns, imposing restrictions on the passage of warships through their water area.[23] However, why does China's action particularly matter? It is partly because of its maritime power, influences and the scale of activity. It is an undeniable fact that China has rapidly grown their political, economic and maritime power and become one of the countries whose influence has had a great impact on the world order followed by the US. In addition, China has increased their military budget and demonstrated its willingness to use force against whoever goes against the will of China. Article 11 of China's EEZ Law specifies the condition for compliance with the Chinese domestic law in the course of exercising the freedom of navigation and Article 14 recognises "historic rights" as the

20 UNCLOS. (1982) art 19(2)(c) and (j).
21 UNCLOS. (1982) art 21(1)(a).
22 Ku, J. (2016) The Non-existent Legal Basis for China's Seizure of the U.S. Navy's Drone in the South China Sea (Lawfare) <https://www.lawfareblog.com/nonexistent-legal-basis-chinas-seizure-us-navys-drone-south-china-sea>.
23 Kraska, J. and Pedrozo, R. (2013) *International Maritime Security Law* (BRILL 2013) 312-314.

right to be preserved, which is again not consistent with the international law.[24] As already discussed in Part 2, China's claims seem to have been strategically developed in a way they can leverage both international law and domestic law depending on their interests, which makes China's claim rather ambiguous. This can be understood as 'strategic ambiguity' which China would like to seek for their benefit.[25]

3.2 Construction and Installation of Military Bases

In the *South China Sea Arbitration*, one of the claims that the Philippines brought against China concerns China's construction of artificial islands and installations on the Mischief Reef.[26] In determining the legality of such activities, article 56 and article 60 should be first examined to identify the extent of sovereign rights that the coastal state has in the EEZ. According to Article 56, the coastal state has sovereign rights over living and non-living resources and other activities for economic exploitation and exploration in the EEZ as well as the jurisdiction regarding the establishment and use of artificial islands, installations, and structures.[27] Article 60 also grants the coastal State the exclusive right over artificial islands, installations, and structures in the EEZ as below.[28]

24 Law on the Exclusive Economic Zone and the Continental Shelf of the People's Republic of China (1998), art 11. The People's Republic of China, Exclusive Economic Zone and Continental Shelf Act 1998, art 11. "Any Country shall enjoy the freedom of navigation in and overflight over the Exclusive Economic Zone … of the People's Republic of China and the expediency of other lawful uses of the sea related to the above freedom, under the condition that the laws and regulations of the People's Republic of China are complied with".

25 Beckman, R. (2013) The UN Convention on the Law of the Sea and the Maritime Disputes in the South China Sea (2013) *The American Journal of International Law* 107(142), 142-156.

26 The South China Sea Arbitration. (2016) PCA 2013-19 [399].

27 UNCLOS. (1982) art 56(1)(b).

28 UNCLOS. (1982) art 60.

Article 60

Artificial islands, installations and structures in the exclusive economic zone.

In the exclusive economic zone, the coastal State shall have the exclusive right to construct and to authorize and regulate the construction, operation and use of:

(a) Artificial islands;

(b) Installations and structures for the purposes provided for in article 56 and other economic purposes;

(c) Installations and structures which may interfere with the exercise of the rights of the coastal State in the zone.

Before getting into the issue in more detail, it should be determined to which state Mischief Reef legally and geographically belongs and its legal status under UNCLOS. The Tribunal concluded that the Mischief Reef is a low-tide elevation,[29] located within the Philippines' EEZ, and accordingly, the Philippines shall have maritime entitlement over the area.[30] China's mere reiteration that "China has indisputable sovereignty over the Nansha Islands and its adjacent waters. The development of any facility in the Nansha Islands falls within the scope of China's sovereignty" is just too weak to make difference in the decision.[31] It seems therefore apparent that China has violated international law regarding the construction of artificial islands in the Philippines' EEZ without the consent of the Philippines under article 60.

A subsequent question is followed as to whether building 'military' installations or structures are permissible under UNCLOS. Article 60(1)(b) grants the coastal state the right to authorise and regulate the construction and the use of installation or structures on one condition, for *economic purposes*, which arguably would not cover military-related concerns. In the initial submission of the Philippines, they expressed serious concerns about China's activities on Mischief Reef because the activities involved Chinese warships and military personnel.[32] On this matter, as China has repeatedly stated in the first place that structures were to protect Chinese fishermen and their production, it was accepted by the Tribunal that such structures were for civilian uses, not for military purposes.[33] However, China's constructions on Mischief Reef might not be solely focused on civilian

29 UNCLOS. (1982) art 13(1) A low-tide elevation is a naturally formed area of land which is surround by and above water at low tide but submerged at high tide.; art 13(2) [It] has no territorial sea of its own.
30 The South China Sea Arbitration. (2016) PCA 2013-19, 1025.
31 *Ibid*., 1006.
32 *Ibid*., 997.
33 *Ibid*., 1028.

uses indeed. Such constructions may have mixed purposes, surely including military purposes. The investigation has released that a 3,000-metre-long airstrip which would be long enough to accommodate most Chinese aircraft was built on the Mischief Reef.[34] Aquilino, US Indo-Pacific commander, expressed his concern that military facilities on Mischief Reef, Subi Reef and Fiery Cross, such as radar systems and missile arsenals, appeared to have been completed and the function of those islands would significantly advance the offensive capability of China, which, in the US view, is certainly a threat.[35] Regarding this, Hong Lei, a Chinese Foreign Ministry Spokesperson, declined to answer the question, but merely repeated the statement that China's activities are "completely lawful, reasonable and justified".[36] China's construction of military installations and structures is not only limited to Mischief Reef. China also built military structures on Subi Reef at the Spratly Islands with the aim of regional dominance and has gradually expanded its military presence on numerous islands in the South China Sea.[37] However, China continues denying the intention to militarize and territorialize the area, repeatedly stating that such construction is only for civilian uses and search and rescue operations and is to enhance national security which would eventually contribute to international peace.

Precisely speaking, states are not necessarily forbidden to build military bases within the EEZ, or on the Continental shelf, of the coastal State. According to articles 56 and 60 of UNCLOS, China may have the right to construct military installations or structures in the EEZ of the coastal state since neither article specifies military elements. Article 56 only gives the coastal state sovereign rights over living and non-living resources and other activities concerning the coastal state's 'economic benefit'. Article 60(1)(b) also confines the scope of installations and structures under the coastal state's exclusive jurisdiction to those "for the purposes provided for in article 56 and other economic purposes". It indicates that as long as the other states' activity does not derogate the coastal state's living and non-living resources or their economic benefits, it may be permissible to construct installations and structures in the EEZ of a coastal state even when they are for military purposes. The same logic applies to article 60(1)(c). Construction of military installations and structures is permissible to the extent such construction may not interfere with the exercise of the rights of the coastal state in the EEZ.[38] To sum

34 The Guardian. (2015) Third South China Sea Airstrip Being Built, Says Expert, Citing Satellite Photos (The Guardian) <https://www.theguardian.com/world/2015/sep/15/third-south-china-sea-airstrip-being-built-says-expert-citing-satellite-photos>.

35 The Guardian. (2022) China has Fully Militarized Three Islands in South China Sea, US Admiral says (The Guardian) https://www.theguardian.com/world/2022/mar/21/china-has-fully-militarized-three-islands-in-south-china-sea-us-admiral-says>.

36 The South China Sea Arbitration. (2016) PCA 2013-19, 1009.

37 Romaniuk, S. N. and Burgers, T. (2019) China's Next Phase of Militarization in the South China Sea (The Diplomat) <https://thediplomat.com/2019/03/chinas-next-phase-of-militarization-in-the-south-china-sea/>.

38 UNCLOS. (1982) art 60(1)(c).

up, UNCLOS does not necessarily forbid the state to construct military installations and structures in the EEZ unless such activity immensely infringes on the coastal State's economic benefits within the area.

There are two possible ways to make the construction of military bases impermissible. In order to make a valid claim against the construction of military bases, the coastal state should be able to prove the immense effects of military construction on its living and non-living resources or economic benefits in its EEZ.[39] On the other hand, the coastal state may seek its national security right by demonstrating the immense scale of military structure that might cause a sufficient level of a threat directed at the coastal state. Clearly, the second approach will be more debatable and difficult to prove since UNCLOS does not say much concerning security issues and there is a lack of standards in assessing the level of threat. The closest provision concerning security issues is Article 301, "[refraining state parties] from any threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the principles of international law embodies in the Charter of the United Nations."[40] While the use of force can be understood more straightforwardly, there still exists ambiguity in terms of assessing what constitutes a threat. The coastal state may want to take 'the scale of military bases (e.g., the size of military construction or emplacement of a military device)', 'consequences', 'reasonableness', and 'international responses' into account in determining the level of threat or the level of disruption. However, the assessment of threat is quite subjective and vague without certain legal guidelines because it can be varied depending on the political situation, international relationship, technological development, or diplomatic relations between states. Providing the guideline for the level of threat or the level of disruption is beyond the objective of this paper; however, the paper warns that when there is a legal ambiguity, it is likely to be abused by powerful maritime states in a way to benefit themselves. The more excessive maritime claims are made but tolerated without proper dispute settlement or at least without much criticism, the more likely they will be heading into gradually forming a new state practice. The proper and timely reaction to challenge excessive claims is required.

3.3 China's Maritime Militia

China's maritime militia refers to Chinese fishing fleets integrated into or controlled by the People's Liberation Army Navy (PLA-N), as an auxiliary naval force.[41] They are operating in conjunction with Chinese warships or government

39 Kraska, J. (2011) *Maritime Power and Law of the Sea: Expeditionary Operations in World Politics* (Oxford University Press 2011) 221.

40 UNCLOS, art 301.

41 Kraska, J. and Monti, M. (2015) The Law of Naval Warfare and China's Maritime Militia 91 International Law Study 450.

vessels, providing the PLA-N with various supports. The maritime militia can conduct a variety of missions from domestic security missions (e.g., search and rescue) to national defence missions (e.g., logistic support, concealment operation, surveillance, and harassment). More recently, China's militia has been assigned a special role, called "Maritime Right Protection Force System", which entails its presence in disputed water, protecting its territorial sovereignty, and supporting law enforcement action.[42] In 2009, for example, USNS *Impeccable* was harassed by two Chinese fishing vessels which were apparently under the control of PLA-N while it was conducting a routine surveillance operation 75 nautical miles off Hanoi Island.[43] Merchant vessels can be utilized to support armed forces, but such mobilizations are only allowed during armed conflict.[44] It is peculiar that China has used militia fishing vessels during peacetime, being routinely used within a nine-dash line despite the role as a reserve force.[45] During peacetime, militia fishing vessels are normally substituted for Chinese government vessels, playing a significant role in strengthening China's position in the South China Sea through its presence and coercion.[46] Some states would rather want fishing vessels than warships to maintain their presence and patrol around the water area. However, this is not to say that states can afford to lower the guard against Chinese maritime militia. They should carefully observe the presence of militia fishing fleets and their capability should not be underestimated.

China's militia fishing vessels are equipped with an advanced communication system to enhance the interaction between them and Chinese warships. Besides, militia fishermen receive national defence and political training and some are even trained to conduct reconnaissance and use a light weapon to confront other vessels in disputed water.[47] More importantly, a number of militia fishing vessels are equipped with Beidou's Vessel Monitoring System, which allows them to track and relay vessels' position, to build a firm information-sharing system between militia fishing vessels and Chinses navy.[48] It should also be aware that China established an integrated information-sharing system which is closely related to Intelligence, Reconnaissance and Surveillance (IRS) operations. IRS operation is a

42 Erickson, A. S. and Kennedy, C. M. (2021) China's Maritime Militia <https://www.cna.org/cna_files/pdf/chinas-maritime-militia.pdf>.

43 Kraska, J. and Pedrozo, R. (2009) *International Maritime Security Law* (BRILL 2013) 315; Pedrozo, R. (2009) Close Encounter at Sea, *Naval War College Review* 62(3), 101.

44 Sato, K. (2020) China's Maritime Milita: A Legal Point of View (The Maritime Issues) <http://www.maritimeissues.com/politics/maritime-militia-in-east-and-south-china-seas.html>.

45 Erickson, A. S. and Kennedy, C. M. (2021) China's Maritime Militia <https://www.cna.org/cna_files/pdf/chinas-maritime-militia.pdf>.

46 Kraska, J. (2020) China's Maritime Militia Vessels May Be Military Objectives during Armed conflict (The Diplomat) <https://thediplomat.com/2020/07/chinas-maritime-militia-vessels-may-be-military-objectives-duri ng-armed-conflict/>.

47 Erickson, A. S. and Kennedy, C. M. (2015) Meet the Chinese Maritime Militia Waging a 'People's War at Sea' (The Wall Street Journal, 30 Match 2015) <https://www.wsj.com/articles/BL-CJB-26372>.

48 Erickson, A. S. and Kennedy, C. M. (2021) China's Maritime Militia <https://www.cna.org/cna_files/pdf/chinas-maritime-militia.pdf>.

sensitive activity since it is hard to be distinguished from other data collection activities. Mobilizing militia fishing vessels would highly improve China's accessibility to the area over which Chinese government vessels would not have been able to conduct surveillance operations. Besides, selected militia fishermen are trained as reporting specialists to ensure that the collected information is correctly sent to the navy.[49] If militia fishing vessels that are already widely dispersed in the South China Sea can conduct IRS operations on their own and share the information with the Chinese navy through the network they have established, that could be a huge threat.

Moreover, it should be given more attention to the fact that the Chinese government provides an increasingly well-funded maritime militia in defence of their maritime interest. The provincial government covers the costs associated with special missions allocated to militia fishermen, and they are compensated for damage and costs incurred in the course of their operation.[50] Also, the local government guarantees generous salaries and monetary compensation to the maritime militia to encourage them to be at the head of venturing disputed areas, such as the South China Sea, and they are also provided with relevant training.[51] For all the benefits the Chinese government provides, China's maritime militia will continue expanding and the quality of maritime militia will be improved and upgraded over time. Fishing vessels that are equipped with an advanced communication system, auxiliary military devices, trained fishermen and even small weapons are surely intimidating and will certainly raise tensions in the South China Sea. In this regard, Chinese maritime militia throw some questions as to the status of militia fishing vessels and how to determine whether they are mobilized legitimately.

3.3.1 The ambiguous status of China's militia

Warships, auxiliaries vessels, and general vessels all have different rights and duties associated with their status under international laws. First of all, militia fishing vessels are clearly not a warship under article 29 of UNCLOS which defines a warship as "a ship belonging to the armed forces of a State bearing the external marks distinguishing such ships of its nationality, under the command of an officer duly commissioned by the government of the State and whose name appears in the appropriate service list or its equivalent, and manned by a crew which is under regular armed forces discipline."[52] Normally, militia fishing vessels do not have external marks unless they are publicly converted into a warship during wartime and hoist naval ensigns. In fact, it is entirely contrary to what China

49 *Ibid*., 15.

50 Erickson, A. S. and Kennedy, C. M. (2015) Meet the Chinese Maritime Militia Waging a 'People's War at Sea' (The Wall Street Journal) <https://www.wsj.com/articles/BL-CJB-26372>.

51 Erickson, A. S. and Kennedy, C. M. (2021) China's Maritime Militia <https://www.cna.org/cna_files/pdf/chinas-maritime-militia.pdf>.

52 UNCLOS. (1982) art 29.

has attempted to do by utilizing militia fishing vessels because they aim to conduct activities at the same level as military activities in disguise. For example, maritime militia at the time of operation in the South China Sea disguised themselves as private fishermen by taking off their uniforms.[53] As such, the question can be narrowed down to whether China's militia fishing vessel is an auxiliary vessel or a general fishing vessel. It is a crucial distinction because only the latter is guaranteed to be protected during the armed conflict by the principle of inviolability under International Humanitarian Law.

According to San Remo Manual, the auxiliary vessel is defined as "a vessel, other than a warship, that is owned by or under the exclusive control of the armed forces of a State and used for the time being on government non-commercial service"[54] Article 65 of San Remo Manual regards enemy auxiliary vessels as military objectives, subject to the limited application to objects "which by their nature, location, purposes or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in circumstances ruling at the time, offers a definite military advantage".[55] It seems that article 40 indicates the importance of understanding the nature, purpose, and consequences of activity in determining the status of an object. It may also indicate that when the status is unclear it can be determined by assessing the level of involvement and contributions they can provide. However, given the large number of Chinese militia fishing fleets that are usually in disguise, it is virtually impossible to distinguish militia fishing vessels from general fishing vessels in practice.[56]

Lastly, the fact that auxiliary vessels will be subject to the military objective during wartime may imply that Chinese militia fishing vessels, as auxiliary vessels, can be as intimidating as warships during peacetime. Even so, it is difficult for other states to take action against China's behaviours when their status is uncertain because it tends to become a more sensitive issue when civilian vessels or civilian actors are involved. For example, the U.S. hesitates to confront China's maritime militia due to political sensitivity, especially when those Chinese fishermen are supported by China's naval force.[57] Such a dilemma becomes apparent when it comes to the grey situation which is neither peacetime nor wartime but in tension, such as the situation in the South China Sea. In the meantime, Chinese militia fishing vessels are excessively operated in the South China Sea with ambiguous status. Ambiguity makes other states hesitate to respond to China's maritime militia, es-

53 Kennedy, C. M. and Erickson, A. S. (2017) China Maritime Report No.1: China's Third Sea Force, The People's Armed Forces Maritime Militia: Tethered to the PLA, CMSI China Maritime Reports 1, 15.

54 International Committee of the Red Cross [ICRC] (1995) San Remo Manual on International Law Applicable to Armed Conflicts at Sea 1995, art 13(h).

55 *Ibid*., art 40.

56 Kraska, J. and Monti, M. (2015) The Law of Naval Warfare and China's Maritime Militia, 91*, International Law Study* 450, 465.

57 Erickson, A. S. and Kennedy, C. M. (2015) Meet the Chinese Maritime Militia Waging a 'People's War at Sea' (The Wall Street Journal) <https://www.wsj.com/articles/BL-CJB-26372>.

pecially when they do not necessarily want to escalate the situation into real combat. On the contrary, such ambiguity makes it easier for powerful maritime states, such as China, to leverage legal discrepancies. Moreover, China has established a so-called "three lines defence" project, that is, the militia will be on the front line and backed up by the China coast guard and navy in order.[58] It may indicate China's intentional desire, by having militia vessels harassed or intercepted by other states, to provoke political problems and discourage other states to take further action.

Militia fishing vessels are a new threat, and it can be China's intentional military strategy. It will be too late to confront China once a number of China's militia vessels are fully equipped, trained, improved, and prepared for future warfare, guarding the front line of protecting China's territorial sovereignty. To prevent China from excessively leveraging the maritime militia, such activities should be internationally identified as wrongful acts under international law.[59] The nature of activities they are conducting for the navy and their level of involvement need to be assessed in determining their status. For example, if they are conducting excessive law enforcement activity, pointing weapons at another state's warship, or entering another state's territorial sea with a threat of coercion, such actions should be considered wrongful acts. China will continue expanding its presence in the South China Sea and accelerate challenging the status quo if the rest of the world remains silent. The international community, therefore, needs to keep an eye on China's movement and properly react in a timely manner. Otherwise, China's militia fishing vessels will eventually be in the best position during both peacetime and wartime, being protected under the principle of inviolability while flourishing their military capability.

4. Regional and International Reactions toward South China Sea Disputes

Regarding China's militarisation of the South China Sea, it is crucial to identify how other states and regional organisations have been and should be reacting to China's actions over this sensitive water area. Part 4 specifically focuses on the responses of the ASEAN, neighbouring states and the U.S. as another major power in the world.

58 Erickson, A. S. and Kennedy, C. M. (2021) China's Maritime Militia <https://www.cna.org/cna_files/pdf/chinas-maritime-militia.pdf>.

59 Sato, K. (2020) China's Maritime Milita: A Legal Point of View (The Maritime Issues) <http://www.maritimeissues.com/politics/maritime-militia-in-east-and-south-china-seas.html>.

4.1 Joint Effort Made by Association of Southeast Asian Nations (ASEAN) and Its Limited Effect

ASEAN was established in 1967 to manage conflicts in Southeast Asia and maintain regional peace. As the tension in the South China Sea has become significant, ASEAN has sought to manage the South China Sea through its declarations, statements, the ASEAN Regional Forum and the China-ASEAN Joint Working Group to Implement the Declaration on Conduct of Parties in the South China Sea.[60] New progress, such ASEAN-China Single Draft Negotiating Text of the Code of Conduct (COC), as the dispute management mechanism, has also been made.[61] However, despite such efforts, there are some sceptics, as this paper is also pointing out, doubting the effectiveness of ASEAN and China-ASEAN cooperation in managing the sovereignty dispute in the South China Sea.

Firstly, ASEAN member states which consist of both claimant states (e.g., Vietnam and the Philippines) and non-claimant states (e.g., Cambodia and Thailand) are having a hard time reconciling their claims.[62] There is no shared interest in resolving sovereignty disputes in the South China Sea because such dispute is not every state's concern but is limited to claimant states.[63] This creates a major obstacle for ASEAN to play the role in managing sovereignty disputes as a complete third party. Additionally, since ASEAN's system of conflict management is consent-based, all member states must arrive at a consensus which also makes it difficult to formulate ASEAN's position to act effectively.[64] Even among claimant states, there exist some challenges to compromising their claims since they have different economic, diplomatic, and political interests in relation to China. Thus, ASEAN could not act effectively in managing sovereignty disputes in the South China Sea unless they achieve an agreement on that matter. Secondly, a strategic reason for China's cooperation with ASEAN may exist. Having considered the COC, ASEAN member states seem to have a shared interest in de-escalating tension in the South China Sea, maintaining benign relations with China, and arguably reducing US involvement in the dispute.[65] Interestingly enough, limited US involvement in the dispute completely met China's interest. Thus, China may strate-

60 Majumdar, M. (2015) The ASEAN way of Conflict Management in the South China Sea, *Strategic Analysis* 39(1), 73-76.

61 Nasu, H. (2019) Rob McLaughlin, Donal R Rothwell and See Seng Tan, *The Legal Authority of ASEAN as a Security Institution* (Cambridge University Press 2019) 130-137.

62 Kusuma, W. (2021) Cery Kurnia and Rio Armanda Agustian, South China Sea: Conflict, Challenge, and Solution, *Lampung Journal of International Law* 3(1), 51:58-59.

63 Nasu, H. (2019) Rob McLaughlin, Donal R Rothwell and See Seng Tan, *The Legal Authority of ASEAN as a Security Institution* (Cambridge University Press 2019) 137.

64 Majumdar, M. (2015) The ASEAN way of Conflict Management in the South China Sea, *Strategic Analysis* 39(1), 73:76-77.

65 Hu, L. (2021) Examining ASEAN's effectiveness in managing South China Sea disputes, *The Pacific Review* 36(10):119-147.

gically need to maintain the South China Sea peaceful, at least seemingly, by developing benign relationships with neighbouring states, in order to avoid intensive involvement of the US in the region accordingly.[66] It is still controversial whether US involvement would aggravate or alleviate the tension in the South China Sea. Be that as it may, it is certain that China would not welcome the US's expanded military presence and involvement in the disputed waters. Lastly, although ASEAN eventually managed to compel China into the COC, it failed to make it legally binding as China initially wished.[67] It is thus likely that China may not be willing to fulfil the agreement if they think it is limiting any of its rights or infringing on its benefits.

4.2 The Rivalry between China and the US

China's excessive restriction of freedom of navigation can also be understood from the view of rivalry between China and the US, as two major powers in the world.[68] As China has rapidly developed and become one of the most powerful maritime countries following the US, the US could not help but have to keep its eyes closely on China's movement. In such efforts, the US navy has been engaging in freedom of navigation operations throughout the region.[69] The US warship performed close-range surveillance operations in the South China Sea and deliberately entered the sensitive water area over which China claimed their sovereignty, raising security concerns and tensions between China and the US.[70] Interestingly, it is observed that the US has only deployed warships to patrol the region conducting military operations without any claims of its own, and it may be understood as the US strategy to avoid unnecessary conflict while planting ideas to China that the US and the rest of world are aware of what they are up to. Such position of the US is not only derived from the principles of international law, but also to some extent represents their own national concerns that China may become a leading maritime power. Therefore, when challenging the legality of China's claims and activities, it should be equally examined whether the US operations to confront Chinese excessive maritime claims are being conducted in a manner consistent with international law.

66 Qi, H. (2019) Joint Development in the South China Sea: China's Incentives and Policy Choices, *Journal of Contemporary East Asia Studies* 8(2), 220-239.

67 Hu, L. (2021) Examining ASEAN's Effectiveness in Managing South China Sea Disputes, *The Pacific Review* 1:16.

68 Majumdar, M. (2015) The ASEAN way of Conflict Management in the South China Sea, *Strategic Analysis* 39(1), 73-75.

69 Kraska, J. and Pedrozo, R. (2013) *International Maritime Security Law* (BRILL 2013) 201-214.

70 Qi, H. (2019) Joint development in the South China Sea: China's incentives and policy choices, *Journal of Contemporary East Asia Studies* 8(2), 220-225.

4.3 Possible Future Directions Regarding the South China Sea Dispute

When there is a legal conflict associated with legal ambiguity, the easiest and fairest way to resolve it is often to strictly stick to the existing rules. This tendency is observed in some coastal states, for example, Malaysia, the Philippines and Vietnam have determined to bring their claims exclusively based on UNCLOS.[71] Claimant states or any other states who wish to restrain china's excessive maritime claims must make sure their operations are consistent with UNCLOS to make their counterclaim more valid and persuasive. Otherwise, it would be contradictory and unreasonable to impose strict standards of law on China and expect it to be consistent with UNCLOS. If a state seeks to expand its right beyond what is essentially granted under international law, the burden of proof is hugely on a claimant state and it must provide sufficient evidence valid enough to make a deviation from international law, taking such as circumstances, geographical or geopolitical dynamics, historical uses, or technological developments into account. If it fails to do so, international law needs to take priority.

In addition, the positions of neighbouring states, who are geographically close to the South China Sea but do not take part in the dispute such as South Korea and Japan, are also important. In the case of South Korea, it has been generally in a position in favour of demilitarizing the South China Sea and supported the view that the freedom of navigation should be guaranteed and the disputes should be resolved in a peaceful manner according to international law, which is often interpreted as reflecting US's position.[72] Nevertheless, the position of South Korea has been quite vague in a way that it avoids direct involvement or statement as regards the matters in the South China Sea.[73] To understand one's position regarding the militarisation of the South China Sea, it is fundamental to identify what rights would be at stake if China sought to militarise the South China Sea. For example, South Korea is highly dependent on oil imported from overseas mainly passing through the South China Sea. Consequently, any undesirable events that may prevent the flow of international commerce in this region would have a huge impact on the economy of South Korea. Besides, it has been reluctant to take a side due to fear of any diplomatic backlash from either two key maritime powers – China and the United States. Overall, it is observed, as also identified in section 4.1., that reluctance to respond against Chinese behaviour is derived from the fear of China's economic or military retaliation. This shed the light back on the US's position in dealing with the issue.

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71 Beckman, R. (2013) The UN Convention on the Law of the Sea and the Maritime Disputes in the South China Sea, *The American Journal of International Law* 107(142), 142-152.

72 Office of the Press Secretary. (2015) Remarks by President Obama and President Park of the Republic of Korea in Joint Press Conference (The White House) <Remarks by President Obama and President Park of the Republic of Korea in Joint Press Conference | whitehouse.gov (https://www.archives.gov)>.

73 Jackson, V. (2015) The South Cina Sea Needs South Korea: Why Seoul can no longer stay on the sidelines of maritime disputes in the South China Sea (The Diplomat) <The South China Sea Needs South Korea – The Diplomat>.

The most dramatic measure was taken by the Philippines by requesting for international decision. However, even though the case was held strongly in favour of the Philippines, it failed to pressure China effectively. In other words, it may have succeeded in gaining public recognition of China's excessive claims, however, it failed to invalidate them in practice. When the decision of Permanent Court of Arbitration was released, the US did not firmly endorse the ruling even though it had strongly endorsed the Philippines' right over China's claims.[74] Besides, China explicitly announced that they would not comply with the decision of the Arbitration. Although states, taking part in the arbitration, agree to be legally bound by the outcomes of it, there are a few cases, including the present case, that a state that was imposed the obligations from the court rejected to perform them, and it is often due to a lack of enforcement mechanism for non-compliance. In such a case, a state in which the court was in favour wished to enforce the decision and several efforts had been made to a varied extent. For example, Nicaragua, in the *Nicaragua case*[75], had sought international recourse by requesting draft resolutions to UN Security Council and UN General Assembly for further decision upon measures to be taken to give more effect to the decision from the court.[76] Nicaragua's attempts were not as successful as it was intended in securing the US's compliance but it was not useless. It does have left an important legal implication that an active engagement in seeking further measures can have effects to a certain extent. It is also observed in a few cases that it is mostly the powerful states, such as the US, China, or Russia, who often defy the decision of the court.[77] Thus, it may be a reasonable expectation for the US, as probably the only state whose power and influences are equivalent to China's, to be at the forefront of taking more forcible, but not coercive, action against China's excessive claims, for example by increasing military patrol. The US seems to shift their neutral position to a more direct position on maritime issues in the South China Sea, once describing China's behaviour as 'bullying'.[78] The US can play a crucial role in supporting smaller states to build their economy and military capacity and this will eventually contribute to developing an international coherent voice about the illegality of China's militarisation in the

74 Poling, G. B. (2020) How Significant Is The New U.S. South China Sea Policy? (CSIS) <How Significant Is the New U.S. South China Sea Policy? (http://www.csis.org)>.

75 ICJ. (1984) *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America).

76 Nguyen, L. and Yu, M. T. (2016) After the Arbitration: Does Non-Compliance Matter? (Asia Maritime Transparency Initiative) <After the Arbitration: Does Non-Compliance Matter? | Asia Maritime Transparency Initiative (http://www.csis.org)>.

77 South China Sea Arbitration (The Republic of Philippines v. The People's Republic of China); International Tribunal for the Law of the Sea [ITLOS] (2013) The Arctic Sunrise Case (Kingdon of the Netherlands v. Russian Federation); ICJ. (1984) Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America).

78 Cooper, Z. and Glaser, B. S. (2020) What Options Are on the Table In the South China Sea? (Texas National Security Review) <What Options are On the Table in the South China Sea? - War on the Rocks>; U.S. Embassy in Laos (2020) Statement by Secretary Michael R. Pompeo, U.S. Position on Maritime Claims in the South China Sea.

South China Sea. In doing so, the US as well as other like-minded states first need to coherently perceive China's claims as 'illegal', 'violation', or 'wrongful act'. The use of stronger terms in joint statements in a regional or international forum would help pressure China to stick to international law and international ruling. It may be true that stronger physical or verbal responses could accelerate the tension between the US and China or between China and other relevant states, however, in the longer term, China needs to realise that their illegal activities are no longer tolerated or ignored but subject to forceful critique and responses from international society.

5. Conclusion

China once described the South China Sea as 'China's core interest'.[79] It may indicate their willingness to take aggressive actions to dominate the South China Sea. Besides, regarding Chinese maritime militia, the possibility of 'legal warfare' that China abuses legal grey areas to utilise fishing vessels for strategic military purposes should not be overlooked.[80] Undoubtedly, China is gaining more naval power in the South China Sea despite constant disputes in the region. Even the court decision has not been able to defeat China's desire to expand its power over the area. As discussed, such desires can be observed through China's constant claims for the EEZ on the historical ground, unlawful restrictions on freedom of navigation, military construction in the disputed EEZ, and the operation of a massive maritime militia. It seems that China tries to take advantage of divergent interpretations of UNCLOS and legal loopholes to make such excessive claims. Yet, the rules are settled. In principle, there are no additional rights that coastal states can exercise authority beyond what is granted under UNCLOS, especially when the EEZ arguably belongs to another state as is the case here. Some scholars may emphasise the need for guidelines in determining the contemporary scope of the coastal states' rights within EEZ. Indeed, such guidelines might be useful, for example, when it comes to new advanced technology and emerging threats associated with it. In this regard, it may well be said that a further guideline for the assessment of a new threat in line with technological development would be a great supplement to current international law. However, the dispute in the South China Sea is too complicated to be defined as a dispute regarding the scope of states' rights within the EEZ. As examined, there are more significant aspects entangled with each other making the dispute more complicated: China's enormous regional

79 Kraska, J. and Pedrozo, R. (2013) *International Maritime Security Law* (BRILL 2013) 313-354, 318.

80 Since 2003, the Chinese Communist Party Central Committee and the Central Military Commission in Bejing adopted the concept of 'three warfares', consisting of psychological, media and legal warfare. Legal warfare means seeking to employ international and domestic laws to gain international support and manage the political repercussions of China's military actions.

and international influences on other states, severe competition between China and the US, incapability and reluctance of other states and China's lack of awareness of the problem.

The more fundamental problem as identified in Part 4 is that China's influences are putting direct or indirect pressures on other states not to react against China's claims. Besides, although most states share the inclusive interest of ensuring the freedom of navigation, they have at the same time different national interests to protect especially in relation to China. This seems to be a major hurdle preventing collective effort. In this regard, the paper emphasises the role of the US maintaining a forceful position against China's claims which would eventually help rally international support and develop coherent reactions against China's attempts at deterring the long-standing principles. International society can build a strategic shared interest to counter China's growing expansion by strictly sticking to international rules.

What China might be afraid of might be shared responses. This is probably why China has worked assiduously with some ASEAN states to encourage them not to stress the need for shared responses.[81] Thus, the paper again underscores the importance of an international coherent reaction with the US at the forefront of maintaining a forceful position against China's behaviour and encouraging like-minded states to engage more actively in promoting freedom of navigation. The dispute in the South China Sea can be described as a competition between power and plurality. However, plurality here will only be able to win if the majority manages to build a coherent strategic shared interest to counter China's illegal activities and take more forceful action collectively. To sum up, China has attempted to distort the interpretation of long-standing principles and make efforts toward the way of increasing its authority over the disputed area by gradually shaping a new norm. Changing the international norm would probably be very slow, nevertheless, China's constant attempts should not be underestimated. Silence or ignorance will only promote China's continuous expansion and individual claims will not be strong and effective enough to discourage China's behaviour. The international community needs to collectively observe and keep challenging China's excessive claims with one coherent voice and put more effort to make such claims publicised at the international level.

References

Ashley Roach, J. and Smith, R. W. (2012) *Excessive Maritime Claims*, Vol. 73, Huntington

81 Jennings, P. (2015) *The International Community and the Strategic Balance in the South China Sea in Murray Hiebert and others* (eds.), Examining the South China Sea Disputes: paper from the fifth annual CSIS South China Sea Conference (Center for Strategic & International Studies 2015) 55.

Beach, CA: Ocean Development.

BBC News. (2020) *South China Sea dispute: China's Pursuit of Resources 'unlawful', says US.* Retrieved from https://www.bbc.co.uk/news/world-us-canada-53397673

Beckman, R. (2013) The UN Convention on the Law of the Sea and the Maritime Disputes in the South China Sea. *The American Journal of International Law* 107(1):142-163.

Cooper, Z. and Glaser, B. S. (2020) *What Options are on the Table in the South China Sea?* Retrieved from https://warontherocks.com/2020/07/what-options-are-on-the-table-in-the-south-china-sea/

Daugirdas, K. and Mortenson, J. D. (2017) United States Confronts China over Seizure of Unmanned Drone in the South China Sea. *American Journal of International Law* 111(2):513-517.

Erickson, A. S. and Kennedy, C. M. (2015) *Meet the Chinese Maritime Militia Waging a 'People's War at Sea'*. Retrieved from https://www.wsj.com/articles/BL-CJB-26372

Erickson, A. S. and Kennedy, C. M. (2021) *China's Maritime Militia*. Retrieved from https://www.cna.org/cna_files/pdf/chinas-maritime-militia.pdf

Hu, L. (2021) Examining ASEAN's effectiveness in managing South China Sea Disputes. *The Pacific Review* 36(1):119-147.

ICJ. (1984) *International Court of Justice Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America*) Judgment of 26 November 1984.

International Committee of the Red Cross [ICRC]. (1995) *San Remo Manual on International Law Applicable to Armed Conflicts at Sea 1995*. No. 309. Geneva: ICRC.

International Law Commission. (1962) *Juridical Régime of Historic Waters, Including Historic Bays: Study prepared by the Secretariat*. UN Doc A/CN.4/143. Geneva: International Law Commission.

International Tribunal for the Law of the Sea [ITLOS] (2013) *The "Arctic Sunrise" Case (Kingdom of the Netherlands v. Russian Federation), Provisional Measures*. Hamburg: ITLOS.

Jackson, V. (2015) *The South China Sea Needs South Korea: Why Seoul Can No Longer Stay on the Sidelines of Maritime Disputes in the South China Sea*. Retrieved from https://thediplomat.com/2015/06/the-south-china-sea-needs-south-korea/

Jennings, P. (2015) *The International Community and the Strategic Balance in the South China Sea in Murray Hiebert and Others*, in Examining the South China Sea Disputes: paper from the Fifth Annual CSIS South China Sea Conference, Hiebert, M., Nguyen, P., and Poling, G. B. (eds.), Lanham, MD: Rowman & Littlefield.

Kennedy, C. M. and Erickson, A. S. (2017) *China Maritime Report No. 1: China's Third Sea Force, The People's Armed Forces Maritime Militia: Tethered to the PLA*. Newport, RI: U.S. Naval War College.

Kraska, J. (2011) *Maritime Power and Law of the Sea: Expeditionary Operations in World Politics*. New York, NY: Oxford University Press.

Kraska, J. (2020) *China's Maritime Militia Vessels May be Military Objectives during Armed Conflict*. Retrieved from https://thediplomat.com/2020/07/chinas-maritime-militia-vessels-may-be-military-objectives-during-armed-conflict/

Kraska, J. and Monti, M. (2015) *The Law of Naval Warfare and China's Maritime Militia*. Retrieved from https://digital-commons.usnwc.edu/cgi/viewcontent.cgi?article=1406&context=ils

Kraska, J. and Pedrozo, R. (2013) *International Maritime Security Law*. Retrieved from https://www.defence.lk/upload/ebooks/International-Maritime-Security-Law.pdf

Kraska, J. and Pedrozo, R. (2016) *China's Capture of U.S. Underwater Drone Violates Law of the Sea'*. Retrieved from https://www.lawfareblog.com/chinas-capture-us-underwater-drone-violates-law-sea

Ku, J. (2016) *The Non-existent Legal Basis for China's Seizure of the U.S. Navy's Drone in the South China Sea*. Retrieved from https://www.lawfareblog.com/nonexistent-legal-basis-chinas-seizure-us-navys-drone-south-china-sea

Kusuma, W., Cery Kurnia, A., and Agustian, R. A. (2021) South China Sea: Conflict, Challenge, and Solution. *Lampung Journal of International Law* 3(1):51-62.

Law on the Exclusive Economic Zone and Continental Shelf of People's Republic of China. (1998) "The People's Republic of China, Exclusive Economic Zone and Continental Shelf Act," 1998. New York, NY: UN.

Majumdar, M. (2015) The ASEAN Way of Conflict Management in the South China Sea. *Strategic Analysis* 39(1):73-87.

Nasu, H., McLaughlin, R., Rothwell, D. R., and Tan. S. S. (2019) *The Legal Authority of ASEAN as a Security Institution*. Cambridge: Cambridge University Press.

Nguyen, L. and Yu, M. T. (2016) *After the Arbitration: Does Non-Compliance Matter?* Retrieved from https://www.csis.org/arbitration-non-compliance-matter/

Office of the Press Secretary. (2015) *Remarks by President Obama and President Park of the Republic of Korea in Joint Press Conference.* Retrieved from https://obamawhitehouse.archives.gov/the-press-office/2015/10/16/remarks-president-obama-and-president-park-republic-korea-joint-press

Order of the President of the People's Republic of China. (1997) *Law of the People's Republic of China on National Defense*, Retrieved from https://www.legal-tools.org/doc/51cae1/pdf/

Pedrozo, R. (2009) Close Encounters at Sea: The USNS Impeccable Incident. *Naval War College Review* 62(3):101-112.

Poling, G. B. (2020) *How Significant is the New US South China Sea Policy?* Retrieved from https://www.csis.org/analysis/how-significant-new-us-south-china-sea-policy

Qi, H. (2019) Joint Development in the South China Sea: China's Incentives and Policy Choices. *Journal of Contemporary East Asia Studies* 8(2):220-239.

Romaniuk, S. N. and Burgers, T. (2019) *China's Next Phase of Militarization in the South China Sea: Beijing is Now Consolidating its Gains in the Region – and its Control*. Retrieved from https://thediplomat.com/2019/03/chinas-next-phase-of-militarization-in-the-south-china-sea/

Sato, K. (2020) *China's Maritime Militia: A Legal Point of View*. Retrieved from http://www.maritimeissues.com/politics/maritime-militia-in-east-and-south-china-seas.html

The Guardian. (2015) *Third South China Sea Airstrip being Built, Says Expert, Citing Satellite Photos.* Retrieved from https://www.theguardian.com/world/2015/sep/15/third-south-china-sea-airstrip-being-built-says-expert-citing-satellite-photos

The Guardian. (2022) *China Has Fully Militarized Three Islands in South China Sea, US Admiral Says*. Retrieved from https://www.theguardian.com/world/2022/mar/21/china-has-fully-militarized-three-islands-in-south-china-sea-us-admiral-says

The South China Sea Arbitration. (2016) In the Matter of the South China Sea Arbitration. PCA 2013-19.

United Nations Convention on the Law of the Sea. (1982) *United Nations Convention on the Law of the Sea*. New York, NY: UNCLOS.

U.S. Embassy in Laos. (2020) *Statement by Secretary Michael R. Pompeo, U.S. Position on Maritime Claims in the South China Sea*. Laos: U.S. Embassy in Laos.

Valencia, M. J. (2017) *US-China Underwater Drone Incident: Legal Grey Areas: The Legal Case against China's Actions is not as clear cut as some U.S. Scholars Argue.* Retrieved from https://thediplomat.com/2017/01/us-china-underwater-drone-incident-legal-grey-areas/

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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 of 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 duties 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 hat 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 Roucounas (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 (Voeneky 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 2012), 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 withdraw 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 meaningful 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 thirty-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.

References

Acer, Y. (2017) *The Aegean Maritime Disputes and International Law*. London: Routledge.

Akande, D. and Tzanakopoulos, A. (2022) Legal: Use of Force in Self-Defence to Recover Occupied Territory. *European Journal of International Law* 32(4):1299-1307.

Allee, T. L. and Huth, P. K. (2006) The Pursuit of Legal Settlements to Territorial Disputes. *Conflict Management and Peace Science* 23(4):285-307.

Anderson, D. and van Logchem, Y. (2014) *Chapter 7: Rights and Obligations in Areas of Overlapping Maritime Claims*, in *The South China Sea Disputes and Law of the Sea.* Jayakumar, S., Koh, T., and Beckman, R. (eds.), pp. 192-228. Cheltenham: Edward Elgar.

Annex VII Arbitral Tribunal. (2012) *South China Sea Arbitration (Philippines v China)*. Retrieved from https://pca-cpa.org/en/cases/7/

Annex VII Arbitral Tribunal. (2015) *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*. Retrieved from https://legal.un.org/riaa/cases/vol_XXXI/359-606.pdf

Annex VII Arbitral Award. (2016) *South China Sea Arbitration (Philippines v China) (Award on Jurisdiction and Admissibility)*. Retrieved from https://docs.pca-cpa.org/2016/07/PH-CN-20160712-Award.pdf

ASEAN. (1976) *Treaty of Amity and Cooperation in Southeast Asia.* Retrieved from https://asean-aipr.org/wp-content/uploads/2018/07/Treaty-of-Amity-and-Cooperation-in-Southeast-Asia-1976-TAC.pdf

ASEAN. (2002) *Declaration on the Conduct of Parties in the South China Sea*. Retrieved from https://cil.nus.edu.sg/databasecil/2002-declaration-on-the-conduct-of-parties-in-the-south-china-sea/

ASEAN. (2012) *Declaration on the Conduct of Parties in the South China Sea.* Retrieved from https://asean.org/declaration-on-the-conduct-of-parties-in-the-south-china-sea-2

Becker, M. A. (2017) The Dispute That Wasn't There: Judgments in the Nuclear Disarmament Cases at the International Court of Justice. *Cambridge International Law Journal* 6(1):4-26.

Bernardez, S. T. (1995) *Some Considerations on the Respective Roles of the Security Council and The International Court of Justice with Respect to 'the Prevention of Aggravation of Disputes' in the Domain of the Pacific Settlement of International Disputes or Situations*, in International Legal Issues

Arising under the United Nations Decade of International Law, Al-Nauimi, N. M. and Meese, R. (eds.), pp. 663-708. Alphen aan den Rijn: Kluwer Law.

BIICL. (2016) *Report on the Obligations of States under Articles 74(3) and 83(3) of UNCLOS in Respect of Undelimited Maritime Areas*. Retrieved from https://www.biicl.org/publications/report-on-the-obligations-of-states-under-articles-743-and-833-of-unclos-in-respect-of-undelimited-maritime-areas

Bonafe, B. I. (2017) *Establishing the Existence of a Dispute before the International Court of Justice: Drawbacks and Implications. QIL QDI*. Retrieved from http://www.qil-qdi.org/establishing-existence-dispute-international-court-justice-drawbacks-implications/

Brecher, M., Wilkenfeld, J., and Moser, S. (1988) *Crises in the Twentieth Century*. Oxford: Pergamon Press.

Brownlie, I. (1998) *The Rule of Law in International Affairs: International Law at the Fiftieth Anniversary of the United Nations*. Leiden: Martinus Nijhoff Publishers.

Brownlie, I. (2009) The Peaceful Settlement of International Disputes. *Chinese Journal of International Law* 8(2):267-283.

Buszynski, L. and Sazlan, I. (2007) Maritime Claims and Energy Cooperation in the South China Sea. *Contemporary Southeast Asia* 29(1):143-171.

Caflisch, L. (2002) *Cent Ans De Règlement Pacifique Des Différends Interétatique* (Recueil des Cours, Collected Courses). Berlin: Springer.

Cançado Trindade, A. A. (2004) *Peaceful Settlement of International Disputes: Current State and Perspectives. Organization of American States (OAS)*. Retrieved from http://www.oas.org/es/sla/ddi/docs/publicaciones_digital_XXXI_curso_derecho_internacional_2004_Antonio_Augusto_Cancado_Trindade.pdf

Collier, J. G. and Lowe, V. (2000) *The Settlement of Disputes in International Law: Institutions and Procedures*. Oxford: Oxford University Press.

Cot, J. P., Pellet, A., and Forteau, M. (1985) *La Charte Des Nations Unies: Commentaire Article Par Article.* 2nd ed. p. 697. Paris: Economica.

Crawford, J. (2014) *Chance, Order, Change: The Course of International Law, General Course on Public International Law*. Leiden: Brill Nijhoff.

Davies David Memorial Institute of International Studies. (1966) *Report of a Study Group on the Peaceful Settlement of International Disputes.* London: David Davies Memorial Institute of International Studies.

Dodds, P. K. (2022) *Border Wars: The Conflicts of Tomorrow*. London: Ebury Press.

Dupont, P. E. (2018) Chapter 2 Contested Sovereignty over Land Territory and Maritime Zones, in *Stress Testing the Law of the Sea*, Minas, S. and Diamond, J. (eds.), pp. 31-54. Leiden: Brill Nijhoff.

Dyke, J. M. V. (2005) An Analysis of the Aegean Disputes under International Law. *Ocean Development & International Law* 36(1):63-117.

Forsberg, T. (1996) Explaining Territorial Disputes: From Power Politics to Normative Reasons. *Journal of Peace Research* 33(4):433-449.

Fravel, M. T. (2008) Power Shifts and Escalation: Explaining China's Use of Force in Territorial Disputes. *International Security* 32(3):44-83.

Gray, C. (2003) The Use and Abuse of the International Court of Justice: Cases concerning the Use of Force after Nicaragua. *European Journal of International Law* 14(5):867-905.

Guyana/Suriname. (Annex VII Tribunal) (Award) (Arbitral Tribunal 2007).

Hensel, P. R. (2017) *The Issue Correlates of War (ICOW) Project*. Retrieved from http://www.paulhensel.org/icow.html

Huth, P. K. (2009) *Standing Your Ground*. Ann Arbor, MI: University of Michigan Press.

ICJ. (1951) *Anglo-Iranian Oil Co. (United Kingdom v. Iran) (Provisional Measures)*. Retrieved from https://www.icj-cij.org/case/16

ICJ. (1957) *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (Advisory Opinion).* Retrieved from https://www.icj-cij.org/case/

ICJ. (1961) *Northern Cameroons (Cameroon v. United Kingdom)*. Retrieved from https://www.icj-cij.org/case/48

ICJ. (1962) *South West Africa (Ethiopia v. South Africa, Liberia v South Africa) (Preliminary Objections)*. Retrieved from https://www.icj-cij.org/case/47/preliminary-objections

ICJ. (1969) *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark and Netherlands) (Judgments)*. Retrieved from https://www.icj-cij.org/case/52

ICJ. (1970) *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa Notwithstanding Security Council Resolution 276 (1970))*. Retrieved from https://www.icj-cij.org/case/53

ICJ. (1974) *Fisheries Jurisdiction (United Kingdom v. Iceland) (Merits) (Judgments)*. Retrieved from https://www.icj-cij.org/case/55

ICJ. (1977) *Gabčíkovo-Nagymaros Project (Hungary/Slovakia) (Judgments)*. Retrieved from https://www.icj-cij.org/case/92

ICJ. (1978) *Aegean Sea Continental Shelf (Greece v. Turkey) (Merits)*. Retrieved from https://www.icj-cij.org/case/62

ICJ. (1979a) *Case Concerning United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran) (Provisional Measures)*. Retrieved from https://www.refworld.org/cases,ICJ,4023aaf77.html

ICJ. (1979b) *United States Diplomatic and Consular Staff in Tehran (United States of America v Iran) (Provisional Measures)*. Retrieved from https://www.icj-cij.org/case/64

ICJ. (1984) *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) (Provisional Measures)*. Retrieved from https://www.icj-cij.org/case/70/provisional-measures

ICJ. (1986a) *Frontier Dispute (Burkina Faso/Mali) (Provisional Measures)*. Retrieved from https://www.icj-cij.org/case/69/provisional-measures

ICJ. (1986b) *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits)*. Retrieved from https://www.icj-cij.org/public/files/case-related/70/070-19860627-JUD-01-00-EN.pdf

ICJ. (1993) *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro) (Provisional Measures)*. Retrieved from https://www.icj-cij.org/case/91

ICJ. (1995) *East Timor (Portugal v Australia)*. Retrieved from https://www.icj-cij.org/case/84/summaries

ICJ. (1996) *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*. Retrieved from https://www.icj-cij.org/case/94

ICJ. (1998) *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America) (Preliminary Objections).* Retrieved from https://www.icj-cij.org/case/89 § para 21

ICJ. (2000) *Aerial Incident of 10 August 1999 (Pakistan v. India) (Judgments)*. Retrieved from https://www.icj-cij.org/case/119

ICJ. (2005) *Certain Property (Liechtenstein v. Germany) (Preliminary Objections)*. Retrieved from https://www.icj-cij.org/case/123/preliminary-objections

ICJ. (2008) *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore) (Judgments)*. Retrieved from https://www.icj-cij.org/case/130/judgments

ICJ. (2010) *Pulp Mills on the River Uruguay (Argentina v Uruguay) (Judgments).* Retrieved from https://www.icj-cij.org/case/135/judgments

ICJ. (2011a) *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation) (Preliminary Objections)*. Retrieved from https://www.icj-cij.org/case/140

ICJ. (2011b) *Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear (Cambodia v. Thailand) (Provisional Measures)*. Retrieved from https://www.icj-cij.org/case/151/provisional-measures

ICJ. (2011c) *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) (Provisional Measures)*. Retrieved from https://www.icj-cij.org/public/files/case-related/150/150-20180202-JUD-01-00-EN.pdf

ICJ. (2012) *Territorial and Maritime Dispute (Nicaragua v Colombia) (Merits)*. Retrieved from https://www.icj-cij.org/case/124

ICJ. (2016a) *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia) (Preliminary Objections)*. Retrieved from https://www.icj-cij.org/case/155

ICJ. (2016b) *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom) (Preliminary Objections)*. Retrieved from https://www.icj-cij.org/case/160/preliminary-objections

ICJ. (2022) *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v Russian Federation) (Provisional Measures)*. Retrieved from https://www.icj-cij.org/case/182

Ioannides, N. A. (2019) The Legal Framework Governing Hydrocarbon Activities in Undelimited Maritime Areas. *International & Comparative Law Quarterly 68*(2):345-368.

Jennings, R. (1994) Reflections on the Term "Dispute.", in *Essays in Honour of Wang Tieya*. DordrechtMartinus: Nijhoff.

Klein, N. (2018) *Resolving Disputes under UNCLOS when the Coastal and User States are Disputed*, in Maritime Order and the Law in East Asia, Hong, N. and Houlden, G. (eds.), London: Routledge.

Kohen, M. G. and Hébié, M. (2018) *Research Handbook on Territorial Disputes*

in International Law. Cheltenham: Edward Elgar.

Lauterpacht H. (1958) *The Development of International Law by the International Court, being a Revised Edition of The Development of International Law by the Permanent Court of International Justice (1934)*. New York, NY: Praeger.

Merrills, J. G. (1977) Interim Measures of Protection and the Substantive Jurisdiction of the International Court. *The Cambridge Law Journal* 36(1):86-109.

Merrills, J. G. (1994) The Principle of Peaceful Settlement of Disputes. In *The United Nations and the Principles of International Law: Essays in Memory of Michael Akehurst*. Oxfordshire: Taylor and Francis.

Mikanagi, T. (2018) Establishing a Military Presence in a Disputed Territory: Interpretation of Article 2(3) and (4) of the UN Charter. *International & Comparative Law Quarterly* 67(4):1021-1034.

Milano, E. (2004) Territorial Disputes, Unlawful Territorial Situations and State Responsibility. *The Law & Practice of International Courts and Tribunals* 3(3):509-541.

Milano, E. and Papanicolopulu, I. (2011) State Responsibility in Disputed Areas on Land and at Sea. Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht 71(3):587.

Miles, C. A. (2017) *Provisional Measures before International Courts and Tribunals*. Cambridge: Cambridge University Press.

Mosler, H. (1980) *The International Society as a Legal Community*. Leiden: BRILL.

MoU. (2012) Memorandum of Understanding in Respect of the Common Guidelines Concerning the Treatment of Fishermen by Maritime Law Enforcement Agencies (Indonesia-Malaysia). Retrieved from https://treaty.kemlu.go.id/apisearch/pdf?filename=MYS-2011-0127.pdf

Munkres, R. L. (1953) *The Indonesian Dispute in the Security Council. University of Nebraska-Lincoln.* Retrieved from https://digitalcommons.unl.edu/opentheses/50/

Murphy, S. D. (2020) *Chapter 9 Obligations of States in Disputed Areas of the Continental Shelf*, in New Knowledge and Changing Circumstances in the Law of the Sea, Heidar, T. (ed.), pp. 183-205. Leiden: BRILL.

Nishimoto, K. (2019) The Obligation of Self-Restraint in Undelimited Maritime Areas. *Jpn Rev* 3(1):28-38.

Northedge, F. S. and Donelan, M. D. (1971) *International Disputes: The Political Aspects*. New York, NY: Europa Publications.

PCIJ. (1924) *The Mavrommatis Palestine Concessions (Greece v Britain) (Judgments)*. Retrieved from https://www.icj-cij.org/pcij

PCIJ. (1939) *The Electricity Company of Sofia and Bulgaria (Belgium v Bulgaria) (Preliminary Objections).* Retrieved from https://www.icj-cij.org/sites/default/files/permanent-court-of-international-justice/serie_AB/AB_77/01_Compagnie_d_electricite_de_Sofia_Arret.pdf

Prescott, J. R. V. (2016) *Political Frontiers and Boundaries.* Oxfordshire: Taylor & Francis.

Quintana, J. J. (2015) *Litigation at the International Court of Justice: Practice and Procedure*. Leiden: Brill Nijhoff.

Ratner, S. (2018) *Gaza and Israel: What Do Calls for "Restraint" Really Mean? Just Security*. Retrieved from https://www.justsecurity.org/56419/gaza-israel-calls-restraint-mean/

Rosenne, S. (2005) *Provisional Measures in International Law: The International Court of Justice and the International Tribunal for the Law of the Sea*. Oxford: Oxford University Press.

Ratner, S. R. (2020) The Aggravating Duty of Non-Aggravation. *European Journal of International Law* 31(4):1307-1342.

Roucounas, E. (2008) *Manila Declaration on the Peaceful Settlement of International Disputes. UN Audiovisual Library of International Law*. Retrieved from https://legal.un.org/avl/pdf/ha/mdpsid/mdpsid_e.pdf

Ruys, T. and Silvestre, F. R. (2022) Illegal: The Recourse to Force to Recover Occupied Territory and the Second Nagorno-Karabakh War. *European Journal of International Law* 32(4):1287-1297.

Schofield, C. (2012) Parting the Waves: Claims to Maritime Jurisdiction and the Division of Ocean Space. *Penn State Journal of International Affairs* 1(1).

Schreuer C. (2008) What is a Legal Dispute? in *International Law between Universalism and Fragmentation, Festschrift in Honour of Gerhard Hafner,* Buffard, I., Crawford, J., Pellet, A., and Wittich, S. (eds.), pp. 964-965. Leiden: Martinus Nijhoff Publishers.

Schultz, K. A. (2015) Mapping Interstate Territorial Conflict: A New Data Set and Applications. *Journal of Conflict Resolution* 61(7):1565-1590.

Sharma, S. P. (1997) *Territorial Acquisition, Disputes, and International Law*. The Hague: Martinus Nijhoff Publishers.

Shaw, M. N. (2021) *International Law*. Cambridge: Cambridge University Press.

Shicun, W. U. and Huaifeng, R. (2003) More than a Declaration: A Commentary

on the Background and the Significance of the Declaration on the Conduct of the Parties in the South China Sea. *Chinese Journal of International Law* 2(1):311-319.

Simma, B., Mosler, H., Paulus, A., and Chaitidou, E. (2012) *The Charter of the United Nations: A Commentary*. Oxford: Oxford University Press.

Syrigos, A. (1998) *The Status of the Aegean Sea According to International Law*. New Rochelle, NY: Aristide D Caratzas Pub.

Tanaka, Y. (2012) A New Phase of the Temple of Preah Vihear Dispute before the International Court of Justice: Reflections on the Indication of Provisional Measures of 18 July 2011. *Chinese Journal of International Law* 11 (1):191-226.

Tanaka, Y. (2018) *The Peaceful Settlement of International Disputes*. Cambridge: Cambridge University Press.

Thao, N. H. (2003) The 2002 Declaration on the Conduct of Parties in the South China Sea: A Note. *Ocean Development & International Law* 34(3-4):279-285.

The Contadora Process for Peace in Central America. (1985) *24 International Legal Materials 182*.

The Covenant of the League of Nations. (1919) *UN Office Geneva*. Retrieved from https://www.ungeneva.org/en/about/league-of-nations/covenant

Thirlway, H. (2009) The Recommendations made by the International Court of Justice: A Sceptical View. *International & Comparative Law Quarterly* 58(1):151-162.

Thirlway, H. (2017) Territorial Disputes and their Resolution in the Recent Jurisprudence of the International Court of Justice. *Leiden Journal of International Law* 31(1):117-146.

UN Press. (2011) *Security Council Press Statement on Cambodia-Thailand Border Situation*. Retrieved from https://www.un.org/press/en/2011/sc10174.doc.htm

United Nations. (1945) *Charter of the United Nations.* Retrieved from https://www.un.org/en/about-us/un-charter

United Nations. (1949) *Revised General Act for the Pacific Settlement of International Disputes.* Retrieved from https://treaties.un.org/pages/View Details.aspx?src=IND&mtdsg_no=II-1&chapter=2&clang=_en

United Nations. (1957) *European Convention for the Peaceful Settlement of Disputes.* Retrieved from https://rm.coe.int/1680064586

United Nations. (1971) *Declaration on Principles of International Law concerning*

Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations. Retrieved from https://digitallibrary.un.org/record/202170

United Nations. (1982a) *Manila Declaration on the Peaceful Settlement of International Disputes*. Retrieved from https://www.refworld.org/docid/3b00f4782.html

United Nations. (1982b) *Convention on the Law of the Sea.* Retrieved from https://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf

United Nations. (1989) *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: Resolution / Adopted by the General Assembly, digitallibrary.un.org.* Retrieved from https://digitallibrary.un.org/record/53874?ln=en

United Nations. (1992) *Handbook on the Peaceful Settlement of Disputes between States*. New York, NY: United Nations.

United Nations. (1996) *Model Rules for the Conciliation of Disputes between States: Resolution / adopted by the General Assembly*. Retrieved from https://digitallibrary.un.org/record/203620?ln=en

United Nations. (1999) *Resolution 53/101: Principles and Guidelines for International Negotiations: Adopted by the General Assembly*. Retrieved from ttps://digitallibrary.un.org/record/265687

United Nations. (2019) *UN Security Council Discusses Kashmir, China Urges India and Pakistan to Ease Tensions. UN News*. Retrieved from https://news.un.org/en/story/2019/08/1044401

United Nations Secretary-General. (2019) *Statement Attributable to the Spokesman for the Secretary-General on the Situation in Jammu and Kashmir. UN News*. Retrieved from https://www.un.org/sg/en/content/sg/statement/2019-08-08/statement-attributable-the-spokesman-for-the-secretary-general-the-situation-jammu-and-kashmir

Vasquez, J. A. (2009) *The War Puzzle Revisited*. Cambridge: Cambridge University Press.

Voeneky, S. and Addison-Agyei, S. (2019) *Antarctica. SSRN Electronic Journal.* Retrieved from https://doi.org/10.2139/ssrn.3369605

Yiallourides, C. (2019) *Maritime Disputes and International Law*. Oxon: Routledge.

Yiallourides, C. and Yihdego, Z. (2019) *Disputed Territories and the Law on the*

Use of Force: Lessons from the Eritrea-Ethiopia Case, in Ethiopian Yearbook of International Law: In Pursuit of Peace and Prosperity, Yihdego, Z., Desta, M. G., and Hailu, M. B. (eds.), pp. 35-61. Cham: Springer.

Yiallourides, C., Gehring, M. W., Gauci, J. P. (2018) *The Use of Force in Relation to Sovereignty Disputes Over Land Territory*. London: The British Institute of International and Comparative Law.

Notes to Contributors

Manuscript. Submissions should be clear and concise. Manuscripts will be accepted with the understanding that their contents are unpublished and not being submitted for publication elsewhere. All parts of the manuscript, including the title page, abstract, tables and legends should be typed in English. Allow margins of at least 3cm on all sides of typed pages. Pages must be numbered consecutively throughout the paper.

Title. Must be as brief as possible and consistent with clarity (6 to 12 words). Authors should also supply a shortened version of the title suitable for the running head, not to exceed 50 character spaces.

Author Affiliation. Include the full names of authors, academic and/or professional affiliations and the complete mailing address of the author to whom proofs and correspondence should be sent as well as the address information of all of the authors.

Abstract. Each paper should be summarized in an abstract of not more than 150 words. Avoid abbreviations, diagrams and references to the text.

Key words. Authors must supply three to five keywords or phrases which identify the most important subjects covered by the paper.

Mathematical Notation. Use only essential mathematical notation as it is costly to typeset and may limit readership. Where mathematical notation is essential, keep it simple and in conformance with conventions of the profession.

References. Citations within the text must include the author name(s) and the data in parentheses [i.e., Smith, Jones, and Cutler (1993)]. Use et al. in the text only when four or more authors are cited. Do not use et al. in the references. Alphabetize the reference section and include all text citations. For more information, consult the *Chicago Manual of Style*. Follow these examples:

- **Journal** - Koenig, E. F. (1984) Fisheries Regulation Under Uncertainty: A Dynamic Analysis. *Marine Resource Economics* 1(2):193-208.
- **Book** - Heaps, T. and Helliwll, J. F. (1985) *The Taxation of Natural Resources. Handbook of Public Economics*, Vol. I, Auerback, A. J. and Feldstein, M. (eds.), pp. 21-72. Amsterdam: North-Holland.

Data and Documentation. Data sources, models and estimation procedures are expected to be documented to permit replication by other researchers. Data used in the analyses should be made available to other researchers for replication purposes. Submission of appendices, model documentation and other supporting materials is encouraged to facilitate the review process.

The Ethical Guidelines

Preamble.

The KMI International Journal of Maritime Affairs and Fisheries (hereinafter referred to as the "the journal", www.kmij.org) is a peer-review journal of ocean policy studies and marine data analytics. The journal offers researchers, analysts and policy makers a distinct combination of legal, political, social and economic analyses. The journal covers a range of international, regional and national marine policies; management and regulation of marine activities including fisheries, ports and logistics; marine affairs, which encompasses the topics of marine pollution and conservation as well as the use of marine resources. Editors of the journal are responsible for organizing and keeping guidelines of reviewing and accepting manuscripts submitted to the journal.

1. General rules

- The guidelines describe measures to set up ethics and hinder malpractices in management of the journal.
- The guidelines apply to those who join the publication of the journal.
- The terms are defined as follows.

Forgery implies the behavior of distorting data.

Falsification implies the behavior of twisting the truth of research performance or findings by deforming research findings, processes, devices, etc., artificially transforming or deleting data arbitrarily.

KMI is an initialism for the Korea Maritime Institute.

Plagiarism implies the behavior of borrowing the concepts, research facts, results, etc., of other people without proper references or notations.

Display of unjustified manuscript and paper authors implies the behavior of granting authorship to a person who has not given or made technical or scientific contribution to the content or results of research.

Double publication implies the act of publishing texts identical or similar to two or more academic journals.

Self-plagiarism implies a sort of **Plagiarism** in which an author republishes a previous work entirely or partially without referring to the previous publication.

The guidelines refer to the Ethical Guidelines.

2. Ethical rules for editors

- **Liability of editors:** Editors should be responsible for deciding whether to respect authors' character, independently as scholars, and publish submitted manuscripts and papers.
- **Fairness of paper treatment:** Editors should treat manuscripts and papers fairly on the basis of manuscript and paper quality and the Ethical Guidelines regardless of gender, age, nationality, organization, prejudice, or private relationship.
- **Objectivity of reviewer selection:** Editors should assist the reviewers utilizing their expertise and fair judgment to evaluate submitted manuscripts and papers. Editors should ensure manuscripts and papers evaluated as objectively as possible by avoiding the reviewers who may have an antagonistic or positive bias towards certain authors.
- **Non-exposure of the manuscripts and the paper review process:** Editors should not expose information on authors or submitted manuscripts and papers to persons except reviewers until it is decided whether to publish the manuscripts and papers.

3. Ethical rules for reviewers

- **Honesty and punctuality of manuscript and paper review:** Reviewers editors assigned to assess should evaluate the manuscripts and the papers reliably and give notice of the results to editors within a certain period of time. When considering themselves disqualified for review, reviewers should inform editors of the fact without hesitation.
- **Impartiality of manuscript and paper review:** Reviewers should review the manuscripts and papers evenly in accordance with the objective criteria. The reviewers should not depreciate the manuscripts and the papers without sufficient basis or refuse them for the reason of colliding with their own views or interpretations.
- **Validity of manuscript and paper review:** Reviewers should respect the intellectual tendency of the author. The reviewers should clarify their judgments and explain in detail the reasons for supplementation in an evaluation sheet, if necessary.
- **Confidentiality of review and disallowance of prior citation:** Reviewers should maintain confidentiality of the contents within the manuscripts and the papers. Except when seeking special advice for evaluation, it is recommended that reviewers do not show manuscripts and papers to others or discuss them on any level. Additionally, reviewers should not cite manuscripts and papers without authors' consent before the publication of the journal that includes the manuscripts and the papers.

4. Ethical rules for authors

- **Research wrongdoing:** Authors are not allowed to forge, falsify or pirate manuscripts and papers, or display unreasonable authorship.
- **Double publication:** Authors are not allowed to submit the studies previously published, nor those set to be published, nor those under review to other academic journals or

publications. This principle does not apply to manuscripts and papers presented at research conferences, research reports, dissertations, nor those openly unpublished, etc. In this case, the fact should be notified to editors and readers.

- **Citation:** Academic materials should be cited precisely and along with their clear and distinct sources. Data privately obtained should be cited only after receiving agreement from the person who produced the information. If the writings or ideas of others are cited or borrowed, respectively, the fact must be specified using footnotes.

5. Enforcement guidelines for research ethics

- **Vow of ethics keeping:** Authors who submit their manuscripts and papers to the KMI or are entrusted with manuscript review and paper review will be considered to have pledged to keep these guidelines.
- **Report of ethics violation:** If authors or reviewers have violated research ethics, the editor-in-chief of the journal as a representative of KMI should rectify the problems involving processes or results. If any problem has proved to be a clear violation of research ethics, the case should be assigned to the Ethics Committee of the journal. The editor-in-chief of the journal nominates the Director and four members of the Ethics Committee of the journal.
- **Composition and convocation of the Ethics Committee:** The Director should convene a meeting of the Ethics Committee within 7 working days after the appointment of the Director and the four members. The Director should be the Chair of the Ethics Committee meeting.
- **Request for attending and material submission:** The Ethics Committee may request informer and suspect to submit materials and to attend its meeting. In this case, suspects should accept the request. The very non-acceptance of suspects violates research ethics.
- **Right protection and confidentiality of informer and suspect**: The identities of informer shall not be disclosed to any third person directly or indirectly. Care should be taken lest the suspects' honor or rights should be infringed on until verification is completed on whether they are involved in any wrongdoing.
- **Judgement of the Ethics Committee meeting:** The Ethics Committee meeting can discuss with more than half of the members present and vote on the contents and results with two-thirds of the members or more present.
- **Report of the Ethics Committee meeting:** The Director shall prepare a results report of the Ethics Committee meeting and submit the result to the editor-in-chief of the journal in five working days following the judgement.
- **Notice of the judgement and decision of editor-in-chief to the author:** The editor-in-chief of the journal shall accept the **Judgement of** the Ethics Committee meeting if any prejudice or private interest of the Ethics Committee is not found. The **Judgement of** the Ethics Committee includes ethics violation, measures and sanctions for the ethics violation. The editor-in-chief of the journal shall notice **the judgement of** the Ethics Committee and the final decision of the editor-in-chief **to the author** in five working days after the arrival of the judgement. If the editor-in-chief of the journal finds any prejudice or private interest

of the Ethics Committee, the editor-in-chief re-appoints the Director and four members of the Ethics Committee of the journal.

- **Opposition of the author:** If the author or the information provider of the **ethics violation is not satisfied with the judgement of** the Ethics Committee and the decision of the editor-in-chief, the author or the information provider may file up the objection to the editor-in-chief. In that case, the editor-in-chief shall give notice of the objection to the Director within 7 working days after the filing. The Director shall review the case within 12 working days after notice is given by the editor-in-chief.
- **Measures and sanctions for ethical violations:** The Ethics Committee shall apply measures and sanctions in accordance with the types, contents, and degrees of the intention of ethical violations, such as amendment or prohibition of publication in the journal, cautions or warnings, and restrictions of submission of an article to the journal.

6. Date of Enforcement

The guidelines shall come into effect as of the 29th of May, 2021.