

# State Responsibility in Disputed Areas on Land and at Sea

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## Abstract

Departing from the observation that traditionally the law of State responsibility has hardly interacted with the law of territory, the article examines how these two fields of international law may relate in the case of State action in contested areas, be they terrestrial or marine. Assessing recent international practice, particularly the case law of the International Court of Justice and arbitral tribunals, and differentiating between land and maritime

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disputes, it identifies the primary obligations incumbent upon States when acting in contested areas – relating to State sovereignty and sovereign rights, *ius ad bellum*, *ius in bello*, procedural obligations pending the final settlement of the dispute – and it examines the consequences of the breach of those primary norms, in terms of secondary obligations, as well as third States' duties and obligations. The legal framework specifically created for disputed maritime areas by Art. 74 para. 3 United Nations Convention on the Law of the Sea (UNCLOS) and Art. 83 para. 3 UNCLOS, including its implications for land disputes, is specifically analysed. The authors submit that, at a time of increasingly pro-active policies and robust actions taken by States in contested areas, more attention should be devoted to the extent to which the law of State responsibility, especially with regard to relevant forms of reparation, has to adapt to the content and scope of primary norms applicable to that specific context.

## I. Introduction

It is undisputed that, according to well-established principles and norms of international law, a State exercises sovereignty over its land territory and its territorial sea and sovereign rights and jurisdiction in adjacent maritime zones. Sovereignty involves the possibility of acting upon a territory and of excluding other States from acting thereupon. Sovereign rights at sea entail exclusiveness as to the exploration and exploitation of resources, thereby preventing other States from exercising such activities (though not from the maritime space where such activities take place). Consequently, whenever a State acts on the territory or in the territorial sea of another State without the latter's permission, it is in breach of the latter's territorial sovereignty. In the same way, whenever a State engages in activities relating to the resources of another State or in other activities that fall under the latter's exclusive rights or jurisdiction in the latter's maritime zones, it is in breach of its exclusive rights. This necessarily entails the former's international responsibility and a duty to provide full reparation for the injury caused.

Traditionally, however, the law of territory (we use here the term in a broad sense, comprising not only land and sea areas subject to the sovereignty of a State, but also maritime areas subject to the jurisdiction of a State) and the law of State responsibility have hardly interacted. Three circumstances seem to have determined such an "uncosy relationship" between the two bodies of law. Firstly, the settlement of boundary disputes normally requires the drawing of a boundary or a line of delimitation,

whether effected through diplomatic means or through judicial means. Claims of State responsibility will be considered in the ancillary at best, at worst an impediment to the settlement of the dispute.<sup>1</sup> Secondly, most boundary disputes on land derive from the lack of demarcation and from the diverging views on the interpretation of an existing boundary. An *ex post facto* characterisation of a territorial situation as “adverse occupation” will not automatically lead to a determination of State responsibility for wrongful occupation or for acts related to the occupation prohibited under international law. Primary norms protecting territorial sovereignty in the context of territorial disputes are arguably based on a standard of due diligence; that, in turn, renders disputes over territory less amenable to the application of standard forms of reparation. Thirdly, with regard to delimitation disputes at sea, the question is even more intricate. Most of the times, delimitation with regard to maritime zones by the parties or by a judicial body will not be simply declaratory of an existing boundary, but it will draw that boundary “from scratch”. Till their delimitation, disputed sea ar-

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<sup>1</sup> It is not to be wondered at that although nineteen cases concerning maritime delimitation have been decided by international judges, in only two cases the parties have raised issues of responsibility; see *Land and Maritime Boundary between Cameroon and Nigeria*, Judgement of 10.10.2002, ICJ Reports 2002, 303 (*Cameroon/Nigeria* Judgement), and *Guyana and Suriname*, Award of 17.9.2007, 47 ILM 166 (2008) (*Guyana/Suriname* Award); and in the latter the judge has only decided on the merits. Numbers with regard to disputes on land are equally striking: if we take the ICJ case law, eighteen cases concerning territorial disputes have been brought before the Court; in three cases only, *Cameroon/Nigeria*, *Nicaragua/Colombia* and *Costa Rica/Nicaragua* issues of State responsibility have been raised by the applicants. In *Cameroon/Nigeria*, the claim has been left unanswered by the judges (see below), in *Nicaragua/Colombia* the Judgement on preliminary objections has upheld Colombia’s objections to the effect that the dispute over the Islands of San Andres and Providencia, in respect of which Colombia had reserved its right to seek reparation, would fall outside the scope of the Court’s jurisdiction; see *Territorial and Maritime Dispute*, Judgement of 13.12.2007, ICJ Reports 2007, 832 (*Nicaragua/Colombia* Judgement). In the recent dispute between Costa Rica and Nicaragua over the wetland of the Isla Portillos (listed by Costa Rica under the Ramsar Convention’s List of Wetlands of International Importance) and the activities conducted by Nicaragua in the area, Costa Rica has requested the Court to determine the reparation which must be made by Nicaragua for breaches of its territorial integrity and of a number of international instruments relating to territorial delimitation between the two States; see *Certain Activities Carried Out by Nicaragua in the Border Area*, Application Instituting Proceedings, 18.11.2010, para. 9, <http://www.icj-cij.org>. With regard to the activities of the Permanent Court of International Justice during the inter-war period, in 1932 in the dispute between Denmark and Norway concerning the status of South-Eastern Greenland, Denmark, in its application, reserved the right to seek reparation for Norway’s violation of the status of South-Eastern Greenland (*Legal Status of the South-Eastern Territory of Greenland*, Application Instituting Proceedings, 18.7.1932, PCIJ Series C 1933, no. 169, 12 et seq.). The case was discontinued the year after. In all these cases, the application was brought unilaterally under an optional clause declaration in accordance with Art. 36 para. 2 Statute of the International Court of Justice.

as might be considered, up to a certain extent,<sup>2</sup> as belonging to either of the parties to the dispute, without there being one with a definitive claim. In such a legal context, it is even harder to substantiate a claim of State responsibility for acts prohibited by international law. On the other hand, unlike for territorial disputes on land, the United Nations Convention on the Law of the Sea provides some guidance through Art. 74 para. 3 UNCLOS and Art. 83 para. 3 UNCLOS concerning the rules regulating States' conduct pending a final delimitation agreement on the exclusive economic zone and on the continental shelf respectively.

Yet, in the last decade, judicial litigation in at least three cases, namely *Cameroon/Nigeria*, *Eritrea/Ethiopia*<sup>3</sup> and *Guyana/Suriname*, has shown that claims of State responsibility may be raised, that the interplay between the law of State responsibility and the rules on contested territory and maritime areas is far from unproblematic and that a consistent and thorough elaboration by international tribunals, together with further scholarly analysis, is especially due. The question does not affect international judicial bodies only, in that they are the actors most likely to have to consider and make determinations with regard to claims of State responsibility in the context of territorial or delimitation disputes. It is also of great import for policy makers, diplomats and private operators, as in many parts of the world interest for contested areas, both on land and at sea, is on the increase as a result of a number of factors, including: a) the global economic crisis and the process of gradual exhaustion of resources in traditional gas and oil fields, hence the need to explore and exploit new fields, including in the continental shelf beyond 200 n.m., even where legal title is contested;<sup>4</sup> b) the

<sup>2</sup> This extent is determined by the concept of "reasonable claim" discussed below.

<sup>3</sup> See the following decisions by the Eritrea/Ethiopia Claims Commission: *Central Front*, Ethiopia's claim no. 2, Partial Award of 28.4.2004, 43 ILM 1275 (2004); *Jus ad Bellum*, Ethiopia's Claims no. 1-8, Partial Award of 19.12.2005, 45 ILM 430 (2006); *Guidance Regarding Jus ad Bellum Liability*, Decision no. 7 of 27.7.2007, 46 ILM 1121 (2007); *Ethiopia's Damages Claims*, Final Award of 17.8.2009, 49 ILM 177 (2010).

<sup>4</sup> E.g. the dispute over the Spratly Islands and related sea areas involving a considerable number of south Asian countries, see C. Schofield/I. Storey, *The South China Sea Dispute: Increasing Stakes and Rising Tensions*, 2009, <http://www.jamestown.org>; the dispute between Bangladesh and India and Myanmar, that has resulted in the submission to the International Tribunal on the Law of the Sea and the constitution of an arbitral tribunal; the continuing tensions over the exploitation of natural resources in the Timor Sea, see N. S. M. Antunes, *Spatial Allocation of Continental Shelf Rights in the Timor Sea*, Centre for Energy, Petroleum and Mineral Law and Policy 13 (2003), Online Journal, Art. 13, <http://www.dundee.ac.uk>; C. Schofield, *Minding the Gap: The Australia-East Timor Treaty on Certain Maritime Arrangements in the Timor Sea (CMATS)*, IJMCL 22 (2007), 189 et seq.; the recent "flare-up" in the dispute between the UK and Argentina over the exploitation of natural resources in the continental shelf off the Falkland/Malvinas Islands. Numerous disputes relate to areas of conti-

threat of international terrorism and piracy, leading States to take robust enforcement measures even in areas where previously they were hesitant to affirm their jurisdiction;<sup>5</sup> c) the great emphasis, especially in richer countries, on the control of illegal immigration fluxes, again leading them to take enforcement measures in disputed areas.<sup>6</sup> The legal questions raised by these phenomena are manifold, complex and they invest different areas of domestic and international law. In terms of international law, they relate to the precise identification of the primary obligations incumbent upon States when acting in contested areas; they require a working distinction between disputed areas on land and disputed areas at sea, as the law of the sea is codified in UNCLOS; they impose the determination of a threshold beyond which legitimate manifestations of claim may result in an infringement of the counterpart's right; and they must consider the extent to which the law of State responsibility, especially with regard to relevant forms of reparation, has to adapt to the content and scope of primary norms applicable to that specific context.

The present article endeavours to address these questions. It examines the relevant legal principles concerning the application of the law of State responsibility to territorial disputes both on land and at sea, that is disputes involving two or more States' competing claims over land territory and/or sea areas. It is divided in three sections. In the first section, it identifies the relevant primary rules applicable in the context of territorial and boundary disputes on land and the consequences deriving from breaches thereof, with reference to the practice of States and international organisations and to relevant case law. The same methodology is adopted in the second section, yet looking at the context of delimitation disputes at sea. The commonalities and differences in terms of applicable primary rules and how the application of these rules may affect determinations of State responsibility and consequent reparation in each of the two territorial contexts are brought to the fore. In the third section, the article examines the position of third parties with regard to disputed areas on land and at sea. Finally, an overall appraisal of relevant State practice, applicable rules and case law is made with a view

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mental shelf beyond 200 n.m. and have impacted the work of the Commission on the Limits of the Continental Shelf (CLCS); see *A. Oude Elferink/C. Johnson*, Outer Limits of the Continental Shelf and "Disputed Areas": State Practice concerning Article 76(10) of the LOS Convention, *IJMCL* 21 (2006), 461 et seq.

<sup>5</sup> See *J. Bayoria*, The Troubled Afghan-Pakistani Border, Council on Foreign Relations, 2009, <http://www.cfr.org>.

<sup>6</sup> See *I. Gonzales Garcia*, El acuerdo España-Marruecos de readmision de inmigrantes y su problematica aplicacion: les avalanches de Ceuta y Melilla, *Anuario español de derecho internacional* 22 (2006), 255 et seq.

to highlighting similarities and differences between the two contexts and to identifying existing gaps in the understanding of this area of international law.

## II. Territorial and Boundary Disputes on Land

As mentioned, issues of State responsibility have hardly arisen in the context of boundary or territorial dispute settlements on land, which makes a reading of the interplay between the law of territory and the law of State responsibility particularly complex. The only two cases in which claims related to State responsibility have been considered by international judicial bodies in that context are quite recent – we are referring to the 2002 Judgment of the International Court of Justice (ICJ) in the *Cameroon/Nigeria* territorial dispute and to some awards of the Eritrea/Ethiopia Claims Commission – but they are not free from ambiguities in their application of the law of State responsibility. State practice is not of much help either. Diplomatic means of dispute settlement normally involve a determination or demarcation of the boundary and the withdrawal of any military presence or civilian administration established by the “adverse occupant”: issues of State responsibility are left aside for the sake of a speedy implementation of the settlement.

As anticipated, the first task we have endeavoured to accomplish is that of identifying the most important primary rules regulating the actions of States, how they operate in the context of territorial disputes and the legal consequences deriving from breaches thereof. We have identified four sets of relevant primary rules, whose relevance and practical operation in the context of territorial disputes are worth attention.

### 1. Territorial Sovereignty of States

The first set of rules relates to the protection of the State’s territorial sovereignty, generally put, the right that every State enjoys to freely act upon its land territory and to exclude others from doing so. It is telling that among the examples of continuing wrongful acts cited by the International Law Commission (ILC), we may also find the “unlawful occupation of the

part of the territory of another State or stationing armed forces in another State without its consent”.<sup>7</sup>

In the 2002 *Cameroon/Nigeria* Judgment, the ICJ determined that the injury suffered by Cameroon as a result of the occupation by Nigeria of parts of its territory, including the Bakassi Peninsula and areas in the Lake Chad region, was sufficiently addressed by the very fact of the delimitation effected by the Court and by the order made to Nigeria to withdraw its troops and administration behind the newly delimited international boundary. The Court did not feel necessary to ascertain whether and to what extent Nigeria’s responsibility had been engaged as a result of that occupation, despite a number of requests advanced by Cameroon with regard to the destruction of properties and the despoliation of the environment.<sup>8</sup>

Technically speaking, as an extreme interpretation, the refusal of the Court to deal with the requests put forward by Cameroon amounts to a *non liquet*: the Court did not address the existence of a violation of Cameroon’s territorial sovereignty and the legal consequences deriving therefrom, Cameroon’s claims notwithstanding. That is to be regretted as the Court had the opportunity to clarify a highly controversial and unclear legal question. As a matter of judicial policy, the most sensible interpretation of the Court’s approach merely based on a declaratory judgment is that the judges were mostly concerned with the formulation of a remedy that would generally satisfy the overall demands of the prevailing party, without overburdening the other party with excessive costs. In other words, the Court tried to contribute to the creation of a non-confrontational environment in which the parties could move to a speedy implementation of the judgment, cooperate in the interest of the local population affected by change in administration and settle the dispute once for all (without opening a new phase of proceedings concerning the calculation of due compensation).<sup>9</sup> The opera-

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<sup>7</sup> International Law Commission’s Articles on State Responsibility (Draft Articles on State Responsibility), in *J. Crawford*, *The International Law Commission’s Articles on State Responsibility: Introduction, Text and Commentaries*, 2002, 36 et seq.

<sup>8</sup> The Court held that “... by the very fact of the present Judgement and of the evacuation of the Cameroonian territory occupied by Nigeria, the injury suffered by Cameroon by reason of the occupation of its territory will in all events have been sufficiently addressed. The Court *will not therefore seek to ascertain whether and to what extent Nigeria’s responsibility to Cameroon has been engaged as a result of that occupation*” (italics added), ICJ Reports 2002, para. 319.

<sup>9</sup> See especially *Cameroon/Nigeria* Judgement (note 1), para. 316 where the Court held that “the implementation of the present Judgement will afford the Parties a beneficial opportunity to co-operate in the interests of the population concerned, in order notably to enable it to continue to have access to educational and health services comparable to those it currently

tion of disposing of Cameroon's claim of State responsibility was instrumental to that conclusion and overall settlement and, to that extent, it was not unprecedented in terms of legal reasoning employed by the Court.<sup>10</sup> While the Court's approach may be considered wise from the perspective of the overall settlement of a complex dispute, on the other hand, it confirms the uneasy relation between the law of territory and the law of State responsibility. More importantly, it leaves us with no hints as to the content of the primary norm protecting State's territorial sovereignty and the consequences of the breach thereof in the context of territorial and boundary disputes. To put it in two questions: when does an adverse occupation result in a breach of the State's territorial sovereignty? What are the legal consequences of such a breach?

A hint to the answer may be found in Nigeria's oral pleadings, where the counsel argued that if the Court had assigned those disputed areas to Cameroon, that still should not have led to a determination of State responsibility, as Nigeria was administering those territories in good faith and in the honest belief that those areas were under its sovereignty.<sup>11</sup> By following that indication, we may put forward the hypothesis that in territorial disputes we should identify a threshold of fault liability on the wrongdoing State.

That leads us to identify two possible scenarios. In the first, adverse occupation is effected in good faith – take for example the cases of an international boundary lacking clear demarcation, of genuine disagreement over the interpretation of a colonial boundary agreement or of disagreement over the continuing validity of consent by the sovereign authorising a stationing of foreign troops – hence the occupying State is under a duty to withdraw behind the line determined by the tribunal and, for instance, return movable goods seized during the occupation. The *Temple of Preah Vihear* Case is

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enjoys. Such co-operation will be especially helpful, with a view to the maintenance of security, during the withdrawal of the Nigerian administration and military and police forces.”

<sup>10</sup> E.g. *Case Concerning the Gabčíkovo-Nagymaros Project*, Judgement of 25.9.1997, ICJ Reports 1997, 7. The Court, while apportioning responsibility between Hungary and Slovakia for the mismanagement of the joint project, did not determine the levels of compensations sought by the parties and observed that “the issue of compensation could satisfactorily be resolved within the framework of an overall settlement if each of the Parties were to renounce or cancel all financial claims and counter-claims” (para. 153). More in general, with regard to the scope and meaning of reparation in the context of the dispute, it opined that “the consequences of the wrongful acts of Both Parties will be wiped out ‘as far as possible’ if they resume their co-operation in the utilization of the shared water resources of the Danube, and if the multi-purpose programme, in the form of a co-ordinated single unit, for the use, development and protection of the watercourse is implemented in an equitable and reasonable manner. What is possible for the Parties to do is to re-establish co-operative administration of what remains of the Project” (para. 150).

<sup>11</sup> Oral pleadings of Nigeria, *Watts*, CR 2002/20, 30, <http://www.icj-cij.org>.



instructive in that respect as Cambodia claimed the return of pieces of cultural property as an ancillary to Thailand's withdrawal following the attribution by the Court of the contested area.<sup>12</sup> It is, in other words, a form of strict, objective liability for acts not prohibited by international law. In the second scenario, adverse occupation results from lack of due diligence or malicious conduct and evidence shows that the occupying State knew or should have known that it was administering foreign territory.<sup>13</sup> Hence the occupying State is responsible under international law, and should provide full reparation for the injury caused to the sovereign State through its occupation, including exploitation of natural resources and damages to properties.

In practice, the determination of the relevant threshold of State responsibility may present considerable difficulties, as facts and the reading thereof for that purpose may be strongly disputed, especially if the applicable standard is that of due diligence, it rests on the "psychological" attitude of the State and it has to take into consideration counter-claims: thus the choice of international tribunals (as well as States) to shy away from questions of State responsibility. Moreover, the above differentiation based on good faith is without prejudice to the effect that an uncontested, peaceful display of authority may have on the consolidation of a title over a given territory, if the counterparty does not pose protest or its own manifestations of *effectivité*.<sup>14</sup> Under the perspective of territorial entitlements – indeed the para-

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<sup>12</sup> *Temple of Preah Vihear*, Judgement of 15.6.1962, ICJ Reports 1962, 6 et seq., at 11 and 36. On 20.4.2011, Cambodia filed a request for interpretation of the 1962 judgment in accordance with Art. 60 of the ICJ Statute due to renewed recent tensions between the two countries over the Temple of Preah Vihear area. Cambodia has asked the Court to adjudge and declare that the obligation of Thailand to withdraw all military and security forces from the area of the temple and its surroundings (appearing in the *dispositif*) is a consequence of the general obligation to respect the integrity of the territory of Cambodia, as defined by the Annex 1 Map on which the 1962 judgment of the Court was based; see *Request for Interpretation of the Judgment of 15 May 1962 in the Case concerning the Temple of Preah Vihear*, Request of the Kingdom of Cambodia of 20.4.2011, para. 45.

<sup>13</sup> A threshold of fault liability related to territorial use was also identified by the Court in the *Corfu Channel* Case, where the Court stated that "it cannot be concluded by the mere fact of the control exercised by a State over its territory and waters that the State necessarily knew, or ought to have known, of any unlawful act perpetuated therein [...]. This fact, by itself and apart from other circumstances, neither involves *prima facie* responsibility nor shifts the burden of proof." *Corfu Channel* Case, Judgement of 9.4.1949, ICJ Reports 1949, 4 et seq., at 18.

<sup>14</sup> *Kohen* denies the significance of good faith as a requirement for the consolidation of title in prescriptive acquisitions and adverse occupation; on the other hand, he states that "[t]outefois, la conscience d'agir contrairement au droit du titulaire de la souveraineté ou, au contraire, la conviction d'être le titulaire pourront avoir des conséquences dans le domaine du

mount perspective for litigators and international tribunals when they are engaged in a judicial process of dispute settlement of a boundary or territorial dispute – the questions of good faith, faulty or even malicious conduct do not seem to play an important role, hence making unnecessary the elaboration and identification of the proper standards of conduct.

Finally, it is noteworthy that re-establishment of lawful sovereignty over territory may impinge upon the interests of groups of private individuals and the concern for the protection of those interests has been given full consideration in judicial practice, well above considerations of State responsibility. As mentioned, that has been clearly spelled out by the ICJ in *Cameroon/Nigeria* when it has called upon the Parties to cooperate in the best interest of the local population, especially with regard to the provision of health and educational services during the transitional period leading to Nigeria's withdrawal from the Bakassi Peninsula.<sup>15</sup> Already in 1865, in the *Aves* arbitration between Venezuela and the Netherlands, the Queen of Spain after having established Venezuela's title over the Aves Island in the Caribbean sea despite the fishing activities of Dutch nationals in the waters surrounding the island, concluded that Dutch fishermen should have been fully indemnified (the value of earnings in the previous five years as increased by a rate of 5 %) in case Venezuela had denied access to those fisheries.<sup>16</sup> In the more recent *Costa Rica/Nicaragua* dispute before the ICJ – technically speaking, a dispute over navigational rights in the context of a 19<sup>th</sup> century treaty establishing the river boundary between the two countries – the Court has upheld Costa Rica's claim to the exercise of customary fishing rights by Costa Rican local populations for subsistence purposes: the reversal of the burden of proof in favour of Costa Rica shows that the Court has paid special regard to the interests of the local inhabitants.<sup>17</sup> Finally, in the *Abyei Area* arbitration the arbitral tribunal has held that traditional grazing rights by local nomadic populations should remain unaffected by the territorial delimitation between the Government of Sudan and the Sudan People's Liberation Movement.<sup>18</sup> In sum, case law shows that the

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contenu et des formes de la responsabilité internationale". *M. G. Kohen*, *Possession contestée et souveraineté territoriale*, 1997, 384.

<sup>15</sup> *Cameroon/Nigeria* Judgement (note 1), para. 316.

<sup>16</sup> Sentence arbitrale relative à la question élevée entre le Venezuela et le Royaume des Pays-Bas, de la domination et de la souveraineté de l'île d'Aves, 30.6.1865, XXVIII RIAA 115, at 123.

<sup>17</sup> *Dispute Regarding Navigational and Related Rights*, Judgement of 13.7.2009, para. 141, <http://www.icj-cij.org>.

<sup>18</sup> *Delimitation of the Abyei Area*, Final Award of 22.7.2009, 48 ILM 1258 (2009) paras. 748 et seq.

protection of individual rights in the context of territorial disputes is of paramount concern for international judicial bodies. That has been a further factor in the reluctance of international tribunals to apply the law of State responsibility, which may have led to a negative evaluation of private activities, especially if authorised, facilitated or directed by the adverse occupant.

## 2. *Ius ad Bellum* Rules

Contested occupations may also result from the use of force by the occupying State, which may be in breach of a second category of primary rules, those under the Charter of the United Nations (UN Charter) and customary international law protecting the territorial integrity of States, which are commonly known as *ius ad bellum* rules. The partial award on the *ius ad bellum* of 19.12.2005 by the Ethiopia/Eritrea Claims Commission is interesting as it highlights the complex intertwining of *ius ad bellum* rules, the law of territory and the law of State responsibility. Eritrea had argued that the military action of May 1998 in the area of the border town of Badme should not be characterised as a use of force falling within the prohibition of Art. 2 para. 4 UN Charter, but it was justified as an effort to regain control over territory which belonged to it, as confirmed by the decision of the Ethiopia/Eritrea Boundary Commission of 13.4.2002.<sup>19</sup> The Commission rejected that claim responding that self-defence as a means of regaining territory cannot be invoked to settle territorial disputes, and that “border disputes are so frequent that any exception to the prohibition of the threat or use of force for territory that is allegedly occupied unlawfully would create a large and dangerous hole in a fundamental rule of international law”.<sup>20</sup> A couple of years later, quoting with approval the above passage, the arbitral tribunal in *Guyana/Suriname* held that the asserted incompatibility between claims of State responsibility for the unlawful use of force and territorial claims has no basis in international law, hereby reaffirming the relevance of *ius ad bellum* rules to the conduct of States in territorial or border disputes.<sup>21</sup>

The principle that force shall not be used or threatened to settle territorial disputes is well-established under general international law and it is reaffirmed in the 1970 General Assembly Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States

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<sup>19</sup> *Jus ad Bellum* (note 3), para. 9.

<sup>20</sup> *Jus ad Bellum* (note 3), para. 10.

<sup>21</sup> *Guyana/Suriname* Award (note 1), paras. 423 et seq.

in Accordance with the Charter of the United Nations (Declaration on Friendly Relations), where it holds that “every State has the duty to refrain from the threat or use of force to violate the existing international boundaries of another State or as a means of solving international disputes, including territorial disputes and problems concerning frontiers of States”.<sup>22</sup> State practice is supportive of that principle. When Argentina acted in 1982 to forcibly regain the Malvinas from Britain, condemnation of that action was widespread, even by those States that supported Argentina’s territorial claim.<sup>23</sup> With regard to the conflict in the Former Yugoslavia, the Security Council has reaffirmed on several occasions the inadmissibility of the alteration of existing borders by force.<sup>24</sup> The counsel for Nigeria argued the point similarly in *Cameroon/Nigeria*: according to him international law would protect a territorial *status quo* (peaceful *status quo*) pending the final delimitation made by the tribunal, unless such *status quo* contradicts an internationally recognised boundary and it has been produced by the resort to the use of force.<sup>25</sup> It is interesting to note that, if force is used, the threshold of liability is lowered from a standard of due diligence generally protecting territorial sovereignty in the context of territorial disputes to an objective standard, which is met unless the use of force is justified in self-defence.

While the proposition that the threat or use of force as a means of settling territorial disputes is contrary to international law is unassailable, one should add that it should not constitute a recipe for immobility, nor that the nature of the underlying dispute may unduly restrict States’ right to exercise their right to self-defence as recognised under Art. 51 UN Charter.<sup>26</sup> In-

<sup>22</sup> GA Res. 2625 (XXV). See the Separate opinion of Judge *ad hoc* Dugard in the Order for provisional measures in *Costa Rica/Nicaragua*, where the Judge has maintained that “[t]he prohibition on the use of force in international relations is accepted as a peremptory norm, a norm of *jus cogens*. This prohibition is directly related to the principle of respect for territorial integrity, as demonstrated by Article 2 (4) of the Charter of the United Nations which prohibits the ‘threat or use of force against the territorial integrity ... of any State’. In these circumstances, it is difficult to resist the conclusion that respect for the territorial integrity of a State *by other States* is a norm of *jus cogens*.” *Costa Rica/Nicaragua* (note 1), Provisional Measures, Order of 8.3.2011, Separate opinion of Judge *ad hoc* Dugard, para. 15.

<sup>23</sup> See debate at the Security Council in UN docs. S/PV.2345 and S/PV.2346. See also SC Res. 502 (1982), where the Council declared itself “deeply disturbed at reports of an invasion on 2 April 1982 by armed forces of Argentina” and demanded an “immediate withdrawal of all Argentine forces”.

<sup>24</sup> E.g. SC Res. 752 (1992) and 757 (1992).

<sup>25</sup> Oral Pleadings of Nigeria, *Abi-Saab*, CR 2002/20, 22, <http://www.icj-cij.org>.

<sup>26</sup> As stated by *Grewe*: “But as protection of possession is not the last word in civil law, the international legal order should also provide ways and means to examine and to correct situations of unlawful possession. It should avoid becoming a rigid order of immobility which may lead to violent explosions. In this respect there is much unfinished business to be accomplished.” *W. G. Grewe*, *Status Quo*, in: R. Bernhardt, *EPIL* 2000, Vol. IV, 687 et seq, at 690.

deed, States still retain the right to act in self-defence under strict conditions of necessity, proportionally and immediacy without prejudice to their claims and positions related to their territorial title. For example, Britain's action to retake the Falkland Islands seems to have satisfied those conditions; Eritrea's action did not as the area around Badme had been under Ethiopia's peaceful administration for years, as it appears to be the case for Nigeria's military actions in 1993-1994 to extend control over certain towns in the Bakassi Peninsula. Finally, as alluded to by the ICJ in *Nicaragua/United States*, a mere frontier incident or border skirmishes may amount to violations of Art. 2 para. 4 UN Charter, yet do not reach the threshold of an armed attack, hence not entitling the injured State to act in self-defence.<sup>27</sup>

Moreover, one should bear in mind the considerable difficulties involved in drawing a line between mere enforcement activities and use of force. While the distinction is partly irrelevant in the context of military occupations to the extent that the applicable standards will derive from the Hague Regulations and the Fourth Geneva Convention, it may come under scrutiny in the context of competing State activities in areas where neither party has managed to establish effective control. Regardless of the relevance of such activities for the consolidation of territorial title, a law-enforcement activity will be generally characterised by the more limited scale, by the fact that it is aimed at implementing and enforcing national legislation (not at asserting sovereignty) and by the fact that it is directed against private individuals: take for instance, a situation where a State adopts and enforces anti-terrorist measures in a remote undisputed area where groups of insurgents or terrorist groups prepare attacks against it. Moreover, by analogy, as elaborated by international tribunals with regard to enforcement activities in disputed sea areas, the use of force, in order to be qualified as lawful law-

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<sup>27</sup> *Military and Paramilitary Activities in and against Nicaragua*, Judgement of 27.6.1986, ICJ Reports 1986, 14, at 103. But see the critical remarks of *Yoram Dinstein* concerning the dangers inherent in considering any border incident as not amounting to an armed attack: "It stands to reason that, if a rifle shot is fired by an Arcadian soldier across the border of Utopia and the bullet hits a tree or a cow, no armed attack has been perpetrated. But it would be fallacious to dismiss automatically from consideration as an armed attack every frontier incident. As ably put by *Sir Gerald Fitzmaurice*, '[t]here are frontier incidents and frontier incidents. Some are trivial, some may be extremely grave'. When elements of the armed forces of Arcadia ambush a border patrol (or some other isolated unit) of Utopia, the assault has to rank as an armed attack and some sort of self-defence must be warranted in response. Many frontier incidents comprise fairly large military engagements, and an attempt to dissociate them from other forms of armed attack would be spurious." *Y. Dinstein*, *War, Aggression and Self-Defence*, 4<sup>th</sup> ed. 2005, 195.

enforcement activity, shall be unavoidable, necessary and proportionate.<sup>28</sup> While the above may be useful indicators, in reality, the distinction between the two is far from unproblematic and the arbitral award in *Guyana/Suriname* is testimony of that.<sup>29</sup>

As for liability, violations of *ius ad bellum* rules in the context of territorial disputes may normally take the form of compensation for damages directly caused by the use of force. In its decision n. 7 of 27.7.2007, the guidance regarding *ius ad bellum* liability, the Ethiopia/Eritrea Claims Commission identified the connection of “proximate cause” as the most relevant criterion to be adopted – in other words, whether the damage and injuries produced should have been foreseeable to an actor committing the wrongful act in question.<sup>30</sup> In that respect, the territorial dimension has played a decisive role in the determinations of the Claims Commission concerning the foreseeability of damage in the Final Award of 17.8.2009. According to the Commission, Ethiopia’s *ius ad bellum* claims were to be territorially and temporally limited within the purposes of Eritrea’s military action, which was aimed at gaining control over territory it regarded as its own; findings of liability should be consequential to the proximate causal relationship between the attack against Badme and its surroundings in May 1998 and the ensuing hostilities and resulting damages. With regard to the Western Front “it was, or clearly should have been, foreseeable to Eritrea’s leaders that Eritrean forces would seize and occupy the areas involved in the initial attacks, as well as additional areas claimed by Eritrea and that were required to secure or hold territory occupied by Eritrean forces” and that such strategy would have met Ethiopia’s fierce resistance and would have resulted in substantial conflict between the two countries in and around Badme and other

<sup>28</sup> The *M/V “Saiga” (No. 2) (Saint Vincent and Grenadine v. Guinea)* (Judgement) ITLOS Case No. 2 (1.7.1999), paras. 155 et seq. The standard had already been developed by the Anglo-American Tribunal in the *SS “Im Alone”* Case (in 7 ILR 203) and by the Danish-British Commission of Inquiry in the incident involving the “*Red Crusader*” (in 35 ILR 485). See *T. Treves, Piracy, Law of the Sea and the Use of Force: Developments off the Coast of Somalia*, EJIL 20 (2009) 399 et seq., at 413.

<sup>29</sup> See below section III. and *P. J. Kwast, Maritime Law Enforcement and the Use of Force: Reflections on the Categorisation of Forcible Action at Sea in Light of the Guyana/Suriname Award*, *Journal of Conflict and Security Law* 13 (2008), 49 et seq.

<sup>30</sup> *Guidance Regarding Jus ad Bellum Liability* (note 3). The United Nations Compensation Commission (UNCC) in the context of the management of mass claims concerning post-conflict Iraq had identified the criterion of “foreseeability”, in order to complement the criterion of causation between the act and the damage or injury produced. See UNCC Decision No. 20, Recommendations made by the Panel of Commissioners concerning Individual Claims for Serious Personal Injury or Death (Category “B” Claims), UN Doc. S/AC.26/Dec.20/1994, cit. in *M. Frigessi di Rattalma/T. Treves* (eds.), *The United Nations Compensation Commission: A Handbook*, 1999, 22 et seq.

areas newly occupied on the western front.<sup>31</sup> In the Central Front, Eritrea's liability was found to cover injury produced in areas which were unquestionably under Ethiopia's sovereignty or were under Ethiopia's peaceful administration prior to May 1998 throughout the period of Eritrea's occupation.<sup>32</sup> Even in the Eastern Front, territorial competing claims over the area of Dalul Wereda made the spread of hostilities highly likely, hence making Eritrea liable for resulting damages and injuries to properties and civilians in that area.<sup>33</sup>

As for the level of reparation, sweeping forms of compensation have been rarely imposed upon a State and they refer to instances of aggressive wars seeking the annexation of parts or the entire territory of other States, namely the reparations imposed against Germany after World War I and those imposed against Iraq after the First Gulf War.<sup>34</sup> However, in the latter case, the financial sustainability of the liability schemes established under Security Council Res. 687 through the United Nations Compensation Commission was a major concern in the policy of the United Nations, as clarified numerous times by the Secretary-General.<sup>35</sup> The Final Award of the Ethiopia/Eritrea Claims Commission of 17.8.2009 is particularly instructive in that respect. In determining the level of compensation due for Eritrea's violations of *ius ad bellum*, the Commission took into account a number of "mitigating" factors in setting the level of compensation to a threshold that would not overburden Eritrea: the fact that many of the underlying acts were not themselves in violation of the *ius in bello*, as determined in the same award,<sup>36</sup> that use of force was different in magnitude from a war of

<sup>31</sup> *Ethiopia's Damages Claims* (note 3), paras. 292 et seq.

<sup>32</sup> *Ethiopia's Damages Claims* (note 3), paras. 298 et seq.

<sup>33</sup> *Ethiopia's Damages Claims* (note 3), para. 305.

<sup>34</sup> See the practice of the Versailles Inter-Allied Reparation Commission, which dealt with claims for reparations for all losses and damage produced by Germany, whether or not deriving from breaches of the laws of war. With regard to the UNCC, the Governing Council in its decision of 6.3.1992 stated that "[w]here direct losses were suffered as a result of Iraq's invasion and occupation of Kuwait with respect to tangible assets, Iraq is liable for compensation. Typical actions of this kind would have been expropriation, removal, theft or destruction of particular items of property by Iraq authorities. Whether the taking of property was lawful or not is not relevant for Iraq's liability if it did not provide for compensation." UNCC Decision No. 9, Propositions and Conclusions on Compensation for Business Losses: Types of Damages and Their Valuation, UN Doc. S/AC.26/1992/9, para. 12. For an appraisal see *D. J. Bederman*, *The United Nations Compensation Commission and the Tradition of International Claims Settlement*, N. Y. U. J. Int'l L. & Pol. 27 (1994), 1 et seq.

<sup>35</sup> Report of the Secretary-General pursuant to para. 10 of SC Res. 687, UN Doc. S/22559; Letter from the Secretary-General to the President of the SC, UN Doc. S/22661. 2008 figures show that half of the compensation Awarded by the UNCC is yet to be paid (<http://www.uncc.ch>).

<sup>36</sup> *Ethiopia's Damages Claims* (note 3), para. 311.



aggression;<sup>37</sup> that the level of compensation imposed upon Eritrea should not undermine Eritrea's ability to comply with its human rights obligations under the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, in particular to ensure that people under its jurisdiction are not deprived of their means of subsistence;<sup>38</sup> that financial sustainability was taken into account in previous experiences;<sup>39</sup> that the implementation of the award should not result in a deterioration of the bilateral relationship between Eritrea and Ethiopia;<sup>40</sup> that imposing a high level of compensation for *ius ad bellum* violation, similar to that imposed for violations of *ius in bello*, would create a disincentive towards abidance by *ius in bello* as the wrongdoing State would find itself liable to pay regardless of its compliance or not with international humanitarian law.<sup>41</sup>

One may cast some doubts especially over the latter mitigating factor and whether it is desirable to set a judicial precedent in that respect: affirming an incentive to the compliance with international humanitarian law may reversely result in a disincentive towards the compliance with *ius ad bellum*. The argument that full abidance by the *ius in bello* should be prioritised over the strict application of the rules of State responsibility to the *ius ad bellum* because of the humanitarian nature of the former creates a "false alternative" and misses one fundamental point: that limiting resort to war and military means by States and creating effective accountability for wrongful behaviours is aimed at saving "succeeding generations from the scourge of war", including those civilian populations that are too often considered the victims of "collateral damage" of modern military operations. Given the fundamental nature of Art. 2 para. 4 UN Charter in contemporary international law, weakening the accountability mechanisms for breaches thereof can hardly be justified.

In conclusion, the recent award of the Eritrea/Ethiopia Claims Commission goes into the same direction indicated by the ICJ in *Cameroon/Nigeria*: rigorous application of the law of State responsibility in the context of territorial disputes should not stand in the way of a speedy settlement of territorial disputes and of ensuring compliance with human rights standards by the wrongdoing State. In other words, peace and stability and due regard

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<sup>37</sup> *Ethiopia's Damages Claims* (note 3), para. 312.

<sup>38</sup> *Ethiopia's Damages Claims* (note 3), para. 313.

<sup>39</sup> *Ethiopia's Damages Claims* (note 3), para. 314.

<sup>40</sup> *Ethiopia's Damages Claims* (note 3), para. 315.

<sup>41</sup> *Ethiopia's Damages Claims* (note 3), para. 316.



for basic human rights are given priority over full justice and full application of international law in the inter-State relation.<sup>42</sup>

### 3. *Ius in Bello* Rules

Moreover – and here we identify a third set of relevant rules of international law – when occupation of contested areas is effected in the context of an armed conflict the law of military occupation will apply, especially the Regulations annexed to the 1907 Convention (IV) respecting the Laws and Customs of War on Land (Hague Regulations) and the 1949 Convention (IV) relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), regardless of any subsequent determination of the boundary. Again, that has been reaffirmed by the Ethiopia/Eritrea Claims Commission in its *ius in bello* partial awards. The Commission has drawn an important line between territorial status and the applicable law in occupied territories, by noting that “under customary international humanitarian law, damage unlawfully caused by one Party to an international armed conflict to persons or property within territory that was peacefully administered by the other Party to that conflict prior to the outbreak of the conflict is damage for which the Party causing the damage should be responsible, and that such responsibility is not affected by where the boundary between them may subsequently be determined to be”.<sup>43</sup> The Commission has found a number of violations of international humanitarian law by both parties with regard to their respective areas of occupation, including looting and destruction of properties and the failure to prevent crimes such as rape against the local population, also – and this is particularly relevant to the present study – with regard to events that were subsequently found, after the award of the Boundary Commission, to have occurred within “their territory”. Such violations have entailed a duty of compensation for the damage and injury produced by the unlawful conduct.<sup>44</sup> The distinction be-

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<sup>42</sup> As noted by the Claims Commission in the Final Award “[h]uge awards of compensation by their nature would require large diversions of natural resources from the paying country – and its citizens needing health care, education and other public services – to the recipient country. In this regard, the prevailing practice of States in the years since the Treaty of Versailles has been to give very significant weight to the needs of the affected population in determining amounts sought as post-war reparations” (*Ethiopia’s Damages Claims* (note 3), para. 21).

<sup>43</sup> *Central Front* (note 3), para. 27.

<sup>44</sup> *Ethiopia’s Damages Claims* (note 3), paras. 66 et seq. See also Art. 3 Hague Convention (IV) Respecting the Laws and Customs of War on Land, 1907, reprinted in *D. Schindler/J.*

tween applicable law and status upheld by the Commission is fully in line with the spirit of the Fourth Geneva Convention, in particular Art. 47 Fourth Geneva Convention, which provides for the continuing application for protected persons of the benefits laid down in the convention, despite the change in legal status of the territory, including through annexation.<sup>45</sup> The issue of sovereignty is left untouched by the formulation chosen and it confirms the humanitarian gist of the Geneva conventions.<sup>46</sup>

#### 4. The Obligation to Make Every Effort to Prevent the Aggravation of the Dispute and not to Hamper the Final Settlement

Finally, one should assess whether in cases of disputed territory, States are under a due diligence obligation to make every effort to prevent the aggravation of the dispute and not to hamper the final settlement. As already mentioned, a due diligence obligation to that effect is codified in Art. 74 para. 3 UNCLOS and Art. 83 para. 3 UNCLOS and it characterises delimitation disputes at sea. In the *Guyana/Suriname* arbitral award, the tribunal found that unilateral exploratory drilling of the sea bed by Guyana and threat to use force by Suriname were both in violation of that obligation.<sup>47</sup> No such express obligation can be found in general treaty or soft-law instruments applicable to territorial or border disputes on land. However, one may infer such obligation from the general duty to settle disputes peacefully and in good faith under Art. 2 para. 3 UN Charter. Moreover, the existence of such obligation is borne out, to a considerable extent, by the case law of international tribunals and by relevant practice of States and international organisations.<sup>48</sup> Both in final judgments and in orders for provisional meas-

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*Toman* (eds.), *The Laws of Armed Conflict: a Collection of Conventions, Resolutions and Other Documents*, 1981; Art. 91 Protocol Additional to the Geneva Conventions of 12.8.1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1977, in UNJYB 132 (1977). See also UN docs. A/38/265 and E/1983/85, 21.6.1983, cit. in *N. Schrijver*, *Permanent Sovereignty over Natural Resources: Balancing Rights and Duties*, 1997, 155.

<sup>45</sup> Art. 47 Fourth Geneva Convention.

<sup>46</sup> *E. Benvenisti*, *The International Law of Occupation*, 2004, 99 et seq.

<sup>47</sup> *Guyana/Suriname* Award (note 1), paras. 480-484.

<sup>48</sup> Art. 31 para. 3 European Convention for the Peaceful Settlement of Disputes, 29.4.1957, 23 ETS 1; General Assembly Declaration on Friendly Relations; General Assembly 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, 5.12.1988, UN Doc. A/RES/43/51.

ures in the context of border disputes on land the ICJ has requested the parties to act in such manner that would defuse the level of confrontation, enhance mutual confidence between the parties and reach a final settlement of the dispute in line with the boundary determined or to be determined by the Court.<sup>49</sup> For instance, in the recent order for provisional measures in *Costa Rica/Nicaragua*, the ICJ has demanded the Parties to “refrain from sending to, or maintaining in the disputed territory, including the *caño*, any personnel, whether civilian, police or security; [...]” and “[...] from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve”.<sup>50</sup>

One may object to the need to infer such rule in the first place by arguing that with regard to the administering/occupying State, abidance by the law of occupation, including the obligation not to alter the status of the territory and its inhabitants, the obligation to use only for the sake of usufruct the natural resources, etc. will most of the times prevent aggravating the dispute. The problem with that objection is that States are normally reluctant to apply the law of occupation, *a fortiori* in cases of boundary disputes, as that may be perceived as diminishing their claim to exercise territorial sovereignty over that land; moreover, not all contested territorial situations are established in the context of an armed conflict. Such an obligation of due diligence is perhaps less precise and it has considerable scope for further definition, on the other hand it is flexible enough to provide a blueprint for good conduct in border disputes, that is disputes involving a contested claim over the course of the boundary, and it is instrumental to their settlement. *De minimis*, unilateral positive actions aimed at changing permanently the status of the territory and of its inhabitants or its physical and demographic characteristics are forbidden. In concreto, a conduct of due diligence by the administering State will imply avoiding the taking of unilateral measures such as: changing the status of the disputed territory; conferring nationality *en masse* to its inhabitants and/or promoting significant settlements of own citizens;<sup>51</sup> conducting excessive exploitation of exhausti-

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<sup>49</sup> E.g. *Frontier Dispute (Burkina Faso/Mali)*, Provisional Measures, Order of 10.1.1986, ICJ Reports 1986, 3; *Cameroon/Nigeria*, Provisional Measures, Order of 15.3.1996, ICJ Reports 1996, 13; *Cameroon/Nigeria* Judgement (note 1), para. 316.

<sup>50</sup> *Costa Rica/Nicaragua* (note 1), Provisional Measures, Order of 8.3.2011, para. 86.

<sup>51</sup> See Art. 11 Bolzano/Bozen Recommendations on National Minorities in Inter-State Relations & Explanatory Note, OSCE High Commissioner on National Minorities, 2008 according to which “States should ... ensure that ... a conferral of citizenship respects the principle of friendly, including good neighbourly, relations and territorial sovereignty, and should refrain from conferring citizenship *en masse*, even if dual citizenship is allowed by the State of residence”, <http://www.osce.org>. See also Report of the Independent International

ble natural resources beyond the needs of usufruct and the benefit of the local population; creating physical barriers aimed at predetermining the future delimitation of the boundary;<sup>52</sup> destroying evidence related to the physical demarcation of the boundary, such as boundary pillars; diverting the course of a river for the sake of controlling water resources or altering the course of a natural boundary. That is without prejudice to the human rights obligations that an administering State, regardless of its territorial entitlement, may have *vis-à-vis* the local population, including positive obligations such as the provision of educational and health services and the provision of security, which may also require law-enforcement activities.<sup>53</sup>

The obligation will also affect the position of the claimant, non-administering State: for instance, it will have to refrain from forcible measures aimed at regaining control over the whole or parts of the disputed territory, such as threatening or using military force. However, subject to relevant procedural limitations under the law of State responsibility, especially the duty to refrain from adopting countermeasures if the dispute is pending before a tribunal, the possibility of adopting lawful non-forcible measures, such as the suspension of existing trade agreements, agreements on transboundary free movement of persons and agreements related to transport by air, rail and road, cannot be ruled out, especially if it makes the view that the

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Fact-Finding Commission on the Conflict in Georgia, Vol. II, September 2009, 155 et seq., <http://www.ceiig.ch>.

<sup>52</sup> In the advisory opinion concerning the legality of the wall in Palestine, the ICJ has maintained that “the construction of the wall and its associated régime create a ‘fait accompli’ on the ground that could well become permanent, in which case, and notwithstanding the formal characterization of the wall by Israel, it would be tantamount to a de facto annexation”. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9.7.2004, ICJ Reports 2004, 136, at 184.

<sup>53</sup> In the order for provisional measures in *Costa Rica/Nicaragua*, the ICJ, despite ordering the parties to refrain from sending any police or security forces in the disputed area, has asserted that “in order to prevent the development of criminal activity in the disputed territory in the absence of any police or security forces, each Party has the responsibility to monitor that territory from the territory over which it unquestionably holds sovereignty” and that “it shall be for the Parties to co-operate with each other in a spirit of good neighbourliness, in particular to combat any criminal activity which may develop in the disputed territory.” See *Costa Rica/Nicaragua* (note 1), Order for provisional measures of 8.3.2011, para. 78. The measures chosen by the Court seem appropriate given the fact that the disputed area is uninhabited. On the other hand, the Court has allowed Costa Rica to dispatch civilian personnel charged with the protection of the environment, in order to avoid irreparable damage to the wetland, subject to the duties of consultation with the Secretariat of the Ramsar Convention and of prior notification to Nicaragua. The authorization given by the Court should not be seen as a pre-determination that Costa Rica has a “better title” to the dispute territory, but only as the result of the determination that Costa Rica is seeking to protect a “plausible right” from irreparable prejudice. See *Costa Rica/Nicaragua* (note 1), Provisional Measures, Order of 8.3.2011, para. 86 and Declaration of Judge *Greenwood*.

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occupation results from the malicious or faulty conduct of the administering State.

Reparation due for such violations may vary from simple declaratory reliefs, to forms of restitution and compensation (the latter, for instance, when the unlawful conduct has involved the excessive use of exhaustible natural resources).

## 5. An Obligation to Make Every Effort to Enter into Provisional Arrangements of a Practical Nature?

On the other hand, it is hard to substantiate the claim that a similar positive obligation to that found in Art. 74 para. 3 UNCLOS and Art. 83 para. 3 UNCLOS – namely that States shall make every effort to enter into provisional arrangements of a practical nature pending delimitation – may apply to the context of territorial disputes on land by virtue of an obligation under general international law. To be sure, practical arrangements are desirable most of the time and such practices have characterised at times the conduct of States pending the settlement of a territorial dispute. For instance, in the dispute over the Baarle-Hertog *enclave*, which eventually was settled through a submission and judgment of the ICJ, the Netherlands and Belgium concluded an interim agreement for provisional arrangements in the disputed plots of land.<sup>54</sup> The agreement specifically stated that the parties may not invoke it in support of either party's claim before the ICJ. The agreement was not renewed after the submission of the dispute to the Court. However, State practice is far from consistent and the conclusion of provisional arrangements does not seem to have flown from a sense of legal obligation to seek an *interim* arrangement, but rather, exclusively, from the convenience of reaching a provisional compromise of a practical nature in the case at hand.

If anything, the lack of agreement on practical arrangements may infringe upon the human rights of local populations in border areas and, to that extent, it may constitute a departure from the positive obligations States owe to individuals in terms of provision of food, water and basic services in general. In other words, positive obligations in the field of human rights may

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<sup>54</sup> Exchange of notes constituting an agreement between the Netherlands and Belgium concerning the exercise of authority over the registered lands known as the "Commune of Zondereygen", Section A, Nos. 91 and 92, 26. and 28.6.1954, 272 UNTS 235; Exchanges of notes constituting an agreement extended the above-mentioned agreement, 5. and 7.12.1956, 272 UNTS 240.

dictate States to enter into provisional arrangements of a practical nature, if the well-being of the local populations is endangered.<sup>55</sup> Also environmental obligations may dictate positive action in disputed areas and require cooperative measures by the States in dispute.<sup>56</sup> In addition to that, a stubborn refusal on the part of one of the States to enter into negotiations towards the conclusion of a provisional arrangement may amount to a breach of the obligation not to aggravate the dispute.

### III. Contested Maritime Areas

Disputes relating to contested maritime areas present differences with respect to those on land, maritime zones being a recent concept in international law. While the claim of States to a territorial sea may be traced back to the first period of law of the sea (XV-XVI centuries), most maritime zones – namely the continental shelf and the exclusive economic zone – date back to the second half of the XX century and have stemmed from the process of expansion of the coastal States' rights, codified by the 1958 and 1973-1982 United Nations Conferences on the Law of the Sea.<sup>57</sup> These zones therefore extend over areas that were previously regarded as part of

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<sup>55</sup> Take a remote border region in State A sparsely inhabited, but economically and socially dependent on a richer, more populated neighbouring region on the other side of the border in State B. Most food and goods are imported from that region and children cross the border every morning to have access to educational services in State B. The border dispute escalates at a certain point in time, the only border crossings are “sealed” and no movement of goods and persons is allowed with great detriment for the local population in State A. In that circumstance, as basic human rights of the local population may become endangered, States would be under the positive obligation to ensure the enjoyment of fundamental human rights, including through provisional arrangements of a practical nature. In the case of the territorial dispute between Guatemala and Belize, the two parties have signed an agreement which provides for provisional arrangements to deal with the disputed “adjacency zone”, including the protection of human rights of those individuals resident in disputed areas and the problem of removal of illegal settlers. See Agreement on a Framework for Negotiations and Confidence Building Measures between Belize and Guatemala, 7.9.2005, <http://www.oas.org>.

<sup>56</sup> In *Costa Rica/Nicaragua* Judge Greenwood has suggested that the Court should have gone further in seeking to protect the eco-system of the disputed area and of the nearby Harbor Head Lagoon by requiring the parties to devise and implement a system of protective measures in coordination with the Ramsar Secretariat. See *Costa Rica/Nicaragua* (note 1), Provisional Measures, Order of 8.3.2011, Declaration of Judge Greenwood, para. 15.

<sup>57</sup> For a description of these early developments see *T. Scovazzi*, The Evolution of International Law of the Sea: New Issues, New Challenges, RdC 286 (2000), 39 et seq.; on the developments prompted by the discussions during the Third United Nations Conference on the Law of the Sea and the adoption of the UNCLOS see *T. Treves*, Codification du droit international et pratique des Etats dans le droit de la mer, RdC 223 (1990), 9 et seq.

the high seas, open to all States, and the exclusive rights that may be exercised therein by the coastal State are attributed to it not on the basis of occupation but as a consequence of the proximity of the areas considered to its land territory, on the basis of the well established principle “the land dominates the sea”.<sup>58</sup> Consequently, in almost all maritime delimitation disputes the parties are called upon to delimit a previously *undelimited* area, where their claims overlap<sup>59</sup> and, since most maritime boundaries still remain to be settled, maritime boundary disputes could be said to be the rule at sea.

Two types of disputes may be distinguished under the general heading of maritime disputes. The first type concerns strictly the drawing of the boundary between the maritime zones claimed by the neighbouring States. While it is true, as the ICJ has maintained, that delimitation “is a process which involves establishing the boundaries of an area already, in principle, appertaining to the coastal State and not the determination *de novo* of such an area”<sup>60</sup> and notwithstanding the elaboration of a body of principles and rules relating to maritime delimitation,<sup>61</sup> mostly through the decisions of international tribunals, there still is a margin of appreciation (for the judge or the parties) as regards the final boundary line, given that “[t]here will rarely, if ever, be a single line that is uniquely equitable”.<sup>62</sup> As long as their claims are reasonable, both States parties to a maritime boundary dispute could

<sup>58</sup> *North Sea Continental Shelf*, Judgement of 20.2.1969, ICJ Reports 1969, 3, para. 96. The same is true for the territorial sea, the extent of which was amply expanded in the second half of the 20<sup>th</sup> century.

<sup>59</sup> An exception being the case in which the Parties disagree as to the existence or validity of a boundary line already drawn, as in the case of the *Guinea-Bissau/Senegal* arbitration. Award reprinted in RGDIP 204 (1990).

<sup>60</sup> *North Sea Continental Shelf* (note 58), para. 18.

<sup>61</sup> *Cameroon/Nigeria* Judgement (note 1), para. 288. On the rules of maritime delimitation see *P. Weil*, *The Law of Maritime Delimitation*, 1989; *N. S. M. Antunes*, *Towards the Conceptualisation of Maritime Delimitation: Legal and Technical Aspects of a Political Process*, 2003; *I. Papanicolopulu*, *Il confine marino: unità o pluralità?*, 2005; *Y. Tanaka*, *Predictability and Flexibility in the Law of Maritime Delimitation*, 2006, and the introductory essays to *J. I. Charney/L. M. Alexander* (eds.), *International Maritime Boundaries*, Vol. I, 1993, and *D. A. Colson/R. W. Smith* (eds.), *International Maritime Boundaries*, Vol. V, 2005.

<sup>62</sup> *Barbados and the Republic of Trinidad and Tobago*, Final Award of 11.4.2006, 45 ILM 800, para. 244. Judge *Schwebel* had noted in 1993 that “the authority to seek an equitable solution by the application of a law whose principles remain largely undefined affords the Court an exceptional measure of judicial discretion” (*Maritime Delimitation in the Area between Greenland and Jan Mayen*, Separate Opinion of Judge *Schwebel*, ICJ Reports 1993, 118, at 128). More than a decade later, the *Barbados/Trinidad and Tobago* Award noted that “[w]ithin those constraints imposed by law, the Tribunal considers that it has both the right and the duty to exercise judicial discretion in order to achieve an equitable result” (*Barbados/Trinidad and Tobago* (note 62), para. 244).



have a reasonable chance of getting the maritime area they claim, or at least a part of it. A second category of disputes concerns entitlement to maritime areas. Of particular relevance are disputes relating to the right of islands, islets and rocks to a continental shelf and an exclusive economic zone, in the light of the requirements of Art. 121 para. 3 UNCLOS, sometimes accompanied by a dispute on title to the island.<sup>63</sup> In this case, the dispute does not concern the exact extent of the maritime zone claimed by a State, but the possibility itself of claiming the zone.<sup>64</sup> The difference between disputes relating to maritime delimitation and disputes concerning entitlement to maritime zones should not be overstressed, since in practice the two are often dealt with together in the final, package solution;<sup>65</sup> however, the qualification of a controversy as a land or maritime dispute could have consequences on the primary rules applicable in order to consider State responsibility issues and on the possibility of seeking third party settlement.<sup>66</sup>

For some years disputes concerning maritime delimitation involved mostly political and diplomatic action, with effective enforcement action to support the abstract claim being rarely undertaken. Thus, no action was usually undertaken in those areas by either of the claimant States. In recent years, however, a number of factors have induced States to begin exploiting, or at least exploring, resources in undelimited areas. In addition, recent

<sup>63</sup> For a list of disputes concerning islands and other similar formations see V. Prescott/C. Schofield, *The Maritime Political Boundaries of the World*, 2<sup>nd</sup> ed. 2005, 265 et seq.

<sup>64</sup> The case of *Okinotorishima* is emblematic; see Y. Song, *Okinotorishima: A "Rock" or an "Island"?* Recent Maritime Boundary Controversy between Japan and Taiwan/China, in: S. Hong/J. M. Van Dyke (eds.), *Maritime Boundary Disputes, Settlement Processes, and the Law of the Sea*, 2009, 176 et seq.

<sup>65</sup> In *Qatar/Bahrain*, for example, the ICJ did not address the status, and the consequent entitlement to maritime areas, of Fasht al Azm and Fasht al Jarim, since it considered that the two features had to be disregarded due to other considerations (*Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, Judgement of 16.3.2001, ICJ Reports 2001, 40, especially paras. 218 and 245-248). In the *Nicaragua/Honduras* Case, the fact that neither of the parties advanced any claims for maritime areas beyond a territorial sea for Bobel Cay, Savanna Cay, Port Royal Cay and South Cay, may have helped in the settlement of the dispute concerning the maritime boundary; see *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea*, Judgement of 8.10.2007, ICJ Reports 2007, para. 262). In the *Romania/Ukraine* Case, the ICJ considered that, given the geographic circumstances, Serpents' Island would not be entitled to separate maritime zones and that therefore it needed not "consider whether Serpents' Island falls under paragraphs 2 or 3 of Art. 121 UNCLOS nor their relevance to this case"; see *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgement of 3.2.2009, <http://www.icj-cij.org>, para 187.

<sup>66</sup> For example, while disputes relating to maritime delimitation fall under the scope of UNCLOS Part XV, territorial disputes on land need a special agreement to be submitted to binding dispute settlement mechanisms.



threats to State security may also be at the basis of enforcement action in maritime zones, including undelimited areas.<sup>67</sup>

In principle, there could be an issue of State responsibility for the violation of rules belonging to the first three categories of rules of international law already discussed in connection with territorial disputes on land, namely territorial sovereignty; *ius ad bellum*; *ius in bello*. In practice, however, such disputes are often linked to a territorial dispute on land. Primary rules applicable to these cases, and especially *ius ad bellum* and *ius in bello*, have been created having in mind principally situations on land. There are, however, some issues peculiar to disputes concerning maritime areas that will be discussed below. In the case of the obligation not to hamper or jeopardise the solution of the controversy and the obligation to negotiate interim solutions, the law applicable to maritime areas is more developed than the law applicable to land territories. These two obligations form the content of specific provisions of Art. 74 para. 3 UNCLOS and Art. 83 para. 3 UNCLOS, which could be considered as reflecting customary international law.

## 1. The Third Paragraph of Art. 74 UNCLOS and Art. 83 UNCLOS

UNCLOS contains primary rules specifically addressing situations of contested maritime zones: Art. 74 para. 3 UNCLOS and Art. 83 para. 3 UNCLOS.<sup>68</sup> These provisions, framed in identical terms, echo the general principles of good faith and peaceful settlement of disputes<sup>69</sup> and contain two obligations: the obligation to try and enter into provisional arrangements and the obligation not to hamper or jeopardise the final agreement on

<sup>67</sup> See for example the LRIT Data Distribution Plan information on geographical areas submitted by Turkey to the IMO, discussed during the 86<sup>th</sup> meeting of the MSC (IMO doc. MSC 86/26 of 12.6.2009, para. 6). Greece has protested these data (see IMO circular letter no. 2961 of 26.5.2009).

<sup>68</sup> Since the beginning of the Third United Nations Conference on the Law of the Sea it had become clear that the extension seawards of the maritime areas subject to the exclusive rights of a coastal State would multiply maritime delimitation disputes and that interim measures would be welcome; *R. Lagoni*, Interim Measures Pending Maritime Delimitation Agreements, AJIL 78 (1984), 345 et seq., at 349.

<sup>69</sup> "Pending agreement as provided for in paragraph 1 [on the basis of international law], the States concerned, in a spirit of understanding and cooperation, shall make every effort to enter into provisional arrangements of a practical nature and, during this transitional period, not to jeopardize or hamper the reaching of the final agreement. Such arrangements shall be without prejudice to the final delimitation."

the maritime boundary. These are obligations of conduct, rather than of result. They do not depend on the previous initiation of negotiations for the settlement of the maritime boundary,<sup>70</sup> even though they do require that a dispute be in place. To some extent, the obligation to try not to hamper or jeopardise the final settlement could in some cases be preliminary with respect to delimitation negotiations.<sup>71</sup> The same may be said for provisional arrangements, which could bring the parties together, permitting the instauration of negotiations aiming at the final solution of the delimitation dispute.

Art. 74 para. 3 UNCLOS and Art. 83 para. 3 UNCLOS do not limit *de iure* the powers of each State in a contested area that still has to be delimited; these powers thus remain those generally attributed to the coastal State by the relevant UNCLOS provisions and customary international law. Art. 74 para. 3 UNCLOS and Art. 83 para. 3 UNCLOS, nonetheless, pose a double condition for the exercise of such rights in the area of overlapping claims, provided that each claim is a reasonable one. Therefore, if a coastal State exercises a right granted under UNCLOS, without at the same time complying with the requirements of Art. 74 para. 3 UNCLOS and Art. 83 para. 3 UNCLOS, it may incur international responsibility.

According to their initial phrase, Art. 74 para. 3 UNCLOS and Art. 83 para. 3 UNCLOS apply pending agreement for the delimitation of the exclusive economic zone and of the continental shelf, respectively, between States with opposite or adjacent coasts. They surely apply in all cases where adjacent or opposite States have not yet delimited their maritime boundary, including cases in which States disagree as to the qualification of features and their entitlement to a – full or partial – maritime area and cases in which there is dispute over a portion of land territory that generates maritime areas.<sup>72</sup> It is open to discussion if, in the face of the textual reference to a pending delimitation between two zones, Art. 74 para. 3 UNCLOS and Art. 83 para. 3 UNCLOS apply also to situations of contested maritime zones deriving from a disputed sovereignty on land and which do not include

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<sup>70</sup> M. H. Nordquist (ed.), United Nations Convention on the Law of the Sea 1982. A Commentary, Vol. II, 1993, at 815 and 984.

<sup>71</sup> As the Arbitral Tribunal in the *Guyana/Suriname* Case has maintained, a State may pose as a condition for the starting or the resumption of negotiations the fact that the other State ceases conduct that could possibly hamper the reaching of an agreed solution. *Guyana/Suriname* Award (note 1), para. 476.

<sup>72</sup> As in the case of the region of Zubarah, contended by Bahrain and Qatar, and relevant to the maritime delimitation between the two States (*Qatar/Bahrain* (note 65), para. 185) and the Peninsula of Bakassi (*Cameroon/Nigeria* Judgement (note 1), para. 261).

the need to draw a maritime boundary between the areas appertaining to two States.<sup>73</sup>

#### a) The Obligation to Make Every Effort to Enter Into Provisional Arrangements

The first obligation contained in Art. 74 para. 3 UNCLOS and Art. 83 para. 3 UNCLOS is a positive one: States involved in a dispute concerning maritime delimitation shall endeavour to enter into provisional arrangements to address the situation of competing claims. This provision imposes on the parties a duty to negotiate in good faith; according to the *Guyana/Suriname Award*, the text indicates “the drafters’ intent to require of the parties a conciliatory approach to negotiations, pursuant to which they would be prepared to make concessions in the pursuit of a provisional arrangement”.<sup>74</sup> As such, it does not impose on the parties the obligation to enter into any agreement or to adopt any specific solution, or any solution at all, but requires all the same some action by them and not merely a passive inaction. According to the Arbitral Tribunal in the *Guyana/Suriname Case*, conducts that could be contrary to the obligation of Art. 74 para. 3 UNCLOS and Art. 83 para. 3 UNCLOS may include refusing to send a delegation or a representative to agreed meetings, failing to respond, even in the negative, to a proposal by the other State<sup>75</sup> and not informing the other State about proposed actions in the contested area.<sup>76</sup> The Tribunal also indicates some active conducts that could satisfy the requirement of Art. 74 para. 3 UNCLOS and Art. 83 para. 3 UNCLOS: actively attempting to bring the other party to the negotiating table;<sup>77</sup> accepting the invitation of the other party to negotiate;<sup>78</sup> giving the other party official and detailed notice of proposed activities; seeking cooperation of the other party in undertaking proposed activities; offering to share the results of any exploration conducted in the contested area; offering to share financial benefits de-

<sup>73</sup> That could be the case of dispute over a solitary island in the middle of the ocean, which generates a 200 n.m. exclusive economic zone not overlapping with areas generated by a nearby coast.

<sup>74</sup> *Guyana/Suriname Award* (note 1), para. 461. See also *North Sea Continental Shelf* (note 58), para. 85. This opinion is shared by the majority of the scholars; e.g. *R. Lagoni* (note 68); *D. M. Ong*, Joint Development of Common Offshore Oil and Gas Deposits: “Mere” State Practice or Customary International Law?, *AJIL* 93 (1999), 771 et seq., at 797 et seq.

<sup>75</sup> *Guyana/Suriname Award* (note 1), para. 473.

<sup>76</sup> *Guyana/Suriname Award* (note 1), para. 477.

<sup>77</sup> *Guyana/Suriname Award* (note 1), para. 476.

<sup>78</sup> *Guyana/Suriname Award* (note 1), para. 476.

iving from activities in the contested area.<sup>79</sup> The list of activities presented by the Tribunal is not exhaustive but seems generally acceptable, with activities that can be divided into two categories: those that have to be undertaken, in order to comply with the requirements of Art. 74 para. 3 UNCLOS and Art. 83 para. 3 UNCLOS, and those that, while not being necessary, are surely consistent with the obligations of the above mentioned provisions. The duty to negotiate obliges a State to actively seek negotiations with the other party or, at the very least, to accept the invitation of the other party to discuss issues. This acceptance, however, may be conditional upon the other party's stopping any unlawful conduct in which it is engaged, as the Tribunal recognised.<sup>80</sup> The latter part of the list, including the sharing of information and revenues, appears to be just a hortatory formulation, which does not embody any legal obligation.<sup>81</sup> In a situation where the relationship between the parties is stressed, or in the case that one of the parties advances excessive claims, it seems that it would be going too far to admit that a State involved in a maritime boundary dispute has to share information or revenues with the other party. The same perplexities arise in considering the duty to give to the other party official and detailed notice of proposed activities. If these activities consist in acts that violate the duty not to hamper or jeopardise the final solution, then they constitute a violation of the "other" obligation of Art. 74 para. 3 UNCLOS and Art. 83 para. 3 UNCLOS.

State practice shows that provisional arrangements may assume the form of formal agreements or may consist in an informal *modus vivendi*. The instrument, either formal or informal, may endorse different solutions, such as joint development zones,<sup>82</sup> provisional boundaries established either under a treaty<sup>83</sup> or a non-formalised *modus vivendi*,<sup>84</sup> the creation of joint

<sup>79</sup> *Guyana/Suriname Award* (note 1), para. 477.

<sup>80</sup> *Guyana/Suriname Award* (note 1), para. 476, in which the Tribunal states that Suriname could have insisted on the immediate cessation of exploratory drilling in the contested area by Guyana's licensee as a condition to participating in further talks.

<sup>81</sup> All the same, if the parties to a dispute manage to enter into provisional arrangements concerning also these aspects, it is evident that they are conforming with the requirement of Art. 74 para. 3 UNCLOS and Art. 83 para. 3 UNCLOS.

<sup>82</sup> Such as the 1974 agreement between Japan and Korea concerning joint development of the southern part of the continental shelf adjacent to the two countries, 1225 UNTS 19778.

<sup>83</sup> An example of a provisional boundary is the 2002 agreement between Algeria and Tunisia on provisional arrangements for the delimitation of the maritime boundaries; *F. Galletti*, *Notion et pratique de "l'arrangement provisoire" prévu aux articles 74 § 3 et 83 § 3 de la Convention sur le droit de la mer. Une contribution marginale du droit de la délimitation maritime?*, *Annuaire du Droit de la Mer* 9 (2004), 115 et seq.; *L. Savadogo*, *Le paragraphe 3 des articles 74 et 83 de la CMB: une contribution à l'Accord sur les arrangements provisoires*

commissions or joint programmes,<sup>85</sup> the sharing of benefits<sup>86</sup> or other provisional measures.<sup>87</sup> Though provisional arrangements were considered mostly as a means for undertaking the exploitation of resources in a disputed area pending delimitation of the maritime boundary,<sup>88</sup> they may even take the shape of mutually agreed self-restraint from undertaking exploitation activities in a contested area.<sup>89</sup> Provisional measures could even be decided by a judge on the application of one or both parties to the dispute, especially in light of Art. 290 UNCLOS.<sup>90</sup> In all cases, provisional arrangements do not in any way prejudice the final settlement of the dispute, as provided by the last phrase of Art. 74 para. 3 UNCLOS and Art. 83 para. 3 UNCLOS.

In conclusion, the duty to make every effort to enter into provisional arrangements consists in a legal obligation to actively try to enter into nego-

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relatifs à la délimitation des frontières maritimes entre la République tunisienne et la République algérienne démocratique et populaire, *Annuaire du Droit de la Mer* 7 (2002), 239 et seq.

<sup>84</sup> An informal *modus vivendi*, based on equidistance, is in place between Italy and Malta for some years; *T. Scovazzi/G. Francalanci*, A partial de facto delimitation of the continental shelf between Italy and Malta?, in: *International Boundaries and Boundary Conflict Resolution: 1989 IBRU Conference Proceedings*, 1990, 181 et seq.

<sup>85</sup> Such as the Tripartite Agreement for Joint Marine Seismic Undertaking in the Agreement Area in the South China Sea signed on 14.3.2005, between the national oil companies of China, the Philippines, and Vietnam and the Joint Oceanographic Marine Scientific Expedition in the South China Sea; see *N. H. Thao/R. Amer*, A New Legal Arrangement for the South China Sea?, *ODILA* 40 (2009), 333 et seq., at 337 et seq.

<sup>86</sup> As provided for in the 2003 agreement between Australia and East Timor relating to the unitization of the Sunrise and Troubadour fields (*D. C. Smith*, Australia – East Timor. Report Number 6-20(3), in: *D. A. Colson/R. W. Smith* (note 61), 3867 et seq.). This agreement is unique in that it provides for the sharing of benefits from an area straddling the boundary between a joint development area and a contested maritime area.

<sup>87</sup> See, for example, the exchange of letters on an interim agreement on joint measures of fisheries and fisheries regulations in the Barents Sea between Norway and Russia, adopted in 1978 for a 1-year period and renewed successively 30 times, according to which both Parties enforce their national legislation in the contested area, but not on the other party; *A. G. Oude Elferink*, *The Law of Maritime Boundary Delimitation: A Case Study of the Russian Federation*, 1994.

<sup>88</sup> According to the *Guyana/Suriname Award*, this obligation “constitutes an implicit acknowledgment of the importance of avoiding the suspension of economic development in a disputed maritime area, as long as such activities do not affect the reaching of a final agreement. Such arrangements promote the realisation of one of the objectives of the Convention, the equitable and efficient utilisation of the resources of the seas and oceans” (*Guyana/Suriname Award* (note 1), para. 460).

<sup>89</sup> In this case it is often difficult to distinguish self-restraint which is the result of an agreement from unilateral action, as exemplified in the case of the hydrocarbon activities moratorium in the Beaufort Sea. See *T. L. McDorman*, *Salt Waters Neighbors*, 2009, 187.

<sup>90</sup> See ITLOS, *Case concerning Land Reclamation by Singapore in and around the Strait of Johore*, Provisional Measures, Order of 8.10.2003, operative part, para. 1, ITLOS No. 12.

tiations for addressing contingent issues pending final settlement of the delimitation dispute. It does not imply in any way the duty to conclude an agreement, even though the conclusion of interim agreements surely results in compliance with this provision. The non-exhaustive list of activities provided by the *Guyana/Suriname* Award constitutes useful guidance in assessing the conduct of States. However, the evaluation of the conduct of a State should be done on a case by case basis, taking into account all the elements of the case and evaluating each action or inaction by a State in the framework of its general conduct since the beginning of the dispute.

## b) The Obligation not to Hamper or Jeopardise the Final Settlement

The second obligation that is usually deduced from the text of Art. 74 para. 3 UNCLOS and Art. 83 para. 3 UNCLOS is a negative one: States involved in a maritime delimitation dispute must refrain from acting in a way that would prejudice the final settlement of the dispute. The main difficulty in interpreting and applying this provision derives from the need to strike the right balance between two differing and opposite considerations. On the one hand, there is the need to avoid, as far as possible, any unilateral action that could worsen the dispute and could threaten international peace and security.<sup>91</sup> On the other, there is the need not to paralyse all unilateral activities pending final settlement of the boundary.

According to the Arbitral Tribunal in the *Guyana/Suriname* Case, this balance could be achieved by distinguishing, at least in the field of hydrocarbon exploration and exploitation, between activities that cause a physical change to the marine environment and those that do not: seismic surveys would belong to the second category, while exploratory drilling would fall under the first.<sup>92</sup> This analysis, which seems mostly based on the ICJ order that denied provisional measures in the *Aegean Sea Continental Shelf* Case,<sup>93</sup> is noteworthy in that it tries to provide objective criteria for evaluating the conformity with the obligation of Art. 74 para. 3 UNCLOS and Art. 83 para. 3 UNCLOS of unilateral actions in the disputed area. However, the conclusion reached by the Tribunal seems not to take into due account the fact that, especially in tense situations, every action could potentially trigger a forceful response by the other party. Resource exploration by one State could be considered by the other as jeopardising the dispute, espe-

<sup>91</sup> *Guyana/Suriname* Award (note 1), para. 465.

<sup>92</sup> *Guyana/Suriname* Award (note 1), para. 467.

<sup>93</sup> *Aegean Sea Continental Shelf* Case, Order of 11.9.1976, ICJ Reports 1976, 1, para. 30.

cially if this is undertaken without any previous notification from the former to the latter. As to the exploitation of renewable resources, such as living resources, these have not been dealt with by international judges. In the latter case, indeed, it is easier to maintain that exploration and exploitation activities do not cause any permanent damage and may even be carried out by both parties, though separately, in the same area.<sup>94</sup> Lack of coordination in the exploitation of renewable resources could however be in contrast with the necessity to preserve renewable resources, as provided for in Art. 61 UNCLOS.

In the second place, the Tribunal considered that the “threat of the use of force” by Suriname also violated its obligation not to hamper or jeopardise the reaching of the final agreement. Evidently, the threat to use force for the solution of a dispute, not to mention its actual use, not only violates basic rules of international law such as Art. 2 para. 4 UN Charter, but is also due to jeopardise and probably hamper the final settlement. The Tribunal’s reasoning, however, could have been more refined by drawing a distinction between use of force against another State and use of limited force in the context of law enforcement activities against private actors, especially in the case of urgency to prevent infringement of a State’s rights.<sup>95</sup> The options enumerated by the Tribunal, which include entering into negotiations, bringing the case to a judge and requesting provisional measures, seem appropriate during the planning period, *before* any activity begins. One could cast some doubts, however, on their being enough *after* activities have started and while they take place. Prohibiting a State from enforcing its legislation against a company that is undertaking exploratory drilling in the continental shelf without license by it appears to take too much into account the interest of third parties and not sufficiently that of the coastal State.<sup>96</sup> It is only when enforcement activities use force beyond the limited amount permitted under international law that the coastal State will be in breach of rules concerning the use of force and its actions may be considered in breach of the obligation not to hamper or jeopardise the final set-

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<sup>94</sup> It is not unusual, in State practice, that more than one State grants licenses for fishing in contested areas; for example, both Honduras and Nicaragua had granted licenses to fishermen in the waters surrounding disputed islands in the Caribbean; see *Nicaragua/Honduras* (note 65), para. 131.

<sup>95</sup> The Tribunal avoided entering into this issue by qualifying the acts of the Surinamese Navy as “threats of use of force” and by rejecting the argument that they should be considered law enforcement activities; *Guyana/Suriname Award* (note 1), para. 445.

<sup>96</sup> One should also consider that maritime boundary disputes are usually well known internationally and private companies can calculate the risk of undertaken activities in a disputed area when a license is issued by one of the claimants.



tlement. In any case, enforcement of national legislation against vessels or licensees of the other State in contested maritime areas must be viewed as the last option, to be exercised by a State in an extremely cautious way and adhering strictly to the requirements of international law, only in situations of urgency and after having sought to protect its rights through other means. In short, a State may incur international responsibility for the violation of the obligations under Art. 74 para. 3 UNCLOS and Art. 83 para. 3 UNCLOS not so much for undertaking enforcement action in a situation of urgency, but rather for not having addressed the situation before, when lesser action could safeguard its rights, and for having thus contributed to its reaching the point when the only possibility to protect its rights was to apply forcefully its legislation.<sup>97</sup> If, on the other hand, a State has in good faith tried to address the situation earlier by other means, and notwithstanding such action is obliged to put in place enforcement action, it may not be responsible for the breach of Art. 74 para. 3 UNCLOS and Art. 83 para. 3 UNCLOS.

**c) Consequences of the Violation of Art. 74 Para. 3 UNCLOS and Art. 83 Para. 3 UNCLOS**

The first consequence of a breach of Art. 74 para. 3 UNCLOS and Art. 83 para. 3 UNCLOS will be the obligation to cease the unlawful conduct and offer appropriate assurances and guarantees of non-repetition.<sup>98</sup> This obligation is especially important since in a situation of contested areas States could be liable to several violations of the obligations set by Art. 74 para. 3 UNCLOS and Art. 83 para. 3 UNCLOS. The parties also remain under the continued duty to comply with the requirements of these provisions; a State therefore shall not withdraw permanently from negotiations even though it might pose as a condition for their continuation the compliance by the other States with their obligations and the cessation of the unlawful conduct. These obligations are applicable to the parties as long as the dispute is not settled, either by agreement or by a binding decision.<sup>99</sup>

<sup>97</sup> *Guyana/Suriname Award* (note 1), para. 476.

<sup>98</sup> Art. 30 Draft Articles on State Responsibility.

<sup>99</sup> Remarkably, the parties might be under an obligation to cooperate even after the final settlement of the maritime boundary, in the case of transboundary oil or gas deposits (*North Sea Continental Shelf* (note 58), para. 99), in the case of transboundary fish stocks (Art. 63 UNCLOS), or in the case of traditional fisheries rights of one State in an area attributed to the other. In this case, however, the obligation to try to enter into an agreement stems from provisions other than Art. 74 para. 3 UNCLOS and Art. 83 para. 3 UNCLOS.



A complex issue relates to the possibility to have recourse to countermeasures, in order to induce the other State to comply with its obligations under Art. 74 para. 3 UNCLOS and Art. 83 para. 3 UNCLOS. Countermeasures are generally permissible as long as they are proportionate<sup>100</sup> and do not violate obligations provided by peremptory norms of international law, including the obligation to refrain from the threat or use of force.<sup>101</sup> A State will therefore be authorised not to comply with its obligations under Art. 74 para. 3 UNCLOS and Art. 83 para. 3 UNCLOS as a countermeasure, but only pending non compliance by the other State.<sup>102</sup> Countermeasures may be adopted also without having previous recourse to the dispute settlement mechanism of UNCLOS, since previous recourse to “all the amicable settlement procedures” before undertaking countermeasures has been expressly ruled out by the ILC while discussing State responsibility.<sup>103</sup> On the other hand, once the dispute settlement mechanism has been set to work, States are precluded from undertaking countermeasures in accordance with Art. 22 International Law Commission’s Articles on State Responsibility (Draft Articles on State Responsibility).

Countermeasures may surely consist in negative conducts such as the withdrawal from negotiations and the suspension of joint interim arrangements.<sup>104</sup> Can they also consist in positive conduct? The following two cases deserve attention. In the first place, it may be debatable to which extent a State can grant exploitation rights in a contested area as a countermeasure. Exploitation activities, in fact, may consist in a serious breach of the obligations under Art. 74 para. 3 UNCLOS and Art. 83 para. 3 UNCLOS and may be prejudicial to the resumption of performance of the obligations.<sup>105</sup> Even though under certain circumstances a State might argue that exploitation could be considered as a legitimate and proportionate countermeasure, these activities should be generally avoided as they can easily be disproportionate and, by leading to an escalation of the conflict between the

<sup>100</sup> Art. 51 Draft Articles on State Responsibility.

<sup>101</sup> Art. 50 Draft Articles on State Responsibility.

<sup>102</sup> Art. 53 Draft Articles on State Responsibility.

<sup>103</sup> See the Third and Fourth Reports of the Special Rapporteur *Gaetano Arangio-Ruiz* (UN Doc. A/CN.4/440 and Add. 1 and UN Doc. A/CN.4/444 and Adds. 1-3) and the debates at the ILC (ILC Reports for 1991, A/46/10, and for 1992, A/47/10). See also, on the ILC debate, O. Schachter, *Dispute Settlement and Countermeasures in the International Law Commission*, AJIL 88 (1994), 471 et seq.

<sup>104</sup> This is implied by the Arbitral Tribunal in the *Guyana/Suriname* Case, when it stated that Suriname, in responding to Guyana’s illegal licensing for exploratory drilling, could have posed as a condition for the resumption of negotiations the compliance by Guyana with its obligations. *Guyana/Suriname* Award (note 1), para. 476.

<sup>105</sup> As laid down in Art. 49 para. 3 Draft Articles on State Responsibility.

two States, may seriously jeopardise the reaching of a final solution. In the second place, some commentators have suggested that law enforcement activities might be viewed as a legitimate countermeasure against violations of international law rules.<sup>106</sup> In the case of contested maritime areas, however, it is quite difficult to consider law enforcement activities as countermeasures, since in most cases they will be permissible and will thus not consist in the violation of rules of international law. If, on the other hand, they are conducted using more force than is legitimate, or are undertaken without due respect for human rights, or if they consist in reprisals contrary to humanitarian principles, they will be inadmissible in any case.<sup>107</sup>

As to the judicial remedy that may be asked by a State, the *Guyana/Suriname Award* reiterated the practice of the ICJ mentioned in connection with disputes on land in considering that reparation for the violations of the relevant rules – including reparation for the injury as a result of the breach of Art. 74 para. 3 UNCLOS and Art. 83 para. 3 UNCLOS – was sufficiently addressed by the declaratory relief of the tribunal.<sup>108</sup> It is surmised that reparation due for the violation of Art. 74 para. 3 UNCLOS and Art. 83 para. 3 UNCLOS will normally take the form of a declaratory relief,<sup>109</sup> eventually accompanied, whenever the judge does not have the competence to delimit the boundary between two parties, by the statement that the parties have to abide by this obligation. In cases where the conduct of a party has produced economic loss for the other party, it might be possible to claim also compensation.<sup>110</sup> In the latter case, however, a State might lose

<sup>106</sup> *R. Rayfuse*, Countermeasures and High Seas Fisheries Enforcement, NILR 51 (2004), 41 et seq.; *contra* see *D. Guilfoyle*, Interdicting Vessels to Enforce the Common Interest: Maritime Countermeasures and the Use of Force, ICLQ 56 (2007), 69.

<sup>107</sup> Art. 50 para. 1 Draft Articles on State Responsibility.

<sup>108</sup> *Guyana/Suriname Award* (note 1), para. 486.

<sup>109</sup> This is in line with the finding of the ICJ in the recent *Pulp Mills Case*, in which the ICJ considered that declaratory relief was an adequate remedy for the breach of procedural obligations (*Case Concerning Pulp Mills on the River Uruguay*, Judgement of 20.4.2010, <http://www.icj-cij.org>, paras. 275-276). If transposed to the field of maritime delimitation, this would mean that a State cannot ask for compensation for breach of the obligations under Art. 74 para. 3 UNCLOS and Art. 83 para. 3 UNCLOS by the other State if the contested area is finally awarded to the latter; this conclusion however raises some doubts as it could lead a coastal State to exploit the contested area without complying with its procedural obligations, in the hope that the area is finally awarded to it.

<sup>110</sup> In initiating proceedings against Myanmar, Bangladesh has requested the judge to “declare that by authorizing its licensees to engage in drilling and other exploratory activities in maritime areas claimed by Bangladesh without prior notice and consent, Myanmar has violated its obligations to make every effort to reach a provisional arrangement pending delimitation of the maritime boundary as required by UNCLOS Articles 74(3) and 83(3), and further requests the Tribunal to order Myanmar to pay compensation to Bangladesh as appropriate” (Notification and statement of claim, para. 26, available on the website of the International

entitlement to compensation due to its own contribution to the injury. Alternatively, a State may not get compensation or may prefer not to ask for it, due to similar requests advanced by the other State. In *Guyana/Suriname*, Guyana had originally asked the Tribunal to declare that “Suriname is under an obligation to provide reparation, in a form and in an amount to be determined”,<sup>111</sup> while in its final submission, Guyana opted for not making any claims for compensation due to the breach of Art. 74 para. 3 UNCLOS and Art. 83 para. 3 UNCLOS asking instead only for declaratory relief.<sup>112</sup>

A final remark concerns the applicability of the disputes settlement mechanism of UNCLOS to Art. 74 para. 3 UNCLOS and Art. 83 para. 3 UNCLOS and the possibility for a State to bring a claim of State responsibility for their breach to a judge, unless a reservation has been entered in accordance with Art. 298 para. 1 lit. (a) UNCLOS.<sup>113</sup> A claim of State responsibility for the violation of Art. 74 para. 3 UNCLOS and Art. 83 para. 3 UNCLOS could form the content either of an ad hoc application, or of a request for provisional measures pending final settlement of a maritime boundary dispute by the judge. A judge could be more ready to consider the consequences of a breach of these provisions in the context of provisional measures. It is noteworthy that the *Guyana/Suriname* Award considered the dispute as to responsibility for the breach of Art. 74 para. 3 UNCLOS and Art. 83 para. 3 UNCLOS as ancillary to the boundary dispute and thus not requiring separate exchanges of view in accordance with Art. 283 para. 1 UNCLOS.<sup>114</sup>

## 2. *Ius ad Bellum* and Other Rules on the Use of Force

“Occupation” by force of sea areas is quite improbable, though it is possible that a State may use force to occupy a portion of land territory that generates maritime areas. As the case of the Spratly Islands shows, in the case of small, uninhabited areas, in particular, one could surmise that the

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Tribunal for the Law of the Sea (ITLOS) <http://itlos.org>). It remains to be seen if this request will be pursued further during the proceedings.

<sup>111</sup> Reply of Guyana, cit. in *Guyana/Suriname* Award (note 1), para. 157.

<sup>112</sup> *Guyana/Suriname* Award (note 1), para. 158. The reasons are not given, but it may be surmised that concern that this claim could trigger a similar claim by Suriname for Guyana’s conduct in licensing CGX to engage in exploratory drilling in the contested area could have played a role in deciding to withdraw the request for compensation.

<sup>113</sup> Reservations under Art. 298 para. 1 lit. (b) and (c) UNCLOS may also be relevant.

<sup>114</sup> *Guyana/Suriname* Award (note 1), para. 457.

occupation of the land territory is instrumental to the assertion of rights over maritime areas. In these cases, the *ius ad bellum* obligations applicable to territorial disputes apply also to disputes concerning maritime areas: first and foremost the general prohibition of the use of force codified in Art. 2 para. 4 UN Charter and the obligation to solve disputes peacefully. Use of force could also be construed as illegal if in breach of the obligations under Art. 74 para. 3 UNCLOS and Art. 83 para. 3 UNCLOS. Shows of force in the contested territory, such as the escorting of research or commercial vessels by the navy or the conduct of military exercises could be classed as illegal threats of the use of force and at the same time as breaches of the obligation not to hamper or jeopardise the settlement of the dispute.

An emerging issue in State practice and international litigation is the extent to which law enforcement activities may be carried out in the contested area. It may be noted, preliminary, that a State must abstain from the use of force to assert its rights over a disputed maritime area or to coerce its neighbour into a settlement of the maritime boundary. At the same time, a State is free to apply its legislation in the area it claims and consequently to enforce such legislation against possible breaches. In this respect, there is a substantial difference between contested land areas and contested maritime spaces. Land, being capable of occupation, will usually be under the effective control of one, and one only, of the parties to the dispute: given this *de facto* situation, it is this State that will materially be able to apply and enforce its legislation. The application by the other State of its legislation will be possible in so far as this is permitted without having direct control of the territory. Maritime areas, on the contrary, are not capable of permanent occupation and furthermore, navigation in them is open to the vessels of all States, including the vessels of the parties to the dispute. It is therefore materially possible for both parties to a dispute to apply their legislation therein and to take steps to enforce it. Instances of contested law enforcement at sea are therefore much more frequent than on land. Suffice it to consider that in almost all cases concerning maritime delimitation, instances of law enforcement in contested areas have been mentioned as undertaken by both parties to the dispute;<sup>115</sup> in some cases, they have been considered relevant for determining the course of the final boundary.<sup>116</sup>

Generally speaking, the limited use of force that may be needed in order to enforce the legislation of the coastal State in a maritime area claimed by it

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<sup>115</sup> Just to mention the latest cases decided by international judges, see the incidents mentioned in *Guyana/Suriname Award* (note 1), para. 457; *Barbados/Trinidad and Tobago* (note 62), paras. 50 and 55; in *Nicaragua/Honduras* (note 65), paras. 49, 52, 58, 64-66.

<sup>116</sup> *Barbados/Trinidad and Tobago* (note 62), para. 270.

is conceptually different from the use of force in international relations prohibited by Art. 2 para. 4 UN Charter. While in the latter case the use of force is the content and end of the action by the State, in the former case the use of force is instrumental to another activity, consisting in applying the legislation of the coastal State and preventing and sanctioning conduct that does not comply with it. Certain criteria, such as the functional objective of the action, the status of the subjected vessel and the location of the incident, may be useful in distinguishing lawful enforcement from unlawful use of force.<sup>117</sup> In practice, it is difficult to distinguish between these two situations. This is particularly true with respect to actions at sea, which are often conducted by military vessels, the same used to conduct armed actions against another State. In addition, in the case of contested sea areas, the enforcement of national legislation could be used as an excuse for muscular action against the vessels and nationals of the other State, in an attempt to reinforce a claim to the maritime area, or could lead to a “true” display of force against the other State, in the event of enforcement activities by one State hampered by the navy of the other State. In *Guyana/Suriname*, the Arbitral Tribunal considered that the action by Suriname against the GXC drilling rig consisted in an illegal threat of the use of force, rather than a law enforcement activity and thus gave rise to the international responsibility of this State.<sup>118</sup>

Apart from the general prohibition of Art. 2 para. 4 UN Charter, there is no rule prohibiting enforcement of national legislation in contested maritime areas: enforcement action by a coastal State, also involving the threat or the use of force, is not therefore *per se* unlawful. This action, however, will have to be specifically permitted by international law and to be prescribed by national legislation, and must adhere strictly to the requisites set down both by national legislation and by international law.<sup>119</sup> International judges have identified in the unavailability, reasonableness and necessity the conditions for the exercise of enforcement action. It therefore appears that law enforcement activities are permitted, in so far as force is used only as the last

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<sup>117</sup> See the criteria proposed in *P. J. Kwast* (note 29).

<sup>118</sup> *Guyana/Suriname* Award (note 1), para. 445. In the light of the facts as presented in the award, it is however debatable whether the action by the Surinamese navy really consisted in the use of force prohibited by Art. 2 para. 4 UN Charter; it might also be debated whether the behaviour of the Surinamese navy violated even the requirements conditioning enforcement action.

<sup>119</sup> See the *M/V Saiga No. 2*, the *I'm Alone* and the *Red Crusader* Cases (note 28) as well as the decision by the European Court of Human Rights in the *Medvedyev* Case (Grand Chamber decision of 29.3.2010, application No. 3394/03). *D. Guilfoyle*, Shipping Interdiction and the Law of the Sea, 2009, esp. 271 et seq.

resort and is proportionate to the circumstances and the aim pursued. In addition to these requirements, and in the light of the fact that the State adopting enforcement action is not the only one that claims exclusive rights in the contested areas, its action will be evaluated not only with respect to the rule attributing the substantive right, but also with respect to the obligations contained in Art. 74 para. 3 UNCLOS and Art. 83 para. 3 UNCLOS. As already noted, a State may therefore be held responsible, though its enforcement action complied with the requirements set by international law and national legislation, because it did not seek to solve the dispute earlier by diplomatic means or by a request for provisional measures pending final settlement of the dispute by adjudication, in accordance with Art. 290 UNCLOS. The requirement that enforcement action be unavoidable and necessary has a role to play in this context.

As to the admissibility of claims for State responsibility, the Arbitral Tribunal in the *Guyana/Suriname*, citing with approval both the Eritrea/Ethiopia Claims Commission decision and the *Cameroon/Nigeria* Judgment quoted above, rejected the argument that in a maritime delimitation case an incident engaging State responsibility for illegal use of force in a disputed area renders a claim for reparations for the violation of an obligation under the Convention and international law inadmissible. According to the Award, “[UNCLOS] makes no mention of the incompatibility of claims relating to the use of force in a disputed area and a claim for maritime delimitation of that area”.<sup>120</sup> There is thus coherence between decisions concerning both land and maritime contested areas as to the admissibility of claims relating to responsibility for acts committed in the contested area. Yet one may confirm the uncertainty surrounding the consequences flowing from a determination of illegality. The *Guyana/Suriname* Award, recalling the *Cameroon/Nigeria* Judgment, states that it “will not seek to ascertain whether and to what extent Suriname’s responsibility to Guyana has been engaged” as a result of the incident qualified as threat of the use of force, especially in view of the fact that Guyana has been awarded the areas where the incident took place.<sup>121</sup> This conclusion however seems to refer to the responsibility for violation of rules on exclusive rights in the exclusive economic zone rather than to rules of the *ius ad bellum*. In any case, the Tribunal leaves the door open for the admissibility of compensation for damages caused by unlawful action, even though it concludes, in the instant case, that such damages “have not been proved to the satisfaction of this Tribunal”.<sup>122</sup>

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<sup>120</sup> *Guyana/Suriname* Award (note 1), para. 423.

<sup>121</sup> *Guyana/Suriname* Award (note 1), para. 451.

<sup>122</sup> *Guyana/Suriname* Award (note 1), para. 452.

Furthermore, the Tribunal clearly states, in conformity with general international law, that the action by Suriname cannot be justified as a lawful countermeasure, even considering the previous illegal action by Guyana, since countermeasures may not involve the use of force.<sup>123</sup> This *dictum* seems particularly useful in a context that sees more and more the threat or the use of force against actions by other States as illegal. The *Guyana/Suriname* Award is particularly relevant because it has considered the permissible extent of enforcement action in contested maritime areas. However, one of the unresolved questions remains the ambiguous relevance attributed thus far to enforcement of national legislation for the purposes of evaluating the *effectivités* in order to establish State sovereignty over land or for drawing a maritime boundary. It is evident that the more weight is given to these activities, the more States may be tempted to resort to them in situations of contested maritime areas, leading probably to an escalation of the controversy. In the same way, if less weight is attached to them, enforcement is likely to be employed with caution and only when really necessary to preserve, rather than to further, the rights of the coastal State. It would be highly desirable that international judges clarify the relevance of State enforcement for the purposes of settling maritime disputes; the notion of critical date for the dispute could be relevant in this context.

### 3. *Ius in Bello* Rules

From the point of view of the *ius in bello*, there is not much to be added to what was already illustrated with respect to territorial disputes on land. Two types of obligations seem particularly important in the case of disputed maritime areas. The first comprehends all rules relating to exploitation of resources. While in more than one case an occupying power has exploited resources of the occupied territory, including its maritime areas,<sup>124</sup> this action has to comply with the relevant provisions of international humanitarian law, first and foremost those contained in the 1907 Hague Regulations. It is thus possible for the occupying power to give permits for the exploitation of these resources and, with respect to marine living resources, the occupying power might also be subject to the *obligation* to permit exploitation of these resources, according to Art. 62 UNCLOS, but this always has to be done in compliance with the requirements of international humanitarian law.

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<sup>123</sup> *Guyana/Suriname* Award (note 1), para. 446.

<sup>124</sup> See Y. Dinstein, *The International Law of Belligerent Occupation*, 2009, 47 et seq.



The second obligation pending on the occupying State is the obligation not to change the status of the territory, including the maritime areas. In this respect, it is to be considered that the occupying power may not cede any part of the maritime areas claimed by the territorial sovereign, nor may it delimit such areas with third States. In the case of delimitation of the territorial sea, the latter would surely violate the sovereignty of the occupied State; in the case of delimitation of other maritime zones, it would be in breach of the exclusive rights of the occupied State which stem from sovereignty over the land, as will be discussed in the following paragraph.

#### 4. Sovereignty, Sovereign Rights and Jurisdiction

It is far from easy to substantiate a claim of State responsibility for violation of primary rules relating to sovereignty or jurisdiction of a State in its maritime zones, with respect to actions by another State in a disputed area. To prove this point, one should establish that a State is exercising sovereignty, under Art. 2 UNCLOS, or sovereign rights and jurisdiction, as provided by Art. 56 UNCLOS and Art. 77 UNCLOS, in a maritime area that does not form part of its territorial sea or exclusive economic zone and continental shelf, respectively. Therefore, such exercise would be in violation of rules of international law. In this context, the difference between delimitation disputes and disputes on entitlement to maritime zones becomes relevant. The latter will be considered first.

Cases in which a State has violated an agreed maritime boundary exclusively by “occupying” the maritime zones of another State and by exercising exclusive jurisdiction – instead of the State that has this right under international law – may be considered mostly as a theoretical case. Most of the times and according to the well established principle “the land dominates the sea”,<sup>125</sup> disputed sovereignty or jurisdiction over maritime areas, and the resulting exercise of related rights and powers, will be the direct result of a disputed land occupation.<sup>126</sup> In other words, claims to maritime zones will not arise out of direct occupation of the relevant maritime area, but out of the occupation of the land territory abutting to the sea, the coast of which generates maritime zones. These situations are not to be settled by drawing a maritime boundary, but by establishing which State is the lawful

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<sup>125</sup> *North Sea Continental Shelf* (note 58), para. 88.

<sup>126</sup> See Art. 88 of the *Oxford Manual of Naval War*, adopted by the *Institut de Droit International* in 1913, concerning internal waters and the territorial sea; and *Y. Dinstein* (note 124), 47, extending the application of this provision to the other maritime zones.



sovereign on the portion of land generating the maritime zones. This was the case, for example, in the *Cameroon/Nigeria* controversy, in which the “occupation” of parts of the territorial sea next to the Bakassi Peninsula was the direct consequence of the occupation of the peninsula itself. Similarly, the dispute between Argentina and the United Kingdom on entitlement to maritime zones, including continental shelf areas beyond 200 n.m.,<sup>127</sup> for the Falkland/Malvinas Islands, South Georgia and the South Sandwich Islands stems from the territorial dispute as to sovereignty over the islands. The events concerning exploitation of oil resources off the coasts of the Falkland/Malvinas Islands by an oil company licensed by the United Kingdom illustrate this point. According to Argentina, which is contesting the right of the United Kingdom to drill for oil, the latter may not exercise sovereign rights over resources of the continental shelf because the land that generates this continental shelf does not appertain to it.<sup>128</sup> On the other hand, the United Kingdom holds exactly the opposite position: its action is in full compliance with international law since it has licensed oil exploitation in maritime areas generated by the coasts of its (is)land territory in areas where there is no overlapping with maritime areas generated by coasts of another State.<sup>129</sup> Establishing potential responsibility of the United Kingdom for unlawful exploitation of mineral resources in the seabed and subsoil would depend on whether its sovereignty over the Falkland/Malvinas Islands is legitimate or not and does not depend upon the drawing of a maritime boundary between areas appertaining to the UK and Argentina.

Similar considerations may be advanced with respect to disputes concerning the occupation of territories in alleged violation of the principle of self-determination, as in the Case of *East Timor* and *Western Sahara*. When requested to evaluate the 1989 agreement between Australia and Indonesia on a joint development zone off the southern coasts of East Timor, the ICJ considered that this would necessarily entail “a determination whether, having regard to the circumstances in which Indonesia entered and remained in East Timor, it could or could not have acquired the power to enter into treaties on behalf of East Timor relating to the resources of its continental

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<sup>127</sup> See protest by Argentina (note dated 20.8.2009) to the submission by the United Kingdom of 11.5.2009, as well as the latter’s protest (note dated 6.8.2009) against the submission by Argentina of 21.4.2009, <http://www.un.org>. Argentina and the United Kingdom have both declared maritime zones around the Falkland/Malvinas Islands, South Georgia and the South Sandwich Islands and have both made a submission to the Commission on the Limits of the Continental Shelf, concerning continental shelf beyond 200 n.m. off these islands.

<sup>128</sup> See declarations by the President of Argentina, <http://www.casarosada.gov.ar>.

<sup>129</sup> See declarations by members of the British Government, <http://www.fco.gov.uk>.

shelf”.<sup>130</sup> In the Case of *Western Sahara*, the dispute as to Morocco’s right to exploit natural resources in the exclusive economic zone and the continental shelf off the coasts of Western Sahara depends upon Morocco’s right to exercise rights on behalf of this territory; maritime zones, in this respect, are considered as part of the land territory and are subject to the same rules.<sup>131</sup> Exploitation of natural resources in sea areas may take place only “for the benefit of the people of Non-Self-Governing Territories, on their behalf or in consultation with their representatives” taking into account the principles of the UN Charter and the principle of permanent sovereignty over natural resources.<sup>132</sup>

Delimitation of maritime zones acquired following breaches of the territorial sovereignty of another State or of the principle of self-determination is also problematic from the perspective of State responsibility. If State A exercises unlawfully sovereignty/jurisdiction over land and maritime areas in violation of the rights of State B and establishes a maritime boundary with State C, it will be internationally responsible towards State B, since the basic principle is that only the State that exercises sovereignty over land that generates maritime areas may delimit the latter *vis-à-vis* third States.<sup>133</sup> Furthermore, the treaty will be without effect since State A cannot dispose of portions of “territory”, also comprising maritime areas, of State B. If, however, the occupation is effected in good faith, as discussed above, there will be no issue of State responsibility of State A and the only consequence might be that the delimitation agreement is without effect. Even this latter consequence might, however, not be produced if State C could not reasonably have had any doubts, taking into account the circumstances of the case and the behaviour of State B, of the disputed sovereignty at the time when the agreement was concluded. These considerations apply, with the necessary corrections, also in the case of sovereignty exercised in violation of the right to self-determination.<sup>134</sup> It may be possible for an administering power to enter into provisional arrangements for resource exploration and exploi-

<sup>130</sup> *Case concerning East Timor*, Judgement of 30.6.1995, ICJ Reports 1995, 90, para. 28.

<sup>131</sup> See the legal opinion of the UN Legal Office (letter dated 29.10.2002 from the Under-Secretary-General for Legal Affairs, the Legal Counsel, addressed to the President of the Security Council, UN Doc. S/2002/161) which deals generally with resource exploitation activities in Non-Self-Governing Territories, with no distinction between activities taking place on land and activities taking place in maritime zones.

<sup>132</sup> Opinion of the UN Legal Office (note 131), para. 24.

<sup>133</sup> Issues concerning the conduct of third States are dealt with in section IV.

<sup>134</sup> The question had been submitted to the ICJ in the *East Timor* Case, with Portugal contesting the validity of the 1989 Agreement between Australia and Indonesia establishing a joint zone off the southern coasts of East Timor (*V. Prescott*, Australia-Indonesia (Fisheries), report Number 6-2(4), in: J. I. Charney/L. M. Alexander (note 61), 1229 et seq.).

tation in areas where the potential claim of the Non-Self-Governing Territory overlaps with the claim of a third State, if these arrangements conform with the requirements mentioned earlier for resource exploitation.<sup>135</sup> The delimitation of permanent maritime boundaries for these zones should, however, be avoided unless agreements are adopted for the benefit of the people of these territories and in consultation with their representatives and conform to general rules on maritime delimitation.<sup>136</sup>

A different problem relates to the possibility of a State incurring international responsibility by breaching the sovereignty or sovereign rights and jurisdiction of another State in undelimited areas, where the claims of the two States overlap, pending final delimitation of the maritime boundary. According to UNCLOS and customary international law, a State exercises full and exclusive sovereignty<sup>137</sup> or sovereign rights<sup>138</sup> in its maritime zones, thus excluding all other States from the exercise of these powers or rights.<sup>139</sup> In the case of maritime boundary disputes, however, the two States maintain that they can exercise the same, exclusive, right on a certain portion of the sea, the area of overlapping claims. It is evident that this duplication of the subject claiming to exercise an exclusive right in a specific sea area could lead (and indeed, often leads) to disputes and sometimes to unilateral acts by the States involved. The question put with respect to territorial disputes on land (“When does an adverse territorial occupation represent a violation of territorial sovereignty.”) could be reframed in the following way to adapt to maritime disputes: when does a State action in a contested maritime area represent a violation of the rules on the coastal State’s powers (sovereignty, sovereign rights or jurisdiction) in its maritime zones?

Recent cases show that a number of critical issues still need to be addressed, mostly connected either with exploitation of resources or with scientific research. A State may grant licenses for the exploration or exploitation of resources in an area that it considers as its own, but where no agreed

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<sup>135</sup> In this regard, the 1989 Agreement between Australia and Indonesia for the joint zone in the Timor Gap could have been lawful, if in compliance with the requirements mentioned above. However, any treaty delimiting permanent boundaries could not have been entered into by Indonesia.

<sup>136</sup> See for instance the preamble of the 1980 Treaty between New Zealand and USA on the delimitation of the maritime boundary between Tokelau and American Samoa. See *R. W. Smith*, *New Zealand (Tokelau) – United States (American Samoa)*, Report Number 5-14, in: J. I. Charney/L. M. Alexander (note 61), 1125 et seq.

<sup>137</sup> Art. 2 UNCLOS.

<sup>138</sup> Art. 56 UNCLOS and Art. 77 UNCLOS.

<sup>139</sup> Though not from navigation in that area, see Art. 17 UNCLOS (innocent passage) and Art. 87 UNCLOS (freedom of navigation).

boundary exists.<sup>140</sup> Will it be responsible for exploring/exploiting resources that are not its own? What if the company carrying out such activities is hampered by the navy of another State, which also claims that the area falls under its own jurisdiction? Will the latter State be responsible for intervening in an area that is not its own? A second critical scenario arises in cases in which scientists carry out scientific research in a disputed area on the basis of an authorisation obtained by one of the claimant States. If the other State hampers such activities claiming that it has not granted permission for scientific research in its own maritime areas, will the first State be responsible for authorising scientific research in maritime areas that do not fall under its jurisdiction? Moreover, should there be differences between instances of “pure” scientific research, as described in Art. 246 para. 3 UNCLOS and scientific research that aims at exploitation of resources or falls under the other categories of Art. 246 para. 5 UNCLOS?

Bringing a claim for violation of sovereignty or sovereign rights in a contested maritime area is not an easy task. For example, for State A to be responsible for the violation of the sovereignty or sovereign rights of State B, it is not sufficient that the area exploited by A is finally attributed to B. State B will furthermore have to prove that the exploitation of resources by State A in a contested area has taken place in bad faith and that State A had full knowledge of the fact that it could not claim that area. In a situation of unsettled maritime boundaries, this will be extremely difficult to demonstrate. Maritime boundaries do not exist *ipso iure* but have to be agreed by the States whose potential areas overlap.<sup>141</sup> Since there is no universally accepted geometrical method for the delimitation of maritime boundaries, the result of the delimitation process will always be, to an extent, insecure. State A may therefore not be held responsible for violation of sovereignty or sovereign rights since there is no clear boundary; this situation may be equated with the occupation in good faith of land territory, save that for maritime areas, most of which are still undelimited, it is still the rule. The only possibility to claim responsibility seems to be the case of a manifestly unreasonable claim, not supported by any of the elements used in the law of maritime delimitation to draw the boundary.<sup>142</sup> An unreasonable claim is not *per*

<sup>140</sup> This was the situation addressed in the *Guyana/Suriname* Award with respect to the concession granted by Guyana to the company CGX.

<sup>141</sup> Art. 15 UNCLOS, Art. 74 UNCLOS and Art. 83 UNCLOS.

<sup>142</sup> The definition of what a “reasonable claim” could be is hard, and this concept is easier defined in a negative way. A claim may be considered unreasonable if it is in manifest contrast with the basic principles applicable in the law of maritime delimitation. Since “the land dominates the sea” (*North Sea Continental Shelf* (note 58), para. 88), claims that are not based on a coastal front will be unreasonable, as well as claims that disregard the presence of some land,

se illegal unless it is in breach of other obligations already accepted, e.g. by a previous treaty, but might lead to international responsibility if actions contrary to international law rules were adopted in the disputed area.

The difficulty in substantiating claims of State responsibility for the violation of rules concerning sovereignty, sovereign rights or jurisdiction in maritime areas<sup>143</sup> is shown also by the few instances in which these claims have reached the adjudicatory stage and by the fact that, even in the latter cases, the request of compensation has finally been put aside.<sup>144</sup> In the

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which can be either mainland or an island, of another State. Given that “there can never be any question of refashioning nature” (*North Sea Continental Shelf* (note 58), para. 91; *Cameroon/Nigeria* Judgement (note 1), para. 295), a State cannot claim areas disregarding the geographical configuration of the area, neither can it claim a full extension of its coastal areas, leaving to the other State only the remaining portion (*Jan Mayen*, ICJ Reports 1993, para. 70). Finally, the equitable solution required by Art. 74 para. 1 UNCLOS and Art. 83 para. 1 UNCLOS and international customary law is to be reached through the use of the “so-called equitable principles/relevant circumstances method” which “involves first drawing an equidistance line, then considering whether there are factors calling for the adjustment or shifting of that line” (*Cameroon/Nigeria* Judgement (note 1), para. 288. See also *Nicaragua/Honduras* (note 65), para. 271; *Barbados/Trinidad and Tobago* (note 62), paras. 304-305; *Guyana/Suriname Award* (note 1), para. 338; *Romania/Ukraine* (note 65), paras. 118-120), the provisional equidistance may have a significant role to play, as evidenced also by the practice of third States trying to intervene in proceedings concerning the delimitation of maritime boundaries. In the light of State and judicial practice in the last fifteen years, the claim advanced by Italy in the delimitation dispute with Malta, which seemed to disregard an independent island-State, might be considered as not supported by today’s law of maritime delimitation (the claim is illustrated in the *Case concerning the Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Judgement of 3.6.1985, ICJ Reports 1985, 13, at 26 et seq.). The same might be said for the Danish claim in the *Jan Mayen* Case, requesting a full 200 m.n. exclusive economic zone in the case of two opposite islands both dependent on mainland State, and for the claim by Turkey (see note of Turkey to the UN Secretary General of 2.3.2004) to maritime areas west of longitude 32° 16’ 18”, which corresponds to the meridian passing through the westernmost point of the Island of Cyprus and thus negates portions of territorial sea to Cyprus (on the issue *T. Scovazzi*, *Maritime Delimitations in the Mediterranean Sea*, VIII/IX *Cursos Euromediterraneos Bancaja de Derecho Internacional*, 2004-2005, 349 et seq., at 447).

<sup>143</sup> A further procedural difficulty for bringing a case concerning State responsibility for the violation of rights in a contested zone before a judge might arise by Art. 297 para. 3 lit. (a) UNCLOS and Art. 298 para. 1 lit. (a) UNCLOS.

<sup>144</sup> In its application concerning maritime delimitation with Honduras, Nicaragua had reserved its rights to claim compensation for interference by Honduras with fishing vessels flying the Nicaraguan flag or being licensed by Nicaragua, and for the extraction of natural resources (*Nicaragua/Honduras* (note 65), para. 17). These requested were not finally maintained, as they are not mentioned in the pleadings of Nicaragua; consequently, the Court has not dealt with the issue. Nicaragua advanced similar claims in its application concerning territorial questions and maritime delimitation with Colombia (Application, para. 9); the ICJ has so far upheld its jurisdiction for drawing the maritime boundary and deciding on sovereignty over maritime features other than the Islands of San Andrés, Providencia and Santa Catalina. It remains to be seen if Nicaragua will maintain its claim for compensation during the proceedings.

*Cameroon/Nigeria* Case, Cameroon had complained also of some incidents having happened at sea.<sup>145</sup> These, however, were dealt with together with incidents happening on land by both Cameroon<sup>146</sup> and the ICJ,<sup>147</sup> the latter finally not deciding on them. One of the reasons may have been that in this case, as often happens, both parties had been involved, up to a certain degree, in enforcement activities with respect to vessels having the nationality of the other party or being licensed by it. In other cases involving contested maritime boundaries, the exercise of jurisdiction by either State is mainly invoked in order to prove the existence of a historic claim to a certain delimitation or a tacit agreement to a certain boundary.<sup>148</sup> It was only in the *Guyana/Suriname* Case that an international judge addressed for the first time the merits of a claim of responsibility for acts committed in a contested maritime area. Nonetheless, it is not possible to find any indication concerning the violation of the provisions on sovereignty or sovereign rights and jurisdiction, since both parties to the case invoked different rules of international law to base their claims for State responsibility. It is indeed much more probable to prove the responsibility of a State for the violation of the obligations provided for in Art. 74 para. 3 UNCLOS and Art. 83 para. 3 UNCLOS rather than to those of e.g. Art. 2 para. 1 UNCLOS, Art. 56 UNCLOS and Art. 77 UNCLOS, concerning sovereignty and sovereign rights of the coastal State in its maritime areas.

Finally, similarly to disputes on land, international judges have usually endeavoured to protect the rights and interests of private parties also in the case of maritime delimitation disputes, independently from the responsibility of the States involved.<sup>149</sup>

#### IV. Third Parties' Obligations in the Context of Contested Areas

Art. 41 Draft Articles on State Responsibility provides for three concurring obligations incumbent upon third States in the context of situations

<sup>145</sup> See Memorial of the Republic of Cameroon, Chapter 6 (in particular part B).

<sup>146</sup> In this respect, it is to be noted that apparently Cameroon did not claim any breach of para. 3 of Arts. 74 and 83 UNCLOS.

<sup>147</sup> *Cameroon/Nigeria* Judgement (note 1), para. 324.

<sup>148</sup> See, for instance, the recent *Nicaragua/Honduras* (note 65), para. 252.

<sup>149</sup> See the *Eritrea/Yemen* Award of 17.12.1999, XXII RIAA 335; the *Guyana/Suriname* Award (note 1) and the *Barbados/Trinidad and Tobago* Award (note 62).

produced by a serious violation of a peremptory norm: a duty not to recognise the situation as lawful; a duty not to assist or aid the wrongdoer in maintaining the situation; a duty to cooperate through multilateral organisations to bring the situation to an end.<sup>150</sup> The secondary obligations set out under Art. 41 Draft Articles on State Responsibility are applicable to the extent that the situation is produced by a serious violation of a peremptory norm. That is normally not the case in delimitation disputes at sea where most of the times both disputing parties will put forward a reasonable claim to the contested area. In territorial and boundary disputes on land such secondary obligations will accrue for third parties in exceptional circumstances, namely in cases of armed aggression<sup>151</sup> or forcible denial of self-determination.<sup>152</sup> Even in the latter circumstances, the tension between the communitarian social sanction and the realities of bilateral relations are likely to emerge in practice and one wonders whether the positive obligations under Art. 41 Draft Articles on State Responsibility are clearly established under customary international law, in the absence of an institutional mechanism of determination of situations produced by serious violations of peremptory norms, with State practice featuring profound inconsistency.<sup>153</sup>

On the other hand, one should emphasise the *erga omnes* effect and opposability of territorial and economic rights, resulting from primary norms, that may impose corresponding obligations for third parties which are not involved in the dispute over land territory or sea areas. Regardless of the characterisation of an unlawful occupation as a “situation resulting from a serious violation of a peremptory norm” – take, for instance, the Eritrean occupation of the Badme area, which did not result from an act of aggression –,<sup>154</sup> third parties will be under an obligation to respect the territorial integrity and sovereignty of the injured State by refusing to recognise the situation as lawful, by refraining from entering into formal arrangements with the occupier regarding the unlawful exploitation of natural resources in the occupied territories, by not accepting to apply existing bilateral eco-

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<sup>150</sup> Commentary to the Draft Articles on State Responsibility (note 7), 242 et seq. The same obligations in respect to international organisations are set out in draft Art. 40 and Art. 41 on the responsibility of international organizations approved by the ILC on first reading in 2009 (Report of the Sixty-First Session, UN Doc. A/64/10, 19-38).

<sup>151</sup> See the practice of non-recognition following Iraq’s invasion of Kuwait in 1990, in particular SC Res. 662 (1990).

<sup>152</sup> *Legal Consequences for States of the Continued Presence of South-Africa in Namibia*, Advisory Opinion of 21.6.1971, ICJ Reports 1971, 16.

<sup>153</sup> Instructive cases of *East Timor* and *Western Sahara* show that the sanctioning nature of non-recognition may hardly work in cases where the Security Council does not impose upon States the obligation not to recognise the lawfulness of those situations.

<sup>154</sup> *Guidance Regarding Jus ad Bellum Liability* (note 3), paras. 30-32.



nomic and commercial treaties to products originated from that region. To the same effect for third parties, particularly with respect to the exploitation of natural resources, we shall consider an occupation resulting in the breach of the right to self-determination of a people regardless of its characterisation as breach of peremptory norms or *erga omnes* obligations.<sup>155</sup> Similarly, in cases of secessionist attempts by a people or a minority to undermine the territorial integrity of a State, if the third party makes the view that such attempts are not justified under international law, it will have to refrain from recognising the secessionist entity and from entering into formal arrangements with that entity.<sup>156</sup> In cases where the Fourth Geneva Convention is applicable to the contested occupation, all parties to the instrument will be under the obligation “to respect and to ensure respect for the present Convention in all circumstances”.<sup>157</sup>

Finally, third States and international organisations may be held responsible, if they aid or assist another State or international organisation in the commission of a wrongful act, and if they did so with knowledge of the circumstances of the wrongful act and that act would have been wrongful if committed by that third party: that may apply to situations where the State or international organisation provides assistance and support in the unlaw-

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<sup>155</sup> *Namibia*, ICJ Reports 1971, 54 et seq. See also the critical view expressed by Judge Higgins with regard to the employment of the concept of *erga omnes* obligations to justify the duty of non-recognition incumbent upon third parties, in *Legality of the Wall*, Separate Opinion of Judge Higgins, ICJ Reports 2004, 216 et seq. The advantage of basing third parties obligations on primary obligations is that they may be held to account irrespective of the characterization of a situation as resulting from a serious breach of a peremptory norm (which, in State and judicial practice, is often conditioned on a condemnation by the Security Council). See, for instance, the question of the fisheries agreement between Morocco and the European Community and their controversial application to the waters off the coast of Western Sahara in *E. Milano*, *The New Fisheries Partnership Agreement between Morocco and the European Community: Fishing too South*, *Anuario español de derecho internacional* 22 (2006), 413 et seq. See also the legal opinion of the UN Legal Office according to which exploitation of natural resources in non-self-governing territories has to be conducted for the benefit of the people and in accordance with their wishes. See opinion UN Legal Office (note 131). It is submitted that the obligation is incumbent also upon third parties involved in economic activities in those territories.

<sup>156</sup> With regard to the cases of Abkhazia and South Ossetia see Report of the Independent International Fact-Finding Commission on the Conflict in Georgia (note 51), 135. With regard to the case of *Kosovo*, see *E. Milano*, *The Independence of Kosovo under International Law*, in: S. Wittich/A. Reinisch/A. Gattini, (eds.), *Kosovo – Staatsschulden – Notstand – EU-Reformvertrag – Humanitätsrecht*, Beiträge zum 33. Österreichischen Völkerrechtstag 2008, 2009, 21 et seq., at 34.

<sup>157</sup> Art. 1, Fourth Geneva Convention. See *Legality of the Wall*, ICJ Reports 2004, 67 et seq.

ful occupation of foreign territory or in the illegal exploitation of natural resources in a non-self governing territory.<sup>158</sup>

It may be noted that in the context of maritime disputes, in particular, the distinction between States parties to the dispute and third States may vary on the basis of the point of view adopted. In the case of a disputed sea area, there may be in fact more than two States claiming it<sup>159</sup> and a final boundary treaty or a provisional agreement between some of them, while complying with the requirements of Art. 74 UNCLOS and Art. 83 UNCLOS, may be prejudicial to the other(s) State(s),<sup>160</sup> which are a party to the dispute, and may be in breach of the latter's sovereignty or sovereign rights.<sup>161</sup> It is normal practice for third States to protest such agreements; it is evident that agreements between two States concerning a maritime boundary shall not prejudice the rights of third States; also, if there is bad faith or an unreasonable claim, it may cause the former States to incur international responsibility for the violation of the territorial rights of the latter.<sup>162</sup> In order to reach this conclusion, however, all pertinent elements of the case will have to be considered and evaluated, including the aim of the agreement, in particular whether the objective was that of creating a *de facto* situation excluding third States from the area, and the conduct of the third party, in particular if it has declined to be involved into the provisional arrangements and if it has presented good reasons for such refusal.

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<sup>158</sup> Art. 16 Draft Articles on State Responsibility; Art. 14 ILC Draft Articles on the Responsibility of International Organizations (note 150).

<sup>159</sup> This may be a consequence of disputed sovereignty on land, as the case of the Spratlys Islands shows, of a peculiar geographical situation where the claims of the parties tend to converge towards a common point, as in the North Sea, or of the special legal regime of a bay, as in the case of the Gulf of Fonseca.

<sup>160</sup> *C. Chinkin*, Third Parties in International Law, 1993, 71 et seq.

<sup>161</sup> As in the case of the Atlantic waters where claims by Barbados, Guyana, Trinidad and Tobago and Venezuela overlap. The 1990 agreement between Trinidad and Tobago and Venezuela for the delimitation of their maritime boundary (J. I. Charney/L. M. Alexander (note 61), 675 et seq.) has caused concern for Guyana and Barbados. The 2003 agreement between Barbados and Guyana for the exercise of jurisdiction in the area of overlapping claim, similarly, has met the concern of Trinidad and Tobago and Venezuela. While the 2006 Award in *Barbados/Trinidad and Tobago* seemed to have settled definitively the dispute at least between these two States, the note of *Trinidad and Tobago* of 11.8.2008, concerning the submission of Barbados to the CLCS, points to a different direction.

<sup>162</sup> Unfortunately, the ICJ, requested to decide this point in *East Timor*, was not able to address the merits because of lack of jurisdiction.

## V. Conclusion

In concluding this examination of State practice and international law rules – the former increasingly coherent in pushing for action in contested areas, mainly resources exploitation and security operations, the latter seeking to catch up with this trend and to regulate the “when” and “how” of such activities – some considerations seem apt.

First and foremost, it is undisputable that primary international law rules concerning *ius ad bellum* and *ius in bello* do apply in contested areas and that breaches thereof do produce a wrongful act from which State responsibility may flow according to relevant secondary rules. The applicability of the latter rules is not suspended pending the final settlement of the controversy. Nor can their substance change because of the existence of a dispute concerning entitlement as to sovereignty or sovereign rights, whether on land or at sea. For example, resort to the use of force to regain the control of a contested territory, not justifiable under Art. 51 UN Charter, is not rendered legal by the uncertainty as to title to land; neither is the threat of the use of force acceptable in the case of unsettled maritime delimitations. We would like to stress two of the conclusions reached in this respect. Firstly, that in the case of use of force in violation of the *ius ad bellum* the consequences of the illicit act of the State include all forms of reparation – thus not only satisfaction, but also restitution and compensation – and secondly, that the applicability of both sets of rules does not depend on the final territorial settlement and a State may be held responsible for actions committed in areas that are finally awarded to it. Having banned the use of force as a means for settling disputes or acquiring territory, it would indeed be inconsistent to admit – or not to sanction – the use of force to (re)gain control over territory or over maritime areas, independently of the basis of the claim. Far from being contested by international judges, this conclusion is rather supported by recent decisions, especially those of the Eritrea/Ethiopia Boundary Commission and of the Guyana/Suriname Arbitral Tribunal.

Concerning the peculiarities of State responsibility in contested areas, it is submitted that while the law of State responsibility is a single and coherent body of law, its application to each of the two contexts of land and maritime disputes presents its own peculiarities because of the different primary rules involved. However, the present study has also shown significant similarities in the way State responsibility is applied in territorial disputes and in maritime delimitation disputes. The existence of similarities is confirmed by recent judicial practice: decisions by international tribunals concerning mari-

time delimitation contain substantial references to decisions relating to territorial disputes on land, as it is the case for the 2007 *Guyana/Suriname* Award's extensive cross-references to the 2002 *Cameroon/Nigeria* Judgment and to the *Eritrea/Ethiopia* Awards. This shows that consideration of the interrelation between the two fields is not only desirable, but also possible.

A meaningful distinction between controversies for the purpose of determining the applicable regime of State responsibility for breach of primary rules concerning sovereignty and sovereign rights has not so much to do with the geographical setting of the dispute – land or sea – but rather with the existence of “objective” uncertainty on the entitlement of rights to a specific area, be it terrestrial or maritime,<sup>163</sup> and therefore with good faith on the part of the State in claiming an area as its own. In the case of *mala fide* occupation of the territory of another State or clearly excessive claims in maritime areas, the State whose territory has been occupied may invoke the responsibility of the occupying State for breach of its sovereignty or sovereign rights and may claim all the consequences of responsibility, including the obligation to compensate all damages resulting out of the illegal occupation. Such claims will usually follow a declaration of the unlawfulness of the occupation or a total rejection of the clearly excessive maritime claim.

Conversely, in the case of real uncertainty concerning entitlement to a specific area, the presence of good faith joined with the objective impossibility of establishing beforehand who will be awarded the area in question, makes it particularly difficult for one State to claim the international responsibility of the other for breach of its sovereignty or sovereign rights. The distinction between responsibility and strict liability for acts not prohibited by international law could be relevant in establishing the consequences of acts committed by States in contested territories or contested maritime areas. In such circumstances, forms of indemnification or restitution could be developed, especially where the *bona fide* occupant has engaged in the exploitation of natural resources.

In the case of uncertainty as to entitlement of territorial or quasi-territorial rights, the responsibility of a State may rather be invoked for breach of the rules on conduct pending final settlement. The existence of a dispute renders applicable further primary rules, whose breach may indeed result in the international responsibility of the State. In this respect there is a differentiation between land and maritime disputes as to the exact content

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<sup>163</sup> Uncertainty may exist not only in the case of undelimited maritime boundaries, but also in the case of non-demarcated land boundaries.

of the relevant rules and their enforceability. The provisions applicable to disputes on maritime boundaries are indeed codified in Art. 74 para. 3 UNCLOS and Art. 83 para. 3 UNCLOS and are subject to binding dispute settlement, while similar rules applicable to land disputes may be deduced from the general principles of international law and normally require a special agreement for being submitted to dispute settlement.

A further problem peculiar to the application of State responsibility to territorial disputes stems from the fact that considerations concerning the legality of the use of force, including in the context of enforcement activities, are intertwined with the issue of the weight of *effectivités* in settling land disputes and drawing maritime boundaries. There is thus the need to draw a balance between those activities that are permitted as a means to reinforce a State's claim to a territory or maritime area and those that are prohibited because they would hamper or jeopardise the final settlement by giving – or being perceived to give – an advantage to one party and thus prejudging the other party's position. In this respect, the importance of Art. 74 para. 3 UNCLOS and Art. 83 para. 3 UNCLOS cannot be overstressed: their role as guiding principles and their transversal applicability may be very helpful in determining issues of State responsibility. Their relevance, furthermore, extends beyond maritime boundary disputes since, arguably, the obligation not to hamper or jeopardise the final settlement of the dispute endorses a general principle of due diligence that might be applied to land disputes as well. This is especially true where the dispute arises out of the absence of a clear boundary demarcation and where the interests and human rights of local populations may be affected by the continuation and aggravation of the dispute. In these cases, the findings of international tribunals with regard to the consistency of State action with due diligence obligations as set out under Art. 74 para. 3 UNCLOS and Art. 83 para. 3 UNCLOS may constitute useful parameters for addressing issues of responsibility in the context of territorial and boundary disputes: to that extent, cross-fertilisation between the law of maritime delimitation and the law of territory could be enhanced.

An examination of the interactions between territorial disputes on land and at sea should not, however, be limited to the two parties directly involved in the dispute. Broadening the perspective, both territorial disputes on land and delimitation disputes at sea may also affect the position of third States. In particular, third States will have to refrain from acting contrary to their obligations and the rights of the parties to the dispute, given the *erga omnes* nature of sovereignty and sovereign rights. A third State will not be

able to justify its conduct by simply invoking the principle of *res inter alios acta* in respect to the territorial dispute on land or at sea.

In conclusion, it is submitted that State responsibility is indeed a necessary component of the law applicable to contested areas and that judges should not shrink away from considering issues of State responsibility. While closer examination of issues of State responsibility by international judges may not necessarily lead to an easier or quicker solution of the dispute, as a number of disputes have been finally submitted to judicial scrutiny only on the understanding that issues of responsibility be set aside, it may nonetheless facilitate unilateral restraint and even, arguably, the final solution of the dispute. Awareness of the existence of State responsibility and of the exact consequences of illegal acts is indeed a primary consideration for States when deciding action, but also when considering the final settlement of a dispute. At the same time, cognition of the need to clarify and further develop this body of international law does not necessarily mean strict adherence to legal principles, disregarding the paramount necessity to peacefully settle longstanding disputes. Any decision as to the existence of responsibility and the consequences thereof should be carefully taken, in the light of all legal rules applicable in the relations between the parties, as well as of other relevant interests, such as the speedy execution of the decision by the parties, the need not to open new controversies between them, the need to hand in a fair and acceptable judgment and to protect vulnerable rights and interests of private individuals and actors affected by the decision. Similarly, the remedy to be afforded to parties by the judge could rarely go beyond declaratory relief or the enunciation of the obligation to comply with the relevant primary rules, and the award of damages appears to be a realistic possibility only in a clear-cut situation, such as occupation by the use of force or in violation of the right to self-determination, or damage caused by violation of international humanitarian law.<sup>164</sup>

That stated, in a historical moment characterised by an increasing strife for natural resources, especially involving developing countries, and by the need for control and management of external threats and challenges, such as international terrorism and illegal immigration, it is essential that the rules concerning sovereignty and related rights, more generally, and the rules regulating State conduct in contested areas are strictly observed, in order to avoid new conflicts and to minimise existing ones. Clarification of the rules applicable to contested land and marine areas, of the options available to State parties to the dispute and the limits of State action, but also of the consequences for the breach of these rules, is of paramount importance since it

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<sup>164</sup> As exemplified in the case of the UNCC.

would be untimely to request a State to regulate conduct on rules the exact content of which is, to a certain extent, still obscure. Conscious of the need for further appraisal of this topic, we hope that the indications provided in this article may constitute an initial contribution towards this end.