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The Aggravating Duty of Non-Aggravation

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Abstract

International law's duty of non-aggravation requires states to avoid actions that might inflame an international dispute, both to maintain international peace and to preserve the effectiveness of judicial or arbitral proceedings. Yet parties on the receiving end of calls for non-aggravation – whether from the Security Council or a tribunal – have little idea of what conduct they are expected to avoid. This state of affairs is most unfortunate in light of the centrality of this norm to the peaceful resolution of disputes and, in particular, examples of provocative and aggravating acts in recent years. This article attempts to give some meaning to this important, but frustratingly vague, norm of international law. After reviewing current understandings of the duty by political and judicial bodies, it justifies the need for a more specific understanding of non-aggravation. It then develops a set of criteria to distinguish aggravating from non-aggravating acts, a process informed by both existing expectations and the underlying purposes of the norm. Based on these criteria, the article offers a coding scheme of presumptively aggravating and non-aggravating acts. Beyond its relevance for decision-makers, the article seeks to encourage theoretical inquiry into the advantages and disadvantages of vague (or underspecified) norms in the international legal order.

1 Introduction

For as long as global actors have argued with one another on the world stage, they have put forth accusations of reckless or provocative behaviour and demands to show restraint. States routinely do so. To mention a few recent examples, France condemned Iran's 2018 ballistic missile test as 'provocative and destabilizing';[1] Australia called upon parties to the South China Sea dispute to 'exercise restraint [and] refrain from provocative actions';[2] and states demanded that Israel exercise 'restraint' during

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1 France Ministry for Europe and Foreign Affairs, *Iran Ballistic Missile Test* (1 December 2018), available at https://bit.ly/2TZW2Kh.

2 Australia Department of Foreign Affairs and Trade, *Statement on Developments in the South China Sea* (14 May 2014), available at https://bit.ly/3l5Qmu3.

clashes with Palestinians at the border fence in Gaza.[3] So does the Security Council, which often urges parties to conflicts to show restraint and avoid taking aggravating acts.[4] These calls are grounded in law, in that key international law instruments, notably the 1970 Friendly Relations Declaration (FRD), require states not to aggravate their disputes.[5] And in the judicial context, orders to the parties not to aggravate a dispute are part and parcel of the provisional measures of the International Court of Justice (ICJ) as well as other tribunals.[6]

The problem with these calls for non-aggravation, *ex post* by an international institution responding to a dispute or *ex ante* in a legal instrument, is that neither the entity demanding it nor those on the receiving end seem to have much idea of what it requires them to do or refrain from doing. Must the latter merely meet their existing obligations, such as those under a treaty or a Security Council resolution? Or do something more? As one International Tribunal for the Law of the Sea (ITLOS) judge put it after his court issued a typical order of non-aggravation, 'I oppose laying down a measure, binding in international law . . . which is of so general a nature that a party cannot be entirely clear when contemplating any given action whether or not it falls within its scope'.[7] The situation is exacerbated by the general absence of appraisal by international institutions of whether actors are carrying out their duties not to aggravate. With little guidance on the meaning of this supposed duty in international law, it risks signalling no more than 'be nice to one another'.

This outcome would be most unfortunate, for the duty of non-aggravation or restraint is an important component of international law's approach to the peaceful resolution of disputes. Indeed, international law has always reflected states' concern about the danger of unilateral, provocative acts. International law rules seek to prohibit, or at least limit or channel, many such acts, even as they acknowledge the freedom of states to undertake many measures that may worsen a particular dispute.

Concern about aggravation and provocation is especially warranted today. Unilateral acts by states, particularly to exit international agreements and cooperative arrangements, attract attention in part because of their potential to aggravate disputes – disputes which may have been under control or at least channelled as a result of those very agreements.[8] Thus, the US withdrawal from the Iran nuclear deal aggravates not only relations with Iran but with its European allies; Saudi Arabia's blockade of Qatar aggravated relations among the states of the Persian Gulf; and

[3] See Ratner, 'Gaza and Israel: What Do Calls for "Restraint" Really Mean?', *Just Security* (17 May 2018), available at https://bit.ly/350SePa.

[4] See examples in Section 2.B below.

[5] GA Res. 2625 (XXV), 24 October 1970, principle 2, para. 4.

[6] See, e.g., *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran v. United States of America)*, Provisional Measures, Order, 3 October 2018, ICJ Reports (2018) 623, para. 102(3).

[7] ITLOS, *Southern Bluefin Tuna Cases (New Zealand v. Japan; Australia v. Japan)*, Provisional Measures, Order, 27 August 1999, para. 2 (Eriksson J., dissenting).

[8] On one possible cause, see Krieger, 'Populist Governments and International Law', 30 *European Journal of International Law* (*EJIL*) (2019) 971.

Chinese construction of military facilities in the South China Sea, especially in defiance of a ruling from the United Nations Convention on the Law of the Sea (UNCLOS) arbitral tribunal,[9] certainly aggravates tensions between China and both Vietnam and the Philippines. These and other actions have elicited condemnation as provocative or reckless, but it remains unclear whether (with the exception of China's actions) they violate any international legal obligations.

This article, then, represents a response to the combined political importance and normative thinness of the duty of non-aggravation in international law. I seek to understand the duty from two perspectives. First, I want to examine closely the current state of the law regarding the obligation. That excavation leads to the somewhat frustrating point that while states share a commitment to the idea that states and non-state actors should not take measures to aggravate their disputes, they have little sense about what that commitment entails in terms of behaviour. Given that status quo, my second goal is to elaborate a more specific obligation on states or non-state actors going forward. Such a duty would need to advance the purposes of the non-aggravation duty while staking out the ground between merely requiring actors to do that which they are already required to do and forbidding behaviours that they would not – and in some cases should not – give up as policy options.

My argument proceeds as follows: Section 2 offers an overview of the development of the duty of non-aggravation. It identifies one strand of the duty associated with preventing threats to the peace and another associated with the integrity of judicial proceedings. Section 3 considers the advantages and disadvantages of moving beyond the status quo to a duty with more specificity, ultimately concluding that the former outweigh the latter. Section 4 offers the framework for a new way of understanding non-aggravation, identifying four factors to distinguish prohibited from permitted conduct. Section 5 then offers a schema for categorizing state (and non-state) behaviour – a framework of Red, Yellow and Green acts – with examples of acts in those categories. I conclude with some observations on the implications of my proposal for the larger goal of the peaceful settlement of disputes as well as other norms of international law subject to the same shortcomings as the non-aggravation norm.[10]

2 Tracing the Duty of Non-Aggravation

Treaties and other instruments that impose duties of non-aggravation, and orders from international bodies to avoid aggravation, represent a challenge to the strict positivist dicta of the *Lotus* case[11] – that which is not specifically prohibited is permitted – insofar as the duty seeks to preclude a large range of acts that states have

[9] *In the Matter of the South China Sea Arbitration (Philippines v. China)*, PCA Case No. 2013–19, Award, 12 July 2016, available at https://pcacases.com/web/sendAttach/2086.

[10] Like many international decision-makers, I will use the terms provocative and aggravating interchangeably.

[11] On challenges to the *Lotus* paradigm, see Bodansky, 'Non-Liquet and the Incompleteness of International Law', in L. Boisson de Chazournes and P. Sands (eds), *International Law, The International Court of Justice and Nuclear Weapons* (1999) 153.

not specifically agreed to ban. Indeed, international law has long recognized the possibility of some intermediate level of proscribed act – one not specifically prohibited, but not permitted either.[12] The ancestor of the modern idea of non-aggravation lies in the notion of the unfriendly act in international law.[13] States often accused one another of such acts or threatened negative consequences, including war, for them.[14] Yet unfriendly acts, while normatively suspicious, were not deemed illegal. States also declared that some conduct would not be considered unfriendly.[15] This pre-UN Charter understanding survives through the concept of retorsion – measures that states may take in response to unwelcomed acts when those responses are not themselves otherwise illegal (and thus not countermeasures or reprisals). International law's allowance of retorsions represents the doctrinal recognition of the right of the state to take manifold measures in response to acts by other states to which they object – acts deemed at least by the responding state as unfriendly.[16]

A *Non-Aggravation under the Charter and Other Treaties*

The Charter era witnessed the development of a duty on states not to take certain unfriendly acts in the first place. Article 2(3) requires states to 'settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered'. This obligation extends beyond a requirement not to settle disputes through force – the point of Article 2(4). Rather, it represents an affirmative duty (though one of conduct, not result) to settle their dispute in a certain manner, one that does not endanger 'international peace and security, and justice'.[17] Attempts to settle a dispute in a way that endangers these values run afoul of the Charter.

Article 33 specifies some modes by which states *could* carry out their obligation to settle their disputes peacefully. The linkage of Article 33 to Article 2(3) means that the options in the former are not to be regarded as aggravating a dispute. Thus, the state seeking the good offices of an intermediary has clearly not committed a provocative or aggravating act as a matter of international law. But the Charter still provides no guidance on the specific actions states are required to take or prohibited from taking, except for the injunction in Article 2(4).

[12] See *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, 22 July 2010, ICJ Reports (2010) 403, para. 9 (Simma, J.) ('great shades of nuance that permeate international law').

[13] See Richter, 'Unfriendly Act', in R. Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law* (2013) ('*MPEPIL*').

[14] See, e.g., J. Monroe, *The Monroe Doctrine: President Monroe's Message at the Commencement of the First Session of the Eighteenth Congress*, 2 December 1823 ('interposition [to] oppress []' Latin American states manifests 'an unfriendly disposition toward the United States').

[15] See, e.g., Convention for the Pacific Settlement of International Disputes, 29 July 1899, 1 Bevans 230, Art. 3 (state's offer to use its good offices to resolve conflicts between two other states); Convention Concerning the Rights and Duties of Neutral Powers in Naval War (Hague, XIII), 18 October 1907, 1 Bevans 723, Art. 26 (exercise of neutrality in war).

[16] See generally Giegerich, 'Retorsion', in *MPEPIL*, *supra* note 13.

[17] See B. Simma et al. (eds), *The Charter of the United Nations: A Commentary* (3d ed. 2012), Art. 2(3), para. 25.

The normative evolution of Article 2(3) advanced significantly with the Friendly Relations Declaration, which elaborates the duty on states to settle disputes peacefully to include the following: 'States parties to an international dispute, as well as other States shall refrain from any action which may aggravate the situation so as to endanger the maintenance of international peace and security, and shall act in accordance with the purposes and principles of the United Nations.'[18]

As the text makes clear, the duty extends beyond the parties to a dispute to all other states. Moreover, it is broad as it requires them to refrain from action which 'may aggravate' the situation. Yet it is narrow insofar as it would seem that the aggravation must endanger international peace and security, not just the dispute between the parties. In 1982, in the unanimously passed Manila Declaration on the Peaceful Settlement of Disputes, the General Assembly changed the operative phrase regarding non-aggravation to 'so as to endanger the maintenance of international peace and security *and make more difficult or impede the peaceful settlement of the dispute*'.[19] The (italicized) addition could merely clarify that aggravating acts endangering peace and security also make peaceful settlement more difficult, or it could expand the duty of non-aggravation to include acts that could also endanger the peaceful settlement of the dispute.[20]

Outside the Charter, other treaties contain obligations not to take measures to worsen the status quo. UNCLOS requires states with opposite or adjacent coasts that have not yet agreed on a delimitation of their exclusive economic zones (EEZs) or the continental shelf to 'enter into provisional arrangements of a practical nature and *. . . not to jeopardize or hamper the reaching of the final agreement*'.[21] Article 18 of the Vienna Convention on the Law of Treaties (VCLT) requires non-party signatories to 'refrain from acts which would defeat the object and purpose' of a treaty – a sort of temporary duty of non-aggravation pending the stronger duty on states to perform in good faith all provisions of the treaties to which they are party.[22] The 2018 settlement of the Macedonia–Greece name controversy commits the parties 'not to undertake, instigate, support and/or tolerate any actions or activities of a non-friendly character directed against the other party', supplemented by many specific obligations.[23]

The duty of non-aggravation resembles a few other norms of international law that require states to take care when exercising their legal rights. They reflect an understanding by states that some conduct, even if not violating a specific rule, ought to be

[18] Friendly Relations Declaration, *supra* note 5.

[19] GA Res. 37/10, 15 November 1982, para. 8 (emphasis added).

[20] UN Charter, Art. 2(3)'s requirement to settle disputes peacefully so as not to endanger 'justice' was not part of the FRD, but it might be captured partially by the italicized phrase.

[21] United Nations Convention on the Law of the Sea (UNCLOS), 10 December 1982, 1833 UNTS 3, Arts. 74(3), 83(3) (emphasis added).

[22] Vienna Convention on the Law of Treaties (VCLT), 23 May 1969, 1155 UNTS 331.

[23] Final Agreement for the Settlement of the Differences as Described in the United Nations Security Council Resolutions 817 (1993) and 845 (1993), the Termination of the Interim Accord of 1995 and the Establishment of a Strategic Partnership Between the Parties (Greece–North Macedonia), 17 June 2018, Art. 3(4).

discouraged or proscribed. Vaughan Lowe calls them 'interstitial norms' that 'set the tone of the approach of international law to contemporary problems'.[24] They include good faith and the ban on *abus de droit*. Each seeks to ensure that states afford one another a minimum of *respect* in exercising their rights and fulfilling their obligations.[25]

B *Issue-Specific Invocation of the Charter-Based Duty*

The duty of restraint or non-aggravation under the Charter has been given some elaboration by the UN's political and judicial organs as well as other authoritative voices.

1 Security Council Resolutions

When the UN organ charged with the maintenance of international peace and security calls for parties not to aggravate their disputes, or determines that particular acts are provocative or aggravating, those determinations would seem to represent interpretations of Article 2(3) (although it is possible that the Council has its own notion of non-aggravation). And the Council has routinely urged parties to disputes to exercise restraint, at times with a specific reminder not to aggravate a dispute. Thus, after Turkey's invasion of Cyprus, the Council requested all states 'to exercise the utmost restraint and to refrain from any action which might further aggravate the situation'.[26] During the Iran–Iraq war, it called upon states other than the belligerents to 'exercise the utmost restraint and to refrain from any act which may lead to a further escalation and widening of the conflict'.[27] During the Eritrea–Ethiopia war, it called on the parties to 'avoid any steps which would aggravate tensions such as provocative actions or statements'.[28] The Council has issued such calls outside the inter-state setting, suggesting that its members are willing to apply the duty to non-state actors. Thus, it called on parties during Timor-Leste's violence in 2008 to 'remain calm, exercise restraint and maintain stability in the country'.[29] During the strife within Iraq after the US invasion, the Council called for 'all segments of the Iraqi population . . . to refrain from statements and actions which could aggravate tensions'.[30]

The Council's resolutions could offer a greater sense of the meaning of an aggravating or provocative act if they identified certain acts as crossing that threshold. However, the Council has done so quite infrequently. In Resolution 250, it found that 'the holding of a military parade [by Israel] in Jerusalem will aggravate tension in the

[24] Lowe, 'The Politics of Law-Making: Are the Methods and Character of Norm Creation Changing?', in M. Byers (ed.), *The Role of Law in International Politics: Essays in International Relations and International Law* (2000) 207, at 218.

[25] See S. Ratner, *The Thin Justice of International Law: A Moral Reckoning of the Law of Nations* (2015), at 192–197.

[26] SC Res. 353, 20 July 1974, para. 2.

[27] SC Res. 479, 28 September 1980, para. 3.

[28] SC Res. 1177, 26 June 1998, para. 6.

[29] SC Res. 1802, 25 February 2008, para. 4.

[30] SC Res. 2233, 28 May 2015, Preamble, para. 7. See also SC Res. 2205, 26 February 2015, Preamble, para. 18 (on Sudan–South Sudan conflict, '[u]rging all parties to refrain from any unilateral action that could aggravate intercommunal relations within [the] Abyei Area').

area . . .'.[31] In resolutions concerning South Africa, the Council identified the imposition of a death sentence on two African National Congress (ANC) members,[32] aggression against its neighbours[33] and killing of peaceful demonstrators[34] as aggravating the situation in Southern Africa. The Council has also condemned North Korea's launch of a missile over Japan as provocative[35] and also referred to various actions as 'destabiliz[ing]' as well as a threat to peace and security.[36] It also welcomed efforts by states not to aggravate the situation, but it did not specify exactly what those efforts entailed.[37]

2 ICJ Judgments

The ICJ has occasionally and obliquely addressed the Charter-based duty. In *Nicaragua v. United States*, after Nicaragua claimed that the United States breached their bilateral friendship treaty by taking unfriendly acts against Nicaragua, the Court rejected this view, noting that '[t]here must be a distinction, even in the case of a treaty of friendship, between the broad category of unfriendly acts and the narrower category of acts tending to defeat the object and purpose of the Treaty'.[38] However, the Court gave no guidance as to the meaning of unfriendly acts. Thus, assuming unfriendly acts are somewhat coextensive with aggravating acts, *Nicaragua* suggests that they extend beyond violations of Article 18 of the VCLT, but not how far.

More recently, in the Bolivia–Chile border dispute, the Court held that Article 2(3) of the Charter, as elaborated in the FRD and the Manila Declaration, does not require Chile to pick a particular method to resolve their dispute – in this case, negotiation, as sought by Bolivia.[39] This holding suggests that Chile's refusal to negotiate with Bolivia is not aggravating the dispute between them in a way to endanger peace and security, but does not set out what would constitute an aggravating act by Chile.[40]

[31] SC Res. 250, 27 April 1968, Preamble, para. 3. Israel held the parade anyway. Report by the Secretary-General in Pursuance of Security Council Resolution 250 (1968), UN Doc. S/8567, 2 May 1968.

[32] SC Res. 547, 13 January 1984; SC Res. 623, 23 November 1988. Maloise was executed in October 1985; Setlaba received a reprieve.

[33] SC Res. 581, 13 February 1986, Preamble, para. 5. See also GA Res. 46/84, 16 December 1991 (receipt of armaments 'aggravate the threat to world peace').

[34] SC Res. 591, 28 November 1986, Preamble, para. 9.

[35] UN Security Council, Statement by the President of the Security Council, UN Doc. S/PRST/2017/16, 29 August 2017.

[36] SC Res. 2397, 22 December 2017, Preamble, para. 6.

[37] See, e.g., SC Res. 2094, 7 March 2013, para. 33 ('welcomes efforts . . . to facilitate a . . . solution through dialogue and to refrain from any actions that might aggravate tensions').

[38] *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States)*, Merits, 27 June 1986, ICJ Reports (1986) 14, para. 273.

[39] *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, Judgment, 1 October 2018, ICJ Reports (2018) 507, paras. 165–166.

[40] Cf. Peters, 'Cooperation in International Dispute Settlement', in J. Delbrück (ed.), *International Law of Cooperation and State Sovereignty* (2002) 107, at 124 (arguing for a customary international law duty to negotiate over a dispute).

C *Non-Aggravation and Provisional Measures*

Although ICJ judgments offer few hints of the meaning of the Charter-based duty of non-aggravation, international tribunals have frequently issued orders of non-aggravation as provisional measures. These orders reflect a different permutation of the duty of non-aggravation, one aimed, in the case of the ICJ, at 'preserv[ing] the respective rights of either party',[41] the touchstone for provisional measures under Article 41 of the ICJ Statute. This second manifestation thus has a legal pedigree ('source') different from Article 2(3) of the Charter. Because the ICJ (and other tribunals) handle disputes that need not endanger international peace and security, and Article 41 of its Statute contains no reference to Article 2(3) of the Charter, these orders are not simply reiterating or interpreting the FRD's duty. Indeed, the language of a typical ICJ order (e.g. 'aggravate or extend the dispute before the Court') is distinct from the FRD ('aggravate the situation so as to endanger the maintenance of international peace and security').

At this point, a formalist approach might simply place the two permutations in separate doctrinal boxes – one about peace and security and one about the judicial settlement of disputes. Such a perspective might also question whether the differences between the two permutations of the duty permit analysing them together. Yet the two manifestations of – and even formal sources for – the duty should not obscure their common purpose in the architecture of international law. Both represent responses to unilateral, provocative acts that can have serious consequences for the peaceful resolution of disputes, human rights and other global values. One recognition of this connection came recently from ICJ Vice-President Xue, who suggested that the ICJ's provisional measures can prevent the aggravation of disputes that might endanger international peace and security.[42] As she wrote, '[a]fter all, maintenance of international peace and security is the ultimate goal for the judicial settlement of international disputes'.[43] Moreover, for both permutations, the targets of the duty or order share uncertainties as to what is expected of them.

1 *The ICJ's Approach to Orders of Non-Aggravation*

The Permanent Court of International Justice (PCIJ) opined on its power to issue provisional measures to prevent aggravation of a dispute long ago in *Electricity Company of Sofia and Bulgaria:*

> [T]he [PCIJ Statute provision authorizing provisional measures] applies the *principle universally accepted by international tribunals* . . . to the effect that the parties to a case must abstain from any

[41] ICJ Statute, Art. 41(1) ('The Court shall have the power to indicate . . . any provisional measures which ought to be taken to preserve the respective rights of either party'); *Frontier Dispute (Burkina Faso v. Republic of Mali)*, Provisional Measures, Order, 10 January 1986, ICJ Reports (1986) 3, para. 18.

[42] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates)*, Request for the indication of provisional measures of the United Arab Emirates, Order, 14 June 2019, ICJ Reports (2019) 361, para. 6 (Xue, Vice-Pres.) ('when two States . . . have recourse to the Court . . . incidents may subsequently occur which are not merely likely to extend or aggravate the dispute but also comprise a resort to force which is irreconcilable with . . . the peaceful settlement of international disputes. . . . [T]he weight of [a provisional] measure . . . cannot be diminished as secondary').

[43] *Ibid.*

> measure capable of exercising a prejudicial effect in regard to the execution of the decision . . . *and, in general, not allow any step of any kind to be taken which might aggravate or extend the dispute.*[44]

The dictum sees the duty of non-aggravation in a judicial setting as grounded in some pre-existing duty – perhaps under custom – on all states involved in formal dispute settlement proceedings.[45] In the many decades since that case, the Court's judges and commentators have debated whether the Court can issue orders of non-aggravation not linked to other provisional measures. The Court's current view seems to be that an order of non-aggravation is only appropriate when the Court has already ordered other measures.[46]

But the more important issue is what those provisional measures regarding non-aggravation mean in two dimensions. First, when the Court calls upon the parties to 'refrain from any action which might aggravate or extend the dispute before the Court', what is the 'dispute before the Court'? Disputes involve a combination of underlying facts and legal claims about those facts. The Court has jurisdiction only over certain of the legal claims associated with the facts, namely those covered by the grant of jurisdiction pursuant to Articles 36(1) and 36(2) of its Statute. Yet the line separating the part of the dispute before the ICJ from the part not before it is not so easy to draw. For instance, in the case of *Qatar v. United Arab Emirates*, virtually any act that the United Arab Emirates (UAE) might do to expand the blockade of Qatar would aggravate the narrow dispute over whether the UAE had violated the Convention on the Elimination of all Forms of Racial Discrimination (CERD); and any act that the UAE took specifically that might aggravate the CERD claims – for example, increasing restrictions on families of Qatari origin[47] – would aggravate the larger dispute between them. The Court does not seem concerned with this conundrum when issuing provisional measures. As a result, an order of non-aggravation effectively allows it to proscribe a broader range of conduct than that which forms the basis for the original claim.[48]

[44] *Electricity Company of Sofia and Bulgaria*, Order, 5 December 1939, 1939 PCIJ Ser. A/B, No. 79, at 194, 199 (emphasis added).

[45] For a duty under an arbitration agreement, see Governments of Croatia and Serbia, *Arbitration Agreement between the Government of the Republic of Croatia and the Government of the Republic of Slovenia*, 4 November 2009, Art. 10, available at https://bit.ly/2TYjIig.

[46] See, e.g., *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Provisional Measures, Order, 23 January 2007, ICJ Reports (2007) 3, para. 49; *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, Provisional Measures, Order, 8 March 2011, ICJ Reports (2011) 6, para. 62. For similar views in the International Centre for Settlement of Investment Disputes (ICSID), see, e.g., ICSID, *CEMEX Caracas Investments v. Venezuela – Decision on the Claimants' Request for Provisional* Measures, 3 March 2010, ICSID Case no. ARB/08/15, para. 65. For scholarly views, see Campolieti, 'The Rule of Non-Aggravation of the Dispute in ICSID Arbitration Practice', 30 *International Centre for Settlement of Investment Disputes Review* (*ICSID Rev.*) (2015) 217; C. Miles, *Provisional Measures Before International Courts and Tribunals* (2017), at 209–213.

[47] I leave aside CERD's coverage regarding national origin versus nationality-based distinction, which divided the Court over provisional measures. See *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates)*, Provisional Measures, Order, 23 July 2018, ICJ Reports (2018) 406, para. 5. As this article was going to press, the blockade of Qatar ended and, just a month later, the ICJ dismissed Qatar's case on the grounds that the UAE's measures did not constitute racial discrimination under the CERD.

[48] For a complaint to the effect, see *Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear (Cambodia v. Thailand)*, Provisional Measures, Order, 18 July 2011, ICJ Reports (2011) 537, para. 24 (Donoghue, J., dissenting) (provisional measures covered the conflict as a whole, rather than the dispute before the Court).

Second, what measures are forbidden as aggravating that dispute? In particular, how does the ICJ's understanding of acts prohibited under orders of non-aggravation compare to those prohibited by the FRD? As a starting point, the Court has stated that provisional measures are justified only if there is 'urgent necessity to prevent irreparable prejudice' to the parties.[49] A non-aggravation order thus seemingly creates a duty to refrain only from action that might cause such irreparable harm. This limit contrasts with the Charter-based duty to avoid action 'which may aggravate the situation so as to endanger international peace and security', but that might not be irreparable (e.g. sending a fleet of ships to a conflict zone). On the other hand, the duty from a judicial order might cover acts not endangering peace and security but nonetheless irreparable, for instance destroying evidence or executing a prisoner.

Beyond this starting point, the Court has offered a few hints regarding prohibited acts:

- In the *Tehran Hostages Case*, the ICJ issued provisional measures of non-aggravation in November 1979. In its 1980 judgment in favour of the United States, the Court criticized the April 1980 US rescue attempt as 'calculated to undermine respect for the judicial process in international relations', citing its 1979 non-aggravation order and thus suggesting that the rescue mission aggravated the dispute.[50] (From the US perspective, the mission was meant to eliminate the dispute.)
- In the Cameroun–Nigeria border dispute, the Court singled out 'action by [either parties'] armed forces' as prejudicing the right of the other regarding the judgment and aggravating the dispute.[51] Such language suggests that unilateral action during a border dispute – already illegal under the FRD[52] – is aggravating. The Court seemed concerned about the effect of military action on civilians and on the evidence it needed.[53]
- In Costa Rica's dispute with Nicaragua over their border region, after the Court had ordered both parties in 2011 not to send their personnel to the disputed area and issued a generic order of non-aggravation, Costa Rica sought new provisional measures in 2013 to address the arrival of Nicaraguan students in the area. The Court stated that the presence of the students 'carries the risk of incidents which might aggravate the present dispute' and reiterated the earlier order of non-aggravation.[54]

[49] *Pulp Mills*, *supra* note 46, paras 31–32; in the ITLOS context, see ITLOS, *Enrica Lexie (Italy v. India)*, Provisional Measures, Order, 24 August 2015, para. 87.

[50] *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, Judgment, 24 May 1980, ICJ Reports (1980) 3, para. 93 (citing *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, Provisional Measures, Order, 15 December 1979, ICJ Reports (1979) 7, para. 47.1.B (hereinafter '*Tehran Hostages Case*')).

[51] *Case Concerning the Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nigeria)*, Provisional Measures, Order, 15 March 1996, ICJ Reports (1996) 13, para. 49(1).

[52] Friendly Relations Declaration, *supra* note 5, principle 1(5).

[53] *Cameroon v. Nigeria*, Order, *supra* note 51, para. 42.

[54] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* and *Construction of a Road in Costa Rica Along the San Juan River (Nicaragua v. Costa Rica)*, Request for the Modification of the Order of 8 March 2011 Indicating Provisional Measures, Order, 16 July 2013, ICJ Reports (2013) 23, paras 37, 38 ('[t]he Court *thus* considers it necessary to reaffirm' the order of non-aggravation), 40(2). For the prior order, see *Certain Activities Carried Out by Nicaragua in the Border Area*, *supra* note 46, para. 86.

In these three disputes, the Court saw the aggravating or potentially aggravating acts as interfering with its work. Yet those acts would endanger international peace and security as well. As a result, it is still not clear whether the Court is applying a different standard in exercising its discretion under Article 41 from the standard applied by the Security Council in interpreting Article 2(3).

2 Provisional Measures by Arbitral Tribunals

Arbitral tribunals have offered a bit more guidance about the duty of non-aggravation.[55] Most notably, the tribunal in the South China Sea arbitration made three key rulings. First, independently of a tribunal order, parties to an arbitration have duty to 'refrain from aggravating or extending the dispute'.[56] Second, neither UNCLOS nor other international law imposes any duty on states 'to refrain from aggravating generally their relations with one another, however desirable it might be for States to do so'; rather, a state's actions 'must have a specific nexus with the rights and claims making up the parties' dispute' to be covered by the non-aggravation duty.[57] Third, it listed conduct that would violate the duty: (1) actions during the proceedings that make the alleged violation more serious; (2) actions to frustrate the effectiveness or implementation of the decision; and (3) undermining the integrity of the proceedings. It then found that China had aggravated the dispute in all three senses.[58]

The ruling provides some clarity on the judicial permutation of the duty. Consistent with *Electricity Company of Sofia and Bulgaria*, once an arbitral or judicial body is seized of a dispute, even if a party contests jurisdiction or admissibility, the parties have certain commitments. Of the three prohibitions above, the first – on actions that would make the alleged violation worse – is the most far-reaching. In addition, the tribunal opines on the duty of non-aggravation under the Charter in asserting that states lack any duty not to aggravate their relations generally. And it suggests that the duty of non-aggravation – at least in the judicial setting but perhaps more generally – only prohibits actions tied to the specific dispute. Yet this last interpretation raises the same question of manageability in terms of identifying which acts would aggravate the dispute.

Investor–state tribunals have interpreted arbitration rules to the effect that among the rights that the tribunal may preserve through provisional measures is a party's

[55] ITLOS has provided little clarification on non-aggravation, despite numerous provisional measures with orders of non-aggravation. See, e.g., ITLOS, *Case Concerning the Detention of Three Ukrainian Vessels (Ukraine v. Russian Federation)*, Provisional Measures, Order, 25 May 2019, para. 120. The only discussion appears to be in *Enrica Lexie*, *supra* note 49, para. 141(1), where ITLOS seemingly recognized that criminal proceedings can aggravate a dispute by ordering the parties to 'refrain from initiating new [court proceedings] which might aggravate or extend the dispute'.

[56] *South China Sea*, *supra* note 9, para. 1169.

[57] *Ibid.*, para. 1174.

[58] *Ibid.*, paras 1176–1180.

right to non-aggravation of the dispute.[59] The *Plama v. Bulgaria* tribunal described that right as referring to 'actions which would make resolution of the dispute by the Tribunal more difficult . . . a right to maintenance of the status quo, when a change of circumstances threatens the ability of the Arbitral Tribunal to grant the relief . . . and the capability of giving [it] effect'.[60] In *Gramercy Funds v. Peru*, the tribunal spoke of a broader duty of non-aggravation, covering 'any action that could potentially exacerbate the controversy, grossly vex the Parties or their counsel, or encumber the arbitration [which] amounts to a waste of resources and a violation of the Tribunal's directions'.[61] One tribunal justified provisional measures on 'the principle that neither party may aggravate or extend the dispute or take justice into their own hands'.[62] At the same time, like the ICJ, tribunals will only order provisional measures if they are urgent and necessary.[63]

As for singling out conduct that would or would not aggravate a dispute, tribunals do so only occasionally.[64] In an early case, *Amco Asia v. Indonesia*, the tribunal found that an article in a newspaper about the dispute 'could not . . . aggravate or exacerbate the legal dispute'.[65] More recently, in *Perenco v. Ecuador*, the tribunal concluded that Ecuador's threatened seizure of the claimant's assets during the arbitration would 'seriously aggravate the dispute between the parties'.[66] But aggravating conduct need not go that far, as tribunals have characterized as aggravating Ecuador's unilateral rescission of its contract with the claimant during the arbitration;[67] and a press

[59] See, e.g., Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, 3 March 1965, 575 UNTS 159, Art. 47; ICSID Rules of Procedure for Arbitration Proceedings (2006), Rule 39(1); ICSID, *Burlington Resources Inc. v. Republic of Ecuador – Procedural Order No. 1*, 29 June 2009, ICSID Case no. ARB/08/5, para. 62. For mention of a duty on parties independent of Article 47, see, e.g., ICSID, *Amco Asia Corporation and others v. Republic of Indonesia – Decision on Request for Provisional Measures*, 9 December 1983, ICSID Case no. ARB/81/1, at 3; ICSID, *International Quantum Resources v. Democratic Republic of Congo – Ordonnance de Procedure No. 1*, 1 July 2011, ICSID Case no. ARB/10/21, para. 28.

[60] ICSID, *Plama Consortium Limited v. Bulgaria – Order [on Provisional Measures]*, 6 September 2005, ICSID Case no. ARB/03/24, para. 45; *see also* ICSID, *Churchill Mining PLC and Planet Mining Pty Ltd v. Indonesia – Procedural Order No. 9*, 8 July 2014, ICSID Case no. ARB/12/14, para. 90 ('the right to the preservation of the status quo and the non-aggravation of the dispute' as a basis for provisional measures'); ICSID, *Nova Group Investments v. Romania – Procedural Order No. 7*, 29 March 2017, ICSID Case no. ARB/16/19, para. 236 (covering acts that would interfere with parties' ability to present positions or with the effectiveness of the award).

[61] ICSID, *Gramercy Funds Management LLC and Gramercy Peru Holdings LLC v. Republic of Peru – Procedural Order No. 9*, 20 July 2019, ICSID Case no. UNCT/18/2, para. 84.

[62] ICSID, *City Oriente v. Ecuador – Decision on Provisional Measures*, 19 November 2007, ICSID Case no. ARB/06/21, para. 57.

[63] *Plama*, *supra* note 60, para. 38; *CEMEX Caracas Investments BV v. Venezuela – Order on Provisional Measures*, 3 March 2010, ICSID Case no. ARB/08/15, paras 44–46, 61.

[64] See Campolieti, *supra* note 46, at 219. Tribunals only grant a small minority of requests for orders of non-aggravation. See British Institute of International and Comparative Law, *2019 Empirical Survey: Provisional Measures in Investor–State Arbitration* (2019), at 11.

[65] *Amco Asia*, *supra* note 59.

[66] ICSID, *Perenco v. Ecuador – Order on Provisional Measures*, 8 May 2009, ICSID Case no. ARB/08/6, para. 46. See also *Burlington Resources*, *supra* note 59, paras 65–68.

[67] *City Oriente – Decision on Provisional Measures, supra* note 62, paras 59, 60, 62 and *dispositif* para. 1.

conference by Argentine officials announcing criminal charges against claimants' local counsel.[68] Yet tribunals found that the mere institution of criminal proceedings against non-parties to the case, or the institution of criminal proceedings followed by their suspension, did not aggravate the dispute.[69]

A particularly creative approach was taken in *Gramercy Holdings*, where the tribunal issued a broad order of non-aggravation and then acknowledged that it could not 'make a *numerus clausus* catalog of . . . actions that may a priori aggravate the dispute'; it then 'encourage[d]' each party, if it 'has any doubt whether a specific action it intends to adopt might result in the violation of the above order', to seek guidance first from the tribunal.[70] When the parties did not avail themselves of this option, the tribunal responded to Peru's assertion that the claimant attempted to undermine its relationship with its counsel by asserting that, if this act occurred, it 'is improper and should not occur again'.[71]

D *Crystallizing Contemporary Understandings*

This review suggests some tentative understandings of the current meaning of the duty. First, we might think of non-aggravation as a duty that both binds states in their relations generally and has particular ramifications in the judicial context. The duty in the former context is legally grounded in the UN Charter and authoritative interpretations thereof (including the FRD, Manila Declaration and Security Council resolutions). The latter duty arises under the terms of judicial or arbitral orders (authorized by the procedural rules of the tribunal) as well as perhaps by some customary law obligation on parties to judicial proceedings. Neither duty is limited to states, insofar as both political bodies and tribunals have demanded non-state actors not to aggravate disputes.

Second, although both duties refer to conduct that might or would aggravate existing disputes, the personal and material reach of the duty depends on the setting. The Charter-based duty, which applies to the immediate parties and all other states, bans aggravating conduct that might harm peace and security. The duty in the judicial setting, which applies only to the parties to the judicial dispute, bans conduct that would deleteriously affect the resolution of the dispute, though the scope of that dispute is open to interpretation.

Third, formally speaking, both duties resemble obligations of conduct more than obligations of result, insofar as parties are required to take (or not take) specific action (that 'may' or 'might' 'aggravate the dispute' so as to lead to certain negative results),

[68] ICSID, *Teinver v. Argentine Republic – Decision on Provisional Measures*, 8 April 2016, ICSID Case no. ARB/09/1, paras 51, 210.

[69] *Churchill and Planet v. Indonesia*, *supra* note 60, paras 92–95; ICSID, *EuroGas and Belmont Resources v. Slovakia – Procedural Order No. 3*, 23 June 2015, ICSID Case no. ARB/14/14, paras 89–91 (concluding 'no actual threat' of aggravation).

[70] ICSID, *Gramercy Funds Management LLC and Gramercy Peru Holdings LLC v. Republic of Peru – Procedural Order No. 5*, 29 August 2018, ICSID Case no. UNCT/18/2, paras 60–63.

[71] *Gramercy Procedural Order No. 9*, *supra* note 61, paras 67, 85.

rather than to achieve a particular outcome. If parties to a dispute take no aggravating measures and the dispute somehow worsens, they have not breached that duty of conduct; and if they take prohibited measures and the dispute somehow does not worsen, they have breached the duty. At the same time, like other duties, it has an element of an obligation of result, insofar as states must avoid causing a state of affairs, namely the worsening of the dispute.[72]

Fourth, as for the Charter-based duty, the Security Council has offered only limited guidance regarding the prohibited conduct, identifying a handful of activities as aggravating.

Fifth, in the judicial context, acts banned by a provisional measures order of non-aggravation seem limited to those causing irreparable harm to the parties. Yet tribunals have also stated that the point of an order of non-aggravation is to preserve the integrity of the proceedings and the tribunal's ability to fashion relief, which might proscribe more acts. Tribunals have only occasionally identified what measures would or would not aggravate a dispute. In any case, these acts need not breach the law underlying the tribunal's jurisdiction.

Sixth, the duty does not simply map onto extant prohibitions. Not all unlawful acts are aggravations of a dispute, as suggested by the Security Council's selectivity in identifying acts as aggravating. And not all aggravations of a dispute are otherwise unlawful, as the various Council and tribunal decisions include prohibitions on acts not otherwise illegal (e.g. refraining from military escalation or provocative political statements, not publicizing a criminal case).

Seventh, actions that may annoy or even infuriate a party to a dispute will not on that basis alone cross the line to conduct aggravating a dispute.

Finally, one might ask whether the duty of non-aggravation has actually influenced the conduct of its targets. On the one hand, the duty might have some kind of restraining effect on actors, in particular if an institution like the Security Council or an international tribunal issues a decision or order of non-aggravation (as opposed to the background requirement under the FRD or by virtue of having submitted their dispute to a tribunal). On the other hand, as the examples show, a non-aggravation demand from an authoritative decision-maker like the Council or ICJ can be ignored. As discussed below, this state of affairs underscores the need for a more specific obligation.

3 Toward a More Elaborated Duty

The paucity of guidance about the duty of non-aggravation under the Charter or in response to an order from the Security Council or a tribunal has both advantages and disadvantages for international law and the underlying purposes of the duty. As

[72] See Wolfrum, 'Obligations of Result Versus Obligations of Conduct: Some Thoughts About the Implementation of International Obligations', in M. Arsanjani et al. (eds), *Looking to the Future: Essays on International Law in Honor of W. Michael Reisman* (2011) 363, at 380–381. To the extent the negative/positive duty distinction may be useful, non-aggravation fits more in the former category, although it will certainly require some affirmative steps by states.

Andreas Kulick has perceptively written about open-textured or vague norms generally, we need to ask whether the status quo is a problem or a solution, an opportunity or a challenge.[73]

A *Vague Norms and the Legal Order*

The reasons for and consequences of vague norms – whether duties, rights or powers – within a legal system are the subject of significant work within legal philosophy, international law and international relations (IR).[74] First, legal philosophers have recognized that vagueness and generality within law – or at least legislation – (a) allow for the law to cover a large set diverse cases, (b) prevent arbitrary results stemming from precise rules, (c) save legislators time and allow them to postpone decisions compared to contemplating various contingencies for more specific rules and (d) encourage the targets of rules to think more about the policies underlying them.[75] Second, work within international law and IR has identified the degree of precision as a dimension of the softness of legal instruments, along with the mode of prescription and the degree of delegation or enforcement.[76] Imprecise commitments are useful when states do not know the trajectory of the issues affected by the commitments and want to avoid locking themselves in – with the framework convention a classic use thereof. If drafters combine low precision with weak delegation, states retain the authority to interpret the agreement; whereas if they combine vagueness with strong delegation, the law can become thicker and harder in a more systematic way – each a desirable outcome for states, depending on the issue.[77] Imprecision or constructive ambiguity up front also promotes wider adherence to the instrument.[78]

These views about precision versus generality assume the availability to law prescribers of the option of future delegation to courts or administrative agencies. These institutions apply the vague norms to the hard cases. Their authority and legitimacy in doing so is grounded in part in using principled forms of reasoning in their decisions (e.g. recourse to rules of recognition, precedent, analogies and tests)[79] – techniques Adil Haque calls 'mediating doctrines'.[80] The disadvantages of vague rules – for

[73] Kulick, 'From Problem to Opportunity? An Analytical Framework for Vagueness and Ambiguity in International Law', 59 *German Yearbook of International Law* (2016) 257, at 273–274.

[74] Open-textured and vague are not synonyms, with the latter a narrower term. See Schauer, 'On the Open Texture of Law', 87 *Grazer Philosophische Studien* (2013) 197, at 199. On related concepts such as generality, ambiguity and indeterminacy, see T. O. Endicott, *Vagueness in Law* (2000).

[75] See Poscher, 'Ambiguity and Vagueness in Legal Interpretation', in L. M. Soland and P. M. Tiersma (eds), *The Oxford Handbook of Language and Law* (2012) 128, at 141–144; on the last of these, see Waldron, 'Clarity, Thoughtfulness, and the Rule of Law', in G. Keil and R. Poscher (eds), *Vagueness and Law: Philosophical and Legal Perspectives* (2016) 317.

[76] Reisman, 'The Concept and Functions of Soft Law in International Politics', in E. G. Bello and B. A. Ajibola (eds), *Essays in Honour of Judge Taslim Olawale Elias*, vol. 1 (1992) 135, at 136; Abbott and Snidal, 'Hard and Soft Law in International Governance', 54 *International Organization* 421 (2000).

[77] Shaffer and Pollack, 'Hard and Soft Law', in J. L. Dunoff and M. A. Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (2013) 197, at 213–214.

[78] See Kulick, *supra* note 73, at 272–273.

[79] See, e.g., H. L. A. Hart, *The Concept of Law* (3d ed. 2012), at 134–136, 144–146.

[80] Haque, 'Indeterminacy in the Law of Armed Conflict', 95 *International Law Studies* (2019) 118, at 126.

example, lack of fairness to targets, uncertainty about prohibited conduct, difficulties for enforcement agencies – are thus overridden in the long term assuming courts (primarily) elaborate the law.[81]

But with the non-aggravation duty, the prospect that courts or other subsidiary bodies will develop more precise commands is fanciful. International courts do not opine on most issues of peace and security due to jurisdictional limitations, with the ICJ unwilling to explain the meaning of non-aggravation even when it has jurisdiction. The Security Council has been equally circumspect in identifying aggravating acts, despite its mandate to apply the Charter's rules on peace and security, including the FRD's duty. Even in ordering provisional measures, tribunals have given only hints of acts that would aggravate a dispute. Thus the very institutions that might elaborate the duty are refraining from doing so.

Yet the analysis does not end there, because vague or general norms have advantages even if no delegee is ever expected to apply them to specific controversies. They can serve key functions without courts – notable flexibility regarding future meanings, overcoming impasses in negotiation and promoting inclusivity of participants in a particular regime.[82] It is thus necessary to consider the specific advantages and disadvantages of the current, highly general and underspecified duty.

B *Advantages of the Status Quo*

The unspecified duty of non-aggravation, in both its Charter and judicial form, has five distinct advantages (most of which it shares with other vague norms). First, the status quo acknowledges the limitations of international law. It offers states significant flexibility in terms of actions permitted short of force and leaves many provocative, even reckless acts not formally proscribed. It reflects the reality that only the consent of states to avoid provocative behaviour can authoritatively and practically constrain them.[83] Rather than devising new guidance for regarding aggravating acts, we are best advised to develop strategies to get states to follow the rules that they have expressly accepted.

Second, specifying *ex ante* certain acts as aggravating could weaken states' ability to respond to violations of international law and thus reduce overall compliance with rules.[84] Sometimes only an aggravating, unfriendly or provocative act demonstrates to a law violator the serious consequences of its transgressions. If international law permitted only friendly, cooperative gestures following violations, they would remain

[81] Endicott, *supra* note 74, at 191–192 ('a vague law does not necessarily represent a deficit in the rule of law [and] an increase in precision is not a guaranteed step to eliminating arbitrary government').

[82] See Kulick, *supra* note 73, at 271–273. See also Marxsen and Peters, 'Self-Defence Against Non-State Actors – The Way Forward', in M. E. O'Connell, C. J. Tams and D. Tladi (eds), *Self-Defence Against Non-State Actors* (2019) 258, at 265–266 ('constructive indeterminacy' to overcome drafting deadlocks).

[83] Even norms of jus cogens require state consent. See VCLT, *supra* note 22, Art. 53.

[84] Cf. Giegerich, *supra* note 16, para. 6 (retorsions are 'indispensable features of a modern international law still lacking centralized implementation and . . . dispute settlement mechanisms [and] contribute to ensuring compliance with . . . rules that are essential for securing friendly relations among nations').

entrenched. Although in some cases such flexibility benefits strong states, with more resources to respond to violations,[85] it can help weak states because provocative responses to illegal acts may sometimes be cheap.

Third, a more detailed elaboration of the duty risks creating legal distinctions among political choices without objective, non-self-judging criteria. How is one to identify a provocative act when states will always characterize their own acts as measured and that of their adversary as reckless? (Actors can deploy self-serving arguments even with more precise norms.) Using Poscher's terminology, the decision costs of a more precise norm are excessive.[86] As a result, international law should leave these choices to politics; certain actions will eventually elicit political approval or disapproval. Identifying some reckless acts as legal violations might even inhibit settlements between parties to a dispute.[87] States might be readier to compromise if their unfriendly acts are not characterized – by them, or by third-party decision-makers like the Security Council or a court – as illegal.

Fourth, elaboration of non-aggravating action could slow the development of new norms. Some provocative measures can lead to change in the law. Much of the law of the sea evolved through unilateral, arguably provocative acts, whether the Truman Declaration or Iceland's decision to close off waters near its shores to British fishing vessels.[88] International norms become stuck in the present without the protest and reactions that allow it to develop over time.

Fifth, a vague duty may enhance the effectiveness and legitimacy of international institutions that invoke it, whether the Security Council or an international court. From the effectiveness perspective, those bodies may better prevent aggravation by not deciding up front what specific acts to ban. They might best invoke the duty and then decide later if any acts by the targets of the command violate it, a strategy pursued by the *Gramercy Funds* tribunal. With respect to legitimacy, decision-makers without hard enforcement powers can benefit from issuing orders whose violations are hard to identify. Whether domestic or international judges or members of the Council, they risk delegitimization if their orders are ignored.[89] This deployment of vagueness ironically preserves the institution's 'semantic authority' – its ability to shape meanings of norms and make its utterances authoritative.[90] A court's credibility as an interpreter of norms depends on accepting its own limits.

[85] International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts (ILC ASR), UN Doc. A/56/10, November 2001, at 128. ('[C]ountermeasures are liable to abuse and this potential is exacerbated by the factual inequality between States').

[86] Poscher, *supra* note 75, at 143–144.

[87] I appreciate this comment from Kathleen Claussen.

[88] 'Policy of the United States with Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf', 10 Federal Register (1945) 12305; *Fisheries Jurisdiction Case (United Kingdom v. Iceland)*, Merits, 25 July 1974, ICJ Reports (1974) 3.

[89] I appreciate this insight form Melissa Durkee. For a defence of vagueness from constitutional law, see Gewirtz, 'Remedies and Resistance', 92 *Yale Law Journal* (1983) 585 (regarding 'all deliberate speed' remedy in *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954)).

[90] I. Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists* (2012), at 63; see also Kulick, *supra* note 73, at 276–277.

C *Arguments for a More Specific Duty*

At the same time, two weighty arguments call for further specificity in the signal to states and non-state actors as to action that will aggravate a dispute. First, under the status quo, those actors are presented with an authoritative command – emanating from the Security Council or tribunal, a well-accepted interpretation of the Charter or a customary law duty in the context of international litigation – to refrain from aggravating acts. In the case of other important bans, states have a general idea of the conduct flowing from the duty – not to use force unilaterally, implement sanctions imposed by the Council (even if certain sanctions require further interpretation) or carry out detailed provisional measures. And, of course, treaties are full of specific commands, even as interpretation is inevitably part of their implementation.

If decision-makers expect actors to observe the non-aggravation duty, they should give some guidance – the form of soft or hard law is not the issue – about what it prohibits. Otherwise, the commands risk irrelevance. Indeed, states have already taken this step in two seminal General Assembly resolutions – the FRD itself, offering an authoritative interpretation of various Charter provisions, and the Definition of Aggression, which provides guidance on one critical term in the Charter.[91] To a very limited extent, this clarification is already proceeding for the non-aggravation duty through the examples by courts and the Council noted earlier. But they have not clarified expectations about the scope of prohibited acts very much.

At least two theories of compliance suggest that specificity can make a difference. First, an institutionalist approach based on international law's embeddedness in regimes – regimes that channel and restrain behaviour through repeated interactions and procedures – would see interactions organized around more specific norms as offering greater potential for regulating behaviour than interactions organized around a vaguer norm. Just as discussions about whether a state has violated the immunity of an embassy are more focused than those about whether it has violated the 'sovereignty' of a sending state, so deliberations around a more specific duty of non-aggravation could promote regime effectiveness.[92]

In addition, a theory emphasizing the inherent value of legal norms in affecting behaviour would predict that rules with greater specificity – 'determinacy' in Thomas Franck's terminology – will exert a greater compliance pull on states. Franck recognized the hazards of both rules with no exceptions ('idiot rules') and open-textured rules that require detailed elaboration to be acting-guiding in particular cases ('sophist rules').[93] His strategy for threading the needle demanded that institutions engage in a deconstructionist technique: 'to leave regulated by simple what-based rules only those activities as to which there is a general systemic consensus to bar exculpatory *why* and *to whom* considerations under any conceivable circumstances.'[94] This process leads to

[91] GA Res. 3314 (XXIX), 14 December 1974.

[92] See, e.g., A. Chayes and A. H. Chayes, *The New Sovereignty* (1998), at 10–11; Abbott and Snidal, *supra* note 76, at 427 ('Precision of individual commitments . . . help[s] limits such opportunistic behavior').

[93] T. Franck, *The Power of Legitimacy Among Nations* (1990), at 50–77.

[94] *Ibid.*, at 89.

determinacy and thus compliance – but also foreseeability and legal security, essential components of the rule of law.[95]

Second, specificity has particular traction in light of the *purpose* of the non-aggravation duty, in both its manifestations. In the most general sense, it serves the goal of preventing increased tension, mistrust and hostility between parties to a dispute – and other actors affected by that dispute. In the peace and security context, such tensions could lead to serious repercussions for global public order – not just armed conflict, but also economic warfare, inflammation of national or ethnic disputes or triggering of migration or refugee flows. The unravelling of cooperative systems that took decades to develop is now a serious risk to international law's goal of discouraging acts that carry grave risks for individuals, states and the planet. In its judicial permutation, the duty promotes the functioning of a particular form of dispute settlement with its own advantages for public order. To foster this mode of settlement, parties should know that it offers the possibility of some kind of freezing of the dispute while the tribunal works out a solution.

International law is not averse to unilateral state action, because that action can be the first step to cooperation, compliance with existing law and better new law. But a core part of its mission is to promote peaceful change, as manifested in the Preamble, Article 1(1) and Article 2(3) of the Charter. These principles are constitutive of modern international law. And the essence of a choice to use judicial means to address disputes is that certain unilateral measures are to be put on hold (even as the doors for amicable settlement remain open).

Our goal, then, should be to construct a set of guidelines or principles that offer the advantages of normative specificity with an awareness of the five risks. Thus, the guidelines should (1) acknowledge states' insistence on significant freedom of action in the absence of specific prohibitions; (2) preserve important modes for states to respond to prior violations of law; (3) limit prospects for self-judging of a provocative act; (4) permit the development of new norms; and (5) avoid undercutting the legitimacy and effectiveness of institutions by boxing them into imposing requirements that, if evaded, will harm those institutions.

4 Elements of a Ban on Aggravating Measures

My elaboration of the duty of non-aggravation relies on four factors to distinguish an aggravating act that international law should proscribe from a non-aggravating act: the perceived purpose of the act, the legality of the act, the degree of coercion involved in the act and the anticipated (or in some cases the actual) response to the act. These factors emerge from both a logic of discovery and a logic of appropriateness. With respect to the former, they are grounded in the practice of states in terms of the kinds of actions states seem to regard as aggravating, or realistic predictions about the sort of actions that states would regard as aggravating. This is a sort of common law

[95] Cf. Haque, *supra* note 80 (on mediating doctrines).

reasoning, deriving current expectations of lawfulness from the actions and reactions, or likely actions and reactions, of global actors.

Regarding the latter, the criteria are grounded in the need to identify actions whose prohibition will *promote the purposes* of the non-aggravation duty, while taking account of the risks involved in a more specific obligation. Thus, I am not merely restating existing expectations but elaborating the duty in a way that serves its underlying purposes. This method produces guidance somewhere between *lex lata* and *lex ferenda*.[96] It is not wholly trapped in the existing views of states but seeks to provide guidance that respects the overall purpose of the duty of non-aggravation.[97]

Before proffering these factors, one aspect of the duty of non-aggravation requires clarification – the meaning of 'dispute', for both the FRD and the typical tribunal order prohibit actions that may aggravate a 'dispute'. As for the meaning of a dispute for purposes of *the duty not to aggravate so as to endanger peace and security*, the South China Sea arbitration ruling is correct insofar as international law does not contain a general duty on states not to aggravate their relations. Without an ongoing dispute between the relevant parties, an initial provocative act – one that could create a dispute – is not covered by the non-aggravation duty. Under such an interpretation, guidance to identify acts that violate the duty should not address acts that *create* disputes at all.[98]

The implications of this view can be seen with the aid of two scenarios. At one end, two states might be enjoying overall friendly relations (as with most states within well-functioning regional organizations) or have agreed to channel their disagreements into a cooperative mechanism (such as the Iran nuclear agreement or a formal dispute settlement process). Or two non-state actors could be working within the framework of a political or legal document to address their competing claims for power, such as a peace agreement (like the Good Friday Accords), or even a contract between an investor and a host state. Here the baseline of relations between the parties consists of full or limited cooperation. At the other end, two states may already have tense relations generally or over certain issues (such as that between the European Union / United States and Russia over Crimea), or a host state may have already expropriated the assets of a foreign investor. In the former case, one might claim the absence of a dispute to begin with; while in the latter case, a dispute, if not an outright conflict, is already under way. Thus, presumably, the non-aggravation duty would prohibit provocative acts only in the second case.

Yet this interpretation seems both practically unmanageable and normatively undesirable. Practically, interstate relations are never characterized by an absolute baseline of no disputes. (Even Switzerland and Germany disagree about things, e.g. the

[96] For defences of this sort of 'critical positivism', see Peters, 'Realizing Utopia as a Scholarly Endeavour', 24 *EJIL* (2013) 533; A. Cassese, *Five Masters of International Law: Conversations with R.-J. Dupuy, E. Jimenez de Aréchaga, R. Jennings, L. Henkin and O. Schachter* (2011), at 258–260.

[97] For an example combining existing and desired practice, see World Bank, Guidelines for the Treatment of Foreign Direct Investment, 1992, preamble para. 4 ('reviewing existing legal instruments and literature, as well as best available practice', to create 'a set of guidelines representing a desirable overall framework which embodies essential principles meant to promote foreign direct investment').

[98] See Peters, *supra* note 40, at 125 (duty on states to negotiate disputes but not situations).

noise from the Zurich airport.) Every act a state takes against another state that could reasonably be considered aggravating or provocative, unless it is wholly irrational, is triggered by some kind of dispute, so the baseline of no disputes is mythical. For instance, one could not say that the duty did not apply to the US withdrawal from the 2015 Iran nuclear agreement on the grounds that that deal ended that dispute, let alone all disputes, between those two states.

Normatively, in terms of the goal of limiting threats to public order, the negative consequences of an initial provocative act, one that somehow creates a dispute, may be worse than those from an act taken by a state in the midst of an ongoing dispute. To take Crimea as an example, if we think of Russia's infiltration and encouragement of ethnic Russians to split off as creating the dispute with Ukraine and other states, then it is clear that that act creates enormous consequences for the stability of Ukraine and economic relations in southeast Europe. A narrow view of the non-aggravation duty would say that it simply would not apply because there was no pre-existing dispute. As a result, an important class of aggravating acts is simply left out, giving the state that initiates a dispute a free pass.

These pragmatic and normative findings suggest that the dictum from the South China Sea case needs to be interpreted quite narrowly. While international law does not include a duty on states not to aggravate their *relations*, the term 'dispute' – that which they do have an obligation not to aggravate – should be read to cover any significant disagreements between them.[99] In the case of the Iran nuclear deal, Iran had a dispute with the other powers over its nuclear programme. The 2015 agreement did not end the dispute, but merely contained it; and the US pull-out aggravated rather than caused the dispute. The Russian intervention in Ukraine did not on its own create the Crimea dispute, but it certainly aggravated it.

With respect to the meaning of 'dispute' in the context of a *provisional measures order of non-aggravation*, the baseline question is less problematic. A tribunal's orders of non-aggravation are directed to actions that might aggravate the narrow dispute 'before' the Court, i.e. the dispute over which the court has or likely has jurisdiction. A tribunal cannot order a party not to aggravate completely unrelated disagreements. Its power – and the corresponding duty on participants in the case – is limited to acts aggravating *that* dispute. Yet, as discussed in Section 2.C, the dispute between the parties to a tribunal proceeding is often broader than the narrower legal dispute 'before' the tribunal and acts aggravating the broader dispute (over which the court lacks jurisdiction) are almost certainly likely to aggravate the narrow dispute. Thus, in developing criteria for an aggravating act, we need to derive factors that would identify those broadly aggravating acts as well.

[99] Cf. Simma et al., *supra* note 17, Art. 2(3), para. 28 (political tension or 'situation' becomes a dispute as soon as 'one of the parties addresses specific claims to another State, which the latter rejects').

A *The Perceived Purpose of the Act*

States and non-state actors act on the international plane for a plethora of reasons. I would identify four categories that seem most relevant to classifying acts as aggravating. First, state or non-state actor *A* might be acting in direct response to a *prior illegal act* by state *B*. In that situation, *A* has a (defeasible) claim that its actions are not provocative. That claim can be rebutted by virtue of some of the other factors discussed below. A state can overreact to a prior violation – consider state *A* that deports all foreigners of nationality *B* after *B*'s police tow away and search a diplomatic vehicle from *A* for illegal parking.

Second, a state or non-state actor might be *asserting its own well-accepted legal rights or privileges* or defending those of other states, a motivation that also leans against classifying its action as aggravating. The dispatch of a naval vessel into an international strait,[100] defending the immunity of a diplomatic official from the jurisdiction of domestic courts[101] or an investor's challenge of an uncompensated expropriation in local courts[102] would constitute actions that are presumptively not provocative. The extent to which the right is widely accepted will be the key factor pointing towards non-aggravation. But states (or non-state actors) might assert even well-accepted legal rights in a way that other states regard as threatening; for example, repeated sailing of a large military fleet off a state's coast. These acts would represent an *abus de droit*, a notion already recognized in international law.[103]

Third, a state might be seeking to *create new law* – to fill in a normative gap or even change the law.[104] These actions would create a slight presumption against characterizing the act as aggravating, insofar as the state is hoping that a new form of regulation will eventually take place. But, as discussed below, the manner of the act will also play a role.

Fourth, and leaning in the other direction, are *intentionally provocative* acts, where the initiators hope to gain attention or ultimate advantage by exacerbating relations with others. If, for instance, one governmental leader insults another or says racist or derogatory comment about a particular people, community or state, such actions seem reckless and ought to be limited.[105] If one state wants to teach a 'lesson' to another state (not assert any clear legal rights) – to subdue or humiliate it – through off-shore military drills or missile tests, such a motive would also push the act to being appraised as aggravating.[106] Or if, during an arbitration, an investor falsely accuses

[100] See UNCLOS, *supra* note 21, Arts 35, 43 (right of transit passage and duty not to suspend it).

[101] Vienna Convention on Diplomatic Relations (VCDR), 18 April 1961, 500 UNTS 95, Art. 31.

[102] World Bank, Guidelines on the Treatment of Foreign Direct Investment, *supra* note 97, Art. IV.

[103] See Byers, 'Abuse of Rights: An Old Principle, A New Age', 47 *McGill Law Journal* (2002) 389.

[104] See, e.g., 'Policy of the United States on the Continental Shelf', *supra* note 88.

[105] See, e.g., 'Ahmadinejad: Holocaust a Myth', *Al Jazeera*, 14 December 2005, available at https://bit.ly/2TWBSAS ('if somebody denies the myth of the massacre of Jews, the Zionist loudspeakers and the governments in the pay of Zionism will start to scream'); 'Transcript of Press Conference by Secretary-General Designate Ban Ki-Moon', United Nations (14 December 2006), available at https://bit.ly/36a7fNZ (Ban Ki-Moon's response to Iran Holocaust denial conference: 'denying historical facts, especially such a very important historical fact as the Holocaust, is not acceptable').

[106] See, e.g., *Corfu Channel Case (United Kingdom v. Albania)*, Merits, 9 April 1949, ICJ Reports (1949) 4, at 28 (telegram to head of British fleet noting that 'His Majesty's Government . . . wish to know whether the Albanian government have learnt to behave themselves').

the government of torturing or spying on them, such an act could well be regarded by a tribunal as aggravating an investor–state dispute.

A critical aspect of this factor is its concern with the *perceived* purpose of the act. For the actual purpose of a state or non-state actor is often known only to a handful of its principals. Thus, if the state's actions (e.g. the tone of a diplomatic communication) indicate to a reasonable observer that it is trying to provoke another state or non-state actor, then the factor weighs in the direction of aggravation. And equally important, if a state has a more justifiable purpose – responding to an illegal act, otherwise asserting its legal rights or reforming the law – it must act so that other actors recognize that purpose for this factor to point towards non-aggravation. Even the perceived reason for a state's potentially aggravating act may be contested, for example in the case of economic sanctions, which some observers will see as a response to an illegal act and others as a response to a policy objectionable to the sanctioning state.[107]

Courts can and should rely on this factor, as well, in identifying aggravating acts. When a litigant acts under a legal duty or asserts its well-accepted legal rights, it is less likely to be abusing the tribunal process; whereas an intentionally provocative act shows a disregard for that process. Creating new law is, however, more problematic in the judicial context because the state has already agreed to the resolution of the dispute through judicial means. Bypassing that mode even to create new law can undermine the functioning of the court, as seen during the ICJ proceedings between Iceland and Britain over fishing rights.[108]

B *The Legality of the Act*

A second factor for characterizing an act as aggravating is its legal valence. A legally *required* action should not be seen as provocative. When a state has a duty under UNCLOS to aid another ship in peril,[109] a duty not to push back refugees to their place of persecution[110] or a duty to implement UN sanctions,[111] the state acts pursuant not merely to lawful authority, but to a legal obligation to respond to a situation. From the perspective of encouraging respect for the rules of international law, the state's decision to follow its legal obligations cannot be considered provocative.

On the other hand, a legally *prohibited* action, all other things being equal, moves in the direction of provocation. Such action can evince a disregard for the rules of the international system. At the same time, some illegal acts are more likely to aggravate disputes than others. Violations of core norms of the international system – on the use of force, non-intervention, immunity of states, basic

[107] See Ruys, 'Sanctions, retortions and countermeasures: concepts and international legal framework', in L. van den Herik (ed.), *Research Handbook on UN Sanctions and International Law* (2017) 19, at 31–32.

[108] See Steinsson, 'The Cod Wars: A Re-analysis', 25 *European Security* (2016) 256.

[109] UNCLOS, *supra* note 21, Art. 98.

[110] Convention relating to the Status of Refugees, 28 July 1951, 189 UNTS 2545, Art. 33.

[111] UN Charter, Art. 25.

human rights and humanitarian law, and some rules of international economic or environmental law – are generally more provocative than violations of more mundane rules (e.g. on telecommunications or double taxation).[112] Moreover, if the illegal act is completely unrelated to the particular dispute (even broadly construed), it is not likely to aggravate that dispute. Thus, if Slovakia illegally arrests a French subject, it would probably not aggravate an investment dispute between a British company and Slovakia. Moreover, if the illegal act is de minimis, it may not aggravate a dispute. So illegality is not simply a proxy for aggravation (or vice versa).

The harder category includes the many acts that the law neither prohibits nor requires, but merely *permits*. Such permission could be express, for example, terminating a treaty in response to a material breach,[113] or taking a countermeasure that meets the criteria of customary international law.[114] Or it could be implied through the lack of an obligation not to do the underlying act, for example, denouncing a foreign state's human rights abuses. While the first group may have a slightly stronger claim to classification as non-aggravating because of the explicit grant of authority, in some cases it will be hard to determine whether the legality is based on an explicit permission or the lack of a ban.[115] Overall, it is difficult to draw any connections between the legal permissibility per se and its aggravating or non-aggravating nature.

Yet within the group of permitted acts, if the state is advancing some *broadly shared values* rather than simply advancing its own foreign policy agenda, then its actions would seem less provocative pro tanto. If it declares a diplomat persona non grata because she has committed a serious crime in the host state,[116] that action advances the broadly shared value of ensuring that diplomats follow local law and carry out the tasks – and only the tasks – assigned to them under the Vienna Convention on Diplomatic Relations.[117] If a host state, however, makes the persona non grata determination to demonstrate its displeasure with the sending state's foreign policy, it is not using its liberties under international law to advance shared values.[118] Similarly, if a state's termination of a treaty after a material breach is seen as self-serving, it will

[112] See, e.g., GA Res. 73/194, 17 December 2018 ('Expresses its utmost concern about the dangerous increase in tensions and the unjustified use of force by the Russian Federation against Ukraine . . . and also calls for the utmost restraint to de-escalate the situation immediately. . . .'); *Tehran Hostages Case,* Order, *supra* note 50, para. 38 (inviolability as a 'fundamental prerequisite for the conduct of relations between States').

[113] VCLT, *supra* note 22, Art. 60.

[114] ILC ASR, *supra* note 85, Arts 49–52.

[115] See Ruys, *supra* note 107, at 35–36 (grounds for UN sanctions often disputed).

[116] VCDR, *supra* note 101, Art. 9.

[117] *Ibid.*, Arts 3, 41.

[118] See Kurmanaev and Minder, 'Bolivia Expels 3 Diplomats in Tiff With Mexico and Spain Over Morales Aides', *New York Times,* 30 December 2019, available at https://nyti.ms/2IfiJqY (though noting Bolivia claims illegal activity by Mexico in granting diplomatic asylum).

be seen as provocative.[119] Nonetheless, the line between a broadly shared value and a parochial interest may not be clear, as arguments over the agenda of the Security Council and sanctions suggest.[120]

Courts can also deploy this criterion to appraise conduct that may aggravate a dispute before them. Acts mandatory under international law should, all things being equal, not be considered as aggravating the dispute. Illegal acts are more likely to be aggravating, though not always. Among legally permissible acts, those not serving the narrow interests of one of the litigants are less likely to be aggravating.[121]

C *The Gravity or Coercive Nature of the Act*

The output of the Security Council and tribunals suggest that some notion of gravity is key to identifying an aggravating act. And indeed, from a normative perspective, more severe acts are likely to lead to the tensions that the duty is meant to prevent. Gravity, however, is often in the eyes of the beholder, so normative guidance requires some grounds for objective discernment (the difference between 'this tastes terrible' and 'this is very salty'). A more precise and relevant marker is its *coercive nature*, i.e. does it impose serious material or human costs on the receiving party that it cannot easily avoid? Consider the following common state actions that could elicit accusations of aggravating a dispute, on a scale of increasing coercion:

(1) written protests;
(2) oral protests;
(3) downgrading of communications channels (e.g. through reduction in diplomatic staff or non-participation in bilateral or multilateral fora);
(4) passive demonstrations of military power (e.g. overflights in the high seas);
(5) creating 'facts on the ground' where states have some disagreement over a territorial issue;[122]

[119] In the context of the US withdrawal from the Intermediate-Range Nuclear Forces (INF) Treaty, see Russian Government News, *Dmitry Medvedev and Xavier Bettel's news conference after the talks*, 6 March 2019, available at http://government.ru/en/news/35940 (Russian foreign minister: 'Any withdrawal from a treaty before its expiration date is itself dangerous. . . .'); NATO, *NATO Statement on the Intermediate-Range Nuclear Forces (INF) Treaty*, 4 December 2018, available at https://bit.ly/2I9m3UY ('We strongly support the finding . . . that Russia is in material breach of its obligations under the INF Treaty [which] erodes the foundations of effective arms control . . . .'); UN, *General Assembly Rejects Resolution Calling for Strengthening Russian–United States Compliance with Intermediate-Range Nuclear Forces Treaty*, 21 December 2018, UN Doc. GA/2116 (by 43-46-78, Assembly rejects Russian proposal urging parties to keep the treaty in force).

[120] Another distinction among permissions is between Hohfeldian claim-rights, implying duties on others (e.g. the right of innocent passage), and liberties (like withdrawing from a treaty). The former might be viewed as less aggravating, as other actors must allow for their exercise rather than simply lack a right to stop it. Beyond the practical difficulty of distinguishing between those categories in the course of ongoing disputes, it seems difficult to justify privileging the former set categorically, though I would not quite rule it out. I appreciate this point from an anonymous *EJIL* reviewer.

[121] See, e.g., *Certain Activities* and *Construction of a Road*, Order, *supra* note 54, paras. 37, 38.

[122] See, e.g., SC Res. 2334, 23 December 2016 (by 14-0-1, Council '[u]nderlines that it will not recognize any changes to the 4 June 1967 lines . . . other than those agreed by the parties through negotiations').

(6) actively undermining a shared political or legal framework for resolving an issue (e.g. boycotting an election or stuffing ballots);[123]
(7) economic measures, such as trade sanctions or boycotts;[124]
(8) other non-economic measures against nationals of the other state (e.g. non-admission or forced departure);
(9) physical enforcement actions on the territory of another state;[125]
(10) forcible military measures (along a range of conduct).[126]

As a general matter, the further along this spectrum the act by a party to a dispute appears, the more likely, prima facie, it is aggravating or provocative. This ordering of coercion is distinct from the legality of the act. For instance, some economic sanctions are required by the Security Council;[127] others are textually authorized by the World Trade Organization (WTO) Agreements;[128] others are implicitly authorized through a lack of a ban on certain sanctions; and some sanctions, such as those on humanitarian goods, may well be illegal.[129] At the same time, this brief ranking is rough and does not capture aggravating acts that are not coercive in terms of economic or human costs. Certainly, some oral protests, given their tone, could be more aggravating of a situation than a passive demonstration of military power.

In the judicial context, coercive acts would involve some kind of direct harm to the other party (or its counsel) in connection with the dispute, as well as active interference in the work of the tribunal (although the two will often overlap).[130] The latter could include attempts to undermine the independence and impartiality of the tribunal.[131] Coercion or severity also seems linked with irreversibility of the act. As noted earlier, jurisprudence from the ICJ and other tribunals typically requires the party seeking provisional measures to demonstrate irreversible harm from the actions of the other party.[132]

[123] See, e.g., SC Res. 792, 30 November 1992 (condemning Khmer Rouge partial renunciation of obligations under Cambodian peace accord).
[124] GA Res. 74/7, 7 November 2019 (by 187-3-2 calling for an end to the US economic embargo on Cuba).
[125] See, e.g., Leaders of France, Germany, the United States, Canada and the United Kingdom, *Salisbury Attack: Joint Statement*, 6 September 2018, available at https://bit.ly/32hFj9I.
[126] See, e.g., GA Res. 73/194, 17 December 2018.
[127] See, e.g., SC Res. 2270, 2 March 2016 (on North Korea).
[128] Understanding on Rules and Procedures Governing the Settlement of Disputes, 15 April 1994, 1869 UNTS 401, Art. 22.
[129] See, e.g., SC Res. 2397, *supra* note 36, para. 25 (exceptions for North Korea); *Alleged Violations of the 1955 Treaty*, Order, *supra* note 6, paras 91–92, 98. See generally Craven, 'Humanitarianism and the Quest for Smarter Sanctions', 13 *EJIL* (2002) 43.
[130] See, e.g., *Gramercy Procedural Order No. 9*, *supra* note 61; *South China Sea*, *supra* note 9, paras 1176–1180.
[131] See, e.g., PCA, *In the Matter of an Arbitration under the Arbitration Agreement between the Government of the Republic of Croatia and the Government of the Republic of Slovenia, Signed on 4 November 2009*, Partial Award, 30 June 2016, PCA Case No. 2012-04, para. 175 (Slovenian agent and appointed arbitrator 'acted in blatant violation' of obligation of independence through *ex parte* conversations attempting to influence tribunal) (hereinafter '*Croatia-Slovenia Partial Award*').
[132] See discussion in Section 2.C above.

D *Actual or Anticipated Response*

The non-aggravation duty is an unusual – perhaps unique – rule of international law insofar as an act's aggravating nature (and thus whether it violates the obligation) depends in part on the reaction that it is expected to elicit, or has elicited, from the receiving party.[133] The same act may aggravate a dispute or have no effect upon it, depending on the reaction of states. To advance the purpose of the duty, we need to identify acts that elicit a *certain kind of response*, one that worsens tensions among the parties. Thus, decision-makers contemplating an act, or judging it after the fact, need to consider the predicted reaction, discounted by its probability, to discern if it would be or was provocative. *Ex post*, they may be able to evaluate the actual reaction if enough time has elapsed to allow other parties to respond. To make matters more complicated, both the FRD and the typical judicial order bar actions that 'might' aggravate a dispute, not those that actually end up aggravating a dispute.

This factor creates a triply complicated challenge: (1) determining the threshold of likelihood that qualifies an action as one that 'might' aggravate tensions; (2) applying that threshold to predict the reaction by the other disputants (a question that does not arise if the state reacts quickly to the first state's act); and (3) discerning among actual or anticipated responses those that ought to count for purposes of identifying an act as provocative from those that should not.

Question (1) requires a judgment of the meaning of 'might'. Tribunals offer little guidance on this issue, with a few investor–state tribunals restating the obvious in noting that the threat of aggravation 'involves possibilities, not certainties'.[134] I would argue that an action might aggravate a dispute if there is a reasonable possibility that it would – somewhere between a probability and a theoretical possibility.

Question (2), the core epistemological challenge, entails a prediction of whether an action might lead to a worsening of a dispute. But the challenge is hardly insurmountable, as such judgments can be handled through recourse to historical practice. For a particular act, we would ask, 'How frequently has an act like this one resulted in some negative reaction by (different kinds of) audiences in the past that has worsened the dispute?'. If the answer is 'rarely', such an act does not create a reasonable possibility of aggravating the dispute. If this sort of act has resulted in negative reactions with some frequency (not even most of the time), then it would meet the threshold. At the same time, many acts are unprecedented, so some predictions will be based on analogies from other acts and reactions.

Question (3) is normatively the most challenging. On the one hand, a duty requiring states to refrain from actions that might aggravate a dispute implies that states must

[133] At the same time, the real-world effect of a law violation always depends on the reactions of others to it, as states routinely decide not to press legal claims. See, e.g., Kress and Nussberger, 'The Entebbe Raid – 1976', in T. Ruys and O. Corten (eds), *The Use of Force in International Law: A Case-Based Approach* (2018) 220, at 231–233.

[134] ICSID, *Biwater Gauff v. Tanzania – Procedural Order No. 3*, 29 September 2006, ICSID Case no. ARB/05/22, para. 145; *EuroGas and Belmont Resources*, supra note 69, para. 90.

think about the consequences of their action, and guidance that encourages them to think about reactions in a more systematic manner is thus to be welcomed. On the other hand, those reactions can range from the reasonable to the unreasonable, based on our considered experience of international intercourse. To take two extremes, Turkey's strong condemnation of the killing of Jamal Khashoggi in the Saudi consulate in Istanbul seems like a reasonable reaction to several grave violations of international law by Saudi Arabia; for example, the ban on extraterritorial enforcement, misuse of the consular premises and serious violations of human rights.[135] On the other hand, were Israel to drop a bomb on Iran for hosting a Holocaust denial conference, or were China to deport all Japanese citizens after a visit to the Yasukuni Shrine by the Japanese prime minister, such actions would likely be seen globally, prima facie, as an unreasonable over-reaction.[136] Free speech jurisprudence reflects this caution in the notion of the heckler's veto.[137] So do philosophical critics of consequentialist reasoning, who argue that because the consequences of an act could include unjustified responses to it, consequentialism ends up condemning a justifiable act.[138]

An opposite problem looms, however, namely that some reacting states may 'swallow' the original act, whether for fear of antagonizing the first state – a particular fear for developing states – or because they do not want to be seen as aggravating the conflict through a further reaction. In such a scenario, where state *B* does not react, or not much, has state *A* aggravated the dispute, or is the dispute at the same state of tension as it was before? The lack of an overt reaction by state *B* does not mean that the dispute stands exactly where it did before, for *A*'s actions could affect many of *B*'s actions as the conflict continues. For a duty of non-aggravation to disincentivize states from actions that will actually aggravate a dispute, the lack of an expected reaction cannot be dispositive. Thus, just as international law should not prohibit states or other actors from advancing their policies even if it is 100 percent certain that those actions will upset or even infuriate other actors, it should not give them a carte blanche to ignore those reactions.

One promising concept to address overreaction and underreaction for purposes of characterizing the initial act as aggravating is *proportionality*, a principle that cuts across many areas of international law.[139] A test could work something like this: If state *A* takes an action that leads or has a reasonable possibility of leading state *B* to respond in a way that will worsen the dispute, and if (and only if) that response *is not seriously disproportionate* to state *A*'s act, then this factor would argue for identifying

[135] See Ratner, 'The Khashoggi Murder: How Mohammed Bin Salman Underestimated International Law', *Lawfare*, 22 October 2018, available at https://bit.ly/2TYlkZ0.

[136] See Fathi, 'Holocaust Deniers and Skeptics Gather in Iran', *New York Times*, 11 December 2006, available at https://nyti.ms/36alFxt; Tabuchi, 'With Shrine Visit, Leader Asserts Japan's Track from Pacifism', *New York Times*, 26 December 2013, https://nyti.ms/2IbdM2J.

[137] See, e.g., in the US context, Hill v. Colorado, 530 U.S. 703, 734 (2000).

[138] Williams, 'Consequentialism and Integrity', in S. Scheffler (ed.), *Consequentialism and Its Critics* (1988) 20; R. E. Goodin, *Utilitarianism as a Public Philosophy* (1995), at 132–148.

[139] See generally Crawford, 'Proportionality', in *MPEPIL*, *supra* note 13.

the original act as one that may aggravate the dispute. (*Ex ante*, state *A* would have to take this factor into account in deciding whether to take the action.)

This test addresses the possibility of *overreaction* by holding *A* responsible only for reactions generally proportionate to its initial act and not those seriously disproportionate to it. While even a seriously disproportionate reaction by *B* to *A*'s act might be deleterious to peace and security, or the integrity of a judicial process, to blame *A* for that reaction would fall prey to the first challenge – i.e. holding a state responsible for an overreaction by the other. Indeed, in that scenario, the provocative and aggravating act is *B*'s, not *A*'s. And it addresses the possibility of *underreaction* because it does not require that *B*, *C* or other states actually so act, just that they could do so.[140]

This criterion requires considering the reaction of states other than *B* in the context of the FRD-based duty – though not in the judicial context, as a court cannot issue orders to non-parties to the dispute. For instance, observers may believe that state or non-state actor *B* will respond in a way that does not increase tensions, but allies of *B* may do so. State *A* needs to take those other reactions into account as well. They would be subject to the same proportionality test, though as a practical matter they will often be less important than the reaction of the other parties to the dispute.

Finally, the fourth criterion may play a smaller role in the judicial context. While recipients of an order of non-aggravation should take into account the potential reactions of the other parties to their activities, some conduct will aggravate a dispute regardless of the potential reaction of the other party – namely, actions that directly interfere with the judicial process, such as improper contact with judges, wiretapping of proceedings and the like. Certainly if the other party became aware of these, it would likely react with alarm, and so in that sense, the fourth criterion is at work.[141] But the real aggravation of the dispute is from the harm to the process itself, regardless of the possible reactions.

E *Summarizing the Factors*

The above approach can be summarized as follows:

(1) If a state or non-state actor acts with the perceived purpose of asserting its own or others' clear legal rights, or to advance a normative change, that perceived purpose cuts against a finding of aggravation, while a perception of a deliberate attempt to antagonize other actors cuts in favour of one.

[140] The test run up against a limiting case, namely acts that could lead to seriously disproportionate reactions or grave accidents (e.g. nuclear war). In those cases, state *A* should consider the possibility of such reactions and refrain from the contemplated act. Rather than introducing a fifth criterion – the possible *final trajectory* of the dispute – in the spirit of Occam's Razor, I regard this as a limiting case. One similar episode was Iran's seemingly accidental destruction of a Ukrainian passenger jet in January 2020 after the United States killed an Iranian general, leading to high-alert status for Iran's air defences. The United States faced at least subtle accusations of aggravating its dispute with Iran; for example, McMahon, 'Trudeau Says Canada Wasn't Warned of Soleimani Strike, Says Crash Victims Would Be Alive if Not for U.S.–Iran Tensions', *Toronto Globe and Mail*, 13 January 2020, available at https://tgam.ca/2TXwihF (quoting Canadian Prime Minister: '[I]f there was no escalation recently in the region, those Canadians would be right now home with their families'). If the accident was within a range of predictable outcomes from the US attack, the accusation of aggravation seems well founded.

[141] See *Croatia-Slovenia Partial Award, supra* note 131.

(2) Legally required acts should prima facie not be considered aggravating; legally permitted acts are prima facie less aggravating than unlawful acts; and legally permitted acts that advance broadly shared values are prima facie less aggravating than other legally permitted acts.
(3) The greater degree of coercion by the initiating state or non-state actor, or other palpable harm to individuals, the more likely the act is aggravating. Subverting established channels for dispute settlement would also prima facie prove aggravating.
(4) As for the actual or anticipated reaction, if an act has a reasonable possibility of leading to a reaction that would worsen the dispute and that reaction is not seriously disproportionate to the original act, then, prima facie the original act is more likely to be aggravating the dispute.

This list of factors meets the test set out earlier for a normative advance on the status quo. It offers a greater specificity and predictability by providing a list of factors, rather than a completely open-ended standard of behaviour. Those factors identify action by a party to a dispute that, as a general matter, is likely to increase tensions and thereby should be avoided to advance the goals of the duty. Each of the four factors influences whether a state's action during a dispute has a reasonable possibility of creating the negative consequences that inhibit states' ability to comply with Article 2(3) of the Charter; and they also capture whether a party's actions may aggravate a dispute before an international tribunal.

The list also takes account of the five risks to normative elaboration identified earlier. (1) The factors preserve significant freedom of action for states, as minor acts that may offend some actors are not aggravating, and an act's legal permissibility can at times argue against characterizing it as aggravating. (2) The list preserves most ways for states to react to violations, preserving the law's horizontal mechanisms for enforcement, such as protests, sanctions and countermeasures. (3) Because the criteria for a provocative act are based in part on the practices of states, they are less prone to self-judging than the status quo; observers can look at analogous cases to appraise the relevant conduct. (4) The factors take account of the legitimate desire of states to develop some norms through unilateral actions, as not all illegal acts are provocative or aggravating. (5) These factors preserve the legitimacy and effectiveness of political or judicial decision-makers, because they still have flexibility to weigh the factors and determine which acts to prohibit in their orders. At the same time, if an institution applies the criteria, identifies acts as prone to aggravate a dispute and issues an order to cease those acts, it risks defiance of its order, with worse results than with a vague order of non-aggravation.

5 Red, Yellow, Green

The four variables offer an opportunity to assist states in deciding *ex ante* whether to take a particular act in the midst of a dispute and to aid international decision-makers in deciding *ex post* whether a particular act will aggravate a dispute or has done so.[142]

[142] See Haque, *supra* note 80, at 126 (mediating doctrines 'give determinate effect to a legal rule whose correct application is indeterminate over some range of cases').

Yet the factors are well short of a test; I have not ranked the factors nor suggested that any are necessary or sufficient for an act to be aggravating; and most of the factors are not susceptible to simple coding, as in coercive/non-coercive. Instead, the duty exhibits what Andrei Marmor calls multidimensional vagueness, with a number of criteria for identifying violations, some of which come in degrees, but 'no common denominator [that] would allow a quantitative comparison of the various constitutive elements on a single evaluative scale'.[143] This state of affairs results from my methodology of combining observation and normative goals. State practice does not permit more precise gradations; and the normative challenge – advancing the two goals while accounting for the five risks – advises against a rigid hierarchy. Put differently, while we could conceivably come up with a checklist of necessary and sufficient conditions for aggravating acts, it would be neither practice-based nor practically useful.

To move beyond a list of factors, one promising approach is to group various acts into discernable, though only prima facie, categories of permissibility – Red, Yellow and Green. One example of such a mapping is in the International Bar Association's Guidelines for Conflicts of Interest in International Arbitration. The IBA Guidelines include a table identifying some acts as not raising a conflict of interest concern (Green), some requiring disqualification (Red), some justifying disqualification unless waived by the parties (Waivable Red) and an intermediate category of acts that 'depending on the facts of a given case, may, in the eyes of the parties, give rise to doubts as to the arbitrator's impartiality or independence' (Orange).[144] None of the lists is exhaustive, yet they address many situations facing potential arbitrators and are a useful guide to interpreting the guidelines themselves.[145] Another example is the WTO's Agreement on Agriculture, with its list of permitted measures of domestic support for agriculture that fit into either an 'Amber Box', 'Green Box' or 'Blue Box'.[146]

A third example, though not based on a tripartite categorization, appears in the Definition of Aggression.[147] Article 2 offers a general definition of certain kinds of force that are 'prima facie evidence of aggression', and Article 3 lists seven acts that constitute aggression (subject to the caveats of Article 2). Article 4 reiterates that the list is not exhaustive. The list itself is frequently cited as authoritative, in particular

[143] A. Marmor, *The Language of Law* (2014), at 89; see also Keil and Poscher, 'Vagueness and Law: Philosophical and Legal Perspectives', in Keil and Poscher, *supra* note 75, at 4. For a similar duty, see Office of the US Trade Representative, *2012 U.S. Model Bilateral Investment Treaty* (2012), Annex B, available at https://bit.ly/3518qQv (unweighted factors for determining expropriation triggering duty to compensate).

[144] International Bar Association, *Guidelines for Conflicts of Interest in International Arbitration*, 23 October 2014, at 17–19, available at https://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx.

[145] See Alvarez, 'Reviewing the Use of 'Soft Law' in Investment Arbitration', 7.2 *European International Arbitration Review* (2018) 149.

[146] Uruguay Round Agreement on Agriculture, 1994, 1867 UNTS 410, Arts. 5–6, Annex 2. See also WTO, *Domestic Support in Agriculture: The Boxes*, available at https://bit.ly/3p2eIHB (last visited 3 November 2020).

[147] See *supra* note 91.

the inclusion of one state's dispatch of 'armed bands, groups [and] irregulars'.[148] Identifying such acts is similar to Franck's deconstruction technique, where we try to find some simple rules amidst a context-dependent norm.

For the non-aggravation duty, the same model can be followed, with Green corresponding to acts that do not prima facie fall afoul of the duty, Red for those that do (though both presumptions could be rebutted) and Yellow for those that could violate the duty, depending on a weighing of the four criteria. The placement of different illustrative acts within the three categories would flow from the four criteria above. In choosing the illustrative acts for the categories, I have sought to catalogue those deployed by states with some regularity and that could be regarded by observers (e.g. states, international organizations and NGOs) as aggravating.

In Table 1, I have highlighted the factor or factors that are doing the key work in the determination of the action (P = perceived purpose; L = legality;

Table 1: Identifying aggravating acts: A tripartite scheme

Green

- Issuance of a diplomatic protest, whether or not in response to a claimed prior illegal act (P, L, C, R)
- Invocation of formal dispute settlement (state, investor or individual vs. state) in response to a claimed prior illegal act (P, L, C)
- Imposition of sanctions in accordance with a Chapter VII decision of the Security Council (P, L)
- Imposition of tariffs in response to a WTO Appellate Body ruling (P, L)
- Regularly, transparently scheduled transit of warships in the high seas and international straits (P, L, C, R)[149]
- Individual and collective self-defence in response to an armed attack (P, L)
- Temporary seizure of a foreign vessel in territorial waters for violating state laws without discrimination based on nationality (P, L, C, R)[150]
- Granting political asylum to a political dissident of another state[151] (L, C)
- Declining to join a multilateral treaty (L, C)[152]
- De minimis or unintended violations of technical elements of treaties, in particular those unrelated to the dispute between two parties (P, C, R)
- * Press conferences by the parties during formal dispute settlement processes[153] (P, L, C)
- * Minor or unintentional violations of the provisional orders of a tribunal with prima facie jurisdiction (P, R)

[148] *Ibid.*, para. 3(g); *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, 19 December 2005, ICJ Reports (2005) 168, para. 146. See also Akande and Tzanakopoulos, 'The International Court of Justice and the Concept of Aggression', in C. Kreß and S. Barriga (eds), *The Crime of Aggression: A Commentary* (2016), at 214, 222–224.

[149] See US Department of Defense, *Freedom of Navigation Program*, 28 Feb. 2017, available at https://bit.ly/38oiq8F.

[150] See, e.g., ITLOS, *M/V 'Virginia G' Case (Panama v. Guinea-Bissau)*, Judgment, 14 April 2014, paras 255–257, 264–271.

[151] See, e.g., Fallows, 'Fang Lizhi', *The Atlantic*, 8 April 2012, available at https://bit.ly/3jYMKbW.

[152] See, e.g., China's non-ratification of the International Covenant on Civil and Political Rights. See S. Sceats and S. Breslin, *China and the International Human Rights System* (2012), at 33. A limiting case might arise with a nearly universally ratified treaty, the Nuclear Non-Proliferation Treaty or UNCLOS.

[153] See, e.g., *Gramercy Procedural Order No. 9*, *supra* note 61, paras 80–85 (refraining from criticizing such actions).

Table 1. Continued

Yellow
• Withdrawal from a bilateral or multilateral treaty (or a peace agreement (P, R))[154]
• Downgrading diplomatic relations (P, R)[155]
• Unscheduled transit or manoeuvres of warships near the territory of other states (P, R)[156]
• Imposition of economic sanctions (e.g. in trade, investment, asset freezes, travel) not authorized by the Security Council (P, L, C, R)[157]
• Violation of Security Council sanctions (P, R)[158]
• Boycotts of international sporting events in response to human rights abuses or other widely condemned illegal acts by the host state (P, R)[159]
• Refusal to negotiate with another state to solve a bilateral dispute (P, R)[160]
• Refusal to participate in multilateral negotiations with broad participation (P, R)[161]
• Refusal to enter into cease-fire talks with an adversary (P, C, R)
• Broad assertions of jurisdiction over international crimes (P, L, C, R)[162]
• * Public accusations of bad faith of other parties during formal dispute settlement (P, C, R)

[154] See, e.g., *Symposium: Contemporary Practice of the United States Related to International Law*, 111 *American Journal of International Law* (*AJIL*) (2017) 1015, at 1036; *Symposium: Contemporary Practice of the United States Relating to International Law*, 113 *AJIL* (2018) 132 (condemning Khmer Rouge refusal to carry out Paris Agreement on Cambodia). The presence/absence of a prior material breach and compliance with / violation of the treaty's provisions on withdrawal may be relevant.

[155] See, e.g., Shultz, Raj and Masood, 'Pakistan Hits Back at India Over Kashmir Move, Targeting Bilateral Trade', *New York Times*, 7 August 2019, available at https://nyti.ms/2TYKdnx; Arsu and Cowell, 'Turkey Expels Israeli Envoy in Dispute Over Raid', *New York Times*, 2 September 2011, available at https://nyti.ms/3eFlRJa.

[156] See Lu, 'US Coastguard Cutter Takes Part in "Freedom of Navigation" in Taiwan Strait for the First Time', *South China Morning Post*, 25 March 2019 (increased frequency of US transit and response by former Chinese official calling it 'an action of provocation').

[157] See, e.g., Ratner, 'U.S. Sanctions Against Iran's Foreign Minister and International Law', *Just Security*, 29 August 2019, available at https://bit.ly/3n56RHz (EU and US sanctions against officials of Syria, Venezuela and Iran).

[158] See, e.g., UN Security Council, Final Report of the Panel of Experts on Libya established pursuant to Security Council Resolution 1973, UN Doc. S/2019/914, 9 December 2019, paras 60–62 ('blatant' violation of arms embargo by Jordan, United Arab Emirates and Turkey).

[159] See International Declaration Against Apartheid in Sports, GA Res. 32/105M, 14 December 1977, Annex; Joyner, 'Boycott', in *MPEPIL*, *supra* note 13, para. 7.

[160] *Obligation to Negotiate Access to the Pacific Ocean*, *supra* note 39 (upholding legality despite tensions created).

[161] See, e.g., Delegation of the European Union to the UN and other international organisations in Geneva, *HRC – Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights 5th Session (14–18 October 2019) Opening Remarks*, 14 October 2019, available at https://bit.ly/36drNVF (EU non-participation in negotiating treaty); US Mission to the United Nations, *Joint Press Statement from the Permanent Representatives of the United States, United Kingdom, and France Following the Adoption*, 7 July 2017, https://bit.ly/2IaqKO2 (opposition to nuclear weapons prohibition treaty).

[162] See, e.g., SC Res. 138, 22 June 1960 (effective acquiescence in kidnapping of Adolf Eichmann); Decision on Interlocutory Appeal Concerning Legality of Arrest, *Prosecutor v. Nikolic* (IT-94-2-AR73), Appeals Chamber, 5 June 2003, paras 25–26 (legality of arrest for serious international crimes).

Red

- Recognition of one side's claim to disputed territory (P, L, C, R)[163]
- Expulsion, non-admission or harassment of another state's nationals without individual determinations (P, C, R)[164]
- Ad hominem or other verbal attacks against foreign officials or nationals based on invidious discrimination (P, R)[165]
- Threat or use of force or violations of the non-intervention duty (i.e. those involving coercion or violence) (P, L, C, R)[166]
- Violations of the immunity of diplomatic and consular officials (P, L, R)[167]
- Use or testing of weapons subject to a multilateral ban, even if the state is not a party to it (C, R)[168]
- Boycotts of international sporting events due to policy disagreements with the host state (P, R)[169]
- Gratuitous displays of weaponry or incendiary propaganda along cease-fire lines (P, R)
- * Interference in the integrity of formal dispute settlement proceedings by undermining key due process elements (P, C)
- * Irreversible acts by a party to formal dispute settlement that render a decision useless for the prevailing party (P, C)[170]
- * Intentional and significant violations of provisional measures of a tribunal with prima facie jurisdiction over a dispute (P, L)[171]
- * Intentional violations of the final judgment of a tribunal (P, L, R)[172]

[163] See Hughes, 'Did Trump Administration's Jerusalem Declaration Violate International Law?', *Opinio Juris*, 3 May 2018, available at https://bit.ly/38h9aD2; GA Res. ES-10/19, 22 December 2017 (condemning US action by vote of 128-9-35).

[164] See Reuters, *Sudan Expels Two Senior U.N. Officials: Sources*, 25 December 2014, available at https://reut.rs/2TX07im; UN Secretary-General, Secretary-General, Condemning Expulsion of United Nations Officials from Sudan, Calls on Government to 'Immediately' Reverse Decision, UN Doc. SG/SM/16439-AFR3045, 25 December 2014; Exec. Order No. 13769, 82 Fed. Reg. 8,977 (Jan. 27, 2017) (U.S. suspension of admission to persons from five countries).

[165] See 'Ahmadinejad: Holocaust a Myth', *supra* note 105; 'Transcript of Press Conference by Secretary-General Designate Ban Ki-Moon', *supra* note 105 (Iran leadership Holocaust denial).

[166] See Ratner, *supra* note 135 (on Khashoggi murder).

[167] See *Tehran Hostages Case*, Judgment, *supra* note 50; United States Department of State, *Department of State in Response to Russian Harassment*, 29 December 2016, available at https://bit.ly/38jmkzC.

[168] See Statement by the President of the Security Council, *supra* note 35 (DPRK missile test); UN Development Programme, *36 African Countries Condemn Use of Cluster Bombs*, 24 May 2013, available at https://bit.ly/3n1xs8q.

[169] See, e.g., Duerden, 'A Soccer Tournament Breaks Through the Boycott of Qatar', *New York Times*, 30 January 2018, available at https://nyti.ms/38iTDCE.

[170] See, e.g., *South China Sea*, *supra* note 9.

[171] DW, *Landmark Russia, Ukraine Prisoner Swap*, 8 September 2019, available at https://bit.ly/38hLSwJ (Russia returns detained Ukrainian sailors more than three months after ITLOS provisional measures order requiring release; *Case Concerning the Detention of Three Ukrainian Vessels*, *supra* note 55).

[172] France 24, *Russia to Pay 2.7 mln in Greenpeace Ship Settlement*, 17 May 2019, available at https://bit.ly/354ySIR (payment to settle EUR 5.4 million award in *Arctic Sunrise* arbitration).

C = coercion;:R = anticipated reasonable response). For Green and Red, these factors generally pull in the same direction; for Yellow, I identify the key factors that could push the act to either Green or Red. Those potentially aggravating actions unique to the judicial context are marked with an asterisk (*). Conduct in the Red category with an asterisk may not be Red in the non-judicial context, because some acts could aggravate a judicial dispute without aggravating international peace and security.

The matrix suggests that the duty of non-aggravation can be legally disaggregated in a way that reflects the existing practice of states and the goals behind the non-aggravation norm. The acts in the three categories highlight the earlier point that the duty is not simply co-extensive with the legality of the act; although some Red acts are already illegal, some are not; and other illegal acts are not Red (e.g. violation of Security Council sanctions, which are Yellow, and technical treaty violations, which are Green). And although the Yellow category covers a large array of conduct, the identification of factors that cause the act to cross into Red or Green assists actors contemplating such actions and those responding to them.

The matrix also takes into account the differing institutional contexts in which aggravating acts can occur. Thus, because interference with the integrity of judicial proceedings is Red, tribunals should issue orders banning such measures if they fear one side or the other might so interfere. But a political organ might be concerned about the dispute's overall threat to international peace and security and urge the parties not to take other measures on the Red list, for example those that arouse ethnic-based violence. At the same time, the Red/Yellow/Green metric does not require a decision-making body to prohibit any actor from carrying out particular aggravating acts – although states are bound not to aggravate disputes even without such an order. That institution, whether a political body or a court, may not fear certain aggravating acts; it may wish to preserve flexibility to the parties; or it may not wish to risk its own legitimacy by issuing a specific order that is then breached. But even if it simply restates the general duty (or even says nothing at all), the indicative list will provide some guidance to identifying and responding to potentially aggravating acts *ex post*.

6 Looking Forward

The derivation of criteria for acts that may lead to the aggravation of a dispute as well as a provisional categorization of some acts can help serve as a focal point for future decisions by actors *ex ante* and international appraisals *ex post*. Ideally, states involved in individual legal regimes could develop their own list of aggravating acts in a treaty or soft law instrument, akin to a set of best (or worst) practices. In addition, institutions with an interest in some consistency in their evaluation of acts as aggravating could deploy this or another list. Political bodies, while not expected to treat like cases alike in the manner of judicial bodies, lose some legitimacy with stakeholders if they stray too far from the perception of fair play in reacting to individual disputes.[173] International

[173] See Ratner, *supra* note 25, at 261–263.

courts judging whether a disputant has violated a non-aggravation order should also find the guidelines helpful in developing a jurisprudence on this question. This sort of project would extend beyond the ICJ to investor–state tribunals, ITLOS and others. Over time, instead of a mere order of non-aggravation, tribunals could add something along the lines of 'and in particular, shall not: . . .', followed by a list of acts that would or might aggravate the dispute.

From a procedural standpoint, the approach of the *Gramercy Fund* tribunal – encouraging parties to seek its opinion about potentially aggravating acts – is promising. While it puts new responsibilities on a tribunal (and increases costs), it provides a useful screening mechanism during the pendency of the case. Aided by the Red/Orange/Green list, or at least the criteria, the tribunal could provide real-time advice or approval to the parties. Extending this process beyond the judicial arena would be feasible. Security Council committees for particular situations could interpret Council demands for non-aggravation just as current committees interpret sanctions and humanitarian exceptions.

Yet one should not underestimate the difficulties of achieving agreement between states on this provisional schema or even a more modest one limited to the Green and Red acts. The UN's Definition of Aggression involved seven years of elaboration of a term that is less open-ended than non-aggravation. For instance, developing states may object to classifying regularly scheduled freedom of navigation exercises as non-aggravating, or Western states to listing policy-based sports boycotts as aggravating – though states could jettison controversial examples in favour of a shorter Red/Green list. Yet even if states cannot develop an illustrative list of some sort, the four factors can limit the range of specious arguments that they or observers offer regarding an act's aggravating or non-aggravating nature.

Beyond the criteria and categorization offered here, this project highlights the importance of further work on vagueness, generality and open-texturedness within international law. International decision-makers and scholars would benefit from more appraisal of the advantages and disadvantages of offering specificity to norms as well as the various methods to that end, for example judicial elaboration or non-binding guidelines. Other norms ripe for such discussion include the precautionary principle, the rule against transboundary harm and the duty of non-intervention.

International law, like domestic law, has its share of norms that are central to the functioning of the system but also open-textured. Whether the second trait is a product of the first or merely a weigh station on the road to greater normative clarity deserves further exploration. And if such clarity can be achieved, international lawyers need to think creatively about how to offer it outside the formal modes of prescription. A combination of general criteria and an indicative matrix represents one promising tool.