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# Legal: Use of Force in Self-Defence to Recover Occupied Territory

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## Abstract

*This article argues that, in certain circumstances, it is legal for a state to use force in self-defence in order to recover territory unlawfully occupied by another state as a result of an armed attack. Where occupation follows from an unlawful armed attack, the occupation is a continuing armed attack, and the attacked state does not lose its right to self-defence simply because of passage of time. It is argued that while it is trite law that territorial disputes cannot be resolved by recourse to force, it is important to draw the distinction between a territorial dispute, on the one hand, and a situation of armed attack resulting in occupation of territory, on the other. Furthermore, where years pass between the initial attack and the use of force in self-defence, that may suggest that there is no other reasonable means of bringing the armed attack and occupation to an end, rendering the use of force in self-defence the ultima ratio – which is precisely the point of the necessity requirement. On this view, time runs against, rather than in favour of, the aggressor.*

## 1 Introduction

This article argues that, in certain circumstances, it is legal for a state to use force in self-defence in order to recover territory unlawfully occupied by another state as a result of an armed attack. Although there have been previous attempts by states whose territory was under relatively prolonged occupation to use force to recover that territory,<sup>1</sup> the question of whether the right to self-defence persists years after the initial use

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<sup>1</sup> Perhaps the most notable example is the attempt of Egypt and Syria in the 1973 Yom Kippur War to recover territory lost to Israel as a result of the 1967 Six-Day War.

of force which resulted in occupation has not been widely discussed in the literature.<sup>2</sup> However, scholarly interest in the issue was kindled in late 2020 in the light of the armed conflict which took place in the Nagorno-Karabakh region between Azerbaijan and Armenia. In that context, it has been suggested that a state whose territory is unlawfully occupied by another state does not have a right to use of force in self-defence to recover the occupied territory.<sup>3</sup> Ruys and Rodríguez Silvestre have argued, in this respect, that even if it is accepted that the region belongs to Azerbaijan, and had been unlawfully occupied by Armenia at least since the end of the First Nagorno-Karabakh War in 1994, Azerbaijan will have lost any right it may have had to act in self-defence because the status quo had lasted for a quarter of a century.<sup>4</sup> Knoll-Tudor and Mueller, in a blog post addressing a range of international legal issues regarding the conflict in Nagorno-Karabakh, agreed with the position taken by Ruys and Rodríguez Silvestre, arguing that ‘continued occupation cannot be equated with “continued attack” permitting the recourse to self-defence in line with Article 51 [of the UN Charter]’.<sup>5</sup>

Ruys and Rodríguez Silvestre set themselves the following question: ‘When part of one state’s territory is occupied by another state for a prolonged duration, can the former state have lawful recourse to military force to recover its land?’<sup>6</sup> They have elaborated on that question as follows:

When part of a state’s territory is occupied by another state for a prolonged duration, can the former state still invoke the right of self-defence to justify military operations aimed at recovering its land? Put differently, can unlawful occupation be regarded as a ‘continuing’ armed attack permitting recourse to self-defence at any point in time – even years after the occupation commenced?<sup>7</sup>

We think that the question is wrongly put – or at least incomplete. The point here is *not* whether an unlawful occupation *per se* constitutes a continuing armed attack, but whether any occupation *that is the direct consequence of an unlawful armed attack* constitutes a continuing armed attack. It should be recalled that there are situations where

<sup>2</sup> See C. Yiallourides, M. Gehring & J.-P. Gauci, *The Use of Force in Relation to Sovereignty Disputes over Land Territory* (2018), paras 158, 161.

<sup>3</sup> See Ruys and Rodríguez Silvestre, ‘Illegal: The Recourse to Force to Recover Occupied Territory and the Second Nagorno-Karabakh War’, 32 *European Journal of International Law (EJIL)* (2021) 1287 (hereinafter Ruys and Rodríguez Silvestre, ‘Recourse to Force’); T. Ruys and F. Rodríguez Silvestre, ‘The Nagorno-Karabakh Conflict and the Exercise of “Self-Defense” to Recover Occupied Land’, *Just Security* (10 November 2020), available at [www.justsecurity.org/73310/the-nagorno-karabakh-conflict-and-the-exercise-of-self-defense-to-recover-occupied-land/](http://www.justsecurity.org/73310/the-nagorno-karabakh-conflict-and-the-exercise-of-self-defense-to-recover-occupied-land/) (hereinafter Ruys and Rodríguez Silvestre, ‘The Nagorno-Karabakh Conflict’); Ruys and Rodríguez Silvestre, ‘Military Action to Recover Occupied Land: Lawful Self-Defence or Prohibited Use of Force? The 2020 Nagorno-Karabakh Conflict Revisited’, 97 *International Law Studies* (2021) 665 (hereinafter Ruys and Rodríguez Silvestre, ‘Military Action’).

<sup>4</sup> See Ruys and Rodríguez Silvestre, ‘Recourse to Force’, *supra* note 3; Ruys and Rodríguez Silvestre, ‘The Nagorno-Karabakh Conflict’, *supra* note 3; Ruys and Rodríguez Silvestre, ‘Military Action’, *supra* note 3.

<sup>5</sup> B. Knoll-Tudor and D. Mueller, ‘At Daggers Drawn: International Legal Issues Surrounding the Conflict in and around Nagorno-Karabakh’, *EJIL:Talk!* (17 November 2020), available at [www.ejiltalk.org/at-daggers-drawn-international-legal-issues-surrounding-the-conflict-in-and-around-nagorno-karabakh/](http://www.ejiltalk.org/at-daggers-drawn-international-legal-issues-surrounding-the-conflict-in-and-around-nagorno-karabakh/).

<sup>6</sup> See Ruys and Rodríguez Silvestre, ‘Recourse to Force’, *supra* note 3, at 1288.

<sup>7</sup> See Ruys and Rodríguez Silvestre, ‘Military Action’, *supra* note 3, at 667.

one state is unlawfully occupying and administering territory of another state, but where such occupation/administration does not necessarily result from an armed attack or from a use of force which was unlawful at the time when it occurred. Consider, first, a case where, upon the accession to independence of one or more neighbouring states, or at some point thereafter, there is a dispute as to where the boundary lies or as to which state has title to a particular piece of territory. It may be that state A has been in occupation or has been administering the territory for many years, but it is asserted by state B that it, rather than state A, is the lawful sovereign with respect to that territory, and it may even be the case that a judicial or arbitral tribunal affirms that claim of state B.<sup>8</sup> In such a case, there would have been prolonged occupation but not one resulting from an armed attack. We may also consider a second case where a state is in occupation of territory that is claimed by another state but where the use of force occurred before the prohibition of the use of force in international relations came into effect. In such a case, while there may have been an 'armed attack' in the factual sense of the word, the occupation will not have resulted from an *unlawful* armed attack given the state of the law when the attack took place.

In this article, we consider only occupations resulting from unlawful armed attack on another state, and argue that where occupation follows from such an armed attack, the occupation is a continuing armed attack, and the attacked state does not lose its right to self-defence simply because of passage of time.

## 2 Distinguishing between Settling Territorial Disputes by Force and the Use of Force in Self-Defence

As Ruys and Rodríguez Silvestre observe,<sup>9</sup> and of course we agree, it is trite law that territorial disputes cannot be resolved by recourse to force.<sup>10</sup> This principle, which is outlined in the Friendly Relations Declaration,<sup>11</sup> follows from the requirement in Article 2(3) of the UN Charter that international disputes be settled only by peaceful means, which itself follows from the prohibition of the use of force in Article 2(4) of the UN Charter.<sup>12</sup> However, it is important to draw the distinction between a territorial dispute on the one hand, and a situation of armed attack resulting in occupation of

<sup>8</sup> See for example the position of the Bakassi Peninsula in the *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria; Equatorial Guinea intervening)*, Judgment, 10 October 2002, ICJ Reports (2002) 303.

<sup>9</sup> Ruys and Rodríguez Silvestre, 'The Nagorno-Karabakh Conflict', *supra* note 3.

<sup>10</sup> See also Yiallourides, Gehring and Gauci, *supra* note 2, paras 33–38.

<sup>11</sup> UNGA Res. 2625 (XXV), 24 October 1970, Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, Annex (hereinafter 'Friendly Relations Declaration'); see also, e.g., UNSC Res. 1177, 26 June 1998, Preamble, recital 3: 'Affirming the principle of peaceful settlement of disputes and stressing that the use of armed force is not acceptable as a means of addressing territorial disputes or changing circumstances on the ground.'

<sup>12</sup> Charter of the United Nations and Statute of the International Court of Justice, adopted 26 June 1945, entered into force 24 October 1945, 1 UNTS 16.

territory on the other. The right to use force in self-defence applies only in relation to armed attacks.

Indeed, it would not be coherent for a principle (the obligation to settle disputes peacefully) that is inherently linked to Article 2(4) of the UN Charter (the obligation not to use force) to prevent the application of Article 51, which, after all, constitutes an exception to the prohibition in Article 2(4). Ruys and Rodríguez Silvestre, after having put much weight on the inadmissibility of force for the resolution of territorial disputes, recognize that ‘defining *where* self-defence stops and the prohibition of settling territorial disputes by force kicks in remains an extremely difficult exercise’,<sup>13</sup> and we agree. Yet it is precisely this exercise that needs to be undertaken.

The distinction that needs to be drawn then is between an outstanding territorial dispute where no force (or at least no unlawful force in the post-Charter period) has yet been used by any of the disputing parties, and a situation where one state creates (or escalates) a territorial dispute by unlawfully invading and occupying territory held by another state. While no force can be used by either party in the former instance, the latter instance is clearly one where an armed attack has taken place, and the right of self-defence is, in the first instance at the very least, triggered.<sup>14</sup>

To put it differently, it is one thing for state *A* to invoke alleged title to territory in order to justify the use of force against state *B*, and quite another for state *A* to respond to an armed attack of state *B* that has led to the occupation of territory previously held by state *A*. In the former instance we have an attempt to settle a territorial dispute by force, which is clearly impermissible. In the latter, we have an instance of the use of force in self-defence, even though it may still be possible that the title to territory continues to be in dispute, and such a dispute has to be resolved by peaceful means, since no use of force can lead to annexation or otherwise lawful title to territory.<sup>15</sup>

### 3 Continuing Armed Attacks

We need to now discuss when, if ever, the right of self-defence ceases where one state has used force resulting in the occupation of (part of) the territory previously controlled by another state. Ruys and Rodríguez Silvestre seem to argue that the right of

<sup>13</sup> Cf. Ruys and Rodríguez Silvestre, ‘The Nagorno-Karabakh Conflict’, *supra* note 3 (emphasis added).

<sup>14</sup> For example, the Argentinian attempt to justify the ‘re-capture’ of the Falkland Islands in 1982 as a use of force in self-defence was rejected by the Security Council, as Ruys and Rodríguez Silvestre also note: *ibid.* at 1290. The United Kingdom established control over the Islands in 1833, more than a century before the entry into force of the UN Charter. By contrast, when the United Kingdom responded, in alleged self-defence against the Argentinian invasion, this was much better received (though, of course, there were disagreements, in particular with respect to the role of the Security Council), including with regards to reclaiming territory taken by use of force. See Henry, ‘The Falklands/Malvinas War – 1982’, in T. Ruys, O. Corten and A. Hofer (eds), *The Use of Force in International Law: A Case-Based Approach* (2018) 361, at 373–377.

<sup>15</sup> UNGA Res. 2625 (XXV), 24 October 1970 (Friendly Relations Declaration), Principle 1(10). See, e.g., UNSC Res. 662, 9 August 1990, para. 1: ‘Decides that annexation of Kuwait by Iraq under any form and whatever pretext has no legal validity, and is considered null and void’; UNGA Res. 68/262, 27 March 2014 (Territorial integrity of Ukraine).

self-defence ceases at some (unclear) point in time when a status quo is established, for example when the territory has been occupied and administered peacefully and there is a prolonged absence of fighting.<sup>16</sup> They do not tell us where that point in time is (e.g. when there is a 'prolonged' absence of fighting, rather than a mere absence of fighting), but they seem to imply that a quarter of a century is long enough. Others who have taken similar positions also do not specify what a 'reasonable time' is within which self-defence can be invoked, or when a 'new territorial status quo comes into existence' which precludes resort to force in self-defence.<sup>17</sup> Clearly, we are not looking for a pinpoint here, but we are highlighting that this argument would make an occupation resulting from an armed attack cease to be an armed attack upon the emergence of a 'new status quo' – whenever that may be. This we think is wrong, and it is to this that we immediately turn.

Article 3(a) of the UNGA Resolution on the Definition of Aggression<sup>18</sup> goes directly against the view that a situation of occupation will at some point cease to be an armed attack. It provides that 'military occupation *resulting from an invasion or attack*' constitutes aggression.<sup>19</sup> Ruys and Rodríguez Silvestre get around this rather significant obstacle to their argument by attempting to cast into doubt the relevance of the UN General Assembly Definition of Aggression for the concept of an 'armed attack' under Article 51 of the UN Charter.<sup>20</sup> However, as we have argued elsewhere,<sup>21</sup> the International Court of Justice has practically equated the notion of 'aggression' with the notion of 'armed attack' by relying on the Definition of Aggression in order to determine whether a particular use of force constitutes an armed attack in numerous instances, including in the *Nicaragua* case<sup>22</sup> and the *Armed Activities* case.<sup>23</sup>

Indeed, the Definition of Aggression makes it clear that occupation that results from an invasion or attack is aggression and must be one of a continuing character.<sup>24</sup> And given that an invasion or attack that leads to occupation is certainly an armed attack within the meaning of Article 51 of the UN Charter,<sup>25</sup> we fail to see how it simply stops being one if one were just to wait long enough. It is significant that state practice

<sup>16</sup> See Ruys and Rodríguez Silvestre, 'Recourse to Force', *supra* note 3, at 1289.

<sup>17</sup> See Yiallourides, Gehring and Gauci, *supra* note 2, paras 158 and 163, respectively.

<sup>18</sup> UNGA Res. 3314 (XXIX), 14 December 1974 (Definition of Aggression), Annex.

<sup>19</sup> Ruys and Rodríguez Silvestre, 'Recourse to Force', *supra* note 3, at 1289 (emphasis added). See also our point above on what is the right question to ask.

<sup>20</sup> Ruys and Rodríguez Silvestre, 'Recourse to Force', *supra* note 3, at 1290.

<sup>21</sup> 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* (2017) 214, at 227.

<sup>22</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, ICJ Reports (1986) 14, para. 195 (hereinafter *Nicaragua*).

<sup>23</sup> *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Merits, ICJ Reports (2005) 168, para. 146. See also *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Merits, ICJ Reports (2003) 161, para. 51 (hereinafter *Oil Platforms*); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports (2004) 136, para. 139.

<sup>24</sup> UNGA Res. 3314 (XXIX), 14 December 1974 (Definition of Aggression), Art. 3(a).

<sup>25</sup> Since such conduct will constitute an aggression and thus one of 'the most grave forms of the use of force': *Nicaragua*, Merits, ICJ Reports (1986) 14, para. 191.

accepts, as it seems Ruys and Rodríguez Silvestre do too,<sup>26</sup> that if there is a short period of time between the initiation of the use of force that results in occupation and a response in self-defence then the right of self-defence persists.<sup>27</sup> One can think of the United Kingdom's response to the invasion and occupation of the Falkland Islands.<sup>28</sup> If the right of self-defence exists in such cases, this can only be because there continued to be an armed attack up to the point when the right of self-defence was exercised.<sup>29</sup> If it were to be accepted that the armed attack consists only of the initial act of invasion, and also accepted that self-defence is lawful in the sort of cases described above, this would open up the possibility that self-defence can be exercised even after an armed attack has ceased. The only justification for accepting self-defence in these cases is because the armed attack continues.<sup>30</sup> But if it continues, what would make it cease?

Ruys and Rodríguez Silvestre also evoke Article 51 UN Charter which states that there is a right of self-defence 'if an armed attack *occurs*', and thus, they claim, the concept of armed attack must be limited to a specific point in time.<sup>31</sup> In the first place, the use of the word 'occurs' does not linguistically confine the attack to a specific point in time. It only means that such an attack must have occurred and presumably is ongoing. It does not specify for how long it must occur. The Charter says 'if an armed attack occurs', not 'when'. If it occurs, presumably it can go on for a rather long time. So, the 'textual' argument does not seem either compelling or dispositive here. In any case, in practice, armed attacks can occur for a lengthy period. One need only think of a case where after state *A* invades state *B*, fighting goes on within the territory of state *B* for several years. After a while, the tide turns, and state *B* gains the upper hand, forcing state *A* to retreat into its own territory. At this point, state *B* is now acting in self-defence in the territory of state *A*.

<sup>26</sup> Ruys and Rodríguez Silvestre, 'Recourse to Force', *supra* note 3, at 1289.

<sup>27</sup> R. Higgins, *Problems and Process: International Law and How We Use It* (1994), at 241; Y. Dinstein, *War, Aggression and Self-Defence* (6th ed. 2017), paras 755–757; J. A. Green, *The International Court of Justice and Self-defence in International Law* (2009), at 102–104 ('The response must be taken within reasonable temporal proximity, taking into account all the circumstances of the particular case').

<sup>28</sup> There was a delay of 23 days between the invasion by Argentina and the arrival of UK forces; similarly, 'nearly five months elapsed between the invasion of Kuwait by Iraq, and the military response by a coalition of UN members'. See Higgins, *supra* note 27, at 241; Green, *supra* note 27, at 102; C. Henderson, *The Use of Force and International Law* (2018), at 230.

<sup>29</sup> Interestingly, Ruys has also characterized the Argentinian invasion and occupation of the Falklands/Malvinas as a case where occupation constitutes an *ongoing* (or *continuing*) *armed attack*: 'Especially in relation to armed attacks of an ongoing nature, *primarily those involving the occupation or annexation of territory*, legal doctrine and customary practice seem to allow a leeway of time for the initiation of defensive action. The most well-known example concerns the 1982 Falklands conflict'. See T. Ruys, *'Armed Attack' and Article 51 of the UN Charter: Customary Law and Practice* (2010), at 101 (emphasis added). Even in that publication, however, he does not seem to address the question at issue here of *when* a continuing attack / the right of self-defence ends.

<sup>30</sup> Other possible explanations, such as for example those relating to the scale of response required or to the distance that may separate the area of action from that of the metropolitan state (as suggested, among others, by Green, *supra* note 27, at 102–103) could not possibly be admissible if an armed attack has 'ended', which would then establish a new territorial 'status quo'.

<sup>31</sup> Ruys and Rodríguez Silvestre, 'Recourse to Force', *supra* note 3, at 1290.

Does the fact that the initial attack by state *A* began years ago, and that state *B* had been under attack for several years, mean that state *B* no longer has the right of self-defence? One can think of the situation between Nazi Germany and the Soviet Union during World War II, where it was a few years after Germany's initial invasion of Soviet territory before the Soviet Union began to use any significant force in German territory.<sup>32</sup> Similarly, the argument that, once occupation has taken place and active hostilities have ceased, there is only a 'reasonable' time in which to recover the territory in self-defence, or else a 'new territorial status quo' is established,<sup>33</sup> would have effectively rendered the recovery of French territory from the Nazi occupation in World War II unlawful if something similar were to happen today. There was a period of several years that intervened between the conclusion of active hostilities in the battle for France in June 1940 and the Normandy landings undertaken by the Allies in June 1944.

#### 4 The Importance of the Necessity Criterion

We agree, of course, with Ruys and Rodríguez Silvestre that there must be some proximity between attack and defence,<sup>34</sup> and that the lapse of time between the two cannot be extended indefinitely. However, this argument does not go to whether there is a continuing armed attack, but rather, as they themselves admit,<sup>35</sup> to the issue of whether use of force in self-defence is *necessary*.<sup>36</sup> So, let us try and disentangle these two issues.

First, there may be a situation where a lapse of time between an armed attack and an attempt to respond is merely an indication that the use of force is no longer necessary to repel the attack. This will be the case where the armed attack has taken place, is complete or over, and there is nothing to repel anymore, absent any occupation.<sup>37</sup> Second, if an armed attack leads to occupation of territory, then it is continuing for as long as the territory is under occupation.<sup>38</sup> And if years pass between the initial attack and the use of force in self-defence, that may actually mean that the use of force

<sup>32</sup> Dinstein, *supra* note 27, paras 752–753; but see O. Corten, *The Law Against War* (2010), at 487: 'It is clear, however, that the simple assertion that a permanent "state of war" exists between two States and that justifies self-defence many years after the end of actual military operations cannot be admitted.'

<sup>33</sup> See *supra*, text accompanying note 17; Ruys and Rodríguez Silvestre, 'Military Action', *supra* note 3, at 711.

<sup>34</sup> Ruys and Rodríguez Silvestre, 'Recourse to Force', *supra* note 3, at 1289.

<sup>35</sup> The *element* of 'immediacy' being merely an aspect of the actual *requirement* of 'necessity': cf. *ibid.*, at 1288.

<sup>36</sup> Green, *supra* note 27, at 102.

<sup>37</sup> See similarly *Nicaragua*, *supra* note 22, para. 237 (the Court concluding that the United States' measures were not necessary, as 'these measures were only taken, and began to produce their effects several months after the major offensive of the armed opposition against the Government of El Salvador had been completely repulsed').

<sup>38</sup> *Oil Platforms*, Merits, ICJ Reports (2003) 161, Reply and Defence to Counterclaim submitted by the Islamic Republic of Iran (10 March 1999), para. 7.47, available at [www.icj-cij.org/public/files/case-related/90/8630.pdf](http://www.icj-cij.org/public/files/case-related/90/8630.pdf) ('In the case of the invasion of another State's territory, in principle an attack still exists as long as the occupation continues'); Corten, *supra* note 32, at 486 ('an invasion followed by occupation of territory which constitutes an ongoing unlawful act under the rules of international responsibility'); Myjer and White, 'The Twin Towers Attack: An Unlimited Right to Self-Defence?', 7 *Journal of Conflict and Security Law* (2002) 5, at 8 ('The armed attack in that situation [the Falklands war] was continuing in the form of an occupation of the islands').

in self-defence is necessary *precisely* because the state resorting to force in self-defence has no other means of bringing the armed attack and occupation to an end (a similar point is made by Corten).<sup>39</sup> So, the passage of time may actually show that there is no other reasonable means of bringing the armed attack and occupation to an end, rendering the use of force in self-defence the *ultima ratio* – which is precisely the point of the necessity requirement.<sup>40</sup>

A strong argument made by Ruys and Rodríguez Silvestre is based on the following passage from the Friendly Relations Declaration: ‘Every State likewise has the duty to refrain from the threat or use of force to violate international lines of demarcation, such as armistice lines, established by or pursuant to an international agreement to which it is a party or which it is otherwise bound to respect.’<sup>41</sup> The next sentence of the same paragraph of the Friendly Relations Declaration says, however: ‘Nothing in the foregoing shall be construed as prejudicing the positions of the parties concerned with regard to the status and effects of such lines under their special regimes or *as affecting their temporary character*.’<sup>42</sup>

These last words, ‘temporary character’, are significant. The two passages should not be construed as referring to the principle of the peaceful settlement of (territorial) disputes, but rather as referring to the principle of necessity. In particular, the latter passage underlines that, contrary to what Ruys and Rodríguez Silvestre argue (which, to simplify, is that time runs in favour of the aggressor), time runs ‘against’ the aggressor, as there must be a temporal limit to lines of demarcation, if these are of a ‘temporary’ character. Surely, when something lasts for a quarter of a century, then its ‘temporary’ character can be called into question. So, here is the necessity point which we think the Friendly Relations Declaration makes: when an armistice or demarcation line is agreed, it is no longer necessary to use force. The temporary armistice line provides time to seek other means to deal with the armed attack that has taken place. But when this armistice line is no longer ‘temporary’, rather it turns into *status quo*, then at some point it becomes necessary again to use force in self-defence, all other means to repel the armed attack having failed.<sup>43</sup>

<sup>39</sup> O. Corten, V. Koutroulis and F. Dubuisson, ‘Le conflit au Haut-Karabakh et le droit international en douze questions’, *Centre de droit international* (14 October 2020), available at <http://cdi.ulb.ac.be/conflit-haut-karabakh-droit-international-douze-questions/>.

<sup>40</sup> Green, ‘The *Ratione Temporis* Elements of Self-Defence’, 2 *Journal on the Use of Force and International Law* (2015) 97, at 101 (discussing the necessity criterion: ‘Ultimately, force must be the only reasonable option for a state to take to abate an armed attack’).

<sup>41</sup> UNGA Res. 2625 (XXV), 24 October 1970 (Friendly Relations Declaration), Principle 1(5).

<sup>42</sup> *Ibid.* (emphasis added).

<sup>43</sup> See Higgins, *supra* note 27, at 241:

Does the UN cease-fire, and the passage of time (during which the position of the intervening forces becomes entrenched) really preclude the invaded country from liberating its territory? The decision of the Croatian troops on 22 January 1993 to march across UN lines into Serb-held territory within Croatia graphically illustrates the dilemma. It is hard to see that the United Nations’ inability to secure the objectives of its agreed plan after a year should extinguish a suspended right of self-defence.



In sum, a use of force in self-defence will only be lawful if it responds to an armed attack that is ongoing, if it is necessary and if it uses proportionate force. In cases of occupation that result from a use of force, the armed attack has not only occurred, but it has yet to cease. Necessity is often taken to refer both to the element of immediacy of the response in self-defence and to the element of the use of force as a last resort.<sup>44</sup> Since prolonged occupation arising out of force is a continuing attack, the element of immediacy is (continuously) met, and the question then turns to the last resort element of necessity. While passage of time may, and hopefully will, open up other means of bringing the occupation to an end, the very passage of years may itself be an indication that the last-resort element of the necessity requirement has been met.

We think that this is not only a reasonable and correct reading of the law of self-defence, but also one that does not favour the aggressor against what usually will be the weaker party. Ruys and Rodríguez Silvestre make a point of highlighting that ‘there have been remarkably few cases where states made use of armed force to challenge the existing territorial status quo and even fewer cases where they have done so by relying on a right of self-defence against a continuing armed attack’.<sup>45</sup> This may well be because such recaptures of occupied territory by force hardly ever happen – the vanquished has a suspicious tendency of also being the weak one. Certainly, the law cannot fix such things as factual inequality, but at the very least it must be interpreted in such a way as to give its subjects a – theoretical – equal chance. Otherwise, it does not even uphold appearances of not being mere apology for the strong making the weak suffer as they must.

<sup>44</sup> See, e.g., Green, *supra* note 27, at 78. Last resort does not, however, mean that the state acting in self-defence must prove that it has first exhausted all possible peaceful means. See Corten, *supra* note 32, at 481; Green, *supra* note 27, at 84–86.

<sup>45</sup> Ruys and Rodríguez Silvestre, ‘Recourse to Force’, *supra* note 3, at 1292.