Crossing Your Neighbor's Rubicon: A Look at Territorial Sovereignty and Necessity

Matthew R. Sonn*

ABSTRACT

In an era of global conflict, states face the challenge of defending themselves against threats that often originate far from their borders. This paper examines the principle of necessity as a potential justification for violating the territorial integrity of non-consenting states. By analyzing historical and contemporary interpretations, the study delves into key concepts such as territorial integrity, necessity, the constraints of the UN Charter, and jus cogens norms. It seeks to clarify whether states can transit through a non-consenting state to address security threats. To address this complex issue, the paper proposes a framework designed to ensure that such transit remains within legal bounds. This framework will be tested through various hypothetical scenarios, demonstrating how states can navigate the delicate balance between self-defense and respect for sovereignty. Ultimately, this analysis aims to contribute to the ongoing discourse on state conduct in an increasingly interconnected and threatening global landscape.

I. INTRODUCTION

Modern warfare has become more global. New technological developments mean that weapon systems have longer ranges, are cheaper, and are more widely available to an array of actors. This means that potential attacks and security threats will come from state and non-state actors across wider spans of geography.[1] As such, states no longer face a threat from only those they share a border with, but from other actors both regionally and globally. In planning to respond

* Commander, Judge Advocate General's Corps, U.S. Navy. LL.M., 2024, Harvard Law School; J.D., 2008, Loyola University New Orleans College of Law; B.S., 2005, Truman State University. This article began life as a research paper submitted in partial fulfillment of the requirements of a Master of Laws degree at Harvard Law School, funded through the Naval Postgraduate School's civilian education program. Many thanks to my advisor Professor Gabriella Blum, my writing group, and in particular my classmates CDR Matthew Pekoske, USCG, and LCDR Sarah Padway, JAGC, USN, for the tremendous feedback and insights. I also want to thank the editors at the Journal of National Security Law and Policy for their insights and suggestions in making this a better article. Finally, I want to thank my wife Emily for all of her help and support through this process.

1. For example, in October 2023, Houthi rebels in Yemen launched drones and cruise missiles at Israel that flew from Yemen over the Red Sea and crossed into Egypt. Ahmed Mohamed Hassan & Dan Williams, *Drone Blasts Hit Two Egyptian Red Sea Towns, Israel Points to* Houthi, REUTERS (Oct. 27, 2023, 5:19 AM), https://perma.cc/U8CE-5CWH; and DEF. INTEL.AGENCY, IRAN ENABLING HOUTHI ATTACKS ACROSS THE MIDDLE EAST (Feb. 2024), https://perma.cc/P434-P2WW.

militarily, this will inevitably lead states to consider transiting through nearby states in order to address these attacks and growing threats. Legal advisors to these militaries should always advise their states to seek consent from the state that has to be crossed, but this paper will examine what happens when those states say "no." Consider the 1981 strike by Israel on an Iraqi nuclear power plant located in Osirak, Iraq. Israel claimed that the plant posed a "mortal danger" to their existence.[2] Israeli military aircraft flew through Jordanian and Saudi Arabian airspace, without their consent, to strike the plant inside of Iraq.[3] This strike was condemned by the United Nations Security Council and was met with great condemnation from states across the globe as an unjustified act of aggression.[4] But, interestingly, the issue of violating Jordanian and Saudi Arabian sovereignty was largely ignored and was not addressed in the final resolutions.

A tremendous amount of ink has been spilled exploring a state's right to defend against attacks emanating from a non-state actor group located in the territory of another state.[5] The so-called "unwilling/unable doctrine" that gained traction in the aftermath of the terrorist attacks on September 11, 2001, and the subsequent "Global War on Terrorism," was taken up by a number of states to justify the use of force against non-state actors located outside their borders. While it is still debated, there are many who argue that a state is lawfully allowed to take kinetic action against a non-state actor who is operating within the borders of another state.[6] Logically, it seems to flow that if a state can legally conduct strikes within the borders of a state, then merely transiting should also be permissible. This paper will further interrogate this position below.

This paper will seek to investigate the relationship between the principles of territorial sovereignty, necessity, and self-defense. In particular, this paper will seek to address the question presented in a scenario in which a state, being threatened or attacked by another state actor, must transit through the territory of a third state in order to defend against the attack. Does the domain (e.g., land, sea, or air) matter in this calculus? How do the principles of territorial sovereignty, necessity, and self-defense interact, and how are they balanced when a neutral third-party is implicated?

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2. *On This Day 1981: Israel Bombs Baghdad Nuclear Reactor*, BBC NEWS, https://perma.cc/FK6E-NE43.

3. Whitney Raas & Austin Long, *Osirak Redux? Assessing Israeli Capabilities to Destroy Iranian Nuclear Facilities*, 31 INT'L SEC. 7, 11 (2007).

4. *See* S.C. Res 487 (June, 19 1981); U.N. SCOR 36th Sess., 2280th mtg., U.N. Doc. S/PV.2280 (June 12, 1981); U.N. SCOR 36th Sess., 2281th mtg., U.N. Doc. S/PV.2281 (June 13, 1981); U.N. SCOR 36th Sess., 2282th mtg, U.N. Doc. S/PV.2282 (June 15, 1981); U.N. SCOR 36th Sess., 2283th mtg., U.N. Doc. S/PV.2283 (June 15, 1981); U.N. SCOR 36th Sess., 2284th mtg., U.N. Doc. S/PV.2284 (June 16, 1981); U.N. SCOR 36th Sess., 2285th mtg., U.N. Doc. S/PV.2285 (June 16, 1981); U.N. SCOR 36th Sess., 2286th mtg., U.N. Doc. S/PV.2286 (June 17, 1981); U.N. SCOR 36th Sess., 2287th mtg., U.N. Doc. S/PV.2287 (June 17, 1981); U.N. SCOR 36th Sess., 2288th mtg., U.N. Doc. S/PV.2288 (June 19, 1981).

5. *See generally* Ashley S. Deeks, *Unwilling or Unable: Toward a Normative Framework for Extraterritorial Self-Defense*, 52 VA. J. INT'L L. 483, 486-88 (2012); Gabriella Blum & John C. P. Goldberg, *The Unable or Unable or Unwilling Doctrine: A View from Private Law*, 63 HARV. INT'L L.J. 63 (2022), Louise Arimatsu, *The Law of State Responsibility in Relation to Border Crossings: An Ignored Legal Paradigm*, 89 INT'L L. STUD. 21 (2013).

6. Deeks, *supra* note 5, at 486-88.

To contextualize these issues, the following hypothetical scenarios spanning the three major domains of warfare—air, land, and sea—will be employed.[7] All of these scenarios involve the same basic factual premise: State A has suffered an armed attack by State B, and State A intends to engage in self-defense under Article 51 of the United Nations (hereinafter UN) Charter. State C is geographically located between States A and B and does not give consent to State A to enter its territory.

Scenario 1 – Air. State A has determined that to address the armed attack from State B, they must enter the airspace of State C. State A will launch cruise missiles to strike a target in State B, and their flight path will overfly State C, crossing through their national airspace. State A will also fly reconnaissance aircraft from State A over State C in order to gather additional intelligence on the activities of State B.

Scenario 2 – Land. State A determines that the only way to respond to State B is to send their troops on land through State C to engage the forces of State B, inside of State B. Due to State B's air defense systems, State A would not be able to fly their troops into State B. In order to neutralize the threat from State B, State A intends to traverse the land territory of State C to engage State B.

Scenario 3 – Maritime. State A intends to sail some of its naval vessels into the territorial and internal waters of State C to land forces inside of State B. For example, there is a river in State C whose mouth is within State C's territorial waters, but the river flows into State B. State A intends to sail its vessels up the river to land forces ashore inside of State B.

To address these questions this paper will proceed as follows. First, this paper will look at territorial integrity generally and within the domains of the sea and air while simultaneously examining the many statements made regarding cyberspace that may shed light on views in the physical world. Next, the paper will proceed to interrogate the principle of necessity, starting with a historical overview that proceeds into a look at the modern understanding of necessity as an excuse to behavior that is otherwise wrongful under international law. The paper will then look at the UN Charter and what is meant in Article 2(4)'s mention of territorial integrity, the *jus cogens* norms of aggression and non-intervention, and *jus ad bellum*. At the conclusion, the paper will suggest that, when certain conditions are met, a state's armed forces may transit through another state's territory to defend itself from a third state.

II. TERRITORIAL INTEGRITY

A. In General

To explore the issue of whether State A has the legal authority to enter the territory of State C in order to defend itself from State B, we must first explore the

7. While this paper will look at sovereignty ideas as they pertain to the cyber domain, these ideas will not be explored in depth. Instead, those statements will be utilized to illuminate thoughts on sovereignty and territorial integrity more generally.

underlying principles of territorial integrity. Maintaining territorial integrity is a cornerstone of the post-Charter international system and is a concept that was recognized in the pre-charter world as well.[8] As noted in the *Convention on Rights and Duties of States* (hereinafter the Montevideo Convention) and by multiple scholars, one of the key indicia of state sovereignty is the ability of states to control their borders and territory therein.[9] This is a foundational principle of international law. In the *Las Palmas* arbitration case, it was noted that territorial sovereignty includes the "right to integrity and inviolability in peace and in war, together with the rights which each State may claim for its nationals in foreign territory."[10]

The idea that states must respect the territorial integrity of other states has been repeatedly noted by the International Court of Justice (hereinafter ICJ),[11] and by the UN, not only in Article 2(4) of the Charter but also in *The Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations* (hereinafter *Friendly Relations*).[12] The ICJ, in *Corfu Channel*, neatly summarized this by stating "[b]etween independent States, respect for territorial sovereignty is an essential foundation of international relations."[13] Further, it has been argued by some that territorial integrity, as referred to in Article 2(4) of the UN Charter, should be "read as territorial inviolability, proscribing any kind of forcible trespassing."[14]

In addition, in times of conflict, "[t]he territory of neutral Powers is inviolable."[15] This means that the armed forces of the parties to a conflict generally are

8. *See* Corfu Channel (UK v. Alb.), Judgement, 1949 I.C.J. 4, at 35 (Apr.1949) ("Between independent States, respect for territorial sovereignty is an essential foundation of international relations."); G.A. Res. 2625 (XXV), at 121 (Oct. 24, 1970) [hereinafter Friendly Relations]; Stuart Elden, Contingent Sovereignty, Territorial Integrity and the Sanctity of Borders, 26 SAIS REV. INT'L AFF. 11, 11 (2006); Jure Vidmar, Territorial Integrity and the Law of Statehood, 44 GEO. WASH. INT'L L. REV. 697, 707 (2012); *see also* Convention on Rights and Duties of States adopted by the Seventh International Conference of American States, art. 3, Dec. 26, 1933, T.S. No. 881, 165 L.N.T.S. 3802 [hereinafter Montevideo Convention].

9. *See* Montevideo Convention, *supra* note 8, at arts. 1 and 3; Elden, *supra* note 8, at 11; DON HERZOG, *SOVEREIGNTY* R.I.P. 279 (Yale Univ. Press, 2020).

10. Island of Palmas (Neth. v. U.S.), 2 R.I.A.A. 829, 839 (Perm. Ct. Arb. 1928) [hereinafter Las Palmas].

11. *See Corfu Channel*, 1949 I.C.J. at 35; Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. Rep. 403 (July 22) [hereinafter Kosovo Advisory Opinion]; Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14 (June 27) [hereinafter *Nicaragua*]; and Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgement, 2005 I.C.J. Rep. 168 (Dec. 19, 2005).

12. *Friendly Relations*, G.A. Res. 2625 (XXV).

13. *Corfu Channel,* 1949 I.C.J. at 35.

14. ALBRECHT RANDELZHOFER & OLIVER DÖRR, *ARTICLE 2(4)*, THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 200–34, 216 (Bruno Simma et al. 3rd ed. 2012) (Whether this is as absolute of a proclamation as asserted by the authors is debatable. Regardless of that, it does serve to illustrate the general rule that the armed forces of a state should not enter the territory of another state without permission.).

15. Convention No. V Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, art. 1, Oct. 18, 1907, 36 Stat. 2310.

prohibited from entering the territory of a neutral state.[16] Furthermore, neutral states have an obligation to prevent violations of their neutrality.[17] Given the foregoing, it is well established, as a general rule, that states must respect the territorial integrity of their fellow states. The proceeding sections will explore what legal regime governs the limits of territorial integrity as applied in the maritime and air domains; and finally, what states have recently said about sovereignty and integrity as it relates to the cyber domain and whether that can be extrapolated to the physical world as well.

B. At Sea

The general view that a state's territory is inviolable absent consent does not apply in all domains. Arguably, the maritime domain offers the most complex view of sovereignty as it relates to the state's authority to control who may or may not cross its borders. This is owed in large part to the long history of state practice shaping the modern law governing use of the seas and waterways. Under the law of the sea, a state's sovereignty extends beyond its shoreline out to the limits of its territorial sea to include the airspace above the sea, and states exercise limited aspects of sovereignty in maritime zones beyond the territorial sea.[18] But, as the *United Nations Convention on the Law of the Sea* (hereinafter UNCLOS) articulates, the territorial sea of a coastal state is different from a land border. Under UNCLOS and customary international law, vessels of any state may execute "innocent passage" through another state's territorial sea.[19] Innocent passage must meet certain conditions articulated in Articles 17 through 26 of UNCLOS: the passage is continuous and expeditious, and the passage is not prejudicial to the "peace good order or security of the coastal state."[20] Further, while a coastal state may impose regulations on how vessels exercise their right of innocent passage,[21] they may not permanently deny the right of innocent passage through their

16. OFF. OF THE GEN. COUNS., U.S. DEP'T OF DEF., LAW OF WAR MANUAL § 15.3.1.1 (rev. ed., Dec. 2016) [hereinafter DOD LAW OF WAR MANUAL].

17. *See* Convention No. XIII Concerning the Rights and Duties of Neutral Powers in Naval War, art. 18, Oct. 18, 1907, 36 Stat. 2415[hereinafter Hague XIII].

18. United Nations Convention on the Law of the Sea art. 2, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS] (Beyond a state's territorial sea, a state may have some limited sovereign rights, such in their exclusive economic zone, and on their continental shelf, *see* Arts. 56 and 77.)

19. The right of innocent passage in customary international law was recognized by the ICJ the *Corfu Channel* case, where it noted "It is, in the opinion of the Court, generally recognized and in accordance with international custom, that States in time of peace have a right to send their warships through straits used for international navigation between two parts of the high seas without the previous authorization of a coastal State, provided that the passage is innocent. Unless otherwise prescribed in an international convention, there is no right for a coastal State to prohibit such passage through straits in time of peace." *Corfu Channel*, 1949 I.C.J. at 28.

20. UNCLOS, 833 U.N.T.S. 397 at art. 19(1).

21. Such measures can include the required use of certain traffic separation schemes, other regulations that pertain to the safety of navigation, the safety of navigation and the regulation of maritime traffic, regulations necessary to protect maritime navigational aids, undersea cables, or other infrastructure, or the other areas described in Articles 21 through 24. UNCLOS, 833 U.N.T.S. 397.

territorial waters.[22] However, "internal waters" are different than the territorial sea. Internal waters are those waters landward of a state's baseline,[23] upon which a state exercises sovereignty and no right of innocent passage exists.[24] This distinction between the rights foreign vessels have in the territorial sea and the internal waters has been recognized by the ICJ,[25] the International Tribunal for the Law of the Sea,[26] and the International Maritime Organization.[27] But internal waters are not wholly inviolable, and customary international law recognizes the right of a ship to enter a harbor or port "when there exists a clear threat to safety of persons aboard the ship."[28] Thus, while internal waters are typically viewed in the same light as the land territory of a state, when it is necessary to save lives, there is a right of entry for vessels.[29]

UNCLOS has been widely ratified, but it has not been universally adopted.[30] The United States is a notable outlier, having refused to ratify the treaty over objections to certain provisions related to deep seabed mining. Despite not ratifying UNCLOS, the United States has taken the position that the navigational portions of the treaty, as well as the portions pertaining to the maritime zones, are reflective of customary international law.[31] Further, given the wide acceptance of

22. Under UNCLOS Art. 25, a coastal state may temporarily suspend the right of innocent passage through their territorial seas "if such suspension is essential for the protection of its security." But these temporary suspensions must be limited in nature, published in advance, and must be implemented "without discrimination in form or in fact among foreign ships." Further the coastal state cannot suspend the right of innocent passage in their *entire* territorial sea, but only the areas necessary to preserve their security. UNCLOS, 833 U.N.T.S. 397.

23. UNCLOS Art. 5 states that "[T]he normal baseline . . . is the low-water line along the coast as marked on large-scale charts officially recognized by the coastal State." UNCLOS also provides for a number of circumstances where the baseline does not directly track the shoreline, such as in cases with a deeply indented shoreline or fringing islands, (Art. 7), some bays (Art. 10), and in some situations involving low-tide elevations (Art. 13). *See* UNCLOS, 833 U.N.T.S. 397.

24. UNCLOS, 833 U.N.T.S. 397 at art. 8.

25. Nicaragua, 1986 I.C.J. Rep. 14, at ¶ 212 ("The laying of mines within the ports of another State is governed by the law relating to internal waters, which are subject to the sovereignty of the coastal State.").

26. M/V "NORSTAR" (Pan. V. It.), Case No. 25, Judgement of Apr. 10, 2019, ITLOS Rep. 10, 74 ("The Tribunal notes that a State exercises sovereignty in its internal waters. Foreign ships have no right of navigation therein unless conferred by the Convention or other rules of international law.").

27. Int'l Maritime Organization [IMO], Res. MSC 167(78), Ann. 34 at App. ¶ 5, *Guidelines on the Treatment of Persons Rescued At Sea* (May 20, 2004). ("A State's sovereignty extends beyond its land territory and internal waters to the territorial sea, subject to the provisions of UNCLOS and other rules of international law.").

28. *Id*. at App. ¶ 6.

29. ROBIN CHURCHILL, A. VAUGHAN. LOWE & AMY SANDER, THE LAW OF THE SEA 115 (4th ed. 2022).

30. Currently there are 169 parties to the treaty. Law of the Sea, United Nations Convention on the Law of the Sea, (Nov. 23, 2024) https://perma.cc/U596-PU4Z.

31. *See* Ronald Reagan, *Statement on United States Oceans* Policy, RONALD REAGAN PRESIDENTIAL LIBRARY (Mar. 10, 1983), https://perma.cc/N2XP-9SFL ("[T]he convention also contains provisions with respect to traditional uses of the oceans which generally confirm existing maritime law and practice and fairly balance the interests of all states."); WILLIAM J. CLINTON, MESSAGE FROM THE PRESIDENT OF THE UNITED STATES TRANSMITTING UNITED NATIONS CONVENTION ON THE LAW OF THE SEA, WITH ANNEXES, DONE AT MONTEGO BAY, DECEMBER 10, 1982 (THE "CONVENTION"), AND THE AGREEMENT

the treaty and the statements of non-treaty parties, UNCLOS is widely viewed as reflective of customary international law as it relates to maritime zones and navigational freedoms.[32] UNCLOS is a legal regime that applies in peacetime and is supplanted by the law of naval warfare during armed conflict.[33] During an armed conflict, the waters of a neutral state,[34] like the land territory, may not be used by belligerents to conduct operations against their adversaries.[35] Further, belligerents have a duty to refrain from entry into neutral waters, though there are a few exceptions.[36] Notably, belligerents are able to engage in "self-help" where the neutral state is either unwilling or unable to prevent an adversary from violating the state's neutrality,[37] and states may engage in self-defense while within neutral waters.[38] Despite the general rule that neutral waters are inviolable, belligerent vessels do retain some of their transit rights.[39] Neutral states have the right to restrict passage, but must impartially apply said restrictions to all parties to the

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RELATING TO THE IMPLEMENTATION OF PART XI OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA OF 10 DECEMBER 1982, WITH ANNEX, ADOPTED AT NEW YORK, JULY 28, 1994 (THE "AGREEMENT"), AND SIGNED BY THE UNITED STATES, SUBJECT TO RATIFICATION, ON JULY 29, 1994 (1994), (noting numerous provisions were reflective of customary international law); Proclamation 10071, 85 F.R. 59165 (Sept. 9, 2020) (noting that UNCLOS "generally reflects customary international law"); and Monica Medina, Assistant Sec'y, Bureau of Oceans and Int'l Env't and Sci. Aff., Remarks at UN Convention (Dec. 8, 2022) (transcript available at https://perma.cc/5Z2B-3CUV) ("On this occasion marking the 40th anniversary of the Law of the Sea Convention, let me again reiterate the United States' continued view that much of the convention reflects customary international law.").

32. THE FLETCHER SCH. OF LAW AND DIPL., TUFTS UNIV., LAW OF THE SEA: A POLICY PRIMER 10 (Jon Burgess et al. eds., 2017).

33. "The law of naval warfare is *lex specialis* and prevails over the peacetime international law of the sea." James Kraska et al., *Newport Manual on the Law of Naval Warfare*, 101 INT'L L. STUD. § 1.1 (2023) [hereinafter *Newport Manual*]. However, there is some debate as to whether the some, or all, of the obligations under UNCLOS continue during times of hostilities. *See Newport Manual* § 4.1 ("During hostilities and to the extent that these two bodies of law are inconsistent, the law of naval warfare is *lex specialis* and prevails over the peacetime international law of the sea as reflected in UNCLOS."); Pete Pedrozo, *Duty to Render Assistance to Mariners in Distress During Armed Conflict at Sea: A U.S. Perspective*, 94 INT'L L. STUD. 102, 126 (2018) (noting that parties to UNCLOS are obligated to continue to follow those provisions, such as the duty to render assistance, which are reflective of customary international law).

34. Neutral waters include internal waters, roadsteads, territorial sea, and archipelagic waters. But neutral water excludes any claimed maritime zones seaward of their territorial sea (e.g. their contiguous zone, exclusive economic zones, et.). *See* Hague XIII, Stat. 2415; INTERNATIONAL INSTITUTE OF HUMANITARIAN LAW, SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA ¶ 18 (Louise Doswald Beck ed., 1995) (hereinafter San Remo Manual); *Newport Manual*, *supra* note 33, at § 11.3.1; and DOD LAW OF WAR MANUAL, *supra* note 16, at § 15.7.

35. Hague XIII, Stat. 2415, at art. 5 ("Belligerents are forbidden to use neutral ports and waters as a base of naval operations against their adversaries . . ."); San Remo Manual, *supra* note 34, at para. 15; *Newport Manual, supra* note 33, at § 11.3.1.

36. Hague XIII, Stat. 2415 at art. 1 ("Belligerents are bound to respect the sovereign rights of neutral Powers and to abstain, in neutral territory or neutral waters, from any act which would, if knowingly permitted by any Power, constitute a violation of neutrality.").

37. *See Newport Manual, supra* note 33, at § 11.3.3.1; DOD LAW OF WAR MANUAL, *supra* note 16 at § 15.4.2; San Remo Manual, *supra* note 34, at ¶¶ 22.

38. *See Newport Manual, supra* note 33, at §11.3.3.2; San Remo Manual, *supra* note 34, at ¶ 30; DOD LAW OF WAR MANUAL, *supra* note 16, at §15.3.1.2.

39. *See* Hague XIII, Stat. 2415 at art. 10; *Newport Manual, supra* note 33 at §11.3.3.5; San Remo Manual, *supra* note 34, at ¶¶ 19-33; DOD LAW OF WAR MANUAL, *supra* note 16, at § 15.7.4.

conflict, and certain transit rights may not be impeded by a neutral state at all (e.g., non-suspendable transit passage).[40] Further, a belligerent vessel may, when permitted, make a port visit to a neutral port,[41] and subject to some limitations, they may make repairs and take on stores and fuel while in said port.[42]

Given the foregoing it would be useful here to highlight a couple of incidents that illuminate how maritime incursions may be viewed. First, in 2016, two U.S. Navy small boats were operating in the Persian Gulf and reportedly entered Iranian territorial waters near Farsi Island. The Iranian Revolutionary Guard Corps interdicted these vessels and detained the crew.[43] The crew was held by the Iranians for approximately sixteen hours before being released.[44] Following the incident, neither the Iranians nor the United States invoked violations of the UN Charter in their public statements.[45] In a more recent incident, the Chinese government alleged that the U.S. Navy had illegally entered into the waters surrounding Second Thomas Shoal.[46] China's claims regarding Second Thomas Shoal are disputed, and were rejected by *The South China Sea Arbitration* in 2016,[47] but, assuming *arguendo*, that it is valid, as the Chinese clearly believe, this incident is illuminating.[48] Despite using some bellicose language, the Chinese government did not explicitly state that the United States had violated the UN Charter or committed a use of force against China by sailing into the claimed waters.[49] While states enjoy full sovereignty over their territorial sea, as we have noted above, there are multiple exceptions, which do not have a counterpart in other domains. Thus, as we see, territorial integrity in the maritime domain is not as absolute as is often stated.

40. Hague XIII, Stat. 2415 at art. 9; *Newport Manual*, *supra* note 33, at §§ 11.3.3.5-11.3.3.6; San Remo Manual, *supra* note 34, at ¶¶ 19, 23-30.

41. *See* Hague XIII, Stat. 241517 at arts. 12-14; *Newport Manual*, *supra* note 33, at § 11.3.3.3.

42. *See* Hague XIII, Stat. 2415 at art. 17; *Newport Manual*, *supra* note 33, at § 11.3.3.4; San Remo Manual, *supra* note 34, at ¶ 20.

43. US Press Release, US Central Command Public Affairs, Central Command statement on events surrounding Iranian detainment of 10 US Navy Sailors Jan. 12-13, 2016 (Jan. 18, 2016), https://perma.cc/GN7U-4SZW (As noted in the article the vessels were being relocated from Kuwait to Bahrain. At the time of this incident the United States and Iran were not engaged in an armed conflict).

44. *Id*.

45. *Id*.; Bozorgmehr Sharafedin & Phil Stewart, *Iran Frees U.S. Sailors Swiftly as Diplomacy Smoothes Waters*, REUTERS (2016), https://perma.cc/346E-PALZ.

46. *China says a US Navy ship "illegally intruded" into waters in the South China Sea*, AP NEWS (2023), https://perma.cc/649T-66PN. (Here again, the United States and China are not involved in an armed conflict, and as the United States noted in the quoted statement, the vessel was conducting "routine operations" not combat operations.).

47. *Id*.; BUREAU OF OCEANS AND INTERNATIONAL ENVIRONMENTAL AND SCIENTIFIC AFFAIRS, LIMITS IN THE SEAS NO. 150: PEOPLE'S REPUBLIC OF CHINA: MARITIME CLAIMS IN THE SOUTH CHINA SEA (2022).

48. A further discussion of United States' Freedom of Navigation Operations is provided in Section V.

49. *China says a US Navy ship "illegally intruded" into waters in the South China Sea*, *supra* note 46.

C. In the Sky

Whereas the maritime territory of a state is largely governed by the provisions of UNCLOS, the civilian use of airspace above a state is largely regulated by the Convention on International Civil Aviation (hereinafter the Chicago Convention). While the Chicago Convention does not apply to military aircraft, many of its provisions are seen as being representative of customary international law.[50] It is well recognized that all states exercise sovereignty in their "national airspace," that is the airspace above their territory including their territorial seas.[51] This is distinct from the airspace located outside of a nation's territory, hereinafter referred to as "international airspace."[52] A state's national airspace extends to the limits of outer space, but not beyond.[53]

As noted above, states exercise exclusive control over their national airspace. Under the Chicago Convention, civil aircraft "not engaged in scheduled international air services shall have the right . . . to make flights into or in transit non-stop across its territory and to make stops for non-traffic purposes without the necessity of obtaining prior permission, and subject to the right of the State flown over to require landing."[54] However, this provision does not apply to military aircraft,[55] and aircraft do not enjoy a right of innocent passage through the national airspace above another state's territory.[56] The general

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50. TALLINN MANUAL 2.0 ON THE INTERNATIONAL LAW APPLICABLE TO CYBER Operations 260 (Michael N. Schmitt gen. ed., 2017) [hereinafter TALLINN MANUAL].

51. *See* The Convention on International Civil Aviation, art. 1, Dec. 7, 1944, 61 Stat. 1180, 15 U.N.T.S. 295 ("The contracting States recognize that every State has complete and exclusive sovereignty over the airspace above its territory.") [hereinafter Chicago Convention]; and Chicago Convention 61 Stat. 1180 at art. 2 (which states the territory includes the land areas and adjoining territorial seas.); UNCLOS, 1833 U.N.T.S. 397 at art. 2 ("1. The sovereignty of a coastal State extends, beyond its land territory and internal waters and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea. 2. This sovereignty extends to the air space over the territorial sea as well as to its bed and subsoil."); and PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH AT HARVARD UNIVERSITY, MANUAL ON INTERNATIONAL LAW APPLICABLE TO AIR AND MISSILE WARFARE art. 1 (2009) [hereinafter AIR AND MISSILE WARFARE MANUAL].

52. International airspace also includes the airspace above a state's claimed contiguous zone, exclusive economic zone, and over the high seas. AIR AND MISSILE WARFARE MANUAL, *supra* note 51; TALLINN MANUAL, *supra* note 50, at 266; DOD LAW OF WAR MANUAL, *supra* note 16, at § 14.2.1.2.

53. While there is no international consensus as to at what altitude airspace ends and space begins, it is generally accepted that no state exercises sovereignty in Outer Space. *See* Dean N. Reinhardt, The Vertical Limit of State Sovereignty (June 2005) (LL.M. thesis, McGill Univ.) (on file with McGill Univ. Inst. of Air & Space L.); TALLINN MANUAL, *supra* note 50, at 27; and DOD LAW OF WAR MANUAL, *supra* note 16, at § 14.2.2; Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies art. 2, Jan. 27, 1967, 610 U.N.T.S. 205 ("Outer space, including the moon and other celestial bodies, is not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means." As of the writing of this paper 114 states were a party to this treaty: https://perma.cc/3C43-EFS2); and G.A. Res. 1962(XVIII), Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space (Dec. 13, 1963) (which was adopted without vote).

54. Chicago Convention, 61 Stat. 1180, *supra* note 51, at art. 5.

55. *See id*. at art. 3.

56. *See* UNCLOS, 1833 U.N.T.S. 397 at arts. 17, 19; LAW OF THE SEA: A POLICY PRIMER, *supra* note 32, at 12 ("There is no right of innocent passage for aircraft flying through the airspace above the coastal

provisions of state sovereignty and territorial integrity apply to the airspace above a state. Given this general rule, it is useful to look back at a couple of historical events that may help illuminate how states view an incursion into the national airspace of another state without consent. First, consider the aforementioned Israeli strike against the Iraqi nuclear power plant in Osirak. As discussed in the introduction to this paper, in conducting this airstrike, Israeli forces flew through Saudi Arabian and Jordanian national airspace to strike the facility within the territory of Iraq.[57] The strike was condemned as an unlawful act of aggression in United Nations Security Council resolution 487. But the resolution failed to speak to the infringement of the territorial integrity of Jordan and Saudi Arabia.[58] Further, in the nine hearings that were held leading to this resolution, and among the dozens of countries that spoke regarding the strike, the violation of the national airspace of Jordan and Saudi Arabia only was mentioned a handful of times, and often only in passing.[59] The majority of the debate seemed to hinge on the fact that Israel could not articulate a lawful justification for their action. Further, it was widely viewed as an act of aggression against Iraq, and the violation of national airspace of Jordan and Saudi Arabia seems to be viewed as minor issue.[60] During the hearing, Israel argued that they had in fact waited to strike until "the eleventh hour after the diplomatic clock had run out, hoping against hope that Iraq's nuclear arms project would be brought to a halt."[61] But as the Israeli representative noted the reactor was less than a month from becoming operational.[62] Had Israel been able to show instead that Iraq was in actual possession of an atomic weapon, and was in the final stages of preparing to carry out an attack, it seems unlikely that objections to the incursion into the airspace of Jordan and Saudi Arabia would have carried the day, because to the extent that the violations of Jordanian and Saudi Arabian airspace were mentioned at all, it was seemingly a minor issue, indicating some

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state's territorial sea."); TALLINN MANUAL, *supra* note 50, at 262; and DOD LAW OF WAR MANUAL, *supra* note 16, at § 14.2.1.

57. Raas & Long, *supra* note 3, at 11.

58. See S.C. Res 487.

59. For example, during the Algerian representative said "... This long-premeditated attack against another State, an attack which furthermore violated the airspace of two others, could only be carried out thanks to weapons on which the aggressor can always count, and to the impunity it has become accustomed to enjoying in its evil doings ..." to place this into context, his remarks span thirty paragraphs in the official record. U.N. Doc. S/PV.2280 at ¶ 165. In a later meeting the representative from Sierra Leone said "In the course of executing such a nefarious operation, Israel violated the territorial integrity not only of Iraq but also of Jordan and Saudi Arabia ..." this is the sole mention in his thirteen paragraphs of comments. U.N. Doc. S/PV.2283 at ¶ 145. For the additional comments see U.N. Doc. S/PV.2280, U.N. Doc. S/PV.228, U.N. Doc. S/PV.2282, U.N. Doc. S/PV.2283, U.N. Doc. S/PV.2284, U.N. Doc. S/PV.2285, U.N. Doc. S/PV.2286, U.N. Doc. S/PV.2287, and U.N. Doc. S/PV.2288.

60. *See* U.N. Doc. S/PV.2280, U.N. Doc. S/PV.228, U.N. Doc. S/PV.2282, U.N. Doc. S/PV.2283, U. N. Doc. S/PV.2284, U.N. Doc. S/PV.2285, U.N. Doc. S/PV.2286, U.N. Doc. S/PV.2287, and U.N. Doc. S/PV.2288.

61. U.N. Doc. S/PV.2280 at ¶ 102.

62. *Id.*

willingness of the international community to be supportive of an incursion in situations where there is an actual, existential, threat to the state.

Another event worth looking into is the incursion into Russian airspace by the United States during the Cold War. In May 1960, a United States spy plane entered Soviet airspace without consent. This was not the first time that the United States had conducted such an operation. The plane was flown by Gary Powers, and after traversing nearly 3,000 miles on a flight from Pakistan to Norway, the Soviet Union's military shot down the aircraft.[63] In a speech made by Chairman Nikita Khrushchev, the head of the Soviet government, he referred to these incursions as aggressive acts by the United States.[64] In telegrams to the United States, the Soviet Government asserted that these flights demonstrated hostile intent by the United States against the Soviet government.[65] The Soviets brought their concern to the United Nations Security Council, where they alleged that the United States had violated Article 2(4) of the charter with these flights.[66] During debate on this issue, the French delegation raised questions as to whether such an incursion was as serious as the Soviets stated given the nearly two-week delay from when the incident occurred to when they raised the issue to the Council.[67] Further, in Soviet's speeches to the Council, the framing of this flight as being an act of aggression was widely rejected by the Security Council members, though some, such as Tunisia, were critical of the incursion into Soviet Airspace.[68] Ultimately the proposed Security Council resolution condemning the flight as an act of aggression was rejected, with only the Soviet Union and Poland voting in favor of it.[69] Given the foregoing, it seems that states do not tend to see incursions into the airspace in the same light as land based incursions.

D. In Cyberspace

The cyber domain has reinvigorated debates about territorial integrity and sovereignty. There has been debate about what is meant by the cyber domain. Is it a global common like the high seas, or is it subject to the sovereignty of the various states who host the infrastructure? Given this emerging debate many states have made statements regarding sovereignty and territorial integrity related to cyberspace, and in doing so have made broader proclamations that apply more generally. While this paper will not delve into the issues surrounding cyberspace

63. For a summary of the incident please, *see U-2 Overflights and the Capture of Francis Gary Powers*, 1960, OFF. OF THE HISTORIAN, https://perma.cc/W78D-HW27.

64. Nikita Khrushchev, Soviet Preliminary Evaluation of the Significance of United States Air Reconnaissance Over the Soviet Union, *in* AM. FOREIGN POL'Y, 1960 at 409-31 (1960).

65. Telegram from Am. Embassy in Moscow to Sec'y of State, Transmitting Translation of Soviet Note Concerning U-2 Plane (1960) (on file with the U.S. Dep't of State).

66. U.N. SCOR, 15th Sess., 857th mtg., U.N. Doc. S/PV.857 (May 23, 1960).

67. U.N. SCOR, 15th Sess., 858th mtg., U.N. Doc. S/PV.858 (May 24, 1960).

68. *See id.*; U.N. Doc. S/PV.857, *supra* note 66; and U.N. SCOR, 15th Sess., 859th mtg., U.N. Doc. S/PV.859 (May 25, 1960).

69. U.N. SCOR, 15th Sess., 860th mtg., U.N. Doc. S/PV.860 (May 26, 1960).

operations, we will examine the various statements and positions as they provide a better understanding of sovereignty in general.

The Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations (hereinafter the Tallinn Manual) states that "[c]yber activities occur on territory and involve objects, or are conducted by persons or entities, over which States may exercise their sovereign prerogatives."[70] The Tallinn Manual further notes that similar to violations of national airspace, territorial waters, and the land of a state, "it is a violation of territorial sovereignty for an organ of a State, or others whose conduct may be attributed to the State, to conduct cyber operations while physically present on another State's territory against that State or entities or persons located there."[71] The Tallinn Manual further notes that "The International Group of Experts assessed [remote cyber operations] lawfulness on two different bases: (1) the degree of infringement upon the target State's territorial integrity; and (2) whether there has been an interference with or usurpation of inherently governmental functions."[72] Further, the United States has taken the position, as articulated in the Department of Defense Law of War Manual (hereinafter DoD Law of War Manual), that

> it would not be prohibited for a belligerent State to route information through cyber infrastructure in a neutral State that is open for the service of public messages, and that neutral State would have no obligation to forbid such traffic. *This rule would appear to be applicable even if the information that is being routed through neutral communications infrastructure may be characterized as a cyber weapon or otherwise could cause destructive effects in a belligerent State (but no destructive effects within the neutral State or States).*[73]

Other governments have also weighed in on this issue. The United Kingdom has asserted that it is not a violation of a state's sovereignty to interfere with the networks of another state without their consent.[74] The Canadian government has similarly stated that when looking at whether certain actions encroach on another state's territorial sovereignty, an assessment of the "scope, scale, impact or severity of disruption caused, including the disruption of economic and societal activities, essential services, inherently governmental functions, public order or public

70. TALLINN MANUAL, *supra* note 50, at 12.

71. *Id*. at 19.

72. *Id*. at 20.

73. DOD LAW OF WAR MANUAL, *supra* note 16, at § 16.4.1 (emphasis added).

74. "Some have sought to argue for the existence of a cyber-specific rule of a "violation of territorial sovereignty" in relation to interference in the computer networks of another state without its consent. Sovereignty is of course fundamental to the international rules-based system. But I am not persuaded that we can currently extrapolate from that general principle a specific rule or additional prohibition for cyber activity beyond that of a prohibited intervention. The UK Government's position is therefore that there is no such rule as a matter of current international law." Rt Hon Sir Jeremy Wright KC MP, U.K. Att'y Gen., Cyber and International Law in the 21st Century (May 23, 2018), https://perma.cc/LQL7-WE66.

safety must be assessed to determine whether a violation" has occurred.[75] The Canadian statement also notes that "[a]ctivities causing negligible or *de minimis* effects would not constitute a violation of territorial sovereignty regardless of whether they are conducted in the cyber or non-cyber context."[76]

However, some states, such as France, have articulated a more restrictive view that any unauthorized activities that access systems or cause effects within their territory constitute a violation of sovereignty.[77] For example, the African Union (hereinafter AU) has staked out what may be the most restrictive view of sovereignty in the realm of cyberspace in the *Common African Position on the Application of International Law to the Use of Information and Communication Technologies in Cyberspace, and all associated Communiqués adopted by the Peace and Security Council of the African Union* (hereinafter the Common African Position). In the Common African Position, the AU asserts state sovereignty extends to the information and communication technologies (ICTs), and the state has the exclusive right to exercise jurisdiction over ICTs located within their borders.[78] Further, it delineates that any "unauthorized access by a State into the ICT infrastructure located on the territory of a foreign State is unlawful."[79] Moreover, it asserts that states must exercise due diligence in preventing their territory from "knowingly being used to violate the rights of other States through acts that constitute a threat or use of force."[80] The Common African Position, and the position of France, stand in stark contrast to the positions articulated by the United Kingdom, United States, and Canada discussed above.

There is a growing debate on the bounds of sovereignty in the cyber domain, but the consensus articulated by the international group of experts, the Tallinn Manual, and state positions, such as the United States and Canada, indicates that merely transmitting data through the servers of third-party does not infringe on the sovereignty of that state. While some states have put forth a more restrictive

75. *International Law Applicable in Cyberspace*, GOV. OF CAN. (2022), https://perma.cc/48XQ-ND7L.

76. *Id.*

77. "Toute pénétration d'origine étatique non autorisée sur les systèmes français ou toute production d'effets sur le territoire français par un vecteur numérique peut constituer, a minima, une violation de souveraineté." (roughly translated as "Any unauthorized penetration of state origin into French systems or any production of effects on French territory by a digital vector may constitute, at a minimum, a violation of sovereignty). Droit International Appliqué Aux Opérations Dans le Cyberespace, MINISTÈRE DES ARMÉES (2019). The Netherlands position is articulated here: Letter from Minister of Foreign Affs. to the Pres. of the Hous. of Representatives (Jul. 5, 2019) (on file with the Government of the Netherlands). Other states that have asserted "sovereignty as a rule" positions to include Austria, the Czech Republic, Finland, Germany, Iran, and New Zealand, though there is disparity in how they apply said rule. Jack Kenny, France, Cyber Operations and Sovereignty: The "Purist" Approach to Sovereignty and Contradictory State Practice, Lawfare (2021), https://perma.cc/LR23-GXYL.

78. Mohamed Helal, *Common African position on the application of international law to the use of information and communication technologies in Cyberspace, and all associated communiqués adopted by the peace and security council of the African Union*, OHIO ST. LEGAL STUD. RSCH. PAPER NO. 823, ¶ 14 (2024) ([hereinafter Common African Position].

79. *Id.* at ¶ 16.

80. *Id.* at ¶ 45.

view, it seems that merely crossing through another state's infrastructure, so long as there is no harm to the transited state, would not constitute a violation of that state's territorial sovereignty.

III. NECESSITY

Necessity is a foundational principle in international law. Discussion of the principle of necessity can be traced back to some of the earliest writings on the topic. Robert Sloane, in his work *On the Use and Abuse of Necessity in the Law of State Responsibility*, notes that "[e]arly publicists on the law of nations—Hugo Grotius, Alberico Gentili, Emer de Vattel, and others—agreed that it included necessity."[81] But there is much debate regarding what this principle permits or restricts. Necessity, as a principle of international law, emerged from the Hobbesian belief that under natural law, states had the right to defend themselves and to do what was needed to achieve that end.[82] Further, Robert Ago noted that necessity and self-defense are distinct concepts and great care should be given to avoid conflating them.[83] Military necessity, along with humanity and honor, form the bedrock principles from which the other principles and rules of International Humanitarian Law (hereinafter IHL) and the Law of Armed Conflict (hereinafter LOAC) are based.[84] The DoD Law of War Manual defines military necessity as "the principle that justifies the use of all measures needed to defeat the enemy as quickly and efficiently as possible that are not prohibited by the law of war."[85] Further, beyond military necessity, the International Law Commission (hereinafter ILC) has included necessity as a circumstance precluding wrongfulness in the Articles on Responsibility of States for Internationally Wrongful Acts (hereinafter ARSIWA).[86] The ILC, in the commentaries to ARSIWA Article 25, notes that" [t]he term "necessity" (*état de nécessité)* is used to denote those exceptional cases where the only way a State can safeguard an essential interest threatened by a grave and imminent peril is, for the time being, not to perform some other international obligation of lesser weight or urgency."[87] While these principles share a name, they are not synonymous. To fully understand the bounds of necessity, both as it relates to military action and state responsibility, we must first explore the historical underpinnings of the modern-day rules.

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81. Robert D. Sloane, *On the Use and Abuse of Necessity in the Law of State Responsibility*, 106 AM. J. OF INT'L L. 447, 454 (2012).

82. *Id*. at 454-55.

83. Roberto Ago, Add. to the Eighth Rep. on State Responsibility, U.N. Doc. A/CN.4/318/Adds.5–7, ¶ 4 (1980).

84. DOD LAW OF WAR MANUAL, *supra* note 16, at § 2.1.

85. *Id*. § 2.2.

86. Int'l Law Comm'n, Rep. on the Work of Its Fifty-Third Session, UN Doc. A/56/10, supp. no. 10, art. 25 (2001) [hereinafter ARSIWA].

87. *Id*. art. 25, cmt. ¶ 1.

A. Necessity as a Circumstance Precluding Wrongfulness

While necessity emerged from the right of a state to defend itself from existential threats, it has expanded and become a prominent part of the law surrounding state responsibility.[88] The *Caroline* incident is one of the earliest events that contributed to the development and articulation of the rules of necessity is in this context. While this is often cited for self-defense, the crux of the exchange is with regard to excusing the conduct of the British military.[89] In this case British soldiers entered the United States without authorization and destroyed a vessel owned by American citizens, the *Caroline*, who had been providing aid to Canadian rebels.[90] During this raid, the soldiers not only destroyed the vessel, lighting her aflame and sending her over Niagara Falls, but also killed two Americans.[91] The subsequent exchange of letters between the United States and British government have gone on to assume an outsized role in the discussion of necessity and self-defense. Daniel Webster's letter to Henry Fox on April 24, 1841, said

> It will be for [Her Majesty's] Government to show a *necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation*. It will be for it to show, also, that the local authorities of Canada—even supposing the necessity of the moment authorized them to enter the territories of the United States at all—did nothing unreasonable or excessive; since the act justified by the necessity of self-defence, must be limited by that necessity . . .[92]

In that same letter Mr. Webster further states that "when its alleged exercise has led to the commission of hostile acts within the territory of a Power at peace, nothing less than a clear and absolute necessity can afford ground of justification." [93] Lord Ashburn, in responding noted that they agreed on the "general principle" of law that was at issue in this case.[94] While the authors of the letters exchanged in response to the *Caroline* incident, switch between "self-defense" and "necessity," several scholars have noted that the core of the argument excusing the actions of the British lies in the realm of necessity vice self-defense.[95] In drafting ARSIWA, the ILC included necessity as a circumstance precluding

88. Sloane, *supra* note 81, at 454-55.

89. ARSIWA, UN Doc. A/56/10, at art. 25, cmt. ¶ 5.

90. *Id*.

91. JUDITH GAIL GARDAM, NECESSITY, PROPORTIONALITY AND THE USE OF FORCE BY STATES, 40 (James Crawford et al. eds., 2004).

92. Arthur Duncan McNair, *Plea of Self-defence or Self-preservation or State Necessity*, 2 INT'L L. J. 22, 222 (1956) (emphasis added).

93. 29 BRITISH STATE AND FOREIGN PAPERS 1840-1841, 1133 (1857).

94. McNair, *supra* note 92, at 223.

95. "The "Caroline" incident of 1837, though frequently referred to as an instance of self-defence, really involved the plea of necessity . . ." (ARSIWA, UN Doc. A/56/10, at art. 25 cmt. ¶ 5); Arimatsu, *supra* note 5, at 42 (states that "[a]lthough the term "self-defence" appears in the exchanges between the parties, it is clear that each was referring to a state of necessity."); *see also* Blum & Goldberg, *supra* note 5, at 89.

wrongfulness.[96] Article 25 of ARSIWA excuses otherwise wrongful conduct, with respect to an obligation owed to another state, when it is faced with "grave and imminent peril."[97] Further, the idea that necessity may excuse a state from certain obligations, in certain circumstances, has been found by the ICJ to be part of customary international law.[98] In *Gabcikovo-Nagymaros Project*, the ICJ found that the plea of necessity contained in ARSIWA reflected customary international law.[99] The ICJ made this point again in the advisory opinion on the *Legal Consequences Of The Construction Of A Wall In The Occupied Palestinian Territory*.[100]

The plea of necessity is one that is typically viewed as having an "exceptional nature."[101] ARSIWA Article 25 establishes a high bar to clear for states to invoke the plea of necessity. In that, even if faced with grave peril, a state may not invoke Article 25 if 1) the action would "impair an essential interest" of the state to whom the obligation exists, 2) the obligation that is being violated "excludes the possibility of invoking necessity," and 3) the breeching state has "contributed to the situation of necessity."[102] At the core of this plea is the idea that necessity is to be reserved for the most severe situations, those where no other option exists.[103] As noted in the commentaries, the plea of necessity was crafted to be a high bar to clear in order to prevent it from becoming the exception that swallows the rule.[104] Thus when, and only when, these elements are met may a state's otherwise wrongful conduct be excused by the plea of necessity.

B. Unable or Unwilling Doctrine

The doctrine of necessity has been used to justify the rise of the "unable or unwilling doctrine" which arose during the fight against terrorists and other non-state actors. Simply put, this test articulates that when a state is attacked (the victim state) by a non-state actor, from the territory of another state (the host state), then the victim state may use force when the host state is either unable or unwilling to suppress the threat.[105] This test has historical origins in

96. ARSIWA, UN Doc. A/56/10, at art. 25.

97. *Id.*

98. *See* Gabcikovo-Nagymaros Project (Hung. v. Slovk.), Judgement, 1997 ICJ Rep. 7, ¶¶ 51-52 (Sept. 25).

99. *Id.* ¶ 51. But as is noted by Robert Sloan the court finds that a plea of necessity is part of customary international law without citation to anything other than the draft of ARSIWA and the decision is void of any reference to state practice or *opinio juris* to give additional credence to this assertion. Sloane, *supra* note 81, at 453.

100. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 ICJ Rep. 136, ¶ 140 (July 9).

101. Ago, *supra* note 83, at ¶ 12.

102. ARSIWA, UN Doc. A/56/10, at art. 25.

103. *See generally id.* at art. 25 cmt.; Ago, *supra* note 83; and Andreas Laursen, *The Use of Force and (the State of) Necessity*, 37 VAND. J. OF TRANSNAT'L L. 485 (2004).

104. See ARSIWA, UN Doc. A/56/10, at art. 36 cmt.; Further, the exceptional nature of the plea of necessity was also echoed in the Tallinn Manual largely mirrors the ARSIWA Art. 25 in its discussion regarding the plea of necessity. TALLINN MANUAL, *supra* note 50, at 135.

105. Deeks, *supra* note 5, at 485-86.

the law of neutrality where a state is entitled to self-help if a neutral state is unable or unwilling to prevent another belligerent from using its territory to launch attacks.[106] Further, it has been argued that this test, in some form, has been accepted into customary international law.[107]

While this paper will not delve into the many nuanced issues of the unable and unwilling doctrine, it is important to highlight the scholarly discussion about the invocation of necessity as it relates to transboundary military actions. In wrestling with the principles of international law that would permit a state to forcibly enter the territory of another state to address a threat authored by third-party (non-state actors), a handful of scholars have argued that it is *necessity* that permits this action, not self-defense.[108] Louise Arimatsu argued that "necessity offers a far more coherent basis upon which to justify the extraterritorial use of force … where the consent of the territorial State is not forthcoming."[109] In addition, Blum and Goldberg argued that "the prerogative to enter the territorial state without consent or other authorization is rooted in principles of necessity, not self-defense."[110] Further, Dapo Akande and Thomas Liefländer, in analyzing Daniel Bethlehem's "Principles Relevant to the Scope of a State's Right of Self-Defense Against an Imminent or Actual Armed Attack by Nonstate Actors,"[111] argue that *necessity* is the principle that relieves a state of its obligation to seek consent of the state where the non-state actor is located.[112]

The unwilling or unable doctrine argues that a state may act on the territory of another state, from which the non-state actor threat is emanating, without its consent. While some have argued that the principle of self-defense permits the state action on the territory of another state,[113] as we have seen, there are a number of scholars who disagree and assert that it is necessity that excuses the conduct toward the territorial state.

C. Jus Ad Bellum

At this point it is worth addressing *jus ad bellum* and when a state may use force in self- defense. Given that there may be an argument that it is self-defense that gives rise to State A's right to incur on the territory of State C, we need to address the bounds here in order to analyze that claim later. While not addressed in the UN Charter, customary international law dictates that in order to lawfully

106. *Id*. at 496-503.

107. *Id*. at 496-504.

108. *See* Blum & Goldberg, *supra* note 5, at 103 ("Our own view, consistent with those of a handful of other scholars in the field, is that the principle of necessity is sufficiently ambiguous that, at a minimum, it is open to an interpretation that would allow it to justify some version of the [unable or unwilling doctrine] . . ."); Arimatsu, *supra* note 5.

109. Arimatsu, *supra* note 5, at 52.

110. Blum & Goldberg, *supra* note 5, at 64.

111. Daniel Bethlehem, *Self-Defense Against an Imminent or Actual Armed Attack by Nonstate Actors*, 106 AM. J. OF INT'L L. 769, 775-77 (2012).

112. Dapo Akande & Thomas Liefländer, *Clarifying Necessity, Imminence, and Proportionality in the Law of Self-Defense*, 107 AM. J. OF INT'L L. 563–566 (2013).

113. *See* Deeks, *supra* note 5.

use force in self-defense, the principles of necessity and proportionality must be complied with under the *jus ad bellum* for a state's actions in self-defense to be lawful.[114] The ICJ in *Nicaragua* and *Nuclear Weapons* noted that the use of force in self-defense is bound by these principles, but they did not define them. Scholars have noted that in this context, "proportionality" means using the force necessary to stop the attacking forces and restore the *status quo ante*.[115] In the case of anticipatory self-defense where the attack is imminent, it means to stop the attack from happening in the first place. In this context, necessity dictates that using military force in self-defense should only be undertaken as a last resort.[116] States faced with the threat of an armed attack should consider other peaceful means to resolve the situation first. That said, a state is not required to attempt peaceable means of resolving the conflict when it is evident that such attempts would not be successful.[117]

D. Justification or Excuse?

In looking at the principles of necessity, to include *jus ad bellum* necessity, military necessity, and necessity as laid out in ARSIWA Article 25, the question becomes whether these principles operate to justify state actions or whether they merely excuse the state when it breeches an international obligation. The principles of *jus ad bellum* necessity and *jus in bello* necessity seemingly function as *enabling* principles. The *jus ad bellum* principle of necessity justifies the resort to violence in the face of a threat or attack. While the *jus ad bellum* principle of necessity is often discussed as limiting the resort to force. This paper disagrees with this reading. If the starting position is that the use of force against another state is strictly prohibited, as we find ourselves in the post-Charter world, then the principle of necessity tells states when they *may* use force in response to an attack and exercise their right to self-defense. As was discussed above, the principle of

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114. RUSSELL BUCHAN & NIKOLAOS K. TSAGOURIAS, REGULATING THE USE OF FORCE IN INTERNATIONAL LAW: STABILITY AND CHANGE 65 (2022); Nicaragua, 1986 I.C.J. Rep. 14 at ¶ 194; Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996, I.C.J. Rep. 679, ¶ 41 (July 8) [hereinafter Nuclear Weapons]; DOD LAW OF WAR MANUAL, *supra* note 16, at §§ 1.11.1.2,1.11.1.3; Kimberley N. Trapp, *Back to basics: Necessity, Proportionality, and the Right of Self-Defence Against Non-State Terrorist Actors*, 56 INT'L AND COMPAR. L.Q. 141, 146 (2007); and San Remo Manual, *supra* note 34.

115. Ago, *supra* note 83, at ¶ 121 ("The requirement of the proportionality of the action taken in self-defence, as we have said, concerns the relationship between that action and its purpose, namely—and this can never be repeated too often— that of halting and repelling the attack or even, in so far as preventive self-defence is recognized, of preventing it from occurring."); Trapp, *supra* note 114, at 146 ("The principle of proportionality then operates in tandem with the requirement that a use of force in self-defence be necessary-namely that the defensive force be tailored, and not go beyond what is necessary to halt or repeal the armed attack to which it is responding."); Buchan & Tsagourias, *supra* note 114, at 69; and DOD LAW OF WAR MANUAL, *supra* note 16, at § 1.11.1.2. ("Force may be used in self-defense, but only to the extent that it is required to repel the armed attack and to restore the security of the party attacked.").

116. Buchan & Tsagourias, *supra* note 114, at 65; and DOD LAW OF WAR MANUAL, *supra* note 16, at § 1.11.1.3.

117. *Id.*

necessity does not provide *carte blanche* to states to do whatever they want. States must still comply with the laws governing the conflict. Further, the principle of proportionality acts to restrain the state once it is enabled to take actions. To put it another way, necessity opens the door for states to use force (within the bounds of the law), but proportionality is what tells a state how far it may go in using force. States have an *"inherent right*" to engage in self-defense,[118] but they do not have a similar right to breach international obligations. As such the *jus ad bellum* and *jus in bello* principles of necessity operates to justify, rather than excuse, actions taken in self-defense.

Similarly, the *jus in bello* principle of military necessity also justifies actions taken in an armed conflict. The DoD Law of War Manual notes repeatedly the idea that military necessity justifies various actions in an armed conflict.[119] Further, in the *jus ad* bellum, Additional Protocol I of the Geneva Conventions states that necessity *permits* certain actions that are otherwise prohibited.[120] Even historically, the military principle of necessity has affirmatively permitted actions. For example, the Lieber Code was written to state what actions necessity permitted.[121] Further, the definition put forth in the *Hostage Case* was also grounded in permissive language, vice restrictive language.[122] Given this, it seems evident that the principle of *military necessity* is a permissive principle, which justifies the actions of states in an armed conflict. But there are limits. The principle of military necessity does not permit actors to take any and all measures deemed "necessary."[123] Military necessity permits actors to take all necessary actions, so long as they comply with the laws governing armed conflict and the principle of proportionality.

Outside of an armed conflict, necessity does not grant a state an affirmative right. For example, the plea of necessity, as articulated by ARSIWA Article 25, is not a permissive principle. Instead, necessity *excuses* a state's actions that are in breach of its international obligations. As noted above, the plea of necessity is

118. U.N. Charter art. 51 (emphasis added).

119. *See* DOD LAW OF WAR MANUAL, *supra* note 16, at § 2.2.

120. For example, Additional Protocol 1 notes the deviation from certain actions when necessary in art. 54 (protection of objects indispensable to the survival of the civilian population), 62 (the general protection of Civilian civil defence organizations), art. 67 (pertaining to the *matériel* and buildings of military units permanently assigned to civil defence organizations), and art. 71 (relating to the limitation of relief personnel) all contain exemptions in the case of military necessity. Protocol Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3.

121. E. D. TOWNSEND, ASSISTANT ADJUTANT GENERAL, GENERAL ORDERS NO. 100, *reprinted in* Instructions for the Government of Armies of the United States in the Field (Francis Lieber ed., Government Printing Office, 1898) (1893).

122. United States v. List (The Hostage Case), Case No. 7, Decision Under Control Council (Nuremberg Military Tribunals Feb. 19, 1948).

123. *See* Michael N. Schmitt, *Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance*, 50 VA. J. INT'L L. 795, 796 (2010); MORRIS GREENSPAN, MODERN LAW OF LAND WARFARE 314 (1959); Nobuo Hayashi, *Contextualizing Military Necessity*, 27 EMORY INT'L L. REV. 189, 193-94 (2013); and JUDITH GAIL GARDAM, NECESSITY, PROPORTIONALITY AND THE USE OF FORCE BY STATES (2004).

one that is, by design, meant to be reserved for the most exceptional circumstances. The distinction, as it relates to territorial incursions, between the principle of necessity in armed conflict, both *jus ad bello* and *jus in bellum,* and the plea of necessity as reflected in ARSIWA, will be explored later in the paper.

IV. THE UN CHARTER

The prohibition on the use of force enshrined in Article 2(4) of the UN Charter is one of the most important principles in the post-Charter era. Article 2(4) states that "[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."[124] This provision of the Charter encapsulated an analogous provision of customary international law.[125] Further, this prohibition helps form the underlying structure of the UN Charter and its collective security agreement.[126] The exact bound of this prohibition has been hotly debated by scholars and states, and those works could fill libraries. This section of the paper will lay out some of the arguments surrounding the bounds of Article 2(4) to better help us understand how this may relate to transiting through another state's territory.

The Charter prohibits states "from the threat or use of force against the territorial integrity or political independence of any state,"[127] but the Charter does not further elaborate on this phrase. While "use of force" can be contrasted with the "armed attack" standard for self-defense in Article 51 of the Charter, the Charter does not provide further clarity for either term. However, absent that contrast, the language of the charter leaves little else. Given this ambiguity in the text, debate has emerged as to whether the prohibition in Article 2(4) is absolute, and all uses of force are violative of the charter, or whether there is some *de minimis* threshold, below which a use of force is not prohibited.[128] Further complicating this debate, and more germane to this paper, is whether every violation of Article 2(4) is a violation of a peremptory norm (*jus cogens*), or if some uses of forces fall below that threshold.[129]

The prohibition on the use of force is typically viewed as being more encompassing than previous attempts to limit state-sponsored violence, by creating a

124. U.N. Charter art. 4.

125. "There can be no doubt that the issues of the use of force and collective self-defence raised in the present proceedings are issues which are regulated both by customary international law and by treaties, in particular the United Nations Charter." *Nicaragua*, *supra* note 11, at ¶ 80.

126. Jean d'Aspremont, *The Collective Security System and the Enforcement of International Law*, *in* THE OXFORD HANDBOOK OF THE USE OF FORCE IN INTERNATIONAL LAW 129–56 (1 ed. 2015).

127. U.N. Charter art. 4.

128. *See generally* Patrick M. Butchard, *Back to San Francisco: Explaining the Inherent Contradictions of Article 2(4) of the UN Charter*, 23 J. OF CONFLICT & SECURITY L. 229 (2018); Buchan & Tsagourias, *supra* note 114, at 22-24; Tom Ruys, *The Meaning of "Force" and the Boundaries of the Jus ad Bellum: Are "Minimal" Uses of Force Excluded from UN Charter Article 2(4)?*, 108 AMERICAN J. OF INT'L L. 159 (2014); and OLIVIER CORTEN: THE PROHIBITION ON THE USE OF FORCE IN CONTEMPORARY INTERNATIONAL LAW (2021).

129. CORTEN, *supra* note 128.

prohibition on all uses of military force.[130] But the question remains as to what exactly is prohibited? This paper will be focusing on whether entry into the territory of another state, by military forces, is always a violation of Article 2(4) and whether all uses of force are *jus cogens* such that they would not be able to be excused by a pleading of necessity.

A. Territorial Integrity

In reading the prohibition on the use of force, the phrase "against the territorial integrity" has been subject to much scrutiny. There are those who will argue that military actions that do not attempt to seize territory or topple a regime fall below the prohibition in Article 2(4).[131] But the dominant view of this clause is that it is not meant to restrict the prohibition to only those actions.[132] In taking a broad view of this prohibition in which territorial integrity is read as territorial inviolability, advocates often cite back to the *travaux prépatories* in which they note that the language was included, at the behest of smaller states, not to function as restrictive language, but to bolster the support for the prohibition, and highlight the principle that military force should not be used to alter borders or engage in regime change.[133] In this restrictive view, "any act of force within territory or any incursion into territory . . . would be included."[134] An example of this view is evidenced by the UN Security Council's condemnation of the Israeli airstrike on Iraq's nuclear power plant at Osirak.[135]

On the other side of the coin is the view that the prohibition on the use of force is not so absolute as to mean that every forcible border crossing is a violation of Article 2(4). In looking at what may fall below the threshold, Oliver Corten proposed six criteria to evaluate the action to determine if the victim state may invoke Article 2(4).[136] Those criteria are: where did the incursion take place; what is the surrounding geopolitical context; who ordered the operation and who executed the mission; what was the target; did the two states come into conflict; and what were the means and methods of carrying out the mission?[137] In determining the answers to these questions, Corten asserts that a state can determine whether Article 2(4) applies or not.

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130. For example, the prohibition in Article 2(4) is typically seen as being broader than the prohibition on "war" that was contained in the Kellogg-Briand treaty. *See* Randelzhofer & Dörr, *supra* note 14, at 207; CORTEN, *supra* note 128, at 51.

131. For a discussion of this, *see* Butchard, *supra* note 128, at 254-59.

132. *See* Randelzhofer & Dörr, *supra* note 14, at 217; Buchan & Tsagourias, *supra* note 114, at 27; and Butchard, *supra* note 128, at 256.

133. Randelzhofer & Dörr, *supra* note 14, at 216; Buchan & Tsagourias, *supra* note 114, at 27; and Butchard, *supra* note 128, at 254-255 (listing notable scholars who support this broad view of the prohibition).

134. Butchard, *supra* note 128, at 254-56.

135. S.C. Res 487 (condemning Israel's airstrike as a violation of Article 2(4)); and Buchan & Tsagourias, *supra* note 114, at 27.

136. CORTEN, *supra* note 128, at 91.

137. CORTEN, *supra* note 128, at 91-92.

Further, emerging doctrines, such as the protection of nationals abroad, have come to prominence, leading to a view that some actions either fall below the Article 2(4) threshold or are exceptions to that rule. While the right to protect nationals abroad may be viewed as controversial by some, the argument flows that military actions undertaken by a state, on the territory of another state, for the purposes of protecting or rescuing their nationals is not a violation of Article 2 (4).[138] The states that have undertaken such operations have argued that because the territorial state was unwilling or unable to protect its citizens, it is lawful to take action.[139] Few states have argued that such actions are violative of Article 2 (4), and it has been argued that given the half-century of state practice and *opinio juris*, the right to protect nationals abroad has entered into the realm of customary international law.[140]

In addition to the aforementioned doctrine, there has been debate about whether there is a minimum threshold below which a use of force would not be violative of the Charter. Scholars have noted that a survey of state practices does not provide insight into whether or not Article 2(4) contains a line below which a military incursion does not constitute a violation of the Charter.[141] Furthermore, states may condemn certain actions as violations of their territorial sovereignty, but not expressly state that the action was violative of Article 2(4).[142] While there may be many reasons for this, beyond a view as to whether the action was or was not a violation of Article 2(4), this lack of consensus is worth highlighting. If the widely held view was that any military incursion was a violation of the Charter, and this aspect of the Charter is the bedrock upon which the rules based international order is based, then it seems that states would have a vested interest in calling out violations to promote wider compliance.

B. Jus Cogens

The other fundamental question that arises here is whether an extraterritorial military action would be considered a violation of a peremptory norm (*jus cogens*). This is crucial because if a military incursion into another state's territory is a violation not just of an international obligation, but of a peremptory norm, then circumstances precluding wrongfulness would not be available to excuse the conduct.[143] The ILC's commentaries note that the "peremptory norms that are clearly accepted and recognized include the prohibitions of aggression, genocide, slavery, racial discrimination, crimes against humanity and torture, and the right to self- determination."[144] The leads us to the question of when does a unilateral military action cross the line?

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138. Randelzhofer & Dörr, *supra* note 14, at 226-227; and Ruys, *supra* note 128, at 198.
139. Randelzhofer & Dörr, *supra* note 14, at 227; and *Las Palmas*, 2 R.I.A.A. 829, 839.
140. Randelzhofer & Dörr, *supra* note 14, at 227; and *Las Palmas*, 2 R.I.A.A. 829, 839.
141. Buchan & Tsagourias, *supra* note 114, at 22-24.
142. Ruys, *supra* note 128, at 190.
143. ARSIWA, UN Doc. A/56/10 at art. 26.
144. *Id*. at art. 26, cmt. ¶ 5.

A useful starting point is the UN General Assembly's *Declaration on the Definition of Aggression*, which noted that "[t]he invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack or any annexation by the use of force of the territory of another State or part thereof;" constitutes an act of aggression.[145] But the line between aggression and a mere use of force is not always clear. A crucial factor in determining if an act is one of "aggression" is if the state has demonstrated hostile intent toward the territorial state.[146] If the state has "hostile intent," then the incursion into the territory would typically be viewed as an act of aggression.[147] One telltale factor that may contribute to determining if a state has "hostile intent" or not would be if the intruding state "[intends] to carry out attacks within the state's territory."[148] Ruys suggests a framework, similar to that of Corten,[149] in determining if there is hostile intent present. Ruys' framework would look to "the general geopolitical and security context . . . the repeated nature of the incursion . . . the location of the incursion . . . the nature of the intruding units . . . [and] specific indications."[150] Ruys supports his assertion that hostile intent is a key factor in assessing if a trespass is an act of aggression or violative of Article 2(4) by noting that in such cases, where there is not hostile intent, states "often refrain from invoking the language of Article 2(4) or 51."[151] Ruys concludes that while there is no gravity threshold for the use of force under Article 2 (4), the term "force" is more encompassing than "aggression".[152]

Further, the idea that an act of aggression is *jus cogens* was addressed by Robert Ago in his *Addendum - Eighth report on State Responsibility*. In that report he noted that the prohibition was "unquestionably a norm of *jus cogens* that we came to the conclusion that no plea of necessity could now have the effect of justifying the commission of an *act of aggression*."[153] But he goes on to note that there are instances where a state uses force in another state's territory which, while wrongful under international law, falls short of being an act of aggression, and therefore may be excused by necessity.[154]

Ago goes on in his report to indicate that not all uses of force on a foreign territory are acts of aggression, which would be in violation of a peremptory norm.[155] In addition to ARSIWA, the ILC recently completed their report on the identification of the peremptory norms of general international law. In that report, which identified the "prohibition on aggression," as the peremptory norm, not mere use

145. G.A. Res. 3314 (XXIX), Definition of Aggression (Dec. 14, 1974).
146. Ruys, *supra* note 128, at 172.
147. *Id*. (citations omitted).
148. *Id*. at 173.
149. CORTEN, *supra* note 128.
150. Ruys, *supra* note 128, at 75-176.
151. *Id*. at 189.
152. *Id*. at 164.
153. Ago, *supra* note 83, at ¶ 58 (emphasis added).
154. *Id*.
155. *Id*. at ¶¶ 60-66.

of force.[156] In addition, scholars have highlighted some of the inherent peculiarities that would emerge if all of Article 2(4) was considered a peremptory norm.[157] It should be noted that some scholars have argued that all forms of the use of force in violation of Article 2(4) are *jus cogens* and thus a plea of necessity is not available.[158]

To that end, this paper disagrees with the assertion that all uses of force on another state's territory are a *jus cogens* violation. In light of state practice relating to the rescue of nationals abroad, and the aforementioned practice of states and the failure to invoke the Charter when other states trespass on their territory, there seems to be a threshold that must be met before the conduct is an act of aggression, and therefore a *jus cogens* violation.[159] Further, as noted by the ILC in their commentaries to ARSIWA and in their report on *jus cogens*, "aggression" is the peremptory norm, not merely using force.[160]

One other peremptory norm that may be raised here is the principle of non-intervention. The principle of non-intervention is rooted in Article 2(4) of the UN Charter. The ICJ in *Nicaragua* stated that the principle protects "the right of every sovereign State to conduct its affairs without outside interference."[161] Meaning that, generally states have the right to conduct their internal affairs, such as elections, free from the meddling of other states. This principle has also been enshrined in multiple UN General Assembly resolutions, such as in the *Declaration On The Inadmissibility Of Intervention In The Domestic Affairs Of States And The Protection Of Their Independence And Sovereignty* and in *Friendly Relations*.[162] In addition, scholars have noted that as equal sovereigns, states are free to conduct their domestic affairs without interference from other states.[163] Further, they note that this principle forms a peremptory norm under international law.[164]

As we have explored in this section, Article 2(4)'s prohibition on the use of force is broader than a pure textualist reading of the section may support. The intention of Article 2(4) is to prohibit the use of all force by states, not just that force aimed at changing a border or the government of another state. But the claim that all uses of force violate a peremptory norm does not seem to bear out.

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156. Int'l Law Comm'n, Rep. on the Work of Its Seventy-Third Session, U.N. Doc. A/77/10 at 16 (2022) [hereinafter Peremptory Norms of General Int'l Law].

157. *See* Laursen, *supra* note 103; Arimatsu, *supra* note 5; Butchard, *supra* note 128.

158. CORTEN, *supra* note 128, at 217-221.

159. Randelzhofer & Dörr, *supra* note 14, at 226-27.

160. ARSIWA, UN Doc. A/56/10 at art. 26, cmt. ¶ 5; and Peremptory Norms of General Int'l Law, *supra* note 156.

161. Nicaragua, 1986 I.C.J. Rep. 14 at ¶ 202.

162. Friendly Relations, G.A. Res. 2625 (XXV).

163. *See generally* Jianming Shen, *The Non-Intervention Principle and Humanitarian Interventions under International Law*, 7 INT'L LEGAL THEORY 1 (2001); and TOM RUYS, OLIVIER CORTEN & ALEXANDRA HOFER, THE USE OF FORCE IN INTERNATIONAL LAW: A CASE-BASED APPROACH (Olivier Corten et al. eds., 2018).

164. *Id.* Note here as well that the ILC identified the right of self-determination as a peremptory norm. *See* Peremptory Norms of General Int'l Law, *supra* note 156.

While it is clear that acts of aggression would be a violation of a peremptory norm, it seems that lower levels of military actions may not rise to that threshold, leaving open the possibility that a plea of necessity is available to excuse those actions.

V. ANALYSIS

A. General Analysis

Now that we have examined the underlying rules and principles at play with regards to sovereignty, necessity, and the UN Charter's prohibition on the use of force, we will look at what general rules we can pull from this to help us explore the issues associated with non-consensual border crossings. This section will begin by tying together some of the ideas raised in the preceding three sections, then move on to discuss the three hypothetical situations proposed in the introduction.

First, as we pulled together in the section on sovereignty, the territorial boundaries that separate nations are more permeable than is often stated and there is potentially more leeway in crossing borders available to states. While the overarching rule, as articulated in *Las Palmas*, *Corfu Channel,* and other ICJ cases, is that states should respect territorial boundaries,[165] we have also seen that this is not an absolute rule. As we noted in the various domains, there are rules established that permit states to non-consensually cross borders in virtually every domain we surveyed, with the land domain being the most restrictive. As we saw at sea, ships may enter another state's territorial sea at will under the right of innocent passage.[166] Further, while foreign vessels are typically restricted from entering the internal waters of a foreign nation, they may do so when there is a state of distress, and it may save lives.[167] In the aviation domain, we see that civilian aircraft in some circumstances, such as those discussed in Article 5 of the *Chicago Convention*, may transit through the air space of another country without prior consent, but this does not extend to military aircraft.[168]

Further, as states have staked out positions related to the cyber domain, they have provided insights applicable in the physical world too. The United States and Canadian statements note that cyber activities that have a *de minimis* impact, whether they manifest in the real world or not, are not violative of the territorial sovereignty of another state.[169] Further, even the most restrictive statements on the cyber domain, such as the Common African Position, only states that

165. *Las Palmas*, 2 R.I.A.A. 829, 839; Corfu Channel, 1949 I.C.J. at 28; Kosovo Advisory Opinion, 2010 I.C.J. Rep. 403/

166. UNCLOS, 1833 U.N.T.S. 397, *supra* note 18, at arts. 17-26.

167. MSC 78/26/Add.2, Ann. 34, at App. ¶ 6.

168. Chicago Convention, 61 Stat. 1180, at art. 5 (which permits civilian aircraft to overfly other states but note that art. 3 of the convention excludes military aircraft from its provision. Further as discussed in the above sections there is no right of innocent passage for aircraft.).

169. *See* U.S. Dep't of State, Remarks on International Law and Stability in Cyberspace (2016), https://perma.cc/AL8R-LDD7; *International Law Applicable in Cyberspace*, *supra* note 75.

"unauthorized access" is unlawful. The statements regarding the *de minimis* impact in the cyber realm are echoing the same *de minimis* arguments that surround violations of Article 2(4) of the UN Charter.[170] It seems that regardless of the domain, territorial boundaries, which should be respected, are not as inviolable as some have asserted, when there is no threat of force being used against the territorial state.

The larger question that looms over the issues of non-consensual entry into another state's territory is whether every incursion into the territory of another is a *jus cogens* violation, which if that were the case, would foreclose the use of necessity as a circumstance precluding wrongfulness. As discussed above, based on the law and state practice, not all territorial violations by another state's military are *jus cogens* violations. First, as discussed above, the ILC, in both the commentaries to ARSIWA, and their report on *jus cogens*, note that "aggression" is the *jus cogens* norm.[171] There are numerous examples of states condemning territorial violations of another state, but not stating that they were acts of aggression or a *jus cogens* violation. As we discussed above, there was sparse condemnation of the territorial violations of Jordan and Saudi Arabia by Israel in their strike on the Osirak reactor.[172] And while the Soviet Union accused the United States of engaging in an act of aggression by flying a spy plane over its territory, this was roundly rejected by the Security Council, as evidenced by the failed resolution and aforementioned statements by the various member states.[173] In addition, unintentional incursions often result in apologies being issued, rather than accusations of aggression and *jus cogens* violations. For example, there have been multiple times that the Swiss army has inadvertently entered into neighboring Lichtenstein, including an incident of dropping artillery shells into Lichtenstein.[174] In another incident United Kingdom Royal Marines came ashore in Spain, while doing an exercise in Gibraltar.[175] Neither of these incidents resulted in accusations of aggression or a violation of a peremptory norm. More recently, a Chinese high-altitude balloon crossed into United States airspace without permission. The United States stated that the balloon was a Chinese spy

170. *See generally* Butchard, *supra* note 128; Buchan & Tsagourias, *supra* note 114, at 22-24; Ruys, *supra* note 128; CORTEN, *supra* note 128.

171. ARSIWA, UN Doc. A/56/10 at art. 26, cmt. ¶ 5; Peremptory Norms of General Int'l Law, U.N. Doc. A/77/10 at 16.

172. *See* Khrushchev, *supra* note 4.

173. *The U-2 Incident and the Collapse of the Summit Conference*, *supra* note 64; U.N. Doc. S/PV.857, *supra* note 66; N. Doc. S/PV.858, *supra* note 67; U.N. Doc. S/PV.859, *supra* note 68; U.N. Doc. S/PV.860, *supra* note 69. While a security council resolution can be vetoed by a single permanent member, in this case, the resolution was rejected by an overwhelming majority of the council.

174. Shahan Russell, Neutral Switzerland Has Invaded Liechtenstein 3 Times in 30 Years – by Mistake, WAR HISTORY ONLINE (2017), https://perma.cc/2EWT-L55W; *Whoops! Swiss Accidentally Invade Liechtenstein*, ABC NEWS (2007), https://perma.cc/UC3B-MKYW; *Liechtenstein: No retaliation for Swiss "invasion"*, THE GUARDIAN (2007), https://perma.cc/UGB2-VBJG.

175. *Tell it to the Marines . . . we've invaded the wrong country*, THE GUARDIAN (2002), https://perma.cc/UGB2-VBJG.

balloon, which the Chinese government denied.[176] The U.S. State Department, in their statements about the incident, said that "the presence of this balloon in [U.S.] airspace is a clear violation of [U.S.] sovereignty, as well as international law.[177] But what is telling in this incident is that the United States did not invoke a violation of the UN Charter, nor did they invoke a violation of *jus cogens* norms. Compare this to the Russian response to the U.S. and U.K. strikes against the Houthi rebels in Yemen in response the missile attacks against shipping in the Red Sea. In this case the Russians submitted a letter to the UN Security Council and clearly accused the United States and the United Kingdom of acts of aggression.[178]

Further, support for the view that not every territorial violation is a *jus cogens* violation can be seen by the response, or lack thereof, to the United States' Freedom of Navigation Program.[179] Every year, the United States military sails and flies in areas to challenge what the United States perceives as excessive maritime claims. Some of the challenged claims, if the state's claim was valid, would create scenarios where in the normal course of events U.S. military ships and aircraft would have violated their sovereignty in ways incompatible with international law.[180] In addition to the example discussed above, in 2023, the United States challenged the People's Republic of China's straight baseline claims around the Paracel Islands. In this case, China stated that the U.S.'s actions violated their sovereignty but made no mention of it being a use of force or act of aggression.[181] Further, Vietnam commented on a previous challenge by the United States against China, and merely asked all parties to "respect sovereignty and jurisdiction of coastal states," but did not say that the actions were an act of aggression.[182] In another incident in 2003, a United States aircraft carrier, escort vessels, and multiple F-18 fighter jets, entered into Indonesian claimed sea and

176. Jim Garamone, F-22 Safely Shoots Down Chinese Spy Balloon Off South Carolina Coast U.S. Department of Defense (2023), https://perma.cc/G6BP-TBTW.

177. *See* U.S. Dep't of State, Senior Department Officials on the People's Republic of China (2023), https://perma.cc/975S-XKW5.

178. Letter from Permanent Rep. of Russian. Federation to the U.N. to the President of the Security Council, U.N. Doc. S/2024/90 (Jan. 22, 2024) (responding to US and UK strikes within Yemen against Houthi targets).

179. *See* U.S. DEP'T OF DEFENSE FREEDOM OF NAVIGATION PROGRAM (2016), https://perma.cc/GR7X-7K83.

180. For example, from October 2021 to September 2022, the United States challenged 22 excessive claims and in the same time period from 2020-2021 the United States challenged 37 excessive claims. While some claims would not impute territorial integrity issues, such as Ecuador's claim to require consent in order to conduct military exercises within its exclusive economic zone, some claims would. For example, some of the challenged claims include straight baseline claims that would create internal waters through which a state cannot exercise innocent passage. The annual reports for all the United States Freedom of Navigation Program can be found here: *Freedom of Navigation Program Annual Reports* (2006), U.S. DEP'T OF DEF., https://perma.cc/DJ3Y-GEVZ.

181. Sam LaGrone, *U.S. Destroyer Performs South China Sea FONOP; China Says it Expelled Warship*, USNI NEWS (2022), https://perma.cc/KW79-HF27; Ankit Panda, *China Reacts Angrily to Latest US South China Seah Freedom of Navigation Operation*, THE DIPLOMAT (2017).

182. Sam Bateman, *The Risks of US Freedom of Navigation Operations in the South China Sea*, EAST ASIA FORUM (2023), https://perma.cc/F4GH-2T3R.

airspace. In response, Indonesia deployed F-16 fighters to intercept the American aircraft. As a result of the incident, the Indonesian government conveyed its concern about the incident, but did not invoke the UN Charter, or claim the incursion was an act of aggression.[183] By and large, when a country responds to a challenge, if they respond at all, it is rarely, if ever, framed as an act of aggression.

What the preceding shows and bolstered by the Ruys and Corten works discussed in the preceding sections, is that there is a line below which a state's intrusion into another state will not be condemned as a *jus cogens* act of aggression. As Ruys noted, intrusions that lack hostile intent towards the territorial state are typically not viewed as acts of aggression, though they may be a violation of Article 2(4).[184]

Further, mere trespass by another state's military forces does not seem to rise to the level of violating the non-intervention principle. In cases of mere trespass, the trespassing state is not taking any actions that would directly interfere in the domestic affairs of the territorial state. As noted in the examples above, none of the states who violated the territorial sovereignty were accused of violating the principle of non-intervention. Compare this to the U.S. support of the Contras in Nicaragua or the NATO bombing campaign in Kosovo, where the states were directly trying to impact the domestic affairs of the respective territories. Thus, it is argued here that mere trespass is not a violation of the principle of non-intervention, nor is it a *jus cogens* violation.

But what is the legal basis to enter the territory of a state which is not the author of the threat? As we discussed above, the principle of necessity is what provides the basis, and excuse, for transgressing against the territorial state's rights. As the scholars Blum, Goldberg, Arimatsu, Akande, Liefländer, and others, have argued, and to which this paper joins the chorus, it is the principle of necessity which excuses the wrongful act when states acts on the territory of a state that is not the author of the threat against it.[185] What we come to find is that a state's inherent right of self-defense, and by extension military necessity, gives a state the legal basis to conduct military operations against a state who is responsible for the threat it is faced with. But that does not excuse the transgression against a third state who is not a party to the conflict. In those cases, it is necessity that provides the excuse for the infringement on the territorial rights of the third state.

183. *Indonesia Deeply Concerned Over US Intrusion,* XINHUA NEWS AGENCY (July 10, 2023), https://perma.cc/JL89-WTZT. Further the incident is discussed in Vivien Jane Evangelio Cay, *Archipelagic Sea Lanes Passage and Maritime Security in Archipelagic Southeast Asia*, THE MARITIME COMMONS: DIGITAL REPOSITORY OF THE WORLD MARITIME UNIVERSITY (2010), https://perma.cc/W3M9-7GG8.

184. Ruys, *supra* note 128, at 172 (citations omitted).

185. *See* Blum & Goldberg, *supra* note 5; Arimatsu, *supra* note 5; Akande & Liefländer, *supra* note 112, at 566.

B. "Necessary Passage"

What seems to be lying just below the surface of this discussion is the fact that there seems to be something akin to the right of innocent passage at play, that I will call "necessary passage." When a state engages in "necessary passage" through the territory of another state, without consent, they are doing so to quash a significant threat facing them. Like innocent passage at sea, "necessary passage" should not be prejudicial to security of the transited state, as best it can, and should avoid a military confrontation with the transited state. In evaluating whether a state is engaged in "necessary passage," I propose the following factors be used to evaluate the transit:[186]

1) What is the threat facing the intruding state?
2) Is there another means to address the threat without intruding into the territory of another state?
3) Is the intruded state willing or able to permit the intruding state transit?
4) What is the overall geopolitical and security context surrounding the transit?
5) The nature of the incursion (e.g., where is happening, how long does it take, etc.)?
6) Did the two states come into conflict during the intrusion?
7) What communications or indications has the intruding state provided to the intruded state?

To touch on these briefly, first, what is the nature of the threat facing the intruding state? The greater the threat the state is facing, the more leeway it tends to be given when responding to said threat. The ICJ has noted that states have a fundamental right to survival and a right to resort to actions in self-defense.[187] Further, while we discussed above that necessity is the principle that excuses the conduct toward the incurred state, this is tied directly to the state's right of survival. And, as noted above, the plea of necessity has an exceptional nature, and should only be invoked in circumstances of "grave peril."[188] Thus, to engage in "necessary passage" the incursion should be proportionate to the level of threat faced, which would need to be significant in order to justify the crossing of another state's territory. If a state, based on the available evidence, believed it was only facing a limited attack, then "necessary passage" would be foreclosed at the outset.

The next three factors are self-explanatory. It may be self-evident, but "necessary passage" should be necessary. If there is another means, though it may be more inconvenient, then the state should refrain from engaging in "necessary

186. These factors are largely based on the factors articulated by Ruys and Corten discussed above. *See* Ruys, *supra* note 128, at 175-176; CORTEN, *supra* note 128, at 91.

187. *Nuclear Weapons*, *supra* note 114 at ¶¶ 96-97.

188. ARSIWA, UN Doc. A/56/10 at art. 25, 25 cmt.; Ago, *supra* note 83; Laursen, *supra* note 103, at 485; TALLINN MANUAL, *supra* note 50, at 135.

passage."[189] Given that territorial integrity is a principle that should be respected, the state should only engage in a non-consensual incursion when it has no other options. Further, if the incurred upon state consents to the entry, then that obviates the need for "necessary passage." In *Corfu Channel*, the ICJ notes that states have an obligation to prevent their territory from knowingly being used for "acts contrary to the rights of other States."[190] This obligation implies that a state should not take actions contrary to the rights of other states. There is an argument that by denying the victim state permission to enter its territory, the host state is in effect engaging in an act contrary to the right of the victim state. When the incurred upon state refuses such permission, then it becomes necessary for the incurring state to engage in "necessary passage." Further, the overall geopolitical situation should be considered by any state considering "necessary passage." If the state to be incurred upon is an ally, or sympathetic, to the state that is threatening the incurring state, then that would factor into overall context of the situation and may limit the communications and intelligence to be shared ahead of, or during the passage.

Where the incursion takes place is a crucial element in assessing the passage and helping frame the passage as being not hostile to the incurred-upon state. The transited state will likely perceive the intrusion far differently if the incurring state takes its forces through a sparsely populated region, as opposed to if it marches its forces through the capital city. Further, the incurred state's perception will be far different if the incurring forces move quickly through the state, verse lingering in one location for an extended amount of time. To harken back to innocent passage at sea, the incurring forces should transit through the state continuously and expeditiously. Finally, how many forces are moving through the state? Is it the entire army of the incurring state or are only the units necessary to quell the threat faced? This is not to say it may not be a substantial number of forces, but the number of forces should only be those needed to address the threat.

Finally, the last two factors are crucial and tied together. Did the incurring state enter into conflict with the incurred upon state's forces and what communications did the incurring state provide to them? When a state is engaging in "necessary passage," the incurring state should avoid coming into conflict with the forces of the incurred upon state. Further the incurring state should ensure that at both the tactical level of the forces on the ground, and at the higher levels, they are clearly communicating with the incurred upon state regarding their intentions and, to the extent possible, the nature of the threat facing the incurring state that is underlying the need to transit through the incurred state. This may require the state seeking to engage in necessary passage to declassify, to the extent possible, whatever

189. In the discussion by the ILC in the commentaries for ARSIWA article 24, Distress, they highlight the case of the "Rebecca." There the Commission held that circumstances of "mere convivence" could not justify violating the local laws. ARSIWA, UN Doc. A/56/10 at art. 24, cmt. ¶ 8, n.371.

190. *Corfu Channel*, 1949 I.C.J. at 22.

intelligence it has to support the assessment that there is a grave risk and the only way to address it is through the territory of the incurred state.

While this framework will provide guidance and help avoid issues, there is potential for abuse. If the bar is not kept high to justify this type of conduct, states may utilize this out of convenience vice actual necessity. Further, it should be noted that the incurred upon state will be in the position of having another state's military cross its borders uninvited and place a great deal of trust that they are only truly passing through. In addition, the power dynamics that will inherently be at play in these types of scenarios should be noted. If a powerful state, such as the United States, Russia, or China, is the one transiting through a weaker state, then that transit is likely to be unopposed because the trespassed state likely lacks the ability to repel the incursion and would have to fear retaliation. However, if a weaker state, or near-peer, attempts this passage, it may result in conflict with the trespassed state, even if the incurring state is fully justified in their claim of necessity.

Recently, this danger was put on full display on April 13, 2024 when Iran launched a barrage of hundreds of drones, cruise missiles and surface-to-air missiles from the territory of Iran, Iraq, and Yemen against targets in Israel.[191] In order to reach Israel, these missiles and drones had to traverse the national airspace of Syria, Jordan, Saudi Arabia, and Lebanon. At the time of writing, it is unclear whether Iran had been granted permission by any of these countries prior to launching their assault on Israel. However, Jordan claims to have shot down some of the objects that were in their airspace, which seems *prima facia* evidence that they did not consent to the overflight.[192]

This incident highlights the advantages and potential perils of the "necessary passage" framework above. Like the "unable or unwilling" doctrine, "necessary passage" is something states would unilaterally decide to do and is left open to abuse by powerful state or malign actors. If Iran decides that it has sufficient grounds to justify a strike on Israel, then the only viable option, as we saw, would be to traverse the territory of its neighboring states to do so. In current context, it seems that Iran would have a difficult time articulating the on-going threat facing it from Israel. After Israel's attack on the Iranian embassy in Syria,[193] there have not been any publicly available statements from Israel that indicate intent to strike against Iran further.

Further, given that there was not an on-going threat of the use of force against Iran, it could have attempted to engage in peaceable resolution of the situation with Israel. But as we have seen with Russia's full-scale invasion of Ukraine, a

191. Jin Yu Young, *Israel Faced a Sophisticated Attack From Iran*, N. Y. TIMES (Apr. 14, 2024).

192. Gaya Gupta & Emma Bubola, *U.S. Intercepts Dozens of Iranian Drones and Missiles Aimed at Israel*, N. Y. TIMES (Apr. 14, 2024).

193. Matthew Mpoke Bigg, *What We Know About Iran's Attack on Israel*, N.Y. TIMES (Apr. 14, 2024).

savvy bad actor could articulate their justification in legal terms.[194] Moreover, given the ongoing conflict between Israel and Hamas, engaging in this type of incursion into other states' airspace threatens to escalate the situation and not bring it to a close.[195] Finally, given the Jordanian response noted above, it seems that it was unlikely that Iran effectively communicated its intentions with all the incurred upon states. Thus, while it seems that Iran has not provided justifications for breaching its neighbors' territory in its strikes on Israel, it is not hard to see how they could have done so in a way that would be supported by the proposed framework.

While the framework is designed to limit negative outcomes of these types of incursions, the author acknowledges that it potentially opens the door to abuse as well. However, the framework can help blunt these abuses. Given that a state following the proposed framework, should be communicating its intentions with the transited state, that will provide the transited states an opportunity to object, either before or after, to the transit. Thus, this framework allows states to take actions, either legally such as brining a case before the ICJ for the incursion, or through other means of protest such as *dé marches* or sanctions.

The proposed framework should provide a workable solution for states when facing a threat that necessitates transiting through the territory of a third state and a means to limit some of the potential negative outcomes of the said transit. The framework for "necessary passage" should ensure that the incurring state is responding proportionately to the threat posed to it, both in the overall need to transit through the third state and the forces it is utilizing. Further, it should also ensure that it is clear to the incurred upon state that the transit is not a hostile act toward that state and is only being undertaken due to necessity.

C. Hypotheticals

Given the foregoing discussion, let us turn our attention to the three hypothetical situations proposed at the outset of this paper. In the first scenario, State A has determined that to respond to the armed attack authored by State B, they will fly cruise missiles and reconnaissance aircraft over the territory of State C, targeting State B, both for the strikes on the territory of State B, and for intelligence gathering against State B. In the second scenario, State A determined that due to State B's air defense systems, it would have to send its forces, on the ground, through the territory of State C, to engage with State B's forces, within State B. Finally, in the third scenario, State A determined that it would transit the territorial sea of State C, and then enter a river to land forces ashore inside of State B's territory. We will now look to see how the framework for necessary passage would work in these scenarios.

194. Russia's "Special Military Operation" and the (Claimed) Right of Self-Defense, LIEBER INSTITUTE WEST POINT, https://perma.cc/4HEL-QPYW.

195. Bigg, *supra* note 193.

For all three scenarios, suppose that the first three criteria are met. State A has suffered an armed attack at the hands of State B. For purposes of this paper the assumption is that State B has indicated that this was the first in a planned series of attacks, thus necessitating State A's invocation of self-defense under Article 51 of the UN Charter. Further, there is no other way for State A to respond other than crossing the territory of State C. To put this into a real-world context hypothetical, assume Lesotho, a nation completely surrounded by South Africa, suffered an armed attack authored by Botswana. If South Africa refused to grant Lesotho permission to cross its territory, then it would have no other option but to incur into South Africa in order to defend against the attacks coming from Botswana. Or, in a less extreme scenario, imagine that Suriname was attacked by Venezuela, and Guyana is refusing to permit Surinamese forces transit through their territory.[196] Finally as noted, State C has refused to grant permission for State A to transit through its territory, thus noting the third prong of the analysis is met.

In looking at the fourth prong, it is important for State A to consider the broader geopolitical and security landscape. Is State C a traditionally neutral country, like Switzerland? Has State B indicated that it will view State C as a party to the conflict if State A transits through State C? Is State C an ally of either State A or B? While these factors are not necessarily legal considerations, they are strong policy considerations that should be factored into ensuring the transit of State A through State C is nonprejudicial to State C.

The fifth prong, the nature of the incursion, may be crucial in determining whether the transit through State C comports to the strictures of "necessary passage." For example, in our first hypothetical, how many missiles are flying over State C, and at what height? One can imagine that one or two missiles flying at a high enough altitude may not even be noticed by the population of State C, other than the military air defense system. Similarly, if State A flies one or two reconnaissance planes or unmanned systems over the territory of State C, in order to gain intelligence on State B, that would be perceived differently than if dozens of attack aircraft fly over State C at low enough altitudes to alarm the general population. In our maritime scenario, the same calculus applies. What are the vessels that State A is going to sail into State C's territorial and internal waters? Is it a few small boats to land forces ashore in State B? Or are they moving multiple large surface combatant vessels through State C's waters? Are they loitering or transiting quickly? Finally, in our land-based scenario, we must question what size force is State A marching through State C and where? Is State A moving a couple of platoons through sparsely populated areas of State C, or is it marching an entire division through State C's capital city?[197] In all three scenarios State A should use as small a military force as it can to effectively defend itself; those

196. All of these scenarios are hypothetical and are not based on any ongoing conflict.

197. A platoon typically has a couple dozen soldiers, where as a division may have more than 10,000. *Military unit*, ENCYCLOPEDIA BRITANNICA (2023), https://perma.cc/2Y5L-8VVQ.

forces should fly, sail, or march through State C in a continuous and expeditious manner; and when possible should avoid transiting through densely populated, or strategically significant, areas of State C. For example, State A should avoid transiting near major metropolitan areas and sensitive military installations of State C.

For the final two prongs, State A's forces need to endeavor to avoid coming into conflict with State C's forces during the transit. This means that State A should not attack or engage State C's air defenses, navy, coast guard, army, or even local police. Further, State A, both at the unit level and the national level, needs to be clearly communicating with State C about their intentions as early as possible. Meaning, State A's national government should be in communication with State C's government regarding their intention to transit through their territory, despite being denied permission. This communication should reiterate that State A does not pose a threat to State C. Similarly, State A's forces on the land, sea, and air need to be prepared to respond to queries from State C's local forces that reiterate their intention to merely pass through, and that do not pose a threat to State C.

These scenarios, while they may elicit varying degrees of protest from State C, are all lawful under the right circumstances. State A, under international law, is bound to respect the borders and sovereignty of State C, and sending its military forces through the territory of State C would be a breach of said obligation. But, as discussed above, this would not be a *jus cogens* violation, even in our scenario where military forces are marching through the land territory of State C. State A must take care to avoid the perception of engaging in an act of aggression toward State C, and following the framework prescribed above would help them in that endeavor. Since the incursion into State C's territory is not a *jus cogens* violation, then necessity would provide excuse for the breach of the international obligation.

In all the above scenarios, the proposed transit must be proportionate to the threat posed by State B to State A. Thus, as discussed above, if State A has other ways to address the threat posed to it by State B, even if they are not as convenient, then State A should refrain from transiting through State C. However, assuming there is no other way to address the threat, then State A must still act proportionally to the threat posed. As such, in our land scenario, State A should refrain from marching an entire division through the territory of State C if the objective of neutralizing the threat can be achieved with a platoon. However, if the threat is much greater, such as State B is planning to launch a full-scale invasion of State A, similar to Russia's further invasion of Ukraine in 2022, then State A would be justified in sending a larger complement of forces through the territory of State C.

Finally, this raises the question as to whether State's C's right to self-defense is triggered by State A's incursion. As noted above, a state's right to self-defense is only triggered if the actions of State A constitute an "armed attack" on State C.[198]

198. U.N. Charter art. 51.

In the *Nicaragua* case, the ICJ noted that it is the "scale and effects" of action against State C that would determine whether or not their right to self-defense is triggered.[199] What we see from the above scenarios, is that if State A has followed the "necessary passage" framework then the incursion into State C's territory would not be seen as rising to an armed attack. Through their communications with State C, State A is clearly stating that they do not pose a threat to State C. Further, by using the minimal number of military units, and trying to avoid highly populated or sensitive areas, State A's actions would not constitute an act of aggression or an armed attack against State C. Thus, the incident would be more akin to the incursions of Lichtenstein by the Swiss, or of Spain by the UK, noted above.[200] This is not to say that State C is without recourse against State A. State C could issue a *démarche* against State A, cease diplomatic relations, or attempt to bring a case against State A to the ICJ. Though, as discussed above, the plea of necessity by State A would likely excuse its conduct against State C.

VI. CONCLUSION

As we have explored here, the principle of necessity permits a state to address a threat posed to it by transiting through the territory of a state that is not the author of the threat. A state engaging in necessary transit faces a high bar to clear in order to excuse the breach of another state's sovereignty. But if they follow the framework set out above, it should ensure that their actions are not viewed as hostile to the incurred upon state and would not be tantamount to an act of aggression. Further, as we noted, there is a potential power imbalance with necessary passage, in that powerful states will be able to exercise this without much fear of reprisal by weaker states. Necessary passage cannot, and should not, be read as giving powerful states a free hand to transit over all others. Finally, it is evident that the domain of transit, land, sea, or air, is irrelevant in terms of legality of the transit.

The ability to engage in necessary passage through another state's territory is predicated on the legal position that not all military incursions are a *jus cogens* violation. There are those that argue *any* incursion is either a prohibited act of aggression or violative of the non-intervention principle. The proceeding sections provide ample evidence to the contrary, in particular the ILC in ARSIWA and the report on *jus cogens*, explicitly called out "aggression" as a peremptory norm, not mere uses of force.[201] Further, as we have seen in the various examples above, states are often reticent to denounce non-hostile incursions as violations of *jus cogens* or of the UN Charter. We have also seen that the emerging debate on sovereignty in cyberspace has illuminated, not only states' views on cyberspace, but on sovereignty as a whole. What emerges from all of this is a view of territorial integrity that is more malleable than we often conceive of it. In addition, the

199. Nicaragua, 1986 I.C.J. Rep. 14 at ¶ 195.
200. *See supra*, notes 184-85.
201. ARSIWA, UN Doc. A/56/10 at art. 26 cmt. ¶ 5.

principles of necessity play significant roles in all stages of this transit. While it is military necessity and the necessity in the *jus ad bellum* that authorizes a state to take military actions against the state that is threatening it, they fail to properly address the breach of third state's territorial integrity. That breach would be excused by the circumstance precluding wrongfulness version of necessity.

As conflicts around the world become more global and interconnected, states will need to weigh options when facing with threats that require the incursion through another state's territory. The framework for necessary passage is designed to provide a way for states to work through these issues, limit conflict with the territorial state, and address the threat that is facing them. While there are obvious risks to the incurring state, following the framework will mitigate some of that risk, or, at the minimum, provide better information to the state in weighing its options.