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VALIDITY OF CONTESTED TITLE TO TERRITORY IN FROZEN CONFLICT ZONES: THE CASE OF NAGORNO KARABAKH WITH PARTICULAR REFERENCE TO THE 2020 WAR

ABSTRACT

In many frozen conflict zones, the validity of a recognised title to territory could be contested on normative and factual grounds. In the case of Nagorno Karabakh (NK), the Azerbaijani internationally recognized title could be contested and reassessed based on the right of the local Armenian population to self-determination. The 2020 six-week war also provides arguments that could impinge upon the Azerbaijani title, in particular, its recourse to force and misconduct during the war as well as the Armistice Agreement ending the war, which conferred upon Russia security guarantees. It could furthermore be challenged on the ground of the ineffectiveness, the long-lasting effective occupation of that land, or the ongoing peace process led by the OSCE Minsk Group, which favours a negotiated settlement and or on account of the behaviour of states in international organizations, such as voting for UN General Assembly resolutions. Finally, it could be argued that in the recent conflict Azerbaijan appeared to treat NK more as a 'grey zone' than its own territory and breached the due diligence precept by inviting mercenaries, endangering international energy security, and expecting impunity.

The article aims to clarify the validity of a recognised but contested title to territory in frozen conflicts through the lens of the NK case. It develops a matrix that permits to contrast the title with grounds that may challenge it and to evaluate whether those grounds are sufficient to dispossess the current titleholder of its right to the territory in question. The article concludes that both normative and factual challenging grounds currently do not erode the Azerbaijani title and as long as derecognition does not occur the title should be considered valid. The article's principal contribution lies in this expandable matrix through which analysts may evaluate contested title to territory in this and similar frozen conflicts.

KEYWORDS: TERRITORIAL TITLE, RECOGNITION, FROZEN CONFLICT ZONES, NAGORNO KARABAKH.

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I. Introduction

The validity of contested territorial claims can, by and large, be inferred from the position of the international community towards these claims.¹ Legality is not synonymous with the effectiveness of the title (administering sovereign powers and rights), and so recognition by states and acts of international organisations serve as mechanisms to validate and stabilise the title (relative in case of partial recognition).² Acquisition, maintenance and loss of the territorial title are mirrored in the recognition practice.³ A universally recognized claim generally presumes legality and stability of the title.⁴ Non-recognition, either explicit or implicit, expresses objection towards formulated or prospective claims.⁵ Partially recognized claims shed doubts on the validity of a territorial title and denote its relativity, as evidenced in the instances of Western Sahara or Palestine. Given the general recognition of Nagorno Karabakh (NK)⁶ as Azerbaijani territory, the article assumes the validity and legality of such territorial title. Nevertheless, this validity is contestable given the unsettled stage of the conflict and legality might be attributed to another mode of the acquisition of territory for instance if a current titleholder commits actions weakening the better position.⁷ Stated differently, the territorial title should not be axiomatized as it is possible for the international community to recognise alternative grounds of territorial title should other considerations prevail, which is what occurred in Kosovo or Abkhazia.

The following analysis centres on grounds and mechanisms which could challenge the currently recognized title to NK and perhaps influence states and international organizations to derecognize the previous sovereign and divest Azerbaijan's title of its validity. The article develops a matrix of normative and factual grounds that will confront the values and principles that maintain the Azerbaijani title, that is the principle of territorial integrity and concomitant principles, including the inviolability of borders, the prohibition of aggression, treatment of forcefully acquired territories as occupied and treaty guarantees as well as policy considerations, such as the preservation of peace and stability.

The article commences with a short history of the Nagorno Karabakh conflict up to the 2020-armed intervention and its aftermath (second part). It then explains the fundament of the Azerbaijani title to Nagorno Karabakh, the principle of *uti possidetis juris* (third part). In the next two parts, the article outlines normative and factual grounds that challenge the Azerbaijani title over NK. The fourth part discusses the right of local Armenians to self-determination and debates pertinent aspects related to the recent war capable of challenging the title. It also asks whether Azerbaijan was allowed to recourse to war under international law to regain control of the territory in question or what the

¹ Opinions of international legal scholars in an auxiliary sense.

² See ROBERT JENNINGS, *THE ACQUISITION OF TERRITORY IN INTERNATIONAL LAW* 37 (1963); Artur Kozłowski, *The Legal Construct of Historic Title to Territory in International Law – An Overview*, 30 *Y.B. INT'L. L.* 91ff (2010).

³ See, for instance, Declaration by the EU and its Member States on the Republic of South Sudan's independence, 9 July 2011, Press release 12679/1/11 REV 1.

⁴ Recognition is generally considered irrevocable, while States who have conferred and maintained recognition have presumably acted in accordance with international law norms. Sovereignty disputes in conflict zones are in most cases non-justiciable, which only bolsters the presumption of validity of state recognition. See HERSCH LAUTERPACHT, *RECOGNITION IN INTERNATIONAL LAW* 55 (1947).

⁵ Condemnation of Israeli occupation of East Jerusalem, the Gaza Strip, the West Bank and the Golan Heights was expressed in UNSC Res 476 (30 June 1980) UN Doc S/RES/476; UNSC Res 478 (20 August 1980) UN Doc S/RES/478; UNGA Res 39/146C (14 December 1984) UN Doc A/RES/39/146C, respectively.

⁶ The terms Nagorno Karabakh, the Nagorno Karabakh Republic (NKR) or the Republic of Artsakh will be used as synonyms for the purposes of this article.

⁷ Malcolm Shaw, *Territory in International Law*, 13 *NETHERLANDS Y.B. INT'L. L.* 79 (1982).

consequences of its ethnic cleansing practices and the use of forbidden ammunition for maintaining the territorial title are. In addition, the article evaluates the ramifications of the Armistice Agreement ending the war, showing its status and impact on the title, while emphasising the crucial role of Russia in the process and its potential agenda to freeze the status quo. In the fifth and final part, factual grounds challenging the Azerbaijani title are outlined. These highlight Azerbaijani ineffectiveness and refer *inter alia* to the fact of the continued occupation of the land by the local Armenians aspiring to their own statehood (Nagorno Karabakh Republic, NKR) as well as the institutionalisation of the NK problem aimed at resolving the current conflict. The inefficacy of Azerbaijan in NK is also mirrored in accepting the Russian Federation's ability to steer the conflict for many years to come, and in Azerbaijani (in)ability and (un)willingness to prevent challenges for international security, including the threat from terrorist activities and energy flow stability as well as its non-readiness to be held accountable for actions during the NK war.

II. A short history of the NK conflict

Nagorno-Karabakh in the 9th century belonged to the Azeri states, from the first half of the 12th century came under the rule of the Seljuk Turks, and then the Mongols.⁸ From the 15th century, Karabakh was a separate khanate partially subordinate to Persian chess,⁹ in 1822, under the Treaty of Kurak, it was transformed into a province administered by the army of the Russian Empire,¹⁰ while as a result of the Treaty of Turkmenchay in 1828, the process of geopolitical and administrative integration with the Russian Empire began, combined with the settlement of its territories by the Armenian population.¹¹ The collapse of the tsarist rule in 1917 triggered the start of fighting in the Nagorno-Karabakh region¹²; in early 1920, the Paris Conference approved the solution that joined it to Azerbaijan in exchange for territorial and national-cultural autonomy (during this period, Armenians accounted for about 94%),¹³ which, however, began to be limited as early as 1937, which was also associated with the change of the name to Nagorno Karabakh Autonomous Oblast (NKAO).¹⁴

After 1945, Karabakh became part of Azerbaijan; in accordance with Art. 87 of the Constitution of the USSR of 1977, Karabakh was its autonomous region. In the second half of 1987, the NKAO conducted a survey on the connection of the oblast to the Armenian SSR, which was backed by about 42% of the 189,000 inhabitants.¹⁵ Based on this, on the 20th of February 1988, the Karabakh authorities applied for the transfer of autonomy to the Armenian SSR,¹⁶ which produced ethnic tensions, as a result of which the whole area was placed under the state of emergency, and power was *de facto* taken over by Moscow.¹⁷ On the 1st of December 1989, that is during the period when the dissolution

⁸ JOHANNES RAU, *THE NAGORNO – KARABAKH CONFLICT BETWEEN ARMENIA AND AZERBAIJAN. A BRIEF HISTORICAL OUTLINE* 9 (2008).

⁹ RAFAL CZACHOR, *ABCHAZJA, OSETIA POŁUDNIOWA, GÓRSKI KARABACH: GENEZA I FUNKCJONOWANIE SYSTEMÓW POLITYCZNYCH* 293 (2014).

¹⁰ RAU, *supra* note 6, at 16.

¹¹ *Id.* at 21.

¹² *Atlas of the Nagorno-Karabakh Republic* 9 (M. Vardanyan ed., 2010).

¹³ J. Wróbel, *Górny Karabach*, in *KONFLIKTY ZBROJNE NA OBSZARZE POSTRADZIECKIM. STAN OBECNY, PERSPEKTYWY UREGULOWANIA. KONSEKWENCJE* 27 (A. Łabuszewska ed., 2003).

¹⁴ CZACHOR, *supra* note 7, at 298.

¹⁵ *Id.* at 300.

¹⁶ RAU, *supra* note 6, at 32-33.

¹⁷ *Id.*

of the Soviet Union was underway and was gaining impetus,¹⁸ the Supreme Council of Armenia announced the inclusion of Nagorno-Karabakh into the Armenian SSR,¹⁹ and on the 2nd of September 1991, the authorities in Karabakh decided to create the Nagorno-Karabakh Republic.²⁰ This provoked a violent reaction from Baku,²¹ which abolished its autonomy, equating Karabakh with other provinces of the state. In response, on 10th of December 1991 the independence referendum was carried out in Karabakh. In the voting, which was boycotted by the Azeris, 82.2% of those eligible took part, and 99.9% of them opted for independence, while only 0.02% were against.²² On 6th of January 1992, the region's newly elected legislature announced the independence of the Nagorno-Karabakh Republic (NKR),²³ which included provisions on, *inter alia*, declaring secession from Azerbaijan, proclaiming international legal subjectivity, and introducing a citizenship of the Nagorno-Karabakh Republic.

The proclamation of independence did not settle the conflict; on the contrary, it ignited it further. Military actions of varied intensity took place throughout the past three decades by the Azeris with an aim to return the territory but were not very successful.²⁴ The 2020 conflict, however, was different and ended with an important victory for Azerbaijan. It lasted 44 days, was led with much-modernized military equipment and with the direct or tacit support of the major regional players (Turkey and Russia respectively).²⁵ Azerbaijan regained nearly three-quarters of what it considered its occupied territory and has secured some further territorial arrangements in writing.²⁶

The 2020 conflict ended with a 'Statement by the President of the Republic of Azerbaijan, the Prime Minister of the Republic of Armenia and President of the Russian Federation' [hereinafter the Armistice Agreement] that stipulates that Armenia has to return the Agdam District to the Republic of Azerbaijan by November 20, 2020,²⁷ as well as the Kalbajar District by November 15, 2020, and the Lachin District by December 1, 2020.²⁸ In addition, according to Point 1, conflicting Parties should remain in their current positions, which means that four other districts (Qubadli, Zangilan, Jabrayil, Fuzuli, and parts of the former Nagorno-Karabakh Autonomous Oblast, including the strategically important city of Shusha, – altogether 5 cities, 4 towns, 286 villages)²⁹ conquered by Azerbaijan during the conflict will remain in its possession. Moreover, Armenia needs to facilitate linking Nakhichevan (Azerbaijan's exclave bordering Armenia, Iran and Turkey) with the western regions of Azerbaijan,

¹⁸ The Estonian SSR declared independence on 16 Nov. 1988, the Lithuanian SSR on 26 May 1989, the Azerbaijan SSR (and Nakhichevan ASSR) on 23 Sep. 1989, the Georgian SSR on 26 May 1990.

¹⁹ This decision was pronounced unconstitutional by the Supreme Court of the USSR. See CZACHOR, *supra* note 7, at 309.

²⁰ *Id.* at 311. The text of the declaration adopted by the NK and Shahumian district councils is available on www.nkrusa.org/nk_conflict/declaration_independece.shtml.

²¹ THOMAS DE WAAL, BLACK GARDEN. ARMENIA AND AZERBAIJAN THROUGH PEACE AND WAR 127 (2003).

²² CZACHOR, *supra* note 7, at 311-312.

²³ RAU, *supra* note 6, at 36. The text of the declaration is available on president.nrk.am/en/nkr/nkr2.

²⁴ WOJCIECH GORECKI, KAUKASKI WEZEL GORDYJSKI. KONFLIKT O GORSKI KARABACH 55ff (2020).

²⁵ See Stefania Kolarz, *Status Prawny Górskiego Karabachu – Porównanie Ze Statusem Prawnym Kosowa* 5(1) FOLIA IURIDICA UNIVERSITATIS WRATISLAVIENSIS 120-123 (2016) (comparing the Nagorno Karabakh and Kosovo conflicts).

²⁶ Interpretation and Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Republic of Azerbaijan v. Republic of Armenia), Application Instituting Proceedings, paras. 14-15 (Sep. 23, 2021) <https://www.icj-cij.org/public/files/case-related/181/181-20210923-APP-01-00-EN.pdf>.

²⁷ Point 2 of the 2020 Armistice Agreement. The text of the Armistice Agreement is available under <http://en.kremlin.ru/events/president/news/64384>.

²⁸ Point 6 of the 2020 Armistice Agreement. Armenia returned the Kalbajar district to Azerbaijan on 25 November 2020 (the original deadline was extended by 10 days).

²⁹ <https://archive.is/Nk92x>.

which presupposes that Azerbaijan may construct new roads there.³⁰ Until now, the territorial provisions of the Agreement have been largely complied with, whereas progress on humanitarian issues, including, inter alia, detainees, demining, missing persons, voluntary return of displaced persons, and protection of historic and cultural sites, is still needed.³¹

III. *Uti possidetis juris* as Azerbaijani title to NK territory

Azerbaijan's legal title is grounded in the *uti possidetis juris* principle, while maintained by the principle of territorial integrity and treaty guarantees. In light of the *uti possidetis juris* principle Nagorno Karabakh as part of the former Azerbaijani SSR became part of the Republic of Azerbaijan since its independence in 1991. Since then, the Azerbaijani title is protected by the principle of territorial integrity. Armenia opposes this claim submitting that within the dissolving USSR, two States were established on the territory of the Azerbaijani SSR – the Republic of Azerbaijan and the “Republic of Nagorno Karabakh”.³²

Inheriting territorial frontiers when independence is achieved is substantiated by the international judiciary and arbitration processes. The ICJ made this point very clear in the *Frontier Dispute*³³ and *Land, Island and Maritime Frontier Dispute* cases,³⁴ while the Badinter Arbitration Committee in its Opinion No 2 concluded that “the right to self-determination must not involve changes to existing frontiers at the time of independence (*uti possidetis juris*) except where the states concerned agree otherwise”.³⁵ According to the prevalent opinion of commentators, the *uti possidetis juris* principle applies to the post-colonial secession movements and protects primarily borders of the first level administration, in line with the constitutional law, as evidenced in the process of dissolution of Yugoslavia and the Soviet Union.³⁶ Krüger has concluded that Azerbaijan, as the first-level administrative unit (Republic), had the right to secede under Article 72 of the 1977 Soviet Constitution, compared to lower-level federal entities, like Autonomous Socialist Soviet Republics (such as

³⁰ Júlia Miklasová, *The Recent Ceasefire in Nagorno-Karabakh: Territorial Control, Peacekeepers and Question of Status*, EJIL:TALK! (Dec. 4, 2020).

³¹ Statement by the Co-Chairs of the OSCE Minsk Group (Oct. 11, 2021) <https://www.osce.org/minsk-group/504007>.

³² See Letter dated 23 March 2009 from the Permanent Representative of Armenia to the United Nations addressed to the Secretary-General. UN Doc A/63/781–S/2009/156 (Mar. 24, 2009). Moreover, Armenia contends that “...the doctrine of *uti possidetis juris* is not an automatic rule that binds successors, but is rather based on their expressed consent (...) It is evident that Armenia and Azerbaijan, as former Union Republics, did not form a common agreement on the principle of *uti possidetis juris*”. Letter dated 18 November 2019 from the Permanent Representative of Armenia to the United Nations addressed to the Secretary-General. UN Doc A/74/555–S/2019/894 (Nov. 19, 2019).

³³ “The essence of this principle [*uti possidetis*] lies in its primary aim of securing respect for the territorial boundaries at the moment when independence is achieved”. *Frontier Dispute (Burkina Faso v. Republic of Mali)* 1986 I.C.J. 554, 566.

³⁴ “What matters, from the point of view of international law, is the frontier “which existed at the moment of independence”. *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)*, 1992 I.C.J. 351, 386–387.

³⁵ Badinter Arbitration Commission, European Community Conference on Yugoslavia, Opinion No 2 (Nov. 20, 1991), reprinted in 92 I.L.R 167.

³⁶ Marcelo Kohen, *Le problème des frontières en cas de dissolution et séparation d'Etats: quelles alternatives?*, in DEMEMBREMENTS D'ETATS ET DELIMITATIONS TERRITORIALES: L'UTI POSSIDETIS EN QUESTION(S) 365–401 (O. Corten et al. eds., 1999); Anne Peters, *The Principle of Uti Possidetis Juris. How Relevant is it for Issues of Secession?*, in SELF-DETERMINATION AND SECESSION IN INTERNATIONAL LAW (C. Walter et al. eds., 2014).

Abkhazia), Autonomous Provinces (such as Nagorno Karabakh and South Ossetia) and Autonomous Areas (Okrug).³⁷

The principle of territorial integrity becomes a principal protective ground for the Azerbaijani title to the disputed land. That is evidenced by the letter that the Azerbaijani representative to the UN sent to the UN Secretary-General. The letter of 22 July 2020 lists a number of authorities to this effect: Article 2(1) and 2(4) of the UN Charter, the Manila Declaration on the Peaceful Settlement of International Disputes, the Declaration on the Right to Development, the Declaration on Principles of International Law Concerning Friendly Relations) and international instruments of a regional nature (the Helsinki Final Act, the Charter of Paris for a New Europe, the European Charter for Regional or Minority Language and the Charter of the Commonwealth of Independent States).³⁸ The letter proceeds that the territorial integrity of Azerbaijan is additionally protected by the Alma Ata Declaration and that all parties in the region, especially Armenia as the signatory, should respect the Azerbaijani title. The Declaration explicitly demands “recognising and respecting each other’s territorial integrity and the inviolability of existing borders”.³⁹ Azerbaijan also heavily relies on the practice of States and international organizations towards its claim. Nonetheless, neither the principle *uti possidetis juris*, which constitutes the source of the title, nor the principle of territorial integrity which preserves that source, are not immutable and in view of the coincidence of multiple factors, precedence might be given to other competing sources of a territorial title, such as the right to self-determination.⁴⁰ These factors will now be elaborated.

IV. The title: Legal grounds challenging Azerbaijani recognized title to Nagorno Karabakh territory

A. The right of native Armenians to self-determination

The first and foremost ground for challenging the Azerbaijani recognized title is the right to self-determination of the local Armenian population connoting the right to choose their own political status.⁴¹ The connection between the right to self-determination and title to territory is based on the

³⁷ Heiko Krüger, *Nagorno Karabakh*, in SELF-DETERMINATION AND SECESSION IN INTERNATIONAL LAW 95-137 (C. Walter et al. eds., 2014); Malcolm Shaw, *Peoples, Territorialism and Boundaries*, 8 EUR. J. INT’L. L. 494ff (1997).

³⁸ Annex to the letter dated 21 July 2020 from the Permanent Representative of Azerbaijan to the United Nations addressed to the Secretary-General. Report on the fundamental norm of the territorial integrity of States and the right to self-determination in the light of Armenia’s revisionist claims, UN Doc. A/74/961S/2020/729, at. 8-13 (Jul. 22, 2020).

³⁹ 31 I.L.M., 1992, p. 148.

⁴⁰ Malcolm Shaw, *The Heritage of States: The Principle of Uti Possidetis Juris Today* 67 BRIT. Y.B. INT’L. L. 154 (1996); Anne Peters, *The Principle of Uti Possidetis Juris: How Relevant Is It for Issues of Secession? in SELF-DETERMINATION AND SECESSION IN INTERNATIONAL LAW* 99- 103, 137 (Christian Walter, et al eds., 2014).

⁴¹ ‘...all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right...’ Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States, UNGA Res 2625 (XXV), UN Doc A/Res/25/2625 (Oct. 24, 1970).

concept of people's sovereignty and its variants, like earned sovereignty.⁴² Thus, effective and enduring political organizations heavily rely upon the said right to corroborate the title. By challenging the recognized title, the right to self-determination directly conflicts other principles that protect the title, such as territorial integrity, inviolability of borders, sovereignty applicable in the NK context

The self-determination right has been enshrined in Articles 1(2) and 55 of the UN Charter and Article 1 of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights respectively.⁴³ The UN General Assembly has confirmed and concretised the right in declarations, most notably in UNGA Resolution 1514 (XV) entitled 'Declaration on the granting of independence to colonial countries and peoples.' It has erga omnes quality.⁴⁴ Nevertheless, the utilization of the said right to determine an own political status remains nowadays very limited. Namely, it is confined to the "salt-water doctrine",⁴⁵ that is, the incomplete decolonization process. Otherwise, it posits internal applicability, giving heed to the principle of territorial integrity.⁴⁶ Such a conception of the right to self-determination led commentators to conclude that the sovereignty of Azerbaijan over the NK region should prevail as the Armenian community is a minority group and as such does not fulfil the requirement to be attributed the right for external self-determination.⁴⁷

In view of the practical non-applicability of the principle of self-determination to 'all people' in the ordinary setting, proposals have been voiced to give the said right a meaning, at least in critical situations, such as those where the symbiosis with the mother state becomes unbearable and the mother state persecutes the local population.⁴⁸ Accordingly, a theory of remedial secession has been built, which justifies independence in contentious cases as the 'last resort option'. This option has been referred to in the Nagorno Karabakh case, in particular by the representatives of the Republic of Artsakh and Armenia.⁴⁹ With regard to the recent military conflict, Prime Minister Pashinyan stated in September 2020 that Armenia's government plans to look at recognizing (*de jure*) Nagorno-Karabakh's independence.⁵⁰ As argued by Baghdasaryan, international relations advisor to the President of

⁴² Treating people as the territorial sovereign corresponds to consultation in resolving territorial matters, such as agreement with indigenous people, plebiscites about cessions. See Paul R Williams, et al., *Resolving Sovereignty-based Conflicts: The Emerging Approach of Earned Sovereignty* 31 DENV.J.INT'L L.& POL'Y 349-387 (2003); Paul R Williams & Francesca Jannotti Pecci, *Earned Sovereignty: Bridging the Gap Between Sovereignty and Self-Determination*, 40(2) STANFORD J. INT'L. L. 347-387 (2004). See also J G Starke, *The Acquisition of Territorial Sovereignty by Newly Emerged States*, 41 BRIT. Y.B. INT'L. L. 411, 413 (1965-1966).

⁴³ International Covenant on Civil and Political Rights art. 1, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; International Covenant on Economic, Social and Cultural Rights art. 1, Dec. 12, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR]. See also Vienna Declaration and Programme of Action, point I(2), July 12, 1993, 32 I.L.M. 1661; African Charter on Human and Peoples' Rights arts. 19, 20, Jun. 27, 1981, 21 I.L.M. 58.

⁴⁴ East Timor (Portugal v. Australia), Judgment, 1995 I.C.J. para. 29; Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, 2019, I.C.J. para. 180.

⁴⁵ The Blue Water Thesis or "Salt-water Thesis" (and opposed to the "Belgian Thesis"), was a limited decolonization approach arising from UN General Assembly Resolution 637, linking self-determination with non-self-governing territories.

⁴⁶ See Final Act of the Conference on Security and Cooperation in Europe, Aug. 1, 1975, 14 I.L.M. 1292. [Helsinki Final Act].

⁴⁷ Milena Sterio, *Self-Determination and Secession Under International Law: Nagorno-Karabakh*, 59 GERMAN Y.B. INT'L. L. 81-114 (2016). Similarly, Tahmina Salayeva, *Self-determination v. territorial Integrity over the Nagorno Karabakh Region*, POLITICON (Feb. 24, 2021).

⁴⁸ Further ANTONIO CASSESE, SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL 95 (1995).

⁴⁹ Consult earlier statements by Armenian representatives to UN ('during the recent decade there had been blatant attempts to deny the right to self-determination by questioning its essence and applicability' referring to Nagorno Karabakh). Press Release, *Viewed Narrowly as Right to Secede, Self-Determination Could Threaten Territorial Integrity of States*, Third Committee Told, UN Doc. GA/SHC/3708 (Oct. 29, 2002).

⁵⁰ <https://tass.com/world/1205619>.

Artsakh, ‘the priority of the foreign policy of the Republic of Armenia and the Republic of Artsakh is to develop the process of international recognition, which is carried out by assessing geopolitical realities and positions’.⁵¹ She has added that the process of recognition by Armenia was delayed as a result of political-diplomatic containment, yet it was assumed ‘that it can be implemented in case of threats to the security of the Artsakh Republic’.⁵² This resembles the Russian rhetoric of recognition of South Ossetia and Abkhazia, when President Medvedev argued that ‘this is not an easy choice to make, but it represents the only possibility to save human lives’.⁵³ In comparison to Russia, Armenia still falls short in formalizing its standpoint through the official recognition of the Republic of Artsakh based on the remedial secession grounds.⁵⁴ This makes the Armenian standpoint unclear, but perhaps still politically convenient.⁵⁵

It is nevertheless worth remarking that remedial secession, as a radical version of the realization of the self-determination right, is not accepted universally.⁵⁶ It remains unclear what component(s) of the self-determination right (economic, social, cultural, or all of them?) need to be disrespected by the mother State, in what persistence and gravity and whether it needs to be accompanied by the violation of other human rights. Moreover, the pretended right to secede is expected to be grounded in convincing reasons, usually underpinned by “gross violation” of human rights of the local population.⁵⁷ Yet, the precise threshold of such “violation” has not still been determined and was even less clear in 1992 when Nagorno Karabakh declared independence.⁵⁸ The International Court of Justice (ICJ) in its *Kosovo*-Opinion did not take a firm position and effectively left the issue to be determined by further institutional and state practice.⁵⁹ In view of the recent military conflict both Armenia and Azerbaijan brought cases before the ICJ related to persecution and racial discrimination,⁶⁰ while the fact of the expulsion of the Armenian people from Nagorno Karabakh to produce effects of remedial secession is dubbed as cynical by Azerbaijan and its scholars who confront that fact with earlier persecution and forceful removal of Azerbaijani population from Nagorno-Karabakh.⁶¹

In practical terms, States have not formally acknowledged the territorial sovereignty of Armenians in Nagorno Karabakh based on breaches of the self-determination right and other human

⁵¹ <https://armenpress.am/eng/news/1030905.html>.

⁵² *Id.*

⁵³ Decrees of President of the Russian Federation Dmitry Medvedev on the recognition of South Ossetia and Abkhazia (Aug. 26, 2008) No 1260 and 1261 <<http://kremlin.ru/acts/bank/27957>>.

⁵⁴ Annex to the letter dated 14 January 2020 from the Permanent Representative of Armenia to the United Nations addressed to the Secretary-General. UN Doc. A/74/654-S/2020/38 (Jan. 16, 2020).

⁵⁵ On territorial control see Chiragov and Others v. Armenia, App. No. 13216/05, ECtHR (Grand Chamber, Jun. 16, 2015), paras. 167 et seq. Armenia does not breach the most evident aspect of territorial integrity in inter-State relations, that is, recognition or incorporation of parts of Azerbaijan. It may have infringed other aspects of the territorial integrity principle, most notably, the use of force and non-intervention, a situation resembling the Russian influence in both Georgian breakaway Republics (before 2008) and Transnistria (until today). See HEIKO KRÜGER, *THE NAGORNO-KARABAKH CONFLICT: A LEGAL ANALYSIS* 94ff (2009).

⁵⁶ Declaration of South Summit, 10–14 April 2000, pt. 54.

⁵⁷ See Aleksaner Martinenko, *The Right to Secession as a Human Right*, 3(1) ANNUAL SURVEY OF INT & COMP. LAW 20 (1996); Milena Sterio, *Self-determination and Secession Under International Law: The Cases of Kurdistan and Catalonia*, 22(1) AM. SOC. INT’L. L. (2018).

⁵⁸ Further ANTONIO CASSESE, *SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL* 95 (1995).

⁵⁹ Accordance with international law of the unilateral declaration of independence in respect of Kosovo, Advisory Opinion, 22 Jul 2010, ICJ 403, paras. 403, 437.

⁶⁰ See Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Azerbaijan v. Armenia) (Sept. 23, 2021); Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan) (Sept. 23, 2021).

⁶¹ Kamal Makili-Aliyev, *Will International Law Help Resolve the Karabakh Conflict?* (Oct. 04, 2021) <http://www.makili-aliyev.com/>.

rights, neither at the time of the declaration of independence nor in view of the recent military conflict.⁶² Asserted long-lasting oppression, the denial of substantive human rights and breaches of the law of armed conflict⁶³ have not brought expected results, which confirms that the concept of remedial secession is still an immature political concept, precedentially initiated in Kosovo's case and later condemned.⁶⁴

B. *Ius ad bellum* and the Azerbaijani title to NK

The UN Charter contains three exceptions under which the use of force could be justified. They can be found in Articles 53(1), 77 and 107, which allow the use of force against former enemy states from the Second World War; Articles 39 and 42 which vests power in the Security Council to either recommend or command an enforcement action; and Article 51, which provides that "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security".⁶⁵ It is the latter exception that was put forward by Azerbaijan to regain its seven occupied territories and Nagorno Karabakh. However, does this exception apply to protracted frozen conflicts and does it not after such a long time encroach upon a formed reality in view of the self-proclaimed statehood of the NKR and thereby violate its right to independence?

At first, the permissibility of the use of force in (or against) Nagorno Karabakh will be discussed referring to conventional principles of necessity, proportionality, and immediacy.⁶⁶ The last aspect raises most controversies.

Some commentators submit that Azerbaijan has had the right to self-defence since the aftermath of the 1988–1994 war and could resort to it at any point in time to regain its occupied territory.⁶⁷ To support their argument, scholars cite Article 3(a) of the UN General Assembly Resolution on the Definition of Aggression which provides that 'military occupation resulting from an invasion or attack or any annexation by the use of force of the territory of another State or part thereof' constitutes aggression.⁶⁸ One could mention Article 2 of the Geneva Conventions stipulating that a situation of occupation inevitably entails the continuation of an international armed conflict (IAC).⁶⁹

⁶² Bernhard Knoll-Tudor & Daniel Mueller, *At Daggers Drawn: International Legal Issues Surrounding the Conflict in and around Nagorno-Karabakh*, EJIL:TALK! (Nov. 17, 2020), <https://www.ejiltalk.org/at-daggers-drawn-international-legal-issues-surrounding-the-conflict-in-and-around-nagorno-karabakh/>.

⁶³ *Self-Determination of the People of Nagorno-Karabakh*, EUROPEAN CENTRE FOR ARTSAKH (Sept. 20, 2016).

⁶⁴ See Volker Röben, 'Der Völkerrechtliche Rahmen für die Sezession einer Minderheit aus dem Staatsverband: Kosovo als Präzedenzfall?' (2009) 84 *Die Friedens-Warte* 75; Jure Vidmar, *Remedial Secession in International Law: Theory and (Lack of) Practice* 6 ST ANTONY'S INT'L. REV. 37-56 (2010).

⁶⁵ Nico Schrijver, *Ban on the Use of Force in the UN Charter*, in THE OXFORD HANDBOOK OF THE USE OF FORCE IN INTERNATIONAL LAW 472-475 (M. Weller et al. eds., 2015).

⁶⁶ CHRISTINE D GRAY, *INTERNATIONAL LAW AND THE USE OF FORCE* 157-170 (4th edn., 2018).

⁶⁷ Dapo Akande & Antonios Tzanakopoulos, *Use of Force in Self-Defence to Recover Occupied Territory: When Is It Permissible?*, EJIL:TALK! (Nov. 18, 2020) < <https://www.ejiltalk.org/use-of-force-in-self-defence-to-recover-occupied-territory-when-is-it-permissible/>>; YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENCE* 61-64 (6th edn., 2017). See also opinions of Turkish international law professors Koni, Kuran and Kabaalioglu at <https://www.aa.com.tr/en/azerbaijan-front-line/azerbaijan-has-right-to-reclaim-its-land-say-experts/1994253>.

⁶⁸ UNGA Res 3314 (XXIX), UN Doc. A/RES/3314(XXIX) (Dec. 14, 1974).

⁶⁹ International Committee of the Red Cross (ICRC), Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), 12 August 1949, 75 U.N.T.S. 287.

As a consequence, the self-defence right would not cease to exist as long as the occupation resulting from an armed attack persist as it amounts to a continuing armed attack/aggression.⁷⁰ If such aggression is long-lasting and all other ways of resolving it proved futile, then the use of force to end it would be all the more justified and meet the necessity criterion.⁷¹ The Azerbaijani claim to recourse to force as legally permissible was only supported by Pakistan⁷² and Turkey⁷³ (its traditional allies) who contend that Azerbaijan has the right to exercise its inherent right of self-defence, that the hostilities are taking place exclusively on its own sovereign territory and that it is Armenia who commenced the attack and Azerbaijan launched a counter-offensive to restore its territorial integrity accordingly.

On another spectrum of this debate are those, including the authors of this article, who are sceptical about the timeliness and necessity of the use of force in self-defence in Nagorno Karabakh by Azerbaijan. Ruys and Silvestre, for example, have argued that Azerbaijan has lost any rights it may have had to act in self-defence given the *status quo* has lasted for more than a quarter of a century.⁷⁴ The same view is shared by Knoll-Tudor and Mueller who argue that ‘continued occupation cannot be equated with “continued attack” permitting the recourse to self-defence in line with Article 51 [of the UN Charter].’⁷⁵ In fact, permitting resort to force in NK after an extended period of time in purported self-defence would contradict not only the principle of peaceful resolution of conflicts,⁷⁶ dozens of UN resolutions⁷⁷ and armistice agreements⁷⁸ but constitute the pretext for the reignition of multiple frozen or nearly settled conflicts (viz. Falklands/Malvinas, Kosovo, Crimea, Northern Cyprus and the like).⁷⁹ This point was made by the Ethiopia-Eritrea Claims Commission in its Partial Award, in which the Commission did not confirm Eritrea’s *jus ad bellum* on the basis that it held a valid claim over the land it sought to recover. The Commission stated

“self-defense cannot be invoked to settle territorial disputes (...) border disputes between States are so frequent that any exception to the prohibition of the threat or use of force for

⁷⁰ On the equation of the term ‘armed attack’ with aggression see Case Concerning Military and Paramilitary Activities in and Against Nicaragua, 1986 I.C.J. Rep. 106, para. 195.

⁷¹ Akande & Tzanakopoulos, *supra* note 100.

⁷² Yeni Şafak, *Pakistan Reiterates Support for Azerbaijan’s ‘Self-Defense’ Against Armenian Occupation* (Oct. 14, 2020) <<https://www.yenisafak.com/en/news/pakistanreiterates-support-for-azerbaijans-self-defense-againstarmenian-occupation-3551697>>.

⁷³ Letter dated 16 October 2020 from the Permanent Representative of Turkey to the United Nations addressed to the Secretary-General. Un Doc. A/75/525–S/2020/1024 (Oct. 19, 2020).

⁷⁴ Tom Ruys & Felipe Rodríguez Silvestre, *The Nagorno-Karabakh Conflict and the Exercise of “Self-Defense” to Recover Occupied Land*, JUST SECURITY (Nov. 10, 2020) <https://www.justsecurity.org/73310/the-nagorno-karabakh-conflict-and-the-exercise-of-self-defense-to-recover-occupied-land/>.

⁷⁵ Knoll-Tudor & Mueller, *supra* note 63.

⁷⁶ Article 2(3) of the UN Charter.

⁷⁷ In the four UNSC Resolutions (Res. 822 of Apr. 30, 1993, Res. 853 of Jul. 29, 1993, Res. 874 of Oct. 14, 1993, and Res. 884 of Nov. 12, 1993) concerning the territories around Nagorno Karabakh, the Council had urged those involved to cease the armed activities, to effectively enforce the cease-fire agreements, and to continue to seek a “negotiated settlement of the conflict”. Friendly Relations Declaration obliges States not to “violate international lines of demarcation, such as armistice lines”, *supra* note 34.

⁷⁸ See, for instance, the 1994 Armistice Agreement <https://www.peaceagreements.org/viewmasterdocument/990>.

⁷⁹ See Quincy Wright ‘[a] State that neglects to defend its frontiers against hostile encroachments soon loses its right to do so, and can rely only on negotiation or action by the United Nations to restore its rightful possession’ in *The Goa Incident* 56(3) AM. J. INT. L. 617-632 (1962); Oscar Schachter ‘an exception for recovering “illegally occupied” territory would render Article 2(4) of the U.N. Charter meaningless in many cases’ in *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1627-8 (1984) or Marcelo Kohen, *La légitime défense ne fait pas naître des droits de souveraineté territoriale*, in POSSESSION CONTESTÉE ET SOUVERAINÉTÉ TERRITORIALE chapter V, para. 88 (1997).

territory that is allegedly occupied unlawfully would create a large and dangerous hole in a fundamental rule of international law”⁸⁰

It is, therefore, argued that the Azerbaijani recourse to military force under the pretext of the self-defence right is inadequate as it does not meet the criteria of immediacy and necessity, in particular, that peace negotiations have been led by the OSCE. In truth, Azerbaijan is placed in a very disadvantaged practical position, yet conflicts like this one should be resolved in a peaceful manner in line with the UN Charter obligations and there exist ways to sanction the wrongdoer through lawful means, e.g. economic sanctions.⁸¹ Broadly in line with this view are the positions of France, Russia and the United States. These States expressly ‘condemn[ed] in the strongest terms the recent escalation of violence along the Line of Contact’, while the UN Secretary-General strongly ‘call[ed] on the sides to ‘immediately stop fighting, de-escalate tensions and return to meaningful negotiations without delay’.⁸² The implication is that Azerbaijan violated the prohibition of the use of force enshrined in Article 2(4) of the UN Charter by attacking Nagorno Karabakh.

The above analysis assumes that self-defence was exercised against Armenia who does not claim the NK territory. Yet, if one assumes that force was used against a separate state, *ergo* the Republic of Artsakh, the weight of the breach non-use of force principle seems much heavier and the catalogue of correlative breaches much broader.⁸³ Most notably, international rules on territorial integrity, the inviolability of borders, and the obligations to settle disputes in a peaceful manner would apply, while self-defence could not be triggered as NK did not commence the war.⁸⁴ Arguably, NK despite remaining unrecognized would likewise be protected from aggression. UNGA Res 3314 ‘Definition of Aggression’ in Article 1 explains that the term ‘State’ is to be construed without prejudice to recognition or membership in the UN.⁸⁵ Furthermore, parts of territories gained by Azerbaijan during the 2020 war could be reclaimed in the future by NK in view of the principle that ‘no territorial acquisition resulting from the threat or use of force shall be recognized as legal’.⁸⁶ The existence of NK as a separate subject, although not officially pronounced, might be deduced from certain statements. For example, the need to distinguish Armenia from Nagorno Karabakh was raised by Judge Ziemele in the *Chiragov* judgment, which did not attribute clear State responsibility to the actors involved under the rules established by the ICJ jurisprudence in the *Bosnian Genocide* and *Nicaragua* cases or by the ILC in its Draft Articles on State Responsibility.⁸⁷

To complete the consideration of the use of force by Azerbaijan, one last option should be considered, namely that this was an internal conflict. If the conflict was waged between the central

⁸⁰ Eritrea-Ethiopia Claims Commission - Partial Award: Jus Ad Bellum - Ethiopia's Claims 1-8, 19 December 2005, 26 RIAA 465, paras. 10-11.

⁸¹ Ruys & Silvestre, *supra* note 119. Consult UNGA Res 56/83, UN Doc A/RES/56/83 (Dec. 12, 2001) [hereinafter Draft Articles on State Responsibility]. See also *The Opinion by the Legal Advisory Committee to the Minister of Foreign Affairs of the Republic of Poland on the Annexation of the Crimean Peninsula to the Russian Federation in Light of International Law*, POLISH Y.B. INT'L. L. 278-285 (2014).

⁸² Statement of the Presidents of the Russian Federation, the United States of America and the French Republic on Nagorno-Karabakh, UN NEWS (Sept. 27, 2020) <https://news.un.org/en/story/2020/09/1073992>.

⁸³ Alexander Wills, *The Crime of Aggression and the Resort to Force against Entities in Statu Nascendi* 10 J. INT'L CRIM. JUST. 83-110 (2012).

⁸⁴ Consult *Kosovo Advisory Opinion*, *supra* note 59; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* 2005 ICJ 168 (Dec 19, 2005).

⁸⁵ UNGA Res 3314, *supra* note 101.

⁸⁶ Friendly Relations Declaration, *supra* note 34.

⁸⁷ Judge Ziemele contends that Armenia should be held responsible for failing to comply with positive obligations, viz. to exert the influence it has over the NKR to secure the applicants' right of access to their property. *Chiragov and Others v. Armenia*, *supra* note 51, at 86-91.

government and the local Armenian separatist forces, then Azerbaijan could not be accused of breaching Article 2(4) of the UN Charter, as it is entitled to use force within its own territory. The self-defence argument would also be invalid, as self-defence cannot be exercised against non-State actors, which the ICJ underlined in the *Wall Advisory Opinion*.⁸⁸ All, therefore, depends on the perception of the actors involved, but it seems plausible to contend that an external actor was at stake.

Concluding, it should be established whether the Azerbaijani (illegal or illegitimate) use of force in NK impinged upon its recognized title. It would be an overstatement that Azerbaijan forfeited its title in this way, but it could well become less sound, in particular with regard to the conduct during the war, which will be discussed in the following section. This is equally true for the use of force in self-defence against an external actor and within the state, using sovereign powers. Establishing a violation of the prohibition of the use of force in the case of the assumption of statehood of NK is immaterial for the title as the mere assumption of the statehood status presupposes the title. The purported statehood on NK and its ability to undermine the title of Azerbaijan will be discussed in section V.A.

C. *Ius in bello* and the Azerbaijani title to NK

Violations of international human rights law (IHRL) and international humanitarian law (IHL) can preclude the acquisition of title to territory or delegitimize the current title. For instance, the realization of apartheid in South Africa and Southern Rhodesia (today's Zimbabwe) in the second half of the 20th century, which led to the creation of South African Bantustans - nominal black homelands (Transkei, Bophuthatswana, Venda and Ciskei) and Rhodesia, was never accepted as a mode of acquiring territorial title. Instead of States, these entities were termed 'illegal minority regime in South Rhodesia' or 'so-called independent Bantustans'.⁸⁹ As regards forfeiting territorial title, certain States argued before the ICJ that Serbia simply lost the right to Kosovo due to a blatant violation of human rights of the local population.⁹⁰ The regional and universal institutional approach is indicative of state practice and *opinio juris* that breaches of IHL and IHRL do not legitimize territorial sovereignty, especially when it comes to acquisition. In 1992, the UN General Assembly referring to the situation in Bosnia called upon "all States and international organizations not to recognize the consequences of the acquisition of territory by force and of the abhorrent practice of ethnic cleansing".⁹¹ The

⁸⁸ See *Wall Advisory Opinion*, *supra* note 29, para. 139. OLIVIER CORTEN, *LE DROIT CONTRE LA GUERRE* 195ff (2nd edn, 2014). For views on the extensive interpretation of the right to self-defence including against Non-State actors see Paulina Starski, *Right to Self-Defence, Attribution and the Non-State Actor – Birth of the "Unable or Unwilling" Standard?*, 75 *ZaöRV* 455, 498ff (2015). The UK, France and the US, generally since the attack of 9/11, officially claim the right to use force against Non-State actors. See summary record of the SC meeting of Nov. 20, 2015, S/PV.7565, at 2 (France), 4 (US), 9 (UK). See also the following letters to the Security Council: UN Docs. S/2014/695 (US); S/2014/851 (UK); S/2015/745 (France).

⁸⁹ On Rhodesia see UNSC Res 216, UN Doc S/RES/216 (Nov. 12, 1965), on Bantustans see UNGA Res 32/105, UN Doc A/RES/32/105 (Dec. 14, 1977); JES Fawcett, *Security Council Resolutions on Rhodesia*, 41 *BRIT. Y.B. INT'L. L.* 103-121 (1965-66); VERA GOWLLAND-DEBBAS, *COLLECTIVE RESPONSES TO ILLEGAL ACTS IN INTERNATIONAL LAW* (1990).

⁹⁰ Marko Milanović, *Arguing the Kosovo Case*, in *THE LAW AND POLITICS OF THE KOSOVO ADVISORY OPINION* 27-38 (Marko Milanović & Michael Wood eds., 2015). See also VALERIO PRIULI, *DAS KOSOVO-VERFAHREN DES INTERNATIONALEN GERICHTSHOFS* 234-413 (2016).

⁹¹ UNGA Res 46/242, UN Doc A/RES/46/242 (Aug. 25 1992). See also UNSC Res 819, UN Doc S/RES/819 (Apr. 16, 1993). Ethnic cleansing constitutes a grave breach of the 1949 Geneva Conventions and 1977 Additional

Parliamentary Assembly of the Council of Europe reiterated this point in 2005 in relation to Nagorno Karabakh, stating

“that independence and secession of a regional territory from a state may only be achieved through a lawful and peaceful process based on the democratic support of the inhabitants of such territory and not in the wake of an armed conflict leading to ethnic expulsion”.⁹²

For those who support the use of force by Azerbaijan in the conflict, there has been no questioning of the territorial title on the basis of the violation of IHL and IHRL.⁹³ Stated differently, the cause for war was just, while methods employed during a war do not impact on consequences, such as on the title.⁹⁴ But, an axiomatic position of “territorial legality” over life in the case is contrary to UN Human Rights Committee’s General Comment No. 36 on the right to life,⁹⁵ the fact that people constitute the basic component of a State⁹⁶ and that the protection of territorial integrity also serves to protect human lives.

For those, however, who contend that the recent Azerbaijani use of force amounted to aggression, which was indiscriminate and exaggerated, a very issue of the territorial title might come into question. The Human Rights Watch remarked that Azerbaijan apparently broke the laws of war by using inherently indiscriminate cluster munitions and artillery rockets that did not distinguish between military targets and civilian objects.⁹⁷ Armenia’s Representative Office at the European Court of Human Rights (ECtHR) asked the court to intervene in view that more than two hundred prisoners of war (POW) and civilians have been unlawfully detained and that they have been subject to torture and inhuman and other degrading or inhuman treatment, which constitutes a breach of the European Convention of Human Rights and International Covenant on Civil and Political Rights, to which both Armenia and Azerbaijan are parties.⁹⁸

Can it be thus constated that Azerbaijan has lost the rights to NK through its adverse acts towards the local Armenian population?⁹⁹ This is doubtful as no state officially endorsed such an idea

Protocols, and could be classified as the crime against humanity and possibly as genocide. Consult Drazen Petrovic, *Ethnic Cleansing - An Attempt at Methodology*, 5 EUR. J. INT’L. L. 342-359 (1994).

⁹² PACE Res 1416 ‘The conflict over the Nagorno-Karabakh region dealt with by the OSCE Minsk Conference’ (Jan. 25, 2005).

⁹³ See Akande & and Tzanakopoulos, *supra* note 100.

⁹⁴ Cf. Christopher Greenwood, *The Relationship Between Jus Ad Bellum and Jus In Bello*, 9(4) REV. INT’L STUD. 223, 227-229, 331-333 (1983). See also Hans Gutbrod, *Assembling the Moral Puzzle – Just War Tradition and Karabakh*, GLOBAL POLICY (Feb. 25, 2021).

⁹⁵ General comment No. 36 (2018) on Article 6 of the International Covenant on Civil and Political Rights, on the right to life UN Doc. CCPR/C/GC/36.

⁹⁶ KARL DOEHRING, ALLGEMEINE STAATSLHRE: EINE SYSTEMATISCHE DARSTELLUNG 28-29 (3rd edn, 2004). Judge Dillard in the *Namibia* case stated that it the population determines the destiny of the territory and not the other way around, Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276, Advisory Opinion, 1971 I.C.J. Rep 16, at 122. Judge Trindade has observed “[n]o State can invoke territorial integrity in order to commit atrocities (such as the practices of torture and ethnic cleansing, and massive forced displacement of the population, nor perpetrate them on the assumption of sovereignty...)” Separate Opinion in Kosovo Advisory Opinion, *supra* note 59, paras. 175-176, 206-208.

⁹⁷ <https://www.hrw.org/news/2020/12/11/azerbaijan-unlawful-strikes-nagorno-karabakh>.

⁹⁸ See Article 5 of the ECHR and Article 9 of the ICCPR, respectively. On 22 July 2021, the ECtHR delivered its judgment in the case of Badalyan v. Azerbaijan, finding that Azerbaijan illegally detained and tortured an Armenian national who had accidentally wandered into Azerbaijani territory while foraging for mushrooms.

⁹⁹ See also Krüger, *supra* note 51, at 57. See also UNHCR, Bi-annual fact sheet 2021 02 Armenia <<https://www.unhcr.org/publications/operations/605c464f0/bi-annual-fact-sheet-2021-02-armenia.html?query=nagorno%20karabakh>>.

and the negotiations are ongoing. On the other hand, the Azerbaijani sovereignty over the region might have lost a great deal of legitimacy, which could, among others, be seen in the recognition of the Republic of Artsakh by states' subunits, such as the state of South Australia, the Assembly of Corsica, the Council of Paris, the Parliament of Catalonia, or the Derby City Council. It should nonetheless be remarked that the international outlets documented the war-related breaches on the side of Armenia too, which was accused of using unguided multiple launch rocket systems (MLRS) as well as inaccurate weapons, including cluster ammunition and explosives.¹⁰⁰ According to information provided to the UN High Commissioner for Human Rights (UNHCHR), 40,000 Azerbaijani nationals have been temporarily displaced, while some 90,000 ethnic Armenians from Nagorno Karabakh have fled the current hostilities.¹⁰¹ Finally, one could ask how Nagorno Karabakh could be considered as a legitimate entity knowing that its army not only controls military the territory of Nagorno Karabakh but until recently also controlled adjacent territories, from which previously native Azerbaijani were expelled and their rights have been continuously breached, as ruled in *Sargsyan v. Azerbaijan*?¹⁰²

D. The 2020 Tripartite Armistice Agreement and Azerbaijani title to territory

The final mode relevant to the recent military conflict in and around NK which could have an impact on the Azerbaijani title over NK is the Tripartite Armistice Agreement signed on 9 November 2020 by President of Azerbaijan Ilham Aliyev, the Prime Minister of Armenia Nikol Pashinyan and the President of Russia Vladimir Putin, which put an end to the conflict.¹⁰³

Although it might be debated whether the Armistice Agreement qualifies as a proper peace agreement (it neither established long-lasting peace nor restored normal relations between feuding states),¹⁰⁴ it can be assumed that it qualifies as an international agreement under the Vienna Convention of the Law of Treaties (VCLT) and the customary law of treaties (it was concluded by states in a written form and is being referred to by the parties and implemented).¹⁰⁵ The Armistice Agreement, besides ending the hostilities, contains territorial clauses and in the follow-up statement of 11 January 2021 a working a tripartite working group was established to supervise the implementation of its point 9, regarding unblocking economic and transport links in the region.¹⁰⁶ Certainly, the Armistice Agreement meets Abbot's categorization of legalization since it was drafted precisely, provides for legal obligations/mandatory language and includes mediators.¹⁰⁷ In particular,

¹⁰⁰ <https://www.amnesty.org/en/latest/news/2021/01/azerbaijan-armenia-scores-of-civilians-killed-by-indiscriminate-use-of-weapons-in-conflict-over-nagorno-karabakh/>.

¹⁰¹ <https://www.ohchr.org/SP/NewsEvents/Pages/DisplayNews.aspx?NewsID=26464&LangID=E>.

¹⁰² Case of *Sargsyan v. Azerbaijan* (Application No. 40167/06).

¹⁰³ *Supra* note 25.

¹⁰⁴ See Rafal Rybicki & Bartosz Ziemblicki, *Peace Treaties as Sources of International Law*, 1-2 КҖҚЫҚ ЖӘНЕ МЕМЛЕКЕТ 59-60 (2020).

¹⁰⁵ Consult Christine Bell, *Peace Agreements: Their Nature and Legal Status*, 100(2) AM. J. INT. L. 379ff (2006); Philipp Kastner, *Interactions between Peace Agreements and International Law*, in INTERNATIONAL LAW AND PEACE SETTLEMENTS 165 (Marc Weller et al. eds. 2021).

¹⁰⁶ The joint trilateral statement issued in Moscow on 11 January 2021 <https://en.armradio.am/2021/01/11/armenian-azerbaijani-russian-leaders-sign-statement-on-unblocking-of-all-economic-and-transport-links-in-the-region/>.

¹⁰⁷ Kenneth W. Abbott et al., *The Concept of Legalization*, 54 INT ORG 405 (2000).

the nine-point Armistice Agreement's text abounds in the word 'shall', which is generally considered to produce legal obligations. Second, Russia appears in the text in the form of a mediator. In the preamble, Vladimir Putin appears alongside Prime Minister of the Republic of Armenia Nikol Pashinyan and the President of the Republic of Azerbaijan Ilham Aliyev as the declarer of the complete ceasefire from November 10, 2020, as of 00:00 Moscow time in the Nagorno-Karabakh conflict zone.¹⁰⁸ Furthermore, Russia seems to have taken the role of the guardian of peace, as its peacekeeping forces¹⁰⁹ will be deployed along the contact line in Nagorno-Karabakh and along the Lachin Corridor.¹¹⁰ In addition, a peacekeeping centre shall be established to oversee the ceasefire, apparently with the Russian leading role in the process.¹¹¹

This 'legalisation' of the 2020 Tripartite Armistice Agreement, with the key point of Russia being the administrator of peace, has profound factual ramifications for the territorial outlook of the Nagorno Karabakh region. The Agreement in Point 1 stipulates that the land regained by Azerbaijan shall remain in its possession, whereas according to Points 2 and 6 Armenia has to return further territories (the Aghdam and Kalbajar and Lachin districts).

Yet, what does this agreed effective territorial change mean from the standpoint of international law as to affecting the legal title of Azerbaijan? The Agreement itself does not contain sovereignty clauses, which would change what has been so far accepted by international law. Against that backdrop, states and international institutions could consider the Agreement as declaratory since for them the returned territories already constituted part of Azerbaijan.¹¹²

The Agreement nevertheless is damaging for the NKR's claim to territorial title. It is not a party to the Agreement as a separate subject and signatory, which demonstrates that other actors have control over its fate and that it can hardly be conceived as an independent and effective entity.¹¹³ The deal weakens the chances of the local population to exercise their self-determination right, subsuming it under Russian patronage and limiting its scope to the currently controlled territories. There is little chance that the signatories of the Agreement as well as the international community will recognize a claim to larger territories than the NKR possesses at present, most notably in ongoing negotiations. Its President, Arayik Harutyunyan, after all, agreed to the terms of the deal, acknowledging that further fighting will only lead to greater defeat.¹¹⁴ Accordingly, the NKR through this acquiescence will likely be estopped from claiming a greater territory. The Russian influence over the NK's land and ensuing practical impingement on the Azerbaijani title will be discussed in section V.C.

¹⁰⁸ Preamble of the 2020 Armistice Agreement.

¹⁰⁹ 960 troops armed with firearms, 90 armoured vehicles and 380 motor vehicles.

¹¹⁰ Point 3 of the 2020 Armistice Agreement. The map of the region reflecting the current situation and the provisions of the Agreement could be accessed under <https://meduza.io/feature/2020/11/12/shestinedelnaya-voyna-v-nagornom-karabahe-itogi>.

¹¹¹ Point 5 of the 2020 Armistice Agreement. See Anton Trojanovski & Carlotta Gall, *In Nagorno-Karabakh Peace Deal, Putin Applied a Deft New Touch*, N. Y. TIMES, Apr. 24, 2021.

¹¹² For instance, Vladimir Putin's Press Secretary Dmitry Peskov stated that Russia, the same as other countries, did not change its position on the status of Nagorno-Karabakh, and that title to this territory would be determined by the resolutions of the UN Security Council. <https://iz.ru/1095876/2020-12-04/peskov-podtverdil-pozitciiu-rossii-po-statusu-karabakha>.

¹¹³ Cf. PACE Resolution 1047 (1994) Conflict in Nagorno-Karabakh, point. 5, where it "welcomes the agreement signed on 26 July 1994 by the Ministers of Defence of Armenia and Azerbaijan and the commander of the army of Nagorno-Karabakh".

¹¹⁴ <https://www.theguardian.com/world/2020/nov/10/nagorno-karabakh-armenia-pm-signs-deal-to-end-war-with-azerbaijan-and-russia>.

V. The title: Territorial ineffectiveness as a ground challenging Azerbaijani recognized title to Nagorno Karabakh territory

A. Long-lasting occupation and statehood of the NKR

The ability of Azerbaijan to exert influence or control on the territory of Nagorno Karabakh since the 1994 Bishkek Ceasefire Agreement, which ended the First Nagorno-Karabakh War (1988-1994), is incontrovertibly insignificant.¹¹⁵ Based on this fact, a claim to the territorial title has been formulated, expressed either directly or in conjunction with other principles.¹¹⁶ The acquisition of territorial title by the Nagorno Karabakh Republic through long-lasting occupation is nonetheless controversial legally. Namely, for the title to be acquired by the passage of time, a party needs to prove authority over the territory, by the exercise of jurisdiction and state functions, on a continuous and peaceful basis.¹¹⁷ It remains beyond doubt that the occupation cannot be regarded as peaceful given the constant political and military opposition of Azerbaijan. Hence, the so-called acquisitive prescription, dispossessing the previous owner, cannot take place.¹¹⁸ Besides, international arbitration has been very reluctant to give precedence to *effectivités* if a solid title could be invoked, such as the one based upon *uti possidetis juris*. This was first pronounced in *Frontier Dispute (Burkina Faso/Mali)* and later confirmed in *Land, Island and Maritime Frontier Dispute* cases by the ICJ.¹¹⁹ Furthermore, a title does not seem to erode if it is placed under a legal regime of occupation. According to Article 42 of the 1907 Hague Regulations, 'the territory is considered occupied when it is actually placed under the authority of the hostile army'.¹²⁰ Irrespective of that, the passage of time may still consolidate the status quo (*ex factis jus oritur*) since it would be untenable, as Visscher once pointed out, to prolong eternally the tension between effectiveness and legality.¹²¹ This tension to be resolved, however, demands acquiescence, that is, international acceptance, which is still missing in this case.¹²² Thus, in legal terms, a title of the NKR to the land in question, based on effectiveness, should be characterized as unsound or inchoate at most.¹²³

¹¹⁵ Text of the Agreement can be accessed under <https://peacemaker.un.org/armeniaazerbaijan-bishkekprotocol94>.

¹¹⁶ The claim is usually substantiated in an occupation stretching beyond the last 30 years of independent rule. See Taras Kuzio, *Armenian Support for Karabakh and Crimea's Self-determination*, NEW EASTERN EUROPE (Aug.18, 2021) <https://neweasterneurope.eu/2021/08/18/armenian-support-for-karabakh-and-crimeas-self-determination>. See also Application Instituting Proceedings and Request for Provisional Measures Republic of Armenia V. Republic of Azerbaijan, vol I, para. 34 (Sept. 15, 2021) <https://www.icj-cij.org/public/files/case-related/180/180-20210916-APP-01-00-EN.pdf>.

¹¹⁷ Cf. Clipperton Island case, 1931, reprinted in 26 AM. J. INT. L. 390, at 393-94; Award of the Arbitral Tribunal in the first stage of the proceedings between Eritrea and Yemen (Territorial Sovereignty and Scope of the Dispute), 1998, 22 RIAA, at. 268, para. 239.

¹¹⁸ *Island of Palmas (Netherlands v. USA)*, 1929, 2 UNRIAA 829, at 869.

¹¹⁹ *Frontier Dispute (Burkina Faso/Republic of Mali)* 1986, ICJ Rep 554, at 566; *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)*, 1992, ICJ Rep 351, at 386-388.

¹²⁰ Convention respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (adopted 18 October 1907, entered into force 26 January 1910) 205 CTS 227 (hereinafter cited as The Hague Convention IV 1907) art 42.

¹²¹ CHARLES DE VISSCHER, *LES EFFECTIVITE DU DROIT INTERNATIONAL PUBLIC* 25 (1967).

¹²² Theodore Christakis, *La sécession : Une question de simple fait?* ESIL RESEARCH FORUM: 'THE POWER OF INTERNATIONAL LAW IN TIMES OF EUROPEAN INTEGRATION' 16 (2007).

¹²³ DHN Johnson, *Consolidation as a Root of Title in International Law*, CAM. L. J 215, 220 (1955).

The correlative, yet more elaborate claim to title underpinned by effectiveness revolves around the notion of statehood. The effectiveness criterion which is needed for the appearance of new statehood on the one hand, and disappearance of the claim to maintain the territorial integrity on the other, seems to be fulfilled in NK's scenario. The only aspect, which arguably disqualifies the loss of territory of the ostensible sovereign and the emergence of the new entity on that territory is the *ex injuria jus non oritur* principle, which relates to the military assistance of Armenia, and substantial dependence upon Armenia.¹²⁴

In fact, there exists a substantive correlation between the self-determination right, which could effectuate statehood, discussed in section IV.A, with the matter of statehood itself. Still, the matter of statehood will be evaluated in accordance with the fact of its purported exitance, not by way of methods leading to it.¹²⁵

Today, the NKR is *de facto* independent from Azerbaijan, although in the opinion of states it still *de jure* belongs to it, but its status is best explained as *non liquet* – since discussions over its fate are carried out. If one conceives statehood as a mere fact (in the absence of legal precepts attached to it) and without considering recognition (in light of Article 3 of the Montevideo Convention), then the NKR is indeed a state and should enjoy rights under international law.¹²⁶ Chhabra, for example, has argued that the NKR fulfils statehood criteria specified in Article 1 of the Montevideo Convention, that is, a defined territory, a people, government, and the ability to enter into relations with other states. For him, the current wait-and-see approach with regard to the NKR and the OSCE talks is wrong, and the Great Powers have “an independent responsibility to keep up the pressure by overseeing the transition unilaterally”.¹²⁷

Others, to the contrary, oppose the statehood of the NKR on the basis of its lack of independence and the Armenian military intervention. It has been claimed that the Armenian Dram continued to be Karabakh's legal tender and the NKR has received critical budget support from Armenian Finance Ministry.¹²⁸ Moreover, the NKR's residents carry Armenian passports and Armenian conscripts were drafted to defend the occupied buffer zone.¹²⁹ The NKR benefits likewise from the Armenian radio frequencies, banking sector and natural resources supplies. In most clear terms, the dependence on Armenia was pronounced in the *Chiragov* case, where the ECtHR stated “the “NKR” and its administration survive by virtue of the military, political, financial and other support given to it by Armenia which, consequently, exercises effective control over Nagorno-Karabakh”.¹³⁰ This could mean that the NKR is a *de facto* protectorate of Armenia,¹³¹ invoking the responsibility of the latter,¹³² but predominantly that the NKR's independence is compromised, which is considered by Crawford as

¹²⁴ Cf. Théodore Christakis, *L'État en tant que “fait primaire”: Réflexions sur la portée du principe d'effectivité*, in *SECESSION: INTERNATIONAL LAW PERSPECTIVES* 138-170 (Marcelo G Kohen ed. 2006).

¹²⁵ Therefore, the parameters assessing the validity and invalidity of the self-determination right (the qualification of local Armenians as people capable to seek statehood, the principles of *uti possidetis juris* and territorial integrity as well as the treaty provisions) will not be discussed here.

¹²⁶ Montevideo Convention on the Rights and Duties of States (signed 26 December 1933, entered into force 26 December 1934) 165 LNTS 19 (hereinafter cited as the Montevideo Convention) art 3.

¹²⁷ Amit K. Chhabra, *Superpower Responsibility for State Recognition: Charting a Course for Nagorno-Karabakh*, 31 B. U. INT'L L. J. 132.

¹²⁸ Knoll-Tudor & Mueller, *supra* note 63.

¹²⁹ *Id.*

¹³⁰ *Chiragov and Others v. Armenia*, *supra* note 51, para. 186.

¹³¹ Melnyk refers to the NKR as “satellite ‘puppet-State’ or even a *de facto* Armenian province”. See Andriy Y Melnyk, *Nagorny-Karabakh*, Max Planck Encyclopedias of International Law, para. 10 (2013).

¹³² See Geneva Convention IV, Arts. 47, 49. See also Brownlie: A State cannot avoid responsibility for military occupation “by setting up, or permitting the creation of, forms of local administration however these are designated”. Ian Brownlie, *State Responsibility. The Problem of Delegation*, in *VÖLKERRECHT ZWISCHEN NORMATIVEM ANSPRUCH UND POLITISCHER REALITÄT* 301 (Konrad Ginther et al eds. 1994).

the cardinal statehood feature.¹³³ As regards the use of force of a third State, *ergo* Armenia, which could invalidate the NKR's claim to statehood, this has not been publicly proclaimed, yet based on certain sources, it could be inferred.¹³⁴

Nevertheless, the authors of this article contend that the biggest hindrance in apprehending the NKR as a state is the lack of its international legal functionality.¹³⁵ Such malfunctioning mainly stems from universal non-recognition and bears considerable consequences for Nagorno Karabakh's capacity to act on the international plane to end this conflict going forward.¹³⁶ Not being considered as a State by international institutions and other States deprives an entity of rights ascribed to statehood by international law.¹³⁷ In consequence, its capacity to join international organizations is limited, its ability to access the international judiciary is restricted, immunities will not be enjoyed, and its ability to maintain diplomatic and consular relations will be hampered.¹³⁸ The NKR is precluded, for instance, from acceding to the Rome Statute and asking the ICC to investigate crimes committed in its territory.¹³⁹ It cannot become a UN Member State and thus resolve disputes peacefully with other States concerned through the ICJ or the General Assembly.¹⁴⁰ It will not be able to formally establish an embassy or a consulate and thus regulate trade issues, develop relationships with other states or provide protection for its citizens and property.¹⁴¹ Nagorno Karabakh officials while travelling abroad will not enjoy functional and personal immunity and thus could, for instance, be searched or arrested in a foreign country.¹⁴² The ostracized statehood of Nagorno Karabakh also affects institutions in creating a stable democratic legal order, observing international law or hindering the suppression of corruption.¹⁴³ These factors, in turn, have an impact on functioning statehood.¹⁴⁴ As such, the NKR can be compared with other entities struggling for statehood whose international legal existence in the sense of utilization of and protection by international law is extremely limited, such as Kurdistan or Somaliland.

¹³³ JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 62 (2nd edn, 2006).

¹³⁴ Human Rights Watch, *Azerbaijan: Seven Years of Conflict in Nagorno-Karabakh* (1994). THOMAS DE WAAL, *BLACK GARDEN: ARMENIA AND AZERBAIJAN THROUGH PEACE AND WAR* 210 (2013).

¹³⁵ See Volker Roeben & Sava Jankovic, *A Rose is a Rose is a Rose. International Legal Functionalism as a Method of Statehood Analysis*, 39(2) *BERKELEY J. INT'L. L.* (2021).

¹³⁶ Generally, SZYMON ZARĘBA, *SKUTKI BRAKU UZNANIA PAŃSTWA W PRAWIE MIĘDZYNARODOWYM* (2020).

¹³⁷ CHRISTIAN HILLGRUBER, *DIE AUFNAHME NEUER STAATEN IN DIE VÖLKERRECHTSGEMEINSCHAFT: DAS VÖLKERRECHTLICHE INSTITUT DER ANERKENNUNG VON NEUSTAATEN IN DER PRAXIS DES 19. UND 20. JAHRHUNDERTS* (1998).

¹³⁸ See Jankovic & Roeben, *supra* note 200.

¹³⁹ On 2 January 2015, the Government of Palestine acceded to the Rome Statute by depositing its instrument of accession with the UN Secretary-General. The Rome Statute entered into force on 1 April 2015. See Dapo Akande, *ICC Assembly of States Parties Urged to Decide on Status of Palestine*, *EJIL:TALK!* (Sept. 24, 2012).

¹⁴⁰ Article 35(1) of the ICJ Statute provides that the Court shall be open to the States parties to the Statute, while Article 93(1) of the UN Charter sets forth that 'All Members of the United Nations are ipso facto parties to the Statute'. The Statute of the International Court of Justice, 33 U.N.T.S. 993.

¹⁴¹ The 1961 Vienna Convention on Diplomatic Relations and the 1963 Vienna Convention on Consular Relations stipulate that the establishment of diplomatic/consular relations occurs between States by mutual consent.

¹⁴² Preliminary Report of the Special Rapporteur, Mr. Roman Anatolevich Kolodkin (60th session of the ILC), UN Doc. A/CN.4/601. See also Margaret McGuinness, *Non-Recognition and State Immunities*, in *UNRECOGNISED SUBJECTS IN INTERNATIONAL LAW* 284ff (Władysław Czapliński & Agata Kleczkowska eds. 2019).

¹⁴³ See Licinia Simão, *Non-State Actors and South Caucasus Security: The Role of NGOs, Transnational Corporations and Religious Organisations*, NOREF POLICY BRIEF (2013). Cf. Report of the Freedom House, *Freedom in the World 2018. Nagorno-Karabakh profile* (2018) <https://freedomhouse.org/report/freedom-world/2018/nagorno-karabakh>.

¹⁴⁴ See CRAWFORD, *supra* note 198, at 89-95; JURE VIDMAR, *DEMOCRATIC STATEHOOD IN INTERNATIONAL LAW THE EMERGENCE OF NEW STATES IN POST-COLD WAR PRACTICE* (2013).

Based on the foregoing, the NKR's claim to title judged through the prism of the emergence of statehood is weak. Not only its independence, but predominantly its functioning as a State within the international legal order is questionable. The NKR would rather fit within the framework of non-state actors, but such status assumption bears much lesser implications on the question of title.¹⁴⁵

B. The international community's view: Unwillingness to delegatize the Republic of Artsakh and ongoing peace negotiations

As remarked, in practical terms a recognized title to land can only be relativized by means of derecognition. However, recognition once accorded may weaken to the extent that the derecognition will follow, although this happens very rarely. It is maintained that the recognition bestowed upon Azerbaijan's sovereignty over NK, although still stable, is affected by the unwillingness to delegatize the Republic of Artsakh, an ongoing negotiations process led by the OSCE Minsk Group since 1994, and the statements of States and their behaviour within international organizations.

Even though states and international organizations currently foster Azerbaijan's sovereignty over Nagorno Karabakh by not recognizing the Republic of Artsakh, it does not mean that this is their definite, unchangeable position. States have remained wary not to close the gate for future statehood of the Republic of Artsakh by attributing responsibility for its creation and existence through military invasion to a third State, i.e. Armenia.¹⁴⁶ Such an invasion would *ipso jure* invalidate the self-determination right of the people of Nagorno Karabakh, as was the case when the declarations of independence pronounced by the authorities in Northern Cyprus or Southern Rhodesia were invalidated by the UN Security Council.¹⁴⁷

On the universal level, no resolution has been adopted by the UN Security Council which would *expressis verbis* term Nagorno Karabakh as an occupied territory or urge the withdrawal from this territory. Similarly, no UN Security Council resolution recognized the Armenian invasion as a source of the self-proclaimed NKR's statehood nor did it proscribe the fact of the declaration of independence. In comparison, UN Security Council Resolutions 822, 853, 874, and 884 adopted in 1993 explicitly underlined the inadmissibility of the use of force for the acquisition of territory and demanded immediate withdrawal of local Armenian forces from the specific regions beside NK, that later become known as Armenian-occupied territories surrounding Nagorno-Karabakh.¹⁴⁸ The UN General Assembly Resolution 62/243 of 2008, in fact, reaffirmed 'continued respect and support for the sovereignty and territorial integrity' of Azerbaijan and demanded the 'immediate, complete and unconditional withdrawal of *all* Armenian forces from *all* the occupied territories of Azerbaijan'.¹⁴⁹ (no distinction has been made between local and Armenian forces and the phrase all territories pertained perhaps to NK too). Still, it did not mention explicitly Nagorno Karabakh in which Armenia is the 'occupying power' and, what is important, the resolution was adopted only by 39 votes (7 States were against while 100 abstained).

¹⁴⁵ Gayathree Devi KT, *The ECtHR on Nagorno-Karabakh: Current Approaches and Future Prospects*, GROJIL-BLOG (Apr. 6, 2021).

¹⁴⁶ See Sava Jankovic, *Four Streams of Democracy and the Recognition of States: The EU Perspective*, 22 SPANISH Y.B. INT'L. L. 55-76 (2018).

¹⁴⁷ Security Council resolutions 216 (1965) and 217 (1965), concerning Southern Rhodesia; Security Council resolution 541 (1983), concerning Northern Cyprus.

¹⁴⁸ UNSC Res 822, UN Doc. S/RES/822 (Apr. 30, 1993) ; UNSC Res 853, UN Doc. S/RES/853 (Jul 29, 1993) ; UNSC Res 874, UN Doc. S/RES/874 (Oct. 14, 1993) ; UNSC Res 884, UN Doc. S/RES/884 (Nov. 12, 1993).

¹⁴⁹ UNGA Res 62/243, UN Doc. A/RES 62/243 (Mar. 14, 2008).

On the regional level, for instance, the Parliamentary Assembly of the Council of Europe in its Resolution 1416 of 2005 proclaimed that ‘Considerable parts of the territory of Azerbaijan are still occupied by Armenian forces, and *separatist forces* are still in control of the Nagorno-Karabakh region’.¹⁵⁰ In a similar vein, the ECtHR Grand Chamber’ judgment in *Chiragov and Others v. Armenia* confirmed the territorial integrity of Azerbaijan by applying the extraterritorial jurisdiction mechanism and established the violation of Article 1 of Protocol No. 1, Article 8, and Article 13 of the ECHR by Armenia by virtue of exerting effective military, political and financial control over Nagorno Karabakh, although it did not pronounce on the legality of the occupation on NK nor name Armenia as the ‘occupant’.¹⁵¹ In conclusion, States within international organizations and courts were unwilling to attribute clear responsibility for the creation of the NKR by military invasion of a third state and delegatize it in that way. In essence, there have been no calls for non-recognition of the NKR.

Another option, stemming directly from the fact of the lack of official condemnation of the NKR, which also call in doubt the Azerbaijani title to Nagorno Karabakh, is the mediation efforts. Here, the OSCE Minsk Group becomes most relevant as a facilitator. It encourages a negotiated, comprehensive, and sustainable settlement of all remaining core substantive issues of the conflict but does not per se advance the status change/maintenance without the engagement of the sides involved.¹⁵² For instance, in Madrid in 2007, the Group’s three Co-Chairs – France, Russia and the United States of America – presented to Azerbaijan and Armenia a set of Basic Principles for a settlement. One point referred to the return of the territories *surrounding* Nagorno-Karabakh to Azerbaijani control, while the other called for a future determination of the final legal status of Nagorno-Karabakh through a legally binding referendum.¹⁵³ The OSCE platform solution is endorsed almost by all states, including Azerbaijan and Armenia. The UN Secretary-General while pledging humanitarian support to Armenia and Azerbaijan in December 2020 urged the parties “to resume negotiations under the auspices of the OSCE’s Minsk Group Co-Chairs to reach a lasting peaceful settlement.”¹⁵⁴

An intriguing complement of this multilateral and procedural approach is the potential role of the UN Security Council. While there is no precedent, the concept of a threat to international security and the powers that the Council holds under Art. 43 UN Charter could include the transfer of title.¹⁵⁵ UN General Assembly could potentially play a role as well, given its previous resolutions, which could to a certain extent be understood as title-conferring, in particular those referring to Palestine or granting independence to colonial countries and people.¹⁵⁶ Still, it should be noticed that the UN, EU and other international institutions and organizations affirm the OSCE’s ‘jurisdiction’ over the conflict and it is where, if ever, the solution and the title will most likely be acknowledged.

¹⁵⁰ PACE Resolution 1416 (2005) The conflict over the Nagorno-Karabakh region dealt with by the OSCE Minsk Conference.

¹⁵¹ The Court has recognised the exercise of extraterritorial jurisdiction (...) through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the government of that territory. *Chiragov and Others v. Armenia*, *supra* note 51, paras. 168, 186. See also *Case of Muradyan v. Armenia*, App. No. 11275/07.

¹⁵² Press Release, Joint Statement by the Heads of Delegation of the OSCE Minsk Group Co-Chair Countries (Dec. 3, 2020).

¹⁵³ Statement by the OSCE Minsk Group Co-Chair countries (Jul. 10, 2009) <<https://www.osce.org/mg/51152>>.

¹⁵⁴ UN News, UN pledges humanitarian support as Armenia and Azerbaijan negotiate ‘lasting, peaceful settlement’ over Nagorno-Karabakh (Dec. 4, 2020) <https://news.un.org/en/story/2020/12/1079302>.

¹⁵⁵ Resolution 1244 demanded Serbia to engage into negotiations over a future status of Kosovo, which could be read as an initial source of title for the newly self-proclaimed state. UNSC Res 1244, UN Doc S/RES/1244 (Jun. 10, 1999).

¹⁵⁶ UNGA Res 181(II) (29 November 1947) UN Doc A/RES/181(II) (Future Government of Palestine); UNGA Res 1514(XV) (14 December 1960) UN Doc A/RES/1514(XV).

Finally, one could refer to the unclear and perhaps even changing practice of states and their institutions regarding this sovereignty dispute. During the recent conflict, the spokesperson for the German Federal Foreign Office avoided a clear answer whether Germany considered the territory of Nagorno-Karabakh to be legally a part of Azerbaijan, but stated instead that the “conflict over the region of Nagorno-Karabakh can only be solved in negotiations” and that “it is now up to the OSCE Minsk Group and the parties to settle the status of Nagorno-Karabakh in negotiations.”¹⁵⁷ The French National Assembly and Senate appealed to the government to protect the people of Nagorno Karabakh and to recognize the independence of the NKR accordingly, which the latter, however, has not done.¹⁵⁸

Notwithstanding, depriving Azerbaijan of its legal title to Nagorno Karabakh by virtue of a still uncertain outcome of the negotiations and in the absence of the agreement between the sides or any other relevant international document(s) as well as in the absence of derecognition seems a bit of exaggeration.

C. The political and military presence of Russia

The Russian role in NK can under no circumstance be underestimated. Indeed, predominantly owing to Russia stepping in, the hostilities were put on hold and the 2020 Tripartite Armistice Agreement was concluded. What is more, the deployment of the Russian military contingent denotes relative peace, stability and sustainability.¹⁵⁹ Of course, tensions may arise due to the unsettled political status, but they will be effectively controlled by the Russians. That being said, the current territorial configuration and future settlement process largely depend on Russia’s political interest.¹⁶⁰ Such a situation leaves no doubts on the territorial ineffectiveness of Azerbaijan and, in consequence, shed doubts on a practical manifestation of a title. Even if the title is legally vested in Azerbaijan, from the pragmatic point of view it is Russia who will shape the future of the territory and at least until 2025 (point 4 of the Armistice Agreement) is also contractually empowered to exert influence. Point 4, in truth, gives the right to the parties of the Agreement to terminate the military presence with 6 months’ notice (otherwise the term will automatically be extended for the next five years), but this is unrealistic to expect given Russia’s cunning approach in similar conflicts.¹⁶¹

By omitting the UN and OSCE in the Agreement, Russia basically gained the decisive role in the conflict management and based on its peacekeeping missions’ policy in Abkhazia or Transnistria, it will not tend to find a political solution to the conflict, which is usually the principle of UN Peacekeeping,¹⁶²

¹⁵⁷ Stefan Talmon, *Germany Goes Back on Earlier Statements on the International Legal Status of Nagorno-Karabakh*, GERMAN PRACTICE IN INT’L L. (Oct. 12, 2020) <https://gpil.jura.uni-bonn.de/2020/10/germany-goes-back-on-earlier-statements-on-the-international-legal-status-of-nagorno-karabakh/>.

¹⁵⁸ Senate Resolution No. 145 portant sur la nécessité de reconnaître la République du Haut-Karabagh, <https://www.senat.fr/leg/ppr20-145.html> and National Assembly Resolution No. 520 sur la protection du peuple arménien et des communautés chrétiennes d’Europe et d’Orient, https://www.assemblee-nationale.fr/dyn/15/textes/l15t0520_texte-adopté-seance.

¹⁵⁹ The joint trilateral statement issued in Sochi on 26 November 2021 stated: ‘We mentioned the significant contribution of the Russian peacekeeping mission in stabilizing the situation and ensuring security in the region’ <https://jam-news.net/an-extremely-useful-meeting-results-of-the-trilateral-putin-pashinyan-aliyev-meeting-in-sochi>.

¹⁶⁰ András Rác, *In Russia's Hands Nagorno-Karabakh After the Ceasefire Agreement*, INSTITUTE FOR SECURITY STUDIES (Apr. 8, 2021) https://www.iss.europa.eu/content/russias-hands#_introduction.

¹⁶¹ Margarete Klein, *Russlands Militärpolitik im postsowjetischen Raum* STIFTUNG WISSENSCHAFT UND POLITIK (Sept. 29, 2019) <https://www.swp-berlin.org/publikation/russlands-militaerpolitik-im-postsowjetischen-raum>.

¹⁶² United Nations Peacekeeping, ‘Principles of Peacekeeping’ (<https://peacekeeping.un.org/en/principles-of-peacekeeping>).

but would rather keep the conflict frozen. This is apparent from two follow-up trilateral statements of January 2021 and of November 2021, where the Russian role is praised by the signatories (Russia, Armenia, and Azerbaijan). The 'entrenchment' of Russia is particularly emphasized in the ultimate sentence of the latter statement, providing:

The Russian Federation will continue to provide the necessary assistance for normalizing relations between the Republic of Azerbaijan and the Republic of Armenia, building an atmosphere of trust between the Azerbaijani and Armenian peoples, and establishing good-neighborly relations in the region.¹⁶³

The projected continued presence of Russia in NK is likewise conspicuous in the Russian military contingent, which according to some sources exceeded almost three times the permissible allocation (Point 3 of the Armistice Agreement stipulates 1,960 troops armed with firearms, 90 armoured vehicles and 380 motor vehicles).¹⁶⁴

There are more open questions regarding the military presence of Russia on the conflict lines, not defined by the Agreement, namely the exact mandate of the mission, its exact tasks, responsibilities or rules of engagement. The Agreement neither prescribes how to ensure the accountability of the mission, including the compliance with the impartiality expected of peacekeeping troops, nor how non-compliance will be sanctioned. The answer to these questions cannot be found in Joint Russian-Turkish Centre for Monitoring the Ceasefire in the Nagorno-Karabakh Conflict Zone operative since 30 January 2021, only accepted by two signatories to the Agreement, that is, Azerbaijan and Russia.

In spite of uncertainties inscribed in the new military and political architecture in NK, Russian intention to continue to dominate the region is evident and this domination will inhibit the sovereignty of Azerbaijan over NK in a similar manner as the NKR itself has done so far. This is not however tantamount to the legal loss or transfer of the title.

D. Wrongful acts, responsibility, and admission of the ineffectiveness of Azerbaijan in NK

It is unnecessary to further elaborate on the ineffectiveness of Azerbaijan in NK, as this is beyond question. It may pay however to approach the problem from another angle, namely from Azerbaijan's attitude towards NK as its land, embracing positive obligations, due diligence and responsibility for actions committed there. On this basis, the territorial title of the recognized titleholder might also be undermined.

To commence with, Azerbaijan has constantly objected to its responsibility for human rights matters in Nagorno Karabakh and seven neighbouring regions, which were outside its effective control (admission of the territorial effectiveness).¹⁶⁵ Yet, the objective inability to exercise control does not translate to eschewing responsibility which can be attributed to a state. Therefore, Azerbaijan should not allude to NK as a 'grey zone' - a conventional slogan utilized by international institutions (among

¹⁶³ *Supra* note 224.

¹⁶⁴ Rác, *supra* note 225.

¹⁶⁵ See, inter alia, Human Rights Council, *National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21*, A/HRC/WG.6/16/AZE/1 (Feb. 7, 2013).

others PACE) to describe areas where monitoring mechanisms cannot function freely or effectively.¹⁶⁶ On the contrary, Azerbaijan must not only politically, but also legally treat NK as its territory and respect all applicable standards and norms. To this end, it should not resort to the use of cluster ammunition in the NK conflict and expect impunity by reason of not being a party to the UN Convention on Cluster Munitions.¹⁶⁷ In a similar vein, Azerbaijan must not commit war crimes in NK, such as wilful killing, taking hostages, torture or inhuman treatment, given the fact it has not signed the Rome Statute of the ICC.¹⁶⁸ Azerbaijan is also not allowed to be excused for not completing a thorough investigation regarding wrongful actions of its soldiers in the territory of NK in view of national law, especially its penal code. Four reported sentences of servicemen are definitely a very low number compared to immense calls for justice.¹⁶⁹ Previous instances of pardoning war criminals, highlighted, among others, in the *Makuchyan and Minasyan v. Azerbaijan and Hungary*, are not well-received either.¹⁷⁰ In short, Azerbaijan bears a negative and positive obligation (collaboration with NGOs, advancing prosecution etc.) in relation to the protection of human rights on its claimed territory.¹⁷¹ Otherwise, the conduct might indicate a different treatment in NK than in the rest of the territory (legal discrimination) and thus impinge on the perception of stretching the title to the whole of the claimed territory.

Azerbaijan should also not use its territory, including NK, to the detriment of other States and international law. Ever since the *Corfu Channel* case, it has been clear that states have obligations of due diligence over harmful uses of their territory.¹⁷² Elementary humanitarian considerations support this obligation. This due diligence extends to risks and threats to international security broadly construed and thus helps control these risks.¹⁷³

¹⁶⁶ Parliamentary Assembly of the Council of Europe Resolution 2240 (2018) Unlimited access to member States, including “grey zones”, by Council of Europe and United Nations human rights monitoring bodies (Oct. 10, 2018).

¹⁶⁷ Convention on Cluster Munitions (30 May 2008) 2688 UNTS 39

¹⁶⁸ See UN News ‘UN rights chief warns of possible war crimes in Nagorno-Karabakh conflict’ <https://news.un.org/en/story/2020/11/1076672>; Statement by Azerbaijani civil society representatives and political activists regarding the consequences of the second Karabakh war and peaceful resolution process of the Nagorno-Karabakh conflict, <http://gozetcu.az/wp-content/uploads/2020/12/AZ-Ceasefire-Statement-031220-4.pdf>. Armenia v. Azerbaijan (no. 42521/20); Azerbaijan v. Armenia (no. 47319/20). The inter-State applications contain allegations of widespread violations of the Convention by the respondent States during the hostilities starting on 27 September 2020, including indiscriminate attacks on civilians as well as civilian and public property and infrastructure; executions, ill-treatment and mutilations of combatants and civilians; the capture and continued detention of prisoners of war; and the forced displacement of the civilian population in areas affected by the war. See ECtHR Press Release, *Receipt of Applications in two Inter-State Cases Related to the Conflict in Nagorno-Karabakh*, ECHR 046 2021 (Feb. 4, 2021). In addition, Armenia has lodged a case against Turkey (no. 43517/20).

¹⁶⁹ See <https://genprosecutor.gov.az/az/post/3272>.

¹⁷⁰ Marko Milanović & Tatjana Papić, *Makuchyan and Minasyan v. Azerbaijan and Hungary* 115(2) AM. J. INT. L. 294-301 (2011).

¹⁷¹ *Armenia/Azerbaijan: Decapitation and War Crimes in Gruesome Videos Must be Urgently Investigated* AMNESTY INTERNATIONAL (Dec. 10, 2020) <https://www.amnesty.org/en/latest/news/2020/12/armenia-azerbaijan-decapitation-and-war-crimes-in-gruesome-videos-must-be-urgently-investigated/>; Human Rights Watch, *Azerbaijan: Armenian POWs Abused in Custody Investigate Abuse; Protect All Detainees* (Mar.19, 2021) <https://www.hrw.org/news/2021/03/19/azerbaijan-armenian-pows-abused-custody>.

¹⁷² *Corfu Channel* (United Kingdom of Great Britain and Northern Ireland v. Albania) I.C.J. Rep. 1949, 22.

¹⁷³ Robert P. Barnidge Jr., *States’ Due Diligence Obligations with Regard to International Non-State Terrorist Organisations: The Heavy Burden States Must Bear*, 16 IRISH STUD. IN INT’L AFF. 120 (2005); Antonio Cassese, *Terrorism is Also Disrupting Some Crucial Legal Categories of International Law*, 12 EUR. J. INT’L. L. 993 (2001).

The unresolved status of Nagorno Karabakh poses challenges for the protection of vulnerable international energy infrastructure affecting vital security interests of many states.¹⁷⁴ The potential next war can affect strategic transboundary pipelines, transporting oil and natural gas from Caspian fields in Azerbaijan to weighty energy markets in Turkey, the Mediterranean, and Europe. These are located north of the current military conflict area in Georgia. They can be targeted by heavy artillery and missile fire. For example, on 6 October 2020 Azerbaijan claimed that a cluster bomb almost reached the Baku-Tbilisi-Ceyhan pipeline.¹⁷⁵ Armenia denied any claims of targeting international energy infrastructure. Potential future incidents involving pipelines also arise from non-state actors.¹⁷⁶ Terrorist activities from NK are a cause for concern, performed in a physical or cyber way,¹⁷⁷ and must be prevented by the holder of title to that territory.

Azerbaijan might also be accused of breaching international law and security by importing mercenaries and engaging them in the Nagorno Karabakh conflict. In October 2020, the Permanent Representative of Armenia to the United Nations warned that Azerbaijan, with the assistance of Turkey, allowed to its borders thousands of foreign terrorist fighters and mercenaries from the Middle East.¹⁷⁸ They allegedly formed part of armed rebel groups and terrorist organizations, such as Al Nusra Front, Sultan Murad, Al Hamza and were involved in war crimes. Hiring mercenaries raises serious accountability concerns, as noted by the UN Working Group on the use of mercenaries, in reference to the recent Nagorno Karabakh conflict.¹⁷⁹ Azerbaijan thus acted in contravention to the International Convention against the Recruitment, Use, Financing and Training of Mercenaries, to which it is a party, and UN Security Council Resolutions 2253, 2396 and 2462, which explicitly refer to this issue.¹⁸⁰

Such a wrongful and negligent use of an own territory by Azerbaijan indicates that it aimed at a different treatment of NK than the rest of its territories, which diminishes its pretension to NK. A recognized titleholder should secure the implementation and integrity of international and regional (ECHR) law standards throughout the entire territory,¹⁸¹ regardless of the factual incapability or

¹⁷⁴ Anderson J. Brito & Adiel T. de Almeida, *Multi-Attribute Risk Assessment for Risk Ranking of Natural Gas Pipelines*, 94 RELIABILITY ENGINEERING & SYS. SAFETY 254 (2009); Mehdi Piri D & Michael Faure, *The Effectiveness of Cross-Border Pipeline Safety and Environmental Regulations under International Law*, 40(3) N.C. J. INT'L L. & COM. REG. 68-69 (2014).

¹⁷⁵ Mamuka Tsereteli, *Escalation in Karabakh: Implications for the Southern Gas Corridor*, MEI@75 (Oct.28, 2020) <https://www.mei.edu/publications/escalation-karabakh-implications-southern-gas-corridor>.

¹⁷⁶ In 2012 the Iran-Turkey gas pipeline was sabotaged by Kurdish separatists, injuring 28 people. In the same year, the Baku-Tbilisi-Erzurum gas pipeline was damaged, Piri D & Faure, *supra* note 239.

¹⁷⁷ In the USA, a November 2015 survey issued by security vendor Tripwire indicated that 82% of oil and gas industry respondents reported their organizations experienced an increase in cyberattacks over the previous 12 months. Additionally, 53% of respondents stated that the rate of cyberattacks had increased between 50% and 100% during that same period. See Joseph R. Dancy & Victoria A. Dancy, *Terrorism and Oil & Gas Pipeline Infrastructure: Vulnerability and Potential Liability for Cybersecurity Attacks*, 2 OIL & GAS, NAT. RESOURCES & ENERGY J. 579 (2017). See, *US Petrol Supplies Tighten After Colonial Pipeline*, BBC (May 12, 2021) [hackhttps://www.bbc.com/news/business-57081386](https://www.bbc.com/news/business-57081386).

¹⁷⁸ Letter dated 31 October 2020 from the Permanent Representative of Armenia to the United Nations addressed to the Secretary-General, UN Doc. A/75/566-S/2020/1073 (Nov.3, 2020).

¹⁷⁹ Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination, *Mercenaries in and Around the Nagorno-Karabakh Conflict Zone Must be Withdrawn – UN experts* (Nov. 11, 2020) <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26494&LangID=E>.

¹⁸⁰ International Convention Against the Recruitment, Use, Financing and Training of Mercenaries, 4 December 1989, 2163 U.N.T.S. 75; UNSC Res. 2253, UN Doc. S/RES/2253 (Dec. 17, 2015); UNSC Res. 2396, UN Doc. S/RES/2396 (Dec. 21, 2017); UNSC Res. 2462, UN Doc. S/RES/2462 (Mar. 28, 2019).

¹⁸¹ See Andrew Forte, *Nagorno Karabakh – A Stark Reminder of the Council of Europe’s Operational ‘Grey Zones’* OPINIOJURIS (Feb. 11, 2021) <http://opiniojuris.org/2021/02/11/nagorno-karabakh-a-stark-reminder-of-the-council-of-europes-operational-grey-zones/>.

wrongful behaviour of non-state actors controlling the territory of other States, viz Armenia.¹⁸² By disrespecting the preventive obligations and engaging in illicit activities in the NK conflict, Azerbaijan impaired its title pretension. Still, this is not commensurate to the cession of the title.

VI. Conclusions

Nagorno Karabakh is an exemplary frozen conflict zone, where territory is contested between warring parties and where the recognized title retains validity despite the situation on the ground. Validity of Azerbaijani title to Nagorno Karabakh is assumed on account of the continued international recognition, lack of official censure of sovereignty over this region, as well as the absence of any sovereignty ruling to this end, scholarly critique, and, most notably, the relinquishment of Azerbaijani claim to the said land. On the other hand, the international community has not delegatized in any act the pretension of local Armenians to Nagorno Karabakh, which was, for instance, the case with the Turkish Republic of Northern Cyprus or South African Bantustans, while states may simply uphold Azerbaijani recognition in light of the ongoing peace negotiations or the fact that they currently do not see a better subject on whom title could be bestowed. This may mean that the Azerbaijani title is currently preferred but does not necessarily testify to its longevity.

Azerbaijani legal title to NK grounded in the *uti possidetis juris*, while its admission to UN within former administrative borders, heed paid by states to the territorial integrity principle (which purportedly safeguards peace and stability) augmented also in regional contractual guarantees, such as the Alma-Ata Declaration, all substantiate territorial title to the contested territory. Yet, these principles and values are not immutable. As Shaw, an authority in the subject, once noted - title to territory is more a relative than an absolute concept, meaning that the whole discussion boils down to who manifests a better title. Accordingly, in line with certain occurrences and developments a title might be lost, and sovereignty accredited to another party, which seem more achievable in conflict zones. To recall the case of Kosovo when UN Special Envoy Marti Ahtisaari suggested in his plan supervised independence for Kosovo based on the impossibility of its reintegration with Serbia and exhaustion of negotiations. In this way, a recognized title of Serbia to Kosovo, based on historical title, *uti possidetis juris*, and admission to the UN, in conjunction with many principles and values was relativized and to certain extent supplemented with the right of Kosovars to self-determination as a source of the title and all respective ensuing guarantees.

The article illustrated a matrix of normative and factual grounds that challenge the Azerbaijani recognized title to NK. In the normative leg of the matrix, the article examined self-determination/secession, treaty, the prohibition to use force in international law, and international human rights and humanitarian law. It found that the right to self-determination of the local Armenians and their effective, long-lasting control over the NK territory do not affect the Azerbaijani title to NK. The title is also not challenged by the 2020 Tripartite Armistice Agreement, since it does not contain sovereignty clauses that would stipulate the diminishment of the recognized Azerbaijani territory but only acknowledges the new status quo and orders Armenia to return certain occupied territories, leaving the most of NK territories outside its scope. Furthermore, Azerbaijanian title to NK territory could not be called in question in view of its use of force to 'liberate the occupied territories', despite the fact that it was an illegal use of force, as the right to self-defence cannot be considered

¹⁸² Letter dated 18 November 2020 from the Permanent Representative of Azerbaijan to the United Nations addressed to the Secretary-General, UN Doc. A/75/625-S/2020/1161 (Dec. 4, 2020).

valid for a prolonged period of time. Finally, alleged violations of international human rights and humanitarian law in the recent conflict do not offer a clear legal basis for the title change, yet the atrocities committed against the population clearly delegitimize the title.

The next part of the article identified and examined grounds that relativise the territorial title of Azerbaijan to NK for factual ineffectiveness. The article analysed the three-decades-long existence of the self-proclaimed Nagorno Karabakh Republic. It showed, however, that the NKR has not become a State at international law as it fails the independence requirement and does not exhibit marks of a functional statehood in the international legal order. The article then assessed the ongoing international mediation process and the practice of States, which has remained inconclusive towards the final status. It found that until completion of the negotiations, the currently recognized title remains valid. The article also scrutinized the significant role of a third power – the Russian Federation – in NK in the aftermath of the Armistice Agreement but concluded that even though the agreed presence is real and perhaps long-running, this does not denote cession of the title, which is also evident in Azerbaijan's entitlement to object further presence of the Russian military contingent. Finally, the fact that Azerbaijan treats NK differently to the rest of its territory by not respecting recognized norms and standards with regard to this territory, is not an accepted standard for loss of territory.

The abovementioned conclusions are based on positive law regarding the acquisition or loss of territorial sovereignty. Therefore, although the factual situation in Nagorno Karabakh, somewhat ambivalent reactions of the international community towards the NKR, including negotiations, unlawful actions of Azerbaijan towards NK as well as the palpable presence of other actors, especially Russia, affect the territorial title, they are not synonymous with the loss of Azerbaijani title, *ergo* the invalidity of its internationally recognized title. Only decisions by states, international organizations by way of official acts and declarations could change the optics of the current conundrum. Still, it is more realistic that the Azerbaijani title will be tolerated regardless of decreased legitimacy, as the NKR's title is likewise shrouded in uncertainties while declaring it a no-man land is excluded in the same measure as a special protectorate, which is a relict of a previous era.