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Illegal: The Recourse to Force to Recover Occupied Territory and the Second Nagorno-Karabakh War

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Abstract

The Second Nagorno-Karabakh War, and its lingering aftermath, have put the fundamental and largely unsettled question of the jus ad bellum *in the spotlight: when part of one state's territory is occupied by another state for a prolonged duration, can the former state have lawful recourse to military force to recover its land? Prior to the 2020 conflict, the Nagorno-Karabakh region was widely regarded as belonging* de jure *to Azerbaijan, but as being unlawfully occupied – for more than 25 years – by Armenia. Accordingly, was Azerbaijan entitled to claim self-defence to lawfully recover it, even though the pre-2020 territorial status quo in the region had existed for more than a quarter of a century? In addition, could Azerbaijan invoke self-defence again in the near or distant future to recover those remaining parts of territory that continue to be outside of its control now that a new ceasefire is being enforced in the region? The answers to these questions have ramifications that extend far beyond the Caucasus, being of relevance for a wide range of pending conflicts around the globe. Upon closer scrutiny, the present authors believe that a negative answer is in order.*

1 Introduction

On 27 September 2020, heavy fighting erupted along the Nagorno-Karabakh Line of Contact between Azerbaijan and Armenia. After two months of military confrontations, the hostilities came to an end with a Russian-brokered ceasefire agreement. The episode substantially modified the territorial status quo that had existed in the region ever since the 1994 Bishkek Protocol.[1] In particular, a sizeable part

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[1] *Bishkek Protocol*, 5 May 1994, available at: https://peacemaker.un.org/armeniaazerbaijan-bishkekprotocol94; *Ceasefire Agreement*, Bishkek, 11 May 1994, available at: https://www.peaceagreements.org/view/990.

of Nagorno-Karabakh that had long been controlled by Armenia was effectively recovered by Azerbaijan.

The events raise a fundamental question of *jus ad bellum* – and one that is surprisingly overlooked in legal doctrine. Indeed, prior to the 2020 conflict, the Nagorno-Karabakh region was widely regarded as belonging *de jure* to Azerbaijan, but as being unlawfully occupied – for more than 25 years – by Armenia.[2] The self-proclaimed 'Republic of Artsakh' was seen as nothing but a puppet regime under the control of Armenia.[3] Against this background, the following question arises: When part of one state's territory is occupied by another state for a prolonged duration, can the former state have lawful recourse to military force to recover its land? Clearly, the relevance of this question extends far beyond the Caucasus (one need only consider the cases of the Golan Heights or the Turkish Republic of Northern Cyprus). Accordingly, rather than seeking to identify who was the 'aggressor' in the 2020 confrontation between Armenia and Azerbaijan – both protagonists accused each other of having triggered the hostilities – this essay tackles the above question in a more general fashion. Upon weighing the arguments, we believe a negative answer is in order.

We start from the assumption[4] that the mere existence of an ongoing situation of belligerent occupation and the resulting application of relevant rules of international humanitarian law do not eclipse the need for a proper legal basis under *the jus ad bellum* when one state seeks recover territory long occupied by another state. Nor can the fact that the occupied state is taking military action on its 'own' (occupied) territory reduce such demarche to a purely intra-state phenomenon removed from the scope of the prohibition on the use of force.[5] A state seeking to recover territory occupied by another must find a proper legal basis under the *jus ad bellum*. Absent Security Council authorization, the right of self-defence is the only lawful path available.

2 The Immediacy Requirement Versus Occupation as a 'Continuing' Armed Attack

An invocation of the right of self-defence in the context described above would appear *prima facie* difficult to reconcile with the 'immediacy requirement'. This criterion, often regarded as part of the broader 'necessity' requirement, stipulates that a close proximity in time must exist between the start of an armed attack and a response

[2] ECtHR, *Chiragov v. Armenia*, Appl. no. 13216/05, Judgment of 16 June 2015, para. 186; GA Res. 62/243, 25 April 2008.

[3] The Republic of Artsakh has not been recognized by any member of the United Nations, including Armenia. In its assessment of the situation on the ground in the *Chiragov* case, the European Court of Human Rights found that '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'. *Ibid.*, para. 180.

[4] See generally Greenwood, 'The Relationship Between *Ius ad Bellum* and *Ius in Bello*', 9 *Review of International Studies* (1983) 221, at 224.

[5] O. Corten, *The Law Against War: The Prohibition on the Use of Force in Contemporary International Law* (3rd edn, 2020), at 156.

in self-defence. While the immediacy requirement primarily serves to exclude 'punitive' reprisals and must be interpreted in a pragmatic manner, that does not mean it cannot, or should not, apply to situations of occupation. Several authors have indeed stressed the principle's broader importance in preventing inter-state hostilities, which flare up much later in time without the occurrence of a new 'armed attack' and without being subjected to a renewed application of the proportionality and necessity criteria.[6] In the words of Oscar Schachter, '[w]ithout that [temporal] limitation, self-defense would sanction armed attacks for countless prior acts of aggression and conquest. It would completely swallow up the basic rule against use of force'.[7] Thus, while the principle of immediacy should be construed flexibly in cases of occupation, the lapse of time between the initial attack and the invocation of self-defence cannot be extended indefinitely. Otherwise, the *ratione temporis* dimension of self-defence would be rendered meaningless.

In light of the foregoing, the state whose territory is invaded in breach of the prohibition on the use of force will lose the ability to invoke the right of self-defence if it either (i) refrains from responding with counter-force for a prolonged period of time (taking into account the need for negotiation, military preparation, efforts to seek third-state support, etc.), or (ii) responds with counter-force, but ultimately fails to repel the invading forces from its territory before a prolonged cessation of active hostilities occurs.[8] In both cases, the underlying idea is that the right of self-defence ceases to apply when a new territorial status quo is established, whereby the occupying state peacefully administers the territory concerned for a prolonged period.

Against this, it has been argued that unlawful occupation is not subject to the immediacy principle because it allegedly constitutes a *continuing* armed attack,[9] thus permitting the state concerned to exercise the right of self-defence for as long as the occupation continues – even if this entails challenging a years-long territorial status quo. In support of this position, it is contended that unlawful occupation constitutes a 'continuing' breach in the sense of Article 14(2) of the International Law Commission (ILC) Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA). Support is also drawn from the inclusion in the list of acts of aggression of Article 3(g) of the UNGA Definition of Aggression (as also copied into Article 8bis(2) of the International Criminal Court (ICC) Rome Statute) of situations of 'military occupation . . . resulting from . . . invasion or attack'.[10] Last but not least, state practice provides a number of examples where state effectively invoked the idea of occupation as a continuing armed attack.

6 See, e.g., C. Yiallourides, M. Gehring and J. Gauci, *The Use of Force in Relation to Sovereignty Disputes over Land Territory* (2018), paras. 152, 157, 161.

7 Schachter, 'The Lawful Resort to Unilateral Use of Force', 10 *Yale Journal of International Law* (1984) 291, at 292.

8 Yiallourides, Gehring and Gauci, *supra* note 6, para. 158; Wright, 'The Goa Incident', 56 *American Journal of International Law* (*AJIL*) (1962) 617, at 623–624.

9 M. Longobardo, *The Use of Armed Force in Occupied Territory* (2018), at 121; Corten, *supra* note 5, at 766.

10 GA Res. 3314 (XXIX), 14 December 1974, Art. 3(g); Rome Statute of the International Criminal Court, 17 July 1998, 2187 UNTS 90, Art. 8bis(2).

None of the above arguments convincingly settle the matter, however. First, while the idea of occupation as a *continuing breach of the prohibition of the use of force* finds support, for instance, in the work of the ILC,[11] it does not automatically follow that it must equally be regarded as a continuing *armed attack*. Indeed, the wording 'if an armed attack *occurs*' in Article 51 UN Charter suggests a more or less instantaneous event, or a series of events, happening at a particular point in time, i.e. the initial 'invasion or attack' resulting in occupation, rather than a prolonged state of affairs characterized by an absence of active hostilities. Further, the notions of 'use of force' and 'armed attack' have different meanings and functions. The 'use of force' is linked to a prohibitive norm of international law, the breach of which gives rise to state responsibility. The concept of armed attack, on the other hand, serves as the trigger to determine whether a victim state can exercise its right of self-defence. Put differently: there is no autonomous prohibition of armed attack as a norm of primary international law. In sum, the concept of a continuing breach under Article 14(2) ARSIWA is ill suited for examining the temporal scope of an armed attack.

Second, notwithstanding the instrument's legal relevance, the list of 'acts of aggression' in the UNGA Definition of Aggression does not constitute the *nec plus ultra* of what constitutes an 'armed attack'. Suffice it to recall that the UN members held divergent views as to what the Definition sought to achieve (to circumscribe the right of self-defence or rather clarify the competence of the UN Security Council),[12] and that Article 6 affirms that the Definition does not enlarge or diminish the scope of lawful self-defence. An analysis of the *travaux* reveals that only two states – (unsurprisingly) Egypt and Syria – drew a link between occupation and self-defence.[13] Other than a few sparse statements by these two countries, there was no discussion of the temporal limitation of the right to self-defence in this context.

3 State Practice: A Mixed Bag?

State practice also paints a mixed picture. For instance, Argentina's attempt to justify its military intervention in the Falklands/Malvinas in 1982 as an exercise of self-defence in response to the 'illegal occupation' of those islands by the United Kingdom[14] was overwhelmingly rejected by the UN Security Council.[15] What is more, even states that supported Argentine's territorial claims over the islands denounced the invasion as an unlawful use of force.[16] The main counter-example concerns the 1973 Yom Kippur

[11] ILC, Articles on the Responsibility of States for Internationally Wrongful Acts, with Commentaries (ARSIWA), UN Doc. A/56/83 (2001), 30, at 60, para. 3.

[12] See further T. Ruys, *'Armed Attack' and Article 51 of the UN Charter: Evolutions in Customary Law and Practice* (2010), at 136–137.

[13] Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States, UN Doc. A/AC.134/SR.67–78, 19 October 1970, paras. 100, 102.

[14] UNSC, 2345th Meeting, UN Doc. S/PV 2345, 1 April 1982, para. 59; UNSC, 2346th Meeting, UN Doc. S/PV 2346, 2 April 1982, para. 12.

[15] UNSC Res. 502, 3 April 1982.

[16] See, e.g., UNSC, 2349th Meeting, UN Doc. S/PV 2349, 2 April 1982, para. 18 (Ireland); UNSC, 2350th Meeting, UN Doc. S/PV 2350, 3 April 1982, para. 203 (Spain).

War, in which Egypt and Syria (unsuccessfully) sought to recover the land occupied by Israel in the aftermath of the 1967 Six-Day War. On this occasion, and similar to their stance in the negotiations on the Definition of Aggression, these two countries effectively argued that Israel's occupation amounted to a continuing armed attack justifying their recourse to self-defence.[17] On top of that, their offensive was not formally condemned by the UN General Assembly or the Security Council, but instead received support from several countries.[18] Some reservations are nonetheless in order. First, it is striking that, in their reports to the Security Council, Egypt and Syria claimed (unconvincingly) that they were engaged in a counter-offensive after Israel had triggered the hostilities.[19] Further, one cannot overlook the numerous skirmishes and other incidents between Israel and its Arab neighbours in the interval between the Six-Day War and the Yom Kippur War (especially at the time of the 'war of attrition' with Egypt).[20] Dubuisson and Koutroulis find that 'it can hardly be suggested that the occupied Arab territories were under the peaceful administration of Israel' at the time.[21]

What about the 2020 Nagorno-Karabakh war itself? Strikingly, Azerbaijan did not unequivocally rely on the notion of occupation as a continuing armed attack, but instead claimed that it was conducting a 'counter-offensive' following intensive shelling of its armed forces by Armenia.[22] Further, while states generally remained silent on the application of the *jus ad bellum*,[23] the joint condemnation by Russia, France and the United States of the escalation of violence[24] hardly evidences support for the position that an occupied state is at liberty to challenge the status quo and pursue the recovery of its land through military means.

One should also be cognizant about the tendency among scholars to focus on potentially deviant practice when interpreting the norms on the use of force. In the present context, it bears emphasizing that, for all the lingering territorial disputes that

[17] UNSC, 1744th Meeting, UN Doc. S/PV 1744, 9 October 1973, para. 82 (Syria); UNSC, 1755th Meeting, UN Doc. S/PV 1755, 12 November 1973, para. 190 (Egypt).

[18] See, e.g., UNSC, 1744th Meeting, UN Doc. S/PV 1744, 9 October 1973, para. 16 (Yugoslavia), para. 179 (India).

[19] Letter from the Permanent Representative of the Syrian Arab Republic to the United Nations to the President of the Security Council, 6 October 1973, UN Doc. S/11009, 6 October 1973; Letter from the Minister for Foreign Affairs of Egypt to the United Nations to the President of the General Assembly, 6 October 1973, UN Doc. A/9190, 6 October 1973.

[20] See UN Secretary-General, Report of the Secretary-General under Security Council Resolution 331, 20 April 1973, UN Doc. S/10929, 18 May 1973.

[21] Dubuisson and Koutroulis, 'The Yom Kippur War – 1973', in T. Ruys, O. Corten and A. Hofer (eds), *The Use of Force in International Law: A Case-Based Approach* (2018) 189, at 199.

[22] Letter dated from the Permanent Representative of Azerbaijan to the United Nations addressed to the President of the Security Council, 27 September 2020, UN Doc. S/2020/948, 28 September 2020.

[23] However, it is worth noting Turkey asserted that Azerbaijan was 'exercising its inherent right of self-defense, since the hostilities are taking place exclusively on its own sovereign territory'. See Letter from the Permanent Representative of Turkey to the United Nations to the President of the Security Council, 16 October 2020, UN Doc. S/2020/1024, 19 October 2020.

[24] Statement of the Presidents of the Russian Federation, the United States of America, and the French Republic on Nagorno-Karabakh, 1 October 2020, available at https://ge.usembassy.gov/statement-of-the-presidents-of-the-russian-federation-the-united-states-of-america-and-the-french-republic-on-nagorno-karabakh/.

could be seen as entailing a form of occupation, there have been remarkably few cases where states made use of armed force to challenge the existing territorial status quo and even fewer cases where they have done so by relying on a right of self-defence against a continuing armed attack.

4 Enter the Principle of Non-use of Force to Settle Territorial Disputes

Amidst competing views on the application of the immediacy requirement to situations of occupation, considerable weight ought to be given to the duty to refrain from the use of force to settle territorial disputes, as consecrated in the UNGA Friendly Relations Declaration[25] The above principle, which stems from the combined application of the prohibition on the use of force, and the customary duty to settle disputes through peaceful means, necessarily applies *irrespective* of whether a state holds a valid title over land or not. Accordingly, and having regard to the *effet utile* principle, the cited duty prima facie pushes against any entitlement to use force to recover occupied territory peacefully administered by another State for a prolonged period of time.[26] As the Ethiopia-Eritrea Claims Commission put it:

> [T]he practice of States and the writings of eminent publicists show that self-defense cannot be invoked to settle territorial disputes. In that connection, the Commission notes that border disputes between States are so frequent that any exception to the prohibition of the threat or use of force for territory that is allegedly occupied unlawfully would create a large and dangerous hole in a fundamental rule of international law.[27]

The idea – raised by some – that the principle of the non-use of force does not apply for lack of a 'territorial dispute' when an occupying state has not explicitly laid a claim over the territory it occupies[28] is deeply problematic for several reasons. It would imply that a state could invoke self-defence to recover unlawfully occupied territory, but would lose that right when the occupying state asserts a claim over the territory concerned. Thus, Syria would supposedly have been entitled to invoke self-defence to recover the Golan Heights lost to Israel in the 1967 Six-Day War, but would subsequently have lost this right of self-defence when Israel formally annexed the territory in 1981 (supposedly creating a territorial dispute that did not theretofore exist). Such interpretation would lead to arbitrary and absurd results and would actually provide an incentive for occupying powers to assert a claim over the occupied land or even seek to formally annex it.

[25] UNGA Res. 2625(XXV), 24 October 1970.

[26] See further M. Kohen, *Possession contestée et souveraineté territoriale* (1997), para. 115; Wright, *supra* note 8, at 623.

[27] Eritrea Ethiopia Claims Commission, *Partial Award: Jus ad Bellum – Ethiopia's Claims* 1–8, 19 December 2005, reprinted in (2009) 26 UNRIAA 457, para. 10.

[28] O. Corten, V. Koutroulis and F. Dubuisson, 'Le conflit au Haut-Karabakh et le droit international', *YouTube* (15 October 2020), available at https://youtu.be/eGE7o_sBc8w; Dubuisson and Koutroulis, *supra* note 21, at 199.

In a similar vein, the idea that one can easily distinguish between territorial disputes where no force has been used (supposedly caught by the principle of the non-use of force) and situations of unlawful occupation resulting from the invasion by one state of another state's territory[29] strikes one as a chimera. As cases such as *Costa Rica v. Nicaragua*,[30] *Cameroon v. Nigeria*[31] or the *Temple of Preah Vihear*[32] illustrate, territorial disputes do not appear out of thin air. Rather, most have in one way or another been created or shaped by a prior use of force (whether years, decades or even centuries earlier). Attempts to distinguish between manifestly unlawful situations of occupation and situations where the occupying state is supposedly acting in good faith[33] are equally problematic. Such attempts quickly collapse into a question of authority: who decides whether a situation of (manifestly) unlawful occupation exists? In many instances, there will be no authoritative ruling from an international judicial body, whereas UN members may be highly divided on the matter. By way of illustration, while the UN General Assembly in 2008 called for 'the withdrawal of all Armenian forces from all the occupied territories of the Republic of Azerbaijan', the voting record reveals that as few as 39 states voted in favour of the resolution, with seven votes against and 100 abstentions.[34]

In the end, as Schachter notes, any exception to the principle of non-use of force for recovering 'illegally occupied' territory threatens to render Article 2(4) UN Charter meaningless in many cases.[35] This is all the more so when considering that at least 120 states or 'quasi-states' are reportedly 'involved in a territorial dispute of some kind, involving approximately 100 separate territories'.[36]

5 International Lines of Demarcation and Armistice

The UNGA Friendly Relations Declaration's passage on the principle of the non-use of force asserts the application of this principle with regard to international lines of demarcation, such as armistice lines, and (arguably) ceasefire lines, while nonetheless

[29] Akande and Tzanakopoulos, 'Use of Force in Self-Defence to Recover Occupied Territory: When Is It Permissible?', *EJIL:Talk!* (18 November 2020), available at www.ejiltalk.org/use-of-force-in-self-defence-to-recover-occupied-territory-when-is-it-permissible/.

[30] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Judgment, 16 December 2015, ICJ Reports (2015) 665.

[31] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria; Equatorial Guinea intervening)*, Judgment, 10 October 2002, ICJ Reports (2002) 303.

[32] *Temple of Preah Vihear (Cambodia v. Thailand)*, Judgment, 15 June 1962, ICJ Reports (1962) 6.

[33] *Land and Maritime Boundary between Cameroon and Nigeria*, Judgment, 10 October 2002, ICJ Reports (2002) 303, para. 311. (Nigeria argued that 'even if the Court should find that Cameroon [had] sovereignty over [the contested areas], the Nigerian presence there was the result of a "reasonable mistake" or "honest belief"').

[34] UNGA, 86th Plenary Meeting, UN Doc. A/62/PV.86, 14 March 2008, at 10.

[35] Schachter, 'The Right of States to Use Armed Force', 82 *Michigan Law Review* (1984) 1620, at 1627–1628.

[36] Yiallourides, Gehring and Gauci, *supra* note 6, para. 1.

emphasizing that this should not be read as '*affecting [the] temporary character*' of these lines.[37] The reference to the 'temporary' character of ceasefire lines and the like is seen by some as an indication that the introduction of a ceasefire – including one of an indefinite duration – does not *terminate* the right of self-defence of the state whose territory has been attacked and become occupied, but at most *suspends* it.[38] Specifically, an armistice or ceasefire agreement would supposedly remove the 'necessity' to act in self-defence, until it becomes clear that peaceful negotiations do not bear fruit, after which the occupied state's necessity to act in self-defence would 'revive'.

We find that this reasoning fails to convince. First, it necessarily starts from a general presumption that, where no ceasefire or armistice agreement has been concluded, states can at any time exercise the right of self-defence to recover occupied territory, even after a prolonged period of peaceful administration of said territory by the occupying state.[39] Yet, for the reasons mentioned above, such general exclusion of situations of unlawful occupation must be rejected.

In addition, the *travaux* of the UNGA Definition of Aggression do not reveal any meaningful support for the view that the 'temporary' character of international lines of demarcation was meant to preserve the right of self-defence of occupied states; enabling them to reopen hostilities if political negotiations proved unsuccessful over time.[40] Rather, the qualification was intended to confirm that international lines of demarcation do not of themselves alter title over territory.

6 Time Changes Everything?

In our view then, the combined effect of the immediacy requirement and the principle of the non-use of force to settle territorial disputes is that a state cannot invoke the right of self-defence to recover occupied land when the territory has been peacefully administered by another state for a prolonged period of time. Some may criticize the resulting temporal uncertainty, questioning the idea that self-defence 'ceases at some (unclear) point in time when a *status quo* is established', without '[telling] us where that point in time is'.[41] This critique is understandable: while a state that is subject to invasion and occupation of part of its territory will not lose its right of self-defence overnight (even if a short-term ceasefire has since been adopted and expired), there is no ready-made quantitative test that enables us to pinpoint the exact duration at

[37] Akande and Tzanakopoulos, *supra* note 29.

[38] *Ibid.*

[39] Recall, for instance, that since the prohibition on the use of force is a peremptory norm, states cannot contractually sign out of it by concluding a ceasefire or armistice agreement. In other words, such an agreement may well prohibit action that would otherwise be permitted under Article 51 UN Charter. Conversely, it cannot, however, be used to preserve the victim state's right of self-defence in the long run (beyond what the UN Charter permits).

[40] Only Syria explicitly questioned the continued application of the principle of non-use of force to international lines of demarcation. See Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States, UN Doc. A/AC.125/SR.114, 1 May 1970, paras. 207, 258.

[41] Akande and Tzanakopoulos, *supra* note 29.

which self-defence ceases to apply and paves the way for the principle of the non-use of force. This does not mean that this critique must guide us to a different outcome.

Recall that the observed uncertainty is not unique to the *jus ad bellum*. Rather, it mirrors the parallel uncertainty that exists within international humanitarian law, where the 'cessation of active hostilities' will trigger obligations, for example pertaining to the repatriation of prisoners of war (POWs) (including in situations of occupation),[42] and the 'general close of military operations' will bring about the end of an international armed conflict.[43] The point here is not to argue that the factual test used to identify the end of an international armed conflict and the expiry of the occupied State's right of self-defence are (or ought to be) identical, but rather to illustrate the point that, to quote Schachter, '[t]he difficulty of defining a precise time limit . . . does not impugn the basic idea'[44] that the occupied state's right of self-defence extinguishes, any more than it would impugn the basic idea that international armed conflicts can terminate even in the absence of a formal peace agreement.

In addition, it could be argued that the degree of uncertainty is all the greater in the alternative scenario according to which the occupied states' right of self-defence 'revives' when peaceful efforts are deemed to be exhausted – supposedly because this entails a renewed necessity to act in self-defence. Indeed, compared to the identification of a continued cessation of active hostilities, the question of examining the exhaustion of peaceful negotiations in situations of unlawful occupation lends itself far less to objective assessment. To take just one example: could one say, 47 years after the invasion of Turkish forces in Northern Cyprus and the de facto partition of the island, that the peaceful route has hit a dead end? As Milanovic pointedly puts it:

> How exactly can one reliably say that, aha, at this point the peaceful options were exhausted and self-defence became necessary? Couldn't one always object that the lawful sovereign should wait a bit more, hoping say for a change of government in their adversary? Couldn't one conversely always say that the lawful sovereign has waited long enough?[45]

With regard to Nagorno-Karabakh, for example, one could point to the numerous bilateral and multilateral meetings in the years preceding the 2020 war to suggest that negotiations were still ongoing and should have continued. Yet, one might just as well argue that any refusal to return the occupied territory in its entirety and without delay to the rightful owner can automatically be taken to reflect a failure of peaceful negotiations. In sum, 'the imponderability of [this] assessment is a good reason to favour the other option, protective of the status quo'.[46]

[42] Geneva Convention Relative to the Treatment of Prisoners of War (Geneva Convention III) 1949, 75 UNTS 135, Art. 118.

[43] ICRC, *Commentary on the Third Geneva Convention* (2020), para. 310 (Art. 3).

[44] Schachter, *supra* note 7, at 292.

[45] Milanovic, Comment (18 November 2020), to Akande and Tzanakopoulos, *supra* note 29.

[46] *Ibid.*

7 Peace against Justice?

The 2020 war over Nagorno-Karabakh has brought to light an important conundrum for *jus ad bellum* – can a state use armed force to recover unlawfully occupied territory? The question seemingly finds us caught between the Scylla of injustice and the Charybdis of insecurity. This double bind is largely informed by the entwined teleological and utilitarian undertones of the present debate, which lie at the juncture of the fundamental values and purposes consecrated in the UN Charter framework on the use of force. Put differently, this debate is also an enquiry into how the principles that inform the prohibition of the use of force interact when they collide, and what outcomes are preferable to others.

On the one hand, we fully acknowledge that an occupied state may feel unfairly disadvantaged if it has a limited time to react militarily to occupation. The frustration that the aggressor is 'rewarded', since the law favours the consolidation of the unlawful territorial status quo, is understandable and legitimate. On the other hand, it is essential to recall that, while the protection of states' territorial integrity is one of the pivotal objectives of the UN Charter, it is by no means the exclusive one, and thus needs to be harmonized with other competing goals, such as the maintenance of international peace and security and the peaceful resolution of disputes between states. In other words, the protection of territorial integrity cannot be pursued at all costs or operate in a vacuum, disregarding the other core values that edify the international legal order.

Following this logic, it has been argued that any exercise of self-defence is subject to a requirement of 'immediacy' and a victim state ultimately forfeits its right of self-defence if it fails to act within a reasonable time and after a new status quo has materialized. However, states are not left adrift as a result of occupation. The law does not surrender to the maxim that 'might makes right'; nor does it leave the occupied state without a remedy. On the contrary, the international legal framework does provide significant tools to deter aggression and support the cause of the victim state.

Thus, while a smaller state may well be powerless on its own in the face of a territorial invasion by a stronger neighbour, Article 51 confirms the victim's right to request support from third states in countering the aggression (pursuant to the right of collective self-defence). In addition, the Security Council may take enforcement measures under Chapter VII of the Charter, whether by authorizing military enforcement action and/or by imposing economic sanctions. Unilateral sanctions may well be imposed by individual states or regional organizations such as the European Union, and the victim state itself is, of course, entitled to take countermeasures. To this may be added the criminalization of aggression and the recent activation of the International Criminal Court's jurisdiction over the crime of aggression – a jurisdiction yet to be put to the test.

The outlawry of war is 'the biggest single change in the international order'[47] of the 20th century and deserves some credit for the marked decline in inter-state armed

[47] See, e.g., S. Pinker, *Enlightenment Now: The Case for Reason, Science, Humanism and Progress* (2018), at 163–164. See also O. Hathaway and S. Shapiro, *The Internationalists: How a Radical Plan to Outlaw War Remade the World* (2017).

conflict since 1945. A significant number of territorial disputes have been submitted to judicial dispute settlement over the past decades. In the context of occupation, it is argued that the objective behind the prohibition of the use of force is better accomplished by protecting the territorial status quo instead of granting an open-ended right to self-defence with no time constraint.

This conclusion is further buttressed by the reference in the Charter's preamble to the fundamental human rights of individual human beings – including, first and foremost, the right to life, also recognized as the 'supreme right'.[48] One must indeed also be cognizant of the human cost at stake. In particular, while situations of occupation often go hand-in-hand with individual human rights violations and a prolonged occupation may itself contravene the right of self-determination, inter-state armed hostilities inevitably result in (often widespread) loss of life, material destruction and internal displacement. The 44-day war between Armenia and Azerbaijan in 2020 claimed the lives of 5,000 soldiers and at least 140 civilians.[49] More than 130,000 civilians were displaced by the fighting,[50] and hundreds of homes and vital infrastructure such as schools and hospitals were destroyed.[51] And while Azerbaijan recovered part of the occupied area from Armenia, and the parties agreed to the deployment of Russian peacekeepers, the ceasefire agreement merely 'refreezes' the new status quo. As before, a lasting solution to the conflict over the region can be achieved only through further peaceful negotiations.

[48] Human Rights Committee, General Comment No. 36 on the Right to Life, CCPR/C/GC/36, 30 October 2018, para. 2.

[49] 'Nagorno-Karabakh Conflict Killed 5,000 Soldiers', *BBC News* (3 December 2013), available at www.bbc.com/news/world-europe-55174211.

[50] UNICEF, 'Statement on One Month of Fighting in and beyond Nagorno-Karabakh' (28 October 2020), available at www.unicef.org/press-releases/unicef-statement-one-month-fighting-and-beyond-nagorno-karabakh.

[51] ICRC, 'Nagorno-Karabakh Conflict: Operational Update December 2020—One Month After Ceasefire Deal, Deep Humanitarian Needs Persist' (15 December 2020), available at www.icrc.org/en/document/nagorno-karabakh-conflict-operational-update-december-2020.