

## Right to self-defense to recover occupied territory? A glance at the Nagorno-Karabakh Conflict

On 27 September 2020 an armed conflict of an international character has erupted between Armenia and Azerbaijan over the contested Nagorno-Karabakh conflict.<sup>1</sup> After 44 days of hostilities, the conflict has come to an end with a ceasefire agreement brokered by the Russian Federation<sup>2</sup> resulting in massive gains on for Azerbaijan, *e.g.* all seven districts previously controlled by Armenia has been handed over to Azerbaijan and Russian peacekeepers have been transferred to the region. Still the status of Nagorno-Karabakh remains untouched and thus contested between the parties.<sup>3</sup> Besides the significant Azerbaijani advantages, the conflict has resulted in the death of over 5000 soldiers and many civilians.<sup>4</sup>

Yet again – as often in time of hostilities – the international blogosphere has exploded, and a number of articles have seen the light of day in connection with the conflict at hand. Pieces have been written among others on the possible statehood of the Nagorno-Karabakh region and the right to self-determination of its people,<sup>5</sup> the interim measures that were requested by Armenia against Azerbaijan from the European Court of Human Rights,<sup>6</sup> the international humanitarian law issues of the armed struggle,<sup>7</sup> use of force related issues<sup>8</sup> and of course the terms of the ceasefire agreement as well.<sup>9</sup>

The focus of these editorial comments dives into the questions of the law on the use of force, which gained significant attention from scholars in recent weeks.

Although Azerbaijan has framed its military campaign against Armenia as a self-defense against Armenian military action violating the long-standing previous ceasefire agreement between the parties by shelling the positions of Azerbaijani forces along the frontline<sup>10</sup>, the question arose whether it is possible for Azerbaijan to use force against Armenia to recover the occupied territory

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<sup>1</sup> <https://www.bbc.com/news/world-europe-54314341> (8 December 2020).

<sup>2</sup> <http://en.kremlin.ru/events/president/news/64384> (8 December 2020).

<sup>3</sup> J. Miklasová, The Recent Ceasefire in Nagorno-Karabakh: Territorial Control, Peacekeepers and Question of Status, EJIL: Talk!, 4 December 2020 <https://www.ejiltalk.org/the-recent-ceasefire-in-nagorno-karabakh-territorial-control-peacekeepers-and-unanswered-question-of-status/> (8 December 2020).

<sup>4</sup> <https://www.bbc.com/news/world-europe-55174211> (8 December 2020).

<sup>5</sup> B. Knoll-Tudor, D. Mueller, At Daggers Drawn: International Legal Issues Surrounding the Conflict in and around Nagorno-Karabakh, EJIL:Talk!, 17 November 2020 <https://www.ejiltalk.org/at-daggers-drawn-international-legal-issues-surrounding-the-conflict-in-and-around-nagorno-karabakh/> (8 December 2020).

<sup>6</sup> I. Risini, Armenia v Azerbaijan before the European Court of Human Rights, EJIL:Talk!, 1 October 2020 <https://www.ejiltalk.org/armenia-v-azerbaijan-before-the-european-court-of-human-rights/> (8 December 2020)

<sup>7</sup> M. O'Brien, Nagorno-Karabakh Conflict: Shortage of Specifics Complicates Search for Solutions, Just Security 21 October 2020 <https://www.justsecurity.org/72974/nagorno-karabakh-conflict-shortage-of-specifics-complicates-search-for-solutions/> (8 December 2020).

<sup>8</sup> E. Schönleben, Collective self-defence or just another intervention? Some thoughts on Turkey allegedly sending Syrian mercenaries to Nagorno-Karabakh, Völkerrechtsblog, 2 November 2020 <https://voelkerrechtsblog.org/articles/collective-self-defence-or-just-another-intervention/> (8 December 2020).

<sup>9</sup> N. Ringler, The Armenia-Azerbaijan Ceasefire Terms: A Tenuous Hope for Peace, Just Security 27 November 2020 <https://www.justsecurity.org/73578/the-armenia-azerbaijan-ceasefire-terms-a-tenuous-hope-for-peace/> (8 December 2020).

<sup>10</sup> Letter dated 27 September 2020 from the Permanent Representative of Azerbaijan to the United Nations addressed to the Secretary-General, A/75/357-S/2020/948 28 September 2020.

of Nagorno-Karabakh over which Armenia exercised effective control, at least according to the European Court of Human Rights.<sup>11</sup>

A significant argument has been brought to the table by Tom Ruys and Filipe Rodríguez Silvestre on Just Security, arguing that a state cannot invoke the right to self-defense when a part of its territory is occupied by another state for a prolonged duration.<sup>12</sup> Apparently this position has been accepted by other scholars as well<sup>13</sup>, however it was also contested by Dapo Akande and Antonios Tzanakopoulos in a blog post on EJIL Talk.<sup>14</sup>

Ruys and Silvestre essentially argue that the start of an attack – which happens according to the co-authors when the occupation commences – and the response in self-defense must be in close proximity to one another temporally speaking, otherwise it would render the right to self-defense meaningless at least within this context.<sup>15</sup> To form their positions, the co-authors rely on the Friendly Relations Declaration by the General Assembly, the Partial Award on the Jus ad Bellum of the Ethiopia-Eritrea Claims Commission, and scholars such as Oscar Schachter and Quincy Wright.<sup>16</sup>

In contrast, Akande and Tzanakopoulos claim that in this situation the right to self-defense is still granted to the victim state, even after years of ceasefire. The co-authors contend that territorial disputes should be differentiated based on the previous use of force in the conflict, where in the absence of use of force, no self-defense can be permitted, on the other hand, when territorial disputes involve the use of force, *i.e.*, a state occupies another state's territory, that would activate the right to self-defense in accordance with the General Assembly Resolution on the Definition of Aggression. The aforementioned resolution states that any military occupation should be regarded as aggression. Since Akande and Tzanakopoulos argue, that the notions of aggression and armed attack are practically the same, they conclude that occupation should be seen as a condition permitting the right to self-defense and more interestingly the necessity of the defensive action does not decrease but rather increases over time assuming that the ceasefire is not temporary in nature. In the words of the co-authors “[i]n cases of occupation that result from a use of force, the armed attack has not only occurred but has not ceased.”<sup>17</sup>

Another interesting position can be found in Yoram Dinstein's iconic book on war, aggression and self-defense, in which the author asserts, that ending a ceasefire in and of itself is not a new armed attack, rather it is a continuation of the original conflict at hand.<sup>18</sup> Dinstein therefore claims that even longer armistices can occur without ending the war and every action taken by the victim state

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11 Chigarov and Others v. Armenia (App. no. 13216/05) ECtHR (2015) para. 186.

12 T. Ruys, F. R. Silvestre, The Nagorno Karabakh Conflict and the Exercise of „Self-Defense” to Recover Occupied Land, Just Security, 10 November 2020 <https://www.justsecurity.org/73310/the-nagorno-karabakh-conflict-and-the-exercise-of-self-defense-to-recover-occupied-land/> (8 December 2020).

13 Knoll-Tudor, Mueller 2020.

14 D. Akande, A. Tzanakopoulos, Use of Force in Self-Defence to Recover Occupied Territory: When Is It Permissible? EJIL:Talk!, 18 November 2020 <https://www.ejiltalk.org/use-of-force-in-self-defence-to-recover-occupied-territory-when-is-it-permissible/> (8 December 2020).

15 The state practice of close proximity was analyzed by Tom Ruys in his monograph on self-defense, arguing that two months—in case of the United States military actions against Iraq in 1993—would still fall within the permitted time gap, but more would render the action illegal (unnecessary) as it was declared in the Nicaragua case for other US actions. Of course, the most prominent example for this is the Falkland Islands conflict in 1982, where the United Kingdom took almost one month to begin the actual defensive military action. See T. Ruys, 'Armed Attack' and Article 51 of the UN Charter, *Evolutions in Customary Law and Practice*, Cambridge University Press 2010, pp. 99-102.

16 Ruys, Silvestre 2020.

17 Akande, Tzanakopoulos 2020.

18 Y. Dinstein, *War, Aggression and Self-Defence*, 6th edn., Cambridge University Press, 2016, pp. 62-64.

falls within the framework of the original self-defense.<sup>19</sup> This argument has been accepted by others and applied to the Nagorno-Karabakh conflict a few years before the contemporary hostilities.<sup>20</sup>

I believe it is not the purpose of such editorial comments to jump in on these debates, however it is necessary to make some observations regarding the views expressed above.

First, and foremost the role of the General Assembly's aggression resolution cannot be taken lightly, since it expressly recognizes "any military occupation, however temporary" resulting from basically any hostile action as an act of aggression.<sup>21</sup> However I would not rush to the conclusion that every act of aggression can be equated with armed attacks, since there is a gap between the notions, armed attacks being the gravest form of use of force.<sup>22</sup> Presumably, this would not change the assessment of a prolonged occupation constituting an armed attack, but a thorough analysis would be required to reach this conclusion.

Secondly, I find it hardly convincing that in the system of *jus contra bellum*, a virtually indefinite right to self-defense should be accepted in connection with occupation. I accept that the principle of *ex injuria jus non oritur* would dictate such a wide notion of this right, however a careful assessment is required to measure the interest of peaceful international relations to that of state sovereignty.

Lastly, state practice cannot be left out of the equation either. It is interesting to note that even Azerbaijan, a state which was clearly a victim of unlawful occupation for almost three decades now, chose not to rely on this argument when it came to justifying its actions to the Security Council as evidenced by the letter cited above. 'Contrary' state practice can be found when looking at the so called 'Yom Kippur War' of 1973. There, several states sided with the Arab States against Israel in an attempt to liberate occupied territory. Some states, such as the Soviet Union and India *expressis verbis* claimed a right to self-defense with respect to the liberation of occupied territories.<sup>23</sup> Tellingly however, even the Arab States did not rely on this narrative of self-defense, and rather used the very same argument put forward in the Nagorno-Karabakh conflict, namely violation of ceasefire.<sup>24</sup>

Yet again international legal scholars face a very similar issue. States do not behave and think the way our understanding of international law would suggest. It should be remembered however that the usefulness of new or even old concepts of international law are relevant only as long as they are accepted as law by states.

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19 Ibid. p. 281.

20 S. Bagheri, *Self-Defense in Karabakh conflict?*, Russian Law Journal, Vol. 3, No. 4, 2015, pp. 159-161.

21 GA Res. 3314 (XXIX), 14 December 1974. Article 3 (a).

22 G. Kajtár, *A nem állami szereplők elleni önvédelem a nemzetközi jogban*, ELTE Eötvös Kiadó, 2015, p. 75.

23 F. Dubuisson, V. Koutroulis, *The Yom Kippur War-1973*, in T. Ruys, O. Corten (Eds.), *The Use of Force in International Law, A Case-based Approach*, OUP, 2018, pp. 194-195.

24 Ibid. p. 192.