

THE ARTSAKH QUESTION: AN ANALYSIS OF TERRITORIAL DISPUTE RESOLUTION IN INTERNATIONAL LAW

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[Since the ceasefire ending the armed conflict between Armenia and Azerbaijan in 1994, the Organization for Security and Co-operation in Europe Minsk Group has attempted to mediate the ongoing territorial dispute between the two states concerning the region known as 'Artsakh' or 'Nagorny Karabagh'. This piece argues that the failure to achieve a compromise solution, amidst the increasing threat of a renewal of armed conflict, calls for consideration of adjudication as a feasible and desirable means of dispute resolution in this case. This article analyses the merits of the dispute in order to identify the legal tensions and how they might be resolved. First, the piece examines the historical background of the dispute in order to trace the territorial title to the region from the 19th century to the present day. It then analyses the legal positions of the parties to expose how both states aim to maximise their negotiating leverage, taking little account of international law or, indeed, political reality in asserting their positions. Finally, it examines the merits of the dispute and possible adjudicated solutions to the issue of territorial title.]

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I INTRODUCTION

Seventeen thousand dead, one million displaced, six years of destruction — the war for the disputed territory of Artsakh,¹ from the local ethnic clashes of 18–20 September 1988 to the ceasefire of 12 May 1994, resulted in the Armenians' military victory with 11 797 square kilometres or 13.62 per cent of the former Soviet Socialist Republic of Azerbaijan's territory under de facto Armenian control.² What cannot be quantified is the amount of human suffering, ingrained hatred and lost opportunities. Refugees and internally displaced persons on both sides, but especially in Azerbaijan, subsist in miserable conditions. Armenia perseveres under a crippling economic blockade from Azerbaijan and Turkey. Artsakh itself remains an international 'black hole' in a state of legal limbo. After 12 years of failed peace negotiations, the main purpose of this study is to advocate the settlement of the dispute through adjudication. A legal solution would break the stalemate and resolve the dispute by peaceful means; a fortiori, judicial development of coherent principles of territorial sovereignty would promote the just resolution of similar disputes.³

The conventional description of the dispute as a fundamental clash between the rights of self-determination and the territorial integrity of states⁴ is erroneous.⁵ The conflict is not a case of unilateral secession from a parent state, but rather a territorial dispute between two states — the *first* Republics of Armenia and Azerbaijan, which existed from 1918–20 — that 'revived' with regained independence in 1991. The common frontier between the two states, determinable solely by mutual consent, is the crux of the dispute. The competing principles for determination of that frontier are self-determination, *uti possidetis juris* and conquest. This article submits that, of these modes of acquisitive title, self-determination is the most likely to achieve a lasting outcome.

In this sensitive and politicised topic, it is vital to lay out the historical foundation before engaging in legal analysis.⁶ Whilst this article does not seek to examine the entire history of the Artsakh region, the pertinent legal and political history of the dispute — from 1813 to the present day — is addressed in order to identify the issues arising under international law. The article then considers the legal positions of the parties concerned, namely, the Republics of Armenia and of Azerbaijan, and the self-declared, but internationally unrecognised, 'Republic of Mountainous Karabagh'. Whilst the Organization for Security and Co-operation in Europe ('OSCE') Minsk Group aims to achieve a negotiated

¹ This term refers to the former Soviet autonomous *oblast*, more commonly known by the Russian-Persian term Nagorny Karabagh.

² Thomas de Waal, *Black Garden: Armenia and Azerbaijan through Peace and War* (2003) 284–6.

³ See, eg, *Territorial and Maritime Dispute Between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v Honduras)* [2007] ICJ Rep 1.

⁴ *Charter of the United Nations* arts 1(2), 2(4).

⁵ See Robert Maguire, 'Decolonization of Belize: Self-Determination v Territorial Integrity' (1982) 22 *Virginia Journal of International Law* 849, 859–61.

⁶ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda) (Judgment)* [2005] ICJ [5]–[14] (Separate Opinion of Judge Kooijmans) <<http://www.icj-cij.org>> at 23 May 2008.

solution to the conflict through mediation,⁷ the possibility of a contentious case in the International Court of Justice cannot be entirely discounted.⁸ This study therefore analyses the relevant principles of international law against the current backdrop of diplomatic negotiation, but also with a view to the (admittedly unlikely) event of both states agreeing to settle the dispute by litigious means.

In Part IV, the analysis addresses the merits of the parties' legal arguments and analyses various solutions available under international law. The primary focus of the discussion is the legal merits of the Artsakh dispute *per se*. Secondary focus is given to the relevance of the discussion to various other 'frozen' territorial disputes.

II HISTORICAL BACKGROUND OF THE DISPUTE

This section examines the historical background of the dispute and identifies the key legal and political issues relevant to its resolution. In analysing the armed conflict between the first Republics of 1917–20, the doctrine of intertemporal law must be borne in mind. This doctrine provides that a dispute must be adjudged according to the laws in force at the relevant time,⁹ in this case validating conquest as a mode of acquisitive title and precluding self-determination as a relevant consideration.¹⁰ The legal and political effects of the Soviet period will then be addressed. Analysis of this era reveals the strategic considerations that prevent a negotiated solution. Moreover, the origins of the current erroneous focus on 'self-determination' versus 'territorial integrity' become apparent within the context of state succession to the Soviet Union in 1990.¹¹

A *Ethnography of the Region: 1813–1917*

Attempts have been made by various commentators to contextualise the dispute historically in order to establish 'historic title' to the territory.¹² These arguments typically cite population censuses as well as cultural monuments, such

⁷ See below Part III(D).

⁸ Neither state has acceded to the optional clause jurisdiction of the ICJ under the *Statute of the International Court of Justice* art 34. Alternative fora include ad hoc or institutional arbitration, such as the OSCE Court of Conciliation and Arbitration ('OSCE Court'). Armenia acceded on 8 October 2001 to the *Convention on Conciliation and Arbitration within the Conference on Security and Cooperation in Europe/Organization for Security and Cooperation in Europe*, opened for signature 15 December 1992, 32 ILM 551 (1993) (entered into force 5 December 1994), but Azerbaijan has not. On the desirability of adjudication generally, and for territorial disputes in particular, see Richard Bilder, 'Some Limitations on Adjudication as an International Dispute Settlement Technique' (1982) 23 *Virginia Journal of International Law* 1, 7–9. On general compliance problems with ICJ judgments, especially on land boundary disputes, see Robert Jennings, 'The International Court of Justice After Fifty Years' (1995) 89 *American Journal of International Law* 493; Colter Paulson, 'Compliance with Final Judgements of the International Court of Justice since 1987' (2004) 98 *American Journal of International Law* 434, 437–43, 449–61.

⁹ *Island of Palmas (The Netherlands v US)* (1928) 2 RIAA 829, 845 ('*Island of Palmas*').

¹⁰ Matthew McMahon, *Conquest and Modern International Law: The Legal Limitations on the Acquisition of Territory by Conquest* (1975) 4, 150.

¹¹ See below Part IV(B).

¹² Michael Croissant, *The Armenia-Azerbaijan Conflict: Causes and Implications* (1998) 11–12; Levon Chorbajian, Patrick Donabedian and Claude Mutafian, *The Caucasian Knot: The History and Geopolitics of Nagorno-Karabagh* (1994) 4–13.

as mosques or churches, as evidence of the notion of an ‘indigenous people’.¹³ The futility of this line of argument becomes apparent when one considers the continuous history of war and conquest throughout the Transcaucasus region, with the resulting ethnic cleansing campaigns and demographic changes.¹⁴ At least within the context of legal arguments, propositions based upon a notional ‘ancient or original title’ have limited evidentiary application.¹⁵

The legal history of the Artsakh dispute begins with the *Treaty of Gulistan* of 1813 ending the First Russo-Persian War.¹⁶ Under the treaty, Persia ceded sovereignty of the Artsakh province to Imperial Russia.¹⁷ In 1826, sovereignty of the Eastern Armenian and Northern Azeri provinces was likewise ceded under the *Treaty of Turkmenchai*.¹⁸ Under Russian jurisdiction, the province of Nakhichevan was part of the administrative region of Yerevan, whilst Artsakh and Zangezour were at first part of the Caspian district, but were then incorporated within a new Elivasetpol district under administrative reforms in 1840, enlarging the former Karabagh Khanate administrative unit within Persia.¹⁹

Ethnic friction first developed during this period when peoples migrated to each other’s historically inhabited lands, resulting in, for example, Armenian communities in Tiflis and Baku.²⁰ Azeri villages were similarly found near Yerevan and clusters of ethnic minorities were scattered throughout the Transcaucasus.²¹ With the end of the Imperial Government in the 1917 October Revolution, the Transcaucasian Federative Democratic Republic was declared.²² This experiment in cooperative federalist governance was short-lived, primarily due to nationalist aspirations. On 26 May 1918, the Georgians declared independence and the Azeris and the Armenians soon followed suit.²³

B *The Struggle for Transcaucasia: 1917–20*

The interregnum until the Soviet Union’s conquest saw a series of inter-ethnic territorial wars. The three disputed territories between the new states of Armenia and Azerbaijan were Nakhichevan, Zangezour and Artsakh.²⁴ Demographically,

¹³ de Waal, above n 2, 148–50; Guner Ozkan, ‘Nagorno-Karabakh Problem: Claims, Counterclaims, and Impasse’ (2006) 1 *Journal of Central Asian and Caucasian Studies* 118, 119. For theoretical background on the concept of ‘ethnicity’, see Roger Ballard, ‘Ethnicity: Theory and Experience’ (1976) 5 *New Community* 196.

¹⁴ See generally Hratch Tchilingirian, ‘Nagorno Karabagh: Transition and the Elite’ (1999) 18 *Central Asian Survey* 435, 436–40.

¹⁵ See *Minquiers and Ecrehos (UK v France) (Judgment)* [1953] ICJ Rep 47, 53, 56, where ‘historical controversies’ were examined as evidence of links between a disputed territory and two sovereign claimants, not as the legal basis for title of peoples per se.

¹⁶ *Treaty of Gulistan*, signed 12 October 1813, Russia-Persia (confirmed 15 September 1814), reproduced in (1817–18) 5 *British and Foreign State Papers* 1109.

¹⁷ See John Baddeley, *The Russian Conquest of the Caucasus* (1908) 90.

¹⁸ *Treaty of Peace and Friendship*, 78 ConTS 105 (signed and entered into force 10 February 1828) (*‘Treaty of Turkmenchai’*).

¹⁹ Croissant, above n 12, 12–13.

²⁰ A N Yamskov, ‘Ethnic Conflicts in the Transcaucasus: The Case of Nagorno-Karabakh’ 20 *Theory and Society* 631, 633.

²¹ Croissant, above n 12, 12–13.

²² Firuz Kazamzadeh, *The Struggle for Transcaucasia (1917–1921)* (1959) 117, 124–7.

²³ *Ibid.*

²⁴ de Waal, above n 2, 127.

the Azeris enjoyed a 60 per cent majority in Nakhichevan;²⁵ the population of Zangezour was evenly split;²⁶ and the Armenians enjoyed a 94 per cent majority in Artsakh.²⁷ On 22 July 1918, the Armenian population of Artsakh convened the First Armenian National Assembly of Karabagh in the provincial capital of Shushi.²⁸ Whilst Armenia, along with the Nagorny Karabagh Republic ('NKR'), has attempted to utilise these ethnic divisions as evidence of an intention for statehood,²⁹ contemporary historical documents indicate the intention of the Artsakh Armenians to unify with Armenia.³⁰

Under Armenia's decentralised system of governance, regional councils functioned with policing, military and jurisdictional autonomy but were ultimately subject to the central government. This is evident from the Armenian parliamentary decision on the principles of government in Zangezour and Karabagh declaring the regions of Zangezour and Karabagh to be integral parts of Armenia, the Goris and Shushi National Councils to be regional governments, and their inclusion in the national budget.³¹ This undermines the proposition that Armenians of the time intended to create several independent states. On the contrary, major political divisions on this point existed only in Shushi, where the merchant class favoured a policy of appeasement with Baku, arguing that Artsakh's geopolitical situation made it a natural trader with Baku.³² The rest of the Artsakh population favoured unification with the Republic.³³

In December 1919, local Armenian irregulars defeated their Azeri counterparts in Zangezour and established Armenian supremacy.³⁴ They then invaded Artsakh but withdrew upon the demand of the British occupiers of Baku on the promise that the territorial issue would be decided at the Paris Peace Conference.³⁵ The British set up a temporary jurisdiction, appointing the ethnic Azeri Dr Khostrov Bey Sultanov as Governor-General, with an advisory council of three Armenians and three Azeris.³⁶ Armenia protested this action as contrary to its territorial rights. The Fourth Armenian National Assembly of Karabagh

²⁵ Zohrabyan, *The National Battles in Yerevan Province 1918* (2000) 77 [trans of: Ազգամիջյան գոյվները Երևանի նահանգում 1918] (author's own translation).

²⁶ Richard Hovannisian, *The Republic of Armenia Volume II: From Versailles to London, 1919–1920* (1982) 207 ('From Versailles to London').

²⁷ de Waal, above n 2, 130.

²⁸ Shahen Avakian, *Nagorno-Karabagh Legal Aspects* (2005) 9 <http://www.armeniaforeignministry.com/fr/nk/legalaspects/legalaspect_full.pdf> at 23 May 2008.

²⁹ For the Armenian Foreign Ministry, see *ibid.* For the NKR Foreign Ministry, see Armen Zalinyan, *What Prevails in the Karabagh Settlement: International Law or a Right on Policy?* (Unpublished manuscript, 2006) 7 (copy on file with author).

³⁰ See, eg, Annex 3 of 'Circular from the British Command' in File 9 of the Republic of Armenia Archives.

³¹ Khachakhetsian, *The Armenian Republic 1918–1920, Political History: Legal Documents and Files* (2000) 85–7 [trans of: Հայաստանի հանրապետությանը 1918–1920 թթ. (քաղաքական պատմությունը), փաստաթուղթերի և նյութերի ժողովածու] (author's own translation).

³² Croissant, above n 12, 12.

³³ Richard Hovannisian, *The Republic of Armenia Volume III: From London to Sevres, February–August 1920* (1996) 131–4 ('From London to Sevres').

³⁴ de Waal, above n 2, 128.

³⁵ *Ibid.*

³⁶ *Ibid.*

likewise protested Azerbaijan's assertion of sovereignty.³⁷ Armenia then passed two laws, the first declaring 'a "Free and United Armenia" including Karabagh and Nakhichevan'³⁸ and the second specifically asserting its sovereignty over Artsakh.³⁹

In April 1919, Armenia occupied Nakhichevan and declared martial law as part of the Yerevan administrative province.⁴⁰ A governor was appointed and police and courts were installed. In August, Azeri forces expelled the Armenian troops and a governor was appointed by Baku.⁴¹ Armenia then shifted its attention to Zangezour, which the Azeris unsuccessfully invaded in November.⁴² The Artsakh Armenians, upon the British withdrawal from Baku in August, agreed in their Fourth National Assembly to a ceasefire with the Azeri Government continuing the temporary jurisdiction of Sultanov.⁴³ Articles 15 and 16 required that garrisons be of peacetime strength and any movement of Azeri troops be authorised by two-thirds of the Council.⁴⁴

Sultanov, acting without such approval, occupied several Armenian villages and instituted an economic blockade to coerce the Armenian population into recognition of Azeri sovereignty.⁴⁵ The Eighth Armenian Assembly of Karabagh convened in the village of Shosh and, on 28 February 1920, categorically rejected the Azeri demands.⁴⁶ Sultanov then convened a group of Armenian merchants in Shushi and, under threat of 'dire consequences', the group expressed its willingness to consider conditional submission to Azerbaijan.⁴⁷ Using this as a pretext, Sultanov then moved more troops into the province in anticipation of an Armenian uprising, which commenced on 21 March 1920.⁴⁸

On 22 April 1920, the Ninth Armenian Assembly of Karabagh declared the provisional agreement null and the union of Artsakh and Armenia.⁴⁹ Armenia simultaneously occupied Nakhichevan, Zangezour and Artsakh for the first time.⁵⁰ Azerbaijan was succumbing to invasion by the Soviet Union, with the result that the Soviet Socialist Republic of Azerbaijan ('SSR of Azerbaijan') was

³⁷ Khachakhetsian, above n 31, 85–7.

³⁸ *Armenian Resolution on the Armenian Position at the Paris Conference* (12 February 1919), cited in Khachakhetsian, above n 31, 89–91.

³⁹ *The Republic of Armenia Government Decision regarding the Governance of Karabagh* (30 May 1919), cited in Khachakhetsian, above n 31, 104.

⁴⁰ Richard Hovannisian, *The Republic of Armenia Volume I: The First Year 1918–1919* (1971) 241 ('*The First Year*').

⁴¹ Hovannisian, *From Versailles to London*, above n 26, 105–6.

⁴² *Ibid* 106–7.

⁴³ *Provisional Accord between the Armenians of Karabagh and the Government of Azerbaijan*, signed 28 August 1919, Azerbaijan–Armenia, reproduced in Hovannisian, *The First Year*, above n 40, 186–7.

⁴⁴ *Ibid*.

⁴⁵ Hovannisian, *From London to Sevres*, above n 33, 138.

⁴⁶ Republic of Armenia, Ministry of Foreign Affairs, *Memorandum on the Armenian Political Situation in Karabagh presented by the Eighth Assembly of Karabagh to the Representatives of the Allied Powers and Transcaucasian Republics* (1920) <http://www.armeniaforeignministry.com/fr/nk/nk_file/article/15.html> at 23 May 2008.

⁴⁷ Hovannisian, *From London to Sevres*, above n 33, 144–5.

⁴⁸ *Ibid* 143.

⁴⁹ *Ibid* 159.

⁵⁰ *Ibid*.

proclaimed on 28 April 1920 in Baku.⁵¹ Armenia's occupation lasted until 10 August 1920, when an agreement was signed recognising de facto Soviet occupation of the three provinces, subject to final determination of their status in later negotiations.⁵²

This history of war between the first Republics may give rise to claims of sovereignty acquired by conquest. For Azerbaijan, the provisional agreement between itself and the Armenian National Councils from January 1919 until April 1920, coupled with the appointment of a Karabagh Azeri as Governor-General, could be characterised as an assertion of sovereignty over the region. On the other hand, Armenia could argue that its proclamations of annexation, coupled with the direct subjugation to Yerevan from April until July 1920, constitute conquest.

C *The Soviet Era: 1920–91*

The Turkish War of Independence, instigated by Mustapha Kemal, successfully prevented the *Treaty of Sevres*,⁵³ signed on 10 August 1920, from being implemented. Turkey invaded Armenia and, in November 1920, occupied the Kars and Aleksandropol provinces so that the Armenian government, hemmed in between the Soviets and the Turks, fell in a Soviet-backed coup, which declared the Soviet Socialist Republic of Armenia ('SSR of Armenia') on 29 November 1920. The Soviet Azerbaijan government, in support of the coup, issued a proclamation acknowledging the three provinces as integral parts of Soviet Armenia,⁵⁴ re-affirmed by Armenia and Azerbaijan in June 1921.⁵⁵

On 4 July 1921, the Caucasian Bureau refused a suggestion to include Karabagh in Armenia and 'conduct [a] plebiscite in Nagorno-Karabagh only'.⁵⁶ Stalin's divide-and-rule strategy was instead implemented by leaving Zangezour in Armenia and transferring Nakhichevan to Azerbaijan as promised to Turkey by art 5 of the *Treaty of Kars*.⁵⁷ On 7 July 1923, the Transcaucasian Socialist Federate Republic dismembered the autonomous region and instead created the *oblast* of Nagorno Karabagh as an isolated enclave surrounded by its former counties.⁵⁸

⁵¹ Ibid 182.

⁵² Ibid 288, 403.

⁵³ Opened for signature 10 August 1920 (not in force), reproduced in Carnegie Endowment for International Peace, *The Treaties of Peace 1919–1923* (1924) vol II, 789. Article 88 of the treaty included de jure recognition of the Republic of Armenia. Whilst Azerbaijan's statehood was never an issue in adjudication, the Mixed Tribunal of Cairo held in a debt claim that Armenia had existed but its statehood was subsequently extinguished by the Soviet conquest: *Achikian v Bank of Athens* (Mixed Tribunal of Cairo, Egypt) [1923–24] *Annual Digest of Public International Law Cases* 18. However, a Greek Court of First Instance ruled that since the *Treaty of Sevres* was not ratified, Armenia did not acquire de jure statehood and, accordingly, no diplomatic immunity: *In Re Armenian Chargé d'Affaires* (Court of First Instance of Athens, Greece) [1923–24] *Annual Digest of Public International Law Cases* 301.

⁵⁴ Avakian, above n 28, 30.

⁵⁵ Ibid 7.

⁵⁶ Ibid.

⁵⁷ Signed 13 October 1921 (ratified 11 September 1922).

⁵⁸ de Waal, above n 2, 130.

In these counties, the Azeri authorities instituted repopulation programmes in order to further isolate Artsakh Armenians from the SSR of Armenia, promote their assimilation into Azerbaijan and, above all, discourage any ambitions to join the SSR of Armenia. The Armenian population never reconciled itself to Azeri rule; petitions and protests increased in the Khrushchev years, culminating in the ‘Letter of the Thirteen’ in 1965.⁵⁹ That document by leading Artsakh Armenian intellectuals complained of cultural and economic discrimination compared to the rest of Soviet Azerbaijan. The committee petitioned for the territory to be transferred in order to end the attempt to drive Armenians out by gradual cultural suffocation as in Nakhichevan.⁶⁰

These periodic appeals — despite the transfer of the Crimea from Russia to the Ukraine in 1954 — were denied by citing art 78 of the *Soviet Constitution*, which prohibited the alteration of a Soviet Republic’s territory without its consent.⁶¹

During the period of *perestroika* in the 1980s, the protests of the Artsakh Armenians in Stepanakert calling for ‘unification’ with Soviet Armenia and demonstrations of solidarity in Yerevan escalated to inter-communal violence. The first and only ‘Soviet civil war’ began in April 1991 with the deportations and pogroms carried out by OMON Azeri forces⁶² in the Armenian-populated county of Shahumyan, better known as ‘Operation Ring’.⁶³

This brief description of the Soviet years demonstrates both the Azeri feeling of ownership of the province and the Armenian sentiment of justice denied.⁶⁴ Upon independence, this dispute caused war and has since polarised political debate in both countries. The dismemberment of the province in 1923 is a sensitive consideration for any final solution due to the tenuous and self-regulated military situation.⁶⁵

D *Independence, War and Ceasefire: 1991–2007*

On 23 August 1991, the Supreme Soviet of Armenia declared independence from the Union of Soviet Socialist Republics and, on 30 August 1991, the Supreme Soviet of Azerbaijan followed suit. On 18 October 1991, the newly independent Republic of Azerbaijan adopted a *Constitutional Act*,⁶⁶ art 2 of which declares the Republic of Azerbaijan to be the direct legal successor of the

⁵⁹ Tchilingirian, above n 14, 442.

⁶⁰ Ibid 441–2.

⁶¹ *Constitution (Fundamental Law) of the Union of Soviet Socialist Republics* (1977). Article 78 provides that ‘territory of a Union Republic may not be altered without its consent’. The Constitution was adopted on 7 October 1977 and was in force until the dissolution of the USSR.

⁶² ‘OMON’ is a Russian acronym of ‘*Otryad Militsii Osobogo Naznacheniya*’, which is often known as the ‘Special Purpose Police Squad’.

⁶³ Caroline Cox and John Eibner, *Ethnic Cleansing in Progress: War in Nagorno Karabakh* (2005) <<http://sumgait.info/caroline-cox/ethnic-cleansing-in-progress/operation-ring.htm>> at 23 May 2008.

⁶⁴ For more detailed analysis of the Soviet period, see Ronald Suny, *The Revenge of the Past: Nationalism, Revolution, and the Collapse of the Soviet Union* (1993) 132–8; Rogers Brubaker, *Nationalism Reframed: Nationhood and the National Question in the New Europe* (1996) 108.

⁶⁵ See below Part III(D).

⁶⁶ Avakian, above n 28, 11.

1918 Republic of Azerbaijan and art 3 of which denounces the *Treaty on the Creation of the Union of Soviet Socialist Republics*. Thus, the Republic of Azerbaijan expressly rejected its secession to the SSR of Azerbaijan, with important consequences for the legal effects of independence. This decision, as discussed below, was partly designed to avoid art 3 of the *Soviet Law on Secession 1990*, which permitted Artsakh to decide its own territorial status by referendum.⁶⁷ This was conducted on 10 December 1991 with an overwhelming majority voting for independence, unification with the SSR of Armenia not being an option. On 23 November 1991, Azerbaijan abolished the autonomy of Karabagh, an act that the USSR Constitutional Oversight Committee declared unconstitutional.⁶⁸

The 1994 ceasefire, ending six years of armed conflict, left Armenian forces in de facto control of most of historical Artsakh prior to its 1923 division. This includes the Nagorny Karabagh *oblast* created in 1923, as well as Karrachar, Jabrail, Kovsakan, Kashunik and Kashatagh.⁶⁹ Thirty-five per cent of Aghdam and 25 per cent of Fizuli, outside of the historical borders, are also Armenian-occupied.⁷⁰ Azeri forces occupy the Shahumyan (Goranboy) region, as well as parts of the Mardakert and Martuni regions.⁷¹ In total, 217 800 Armenian refugees and 739 000 Azeri refugees remain displaced.⁷²

III LEGAL POSITIONS OF THE PARTIES

This section describes, analyses and criticises the positions adopted in the course of peace negotiations. The *casus belli* — Artsakh's political status — has been the core issue that has scuppered hopes of a peace deal. This piece proposes that a litigated solution to the conflict ought to be seriously considered. Whilst a political solution remains possible, the intransigent and polarised positions of the two states suggest that adversarial litigation may be a more appropriate mechanism of dispute settlement.

A *The Position Adopted by the Parties to the Dispute*

It is clear that states adopt particular dispute paradigms in order to maximise bargaining leverage and appease their domestic constituencies.⁷³ Armenia and the NKR portray the armed conflict as an NKR insurgency against Azerbaijan, with Armenia involved merely as an interested spectator.⁷⁴ This view extracts indirect recognition from Azerbaijan of the legal existence — and thence the unilateral secession — of the NKR.⁷⁵ This paradigm is incorrect for the following reasons. First, the armed conflict eventually intensified into an interstate conflict with full participation of regular forces, particularly from 1992

⁶⁷ Ibid 33.

⁶⁸ Ibid 15.

⁶⁹ The names above are Azeri. The Armenian names are Kelbajar, Jebrail, Zangelan, Gubatly and Lachin respectively.

⁷⁰ de Waal, above n 2, 286.

⁷¹ Ibid.

⁷² Ibid 285.

⁷³ Croissant, above n 12, 107.

⁷⁴ de Waal, above n 2, 162.

⁷⁵ Tim Potier, *Conflict in Nagorno-Karabakh, Abkhazia and South Ossetia* (2001) 93.

until 1994. Second, since the end of the armed conflict, the NKR has been fully integrated into the Armenian military, economic and foreign relations spheres. Third, the NKR could not economically survive but for the provision made for it in the Armenian budget.⁷⁶ Finally, the apparent aim of the Armenian people of Artsakh, from 1918 to the present day, has not been the creation of a separate state, but rather reunification with the Republic of Armenia.⁷⁷

By contrast, Azerbaijan seeks to portray the armed conflict as strictly a 'belligerency' with Armenia.⁷⁸ This demonstrates that Armenia has occupied 'sovereign Azeri territory',⁷⁹ that the 'occupation' is a consequence of an unlawful use of force and that Armenia therefore has no territorial claim.⁸⁰ This is also submitted to be erroneous. First, the conflict was primarily waged at a local level, in that inter-communal clashes in Artsakh gradually escalated to the interstate level, both in 1918–20 and 1988–94.⁸¹ Second, before and since its inclusion within Azerbaijan's jurisdiction, the Armenian population of Artsakh continuously agitated for unification with Armenia.⁸² Third, the region has never been part of the territory of independent Azerbaijan, which constitutes the underlying assumption of the Azeri case. The principle of territorial integrity was not engaged, although certainly both states *prima facie* violated the prohibition of the use of force and the art 33 principle requiring pacific means of dispute settlement.

B Legal Position of Armenia and the NKR

Armenia and the NKR assert that the people of the NKR have exercised their right to self-determination as enshrined alongside that of the territorial integrity of states.⁸³ They rely upon the following grounds to support the submission that self-determination gave rise to a right of unilateral secession. First, art 3 of the *Soviet Law on Secession 1990* permitted the province to determine its own political status by a plebiscite, which took place in 1991.⁸⁴ Second, the NKR is a

⁷⁶ Laurence Broers, *The Politics of Non-Recognition and Democratization* (2005) <<http://www.c-r.org/our-work/accord/nagorny-karabakh/democratization.php>> at 23 May 2008.

⁷⁷ See the statement of current Armenian Republic President Robert Kocharian in 1998, that of current NKR 'President' Arkady Gukasian on 13 October 1997, and that of current Armenian Foreign Minister Vartan Oskanian on 18 June 1998 in Potier, above n 75, at 97–9.

⁷⁸ Croissant, above n 12, 67.

⁷⁹ Ministry of Foreign Affairs, Republic of Azerbaijan, *Armenian Aggression against Azerbaijan: Armenian Terrorism* (2007) <http://www.mfa.gov.az/eng/armenian_aggression/terrorism.shtml> at 23 May 2008.

⁸⁰ Ian Brownlie, *Principles of Public International Law* (6th ed, 2003) 160.

⁸¹ See above Part II.

⁸² Ministry of Foreign Affairs, Nagorno Karabagh Republic, *Nagorno Karabagh Republic: History and Current Reality* (2006) <<http://www.nkr.am/en/history-and-current-reality/79>> at 23 May 2008.

⁸³ See *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations*, GA Res 2625, UN GAOR, 6th Comm, 25th sess, 1883rd plen mtg, UN Doc A/RES/2625 (1970) ('*Declaration on Friendly Relations*').

⁸⁴ Avakian, above n 28, 13–14.

state according to art 1 of the *Montevideo Convention*,⁸⁵ notwithstanding the absence of international recognition. Third, even if the NKR were part of Azerbaijan, the principle of territorial integrity is conditional upon the right of self-determination; denial of cultural autonomy and systematic violation of human rights gave rise to a right to unilateral secession.⁸⁶

There are a number of problems with these arguments. The first is that Azerbaijan, through its rejection of its Soviet legal heritage, has no obligations by virtue of Soviet law; it is therefore not obliged to implement the *Soviet Law on Secession 1990*. Even if it were, the law was clearly intended, particularly under art 1, to obstruct the process of secession that was already underway. The fact that not a single Union Republic seceded on the basis of the law is testament to its irrelevance to the claims to statehood that were accepted.⁸⁷ Moreover, neither Abkhazia, South Ossetia, nor Transdniestra implemented art 3 nor relied upon it for their ‘secessions’. Thus, the position under Soviet constitutional law is immaterial.

Second, the NKR does not satisfy the factual criteria for statehood under the *Montevideo Convention*. The NKR’s dependence upon and fusion with Armenia is to such a high degree, especially in external relations where state practice requires ‘independence’ or ‘sovereignty’,⁸⁸ that the case is in this respect analogous to that of Manchukuo — a ‘puppet state’ created by Japan that was for all purposes a Japanese colony.⁸⁹ Indeed, the NKR would be unable to survive without sponsorship from Armenia proper.⁹⁰ As defined in the *Island of Palmas* case, ‘sovereignty ... signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other state, the functions of a State’.⁹¹ The NKR thus fails to meet the fundamental ingredients for statehood. Therefore, notwithstanding its claims to independence, the NKR is akin to a satellite state — if not a de facto province — of Armenia.⁹²

However, the most fundamental difficulty is that the Armenian argument is entirely based upon self-determination, which has a vague and amorphous status under international law.⁹³ It is increasingly acknowledged that self-determination encompasses minority cultural rights and a prohibition of discrimination by the

⁸⁵ These criteria being territory, population, government, and capacity to enter into legal relations: *Montevideo Convention on the Rights and Duties of States*, opened for signature 26 December 1933, 165 LNTS 19, art 1 (entered into force 26 December 1934) (*Montevideo Convention*). This definition is, however, a non sequitur — it pre-supposes the existence of a state: James Crawford, *The Creation of States in International Law* (2nd ed, 2006) 45–6, 436–7; Thomas Grant, ‘Defining Statehood: The Montevideo Convention and Its Discontents’ (1999) 37 *Columbia Journal of Transnational Law* 403, 434–47.

⁸⁶ Avakian, above n 28, 16.

⁸⁷ Christine Gray, ‘Self-Determination and the Breakup of the Soviet Union’ (1992) 12 *Yearbook of European Law* 465, 466–7.

⁸⁸ *Customs Regime between Germany and Austria (Germany v Austria) (Judgment)* [1931] PCIJ (Ser A/B) No 41, 46; *Rights of Nationals of the United States of America in Morocco (France v US) (Judgment)* [1952] ICJ Rep 176, 183.

⁸⁹ Crawford, *The Creation of States*, above n 85, 75, 78–9.

⁹⁰ For instance, inhabitants of Transdniestra, Abkhazia and South Ossetia automatically receive Russian citizenship, and those of Artsakh likewise Armenian citizenship: Potier, above n 75.

⁹¹ *Island of Palmas* (1928) 2 RIAA 829, 829 (emphasis added).

⁹² For further examples of the unification process, see Potier, above n 75, 99.

⁹³ Thomas Musgrave, *Self-Determination and National Minorities* (1997) 177–9.

state ('internal self-determination').⁹⁴ However, whilst a customary rule and perhaps even *jus cogens*,⁹⁵ self-determination nonetheless does not embody a *general* right to unilateral secession ('external self-determination').⁹⁶ International law is neutral on the phenomenon of secession: it neither prohibits nor authorises it. A right is only vested in specific contexts, such as in a non-self-governing territory in decolonisation,⁹⁷ or inversely in a colony to block cession to another state.⁹⁸

There is a school of thought, notably advanced by Professor Otto Kimminich, which interprets the UN's *Declaration on Friendly Relations*⁹⁹ to mean that, as long as a state respects the rights of minority groups,

these groups can find their protection within the State in accordance with present-day international law. As soon as that State consistently violates these rights a situation arises in which the ... ethnic group may invoke its right of self-determination in order to bring about constitutional changes within the State or to find an international solution by seceding.¹⁰⁰

However, this differs from the orthodox view that self-determination constitutes 'internal' rights within the state: cultural, economic and political rights of autonomy equal to those of other inhabitants.¹⁰¹ Even more dubious is the notion that the territorial sovereignty of a state is conditional upon respect for self-determination and human rights of an ethnic minority within its borders.¹⁰² As Professor Crawford explains, Bangladesh's unilateral secession from Pakistan is the only example in modern international law of a seceding territory attaining international recognition of its statehood.¹⁰³

Parallels with the Kosovo situation are unfounded because the territorial title to Kosovo has long been held by Serbia. Recognition of Kosovar statehood by a

⁹⁴ Stephen Hall, *Public International Law* (2003) 145–7.

⁹⁵ Brownlie, above n 80, 637–8.

⁹⁶ *Reference re Secession of Québec* [1998] 2 SCR 217.

⁹⁷ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) (Advisory Opinion)* [1971] ICJ Rep 16, 31–3; *South West Africa (Ethiopia v South Africa; Liberia v South Africa) (Preliminary Objections)* [1962] ICJ Rep 319, 329; *East Timor (Portugal v Australia) (Judgment)* [1995] ICJ Rep 90, 101–2.

⁹⁸ Whilst the General Assembly has referred to the 'interests' rather than the 'rights' of the colonies of Gibraltar and the Falkland Islands, it nonetheless urged negotiated solutions between the parties, which have hitherto faltered due to the opposition of the colonies to any change in the status quo. See, eg, *Question of Gibraltar*, GA Res 2070, UN GAOR, 4th Comm, 20th sess, 1398th plen mtg, UN Doc A/RES/2070 (XX) (1965); Special Committee of 24, *Question of the Falkland Islands (Malvinas)*, UN Doc A/AC.109/2003/24 (2003); *Question of the Falkland Islands (Malvinas)*, GA Res 2065, UN GAOR, 4th Comm, 20th sess, 1398th plen mtg, UN Doc A/RES/2065 (XX) (1965).

⁹⁹ *Declaration on Friendly Relations*, above n 83.

¹⁰⁰ Otto Kimminich, 'A "Federal" Right to Self-Determination' in Christian Tomuschat (ed), *The Modern Law of Self-Determination* (1993) 83, 92.

¹⁰¹ Brownlie, above n 80, 161, 553. See also Christian Tomuschat, 'Self-Determination in a Post-Colonial World' in Christian Tomuschat (ed), *The Modern Law of Self-Determination* (1993) 1, 10; Crawford, *The Creation of States*, above n 85, 126–8.

¹⁰² Crawford, *The Creation of States*, above n 85, 161.

¹⁰³ James Crawford, 'State Practice and International Law in Relation to Secession' (1998) 69 *British Yearbook of International Law* 85, 92.

small number of states¹⁰⁴ does not ‘constitute’ its legal basis,¹⁰⁵ especially given that there is a strong argument that such recognition constitutes a breach of an obligation to continuously recognise the territorial integrity of Serbia imposed by the UN Security Council.¹⁰⁶ Moreover, although superficially supporting the argument that state practice is moving towards the conditionality of territorial title upon respect for self-determination, the Kosovo example is distinguishable because the Security Council, despite initially and expressly recognising the territorial integrity of Serbia, may (if Russian opposition ceases) attempt to claim the right to dispose of Serbia’s territory in order to impose independence without Serbia’s consent.¹⁰⁷ Mandates must be addressed carefully because they represent extreme cases whereby the will of the international community can trump state consent, contravening the pillars of sovereignty and equality between states, encapsulated in the maxim *par in parem non habet imperium*.

Moreover, international recognition of Kosovar independence does not oblige Serbia to recognise Kosovo — it can hold out so long as it can withstand political pressure. Moreover, such recognition, if taken without a Security Council mandate, would arguably constitute an internationally wrongful act.¹⁰⁸ Thus, Armenian hopes that Kosovo will prove a ‘precedent’ for Artsakh may be in vain; even if it does, it will likely come with unpalatable conditions to appease Azerbaijan.¹⁰⁹ In particular, recognition would likely be conditional upon not unifying with another state, as was imposed upon Austria following both World

¹⁰⁴ ‘Recognition for New Kosovo Grows’, *BBC News* (UK) 18 February 2008 <<http://news.bbc.co.uk/1/hi/world/europe/7251359.stm>> at 23 May 2008; ‘Serbia’s Neighbours Accept Kosovo’, *BBC News* (UK) <<http://news.bbc.co.uk/1/hi/world/europe/7304488.stm>> at 23 May 2008.

¹⁰⁵ *Reference re Secession of Québec* [1998] 2 SCR 217, 288–9.

¹⁰⁶ *Resolution 1244*, SC Res 1244, UN SCOR, 54th sess, 4011th mtg, 2nd Annex, UN Doc S/RES/1244 (10 June 1999) [5], [8]. See also Churkin, submission to UN Security Council on behalf of the Russian Federation, UN SCOR, 63rd sess, 5839th mtg, UN Doc S/PV.5839 (18 February 2008) 6.

¹⁰⁷ On Security Council powers, see Crawford, *The Creation of States*, above n 85, 557–60; International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, UN Doc A/CN.4/L.682 (13 April 2006) 168–9; Danesh Sarooshi, *The United Nations and the Development of Collective Security: The Delegation by the UN Security Council of Its Chapter VII Powers* (1999) 16–19; Erika de Wet, *The Chapter VII Powers of the United Nations Security Council* (2004) 178–87, 370. Cf Hans Kelsen, *The Law of the United Nations: A Critical Analysis of Its Fundamental Problems* (1950) 294; Michael Wood, ‘The UN Security Council and International Law: The Security Council’s Powers and Their Limits’ (Lecture delivered at Sir Hersch Lauterpacht Memorial Lecture Series, Cambridge, UK, 8 November 2006) [52]–[64], available from <<http://www.lcil.cam.ac.uk>> at 23 May 2008. See also Jonathan Charney, ‘Self-Determination: Chechnya, Kosovo, and East Timor’ (2001) 34 *Vanderbilt Journal of Transitional Law* 455; Bartram Brown, ‘Human Rights, Sovereignty, and the Final Status of Kosovo’ (2005) 80 *Chicago-Kent Law Review* 235; Henry Perritt, ‘Final Status for Kosovo’ (2005) 80 *Vanderbilt Journal of Transitional Law* 3.

¹⁰⁸ See, eg, *East Timor (Portugal v Australia) (Judgment)* [1995] ICJ Rep 90, 170 (Dissenting Opinion of Judge Weeramantry).

¹⁰⁹ Office of the Special Envoy of the Secretary-General of the United Nations for the Future Status Process for Kosovo, *Executive Summary of the Comprehensive Proposal for the Kosovo Status Settlement* (2007) <<http://www.unosek.org/unosek/en/statusproposal.html>> at 23 May 2008.

Wars;¹¹⁰ upon Cyprus with independence from the British Empire;¹¹¹ and was proposed under the Ahtisaari plan for Kosovo.¹¹² Unless the vast majority of states recognise Kosovo and thereby change customary international law, the case does not alter the legal position regarding unilateral secession.

C Legal Position of Azerbaijan

Azerbaijan claims that upon its secession from the Soviet Union under the principle of *uti possidetis juris*, it ‘inherited’ both Nakhichevan and Artsakh within its borders.¹¹³ Therefore, Armenia has ‘occupied’ Azeri territory in violation of its obligation to respect the territorial integrity of UN member states under arts 2 and 33 of the *UN Charter*. Self-determination remains subject to territorial integrity in all cases, and the suppressive measures taken against secessionist rebels on Azeri territory (which would have succeeded but for the intervention of Armenia) were strictly an internal Azeri matter.¹¹⁴ Notwithstanding the repeated instances of state persecution of the Armenian minority population in Artsakh and Azerbaijan proper, the territorial title of Azerbaijan remains intact.

It is submitted that the fatal flaw in this argument is its presupposition that the disputed territories in question are Azeri territory. Although there is certainly a territorial *claim* to be made, it is not an incontrovertible fact that the region was ever part of independent Azerbaijan. The controversy of the matter is demonstrated by the League of Nations’ rejection of Azerbaijan’s application for membership in December 1920 on the ground that its frontiers with Armenia were ‘insufficiently clear’, and by the *Treaty of Sevres*, art 92 of which called upon the states to resolve their territorial disputes by peaceful settlement.

By renouncing its Soviet legal heritage, the Republic of Azerbaijan not only rejected its legal *obligations* stemming from Soviet Azerbaijan as its successor, but it also rejected its *rights* stemming from that source: namely, its jurisdictional competence, as distinct from sovereign competence,¹¹⁵ over both Artsakh¹¹⁶ and Nakhichevan.¹¹⁷ Had Azerbaijan accepted its Soviet legal heritage, Armenia, as the successor to the SSR of Armenia, would have been bound to recognise Azerbaijan’s inherited right to the ‘protectorate’ of Nakhichevan. However,

¹¹⁰ *Treaty of Peace with Germany (Treaty of Versailles)*, opened for signature 28 June 1919, 2 USTS 43, art 80 (entered into force 10 January 1920); *Treaty for the Re-establishment of an Independent and Democratic Austria*, opened for signature 15 May 1955, 6 USTS 2435, art 1 (entered into force 6 June 1955).

¹¹¹ *Treaty of Guarantee*, 382 UNTS 3, appendix B, art 2 (signed and entered into force 16 August 1960).

¹¹² *Letter Dated 26 March 2007 from the Secretary-General addressed to the President of the Security Council Addendum: Comprehensive Proposal for the Kosovo Status Settlement*, UN Doc S/2007/168/Add.1 (22 March 2007).

¹¹³ Administrative Department of the President of the Republic of Azerbaijan, *Armenian–Azerbaijan, Nagorny Karabakh Konflikt* (2005) 149 <<http://www.elibrary.az/docs/azerbaijan/eng/gl7.pdf>> at 23 May 2008.

¹¹⁴ Non-intervention by a state in the internal affairs of another state is a principle of customary international law: *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v US) (Judgment)* [1984] ICJ Rep 392, 424.

¹¹⁵ Brownlie, above n 80, 105–6.

¹¹⁶ Via Stalin’s 1921 Caucasian Bureau decision: Avakian, above n 28, 7.

¹¹⁷ Via *Treaty of Kars*, above n 57, art 5.

Azerbaijan would have likewise been bound to recognise that, by Soviet law, Artsakh validly exercised its right to unilateral secession upon Azerbaijan's declaration of independence. By declaring itself the legal successor to the first Republic of Azerbaijan, contemporary Azerbaijan inherited only those rights and obligations that the former possessed.

Azerbaijan's case is based upon the principle of *uti possidetis juris*: namely, that administrative borders within the Soviet Union became internationalised upon the secession of the Union Republics. Azerbaijan has hedged its bets with the *Constitutional Act on the State Independence of Azerbaijan*,¹¹⁸ particularly in arts 2 and 3,¹¹⁹ wherein it declares itself successor to the First Republic of Azerbaijan and denounces the *Treaty of Establishment of the Soviet Union*.

D *Current Status of Negotiations*

The discussion above addresses the current situation from the standpoint of international law but international diplomacy operates with a different methodology. Whilst the latter observes legal principles, it broadly encourages reconciliation and compromise rather than strict enforcement of legal rights. The OSCE Minsk Group has been involved in conducting negotiations along these lines since the 1994 ceasefire.¹²⁰

However, the history of the negotiations demonstrates that the positions of the parties have hardened over time and that the political environments of the two nations have precluded the possibility of reaching compromises.¹²¹ The brief hopes raised by the Key West talks in 2001 and their subsequent dramatic collapse,¹²² demonstrates the strength of domestic positions on the issue and the triumph of political factors over legal considerations.

The failure to achieve agreement after 12 years of dialogue demonstrates the width of the gulf between the two sides and the unlikelihood that this gulf can be bridged in the foreseeable future. In a recent press statement, the three co-Chairs of the OSCE Minsk Group declared their dissatisfaction with the current state of negotiations. The Co-Chairs concluded with the following observations regarding the steps by which a solution could progress:

The principles [for resolution] are based on the redeployment of Armenian troops from Azerbaijani territories around Nagorno-Karabakh, with special modalities for Kelbajar and Lachin districts (including a corridor between Armenia and Nagorno-Karabakh), demilitarization of those territories, and a referendum ... to determine the final legal status of Nagorno-Karabakh. ... Regarding the vote to determine the future status of Nagorno-Karabakh, the Co-Chairs stressed that suitable pre-conditions ... would have to be achieved so that the vote would take place in a non-coercive environment ... after a vigorous debate in the public

¹¹⁸ Partially reproduced in Avakian, above n 28, 15.

¹¹⁹ Article 2 proclaims that '[t]he Republic of Azerbaijan is the successor of the Azerbaijani Republic, which existed from May 28, 1918 till April 28, 1920', and art 3 states that '[t]he treaty of the establishment of the USSR of December 30, 1922 is considered not valid in the part related to Azerbaijan from moment of signing it': *ibid*.

¹²⁰ OSCE, *Minsk Process* <<http://www.osce.org/item/21979.html>> at 23 May 2008.

¹²¹ Gerard Libaridian, *The Elusive 'Right Formula' at the 'Right Time': A Historical Analysis of the Official Peace Process* (2005) <<http://www.c-r.org/our-work/accord/nagorny-karabakh/elusive-right-formula.php>> at 23 May 2008.

¹²² de Waal, above n 2, 266–8.

arena. Unfortunately, at their most recent meeting ... the Presidents did not reach agreement on these principles.

Although no additional meetings between the sides under the auspices of the Co-Chairs are planned for the immediate future, they will be ready to reengage if the parties decide to pursue the talks with the political will that has thus far been lacking.¹²³

The most sensitive issue is clearly the final status of Artsakh, which would be determined by referendum. The presumption is that the boundaries of Artsakh are not its historical borders, but those created by the SSR of Azerbaijan in 1923. However, the presumption acknowledges the strategic sensitivity of the contiguous regions to Armenia. Ultimately, the absence of political will and the mutual intransigence throughout the negotiations means that a negotiated settlement, though a worthy goal, has low prospects of success.

A recent International Crisis Group report supports this conclusion. The report found the status quo unsustainable, and that by the year 2012 — when its oil revenues begin to decline — Azerbaijan may attempt to use force to occupy the territory,¹²⁴ which would surely violate art 33 of the *UN Charter*. Moreover, the report identifies the main obstacle to a negotiated solution as the mutual intransigence of the two populations, reinforced by the nationalistic rhetoric of state officials.¹²⁵ In this situation, which contains the ingredients for resumption of the armed conflict, litigation is the optimum way forward, affording both parties the opportunity to argue adversarially in a court of law.

However, the adjudication option has its own problems. The first is the question of forum. There is an apparent tension between the parties, wherein Azerbaijan prefers the UN, and Armenia the OSCE.¹²⁶ This may be a source of contention in negotiations for a shift to an adjudication framework, namely, whether to submit the dispute to the ICJ, the OSCE Court, or to constitute an ad hoc arbitral tribunal. Factors affecting the choice of forum include litigation costs, past jurisprudence, current membership, and the terms of reference.

A second problem is the nature of litigation itself. The ICJ, for instance, has been criticised for adopting a conciliatory approach in its past jurisprudence.¹²⁷ In a territorial dispute of this kind, where a definitive and principled decision is necessary, such an approach would be hazardous. The issue of compliance, which in ICJ land boundary cases has been problematic,¹²⁸ also arises. However, after a certain period of resistance, losing states have generally complied with the judgments in question.¹²⁹

¹²³ OSCE Minsk Group Co-Chairs, 'Statement by the Minsk Group Co-Chairs' (Press Release, 3 July 2006) <<http://www.osce.org/item/19803.html>> at 23 May 2008.

¹²⁴ International Crisis Group, *Nagorno-Karabakh: Risking War* (ICG Europe Report No 187, 14 November 2007) 8.

¹²⁵ *Ibid* 15–18.

¹²⁶ See *The Situation in the Occupied Territories of Azerbaijan*, GA Res 62/243, UN GAOR, 62nd sess, 86th plen mtg, Agenda Item 20, UN Doc A/Res/62/243 (14 March 2008). See also UN GAOR, 62nd sess, 86th plen mtg, UN Doc A/62/PV.86 (14 March 2008).

¹²⁷ See, eg, *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v Bahrain) (Judgment)* [1994] ICJ Rep 111, 135 (Dissenting Opinion of Judge Oda).

¹²⁸ See, eg, Paulson, above n 8.

¹²⁹ *Ibid* 456–61.

IV POSSIBLE SOLUTIONS TO THE DISPUTE

In 1963, in what remains a seminal authority on territorial sovereignty, Professor Jennings observed the following conundrum facing international law:

We find that in addition to the 5 orthodox modes for the acquisition of territorial sovereignty, there is the case of the emergence of the new State — by far the most important case of territorial change at the present time — in regard to which, however, international law is singularly undeveloped, uncertain, and, it must be said, comparatively unstudied.¹³⁰

This section, in advancing legal conclusions regarding the conflict, addresses this issue head on. The implications of formulating clear legal principles in this area are potentially far-reaching for the Artsakh dispute, and would be of similar value for the settlement of territorial disputes in general. The general principle of modern international law regarding settlement of boundaries between states is that the exclusive competence for their determination lies solely with the two states concerned. Consequently, the general prohibition on the use of force for the settlement of disputes allows for only cession and arbitration as modes for the acquisition of title.¹³¹

A *Principles of Territorial Sovereignty*

Two observations can be made at the outset. The first is that recognition by third states of another's claim to territorial title does not serve as a legal basis for title.¹³² Where there is a prima facie territorial dispute, the consent of state B to a negotiated settlement with state A, or to submit the dispute to adjudication, is required for settlement of the disputed territory's legal status.¹³³ This applies not only in disputes concerning frontier boundaries between states, but also in the event of a new state emerging from the territory of another. As Oppenheim observes, 'the formation of a new State is ... a matter of fact and not of law. It is through recognition, which is a matter of law, that such a new State becomes a subject of International Law'.¹³⁴

The formation of a new state can occur through disintegration, secession or devolution.¹³⁵ Secession, in particular, may arise through various scenarios: at one extreme, through a war of independence culminating in recognition by the

¹³⁰ Robert Jennings, *The Acquisition of Territory in International Law* (1963) 11–12.

¹³¹ Michael Bothe, 'Boundaries' in Rudolf Bernhardt (ed), *Encyclopedia of Public International Law* (1992) vol 1, 443, 444.

¹³² Ibid 448. Cf Ian Brownlie, 'Recognition in Theory and Practice' (1982) 53 *British Yearbook of International Law* 197, 201, 203–4; Crawford, 'State Practice and International Law in relation to Secession', above n 103, 90.

¹³³ Crawford, 'State Practice and International Law in relation to Secession', above n 103, 116.

¹³⁴ Lassa Oppenheim and Hersch Lauterpacht, *International Law: A Treatise* (8th ed, 1955) vol 1, 544. On this point, Jennings comments: 'And if this is true, one may, therefore, regard the title to territory as arising simply from the fact of the emergence of a new State, or one may regard it perhaps as having been acquired by recognition, depending upon one's view of the legal nature of recognition': Jennings, above n 130, 8.

¹³⁵ This terminology has often been conflated: Matthew Craven, 'The European Community Arbitration Commission on Yugoslavia' (1995) 66 *British Yearbook of International Law* 333, 354–6.

parent state of the seceding state's existence,¹³⁶ and at the other, the use of constitutional mechanisms for the latter's secession. In either case, recognition by the parent state is the axis of the test; prior to recognition, the new state's factual independence is de facto, subsequently it is de jure or 'as of right'.¹³⁷

The second observation is that the contemporary prohibition on the use of force to settle disputes contrasts with the position before the adoption of the *UN Charter*.¹³⁸ The conceptual problem with this change is that it presumes existing territorial title to be legal at the time of ratification of the *UN Charter* and does not demand compulsory jurisdiction for the adjudication of such disputes.¹³⁹

Under current law, annexation with its legal basis as conquest per se is unlawful. However, although states have, in practice, used force as a means of de facto acquisition of territory from another state,¹⁴⁰ such acquisitions have (albeit inconsistently)¹⁴¹ been at the peril of collective non-recognition¹⁴² and even individual¹⁴³ or collective¹⁴⁴ use of force to eject the putative conqueror. Thus, the territorial title to Artsakh remains disputed, and will remain so until both parties consent to settle the dispute by treaty or adjudication.

B Legal Consequences of the Soviet Collapse

The dissolution of the Soviet Union raises a crucial issue for the Artsakh dispute; namely, the legal basis upon which Armenia and Azerbaijan acquired de jure statehood. The emergence of successor states to the Soviet Union in 1991 was a fait accompli which the international community was compelled to recognise by the momentum of historical events.¹⁴⁵ De jure statehood came with the dissolution of the Soviet Union on 8 December 1991.¹⁴⁶ The presence of these objective criteria gives rise to a de facto state; the acquisition of de jure statehood comes by means of parent state recognition.¹⁴⁷ This was the case in the secession of Bangladesh from Pakistan, where the latter was regarded as the

¹³⁶ Cf Bangladesh's secession from Pakistan: Crawford, 'State Practice and International Law in relation to Secession', above n 103, 95.

¹³⁷ Ibid 10–25.

¹³⁸ Erich Kussbach, 'Conquest' (1992) 1 *Encyclopedia of Public International Law* 756, 757.

¹³⁹ Sharon Korman, *The Right of Conquest: The Acquisition of Territory by Force in International Law and Practice* (1996) 304.

¹⁴⁰ See, eg, Israel's annexation of the Golan Heights, East Jerusalem and parts of the West Bank seized in the 1967 Arab–Israeli War: *ibid* 249–66.

¹⁴¹ See, eg, India's invasion of Goa which, although probably unlawful, was not condemned by the Security Council or the General Assembly. However, India's justification for the use of force on the grounds that Goa was Indian territory 450 years before and therefore had a continuing right to self-defence of the territory in 1945 was not accepted. Tolerance of the invasion was political, in contrast to the condemnation of Argentina's similar justification for the invasion of the Falklands: *ibid* 267–80.

¹⁴² See, eg, the Turkish seizure of Northern Cyprus in the 1979 invasion, as discussed in David J Harris, *Cases and Materials on International Law* (6th ed, 2004) 920.

¹⁴³ See, eg, the successful British invocation of the right to self-defence to eject the Argentinean invasion of the Falklands in 1979: *ibid* 924–5.

¹⁴⁴ This has only occurred once, when the Security Council authorised the use of force in the 1990 Persian Gulf War: Korman, above n 139, 300–1.

¹⁴⁵ Gray, above n 87, 468; Crawford, *The Creation of States*, above n 85, 395.

¹⁴⁶ Gray, above n 87, 468.

¹⁴⁷ Cf Crawford's view that parent state recognition is generally required for de jure statehood: Crawford, *The Creation of States*, above n 85, 376–9, 390–1, 417.

continuation of the former Pakistan notwithstanding the loss of more than half of its population and territory, and so no member of the international community (apart from India) recognised Bangladeshi independence until Pakistan first did so.¹⁴⁸ Moreover, so long as the parent state refuses to recognise the secession, it has the right to attempt to use force to bring the seceding territory back under its control.¹⁴⁹

Soviet recognition of its own dissolution therefore rendered the secessions lawful. However, this did not operate identically for every seceding state. The Central Asian states of Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan and Uzbekistan did not exist prior to Sovietisation, and hence became new states.¹⁵⁰ For the Baltic states, the doctrine of reversion was generally accepted to apply due to the illegality of the Soviet Union's annexations in 1940,¹⁵¹ with important legal consequences.¹⁵² Moldova immediately sought reunification with Rumania, being for centuries a disputed buffer territory between Rumania and the Russian Empire; consequently, statehood was new for it as well.¹⁵³

For Armenia, Azerbaijan and Georgia, claims to have reverted to pre-Soviet independence, like the Baltic States, have been given less credence due mainly to the fact that their independence occurred between 1917–21,¹⁵⁴ whereas the Baltic States were independent until the more recent date of 1940. Although the implications of the doctrine of reversion for the Transcaucasian States have been dismissed,¹⁵⁵ in the context of territorial disputes such as the Artsakh conflict, those implications have the potential to be profound.

International recognition of the new successor states occurred according to internal Soviet administrative borders, following state practice regarding the former Yugoslavia.¹⁵⁶ Thus, regarding the criterion of territory, international recognition was granted to all the former Union Republics of the Soviet Union as successor states, but not to any of the five autonomous regions that claimed

¹⁴⁸ Ibid 386.

¹⁴⁹ Third states may give de facto recognition to qualifying states, and so avoid premature recognition, for most practical considerations treating the de facto state as any other. This was the case with Latin America, where third states extended de facto recognition since Spain had for practical purposes ceased attempts to re-conquer the seceding territories yet refused to recognise them as states: *ibid* 379.

¹⁵⁰ Gray, above n 87, 490–1.

¹⁵¹ *Ibid* 483.

¹⁵² *Ibid*.

¹⁵³ *Ibid* 489–90.

¹⁵⁴ *Ibid* 484–8. Cf Crawford, *The Creation of States*, above n 85, 531.

¹⁵⁵ *Ibid* 487.

¹⁵⁶ *Ibid* 476–7. See *Resolution 822*, SC Res 822, UN SCOR, 48th sess, 3205th mtg, UN Doc S/RES/822 (30 April 1993); *Resolution 853*, SC Res 853, UN SCOR, 48th sess, 3259th mtg, UN Doc S/RES/853 (29 July 1993); *Resolution 874*, SC Res 874, UN SCOR, 48th sess, 3292nd mtg, UN Doc S/RES/874 (14 October 1993); *Resolution 884*, SC Res 884, UN SCOR, 48th sess, 3313th mtg, UN Doc S/RES/884 (12 November 1993). On the 'territorial integrity' of Azerbaijan see *Cooperation between the United Nations and the Conference on Security and Cooperation in Europe*, GA Res 49/13, UN GAOR, 49th sess, 57th plen mtg, UN Doc A/RES/49/13 (15 November 1994); *Cooperation between the United Nations and the Organization for Security and Cooperation in Europe*, GA Res 57/298, UN GAOR, 57th sess, 79th plen mtg, Agenda Item 22(1), UN Doc A/RES/57/298 (6 February 2003). Cf *Universal Realization of the Right of Peoples to Self-Determination*, GA Res 61/150, UN GAOR, 61st sess, 81st plen mtg, Agenda Item 66, UN Doc A/RES/61/150 (14 February 2007).

statehood.¹⁵⁷ Where there were no territorial disputes between the new states, this policy was uncontroversial. However, continuing international recognition of internal Soviet borders does not reflect this fact.

It is submitted that international recognition of any of the four remaining putative states as successors to the Soviet Union cannot serve as the legal basis for territorial title. Nor can non-recognition be conclusive of their status. All four entities firstly fail the *Montevideo Convention's* objective criteria for statehood, since they remain 'puppet states' — they do not possess the crucial criterion of 'independence'.¹⁵⁸ Thus, Artsakh's claim to statehood is a faulty stratagem, since the international community may apply political pressure upon Azerbaijan to recognise Artsakh, but Azerbaijan may reject this pressure and refuse. The potential for stalemate through the principle of consent is reflected in the ability of losing belligerents to withhold recognition of the loss of disputed territory.¹⁵⁹ A current example is Serbia's refusal to recognise Kosovo's secession.¹⁶⁰

Thus, the issue is whether Armenia and Azerbaijan recovered their pre-1921 independence, or whether they became new states in the eyes of the international community via recognition. In the cases of Poland, India and the Baltic states, the successor states reverted to a legal identity pre-existing the intervening period.¹⁶¹ As seen above, this is the legal position adopted by Azerbaijan in order to avoid Soviet law and foster nationalism.¹⁶² If the doctrine of reversion operates, it removes the intervening Soviet jurisdiction for the determination of the frontier between the two states. If the doctrine of reversion does not operate, then pre-1920 Armenia and Azerbaijan in legal terms never existed — the paradigm is solely that of successors to the Soviet Union.

C Legal Consequences of 1918–20

If the doctrine of reversion operates, then the de facto statehood of the first Republics is relevant for the purpose of the common frontier between their successors. Under the doctrine of intertemporal law, which prevents retrospective application of law, traditional international law becomes applicable to the case. This recognises two applicable modes of acquisitive title: cession and conquest.¹⁶³ Right of conquest constituted a good basis for acquisitive title under

¹⁵⁷ Namely, Chechnya, Transdnistria, Artsakh, South Ossetia and Abkhazia. See Potier, above n 75.

¹⁵⁸ See *Island of Palmas* (1928) 2 RIAA 829. See also the dissenting opinion of Judge Anzilotti in *Customs Regime between Germany and Austria* [1931] PCIJ (Ser A/B) No 41, 57–8:

Independence ... is really no more than the normal condition of States according to international law; it may also be described as *sovereignty* (*suprema potestas*), or *external sovereignty*, by which is meant that the State has over it *no other authority than that of international law* (emphases added).

¹⁵⁹ See, eg, the Syrian refusal to negotiate over the status of the Israeli-occupied Golan Heights: Korman, above n 139, 266–7.

¹⁶⁰ See Christopher J Borgen, 'Kosovo's Declaration of Independence: Self-Determination, Secession and Recognition' (29 February 2008) *American Society of International Law Insights* <<http://www.asil.org/insights/2008/02/insights080229.html>> at 23 May 2008.

¹⁶¹ Brownlie, above n 80, 640; Charles Alexandrowicz, 'New and Original States: The Issue of Reversion to Sovereignty' (1969) 45 *International Affairs* 465; Subhash Jain, 'Reversion to Sovereignty: An Inquiry' (1969) 9 *Indian Journal of International Law* 525.

¹⁶² See Suny, above n 64, 38–43.

¹⁶³ Korman, above n 139, 17.

customary international law, by which a state's occupation of a disputed territory, with intent to extend its jurisdiction over that territory, could constitute a legal basis for annexation.¹⁶⁴

Although at the beginning of the 20th century a shift from conquest to self-determination to determine a territory's political status may have begun,¹⁶⁵ following the Great War, states refused to abandon conquest as a legal basis for acquisitive title.¹⁶⁶ It was not until the advent of the *UN Charter* following World War II that conquest became an unlawful basis for title per se, although that has not prevented states from occupying and justifying the annexation on alternative legal bases.¹⁶⁷

As seen above, Artsakh, Zangezour and Nakhichevan remained disputed territories until January 1920, whereupon it was clear that their status would not be settled at the Paris Peace Conference as anticipated.¹⁶⁸ Whilst it is arguable that territorial dispositions of the victorious Allied Powers following the Great War established self-determination as a legal basis for title,¹⁶⁹ the principle was rarely applied. Armenia could plead conquest as a legal basis by the fact of its occupation and subsequent undisputed sovereignty from April to July 1920. Due to the collapse of Azerbaijan, a peace treaty of cession was never concluded. However, Armenia could base its claim on the other modes of annexation: proclamations of annexation and performance of state functions.

The Azeri case for conquest would be argued on the basis of Sultanov's regime. However, this is problematic because the regime was temporary and expressly conditional upon resolution of the territory's final status at the Paris Peace Conference, and so cannot be relied upon as a legal basis for title. Thus, Armenia could claim to have had an inchoate title that 'revived' upon independence in 1991, whereas Azerbaijan would have to counterclaim that the status of the province was merely disputed.

D *Proposed Legal Basis for Adjudication of Territorial Title*

As seen above, good title can arise in the modern system by three acquisitive modes: cession, acquiescence and adjudication. Cession would involve bilateral agreement between Armenia and Azerbaijan concerning determination of their common frontier, which the OSCE Co-Chairs propose be done by plebiscite.¹⁷⁰ Acquiescence involves the failure by a state to assert a claim to title over a territory when it can reasonably be expected to do so.¹⁷¹ This section submits that the first appears unlikely given the mutual political intransigence as to the territory's final status; that the second may operate for Nakhichevan and Zangezour but not Artsakh; and proposes that the third be adopted as the most practical mode for resolution of this dispute. Given the deadlock in political

¹⁶⁴ The modes of annexation were compulsory treaty of cession, proclamation of annexation, and performance of state functions in the conquered territories: *ibid* 123–31.

¹⁶⁵ *Ibid* 135–6.

¹⁶⁶ *Ibid* 149–50, 161.

¹⁶⁷ *Ibid* 303–4.

¹⁶⁸ *Treaty of Sevres*, above n 53, art 92.

¹⁶⁹ See Korman, above n 139, 135.

¹⁷⁰ OSCE Minsk Group Co-Chairs, above n 123.

¹⁷¹ *Temple of Preah Vihear (Cambodia v Thailand) (Judgment)* [1962] ICJ Rep 6, 25.

dialogue, which shows every sign of continuing into the near future, it is submitted that the third means of awarding good title is more amenable to the political mood of confrontation dominant in the two countries. The task is therefore to explore legal bases for an adjudicated award of territorial title.

1 *Unilateral Self-Determination*

In the adjudication context, the first model that can most easily be discarded is that currently advocated by Armenia, namely, that the NKR be declared an independent state. Under international law, there is no general right of a 'people' to secede from the parent state outside of the constitutional framework of that state.¹⁷² Although the case of *Reference re Secession of Québec* suggests that there exists a specific right in an instance of alien subjugation,¹⁷³ there has hitherto been no evidence of state practice concerning such a right. Moreover, the proposition is problematic because the Supreme Court of Canada never identified *who* is to identify when the right is engaged, and how.

Whilst Armenia could rely upon the *Western Sahara* opinion¹⁷⁴ as support for its claim of unilateral self-determination, this would be dubious because the NKR does not satisfy the factual criteria for statehood by asserting independent control over its territory. Moreover, the *Western Sahara* opinion was decided in the context of decolonisation, a distinct context to secession from a federative state.

2 *Uti Possidetis*

The second model is on the basis of *uti possidetis*, a principle which operates upon possession at the time of secession and would render the territory part of Azerbaijan.¹⁷⁵ It was first applied in the decolonisation of South America, where the successors to the Spanish Empire expressly agreed *inter se* that each new state acquired sovereign title over those territories it possessed. Thus, colonial administrative boundaries — often highly obscure over unexplored lands — became international frontiers, despite never being conceived of as such.¹⁷⁶ This was for two policy reasons: to forestall violent territorial disputes by committing to pacific resolution of boundary disputes and to deter European powers from colonising territory *terra nullius*.¹⁷⁷ This novel application of *uti possidetis* produced a regional custom binding upon Spanish South America.¹⁷⁸ The key factor is that this arose by common agreement, conforming to the general

¹⁷² *Reference re Secession of Québec* [1998] 2 SCR 217.

¹⁷³ *Ibid* 285.

¹⁷⁴ *Western Sahara (Advisory Opinion)* [1975] ICJ Rep 12.

¹⁷⁵ The principle was originally one of Roman law, whereby the order of the praetor forbade the disturbance of immovable property in possession: Eduardo Jiménez de Aréchaga, 'Boundaries in Latin America: *Uti Possidetis* Doctrine' in Rudolf Bernhardt (ed), *Encyclopedia of Public International Law* (1992) vol 1, 449, 450.

¹⁷⁶ Malcolm Shaw, 'Peoples, Territorialism and Boundaries' (1997) 8 *European Journal of International Law* 478, 489–90.

¹⁷⁷ *Land Island and Maritime Frontier Dispute (El Salvador v Honduras) (Judgment)* [1992] ICJ Rep 351, 386–7.

¹⁷⁸ Brazil asserted a variation of the principle. See Malcolm Shaw, 'The Heritage of States: The Principle of *Uti Possidetis Juris* Today' (1996) 67 *British Yearbook of International Law* 75, 100.

principle that the determination of frontiers lies within the exclusive competence of the states concerned.

The second instance of *uti possidetis* was in the decolonisation of Africa. The new states agreed to apply both external borders between colonies and internal borders within each colony as the basis for their new frontiers.¹⁷⁹ The arbitrariness of these geometric lines was noted by Judge Ajibola in his separate opinion in *Territorial Dispute (Libya v Chad)*.¹⁸⁰ Nonetheless, the successors by their agreement to apply *uti possidetis* rendered that principle a regional custom, which has generally been applied to African territorial disputes.¹⁸¹ Again, the crucial factor was common agreement between the states concerned.

On the basis of these two regional customs, some commentators assert that *uti possidetis* now constitutes a general international custom in state succession.¹⁸² The claim is based upon *Frontier Dispute (Burkina Faso v Mali)*¹⁸³ and the Second Opinion of the Badinter Arbitration Commission.¹⁸⁴ However, it is doubtful that either the former, in which the ICJ was at pains to show that a regional custom in decolonisation could also be applied elsewhere,¹⁸⁵ or the latter, resulting in the Commission (leaving aside jurisdictional difficulties) being accused of opaque and dubious legal technique,¹⁸⁶ constitutes a solid interpretive basis for a universally binding international custom.

On the contrary, modern state practice in the two cases of secession from a federative state with territorial disputes points in another direction. In the collapse of the former Yugoslavia, the belligerent states clearly did not apply *uti possidetis* and the Commission had no jurisdiction to impose the principle without their consent.¹⁸⁷ Moreover, the absence of consent amongst the successors to the Soviet Union is highly significant because even if *uti possidetis* applies generally, the 'persistent objector' rule would preclude it here in light of the conduct of Armenia and Russia.

In the *Alma Ata Declaration* of 21 December 1991,¹⁸⁸ *uti possidetis* is entirely absent, unlike in similar instruments in South America and Africa.¹⁸⁹ Professor Shaw asserts that

while these instruments do not specifically differentiate between *uti possidetis* as turning internal boundaries into international boundaries ... it is clear that the intention was to assert an *uti possidetis* doctrine, not least since this would

¹⁷⁹ *Border Disputes among African States*, Organisation of African Unity, Assembly of Heads of State and Government, 1st ord sess, OAU Doc AHG/RES.16(I) (17–21 July 1964).

¹⁸⁰ (*Judgment*) [1994] ICJ Rep 6, 52–3 (Separate Opinion of Judge Ajibola).

¹⁸¹ Shaw, above n 178, 494.

¹⁸² *Ibid* 495–6.

¹⁸³ (*Judgment*) [1986] ICJ Rep 554, 565–7.

¹⁸⁴ *Opinion No 2 of the Arbitration Commission of the Peace Conference on Yugoslavia*, 31 ILM 1497 (1992).

¹⁸⁵ *Frontier Dispute (Burkina Faso v Mali) (Judgment)* [1986] ICJ Rep 554, 565–7.

¹⁸⁶ Steven Ratner, 'Drawing a Better Line: *Uti Possidetis* and the Borders of New States' (1996) 90 *American Journal of International Law* 590, 604.

¹⁸⁷ Craven, above n 135, 385–90.

¹⁸⁸ *Alma Ata Declaration*, 31 ILM 138 (1992) (signed and entered into force 21 December 1991).

¹⁸⁹ Shaw, above n 178, 98, 103, 110.

provide international and regional (as well as crucial national) legitimacy for the new borders.¹⁹⁰

This assertion cannot be sustained in light of the conduct of the successors. Whilst the *Alma Ata Declaration* mentioned ‘territorial integrity’, this principle is distinct from *uti possidetis*. The latter is a mechanism that *can* determine where the border is, while the former protects that border after determination.¹⁹¹

The oft repeated justification for *uti possidetis* is, according to the ICJ, ‘to prevent the independence and stability of new states being endangered by fratricidal struggles’.¹⁹² War, however, has inexorably come with a decision made against the wishes of the inhabitants of the province concerned. Even in South America and Africa, where states consented to *uti possidetis* in order to prevent war, several have nonetheless occurred as a direct consequence of frustration of popular will.¹⁹³ Nationalistic aspirations within states that are created on geometric lines blind to history, geography or ethnicity, have forced a shift to self-determination to adjust territorial boundaries and prevent war.¹⁹⁴

3 *Self-Determination in the Interstate Context*

This leads to the third model of self-determination; namely, that of an interstate territorial dispute resolved on the basis of plebiscite in the territory concerned. Whilst this is proposed as the legal basis for settlement in the instant case, it remains problematic. The underlying legitimacy associated with the word arises because of democratic sensibilities — if the people of a given territory freely choose their own political status, this presumably results in peace and contentment. However, the determination of borders then becomes a matter of votes, which is not a panacea guaranteed to achieve ‘justice’.

The first problem is population: does an ‘indigenous people’ possess greater right to determine their homeland’s political status than other, ‘non-indigenous’ residents?¹⁹⁵ The Azeris would argue that self-determination ought to accord greater weight to their claims than the Armenians’ because the Azeris are the ‘indigenous’ people of the province, and vice versa.

¹⁹⁰ Ibid 110.

¹⁹¹ Ibid 152.

¹⁹² *Frontier Dispute (Burkina Faso v Mali) (Judgment)* [1986] ICJ Rep 554, 565.

¹⁹³ See, eg, *Arbitral Award Made by the King of Spain on 23 December 1906 (Honduras v Nicaragua) (Judgment)* [1960] ICJ Rep 192; *Land Island and Maritime Frontier Dispute (El Salvador v Honduras) (Judgment)* [1992] ICJ Rep 351; *Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v Nigeria) (Judgment)* [2002] ICJ 303; *Territorial Dispute (Libya v Chad) (Judgment)* [1994] ICJ Rep 6.

¹⁹⁴ See, eg, Bongfen Chem-Langhee, *The Paradoxes of Self-Determination in the Cameroon under United Kingdom Administration: The Search for Identity, Well-Being and Continuity* (2003) 172 on the plebiscites conducted in the territories of the British colony of Cameroon.

¹⁹⁵ For example, the ‘indigenous’ Abkhaz people of Abkhazia, who possess a distinctive culture, religion and language, became a minority in their own homeland as a result of colonisation. Even following the expulsion of the Georgian population, the Abkhaz constitute a mere plurality. Do the Abkhaz people possess greater right to determine Abkhazia’s status? This is a difficult problem where application of self-determination through participation of Georgian refugees in any plebiscite may prove unfeasible and provoke the resumption of hostilities at the local level: see Edward Mihalkalin, ‘The Abkhazians: A National Minority in Their Own Homeland’ in Tozun Bahcheli, Barry Bartmann and Henry Srebrnik (eds), *De Facto States: The Quest for Sovereignty* (2004) 143.

The second problem with self-determination is territorial delimitation. As the history of the conflict shows, the SSR of Azerbaijan altered the historic borders of the region. This leaves open the question of who should determine the status of these lands: the Armenians who were removed; the Kurds and Azeris who were brought in; or the Armenians who have resettled since the ceasefire?¹⁹⁶

The ‘doctrine of the critical date’ may prove decisive, since it freezes time so that any state actions or changes of circumstance following the ‘critical date’ are immaterial for the purpose of determining title. The doctrine has its origin in the *Island of Palmas* case where the arbiter fixed the date of a treaty as the critical date.¹⁹⁷ One candidate is the signing of the *Alma Ata Declaration* on 21 December 1991. Fixing the critical date at this point would leave three modes of acquisitive title: conquest, *uti possidetis* and self-determination. The preferred avenue is self-determination, since, despite practical problems of implementation, its reliance upon democratic consultation rather than conquest holds more promise for a lasting solution to the dispute.

4 *Co-sovereignty*

There remains one creative but impractical solution to the dispute at hand: co-sovereignty. Precedents include the agreements regarding Andorra¹⁹⁸ and Monaco.¹⁹⁹ However, it has been dismissed as unrealistic because of its rejection in the only other cases where it has been mooted on the grounds that it contravened the wishes of the inhabitants, which would not be conducive to the goal of a lasting peace.²⁰⁰ This has a superficial attractiveness in that it would aid the reconciliation process between Armenia and Azerbaijan, as well as ensure that both states are seen to save face. However, it is unlikely to be politically acceptable.

E *Impact on Territorial Sovereignty in International Law*

How should self-determination be applied, and what would be the implications for international law? As discussed above, the scope of self-determination is constrained to ‘internal’ self-determination. It does not yet equate to a *general* right to ‘external’ self-determination to determine the political status of one’s territory.²⁰¹ Whilst the current status of Kosovo may indicate a shift towards state violation of ‘internal’ self-determination giving rise to ‘external’ self-determination, such a principle is not yet an international custom.²⁰²

¹⁹⁶ Similar problems arise in the context of *uti possidetis* since although that principle has the benefit of a drawn line, administrative, military and ecclesiastical lines may conflict: see *Land Island and Maritime Frontier Dispute (El Salvador v Honduras) (Judgment)* [1992] ICJ Rep 351, 380.

¹⁹⁷ *Island of Palmas* (1928) 2 RIAA 829.

¹⁹⁸ Crawford, *The Creation of States*, above n 85, 76.

¹⁹⁹ *Ibid* 72. See also *Land Island and Maritime Frontier Dispute (El Salvador v Honduras) (Judgment)* [1992] ICJ Rep 351.

²⁰⁰ See, eg, Gibraltar and the Falklands in Musgrave, above n 93, 249–51.

²⁰¹ See *Reference re Secession of Québec* [1998] 2 SCR 217.

²⁰² See Borgen, above n 160.

Another analytical method of utilising self-determination is to curtail such a right to state succession to a federative state. This is attractive because it provides solutions to the problems encountered in the Yugoslav and Soviet succession cases. Whilst this may raise fears that the principle could extend to other contexts,²⁰³ these concerns could be allayed by curtailing the principle to particular factual situations. Self-determination would operate within the doctrine of reversion: following the secession of Armenia and Azerbaijan from the Soviet Union, they reverted to their former statehood. The Artsakh territorial dispute was likewise revived, whereby an adjudicator could order that sovereignty be determined by referendum as the mode for determination of title.

How could such a solution affect other territorial disputes? Firstly, the principle of sovereignty underpinning the international legal system requires that the parties to each dispute either agree through negotiation or submit the case to adjudication. Thus, this model would be applicable to South Ossetia, Abkhazia and Transdniestra, since they are de facto parts of Russia.

Self-determination is no panacea, and like any other tool requires a particular context to be effective. It is submitted that permitting the people of a territory to decide their own status is more likely to eventuate in peace between states and peoples than relying upon a principle based upon conquest, which favours frontiers 'drawn with little or no consideration for those factors of geography [or] ethnicity ... that played a part in boundary determinations elsewhere' so that boundaries in Africa 'are patently even more artificial than elsewhere, since most of them are merely straight lines traced on the drawing board with little relevance to the physical circumstances on the ground'.²⁰⁴

V CONCLUSIONS

This article makes the following conclusions regarding the legal aspects of the Artsakh conflict: first, Armenia existed as a de jure independent state and Azerbaijan existed de facto, prior to their conquest by the Soviet Union in 1920. During that period of independence, the two states disputed territorial title to three regions: Zangezur, Nakhichevan and Artsakh.

In 1991, the Union Republics seceded from the Soviet Union. Despite their procedural unlawfulness under Soviet law, the Soviet Union recognised the secessions, which served as the requisite legal basis for the statehood of Armenia and Azerbaijan. However, no such recognition was afforded to the claims of Artsakh and the other autonomous regions to secession. The *Soviet Law on Secession 1990* does not consequently serve as a legal basis for their claims to statehood.

There is no general right of a territory to unilaterally secede from a parent state under international law. Thus, there is no legal basis for the claim that Artsakh exercised a right to self-determination that gave rise to a right to unilateral secession from the Soviet Union. As successor states to the Soviet Union in 1991, Armenia and Azerbaijan reverted to their pre-1920 independence. The two states disputed title to three territories, which likewise revived in 1991.

²⁰³ Musgrave, above n 93, 103.

²⁰⁴ *Territorial Dispute (Libya v Chad) (Judgment)* [1994] ICJ Rep 6, 52–3 (Separate Judgment of Judge Ajibola).

The legal dispute is, therefore, not one of the Artsakh region's secession from the Soviet Union or Azerbaijan, but a territorial dispute between the independent states of Armenia and Azerbaijan for the territory of Artsakh. Under international law, recognition by third states does not serve as the legal basis for the common frontier between Armenia and Azerbaijan. Exclusive competence to determine that boundary, and thus settle the Artsakh dispute, lies with Armenia and Azerbaijan.

Under modern international law, the rule prohibiting the use of force as a means to resolve disputes means that there are effectively two modes of allocating that boundary: cession or adjudication. Given the lack of progress for a political solution, it is suggested that the states opt for a litigated solution.

Thus, the typical legal analysis of competing principles of territorial integrity and self-determination is incorrect. Artsakh was never part of independent Azerbaijan, which had no claim to territorial integrity, and Artsakh could not legally secede from the Soviet Union unilaterally. An international court or tribunal could apply three modes of acquisitive title: conquest in 1920, Soviet conquest and allocation to Azerbaijan (applying *uti possidetis*), and self-determination. It is submitted that self-determination is the least problematic solution to the instant case and for disputes in the context of succession to federative states.