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**Protracted conflicts in the GUAM area and their  
implications for international peace, security and  
development**

**The situation in the occupied territories of Azerbaijan**

**Letter dated 22 December 2008 from the Permanent  
Representative of Azerbaijan to the United Nations  
addressed to the Secretary-General**

On the instructions of my Government, I have the honour to transmit herewith the Report of the Legal Consequences of Armed Aggression by the Republic of Armenia against the Republic of Azerbaijan (see annex).

I should be grateful if you would have the present letter and its annex circulated as a document of the General Assembly, under agenda items 13 and 18, and of the Security Council.

*(Signed)* Agshin **Mehdiyev**  
Ambassador  
Permanent Representative



**Annex to the letter dated 22 December 2008 from the Permanent Representative of Azerbaijan to the United Nations addressed to the Secretary-General**

**REPORT ON THE LEGAL CONSEQUENCES OF THE  
ARMED AGGRESSION BY THE REPUBLIC OF ARMENIA  
AGAINST THE REPUBLIC OF AZERBAIJAN**

**I. Did the Republic of Armenia perpetrate an armed attack against the Republic of Azerbaijan in and around the Nagorny Karabakh region?**

**II. Can the Republic of Azerbaijan exercise a right of self-defence (under Article 51 of the UN Charter) against the Republic of Armenia at the present time?**

**A. International and Non-International Armed Conflicts**

1. It is necessary to distinguish between events entailing use of force in and around the Nagorny Karabakh region of the Republic of Azerbaijan before and after the emergence of Armenia and Azerbaijan as sovereign States. The critical date in any analysis of the use of unlawful force between Armenia and Azerbaijan is that of their independence towards the end of 1991 (see *infra* 9). There was of course much use of force in and around Nagorny Karabakh in the time-frame between 1988 and 1991, but that happened while both Armenia and Azerbaijan still constituted integral parts of the USSR. Instances of the use of force in and around Nagorny Karabakh in the days of the Soviet Union shed light on subsequent events and put them in a proper historical perspective. However, these incidents – even when marked by intensity and scale – must be legally subsumed under the heading of a non-international armed conflict raging within the borders of a single sovereign State.

2. Naturally, from the viewpoint of the fighter (and the civilian victims) on the ground, the fact that the same bloodletting by the same armed groups within the same territory carries one legal tag (non-international armed conflict) until a certain date, and a different legal tag (international armed conflict) thereafter, may appear to be artificial and even perplexing. But, legally speaking, there is a profound disparity between non-international (intra-State) armed conflicts and international (inter-State) armed conflicts, since they are regulated by divergent sets of rules. Shortly after the Republics of Armenia and Azerbaijan became independent (see *infra* 9), the Nagorny Karabakh conflict underwent a major metamorphosis. When the newly established Republic of Armenia intervened militarily on behalf of ethnic-Armenian local inhabitants of Nagorny Karabakh, the conflict changed from a non-international (intra-State) armed conflict into an international (inter-State) armed conflict. Thus, from the moment of post-independence clash between the two newly established Republics – once the Republic of Armenia perpetrated an armed attack against the Republic of Azerbaijan (see *infra* 16) – the conflict shifted gear from one legal regime (governing non-international armed conflicts) to another (pertaining to international armed conflicts).

3. The law of armed conflict is divided into *jus ad bellum* pertaining to the legality of war (as well as cognate issues) and *jus in bello* regulating the means and methods of warfare (otherwise known as

international humanitarian law (IHL)). As far as the international *jus ad bellum* is concerned, an unlawful use of force can only be unleashed by one sovereign State against another. The reason for that is quite simple. The Charter of the United Nations – while prohibiting the use (or threat) of force, whether or not it amounts to war (that is to say, interdicting also uses of force short of war) – addresses the issue exclusively in terms of inter-State force. Article 2(4) of the Charter proclaims: “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations”.<sup>1</sup>

4. The linchpin of Article 2(4) is that the injunction against the (threat or) use of force relates to the “international relations” between Member States. There is no parallel prohibition – either in the Charter or anywhere else in international law – banning recourse to force internally within the borders of a single State. Such intra-State force is always subjected to domestic regulation (in conformity with the national constitution and legislation in force), making the use of lawful force a monopoly of State instrumentalities. But internationally there is no *jus ad bellum* concerning non-international armed conflicts. International law does deal with multiple dimensions of *jus in bello* in the course of intra-State conflicts,<sup>2</sup> but it leaves aside questions pertaining to the *jus ad bellum* in such conflicts.

#### B. The Thrust and Repercussions of Article 2(4) of the Charter

5. When it comes to inter-State conflicts, international law addresses not only a host of topics apposite to the *jus in bello*,<sup>3</sup> but also the crucial issue of the *jus ad bellum*. Article 2(4) (quoted *supra* 3) is the mainstay of that *jus ad bellum*. In 1945, the provision of Article 2(4) was in several respects innovative: earlier there was only a renunciation of war as an instrument of national policy in the relations between Contracting Parties, and even that goes back only to the Kellogg-Briand Pact of 1928.<sup>4</sup> But, as underscored by the International Court of Justice (ICJ) in the *Nicaragua* Judgment of 1986, the norm enshrined in Article 2(4) can now be regarded as an embodiment of customary international law, and, as such, it obligates all States (whether or not they are Members of the United Nations).<sup>5</sup>

6. Moreover, the International Law Commission (ILC), in its commentary on the draft text of the 1969 Vienna Convention on the Law of Treaties, identified the Charter’s prohibition of the use of inter-State force as “a conspicuous example” of *jus cogens*.<sup>6</sup> The Commission’s position was quoted

<sup>1</sup> Charter of the United Nations, 1945, 9 *International Legislation* 327, 332 (M.O.Hudson ed., 1950).

<sup>2</sup> See, especially, Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1977, *The Laws of Armed Conflicts: A Collection of Conventions, Resolutions and Other Documents* at 775 (D.Schindler and J.Toman eds., 4<sup>th</sup> ed., 2004).

<sup>3</sup> See, especially, Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1977, *The Laws of Armed Conflicts*, *supra* note 2, at 711.

<sup>4</sup> General Treaty for Renunciation of War as an Instrument of National Policy (Kellogg-Briand Pact of Paris), 1928, 94 League of Nations Treaty Series 57, 63.

<sup>5</sup> Case Concerning Military and Paramilitary Activities in and against Nicaragua (Merits), [1986] Reports of the International Court of Justice 14, 99-100.

<sup>6</sup> Report of the International Law Commission to the General Assembly, 18<sup>th</sup> Session, [1966] II *Yearbook of the International Law Commission* 172, 247.

with apparent approval by the ICJ in the *Nicaragua* case.<sup>7</sup> What this means is that any treaty colliding head-on with the prohibition of the use of force will be invalidated by virtue of Articles 53 or 64 of the Vienna Convention.<sup>8</sup> If that is not enough, Article 52 of the Vienna Convention, relating to coercion of a State, prescribes: “A treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations”.<sup>9</sup> Already in 1973, the ICJ held in the *Fisheries Jurisdiction* case: “There can be little doubt, as is implied in the Charter of the United Nations and recognized in Article 52 of the Vienna Convention on the Law of Treaties, that under contemporary international law an agreement concluded under the threat or use of force is void”.<sup>10</sup> It follows that any treaty of cession, whereby an aggressor State purports to gain lawful title over a territory procured by unlawful force, is void *ab initio*.

7. Most scholars, when citing Article 2(4), accentuate the words “against the territorial integrity or political independence of any state” (see *supra* 3). Yet, it is necessary to bring to the fore the other limb in the same sentence: “or in any other manner inconsistent with the Purposes of the United Nations”. The upshot is that the prohibition is comprehensive, embracing all categories of inter-State use of force in the “international relations” between UN Member States, unless exceptionally permitted by the Charter. In the *Nicaragua* Judgment, the ICJ pronounced *tout cours* that Article 2(4) articulates the “principle of the prohibition of the use of force” in international relations.<sup>11</sup> The principle was presented by the Court in a non-restrictive, all-inclusive, fashion.

8. There are only two lawful exceptions to the UN Charter’s broad ban on the use of inter-State force, and both are prescribed in the Charter itself.<sup>12</sup> One exception is enforcement action taken (or authorized) by the Security Council in keeping with the powers vested in it under Chapter VII (and VIII) of the Charter (Articles 39 *et seq.*)<sup>13</sup> (see *infra* 55 *et seq.*). The other exception to the prohibition of the use of inter-State force relates to the exercise of the right of self-defence (Article 51) (see *infra* 12).

### C. The Status of Nagorny Karabakh as Part of the Territory of the Republic of Azerbaijan

9. The occupation by force of Nagorny Karabakh and its surrounding areas constitutes a flagrant breach by the Republic of Armenia of the “territorial integrity” of the Republic of Azerbaijan. The Republics of Armenia and Azerbaijan broke away from the USSR in September-October 1991. There is no question about their independent existence at least as from 8 December 1991, at which date a formal declaration was made at Minsk by Russia, Ukraine and Belarus that “the Union of Soviet

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<sup>7</sup> *Nicaragua* case, *supra* note 5, at 100.

<sup>8</sup> Vienna Convention on the Law of Treaties, 1969, [1969] *United Nations Juridical Yearbook* 140, 154.

<sup>9</sup> *Ibid.*, 153.

<sup>10</sup> *Fisheries Jurisdiction* case (Jurisdiction of the Court) (UK v. Iceland), [1973] *Reports of the International Court of Justice* 3, 14.

<sup>11</sup> *Nicaragua* case, *supra* note 5, at 100.

<sup>12</sup> The existence of these two exceptions is confirmed by the ICJ in its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, [1996] *Reports of the International Court of Justice* 226, 244.

<sup>13</sup> Charter of the United Nations, *supra* note 1, at 343 ff.

Socialist Republics as a subject of international law and a geopolitical reality no longer exists”.<sup>14</sup> Almost from their very inception, the Republics of Armenia and Azerbaijan committed themselves – like other Parties to the Alma Ata Declaration of 21 December 1991 – to: “Recognizing and respecting each other’s territorial integrity and the inviolability of existing borders”.<sup>15</sup> The 1993 Charter of the Commonwealth of Independent States (CIS) (to which they both belong) stresses, in Article 3, the principle of “inviolability of state frontiers, recognition of existing frontiers and renunciation of illegal acquisition of territories”.<sup>16</sup> Indubitably, a firm stand was taken by all the newly independent Republics of the CIS, to retain their former administrative (intra-State) borders as their inter-State frontiers following the dissolution of the USSR.<sup>17</sup>

10. The Security Council explicitly referred in Resolution 884 (1993) to “the conflict in and around the Nagorny Karabakh region of the Azerbaijani Republic”, while “*Reaffirming* the sovereignty and territorial integrity of the Azerbaijani Republic and of all other States in the region”, as well as “the inviolability of international borders”.<sup>18</sup> Similar language had been used earlier, especially in Resolution 853 (1993).<sup>19</sup> General Assembly Resolution 62/243 of 14 March 2008 is phrased along the same lines: “*Reaffirms* continued respect and support for the sovereignty and territorial integrity of the Republic of Azerbaijan within its internationally recognized borders”.<sup>20</sup>

11. These undertakings and resolutions are entirely in harmony with the general legal principle of *uti possidetis*: “after achieving independence existing delimitations acquire the protection of international law and any changes must be achieved peacefully without the use or threat of force”.<sup>21</sup> The obligation to settle international disputes amicably is embedded in Article 2(3) of the UN Charter: “All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered”.<sup>22</sup> Article 2(3) and Article 2(4) – two consecutive paragraphs in the same provision of the Charter – must be read together: when a dispute between States arises, the use of force is not a legally viable option (Article 2(4)), and the Parties are bound to settle their differences peacefully (Article 2(3)). If – immediately after independence – the Republic of Armenia wished to challenge the sovereignty of the Republic of Azerbaijan over Nagorny Karabakh, it should have done that by peaceful means instead of resorting to force.

#### D. Article 51 of the Charter

12. Article 51 of the UN Charter promulgates: “Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of

<sup>14</sup> Minsk Agreement, 1991, 31 *International Legal Materials* 143, *id.* (1992).

<sup>15</sup> Alma Ata Declaration, 1991, 31 *International Legal Materials* 147, 148 (1992).

<sup>16</sup> Charter of the Commonwealth of Independent States, 1993, 34 *International Legal Materials* 1279, 1283 (1995).

<sup>17</sup> See S.R.Ratner, “Drawing a Better Line: *Uti Possidetis* and the Borders of New States”, 90 *American Journal of International Law* 590, 597 (1996).

<sup>18</sup> Security Council Resolution 884 (1993), 48 *Resolutions and Decisions of the Security Council* 73, *id.* (1993).

<sup>19</sup> Security Council Resolution 853 (1993), 48 *Resolutions and Decisions of the Security Council* 71, *id.* (1993).

<sup>20</sup> General Assembly Resolution 62/243, Article 1 (14 March 2008).

<sup>21</sup> R.Mullerson, “The Continuity and Succession of States, by Reference to the Former USSR and Yugoslavia”, 42 *International and Comparative Law Quarterly* 473, 486 (1993).

<sup>22</sup> Charter of the United Nations, *supra* note 1, at 332.

the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security”.<sup>23</sup> In the *Nicaragua* Judgment, the ICJ construed the expression “inherent right” appearing in Article 51 as a reference to customary international law.<sup>24</sup> According to the Court, the framers of the Charter thereby acknowledged that self-defence was a pre-existing right of a customary nature, which they desired to preserve (at least in essence).<sup>25</sup>

13. The exercise of the right of self-defence is permitted in Article 51 only in response to an armed attack. It ought to be accentuated that the drafters of the Charter deliberately used different language *in pari materia* in three key clauses:

(i) Article 2(4) (quoted *supra* 3) – stating the overall prohibition – adverts to “the threat or use of force”.

(ii) Article 39 (quoted *infra* 56) – setting forth the powers of the Security Council – alludes to “any threat to the peace, breach of the peace, or act of aggression”.<sup>26</sup>

(iii) Article 51 (quoted *supra* 12) – whereby the exercise of the right of self-defence is admissible – coins the phrase “armed attack” (which is not to be confused with the definition of attacks employed in the context of hostilities within the purview of the *jus in bello*).<sup>27</sup>

Plainly, both Articles 2(4) and 39 cover not only actual use of force but also mere threats. Conversely, Article 51 does not mention threats. The exceptional resort to self-defence is contingent on the occurrence of an “armed attack”, which is rendered in French as “agression armée”, *i.e.*, armed aggression.

14. Since Article 2(4) forbids in generic terms “the threat or use of force”, and Article 51 allows taking self-defence measures specifically against an “armed attack”, a gap is discernible between the two stipulations.<sup>28</sup> Even if one glosses over mere threats of force, it is evident that not every unlawful use of force constitutes an armed attack. For an unlawful use of force to acquire the dimensions of an armed attack, a minimal threshold has to be reached. Solely an armed attack – as distinct from any use of force that is below that threshold – justifies self-defence in response. In a Resolution on Self-Defence, adopted by the *Institut de Droit International* in Santiago de Chile in 2007, it is stated: “An armed attack triggering the right of self-defence must be of a certain degree of gravity. Acts

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<sup>23</sup> Charter of the United Nations, *supra* note 1, at 346.

<sup>24</sup> *Nicaragua* case, *supra* note 5, at 94.

<sup>25</sup> *Ibid.*

<sup>26</sup> Charter of the United Nations, *supra* note 1, at 343.

<sup>27</sup> For the latter, see N.Melzer, *Targeted Killing in International Law* 270 (2008).

<sup>28</sup> See A.Randelzhofer, “Article 51”, 1 *The Charter of the United Nations: A Commentary* 788, 790 (B.Simma ed., 2<sup>nd</sup> ed., 2002).

involving the use of force of lesser intensity may give rise to countermeasures in conformity with international law”.<sup>29</sup>

15. There is no authoritative definition of an armed attack. Nonetheless, in 1974 the General Assembly adopted by consensus a Definition of Aggression, which is practically confined to armed aggression,<sup>30</sup> namely, the equivalent of an armed attack (see *supra* 13). The most egregious manifestations of aggression are listed in Article 3(a) and (b):

“(a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;

(b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State”.<sup>31</sup>

Undeniably, invasion or attacks by the armed forces of a foreign State, military occupation and bombardment – the highlights of Article 3(a)-(b) of the Definition – constitute armed attacks, triggering the right of self-defence in accordance with Article 51 and customary international law.<sup>32</sup> As far as invasion is concerned, this is strongly supported by the Separate Opinion of Judge Simma in the Congo/Uganda *Armed Activities* case of 2005.<sup>33</sup> As for occupation: “When territory has been occupied illegally, the use of force to retake it will be a lawful exercise of the right of self-defence”.<sup>34</sup>

16. The first armed attack by the Republic of Armenia against the Republic of Azerbaijan after the independence of the two Republics – an attack in which organized military formations and armoured vehicles operated against Azerbaijani targets – occurred in February 1992, when the town of Khojaly in the Republic of Azerbaijan was notoriously overrun.<sup>35</sup> Direct artillery bombardment of the Azerbaijani town of Lachin – mounted from within the territory of the Republic of Armenia – took place in May of that year.<sup>36</sup>

17. Armenian attacks against areas within the Republic of Azerbaijan were resumed in 1993, eliciting a series of four Security Council resolutions. It is noteworthy that in the first of these texts, Resolution 822 (adopted on 30 April 1993), the Security Council used the explicit term “invasion” in describing the attack against “the Kelbadjar district of the Republic of Azerbaijan” (although this was attributed

<sup>29</sup> *Institut de Droit International*, Resolution on Self-Defence, Article 5 (Santiago de Chile, 2007).

<sup>30</sup> See Article 1 of the Definition of Aggression, General Assembly Resolution 3314 (XXIX), 29(1) *Resolutions of the General Assembly* 142, 143 (1974).

<sup>31</sup> *Ibid.*

<sup>32</sup> See K.C.Kenny, “Self-Defence”, 2 *United Nations: Law, Policies and Practice* 1162, 1164 (R.Wolfrum ed., 1995).

<sup>33</sup> *Case Concerning Armed Activities on the Territory of the Congo (Congo v. Uganda)* (International Court of Justice, 2005), 45 *International Legal Materials* 271, 369 (2006).

<sup>34</sup> A.Aust, *Handbook of International Law* 229 (2005).

<sup>35</sup> See T. de Waal, *Black Garden: Armenia and Azerbaijan through Peace and War* 170 (2003).

<sup>36</sup> See Statement by the Ministry of Foreign Affairs of the Republic of Azerbaijan, annexed to a Letter from the Permanent Representative of Azerbaijan to the President of the Security Council (Doc. S/23926, 14 May 1992).

to “local Armenian forces”, see *infra* 18).<sup>37</sup> The Security Council then condemned, in Resolution 853 (adopted on 29 July 1993), “the seizure of the district of Agdam and of all other recently occupied areas of the Azerbaijani Republic”.<sup>38</sup> In Resolution 874 (adopted on 14 October 1993), the Council called for “withdrawal of forces from recently occupied territories”.<sup>39</sup> And in Resolution 884 (adopted on 13 November 1993), the Council condemned “the occupation of the Zangelan district and the city of Goradiz”.<sup>40</sup> In Resolution 62/243 of 2008, the General Assembly “*Demands* the immediate, complete and unconditional withdrawal of all Armenian forces from all the occupied territories of the Republic of Azerbaijan”.<sup>41</sup>

18. It is true that, in 1993, the Security Council was under the impression that there was, e.g., an “invasion of the Kelbadjar district of the Republic of Azerbaijan by local Armenian forces” (Resolution 822).<sup>42</sup> In Resolution 884, the Council even called “upon the Government of Armenia to use its influence to achieve compliance by the Armenians of the Nagorny Karabakh region of the Azerbaijani Republic” with earlier resolutions.<sup>43</sup> Yet, already in 1993, the UN Secretary-General stated to the Security Council: “Reports of the use of heavy weaponry, such as T-72 tanks, Mi-24 helicopter gunships and advanced fixed wing aircraft are particularly disturbing and would seem to indicate the involvement of more than local ethnic forces”.<sup>44</sup> Moreover, in the meantime, the Republic of Azerbaijan acquired on the ground – in early 1994 – irrefutable evidence (including military ID cards of Armenian servicemen, operational maps, and signed statements by captured personnel), confirming the participation in the hostilities within the territory of Azerbaijan of regular units of the armed forces of the Republic of Armenia, e.g., Motor-Rifle Regiment No. 555.<sup>45</sup>

19. The occupation of Nagorny Karabakh and surrounding areas, resulting from the invasion of the Republic of Azerbaijan by the Republic of Armenia, has remained in place until the present day. In all, approximately 20% of the entire territory of the Republic of Azerbaijan is currently occupied by armed forces of the Republic of Armenia. The deployment in 1998 of Armenian soldiers to the Kelbadjar district of the Republic of Azerbaijan (the specific subject of Security Council Resolution 822) was attested, for example, by the Final Report of the OSCE Observers of the Presidential Election in the Republic of Armenia.<sup>46</sup> The presence of Armenian conscripts in the Nagorny Karabakh region – as late as 2005 – is confirmed in a Crisis Group report on Nagorny Karabakh.<sup>47</sup>

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<sup>37</sup> Security Council Resolution 822 (1993), 48 *Resolutions and Decisions of the Security Council* 70, *id.* (1993).

<sup>38</sup> Security Council Resolution 853 (1993), *supra* note 19, at 71.

<sup>39</sup> Security Council Resolution 874 (1993), 48 *Resolutions and Decisions of the Security Council* 72, 73 (1993).

<sup>40</sup> Security Council Resolution 884 (1993), *supra* note 18, at 73.

<sup>41</sup> General Assembly Resolution 62/43, *supra* note 20, Article 2.

<sup>42</sup> Security Council Resolution 822 (1993), *supra* note 37, at 70.

<sup>43</sup> Security Council Resolution 884 (1993), *supra* note 18, at 73.

<sup>44</sup> Report of the Secretary-General Pursuant to the Statement of the President of the Security Council in Connection with the Situation Relating to Nagorny-Karabakh, para.10 (Doc. S/25600, 14 April 1993).

<sup>45</sup> The evidence is presented in a Letter from the Chargé d’Affaires of the Permanent Mission of Azerbaijan to the UN Secretary-General (with annexed photocopies) (Doc. S/1994/147, 14 February 1994).

<sup>46</sup> OSCE, Office for Democratic Institutions and Human Rights, Republic of Armenia Presidential Election Observation, Final Report, page 8 (Issued 9 April 1998).

<sup>47</sup> Crisis Group, Nagorno-Karabakh: Viewing the Conflict from the Ground at p. 9 (Europe Report No. 166, 14 September 2005).



20. When an armed attack occurs – through invasion or attacks by the armed forces of a foreign State, occupation and bombardment – the right of self-defence solidifies once and for all. This is important to keep in mind when successive rounds of fighting (punctuated by cease-fires) take place in the course of the same international armed conflict. It is wrong to appraise each round of combat as if it were a separate armed conflict (with a separate armed attack and a separate response by way of self-defence). The commission of the original armed attack must be considered to be the defining moment. Any acts taken thereafter by the victim of the armed attack must be seen as falling within the general scope of the exercise of the same right of self-defence, in response to the same armed attack. “The exception of self-defence, ... if accepted as valid, would legalize once and for all the initiatives taken to repulse the adversary by the State making it”.<sup>48</sup>

#### E. Conditions Not Mentioned in Article 51

21. In the *Nicaragua* case, the ICJ enunciated that Article 51 “does not contain any specific rule whereby self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in customary international law”.<sup>49</sup> In its 1996 Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the Court – quoting these words – added that “[t]he submission of the exercise of the right of self-defence to the conditions of necessity and proportionality is a rule of customary international law”, but “[t]his dual condition applies equally to Article 51 of the Charter, whatever the means of force employed”.<sup>50</sup> The two conditions of necessity and proportionality were reaffirmed by the ICJ in its Judgments in the 2003 *Oil Platforms* case,<sup>51</sup> and in the 2005 *Armed Activities* case.<sup>52</sup>

22. A discussion of the issue of proportionality in the setting of the Nagorny Karabakh conflict is premature at the present juncture. A proper analysis of proportionality depends on the form in which any hypothetical resumption of self-defence by the Republic of Azerbaijan (see *infra* 24) is actually manifested (if at all) in the future. In particular, this will be determined by the nature, scope and scale of such recourse to counter-force by the Republic of Azerbaijan against the Republic of Armenia, if and when it occurs.

23. As for necessity, the principal point is that “force should not be considered necessary until peaceful measures have been found wanting or when they clearly would be futile”.<sup>53</sup> For more than 15 years, the Republic of Azerbaijan has made efforts in good faith to resolve the Nagorny Karabakh conflict peacefully. There were direct negotiations conducted on various rungs of the political ladder – including the Presidential level – between the Republic of Azerbaijan and the Republic of Armenia. Additionally, there has been mediation under the aegis of the Organization for Security and

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<sup>48</sup> See J. Combacau, “The Exception of Self-Defence in U.N. Practice”, *The Current Legal Regulation of the Use of Force* 9, 21 (A. Cassese ed., 1986).

<sup>49</sup> *Nicaragua* case, *supra* note 5, at 94.

<sup>50</sup> Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, *supra* note 12, at 245.

<sup>51</sup> *Case Concerning Oil Platforms* (Iran v. United States) (International Court of Justice, 2003), 42 *International Legal Materials* 1334, 1361-1362 (2003).

<sup>52</sup> *Case Concerning Armed Activities on the Territory of the Congo*, *supra* note 33, at 306.

<sup>53</sup> O. Schachter, “The Right of States to Use Armed Force”, 82 *Michigan Law Review* 1620, 1635 (1984).

Cooperation in Europe (OSCE) [originally, Conference for Security and Cooperation in Europe (CSCE)], the so-called Minsk Process. Regrettably, the many years of expanded energy (not least, since 1994, by the Co-Chairmen of the Minsk Group) have not produced any tangible results. Surely, after more than a decade and a half of fruitless negotiations and mediation – which have merely left the Republic of Armenia in occupation of NK and surrounding areas – the Republic of Azerbaijan is entitled to draw a line in the sand: the condition of necessity has certainly been satisfied, indeed exhausted.

24. Immediacy has not been recognized by the ICJ as a condition to the exercise of the right of self-defence. By contrast, some scholars<sup>54</sup> believe that it is. All the same, immediacy does not present any real difficulty to the Republic of Azerbaijan in the present case, taking the view that, “although immediacy serves as a core element of self-defence, it must be interpreted reasonably”.<sup>55</sup> More specifically, the main factors here are:

(i) Time consumed by negotiations (designed to satisfy the condition of necessity) does not count.

(ii) The Republic of Azerbaijan actually commenced to exercise its right of self-defence as early as the summer of 1992 (shortly after the onset of the armed attack by the Republic of Armenia and without any undue time-lag). The fact that fighting was later suspended through acceptance of a cease-fire (*infra* 26) means that what is at balance today is not an initial invocation but a resumption of the exercise of the right of self-defence.

(iii) In any event, when an armed attack produces continuous effects (through occupation) – and in the time that lapsed since the start of the armed attack the victim does not sleep on its rights, but keeps pressing ahead with (barren) attempts to resolve the conflict amicably – the right of self-defence is kept intact, despite the long period intervening between the genesis of the use of (unlawful) force and the ultimate (lawful) stage of recourse to counter-force. The Republic of Azerbaijan – as the victim of an armed attack – retains its right of self-defence, and can resume exercising it as soon as it becomes readily apparent that prolonging the negotiations is an exercise in futility.

25. The duration of the right of self-defence is determined by the armed attack. “As long as the attack lasts, the victim State is entitled to react”.<sup>56</sup> By responding to the continued armed attack by Armenia, Azerbaijan will not be responding to an event that occurred in the early 1990s. It will be responding to a present reality.

#### F. Cease-Fire

26. As mentioned (*supra* 24), the right of self-defence in the Nagorny Karabakh conflict was invoked by the Republic of Azerbaijan from the very beginning (1992), although the Republic of Azerbaijan

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<sup>54</sup> See, e.g., Y.Dinstein, *War, Aggression and Self-Defence* 210 (4<sup>th</sup> ed., 2005); Akehurst’s *Modern Introduction to International Law* 316 (P. Malanczuk ed., 7<sup>th</sup> ed., 1997).

<sup>55</sup> T.D.Gill, “The Temporal Dimension of Self-Defence: Anticipation, Pre-emption, Prevention and Immediacy”, 11 *Journal of Conflict & Security Law* 361, 369 (2006).

<sup>56</sup> N.Ronzitti, “The Expanding Law of Self-Defence”, 11 *Journal of Conflict & Security Law* 343, 352 (2006).

failed at the time in its attempts to repel the Armenian armed attack. In the four resolutions, adopted in 1993 by the Security Council, the Council first demanded a cease-fire (in Resolutions 822 and 853), then called upon the Parties to make effective and permanent a cease-fire established between them (Resolution 874), and also condemned resumption of hostilities in violation of the cease-fire (Resolution 884).<sup>57</sup> A fragile cease-fire was finally put in place in May 1994. Yet, sporadic violations of the cease-fire have been perpetrated by the armed forces of the Republic of Armenia, along the Line of Contact (LOC), especially since 2003.

27. Fifteen-years old cease-fire calls by the Security Council are, of course, scarcely relevant to the present circumstances. Cease-fires, by their very nature, are no more than interludes. Indeed, it must not be forgotten that a prolonged cease-fire – in freezing lines extant at the moment when hostilities were suspended – plays into the hands of an aggressor State that gained ground through its armed attack. “In circumstances where the aggressor state has acquired control over territory pertaining *prima facie* to the defending state, a cease-fire would tend to entrench positions of control, and recovery through negotiations may prove a difficult, if not an impossible task”.<sup>58</sup> A cease-fire, even when long-standing, is not meant to last forever *qua* cease-fire. A cease-fire is merely supposed to be a springboard for diplomatic action: to provide “a breathing space for the negotiation of more lasting agreements”.<sup>59</sup> This is precisely what the Republic of Azerbaijan has been striving to accomplish all these years. But, once the Republic of Azerbaijan arrives at the firm conclusion that a peaceful settlement – based on withdrawal by the Republic of Armenia from Nagorny Karabakh and surrounding areas – is unattainable, it is entitled to terminate the cease-fire and resume the exercise of self-defence.

28. Evidently, the Republic of Armenia may still forestall such developments by putting a prompt end to the occupation of Nagorny Karabakh and surrounding areas. Should the Republic of Armenia do this while the cease-fire lasts, and before the Republic of Azerbaijan opts to re-invoke its right of self-defence, there would be no ground for any actual resumption of hostilities. Irrespective of a prognosticated Armenian withdrawal, the Parties to the conflict would still have to resolve outstanding issues of State responsibility. But, if the Armenian occupation of Nagorny Karabakh and surrounding areas were to be terminated, any reason for the use of counter-force by the Republic of Azerbaijan against the Republic of Armenia will have disappeared.

#### G. Military Intervention by Third States

29. Since (in the early days of the Nagorny Karabakh conflict) threats of military intervention seem to have been made by third States on behalf of both the Republic of Armenia and the Republic of

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<sup>57</sup> Security Council Resolution 822 (1993), *supra* note 37, at 70; Security Council Resolution 853 (1993), *supra* note 19, at 71; Security Council Resolution 874 (1993), *supra* note 39, at 72; Security Council Resolution 884 (1993), *supra* note 18, at 73.

<sup>58</sup> K.H.Kaikobad, “‘*Jus ad Bellum*’: Legal Implications of the Iran-Iraq War”, *The Gulf War of 1980-1988* 51, 64-65 (I.F.Dekker and H.H.G.Post eds., 1992).

<sup>59</sup> S.D.Bailey, “Cease-Fires, Truces, and Armistices in the Practice of the UN Security Council”, 71 *American Journal of International Law* 461, 469 (1977).

Azerbaijan,<sup>60</sup> it is appropriate to consider the legal implications of such a potential intervention. When one posits an armed attack committed by the Republic of Armenia against the Republic of Azerbaijan (see *supra* 16-19, *infra* 47), the rules of international law are as follows:

(i) Third States are forbidden by international law to intervene militarily in favour of the Republic of Armenia against the Republic of Azerbaijan. Any such military intervention (in support of a State which has mounted an armed attack against another State) will itself be deemed an armed attack against the Republic of Azerbaijan.

(ii) By contrast, in conformity with Article 51 of the Charter (quoted *supra* 12), the right of self-defence can be exercised “collective”ly by any third State. What this means is that (as stated by the ICJ in the *Nicaragua* case):

“for one State to use force against another, on the ground that that State has committed a wrongful act of force against a third State, is regarded as lawful, by way of exception, only when the wrongful act provoking the response was an armed attack”.<sup>61</sup>

And the corollary:

“States do not have a right of ‘collective’ armed response to acts which do not constitute an ‘armed attack’”.<sup>62</sup>

So, since an armed attack was committed by the Republic of Armenia against the Republic of Azerbaijan, a third State can exercise its own right of (collective) self-defence against the Republic of Armenia (and only against the Republic of Armenia).

30. Nevertheless, the ICJ held:

“There is no rule in customary international law permitting another State to exercise the right of collective self-defence on the basis of its own assessment of the situation. Where collective self-defence is invoked, it is to be expected that the State for whose benefit this right is used will have declared itself to be the victim of an armed attack”.<sup>63</sup>

Furthermore, according to the ICJ, a request for help from a third State has to be extended by the direct victim of the armed attack: in the absence of such a request, collective self-defence by the third State is excluded.<sup>64</sup> In the *Oil Platforms* case, the Court reiterated this requirement of a request that has to be made to the third State by the direct victim of the armed attack.<sup>65</sup>

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<sup>60</sup> See N. Stürchler, *The Threat of Force in International Law* 305 (2007).

<sup>61</sup> *Nicaragua* case, *supra* note 5, at 104.

<sup>62</sup> *Ibid.*, 110.

<sup>63</sup> *Ibid.*, 104.

<sup>64</sup> *Ibid.*, 105.

<sup>65</sup> *Case Concerning Oil Platforms*, *supra* note 51, at 1355.

31. In his Dissenting Opinion in the *Nicaragua* case, Judge Jennings doubted whether the prerequisite of “some sort of formal declaration and request” by the direct victim of the armed attack (a declaration that it is under an armed attack and a request for assistance) is realistic in all instances.<sup>66</sup> Judge Jennings conceded: “Obviously the notion of collective self-defence is open to abuse and it is necessary to ensure that it is not employable as a mere cover for aggression disguised as protection”.<sup>67</sup>

32. One thing is clear: if a third State sends troops into the territory of the direct victim of the armed attack (in this case, the Republic of Azerbaijan), uninvited yet allegedly in order to offer military assistance against the armed attack underway by the attacking State (the Republic of Armenia), this will be viewed as another armed attack against the Republic of Azerbaijan, this time by the third State. No matter what the real intentions of the third State are, it is not entitled to dispatch troops into the territory of the Republic of Azerbaijan without the latter’s consent. On the contrary, the third State does have the right to take forcible action against the Republic of Armenia, in response to its armed attack against the Republic of Azerbaijan, in exercise of the collective right of self-defence conferred directly on the third State by both Article 51 and customary international law. Still, the third State can proceed into action against the Republic of Armenia only in a manner consistent with the sovereign rights of the Republic of Azerbaijan. Differently put, the collective right of self-defence of the third State against the Republic of Armenia must be exercised without infringing upon the rights of the Republic of Azerbaijan.

### **III. What are the conditions under which individuals in Nagorny Karabakh may be held to have acted as *de facto* organs of the Republic of Armenia?**

33. The armed attack by the Republic of Armenia against the Republic of Azerbaijan is not limited to straightforward military action by regular armed forces (taking the shape of a direct invasion or attacks by such forces, occupation and bombardment; see *supra* 15). An armed attack can as well ensue in two indirect ways:

- (i) The cross-border launch of armed bands or irregular troops by and from one State against another.
- (ii) The use of *de facto* organs of the attacking State.

Both of these indirect types of forcible intervention play important roles in the armed attack by the Republic of Armenia against the Republic of Azerbaijan.

#### **A. Armed Bands**

34. In the *Nicaragua* case, the ICJ pronounced that “it may be considered to be agreed that an armed attack must be understood as including not merely action by regular armed forces across an

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<sup>66</sup> *Nicaragua* case, *supra* note 5, at 544-545.

<sup>67</sup> *Ibid.*, 544.

international border”, but also the dispatch of armed bands or “irregulars” into the territory of another State.<sup>68</sup> The Court quoted Article 3(g) of the General Assembly consensus Definition of Aggression:

“(g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein”.<sup>69</sup>

The ICJ specifically took paragraph (g) of Article 3 “to reflect customary international law”.<sup>70</sup> In the post-*Nicaragua* period, ICJ again has come back to rely on Article 3(g) in the *Armed Activities* case.<sup>71</sup> Interestingly, so far, Article 3(g) is the only clause of the Definition of Aggression expressly held by the ICJ to mirror customary international law.

35. It may be observed that, under the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations – adopted by consensus by the General Assembly in 1970 and generally regarded as an expression of customary international law – “every State has the duty to refrain from organizing or encouraging the organization of irregular forces or armed bands ... for incursion into the territory of another State”.<sup>72</sup>

36. The Judgment of the ICJ in the *Nicaragua* case adhered to the view that, “while the concept of an armed attack includes the dispatch by one State of armed bands into the territory of another State, the supply of arms and other support to such bands cannot be equated with armed attack”.<sup>73</sup> The ICJ did “not believe” that “assistance to rebels in the form of the provision of weapons or logistical or other support” rates as an armed attack.<sup>74</sup> These are much criticized sweeping statements. In his Dissenting Opinion, Judge Jennings expressed the view that, whereas “the mere provision of arms cannot be said to amount to an armed attack”, it may qualify as such when coupled with “logistical or other support”.<sup>75</sup> In another dissent, Judge Schwebel emphasized the words “substantial involvement therein” (appearing in Article 3(g) of the Definition of Aggression), which are incompatible with the language used by the majority.<sup>76</sup>

## B. “Auxiliaries” and Paramilitaries

37. Incontestably, numerous attacks against the Republic of Azerbaijan were mounted by ethnic Armenian inhabitants of Nagorny Karabakh. Since Nagorny Karabakh has become an occupied territory, it is necessary to note the position taken by the ICJ in the 2004 Advisory Opinion on the *Wall*. The ICJ held there that Article 51 has no relevance to attacks originating within occupied

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<sup>68</sup> *Ibid.*, 103.

<sup>69</sup> General Assembly Resolution 3314 (XXIX), *supra* note 30, at 143.

<sup>70</sup> *Nicaragua* case, *supra* note 5, at 103.

<sup>71</sup> *Case Concerning Armed Activities on the Territory of the Congo*, *supra* note 33, at 306.

<sup>72</sup> General Assembly Resolution 2625 (XXV), *25 Resolutions of the General Assembly* 121, 123 (1970).

<sup>73</sup> *Nicaragua* case, *supra* note 5, at 126-127.

<sup>74</sup> *Ibid.*, 104.

<sup>75</sup> *Ibid.*, 543.

<sup>76</sup> *Ibid.*, 349.

territories, adding however the caveat that no claim has been made in the *Wall* proceedings that the attacks “are imputable to a foreign State”.<sup>77</sup> In light of binding resolutions of the Security Council, adopted in the wake of the outrage of 9 September 2001, a number of Judges took exception to the legal assessment that an armed attack cannot be committed by non-State actors.<sup>78</sup> Without getting into that issue, it is important to emphasize the undisputed caveat. In the Nagorny Karabakh conflict, the argument of the Republic of Azerbaijan rests on the foundation that the attacks “are imputable to a foreign State”, namely, that they can be attributed to the Republic of Armenia. Attributability and imputability are synonymous terms in international law.<sup>79</sup>

38. It is a well-known phenomenon in the international domain that the *de jure* organs of a State “supplement their own action by recruiting or instigating private persons or groups to act as ‘auxiliaries’ while remaining outside the official structure of the State”, such “auxiliaries” being instructed to carry out particular “missions” in and against neighbouring countries.<sup>80</sup> Accordingly, when paramilitary persons or groups (militias or armed bands) perpetrate hostile acts against a local State, a paramount question is whether the actors conducted themselves as “auxiliaries” of a foreign State, in which case their acts can be attributed to the foreign State as acts of State. It must be underscored that the actors do not have to belong *de jure* to the foreign State’s governmental apparatus, since they may be considered its *de facto* organs.

39. In the *Nicaragua* Judgment, it was categorically stated that – when the “degree of dependence on the one side and control on the other” warrant it – the hostile acts of paramilitaries can be classified as acts of organs of the foreign State.<sup>81</sup> Yet, the ICJ held that it is not enough to have “general control by the respondent State over a force with a high degree of dependency on it”, because that does not mean that the State concerned “directed or enforced the perpetration” of breaches of international law.<sup>82</sup> “For this conduct to give rise to legal responsibility” of the State in question, “it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed”.<sup>83</sup>

40. The insistence on “effective control” by the foreign State over the local paramilitaries makes a lot of sense. Nevertheless, the proposition that “general control” does not amount to “effective control” – and that a close operational control is a *conditio sine qua non* – is, to say the least, debatable. In 1999, the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY), in the *Tadić* case, sharply assailed the *Nicaragua* prerequisite of close operational control – as an absolute

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<sup>77</sup> Advisory Opinion on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 2004, 43 *International Legal Materials* 1009, 1050 (2004).

<sup>78</sup> See (Dissenting) Declaration by Judge Buergenthal (*ibid.*, 1079) and Separate Opinions by Judges Higgins and Kooijmans (*ibid.*, 1063, 1072).

<sup>79</sup> See Starke’s *International Law* 176 (I.A. Shearer ed., 11<sup>th</sup> ed., 1994).

<sup>80</sup> Report of the International Law Commission, 53<sup>rd</sup> Session (2001), General Assembly Doc. A/56/10, at 43, 104.

<sup>81</sup> *Nicaragua* case, *supra* note 5, at 62.

<sup>82</sup> *Ibid.*, 64.

<sup>83</sup> *Ibid.*, 65.

condition of “effective control” – maintaining that it is inconsonant with both logic and law.<sup>84</sup> The ICTY Appeals Chamber said:

“control by a State over subordinate *armed forces or militias or paramilitary units* may be of an overall character (and must comprise more than the mere provision of financial assistance or military equipment or training). This requirement, however, does not go so far as to include the issuing of specific orders by the State, or its direction of each individual operation. Under international law it is by no means necessary that the controlling authorities should plan all the operations of the units dependent on them, choose their targets, or give specific instructions concerning the conduct of military operations and any alleged violations of international humanitarian law. The control required by international law may be deemed to exist when a State (or, in the context of an armed conflict, the Party to the conflict) has a role in *organising, coordinating or planning the military actions* of the military group, in addition to financing, training and equipping or providing operational support to that group. Acts performed by the group or members thereof may be regarded as acts of *de facto* State organs regardless of any specific instruction by the controlling State concerning the commission of each of those acts”.<sup>85</sup>

The ICTY Appeals Chamber added:

“Where the controlling State in question is an adjacent State with territorial ambitions on the State where the conflict is taking place, and the controlling State is attempting to achieve its territorial enlargement through the armed forces which it controls, it may be easier to establish the threshold”.<sup>86</sup>

The *Tadić* conclusion is that paramilitaries can act quite autonomously and still remain *de facto* organs under the overall control of the foreign State. The doctrine of overall control has been consistently upheld in successive ICTY judgments (both at the Trial and the Appeal levels) following the *Tadić* case.<sup>87</sup>

41. Notwithstanding the disagreement between the ICJ and the ICTY, it has to be appreciated that – even when setting the higher bar of close operational control – the ICJ took it for granted that, under certain circumstances, acts performed by paramilitaries can become acts of a foreign State. In the 2005 *Armed Activities* case, the ICJ regarded the attributability of an armed attack to a foreign State as the acid test.<sup>88</sup> What has to be considered, according to the Judgment, is whether conduct was carried out “on the instructions of, or under the direction or control of”, a given State.<sup>89</sup> The phrase quoted is borrowed from Article 8 of the ILC 2001 Draft Articles on Responsibility of States for Internationally Wrongful Acts, which reads:

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<sup>84</sup> *Prosecutor v. Tadić*, Judgment, ICTY Appeals Chamber, 1999, 38 *International Legal Materials* 1518, 1540-1545 (1999).

<sup>85</sup> *Ibid.*, 1545. Emphasis in the original.

<sup>86</sup> *Ibid.*

<sup>87</sup> For details, see E.La Haye, *War Crimes in Internal Armed Conflicts* 19 (2008).

<sup>88</sup> *Case Concerning Armed Activities on the Territory of the Congo*, *supra* note 33, at 306.

<sup>89</sup> *Ibid.*, 308.



“The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct”.<sup>90</sup>

42. Interestingly enough, in its commentary on Article 8 of the Draft Articles, the ILC relied on the “effective control” test in *Nicaragua* Judgment (which it quoted at some length) and linked the phrase “under the direction or control of” to the ICJ’s notion of “control”.<sup>91</sup> We have here a double mirror: the ILC reflects the ICJ’s terminology, and then the ICJ quotes the ILC.

43. The ILC was fully cognizant of the dissonance between the approaches taken by the ICJ and the ICTY. On the one hand, it seems to have fully endorsed the ICJ line by stating: “Such conduct will be attributable to the State only if it directed or controlled the specific operation”, as distinct from conduct “which escaped from the State’s direction or control”.<sup>92</sup> The reference to direction or control of a specific conduct, rather than the general or overall direction or control, is the telling point.<sup>93</sup> On the other hand, the ILC attempted to span the gap between the two conflicting schools of thought. First, it pointed out that the ICTY spoke in connection with individual criminal responsibility for breaches of IHL, whereas the ICJ dealt with a non-criminal case relating to State responsibility.<sup>94</sup> Secondly, the ILC stressed<sup>95</sup> a dictum from the *Tadić* Judgment that ultimately everything depended on the “degree of control”, which may “vary according to the factual circumstances of each case”, so that the *Nicaragua* “high threshold for the test of control” will not be required in every instance.<sup>96</sup> The ILC agreed: “Each case will depend on its own facts, in particular those concerning the relationship between the instructions given or the direction or control exercised and the specific conduct complained of”.<sup>97</sup> The ILC further explained: “In the text of article 8, the three terms ‘instructions’, ‘direction’ and ‘control’ are disjunctive; it is sufficient to establish any one of them”.<sup>98</sup>

44. The ICJ came back to the subject at some length in the *Genocide* case of 2007, where the previous (*Nicaragua*) position was endorsed and the *Tadić* criticism rejected.<sup>99</sup> All the same, the ICJ stated that the overall control test of the ICTY may be “applicable and suitable” when “employed to determine whether or not an armed conflict is international” (which was the issue in *Tadić*), but it cannot be presented “as equally applicable under the law of State responsibility for the purpose of determining ... when a State is responsible for acts committed by paramilitary units, armed forces

<sup>90</sup> Report of the International Law Commission, *supra* note 80, at 45.

<sup>91</sup> *Ibid.*, 105.

<sup>92</sup> *Ibid.*, 104.

<sup>93</sup> See A.J.J. de Hoogh, “Articles 4 and 8 of the 2001 ILC Articles on State Responsibility, the *Tadić* Case and Attribution of Acts of Bosnian Serb Authorities to the Federal Republic of Yugoslavia”, 72 *British Year Book of International Law* 255, 278 (2001).

<sup>94</sup> Report of the International Law Commission, *supra* note 80, at 106-107.

<sup>95</sup> *Ibid.*, 106.

<sup>96</sup> *Prosecutor v. Tadić*, *supra* note 84, at 1541.

<sup>97</sup> Report of the International Law Commission, *supra* note 80, 108.

<sup>98</sup> *Ibid.*

<sup>99</sup> *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia/Herzegovina v. Serbia/Montenegro) (International Court of Justice, 2007), 46 *International Legal Materials* 185, 287-288 (2007).

which are not among its official organs”.<sup>100</sup> The ICJ added that “the degree and nature of a State’s involvement in an armed conflict on another State’s territory which is required for the conflict to be characterized as international, can very well, and without logical inconsistency, differ from the degree and nature of involvement required to give rise to that State’s responsibility for a specific act committed in the course of the conflict”.<sup>101</sup> The ICJ again cited Article 8 of the ILC’s Draft Articles, once more underlining the importance of attributability.<sup>102</sup>

45. The *Genocide* Judgment did not lay to rest the dispute between the ICJ and the ICTY.<sup>103</sup> Yet, neither the ICJ nor the ICTY dealt with the issue of an armed attack. If one takes the *Genocide* case’s bifurcation between the question whether “a State’s involvement in an armed conflict on another State’s territory” is sufficient for the conflict to become international, and the question of State responsibility for specific acts, then the issue of an armed attack is closer to the former rather than to the latter. Furthermore, the ILC was right in stressing the significance of “the factual circumstances of each case”. When the factual circumstances show that tiers of command and control in the ostensibly separate structures of the paramilitaries and the foreign State are intermeshed to such an extent that it is practically impossible to disentangle them – so much so that officials routinely rotate, switching posts within the two hierarchies – the paramilitaries must be seen as “under the direction or control of” the foreign State.

46. A good authority for this thesis can be found in the 2000 Judgment of a Trial Chamber of the ICTY in the *Blaškić* case. Here the ICTY established Croatia’s overall control over paramilitary Croat forces fighting in Bosnia-Herzegovina, accentuating the phenomenon of sharing of personnel: senior Croatian officers voluntarily resigning from regular military service in order to serve in Bosnia-Herzegovina – with official authorization and acknowledgement of their being temporarily detached – while able to rejoin the ranks of the Croatian army at a later stage.<sup>104</sup>

47. In the case of the Republic of Armenia and the so-called “Nagorno Karabakh Republic” (“NKR”), the movement of personnel in leadership echelons between the supposedly separate entities has happened in an even more remarkable way and on the highest possible level. The two most egregious instances are those of the present and the previous Presidents of the Republic of Armenia. The present President, Serzh Sargsyan – elected in February 2008 – had started his career as Chairman of the “NKR Self-Defence Forces Committee”, a post which he left in 1993, in order to assume the mantle of Minister of Defence (and later Prime Minister) of the Republic of Armenia. His predecessor, Robert Kocharyan, was the first “President of the NKR”, from 1994 to 1997. He then became Prime Minister of the Republic of Armenia, and from 1998 to 2008 served as President. In such circumstances, it is (to say the least) a reasonable conclusion that the present *de jure* top organs of the Republic of Armenia were its *de facto* organs even while hoisting the banner of the “NKR”. After all, how can the Republic of Armenia credibly deny attributability of decisions taken and policies executed by two

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<sup>100</sup> *Ibid.*, 288.

<sup>101</sup> *Ibid.*

<sup>102</sup> *Ibid.*

<sup>103</sup> See A.Cassese, “The *Nicaragua* and *Tadić* tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia”, 18 *European Journal of International Law* 649-668 (2007).

<sup>104</sup> *Prosecutor v. Blaškić* (ICTY Trial Chamber, 2000), 122 *International Law Reports* 2, 54-55.

consecutive Heads of State in their previous incarnations as “President of NKR” and “Chairman of the NKR Self-Defence Forces Committee”? Those decisions and policies are clearly the reason why the two individuals were later rewarded by elevation to the Republic of Armenia’s top position. If the Republic of Armenia itself looks upon a leadership role in the “NKR” as a natural stepping-stone on the path of career-building within the Republic – there being no temporal interludes or other partitions creating temporal or other buffer zones and dividing the two purportedly separate entities – surely the Republic of Azerbaijan is entitled to consider the “NKR” a mere backyard of the Republic of Armenia, and regard the two as inseparable.

48. It may be remarked that, in view of the fact that the paramilitaries in and around the Nagorny Karabakh region of Azerbaijan can be considered *de facto* organs of the Republic of Armenia, there is no real need for the Republic of Azerbaijan to conduct any negotiations with the Nagorny Karabakh inhabitants of Armenian extraction as long as the occupation of Nagorny Karabakh by the Republic of Armenia lasts. Negotiations coming within the rubric of necessity as a condition to the exercise of the right of self-defence (see *supra* 23) have had to be carried out with the genuine adversary Party to the conflict, *i.e.*, the Republic of Armenia. Only after withdrawal by the Republic of Armenia from Nagorny Karabakh and surrounding areas will the time come for the Republic of Azerbaijan to resolve democratically the manner and structure of peacetime protection of the Armenian minority within its territory (including the possibility of the grant of internal autonomy and/or other guarantees ensuring respect for the rights of a national minority).

#### **IV. What is the role of the Security Council in the Nagorny Karabakh conflict?**

49. In Article 24(1) of the Charter, Member States “confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf”.<sup>105</sup> It is the function of the Security Council to decide or recommend what measures are to be taken in the discharge of its responsibility. Decisions, unlike recommendations, are binding on all Member States. Article 25 of the Charter is categorical:

“The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter”.<sup>106</sup>

As the ICJ stated, in its 1971 Advisory Opinion on *Namibia*, once a binding decision is adopted by the Security Council, all Member States of the UN must comply with it (whether or not they are members of the Council, and even if – assuming that they are non-Permanent Members of the Council – they voted against the resolution).<sup>107</sup>

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<sup>105</sup> Charter of the United Nations, *supra* note 1, at 339.

<sup>106</sup> *Ibid.*

<sup>107</sup> Advisory Opinion on *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, [1971] *Reports of the International Court of Justice* 16, 54.

## A. Article 51 of the Charter

50. Pursuant to Article 51, the Security Council has a special mandate. “In practice it is for every state to judge for itself, in the first instance, whether a case of necessity in self-defence has arisen”.<sup>108</sup> That is to say, a State resorting to counter-force in response to an armed attack – in the exercise of the right of self-defence – acts unilaterally, at its own discretion. There is no requirement of seeking in advance a green light from the Security Council, in order to resort to counter-force in self-defence. The acting State is the one to determine (unilaterally) when, where and how to employ counter-force in response to an armed attack. What Article 51 requires is that the self-defence measures taken be reported immediately to the Security Council. However, the pivotal point is that the report has to be sent to the Council after – not before – the self-defence measures have been undertaken by the acting State. The Security Council comes into the picture not in the first instance, but only subsequently.

51. The ICJ, in the *Nicaragua* case, held that “the absence of a report may be one of the factors indicating whether the State in question was itself convinced that it was acting in self-defence”.<sup>109</sup> Failure to report was also noted in the *Armed Activities* case.<sup>110</sup> While the consequences of such a failure may not be as grave as the ICJ envisioned in *Nicaragua*,<sup>111</sup> there is no doubt that a State resorting to self-defence exposes itself to a certain risk by not reporting to the Council.

52. Even when a report about recourse to self-defence is submitted to the Security Council, this is not the end of the matter. After all, each of the Parties to a conflict often claims to be acting in self-defence against an armed attack by its adversary. When both Parties do that, one of them must be wrong, since there is no self-defence against self-defence. Consequently, whereas in the first instance every State has a right to appraise for itself whether it is the victim of an armed attack (to which it responds with self-defence), there comes a second stage in which the competence to decide whether an armed attack has actually occurred – and by whom – passes to the Security Council.<sup>112</sup>

53. Once the second stage is reached, the Security Council is at a crossroads. The Council may adopt a binding decision, either endorsing the invocation of self-defence or rejecting it. Alternatively, the Council may do nothing, either by choice or by force of a political reality (chiefly, due to the use or the threat of the use of the veto power by one of its Permanent Members). A third option is that the Council will issue a (non-binding) recommendation as to what it thinks should be done.

54. Empirically, when fighting flares up between States, the Security Council rarely determines in a binding fashion who has initiated an armed attack and who is therefore entitled to exercise self-defence.<sup>113</sup> The Council usually prefers neither to identify the attacker nor to attribute

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<sup>108</sup> 1 Oppenheim’s *International Law* 422 (R.Jennings and A.Watts eds., 98<sup>th</sup> ed., 1992).

<sup>109</sup> *Nicaragua* case, *supra* note 5, at 105.

<sup>110</sup> *Case Concerning Armed Activities on the Territory of the Congo*, *supra* note 33, at 306.

<sup>111</sup> For details, see Dinstein, *supra* note 54, at 216-218.

<sup>112</sup> See S.A.Alexandrov, *Self-Defence against the Use of Force in International Law* 98 (1996).

<sup>113</sup> The best known case in which this happened is Resolution 83 (1950), in which the Security Council determined in a binding way that “the armed attack upon the Republic of Korea by forces from North Korea constitutes a breach of the peace”, recommending that Member States furnish assistance to the victim “to repel the armed attack”. 3 *Resolutions and Decisions of the Security Council* 20, *id.* (1950).

responsibility: instead, it calls on both Parties to cease fire, withdraw their forces and seek an amicable solution to the conflict.<sup>114</sup> A paradigmatic illustration of this tendency can be found in Resolutions 822 and 853 of 1993 as regards the the Nagorny Karabakh conflict.<sup>115</sup> However, ignoring a Security Council resolution may be hazardous, since the result may be that the Council will shift gear: moving from a soft language to a more determinative decision.

## B. Chapter VII of the Charter

55. The Security Council has a wider role to play under Article 39 *et seq.* of the Charter. Since Article 39 is the opening clause of Chapter VII of the Charter (devoted to “Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression”), this is usually called Chapter VII action. The idiom is maintained in this Report, although it must be noted that:

- (i) Article 51 is the closing provision of the Chapter, yet it is excluded from the discussion here.
- (ii) Some of the measures taken by the Security Council – when it authorizes (rather than ordains) enforcement action – is actually carried out in keeping with Chapter VIII (dealing with “Regional Arrangements”), specifically, Article 53(1).<sup>116</sup>

56. Article 39 of the Charter lays down:

“The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security”.<sup>117</sup>

As the text elucidates, the Security Council may adopt either (non-binding) recommendations or binding decisions. Recommendations may be identical to those adopted under Chapter VI.<sup>118</sup> The main consequence of a determination of “the existence of any threat to the peace, breach of the peace, or act of aggression” is that it may set the stage for the adoption by the Security Council of a binding decision (*supra* 49) initiating enforcement action.

57. The fact that the the Nagorny Karabakh conflict had endangered “peace and security in the region” was acknowledged by the Security Council in Resolutions 822, 853, 874 and 884 of 1993.<sup>119</sup> Nevertheless, the Council has not made a determination of the existence of a threat to the peace (or a breach of the peace or an act of aggression) in conformity with Article 39 (quoted *supra* 56). The

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<sup>114</sup> See C.Gray, *International Law and the Use of Force* 96-97 (2<sup>nd</sup> ed., 2004).

<sup>115</sup> Security Council Resolution 822 (1993), *supra* note 37, at 70; Security Council Resolution 853 (1993), *supra* note 19, at 71.

<sup>116</sup> Charter of the United Nations, *supra* note 1, at 347.

<sup>117</sup> *Ibid.*, 343.

<sup>118</sup> See B.Conforti, *The Law and Practice of the United Nations* 179 (2<sup>nd</sup> ed., 2000).

<sup>119</sup> Security Council Resolution 822 (1993), *supra* note 37, at 70; Security Council Resolution 853 (1993), *supra* note 19, at 71; Security Council Resolution 874 (1993), *supra* note 39, at 72; Security Council Resolution 884 (1993), *supra* note 18, at 73.

difference in practical terms between a threat to the peace (formally determined by the Council) and a situation that endangers peace (merely acknowledged by the Council) is admittedly unclear.<sup>120</sup> Equally, there is no obvious distinction between threat or danger to peace and security “in the region” and in the world at large. After all, there is no “hierarchy or subordination between peace and security on the global and regional level, as the two are of course closely linked”.<sup>121</sup> A fire lit regionally may easily spread globally.

58. The cardinal point is that the Security Council is the sole body competent under the Charter to adopt binding decisions entailing enforcement measures: if the Security Council fails to adopt such a binding decision (perhaps because of inability to surmount a veto by one of the Permanent Members), the General Assembly does not have the competence to become a substitute for the Council.<sup>122</sup>

59. When cease-fire is the issue, it is required to distinguish between a mere (non-binding) exhortation by the Security Council for the cessation of hostilities and a mandatory decision to the same effect (which the Parties to the conflict are obligated to observe). In recent years, the signal for the binding character of a Security Council decision has usually been a Preambular paragraph in the text stating unambiguously that the Council is acting under Chapter VII of the Charter.

60. The issue of a mandatory cease-fire is of essence if it is expected that the Parties to the conflict will leave the field of action in favour of the Security Council. It is important to keep in mind that, when the Security Council decides (let alone recommends) to take specific measures under Chapter VII, such a resolution by itself does not automatically halt any unilateral self-defence measures taken by a State in response to an armed attack.

61. Notwithstanding views to the contrary,<sup>123</sup> the correct analysis of the text of Article 51 leads to the conclusion that it is not enough for the Security Council to adopt just any Chapter VII resolution, in order to divest Member States of their right to continue concurrently a resort to force in self-defence, in response to an armed attack.<sup>124</sup> The right of self-defence, vested in the victim of an armed attack, “remains intact until the Council has *successfully* dealt with the controversy before it”.<sup>125</sup> And, basically, it is for the State acting in self-defence to evaluate whether the Council’s efforts have been crowned with success.<sup>126</sup> It follows that, if the Council really wishes the Parties to the conflict to disengage, it has no choice but to adopt a legally binding Chapter VII decision that impose a

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<sup>120</sup> See J.A.Frowein and N.Krisch, “Article 39”, 1 *The Charter of the United Nations: A Commentary*, supra note 28, at 717, 723.

<sup>121</sup> K.Wellens, “The UN Security Council and New Threats to the Peace: Back to the Future”, 8 *Journal of Conflict & Security Law* 15, 33 (2003).

<sup>122</sup> See T.Bruha, “Security Council”, 2 *United Nations: Law, Policies and Practice*, supra note 32, at 1147, 1148.

<sup>123</sup> See A.Chayes, “The Use of Force in the Persian Gulf”, *Law and Force in the New International Order* 3, 5-6 (L.F.Damrosch and D.J.Scheffer eds., 1991).

<sup>124</sup> See O.Schachter, “United Nations Law in the Gulf Conflict”, 85 *American Journal of International Law* 453, 458 (1991).

<sup>125</sup> See E.V.Rostow, “Until What? Enforcement Action or Collective Self-Defense?”, 85 *American Journal of International Law* 506, 511 (1991). Emphasis in the original.

<sup>126</sup> See L.M.Goodrich, E.Hambro and A.P.Simons, *Charter of the United Nations: Commentary and Documents* 352 (3<sup>rd</sup> ed., 1969).

mandatory cease-fire. Short of an explicit decree by the Council to desist from any further use of force, the State acting in self-defence retains its right to proceed with the forcible measures that it has chosen to pursue in response to the armed attack.

**V. Can responsible individuals in the Republic of Armenia be criminally accountable for acts of aggression against the Republic of Azerbaijan?**

**A. The Nuremberg Legacy**

62. The criminalization of war of aggression in a treaty in force was first accomplished in the Charter of the International Military Tribunal annexed to the 1945 London Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis.<sup>127</sup> Article 6(a) of the London Charter established the jurisdiction of the Tribunal over crimes against peace, defined as follows:

“planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing”.<sup>128</sup>

63. Article 6 specifically adds at its end:

“Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan”.

64. The London Charter served as the basis for the Nuremberg trial of the major Nazi war criminals. It also served as a model for the similar trial of the major Japanese war criminals in Tokyo. Article 5(a) of the Charter of the International Military Tribunal for the Far East (issued in a Proclamation by General D. MacArthur, in his capacity as Supreme Commander of the Allied Powers in the region) included a parallel definition of crimes against peace.<sup>129</sup>

65. In its Judgment of 1946, the International Military Tribunal (IMT) at Nuremberg held that Article 6(a) of the London Charter is declaratory of modern international law, which regards war of aggression as a grave crime.<sup>130</sup> Hence, the IMT rejected the argument that the provision of Article 6(a) amounted to *ex post facto* criminalization of the acts of the defendants, in breach of the *nullum crimen sine lege* principle.<sup>131</sup> The Tribunal declared:

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<sup>127</sup> Charter of the International Military Tribunal, Annexed to London Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, 1945, *The Laws of Armed Conflicts*, *supra* note 2, at 1253, 1255.

<sup>128</sup> *Ibid.*, 1256.

<sup>129</sup> Charter of the International Military Tribunal for the Far East, 1946, 14 *Department of State Bulletin* 361, 362 (1946).

<sup>130</sup> International Military Tribunal (*Nuremberg* trial), Judgment (1946), 1 *International Military Tribunal* (Blue Book Series) 171, 219-223.

<sup>131</sup> *Ibid.*, 219.

“Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced”.<sup>132</sup>

Elsewhere in its Judgment, the IMT said:

“War is essentially an evil thing. Its consequences are not confined to the belligerent States alone, but affect the whole world.

To initiate a war of aggression, therefore, is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole”.<sup>133</sup>

66. The Nuremberg criminalization of war of aggression was upheld, in 1948, by the International Military Tribunal for the Far East (IMTFE) at Tokyo.<sup>134</sup> It was also endorsed in other trials against criminals of World War II (WWII), most conspicuously in the *Ministries* case, in 1949, the last of the “Subsequent Proceedings” (held by American Military Tribunals at Nuremberg for the prosecution of mid-level Nazi war criminals).<sup>135</sup>

67. It is clear from the WWII case law that individual liability for crimes against peace can only be incurred by high-ranking persons, whether military or civilian. In the *High Command* case of 1948 (also a “Subsequent Proceedings” trial), an American Military Tribunal ruled that the criminality of aggressive war attaches only to “individuals at the policy-making level”.<sup>136</sup> In the *I.G. Farben* case of the same year (yet another “Subsequent Proceedings” trial), the Tribunal pronounced that it would be incongruous to charge the entire population with crimes against peace: only those persons in the political, military or industrial spheres who bear responsibility for the formulation and execution of policies can be held liable for crimes against peace.<sup>137</sup>

68. The limitation of individual accountability for the crime of aggression to leaders or organizers is clear also from the 1996 text of Article 16 of the Draft Code of Crimes against the Peace and Security of Mankind (quoted *infra* 77). It is today fully recognized that “the crime of aggression is necessarily committed by those decision-makers who have the capacity to produce those acts which constitute an ‘armed attack’ (as that term may be defined) against another state”.<sup>138</sup>

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<sup>132</sup> *Ibid.*, 223.

<sup>133</sup> *Ibid.*, 186.

<sup>134</sup> *In re Hirota and Others* (International Military Tribunal for the Far East, 1948), [1948] *Annual Digest and Reports of Public International Law Cases* 356, 362-363.

<sup>135</sup> *USA v. Von Weizsaecker et al.* (“*Ministries* case”) (Nuremberg, 1949), 14 *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10* (Green Book Series) 314, 318-22.

<sup>136</sup> *USA v. Von Leeb et al.* (“*High Command* case”) (Nuremberg, 1948), 11 *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10* 462, 486.

<sup>137</sup> *USA v. Krauch et al.* (“*I.G. Farben* case”) (Nuremberg, 1948), 8 *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10* 1081, 1124-1125.

<sup>138</sup> M.C.Bassiouni and B.B.Ferencz, “The Crime against Peace”, 2 *International Criminal Law* 313, 347 (M.C.Bassiouni, ed., 2<sup>nd</sup> ed., 1999).



69. This is not to say that penal responsibility for crimes against peace is reduced, even in a dictatorship, to one or two individuals at the pinnacle of power. As the Tribunal in the *High Command* case asserted: “No matter how absolute his authority, Hitler alone could not formulate a policy of aggressive war and alone implement that policy by preparing, planning and waging such a war”.<sup>139</sup>

70. What has to be done is sift the evidence concerning personal contributions to the decision-making process by all those who belong to leadership echelons. The Tribunal in the *High Command* case declined to fix a distinct line, somewhere between the private soldier and the Commander-in-Chief, where liability for crimes against peace begins.<sup>140</sup> The Judgment did articulate the rule that criminality hinges on the actual power of an individual to “shape or influence” the war policy of his country.<sup>141</sup> The phrase “shape or influence” is patently flexible, catching in its net not only those at the very top.<sup>142</sup>

71. Relevant leadership echelons are by no means curtailed to the armed services. Crimes against peace may equally be committed by civilians.<sup>143</sup> The prime example is that of members of the cabinet or senior government officials whose input is apt, at times, to outweigh that of generals and admirals. The majority of the defendants convicted at Nuremberg of crimes against peace were high-ranking civilians.

#### B. The Rome Statute of the International Criminal Court

72. Article 5(1)(d) of the 1998 Rome Statute of the International Criminal Court confers on the Court (ICC) subject-matter jurisdiction with respect, *inter alia*, to “the crime of aggression”.<sup>144</sup> However, Article 5(2) of the Statute defers action to a future time:

“The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations”.<sup>145</sup>

73. Articles 121 and 123 of the Rome Statute pertain to amendment and review procedures that will formally commence seven years after the entry into force of the Statute (2002).<sup>146</sup> The decision to postpone the definition of the crime of aggression was largely motivated by the fact that the Rome conference was unable to reach an agreement as to whether the ICC would be empowered to exercise

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<sup>139</sup> *High Command* case, *supra* note 136, at 486.

<sup>140</sup> *Ibid.*, 486-487.

<sup>141</sup> *Ibid.*, 488-489.

<sup>142</sup> See K.J.Heller, “Retreat from Nuremberg: The Leadership Requirement in the Crime of Aggression”, 18 *European Journal of International Law* 477, 486 *et seq.* (2007).

<sup>143</sup> See M.Greenspan, *The Modern Law of Land Warfare* 455-456 (1959).

<sup>144</sup> Rome Statute of the International Criminal Court, 1998, *The Laws of Armed Conflicts*, *supra* note 1, at 1314, 1315.

<sup>145</sup> *Ibid.*

<sup>146</sup> *Ibid.*, 1372-1373.

jurisdiction in the absence of a Security Council determination that an act of aggression has occurred.<sup>147</sup>

74. Preliminary work on the definition of the crime of aggression for the purposes of an amendment of the Rome Statute has already started. First, the matter was addressed by a Preparatory Commission (which drafted the Elements of Crimes that will assist the ICC in the interpretation and application of the Statute's provisions relating to other crimes within its jurisdiction). Further drafting has been undertaken by a special Working Group under the auspices of the Assembly of States Parties of the Rome Statute. But it must be perceived that, under Article 121, an amendment of the Rome Statute requires a two-thirds majority of the States Parties plus ratification or acceptance by seven-eighths of them. There is no indication, as yet, that such a high degree of quasi-unanimity is attainable.

75. The controversy attending the formulation of the crime of aggression is very real, but its ramifications must not be exaggerated. There is no reason to believe that States regard as outdated the concept of wars of aggression as a crime under international law. On the contrary, support for this concept has been manifested consistently in international forums. It is important to note that the General Assembly consensus 1970 Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (*supra* 35) recognized that "war of aggression constitutes a crime against peace, for which there is responsibility under international law".<sup>148</sup>

76. As early as 1946, the General Assembly affirmed the principles of international law recognized by the Charter and the Judgment of the International Military Tribunal.<sup>149</sup> In 1947, the General Assembly instructed the ILC to formulate these principles and also to prepare a Draft Code of Offences against the Peace and Security of Mankind.<sup>150</sup> The ILC composed the "Nürnberg Principles" in 1950. The text recites the Charter's definition of crimes against peace, emphasizing that offenders bear responsibility for such crimes and are liable to punishment.<sup>151</sup>

77. In 1996, the ILC completed a long overdue Draft Code of Crimes against the Peace and Security of Mankind. Without attempting to define aggression, the final text includes the crime of aggression in Article 16:

"An individual who, as leader or organizer, actively participates in or orders the planning, preparation, initiation or waging of aggression committed by a State shall be responsible for a crime of aggression".<sup>152</sup>

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<sup>147</sup> See M.H.Arsanjani, "The Rome Statute of the International Criminal Court", 93 *American Journal of International Law* 22, 29-30 (1999).

<sup>148</sup> General Assembly Resolution 2625 (XXV), *supra* note 73, at 122.

<sup>149</sup> General Assembly Resolution 95 (I), 1(2) *Resolutions of the General Assembly* 188, *id.* (1946).

<sup>150</sup> General Assembly Resolution 177 (II), 2 *Resolutions of the General Assembly* 111, 112 (1947).

<sup>151</sup> Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, Report of the International Law Commission, 2<sup>nd</sup> Session, [1950] II *Yearbook of the International Law Commission* 364, 374, 376.

<sup>152</sup> Draft Code of Crimes against the Peace and Security of Mankind, Report of the International Law Commission, 48<sup>th</sup> Session, [1996] II (2) *Yearbook of the International Law Commission* 17, 42-43.

In its commentary, the ILC observed that the branding of aggression as a crime against the peace and security of mankind is drawn from the 1945 London Charter as interpreted and applied by the IMT.<sup>153</sup>

78. In all – despite the currently unresolved search for a generally agreed definition of the crime of aggression – the criminality of a certain core of aggressive acts of war can be viewed as validated by customary international law (moulded by the London Charter and the Nuremberg Judgment).<sup>154</sup> The disagreements linked especially to the “architecture” of the institutional relationship between the ICC and the Security Council do not diminish from the substantive “content of customary international law”.<sup>155</sup>

79. In one important respect, the Rome and ILC decisions to criminalize “aggression” *per se* – and establish individual accountability for that crime – runs counter to the Nuremberg precedent and to the consensus Definition of Aggression, inasmuch as the latter focus on “war of aggression” as a crime. The objection to the narrower Nuremberg approach is that the distinction between a war of aggression and other acts of aggression (short of war) is sometimes fraught with difficulties.<sup>156</sup> The counter-argument is that incidents short of war may not be grave enough to justify the subjection of individuals to criminal accountability. Only an actual definition of the crime of aggression – once adopted (at some indefinite point in the years ahead) – will show whether the theoretical broadening of the scope of the crime to acts short of war is acceptable to States in practice. But whether aggression short of war is included in or excluded from the definition, one thing is clear: in essence, a war of aggression is indeed a punishable crime.

### C. Immunity from Prosecution?

80. Some high-ranking office-holders of the State (primarily, Heads of States) enjoy certain immunities from prosecution under international law. Thus, the *Institut de Droit International*, in a resolution adopted in Vancouver in 2001, stated:

“In criminal matters, the Head of State shall enjoy immunity from jurisdiction before the courts of a foreign State for any crime he or she may have committed, regardless of its gravity”.<sup>157</sup>

81. However, this rule is clearly confined to criminal proceedings before the domestic courts of foreign States. As the ICJ emphasized, in the *Arrest Warrant* case of 2002, “jurisdictional immunity is procedural in nature” and must not be confused with the issue of criminal responsibility (which is a matter of substantive law).<sup>158</sup> As the Court put it, immunity does not mean impunity.<sup>159</sup> Accordingly,

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<sup>153</sup> *Ibid.*, 43.

<sup>154</sup> See A.Cassese, *International Criminal Law* 113-114 (2003).

<sup>155</sup> R.Cryer, “Aggression at the Court of Appeal” 10 *Journal of Conflict & Security Law* 209, 228 (2005).

<sup>156</sup> See G.Gaja, “The Long Journey towards Repressing Aggression”, 1 *The Rome Statute of the International Criminal Court: A Commentary* 427, 435 (A.Cassese et al. eds., 2002).

<sup>157</sup> *Institut de Droit International*, Resolution, “Immunities from Jurisdiction and Execution of Heads of State and of Government in International Law”, 69 *Annuaire de l’Institut de Droit International* 743, 753 (Vancouver, 2001) (Article 13(2)).

<sup>158</sup> *Case Concerning the Arrest Warrant of 11 April 2000*, [2002] *Reports of the International Court of Justice* 3, 25.

<sup>159</sup> *Ibid.*

the Court made it clear that there is no bar to prosecution of high-ranking office-holder (in the case before it, a Foreign Minister) before an international criminal court vested with jurisdiction.<sup>160</sup>

82. Article 27 of the Rome Statute prescribes:

“1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or government, a member of a government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.

2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person”.<sup>161</sup>

This provision follows in the wake of Article 7 of the 1945 London Charter, which reads:

“The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment”.<sup>162</sup>

The conceptual underpinning of the removal of immunity in the Charter was resoundingly supported by the IMT:

“The principle of international law, which under certain circumstances, protects the representatives of a state, cannot be applied to acts which are condemned as criminal by international law. The authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment in appropriate proceedings”.<sup>163</sup>

It is incontrovertible today that the official position of a Head of State or any other high-ranking governmental office-holder does not cloak the person concerned with immunity, if put on trial for crimes against peace (war of aggression) before an international criminal court or tribunal vested with jurisdiction.

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<sup>160</sup> *Ibid.*, 25-26.

<sup>161</sup> Rome Statute, *supra* note 144, at 1327.

<sup>162</sup> Charter of the International Military Tribunal, *supra* note 127, at 1257.

<sup>163</sup> International Military Tribunal (*Nuremberg* trial), Judgment, *supra* note 130, at 223.