

THE IMPLICATIONS OF THE 1993 U.N. SECURITY COUNCIL ACTION FOR THE SETTLEMENT OF THE ARMENIA-AZERBAIJAN CONFLICT

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Abstract

The article revisits the four resolutions adopted in 1993 by the U.N. Security Council on the conflict between Armenia and Azerbaijan. It analyses the terminology used in these resolutions viewed within the overall context, in which these resolutions were adopted. It is the premise of this article that these resolutions were the result of the complex web of interrelated factors, which had a decisive impact on the Security Council actions in relation to the conflict. These resolutions reflect the delicate balance between the obligation of the U.N. Security Council to abide by the principles and norms of international law enshrined in the U.N. Charter and address situations threatening international peace and security in an unbiased way and on the other hand safeguarding the interests of the permanent members of the Council. Hence, although the resolutions fell short of pointing finger, they implicitly pointed to the inter-state nature of the conflict, singled out the principles and norms of international law applicable to this conflict, reminded of the inadmissibility of violating those norms and outlined the principles that should provide the overall framework and guidance for the mediation efforts for the conflict settlement pursued in the context of the OSCE Minsk process.

Keywords: Armenia-Azerbaijan conflict, Nagorny Karabakh, UN Security Council resolutions, territorial integrity, OSCE Minsk Process

Introduction

In the course of 1993 the United Nations Security Council adopted four resolutions on the conflict between Armenia and Azerbaijan.¹ There are few other cases, when the Security Council adopted four resolutions on a particular conflict just in one year, which in itself can be regarded as the acknowledgement of the gravity of the situation. These resolutions are probably the most cited and referred to documents in the context of the conflict between Armenia and Azerbaijan. And this is not a surprise as the resolutions adopted by the Security Council are the most authoritative decisions of this body empowered by the U.N. Member States through the U.N. Charter to maintain international peace and security.

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¹ S/RES/822 (April 30, 1993), S/RES/853 (July 29, 1993), S/RES/874 (October 14, 1993) and S/RES/884 (November 12, 1993). For simplicity in the article I will refer only to the consecutive numbers of these resolutions (i.e. 822, 853, 874 and 884). All U.N. documents are available publicly at www.un.org/documents/

Although, the texts of the above-mentioned resolutions are well known, at least to those who had a chance to get acquainted with the background of one of the most violent armed conflicts on the territory of the former Soviet Union, few attempts were made to explore in detail the terminology used in these resolutions and the overall context in which these resolutions were adopted. Yet, these resolutions were the result of the complex web of interrelated factors, which had a decisive impact on the Security Council action in relation to the conflict.

Hence, the purpose of this article is to reconsider the wording of the resolutions, try to analyse possible reasons explaining why these resolutions were framed the way they were and elaborate on the implications of the Security Council actions for the conflict settlement process.

Since there is no codified generally accepted rules of interpretation of the Security Council resolutions, for the purpose of this article I will combine the two methods, one focusing narrowly on the ordinary or plain textual meaning of the terms of the resolutions and the method of reading the text of the resolutions in the overall context, taking into account the object and purpose of the resolutions as well as the overall political background.²

I will start by elaborating on the factors affecting the daily practice of the Security Council, in particular the complex decision-making process and the role of the permanent members of the Council in this regard. Two aspects will be specifically mentioned in the following sections. First, as will be argued below the U.N. Charter requires that the Security Council in its daily practice must assess problems likely to threaten the international peace and security based on the principles and norms of international law enshrined in the U.N. Charter and determine which of the arguments presented by the parties to a dispute correspond to the factual situation. Therefore, international law provides overall framework for the Security Council actions. In this regard, analysis of the terminology used in these resolutions from the perspective of their meaning within international law is crucial for understanding the actual meaning embedded into the adopted texts. Second, the “veto” power of the permanent members of the Security Council continues to give them unprecedented leverage on the Security Council action and allows them to shape the decisions in the way that would not harm their interests.

It is equally important to bear in mind that the resolutions were adopted as a response to the dramatic events unfolding in the conflict zone and therefore can be regarded as an assessment by the Security Council of the situation on the ground and recognition of the facts by this authoritative organ of the United Nations. For the purpose of this article I will specifically focus on the way the Security Council addressed the reports coming from the region on the involvement of Armenia into the conflict. Today, with the continued presence of the regular troops of Armenia in the occupied territories of Azerbaijan³ and Armenia’s president Serzh

² See Michael C. Wood, “The Interpretation of Security Council Resolutions”, *Max Planck Yearbook of United Nations Law*, 2:73, (1998), http://www.mpil.de/shared/data/pdf/pdfmpunyb/wood_2.pdf (accessed July 17, 2009).

³ For example, in the aftermath of the Presidential elections in Armenia in March 1998 the OSCE/ODIHR Election Observation Mission in Armenia released Final Report in which it expressed extreme concern “that one of the mobile boxes has crossed the national borders of the Republic of Armenia to collect votes of Armenian soldiers posted abroad (Kelbajar)”, thus confirming the deployment of Armenian troops in the Kelbadjar district of Azerbaijan, which was occupied in April 1993. See “OSCE/ODIHR Final Report on the Presidential Elections in Armenia” issued on 9 April 1998, p. 8. Available online at: http://www.osce.org/documents/odihr/1998/04/1215_en.pdf (accessed October 29, 2009).

Sarkisian and his defence minister Seyran Ohanian's routine visits to these territories for inspecting troops stationed there⁴ and attending military exercises, the direct military involvement of Armenia in the conflict is not questioned and widely recognised by the international community.⁵ However, back in 1993 for at least several permanent members of the Security Council the military intervention of Armenia was inconvenient truth, which they were reluctant to accept. In the sections that follow I will try to identify factors that may have shaped the stance of permanent members of the Council and will discuss what repercussions this had for the overall tone of the adopted resolutions and the terminology that was used to frame the texts.

With a view to reconstruct the scene as was seen at that time from the U.N. Headquarters in New York City reference will be made to the reports of the U.N. Secretary-General and the Chairman of the Minsk Conference of the Conference for Security and Cooperation in Europe (CSCE)⁶ dealing with the conflict, submitted to the Security Council based upon the inquiries of the fact-finding missions. Since the Security Council was also furnished with information on the developments in the conflict zone by regional States I will consult the correspondence communicated to the Security Council both from Azerbaijan and Armenia as well as from other States concerned. The verbatim records of the proceedings of the relevant Security Council meetings as well as *the Repertoire of the Practice of the Security Council*⁷, serving as an institutional memory of the practice of the Security Council and *the Yearbook of the United Nations*⁸, which is considered to be a comprehensive and authoritative reference publication about the work of the United Nations, will be consulted with a view to revealing the atmosphere prevailing in the Security Council at that time and shedding light on the positions of the Council members towards the conflict. These sources are also useful to recreate chronology of the actions taken by the Security Council with regard to the conflict between Armenia and Azerbaijan.

The Security Council resolutions were not adopted in the vacuum. The conflict drew the attention of the international community and the developments in the conflict zone quickly became a matter of public knowledge as reflected in the news reports of the leading foreign media outlets as well as the statements issued by the major international organizations and individual States. Hence, a short reference will be made to the background information based on the news reports, the official documents distributed in the United Nations as well as the statements by the relevant international organizations in order to provide the reader with the general context of the conflict. For the sake of presenting objective and unbiased account of

⁴ The last such visit occurred in October 2009. Information on this visit and related photographs is publicly available at the official web page of the president of the Republic of Armenia, <http://president.am/events/news/eng/?day=22&month=10&year=2009&id=766> (accessed October 26, 2009).

⁵ See for example the Report entitled "The conflict over the Nagorno-Karabakh region dealt with by the OSCE Minsk Conference" (Doc. 10364) prepared by the Rapporteur of the Political Affairs Committee of the Parliamentary Assembly of the Council of Europe Mr. David Atkinson in November 2004 and the subsequent resolution 1416 adopted by PACE on January 25, 2005. Available online at <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta05/ERES1416.htm>, (accessed October 29, 2009).

⁶ Since 1994 – OSCE (Organization for Security and Cooperation in Europe).

⁷ See *Repertoire of the Practice of the Security Council*, Supplements 1989-1992 (ST/PSCA/1/Add. 11) and 1993-1995 (ST/PSCA/1/Add. 12). Items 19 and 9 respectively related to the conflict between Armenia and Azerbaijan. Available online at <http://www.un.org/Depts/dpa/repertoire> (accessed June 10, 2009).

⁸ See *Yearbook of the United Nations*, 1992-1994, Department of Public Information, New-York. All issues are available online at <http://unyearbook.un.org/index.html> (accessed June 10, 2009).

the key events of the conflict, in this article I will refer mainly to the books, articles and reports on the conflict written by non-regional independent scholars and observers.

When appropriate, I will elaborate on the meaning of the principles and norms of international law singled out by the Security Council in its resolutions and identify the obligations of individual States derived from these norms. I will conclude by dwelling upon the implications of the Security Council action for the current conflict settlement process.

The U.N. Charter as a framework for the Security Council action

The primary purpose of the United Nations and its central organ - the Security Council as reflected in the first Article of Chapter 1 of the U.N. Charter is "...to bring about by peaceful means, and in conformity with the principles of justice *and international law* adjustment or settlement of international disputes..."⁹ Thus, the U.N. Charter establishes international law as a clear-cut framework for the Security Council within which to address a particular situation threatening international peace and security. Rosalyn Higgins, analyzing the place of international law in the decisions adopted by the Security Council, noted that it is for the Security Council to decide, which of the legal propositions presented by the parties to the dispute happened to accord with the facts of the case.¹⁰ She recognized the right of the Security Council to "make authoritative and binding interpretations of Members' legal obligations under the Charter."¹¹

At the same time, because of the "veto" power reserved for the permanent members of the Security Council by the founders of the United Nations, there are voices constantly challenging the legitimacy of the collective authority of the Council on the grounds that the proceedings in this organ are dominated by the powerful few and hence this body is merely an instrument in the hands of the major powers to advance their interests, rather than a mechanism of maintaining international peace and security – a core mission prescribed in the Charter.¹² Under the circumstances, being guided in its daily practice by the principles and norms of international law becomes also an indispensable precondition and a source of legitimacy for the Security Council in the eyes of the Member States of the United Nations. Due to the legitimacy vested in the Security Council its resolutions should be regarded as authoritative decisions of the United Nations to be reckoned with. Rosalyn Higgins underlined in this regard that "[t]he application of legal rules to particular circumstances forms part of the United Nations practice and, over a period of time, becomes part of the stream of authoritative decisions which are looked to as a source of law."¹³

The analysis of the practice of the Security Council reveals that on many occasions the decisions taken by this U.N. organ reflect the delicate balance between the obligation of the

⁹ Charter of the United Nations and Statute of the International Court of Justice, U.N. Department of Public Information, DPI/511, United Nations, New York (2006), (Emphasis added).

¹⁰ See Rosalyn Higgins, "The Place of International Law in the Settlement of Disputes by the Security Council", *The American Journal of International Law*, vol. 64:1 (1970): 4, <http://links.jstor.org/sici?sici=0002-9300%28197001%2964%3A1%3C1%3ATPOILI%3E2.0.CO%3B2-7> (accessed March 17, 2009).

¹¹ *Ibid.*, at 6.

¹² See David D. Caron, "The Legitimacy of the Collective Authority of the Security Council", *The American Journal of International Law*, vol. 87:4 (1993): 552-588, <http://links.jstor.org/sici?sici=0002-9300%28199310%2987%3A4%3C552%3ATLOTCA%3E2.0.CO%3B2-E> (accessed April 20, 2009).

¹³ See Rosalyn Higgins, "The Place of International Law in the Settlement of Disputes by the Security Council", *The American Journal of International Law*, vol. 64:1 (1970): 6, <http://links.jstor.org/sici?sici=0002-9300%28197001%2964%3A1%3C1%3ATPOILI%3E2.0.CO%3B2-7> (accessed March 17, 2009).

Security Council to address situations threatening international peace and security based on the established facts and abiding by the principles and norms of international law enshrined in the U.N. Charter and on the other hand safeguarding of interests of the permanent members of the Council. Such quest for “middle ground” that would accommodate interests of all permanent members while remaining in the realm of the legal framework set by the U.N. Charter over years transformed into an institutional constraint. Thus, the Council in critical moments was preoccupied more with hammering the “convenient” text of its resolutions rather than scrupulously exploring the merits of a particular case. Thus said, throughout its history the Security Council has established a pattern of avoiding pointing fingers to those perpetuating the unlawful acts (this proposition is especially relevant in the cases, when the permanent members had a particular interest in the matter) and at the same time trying to maintain international peace and security through outlining the measures that were believed to prevent further exacerbation of the situation, if not resolving a conflict. From this perspective, due to the complex decision-making process in the Security Council, the recommendations and decisions adopted by this central body of the United Nations can indeed be qualified as the art of the possible. The process of adoption of the resolutions related to the Armenia-Azerbaijan conflict and the terminology used in their texts reinforces this pattern.

1991: internal conflict becomes international

The conflict between Armenia and Azerbaijan has a complex nature with elements of ethnicity, identity and historical narratives closely interconnected with the territorial claims. This article is far from being an attempt to provide a detailed historical account of the conflict. An extensive literature exists on this topic.¹⁴ It should be mentioned though that the conflict between Armenia and Azerbaijan triggered by the Armenian claims to the Nagorny Karabakh region of Azerbaijan was left simmering throughout the Soviet period only to erupt with renewed intensity in 1988, when loosening of the central authority of Moscow over the periphery of the U.S.S.R. gave new impetus to the Armenian separatist tendencies in the Nagorny Karabakh¹⁵ Autonomous Oblast (NKAO) of the then Soviet Socialist Republic of Azerbaijan. These tendencies quickly materialized into the secessionist movement actively supported by the neighbouring Soviet Socialist Republic of Armenia with first instances of sporadic violence marked already at the end of 1987. The unilateral attempts of the local authorities in NKAO to secede from Azerbaijan¹⁶ in contravention of the national and the

¹⁴ For the detailed account of the conflict see Svante Cornell (ed.) *Small Nations and Great Powers: A Study of Ethno-political Conflict in the Caucasus*, (London: Curson Press, 2000); Thomas Goltz, “*Azerbaijan Diary*”, (New York: M.E. Sharpe, 1998); Thomas de Waal, *Black Garden: Armenia and Azerbaijan through Peace and War*, (New York & London: NYU Press, 2004).

¹⁵ The term “Nagorny Karabakh” is a Russian translation of the original name of the geographic area in Azerbaijani language – Dağlıq Qarabağ (pronounced Daghlygh Garabagh), which literally means mountainous Garabagh. In order to avoid confusion the term “Nagorny Karabakh” referred to in the U.N. documents will be used here. For the similar purposes the names of the geographic locations will be used as they are referred to in the U.N. terminology.

¹⁶ On February 20, 1988, the representatives of the Armenian community at the session of the Soviet of People’s Deputies of the NKAO adopted a decision to petition to the Supreme Soviets of the Azerbaijan SSR and the Armenian SSR for the transfer of the NKAO from the Azerbaijan SSR to the Armenia SSR. On December 1, 1989, the Supreme Soviet of the Armenia SSR adopted a resolution on the re-unification of the Armenia SSR and Nagorny Karabakh. On September 2, 1991, the joint session of the Nagorny Karabakh regional and Shaumian district Soviet of People’s Deputies declared the establishment of the “Nagorny Karabakh Republic” within the administrative frontiers of the NKAO and Shaumian district of Azerbaijan.

Union legislation prompted the authorities of Azerbaijan to abolish the autonomy of the Nagorny Karabakh region.¹⁷

The critical dates of the conflict are September 21 and October 18, 1991, when respectively Armenian SSR and Azerbaijani SSR declared their independence. Since then what in pure legal terms could be regarded as an internal strife between the Union Republics (when the two Republics were formally an integral part of the Soviet Union) turned into an armed conflict between the two sovereign neighbouring States.¹⁸ By the end of 1991 the tensions spiralled gradually into the military phase, when isolated armed attacks by the Armenian informal paramilitary groups¹⁹ across the border with Azerbaijan and within the former NKAO took the form of planned combat operations. With the creation of the State Defence Committee in Armenia (1991) and at a later stage of the Armenian Ministry of Defence in January 1992 the separate armed detachments of Armenia transformed into national army units, which coordinated their combat activities with the unlawful Armenian paramilitary forces within the former NKAO.²⁰

Since February 1992 the number of the armed attacks from the territory of Armenia on the border villages in Azerbaijan as well as artillery bombardments from the territory of Armenia along the perimeter of the international frontier increased drastically. The notorious attack on the town of Khojaly on 25-26 February was the first instance of overt involvement of the regular Armenian forces together with the 366th infantry guards regiment of the former Soviet Army stationed in the area in the slaughter against the civilian population leaving hundreds of civilians dead and many more wounded.²¹ Another critical date in the escalation of conflict was May 17, 1992, when the Lachin district of Azerbaijan bordering Armenia was attacked and subsequently occupied.²² The seizure of this district was crucial for the Armenian armed forces, as the strategic road passing through this district was the only way through which the military personnel as well as arms and military equipment, which were reportedly air-lifted to Armenia from Beirut²³ and elsewhere could be transported to the Nagorny Karabakh region. From now on the conflict quickly escalated into a full-fledged war.

¹⁷ This autonomy existed until November 26, 1991, when the Supreme Soviet of Azerbaijan adopted Law “On Abolition of the Nagorny Karabakh Autonomous Oblast of the Republic of Azerbaijan”.

¹⁸ See Elizabeth Fuller, “*Nagorno-Karabakh: Internal Conflict Becomes International*”, RFE/RL Research Report, (March 13, 1992).

¹⁹ See Elizabeth Fuller, “*Paramilitary Forces Dominate Fighting in Transcaucasus*”, RFE/RL Research Report, Vol.2:25 (June 18, 1993).

²⁰ The fact of coordination of activities between State Defence Committee of Armenia and paramilitary structures in Nagorny Karabakh was confirmed by the Ministry of Defence of Armenia on its official web page at <http://www.mil.am/eng/index.php?page=25> (accessed May 12, 2008).

²¹ See Tomas de Waal, *Black Garden: Armenia and Azerbaijan through Peace and War*, (New York and London: NYU Press, 2004), 169-172; Thomas Goltz, “*Azerbaijan Diary*”, (New York: M.E. Sharpe, 1998), 117-129;

²² See Statement of the Ministry of Foreign Affairs of the Republic of Azerbaijan annexed to the letter of the Chargé d’Affaires of the Permanent Mission of Azerbaijan to the United Nations, U.N. Doc. S/23926 (May 14, 1992).

²³ See Svante E. Cornell, “The Nagorny-Karabakh Conflict Reconsidered”, *Journal of South Asian and Middle Eastern Studies*, vol. 20:4 (1997): 8.

Appearing on the radar screen of the U.N. Security Council

The conflict appeared officially on the radar screen of the U.N. Security Council only after both Armenia and Azerbaijan formally became members of the United Nations.²⁴ Since May 1992 the members of the Security Council, amid the reports coming from the region indicating the escalation of the conflict between the two neighbouring countries,²⁵ engaged in series of consultations²⁶ followed by the statements of the President of the Council (which are ranked second in importance after the Security Council Resolutions).²⁷ In these carefully drafted statements the members of the Security Council expressed concern over the deterioration of the situation, called upon the parties to take all steps to bring the violence to an end and to help to facilitate the provision of humanitarian assistance.²⁸ The members of the Security Council supported the efforts undertaken within the framework of the CSCE aimed at assisting the parties in arriving at a peaceful settlement of the dispute and decided to “consider further the role of the United Nations in Nagorny Karabakh at an appropriate time in the light of the development of the situation in the area.”²⁹

It is noteworthy that in their first statement on the conflict dated 12 May 1992 the members of the Security Council found it necessary to recall the statements on the admission respectively of Armenia and Azerbaijan to the United Nations made on their behalf by the President of the Council³⁰, in particular the reference to the Charter principles relating to the peaceful settlement of disputes and the non-use of force.³¹ Such a reference seems to indicate that the Security Council was aware of the involvement of the two neighbouring states into the conflict and sought to remind these states of their relevant obligations under the U.N. Charter.

The most important decision at this stage was that of the U.N. Secretary-General to dispatch a fact-finding mission in March 1992 to assess the situation on the ground.³²

²⁴ Both Armenia and Azerbaijan became members of the United Nations on March 2, 1992.

²⁵ See letter dated March 13, 1992 from the Chargé d’Affaires of the Permanent Representative of Ukraine to the United Nations addressed to the Secretary-General, (U.N. Doc. A/47/122-S/23716); Letter dated March 27, 1992 from the Permanent Representative of Islamic Republic of Iran to the United Nations addressed to the Secretary-General U.N. Doc. S/23760; Letter dated May 10, 1992 from the Permanent Representative of Azerbaijan to the United Nations addressed to the President of the Security Council, U.N. Doc. S/23894.

²⁶ See U.N. doc. S/PV.3072, (May 12, 1992).

²⁷ See *Repertoire of the Practice of the Security Council*, Supplement 1989-1992 (ST/PSCA/1/Add. 11), Item 19 related to the Armenia-Azerbaijan conflict, <http://www.un.org/Depts/dpa/repertoire> (accessed June 10, 2009).

²⁸ See Statements by the President of the Security Council U.N. Doc. S/23904 (May 12, 1992); U.N. Doc. S/24493 (August 26, 1992); U.N. Doc. S/24721 (October 27, 1992); U.N. Doc. S/25199 (January 29, 1993); U.N. Doc. S/25539 (April 6, 1993).

²⁹ See Statement by the President of the Security Council UN Doc. S/24493 (August 26, 1992).

³⁰ See statements of the President of the Security Council on January 29, 1992 (U.N. Doc. S/23496) and on February 14, 1992 (U.N. Doc. S/23597) on the admission respectively of Armenia and Azerbaijan.

³¹ Statement by the President of the Security Council, U.N. Doc. S/23904 (May 12, 1992).

³² There were two other U.N. missions to the region from 21-28 May and 4-10 July 1992 See “*Report of the Secretary-General on the Work of the Organization*” submitted to the U.N. General Assembly U.N. Doc. A/47/1(September 11, 1992), at 18.

The Security Council's decision to act in the aftermath of the armed attack of April 1993

Perhaps the critical point for the Security Council in regard to the conflict between Armenia and Azerbaijan was the invasion of the Kelbadjar district of the Republic of Azerbaijan.³³ Since the outbreak of the conflict Armenia alleged that it was not involved into the conflict with Azerbaijan, referring to the Armenians in the Nagorny Karabakh region.³⁴ However, after the armed attack and subsequent invasion by April 2, 1993 of Kelbadjar district, which is located outside of the administrative line of former NKAO, the international community began expressing serious doubts in this regard.³⁵

Overt military invasion from Armenia and violation of the international border prompted the Ministry of Foreign Affairs of Azerbaijan to register a strong protest with the Ministry of Foreign Affairs of Armenia.³⁶ The evidences made available to the Security Council by Azerbaijan confirmed that Kelbadjar district was invaded from at least two directions: from the territory of Vardenis district of Armenia bordering Azerbaijan and from within the former NKAO.³⁷

The well-documented direct evidences (including military ID cards of Armenian servicemen, call-up papers to active service, passports, vacation cards, discharge tickets, petitions to confer regular military ranks and other documents) captured by the Azerbaijani Army units in the course of military actions³⁸ from December 1993 to February 1994 as well as testimonies of the Armenian soldiers from the 555th separate motor rifle regiment (military unit of 59016) of the Armed Forces of Armenia³⁹ captured during the combat operations not only proved the supply of ammunitions and deployment of troops of the Republic of Armenia into the territory of Azerbaijan to engage in combat activities, but indicated that the invasion of Kelbadjar and other districts of Azerbaijan was a pre-planned armed attack⁴⁰ aimed at

³³ See statement by the President of the Security Council, U.N. Doc. S/25539 (April 3, 1993).

³⁴ See letters from the Permanent Representative of Armenia to the United Nations addressed to the President of the Security Council, U.N. Doc. S/23896, (May 11, 1992); U.N. Doc. S/24656, (October 12, 1992); U.N. Doc. S/25510, (April 1, 1993).

³⁵ See Elizabeth Fuller, "Paramilitary Forces Dominate Fighting in Transcaucasus", RFE/RL Research Report, Vol.2:25 (June 18, 1993): 75; "Azerbaijan: Seven Years of Conflict in Nagorny-Karabakh", Human Rights Watch Report, USA (1994), 67-73; Svante E. Cornell, "The Nagorny-Karabakh Conflict Reconsidered", *Journal of South Asian and Middle Eastern Studies*, vol. 20:4 (1997): 8; Thomas Goltz, "Azerbaijan Diary", (New York: M.E. Sharpe, 1998), 341; Tomas de Waal, *Black Garden: Armenia and Azerbaijan through Peace and War* (New York and London: NYU Press, 2004), 212;

³⁶ See "Note of the Ministry of Foreign Affairs of the Azerbaijani Republic" annexed to the letter from the Permanent Representative of Azerbaijan to the United Nations addressed to the President of the Security Council, U.N. Doc. S/25488 (March 29, 1993).

³⁷ See Letters of the Chargé d'Affaires of the Permanent Mission of the Republic of Azerbaijan to the United Nations addressed to the President of the Security Council U.N. Doc. S/1994/108 (February 2, 1994) and U.N. Doc. S/1994/147 (February 14, 1994) (with annexed photocopies).

³⁸ See Letters of the Chargé d'Affaires of the Permanent Mission of the Republic of Azerbaijan to the United Nations addressed to the President of the Security Council U.N. Doc. S/1994/108 (February 2, 1994) and U.N. Doc. S/1994/147 (February 14, 1994) (with annexed photocopies).

³⁹ See "Azerbaijan: Seven Years of Conflict in Nagorny-Karabakh", Human Rights Watch Report, USA (1994);

⁴⁰ The Charter of the United Nations makes clear distinction between threat or use of force and an armed attack, the later being the gravest form of the use of force by a State against another sovereign State invoking under Article 51 of the Charter a right of self-defence. This implies that an armed attack by definition is possible only in the context of inter-State conflict.

acquisition of territory of another sovereign State.⁴¹ That the hostilities in and around the Nagorny Karabakh region were attacks was also obvious to the Security Council, which in its statement dated 18 August 1993 demanded “a stop to all attacks and an immediate cessation of the hostilities and bombardments, which endanger peace and security in the region...”⁴² The Chairman of the Minsk Conference of the CSCE in his report addressed to the President of the Security Council also confirmed the fact of “armed attacks” on the city of Agdam, while underlining that the military situation was such that Agdam posed no serious military threat.⁴³

Of particular importance are the military maps captured by the Azerbaijani Army units during the military operations, since they can serve as evidence of planning, control and direction of the combat operation by Armenia in the territories of Azerbaijan. The operational map of the commander of third motor-rifle battalion⁴⁴ of third separate motor-rifle brigade of the Armed Forces of Armenia Major S. Barsegyan had superscriptions of combat orders to seize the Kelbadjar district of Azerbaijan on April 1, 1993.⁴⁵ Another map signed by the Chief of Staff of the Armed Forces of the Republic of Armenia Lieutenant-General G. Adresyan contained written operation order addressed to the commander of the 555th separate motor rifle regiment to retain captured territories.⁴⁶

The Western news agencies reporting on the Kelbadjar offensive also reported on the direct involvement of Armenia. *The Independent* wrote on 8 April that “[i]t is Armenia that invaded Azerbaijani territory”. *The Times* wrote on 14 April that “[o]ne thing is certain: the Kelbadjar region was attacked from Armenia itself, to the west, as well as from Nagorno-Karabakh to the east”. *The Washington Post* came to the same conclusion stating on 28 April that “[t]he war involving the former Soviet Republics of Armenia and Azerbaijan has moved into a dangerous new phase...”, while the *Agence France Presse* wired on 22 April that “Azerbaijan has suffered a series of setbacks in the war after Armenia carried out a major offensive early this month...”.⁴⁷ These press reports indicate that the events received wide coverage in the world press and hence constitute a matter of public knowledge, which contribute to corroborating the existence of the facts on the ground.⁴⁸

⁴¹ For the detailed analysis of the use of force against the Republic of Azerbaijan qualified as an “armed attack” in international law terms see “*Report on the Legal Consequences of the Armed Aggression of the Republic of Armenia against the Republic of Azerbaijan*”, U.N. Doc. A/63/662-S/2008/812 annexed to the letter dated December 22, 08 from the Permanent Representative of Azerbaijan to the United Nations addressed to the Secretary-General, <http://daccessdds.un.org/doc/UNDOC/GEN/N08/669/16/PDF/N0866916.pdf?OpenElement> (accessed April 20,2009).

⁴² See statement by the President of the Security Council, U.N. Doc. S/26326 (August 18, 1993).

⁴³ See Report by the Chairman of the Minsk Conference of the Conference on Security and Cooperation in Europe on Nagorny Karabakh to the President of the Security Council dated July 27, 1993 annexed to the letter from the Permanent Representative of Italy to the United Nations addressed to the President of the Security Council U.N. Doc. S/26184 (July 28, 1993) at 3.

⁴⁴ The map indicated that on the eve of the attack on Kelbadjar district the battalion was deployed in the settlement of Basargechar of the Republic of Armenia.

⁴⁵ See Letter of the Chargé d’Affaires of the Permanent Mission of the Republic of Azerbaijan to the United Nations addressed to the President of the Security Council U.N. Doc. S/1994/147 (February 14, 1994).

⁴⁶ *Ibid.* (The copies of the maps were made available to the U.N. Security Council).

⁴⁷ See letter dated April 30, 1993 from the Permanent Representative of Azerbaijan to the United Nations addressed to the President of the Security Council, U.N. Doc. S/25701 (provides excerpts from the news reports).

⁴⁸ ICJ ruled on press reports as a source for establishing existence of the facts in its *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* case, *Merits Judgement*, Para. 62 and 63 (1986). All ICJ cases are available online at <http://www.icj-cij.org/>.

The direct evidences and the news reports from the ground, the assessment of the situation by the Chairman of the CSCE Minsk Conference in his report⁴⁹ and the statement dated July 27, 1993⁵⁰ as well as the subsequent similar statement by the European Community⁵¹ refuted the argument of the Government of Armenia that the military activities conducted by the Armenian forces were exclusively countermeasures carried out in self-defence.⁵²

On April 3, 1993 Turkey requested the Security Council urgently to consider the situation between Armenia and Azerbaijan, citing reports of a large-scale offensive by Armenian armed forces on Kelbadjar district of Azerbaijan.⁵³ The Council convened on 6 April and following consultations with the members of the Council, the President issued a statement. If before the Kelbadjar offensive the Security Council was rather cautious in its statements on the matter referring to “all the parties and others concerned” while appealing for an immediate cease-fire⁵⁴, in the aftermath of the attack on Kelbadjar, the Council was unequivocal in its statement and expressed serious concern at the “deterioration of relations between the Republic of Armenia and the Republic of Azerbaijan”⁵⁵.

Pursuant to the request by the Security Council made in the above-mentioned statement to ascertain facts, the UN Secretary-General submitted a report to the Council containing an assessment of the situation on the ground. The report has a particular significance, because for the first time it indicated that the scale of the conflict exceeds an internal ethnic tension. It observed *inter alia* that “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.”⁵⁶

The Security Council decided to remain seized of the matter and already on April 30, 1993 having considered the report of the Secretary-General and the letters submitted by the Permanent Representatives of Azerbaijan and Armenia as well as Denmark⁵⁷ and Turkey,⁵⁸ the Council unanimously adopted its first resolution 822.⁵⁹

⁴⁹ See *Supra* note 43.

⁵⁰ See *Infra* note 121.

⁵¹ See *Infra* note 138.

⁵² See letters of the Permanent Representative of Armenia to the United Nations addressed to the President of the Security Council: U.N. Doc. S/25776 (May 14, 1993); U.N. Doc. S/26036 (July 4, 1993); U.N. Doc. S/26044 (July 6, 1993); U.N. Doc. S/26135 (July 22, 1993); U.N. Doc. S/26154 (July 26, 1993); U.N. Doc. S/26328 (August 18, 1993); U.N. Doc. S/26394 (September 1, 1993); U.N. Doc. S/26409 (September 7, 1993).

⁵³ See U.N. Doc. S/25524 (April 3, 1993).

⁵⁴ See Statements by the President of the Security Council U.N. Doc. S/23904 (May 12, 1992); U.N. Doc. S/24493 (August 26, 1992); U.N. Doc. S/24721 (October 27, 1992); U.N. Doc. S/25199 (January 29, 1993).

⁵⁵ See statement by the President of the Security Council U.N. Doc. S/25539, (April 6, 1993).

⁵⁶ See 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, U.N. Doc. S/25600 (April 14, 1993).

⁵⁷ See statement of the European Community dated April 7, 1993 annexed to the letter dated April 7, 1993 from the Permanent Representative of Denmark to the United Nations addressed to the President of the Security Council U.N. Doc. S/25564 (April 7, 1993).

⁵⁸ See U.N. Doc. S/25660 (April 8, 1993) and U.N. Doc. S/25671 (April 27, 1993).

⁵⁹ For the voting records as well as the texts of the statements made after the adoption of the resolution see Provisional Verbatim Record of 3205th meeting of the Security Council, U.N. Doc. S/PV.3205 (April 30, 1993).

The resolution 822: resolving a dilemma between the undeniable and the unacceptable

The resolution 822, which was the first in series of resolutions adopted by the U.N. Security Council related to the conflict, is significant from several points. First, the timing of the adoption of the resolution is by itself noteworthy. As is seen from the above-mentioned chronology of the unfolding events on the ground the Security Council decided to step in only after acquiring evidences indicating the spiralling of the fighting into full-fledged combat operations with involvement of heavy military equipment causing wide-spread heavy destruction and losses of human life.⁶⁰

Secondly, and perhaps more importantly at this stage, it seems that based on the reports coming in from the region and its assessment of the situation, the Security Council had established for itself that the conflict was of international nature and endangers regional peace and security. From this perspective, the wording of the first and subsequent resolutions is of particular importance in the light of the controversy around the direct involvement of Armenia in the conflict and continuous attempt to camouflage its direction and control over the military operations in the territory of Azerbaijan. Thus, the resolution expressed serious concern at the “deterioration of relations between the Republic of Armenia and the Republic of Azerbaijan”, clearly indicating Armenia’s role in the conflict.⁶¹ More importantly the document reaffirmed the “respect for sovereignty and territorial integrity of all the states in the region” and “the inviolability of international borders and the inadmissibility of the use of force for the acquisition of territory.”⁶² The reference to these fundamental principles of international law would have been needless unless the Security Council would not have established for itself that there was a military confrontation between the neighbouring states and that there was a use of force threatening the territorial integrity of a State. The fact that applicability of these principles by the Security Council is case specific can be seen, if we compare the text of this resolution with the one adopted by the Council in regard of the on-going conflict in neighbouring Georgia involving the break-away secessionist region of Abkhazia. In that case, in recognition of the fact that the conflict in Georgia was essentially an internal ethnic conflict, the Security Council did not find it appropriate to refer specifically to the principles of the inviolability of international borders and inadmissibility of the use of force for the acquisition of territory.⁶³

Clearly, the Security Council reaffirms the inadmissibility of the use of force for the acquisition of territory generally in the context of inter-state conflict, when there is an attempt of acquisition of a territory by force. In order to sustain this argument it is suffice to look at the text of the resolution 242, for example, which was adopted by the Security Council on November 22, 1967 in the wake of the Six-Day War between Israel and Egypt, Jordan and Syria. In that resolution the Council framed its position along the same lines emphasising the “*inadmissibility of the acquisition of the territory by war*”.⁶⁴

⁶⁰ See Provisional Verbatim Record of the statements of the members of the Security Council made at the 3205th meeting of the Security Council, U.N. Doc. S/PV.3205 (April 30, 1993) at 11.

⁶¹ See U.N. Doc. S/RES/822 (1993), April 30, 1993, Preamble part.

⁶² See U.N. Doc. S/RES/822 (1993), April 30, 1993, Preamble part.

⁶³ See U.N. Doc. S/RES/849 (1993), July 9, 1993; U.N. Doc. S/RES/854 (1993), August 6, 1993; U.N. Doc. S/RES/858 (1993), August 24, 1993; U.N. Doc. S/RES/1781 (2007) October 15, 2007; U.N. Doc. S/RES/1808 (2008), April 15, 2008.

⁶⁴ See U.N. Doc. S/RES/242 (November 22, 1967) (Emphasis added).

While reaffirming this important principle the Security Council was guided by one of the core principles of international law enshrined in Article 2 (4) of the U.N. Charter, which declares that “[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state ...”. The prohibition of the threat or use of force is one of the consequential principles generated from the fundamental norm of territorial integrity of States and meant to protect the international boundaries of independent States.⁶⁵ It should be mentioned here that the principle of non use of force enshrined in a number of international instruments of both global and regional nature⁶⁶ is not only a rule of customary international law (i.e. binding for all States), but is also accepted as a peremptory norm *jus cogens*.⁶⁷ Hence, by making such reference to this fundamental principle of international law the Security Council made it clear that no territorial acquisition resulting from the use of force shall be recognised as lawful as a result of the military activities.

As the resolution 822 indicates the principal preoccupation of the Security Council was to stop the fighting and to prevent further escalation of the conflict. The Council demanded “the immediate cessation of all hostilities and hostile acts with a view to establishing a durable cease-fire...”. The Council was specifically concerned with the situation in Kelbadjar district of Azerbaijan, which is reflected in the preamble part of the resolution, where the Security Council noted with alarm the “*invasion* of Kelbadjar district of the Republic of Azerbaijan by local Armenian forces” and the first paragraph, in which the Council demanded “...immediate withdrawal of *all occupying forces* from the Kelbadjar district and other recently occupied areas of Azerbaijan.”⁶⁸ The Council requested also the Secretary-General to “assess the situation in the region, in particular in the Kelbadjar district of Azerbaijan”.⁶⁹

The resolution shows, that the Security Council has unequivocally established for itself that there was an *invasion* of Kelbadjar district and that there was a fact of *occupation* of territory of a sovereign state. As far as the term *occupation* is concerned two aspects should be mentioned here. First, it should be noted that according to Article 42 of the Regulations annexed to Hague Convention IV, Respecting the Laws and Customs of War on Land (1907) (hereinafter the Hague Regulations) the occupation in international law terms is by itself possible only in the context of inter-state conflict, when at least a part of the territory of a sovereign state is “actually placed under the authority of the hostile army”⁷⁰, i.e. is subject to belligerent occupation by the army of another State. In fact it is widely accepted that “there

⁶⁵ For a more detailed account of these principles see “*Report on the Fundamental Norm of the Territorial Integrity of States and Right to Self-determination in the Light of Armenia’s Revisionist Claims*”, U.N. Doc. A/63/664-S/2008/823 annexed to the letter dated December 26, 2008 from the Permanent Representative of Azerbaijan to the United Nations addressed to the Secretary-General, available online at <http://daccessdds.un.org/doc/UNDOC/GEN/N08/670/89/PDF/N0867089.pdf?OpenElement> (accessed April 20, 2009).

⁶⁶ See for example “The Declaration on the Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the UN” adopted by the U.N. General Assembly resolution 2625 (XXV) on October 24, 1970; The “Draft Declaration on Rights and Duties of States” annexed to the U.N. General Assembly resolution 375 (IV) adopted on 6 December 1949; Principle IV of the Declaration of Principles adopted by the CSCE in the Helsinki Final Act (1975).

⁶⁷ See Article 53 of the “Vienna Convention on the Law of Treaties” (May 22, 1969).

⁶⁸ See U.N. Doc. S/RES/822 (1993), April 30, 1993, Preamble part and para. 1.

⁶⁹ See U.N. Doc. S/RES/822 (1993), para., 4.

⁷⁰ See Article 42 of the Regulations annexed to Hague Convention IV, Respecting the Laws and Customs of War on Land (1907).

can be no occupation in an international law sense of the concept as between contending forces in an internal conflict.”⁷¹

Secondly, the determination by the Security Council that the territories of Azerbaijan were occupied in a sense of the concept as defined in the Hague Regulations and the Geneva Convention IV on the Protection of Civilians in Time of War (1949) (hereinafter the Geneva Convention IV) and that “all parties are bound to comply with the principles and rules of international humanitarian law”⁷² implies that the rights and obligations of States identified in these international legal instruments apply to this particular conflict.⁷³

As far as the determination by the Security Council that the Kelbadjar district of the Republic of Azerbaijan was invaded by “local Armenian forces” is concerned, careful consideration of the terminology used in the resolution reveals one particular contradiction. Thus, the word “invasion” in international law terms is primarily applied in the context of international conflict, which can be clearly established from the consensus definition of aggression, which was adopted by the U.N. General Assembly in 1974. The resolution states that the armed aggression against a sovereign state occurs as a result of “[t]he *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.”⁷⁴

Wood elaborating on the general rules of interpretation of the Security Council resolutions noted that “[t]he terms used in...[resolutions], to the extent that they are standard, will presumably bear the same meaning in each resolution”.⁷⁵ Hence, attribution of the word “invasion” by the Security Council to the context of inter-state conflict can be clearly seen, if we compare this resolution with resolutions adopted in regard of other conflict situations. The most vivid example could be the resolution 660 of August 2, 1990 and the subsequent resolutions in regard of the armed attack of Iraq on Kuwait, in which the Security Council condemned Iraq’s *invasion* and occupation of Kuwait.⁷⁶

⁷¹ See the “*Report on the international legal responsibilities of Armenia as the belligerent occupier of Azerbaijani territory*”, U.N. Doc. A/63/692-S/2009/51 annexed to the letter dated January 27, 2008 from the Permanent Representative of Azerbaijan to the United Nations addressed to the Secretary-General, at 6, <http://daccessdds.un.org/doc/UNDOC/GEN/N09/221/70/PDF/N0922170.pdf?OpenElement> (accessed April 20, 2009).

See also Reports “*Military Occupation of the Territory of Azerbaijan: a Legal Appraisal*”, U.N. Doc. A/62/491-S/2007/615 annexed to the letter dated October 8, 2007 from the Permanent Representative of Azerbaijan to the United Nations addressed to the Secretary-General, <http://daccessdds.un.org/doc/UNDOC/GEN/N07/558/52/PDF/N0755852.pdf?OpenElement> (accessed April 20, 2009);

⁷² See UN Doc. S/RES/822 (April 30, 1993), para 3. The above-mentioned instruments are part of the body of treaties forming the International humanitarian law.

⁷³ See the “*Report on the international legal responsibilities of Armenia as the belligerent occupier of Azerbaijani territory*”, U.N. Doc. A/63/692-S/2009/51 annexed to the letter dated January 27, 2008 from the Permanent Representative of Azerbaijan to the United Nations addressed to the Secretary-General, <http://daccessdds.un.org/doc/UNDOC/GEN/N09/221/70/PDF/N0922170.pdf?OpenElement> (accessed April 20, 2009), at 4-5.

⁷⁴ See Article 3(a) of the Definition of Aggression, General Assembly Resolution 3314 (XXIX) (1974), (Emphasis added).

⁷⁵ See Michael C. Wood, “The Interpretation of Security Council Resolutions”, *Max Planck Yearbook of United Nations Law*, 2:73, (1998): 89, http://www.mpil.de/shared/data/pdf/pdfmpunyb/wood_2.pdf (accessed: July 17, 2009).

⁷⁶ See UN Doc. S/RES/660 (August 2, 1990), (Emphasis added).

Furthermore, the fact that the conflict was between Armenia and Azerbaijan was also recognised by the Minsk Group of the CSCE, which in its “Adjusted timetable of urgent steps to implement United Nations Security Council Resolutions 822 (1993) and 853 (1993)” dated September 28, 1993 defined the area of conflict as to include the territories on both sides of the international border between Armenia and Azerbaijan (including the segment of the international frontier between Armenia and the Nakhichevan province of Azerbaijan, which is hundreds kilometres away from the Nagorny Karabakh region).⁷⁷

So, on one hand, the wording of the resolution suggests that the Security Council was aware of the involvement of more than local ethnic forces in the conflict. But, strangely enough, on the other hand the resolution attributes the invasion of Kelbadjar district to “local Armenian forces”, omitting the fact that the district was also attacked from the territory of Armenia.⁷⁸ This is in clear dissonance with the terms used in other paragraphs of the resolution, let alone the facts on the ground, which, as was mentioned above, were confirmed also by the independent foreign news reports.

The source of this obvious inconsistency should be looked for in the practice of adoption of the Security Council resolutions and the attitudes of several permanent members of the Security Council towards this particular conflict. Since no on-the-record debates were conducted in the Security Council preceding the adoption of the first and subsequent resolutions, for the purpose of establishing the positions of the members of the Council I have looked through the publicly available verbatim records of the proceedings of the meeting of the Security Council after the vote.

Although the rules of the Security Council require that at least nine of the fifteen members of the Council must vote affirmatively (including five concurring votes of the permanent members) for an action, in practice, due to this voting procedure, the decisions are dominated by the subgroup of two, three or all five permanent members holding “veto” power.⁷⁹ This partially explains the widely held belief that on many occasions the resolutions of the Security Council are watered down in an effort to forge a unanimity that would satisfy the interests of the permanent members of the Council. From this perspective, the last thing a country involved in an armed conflict dealt with by the Security Council would want is to have permanent members of the Council to have an interest in the matter. Yet, the conflict between Armenia and Azerbaijan is a case in point.⁸⁰ One can argue that the attitude of at least three of the five permanent members (Russia, The United States and France)⁸¹ towards the conflict between Armenia and Azerbaijan had a decisive influence on shaping the attitude

⁷⁷ See U.N. Doc. S/26522 (October 1, 1993); U.N. Doc. S/26718 (November 10, 1993); U.N. Doc. S/26732 (November 12, 1993).

⁷⁸ See *supra* note 61.

⁷⁹ For the analysis of the consequences of the domination in the Security Council by subgroup of permanent members see David D. Caron, “The Legitimacy of the Collective Authority of the Security Council”, *The American Journal of International Law*, vol. 87:4 (1993): 552-588, <http://links.jstor.org/sici?sici=0002-9300%28199310%2987%3A4%3C552%3ATLOTCA%3E2.0.CO%3B2-E> (accessed April 20, 2009). See also Frederic L. Kirgis, Jr., “The Security Council’s First Fifty Years”, *The American Journal of International Law*, vol. 89:3, (1995): 506-539, <http://links.jstor.org/sici?sici=0002-9300%28199507%2989%3A3%3C506%3ATSCFFY%3E2.0.CO%3B2-U> (accessed May 14, 2009).

⁸⁰ For example, the French representative in his statement in the aftermath of the adoption of the second resolution by the Security Council on the matter (S/RES/853) underlined that “[his] Government has long taken a special interest in this painful conflict...”. U.N. Doc. S/PV.3259 (July 29, 1993), at 6. The interest of Russia is elaborated in section VII of this article. For the factors affecting U.S. position towards the conflict see *Infra* n. 79.

⁸¹ Since 1997 the three countries are Co-Chairs of the OSCE Minsk Group dealing with the conflict.

of the Security Council towards the conflict as was reflected in this and subsequent resolutions.⁸²

The analysis of the verbatim records of the 3205th meeting of the Security Council, during which the draft resolution was discussed and subsequently voted in favour of, allows concluding that the proposal to add the word “local” before the phrase “Armenian forces” had a specific purpose behind it, rather than reflected the general knowledge of the factual situation on the ground, which was widely discussed in the couloirs of the United Nations during the off-the-record consultations among the members of the Security Council. Interestingly enough the representative of the Russian Federation Mr. Vorontsov, who apparently was one of the principal sponsors of the incorporation of the word “local” into the draft resolution,⁸³ in his statement after the voting on the resolution informed the Security Council that in the light of the escalation of the conflict the President of the Russian Federation B. Yeltsin “...appealed to the Presidents of *Armenia and Azerbaijan for an immediate halt to all hostilities...*”⁸⁴ The French representative Mr. Merimee in his statement on behalf of the delegation of France did not hide his satisfaction that the resolution “...strike[s] a reasonable balance between acknowledging that the tension exists between *Armenia and Azerbaijan* and recognizing the localized nature of the fighting.”⁸⁵ It is noteworthy that both the Russian and the French Presidents in their joint statement on the conflict dated March 16, 1993 underlined that “[t]he non-use of force for political purposes and the peaceful settlement of disputes must remain the fundamental principles *guiding the conduct of democratic States*”, recognizing implicitly that the conflict is of inter-state character.⁸⁶

It is not excluded that by this ‘*jeu de mots*’ the intention was to fence off Armenia from any legal responsibilities under international law,⁸⁷ and to prevent the issue of an “enforcement action” under chapter VII to be brought to the agenda of the Security Council in the future had it not complied with the provisions of this resolution. The comparison of the assessment of the situation contained in the report drafted by the fact-finding mission and submitted to the Security Council by the Secretary-General two weeks before the voting with the final wording of the adopted resolution sustains the above mentioned supposition. The report in question in its assessment of the situation on the ground had clearly established that “[t]he intensification of fighting in and around the Nagorny Karabakh, especially the recent attack against the Kelbadjar and Fizuli districts of Azerbaijan, poses a *serious threat to the maintenance of international peace and security in the entire Transcaucasus region.*”⁸⁸

⁸² The domestic political considerations linked to the presence of large Armenian diasporas in these countries could have played its role in framing of the positions of these countries towards the conflict in which Armenia was involved. For the impact of Armenian lobby on the domestic politics of states see Heather S. Gregg, “Divided They Conquer: The Success of Armenian Ethnic Lobbies in the United States”, (The Rosemary Rogers Working Paper Series, Working paper #13, Massachusetts Institute of Technology, USA, August 2002).

⁸³ There are anecdotal evidences pointing to this fact.

⁸⁴ See *Supra* note 60, at 19, (Emphasis added).

⁸⁵ See *Supra* note 60, at 11.

⁸⁶ See Annex to the letter dated March 31, 1993 from the Permanent Representatives of France and the Russian Federation to the United Nations addressed to the Secretary-General. U.N. Doc. S/25499 (March 31, 1993), (Emphasis added).

⁸⁷ For the applicable responsibilities see in particular Articles 4 to 8 and 11 of the International Law Commission’s Articles on Responsibility of States for International Wrongful Acts, annexed to U.N. General Assembly resolution 56/83 adopted on December 12, 2001.

⁸⁸ See 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, U.N. Doc. S/25600 (April 14, 1993) para.10 at 3, (Emphasis added).

However, the Security Council chose to disregard for some reason the assessment of the Secretary-General, which was essentially based on the fact-finding mission visiting the conflict zone and, instead, pointed in its first and subsequent resolutions that the situation “*endangers peace and security in the region.*”⁸⁹

It should be noted that determination of the existence of a *threat* to international peace and security and identifying its seriousness is the first step the Security Council takes before deciding on action. Although the difference in practical terms between the existence of a situation posing a “threat” or “endangering” international peace and security is unclear,⁹⁰ in the U.N. Charter terms there is a difference in the meaning, which entails different implications. According to Article 39 of the Charter the Security Council has to determine that there is a *threat* to the peace, breach of the peace or act of aggression and to identify how serious it is before recommending measures to maintain or restore international peace and security under Chapter VII, whereas the phrase “endangering the maintenance of international peace and security” is referred to in Chapter VI, which does not entail immediate enforcement actions by the Security Council.⁹¹ It can be argued that by avoiding reference to the existence of a “threat” the drafters of the resolutions intended to prevent any action under Chapter VII. This partially explains why there were no on-the-record public deliberations on the matter in the Security Council’s chamber. Instead, perhaps in an effort to avoid scrutiny by the U.N. Member States of the decisions, which were to be taken in this delicate conflict situation, the Security Council followed the pattern established since the early 1990s to work out the texts of resolutions in its closed consultation room and meeting in its normal chamber only to vote on the agreed upon resolutions.⁹²

Unwillingness of the several permanent members of the Security Council to explicitly mention Armenia’s role in the escalation of this conflict was already mentioned as a possible reason for the cautious approach dominating in the Council. However, it should not be overlooked either that the resolutions towards the Armenia-Azerbaijan conflict were adopted in 1993, i.e. in early years after the end of the Cold War. The primary consequence of the decades of impasse in the Security Council during the Cold War period was that the reluctance to assess the conflict situations in heavy terms and admitting the existence of a threat to international peace and security in the sense contemplated in Article 39 of the U.N. Charter was still there. This self-restraint was to a large extent necessitated to preserve the strategic stability in the world through avoiding overt involvement by the major powers into regional conflicts that could trigger larger East-West confrontation. Interestingly enough, with the end of the bloc confrontation the practice of the Security Council has gradually changed, which was manifested in more resolutions under Chapter VII adopted in regard of

⁸⁹ See U.N. Docs. S/RES/822 (1993); S/RES/853 (1993); S/RES/874 (1993) and S/RES/8884 (1993), (Emphasis added).

⁹⁰ See “*Report on the Legal Consequences of the Armed Aggression of the Republic of Armenia against the Republic of Azerbaijan*”, U.N. Doc. A/63/662-S/2008/812 annexed to the letter dated December 22, 2008 from the Permanent Representative of Azerbaijan to the United Nations addressed to the Secretary-General, <http://daccessdds.un.org/doc/UNDOC/GEN/N08/669/16/PDF/N0866916.pdf?OpenElement> (accessed April 20, 2009), at 21-22.

⁹¹ For the analysis of the practice of the Security Council see Frederic L. Kirgis, Jr., “The Security Council’s First Fifty Years”, *The American Journal of International Law*, vol. 89:3 (1995): 511-514, <http://links.jstor.org/sici?sici=0002-9300%28199507%2989%3A3%3C506%3ATSCFFY%3E2.0.CO%3B2-U> (accessed May 14, 2009).

⁹² See Frederic L. Kirgis, Jr., “The Security Council’s First Fifty Years”, *The American Journal of International Law*, vol. 89:3 (1995): 518, <http://links.jstor.org/sici?sici=0002-9300%28199507%2989%3A3%3C506%3ATSCFFY%3E2.0.CO%3B2-U> (accessed May 14, 2009).

the matters where existence of a threat to international peace and security was not that obvious.⁹³ It should be noted that the factors identified above are not contradictory, but rather reinforce each other and indicate the impact of the institutional constraints of the Security Council on its daily practice.

Furthermore, it should be mentioned that the statements by other members of the Security Council in the aftermath of the voting on the first resolution show that the views held by the French and several other permanent members were not shared in the Council. For example, the representative of Djibouti Mr. Olhaye was more explicit than others and did not hide his disappointment with the attitude of several permanent members stating that "...we all know only too well that the truth is that this is a conflict between Armenia and Azerbaijan" and expressing hope that in the near future the Security Council will be in a position "to call a spade a spade."⁹⁴

The representative of the United Kingdom Mr. Richardson also did not seem to have any delusions as to the root-causes of the conflict unequivocally stating that "...the only realistic solution, given the United Nations and CSCE principles, is for continued Azerbaijani sovereignty over Nagorny Karabakh, with real autonomy for the local Armenian population."⁹⁵ It is noteworthy that in his statement Mr. Richardson elaborated on the reasons why the Security Council decided to act at this moment and time. Speaking on the value of the resolution he underlined that "...it includes the essential elements of a draft statement [by the senior officials of the CSCE] which could not be agreed upon at [the] Prague [meeting] because of the opposition of one party."⁹⁶

The representative of Hungary Mr. Erdos also pointed to the international nature of the conflict stating that "the resolution reaffirms that the United Nations will not accept a policy of *faits accomplis*, threats to regional stability, the use of force for the acquisition of territory, and the violation of international borders."⁹⁷ Likewise, the representative of Venezuela Mr. Arria reminded the Republic of Armenia and the Republic of Azerbaijan that they assumed obligations by signing the Charter of the United Nations, in particular showing "absolute respect for one another's independence and territorial integrity and renounce the use of force as a way of solving dispute."⁹⁸

The President of the Security Council Mr. Marker in his capacity as the representative of Pakistan expressed belief that the adopted resolution "...would lead to an expeditious withdrawal of all Armenian forces from the territory of Azerbaijan Republic and called upon the "concerned *States* to respect scrupulously the sovereignty and territorial integrity of all the States of the region" and "...to respect the inviolability of international borders of all States...".⁹⁹

⁹³ See Frederic L. Kirgis, Jr., "The Security Council's First Fifty Years", *The American Journal of International Law*, vol.89:3 (1995): 511-514, <http://links.jstor.org/sici?sici=0002-9300%28199507%2989%3A3%3C506%3ATSCFFY%3E2.0.CO%3B2-U> (accessed May 14, 2009).

⁹⁴ See *Supra* note 60, at 7.

⁹⁵ See *Supra* note 60, at 13.

⁹⁶ See *Supra* note 60, at 13.

⁹⁷ See *Supra* note 60, at 14.

⁹⁸ See *Supra* note 60, at 17.

⁹⁹ See *Supra* note 60, at 21, (Emphasis added).

Having recreated the overall atmosphere that prevailed in the Security Council on the eve and during the adoption of the first resolution, it is possible to assume that the majority if not all the members of the Security Council did not suffer from the lack of information and had established for themselves the factual situation on the ground. Under these circumstances, the attribution of the invasion of Kelbadjar district to “local Armenian forces”, while keeping all the elements pointing implicitly to the international nature of the conflict was a result of an inevitable compromise forged among the members of the Security Council. The wording of the resolution reflected the effort of the members of the Council to solve a dilemma of reconciling the need to fulfil their obligations under the U.N. Charter and address urgently the issue impartially, taking in due account the irrefutable evidences contained in the incoming reports from the conflict zone and at the same time safeguarding the interests of several permanent members of the Council, which in this particular case seemed to be avoiding direct reference to Armenia as perpetrator of the invasion and occupation of the territories of another sovereign State with all the consequences which this could entail.

The Security Council action in response to further escalation of the conflict

Perhaps it would have been possible to prevent further escalation of the conflict with more destruction of civilian settlements and mass fleeing of the population from the occupied territories, had the Security Council adopted a resolution with an enforcement clause in it. There were proposals voiced in the Council during the proceedings before the adoption of the forth resolution 884 on the matter to include into the text an expression of the Council’s intention to take further appropriate steps in case these resolutions continue to be defied.¹⁰⁰ In any case, although the first resolution is not without value in terms of providing together with the subsequent resolutions overall legal framework for the ongoing peace negotiations, it did not prevent the conflict from further spiralling down into the full-fledged war. The possible rationale behind the positions of at least several permanent members of the Security Council elaborated above explains why the subsequent resolutions adopted by the Council in response to the increasing violence and advancement of Armenian forces deeper into the territory of Azerbaijan by and large repeated the pattern and were watered down to certain extent. However, the other resolutions adopted in the course of 1993 introduced a number of new elements, which are important to elaborate on with a view to trace the evolution in the assessment of the situation by the Security Council.

Amid the escalation of the hostilities and intensifying armed attacks in the course of the four months the Security Council has adopted three more resolutions.¹⁰¹ The second resolution (853) openly acknowledges the existence of tensions between Armenia and Azerbaijan (in previous resolution the Council only expressed concern over deterioration of relations between the two countries).

The paragraphs 3, 4, 5, 8 and 12 of the resolution are of particular interest and should be analysed together, since in these provisions the Security Council essentially outlined the step-by-step approach for the conflict settlement. Thus, in the paragraph 3, the Council excluded any conditionality in regard of withdrawal of the occupying forces, explicitly demanding “...*immediate, complete and unconditional* withdrawal of the occupying forces involved

¹⁰⁰ See U.N. Doc. PV.3313 (November 12, 1993) at 5, (Pakistan).

¹⁰¹ See U.N. Doc. S/RES/853 (July 29, 1993); U.N. Doc. S/RES/874 (October 14, 1993); U.N. Doc. S/RES/884 (November 12, 1993).

from the district of Agdam and all other recently occupied areas of the Azerbaijani Republic”.¹⁰² By this unequivocal demand the Security Council left no room for interpretation of the text of the resolution and *a priori* excluded any trade-off of the occupied territories for some sort of political gains at the negotiation table. The importance of this position by the Council is even more apparent, if compared with other cases, when ambiguity in the text of the resolutions of the Security Council resulted in endless interpretation and “chicken-and-egg” type debates over the terms of the conflict settlement. The classic case in point is the resolution 242 (1967).¹⁰³ The ambiguous design of the resolution meant different things to the different parties involved. As a result, the Arab States referring to the resolution demanded immediate withdrawal of Israel from the occupied territories, while Israel, referring to the provisions of the same resolution, maintained that withdrawal is conditioned by the permanent peace agreement, security and recognition of Israel by its Arab neighbours.¹⁰⁴

In paragraph 4 of the resolution 853 the Security Council calls for the parties to reach and maintain durable cease-fire arrangements, whereas in paragraph 5 it “[r]eiterates in the context of paragraphs 3 and 4 above its earlier calls for the restoration of economic, transport and energy links in the region”. In paragraph 8 the Council “[u]rges the parties concerned to refrain from any action that will obstruct a peaceful solution to the conflict, and to pursue negotiations within the Minsk Group of the CSCE, as well as through direct contacts between them, towards a final settlement”.

The Security Council expressed its grave concern at the displacement of large numbers of civilians in the Azerbaijani Republic...” and in paragraph 12 of the resolution requested the Secretary-General and relevant international agencies “...to assist displaced persons to return to their homes”. It is noteworthy that the Council did not put any conditions on the return of the displaced population, suggesting that the return should start immediately as soon as the situation on the ground will allow doing so. Thus, already at this stage, the Council clearly showed that it favours a phased approach in the settlement of this conflict as the only viable option, which would consist of the sequence of steps, which in its view, need to be taken to remove the results of the conflict and foster a resolution, starting with withdrawal of occupying forces, establishment and maintenance of durable cease-fire arrangements, restoring communications in the region, return of the displaced population to their homes and continuing negotiations towards a final settlement.

Another noteworthy element, which was absent in the first resolution, was coining by the Security Council of the term ‘Nagorny Karabakh region of the Azerbaijani Republic’, which was used in the subsequent resolutions of October and November 1993.¹⁰⁵ Armenia was continuously referring in its correspondence to the Security Council to the self-proclaimed “Nagorny Karabakh Republic” implying that it was an independent “state” and was distributing documents on its behalf.¹⁰⁶ Azerbaijan categorically rejected any attempts to introduce into United Nations usage of any concepts that would undermine its sovereignty and territorial integrity and registered its vigorous objection with the Security Council

¹⁰² See U.N. Doc. S/RES/853 (July 29, 1993), para. 3.

¹⁰³ See U.N. Doc. S/RES/242 (November 22, 1967).

¹⁰⁴ *Ibid.*, para 1.

¹⁰⁵ See U.N. Doc. S/RES/853 (1993); U.N. Doc. S/RES/874 (1993); U.N. Doc. S/RES/884 (1993).

¹⁰⁶ See letters of the Permanent Representative of Armenia to the United Nations addressed to the President of Security Council. U.N. Doc. S/23896 (May 11, 1992); U.N. Doc. S/26036 (July 4, 1993); U.N. Doc. S/26154 (July 26, 1993); U.N. Doc. S/26393 (September 1, 1993); U.N. Doc. S/26409 (September 7, 1993);

President¹⁰⁷ to the use of term “Nagorny Karabakh Republic” in the letters circulated as a Security Council document at the request of Armenia.¹⁰⁸ By using the term the ‘Nagorny Karabakh region of the Azerbaijani Republic’ in the operative paragraph¹⁰⁹ of the above-mentioned resolution the Security Council decided which of the legal propositions presented by Armenia and Azerbaijan was in accord with international law and reaffirmed that the Nagorny Karabakh region was part of the territory of the Republic of Azerbaijan.

Furthermore, the fact that unlike the resolution 822, in which the Security Council reaffirmed “the *respect* for sovereignty and territorial integrity of all States in the region”,¹¹⁰ in its second and subsequent resolutions the Council was more specific and reaffirmed “*the sovereignty and territorial integrity of the Azerbaijani Republic* and of all other States in the region” should not escape one’s attention either.¹¹¹ Removal of the word “respect” from the phrase put an additional emphasis on the recognition of the *sovereignty* of Azerbaijan over its territory, including the Nagorny Karabakh region.

This opinion of the Security Council essentially reflected the general view of the international community,¹¹² which, based on the principle *uti possidetis juris*, recognised the former administrative borders between the Union Republics of the former Soviet Union as the international boundaries of the newly independent States protected by international law.¹¹³ The Government of Armenia was alarmed with such a position of the Security Council and could not hide its irritation with the language of the resolutions.¹¹⁴

This assessment by the Security Council of the Nagorny Karabakh region as being a part of the territory of the Republic of Azerbaijan under international law was in line with other paragraphs of this and other resolutions, in which the Council reaffirmed the inviolability of international borders and inadmissibility of the use of force for the acquisition of territory.¹¹⁵

¹⁰⁷ See letter of the Permanent Representative of Azerbaijan to the United Nations addressed to the President of Security Council. U.N. Doc. S/24771 (November 7, 1992).

¹⁰⁸ See letter of the Permanent Representative of Armenia to the United Nations addressed to the President of Security Council. U.N. Doc. S/24751 (October 31, 1992).

¹⁰⁹ The operative paragraphs of the U.N. Security Council resolutions state the opinion of the Council or the action to be taken, whereas the preamble clauses of the resolutions generally recite the considerations on the basis of which action is taken.

¹¹⁰ See U.N. Doc. S/RES/822 (April 30, 1993), (Emphasis added).

¹¹¹ See U.N. Doc. S/RES/853 (July 29, 1993), (Emphasis added).

¹¹² See for example the Declaration of the European Commission on “The Guidelines on Recognition of New States in Eastern Europe and the Soviet Union” adopted on December 16, 1991 at the Extraordinary European Political Cooperation Ministerial Meeting (Doc.4a/21), reproduced in *European Foreign Policy: Key Documents*, ed. Christopher Hill & Karen E. Smith, (London & New York: Routledge, 2000), 282.

¹¹³ For the detailed review of this and other legal aspects of the conflict see Tofiq Musayev, “From Territorial Claims to Belligerent occupation: Legal Appraisal”, *Diplomatiya Alami* (“Diplomatic World”), Journal of the Ministry of Foreign Affairs of the Republic of Azerbaijan, No. 18-19 (2008), available online at <http://mfa.gov.az/images/stories/jurnal/18-19.pdf>; See also “Report on the Fundamental Norm of the Territorial Integrity of States and Right to Self-determination in the Light of Armenia’s Revisionist Claims”, U.N. Doc. A/63/664-S/2008/823 annexed to the letter dated December 26, 2008 from the Permanent Representative of Azerbaijan to the United Nations addressed to the Secretary-General, available online at <http://daccessdds.un.org/doc/UNDOC/GEN/N08/670/89/PDF/N0867089.pdf?OpenElement> (accessed April 20, 2009).

¹¹⁴ See statements issued on August 2, 1993 and October 20, 1993 by the Ministry of Foreign Affairs of the Republic of Armenia annexed to the letters of the Permanent Representative of Armenia to the United Nations addressed to the President of Security Council U.N. Doc. S/26236 (August 4, 1993) and U.N. Doc. S/26612 (October 21, 1993).

¹¹⁵ See *Supra* note 105.

The statements by the permanent members of the Security Council during the proceedings leading to the adoption of these resolutions indicate that the members of the Council were alarmed with the continuing military activities and seizure of additional territory by force. The members of the Security Council wanted to send a clear message that “the international community will no longer tolerate the continuation of bloodshed and the ever-more-dangerous escalation of the conflict.”¹¹⁶ It seems that in order to make their appeal to stop hostilities more convincing the members of the Security Council chose to reaffirm in the subsequent resolutions the uselessness of territorial acquisitions by force since, as was mentioned above, any occupation under international law would not lead to the automatic transfer of sovereignty over that particular territory or change of its legal status.

Interestingly, the nine members of the Minsk Conference¹¹⁷ spoke in similar terms in their statement endorsed by the Security Council,¹¹⁸ in which they stressed that “[n]o acquisition of territory by force can be recognized, and the occupation of territory cannot be used to obtain international recognition or to impose a change of legal status.”¹¹⁹

The Security Council went even further in its second resolution (reiterated in its forth resolution) and for the first time urged “the Government of the Republic of Armenia to continue to exert its influence to achieve compliance by the Armenians of the Nagorny Karabakh region of the Azerbaijani Republic with its [resolutions] ...”.¹²⁰ The appearance of such explicit reference to the link between the Government of the Republic of Armenia and the separatist regime in Nagorny Karabakh region and the apparent influence of the former over the latter is noteworthy. The strong link between the Government of Armenia and the forces in the Nagorny Karabakh region was also obvious to the European Community, which in its statement of September 3, 1993 in line with the second resolution adopted by the Security Council called the Government of Armenia to “use its *decisive* influence over the Armenians of Nagorny Karabakh to see that they comply with the Security Council [resolutions]...”.¹²¹

The report of the Chairman of the Minsk Conference of the CSCE addressed to the President of the Security Council, which was discussed in the Security Council before the adoption of the second resolution can shed some light on the reasons why the Security Council found it necessary at this point to refer to the Government of Armenia in its resolution.¹²² In this report, which was drafted in the aftermath of the armed attack and seizure of the city of Agdam located beyond the administrative line of the former NKAO, the Chairman of the Minsk Conference Mr. Raffaelli noted that the situation in the conflict zone changed

¹¹⁶ See U.N. Doc. S/PV.3313 at 8 (November 12, 1993), (Russia); See also S/PV.3292 (October 14, 1993) at 4, (France); S/PV.3313 (November 12, 1993).

¹¹⁷ Germany, the United States of America, Belarus, France, Italy, Russian Federation, Sweden, Czech Republic and Turkey.

¹¹⁸ See U.N. Doc. S/PV.3313 (November 12, 1993).

¹¹⁹ See “Declaration of Nine” Enclosure I to the letter dated November 9, 1993 of the Permanent Representative of Italy to the United Nations addressed to the President of Security Council, U.N. Doc. S/26718 (November 10, 1993);

¹²⁰ U.N. Doc. S/RES/853 (July 29, 1993), para 9.

¹²¹ See Statement annexed to the Letter dated September 7, 1993 from the Permanent Representative of Belgium to the United Nations addressed to the President of the Security Council U.N. Doc. S/26417 (September 15, 1993), (Emphasis added).

¹²² See Report by the Chairman of the Minsk Conference of the Conference on Security and Cooperation in Europe on Nagorny Karabakh to the President of the Security Council dated July 27, 1993 annexed to the letter from the Permanent Representative of Italy to the United Nations addressed to the President of the Security Council U.N. Doc. S/26184 (July 28, 1993).

dramatically and that further territories of the Azerbaijani Republic were occupied. While noting in his report that the attitude of the leaders of the local Armenian community in Nagorny Karabakh is governed by military, rather than diplomatic considerations, in his statement supported by the nine countries of the Minsk Conference issued earlier he warned that “[t]hose who *encourage* the Armenian community of Nagorny Karabakh to continue the fighting and the encroachment on the surrounding territories share responsibility for the continuing loss of Armenian lives and the destruction of the *Armenian economy*.”¹²³ He came to conclusion that under the circumstances political pressure by the international community is necessary to give impetus to the peace process and called for the early action by the Security Council.¹²⁴ It is noticeable that the Chairman of the Minsk Conference while noting that the forces in Nagorny Karabakh are encouraged by a third party, warned of the negative consequences of the continuing military operations for the economy of Armenia, implicitly acknowledging in this way that those, who encourage further occupation of the territories of Azerbaijan were in Armenia.

Given the overall military context in which the Security Council adopted its second resolution and the reports from the CSCE indicating the existence of forces encouraging further military advances in the conflict zone, one can argue that by urging the Government of Armenia to continue to exert its influence to achieve compliance by the Armenians of the Nagorny Karabakh region with its resolutions, the Security Council had established for itself that the Government of Armenia was in a position to exert influence to have all occupying forces cease hostile acts and withdraw from the occupied territories of Azerbaijan (this is what it demanded in its resolutions). The Security Council was more specific in this regard and in its statement of August 18, 1993 amid the intensification of the fighting in the Fizuli district of Azerbaijan demanded the immediate, complete and unconditional withdrawal of occupying forces from the occupied areas of Azerbaijan and called “the Government of the Republic of Armenia to use its *unique* influence to this end”.¹²⁵

The Security Council in its resolution 853 of July 1993 urged “states to refrain from the supply of any weapons and munitions which might lead to an intensification of the conflict or the continued occupation of territory”.¹²⁶ But already in its forth resolution in the wake of occupation of Zangelan district of the Republic of Azerbaijan and the attack on the city of Goradiz in the Fizuli district the Council went even further and specifically called “the Government of the Republic of Armenia to use its influence to... ensure that forces involved are not provided with the means to extend their military campaign further.”¹²⁷ The Security Council apparently was aware that due to the complex geography of the area of conflict, the only direction through which the forces in and around the Nagorny Karabakh region could be resupplied with ammunition was through the roads linking Armenia and the Nagorny Karabakh region passing through the Lachin and Kelbadjar districts, which were occupied by then and were under the Armenian control.

¹²³ See Appendix “Statement of the Chairman of the CSCE Minsk Conference on the offensive on and the reported seizure of the Azerbaijani city of Agdam”, at 5, to the Report by the Chairman of the Minsk Conference of the Conference on Security and Cooperation in Europe on Nagorny Karabakh to the President of the Security Council dated July 27, 1993 annexed to the letter from the Permanent Representative of Italy to the United Nations addressed to the President of the Security Council U.N. Doc. S/26184 (July 28, 1993), (Emphasis added).

¹²⁴ See *Supra* note 119, at 3.

¹²⁵ See U.N. Doc. S/26326 (August 18, 1993), (Emphasis added).

¹²⁶ See U.N. Doc. S/RES/853 (1993), para. 10.

¹²⁷ U.N. Doc. S/RES/884 (November 12, 1993), para 2.

At the same time, the drafters of these resolutions wanted to balance the reports coming from the region pointing to the direct involvement of Armenia in the conflict by presenting the role of the Government of Armenia in a maximum positive way.¹²⁸ By urging the Government of Armenia to *continue* to exert its influence, the Security Council seems to be convinced that this influence was taking place for a while. Yet, not only as a result of this influence by Armenia the fighting was halted, on the contrary, the conflict zone expanded even further with more territories of Azerbaijan falling under the occupation.¹²⁹ However, the important thing is that by stating that the Government of Armenia is in a position to exert continuous influence over the occupying forces it seems that the Security Council was under the impression that the advancing occupying forces were under the control of the Government of Armenia.¹³⁰

It should be mentioned that the determination of a potential of control by the *de-jure* organs of a State over the course of the military actions allegedly carried out by the paramilitary forces on the territory of another sovereign State was used by the International Court of Justice in its judgment in the *Nicaragua case*¹³¹ and elaborated further in the *Bosnian Genocide case*¹³² to attribute the unlawful conduct by the paramilitary forces to the outside State and thus establishing that State's responsibility for this conduct under international law. Elaboration in detail of the question of the control by an outside State over the paramilitary forces carrying out military activities in the territory of another State is beyond the scope of this article and requires separate consideration.¹³³

Further advance of the Armenian forces and the expansion of the conflict deeper into Azerbaijani territories and closer to the international borders of Azerbaijan with Iran and Turkey alarmed these regional countries. In the wake of the occupation of Djabrail and Kubatli districts and the real threat of seizure of Zangelan district of Azerbaijan, the Minister of Foreign Affairs of Iran Mr. Ali Akbar Vilayati in his letter addressed to the UN Secretary-General expressed his concern with the developments and called the United Nations [to] "...take immediate and effective measures to implement Security Council Resolutions 822 (1993) and 853 (1993) and decisively compel the aggressive forces to accept a cease-fire and

¹²⁸ The representative of Brazil in his statement after the voting on the resolution S/RES/853 echoed the arguments, which reportedly were put forward during the off-the-record consultations in the Security Council and described the influence of Armenia as "constructive", U.N. Doc. S/PV.3259 (July 29, 1993) at 13.

¹²⁹ The fact that the attacks by the Armenian armed units continued even at a time when there was a real progress in the negotiating process was recognised even by the Permanent Members of the Security Council. See Statement by the Russian representative Mr. Vorontsov after the vote on the resolution S/RES/853 U.N. Doc. S/P.3259 (July 29, 1993), at 9-10.

¹³⁰ The fact that the Armenian forces on the ground responded instantaneously to the "appeals" of the Government of Armenia can be seen from the letters of the Permanent Representative of Armenia to the United Nations addressed to the President of the Security Council (although there is no reported evidence on the ground, nor can it be verified that the retreat of the Armenian forces from the previously occupied territory had actually taken place). See U.N. Docs. S/26394 (September 1, 1993) and S/26393 (September 1, 1993).

¹³¹ See *Supra* note 48.

¹³² See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, ICJ Judgment of February 26, 2007. All ICJ cases are available online at <http://www.icj-cij.org/>.

¹³³ For an extensive analysis of the issues of control by the State over the military activities of paramilitary forces see Stefan Talmon, "The Various Control Tests in the Law of State Responsibility and the Responsibility of Outside Powers for Acts of Secessionist Entities", Materials of the International Conference entitled "Basic Principles for the Settlement of the Conflicts on the Territories of the GUAM States", Baku, April 15-16, 2008. Modified version of the article was published in *International and Comparative Law Quarterly*, vol. 58 (May 2009).

to withdraw to the internationally recognised borders.”¹³⁴ This recognition of the fact that the attacks on the south-western districts of Azerbaijan were mounted from the territory of Armenia is particularly noteworthy, since Iran from the beginning of the conflict was pursuing a neutral policy and, secondly, the geographic proximity of the fighting allowed Iran to monitor the events right across its border with Azerbaijan.

Similarly, the Government of Turkey after the Kelbadjar offensive and especially with the occupation of other districts of Azerbaijan as well as the armed attacks on the Nakhichevan province urged Armenia to stop aggression against Azerbaijan, to respect its commitments under the U.N. Charter and made improvement of its relations with Armenia¹³⁵ conditional upon the withdrawal of the Armenian forces from the occupied territories.¹³⁶

The Member States of the European Community also in response to the attacks of the Armenian armed forces against the south-western districts of Azerbaijan¹³⁷ issued a statement on September 3, 1993 in which they called these forces to fully respect the Security Council resolutions and withdraw from the regions of Kelbadjar, Agdam, Fizuli and Djebail emphasizing that the “...member States have no evidence that Azerbaijan would be capable of initiating major attacks from these regions.”¹³⁸ Indeed, the sequence of the occupation of the territories of Azerbaijan suggests that the advances of the Armenian armed forces resembled more pre-planned military operations rather than sporadic spill-over of fighting into the neighbouring areas.¹³⁹

It is interesting to note that Russia, which after the retreat from the South Caucasus in the wake of the demise of the Soviet Union, thought to make a comeback through offering to the parties a peace plan on its own terms, perceived any mediation efforts of Iran and especially of Turkey as attempts to expand their influence into the region.¹⁴⁰ The coincidence of the intensification of the fighting and further advances of the Armenian armed forces deeper into the territory of Azerbaijan with the reluctance of Azerbaijan to accept the terms of the proposed Russian deal¹⁴¹ is striking and reveals the geopolitical dimension of the conflict.¹⁴²

¹³⁴ See letter dated August 30, 1993 from the Chargé d’Affaires a.i. of the Permanent Mission of the Islamic Republic of Iran addressed to the Secretary-General, U.N. Doc. S/26387 (August 31, 1993), (Emphasis added).

¹³⁵ In April 1993, protesting against the attack and occupation of Kelbadjar district Turkey cut diplomatic relations with Armenia and suspended shipment of goods through its territory to this country, which complicated already strained relations between these two countries.

¹³⁶ See letters dated April 5, 1993 and April 27, 1993 of the Permanent Representative of Turkey to the United Nations addressed to the President of the Security Council, U.N. Docs. S/25524 (April 5, 1993) and U.N. Doc. S/25671 (April 27, 1993).

¹³⁷ See letter dated August 23, 1993 of the Permanent Representative of Azerbaijan to the United Nations addressed to the President of the Security Council, U.N. Doc. S/26345 (August 24, 1993).

¹³⁸ See letter dated September 7, 1993 of the Permanent Representative of Belgium to the United Nations addressed to the President of the Security Council, U.N. Doc. S/26417 (September 15, 1993).

¹³⁹ The occupation of the Lachin (May 18, 1992) and Kelbadjar (April 2, 1993) districts created land connection between the Nagorny Karabakh region of Azerbaijan and Armenia, which was crucial for resupply of arms and ammunitions, while the seizure of Agdam (July 23, 1993) and Fizuli (August 23, 1993) districts cut off the north-western districts from the rest of Azerbaijan thus paving the way for the occupation of Djabrail (August 23, 1993), Gubatly (August 31, 1993) and Zangelan (October 23, 1993) districts.

¹⁴⁰ See Elizabeth Fuller, “Russia, Turkey, Iran, and the Karabakh Mediation Process”, RFE/RL Research Report, vol.3:8 (February 25, 1994);

¹⁴¹ The Russian-sponsored plan envisaged signing of a cease-fire and deployment of the CIS peacekeeping forces (essentially Russian) to the region. For more on this see Svante Cornell (ed.) *Small Nations and Great Powers: A Study of Ethno-political Conflict in the Caucasus*, (London: Curson Press, 2000), 99-102.

¹⁴² See Thomas Goltz, “Letter from Eurasia: The Hidden Russian Hand”, *Foreign Policy*, CEIP, No. 92, (Fall

Under the circumstances, in the course of the three months the Security Council adopted two more resolutions (874 and 884). The Security Council seems to be convinced that the south-western districts of Azerbaijan were attacked also from the territory of Armenia and in its fourth resolution (884) in the paragraph concerning the occupation of the Zangelan district condemned "...attacks on civilians and *bombardments of the territory of the Azerbaijani Republic*"¹⁴³ The evolution in the assessment of the situation by the Council is even more revealing, if compared with its previous resolutions, in which the Security Council spoke in general terms and condemned "bombardments of inhabited areas".¹⁴⁴

It is noteworthy that the third resolution (874) unlike the two previous ones mentions the role of the Russian Federation in establishing the cease-fire, while urging the states in the region "to refrain from any hostile acts and from any interference or intervention which could lead to the widening of the conflict and undermine peace and security in the region."¹⁴⁵ Although no states were singled out, given the frustration of Russia with various international mediation efforts, one can argue that the primary sponsor of this paragraph was Russia, which under the pretext of preventing possible spill-over of the conflict into neighbouring regions wanted to put the weight of the Security Council behind its efforts to rebuff possible involvement of Turkey and to a lesser extent of Iran. In this regard, the distinction, which the Security Council is making in this resolution between the terms interference and intervention, is particularly noteworthy.

In its fourth resolution (884) the Security Council while reiterating its previous demands to cease armed hostilities, make effective and permanent the cease-fire and demanding unilateral withdrawal of occupying forces from the Zangelan district and from other recently occupied areas of Azerbaijan, expressed once again its concern at the displacement of a large numbers of civilians in the Republic of Azerbaijan and requested the Secretary-General and relevant international agencies to provide urgent humanitarian assistance to the affected civilian population and to assist displaced persons to return to their homes.¹⁴⁶

The resolution 853 and subsequent resolutions 874 and 884 are particularly noteworthy since in these resolutions the Security Council used its authority under Article 34 and determined that the continuation of the conflict in and around the Nagorny Karabakh region of the Azerbaijani Republic, and of the tensions between the Republic of Armenia and the Azerbaijani Republic, would endanger peace and security in the region. Such a determination is a prerequisite for invoking the relevant provisions of Chapter VI, particularly Article 33(2), Article 36, and Article 37(2), which give the Council authority to recommend terms of settlement of the conflict. By making such determination on the situation the Council indicated that it was acting under these provisions.

The fact that the Security Council did not specifically mention in these resolutions that it was acting under Chapter VII diminishes neither the power of the Council to express its authoritative position towards the conflict, nor the value of the recommendations of the terms

1993); Elizabeth Fuller, "*Karabakh Mediation Process: Grachev versus the CSCE?*", RFE/RL Research Report, vol.3:23 (June 10, 1994); Elizabeth Fuller, "*Nagorno-Karabakh: Internal Conflict Becomes International*", RFE/RL Research Report, (March 13, 1992).

¹⁴³ See U.N. Doc. S/RES/884 (1993), para. 1, (Emphasis added).

¹⁴⁴ See U.N. Doc. S/RES/853 (1993), para. 2.

¹⁴⁵ See U.N. Doc. S/RES/874 (1993) and S/RES/884 (1993), paras. 10 and 6 respectively.

¹⁴⁶ See U.N. Doc. S/RES/884 (1993).

of the settlement that in its assessment would restore international peace and security. What is essential is that the Council is empowered through these Articles to consider the merits of the conflict situation and reach a conclusion, which, as was pointed out by Kirgis, would have “normative consequences”.¹⁴⁷ And this is what the Security Council did. The text of the adopted resolutions indicate that the Security Council made it clear that it would not accept any *fait accompli* situations arising as a result of the use of force for the acquisition of territory. The determination by the Council of the fact of *occupation* of the territories of Azerbaijan and qualification of occupation as unlawful under international law is by definition requires that the perpetrator of this unlawful act is obliged to end this occupation immediately and unconditionally. In other words, the obligation to put an end to internationally wrongful act derives not only from principles and norms of international law¹⁴⁸, but also from the acts of application of these norms through, *inter alia* the UN Security Council resolutions. The existence of the fact of occupation also puts obligation on all States not to recognize as lawful the situation resulting from the occupation of the territories of the Republic of Azerbaijan, nor render aid or assistance in maintaining this situation.

Furthermore, it is well worth reminding here that the resolutions adopted by the Security Council are binding on the basis of Article 25 of the U.N. Charter, which states that “[t]he Members of the United Nations agree to accept and to carry out the decisions of the Security Council in accordance with the present Charter”. This understanding of the meaning of Article 25 is reflected in the interpretation by the authoritative Venice Commission of the Council of Europe of the recommendations contained in the resolutions adopted by the Security Council¹⁴⁹ in the wake of the escalation of the armed conflict in Georgia in August 2008.¹⁵⁰

Conclusion: The implications of the U.N. Security Council action for the conflict settlement

The analysis of the terminology used in the four resolutions of the Security Council and the statements by its President viewed within the overall context of the unfolding events on the ground as well as the attitudes of the several permanent members of the Council towards the conflict confirmed the supposition made in the introduction part of this article that the adopted resolutions were the result of the complex web of interrelated factors. The decision-making process of the Security Council, which transformed over the decades into an institutional constraint, the special interests of at least several permanent members of the Council on the one hand as well as the obligation to abide by the U.N. Charter in its daily practice had a decisive impact on the actions by the Security Council in relation to the conflict between Armenia and Azerbaijan.

¹⁴⁷ See Frederic L. Kirgis, Jr., “The Security Council’s First Fifty Years”, *The American Journal of International Law*, vol. 89:3, (1995): 519, <http://links.jstor.org/sici?sici=0002-9300%28199507%2989%3A3%3C506%3ATSCFFY%3E2.0.CO%3B2-U> (accessed May 14, 2009).

¹⁴⁸ See Article 3 of the International Law Commission’s Articles on Responsibility of States for International Wrongful Acts, annexed to U.N. General Assembly resolution 56/83 adopted on December 12, 2001.

¹⁴⁹ See U.N. Doc. S/RES/1839 (2008) (October 9, 2008); U.N. Doc. S/RES/1866 (2009) (February 13, 2008).

¹⁵⁰ See Opinion No. 516/2009 on “The Law on Occupied Territories of Georgia” approved by the Georgian parliament on October 28, 2008, adopted in March 2009 on the 78th plenary session of the European Commission for Democracy through Law (Venice Commission) of the Council of Europe.

The resolutions did not prevent further escalation of the conflict. By May 1994, when a cease-fire was brokered, the Nagorny Karabakh region and surrounding seven administrative districts, which constitute almost one-fifth of the territory of Azerbaijan, were occupied by the Armenian forces. Approximately one out of every eight persons in Azerbaijan became an internally displaced person or refugee, tens of thousands of people were killed, wounded or injured and about 5,000 citizens since then are missing. The peaceful negotiations between Armenia and Azerbaijan with the mediation of the Co-Chairs of the OSCE Minsk Group conducted for over fifteen years have yet to yield results.

Nevertheless, the gravity of the situation threatening international peace and security prevented the Security Council from adopting more watered-down and neutral resolutions, which was often the case, when at least several permanent members of the Council had particular interest towards a conflict situation. Although the Security Council followed the established pattern and fell short of pointing finger, guided by the obligation to preserve objectivity and abide by the U.N. Charter, the Council determined that the territories of Azerbaijan were under occupation as a result of military activities. This determination put in motion the international legal instruments, which were designed specifically to address the situations emerging out of belligerent occupation and to protect these territories and to ensure that their legal status remains unaffected by the occupation pending their return to the sovereign. Thus, the law on occupation, which is essentially framed by the 1907 Hague Regulations and the Geneva Convention IV provides that the fact of occupation is considered temporary by international law and, hence, no transfer of sovereignty over the occupied territory to the occupier is possible. Furthermore, the law on occupation puts clear-cut obligations on the occupying power in regard of the occupied territory. Among them are the obligations not to change the existing legal system and to respect the existing institutions. The law on occupation also prohibits the acts of pillage, looting and the exploitation of resources, the destruction by the occupying power of any real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities. Of particular importance is Article 49 of Geneva Convention IV, which prohibits the establishment of settlements in the occupied territories consisting of the population of the occupying power or of persons encouraged by the occupying power with the intention of changing the demographic composition in these territories.¹⁵¹

Hence this recognition of the fact by the Security Council allowed Azerbaijan to keep the situation in the occupied territories under the scrutiny of the international community.¹⁵² In 2005 in response to the concerns regarding the illegal settlements in the occupied territories

¹⁵¹ See the “*Report on the international legal responsibilities of Armenia as the belligerent occupier of Azerbaijani territory*”, U.N. Doc. A/63/692-S/2009/51 annexed to the letter dated January 27, 2008 from the Permanent Representative of Azerbaijan to the United Nations addressed to the Secretary-General. Available online at <http://daccessdds.un.org/doc/UNDOC/GEN/N09/221/70/PDF/N0922170.pdf?OpenElement> (accessed April 20, 2009).

¹⁵² On October 29, 2004, the U.N. General Assembly decided to include the item entitled “The situation in the occupied territories of Azerbaijan” to the agenda of its 59th session. The issue of the situation in the occupied territories of Azerbaijan has been also included into the agenda of the subsequent sessions of the U.N. General Assembly. On March 14, 2008, the General Assembly adopted at its 62nd session resolution A/RES/62/243 on the situation in the occupied territories of Azerbaijan, in which the General Assembly expressed concern that the armed conflict in and around the Nagorny Karabakh region of the Republic of Azerbaijan continued to endanger international peace and security, and reaffirmed *inter alia* its continued strong support for the sovereignty and territorial integrity of the Republic of Azerbaijan within its internationally recognized borders.

raised by Azerbaijan before the U.N. General Assembly¹⁵³ the OSCE dispatched a fact-finding mission to assess the situation on the ground.¹⁵⁴ In 2006 alarmed by the reports¹⁵⁵ of the wide-scale fires in the occupied territories of Azerbaijan the U.N. General Assembly adopted a resolution entitled “The situation in the occupied territories of Azerbaijan”, as proposed by Azerbaijan, which stressed the necessity of the urgent conduct of an environmental operation and called for an assessment of the short-term and long-term impact of the fires on the environment of the region and its rehabilitation.¹⁵⁶ As a follow-up another OSCE fact-finding mission was conducted in the occupied territories in October 2006.¹⁵⁷

Furthermore, the Security Council resolutions provided rather clear appraisal of the situation on the ground and identified the principles and norms of international law applicable to this conflict, while reminded of the inadmissibility of violating those norms. By pointing to internationally wrongful acts in the context of this conflict the Security Council established the obligations of the perpetrator of those acts as well as the rights of the victim.

While reiterating its full support for the peace process being pursued within the framework of the OSCE, the Security Council through its resolutions established the overall legal framework for the conflict settlement in the context of the Minsk process and outlined the principles that should provide guidance for the mediation efforts to find a just and lasting solution to the conflict. In particular, the resolutions reaffirmed the sovereignty and territorial integrity of the Republic of Azerbaijan, stressed the inadmissibility of the use of force for the acquisition of territory, demanded immediate, complete and unconditional withdrawal of the Armenian forces from all the occupied territories, called for the restoration of economic, transport and energy links in the region and called to assist the displaced persons to return to their homes. It is noteworthy that in the aftermath of the Budapest summit of the CSCE (1994), which decided to intensify CSCE action in relation to the conflict, the Security Council returned to this matter and issued a statement¹⁵⁸, in which it reaffirmed all its relevant resolutions on the principles of sovereignty and territorial integrity as well as the inviolability of international borders and stressed the urgency of concluding a political agreement on the cessation of the armed conflict on the basis of the relevant principles of the Charter of the United Nations and of the OSCE.

¹⁵³ See “*Information on the transfer of population into the occupied territories of Azerbaijan*”, annexed to the letter dated November 11, 2004 from the Permanent Representative of Azerbaijan to the United Nations addressed to the President of the General Assembly, U.N. Doc. A/59/568, (November 11, 2004).

¹⁵⁴ Based on the findings of the OSCE Fact-Finding Mission carried out from 30 January–5 February 2005 the OSCE Minsk Group Co-Chairmen in their recommendations have emphasized the inadmissibility of changes in the demographic composition of the region and urged appropriate international agencies to conduct needs assessment for resettlement of the population located in the occupied territories and return of the internally displaced persons to their places of permanent residence. For the details see Letter dated March 18, 2005 from the Permanent Representative of Azerbaijan to the United Nations addressed to the Secretary-General. Annex II: *Report of the OSCE fact-finding mission to the occupied territories of Azerbaijan surrounding Nagorny Karabakh*, U.N. Doc. A/59/747-S/2005/187, (March 21, 2005).

¹⁵⁵ See Letter dated July 28, 2006 from the Minister for Foreign Affairs of the Republic of Azerbaijan annexed to the letter dated July 28, 2006 from the Permanent Representative of Azerbaijan to the United Nations addressed to the Secretary-General, U.N. Doc. A/60/963.

¹⁵⁶ See U.N. Doc. A/RES/60/285 (September 7, 2006).

¹⁵⁷ For details see letter dated December 20, 2006 from the Permanent Representative of Belgium to the United Nations addressed to the Secretary-General. Annex: *OSCE-led environmental assessment mission to the fire-affected territories in and around the Nagorny Karabakh region. Report to the OSCE Chairman-in-Office from the Coordinator of OSCE Economic and Environmental Activities*. U.N. Doc A/61/696.

¹⁵⁸ See Statement by the President of the Security Council, U.N. Doc. S/PRST/1995/21 (April 26, 1995).

The step-by-step approach to the settlement of the conflict suggested by the U.N. Security Council through its resolutions is of practical relevance to the current peace negotiations conducted in the framework of the OSCE. The phased settlement model built into these resolutions and advocated for by Azerbaijan for the past decade is increasingly accepted not only by the international community, but also by Armenia as the only viable strategy to break the stalemate in the resolution of this protracted conflict. The Joint declaration¹⁵⁹ signed in Moscow on November 2, 2008 by the Presidents of Azerbaijan, Armenia and the Russian Federation - the first ever document signed between Armenia and Azerbaijan since the cease-fire of 1994 – reflect the acceptance by the parties of the step-by-step approach to the settlement of the conflict on the basis of the principles and norms of international law and the decisions and documents adopted in this framework.

¹⁵⁹ For the English version of the text of the Joint declaration see annex to the letter dated November 10, 2008 from the Permanent Representative of the Russian Federation to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2008/702, (November 11, 2008).