NAGORNO-KARABAKH: A LEGAL REAPPRAISAL

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ABSTRACT

In September 2023, the Republic of Azerbaijan utilized military force to capture Nagorno-Karabakh, a mountainous region in the southern Caucasus. The region, whose inhabitants were majority ethnic Armenians, had been governed by the self-declared Republic of Artsakh (formerly the Republic of Nagorno-Karabakh), a de facto independent state since 1994 after Armenian forces won a war against Azerbaijan. For more than thirty years, Azerbaijan has relied on the international legal doctrine of uti possidetis juris, a rule sanctifying prior colonial administrative borders upon the emergence of new states, to justify its claim to Nagorno-Karabakh. Meanwhile, Armenians living in Nagorno-Karabakh justified their claim to an independent state based on the peremptory legal norm of self-determination. This Note explores the normative and legal justifications for uti possidetis juris' application to Nagorno-Karabakh, ultimately concluding that Azerbaijan's reliance on the doctrine is dubious. Moreover, it examines the right to self-determination over the course of the conflict, particularly in light of Azerbaijan's 2023 offensive. This analysis reveals that Karabakh Armenians' self-determination rights were violated in such a way to justify remedial secession under international law.

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INTRODUCTION

More than three decades after the dismemberment of the Soviet Union, Armenian-Azerbaijani contestation over the status of Nagorno-Karabakh, a territory in the southern Caucasus no larger than the U.S. state of Delaware, persisted as the longest-running conflict in the post-Soviet sphere.[1] Until 2023, the region existed as a *de facto* independent state – the Republic of Artsakh (formerly the Republic of Nagorno-Karabakh) – that governed roughly 120,000 Armenians.[2] In that year, Azerbaijani forces overwhelmed local authorities, emptying Nagorno-Karabakh of its Armenian population and reestablishing Azerbaijani jurisdiction over its lands for the first time since losing them in a war over the enclave amid the collapse of the USSR.[3]

The presented narratives of Armenia and Azerbaijan are deceivingly straightforward. For Armenians, the region is a storied center of Armenian life dating back millennia that was cynically appended to Azerbaijan by the Soviets.[4] Haunted by the collective memory of genocide at the hands of the Ottoman Turks, Armenians fear that living under Azerbaijani sovereignty in Nagorno-Karabakh risks the destruction of an Armenian community in their historic homeland once more.[5] The conflict is therefore one of historical justice; vindicating the right to self-determination for Armenians in Nagorno-Karabakh is not solely a political or legal imperative, but remedies a grievous past inequity and shields against a future one.[6] For Azerbaijanis, reasserting territorial control over the breakaway region has been at the core of Azerbaijan's integrity as a state.[7] Having lost the territory in the aftermath of the Soviet Union's collapse and burdened by hundreds of thousands displaced by the war, Azerbaijanis viewed the reestablishment of sovereignty over Nagorno-Karabakh – a region they consider integral to the identity of historical and contemporary Azerbaijani

[1] *See* LAURENCE BROERS, ARMENIA AND AZERBAIJAN: ANATOMY OF A RIVALRY 2 (2019).

[2] Patrick Reevell, *Over 100,000 Armenians Have Now Fled Disputed Enclave Nagorno-Karabakh*, ABC (Sept. 30, 2023, 10:30 AM), https://abcnews.go.com/International/93000-armenians-now-fled-disputed-enclave-nagorno-karabakh/story?id=103596275.

[3] *Id.*

[4] *See* CHRISTOPHER J. WALKER, ARMENIA AND KARABAGH: THE STRUGGLE FOR UNITY 70 (1991).

[5] BROERS, *supra* note 1, at 3.

[6] *Id.*

[7] *Id.*

people – as a national imperative.[8] These accounts veil a complex history of the southern Caucasus, a transit zone for numerous peoples and empires, as well as an equally intricate *ménage* of international legal concepts whose precise contours have taken shape alongside the conflict itself.[9]

Much has been written about the legal issues presented by the conflict, ranging from legal identity,[10] territorial integrity,[11] self-determination,[12] the use of force,[13] indigenous rights,[14] and so on. Nevertheless, there is a paucity of scholarship analyzing the conflict, particularly with regard to the right to self-determination, after its status quo drastically changed following Azerbaijan's reassertion of jurisdiction over Nagorno-Karabakh in 2020 and 2023.[15] Moreover, relatively little attention has been paid to a legal principle at the core of Azerbaijan's *démarches* in international legal and political fora: *uti possidetis juris*.[16] Rooted in the obscurities of Roman property law, the doctrine as applied

[8] *Id.*; *see also* TIM POTIER, CONFLICT IN NAGORNO-KARABAKH, ABKHAZIA AND SOUTH OSSETIA: A LEGAL REAPPRAISAL 6 (2001).

[9] *See* Heiko Krüger, *Nagorno-Karabakh*, *in* SELF-DETERMINATION AND SECESSION IN INTERNATIONAL LAW 214 (Christine Walter, Antje von Ungern-Sternberg & Kavus Abushov eds., 2014) ("As part of the Caucasus, for thousands of years Nagorno-Karabakh has been a transit and settlement zone for many ethnic groups and, as such, has seen innumerable campaigns of conquest and ethnic dislocations.").

[10] *See, e.g.*, Kamal Makili-Aliyev, *An Illegal Republic: the Formation and Continuity of the Collective Legal Identity of Karabakh Armenians*, 27 CITIZENSHIP STUD. 799 (2023).

[11] *See, e.g.*, Johanna Popjanevski, *International Law and the Nagorno-Karabakh Conflict*, *in* THE INTERNATIONAL POLITICS OF THE ARMENIAN-AZERBAIJANI CONFLICT (Svante E. Cornell ed., 2017).

[12] *See, e.g.*, Vazgen Manukian & Andrei Sakharov, *Nagorno-Karabagh's Right to Political Independence Under International Law: An Application of the Principle of Self-Determination*, 24 SW. U. L. REV. 183 (1994).

[13] The issue of Azerbaijan's use of force in the 2020 war over Nagorno-Karabakh has been the subject of much debate. *Compare* Dapo Akande & Antonios Tzanakopoulos, *Legal: Use of Force in Self-Defence to Recover Occupied Territory*, 32 EUR. J. INT'L L. 1299 (2021) (concluding that Azerbaijan's use of force was legal because an occupation constitutes a "continuing armed attack"), *with* Tom Ruys & Felipe Rodríguez Silvestre, *Illegal: The Recourse to Force to Recover Occupied Territory and the Second Nagorno-Karabakh War*, 32 EURO. J. INT'L L. 1287 (2021) (arguing that Azerbaijan's use of force was illegal because the right of self-defense stops where there exists a territorial *status quo* without continuous fighting).

[14] *See, e.g.*, Lisabelle Panossian, *Protecting Humanity's Cradle of Civilization: Advancing the Right to Self-Determination for Indigenous Peoples in the Middle East & South Caucasus*, 22 NW. J. HUM. RTS. 149, 149 (2024).

[15] Ivan Nechepurenko & Anton Troianovski, *Azerbaijan Reclaims Armenian Enclave, Shifting Region's Political Dynamics*, N.Y. TIMES (Sept. 20, 2023), https://www.nytimes.com/2023/09/20/world/europe/azerbaijan-armenia-cease-fire.html.

[16] *See* Permanent Rep. of Azerbaijan to the U.N., Letter dated 26 December 2008 from the Permanent Representative of Azerbaijan to the United Nations addressed to the Secretary-General, at 48 ¶ 166, U.N. Doc. A/63/664-S/2008/823 (Dec. 29, 2008) ("It follows from this

today defines the frontiers of newly independent states on the basis of their prior administrative borders, without regard to their shape or origin.[17] Its application to Nagorno-Karabakh naturally implicates the concomitant right to self-determination, a principle widely recognized in international legal sources, but whose precise contours remain unclear. Thus, Armenian and Azerbaijani portrayals of the conflict largely map onto the international legal system as embodied by these principles.

Accordingly, this Note seeks to fill a lacuna in legal analysis of the conflict by critically examining *uti possidetis juris* and the right to self-determination. Part I provides a brief survey of the dispute's history. Part II examines in closer detail *uti possidetis juris*: its origins, legal development, and its purported normative and legal applicability to Nagorno-Karabakh. Finally, Part III delineates the right to self-determination, particularizing the right's accompanying privileges and their consequences for the conflict.

I. HISTORICAL OVERVIEW

Situated in the South Caucasus, Nagorno-Karabakh[18] – known to Armenians

that Armenia's claims as to the claimed 'independence' or 'reunification' of Nagorny Karabakh are contrary to the internationally accepted principle of *uti possidetis* and therefore unsustainable in international law.").

[17] *See* Enver Hasani, *Uti Possidetis Juris: From Rome to Kosovo*, 27 FLETCHER F. WORLD AFF. 85, 85 (2003).

[18] The terminology employed to describe the territory, as well as the cities and towns within, is "confusingly diverse and politically fraught." BROERS, *supra* note 1, at xii. Nagorno-Karabakh (or Nagorny Karabakh) is an adaptation of the Russian *Nagorno-Karabakhskaya Avtonomnaya Oblast*, literally "Autonomous Region of Mountainous Karabakh," which describes the autonomous region that existed in the Soviet-era from 1923–1991. *See id.* It appears that *Qarabāgh* was the Turkic name initially used to describe the lowlands between the Arak River and the Kura River beginning in the 11th century following the invasion of Turkic-speaking peoples into the region. *See* Alexander V. Akopyan, *On the Earliest Coins of Khachen (Qarabāgh)*, 222 J. ORIENTAL NUMISMATIC SOC. 6, 9 (2015). Some scholars posit that *Qarābagh* is derived from the Turkic *qara*, meaning "black," and the Persian *bâğ*, meaning "garden." *See* Sebastian Muth, *War, Language Removal and Self-Identification in the Linguistic Landscapes of Nagorno-Karabakh*, 42 NAT'Y PAPERS, 63, 64 (2014). Others point to Turkic toponymy which translates *qara* as "many, rich" resulting in a literal translation of "rich in gardens." *See* Akopyan, *supra*, at 9. Eventually, *Qarabāgh* came to refer to both the lowlands as well as the neighboring mountainous areas of the region. *Id*. Nagorno is derived from the Russian *nagorny* (нагорный), meaning "mountainous." *See Nagorno-Karabakh Profile*, BBC (Jan. 30, 2024), https://www.bbc.com/news/world-europe-18270325 [https://perma.cc/297J-V6H9]; Muth, *supra*, note 18 at 64. Accordingly, Nagorno-Karabakh's literal translation to English is "Mountainous Karabakh." The Republic of Nagorno-Karabakh often presented its name in English as the "Republic of Mountainous Karabakh," to avoid negative connotations associated with a "war-torn post-Soviet region as

as Artsakh – straddles Europe and Asia between the Black and Caspian Seas.[19] Karabakh itself is a small area divisible into three areas: Nagorno-Karabakh, Lowland Karabakh to the south, and the eastern slopes of the Zangezur Mountains.[20] Over the course of centuries, the region was subdued by Persians, Seljuk Turks, Mongols, and Arabs.[21] For centuries during the Middle Ages, the region maintained autonomy under the Principality of Khachen, governed by Armenian lords under Persian suzerainty.[22] This lasted until the mid-eighteenth century, when the Karabakh Khanate was established as a Persian tributary.[23] After years of battle, the Treaty of Gulistan ended the Russo-Persian War (1804-1813), ceding Nagorno-Karabakh to Russian control.[24] The remainder of Transcaucasia would fall to Russian rule in 1828 per the terms of the Treaty of Turkmenchay that followed yet another Russo-Persian War (1826-1828).[25]

In the nineteenth century, ethnic tensions between Armenians and

'Nagorno-Karabakh might indicate.'" Muth, *supra*, note 18 at 72. The area upon which the Nagorno-Karabakh Autonomous Oblast, as well as the Republic of Nagorno-Karabakh existed constitutes a largely mountainous and forested portion of the broader Karabakh region, which itself encompasses parts of southern Armenia and western Azerbaijan. *See Nagorno-Karabakh*, BRITANNICA, https://www.britannica.com/place/Nagorno-Karabakh (last visited Jan. 8, 2024). Armenians commonly refer to the Karabakh region as *Artsakh* (Արցախ). *See* Emil Sanamyan, *On Origins of Geographic Term 'Karabakh'*, INST. OF ARMENIAN STUD. (Mar. 13, 2017), https://dornsife.usc.edu/armenian/2017/03/13/on-origins-of-geographic-term-karabakh/ [https://perma.cc/T52B-7DA5]. The word is possibly derived from *Aran*, the name of a local chieftain appointed by Armenian King Vagharsh I to govern the region, as well as the Armenian root *tsakh* meaning "dried woods" or "forest." *See* Pauline Getzoyan, *Aran Wines and the Enduring Spirit of Artsakh*, THE ARMENIAN WKLY (Jan. 27, 2021), https://armenianweekly.com/2021/01/27/aran-wines-and-the-enduring-spirit-of-artsakh/ [https://perma.cc/4BNK-KUY8]. Accordingly, Artsakh may literally translate to "Forests /Woods of Aran." Other theories posit that the name may be derived from the name of King Artaxias I. *See* Yelena Gevorgyan & Mariam Loretsyan, *Land of the Ghashang People*, EVN REPORT (Sept. 2, 2018). Beginning in the 15th century, Armenian written sources begin referring to "Karabakh," and the term "Artsakh" largely fell out of use until its revival in the 20th century. *See* Emil Sanamyan, *On Origins of Geographic Term 'Karabakh'*, INST. OF ARMENIAN STUDIES (Mar. 13, 2017), https://dornsife.usc.edu/armenian/2017/03/13/on-origins-of-geographic-term-karabakh/ [https://perma.cc/6Q65-FGFF]. This Note refers to the region using the phrase Nagorno-Karabakh given its widespread usage.

[19] M. HAKAN YAVUZ & MICHAEL M. GUNTER, THE KARABAKH CONFLICT BETWEEN ARMENIA AND AZERBAIJAN: CAUSES & CONSEQUENCES 1 (2023).

[20] *Id*. at 2.

[21] POTIER, *supra* note 8, at 1.

[22] Anoush Baghdassarian, *The History Behind the Violence in Nagorno-Karabakh*, LAWFARE (Oct. 19, 2020, 5:51 PM), https://www.lawfaremedia.org/article/history-behind-violence-nagorno-karabakh. [https://perma.cc/8Y8P-AWRT].

[23] *Id.*

[24] YAVUZ & GUNTER, *supra* note 19, at 18.

[25] *Id.*

Azerbaijanis (then called Tatars, Turks, Muslims, or Persians by different sources)[26] heightened due to rising nationalism, territorial disputes, and crises in the Russian Empire.[27] Following the collapse of the Empire and short-lived withdrawal of Russian troops in 1917, fighting broke out between the declared First Republic of Armenia and Azerbaijan Democratic Republic over several disputed regions, including Karabakh.[28] In July 1918, a governing body of Karabakh elected by the residents of the region declared union with Armenia.[29] However, the territorial dispute was further complicated by an attempted invasion by Ottoman troops, a short-lived British occupation of the region post-World War I, and a pending resolution to the conflict at the Paris Peace Conference.[30] In 1920, the Bolsheviks entered Azerbaijan, followed by Armenia and Georgia.[31] Shortly thereafter, Nagorno-Karabakh was ultimately placed within the boundaries of Soviet Azerbaijan, though with an autonomous status as the Nagorno-Karabakh Autonomous Oblast (NKAO).[32]

Throughout the era of Soviet rule, the NKAO petitioned the USSR's central bodies on many occasions to unite with Soviet Armenia, only to be dismissed (and punished).[33] During the late 1980s, the era of *perestroika* and *glasnost* under Mikhail Gorbachev, the regional government of the NKAO passed a resolution once more demanding its transfer to Armenia.[34] However, 1988 proved to be a consequential year in the course of the conflict; violence erupted as Azerbaijani authorities forcefully repressed the burgeoning independence movement in Nagorno-Karabakh.[35] The situation unraveled rapidly as the Soviet Union disintegrated around the region. In 1991, 99.89% of voters in Nagorno-Karabakh voted in a referendum, boycotted by its Azerbaijani inhabitants, with an 82.2% turnout to declare independence from Azerbaijan.[36] Upon Nagorno-Karabakh's secession, fighting intensified and lasted for three years.[37] At the

[26] Azerbaijanis are a predominantly Turkic-speaking Shi'ite Muslim people in Transcaucasia. They speak a similar language to the Azeris located in northwestern Iran (in the region of Azerbaijan); however, the ancestors of the modern-day Transcaucasian Azeris were called Tatars by the Russians. The ethnonym Azerbaijani gained prominence following the collapse of the Russian Empire. *See* BABAK REZVANI, CONFLICT AND PEACE IN CENTRAL EURASIA: TOWARDS EXPLANATIONS AND UNDERSTANDINGS, 136 n. 4 (2015).

[27] YAVUZ & GUNTER, *supra* note 19, at 20.

[28] *Id.*

[29] Baghdassarian, *supra* note 22.

[30] YAVUZ & GUNTER, *supra* note 19, at 21.

[31] *Id.*

[32] Baghdassarian, *supra* note 22.

[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] *Id.*

1994 signing of the Bishkek Protocol establishing a ceasefire, roughly 25,000 people had been killed, while nearly 350,000 Armenians and 750,000-800,000 Azerbaijanis were displaced.[38]

In the aftermath of the war, the Republic of Nagorno-Karabakh emerged in control of the territory, along with seven surrounding districts.[39] Although Armenia never formally recognized the *de facto* independent Republic, it heavily supported it militarily and financially.[40] A mediation process led by the Organization for Security and Cooperation in Europe (OSCE) Minsk Group (co-chaired by Russia, France, and the United States) has been ongoing since 1992; however, it has accomplished little during its lifespan.[41] Following 1994, fighting occasionally flared up, most severely in 2016.[42] However, in late September of 2020, Azerbaijan launched a military offensive in and around Nagorno-Karabakh. The war lasted six weeks, resulting in more than seven thousand casualties.[43] After Azerbaijan's forces captured the city of Shusha, Armenian Prime Minister Nikol Pashinyan, Azerbaijani President Ilham Aliyev, and Russian President Vladimir Putin signed a ceasefire agreement on November 10, 2020 to end Azerbaijan's military operations in Nagorno-Karabakh.[44] The agreement ceded lands held outside the former-NKAO to Azerbaijan.[45] Furthermore, it specified that a peacekeeping force composed of just under two-thousand Russian soldiers would be deployed along the Lachin corridor, the sole road linking Armenia to Nagorno-Karabakh.[46]

Then, in September 2023, Azerbaijan began its final assault on the enclave. Having blockaded Nagorno-Karabakh for nine months, Baku, under the guise of "counter-terrorism operations" reasserted its control over the entirety of the territory after the President of the Republic of Artsakh signed a decree dissolving

[38] Krüger, *supra* note 9, at 216.

[39] *Id.*

[40] Michael Ertl, *Nagorno-Karabakh: Conflict Between Azerbaijan and Armenians Explained*, BBC (Sept. 28, 2023), https://www.bbc.com/news/world-europe-66852070.

[41] Krüger, *supra* note 9, at 216.

[42] Baghdassarian, *supra* note 22.

[43] *Nagorno-Karabakh Conflict*, CTR FOR PREVENTIVE ACTION, https://www.cfr.org/global-conflict-tracker/conflict/nagorno-karabakh-conflict (updated Jan. 24, 2024) [https://perma.cc/KA8G-W7B7].

[44] The Agreement is known as the Tripartite Agreement. *See* Press Release, Prime Minister of the Republic of Armenia, Statement by the Prime Minister of the Republic of Armenia, the President of the Republic of Azerbaijan and the President of the Russian Federation (Oct. 11, 2020), https://www.primeminister.am/en/press-release/item/2020/11/10/Announcement/ [https://perma.cc/2SH6-GUBV].

[45] *Id*.

[46] *Id*. at ¶ 3.

all the Republic's institutions.[47] As a result of Azerbaijan's swift military victory, more than one-hundred thousand Armenians fled Nagorno-Karabakh.[48]

II. UTI POSSIDETIS JURIS

A. Historical Overview of Uti Possidetis Juris

The expression *uti possidetis* derives from republican-era Roman law, wherein it formed part of a praetorial possessory interdictum forbidding the disturbance of an existing possession of immovable property as between two individuals.[49] The interdictum *uti possidetis* was employed in cases where one party's use of land permanently disturbed another's possession.[50] Like other possessory interdicts, interdictum *uti possidetis* came to be used to determine which party should have the advantage of standing in defense as the possessor of property.[51] In claiming the interdict, the juristic possessor of property claimed a declaration recognizing his possession, discontinuance of the disturbance, and damages for the disturbance which had already occurred.[52] With both disputants

[47] *Nagorno-Karabakh Republic Will Cease to Exist from Jan 1 2024 – Nagorno-Karabakh Authorities*, REUTERS (Sept. 28, 2023), https://www.reuters.com/world/asia-pacific/nagorno-karabakh-republic-will-cease-exist-jan-1-2024-nagorno-karabakh-2023-09-28/.

[48] European Parliament Resolution of 5 October 2023 on the Situation in Nagorno-Karabakh After Azerbaijan's Attack and the Continuing Threats Against Armenia, EUR. PARL., 2023/2879(RSP), (Oct. 5, 2023), https://www.europarl.europa.eu/doceo/document/TA-9-2023-0356_EN.html.

[49] JOHN BASSETT MOORE, COSTA RICA-PANAMA ARBITRATION: MEMORANDUM ON UTI POSSIDETIS 5 (1913).

[50] RUDOLF SOHM, THE INSTITUTES: A TEXTBOOK OF THE HISTORY AND SYSTEM OF ROMAN PRIVATE LAW 333 (James Crawford Ledlie trans., 3d ed. 1907).

[51] GAIUS, GAII INSTITUTIONUM IURIS CIVILIS COMMENTARII QUATUOR [Elements of Roman Law] 504 (Edward Poste ed., trans., Clarendon Press, 1871); MOORE, *supra* note 49, at 6.

[52] Under Roman law, possessory interdicts were certain legal remedies akin to injunctive relief granted for the purpose of protecting juristic possession. *See* SOHM, *supra* note 50, at 333. Before Emperor Justinian, the interdictum *uti possidetis* only applied to immovable property, whereas movable property was encompassed by the interdictum *utrubi*. In the interdict *uti possidetis*, the winning party was he who was in possession of immovable property at the time of the granting of the interdict by the praetor, provided the possession was not achieved due to force, secrecy, or on revocatory terms, with no binding transaction being concluded with the grantor. In the interdict *utrubi*, the winner was the party who had been in possession the greater portion of the year immediately preceding the granting of the interdict, provided the same conditions were met. However, the Eastern Roman Empire extended the application of interdictum *uti possidetis* to moveable as well as immovable property, as codified by the Corpus juris of Justinian. Accordingly, disputes concerning possession of moveable and immovable property were resolved by reference to who was in possession at the time of the suit. *Id.* at 333–34, n. 3.

present, the praetor recited the interdict as follows: *Uti aes aedes, quibus de agitur, nec vi nec clam nec precario alter ab altero possidetis, quominus ita possideatis, vim fieri veto*.[53] The exposition translated literally means: "Whichever party has possession of the house in question, without violence, clandestinity, or permission in respect of the adversary, the violent disturbance of his possession I prohibit."[54] According to this principle, a party in possession of land or buildings at the issue of the interdict was deemed the juristic possessor, provided he had obtained such possession from his adversary *nec vi* (without force), *nec clam* (without secrecy), and *nec precario* (without permission, i.e. on terms of revocation at will, no binding transaction being concluded with the grantor).[55] The import of the interdict is captured by the phrase *Uti possidetis, ita possideatis*, or "As you possess, so may you possess."[56]

The principle was transferred into the international legal lexicon in the nineteenth century, albeit altered in two significant respects.[57] First, *uti possidetis* no longer applied to private disputes over immovable property, but to states' disputes over territorial sovereignty.[58] Second, it indicated a definitive status rather than serving as a procedural burden-shifting mechanism in judicial proceedings.[59] Ironically, *uti possidetis* as applied in the international legal context was an inversion of the original praetorian interdict.[60] Rather than consolidating territorial possession by a peaceful possessor, the doctrine legitimatized states' jurisdiction over territory in a time where the use of force was lawful and the right of conquest recognized.[61] Accordingly, it initially served to affirm the *de facto* situation following hostilities between sovereigns, so that belligerents would retain the territory effectively under their control upon the conclusion of peace.[62] The doctrine further materialized in the era of colonization, where the principle was used to resolve "irreconcilable claims of right" between competing colonial powers.[63]

The first notable application of *uti possidetis* as an internationalized principle

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[53] GAIUS, *supra* note 51, at 505.

[54] *Id.*

[55] SOHM, *supra* note 50, at 334.

[56] MOORE, *supra* note 49, at 9.

[57] Anne Peters, *The Principle of Uti Possidetis Juris: How Relevant is it for Issues of Secession?*, *in* SELF-DETERMINATION AND SECESSION IN INTERNATIONAL LAW 98 (Christine Walter, Antje von Ungern-Sternberg & Kavus Abushov eds., 2014).

[58] *Id.*

[59] *Id.*

[60] W. Michael Reisman, *Protecting Indigenous Rights in International Adjudication*, 89 AM. J. INT'L L. 350, 352 (1995).

[61] MOORE, *supra* note 49, at 9.

[62] Malcom N. Shaw, *The Heritage of States: The Principle of Uti Possidetis Juris Today*, 67 BRIT. Y.B. INT'L L. 75, 98 (1997).

[63] MOORE, *supra* note 49, at 11–12.

occurred in Latin America.[64] When Spanish colonies in South and Central America declared independence from the Spanish Crown during the early part of the nineteenth century, many of the emerging states adopted the principle as one of constitutional and international law, to which they referred to as "*Uti Possidetis Juris* of 1810."[65] The addition of *"juris*" to the Latin neologism was done with a view to emphasize the notion of the right to possess, thereby divesting the phrase *uti possidetis* of its associations with the validation of post-war boundaries.[66] The essence of *uti possidetis juris* as applied in South and Central America was that boundaries must remain as they existed under law at the time of declaration of independence, chiefly 1810 with regard to Spanish colonies in South American and 1822 for those in Central America.[67]

According to Shaw, the "real thrust of the doctrine as developed in Latin America was external rather than internal."[68] In this sense, *uti possidetis juris* was intended to prevent the renewal of any European colonization on the basis that parts of the continent constituted *terra nullius* (land of no one), [69] or land not under effective control of the newly independent states.[70] This contrasted with *uti possidetis de facto*, or possession based on factual possession, embraced by Brazil as a successor to the Portuguese colony in South America.[71] Rather, the doctrine as applied asserted constructive or fictional possession within previously drawn administrative borders due to the abundance of unexplored regions in Latin America.[72] Although avoidance of boundary disputes between nascent Latin American states was initially an ancillary focus of the doctrine, it

[64] Peters, *supra* note 57, at 98.

[65] Territorial Dispute (Libyan Arab Jamahiriya v. Chad), 1994 I.C.J. 1, 84, ¶ 118 (Feb. 3) (separate opinion by Ajibola, J.); Affaire des Frontières Colombo-Vénézuéliennes, 1 R.I.A.A. 223, 228 (Swiss Fed. Council 1922).

[66] MOORE, *supra* note 49, at 40.

[67] Libyan Arab Jamahiriya v. Chad, 1994 I.C.J. at ¶ 118 (separate opinion by Ajibola, J.).

[68] Shaw, *supra* note 62, at 98.

[69] Malcolm Shaw, *The Responsibility of States*, BRITANNICA, https://www.britannica.com /topic/international-law/The-responsibility-of-states#ref1293769 (last visited March 12, 2025) ("i.e., land not under the sovereignty or control of any other state or socially or politically organized grouping").

[70] Shaw, *supra* note 62, at 98.

[71] Brazil adopted this approach in the aftermath of the war of 1801 as fought between Spain and France on one side and Portugal on the other. The war was seen by Brazil as revoking a prior treaty which delimited boundaries. Therefore, it reverted to the original principle of *uti possidetis* in international law, which simply accepted the territorial results of war and actual possession regardless of how it came to be possessed. *See id* at 100.

[72] *Id.* at 98-9 ("Thus, the doctrine moved from its original function of preserving the actual state of affairs, with its consequential emphasis upon actual possession however brought about, to an approach that forbade acquisition of title by occupation of territory deemed *terra nullius* or by conquest, the latter being at the time, of course, still a legitimate mechanism for territorial change.").

later became a core focus of its application.[73] Numerous treaties between Latin American states refer specifically to the principle, as do a number of state constitutions.[74] Moreover, several arbitration panels, as well as the International Court of Justice (ICJ), have resolved territorial disputes between Latin American states on the basis of *uti possidetis juris*.[75]

In post-World War II Africa, a wave of decolonization movements aroused debates on the proper delimitation of borders in newly independent states.[76] Whereas one colonial power was involved in Latin America, in Africa roughly seven European colonial powers were engaged.[77] The "colonial penchant for geometric lines" had left the continent with many states whose frontiers did not account for ethnic, geographic, and economic considerations.[78] It was due to these conditions that *uti possidetis* was resorted to early on.[79] The key document expanding the principle to the African continent was Resolution 16(1) of the Organization of African Unity, adopted in Cairo in 1964.[80] The ICJ Chamber Judgment in the *Frontier Dispute* case between Burkina Faso and Mali, two former French colonies, affirmed *uti possidetis juris*' application outside the context of decolonization in Latin America.[81] The Court stated that

> It is a general principle, which is logically connected with the phenomenon of the obtaining of independence, wherever it occurs. Its obvious purpose is to prevent the independence and stability of new States being endangered by fratricidal struggles provoked by the challenging of frontiers following the withdrawal of the administering power.[82]

Accordingly, *uti possidetis juris*' adoption in the context of Latin America and

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[73] *Id*. at 99.

[74] *Id.* at 99–100; MOORE, *supra* note 49, at 33; Malcolm N. Shaw, *Peoples, Territorialism and Boundaries*, 8 EUR. J. INT'L L. 478, 493 (1997).

[75] *See, e.g.*, Dispute Between Argentina and Chile Concerning the Beagle Channel, 21 R.I.A.A. 53 (Court of Arbitration 1977); Affaire des Frontières Colombo-Vénézuéliennes, 1 R.I.A.A. 223; Frontier Dispute (Burkina Faso v. Mali), 1986 I.C.J. 554 (Dec. 22).

[76] *Compare* Resolution Adopted by the All-African People's Conference, Accra, (Dec. 5–13, 1958) (denouncing "artificial frontiers drawn by imperialist powers to divide the peoples of Africa"), *with* Charter of the Organization of African Unity (1963), art. 3 ("respect for the sovereignty and territorial integrity of each State and for its inalienable right to independent existence . . .").

[77] Shaw, *supra* note 74, at 493.

[78] Libyan Arab Jamahiriya v. Chad, 1994 I.C.J. at ¶ 8 (separate opinion by Ajibola, J.).

[79] Shaw, *supra* note 62, at 100.

[80] *Id.* at 103; Org. of African Unity [OAU] AHG/Res. 16(1) (1964) ("The Assembly of Heads of State and Government meeting in its First Ordinary Session in Cairo . . . solemnly declares that all Member States pledge themselves to respect the borders existing on their achievement of national independence.").

[81] Burkina Faso v. Mali, 1986 I.C.J. at ¶ 20.

[82] *Id.*

Africa established "an acceptable rule of the appropriate territorial framework for the creation of new States and thus entrenching, at least, territorial stability at that critical moment."[83]

The application of this principle beyond the purely colonial context was stressed with regard to the former Yugoslavia and the former USSR.[84] In dealing with the aftermath of the breakup of the former Yugoslavia, the international community had to address the issue of the status of the boundaries of the newly formed states.[85] Consequently, the European Community established an Arbitration Commission for the purpose of resolving differences.[86] Headed by French lawyer Robert Badinter, the Arbitration Commission issued various opinions and rulings dealing with specific questions submitted by the peace conference on Yugoslavia as well as applications for international recognition by various republics of the former Yugoslavia.[87] In Opinion No. 3, Judge Badinter concluded that former administrative boundaries become protected by international law following from the principle of *uti possidetis juris* in particular.[88] Judge Badinter noted that, although initially applied in decolonization contexts in Latin America and Africa, *uti possidetis juris* stands today as a "general principle" of international law that "applies all the more readily to the [former Yugoslav Republics]."[89]

With regard to the former USSR, Shaw argues that various agreements signed by and among former Soviet Republics intended to assert *uti possidetis juris* as a delimitation doctrine.[90] For example, the Agreement establishing the Commonwealth of Independent States provided that the former Soviet Republics "acknowledge and respect each other's territorial integrity and the inviolability

[83] Shaw, *supra* note 62, at 111.

[84] MALCOLM N. SHAW, INTERNATIONAL LAW 448 (5th ed., 2003). The principle was also applied to the former Czechoslovakia. *See* Shaw, *supra* note 62, at 111.

[85] *See* Shaw, *supra* note 62, at 107.

[86] The Arbitration Commission consisted of five members, all presidents of constitutional courts of EC member states. *See* Peter Radan, *The Badinter Arbitration Commission and the Partition of Yugoslavia*, 25 NAT'Y PAPERS 537, 537 (1997).

[87] *Id.*

[88] This was in response to the following question put to the Commission: "Can the internal boundaries between Croatia and Serbia and between Bosnia and Hercegovina and Serbia be regarded as frontiers in terms of public international law?" *See* PETER RADAN, THE BREAK-UP OF YUGOSLAVIA AND INTERNATIONAL LAW 222 (2002).

[89] *See* Conference on Yugoslavia Arbitration Commission: Opinions on Questions Arising from the Dissolution of Yugoslavia, Jan. 11 and July 4, 1992, 31 I.L.M. 1488, 1500 (1992). In Opinion No. 3, the Commission was asked whether the internal boundaries between Serbia and Croatia and Bosnia-Herzegovina constituted frontiers in terms of public international law. *See* Shaw, *supra* note 62, at 109.

[90] Shaw, *supra* note 62, at 110.

of existing borders within the Commonwealth."[91] This commitment was reaffirmed just under two weeks later by the Alma Ata Declaration of December 21, 1991 which referred to the respect for the "inviolability of existing borders."[92] Shaw concludes that while these agreements do not specifically reference *uti possidetis juris*, their emphasis on the inviolability of former frontiers and respect for territorial integrity is akin to support for adopting the principle with regards to the borders of former Soviet Republics.[93]

B. (In)applicability to Nagorno-Karabakh

The resolution of the Nagorno-Karabakh conflict in favor of Azerbaijan on the basis of *uti possidetis juris* is suspect on several accounts. As it stands, the principle's precise status is unclear in international law.[94] The ICJ has indicated in dicta in the *Frontier Dispute (Burkina Faso/Mali*) case that *uti possidetis* constitutes a "general principle" of international law but has never held so explicitly.[95] The Chamber failed to substantiate in any way its assertion that *uti possidetis* is firmly entrenched in international law.[96] Moreover, prior to the case, no arbitral or judicial body had made statements to this effect.[97] The Chamber's imprecise characterization of the doctrine's status has led to differing interpretations as to whether the *uti possidetis* principle should be regarded as customary international law, a general principle, or merely a customary

[91] *Id.*

[92] Alma Ata Declaration, 31 I.L.M. 138, 148 (1992).

[93] Shaw, *supra* note 62, at 110.

[94] It is clear, however, that *uti possidetis juris* is not a norm of *jus cogens* given that states may derogate from the principle through bilateral agreement. *See* Steven R. Ratner, *Drawing a Better Line: UTI Possidetis and the Borders of New States*, 90 AM. J. INT'L L. 590, 600 (1996); Shaw, *supra* note 74, at 504 ("The relevant parties may decide to rearrange the territorial situation so that the new state comes to independence within changed borders."). *Jus cogens* is defined in Article 53 of the Vienna Convention on the Law of Treaties, 23 May 1969, UNTS 1155, 331 (VCLT) as a "norm accepted and recognized by the international community of States as a whole as a norm from which *no derogation is permitted* . . ." (emphasis added).

[95] Burkina Faso v. Mali, 1986 I.C.J. at ¶ 20 ("Although there is no need, for the purposes of the present case, to show that this is a firmly established principle of international law where decolonization is concerned, the Chamber nonetheless wishes to emphasize its general scope, in view of its exceptional importance for the African continent and for the two Parties."); Brian Taylor Sumner, *Territorial Disputes at the International Court of Justice*, 53 DUKE L. J. 1779, 1809 n. 225 (2004) ("The ICJ has, in dictum, indicated that *uti possidetis* might be a 'general principle' of international law but has never held so explicitly.").

[96] RADAN, *supra* note 88, at 130.

[97] The experience of Spanish America, rather than confirming the views of the Chamber in the *Frontier Dispute Case*, points to the opposite conclusion. *Id.* at 130–31.

practice.[98] While there was certainly ample state practice during decolonization of Latin America,[99] Africa,[100] and Asia,[101] the principle's invocation lacked uniformity.[102] Moreover, reference to the principle in these and modern cases fails to evidence the requisite *opinio juris* for it to constitute customary international law.[103] Indeed, contrary to the notion of states adhering to *uti possdetis juris* out of a sense of legal obligation, different noncolonial borders frequently emerge after independence and after post-independence border disputes.[104] Furthermore, many state treaties invoking the principle as a basis for delimiting frontiers did so on the basis of convenience with little to no regard

[98] *Compare* Abraham Bell & Eugene Kontorovich, *Palestine, Uti Possidetis Juris, and the Borders of Israel*, 58 ARIZ. L. REV. 633, 635 (2016) ("*Uti possidetis juris* is widely acknowledged as the doctrine of customary international law that has proven central to determining territorial sovereignty in the era of decolonization."), *with* Ratner, *supra* note 94, at 598 (arguing that the lacking evidence of *opinio juris* suggests "a less than rock-solid basis for a customary norm and at least the possibility that *uti possidetis* was no more than a policy decision adopted to avoid conflicts during decolonization."). *See also* Krüger, *supra* note 9, at 225 ("The principle of *uti possidetis* was originally established within the context of decolonization, but today it must be considered part of customary international law beyond the colonial context.").

[99] Case Concerning Territorial and Maritime Dispute Between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), Judgment, 2007 I.C.J. 659 (Oct. 8).

[100] Burkina Faso v. Mali, 1986 I.C.J.

[101] Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand), Judgment, 1962 I.C.J. 6 (June 15).

[102] Ratner, *supra* note 94, at 599 ("Some have cited these divergences to conclude that *uti possidetis* is devoid of legal content.").

[103] Customary international law requires that a state practice must be performed from a sense of legal obligation, or *opinio juris*. This distinguishes "mere custom" from customary international law, which is custom that has ripened into law. *See* JENS DAVID OHLIN, INTERNATIONAL LAW: EVOLVING DOCTRINE AND PRACTICE 45 (2d. ed., 2021). The presence of *uti possidetis* in constitutions and treaties does not demonstrate *opinio juris*. *See* Ratner, *supra* note 94, at 598.

[104] Sumner, *supra* note 95, at 1809 n. 225; Ratner, *supra* note 94, at 599–600. This was true in both Latin America as well as Africa. For example, in 1957 British Togoland merged with Ghana, instead of becoming a separate state. In the British Cameroons, the northern part voted for merger with Nigeria, while the southern part chose to become part of French Cameroon to form the Federal Republic of Cameroon. Conversely, British Northern Somaliland and Italian Southern Somalia united to form Somalia instead of remaining two separate states. The former Italian colony of Eritrea, administered by the British after World War II, became a federal unit within Ethiopia in 1962, rather than an independent state. However, Eritrea eventually seceded, becoming an independent state in 1993 after a long war. In 1962, the Belgian colony of Ruanda-Urundi dissolved into the two independent states of Rwanda and Burundi. Finally, the enclaves of Walvis Bay and Ifni did not become independent but became part of Namibia and Morocco respectively. *See* RADAN, *supra* note 88, at 132–33.

for any legal obligation to do so.[105] This reality suggests the ICJ has overinflated the legal weight accorded to *uti possidetis*, and, given the fact that it lacks status as a rule of customary international law or a generally applicable principle of law, the doctrine should be referred to in circumstances where its application would be as compelling as its political justifications are.[106]

The Chamber summarized such nonlegal justifications for the doctrine in the *Frontier Dispute (Burkina Faso/Mali*) case, noting that its "obvious purpose is to prevent the independence and stability of new States being endangered by fratricidal struggles provoked by the challenging of frontiers following the withdrawal of the administering power."[107] Shaw thus posits that the application of *uti possidetis juris* in both colonial and non-colonial contexts is normatively preferrable on account of the principle functionally minimizing threats to peace and security by entrenching territorial stability upon the achievement of independence.[108] This is due to the principle's clarity and simplicity; absent a default rule upgrading former administrative borders into international ones, "all borders would be open to dispute, and new states would fall prey to irredentist neighbors or internal secessionist claimants."[109]

However, whether such justifications have been vindicated is doubtful. States in Latin America,[110] Africa,[111] the former Yugoslavia,[112] and the former Soviet Union[113] constantly resorted to violent wars to resolve border disputes, despite

[105] MOORE, *supra* note 49, at 51 ("the Republic of Colombia and the Republic of the Centre of America, in entering into the treaty of 1825, intended nothing more than the demarcation of their common frontier on grounds of right and of convenience . . .").

[106] Arguably, *uti possidetis* may not be considered one of the sources of authority in Article 38 of the ICJ Statute. *See* Sumner, *supra* note 95, at 1809 n. 225.

[107] Burkina Faso v. Mali, 1986 I.C.J. at ¶ 20.

[108] Shaw, *supra* note 74, at 503.

[109] Ratner, *supra* note 94, at 591.

[110] The War of the Pacific (1879-83) and the Chaco War (1932–35) are the most significant Latin American examples. *See* RADAN, *supra* note 88, at 236.

[111] Such conflicts include the secessionist conflicts relating to Katanga from the Congo (1960–63), Biafra from Nigeria (1974–93), South Sudan from Sudan, in addition to recourse to violence to solve border disputes between Somalia and Ethiopia, Nigeria and Cameroon, and Ethiopia and Eritrea. *Id*.

[112] Badinter himself apparently acknowledged in June of 1994 that the Badinter Commission's Opinions, particularly Nos. 1–4 encouraging Bosnia-Herzegovina to seek early independence, and the early recognition of Bosnia-Herzegovina brought about war. *See* Michla Pomerance, *The Badinter Commission: The Use and Misuse of the International Court of Justice's Jurisprudence*, 20 MICH. J. INT'L L. 31, 48–9 n. 70 (1998).

[113] In addition to the dispute over Nagorno-Karabakh, conflicts over the self-declared Republic of Abkhazia and Republic of South Ossetia in Georgia, as well as the "People's Republic of Transnistria" in Moldova remain protracted. *See* Arman Sarvarian, *Uti Possidetis Iuris in the Twenty-First Century: Consensual or Customary?*, 22 INT'L J. MINORITY AND GRP. RTS. 511, 525 (2015). *See also* Justin A. Evison, *Migs and Monks in Crimea: Russia Flexes*

the presumed applicability of *uti possidetis juris*. The compendium of sizeable wars and threats of war that the principle of *uti possidetis juris* has failed to prevent indicates that the principle leads to results in discord with its supposed justifications.[114] In contrast to a simplistic recipe for delimiting borders with minimal "fratricidal struggles," the *ipse dixit* maintenance of former internal borders as inviolable international ones leads to the international community having to support wars in support of such borders; consequentially, such policy decisions cause the forced imposition of these borders upon rebel populations, or their forced expulsion.[115]

Regarding modern state dissolutions, the extension of *uti possidetis juris* to non-colonial circumstances fails to bear out its functionalist justifications as it clearly leads to "genuine injustices" by stranding minorities in new states with uncertain human rights and dissatisfaction with their new status.[116] This is manifestly the case regarding the majority Armenian populace of Nagorno-Karabakh. The mechanic sanctification of Azerbaijan SSR's frontiers to include the NKAO guaranteed that the Armenians of the region would be relegated to exist as a perpetual ethnic minority in a state that has perpetrated violence against Armenians,[117] denied the Armenian Genocide,[118] routinely engages in anti-Armenian dehumanization,[119] and that is otherwise destitute of basic human

Cultural and Military Muscles, Revealing Dire Need for Balance of Uti Possidetis and Internationally Recognized Self-Determination, 220 MIL. L. REV. 90, 91 (2014) ("Russia violated *uti possidetis* by sponsoring Crimea's secession vote from Ukraine and subsequently annexing Crimea in March of 2014."); Júlia Miklasová, *Dissolution of the Soviet Union Thirty Years On: Re-Appraisal of the Relevance of Uti Possidetis Iuris*, *in* THE INTERNATIONAL LEGAL ORDER IN THE XXIST CENTURY: ESSAYS IN HONOUR OF PROFESSOR MARCELO GUSTAVO KOHEN (Jorge E. Viñuales, Andrew Clapham, Laurence Boisson de Chazournes & Mamadou Hébié eds., 2023) (discussing the implications of Russia's invasion of Ukraine in 2022 on conceptions of post-Soviet state practice regarding *uti possidetis juris*).

[114] *See* RADAN, *supra* note 88, at 237. *But see* Ingrid Wuerth, *International Law in the Post-Human Rights Era*, 96 TEX. L. REV. 279, 310–11 n.172 (2017) (citing David B. Carter & H.E. Goemans, *The Making of the Territorial Order: New Borders and the Emergence of Interstate Conflict*, 65 INT'L ORG. 275, 304 (2011) (arguing that empirical evidence does not support the contention that groups unhappy with borders frequently make territorial claims through the use of force).

[115] RADAN, *supra* note 88, at 236 (quoting Robert Hayden).

[116] Ratner, *supra* note 94, at 591.

[117] *See* discussion *infra* Section III.

[118] *Aliyev Vows Support For Armenian Genocide Denial*, AZATUTYUN (Sept. 3, 2014), https://www.azatutyun.am/a/26564862.html [https://perma.cc/VL6Y-SCYC] (last visited March 14, 2025) (quoting President Ilham Aliyev stating that "Turkey and Azerbaijan will jointly counter the lie about the genocide of Armenians.").

[119] Panossian, *supra* note 14, at 175 ("Government officials, media, and school textbooks have dehumanized Armenians for decades, portraying them as the Azerbaijani people's greatest enemy.").

rights.[120] As Ratner so clairvoyantly prophesized in 1996, "with regard to . . . Armenians in Nagorno-Karabakh, *uti possidetis* may prove a recipe for continued denial of human dignity to minorities."[121] While the cosmopolitan, liberal internationalist[122] notion of the multiethnic democratic state that can function within any borders is assuredly aspirational, this wide-eyed conception may prove impossible to construct or disregard certain minorities inhabiting distinct territories.[123] Ratner explains that we cannot "impose a cosmopolitan diktat," but must "acknowledge that certain new states are not currently able or willing to guarantee the human rights of minorities in discrete territories, and must consider alternatives to leaving these groups at the mercy of new governments."[124]

Regardless of the doctrine's hierarchical status under international law and its normative underpinnings, the appropriateness of applying the principal to state dismemberment outside the colonization context has aroused significant debate.[125] Whereas some lauded the Badinter Commission's extension of the principal to Yugoslavia as balanced,[126] others have criticized this application of *uti possidetis juris* as underpinned by "the shallowest of legal reasoning."[127] The Commission's adoption of the principle as the *de facto* delimitation method was largely based on the aforementioned dicta in the *Frontier Dispute (Burkina Faso*

[120] *Id.* at 186–90; *Azerbaijan: Events of 2023*, HUM. RTS. WATCH, https://www.hrw.org/world-report/2024/country-chapters/azerbaijan (last visited March 14, 2025) ("Long-term human rights concerns persisted in Azerbaijan in 2023. The government severely restricted freedoms of expression, assembly, and association.").

[121] Ratner, *supra* note 94, at 591.

[122] Both Ratner and Radan lambast the naiveté of the so-called "liberal internationalist" view of states and borders. *See* RADAN, *supra* note 88, at 239 ("Shaw's justification of the principle of *uti possidetis* is indicative of the view of liberal internationalists . . .); Ratner, *supra* note 94, at 617.

[123] Ratner, *supra* note 94, at 592.

[124] *Id.* at 617.

[125] See, e.g., Peters, *supra* note 57, at 105–6 (summarizing various critiques of the extension of *uti possidetis juris* to the former Yugoslavia and Soviet Union); Shaw, *supra* note 74, at 500 ("In each case, the territorial integrity of the states concerned, successors of the Republics of the former USSR, was reaffirmed in circumstances demonstrating that the definition of the territory concerned was that of the former Republic."); RADAN, *supra* note 88, at 235 ("It can also be noted that there has been considerable condemnation of the approach taken by the EC in recognising the former Yugoslav republics as independent states within existing federal borders."); Ratner, *supra* note 94, at 613 ("The [Badinter Commission], however, erred in its comprehension of the nature and purpose of *uti possidetis*.").

[126] Alain Pellet, *The Opinions of the Badinter Arbitration Committee A Second Breath for the Self-Determination of Peoples*, 3 EUR. J. INT'L L. 178, 181(1992).

[127] Marc Weller, *International Law and Chaos*, 52 CAMBRIDGE L. J. 6, 9 (1993) ("[The Commission's opinions] do not appear destined to assist the international community greatly when addressing the potentially dangerous problem of secession in the future.").

/Mali) case.[128] Given the similarities between the two cases, the Badinter Commission's opinions regarding the breakup of Yugoslavia had implications for the recognition policies of European Community (EC) Member States regarding the successor states to the Soviet Union.[129]

Shaw contends that international agreements signed between former Soviet Republics implicitly adopted the principle of *uti possidetis juris* as the delimitation principle between those states.[130] Notably, the Agreement that established the Commonwealth of Independent States (CIS) signed on December 8, 1991 provided that the "High Contracting Parties acknowledge each other's territorial integrity and *the inviolability of existing borders within the Commonwealth*."[131] This "respect" was reaffirmed by the Alma Ata Declaration of December 21, 1991, signed by eleven of the former Soviet Republics (excluding the Baltic States and Georgia) which referred to the Republics' recognition of and respect for "each other's territorial integrity and the inviolability of existing borders."[132] The EC's declaration and subsequent guidelines regarding Recognition of New States in Eastern Europe and in the Soviet Union required emerging states in both the former Yugoslavia and Soviet Union to respect the following principles:

- Respect for the provisions of the UN Charter, the Final Act of Helsinki and the Charter of Paris, especially with respect to the rule of law, democracy and human rights;
- Guarantees for the rights of ethnic and national minorities;
- Respect for the inviolability of all frontiers, which could only be changed by peaceful agreement;
- Commitment to settle by agreement or arbitration all questions concerning state succession and regional disputes;
- Acceptance of all relevant commitments with regard to disarmament and nuclear non-proliferation as well as to security and regional stability.[133]

However, the presumed extension of *uti possidetis juris* to the Soviet Union (let alone the former Yugoslavia) suffers from several defects. First, the

[128] Sarvarian, *supra* note 113, at 524; RADAN, *supra* note 88, at 228; Opinion No. 3 of the Arbitration Commission of the Peace Conference on Yugoslavia (1992) 31 I.L.M. 1499, at 1500 ("*Uti possidetis*, though initially applied in settling decolonization issues in America and Africa, is today recognized as a general principle, as stated by the International Court of Justice in the case between Burkina Faso and Mali . . .").

[129] Sarvarian, *supra* note 113, at 525.

[130] Shaw, *supra* note 62, at 110.

[131] *Id.*; Agreement Establishing the Commonwealth of Independent States, art. 5, 31 I.L.M. 138, 144 (1992) (emphasis added).

[132] Shaw, *supra* note 62, at 110; Alma Ata Declaration, 31 I.L.M. 138, 148 (1992).

[133] OHLIN, *supra* note 103, at 146–47.

preambular reference in the Alma Ata Declaration to "territorial integrity and the inviolability of the existing borders" is arguably contradicted by long-running territorial disputes within and between former Soviet Republics.[134] Furthermore, the Declaration's purported commitment to *uti possidetis juris* on the basis of intra-Soviet administrative law is belied by the reality that the "Union of Soviet Socialist Republics as a subject of international law . . . no longer exists."[135] Indeed, the Russian Federation, as the successor state to the USSR,[136] has not recognized *uti possidetis juris* as a universally binding principle of international law and has selectively created exceptions to it.[137] It is also important to note that the EC issued a statement in the context of the recognition of former Soviet Republics a little more than two weeks after it issued its Recognition Guidelines which stated "[r]ecognition shall not be taken to imply acceptance by the European Community and its Member States of the position of any of the republics concerning territory which is the subject of a dispute between two or more republics."[138] Radan argues that this statement "clearly indicates that internal federal borders are not automatically to be taken as international borders following secession or the dissolution of an internationally recognised state."[139] *Uti possidetis juris* is not simply an abstract legal formula to heedlessly apply in the mold of the Roman Praetor whenever an entity seeks statehood. In this sense, all roads do not lead to Rome insofar as the application of *uti possidetis juris* is concerned.

Finally, there is ample evidence that *uti possidetis juris* was, prior to the Commission's opinions, merely a consensual doctrine meant to be applied when invoked in treaties or other international agreements.[140] Indeed, the *Frontier*

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[134] Sarvarian, *supra* note 113, at 525; Arman Sarvarian, *The Artsakh Question: An Analysis of Territorial Dispute Resolution in International Law*, 9 MELBOURNE J. INT'L L. 1, 24 (2008); Ratner, *supra* note 94, at 597 ("Nevertheless, the former republics still maintain claims against each other and do not appear to have yet achieved a consensus regarding the permissibility of secessions of territorial realignments.").

[135] Sarvarian, *supra* note 113*,* at 525–26. Armenia has advanced an argument along these lines that the very affiliation of Nagorno-Karabakh to Azerbaijan was conditioned on the existence of the Soviet Union. *See* Peters, *supra* note 57, at 96 n. 4; *But cf.* Krüger, *supra* note 9, at 226: ("However, there was no provision of the Soviet Constitution or of Soviet law on which such an argument could be based.").

[136] JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 678 (2007) ("Russia's continuity was asserted and supported by all parties.").

[137] Lauri M. . .lksoo, *Post-Soviet Eurasia, Uti Possidetis and the Clash Between Universal and Russian Led Regional Understandings of International Law*, 52 NYU J. INT'L L & POL. 787, 820 (2021) ("Rather than accept the complete application of *universal international law* and genuine sovereign equality of states, post-Soviet Russia has instead promoted elements of *regional international law* through Russian regional hegemony.").

[138] Recognition of Former Soviet Republics, 12 E.C. BULL., no. 12, at 121 (1991).

[139] RADAN, *supra* note 88, at 235.

[140] Sarvarian, *supra* note 113, at 525.

Dispute (Burkina Faso/Mali) case, the *locus classicus* for the principle, involved such a bilateral agreement.[141] The Chamber noted that *uti possidetis juris* is a principle "*established during the colonial period*," which, as a general principle is "logically connected with *this form of decolonization* wherever it occurs."[142] Both the language of the Chamber and the context of this case indicate the principle is limited to classical instances of colonization.[143] Peters has contended that the Soviet Union can be viewed as a "modern quasi-colonial empire," rendering the extension of *uti possidetis juris* from its roots in decolonization to the breakup of the Soviet Union apropos.[144] However, colonialism has been consistently understood by the United Nations as applying to overseas colonial possessions of a mother state, and does not apply to states that may have been constituted as the result of territorial expansion into adjacent areas, such as the USSR.[145] The principle's application beyond non-colonial circumstances is therefore "suspect" on account of "decolonization [being] now historically complete (more or less) and the law now cognizant of notions of internal self-determination and political participation . . . ."[146] Accordingly, for the aforementioned reasons, the extension of *uti possidetis juris* to the former Republics of the Soviet Union is far from well-grounded.

C. Applying the Doctrine Anyway

Assuming, *arguendo*, that *uti possidetis juris* is appropriately characterized as a general or even customary principle of international law applicable to the dissolution of the Soviet Union and the subsequent conflict over Nagorno-Karabakh, Azerbaijan's claim to the disputed territory on the basis of the doctrine remains dubious. *Uti possidetis juris* operates to crystallize a state's frontiers inherited from colonial administrative lines or boundaries at the

[141] *Id.* at 521; Burkina Faso v. Mali, 1986 I.C.J. at ¶ 20.

[142] Burkina Faso v. Mali, 1986 I.C.J. at ¶ 23; Ratner, *supra* note 94, at 614.

[143] Ratner, *supra* note 94, at 614; Matthew C. R. Craven, *The European Community Arbitration Commission on Yugoslavia*, 66 BRIT. Y.B. INT'L L. 333, 388 (1996) ("Rather, [the Chamber's] concern was merely to affirm that the principle was 'not a special rule which pertains solely to one specific system of international law', and could therefore apply to cases of decolonization other than those in Spanish America.").

[144] Peters, *supra* note 57, at 114 ("Soviet rule, dominated by Russia, over non-Russian Republics was a mix of direct and indirect rule, of economic exploitation accompanied by a civilizing mission, and to that extent displayed the same characteristics as the classic colonial rule of European powers over overseas territories."). *But see* RADAN, *supra* note 88, at 230 (pushing against comparisons between classical instances of decolonization that *uti possidetis juris* first accommodated and the circumstances found in the former Yugoslavia and the USSR).

[145] RADAN, *supra* note 88, at 230.

[146] Ratner, *supra* note 94, at 614.

moment when independence is achieved, i.e., the "critical date."[147] The Chamber in the *Frontier Dispute (Burkina Faso/Mali*) case analogized the doctrine to a "photograph" of the territorial situation existing as of the critical date that "freezes the territorial title; it stops the clock, but does not put back the hands."[148] The *jus* relied on to determine the relevant boundaries is the "constitutional or administrative law of the pre-independence sovereign."[149]

Azerbaijan asserts that this critical date is October 18, 1991, the date on which it adopted the Constitutional Act on Restoration of the State Independence of the Republic of Azerbaijan.[150] To discern the extent of Azerbaijan's frontiers vis-à-vis Nagorno-Karabakh to which the principle of *uti possidetis juris* was to apply as of the critical date, a more in-depth background of the Bolshevik's decision regarding the region will be reproduced.

Following the Sovietization of Azerbaijan and subsequently Armenia in 1920, several events occurred that decisively altered the course of the conflict.[151] On November 30th of that year, Nariman Narimanov, the head of the Revolutionary Committee of Azerbaijan, sent his Armenian counterpart a telegram co-signed by Commissar of Foreign Affairs Mirza Daud Huseinov declaring: "As of today, the old frontiers between Armenia and Azerbaijan are declared to be non-existent. Mountainous Karabagh, Zangezur and Nakhichevan are recognized to be integral parts of the Socialist Republic of Armenia."[152]

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[147] Burkina Faso v. Mali, 1986 I.C.J. at ¶ 30; Frontier Dispute (Bénin v. Niger), 2005 I.C.J. 90, 120 ¶ 46 (July 12) ("Only at the moment of independence, also called the 'critical date', did these boundaries become international frontiers.").

[148] Burkina Faso v. Mali, 1986 I.C.J. at ¶ 30.

[149] Land, Island and Maritime Frontier Dispute (El Salvador v. Honduras: Nicaragua intervening) 1992 I.C.J. 351, 559 ¶ 333 (Sept. 11) ("when the principle of the *uti possidetis juris* is involved, the *jus* referred to is not international law but the constitutional or administrative law of the pre-independence sovereign, in this case Spanish colonial law . . ."); Bénin v. Niger, 2005 I.C.J. at ¶ 28 ("in accordance with the principle of *uti possidetis juris*, the course of the frontier and the attribution of islands in the River Niger to either [Benin or Niger] must be determined in the light of French colonial law, known as '*doit d'outre-mer*'.").

[150] Although, the more appropriate timeframe is likely in late December of 1991, by which a referendum affirmed the Constitutional Act and Azerbaijan was recognized by other states. The referendum was held on December 29, 1991. *See* Permanent Rep. of Azerbaijan to the U.N., Letter dated 26 December 2008 from the Permanent Representative of Azerbaijan to the United Nations addressed to the Secretary-General, at 46 ¶ 156, U.N. Doc. A/63/664-S /2008/823 (Dec. 29, 2008); Ramil Iskandarli, *A Guide to the Republic of Azerbaijan Law Research*, GLOBALEX, https://www.nyulawglobal.org/globalex (last visited Mar 11, 2025). President George H.W. Bush recognized Azerbaijan on December 25, 1991. *A Guide to the United States' History of Recognition, Diplomatic, and Consular Relations, by Country, since 1776: Azerbaijan*, OFF. OF THE HIST., DEPT. OF STATE, https://history.state.gov/countries/azerbaijan (last visited March 14, 2025).

[151] WALKER, *supra* note 4, at 105.

[152] *Id*.

Shortly thereafter, Joseph Stalin wrote in *Pravda*, "Soviet Azerbaijan has officially renounced its claim to the disputed territories . . . The age-old conflict between Armenia and its Muslim neighbors has been settled in one fell swoop."[153] Armenia considered this decree as an expression of the official stance of Soviet Azerbaijan.[154] The settlement did not last. Narimanov repudiated his cession, urging the Caucasian Bureau of the Community Party (Kavburo) to take up the dispute. In June of 1921, the Bureau affirmed that Karabakh belonged to Armenia.[155] However, the Bureau of the Communist Party of Azerbaijan refused to comply.[156] Accordingly, the Kavburo met once again in July 1921 to finally settle the frontier dispute.[157] On July 4, the Bureau decided by a majority vote that the region should be attached to Armenia.[158] However, the very next day, the Bureau accepted without debate, a motion that contradicted the one it had passed just one day prior, deciding "to leave Mountainous Karabagh inside the frontiers of Azerbaijan, giving it a large measure of regional autonomy . . . ."[159] Two years later, on July 7, 1923, authorities in Baku established the Autonomous Region of Mountainous Karabakh.[160]

Based on this decision, Azerbaijan may assert it holds territorial title to Nagorno-Karabakh, which, as of the moment of independence, remained unchanged.[161] Consequently, *uti possidetis* seemingly inures to the benefit of Azerbaijan. However, numerous realities potentially render Azerbaijan's assertion of title unavailing. One such reality is the procedural deficiency in granting Azerbaijan control of Nagorno-Karabakh according to Soviet law. In applying *uti possidetis juris*, the *jus* of the former sovereign, in this case the law of the Soviet Union, serves as the basis for determining the relevant boundaries.[162] Despite the Kavburo twice affirming that Nagorno-Karabakh should be attached to the Armenian Soviet Socialist Republic in June of 1921

[153] *Id.* at 106. Narimanov had also issued another earlier decree reading: "The toiling peasantry of mountainous Karabakh was granted the right to self-determination and all military activities must cease within the bonds of Zangezur from which the troops of Soviet Azerbaijan were withdrawing." *See* OHANNES GEUKJIAN, ETHNICITY, NATIONALISM AND CONFLICT IN THE SOUTH CAUCASUS: NAGORNO-KARABAKH AND THE LEGACY OF SOVIET NATIONALITIES POLICY 68 (2012).

[154] GEUKJIAN, *supra* note 153, at 68.

[155] Walker, *supra* note 4, at 107.

[156] *Id.*

[157] *Id.*

[158] *Id*

[159] *Id.* at 108.

[160] *Id.* at 109.

[161] *See* Permanent Rep. of Azerbaijan to the U.N., Letter dated 26 December 2008 from the Permanent Representative of Azerbaijan to the United Nations addressed to the Secretary-General, at 44–5 ¶ 151, U.N. Doc. A/63/664-S/2008/823 (Dec. 29, 2008).

[162] El Salvador v. Honduras: Nicaragua intervening, 1992 I.C.J. at ¶ 333.

and on July 4, 1921, the July 5 vote taken by the Kavburo was insufficient under the voting rules governing its Plenary Session.[163] While a majority vote was required of the nine members, only four voted in the affirmative, while three abstained.[164] Consequently, the Kavburo's decision of July 4 arguably remained the only *de jure* act taken to resolve the conflict. While this may elevate form over substance, particularly in light of the context and subsequent perception of the act intended by the Kavburo, this inadequate procedure, particularly in a vote to effect territorial change, had significant consequences. As the Chamber noted in the *Benin/Niger* frontier dispute case, although it will not substitute itself for a domestic court, account must be taken of whether "the administrative authorities either manifestly exceeded their powers or acted in manifest breach of the applicable rules."[165] Such a deficiency would render the decision taken by Azerbaijan SSR's Central Executive Revolutionary Committee two years later to establish the Nagorno-Karabakh Autonomous Oblast *ultra vires*.

An additional wrinkle in Azerbaijan's claim to title is that the Soviet Union arguably did not have the legal authority to transfer title to Nagorno-Karabakh. While, admittedly, the Russians' assertion of power over the Caucasus through threat and use of military force was not prohibited by international law at the time,[166] it is questionable whether the territorial decisions taken by the Soviets were legitimate. It remains uncertain whether the Kavburo had the right to determine the final status of a disputed territory between two Soviet Republics, given it was not even a state structure.[167] As an independent state between 1918 and 1920, the Republic of Armenia was recognized as such by the Treaty of Sèvres in August of 1920.[168] The Treaty specified that disputed territory between Azerbaijan and Armenia was to be determined by direct negotiation between the two states.[169] Armenia had occupied the provinces of Nakhichevan, Zangezur, and Nagorno-Karabakh beginning in April 1920, and the Ninth Armenian Assembly of Karabakh declared the union of Nagorno-Karabakh and Armenia.[170] This situation lasted until August 1920, when Armenia signed an

[163] SHAHEN AVAKIAN, NAGORNO KARABAKH: LEGAL ASPECTS 14 (5th ed., 2015).

[164] *Id*. at 14 n. 13.

[165] Bénin v. Niger, 2005 I.C.J. at ¶ 140.

[166] Krüger, *supra* note 9, at 226. According to the inter-temporal rule of international law (*tempus regit actum*), a judicial fact must be ". . . appreciated in the light of the law contemporary with it, and not of the law in force at the time such a dispute in regard to it arises or falls to be settled." *See* Island of Palmas Case (Netherlands v. U.S.A.) 2 R.I.A.A. 829, 845 (Max Huber 1928).

[167] GEUKJIAN, *supra* note 153, at 72 ("Russia probably should have directly participated in the decision-making process and engaged in the debates for an equitable settlement.").

[168] The Treaty of Peace Between the Allied and Associated Powers and Turkey Signed at Sèvres, art. 92 (Aug. 10, 1920).

[169] *Id.*

[170] Sarvarian, *supra* note 134, at 6.

agreement with Soviet authorities providing that the provinces would be subject to final determination of their status in later negotiations.[171] The League of Nations, in passing judgment on Azerbaijan's application for recognition and membership, noted that there remained disputes between it and Armenia over Nagorno-Karabakh.[172] In a message to the Assembly of the League of Nations, the head of the Azerbaijani delegation to the Paris Peace Conference noted that "the interested Governments would find a way of settling these disputes by mutual concessions."[173] Given the clouded title to Nagorno-Karabakh with multiple claimants and international law's invocation of the property law maxim *nemo dat quod non habet* (no one can give what they do not have)[174], the Soviet Union could not "transfer more rights than she herself possessed."[175]

Concurrent with the events in Nagorno-Karabakh, the dispute over the Åland Islands, wherein the predominantly Swedish population of the islands claimed by Finland sought unification with Sweden after the collapse of the Russian Provisional government in October 1917, was referred to the Council of the League of Nations in July 1920, which appointed an International Commission of Jurists to investigate the matter.[176] The Commission of Jurists noted that, the formation and dismemberment of States as a result of revolutions and wars creates "situations of fact, which, to a large extent, cannot be met by the application of normal rules of positive law . . . Under such circumstances, the principle of self-determination of peoples may be called into play."[177] The parallels between the two cases are striking: both populations had petitioned for unification with a host country, and, due to forced association with a foreign state, were denied political self-determination. The subsequent Commission of Rapporteurs that reviewed the case noted that if Finland did not guarantee the Åland Islanders cultural autonomy within Finland, the principle of self-determination would justify "the separation of the islands from Finland, based upon the wishes of the inhabitants which would be freely expressed by means of a plebiscite."[178] The proper status of the Nagorno-Karabakh at the time was

[171] *Id.* at 7. Ironically, this agreement was signed on the same date as the Treaty of Sèvres, August 10, 1920. *See* WALKER, *supra* note 4, at 103.

[172] Edita Gzoyan, *The Issue of Nagorno-Karabakh in the League of Nations*, ARMENIAWEEKLY (July 23, 2020), https://armenianweekly.com/2020/07/23/the-issue-of-nagorno-karabakh-in-the-league-of-nations/ [https://perma.cc/F762-6PTY].

[173] *Id.*

[174] *Nemo dat quod not habet*, ICLR, https://www.iclr.co.uk/knowledge/glossary/nemo-dat-quod-not-habet/ (last visited March 14, 2025).

[175] Island of Palmas Case (Netherlands v. U.S.A.) 2 R.I.A.A. 829, 842.

[176] RADAN, *supra* note 88, at 28.

[177] The Aaland Islands Case, Report of the International Commission of Jurists (1920) LNOJ Spec. Supp. 3, 6.

[178] RADAN, *supra* note 88, at 30. There is disagreement about whether the *Åland Islands* case understood self-determination as a political concept or a legal rule of international law.

disputed, with a clearly stated preference by its inhabitants for association with Armenia. The forcible Sovietization of Armenia and Azerbaijan, although perhaps not violative of the rules governing use of force, may have run afoul of emerging conceptions of territoriality as enshrined in the Covenant of the League of Nations[179] and self-determination as expressed in the Åland Islands matter, while usurping the role of the nascent League of Nations in resolving the territorial dispute and violating pertinent international and bilateral agreements between the relevant parties regarding the resolution of the issue.

Azerbaijan's claim to title is further muddled by its rejection of all Soviet legal heritage in its emergence as an independent state in 1991. The Constitutional Act on State Independence explicitly rejects Sovietization as an "annexation by Soviet Russia" overthrowing Azerbaijan's legitimate government in 1920.[180] Armenia has raised this rejection of Soviet heritage to cast doubts on Azerbaijan's title to Nagorno-Karabakh.[181] Perhaps unsurprisingly, Armenia also asserts that the Kavburo, as the political party of a third-party state, had "no legal power or jurisdiction" to decide the status of the territory of Nagorno-Karabakh.[182] By claiming to be a successor to the Republic of Azerbaijan (1918-1920), and disavowing the interim Soviet period as illegitimate, presumably, the legal titles and rights of Azerbaijan would revert to those that existed in 1920.[183] And, as Sarvarian posits, it is not "interconvertible that the region was ever a part of an independent Azerbaijan."[184] On this reversionary basis, Azerbaijan would lack a clear title to Nagorno-Karabakh given the disputed nature of the territory at the time as recognized by the League of Nations, Paris Peace Conference, and other states.

Krüger notes that "an exception to the *uti possidetis* principle would at best be conceivable if, first, the Armenians acquired a legitimate claim over Nagorno-Karabakh in pre-Soviet times which, second, has to be respected even

Compare SHAW, *supra* note 84, at 226 ("it was clearly accepted by both the International Commission of Jurists and the Committee of Rapporteurs dealing with the situation that the principle of self-determination was not a legal rule of international law, but purely a political concept."), *with* RADAN, *supra* note 88, at 30 ("The report clearly states that in revolutionary situations, such as the dissolution of a state, the principle of national self-determination is the most important, although not the only, principle affecting the creation of new states.").

[179] The Baltic States argued that their annexation by the Soviet Union in 1940 violated the Covenant of the League of Nations which protected the territorial integrity of member states against external aggression. *See* Christine Gray, *Self-Determination and the Breakup of the Soviet Union*, 12 Y.B. EUR. L. 465, 478 (1992).

[180] AVAKIAN, *supra* note 163, at 20.

[181] *Id*.

[182] *Id.* at 14.

[183] Sarvarian, *supra* note 134, at 14.

[184] *Id.*

today."[185] Although she reaches the conclusion that this is "more than questionable" on account of both Armenia and Azerbaijan lacking recognition at the time, it is conceivable that the First Republic of Armenia's acts between 1918-1920, including effective occupation of Nagorno-Karabakh in 1920, may give rise to an inchoate title that revived upon independence in 1991.[186] Azerbaijan outright rejects this claim as "fallacious," noting that its successor-status amounts more to succession to a political lineage rather than to a particular legal heritage.[187] Baku asserts that "it is well known that Nagorny Karabakh has been part of Azerbaijan for centuries," and the Kavburo's decision of July 1921 was recognition of this fact.[188] First, although both Armenians and Azerbaijanis offer contrasting ethnographic histories of the region, Azerbaijan's assessment of a centuries-old historical claim to the region here strains credulity given ample evidence of its Armenian character dating back millennia and the emergence of an Azerbaijani state only in the early twentieth century.[189] Second, the notion of reversion to pre-Soviet legal rights and obligations has been legitimated by way of the Baltic States, and has been regarded as well-founded in the case of Poland, India, and Madagascar.[190] It may also be the case that *jus cogens* norms, such as the right to self-determination, support reversion to pre-occupation sovereignty and all rights inherent in it.[191]

The claim to Nagorno-Karabakh by Azerbaijan is also weakened by the reality that, upon the arrival of the critical date, likely between October and December of 1991, it is doubtful that the "photograph" of the territorial situation at that time would affirm that Nagorno-Karabakh was within its boundaries. On February 20, 1988, the regional Soviet of Nagorno-Karabakh adopted a resolution calling for the transfer of the region from Azerbaijan SSR to Armenia SSR.[192] In the weeks that followed, mass protests broke out in Armenia and throughout Nagorno-Karabakh in reaction to the negative response offered by

[185] Krüger, *supra* note 9, at 226.

[186] Sarvarian, *supra* note 134, at 14.

[187] *See* Permanent Rep. of Azerbaijan to the U.N., Letter dated 26 December 2008 from the Permanent Representative of Azerbaijan to the United Nations addressed to the Secretary-General, at 48 ¶ 167, U.N. Doc. A/63/664-S/2008/823 (Dec. 29, 2008).

[188] *Id.* at 44 ¶ 151.

[189] Panossian, *supra* note 14, at 156 ("Nevertheless, various sources, removed the Azerbaijani government's influence, identify NK Armenians as the oldest surviving population indigenous to NK."); *Cf* Krüger, *supra* note 9, at 214 ("Armenians and Azerbaijanis have divergent views on the ethnic history of the region.").

[190] Charles H. Alexandrowicz, *New and Original States: The Issue of Reversion to Sovereignty*, 45 INT'L AFF. 465, 478 (1969).

[191] *Id.* at 479.

[192] Out of a total of 140 Armenian deputies, 110 voted for the resolution. The First Secretary of the Azeri Community Party was also present at the vote. *See* WALKER, *supra* note 4, at 123.

both Azerbaijan and the Central Committee of the Communist Party of the USSR.[193] The events culminated in the atrocities perpetrated at Sumgait, a town in the suburbs of Baku, wherein many Armenians were massacred.[194] The remainder of the year witnessed strikes, protests, declarations of secession by the Soviet of Mountainous Karabakh, and demands for re-attachment of Karabakh to Armenia by the Armenian Supreme Soviet, all met with intransigence by Moscow and Azerbaijani officials.[195] In early 1989, Soviet leadership imposed a special government administration in Nagorno-Karabakh, putting the region under Moscow's direct control.[196] This status was short-lived, and was replaced in November 1989 by a military administration system meant to push the region back into the "Azeri sphere."[197] From this time onwards, "skirmishes and shoot-outs between armed bands in Karabakh became the rule rather than the exception, and the Soviet army's attempts to calm the situation by setting up checkpoints and searching cars and villages for arms were largely futile."[198] Indeed, the escalation of the conflict was irreversible, and by mid-1991, Armenian militants were *de facto* in control of Nagorno-Karabakh.[199]

It appears then, that as of the December 1991 dissolution of the USSR and recognition of Azerbaijan as an independent state, Nagorno-Karabakh remained beyond its jurisdiction. It should be noted at the outset that *uti possidetis juris*' preference for legal fiction in the form of title should not be confused with *uti possidetis de facto*'s reliance on purely effective control.[200] Rather, Azerbaijan's inability to act *à titre de souverain vis-à-vis* the territory in the years leading up to the critical date seemingly indicates a lack of *effectivités*, that is, "conduct of the administrative authorities as proof of the effective exercise of territorial jurisdiction."[201] As Judge Ajibola explains in his Separate Opinion in the *Libya /Chad* case, *uti possidetis juris* prefers legal title over effective occupation, but "it does not deny the fact that effective occupation could be taken into consideration."[202] Other forms of *effectivités* that may confirm "the exercise of the right derived from a legal title"[203] include legislative acts specific to the

[193] *Id.* at 124.

[194] *Id.*

[195] *Id.* at 126–27.

[196] *Id.* at 128. For the first time since 1921, Soviet Azerbaijan's political control over Karabakh was reduced. *See* POTIER, *supra* note 8, at 7.

[197] *See* WALKER, *supra* note 4, at 129.

[198] Svante E. Cornell, *Turkey and the Conflict in Nagorno Karabakh: A Delicate Balance*, 34 MIDDLE EAST STUD. 51, 55 (1998).

[199] *Id.* at 56.

[200] Hasani, *supra* note 17, at 85–6.

[201] Burkina Faso v. Mali, 1986 I.C.J. at ¶ 63.

[202] Libyan Arab Jamahiriya v. Chad, 1994 I.C.J. at 89, ¶ 128 (separate opinion by Ajibola, J.).

[203] Burkina Faso v. Mali, 1986 I.C.J. at ¶ 63.

territory, regulation of economic activities, public works, and law enforcement.[204]

For roughly two years prior to the critical date, Azerbaijan "relied upon the Soviet central government for a solution," and seemingly lacked the capacity to project effective sovereignty over the region.[205] Meanwhile, the Karabakh National Council was acting as a *de facto* legislative body, passing laws and proclaiming an independent Republic of Nagorno-Karabakh in September of 1991.[206] When the Azerbaijani SSR's parliament attempted to abolish the autonomous status of Nagorno-Karabakh in November of that year, the move "had more of a theoretical political importance than a real value" given the lack of military control over the enclave.[207] It was also unclear whether Azerbaijan had any legal authority to alter the status or territorial boundaries of Nagorno-Karabakh at this juncture, considering legislation passed by the USSR first in 1981 and amended as of 1986 that placed Nagorno-Karabakh within a hierarchy of compliance, first under the USSR Constitution, then under the Constitution of the Azerbaijan SSR.[208] Article 3 of the law expressly stated that the territory of the oblast "may not be altered without the consent of the National Deputies' Council of the [NKAO]."[209] Moreover, Moscow's direct intervention to assign the region to a special government administration and then a military administration system in 1989, contradicts the notion that Azerbaijan was acting as sovereign in the immediate run-up to independence.[210]

Naturally, Azerbaijan argues that Nagorno-Karabakh's acts constituted an illicit secession under both Soviet and international law and were therefore "contrary to the internationally accepted principle of *uti possidetis*."[211] This argument misses the mark. Even if *uti possidetis juris* was applicable, it would not have prohibited Nagorno-Karabakh's declaration of independence nor its secession; the principle is "agnostic" on such questions.[212] As the Netherlands concluded in its written statement in the *Kosovo* proceedings before the ICJ, *uti possidetis juris* "only refers to a rule for the identification of boundaries following the proclamation of independence and is without prejudice to the

[204] Territorial and Maritime Dispute (Nicaragua v. Colombia) 2012 I.C.J. 624, 655–57 ¶ 81–84 (Nov. 2012). Other activities may include the authorization of felling palm trees, grazing, fishing, as well as the levying of taxes. *See* Bénin v. Niger, 2005 I.C.J. at ¶ 78, 87.

[205] Cornell, *supra* note 198, at 55.

[206] *Id.* at 56.

[207] *Id.*

[208] AVAKIAN, *supra* note 163, at 22.

[209] *Id.*

[210] Cornell, *supra* note 198, at 55.

[211] *See* Permanent Rep. of Azerbaijan to the U.N., Letter dated 26 December 2008 from the Permanent Representative of Azerbaijan to the United Nations addressed to the Secretary-General, at 48 ¶ 166, U.N. Doc. A/63/664-S/2008/823 (Dec. 29, 2008).

[212] Peters, *supra* note 57, at 113.

existence of a right to proclaim independence."[213] Analogizing to Kosovo, the principle may actually work contrary to Azerbaijan, sanctifying not only Azerbaijan's frontiers, but also provincial boundaries, such as those of Nagorno-Karabakh *once* it declared independence.[214] Importantly, *uti possidetis juris* can "potentially transform *any type* of internal territorial demarcation that has been established in domestic law in the period of time before secession into an international one once secession has been successful."[215] Therefore, the principle would not render unlawful border changes in instances of secession such as the creation of Bangladesh in 1971 and Eritrea in 1993; it would, however, suggest that the borders of the new states should coincide with those of East Pakistan and the former Ethiopian province, respectively.[216]

Post-independence *effectivités* may be given regard when "they afford indications in respect of the . . . *uti possidetis juris* boundary, providing a relationship exists between the *effectivités* concerned and the determination of that boundary."[217] As the Court explains in the *Indonesia/Malaysia* case, "it cannot take into consideration acts having taken place after the date on which the dispute between the Parties crystallized unless such acts are a normal continuation of prior acts and are not undertaken for the purpose of improving the legal position of the Party which relies on them."[218] Here, Nagorno-Karabakh may point to a multitude of acts that affirm its sovereignty over the region post-independence. The Republic of Nagorno-Karabakh, subsequently renamed the Republic of Artsakh, maintained a system of constitutional government, deployed security forces throughout the enclave, and otherwise retained *de facto* control of the region for more than three decades prior to dissolution and mass exodus under coercive conditions.[219] Despite this, there has been a lack of recognition by international organizations and individual states of the statehood or legitimacy of the Republic of Artsakh's actions. To the contrary, the Security Council passed a series of resolutions in 1993 – 822, 853, 874, 884 – reaffirming the territorial integrity of Azerbaijan and calling for a withdrawal of Armenian forces occupying districts within it.[220] Although Security Council resolutions are binding under international law, the ICJ has traditionally limited

[213] Written Statement of the Kingdom of the Netherlands, Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, (Apr. 17, 2009).

[214] Peters notes, in this regard, that *uti possdetis juris* would be respected. Peters, *supra* note 57, at 113.

[215] *Id.* at 136.

[216] Ratner, *supra* note 94, at 601.

[217] Bénin v. Niger, 2005 I.C.J. at ¶ 27.

[218] Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), 2002 I.C.J. 625, ¶ 135 (Dec. 17).

[219] Panossian, *supra* note 14, at 196.

[220] S.C. Res. 822 (Apr. 30, 1993); S.C. Res. 853 (July 29, 1993); S.C. Res. 874 (Oct. 14, 1993); S.C. Res. 884 (Nov. 12, 1993). *See also* Krüger, *supra* note 9, at 229.

their effect when they conflict with the "principles and purposes in Chapter I of the UN Charter," including the right to self-determination.[221] Moreover, the resolutions also refer the dispute over Nagorno-Karabakh to the Commission on Security and Cooperation in Europe (CSCE), with Resolution 884 urging "the parties concerned to continue to seek a negotiated settlement of the conflict within the context of the Minsk process."[222] Until Azerbaijan's resort to force in 2020 and 2023, the CSCE (subsequently renamed the OSCE) mediated the dispute for more than thirty years under the Minsk Group.[223] This, as well as the clash of post-colonial *effectivités*, indicates that title to the territory remains contested. As a legal dispute over title, "exclusive competence to determine that boundary, and thus settle the . . . dispute, lies with Armenia and Azerbaijan," not third parties.[224] Shaw adds that where the matter of particular internal boundaries is contested, then resolution may turn on traditional processes of state formation, such as effectiveness, third-party recognition, or acquiescence.[225]

III. SELF-DETERMINATION

A. Development of Self-Determination

By way of its application in decolonization, state dismemberment, and secession contexts, *uti possidetis juris* inherently implicates two related principles of international law: territorial integrity and self-determination. As the Chamber noted in its judgment in the *Frontier Dispute (Burkina Faso/Mali)* case, "[a]t first sight [*uti possidetis juris*] conflicts outright with another one, the right of peoples to self-determination."[226] Territorial integrity protects the territorial framework of an independent state, thereby preserving its overall sovereignty.[227] A "fundamental norm of the international legal order," territorial integrity cannot easily be derogated from.[228] Essentially, the principle applies *ex post* to a new state, whose frontiers have been codified in accordance with *uti possidetis juris*.[229] Nevertheless, where a territorial dispute centers on uncertain

[221] Panossian, *supra* note 14, at 208.

[222] S.C. Res. 884, *supra* note 220, ¶ 5.

[223] Sarvarian, *supra* note 134, at 2–3.

[224] *Id.* at 27.

[225] Shaw, *supra* note 62, at 119.

[226] Burkina Faso v. Mali, 1986 I.C.J. at ¶ 25.

[227] SHAW, *supra* note 84, at 270.

[228] The principle is codified in Article 2(4) of the United Nations Charter, providing that "no state shall use force against the territorial integrity or political independence of any other state." *See* Milena Sterio, *Self-Determination and Secession under International Law: Nagorno-Karabakh*, 59 GERMAN Y.B. INT'L L. 81, 86 (2016); U.N. Charter art. 2, ¶ 4.

[229] Sterio, *supra* note 228, at 88.

state frontiers, territorial integrity does not apply.[230] In their conjunctive operation, the principles of *uti possidetis juris* and territorial integrity are frequently inharmonious with the right to self-determination under international law.[231] This tension is readily apparent in the dispute at hand, wherein Azerbaijan frequently invokes its territorial integrity to cast illegality upon Nagorno-Karabakh's secession, whose government justifies its actions by invocation of the right to self-determination.[232]

The right of self-determination is "one of the most fundamental collective rights recognized by international law."[233] The legal basis of the right is rooted in references to the "principle of equal rights and self-determination of peoples" in Articles 1(2) and 55 of the United Nations Charter.[234] Following World War II, self-determination became the legal principle that spurred decolonization, requiring colonial powers to grant territories independence while imbuing nascent states with legitimacy, as affirmed by numerous United Nations General Assembly resolutions[235] and judicial approval in the *Namibia*,[236] *Western Sahara*,[237] and *East Timor*[238] cases.[239] In addition to the colonial context, the 1970 Declaration on Principles of International Law referred to the principle arising in instances of "alien subjugation, domination and exploitation," noting that "all peoples have the right freely to determine their economic, social and cultural development."[240] It has been further codified in both the International Covenant on Civil and Political Rights (ICCPR) and International Covenant on

[230] SHAW, *supra* note 84, at 443.

[231] OHLIN, *supra* note 103, at 132 ("In other situations, however, self-determination might entail the creation of an independent state for that people. This latter possibility puts the principle of self-determination in tension – and perhaps direct conflict – with the principle of territorial sovereignty.").

[232] Sterio, *supra* note 228, at 86; Popjanevski, *supra* note 11, at 24 ("The separatist authorities of Nagorno-Karabakh largely base their claims for secession on the right to self-determination in international law.").

[233] OHLIN, *supra* note 103, at 148.

[234] UN Charter art. 1, ¶ 2, 55; RADAN, *supra* note 88, at 9.

[235] *See, e.g.*, G.A. Res. 2138 (XXI) (Oct. 22, 1966); G.A. Res. 2151 (XXI) (Nov. 17, 1966); G.A. Res. 2379 (XXIII) (Oct. 25, 1968); G.A. Res. 2649 (XXV) (Nov. 30, 1970); G.A. Res. 3485 (XXX) (Dec. 12, 1975).

[236] Western Sahara, Advisory Opinion, 1975 I.C.J. 12 (Oct. 1975).

[237] Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16, ¶ 52 (June 21).

[238] In this case, the ICJ concluded that Portugal's assertion that self-determination was of an *erga omnes* character was "irreproachable." *See* Port. v. Austl., 1995 I.C.J. at ¶ 29.

[239] Shaw, *supra* note 74, at 480.

[240] *Id.* at 481; G.A. Res. 2625 (XXV), Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations (Oct. 24, 1970).

Economic, Social and Cultural Rights (ICESCR), which identically state that "[*a*]*ll peoples* have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."[241]

B. People and Self-Determination

Despite its primacy in the international legal hierarchy, the precise guarantees that a right to self-determination entails, and to whom, remains ambiguous.[242] The text of relevant legal sources makes clear that the right to self-determination is attributable to *peoples*, as opposed to states.[243] Therefore, as a threshold matter, it must be ascertained what groups constitute peoples in order to denote their right to self-determination. International law has thus far failed to provide a workable definition of which collective groups count as peoples.[244] Ohlin suggests that one should look beyond law to cognate disciplines in the social sciences for an answer.[245] Two prominent conceptions of self-determination have emerged that differ on this very question: the "classical" theory and the "romantic" or "enlarged" theory of self-determination.[246] The classical theory posits that a people is territorially constituted by the population of a particular state or territorial entity.[247] This view elevates the primacy of territorial integrity, arguing that the achievement of self-determination entails the population of a particular territory accessing a "bundle of human rights" within a state such as freedom of expression, association, and political participation.[248] Meanwhile, the romantic theory of self-determination holds that a people is a group, or "nation" (as understood in the nineteenth and early twentieth centuries) bounded by common history, language, and other cultural similarities.[249] Through this lens, the formation of a state is the pinnacle of a people's self-determination.[250]

Sterio suggests in the tradition of the classical view that, contrary to minorities—to whom the right of self-determination does not attach under

[241] *See* International Covenant on Civil and Political Rights art. 1, Dec. 16, 1966, 999 U.N.T.S. 171; G.A. Res. 2200A (XXI), International Covenant on Economic, Social, and Cultural Rights (Dec. 16, 1966).

[242] Panossian, *supra* note 14, at 151.

[243] OHLIN, *supra* note 103, at 148.

[244] ANTONIO CASSESE, SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL 326 (1995).

[245] OHLIN, *supra* note 103, at 157.

[246] RADAN, *supra* note 88, at 8. Shaw refers to the "enlarged self-determination thesis," which opposes the application of *uti possidetis juris* in favor of new boundaries reflecting in some way the views of the people concerned. *See* Shaw, *supra* note 74, at 502.

[247] RADAN, *supra* note 88, at 8.

[248] Shaw, *supra* note 74, at 484.

[249] RADAN, *supra* note 88, at 8.

[250] *Id.* at 17–18.

international law and who may not exercise specific territorially linked autonomy claims—peoples are typically viewed as "whole peoples" or an entire group within a specific nation.[251] She posits that if one "conceives of a people as a 'whole people' or an entirety of a nation, one may have serious questions about whether the inhabitants of Nagorno-Karabakh do constitute a people. It may be that they are simply Armenian, or Azeri, or a mixture of the two."[252] However, the limiting of peoplehood to the residents of Nagorno-Karabakh on the basis that they may be considered individual ethnic or regional "minorities" within the broader state of Azerbaijan as opposed to "peoples" with a right to self-determination is at odds with development of the right to self-determination. Paragraph 7 of the Declaration on Friendly Relations makes clear that a state's territorial integrity is protected under certain conditions, chiefly that the state conducts itself "in compliance with the principle of equal rights and self-determination of peoples . . . [and] possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour."[253] The notion that a state's territorial integrity is protected unless a state subjects particular groups to discrimination allows for the proposition that a people is not defined as the entire population of a state.[254] Moreover, in its 2019 Advisory Opinion on the consequences of the United Kingdom severing the Chagos Peninsula from Mauritius prior to decolonization, the ICJ signaled its support in *dicta* for a broader view that self-determination applies beyond decolonization and may attach to ethnic minorities located *within* a state, declaring that "the right to self-determination, as a fundamental human right, has a broad scope of application."[255]

This echoes the view of the Supreme Court of Canada, which, in the *Reference re Secession of Quebec* case, concluded:

> It is clear that 'a people' may include only a portion of the population of an existing state. The right to self-determination has developed largely as a human right, and is generally used in documents that simultaneously contain references to 'nation' and 'state.' The juxtaposition of these terms is

[251] Sterio, *supra* note 228, at 92; *see also* Shaw, *supra* note 74, at 488 ("It cannot, therefore, be maintained that the current conception of minority rights in international law includes the right as such to territorial autonomy.").

[252] Although, Sterio assumes for the purposes of analyzing the guarantees flowing from a right to self-determination that the inhabitants of Nagorno-Karabakh are a people. Sterio, *supra* note 228, at 92.

[253] RADAN, *supra* note 88, at 52; G.A. Res. 2625 (XXV), Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations (Oct. 24, 1970).

[254] RADAN, *supra* note 88, at 52.

[255] Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, 2019 I.C.J. 95, 131 ¶ 144 (Feb. 25); OHLIN, *supra* note 103, at 158.

> indicative that the reference to 'people' does not necessarily mean the entirety of a state's population.[256]

The Court noted that while "international law expects that the right to self-determination will be exercised by peoples within the framework of existing sovereign states," where this is not feasible "a right of secession may arise."[257] The intimation that the inhabitants of Nagorno-Karabakh may not constitute a people for the purposes of self-determination due to their territorially-linked demands seemingly conflates the *ex post* privileges flowing from the right— namely, the purported claim to autonomy or secession— with the threshold definitional question of who counts as a possessor of the right. Even under a classical conception of self-determination, the various ethnic groups inhabiting Nagorno-Karabakh, a territorially delimited region that the international community considers to be a part of a larger state, may be holders of the right to self-determination – Armenian and Azerbaijani alike. The question of what this entails occurs at the second stage of analysis.

In this dispute, the status and specific rights of Karabakh Armenians has been the primary scholarly focal point as they were, until recently, the majority population of the region that claimed the right to self-determination, and, subsidiarily, a right to secession.[258] Based on the fact that Karabakh Armenians speak a distinctive dialect of the Eastern Armenian language, practice their own distinctive version of the Christian faith, and self-identify as a people indigenous to the Nagorno-Karabakh region with a desire to "preserve, develop and transmit to future generations their ancestral territories and identity . . . in accordance with their own cultural patterns, social institutions and legal system," Karabakh Armenians would likely pass muster as a "people" for the purposes of self-determination.[259] Indeed, it may be the case, as Panossian argues, that Karabakh Armenians' claim to a right of self-determination is buttressed by the fact that they may constitute an "indigenous people" under the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), to whom the right of self-determination is explicitly attached.[260]

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[256] Reference re Secession of Quebec, [1998] S.C.R. 217, para. 124 (Can.).

[257] *Id.* at para. 122.

[258] Panossian, *supra* note 14, at 149 ("The region comprised of an indigenous Armenian majority – until September 2023").

[259] *Id.* at 157–58.

[260] UN Special Rapporteur José Martinez Cobo has outlined criteria to assist with characterizing a group as an indigenous people, including: (1) historical continuity with pre-invasion societies, (2) cultural distinctiveness, (3) non-dominance, and (4) a determination to preserve, develop, and transmit to future generations their ancestral territories and identify as people in accordance with their own cultural patterns, social institutions and legal system. For more on the indigenous status of Karabakh Armenians, *see* Panossian, *supra* note 14.

C. Analyzing the Guarantees of a Right to Self-Determination

The second stage of analysis of a right to self-determination is determining what privileges flow therefrom, namely the political, economic, social and cultural development owed to peoples and whether the vindication of these guarantees is constricted by existing state borders or permits secession in some instances. A common dichotomy presented is that there exist two strands of self-determination: internal versus external self-determination.[261] Whereas the internal dimension concerns the relationship between a people and its own state or government, the external dimension defines the status of a people in relation to another people.[262] Internal self-determination concerns the achievement of a bundle of social, political, and economic freedoms within the parent state's existing governance and boundaries. According to the Supreme Court of Canada, international law expects that a right of self-determination occurs internally "within the framework of existing sovereign states and consistently with the maintenance of the territorial integrity of those states."[263]

Meanwhile, external self-determination is essentially concerned with the question of a right of a people to secede from a state in contemporary literature.[264] The general view of international law on secession is that it is "neither legal nor illegal . . . but a legally neutral act the consequences of which are, or may be, regulated internationally."[265] The ICJ in its Advisory Opinion on Kosovo infamously punted on the question, merely ruling that Kosovo's independence declaration did not violate international law given that "general international law contains no applicable prohibition of declarations of independence."[266] In arriving at this decision, it concluded that debates regarding the extent of the right of self-determination and the existence of any right to "remedial secession" is beyond the scope of the question posed by the General Assembly.[267] However, various instruments have been interpreted as permitting secession under specific circumstances, namely instances of overseas colonization, where a people is oppressed under foreign military occupation, and where a defined group is denied meaningful access to internal self-

[261] OHLIN, *supra* note 103, at 160; Reference re Secession of Quebec, S.C.R. 217, para. 126; Russell A. Miller, *Self-Determination in International Law and the Demise of Democracy*, 41 COLUM. J. TRANSNAT'L L. 601, 617 (2003).

[262] Miller, *supra* note 261, at 617 (quoting Patrick Thornberry, *The Democratic or Internal Aspect of Self-Determination with Some Remarks on Federalism*, *in* MODERN LAW OF SELF-DETERMINATION 101 (1991)).

[263] Reference re Secession of Quebec, S.C.R. 217, para. 122.

[264] KAREN KNOP, DIVERSITY AND SELF-DETERMINATION IN INTERNATIONAL LAW 18 (2002).

[265] CRAWFORD, *supra* note 136, at 390.

[266] Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. 403, ¶ 84 (July 22).

[267] *Id.* at ¶ 83.

determination.[268] The third scenario, wherein external self-determination equips groups with a remedial tool to secede, has been characterized as a method of last resort only accessible once a high threshold of human rights violations has been triggered.[269] As Cassese concludes:

> [A] racial or religious group may attempt secession, a form of external self-determination, when it is apparent that internal self-determination is absolutely beyond reach. Extreme and unremitting persecution and the lack of any reasonable prospect for peaceful challenge may make secession legitimate. A racial or religious group may secede - thus exercising the most radical form of external self-determination - once it is clear that all attempts to achieve internal self-determination have failed or are destined to fail.[270]

Accordingly, a people may not secede from an independent state in violation of its territorial integrity if the latter has not committed "unremitting persecution" or some other severe form of denial of internal self-determination and may only lead to a new state if the criteria for statehood are met.[271]

D. Analyzing the Right to Self-Determination in Nagorno-Karabakh

In declaring the independence of the Nagorno-Karabakh Republic, authorities explicitly invoked the right to self-determination.[272] Accordingly, it must be ascertained whether the population of Nagorno-Karabakh had been deprived of fundamental rights by Baku in such a way as to give rise to a right to remedial secession. Stemming from the initially unjust decision by the Soviets to assign the region to the Azerbaijan SSR, repression at the hands of Soviet and Azerbaijani authorities goes back more than a century. Indeed, in the 1930s, 1945, 1965, 1967, and 1977, authorities in the NKAO petitioned the USSR's central bodies to join the Armenian SSR, which were usually rebuffed and met with arbitrary detentions.[273] Population transfers by both Soviet and Azerbaijani officials took place in several different periods. In 1926, census data indicated that Armenians constituted nearly ninety percent of the region's inhabitants.[274] Within six decades, the percentage of Armenian residents had dropped to roughly seventy-seven percent.[275] This decline is not merely attributable to innocuous population shifts; Heydar Aliyev, former Secretary of the Community

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[268] Reference re Secession of Quebec, S.C.R. 217, para. 138.

[269] Panossian, *supra* note 14, at 168.

[270] CASSESE, *supra* note 244, at 120.

[271] RADAN, *supra* note 88, at 245.

[272] Popjanevski, *supra* note 11, at 24; *Declaration on State Independence of the Nagorno Karabakh Republic*, OFF. NAGORNO KARABAKH REPUB., http://www.nkrusa.org/nk_conflict/declaration_independence.shtml (last visited Mar. 21, 2025).

[273] Often, the principal advocates were imprisoned. *See* Baghdassarian, *supra* note 22.

[274] *Id.*

[275] *Id.*

Party of Azerbaijan, admitted that he had intentionally engaged in a campaign to "increase the number of Azerbaijanis and reduce the number of Armenians living in the region."[276] The effect of population transfers is readily apparent in Nakhichevan, another formerly disputed territory assigned by the Soviets to Azerbaijan that once hosted nearly 50,000 Armenians.[277] By 1987, only two Armenian villages remained.[278]

Karabakh Armenians were also barred from achieving meaningful political, economic, and cultural rights under Azerbaijani and Soviet governance. Arrests and deportations commonly followed acts of political expression.[279] Monuments were destroyed to stamp out allegedly nationalist Armenian symbols.[280] In 1991, Azerbaijan "illegitimately" stripped Nagorno-Karabakh of its autonomous status, violating its own law defining the legal relationship between itself and the NKAO.[281] Following this decision, "a credible offer of the 'highest possible level of autonomy'" was not forthcoming from Baku.[282] Economically, Armenian institutions and enterprises in Nagorno-Karabakh were forced to become "dependent" on Azerbaijani cities outside of the NKAO.[283] Throughout nearly forty years of existing as an autonomous region within Azerbaijan, the territory's villages were kept isolated from one another and "not a single kilometre of road [had] been built to link the villages to the regional centre."[284] Armenian villages throughout the region and in surrounding districts were also subject to economic blockades.[285] Furthermore, Karabakh Armenians faced denial of various cultural freedoms, such as the ability to have Armenian-language textbooks in schools, as well as television broadcasting in their own

[276] Panossian, *supra* note 14, at 175.

[277] WALKER, *supra* note 4, at 113.

[278] The Kurdish population of Nagorno-Karabakh had also suffered at the hands of Soviet population-transfer, having been "forcibly deported" to the USSR's Central Asian Republics in the 1920s. *Id.* at 114.

[279] In one bizarre instance, First Secretary of the Shamkhor district, Asadov, appeared in the Armenian village of Chardakhlu, and attempted to force the inhabitants to celebrate the 90th birthday of a Soviet marshal. *Id.* at 118-19, 121-22.

[280] *Id.*at 120.

[281] Michael Ajemian, *Territorial Stalemate: Independence of Nagorno-Karabakh Following the Dissolution of the Soviet Union, and its Lingering Effects Decades Later*, 34 SUFFOLK TRANSNAT'L L. REV. 375, 388 n. 53 (2011).

[282] Bernhard Knoll-Tudor & Daniel Mueller, *At Daggers Drawn: International Legal Issues Surrounding the Conflict in and around Nagorno-Karabakh*, EJIL:TALK! (Nov. 17, 2020), https://www.ejiltalk.org/at-daggers-drawn-international-legal-issues-surrounding-the-conflict-in-and-around-nagorno-karabakh/ [https://perma.cc/F3T8-MRB7].

[283] WALKER, *supra* note 4, at 118.

[284] *Id.*

[285] *Id.* at 122.

language.[286]

Once violent hostilities between armed militias in the region began in earnest in 1988, the "response from Azerbaijani authorities was heavy handed."[287] Massacres occurred at Sumgait in 1988, where Armenians civilians were indiscriminately killed, raped, and burned alive, and at Baku in 1990 where Armenians were beaten, killed, and expelled from Azerbaijan's capital.[288] Azerbaijan, backed by Soviet troops, launched "Operation Ring" in 1991, which resulted in operations in Armenian villages north of Nagorno-Karabakh, leading to "serious human rights violations and hundreds of casualties."[289] Meanwhile, there were several instances of armed Armenian groups committing massacres against Azerbaijani civilians, such as that at Khojaly in 1992, where hundreds were killed.[290] By 1994, nearly thirty thousand had perished, with large-scale displacement of both Azerbaijanis from Nagorno-Karabakh and its surrounding districts as well as Armenians from Azerbaijan.[291]

Arguably, the near century of repudiation, repression, and retaliation by Azerbaijani and Soviet authorities had the cumulative effect of rendering internal self-determination impossible on the eve of Nagorno-Karabakh's declaration of independence. However, Popjanevski concludes that while Karabakh Armenians "allege systematic discrimination in the pre-independence period, there is no evidence of the type of suffering that would warrant a deviation from prevailing international norms."[292] Despite these conclusions, Popjanevski's analysis largely starts the clock in 1987, when hostilities began escalating throughout the region. Broadening the timeline permits a more comprehensive picture of nearly a century devoid of political, cultural, and economic freedoms. The targeted violence, arbitrary detentions, and population engineering over the course of decades offers more pretext for secession in addition to the events just prior to the First Nagorno-Karabakh War.

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[286] Baghdassarian, *supra* note 22.

[287] *Id*.

[288] *Id.* Garry Kasparov, former World Chess Champion, who is from Baku and was in Baku in 1990 described the pogroms taking place: ''No one would halt the Armenian pogroms in Baku, although there were eleven thousand soldiers of internal troops in the city. No one would intervene until the ethnic cleansing was carried out. The pogroms were happening not in a random place, but in the huge capital city with blocks of flats. In such a megapolis as Baku, the crowd simply cannot carry out targeted operations like that. When the pogrom-makers go purposefully from one district to another, from one apartment to another, this means that they had been given the addresses and that they had a coordinator.'' *See* CONG. REC. E174 (Feb. 12, 2020), https://www.govinfo.gov/content/pkg/CREC-2020-02-12/pdf/CREC-2020-02-12-pt1-PgE174-3.pdf#page=1 [https://perma.cc/5P4N-3Y3R].

[289] Popjanevski, *supra* note 11, at 26.

[290] Baghdassarian, *supra* note 22.

[291] *Id.*

[292] Popjanevski, *supra* note 11, at 27.

Popjanevski attempts to buttress her argument that the threshold for remedial secession had not been triggered by referencing realities after the ending of hostilities in 1994. For example, she claims that "[s]ince Azerbaijan has lacked access to the region since the war in the early 1990s, it is difficult to argue that Baku has systematically violated the rights of its current population."[293] This is irrelevant; the right to self-determination held by Karabakh Armenians ought not depend on the events that followed from its manifestation in the form of secession. The entire purpose of Nagorno-Karabakh's attempt at secession in the first instance was due to systematic violations of its inhabitants' rights in the near century under Azerbaijani rule. She further adds that "Azerbaijan, as the parent state, has also on several occasions offered wide autonomy to the region to allow for the exercise of a level of self-governance and the protection of cultural and political rights."[294] However, "in a country where elections are characterized by massive fraud . . . and in a political system where we witnessed the emergence of the first post-Soviet dynasty, the promise of a high level of autonomy sounds hollow, and is void of substance."[295] Moreover, the Azerbaijani government revoked NKAO's autonomous status in the first instance.[296] As the old saying goes, "fool me once . . . ."

Nagorno-Karabakh's claim to remedial secession ought to be examined continuously over the totality of the dispute, especially in light of Azerbaijan's 2020 and 2023 offensives. On September 27, 2020, Azerbaijan launched a military offensive, backed by the Republic of Turkey, in Nagorno-Karabakh and surrounding districts, resulting in a six-week war that killed more than 7,000 soldiers and civilians.[297] The war was "rife with reports of the use of inherently indiscriminate munitions, chemical weapons, and Syrian mercenaries, as well as evidence of torture, mutilation, executions and enforced disappearances against Armenian POWs and civilians."[298] Moreover, desecration of ancient Armenian monuments and cemeteries in Nagorno-Karabakh was widely reported and condemned.[299] At the time, Knoll-Tudor and Mueller concluded Nagorno-Karabakh had not met the threshold to claim a purported right to secession, but noted that the strength of its argument "will depend on Azerbaijan's compliance

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[293] *Id.*

[294] *Id.*

[295] Vicken Cheterian, *Karabakh Conflict After Kosovo: No Way Out?*, 40 NAT'Y PAPERS 703, 714–15 (2012).

[296] Ajemian, *supra* note 281, at 388.

[297] *Nagorno-Karabakh Conflict*, CTR. FOR PREVENTIVE ACTION, https://www.cfr.org/global-conflict-tracker/conflict/nagorno-karabakh-conflict (updated Jan. 24, 2024).

[298] Sheila Paylan, *Dangerous Ramifications of Recognizing the End of Nagorno-Karabakh*, OPINIOJURIS (Mar. 3, 2024), https://opiniojuris.org/2024/03/21/the-dangerous-ramifications-of-recognizing-the-end-of-nagorno-karabakh/.

[299] Resolution on the Destruction of Cultural Heritage in Nagorno-Karabakh, EUR. PARL. DOC. 2022/2582(RSP) (2022).

with the ceasefire agreement and whether it will extend to Armenians under its jurisdiction the most basic fundamental rights and autonomy entitlements."[300]

Since the 2020 ceasefire, Azerbaijan has only engaged in more extreme denial of Karabakh Armenians' right to self-determination, flouting the agreement and international law in the process. In late 2022, dozens of Azerbaijani citizens, allegedly concerned over environmental practices in Nagorno-Karabakh, began demonstrating on the Lachin corridor near the town of Shusha.[301] Supported by the Azerbaijani government, the protestors blockaded the Lachin Corridor, the only strip of land connecting the inhabitants of Nagorno-Karabakh with Armenia, leading to widespread condemnation.[302] The blockade "turned Nagorno-Karabakh into a vast concentration camp for 120,000 Armenians,"[303] causing shortages of food, medication, hygiene products, and was further compounded by disruptions to electricity and natural gas from Azerbaijan.[304] In response to Armenia's request for provisional measures in its already ongoing 2021 case against Azerbaijan for alleged violations of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), the ICJ ordered Baku to "take all measures at its disposal to ensure unimpeded movement of persons, vehicles and cargo along the Lachin Corridor in both directions."[305] Despite this, the protestors continued to block the Lachin Corridor for months.[306]

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[300] Knoll-Tudor & Mueller, *supra* note 282.

[301] The demonstrators stated they were protesting illegal mining practices in Nagorno-Karabakh, as well as the use of the road to transport minerals to Armenia. The Ministry of Ecology and Natural Resources reportedly provided the protestors with tents. *See* Heydar Isayev & Lilit Shahverdyan, *Azerbaijanis Again Block the Road to Karabakh*, EURASIANET (Dec. 12, 2022), https://eurasianet.org/azerbaijanis-again-block-the-road-to-karabakh [https://perma.cc/ZX68-BUFS].

[302] The United States as well as several Special Rapporteurs to the United Nations urged Azerbaijan to lift the corridor blockade, as it had resulted in food, medicine, and hygiene product shortages. Press Release, OHCHR, UN Experts Urge Azerbaijan to Lift Lachin Corridor Blockade and End Humanitarian Crisis in Nagorno-Karabakh (Aug. 7, 2023), https://www.ohchr.org/en/press-releases/2023/08/un-experts-urge-azerbaijan-lift-lachin-corridor-blockade-and-end. The European Parliament adopted a resolution in January 2023 calling on Azerbaijan to immediately reopen the Lachin corridor in accordance with the 2020 Ceasefire Agreement. *See* Joint Motion for a Resolution on the Humanitarian Consequences of the Blockade in Nagorno-Karabakh, EUR. PARL. (Jan. 1, 2023), Doc. RC-B9-0075/2023, https://www.europarl.europa.eu/doceo/document/RC-9-2023-0075_EN.html.

[303] Luis Moreno Ocampo, *Call What is Happening in Nagorno-Karabakh by its Proper Name*, WASH. POST (Sept, 22, 2023), https://www.washingtonpost.com/opinions/2023/09/22/nagorno-karabakh-genocide-armenia/.

[304] Panossian, *supra* note 14, at 176–77.

[305] Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Arm. v. Azer.), Order, 2023 I.C.J. 14, ¶ 67 (Feb. 22).

[306] Panossian, *supra* note 14, at 178.

On September 19, 2023, Azerbaijan launched an offensive under the guise of counterterrorist operations.[307] The following day, security forces in Nagorno-Karabakh surrendered.[308] Shortly thereafter, the Republic of Artsakh's president, Samvel Shahramanyan, signed an agreement to dissolve the enclave's government by January 2024.[309] As a result, nearly the entirety of Nagorno-Karabakh's Armenian population fled, "leaving the region emptied of its indigenous Armenian population for the first time in nearly 1,200 years."[310] One month later, the ICJ issued further provisional measures requiring Azerbaijan to "(i) ensure that persons who have left Nagorno-Karabakh after 19 September 2023 and who wish to return to Nagorno-Karabakh are able to do so . . .; and (iii) ensure that persons who remained . . . are free from the use of force or intimidation . . ."[311]

Azerbaijan's offensives in 2020 and 2023 clearly violated the self-determination rights of Nagorno-Karabakh's inhabitants. Baku's use of force in 2020 arguably violated international prohibitions on the use of force, leading to indiscriminate killings, arbitrary detention, and torture.[312] In addition, the nine-month long blockade of the Lachin Corridor, restricting critical medicines and food, and the subsequent offensive by Azerbaijan in 2023 in violation of an ICJ ruling has been described by Luis Moreno Ocampo, the first Chief Prosecutor of the International Criminal Court, as genocide.[313] These campaigns took place within a broader milieu of dehumanization of Armenians by the upper echelons of Azerbaijan's government. Ilham Aliyev, Azerbaijan's President, has repeatedly dehumanized ethnic Armenians, referring to them as a "virus," "rats," "dogs," "devils," "terrorists," "fascists," "enemies," "usurping interlopers," "barbarians and vandals," and encouraged violence against them.[314] Moreover, Azerbaijan's legal frameworks "provide little to no possibility for any ethnic

[307] *Azerbaijani Forces Strike Armenian-controlled Karabakh, Raising Risk of New Caucasus War*, REUTERS (Sept. 19, 2023), https://www.reuters.com/world/azerbaijan-says-six-its-citizens-were-killed-by-land-mines-karabakh-2023-09-19/.

[308] Christian Edwards, *Nagorno-Karabakh Will Cease to Exist from Next Year. How Did this Happen?*, CNN (Sept. 28, 2023), https://www.cnn.com/2023/09/28/europe/nagorno-karabakh-officially-dissolve-intl/index.html [https://perma.cc/6K3N-XZ78].

[309] Panossian, *supra* note 14, at 178.

[310] *Id.* at 179.

[311] Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Arm. v. Azer.), 2023 I.C.J. 619, ¶ 74 (Nov. 17).

[312] *See* Ruys & Silvestre, *supra* note 13.

[313] *See* Ocampo, *supra* note 303. Ocampo has also called for Ilham Aliyev, Azerbaijan's President, to be investigated by the International Criminal Court. *See* Luis Moreno Ocampo, *The ICC Should Consider the New Armenian Genocide Petition*, POLITICO (May 10, 2024, 4:00 AM CET), https://www.politico.eu/article/icc-armenian-genocide-nagorno-karabakh-azerbaijan-ilham-aliyev/ [https://perma.cc/8PV6-VN4S].

[314] Ocampo, *supra* note 313.

minority to assert a right to internal self-determination inside the country's borders."[315] Accordingly, even if the threshold to act upon a right to remedial secession did not exist in the 1990s, this right was triggered in the years since due to the continued denial of internal self-determination, a deadly blockade in violation of ICJ provisional measures, and illicit recourses to military force in violation of a ceasefire agreement. The culmination of these severe denials of human rights was the mass expulsion of Nagorno-Karabakh's Armenian inhabitants.

CONCLUSION

The exodus of almost the entire population of Nagorno-Karabakh marked a tragic end to the near-century long quest for independence or reunification with Armenia. The Republic of Artsakh has since been formally dissolved, while its former citizens continue to struggle integrating into Armenia, where one in every thirty people in the country is now a refugee from Nagorno-Karabakh.[316] Nevertheless, it remains doubtful that the cause of the region's inhabitants — one that struck at the heart of self-determination—will simply disappear.[317]

This Note has demonstrated that unquestioning adherence to internal administrative borders by virtue of *uti possidetis juris* is neither straightforward nor amenable to the peremptory norm of self-determination in the case of Nagorno-Karabakh. As in other instances, inflated notions of *uti possidetis juris* here have been wielded to carry out expulsion and violence rather than as a shield against destabilization. The semantic invocation of the doctrine is violative of the highest principles of international law, chiefly that as long-term inhabitants of the region, Karabakh Armenians—by virtue of their unique attachment and historic claims to their ancestral lands—were entitled to the right of self-determination.[318] Territorial administration is not an end in itself; "not international administration of territory for territorial administration's sake – but rather as a means to an end, namely, to secure the well-being of the 'people' or the 'population,' and the inhabitants living under the rule of law in a democratic society."[319] Although Armenia and Azerbaijan appear to be on the cusp of finalizing an agreement to normalize relations and achieve peace in the South Caucasus, the echoes of Nagorno-Karabakh's violent dismantling will

[315] Panossian, *supra* note 14, at 189.

[316] *Armenia Struggles to Cope with Exodus from Nagorno-Karabakh*, CRISIS GRP. (Mar. 4, 2024), https://www.crisisgroup.org/europe-central-asia/caucasus/armenian-azerbaijani-conflict-armenia/armenia-struggles-cope-exodus.

[317] *Id.*

[318] Ratner, *supra* note 94, at 615-16.

[319] Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. 403, ¶ 129 (July 22) (separate opinion by Trindade, C.)

"reverberate across other majority-minority conflicts around the globe for years to come."[320]

[320] Laurence Boers, *Nagorno-Karabakh Republic: Life and Death of an Unrecognized State*, EURASIANET (Jan. 2024), https://eurasianet.org/the-nagorno-karabakh-republic-the-life-and-death-of-an-unrecognized-state [https://perma.cc/P43F-T7HM].