# COMBATANT IMMUNITY FOR MEMBERS OF THE NAGORNO-KARABAKH ARMY: A CASE STUDY

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## Abstract

After Azerbaijan regained control over the territory of the Nagorno-Karabakh region, it detained a number of officials of the Nagorno-Karabakh Republic (hereinafter — NKR) and members of the Nagorno-Karabakh Defence Army (hereinafter — NKDA). The detainees face charges of participating in illegal armed formations and/or terrorism financing. The present case study explores whether the detainees might benefit from combatant immunity and whether Azerbaijan's prosecution of those who fought for the NKR complies with international humanitarian law. Referencing the rules on prisoner of war status specified in Article 4(2) of the Third Geneva Convention, this paper concludes that members of the NKDA indeed fell into the hands of the "enemy", NKDA *prima facie* complied with the "four requirements" for irregular armed formations per Article 4(2) and "belonged" to Armenia, that for these purposes can be deemed to have been engaged in an international armed conflict with Azerbaijan. If evidence available to the Azerbaijani authorities supports the view that NKDA members fit the requirements of Article 4(2) of the Third Geneva Convention, members of the NKDA should be treated as prisoners of war and lawful combatants. Therefore, being a member of the NKDA or supporting its activities should not be criminally punishable.

## Key words

international humanitarian law, combatant immunity, Nagorno-Karabakh Republic, irregular armed formations, prisoner of war

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## Introduction and relevant background

On 19 September 2023, the Armed Forces of Azerbaijan launched a military operation against the self-proclaimed Nagorno-Karabakh Republic. On the next day, authorities of the NKR agreed to surrender and, on 28 September 2023, the President of the NKR signed a decree dissolving all institutions of the NKR by 1 January 2024.[1] This ended the NKR and its conflict with Azerbaijan.

After hostilities ceased, the Azerbaijani authorities proceeded to detain a number of the NKR officials. As of 4 October 2023, Azerbaijan authorities detained at least eight former state and military officials of the NKR: former State Minister Ruben Vardanyan, former Presidents Arkady Ghukasyan, Arayik Harutyunyan and Bako Sahakyan, former Minister of Foreign Affairs Davit Babayan, former commander of the Defence Forces of the NKDA Levon Mnatsakanyan, former deputy commander of the NKDA Davit Manukyan and chairman of the National Assembly Davit Ishkhanyan.[2] On top of that, on 1 October 2023, the Azerbaijani Prosecutor General told reporters that more than 300 "Armenian separatists" were put on the international wanted list.[3]

In response to Azerbaijan's detentions, Armenia requested that the International Court of Justice (hereinafter — ICJ) enters provisional measures ordering that "Azerbaijan shall refrain from taking punitive actions against the current or former political representatives or military personnel of Nagorno-Karabakh".[4] The ICJ did not grant this provisional measure, as Armenia failed to show any link

[1] *Telegram Channel "NKR InfoCenter".* Decree of the NKR President. 28 September 2023. URL: https://t.me/texekatvakanshtab/6298 (accessed: 20.03.2024).

[2] *The Armenian Weekly.* Former state and military officials of Artsakh detained by Azerbaijan. 4 October 2023. URL: https://armenianweekly.com/2023/10/04/former-state-and-military-officials-of-artsakh-detained-by-azerbaijan/ (accessed: 20.03.2024).

[3] *Turan*. Azerbaijan has put over 300 Armenian separatists on the wanted list /UPDATED/. 1 October 2023. URL: https://turan.az/en/politics/azerbaijan-has-put-over-300-armenian-separatists-on-the-wanted-list-updated-769951 (accessed: 20.03.2024).

[4] ICJ. *Application of the International Convention on The Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan)*. Request by the Republic of Armenia for the Indication of Provisional Measures. 28 September 2023. URL: https://www.icj-cij.org/sites/default/files/case-related/180/180-20230928-wri-01-00-en.pdf (accessed: 20.03.2024).

of its request with the International Convention on the Elimination of All Forms of Racial Discrimination.[5] Apart from applying to the ICJ, Armenia reportedly requested interim measures before the European Court of Human Rights (hereinafter — ECtHR) demanding immediate release of the former leaders of the NKR.[6] The ECtHR has not reported its decision on Armenia's request,[7] which suggests that Armenia's request might not have been successful.

Charges against the former NKR officials include terrorism financing, participating in activities of armed formations or groups not provided for by law, and illegal border crossings.[8] This is consistent with the previous practice of Azerbaijani courts that charged with terrorism crimes even members of the regular army of Armenia captured after the 2020 ceasefire.[9] Also, Azerbaijan hinted before the ICJ that it intended to prosecute the leaders of the NKR for war crimes.[10]

The present paper analyses whether, from the standpoint of international humanitarian law (hereinafter — IHL), members of the NKDA and its supporters can be prosecuted for the mere fact of taking part in hostilities against Azerbaijan or supporting the NKDA. The case study reviews the prospects of a claim of combatant immunity that supporters of the NKR might raise before Azerbaijani courts. The status of lawful combatants, if provided to the NKDA members, entails three substantial consequences. First, members of the NKDA must be immune from prosecution for raising arms against Azerbaijan. Second, former state officials of the NKR cannot be prosecuted for supporting the activities of the NKDA, because the support of lawful conduct cannot entail criminal responsibility.[11] This is even more so when a supporter of lawful combatants is charged with terrorism financing. As Professor Ben Saul correctly noted, in the international framework of combating terrorism, it is not an offence to finance attacks on combatants, fighters, or civilians taking a direct part in hostilities.[12] Therefore, it would not be a mistake to assert that supporters of lawful combatants should also benefit from the combatant immunity enjoyed by those who take active part in hostilities. Third, if NKDA members are recognised as lawful combatants under the rules of the IHL, Azerbaijani courts should not treat the NKDA as an "illegal armed formation".

Three important qualifications must be made. First, this case study does not discuss whether the NKR had achieved statehood[13] before its termination by decree; rather, the analysis below is based on the scenario where that is not the case, as an argument to the contrary is unlikely to be successful before Azerbaijani courts. Second, Azerbaijan undoubtedly has a right — and even a duty — to prosecute war crimes.[14] Accordingly, this brief analysis focuses only on the prosecution of crimes unrelated to violations

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5 ICJ. *Application of the International Convention on The Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan)*. Order on Armenia's Request for the indication of provisional measure. 17 November 2023.

6 *News.AM.* Armenia appeals to ECHR demanding to ensure protection of rights of former and current leaders of Karabakh. 5 October 2023. URL: https://news.am/eng/news/785191.html (accessed: 20.03.2024).

7 See the list of the ECtHR's press reports on interim measures at the HUDOC web platform: URL: https://hudoc.echr.coe.int/eng-press#{%22documentcollectionid%22:[%22R39%22]} (accessed: 20.03.2024).

8 See, for instance, charges brought against Ruben Vardanayan: *Aze.Media.* State Security Service: Ruben Vardanyan charged with financing terrorism. 28 September 2023. URL: https://aze.media/state-security-service-ruben-vardanyan-charged-with-financing-terrorism/ (accessed: 20.03.2024).

9 *Haqqin.* The court sentenced 12 Armenian soldiers to 6 months in prison. And their term has expired. 2 July 2021. URL: https://haqqin.az/news/214024 (accessed: 20.03.2024).

10 ICJ. *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan)*. Verbatim Record, Public sitting held on 12 October 2023. CR 2023/22. P. 46. URL: https://www.icj-cij.org/sites/default/files/case-related/180/180-20231012-ora-02-00-bi.pdf (accessed: 20.03.2024).

11 For example, the US District Court for the Eastern District of Missouri heard the case against defendants who provided material support to a foreign terrorist organisation that fought in Syria. The court rejected the claim of combatant immunity because the Syrian civil war was a non-international armed conflict. Nevertheless, the US court agreed, in principle, that the defendants charged with terrorism financing might have benefited from the combatant immunity, if they had supported lawful combatants fighting in an international armed conflict. See United States District Court for the Eastern District of Missouri Eastern Division. *United States of America v. Ramiz Zijad Hodzic, Sedina Unkic Hodzic, Nihad Rosic, Mehida Medy Salkicevic, And Armin Harcevic.* No 4:15 CR 49 CDP. Judgment of 5 February 2019. § 2.

12 Saul B. *From conflict to complementarity: Reconciling international counterterrorism law and international humanitarian law* // International Review of the Red Cross. 2021. Vol. 103 (916–917). P. 178. See also, Van Poecke T., Verbruggen F., Yperman W. *Terrorist offences and international humanitarian law: The armed conflict exclusion clause* // International Review of the Red Cross. 2021. Vol. 103 (916–917). P. 301.

13 A body of international legal commentary on this topic includes Crawford J. *Creation of States*. Oxford : Oxford University Press, 2006. P. 403; Melnyk A. *Nagorno-Karabakh* // Max Planck Encyclopedias of International Law. May 2013; *The Nagorno-Karabakh Conflict: Historical and Political Perspectives* / ed. by M. Hakan Yavuz, M. Gunter, New York : Routledge, 2023. P. 113–221; Krüger H. *The Nagorno-Karabakh Conflict: A Legal Analysis*. London : Springer, 2010. P. 40–90; Bachmann S., Prazauskas M. *The Status of Unrecognized Quasi-States and Their Responsibilities under the Montevideo Convention* // The International Lawyer. 2019. Vol. 52. № 3. P. 393–438; Roeben V., Jankovic S. *Validity of Contested Title to Territory in Frozen Conflict Zones: The Case of Nagorno Karabakh with Particular Reference to the 2020 War* // Chinese (Taiwan) Yearbook of International Law and Affairs. 2021. Vol. 39. P. 73–110.

14 Henckaerts J-M., Doswald-Beck L., Alvermann C., Dörmann K., Rolle B. *Customary International Humanitarian Law*. Cambridge : Cambridge University Press, 2005. P. 607, Rule 158.

of the IHL, including financing of terrorism and participating in the activities of the NKDA labelled as an "illegal armed formation". Third, this paper does not aim at conclusively proving that the combatant immunity bars the prosecution of the NKDA members or its supporters. This would be an impossible task without direct access to evidence available to defendants and Azerbaijani authorities and without numerous findings of fact necessary to properly substantiate this point. The analysis is based on the information contained in open sources.

## 1. Applicable legal rules, definitions and tests

Three sources detail the rules on combatant immunity: customary IHL, the Geneva Convention relative to the Treatment of Prisoners of War (hereinafter — GC III),[15] and the Protocol Additional to the Geneva Conventions and relating to the Protection of Victims of International Armed Conflicts (hereinafter — AP I).[16] While Armenia signed and ratified both GC III and AP I, Azerbaijan signed only GC III.[17] This means that members of the NKDA would be unable to rely directly on the rules of AP I before Azerbaijani courts. They can, however, rely on provisions of this treaty insofar as it reflects the rules of customary law.

The codification by the International Committee of the Red Cross (hereinafter — ICRC) of customary IHL documents the rule on combatant immunity: "Upon capture, combatants entitled to prisoner-of-war status may neither be tried for their participation in the hostilities nor for acts that do not violate international humanitarian law".[18] This is a long-standing rule of customary IHL.[19]

The notion of "combatant" has close links to the notion of "prisoner of war" (hereinafter — POW).[20] In general, any combatant who falls into the power of an adverse party is a POW and anyone who takes part in hostilities and meets the requirements for the POW status is a combatant.[21]

GC III Article 4 defines POWs and sets the personal scope of application of GC III.[22] Since the NKDA are irregular armed forces that have never been incorporated into the Armenian army, only Article 4(2) would apply to them, which vests the POW status with "[m]embers of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions: (a) that of being commanded by a person responsible for his subordinates; (b) that of having a fixed distinctive sign recognizable at a distance; (c) that of carrying arms openly; (d) that of conducting their operations in accordance with the laws and customs of war".

Combatant immunity, the status of a combatant and POW can be raised only in an international armed conflict, since it is necessary to trigger the application of GC Article 4 or the relevant customary rules.[23] Members of armed groups that fight in non-international armed conflicts do not have combatant immunity.

Domestic criminal courts must observe combatant immunity, as the IHL mandates that combatants who fight in accordance with IHL may not be prosecuted under domestic law for acts of war permitted under IHL.[24] Combatant privilege transforms what would otherwise be an unlawful act under domestic law

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15 International Committee of the Red Cross (ICRC). *Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention)*. 75 UNTS 135. 12 August 1949.

16 International Committee of the Red Cross (ICRC). *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*. 1125 UNTS 3. 8 June 1977.

17 See the list of signatories to GC III on the website of the ICRC: URL: https://ihl-databases.icrc.org/en/i hl-treaties/gciii-1949/state-parties (accessed: 20.03.2024). See the list of signatories to AP I on the website of the ICRC: URL: https://ihl-databases.icrc.org/en/ihl-treaties/api-1977/state-parties (accessed: 20.03.2024).

18 Henckaerts J-M. *Customary International Humanitarian Law*. P. 384.

19 *Ibid*.

20 The ICRC Commentary to AP I clarifies that the Third Geneva Convention does not define the term "combatant" but "implicitly include[s it] in the recognition of prisoner-of-war status in the event of capture". Article 43 of AP I removed all ambiguity and "explicitly stated that all members of the armed <…> can participate directly in hostilities, i. e., attack and be attacked". See Pictet J. et al. *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*. Geneva : International Committee of the Red Cross, 1986. P. 515, § 1677.

21 International Committee of the Red Cross (ICRC). *Commentary on the Third Geneva Convention: Convention (III) Relative to the Treatment of Prisoners of War*. Cambridge : Cambridge University Press, 2021 (hereinafter — ICRC Commentary to GC III). § 950: "In addition to providing the personal scope of application of the Third Convention, Article 4 is relevant to the definition of 'combatants'".

22 ICRC Commentary to GC III. § 950.

23 See Article 2 of GC III.

24 Bartels R. *The right to participate in hostilities: Combatant privilege vs criminal responsibility for members of organised armed groups during international and domestic criminal trials // Armed Groups and International Law* / ed. by K. Fortin, E. Heffes. Cheltenham, UK : Edward Elgar Publishing, 2023. P. 66. See also Appeals Court of The Hague. Judgment of 30 April 2015. ECLI:NL:GHDHA:2015:1082. Consideration 10.4.3.3.2.

into a lawful act compliant with IHL.[25] As Emily Crawford put it, combatant status "is an international status that provides immunity from the operation of domestic criminal law" for acts committed during the course of the armed conflict.[26] IHL prohibits neither taking part in international armed conflict nor being a member of an armed group involved in an international armed conflict nor financing or supporting an armed formation by nationals of a state to which an armed group belongs. Thus, if a combatant fights in an armed formation that satisfies the requirements of Article 4(2), a state cannot treat as illegal the mere facts of taking part in hostilities, being a member of this armed formation or supporting its activities.

Therefore, to substantiate combatant immunity against a prosecution in Azerbaijan, members and supporters of the NKDA should prove that GC III Article 4(2) applies to NKDA members, i.e., that NKDA members have POW status and, therefore, they are lawful combatants. Article 4(2) would also only apply if Armenia and Azerbaijan were in a state of international armed conflict.

Applying the rules of Article 4(2), members and supporters of the NKDA would need to prove, first, that NKDA members fell "into the power of the enemy", second, that the NKDA meets the four conditions established for irregular armed groups and, third, that the NKDA "belongs" to a party to an international armed conflict.

## 2. Falling "into the power of the enemy"

When Azerbaijan captured the members of the NKDA, they indeed fell "into the power of the enemy", as the NKDA was engaged in an armed conflict with the Azerbaijani armed forces. A difficulty might arise with this requirement only in a situation where an NKDA member holds an Azerbaijani nationality. The ICRC noted that some states have denied combatant status to their own nationals who fight in the armed forces of the enemy.[27] The rationale behind this practice is that nationals cannot treat their own state as an "enemy". This reading of the notion of "enemy" substantially complicates the claim of combatant immunity for members of secessionist armed forces.

While the ICRC suggests that states must grant POW status to their own nationals, at the same time, it admits that they can prosecute these nationals for treason or other crimes against the state.[28] Therefore, members of the NKDA that have an Azerbaijani nationality could qualify as POWs, but Azerbaijan can prosecute them for taking part in hostilities against itself.

Michael N. Schmitt and Kevis S. Globe opine that "most members of the [NKDA] are nationals of Azerbaijan", which "precludes them from claiming belligerent immunity for participating in the conflict".[29] The underlying factual premise, however, needs further verification. In the *Chiragov* judgment, the ECtHR pointed to "a general situation which involves the flight of practically all Azerbaijani citizens <…> from Nagorno-Karabakh and the surrounding territories <…>".[30] Importantly, as Azerbaijan asserted itself, many individuals residing in Nagorno-Karabakh were in fact holders of Armenian passports.[31] It stands to reason that even if some residents of Nagorno-Karabakh, including members of the NKDA, had Azerbaijani citizenship, their numbers could be limited. For completeness, should some of the residents of Nagorno-Karabakh have been dual nationals, the same rules would apply in this context as if they had been only Azerbaijani nationals.

Therefore, presuming that NKDA members do not hold Azerbaijani citizenship, they should satisfy the requirement of falling to the hands of the "enemy" upon their capture by Azerbaijan without complication.

## 3. Compliance with the "four conditions" for irregular armed groups

The NKDA appears to satisfy the four conditions enumerated in GC III Article 4(2): first, that of being commanded by a person responsible for his subordinates; second, that of having a fixed distinctive sign recognisable at a distance; third, that of carrying arms openly; fourth, that of conducting their operations in accordance with the laws and customs of war. While the NKDA undoubtedly meets the first three

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25 Bartels R. *Op. cit.* P. 67.

26 Crawford E. *The Treatment of Combatants and Insurgents under the Law of Armed Conflict*. Oxford : Oxford University Press, 2010. P. 53.

27 ICRC Commentary to GC III. § 966–969.

28 Ibid. § 970–972.

29 Schmitt M.N., Coble K. *The Evolving Nagorno-Karabakh Conflict – An International Law Perspective – Part II* // Lieber Institute West Point. 29 September 2023. URL: https://lieber.westpoint.edu/evolving-nagorno-karabakh-conflict-international-law-perspective-part-ii/ (accessed: 20.03.2024).

30 ECtHR. *Chiragov and Others v. Armenia* [GC]. no. 13216/05. 16 June 2015. § 220.

31 *Chiragov*. § 166.

conditions, the Azerbaijani authorities might argue that the members of the NKDA lost their POW status because the NKDA violated the IHL.[32]

As the ICRC emphasises, to be disqualified from combatant immunity, an armed group must be involved in "large-scale or systematic non-compliance with international humanitarian law".[33] The ICRC concludes that "non-compliance by one member of a group would not disqualify all members of the group from prisoner-of-war status".[34] A potential counter-argument on the loss of POW status, therefore, would be unlikely to succeed unless the Azerbaijani authorities manage to prove a systematic pattern of war crimes committed by NKDA members.

Thus, the NKDA apparently meets all four conditions specified in Article 4(2), as the available open source information does not seem to confirm large-scale or systematic war crimes that would justify the termination of combatant immunity provided to its members.

## 4. "Belonging" to a party to the conflict

It may be argued that the NKDA "belongs" to Armenia engaged in an international armed conflict with Azerbaijan. This potential argument would be the most debatable and requires extensive elaboration.

As follows from Article 4(2) of GC III, there is no need for the NKDA to be formally incorporated into Armenia's armed forces;[35] *de facto* relationships of "belonging" suffice.[36] The ICRC explains that an armed group belongs to a party to a conflict if that group in fact fights on behalf of that party and the party in question accepts "both the fighting role of the group and the fact that the fighting is done on its behalf".[37] The ICRC notes that a state's acceptance of these *de facto* relations may be tacit. This would be the case when "a group is involved in combat operations alongside the State and claims to be fighting on behalf of the State" and the state does not deny its links with that armed group.[38] The ICRC has expressed the view that a state tacitly accepts "belonging" of an irregular armed group where the state has "overall control"[39] over such an armed group and the group in question fights on the state's behalf.[40]

Against these rules, members and supporters of the NKDA might face at least two difficulties when claiming combatant immunity. First, Armenia has consistently denied its control over the NKDA and that Armenia was even involved in an armed conflict with Azerbaijan. Second, it is not clear whether Armenia retained its overall control over the NKDA after the 10 November 2020 armistice.

The NKR had positioned itself as an independent state that seceded from Azerbaijan. Armenia only claimed that it supported the NKR but has never accepted that the NKDA was fighting on Armenia's behalf. This model of relations does not correspond to the situation Article 4(2) was designed to address. Article 4(2) of GC III was a response to the policy of Nazi Germany that denied POW status to partisans fighting in occupied territories.[41] Neither partisans nor states that fought against Germany had seriously hidden their mutual support and sympathies. Partisans did not intend to create their own new states but focused their efforts on liberating their territories from the Occupying Power and restoring the control of sovereign states over their territories. The "stealth" model of relations between the non-recognised NKR and Armenia contrasts starkly with the relationships between partisans and the Allies.

In 2015, Armenia vigorously denied before the ECtHR its role in the armed conflict between the NKR and Azerbaijan.[42] Armenia insisted that it was the NKDA that captured Lachin and Shusha in 1992 and "volunteers of Armenian origin" carried out all subsequent military actions.[43] Following the cessation of the

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32 For example, Azerbaijan's counsel argued before the ICJ: "In the armed conflicts over Garabagh, indiscriminate and disproportionate attacks by the Armenian forces resulted in hundreds of civilians being killed, injured, detained or missing; thousands of civilians having had their property and homes destroyed; and over 700,000 people being forced to leave the occupied areas". ICJ. Verbatim Record in *Armenia v. Azerbaijan*. CR 2023/22. P. 48. § 22.

33 ICRC Commentary to GC III. § 1026.

34 Ibid. § 1026.

35 Ibid. § 1001.

36 Ibid. § 1004.

37 Ibid. § 1005.

38 Ibid. § 1007.

39 The "overall control" test was developed in the jurisprudence of the International Criminal Tribunal for the Former Yugoslavia to classify armed conflicts as being of international character. See ICTY. *Prosecutor v. Duško Tadić*. IT-94-1-A. Appeal Judgement. 15 July 1999. § 120.

40 ICRC Commentary to GC III. § 1008.

41 Ibid. § 1000.

42 *Chiragov*. § 159.

43 Ibid. § 160.

armed conflict in 1994, according to Armenia, it had no military presence in Nagorno-Karabakh.[44] Despite these arguments of the Armenian Government, the ECtHR determined in the 2015 *Chiragov* judgment:

> Armenia, through its military presence and the provision of military equipment and expertise, has been significantly involved in the Nagorno-Karabakh conflict from an early date. This military support has been — and continues to be — decisive for the conquest of and continued control over the territories in issue, and the evidence, not least the Agreement, convincingly shows that the Armenian armed forces and the "NKR" are highly integrated.[45]

The findings of the ECtHR indicate that Armenia maintained overall control over the NKDA. For this reason, the Geneva Academy concluded that Armenia occupied the territory where the NKR was established using the NKDA as proxy.[46] This is consistent with Azerbaijan's statements that Armenia occupied its territory.[47] Therefore, the NKDA, being under Armenia's overall control, could be argued to have taken part in an international armed conflict between Armenia and Azerbaijan. Notwithstanding this, the question remains whether the NKDA can "belong" to Armenia provided that Armenia had denied this belonging and denied that NKDA fought on Armenia's behalf.

The District Court of The Hague faced a similar question in 2022 when it prosecuted four members of the Donetsk People's Republic Armed Forces (hereinafter — DPR AF) who were allegedly responsible for the downing of MH17. The District Court found that the Russian Federation exercised overall control over the DPR AF and, therefore, the MH17 was shot down during a combat operation in the course of an international armed conflict.[48] Nevertheless, the District Court denied the defendants' combatant immunity stating that the finding of Russia's overall control over the DPR AF was insufficient in itself to grant them the combatant immunity. According to the District Court, for the combatant immunity to exist, the Russian Federation should have accepted that the DPR AF belonged to it and should have taken responsibility for their actions.[49]

The judgment of the District Court of The Hague appears to us to be a legalistic decision that could have given more regard for the spirit of the rules underlying the combatant immunity. It is questionable whether the official position of a state can be used as a pretext for legitimising the prosecution of those who fight in irregular armed groups under the overall control of that state. A state might deny its links with an irregular armed group for various political reasons but this should not gloss over the *de facto* relationships between the state and an armed group fighting in an international armed conflict. Apparently for this reason, the ICRC concluded that a state's overall control over armed groups in itself indicates the relations of "belonging" and the state's tacit acceptance of these relationships.[50] The reading of the District Court might lead to an undesirable consequence of individuals fighting in international armed conflicts losing their protected status for the sole reason that the state supporting an armed group officially denies this support. Courts should not turn a blind eye on the facts and focus on political statements instead.

If Azerbaijani courts adopt the reasoning of the District Court of The Hague, they are likely to deny combatant immunity to members and supporters of the NKDA because Armenia never accepted that the NKDA belongs to it. Such reasoning, however, would undermine the rationale behind the combatant immunity. The reading of the IHL rules on combatant immunity showing that the NKDA *de facto* belonged to Armenia and Armenia accepted it tacitly, even though it has never officially confirmed its control over the NKDA, seems to better account for the spirit and rationale of the relevant rules.

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44 Ibid. § 161.

45 Ibid. § 180.

46 See the classification of this armed conflict carried out by the Geneva Academy on the website of its online project: Geneva Academy — RULAC. *Military occupation of Azerbaijan by Armenia*. 9 October 2022. URL: https://www.rulac.org/browse/conflicts/military-occupation-of-azerbaijan-by-armenia (accessed: 20.03.2024).

47 For example, before the ICJ Azerbaijan qualified Armenia's actions in Nagorno-Karabakh as an occupation (See. ICJ. *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Azerbaijan v. Armenia)*. Application instituting proceedings against Armenia. 23 September 2021). This position is in line with the numerous resolutions of the UN Security Council: UN Security Council. *Security Council resolution 822 (1993) [Armenia-Azerbaijan]*. S/RES/822 (1993). 30 April 1993. § 1; UN Security Council. *Security Council resolution 853 (1993) [Armenia-Azerbaijan]*. S/RES/853 (1993). 29 July 1993. § 3; UN Security Council. *Security Council resolution 874 (1993) [Armenia-Azerbaijan]*. S/RES/874 (1993). 14 October 1993. § 5; UN Security Council. *Security Council resolution 884 (1993) [Armenia-Azerbaijan]*. S/RES/884 (1993). 12 November 1993. § 4.

48 District Court of The Hague. Cases no. 09-748004/19, 09-748005/19, 09-748006/19, 09-748007/19. Judgment. 17 November 2022. Sections 4.4.3.1.4 and 4.4.3.2.

49 *Ibid*.

50 ICRC commentary to GC III. § 1007–1008.

If Azerbaijani courts confirm that the NKDA "belonged" to Armenia, another question arises: did Armenia retain its overall control over the NKDA after November 2020? On 10 November 2020, following the 44-day armed conflict, the President of the Republic of Azerbaijan, the Prime Minister of the Republic of Armenia and President of the Russian Federation issued a joint statement declaring a ceasefire in the region.[51] According to that statement, Russia deployed its peace-keeping contingent along the contact line in Nagorno-Karabakh and the Lachin corridor, and Armenia withdrew its armed forces.[52] The Russian peacekeeping forces established sole control over the Lachin corridor[53] — the only piece of land that connected Armenia and the NKR.

Accordingly, the Armenian armed forces were to withdraw from the NKR, and Russian peacekeeping forces were to ensure that new Armenian soldiers would not enter the NKR through the Lachin corridor. In these circumstances, Armenia must have had serious difficulties with maintaining overall control over the NKDA. If Armenia indeed lost its overall control over the NKDA, an international armed conflict between Armenia (with the NKDA belonging to it) and Azerbaijan would have transformed into a non-international armed conflict between the NKDA and the Azerbaijani armed forces. As a result, members of the NKDA would have lost their combatant status.

However, as the Geneva Academy noted, "it is not yet clear to what extent the provision on the withdrawal of Armenian troops is followed in practice".[54] In July 2022, the Azerbaijani President asserted that the issue of "the withdrawal of Armenian armed forces from Karabakh <…> has not been resolved to this day".[55] It remains unclear whether the Armenian armed forces completely withdrew from the NKR before Azerbaijan launched its military operation in September 2023. Nevertheless, even if Armenia had withdrawn completely from the NKR and ceased providing new weapons to the NKDA, Armenia still might have exercised overall control over the NKDA by other means (e.g., by planning and supervising its military operations). Therefore, the "belonging" of the NKDA to Armenia after November 2020 is heavily dependent on facts and cannot be conclusively judged without access to materials evidencing the links between Armenia and the NKDA.

Recapping the point on whether the NKDA met the requirement of "belonging" to Armenia, claims of combatant immunity would face two major obstacles. First, Azerbaijani authorities might argue, following the same logic as that used by the District Court of The Hague, that members of the NKDA were not combatants, because Armenia has never conceded its control over the NKDA. This would likely be an erroneous interpretation of rules on combatant immunity — Armenia's *de facto* overall control over the NKDA in itself should suffice to grant the NKDA members combatant immunity. Second, Azerbaijani authorities might state that Armenia lost its overall control over the NKDA after the November 2020 ceasefire. Merits of this claim cannot be assessed on the basis of information contained in open sources.

## Conclusion

Paradoxically enough, Armenia and Azerbaijan have found themselves in a situation where they would each need to disavow their previous positions to achieve their goals of prosecuting or preventing the prosecution of the NKDA members and supporters. To increase the chances of success for any combatant immunity claim, Armenia would have to accept that the NKDA belonged to it and remained under Armenia's control even after November 2020. To prosecute the members and supporters of the NKDA in a manner compliant with international rules on combatant immunity, Azerbaijan would have to distance the NKDA from Armenia claiming that NKDA was an independent secessionist armed group.

At the same time, members and supporters of the NKDA can provide a unique source of information that can officially testify about Armenia's control over the NKDA. Azerbaijani authorities might play this card guaranteeing combatant immunity to those who testify on Armenia's role in the NKDA's activities. This might well be a happy-end scenario in the spirit of transitional justice[56] — members and supporters

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[51] *Official website of the President of the Republic of Azerbaijan*. Statement by the President of the Republic of Azerbaijan, Prime Minister of the Republic of Armenia and President of the Russian Federation. 10 November 2020. URL: https://president.az/en/articles/view/45923 (accessed: 20.03.2024).

[52] Ibid. § 3 and 4.

[53] Ibid. § 6.

[54] Geneva Academy — RULAC. *Military occupation of Azerbaijan by Armenia*. Updated on 9 October 2022. URL: https://www.rulac.org/browse/conflicts/military-occupation-of-azerbaijan-by-armenia (accessed: 20.03.2024).

[55] *Official website of the President of the Republic of Azerbaijan*. Ilham Aliyev chaired meeting on results of six months of this year. 15 July 2022. URL: https://president.az/en/articles/view/56665 (accessed: 20.03.2024).

[56] See, for instance, Murphy C. *The Conceptual Foundations of Transitional Justice*. Cambridge : Cambridge University Press, 2017. P. 14: "Nuanced compromise views demonstrate that choices to adopt responses other than punishment do not simply

of the NKDA would receive their freedom, and Azerbaijan would receive the truth, strengthening its public image of a country that respects the IHL. The post-conflict resolution of this crisis lies in the area of politics and only time will show how all stakeholders deal with the combatant immunity issue.

## ИММУНИТЕТ КОМБАТАНТА ДЛЯ ЧЛЕНОВ АРМИИ НАГОРНОГО КАРАБАХА: КЕЙС-СТАДИ

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### Аннотация

После того как Азербайджан восстановил контроль над территорией Нагорно-Карабахского региона, он задержал ряд должностных лиц Нагорно-Карабахской Республики (далее — НКР) и членов Армии обороны Нагорного Карабаха (далее — АОНК). Задержанным предъявлены обвинения в участии в незаконных вооруженных формированиях и/или финансировании терроризма. В настоящем исследовании рассматривается вопрос о том, могут ли задержанные пользоваться иммунитетом комбатанта и соответствует ли преследование Азербайджаном тех, кто воевал на стороне НКР, нормам международного гуманитарного права. С учетом правил, определяющих статус военнопленных и указанных в статье 4(2) Третьей Женевской конвенции, в статье делается вывод о том, что члены АОНК действительно попали под власть «неприятеля», АОНК *prima facie* соответствовала «четырем требованиям» к нерегулярным вооруженным формированиям, предусмотренным в статье 4(2) и «принадлежала» Армении, которая в этих целях может считаться вовлеченной в международный вооруженный конфликт с Азербайджаном. Если доказательства, имеющиеся у азербайджанских властей, подтверждают позицию о том, что члены АОНК соответствуют требованиям статьи 4(2) Третьей Женевской конвенции, с членами АОНК следует обращаться как с военнопленными и законными комбатантами. Поэтому членство в АОНК или поддержка ее деятельности не должны подлежать уголовному наказанию.

### Ключевые слова

международное гуманитарное право, иммунитет комбатанта, Нагорно-Карабахская Республика, нерегулярные вооруженные формирования, военнопленный

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### References / Список источников

Bartels R. (2023) The right to participate in hostilities: Combatant privilege vs criminal responsibility for members of organised armed groups during international and domestic criminal trials. In: Fortin K., Heffes E. (eds.) Armed Groups and International Law. Cheltenham, UK : Edward Elgar Publishing. P. 64–90.

Bachmann S., Prazauskas M. (2019) The Status of Unrecognized Quasi-States and Their Responsibilities under the Montevideo Convention. The International Lawyer, vol. 52, no. 3, pp. 393–438.

Crawford E. (2010) The Treatment of Combatants and Insurgents under the Law of Armed Conflict. Oxford: Oxford University Press.

Crawford J. (2006) Creation of States. Oxford: Oxford University Press.

sacrifice justice for the sake of another value that is distinct from and unrelated to justice (eg, something we could name reconciliation). Instead, alternative responses may serve both the values of justice and reconciliation to some degree. At the same time, nuanced compromise views recognise that alternative responses to wrongdoing entail a moral cost and sacrifice. However, the moral cost and sacrifice is principled and one that can be justified".

Hakan Yavuz M., Gunter M. (2023) The Nagorno-Karabakh Conflict: Historical and Political Perspectives. New York: Routledge.

Henckaerts J-M., Doswald-Beck L, Alvermann C., Dörmann K, Rolle B. (2005) Customary International Humanitarian Law. Cambridge University Press.

International Committee of the Red Cross (2021). Commentary on the Third Geneva Convention: Convention (III) Relative to the Treatment of Prisoners of War. Cambridge University Press.

Pictet J. et al. (1986) Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949. International Committee of the Red Cross.

Krüger H. (2010) The Nagorno-Karabakh Conflict: A Legal Analysis. London: Springer.

Melnyk A. (2013) Nagorno-Karabakh // Max Planck Encyclopedias of International Law.

Murphy C. (2017) The Conceptual Foundations of Transitional Justice. Cambridge: Cambridge University Press.

Roeben V., Jankovic S. (2021) Validity of Contested Title to Territory in Frozen Conflict Zones: The Case of Nagorno Karabakh with Particular Reference to the 2020 War. Chinese (Taiwan) Yearbook of International Law and Affairs, vol. 39, pp. 73–110.

Saul B. (2021) From conflict to complementarity: Reconciling international counterterrorism law and international humanitarian law. International Review of the Red Cross, vol. 103, nos. 916–917, pp. 157–202.

Van Poecke T., Verbruggen F., Yperman W. (2021) Terrorist offences and international humanitarian law: The armed conflict exclusion clause. International Review of the Red Cross, vol. 103, nos. 916–917, pp. 295–324.