

FROM TERRITORIAL CLAIMS TO BELLIGERENT OCCUPATION: LEGAL APPRAISAL

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Essential facts

At the end of 1987, the Armenian Soviet Socialist Republic (SSR) openly laid claim to the territory of the Nagorny Karabakh Autonomous *Oblast* (NKAO) of the Azerbaijan SSR. That marked the beginning of the systematic expulsion of Azerbaijanis from the Armenia SSR and the NKAO.

On 20 February 1988, at a meeting of the Soviet of People's Deputies of the NKAO, Armenian representatives adopted a decision to petition the Supreme Soviets of the Azerbaijan SSR and the Armenia SSR for the transfer of the NKAO from the Azerbaijan SSR to the Armenia SSR.¹ This decision set in motion determined actions by the Armenian authorities aimed at the unilateral secession of the NKAO from the Azerbaijan SSR.

The first victims were two Azerbaijanis, killed by Armenians on 24 February 1988 near the town of Askaran in Nagorny Karabakh. On 28 February 1988, interethnic clashes broke out in Sumgait.

At a meeting of the Soviet of People's Deputies of the NKAO, held on 12 June 1988 without the participation of any Azerbaijani deputies, an unlawful decision was adopted on the withdrawal of the NKAO from the Azerbaijan SSR.²

The Armenia SSR was also actively involved in efforts to legalize the separation of the NKAO from the Azerbaijan SSR. The highest organ of State authority of the Armenia SSR — the Supreme Soviet — adopted a number of decisions that violated the Constitution, the most notorious of which was the resolution “On the Reunification of the Armenia SSR and Nagorny Karabakh” of 1 December 1989. This document made provision for the adoption of all the necessary measures for the amalgamation of the political, economic and cultural structures of the Armenia SSR and Nagorny Karabakh into a single State political system.³

The proclamation on 2 September 1991 of the “Republic of Nagorny Karabakh” and the declaration of this entity as an “independent State”, based on the outcome of a “referendum” held

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¹ For text, see Vaan Arutunyan, *Events in Nagorny Karabakh: Chronicle*, part 1, February 1988-January 1989 (Yerevan: Academy of Sciences of the Armenia SSR, 1990), p. 38.

² Decision of the Eighth Meeting of the Twentieth Convocation of the Soviet of People's Deputies of the Nagorny Karabakh Autonomous Oblast Proclaiming the Withdrawal of the NKAO from the Azerbaijan SSR, 12 July 1988. For text, see Vaan Arutunyan, pp. 113-115.

³ For text, see newspaper “Kommunist” (in Armenian), 2 December 1989.

on 10 December 1991, marked the next step in efforts to legitimize the separation of Nagorny Karabakh from Azerbaijan.

The collapse of the USSR finally freed the hands of the Armenian nationalists. At the end of 1991 and the beginning of 1992 the conflict reached the military phase. Taking advantage of the political instability as a result of the dissolution of the Soviet Union and internal squabbles in Azerbaijan, Armenia began combat operations on the territory of Azerbaijan. Over the period of 1992-1993 a considerable area of Azerbaijan was occupied by Armenia, including Nagorny Karabakh and seven adjacent districts. The resulting war unleashed against Azerbaijan led to the deaths and wounding of thousands of people; hundreds of thousands became refugees and were forcibly displaced and several thousand disappeared without trace.

Contrary to numerous statements of the official Yerevan that Armenia is not directly involved into the conflict with Azerbaijan, there are indisputable proofs, which testify against such allegations and argue for the direct military aggression of the Republic of Armenia against a neighbouring sovereign State.

Attempts to justify the claims

In order to justify the territorial claims of Armenia towards Azerbaijan, the officials of the former are guided by the position according to which Nagorny Karabakh had never been within the jurisdiction of independent Azerbaijan. This understanding is based on the following key arguments:

Firstly, in the period when independent Azerbaijan became part of the Soviet Union Karabakh had not been within its jurisdiction, the evidence of which is the decision of the League of Nations that refused to recognize Azerbaijan because of its territorial claims to the Armenian populated Eastern Caucasus, including in particular Nagorny Karabakh, as well as the lack of efficient State control over its supposed territory and inability to ground the legitimacy of the frontiers of this territory.

Secondly, the legal cause for secession of Nagorny Karabakh from Azerbaijan in the process of disintegration of the USSR in 1991 and the establishment of the “Republic of Nagorny Karabakh”. Thereby the special emphasis is placed on the provisions of the Law of the USSR “On the Procedures for Resolving Questions Related to the Secession of Union Republics from the USSR” of 3 April 1990, according to which in case of realization by the Union Republic of the secession procedure provided for in this Law autonomous entities would acquire a right to decide independently the question of staying in the USSR or in the seceding Republic, as well as to raise the question of their own State-legal status.

Thirdly, Azerbaijan has no ground to assert its frontiers from the Soviet period insofar as it refused to regard itself as a successor State to the USSR.⁴

Thus, the analysis below, though passes over in silence a number of important legal issues arising from the conflict, focuses primarily on the above-mentioned arguments of Armenia, as well as addresses the current situation in the occupied territories of Azerbaijan and resulting responsibility under international law.

Consideration of the application made by Azerbaijan and Armenia for admission to the League of Nations

On April 1919, Allied Powers recognized temporary Garabagh General-Governship, which was established by the Republic of Azerbaijan on January 1919 and consisted of Shusha, Javanshir, Jabrayil and Zangazur uezds⁵ with the center in Shusha town, to be under Azerbaijani jurisdiction and Khosrov bay Sultanov as its governor. In 1919, the Armenian National Assembly of Nagorno-Karabakh recognized officially the authority of Azerbaijan.⁶

In 1918-1920, the Republic of Azerbaijan had diplomatic relations with a number of States. Agreements on the principles of mutual relations were signed with some of them; sixteen States established their missions in Baky. with the purpose of achieving the admission to the League of Nations, the government of Azerbaijan formed on 28 December 1918 the delegation at the Paris Peace Conference headed by the speaker of parliament Alimardan bay Topchubashov.

As a result of the activities of the Azerbaijani delegation and growing threat of occupation of Transcaucasia by Soviet Russia, the Supreme Council of the Allied Powers at the Paris Peace Conference *de-facto* recognized on 12 January 1920 the independence of the Republic of Azerbaijan.

Despite the international recognition, as a consequence of externally inspired destabilization of the situation in the country and military intervention, Azerbaijan was occupied on 28 April 1920 by the Russian Red Army troops. Nonetheless, in many parts of the country the Azerbaijanis offered serious resistance to the Bolsheviks, while the Azerbaijani delegation at the

⁴ For more information about the position of Armenia, see this country's initial reports under the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, UN Documents E/1990/5/Add.36 and CCPR/C/92/Add.2; "Legal aspects for the right to self-determination in the case of Nagorny Karabakh", UN Document E/CN.4/2005/G/23; Speech by Serzh Sarkisian at the parliamentary hearings on the problem of Nagorny Karabakh, 29-30 March 2005, IA REGNUM: <<http://www.regnum.ru/news/437271.html>>.

⁵ Uezd - administrative-territorial unit of the Russian Empire, which was applied in the Republic of Azerbaijan and Azerbaijan SSR until the late 1920s.

⁶ Provisional agreement between the Armenians of Nagorny Karabakh and the Government of Azerbaijan, 26 August 1919 года. For text, see "To the History of Formation of the Nagorny Karabakh Autonomous Oblast of the Azerbaijan SSR. 1918-1925: Documents and Materials" (Baky: Azerneshr, 1989), pp. 23-25. See also Tadeusz Swietochowski, *Russia and Azerbaijan: A Borderland in Transition* (New-York: Columbia University Press, 1995), pp. 75-76.

Paris Peace Conference continued its work to achieve *de-jure* recognition and admission into the League of Nations.

The head of the Azerbaijani Delegation at the Conference by a letter of 1 November 1920 requested the Secretary-General of the League of Nations to submit to the Assembly of the League an application for the admission of the Republic of Azerbaijan into full membership of the Organization.

The Secretary-General of the League of Nations in his Memorandum of 24 November 1920⁷ formulated the following two key issues which would have been considered in regard to the application submitted by Azerbaijan:

“1. The territory of Azerbaijan having been originally part of the Empire of Russia, the question arises whether the declaration of the Republic in May 1918 and the recognition accorded by the Allied Powers in January 1920 suffice to constitute Azerbaijan *de jure* a “full self-governing State [...]”

2. Should the Assembly consider that the international status of Azerbaijan as a “fully self-governing State” is established, the further question will arise whether the Delegation by whom the present application is made is held to have the necessary authority to represent the legitimate government of the country for the purpose of making the application [...]”.

As to the first issue, the most important part of the mentioned Memorandum of the Secretary-General relates to the “Juristic observations”, which reminds of the conditions governing the admission of new Members to the Organization contained in article 1 of the Covenant of the League of Nations,⁸ including the requirement to be a fully self-governing State. It is obvious actually that the state, considerable part of the territory of which was occupied by the time of consideration of its application in the League of Nations, and yet the Government that submitted this application was overthrown, could not be regarded as fully self-governing in terms of article 1 of the Covenant of the League of Nations.

In addressing the second issue, the Secretary-General of the League of Nations pointed out in his Memorandum that the mandate of the Azerbaijani delegation attending at the Paris Peace Conference derived from the Government which had been in power at Baku until April 1920. Thus, the attention in the Memorandum is distinctly paid to the fact that at the time of submission by the Azerbaijani delegation of the application (1 November 1920) and the publication date of the Memorandum (24 November 1920) the Government of the Republic of Azerbaijan, which issued the credentials to the Delegation, was not actually in power since April

⁷ League of Nations. Memorandum by the Secretary General on the Application for the Admission of the Republic of Azerbaijan to the League of Nations. Assembly Document 20/48/108.

⁸ See also The Covenant of the League of Nations (1919), in Malcolm D. Evans (ed.), *Blackstone’s International Law Documents* (Oxford: Oxford University Press, 6th ed., 2003), pp. 1-7, at p. 1, article 1.

1920. It was further noted in the Memorandum that this Government did not exercise the authority over the whole territory of the country.

Therefore, the Fifth Committee of the Assembly of the League of Nations in its resolution on the request for admission made by Azerbaijan decided that “it is not desirable, in the present circumstances, that Azerbaijan should be admitted to the League of Nations”. It is clear from the text of the said resolution that under “the present circumstances” the Fifth Committee, which made no reference to Nagorny Karabakh at all, understood only that “Azerbaijan does not seem to possess a stable government with jurisdiction over a clearly defined territory”.⁹ Thus, these were just those reasons, derived from the requirements set forth in article 1 of the Covenant of the League of Nations, which had prevented Azerbaijan from being admitted to the Organization.

At the same time, the League of Nations did not consider Armenia itself as a State and proceeded from the fact that this entity had no clear and recognized borders, neither status nor constitution, and its Government was unstable. As a result, the admission of Armenia to the League of Nations was voted down on 16 December 1920.¹⁰

Nagorny Karabakh within the Azerbaijan SSR

Along with the above-mentioned facts on the recognition by the Allied Powers of the authority of Azerbaijan over Nagorny Karabakh, a proposition that Karabakh was not under the jurisdiction of independent Azerbaijan when it became part of the Soviet Union is refuted also by the decision of the Caucasian Bureau of the Central Committee of the Russian Communist Party (Bolsheviks), which, owing to the territorial claims of Armenia, did take up the problem several times and, at the meeting held on 5 July 1921, decided to retain Nagorny Karabakh within the Azerbaijan SSR. The following quotation demonstrates that the Bureau decided to leave Nagorny Karabakh within the Azerbaijan SSR, not to transfer it, as the Armenian side insists:

“Taking into account the necessity of national peace between the Muslims and the Armenians, the economic relations between upper and lower Karabakh and the permanent relations of upper Karabakh with Azerbaijan, Nagorny Karabakh shall be retained within the Azerbaijan SSR and broad autonomy shall be given to Nagorny Karabakh with Shusha city as an administrative centre”.¹¹

⁹ League of Nations. Fifth Committee. Admission of New Members. Resolution on the request for admission made by Azerbaijan. Assembly Document 127.

¹⁰ League of Nations. Annex 30 B. Future status of Armenia. Memorandum agreed to by the Council of the League of Nations, meeting in Paris on 11 April 1920. League of Nations Document 20/41/9, p. 27; See also Admission of new Members to the League of Nations. Armenia. Assembly Document 209, pp. 2-3; Assembly Document 251.

¹¹ Extract from the Protocol of the plenary session of the Caucasian Bureau of the Central Committee of the Russian Communist Party (Bolsheviks) of 5 July 1921. For text, see “To the History of Formation of the Nagorny Karabakh Autonomous Oblast of the Azerbaijan SSR. 1918-1925: Documents and Materials”, p. 92.

In this regard, the attention should be drawn to the contradictory position of the Government of the Republic of Armenia as to the status of the Caucasian Bureau. Thus, in the initial report of Armenia under the International Covenant on Civil and Political Rights the Caucasian Bureau is referred to as “an unconstitutional and unauthorized party organ”, which “had no right to participate on the national State-building activities of another State”, while its decision of 5 July is considered as “an act of gross intervention in the internal affairs of another sovereign Soviet Republic.”¹² On the contrary, in another official document, the Caucasian Bureau is viewed by Armenia as a legitimate body with the authorization to decide on territorial issues affecting Armenia and Azerbaijan at that time. Thus, Armenia is confident that “[d]e jure, only the [...] decision [of the Caucasian Bureau] of July 4, 1921 [to] ‘include Nagorny Karabakh in the Armenia SSR, and to conduct plebiscite in Nagorny Karabakh only’ was the last legal document on the status of Nagorny Karabakh to be legally adopted without procedural violations.”¹³

In reality, the decision of 5 July 1921 was the final and binding ruling which would be repeatedly affirmed by the Soviet leadership and recognized by Armenia over the years.

On 7 July 1923, the Central Executive Committee of the Azerbaijan SSR issued the Decree “On the Formation of the Nagorny Karabakh Autonomous *Oblast*”.¹⁴ The administrative borders of the NKAO were defined in a way to ensure that the Armenian population constituted a majority. According to the population census of 12 January 1989, the population of the autonomous oblast was around 189,000 persons; of them: around 139,000 Armenians – 73,5 %, around 48,000 Azerbaijanis – 25,3 %, around 2000 representatives of other nationalities – 1,2 %.¹⁵ At the same time, about 200,000 Azerbaijanis compactly resided in Armenia at that time were refused the same status by both the USSR central government and the Armenia SSR.

The allegations of discrimination against the Armenian population of Nagorny Karabakh do not stand up to scrutiny. In reality, the NKAO possessed all the essential elements of self-government.

The status of Nagorny Karabakh as an autonomous *oblast* within the Azerbaijan SSR was stipulated in the USSR Constitutions of 1936 and 1977.¹⁶ In accordance with the Constitutions of the USSR and the Azerbaijan SSR, the legal status of the NKAO was governed by the Law “On the Nagorny Karabakh Autonomous *Oblast*”, which was adopted by the Supreme Soviet of the

¹² See the UN Document E/1990/5/Add.36, para.2.

¹³ See Annex to the note verbale dated 21 March 2005 from the Permanent Mission of Armenia to the United Nations Office at Geneva addressed to the Office of the United Nations High Commissioner for Human Rights, entitled “Legal aspects for the right to self-determination in the case of Nagorny Karabakh”. UN Document E/CN.4/2005/G/23, p. 4.

¹⁴ For text, see “To the History of Formation of the Nagorny Karabakh Autonomous Oblast of the Azerbaijan SSR. 1918-1925: Documents and Materials”, pp. 152-153.

¹⁵ National composition of the population of the USSR. According to the findings of the All-Union population census of 1989. (Moscow: Finance and Statistics, 1991), p. 120.

¹⁶ USSR Constitution (Moscow, 1936), p. 14, article 24; USSR Constitution (Moscow, 1977), pp. 13-14, article 87.

Azerbaijan SSR on 16 June 1981.¹⁷ Under the Constitution of the USSR, the NKAO was represented by five deputies in the Council of Nationalities of the Supreme Soviet of the USSR. It was represented by 12 deputies in the Supreme Soviet of the Azerbaijan SSR.

The Soviet of People's Deputies of the NKAO — the government authority in the *oblast* — had a wide range of powers. It decided all local issues based on the interests of citizens living in the *oblast* and with reference to its national and other specific features. Armenian was used in the work of all government, administrative and judicial bodies and the Prosecutor's Office, as well as in education, reflecting the language requirements of the Armenian population of the *oblast*. Local TV and radio broadcasts and the publication of newspapers and magazines in the Armenian language were all guaranteed in the NKAO.

As a national territorial unit, the NKAO enjoyed administrative autonomy, and, accordingly, had a number of rights, which, in practice, ensured that its population's specific needs were met. In fact, statistics illustrate that the NKAO was developing more rapidly than Azerbaijan as a whole. The existence and development of the NKAO within Azerbaijan confirms that the form of autonomy that had evolved fully reflected the specific economic, social, cultural and national characteristics of the population and the way of life in the autonomous *oblast*.

Disintegration of the USSR

All the decisions taken with a view to separating Nagorny Karabakh from Azerbaijan ran counter to the USSR Constitution, which stipulated that the territory of a Union Republic could not be altered without its consent, while the borders between Union Republics could be altered by mutual agreement of the Republics concerned, subject to approval by the USSR.¹⁸

In connection with the adoption in the late 1980-s of the illegal decisions aimed at the secession of the NKAO from the Azerbaijan SSR and annexation of the *oblast* to the Armenia SSR, the Supreme Soviet of the USSR and its Presidium considered on several occasions the crisis in Nagorny Karabakh. All decisions of the superior State body of the former USSR unequivocally recognized the inadmissibility of changing borders or the constitutionally established national-territorial division of the Azerbaijan SSR and the Armenia SSR.¹⁹

¹⁷ Law of the Azerbaijan SSR "On the Nagorny Karabakh Autonomous Oblast", 16 June 1981 (Baky: Azerneshr, 1987), p. 3, article 3.

¹⁸ USSR Constitution (Moscow, 1977), p. 13, article 78.

¹⁹ Resolution of the Presidium of the Supreme Soviet of the USSR "On Measures Concerned with the Appeals of the Union Republics Regarding the Events in Nagorny Karabakh, in the Azerbaijan SSR and the Armenia SSR", 23 March 1988. Bulletin of the Supreme Soviet of the USSR, 1988, No. 13, pp. 27-28; Resolution of the Supreme Soviet of the USSR "On the Decisions of the Supreme Soviets of the Armenia SSR and the Azerbaijan SSR on the Question of Nagorny Karabakh", 18 July 1988. Bulletin of the Supreme Soviet of the USSR, 1988, No. 29, pp. 20-21; Resolution of the Presidium of the Supreme Soviet of the USSR "On Inconsistency with the Constitution of the

The next attempt of the Armenian side to legalize the secession of Nagorny Karabakh was made on 2 September 1991. Unlike all previous decisions, the proclamation that day of the “Republic of Nagorny Karabakh” was argued by the Law of the USSR “On the Procedures for Resolving Questions Related to the Secession of Union Republics from the USSR” of 3 April 1990.²⁰

It should be made clear in this regard that under article 72 of the USSR Constitution only Union Republics had the right freely to secede from the USSR.²¹ However, as subsequent events illustrated, this right had remained a dead letter. As Antonio Cassese correctly pointed out, the Law of 3 April 1990 made the whole process of possible secession from the Soviet Union so cumbersome and complicated, that one may wonder whether it ultimately constituted a true application of self-determination or was rather intended to pose a set of insurmountable hurdles to the implementation of that principle.²²

It is necessary first to note that the purpose of this Law was to regulate mutual relations within the framework of the USSR by establishing a specific procedure to be followed by Union Republics in the event of their secession from the USSR. A decision by a Union Republic to secede had to be based on the will of the people of the Republic freely expressed through a referendum, subject to authorization by the Supreme Soviet of the Union Republic.

At the same time, according to this Law, in a Union Republic containing autonomous entities, the referendum had to be held separately in each entity in order to decide independently the question of staying in the USSR or in the seceding Union Republic, as well as to raise the question of its own State-legal status. Moreover, the Law provided that in a Union Republic, whose territory included areas with concentration of national groups that made up the majority of the population in a given locality, the results of the voting in those localities had to be considered separately during the determination of the referendum results.

It is not difficult to see how an attempt by a Union Republic to secede from the USSR would have ended, assuming it had complied with the procedure stipulated in the Law of 3 April 1990.

It is important to emphasize that the secession of a Union Republic from the USSR could be regarded valid only after the fulfillment of complicated and multi-staged procedures and, finally, the adoption of the relevant decision by the Congress of the USSR People’s Deputies.

USSR of the Acts on Nagorny Karabakh adopted by the Supreme Soviet of the Armenia SSR on 1 December 1989 and 9 January 1990”. Bulletin of the Supreme Soviet of the USSR, 1990, No. 3, p. 38.

²⁰ For text, see Bulletin of the Supreme Soviet of the USSR, 1990, No. 15, pp. 303-308.

²¹ USSR Constitution (Moscow, 1977), p. 12, article 78.

²² Antonio Cassese, *Self-determination of peoples. A legal reappraisal* (Cambridge: Cambridge University Press, 1995), pp. 264-265.

In reality, the Law made it practically impossible for Republics successfully to negotiate the entire secession process and thus clearly failed to meet international standards on self-determination.²³ It is therefore curious to hear this Act being invoked by uncompromising advocates of the unrestricted application of the right of peoples to self-determination, since that is precisely what the Law limited.

According to Rein Mullerson, “the tactics used with the adoption of the said Law were not only powerless to prevent the dissolution of the USSR, but also aggravated the situation when the majority had begun to perceive their minorities (sometimes rightly, sometimes wrongly) as a fifth column of the Kremlin.”²⁴

For the reasons mentioned above, it is natural that the Law of 3 April 1990 was never applied. During the existence of the Soviet Union, none of the Union Republics had used the procedure for secession stipulated in it. Instead, it was rapidly superseded by the dramatic events in the USSR and forfeited not only its urgency but also legal effect until the Soviet Union ceased to exist as international legal person.

It is sufficient to recollect that the extraordinary Congress of the USSR People’s Deputies, held at the beginning of September 1991, had practically put an end to all formerly existed statehood in the Soviet Union.²⁵ The final resolution of the Congress, declaring the transition period to form the new system of State relations, enacted to speed up preparation and signing of a Treaty on the Union of Sovereign States. At the same time, according to the said resolution of the Congress, this Union would have been based on the principles of independence and territorial integrity of its constituent States.²⁶

Besides, the resolution of the Congress supported the Republics in their aspiration towards international recognition and admission to the United Nations membership. Moreover, the Congress expressed respect to the declarations on sovereignty or independence adopted by the Union Republics and made it clear that those of them which preferred to remain outside the new Union would be required to hold negotiations with the USSR for solving the matters arising in connection with the Republic’s secession.²⁷

In other words, whereas in 1990 the Soviet leadership insisted to conform to the rules laid down in the Law of 3 April 1990, the resolutions of the Congress and subsequent decisions of the

²³ *Ibid.*, p. 265.

²⁴ Rein Mullerson, *International Law, Rights and Politics: Developments in Eastern Europe and the CIS* (London & New York: Routledge, 1994), p. 75.

²⁵ “First meeting of the State Council: sovereign policy and economic cooperation”. Newspaper “Izvestiya”, 9 September 1991.

²⁶ Resolution of the Congress of the USSR People’s Deputies “On Measures Deriving from the Joint Statement of the President of the USSR and Leaders of the Union Republics and Decisions of the Extraordinary Session of the Supreme Soviet of the USSR”, 5 September 1991. Newspaper “Izvestiya”, 7 September 1991.

²⁷ *Ibid.*

State Council of the USSR set conditions for achieving the same goals in the course of negotiations with each of the Republics.

The process of independence by Union Republics occurred outside the realm of law and was precipitated by the political crisis at the centre of the Soviet Union and the correlative increase in the strength of centrifugal forces.²⁸

Thus, any actions intended to secure the unilateral secession of Nagorny Karabakh were accompanied by the apparent violation of the USSR Constitution, and, therefore, caused no legal consequences whatsoever.

The NKAO remained in existence until 26 November 1991, when, pursuant to an Act adopted by the Supreme Council of the Republic of Azerbaijan, the autonomous *oblast* was revoked as a territorial entity of the country.²⁹ Until the full restoration of State independence of the Republic of Azerbaijan and its recognition by the international community, Nagorny Karabakh continued to form part of Azerbaijan.

Legitimization of borders

Shortly after the Soviet Union ceased to exist, its former constituent Republics were accorded *de jure* recognition by the international community. At the moment the Republic of Azerbaijan gained independence, the former administrative borders of the Azerbaijan SSR, which also encompassed the NKAO, were deemed henceforth to be international borders and to be protected under international law (*uti possidetis juris*). This understanding finds support in the relevant practice.

Thus, the Agreement Establishing the Commonwealth of Independent States of 8 December 1991 provided that “[t]he High Contracting Parties acknowledge and respect each other’s territorial sovereignty and the inviolability of existing borders within the Commonwealth.”³⁰ The same approach was reiterated in the Alma Ata Declaration of 21 December 1991 signed by the eleven former Union Republics, including Armenia and Azerbaijan.³¹

These decisions, as well as “The Guidelines on Recognition of New States in Eastern Europe and the Soviet Union” of 16 December 1991, in which the European Community and its Member States required *inter alia* “respect for the inviolability of all frontiers which can only be

²⁸ Antonio Cassese, p. 266.

²⁹ Law of the Republic of Azerbaijan “On Revocation of the Nagorny Karabakh Autonomous *Oblast* of the Republic of Azerbaijan”, 26 November 1991. Bulletin of the Supreme Council of the Republic of Azerbaijan, 1991, No. 24, pp. 77 & 78.

³⁰ For text, see 31 International Law Materials 1992, pp. 143-146, at p. 144, article 5.

³¹ For text, see *ibid.*, pp. 148-149, at p. 148.

changed by peaceful means and by common agreement”,³² had reinforced in fact that the principle of *uti possidetis juris* is a “general principle, which is logically connected with the phenomenon of the obtaining of independence, wherever it occurs.”³³ On the basis of this principle the former administrative borders between Union Republics had been recognized as their international boundaries protected by international law, particularly by the principle of territorial integrity.

This approach received additional support in the relevant resolutions of the United Nations Security Council relating to the conflict between Armenia and Azerbaijan.³⁴

As Thomas Franck pointed out with reference to the emerging practice, *uti possidetis juris* appeared to be applicable equally to entities such as Croatia and Azerbaijan, and, more important, to be adapting to protect their pre-existing boundaries not only against external claims for revision but also against internal claims.³⁵

According to David Atkinson, rapporteur on the Karabakh conflict for the Parliamentary Assembly of the Council of Europe (PACE), “the borders of Azerbaijan were internationally recognized at the time of the country being recognized as an independent State in 1991,” the territory of which “included the Nagorny Karabakh region.”³⁶

As to the Armenian side’s argument that by proclaiming the restoration of the State independence of 1918-1920 and thus becoming the successor of the then Azerbaijan Democratic Republic the modern Republic of Azerbaijan allegedly forfeited a right to pretend to the borders of the Soviet period, the attention should be drawn to article 11 of the Vienna Convention on Succession of States in Respect of Treaties, according to which “[a] succession of States does not as such affect: (a) a boundary established by a treaty [...]”³⁷

Although this provision directly applies to external boundaries of the former USSR established by the relevant international treaties, to which it was a party, it actually underlines the principle, according to which “[o]nce agreed, the boundary stands.”³⁸ In other words, this conceptual international legal approach provides that an actual boundary continues to exist

³² For text, see *ibid.*, pp. 1486-1487, at p. 1487.

³³ *Case Concerning the Frontier Dispute (Burkina Faso/Republic of Mali)*, ICJ Judgment of 22 December 1986, ICJ Reports 1986, pp. 554-651, at p. 565, para. 20.

³⁴ United Nations Security Council resolutions 822 (1993) of 30 April 1993, 853 (1993) of 29 June 1993, 874 (1993) of 14 October 1993 and 884 (1993) of 11 November 1993.

³⁵ Thomas M. Franck, “Postmodern Tribalism and the Right to Secession”, in C. Brölmann, R.Lefeber, M.Zieck (eds.), *Peoples and Minorities in International Law* (Dordrecht/Boston/London, Martinus Nijhoff Publishers, 1993), pp. 3-27, at p. 20.

³⁶ Report of the Political Affairs Committee of the Parliamentary Assembly of the Council of Europe. Document 10364, 29 November 2004. Explanatory Memorandum by the Rapporteur, part III, para. 5.

³⁷ Vienna Convention on Succession of States in Respect of Treaties, 22 August 1978. For text, see Malcolm D. Evans (ed.), pp. 185-199, at p. 188.

³⁸ *Case Concerning the Territorial Dispute (Libya/Chad)*, ICJ Judgment, 3 February 1994, ICJ Reports 1994, pp. 6-41, at p. 37, paras. 72-73

notwithstanding the succession, so that the change of sovereignty is powerless to undermine such boundaries which achieve permanence.³⁹

Prohibition under international law of the forcible seizure of a territory

The Charter of the United Nations proclaims as one of the purposes of the United Nations the maintenance of international peace and security and, to that end, the taking of effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and the bringing about by peaceful means, and in conformity with the principles of justice and international law, of adjustment or settlement of international disputes or situations which might lead to a breach of the peace.⁴⁰

Pursuant to article 2, paragraph 4, of the Charter, States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Charter of the United Nations.⁴¹

The Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations of 24 October 1970 stipulates that a “war of aggression constitutes a crime against the peace, for which there is responsibility under international law.” In addition, under the Declaration, “[e]very State has the duty to refrain from the threat or use of force to violate the existing international boundaries of another State or as a means of solving international disputes, including territorial disputes and problems concerning frontiers of States.”⁴²

Attention is also drawn to the Declaration’s conclusion that the “territory of a State shall not be the object of military occupation resulting from the use of force in contravention of the provisions of the Charter” and, accordingly, that “[n]o territorial acquisition resulting from the threat or use of force shall be recognized as legal.”⁴³ This position is also upheld in the Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations of 18 November 1987, which stipulates that “[n]either acquisition of territory resulting from the threat or use of force nor any occupation of

³⁹ Malcolm N. Shaw, “The Heritage of States: The Principle of Uti Possidetis Juris Today”, 77 *The British Yearbook of International Law* 1996 (Oxford: Clarendon Press, 1977), pp. 75-154, at p. 90.

⁴⁰ Charter of the United Nations, 26 June 1945 (New York: United Nations Department of Public Information, 2001), article 1, para. 1.

⁴¹ *Ibid.*

⁴² Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, 24 October 1970. United Nations General Assembly resolution 2625 (XXV). Resolutions adopted by the United Nations General Assembly at its twenty-fifth session. Official records of the General Assembly, 25th session, Supplement No. 28 (A/8028), p. 153.

⁴³ *Ibid.*

territory resulting from the threat or use of force in contravention of international law will be recognized as legal acquisition or occupation.”⁴⁴

As the International Court of Justice established in its judgment in the *Military and Paramilitary Activities in and against Nicaragua* case, principles relating to the use of force that have been incorporated in the Charter of the United Nations reflect customary international law. The same holds true for the Court’s determination of the illegality of territorial acquisition resulting from the threat or use of force.⁴⁵ This rule prohibiting the use of force is a conspicuous example of a peremptory norm of international law (*jus cogens*), as defined in article 53 of the Vienna Convention on the Law of Treaties.⁴⁶

The sole exception to this rule is the right of self-defence under article 51 of the United Nations Charter. Bearing in mind the arguments put forward by the Armenian authorities on this issue, it is important to note that the beneficiaries of this rule are States. As pointed out by the International Court of Justice in its advisory opinion regarding the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, “[a]rticle 51 of the Charter thus recognizes the existence of an inherent right of self-defence in the case of armed attack by one State against another State.”⁴⁷ The entity established on the occupied territory of Azerbaijan by Armenia and rendered subservient to its will is not a State and cannot therefore invoke the right of self-defence.

This understanding is reflected in the relevant resolutions of the United Nations Security Council, adopted in 1993 following the armed seizure of Azerbaijani territory. The resolutions recognize that the Nagorny Karabakh region belongs to Azerbaijan and reaffirm the sovereignty and territorial integrity of the Republic of Azerbaijan, the inviolability of its international borders and the inadmissibility of the use of force for the acquisition of territory. The resolutions demand the immediate cessation of all hostilities and the immediate, complete and unconditional withdrawal of the occupying forces from all occupied regions of the Republic of Azerbaijan and, in this context, call for the restoration of economic, transport and energy links in the region and

⁴⁴ Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations, 18 November 1987. United Nations General Assembly resolution 42/22. Resolutions adopted by the United Nations General Assembly at its forty second session. Official Records of the General Assembly, 42nd session, Supplement No. 41 (A/42/41), p. 403.

⁴⁵ *Military and Paramilitary Activities in and against Nicaragua case (Nicaragua v. United States of America)*, Judgment of 27 June 1986, I.C.J. Reports 1986, paras. 188 and 190; see also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*. Advisory Opinion of 9 July 2004, I.C.J. Reports 2004, para. 87.

⁴⁶ Vienna Convention on the Law of Treaties, 22 May 1969. For text, see Ian Brownlie (ed.), *Basic Documents in International Law* (Oxford: Oxford University Press, 5th ed., 2002), pp. 270-297, at p. 285. See also *Military and Paramilitary Activities in and against Nicaragua case (Nicaragua v. United States of America)* (Merits), para. 190; Articles on Responsibility of States for Internationally Wrongful Acts. Annex to United Nations General Assembly resolution 56/83 of 12 December 2001, article 41, para. 2; Ian Brownlie, *Principles of Public International Law* (Oxford: Oxford University Press, 6th ed., 2003), pp. 488-489.

⁴⁷ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, para. 139.

for measures to assist refugees and displaced persons to return to their homes. In this light it is clear that the actions of the Armenian authorities can only be viewed as a violation of the peremptory norms of international law.

Armenia's role in the occupation of Azerbaijani territory

It cannot be denied that the policy pursued by Armenia in the occupied territories of Azerbaijan differs little from comparable activities carried out by occupying countries in other areas of the world. Considerations of time and geographical conditions do not substantially alter the methods employed in the occupation.

There have been numerous instances in history of States arguing that situations in which their armed forces have become embroiled do not constitute a military occupation or that, at the very least, are substantially different from the notion of occupation as defined in the 1907 Hague Regulations respecting the Laws and Customs of War on Land⁴⁸ and the 1949 Geneva Convention relative to the Protection of Civilian Persons in Time of War.⁴⁹

In addition, the occupiers often disguise their own role in the forcible seizure of the territory of another State by setting up quasi-independent puppet regimes in the occupied territories.⁵⁰ At the same time, the occupying Power generally endeavours to lend its actions a semblance of legality and to confer an appearance of independence on the entities created through those actions, entities that, more often than not, have been formed with the collaboration of certain elements of the population of the occupied country. It is clear, however, that to all intents and purposes they are always subject to the will of the occupying Power.⁵¹ Sometimes actions of this kind are accompanied by attempts to endow the subordinate regimes set up in the occupied territories with a respectable image and to foster the impression that they espouse democratic values.

The features enumerated above are all evidenced in the policies and practices followed by Armenia in the occupied territories of Azerbaijan. Armenia denies both that there is any occupation within the meaning of international law and that it has anything to do with controlling

⁴⁸ Annex to the 1907 Hague Convention IV respecting the Laws and Customs of War on Land: Regulations respecting the Laws and Customs of War on Land, 18 October 1907. For text, see Adam Roberts and Richard Guelff (eds.), *Documents on the Laws of War* (Oxford: Oxford University Press, 3rd ed., 2003), pp. 73-84. Geneva Convention relative to the Protection of Civilian Persons in Time of War, 12 August 1949. For text, see Adam Roberts and Richard Guelff (eds.), pp. 299-369.

⁴⁹ Geneva Convention relative to the Protection of Civilian Persons in Time of War, 12 August 1949. For text, see Adam Roberts and Richard Guelff (eds.), pp. 299-369.

⁵⁰ Adam Roberts, "Transformative military occupation: applying the laws of war and human rights", see at <http://ccw.politics.ox.ac.uk/publications/roberts_militaryoccupation.pdf>.

⁵¹ Jean Pictet (gen. ed.), *International Committee of the Red Cross, Commentary on the Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War* (Geneva, 1958), p. 273.

these territories. Thus in one of recent interviews Prime Minister Serzh Sarkisian⁵² claimed once again that only volunteers had fought for Nagorny Karabakh. At the same time, Armenia, in his words, acted as “guarantor of the security of Nagorny Karabakh,” prepared to intervene immediately in the event of the outbreak of a new war.⁵³ The question of Armenia providing guarantees is also mentioned in the country’s national security strategy of 7 February 2007.⁵⁴ No explanation is provided, however, of how these guarantees, which affect a portion of Azerbaijan’s territory, fit with international law.

In addition, the authorities in Yerevan are trying to give the puppet regime they set up in the occupied territories the appearance of legitimacy, independence and democracy. In the words of Serzh Sarkisian, “the young Republic of Nagorny Karabakh is today taking mature strides towards the formation of statehood and the development of democracy.”⁵⁵

It is no secret, however, that democracy cannot be propagated by the sword, and the holding of multiparty elections is not in itself proof of pluralism or the absence of authoritarianism.⁵⁶ Generally speaking, such attempts to disguise aggression against a neighbouring State are unlikely to be taken seriously, given the incontrovertible evidence of a situation that is the diametric opposite.

In addition to the facts at the disposal of the Azerbaijani authorities attesting to the direct involvement of the Armenian armed forces in the military hostilities against Azerbaijan, which are qualified as armed aggression, and the presence of these forces in the occupied territories — issues which merit a separate and careful investigation — the assessment of Armenia’s role given by independent observers is also completely unequivocal.

As the PACE rapporteur David Atkinson pointed out, “Armenians from Armenia had participated in the armed fighting over the Nagorny Karabakh region besides local Armenians from within Azerbaijan. Today, Armenia has soldiers stationed in the Nagorny Karabakh region and the surrounding districts, people in the region have passports of Armenia, and the Armenian government transfers large budgetary resources to this area.”⁵⁷

This view is corroborated by other sources as well. For example, according to the findings of the International Crisis Group, “[t]he highly trained and equipped Nagorny Karabakh Defence Army is primarily a ground force, for which Armenia provides much of the backbone.”

⁵² Since 2008 Serzh Sarkisian is the President of the Republic of Armenia.

⁵³ *Caucasus Context* 2007, vol. 4, issue 1, pp. 43-44. See also the message by the Armenian Prime Minister Serzh Sarkisian of 1 September 2007 on the occasion of the “sixteenth anniversary of the independence of the Republic of Nagorny Karabakh”. “Hayinfo” website: <http://www.hayinfo.ru/page_rev.php?tb_id=18&sub_id=1&id=18956>.

⁵⁴ National security strategy of the Republic of Armenia of 7 February 2007, chapter III, see website of the Ministry of Defence of Armenia <<http://www.mil.am/eng/?page=49>>.

⁵⁵ Message by Serzh Sarkisian, Prime Minister of Armenia, of 1 September 2007.

⁵⁶ Adam Roberts, “Transformative military occupation: applying the laws of war and human rights”.

⁵⁷ Report of the Parliamentary Affairs Committee of the Parliamentary Assembly of the Council of Europe. Document 10364, 29 November 2004. Explanatory memorandum by the Rapporteur, para. 6.

According to estimates by this non-governmental organization, the Armenian military presence in the occupied territories of Azerbaijan consists of some 10,000 soldiers from Armenia. Attention is also drawn to reports that many conscripts and contracted soldiers from Armenia are forcibly sent to serve in Nagorny Karabakh as part of their military service, and not as volunteers, as maintained by the Armenian authorities. The Crisis Group states: “[t]here is a high degree of integration between the forces of Armenia and Nagorny Karabakh. Senior Armenian authorities admit they give substantial equipment and weaponry. Nagorny Karabakh authorities also acknowledge that Armenian officers assist with training.”⁵⁸

In its final report on the outcome of the presidential elections in Armenia in 1998, the Office for Democratic Institutions and Human Rights (ODIHR) of the Organization for Security and Cooperation in Europe (OSCE) expresses its “extreme concern that one of the mobile boxes has crossed the national borders of the Republic of Armenia to collect votes of Armenian soldiers posted abroad (Kelbajar) [in Azerbaijan]”.⁵⁹

The Human Rights Watch/Helsinki report entitled “Seven years of conflict in Nagorno Karabakh”, prepared in 1994 following a visit to the region — including the area of hostilities — by representatives of this human rights organization, states outright that the available evidence outweighs the Armenian authorities’ denials. Adducing a wealth of facts based both on their own observations and on interviews with soldiers from the Armenian armed forces conducted during their visit to Nagorny Karabakh, the report’s authors unequivocally conclude: “[a]s a matter of law, Armenian army troop involvement in Azerbaijan makes Armenia a party to the conflict and makes the war an international armed conflict, as between the government of Armenia and Azerbaijan.”⁶⁰

In addition, the economy of Nagorny Karabakh is closely tied to Armenia and, to a large extent, depends on its financial infusions. As noted by the Crisis Group, “State loans” provided by Armenia since 1993 constituted 67.3 per cent of Nagorny Karabakh’s budget in 2001 and 56.9 per cent in 2004. To date, nothing has been repaid against these loans. Moreover, “[a]ll transactions are done via Armenia, and products produced in Nagorny Karabakh often are labelled ‘made in Armenia’ for export.”⁶¹

Resolution 1416 (2005) adopted on 25 January 2005 by the Parliamentary Assembly of the Council of Europe acknowledges the continued occupation of considerable parts of the territory of Azerbaijan and the conduct of ethnic cleansing. The Assembly also draws attention to

⁵⁸ International Crisis Group, “Nagorny Karabakh: Viewing the conflict from the ground”. Europe Report No. 166, 14 September 2005, pp. 9 & 10.

⁵⁹ OSCE/ODIHR Final Report of 9 April 1998, see OSCE website <http://www.osce.org/documents/odihr/1998/04/1215_en.pdf>.

⁶⁰ Human Rights Watch/Helsinki, “Seven years of conflict in Nagorny Karabakh” (1994), pp. 67-73.

⁶¹ International Crisis Group, “Nagorny Karabakh: Viewing the conflict from the ground”, pp. 12 and 13.

Armenia's obligations under international law and points out "that the occupation of foreign territory by a Member State constitutes a grave violation of that State's obligations as a member of the Council of Europe."⁶² The resolution also contains an appeal for compliance with the United Nations Security Council resolutions, in particular, by withdrawing military forces from any occupied territories.⁶³

Accordingly, in view of Armenia's involvement in it, the conflict falls within the purview of international law and, in particular, the principle of the territorial integrity of States. International practice demonstrates that there is no legal foundation to irredentist claims, which all too often are based on the ethnic affinity between the population of a parent country and the inhabitants of a territory which has separated from it. The irredentist nature of the conflict between Armenia and Azerbaijan and the application to it of international law are also reaffirmed, *inter alia*, in the United Nations Security Council resolutions on the conflict. While these resolutions may not directly invoke the responsibility of Armenia, they do nonetheless contain a number of telling phrases, such as the "inadmissibility of the use of force for the acquisition of territory" and "occupied territories", which are generally used in connection with international armed conflicts. Thus, as Adam Roberts stresses with reference to the treaties and other legal texts on the occupation, "an occupation is essentially of an international character".⁶⁴

The situation in the occupied territories of Azerbaijan on the agenda of the United Nations

It is clear that Armenia is seeking to achieve a transfer of sovereignty over Azerbaijani territories that it seized through military force and in which it has carried out ethnic cleansing. As there is no likelihood that such a transfer will be agreed to by Azerbaijan, whose officials have repeatedly stated that national territory cannot be a subject of compromise,⁶⁵ the one hope remaining for Armenia is to solve the problem outside a legal framework, namely by bringing about a situation in which recognition of a *fait accompli* is inevitable. These plans are being implemented through efforts to alter the demographic composition of the population in the occupied territories and prevent a return to the pre-war situation.

In a letter dated 11 November 2004 from the Minister for Foreign Affairs of the Republic of Azerbaijan addressed to the Secretary-General of the United Nations attention is drawn to

⁶² PACE resolution 1416 (2005), entitled "The conflict over the Nagorny Karabakh region dealt with by the OSCE Minsk Conference", 15 January 2005, para. 2.

⁶³ *Ibid.*, para. 3.

⁶⁴ Adam Roberts, "What is a military occupation?", 55 *The British Yearbook of International Law* 1985, pp. 249-305, at p. 255.

⁶⁵ See, e.g., Elmar Mammadyarov, "Towards peace in the Nagorny Karabakh region of the Republic of Azerbaijan through reintegration and cooperation", 17 *Accord* 2005, pp. 18-19.

Armenia's concerted efforts to transfer its population into the occupied territories, the exploitation of Azerbaijan's natural resources and the destruction and appropriation of its historical and cultural heritage, as well as other illegal activities carried out to consolidate the status quo of the occupation and to prevent the expelled Azerbaijani population from returning to their places of origin, thereby imposing a *fait accompli*.⁶⁶

Deeply concerned by the far-reaching implications of these activities, Azerbaijan requested that the situation in its occupied territories should be addressed within the framework of the United Nations General Assembly. Accordingly, on 29 October 2004 the General Assembly decided to include in its agenda the item entitled "The situation in the occupied territories of Azerbaijan".⁶⁷ This item was considered on 23 November 2004 during the fifty-ninth session of the Assembly.⁶⁸

A fact-finding mission of the Organization for Security and Cooperation in Europe (OSCE) visited the occupied territories of Azerbaijan from 30 January to 5 February 2005. On the basis of material provided by Azerbaijan and obtained during an investigation of the situation on the ground, the mission produced a detailed report which confirmed the facts of the settlement of the occupied territories.⁶⁹

The following year was marked by further escalation of the situation in the occupied territories of Azerbaijan. From mid-May 2006, a portion of these territories along the line of contact was swept by large-scale fires, which caused significant harm to the environment and biodiversity in Azerbaijan. The Azerbaijani side stated that the magnitude and character of the fires and the way they had spread confirmed that they were of intentional and artificial origin.⁷⁰ Having considered the situation in the occupied territories of Azerbaijan, the United Nations General Assembly adopted at its 60th session the resolution submitted by Azerbaijan on the question. The resolution expressed serious concern about the fires in the affected territories and,

⁶⁶ Letter dated 11 November 2004 from the Permanent Representative of Azerbaijan to the United Nations addressed to the President of the General Assembly, transmitting a letter dated 11 November 2004 from the Minister for Foreign Affairs of the Republic of Azerbaijan regarding the illegal activities carried out in the occupied territories of the Republic of Azerbaijan and providing information on the transfer of population into the occupied territories of Azerbaijan. United Nations Document A/59/568.

⁶⁷ Forty-sixth plenary meeting, 29 October 2004, A/59/PV.46.

⁶⁸ Sixtieth plenary meeting, 23 November 2004, A/59/PV.60.

⁶⁹ Letter dated 18 March 2005 from the Permanent Representative of Azerbaijan to the United Nations addressed to the Secretary-General. Annex II: Report of the OSCE fact-finding mission to the occupied territories of Azerbaijan surrounding Nagorno Karabakh, United Nations Document A/59/747-S/2005/187.

⁷⁰ Letter dated 28 July 2006 from the Permanent Representative of Azerbaijan to the United Nations addressed to the Secretary-General, transmitting a letter dated 28 July 2006 from the Minister for Foreign Affairs of the Republic of Azerbaijan regarding the wide-scale fires in the occupied territories of Azerbaijan, United Nations Document A/60/963.

inter alia, stressed the necessity to urgently conduct an environmental operation to suppress the fires and to overcome their detrimental consequences.⁷¹

On the basis of that resolution, the occupied territories were visited by an OSCE-led environmental assessment mission to the fire-affected territories in and around the Nagorny Karabakh region from 2 to 13 October 2006. The mission concluded, *inter alia*, that “[t]he fires resulted in environmental and economic damages and threatened human health and security.”⁷²

On 14 March 2008, the United Nations General Assembly adopted at its 62nd session another resolution on the situation in the occupied territories of Azerbaijan. Seriously concerned that the armed conflict in and around the Nagorny Karabakh region of the Republic of Azerbaijan continued to endanger international peace and security, the General Assembly reaffirmed its continued strong support for the sovereignty and territorial integrity of the Republic of Azerbaijan within its internationally recognized borders, demanding the immediate, complete and unconditional withdrawal of all Armenian forces from all occupied territories of the Republic of Azerbaijan. At the same time, the Assembly reaffirmed the inalienable right of the population expelled from the occupied territories to return to their homes. It has been also recognized the necessity of providing normal, secure, and equal conditions of life for Armenian and Azerbaijani communities in the Nagorny Karabakh region of the Republic of Azerbaijan, which would allow to build up an effective democratic system of self-governance in this region within the Republic of Azerbaijan. The General Assembly also reaffirmed that no State shall recognize as lawful the situation resulting from the occupation of the territories of the Republic of Azerbaijan, nor render aid or assistance in maintaining this situation.⁷³

A legal assessment of activities in the occupied territories of Azerbaijan

The policy being pursued by Armenia in the occupied territories of Azerbaijan, which is aimed at achieving a transfer of sovereignty over these territories, is well known in international practice. Such attempts have been made on more than one occasion in the past, leading the international community to draw up regulations to effectively counteract them.

⁷¹ General Assembly resolution 60/285 of 7 September 2006, entitled “The situation in the occupied territories of Azerbaijan”.

⁷² Letter dated 20 December 2006 from the Permanent Representative of Belgium to the United Nations addressed to the Secretary-General. Annex: OSCE-led environmental assessment mission to the fire-affected territories in and around the Nagorny Karabakh region. Report to the OSCE Chairman-in-Office from the Coordinator of OSCE Economic and Environmental Activities. United Nations Document A/61/696.

⁷³ United Nations General Assembly resolution 62/243 of 14 March 2008, entitled “The situation in the occupied territories of Azerbaijan”.

International law is not applicable only to the inhabitants of the occupied territory; it also protects the separate existence of the State, its institutions and its laws.⁷⁴ International law also prohibits actions which are based solely on the military strength of the occupying Power and not on a sovereign decision by the occupied State.⁷⁵ A generally established rule, upheld by lawyers and confirmed on many occasions by the decisions of international and domestic courts, is that the occupation of a territory in time of war is temporary in nature and thereby does not entail a transfer of sovereignty. Provisions relating to occupation, in particular the relevant articles of the Hague Regulations respecting the Laws and Customs of War on Land and the Geneva Convention relative to the Protection of Civilian Persons in Time of War, are premised on the short-lived nature of a situation of occupation and remain in force for the duration of a war, even in the event of a ceasefire or a truce. The occupation of a territory *jus in bello* does not entail the right to annex that territory, since *jus contra bellum* forbids any seizure of territory based on the use of force.⁷⁶

According to the traditional concept of occupation (article 43 of the Hague Regulations respecting the Laws and Customs of War on Land), the occupying authority must be considered as merely being a de facto administrator.⁷⁷ Furthermore, occupants should use their powers only for the immediate needs of administration and not for long-term policy changes.⁷⁸ Therefore, the occupying Power is obliged to respect the laws of the occupied State unless “absolutely prevented” (article 43 of the Hague Regulations respecting the Laws and Customs of War on Land). In other words, the occupying authority is not entitled to modify the legislation in force, except in cases motivated by military necessity or maintenance of public order.

As noted above, all of Armenia’s hopes for the recognition of an eventual *fait accompli*, and thus of the transfer of sovereignty over the occupied territories of Azerbaijan, involve an altering of the demographic composition of the occupied territories and prevention of a return to the pre-war situation. Indeed, the available information shows that Armenia has pursued a policy and developed practices that call for the establishment of settlements in the occupied Azerbaijani territories. There have been reports of a programme called “Return to Artsax” whose purpose is to artificially increase the Armenian population in the occupied Azerbaijani territories to 300,000 people by 2010. A working group set up to implement this resettlement programme under the

⁷⁴ Jean Pictet (gen. ed.), p. 273.

⁷⁵ *Ibid.*

⁷⁶ Eric David, *Principes de droit des conflits armés* (Principles of the Law of Armed Conflicts) (Moscow: ICRC, 2000), pp. 376-378; Jean Pictet (gen. ed.), p. 275.

⁷⁷ Jean Pictet (gen. ed.), p. 273.

⁷⁸ See, e.g., “Thawing a Frozen Conflict: Legal Aspects of the Separatist Crisis in Moldova”. A Report from the Association of the Bar of the City of New York, p. 69.

leadership of the Prime Minister of Armenia includes both Armenian officials and representatives of non-governmental organizations operating in Yerevan.⁷⁹

During the working visit to Nagorny Karabakh on 2 and 3 September 2000 of Andranik Margaryan, the former Prime Minister of Armenia, an agreement was concluded between the latter and the representative of the subordinate regime in the occupied territories which also includes provisions on the transfer of population to the occupied territories of Azerbaijan.⁸⁰ In an interview on 18 December 2003 the Prime Minister confirmed that “Armenia and NKR are within the common economic space” and that their “main purpose is the settlement of NKR and development of its investment field by means of creating the favourable regime for economic subjects”.⁸¹

It should be noted in that connection that the sixth paragraph of article 49 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War prohibits transfers of population to occupied territory. State practice has made that provision one of the norms of customary international law applied in cases of international armed conflict.⁸² The provision was intended to prevent a practice adopted during the Second World War by certain States, which transferred portions of their own population to occupied territory for political and racial reasons or in order, as they had claimed, to colonize those territories.⁸³ At the Trial of the Major War Criminals before the International Military Tribunal in Nuremberg in 1946, the Tribunal found two of the defendants guilty of attempting to “Germanize” occupied territories.⁸⁴

The legislation and military regulations and manuals of many States, including Armenia, include provisions prohibiting a party to a conflict from deporting or transferring part of its population to territory under its occupation. Official announcements and practice reflected in accounts also confirm the prohibition on transferring civilian population to occupied territory.⁸⁵

Attempts to change the demographic composition of the population of occupied territory have been condemned by the United Nations Security Council,⁸⁶ the United Nations General Assembly,⁸⁷ the United Nations Commission on Human Rights⁸⁸ and other international bodies.

⁷⁹ Eric David, p. 381.

⁸⁰ See the “Noyan Tapan” report dated 5 September 2000 and the “Mediamaks” report dated 6 September 2000.

⁸¹ See at <http://www.gov.am/ruversion/premier_2/print.html?=&url> and <http://www.menq.am/pls/dbms/mnp.show_npitem?pnp=128&pfile=359977&pnew=y&plgg=3>.

⁸² Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law* (Cambridge: Cambridge University Press, 2005). Volume I: Rules, p. 462.

⁸³ Jean Pictet (gen. ed.), p. 283.

⁸⁴ Jean-Marie Henckaerts and Louise Doswald-Beck, p. 463.

⁸⁵ *Ibid.*, p. 462.

⁸⁶ See, e.g., United Nations Security Council resolutions 446 of 22 March 1979; 452 of 20 July 1979; 476 of 30 June 1980; 465 of 1 March 1980; 677 of 28 November 1990; 752 of 15 May 1992 and 787 of 16 November 1992.

⁸⁷ See, e.g., United Nations General Assembly resolutions 36/147 of 16 December 1981; 37/88 C of 10 December 1982; 38/79 D of 15 December 1983; 39/95 D of 14 December 1984; 40/161 D of 16 December 1985 and 54/78 of 22 February 2000.

The International Committee of the Red Cross (ICRC), in its verbal note of 10 November 2000 addressed to the Permanent Mission of Azerbaijan to the United Nations Office and other international organizations at Geneva, shared “the concern [...] as regards the ‘cooperation agreement’ between Armenia and Nagorny Karabakh whereby, according to the ‘Noyan-Topan’ news agency, there will be a sharp increase in the population of Nagorny Karabakh [...].” In this regard, ICRC made it clear that “it [...] endeavours to direct its humanitarian assistance in a way that does not help to consolidate territorial gains by one party to a conflict and that will not encourage resettlement which could be an obstacle to the return of forcibly displaced persons to their homes.”

In their recommendations, based on the conclusions contained in the report of the OSCE fact-finding mission on illegal settlement, the Co-Chairs of the OSCE Minsk Group “discouraged any further settlement of the occupied territories” and urged the parties to “accelerate negotiations towards a political settlement in order, inter alia, to address the problem of the settlers and to avoid changes in the demographic structure of the region.” The Co-Chairs pointed out in particular that “prolonged continuation of this situation could lead to a fait accompli that would seriously complicate the peace process.”⁸⁹

In addition, Armenia, as the occupying Power, is aiming to consolidate the results of ethnic cleansing and denying the right of return to those forced to resettle by encouraging various forms of economic activity in the occupied territories, directly affecting property rights. It should be recalled in this connection that international law, in particular the Hague Regulations respecting the Laws and Customs of War on Land (articles 46, 52, 53, 55 and 56) and the Geneva Convention relative to the Protection of Civilian Persons in Time of War (articles 53 and 147), imposes on the occupying Power an obligation to respect property located in occupied territory. That rule applies both to the physical integrity and to the ownership of such property.⁹⁰ Specific provisions of the Charter of the International Military Tribunal at Nuremberg (article 6 (b))⁹¹ and the Rome Statute of the International Criminal Court (article 8) also cover protection of property.⁹² Undoubtedly, the applicable instruments of international law should also include

⁸⁸ See, e.g., resolution 2001/7, of 18 April 2001, of the United Nations Commission on Human Rights. See also the report of the Special Rapporteur of the United Nations Commission on Human Rights Sub-Commission on the Prevention of Discrimination and Protection of Minorities entitled “Human rights and population transfer”, United Nations Document E/CN.4/Sub.2/1997/23, p. 19, para. 65.

⁸⁹ Letter dated 18 March 2005 from the Permanent Representative of Azerbaijan to the United Nations addressed to the Secretary-General, Annex I, “Letter of the OSCE Minsk Group Co-Chairs to the OSCE Permanent Council on the OSCE Minsk Group fact-finding mission to the occupied territories of Azerbaijan surrounding Nagorny Karabakh”, United Nations Document A/59/747-S/2005/187.

⁹⁰ Eric David, p. 389.

⁹¹ Judgment (extracts). *The Charter Provisions*. For text, see Adam Roberts and Richard Guelff (eds.), pp. 177-178, at p. 177.

⁹² Rome Statute of the International Criminal Court (Extract), 17 July 1988. For text, see Adam Roberts and Richard Guelff (eds.), pp. 667-697, at p. 676, article 8(2)(a)(iv).

human rights conventions for which an occupying Power holds the primary responsibility for fulfillment in occupied territories.⁹³

From a legal point of view, the previous owners of property located in occupied territory are legitimate. As a result, any economic activity undertaken by natural or legal persons jointly with an occupying Power or under the tutelage of that Power's local authorities is illegal and performed at their own risk. There is no point in hoping that such economic activity will be sanctioned after the final resolution of the conflict or that those involved will be able to escape responsibility. It goes without saying that all agreements which provide the basis for altering the economic value of property will be challenged and abrogated once Azerbaijani sovereignty over the occupied territories is restored. Advocating otherwise would be tantamount to justifying the crimes committed and violating the peremptory norms of international law.

Neutral States which fail to take all necessary and feasible action to prevent their nationals from seizing property in occupied territories are considered to be providing indirect assistance for the occupier's illegal activities and are therefore to be considered accountable in ways which could include being forced to provide compensation for the injury inflicted.⁹⁴

Responsibility under international law

As stated in the Articles on Responsibility of States for Internationally Wrongful Acts, developed by the International Law Commission, "[e]very internationally wrongful act of a State entails the international responsibility of that State." Such an act of a State is deemed to occur when conduct consisting of an action or omission: (a) is attributable to the State under international law; and (b) constitutes a breach of an international obligation of the State.⁹⁵ As early as 1928, in its ruling in the *Factory at Chorzów* case, the Permanent Court of International Justice described the principle of international responsibility as one of the principles of international law and, furthermore, of the general understanding of the law.⁹⁶

The principle of responsibility is closely bound up with the principle of the conscientious fulfillment of obligations under international law (*pacta sunt servanda*). It is important to note that a breach that is of an ongoing nature relates to the entire period over which the act was

⁹³ See, e.g., *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, paras. 102-113.

⁹⁴ Loukis G. Loucaides, "The Protection of the Right to Property in Occupied Territories", 53(3) *International and Comparative Law Quarterly* 2004, pp. 677-690, at p. 686.

⁹⁵ Articles on Responsibility of States for Internationally Wrongful Acts, articles 1 and 2. See also *Ilaşcu and others v. Moldova and Russia*, ECHR Judgment of 8 July 2004, para. 314, EHCR Portal, HUDOC Collection.

⁹⁶ *Factory at Chorzów (Claim for Indemnity) Case (Germany v. Poland)* (Merits), P.C.I.J. Series A (1928) No. 1, Permanent Court of International Justice. For text, see Martin Dixon and Robert McCorquodale, *Cases and Materials on International Law* (Oxford: Oxford University Press, 3rd ed., 2003), p. 404. See also I.I.Lukashuk, *International law* (Moscow: Walters Kluwer, 3rd ed., 2007), p. 376.

performed and remains at variance with obligations under international law. Furthermore, in the event that a State breaches its obligations under international law through a series of wrongful acts or omissions, the breach extends over the entire period starting with the first of the acts or omissions in the series and continues for as long as they are repeated and remain at variance with the State's obligations under international law.⁹⁷

The responsibility of the State is incurred for any act or omission of its authorities which occurs either within or beyond its national borders. An internationally wrongful act is also perpetrated by the organs of a State or by its agents, acting *ultra vires* or contrary to instructions.⁹⁸

As noted above, there is a convincing body of evidence attesting to the use of force by Armenia against the territorial inviolability of Azerbaijan and the exercise by Armenia of effective overall military and political control of the occupied territories of Azerbaijan. This control is applied both by the armed forces of Armenia and through the puppet regime set up by it in the occupied territory, which, by performing the functions of a local administration, owes its existence to the support, in military and other terms, of the occupying State.

Armenia's responsibility arises as the consequence both of the internationally wrongful acts of its own organs and agents in the occupied territories and the activities of its local administration. Furthermore, there is responsibility even in the event of consent to, or tacit approval of, the actions of this administration.⁹⁹

Armenia's international responsibility, which is incurred by its internationally wrongful acts, involves legal consequences manifested in the obligation to cease these acts, to offer appropriate assurances and guarantees that they will not recur and to provide full reparation for injury in the form of restitution, compensation and satisfaction, either singly or in combination.¹⁰⁰

As stated in the commentary to the draft Articles on Responsibility of States for Internationally Wrongful Acts, "[e]very State, by virtue of its membership in the international community, has a legal interest in the protection of certain basic rights and the fulfillment of certain essential obligations."¹⁰¹ A significant role in securing recognition of this principle was

⁹⁷ *Ilaşcu and others v. Moldova and Russia*, paras. 320-321. See also Articles on Responsibility of States for Internationally Wrongful Acts, article 14, para. 2, and article 15, para. 2.

⁹⁸ *Ilaşcu and others v. Moldova and Russia*, para. 319. See also *Ireland v. United Kingdom*, ECHR Judgment of 18 January 1978, para. 159, ECHR Portal, HUDOC Collection; Articles on Responsibility of States for Internationally Wrongful Acts, article 7.

⁹⁹ See *Louizidou v. Turkey*, ECHR Judgment of 23 March 1995, para. 62; *Louizidou v. Turkey*, ECHR Judgment of 18 December 1996, para. 52; *Cyprus v. Turkey*, ECHR Judgment of 10 May 2001, para. 77; *Ilaşcu and others v. Moldova and Russia*, paras. 314-319, ECHR Portal, HUDOC Collection.

¹⁰⁰ See Articles on Responsibility of States for Internationally Wrongful Acts, articles 28, 30, 31 & 34-37.

¹⁰¹ Draft Articles on Responsibility of States for Internationally Wrongful Acts with commentaries (2001), comment to article 1, para. 4.

played by the decision of the International Court of Justice in the *Barcelona Traction* case. This identified the existence of a special category of obligations — obligations towards the international community as a whole. The International Court of Justice states: “[b]y their very nature the former [the obligations of a State towards the international community as a whole] are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.”¹⁰² Accordingly, serious breaches of obligations flowing from peremptory norms of general international law may have additional consequences affecting not only the State bearing the responsibility, but also all other States. Inasmuch as all States have a legal interest, they are all entitled to invoke the responsibility of the State which has breached its responsibility *erga omnes*. Furthermore, States must cooperate with a view to ending such breaches by lawful means.¹⁰³

It is generally recognized that the category of serious breaches of obligations under peremptory norms of general international law includes, among others, aggression, genocide and racial discrimination.¹⁰⁴

As stated in the Articles on Responsibility of States for Internationally Wrongful Acts, “[n]o State shall recognize as lawful a situation created by a serious breach [of obligations under peremptory norms of general international law], nor render aid or assistance in maintaining that situation.”¹⁰⁵

Alongside Armenia’s responsibility as the State which unleashed war against Azerbaijan, under the customary and treaty norms of international criminal law, certain acts perpetrated in the context of an armed conflict are viewed as international criminal offences and responsibility for them is borne on an individual basis by those participating in the said acts, their accomplices and accessories.

A distinction should be drawn between the two stages in the perpetration during a conflict of the most serious international offences such as genocide, crimes against humanity and military crimes. The first stage can be sited during the active military campaign, which had such tragic consequences for the civilian Azerbaijani population. The events which took place at that time were sufficiently well covered by international organizations, non-governmental human rights bodies and the media. The second stage relates to the situation in the occupied territories of Azerbaijan. Concern about the extent to which the rules of international law were being observed

¹⁰² *Case Concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, I.C.J. Judgment of 5 February 1970, I.C.J. Reports 1970, para. 33. See also I.I.Lukashuk, pp. 379-380.

¹⁰³ I.I.Lukashuk, pp. 379-380, 394-396; Draft Articles on Responsibility of States for Internationally Wrongful Acts with commentaries (2001), commentary to article 1, para. 4.

¹⁰⁴ Draft Articles on Responsibility of States for Internationally Wrongful Acts with commentaries (2001), commentary to article 40, para. 4.

¹⁰⁵ See Articles on Responsibility of States for Internationally Wrongful Acts, article 41; See also General Assembly resolution 62/243 of 14 March 2008, entitled “The situation in the occupied territories of Azerbaijan”, op. 5.

in those territories was heightened when an item on the issue was placed on the agenda of the United Nations General Assembly and when the resolutions on the situation in the occupied territories of Azerbaijan were adopted at the Assembly's sixtieth and sixty second sessions.

At the same time, when considering this issue and elaborating measures to prevent unlawful activities in the occupied Azerbaijani territories, it is essential that the situation be appraised from the standpoint of international law. Thus, measures undertaken by the occupying Power to change the demographic composition of the population of the occupied territories, including by moving, both directly and indirectly, civilians into the occupied territory,¹⁰⁶ the destruction or appropriation of State and private property in the occupied territory,¹⁰⁷ attacks against cultural properties¹⁰⁸ and effects on the environment,¹⁰⁹ are categorized as war crimes — in other words, serious breaches of the law of armed conflicts.

In addition, depending on the specific circumstances, a single action may constitute a number of offences. Thus, the war crimes committed by the Armenians during the conflict in some cases compound other offences, such as genocide and crimes against humanity, or are coterminous with them. For example, the massacre in February 1992 of the civilian Azerbaijani population of the town of Khojaly, which constituted a serious breach of the law of armed conflicts, may also be qualified as genocide.¹¹⁰

The international community, acting chiefly through the United Nations, has proclaimed and set down in international instruments a compendium of fundamental values, such as peace and respect for human rights. The consensus on them was reflected in the adoption in 1948 of the Universal Declaration of Human Rights, according to which “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world”. At the same time, the Universal Declaration

¹⁰⁶ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977. For text, see Adam Roberts and Richard Guelff (eds.), pp. 419-479, at p. 471, article 85 (4) (a); Rome Statute of the International Criminal Court, 17 July 1998, p. 677, article 8 (2) (b) (viii).

¹⁰⁷ Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, p. 352, article 147; Rome Statute of the International Criminal Court, 17 July 1998, pp. 676-677, article 8 (2) (a) (iv).

¹⁰⁸ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, p. 471, article 85 (4) (d); Rome Statute of the International Criminal Court, 17 July 1998, at p. 677, Article 8 (2) (b) (ix).

¹⁰⁹ Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, p. 352, article 147; Rome Statute of the International Criminal Court, 17 July 1998, p. 677, article 8 (2) (b) (xiii).

¹¹⁰ Convention on the Prevention and Punishment of the Crime of Genocide, General Assembly resolution 260 A (III), 9 December 1948. For text, see United Nations Centre for Human Rights, *Human Rights: A Compilation of International Instruments*, ST/HR/1/Rev.5, vol. 1 (Second Part), New York and Geneva, United Nations 1994, pp. 673-677. For more information about the massacre in Khojaly, see Annex 1.

emphasizes that “disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind.”¹¹¹

Regrettably, even some 60 years after the adoption of the Universal Declaration of Human Rights, the conspicuous “silence” in certain international criminal proceedings serves to accentuate a deficiency characteristic of the international community today: the gap between the theoretical values of law and harsh reality, which impedes the application in practice of the rich potential of international law standards. At the same time, if one is to be consistent in upholding universally accepted values, it is essential to take steps to inhibit any brazen attempt to reject these and not to permit lawlessness, including by prosecuting their supposed perpetrators.¹¹² It is clear that there can be no long-term and sustainable peace without justice and respect for human dignity, rights and freedoms.

¹¹¹ Universal Declaration of Human Rights, General Assembly resolution 217 A (III), 10 December 1948. For text, see United Nations Centre for Human Rights, *Human Rights: A Compilation of International Instruments*, ST/HR/1/Rev.5, vol. 1 (First Part), New York and Geneva, United Nations, pp. 1-7, at p. 1.

¹¹² See, e.g., Antonio Cassese, *International Criminal Law* (Oxford: Oxford University Press, 2003), p. 446.