

Chapter A: The territorial Status of Nagorno-Karabakh

I. Object of investigation

The primary concern of this treatise is to shed further light on and analyse the Nagorno-Karabakh conflict and the legal arguments expressed in this context over recent years. Besides the involvement of the Republic of Armenia in the conflict and the war crimes which have obviously been committed, the territorial status, i.e. the territorial assignment of Nagorno-Karabakh, is the main point of contention. The legal dispute can essentially be reduced to the issue of whether Nagorno-Karabakh has effectively seceded from the Azerbaijan Soviet Socialist Republic or the Republic of Azerbaijan. If so, then no plausible legal arguments can be advanced to prevent the formation of an autonomous state. If not, then the region belongs to the Republic of Azerbaijan and is subject to its state control. The first chapter is dedicated to this very complex and politically highly explosive problem.

The question of the right to secede comprises two aspects. Firstly it needs to be clarified whether a secession of Nagorno-Karabakh was legitimate under the law of the USSR (see III.). And secondly the question of territorial secession also has dimensions under international law, meaning that the admissibility of a secession also needs to be examined in this context (see IV.). Before we turn to these two issues, we shall start by establishing an overview of the underlying historical context (see II.).

II. Historical outline

Giving an account of the historical and above all the ethnological development of Karabakh represents a significant challenge. The territory of what is today Nagorno-Karabakh has, as part of the natural isthmus between the Black Sea and the Caspian Sea, been a transit and settlement zone for countless ethnic groups for thousands of years and as such has seen innumerable territorial conflicts, campaigns of conquest and ethnic dislocations.¹ The Caucasus today continues to be

¹ See Avşar, Schwarzer Garten, 2006, pp. 10 et seq.

home to some 50 different ethnic groups.² Consequently there is significant ambiguity concerning the point in time and scope of the formation and arrival of individual ethnic groups and their specific settlement areas within Nagorno-Karabakh.

Nonetheless, the description of settlement history forms a key pillar in the argumentation of both the Armenian and Azerbaijani sides to underpin the veracity of their own territorial claim and undermine that of the other side.³ The dispute among politicians and lawyers on either side continues among the historians.⁴

1. Legal significance of history

In the final analysis, however, it is clear that the settlement history of a territory such as Nagorno-Karabakh, which has for centuries been subject to profound ethnic overlaps and dislocations, does not in fact provide a solid foundation for a territorial claim from a legal perspective.

Applying the legal yardstick retrospectively, we may at best have recourse to the right to sovereign governance under the classical concept of international law.⁵ From this perspective the starting point in law for territorial assignment was political and diplomatic skill and the ability of the sovereign to assert himself through violence.⁶ From a legal perspective the settlement history of a specific ethnic group was irrelevant.⁷ The people living in a territory were at the mercy of the power politics of their princes and kings⁸ who acquired the territories legally through ceding, exchange and inheritance⁹ or divided them up at will.¹⁰ The wars of the sovereigns were also still regarded as legitimate (*ius ad bellum*)¹¹ in the 19th

² See Avşar, *Schwarzer Garten*, 2006, pp. 10 et seq.

³ See Smith/Law/Wilson/Bohr/Allworth (eds.), *Nation-building in the Post-Soviet Borderlands*, 1998, p. 49; Avşar, *Schwarzer Garten*, 2006, pp. 41 et seq.

⁴ See de Waal, *Black Garden*, 2003, pp. 145 et seq; Report of the Political Affairs Committee of the Parliamentary Assembly of the Council of Europe, Doc. 10364, 29 November 2004, appendix IV.

⁵ Cf. e.g. Hobe/Kimminich, *Einführung in das Völkerrecht*, 2004, pp. 36 et seq.

⁶ See also Hobe/Kimminich, *Einführung in das Völkerrecht*, 2004, p. 39; Kimminich, *Menschenrechte: Von kollektiven und individuellen Rechten*, <http://www.lsg.musin.de/deutsch/d/aufkl/menschenrechte.htm>.

⁷ See also O'Brien, *International Law*, 2001, p. 219; Shaw, *International Law*, 2003, p. 443; Moore (ed.), *National Self-Determination and Secession*, 1998, p. 145.

⁸ Cf. Kimminich, *Menschenrechte: Von kollektiven und individuellen Rechten*, <http://www.lsg.musin.de/deutsch/d/aufkl/menschenrechte.htm>.

⁹ Cf. Hobe/Kimminich, *Einführung in das Völkerrecht*, 2004, p. 39; Kimminich, *Menschenrechte: Von kollektiven und individuellen Rechten*, <http://www.lsg.musin.de/deutsch/d/aufkl/menschenrechte.htm>.

¹⁰ See Crawford, *The Creation of States in International Law*, 2006, p. 10.

¹¹ See Hobe/Kimminich, *Einführung in das Völkerrecht*, 2004, pp. 36 et seq; Ipsen, *Völkerrecht*, p. 35; Fischer, in: Ipsen, *Völkerrecht*, 2004, p. 1069; Schweisfurth, *Völker-*

and at the beginning of the 20th century and, where annexation took place, resulted in the legal acquisition of territory.¹² This applied equally to the sovereign national states who adopted the principle of *ius ad bellum* from the princes.¹³ Whilst this may sound dubious from today's democratic and humanitarian perspective, it did conform to the legal and political concepts of the time. A different interpretation in terms of legal history is almost unthinkable in light of today's state practice and consequently contemporary international law, otherwise the whole of the current global structure of states would run the risk of splintering due to – frequently disputable – historical and ethnological insights and theories.

The legal starting point for a contemporary evaluation is thus the classical affiliation of Nagorno-Karabakh with respect to sovereignty at the time of the emergence of modern international law, that is the period after the end of the First World War. The prohibition on wars of aggression in international law did not apply to Russia and the Caucasus region it had previously annexed until 1929, when the Briand-Kellogg Pact came into force.¹⁴ The prohibition on wars of aggression did not prevail in customary law until the beginning of the Second World War.¹⁵ Thus, the Russian seizure of territory and territorial policy in the Caucasus in 1921/1922 can hardly be regarded as being contrary to international law and as such form the basis for today's legal evaluation of the territorial affiliation of Nagorno-Karabakh (for details see below section 5). Alongside this a people's right to self-determination with a substantial legal character developed out of a lengthy process only after the end of the Second World War, beginning with the foundation of the United Nations.¹⁶ That is why ethnic considerations and issues of self-

recht, 2006, p. 357; Gabriel, *Die Überwindung des Kriegszustandes*, Center for International Studies Zurich, no. 24 / 1999, p. 14.

¹² See Hillier, *Sourcebook on Public International Law*, 1998, p. 241; Hobe/Kimminich, *Einführung in das Völkerrecht*, 2004, pp. 39, 85; Kimminich, *Menschenrechte: Von kollektiven und individuellen Rechten*, <http://www.lsg.musin.de/deutsch/d/aufkl/menschenrechte.htm>; O'Brien, *International Law*, 2001, p. 212; Schweisfurth, *Völkerrecht*, 2006, p. 291; Shaw, *International Law*, 2003, p. 423. The doctrine under which the violent seizure of territory (annexation) is not recognised was established in state practice only after 1932. See Hobe/Kimminich, *Einführung in das Völkerrecht*, 2004, p. 73; Epping/Gloria, in: Ipsen, *Völkerrecht*, 2004, p. 301; Schweisfurth, *Völkerrecht*, 2004, p. 291.

¹³ See Ipsen, *Völkerrecht*, 2004, p. 35.

¹⁴ The Covenant of the League of Nations included partially a prohibition of war. However, the Soviet Union only became a member of the League of Nations in 1934. The later prohibition of war became apparent through the Geneva Protocol 1924, which never came into force for Russia. See also Shaw, *International Law*, 2003, p. 422 f. regarding the Briand-Kellogg Pact and the classical rules being applicable before it.

¹⁵ See Hobe/Kimminich, *Einführung in das Völkerrecht*, 2004, p. 49; Dahm/Delbrück/Wolfrum, *Völkerrecht*, vol. I/3, 2002, p. 821.

¹⁶ Although the principle of the right to self-determination of the peoples had already been considered in 1920 during the era of the League of Nations in the Åland Islands case, it was not acknowledged as the basis of a legal claim. See Crawford, *The Creation of States in International Law*, 2006, pp. 108 et seq; Hobe/Kimminich, *Einführung in das*

determination did not play a significant part in the evaluation of the territorial status of Nagorno-Karabakh before this period.

2. From antiquity to the early modern period: ethnic dislocations and intermixing under Muslim rule

In order to understand the causes of the conflict it is nonetheless necessary to go further back in time. Like many other settled regions of Eurasia, the area of today's Nagorno-Karabakh has for many centuries been the object of countless territorial conflicts, campaigns of conquest and ethnic dislocations. A historical analysis of which ethnic group settled here before another depends on the time of observation.

In view of ancient history, two different versions are advocated.¹⁷ Armenian orientated sources assume that Nagorno-Karabakh was part of the early Armenia as the province of Arzakh.¹⁸ In contrast, Azerbaijani sources place the province of Arzakh within the former Caucasian Albania.¹⁹

This question ultimately has no profound ethnological relevance. The concept of Armenia is derived from the designation of a geographical territory and provides no information about the ethnic origin of the people living in this territory at the time.²⁰ The theory that from an ethnological perspective Karabakh was already settled by Armenians in ancient times is correspondingly only endorsed to a limited extent, seemingly even amongst Armenian scholars.²¹ On the other hand, the Albanians cannot be equated with today's Azerbaijani ethnic group. The Caucasian Albanians, not to be confused with the Balkan Albanians, were an autochthonous, that is, long-established people in the Caucasus. They had their own culture and their language belonged to the eastern group of Caucasian languages.²² Some of the Albanian tribes spoke Turkic languages.²³

Völkerrecht, 2004, p. 112. Further, the right to self-determination in the Charter of the United Nations was merely the formulation of an objective. Only after state practice was based on the right to self-determination, did it develop into an effective principle in customary international law. Convincing in this regard also Heintze, in: Ipsen, Völkerrecht, 2004, p. 391.

¹⁷ Cf. Report of the Political Affairs Committee of the Parliamentary Assembly of the Council of Europe, Doc. 10364, 29 November 2004, appendix IV.

¹⁸ Cf. Luchterhandt, *Archiv des Völkerrechts* (vol. 31) 1993, pp. 30, 38.

¹⁹ Cf. Mamedowa, in: Halbach/Kappler (eds.), *Krisenherd Kaukasus*, 1995, pp. 110 et seq. See also Rau, *Der Berg-Karabach-Konflikt*, 2007, p. 8.

²⁰ See Avşar, *Schwarzer Garten*, 2006, p. 47.

²¹ Cf. Mammadov/Musayev, *Armjano-Aserbaidischanski Konflikt*, 2006, pp. 10 et seq. The Term "Armenia" is originally supposed to go back to a geographical description of an area near the Van Lake, which today belongs to Turkey.

²² Cf. Rau, *Der Berg-Karabach-Konflikt*, 2007, p. 8.

²³ See Rau, *Der Berg-Karabach-Konflikt*, 2007, p. 8.

Leaving aside Karabakh's affiliation in terms of sovereignty in the early centuries AD, there can be no doubt about the presence of ethnic Albanians in the region. After all the Albanian people also form the fulcrum around which the dispute over Karabakh's early settlement history revolves.²⁴ According to the Armenian perception of history, the Albanians were converted to Christianity and "Armenianized" at a very early stage, meaning that the Albanian settlement became part of Armenian settlement history.²⁵ From the Azerbaijani perspective, the Albanians made up part of the Islamicized and "Turkicized" ancestors of the Azerbaijani people.²⁶ Shifting sovereignty in Karabakh necessarily led to a host of ethnic change, diversification and intermixing.²⁷ There must have been significant interaction among the Albanian, early Armenian and early Azerbaijani (Turkic) cultures, whereby the history of the Albanians, at least in certain parts, have obviously formed part of the common cultural heritage of Armenians and Azerbaijanis.

According to Armenian orientated sources, the early kingdom of Armenia, insofar as it existed as an autonomous state entity at all under Roman hegemony,²⁸ dissolved around 400 AD.²⁹ The still existing Caucasus Albania, including Arzakh or Karabakh, adopted Christianity as its state religion at the start of the fourth century and the Christian (Gregorian) church spread through the Caucasus in the fourth and fifth centuries.³⁰ At the beginning of the eighth century Caucasus Albania, including Arzakh, was conquered by the Arabs, whereby Christianity was supplanted by Islam over time.³¹ Nonetheless, the Albanian Patriarchy endured until the early 19th century, in parallel to the Armenian Church.³²

In the eighth century Caucasus Albania collapsed. In the tenth, eleventh and twelfth centuries the region of Nagorno-Karabakh, like other Caucasus regions, was part of different Muslim state entities.³³ In the 13th century, what had been Caucasus Albania and Arzakh were conquered by the Mongols, whose rule was

²⁴ See Avşar, *Schwarzer Garten*, 2006, p. 47.

²⁵ See Croissant, *The Armenia-Azerbaijan Conflict*, 1998, p. 11.

²⁶ Cf. Report of the Political Affairs Committee of the Parliamentary Assembly of the Council of Europe, Doc. 10364, 29 November 2004, appendix IV.

²⁷ See Hewsens, in: Samuelian (ed.), *Classical Armenian Culture: Influences and Creativity*, 1982, p. 33; de Waal, *Black Garden*, 2003, p. 8.

²⁸ Concerning doubts in this regard: Mammadow/Musayev, *Armjano-Aserbajdschanski Konflikt*, 2006, p. 14.

²⁹ Cf. Luchterhandt, *Archiv des Völkerrechts* (vol. 31) 1993, pp. 30, 38.

³⁰ Cf. Portier, *Conflict in Nagorno-Karabakh*, 2001, p. 1; Rau, *Der Berg-Karabach-Konflikt*, 2007, p. 9; Avşar, *Schwarzer Garten*, 2006, pp. 43 et seq.

³¹ See Portier, *Conflict in Nagorno-Karabakh*, 2001, p. 1; Rau, *Der Berg-Karabach-Konflikt*, 2007, p. 9.

³² Only in 1837 the tsarist Russia dissolved the Albanian patriarchy by integrating it into the Armenian Church. See Avşar, *Schwarzer Garten*, 2006, p. 49; Rau, *Der Berg-Karabach-Konflikt*, 2007, pp. 9 et seq.

³³ A detailed explanation is given by Rau, *Der Berg-Karabach-Konflikt*, 2007, p. 11.

superseded by the Garagoyunlu, Aghgoyunlu and Safavid Turks.³⁴ Right up until the late Middle Ages Karabakh is said to have been home to the Caucasian Albanians.³⁵ Until this time the territory could not be clearly classified ethnically as belonging to either the Armenian or the Azerbaijani cultural area.³⁶

Karabakh, like Erivan, was considered to be a territory dominated by the Azerbaijanis from the 16th to the 19th centuries.³⁷ According to Armenian orientated accounts in Karabakh, Armenian princes are said to have behaved like feudal lords until the 18th century.³⁸ However, historical studies verify that, in contrast to the Armenian rulers, the ruling princes had enjoyed the Arabian designation “meliks” since the 15th century.³⁹ They no longer saw themselves as Armenian heirs, but as heirs of the Albanian Arshakids.⁴⁰ Not even the territory of modern Armenia could be regarded as being under Armenian rule at that time. A still existing list of the rulers of the Khanate of Erivan shows no identifiable trace of purely Armenian princes over 500 years.⁴¹ The fact that the meliks may have been Christian is not sufficient evidence for classifying them within the Armenian ethnic group since Albanian Christianity was still widespread.⁴² Instead the meliks reflected seemingly the intermixing of the ethnic groups and cultures.⁴³ A definitive classification of Albanian, Armenian or Azerbaijani culture is hardly possible in this case.

In the middle of the 18th century the Karabakh khanate was established under the Azerbaijani Panah-Ali khan Javanshir.⁴⁴ The Karabakh khanate became one of

³⁴ See also Portier, *Conflict in Nagorno-Karabakh*, p. 1; Luchterhandt, *Archiv des Völkerrechts* (vol. 31) 1993, pp. 30, 38.

³⁵ This is apparently confirmed by historical Armenian sources in direct contrast to Armenian modern-day perception of the history of this time. Cf. Avşar, *Schwarzer Garten*, 2006, p. 49 et seq.

³⁶ Cf. Avşar, *Schwarzer Garten*, 2006, p. 50.

³⁷ Rau, *Der Berg-Karabach-Konflikt*, 2007, p. 11.

³⁸ Cf. Luchterhandt, *Archiv des Völkerrechts* (vol. 31) 1993, pp. 30, 38.

³⁹ Cf. Rau, *Der Berg-Karabach-Konflikt*, 2007, p. 11; Avşar, *Schwarzer Garten*, 2006, p. 50.

⁴⁰ See Mamedowa, in: Halbacht/Kappler (eds.), *Krisenherd Kaukasus*, 1995, p. 113. Furthermore they did not have Armenian surnames. Cf. Rau, *Der Berg-Karabach-Konflikt*, 2007, p. 11.

⁴¹ *Armjanskaja Sowetskaja Enziklopedija*, vol. 3, Yerivan 1977, p. 571; Rau, *Der Berg-Karabach-Konflikt*, 2007, pp. 11, 79.

⁴² Cf. Avşar, *Schwarzer Garten*, 2006, p. 49.

⁴³ See Hewsens, in: Samuelian (ed.), *Classical Armenian Culture: Influences and Creativity*, 1982, p. 33; Avşar, *Schwarzer Garten*, 2006, p. 50.

⁴⁴ See Portier, *Conflict in Nagorno-Karabakh*, 2001, p. 1; Rau, *Der Berg-Karabach-Konflikt*, 2007, p. 14; Petruschewskij, *Berichte der Akademie der Wissenschaften Aserbaidschans*, vol. 2, 1946, p. 100. Armenian sources interpret the taking of power by Javanshir as the first arrival of a Turkic-speaking ethnic group in Karabakh. Cf. Avşar, *Schwarzer Garten*, 2006, pp. 54 et seq.

the most important and largest of the Azerbaijani khanates.⁴⁵ In the mountain region of Karabakh five melikdoms arose that were governed by princes (meliks) of Albanian origin subordinated to the khan of Karabakh.⁴⁶ To reinforce the power of the khan, the fortress of Panahabad (today Shusha) was built in 1751. At this time there was a blossoming of Azerbaijani culture in Karabakh, as there was in the neighbouring khanate of Gyandzha, whereby Shusha became one of the most important cities of Azerbaijani culture.⁴⁷ Most of the region could meanwhile be regarded as being settled by Azerbaijani tribes, such as the Otuziki, Javanshir and Kebirli.⁴⁸ Although a proportion of Karabakh's population was Christian-Albanian and Armenian, most of its population at this time was Muslim.⁴⁹

At the end of the 18th century the Azerbaijani khanates were under an increasing threat of being occupied by the Persian and Russian Empires. Various khanates, including Karabakh and Erivan, joined forces on the initiative of the Karabakh khan. Despite this, some of the largest cities were occupied by the Russian army. The Karabakh khan successfully resisted the Persian conquest at first, but ultimately could not withstand the repeated attacks. At the same time Persians and Russians, at least briefly, withdrew as a consequence of the murder of the Persian Shah and the death of the Russian Tsarina. Karabakh's battle against the invaders was for the most part carried out by the whole population of Karabakh, regardless of their ethnic or religious affiliation.⁵⁰

At the beginning of the 19th century things again came to a head for the Karabakh khanate. Again the Russians were threatening to invade from the north and Persians from the south.⁵¹ Further, Russia and Persia went to war in 1804. Caught up in this situation the khan of Karabakh bowed in 1805 to the Russian Empire and relinquished his own claim to power.⁵² This was confirmed in 1813 in the Russo-Persian peace treaty of Gulistan. Karabakh maintained its autonomous status as a khanate for 17 years before it was dissolved and made into a Russian province with a military administration in 1822.⁵³ According to estimates 117,000 Muslims, in particular Azerbaijanis and Kurds, were still living in Karabakh and Erivan in this decade.⁵⁴ Research in recent decades has shown that 80% of the

⁴⁵ Cf. Petruschewskij, *Berichte der Akademie der Wissenschaften Aserbaidshans*, vol. 2, 1946, p. 100; Petruschewskij, *Otscherki po istorii feodalnich odnoschenoj w Azerbajian i Armenii w XVI - XIX ww*, 1949, p. 137.

⁴⁶ Cf. Ioannisjan, *Rossija i armjanskoje oswoboditelnije dwischenije w 80-ch godach XVIII stoletija*, 1947, p. 16; Rau, *Der Berg-Karabach-Konflikt*, 2007, p. 15; Avşar, *Schwarzer Garten*, 2006, p. 52.

⁴⁷ See Elliott, *Azerbaijan*, 2004, p. 42.

⁴⁸ Cf. Rau, *Der Berg-Karabach-Konflikt*, 2007, pp. 14 et seq., 27.

⁴⁹ Cf. Avşar, *Schwarzer Garten*, 2006, p. 53.

⁵⁰ See Avşar, *Schwarzer Garten*, 2006, p. 55.

⁵¹ See Rau, *Der Berg-Karabach-Konflikt*, 2007, pp. 18 et seq.

⁵² Tract between Karabagh Khan and the Russian Empire from 14 May 1805. See also Segal, *Jelisawetpolskaja gubernija*, in: *Kawkaszkij westnik*, 1902, N3.

⁵³ Cf. Rau, *Der Berg-Karabach-Konflikt*, 2007, p. 19.

⁵⁴ See Portier, *Conflict in Nagorno-Karabakh*, 2001, p. 2.

population in the southern Caucasus region was Muslim and 20% Armenian.⁵⁵ The Armenian population in Karabakh was still only 8.4% of the total in 1823.⁵⁶

3. Later modern period: waves of Armenian immigration

Between 1826 and 1828 a second war raged between Russia and Persia for supremacy in the southern Caucasus, and was ended with the peace treaty of Turkmanchay in 1828. The Erivan and Nakhchivan khanates, which up to that point had been home to a majority Azerbaijani population,⁵⁷ also fell to Russia.⁵⁸

Russia attempted to consolidate its control in the whole of the Caucasus region by means of a strong policy of Christianization and settlement of Armenians. The resettlement and concentration of Christian Armenians was intended to serve as a bridgehead of Russian power at the edge of the Middle East.⁵⁹ Up to that point the Russian military administration had lacked the support of the Muslim population, and the proportion of Armenians in the population was relatively low.⁶⁰ Correspondingly, the 1828 Turkmanchay peace treaty provided for a resettlement of Armenians from Persia and the Ottoman Empire to the Caucasus and in particular into the modern territories of Armenia, Azerbaijan and Georgia.

As a result, massive population movements took place across the whole of the Caucasus region, with a strong influx of Armenians into Nagorno-Karabakh and other regions. An estimated 57,000⁶¹ to 200,000⁶² Armenians left territories governed by Persia and the Ottomans and migrated primarily to Erivan and Nagorno-Karabakh. 30,000 Armenians settled in Karabakh alone, increasing their share of the population from 8.4% to an estimated 34.8%.⁶³ Other studies cite a figure of almost 50%.⁶⁴ In Erivan the proportion seemed to have increased from 24% to

⁵⁵ Cf. Bournoutian, in: Suny (ed.), *Transcaucasia, Nationalism and Social Change*, 1996, p. 79; Bournoutian, *Eastern Armenia in the Last Decades of Persian Rule 1807-1828*.

⁵⁶ Cf. Omid Yazdani, *Geteiltes Aserbajdschan*, 1993, p. 88.

⁵⁷ See Rau, *Der Berg-Karabach-Konflikt*, 2007, pp. 23, 25.

⁵⁸ See also Rau, *Der Berg-Karabach-Konflikt*, 2007, p. 23.

⁵⁹ See Swietochowski, in: Halbach/ Kappeler (eds.), *Krisenherd Kaukasus*, 1995, p. 161.

⁶⁰ Cf. Avşar, *Schwarzer Garten*, 2006, p. 62.

⁶¹ See Bournoutian, in: Suny (ed.), *Transcaucasia, Nationalism and Social Change*, 1996, p. 79; Bournoutian, *Eastern Armenia in the Last Decades of Persian Rule 1807-1828*, 1982; Portier, *Conflict in Nagorno-Karabakh*, 2001, p. 2; Rau, *Der Berg-Karabach-Konflikt*, 2007, pp. 25 et seq.

⁶² Assessment by Shavrov, who was directly involved in the Russian colonial policy. See Shavrov, *Novaja, ugroza ruscomu delu w Sakavkase*, 1911, pp. 59 et seq.

⁶³ Cf. Omid Yazdani, *Geteiltes Aserbajdschan*, 1993, p. 89; Avşar, *Schwarzer Garten*, 2006, p. 63.

⁶⁴ Cf. Bournoutian, in: Suny (ed.), *Transcaucasia, Nationalism and Social Change*, 1996, p. 79.

53.8%.⁶⁵ In return 35,000 of the 117,000 Muslims who once lived in Erivan and Karabakh fled Russian rule.⁶⁶

To expedite the resettlement of the Armenians to Karabakh, new villages were founded with government money⁶⁷ and estates bought up from Muslims.⁶⁸ The corresponding decrees were in part implemented by Cossack troops.⁶⁹ As recently as 1978 these historic circumstances were commemorated with celebrations and the inauguration of a memorial to the 150th anniversary of the Armenian settlement of Nagorno-Karabakh in Aghdara.⁷⁰ In view of the disputes surrounding the settlement history between Armenians and Azerbaijanis the commemorative inscription of the memorial “150 Years of Resettlement” was destroyed by the Armenians at the end of the 20th century.⁷¹

The Russian policy of Christianization and resettlement was accompanied and supported by a restructuring of the territorial administration. Thus in 1828 not only the Karabakh khanate was dissolved, but also the khanates of Erivan and Nakhchivan. Instead of these two khanates once ruled by the Azerbaijanis, a new administrative area, the Armenian Oblast, the main part of the later Republic of Armenia, was created in 1828.⁷² The decision to create this area was not taken for ethnological reasons, but due to geo-strategic and power-political considerations.⁷³ Not even Armenian sources credit Erivan with playing an important part in the cultural and economic life of the Armenians before 1828.⁷⁴ In 1840 Karabakh became part of the Kaspijskaya Oblast, in 1846 part of the Governorate Shemakhan-skaya and then in 1867 part of the Governorate Elisavetpol.⁷⁵ All meliks were purposefully Christianized and Armenianized.⁷⁶

Finally tsarist Russia dissolved the Albanian-Christian patriarchy in 1836, thus ending the division of Karabakh’s Christians in favour of the Armenians.⁷⁷ The assimilation of the former Karabakh Albanians that had been underway for centuries could thus be deemed completed.⁷⁸ The property of the Albanian patriarchy was

⁶⁵ Cf. Avşar, *Schwarzer Garten*, 2006, p. 63.

⁶⁶ See Portier, *Conflict in Nagorno-Karabakh*, 2001, p. 2.

⁶⁷ See Selinskij, *Ekonomitscheski bit gosudarstvennich krestjan Sangesurskogo ujesda Jelisawetpolskoj gubernii*, 1886, p. 10; Glinka, *Opisanije pereselenija armjan Adderbid-schanskich w predeli Rossii*, 1831.

⁶⁸ See Shavrov, *Novaja, ugroza ruscomu delu w Sakavkase*, 1911, pp. 59 et seq.

⁶⁹ Cf. Avşar, *Schwarzer Garten*, 2006, p. 66.

⁷⁰ Cf. Rau, *Der Berg-Karabach-Konflikt*, 2007, p. 25.

⁷¹ See pictures in Rau, *Der Berg-Karabach-Konflikt*, 2007, p. 89.

⁷² See Avşar, *Schwarzer Garten*, 2006, p. 64.

⁷³ For details: Avşar, *Schwarzer Garten*, 2006, p. 64; Rau, *Der Berg-Karabach-Konflikt*, 2007, p. 24.

⁷⁴ See Mouradian, in: Halbach/ Kappeler (Hrsg.), *Krisenherd Kaukasus*, 1995, pp. 80, 83.

⁷⁵ Cf. Human Rights Watch, *Azerbaijan, Seven Years of Conflict in Nagorno-Karabakh*, 1994, xiii.

⁷⁶ Cf. Rau, *Der Berg-Karabach-Konflikt*, 2007, p. 25.

⁷⁷ Cf. Avşar, *Schwarzer Garten*, 2006, p. 67.

⁷⁸ Cf. Rau, *Der Berg-Karabach-Konflikt*, 2007, pp. 9 et seq.

transferred to the Armenian Church by decree.⁷⁹ Pro-Armenian sources nonetheless view all Christian historical architecture in Nagorno-Karabakh as evidence of the prevalence of the Armenian ethnic group.⁸⁰ Viewed in the light of historic events alone, this interpretation appears to be untenable. The Albanian Church and culture must have played a distinctive role in Karabakh until the 19th century,⁸¹ otherwise there is no explanation as to why its dissolution and forced integration into the Armenian church was an important factor in Russia's power politics.

The population movements in the first half of the 19th century were just the start of Nagorno-Karabakh's ethnic upheavals. The region was hit by further waves of Armenian immigration in the course of the Russo-Ottoman wars of 1853-1856 (Crimean war) and 1876-1878 (Serbo-Turkish and Russo-Turkish war).⁸² In return thousands of Muslims left the region.⁸³ A further influx of Armenians occurred in the 1890s after the Armenian minority in Eastern Anatolia had attempted to attain independence via violent means.⁸⁴ The consequence was mutual attacks by Armenians and Kurds.⁸⁵ The Armenian militias, however, were no match for the Ottoman forces and Kurdish tribes. Kurdish incursions ultimately led to a new sizeable wave of Armenian emigration to the Transcaucasus.⁸⁶ There is no consensus on the exact figures of Armenian immigrants in the 19th century. Armenian and Azerbaijani figures, however, are of a similar dimension. Thus we can assume that between 500,000 and 700,000 Armenians migrated to the Transcaucasian region, that is, above all in the areas of Erivan and Nagorno-Karabakh.⁸⁷ This increased the number of Armenians in the South Caucasus to 900,000 by the end of the 19th century.⁸⁸

The antipathies and tensions between the Armenians and Azerbaijanis grew in the course of the population movements and the events in Eastern Anatolia. Nourished by preferential Russian treatment and radicalisation amongst Armenians, as well as the emergence of a state of social underdevelopment and an exaggerated sense of threat amongst Azerbaijanis, the first significant interethnic acts of vio-

⁷⁹ See Mamedova, in: Halbach/ Kappeler (Hrsg.), *Krisenherd Kaukasus*, 1995, pp. 110, 113.

⁸⁰ This calls into question Luchterhandt's thesis, which holds Albanian religious culture as constituting evidence of a majority Armenian settlement of Karabakh. Cf. Luchterhandt, *Archiv des Völkerrechts* (vol. 31) 1993, pp. 30, 39.

⁸¹ See also Avşar, *Schwarzer Garten*, 2006, p. 49.

⁸² See Portier, *Conflict in Nagorno-Karabakh*, 2001, p. 2; Isarow, *Nowaja ugroza russkomu delu w Sakawkasje*, 1911, pp. 59 et seq.

⁸³ See Portier, *Conflict in Nagorno-Karabakh*, 2001, p. 2.

⁸⁴ Cf. Avşar, *Schwarzer Garten*, 2006, p. 79 et seq.; Rau, *Der Berg-Karabach-Konflikt*, 2007, p. 26.

⁸⁵ See Avcar, *Schwarzer Garten*, 2006, pp. 78 et seq.

⁸⁶ Cf. Rau, *Der Berg-Karabach-Konflikt*, 2007, p. 26.

⁸⁷ See van der Leeuw, *Azerbaijan: Quest for Identity*, 2000, p. 143; Mouradian, in: Halbach/Kappeler (eds.), *Krisenherd Kaukasus*, 1995, pp. 80, 81.

⁸⁸ See Isarow, *Nowaja ugroza russkomu delu w Sakawkasje*, 1911, pp. 59 et seq.

lence erupted in the Transcaucasian region.⁸⁹ Some 100 Armenians and 200 Azerbaijanis died in violent skirmishes in Shusha and Gyandzha.⁹⁰ These facts illustrate that the huge predominance of Armenians in Nagorno-Karabakh and the potential for interethnic conflict in the 20th century had their origins mainly in the 19th century.

4. Beginning of the 20th century: between the fronts of the great powers

From the very beginning, the 20th century was marked by intense territorial conflicts between the great powers and between different ethnic groups around the world. The early decades were to be significant with regard to drawing the borders of the modern states. This applies just as much to Europe as it does to the Middle East or the Caucasus region. In the absence of a general prohibition on war, the question of territorial structure remained coupled to the ability of the great powers to successfully wage war.⁹¹ The different ethnic groups either found themselves between the fronts or tried, through the formation of strategic alliances, to assert their own ambitions for power. Modern international law did not yet exist.

In the first two decades of the 20th century the division of the whole of the Greater Caucasus region and Eastern Anatolia was fought over particularly fiercely. Due to their strategic position, wealth of natural resources and ethnic intermixing, these regions often featured in the plans of numerous European and local players. Russia and the Ottoman Empire in particular attempted to shore up their spheres of influence through belligerent means and the strategic integration of the Armenian and Azerbaijani ethnic groups. However, France and Great Britain also intervened in events and attempted to prevent the advance of the Ottomans, for instance by supplying weapons to Armenian and Georgian militias.⁹²

A direct consequence of the violent disputes and the actual, supposed or claimed alliances and power interests of local ethnic groups was homicide and the deportation of countless Armenians by the Turks, as well as Armenian and Russian acts of retaliation against the civilian Muslim population in 1915.⁹³ Tens of thousands died on the Armenian and Muslim sides. The heated debate about these

⁸⁹ Cf. Altstadt, *The Azerbaijani Turks*, 1992, p. 41; for further details and references: Avşar, *Schwarzer Garten*, 2006, pp. 70-86.

⁹⁰ Cf. Avşar, *Schwarzer Garten*, 2006, p. 84.

⁹¹ The conditions of the peace treaties under international law which dealt in particular with territorial issues were thus also directly related to the military strength of the victorious side.

⁹² Cf. Avşar, *Schwarzer Garten*, 2006, pp. 87-90.

⁹³ See Gust (Hrsg.), *Der Völkermord an den Armeniern 1915/16*, 2005.

events is still one of the most difficult problems between Armenia and Turkey today.⁹⁴

A further significant caesura for the Transcaucasus region was the weakening of Russia through the February and October revolutions in 1917. Since Russia had previously asserted its power by forcing back the Ottomans, it now left a considerable power vacuum, which various local groups attempted to fill.⁹⁵ The consequence was a situation approximating a civil war,⁹⁶ which claimed thousands of Armenian and Azerbaijani victims both in Baku and in Nagorno-Karabakh.⁹⁷ Whilst Baku had come under the leadership of an Armenian and Russian dominated council headed by the Bolshevik Shaumian,⁹⁸ the Transcaucasian Democratic Federal Republic was declared in the western Azerbaijani city of Gyandzha in April 1918.⁹⁹ This was intended to consist of the partial states of Armenia, Azerbaijan and Georgia. However, independent republics for the territories of Armenia, Azerbaijan and Georgia were declared in May 1918, signalling the failure of the Transcaucasian republic.

During the same period Ottoman troops invaded Armenia. According to the Treaty of Batumi from 4 June 1918 between Armenia and Turkey the territory of Armenia included only the areas around the valley of Ararat and around the Basin of Sevan.¹⁰⁰ Nagorno-Karabakh was not part of Armenia pursuant to the Treaty of Batumi. In the autumn of 1918 it became clear that, having lost the First World War, the Ottoman Empire would lose the military supremacy it had attained in the Caucasus region and would further not be able to successfully promote Azerbaijani interests in Nagorno-Karabakh. Consequently the Dashnak government of Armenia continued to pursue its ambitions for a greater Armenia and laid claim to territories in Georgia, Eastern Anatolia and Azerbaijan, including Nagorno-Karabakh.¹⁰¹

In November 1918 the British army marched into the Transcaucasus. Shortly before this the “Army of Islam” unit raised by the Ottoman army and the government of the Azerbaijan Democratic Republic, which had been established in May, marched into Baku. The command of the British troops did not regard the Repub-

⁹⁴ Cf. Report of the Political Affairs Committee of the Parliamentary Assembly of the Council of Europe, Doc. 10364, 29 November 2004, appendix IV.

⁹⁵ See Avşar, *Schwarzer Garten*, 2006, pp. 90 et seq.

⁹⁶ See van der Leeuw, *Azerbaijan: Quest for Identity*, 2000, p. 150.

⁹⁷ See van der Leeuw, *Azerbaijan: Quest for Identity*, 2000, p. 150; Altstadt, *The Azerbaijani Turks: power and identity under Russian rule*, 1992, pp. 86 et seq.; Rau, *Der Berg-Karabach-Konflikt*, 2007, p. 28.

⁹⁸ There were only two Azerbaijanis among those commissioners. See Avcar, *Schwarzer Garten*, 2006, p. 92.

⁹⁹ Cf. Avşar, *Schwarzer Garten*, 2006, p. 95.

¹⁰⁰ See Rau, *Der Berg-Karabach-Konflikt*, 2007, p. 29.

¹⁰¹ See Altstadt, *The Azerbaijani Turks: power and identity under Russian rule*, 1992, pp. 101 et seq.; Rau, *Der Berg-Karabach-Konflikt*, 2007, p. 29.

lic of Azerbaijan as a sovereign state, but still as a part of Russia.¹⁰² This was particularly true against the background that Moscow also regarded the administrative developments in the Caucasus merely as a temporary phenomenon, and to this extent a new Russian seizure was to be anticipated.¹⁰³ Nonetheless the British troops accepted the Azerbaijani government as the sole legitimate partner in talks.¹⁰⁴

Led by pragmatic and economic considerations, the British General Thomson decided that the region of Nagorno-Karabakh should remain part of the Republic of Azerbaijan.¹⁰⁵ He appealed to the leadership of Karabakh to accept territorial affiliation to Azerbaijan. In January 1919 the Azerbaijani Sultanov became Governor-General of Karabakh. In contrast to the leadership of Armenia, the Armenian leaders in the Karabakh People's Congress made concessions in August 1919. Under an agreement signed by the Armenians, Nagorno-Karabakh was initially intended to remain as part of Azerbaijan as an autonomous region, with its final status to be clarified at the Paris Peace Conference convened after the First World War.¹⁰⁶ The peace conference, held in spring 1920, finally confirmed Azerbaijan's claim to Nagorno-Karabakh.¹⁰⁷

Still in August 1919 the Dashnak government in Armenia rejected the conditions of the agreement and sent Armenian troops to Karabakh to replace the Armenian leadership there with a puppet government.¹⁰⁸ In reply Sultanov, Governor-General of Karabakh, also declared the agreement – and its as yet still unclear consequences – void.¹⁰⁹ At the same time Armenian troops attempted to bring not just Karabakh, but also other regions of Azerbaijan and Eastern Anatolia under their control.¹¹⁰ In 1920 the Governor General of Karabakh forced the Armenian troops out of Shusha. In the course of the violent confrontations, each side was responsible for attacks on the Armenian and Muslim civilian population respectively.¹¹¹

Whether the proclaimed republics of Armenia, Azerbaijan and Georgia had attained the status of sovereign states is questionable. In any case Great Britain was still striving to attain international recognition of Azerbaijan and Georgia in January 1920.¹¹² The aim was to strengthen resistance of local leaders against the cur-

¹⁰² See Swietochowski, *Russian Azerbaijan, 1905-1920*, 1985, pp. 141 et seq.

¹⁰³ Cf. Croissant, *The Armenia-Azerbaijan Conflict*, 1998, p. 17.

¹⁰⁴ Cf. Rau, *Der Berg-Karabach-Konflikt*, 2006, p. 28.

¹⁰⁵ See Altstadt, *The Azerbaijani Turks: power and identity under Russian rule*, 1998, pp. 100 et seq.; Hovannisian, *The Republic of Armenia*, 1971, pp. 195, 211.

¹⁰⁶ See Portier, *Conflict in Nagorno-Karabakh*, 2001, p. 2; Auch, *Ewiges Feuer in Aserbaidshan*, 1992, p. 17; Luchterhandt, *Archiv des Völkerrechts* (vol. 31) 1993, pp. 30, 40.

¹⁰⁷ See Portier, *Conflict in Nagorno-Karabakh*, 2001, p. 2; Avşar, *Schwarzer Garten*, 2006, p. 108.

¹⁰⁸ See van der Leeuw, *Azerbaijan: Quest for Identity*, 2000, p. 152.

¹⁰⁹ Cf. Avşar, *Schwarzer Garten*, 2006, p. 105.

¹¹⁰ Cf. Avşar, *Schwarzer Garten*, 2006, pp. 106 et seq.

¹¹¹ See Van der Leeuw, *Azerbaijan: Quest for Identity*, 2000, p. 152; Mamedova, in: Halbach/Kappeler (eds.), *Krisenherd Kaukasus*, 1995, p. 124.

¹¹² Cf. Avşar, *Schwarzer Garten*, 2006, p. 109.

rently emergent Bolshevik invasion. In December 1920 the League of Nations finally refused international recognition for Armenia and Azerbaijan and rejected their applications for membership of the League.¹¹³ With reference to Article 1 of the Constitution of the League of Nations both regions were denied the right to a full and thus effective self-administration, possibly also with the prospect of the renewed Russian seizure of power. It was said they lacked in particular clear, recognised borders, a constitution and a stable government.¹¹⁴ In contrast to the Armenian point of view,¹¹⁵ the announcements made no direct reference to the affiliation of the region of Nagorno-Karabakh.

5. Soviet era: Nagorno-Karabakh as an autonomous region in the Azerbaijan SSR

Despite the changeover of power in Russia in the course of the February and October revolutions, the Transcaucasus was of particular significance in Russia's domestic and foreign policy strategy. The new Bolshevik rulers unwaveringly continued the tsarist policy of expansion. To prepare for the renewed Russian settlement of land in the Caucasus region, the "Caucasian Bureau" was founded and was charged with coordinating Bolshevik infiltration to form the basis for a Russian invasion.¹¹⁶

As early as spring 1920 the Red Army positioned itself at the borders of the Republic of Azerbaijan. In March the Azerbaijani troops were deployed to Karabakh to put down an Armenian rebellion, thus clearing the way for the Red Army to enter Azerbaijan. On 27 April 1920, the eve of the Russian invasion, the Azerbaijani leadership complied with an ultimatum of the Communist Party of Azerbaijan and resigned.¹¹⁷ The Russian troops then marched into Azerbaijan with no military or political resistance to speak of. The Republic of Azerbaijan *de facto* ceased to exist on 28 April 1920.¹¹⁸

When in May 1920 the Republic of Armenia withdrew those of its troops still stationed in Karabakh, the Red Army also invaded Karabakh. The leadership of the Caucasian Bureau then declared via telegram that Karabakh was regarded as a part of the Azerbaijan Soviet Republic.¹¹⁹ The "Azerbaijani Revolutionary Com-

¹¹³ See League of Nations Assembly doc. 20/48/206 and 20/48/251; United Nations Commission on Human Rights doc. E/CN.4/2005/G/23; Mammadov/Musayev, *Armjano-Aserbajdschanski Konflikt*, 2006, pp. 47 et seq.

¹¹⁴ See League of Nations Assembly doc. 20/48/206 and 20/48/209; United Nations Commission on Human Rights doc. E/CN.4/2005/G/23.

¹¹⁵ See United Nations Commission on Human Rights doc. E/CN.4/2005/G/23.

¹¹⁶ Cf. Avşar, *Schwarzer Garten*, 2006, pp. 112 et seq.

¹¹⁷ Cf. Avşar, *Schwarzer Garten*, 2006, pp. 113 et seq.

¹¹⁸ Likewise Rau, *Der Berg-Karabach-Konflikt*, 2007, p. 31.

¹¹⁹ Telegram from Ordzhonikidze, head of the Caucasian Bureau, to Chicherin, the Russian commissioner for foreign affairs, of 19 June 1920. However, it is unclear whether the

mittee” was installed as the highest local organ in Azerbaijan under the leadership of Nariman Narimanov. It was charged with implementing the Russian directions of the Caucasian Bureau and Moscow central government thus driving forward the Sovietisation of Azerbaijan.¹²⁰ Avşar assumes that the Communist Party of Azerbaijan, which was fomenting the upheaval, was at this time dominated by Russians and Armenians¹²¹. If this were really the case, the situation would have been beneficial to the Moscow leadership, as lower levels of resistance to Russian strategic planning in the Caucasus would have been anticipated. Russia was concerned in particular with expanding as rapidly as possible into the strategically significant Caucasus region.

A remarkable declaration by Narimanov of 1 December 1920, which is fiercely debated in Armenian and Azerbaijani literature, should also be viewed against this background. Narimanov declared that Zangezur and Nakhchivan were to be regarded as a part of Soviet Armenia and the working farmers in Nagorno-Karabakh had a full right to self-determination.¹²² Other authors are of the opinion that Narimanov also spoke of the direct ceding of Nagorno-Karabakh to the Armenian Soviet Republic.¹²³ The background is that different decisions by Narimanov were apparently published in Baku¹²⁴ and Yerevan¹²⁵.

As also follows from Narimanov’s statements, the clear objective was to support the parallel Bolshevik coup in Armenia (of 29 November to 1 December 1920).¹²⁶ Unlike in Azerbaijan, the nationalist Dashnaks in Armenia represented a serious problem for Russian expansion. Therefore the main beneficiary of Narimanov’s different statements was Moscow. To this extent one could suppose that this was a political move instigated by Moscow.¹²⁷ In contrast to Stalin, who as the

recognition of the territorial affiliation was initiated by Ordzhonikidze or the Karabakh regional government.

¹²⁰ Cf. Avşar, *Schwarzer Garten*, 2006, pp. 114 et seq.

¹²¹ According to Avşar, *Schwarzer Garten*, 2006, p. 115.

¹²² According to an article in “Communist” newspaper (Baku) from 2 December 1920, p. 1. See also Rau, *Der Berg-Karabach-Konflikt*, 2007, p. 33.

¹²³ See e.g. de Waal, *Black Garden*, 2003, p. 129; Mamedova, in: Halbach/Kappeler (eds.), *Krisenherd Kaukasus*, 1995, pp. 110, 126.

¹²⁴ At least the Baku issue of the “Communist” from 2 December 1920 (see p. 1), which refers to a decision of Narimanov from 1 December 1920, does not reveal any ceding of the disputed area. See also Rau, *Der Berg-Karabach-Konflikt*, 2007, p. 33.

¹²⁵ Asenbauer documents an extract from the Yerevan edition of the “Communist” of 7 December 1920 citing a decision by Narimanov of 30 November 1920 dealing with the ceding of Nagorno-Karabakh. See Asenbauer, *Zum Selbstbestimmungsrecht des armenischen Volkes von Berg-Karabach*, 1993, p. 289.

¹²⁶ According to the issue of the “Communist” from 2 December 1920, p. 1.

¹²⁷ See also Mamedova, in: Halbach/Kappeler (eds.), *Krisenherd Kaukasus*, 1995, pp. 110, 126; Avşar, *Schwarzer Garten*, 2006, pp. 117 et seq.

then Commissar of Nationalities confirmed the decision,¹²⁸ Narimanov himself even appeared to be an advocate of Karabakh remaining a part of Azerbaijan.¹²⁹

The question is to be raised whether Narimanov's declaration had binding force in international law at all; this must be answered in the negative. Neither Narimanov nor the Azerbaijani Revolutionary Committee nor Stalin solely possessed the requisite authority under international law to be able to cede or initiate the ceding of a territory. Only the Moscow central government as the new sovereign and the Caucasian Bureau as an institution with plenipotentiary powers were able to do so. Therefore it was indeed possible for different decisions to be published in Yerevan and Baku for purely political reasons, without having a legal effect. To this extent it is no wonder that Moscow attributed no legally binding force to the statements. Moscow instead continued to negotiate the solution of the Karabakh issue after the expected political effect of Narimanov's declaration failed to materialise or at least no longer fitted into the given political framework.¹³⁰

The key decision was not taken by the Caucasian Bureau until 5 July 1921. Whilst on 4 July the Caucasian Bureau decided in a – obviously preparatory – evening session on the inclusion of Nagorno-Karabakh in the Armenian Soviet Republic and decided to submit the question again,¹³¹ it annulled this decision on 5 July under pressure from Narimanov.¹³² In view of the strong economic interdependence between Karabakh and Azerbaijan and in the interests of having good relations with Turkey, it was ultimately decided that Nagorno-Karabakh should remain in the Azerbaijan Soviet Republic and be granted autonomous status.¹³³ This was the final and binding ruling which was repeatedly affirmed by the Soviet leadership over the following years.¹³⁴ Nagorno-Karabakh consequently attained autonomous status in 1923 and was a part of the Azerbaijan Socialist Soviet Republic before the Republic of Azerbaijan was re-established in 1991.

¹²⁸ Cf. Auch, *Ewiges Feuer in Aserbaidshjan*, 1992, p. 18.

¹²⁹ As a result of Narimanov's endeavours, the Karabakh question was again debated on 4 and 5 July 1921 by the Caucasian Bureau which ultimately decided in favour of Azerbaijan. Cf. minutes of the evening session of the Caucasian Bureau of 4 July 1921; Altstadt, *The Azerbaijani Turks: power and identity under Russian rule*, 1992, p. 117; Portier, *Conflict in Nagorno-Karabakh*, 2001, p. 4.

¹³⁰ For more details see: Avşar, *Schwarzer Garten*, 2006, pp. 118 et seq.

¹³¹ Cf. minutes of the evening session of the Caucasian Bureau of 4 July 1921 and also Avşar, *Schwarzer Garten*, 2006, p. 120.

¹³² Narimanov's endeavours are reflected in the minutes of the evening session of the Caucasian Bureau of 4 July 1921, whereby it became clear that no final decision had been taken with respect to the territorial affiliation of Karabakh.

¹³³ According to the minutes of the session of the Caucasian Bureau of 5 July 1921, no. 12, point 2. See also de Waal, *Black Garden*, 2003, p. 130; Swietochowski, in: Halbach/Kappeler (eds.), *Krisenherd Kaukasus*, 1995, pp. 161, 167.

¹³⁴ See also Cornell, *Journal of South Asian and Middle Eastern Studies* vol. 20/no. 4 (1997) 1 et seq.; Cornell, *The Nagorno-Karabakh Conflict*, report no. 46, Department of East European Studies, 1999, p. 9.

The ensuing decades passed off relatively peacefully, despite the fact that the demand to annexe Nagorno-Karabakh to the Armenian SSR was repeatedly expressed.¹³⁵ There were some disputes in the 1960s when the workers and peasants of Nagorno-Karabakh and the Armenian SSR presented various petitions to the Soviet state leadership. Their aim was to change the territorial affiliation of Karabakh, but this was rejected. The main bones of contention were the deteriorating living conditions and economic underdevelopment of Nagorno-Karabakh.¹³⁶ However these circumstances did not necessarily appear to be a consequence of a discriminatory economic policy from Baku, but rather of the overall economic situation in the USSR frequently causing problems in rural areas.¹³⁷ Apart from this the Armenians feared the loss of their majority among the population. Whilst countless Armenians of Nagorno-Karabakh migrated to the cities, Azerbaijanis moved in as a result of state settlement programmes. As a consequence the Armenian share of the population dropped from 94.4% in 1923 to 75.9% in 1979.¹³⁸

Isolated violent skirmishes occurred apparently at a later time.¹³⁹ However, it is impossible to establish definitively which side cast the first stone. Whilst the Karabakh Armenians demanded annexation to the Armenian SSR despite their autonomous status,¹⁴⁰ the Azerbaijani side, and above all the Soviet central government, must have been trying to maintain the territorial structure of the USSR – in particular in the context of the cold war – and to prevent an internal break-up of the multinational state. It can be assumed that questionable methods were also used. How serious the risk of destruction was, even on the region's own doorstep, was shown by the subsequent separatist movements in Abkhazia, South Ossetia and Chechnya. The spectacular excesses of Moscow's settlement and ethnic policies, however, did not primarily affect the Armenians of Nagorno-Karabakh, but rather the Chechens, Crimean Tatars, Ingushs, Ukrainians, Volga Germans and, between 1948 and 1950, also parts of the Armenian Azerbaijanis.¹⁴¹

In the course of Perestroika nationalist movements across the Soviet Union were strengthened¹⁴² and in many cases they became violent.¹⁴³ In 1988 the con-

¹³⁵ Cf. Portier, *Conflict in Nagorno-Karabakh*, pp. 5 f.; Luchterhandt, *Archiv des Völkerrechts* (vol. 31) 1993, pp. 30, 41.

¹³⁶ Cf. Luchterhandt, *Archiv des Völkerrechts* (vol. 31) 1993, pp. 30, 41; Swietochowski, in: Halbach/ Kappeler (eds.), *Krisenherd Kaukasus*, 1995, pp. 161, 164.

¹³⁷ Cf. Avşar, *Schwarzer Garten*, 2006, pp. 126 et seq.

¹³⁸ Cf. Report of the Political Affairs Committee of the Parliamentary Assembly of the Council of Europe, Doc. 10364, 29 November 2004, appendix IV; Auch, *Ewiges Feuer in Aserbaidschan*, 1992, p. 29.

¹³⁹ So Luchterhandt, *Archiv des Völkerrechts* (vol. 31) 1993, pp. 30, 41 without any further reference.

¹⁴⁰ See de Waal, *Black Garden*, 2003, p. 16.

¹⁴¹ Cf. for instance USSR Council of Ministers decisions on resettlement of Azerbaijanis living in Armenia no. 4083 from 23 December 1947 and no. 754 from 10 March 1948.

¹⁴² Cf. Halbach, *Bericht des Bundesinstituts für ostwissenschaftliche und internationale Studien* 11/1988, pp. 1 et seq.

flict over Nagorno-Karabakh escalated once again. More detailed studies by de Waal show that as early as 1986 the Armenian side within and outside Karabakh started strategic planning to effect a transfer of the mountainous region to the Armenian SSR.¹⁴⁴ Muradian, the main driver behind the new movements, speculated that the Azerbaijani leadership would attempt to settle Azerbaijanis in Nagorno-Karabakh and drive Armenians out.¹⁴⁵ However, objective evidence of this theory can hardly be provided. According to Avşar the insidious decline in the proportion of Armenians in the population described at least for the period 1923-1979 (from 94.4% to 75.9%) is due to a natural rural migration towards Baku, Yerevan and Moscow¹⁴⁶ and not coercive measures by the state, as in other territories of the USSR. In addition, this accusation did not appear to be the only factor for secession ambitions at the time of Perestroika. Rather a combination of historical, cultural, religious, political and also socio-economic factors was the cause and Perestroika opened a serious opportunity for nationalist movements across the Soviet Union to strive for secession. According to statements made by Aganbekyan, a key Armenian adviser of Gorbachev, it was imperative for the Armenians to exploit the moment of Perestroika.¹⁴⁷ In this context networks were created and weapons distributed to Armenian activists in Karabakh as early as 1986.¹⁴⁸ According to de Waal's investigations, the resignation of the influential Azerbaijani politburo member Aliiev was stage-managed.¹⁴⁹ At the beginning of 1988 the Armenians of Nagorno-Karabakh and Armenia were mobilised and mass demonstrations initiated by means of flyers.¹⁵⁰

On 20 February 1988 the Regional Soviet of Nagorno-Karabakh finally decided formally to work towards a transfer of the region to the Armenian SSR.¹⁵¹ This was rejected by the Supreme Soviet of the Azerbaijan SSR, the Supreme Soviet of the USSR and the Central Committee of the CPSU with reference to Art. 78 of the Constitution of the USSR.¹⁵² Under Art. 78 territorial alterations were inadmissible without the consent of the affected union republic. That notwithstanding, the Regional Soviet of Nagorno-Karabakh resolved in July 1988 to cede Nagorno-

¹⁴³ Cf. Dehdashti, *Internationale Organisationen als Vermittler in innerstaatlichen Konflikten*, 2000, p. 26.

¹⁴⁴ For details see: de Waal, *Black Garden*, 2003, pp. 15 et seq., 20 et seq. The fate of Azerbaijanis living in Nagorno-Karabakh appeared to be irrelevant. The instigator Muradian primarily saw them as an Azerbaijani instrument of power over the Armenians (parts of the interview with Muradian printed in: de Waal, *Black Garden*, 2003, p. 21).

¹⁴⁵ See De Waal, *Black Garden*, 2003, p. 16.

¹⁴⁶ Cf. Avşar, *Schwarzer Garten*, 2006, p. 127.

¹⁴⁷ See De Waal, *Black Garden*, 2003, p. 20.

¹⁴⁸ Cf. de Waal, *Black Garden*, 2003, pp. 15 et seq.

¹⁴⁹ Cf. De Waal, *Black Garden*, 2003, p. 17.

¹⁵⁰ See de Waal, *Black Garden*, 2003, pp. 20 et seq., 22 et seq.

¹⁵¹ See de Waal, *Black Garden*, 2003, p. 10.

¹⁵² See Portier, *Conflict in Nagorno-Karabakh*, 2001, pp. 6 et seq.; de Waal, *Black Garden*, 2003, pp. 60 et seq.; Mett, *Das Konzept des Selbstbestimmungsrechts der Völker*, 2004, p. 240.

Karabakh from the Azerbaijan SSR and annexe it to the Armenian SSR. Moscow then moved special units into the region to prevent a secession.

At the same time the situation escalated for the civilian population of Armenian and Azerbaijani origin following expulsions, violent incursions and killings on both sides.¹⁵³ The escalation took place as the first Azerbaijanis saw themselves forced to leave the Armenian SSR as a result of the growing anti-Azerbaijani mood, Armenian mass demonstrations and Armenian attacks.¹⁵⁴ Then on 22 February 1988 the deputy Attorney General of the USSR reported on the radio that two young Azerbaijanis had been killed in an administrative district bordering Nagorno-Karabakh on that day.¹⁵⁵ This led to violent attacks by Azerbaijanis on Armenians in Sumgait in front of police and Soviet troops.¹⁵⁶ The result of these events was a death toll of between 26 and 32 Armenians and hundreds injured.¹⁵⁷ Sumgait, an industrial suburb of Baku, was at that time one of the largest refuges of Azerbaijanis fleeing from Armenia towards Baku and as such an ideal breeding ground for acts of violence directed at Armenians.¹⁵⁸ There has been much speculation as to the origin of the violent excesses.¹⁵⁹ This particularly centres around the potential involvement of the KGB, the Soviet Committee for State Security. The KGB obviously organised acts of provocation within local conflicts across the Soviet Union to weaken the Gorbachev Administration.¹⁶⁰

The events in Sumgait explosively kindled hatred amongst the Armenians who were already mobilised at mass demonstrations in Armenia and Karabakh. In particular the Armenians were reminded of the murders and persecution perpetrated by the Turks in 1915.¹⁶¹ In the further course of events acts of violence, killings

¹⁵³ See report by Human Rights Watch, *Azerbaijan, Seven Years of Conflict in Nagorno-Karabakh*, 1994, p. 1; UN ECOSOC doc. E/CN.4/1997/138, annex; UN ECOSOC doc. E/CN.4/1997/139, annex; de Waal, *Black Garden*, pp. 2003, 18 et seq., 22 et seq; Quiring, *Schwelende Konflikte in der Kaukasus-Region*, *APuZ* 13 (2009), p. 19.

¹⁵⁴ See Report by the Political Affairs Committee of the Parliamentary Assembly of the Council of Europe, Doc. 10364, 29 November 2004, appendix IV; UN ECOSOC doc. E/CN.4/1997/139, annex; de Waal, *Black Garden*, 2003, pp. 18 et seq., 22 et seq.

¹⁵⁵ See Cornell, *The Nagorno-Karabakh Conflict*, report no. 46, Department of East European Studies, 1999, pp. 16 et seq.; de Waal, *Black Garden*, 2003, p. 15; Luchterhandt, *Archiv des Völkerrechts* (vol. 31) 1993, pp. 30, 43.

¹⁵⁶ See for further details: de Waal, *Black Garden*, 2003, pp. 32 et seq.; cf. also Report by the Political Affairs Committee of the Parliamentary Assembly of the Council of Europe, Doc. 10364, 29 November 2004, appendix IV.

¹⁵⁷ See Cornell, *The Nagorno-Karabakh Conflict*, report no. 46, Department of East European Studies, 1999, p. 17; de Waal, *Black Garden*, 2003, pp. 34, 40.

¹⁵⁸ Cf. Cornell, *The Nagorno-Karabakh Conflict*, report no. 46, Department of East European Studies, 1999, p. 14.

¹⁵⁹ Cf. de Waal, *Black Garden*, 2003, pp. 41 et seq.

¹⁶⁰ See report Times Online “Vladimir Kryuchkov”, 30 November 2007; de Waal, *Black Garden*, 2003, pp. 41 et seq.

¹⁶¹ Cf. Cornell, *The Nagorno-Karabakh Conflict*, report no. 46, Department of East European Studies, 1999, p. 19.

and expulsions occurred on the Armenian and Azerbaijani side.¹⁶² Both sides cite pogroms in several cities and regions.¹⁶³

As a result of the serious unrest in Nagorno-Karabakh, Moscow placed the region under special administration in January 1989. Some Armenian dissidents subsequently founded the “Armenian National Movement”, which was quickly to become the governing political power not only in Nagorno-Karabakh, but also in Armenia.¹⁶⁴ This also goes towards explaining the strong interconnections and interdependencies between the government in Armenia and the *de facto* leadership in Nagorno-Karabakh, the effects of which can still be felt today.¹⁶⁵

The Armenian national movement openly declared its aim to be the removal of Moscow’s special administration committee.¹⁶⁶ In August 1989 unauthorised elections were held in Karabakh with the support of the national movement. The “Congress of plenipotentiary representatives of the population of the autonomous region of Nagorno-Karabakh”, convened solely by Armenians, then declared Karabakh to be an independent territory of the Union and elected a “National Council” which was intended to wield the power of the state.¹⁶⁷ One of the first steps taken by this Armenian parallel government was the formation of an Armenian defence force.¹⁶⁸ The Armenian SSR recognised the National Council as the sole legitimate representative instance of the Armenians in Karabakh.¹⁶⁹

Neither Moscow nor Baku recognised the Congress of plenipotentiary representatives of the population of the autonomous region of Nagorno-Karabakh, the National Council or their declarations.¹⁷⁰ Instead, in November 1989 Moscow transferred the administrative power over Nagorno-Karabakh back to the Azerbaijan SSR without changing its territorial status.¹⁷¹ Nonetheless the Supreme Soviet of the Armenian SSR and the National Council of Nagorno-Karabakh jointly de-

¹⁶² Cf. de Waal, *Black Garden*, 2003, pp. 45 et seq., 62 et seq., 89 et seq.; Mett, *Das Konzept des Selbstbestimmungsrechts der Völker*, 2004, p. 240 et seq.; Avşar, *Schwarzer Garten*, 2006, p. 134; UN ECOSOC doc. E/CN.4/1997/138, annex; UN ECOSOC doc. E/CN.4/1997/139, annex.

¹⁶³ UN ECOSOC doc. E/CN.4/1997/139, annex; Quiring, *Schwelende Konflikte in der Kaukasus-Region*, APuZ 13 (2009), p. 19.

¹⁶⁴ See Avşar, *Schwarzer Garten*, 2006, p. 137.

¹⁶⁵ Cf. Cornell, *Journal of South Asian and Middle Eastern Studies* vol. 20/no. 4 (1997) 1 et seq.; interview with Armenian President Kotscherian from 10th July 2007., <http://www.spiegel.de/politik/ausland/0,1518,493351,00.html>. Thus even in 2007 the former Defence Minister of Karabakh was appointed the General Chief of Staff of the Armenian Republic.

¹⁶⁶ See Avşar, *Schwarzer Garten*, 2006, p. 137.

¹⁶⁷ See Luchterhandt, *Archiv des Völkerrechts* (vol. 31) 1993, pp. 30, 45; Mammadow/Musayev, *Armjano-Aserbaidischanski Konflikt*, 2006, p. 58.

¹⁶⁸ Cf. Avşar, *Schwarzer Garten*, 2006, p. 137.

¹⁶⁹ Cf. Avşar, *Schwarzer Garten*, 2006, p. 137; Mammadow/Musayev, *Armjano-Aserbaidischanski Konflikt*, 2006, p. 58.

¹⁷⁰ Cf. Mett, *Das Konzept des Selbstbestimmungsrechts der Völker*, 2004, p. 241.

¹⁷¹ Cf. Mett, *Das Konzept des Selbstbestimmungsrechts der Völker*, 2004, p. 241.

clared the unification of the region with the Armenian SSR on 1 December 1989.¹⁷²

In view of the political interconnections and the enforced ideological conformity between the Armenian SSR and the parallel government in Karabakh¹⁷³ it is no surprise that the skirmishes between the Armenian and the Azerbaijan SSR – initially in the form of partisan battles – had intensified in the meantime. The masses previously mobilised in the Armenian SSR and the power of ideology fuelled by national unity inevitably drove Yerevan into a territorial war. However, the political and military course of the Azerbaijani leadership with respect to the Armenian population also contributed considerably to the escalation of the conflict. Baku thereby did not merely rely on a show of military strength against the Armenian militias, but also on an expulsion of the civilian population. Thus in 1991 Azerbaijani troops forced countless Armenians living in the regions to the north of Nagorno-Karabakh to leave their villages, leading to murders, maiming and loss of personal property.¹⁷⁴ Subsequently Azerbaijani refugees were settled there.¹⁷⁵

These Azerbaijani actions then provided sufficient material for Armenian propaganda. Still today the *de facto* leadership in Nagorno-Karabakh cites the events of 1991 in order to underpin the necessity of a breakaway.¹⁷⁶ In doing so it does not mention that the Armenian side itself expelled hundreds of thousands of Azerbaijanis, committed acts of violence and killings.¹⁷⁷

On 30 August 1991 the Azerbaijan SSR declared that it was pursuing the route to independence from the USSR. On 18 October 1991 the Azerbaijani parliament passed a constitutional law on the national independence of Azerbaijan. On 2 September 1991 the non-recognised parallel government of Nagorno-Karabakh, the “National Council”, declared its own republic in Nagorno-Karabakh. Conse-

¹⁷² See Cornell, *The Nagorno-Karabakh Conflict*, report no. 46, Department of East European Studies, 1999, pp. 23 et seq.; de Waal, *Black Garden*, 2003, p. 290.

¹⁷³ The particular strength of the interconnections between the Supreme Soviet of the Armenian SSR and the National Council of Nagorno-Karabakh was evident, for example from the joint session and passing of resolutions on 1 December 1989. The foremost objective was the integration of Nagorno-Karabakh into the Armenian SSR.

¹⁷⁴ For details see: de Waal, *Black Garden*, 2003, pp. 116 et seq., 118 et seq., 120 et seq. According to the Azerbaijani version the Armenian settlers voluntarily left their villages, which is doubtful given the findings of investigations by two human rights groups (Cf. de Waal, *Black Garden*, 2003, p. 121). See also Quiring, *Schwelende Konflikte in der Kaukasus-Region*, APuZ 13 (2009), p. 19.

¹⁷⁵ See de Waal, *Black Garden*, 2003, p. 117.

¹⁷⁶ Cf. explanations of the unofficial Nagorno Karabakh Republic’s office in Washington under http://www.nkrusa.org/nk_conflict/armed_conflict.shtml.

¹⁷⁷ See the detailed report about expulsions and acts of violence against civilians committed on both sides: Human Rights Watch, *Azerbaijan, Seven Years of Conflict in Nagorno-Karabakh*, New York 1994. See also UN ECOSOC doc. E/CN.4/1997/138, annex; UN ECOSOC doc. E/CN.4/1997/139, annex; de Waal, *Black Garden*, 2003; Quiring, *Schwelende Konflikte in der Kaukasus-Region*, APuZ 13 (2009), p. 19.

quently Azerbaijan revoked the autonomous status of Nagorno-Karabakh at the end of November. On 10 December 1991 Karabakh held a referendum in which the majority of Armenians voted for an independent republic. The referendum was boycotted by the Azerbaijanis still living in the region, who were not represented in the National Council.

Two days before, on 8 December 1991, Belarus, Russia and the Ukraine declared that the USSR no longer existed as an entity. In the course of subsequent events various successor countries of the USSR, including Armenia and Azerbaijan, established the CIS with the Declaration of Alma-Ata, including the express undertaking to respect their borders. Finally the USSR was formally dissolved on 26 December 1991. On 6 January 1992 the formerly proclaimed Republic of Nagorno-Karabakh declared its national independence.

6. Post-Soviet era: war, ceasefire and an unresolved conflict

Between 1992 and 1994 Armenia and Azerbaijan openly went to war over Nagorno-Karabakh. Armenia finally forced the Azerbaijani forces beyond today's demarcation line, whereby not only Nagorno-Karabakh, but also the surrounding Azerbaijani districts were occupied. It is unclear whether the Armenian victory was a result of Russian support.¹⁷⁸ At the end of 1992 Russia started to supply Armenia with weapons and fuel.¹⁷⁹ Further, Russian mercenaries and apparently the 366th motorised Russian infantry regiment fought on the Armenian side.¹⁸⁰ The weapons have been silent since May 1994.

In the course of the war further acts of violence were inflicted on the civilian population and mass expulsions took place. One of the worst episodes was the violent attacks on the Azerbaijani civilian population of Khojaly in the region of Nagorno-Karabakh in February 1992.¹⁸¹ Human Rights Watch reported that Armenian troops killed 161 civilians in one night.¹⁸² The Azerbaijani side even spoke of 613 dead.¹⁸³ Other sources specify 476 to 636 dead.¹⁸⁴ Reports by international journalists, film material and the Azerbaijani investigation spoke of corpses, some of which were disfigured beyond recognition, dead women and children and the

¹⁷⁸ Cf. de Waal, *Black Garden*, 2003, pp. 200 et seq.

¹⁷⁹ See report in *Washington Times*, 10 April 1997, "Armenia Armed by Russia for battles with Azerbaijan"; de Waal, *Black Garden*, 2003, pp. 199 et seq.

¹⁸⁰ See de Waal, *Black Garden*, 2003, pp. 200 et seq.; Avşar, *Schwarzer Garten*, 2006, pp. 115, 156; Rau, *Der Berg-Karabach-Konflikt*, 2007, p. 41.

¹⁸¹ For details see: de Waal, *Black Garden*, 2003, pp. 169 et seq.

¹⁸² Cf. report by Human Rights Watch 1993, *The Former Soviet Union*.

¹⁸³ Cf. letter dated 23 April 2002 from the Permanent Mission of Azerbaijan to the United Nations and the Commission on Human Rights, E/CN.4/2002/186.

¹⁸⁴ Cf. de Waal, *Black Garden*, 2003, p. 171; Avşar, *Schwarzer Garten*, 2006, pp. 152 et seq. with further references.

murder of fleeing civilians.¹⁸⁵ By 2007 150 people from Khojaly were still missing.

Overall tens of thousands of people from both ethnic groups are thought to have died during the violent clashes and hundreds of thousands became refugees, some of whom are still living in refugee camps.¹⁸⁶ This is compounded by the apparently systematic destruction of Azerbaijani towns, for example Agdam, by Armenian troops.¹⁸⁷ Finally this is one of the wars of secession of the post-Soviet era to have claimed the greatest number of victims, and which has further triggered the largest movement of refugees since the end of the Second World War.¹⁸⁸

On the territory of the proclaimed Republic of Nagorno-Karabakh an entity has established itself that is not recognised internationally by any state. It is assumed that Armenia is financing a large part of the Karabakh budget.¹⁸⁹ Furthermore, Armenian soldiers are said to be stationed in the trenches of Karabakh.¹⁹⁰ With some 20,000 soldiers Nagorno-Karabakh is one of the most militarised regions in Europe.¹⁹¹ Ever since the expulsions there are next to no Azerbaijanis now living in the region. This also applies to Shusha, Nagorno-Karabakh's second-largest city, which was previously home to a Muslim majority.¹⁹² The Minsk Group, set up under the tutelage of the OSCE, has been seeking a diplomatic resolution to the Karabakh conflict for over ten years. However, Armenia and Azerbaijan have not yet been able to agree a compromise. Officially Armenia merely supports Nagorno-Karabakh's striving for independence. Azerbaijan continues to support the affiliation of the region to its national territory, yet offers Nagorno-Karabakh the greatest possible autonomous status.¹⁹³ The leadership of Nagorno-Karabakh is still attempting to lay the foundations of its national independence. A referendum

¹⁸⁵ Cf. e.g. reports in *The Sunday Times*, 1 und 8 March 1992; *The Boston Globe*, 3 March 1992; *The New York Times*, 3 and 6 March 1992; *The Times*, 2 and 3 March 1992; taz, 7 March 1992; *Frankfurter Rundschau*, 2 March 1992. See also Avşar, *Schwarzer Garten*, 2006, pp. 152 et seq.; de Waal, *Black Garden*, 2003, pp. 169 et seq.

¹⁸⁶ Cf. the observations and findings of the Council of Europe in resolution 1416 (2005) as well as report at *Caucas.com – Europeanews* “Agdam, die Geisterstadt” from 2 November 2004; report of *Deutschlandfunk* “Demokratie im Ausnahmezustand” on 18 July 2007.

¹⁸⁷ See eyewitness account in: de Waal, *Black Garden*, 2003, p. 6. See also Wiedemann/Erich, *Smartes Stück Kolonialismus*, *Der Spiegel*, 18 October 1993, p. 212.

¹⁸⁸ See Dehdashti, *Internationale Organisationen als Vermittler in innerstaatlichen Konflikten*, 2000, p. 15; Avşar, *Schwarzer Garten*, 2006, p. 166.

¹⁸⁹ See below, chapter B section III.

¹⁹⁰ See below, chapter B section II. 2. b) dd) and report of *Deutschlandfunk* “Demokratie im Ausnahmezustand” on 18 July 2007.

¹⁹¹ According to a report of *Deutschlandfunk* “Demokratie im Ausnahmezustand” on 18 July 2007.

¹⁹² According to a report of *Deutschlandfunk* “Demokratie im Ausnahmezustand” on 1 September 2006 in “*Europa Heute*”.

¹⁹³ According to a speech of Azerbaijani President Aliyev on 15 February 2007 in Berlin, Reception of the Konrad-Adenauer-Foundation.

on the first constitution was held in December 2006, but this was not recognised internationally.¹⁹⁴ The same applies to the presidential elections conducted in July 2007.

If no diplomatic or legal resolution to the conflict is reached in the near future, there is a serious risk that new violent struggles for Nagorno-Karabakh may break out. The conflict in Georgia in August 2008 made clear how fragile the status quo in the Caucasian conflict regions is.

New struggles for Nagorno-Karabakh would without doubt have a destabilising effect and be a setback for the entire Caucasus. In light of various resolutions of the UN Security Council and declarations of the Council of Europe and the OSCE, which underline Azerbaijan's claim, the Azerbaijani leadership has made it clear that any further delay is practically impossible.¹⁹⁵ The Armenian leaders also provide sufficient grounds for taking a tougher line. Even in recent years the primary political strategy has consisted of constructing their own form of legal interpretation and vehemently championing it, contrary to the declarations of the international organisations and with the support of individual advocates in Europe.¹⁹⁶ The current strategy goes beyond this and, irrespective of the legal evaluation, is orientated increasingly at proclaiming purely that the process of division is apparently irreversible.¹⁹⁷ The extremely tense situation and the possibility that the legal dimension may lose yet more significance provides sufficient grounds to illustrate in closer detail the legal questions surrounding the separation of Nagorno-Karabakh from Azerbaijan and provide clear answers to them.

III. Analysis under USSR law

Armenia and Nagorno-Karabakh argue that the lawful secession of Nagorno-Karabakh had already been effected under the law of the USSR.¹⁹⁸ They refer especially to the 1990 Soviet Law on Secession. Their argument states that on 2 September 1991 Nagorno-Karabakh declared itself an independent republic, rati-

¹⁹⁴ See Rau, *Der Berg-Karabach-Konflikt*, 2007, p. 50; the report of Deutsche Welle from 14 December 2006 "Berg-Karabach gibt sich Verfassung", <http://www.deutsche-welle.de/dw/article/0,2144,2272756,00.html>.

¹⁹⁵ According to a speech of Azerbaijani President Aliyev on 15 February 2007 in Berlin, Reception of the Konrad-Adenauer-Foundation.

¹⁹⁶ Like Asenbauer, in: *Zum Selbstbestimmungsrecht des armenischen Volkes von Berg-Karabach* and Luchterhandt, who summarises Nagorno-Karabakh as "the Armenians' pride and glory"; cf. Luchterhandt, lecture at the American University of Armenia on 24 March 1999, <http://www.deutsch-armenische-gesellschaft.de/dag/vorr.htm>.

¹⁹⁷ According to an interview with Armenian President Kotscherian on 10 July 2007, <http://www.spiegel.de/politik/ausland/0,1518,493351,00.html>.

¹⁹⁸ Cf. note verbale dated 21 March 2005 from the Permanent Mission of Armenia to the United Nations Office at Geneva and the UN High Commissioner for Human Rights, E/CN.4/2005/G/23, pp. 7 et seq.

fied this in a referendum and thereby satisfied the requirements of the Law on Secession. Azerbaijan rejects the Armenian view, on the grounds that Nagorno-Karabakh did not fulfil the necessary requirements of the Law on Secession.

In fact, the question must be raised whether the superpower USSR really intended territorial questions of utmost political and strategic significance to be resolved solely through a self-organized referendum, when facing its dissolution.¹⁹⁹ History paints a different picture. In 1990, when the Law on Secession was passed, the Soviet government under Gorbachev did everything in its power to prevent the splintering and collapse of the Soviet Union.

In any case, Soviet secession law and both viewpoints shall be analysed here in more detail (see parts 3 and 4). But we first need to clarify how long Soviet secession law had been valid in the territory of the former Azerbaijan SSR (see part 1) and what the territorial status of Nagorno-Karabakh was at the time (see part 2).

1. Validity of the law of the USSR

Theoretically a secession of Nagorno-Karabakh under USSR law may have occurred up to the point when the Soviet secession law lost its validity. The Azerbaijani Constitutional Law of 18 October 1991 illustrated that, although Soviet law initially continued to apply after the foundation of the Republic of Azerbaijan (Art. 4), this should not have affected the territorial integrity of Azerbaijan (Art. 14 para. 1). Thus the secession law of the USSR containing a possible right to secession of autonomous regions should no longer be applicable after the point of Azerbaijan's independence. However, this was a declaratory statement of the law since independence only made sense if it caused any laws that would have restricted the independence of Azerbaijan to lose their validity.

The decisive point for the invalidity of the Soviet secession law thus is the date of the foundation of the sovereign Republic of Azerbaijan. Various dates come into question: the day of the initiation of the independence process (30 August 1991), the day on which the Azerbaijani Constitutional Law was passed (18 October 1991) and the day on which the Supreme Soviet of the USSR recognised the dissolution of the Soviet Union (26 December 1991).

There are convincing arguments in favour of the day on which the Constitutional Law of the Republic of Azerbaijan was passed, 18 October 1991. The initial purpose of the declaration on the reinstatement of national independence of 30 August 1991 was simply to get the formal secession process going. In August 1991 the Azerbaijan SSR still regarded itself as an integral component of the USSR. By contrast, the enactment of the Constitutional Law on 18 October 1991 now expressed the desire to secede from the USSR. By virtue of a constitution of its own, the former union republic was to be transformed into an independent state.

¹⁹⁹ See also Portier, *Conflict in Nagorno-Karabakh*, 2001, p. 41.

According to the view held here this formal act of founding a state was also covered by Soviet law and international law. As shall be set out in more detail below, Art. 72 of the Constitution of the USSR provided for a right to secession for the union republics.²⁰⁰ It was expressly named a *free* right to secession and was constitutionally not tied to any substantial restrictions.²⁰¹ In any case in 1990 the Gorbachev administration was still attempting to direct any exercise of the right to secession under a special Law on Secession.²⁰² But this law did not provide the only means to exercise the right to secession,²⁰³ due to serious doubts about its constitutionality.²⁰⁴ At least the Law on Secession was not applied in practice; none of the union republics made recourse to it when moving towards independence.²⁰⁵ The Congress of People's Deputies of the USSR finally recognised this practice.²⁰⁶ From this point of view, the Azerbaijan SSR, like the other Soviet republics, exercised its constitutional right to secession in an effective manner.

Apart from this, on 18 October 1991 Azerbaijan fulfilled the requirements for independence under international law. At first an international right to secession for Azerbaijan might be considered due to the de facto annexation of Azerbaijan by Russian Bolsheviks in 1920. But unlike the de facto annexation of the Baltic states, international law did not provide for such a right to secession in 1920, since the prohibition on war of aggression and thus the unlawfulness of violent annexation did not apply to Russia until 1929.²⁰⁷

But in spite of this, the Republic of Azerbaijan fulfilled all requirements necessary for its creation of statehood and independence in October 1991. In accordance with the doctrine of statehood under international law and corresponding state practice, an independent state is primarily characterised by a permanent population, a defined territory and the existence of its own effective state authority or government.²⁰⁸ In the context of the Republic of Azerbaijan at the end of 1991, there may at most be doubts with respect to the establishment of its own sovereign state authority. Although the Constitution of the USSR vested in the Azerbaijan

²⁰⁰ See below, section III. 3. and 4. b) aa).

²⁰¹ In accordance with Soviet legal experts in: Kudrjawzew, *Verfassung der UdSSR – Erläuterungen zur Verfassung der UdSSR*, 1980, p. 172.

²⁰² See report by Institut für Ostrecht, *Recht in Ost und West* 1989, pp. 198, 199.

²⁰³ See below, section III. 4. b) aa).

²⁰⁴ See below, section III. 4. a) aa).

²⁰⁵ Cf. Mammadow/Musayev, *Armjano-Aserbajdschanski Konflikt*, 2006, p. 63.

²⁰⁶ Thus in September 1991 the Congress of People's Deputies accepted declarations of sovereignty and independence of union republics. None was based on the Law on Secession. Cf. resolution of the Extraordinary Congress of the Soviet People's Deputies of 5 September 1991 on the reform of state and economy in: *Europa-Archiv*, vol. 46/2 (1991), *Dokumente*, pp. 523 et seq.; see also Mett, *Das Konzept des Selbstbestimmungsrechts der Völker*, 2004, p. 234.

²⁰⁷ The Briand-Kellogg Pact was relevant in this regard and applied to Russia from 1929.

²⁰⁸ See Shaw, *International Law*, 2003, pp. 177 et seq; Epping, in: Ipsen, *Völkerrecht*, 2004, pp. 59 et seq; Hobe/ Kimminich, *Einführung in das Völkerrecht*, 2004, pp. 67 et seq.

SSR the status of a sovereign Soviet state (Art. 76 of the 1977 Constitution of the USSR), granted the necessary state administrative structures and responsibilities of its own to enter into international agreements (Art. 80 of the Constitution of the USSR), it was, however, to a considerable extent dependent on Moscow for decision-making.²⁰⁹ The Azerbaijan SSR and the other union republics reconciled this deficiency in qualitative statehood at the time of their permanent and final split from the USSR.²¹⁰ In contrast to the period of the secession of the Baltic states, the USSR could finally not counter a secession of the Azerbaijan SSR in the second half of 1991. Unlike the breakaway movements in Abkhazia, South Ossetia or Nagorno-Karabakh, the union republics could not be accused of an unlawful secession due to their right to secession under Art. 72 of the Constitution of the USSR.

If this view is not upheld, then the foundation of the Republic of Azerbaijan must be dated at the point of the dissolution of the USSR on 26 December 1991. This means that, depending on one's point of view, the Soviet secession law no longer applied to the territory of the former Azerbaijan SSR after 18 October or 26 December 1991. Soviet law thus applies to the decisions of Nagorno-Karabakh to accede to the Armenian SSR of July 1988 and December 1989 (albeit the 1990 Law on Secession did not yet apply) and the decision of September 1991 to found its own union republic. This does not take in Nagorno-Karabakh's declaration of independence of January 1992, itself the object of investigation from an international law perspective.²¹¹

2. Territorial status of Nagorno-Karabakh

As follows from points 3 and 4 below, the secession options for a specific region under Soviet law depended on its territorial status. This aspect shall be considered more closely before we review the secession options that were open to Nagorno-Karabakh.

The 1977 Constitution of the USSR structured the Soviet Union into various units horizontally and vertically. The supreme territorial unit was the USSR, followed by the union republics which themselves decided the further subdivisions into regions, territories etc. In view of the fact that many union republics were not ethnically homogenous entities, the Constitution introduced different forms of regional autonomies: autonomous republics, autonomous regions and autonomous areas.

Under Art. 87 para. 3 of the 1977 Constitution of the USSR Nagorno-Karabakh had the status of an autonomous region within the Azerbaijan SSR. The autonomy

²⁰⁹ From the perspective of international law, the Azerbaijan SSR therefore could not be considered as a state. See also Dehdashti, *Internationale Organisationen als Vermittler in innerstaatlichen Konflikten*, 2000, p. 29.

²¹⁰ See also Kohen, in: Kohen (ed.), *Secession, International Law Perspectives*, 2006, p. 11, with regard to cases, in which domestic law provides a right to secession.

²¹¹ See below, section IV.

was largely understood to be a cultural autonomy, that is, it related in particular to a people's use of its own language and the development of its own culture.²¹² Laws were proposed by the Regional Soviet but had to be passed by Baku. Nagorno-Karabakh sent a deputy to the Supreme Soviet of the Azerbaijan SSR, which had legislative authority.²¹³ Nagorno-Karabakh thus lacked the elementary qualities of Soviet-style statehood, as they were characteristic of the union republics.²¹⁴ The region was integrated into the state structure of the Azerbaijan SSR and was thus largely dependent on its decisions not only de facto, but also in terms of constitutional law.²¹⁵

3. Secession of Nagorno-Karabakh under the 1977 Constitution of the USSR?

What remains to be examined is whether Nagorno-Karabakh as an autonomous region of the Azerbaijan SSR was entitled to its own right to secession under Soviet law and, if such right existed, whether Nagorno-Karabakh effectively exercised it before 18 October 1991 or 26 December 1991. Let us first turn in more detail to the 1977 Constitution of the USSR and the options for secession provided under it.

The 1977 Constitution of the USSR dealt with secession options and territorial alterations in the context of the territories of the union republics in two places. Art. 72 provided that each union republic retained the right to freely secede from the USSR. There is no doubt that Nagorno-Karabakh as an autonomous region could not have recourse to this right, to which the Azerbaijan SSR was solely entitled.²¹⁶ Given the structure of the USSR, there is also no room for an analogous application of this article in favour of the autonomous regions. The USSR was conceived as a federation of sovereign Soviet states.²¹⁷ Under Soviet ideology, the Soviet states were necessarily entitled to a free right to secession since a voluntary fusing of the peoples was intended to give rise to an all-encompassing socialist society.²¹⁸ The autonomous regions, in contrast, were assigned and subordinate to the control

²¹² See Uibopuu, in: Finke (ed.), *Handbuch der Sowjetverfassung*, vol. 2, art. 86, note 8; Dehdashti, *Internationale Organisationen als Vermittler in innerstaatlichen Konflikten*, 2000, pp. 31 et seq.; Gärtner, *Recht in Ost und West* 1990, pp. 228, 233.

²¹³ See Arnold, *Die Rechtsstellung der nationalen Gebietseinheiten der Sowjetunion*, 1993, pp. 104 et seq.; Gärtner, *Recht in Ost und West* 1990, pp. 228, 233.

²¹⁴ Cf. also Uibopuu, in: Finke (ed.), *Handbuch der Sowjetverfassung*, vol. 2, 1983, art. 86, note 8.

²¹⁵ Cf. also Feldbrugge, *Russian Law: The End of the Soviet System and the Role of Law*, 1993, pp. 123 et seq.

²¹⁶ In accordance with: Cornell, *Journal of South Asian and Middle Eastern Studies* vol. 20/no. 4 (1997) 1 et seqq.

²¹⁷ According to Arts. 70 and 76 of the Constitution of the USSR.

²¹⁸ Cf. Dehdashti, *Internationale Organisationen als Vermittler in innerstaatlichen Konflikten*, 2000, pp. 26 et seq.

of the individual Soviet states, that is, the union republics. According to Art. 86 of the Constitution they were their constituent part and correspondingly should not be the beneficiaries of their individual constitutional right to secession.

Further options for territorial alterations were provided for by Article 78. Art. 78 sentence 1 illustrated that territorial restructuring and subdivisions affecting the union republics were conceivable. This also included a potential secession of Nagorno-Karabakh from the Azerbaijan SSR. However, Art. 78 sentence 1 spelt out the inference drawn from the ideological conception of the USSR as well as Art. 86 sentence 1: the territory of a union republic could not be altered without its consent. This was a clear constitutional prohibition that had to be observed in the absence of an amendment to the Constitution and that, in accordance with Art. 173, could not be revoked by an ordinary, non-constitutional Soviet law.²¹⁹ In light of the Azerbaijan SSR's consistent approach of refusing any territorial alteration, the secession of Nagorno-Karabakh could not have been legally successful on this basis.²²⁰

Art. 78 sentence 2 governed the case of altering the borders between the individual union republics. On this basis Nagorno-Karabakh could have been incorporated into the Armenian SSR. In such a case, Art. 78 sentence 2 would have required a mutual agreement between the Armenian and Azerbaijan SSRs. Furthermore, Moscow would have had to ratify the alteration of borders. Such an agreement was not reached. Although the Regional Soviet of Nagorno-Karabakh was campaigning in 1988 for the region to be transferred to the Armenian SSR²²¹, this was rejected by the Supreme Soviet of the Azerbaijan SSR, the Supreme Soviet of the USSR and the Central Committee of the CPSU. Thus the request legally failed. As described above, the Regional Soviet of Nagorno-Karabakh nonetheless decided to cede Nagorno-Karabakh to the Armenian SSR in July 1988. The decision clearly violated the Constitution of the USSR and also the Azerbaijani Autonomy Law for Nagorno-Karabakh and as such had no legally binding effect. It must be assumed that this resolution of the then leadership of Nagorno-Karabakh challenged the intervention of Moscow and Baku and in doing so contributed decisively to the escalation of the conflict in the subsequent period.

Under Art. 78 sentence 2 of the Constitution, the joint decision of the Supreme Soviet of the Armenian SSR and the non-recognised National Council of Nagorno-Karabakh of 1 December 1989 also had no legal effect. Although it was intended to integrate Nagorno-Karabakh into the Armenian SSR,²²² neither Baku nor Moscow agreed.

²¹⁹ See below, section III. 4. a) bb).

²²⁰ Correspondingly correct: Mammadov/Musayev, *Armjano-Aserbajdschanski Konflikt*, 2006, pp. 55 et seq.

²²¹ See also de Waal, *Black Garden*, 2003, p. 10; Cornell, *Journal of South Asian and Middle Eastern Studies* vol. 20/no. 4 (1997) 1 et seq.

²²² See Cornell, *Journal of South Asian and Middle Eastern Studies* vol. 20/no. 4 (1997) 1 et seq; de Waal, *Black Garden*, 2003, p. 290.

In conclusion it should be noted that the 1977 Constitution of the USSR did not grant Nagorno-Karabakh a right to secession that it could have successfully exercised.²²³ Territorial alterations were solely in the hands of the union republics or the USSR, which, however, upheld the status quo of Nagorno-Karabakh. Now, the question needs to be answered whether Nagorno-Karabakh was entitled to a right to secession under non-constitutional law.

4. The secession of Nagorno-Karabakh under the 1990 Law on Secession of the USSR?

The sole non-constitutional provision from which a right to secession of Nagorno-Karabakh could have been derived is Art. 3 para. 1 sentence 2 of the 1990 Law on Secession of the USSR. The key questions are whether Art. 3 did in fact provide a right to secession for Nagorno-Karabakh (see part a) and, if so, whether Nagorno-Karabakh effectively exercised it during the period in which the Law on Secession applied (see part b).

a) Right to secession under Art. 3 para. 1 sentence 2 of the 1990 Law on Secession of the USSR

In view of the vehement attempts of the Baltic states to break away from the USSR and the danger of further union republics splintering, the Gorbachev administration passed a number of laws in 1990 in order to reorganise and shore up the territorial structure of the USSR.²²⁴ The Law on Secession was one of these laws.²²⁵ As its subtitle (“Law concerning the procedure of secession of a Soviet Republic from the Union of Soviet Socialist Republics”) and its section 1 suggest, it dealt with the breaking away of the union republics from the Soviet Union. In the event that a union republic followed a secession procedure, Art. 3 para. 1 sentence 2 of the Law on Secession provided that any autonomous regions, such as Nagorno-Karabakh, should decide on their own whether they want to remain in the breakaway union republic or in the federation of the USSR and which legal status they should adopt.

²²³ In accordance with: Cornell, *Journal of South Asian and Middle Eastern Studies* vol. 20/no. 4 (1997) 1 et seq.

²²⁴ For instance, the Law of 26 April 1990, “On the delimitation of powers between the USSR and the subjects of the federation”; see in this regard also Feldbrugge, *Russian Law: The End of the Soviet System and the Role of Law*, 1993, p. 129.

²²⁵ For a short survey of the secession law 1990 in German see: Institut für Ostrecht, *Recht in Ost und West* 1990, p. 199.

According to the Armenian view, Nagorno-Karabakh is said to have been correspondingly entitled to a right to secession, as, after all, the Azerbaijani SSR had broken away from the USSR.²²⁶ The Azerbaijani side rejects this approach.

aa) Constitutionality of Art. 3 para. 1 sentence 2 of the Law on Secession

Let us start by looking more closely at the issue of constitutional conformity of Art. 3 para. 1 sentence 2 of the Law on Secession and an independent right to secession of Nagorno-Karabakh. According to Art. 173 of the Constitution the constitutionality of acts was of utmost importance. There appear to be contradictions to the Constitution of the USSR in two respects.

Firstly, Art. 78 of the Constitution stated that the territory of a union republic may not be altered without its consent. The secession of an autonomous region under Art. 3 para. 1 sentence 2 of the Law on Secession would have represented such territorial alteration and thus would have required the consent of the affected union republic. Correspondingly an autonomous right to secession of Nagorno-Karabakh under Art. 3 para. 1 sentence 2 of the Law on Secession independent of the Azerbaijan SSR would clearly have violated Art. 78 of the Constitution.

Secondly, Art. 72 of the Constitution of the USSR expressly provided that the union republics retained the right to secede *freely* from the USSR. Despite the fact that prior to 1989 the exercise of the right to secession was inconceivable for ideological reasons and would have been blocked politically,²²⁷ the Soviet leadership constantly underlined its significance and defended its establishment in law.²²⁸ Legally the USSR was expressly founded as a voluntary union of sovereign states, the union republics (Art. 70 and 76 of the Constitution of the USSR).²²⁹ The voluntary fusion of the various peoples formed the foundation for an all-encompassing socialist society.²³⁰ Correspondingly, there was no doubt from the point of view of Soviet legal scholars that the right to secession in Art. 72 had real force of law²³¹ and was indeed *freely* granted,²³² meaning at least without imposing

²²⁶ Cf. note verbale dated 21 March 2005 from the Permanent Mission of Armenia to the United Nations Office at Geneva and the UN High Commissioner for Human Rights, E/CN.4/2005/G/23, pp. 7 et seq.

²²⁷ Similarly: Welhengama, Minorities' claims: from autonomy to secession, 2000, p. 310.

²²⁸ See Uibopuu, in: Finke (ed.), Handbuch der Sowjetverfassung, vol. 2, 1983, art. 72, note 6.

²²⁹ Regarding the political reality, this was scarcely imaginable. Cf. Feldbrugge, Russian Law: The End of the Soviet System and the Role of Law, 1993, p. 123; Mett, Das Konzept des Selbstbestimmungsrechts der Völker, 2004, p. 226. Concerning the sovereignty of the union republics, see also Dehdashti, Internationale Organisationen als Vermittler in innerstaatlichen Konflikten, 2000, p. 29.

²³⁰ See Dehdashti, Internationale Organisationen als Vermittler in innerstaatlichen Konflikten, 2000, pp. 26 et seq.

²³¹ See Uibopuu, in: Finke (ed.), Handbuch der Sowjetverfassung, vol. 2, 1983, art. 72, note 8 with further references.

any substantial conditions. The right to secession of an autonomous region provided for in Art. 3 para. 1 sentence 2 of the Law on Secession, however, clearly presented a hurdle and a serious consequence. This was not compliant with the free and unconditional right to secession granted to the union republic.

Of course, when interpreting the constitutional pillars of the USSR, its common and union-wide ideology must be considered. After all, it was this ideology that underpinned the Constitution and found its expression, for example in Art. 70. Despite the proclaimed voluntary nature of membership of the Union, the USSR represented an ideologically solid and integrated state entity. The right to secession of the union republics and the common ideology were thus in a state of conflict. This conflict was politically dissolved by 1990/1991 in that the secession of a union republic was de facto ruled out.²³³ But this had no effect on the legal validity of the right to secession vested in Art. 72 of the Constitution of the USSR.²³⁴ As shown Soviet scholars also confirmed its validity. Legally the conflict persisted and, given the express constitutional provisions, could not be substantially resolved to the disadvantage of the union republics' right to secession. In formal legal terms, the only conceivable option would have been to channel the exercise of the free right to secession into a specific procedure protecting the integrity of the USSR as far as possible by implementing adjustment measures. But under Art. 72 of the Constitution such a procedure must not have established any substantial hurdles and conditions.

The 1990 Law on Secession finally installed a procedure that regulated a process for the exercise of the right to secession pursuant to Art. 72. However, as is shown below,²³⁵ the Law on Secession provided for such a complex, cumbersome and disadvantageous procedure which would not only have a successful secession delayed for years but could even have made it impossible. Kohen and Cassese therefore take the view that the Law on Secession was one of the final acts with which Gorbachev attempted to prevent the foreseeable premature dissolution of the USSR.²³⁶ One of the serious consequences that the Law on Secession provided for a union republic willing to secede, was to grant a right to secession to autonomous regions under Art. 3 para. 1 sentence 2 of the Law on Secession. Under constitutional law, these regions were constituent parts of the union republics (Art. 86 of the Constitution of the USSR). A secession on their own would thus have led to the splintering and downsizing of assured union territories as well as serious eco-

²³² Cf. Kudrjawzew, *Verfassung der UdSSR – Erläuterungen zur Verfassung der UdSSR*, 1980, p. 172.

²³³ Cf. also Feldbrugge, *Russian Law: The End of the Soviet System and the Role of Law*, 1993, p. 127.

²³⁴ Correspondingly the prevailing Soviet opinion recognised the right to secession of the union republics as real and guaranteed. Cf. Uibopuu, in: Finke (ed.), *Handbuch der Sowjetverfassung*, vol. 2, 1983, art. 72, note 8 with further references.

²³⁵ See below, section III. 4. b).

²³⁶ Cf. Kohen, in: Kohen (ed.), *Secession, International Law Perspectives*, 2006, p. 16; Cassese, *Self-Determination of Peoples: Legal Reappraisal*, 1995, pp. 264 et seq.

conomic and geo-strategic damage. Additionally, it would have posed the risk of ethnic, political and military conflicts, which was indeed tragically confirmed. The right to secession for autonomous regions under Art. 3 para. 1 sentence 2 of the Law on Secession thus constituted an extraordinary condition and substantial restriction of Arts. 72 and 78 and ultimately also of Art. 86 of the Constitution of the USSR. Accordingly it could not be compliant with the Soviet Constitution.

bb) Validity and interpretation of Art. 3 para. 1 sentence 2 of the Law on Secession

But what did the unconstitutionality of Art. 3 para. 1 and 2 of the Law on Secession mean? Did this rule of law become void or was it valid and applicable nonetheless? Let us first rehearse the legal and political circumstances which have to be considered when answering these questions.

As is known, in the transitional years of 1989-1991 events came thick and fast, not only in Nagorno-Karabakh but across the whole territory of the USSR. Faced with the secessionist movements in the Baltic states and Moldova and the territorial disputes in the Georgian and Azerbaijan SSRs, Moscow saw itself forced to build not only the political system, but also the federal structure of the USSR on a new foundation. In political and legal terms a reform of the federal system would have required a revision of the 1922 Treaty of Union on which the Constitution of the USSR was based.²³⁷ A comprehensive amendment of the Soviet Constitution would have been necessary in any case since the federal structure was determined within it (c.f. Arts. 70-88 of the 1977 Constitution of the USSR). Gorbachev in fact had initiated numerous constitutional amendments, but these mainly concerned the restructuring and reinforcement of the central Moscow state organs.²³⁸ In contrast, the federal structure was to be realigned from above with ordinary, non-constitutional union laws,²³⁹ which included the Law on Secession. In this context Feldbrugge also questions the constitutionality of another law, the 1990 Law "On the delimitation of powers between the USSR and the subjects of the federation".²⁴⁰

Even the supporting pillars of the USSR, the Russian and Ukrainian SSR, opposed this centralist course. Gorbachev subsequently relinquished further attempts to change the federal structure from above in June 1990.²⁴¹ He then entered into

²³⁷ In accordance with: Feldbrugge, *Russian Law: The End of the Soviet System and the Role of Law*, 1993, p. 129. In the context of the Treaty of Union see also Mett, *Das Konzept des Selbstbestimmungsrechts der Völker*, 2004, pp. 218 et seq., 226 and 228 et seq.

²³⁸ See Meissner, *Berichte des Bundesinstituts für ostwissenschaftliche und internationale Studien*, no. 34/1991.

²³⁹ See Meissner, *Recht in Ost und West 1989*, p. 385; Mett, *Das Konzept des Selbstbestimmungsrechts der Völker*, 2004, p. 229.

²⁴⁰ Cf. Feldbrugge, *Russian Law: The End of the Soviet System and the Role of Law*, 1993, p. 129.

²⁴¹ Cf. Mett, *Das Konzept des Selbstbestimmungsrechts der Völker*, 2004, p. 229.

negotiations on a renewal of the Treaty of Union. But a revision of the Treaty of Union never came to pass. Instead, the union republics expressly opposed the new federal order planned by Moscow. Faced with the eroded power structures in Moscow, they wanted to pursue independence. Instead of revising the Treaty of Union of 1922, they de facto dissolved the USSR and created a completely separate organisational form, the CIS. The consequence was that any amendments to the Constitution that would have been necessary, due to laws intended to restructure the federal order, have never been drafted.²⁴² By the same token, these laws were never repealed by the Moscow central government which was fighting for its power. Their validity and interpretation against the backdrop of any constitutional violations thus remained completely unclear. This applies also to the Law on Secession.

Now, the critical question is whether unconstitutional laws or rules were invalid *per se* or whether they required an additional act of revocation. This question could not be definitively answered, at least from the point of view of the original 1977 Constitution. The background was that for decades constitutional reality in the USSR had taken a backseat to dominant political reality. The state order was primarily orientated towards the will of the Communist Party and not the regime of constitutional law.²⁴³ In accordance with the 1936 and 1977 Constitutions of the USSR, judicial review was vested in the Presidium of the Supreme Soviet of the USSR and thus attained little practical significance.²⁴⁴

Purely theoretically the invalidity of unconstitutional laws could already have been concluded from the hierarchy of rules determined in Art. 173 of the 1977 Constitution of the USSR. This was also suggested by Soviet commentators at the time. According to this view, laws that violated the constitution were invalid and should be revoked.²⁴⁵ During the Gorbachev era, however, several amendments to the Constitution and non-constitutional regulations were enacted with respect to the evaluation of the constitutionality of laws. The alteration of Arts. 124 and 125 of the 1977 Constitution of the USSR revitalised judicial review and assigned it to a special Constitutional Supervision Committee of the USSR. The corresponding law which was enacted to implement the alteration (Constitutional Control Act 1989) said that the “Constitutional Supervision Committee” is entitled only to perform supervisory functions. Where the Committee deemed a union law to be un-

²⁴² Despite the fact that amendments to the constitution in the Soviet Union had a different status than in western legal systems and were made also as a purely retrospective formality (see Finke (ed.), *Handbuch der Sowjetverfassung*, vol. 2, 1983, art. 174, note 5), they were legally cogent. If no amendments were made, laws had to comply with the unamended constitution. Art. 173 of the 1977 Constitution of the USSR assigned top priority to the constitutional standards in the hierarchy of rules with which all subordinate laws had to comply.

²⁴³ Cf. Wieser, *Recht in Ost und West* 1991, pp. 372, 373.

²⁴⁴ Cf. Wieser, *Recht in Ost und West* 1991, p. 372; Reinhardt, *Recht in Ost und West* 1990, pp. 298, 299.

²⁴⁵ Cf. Kudrjawzew, *Verfassung der UdSSR – Erläuterungen zur Verfassung der UdSSR*, 1980, p. 14.

constitutional, its opinion could neither suspend nor overrule or revoke the law.²⁴⁶ This illustrated firstly that the USSR had not further approached a true division of powers by setting up the Constitutional Supervision Committee. Secondly it became clear that a union law regarded to be unconstitutional should remain in force and not be deemed invalid *per se*. The final decision could be made only by the Congress of People's Deputies, which could have remedied a violation of the constitution.²⁴⁷

In terms of the Karabakh conflict this means that Art. 3 para. 1 sentence 2 of the Law on Secession, despite the doubts about its constitutionality, continued to be valid. Nonetheless, this does not mean that the higher-ranking constitutional standards of Arts. 72, 78 and 86 of the Constitution should not have been considered. Art. 173 of the 1977 Constitution of the USSR specified that laws shall be promulgated on the basis of and in conformity with the Constitution. To this extent, allowance had to be made for the constitutional provisions, at least in the interpretation of the non-constitutional laws, such as the Law on Secession, as far as this was permitted by their formulation. The subsequent analysis has to take this into consideration.

b) Exercise of the right to secession under Art. 3 para. 1 sentence 2 of the 1990 Law on Secession of the USSR

Taking this into account, it can be assumed that the Law on Secession was valid in full. This leads to the question whether Nagorno-Karabakh could actually invoke Art. 3 para. 1 sentence 2 of the Law on Secession. Under closer scrutiny the Law on Secession attached a large number of conditions to the secession of a union republic, and consequently also to that of an autonomous region.

The background to this, as already implied, was the obvious anxiety of the Gorbachev administration that the Soviet empire would break up in the wake of the emergent national movements in the union republics and their subdivisions, which ultimately indeed came to pass. It is supposed that Gorbachev's aim with the Law on Secession, therefore, was not to initiate the dissolution of the USSR, but to ensure its eroding power, to re-strengthen the union or at least hold up the separation process for as long as possible.²⁴⁸ To reduce the pressure for secession at the time, the Law on Secession initially did in fact promise the prospect of secession to the union republics. However, it was connected with cumbersome,

²⁴⁶ See Reinhardt, *Recht in Ost und West* 1990, pp. 298, 300; Paetzold, *Recht in Ost und West* 1989, pp. 38, 41.

²⁴⁷ See Reinhardt, *Recht in Ost und West* 1990, pp. 298, 300; Paetzold, *Recht in Ost und West* 1989, pp. 38, 41; Institut für Ostrecht, *Ost und West* 1990, p. 118.

²⁴⁸ Cf. Kohen, in: Kohen (ed.), *Secession, International Law Perspectives*, 2006, p. 16; Hannum (ed.), *Documents on Autonomy and Minority Rights*, 1993, p. 742; Cassese, *Self-Determination of Peoples: Legal Reappraisal*, 1995, pp. 264 et seq.; Portier, *Conflict in Nagorno-Karabakh*, 2001, p. 41.

highly formal and time-related conditions and possible territorial consequences.²⁴⁹ Gorbachev thus de facto blocked the route via the Law on Secession and even encouraged the secessionist forces in the individual regions.²⁵⁰ The conditions of the Law on Secession were not acceptable to the union republics and appeared to jeopardise their attempts to gain independence. Correspondingly no union republic selected the route presented by Gorbachev.²⁵¹ Instead they took the bull by the horns and broke away from Moscow in view of their right to secession provided in Art. 72 of the Constitution.

Let us now examine in more detail the requirements that the Law on Secession would have imposed for a secession of Nagorno-Karabakh. Luchterhandt refers in this context mainly to the issue of referendum.²⁵² But as will be shown, the procedure was much more complex.

aa) Secession procedure of the Azerbaijan SSR under the Law on Secession

The Law on Secession dealt primarily with the secession of a union republic from the USSR and, in this context, also regulated the issue of what should happen to the autonomous regions. The subtitle of the law and its Art. 1 leave no doubts about this. It is therefore correct to assume that the possibility provided for in Art. 3 para. 1 sentence 2 of the Law on Secession for an autonomous region to decide its own fate was coupled with a corresponding secession procedure of the Azerbaijan SSR, which was a procedure under the Law on Secession.²⁵³ Such procedure was officially performed neither by the Azerbaijan SSR nor any other union republic.²⁵⁴ Insofar, Art. 3 para. 1 sentence 2 of the Law on Secession would have had no bearing.²⁵⁵

But were the Armenians of Nagorno-Karabakh in a position to claim that the Azerbaijan SSR had not based its own secession from the USSR on the Law on Secession, or that it had breached this Law? Could a right to secession have arisen for Nagorno-Karabakh in these circumstances? The due outcome is to reject this claim. According to Article 72 of the Soviet constitution of 1977, the union republics possessed a free and as such unconditional right to secession.²⁵⁶ Accordingly

²⁴⁹ In accordance with: Hannum (ed.), Documents on Autonomy and Minority Rights, 1993, p. 742; Cassese, Self-Determination of Peoples: Legal Reappraisal, 1995, pp. 264 et seq.

²⁵⁰ See also Mullerson, International Law, Rights and Politics, 1994, p. 75.

²⁵¹ See also Hannum (ed.), Documents on Autonomy and Minority Rights, 1993, p. 742.

²⁵² Cf. Luchterhandt, lecture at the American University of Armenia on 24 March 1999, <http://www.deutsch-armenische-gesellschaft.de/dag/vorr.htm>.

²⁵³ Insofar the Azerbaijan view is correct at this point. Cf. Musayev, Legal Aspects of the Nagorno-Karabakh Conflict, http://www.mfa.gov.az/eng/armenian_aggression/legal/index.shtml.

²⁵⁴ Cf. also Mammadov/Musayev, Armjano-Aserbajdschanski Konflikt, 2006, p. 63.

²⁵⁵ In accordance with: Portier, Conflict in Nagorno-Karabakh, 2001, p. 41.

²⁵⁶ See above, section III. 1., 4. a) aa).

some general doubt arises as to whether the unwieldy procedure of the Law on Secession was the only way to exercise this right to secession. Ultimately even the Soviet Congress of People's Deputies, the highest Soviet legislative organ, accepted the declarations of independence of various union republics, although they did not take the route provided for by the Law on Secession.²⁵⁷

But even if the assumption holds that the Azerbaijan SSR was bound to the Law on Secession and that it breached this Law, no right to secession for Nagorno-Karabakh could be derived from this. The Law on Secession merely defined procedural steps which, if followed through, would have entailed an effective secession. At the same time this means that a substantive breach of the Law on Secession by the Azerbaijan SSR would at most have led to a situation where it was not able to effectively secede from the USSR. The Azerbaijan SSR would not then have become independent until December 1991 when the USSR was dissolved. Nagorno-Karabakh could not have accrued any benefit from this. According to the *uti possidetis* principle of international law, Nagorno-Karabakh would still have become a constituent part of the Republic of Azerbaijan under these terms.

As a result it is certain that Art. 3 para. 1 sentence 2 of the Law on Secession did not apply and did not grant Nagorno-Karabakh any right to secession. Nonetheless the Armenian side vehemently invokes Art. 3 para. 1 sentence 2 of the Law on Secession. In order to obtain a more comprehensive picture of the secession procedure provided for against this backdrop, the further conditions stipulated by the Law on Secession for a successful separation should at least be subject to hypothetical scrutiny. However this is no longer able to have any influence on the conclusion at hand.

bb) Formal initiation of the secession procedure under the Law on Secession

As follows from Art. 2 para. 2 and Art. 4 of the Law on Secession, various procedural steps should have been performed before the referendum was held in Nagorno-Karabakh.²⁵⁸ They represented mandatory requirements for an effective secession.

Thus, Art. 2 para. 2 of the Law on Secession required that the Supreme Soviet of the union republic or 10% of the electorate in the union republic make a formal application for the referendum. The Supreme Soviet of the union republic further had to approve such a referendum. These requirements for the participation of the union republic represented real preconditions for the effectiveness of the secession procedure. This arises not only from the interpretation of the Law on Secession itself, but in particular also from Arts. 78 and 86 of the 1977 Constitution of the USSR, which had to be taken into consideration given the doubts about the consti-

²⁵⁷ Cf. Resolution of the Extraordinary Congress of the Soviet People's Deputies of 5 September 1991 on the reform of state and economy in: Europa-Archiv, vol. 46/2 (1991), Dokumente, pp. 523 et seq. See also Mett, *Das Konzept des Selbstbestimmungsrechts der Völker*, 2004, p. 234.

²⁵⁸ Cf. also Bericht Institut für Ostrecht, *Recht in Ost und West* 1990, p. 199.

tutionality of the Law on Secession.²⁵⁹ As we have seen, Art. 78 of the Constitution prohibits any alteration of the territory of a union republic without its consent. Alongside this, Art. 86 of the Constitution stipulated that autonomous territories were constituent parts of the union republics. Correspondingly the participation of the union republics during the secession procedure was mandatory. This requirement however was not satisfied. The leadership of Nagorno-Karabakh decided to hold the referendum alone and against the will of the leadership in Baku, although the latter had the decision-making authority in constitutional and non-constitutional terms.

Furthermore, under section 4 of the Law on Secession, the Supreme Soviet of the union republic was required to set up an electoral commission with participation of the representatives of Nagorno-Karabakh. The commission was required to take the necessary organisational decisions and monitor the results and in doing so guarantee the legality and equivalence of the different referenda. This requirement was not satisfied either. Nagorno-Karabakh organised the referendum independently of Baku.

Correspondingly the referendum held in Nagorno-Karabakh on 10 December 1991 contravened the Law on Secession and was devoid of legal effect. Furthermore the argument that the Azerbaijan SSR itself did not observe the Law on Secession is not convincing. As illustrated, the Azerbaijan SSR did not proceed along the path of the Law on Secession.²⁶⁰ But even if we assume that the Azerbaijan SSR had violated the Law on Secession, it is more than questionable as to whether this would have provided Nagorno-Karabakh with the right to hold the referendum independently. Section 7 of the Law on Secession, which refers solely to potential procedural violations during the conduct of the referendum, suggests the general premise that in the case of a breach of the law, it would have been up to Moscow to decide whether a substitute referendum should be held.

cc) Further conditions under the Law on Secession

In addition, the Law on Secession provided further mandatory requirements for the conduct of a successful secession process. They make clear that an autonomous region could not decide its fate without the involvement of the union republic. The compelling character of these conditions in turn follows from the interpretation of the Law on Secession itself and the applicable constitutional provisions, in particular Arts. 78 and 86 of the Constitution of the USSR.

For example, section 5 of the Law on Secession provided that, with the consent of Baku, Moscow sends election observers. This naturally did not happen because no procedure under the Law on Secession was initiated. To this extent no reliable, independent statement can be made about the proper conduct of the referendum of 10 December 1991. Although the leadership of Nagorno-Karabakh is supposed to have provided 23 election observers itself, this firstly would not comply with sec-

²⁵⁹ See above, section III. 4. a) bb).

²⁶⁰ See above, section III. 4. b) aa).

tion 5 of the Law on Secession, and secondly it is unclear whether the observers deployed did in fact enable an independent assessment of the election.²⁶¹

After the holding of a referendum the Supreme Soviet of the Azerbaijan SSR, the Supreme Soviet of the USSR, the Congress of People's Deputies of the USSR and the other union republics and autonomous units would have had to be involved in a complex procedure. The aim would have been to monitor the referenda with respect to their validity and compliance with Soviet law and to determine the necessary conclusions and proposals for the affected union republic and the entire territory of the USSR. In a final act the Congress of People's Deputies would have had to set out a transitional phase, which would conclude in secession. This means that even with a valid referendum, Nagorno-Karabakh could not have completed an effective secession from the Azerbaijan SSR on its own.

5. Effects of the revocation of the autonomous status

As a reaction to the declaration of the Republic of Nagorno-Karabakh by the National Council on 2 September 1991, Azerbaijan revoked the autonomous status of Nagorno-Karabakh at the end of November 1991.²⁶² The question is whether this decision on revocation altered anything with respect to the denial of a right to secession of Nagorno-Karabakh.

Insofar as the validity of the Soviet right of autonomy can still be assumed in November 1991, which is questionable given the foundation of the Republic of Azerbaijan in October 1991,²⁶³ one would conclude that the revocation of the autonomous status infringed against Art. 87 of the constitution of the USSR and the Azerbaijani Autonomy Law.²⁶⁴ The key question then is which consequences would have followed from such an infringement. Neither the Constitution of the USSR nor the Autonomy Law provide explicit statements in this regard. At the very least the right to secession for Nagorno-Karabakh can not be inferred. Under Art. 86 of the Constitution of the USSR an autonomous region formed an integral component of a union republic. Under Art. 78 of the Constitution of the USSR the borders of this union republic could only be altered with its consent. Thus, the only logical consequence of a violation of the autonomous status of Nagorno-Karabakh as enshrined in Art. 87 of the Constitution of the USSR and in the Azerbaijani Autonomy Law would have been the invalidity or revocability of the actual decision on the abolition of autonomy. In contrast, the entitlement to a right to secession for Nagorno-Karabakh was excluded under Arts. 78 and 86 of the Constitution of the USSR.

²⁶¹ Correspondingly correct in this regard: Mammadov/Musayev, *Armjano-Aserbaid-schanski Konflikt*, 2006, p. 70.

²⁶² Cf. also Portier, *Conflict in Nagorno-Karabakh*, 2001, p. 7.

²⁶³ See above, section III. 1.

²⁶⁴ Cf. also Portier, *Conflict in Nagorno-Karabakh*, 2001, p. 7.

6. Preliminary conclusion

In summary it should be noted that Nagorno-Karabakh did not have the option to secede effectively from the Azerbaijan SSR under the law of the USSR. The decisions of July 1988 and December 1989 to accede to the Armenian SSR and the decision of September 1991 to establish an independent union republic contravened Soviet law and therefore had no legal effect. Art. 3 para. 1 sentence 2 of the Law on Secession, referred to by the Armenian side in the discussion, is extremely problematic²⁶⁵ with respect to Arts. 72, 78 and 86 of the Constitution of the USSR but was nonetheless valid.²⁶⁶ Irrespective of this, the actions taken by Nagorno-Karabakh, and in particular the referendum of 1991, did not satisfy the procedure of the Law on Secession.²⁶⁷ Several mandatory requirements of the Law on Secession were not fulfilled.

IV. Analysis under international law

The last century provides numerous examples in which alterations were made to the affiliation of territories. During this period the right to self-determination of peoples has become significant for the analyses of territorial disputes under international law alongside the principle of territorial integrity and the principle of *uti possidetis*. The discourse about the secession of Nagorno-Karabakh is also to be regarded in this legal context. Azerbaijan relies primarily on the principle of territorial integrity. Nagorno-Karabakh, on the other hand, deems itself to have an independent right to self-determination against Azerbaijan in the form of a so-called external right to self-determination on secession.

Thus, the discourse in international law is primarily concerned with the issue whether and under which conditions, an external right to self-determination, that is, a right to secession, exists at all and how it can be reconciled with the principle of territorial integrity. Furthermore numerous questions of fact arise that need to be classified and answered in this context. To date the community of states and international organisations such as the UN, the Council of Europe and the OSCE have not recognised a right to secession for Nagorno-Karabakh and have repeatedly underlined the territorial integrity of Azerbaijan.²⁶⁸ Luchterhandt and

²⁶⁵ See above, section III. 4. a) aa).

²⁶⁶ See above, section III. 4. a) bb).

²⁶⁷ See above, section III. 4. b).

²⁶⁸ See e.g. Security Council resolutions 822 (1993); 853 (1993); 874 (1993), and 884 (1993); Council of Europe Parliamentary Assembly resolution 1416 (2005), and Council of Europe Committee of Ministers recommendation 1690 (2005); OSCE, 1996 Lisbon Summit 2-3 December 1996, statement of the OSCE-Chairman in office. See also Mett, *Das Konzept des Selbstbestimmungsrechts der Völker*, 2004, p. 266; Luchterhandt, *Republik Armenien, Karabach und Europa – endlose Frustration?*, lecture at

Asenbauer hold the view that this international position is purely politically motivated with no foundations in international law.²⁶⁹ They claim that part of the strategy is to prevent a further splintering of the former Soviet states and another part to please Azerbaijan and Turkey for “opportunistic reasons”.²⁷⁰ This view questions the credibility of the community of states becoming embroiled in power games.²⁷¹ Speculation of this type was fuelled in particular by the initial behaviour of third states within the mediating international Minsk Group. The Minsk Group was initially regarded as more of a sphere for pursuing international interests in the Caucasus region and less as a forum for the resolution of the conflict.²⁷²

These accusations no doubt give cause to reopen and brightly illuminate the issues of international law. The aim is to establish whether there were clear arguments under international law for or against a secession of Nagorno-Karabakh from Azerbaijan.

Before we look more closely at the principle of territorial integrity, any exceptions in the form of rights to secession and the relevant questions of fact (see sections 2 and 3), we first need to clarify whether Nagorno-Karabakh may have effected its independence under other grounds in international law when the Azerbaijan SSR broke away from the USSR (see section 1). If this was the case, then no further discussion is required on the territorial integrity and the right to self-determination of peoples. Nagorno-Karabakh would then no longer have been located within the borders of Azerbaijan, thus removing the basis for the whole discussion on the principle of territorial integrity in the context of the Republic of Azerbaijan.

1. Nagorno-Karabakh as an original component of the Republic of Azerbaijan

First of all, the key issue is whether the region of Nagorno-Karabakh is an original, i.e. initial, component of the Republic of Azerbaijan. The Azerbaijani side is unequivocal about the fact that Nagorno-Karabakh became a part of the new Republic of Azerbaijan after the transformation of the Azerbaijan SSR. The Armenian side has advanced a number of arguments in an attempt to undermine this position. These are based not only on Soviet law (see section III above), but also on

the American University of Armenia on 24 March 1999, <http://www.deutsch-armenische-gesellschaft.de/dag/vorr.htm>.

²⁶⁹ Cf. Luchterhandt, *Republik Armenien, Karabach und Europa – endlose Frustration?*, lecture at American University of Armenia on 24 March 1999, <http://www.deutsch-armenische-gesellschaft.de/dag/vorr.htm>; Asenbauer, *Zum Selbstbestimmungsrecht des Armenischen Volkes von Berg-Karabach*, 1993, p. 145.

²⁷⁰ Cf. Luchterhandt, lecture at the American University of Armenia from 24 March 1999, <http://www.deutsch-armenische-gesellschaft.de/dag/vorr.htm>.

²⁷¹ Cf. Asenbauer, *Zum Selbstbestimmungsrecht des Armenischen Volkes von Berg-Karabach*, 1993, p. 145.

²⁷² Cf. de Waal, *Black Garden*, 2003, pp. 230, 234 et seq., 254.

different lines of argument pertaining to dimensions of international law. This reasoning shall be examined in more detail below (parts b-d). Prior to that we must establish which territorial affiliation fundamentally ensued from the relevant rules under international law in regard to the secession of the Azerbaijan SSR from the USSR and its transformation (part a).

a) Affiliation of Nagorno-Karabakh in accordance with the *uti possidetis* principle

A core pillar of customary international law relating to territorial issues of modern international law is the principle of *uti possidetis iuris*. This says that in cases of alterations of statehood, previously existing national borders continue to be valid or, in the event of a transformation and division of the state, former internal administrative borders – federal or internal union borders in particular – attain the status of international borders.²⁷³ Although the principle of *uti possidetis* originally established itself within the context of decolonisation, we can assume that it had become a part of customary international law by the end of the 20th century.²⁷⁴ Consequently it has not only been adopted by the acts of foundation of the African Union, but also in the treaty establishing the CIS and the directives of the European Community on the recognition of new states in Eastern Europe and the Soviet Union.

The principle of *uti possidetis* marks the basic framework within which the conflict between the principle of territorial integrity and the right to self-determination of peoples can take place. A newly founded state can therefore only rely on the principle of territorial integrity vis-à-vis a breakaway region if the region had belonged to its administrative area beforehand in accordance with the *uti possidetis* rule and correspondingly lay at all within its national borders after the founding of the state. On the other hand, the people of a breakaway region also can only rely on a possible right to self-determination by respecting the new borders, even if these borders had been drawn randomly at some point in the past and continue to divide ethnically homogenous settlement areas.²⁷⁵

The application of the *uti possidetis* principle to the case of Nagorno-Karabakh shows that the region became an original component of the Republic of Azerbaijan after the Azerbaijani secession and transformation process in 1991. Nagorno-Karabakh lay within the administrative borders crucial to the *uti possidetis* princi-

²⁷³ See Shaw, *International Law*, 2003, pp. 446 et seq; Tomuschat, in: Kohen (Ed.), *Secession, International Law Perspectives*, 2003, p. 37 et seq.; Herdegen, *Völkerrecht*, 2006, p. 38; Epping/Gloria, in: Ipsen, *Völkerrecht*, 2004, p. 283; Hobe/Kimminich, *Einführung in das Völkerrecht*, 2004, p. 78.

²⁷⁴ See also ICJ Reports, 1986, pp. 554 et seq; Hillier, *Sourcebook on Public International Law*, 1998, p. 218; Schweisfurth, *Völkerrecht*, 2006, p. 283; Simmler, *Das uti-possidetis-Prinzip*, 1999, p. 293. With regard to the application of this principle in practice see e.g. Hobe/Kimminich, *Einführung in das Völkerrecht*, 2004, pp. 78 et seq.

²⁷⁵ See Shaw, *International Law*, 2003, pp. 448 et seq.; Heintze, in: Ipsen, *Völkerrecht*, 2004, pp. 419 et seq.

ple, that is, within the borders of the Azerbaijan Union Republic. These borders applied until the Azerbaijan SSR withdrew from the USSR or until the dissolution of the USSR and were then converted into the international borders of the Republic of Azerbaijan.²⁷⁶

Nonetheless, an aspect of the Armenian argumentation is to question the applicability of the principle of *uti possidetis*. The gist of the argument is to dispute the initial borders of the Republic of Azerbaijan.²⁷⁷ The Armenian view is that Nagorno-Karabakh never lay within the international borders of Azerbaijan, meaning that the discussion of the principle of the territorial integrity and peoples' right to self-determination would be superfluous.²⁷⁸ Three different lines of argument are used that shall be examined.

b) Effects of the establishment of Bolshevik hegemony in the Caucasus region in 1920/1921 and the decisions of the Caucasian Bureau of 1921

A first line of argumentation refers initially to the opaque circumstances regarding power and territorial assignment directly before and after the establishment of the Bolshevik hegemony in the Caucasus in 1920/1921. The argument refers to the non-recognition of the first Republic of Azerbaijan and its borders by the League of Nations, a declaration by Narimanov, the Chairman of the Azerbaijani Revolutionary Committee, and the decisions of the Caucasian Bureau of 1921.²⁷⁹

On the validity of the *uti possidetis* principle in the context of historical events: The first question we need to look at concerns the extent to which historical events are at all relevant in the present case. In essence the principle of *uti possidetis* does not depend on any actual or proclaimed historical affiliations or events before the development of modern international law.²⁸⁰ Key criteria for the principle of *uti possidetis* are the effectiveness and consequently the *de facto* efficacy

²⁷⁶ See also Report of the Political Affairs Committee of the Parliamentary Assembly of the Council of Europe, Doc. 10364, 29 November 2004, III. para. 5.

²⁷⁷ Cf. summary of an Armenian parliament hearing on 3 February 2005, www.regnum.ru/english/584766.html as well as note verbale dated 21 March 2005 from the Permanent Mission of Armenia to the United Nations Office in Geneva and the UN High Commissioner for Human Rights, E/CN.4/2005/G/23.

²⁷⁸ Cf. summary of an Armenian parliament hearing on 3 February 2005, www.regnum.ru/english/584766.html.

²⁷⁹ Cf. note verbale dated 21 March 2005 from the Permanent Mission of Armenia to the United Nations Office at Geneva and the UN High Commissioner for Human Rights, E/CN.4/2005/G/23, pp. 2 et seq.; Mammadov/Musayev, *Armjano-Aserbajdschanski Konflikt*, 2006, p. 54, in particular fn. 115 et seq.

²⁸⁰ With regard to the limited significance of historical arguments in general see also: Shaw, *International Law*, 2003, p. 446.

and temporal validity of the existing administrative borders,²⁸¹ which in the present case had existed for almost 70 years. In the case of Yugoslavia, for example, the EC Arbitration Commission on Yugoslavia recognised that the principle of *uti possidetis* was fully applicable to the situation of the break-up of former socialist union states.²⁸² This conclusion can be applied directly to Nagorno-Karabakh, meaning that there is no doubt that the old union borders retain their validity.²⁸³

The applicability of the principle of *uti possidetis* further follows from the 1991 CIS Treaty and the acts of accession of Armenia and Azerbaijan in 1991.²⁸⁴ The CIS was founded and expanded in accordance with these treaty documents in mutual recognition of the inviolability of existing borders.²⁸⁵ The purpose and aim of this provision was to guard the still ongoing transformation process of the former union republics and not to saddle it with territorial disputes. In light of Art. 31 of the Vienna Convention on the Law of Treaties, this only made sense if the territorial guarantee also included the autonomous regions. These regions posed a particular potential for conflict, which was also true of Nagorno-Karabakh. As we have seen above, the region was not able to emancipate itself as an independent republic under Soviet law²⁸⁶ and was still part of Azerbaijan when the CIS Treaty and the acts of accession of Armenia and Azerbaijan were signed in December 1991.

For this reason there are no doubts regarding the validity of the principle of *uti possidetis*. Thus, the discussed historical events of the first decades of the 20th century are no longer relevant. Correspondingly, the community of states has repeatedly recognised the territorial integrity of Azerbaijan and in doing so the unconditional validity of the principle of *uti possidetis*.

Consideration of historical events: Nagorno-Karabakh would still be deemed an original component of the Republic of Azerbaijan even if the principle of *uti possidetis* were not held to be relevant and consideration were hypothetically given to historical events instead.

Section II looked at the fact that Nagorno-Karabakh, like most regions in Europe and Asia, was at the mercy of a range of great powers over the course of previous centuries. From an international law perspective Nagorno-Karabakh had never been independent. Nagorno-Karabakh for a long time had been under Turkish and Persian rule and was firmly integrated into the Russian Empire in 1822.

²⁸¹ With regard to effectiveness in the context of the *uti possidetis* doctrine see in general: Heintze, in: Ipsen, *Völkerrecht*, 2004, pp. 419 et seq.; Shaw, *International Law*, 2003, pp. 270, 448 et seq.

²⁸² See EC Arbitration Commission on Yugoslavia, 3 *EJIL* (1992), pp. 183 f., opinion no. 2 and 3. Cf. also Cassese, *International Law*, 2005, p. 84; Hillier, *Sourcebook on Public International Law*, 1998, p. 245; O'Brien, *International Law*, 2001, pp. 217 et seq.

²⁸³ In accordance with: Warbrick, in: Evans (Ed.), *International Law*, 2006, pp. 217, 227.

²⁸⁴ In accordance with: Cornell, *Journal of South Asian and Middle Eastern Studies* vol. 20/no. 4 (1997) 1 et seq.

²⁸⁵ See Alma-Ata Declaration dated 21 December 1991.

²⁸⁶ See above, section III.

Nagorno-Karabakh was assigned to administrative districts from which later on the Republic of Azerbaijan emerged (such as the *Gouvernorat Elisavetpol*²⁸⁷). Russia started settling Armenians in Nagorno-Karabakh for strategic power-related reasons, leading to a considerable predominance of Armenians by the beginning of the 20th century.²⁸⁸

The Russian February and October revolutions of 1917 produced a power vacuum in the southern Russian satellite regions. Azerbaijan, including its administratively affiliated region of Nagorno-Karabakh, subsequently declared itself an independent republic, albeit not recognised internationally, especially given the fact that Russia was only temporarily weakened.²⁸⁹ The Republic of Armenia, which was also proclaimed at that time, laid claim to Nagorno-Karabakh as well as other regions due to the majority Armenian population that had developed there. Nonetheless the British troops who had invaded in the meantime²⁹⁰ and the plenipotentiary Paris Peace Conference²⁹¹ confirmed the Azerbaijani territorial claim to Nagorno-Karabakh.

In 1921 the Russian army moved back into the Southern Caucasus region, and Russia again imposed its rule on the entire region. Although the dissolution of the Republic of Azerbaijan from inside was supported by the regional Bolshevik party, this nonetheless represented the establishment of the Russian-Bolshevik hegemony. The Azerbaijani administration that had existed independently up to that point was removed under the pressure of the internal and external Bolshevik forces and the presence of the invading Red Army and replaced by a Bolshevik one. The same thing happened in Armenia. This gave rise to a state structure which one year later was officially named the Soviet Union. The Bolshevik-Russian claim to power was made plain in particular by using the Caucasian Bureau as the central Moscow nerve centre for the Caucasus.

From the perspective of international law at that time, the Russian-Bolshevik seizure of land and the Russian decisions on the territorial assignments can hardly be classified as violations of international law. In 1920/1921 classical international law had not yet been superseded. The prohibition on wars of aggression and thus the unlawfulness of annexation did not apply to Russia or the Soviet Union that had been established in the meantime until 1929 when the Briand-Kellogg pact came into force.²⁹² As has already been ascertained, annexation was regarded as a

²⁸⁷ Cf. Human Rights Watch, *Azerbaijan, Seven Years of Conflict in Nagorno-Karabakh*, xiii; Rau, *Der Berg-Karabach-Konflikt*, 1994, p. 24.

²⁸⁸ See above for details, section II. 3.

²⁸⁹ The League of Nations particularly refused to recognise Armenia and Azerbaijan as independent states. See League of Nations Assembly doc. 20/48/206 and 20/48/251.

²⁹⁰ See Altstadt, *The Azerbaijani Turks: power and identity under Russian rule*, 1992, pp. 101 et seq.; Avşar, *Schwarzer Garten*, 2006, pp. 102 et seq.; Rau, *Der Berg-Karabach-Konflikt*, 2007, p. 28.

²⁹¹ Cf. Portier, *Conflict in Nagorno-Karabakh*, 2001, p. 2; Avşar, *Schwarzer Garten*, 2006, p. 108.

²⁹² Cf. the so-called Litvinov Protocol dated 9 February 1929.

lawful method of acquiring territory under the auspices of classical international law.²⁹³ Against this background it is difficult to identify a standard that undermines violent seizures of land and territorial decisions by the Russian or Soviet central government in international law even for the first few decades of the 20th century.²⁹⁴

In its final decision of 5 July 1921 the Russian state apparatus confirmed, along with the regional leaderships in the form of the legitimated Caucasian Bureau, that Nagorno-Karabakh should remain part of the Azerbaijan Soviet Republic.²⁹⁵ Whilst Armenia throws doubt on the validity of the decision,²⁹⁶ its position is not convincing²⁹⁷ in that the decision of the Caucasian Bureau was repeatedly confirmed over subsequent years and even enshrined in the Constitution²⁹⁸ and as such was legally valid. The decision of 5 July 1921 was the key binding decision, also applicable under classical international law, that led to a clear assignment of Nagorno-Karabakh to Azerbaijan and this continues to apply after the transformation of the Azerbaijan SSR – independently of the *uti possidetis* principle. Nagorno-Karabakh purely and simply represented an integral component of the Azerbaijan SSR (c.f. Art. 86 of the 1977 Constitution of the USSR).

²⁹³ See above, section II. 1. Cf. also Hillier, *Sourcebook on Public International Law*, 1998, p. 241; O'Brien, *International Law*, 2001, p. 212; Shaw, *International Law*, p. 423; Hobe/Kimminich, *Einführung in das Völkerrecht*, 2004, pp. 39, 85; Kimminich, *Menschenrechte: Von kollektiven und individuellen Rechten*, <http://www.lsg.musin.de/deutsch/d/aufkl/menschenrechte.htm>; Schweisfurth, *Völkerrecht*, 2006, p. 291.

²⁹⁴ The doctrine under which the violent seizure of territory (annexation) is not recognised was established in state practice only after 1932, in particular with respect to the non-recognition of the Soviet Union's (*de facto*) annexation of the Baltic states in 1940. Cf. also Hobe/Kimminich, *Einführung in das Völkerrecht*, 2004, pp. 73, 85; Epping/Gloria, in: Ipsen, *Völkerrecht*, 2004, p. 301; Schweisfurth, *Völkerrecht*, 2006, p. 291.

²⁹⁵ Cf. minutes of the session of the Caucasian Bureau of 5 July 1921, no. 12, point 2. See also de Waal, *Black Garden*, 2003, p. 130; Swietochowski, in: Halbach/Kappeler (eds.), *Krisenherd Kaukasus*, 1995, pp. 161, 167.

²⁹⁶ Cf. note verbale dated 21 March 2005 from the Permanent Mission of Armenia to the United Nations Office at Geneva and the UN High Commissioner for Human Rights, Commission doc. E/CN.4/2005/G/23, p. 4.

²⁹⁷ The Armenian view holds that the Caucasian Bureau were still able to make legally effective decisions on 4 July 1921, but no longer on 5 July 1921. Cf. note verbale dated 21 March 2005 from the Permanent Mission of Armenia to the United Nations Office at Geneva and the UN High Commissioner for Human Rights, Commission doc. E/CN.4/2005/G/23, p. 4. The minutes of the Caucasian Bureau of 4 and 5 July 1921, however, leave no doubts as to the meeting on 5 July 1921. According to the minutes of 4 July an assignment of Nagorno-Karabakh to the Armenian SSR was decided with the express proviso that a different decision may be taken at a later stage. According to the minutes of 5 July the decision of 4 July was revised immediately and finally on the following day in favour of the Azerbaijan SSR.

²⁹⁸ Cf. Art. 87 sentence 3 of the Constitution of the USSR.

This means at the same time that no historical factor forwarded and discussed by the Armenian or Azerbaijani side which occurred before the critical date of 5 July 1921 can have any significance. This applies in particular to the controversial declaration by Narimanov, the Chairman of the Azerbaijani Revolutionary Committee, of December 1920. According to this the working farmers in Nagorno-Karabakh were themselves to decide on the affiliation of their region.²⁹⁹ The declarations which were irrelevant to the status of Nagorno-Karabakh, also include the decision of the League of Nations of December 1920 cited by Armenia.³⁰⁰ This merely rejected the admission of the first Republic of Azerbaijan to the League of Nations due to a lack of the requirements for statehood.³⁰¹ No statement was made on the status or affiliation of Nagorno-Karabakh.³⁰² This shows that, in view of the principle of *uti possidetis* and classical international law, the historical issues fiercely debated by Armenian and Azerbaijani historians do not permit a different view of the assignment of Nagorno-Karabakh to the Republic of Azerbaijan.

c) Effects of shifts in administrative responsibilities between 1989 and 1991

Alongside historical events, the Republic of Armenia cites two administrative directives from Moscow and Baku that could call into question Nagorno-Karabakh's affiliation to the Republic of Azerbaijan.³⁰³ These directives relate to Moscow's establishment of a special administrative zone for Nagorno-Karabakh between January and November 1989 and Baku's revocation of the autonomous status of Nagorno-Karabakh in November 1991. However, in the final analysis these decisions had no effect on the affiliation of Nagorno-Karabakh to Azerbaijan under the principle of *uti possidetis*.

On the temporary establishment of a special administrative zone: The principle of *uti possidetis* is derived from the principle of effectiveness in customary international law or is at least considerably influenced by it.³⁰⁴ This means that short-term, temporary changes to administrative responsibilities cannot have any territorial consequences under international law. Firmly established and effective

²⁹⁹ Cf. the respective article in newspaper "Communist" (Baku) from 2 December 1920, p. 1. See also Rau, *Der Berg-Karabach-Konflikt*, 2007, p. 33. Considering the political context of this decision and its different version which was likely published in Yerevan, see above section II. 5.

³⁰⁰ Cf. note verbale dated 21 March 2005 from the Permanent Mission of Armenia to the United Nations Office at Geneva and the UN High Commissioner for Human Rights, E/CN.4/2005/G/23, pp. 2 et seq.

³⁰¹ See League of Nations Assembly doc. 20/48/206.

³⁰² See above, section II. 4.

³⁰³ Cf. Note verbale dated 21 March 2005 from the Permanent Mission of Armenia to the United Nations Office at Geneva and the UN High Commissioner for Human Rights, E/CN.4/2005/G/23, pp. 5 et seq.

³⁰⁴ See Shaw, *International Law*, 2003, pp. 449 et seq.; Epping/Gloria, in: Ipsen, *Völkerrecht*, 2004, p. 282.

administrative borders are the key criteria. In the case of the USSR up to the end these were the borders of the union republics. These borders were constitutionally guaranteed by Art. 78 of the USSR's Constitution and could only be revoked or moved with the consent of the respective union republic. Consequently Moscow could not alter the borders itself, nor did it intend to in the case of Nagorno-Karabakh. The Moscow resolution quoted solely set up special administrative rights for a temporary period to gain control of the (civil) war-like situation in Nagorno-Karabakh through direct intervention by Moscow. When this failed, Moscow transferred administrative power back to Baku in November 1989 without changing the previous territorial status.³⁰⁵ The setting up of a special administration thus did not represent a step towards breaking up Nagorno-Karabakh from the Azerbaijan SSR.³⁰⁶ In denying recognition to the illegally established Armenian parallel government in Karabakh ("National Council"),³⁰⁷ Moscow put paid to any speculation about an alteration of the hitherto recognised borders of the Soviet Union.

On the revocation of the autonomous status by Baku: After the declaration of independence and the flagrant eruption of violence in Armenia, Azerbaijan and especially in Nagorno-Karabakh, in November 1991 Azerbaijan revoked the autonomous status of Nagorno-Karabakh that had applied up to that point. All the same, this decision changed nothing in respect to the territorial affiliation of Nagorno-Karabakh under the principle of *uti possidetis*. The decision may at most have violated national law insofar as one assumed that Azerbaijan was still part of the USSR in November 1991 (see part III. 5. above). Violations of national laws merely mean that the corresponding decisions are unlawful and may be invalid. However, pursuant to Art. 78 of the Constitution of the USSR they could not change the territorial structure of the union republics and thus did not affect the borders of the union republics which is the deciding criterion for the *uti possidetis* principle.

d) Effects of the Azerbaijani constitutional declaration of 1991

A further line of Armenian argument holds that the Azerbaijan SSR lost Nagorno-Karabakh during its process of transformation to the Republic of Azerbaijan. Armenia argues that the transformation of Azerbaijan was guided by the notion of re-founding the first Republic of Azerbaijan of 1918-1920 and revoking the Treaty of Union on the creation of the USSR of 1922 as unlawful. Azerbaijan, it is claimed,

³⁰⁵ In accordance with: Mett, *Das Konzept des Selbstbestimmungsrechts der Völker*, 2004, p. 241.

³⁰⁶ Cf. Mett, *Das Konzept des Selbstbestimmungsrechts der Völker*, 2004, p. 241.

³⁰⁷ Cf. Mett, *Das Konzept des Selbstbestimmungsrechts der Völker*, 2004, p. 241.

thus renounced the legal heritage of the Soviet Union and correspondingly lost all claims to Nagorno-Karabakh.³⁰⁸

In the final analysis, this assumption is not convincing. The Azerbaijan SSR did not renounce the legal heritage of the Soviet Union in the underlying Constitutional Law of 30 August 1990. Instead, Arts. 4 and 15 of the Constitutional Law set down the standard intertemporal provisions³⁰⁹ stipulating the continued validity and the priority of Soviet law in the framework of the new Azerbaijani legal system. The continued validity of the Soviet-Azerbaijani Constitution of 1978 and the continued validity of Soviet acts was expressly resolved, insofar as they did not collide with the Constitutional Law or the territorial integrity of Azerbaijan. Respect for the territorial integrity and thus also the legal affiliation of Nagorno-Karabakh to Azerbaijan thus had utmost priority. To this extent it is out of the question that Azerbaijan expressly renounced the Soviet heritage in the context of Nagorno-Karabakh and in doing so lost the region.

Of course it would also have been conceivable that Azerbaijan had impliedly renounced Nagorno-Karabakh. At that time both Soviet law³¹⁰ and international law³¹¹ did not exclude conclusive conduct in territorial issues at all. An implied renouncement would have at least required a clear intention to a legal commitment demonstrating to the outside world that the Azerbaijan SSR would not extend its territory to Nagorno-Karabakh after its transformation to the Republic of Azerbaijan. However, the violent dispute over the region which also originated from Azerbaijan indicated the exact opposite, namely that Azerbaijan did not renounce Nagorno-Karabakh under any circumstances.

In conclusion Nagorno-Karabakh was thus an original component of the Republic of Azerbaijan. According to the *uti possidetis* principle the former union borders of the Azerbaijan SSR within which Nagorno-Karabakh lay were redefined as the new borders of the Republic of Azerbaijan. Any doubts expressed about this outcome are proven to be insubstantial. Moreover, this conclusion is consistent with the evaluation of international organisations, namely the UN Security Council, the OSCE or the Council of Europe, bodies which ultimately also hold that Nagorno-Karabakh was an original component of Azerbaijan.³¹² A le-

³⁰⁸ Cf. note verbale dated 21 March 2005 from the Permanent Mission of Armenia to the United Nations Office at Geneva and the UN High Commissioner for Human Rights, E/CN.4/2005/G/23, pp. 6 et seq.

³⁰⁹ For instance, such provisions were also stipulated in the context of the German unification treaty 1990.

³¹⁰ Cf. wording of Art. 78 of the Constitution of the USSR 1977.

³¹¹ Cf. Heintschel von Heinegg, in: Ipsen, *Völkerrecht*, 2004, p. 239; Hobe/Kimminich, *Einführung in das Völkerrecht*, 2004, p. 205 et seq.

³¹² See e.g. Security Council resolutions 853 (1993) and 884 (1993), where Nagorno-Karabakh is clearly considered as a region of the Azerbaijani Republic. This appraisal is confirmed in the Council of Europe Parliamentary Assembly resolution 1416 (2005) and in OSCE, 1996 Lisbon Summit 2-3 December 1996, statement of the OSCE-Chairman in office.

gally valid national independence of Nagorno-Karabakh could therefore only emerge on the basis of a right to secession under international law, which we shall now examine in more detail.

2. The principle of territorial integrity under international law

International law primarily regulates legal relationships among states. Insofar, it is no surprise that the sovereignty of states represented one of the supporting pillars of international law from the outset. The sovereignty of states and in particular their sovereign equality is the fundamental premise for stable and trustful international relations.³¹³ Alongside many other variable factors, the so-called principle of territorial integrity of a state forms a key element of national sovereignty and the sovereign equality of states. This is a fundamental maxim of the overall international legal order.³¹⁴

a) *Characteristics of the principle of territorial integrity*

The principle of integrity protects the territorial existence of a state. It does not aim to lay the foundations for any particular state apparatus, but instead to consolidate humane relations within a community in a specific area³¹⁵ and in doing so to secure international order.³¹⁶ The integrity principle is thus a fundamental constant for undisturbed, integrative and thus also peaceful relations in a specific territory, regardless of how the territory is *de facto* ethnically or religiously composed at a specific point in time. In the case of any alterations of statehood, the principle of territorial integrity in relation to states which are still in their infancy is supported by the principle of *uti possidetis iuris* already described above. Under this doctrine internal administrative borders of an old federation of states are reinterpreted as the borders of the new state under international law at the moment of its independence.³¹⁷

b) *Relevance of the principle of territorial integrity*

Given that the integrity principle has its origins in the fundamental principle of the sovereign equality of states, it prohibits the support of secessionist movements within a state by other states.³¹⁸ At first glance, however, it does not appear possible to apply this to purely internal secessionist movements *per se* since they are not classical subjects of international law. This raises the question as to the extent

³¹³ Cf. e.g. Art. 2 para. 1 UN-Charter; Epping, in: Ipsen, *Völkerrecht*, 2004, pp. 367 et seq.

³¹⁴ Cf. e.g. Kohen, in: Kohen (Ed.), *Secession, International Law Perspectives*, 2006, p. 6; Elsner, *Die Bedeutung des Volkes im Völkerrecht*, 2000, p. 299.

³¹⁵ See also Elsner, *Die Bedeutung des Volkes im Völkerrecht*, 2000, p. 311.

³¹⁶ Cf. Heintze, in: Ipsen, *Völkerrecht*, 2004, p. 417.

³¹⁷ Cf. Hobe/Kimminich, *Einführung in das Völkerrecht*, 2004, p. 78.

³¹⁸ See Kohen, in: Kohen (Ed.), *Secession, International Law Perspectives*, 2006, pp. 6 et seq.

to which the Republic of Azerbaijan could or can rely on the principle of territorial integrity with respect to Nagorno-Karabakh.

As a result, the recourse to the principle of territorial integrity is affirmed. Firstly the conflict of Nagorno-Karabakh is not a purely internal secessionist movement. Although the Armenian side vehemently denies this, the evidence and indications of financial and military support of Nagorno-Karabakh by Armenia cannot be overlooked. It is assumed that Armenia finances a large part of the Karabakh budget and Armenian soldiers are stationed in the trenches of Karabakh.³¹⁹ Without this effective neighbourly support, the economically weak and small region would not have been able to prevail over Azerbaijan and survive until today. In this respect the international community clearly presumes the involvement of third states, above all Armenia,³²⁰ and for this reason alone recourse to the principle of territorial integrity is possible.

Moreover, under customary international law the principle of territorial integrity has developed into a principle of international law, which is not only applied in the context of relations among states but also of purely internal secessionist movements.³²¹ As the cases of Bosnia and Herzegovina, Kosovo, Georgia and the Comoros show, the international community of states here also assumed that the integrity principle was relevant.³²² In this context also the UN Security Council³²³ and the OSCE³²⁴ left no doubts as to the fact that Azerbaijan can also invoke the integrity principle, which even finds agreement in the literature supporting Nagorno-Karabakh.³²⁵

c) General scope of the principle of territorial integrity in light of the right to self-determination of peoples

The integrity principle is aimed at the continued existence of states and protects them in particular from secessionist processes that are supported from the outside and driven from within. Under contemporary international law criteria, however, the territorial permanence of a state does not represent an irrefutable dogma. This

³¹⁹ According to a report of Deutschlandfunk “Demokratie im Ausnahmezustand” on 18 July 2007. Conclusive circumstantial evidence and proofs of an involvement of the Armenian Republic are provided in: Human Rights Watch, Azerbaijan, Seven Years of Conflict in Nagorno-Karabakh, 1994, pp. 67 et seq, 110 et seq. (containing details and also references to the former Secretary-General of the United Nations Boutros-Ghali). See also below chapter B for more details.

³²⁰ Resolution 853 of the UN Security Council refers to states which have to refrain from the supply of any weapons and munitions. Resolutions 874 and 884 of the UN Security Council refer to the states in the region to refrain from any hostile acts and from any interference or intervention in the conflict.

³²¹ See Kohen, in: Kohen (Ed.), *Secession, International Law Perspectives*, 2006, p. 7.

³²² See Kohen, in: Kohen (Ed.), *Secession, International Law Perspectives*, 2006, p. 7.

³²³ Cf. Security Council resolutions 822 (1993), 853 (1993), 874 (1993) and 884 (1993).

³²⁴ Cf. OSCE 1996 Lisbon summit, Statement of the OSCE Chairman-in-office.

³²⁵ See Luchterhandt, *Archiv des Völkerrechts* (vol. 31) 1993, pp. 30, 57.

is shown by an analysis from the perspective of international law of the countless territorial alterations of recent years in Africa, Asia and Europe. During the last century the right to self-determination of peoples emerged in customary law as one of the essential determining reasons for the revocation of the integrity principle.³²⁶ The argument states that in accordance with the right to self-determination all peoples have the right to decide freely and without external political influence on their political status and structure their economic, social and cultural development.³²⁷ The background to this is the view that any statehood that is not based on the will of the people only permits limited permanence.³²⁸

According to widespread opinion and state practice the right to self-determination exhibits two sides, an external (offensive) and an internal (defensive) one.³²⁹ The external right to self-determination is aimed at the establishment of an independent state of its own, the affiliation with another state or the establishment of another type of freely selected status. The internal right to self-determination refers to the free structuring of the national order and with this in particular the relationship of a people to its government. One of the most important components is the concept of autonomy. This is understood to mean the self-administration of a region within a state and its partial independence from regional or central government.³³⁰

The principle of territorial integrity conflicts with the external, i.e. offensive, right to self-determination. The latter is aimed at altering the given territorial status. Secession thereby represents the most significant form in which the external right to self-determination is exercised. Correspondingly the Nagorno-Karabakh conflict pertains primarily to the issue of the relationship between the principle of territorial integrity and the external (offensive) right to self-determination. For this reason the external and not the internal right to self-determination is the primary object of analysis below. Accordingly the exact nature of the relationship between the principle of territorial integrity and the external right to self-determination must be examined.

In principle, there are no doubts about the fact that international law in decades past has been and still is strictly sovereignty-orientated. State practice demonstra-

³²⁶ See e.g. Hobe/Kimminich, *Einführung in das Völkerrecht*, 2004, pp. 111 et seq; Heintze, in: Ipsen, *Völkerrecht*, 2004, pp. 389 et seq.

³²⁷ Cf. Art. 1 para. 1 of the International Covenant on Civil and Political Rights, 1966; Art. 1 para 1 of the International Covenant on Economic, Social and Cultural Rights, 1966; Friendly Relations Declaration, 1970, The principle of equal rights and self-determination of peoples; Final Act of the CSCE Helsinki 1975, Questions relating to Security in Europe, point 1 a) VIII. para. 2.

³²⁸ Cf. Heintze, in: Ipsen, *Völkerrecht*, 2004, pp. 417 et seq.

³²⁹ Cf. Doering, in: Simma (Ed.), *The Charter of the United Nations*, 2002, art. 1, annex: Self-Determination, notes 32 et seq; Heintze, in: Ipsen, *Völkerrecht*, 2004, p. 394; Final Act of the CSCE Helsinki 1975, Questions relating to Security in Europe, point 1 a) VIII. para. 2.

³³⁰ Cf. Heintze, in: Ipsen, *Völkerrecht*, 2004, p. 435.

bly behaves with great reserve, that is in full awareness of the legal significance of its behaviour, with respect to secessionist movements.³³¹ The same applies to the prevailing opinion in the international law literature.³³² International law therefore can be correctly described as being hostile to secession.³³³ In this light, the principle of territorial integrity generally ranks higher than the *external* right to self-determination and at least in principle is able to prevail over it.³³⁴ Numerous international documents underline this, for example Resolution 1514 of the UN General Assembly, the CSCE Helsinki Final Act of 1975 and the OSCE Charter of Paris of 1990.³³⁵ Under these provisions the exercise of the right to self-determination is only respected in conformity with the principle of territorial integrity. The political motives behind this conviction are clear. Firstly it seeks to reinforce the stability of international relations. And secondly it looks to prevent the risk of a premature and permanent break-up and collapse of states due to the immense ethnic diversity on the continents. An important objective is to promote and not undermine integrative interethnic relations. Correspondingly the Republic of Azerbaijan could in principle invoke the principle of territorial integrity against an external right to self-determination of Nagorno-Karabakh, insofar as this exists at all.

3. Exceptions to the principle of territorial integrity: right to self-determination and rights to secession

Of course the shown fundamental ranking of the principle of territorial integrity and the right to self-determination is not without limitation, otherwise the external right to self-determination of peoples would be completely irrelevant. The com-

³³¹ See Tomuschat, in: Kohen (ed.), *Secession, International Law Perspectives*, 2006, pp. 23, 26 et seq; Castellino, *International Law and Self-determination*, 2000, p. 107; Heintze, in: Ipsen, *Völkerrecht*, 2004, p. 423; Welhengama, *Minorities' claims, from autonomy to secession*, 2000, pp. 314 et seq.

³³² For instance, see Herdegen, *Völkerrecht*, 2006, pp. 256 et seq.; Hobe/Kimminich, *Einführung in das Völkerrecht*, 2004, p. 115; Heintze, in: Ipsen, *Völkerrecht*, 2004, p. 423.

³³³ Cf. Nowak, in: Reiter (Ed.), *Grenzen des Selbstbestimmungsrechts*, 1996, p. 246; Heintze, in: Ipsen, *Völkerrecht*, 2004, p. 423.

³³⁴ Cf. also Elsner, *Die Bedeutung des Volkes im Völkerrecht*, 2000, pp. 303, 319 et seq. Although there is some support in the literature for the view that the principle of territorial integrity and the right to self-determination would be of equal rank, this does not produce a different result in the context of secession. Ultimately these authors also confirm an existing rule and exception relationship in favour of the territorial integrity for the account of secession. For instance, cf. Heintze, in: Ipsen, *Völkerrecht*, 2004, pp. 417, 423 et seq.

³³⁵ See UN General Assembly Resolution 1514 (XV), para. 6; Final Act of the CSCE Helsinki 1975, Questions relating to Security in Europe, point 1 a) VIII. para. 1 and 2; OSCE Charter, Paris 1990, section Friendly Relations among Participating States, para. 7.

munity of states did not presume a general prohibition on secession. It has even approved exceptions under certain conditions when the external right to self-determination can prevail over the principle of territorial integrity. This particularly affects constellations of colonialisation³³⁶, which do not need to be considered here. The question is rather whether such an exception outside the colonial context applies for the benefit of Nagorno-Karabakh. Seen in terms of international law, this is the decisive point for the legitimacy or unlawfulness of the breakaway of Nagorno-Karabakh from Azerbaijan.

a) *Secession on the basis of a decision of the whole people of a state*

In accordance with the right to self-determination all peoples have the right to decide freely and without external political influence on their political status and to structure their economic, social and cultural development.³³⁷ There is thus no debate about the fact that peoples are able to set down the conditions for relations within their community, that is, exercise the right to self-determination internally.³³⁸ However, at the same time there should be no doubt that peoples have the right to be free from foreign rule and exploitation and to be able to restructure themselves and the national entity they have set up with validity to the outside, for example by dismembration (breaking up) or secession (breaking away) of individual parts.³³⁹

Given the top priority of the principle of territorial integrity, there is a fierce debate regarding exactly who is the bearer of the right to self-determination understood in this way. As we have seen, customary international law assumes that the right to self-determination is granted primarily to the “peoples”. But there is a considerable lack of clarity with regard to the definition of the term “people”.³⁴⁰ Numerous authors have attempted to develop appropriate criteria to provide support in this respect.³⁴¹ However, a final analysis is ultimately not possible as the community of states, the primary normative instance, has visibly abstained from

³³⁶ Cf. e.g. Cassese, *Self-Determination of Peoples*, 1995, p. 129.

³³⁷ See Art. 1 para. 1 of the International Covenant on Civil and Political Rights, 1966; Art. 1 para. 1 of the International Covenant on Economic, Social and Cultural Rights, 1966; Friendly Relations Declaration, 1970, The principle of equal rights and self-determination of peoples.

³³⁸ Cf. Hobe/Kimminich, *Einführung in das Völkerrecht*, 2004, p. 164.

³³⁹ See e.g. Final Act of the CSCE Helsinki 1975, Questions relating to Security in Europe, point 1 a) VIII. para. 2, which regards the right of self-determination of peoples in its internal and external dimension. See also Mett, *Das Konzept des Selbstbestimmungsrechts der Völker*, 2004, p. 202.

³⁴⁰ See Tomuschat, in: Kohen (ed.), *Secession, International Law Perspectives*, 2006, pp. 23 et seq.; Herdegen, *Völkerrecht*, 2006, p. 256.

³⁴¹ See e.g. Doering, in: Simma (ed.), *The Charter of the United Nations*, 2002, art. 1, annex: *Self-Determination*, notes 27 et seq.; Hobe/Kimminich, *Einführung in das Völkerrecht*, 2004, p. 164; Heintze, in: Ipsen, *Völkerrecht*, 2004, pp. 408 et seq.

any clear definition.³⁴² The term “people” thus remains an indeterminate legal term whose meaning is to be regarded in the context of the particular normative question at issue.³⁴³ For this reason international organs also supporting the enforcement of the right to self-determination do not work with an abstract definition of the term “people”.³⁴⁴

Thus, also in the context of secession it does not matter how the term “people” is to be defined abstractly, but rather what matters is the group of people on which the community of states specifically confers an external right to self-determination. It is indisputable that at least the respective whole people of a state, known under the German term “*Staatsvolk*”, would have such a right.³⁴⁵ This comprises the totality of the citizens within a state regardless of their affiliation to individual ethnic groups or minorities.³⁴⁶ The whole people of a state form the permanent population which is one of the constitutive pillars of modern states under international law, particularly alongside the defined territory and effective government.³⁴⁷

In the concrete case of the Nagorno-Karabakh conflict before us, the whole people of a state relevant under international law was the entire population of the USSR before the establishment of the Republic of Azerbaijan in 1991. Neither the people of the Azerbaijan SSR nor the population of Nagorno-Karabakh satisfied this requirement. With the establishment of the Azerbaijani state the population of Azerbaijan attained the quality of a people of a state, strictly speaking the people of the Republic of Azerbaijan. The inhabitants of Nagorno-Karabakh thereby formed an integrative component of this Azerbaijani people. What is clear is that neither during the Soviet period nor during the time of the new Republic of Azerbaijan did they constitute a separate people of a state, since there was no Karabakh state effectively created. Consequently they were not entitled to the external right

³⁴² See Musgrave, *Self Determination and National Minorities*, 1997, p. 148; Heintze, in: Ipsen, *Völkerrecht*, 2004, pp. 407, 410; Elsner, *Die Bedeutung des Volkes im Völkerrecht*, 2000, p. 310.

³⁴³ See also Heintze, in: Ipsen, *Völkerrecht*, 2004, p. 407.

³⁴⁴ For instance the Human Rights Committee established under the International Covenant on Civil and Political Rights. Cf. Heintze, in: Ipsen, *Völkerrecht*, 2004, pp. 407 et seq., 410.

³⁴⁵ Cf. Cassese, *Self-Determination of Peoples*, 1995, p. 144; Mett, *Das Konzept des Selbstbestimmungsrechts der Völker*, 2004, pp. 209, 269, 270 et seq., 371; Council of Europe, *Expertise on a special legal status for the Gagauzes on Moldova*, Doc. CM/Inf (94) 27, 2 September 1994 (excerpts also in Doc. 10364, 29 November 2004). On the issue of whether a people of a state in this context must or can be subject of the external right to self-determination at all, see also Doering, in: Simma (ed.), *The Charter of the United Nations*, 2002, art. 1, annex: *Self-Determination*, note 35; Heintze, in: Ipsen, *Völkerrecht*, 2004, p. 408.

³⁴⁶ Cf. Eide, UN Doc. E/CN.4/Sub.2/1993/34, para. 82; Heintze, in: Ipsen, *Völkerrecht*, 2004, p. 408; Hobe/Kimminich, *Einführung in das Völkerrecht*, 2004, p. 87.

³⁴⁷ Cf. e.g. 1933 Montevideo Convention on the Rights and Duties of States and Hobe/Kimminich, *Einführung in das Völkerrecht*, 2004, pp. 67 et seq.

to self-determination (in the form of a right to secession) which a people of a state could have claimed.

In addition, it becomes clear that the secession of Nagorno-Karabakh is conceivable on the basis of a decision of the whole people of Azerbaijan, including the Karabakh Armenians. What this means is that all citizens of Azerbaijan as a whole could be called upon to decide about the status of Karabakh, even though a positive vote seems to be unrealistic at present. Let us examine some further cases in which a right to secession is discussed.

b) Right to secession of ethnic peoples

There is a discussion being conducted mainly in international law literature whether a right to secession can be conferred under international law on the individual ethnic peoples who live in a multinational state.³⁴⁸ Here no clear definition and demarcation criteria recognised by the community of states for the terms “ethnic people” and “ethnic group” have been established.³⁴⁹ From a semantic perspective at least one can cautiously refer to a group of people which as an ethnic people is characterised by objective criteria of a cultural or ethnic nature (such as language, religion) and subjective criteria (such as a sense of belonging).³⁵⁰ Furthermore the ethnic people must exhibit a size that is comparable with that of other groups in the respective state.³⁵¹

In the present case it was merely parts of the Armenian population group that were pushing for a secession. The Azerbaijanis living in Nagorno-Karabakh consistently rejected secession, which was demonstrated in particular by the boycott of the secession referendum held on 10 December 1991. This was an independence movement of a group of people who objectively belonged to their own – Armenian – ethnic group and were subjectively linked by a sense of belonging. There is no denying that the Armenians of Nagorno-Karabakh exhibited certain characteristics of a people. Nonetheless, they cannot be described as an ethnically self-contained people. The Armenian ethnic group is settled first and foremost in Armenia. In the territory of the Azerbaijan SSR and the Republic of Azerbaijan, Armenians formed a partial ethnic group which has been and is a clear minority as compared with the ethnic Azerbaijani people. This is a typical case of the intermixing of ethnic groups in border regions. The situation is one of a “kin-state” in which a group of people belongs to an ethnic group being the dominant majority in another state.³⁵² Correspondingly the Armenians of Nagorno-Karabakh solely

³⁴⁸ Cf. e.g. Heintze, in: Ipsen, *Völkerrecht*, 2004, p. 409.

³⁴⁹ Cf. Heintze, in: Ipsen, *Völkerrecht*, 2004, p. 410.

³⁵⁰ Cf. Hobe/Kimminich, *Einführung in das Völkerrecht*, p. 164; Heintze, in: Ipsen, *Völkerrecht*, 2004, p. 409.

³⁵¹ See Heintze, in: Ipsen, *Völkerrecht*, 2004, p. 409.

³⁵² Cf. Heintze, in: Ipsen, *Völkerrecht*, 2004, p. 413.

have the status of an ethnic group and an ethnic minority but not an ethnic people.³⁵³

Ultimately, however, whether the Armenians of Nagorno-Karabakh are granted the status as an ethnic people or an ethnic group alongside the status as a minority is irrelevant for the analysis under international law with regard to secession. As established, there are no internationally recognised demarcation criteria for these categories. Correspondingly both categories are discussed equally in international law with respect to existing rights to self-determination and rights of secession. Hence the following remarks on ethnic groups apply equally to the category of the ethnic people.

c) *Right to secession of ethnic groups and minorities due to crimes under international law, systematic discrimination and massive human rights violations*

Under international law minorities are mainly entitled to minority rights. In cases where these groups also represent ethnic groups, it is highly disputed whether they are also entitled to an external right to self-determination.³⁵⁴ The still prevailing view in the literature rejects this with respect to the principle of territorial integrity.³⁵⁵

A not inconsiderable alternative believes that ethnic groups and minorities are also entitled to an external right to self-determination as a last resort alongside the internal right to self-determination.³⁵⁶ This would mean that the rights of a minority translate into an external right to self-determination, that is, a right to secession, if a group is absolutely and intolerably oppressed. Most serious violations

³⁵³ In accordance with: Cornell, *Journal of South Asian and Middle Eastern Studies* vol. 20/no. 4 (1997) 1 et seq.

³⁵⁴ Cf. Doehring, in: Simma (ed.), *The Charter of the United Nations*, 2002, art. 1, annex: Self-Determination, notes 35 f.; Herdegen, *Völkerrecht*, 2006, p. 256. In regard to the Friendly Relations Declaration see Kohen, in: Kohen (ed.), *Secession, International Law Perspectives*, 2006, p. 10. In regard to the majority of legal writers see also Welhengama, *Minorities' claims, from autonomy to secession*, 2000, p. 313; Mett, *Das Konzept des Selbstbestimmungsrechts der Völker*, 2004, p. 269.

³⁵⁵ Cf. Cárdenas/Cañás, in: Danspeckgruber (ed.), *The Self-Determination of Peoples*, 2002, p. 113; Cornell, *Journal of South Asian and Middle Eastern Studies* vol. 20/no. 4 (1997) 1 et seq; Corten, in: Kohen (ed.), *Secession, International Law Perspectives*, 2006, pp. 231 et seq; Kohen, in: Kohen (ed.), *Secession, International Law Perspectives*, 2006, p. 10; Mett, *Das Konzept des Selbstbestimmungsrechts der Völker*, 2004, pp. 184 et seq, 269; Portier, *Conflict in Nagorno-Karabakh*, 2001, p. 36; Welhengama, *Minorities' claims, from autonomy to secession*, 2000, pp. 313 et seq. With regard to the majority of legal writers cf. also Tomuschat, in: Kohen (ed.), *Secession, International Law Perspectives*, 2006, p. 37; Herdegen, *Völkerrecht*, 2006, p. 256.

³⁵⁶ Cf. Doehring, in: Simma (ed.), *The Charter of the United Nations*, 2002, art. 1, annex: Self-Determination, note 40; Heintze, in: Ipsen, *Völkerrecht*, 2004, p. 414; Herdegen, *Völkerrecht*, 2006, p. 257; Tomuschat, in: Kohen (ed.), *Secession, International Law Perspectives*, 2006, pp. 38 et seq.

must be evident, that is to say, crimes under international law, systematic discrimination and massive human rights violations.³⁵⁷ The state apparatus must have developed into an intolerable instrument of terror and a tyrannical system³⁵⁸ so that the existing obligation of loyalty towards it can be deemed to be revoked.³⁵⁹ Secession is to be the *ultima ratio*, that is the last resort.³⁶⁰

As demonstrated it is less important from the perspective of international law whether a group falls under an abstract term of a people since no clear-cut term exists in the practice of the community of states. What is decisive is whether the community of states confers on a certain part of the population a right to secession. This also applies to ethnic groups and minorities such as the Armenians of Nagorno-Karabakh. Ultimately the community of states represents the decisive standard-setting instance in international law. To this extent the views held in the literature must match the conduct of the community of states. Otherwise these points of view represent progressive attempts at developing international law but contribute little to the legal evaluation of the Karabakh conflict. How does the community of states evaluate the secession demands of ethnic population groups and minorities as represented by the Armenians of Nagorno-Karabakh?

The resolution of this issue is extremely difficult and complex, which is why a step-by-step approach on the basis of the classical doctrine of sources of international law (c.f. Art. 38 of the Statute of the International Court of Justice) appears to be advisable. According to this, first international treaties (see part aa), then customary international law (see part bb) and finally the general principles of law (see part cc) shall be examined.

aa) International treaties

The international treaties relevant in the present context are limited to a small number of conventions. These include the Charter of the United Nations (UN Charter) and the human rights covenants (Covenant on Civil and Political Rights, Covenant on Economic, Social and Cultural Rights).³⁶¹

The UN Charter: The right to self-determination of peoples was established in Arts. 1 para. 2 and 55 of the UN Charter. These state that relations among the nations are to be developed on the basis of, *inter alia*, respect for the principle of the self-determination of peoples. The will of the authors of the UN Charter was thus to define the principle of self-determination as one of the aims of the UN. The le-

³⁵⁷ Cf. Tomuschat, in: Kohen (ed.), *Secession, International Law Perspectives*, 2006, p. 4; Hobe/Kimminich, *Einführung in das Völkerrecht*, 2004, p. 118; Herdegen, *Völkerrecht*, 2006, p. 257; Heintze, in: Ipsen, *Völkerrecht*, 2004, p. 414.

³⁵⁸ Cf. Tomuschat, in: Tomuschat (ed.), *Modern Law of Self-Determination*, 1993, p. 9; Tomuschat, in: Kohen (ed.), *Secession, International Law Perspectives*, 2006, p. 42.

³⁵⁹ Cf. Heintze, in: Ipsen, *Völkerrecht*, 2004, p. 414.

³⁶⁰ See Tomuschat, in: Kohen (ed.), *Secession, International Law Perspectives*, 2006, p. 41; Heintze, in: Ipsen, *Völkerrecht*, 2004, p. 414.

³⁶¹ Cf. also Tomuschat, in: Kohen (ed.), *Secession, International Law Perspectives*, 2006, pp. 26 et seq.

gally binding force of such aims is generally problematic. In the context of the UN Charter, however, it is clear that the objectives not only have a purely programmatic character, but also a formal legal and binding one.³⁶² For example, it follows from Art. 2 para. 4 of the UN Charter that the states are to attain the common ends of the Charter.

The decisive question for this treatise is whether Arts. 1 para. 2 and 55 of the UN Charter also include a right to secession in favour of ethnic groups and minorities. Both articles of the Charter are silent on this, so the matter depends largely on their interpretation. The interpretation rules of Arts. 31-33 of the 1980 Vienna Convention on the Law of Treaties (VCLT) can be used by analogy with respect to the interpretation of the UN Charter.³⁶³ Under Art. 32 of the VCLT, the documents which prepared the ground for the UN Charter, here in particular the Dumbarton Oaks Proposals, form supplementary means of interpretation. It is apparent from these preparatory documents that the right to self-determination enshrined in the UN Charter is not intended to justify secession.³⁶⁴ Naturally these historical documents are merely supplementary under the analogous application of Art. 32 VCLT if there is no clear interpretation in terms of Art. 31 para. 3 VCLT. Under Art. 31 para. 3 VCLT applied by analogy, therefore, subsequent Charter-related agreements between the parties and standard practice in the application of the Charter should have top priority in interpreting the Charter.³⁶⁵ But corresponding agreements allowing clarity on the admissibility of secession on the basis of the Charter have not been concluded.

Similarly there is no recognisable practice as to the implementation of the Charter suggesting that the parties to the treaty agree that the UN Charter covers a right to secession. On the contrary, the community of states has to date rejected rights of secession for ethnic groups and minorities in numerous cases,³⁶⁶ which correspondingly also applies in the context of the UN Charter.

Also the Friendly Relations Declaration of the UN General Assembly (Resolution 2625 (XXV)), which is frequently cited in the context of rights to secession, does not reveal a different point of view. In many respects the Declaration reflects

³⁶² See Doehring, in: Simma (ed.), *The Charter of the United Nations*, 2002, art. 1, annex: Self-Determination, note 1.

³⁶³ See Ress, in: Simma (ed.), *The Charter of the United Nations*, 2002, preface: Interpretation of the Charter, notes 8 et seq., 26 et seq.

³⁶⁴ See UNCIO VI, p. 296, document 343, I/1/16; Wolfrum, in: Simma (ed.), *The Charter of the United Nations*, 2002, art. 1 note 21; Schachter (ed.), *United Nations legal order*, 1995, p. 353.

³⁶⁵ Cf. Ress, in: Simma (ed.), *The Charter of the United Nations*, 2002, preface: Interpretation of the Charter, notes 8 et seq., 26 et seq.; Hobe/Kimminich, *Einführung in das Völkerrecht*, 2004, pp. 216 et seq.

³⁶⁶ See below, section IV. 3. c) bb) (1). Cf. also Tomuschat, in: Kohen (ed.), *Secession, International Law Perspectives*, p. 31; Welhengama, *Minorities' claims, from autonomy to secession*, 2000, pp. 308, 312; Mett, *Das Konzept des Selbstbestimmungsrechts der Völker*, 2004, p. 269; Heintze, in: Ipsen, *Völkerrecht*, 2000, p. 423.

the position of states with regard to the interpretation of the UN Charter. But this is not the case in the context of secession, since the states principally reject secession claims.³⁶⁷ Another question is whether greater significance can be ascribed to the Friendly Relations Declaration with regard to customary international law, that is, independently of the UN Charter (this is discussed in more detail below³⁶⁸).

The human rights covenants: Two identical articles in the two human rights covenants of 1966 state the right to self-determination of peoples.³⁶⁹ However these neither define precisely the term “people” nor do they provide a definitive and clear right to secession for peoples, ethnic groups or minorities³⁷⁰. It is therefore correct to assume that the two human rights covenants are not a suitable basis for secession claims.³⁷¹ This view was underlined for example in the context of the dissolution of Yugoslavia. The secession options discussed in particular for the benefit of the Kosovo Albanians were recognised neither in the context of the human rights covenants nor in any other respect by the community of states under international treaties.³⁷² The community of states refuses to define precisely and explicitly the rights of secession and their criteria.³⁷³ The categorical non-application of human rights covenants in secession circumstances can therefore also be seen as a practice determining the interpretation of the human rights covenants in accordance with Art. 31 para. 3 lit. b VCLT to the disadvantage of peoples seeking secession. Although this does not give rise to a general prohibition on secession, it is also clear that secession at least can not be based solely on the human rights covenants.

The right to self-determination is also established in other international documents alongside the UN Charter and the human rights covenants, for example the

³⁶⁷ Cf. also Schachter (ed.), *United Nations legal order*, 1995, p. 362; Heintze, in: Ipsen, *Völkerrecht*, 2004, p. 422 and below, section IV. 3. c) bb) (1).

³⁶⁸ See below, section IV. 3. c) bb).

³⁶⁹ See Art. 1 para. 1 of the International Covenant on Civil and Political Rights, 1966; Art. 1 para. 1 of the International Covenant on Economic, Social and Cultural Rights, 1966. Cf. also Tomuschat, in: Kohen (ed.), *Secession, International Law Perspectives*, 2006, pp. 26 et seq.

³⁷⁰ Cf. also Council of Europe, *Expertise on a special legal status for the Gagauzes on Moldova*, Doc. CM/Inf (94) 27, 2 September 1994 (excerpts also in Doc. 10364, 29 November 2004).

³⁷¹ See Council of Europe, *Expertise on a special legal status for the Gagauzes on Moldova*, Doc. CM/Inf (94) 27, 2 September 1994 (excerpts also in Doc. 10364, 29 November 2004); Tomuschat, in: Kohen (ed.), *Secession, International Law Perspectives*, 2006, pp. 26 et seq.

³⁷² See also Tomuschat, in: Kohen (ed.), *Secession, International Law Perspectives*, 2006, pp. 26 et seq.; Justenhoven, *Die Neue Ordnung*, 1999, Nr. 2; Krueger, *Implication of Kosovo, Abkhazia and South Ossetia for international law*, CRIA, Vol. 3-2 (2009), pp. 132 et seq.

³⁷³ See also Tomuschat, in: Kohen (ed.), *Secession, International Law Perspectives*, 2006, pp. 26 et seq.

CSCE Helsinki Final Act of 1975³⁷⁴ and the already mentioned Friendly Relations Declaration (UN Resolution 2625 (XXV))³⁷⁵. But these documents themselves do not give rise to a binding, international treaty-based right to secession as they have a non-binding character. The Helsinki Final Act is a pure declaration of intent and not a treaty under international law. It thus lacks any binding force.³⁷⁶ The same applies to the Friendly Relations Declaration. This Declaration was passed by the UN General Assembly, which has no legislative competence (c.f. Art. 10 UN Charter).³⁷⁷ The Declaration therefore principally has a solely recommendatory character.³⁷⁸ Although there is a discussion as to whether the Friendly Relations Declaration reflects customary international law (this is further dealt with below),³⁷⁹ this does not alter its lack of binding character as a treaty.

bb) Customary international law

According to the classical doctrine of sources of international law, customary law is the second main source of international law besides international treaties (c.f. Art. 38 para. 1 lit. b of the Statute of the International Court of Justice).³⁸⁰ Customary international law is understood to be unwritten law which is not created by express agreement among the subjects of international law.

The conventional doctrine reveals two aspects required for a rule under customary international law. The first is a specific state practice.³⁸¹ Customary law can only be said to exist if the subjects of international law, that is primarily the states, develop a specific practice in the treatment of a certain problem. The second is the requirement of what is called *opinio iuris sive necessitatis* (hereafter referred to as *opinio iuris*).³⁸² As in legal relations amongst individuals, unilateral behaviour is insufficient ground for establishing rights also in international law. Instead state practice must be supported by the knowledge and conviction that a

³⁷⁴ Cf. Final Act of the CSCE Helsinki 1975, Questions relating to Security in Europe, point 1 a) VIII. para. 2.

³⁷⁵ See Friendly Relations Declaration, 1970, The principle of equal rights and self-determination of peoples.

³⁷⁶ See Hobe/Kimminich, Einführung in das Völkerrecht, 2004, p. 423 with further references.

³⁷⁷ See also Epping, in: Ipsen, Völkerrecht, 2004, p. 366.

³⁷⁸ See Heintschel von Heinegg, in: Ipsen, Völkerrecht, 2004, p. 221.

³⁷⁹ See section IV 3. c) bb) (3) for a further discussion of the theory of remedial secession held in the context of the Friendly Relations Declaration. However, this theory would only have significance in relation to customary international law as the Friendly Relations Declaration *per se* does not constitute international law.

³⁸⁰ See e.g. Shaw, International Law, 2003, p. 66.

³⁸¹ Cf. Art. 38 para. 1 b of the Statute of the ICJ; Shaw, International Law, 2003, pp. 68 et seq.; Hobe/Kimminich, Einführung in das Völkerrecht, 2004, p. 184; Heintschel von Heinegg, in: Ipsen, Völkerrecht, 2004, pp. 214 et seq.

³⁸² See Art. 38 para. 1 b of the Statute of the ICJ; Shaw, International Law, 2003, pp. 80 et seq.; Hobe/Kimminich, Einführung in das Völkerrecht, p. 184; Heintschel von Heinegg, in: Ipsen, Völkerrecht, 2004, pp. 217 et seq.

corresponding legal obligation exists. It requires recognition that the act exercised has the quality of law.

This classical doctrine has encountered fundamental criticism in recent decades, saying that the development of a customary international law standard over a period of time is no longer appropriate in today's fast-moving times.³⁸³ For this reason many authors more or less dilute the criterion of state practice.³⁸⁴ What is clear is that not every case requires empirical proof of the existence of state practice and *opinio iuris*. If an elementary principle of international law is already derived from international relations and fundamental documents (such as the UN Charter, Treaty on European Union), then a state practice borne out by *opinio iuris* is taken as read.³⁸⁵ Strictly speaking this does not dilute the classical doctrine, but instead merely makes it more manageable for today's requirements. The elementary principles of international law thereby do not form part of general principles of law under Art. 38 para. 1 lit. c of the Statute of the International Court of Justice, but of customary law.³⁸⁶ The general principles of law derive solely from the legal systems of the national states and not from international relations or international documents.³⁸⁷

Thus, given these three aspects of customary international law (state practice, *opinio iuris*, elementary principle of international law), the extent to which a right to secession of the Armenians of Nagorno-Karabakh exists remains to be examined (see sections (1)-(3) below). Although this three-part legal approach may be criticised in that a right to secession is thus still dependent on the politically affected behaviour of the community of states, linking into the politically motivated behaviour of the states is the sole conceivable method of laying the foundations of the right to self-determination in customary law. Any other approach would lie outside the international legal system.

(1) State practice

What is required first and foremost is a state practice indicating the existence of an internationally recognised right to secession for ethnic groups or minorities. What is interesting here for the time being is primarily the situations discussed in the literature in which crimes under international law, systematic discrimination and massive human rights violations exist.

³⁸³ Cf. Hobe/Kimminich, *Einführung in das Völkerrecht*, 2004, pp. 185 et seq.

³⁸⁴ See Tomuschat, in: Kohen (ed.), *Secession, International Law Perspectives*, 2006, p. 39; Hobe/Kimminich, *Einführung in das Völkerrecht*, 2004, p. 186; Heintschel von Heinegg, in: Ipsen, *Völkerrecht*, 2004, pp. 213 et seq.

³⁸⁵ Cf. Heintschel von Heinegg, in: Ipsen, *Völkerrecht*, 2004, pp. 227.; Mosler, *EPIL II* (1995), pp. 511, 513; Tomuschat, in: Kohen (ed.), *Secession, International Law Perspectives*, 2006, p. 39.

³⁸⁶ Cf. Heintschel von Heinegg, in: Ipsen, *Völkerrecht*, 2004, p. 227.

³⁸⁷ See below, section IV. 3. c) cc).

The specific requirements which need to be satisfied for the requisite state practice are contested in the international law literature.³⁸⁸ In principle any behaviour of the subjects of international law, irrespective of whether they are of a legal or factual nature, may form state practice. This includes conduct, statements and omissions in the field of international relations or at national level in as far as they are internationally relevant.³⁸⁹

In order for a behaviour to develop into a standard enshrined in customary law, the minimum requirement is that it is of a certain duration, uniformity and coverage,³⁹⁰ otherwise it cannot be held to be customary practice. A short duration does not necessarily mean that a customary standard cannot be established; a short term may already have been sufficient.³⁹¹ The practice can be classified as uniform if a representative number of subjects of international law behave consistently, that is largely identically.³⁹² The characteristic of the coverage of the behaviour does not mean that all subjects of international law must behave in the same manner. However, what is necessary is that not only the conflicting parties recognise the practice, but also all subjects of international law whose interests are affected.³⁹³

In conclusion no state practice can be found in the case of ethnic groups and minorities satisfying the requirements for the emergence of customary law and supporting the existence of a right to secession. This is also true in cases where the state, confronted with the secessionist demands, turns to forcible measures violating human rights. Even confessed advocates of a right to secession acknowledge this deficiency of the necessary state practice.³⁹⁴ On the contrary, the practice of the states instead demonstrates that the existence of a right to secession is not assumed. The majority of states does not support such an approach³⁹⁵ and seemingly flatly denies a right to secession for ethnic groups and minorities.³⁹⁶

³⁸⁸ See Heintschel von Heinegg, in: Ipsen, *Völkerrecht*, 2004, pp. 213 et seq.

³⁸⁹ See Heintschel von Heinegg, in: Ipsen, *Völkerrecht*, 2004, p. 215; Hobe/Kimminich, *Einführung in das Völkerrecht*, 2004, p. 184; Kokott/Doehring/Buergenthal, *Grundzüge des Völkerrechts*, 2003, p. 24.

³⁹⁰ Cf. Heintschel von Heinegg, in: Ipsen, *Völkerrecht*, 2004, pp. 215 et seq.

³⁹¹ Cf. Heintschel von Heinegg, in: Ipsen, *Völkerrecht*, 2004, pp. 214 et seq.

³⁹² See Heintschel von Heinegg, in: Ipsen, *Völkerrecht*, 2004, p. 216.

³⁹³ See Heintschel von Heinegg, in: Ipsen, *Völkerrecht*, 2004, p. 216.

³⁹⁴ Cf. Tomuschat, in: Kohen (ed.), *Secession, International Law Perspectives*, 2006, pp. 27 et seq; Doering, in: Simma (ed.), *The Charter of the United Nations*, 2002, art. 1, annex: *Self-Determination*, note 36.

³⁹⁵ In accordance with: Gray, *International Law and the Use of Force*, 2004, p. 58; Crawford, *BYIL* 1998, p. 114; Welhengama, *Minorities' claims, from autonomy to secession*, 2000, pp. 308, 312; Shaw, *International Law*, 2003, p. 444; Mett, *Das Konzept des Selbstbestimmungsrechts der Völker*, 2004, p. 269; Wodarz, *Gewaltverbot, Menschenrechtsschutz und Selbstbestimmungsrecht im Kosovo-Konflikt*, 2002, p. 202. See also Heintze, in: Ipsen, *Völkerrecht*, 2004, p. 423, who considers state practice to be extremely cautious and reserved in regard to the acceptance of secession.

³⁹⁶ Cf. Tomuschat, in: Kohen (ed.), *Secession, International Law Perspectives*, 2006, p. 31.

This finding is based on several indications. Given the immense significance and frequency of secessionist movements, countless conducts of states in the form of statements, silence and behaviour in the case of separatist conflicts can be identified.

A clear indication for a rejection of the right to secession of ethnic groups and minorities derives from recent African history. After the former colonies gained independence in the 1950s and 1960s, the new African heads of state and government agreed in 1964 to retain the old colonial borders as state borders (principle of *uti possidetis iuris*).³⁹⁷ The continued validity of this agreement was confirmed in the Constitutive Act of the African Union in 2000.³⁹⁸ The resulting binding borders arbitrarily divided many ethnic peoples and continue to do so. At the same time no right to unification or separation of individual peoples was recognised.³⁹⁹

An illustrative case in this regard is that of the Igbo tribe which declared its independence from Nigeria in 1967. Apart from a few African states the ultimately unsuccessful separation attempt found no support.⁴⁰⁰ The community of states did not even put the case on the agenda of the General Assembly of the United Nations.⁴⁰¹ An African exception seems to be the successful separation of Eritrea from Ethiopia in 1993. But this was not based on the recognition of any right to secession that is conferred *per se* on an oppressed group. Instead the community of states only conferred a right to separation on Eritrea because Ethiopia had breached Resolution 390 A (V) of the General Assembly of the United Nations and the autonomous status of Eritrea stipulated in it.⁴⁰² Interestingly, Art. 20 of the African Charter on Human and Peoples' Rights which came into force in 1986 confers a right to liberation on colonised or oppressed peoples. However, it has not yet become clear whether the African states, having thrown off their colonial shackles, use this as a basis to confer a right to alter national borders or to secession on individual groups and minorities. Finally, even if this were the case, no broad, common practice extending beyond Africa would arise in the context of customary law.⁴⁰³

³⁹⁷ Cf. OAU Assembly Resolution, Cairo 1964. See also Tomuschat, in: Kohen (Ed.), *Secession, International Law Perspectives*, 2006, p. 27.

³⁹⁸ Cf. Art. 4 b of the Constitutive Act of the African Union.

³⁹⁹ See Tomuschat, in: Kohen (ed.), *Secession, International Law Perspectives*, 2006, p. 27.

⁴⁰⁰ Cf. Tomuschat, in: Kohen (ed.), *Secession, International Law Perspectives*, 2006, p. 29.

⁴⁰¹ Cf. Tomuschat, in: Kohen (ed.), *Secession, International Law Perspectives*, 2006, p. 29.

⁴⁰² See Kohen, in: Kohen (ed.), *Secession, International Law Perspectives*, 2006, p. 19; Tomuschat, in: Kohen (ed.), *Secession, International Law Perspectives*, 2006, p. 28.

⁴⁰³ From a dogmatic legal perspective Art. 20 of the African Charter on Human and Peoples' Rights naturally throws up questions in the context of secession. However these cannot be attributed to the area of customary law, but to African international contract law. This has no validity with respect to Nagorno-Karabakh. For consideration from the perspective of customary law, therefore, sole reliance should be placed on the actual broad conduct of states. For an African point of view see Ouguergouz/Tehindra-

What was also illustrative in the context of secession was the conduct of states during the collapse of the USSR, above all in the form of their practice concerning recognition. Here too the extreme restraint with respect to rights of secession was confirmed – not only towards ethnic groups and minorities, but also towards the union republics, who were expressly entitled to a free right to secession under Art. 72 of the 1977 Constitution of the USSR.⁴⁰⁴ Thus the independence of Estonia, Latvia and Lithuania was not recognised because these former union republics had a constitutional right to secession, but because the Soviet Union annexed the Baltic states in 1940 in breach of international law.⁴⁰⁵ With respect to the recognition of the remaining union republics, the community of states waited for the complete collapse and dissolution of the USSR, despite the fact that the union republics regarded themselves as being entitled to secession on the basis of Art. 72 of the Constitution of the USSR.⁴⁰⁶

The international reactions to the secessionist endeavours in Abkhazia, South Ossetia, Chechnya, Transnistria and Nagorno-Karabakh are also significant. In all of these areas peoples, groups or minorities attempted to set up independent miniature states. The community of states in a permanent and consistent practice had recognised none of these regions as independent states.⁴⁰⁷ Russia constituted the only exception when recognising Abkhazia and South Ossetia in the course of the Georgia-conflict in August 2008. No other state – apart from Nicaragua – followed the Russian example. Rather, most states vehemently denied the recognition of Abkhazia and South Ossetia, declaring them illegal under international law.

The position of states became even clearer in the case of Chechnya. Here the Russian side has clearly committed serious human rights violations against the civilian population and has arbitrarily deployed a massive military force.⁴⁰⁸ Neither the states of the Council of Europe⁴⁰⁹ and the OSCE⁴¹⁰ nor for instance the German *Bundestag*⁴¹¹ have taken this as grounds to recognise the independence of Chech-

zanarivelo, in: Kohen (ed.), *Secession, International Law Perspectives*, 2006, pp. 257 et seq.

⁴⁰⁴ See above, section III. 3.

⁴⁰⁵ See Tomuschat, in: Kohen (ed.), *Secession, International Law Perspectives*, 2006, p. 31; Kohen, in: Kohen (ed.), *Secession, International Law Perspectives*, 2006, p. 20.

⁴⁰⁶ Cf. Mett, *Das Konzept des Selbstbestimmungsrechts der Völker*, 2004, pp. 249 et seq.

⁴⁰⁷ See also Pazartzis, in Kohen (ed.): *Secession, International Law Perspectives*, 2006, pp. 367 et seq.; Gray, *International Law and the Use of Force*, 2004, p. 58.

⁴⁰⁸ See resolution of the German Parliament (Deutscher Bundestag) on 19 January 2005, BT-Drucks. 13/263; Tomuschat, in: Kohen (ed.), *Secession, International Law Perspectives*, 2006, p. 31; Pazartzis, in Kohen (ed.): *Secession, International Law Perspectives*, 2006, pp. 369 et seq.; Mett, *Das Konzept des Selbstbestimmungsrechts der Völker*, 2004, pp. 250 et seq.

⁴⁰⁹ See resolution of the Parliamentary Assembly 1201 (1999).

⁴¹⁰ See declaration of the OSCE summit in Istanbul 1999, Nr. 23.

⁴¹¹ See BT-Drucks. 13/263.

nya.⁴¹² They have merely condemned the human rights violations committed and independently of this have expressly confirmed the territorial integrity of the Russian Federation. Furthermore, the case of Chechnya has not appeared on any United Nations agenda.⁴¹³ The rejecting approach of the community of states with respect to corresponding claims to secession is obvious.⁴¹⁴

Finally the case of the breakaway of the Serbian region of Kosovo underlines the extreme restraint of the community of states with respect to secession claims founded in international law. Thus the Kosovo Resolution passed by the UN Security Council in 1999 has merely conferred a far-reaching autonomous status. This provided solely for an internal right to self-determination of the Kosovans.⁴¹⁵ An external right to self-determination and a right to secession respectively were rejected, despite the documented violence against the Kosovo population.

When the Kosovans proceeded to nonetheless declare their independence in February 2008, the community of states was deeply split on the question of whether an independent Kosovo may be accepted. Many states, such as Australia, France, Germany, Great Britain and the USA recognised Kosovo. Other states, such as China, Romania, Russia and Spain, rejected such an approach. Further states, e.g. Brazil, Canada, India and Iran reacted neutrally. At present the majority of states did not recognise Kosovo. These different approaches make clear that there is no coherent view among the states on the basis of which a right to secession may exist or develop. The non-recognition of Abkhazia and South Ossetia in August 2008 underlines this view again. With the exception of Russia and Nicaragua, no state accepted Abkhazia's and South Ossetia's independence. Rather the territorial integrity of Georgia was underlined. The case of Kosovo did not change anything in regard to the renunciatory stance of the community of states.⁴¹⁶

In summary it is clear that the community of states have not developed a practice that satisfies the requirements of duration, uniformity and coverage. Thus, the states still do not confer a right to secession on ethnic groups and minorities.⁴¹⁷ In this context the reactions in particular to the secessionist movements in Abkhazia, South Ossetia, Chechnya, Transnistria and Nagorno-Karabakh are significant. The community of states thus still appears to reject clear rights to secession.⁴¹⁸ Analy-

⁴¹² See also Mett, *Das Konzept des Selbstbestimmungsrechts der Völker*, 2004, pp. 250 et seq.

⁴¹³ Cf. Tomuschat, in: Kohen (ed.), *Secession, International Law Perspectives*, 2006, p. 31.

⁴¹⁴ In accordance with: Tomuschat, in: Kohen (ed.), *Secession, International Law Perspectives*, 2006, p. 31.

⁴¹⁵ Cf. Tomuschat, in: Kohen (ed.), *Secession, International Law Perspectives*, 2006, pp. 33 et seq.

⁴¹⁶ For details see Krueger, *Implication of Kosovo, Abkhazia and South Ossetia for international law*, CRIA, Vol. 3-2 (2009), pp. 121 et seq.

⁴¹⁷ See also Tomuschat, in: Kohen (ed.), *Secession, International Law Perspectives*, 2006, p. 34; Mett, *Das Konzept des Selbstbestimmungsrechts der Völker*, 2004, p. 269.

⁴¹⁸ See also Tomuschat's assessment in: Kohen (ed.), *Secession, International Law Perspectives*, 2006, pp. 31, 34.

sis of the events in Chechnya leads us to suppose that this even applies in cases where it can be assumed that crimes under international law, systematic discrimination and massive human rights violations have been committed.⁴¹⁹ This assumption is also underlined by the conduct of states in cases of massive human rights violations in Northern Iraq and Kosovo⁴²⁰. Even under such circumstances no uniform and widespread state practice was established which might confer a right to secession on heavily discriminated groups. Furthermore in the case of Kosovo, the independence of the Kosovans was rejected before 2008 despite proven cases of human rights violations. Even though several states recognised Kosovo's independence in the spring of 2008, many other countries did not follow this example. No uniform and widespread state practice was observed to support a generally applicable right to secession.

(2) *Opinio iuris sive necessitatis*

Given the lack of state practice, any *opinio iuris*, the conviction that states conduct out of a sense of legal obligation, which would otherwise be required is no longer relevant. Whilst the theory of the instantaneous creation of customary law states that customary international law could also develop from a corresponding *opinio iuris* alone, this would rightly be an error in law which could hardly be the basis for the creation of law.⁴²¹ Without being practiced there is nothing that can manifest and normatively constitute common practice.

That notwithstanding, there would be no clear *opinio iuris* in favour of a right to secession in customary international law in the present case. The conduct of the community of states would have to be supported by a conviction that ethnic groups and minorities have a corresponding right to secession under certain conditions. However this is not the case.⁴²² On the contrary, one can virtually assume that the community of states, with its rejective approach, regards any secession of ethnic groups and minorities as legally impossible. Nevertheless, the thesis of a contrary *opinio iuris* cannot be conclusively substantiated with respect to all sets of circumstances. The community of states behaves in a restrained manner with respect to secession demands and only reacts in the context of individual concrete cases such as Kosovo or Chechnya.

The lack of a coherent legal view (*opinio iuris*) becomes even clearer when regarding the case of Kosovo. Upon closer examination, the behaviour of those states recognising Kosovo was dominated by political motives. Legal aspects

⁴¹⁹ Cf. Tomuschat, in: Kohen (ed.), *Secession, International Law Perspectives*, 2996, p. 31; Mett, *Das Konzept des Selbstbestimmungsrechts der Völker*, 2004, pp. 266 et seq.

⁴²⁰ See also Crawford, *The Creation of States*, 2006, pp. 403 et seq.

⁴²¹ Cf. Hobe/Kimminich, *Einführung in das Völkerrecht*, 2004, p. 186; Heintschel von Heinegg, in: Ipsen, *Völkerrecht*, 2004, p. 214.

⁴²² Cf. Tomuschat, in: Kohen (ed.), *Secession, International Law Perspectives*, 2006, pp. 34 et seq; Welhengama, *Minorities' claims, from autonomy to secession*, 2000, pp. 308, 312, 314; Mett, *Das Konzept des Selbstbestimmungsrechts der Völker*, 2004, pp. 266 et seq.

played only a secondary role.⁴²³ The aim was to improve the critical security and economic situation in Kosovo - a region situated in the middle of Europe. A worldwide recognition of an independent state was assumed to be the key to solve the problems. Insofar the reactions of the states reflected conflict resolution strategies that were deemed right as well as further considerations regarding foreign affairs. They mirrored no clear legal assumptions. Legal motives and considerations were deliberately not communicated or at least only to a limited extent.⁴²⁴ On the contrary all states having recognised Kosovo expressly excluded any legal effect of their conduct by declaring that the Kosovo case cannot be seen as a precedent for other situations in the world. Thus even they confirmed their hostile attitude towards secessions, emphasizing the non-existence of a right to secession also in exceptional cases. Against this backdrop their recognition of Kosovo certainly also seems questionable from a legal point of view and not being in conformance with international law. But besides that, it is clear that no basis was provided for the evolution of a right to secession.

Finally no clear and general *opinio iuris* either for or against a general right to secession can be identified, despite the fact that the tendencies towards an absolute exclusion are obvious. This is also true in the case of crimes under international law, systematic discrimination and massive human rights violations.⁴²⁵ A right to secession in customary international law in favour of Nagorno-Karabakh could not arise on this basis. However at best we are left with the question whether international documents permit a different point of view that may suggest an elementary principle of secession, which shall now be examined in part 3.

(3) Elementary principle of international law: remedial secession

We have already seen above⁴²⁶ that the classical doctrine of customary international law has been subject to criticism for several decades and is being further developed by the literature and international institutions such as the International Court of Justice and the International Criminal Tribunal for the former Yugoslavia.⁴²⁷ Under the approach that has developed, the existence of a state practice supported by an *opinio iuris* can be assumed if an elementary principle under international law already derives from international relations and fundamental

⁴²³ For details see Krueger, Implication of Kosovo, Abkhazia and South Ossetia for international law, CRIA, Vol. 3-2 (2009), pp. 139 et seq.

⁴²⁴ For details see Krueger, Implication of Kosovo, Abkhazia and South Ossetia for international law, CRIA, Vol. 3-2 (2009), pp. 139 et seq.

⁴²⁵ Cf. Tomuschat, in: Kohen (ed.), Secession, International Law Perspectives, 2006, p. 31; Mett, Das Konzept des Selbstbestimmungsrechts der Völker, 2004, pp. 266 et seq.

⁴²⁶ See above, introductory remarks to section IV. 3. c) bb).

⁴²⁷ Cf. Tomuschat, in: Kohen (ed.), Secession, International Law Perspectives, 2006, p. 39; Hobe/Kimminich, Einführung in das Völkerrecht, 2004, p. 186; Heintschel von Heinegg, in: Ipsen, Völkerrecht, 2004, pp. 213 et seq.

documents (such as the UN Charter, Treaty on European Union).⁴²⁸ This begs the question of whether the approach for its part is founded in international law and can claim validity. This can be affirmed without doubt. It does not fundamentally revoke the classical doctrine of customary international law, but instead merely adapts it to the requirements of today's fast-moving times. A general practice acknowledged as law pursuant to Art. 38 of the Statute of the International Court of Justice is not waived, it is merely more finely distilled.

What does this mean for the Nagorno-Karabakh conflict? Has such an elementary principle under international law developed granting a right to secession under certain circumstances? The majority of legal authors reject this view.⁴²⁹ On the contrary a broad view of international legal scholars⁴³⁰ and some states⁴³¹ (remedial secession⁴³² and oppression theories⁴³³) refer to three declarations that were passed within the UN. These international documents are said to provide for secession as a last resort for ethnic groups and minorities in the event of extreme and most severe crimes and intolerable persecution.⁴³⁴ The still prevailing opinion

⁴²⁸ Cf. Tomuschat, in: Kohen (ed.), *Secession, International Law Perspectives*, 2006, p. 39; Heintschel von Heinegg, in: Ipsen, *Völkerrecht*, 2004, p. 227; Mosler, *EPIL II* (1995), pp. 511, 513.

⁴²⁹ See Corten, in: Kohen (ed.), *Secession, International Law Perspectives*, 2006, pp. 231 et seq; Fischer, in: Ipsen, *Völkerrecht*, 2004, pp. 1080 et seq.; Higgins, in: Brölmann/Lefeber/Zieck (ed.), *Peoples and Minorities in International Law*, 1993, p. 29; Kohen, in: Kohen (ed.), *Secession, International Law Perspectives*, 2006, p. 10; Mett, *Das Konzept des Selbstbestimmungsrechts der Völker*, 2004, pp. 247 et seq, 269 (in regard to Nagorno-Karabakh and Chechnya); Quane, *ICLQ* 47 (1998), pp. 537, 564; Tancredi, in: Kohen (ed.), *Secession, International Law Perspectives*, 2006, pp. 171 et seq; Welhengama, *Minorities' claims, from autonomy to secession*, 2000, pp. 313 et seq. Cf. also Tomuschat, in: Kohen (ed.), *Secession, International Law Perspectives*, 2006, pp. 34 et seq with further references; Herdegen, *Völkerrecht*, 2006, p. 256.

⁴³⁰ Cf. Doehring, in: Simma (ed.), *The Charter of the United Nations*, 2002, art. 1, annex: *Self-Determination*, note 40; Hannum, *Rethinking Self-Determination*, *VJIL* 34 (1993), pp. 1, 45 et seq; Herdegen, *Völkerrecht*, 2006, p. 257; Heintze, in: Ipsen, *Völkerrecht*, 2004, p. 414; Kimminich/Hobe, *Einführung in das Völkerrecht*, 2004, pp. 115 et seq; Musgrave, *Self-Determination and National Minorities*, 1997, p. 209; Tomuschat, in: Kohen (ed.), *Secession, International Law Perspectives*, 2006, pp. 38 et seq.

⁴³¹ See, for the Australian position, *Self-Determination – The Australian Position*, information paper addressed to the UN-ECOSOC from 30 November 1995, UN-ECOSOC doc. E/CN.4/1995/WG.15/2/Add.2 = http://www.cwis.org/fwdp/Oceania/aus_95.txt.

⁴³² See, for the term "remedial secession", Buchheit, *Secession*, 1978, p. 222; Kohen, in: ders. (ed.), *Secession, International Law Perspectives*, 2006, p. 10; Tomuschat, in: Kohen (ed.), *Secession, International Law Perspectives*, 2006, p. 35.

⁴³³ Cf. Musgrave, *Self Determination and Minorities*, 1997, pp. 188 et seq.

⁴³⁴ Cf. Hannum, *Rethinking Self-Determination*, *VJIL* 34 (1993), pp. 1, 45 et seq; Herdegen, *Völkerrecht*, 2006, p. 257; Hobe/Kimminich, *Einführung in das Völkerrecht*, 2004, p. 118; Heintze, in: Ipsen, *Völkerrecht*, 2004, p. 414; Tomuschat, in: Kohen (ed.), *Secession, International Law Perspectives*, 2006, pp. 35, 41 et seq.; Tomuschat, *Modern*

counters that the wording does not permit such an interpretation, that these declarations are non-binding soft law and that there is a lack of state practice which would convert the declarations into “hard” international law.⁴³⁵

The three declarations include the Friendly Relations Declaration (UN Resolution 2625 (XXV)), the Declaration of the 1993 World Conference on Human Rights and the Declaration on the occasion of the 50th anniversary of the UN. The Friendly Relations Declaration is of particular interest here as the other two declarations were not made until after the decisive formal secession decisions in Nagorno-Karabakh of 1991/1992. Let us look more closely at the Friendly Relations Declaration. The section cited by the remedial secession theory, known as the saving clause, states:

“Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.”⁴³⁶

On first reading of this section it is not clear why a remedial secession is regarded by a section of the literature as being founded in international law. Remedial secession as an elementary principle in customary international law would only be recognised where two requirements exist, which we shall examine. First, the interpretation of the saving clause must give rise to a corresponding right to secession, as a basic requirement. Second, any right to secession must be able to apply as an elementary principle of international law pursuant to the newer doctrine of customary international law.

First: interpretation of the saving clause: At a closer look, the wording of the cited clause solely provides that the interference with territorial integrity, and thus also secession, is categorically excluded if a state respects the principle of the equality and self-determination of peoples. What should apply in the case where a state does not behave in accordance with this principle, in particular if it does not have a government representing the entire population, is left open. There is no mention of the automatic creation of a right to secession.

Law of Self-Determination, 1993, p. 9; Wodarz, *Gewaltverbot, Menschenrechtsschutz und Selbstbestimmungsrecht im Kosovo-Konflikt*, 2002, pp. 189 et seq.

⁴³⁵ Cf. Tomuschat, in: Kohen (ed.), *Secession, International Law Perspectives*, 2006, pp. 35 et seq.; Fischer, in: Ipsen, *Völkerrecht*, 2004, pp. 1080 et seq.; Musayev, *International Human Rights Law: Collected Essays*, 2005, pp. 100 et seq.; Musgrave, *Self Determination and Minorities*, 1997, pp. 188 et seq.; Mett, *Das Konzept des Selbstbestimmungsrechts der Völker*, 2004, pp. 247 et seq.

⁴³⁶ See Friendly Relations Declaration, 1970, The principle of equal rights and self-determination of peoples, para. 7.

Such a right may arise from an *argumentum e contrario* stating that when secession is excluded for loyal states and governments, then a right to secession must be granted when states and governments are disloyal. Such an *argumentum e contrario*, however, is not evident given the extremely restrained conduct of the states with respect to secessions and would only be permissible if it complied with the systematic context and the aims and objectives of the Declaration.⁴³⁷ Whether this is the case, is indeed more than questionable.

The preamble of the Declaration says that any attempt to disrupt the national unity and territorial integrity of a state in part or in full is incompatible with the purposes and principles of the UN Charter⁴³⁸ and is thus also not compliant with the Declaration.⁴³⁹ The exercise of a right to secession would without doubt represent such an attempt, meaning that an interpretation in favour of such a right to separation seems to be systematically excluded.

The preamble also states that the Declaration is primarily to be seen in the light of maintaining world peace, international security and the development of friendly relations among nations.⁴⁴⁰ Even though the paramount importance of an effective application of the principle of self-determination is also recognised by the preamble⁴⁴¹, the right to self-determination must be categorised in the context of the primary objectives of the Declaration and the UN Charter. At least in regard to the external right to self-determination this is particularly expressed by the clarification already mentioned that any attempt aimed at the partial or total disruption of the national unity and territorial integrity of a state is incompatible with the purposes and principles of the charter.⁴⁴² Finally, there is also no clear reason why the primary objectives would in essence be better served by conferring an external right to self-determination on ethnic groups and minorities in the form of the right to secession than not conferring such a right. There is ultimately no clarification as to what the consequences of conferring or not conferring a right to secession in exceptional circumstances would be for world peace, international security and relations among states. The very prospect of a legitimated right to secession in international law can inspire secessionist forces and foreign supporters and provoke internal reprisals – whether justified or not. The situation can therefore develop into a cross-border crisis, considerably jeopardising international security and peace.⁴⁴³ The Karabakh conflict and the conflicts in Abkhazia and South Ossetia are prime examples of this.

⁴³⁷ Interpretation in accordance with the Friendly Relations Declaration, 1970, General part, para. 1 and in analogy to Art. 31 para. 1 of the Vienna Convention on the Law of Treaties, 1980.

⁴³⁸ Cf. Friendly Relations Declaration, Preamble, para. 14.

⁴³⁹ In Accordance with the General part of the declaration the UN Charter constitutes the base for its interpretation.

⁴⁴⁰ See e.g. Friendly Relations Declaration, Preamble, para. 1, 2, 3 and 4.

⁴⁴¹ See Friendly Relations Declaration, Preamble, para. 13.

⁴⁴² See Friendly Relations Declaration, Preamble, para. 14.

⁴⁴³ See also Portier, Conflict in Nagorno-Karabakh, 2001, pp. 46 et seq.

What also appears problematic here is the handling of any right to secession. There is no clarity whatever as to the factual and legal conditions for the development of such a right. The Friendly Relations Declaration gives us nothing to go on. This means that it is mainly the parties to the conflict who, citing a range of authors, fill the void themselves and see themselves as legitimated under international law to turn to violent measures, which can attain the dimensions of terrorism and civil war. Typical of this are for example the statements of Asenbauer who, with reference to the Friendly Relations Declaration, even assumes a completely free and thus also unconditional right to secession and as such legitimises the secession movement in Nagorno-Karabakh.⁴⁴⁴ The established principles of international law (in particular the principle of territorial integrity), the doctrine of sources of international law and even the theory of remedial secession are completely turned on their head. A free and unconditional right to secession has no other adherents elsewhere in international literature on international law.

Moreover, further teleological doubts also exist. As described, the theory of remedial secession applies in the event of the most severe and extreme violations of human rights which make secession necessary as the last resort. The system of human rights already provides various rights for such extreme situations, the effectiveness of which is naturally open to discussion in each individual case. What is questionable, however, is whether the Friendly Relations Declaration, the purpose of which is above all the maintenance of international peace and security, would want to add a further instrument, the right to secession, to the established human rights system.

Additionally, the granting of a right to secession or an external right to self-determination appears to be less suited than existing human rights law in assisting oppressed ethnic groups and minorities. These groups would require consistent and the most effective assistance possible from the community of states. But the right to self-determination under the Friendly Relations Declaration does not form a solid basis under international law for an intervention by other states.⁴⁴⁵ The Friendly Relations Declaration expressly states that in relation to the realisation of the right to self-determination, other states must refrain from any actions that are aimed at destroying the national unity and territorial integrity of an affected state in full or in part.⁴⁴⁶ Third countries should therefore not encourage the dismemberment of an existing state. Without assistance from a third country, however, the right to secession could not be enforced by a group already weakened by most severe discriminations. The more meaningful approach here is the employment of

⁴⁴⁴ See Asenbauer, *Zum Selbstbestimmungsrecht des Armenischen Volkes von Berg-Karabach*, 1993, p. 138. A critical view should also be taken of the historical aspects advanced to underpin the thesis, which are not able to legitimise secession claims either under classical or modern international law.

⁴⁴⁵ See also Elsner, *Die Bedeutung des Volkes im Völkerrecht*, 2000, p. 305.

⁴⁴⁶ See Friendly Relations Declaration, 1970, The principle of equal rights and self-determination of peoples, para. 8. See also Musgrave, *Self Determination and Minorities*, 1997, pp. 191 et seq.

the human rights system and the humanitarian intervention with a mandate of the UN Security Council.⁴⁴⁷ The instruments available would be applied directly to the source of the problem, that is, to the responsible regime in power at the time. Whether in addition to these instruments it would also generally make sense in the long term to demolish the entire state, that is also the state territory and the people in its totality, is more than doubtful.⁴⁴⁸

In conclusion, the apparently prevalent view represented here holds that no right to secession as understood by the remedial secession and oppression theories derives from the Friendly Relations Declaration, taking into account the systematic context and the teleological relations. This is particularly true of the saving clause.

The legal quality of the saving cause: If we still concluded that the saving clause covers secessions in extremely exceptional circumstances then it would not follow from this alone that there is a right to secession under international law. As indicated above, this would only be the case if we assume that an interpretation of the saving clause in favour of a right to secession reflects an elementary principle of international law.⁴⁴⁹ This would require that the saving clause in this respect is regarded as particularly entrenched and generally recognised. Only then is any departure from the classical requirement of an empirical proof of a state practice and an *opinio iuris* justified.⁴⁵⁰

The Friendly Relations Declaration as a so-called declaration of principles is in any case a fundamental international document. However this general assessment is not sufficient to confer the status of binding standards on all normative statements of the Declaration. Otherwise one would breach the doctrine of sources of international law by prematurely converting soft law into hard international law. What is required instead is the proof that the saving clause, by itself, has developed as a particularly entrenched and generally recognised principle of international law in favour of secession.

This proof can hardly be furnished. In spite of the Friendly Relations Declaration, states do not generally acknowledge secession claims in the event of serious violations of human rights. The case of Chechnya is exemplary. But also in the case of Kosovo the states did not proceed on the assumption that a general right to secession exists. Such a right was even excluded by declaring that the recognition of Kosovo is no precedent.⁴⁵¹ Against this backdrop an elementary principle of remedial secession could hardly have developed. The remedial secession and oppression theories can not be regarded as either reinforced or recognised with re-

⁴⁴⁷ Cf. also Elsner, *Die Bedeutung des Volkes im Völkerrecht*, 2000, p. 305.

⁴⁴⁸ See also Kohen, in: Kohen (ed.), *Secession, International Law Perspectives*, 2006, pp. 10 et seq.

⁴⁴⁹ See above, introductory remarks to section IV. 3. c) bb) (3).

⁴⁵⁰ Cf. also Tomuschat, in: Kohen (ed.), *Secession, International Law Perspectives*, 2006, p. 39.

⁴⁵¹ See Krueger, *Implication of Kosovo, Abkhazia and South Ossetia for international law*, CRIA, Vol. 3-2 (2009), pp. 140 et seq.

spect to clear state practice.⁴⁵² Even the Friendly Relations Declaration does not expressly provide for a right to secession. This is derived only from a controversial interpretation of the saving clause. Further, also in the later Declaration of the 1993 World Conference on Human Rights 1993 and the Declaration on the Occasion of the 50th Anniversary of the UN no clarification is made as to whether the saving clause grants a right to secession. Both declarations are just as imprecise as the Friendly Relations Declaration. This means that the community of states did not want to make any firm commitments in favour of a remedial secession even on passing instruments of soft law.⁴⁵³

In summary we can establish that at the time of the Soviet transition, international law did not recognise a right to secession for severely oppressed ethnic groups and minorities, and this is also true of international law today. Ethnic groups and minorities still need to pursue the route laid out within the framework of human rights. The community of states has not generally resolved the extremely difficult and complex problem of the secession of ethnic groups and minorities with the instruments of law, nor is it currently prepared to do so. As long as this will be the case the principle of integrity has to be given priority. This means for secessionist movements that they have no support under international law whatsoever with respect to secession and the foundation of their own statehood. They have no claim to secession. But they are guaranteed human rights and the rights recognised by customary international law to internal (defensive) self-determination.⁴⁵⁴

(4) Factual analysis

That notwithstanding, we should not ignore the fact that the remedial secession and oppression theories do have some renowned advocates in international jurisprudence. Although it is no longer a central issue here, we shall nonetheless examine whether the documented facts would justify a secession of Nagorno-Karabakh on the basis of the remedial secession and oppression theories. If this turns out to be clearly the case, then Nagorno-Karabakh could refer to at least a part of international jurisprudence, albeit this would not be a solid position given the lack of state practice. If the documented facts do not permit a clear form of secession in accordance with these theories, then a right to separation would appear to be unjustifiable from the perspective of international jurisprudence as a whole.

One of the main difficulties of the remedial secession and oppression theories, as we have already touched on, concerns the lack of clarity concerning the exact components of the theories. This should also be taken as clear evidence of the fact that the theories cannot reflect valid customary law. The sources on which they are based (above all the Friendly Relations Declaration) provide no indication of the type, scope and duration of the human rights violations and discriminations. There

⁴⁵² Cf. above, section IV. 3. c) bb) (1).

⁴⁵³ See Krueger, *Implication of Kosovo, Abkhazia and South Ossetia for international law*, CRIA, Vol. 3-2 (2009), p. 128.

⁴⁵⁴ Cf. also above, section IV. 2 c).

are no clues as to the form of the requisite desperate situation or the consideration of other aspects, for example partial culpability and systematic provocations by the minority group. Further, it is completely unclear what happens in the case given where the state power against which secession was originally claimed for, no longer formally exists. Does the Republic of Azerbaijan have to take responsibility for measures of the USSR or the Azerbaijan SSR or does it, as a newly founded state, have the chance to pursue new unburdened paths in terms of the integration of minorities? After all on 6 January 1992 Nagorno-Karabakh declared its national independence when it became unequivocally clear that the Azerbaijan SSR no longer existed. The Republic of Armenia for its part makes clear that it is no longer responsible for the decisions of the Armenian SSR.⁴⁵⁵

All of these points ultimately show that the remedial secession and oppression theories have struggled to prevail in practice and provide broad leeway for abuse. The literature behind the theories agrees at least that two essential requirements must be present for a secession to appear justified.⁴⁵⁶ Firstly the responsible national administration must have committed most severe, massive and systematic human rights violations and discriminations towards an ethnic group or minority. Secondly the situation with respect to human rights must have reached a point at which such rights can only be guaranteed by means of secession as the ultimate last resort. Restrictions are sometimes demanded if the group seeking to secede directly challenged or provoked the state repressions.⁴⁵⁷

Most severe, massive and systematic human rights violations: An unresolved question is the extent to which the Republic of Azerbaijan must take responsibility for any measures of the USSR administration or the Azerbaijan SSR. However, this aspect becomes irrelevant if one cannot assume that the threshold of most severe, massive and systematic human rights violations as understood by the remedial secession and oppression theories was reached even during the Soviet period. Such violations are ethnic cleansing, mass murder, slavery and widespread torture.

What is remarkable is that Armenia barely deals with these aspects in relation to the Soviet era. The official position is based primarily on the historical-ethnological hypotheses, the challenging of the initial affiliation of Nagorno-Karabakh to Azerbaijan in light of the *uti possidetis* principle⁴⁵⁸ and an assumed right to secession under Soviet law.⁴⁵⁹ To this extent it is already doubtful whether the requirements of the remedial secession and oppression theories were satisfied.

⁴⁵⁵ See Cornell, *Journal of South Asian and Middle Eastern Studies* vol. 20/no. 4 (1997) 1 et seq. with reference to Armenian Foreign Minister Papazyan.

⁴⁵⁶ See Doehring, in: Simma (ed.), *The Charter of the United Nations*, 2002, art. 1, annex: Self-Determination, note 40; Tomuschat, in: Kohen (ed.), *Secession, International Law Perspectives*, 2006, pp. 38 et seq; Heintze, in: Ipsen, *Völkerrecht*, 2004, p. 414; Herdegen, *Völkerrecht*, 2006, p. 257.

⁴⁵⁷ See Elsner, *Die Bedeutung des Volkes im Völkerrecht*, 2000, pp. 306 et seq.

⁴⁵⁸ See above, section IV. 1.

⁴⁵⁹ For the official Armenian position see note verbale dated 21 March 2005 from the Permanent Mission of Armenia to the United Nations Office at Geneva and the UN High

Nonetheless Nagorno-Karabakh⁴⁶⁰ as well as Asenbauer and Luchterhandt⁴⁶¹ give the impression that the Karabakh Armenians had been suppressed for decades by the Azerbaijani leadership in Baku. Nagorno-Karabakh claims political, social, economic and cultural discrimination.⁴⁶² Asenbauer refers to poor living conditions in Nagorno-Karabakh and suggests cases of ignorance on the part of the public prosecution as well as partial oppressive measures during the Soviet period.⁴⁶³ Furthermore there are claims of the persecution of the Armenian intelligentsia of Nagorno-Karabakh.⁴⁶⁴ Azerbaijan dismisses claims of any type of discrimination. In terms of the economic conditions Azerbaijan claims that most economic indicators in Nagorno-Karabakh were in fact higher than in the rest of the Azerbaijan SSR.⁴⁶⁵ Yazdani also assumes that at the beginning of the conflict the socio-economic living conditions in Nagorno-Karabakh were better than in Armenia or in other Azerbaijani areas.⁴⁶⁶

There exist no more detailed analyses of the living conditions in Nagorno-Karabakh during the Soviet era by a third party. How credible the respective portrayals are can not be resolved in the light of the profoundly political dimension of the conflict from the outset.⁴⁶⁷ The extent to which the conflict colours the differ-

Commissioner for Human Rights, E/CN.4/2005/G/23. Cf. also Musayev, *Legal aspects of the Nagorny Karabakh conflict*, http://www.mfa.gov.az/eng/armenian_aggression/legal/index.Shtml.

⁴⁶⁰ Cf. website of the unofficial Nagorno Karabakh Republic (Washington office), http://www.nkrusa.org/nk_conflict/azerbaijan_discrimination.shtml. For Karabakh's position see also the report of Human Rights Watch, *Azerbaijan, Seven Years of Conflict in Nagorno-Karabakh*, 1994, p. 108.

⁴⁶¹ Cf. Asenbauer, *Zum Selbstbestimmungsrecht des Armenischen Volkes von Berg-Karabach*, 1993, pp. 75 et seq; Luchterhandt, *Archiv des Völkerrechts* (vol. 31) 1993, pp. 30, 41 et seq.; Luchterhandt, lecture at the American University of Armenia on 24 March 1999, <http://www.deutsch-armenische-gesellschaft.de/dag/vorr.htm>.

⁴⁶² Cf. website of the unofficial Nagorno Karabakh Republic (Washington office) under http://www.nkrusa.org/nk_conflict/azerbaijan_discrimination.shtml.

⁴⁶³ Cf. Asenbauer, *Zum Selbstbestimmungsrecht des Armenischen Volkes von Berg-Karabach*, 1993, p. 77.

⁴⁶⁴ See Asenbauer, *Zum Selbstbestimmungsrecht des Armenischen Volkes von Berg-Karabach*, 1993, pp. 75 et seq; Luchterhandt, *Archiv des Völkerrechts* (vol. 31) 1993, pp. 30, 41 f.

⁴⁶⁵ Cf. Human Rights Watch, *Azerbaijan, Seven Years of Conflict in Nagorno-Karabakh*, 1994, p. 105.

⁴⁶⁶ Cf. Omid Yazdani, *Geteiltes Aserbaidshan*, 1993, pp. 86 et seq.

⁴⁶⁷ Thus a letter cited by Asenbauer from Khanzadyan, an Armenian member of the Central Committee of the CPSU, to Brezhnev from 1977 suggests that the main concern was the abolition of a situation regarded as historically unjust. There is no mention of any compelling humanitarian need to transfer Nagorno-Karabakh from the Azerbaijan to the Armenian SSR. There were also scarcely any grounds to suggest this with any credibility. Cf. Asenbauer, *Zum Selbstbestimmungsrecht des Armenischen Volkes von Berg-Karabach*, 1993, p. 77.

ent perceptions of Armenians and Azerbaijanis becomes clear in the scope of the historical accounts.⁴⁶⁸ Even the comments of Asenbauer and Luchterhandt which are based solely on Armenian sources and positions appear questionable.

One can generally assume that the social and economic situation in the USSR was tense, at least in contrast to the Western democracies. The possibility of rural regions being discriminated against and a concomitant migration into cities cannot be totally ruled out,⁴⁶⁹ and this would not only have affected Nagorno-Karabakh, but also other regions in the Azerbaijan SSR and the USSR.⁴⁷⁰ This is certainly speculation and clearly produces no indication of discrimination in the context of the remedial secession and oppression theories. After all, the extent to which the actual socio-economic problems were part of the core problem is open to question.⁴⁷¹ Thus Gorbachev, too, failed to ease the situation with an economic and social programme initiated for Nagorno-Karabakh.⁴⁷² The secession movement continued unperturbed.

We also know that the political establishment in the Soviet Union dealt harshly with critics of the system. This may also have been true of central figures of secession movements in the individual union republics, irrespective of the ethnic group to which the respective person belonged. One may assume that in any political system forces that want to subvert the system challenge forces of greater or lesser strength seeking to maintain the system. This may have been the case above all for the states of the former Eastern Bloc. As the political establishment in the Azerbaijan SSR was largely occupied by Azerbaijanis, typical problems of the political system of the USSR or Eastern Bloc may have been seen as Azerbaijani restrictions or harassment from the point of view of the Karabakh Armenians. However, this alters nothing about the fact that these were typical problems facing the entire Eastern Bloc that were not necessarily linked to ethnic issues.

Whatever the real circumstances may have been, it should be clear in any case that the high threshold of discrimination of the remedial secession and oppression theories in Nagorno-Karabakh was not reached before the period of Perestroika. As we have seen, most severe, massive and systematic human rights violations, such as the murder of entire parts of the population, prevention of supplies to starving population groups, ethnic cleansing or torture, would have to exist. This was not the case. If the discrimination threshold were to be set much lower, then numerous regions of the former Eastern Bloc would run the risk of being overrun with secession claims.

⁴⁶⁸ See above, section II.

⁴⁶⁹ With regard to the migration of Karabakh Armenians to Baku, Yerevan and Moscow see Avşar, *Schwarzer Garten*, 2006, p. 127.

⁴⁷⁰ See also Dehdashti, *Internationale Organisationen als Vermittler in innerstaatlichen Konflikten*, 2000, p. 407.

⁴⁷¹ See in particular Dehdashti, *Internationale Organisationen als Vermittler in innerstaatlichen Konflikten*, 2000, p. 407.

⁴⁷² Cf. Dehdashti, *Internationale Organisationen als Vermittler in innerstaatlichen Konflikten*, 2000, p. 408.

The events during the Soviet transitional phase and the escalating Nagorno-Karabakh conflict in 1988 might have provided a different perspective. Luchterhandt refers to genocide-like actions in 1988, without specifying them more clearly.⁴⁷³ These references still seem to pertain to the events in Sumgait in the spring of 1988. At that time the conflict between the Armenians and Azerbaijanis had already escalated on a political level and within the civilian population. Following the mobilisation of the Armenians in the Armenian SSR, a first major mass migration of Azerbaijanis from the Armenian SSR took place. The Azerbaijani refugees were accommodated predominantly in Sumgait, a town to the north of Baku. After the deputy Attorney General of the USSR broadcast the killing of two Azerbaijanis in an administrative district bordering on Nagorno-Karabakh,⁴⁷⁴ violent attacks by Azerbaijanis on Armenians erupted in Sumgait before the eyes of the police and Soviet troops.⁴⁷⁵ The toll of the events was between 26 and 32 Armenian dead and hundreds injured.⁴⁷⁶

The events in Sumgait should without doubt be condemned and represent a black day in Armenian-Azerbaijani history. Nonetheless these events are not sufficient to legitimise the break-up of a state in accordance with the theories which are the focus of attention here. At that point the conflict in and between the Armenian and Azerbaijan SSR had already reached a critical stage. The events in Sumgait require qualification as the consequence of an interethnic conflict and not as their cause or even legitimization. Furthermore the region of Nagorno-Karabakh, situated at the other end of Azerbaijan, played only an indirect part in the Sumgait attacks. The violent acts did not affect the Karabakh Armenians, but Armenians living to the north of Baku. The violence had its origin primarily in the tense situation of the Azerbaijani refugees and possibly also in the involvement of the Soviet KGB.⁴⁷⁷

As shown in the historical outline above, acts of violence, killings and expulsions occurred on the Armenian and Azerbaijani sides in the course of conflict.⁴⁷⁸ Both sides cite pogroms in several cities and regions.⁴⁷⁹ The Azerbaijani attacks on the Armenian civilian population and their expulsion from the region north of Na-

⁴⁷³ Cf. Luchterhandt., lecture at the American University of Armenia on 24 March 1999, <http://www.deutsch-armenische-gesellschaft.de/dag/vorr.htm>.

⁴⁷⁴ See de Waal, *Black Garden*, 2003, p. 15; Cornell, *The Nagorno-Karabakh Conflict*, report no. 46, Department of East European Studies, 1999, pp. 16 et seq.; Luchterhandt, *Archiv des Völkerrechts* (vol. 31) 1993, pp. 30, 43.

⁴⁷⁵ For details see de Waal, *Black Garden*, 2003, pp. 32 et seq.

⁴⁷⁶ See de Waal, *Black Garden*, 2003, pp. 34, 40; Cornell, *The Nagorno-Karabakh Conflict*, report no. 46, Department of East European Studies, 1999, p. 17.

⁴⁷⁷ See chapter A II. 5.

⁴⁷⁸ See above, section II., 5. and 6. Cf. de Waal, *Black Garden*, 2003, pp. 45 et seq., 62 et seq., 89 et seq.; Mett, *Das Konzept des Selbstbestimmungsrechts der Völker*, 2004, p. 240 et seq.; Aşşar, *Schwarzer Garten*, 2006, p. 134; UN ECOSOC doc. E/CN.4/1997/138, annex; UN ECOSOC doc. E/CN.4/1997/139, annex.

⁴⁷⁹ UN ECOSOC doc. E/CN.4/1997/139, annex; Quiring, *Schwelende Konflikte in der Kaukasus-Region*, APuZ 13 (2009), p. 19.

gorno-Karabakh in 1991 (known as Operation Ring) are among the events documented.⁴⁸⁰ At this time the conflict had firmly taken on forms resembling a civil war and was on the brink of an internal union (and subsequently interstate) war. The Armenian and Azerbaijan SSR had already set up their own special troops prior to these events.⁴⁸¹ Paramilitary units formed in Nagorno-Karabakh who infiltrated the entire region, blew up bridges and railway sections and took hostages.⁴⁸² The Armenian rebels similarly infiltrated Armenian-settled villages in the regions of Khanlar and Shaumian to the north of Karabakh. During what was known as “Operation Ring” the Azerbaijani troops not only took action against the rebels, but also against the civilian population. Later there were reports of killings and mass expulsions.⁴⁸³

The injustices committed during this operation should be punished under criminal law, human rights law and international law of war. But at the same time they do not justify the secession of Nagorno-Karabakh under the theories which are the focus here. Their starting point is the assistance for an initially heavily discriminated ethnic group which takes up arms against the oppressor or regime of terror. What is not provided for is the support of an ethnic group which was originally not entitled to secession and pursues secession with external or foreign assistance and which, through the systematic incitement of people, the establishment of paramilitary units, attacks on civilians and the committing of ethnic cleansing in the claimed areas, consciously sets the spiral of violence and counter-violence in motion and foments it decisively.⁴⁸⁴

The latter was in fact the case. The Armenians of Nagorno-Karabakh were not oppressed most severely during the Soviet era as understood by the remedial secession and oppression theories. Instead, as described in section II, there was a strengthening of national movements across the Soviet Union in the wake of Perestroika,⁴⁸⁵ as there was in Nagorno-Karabakh. Many ethnic groups sought to seize the opportunity. As investigations by de Waal have shown, the Armenian side in and around Karabakh commenced strategic planning at an early stage to achieve a transfer of the mountainous region to the Armenian SSR⁴⁸⁶ without there being any legitimacy under Soviet or international law. The Armenians of Nagorno-Karabakh and Armenia were mobilised, mass demonstrations initiated with flyers,

⁴⁸⁰ See Human Rights Watch, *Azerbaijan, Seven Years of Conflict in Nagorno-Karabakh*, 1994, pp. 3 et seq.; de Waal, *Black Garden*, 2003, pp. 113 et seq, 116 et seq.

⁴⁸¹ See de Waal, *Black Garden*, 2003, p. 110.

⁴⁸² See de Waal, *Black Garden*, 2003, pp. 112 et seq., 116.

⁴⁸³ See de Waal, *Black Garden*, 2003, 116 et seq (with reference to the Human Rights Group Moscow).

⁴⁸⁴ In accordance with Cornell, *Journal of South Asian and Middle Eastern Studies* vol. 20/no. 4 (1997) 1 et seq.

⁴⁸⁵ Cf. Halbach, *Bericht des Bundesinstituts für ostwissenschaftliche und internationale Studien* 11/1988, pp. 1 et seq.

⁴⁸⁶ For details see de Waal, *Black Garden*, 2003, pp. 15 et seq, 20 et seq.

networks created and in some cases weapons distributed to Armenian activists.⁴⁸⁷ As a result the situation increasingly escalated under state propaganda to reach the extent of the documented excesses, such as acts of violence, homicides and expulsions, occurring on both the Armenian and Azerbaijani sides.⁴⁸⁸

Thus Human Rights Watch also reports that as a result of the Armenian policies and Armenian attacks, between 750,000 and 800,000 Azerbaijanis were expelled from Karabakh and the seven surrounding Azerbaijani administrative districts in the period between 1988 and 1994 in violation of the international law of war.⁴⁸⁹ The 40,000 Azerbaijanis living in Nagorno-Karabakh had already been expelled by mid-1992.⁴⁹⁰ In the course of the hostile disputes one of the most tragic events of the conflict occurred in February 1992, namely the violent attacks in Khojaly (Nagorno-Karabakh region) committed by Armenian troops.⁴⁹¹ Human Rights Watch reported that in one night Armenian troops killed 161 Azerbaijani civilians.⁴⁹² The Azerbaijani side even speaks of 613 dead.⁴⁹³ Other sources speak of 476-636 dead.⁴⁹⁴

In conclusion, even in the face of countless Armenian refugees, serious transgressions were committed on each side. These had their origin in the secessionist plans and propagandistic measures of a group not entitled to secession which was to a large extent responsible for the fact that the violence of the conflict, characterised by expulsion and human rights violations, continued to escalate. Even if we hypothetically apply the theories described here, no right to secession could arise.⁴⁹⁵ The Council of Europe aptly summed this up in a Resolution by formulating the following with respect to the claim to secession as enforced by Nagorno-Karabakh:

⁴⁸⁷ Cf. de Waal, *Black Garden*, 2003, pp. 15 et seq., 20 et seq., 22 et seq.; Cornell, *Journal of South Asian and Middle Eastern Studies* vol. 20/no. 4 (1997) 1 et seq.

⁴⁸⁸ See above, section II., 5. and 6.

⁴⁸⁹ Cf. Human Rights Watch, *Azerbaijan, Seven Years of Conflict in Nagorno-Karabakh*, 1994, p. 58.

⁴⁹⁰ Cf. Human Rights Watch, *Azerbaijan, Seven Years of Conflict in Nagorno-Karabakh*, 1994, p. 58.

⁴⁹¹ For details see de Waal, *Black Garden*, 2003, pp. 169 et seq; Avşar, *Schwarzer Garten*, 2006, p. 152 et seq and also the reports in *The Sunday Times*, 1 und 8 March 1992; *The Boston Globe*, 3 March 1992; *The New York Times*, 3 and 6 March 1992; *The Times*, 2 and 3 March 1992.

⁴⁹² Cf. report by Human Rights Watch, *The Former Soviet Union*, 1993.

⁴⁹³ Cf. letter dated 23 April 2002 from the Permanent Mission of Azerbaijan to the United Nations Office at Geneva addressed to the Chairperson on Human Rights, E/CN.4/2002/186.

⁴⁹⁴ Cf. de Waal, *Black Garden*, 2003, p. 171; Avşar, *Schwarzer Garten*, 2006, pp. 152 et seq with further references.

⁴⁹⁵ Furthermore, an application of the theories would produce completely absurd results, namely Azerbaijanis expelled from Armenia could then use the transgressions committed by the Armenians as the basis of a claim for a part of Armenia's territory.

“The Assembly expresses its concern that the military action, and the widespread ethnic hostilities which preceded it, led to large-scale ethnic expulsion and the creation of mono-ethnic areas which resemble the terrible concept of ethnic cleansing. The Assembly reaffirms that independence and secession of a regional territory from a state may only be achieved through a lawful and peaceful process based on democratic support by the inhabitants of such territory and not in the wake of an armed conflict leading to ethnic expulsion and the de facto annexation of such territory to another state.”⁴⁹⁶

Secession as the last resort: There is a further factor at work in the case of Nagorno-Karabakh that underlines this outcome. We have already set out above that the remedial secession theory requires a desperate situation.⁴⁹⁷ Secession must be the last resort to avoid human rights violations and discrimination. Only in this case can a “remedial” secession even enter into consideration. This means that all other ways and means of bringing about a change must have failed and been exhausted, leaving secession as the sole option of preventing massive human rights violations.⁴⁹⁸

From the point of view of Nagorno-Karabakh, a continued affiliation of the region to Azerbaijan appears to be unthinkable. The Armenian side refers to the homicide and deportation of countless Armenians by the Turks in 1915, as well as to the events in Sumgait in 1988 and the incidents occurring during the hostile dispute for Nagorno-Karabakh itself.⁴⁹⁹ This is why it is claimed that a peaceful coexistence is not possible. However these accounts are one-sided and partly erroneous⁵⁰⁰ and as such, are contributing factors to the particular emotionality of the conflict. The events of 1915 cannot be linked to Azerbaijan. Furthermore the ethnic cleansing and murders perpetrated by Armenians during the hostile dispute for Nagorno-Karabakh are kept quiet. Nor is it mentioned that the Armenians and Azerbaijanis maintained the closest of neighbourly relations for decades.⁵⁰¹

Finally, the Armenian perception cited does not satisfy the requirements of the remedial secession theory. A desperate humanitarian situation in terms of the remedial secession theory has not arisen. From the very beginning, that is since

⁴⁹⁶ Council of Europe Parliamentary Assembly resolution 1416 (2005).

⁴⁹⁷ See above, section IV. 3. c) bb) (4).

⁴⁹⁸ See Doehring, in: Simma (ed.), *The Charter of the United Nations*, 2002, art. 1, annex: Self-Determination, note 40; Heintze, in: Ipsen, *Völkerrecht*, 2004, p. 414; Herdegen, *Völkerrecht*, 2006, p. 257; Tomuschat, in: Kohen (Ed.), *Secession, International Law Perspectives*, 2006, pp. 38 et seq, in particular p. 41.

⁴⁹⁹ According to a report by Deutschlandfunk “Demokratie im Ausnahmezustand” from 18 July 2007, <http://www.dradio.de/dlf/sendungen/hintergrundpolitik/647657/>. Cf. Also the website of the unofficial Nagorno-Karabakh Republic (Washington office), http://www.nkrusa.org/nk_conflict/index.shtml.

⁵⁰⁰ Cf. also Wiedemann, *Smartes Stück Kolonialismus*, *Der Spiegel*, 18 October 1993, p. 215; de Waal, *Black Garden*, p. 215; Avşar, *Schwarzer Garten*, 2006, pp. 165 et seq.

⁵⁰¹ According to a report by Deutschlandfunk “Demokratie im Ausnahmezustand” from 18 July 2007, <http://www.dradio.de/dlf/sendungen/hintergrundpolitik/647657/>. See also de Waal, *Black Garden*, 2003, p. 247.

1988, the main issue was to fulfil the utmost political demand, namely the secession of Nagorno-Karabakh from Azerbaijan, to alter a territorial affiliation that was perceived to be incorrect in historical, ethnic and to an extent also economic terms.⁵⁰² Thus it did not follow from the secession decision of the Nagorno-Karabakh parliament of 20 February 1988 that secession was absolutely necessary as a last resort to avoid objective and demonstrably most severe human rights violations by the Azerbaijani authorities.⁵⁰³ The same applies to the decision of the Supreme Soviet of Armenia of 15 June 1988 in which solely the socio-economic considerations and “problems” in the inter-ethnic relations were listed.⁵⁰⁴

Moreover, alternatives to secession had never been seriously considered. To this day the leadership of Nagorno-Karabakh categorically rejects offers of far-reaching autonomy. All possibilities of new forms of integration which were on offer after the dissolution of the USSR have remained unused. An integrative solution to the Karabakh conflict still seems to be possible.⁵⁰⁵ All that is missing is the political will, trust, mutual understanding and for each side to have the strength to stand up and admit their own wrongdoings. All of these aspects are without doubt politically explosive and difficult to realise, but they demonstrate that the humanitarian situation has not become a desperate one as required by the remedial secession theory. Although the situation appears to be politically hopeless, it can be resolved with suitable integrative impulses in the medium to long term.

In summary we note that no right to secession of Nagorno-Karabakh arose under international law, even pursuant to the partially held remedial secession and oppression theories. To this extent one reaches the same result with the prevailing view based on state practice as well as the lesser held view: neither international treaties nor customary international law support Karabakh’s claim to an external right to self-determination in the form of the right to secession.

⁵⁰² This political dimension of the secession movement was already suggested in a letter from Khanzadyan, an Armenian member of the Central Committee of the CPSU, to Brezhnev in 1977. Even then the issue was to bring an assignment of Nagorno-Karabach that was seen as historically and ethnically unjust to an end. There was no mention of a compelling humanitarian need to alter the territorial *status quo*. Cf. Asenbauer, *Zum Selbstbestimmungsrecht des Armenischen Volkes von Berg-Karabach*, 1993, p. 77.

⁵⁰³ Reference was made to the “desire” of the Armenian working class to achieve an assignment of territory. No compelling humanitarian reasons were mentioned. Cf. Asenbauer, *Zum Selbstbestimmungsrecht des Armenischen Volkes von Berg-Karabach*, 1993, p. 322.

⁵⁰⁴ Cf. Asenbauer, *Zum Selbstbestimmungsrecht des Armenischen Volkes von Berg-Karabach*, 1993, pp. 332 et seq.

⁵⁰⁵ With the same conclusion: de Waal, *Black Garden*, 2003, p. 272.

cc) General principles of law

The general principles of law form the third recognised source of international law besides the international treaties and customary international law. Unlike the elementary principles of international law described above,⁵⁰⁶ which are classified as customary law, the general principles of law are derived from the legal systems of the individual states and their fundamental principles.⁵⁰⁷ It is theoretically conceivable for a right to secession for ethnic groups and minorities to develop in this way. However, for this to be the case, the internal legal systems must commonly provide for a right to secession, which is not the case. Although the Constitutions of Yugoslavia and the USSR expressly contained provisions on secession issues, these did not refer to ethnic groups or minorities, but whole parts of the union. That notwithstanding, some constitutions still contain secession options today, such as the constitutions of Ethiopia or Uzbekistan,⁵⁰⁸ however these too change nothing with respect to the lack of a general legal principle.

d) *Right to secession of ethnic groups and minorities – political discriminations*

The Armenian secession movement refers to the fact that the Armenians of Nagorno-Karabakh were discriminated against politically and culturally during the Soviet era.⁵⁰⁹ However, no reference is made to facts providing evidence for an exclusion of the Armenian ethnic group from the political decision-making process. Instead factors are presented suggesting that the Armenian culture in the Azerbaijan SSR was restricted in its development and expression.⁵¹⁰

The thesis that political discrimination can lead to a right to secession only has limited adherents amongst international law scholars. Even supporters of the remedial secession theory are cautious in this regard.⁵¹¹ Individual supporters of the thesis of a politically founded secession demand that a section of the people of a state is excluded from the state order for the emergence of a right to secession.⁵¹²

Nevertheless, a politically founded secession lacks sufficient basis in international treaties and customary international law. At best one could at first glance invoke the Friendly Relations Declaration and its saving clause already mentioned at several points.⁵¹³ To summarise once again, the saving clause states that the

⁵⁰⁶ See above, section IV. 3. c) bb) (3).

⁵⁰⁷ Cf. e.g. Heintschel von Heinegg, in: Ipsen, *Völkerrecht*, pp. 230 ff.; Kimminich, *Einführung in das Völkerrecht*, 2004, pp. 189 et seq.

⁵⁰⁸ Cf. Kohen, in: ders. (ed.), *Secession, International Law Perspectives*, 2006, p. 20.

⁵⁰⁹ Cf. also website of the unofficial Nagorno Karabakh Republic (Washington office), http://www.nkrusa.org/nk_conflict/azerbaijan_discrimination.shtml.

⁵¹⁰ Cf. website of the unofficial Nagorno Karabakh Republic (Washington office), http://www.nkrusa.org/nk_conflict/azerbaijan_discrimination.shtml.

⁵¹¹ Cf. Tomuschat, in: Kohen (ed.), *Secession, International Law Perspectives*, 2006, p. 35.

⁵¹² Cf. Mett, *Das Konzept des Selbstbestimmungsrechts der Völker*, 2004, pp. 268, 373; Tomuschat, in: Kohen (ed.), *Secession, International Law Perspectives*, 2006, p. 39.

⁵¹³ See above, section IV. 3. c) bb) (3).

Declaration does not provide authorisation to infringe the territory of a state which in particular has a government reflecting the entire population of the territory.⁵¹⁴

Above we described that no secession claim can be derived from this clause, even in the event of the most severe human rights violations.⁵¹⁵ This also applies in the event of political discriminations. A different result could only be arrived at by an *argumentum e contrario*, which is not covered by the purposes of the Declaration however. A secession claim for minorities who feel politically marginalized would represent a considerable factor of instability and uncertainty for numerous states and regions worldwide. This is particularly true of developing countries, which sometimes have significant problems in creating and maintaining democratic structures. A guaranteed state entity in the form of a permanent population and a defined state territory forms the fundamental requirement for a people to be able to pursue the difficult path to democracy and pluralism. The Friendly Relations Declaration does not appear to take a different approach which then further has the requisite confirmation as an elementary principle of international law.⁵¹⁶

However even if we were to suppose that the thesis of a politically founded secession was appropriate, we would struggle to identify a claim to secession in the case of Nagorno-Karabakh. The Armenians of Nagorno-Karabakh were not excluded from political participation in the USSR or the Azerbaijan SSR. They had exactly the same civil rights as the Azerbaijanis in Nagorno-Karabakh, the inhabitants of the rest of the Azerbaijan SSR and those of the rest of the USSR.

What can hardly be denied are the system-related conflicts referred to above among the political subsystems within the USSR. The division into union republics, regions and territories and the setting-up of various autonomous territorial forms necessarily introduced tension with respect to competencies and influence.⁵¹⁷ These tensions were partly reinforced by territorial assignments historically or ethnically perceived as unjust and were ultimately the cause for the eruption of secessionist movements within the union republics at the time of Perestroika.⁵¹⁸

The relationship between the union republics and their autonomous regions was particularly ambivalent. The autonomous regions strove to upgrade their status and gain more rights, which they attempted to achieve also with the aid of the central government in Moscow.⁵¹⁹ The union republics, on the other hand, tried to

⁵¹⁴ See Friendly Relations Declaration, 1970, The principle of equal rights and self-determination of peoples, para. 7.

⁵¹⁵ See above, section IV. 3. c) bb) (3).

⁵¹⁶ For the prerequisites of a recognition as elementary principle of international law see above, section IV. 3. c) cc).

⁵¹⁷ Cf. Dehdashti, *Internationale Organisationen als Vermittler in innerstaatlichen Konflikten*, 2000, p. 34.

⁵¹⁸ See also Dehdashti, *Internationale Organisationen als Vermittler in innerstaatlichen Konflikten*, 2000, p. 34.

⁵¹⁹ Cf. Dehdashti, *Internationale Organisationen als Vermittler in innerstaatlichen Konflikten*, 2000, p. 34.

maintain and extend their influence over the autonomous regions.⁵²⁰ As union republics they had greater political significance, even though they could find themselves having to defend their position towards Moscow. Furthermore, Soviet ideology sought to increase the self-awareness of the individual nations and created a latent perception of threat between individual ethnic groups.⁵²¹

The mutual assumptions of threat provided a psychological basis for hatred and violence as well as the success of the political elites in moving the masses on to the streets with propagandist techniques in the transitional years. Although we cannot discount the fact that injustices and conflicts occurred in the political and cultural order of the USSR, they were scarcely a form of political discrimination on the basis of which one could require the dismemberment of a state retrospectively.

Furthermore, being granted autonomous status, Nagorno-Karabakh was in fact privileged over other ethnic minorities in the USSR. Of the 100 ethnic groups still registered in 1989, only 53 had their own territories.⁵²² The remaining ethnic groups were represented separately neither at a low administrative level nor at the level of the Soviet of Nationalities. Even densely settling minorities of the same size or larger than the Armenians in Nagorno-Karabakh, such as the Poles or the Germans, did not have a special territorial status.⁵²³ The autonomy secured a certain level of self-administration for Nagorno-Karabakh and was intended for example to ensure that the Armenian language was retained in public offices, schools and courts.⁵²⁴ Nagorno-Karabakh, unlike other minority areas, was guaranteed representation by its own deputies in the Soviet of the Union and the Soviet of the Nationalities of the USSR.⁵²⁵ Unlike the autonomous regions of the Russian SSR, Nagorno-Karabakh even submitted its own deputy chairman to the Presidium of the Supreme Soviet of its own union republic, the Azerbaijan SSR.⁵²⁶ The effectiveness of the existing administrative structures becomes clear by virtue of the fact that during the Soviet transitional period the strongest secession movements did not develop in places where national minorities were largely denied rights. Instead this was much more the case in the regions where ethnic groups

⁵²⁰ Cf. Dehdashti, *Internationale Organisationen als Vermittler in innerstaatlichen Konflikten*, 2000, p. 34.

⁵²¹ For details see Dehdashti, *Internationale Organisationen als Vermittler in innerstaatlichen Konflikten*, 2000, p. 406; Quiring, *Schwelende Konflikte in der Kaukasus-Region*, APuZ, Vol. 13 (1992), p. 19.

⁵²² See Dehdashti, *Internationale Organisationen als Vermittler in innerstaatlichen Konflikten*, 2000, p. 33.

⁵²³ Cf. Gärtner, *Recht in Ost und West 1990*, pp. 228, 233.

⁵²⁴ See e.g. Art. 159 of the Constitution of the USSR and also Gärtner, *Recht in Ost und West 1990*, pp. 228, 233.

⁵²⁵ Cf. Art. 110 of the Constitution of the USSR and also Gärtner, *Recht in Ost und West 1990*, pp. 228, 233.

⁵²⁶ Cf. Gärtner, *Recht in Ost und West 1990*, pp. 228, 233; Arnold, *Die Rechtsstellung der nationalen Gebietseinheiten der Sowjetunion*, 1993, pp. 104 et seq.

could already fall back on their own functioning administrative apparatus, such as in Abkhazia, South Ossetia, Chechnya and Nagorno-Karabakh⁵²⁷. Consequently there can be no suggestion of an exclusion from participation in the political state life of the Soviet Union of the Armenian ethnic group in Nagorno-Karabakh.

Armenia ultimately relies on the fact that in November 1991 Azerbaijan revoked the autonomous status of Nagorno-Karabakh.⁵²⁸ This argumentation is a bit surprising since at the same time it is assumed that as early as September 1991 Nagorno-Karabakh understood itself to be a republic independent of Baku which no longer required an autonomous status. Aside from this the revocation of the autonomous status was a direct reaction to the violent independence attempts of Nagorno-Karabakh, for which purposes the autonomous self-administration had also been used. This too was a consequence of the conflict and not its legitimating cause. That notwithstanding, the Republic of Azerbaijan has been offering Nagorno-Karabakh a far-reaching autonomous status for years which the Armenian side rejects.

Aside from this it would nonetheless be questionable as to whether the non-granting of an autonomous status in the case of Nagorno-Karabakh would have justified secession. In most states the political and cultural integration of ethnic minorities, as well as that of other social minorities, is effected by an equal treatment in terms of political and cultural rights. Special cultural assets, such as a group's language, can also be regulated by non-constitutional laws.

e) Right to secession after annexation

A legitimate option for the secession of a region recognised under international law is secession following a prior illegal annexation.⁵²⁹ The prohibition on wars of aggression was established with the emergence of modern international law and the conclusion of the Briand-Kellogg Pact in 1928.⁵³⁰ This meant at the same time that no valid title could be derived under international law for territories annexed during a war,⁵³¹ as had been the case before.⁵³² The doctrine, according to which

⁵²⁷ See also Dehdashti, *Internationale Organisationen als Vermittler in innerstaatlichen Konflikten*, 2000, p. 408.

⁵²⁸ Note verbale dated 21 March 2005 from the Permanent Mission of Armenia to the United Nations Office at Geneva and the UN High Commissioner for Human Rights, E/CN.4/2005/G/23, p. 9.

⁵²⁹ Cf. Kohen (ed.), *Secession, International Law Perspectives*, 2006, p. 19; Cassese, *Self-Determination of Peoples*, 1995, p. 129 (especially in regard to military occupation).

⁵³⁰ Cf. Hobe/Kimminich, *Einführung in das Völkerrecht*, 2004, p. 49; Dahm/Delbrück/Wolfrum, *Völkerrecht*, vol. I/3, 2002, p. 821.

⁵³¹ Cf. Hobe/Kimminich, *Einführung in das Völkerrecht*, 2004, p. 85; Schweisfurth, *Völkerrecht*, 2006, pp. 291 et seq.

⁵³² Cf. Hillier, *Sourcebook on Public International Law*, p. 241; O'Brien, *International Law*, 2001, p. 212; Shaw, *International Law*, 2003, p. 423; Hobe/Kimminich, *Einführung in das Völkerrecht*, 2004, pp. 39, 85; Kimminich, *Menschenrechte: Von kollekti-*

violent annexation is no longer recognised, thus attained force in part only towards the end of the 1930s and then finally in October 1945 with the entering into force of the UN Charter.⁵³³ As of this point in time a state that had performed annexation no longer had a solid territorial title and it could no longer rely on its territorial integrity if the annexed region wanted to secede again. The secession of the Baltic states from the Soviet Union in 1991 which was regarded as legally legitimate and recognised may be seen against this background. The Baltic states had been *de facto* annexed on conclusion of the Hitler-Stalin pact of 1940 by the Soviet Union, that is, by massive coercion and the threat of force. The situation resembled that of the conduct of the Russian Soviet Republic in the annexation of the Caucasus region around 1920. However, the prohibition on war and annexation under international law did not yet apply at that time.

The question now is whether the region of Nagorno-Karabakh could rely on such a right to secession with respect to the USSR or the Republic of Azerbaijan, as was apparently the case according to Asenbauer.⁵³⁴ An elementary condition would be that an annexation occurred after the Briand-Kellogg Pact applied to the Soviet Union, that is, after 1929. Prior to this, classical international law with its possibilities of territorial acquisition was not regarded as having been superseded.⁵³⁵ Nagorno-Karabakh was not annexed after this caesura in international law. Nagorno-Karabakh was already firmly integrated within the Azerbaijan SSR as a part of the Soviet Union.

Russia added the region to its territory at the beginning of the 19th century.⁵³⁶ In 1840 Karabakh became part of the Kaspijskaya Oblast, in 1846 part of the Shemakhanskaya Governorate and then in 1867 part of the Elisavetpol Governorate (today Gyandzha)⁵³⁷ and thus part of an administrative structure marked by Azerbaijani influence. Directly after the turmoil of the 1917 revolutions, individual state structures emerged in Armenia, Azerbaijan and Georgia whose quality of statehood was unclear under international law. Nagorno-Karabakh itself did not develop an effective body politic of its own in this period. In 1920 Azerbaijan and Nagorno-Karabakh were *de facto* re-annexed by Russia. In 1921 it was decided that Nagorno-Karabakh would remain within the Azerbaijan Soviet Republic.⁵³⁸ This decision was repeatedly confirmed⁵³⁹ and was unobjectionable under interna-

ven und individuellen Rechten, <http://www.lsg.musin.de/deutsch/d/aufkl/menschenrechte.htm>; Schweisfurth, *Völkerrecht*, 2006, p. 291.

⁵³³ Cf. Hobe/Kimminich, *Einführung in das Völkerrecht*, 2004, p. 73; Epping/Gloria, in: Ipsen, *Völkerrecht*, 2004, p. 301; Schweisfurth, *Völkerrecht*, 2006, p. 291.

⁵³⁴ Cf. Asenbauer, *Zum Selbstbestimmungsrecht des Armenischen Volkes von Berg-Karabach*, 1993, p. 138 (without any further explanation).

⁵³⁵ See above, sections I. and IV. 1. b).

⁵³⁶ Cf. Rau, *Der Berg-Karabach-Konflikt*, 2007, p. 19.

⁵³⁷ Cf. Rau, *Der Berg-Karabach-Konflikt*, 2007, p. 24.

⁵³⁸ For details see above, section II. 5.

⁵³⁹ E.g. by Art. 87 para. 3 of the Constitution of the USSR. See also Cornell, *Journal of South Asian and Middle Eastern Studies* vol. 20/no. 4 (1997) 1 et seq.

tional law.⁵⁴⁰ There is no annexation of Nagorno-Karabakh after 1929 that would have legitimised secession, neither by the USSR and the Russian Soviet Republic nor the Azerbaijan Soviet Republic.

f) *De facto secession*

In recent years the Armenian side has increasingly been trying to make the international community of states accept the fact that a stabilised entity has developed in Nagorno-Karabakh, irrespective of the legal situation under international law.⁵⁴¹

From a legal perspective, what are known as stabilised *de facto* regimes beg the question of whether individual state entities may develop purely over the course of time. A secession that does not comply with international law could thus gain legitimacy retrospectively. With respect to Nagorno-Karabakh, however, it is doubtful whether this question is even relevant. As shall be seen below, the established entity in Nagorno-Karabakh can scarcely be regarded as a classic *de facto* regime under international law.⁵⁴² The interconnections between the Republic of Armenia and the entity in Nagorno-Karabakh are so close that one must either view Nagorno-Karabakh rather as an emancipated province of Armenia or assume the existence of a kind of *de facto* federation.⁵⁴³ There is no legitimacy under international law for these circumstances.

However even if we were to leave aside this state of affairs and consider the status of a *de facto* regime for Nagorno-Karabakh, we cannot assume that an independent state recognised under international law can develop simply over the course of time.

From the perspective of modern international law, which seeks to prevent conflicts, such an approach would be very questionable. In this case all that would be required to establish legal facts would be sufficient military stamina and adequate foreign support. Naturally such a theory cannot be discounted purely in terms of its approach. But one would have to be able to ground it in customary international law. At first glance this appears to be possible on the basis of the classical concept of statehood in international law.⁵⁴⁴

⁵⁴⁰ See also above, section IV. 1. b). 5.

⁵⁴¹ According to an interview with Armenian President Kotscherian on 10 July 2007, <http://www.spiegel.de/politik/ausland/0,1518,493351,00.html> and note verbale dated 21 March 2005 from the Permanent Mission of Armenia to the United Nations Office at Geneva and the UN High Commissioner for Human Rights, E/CN.4/2005/G/23, pp. 10 et seq. Cf. also Luchterhandt, Republik Armenien, Karabach und Europa – endlose Frustration?, lecture at the American University of Armenia on 24 March 1999, <http://www.deutsch-armenische-gesellschaft.de/dag/vorr.htm>.

⁵⁴² See below, chapter B II. 2. b) dd) and B III.

⁵⁴³ In accordance with: Cornell, The Nagorno-Karabakh Conflict, report no. 46, Department of East European Studies, 1999, p. 44; Cornell, Journal of South Asian and Middle Eastern Studies vol. 20/no. 4 (1997) 1 et seq; de Waal, Black Garden, 2003, p. 246.

⁵⁴⁴ See e.g. Crawford, The Creation of States in International Law, 2006, pp. 45 et seq.

It's generally acknowledged that third states may recognise regions willing to secede as soon as all requirements of statehood are met.⁵⁴⁵ These regions must particularly satisfy the criteria of a defined territory, a permanent population and an effective government. That means the separation of a region and the creation of a new state may be successfully completed on the basis of the classical concept of statehood (that is *ex factis ius oritur* – law arises from the facts).

But this principle applies only with certain restrictions.⁵⁴⁶ Otherwise the effect and the essential content of modern international law would be turned on its head. If the status achieved does not comply with international law, this is viewed as being non-compliant with the classical doctrine of statehood and particularly with the criterion of an effective government (the principle of *ex iniuria ius non oritur* – illegal acts do not create legal rights).⁵⁴⁷ Crawford explains correctly in this regard that a government must not just exercise authority, but also must have a right or title to exercise that authority on a certain territory.⁵⁴⁸ This is also why the community of states principally does not accept a status, which rests upon illegal and violent alterations of territories⁵⁴⁹. That applies particularly to cases in which the alteration of territory is accompanied with ethnic expulsion or is backed up by an illegal intervention of a third country.

This casuistry has been indicated by resolutions of the General Assembly of the UN and the UN Security Council in the case of Southern Rhodesia.⁵⁵⁰ In this case the unilateral declaration of independence of an illegal minority regime was not accepted even as it was founded.⁵⁵¹ The applicable rule appears yet clearer in the treatment of the cases of Abkhazia, South Ossetia, Transnistria and also Nagorno-Karabakh. All territories were refused recognition by the community of states until today, despite the fact that stable structures similar to those of states had been established in each case. Only Russia and Nicaragua recognised Abkhazia and South Ossetia in 2008. Even though recognition does not constitute a necessary require-

⁵⁴⁵ See e.g. Epping/Gloria, in: Ipsen, *Völkerrecht*, 2004, pp. 266, 271 et seq.; Hilpold, *ZÖR* 2008, pp. 117, 124 et seq.; Hobe/Kimminich, *Einführung in das Völkerrecht*, 2004, p. 71.

⁵⁴⁶ See Christakis, in: Kohen (Ed.), *Secession, International Law Perspectives*, 2006, pp. 138 et seq; Tancredi, in: Kohen (Ed.), *Secession, International Law Perspectives*, 2006, pp. 182 et seq; Epping, in: Ipsen, *Völkerrecht*, 2004, p. 63; Epping/Gloria, in: Ipsen, *Völkerrecht*, 2004, pp. 302 et seq.

⁵⁴⁷ Christakis, in: Kohen (Ed.), *Secession, International Law Perspectives*, 2006, pp. 138 et seq; Tancredi, in: Kohen (Ed.), *Secession, International Law Perspectives*, 2006, pp. 182 et seq; Epping, in: Ipsen, *Völkerrecht*, 2004, pp. 63, 302; Krieger, *Das Effektivitätsprinzip im Völkerrecht*, 2000, pp. 176 et seq.

⁵⁴⁸ Cf. Crawford, *The Creation of States*, 2006, p. 57 (with regard to the Congo).

⁵⁴⁹ Cf. Epping, in: Ipsen, *Völkerrecht*, 2004, p. 32; Epping/Gloria, in: Ipsen, *Völkerrecht*, 2004, p. 302.

⁵⁵⁰ See also Wirth, *ZaöRV* 67 (2007), p. 1079.

⁵⁵¹ Cf. UN General Assembly resolutions 2024 (XX) and 2151 (XXI) and UN Security Council resolutions 216 (1965), 217 (1965) and 221 (1966).

ment of statehood,⁵⁵² the widespread refusal of recognition makes clear that the community of states also on a fairly long-term basis does not accept the statehood of *de facto* regimes, which have come into being illegally and through non-peaceful and military means.

The resolution of the Parliamentary Assembly of the Council of Europe 1416 (2005) regarding the conflict in Nagorno-Karabakh is also significant in this respect:

“The Assembly reaffirms that independence and secession of a regional territory from a state may only be achieved through a lawful and peaceful process based on democratic support by the inhabitants of such territory and not in the wake of an armed conflict leading to ethnic expulsion and the *de facto* annexation of such territory to another state.”⁵⁵³

Correspondingly the legitimisation of an unauthorised, unlawfully created secession is also rejected in international jurisprudence even where a *de facto* regime has developed.⁵⁵⁴

The case for Nagorno-Karabakh is clear against this background. The secession of this region was legitimated neither under Soviet law nor international law. The factual separation was rather an outcome of an armed conflict that was essentially promoted and carried out by another state, namely Armenia.⁵⁵⁵ These facts are opposed to a creation of a new state in Nagorno-Karabakh under the classical concept of statehood. Correspondingly the mere founding of a state-like entity in Nagorno-Karabakh does not derive any retrospective legitimacy for the secession from Azerbaijan under international law. As a result the community of states has already made clear, as indicated above, that it is not prepared to accept a secession of Nagorno-Karabakh.

4. Preliminary conclusion

This section focused on the question whether Nagorno-Karabakh can rely on a right to secession under international law. The conclusion is that this is not the case. It was initially established that the region of Nagorno-Karabakh became a part of the Republic of Azerbaijan when the latter was founded. The basis for this under international law is the principle of *uti possidetis*.⁵⁵⁶ The affiliation of Nagorno-Karabakh to Azerbaijan is not affected by the historical events fiercely debated by the two sides and ethnic developments in the region. We would even arrive at this solution if we disregarded the principle of *uti possidetis*. The crucial

⁵⁵² Cf. Doering, in: Simma (ed.), *The Charter of the United Nations*, 2002, art. 1, annex: Self-Determination, note 46.

⁵⁵³ Council of Europe Parliamentary Assembly resolution 1416 (2005).

⁵⁵⁴ Cf. Christakis, in: Kohen (ed.), *Secession, International Law Perspectives*, 2006, pp. 138 et seq; Tancredi, in: Kohen (ed.), *Secession, International Law Perspectives*, 2006, pp. 182 et seq.

⁵⁵⁵ See below chapter B.

⁵⁵⁶ See above, section IV. 1.

decision of the Moscow-deployed Caucasian Bureau of 5 July 1921 confirmed the affiliation of Nagorno-Karabakh to the Azerbaijan SSR, which was then able to convert to the Republic of Azerbaijan with Nagorno-Karabakh being included.

With respect to this original affiliation of Nagorno-Karabakh to Azerbaijan, national independence of the mountainous region could only have been effected on the basis of a right to secession under international law. International law recognises internal and external rights to self-determination. A right to secession constitutes the most significant external right to self-determination. It may only prevail over the claim to state integrity in exceptional cases.⁵⁵⁷ The exceptional circumstances coming into question were tested in the context of the Nagorno-Karabakh conflict. However no exception appeared to be relevant.⁵⁵⁸ The correctness of the consistent practice of the community of states not to recognise the established entity in Nagorno-Karabakh was thus confirmed.

Particular emphasis was placed on questions relating to potential human rights violations, political discriminations and a *de facto* secession.⁵⁵⁹ A highly controversial question in international jurisprudence turned out to be whether most severe, massive and systematic human rights violations and discriminations cause a right to secession to arise as a last resort.⁵⁶⁰ The prevailing doctrine correctly rejects this view. There was no evidence of a corresponding state practice nor any international documents that could be interpreted in this way.⁵⁶¹ Also the often quoted Friendly Relations Declaration offered no satisfactory normative basis. If the question of separation should at all be legally resolved in favour of ethnic peoples, groups and minorities, it is incumbent on the community of states to create clear rules. Such rules could then show a way of harmonizing the demands of a certain section of a population for security or broader independence and the compelling requirements of territorial integrity for the purpose of protecting international security and peace.

This legal discourse is irrelevant to the case of Nagorno-Karabakh. Thus the investigation showed that even the requirements of the remedial secession and oppression theories positioned in part by the literature were in fact not present.⁵⁶² There were no indications of the requisite most severe, massive and systematic human rights violations and discriminations during the Soviet era. Widespread human rights violations did not occur until after 1988 when the conflict took a violent turn due to the strategic encouragement of the Armenian secession movement and the ensuing mass migration of Azerbaijanis from the Armenian SSR. In the course of the following time acts of violence, homicides and expulsions occurred on the Armenian and Azerbaijani sides, which, however, would not legitimise a separation of Nagorno-Karabakh even under the remedial secession and oppres-

⁵⁵⁷ See above, section IV. 2.

⁵⁵⁸ See above, section IV. 3.

⁵⁵⁹ See above, sections IV. 3. c), d) and f).

⁵⁶⁰ See above, section IV. 3. c).

⁵⁶¹ See above, sections IV. 3. c) bb) (1) and (3).

⁵⁶² See above, section IV. 3. c) bb) (4).

sion theories. The Karabakh Armenians were a group not originally entitled to secession which attempted to realize its political objective of secession by means of mass expulsions, ethnic cleansing and other violent acts committed by itself.

No clear statements can be made with regard to the economic, political and cultural discrimination claimed by the Armenian side and disputed by the Azerbaijani side. As for many other regions of the Eastern Bloc, partial state repressions of Nagorno-Karabakh cannot be excluded. Curtailment of economic, political and cultural freedom and political power struggles amongst the individual administrative units were endemic within the system and not a specific Armenian-Azerbaijani phenomenon. Furthermore, the Armenian separatist movement was deeply politicised even at an early stage. It is unclear to what extent reality became prematurely perceived as ethnically discriminating as a consequence of this, either intentionally or unintentionally. Ultimately this was irrelevant to the question posed here regarding a politically related right to secession. Only some legal scholars conceive such a right as legally founded. They at best assume it where one part of the population is completely excluded from political participation in the state. This was not the case here.⁵⁶³

In conclusion Karabakh Armenians were not entitled to a right to secession under international law. Nagorno-Karabakh from the outset represented a component of the Republic of Azerbaijan and continues to do so. Thus the view of the international organisations, such as the UN (Security Council), the Council of Europe and the OSCE, which all confirm the territorial integrity of Azerbaijan by recognising Nagorno-Karabakh as a component of Azerbaijan, has emerged as the appropriate one under international law.⁵⁶⁴

⁵⁶³ See above, section IV. 3. d).

⁵⁶⁴ See UN Security Council resolutions 822 (1993), 853 (1993), 874 (1993) and 884 (1993) as well as Council of Europe Parliamentary Assembly resolution 1416 (2005) and Council of Europe Committee of Ministers recommendation 1690 (2005) which, in particular, refer to the mentioned UN Security Council resolutions. See also OSCE, 1996 Lisbon Summit 2-3 December 1996, statement of the OSCE-Chairman in office.