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A Legal Analysis

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List of abbreviations

APuZ	Aus Politik und Zeitgeschichte (German journal)
Art.	Article
BSEC	Organization of the Black Sea Economic Cooperation
BT-Drucks.	Printed matter of the German Bundestag
Cf.	Compare
CIS	Commonwealth of Independent States
Cl.	Clause
CRIA	Caucasian Review of International Affairs
CSCCE	Conference for Security and Co-operation in Europe
ECOSOC	Economic and Social Council (ECOSOC) of the United Nations
ed.	Editor
EJIL	European Journal of International Law
EPIL	Encyclopaedia of Public International Law
GDR	German Democratic Republic
GUAM	Organization for Democracy and Economic Development
ICJ	International Court of Justice
ICLQ	International & Comparative Law Quarterly
lit.	littera (letter)
no.	Number
OAU	Organization of African Unity
OSCE	Organization for Democracy and Cooperation in Europe
para.	Paragraph

UN	United Nations
UN-ECOSOC	United Nations Economic and Social Council
VCLT	Vienna Convention on the Law of Treaties 1980
VJIL	Virginia Journal of International Law
vol.	Volume

Introduction

The Caucasus region, situated on a natural isthmus between the Black Sea and the Caspian Sea, has long been a border zone and a melting pot for a diverse range of cultures and peoples. As the intersection between Europe and Asia, and also between Russia and the Ottoman and Persian Empires, it has featured in the strategic plans of numerous great powers over the centuries. Given its abundance of natural resources, the ready-made raw material transport routes to Europe and its enduring position on the edge of Russia, nothing has changed to the present day.

The tremendous development opportunities of the Caucasian region are being tarnished by unresolved territorial conflicts that put a continual and regionally balanced growth, sustained democratisation and long-term stability at risk. These conflicts, which all erupted with the dissolution of the Soviet Union, include the separatist movements in Abkhazia, Chechnya, Nagorno-Karabakh and South Ossetia. The war over South Ossetia, which erupted between Russia and Georgia in August 2008, spelt out the explosive potential still inherent in these conflicts.

The conflict over Nagorno-Karabakh has claimed the highest number of victims. An estimated 25,000 Armenian and Azerbaijani casualties and over a million refugees are the tragic toll of a conflict over the affiliation of a mountainous area of some 4,400 square kilometres. The conflict began in 1988 with mass demonstrations for the region of Nagorno-Karabakh, part of the Soviet Republic of Azerbaijan, to be annexed to the Soviet Republic of Armenia. In 1992 the emerging civil and rebel war became a war between the young republics of Armenia and Azerbaijan.

The weapons have been silent since 1994, although the most intensive phase of the conflict has been followed by a cooling-off phase. To this day young recruits from the hostile parties face each other in the trenches along the armistice line. The occupied territory still comprises Nagorno-Karabakh and seven surrounding administrative districts. Despite years of international attempts at mediation, the presidents of Armenia and Azerbaijan, both under considerable political pressure at home, have been unable to reach a resolution. Whilst Azerbaijan asserts that Nagorno-Karabakh is an integral part of its territory, Armenia, contrary to all indications, does not regard itself as a party to the conflict. The official line is that it merely supports the separatist endeavours of Armenians living in Nagorno-Karabakh. These Karabakh Armenians for their part refer to the right to self-determination of peoples and reject any type of incorporation in Azerbaijan.

The Republic of Armenia and the international Armenian diaspora were helping to establish quasi-state administration structures on the territory of Nagorno-Karabakh. The profound military, political and budgetary links between Armenia

and Nagorno-Karabakh suggest the *de facto* existence of a loose federation. To date the international community has not recognised Nagorno-Karabakh either as an independent state or as a part of Armenia. International organisations and third countries have repeatedly underlined the view that Nagorno-Karabakh still belongs to Azerbaijan and that troops should be withdrawn from the occupied areas.¹

However, there is speculation that the international community underscores the Azerbaijani claim for opportunistic reasons alone.² International organisations and third countries are seen to be playing a double-handed game which, as in previous centuries, is concerned with securing strategic spheres of influence and natural resources in the Caucasus region and in burgeoning Azerbaijan in particular. Irrespective of the intention behind such speculation, there nonetheless remains a serious question as to how the secession endeavours of Nagorno-Karabakh, its territorial status and the involvement of Armenia should be assessed in legal terms. Is the legal view of the international community correct, irrespective of the political interests in the region, or is the view an incorrect perception that pursues political objectives alone?

This treatise shall attempt to understand this issue. The aim is a detailed examination of the key legal aspects of the Karabakh conflict, taking into account international documentation of recent years. This is firstly concerned with the lawfulness or unlawfulness of the secession of Nagorno-Karabakh under Soviet law and international law (Chapter A) and secondly with the conduct of the Republic of Armenia over the course of the conflict (Chapter B).

A number of factual and legal issues pertaining to the foundations of modern international law require resolution. Central to this is the principle of territorial integrity and the tenet of self-determination of peoples. Their relationship reflects the conflict experienced by the world of states navigating a course through security, stability, claims to power and the philosophical concept of a people's right to self-determination that emerged some decades ago.

¹ The sovereignty and territorial integrity of Azerbaijan was confirmed in UN General Assembly resolution GA/10693 (2008); UN 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). See also OSCE, 1996 Lisbon Summit 2-3 December 1996, statement of the OSCE-Chairman in office.

² 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.

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.