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The situation in the occupied territories of Azerbaijan

Security Council
Sixty-fourth year

Letter dated 23 January 2009 from the Permanent Representative of Azerbaijan to the United Nations addressed to the Secretary-General

I have the honour to transmit herewith the report on the international legal responsibilities of Armenia as the belligerent occupier of Azerbaijani territory (see annex).

I should be grateful if you would have the present letter and its annex circulated as a document of the General Assembly, under agenda items 13, "Protracted conflicts in the GUAM area and their implications for international peace, security and development", and 18, "The situation in the occupied territories of Azerbaijan", and of the Security Council.

(*Signed*) Agshin **Mehdiyev**
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Annex to the letter dated 23 January 2009 from the Permanent Representative of Azerbaijan to the United Nations addressed to the Secretary-General

Report on the international legal responsibilities of Armenia as the belligerent occupier of Azerbaijani territory

1. The present Report provides the view of the Government of the Republic of Azerbaijan with regard to the international legal responsibilities of the Republic of Armenia ("Armenia") as the belligerent occupier of the legitimate and recognised territory of the Republic of Azerbaijan ("Azerbaijan")[1]. The Report addresses the following issues:

a) Is Armenia an occupier in international law of Azerbaijani territory?

b) If so, what are Armenia's duties as an occupier of Azerbaijani territory with regard to issues such as the maintenance of public order, the preservation of the Azerbaijani legal system and the protection of human rights in the territory in question?

c) How may Armenia's responsibilities be monitored and enforced in international law?

1. General

2. International law historically dealt with question of occupation of territory of a state as part of what used to be called the law of war and what is now called international humanitarian law.[2] The law is essentially laid down in three instruments, being the Regulations annexed to Hague Convention IV, Respecting the Laws and Customs of War on Land 1907 ("the Hague Regulations"); Geneva Convention IV on the Protection of Civilians in Time of War 1949 ("Geneva Convention IV") and Additional Protocol I to the Geneva Conventions of 1949 relating to the Protection of Victims of International Armed Conflicts 1977 ("Additional Protocol I").

3. Armenia became a party to Geneva Convention IV and to Additional Protocol I on 7 June 1993 and Azerbaijan became a party to Geneva Convention IV on 1 June 1993. Accordingly, Armenia is bound by all three of the instruments noted above, the Hague Regulations constituting customary international law.

[1] For more information on the matter, see also the Reports entitled "Military Occupation of the Territory of Azerbaijan: a Legal Appraisal", A/62/491-S/2007/615, "The Legal Consequences of the Armed Aggression of the Republic of Armenia Against the Republic of Azerbaijan", A/63/662-S/2008/812, and "Fundamental Norm of the Territorial Integrity of States and the Right to Self-Determination in the Light of Armenia's Revisionist Claims", A/63/664-S/2008/823.

[2] See e.g. L. Green, *The Contemporary Law of Armed Conflict*, 2nd ed., Manchester, 2000, chapters 12 and 15; H.P. Gasser, "Protection of the Civilian Population" in D. Fleck (ed.), *Handbook of Humanitarian Law in Armed Conflict*, Oxford, 1995, p. 209; UK Ministry of Defence, *The Manual of the Law of Armed Conflict,* Oxford, 2004, chapters 9 and 11; E. Benvenisti, *The International Law of Occupation,* Princeton, 2004 and J. Pictet (ed.), *The Geneva Conventions of 12 August 1949: Commentary, Geneva Convention IV,* Geneva, 1958. See also A. Roberts, "What is a Military Occupation?", 55 British Year Book of International Law, p. 249.

a) Occupation and Sovereignty

4. The first point to make is that international law specifies that territory cannot be acquired by the use of force. Article 2 (4) of the United Nations Charter declares that "[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state ..".

5. The Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations 1970[3] provided that:

> "The territory of a state shall not be the object of acquisition by another state resulting from the threat or use of force. No territorial acquisition resulting from the threat or use of force shall be recognised as legal".

6. Principle IV of the Declaration of Principles adopted by the Conference on Security and Cooperation in Europe in the Helsinki Final Act 1975 noted that:

> "The participating states will likewise refrain from making each other's territory the object of military occupation or other direct or indirect measures of force in contravention of international law, or the object of acquisition by means of such measures or the threat of them. No such occupation or acquisition will be recognized as legal".

7. It is, thus, abundantly clear that occupation does not confer sovereignty over the occupied territory upon the occupying state. Gasser, for example, writes that:

> "The annexation of conquered territory is prohibited by international law. This necessarily means that if one state achieves power over parts of another state's territory by force or threat of force, the situation must be considered temporary by international law. The international law of belligerent occupation must therefore be understood as meaning that the occupying power is not sovereign, but exercises provisional and temporary control over foreign territory".[4]

8. Accordingly, sovereignty over the occupied territory does not pass to the occupier. The legal status of the population cannot be infringed by any agreement concluded between the authorities of the occupied territory and the occupying power, nor by an annexation by the latter.[5] Occupation is, thus, a relationship of power and such power is regulated according to the rules of international humanitarian law, which lays down both the rights and the obligations of the occupying power pending termination of that status. Both the legal status of the parties to the conflict and the legal status of the territory in question remain unaffected by the occupation of that territory.[6] Accordingly, no action taken by Armenia or by its subordinate local authority within the occupied territories can

[3] Adopted in General Assembly resolution 2625 (XXV).
[4] *Op.cit*., p. 242. See also Benvenisti, *Op.cit*., p. 8. Note in addition *Prefecture of Voiotia v Germany (Distomo Massacre),* Court of Cassation, Greece, 4 May 2000, 129 International Law Reports, pp. 514, 519 and *Mara'abe v The Prime Minister of Israel,* Israel Supreme Court, 15 September 2005, 129 International Law Reports, pp. 241, 252.
[5] See article 47 of Geneva Convention IV.
[6] See article 4 of Additional Protocol I.

affect the pre-existing legal status of these territories, which thus remain Azerbaijani in international law.

b) Commencement of Occupation

9. Article 42 of the Hague Regulations provides that:

> "Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised".

10. This provision is considered to be a rule of customary international law and thus binding on all states.[7] It was examined by the International Court of Justice in the *Construction of a Wall* advisory opinion, in which the Court declared that:

> "territory is considered occupied when it is actually placed under the authority of the hostile army, and the occupation extends only to the territory where such authority has been established and can be exercised".[8]

11. The International Court of Justice noted that:

> "under customary international law, as reflected in article 42 of the Hague Regulations of 1907, territory is considered to be occupied when it is actually placed under the authority of the hostile army, and the occupation extends only to the territory where such authority has been established and can be exercised …. In order to reach a conclusion as to whether a state, the military forces of which are present on the territory of another state as a result of an intervention, is an 'occupying power' in the meaning of the term as understood in the *jus in bello*, the Court must examine whether there is sufficient evidence to demonstrate that the said authority was in fact established and exercised by the intervening state in the areas in question".[9]

12. Article 2 of Geneva Convention IV provides that the convention shall apply:

> "to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognised by one of them. The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance".[10]

13. Since both Armenia and Azerbaijan are parties to this Convention, they are bound by its provisions. This obligation thus derives from both quoted parts of the article. Insofar as the first paragraph is concerned, the official Commentary on the Convention notes that "[a]ny difference arising between two states and leading to the intervention of members of the armed forces is an

[7] See *Construction of a Wall*, ICJ Reports, 2004, pp. 136, 172.
[8] *Ibid*., p. 167.
[9] *Congo v Uganda,* ICJ Reports, 2005, pp. 168, 229-30.
[10] See also article 3 of Additional Protocol I.

armed conflict within the meaning of article 2".[11] That this happened from the early 1990s is indisputable as is the continuing outbreak of low-level hostilities and loss of life.[12]

14. The International Court of Justice has discussed the meaning of this paragraph in its advisory opinion in the Construction of a Wall case.[13] It noted that the Convention is applicable under this paragraph when two conditions were fulfilled; that there exists an armed conflict and that the conflict is between two contracting parties. The Court continued by stating that "[i]f those two conditions are satisfied, the Convention applies, in particular, in any territory occupied in the course of the conflict by one of the contracting parties". Further, the Court noted that the object of the second paragraph, which provides that the Convention applies to "all cases of partial or total occupation of the territory of a High Contracting Party", was "directed simply to making it clear that, even if the occupation effected during the conflict met no armed resistance, the Convention is still applicable". As the Court emphasised, the purpose of the Convention was to seek to guarantee the protection of civilians irrespective of the status of the occupied territory.[14] It further underlined its approach by concluding that:

> "the Fourth Geneva Convention is applicable in any occupied territory in the event of an armed conflict arising between two or more High Contracting Parties".[15]

15. Further, the Eritrea–Ethiopia Claims Commission has pointed out that:

> "These protections [provided by international humanitarian law] should not be cast into doubt because the belligerents dispute the status of territory … respecting international protections in such situations does not prejudice the status of the territory".[16]

16. Insofar as the conflict between Armenia and Azerbaijan is concerned, both the Hague Regulations and Geneva Convention IV apply. Further, as Armenia is a party to Additional Protocol I, this also applies.

[11] Pictet (ed.), *Commentary*, *Op.cit*., p. 20.
[12] See e.g. an AFP report dated 5 September 2007 stated that three Armenian and two Azerbaijani soldiers had been killed in fighting near Nagorny Karabakh. The report concludes by noting that "Armenian and Azerbaijani forces are spread across a ceasefire line in and around Nagorny Karabakh, often facing each other at close range, and shootings are common", <http://www.reliefweb.int/rw/rwb.nsf/db900sid/TBRL-76RMYP?OpenDocument>. See also the Parliamentary Assembly of the Council of Europe report on Migration, Refugees and Population dated 6 February 2006, which deplores "the frequent incidents along the ceasefire line and the border incidents, which are detrimental to refugees and displaced persons", Doc. 10835, <http://assembly.coe.int/Main.asp?link=/Documents/WorkingDocs /Doc06/EDOC10835.htm>, at para. 5. This terminology was repeated in Resolution 1497, 2006.
[13] ICJ Reports, 2004, pp. 136, 174-5.
[14] *Ibid*., p. 175.
[15] *Ibid*., p. 177.
[16] Partial Award, Central Front, Ethiopia's Claim 2, The Hague, 28 April 2004, para 28. See also article 4 of Additional Protocol I.

2. Armenia as an Occupier under International Law

a) Armenia as the Occupier of Azerbaijani Territory

17. The critical period for the determination of the status of Armenia as an occupying power of Azerbaijani territory is the end of 1991 for this was the period during which the USSR disintegrated and the new successor states came into being, thus transforming an internal dispute between the two Union Republics into an international conflict. There can be no occupation in an international law sense of the concept as between contending forces in an internal conflict. With the declaration of Armenian independence on 21 September 1991 and that of Azerbaijan on 18 October that year, the conflict over Nagorny Karabakh[17] became an international one. Both Armenia and Azerbaijan came to independence and were recognised as such in accordance with international law within the boundaries that they had had as republics of the USSR. This meant that Nagorny Karabakh was internationally accepted as falling with the territory of Azerbaijan.

18. Fighting in the region of Nagorny Karabakh intensified after independence of Armenia and Azerbaijan, followed by the increased involvement of troops from the Republic of Armenia during this period. The first armed attack by the Republic of Armenia against the Republic of Azerbaijan after the independence of the two Republics – an attack in which organized military formations and armoured vehicles operated against Azerbaijani targets – occurred in February 1992, when the town of Khojaly in the Republic of Azerbaijan was notoriously overrun.[18] Direct artillery bombardment of the Azerbaijani town of Lachin – mounted from within the territory of the Republic of Armenia – took place in May of that year.[19] Armenian attacks against areas within the Republic of Azerbaijan were resumed in 1993, eliciting a series of four Security Council resolutions. Human Rights Watch in its comprehensive report of December 1994 established on the basis of evidence it had collected "the involvement of the Armenian army as part of its assigned duties in the conflict ..". Such information was gathered by Human Rights Watch from prisoners from the Armenian army captured by Azerbaijan and from Armenian soldiers in Yerevan, the capital of Armenia. Western journalists also reported seeing busloads of Armenian army soldiers entering Nagorny Karabakh from Armenia. Human Rights Watch concluded that the Armenian army troop involvement in Azerbaijan made Armenia a party to the conflict and made the war an international armed conflict involving these two states.[20]

19. That there was and remains a situation of armed confrontation has been recognised by various United Nations organs. The UN Human Rights Committee, for example, has referred with regard to

[17] Note that Nagorny Karabakh is sometimes written as Nagorno-Karabakh or Karabagh. In reality, "Nagorny Karabakh" is a Russian translation of the original name in Azerbaijani language – "Dağlıq Qarabağ" (pronounced as "Daghlygh Garabagh"), which literally means mountainous Garabagh. The word "Garabagh" is translated from Azerbaijani as "Black Garden". In order to avoid confusion the widely referred term "Nagorny Karabakh" will be used hereinafter.
[18] See T. de Waal, *Black Garden: Armenia and Azerbaijan through Peace and War* 170 (2003).
[19] See Statement by the Ministry of Foreign Affairs of the Republic of Azerbaijan, annexed to a Letter from the Permanent Representative of Azerbaijan to the President of the Security Council (Doc. S/23926, 14 May 1992).
[20] *Seven Years of Conflict in Nagorno-Karabakh*, New York, 1994, pp. 69-73.

Azerbaijan explicitly to "[t]he situation of armed conflict with a neighbouring country".[21] The Committee on the Elimination of Racial Discrimination noted in its Concluding Observations on Azerbaijan on 12 April 2001 that:

> "After regaining independence in 1991, the State party was soon engaged in war with Armenia, another State party. As a result of the conflict, hundreds of thousands of ethnic Azerbaijanis and Armenians are now displaced persons or refugees. Because of the occupation of some 20 per cent of its territory, the State party cannot fully implement the Convention".[22]

20. Further, this Committee proceeded to "express its concern about the continuation of the conflict in and around the Nagorny-Karabakh region of the Republic of Azerbaijan", a conflict which "undermines peace and security in the region and impedes implementation of the Convention".[23] Concern with "the conflict in the Nagorny-Karabakh region" was also expressed in the Committee's Concluding Observations on Azerbaijan on 14 April 2005.[24]

21. A similar position has been adopted by the UN Committee on Economic, Social and Cultural Rights. In its Concluding Observations on Azerbaijan on 22 December 1997, it was noted that "the State party is also faced with considerable adversity and instability due to an armed conflict with Armenia".[25] The Committee also referred to the "conflict with Armenia" in its Concluding Observations on Azerbaijan on 14 December 2004.[26]

22. The US Department of State's Country Reports on Human Rights Practices for Armenia 2006, for example, noted that:

> "Armenia continues to occupy the Azerbaijani territory of Nagorno-Karabakh and seven surrounding Azerbaijani territories. All parties to the Nagorno-Karabakh conflict have laid landmines along the 540-mile border with Azerbaijan and along the line of contact".[27]

23. The US Department of State's Country Reports on Human Rights Practices for Azerbaijan 2006 stated that:

> "Armenia continued to occupy the Azerbaijani territory of Nagorno-Karabakh and seven surrounding Azerbaijani territories. During the year, incidents along the militarized line of contact separating the sides as a result of the Nagorno-Karabakh conflict again resulted in numerous casualties on both sides. Reporting from unofficial sources indicated approximately 20 killed and 44 wounded, taking into account both military and civilian casualties on both sides of

[21] See the Concluding Observations of the Human Rights Committee: Azerbaijan, 3 August 1994, CCPR/C/79/Add. 38, at para. 2. The reference to "armed conflict" was repeated in the Committee's Concluding Observations on Azerbaijan on 12 November 2001, CCPR/CO/73/AZE, at para. 3.
[22] CERD/C/304/Add.75, at para. 3.
[23] *Ibid*, at para. 7.
[24] CERD/C/AZE/CO/4, at para. 10.
[25] E/C.12/1/Add.20, at para. 12.
[26] E/C.12/1/Add.104, at para. 11.
[27] <http://www.state.gov/g/drl/rls/hrrpt/2006/78799.htm>.

> the line of contact. According to the national agency for mine actions, landmines killed two persons and injured 15 others during the year".[28]

24. Further, the Freedom House Report on Azerbaijan for 2006 states that:

> "The Azerbaijani government continued to have no administrative control over the self-proclaimed Nagorno-Karabakh Republic (NKR) and the seven surrounding regions (Kelbajar, Gubatli, Djabrail, Fizuli, Zengilan, Lachin, and Agdam) that are occupied by Armenia. This area constitutes about 17 percent of the territory of Azerbaijan",[29]

while the International Crisis Group's Report on Nagorny Karabakh of 11 October 2005 notes in its Executive Summary that:

> "Armenia is not willing to support withdrawal from the seven occupied districts around Nagorno-Karabakh, or allow the return of Azerbaijani internally displaced persons (IDPs) to Nagorno-Karabakh, until the independence of Nagorno-Karabakh is a reality".[30]

25. The Security Council has consistently reaffirmed both the sovereignty and territorial integrity of Azerbaijan and the inadmissibility of the use of force for the acquisition of territory. It has further consistently recognised that Nagorny Karabakh is part of Azerbaijan and called on a number of occasions for the withdrawal of the occupying forces from all the occupied territories of Azerbaijan.

26. Security Council resolution 822 (1993) called for "the immediate cessation of all hostilities and hostile acts with a view to establishing a durable cease-fire, as well as immediate withdrawal of all occupying forces from the Kelbajar district and other recently occupied areas of Azerbaijan". Resolution 853 (1993) condemned "the seizure of the district of Agdam and of all other recently occupied areas of the Azerbaijani Republic" and demanded the "the immediate, complete and unconditional withdrawal of the occupying forces involved from the district of Agdam and all other recently occupied areas of the Azerbaijani Republic", while resolution 874 (1993) repeated the call for the "withdrawal of forces from recently occupied territories". Resolution 884 (1993) reaffirmed the earlier resolutions, condemned the occupation of the Zangelan district and the city of Goradiz in the Azerbaijani Republic and demanded the "unilateral withdrawal of occupying forces from the Zangelan district and the city of Goradiz, and the withdrawal of occupying forces from other recently occupied areas of the Azerbaijani Republic".

27. Resolutions 853 (1993) and 884 (1993) further called upon the Government of the Republic of Armenia to "continue to exert its influence" to achieve compliance with Security Council resolutions, as did the statement made by the President of the Security Council on 18 August 1993.[31]

[28] <http://www.state.gov/g/drl/rls/hrrpt/2006/78801.htm>.
[29] <http://www.freedomhouse.org/template.cfm?page=47&nit=390&year=2006>.
[30] "Nagorno-Karabakh: A Plan for Peace", Report No. 167, p. I.
[31] S/26326, 18 August 1993.

28. The General Assembly of the United Nations has also included on its agenda from 2004, an item entitled "The Situation in the Occupied Territories of Azerbaijan". On 14 March 2008, the Assembly adopted resolution 62/243, including the following substantive provisions:

> "1. *Reaffirms* continued respect and support for the sovereignty and territorial integrity of the Republic of Azerbaijan within its internationally recognized borders;
>
> 2. *Demands* the immediate, complete and unconditional withdrawal of all Armenian forces from all the occupied territories of the Republic of Azerbaijan;
>
> 3. *Reaffirms* the inalienable right of the population expelled from the occupied territories of the Republic of Azerbaijan to return to their homes, and stresses the necessity of creating appropriate conditions for this return, including the comprehensive rehabilitation of the conflict-affected territories;
>
> 5. *Reaffirms* that no State shall recognize as lawful the situation resulting from the occupation of the territories of the Republic of Azerbaijan, nor render aid or assistance in maintaining this situation".

29. The report of the Political Affairs Committee of the Parliamentary Assembly of the Council of Europe, dated 19 November 2004, declared that:

> "Armenians from Armenia had participated in the armed fighting over the Nagorno-Karabakh region besides local Armenians from within Azerbaijan. Today, Armenia has soldiers stationed in the Nagorno-Karabakh region and the surrounding districts, people in the region have passports of Armenia, and the Armenian government transfers large budgetary resources to this area".[32]

30. Resolution 1416 (2005), adopted on 25 January 2005 by the Parliamentary Assembly of the Council of Europe, noted particularly that "[c]onsiderable parts of the territory of Azerbaijan are still occupied by Armenian forces" and reiterated that "the occupation of foreign territory by a member state constitutes a grave violation of that state's obligations as a member of the Council of Europe."

31. The International Crisis Group noted in its September 2005 report that "[a]ccording to an independent assessment, there are 8,500 Karabakh Armenians in the army and 10,000 from Armenia" and that "many conscripts and contracted soldiers from Armenia continue to serve in NK [Nagorny Karabakh]", while "[f]ormer conscripts from Yerevan and other towns in Armenia have told Crisis Group they were seemingly arbitrarily sent to Nagorno-Karabakh and the occupied districts immediately after presenting themselves to the recruitment bureau. They deny that they ever volunteered to go to Nagorno-Karabakh or the adjacent occupied territory". It was further noted that "[t]here is a high degree of integration between the forces of Armenia and Nagorno-Karabakh".[33]

[32] David Atkinson, "The conflict over the Nagorno-Karabakh region dealt with by the OSCE Minsk Conference", Explanatory Memorandum, para. 6.
[33] "Nagorno-Karabakh: Viewing the Conflict from the Ground", Report no. 166, 14 September 2005, pp. 9-10.

32. The above indicative materials demonstrate clearly that the regular armed forces of the Republic of Armenia took direct part in the capture of Nagorny Karabakh and seven surrounding regions. Further, Armenia has sustained the existence of the "Republic of Nagorny Karabakh", an illegally created and entirely unrecognised entity within the internationally recognised territory of Azerbaijan, by a variety of political and economic means, including the maintenance of military forces in the occupied territories and on the line of contact.

33. It has been internationally recognised that Azerbaijani territories are under occupation and that Armenia has been actively involved in the creation and maintenance of that situation. Accordingly, Armenia is an occupying power within the meaning of the relevant international legal provisions. Article 6 of Geneva Convention IV declares that the ***C***onvention applies "from the outset of any conflict or occupation mentioned in article 2", so that it clearly applies as from the moment that Armenian forces entered Azerbaijani territory and will continue so to do until their final withdrawal.[34]

a) Armenia's Duties as an Occupier of Azerbaijani Territory

1) General

34. In the official statement of the ICRC delivered by Thürer in 2005, the following was noted with regard to the duties of an occupier in the light of the applicable law:

> "the occupying power must not exercise its authority in order to further its own interests, or to meet the interests of its own population. In no case can it exploit the inhabitants, the resources or other assets of the territory under its control for the benefit of its own territory or population. Any military occupation is considered temporary in nature; the sovereign title does not pass to the occupant and therefore the occupying powers have to maintain the *status quo*. They should thus respect the existing laws and institutions and make changes only where necessary to meet their obligations under the law of occupation, to maintain public order and safety, to ensure an orderly government and to maintain their own security".[35]

35. Article 43 of the Hague Regulations provides the essential framework of the law of occupation. It notes that:

> "The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore and ensure, as far as possible, public order and safety [*l'ordre et la vie publics*], while respecting, unless absolutely prevented, the laws in force in the country".

[34] See Pictet, *Geneva Convention IV*, p. 60 with which the official statement of the International Committee of the Red Cross ("ICRC") delivered by D. Thürer on 21 October 2005 agrees, <http://www.icrc.org/web/eng/siteeng0.nsf/ htmlall/occupation-statement-211105?opendocument>. See also Roberts, "Military Occupation", *loc. cit*., p. 256 and *Construction of a Wall,* ICJ Reports, 2004, pp. 136, 174, noting that Geneva Convention IV applies when an armed conflict between two contracting parties exists.

[35] <http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/occupation-statement-211105?opendocument>.

36. Further, the International Court of Justice has emphasised that an occupying power is under an obligation under article 43:

> "to take all the measures in its power to restore, and ensure, as far as possible, public order and safety in the occupied area, while respecting, unless absolutely prevented, the laws in force [in the occupied area]. This obligation comprised the duty to secure respect for the applicable rules of international human rights law and international humanitarian law, to protect the inhabitants of the occupied territory against acts of violence, and not to tolerate such violence by any third party".[36]

37. Article 43 has been described as the "gist" of the law of occupation and the culmination of prescriptive efforts made in the nineteenth century and thus recognised as expressing customary international law.[37] The key features of this provision read together create a powerful presumption against change with regard to the occupying power's relationship with the occupied territory and population, particularly concerning the maintenance of the existing legal system, while permitting the occupier to "restore and ensure" public order and safety. While the balance between the two is not always clear, especially with regard to extended occupations, it is clear that the occupying power does not have a free hand to alter the legal and social structure in the territory in question and that any form of "creeping annexation" is forbidden. As Benvestisti has pointed out:

> "the administration of the occupied territory is required to protect two sets of interests: first, to preserve the sovereign rights of the ousted government, and, second, to protect the local population from exploitation of both their persons and their property by the occupant".[38]

2) Protection of the Existing Local Legal System

38. International humanitarian law provides for the keeping in place of the local legal system during occupation. This is a fundamental element in the juridical protection of the territory and population as they fall under the occupation of a hostile power. Article 43 of the Hague Regulations expressly provides for this in noting that the occupying power must respect local laws "unless absolutely prevented", a high threshold which may be only rarely achieved. This is because occupation is a temporary factual situation with minimal modification of the underlying legal structure with regard to the territory in question. The term "laws in force" is to be interpreted widely to include not only laws in the strict sense, but also constitutional provisions, decrees, ordinances, court precedents as well as administrative regulations and executive orders.[39]

39. Article 43 of the Hague Regulations has been supplemented by Geneva Convention IV. Article 64 provides, for example, that the penal laws of the occupied territory shall remain in force, unless they constitute a threat to the security of the occupying power. Occupying powers may however,

[36] *Congo v Uganda*, ICJ Reports, 2005, pp. 168, 231.
[37] See Benvenisti, *Op.cit*., pp. 7-8. See also M. Sassòli, "Legislation and Maintenance of Public Order and Civil Life by Occupying Powers", 16 European Journal of International Law, 2005, p. 661 and A. Roberts, "Transformative Military Occupation", 100 American Journal of International Law, 2006, p. 580.
[38] *Op.cit*., p. 28. See also S. Wills, "Occupation Law and Multi-National Operations: Problems and Perspectives", 77 British Year Book of International Law, pp. 256, 264.
[39] See Sassòli, *loc. cit*., pp. 668-9.

under the second paragraph to this provision, subject the population of the occupied territory to "provisions which are essential to enable the occupying power to fulfil its obligations under the present Convention, to maintain the orderly government of the territory, and to ensure the security of the Occupying Power, of the members and property of the occupying forces or administration, and likewise of the establishments and lines of communication used by them". However, this is to be restrictively interpreted and the difference between preserving local laws and providing for "provisions" which are "essential" is clear and significant. They mean not only that the legal system as such is unaffected save for the new measures which are not characterised as such as laws, but that the test for the legitimacy of these imposed measures is that they be "essential" for the purposes enumerated. The fact that the French term *indispensable* is used clearly demonstrates the restrictive nature of the reservation.

40. Article 64 also provides that "the tribunals of the occupied territory shall continue to function in respect of all offences covered by the said laws", while article 54 provides that:

> "the Occupying Power may not alter the status of public officials or judges in the occupied territories, or in any way apply sanctions to or take any measures of coercion or discrimination against them, should they abstain from fulfilling their functions for reasons of conscience".

41. In other words, while the occupying power may enact penal provisions of its own in order to maintain an orderly administration, such competence is constrained by the need to preserve the existing local legal system and by the need to comply with the rule of law.[40] Further, protected persons accused of offences shall be detained in the occupied country, and if convicted they shall serve their sentences therein.[41] Representative of the delegates of the International Committee of the Red Cross ("ICRC") have the right to go to all places where protected persons are found, particularly places of internment, detention and work.[42]

42. In addition to the preservation of the local legal system, article 56 provides that to the fullest extent of the means available to it, the occupying power has the duty of ensuring and maintaining, with the cooperation of national and local authorities, the medical and hospital establishments and services, public health and hygiene in the occupied territory, with particular reference to the adoption and application of the prophylactic and preventive measures necessary to combat the spread of contagious diseases and epidemics. Medical personnel of all categories are to be allowed to carry out their duties.[43]

3) Property Rights

43. Article 46 of the Hague Regulations provides that, *inter alia*, the lives of persons, and private property, as well as religious convictions and practice, must be respected. Article 46 also specifies that private property cannot be confiscated, except where requisitioned for necessary military

[40] See articles 67 and 69-75 of Geneva Convention IV and article 75 of Additional Protocol I.
[41] Article 76 of Geneva Convention IV.
[42] Article 143.
[43] See also article 14 of Additional Protocol I.

purposes, but even then requisitioning must take into account the needs of the civilian population.[44] Pillage is forbidden,[45] while reprisals against the property of protected persons are prohibited.[46]

44. Article 55 states that the occupying state shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile state, and situated in the occupied country and that it must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct. In addition, article 56 provides that the property of municipalities, institutions dedicated to religion, charity and education, the arts and sciences, even when state property, shall be treated as private property and that all seizure of, destruction or wilful damage done to institutions of this character, historic monuments, works of art and science, is forbidden, and should be made the subject of legal proceedings.

45. Article 53 of Geneva Convention IV prohibits the destruction by the occupying power of any real or personal property belonging individually or collectively to private persons, or to the state, or to other public authorities, or to social or cooperative organizations, except where such destruction is rendered absolutely necessary by military operations.[47] It is a grave breach of the Convention to engage in extensive destruction not so justified.[48]

4) Protecting Protected Persons

46. A number of provisions exist detailing the treatment of persons within the occupied territory (termed protected persons under the convention). The major ones are as follows:

i) It is prohibited to employ protected persons for work outside the occupied territory (article 51 (3)).

ii) Protected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity All protected persons shall be treated with the same consideration by the party to the conflict in whose power they are, without any adverse distinction based, in particular, on race, religion or political opinion (article 27).

iii) The party to the conflict in whose hands protected persons may be, is responsible for the treatment accorded to them by its agents, irrespective of any individual responsibility which may be incurred (article 28).

iv) No physical or moral coercion shall be exercised against protected persons, in particular to obtain information from them or from third parties (article 31).

[44] Article 52 of the Hague Regulations and article 55 of Geneva Convention IV.
[45] Article 47 of the Hague Regulations.
[46] Article 33 of Geneva Convention IV.
[47] See also article 23 (g) of the Hague Regulations.
[48] Article 147 of Geneva Convention IV.

v) There is a prohibition on taking any measure of such a character as to cause the physical suffering or extermination of protected persons in their hands. This prohibition applies not only to murder, torture, corporal punishments, mutilation and medical or scientific experiments not necessitated by the medical treatment of a protected person, but also to any other measures of brutality whether applied by civilian or military agents (article 32).

vi) No protected person may be punished for an offence he or she has not personally committed. Collective penalties and likewise all measures of intimidation or of terrorism are prohibited and reprisals against protected persons and their property are prohibited (article 33).

vii) The taking of hostages is prohibited (article 34).

5) Missing Persons

47. Special provisions apply with regard to missing persons. Article 26 of Geneva Convention IV provides that each party to the conflict shall facilitate enquiries made by members of families dispersed owing to the war, with the object of renewing contact with one another and of meeting, if possible. It shall encourage, in particular, the work of organizations engaged on this task provided they are acceptable to it and conform to its security regulations.

48. Article 33 of Additional Protocol I, which is specifically entitled "Missing Persons", provides that:

> "1. As soon as circumstances permit, and at the latest from the end of active hostilities, each party to the conflict shall search for the persons who have been reported missing by an adverse party. Such adverse party shall transmit all relevant information concerning such persons in order to facilitate such searches.
>
> 2. In order to facilitate the gathering of information pursuant to the preceding paragraph, each party to the conflict shall, with respect to persons who would not receive more favourable consideration under the Conventions and this Protocol:
>
> (a) Record the information specified in article 138 of the Fourth Convention in respect of such persons who have been detained, imprisoned or otherwise held in captivity for more than two weeks as a result of hostilities or occupation, or who have died during any period of detention;
>
> (b) To the fullest extent possible, facilitate and, if need be, carry out the search for and the recording of information concerning such persons if they have died in other circumstances as a result of hostilities or occupation.
>
> 3. Information concerning persons reported missing pursuant to paragraph I and requests for such information shall be transmitted either directly or through the Protecting Power or the Central Tracing Agency of the International Committee of the Red Cross or national Red Cross (Red Crescent, Red Lion and Sun) Societies. Where the information is not transmitted through the International Committee of the Red Cross and its Central Tracing Agency, each party to the conflict shall ensure that such information is also supplied to the Central Tracing Agency.

> 4. The parties to the conflict shall endeavour to agree on arrangements for teams to search for, identify and recover the dead from battlefield areas, including arrangements, if appropriate, for such teams to be accompanied by personnel of the adverse party while carrying out the missions in areas controlled by the adverse party. Personnel of such teams shall be respected and protected while exclusively carrying out these duties".

49. As a party to Additional Protocol I, Armenia is bound by the above provision.

50. Further, in resolution 59/189, adopted by the United Nations General Assembly on 20 December 2004, states parties to an armed conflict were called up to take all appropriate measures to prevent persons from going missing in connection with armed conflict and to account for persons reported missing as a result of such a situation. The resolution also reaffirmed both the right of families to know the fate of their relatives reported missing in connection with armed conflicts; and that each party to an armed conflict, as soon as circumstances permit and, at the latest, from the end of active hostilities, shall search for the persons who have been reported missing by an adverse party. States parties to an armed conflict were called upon to take all necessary measures, in a timely manner, to determine the identity and fate of persons reported missing in connection with the armed conflict.[49]

51. Resolution 1553 (2007) of the Council of Europe Parliamentary Assembly emphasised that the issue of missing persons was a "humanitarian problem with human rights and international humanitarian law implications" and that time was of the essence when seeking to solve the issue of the missing. The resolution noted that the Parliamentary Assembly was concerned by the "continuing allegations of secret detention of missing persons". The resolution also gave the figure of 4,499 Azerbaijanis listed as missing as a result of the Nagorny Karabakh conflict[50] and declared that:

> "The right to know the fate of missing relatives is … firmly entrenched in international humanitarian law. Furthermore, state practice establishes as a norm of customary international law, applicable in both international and non-international armed conflicts, the obligations of each party to the armed conflict to take all feasible measures to account for persons reported missing as a result of armed conflict, and to provide their family members with any information it has on their fate. The right to know is also anchored in the rights protected under the European Convention on Human Rights, notably Articles 2, 3, 5, 8, 10 and 13".

6) Prohibition on Settlements in Occupied Territories

52. Article 49 of Geneva Convention IV provides that "the occupying power shall not deport or transfer parts of its own civilian population into the territory it occupies". This constitutes the basis and expression of a rule of law prohibiting the establishment of settlements in the occupied territories consisting of the population of the occupying power or of persons encouraged by the

[49] See also General Assembly resolutions 61/155, adopted on 19 December 2006, and 63/183, adopted on 18 December 2008.
[50] According to the State Commission of the Republic of Azerbaijan on Prisoners of War, Hostages and Missing Persons, 4210 citizens of Azerbaijan are registered missing in connection with the conflict as of 1 January 2008, of them 47 children, 256 women and 355 elderly.

occupying power with the intention, expressed or otherwise, of changing the demographic balance. The International Court of Justice has noted that this provision:

> "prohibits not only deportations or forced transfer of population such as those carried out during the Second World War, but also any measures taken by an occupying power in order to organise or encourage transfers or parts of its own population into the occupied territory".[51]

53. Such activity also constitutes a grave breach of Additional Protocol I[52] and, indeed, a breach of Armenia's own domestic legislation.[53] Attempts to change the demographic composition of occupied territories have also been condemned by the Security Council.[54] The Committee on the Elimination of Racial Discrimination in its Decision 2 (47) of 17 August 1995 on the situation in Bosnia and Herzegovina declared that "any attempt to change or to uphold a changed demographic composition of an area, against the will of the original inhabitants, by whichever means is a violation of international law",[55] while Special Rapporteur Al-Khasawneh in his Final Report on "Human Rights Dimensions of Population Transfer" for the Sub-Commission on the Prevention of Discrimination and the Protection of Minorities underlined the illegality of population transfers and their prohibition under international human rights and humanitarian law.[56] This view was endorsed by the Sub-Commission in its consideration of the Report.[57]

54. Practice shows clearly that Armenia has violated this prohibition. Significant numbers of Armenian settlers have been encouraged to move into the occupied areas, in particular the Lachin area, an area that had been especially depopulated of its Azerbaijani inhabitants. There have been numerous independent reports of the introduction of settlers into the occupied areas.

55. The Report of the OSCE Fact-Finding Mission to the Occupied Territories of Azerbaijan Surrounding Nagorny Karabakh, 2005, concluded that the settlement figures were approximately as follows: 1,500 in Kelbajar district; 800 to 1,000 in Agdam district; under 10 in Fizuli district; under 100 in Jebrail district; 700 to 1,000 in Zangelan district and from 1,000 to 1,500 in Kubatly district.[58] The report also noted that some 3,000 settlers lived in Lachin town[59] and emphasised that "[s]ettlement incentives are readily apparent".[60] The US Committee for Refugees and Immigrants in its World Refugee Survey 2002 Country Report on Armenia stated that:

[51] *Construction of a Wall*, ICJ Reports, 2004, pp. 136, 183.
[52] See article 85 (4) (a) defining as a grave breach of the Protocol: "The transfer by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory, in violation of Article 49 of the Fourth Convention". It also amounts to a war crime under the Statute of the International Criminal Court 1998, see article 8 (2) b (viii).
[53] See J.M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law, vol I: Rules*, ICRC, Cambridge, 2005, p. 462, footnote 36.
[54] See e.g. resolutions 446, 452, 465, 476, 677.
[55] A/50/18, 1995, para. 26.
[56] E/CN.4/Sub.2/1997/23, 27 June 1997. See also the First Report by Al-Khasawneh and Hatano, E/CN.4/Sub.2/1993/17 and Corr.1, 1993.
[57] Sub-Commission resolution 1997/29.
[58] A/59/747-S/2005/187, at page 26.
[59] *Ibid*., at page 29.
[60] *Ibid*., at page 30.

> "According to the de facto government of Nagorno-Karabakh, the population of the enclave stood at about 143,000 in 2001, slightly higher than the ethnic Armenian population in the region in 1988, before the conflict. Government officials in Armenia have reported that about 1,000 settler families from Armenia reside in Nagorno-Karabakh and the Lachin Corridor, a strip of land that separates Nagorno-Karabakh from Armenia. According to the government, 875 ethnic Armenian refugees returned to Nagorno-Karabakh in 2001. Most, but not all, of the ethnic Armenian settlers in Nagorno-Karabakh are former refugees from Azerbaijan. Settlers choosing to reside in and around Nagorno-Karabakh reportedly receive the equivalent of $365 and a house from the de facto authorities".[61]

56. In a paper prepared by Anna Matveeva on "Minorities in the South Caucasus" for the ninth session (May 2003) of the Working Group on Minorities of the UN Sub-Commission on Promotion and Protection of Human Rights, the following was stated:

> "A policy of resettlement in areas held by the Armenian forces around Karabakh ('occupied territories' or 'security zone') which enjoy relative security has been conducted since 1990s. Applications for settlement are approved by the governor of Lachin who tends to mainly accept families. Settlers normally receive state support in renovation of houses, do not pay taxes and much reduced rates for utilities, while the authorities try to build physical and social infrastructure".[62]

57. The International Crisis Group report of September 2005 reported that:

> "Stepanakert[63] considers Lachin for all intents and purposes part of Nagorno-Karabakh. Its demographic structure has been modified. Before the war, 47,400 Azeris and Kurds lived there: today its population is some 10,000 Armenians, according to Nagorno-Karabakh officials. The incentives offered to settlers include free housing, social infrastructure, inexpensive or free utilities, low taxes, money and livestock. In the town centre, up to 85 percent of the houses have been reconstructed and re-distributed. New power lines, road connections and other infrastructure have made the district more dependent upon Armenia and Nagorno-Karabakh than before the war".[64]

58. The International Crisis Group report of October 2005 stated that:

> "The interest in Lachin seems to be based on more than security. Stepanakert, with Armenia's support, has modified the district's demographic structure, complicating any handover... Stepanakert considers Lachin for all intents and purposes part of Nagorno-Karabakh and has

[61] <http://refugees.org/countryreports.aspx?__VIEWSTATE=dDwxMTA1OTA4MTYwOztsPENvdW50cnlERDpH b0J1dHRvbjs%2BPrImhOOqDI29eBMz8b04PTi8xjW2&cid=312&subm=&ssm=&map=&_ctl0%3ASearchInput=+KEYWORD+SEARCH &CountryDD%3ALocationList>.
[62] E/CN.4/Sub.2/AC.5/2003/WP.7, 5 May 2003 at pages 34-35.
[63] Note that the name of the town was Khankendi until September 1923, when it was renamed after bolshevik leader Stepan Shaumian. Although the Azerbaijani authorities subsequently restored the original name of the town, it is still referred to by the Armenians as "Stepanakert".
[64] *Op.cit*., p. 7.

> established infrastructure and institutions in clear violation of international law prohibitions on settlement in occupied territories".[65]

59. Accordingly, Armenia's breach of this important rule of international humanitarian law has been clearly established.

7) Application to Subordinate Local Administrations

60. Geneva Convention IV provides that for the continued existence of convention rights and duties irrespective of the will of the occupying power. Article 47 in particular provides that:

> "Protected persons who are in occupied territory shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention by any change introduced, as the result of the occupation of a territory, into the institutions or government of the said territory, nor by any agreement concluded between the authorities of the occupied territories and the Occupying Power, nor by any annexation by the latter of the whole or part of the occupied territory".

61. In particular, the rights provided for under international humanitarian law cannot be avoided by recourse to the excuse that another party is exercising elements of power within the framework of the occupation. This is the scenario that Roberts has referred to in noting that occupying powers often seek to disguise or limit their own role by operating indirectly by, for example, setting up "some kind of quasi-independent puppet regime".[66] It is clear, however, that an occupying power cannot evade its responsibility by creating, or otherwise providing for the continuing existence of, a subordinate local administration. The UK Manual of the Law of Armed Conflict has, for example, provided as follows:

> "The occupying power cannot circumvent its responsibilities by installing a puppet government or by issuing orders that are implemented through local government officials still operating in the territory".[67]

62. Accordingly, Armenia is responsible as the occupying power not only for the actions of its own armed forces and other organs and agents of its government, but also for the actions of its subordinate local administration in the occupied territories, including the forces and officials of the so-called "Republic of Nagorny Karabakh".

[65] *Op.cit*., p. 22. See also the full analysis of the settlement programme presented by the Permanent Representative of Azerbaijan to the UN in November 2004, A/59/568.
[66] "Transformative Military Occupation: Applying the Laws of War and Human Rights", 100 American Journal of International Law, 2006, pp. 580, 586.
[67] *Op.cit*., p. 282.

3. The Application of International Human Rights Law to Occupations

63. In addition to the traditional rules of humanitarian law, international human rights law is now seen as in principle applicable to occupation situations. The International Court of Justice has interpreted article 43 of the Hague Regulations to include:

> "the duty to secure respect for the applicable rules of international human rights law and international humanitarian law, to protect the inhabitants of the occupied territory against acts of violence, and not to tolerate such violence by any third state".[68]

64. More generally, the International Court of Justice has discussed the relationship between international humanitarian law and international human rights law. In its advisory opinion on the *Legality of the Threat of Use of Nuclear Weapons,* the Court emphasised that "the protection of the International Covenant of Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency" and in such cases the matter will fall to be determined by the applicable *lex specialis,* that is international humanitarian law.[69]

65. The Court returned to this matter in its advisory opinion on the *Construction of a Wall*, where it declared more generally that:

> "the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind found in Article 4 of the International Covenant on Civil and Political Rights".[70]

66. As to the relationship between international humanitarian law and human rights law, the Court noted that there were three possible situations. First, some rights might be exclusively matters of humanitarian law, some rights might be exclusively matters of human rights law and some matters may concern both branches of international law.[71] It was essentially a question of interpretation of the particular instrument in question. In particular, the jurisdiction of states, while primarily territorial, may sometimes be exercised outside the national territory and in such a situation the International Covenant and other relevant human rights treaties had to be applied by state parties. This was an approach that was deemed consistent with both the *travaux préparatoires* of, for example, the International Covenant on Civil and Political Rights and with the constant practice of the Human Rights Committee established under it.[72]

67. The Court concluded by affirming that the International Covenants on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the Convention on

[68] *Congo v Uganda,* ICJ Reports, 2005, pp. 168, 231 and 242 and following.
[69] ICJ Reports, 1996, pp. 226, 239.
[70] ICJ Reports, 2004, pp. 136, 178.
[71] *Ibid.*
[72] *Ibid.,* pp. 179-82.

the Rights of the Child were "applicable in respect of acts done by a state in the exercise of its jurisdiction outside of its own territory".[73]

68. It is also worth point out the applicability of the general principle of state responsibility for the acts of its organs which would obviously include members of its armed forces acting abroad.[74] The Court interestingly referred in addition in the *Construction of a Wall* case to the prolonged occupation question and to the applicability of the International Covenant on Economic, Social and Cultural Rights.[75]

69. The Court returned to the question of the relationship between international humanitarian law and international human rights law by reaffirming that:

> "international human rights instruments are applicable 'in respect of acts done by a state in the exercise of its jurisdiction outside its own territory', particularly in occupied territories".[76]

70. Accordingly, it is now accepted that the law applicable in occupation situations includes multilateral human rights instruments to which the occupying power is a party. This means inevitably not only that the organs and agents of the occupying power must act in conformity with the provisions of such instruments, but also that the population is entitled to the benefit of their application. Thus, the application of human rights law in these situations impacts upon the powers and duties of the occupier and affects the traditional attempts to balance military necessity and humanity in any occupation.

71. Armenia is a party to the following universal human rights conventions as from the date in parenthesis:

i) International Covenant on Civil and Political Rights (23 June 1993) ("ICCPR");

ii) International Covenant on Economic, Social and Cultural Rights (13 September 1993) (ICESCR");

iii) Convention on the Prevention and Punishment of the Crime of Genocide (23 June 1993);

iv) Convention on the Elimination of All Forms of Racial Discrimination (23 June 1993);

v) Convention on the Rights of the Child (23 June 1993);

vi) Convention on the Elimination of All Forms of Discrimination against Women (13 September 1993);

[73] *Ibid*., pp. 180 and 181.
[74] See e.g. *Difference Relating to Immunity from Legal Process of a Special Rapporteur,* ICJ Reports, 1999, p. 87 and *Congo v Uganda,* ICJ Reports, 2005, pp. 168, 242. See also Article 4 of the International Law Commission's Articles on State Responsibility, 2001, A/56/10 and General Assembly resolution 56/83 of 12 December 2001.
[75] ICJ Reports, 2004, pp. 136, 181 (emphasis added).
[76] ICJ Reports, 2005, pp. 178, 242-43.

vii) Convention against Torture (13 September 1993).[77]

72. Accordingly, Armenia is bound by the provisions of these conventions not only within its own borders, but also in the occupied territories of Azerbaijan. One may note briefly the relevance of the following obligations by way of example:

i) The obligation to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the particular instrument, without distinction of any kind (article 2, ICCPR and article 2, ICESCR);

ii) Right to life (article 6, ICCPR);

iii) Prohibition of torture and cruel, inhuman and degrading treatment or punishment (article 7, ICCPR and Convention against Torture);

iv) Right to liberty and security of person (article 9, ICCPR);

v) Right to liberty of movement and the right not to be arbitrarily deprived of the right to enter one's own country (article 12, ICCPR);

vi) Right to equality before court and tribunals (article 14, ICCPR) and to equality of protection before the law (article 26, ICCPR);

vii) Prohibition of arbitrary or unlawful interference with privacy, family, home or correspondence (article 17, ICCPR);

viii) Right to freedom of thought, conscience and religion;

ix) Prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence (article 20);

x) Rights to peaceful assembly and association (articles 21 and 22, ICCPR);

xi) Right and opportunity, without distinction and without unreasonable restrictions to take part in the conduct of public affairs, directly or through freely chosen representatives; to vote and to have access, on general terms of equality, to public service in one's country (article 25, ICCPR);

xii) Right of persons belonging to minorities not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language (article 27, ICCPR).

[77] Armenia is also a party to the International Convention for the Protection of All Persons from Enforced Disappearance 2006 (10 April 2007). This Convention is not yet in force.

73. In addition, Armenia is also a party to the European Convention on Human Rights. The question of the application of this Convention extraterritorially by states parties has been the subject of a number of important cases.

74. The European Court of Human Rights has interpreted the concept of 'jurisdiction' as it appears under article 1 ("High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention") to include the situation where acts of the authorities of contracting states, whether performed within or outside national boundaries, produce effects outside their own territory.[78] The Court emphasised that:

> "Bearing in mind the object and purpose of the Convention, the responsibility of a Contracting Party may also arise when as a consequence of military action whether lawful or unlawful it exercises effective control of an area outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration".[79]

75. The Court clarified further that a state's responsibility in exercising effective control over the area outside its national territory "cannot be confined to the acts of its own soldiers or officials [in that area] but must also be engaged by virtue of the acts of the local administration which survives by virtue of [this state's] military and other support".[80] Such responsibility would cover acts of a state supporting the installation of a separatist state within the territory of another state.[81] Responsibility could also be engaged by the acquiescence or connivance of the authorities of a contracting state in the acts of private individuals which violate the convention rights of other individuals within its jurisdiction, particularly with regard to the recognition by a state of the acts of "self-proclaimed authorities which are not recognised by the international community".[82]

76. Accordingly, the responsibility of Armenia for violations of the European Convention of Human Rights in the occupied territory of Azerbaijan is engaged. The relevant rights under this Convention would include the right to life (article 2), the prohibition of torture and inhuman and degrading treatment and punishment (article 3), due process (article 5), fair trial (article 6), the right to private and family life (article 8) and the right to peaceful enjoyment of property (article 1 of Protocol I).

4. Implementation of Armenia's Responsibilities under Applicable International Law

77. To the extent that Armenia has violated the relevant applicable law with regard to the occupation of Azerbaijani territory, it is responsible under international law. That is the essential

[78] See e.g. *Drozd and Janousek v. France and Spain*, Series A, vol. 240, 1992, p. 29. See also *Loizidou v. Turkey*, Judgments of 23 February 1995 and 28 November 1996, *Cyprus v. Turkey*, Judgment of 10 May 2001, *Ilaşcu v Moldova and Russia*, Judgment of 8 July 2004.
[79] Judgment of 23 February 1995 at para. 62. See also Judgment of 28 November 1996 at para. 52, Judgment of 10 May 2001, paras. 75 and following.
[80] Judgment of 10 May 2001 at para. 77 and Judgment of 8 July 2004 at paras. 312 and the following.
[81] Judgment of 8 July 2004, para. 312.
[82] Judgment of 8 July 2004, para 318. See also Judgment of 10 May 2001, para 81.

fact. As article 1 of the Articles on State Responsibility adopted by the International Law Commission on 9 August 2001[83] declares, "[e]very internationally wrongful act of a state entails the international responsibility of that state", while article 2 provides that there is an internationally wrongful act of a state when conduct consisting of an action or omission is attributable to the state under international law and constitutes a breach of an international obligation of the state. This principle has been affirmed in the case-law.[84]

78. It is international law that determines what constitutes an internationally unlawful act, irrespective of any provisions of municipal law.[85] Article 12 stipulates that there is a breach of an international obligation when an act of that state is not in conformity with what is required of it by that obligation, regardless of its origin or character.[86] A breach that is of a continuing nature extends over the entire period during which the act continues and remains not in conformity with the international obligation in question,[87] while the Permanent Court of International Justice has emphasised that "it is a principle of international law, and even a greater conception of law, that any breach of an engagement involves an obligation to make reparation".[88]

79. Any state responsible for an internationally wrongful act is under an obligation to cease that act, if it is continuing, and to offer appropriate assurances and guarantees of non-repetition if circumstances so require.[89] Armenia is under such an international obligation.

80. The question of implementation or enforcement of the relevant responsibility laid down in international humanitarian law and under international human rights law, however, is a separate legal and practical question. There are a number of relevant mechanisms. To the extent that Armenia is in violation of relevant UN treaties, organs created under such conventions (such as the Human Rights Committee; the Committee on Economic, Social and Cultural Rights; the Committee on the Elimination of Racial Discrimination; the Committee against Torture etc.) possess the jurisdiction to monitor and hold to account states, including Armenia, that have breached the binding provisions in question. The same is true of relevant regional conventions, in particular the European Convention on Human Rights, with the European Court of Human Rights being a particularly active body and one capable as a court of producing binding decisions.

81. International humanitarian law has its own implementation processes. Parties to the 1949 Geneva Conventions and to Additional Protocol I undertake to respect and to ensure respect for the instrument in question,[90] and to disseminate knowledge of the principles contained therein.[91] A

[83] Commended to governments in General Assembly resolution 56/83. See also General Assembly resolutions 59/35 and 62/61.
[84] See e.g. *Chorzów Factory* case, PCIJ, Series A, No. 9, p. 21 and the *Rainbow Warrior* case, 82 International Law Reports, p. 499.
[85] Article 3.
[86] See the *Gabčíkovo–Nagymaros Project* case, ICJ Reports, 1997, pp. 7, 38.
[87] See article 14. See also e.g. the *Rainbow Warrior* case, 82 International Law Reports, p. 499; the *Gabcikovo-Nagymaros (Hungary v Slovakia)* case, ICJ Reports, 1997, pp. 7, 54; *Genocide Convention (Bosnia v Serbia)* case, ICJ Reports, 2007, para. 431; *Loizidou* v. *Turkey*, Merits, European Court of Human Rights, Judgment of 18 December 1996, paras. 41–7 and 63–4; and *Cyprus* v. *Turkey*, European Court of Human Rights, Judgment of 10 May 2001, paras. 136, 150, 158, 175, 189 and 269.
[88] The *Chorzów Factory* case, PCIJ, Series A, No. 17, 1928, p. 29; 4 AD, p. 258. See also the *Corfu Channel* case, ICJ Reports, pp. 4, 23.
[89] Article 30. See also the *Rainbow Warrior* case, 82 International Law Reports, pp. 499, 573.
[90] Common article 1.
[91] See e.g. article 144 of Geneva Convention IV and article 83 of Additional Protocol I.

variety of enforcement methods also exist, although the use of reprisals has been prohibited.[92] One of the means of implementation is the concept of the Protecting Power, appointed to look after the interests of nationals of one party to a conflict under the control of the other, whether as prisoners of war or occupied civilians. Such a power must ensure that compliance with the relevant provisions has been effected and that the system acts as a form of guarantee for the protected person as well as a channel of communication for him with the state of which he is a national. However, the drawback of this system is its dependence upon the consent of the parties involved. Not only must the Protecting Power be prepared to act in that capacity, but both the state of which the protected person is a national and the state holding such persons must give their consent for the system to operate.[93]

82. Additional Protocol I also provides for an International Fact-Finding Commission[94] with competence to inquire into grave breaches[95] of the Geneva Conventions and that Protocol or other serious violations, and to facilitate through its good offices the "restoration of an attitude of respect" for these instruments. This body came into being as the International Humanitarian Fact-Finding Commission in 1991 after 20 states parties to the Protocol agreed to accept its competence.[96]The parties to a conflict may themselves, of course, establish an ad hoc inquiry into alleged violations of humanitarian law.[97]

83. An important monitoring and indeed implementation role is played by the International Committee of the Red Cross.[98] This body has a wide-ranging series of functions to perform, including working for the application of the Geneva Conventions and acting in natural and man-made disasters. It has operated in a large number of states, visiting prisoners of war and otherwise functioning to ensure the implementation of humanitarian law.[99] It operates in both international and internal armed conflict situations. It is involved in the Armenia-Azerbaijan conflict.

84. The International Court of Justice in the *Construction of a Wall* case referred to the "special position" of the ICRC concerning execution of Geneva Convention IV, which "must be 'recognised and respected at all times' by the parties pursuant to article 142 of the Convention".[100] In addition, the Eritrea-Ethiopia Claims Commission has noted that the ICRC had been assigned significant responsibilities in a number of articles of the Geneva Convention III (with which it was concerned) both as a humanitarian organization providing relief and as an organization providing necessary and vital external scrutiny of the treatment of prisoners of war.[101]

[92] See e.g. articles 20 and 51(6) of Additional Protocol I.
[93] See article 9 of Geneva Convention IV.
[94] See article 90 of Additional Protocol I.
[95] See articles 50, 51, 130 and 147 of the four 1949 Conventions respectively and article 85 of Additional Protocol I. A Commission of Experts was established in 1992 to investigate violations of international humanitarian law in the territory of the Former Yugoslavia, see Security Council resolution 780 (1992). See also the Report of the Commission of 27 May 1994, S/1994/674.
[96] See UK Manual, *Op.cit*., p. 415. As of October 2008, 70 of the 168 states parties to the Protocol (but not including either Armenia or Azerbaijan) have accepted the competence of the Commission, see statement of the President of the Commission dated 23 October 2008, <http://www.ihffc.org/en/documents/IHFFC_PresGA0810. pdf>.
[97] Articles 52, 53, 132 and 149 of the four 1949 Conventions respectively.
[98] See e.g. G. Willemin and R. Heacock, *The International Committee of the Red Cross*, The Hague, 1984, and D. Forsythe, "The Red Cross as Transnational Movement", 30 *International Organisation*, 1967, p. 607.
[99] See e.g. article 142 of Geneva Convention IV.
[100] ICJ Reports, 2004, pp. 136, 175-6.
[101] Partial Award, Prisoners of War. Ethiopia's Claim 4 case, 1 July 2003, paras. 58 and 61-2.

85. It is, of course, also the case that breaches of international humanitarian law or international human rights law may constitute war crimes or crimes against humanity or even genocide for which universal jurisdiction is provided with regard to alleged offenders.[102] In such cases, pursuit of such individuals may be undertaken through the domestic courts of involved or third party states. There is no current international criminal court or tribunal with relevant individual jurisdiction with regard to Armenia. State responsibility in such cases may be enforced through relevant inter-state mechanisms.

5. Conclusions

86. The following conclusions may be reached:

1) The applicable law in the first instance is international humanitarian law, consisting of the Hague Regulations (being part of customary international law), together with Geneva Convention IV and to Addition Protocol I on 7 June 1993 to both of which Armenia is a party;

2) Armenian involvement in the conflict with Azerbaijan gave to that conflict an international character;

3) Armenian involvement in the capture and retention of the Nagorny Karabakh region of Azerbaijan and its surrounding districts was such as to bring the provisions of international humanitarian law into operation;

4) The facts show that Armenia is in occupation of these areas as that term is understood in international humanitarian law;

5) International law precludes the acquisition of sovereignty to territory by the use of force so that the occupation by Armenia of Azerbaijani territory cannot give any form of title to the former state;

6) As an occupying power, Armenia is subject to a series of duties under international law;

7) The core of these duties is laid down in article 43 of the Hague Regulations and focus upon the restoration and ensuring, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country;

8) The presumption in favour of the maintenance of the existing legal order is particularly high and is supplemented by provisions in Geneva Convention IV;

[102] See e.g. A. Cassese, *The International Criminal Court*, 2nd edn, Oxford, 2008; W. Schabas, *An Introduction to the International Criminal Court*, 3rd edn, Cambridge, 2007; R. Cryer, H. Friman, D. Robinson and E. Wilmshurst, *An Introduction to International Criminal Law and Procedure*, Cambridge, 2007; I. Bantekas and S. Nash, *International Criminal Law,* 2nd edn, London, 2003; and G. Werle, *Principles of International Criminal Law*, The Hague, 2005.

9) Private and public property is particularly protected. Private property cannot be confiscated, except where requisitioned for necessary military purposes, but even then requisitioning must take into account the needs of the civilian population;

10) The occupying state is no more than the administrator of public property and must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct;

11) Destruction of private and public property is forbidden, except where such destruction is rendered absolutely necessary by military operations;

12) Protected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They are to be at all times humanely treated and protected especially against all acts of violence or threats thereof;

13) Armenia as the occupying power is under a special obligation with regard to Azerbaijani missing persons, of whom there are accepted to be 4,210 as of 1 January 2008;

14) Armenia bears a responsibility under international humanitarian law not to establish or facilitate the establishment of settlements of Armenians in the occupied territories;

15) Armenia cannot evade its responsibilities under international humanitarian law by means of its support for a subordinate local administration;

16) In addition to the traditional rules of humanitarian law, Armenia is also bound in its administration of the occupied territories by the provisions of those international human rights treaties to which it is a party;

17) Such treaties include the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social and Cultural Rights; the Convention on the Prevention and Punishment of the Crime of Genocide; the Convention on the Elimination of All Forms of Racial Discrimination and the Convention against Torture;

18) Armenia is also bound by the European Convention of Human Rights in its occupation of Nagorny Karabakh and surrounding districts;

19) Armenia bears state responsibility for its breaches of international humanitarian law and international human rights law as discussed above and is under an obligation both to cease its violations and make reparation for them;

20) Such obligations under international humanitarian law and under international human rights law may be monitored and implemented by mechanisms in force for Armenia, such as the Human Rights Committee and the European Court of Human Rights, together with ICRC processes;

21) Insofar as war crimes, crimes against humanity and genocide are concerned, individual responsibility may lie and may be implemented through domestic courts in various involved or third party states, while state responsibility may be enforced where possible through relevant inter-state mechanisms.