The Nagorno-Karabagh Crisis:
A Blueprint for Resolution

A Memorandum Prepared by the
Public International Law & Policy Group
and the New England Center for
International Law & Policy

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On May 17th and 18th, 2000, an international conference was held in Washington, D.C., entitled "The Nagorno-Karabagh Crisis: A Time for Resolution." All interested parties to the conflict were invited to participate in the conference, and many different perspectives on the conflict and its resolution were presented. This Memorandum prepared by the Public International Law and Policy Group and the New England Center for International Law & Policy, while not a conference report, takes into consideration many of the ideas and initiatives presented at the conference and argues that a long term solution to the Nagorno-Karabagh crisis lies in the adoption of a policy of intermediate sovereignty followed by earned recognition for Nagorno-Karabagh.

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I. Introduction

The current struggle over Nagorno Karabagh began in February of 1988 when its governing council, encouraged by perestroika and glasnost, requested to be free from the administration of Azerbaijan. What began as massacres of ethnic Armenians in Sumgait, became a military conflict initiated by Azerbaijan to crush Karabagh's independence movement. The result has been many thousand deaths and over 1 million refugees and displaced persons. A cease-fire was negotiated on 12 May 1994. Since the cease-fire, there have been no major outbreaks of violence, yet there has also been no significant movement towards creating a basis for a lasting peace. As a consequence of the conflict, Azerbaijan and Turkey maintain a complete blockade on Armenia and Nagorno Karabagh, few refugees or displaced persons have returned to their homes, and economic and social development has remained static. In response, the United States has limited direct governmental assistance to Azerbaijan.

In an effort to make meaningful progress toward final settlement of the conflict, the OSCE reinforced a Russian mediated cease-fire and has created the Minsk peace process presently co-chaired by the United States, France and Russia, which recently put forward a proposal for a Common State -- the details of which remain confidential. Nagorno Karabagh and Armenia accepted the Common State proposal as a basis for negotiations, while Azerbaijan has rejected the proposal. Recently, representatives of Azerbaijan and Armenia have engaged in a number of informal meetings on the margins of OSCE and other international fora, and have indicated a willingness to engage in renewed negotiations, although the parties remain deadlocked over the precise nature of any final settlement. Throughout this process Azerbaijan has rejected trilateral negotiations which would include representatives of Nagorno Karabagh despite the fact that the previous rounds of formal negotiations in the mid 1990's included representatives of Nagorno Karabagh. Azerbaijan has apparently refused inclusion of Nagorno Karabagh into the talks out of concern that such participation might imply some degree of de facto status for Nagorno Karabagh.

This memorandum seeks to propose a solution based upon international law and the recent precedent established in a number of other peace processes, including Bosnia, Northern Ireland, East Timor, the Middle East, and Kosovo. In its essence, this paper proposes that the process for resolving the crisis should consist of two phases. The first phase -- a period of three to five years, would provide Nagorno Karabagh with a level of intermediate sovereignty and require Nagorno Karabagh and Azerbaijan to comply with a number of obligations concerning the right of refugees to return and the protection of minority rights. Nagorno Karabagh and Azerbaijan would also be obligated to engage in a number of mutual confidence building measures. After the expiry of the interim period, an international mechanism would determine whether Nagorno Karabagh had earned international recognition based upon its performance during the interim period of de facto independence with respect to the obligations concerning respect for fundamental principles of international law, including those relating to the protection of minority rights, democratic processes of governance and economic organization, and the protection of human rights. The interest of the people of Nagorno Karabagh in independence would be reconfirmed by a referendum.

The intermediate sovereignty/earned recognition proposal is designed to produce a phased resolution of the crisis with clear benchmarks for measuring compliance by the parties. If adopted and properly implemented, the proposal should lead to a final settlement that promotes peaceful relations between Azerbaijan, Nagorno Karabagh and Armenia. A peaceful final settlement should also lead to the lifting of the Azerbaijani and Turkish economic embargo against Armenia and Nagorno Karabagh and the lifting of United States restrictions on assistance for Azerbaijan, and it could ensure the stability necessary for continued economic development by American and European interests in Azerbaijan, Armenia, and Nagorno Karabagh, particularly in the oil sector. Resolution of the conflict would provide a basis for improved relations between Armenia and Turkey, which would be in the strategic interests of the United States and its European allies.

The following sections of the memorandum include a brief description of the history of the conflict and the efforts of the international community to resolve the conflict, the articulation of the international legal principles governing disputes of this nature, and a detailed proposal for a process of intermediate sovereignty/earned recognition with reference to comparable precedents.

II. Background

A. Brief History of the Conflict

1. Before Sovietization

Nagorno Karabagh is historic Armenian territory which, in different eras, has formed part of Armenia. Its Armenian roots reach back to before the first millennium BC. Armenian princely dynasties successively presided over Karabagh, guaranteeing its sovereignty through treaty arrangements with neighboring powers.

The Russian Empire, expanding southwards in the Transcaucasus, annexed Karabagh in 1805. This action was officially recognized by Persia in the Treaty of Gulistan in 1813. After the 1917 Russian revolutions and the collapse of Tsarist rule, there emerged in 1918 the briefly independent Republics of Armenia and Azerbaijan. The dispute over Nagorno Karabagh between the Karabagh Armenians and Azerbaijan, on whose side the Ottoman Turkish army intervened, dates from this period.

In July 1918, the First Armenian Assembly of Nagorno Karabagh declared the region self-governing and created a National Council and government. The size of Nagorno Karabagh was then significantly greater than the portion that subsequently became the Nagorno Karabagh Autonomous Oblast. In August 1919, the Karabagh National Council entered into a provisional treaty agreement with the Azerbaijani government. Despite signing the Agreement, the Azerbaijani government continuously violated the terms of the treaty. This culminated in March 1920 with the Azerbaijanis' massacre of Armenians in Karabagh's former capital, Shushi, in which it is estimated that more than 20,000 Armenians were killed. In this light, the Ninth Karabagh Assembly nullified the treaty in whole and pronounced union with Armenia.

From 1918 to 1920 Nagorno Karabagh possessed all necessary attributes of statehood, including an army and legitimate authorities. The League of Nations and the leading world powers recognized the disputed status of Nagorno Karabagh. The League of Nations neither recognized the sovereignty of the Azerbaijan Republic over Karabagh nor accepted the Azerbaijan Republic as its member-state.

In 1918, 330,000 Armenian people lived within the then-existing borders of Nagorno Karabagh. They made up 95 percent of its population, with 3 percent Azerbaijanis and 2 percent others. As a result of the Turkish-Azerbaijani aggression in 1918-1920 aimed at total cleansing of the Armenians of Nagorno Karabagh, an estimated 20 percent of all Armenians were killed.

2. Nagorno Karabagh Under Soviet Azerbaijani Rule: 1920-1988

The violent conflict in the Caucasus ended with the Sovietization of the Caucasian republics. On November 30, 1920 the Sovietized government of Azerbaijan recognized Nagorno Karabagh as a part of Armenia, but then reversed this decision several days later.

On March 16, 1921, a treaty between republican Turkey and Soviet Russia determined that Nagorno Karabagh and Nakhichevan were to be under the authority of the Soviet Azerbaijan. On June 12, 1921 the government of Soviet Armenia declared Nagorno Karabagh as its integral part on the basis of the repeatedly expressed will of its population.

On July 5, 1921 the Caucasus Bureau of the Russian Communist Party adopted a political decision to annex Armenian-populated Nagorno Karabagh to Soviet Azerbaijan, thus laying the foundation for the Stalinist practice of gerrymandering in Transcaucasia. Stalin decided that Nagorno Karabagh should be included as an autonomous region within the boundaries of the Soviet Republic of Azerbaijan, in consideration of the necessity of national harmony between Muslims and Armenians, of the economic tie between Upper and Lower Karabagh, and its permanent relationship with Azerbaijan.

In 1923, Nagorno Karabagh had a population of almost 158,000, 95 percent of which were Armenians. On July 7, 1923, Soviet Azerbaijan's Revolutionary Committee resolved to dismember Karabagh and to create on part of its territory the Autonomous Region (oblast) of Nagorno Karabagh. From 1924 to 1929, an uncertain jurisdiction called "Red Kurdistan" was established, with the intent of effectively separating Nagorno Karabagh from Armenia. In 1930, the Kurdish autonomous area was abolished, but the artificial buffer between Armenia and Karabagh, the Lachin and Kelbajar districts (regions), was retained. Stalin's 1936 Constitution sealed this territorial arrangement.

This separation became a subject of continual protest -- from both Nagorno Karabagh and Armenia -- which was expressed periodically in the form of petitions to Moscow. Furthermore, in September 1966, the Soviet Armenian leadership petitioned the central authorities to examine the question of returning Karabagh to Armenia. In addition to the petitions, by the late 1960s there were mass protests held in Karabagh, which led to a large scale crackdown on Armenian activists.

3. 1988 to the Present

The current struggle over Nagorno Karabagh began in February of 1988 when the Karabagh Armenians, encouraged by perestroika and glasnost, began to take steps to break free of Azerbaijani control. On February 20, 1988, the Decision of the Nagorno Karabagh Autonomous Oblast (NKAO) Regional Soviet of People's Deputies, which was addressed to the highest legislative bodies of the Supreme Soviets of Armenia, Azerbaijan and the USSR, contained the official request to consider and resolve positively "the question of handing over the NKAO from the Soviet Azerbaijan to the Soviet Armenia."

The response within Azerbaijan was brutal acts of violence organized by Azerbaijani nationalists with the tacit support of the secret police directed against the Armenian civilian population. On February 26, 1988, the international community witnessed the massacre of Armenians in Sumgait, the third largest city of Azerbaijan and its second largest industrial center. Individual Armenians were attacked in their homes, at their businesses and on the streets. Azerbaijani authorities exerted no effort to apprehend or prosecute the perpetrators.

On June 13, 1988, the Supreme Soviet of the Azerbaijani SSR denied the application of the Karabagh Assembly. This was counterbalanced on June 15 by Armenia's Supreme Soviet, which approved Karabagh's proposal and appealed to the Soviet government to resolve the matter.

On July 18, 1988, the USSR Supreme Soviet, relying on Article 78 of the Soviet Constitution, which prohibited any territorial changes to a Union republic without its consent, decided to

leave Nagorno Karabagh within the structure of Soviet Azerbaijan. However, by the March 24, 1988, resolution of the Central Committee of the Communist Party of the Soviet Union Arkadi Volsky was appointed Moscow's authorized representative in the territory. Beginning on January 20, 1989, the Supreme Soviet established a special authority in Nagorno Karabagh, headed by Volsky, which was directly subject to the USSR government. In the summer of 1989 a legislative body, named the National Council was formed which represented all strata of the Nagorno Karabagh population.

The USSR Supreme Soviet's resolution of November 28, 1989, liquidated the "Volsky Committee." Three days later, on December 1, 1989, at the joint session of Parliaments of Armenia and Nagorno Karabagh the reunification was accepted. Soon after, the NKAO legislative body voted in favor of secession from Azerbaijan. The Supreme Soviet of Azerbaijan quickly rejected the decision as illegal, and the Presidium of the Supreme Soviet of the Union declared it null and void.

In 1989, according to the official USSR census, Nagorno Karabagh had 189,000 inhabitants, of whom 76.9 percent were Armenians and 21.5 percent were Azerbaijanis.

On January 15, 1990, a USSR Supreme Soviet decision installed Soviet Azerbaijan's "Republic Organizational Committee" (Orgkom). The stated purpose of this body was to reestablish the erstwhile local "soviets" of Nagorno Karabagh. In reality, though, the Committee, under the direction of Azerbaijani Communist Party deputy leader Viktor Polianichko, schemed to do away with Karabagh's autonomy. Polianichko aimed to resolve the issue by ridding Karabagh of its Armenian majority. Therefore, he artificially increased the size of the Azerbaijani community in Nagorno Karabagh. This was combined with concerted military actions. From January to May 1991, the inhabitants of 24 Armenian villages in Nagorno Karabagh were forcibly driven from their homes. As a consequence Soviet Azerbaijan placed more than half of Nagorno Karabagh's territory under military occupation.

On August 30, 1991, Soviet Azerbaijan's Supreme Soviet adopted its "Declaration on re-establishment of the national independence of the Azerbaijani Republic." Four days later Nagorno Karabagh initiated the same process through the joint adoption of the "Declaration of the Republic of Nagorno Karabagh" by the local legislative councils of Nagorno Karabagh and the bordering Armenian-populated Shahumian district. The only difference was that, for Karabagh, independence was declared not from the Soviet Union but from Azerbaijan. This act fully complied with existing law. Indeed, the 1990 Soviet law titled "Law of the USSR Concerning the Procedure of Secession of a Soviet Republic from the USSR," provides that the secession of a Soviet republic from the body of the USSR allows an autonomous region and compactly settled minority regions in the same republic's territory also to trigger its own process of independence.[1]

On October 18, 1991, the Azerbaijani Republic confirmed its own independence by adoption of its "Constitutional Act" on national independence, and in November the Supreme Soviet of Azerbaijan adopted a resolution on the "Abolition of the Nagorno Karabagh Autonomous Oblast." Azerbaijani President A. Mutalibov then signed the law on dissolution of the Nagorno Karabagh Autonomous Region on November 23, 1991.

Following the adoption of this resolution, the Azerbaijani parliament redrew Nagorno Karabagh's borders in favor of neighboring Azerbaijani districts, and changed the names of its cities and villages. In so doing, Baku flouted Articles 86 and 87 of the Soviet Constitution, which codified autonomous region status for Nagorno Karabagh and prohibited any change therein without its consent, and also violated its own law. This decision was designed to prevent Nagorno Karabagh from using the relevant articles of Soviet law to legally separate from Azerbaijan, as well as a way to more directly manipulate Karabagh's demography through territorial gerrymandering, forced depopulation and resettlement.

On November 27, 1991, the USSR Constitutional Oversight Committee's resolution deemed unconstitutional the Orgkom created by the Supreme Soviet decision of January 15, 1990, as well as the November 23, 1991 Azerbaijani decision abolishing Karabagh's autonomy. It also revoked the December 1, 1989, Armenian resolution on reunification.

The actions of the USSR Constitutional Oversight Committee did not, however, annul the joint decision of the NKAO and Shahumian district to declare the establishment of the Nagorno Karabagh Republic on September 2, 1991, since that declaration was deemed in compliance with the then existing law. (The April 3, 1990 "Law of the USSR Concerning the Procedure of Secession of a Soviet Republic from the USSR," provides autonomous entities and compactly settled ethnic minorities living in a seceding republic's territory with the right of self determination, to be confirmed with a referendum. The Nagorno Karabagh Republic was proclaimed on the basis of the referendum provided under this law by the NKAO and Shahumian district after the announcement of Azerbaijan's independence on August 30, 1991.)

On December 10, 1991, the Nagorno Karabagh Republic held its own referendum on independence in the presence of international observers. The vote overwhelmingly approved Karabagh's sovereignty. This action of Nagorno Karabagh, which at that time was part of a still existent and internationally recognized Soviet Union, corresponded fully with the relevant Soviet law pertaining to leaving the USSR. As an initial step along the path to full sovereignty, the newly independent Nagorno Karabagh Republic created legitimate government institutions. On December 28, 1991, elections took place for its parliament, and on January 6, 1992, the newly convened parliament of Karabagh adopted its Declaration of Independence on the basis of the referendum results.

The reaction from Azerbaijan, which physically surrounded Karabagh and its capital, Stepanakert, was to commence a campaign of indiscriminant bombardment and shelling of the Karabagh Armenians and to launch a series of ground attacks. Azerbaijani attacks commenced in early 1991, with mass bombardment of Stepanakert and other towns and villages. By the summer of 1992, Azerbaijan had seized and occupied about half the territory of the Nagorno Karabagh Republic and forcibly dislocated and displaced the Armenian inhabitants.

The Karabagh Armenians organized an army and undertook military operations which allowed them to seize Azerbaijani-held areas used to launch attacks on Stepanakert and nearby towns, and to break the Azerbaijani-imposed blockade of Karabagh by establishing a ground connection

to Armenia.

On May 8, 1992, the Karabagh Defense Forces took the strategically important town of Shushi, from which the Azerbaijanis had been shelling Stepanakert. On May 18, they established a land link with Armenia across the Lachin region, thus breaking the blockade on Karabagh. In the summer of 1992 Azerbaijan occupied approximately 60% of the territory of Nagorno Karabagh and displaced the population.

Facing continuing efforts by the Azerbaijani forces aimed at the destruction of the Karabagh Armenians, Nagorno Karabagh reached out to the international community. It then prepared for a limited counteroffensive to secure for its inhabitants some level of safety. At the same time, Nagorno Karabagh moved ahead with establishing itself as the first fully functioning democracy in the region.

On September 20, 1992, the Nagorno Karabagh parliament petitioned the United Nations, the Commonwealth of Independent States, and individual countries for recognition of the Nagorno Karabagh Republic.

On March 27, 1993, the Karabagh Defense Forces, responding to an Azerbaijani spring offensive, launched counterattacks at two strategic Azerbaijani cities, Kelbajar and Fizuli. The capture of Kelbajar on April 3 freed Karabagh from Azerbaijani attacks on its North and West. From July 23 to September 4, 1993, Karabagh Defense Forces took control of Agdam, Fizuli, Jebrail, and Horadiz, in order to acquire sufficient territory to create a buffer zone for civilians against any indiscriminate attacks of the Azerbaijani army. From December 22, 1993, to May 1994, the re-formed Azerbaijani army launched new unsuccessful attacks on Karabagh.

At this time, Azerbaijan continues to occupy all of the Shahumian district, as well as parts of the Mardakert and Martuni districts of the Nagorno Karabagh Republic, while the latter controls parts of Azerbaijan seized for defensive purposes.

Following a negotiated cease-fire, Nagorno Karabagh has continued to demonstrate to the international community its ability to maintain and promote highly developed governmental institutions, political parties, and free local and parliamentary elections. On December 28, 1994, the Nagorno Karabagh Parliament adopted a resolution establishing the post of President of the republic. In the presence of international observers the legislature elected Robert Kocharian president pro tempore. Two years later, on November 24, 1996, national elections were held and Robert Kocharian was reelected president by popular vote, with the presence of international observers. After Robert Kocharian accepted the position of Prime Minister of Armenia, new Presidential elections were held in August 1997, with former Foreign Minister Arkady Ghoukasian elected for a five year term.

B. The Peace Process

1. Mediation by the Russian Federation and the Commonwealth of Independent States

In late 1991, Russia offered to mediate the dispute between Nagorno Karabagh and Azerbaijan. The presidents of Russia and Kazakhstan, Boris Yeltsin and Nursultan

Nazarbayev, visited Nagorno Karabagh and, thereafter, a joint declaration was signed by representatives of Armenia and Azerbaijan. Although the mediation effort failed to resolve the conflict, it did provide for the establishment of a cease-fire in May 1994, which was signed by the parliamentary speakers of Armenia, Azerbaijan and Nagorno Karabagh in Bishkek, Kirgizstan. This act amounted to the first recognition of Nagorno Karabagh's distinctiveness as a political and territorial entity in the negotiations.

2. Actions Taken by the United Nations Security Council

Concerned over the increased fighting in and around Nagorno Karabagh, the United Nations Security Council adopted four resolutions concerning the conflict, Resolutions 822, 853, 874, and 884, between April and November 1993.[2] While each resolution addressed the view of the Security Council concerning developments in the region, the recital and decretal paragraphs of the resolutions also contained principals the Security Council desired to see implemented as part of a peaceful settlement to the conflict.

In addition to expressing concern about the threat to peace and security in the Caucasus, the recital paragraphs of each of the resolutions contained language stating that the Security Council reaffirmed the sovereignty and territorial integrity of all States in the region and the inviolability of international borders. The Security Council also restated its position that it is inadmissible to use force to acquire territory.

The pertinent paragraphs of the resolutions called for a cessation of all hostilities, the withdrawal of all occupying forces from occupied areas of Azerbaijan, and for the unimpeded access for international humanitarian relief. The resolutions also endorsed the efforts of the Organization on Security and Cooperation in Europe (the OSCE, referred to in the resolutions by its former name, the Conference on Security and Cooperation in Europe, the CSCE), and particularly the Minsk Group[3] to achieve a peaceful solution to the conflict. The Secretary-General was instructed to consult regularly with the Chairman-in-Office of the OSCE concerning developments in the Nagorno Karabagh conflict.

The Security Council resolutions highlighted the Council's view that it was necessary for the parties to the conflict to immediately cease hostilities, return territory occupied through force of arms, permit delivery of international humanitarian assistance, and cooperate with the mediation efforts of the OSCE. Although the Security Council remains "actively seized of the matter" and the Secretary-General is requested, in consultation with the Chairman-in-Office of the OSCE and the chairs of the Minsk Group, to continue to report to the Security Council concerning the situation in Nagorno Karabagh, the Security Council has not acted further on the Nagorno Karabagh conflict, opting instead to permit the OSCE through the Minsk Group to pursue a settlement among the parties to the conflict.

3. OSCE Mediation Efforts

On 24 March 1992, during the Helsinki Additional Meeting of the CSCE Council (now, OSCE), it was decided by the ministers that the Chairman-in-Office should visit the region in order to contribute, in particular, to the establishment and maintenance of an effective cease-fire, as well as to the establishment of a framework for an overall peace settlement. The

ministers also determined that it was necessary for the Chairman-in-Office to convene a peace conference in Minsk as soon as possible. The OSCE ministers stated that elected representatives of Nagorno Karabagh would be invited to the Minsk Conference as interested parties after consultation with member states of the Minsk Group. The conference, however, did not take place due to a failure of the States to agree on whether the Nagorno Karabagh delegation would participate directly or as part of the Armenian delegation. Although a formal conference did not occur, the designated participants continued to meet as the "Minsk Group" with the goal of resolving the dispute.

Mediation efforts by the Russian Federation in cooperation with the Minsk Group led to the parties' agreeing to a formal cease fire on 12 May 1994. In December 1994, at its Budapest meeting, the OSCE determined to form a multinational OSCE peacekeeping force to support the cease fire. The OSCE established a High-Level Planning Group (HLPG) comprised of military experts seconded by participating members of the OSCE. The HLPG's mandate is to:

> (1) make recommendations for the Chairman-in-Office on developing a plan for the establishment, force structure requirements and operations of a multinational OSCE peacekeeping force for Nagorno Karabagh; and
>
> (2) make recommendations on, *inter alia*, the size and characteristics of the force, command and control, logistics, allocations of units and resources, rules of engagement and arrangements with contributing States.

In August 1995, the Chairman-in-Office of the OSCE appointed a "Personal Representative of the Chairman-in-Office on the Conflict Dealt with by the OSCE Minsk Conference." The Personal Representative is based in Tbilisi, and maintains branch offices in Baku, Yerevan and Stepanakert. The Personal Representative represents the Chairman-in-Office in matters relating to Nagorno Karabagh. The Personal Representative is assisted by five field assistants, and they spend much of their time monitoring the line of contact between the parties.

During the OSCE's 1996 Lisbon Summit, representatives of Azerbaijan threatened to veto all summit documents unless its territorial claim to Nagorno Karabagh appeared in an official OSCE document. Unwilling to enshrine Azerbaijan's claim in an official declaration of the summit, a compromise was reached whereby the Chairman-in-Office made a non-binding statement that a settlement of the Nagorno Karabagh conflict should be based on the following three principles:

> (1) the territorial integrity of the Republic of Armenia and the Azerbaijan Republic;
>
> (2) legal status of Nagorno Karabagh defined in an agreement based on self-determination which confers on Nagorno Karabagh the highest degree of self-rule within Azerbaijan; and
>
> (3) guaranteed security for Nagorno Karabagh and its whole population, including mutual obligations to ensure compliance by all the parties with the provisions of the settlement.

The consequence of this non-binding statement

was in effect to halt progress on a long term resolution of the conflict, as subsequent to the statement Azerbaijan refused to negotiate on any proposal which did not explicitly reaffirm it territorial integrity consistent with the Lisbon letter. As a result, the OSCE Istanbul summit in November 1999 adopted a resolution calling upon the parties to resume trilateral negotiations, while refusing to reaffirm the language of the Lisbon letter.

In 1997, France, Russia, and the United States, the three co-chairs of the Minsk Group, announced a new initiative. The new initiative would involve a two-stage settlement of the conflict. The first stage would include a demilitarization of the line of contact, including, *inter alia*, troop withdrawals, deployment of a multinational peacekeeping force, and return of refugees, establishment of measures to guarantee the security of all populations, removal of blockades and embargoes, and the normalization of communications throughout the region. The second stage would then determine the status of Nagorno Karabagh. However, the parties failed to reach agreement on this proposal, in large part because it attempted to resolve the consequences of the conflict without addressing the causes which relate to security and status.

In November 1998, the Minsk Group prepared a proposal for agreement for the comprehensive settlement of the conflict in Nagorno Karabagh. Although the contents of the report are confidential, public reports indicate that the proposal addresses the main issues concerning the status of Nagorno Karabagh, a cessation of armed conflict, and guarantees concerning compliance with the agreement. Nagorno Karabagh and Armenia accepted the Common State proposal as a basis for negotiations, while Azerbaijan has rejected the proposal.

In December 1999, the co-chairmen of the Minsk Group visited Baku, Stepanakert, and Yerevan in hopes of revitalizing the peace process. Although no breakthrough was announced, all parties to the conflict stated that the visit advanced the negotiating process.

C. Identification of Strategic Interests

1.Russia (member and co-chair of OSCE Minsk Group)

Russia's interests in the South Caucasus, which it considers as the "near abroad," are diverse. Moscow plays a large role in the political and military processes of the region and has been the most active mediator in the Nagorno Karabagh conflict.

Concerning that conflict, however, Russia's conduct can be described as ambiguous and unpredictable. Whereas traditionally Moscow is an ally of Armenia, the Russian government tilted toward Baku after the dissolution of the former USSR and periodically provided crucial support to the Azerbaijani forces. At the same time, Armenia and Azerbaijan acquired Soviet military hardware, in large part as a consequence of the dissolution of the Soviet Army and Azerbaijan's and Armenia's legitimate claim to those resources under the relevant doctrines of state succession. Russia initiated several negotiations between the parties involved in the conflict, although preferring a Russian-only mediation to international initiatives.

Due to the military and economic importance of

the region, Russia's major aim is to remain the most influential power in the Caucasus. The territories of Georgia, Armenia, Azerbaijan and Nagorno Karabagh serve as a buffer for Russia against intrusion from Turkey and Iran. Therefore, it is in the interest of Russia to minimize the influence of the latter two countries in the region and to extend or establish its own military presence. Russia operates military bases in Armenia and Georgia, and the strategic Gabala radar facility in Azerbaijan, which represents a $10 billion Russian investment and is capable of monitoring air traffic over Turkey, Iran, China, India, Iraq, Pakistan and much of northern Africa.[4] Additionally, Russia not only seeks to profit economically from the recently discovered oil and gas reserves under the Caspian Sea, but it also seeks to gain domination over the energy sources and lines of supply from the Caspian Basin as an instrument of global power.

To reach its economic and military goals, Moscow could pursue two different strategies. On the one hand, Russia could continue a policy of *divide et impera* and therefore try to keep the conflict alive in order to exert pressure on the Azerbaijanis concerning the stationing of Russian troops on the border to Iran and the participation in Azerbaijan's oil riches. On the other hand, it could be expected that the settlement of the conflict would create stronger CIS republics in the southern Caucasus, which would independently ensure a secure buffer against Iran and Turkey. Additionally, it has to be considered that Russia can only share in the oil revenues and pipeline profits from Azerbaijan if that oil flows securely.

2. **United States** (member and co-chair of OSCE Minsk Group)

The US plays an active role in the mediation process. It has exercised initiatives within the Minsk Group and has appointed a special envoy to facilitate the negotiation process.

With regard to the conflicting parties, the US tends to give preferential aid treatment to the Armenians, while providing preferential political treatment to Azerbaijan. Due to Section 907 of the Freedom Support Act (1992), which prohibits US government assistance to the government of Azerbaijan until it lifts the blockade against Armenia and Nagorno Karabagh, Azerbaijan is the only former Soviet republic that is denied direct economic US aid. In contrast, Armenia is the highest per capita recipient among these states. Nonetheless, American nongovernmental organizations have delivered a substantial amount of humanitarian assistance to Azerbaijani refugees, whereas the assistance to refugees and needy in Karabagh is small. Politically, the Clinton administration currently seeks to avoid expressing a formal position on Nagorno Karabagh's status, although in 1999 the State Department formally received a visit by Nagorno Karabagh's president Arkady Ghoukasian.

The principal interest of the US is a long-lasting stability in the southern Caucasus that ensures the protection of humanitarian principles. At the same time, stable conditions are of vital importance for the US as they facilitate not only the participation in the exploitation of oil and gas resources on Azerbaijani territory but may also allow the establishment of an energy corridor through Azerbaijan, Georgia and Turkey as an alternative to supply lines through Iran, Iraq and Russia. While the establishment of an energy corridor through Azerbaijan, Georgia and Turkey could lead the US administration to pro-

Azerbaijani conduct, a bias in this direction would jeopardize the current freedom and stability in the region and could end in another oppressive Kosovo-like situation. Conversely, support for Armenia corresponds to US interests, since Armenia and the Nagorno Karabagh Republic, as democratically-orientated states, could play an important role in stabilizing the region. In any case, the US will have to take into account the interests of its strategically important NATO ally Turkey, as well as the fact that the region is recognized to be the "backyard" of Russia, and will thus have to significantly incorporate Russia's interests in the peacebuilding process.

3. **Turkey** (member of OSCE Minsk Group)

As an immediate neighboring state of Armenia, Turkey has a significant influence within the Caucasus. Accordingly, Turkey offered its direct participation in mediation activities as well as in a possible international peacekeeping force, but was rejected by Armenia's and Nagorno Karabagh's representatives.

The attitude of Turkey regarding the conflict has consistently been pro-Azerbaijani. Turkey has provided a wide range of military, economic and diplomatic assistance to Baku and has joined Azerbaijan's blockade of Armenia. In addition, Turkey lobbied internationally for the Azerbaijani cause and was the only country that defended Azerbaijan's position of rejecting the proposal of the co-chairs of the Minsk Group, and refuses to establish any level of diplomatic relations with Armenia.

Turkey's principal economic interest is the construction of a main oil export pipeline from Azerbaijani oil fields to the Turkish Mediterranean port of Ceyhan. Politically, Turkey is trying to strengthen ties with Turkic-speaking former Soviet republics of Azerbaijan, Turkmenistan, Kazakhstan, Uzbekistan, Kirgizstan. Therefore, it is interested in strengthening the position of the Azerbaijanis, who possess strong ethnic relations with the Turks. Nevertheless, there are factors which impose certain restraints on Turkish policy. On the one hand, Turkey has to be careful not to endanger its relations with Russia, where it has important commercial interests. On the other hand, Turkey is forced not to distance itself too much from the American and European policies, out of consideration for military dependence on the US and Turkey's intention to become a member of the EU. However, Ankara continues linking the lifting of the blockade of Armenia to the settlement of the Nagorno Karabagh issue, although parts of the business community in Turkey are publicly advocating trade links across the border with Armenia.

4. Iran

Iran has consistently offered its services as a mediator to the conflict and has sought to keep the forces in the region in balance. For instance, it has assisted in the organization of camps for the displaced in Azerbaijan. At the same time, it has established economic relations with Armenia and with Karabagh.

Although Azerbaijanis share the same religion with the Iranians, it seems that Tehran prefers a weak Azerbaijani republic on its northern flank. Iranian leaders fear that an independent, oil-rich and affluent Azerbaijan might negatively influence the well-integrated Azerbaijani minority in Iran (10-20% of Iran's population) and that Azerbaijani nationalism might even jeopardize the

integrity of the Iranian state in the long term.

5. Western oil companies

A consortium led by BP/Amoco has invested heavily in the Azerbaijani oil fields as an alternative to the Middle East. Without resolving the Karabagh issue, the region's security and economic development, especially the exploitation of the undeveloped oil and gas reserves under the Caspian Sea, are permanently threatened. Correspondingly, US and other international oil companies are interested in a quick and durable resolution of the conflict to ensure the realization of oil contracts concluded with the Azerbaijani government in 1994. Despite early projections of significant reserves, a number of questions have been raised recently about the extent of these reserves and the economic viability of their full exploitation.

D. United States Congressional Actions

Throughout the crisis, the US Congress has been actively engaged in trying to promote a resolution of the conflict. Notably, these efforts evidence the necessary political will for the United States to take an increasingly larger leadership role in the continuing efforts to reach a long-term solution. Congressional action also tends to reflect the facts on the ground, including the de facto nature of Nagorno Karabagh's independent status, and indicates an understanding of the necessity of undertaking creative approaches to resolving a conflict between the right of self-determination and territorial integrity.

The US Congress has focused its attention on Nagorno Karabagh to date primarily through foreign operations appropriations legislation. Within this context, the two main areas of consideration have been:

> (1) the allocation of funding in order to promote resolution of the conflict over Nagorno Karabagh -- and incentivize the parties to the conflict to reach such a resolution, as well as the provision of humanitarian assistance to the people of Nagorno Karabagh; and
>
> (2) the viability of restrictions on direct aid to Azerbaijan put in place in response to Azerbaijan's now [twelve]-year-old blockade against Armenia and Nagorno Karabagh.

In this regard, Nagorno Karabagh has been fortunate to be able to count on the support of vocal members of Congress, while other members have challenged, and continue to challenge, the appropriateness of legislative restrictions on direct financial assistance to Azerbaijan.

With respect to the allocation of funds, the Foreign Operations Appropriations Act for fiscal year 2000 provides for $839 million for assistance to the Independent States of the former Soviet Union. Of the unspecified portion of that $839 million to be made available for the Southern Caucasus region, which consists of Armenia, Azerbaijan and Georgia, the Act provides that 15 percent should be used for confidence-building measures and other activities in furtherance of the peaceful resolution of the regional conflicts, especially those in the vicinity of Abkhazia and Nagorno Karabagh.[5] The legislative history for this provision, as set forth in the Report of the House Committee on

Appropriations, evidences the intent behind this provision: "The primary national interest of the United States in the Southern Caucasus is peace."[6] The Committee Report goes on to present a strong incentive to the parties to the conflict for receiving aid in the future, stating that when the conflicts over Abkhazia and Nagorno Karabagh are settled and regional transport and communications links restored, the Committee is willing to consider exceptional support for the region. The Committee Report emphasizes that the amount of support given to each country in the region should be proportional to its willingness to cooperate with the Minsk Group and other efforts to resolve regional conflicts. In addition to recommending confidence-building measures, the House Committee on Appropriations urged the Secretary of State to move forthwith to appoint a permanent Special Negotiator to facilitate direct negotiations. The Secretary was further urged to remain engaged in the regional peace process. Moreover, although not enacted as part of the legislation, the Committee Report contains an explicit directive that $20,000,000 in humanitarian assistance be provided to victims of [the] Nagorno Karabagh conflict residing in Nagorno Karabagh during the period January 1, 1998 through September 30, 2000.[7]

The Foreign Operations Appropriations Act for fiscal year 1999 allocated $801 million for assistance to the New Independent States of the former Soviet Union. Of that, not less than $228 million was to be made available to the Southern Caucasus region, 17.5 percent (or $39.9 million) of which "should be used for reconstruction and other activities relating to the peaceful resolution of conflicts within the region, especially those in the vicinity of Abkhazia and Nagorno-Karabagh."[8] Although not ultimately included in this legislation as enacted, the version of the appropriations bill that had passed in the House contained an additional proviso (reiterated in the House Committee Report for the fiscal year 2000 legislation cited above) to explicitly incentivize the parties to the conflict to participate in the peace process. It directed that funds made available to parties participating in the Minsk Process shall be provided only to those parties which agree to participate in direct or proximity negotiations without preconditions to resolve conflicts in the region.[9]

The House version of the bill also provided clear policy guidance through its suggestion, within the text of that bill, that the earmarked $39.9 million should be made available for humanitarian assistance for refugees, displaced persons, and needy civilians affected by the conflicts in the Southern Caucasus region, including those in Abkhazia and Nagorno Karabagh. The House Committee Report again reiterated that the primary national interest of the United States in the Southern Caucasus is peace.[10] The Report also expressed emphatically many of the points that were subsequently reiterated in the House Committee Report for the fiscal year 2000 legislation, as discussed above, concerning (1) the Committee's expectation that greater economic support will be made available in the region once peace is reached and a stable infrastructure is in place, (2) encouraging the Executive branch to actively pursue steps to re-energize and further the peace process, and (3) the recommendation that $20 million in humanitarian assistance be provided to victims of the Nagorno Karabagh conflict residing in Nagorno Karabagh.[11] The Senate appropriations bill for fiscal year 2000, on the other hand, contained no reference to, or explicit allocation of funds in connection with, the conflict

in Nagorno Karabagh.[12]

The Foreign Operations Appropriations Act for fiscal year 1998 made $770 million available for assistance for the New Independent States of the former Soviet Union, not less than $250 million of which was to be made available for assistance for the Southern Caucasus region. Twenty-eight percent of that, or $70 million, was to be used "for reconstruction and remedial activities relating to the consequences of conflicts within [the Southern Caucasus] region, especially those in the vicinity of Abkhazia and Nagorno-Karabagh."[13] Moreover, the text of the legislation specified that the funds allocated for the Southern Caucasus region were to be made available for humanitarian assistance for refugees, displaced persons, and needy civilians affected by the conflicts in the Southern Caucasus region, including those in the vicinity of Abkhazia and Nagorno Karabagh.

The Conference Report on the fiscal year 1998 legislation sets forth the legislative intent in the clearest possible terms:

The managers seek to make the maximum use of American assistance as an incentive for the regional parties to cooperate with the Minsk Group and other international mediators seeking to bring peace to the South Caucasus. The managers are convinced that the ready availability of international reconstruction aid, including the potential US initial contribution provided in this conference agreement, will encourage leaders to make peace. The managers intend that the emphasis be placed on restoring transportation, telecommunications, and other infrastructure that promote regional economic integration.[14]

The Foreign Operations Appropriations Act for fiscal year 1997 provided for $625 million to be made available for assistance for the New Independent States of the former Soviet Union, but no portion of those funds was explicitly allocated for assistance in connection with the conflict in Nagorno Karabagh. As with the fiscal year 1998 legislation, the fiscal year 1997 appropriations legislation provided that none of the funds appropriated for the region would "be made available to any government of the new independent states of the former Soviet Union if that government directs any action in violation of the territorial integrity or national sovereignty of any other new independent state, such as those violations included in the Helsinki Final Act."[15]

In addition to allocating funds for the Southern Caucasus region, the appropriations legislation for each of these years also carves out exceptions to the restrictions on aid to Azerbaijan contained in Section 907 of the Freedom for Russia and Emerging Eurasian Democracies and Open Markets Support Act of 1992 (also known as the Freedom Support Act). Section 907 of the Freedom Support Act provides that, except for assistance in connection with nonproliferation and disarmament programs and activities, "United States assistance under [the Freedom Support Act] or any other Act may not be provided to the Government of Azerbaijan until the President determines, and so reports to the Congress, that the Government of Azerbaijan is taking demonstrable steps to cease all blockades and other offensive uses of force against Armenia and Nagorno Karabagh."[16] Senator Kerry, as a cosponsor of a modified version of this provision first offered in the Senate Foreign Relations Committee, clarified during debate on the Conference Report for the Freedom Support Act that he believed that "demonstrable steps" should not mean words, but rather actions that "reflect a

sustained commitment on the part of the Azerbaijani Government to end the violence in Nagorno Karabagh and to lift permanently the blockades against Armenia and Nagorno Karabagh."[17] Senator Kerry also emphasized that the conferees' refusal to remove or weaken the language of Section 907 as approved by both the House and Senate, despite the Administration's urging that the language be dropped, stood "as a strong expression of congressional intent."[18]

Notwithstanding the clear-cut directive of Section 907 of the Freedom Support Act, subsequent appropriations legislation, beginning with fiscal year 1996, did weaken the impact of Section 907.[19] The Foreign Operations Appropriations Act for fiscal year 1997, on the other hand, actually contains language that mirrors Section 907 of the Freedom Support Act, while the Conference Report contains the conferees' directive that assistance to Azerbaijan by nongovernmental and international organizations, in the form of humanitarian services and the channels for providing of humanitarian services, not be precluded.[20]

The Foreign Operations Appropriations Act for fiscal year 1998 explicitly incorporates exceptions to Section 907 of the Freedom Support Act directly in the text of the legislation. These carve-outs remove the Section 907 limitations on assistance to Azerbaijan with respect to (1) humanitarian assistance for refugees, displaced persons and needy civilians affected by the regional conflict; (2) activities to support democracy or assistance in connection with nonproliferation and disarmament programs and activities (the latter of which had already been taken into account in Section 907); (3) any assistance provided by the Trade and Development Agency; and (4) any activity carried out by a member of the US and Foreign Commercial Service while acting within his or her official capacity.[21] The Conference Report for the fiscal year 1998 legislation characterizes the third and fourth carve-outs as "limited support for United States commercial entities." The conferees also explained that no carve-out had been made for reconstruction aid since the managers assumed "that in the event that an interim settlement is reached with regard to Nagorno Karabagh, any blockades will be lifted and the President will be in a position to make the determination necessary to lift" the restrictions of Section 907.[22]

These exceptions to Section 907 of the Freedom Support Act were further expanded in the Foreign Operations Appropriations Act for fiscal year 1999 to include, in addition to the carve-outs contained in the fiscal year 1998 legislation listed above, carve-outs for (1) insurance, reinsurance, guarantees and other assistance provided by the Overseas Private Investment Corporation (OPIC); and (2) any financing provided under the Export-Import Bank Act of 1945.[23]

While the exceptions to Section 907 contained in the Foreign Operations Appropriations Act for fiscal year 2000 are identical to those contained in the legislation for fiscal year 1999, the continued existence of Section 907 altogether was threatened in 1999 in connection with the passage of the Silk Road Strategy Act of 1999. The Silk Road Strategy Act, which was incorporated into the Omnibus Appropriations Act for fiscal year 2000, Pub. L. 106-113 (1999), was first introduced as a stand-alone bill in an effort to target assistance to support the economic and political independence of the

countries of the Central Caucasus and Central Asia. The only provision of the amendment that was in contention, and subject to vigorous debate, was a proposed revision to Section 907 of the Freedom Support Act that would give the President the right to waive the restrictions in Section 907 if the President were to determine "and so certif[y] to Congress, that the application of the restriction would not be in the national interests of the United States."[24] Although Senator Brownback, a sponsor of the Silk Road Strategy Amendment, emphasized in debate that this provision did not abolish Section 907, but simply provided the President with what Brownback deemed a standard national interest waiver, the Clinton Administration's open support for the provision provided clear assurance that the President would invoke the waiver if the provision were to pass. Senator Brownback explained the motivation behind providing the President with a national interest waiver for Section 907, in part, in economic terms: "Continuing [Section 907] undermines the ability of American companies to secure their substantial investments in the region. Repealing Section 907 would allow for commercial and technical assistance to aid in the development of infrastructure, trade, [and] pipeline projects."[25] Proponents of the waiver for Section 907 also expressed during debate on the Senate floor their opinion that (1) Azerbaijan's blockade is effectively non-existent since Armenia has outlets other than through Azerbaijan for the transportation of goods and aid in and out of the country; and (2) a restriction on direct aid just to Azerbaijan, and to no other government in the region, is an unwarranted display of partiality on the part of the United States.

In opposing the proposed emasculation of Section 907, Senator McConnell expressed his belief that Section 907 -- "even though it has been constantly stripped down -- is important to give the Azerbaijanis some incentive for ultimate settlement" of the conflict over Nagorno Karabagh. Senator Sarbanes elaborated that waiving Section 907 "in the absence of any progress toward a lifting of the blockade would reward the Government of Azerbaijan for its intransigence and remove a major incentive for good-faith negotiations from one side of the conflict," especially in light of Azerbaijan's rejection at that time of the Minsk Group's common state proposal. Senator Sarbanes also disputed the assertion that Azerbaijan's blockade has had no effect on Armenia.[26]

In the end, the Silk Road Strategy Act was passed, after an amendment was adopted that removed the waiver authorization language with respect to Section 907 of the Freedom Support Act. Thus, Section 907 currently remains in place, as qualified by the carve-outs contained in the appropriations legislation for fiscal year 2000 discussed above.

III. The Right of Self-Determination

Possessing the right of self-determination is a legal question, while accomplishing self-determination is a question of power and diplomacy. This section examines the former, while Section IV presents a formula for attaining the latter.

A. The Meaning of Self-Determination

1. International Recognition of the Principle of Self-Determination.

The principle of self-determination is included in Articles 1, 55, and 73 of the United Nations Charter. The right to self-determination has also been repeatedly recognized in a series of resolutions adopted by the U.N. General Assembly, the most important of which is Resolution 2625(XXV) of 1970. While these resolutions are not in themselves binding, they do constitute an authoritative interpretation of the U.N. Charter.[27] In the *Western Sahara case* in 1975,[28] the *Frontier Dispute case* in 1986,[29] and the *Case Concerning East Timor* in 1995, the International Court of Justice held that the principle of self-determination has crystallized into a rule of customary international law, applicable to and binding on all States.[30]

The principle of self-determination was further codified in the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights -- which are considered to constitute the international "Bill of Rights."[81] Before its break up, the Soviet Union was a party to both of these human rights treaties, and the U.N. Human Rights Commission confirmed in 1993 that the former Soviet Republics continue to be bound by these treaty obligations.[32]

Under the principle of self determination, all self-identified groups with a coherent identity and connection to a defined territory are entitled to collectively determine their political destiny in a democratic fashion and to be free from systematic persecution. For such groups, the principle of self-determination may be implemented by a variety of means, including autonomy within a federal entity, a confederation of states, free association, or, in certain circumstances, outright independence.[33] Moreover, in accordance with the Charter on European Security accepted by the OSCE in Istanbul in November 1999, it is now widely held that conflict concerning ethnic minorities can only be positively resolved within democratic entities, and that in instances where states are undemocratic the principle of self-determination takes greater priority over the principle of territorial integrity.

2. Who is Entitled to Self-Determination?

For a group to be entitled to a right to collectively determine its political destiny, it must possess a focus of identity sufficient for it to attain distinctiveness as a people.[34]

The traditional two part test examines first "objective" elements of the group to ascertain the extent to which its members share a common racial background, ethnicity, language, religion, history and cultural heritage. Another important "objective" factor is the territorial integrity of the area which the group is claiming.[35]

The second "subjective prong" of the test requires an examination of the extent to which individuals within the group self-consciously perceive themselves collectively as a distinct "people." It necessitates that a community explicitly express a shared sense of values and a common goal for its future. Another "subjective" factor is the degree to which the group can form a viable political entity.[36]

3. Self-Determination and the Right to Independence

Traditionally, the right to pursue independence as an exercise of the principle of self-determination was applied to people under "colonial" or "alien" domination, and under the principle known as *uti possidetis* states were permitted to become independent only within their former colonial boundaries.[37]

However, the modern trend, supported by the writing of numerous scholars,[38] U.N. General Assembly resolutions,[39] declarations of international conferences,[40] judicial pronouncements,[41] decisions of international arbitral tribunals,[42] and state practice since the fall of communism in Eastern Europe, has supported the right of a non-colonial "people" to secede from an existing state when the group is collectively denied civil and political rights.

The denial of the exercise of the right of democratic self-government as a precondition to the right of a non-colonial people to dissociate from an existing state is supported most strongly by the United Nations' 1970 Declaration on Principles of International Law Concerning Friendly Relations, which frames the proper balance between self-determination and territorial integrity as follows:

> Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves *in compliance with the principle of equal rights and self-determination of peoples* as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or color.[43]

By this Declaration, the General Assembly indicated that the right of territorial integrity takes precedence over the right to self-determination only so long as the state possesses "a government representing the whole people belonging to the territory without distinction as to race, creed or color."[44] Where such a representative government is not present, "peoples" within existing states will be entitled to exercise their right to self-determination through secession.

Most recently, in considering whether Quebec could properly secede from Canada, the Canadian Supreme Court found that,

> A right to secession only arises under the principle of self-determination of peoples at international law where "a people" is governed as part of a colonial empire; where "a people" is subject to alien subjugation domination or exploitation; and possibly *where "a people" is denied any meaningful exercise of its right to self determination within the state of which it forms a part*."[45]

The Court then went on to declare:

> A state whose government represents the whole of the people or peoples resident within its territory, on a basis of equality and without discrimination, and respects the principles of self-determination in its internal arrangements, is entitled to maintain its territorial integrity under international law and to have the territorial integrity recognized by other states.[46]

As the Court found that the people of Quebec had not been "denied meaningful access to government to pursue their political, economic, cultural and social development, they were not entitled to secede from Canada" without the agreement of the Canadian government. Implicitly, however, had the Court found that the people of Quebec were denied any such right of democratic self-government and respect for human rights, then unilateral secession from Canada would have been permissible under international law.

In the case of the dissolution of the former Yugoslavia, the republics of Slovenia, Croatia, Bosnia-Herzegovina and Macedonia were deemed entitled to secede on the basis that they had been denied the proper exercise of their right of democratic self-government, they possessed clearly defined borders within the umbrella state, and in some cases they had been subject to ethnic aggression and crimes against humanity committed by the forces of the central government.[47] Notably, the international community did not consider that the Bosnian Serb entity known as Republika Srpska was entitled to dissociate from Bosnia-Herzegovina because, although it possessed a right of political autonomy, it had not been denied the proper exercise of its political rights and it did not possess historically defined borders. In contrast, in the case of the Serb autonomous region of Kosova, in the face of ethnic cleansing and repression by the central government of Serbia, the international community (through NATO action) supported the effort of the Albanian Kosovars to attain a status that can be characterized as "intermediate sovereignty" within Kosova's regional borders.

These examples indicate that if a government is at the high end of the scale of representative government, the only modes of self-determination that will be given international credence are those with minimal destabilizing effect, such as internal autonomy. If a government is extremely unrepresentative, then much more potentially destabilizing modes of self-determination, including secession, may be recognized as legitimate.[48]

The case for secession becomes even stronger when the claimant group has attained de facto independence. In one of the first cases involving the right of self-determination, the Commission of Jurists on the *Aaland Islands dispute* recognized de facto independence as a special factor:

> From the point of view of both domestic and international law, the formation, transformation and dismemberment of States as a result of revolutions and wars create situations of fact which, to a large extent, cannot be met by the application of the normal rules of positive law .... This transition from a de facto situation to a normal situation de jure cannot be considered as one confined entirely within the domestic jurisdiction of a State. It tends to lead to readjustments between the members of the international

> community and to alterations in their territorial and legal status.[49]

Thus, if pursuant to the situation on the ground, the entity satisfies the criteria for independent statehood, the conflict between the principles of self-determination and territorial integrity evaporates. The applicable criteria for statehood are: (1) a permanent population; (2) a defined territory; (3) a government; and (4) capacity to enter into relations with other states.[50]

Finally, some commentators have taken the position that the right of a people to secede must further be based on a "balancing of conflicting principles," considering such factors as "the nature of the group, its situation within its governing state, its prospects for an independent existence, and the effect of its separation on the remaining population and the world community in general."[51]

4. The Process for Exercising the Right of Self-Determination

In acknowledging the independence of Slovenia, Croatia, Bosnia-Herzegovina and Macedonia, the international community, and in particular the European Union, established a number of preconditions, such that their attainment of international status would be exercised consistent with the principles of *uti possidetis* and respect for territorial integrity. To that end, the international community recognized these states within the borders that they possessed as constituent territorial units of the former Yugoslavia. The international community also required these states to hold a referendum confirming the wishes of the general public to seek independence, and to demonstrate their commitment to respect fundamental principles of international law, including those relating to the protection of minority rights, democratic processes of governance and economic organization, and the protection of human rights.

B. Nagorno Karabagh's Legal Entitlement to Independence

Nagorno Karabagh has a right of self-determination, including the attendant right to independence, according to the criteria recognized under international law set forth above.

1. The Armenians of Nagorno Karabagh are a Group Entitled to Self-Determination

The Armenians of Nagorno Karabagh possess the objective and subjective factors required of a group entitled to the right to self-determination.[52]

The Armenians of Nagorno Karabagh are objectively distinct from the Azerbaijanis. The Nagorno Karabagh Armenians speak a dialect of Armenian, an Indo-European language, while the Azerbaijanis speak a Turkic dialect, which is part of the Altaic language group. The Nagorno Karabagh Armenians are Christians, while the Azerbaijanis are predominantly Shi'i Muslims. And the Nagorno Karabagh Armenians share the ancient culture and historical experience of the Armenian people, while the Azerbaijanis are now developing a national identity and share the historical experience of Turkic peoples.

Nagorno Karabagh also has a long tradition of being a distinct territorial unit. The region of Nagorno Karabagh (Artsakh) was organized as one of the fifteen provinces of historical Armenia

and was also a separate "Melikdom" under the Persian Empire. Nagorno Karabagh's distinct territorial identity was recognized by the Soviet Union when it was designated an "autonomous region" (1923 through 1989) and later as an "ethno-territorial administrative division" administered directly from Moscow rather than by Azerbaijan (January through November 1989).

With respect to the subjective prong of the test, the Armenian population of Nagorno Karabagh responded to the decision of Azerbaijan to remove the autonomy of Nagorno Karabagh and to place the region under Azerbaijan's direct administration in November 1991, by holding an internationally monitored referendum on the independence of the region. On December 10, 1991, 82 percent of the Nagorno Karabagh electorate (as determined by the January 1989 USSR census) took part in this vote in which a 99.7 percent majority supported secession.[53] Since this time, the Nagorno Karabagh Republic has essentially operated as a de facto state.

2. Nagorno Karabagh's Right to Self-Determination Includes the Right to Independence

The Azerbaijanis argue that political independence for Nagorno Karabagh violates the right of Azerbaijan to territorial integrity. But the claim to territorial integrity can be negated where a state does not conduct itself "in compliance with the principle of equal rights and self-determination of peoples" and does not allow a subject people "to pursue their economic, social and cultural development" as required by United Nations General Assembly Resolution 2625(XXV).[54] Moreover, it should be noted that when Azerbaijan declared independence from the Soviet Union, it claimed to be the successor state to the Azerbaijani Republic of 1918-1920. The League of Nations, however, did not recognize Azerbaijan's inclusion of Nagorno Karabagh within Azerbaijan's claimed territory.

Prior to 1988, Azerbaijan's human rights record with respect to the Armenian people of Nagorno Karabagh was dismal. During the seven decades of the USSR's existence, the government of Soviet Azerbaijan conducted a systematic policy of repression and removal of Karabagh Armenians from their historic homeland. During this time, the Armenian population in Nagorno Karabagh was reduced from ninety-five percent of the total population of the region in 1926, to seventy-five percent of the population in 1976.

Subsequent to the Karabagh movement for independence in 1988, the human rights violations against the Armenians of Nagorno Karabagh intensified, including "pogroms, deportations, and other atrocities."[65] Azerbaijan began a blockade of food and fuel into Nagorno Karabagh which continues to the present. In view of these developments, Nobel Peace Prize laureate Andrei Sakharov warned in November of 1988 that the "Armenian people are again facing the threat of genocide," and that "for Nagorno Karabagh this is a question of survival, for Azerbaijan - just a question of ambitions."[66] Hence, the prospects for guaranteeing human rights and allowing the Karabagh Armenians to pursue their "economic, social and cultural development" under Azerbaijani rule, even with Azerbaijani assurances of local autonomy, are not very promising. Under these circumstances, the Nagorno Karabagh claim to self-determination through independence may supersede Azerbaijan's claim to territorial integrity.

That Nagorno Karabagh has had to resort to force to protect itself, to break the Azerbaijani blockade by opening the Lachin Corridor to Armenia and the world, and to establish defensible borders does not disqualify it from the right to independence. In fact, the tension between the right of Nagorno Karabagh to self-determination and the right of Azerbaijan to maintain its territorial integrity must be analyzed in view of the de facto independence Nagorno Karabagh has achieved and maintained for the past six years by virtue of the success of its armed forces,[57] and its development of civil and political institutions.

Nagorno Karabagh now meets all of the traditional requirements for statehood set forth by the Montevideo Convention.[58] It has control over a defined territory, which encompasses over 5,000 sq. kilometers. Its permanent population of 150,000, is greater than that of other States that have been admitted into the United Nations since 1990, including Andorra (66,000), Liechtenstein (32,000), Marshall Islands (66,000), The Federated States of Micronesia (132,000), Monaco (32,000), Nauru (11,000), Palau (18,000), and San Marino (25,000).[59] Nagorno Karabagh has its own democratically elected president and legislature. Its government commands the armed forces, and engages in discussions with foreign states. Through its government institutions, Karabagh has the capacity to conduct international relations and has represented the people of the region at international peace negotiations under the mediation of the Organization on Security and Cooperation in Europe, as well as established representative offices in the United States, France, Russia, Lebanon, Australia, and Armenia.[60]

Finally, Nagorno Karabagh's right to independence is also consistent with the balancing-of-factors approach advocated by some commentators.[61] That the vast majority of the people in Nagorno Karabagh constitute a unique group, with its own government and defense forces and a historic tie to the territory, has been discussed above. That the group has achieved de facto independence after an overwhelming vote for secession and after withstanding a military assault indicates its prospects for an independent existence. As a result of the armed conflict, the current population of Nagorno Karabagh is approximately 95% Armenian, with the other five percent of the population being made up of Russian, Greek, Azerbaijani and Tatar minorities. The government of Nagorno Karabagh is ensuring minority rights and continued political participation of these ethnic minorities and others who may wish to return. The government of Nagorno Karabagh has expressed its willingness to establish bilateral contacts with the government of Azerbaijan on matters relating to refugee return and minority rights protections, as well as on a range of other subjects relevant to their bilateral relationship.

As for its effect on Azerbaijan, the de jure secession of Nagorno Karabagh would have little effect. Azerbaijan would lose only two percent of its total population and it would neither lose a part of its oil fields nor be cut off from important connecting roads or waterways. The end of oppression and the avoidance of a further escalation of violence would be in the international interest. And as discussed in more detail below, a negotiated exchange of territories could improve the security of both Nagorno Karabagh and Azerbaijan and substantially reduce the current level of instability in the region.

Thus, international law provides a firm basis for Nagorno Karabagh's pursuit of independence from Azerbaijan. Based on recent precedents established in a number of other peace processes, the next section proposes a two-phased procedure for the attainment of international recognition of Nagorno Karabagh's de jure independence.

IV. A Proposed Framework for Nagorno Karabagh's Self Determination Based on Existing International Models

The realization of Nagorno Karabagh's right to self-determination may be achieved through peaceful and constructive means within the OSCE peace process. In this regard, it is relevant and instructive to consider the implementation of, as well as proposals for achieving, self-determination in other regional contexts which may be used as a model for the next steps in the OSCE process. Critical in light of these precedents is the need for a detailed phased process for achieving self-determination, which the concerned parties can commit to in advance. This section thus draws on existing precedent to develop an approach of intermediate sovereignty/earned recognition as a basis for crafting a long term resolution of the Nagorno Karabagh dispute.

As noted in the introduction, the intermediate sovereignty/earned recognition approach consists of two phases, the first phase - intermediate sovereignty - would encompass a period of three to five years, and would have three primary elements. The first element would entail both the provision of a level of sovereignty for Nagorno Karabagh consistent with its right to self-determination, and the creation of mechanisms for joint co-operation between the government of Nagorno Karabagh and the government of Azerbaijan. The second element would entail establishment of specific commitments on the part of Nagorno Karabagh and Azerbaijan to permit and encourage the return of refugees and internally displaced persons, provide for the protection of human rights and minority rights, and engage in a series of defined confidence building measures. The third element would entail the assistance of the international community in implementing and monitoring the interim arrangement and assisting with the preparations for eventual independence.

The second phase - earned recognition - would occur at the end of the interim phase and would entail a determination by an international mechanism as to the best means by which Nagorno Karabagh could be recognised as an independent state. The determination of the international mechanism would be based upon Nagorno Karabagh's compliance with the commitments undertaken during the interim period - taking into consideration Azerbaijan's compliance with its commitments as well, and the results of a second referendum held in Nagorno Karabagh.

To help define the specifics of the proposal for intermediate sovereignty/earned recognition, this section draws upon peace agreements and peace proposals sponsored or adopted by the international community which were designed to resolve disputes involving both claims of self-determination and the occurrence or threat of armed conflict. These proposals and agreements include:

The 1999 Montenegro Proposal put forward by the Republic of Montenegro, one of the last two constituent republics of the Federal Republic of Yugoslavia, presented a proposal for greatly enhanced autonomy. Montenegro's proposal would transform the existing federation into a confederation of two equal states, characterized as a "joint state." If the Montenegrin demands for increased autonomy are not met, Montenegro threatens to hold a referendum on independence

from Yugoslavia.

The 1999 Agreement on the Question of East Timor between the Republic of Indonesia and the Portuguese Republic adopted under the auspices of the United Nations. This agreement includes an annex entitled: A Constitutional Framework for a Special Autonomy for East Timor. In addition, Portugal, Indonesia and the United Nations entered into the **East Timor Popular Consultation Agreement Regarding Security** and the **Agreement Regarding the Modalities for the Popular Consultation of the East Timorese Through a Direct Ballot**, both dated May, 5, 1999. The UN Security Council passed a resolution in support of the Agreement between Indonesia and Portugal and related documents.

The 1999 Rambouillet/Paris Accords, which were negotiated under the auspices of the Contact Group (Russia, United States, France, Great Britain, Germany and Italy), and were signed by the Kosovar delegation, and witnessed by the Contact Group, but not signed by the Serbian delegation. The essence of the Rambouillet/Paris Accords were confirmed as guiding in **UNSC Resolution 1244** which established the mandate for the UN administration of Kosova at the conclusion of the NATO air campaign.

The 1998 Good Friday Agreement between Northern Ireland, the United Kingdom of Great Britain and Northern Ireland and the Republic of Ireland, was reached through multi-party negotiations. A corollary document to the Good Friday Agreement is the Agreement between the Government of the United Kingdom of Great Britain and the Government of Ireland, also dated April 10, 1998, which, among other things, affirmed the Good Friday Agreement.

The 1995 Dayton Accords, which the Republic of Bosnia and Herzegovina, the Republic of Croatia, and the Republic of Yugoslavia signed, consists of the General Framework for Peace Agreement that formally ended the war in Bosnia. The agreement created a multi-ethnic state consisting of two entities, the Federation of Bosnia and Herzegovina and the Republika Srpska, but efforts to implement its terms have been hindered both by continued ethnic animosity and the complex machinery of ethnic checks and balances built into the constitution of the state.

The Oslo Accords of 1993 and the Wye River Memorandum of 1998 (signed by Israel and the PLO, and witnessed by the US and Russia) created the framework for permanent status negotiations between the Israelis and the Palestinians. While Oslo focused on the doctrine of "land for peace," Wye required the Palestinians to "earn" the right to partake in permanent status talks and, subsequently, "earn" their independence.

The 1992 Set of Ideas on an Overall Framework Agreement on Cyprus, compiled by then United Nations Secretary-General Boutros Boutros-Ghali and endorsed by a UN Security Council Resolution, was to be the basis for settlement of the conflict between the Greek Cypriot and Turkish Cypriot communities of Cyprus in 1992. Although never finally agreed upon by the parties at that time, the Overall Framework Agreement remains the most recent formal draft proposal for resolving the conflict.

The Compact of Free Association Act of 1985,[62] which was signed into law in 1986, is the agreement between the Federated States of

Micronesia and the Republic of the Marshall Islands and the United States, as administering authority of the Trust Territory of the Pacific Islands. The Compact establishes a relationship of free and voluntary association between the United States and each of the Federated States of Micronesia and the Republic of the Marshall Islands, which both became fully self-governing. Under the Compact, the United States provides both former trust territories with economic assistance and is responsible for all security and defense matters.

A. Phase One: Intermediate Sovereignty

1. Managing the Interim Arrangement and Preparing for Independence

To manage the relationship between Nagorno Karabagh and Azerbaijan during the interim period it will be necessary to establish mechanisms for cooperation and interaction between them. To prepare Nagorno Karabagh for the full exercise of its right of self-determination and the possibility of internationally recognized independence, it would further be prudent to permit Nagorno Karabagh to enter into formal relationships with neighboring states and international organizations and to allow both entities to negotiate the exchange of territory with respect to the security needs and considerations of each.

a. *Establishing Mechanisms for Mutual Cooperation and Interaction*

Taking the current cease-fire situation of non-violent co-existence between Azerbaijan and Nagorno Karabagh, under which each entity exercises control over its own internal affairs, as the starting point, the first step toward achieving a peaceful resolution of the ongoing conflict should be the establishment of a cooperative interim arrangement in which the parties can interact with each other through high-level joint committees or other consultative arrangements on matters of common concern. This type of interim structure is especially appropriate in the case of Nagorno Karabagh and Azerbaijan given that attempts to intermingle governmental functions would likely be highly disruptive, as well as unattractive to the parties.[63]

Examples of this kind of joint-committee arrangement can be found in the Israeli/Palestinian peace process, the case of Northern Ireland, the proposed framework for autonomy for East Timor, the proposed framework agreement for resolving the conflict in Cyprus and the Dayton Accords.

Under the Oslo Agreement, Israel and the Palestinians agreed to form a Joint Israeli-Palestinian Liaison Committee to ensure smooth implementation of the Declaration of Principles, as well as a Joint Israeli-Palestinian Economic Cooperation Committee to ensure mutual benefit of cooperation and the development of the West Bank, Gaza and Israel. Other joint committees mentioned in the Wye River Agreement include the Monitoring and Steering Committee, the Civil Affairs Committee, the Legal Committee and the Standing Cooperation Committee.

A central theme in the Good Friday Agreement is the concept of joint consultation and coordination among the interested governmental entities of Northern Ireland, the United Kingdom and the Republic of Ireland. The Good Friday

Agreement breaks these relationships into three "strands." Strand One is the Northern Ireland Assembly, which is composed of 108 members from a cross-section of the Northern Ireland community, tasked with acting on a cross-community basis. Strand Two is the North/South Ministerial Council, composed of executive level representatives from the Northern Ireland and Irish governments, which serves as a forum for cooperation in sectors such as agriculture, education, transport, environment, waterways, social security and social welfare, tourism, certain EU Programs, inland fisheries, aquaculture and marine matters, health and urban and rural development. Strand Three is the British-Irish Council, composed of representatives from the British government, the Irish government and the devolved institutions of Northern Ireland, as well as the governments of Scotland and Wales, which functions at a summit level for the exchange of information and coordination of common policies on issues such as transport, agriculture, the environment and cultural, health, and EU issues.[64] The Good Friday Agreement also calls for an independent commission to determine future policing arrangements, with the goal of achieving cross-community policing and non-discrimination.

With respect to the status of East Timor, the Constitutional Framework for a Special Autonomy for East Timor would have been the governing document had East Timor adopted the special autonomy relationship rather than independence in its August 1999 referendum. The Framework set forth concepts and mechanisms for the coordination and cooperation between the government of the Republic of Indonesia (Indonesian Central Government) and the Special Autonomous Region of East Timor (SARET). The Framework allows for the creation of unlimited and unidentified "bodies or other arrangements to facilitate consultation, cooperation, and coordination on such matters as police matters, tourism, transportation, telecommunications, education, health and the environment."[65] In addition, the SARET police force and officials of the Indonesian Central Government would be required to coordinate with each other with respect to the apprehension of suspects accused of committing crimes in and outside of the SARET. Furthermore, the Framework would have provided for the creation of a Transitional Council, composed of no more than 25 persons of East Timorese identity appointed by the United Nations, to facilitate the smooth functioning of general administrative, public services and public order in the period between the vote in favor of the SARET and the establishment of the SARET.[66]

While the Cyprus Overall Framework Agreement contemplates the creation of integrated governmental functions between the Greek Cypriot and Turkish Cypriot communities, it also provides for bi-communal committees during the transition period after the Overall Framework Agreement is approved to deal with property settlement claims, economic development and safeguards and arrangements related to the territorial adjustments made under the Overall Framework Agreement.[67] The Overall Framework Agreement also provides for the establishment of a committee composed of the leaders of the two communities and a representative of the Secretary-General of the United Nations to work out the transitional arrangement procedures and to ensure that the other bi-communal committees are implemented in an effective and timely manner.

Although the Dayton Accords also provide for a

more integrated governmental arrangement between the constituent entities that comprise Bosnia and Herzegovina than would be appropriate with respect to Nagorno Karabagh and Azerbaijan in light of their current de facto situation, the Dayton Accords do provide for coordinating arrangements as well. For instance, a Joint Military Commission, composed of the senior military commanders of the parties and chaired by the commander of the peacekeeping force, serves to advise the commander of the international peacekeeping force and as a channel for addressing cease-fire violations or other acts of non-compliance with the provisions of the peace agreement. In addition, the entities that make up Bosnia and Herzegovina are committed to coordinating their military activities through a Standing Committee on Military Matters. The Standing Committee includes the members of the three-person presidency, each of whom exercises civilian control over independent armed forces.

With these precedents in mind, Nagorno Karabagh should establish Joint Committees providing for cooperation between the highest political levels of Nagorno Karabagh and Azerbaijan, as well as between technical agencies concerning rail, Postal Telegraph and Telephone, commerce, and culture. Joint Commissions on refugee return, property restitution and compensation, border demarcation and economic cooperation should also be created. These Joint Commissions may also include the participation of an OSCE observer/facilitator. In addition, a Joint Military Commission should be created as a confidence building measure. The Joint Military Commission should be the primary entity, along with international representatives, for planning the demilitarization of territories to be exchanged.

b. *Right to Enter into Relationships with Neighboring States and Participate in International Organizations*

At the same time that the mechanisms for cooperation are implemented, each entity participating in the interim arrangement must be accorded the right to initiate and maintain relationships with neighboring states and conduct its own foreign relations in some capacity. In different degrees and formulations, this element has repeatedly been recognized and articulated in other regional contexts.

The Bosnian Constitution, for instance, permits each entity to (1) establish "special parallel relationships with neighboring states consistent with the sovereignty and territorial integrity of Bosnia" and (2) to enter into agreements with states and international organizations with the consent of the [Bosnian] Parliamentary Assembly."[68] The Republika Srpska also has the right to have at least one-third of the ambassadors and international representatives of Bosnia come from Srpska.

Moreover, the Rambouillet/Paris Accords provide that Serbians present in Kosova would be entitled to make use of social and educational services provided by the Republic of Serbia. Under the proposed framework for autonomy for East Timor, the Indonesian Central Government would retain primary authority and responsibility for foreign relations, strategic natural resources and defense. At the same time, the framework would allow the SARET, to the extent not inconsistent with the powers of the Indonesian Central Government and with the consent of the Indonesian Central Government, to enter into agreements and relationships with foreign

countries and international organizations within selected spheres, as well as receive international development assistance.[69]

The Oslo agreement provides that both Israel and the Palestinians should pursue liaison and cooperation opportunities with Jordan and Egypt to ensure continued cooperation and economic growth among all those concerned. Although not specifically addressed in the Oslo/Wye Accords, as part of the Middle East peace process the PLO has attained an increasing level of representation in the United Nations. Starting in 1974, the PLO was granted observer status and was permitted to participate in the sessions and the work of the General Assembly and in the sessions and the work of all international conferences convened under the auspices of the General Assembly in the observer capacity. At that time, the PLO also established a permanent observer mission at UN headquarters in New York and in Geneva, and by UN Security Council resolution in 1975, it was decided that PLO representatives should be invited to participate in UN debates with the "same rights of participation as are conferred when a Member state is invited to participate under rule 37." Since then, such invitation was repeated by the UN Security Council on numerous occasions.

In 1998 the PLO became entitled to have its communications issued and circulated as official documents of the UN, and via resolution 52/250 the UN conferred upon the PLO, which carries the name "Palestine" in the United Nations, additional rights and privileges of participation that had previously been exclusive to Member States, such as the right to participate in the general debate held at the start of each session of the General Assembly, the right to cosponsor resolutions, and the right to raise points of order on Palestinian and Middle East issues. Furthermore, resolution 52/250 also changed the seating of the PLO to a location directly after non-Member States with the allocation of six seats for delegates, while observers get two seats. In 1998, PLO leader Yasir Arafat addressed the 53rd General Assembly plenary under the agenda item of General Debate, which was the first time in the history of the United Nations that a non-member state participated under that item of business. During that session, the PLO co-sponsored 21 resolutions and one decision. The PLO has thus remained a non-state member of the UN under the rubric of a "proto-state."

Under the Overall Framework Agreement on Cyprus, the federated states would be permitted to enter into agreements with foreign governments and international organizations "in their areas of competence."[70] In addition, the Overall Framework Agreement specifically provides that Cyprus must maintain "special ties of friendship" with Greece and Turkey and accord them most favored nation treatment in connection with all agreements.[71]

The proposal of the Republic of Montenegro envisions each member state's being represented equally in foreign missions, with member states having an independent mission in a foreign country "when a special interest in this exists."

The Compact of Free Association Act of 1985,[72] affirms the capacity of the Federated States of Micronesia and the Marshall Islands to conduct foreign affairs in their own name and right, including the capacity to enter into treaties and other international agreements with governments and international organizations, except with respect to security and defense matters, which

the United States is responsible for.

To prepare Nagorno Karabagh for the full exercise of its right of self-determination and the possibility of internationally recognized independence, and to promote economic and political development in the region, Nagorno Karabagh should be entitled to enter into special relationships with neighboring states on matters relating to trade, economic development, education and culture. Nagorno Karabagh should also be entitled to acquire membership in relevant international organizations, and to establish trade and "special interest" missions in foreign countries.

c. *Return and Exchange of Territory*

In certain circumstances, states have exchanged occupied territories in order to promote the development of peaceful relations. In the case of the Nagorno Karabagh conflict, Azerbaijan currently occupies approximately 750 sq. km (15%) of territory considered to have traditionally been a part of Nagorno Karabagh, while Nagorno Karabagh controls 7,059 sq. km (8%) of territory considered to have traditionally been possessed by Azerbaijan. Taking into account security considerations, the exchange of some or all of this territory as part of the peace package may significantly promote the development of peaceful relations and remove a contentious issue from the future relations between Nagorno Karabagh and Azerbaijan.

The Wye accords focus on the commitments of Israel to give up land in exchange for a number of defined reciprocal commitments made by the Palestinians.[73] Bearing in mind the current situation in the Middle East, it is important, with respect to Nagorno Karabagh and Azerbaijan, that territory be exchanged for territory, as opposed to an arrangement whereby territory is exchanged for political commitments which are difficult to verify and which can be withdrawn or modified once the exchange of territory has taken place. In addition, it will be essential to ensure that the rights of minorities who remain in the exchanged territory will be protected, and it might be necessary for the parties to consent to the deployment of some form of OSCE monitors to ensure the simultaneous withdrawal of forces. Drawing from the lessons of the Israeli-Palestinian peace process, it would further be advisable for the exchanged territory to remain demilitarized. In the case of the Nagorno Karabagh conflict, it would be necessary for such demilitarization as the territory would serve as a buffer security zone between Nagorno Karabagh and Azerbaijan armed forces. Given the nature of the security concerns the parties might choose to exchange only a portion of the territory currently under their control

2. Confidence Building Measures

In order for the interim process to effectively create an environment in which the right of self-determination can be meaningfully exercised, it is crucial that each party be required to commit to taking specific steps to build mutual confidence. The steps should be ones capable of producing tangible results during and at the end of the interim period. Particularly relevant to the situation in Nagorno Karabagh are commitments to (a) encourage the return of refugees and displaced persons, (b) create a process for property restitution and exchange; (c) implement laws governing respect for minority rights within each entity's territory and to adopt international conventions; (d) create special mechanisms to protect minority rights and free expression of

cultural identity; and (e) respect the continuing cease-fire and refrain from resorting to violence to resolve disputes that may arise.

a. *Ensuring The Right of Return for Refugees and Displaced Persons*

The Rambouillet/Paris Accords provide that the parties were obligated to permit the return of refugees and internally displaced persons, cooperate with United Nations High Commissioner for Refugees in an effort to promote the return of refugees and displaced persons, permit the UNHCR and other organizations to monitor the treatment of persons following their return and permit international organizations to provide assistance to returnees. Similarly, the Dayton Accords provide a comprehensive framework for implementing the peace settlement, which includes commitments by the parties to permit refugees to return to their homes and have their property returned to them.[74]

The Overall Framework Agreement on Cyprus provides detailed provisions governing the handling of displaced persons, with respect to both those displaced since 1974 as a result of the ongoing conflict and those displaced following territory adjustments under the Overall Framework Agreement. Under these provisions, a bi-communal committee would arrange for suitable housing for all persons affected by territorial adjustments.[75] Those, however, that were or were known to have been actively involved in acts of violence or incitement to violence against persons of the other Cypriot community would, subject to the due process of law, be prevented from returning to the territory administered by the other community.

As noted in the review of facts, there are over 600,000 refugees and internally displaced persons in Nagorno Karabagh and Azerbaijan. Although many of the refugees have resettled and are likely to be uninterested in returning to their previous homes, every effort should be made to ensure the right of return and to create conditions conducive to their return. In particular the parties should refrain from using state controlled media to incite ethnic and race hatred. The international community, through the UNHCR and private refugee agencies, should be actively involved in assisting Nagorno Karabagh and Azerbaijan to create such conditions, while the OSCE should be responsible for monitoring the efforts of Nagorno Karabagh and Azerbaijan to create such conditions and the actual level of return of refugees and displaced persons.

b. *Creating a Process for Property Restitution and Exchange*

The Rambouillet/Paris Accords provided that the parties were obligated to permit all persons to reoccupy their real property, assert their occupancy rights in state-owned property and recover their other property and personal possessions. The Accords did not provide for a mechanism of compensation for destroyed or abandoned personal or real property. The Dayton Peace Accords provided for the creation of a Property Restitution Commission which certifies title to property and has recently begun to assist in property exchange.

Under the Overall Framework Agreement on Cyprus, the ownership of property of displaced persons would be transferred to the ownership of the community in which the property is located through an exchange of property titles based on 1974 value plus inflation. Displaced persons

would be compensated by the agency of their community from funds obtained from the sale of properties transferred to the agency or through the exchange of property. There would also be a process for persons from both communities who resided and/or owned property in 1974 in the area to be administered by the other community to file compensation claims. Under the proposed Framework for East Timor, the SARET could establish a Land Claims Commission to resolve disputed claims of title to real property.

In Nagorno Karabagh and Azerbaijan, property return and restitution commissions should be created that would be responsible for certifying ownership to property, securing the right of return to that property, or, alternatively, arranging for exchange of the property or financial compensation - whichever the owner prefers. The efforts of these commissions should be coordinated by a Joint Commission on Property Return and Restitution. Given the widespread and intentional destruction of civilian and public property during the conflict it may further be advisable to create a commission to assess war damages.

c. Adopting Laws and International Conventions Governing Respect for Minority Rights

The Rambouillet/Paris Accords provided that the rights and freedoms set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols would apply directly in Kosovo. Minority populations were also entitled to a number of specifically delineated rights which related to (1) preserving and protecting their national, cultural, religious, and linguistic identities; (2) access to, and representation in, public broadcast media; and (3) the ability to finance their activities by collecting contributions from members of their community. The Dayton Accords incorporated the European Convention and a number of other important international human rights treaties into Bosnian domestic law.

In Northern Ireland, there is to be a "democratically elected Assembly … which is inclusive in its membership … and subject to the safeguards to protect the rights and interests of all sides of the community."[76] There is also proportionate allocation of the Committee Chairs, Ministers and Committee Membership, and key decisions, such as the election of the First Minister and budget allocations, must be made on a cross-community basis. The Good Friday Agreement calls for the promotion of tolerance and integration in areas such as housing and education. Moreover, public office holders must take a pledge to serve all the people of Northern Ireland and to promote equality and non-discrimination.[77] The Ministers are also bound by a Code of Conduct that requires them to uphold equality of treatment. The Good Friday Agreement refers to the European Convention on Human Rights as a guide for the array of human rights that should be safeguarded in Northern Ireland; however, the responsibility for safeguarding these rights runs across governmental lines to the United Kingdom, the newly formed bodies of Northern Ireland and the Republic of Ireland, as well as a Joint Committee (of Human Rights Commissions), an Equality Commission and a Northern Ireland Victims Commission aimed at "reconciliation" through community-based initiatives.

Under the proposed East Timor Framework,

both the Indonesian Central Government and the SARET would be obligated to protect and promote fundamental rights and freedoms. The Framework covers a broad range of freedoms, with United Nations Conventions as the reference point.[78]

With the return of refugees to Nagorno Karabagh and Azerbaijan there will be a need to ensure minority right protection. Nagorno Karabagh, as an intermediate sovereign, should adopt the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols into domestic law. A mechanism should be created to assist minorities in Azerbaijan to effectively utilize the Council of Europe process for enforcing the European Convention, and the OSCE should ensure that all appropriate domestic legislation has been adopted to give the Convention effect in Azerbaijan and that adequate remedies are available. Relevant United Nations Conventions should also be given full force and effect in both Nagorno Karabagh and Azerbaijan.

d. *Creating Special Mechanisms to Protect Minority Rights and Free Expression of Culture*

The Rambouillet/Paris Accords provided for a number of mechanisms governing the protection of minority rights, including the right to free and active participation in all forms of government and the creation of an ombudsman, who would monitor the protection of human and minority rights. Similarly, the Dayton Accords provided for undertakings by the parties to guarantee the protection of human rights and the establishment of an independent ombudsman and a human rights commission with joint representation of the parties to address alleged breaches of human rights protections.[79]

In Northern Ireland, the parties must commit to (1) the establishment of a Civic Forum that would bring together representatives from business, trade union and voluntary sectors to address concerns on social, economic and cultural issues; (2) passage of legislation regarding linguistic diversity; and (3) promotion of the rights set forth in the Good Friday Agreement relating to civil rights, economic rights and religious freedoms.

To ensure the adequate implementation of minority and human rights protections in Nagorno Karabagh and Azerbaijan, a series of ombudsman positions should be created with competence to address allegations of the infringement of minority and human rights and to comment upon the adoption, implementation and enforcement of legislation and any other state activity which may impact the exercise of minority or human rights.

e. *Committing to Non-Violence in Resolving Disputes*

The initial step in implementing the peace settlement under the Dayton Accords involves the mutual renunciation of the use or threat of force to settle disputes. The most salient elements of this commitment to non-violence, each of which is detailed in a separate annex to the General Framework for Peace Agreement, are: (1) the cease fire, disengagement of forces, withdrawal of foreign forces, and exchange of prisoners;[80] (2) undertakings to implement confidence-building measures and reduce military forces to attain a stable regional balance at a lower level of arms;[81] (3) agreement on boundaries and borders, with international arbitration agreed as

the means to settle any outstanding territorial disputes;[82] and (4) establishment of an international police task force under the auspices of the United Nations to assist and monitor law enforcement activities.[83] The Overall Framework Agreement on Cyprus also provides detailed provisions to govern the demilitarization of the Cypriot communities.[84]

Key to the successful implementation of the self-governing process in Northern Ireland is the decommissioning of weapons. This element is currently threatening the survival of the Northern Ireland bodies recently empowered with devolved authorities. A commitment to decommissioning and non-violence, and the maintenance of any "cease fire" has been taken by interested parties as a critical step – viewed by some as a pre-condition – to achieving self-governance.

Although the cease-fire between Nagorno Karabagh and Azerbaijan is well-established and both entities have made commitments to the peaceful settlement of the dispute, Azerbaijan has recently signaled its interest in the possibility of again attempting to resolve the dispute through the use of force. The permanent resolution of the dispute will, however, be promoted with the deployment of a small international police task force in areas of refugee and displaced persons returns and with continued joint monitoring of the demilitarized area.

3. Third-Party Oversight and Policing

Also crucial for ensuring a smooth and efficient transition to achieving self-determination, and monitoring the parties' fulfillment of their commitments to promote peace and normalize relations with each other, is the provision for a third-party and/or international presence to oversee the implementation of the parties' agreement.

The Dayton Accords contain extensive provisions for the participation of international organizations in the implementation of the peace settlement. In the military arena, the "Implementation Force" ("IFOR"), since renamed the "Stabilization Force" ("SFOR"), consists of NATO and non-NATO forces that are to assist in implementing the terms of the agreements regarding territory, size and disposition of forces and in establishment of a durable peace.[85] The OSCE is tasked with the supervision (a consciously more active role than monitoring) of the election program for Bosnia.[86] In the area of refugee assistance and repatriation, the Dayton Accords require the parties to grant access to the United Nations High Commissioner for Refugees, the International Committee of the Red Cross and the United Nations Development Programme, all of which thereby have acknowledged roles in the implementation of the settlement.[87] Finally, an International Police Task Force, under the auspices of the United Nations, was established to train and monitor law enforcement personnel and their activities.[88]

The Rambouillet/Paris Accords provide for the presence of an international military force under the direction of NATO and for the deployment of a United Nations organized Police Task Force similar to that deployed in Bosnia.

Under the Overall Framework Agreement on Cyprus, an interim monitoring committee, composed of the two Cypriot communities, the guaranteeing powers, and the United Nations Peace-keeping Force in Cyprus, would be

responsible for overseeing the process of demilitarization in Cyprus and, in particular, the achievement of agreed-upon reductions of arms and troop withdrawals.[89] A supervision and verification committee, composed of the guarantor powers, as well as the federal Cypriot president and vice president, would also be established with the assistance of United Nations support personnel. This committee would investigate any threat to the security of either community or of the federal republic through on-site inspections or other means.[90] The United Nations Development Programme would provide assistance to the bi-communal committee on economic development and safeguards. The Overall Framework Agreement also expressly provides for the United Nation's commitment to assist each community in fulfilling its functions and permits each side to employ foreign experts to do so.

Consistent with these precedents and the existing practice of involving international monitors in the verification of the cease-fire, it would be useful for Nagorno Karabagh to consent to the limited deployment of military and human rights observers to validate Nagorno Karabagh's compliance with the commitments undertaken during the period of intermediate sovereignty. Azerbaijan should similarly commit to the stationing of military and human rights observers within its territory. These monitors could then perform a useful function in communicating to the international mechanism charged with structuring Nagorno Karabagh independence the level of compliance and articulating their evaluations concerning the nature of Nagorno Karabagh's expected future compliance.

B. Phase Two: Earned Recognition

Central to the exercise of the right of self-determination is determining what the party's ultimate status will be and how that status will be determined.

Under the Rambouillet/Paris Accords, an international meeting would be convened three years after the entry into force of the agreement. This meeting would determine a mechanism for a final settlement for Kosovo on the basis of the will of the people,[91] opinions of relevant authorities, each party's efforts regarding the implementation of the Agreement, and the Helsinki Final Act. A comprehensive assessment of the implementation of the Agreement would take place at the meeting, as well as the consideration of proposals by any party for additional measures to be taken.

The Oslo and Wye accords create a process for earned final status negotiations. If the parties comply with the obligations undertaken in Oslo and Wye, then they will be entitled to begin permanent status negotiations not later than the beginning of the third year of implementation. The permanent status negotiations would consider the status of any remaining controversial issues such as Jerusalem, refugees, settlements, security arrangements, borders, relations and cooperation with other neighbors. The agreements reached in the interim negotiations were not to prejudice permanent status negotiations. In the event the Palestinians fulfilled their commitments under the Oslo and Wye accords, they would in effect possess de facto, but not de jure, independence.

Providing more certainty than these precedents for deferred negotiation of permanent status is the process for a referendum in which the constituent people have the opportunity on their own

initiative and/or after a pre-established period of time to express their wish concerning their status through a free and democratic process. The efficiency and reliability of the referendum will depend upon the pre-determined agreement regarding the timing, conditions and requirements for the referendum.

For example, the "Agreement Regarding the Modalities for the Popular Consultation of the East Timorese Through a Direct Ballot" established a fixed date for a referendum, which was approximately three months from the date of the agreement between Indonesia and Portugal.[92] The Consultation Agreement provided that both the registration of voters and the actual referendum would occur both inside and outside of East Timor, thereby ensuring the participation of the diaspora. The referendum process was conducted under the auspices of the United Nations.[93] The Consultation Agreement also set forth a detailed schedule for the process leading up to and including the referendum, which included operational planning and deployment, dissemination of public information, preparation and registration, exhibition of lists and challenges, political campaigns and a cooling-off period immediately prior to the polling day. The right to vote was extended to those aged 17 and older if (1) they were born in East Timor; (2) they were born outside of East Timor and had at least one parent born in East Timor; or (3) their spouse fell under (1) or (2).

The Indonesian Central Government had the primary responsibility for security in the period leading up to the referendum, with the presence of international civilian police and United Nations election monitors and personnel.[94] The text of the ballot question was explicitly specified in advance and set forth in the Consultation Agreement.[95] Instructive in the case of East Timor, with the violence and chaos that both preceded and followed the referendum, is the importance of effective mechanisms for maintaining peace during the referendum process and the preparation of a framework for independence ready to be implemented in the event independence is chosen, both of which were lacking in East Timor.

Under the Good Friday Agreement, a referendum was held, upon the order of the Secretary of State, in which the people of Northern Ireland were asked to vote on a specified date whether or not to cease being a part of the United Kingdom.[96] The Good Friday Agreement assumed that unless a majority of those voting opted for the separation from the United Kingdom, Northern Ireland would remain. The Irish people were asked to vote on a constitutional amendment that would essentially relinquish their claim to the territory of Northern Ireland. In addition, under the Good Friday Agreement, the majority of the people of Northern Ireland can, through a later referendum, choose to join the Republic of Ireland. The Secretary of State can call for the referendum not more frequently than once every seven years if, in his or her view, it is "likely" that the majority of those voting would "express a wish that Northern Ireland should cease to be part of the United Kingdom and form part of a united Ireland." If the result favors uniting with Ireland, then the Secretary of State is obligated to take such proposals as are necessary to the British Parliament to give effect to that result. The British and Irish Governments each committed to honor the results of a properly-conducted referendum of the majority of the people of Northern Ireland.

With respect to the freely associated states of FSM and the Marshall Islands, either may terminate the Compact of Free Association with the United States, pursuant to their respective constitutional processes, if the people represented by such government vote in a referendum to terminate and proper notice is given to the United States government. In the case of such a termination of the Compact, the United States government and the government so terminating would promptly consult with each other regarding their future relationship and the continuing level of economic assistance that the United States government would provide to the terminating government.

Given Nagorno Karabagh's similarity to many of these precedents and the need for a final determination as to the exact nature of Nagorno Karabagh's status as a state, the international community should develop an international mechanism, such as an international mediation panel, coupled with a commission of inquiry, to determine at the end of the three to five year interim period the manner in which Nagorno Karabagh will be recognized and the extent of any further commitments which may be necessary to ensure peace and security. The international mechanism should also base its determination upon the results of a referendum of all citizens of Nagorno Karabagh as identified in the 1989 census and their children, which Nagorno Karabagh and Azerbaijan would be committed to honor. Participants in the 1989 census not currently present in Nagorno Karabagh should be provided with an opportunity to participate in the referendum, including Nagorno Karabagh citizens currently or previously present in the Shaumian district.

V. Recommendations

To promote a permanent resolution of the Nagorno Karabagh conflict, the OSCE and other interested international parities should facilitate a process of intermediate sovereignty and earned recognition for Nagorno Karabagh. This process would entail a two phase approach. For the first three to five years of the process, Nagorno Karabagh would be entitled to exercise an intermediate level of sovereignty. During this period both Nagorno Karabagh and Azerbaijan would undertake to comply with a number of confidence building measures and obligations concerning matters of human rights.

To manage the period of intermediate sovereignty, the parties should undertake:

- The establishment of mechanisms for mutual cooperation and interaction such as Joint Committees providing for cooperation between the highest political levels of Nagorno Karabagh and Azerbaijan, and between technical agencies concerning rail, Postal Telegraph and Telephone, commerce, and culture. These mechanisms should also include Joint Commissions on refugee return, property restitution and compensation, border demarcation and economic cooperation, and would include the participation of an OSCE observer/facilitator. A Joint Military Commission, with international participation, should be created to plan the demilitarization of any territories to be exchanged;

- The creation of special relationships with neighboring states on matters relating to trade, economic development, education and culture, as well as the acquisition of membership in relevant international organizations and the establishment of "special interest" missions in foreign countries; and

- The exchange of territory, taking into account security considerations, designed to promote viability and the development of peaceful relations while also removing a contentious issue from the future relations between Nagorno Karabagh and Azerbaijan.

To promote mutual confidence the parties should undertake:

- The public commitment to ensure the right of return for refugees and displaced persons and create conditions conducive to their return;

- The creation of property return and restitution commissions, that would be responsible for certifying ownership to property, securing the right of return to that property, or, alternatively, arranging for exchange of the property or financial compensation. In addition, it is advisable for the parties to create a commission to assess war damages;

- The adoption and enforcement of the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols. This should be accompanied by a mechanism to assist minorities to effectively utilize the Council of Europe process for enforcing the European Convention. Relevant

United Nations Conventions should also be given full force and effect in both Nagorno Karabagh and Azerbaijan;

- The creation of a series of ombudsman positions with competence to address allegations of the infringement of minority and human rights and to comment upon the adoption, implementation and enforcement of legislation and any other state activity that may impact the exercise of minority or human rights;

- A recommitment to non-violence and the peaceful settlement of the dispute, and the permissible deployment of a small international police task force in areas of refugee and displaced persons returns and with continued joint monitoring of the demilitarized area.

To establish effective third-party oversight and policing the parties should agree to:

- The limited deployment of military and human rights observers to validate the parties' compliance with the commitments undertaken during the period of intermediate sovereignty.

After the expiry of the interim period, an international mechanism should determine whether Nagorno Karabagh has earned international recognition based upon its performance during the interim period of de facto independence with respect to the obligations concerning refugees and the protection of minorities. The interest of the people of Nagorno Karabagh in independence should be reconfirmed by a referendum.

ENDNOTES

1. See Law of the USSR Concerning the Procedure of Secession of a Soviet Republic from the Union of Soviet Socialistic Republics, Register of the Congress of the Peoples Deputies of USSR and Supreme Soviet of USSR, issue NO. 13, at 252 (April 3, 1990).

2. The four U.N. Security Council resolutions are:

> 1)Resolution 822 (1993), Adopted by the Security Council at its 3205th meeting, on 30 April 1993;
>
> 2) Resolution 853 (1993), Adopted by the Security Council at its 3259th meeting, on 29 July 1993;
>
> 3) Resolution 874 (1993), Adopted by the Security Council at its 3292nd meeting, on 14 October 1993; and
>
> 4) Resolution 884 (1993), Adopted by the Security Council at its 3313th meeting, on 12 November 1993.

3. Currently, the Minsk Group consists of its three co-chairs France, Russia, and the United States, as well as Austria, Germany, Finland, Sweden, Italy, Belarus, Turkey, Azerbaijan and Armenia.

4. Gleb Naumkim, "Azerbaijan is Not Leaving the Agreement on Collective Security," Nezavisimaya Gazeta, (February 25, 1999); Nigiar Mejidova, "Russian Facility is Killing Azerbaijanis, Obshaya Gazeta, (December 9, 1999).

5. FOREIGN OPERATIONS, EXPORT FINANCING, AND RELATED PROGRAMS APPROPRIATIONS ACT, Pub. L. No. 106-113, 113 Stat. 1501 (1999).

6. H. Rep. No. 106-254, at 46 (1999).

7. *Id*. at 47.

8. FOREIGN OPERATIONS, EXPORT FINANCING AND RELATED PROGRAMS APPROPRIATIONS ACT, Pub. L. 105-277, 112 Stat. 2681, 160 (1998).

9. H.R. 4569, 105-2th Cong., at 20 (as passed the House).

10. H. Rep. No. 105-719, at 41 (1998).

11. *See id*. at 41-43.

12. *See* S. 2334, 105-2th Cong., at 25-30 (1998) (as passed the Senate).

13. Foreign Operations, Export Financing and Related Programs Appropriations Act, Pub. L. 105-118, 111 Stat. 2386, 2397 (1997).

14. H.R. Conf. Rep. No. 105-401, at 70 (1997).

15. *See* Pub. L. 104-208, 110 Stat. 3009, at 129-132 (1996).

16. Freedom Support Act ' 907, 22 USC. ' 5812 (1992).

17. 138 Cong. Rec. 29,454 (1992).

18. *Id*. at S16,105.

19. *See* Foreign Operations, Export Financing, and Related Programs Appropriations Act, Pub. L. 104-107, 110 Stat. 704, 714 (1996) ("Notwithstanding any other provision of law, assistance may be provided for the Government of Azerbaijan for humanitarian purposes, if the President determines that humanitarian assistance provided in Azerbaijan through nongovernmental organizations is not adequately addressing the suffering of refugees and internally displaced persons.").

20. *See* H.R. Conf. Rep. 104-863, at 969 (1996).

21. *See* Foreign Operations, Export Financing, and Related Programs Appropriations Act, Pub. L. 105-118, 111 Stat. 2386, 2397 (1997).

22. H.R. Conf. Rep. No. 105-401, at 71 (1997).

[23] *See* Fiscal Year 1999 Foreign Operations Appropriations Act, Pub L. 105-277, 112 Stat. 2681, 160-61 (1998).

[24] 145 Cong. Rec. S7,945 (daily ed. June 30, 1999) (Amendment 1118 offered by Sen. Brownback).

[25] 145 Cong. Rec. S7,840 (daily ed. June 30, 1999) (statement of Sen. Brownback). *See also id*. at S7,873 (statement of Sen. Hutchinson) ("There are a number of American jobs that will be dependent on our keeping a good relationship with Azerbaijan.")

[26] *See id*. at 7,868-9.

[27] HURST HANNUM, AUTONOMY, SOVEREIGNTY, AND SELF DETERMINATION: THE ACCOMMODATION OF CONFLICTING RIGHTS 45 (190).

[28] Western Sahara, 1975 I.C.J. 3, 31-33 (Advisory Opinion, Jan. 3).

[29] Case Concerning the Frontier Dispute (Burkina Faso v. Mali), 1986 I.C.J. 554, 566-67 (Dec. 22).

[30] Case Concerning East Timor (Port. v. Austr.), 1995 I.C.J. 90 (June 30).

[31] Article 1, common to both the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights reads:

> 1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development;
> 2. The States Parties to the present Covenant ... shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United nations.

International Covenant on Civil and Political Rights, 16 Dec. 1966, art. 1, 999 U.N.T.S. 171; International Covenant on Economic, Social and Cultural Rights, 16 Dec. 1966, art. 1, 993 U.N.T.S. 3.

[32] U.N. Commission of Human Rights, Res. 1993/23, Succession of States in Respect of International Human Rights Treaties.

[33] U.N. General Assembly Resolution 2625 (XXV), U.N. GAOR, 25th Sess., Supp. No. 28, at 124, U.N. Doc. A/8028 (1970).

[34] The United Nations Economic and Social Cooperation Organization (UNESCO) defines "people" as individuals who relate to one another not just on the level of individual association, but also based upon a shared consciousness, and possibly with institutions that express their identity. UNESCO considers the following indicative characteristics in defining people: (a) a common historical tradition; (b) religious or ethnic identity; (c) cultural homogeneity; (d) linguistic unity; (e) religious or ideological affinity; (f) territorial connection; and (g) common economic life. *See* Patrick Thornberry, *The Democratic or Internal Aspect of Self-Determination, in* MODERN LAW OF SELF-DETERMINATION 102, 124 (Christian Tomuschat ed., 1993).

[35] Lea Brilmayer, *Secession and Self-Determination: A Territorial Interpretation*, 16 YALE J. INT'L L. 177, 178-79 (1991).

[36] Ved Nanda, *Self-Determination Under International Law: Validity of Claims to Secede*, 13 CASE W. RES. J. INT'L L. 257, 276 (1981).

[37] Case Concerning the Frontier Dispute (Burkina Faso v. Mali), 1986 I.C.J. 554, 565 (Dec. 22). In the Frontier Dispute Case, the International Court of Justice acknowledged an "apparent contradiction" between the principles of *uti possidetis* and self-determination. *Id.* at 567. But the Court did not elaborate on this

statement because it was limited by an agreement of the parties to resolve their dispute on the basis of the "principle of intangibility of frontiers inherited from colonization." *Id*. at 565.

38. *See* Curtis G. Berkey, *International Law and Domestic Courts: Enhancing Self-Determination for Indigenous Peoples*, 5 HARV. HUM. RTS. J. 65, 79 n.88 (1992); Deborah Z. Cass, *Re-Thinking Self-Determination: A Critical Analysis of Current International Law Theories*, 18 SYRACUSE J. INT'L L. & COM. 21 (1992); Antonio Cassese, *The Self-Determination of Peoples, in* THE INTERNATIONAL BILL OF RIGHTS 92, 101 (Louis Henkin ed., 1981); Thomas M. Franck, *Postmodern Tribalism and the Right to Secession, in* PEOPLES AND MINORITIES IN INTERNATIONAL LAW 3, 13-14 (Catherine Brolmann, Rene Lefeber & Marjoleine Zieck eds., 1993); Otto Kimminich, *A "General" Right of Self-Determination?, in* MODERN LAW OF SELF-DETERMINATION 83 (Christian Tomuschat ed., 1993); Frederic L. Kirgis, Jr., *The Degrees of Self-Determination in the United Nations Era*, 88 AM. J. INT'L L. 304 (1994); W. OFUATEY-KODJOE, THE PRINCIPLE OF SELF-DETERMINATION IN INTERNATIONAL LAW 181-90 (1977); Gary J. Simpson, *Judging the East Timor Dispute: Self-Determination at the International Court of Justice*, 17 HASTINGS INT'L L. & CONTEMP. L. REV. 323, 340 (1994); Christian Tomuschat, *Self-Determination in a Post-Colonial World, in* MODERN LAW OF SELF-DETERMINATION 1, 2-8 (Christian Tomuschat ed., 1993).

39. *See, e.g.*, Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, Annex to GA Res. 2625, UN GAOR, 25th Sess., Supp. No. 28, at 121, U.N. Doc. A/8028 (1970), reprinted in 9 ILM 1292 (1970).

40. *See, e.g.*, Vienna Declaration and Programme of Action, pt. I, para. 2, U.N. Doc. A/CONF.157/24 (pt. I) (1993), *reprinted in* 32 ILM 1661 (1993).

41. *See, e.g.*, Decision of the Supreme Court of Canada in the Matter of Section 53 of the Supreme Court Act, R.S.C. 1985, C. S-26, and in the matter of A Reference by the Governor in Council Concerning Certain Questions Relating to the Secession of Quebec from Canada, as set out in Order in Council P.C. 1996-1997, dated September 30, 1996, at para. 154 (emphasis added).

42. *See, e.g.*, Conference on Yugoslavia Arbitration Commission Opinion No. 1, Opinions on the Questions Arising from the Dissolution of Yugoslavia, *reprinted in* 31 I.L.M. 1494-97 (Nov. 1992).

43. U.N. G.A. Res. 2625(XXV), U.N. GAOR, 25th Sess., Supp. No. 28, at 121, U.N. Doc. A/8028 (1970) [emphasis added].

44. *Id*. A similar clause was included in the 1993 Vienna Declaration of the World Conference on Human Rights, which was accepted by all United Nations member states. However, the Vienna Declaration did not confine the list of impermissible distinctions to those based on "race, creed or color," indicating that distinctions based on religion, ethnicity, language or other factors would also trigger the right to secede. Vienna Declaration and Programme of Action, pt. I, para. 2, U.N. Doc. A/CONF.157/24 (pt. I) (1993), *reprinted in* 32 ILM 1661 (1993).

45. Decision of the Supreme Court of Canada, at para. 154 (emphasis added).

46. *Id*., at para. 154.

[47.] Conference on Yugoslavia Arbitration Commission Opinion No. 1, Opinions on the Questions Arising from the Dissolution of Yugoslavia, *reprinted in* 31 I.L.M. 1494-97 (Nov. 1992).

[48.] Frederic L. Kirgis, Jr., *The Degrees of Self-Determination in the United Nations Era*, 88 AM. J. INT'L L. 304 (1994).

[49.] Committee of Jurists, Report on the Aaland Islands Question, League of Nations O.J. Spec. Supp. 3, at 6 (1920).

[50.] Montevideo Convention on Rights and Duties of States, Art. 1, Signed Dec. 26, 1933, 49 Stat. 3097, 300.

[51.] LEE C. BUCHHEIT, SECESSION: THE LEGITIMACY OF SELF-DETERMINATION 217 (1978); MICHLA POMERANCE, SELF-DETERMINATION IN LAW AND PRACTICE 73-74 (1982).

[52.] *See supra* notes 40-42 and accompanying text.

[53.] *See* HAIG E. ASENBAUER, ON THE RIGHT OF SELF-DETERMINATION OF THE ARMENIAN PEOPLE OF NAGORNO KARABAKH 98 (1995).

[54.] U.N. G.A. Res. 2625(XXV), U.N. GAOR, 25th Sess., Supp. No. 28, at 121, U.N. Doc. A/8028 (1970).

[55.] Armen Tamzarian, *Nagorno Karabagh's Right to Political Independence Under International Law: An Application of the Principle of Self-Determination,* 24 S.W. U. L. REV. 183, 208 (1994).

[56.] *Id*.

[57.] *See* Armen Tamzarian, *Nagorno Karabagh's Right to Political Independence Under International Law: An Application of the Principle of Self-Determination*, 24 S.W. U. L. REV. 183, 201 (1994).

[58.] Montevideo Convention on Rights and Duties of States, Art. 1, Signed Dec. 26, 1933, 49 Stat. 3097, 300.

[59.] THE WORLD ALMANAC AND BOOK OF FACTS 2000 878-879 (1999).

[60.] A Delegation from Nagorno Karabagh was invited to participate, along with Armenia, Azerbaijan, Russia, Germany, France, the Czech Republic, Sweden, Italy, Belarus, the US, and Turkey in a peace conference for Nagorno Karabagh to be held in Minsk. A series of documents related to the peace negotiations have born the signature of officials of Nagorno Karabagh represented as a separate entity. These include (1) the Timetable of Urgent Steps proposed by the chairman of the CSCE Minsk Group, on June 14, 1993; (2) the Moscow Communique of February 18, 1994, following negotiations among the defense ministers of Armenia, Azerbaijan and the representative of Nagorno Karabagh's Army of Defense; (3) the Bishkek Protocol of May 9, 1994, as the fruit of negotiations among the parliament speakers of Armenia, Azerbaijan, and Nagorno Karabagh undertaken within the Commonwealth of Independent States Interparliamentary Assembly Mediation Mission; and (4) the Agreement on Cease-Fire, mediated by Russia on May 12, 1994, among the ministers of defense of Armenia and Azerbaijan and the commander of Nagorno Karabagh's armed forces.

[61.] *See supra* note 58 and accompanying text.

[62.] 48 USC. §1681 et seq.

[63.] In the case of the Rambouillet/Paris accords with respect to Kosova, the international community attempted to construct a highly complicated set of interrelationships between Kosova and the Serb Republic, between Kosova and the Federal Republic of Yugoslavia (FRY), and within Kosova among the Kosova Albanians and the Serbian minority. These mechanisms were based on

the Dayton Accord mechanisms and were generally perceived to be unworkable and likely to enhance the tension between the parties rather then creating an environment suitable to a long term resolution of the conflict. As a result, during the current interim administration of Kosova, the UN Mission in Kosova has essentially rejected the approach of the Rambouillet/Paris Accords relating to joint FRY/Kosova and Republic of Serbia/Kosova institutions and has rather sought to create a Kosova-wide Governing Council, inclusive of all minority representatives.

64. In addition, the British-Irish Intergovernmental Conference and the British Irish Agreement establish commitments between Britain and Ireland to honor their obligations and not encroach on the affairs of Northern Ireland.

65. Art. 50.

66. The Indonesian Central Government, the United Nations and the Transitional Council were also to have consulted with each other and coordinated the transition of powers to the SARET, including transitional security issues.

67. Set of Ideas on an Overall Framework Agreement on Cyprus, 1992, Art. VIII, para. 94. The Overall Framework Agreement also lays out a number of specific bi-communal committees to foster relations and promote goodwill between the Greek Cypriot and Turkish Cypriot communities during the transition period, including ones (1) to review school textbooks and recommend removal of material contrary to the promotion of goodwill and close relations; (2) to survey the water situation and make recommendations for meeting the water needs of Cyprus; (3) to promote the restoration of historical and religious sites throughout Cyprus and (4) to undertake a population census of both communities. *See Id.,* Appendix. Each of the bi-communal committees would be permitted to request expert assistance as required.

68. Constitution of Bosnia and Herzegovina, Art. III, paras. 2(a) and (d).

69. See Framework Agreement, Art. 55. While this provision gives only a limited degree of flexibility to conduct foreign affairs independent of the Indonesian Central Government, the ability to obtain international development assistance has been central to East Timor in its urging of the international community, and ASEAN nations in particular, to provide economic assistance and support to East Timor.

70. Set of Ideas on an Overall Framework Agreement on Cyprus, 1992, Art. III(A), para. 26(a).

71. Id. at Art. II, para. 14, Art. VII, para. 90 and Appendix, para. 9. Cf. id., Appendix, para. 10 ("Both communities will … terminate all current or pending recourse before an international body against the other community or Greece or Turkey.")

72. 48 USC. §1681 et seq.

73. Article V of the Overall Framework Agreement on Cyprus also provides detailed provisions regarding territorial adjustments, which proved the main stumbling block to resolution of the conflict in 1992.

74. Annex 7, esp. Art. XII.

75. Set of Ideas on an Overall Framework Agreement on Cyprus, Art. VI(A).

76. Strand One, Paragraph 1.

77. If an individual holding office fails to use democratic and non-violent means in the exercise of his or her duties, then that individual can be removed from office.

78. These rights include traditional universally recognized rights, such as freedoms from

torture and of religion and more novel rights such as the right to an adequate standard of living and the rights of the child.

79. *See* Annex 6.

80. *See* Annex 1A.

81. *See* Annex 1B.

82. *See* Annexes II and V.

83. *See* Annex 11.

84. *See* Set of Ideas on an Overall Framework Agreement on Cyprus, at Art. IV.

85. See General Framework for Peace Agreement, Annex 1A.

86. *See*, Annex 3.

87. *See*, Annex 7.

88. *See*, Annex 11.

89. *See* Set of Ideas on an Overall Framework Agreement for Cyprus, Art. IV, para.63.

90. *See* Overall Framework Agreement for Cyprus. at para. 64-65.

91. During the negotiations, US Secretary of State Albright provided the Kosova delegation with a letter confirming that this provision envisioned the holding of a referendum wherein the people of Kosova would vote on the nature of the final status of Kosova. No provision was made for determining who could in fact vote in the referendum, but it would presumably include all Kosovars present in Kosova before the start of the conflict in 1998.

92. At the initiative of the United Nations, the date of the referendum was extended in order to ensure the existence of a proper environment for the referendum.

93. The United Nation's involvement ranged from having its logo on the ballot to responsibility for tallying and announcing the results of the vote.

94. The East Timor Popular Consultation Agreement Regarding Security specifically addressed the establishment of a secure environment in which to conduct the referendum. While the Indonesian government had primary responsibility, they were also obligated to neutrality. The United Nations set up a Commission on Peace and Stability that created a code of conduct for the parties to abide by before, during and after the referendum process, including disarmament of paramilitary groups. Under this agreement, the United Nations had the sole authority to determine if a peaceful environment existed in which to proceed with the vote, which it exercised by delaying the vote nearly three weeks in the hopes of achieving a more stable environment.

95. The ballot question read: "Do you accept the proposed special autonomy ACCEPT for East Timor within the Unitary State of the Republic of Indonesia OR Do you reject the proposed special autonomy REJECT for East Timor leading to East Timor's separation from Indonesia?"

96. The Good Friday Agreement required that following question be put to the people of Northern Ireland: "Do you support the agreement reached in the multi-party talks on Northern Ireland and set out in Command Paper 3883?" Validation, Implementation, and Review Paragraph 2.

Annex A
The Public International Law & Policy Group

Founded in 1996, the Public International Law & Policy Group is a non-profit organization primarily composed of public international lawyers and foreign relations professionals committed to promoting the rule of law in international relations. A number of the Group's members have previously practiced as legal advisors with various Ministries of Foreign Affairs. The Group provides public international legal aid on a pro bono basis to states in transition, newly independent states, and developing states at various levels of government, as well as to governmental delegations to international organizations. On occasion, the Group also provides legal assistance to non-governmental organizations.

New England Center for International Law & Policy

The Center for International Law & Policy at New England School of Law was established in 1996 to promote the study and understanding of the relationship between international law and policy, with special emphasis on issues vital to the national interest. To this end, the Center sponsors symposia, research, publication, teaching, pro bono assistance, and the dissemination of knowledge in these areas.

Annex B

Contributing Attorneys

Nancy E. Furman is an associate in the Washington, D.C. office of Wilmer, Cutler & Pickering. She specializes in corporate transactions and has substantial experience in mergers and acquisitions, public and private financing, corporate restructuring, e-commerce and international matters, including privatization transactions with the government of the Republic of Armenia and the representation of Kosovo on issues of public international law. Ms. Furman has served as a law clerk to Chief Judge Charles P. Sifton of the U.S. District Court for the Eastern District of New York. Ms. Furman received her J.D. from Harvard Law School and her B.A. from Yale University.

Maura E. Griffin is an associate in the Washington, D.C. office of Wilmer, Cutler & Pickering. Ms. Griffin's practice includes a focus on international corporate transactions and aviation-related matters. She has also been involved in public international law issues such as representation of human rights organizations and the government of Kosovo. Ms. Griffin has a background in international environmental law and development law and finance, including work with Conservation International. She received her L.L.M. in International and Comparative Law from the Georgetown University Law Center, her J.D. from Tulane University, and her B.A. and Certificate in International Studies from the College of the Holy Cross. Prior to obtaining her J.D., Ms. Griffin worked with the Phelps Stokes Fund where she designed and administered US Information Agency international visitor projects, and with the Carnegie Endowment for International Peace where she coordinated its foreign policy forum.

Christopher Goebel is an associate with Curtis, Mallet-Prevost, Colt & Mosle specializing in international finance, including capital markets and infrastructure projects in developing countries. He has also advised a number for foreign governments on matters of public international law, including Bosnia-Herzegovina, Macedonia and Estonia and served as legal advisor to the Underrepresented Nations and Peoples Organization in the Hague. He was also a Fulbright Scholar at the Institut d'Etudes Politiques de Paris, concentrating on issues relating to ethnic conflict. Mr. Goebel received his J.D. from Harvard and his B.A. from Cornell University and is a member of the French Society for International Law.

Bruce Janigian, A.B., J.D., LL.M., heads the international and government law practices of the Weintraub Genshlea & Sproul Law Corporation. He is the United States Legate of the European Academy of Arts and Sciences. Mr. Janigian was vice president and director of the Salzburg Seminar, as well as holding Fulbright and visiting professorships in international law at the University of Salzburg. Formerly Attorney Adviser to the US Agency for International Development, he has held executive appointments for the State of California, and was a visiting scholar at the Hoover Institution on War, Revolution and Peace. Mr. Janigian received his B.A. from the University of California, Berkeley, his J.D. from the University of California, Hastings, and his LL.M. in

International and Comparative Law from George Washington University.

Andrew J. Lorentz is an associate in the Brussels, Belgium office of Wilmer, Cutler & Pickering specializing in international corporate transactions and European competition law. Mr. Lorentz has substantial experience in mergers and acquisitions, privatizations, and project finance matters. He has also represented foreign governments, including Kosovo, the United Arab Emirates, and the Sultanate of Oman, on public international law, international finance, and infrastructure projects. Mr. Lorentz has a background in military and intelligence affairs, having served as an intelligence officer in the US Army and the Drug Enforcement Administration of the US Department of Justice. Mr. Lorentz received his J.D. from Georgetown University, an M.A. in International Relations from Boston University, and his B.A. from the University of Pennsylvania.

Robert H. Lantz recently accepted a position as commercial counsel at COMSAT Corporation where he will serve as counsel to COMSAT's operating subsidiaries in Russia, China, India, Turkey, and Brazil. Previously, Mr. Lantz was an associate at Wilmer, Cutler & Pickering in Washington, D.C., where he represented clients in Central and Eastern Europe and Latin America in corporate transactions, including privatizations, project finance, international lending, and equity investments. He is a member of the adjunct faculty of the Georgetown University Law Center where he teaches International Business Transactions. Mr. Lantz received his LL.M. in International and Comparative Law from Georgetown University, a J.D. from the McGeorge School of Law, an M.B.A. from National University, and his B.A. in international relations from California State University, Sacramento.

Michael P. Scharf is Professor of Law and Director of the Center for International Law and Policy at the New England School of Law, and is currently Visiting Professor of International law at the Fletcher School of Law and Diplomacy. Previously he served as Attorney-Advisor for United Nations Affairs at the US Department of State, and as a member of the US Delegation to the U.N. Commission on Human Rights and to the Sixth (Legal) Committee of the U.N. General Assembly. Prof. Scharf has published a number of texts relating to advanced issues of public international law, state succession and self-determination. He holds a J.D. and B.A. from Duke University.

Paul R. Williams teaches international law and international relations at the American University. Previously he held the position of Senior Associate with the Carnegie Endowment for International Peace, and served as an Attorney-Advisor in the Office of the Legal Advisor for European Affairs in the United States Department of State. During the Dayton Peace Negotiations he served as the Legal Advisor to the Bosnian delegation, and during the Rambouillet/Paris Negotiations he served as Legal Advisor to the Kosovar delegation. At other times he has advised the governments of Macedonia and Estonia on matters of public international law. Mr. Williams holds a Ph.D. from the University of Cambridge, a J.D. from Stanford Law School, and an A.B. from the University of California at Davis.