

LEGAL ASPECTS OF THE NAGORNO-GARABAGH CONFLICT

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Abstract

The Nagorno-Garabagh conflict has been going on since 1988. The conflict between Armenia (although it denies its involvement in the conflict claiming that it is just “an interested party”) and Azerbaijan is considered to be the most important conflict in the South Caucasus. Though the object of this conflict is Nagorno-Garabagh Autonomous Region (the region was called so as an administrative-territorial area during the Soviet time), seven other districts of Azerbaijan which have nothing common with this autonomous region are also occupied by the Armed Forces of Armenia. So, as a result of the conflict approximately 20% of the territory of the Republic of Azerbaijan is still under occupation and more than one million Azerbaijanis have become refugees and internally displaced persons. In May 1994 the parties concluded cease-fire agreement which is still in force today. The Republic of Azerbaijan states that Armenia should be recognized as an aggressor according to the Charter of the UN, but it is not the case yet. The Republic of Armenia claims that the Armenians of Nagorno-Garabagh are entitled to secede from Azerbaijan and build their own state on the base of the self-determination principle of international law. Now the Minsk Group of the OSCE is exercising a mediation function between the parties to the conflict. No political agreement on the settlement of the conflict has been achieved yet.

Keywords: Nagorno-Garabagh conflict, territorial integrity, self-determination, peoples, minorities, occupation, *uti possidetis*.

Introduction

Before speaking about the legal aspects of the Nagorno-Garabagh conflict, we should tackle some issues concerning the legal status of this territory. In Soviet times this enclave, called Nagorno -Garabagh Autonomous Region (hereinafter referred as NGAR) had no direct land border with Armenia. First of all, it should be mentioned that after the collapse of the USSR, **Nagorno-Garabagh remained within the state of Azerbaijan in terms of international law.** In their struggle for political status of the region, the Armenian side illegally claimed either the annexation of this area to the Republic of Armenia or its independence. According to their major arguments, prior to the conflict 75% of the population of Nagorno-Garabagh

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comprised the Armenians and they were imposed to a socio-economic discrimination and cultural exploitation by Azerbaijan for decades. As for the Republic of Azerbaijan, it fairly demands the protection of its territorial integrity on the base of the universally recognized norms and principles of international law. At the same time, Azerbaijan offers high degree of autonomy for Nagorno-Garabagh only within its territorial integrity. On the other hand, Armenia continuously insists that Nagorno-Garabagh had historically been their native land and therefore, despite the fact that NGAR had been within the former Azerbaijanian SSR (Soviet Socialistic Republic), it can not remain within the independent state of Azerbaijan after the collapse of the USSR. According to the official position of Armenia in this regard the boundaries in the former USSR Republics were just of an administrative character. Basic legal aspects of the conflict can be summarized as above. But, what response do the national law valid during the Soviet period as well as international law give to the allegations of Armenia?

Firstly, it should be mentioned that according to the official position of the Republic of Azerbaijan Armenia must be recognized as a directly participating party to this conflict. But, Armenia declares that this is a conflict between Azerbaijan and Nagorno-Garabagh, and Armenia is involved here just as «an interested party». Furthermore, they declare that the Armenian population of Nagorno-Garabagh has the right to self-determination and they are entitled to establish their own independent state in accordance with this right.

Since this conflict was an internal affair of the USSR prior to its collapse, relevant norms of the Soviet law were applicable to this conflict. For analysis of the conflict from the legal point of view, I will address the last Constitution of the USSR of 1977.

After the collapse of the USSR the nature of the conflict has changed. Therefore, relevant norms and principles of international law should be applied to the conflict. I will tackle these issues from two aspects: 1) Firstly, Nagorno-Garabagh conflict will be discussed as an internal affair of the Republic of Azerbaijan; here I will touch upon the issue of national minorities according to international law and examine whether the Armenian population of Nagorno-Garabagh was entitled to secede from Azerbaijan; 2) Secondly, the Nagorno-Garabagh conflict will be tackled as an international armed conflict between the Republic of Armenia and the Republic of Azerbaijan.

1. Legal assessment of the Nagorno-Garabagh conflict according to the Soviet law

1.1. Hierarchy of regional unions by their status according to the Constitution of the USSR

According to Art. 71 of the Constitution of the USSR from 1977, the Soviet Union consisted of 15 union republics and these republics stood on the highest level of hierarchy of regional unions, established on national basis. The abovementioned highest level of hierarchy was followed by the undermentioned regional unions, established on a national basis: a) autonomous republics; b) autonomous regions (oblasti); c) national regions (okrugi). According to Art. 72 of the Constitution, **only union republics** were entitled to secede freely from the USSR. On the threshold of the demise of the USSR, a new comprehensive law,

regulating the mechanism of such secession, was adopted (we will touch upon this law again below).

1.2. The Nagorno-Garabagh conflict as an internal affair of the USSR

Prior to the collapse of the USSR, the Nagorno-Garabagh conflict was not an issue of international nature, but rather an internal affair of the USSR. Notwithstanding this, the Armenian side was trying to apply the right to «self-determination» to prove their arguments. However, as the conflict was developing from the very beginning within the framework of the communist ideology in the USSR, discussions in this field were conducted not on the base of the right to self-determination, as stipulated by international law, but upon «the Leninist principle on self-determination». As the relevant Leninist principle was more popular in the USSR than the documents adopted by the UN in this field and as it supported the right to self-determination for all nations (including full secession), supporters of the secession of Nagorno-Garabagh were benefiting much from this idea. Naturally, such idea had nothing common with the norms and principles of international law concerning the right to self-determination.

2. Did the USSR Constitution entitle Nagorno-Garabagh to secede from the Azerbaijanian SSR?

2.1. Status of Nagorno-Garabagh in the USSR Constitution

Firstly, we should investigate the status of Nagorno-Garabagh according to this Constitution. According to Art. 86 of the Constitution Nagorno-Garabagh was an autonomous region. The Article states that Autonomous Region is an integral part of the territory of the respective Union Republic. In Art. 87.3. of the Constitution Nagorno-Garabagh is mentioned as an autonomous region constituting an integral part of the Azerbaijanian SSR.

2.2. Secession possibilities for Nagorno-Garabagh

As already mentioned, only the union republics were entitled to secession and such right could be exercised in respect to the entire USSR. But the Armenians of Nagorno-Garabagh were claiming secession from the Azerbaijanian SSR and annexation to the Armenian SSR. The question is whether the Armenian population of Nagorno-Garabagh was entitled to put forward such a demand on the base of the USSR Constitution? In this respect, like the Constitution of the former Yugoslavia, the USSR Constitution also contained relevant Art. 78. That Article stated:

„The territory of a Union Republic may not be altered without its consent. The boundaries between the Union Republics may be altered by mutual agreement of the Republics concerned, subject to ratification by the Union of Soviet Socialist Republics.”

As it is evident, unlike autonomous territories, territorial integrity of the union republics was regulated by the constitution and any change to it could be made only by consent of the relevant republic. On the other hand, there was no agreement between the Azerbaijanian SSR and the Armenian SSR on the secession of the Nagorno-Garabagh Autonomous Region from the Azerbaijanian SSR.

Resolution adopted in 1989 by the Supreme Soviet of the Armenian SSR on annexation of Nagorno-Garabagh to Armenia was the highest point of these processes, which completely contradicted to the provisions of the abovementioned constitution.¹ Taking into consideration that in 1988, as the conflict broke out, the USSR still existed as a state and its constitution was still in force, one understands the anti-constitutional nature of the demand of the Nagorno-Garabagh Armenians. Moreover, the special meeting of the Presidium of the Supreme Soviet of the USSR, held on 18 July 1988, discussed a request of the Council of the NGAR on secession of Nagorno-Garabagh from the Azerbaijanian SSR and its annexation to the Armenian SSR, and decided to keep the NGAR in the composition of the Azerbaijanian SSR.

2.3. Alma-Ata Declaration of 21.12.1991 and the issue of territorial integrity

When we compare dismembration processes in the former Yugoslavia and the USSR, it becomes evident that unlike Yugoslavia, union republics of the USSR² regulated the process of dismembration in line with international law, i.e. through the Alma-Ata Declaration adopted on 21 December 1991. Preamble of the declaration says that *the states adopt the declaration by recognizing and respecting territorial integrity as well as inviolability of existing borders of each of the signatory states*. This provision once more confirms that union republics had taken an obligation to recognize existing borders even upon collapse of the USSR. By not recognizing territorial integrity of Azerbaijan in its further practice the Republic of Armenia has violated also this provision.

Conclusion

In conclusion, we may say that valid legislation during the Soviet period did not envisage possibilities of secession for autonomous regions, and borders among union republics could be changed only upon their consent. Taking all these into consideration, it is noteworthy that separatist actions of the Armenians of Nagorno-Garabagh have violated relevant provisions of the USSR Constitution as well as territorial integrity of the Azerbaijanian SSR within the USSR.

¹ Although the Republic of Armenia claims to be neutral in the conflict, the abovementioned resolution of the Supreme Soviet of the Armenian SSR has not been cancelled up today. Even in February of 2003, referring to this resolution, one of the Yerevan courts stated that the resolution had resolved not only the issue of annexation of Nagorno-Garabagh to Armenia, but also the naturalization of the Nagorno-Garabagh Armenians (i.e. citizens of Azerbaijan) as citizens of the Republic of Armenia. This ruling of the court resolved disputes around the citizenship of President Robert Kocharyan (as he was born in Nagorno-Garabagh, his candidacy did not meet the criteria of citizenship in presidential elections). In Azerbaijan this ruling was criticized as an act against territorial integrity of Azerbaijan. In Armenia it was assessed as an act against sovereignty and independence of Nagorno-Garabagh (!) and condemned.

² International Legal Materials (1992), p. 148. These republics were as follows: The Republic of Azerbaijan, the Republic of Armenia, the Republic of Belarus, the Republic of Kazakhstan, the Republic of Moldova, Russian Federation, the Republic of Tajikistan, the Republic of Turkmenistan, the Republic of Uzbekistan and Ukrain. At that time 3 Baltic republics had already gained independence and been admitted to the UN on 17.09.1991

3. Assessment of the Nagorno-Garabagh conflict upon the relevant documents of international law

Assessment of the Nagorno-Garabagh conflict is not possible without analyzing relevant norms and principles of international law. The importance of this issue is explained by the fact that it covers the contradiction between two important principles of international law: territorial integrity of states and self-determination of peoples.

3.1. Regulation of self-determination by international law

After World War II, the right to self-determination began to change from political concept into legal principle. This principle began to be reflected in fundamental documents of the contemporary international law. As an example, we can refer to the UN Charter, Covenant on civil and political rights as well as Covenant on economic, social and cultural rights. But issues concerning the right to self-determination are not explained in details in these specific documents. Therefore, the UN General Assembly pledged itself to resolve this task. In this connection, we can enumerate resolutions of the UN General Assembly 1514 (XV), 1541 (XV) and 2625 (XXV). These resolutions established close relationship between the right to self-determination and the process of decolonization, and the International Court of Justice confirmed that this aspect of the right to self-determination constituted a part of international law. Nevertheless, it should be mentioned, that there are significant differences between the provisions of resolutions 1514 and 2625.

It becomes evident from the text of several international documents that the right to self-determination goes beyond the notion of colony. Article 1 of the abovementioned Covenants state that peoples enjoy the right to self-determination.³ Resolution 2625 states that the right to self-determination is the right, which can be applied to all peoples and is the duty, which shall be followed by all states.⁴ It should be mentioned that the nature and character of the right to self-determination can always cause tension among the states.

3.2. Contradictions between the right to self-determination and territorial integrity

According to some international lawyers, there is a conflict between the principles of self-determination and territorial integrity. This approach to the issue raises a question which of these principles should prevail. It should be pointed out that nearly in all international legal documents provisions stipulating the right to self-determination are followed by the provisions emphasizing inviolability of borders and territorial integrity of sovereign states. For example:

The General Assembly (GA) Resolution 1514 (XV) „The Declaration on Granting of Independence to Colonial Countries and Peoples“, Abs. 6: “Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations”.

³ International Covenant on Civil and Political Rights (1976) 999 UNTS 171, 173; International Covenant on Economic, Social and Cultural Rights (1976) 993 UNTS 3, 5.

⁴ Christian Tomuschat „Völkerrecht“, Baden-Baden 2001, p.81.

Helsinki Final Act dated from the 1st of August 1975 also limits self-determination by territorial integrity of states. 8th principle of this act on equal rights and the self-determination of peoples states:

“The participating States will respect the equal rights of peoples and their right to self-determination, acting in all times in conformity with the purposes and principles of the Charter of the United Nations and with relevant norms of international law, including those relating to territorial integrity of States”.

Obligations reflected in this document have been further reiterated in the Paris Charter (1990), Final Declaration of the Lisbon Summit (1996) and the European Security Charter (Istanbul Summit). All these provisions allowed some lawyers and states to prove the prevalence of territorial integrity over self-determination. Moreover, it was suggested that provisions of resolution 1514 only apply to «the peoples of colonies». Professor Gros Espiell wrote in this connection: „*The right to self-determination of peoples does not apply to peoples which are not under colonial or alien domination, since Resolution 1514 (XV) or other UN instruments condemn any attempt aimed against...territorial integrity of a country*”. Conclusion stemming from such logic is that today self-determination is of no importance, as there are no colonies any more. Nevertheless, such interpretation of self-determination is rejected. Because, this interpretation would pose a danger on universality of this principle as per clause 1 of resolution 2625, which stipulates self-determination as a fundamental right for all peoples. However, even in this document self-determination is limited by conditions on territorial integrity. Clause 7 of this resolution says:

“Nothing in the foregoing paragraph shall be construed as an authorizing or encouraging any action, which would dismember or impair, totally or in part, the territorial integrity or political union 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”.

Having read this provision thoroughly, one can say that this could serve as the only provision, to which the Armenian population of Nagorno-Garabagh might refer. However, as mentioned above, the Armenian population of Nagorno-Garabagh blamed official Baku for social-economic discrimination and cultural exploitation. In fact, this provision of the resolution 2625 does not prohibit a secession as a result of an internal conflict. When reading this provision from the aspect of the right to self-determination as a human right, we may conclude upon textual interpretation of the resolution that secession is not prohibited as an action in contradiction to international law. As such, provision concerning protection of territorial integrity of states envisages a reservation which states that territorial integrity of a state is protected if it respects the right to self-determination and possesses a government representing the whole people belonging to the territory without distinction as to race, creed or colour. We should mention with regard to this provision, i.e. representative government, that Nagorno-Garabagh was the only autonomous region in the USSR, represented in the Supreme Soviet of the Azerbaijanian SSR by deputy chairman. In general, Nagorno-Garabagh was represented in the Supreme Soviet of the Azerbaijanian SSR by 10 MPs of the

Armenian nationality.⁵ Moreover, number of the Armenian MPs in the Regional Council of Nagorno -Garabagh exceeded the number of the Azerbaijani MPs due to predominance of the Armenian population in the region.⁶

According to Karl Doebling, a German international lawyer, ethnic groups may have the right to secession only if they are exposed to an excessive discrimination. This means that in case of systematic gross violation of human rights and absence of any state mechanism against such violation, national minorities can benefit from the right to self-determination and establish their own state. But, the Armenian population of Nagorno-Garabagh was not exposed to any violation of human rights and their actions bear separatist character.

3.3. Was the Armenian population of Nagorno-Garabagh entitled to secede from Azerbaijan for establishing their own state as national minority?

a) Difference between the notions of people and national minority

After collapse of the USSR the Armenian population of Nagorno-Garabagh has changed their previous position. If previously they aimed at a secession from Azerbaijan and annexation to Armenia, now they claim to establish an independent state upon the right to self-determination of peoples. However, in this case it is important to take into consideration the difference between the rights of «**peoples**» and «**minorities**». In all documents of international law the right to self-determination is granted only to peoples. “People” is any group living on the territory of any state and building majority of its population. Only in this sense people are entitled to self-determination and creation of their own state. As to minorities (national, ethnic, linguistic, religious, etc.), they are not entitled to determine their political status. In this connection, Art. 27 of Covenant on civil and political rights states:

“In those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.”

Declaration of the UN GA on rights of national, ethnic, religious and linguistic minorities, dated from 18.12.1992, does not either grant to minorities right to self-determination. Article 2 of this declaration contains a similar provision on the rights of minorities. Article 8 para. 4 of the declaration is as follows:

“Nothing in the present Declaration may be construed as permitting activity contrary to the purposes and principles of the United Nations, including sovereign equality, territorial integrity and political independence of States”.

The Armenian population, living in Azerbaijan, are ethnic minorities like Russians, Georgians, Ukrainians, Jewish and other ethnic minorities.⁷ The Armenian population of

⁵ Interestingly, on 17th June 1988, as the Supreme Soviet of the Azerbaijanian SSR rejected the request on secession of Nagorno-Garabagh from Azerbaijan, 17 MPs of the Armenian origin from constituencies beyond Nagorno-Garabagh also voted for this decision. See, O. Luchterhandt „Das Recht der Berg-Karabachs Armenier auf Selbstbestimmung aus völkerrechtlicher Sicht“. Hamburg 1992, p.14

⁶ 110 MPs out of 140 were Armenians by nationality. See., O. Luchterhandt, p.13.

⁷ Armenians comprise 2% of the total population of Azerbaijan.

Nagorno-Garabagh can be afforded only abovementioned rights (Art. 27 of the Covenant). This means that they are entitled to determine their status for effective participation in political, social, economic, cultural, religious and public life of Azerbaijan. They may not commit any action, which might pose a danger to sovereignty and territorial integrity of the Republic of Azerbaijan according to international law.

b) Examples from history

In 1921, as the dispute over territorial integrity of Finland and the right to self-determination of the population of Åland Islands (Åhvenanmaa), mainly consisting of Swedes, was investigated, a report of International Lawyers' Commission prepared for the Council of the League of Nations, concluded that compared to Finns the population of Åland Islands was just a «national minority», not «people». The report of the commission stated furthermore that regulations applied to the people can not be applied to minorities. The most important conclusion was that minorities are not entitled to self-determination.⁸ This report was submitted to the Council of the League of Nations. The Council approved the report and attached it to its resolution. According to that resolution, sovereignty of Finland over Åland Islands was recognized. The resolution also called for according of guarantees to the inhabitants of the island and achieving of an agreement over the neutral status of the island.⁹

The other example is more recent. On August 27, 1991, the European Communities, taking into consideration the processes in the former USSR and Yugoslavia, adopted declaration. According to the declaration, the European Communities would never recognize the frontiers, which were not established through peaceful means i.e. negotiations. The declaration established a Peace Conference and Arbitration Commission of the EC for Yugoslavia. Opinion 2 adopted by the Commission comments on the possibility of application of the right to self-determination to the Serbian people of Croatia and Bosnia-Herzegovina. The Serbian population on these territories constituted 1/3 of the total population. The opinion rejected the demand of the Serbian people for the right to self-determination. In its opinion, Arbitration Commission declared „*that the Serbian population in Bosnia-Herzegovina and Croatia must be afforded every right accorded to minorities under international conventions as well as national and international guarantees consistent with the principles of international law...*”¹⁰. Thus, prevalence of the principle of territorial integrity over self-determination was declared once again. First part of the opinion states:

*„It is well established that, whatever the circumstances, the right to self-determination must not involve changes of existing frontiers at the time of independence except where the states concerned agree otherwise.”*¹¹

Issue of frontiers is also important in assessment of the Nagorno-Garabagh conflict. Because, representatives of both Armenia and Nagorno-Garabagh are constantly claiming that Nagorno-Garabagh has never been within independent Azerbaijan and borders during the

⁸ Report of the International Commission of Jurists (1920) LNOJ Spec. Supp. 3; The Åland Islands Question: Report Submitted to the Council of the League of Nations by the Commission of Rapporteurs (1921) League Doc. B7.21/68/106, 27

⁹ Resolution Adopted by the Council at its Thirteenth Session (1921) LNOJ, Supp. 5, 24-6

¹⁰ 31 ILM 1497 (1992), paragraph 2. Moreover, European Union has adopted declaration on recognition of newly-established states in Eastern Europe and Soviet Union.

¹¹ Again there.

Soviet period had exclusively administrative nature. By such statements they are trying to justify separatist actions of the Armenian population of Nagorno-Garabagh. Such problem arose also in the former Yugoslavia and it can be called “irredentist demand”¹² in legal terminology.

c) Role of the Principle *Uti possidetis iuris* in this regard

During dismembration of Yugoslavia the abovementioned Arbitration Commission of the EC referred to the principle of *uti possidetis*.¹³ In other words, this principle was applied in order to limit the boundaries of the newly established independent states, This principle envisages that frontiers of the territories, which are not subject to self-government, remain unchanged after they gain independence. Although this principle was in particular applied in the processes of liberation from colonies¹⁴, Arbitration Commission of the EC declared that *uti possidetis* has already gone beyond the context of colonies and become a general principle. To substantiate its position once again, the Commission referred to the case concerning the frontier dispute between Burkina Faso and Mali, decided by the International Court of Justice¹⁵. Here, the judgement of the International Court of Justice was based on the principle of *uti possidetis*:

“Nevertheless the principle is not a special rule which pertains to one specific system of international law. It is a general principle, which is logically connected with the phenomenon of the obtaining of independence, wherever it occurs. Its obvious purpose is to prevent the independence and stability of new States being endangered by fratricidal struggles”¹⁶.

It can be stated in general that if the Nagorno-Garabagh issue is brought before the International Court at any time, then we may say with confidence that the decision will be in favor of Azerbaijan under the principle of *uti possidetis*. However, it should also be mentioned that since Azerbaijan and Armenia do not recognize compulsory jurisdiction of the International Court of Justice according to Art. 36 para. 1 of its Statute, or due to the absence of special agreement between the parties on submission of the dispute to the International Court and in general, since the Republic of Armenia denies its involvement in this dispute as a party, possibility of submitting the dispute to the ICJ is at zero yet.

¹² *Irredentism* is a movement of an ethnic group, living on the territory of a state, which strives to secede from that state in order to be included within the boundaries of another state where the ethnic group constitutes majority.

¹³ In 19th century when Spanish colonies gained independence in Central and Southern America, they acted on the principle of *uti possidetis iuris* (*Uti possidetis, ita possedatis* – *what You have, You possess it*).

The essence of this principle was that borders of the former Spanish provinces remained as borders of the newly established states.

¹⁴ During the processes of liberation from colonies in Africa, Conference of African states, held in Cairo in 1963, adopted a decision about not changing borders of former colonies and keeping borders of newly established states within the limits of former colonies.

¹⁵ Case Concerning the Frontier Dispute (Burkina Faso/Republic of Mali) Judgement, ICJ Reports 1986, p. 554-565

¹⁶ Again there.

Conclusion

Summarizing the abovementioned, we can classify the evidences against separatism as follows:

1. The right to self-determination of people can only be exercised on the basis of the maxim *pacta sunt servanda* (treaties must be respected);
2. International Law is the law of states and not of peoples or individuals. States are the subjects of international law and peoples are the objects of that law;
3. The so-called principle of reciprocity; as a state cannot oust a part of itself, equally a part of the state cannot forcefully secede from that state.

Such approach to self-determination reflects the position of majority of countries, which are able to protect their territorial integrity. As such, usually, if there is a discrepancy between territorial integrity of any independent state and self-determination of any national minority, living on the territory of this state, only internal self-determination (i.e. granting autonomy) can be taken into consideration. Any claims, which demand that the principle of self-determination should support secession of any part of state from it, have always been rejected. With only exception of Bangladesh (in that case, without interference of the Indian army Bangladesh could not have gained independence), no other separatist claim has been accepted by the international community since 1945. As it is evident, Bangladesh events did not serve as precedent, these events were mainly explained by «oppression theory». Linguistic, ethnic and cultural differences of Bengalis and geographical separation of the territory from Pakistan served as a ground for establishment of the state of Bangladesh according to abovementioned theory (around one million people were reported to be killed during the conflict).

3.4. Assessment of the referendum, held on December 10th 1991 in Nagorno-Garabagh, in terms of international law

Coup d'etat, committed in August 1991 in Moscow, served as a signal for most Soviet Republics. This was followed by the processes of secession from the USSR and the Soviet republics declared their independence.

On September 2nd of the same year the meeting of the Regional Council of Nagorno-Garabagh declared the Nagorno-Garabagh Autonomous Region as a new Republic of Nagorno-Garabagh. The meeting was held without participation of the Azeri delegation. On November 26th of the same year Azerbaijan reacted to this illegal action by cancellation of the autonomous status of Nagorno-Garabagh. The so-called republic held referendum on independence on December 10th and declared its independence on January 6th of 1992.

As for legitimacy of this referendum, held in Nagorno-Garabagh on ethnic basis, the Armenian side refers to the Law of the USSR dated 03.04.1990 on «Procedures for resolution of the issues related to secession of Soviet Republics from the USSR». It should be noted, that this law itself was contrary to the Constitution of the USSR, because it contradicted the abovementioned Articles (78, 86, 87) of the USSR Constitution. Art. 3 of this Law, which is based on the principles of Leninism and which supports self-determination of not only

peoples, but also of ethnic minorities (including secession from any state), envisaged right to self-determination for autonomous regions of the Soviet Union, too. However, Armenia's position on legitimacy of this referendum had no substantiation both in national and international law. As such, there is a fact, which is obviously ignored (may be deliberately) by the Armenian side in connection with this matter: when the referendum was held (10.12.1991) Azerbaijan was an independent state. **Therefore, provisions of the abovementioned Law could not be applied to the independent Republic of Azerbaijan and its territory.**

Secondly, the Armenian side can not substantiate legitimacy of their secession from Azerbaijan by oppression theory (i.e. for the reason of discrimination of the Armenian people of Nagorno-Garabagh). Even if there were facts of discrimination, the Armenian population of Nagorno-Garabagh could not refer to it. Because, in the former Soviet Union government was rather centralized and local governments (Republics of the Union) were directly subordinated to the instructions of the Kremlin. Moreover, the Armenians and the Azerbaijanis of Nagorno-Garabagh had joint administration council in Nagorno-Garabagh. The Head of the Council was Armenian by nationality, there were Armenian schools in the enclave, welfare of the population was very good and etc. Taking all these into consideration, we can insist that any fact of discrimination towards the Armenian population of Nagorno-Garabagh is out of question.

Thirdly, this referendum is neither legitimate from the point of view of valid international legal regulations, as the referendum was held without consent of the independent Azerbaijani state exclusively on an ethnic basis. Ethnic principle of self-determination has never been taken as a serious factor by international community in assessment of any claims against a state. Moreover, ethnic principle of self-determination can not be considered legitimate without consent of all related parties, because the referendum, held on this basis is of discriminative character by itself. If the Armenian population, living in Nagorno-Garabagh expresses their wish of independence through self-determination, then this wish should raise a suspicion as the fact of their ability of self-determination. As mentioned above, on the threshold of the conflict, the Armenian population of Nagorno-Garabagh did not aim to gain independence at all, their major intention was to annex Nagorno-Garabagh to Armenia. There are many facts which prove irredentist character of the intention of the Armenian population. Appointment of the Minister of Defence of the so-called Republic of Nagorno-Garabagh Serj Sarkisyan as the Minister of Armenia in 1993, election of Robert Kocharyan (although he remains a citizen of Azerbaijan from the legal point of view) as the President of the Republic of Armenia in March of 1998 and February of 2003, non-cancellation of the resolution of the Supreme Soviet of the Armenian SSR dated 01.12.1989 on annexation of Nagorno-Garabagh to Armenia, involvement of the Armed Forces of the Republic of Armenia in this conflict and other evidences prove that **the conflict bears irredentist character and is closely connected with the issue of territorial integrity.** Naturally, when we consider the conflict from this point of view, we should treat it as an international armed conflict and the Republic of Armenia should be accepted as an aggressor.

4. Nagorno -Garabagh Conflict as an International Armed Conflict

When we treat the conflict from this aspect, first of all the violation of the Art. 2 para. 4 of the UN Charter by the Republic of Armenia should be examined. Such violation results out

of Armenia's sending of its armed forces to Nagorno-Garabagh or its support for the Armenian people, residing there. This provision of the UN Charter prohibits threat or use of force in international relations, which contradict the purposes and principles of the UN.

4.1. Prohibition of use of force according to the UN Charter

First, it should be examined, which type of force is envisaged in Art. 2.4 of the UN Charter. We can unequivocally say that this provision prohibits use of military force in international relations, i.e. direct use of armed forces against the territory or armed forces of any country¹⁷. Furthermore, it should be examined, whether Art. 2.4 of the Charter envisages direct use of force, i.e. support of any aggressor state or sending of armed groups to the territory of any state. It is not possible to get a comprehensive information from the text of the abovementioned provision in this regard. Other provisions of the UN Charter are also unhelpful in this respect. However, we can refer to the Declaration of the UN General Assembly of 1970 "On friendly relations among States" as a customary law. This Declaration contains the following provisions on prohibition of use of force:

«Every state has obligation to refrain from organizing or encouraging organization of illegal forces (including mercenaries) or armed groupings for the purpose of intervening to other state's territory»¹⁸

During dealing with the Nicaragua case, the International Court of Justice referred to this provision and stated that principally intensive support to rebels on the territory of other state can also be treated as use of force, as envisaged in Art. 2.4 of the Charter.¹⁹ Resolution 2625 also envisages relevant provision on self-determination:

«Every state has to refrain from any actions aimed at partial or complete destruction of national and territorial integrity of any other country or state»²⁰.

Other provisions of the resolution also prohibit use of force in any form. This also envisages use of indirect force. Taking the abovementioned into account, we can conclude that although Armenia denies its direct involvement in the conflict, it has violated Article 2.4 of the UN Charter by its indirect involvement, i.e. sending of armed groups, or providing intensive support for the Nagorno-Garabagh separatists. Thus, the Republic of Armenia has violated legal values like territorial integrity and political sovereignty of Azerbaijan protected under the said Article, and such violation contradicts the purposes of the UN.

The abovementioned article prohibits use of force only in international relations, i.e. between two states. Thus, this article does not envisage use of force within state boundaries. That is why, we can absolutely say that even if the conflict can be treated as a conflict between Azerbaijan and Nagorno-Garabagh, i.e. as an internal (non-international) armed conflict, as insisted by the Armenian side, then Azerbaijan will still preserve its right to use armed force at any time against Nagorno-Garabagh separatists with the purpose of restoring its territorial integrity observing relevant norms of international law (*Additional Protocol II from 1977 to*

¹⁷ see, Fischer, in: Ipsen, § 59, RN 12; Randelzhofer, in: Simma, Art. 2 (4), RN 16

¹⁸ see G. A. Resolution 2625, Tomuschat, p. 79

¹⁹ see ICJ Reports, 1986, p. 119, § 338, in: ILM 25 (1986), p. 1076.

²⁰ see, G. A. Resolution 2625, in: Tomuschat, p. 81. In this regard resolution of the Supreme Soviet of the Armenian SSR dated from 01.12.1989 should again be mentioned).

Geneva Convention of 12.08.1949 on protection of the victims of non-international armed conflicts).

4.2. Some reflections on the Resolutions of the UN Security Council on the Nagorno-Garabagh Conflict

4.2.1. Measures for the maintenance of international peace and security in accordance with Chapter VII of the UN Charter

In accordance with Article 39 of the Charter, the UN Security Council determines the existence of any threat to the peace, breach of peace, or act of aggression. Then, in accordance with Article 41 and following articles of the Charter, decision may be taken to impose non-military or military sanctions.

Here, a question may arise, whether the SC is governed by its own discretion while adopting the resolutions under Chapter VII, or any legal restrictions do exist? Article 24.1 of the UN Charter confers upon the SC the primary responsibility for the maintenance of international peace and security. That is why, there is a unanimous opinion on this issue that the SC has a broad freedom of action in actual and legal assessment of three cases (threat to the peace, breach of peace and act of aggression) considered in Article 39 of the Charter. Here, the SC may only be subject to a limited legal control by third organizations.²¹

According to Article 24.2 sentence 1 of the UN Charter, the SC shall act in accordance with the purposes and principles of the UN. However, these purposes and principles are systematically restricted by Chapter VII in accordance with Article 24.2 sentence 2 in comparison with Article 2.7 sub-sentence 1 of the Charter. Thus, the SC should settle the issue of existence of the conditions, envisaged in Article 39 by making comments on the content of the norm when any suspicion arises. Here, it should be governed by its broad discretion and the UN purposes and principles.

4.2.2. Legal basis for resolutions adopted by the SC on the Nagorno-Garabagh conflict according to the UN Charter

When reading resolutions of the SC on Nagorno-Garabagh conflict,²² we may conclude that the SC has not adopted these resolutions on the basis of Chapter VII of the Charter. Because, any resolution, adopted in accordance with Chapter VII, should contain at the end of its preamble the following sentence: «*acting under Chapter VII of the Charter*»²³. None of the resolutions, adopted on the Nagorno-Garabagh conflict, contains such provision. A question arises, what was the legal basis for the UN SC to adopt the said resolutions? In this

²¹ See Jurij Daniel Aston. «Die Bekämpfung abstrakter Gefahren für den Weltfrieden durch legislative Massnahmen des Sicherheitsrates – Resolution 1373 (2001) im Kontext». In ZaoRV 2002, p. 257 (270). However, principally, the examination of the SC Resolutions by the International Court of Justice is possible under Article 92 and following Articles of the Charter (International Court of Justice did not allow such examination in the Lockerbie Case («Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incidents at Lockerbie», ICJ Reports 1992, p. 126, § 39, in: ILM 1992, p. 671) and the case of Bosnia-Herzegovina against NATO countries («Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide», ICJ Reports 1992, p. 18 f, § 33-35, in: ILM 1993, p. 898). The only argument was that the current stage of the trial did not give any ground for such examination.)

²² All these resolutions of the SC can be found at <http://www.un.org/Docs/scres/1993/scres93.htm>

²³ As an example, the SC Resolutions on the Iraq issue: No 678, dated: 29.11.1990 «On liberation of Kuwait», also No 687, dated: 03.04.1991 «On peace agreement with Iraq», see Tomuschat, p. 531

connection, only Article 36 of the Charter can be referred to. This article says that the SC may, at any stage of a dispute of the nature referred to in Article 33 or of a situation of like nature, recommend appropriate procedures or methods of adjustment.

Now, let us analyze these resolutions one after another:

a) Although Resolution **822** adopted by the SC on 30 April 1993 states the fact of deterioration of the relations between the Republic of Azerbaijan and the Republic of Armenia, Armenia is not mentioned here as a party involved in the conflict. Moreover, the resolution stresses the sovereignty and territorial integrity of all states of the region, inviolability of international borders and inadmissibility of the use of force for acquisition of territory. Further, the SC demands “*immediate withdrawal of occupying forces from the Kelbadjar district and other recently occupied areas of Azerbaijan*”. As it is evident, the expression «all occupying forces» does not clearly specify who is meant, and naturally, similar expressions make it difficult to comment on the resolution. I think, it would have been better to concretely demand immediate withdrawal of the Armed Forces of the Republic of Armenia and separatist armed groups of Nagorno-Garabagh from the occupied territories of Azerbaijan. But, we should mention here that if we take into consideration procedural difficulties in decision-making mechanism of the SC, it was impossible to include such provision in the text of the resolution. Further, the SC calls the parties to continue the negotiations within the framework of the peace process of the Minsk Group of Conference on Security and Cooperation in Europe (CSCE).

b) Preamble of the SC resolution **853** dated 29 July 1993, restates the fact of deterioration of the relations between the Republic of Azerbaijan and the Republic of Armenia, principles of sovereignty and territorial integrity of the states. In comparison with the previous resolution, it mentions territorial integrity of Azerbaijan more explicitly. In the operational part of the resolution the SC condemns the occupation of the district of Agdam and other recently occupied areas of the Republic of Azerbaijan and demands immediate, complete and unconditional withdrawal of occupying forces from these territories. As it is evident, here it is not also defined who is meant under the expression «occupying forces». In comparison with resolution 822, this resolution contains several provisions, interpretation of which can serve as a ground to conclude on indirect involvement of the Republic of Armenia in the conflict. The matter is that in this resolution the SC urges the Government of Armenia to continue to exert its influence to achieve compliance by the Armenians of the Nagorno-Garabakh region of the Republic of Azerbaijan with its resolution 822 (1993) and the acceptance by this party of the proposals of the Minsk Group of the CSCE. Of course, the Republic of Armenia is not mentioned in this provision as a direct party, but it is difficult to interpret the word «influence» used here. This means that if the Armenian population of Nagorno-Garabagh was treated as an independent party, as claimed by themselves and officials of the Republic of Armenia, then they would not have to agree to the influence of the Republic of Armenia as an independent party. However, inclusion of this provision in the resolution gives reason to conclude that although indirectly the SC has recognized by default the involvement of the Republic of Armenia in the conflict as a party.

Then, the abovementioned provision indicates Nagorno-Garabagh as a part of the territory of the Republic of Azerbaijan. There is nothing new in the resolution except the abovementioned.

c) In its Resolution **874**, dated 14 October 1993, the SC expresses its serious concern that a continuation of the conflict in and around the Nagorno-Karabakh Region of the Republic of Azerbaijan, and of the tensions between the Republic of Armenia and the Republic of Azerbaijan would endanger peace and security in the region. As it is evident, for the first time, this resolution concretely defines the object of the conflict: ***the conflict in and around the Nagorno-Garabagh region of the Republic of Azerbaijan***. Previous two resolutions mentioned the occupation of several districts of the Republic of Azerbaijan and it was difficult to understand the essence of the conflict. Moreover, in this resolution the SC also draws attention to the fact of displacement of large numbers of civilians of the Republic of Azerbaijan from their native lands. Furthermore, like in the resolution 853, the SC also calls all states of the region to maintain peace and security.

d) Resolution **884**, dated 12 November 1993, also states important principles of international law and mentions continuation of the tensions between the Republic of Azerbaijan and the Republic of Armenia. The SC notes with alarm the escalation in armed hostilities and excesses in the use of force in response to those violations, in particular the occupation of the Zangilan district and the city of Goradiz in the Republic of Azerbaijan. Here also, forces, occupying these territories are not mentioned unequivocally. Besides that the SC expresses its grave concern at the latest displacement of a large number of civilians and the humanitarian emergency in the Zangilan district and the city of Goradiz, on Azerbaijan's southern frontier

In the operative part of the resolution the SC condemns the occupation of the abovementioned territories, attacks on civilians and bombardments of the territory of the Republic of Azerbaijan. This provision specifies expressly either who attacked the peaceful population and bombed the Azerbaijani lands.

Further on, the SC calls upon the Government of Armenia to use its influence to achieve compliance by the Armenians of the Nagorno-Karabakh region of the Republic of Azerbaijan with resolutions 822 (1993), 853 (1993) and 874 (1993) and to ensure that the forces involved are not provided with the means to extend their military campaign further. Again, like in the previous provisions of the resolution, the SC uses abstract and ambiguous words like «forces involved». However, as it is evident, the second part of this sentence of the resolution contains an interesting provision, i.e. the Government of Armenia is called upon **to ensure that the forces involved are not provided with the means** in order to continue military operations. For the first time in this resolution, although not openly, support of the abovementioned «involved forces» by the Republic of Armenia is implied. May be, by this provision the SC wants to express the fact of violation of the principle of prohibition of the use of force by Armenia.

Then, the SC demands immediate cessation of armed hostilities and withdrawal of occupying forces from the Zangilan district and the city of Goradiz.

Interim conclusion

I think the resolutions adopted by the UN SC did not fully reflect the realities and the SC had not correctly assessed the situation. It means that the resolutions had to be adopted upon

Chapter VII of the UN Charter, because conditions, envisaged in Article 39, were present. I would like to substantiate my position by commenting on Article 39. For this purpose, we should clarify presence of any of the three conditions as a result of the actions of Armenia, as envisaged in Article 39 of the UN Charter.

4.3. Definition of peace under Article 39 of the UN Charter

First of all, we should analyze which definition of peace is envisaged in Article 39 of the Charter. According to «the notion of negative peace», «**peace**» means absence of only that type of force in the international relations, which is envisaged in Article 2.4 of the UN Charter²⁴. When interpreting Article 39 according to this definition, we may conclude that the SC can take measures upon Chapter VII only if armed force is used or threat of use of such force is present.

4.4. Assessing actions of the Republic of Armenia as an act of aggression

Now, we should review the possibility of assessing actions of the Republic of Armenia as an act of aggression under Article 39 of the Charter. An act of aggression means continuous use of direct or indirect armed force, i.e. this is the breach of peace in any case.²⁵ As it is known, this conflict did not begin by using direct armed forces from the territory of Armenia to Azerbaijan. The Armenian population of Nagorno-Garabagh had started the conflict on the territory of the Republic of Azerbaijan. Actions of the Republic of Armenia in this conflict coincide with Art. 3, lit. g of the Resolution of the UN General Assembly on «Definition of Agression», dated from 14 December 1974. It states:

«Article 3

Any of the undermentioned actions should be assessed as an act of aggression under provisions of Article 2, notwithstanding declaration or non-declaration of war.

.....g) *The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another state of such gravity as to amount to the acts listed above, or its substantial involvement therein*»²⁶.

In its decision, issued on Nicaragua case, International Court of Justice referred to this provision and recognized it as a valid customary law. When treating the issue from this aspect, it is possible to insist that the Republic of Armenia has violated valid customary law and thus, peace envisaged in Article 39 of the UN Charter by its actions, i.e. sending paramilitary bands and other groups.

4.5. Intervention possibilities of the UN Security Council in presence of threat to the peace

Article 39 of the UN Charter authorizes the SC to intervene not only in the case of breach of peace, but also in the case of threat to the peace. When any threat to the peace exists, intervention covers preventive authorities. But a question arises: What are the margins of preventive authorities of the SC? When treating the notion of threat in the narrow sense, only

²⁴ see, Michael Bothe., in: Wolfgang Graf Vitzthum, Voelkerrecht, 2. Aufl., Berlin/New York 2001, p. 612.

²⁵ see, Jochen Abr. Frowein., in: Bruno Simma, «Charta der Vereinten Nationen», 1. Aufl., München 1991, Art. 39, RN 12.

²⁶ see, G. A. Resolution 3314, Tomuschat, Voelkerrecht, p. 84.

imminent breach of peace may be regarded as a threat to peace.²⁷ Such approach allows limiting authorities of the SC and thus, meets the principle of sovereign equality.

But it is possible to interpret the notion of threat in a broader sense and define it as an action beyond simple violation of borders. In the practice of the UN SC the situations of gross violation of human rights within any state were assessed as a threat to the peace with a certain caution. Nevertheless, beginning from 1990s of the last century, the SC has developed a different practice. According to this practice, gross violation of human rights within any state from the point of view of partial crossing of borders (e.g. refugee flow) within any country are also assessed as the threat to the peace (*For example, the SC Resolution 688 dated 5 April 1991 (Iraq); the SC Resolution 841 dated 16 June 1993 (Haiti); the SC Resolution 955 dated 8 November 1994 (Ruanda); the SC Resolution 794 dated 3 December 1992; for comparison, also the SC Resolution 1137 dated 12 November 1997 (on violation of disarmament provisions); the SC Resolution 1161 dated 9 April 1998 (illicit arms trafficking in crisis areas).*

Final Conclusion

In conclusion of all abovementioned statements, we can say that the Armenian population of Nagorno-Garabagh is not entitled to secede from Azerbaijan and build their independent state according to international law, as they constitute national minority in Azerbaijan and they had never been exposed to systematical gross violation of human rights.

When taking into consideration the fact that more than one million people have become refugees and IDPs as a result of this war, and gross violation of human rights has taken place during these processes, we may say with confidence that during the conflict all conditions, mentioned in Art. 39 of the UN Charter, were present, which gives ground to say that the SC had to take appropriate and necessary measures and recognize the Republic of Armenia as an aggressor under Chapter VII of the Charter.

²⁷ see, Joachim Arntz., *Der Begriff der Friedensbedrohung und Praxis der Vereinten Nationen*, Bonn 1975, p. 22.