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Master's Paper

Nagorno-Karabakh Conflict in light of the ICJ's advisory

Opinion on Kosovo:

Whether the Nagorno-Karabakh Case Meets the Criteria

Elaborated by the UN Court

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Introduction

In October 1991 by means of referendum Nagorno-Karabakh people declared their independence and then affirmed their right to self-determination during unequal war unleashed by Azerbaijan planning to suppress the aspirations of Nagorno-Karabakh population to gain independence. As a result of the ceasefire agreement signed in 1994 the war between Nagorno-Karabakh and Azerbaijan stopped, factually acknowledging new delimitation of borders in South Caucasus region. After the ceasefire agreement the conflict was transferred from the battle field to the area of diplomacy and international law and continues till now. The parties blame each other for breaking international legal norms. Azerbaijan asserts the principle of territorial integrity in support of its positions, accusing Armenia in having conducted an aggressive war and occupying Azerbaijani territories. In their turn Nagorno-Karabakh and Armenia base their policy on the principle of self-determination. Thus the gist of this conflict is the clash of two principles of international law mentioned above.

Unfortunately there is no a well-established international legal doctrine which would completely regulate the co-existence of these legal frameworks, set out precise legal bases for the application of the self-determination principle, the mechanisms of its application, would establish the cases of priority of this principle over the principle of territorial integrity and *vice versa*. International law has not found ultimate solution to this problem. As a result, the application of these principles is left mainly to the political discretion of the major players of the international law arena and is conditioned by their geopolitical interests.

This problem is very actual because there are several unresolved territorial conflicts with similar content (the Palestinian conflict, Northern Cyprus problem, etc.) among which Nagorno-Karabakh conflict is of vital interest for us.

Recently a significant step was made towards the development of international law in this area: in July 22, 2010 International Court of Justice issued an advisory opinion virtually recognizing the legality of unilateral declaration of independence made by Kosovo (former separatist province of Yugoslavia) under international law. This is the first time that an international judicial organ decides in favor of the principle of self-determination.

Taking into consideration that the Nagorno-Karabakh conflict is far from resolution and the negotiations continue it is important from theoretical and practical point of view to research the legal implications of the ICJ's advisory opinion to find out whether its criteria are applicable to the Nagorno-Karabakh conflict and can be utilized to strengthen the positions of Nagorno-Karabakh and Armenia in the process of negotiations.

This paper will present an analysis of the ICJ's advisory opinion on the Kosovo case and find out whether the criteria used by the ICJ are applicable to the Nagorno-Karabakh conflict. Otherwise stated is Nagorno-Karabakh entitled to claim independence under the legal framework of the ICJ's advisory opinion?

Chapter 1. The ICJ's Legal Doctrine on Kosovo Case

Legal Certainty or Political Compromise?

On 17 February 2008, the parliament of Kosovo having been elected under the UN supervision in a special session adopted the Declaration of Independence, declaring Kosovo an “independent, sovereign and democratic country”. Serbia contended the legality of Kosovo’s declaration of independence and secession under international law and managed to instigate a debate within the UN General Assembly in order to engage the services of the International Court of Justice to provide an advisory opinion on this matter. In 8 October 2008 the UNGA adopted A/RES/63/3 resolution, where it was stated that “this act has been received with varied reactions by the Members of the United Nations as to its compatibility with the existing international legal order”. As a result, the UNGA decided, in accordance with Article 96 of the UN Charter, to request the ICJ, pursuant to Article 65 of the Statute of the Court, to render an advisory opinion on the following question:

Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?

On July 22, 2010 the ICJ issued an advisory opinion in response to a question set out in 63/3 resolution of the UN General Assembly. This advisory opinion promised to be a landmark for the development of international law particularly in the sphere of self-determination of peoples which is one of the most sensitive problems of contemporary international law. Though the advisory opinion is not

compulsory for states and other international actors but the authority of the UN court and its political and legal status in framing and developing international law makes this act highly important and *de facto* mandatory. However the UN court delivered an advisory opinion which has not fully satisfied the hopes construing the legal question submitted to it rather narrowly. It covered only few of the contentious legal issues, relevant in the context of the Kosovo case remaining silent on such problems as legal effects of the unilateral declaration of independence particularly validity and legal consequences of the recognition of Kosovo as an independent state, the question of whether Kosovo is entitled to declare its independence unilaterally under international law, or whether it is lawful within the current international legal order for entities being a constituent part of a state unilaterally to break away from it, and it did not address the extent of the right of self-determination and the existence of a right of “remedial secession”. Notwithstanding this and despite various criticisms on politically motivated approach employed by the ICJ and narrow scope of its advisory opinion there are certain nuances deserving attention. The scrutiny of the ICJ’s wording shows that the legal doctrine of its opinion factually endorses Kosovo’s independence and vicariously opens the door for other secessionist movements to reach the desirable outcome. The logic of the ICJ’s reasoning should be considered in conjunction with the written statements submitted to the UN court by the UN member states on the issue in question. The considerable part of countries including major actors of international relations as the USA, UK etc. favored the principle of self-determination and brought quite interesting arguments from political and legal points of view.¹ These statements partly supplement the gaps and ambiguities of the ICJ’s advisory opinion. Besides the statements of the countries expressing their official approach to the problem of self-determination manifest emerging of *opinio juris* in postcolonial interpretation of this aspect of international law. The subsequent sections will introduce the main legal criteria (the legal doctrine) envisaged by the ICJ.

1. The issue of legality of unilateral declaration of independence under international law

¹ See [Accordance with international law of the unilateral declaration of independence in respect of Kosovo \(Request for Advisory Opinion\)](http://www.icj-cij.org/docket/index.php?p1=3&p2=4&k=21&case=141&code=kos&p3=1). Written statements <http://www.icj-cij.org/docket/index.php?p1=3&p2=4&k=21&case=141&code=kos&p3=1>

The gist of the ICJ's advisory opinion is the problem of legality of unilateral declaration of independence made by the Kosovo parliament. The ICJ's wording on this issue reads: "... The task which the Court is called upon to perform is to determine whether or not the declaration of independence was adopted in violation of international law ... the Court considers that general international law contains no applicable prohibition of declarations of independence. Accordingly, it concludes that the declaration of independence of 17 February 2008 did not violate general international law."² When deciding on this issue the Court used the so called "**Lotus presumption.**"³ This legal doctrine was first established in the famous Lotus case in 1927 by the Permanent Court of Justice, a judicial organ of the League of Nations and then also applied by the ICJ itself in the judgment on Nicaragua case, in the advisory opinion on the legality of the threat or use of nuclear weapons.⁴ Under Lotus presumption what is not prohibited under international law is permitted. This is an international legal manifestation of one of the founding principles of the Constitutional law emerged in Anglo-Saxon legal system, which applies to natural persons as opposed to state officials, which can act only in accordance with internal law of the state concerned. The Lotus Presumption, as formulated by the Permanent Court of International Justice, applies to relations between independent states and reads as follows: "International law governs relations between independent states. The rules of law binding upon states therefore emanate from their own free will as expressed in conventions and usages generally accepted as expressing principles of law and established in order to regulate the relations between the co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of states cannot therefore be presumed."⁵ Applying this test, the ICJ does not ask whether there is a legal entitlement under international law to unilaterally declare independence, but just whether there is a rule prohibiting such a declaration *per se*. As a result of applying this negative test the Court states, that there is no such a rule in international law, which bans unilateral declaration of independence. It means that the unilateral declaration of independence as such does not violate any norm of

² Advisory Opinion on the Accordance with International Law of Unilateral Declaration of Independence in Respect of Kosovo, 141,32, (I.C.J. 2010).

³ Burri, Thomas. The Kosovo Opinion and Secession: The Sounds of Silence and Missing Links *German Law Journal*. 11(2010):881-890.

⁴ Case Concerning Military and Paramilitary Activities in and against Nicaragua (merits), 1986 I.C.J. 101, ¶ 269. Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226, ¶ 52.

⁵ The Case of the S.S. "Lotus." No. 10, 18-19 (P.C.I.J., 1927).

international law. The application of this principle by the ICJ begs some questions. Firstly Lotus presumption only relates to states as major actors of international law. From the ICJ's wording it can be inferred that this principle can apply also to entities not being states yet such as Kosovo when declaring its independence. This approach seemingly aims to strengthen the positions and role of these subjects and indirectly contributes to the rise of international legitimacy of self-determination principle.

Judge Simma, one of the ICJ judges, contends the application of Lotus presumption due to its being outdated. He claims, that, as opposed to the beginning of the 20-th century, when international law was consensual in nature and therefore precluded restrictions on state's independence, now the international legal order is not exclusively based on states' consent and is strongly influenced by ideas of public law.⁶ Judge Simma *inter alia* implies the emergence of *jus cogens* norms, which create obligations for states without their consent. But there is a slight incompleteness in this reasoning, because *jus cogens* norms are a product of collective activity of international community, otherwise stated, the peremptory international legal norms are created by means of universal or at least the overwhelming majority consent or acquiescence of states as members of the international legal order. Thus states' consent is one of the cornerstones of international law stemming from the principle of sovereign equality enshrined in Article 2 of the UN Charter. Thomas Barri also shares judge Simma's opinion on this problem,⁷ but for the justification of his views he brings the following arguments: the principle "what is not forbidden is permitted" will probably be applicable in internal legal order of a particular state because the internal legal order is complete and coherent.⁸ International legal order, despite the efforts in recent decades to unify it still remains fragmented into considerably incoherent parts. And the application of this approach is not the best solution to fill the gaps existing in international law. The next argument is that the soft law should not be underestimated.⁹ Recommendations, principles, and best practices regularly establish a framework in which international

⁶ Advisory Opinion (Declaration of Judge Simma), 141 at 2

⁷ Burri, Thomas. *The Kosovo Opinion and Secession: The Sounds of Silence and Missing Links* *German Law Journal*. 11(2010): 867-90.

⁸ *Id.*

⁹ *Id.*

actors may act. If an international actor ignores these soft rules, it might ultimately be held accountable.¹⁰ Though Lotus presumption should not be overestimated, but it would not be right to completely set aside this principle. Perhaps it should be deprived of its status of general principle (and it is really deprived now), but there can be areas in international law where the application of this norm would have positive effect. Which areas would they be state practice will show, and the role of international judicial bodies and particularly the ICJ's impact is important in crystallizing the existing state practice and thus contributing to creation of international customs. The ICJ in some cases mentioned above and also in case of unilateral declaration of independence as a recent development points out that the Lotus presumption is applicable.

In this context the Court's views on the practice of the UN Security Council as *lex specialis* on the matter of declaration of independence bear emphasize. The Court mentions that "Within the legal framework of the United Nations Charter, notably on the basis of Articles 24, 25 and Chapter VII thereof, the Security Council may adopt resolutions imposing obligations under international law. The Court has had the occasion to interpret and apply such Security Council resolutions on a number of occasions and has consistently treated them as part of the framework of obligations under international law."¹¹ Thus acknowledging that the UN Security Council's resolutions are an important source of international law, the Court continues:" Several participants have invoked resolutions of the Security Council condemning particular declarations of independence: see, inter alia, Security Council resolutions 216 (1965) and 217(1965),concerning Southern Rhodesia Security Council resolution 541 (1983), concerning northern Cyprus; and Security Council resolution 787 (1992), concerning the Republika Srpska. The Court notes, however, that in all of those instances the Security Council was making a determination as regards the concrete situation existing at the time that those declarations of independence were made; the illegality attached to the declarations of independence thus stemmed not from the unilateral character of these declarations as such, but from the fact that they were, or would have been, connected with the unlawful use of force or other egregious violations of norms of general international law,(by the people seeking self-determination (emphasize added)) in

¹⁰ *Id.*

¹¹ Advisory Opinion 410, at 30,31.

particular those of a peremptory character (*jus cogens*). In the context of Kosovo, the Security Council has never taken this position. The exceptional character of the resolutions enumerated above appears to the Court to confirm that no general prohibition against unilateral declarations of independence may be inferred from the practice of the Security Council.”¹² It means that the Court, referring to the Security Council’s resolution as a source of *lex specialis*, points out a precondition for the legality of the unilateral declaration of independence - mandatory requirement that the unilateral declaration of independence shall not be a result of or be connected with the egregious violations of *jus cogens* and other norms of general international law. One more precondition will be discussed below.

The next point, concerning the issue of unilateral declaration of independence, covered by the ICJ, is **the link between unilateral declaration of independence and secession**. The ICJ sees no such a link, stating that it is not asked by the General Assembly on the legal effects of the declaration of independence or the right to secession.¹³ The ICJ restricts its opinion strictly to the narrow formulation of the question submitted by the General Assembly, focusing on the act of declaring independence. A declaration of independence alone is not sufficient for an entity to gain independence since, in the words of the ICJ, sometimes a declaration of independence results in the creation of a new state and in others it does not.¹⁴ Robert Muhharemi in his article criticizes the ICJ for avoiding to state its opinion on both the legal aspects of secession and creation of a new state.¹⁵ According to the same author the ICJ thus distinguishes between “declaring” independence and “effecting” it, which seems artificial and unconvincing. The UN court sets forth an approach that a state first declares its independence and then takes steps to actually validate or enforce it. This approach does not indeed reflect the process of creation of a new state and Kosovo in particular. In June 1999 after NATO bombing and Miloshevič’s capitulation the UNSC passed Resolution 1244, mandating a UN interim administration (UNMIK) to establish and oversee Kosovo provisional democratic institutions of self-government within a framework of Yugoslav sovereignty, pending a final

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* at 29, 30

¹⁵ Muharremi, Robert. *A Note on the ICJ Advisory Opinion on Kosovo*. German Law Journal 11 (2010):873-74

settlement. The UNMIC created the provisional institutions of self-government, supported their development to become properly functioning state bodies.¹⁶ When independence was declared in 2008, all government structures, including a completely new legal framework, were already in place for Kosovo to effectively and independently assume the functions of a state.¹⁷

The position, taken by a number of scholars is a right one. The declaration of independence is not an initial, starting point of a state-building process but its logical end, its culmination. The declaration of independence is closely linked with self-determination and secession. This was the case when the Soviet Union collapsed and former soviet republics including Armenia got independence. The declaration of independence by these republics and also Armenia was the final step in the process of obtaining statehood *i.e.* making secession. Thus secession cannot be illegal *per se*, if the act, which concludes the process of secession, that is the declaration of independence, is considered legal under international law. The ICJ, stating that in not all circumstances the declaration of independence leads to creation of a state, implies the political means of dispute resolution such as negotiations and recognition *i.e.* whether the international community of states has recognized an entity in question as a state. Thus the ICJ gives a great value to the recognition, which in this logic has not only declarative effect, acknowledging the creation of a new state as an existing fact without any legal effect on the emergence of statehood, but also possesses a constitutive asset, meaning that the recognition by other states of an entity is decisive for the statehood to become a fact. This double understanding of the recognition can be found in international law theory and also in some international documents such as Ahtisaary plan on Kosovo.¹⁸ The ICJ also recalls Resolution 1244 as *lex specialis*, where the necessity of political settlement of Kosovo problem is emphasized. So the ICJ implies the legality of any settlement of territorial dispute including by realizing the principle of self-determination if the settlement is a product of political compromise of the parties involved in the respective conflict. The role

¹⁶ *Id.*

¹⁷ *International Crisis Group. Kosovo Conflict History.* 3 March 2008; <http://www.crisisgroup.org>; <http://www.crisisgroup.org/en/key-issues/research-resources/conflict-histories/kosovo.aspx>

¹⁸ The Comprehensive proposal for Kosovo Status Settlement. Report of the Special Envoy of the Secretary-General on Kosovo's future status."UNOSEK. *United Nations office of the special envoy for Kosovo.* 26 March 2007; <http://www.unosek.org/docref/report-russian.pdf>.

of *lex specialis* under the Court's reasoning is considerable in developing international legal obligations for the parties to the dispute and establishing the order and basic directions of the resolution of the conflict. This was the case in Kosovo dispute (UNSC Resolution 1244). It can be argued that the ICJ merely restates the *status quo*. The whole political process *per se* is a process of bargaining and compromise, where the prospect of success is conditioned by the favorable political situation, the real balance of forces between parties and the interests of major political poles. But there is a nuance here. The ICJ initially upholds the legality of the claim for secession *per se* which means that during political process the right of peoples to self-determination just crystallizes, concretizes and is being applied rather than it emerges. Political compromise notwithstanding the issue of legality of the claim is necessary for establishment of long-term peace, security and stability in the world in general and in the region of the dispute in particular. One of the most salient examples of political settlement of the territorial dispute is secession of Bangladesh (East Pakistan) from Pakistan (West Pakistan) in 1971 where the insurgents of the East defeated the central government and declared independence with huge support of India and also Russia.¹⁹ The international community in face of the UN did not interfere until the resolution of the conflict by the parties themselves. The same can be said for secession of South Sudan in 2010.

One more point in the context of legality of unilateral declaration of independence, which is addressed in the advisory opinion, is the problem of **who possesses the right to declare independence**. The Court states that "The identity of the authors of the declaration of independence... is a matter which is capable of affecting the answer to the question whether that declaration was in accordance with international law."²⁰ The ICJ, ruling on this point, adheres to the international customary rule, that "the right to self-determination must be claimed and exercised by an organization, that is representative of the entire people. Thus as far as external self-determination is concerned, there must be a liberation movement or another type of the body representative of the whole people."²¹ From the ICJ's line of reasoning it follows, that one more precondition

¹⁹ Wikipedia. Bangladesh. 16 March 2011. <http://en.wikipedia.org/wiki/Bangladesh>

²⁰ *Advisory opinion*, 410 at 20

²¹ Cassese, Antonio. *Self-Determination of Peoples*. Cambridge: University Press, 1995.

of legality of the unilateral declaration of independence is its declaration by representatives of the people seeking cession. The declaration of independence undoubtedly can be made also by means of referendum, which can be considered as a more authoritative tool since the decision is being made directly by the people. The ICJ, touching upon this problem, argues, that the Kosovo Assembly, when adopting the declaration, was acting as a body, representing the people of Kosovo rather than as a Provisional Institution of Self-Government (PISG) under the UN supervision. Particularly the Court states, that the declaration refers to the “democratic-elected leaders” of the people, which declare Kosovo an independent and sovereign state.”²² Thus the Court wants to show, that even if the Kosovo Assembly had been elected under the supervision of the UN Interim Administration (UNMIK) at the time of declaring Kosovo’s independence, Kosovo’s parliament was already emancipated and acted as a representative body of a state rather than a provisional body of a contentious territory. On this point the Court’s wording reads as follows:” The Court considers that the authors of that declaration did not act, or intend to act, in the capacity of an institution created by and empowered to act within that (UN) emphasize added) legal order but, rather, set out to adopt a measure the significance and effects of which would lie outside that order.” The Court states, that the declaration confers powers on Kosovo Assembly, which it did not have under the UNMIK regulation on a Constitutional Framework for Provisional Self-Government (hereinafter “Constitutional Framework”) such as external relations, which were vested in the Special Representative of the Secretary-General. The Declaration was not approved by the Special Representative of Secretary General as it was in the case of acts adopted by the PISG. Also the procedure of adoption of the declaration differed from the procedure under which the acts of the PISG were adopted.²³ The Court thus arrives at the conclusion that, taking all factors together, the authors of the declaration of independence of 17 February 2008 did not act as one of the Provisional Institutions of Self-Government within the Constitutional Framework, but rather as persons, who acted together in their capacity as representatives of the people of Kosovo outside the framework of the interim administration.²⁴

²² Advisory opinion, 410 at 39

²³ *Id.*

²⁴ *Id.*

Thus the unilateral declaration of independence of Kosovo meets the criteria of democratic decision-making elaborated by the ICJ.

2. Territorial integrity v self determination

Though the ICJ's advisory opinion is criticized for its irresolute approach concerning self-determination and secession, the 'world court' as it is often called for all that briefly touched upon the issue of self-determination, but it is sufficient to confirm that the UN court is not reluctant to the process of international recognition of self-determination principle in its modern (non-colonial) interpretation. Pursuant to paragraph 80 of the ICJ's advisory opinion "the scope of the principle of territorial integrity is confined to the sphere of relations between States." In this way the Court disentangles the principle of self-determination from territorial integrity rejecting those states' allegations which argue that "prohibition of unilateral declarations of independence is implicit in the principle of territorial integrity."²⁵ The Court refers to the wording of UN Charter Article 2, paragraph 4, which provides that: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations."²⁶ The Court also recalls the Helsinki Final Act according to which "the participating States will respect the territorial integrity of each of the participating States" (Art. IV).²⁷ The list of international covenants with similar provisions is not exhaustive. Such clauses are provided also by international Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights, The Declaration on Principles of International Law, Declaration on the Granting of Independence to Colonial Countries and Peoples etc. All these acts recognize the right of peoples to both internal self-determination, which includes the protection of fundamental, internationally recognized rights and freedoms by the state without discrimination of race, color, creed, other assets and *inter alia* the establishment of autonomy within the sovereign state concerned and external self-determination, if the sovereign state fails to maintain and protect

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

the rights of certain community enshrined in international covenants. Legal scholars argue and state practice shows that for the secession to be legitimate the violations should be of such intensity as to eliminate any possibility of remaining under the rule of oppressing state without endangering national, cultural, ethnic, religious development of suppressed community and the secession is the only means left. Bangladesh and Kosovo cases can be considered as falling within this ambit, though throughout decades Bangladesh case was considered exception and did not constitute customary international law.²⁸ However throughout the decades state practice has limited the application of external dimension of the principle of self-determination only to colonial peoples and peoples under foreign military occupation.²⁹ The priority of self-determination principle in aforementioned cases has become customary law. The ICJ itself also issued judgments and advisory opinions on the cases with such content such as East Timor and West Sahara cases.³⁰ According to the ICJ, self-determination is an essential principle of international law, possessing an *erga omnes* nature.³¹ But the content of the dispute (East Timor) adjudicated by the ICJ was military occupation.

Kosovo case is the first case on postcolonial application of self-determination principle, which was ruled by an international judicial body. The current state of international law, the legal and factual background of the Kosovo case come to prove, that the ICJ at least indirectly endorsed the right of peoples residing in the territory of a sovereign state to self-determination and whether this right will be exercised internally within the territory of a state concerned in form of autonomy or externally by means of secession shall be determined by the respective community, seeking self-determination. The Kosovo people chose secession, which was legitimized by international community in face of the UN bodies and particularly the ICJ. There are some facts that indicate the correctness of this point of view. First of all the period of decolonization is in the past, the peoples of African, Asian and American colonies have already gained independence by means of external self-determination. The second type of external- self determination mentioned above can occur in present but it is missing in Kosovo case. The Kosovo Albanians were not

²⁸ See e.g. Cassese, Antonio. *Self-Determination of Peoples*. Cambridge: University Press, 1995.

²⁹ *Id.*

³⁰ Case concerning East Timor (Portugal v. Australia), 84 (Judgment OF 30 JUNE 1995), Advisory Opinion Western Sahara, 61 (16 October 1975).

³¹ Case concerning East Timor, 84, at 16.

under foreign military occupation. They were ethnic, cultural and religious minority compactly residing in the Kosovo region within the territory of Yugoslavia. The suppression of the Albanian minority by the government of Yugoslavia, gross human rights violations resulted in a secessionist movement in Kosovo which was actually upheld by international community and finally by the ICJ granting the legitimacy of Kosovo's declaration of independence. Thirdly the ICJ, acknowledging the Security Council's resolutions as a source of international law creating international obligations, refers to its resolution 1244 on creation of the UNMIC, where the Security Council *inter alia* provides a responsibility of the UNMIC "to "[f]acilitat[e] a political process designed to determine Kosovo's future status, taking into account the Rambouillet accords" and [i]n a final stage, [to oversee] the transfer of authority from Kosovo's provisional institutions to institutions established under a political settlement".³² This provision of the resolution and the ICJ's attitude to the Security Council's resolutions in general shows that the aforementioned resolution, as an enactment imposing obligations under international law, does not preclude Kosovo's independence as such, leaving the determination of the final status to political settlement. The overall position of the ICJ can be said to entail positive prospects for future recognition and endorsement of the right of minorities to self-determination.

The interpretation of the interrelation between the principles of territorial integrity and self-determination set out by the ICJ coincides with the views of several international law scholars such as V. Qocharyan, T. Samuelian, Ara Papyan. It is worth to introduce briefly their views on this issue.

T. Samuelian argues that the principle of territorial integrity is not absolute, and a sovereign state has certain duties. These duties include honoring treaty obligations, respecting the human rights of population, protecting their life, liberty, property, and on a non-discriminatory basis, which entails equal protection of the law, equal opportunity for economic development, and meaningful participation in that population's self-governance, regardless of race, religious, ethnic origin, social class, etc. Samuelian considers self-determination a remedy, which is applied in case of sovereign's violation of its duties. When asserted in a

³² Advisory Opinion 140, at 37

manner justified under the circumstances in order to permit the remedy of self-determination, the community of nations suspends its recognition of certain aspects of sovereignty. Sovereignty ends where the right and remedy of self-determination begin.³³

Ara Papyan, referring to the Restatement of Foreign Relations of the United States, considers the principle of territorial integrity as a prohibition to use of force by one state against another to conquer it or to overthrow its government. Thus the principle of territorial integrity does not conflict with the principle of self-determination. In international law there is no a principle of preservation of territorial integrity (which would preclude any possible territorial changes in a state (emphasize added)).³⁴

In this context it is interesting to consider Canada's Supreme Court's opinion on the Quebec case. As opposed to the ICJ's advisory opinion on Kosovo case Canada's Supreme Court clearly enumerates the cases when the people can claim for external self-determination 1."... A people "is governed as a part of a colonial empire" 2. "...A people" is subject to alien subjugation, domination or exploitation; 3."...a people" is denied any meaningful exercise of its right to self-determination within the state of which it forms a part.³⁵ As first two cases are concerned they form part of international customary law. The most interesting is the third case: Canada's Supreme Court explicitly mentioned non-colonial manifestation of external self-determination as a possible basis for secession but ultimately rejected Quebec's claim on secession based on this type of external self- determination. The ICJ though intentionally abstained from enlightening the problem of secession but overall assessment of its opinion reveals that the UN court implied the legality of Kosovo's cession.

So which are the lessons of the ICJ's advisory opinion? The ICJ held that the unilateral declaration of independence made by representatives of the people seeking secession and which is not a result of or connected with egregious violations of *jus cogens* norms and other norms of general international law does not infringe any international legal norm and consequently it is legal. The ICJ's second point was that there

³³ Samuelian, Thomas, J. *LEGAL ASPECTS OF ARTSAKH'S SELF-DETERMINATION IN THE CONTEXT OF CONTEMPORARY INTERNATIONAL LEGAL CHALLENGES: BEFORE AND AFTER. KOSOVO*. YEREVAN: 2010

³⁴ ARMENIA TODAY. Есть в международном праве принцип сохранения территориальной целостности? 02 February. 2011,00:17 URL <http://www.armtoday.info/>

³⁵ Reference re Secession of Quebec, 2 S.C.R. 217, 4,5, (1998)

is no clash between the principles of territorial integrity and self-determination as the former relates only to states. It can be argued that the outcome of this case was predetermined and ultimately the ICJ was not capable of considerably changing the situation around Kosovo. After the NATO bombing and Miloshevič's capitulation Yugoslavia's sovereignty over Kosovo factually ceased to exist. The UN interim administration took the power in its hands and by means of the PISG prepared political, institutional and legal framework for the official cession of Kosovo. The UN administration and super actors of international arena stated that the Kosovo case is unique and cannot be a precedent for other secessionist movements. Thus the ICJ seemingly would not dare deliver an opinion contradicting the policy of super powers. But the situation is not that unequivocal. The ICJ indeed issued a legal act which did not close the door for other secessionist movements. Moreover it encourages the liberation movements to further their separatist aspirations through political negotiations with their parent states finding mutually acceptable solutions. The main demerit of the opinion is that its reasoning is partly latent and sometimes has indirect implications, but the fact that the ICJ does not preclude the unilateral declaration of independence *per se*, does not restrict its legality to the Kosovo case only, conditions the legality of the declaration of independence to existence of representatives of the people, struggling for independence, which shall adopt it and sees no conflict between two well-known principles comes to prove that this advisory opinion bears big potential to be successfully employed as a precedent for other secessionist movements.

Chapter 2 Nagorno-Karabakh Conflict

Legal Implications

Legal positions of the parties

This section will be devoted to the issue of legal paradigms adopted by the parties to the Karabakh dispute setting out the main legal arguments brought by Armenia and Azerbaijan respectively. Armenia and Nagorno-Karabakh portray the conflict as an NKR insurgency against Azerbaijan, with Armenia involved

merely as an interested spectator.³⁶ This approach was admitted by the international community. In summit of Conference of Security and Cooperation of Europe (CSCE) (the future Organization of Security and Cooperation of Europe (OSCE)) in Budapest Nagorno-Karabakh was recognized as a party to the conflict³⁷ which means the international community does not consider this conflict as an interstate matter between Azerbaijan and Armenia, but realizes that the struggle of Armenian minority of Azerbaijan for self-determination is a crucial point in this dispute. This approach served as a base for tripartite negotiations (Armenia, Azerbaijan and Armenia) with mediation of OSCE Minsk Group. But after the resign of the first president of Armenia Levon Ter-Petrosyan his successor Robert Kocharyan changed the format of negotiations excluding the NKR and making the negotiations bilateral. This adversely affected the positions of Armenia and Nagorno-Karabakh because the conflict the gist of which was the claim of the Karabakh Armenians for independence gradually began to transform to interstate territorial conflict between Armenia and Azerbaijan for Nagorno-Karabakh.

The principle of self-determination is a core issue on which Armenia and Nagorno-Karabakh Republic base their position asserting that the people of the NKR have exercised their right to self-determination as enshrined alongside that of the territorial integrity of states.³⁸ This statement is based on the following arguments: 1. The decision of the Russian Bolshevik's Party's Caucasus Bureau's session of July 5 1921 on Karabakh's transfer to Azerbaijan is void. 2. Art 3 of the Soviet Law on Secession 1990 permitted the province to determine its own political status by a plebiscite, which took place in 1991. 3. The insurgency movement in Nagorno-Karabakh faced rigid force employed by the Azerbaijani government (atrocities in Sumgait (1988) and Baku (1990), deportations of Armenians residing in Azerbaijan, etc.), which eventually unleashed the war against Nagorno-Karabakh eliminating any possibility for Nagorno-Karabakh to stay

³⁶ Sarvarian, Arman. "The Artsakh Question: An Analysis of Territorial Dispute Resolution in International Law" *Melbourne Journal of International Law* 7(2008).

³⁷ Conference for Security and Co-operation in Europe 1994 Summit Budapest; <http://www.osce.org/mc/39554>

³⁸ See Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, GA Res 2625, UN GAOR, 6th Comm, 25th sess, 1883rd plen mtg, UN Doc A/RES/2625 (1970) ('Declaration on Friendly Relations').

within Azerbaijani borders. 4. Nagorno-Karabakh has never been within the sovereignty of postsoviet independent Azerbaijan.

The first argument is quiet substantive. On July 5 1921, after the Dashnak government was overthrown and Soviet rule in Armenia was established (November 29, 1920) the Russian Bolshevik's Party's Caucasian Bureau adopted a decision to transfer Nagorno-Karabakh to Azerbaijan thus unilaterally settling the dispute between Armenia and Azerbaijan concerning the sovereign title on this province. The decision in question is not legal under international law because the Russian Bolshevik Party's body was not entitled to determine the future of the contested region since at that time neither Armenia nor Azerbaijan were formally a part of the Soviet Russia and remained sovereign.³⁹ Till December 30, 1922 the Soviet Armenia was a sovereign state and only after this date it joined the Transcaucasus federation along with Georgia and Azerbaijan and through this federation became a part of the Soviet Union factually losing its independence.⁴⁰ The same relates to Azerbaijan. Thus a third country in face of its leading party's body without any mandate unilaterally settled a dispute between two sovereign states violating the principle of sovereignty of states. However Armenia's acquiescence can play a role of legitimizing factor. On the other hand since August, 1920 Nagorno-Karabakh was conquered by the Soviet Azerbaijan⁴¹ which held the legitimate sovereign title over the region because international law of that time recognized obtaining sovereign title over the territory by means of conquest.⁴² The principle of self-determination was properly recognized and established after the second world war. It is difficult if not impossible to claim for retrospective effect of contemporary international legal norms at past disputes.

Thus the logical analysis of the first argument reveals that even in case of absence of the notorious decision of Russian Bolsheviks Azerbaijan could assert its sovereign rights over Karabakh.

³⁹ Ղազարխեցյան Վ., Խուդավերդյան, Կ., Մելքոնյան Ա. և ուրիշներ: *Հայոց պատմություն: Երևան. <<Լույս>>, 2000.*

⁴⁰ *Id.*

⁴¹ *Id.*, Sarvarian, Arman. "The Artsakh Question: An Analysis of Territorial Dispute Resolution in International Law" *Melbourne Journal of International Law* 7(2008).

⁴² Cassese, Antonio. *Self-Determination of Peoples*. Cambridge: University Press, 1995.

The second argument that Nagorno-Karabakh held plebiscite (in 10 December 1991 after the collapse of the USSR the population of Nagorno-Karabakh in the referendum with an overwhelming majority voted for independence) in accordance with the Soviet legislation (Soviet Law on Secession) has different interpretations. One approach is that it is not a strong one merely because prior to the plebiscite in August 1991 Azerbaijan adopted a Constitutional Act on State Independence rejecting the legal succession of the Soviet Azerbaijan and releasing itself from obligations by virtue of the Soviet law. Thus this argument being

supported by Armenia and NKR is immaterial.⁴³ Another approach which is more convincing is that The Soviet Law on Secession (Art3) concerns not only Soviet republics included in the USSR but also autonomous republics, autonomous regions or autonomous territories within the borders of those republics. In case of secession of a Soviet republic the aforementioned autonomous units had a right by means of referendum conducted in their territories to decide whether to remain in the Soviet Union, in the seceding republic as well as to decide on their state legal status (*i.e. inter alia* to get independence (emphasize added)).⁴⁴ So under this law Nagorno-Karabakh people had a right to self-determination in case of secession of the parent state (Azerbaijan SSR) from the USSR. Accordingly the Nagorno-Karabakh people by means of referendum (plebiscite) determined the political status of Nagorno-Karabakh Autonomous Oblast creating independent state Nagorno-Karabakh or Artsakh.

The third argument is of great importance. Under customary international law the right to external self-determination except decolonization and military occupation cases is applicable in extreme circumstances, when the minority within a sovereign state is suppressed, their rights are largely disregarded and violated which endangers minority's normal ethnic, cultural, religious development.⁴⁵ Eghishe Kirakosyan, the lecturer on International law in Yerevan State University expressed an opinion that in theory and practice of

⁴³ Sarvarian, Arman. "The Artsakh Question: An Analysis of Territorial Dispute Resolution in International Law" *Melbourne Journal of International Law* 7(2008).

⁴⁴ The USSR Law on Secession (adopted in April 3 1990).

⁴⁵ Cassese, Antonio. *Self-Determination of Peoples*. Cambridge: University Press, 1995.

international law there is a trend to define a concept of 'remedial or effective secession' the gist of which is to single out gross human rights violations against certain community as a basis for secession from the concept of secession under the principle of self-determination. For the concept of self-determination to apply certain community shall qualify the criteria of people (ethnicity, language, culture, religion etc.). This newly-developed notion admits the possibility of secession on the bases of gross and continuing human rights' violations against a concrete human community by the state in whose territory the community resides. (Kirakosyan Eghishe. Personal interview. 8 February 2011). In the Kosovo case according to London Declaration of 31 January 2006 of the six nation Contact Group (the US, the UK, France, Germany, Italy and Russia) makes clear that the Contact Group holds the human rights' abuse such as ethnic cleansing that took place prior to NATO intervention as relevant in determining final status.⁴⁶ Canada's Supreme Court, as was mentioned above, ruling on Quebec case, acknowledged the right of a people denied any meaningful exercise of its right to self-determination to secede. The horrible events in Baku, Kirovabad and Sumgait, when Armenian population was killed, raped, pillaged, deported, the bloody war started by Azerbaijan against Nagorno-Karabakh plainly and obviously exhibit the inability or (more probable) reluctance of Azerbaijani authorities to maintain and protect the rights of Armenian minority, to guarantee their free development within Azerbaijan. Such an attitude from Azeri side leaved only one alternative for Nagorno-Karabakh Armenians - secession which is *de facto* realized.

So it can be derived that the factual context of the Karabakh case can lead to remedial secession, a notion which, as was mentioned above, was valued by the international community in resolution of the Kosovo conflict.

Armenian side of the conflict also claims that Azerbaijan due to its rejection of the legal heritage of the Soviet Azerbaijan and declaration of being successor of Democratic Republic of Azerbaijan (1918-1920) is not eligible to territorial pretentions on Nagorno-Karabakh as the latter has never been within the territory of the first republic of Azerbaijan. This approach is not definite. On one hand in August 1920 the Soviet

⁴⁶ Goodwin, Morag." From Province to Protectorate to State? Speculation on the Impact of Kosovo's Genesis upon the Doctrines of International Law". *German Law Journal*. 8 (2007): 1-20.

Azerbaijan annexed Nagorno-Karabakh and the former was the transferee of the Karabakh territory by the Russian Bolshevik's Party's Caucasus Bureau's decision.⁴⁷ If Azerbaijan rejects its succession of the Soviet Azerbaijan, it rejects its title over Nagorno-Karabakh.

If asserting that Azerbaijan has ceased to have a sovereign title over Nagorno-Karabakh due to its rejection of the Soviet legal heritage the legal consequence is that sovereignty (status) over Nagorno-Karabakh is uncertain. Customary international law provides that in such cases the free and genuine expression of the will of the people of that territory shall be secured and the problem shall be resolved in accordance with that will.⁴⁸ If applying this theory it becomes apparent that the Nagorno-Karabakh people expressed their will by means of the plebiscite held in 1991. In this case the fact of holding plebiscite acquires legal significance not because of its conformity with the Soviet legislation but because of being a measure of self-determination in general, which is inherent right of a population of the territory which has uncertain status.

On the other hand the Constitutional Act on the State Independence of the Republic of Azerbaijan (1991) contains a reservation on the declaration of being a successor of Azerbaijan Republic of 1918, which concerns the territorial aspects of succession. According to Art 4 of the Constitutional Act all the acts that had been effective before the restoration of the state independence of the Republic of Azerbaijan, do not contradict the sovereignty and territorial integrity of the Republic of Azerbaijan and not aiming at the change of the national state structure retain their effectiveness in the Republic of Azerbaijan. Thus it appears that Azerbaijan has declared itself the successor of First Azerbaijan Republic within the boundaries of the Soviet Azerbaijan meaning that Azerbaijan did not waive its sovereign title over Nagorno-Karabakh. However the aforementioned statement of the Azerbaijani Constitutional Act raises questions on legality of such partial succession under international law. The succession of states is regulated by two conventions-Vienna Convention on Succession of States in respect of Treaties of 1978 and Vienna Convention on Succession of

⁴⁷ Sarvarian, Arman. "The Artsakh Question: An Analysis of Territorial Dispute Resolution in International Law" *Melbourne Journal of International Law* 7 (2008).

⁴⁸ Cassese, Antonio. *Self-Determination of Peoples*. Cambridge: University Press, 1995.

States in respect of State Property, Archives and Debts of 1983. These conventions codify customary international law in the area of states' succession and add some new guidelines in this field of international relations. The territorial aspects of succession are addressed by Vienna Convention of 1978 concerning treaty succession. Art 11 of the Convention states that succession does not affect a boundary established by a treaty or obligations and rights established by a treaty and relating to the regime of a boundary. In other words a newly-emerged state at the time of succession is obliged to recognize the boundaries and the regime thereof as they were in predecessor state. In case of disagreement in respect of boundaries the successor state may claim for revision of boundaries only after succession preserving all the international legal requirements concerning the problem in question.⁴⁹ The legal implication of the Convention on Azerbaijan is that the latter is not eligible to declare itself being a successor of one state without recognition of the boundaries of the predecessor state. It means that Azerbaijan being successor of Azerbaijan Democratic Republic of 1918 can claim for sovereignty only on the territories within the boundaries of that republic which never included Nagorno-Karabakh. Although Azerbaijan is not a party to the Convention its provisions are binding due to being a part of international customary law.⁵⁰ In light of this argument the fact of conquest of Nagorno-Karabakh by the Soviet Azerbaijan in 1920 becomes immaterial.

Azerbaijan claims that upon its secession from the Soviet Union under the principle of *uti possidetis juris*, it inherited Nagorno-Karabakh within its borders.⁵¹ Consequently, Armenia has 'occupied' Azeri territory in violation of its obligation to respect the territorial integrity enshrined in arts.2 and 33 of the UN Charter. Self-determination principle is subordinate to territorial integrity and the suppressive measures taken against secessionist rebels on Azerbaijani territory (which would have succeeded but for the intervention of Armenia) were strictly an internal problem of Azerbaijan. Notwithstanding the repeated instances of state

⁴⁹ Քոչարյան, Վիգեն: *Միջազգային Իրավունք*: Երևան: Երևանի համալսարանի հրատարակչություն, 2002:

⁵⁰ Cassese, Antonio. *International Law*. Cambridge: University Press, 2005.

⁵¹ Sarvarian, Arman. "The Artsakh Question: An Analysis of Territorial Dispute Resolution in International Law" *Melbourne Journal of International Law* 7(2008).

persecution of the Armenian minority population in Artsakh and Azerbaijan, the territorial title of Azerbaijan remains supreme.⁵²

Uti possidetis or inviolability of frontiers is a general rule of international law. Coming from decolonization period, this rule was then spelled out in the Helsinki Final Act of 1975, which acknowledged this principle and put an obligation on the state parties to the Act to refrain from the violation of *uti possidetis*.⁵³ It is apparent from the wording of the clause mentioned above that the principle of inviolability

of frontiers, supplementing the principle of territorial integrity, relates to states and not to peoples residing within these frontiers and seeking self-determination. In spite of that the Chamber of the ICJ in the *Case concerning the Frontier Dispute* took a different view. Particularly it stated that” [the principle of *uti possidetis*] is a general principle, which is logically connected with the phenomenon of obtaining independence, wherever it occurs. Its obvious purpose is to prevent the independence and stability of new states being endangered by fratricidal struggles provoked by challenging frontiers following the withdrawal of administering power.”⁵⁴ It follows that this principle is applicable to cases when a former colony acquires independence being recognized in its colonial boundaries and to cases of secession of a region from a sovereign state. This interpretation of the principle is contrasted to the principle of self- determination. However the inviolability of frontiers and territorial integrity shall be upheld as far as the rights of all communities of a state concerned are protected and proper conditions are guaranteed for their coexistence and future development. In case of gross human rights’ violations, persecution of a community compactly residing in a territory of a sovereign state the above- mentioned state-protecting principles shall not prevail and the principle of self- determination (external) or remedial secession must come to fore.

⁵² *Id.*

⁵³ See Helsinki Final Act (1975).

⁵⁴ ICJ, Reports 1986,565, para.20.

The flow in Azerbaijan's argument stems from three facts: 1. The reservation made in Azerbaijani Constitutional Act as it was represented earlier has controversies and is a disputed measure under international law. 2. Pursuant to the Soviet legislation Nagorno-Karabakh as an autonomous unit of Azerbaijan SSR had a right to determine its political future in case of Azerbaijan's secession from the USSR notwithstanding separation from both the USSR and Azerbaijan. 3. Azerbaijan's allegations, that notwithstanding the repeated state persecution of Armenian minority of Nagorno-Karabakh and other regions of Azerbaijan this problem is its internal matter and cannot lead to destruction of its territorial integrity, is in conflict with contemporary international law prohibiting violation of human (minority) rights, *inter alia* also the right to self-determination and supporting maintenance of international peace and security. It is evident that international community particularly in case of Kosovo conflict has manifested its intolerance to gross violations of Kosovo minority's rights and their continuous discrimination and persecution by the government of Yugoslavia seeing these violations as considerable factors contributing to settlement of the conflict based on the right of a minority to secession. Thus, especially after Kosovo conflict and the ICJ's recent advisory opinion the approach of Azerbaijani party seems unacceptable.

Nagorno-Karabakh and Kosovo

Similar and Different

Nagorno-Karabakh and Kosovo conflicts have similarities deriving from the similar gist and content they have. Notwithstanding the similarities, each conflict, each dispute is a unique factual pattern having its peculiarities. This section will cover the issue of similarities and differences of the Nagorno-Karabakh and Kosovo cases.

The political scientist Sergey Minasyan as the major similarity of aforementioned conflicts highlights the fact that both conflicts have ethno-political roots *i.e.* in both cases ethnic, religious and cultural minority managed to secede from a parent country and create separate states (Minasyan Sergey, the deputy director of

Institute of Caucasus. Personal interview. 23 January 2010). As far as the major difference is concerned the political scientist points out the huge international support to Kosovo separatist movement in face of Western countries, the NATO and the UN. This support led to transformation of political decision into legal solution to the problem. Nagorno-Karabakh people reached their aim *i.e. de facto* separated from Azerbaijan by own strength and with support of Armenia. That is why the final (legal) solution is delayed. International law specialist Eghishe Kirakosyan is of opinion that the major differences of two conflicts are political and not legal.

As one more similarity the historical background of Kosovo and Nagorno-Karabakh can be mentioned. Two provinces were annexed by Serbia and Azerbaijan respectively at the beginning of the 20-th century and were administrative units within the territory of Yugoslavia and the Soviet Azerbaijan.⁵⁵ But in this context some important differences should be noted. Firstly Yugoslavia provided more latitude in self-government than the Soviet Azerbaijan. Since 1923 Nagorno-Karabakh was factually deprived of its autonomous status and became an isolated enclave within the Soviet Azerbaijan *prima facie* bearing the name Nagorno-Karabakh Autonomous Oblast. Such an administrative-territorial division demolished even a little autonomy enjoyed by Nagorno-Karabakh at the beginning of the Soviet rule. Instead Yugoslav authorities almost always provide an autonomy to Kosovo. The level of autonomy varied from federal autonomy to autonomy under Serbian jurisdiction.⁵⁶ Secondly though both Albanian and Armenian minorities in Yugoslavia and Azerbaijan respectively were suppressed and discriminated by the government as opposed to Armenian minority the Kosovo Albanians also discriminated against Serb and also other minorities of the separatist region e.g. Romas.⁵⁷ International law neither bans nor authorizes the resort to force by the dependent people or liberation movement but despite that state practice reveals restriction on the

⁵⁵ *International Crisis Group*. Kosovo Conflict History. 3 March 2008; <http://www.crisisgroup.org>; <http://www.crisisgroup.org/en/key-issues/research-resources/conflict-histories/kosovo.aspx>; Goodwin, Morag." From Province to Protectorate to State? Speculation on the Impact of Kosovo's Genesis upon the Doctrines of International Law". *German Law Journal*. 8 (2007): 1-20.

⁵⁶ Sarvarian, Arman. "The Artsakh Question: An Analysis of Territorial Dispute Resolution in International Law" *Melbourne Journal of International Law* 7(2008). *International Crisis Group*. Kosovo Conflict History.3 March 2008 <http://www.crisisgroup.org>; <http://www.crisisgroup.org/en/key-issues/research-resources/conflict-histories/kosovo.aspx> Jansen, G. Richard. *Albanians and Serbs in Kosovo: An Abbreviated History an Opening for the Islamic Jihad in Europe..* Colorado State University, 2008.

⁵⁷ Cassese, Antonio. *Self-Determination of Peoples*. Cambridge: University Press, 1995.

right of the suppressed minority to use force only to the case of forcible denial of self-determination by the parent state (either by means of armed force or even coercive measures short of military violence).⁵⁸ The Nagorno-Karabakh Armenians applied force when Azerbaijani government levied war against them to oppress their movement for independence. Albanian extremists in contrast started ethnic cleansing of especially Serb population of Kosovo in 1980-s when there was no armed conflict between Albanian rebels and Yugoslav government nor any flagrant coercive action by the latter.⁵⁹ Sufficed to say that killing civilian population is prohibited by international law in any case even when waging war and depending on circumstances constitutes either a war crime or crime against humanity.⁶⁰ Notably this issue is beyond the scope of this research and generally concerns International Human Rights Law and International Humanitarian Law. The parallel however was made to evaluate the whole process of liberation movement in Kosovo and Nagorno-Karabakh under international law. One more similarity of Kosovo and Karabakh cases is the declaration of independence according to international law. Moreover in case of all things equal the Nagorno-Karabakh population's will was expressed by means of direct democracy *i.e.* referendum on independence which is a higher level of democratic decision-making than representative democracy by means of parliament. This was the case in Kosovo. It is interesting to find out whether the political entities in Kosovo and Nagorno-Karabakh meet the criteria of statehood mentioned in Montevideo Convention of 1933. These criteria are: a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other states.

Kosovo meets the first criterion. Since 20 February 2008 it has its law on citizenship which establishes the principles of permanent and firm legal relationship between the state and its allegiances. The citizens of a state form its permanent population which is the case in Kosovo. Nagorno-Karabakh in contrast has not such a law yet which leaves the question of citizenship open. All the inhabitants of Nagorno-Karabakh have either

⁵⁸ *International Crisis Group*. Kosovo Conflict History. 3 March 2008 <http://www.crisisgroup.org>; <http://www.crisisgroup.org/en/key-issues/research-resources/conflict-histories/kosovo.aspx>; Goodwin, Morag." From Province to Protectorate to State? Speculation on the Impact of Kosovo's Genesis upon the Doctrines of International Law". *German Law Journal*. 8 (2007): 1-20.

⁵⁹ See Geneva Conventions of 1949.

⁶⁰ *Advisory opinion*, 410 at 46.

passports of RA or passports of other states. Thus Armenian self-recognized republic is not in conformity with this requirement.

The second criterion mentioned above is met by both Kosovo and Karabakh. The territorial scope of Artsakh and Kosovo is defined in their Constitutions. On the other hand taking account of pendency of Nagorno-Karabakh conflict the status of the territories surrounding Nagorno-Karabakh (Kelbajar, Lachin, Kubatli etc.) can be changed under political settlement of the conflicting parties.

As far as government is concerned Nagorno-Karabakh certainly meets this criterion. The supreme state bodies, the order of their formation and powers are established in the Constitution of Nagorno-Karabakh Republic. The situation in Kosovo is controversial. Pursuant to the ICJ's advisory opinion the Special Representative of Secretary General continues to exercise the functions prescribed by the Security Council Resolution 1244.⁶¹ This clause implies that all the institutional and legal framework established under resolution 1244, including the Constitutional Framework, continues to remain in force as part of international *lex specialis* applicable to Kosovo. But the Constitution of the Republic of Kosovo of 2008 has created an entirely new institutional and legal framework and is a source of constitutional authority in its own right not based on resolution 1244. Since 2008, Kosovo government authorities exercise their powers exclusively on the basis of the Constitution of the Republic of Kosovo and not on the basis of the Constitutional Framework or resolution 1244. By confirming the continuation of resolution 1244, which vests the sole responsibility for the governance of Kosovo in the SRSG, the ICJ maintains the untenable legal fiction that the SRSG is still in charge of governing Kosovo, while Kosovo is in fact governed under the Constitution of the Republic of Kosovo, which does not recognize the SRSG as a public authority.⁶² Besides if assuming that both legal frameworks established by the UN and Constitution of Kosovo are functioning it turns out to be two sovereign systems of government in Kosovo. Such a situation contradicts the traditional

⁶¹ Muharremi, Robert. *A Note on the ICJ Advisory Opinion on Kosovo*. German Law Journal 11(2010):873-74.

⁶² Мелик-Шахназаров, Арсен. *Нагорный Карабах Факты Против Лжи*. Москва. Волшебный Фонарь, 2009.

theory of Constitutional and International law relating to the so-called internal sovereignty which means that within its territory the state power is unique and supreme. If there are two sovereign powers on the same territory there is no sovereign state power at all.

The criterion of international personality is problematic in both Nagorno-Karabakh and Kosovo cases. Though the political and legal climate is much more propitious for Kosovo taking into consideration tens of states recognized its independence including the US and influential countries of the EU, the ICJ's advisory opinion, this newly independent state is not a member of the UN or other major international organization. Nevertheless Kosovo is a party to European Partnership program held by the EU, has diplomatic relations with the USA, France, Albania, Finland Czech Republic etc. Nagorno-Karabakh's situation is markedly worse: mere *representatives* (emphasize added) in few countries – (Armenia, the US, Russia, etc.) as opposed to Kosovo's *embassies or consulates* (emphasize added) in aforementioned states without being represented in any international organization.

Thus neither Kosovo nor Nagorno-Karabakh fully satisfy Montevideo criteria meaning that these entities are at the initial stages of development and have a lot to do to affirm and strengthen their statehood. The political conjuncture and clash of interests of major geopolitical players obstruct the development and full integration of Kosovo and Nagorno-Karabakh into international community of states. Nagorno-Karabakh is in more delicate situation. It is not recognized by even one state including Armenia, there is no peace agreement with Azerbaijan which would determine the final status of Nagorno-Karabakh. Nagorno-Karabakh notwithstanding firm legal bases for its claim of independence remains completely unrecognized republic. In such circumstances there can be no word about proper international integration of Nagorno-Karabakh Republic. This is one of the major differences existing between two 'stories' of self-determination of peoples.

As noted by Sergey Minasyan "International law merely formulates results achieved in the political arena or battle field. Nagorno-Karabakh conflict also will be resolved in political field requiring political will of leaders of conflicting parties and international community."

Chapter 3 Testing Applicability of ICJ's Legal Doctrine on Nagorno-Karabakh Case

In the first chapter the legal doctrine elaborated by the ICJ with regard to Kosovo case was discussed. This chapter will address the issue of applicability of this doctrine to Nagorno-Karabakh conflict.

As it was previously mentioned the ICJ has defined certain criteria for unilateral declaration of independence to be lawful: (1) the independence shall be declared by the representatives of the people seeking self-determination. (2) the declaration of independence shall not be a result of or be connected with egregious violations of *jus cogens* and other norms of general international law by the people seeking self-determination. Does Nagorno-Karabakh case in conformity with these legal requirements? The answer is-yes. The subsequent paragraphs will discuss and substantiate Nagorno-Karabakh's conformity with each of the criteria mentioned above.

1. **The independence shall be declared by the representatives of the people seeking self-determination.**

In 1991 referendum Nagorno-Karabakh people by overwhelming majority voted for independence from Azerbaijan. This act is a unilateral declaration of independence. Moreover the ICJ established less ambitious criterion –declaration of independence by the representatives of the people which in democratic society associates with parliament and forms a type of representative democracy. In 2008 Kosovo parliament adopted the declaration of independence. In Nagorno-Karabakh the independence was declared by the people themselves displaying manifestation of direct democracy, hence Nagorno-Karabakh people not only meet the minimum threshold adopted by the ICJ but took a higher standard of democratic decision-making. It is argued that the plebiscite in Nagorno-Karabakh is not valid since the Azeri community of Nagorno-Karabakh did not participate in it and also because of absence of international monitoring over the referendum. These allegations are not properly founded. Firstly Azeri population constituted at most 25 percent of the whole population of Nagorno-Karabakh at the end of 1980s being a minority.⁶³ Under

⁶³ JIA , Bing Bing. The Independence of Kosovo: A Unique Case of Secession?" *Chinese Journal of International law* 8 (2009).

customary international law in such cases the position of majority is conclusive.⁶⁴ In Kosovo the declaration of independence was proclaimed even though the 10 Serb members of the Assembly boycotted the voting.⁶⁵ The deputies boycotted the voting represented the Serb minority of Kosovo but their absence did not affect the outcome of the voting because the deputies representing the ethnic majority of the province voted for independence. The correlation between representatives of ethnic majority and minority and the lack of opportunity for parliamentary minority to influence the results of the voting for independence in Kosovo assembly greatly resemble the situation in Nagorno-Karabakh. In both cases the decision of ethnic majority obtained legitimacy. The absence of minority in the decision-making process could not anyway be decisive in the sense of outcome. The difference is procedural-the process of decision-making. In Nagorno-Karabakh the ethnic majority made the political decision directly by means of plebiscite and in Kosovo the decision was made by the representatives of the ethnic majority.

As far as the second argument is concerned it should be noted that neither treaty nor customary international law requires compulsory international monitoring of plebiscites and other means of self-determination.⁶⁶ Summing up the above-mentioned considerations it can be concluded that Nagorno-Karabakh's declaration of independence meets the first pre-condition of legality.

2. The declaration of independence shall not be a result of or be connected with egregious violations of *jus cogens* and other norms of general international law by the people seeking self-determination.

The violations of international law in abovementioned level can be unlawful use of force, outrageous human rights' violations etc. Obviously Nagorno-Karabakh Armenians were not engaged in any such internationally wrongful act. The liberation movement in Nagorno-Karabakh was peaceful, upholding

⁶⁴ *Id.*

⁶⁵ Cassese, Antonio. *Self-Determination of Peoples*. Cambridge: University Press, 1995.

⁶⁶ Սյվլազյան, Արմեն: Հայաստանի Ազատագրված Տարածքը և Արցախի Հիմնախնդիրը: Երևան, Հայոց Համաշխարհային գործակցություն, 2006.

internal and international law.⁶⁷ On the contrary Azerbaijani authorities used force against the Armenian minority lawfully striving for self-determination. Awful massacres, killings, pillages, mass deportations of Armenian population of Azerbaijan and Nagorno-Karabakh and finally war unleashed against Nagorno-Karabakh rebels are apparent displays of egregious violations of international legal norms perpetrated by Azerbaijan. It can be surely said that the Armenian population of Nagorno-Karabakh had a status of victim and not aggressor. The declaration of independence together with active measures of self-defense were the only means of overcoming aggressive policy of Azerbaijan and thus is not a result or is not connected with any international wrongdoing. So as was substantiated in previous paragraphs Nagorno-Karabakh's unilateral declaration of independence through plebiscite of December 10 1991 meets the criteria of legality mentioned in the ICJ's well-known advisory opinion.

Notwithstanding the legality of unilateral declaration of independence being the core legal issue handled by the UN court it is worth touching upon the legal implications of the ICJ's other considerations which can be valuable for Nagorno-Karabakh conflict resolution. The Court makes a distinction between the principle of territorial integrity being applicable to states and the principle of self-determination, at the same time implying the importance of political settlement of a territorial dispute. Put it another way the Court does not inhibit the resolution of a dispute on the bases of self-determination principle but makes it important to reach such a solution by means of political negotiations and compromise between parties and recognition by international community of the secession of a separatist region.⁶⁸ Thus Nagorno-Karabakh and Armenia must strengthen their diplomatic efforts to reach a solution to the dispute which will satisfy both Armenian and Azerbaijani parties. Finding an ultimate solution to the problem corroborating with the OSCE Minsk Group will ensure the international recognition of the final results of negotiations.

The ICJ's advisory opinion has strengthened the positions of Nagorno-Karabakh and Armenia in the sense that it did not prohibit the claim on secession and permitted to use it in the process of negotiations if properly grounded. Azerbaijan's statements that territorial integrity is predominant over the principle of self-

⁶⁷ Advisory opinion, 410, at 37, 39.

⁶⁸ *Id.*

determination and Armenian's party's claims contradict international legal norms are not lawful and are ill-grounded according to the reasoning of the ICJ's advisory opinion.

Conclusion

Kosovo events and the ICJ's advisory opinion show that the attitude of the international community towards postcolonial interpretation of self-determination principle is being changed. The ICJ has tried to clarify to some extent how self-determination principle should be applied in modern international law. It is not surprising that after Kosovo in 2010 the world witnessed emergence of one more new state separated from the parent state, South Sudan. At the same time it is true that without wide international support and consistent state practice the ICJ's advisory opinion will not become customary law and consequently will not serve as a legal precedent for other secessionist movements. In this light South Sudan case is not a manifestation of chain reaction after the ICJ's advisory opinion but more a result of a political decision of the parties to the dispute which was admitted by international community. This was also the case in 1971 when Bangladesh seceded from Pakistan. The UN court also realizes the importance of politics in dispute resolution process emphasizing the importance of political settlement of a conflict.

The hypothetical application of the legal doctrine of the ICJ's advisory opinion to Nagorno-Karabakh case has revealed that Nagorno-Karabakh meets the criteria elaborated by the ICJ. The outcome of Kosovo conflict and the line of the ICJ's reasoning imply that the strongest argument for a minority claiming for secession should be the concept of so called remedial secession *i.e.* the fact of suppression and gross and continuing violations of human rights by the parent state with regard to certain community compactly residing within its borders. Nagorno-Karabakh and Armenia have all necessary legal and factual bases to substantiate the aforementioned argument.

In political sense weighted by the ICJ's advisory opinion Armenian and Azeri parties are far from reconciliation. Moreover the belligerent rhetoric of Azerbaijan has recently increased. Notwithstanding

Azerbaijan's reluctance to humbly accept the secession of Nagorno-Karabakh and in such a way obstructing the resolution of the conflict the policy pursued by Armenia and Nagorno-Karabakh also does not lead to political settlement of the problem acceptable for us. As major flaws of Armenian policy can be mentioned exclusion of Nagorno-Karabakh from negotiations and making them bilateral between Armenia and Azerbaijan, lack of active, initiative steps to move the negotiations forward in pro-Armenian direction, policy towards maintenance of *status quo* instead of real actions aiming at final resolution of the conflict etc. It is time for taking active political measures to pace the process of finding peaceful and mutually acceptable solution to the problem because preserving *status quo* entails grave political and economic consequences for Armenia and Artsakh. As possible steps for reformation of the Armenian policy in Karabakh dispute I would suggest the following:

1. The restoration of the status of Nagorno-Karabakh as a party to the conflict and enabling it to participate in negotiations with all rights existing before R. Kocharyan's erroneous decision. The subject of the right to self-determination claiming to be given opportunity to determine its political future must participate in negotiations which handle its political future. The restoration can be done in two ways: Nagorno-Karabakh forbids Armenia to negotiate on its behalf or Armenia suspends negotiations till Nagorno-Karabakh's return to negotiation table.

2. The active propagandistic activity in international organizations including finding allies to lobby our interests, submitting the drafts of resolutions and other acts representing the position of Nagorno-Karabakh and Armenia and having them passed. The UN General Assembly, the Parliamentary Assembly of Council of Europe, European Parliament, NATO Parliamentary Assembly adopted resolutions upholding Azerbaijan's territorial integrity and demanding that Armenian forces withdraw from occupied territories of Azerbaijan. These documents do not produce legal consequences and constitute soft law but their political importance is great. Such legal documents distort the gist and content of the conflict and influence the opinion of international community in favor of Azerbaijan. These acts also represent the official position of the respective organizations and bodies which have great persuasive effect. The continuing distortion of the legal points and facts pertaining to Karabakh generates consolidated negative approach of international

community towards Armenia and Nagorno-Karabakh which can have undesirable consequences in the process of regulation of the conflict.

3. Initiating real and deep internal reforms in both Armenia and Nagorno-Karabakh to refigure democracy and liberalize economy. The protection of democratic values and market economy will not only strengthen the defensive capacities of Artsakh and Armenia but it has also ideological value. Democracy and free market economy are cornerstones of western culture the representatives of which are dominant actors of international arena. Sharing these values and becoming the ideological associate of western states Armenia will obtain a strong measure to counterbalance Azerbaijan's economic attractiveness for international community and the possibility of support of western world to the Armenian party in resolution of the conflict will be more real.

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