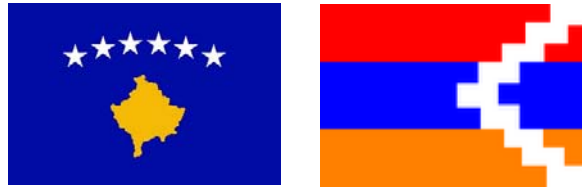


**“Kosovo and Karabakh: parallel or different”?**



Comparative analysis of the application of the principle of self-determination in  
the cases of Kosovo and Karabakh

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## **Abstact**

The right of self-determination has long been considered a right, which despite its character of jus cogens, lacks of shaping, of clear standards and means of application. The paper treats two cases: Kosovo and Karabakh, which core issue is the application of the principle of self-determination to achieve political independence. Both share the same claim, the same controversy, still the author argues that Kosovo's case seems to have paved its way in a more successful manner, through external influence, while Karabakh seems to be defending a status quo, which is fragile on one hand, and on the hand, negotiating in a scope, which has and probably will not given a certain outcome. The paper compares both cases from the point of view of application of the principle, the possibilities of both regions of advancing their self-determination rights and evaluates the possibility for Kosovo to become a precedent for Karabakh.

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## Introduction

The purpose of this work is to conduct a comparative analysis of the application of the principle of self-determination in two cases of ethnic conflicts<sup>1</sup>: Kosovo and Nagorno-Karabakh. Both cases seem to be similar in terms of problem background, although each of them has received quite different treatment by the international community. Moreover, while the legal arguments of Nagorno-Karabakh for self-determination seem to be better-founded, the progress towards independence of the Kosovo seems to be more substantial and coherent.

Karabakh, as an unresolved issue of Armenian-Azeri foreign policy, has been in the center of attention of the parties of the conflict and of the international community for almost two decades, affecting not only the parties of the conflict, but also the whole region and bringing the participation of big players, leading countries of international community, such as Russia, US, France and indirectly the EU, and also Turkey.

Kosovo, on the other hand has attracted the international community by its unexpected escalations, besides dividing the international community in two: countries, which have recognized its independence and countries, which are unwilling to do so, mostly fearing that the principle applied in Kosovo will turn into a referent case for their own unresolved conflicts.

The reasons for choosing Kosovo as an object comparable to the case of Karabakh, was not only the fact that both regions shared the same claim, the demand of independence, and the means, their right to self-determination, but

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<sup>1</sup> Ethnic conflict: war, civil war, or other conflict between or among two or more racial, language, or religious groups. "ethnic conflict." *The Oxford Essential Dictionary of the U.S. Military*. Oxford University Press, 2001. Answers.com 16 Mar. 2010. <http://www.answers.com/topic/ethnic-conflict-1>

also the fact that they had in common more characteristics, such as having been parts of big empires, having undergone ethnic cleansing, and having expressed through referenda their wish of becoming independent, among other aspects to be treated in this paper.

This paper will evaluate the fact that Kosovo's situation may represent a precedent for regions claiming independence through their right to self-determination, and particularly, for Karabakh. It will analyze the case of Kosovo, which set up the precedent that when the powerful and leading countries recognize a state, that recognition plays a major role in considering that the principle of self-determination, often in conflict with the principle of territorial integrity, has prevailed over the last one, allowing the recognized entity to make an important step towards its independence.

The following lines of this paper will present both cases at first separately and paying attention to the context: history, geography, ethnic aspects and the evolution which undergone by each dispute. Later on, the cases will be compared.

The paper will consist in defining the factors and arguments, which created different application (and possibilities of prevailing) of the principle of self-determination, thus creating the conception that Kosovo should not be considered a precedent for Karabakh. Comparison of the cases will focus on legal issues, even though political factors will not be ignored, taking into account the fact, that they always play a key role in political decision-making and application of international public law.

But, before proceeding to the presentation of the cases and to their further comparison, theoretic aspects regarding the principle of self-determination, its interpretation and application will be treated. That second introduction will

serve as a guideline and a theoretic basis over which the cases will have a stronger standing.

## **PART I: The principle of self-determination**

### **1.1. A right of choice**

In public international law, the right to self-determination is described as the right of the peoples to determine freely their political status and freely pursue their economic, social and cultural development. It is an individual and collective right to "freely determine . . . political status and [to] freely pursue . . . economic, social and cultural development"<sup>2</sup>.

Basically, it is a right of choice, a right to determine a political status, generally said, to select the direction of further development. Hence, the right of self-determination has a bigger scope, that the right of the people to political independence. Its meaning is far broader: it means the right of the people to choose to stay within a state by fully integrating to it, to become an independent state or to acquire/preserve the status of an autonomous region within a state.

It is also important to mention, that in international law, the principle of self-determination of peoples is a norm of Jus cogens<sup>3</sup>. The Jus cogens norms are the highest rules of international law, which must be obeyed. It is also a right of means (process) and not one of outcome. The subjects entitled to this right are the peoples and not the states. By opting to exercise the right to self-determination, the respective people engage in a process, which may provide a wide range of possible outcomes conditioned by the situations, needs, interests

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<sup>2</sup> Karen Parker, Understanding Self-Determination: The Basics, Presentation to First International Conference on the Right to Self-Determination, United Nations, August 2000, Geneva.

<sup>3</sup> Jus Cogens: the body of peremptory principles or norms from which no derogation is permitted; those norms recognized by the international community as a whole as being fundamental to the maintenance of an international legal order. Available at "Preemptory norm." West's Encyclopedia of American Law. The Gale Group, Inc, 1998. Answers.com 16 Mar. 2010. <http://www.answers.com/topic/peremptory-norm>



and conditions of concerned parties<sup>4</sup>.

The self-determination right requires a set of factors of a people that give rise to possession of right to self-determination: a history of independence or self-rule in an identifiable territory, a distinct culture, and a will and capability to regain self-governance<sup>5</sup>.

There is also a theory, stating that the requirements to have a claim on the right of self-determination are: "people" (ethnographic), a state (from which they are seceding) that seriously violates their human rights; and the absence of other effective remedies under either domestic law or international law<sup>6</sup>.

Moreover, claims raised from this principle may range from cultural, economical, social or political autonomy. However, if the above-mentioned first three types of autonomy may be accepted more or less easily by the states, then the last one, the political autonomy, may create severe conflicts between the so called mother state and the entity which is willing to be politically independent.

## **1.2. Brief history on the development of the right to self-determination**

The historical development of this right has its roots in the Article 1 of the Charter of the United Nation, as the inclusion of the principle in the UN Charter symbolizes the universal recognition of the principle.

The development of modern states in Europe and the rise of popular national consciousness enhanced the status of self-determination as a political principle,

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<sup>4</sup> "Self-determination." The Concise Oxford Dictionary of Politics. Oxford University Press, 1996, 2003. Answers.com 13 Mar. 2010. <http://www.answers.com/topic/self-determination>

<sup>5</sup> Karen Parker, Understanding Self-Determination: The Basics, Presentation to First International Conference on the Right to Self-Determination, United Nations, August 2000, Geneva.

<sup>6</sup> Special Committee on European Affairs, Thawing a Frozen Conflict: Legal Aspects of the Separatist Crisis in Moldova, 61 REC. OF THE ASS'N OF THE BAR OF THE CITY OF NEW YORK, 2006, available at [http://www.abcnny.org/Publications/record/vol\\_61\\_2.pdf](http://www.abcnny.org/Publications/record/vol_61_2.pdf).

but it was not until the period of World War I that the right of national independence came to be known as the principle of national self-determination<sup>7</sup>

The principle of self-determination is included in the purposes of the UN. Particularly, according to the article 1 of the UN<sup>8</sup> Charter one of the purposes of the UN is the development of friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace.

Furthermore, the UN General Assembly Resolution 2625 by its Declaration of Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, in 24 October 1970 stated that "By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter<sup>9</sup>."

The right of self-determination is also provided by the Helsinki Final Act<sup>10</sup> adopted by the Conference on Security and Co-operation in Europe (CSCE) in 1975, which first article stipulated the following: "The participating States will respect each other's sovereign equality and individuality as well as all the rights inherent in and encompassed by its sovereignty, including in particular the right

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<sup>7</sup> "Self-determination." The Concise Oxford Dictionary of Politics. Oxford University Press, 2003. Answers.com 13 Mar. 2010. <http://www.answers.com/topic/self-determination>

<sup>8</sup> United Nations

<sup>9</sup> UN General Assembly, Respect for the principles of national sovereignty and non-interference in the internal affairs of States in their electoral processes: resolution adopted by the General Assembly, 18 December 1990, A/RES/45/151, <http://www.unhcr.org/refworld/docid/3b00efe434.html> [accessed 16 March 2010]

<sup>10</sup> Conference on Security and Co-operation in Europe, Final Act, Helsinki, 1 August 1975, available at <http://www.hri.org/docs/Helsinki75.html>

of every State to juridical equality, to territorial integrity and to freedom and political independence. They will also respect each other's right freely to choose and develop its political, social, economic and cultural systems as well as its right to determine its laws and regulations".

The principle of self-determination has been affirmed by the International Court of Justice in the Namibia case<sup>11</sup>, the Western Sahara<sup>12</sup> case and the East Timor<sup>13</sup> case, in which its erga omnes<sup>14</sup> character was confirmed. Furthermore, it should be also mentioned that the scope and content of the right to self-determination has been elaborated upon by the UN Human Rights Committee and the Committee on the Elimination of Racial Discrimination, as well as by numerous leading international jurists.

Over the years the principle of self-determination has changed its character from soft to hard law. Self-determination right has become an integral part of human rights law, which has a universal application.

### **1.3. The means to enforce the right**

The means of enforcement of self-determination may have a big variety of clear and hybrid forms. Despite these seemingly clearly agreed definition, there is no agreement on the content, applicability and implementation of the right to self-determination.

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<sup>11</sup> Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276, 1970, available at <http://www.icj-cij.org>

<sup>12</sup> Western Sahara, International Court of Justice, 1974, available at <http://www.icj-cij.org>

<sup>13</sup> Case concerning East Timor (Portugal v. Australia), Summary of the Judgment of 30 June 1995, available at <http://www.icj-cij.org>

<sup>14</sup> Definition of erga omnes (Latin: "toward all"): obligations, which apply to all states. "erga omnes." Encyclopædia Britannica. 2010. Encyclopædia Britannica Online. 16 Mar. 2010 <<http://www.britannica.com/EBchecked/topic/930543/erga-omnes>>.

Richard Falk has categorized two the different types of self-determination claims that have been made historically and their sub categories. The first category is constituted by the claims of secession and autonomy and its branches are decolonization, elimination of foreign rule, secession by federal units in relation to a central, administrative sub-units and formation of indigenous communities or nations. The second category are the claims of Human Rights and Democracy, which branches are the option of colonial status, the option of federalism, the option of legal regimes, which guaranty and protect the rights of access, participation, and equality, the option of fiduciary arrangements administered by a traditional territorial sovereign, with an undertaking to preserve traditional rights to sacred and the ways of life of minorities and indigenous peoples<sup>15</sup>.

For the first category of claims, the most suitable means are not well defined, particularly, one may argue that for the claims on secession and autonomy, can be decided by an agreement with the state of which the entity is a part (bilaterally) or unilaterally. In the case of the second option, the respective entity in most of cases, will organize a referendum or adopt respective legal instruments through legislative means, which could derive in an armed conflict.

Besides the unilateral/bilateral conceptions, the process may also include third parties: states, international organizations. Particularly, according to the real politick<sup>16</sup> theory the successful exercise of self-determination requires the support of the leading powers<sup>17</sup>, as will later be presented in the case of Kosovo.

On the other hand, for the claims of the second category, representativeness of the population of the entity, which is willing to exercise its right to self-

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<sup>15</sup> Richard Falk, *Self-Determination Under International Law: The Coherence of Doctrine Versus the Incoherence of Experience* in *The Self-Determination of Peoples: Community, Nation, and State in an Interdependent World*, 2002.

<sup>16</sup> German terminology used to express the politics of advancing national interests of a country, instead of moral or ethic ones.

<sup>17</sup> Hannum Hurst, *Right of self-determination in the twenty-first century*, *The Washington and Lee Law Review*, 1998.

determination, is an effective means of enforcement of that right. Either through participation in the central government or through its elected representatives in the case of an autonomous region, the self-determination right may be exercised.

#### **1.4. Self-determination v. Territorial integrity**

The principle of self-determination often conflicts with the principle of territorial integrity of the states even though both principles are equal in international public law, they are both *jus cogens* and they are both prescribed by the UN Charter.

Still, those concepts often conflict/compete with each other, and their co-enforcement mechanisms are not well defined by law, creating situations, where one's enforcement, breaches the other one. Hence, both as mentioned-above are stipulated by law, and both are preemptory norms. As an example, one may mention the UN resolution 1514 adopted in 1960, which elevated the status of self-determination, and also emphasized territorial integrity: "(6) any attempt aimed at the partial or total disruption of national unity and territorial integrity of a country is incompatible with the Purposes and Principles of the Charter of the United Nations."

The UN has intended to spread some light over this issue by the declaration of October 24, 1979 of the General Assembly, which indicated that the right of territorial integrity prevails over the right to self-determination only so long as the state possesses "a government representing the whole people belonging to the territory without distinction as to race, creed or color".

More conservative authors of Public International Law support the approach of prevalence of the right of territorial integrity, considering it an inseparable factor

of sovereignty. Those authors emphasize that the logic of secession would be the infinite division of existing political entities<sup>18</sup>, meaning an attempt against the sovereignty of the states. Other authors support the prevalence of self-determination right as an inherent right of the peoples, which due to its character of human right (it refers to the people), shall prevail over the rights of the states. "Every State has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples"<sup>19</sup>. However, international law, went further than only establishing the passive obligation of the states to protect/promote the right of self-determination of the peoples living within the territory of a member state, as it also prescribed means of self-determination right enforcement, which may contradict with the principle of territorial integrity. Particularly, the General Assembly of the UN has declared the following: "The establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people (...)"<sup>20</sup>.

Therefore, the debate is still often, and the concepts are ambivalent, creating a situation, where the correlation of both principles should and will be decided separately on a case-by-case basis.

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<sup>18</sup> Viva Bartkus, *The Dynamic of Secession*, Cambridge University Press, 1999

<sup>19</sup> General Assembly of the United Nations, Declaration on Principles of International Law concerning friendly relations and cooperation among states in accordance with the Charter of the United Nations, Resolution 2625 (XXV), 24 October, 1970

<sup>20</sup> General Assembly of the United Nations, Declaration on Principles of International Law concerning friendly relations and cooperation among states in accordance with the Charter of the United Nations, Resolution 2625 (XXV), 24 October, 1970

## PART II: Kosovo

### 2.1. Background of the case

Kosovo is situated in the central part of the Balkan. In the Southwest, it is bordered by Albania, in the West by Montenegro, in the North by Serbia and in the East and Southeast by Macedonia and which currently counts with 1,804,838 population (July 2009 est.), of which Albanians: 88%, Serbs: 7%, other: 5% (Bosniak, Gorani, Roma, Turk, Ashkali, Egyptian)<sup>21</sup>.

In the 13th century the territories of Kosovo were incorporated in the Serb realm. Kosovo was considered the cultural center of the Serbian realm, a place spiritually important for the Serbs<sup>22</sup>.

In 1389 after the defeat of the Serbs, those territories got dominated by the Ottoman Empire. By the end of 19th century the Albanians become the main ethnic group of Kosovo. In 1912 after the first Balkan war Serbia gained control over Kosovo again<sup>23</sup>.

In 1963, under the constitution of the Socialist Federal Republic of Yugoslavia Kosovo become an autonomous province of Serbia. In 1980 Albanian struggle for independence began<sup>24</sup>.

In 1989 Serbian leader Slobodan Milosevic revoked the province's autonomous status, allowing the 10% Serb minority to impose an apartheid-style system on the country's ethnic Albanian majority. The majority of ethnic Albanians in the

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<sup>21</sup> World Factbook, Center of Intelligence Agency, available at <https://www.cia.gov/library/publications/the-world-factbook/index.html>

<sup>22</sup> History of Kosovo to 1918, the Balkans Kosovo, Global perspectives available at <http://www.cotf.edu/earthinfo/balkans/kosovo/KVtopic3.html>

<sup>23</sup> World Factbook, Center of Intelligence Agency, available at <https://www.cia.gov/library/publications/the-world-factbook/index.html>

<sup>24</sup> World Factbook, Center of Intelligence Agency, available at <https://www.cia.gov/library/publications/the-world-factbook/index.html>

public sector and Serbian-owned enterprises were fired from their jobs and forbidden to use Albanian language in schools or government<sup>25</sup>.

During the above-mentioned period a parallel Albanian government was set up with democratic elections, a parallel school system, and other quasi-national institutions<sup>26</sup>.

Kosovo responded by self-declaring itself independent and electing a president (Ibrahim Rugova). In 1989 the Kosovo Liberation Army (KLA), an armed group of ultra-nationalists managed to convince a big number of the province's ethnic Albanians that their only hope for national liberation was armed struggle<sup>27</sup>.

In 1992, the Federal Republic of Yugoslavia (FRY) succeeded the SFRY, which on its turn was succeeded by the federation of Serbia-Montenegro in 2003<sup>28</sup>.

In 1991 an informal referendum organized by Albanian Kosovars declared the independence of Kosovo. From 1998 on, Serbian authorities conducted a nationalistic campaign in Kosovo, resulting in massacres, expulsions of Albanians<sup>29</sup>.

In 1999, NATO began bombing Serbia, forcing it to withdraw its military and police forces from Kosovo<sup>30</sup>. After 10 week struggle, FRY and NATO signed an agreement, a peace accord<sup>31</sup>, on June 3. "From the start the Kosovo problem has been about how we should react when bad things happen in unimportant places," global analyst Thomas Friedman explained in the New York Times as

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<sup>26</sup> Conflict history: Kosovo, Crisis Group available at [http://www.crisisgroup.org/home/index.cfm?action=conflict\\_search&l=1&t=1&c\\_country=58](http://www.crisisgroup.org/home/index.cfm?action=conflict_search&l=1&t=1&c_country=58)

<sup>27</sup> World Factbook, Center of Intelligence Agency, available at <https://www.cia.gov/library/publications/the-world-factbook/index.html>

<sup>28</sup> Christopher J. Borgen, Kosovo's Declaration of Independence: Self-Determination, Secession and Recognition, Volume 12, Issue 2, ASIL Insights, February 29 , 2008

<sup>29</sup> <http://www.elmundo.es/elmundo/2008/02/17/internacional/1203244462.html>

<sup>30</sup> NATO's role in relation to the conflict in Kosovo, available at

<http://www.nato.int/kosovo>

<sup>31</sup> See attached



the Accord was announced<sup>32</sup>."

The resolution 1244 of the United Nations Security Council (1999) placed Kosovo under the UN Interim Administration in Kosovo (UNMIK) transitional administration<sup>33</sup>. There has not been any further Security Council resolution mandating independence for Kosovo. Among the principles stated in the resolution there may be mentioned "deployment in Kosovo international civil and security presences" and "facilitating a political process designed to determine Kosovo's future status<sup>34</sup>".

In November 2005, Martti Ahtisaari, Special Envoy for Kosovo, was appointed. After acting as a mediator between the parties for more than a year, Ahtisaari submitted in March 2007 the Comprehensive Proposal for the Kosovo Status Settlement, also called "the Ahtisaari Plan". The plan proposed Kosovo's independence after a period of international supervision. While the Kosovar Albanian leadership supported it, Serbia rejected the Plan<sup>35</sup>.

In 2006, Montenegro declared independence in accordance with the law of Serbia-Montenegro. Serbia declared itself the successor to Serbia-Montenegro later that year.

On August 2007, the negotiations entered a second stage, under the mediator role of the Troika (the EU, Russia, and the U.S). The negotiations lasted until December, 2007. At the end of the negotiations, the Troika reported on December 10, 2007 the following:

In 2006 the negotiations for the definition of Kosovo's status started, though the

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<sup>32</sup> Noam Chomsky, Kosovo Peace Accord, Z Magazine, July, 1999

<sup>33</sup> NATO's role in relation to the conflict in Kosovo, NATO's objectives available at <http://www.nato.int/kosovo/history.htm>

<sup>34</sup> Resolution 1244 adopted by the Security Council at its 4011<sup>th</sup> meeting, on June/06/1999

<sup>35</sup> Christopher J. Borgen, Kosovo's Declaration of Independence: Self-Determination, Secession and Recognition, Volume 12, Issue 2, ASIL Insights, February 29, 2008

Parties could not achieve any agreement<sup>36</sup>.

On 17th February, 2008 the Kosovo Assembly declared Kosovo independent after a referendum, which results were not accepted by Serbia. Kosovo's declaration for independence was followed by the recognition of such leading countries as the United States, Great Britain, France, Germany and others<sup>37</sup>.

## 2.2. Legal arguments

The legal arguments of the Kosovo case will be presented on three main issues:

- 2.2.1. Substance: the standing of the people of Kosovo to have a claim on their right of self-determination.
  - 2.2.2. Process: the means of enforcement of the right of self-determination.
  - 2.2.3. Kosovo's independence: a reality or a future event?
- 2.2.1. Substance: the standing of the people of Kosovo to have a claim on their right of self-determination.

The self-determination right requires a set of factors of a people that give rise to the possession of the right to self-determination: a history of independence or self-rule in an identifiable territory, a distinct culture, and a will and capability to

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<sup>36</sup> Christopher J. Borgen, Kosovo's Declaration of Independence: Self-Determination, Secession and Recognition, Volume 12, Issue 2, ASIL Insights, February 29, 2008

<sup>37</sup> Recognition of Republic of Kosova by 65 out of 192 United Nations (UN) members available at <http://www.kosovothankyou.com/>

regain self-governance<sup>38</sup>.

Politically, Kosovo, as stipulated by the Constitution of the Socialist Federal Republic of Yugoslavia (hereinafter referred to as SFRY), Kosovo enjoyed the status of autonomous province of Serbia, therefore it had certain self-rule at the level of local governance.

Particularly, the article 111 of the Constitution<sup>39</sup> provided the following: "In the Socialist Republic of Serbia there are the autonomous provinces of Vojvodina and Kosovo and Metohija, established in 1945 by decision of the People's Assembly of the People's Republic of Serbia in accordance with the express will of the population of these areas". In addition to that, the article 112 prescribed that: "The autonomous provinces are social-political communities within the republic. The autonomous rights and duties and the basic principles of organization in the autonomous provinces shall be determined by republican constitution".

Besides that, the Constitution of SFRY, directly recognized the principle of self-determination, a principle on which the federation was founded. Particularly, the part one of the Preamble of the SFRY Constitution of 1963 stipulated the following: The peoples of Yugoslavia, on the basis of the right of every people to self-determination, including the right to secession (...), have united in a federal republic of free and equal peoples and nationalities and have founded a socialist federal of working people, the Socialist Federal Republic of Yugoslavia (...).

In addition to that, the part 7 of the Preamble of the SFRY Constitution provided the following:

VII) Yugoslavia strives:

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<sup>38</sup> Karen Parker, Understanding Self-Determination: The Basics, Presentation to First International Conference on the Right to Self-Determination, United Nations, Geneva, August 2000

<sup>39</sup> The Constitution of the Socialist Federal Republic of Yugoslavia, Belgrade: Secretariat of Information of the Federal Executive Council, 1963

Para. 3) for the right of every people to determine freely and to develop its own social and political system by ways and means of its own free choosing;

Para. 4) for the right of peoples to self-determination and national independence and for their right to wage liberation struggle to attain these just aims.

Therefore even though the Constitution states that the SFRY was formed on the basis of the right to self-determination, it stipulated that the status of Kosovo and other Serbian autonomous provinces were left at the discretion of Serbia.

Serbian Constitution's<sup>40</sup> Preamble stated the following: "(...) Considering also that the Province of Kosovo and Metohija is an integral part of the territory of Serbia, that it has the status of a substantial autonomy within the sovereign state of Serbia and that from such status of the Province of Kosovo and Metohija follow constitutional obligations of all state bodies to uphold and protect the state interests of Serbia in Kosovo and Metohija in all internal and foreign political relations, the citizens of Serbia adopt the Constitution of the Republic of Serbia.

Both the Serbian and the SFRY Constitution recognize Kosovo as an "autonomous province", though none of them provides the means for Kosovo of opting out of the territory of either state.

As to the second requirement of the definition above cited: cultural/ethnic distinctiveness, the population of Kosovo, starting from the 19<sup>th</sup> century is composed dominantly by Albanian Kosovars, which differ from Serbs culturally, religiously and ethnically.

The third factor of the description, the will (the capability will not be discussed, as it is a subjective factor, which may be subject to different evaluations) to regain self-governance was also present: first unofficially, as starting from 1980s Albanian Kosovars started their struggle for independence, and the officially, the

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<sup>40</sup> Constitution of the Republic of Serbia, adopted by referendum on: 28/29 Oct 2006

will was expressed in the referendum for independence of Kosovo held on February 17<sup>th</sup>, 2004.

### 2.2.2. Process: the means of enforcement of the right of self-determination

Even though Kosovo's struggle for independence began in 1980, the claim was not well formulated from the scope of legitimacy. Particularly, the official referendum for independence in Kosovo was held recently, on February 2008, while the struggle and the demand/claim for independence had been formulated almost 30 years earlier.

Moreover, the armed conflicts in the region brought the participation of the external forces, particularly, the Security Council of the United Nations, NATO, the European Union, making the process of the realization of the right of self-determination of Kosovo largely advanced by external forces.

### 2.2.3. Kosovo's independence: a reality or a future event?

Even though the issue to be treated in this paragraph is much broader than the scope of this master's paper, its inclusion will help to analyze Kosovo's status and explore the stage on which it stands at the present. In international public law, an entity can be considered an independent state if it possesses the following: a defined territory, permanent population, a permanent administration, a government engaged in discussions with foreign states. Recognition is not an obligatory requisite, it is rather a complementary one. In the case of Kosovo, it has been recognized by over 60 states, the question rises of whether that makes Kosovo a state. This requirement is viewed in the light of the other requirements, which in the present case are fulfilled.

Particularly, as it has mentioned above more than 60 states have recognized Kosovo, among which the US, France, Turkey, Germany, etc.

One may also argue, that if analyzing practice, membership in the UN, is self-declaratory factor of being a state, as non-state actors may not be full members of the United Nations, otherwise said, membership to the UN is deemed to be a sufficient proof of statehood. The obstacles of Kosovo to be recognized by the UN, and to be granted membership will be discussed in the following chapter on Political arguments. However, in the near future, most probably the status of member of the UN will not be achieved by Kosovo.

Still, one may also argue that, external factors such as recognition, establishment of diplomatic relations, membership in international organizations are considered secondary, non-obligatory requirements and prevalence is given to the structure of the entity: its institutions and processes.

In this aspect, it should be noted, that Kosovo has well developed executive, judicial and legislative powers, administrative agencies, local authority mechanisms (municipalities)<sup>41</sup>, etc. Different public policy areas are under control of different organizations. Particularly:

Pillar I: Police and Justice, under the direct leadership of the United Nations

Pillar II: Civil Administration, under the direct leadership of the United Nations

Pillar III: Democratization and Institution Building, led by the Organization for Security and Co-operation in Europe (OSCE)

Pillar IV: Reconstruction and Economic Development, led by the European Union (EU)<sup>42</sup>.

In Kosovo, international organizations play a major role in the shaping of the

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<sup>41</sup> Institutions of Republic of Kosovo at <http://www.ks-gov.net/portal/eng.htm>

<sup>42</sup> Joachim Rucker, Martti Ahtisaari available at <http://www.unmikonline.org/>; <http://un-interpreters.org/glossaries.html>; UNMIK Mandate: Resolution 1244 of 10 June 1999

institutions and the processes. On one hand, they contribute with their experience to the creation of a new republic; on the other hand, they still have control over Kosovo through their active participation in internal affairs.

Still, Kosovo is a benchmark case, on application of the principle of self-determination towards a people, which enjoys an unprecedented “care” of international community actors, and which is shaping its own way towards independence, which even if arguably considered “de jure” achieved, is not de facto achieved yet, as even though independence from Serbia is an internally, and in some cases, externally accepted fact, the factual independence (expressed mainly through autonomy in decision making, and self-sustainability) from international organizations and third states is not achieved yet.

### **2.3. Political arguments**

The external political factor had a major influence in the process of enforcement of Kosovo’s right of self-determination. The US’s active role in the conflict of Kosovo, expressed in two stages: the first stage was NATO’s bombing on Serbia, the resolution 1244 (which according to Serbia contains a clear obstacle to the independence of Kosovo, as in its preamble states the following “Reaffirming the commitment of all Member States to the sovereignty and territorial integrity of the FRY and the other states of the region”) and the establishment of the interim administration, which played a big role in persuading different countries to support Albanian Kosovars rights of self-determination.

The Second stage was US’S recognition of Kosovo, which faced the strong opposition of Russia and China, creating an unprecedented fact: Kosovo remains the only state recognized by the US, which has not been recognized by the UN.

The reasons for the veto in the Security Council are the contradicting interests of

the members of the Council. Particularly, the political interests of both Russia and China, as well as those of many countries of Europe, such as Spain, are conflicted directly with the notion of granting externally independence to autonomous entity/separatists. Those countries have their own intern disputes with their own autonomous regions; therefore, they are reluctant about accepting Kosovo as a precedent. One may argue, that if Kosovo is considered a precedent, then right to territorial integrity of the states will be largely menaced. However, one may also argue that the right of self-determination is provided by law and must have means of enforcement, and Kosovo's precedent is not only valuable from the point of view of the outcome, but also from the point of view of the means employed.

In that context, the actions of the US and of the other states, which recognized Kosovo, mainly states, which had not internal territorial/ethnic conflicts, marked a before and after in the international relations, showing that external recognition of entity by a leading country/ies, is a politically strong means, which contributes substantially/ if not enforces directly, the right of self-determination of a respective entity.



## **PART III: Karabakh**

### **3.1. Background of the case**

#### **3.1.1. Chronology of the facts**

Karabakh is situated in the Caucasus Minor, the Southwest of Azerbaijan, on the northeastern flank of the Karabagh Range of the Lesser Caucasus range, extending from the crest line of the range to the Kura River<sup>43</sup>. It has a total area of 4,400 square kilometers<sup>44</sup>. Nagorno-Karabagh counts with a population of 144,300 people, 95% of which are ethnically Armenians, and 5% are minorities (according to the estimates of 2005)<sup>45</sup>.

After the first Russian-Persian war, by the treaty of Gulistan (1813) Karabakh was transferred from Russian to Persian domination. The dispute of Karabakh started after the October Revolution, in 1917, when according to Lenin's doctrine people leaving Russia were recognized their right to self-determination.

From 1918 to 1929 the legislative power in Karabakh was exercised by Armenian Assemblies. In 1918, 22-26 July, the region was declared self-governing; a National Assembly and a Government were set up<sup>46</sup>.

On February 1919, the Armenian National Council of Nagorno-Karabakh addressed a protest note to the Allied governments rejecting the inclusion of Karabakh in the territory of Azerbaijan. On August, 1919 Karabakh and Azerbaijan concluded a provisional agreement to avoid military conflict.

On August 10, 1920, Soviet Russia and the Republic of Armenia, signed an

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<sup>43</sup> Shahan Avakian, Nagorno-Karabakh Legal Aspects, Basic Facts,, 2005

<sup>44</sup> Nagorno Karabakh Politics, Divisions, Geography, History, Current Situation, Cambridge Encyclopedia Vol. 53,

<sup>45</sup> Shahan Avakian, Nagorno-Karabakh Legal Aspects, Basic Facts, 2005

<sup>46</sup> Shahan Avakian, Nagorno-Karabakh Legal Aspects , Sovereignty of Nagorno-Karabakh under Domestic Legislation in the Former USSR, 2005

agreement, which provided that Karabakh, Zangezour and Nakhichevan should be occupied by Soviet troops. According to the agreement the solution would be determined by a further pact<sup>47</sup>.

On November 30, 1920 Soviet Azerbaijan declared about the recognition of the territories of Karabakh, Zangezour and Nakhichevan as part of Soviet Armenia.

On June 1921, Armenia SSR and Azerbaijan SSR adopted a declaration proclaiming Karabakh an integral part of Armenia.

On July 4, 1921 the Kavbureau decided to include Karabakh in Armenia SSR and to conclude plebiscite in Karabakh only. The following day, Moscow decided to leave Karabakh in Azerbaijan (Stalin's decision was not approved by the majority of the members of the PS).

On July 7, 1923 Soviet Azerbaijan's Central Executive Committee resolved to dismember Karabakh and establish the Autonomous Region of Nagorno-Karabakh.

On February 20, 1988 a session of the delegates of the Autonomous Region of Nagorno-Karabakh adopted a resolution of the transfer of Karabakh from Azerbaijan to Armenia. The Supreme Soviet of Azerbaijan refused, while the Supreme Soviet of Armenia approved the request, and appealed to the Soviet Government.

On July 18, 1988 the Supreme Soviet of the USSR decided to leave Karabakh within the territory of Azerbaijan according to the Article 78 of the Soviet Constitution of October 7, 1977<sup>48</sup>.

On January 20, 1989 the Supreme Soviet appointed an authority in Karabakh, which continued to exercise its powers until November 28 of the same year,

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<sup>47</sup> Shahan Avakian, *Nagorno-Karabakh Legal Aspects, Sovereignty of Nagorno-Karabakh under Domestic Legislation in the Former USSR*, 2005

<sup>48</sup> It stated: "The territory of a Union Republic may not be altered without its consent. The boundaries between Union Republics may be altered by mutual agreement of the Republics concerned , subject to ratification by the Union of Soviet Socialist Republics"

being replaced by the Republican Organizational Committee.

On December 1, 1989, the Supreme Soviet of Armenia adopted a resolution for reunification. The Constitutional Oversight found the law unconstitutional and revoked Armenian resolution.

On November 23, 1991, the SSR of Azerbaijan adopted a law on the abolition of Nagorno-Karabakh Autonomous Oblast.

On September 2, 1991, Karabakh adopted the Declaration of Independence of the Republic of Nagorno-Karabakh. On December 10, 1991, Nagorno- Karabakh held its referendum of independence (99% in favor of independence of Karabakh).

On December 28, 1991, parliamentary elections were held in Nagorno-Karabakh. On September 20, 1992, the Parliament of the Republic of Nagorno-Karabakh petitioned the UN, CIS and individual countries to recognize it.

In 1992, the Declaration on State Independence of the Republic of Karabakh was adopted by the Supreme Council of Karabakh and later on the Parliament adopted the constitutional law "Basic principles of the state independence of Nagorno-Karabakh Republic".

All those events were accompanied by an armed conflict, which started in 1988 and ended in 1994.

In 1994 Armenia and Azerbaijan managed to accord a ceasefire by the Bishkek Protocol, which, first article stipulated participants (Azerbaijan, Karabakh, Armenia, Russia, Kirgizstan, CIS representative) "determination to assist in all possible ways to the cessation of armed conflict in and around Nagorno Karabakh, which does not only cause irretrievable losses to Azerbaijani and Armenian people, but also significantly affects the interests of other countries in the region and seriously complicates the international situation"<sup>49</sup>

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<sup>49</sup> Article 1, The Bishkek Protocol, Bishkek Kyrgyzstan, May 5, 1994, available at [http://www.nkrusa.org/nk\\_conflict/documents](http://www.nkrusa.org/nk_conflict/documents).

### 3.1.2. Negotiations within the scope of the OSCE Minsk Group

In contrast with the case of Kosovo, the forum of negotiations on the conflict of Karabakh is the OSCE Minsk Group. The last one is aimed to convening a conference in Minsk, Belarus on the settlement of the Karabakh Conflict according to the decision adopted by the Helsinki Additional Meeting of the CSCE Council on 24 March 1992<sup>50</sup>. Even though the conference failed to take place, the Minsk Group currently is leading the negotiations towards the peaceful settlement of the conflict of Karabakh.

The objectives are achieving an agreement on cessation of armed conflict by the parties in order to convene the Minsk Conference and the promotion of peace process, through OSCE peacekeeping forces<sup>51</sup>.

The Composition of the Minsk Group is as follows:

- Co-Chairmanship: France, the Russian Federation and the United States
- Permanent members: Belarus, Germany, Italy, Sweden, Finland, Turkey, Armenia and Azerbaijan and on a rotating basis the OSCE Troika.

One factor which should be outlined is the perception on the composition of the parties of the conflict, hence, of the negotiations: Azerbaijan and Armenia.

The reason for excluding Nagorno-Karabakh from being a member of the negotiations was a political one. When the negotiations started Robert Kocharyan, the ex-president of Karabakh, was the president of Armenia, and he made the decision to represent both Karabakh and Armenia in the negotiations

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<sup>50</sup> <http://www.osce.org/item/21979.html>

<sup>51</sup> <http://www.osce.org/item/21979.html>

process, as he had de facto power over both subjects. Still, even though, at a first glance, it seemed that he would defend the interests of both subject in the most possible effective manner, soon the inefficiency of that decision become evident.

The conflict concerned Karabakh, a region that wanted to be independent from Azerbaijan and Armenia. Armenia was a third party, who participated in the armed conflict between Azerbaijan and Karabakh. The delegation of the right of Karabakh of self-representation to Armenia influenced strongly the further events. First of all, it impeded the conflict from being negotiated in the scope of the UN, as it was not about a member state and its region, but about two separate countries, and it meant the transfer of the mediator role to the OSCE Minsk Group<sup>52</sup>.

The most substantial progress of the negotiations could be considered the "Madrid Principles".

Until the present, representatives (presidents) of both parties have reached agreement only upon the wording of the preamble, in Sochi on January 25<sup>53</sup>.

One of the key points of the basic principles is the status of Karabakh, which should be decided by referendum, which date remains uncertain. Still, the subjects of the referendum also create a controversy, particularly, Armenians state that the referendum needs to be carried out in the territory of Nagorno-Karabakh with the participation of expelled Azeries, while Azerbaijan supports the position that the referendum needs to be concluded in the entire territory of

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<sup>52</sup> Extract from the interview with Khachik Derghoukassian, Prof. of Politics and International Relations, on the politic aspects of the conflict of Karabakh

<sup>53</sup> <http://politicom.moldova.org/news/karabakh-conflict-armenia-azerbaijan-agree-on-madrid-principles-205668-eng.html>

Azerbaijan, as it is provided by the Constitution of Azerbaijan<sup>54</sup>.

The list of the issues to be covered and resolved by the Madrid Principle is the following: The return of the territories surrounding Nagorno-Karabakh to Azerbaijani control, an interim status for Nagorno-Karabakh providing guarantees for security and self-governance, a corridor linking Armenia to Nagorno-Karabakh; future determination of the final legal status of Nagorno-Karabakh through a legally binding expression of will; the right of all internally displaced persons and refugees to return to their former places of residence; and international security guarantees that would include a peacekeeping operation<sup>55</sup>.

Until the present not only substantial issues such as the above mentioned remain unresolved, but also the parties have not agreed on the approach towards the negotiations. While Armenia insists in Package approach, Azerbaijan prefers to demonstrate a step-by-step approach<sup>56</sup>.

### **3.2. Legal arguments**

The main legal arguments for application and implementation of the principle of self-determination in the case of Karabakh are the following:

3.2.1. Illegitimate inclusion of Karabakh in the territory of Azerbaijan SSR

3.2.2. The secession rules of the USSR

3.2.3. Azerbaijan's clear slate position towards the Soviet Republic of Azerbaijan

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<sup>54</sup> Amanda Akcakoca and Dennis Sammut, Karabakh: the quest for peace, LINKS Briefing Paper, 01/12/2010

<sup>55</sup> Joint Statement on the Nagorno-Karabakh Conflict, The White House Office of the Press Secretary, July 10, 2009 available at <http://armenia.usembassy.gov/news071009.html>

<sup>56</sup> Amanda Akcakoca and Dennis Sammut, Karabakh: the quest for peace, LINKS Briefing Paper, 01/12/2010

### 3.2.1. Illegitimate inclusion of Karabakh in the territory of Azerbaijan SSR

In July 4, 1921 in Tbilisi Georgia the Caucasian bureau decided to include Karabakh in the territory of Armenia and to conduct a referendum in Karabakh. Still on July 4, Stalin, as the representative of Moscow, decided to adopt a new decision, which stated that Karabakh would stay in the territory of Azerbaijan SSR, as an autonomous region with wide autonomy. That decision was not approved by the majority of the members of the Plenary Session<sup>57</sup>. For this reason the last decision's legitimacy may be questioned and the previous decision dating from July 4, 1921 should be applied. In addition to that, the legitimacy of the forum is questioned, the decision of including Karabakh in Azerbaijan was dictated by Moscow, particularly, its Bolshevik party, which had no legal authority, power of jurisdiction to decide on the status of Karabakh.

### 3.2.2. The secession rules of the USSR

The article 3 of the Soviet Law on the Procedures of the Resolution of Problems of Secession of a Union Republic from the USSR stipulated that: "Referendum on Independence in a Soviet Republic that includes autonomous republics, autonomous regions, or autonomous oblasts should be recognized separately by each autonomous entity."

According to the mentioned law, Karabakh, as a separate oblast, had the right to trigger its own process of independence<sup>58</sup>. The laws of the USSR, as supreme legal authority, had a binding character for all member states. Therefore, the referendum held in Karabakh on December 10, 1991 complied entirely with the provisions of the law on the Procedures of the Resolution of Problems of Secession of a Union Republic from the USSR.

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<sup>57</sup> Shahan Avakian, *Nagorno-Karabakh Legal Aspects, Sovietization Period, 2005*

<sup>58</sup> to exercise their right of choice.

Moreover, the referendum was legitimate, as 82,2 percent of Karabakh's registered voters participated, from which 99 percent (107,648 people) approved Karabakh's sovereignty. The Central Electoral Committee of Nagorno-Karabakh by its Act on Referendum declared that 22,747 persons of Azerbaijani origin, who did not participate in the referendum, had been previously notified about it. Consequently, on December 12, 1991 an Act "On the resolutions of the Referendum on the Independence of the Republic of Nagorno-Karabakh" was signed, according to which no violations were recorded by the observers during voting, delivery of bulletins and vote count.<sup>59</sup>

Even though currently in the negotiations in the scope of the OSCE Minsk Group on the adoption of the "Basic Principles" on the Karabakh issue Azerbaijan argues that in order to decide the status of Karabakh a referendum should be held within the entire territory of Azerbaijan<sup>60</sup>, that statement contradicts directly with the USSR law.

That position of Azerbaijan has its roots in the Article 4 of the Constitutional Act of Azerbaijan<sup>61</sup>, which prescribes the following:

Article 4. The Constitution of Azerbaijan of 1978 is in force so far as it does not contradict the provisions of this Constitutional Act. All previous acts that were in force in the Republic of Azerbaijan before the proclamation of the state independence will be in force so far as they do not contradict the sovereignty and territorial integrity of Azerbaijan and are not abolished or changed by the order determined by law. Until the adoption of appropriate laws of the Republic

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<sup>59</sup> Shahan Avakian, *Nagorno-Karabakh Legal Aspects, Sovereignty of Nagorno-Karabakh under Domestic Legislation in the Former USSR*, 2005

<sup>60</sup> Amanda Akcakoca and Dennis Sammut, *Karabakh: the quest for peace*, LINKS Briefing Paper, 01/12/2010

<sup>61</sup> "Constitutional Act on the State Independence of the Azerbaijani Republic", adopted in Baku on 07.11.1991



of Azerbaijan, the list of the USSR law being in force in the territory of Azerbaijan is subject to determination by the Parliament of the Republic of Azerbaijan.

This article testifies about Azerbaijan's will not to be guided by Soviet laws, otherwise the law on the Procedures of the Resolution of Problems of Secession of a Union Republic from the USSR would be applied, therefore as mentioned above, from the Azerbaijani point of view it would "contradict the sovereignty (soviet law would be applied instead of local law) and territorial integrity (Karabakh's right to self-determination would prevail over Azerbaijan's to territorial integrity)", meaning that

- Nagorno Karabakh would be considered a separate entity, so called oblast.
- The referendum held in Karabakh would be considered legitimate, as it complied with the Soviet law, which if considered to be in force and applicable, would be binding.

In this context, the intention of Azerbaijan, was to repudiate the Soviet law on procedures, and hence refuse to accept Karabakh's legal status and right to self-determination. Consequently, the Republic of Azerbaijan was formed on the territory of the Azerbaijan SSR, and the Republic of Nagorno-Karabakh on the territory of the Nagorno Karabakh Autonomous region<sup>62</sup>.

### 3.2.3 Azerbaijan's clean slate position towards the Soviet Republic of Azerbaijan

The article 2 of the Constitutional Act in State Independence of Azerbaijan, which forms an inseparable part of the Constitution of Azerbaijan of 1995 stipulates the following:

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<sup>62</sup> Shahan Avakian, Nagorno-Karabakh Legal Aspects, Concluding Remarks, 2005

Article 2. The Republic of Azerbaijan is the successor of the Azerbaijani Republic, which existed from May 28, 1918 till April 28, 1920.

In this context, it is interesting to remark that the first Azeri state, established in 1918, has never been recognized by the League of the Nations, arguing that it was impossible to determine the frontiers of the territories, within which Azerbaijani government exercised its authority<sup>63</sup>. However, Karabakh was not within those territories. As it is been mentioned in the description of the background of the case: In 1918 Karabakh was declared self governing, a National Assembly and a Government were set up and until 1929 the legislative power in Karabakh was exercised by Armenian Assemblies.

Furthermore, the article 3 of the same Constitutional Act reads as follows:

Article 3. The Treaty on the establishment of the USSR of December 30, 1922 is considered not valid in the part related to Azerbaijan from the moment of signing it.

Therefore, Azerbaijan has adopted the clear slate position, according to which it does not recognize itself as the successor of the Soviet Republic of Azerbaijan, hence, it identifies itself as not "inheriting" the rights and obligations that the Soviet Republic of Azerbaijan had, assuming none of the rights, obligations, membership, assets or debts of the predecessor state<sup>64</sup>.

In addition to that, the Constitutional Act declared that the establishment of Soviet power in Azerbaijan constituted an "annexation by Soviet Russia", which

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<sup>63</sup> Shahan Avakian, *Nagorno-Karabakh Legal Aspects, Sovereignty of Nagorno-Karabakh under Domestic Legislation in the Former USSR*, 2005

<sup>64</sup> Steiner, *International Public Law, the traditional actors: states and international organizations, the Succession process: the end of the USSR*

"overthrew Azerbaijan's legal government<sup>65</sup>."

Hence, Azerbaijan refuses to its pretensions over Nagorno Karabakh, by considering itself the successor of Azerbaijani Republic, which existed from May 28, 1918 till April 28, 1920, and considering the Soviet authority in Azerbaijan illegitimate and therefore, all its adopted legal normative acts, void and therefore non-binding.

### **3.2. Political arguments**

First of all, one may argue that the conflict of Karabakh is the center of attention of both parties of the conflict, as political power in Armenia and in Azerbaijan has a question of legitimacy, and ceding Karabakh or the linked territories to it, will mean a loose of legitimacy, strengthen the criticism towards the already criticized authorities and give a reason to the opposition to become more active.

Azerbaijan, while accepting to negotiate, does not exclude the possibility of war. It carries out strong public advocacy towards the development of the idea, that Azerbaijan is militarily and economically stronger to defeat Armenia. This approach also serves to keep its legitimacy. As the main promise for government change, was the advocacy of the idea that the new authority would bring back Karabakh and recuperate the lost glory of Azerbaijan. Still, the problem resides on the fact that declaring war without the acceptance of the UN Security Council, will result in the repudiation of Azerbaijan by the International Community as an aggressor. Besides that, as the conflict of Georgia has shown, war can mean irreparable loses. Still, the war between Georgia and Russia also demonstrated that frozen conflicts may have unexpected escalations, and a long lasting and stabile status/ solution is required to be achieved in order to avoid armed

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<sup>65</sup> Shahen Avakian, Nagorno-Karabakh Legal Aspects, Sovereignty of Nagorno-Karabakh under Domestic Legislation in the Former USSR, 2005

interventions<sup>66</sup>.

As to Armenia, recent developments in the Armenian-Turkish relations, brought the Karabakh issue in stage again, it will be discussed in the second part of this essay.

The key players on the Karabakh issue are Turkey, Russia, the US and the EU. The basic motivation of those leading countries is to gain influence in the region. Russia, as a strategic partner of Armenia, has supported Armenia during the war, and currently is playing an active role within the OSCE Minsk Group as a mediator through its Ministry of Foreign Affairs, Serguei Lavrov, still, even as a strategic partner it has a balanced point of view, due to the economic interests linked with Azerbaijan.

The US's position is directly comparable to the Russian. As to the EU, it would like to play a more important role in the process of negotiations. It is deemed that France may indirectly represent the EU, as a member state, in the Minsk Group, still, that is a vague argument, as most probably, the EU, would like to have a clearer participation in the process.

As to Turkey, which has declared itself a strategic partner of Azerbaijan, its strong pro-Azerbaijani position in the conflict is marked by the historic hostile relations with the Armenians, and lately by its efforts to demonstrate Azerbaijan that it is not a traitor and that it will still, as a leading and influential county, support and advance Azerbaijan's interests. Still, its active participation is also a means to restore its active role as a key player in the region.

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<sup>66</sup> Amanda Akcakoca and Dennis Sammut, Karabakh: the quest for peace, LINKS Briefing Paper, 01/12/2010

## **PART IV: Comparison**

After Kosovo's declaration of independence, Azerbaijan's withdrawal of its peacekeeping forces from Kosovo, denoted the fact that was viewed as a potentially troubling precedent for the resolution of its 20-year conflict with Armenia over Karabakh<sup>67</sup> Even Azeri president Ilham Aliyev stated that recognition of Kosovo's independence had "a negative impact on the Nagorno-Karabakh peace process"<sup>68</sup>

The comparison of the two cases will be based in both factual and legal analogies and disanalogies. Consequently, a comparative analyze will be done on the requirements to which entities must comply with in order to be considered an independent state. The reason for this distinction in this section, is that it will permit to analyze both cases, from the point of view of compliance with the requirements of the right to self-determination (process), in order to analyze whether Karabakh and Kosovo have standing, and secondly, the legality of their claim by discovering whether these subjects under PIL have possibilities to become independent states (outcome).

### **4.1. Factors related to process**

First of all, both entities share the fact of have belonged to a multi-ethnic federation<sup>69</sup>, upon collapse of which they automatically stayed included in the territory of one of the seceding states<sup>70</sup> of that federation. Still, it is important to mention that Karabakh was an independent region during several short times of its history opposite to Kosovo, which was never a sovereign entity. Besides that,

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<sup>67</sup> <http://www.eurasianet.org/departments/insight/articles/eav032808a.shtml>

<sup>68</sup> IBID

<sup>69</sup> Respectively the Yugoslavia and the USSR

<sup>70</sup> Respectively Serbia and Azerbaijan

the time frame of the beginning of the claim of the right of self-determination also differs. While in the case of Kosovo, this right was claimed after the fact that Serbia seceded Yugoslavia, in the case of Karabakh, the independence claimed before Azerbaijan become an independent state.

Another similarity lies in the fact that both entities went through ethnic cleansing aimed treatment by the other party. Ethnic cleansing is described as the attempt to create ethnically homogeneous geographic areas through the deportation or forcible displacement of persons belonging to particular ethnic groups<sup>71</sup>. The ultimate aim is to become the majoritarian frame of population of the region and therefore, preserve/exercise authority over it. Particularly in Kosovo those practices (force expulsion, looting and burning, detentions, summary execution, rape, violations of medical neutrality and identity cleansing) were carried out by Serbian former president Milosevic<sup>72</sup>, while in Karabakh ethnic cleansing was a common Azeri practice both before and after the war<sup>73</sup>, Sumgait<sup>74</sup> could serve as a well-fitting example to demonstrate Azeri actions towards the people of Karabakh.

In my opinion, in the case of presence of ethnic cleansing by the majoritarian population towards the people of the region, the claim of independence of the people struggling for it through its right to self-determination becomes even more well-founded, as peaceful cohabitation between them and the repressive nation becomes hardly achievable.

Also, the support that the international community has provided Kosovo has strengthened its economy and civil society beyond those of the other regions.

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<sup>71</sup> ethnic cleansing." Encyclopedia Britannica. 2010. Encyclopædia Britannica Online. 15 Mar. 2010 <<http://www.britannica.com/EBchecked/topic/194242/ethnic-cleansing>>.

<sup>72</sup> <http://jakarta.usembassy.gov/news/kosovo.html>

<sup>73</sup> Caroline Cox and John Eibner, Ethnic Cleansing in Progress: War in Nagorno Karabakh available at [Sumgait.Info](http://Sumgait.Info)

<sup>74</sup> Ethnic cleansing carried out against ethnic Armenian population of Nagorno Karabakh available at [http://www.nkrusa.org/nk\\_conflict/nk\\_until\\_1918.shtml](http://www.nkrusa.org/nk_conflict/nk_until_1918.shtml)

Both entities participated in an armed conflict with the so called “motherland,” which comes to reinforce the position above mention related to ethnic cleansing. Meanwhile, even though the similarities may lead to think that Kosovo could be used as a precedent for Karabakh, the case of Karabakh also differs. Particularly, while Kosovo has never had his own national State in the case of Karabakh, we had also the initial claim of reunification with Armenia, which will be only mentioned in this text and not stressed, because, the current claim, which is the basis of the conflict of Karabakh, is in conformity with the will of the people of Nagorno-Karabakh, ethnically Armenians in their majority, to exercise their right to self-determination. In the case of Kosovo, on the contrary, there has been no such even initial demand on reunification with Albania, even though in that case it would be called unification rather than reunification, due to the fact that the territory of Kosovo never belonged to Albania.

Other factor, which makes the cases different is the factor of external influence. In the case of Karabakh external influence has not amounted to the external influence present in the case of Kosovo. Particularly, the later has been under the administration and jurisdiction of the UN, which has helped to pass the transition period more softly, while in the case of Karabakh, except the participation of members of the international community, through assistance in peacekeeping and the negotiation process, Nagorno-Karabakh has been building up its statehood throughout past 16 years without involvement of international community<sup>75</sup>. Before its independence Kosovo was placed under UN Security Council resolution 1244 of June 1999, as a region needing international protection, rendering its situation unique and unprecedented under international law, while Karabakh has always been ruled by local authorities.

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<sup>75</sup> Shahen Avakian, Independent state of Nagorno-Karabakh under International law Nagorno-Karabakh Legal Aspects, 2005

Kosovo's conflict was in the scope of the UN, as it was viewed as a conflict within the territory of one member state of the UN, while the conflict of Karabakh is being treated in the scope of the OSCE, considering a matter of dispute between two states- Armenia and Azerbaijan.

#### **4.2. Factors related to outcome**

Besides all the above-mentioned aspects comparison could also be carried out on the requirements, to which the entity willing to be considered an independent state must comply with according to Public International Law<sup>76</sup>:

1. a defined territory:

Nagorno Karabakh has a defined territory over which it has established its jurisdiction. The borders are defined.

2. permanent population

The majority of the population of Nagorno Karabakh constitute a homogeneous ties to the territory. The population is about 145,500 with 95% Armenians and 5% minorities.<sup>77</sup>

The population balance factor also unites Kosovo and Karabakh. In both cases, the predominant frame of population is constituted by people, who claim its rights to self-determination. According to recent polls 95% of population in Karabakh is ethnically Armenian and in Kosovo 88% of population is ethnically Albanian. However, Kosovo's overall population (around 2 million) is much bigger than Karabakh's (around 140,000), making it a more viable potential state.

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<sup>76</sup> Shahen Avakian, Independent state of Nagorno-Karabakh under International law, Nagorno-Karabakh Legal Aspects, 2005

<sup>77</sup> Shahen Avakian, Independent state of Nagorno-Karabakh under International law Nagorno-Karabakh Legal Aspects, 2005



3. permanent administration organized under common political institutions exercising exclusive jurisdiction on the respective territory and people

Nagorno Karabakh is a Presidential Republic from November 1994. It has three branches of Government and with local governance system, regular elections are held.

4. a government engaged in discussions with foreign states.

Nagorno Karabakh carries out effective negotiations within the scope of the OSCE, it has signed some international documents, among which the Bishkek treaty, even though it is not a party to the negotiations, the OSCE Minsk group in 1992 at the Helsinki Council of Ministers referred to Karabakh as a party to the negotiations. Karabakh has also representative offices in France, Armenia, Russia, etc.

A fifth complementary element according to some authors is the recognition by third states of the respective state. Still, even though this theory is not widely accepted, it has not been included as an obligatory requirement for the states to fulfill, in order to be able to claim for independence.

However, if the cases are compared on that basis, the independence of Karabakh has not been recognized by any country, including Armenia.

## **Conclusion**

Both Kosovo and Karabakh are paving their way towards the enforcement of their right to self determination. As a primary scrutiny, both the people of Karabakh and the people of Kosovo are eligible for the exercise of the right of self-defense. As a secondary scrutiny (their fulfillment of the requirements to become an independent state), they both have the right to claim for independence.

Moreover, besides the compliance with both standards, the cases share a common history of inclusion within the territory of a state, after the collapse of a multi-ethnic federation. Still, they differ in one key aspect: the claim of independence in Karabakh was raised after a referendum, which was in conformity with the existing laws of the USSR, which makes the claim more legitimate, while in the case of Kosovo, the referendum took place 30 years after the formulation of the claim.

Both cases share a history of hostilities, which has made their stay within the territory of the state of which they formed part no longer viable. Particularly, both Serbia and Azerbaijan had revoked the status of autonomous province of Kosovo and Karabakh and in both cases an armed conflict took place.

While Kosovo had an important meaning for the Serb Nation as a cultural center, Karabakh has never been associated with Azeri culture or history, for decades it has been a principate of ethnically Armenian Karabakh people.

Even though all the above mentioned factors help to trace parallels among the cases and to make distinctions, the key factor which has make the cases not go parallel has been the external influence. While Karabakh had to pave its way in harsh conditions, and mainly with support of Armenia, and Armenian Diaspora,

Kosovo's claim's enforcement was largely conditioned by the UN, in the framework of the transnational government, which served as an interim stage towards sovereignty, and later on by the support of other international actors: the OSCE, the EU and by the states which recognized Kosovo.

The first factor, which determined the status of Kosovo was the scope of negotiations, the UN, and later the transnational administration, which helped to the shape the institutions and the stabilization process in Kosovo.

The establishment of a transitional transnational administration for Karabakh, which would coordinate internally the process of self-determination in Karabakh and help to the settlement of peace in the region, is not a completely viable idea, as Karabakh is in a stage of development much advanced than Kosovo at the stage when the transnational administration was set up (destroyed after war, lacking of public administrative structure, with no history of sovereignty) as after 16 years of building a statehood, at least from the point of view of internal conception and a foreign authority most probably would not be accepted by the people. Even though the first stage of external influence, as mentioned above is not completely applicable to Karabakh, the second stage of external influence (recognition) would largely contribute to forge the status of it. As Kosovo's precedent has shown, recognition, even as a non-obligatory precondition of existence, contributes to the legality of the entity and to the advancement of its self-determination rights.

While international community decides on that issue, substantive efforts are invested in Karabakh on the shaping of its democratic processes and institutions, building the internal conception of a state as a factor capable of influencing the external conception, building the substance, as a factor capable of influencing the outcome.

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